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 (PPC1)

STATEMENT OF EVIDENCE OF JAMES BRENT WATSON SINCLAIR ON BEHLAF OF WAIKATO REGIONAL COUNCIL AS SUBMITTER

Technical – Block 2

DATED 3 May 2019

TABLE OF CONTENTS

INTRODUCTION

1. My name is Brent Sinclair. I have been employed by the Waikato Regional Council ("Council") since 1997, and through that period have held various positions of technical and management responsibility within the regulatory part of Council.

2. I currently hold the title of "Manager – Industry and Infrastructure" within the Resource Use Directorate at the Council, a position I have held since 2013. Prior to that time I held the title "Division Manager – Consented Sites" which I held since 2009.

3. Whilst having differing titles, both these roles have essentially had the same function, that being responsibility for the oversight of Council's activities as they relate to the processing of resource consent applications and the subsequent compliance monitoring of consents that are granted. I would describe my specific expertise as being the practical implementation of resource management policy and regulation.

4. As part of my role, I was and remain responsible for the implementation of Variation 6 to the Waikato Regional Plan, which became operative in April 2012. As part of the implementation, I was responsible for the development of a project to receive and process resource consent applications from approximately 2,600 farmers to authorise the taking of water for shed wash down and milk cooling purposes.

5. There are a number of similarities between the implementation of that project, and what lies ahead as we look to implement PPC1, although the implementation of PPC1 will in my opinion have a far greater demand on resources.

6. I have a Bachelor of Engineering from the University of Auckland and a Master of Science in Engineering from the University of Birmingham in the UK. My MSc had as its focus Water Resource Management. I also hold current certification under the "Making Good Decisions" programme for RMA decision-makers.

7. 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 EVIDENCE

8. My evidence pertains to the implications for implementation, principally of three aspects of the proposed rules framework, namely:
    - Rule/consent activity status;
    - Whether applications under the rules are precluded from notification; and
    - The phasing of the required applications.

RULE/CONSENT ACTIVITY STATUS

9. For the purposes of this evidence, I comment on the implementation challenges as I see them for the three scenarios outlined in the evidence of Dr McLay. I will highlight that to implement of any of the scenarios, and also meet the statutory timeframe requirements set out in the RMA and the associated Resource Management Discount Regulations, will be difficult, if even possible. In my opinion, the adoption by the Panel of my recommendations regarding rule status, the preclusion of notification and the phasing of the lodgement of the necessary applications will be essential to enable an implementation strategy to be developed that has a reasonable chance of meeting statutory requirements.

10. In preparing this evidence, I note the s42A report recommendation that the permitted activity pathway for those farms registered to a Certified Sector Scheme be removed. If this recommendation is accepted, the consequence of this change is that all of those farms, aside from any that are permitted under permitted activity rules 3.11.5.1A or 3.11.5.2, will require resource consent. This would be the case with Scenarios 2 and 3 of Dr McLay's evidence, and as Dr McLay identified, would result in a significant increase in the number of farms that require consent.

11. Based on this assumption, Dr McLay states that the total number of farms that Council expects will require land use consent under PPC1 for ongoing farming, is likely to be around 5,700. Under Scenario 2 of Dr McLay's evidence, the first tranche of consent

applications (i.e. all properties within Priority 1 sub-catchments and those that are in the upper quartile of nitrogen emitters) will number approximately 2,700, an increase of some 1,100 applications compared to the "as notified" scenario. That number would rise to as high as 4,300 applications if all of the s42A recommendations/options for reprioritising a number of sub-catchments and all dairy farms, are adopted, i.e. Dr McLay's Scenario 3.

12. Against this context, I wish firstly to address the implications of the activity status of the consents required from an implementation perspective.

13. I refer to proposed rules 3.11.5.2A and 3.11.5.4 in the Track Change version of PPC1 in the s42A report. These are a controlled activity rule and a restricted discretionary activity rule respectively for farms (excluding commercial vegetable production) that are not permitted under rules 3.11.5.1A or 3.11.5.2. My understanding is that the s42A report has proposed two rules options for these "non-permitted" farming operations:
    (a) All are subject to rule 3.11.5.2A (controlled activity) subject to operating within their Nitrogen Reference Point (NRP) or a maximum stocking rate, otherwise defaulting to 3.11.5.4 (restricted discretionary activity); or
    (b) All are subject to rule 3.11.5.4 (restricted discretionary activity).

14. I explain below why, from an implementation perspective, I strongly support option (a).

15. I am aware that the Panel has heard evidence from farmers and farmer representative bodies on the costs of implementing the requirements of PPC1. Council's implementation team is also very conscious of this matter and, irrespective of the final form of the rules framework, we will work to ensure that regulatory processes, including the consent process, are as streamlined as practicable.

16. I am are also conscious that the direct costs charged by the Council associated with the receipt, processing and granting of an application is just one of several, significant costs that most farmers will face. Other obvious costs include those associated with stock exclusion, obtaining a Nitrogen Reference Point (NRP), developing an Farm Environment Plan (FEP) and having it approved by a certified professional, and implementing measures to move to, or toward, good farming practice and reduce nitrogen discharges (where necessary). For this reason, I support the statement in Dr McLay's evidence that it is important that the rules framework be no more onerous than circumstances require and no more costly to farmers than is necessary and justified.

17. In my opinion, from a costs perspective, the Panel's decision on rule activity status is a significant matter. Activity status is very likely to affect the time and cost of applying for and obtaining resource consent. This arises primarily from the fact that controlled activities must be granted (s104A) except where s104A(a) applies, but restricted discretionary activities may be granted or declined (s104C), albeit that the grounds for declining are limited to those matters specified in the rule over which discretion has been restricted.

18. In practice, this means that a controlled activity application is focused not on whether the consent should be granted, with all of the assessment and evaluation that necessitates, but solely the nature of the consent conditions which should be imposed. The scope of that exercise is further limited by the matters of control specified in the rule. The various effects and policy considerations set out under s104 are relevant therefore only in relation to determining conditions. This fundamental difference enables a more streamlined application process and subsequent consent process to be implemented, than would be possible under a restricted discretionary activity rule.

19. There is, in my opinion, far less scope for streamlining the consent process in relation to a restricted discretionary activity. This was demonstrated in the declarations made by the Environment Court in Wellington Fish and Game Council v MWRC[1] in 2017, and the events since then. The Court held that in considering a restricted discretionary activity consent, the council had a duty to consider all matters over which discretion was restricted and all of the relevant objectives and policies and national instruments insofar as they related to those matters. That finding in itself was not a surprise, but it does emphasise the point that the nature of the consent process in a restricted discretionary activity context is fundamentally different to that required in a controlled activity context, necessitating a full evaluative assessment of whether the application can or should be granted, something not required for a controlled activity. This substantially wider assessment process has resourcing implications not just for the Council in undertaking that assessment, but also for the applicant in terms of the information required to support their application and the cost of obtaining the consent.

20. This appears to be reflected in Horizon's consent processing costs since the declaration proceedings. While the respective rules/policy frameworks between Horizons Regional Council's One Plan and PPC1 are not the same, the Horizons' experience does, in my opinion, provide a reasonable and relevant costs comparison. Horizon's rules provide

[1] Decision [2017] NZEnvC ENV-2016-WLG-000038

both controlled and restricted discretionary activity pathways for landowners depending upon their ability to meet nitrogen leaching limits. Controlled activity consent application costs (i.e. Council charges based on actual time spent) are estimated at $1,000-$2,000 approximately (G Bevin, Consents Manager, Horizons, pers.comm). The cost to the farmer of preparing their application is additional to this. Mr Bevin noted that of the approximately 150 properties that need restricted discretionary activity consent at present, only 6 applications have been processed since the declaration proceedings, and that all of these have been relatively straightforward because all have been within maximum allowable leaching rates. Nonetheless, Mr Bevin advises that the costs charged ranged between $3,000 and $5,000 approximately.

21. These costs are also generally consistent with those reported by Environment Canterbury for consents issued under their Land and Water Plan. Its estimate is "around $2,000-$2,500" on average, which includes controlled, discretionary and non-complying activities (but does not differentiate between them).

22. PPC1 implementation staff advise me that, based on their understanding of what the consent process is expected to involve for an average farm, 8 hours of processing time has been assumed for implementation planning purposes. That estimate is based on the application being a controlled activity and corresponds to the approximate time for processing straightforward controlled activity applications currently. This equates to a cost of around $1,000. Administrative functions that Councils must perform when processing applications can be expected to add to that cost.

23. Implementation staff estimate a restricted discretionary activity application is likely to take twice that amount of time, i.e. equating to a Council cost to applicants in excess of $2,000. Given the experience at Horizons and Environment Canterbury, these initial estimates could well under-estimate the actual costs. However, for the purpose of this evidence the key issue is that the costs will be significantly greater under a restricted discretionary activity regime – at least double those under a controlled activity consenting regime.

24. Putting aside the matter of cost impact, there are, in my opinion, other compelling resource management reasons for selecting the option of controlled activity rule 3.11.5.2A being the relevant rule for the bulk of those farms requiring consent. I note here that Mr Mayhew's evidence proposes some changes to the structure of the s42A report version of this rule. I support these changes and refer to them below.

25. The rule is, in effect, a mechanism for providing appropriate regulatory oversight to ensure farmers develop, and begin to operate in accordance with, an appropriate FEP. In order to be processed under this rule, the rule requires that when lodging an application, a FEP, approved by a certified farm environment planner, must be provided. As signalled in the changes proposed by My Mayhew, we envisage that the FEP will include an assessment against Good Farming Practice (GFP), and where the farm is not operating at GFP, a description of how it intends to achieve GFP along with a set of actions that will be undertaken in order to achieve GFP. Furthermore, the FEP will need to be approved by the Certified Farm Environment Planner (CFEP) as reflecting farm practices and management that will, as the situation requires, meet the required nitrogen reductions or remain within the property's NRP or not exceed a specified stocking rate.

26. We expect that the large majority of the 5,700 farms which require consent, will fall under rule 3.11.5.2A (if that is the option chosen). This is because we expect most farmers to provide a FEP which demonstrates how they will achieve GFP and to meet the nitrogen requirements that apply. In my opinion, the benefits to plan implementation as a result of having this certainty of outcome by way of a controlled activity rule, for the majority of farmers, is likely to be significant. The desire for certainty, both in terms of requirements and outcomes, is a constant and understandable theme we hear from the farming sector.

27. In my opinion, provided the controlled activity standards and terms, and the matters over which control is reserved are sufficiently encompassing, the legal presumption to grant these consents, is appropriate. Given the "entry" criteria for rule 3.11.5.2A that are proposed in Mr Mayhew's evidence, it is hard to envisage a situation where declining an application under this rule, would be appropriate. Or, put another way, where appropriate conditions to achieve the desired outcomes could not be imposed.

28. Any applicant whose FEP reflected an inability or unwillingness to meet the expectations as they relate to GFP or nitrogen, would appropriately default to a higher rule activity status where the Council as consent authority has the discretion to decline consent.

29. A separate, and in my view, equally valid reason to retain controlled activity status relates to our ability to positively engage with farmers who will be required to obtain consent.

30. My understanding is that one of the primary purposes of PPC1 is to have all farms authorised and have an appropriate FEP. As Dr McLay notes, this will involve engagement with some 5,700 farmers, many of whom will have limited, if any, knowledge of the specific

requirements of PPC1. This was certainly the case when we came to implement the outcomes of Variation 6.

31. As part of our communication with farmers to engage them in the process, a simple message that they are guaranteed resource consent, subject to meeting a few albeit very important pre-requisite matters, is an important and powerful part of any messaging. This was an important part of the messaging that saw the extremely high level of engagement from the farming sector that occurred during the implementation of Variation 6.

32. That messaging becomes even more important when engaging with the sector regarding the need to register and provide a NRP. A clear rule framework that results in a controlled activity consent process when these pre-requisites are undertaken done, with the alternative of a discretionary activity process should they not be, provides a strong messaging tool as part of any engagement strategy. Again, this was an integral and important aspect of the implementation of the farm water rules contained in Variation 6, where engaging the farming sector to lodge consent application within a defined window of time was critical to successful implementation.

33. All that said, I note the concern identified in Dr McLay's evidence that there may not be sufficient resources in the sector to enable NRPs to be generated and submitted within the window of time set out in PPC1 at present. Should that be the case, and a significant portion therefore fall to discretionary activity status because of a lack of sector resources available to farmers to have a NRP completed in time, this will add time and cost as the processing of a discretionary activity consent is inherently more involved than is the case for a controlled activity consent

34. I encourage the Panel to receive advice on that matter as successful lodgement of a NRP is a critical aspect of the Plan implementation.

PRECLUSION OF NOTIFICATION FOR APPLICATIONS

35. All of the rules in the "as notified" version of PPC1 were subject to provisions precluding applications under the rules, from public or limited notification. The power to impose such a provision is contained in s77D of the RMA and I note that the provision contains no criteria or guidance as to when imposition of such a provision may be appropriate. The s42A's Track Change version of PPC1 shows the deletion of these provisions for all rules. The rationale for deletion of the provision as it relates to rule 3.11.5.7 (non-complying activity), is found at paragraph 534 of the s42A report. However, I am unable to locate

any discussion of the reasons for deletion of the provision as it relates to the other, lower activity status rules.

36. In my opinion, there are good resource management reasons for retention of the provision for non-notification as it relates to controlled activity rule 3.11.5.2A. Further, a case could be made for such a provision in relation to restricted discretionary activity rule 3.11.5.4, although for a restricted discretionary rule, I acknowledge the case is less compelling.

37. The potential adverse effects arising from an individual consent application, are unlikely to constitute environmental effects that will be likely to be more than minor nor are there likely to be any persons specifically affected in a way which is minor or more than minor. The effects of concern in this case are the cumulative effects of diffuse discharges on water quality, hence, in my opinion, there is little benefit gained by notifying applications individually. In addition, the performance expectations for applications will be quite clearly set out in the rule and the Schedule 1 framework (i.e. to achieve good farming practice, to exclude stock from waterways, to provide an NRP, to meet nitrogen reductions and so on). In this context, the purpose of the consent process is essentially to individualise these requirements to a farm as appropriate. For these reasons, there is, in my opinion, a very strong case for utilising the provisions in s77D and precluding the consideration of public and limited notification for applications under rule 3.11.5.2A.

38. Any rare exceptions to the above generalisations, could be caught under consideration of "special circumstances".

39. With regard to controlled activities generally, I note that s95A(5)(b)(i) of the RMA means that, subject to consideration of special circumstances, for an application made under a controlled activity rule, *public* notification is precluded unless the applicant requests public notification. That being the case, the main efficiency benefit of a non-notification provision for a controlled activity rule, would be to preclude the need to consider limited notification. Given that under the version proposed in Mr Mayhew's evidence, rule 3.11.5.2A would only apply to those farmers whose FEP demonstrates that they propose to operate in accordance with GFP, meet any necessary nitrogen reduction or alternatively operate within their NRP or within the 18 stock units limit, it is, in my opinion, appropriate for non-notification to be specified for this rule. This will enable a more streamlined process as the consent processing officer will not need to put his/her mind to the issue of whether limited notification is required or not, including the associated documentation of such a decision and the time/costs that such would involve.

40. The efficiency benefit of a non-notification provision is greater in the context of a restricted discretionary activity rule. Here, both the "public" and "limited" limbs of the notification tests would otherwise be relevant. Removal of the need to consider the "effects" tests, albeit that consideration of "special circumstances" would still be required, will materially contribute to the more efficient processing of resource consents and the greater minimisation of costs. If the Panel chooses to go with the restricted discretionary activity option, precluding notification would also provide significant, up-front process/cost certainty and benefit to farmers.

41. However, I acknowledge that the case for a "non-notification" provision is less compelling if the Panel chooses the option of rule 3.11.5.4. I presume the reason the Panel might decide to choose that option is to provide for the unlikely scenario that the Council as consent authority might wish to decline an application.

42. The somewhat perverse outcome of an approach that would require all applications be treated as a restricted discretionary activity would significantly increase processing time and costs for the very vast majority of applications, to provide for the potential occasion where an application should be declined.

43. Considering all of the above, in my opinion retention of a presumption of non-notification unless special circumstances apply will assist the efficient implementation of the rules by enabling further streamlining of the consent process, resulting in greater certainty, and lower time/cost to both applicants and the Council.

44. As I have noted previously, the provision of a process which provides certainty that consent will be granted and on a non-notified basis, will assist Council implementation staff as they engage with the 5700 farmers that would require consent under scenario 2 or 3 in Dr McLay's evidence.

PHASING OF APPLICATIONS

45. There are already some significant challenges that will need to be overcome from an implementation perspective even if the rules framework remain as PPC1 was notified, i.e. scenario 1 from Dr McLay's evidence, which results in a lesser number of farmers requiring consent.

46. Irrespective of which option is chosen, once the rule becomes operative, farmers will have six months to lodge an application if they wish to avail themselves of the "protection" provided by Section 20A of the RMA. During that time, as Dr McLay notes, farmers will need to work with a CFEP to complete the necessary pre-requisite planning work to be in a position to lodge an application. As Dr McLay notes, there is considerable doubt that the sector has the resources to manage such a workload in the time period that this work will be required to take place.

47. I note the s42A report recommends that the requirement for consent be linked to the date that the Plan becomes operative. This is a departure from the wording of s20A of the RMA which links to a rule in a Plan becoming operative. This is a matter that the Panel may wish to consider. From an implementation perspective, I believe consistency with the wording of s20A would be preferable.

48. Also, it is my expectation that Council via its annual planning processes will need to set a fixed charge (pursuant to s36 of the RMA) for the costs of processing these applications.

49. Given the time needed to prepare an application, and the expected requirement to pay an upfront fee for its processing, it seems most likely that the majority of applications that are lodged will be received by Council towards the end of that six month period.

50. The RMA requires that a non-notified application is processed within 20 working days. The Resource Management Discount Regulations impose penalties on consent authorities where the required timeframes are not met, up to a maximum of a 50% fee discount.

51. Under scenario 1, I understand approximately 1,600 applications would need to be lodged in the first tranche. This number grows to around 2,700 if Scenario 2 is followed, or to 4,300 if Scenario 3 is chosen.

52. So even under Scenario 1, Council could well find itself in the position where it must process 1,600 applications within a 2-3 month period if it is to meet the statutory timeframe obligations set out in the RMA.

53. By way of comparison, I currently have a team of around 20 consent planners, complemented by a number of contracted consultants, who over the course of a year process in the order of 1,000 consent applications. I acknowledge that a good number of those applications are not for controlled activity consent, but the significant majority (approx. 95%) are processed without notification.

54. If the assumption of 8 hours per application proves correct, 12,800 processing hours over a 3 month period would require 35-40 people. I have significant concerns whether the resources exist within the Region to achieve this. Operationally, the ability to recruit, and train the required people (irrespective of whether those are staff employed by the Regional Council or by contractors) for a short deployment period is likely to be a considerable challenge, and quite likely not possible at all. On the basis of 1600 applications at $1000 per application, the financial risk to the Council of failing to meet timeframes, is up to $800,000.

55. The increased numbers of applications required under Scenario 2 and 3 compound the peak resourcing issue significantly. Given this, I strongly advise the Panel to consider options to more evenly "spread" the timing for lodgement of these applications.

56. When WRC implemented the farm water rules from Variation 6, a catchment based approach was followed. We did this with considerable support and assistance from the rural sector. This enabled a staggered and staged process for lodgement of applications that sat alongside a phased engagement process supported by the rural sector and their contacts within each catchment.

57. One option the Panel may consider, is whether the lodgement date could be set out within the Plan on a sub-catchment basis based on the likely number of farms captured by each sub-group (which may be a number of sub-catchments). This would enable the workload to be spread over a longer period for both CFEPs and Council staff/contractors, enabling resourcing requirements to be smoothed and more likely better timeframe, cost and environmental outcomes.

CONCLUSION

58. As I have noted, PPC1 implementation staff will make their best efforts to efficiently implement whatever rule framework that results from the process. That will inevitably require considerable collaboration and co-operation from the farming sector which was very much the case as the implementation of the farm water take rules in Variation 6 proceeded, and was a critical factor in what I believe has been a successful implementation process.

59. That said, the size of that challenge should not be underestimated and to give the best opportunity to find a pathway that meets the objectives of the Plan, it is my

recommendation that the Panel chooses the option of controlled activity rule 3.11.5.2A, includes the provision for non-notification and considers options to phase consent applications to assist the industry in preparing the required supporting information and plans so the resource consents can feasibly be processed within the operational constraints I have described.