

**Before the Hearing Panel  
At Wellington**

Under the Resource Management Act 1991 (the Act)

In the matter of Proposed Natural Resources Plan for the Wellington  
Region (Hearing Stream 3)

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**A J Barton and Ongaha Farms Limited legal submissions for Hearing  
Stream 3: Water Allocation**

Dated 21 November 2017

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## **Introduction**

1. These submissions are on behalf of Ongaha Farms Limited and John Barton (the submitters) and are intended to assist the Panel to evaluate the important matters raised by their original submissions.
2. The thrust of those original submissions is that the basis for the proposed management of ground water in the Lower Ruamāhanga Valley (**LRV**) was flawed and in need of significant improvement.
3. In particular, the submitters raised concerns that their groundwater use might be unnecessarily restricted as a result of it being categorised as directly connected to the surface water (the Ruamahanga River).
4. The submitters have engaged and relied on the expert advice of a hydro geologist, Jon Williamson and resource management planner, Lindsay Daysh, and are grateful for the efforts they have put into expert conferencing at the sensible direction of the Panel.
5. Mr Williamson's initial statement of evidence considered site specific characteristics at Ongaha; chemical analyses and thorough computer modelling to test the extent of connection between the groundwater and the Ruamāhanga River.
6. The work undertaken by Mr Williamson and his firm vindicated the thoughtful observations of Mr Barton over 50 summers of groundwater irrigation at Ongaha.
7. Mr Hughes and Dr Gyopari for the council acknowledged the credibility of Mr Williamson's evidence and sought time for discussions and additional modelling. The purpose of the additional modelling was to thoroughly test Mr Williamson's model and resulting thesis for the LRV.
8. The resulting Joint Witness Statement (hydrogeology) amounts to acceptance of shortcomings in Council's earlier LRV work and the notified provisions for LRV groundwater management.
9. This means that the Panel can no longer rely on the earlier LRV work by consultants for GWRC, which is effectively supplanted by the more recent collaborative work of the current hydrogeologists.

## **The JWS (Hydrogeology)**

10. The JWS confirms:
  - The model adequately represents the conceptual hydrogeology environment of the LRV;
  - The range of scenarios tested capture a full spectrum of plausible responses to groundwater pumping, and;
  - The modelling as a useful basis for review of the groundwater classification (and reclassification – Jon Williamson) in the LRV.
11. The position then is that the 3 hydrogeologists engaged in this process agree that the modelling is appropriate for your purposes and that it has now been thoroughly tested. It is more suitable for assessment of the LRV issues than the regional scale modelling undertaken for the council which formed the basis of Dr Gyopari's 2010 "Wairarapa Valley groundwater resource investigation" and 2012 Framework.
12. In short, this modelling significantly improves on those investigations as far as the LRV is concerned.

## **Critical Findings**

13. The critical findings recorded in the JWS are under the heading "points of agreement" at Part 3.
14. The over-arching findings are that, "the degree of hydraulic connection between groundwater and the (river) progressively decreases from north to south to a greater extent than previously thought ..." and the extent of this reduced connection is, "... sufficient to justify a change in the classification of groundwater in part of the zone".
15. The changes in classification are illustrated in the figures 2 and 4 of the JWS. The most fundamental of these is the introduction of a category B zone at depths greater than 10 metres for the LRV zone between the Lake zone and the Moiki zone.
16. On the subject of this category B classification the experts say:

Depletion of the river increases more slowly with the onset of pumping reaching a zonal average peak where up to approximately 40% of the take is coming from the river. The depletion then reduces more slowly when pumping ceases. This suggests that mitigating zone scale impacts can be best accounted for by assigning the river depleting portion of the groundwater takes to the surface water allocation budget (with the rest coming from groundwater storage and through flow). Applying pumping restrictions to existing takes during low flow periods will be of relatively limited benefit to the river (due to the relatively small reduction depletion over a considerable period of time after takes cease).

These sentences are reflected in the revised schedule P, which Mr Williamson has further refined in his short supplementary statement of 20 November 2017.

17. Any temptation to criticise Mr Williamson for moving beyond the wording of the JWS can and should be resisted by observing that he is doing little more than promoting improvements that have subsequently occurred to him. His overriding concern is for future users of the Plan (should the Panel accept the approach of the experts). One of the several challenges faced by the experts has been the time critical nature of their collective discussions in the relatively short period since completion of the modelling work.
18. Not only has potential further refinement of schedule P raised timing issues, but Mr Daysh in his supplementary statement has raised two other matters that could also benefit from more time for expert conferencing:
  - (a) issues raised by Mr Williamson and responded to by Dr Gyopari as to the reclassification ("re-categorisation"), and
  - (b) the question as to integration of groundwater allocation so that pre-existing (modelled) takes have priority over applications for new bores or revival of disused bores.<sup>1</sup>

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<sup>1</sup> Daysh Supplementary Statement, xx

## Implications

19. The implications set out at 6 bullet points in part 4 of the JWS are self-explanatory. The experts recognise that further work is required in relation to:
- Re-calculating surface water (river) allocations;
  - A new groundwater allocation for the category B (or C) classification in the LRV zone;
  - Ascertaining whether further groundwater allocation was available in the category B (or C) area;
  - An addendum to the 2012 Framework for Conjunctive Water Management;
  - Recalculation of groundwater through flow to the Lake Zone and impacts on Lake Zone groundwater allocation and;
  - Further consideration as to whether the Moiki and LRV zones are amalgamated into a single zone.
20. As the submitters have an interest in any such further, other, additional or amended relief as might better give effect to the issues raised or touched on in these submissions<sup>2</sup>. They have an interest in the consequential revisions identified and any others yet to be identified. For that purpose, it is respectfully submitted that Mr Williamson and Mr Daysh need to be included in those processes.
21. The Panel has provided considerable time for further modelling and conferencing. That is acknowledged as being appropriate. And as constructive as that time has been, there is a danger of underutilisation if the all-important process of formulating optimal methods is now rushed or taken lightly.
22. The legal objective here is to extract the optimal policies and methods from the evidence. There being no real debate about the proposed policy framework,<sup>3</sup> the question is whether you can be sure that what is now

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<sup>2</sup> Paragraph 14 of submission dated 23 October 2015.

<sup>3</sup> JWS planning;

in front of you enables you to settle on the optimal provisions to implement those policies?

23. It is submitted that the refined schedule P now being advanced by Mr Williamson is less likely to result in ambiguity, confusion or obfuscation than the version recorded in the JWS. The distinctions and thresholds between the categories are clearer. The descriptors more logical and less likely to confuse or allow room for expensive and wasteful debate.
24. For example, Mr Williamson has sensibly done away with the sub-categories of Category B groundwater (high connection and moderate connection) and deleted the words, "...in the sub-catchment..." from the restrictions threshold because they are undefined, potentially confusing and unnecessary.
25. As recognised by Mr Daysh, these refinements provide greater clarity and therefore, to be preferred, even if there consequential remapping and labelling work is required.

#### **Legal Issues - Introductory**

26. All decisions under the Resource Management Act 1991 (the Act) must be made in accordance with the purpose and Part 2 of the Act. The purpose of the Act is found in s 5: promoting the sustainable management of natural and physical resources.
27. But the wording of this purpose, and the rest of Part 2, is expressed in general terms and the language used is "open-textured".<sup>4</sup> So the courts have given guidance to decision-makers about how to determine whether a plan change is in accordance with the purpose of the Act.
28. The Supreme Court has explained that "Parliament has provided for a hierarchy of planning documents".<sup>5</sup> The court ruled in *King Salmon* that even though Part 2 remains relevant, the purpose of the hierarchy of planning documents "is to flesh out the principles in s 5 and the remainder of Part 2 ...", and they become "increasingly detailed both as to content and location."<sup>6</sup> So planning documents begin with national policy statements, then regional policy statements, and on to district

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<sup>4</sup> *King Salmon* at [151].

<sup>5</sup> *King Salmon* at [151].

<sup>6</sup> At [151].

plans, within each of which are found objectives, policies, rules and methods.

29. The hierarchy of planning documents is clear from the Act itself, such as ss 66 and 67 which require a regional plan to give effect to a national policy statement, and ss 74 and 75 which require a district plan to give effect to any national policy statement and regional policy statement. Furthermore, the Supreme Court has said “that the “give effect to” requirement is a strong directive”.<sup>7</sup>
30. In all cases, including this one, the hierarchy of planning documents must be respected, because giving effect to higher order planning documents means that the decision maker will be acting in accordance with the purpose of the Act and Part 2. The Supreme Court has said that the higher planning documents are what “gives substance to Part 2’s provisions” so that “by giving effect to the [higher order planning document], a regional council is necessarily acting “in accordance with” Part 2”.<sup>8</sup>
31. Other than in exceptional cases of invalidity, incomplete coverage or uncertainty about the meaning of the higher order document, the Supreme Court has made it clear that going back to Part 2 is not necessary or appropriate.

### **Section 32 – most appropriate**

32. In making a decision on the proposed NRP, the Council has certain obligations under s 32 of the Act.
33. The legal tests from s 32 are well known and well traversed by various court decisions. In *Monk v Queenstown Lakes District Council* [2013] NZEnvC 156 the court usefully described the process as follows:

[47] That is a generic assessment of the amended plan change, but of course each provision will need to be assessed individually (to the extent necessary) under section 32. That means that one of the primary matters for the court to consider on a substantive

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<sup>7</sup> King Salmon at [80].

<sup>8</sup> King Salmon at [85].

hearing of the appeal on [the plan change application] would be to compare:

- (a) the status quo ... with
- (b) the [plan change] proposal; or
- (c) the submissions on [the plan change]; or
- (d) something in between (a), (b) and (c)

in the light of the relevant tests under the RMA for preparation of plan changes. In particular, as set out in *High Country Rosehip Orchards Limited v Mackenzie District Council*, that requires:

[...]

- 8. ... Each proposed objective in [the] ... plan ... change ... **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act;
- 9. The policies ... to **implement** the objectives, and the rules (if any) ... to implement the policies.
- 10. [Examination of] Each proposed policy or method (including each rule), ... **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives of the district plan:

(a) **taking into account:**

- (i) the benefits and costs of the proposed policies and methods (including rules);

And

- (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods; ...

[...]

The ultimate issue for the substantive hearing would be which of the options (a) to (d) above better achieves, in respect to each objective, policy and rule, the purpose of the RMA when examined under those statutory tests.



34. As to the correct approach to be taken to s 32, the High Court has observed:<sup>9</sup>

*Section 32*

[44] Section 32 requires that, before adopting any proposed changes to policies, the Board must evaluate and examine whether, having regard to the efficiency and effectiveness, the changes are the most appropriate way of achieving the objectives of the Freshwater Plan.<sup>10</sup> In making that evaluation the Board had to take into account the benefits and costs of the proposed policies (ie “benefits and costs of any kind, whether monetary or non-monetary”);<sup>11</sup> and the “risk of acting or not acting, if there is uncertain, or insufficient information” about the subject matter of the proposed policies.<sup>12</sup>

35. More recently, the Environment Court has explained what is meant by “most appropriate”:<sup>13</sup>

It ... does not necessarily mean the most superior in an absolute sense. Rather it means the most appropriate of the ways presented to the decision-maker, with the decision being made as a value judgement, and having regard to comparative costs and benefits, and measured against the purpose of the Act or the objectives.

### **The NPS – FWM**

36. In this case the PNRP must be assessed against how well it gives effect (relative to alternatives that have been put forward in this process) to the National Policy Statement for Freshwater Management 2014 (as amended in 2017).
37. The Supreme Court in *King Salmon* reminds decision makers that focussing on the words used in the higher order planning document is very important. Whether the PNRP “gives effect to” the National Policy Statement will “be affected by what it relates to, that is, what must be given effect to.”<sup>14</sup> In other words, careful attention to the relevant wording of the National Policy Statement is essential.

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<sup>9</sup> *Rational Transport Society Incorporated & Anor v NZTA* CIV-2011-485-002259

<sup>10</sup> Section 2(1)

<sup>11</sup> Section 2(1)

<sup>12</sup> Section 32(4)

<sup>13</sup> *Creswick Valley Residents' Association Inc v Wellington City Council* [2015] NZEnvC 149 at [3-18].

<sup>14</sup> *King Salmon* at [80]

38. In this case, certain water quality and water quantity provisions in the NPS need to be considered together with the changes which take effect from Wednesday 6 September 2017. The amendments include four additions to the NPS: two in relation to water quality and two equivalent provisions as to water quantity:
- (a) B. Water quantity: Objective B5:  
To enable communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quantity, within limits.
  - (b) B. Water quantity: Policy B8:  
By every regional council considering, when giving effect to this national policy statement, how to enable communities to provide for their economic well-being, including productive economic opportunities, while managing within limits.
39. The NPS includes an appendix enabling progressive implementation of these amendments.<sup>15</sup> The Council has notified its intention as to implementation.<sup>16</sup> The question for you is the extent to which these new provisions bite for the purpose of identifying the most appropriate freshwater management provisions at this time.
40. In my submission, whilst the amendments are not required to be immediately implemented, they do need to be acknowledged as the direction in which the PNRP is heading, such that present decision making should not be contradictory or at odds with them. In that regard, you need to have one eye to potential economic outcomes for people and communities in order to properly settle on appropriate methodologies for efficient water use. This means that methodologies which have inherent inefficiencies should not be preferred over methodologies which have the potential to provide productive economic opportunities.
41. In particular the submitters assert that methods which might produce unjustified low flow restrictions will be less efficient in terms of productive efficiency. Specifically, in this regard, these submitters refer to the joint witness statement of the hydrologists as to the preferred

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<sup>15</sup> NPS-FWM Appendix E

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method of mitigating ground water takes in the "new" B Zone (or Mr Williamson's preferred C Zone) now recommended by them.

42. The submitters refer to a 2014 report for the Ministry for Primary Industries which attributes \$51.38 million economic uplift/activity to irrigation in the Wellington region annually<sup>17</sup> and suggest that the achievement of such economic activity is significant in terms of the NPS' new objective B5 and policy B8. Any plan methodology which unnecessarily constrains such activity will be at odds with the amendments, not in line with them.

### **Rationale**

43. Tying all these strands together, the legal question for your decision in this case is whether the PNRP most appropriately gives effect to the NPS. Is the PNRP the "most appropriate" way to do this, or is there a more appropriate option that has been presented by submitters and their experts as refined by conference and further reflection?
44. The submitters rely on the evidence of Mr Williamson (and the JWS), and Mr Daysh to assert that there are more appropriate options for the categorisation of groundwater in the Lower Valley and for the proposed process of re-classifying groundwater.
45. In the main, the JWS- Hydrogeology demonstrates that Mr Hughes and Dr Gyopari have come around to Mr Williamson's conclusions as to the degree of connectivity between groundwater and surface water in this sub-zone. There is now fundamental agreement as to allocation methodology to mitigate potential stream depletion and the thresholds for introduction of any restrictions should they be required.
46. Those thresholds would enable the submitters and other current water users in the B (or Williamson C) sub zone to continue irrigating at their average rates of take without low flow restrictions and with some headroom for prolonged dry conditions.
47. Where Mr Williamson suggests further refinement to Schedule P it is to address some of the acknowledged complexity and to remove ambiguity.

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<sup>17</sup> Statement of AJ Barton at paragraph 37, reference to hyperlink at Footnote 5

The more certainty that water users have, the more able they will be to achieve productive economic opportunities for the benefit of the wider community and the less resources, both of council and water users, will be tied up arguing over interpretation issues. Mr Daysh agrees with this approach.

48. On the question of the re-classification criteria there has been a late flurry of activity from Mr Hughes and Dr Gyopari who lodged a rebuttal statement yesterday. Mr Williamson finds that statement provocative but as yet has not had time to respond to it. He advises that he finds the criticism to be unjustified and unhelpful in that rather than suggest alternatives, they fall back on the vague and uncertain language of the discretion which they say should be reserved to council. They criticise Mr Williamson's attempt to provide some level of certainty and guidance for plan users, but advocate greater uncertainty.
49. Mr Williamson wishes to be heard on this point however the most constructive way to address this difference in opinion is to direct the experts to engage in the necessary conferencing on the point.
50. Finally, whilst there is further work for the experts to do, the determination of the submitters and Mr Barton in particular should be acknowledged for what it has achieved to date. Without that effort, and the involvement of Mr Williamson and Mr Daysh, the communities of the region would likely have been saddled with sub-optimal provisions which would not have achieved the purpose of the Act.

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21 November 2017