Before the Hearing Panel
At Wellington

Under	the Resource Management Act 1991 (**RMA**)
In the matter of	Proposed Natural Resources Plan for the Wellington Region (Hearing Stream 3)

Legal submissions in reply
Hearing Stream 3 - water allocation

Date: 8 December 2017

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MAY IT PLEASE THE PANEL

1 These legal submissions reply to the main legal matters raised by the Hearing Panel and submitters during Hearing Stream 3, as it relates to water allocation. They do not address every legal issue addressed or question asked throughout the hearing time, but have addressed common themes or recurring issues.

2 These submissions should be read in conjunction with the other submissions previously filed by counsel in respect of this Hearing Stream.[1]

3 These submissions do not address natural form and function issues, as those have already been filed on that topic.

4 In summary, the main legal themes or issues that arose in the relevant part of Hearing Stream 3 are:

4.1 the legality of restricting permitted activities;

4.2 the definition of 'domestic needs' under section 14 of the Resource Management Act 1991 (**RMA**);

4.3 the appropriate use of the prohibited activity status;

4.4 scope for the set of provisions proposed by Mr Percy;

4.5 section 14(3) takes;

4.6 issues arising from the joint work completed by the water science experts;

4.7 priority of applications for resource consent; and

4.8 an update on the status of the Stock Exclusion Regulations.

[1] Dated 7 August 2017.

Legality of Restricting Permitted Activities

5 Rule 137 in the proposed Plan provides for the take and use of water from a surface water body as a permitted activity for dairy farm washdown and milk cooling on a dairy milking platform, provided a range of standards are met, including that:

> …the total take shall be no more than 70L per day per stock unit based on the maximum herd size on the property at any time during the three years prior to the date of public notification of the Proposed Natural Resources Plan (31.07.2015), and…

6 We understand that the Panel has raised a concern around the restriction of the permitted activity to a limited time period, being the three years prior to the date of public notification of the proposed Plan. In particular, we understand that the Panel was concerned that this may give the Rule a retrospective effect.

7 Under section 77A of the RMA a local authority can categorise an activity as a permitted activity. The requirement for a permitted activity is that it does not reserve any discretion to a decision maker to provide final approval to a permitted activity[2] and it must be sufficiently certain to be understandable and functional.[3]

8 Effectively, this rule 'caps' the amount of water that can be taken for these purposes as a permitted activity and limits the permitted amount to 70L per day per stock unit, based on the existing number of stock units when the proposed plan was notified (or in the 3 years prior to that). Without this rule, taking for this purpose would be a discretionary activity under Rule 142 and under section 20A a resource consent would be required within 6 months of the rule becoming operative (where the activity is currently permitted). It effectively allows certain existing uses to remain permitted activities, as long as the identified parameters are met.

9 It is submitted there is no issue with a permitted activity defining the total take amount in this way as it is certain and can be calculated based on records kept of number of stock units. It does not have a

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[2] *Boanas v Oliver* C072/94 (PT).

[3] *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.

retrospective effect, the reference to the three years prior to notification is simply to determine the amount of water that can be taken as a permitted activity and it does not propose to govern past activities. If the take is a 'new' take for this purpose (ie, it came about after the proposed Plan was notified) then resource consent will be required under the rules in the whaitua chapters.

The definition of 'domestic needs' under section 14 of the RMA

10 Section 14 of the RMA sets out a range of restrictions regarding the taking and use of water. However, under section 14(3)(b) and (d), a person is not prohibited from taking water where it relates to '*reasonable domestic needs*'. Relevant extracts from sections 14(3)(b) and (d) of the RMA are set out below.

> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
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> …
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> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
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> (i) an individual's reasonable domestic needs; or
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> (ii) the reasonable needs of a person's animals for drinking water,—
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> and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or
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> …
>
> (d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

11 The Panel has asked for comment on the scope of this domestic use, and particularly whether it includes outside uses such as washing a car or watering tomatoes.

12 The term 'domestic needs' has not been considered by the Court in the context of the RMA. However, as previously advised to the Panel the requirements of section 14(3)(b) of the RMA are that the take is *required* for the *reasonable domestic needs* and the take does not, or is not likely to have an adverse effect on the environment.[4]

13 The dictionary defines domestic as: 'of the home, household or family affairs'.[5]

14 It is submitted that the use of water in the residential setting for the garden or for washing the car or other domestic activities, is likely to be for a domestic purpose. However, most of the water used will be 'taken' from the reticulated system, so is not 'water' as defined in the RMA (because you are taking it from a pipe). Whether section 14(3) applies will only be relevant where people are taking 'water' - eg, groundwater or from a stream.

15 Whether section 14(3) applies to water taken and used for washing a car or watering tomatoes may not even arise because Rule 136 of the proposed Plan allows for taking of certain levels of water as a permitted activity (subject to rate and volume restrictions). If the take cannot meet the standards in that Rule, then consent will be required, unless authorised by section 14(3) of the RMA. The fact that the use is taking place on a residential site and is one of the sorts of activities that is anticipated in a residential setting indicates that the use is for a domestic need. Of course, it still has to be *required* and *reasonable* and *not likely to have an adverse effect on the environment.* That would be determined on the facts of each case.

The appropriate use of the prohibited activity status

16 Under section 77A of the RMA, the Council can categorise an activity as a prohibited activity. Section 77B(7) of the RMA provides:

> If an activity is described in this Act, regulations or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

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[4] Legal submissions on Hearing Stream 3, dated 7 August 2017.

[5] The New Zealand Oxford Dictionary (2005) Oxford University Press.

17 The Panel has asked for relevant case law on the appropriate use of the prohibited activity status, especially post *King Salmon* and where a directive policy approach is taken.

Relevant case law pre King Salmon

18 A summary of the relevant case law is set out below. Ultimately, what the case law states is that prior to imposing a prohibited activity status, clear assessment and analysis should be undertaken (under section 32, and the other matters that Council is required to have regard to) to ensure that prohibited activity status is the most appropriate status.

19 The Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development & Ors* considered the circumstances in which it is proper for a local authority to classify an activity as a 'prohibited activity' when formulating its plan in accordance with the RMA.[6]

20 In terms of the original Environment Court decision, the Court of Appeal noted that:[7]

> In short, the Environment Court held that prohibited activity status should not be used unless an activity is actually forbidden. In the words of the Environment Court (at [13]), prohibited activity status "should be used only when the activity in question should not be contemplated in the relevant place, under any circumstances"…

21 Effectively, the question the Court of Appeal was looking at was whether prohibited activity status was appropriate only for absolutely forbidden activities. It started by looking at the process for making a plan, commenting that:[8]

> Thus, the Act provides that a plan must start, at the broadest level, with objectives, then specify, in respect of each objective, more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to those policies.

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[6] [2008] 1 NZLR 562.

[7] Ibid, at [3].

[8] Ibid, at [24].

22 At paragraph [34] the Court of Appeal was presented with a range of different situations where prohibited activity status may be appropriate, including:

22.1 where the Council takes a precautionary approach (eg, where mining is prohibited by prospecting is not so that whether and on what terms mining should be allowed would be made only when information derived from prospecting could be evaluated);

22.2 where the Council takes a purposefully staged approach (eg, where the Council wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area);

22.3 where the Council is wishing to ensure comprehensive development in a co-ordinated and interdependent matter;

22.4 where it is necessary to allow an expression of social or cultural outcomes or expectations;

22.5 where it is intended to restrict the allocation of resources (eg, restricting aquaculture to a designated area); or

22.6 where the Council wishes to establish priorities other than on a 'first in first served' basis.

23 The Court effectively agreed these were all possible scenarios where prohibited status might apply and stated that:

> [36] It is clear from the extracts from the Environment Court decision that we have highlighted at [3] – [4] above that the Court postulated a bright line test – ie the local authority must consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate. We are satisfied that, in at least some of the examples referred to at [34] above, the bright line test would not be met. Yet it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in

> cases falling within the situations described in that paragraph.

24 In addition, the Court noted that:

> [37] Coromandel Watchdog and the interveners argued that the question which a local authority had to ask and answer was whether prohibited activity status was the "most appropriate" for the particular area, having regard to the matters evaluated in the course of the process mandated by the Act. They argued that the Environment Court had, by substituting the dictionary definition "forbidden" for the words of s 77B(7), put an unnecessary and incorrect gloss on the words of the Act itself.

25 Ultimately, the Court found that the 'forbidden' test applied by the Environment Court (or the 'in no circumstances ever be allowed') was not the correct test and instead focussed on the 'most appropriate' option assessment:

> [41] We are satisfied that resort to a dictionary definition of the word "prohibit" was unnecessary in this instance. The Act defines prohibited activity in terms which need no elaboration. It simply means an activity for which a resource consent is not available. We agree with Coromandel Watchdog and the interveners that elaboration has the potential to limit unduly the circumstances in which the allocation of prohibited activity status may be the most appropriate of the options available under s 77B(7).

26 *Coromandel Watchdog* was considered by the Environment Court in *Thacker v Christchurch City* Council.[9] The dispute before the Court revolved around the methods proposed to give effect to the policies and objectives:

> [11] Both the City Council and the Regional Council agree that subdivision, excavation and filling in the areas under consideration should be subject to significant restrictions. The difference between the councils is the degree of restriction. Specifically, the Regional Council seeks reinstatement of the prohibited activity status in respect of various activities which Variation 48 originally proposed and its extension to Lower Styx.

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[9] C026/2009.

> [12] The remaining parties to these appeals all support the City Council's position against prohibition and seek various other remedies in addition.

27 The Court considered the relevant objectives and policies and whether these objectives and policies could support a prohibited activity status:

> [37] We think that it was accepted by both Councils that in order for there to be a prohibition on various forms of development within the identified areas, such prohibition must reflect relevant objectives and policies. Mr Hardie contended that nothing in the objectives and policies provided any basis for the prohibition which the Regional Council sought to impose and there is no appeal against the relevant provisions of the objectives and policies.
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> [38] Ms G M Dixon (Senior Planner for the City Council) identified and analysed all of the relevant objectives and policies in the Proposed Plan and concluded that these did not seek to avoid development in the identified areas but rather to limit that development and to avoid increased risk to wellbeing and safety in the identified areas and downstream. We understood the City Council's position to be that the use of the word *avoid* in the objectives and policies would support prohibited activity status where the use of other expressions would not.
>
> [39] Notwithstanding Ms Dixon's analysis of the Proposed Plan, we do not consider that it can be conclusively said that the provisions of the objectives and policies are so precise as to absolutely rule out the use of prohibited activity status to give effect to them.
>
> [40] A number of the policies to which Ms Dixon referred us sought to *control* development, dwelling densities and the location and extent of filling or excavation. Ms Perpick submitted that *control* could mean drawing the limit of any such developments at the current level of development by way of prohibition on further development, or on development above certain specified levels. We consider that there is some merit to that submission. We certainly cannot say conclusively that in some instances prohibitions of the sort requested by the Regional Council necessarily go beyond the contemplation of the objectives and policies and therefore cannot stand, although neither could it be said that the objectives and policies clearly signal the imposition of prohibited activity status.

> [41] We conclude (narrowly) that prohibition on subdivision, development, filling or excavation beyond certain levels may possibly be contemplated by the objectives and policies of the Proposed Plan or alternatively may be a method of giving effect to those objectives and policies. We therefore turn to consider the merits of such prohibitions in this case.

28 The Court went on to note that prohibited activity status should not be imposed lightly:

> [42] The imposition of prohibited activity status on any activity or activities is the most draconian form of control available under RMA. A prohibited activity is not only one for which a resource consent must not be granted by a consent authority, but a proponent of such an activity may not even make an application for it. Although not specifically stated by any of the parties to these proceedings there was an implicit acceptance that prohibited activity status was not one which should be imposed lightly and without detailed consideration.

29 The Court also provided some further analysis on *Coromandel Watchdog*, stating:

> [45] … For the purposes of our deliberations however, we consider that the most significant portions of the *Coromandel Watchdog case* are those contained in Paragraphs [23] to [31], [37] and [41]. In the two later paragraphs the Court of Appeal identified that the appropriate test for imposition of prohibited activity status is whether or not the allocation of that status is *the most appropriate of the options available.*
>
> [46] In Paragraphs [23] to [31] the Court identified the process to be undertaken in order to determine whether or not the imposition of prohibited activity status was the most appropriate course to adopt. The Court referred to the statutory scheme for plan changes under RMA together with the accepted principles, practices and requirements for application of that statutory scheme.
>
> [47] In particular, the Court of Appeal emphasised the provisions of s 32 RMA which impose an obligation on local authorities to undertake an *evaluation* at various stages of the proposed plan process. Section 32(1) requires the undertaking of an *evaluation* before notification of a proposed plan and s 32(2) requires the undertaking of a

> *further evaluation* prior to making a decision on the proposed plan (or plan change) under Clause 10, Schedule 1.

30 In other words, this case clearly states that the activity status must reflect the relevant objectives and policies, which, in my submission is no more than what section 67(1) of the RMA requires when it states the rules (if any) must implement the policies, which in turn must implement the objectives. It also endorsed the test for prohibited status as whether or not the allocation of that status is *the most appropriate of the options available.*

Relevant case law post King Salmon

31 The key finding from *King Salmon* on this issue was that the use of 'avoid' in a policy (with no other provisos) means do' not allow' or 'prevent the occurrence of' (para 62). In other words, 'avoid' sends a clear signal that activities that are to be avoided will not be allowed.

32 In terms of discussion on prohibited activity status post *King Salmon*, we note that the *King Salmon* decision was released on 17 April 2014. On 19 November 2015 *Coromandel Watchdog* was referred to in *WMG Yovich v Whangarei District Council*.[10] No particular analysis of the impact of *King Salmon* was provided. The Court simply stated:

> [130] In considering the adoption of prohibited activity status in *Coromandel Watchdog et al v Chief Executive of Ministry for Economic Developments* [16] the Court of Appeal reiterated the purpose of rules in the statutory scheme and noted:
>
> > "[24] Thus the Act provides that a plan must start, at the broadest level, with objectives, then specify in respect of each objective more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to these policies."
>
> [131] We acknowledge that prohibition is a tool available to achieve a Plan objective, but the connection in PC130 is tenuous, at best. Given the prohibition would not be reflected in the existing development at Precinct A, we

[10] [2015] NZEnvC 199.

> conclude the existing rules better implement the objectives and policies of the Plan.

33 It is submitted that *King Salmon* does not result in any particular change to the case law set out above. For example, in paragraph 27 above the Court said 'in order for there to be a prohibition on various forms of development within the identified areas, such prohibition must reflect relevant objectives and policies'. That still remains the case. As was the case pre *King Salmon*, the correct approach is to assess the requirement for a prohibited activity status, and determine whether it is the most appropriate status for the particular activity.

Directive policies

34 Section 67(1) of the RMA states that a regional plan must state 'the policies to implement the objectives' and 'the rules (if any) to implement the policies'. The question therefore is whether the proposed activity status in a rule implements a directive or 'avoid' policy. At a practical level, directive objectives and policies should usually be accompanied by a restrictive activity status. Whether a prohibited status is the most appropriate status will depend on the specific wording of the objectives and policies and the context of the proposed Plan (ie, the rule is not being considered in isolation without that contextual framework). It is also worth noting that the Supreme Court itself put a caveat on the breadth of its interpretation of 'avoid'[11]:

> It is improbable that it would be necessary to prohibit an activity that has a minor or transitory effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding

35 In other words, while an obvious response is that an 'avoid' policy (with no provisos) is likely to be accompanied by a restrictive activity status, there may be things in the context of the other provisions or effects being managed that make it more appropriate to have a lesser status. It will depend very much on the wording of the relevant policies and proposed rules and the issue at hand. This approach was reflected in the Board of Inquiry Decision on the *Tukituki Catchment Proposal*.[12]

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[11] *King Salmon*, at [145].

[12] See Mr Slyfield's legal submissions dated 29 September 2017 and extract attached to those submissions.

'Schedule XX' proposed by Mr Percy

36 Mr Percy's evidence sets out an 'alternative management framework' for water allocation parameters on behalf of the submitters he is representing[13] and in particular, a new Schedule setting minimum flow limits and allocation limits. He states that the 'content [is] yet to be populated'.

37 The Panel asked for an analysis of scope of submissions to accommodate what Mr Percy suggests in his evidence. The conclusion in the Wellington Fish and Game legal submissions, dated 22 September 2017, was that 'the framework as recommended by Mr Percy is a direct or otherwise logical consequence of the submissions summarised in Appendix A' of that document. With respect, such a conclusion is not obvious from a review of that Appendix A.

38 Before addressing the scope issue, the first more fundamental problem is that there is no technical evidence before the Panel on what numbers should be 'populated' into Mr Percy's table and no opportunity for submitters to comment on whatever those numbers may be.

39 For example, if the Panel wished to increase (say) the minimum flow level to a higher number then there may well have been potential submitters who wanted to comment on that or bring evidence as to an alternative number. Changing minimum flows and allocation limits is not a minor issue. It has wide reaching impact and for that reason, the public should have been able to see what the alternatives were that were proposed and been able to submit (or further submit) on that as they wished.

40 Mr Percy has not even come up with his own numbers - he has simply left Council to come up with the numbers in the table he created. That is not the Council's role. The Council carefully identified its own numbers and if submitters wished to challenge those they are entitled to do so and to offer alternatives. However, it is not for the Council to create an alternative for a submitter (and it is unclear whether the information even exists at this point).

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[13] 28 August 2107 evidence, pages 15-24 and Table 4, page 33 and Schedule XX, page 51.

41 In terms of scope, the legal submissions for Hearing One, dated 20 April, addressed the scope caselaw in detail (paragraphs 105-115). The most recent case at that time was a High Court one on the Unitary Plan. It stated:

> A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The 'workable' approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

42 The legal overview for Hearing One, dated 22 May 2017, addressed *Turners & Growers v Far North District Council*.[14] It is one of the most recent cases on scope and states that *Clearwater Resort Ltd v Christchurch City Council* remains the leading authority on whether a submission is 'on' a plan change (paragraph 22):

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

43 In terms of Schedule XX proposed by Mr Percy, this Schedule was not included in the submissions of any of the parties he represents and even in his evidence he does not include the relevant flows and volumes. It is submitted that adding in these values would result in a significant amendment to the proposed Plan, without any real opportunity for those potentially affected to comment (ie, the changes now sought could not

[14] [2017] NZHC.

be reasonably foreseen as a consequence of the submissions made as even now at hearing stage there are no flows or volumes. Accordingly, the consequences of that Schedule and who might have been directly affected by it cannot be determined). It is quite plausible that 'would be' submitters looked at what the low flow levels were in the proposed Plan and decided based on previous usage that they could 'live with' restrictions that apply at that level of flow. If a different low flow level is now created which was not in a submission, it could impact on the number of times a year low flow conditions are met and potentially people are affected in different ways than previously, with now no opportunity to speak to that.

Section 14(3) takes

44 Mr Percy suggests that all section 14(3) takes should cease once minimum flows are reached (albeit, does not identify what those flow levels are).

45 At paragraph 162 of his evidence, Mr Percy refers to the Fish and Game submissions and Minister of Conservation submissions and states they seek the policies are amended to ensure takes below minimum flow are consistent with section 14(3)(b) of the RMA. The submissions do say that, but what does that really mean in terms of scope? In our submission it is difficult to reasonably foresee that a consequence of the submissions by his clients could result in section 14(3) takes being prohibited by the proposed Plan at low flows.

46 When you turn to the Fish and Game submission it seeks 'delete provisions which allow takes below minimum flow for root stock and encourage water saving and storage options' and 'amend policies to ensure that takes below minimum flow are consistent with section 14(3)(b) of the RMA and do not result in significant adverse impacts.'[15] It also specifically sought in relation to surface water that 'in times of water shortage, takes are restricted to those that are essential to the health or safety of people and communities, or for drinking water for animals and all other takes are ceased'. [16]

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[15] Page 52 Fish and Game submission.

[16] Page 37 Fish and Game submission.

47 He also states that 'Rangitane submitted the Policies P111 and P115 do not give effect to NPS-FM and the policy and rules should be amended so that they do not permit takes to occur below the minimum flow levels set in the Plan'. When you turn to the Rangitane submission, what they actually sought was:[17]

47.1 Amendment of P111 and associated rules 'so that it does not provide for takes below water quantity limits established in the Plan'.

47.2 Amendment of P112 to remove reference to the protection of rootstock from the policy and rules.

47.3 Amendment of P115 and associated rules 'so that it is consistent with giving effect to the NPSFM, including so that it does not allow water takes other than those provided for in s14(3)(b) and (e) below minimum flows and levels'.

48 The Minister of Conservation submission states 'the allowance for rootstock protection is not consistent with the other types of water take in this policy which are provided for in section 14(3) of the RMA and may not give effect to the NPSFM Objective B1'.

49 On a plain reading of these submissions, it is difficult to ascertain that a consequence of them might be cease of takes at low flows. In fact, most of the submissions imply that an exception for section 14(3) takes should be provided for (other than Rangitane's submission, which explicitly says so). In our submission, the amendments sought in Mr Percy's evidence are outside scope of the submissions made.

Issues arising from the joint work completed by the water science experts

50 Following the submissions made by AJ Barton, AJ Barton and Ongaha Farms Ltd, and the Wairarapa Water Users Society Inc, the Panel granted an extension to allow for joint witness conferencing. That conferencing took place between the experts (Dr Mark Gyopari, Brydon Hughes, Mike Thompson and Jon Williamson), and separately the

[17] Page 79 Rangitane submission.

planners (Lindsay Daysh and Paula Hammond). A final joint statement of the technical experts dated 7 November 2017 was provided and 2 joint statements from the planners were provided (13 and 17 November 2017).

51 Further to the reconvened hearing of H3 - water allocation - in relation to the Lower Ruamahanga on 21 November 2017 the technical experts and planners conferenced further to propose the amendments to the proposed Plan that were necessary to implement the points of agreement by the technical experts and planners. A combined joint statement dated 30 November 2017 was provided.

52 It is clear from the technical joint witness statements that it was agreed there should be:

52.1 a change in classification of groundwater in the southern part of the Lower Ruamahanga Zone (at a depth below 10m); and

52.2 a boundary change at the southern end of the Lower Ruamahanga zone.

This is reflected in Figure 2 of the technical experts joint witness statement dated 7 November 2017.

53 This agreement then resulted in the need for a variety of other amendments, which have been agreed in the combined joint witness statement dated 30 November 2017:

53.1 Amendments to the classification table (that classifies water into A, B or C) - see Table 4.1 following paragraph 4 in the combined joint witness statement.

53.2 Consequential amendments to provisions that use the wording from Table 4.1 that has now been changed - see Table 1 following paragraph 5 in the combined joint witness statement.

53.3 Recalculation of the Lake Groundwater Management zone allocation amount and the northern and southern parts of the Lower Ruamahanga catchment management sub-unit - see

Table 2 following paragraph 7 in the combined joint witness statement.

53.4 A new allocation amount for the Lower Ruamahanga Category B groundwater (which did not previously exist) - see Table 2 following paragraph 7 in the combined joint witness statement.

54 We understand that the Panel has asked for confirmation as to the scope to make these changes.

55 The law on the scope to make amendments is set out above. Essentially, any amendment to the proposed plan as notified must not go beyond what is reasonably and fairly raised in submissions, taking into account the whole relief package detailed in each submission. As set out above, it is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the submission.

56 The submissions which touch on the same subject matter as the potential amendments are:

56.1 Wairarapa Water Users Society:

56.1.1 Their submission effectively challenged the entire classification of groundwater in the proposed Plan and made specific comments about whether the level of connectivity proposed actually existed and how a strong and consistent relationship needed to exist for a direct connection.

56.1.2 It raised issues with requiring users to 'individually verify' the category and stated that a process was needed to identify 'which category aquifer a particular abstraction may be tapping'.

56.1.3 Sought the relief categorisation of groundwater after the Council has 'verified its connectivity with surface water and performed an empirical calibration of the model' and that Schedule P needed empirical calibration by the Council.

56.2 AJ Barton and Ongaha Farms Ltd:

56.2.1 Raised issue with a regional scale groundwater model being applied at an individual level, the nature of the boundaries between different zones and the lack of simple definition for the level of connection between surface and groundwater.

56.2.2 Stated that Category A for the entire Lower Ruamahanga is not appropriate and that there is evidence that the Category C zone should extend further north from the Lake zone up to the vicinity of the Huangarua confluence.

56.2.3 A mechanism be provided for recognising and accommodating local variations of groundwater connectivity in a robust, workable and transparent manner.

56.2.4 That the definitions for Category A, B and C be amended to better explain the hydraulic connectivity. A single zone my contain different aquifers at different depths and locations.

56.2.5 A distinction is made in the various groundwater zones between shallow unconfined and hydraulically connected aquifers.

56.2.6 The arbitrary use of depth of an aquifer when assessing the degree of hydraulic connection be removed.

56.2.7 Figures 7.8 and 7.9 be removed.

56.2.8 Any consequential relief required also be provided.

57 In our submission the changes proposed, and the consequential amendments required are all potential consequences of the issues raised in these submissions and therefore, are a foreseeable consequence of the submissions by the Wairarapa Water Users Society and

Mr Barton/Ongaha Farms. Whilst the submissions do not specifically seek the exact amendments now proposed, they in general seek a reassessment of the water Categories and change to the identification of groundwater connectivity. That assessment and change has taken place, and it is foreseeable and logical that as a result of that change, the additional amendments are required.

58 In addition, as set out in the section 32AA analysis in the 30 November 2017 combined joint witness statement, the impact of the changes on those potentially affected by them are either neutral or positive.

Priority of applications

59 Mr Williamson and Mr Daysh have suggested that an application to renew an existing water take consent should take priority over an application for a new take. Mr Williamson commented in his evidence:

> [14] I have to say that I am still unclear how existing takes (on which all the modelling is based) will be distinguished from new applications for new bores not previously identified in the allocation process and I think that there needs to be some more clarity around that. I know that new applications for new bores has been an issue for Ms Hammond. I assume that there will be some method for prioritising the renewal of existing takes over any fresh applications for new takes from new bores not previously provided for in the allocation process, but I am unsure what is proposed.

60 Mr Daysh stated in his 20 November 2017 evidence that:

> …I consider an advice note to Policy 115 would assist. This could read:
>
> *In considering water takes in areas identified as being over allocated priority will be given to renewals of existing water permits over new water permits.*

61 In my submission this suggestion is ill founded. Firstly, because it refers to 'priority' which as a specific meaning in an RMA sense and relates to how priority is to be allocated where more than one resource consent application is received concerning the same resource at the same time. The answer provided by the Courts has been 'first in time', although which is first can itself be the subject of dispute and each

application must be considered individually on its merits and without regard to other applications.[18]

62 There is no power in the RMA to distinguish between consents on the basis of whether they replace an earlier consent or not.[19] However, there is recognition of a consent that replaces an existing consent in the RMA:

62.1 Section 124 of the RMA, which allows existing consents to continue while the 'new' consent for the same activity is processed.

62.2 Sections 124B of the RMA which creates a type of priority between existing consent holders applying for a new consent for the same activity and entirely new consent applications, where resources are fully allocated (with the existing consent in place).

62.3 Section 104(2A) of the RMA which requires the consent authority, when considering an application to which section 124 applies, to have regard to the value of the investment of the existing consent holder.

63 This is not the same as saying that existing consent holders should automatically have precedence over new consent applicants which is what the note proposed by Mr Daysh does. No rationale was provided by Mr Daysh for this precedence and in my submission, the RMA and the provisions of the proposed Plan (ie, where there is a fully allocated catchment the amount of water available to be allocated is the greater of the allocation amount, or that which is allocated to consent. Effectively this means that so long as an existing user is applying to take the same (or less) water, they can potentially replace their consent, whereas for a new user, there is no water available). This makes the proposed note in Policy 115 redundant.

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[18] *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257 and *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71.

[19] *Minister of Conservation v Otago Regional Council EnvC* C071/02.

Legal issues raised by Mr Gordon

64 In his submissions, Mr Gordon references the need for the Panel to make a decision which achieves the most appropriate outcome, and the need for the proposed Plan to give effect to the National Policy Statement for Freshwater Management 2014 (NPS-FM). We have provided legal submissions to the Council on the meaning of 'most appropriate' and the need to give effect to the NPS-FM in Hearing one, and do not propose to replicate those submissions here.

Stock Exclusion Regulations

65 As set out in the Memorandum granting leave for extension of reply statements, the Panel granted leave for Mr Loe to provide a further written statement in reply if and when the Stock Exclusion Regulations are made. However, in the circumstances that the Stock Exclusion Regulations are not made by the end of 2017, counsel would update the Panel and seek directions as to any additional reply statement from Mr Loe.

66 In that memo, the Panel granted leave for Mr Loe to provide a supplementary reply statement to address the proposed Stock Exclusion Regulations, should they be made.

67 By way of update to the Panel, the proposed Stock Exclusion Regulations have not been made, and are not expected to be made prior to Christmas. Council proposes that Mr Loe will provide his supplementary reply statement when the Stock Exclusion Regulations are made, but this is unlikely to be before 2018.

Date: 8 December 2017

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