

**BEFORE AN INDEPENDENT HEARING PANEL  
OF THE WAIKATO REGIONAL COUNCIL**

**IN THE MATTER OF** the Resource Management Act  
1991 (**RMA**)

**AND**

**IN THE MATTER OF** the Proposed Waikato Regional  
Plan Change 1: Waikato and  
Waipā River Catchments

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**STATEMENT OF REBUTTAL EVIDENCE OF IAN DAVID MAYHEW ON BEHALF OF  
WAIKATO REGIONAL COUNCIL AS SUBMITTER**

**Planning – Block 3**

**DATED 19 July 2019**

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## Introduction

1. My full name is Ian Mayhew. I am a Principal Planning and Policy Consultant with 4Sight Consulting Limited. I have been engaged by the Waikato Regional Council (**Council**) to provide policy planning support and evidence in respect of its submissions to Proposed Plan Change 1 to the Waikato Regional Plan and Variation 1 to Proposed Plan Change 1 (collectively referred to as **PPC1**). My qualifications and relevant experience are set out in my evidence for Hearing Block 2 dated 3 May 2019.
2. I confirm that I am familiar with the Code of Conduct for Expert Witnesses as set out in the Environment Court Practice Note 2014 and have presented evidence before the Environment Court in relation to resource consent applications. I have read and agree to comply with the Code. Except where I state that I am relying upon the specified evidence or advice of another person, my evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed in my evidence.

## Scope of Rebuttal Evidence

3. This rebuttal evidence responds to evidence lodged by:
  - a. Deborah Kissick for the Director General of Conservation;
  - b. Helen Marr for Fish and Game; and
  - c. Gerard Willis for Fonterra.

## Evidence of Deborah Kissick for the Director General of Conservation

4. I respond to amendments proposed by Ms Kissick in relation to:
  - a. Policy 15<sup>1</sup>; and
  - b. Method 3.11.4.4<sup>2</sup>.
5. I understand the amendments that Ms Kissick proposes give effect to the Director General of Conservation's submission which seeks to ensure the policy recognises all important values of wetlands and the complex nature of the Whangamarino Wetland and the protection and restoration of the Whangamarino Wetland and to avoid further loss of the bog ecosystem<sup>3</sup>.

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<sup>1</sup> Paras 168 to 184 and Appendix 1 (page 89 of pdf)

<sup>2</sup> Paras 49 to 60 and Appendix 1 (page 90 and 91 of pdf)

<sup>3</sup> Paras 168 and 169

6. By way of background, in its submissions to PPC1 the Council supported the inclusion of provisions relating to the internationally important Whangamarino Wetland that support the management of this wetland and which seek to halt the decline in water quality over the next 10 years, and sought minor amendments to Method 3.11.4.4.
  
7. In the s 42A report for Block 3 matters, the reporting officers:
  - a. Did not propose any changes to Policy 15 as notified in Variation 1; and
  - b. Recommended deleting the implementation matters in their entirety<sup>4</sup>. However, in respect of Method 3.11.4.4, the reporting officers advised that if the Panel was of a mind to keep some of the implementation methods, then this method could be updated to reflect the final positions on Policy 14 and Farm Environment Plans (FEPs)<sup>5</sup>.

### **Policy 15**

8. Ms Kissick seeks the following changes to Policy 15:

~~Restore and Pprotect and make progress towards restoration of the Whangamarino Wetland through the reduction of both diffuse and point source discharges of contaminants entering the wetland system, to:~~

- ~~i. Achieve the water quality limits/targets for Whangamarino Wetland in Tables 3.11-1 and 3.11-4;~~
  - ~~ii. Protect the significant values and ecosystem health of the wetland system;~~
  - ~~iii. Avoid further loss of bog wetland habitat;~~
  - ~~iv. Increase the availability of mahinga kai; and~~
  - ~~v. Support implementation of the Lake Waikare and Whangamarino Wetland Catchment Plan;~~
  - ~~vi. Recognise the hydrological drivers that affect water quality.~~
- ~~by reducing the diffuse discharge of contaminants nitrogen, phosphorus, sediment and microbial pathogens in the sub-catchments that flow into the wetland to:~~
- ~~a. Reduce and minimise further loss of the bog ecosystem; and~~
  - ~~b. Provide increasing availability of mahinga kai; and~~
  - ~~c. Support implementation of any catchment plan prepared in future by Waikato Regional Council that covers Whangamarino Wetland.~~

9. The international significance of the Whangamarino Wetland is not at issue, nor is the aim of protecting and restoring this important and valuable wetland system. However, I am

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<sup>4</sup> Para 333

<sup>5</sup> Para 358

concerned at the potential interpretation of some of the changes that are proposed by Ms Kissick and their application in practice; in particular the implications for diffuse and point source discharges of contaminants within sub-catchments that flow into the wetland system. I address the changes and my concerns below.

10. Clause i: In my opinion, the introduction of this clause raises the issue of how it is to be interpreted alongside other requirements of PPC1 in respect of contaminants. Clearly, the intention of the provisions of PPC1 is to provide a pathway to meet the specified water quality limits for the relevant sub-catchment. However, this is provided for by a range of land use and discharge provisions for both diffuse and point sources. In my opinion, the inclusion of this clause is unnecessary and begs the question whether it anticipates an alternative consideration for land use and discharge applications within sub-catchments that flow to/through the wetland or whether landowners/discharges within these catchments are required to adopt additional land use practices.
11. Clause ii. I accept the addition of this clause; it reflects the direction of Objective A2 of the National Policy Statement for Freshwater Management 2014 (updated 2017) (**NPSFM**).
12. Clause iii. Ms Kissick has amended the notified versions “reduce and minimise” to “avoid” in respect of further loss of the bog system within the wetland. As the Panel will appreciate, following the decision of the Supreme Court in King Salmon<sup>6</sup> the use of the term “avoid” in planning instruments sets a very strong and directive policy framework. I accept that in the case of the Whangamarino wetland bog system, which I understand to be a very (and potentially the most) significant and sensitive component of the wetland, this directive may be entirely appropriate. However, I am concerned as to how this may be interpreted in practice for the numerous diffuse and point source discharges that collectively contribute to contaminant effects on the wetland and whether these implications have been adequately explored, understood and accepted. Accordingly, I respectfully recommend that the Panel consider the potential implications of this change if you are of a mind to adopt it.
13. Clause vi – recognising the role of hydrological drivers. This clause appears out of place and doesn’t fit with the ‘sense’ of the policy. I accept that it is not solely the magnitude of

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<sup>6</sup> Environmental Defence Society v New Zealand King Salmon [2014] NZSC 38, (2014) 17 ELRNZ 442.

contaminant concentrations or loads that have the potential to adversely affect the values of the wetland. High flow/flood events also play a part by transporting contaminants across the wetland system rather than in defined stream channels, potentially depositing contaminants over a wide area. I understand that this matter was a focus of the review of the Council's existing resource consents for the Lake Waikare Gate as discussed in the evidence of Mr Ghassan Basheer for the Council to Block 2. As I provided in my verbal evidence to the Panel in Block 2, in my opinion the adverse effects associated with the diversion of water are understood and already appropriately managed by the Waikato Regional Plan (**WRP**) and hence additional wording in this policy is not required.

#### **Method 3.11.4.4**

14. As I have advised previously, the s42A report has recommended deleting the implementation methods in their entirety. This is not a matter I have assessed in detail and hence do not have a position on this, other than to note that pursuant to RMA s 67(2) implementation methods are not mandatory content for a regional plan and that a plan method that purports to direct the Council's priorities should only do so in the context of the range of priorities that the Council faces and recognising that the regional ratepayer will ultimately have to fund the implementation of these 'priorities'.
  
15. Turning to Ms Kissick's amendments<sup>7</sup>, there are three that I would like to address.
  - a. Clause a and c – the introduction of "As a priority". In accordance with my statement above, adopting a submitter's perceived priority into a plan may not result in the best allocation of the Council's resources to the many complex issues that it faces, not just in relation to the significant issues and requirements of PPC1 but across all of the Council's functions and activities. It is also likely that the Council priorities will change over time in accordance with statutory requirements and other processes.
  
  - b. Clause h – evaluate options and implement a programme to reduce hydrological impacts on wetland systems. Again, I caution against directing the Council's investigation and implementation programmes in an *ad hoc* manner without

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<sup>7</sup> Appendix 1: Page 90 and 91 of pdf

understanding what it is trying to achieve and its relative importance alongside a wide range of issues.

- c. Clause i – directing a review of the Lower Waikato Flood Control Scheme Consents. In my opinion, it is not appropriate to signal an *ad hoc* review of resource consents in a plan method and it is not clear what sort of “review” Ms Kissick is referring to, nor what the purpose of the review is. Section 128 of the RMA limits the circumstances under which a resource consent can be reviewed. These include: at any time specified for that purpose in the consent, in response to rules in a regional plan that set minimum flows/water quality standards, and in response to a national environmental standard or national planning standard. I understand that there is no scope to review a consent outside the circumstances specified in s128 or the resource consent itself.
16. As I have indicated previously, I do not have a view as to whether the methods should be removed in their entirety. However, should the Panel decide to retain them, then in my opinion, the changes proposed by Ms Kissick that I have discussed above should not be adopted.

### **Evidence of Helen Marr for Fish and Game**

17. Ms Marr similarly suggests a range of amendments to Policy 15<sup>8</sup> to reflect that the “*Whangamarino Wetland is an internationally important wetland complex and its values must be protected and its health restored*”. Ms Marr’s preferred version is:

*Protect and restore the ~~make progress towards restoration of~~ Whangamarino Wetland by:*

- aa. ~~reducing the diffuse discharge of nitrogen, phosphorus, sediment and microbial pathogens in the sub-catchments that flow into the wetland; and~~ to:*
- a. ~~Reduce and minimise~~ Avoiding further loss of the bog ecosystem; and*
- ab. ~~Providing for the protection of other significant values of the wetland complex; and~~*
- b. ~~Provide~~ing increasing availability of mahinga kai; and*
- ba. ~~Managing the hydrological regime including the impacts of the Lower Waikato Waipā Flood Control Scheme; and~~*
- c. ~~Supporting~~ implementation of any catchment plan prepared in future by Waikato Regional Council that covers Whangamarino Wetland.*

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<sup>8</sup> Paras 2.5 to 2.7 and 6.1 to 6.8

18. I do not agree with the change that Ms Marr proposes to the structure of the policy that broadens its focus and explicitly seeks to manage hydrology and the impacts of the Lower Waikato and Wāipa Flood Control Scheme. The hydrology of the Waikato and Wāipa Rivers needs to be viewed as a whole – through an entire system lens. As indicated in the evidence of Mr Basheer, the scheme is inherently linked to the hydrology of the rivers, including Lake Taupo operating levels, and is a very complex system. Accordingly, zeroing in on just the Lower Waikato and Wāipa Flood Control Scheme is not appropriate.
19. In my opinion, the focus of PPC1 is on water quality and this should be retained. As I have indicated previously, I accept that the diversion of water and associated hydrological modification, both historical and future, may have an impact on the Whangamarino Wetland and wetlands in general. However, this is addressed by the WRP and is a matter that should be addressed more holistically in the recently initiated review of that plan if it is currently not adequate to effectively protect the significant values of wetlands, as required by the NPSFM.
20. My previous statement regarding the use of “avoid” also apply to the changes sought by Ms Marr. In my opinion, the Panel should reject the changes sought by Ms Marr.

### **Evidence of Gerard Willis for Fonterra**

21. Lastly, I would like to briefly address the evidence of Mr Willis and the changes to Schedule 1: Requirements for Farm Environment Plans (**FEPs**) that he promotes. My understanding is that the intent of these changes is to provide more certainty to enable Permitted Activity Rule 3.11.5.3 of PPC1 (as per PPC1 as notified) to be retained – either as is or in a modified form. In this regard, Mr Willis states that *“In my opinion, Schedule 1 can be drafted such that there is absolute certainty as to what must be satisfied for an activity to be permitted (ie. that the FEP must contain specific matters).”*<sup>9</sup>
22. While Mr Willis advocates for a permitted activity for farming activities under a Certified Industry Scheme, the extent and complexity of the standards and requirements that he proposes in Part C of Schedule 1<sup>10</sup> demonstrates the significant range of matters that need

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<sup>9</sup> Para 1.2 (b)

<sup>10</sup> Attachment A to Mr Willis' evidence

to be considered to implement Good Farming Practice (GFP) and necessary nitrogen loss reductions and the complexity of farm management actions.

23. I cannot advise whether the extensive standards and requirements he proposes address the full suite of matters that should be considered in the development of a FEP or whether they are all required in each circumstance. However, in my opinion, compliance with such numerous and complex standards would be extremely difficult to monitor and enforce to ensure that a farm can continue to operate as a permitted activity. Furthermore, compliance monitoring inherently has a level of subjectivity and non-compliance can be transient – if a farmer fails to comply with elements of their FEP at a point in time but agreed to comply in the future, would they be allowed to continue as a permitted activity or be required to obtain a resource consent?
24. In my opinion, the level of subjectivity and flexibility that is desirable in a FEP lends itself to a consent regime. As per my evidence to Block 2, this could be achieved via a controlled activity consent that defaults to a restricted discretionary activity where GFP or the necessary nitrogen reductions are not met.
25. I accept that compliance monitoring of the implementation of a potentially complex FEP will still be required under a resource consent and to some extent compliance requirements will be similar to those of a permitted activity. However, in my opinion, a FEP that is developed to meet the requirements of Policy 1 and 2 will be customised to the specific farm and circumstances and should be more focused and applicable than a large set of generic standards and requirements. Furthermore, a consent process offers the opportunity to identify and prioritise key compliance matters to improve monitoring efficiency and effectiveness.
26. Accordingly, while I accept that it may be theoretically possible to develop a comprehensive set of standards to enable a farm to operate as a permitted activity, in practice the complexity of doing so goes beyond the scope of what would normally be accommodated as a permitted activity.
27. In respect of Mr Willis' proposed rules regime, he advises that<sup>11</sup>:

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<sup>11</sup> Paras 8.1 and 8.2

*My proposal would make Schedule 1 significantly more prescriptive. One consequence of that added prescription is that some farms may not be able (or may choose not) to comply with one or more of the specific performance standards and will not include those standards in their FEP.*

*My proposal to deal with that situation is to create a new controlled activity Rule 3.11.5.3A. That rule would require a farmer to apply for consent to undertake the farming activity that does not include an FEP that complies with requirements in Schedule 1. Control would be reserved to that aspect of Schedule 1 that was not complied with.*

28. In my opinion, should a permitted activity regime for farming activities under a Certified Industry Scheme be retained, it is not appropriate to address non-compliance with standards through a controlled activity rule for which consent cannot be refused.
  
29. Some of the standards and terms Mr Willis proposes in his Schedule 1 are fundamental to the intent and success of PPC1. For example, should a farmer choose not to comply with their required level of nitrogen reduction (Part C 2 a of Mr Willis' Schedule 1), there would be no ability for the Council to decline the consent. As per the rule regime I have previously proposed, non-compliance with this important standard should at a minimum default to a restricted discretionary activity. While I accept that there may be entirely valid reasons for this standard not to be achieved in an acceptable period of time, I consider that there still needs to be the ability to refuse consent in this circumstance.
  
30. Accordingly, while it may be technically and theoretically possible to develop a set of clear, unambiguous and certain standards to allow a permitted activity regime, the significant complexity associated with farm management plans, the range of actions that may be appropriate and the desirability of enabling a customised and tailored approach (as promoted throughout PPC1) does not, in my opinion, support a permitted activity regime.

Ian Mayhew