BEFORE THE	Waikato Regional Council Hearing Commissioners
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Waikato Regional Proposed Plan Change 1 – Waikato and Waipā River Catchments

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REBUTTAL STATEMENT OF JANEEN KYDD-SMITH
ON BEHALF OF THE WAIKATO AND WAIPĀ RIVER IWI IN RELATION TO THE HEARING TOPICS FOR HEARING BLOCK 3
(Submitter No. 74035)

19 July 2019

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INTRODUCTION

1. My name is Janeen Kydd-Smith.

2. I am a Director and Principal Planner of Sage Planning HB Limited, in Napier.

3. I have been engaged by the Waikato and Waipā River Iwi (**River Iwi**) to prepare and present planning evidence in relation to their submissions and further submissions on Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments (**PC1**), including Variation 1 to PC1.

4. I have previously provided the following statements of evidence:

   (a) Block 1 Evidence in Chief - 15 February 2019;

   (b) Block 1 Rebuttal Statement - 27 February 2019;

   (c) Block 2 Evidence in Chief - 3 May 2019;

   (d) Block 2 Rebuttal Statement - 10 May 2019; and

   (e) Block 3 Evidence in Chief - 5 July 2019.

5. I confirm the qualifications and experience set out in my Block 1 Evidence in Chief.

EXPERT WITNESS CODE OF CONDUCT

6. I confirm that I have read the ‘Code of Conduct' for expert witnesses contained in the Environment Court Practice Note 2014. In the same way as I would if appearing in the Court, my evidence has been prepared in compliance with that Code. In particular, unless I state otherwise, this evidence is within my sphere of expertise and I have not omitted to consider material facts known to me that might alter or detract from the opinions I express.

SCOPE OF EVIDENCE

7. This statement of evidence is based on a review of the Statement of Evidence in Chief for the Block 3 hearing prepared by the following persons:

   (a) Kim Hardy (Miraka Limited);

   (b) Grant Eccles (Federated Farmers of New Zealand);

   (c) Gerard Willis (Fonterra Co-operative Group Ltd); and

   (d) Chris Keenan (Horticulture New Zealand);

   (e) Gillian Crowcroft (Mercury NZ Limited);

   (f) Deborah Kissick (Director General of Conservation);

   (g) Helen Marr (Auckland/Waikato & Eastern Region Fish and Game Councils);

   (h) Philip Mitchell (Oji Fibre Solutions (NZ) Limited);

   (i) Bridget Robson (CNI Iwi Holdings Limited);

   (j) Chris Scraften (Watercare Services Limited);

   (k) Ian Millner (Federated Farmers of New Zealand); and

   (l) Vance Hodgson (Horticulture New Zealand).

8. My rebuttal evidence focuses on the following matters raised in the above statements of evidence:

   (a) Policy 7;

   (b) Policy 17;

   (c) Implementation Methods;

   (d) Definition – Property;

   (e) Definition – Good Management Practice; and

   (f) Maximum Area Cap for CVP - Offsetting Diffuse Discharges.

9. I also provide comments on the response to the Hearing Panel questions, from Matthew McCallum-Clark (Section 42A lead author), set out in his memo to the Panel dated 5 July 2019, in relation to the following:

   (a) Question 6: Permitted activities and section 70;

   (b) Question 18: Tangata whenua ancestral lands definition;

   (c) Question 19: Policy 10; and

   (d) Question 20: Numeric value for the 75th percentile.

EVIDENCE

Policy 7: Preparing for allocation in the future & Implementation Methods 3.11.4.7 and 3.11.4.8

10. I note that there are differences of opinion between Planners in their Statements of Evidence in Chief for the Block 3 hearing about Policy 7 and associated Implementation Methods 3.11.4.7 and 3.11.4.8. For example:

   (a) Kim Hardy (Miraka Limited)[1], Grant Eccles (Federated Farmers)[2] and Gerard Willis (Fonterra)[3] agree with the Reporting Officers' recommendation to delete Policy 7;

   (b) Chris Keenan (Horticulture NZ)[4] considers that Policy 7 should remain as it presents clear evidence that the current approach is a transitional measure and that a better instrument for managing achievement of the Vision and Strategy is being prepared;

   (c) Gillian Crowcroft (Mercury)[5] and Deborah Kissick (DOC)[6] consider that Policy 7, as notified, includes a large section of 'how' future allocation should be evaluated in the future, which is more

[1] Paragraphs 8.1-8.6 of Kim Hardy's Statement of Evidence in Chief for the Block 3 hearing.
[2] Paragraphs 9.1-9.3 of Grant Eccle's Statement of Evidence in Chief for the Block 3 hearing.
[3] Paragraphs 10.1- 10.4 of Gerard Willis' Statement of Evidence in Chief for the Block 3 hearing.
[4] Paragraphs 83-89 of Chris Keenan's Statement of Evidence in Chief for the Block 3 hearing.
[5] Paragraphs 3.1-3.3 of Gillian Crowcroft's Statement of Evidence in Chief for the Block 3 hearing.
[6] Paragraphs 66-82 of Deborah Kissick's Statement of Evidence in Chief for the Block 3 hearing.

a method than a policy. They consider that Policy 7 should be deleted and included as a non-regulatory implementation method under Section 3.11.4;

(d) Helen Marr (Fish and Game)[7] is concerned that when all the recommendations of the Reporting Officers across all the hearings are taken together, the overall effect is that PC1 will be all but silent on the need for future changes to the nitrogen allocation system. She agrees with the Officers that Policy 7 cannot bind a future Council and will not be determinative when deciding the shape of any future plan review. Rather, the policy and its associated methods are informative of the currently desired trajectory of change and will be factors that the Council will at least consider when reviewing the plan in the future. Ms Marr considers that either: Policy 7 remain, along with Implementation Methods 3.11.4.7 and 3.11.4.8; or the content of Policy 7 be incorporated into Methods 3.11.4.7 and 3.11.4.8 which remain part of PC1;

(e) Philip Mitchell (Oji Fibre Solutions (NZ) Ltd)[8] considers that Policy 7 should be retained, but reworded so that it directs its focus to the gathering of information relevant to future policy development requirements; and

(f) Bridget Robson (CNI Iwi Holdings Limited)[9] considers that it is not appropriate to remove Policy 7, particularly given the status of PC1 as being only one step towards meeting the Vision and Strategy, but considers that the policy should be reworded and split into a policy and method, and identify that the allocation methodology described in the policy is contingent on allocation being chosen as an approach.

11. As stated in my Evidence in Chief for the Block 3 hearing[10], I consider that Policy 7 should be retained, as it is an important part of achieving the

[7] Paragraphs 5.1-5.9 of Helen Marr's Statement of Evidence in Chief for the Block 3 hearing.
[8] Paragraphs 7.1-7.2 of Philip Mitchell's Statement of Evidence in Chief for the Block 3 hearing.
[9] Paragraphs 14-30 of Bridget Robson's Statement of Evidence in Chief for the Block 3 hearing.
[10] Paragraphs 17-35 of Janeen Kydd-Smith's Statement of Evidence in Chief for the Block 3 hearing.

Vision and Strategy (particularly Objective 3(c)) and signals to the community that future allocation will occur and what principles will be considered as part of that, including allowance for flexibility of development of tangata whenua ancestral land. However, I consider that Policy 7 should be amended as requested by the River Iwi submission, but that clause a. and associated Footnote 5 should also be deleted to remove the potential for the consideration of approaches for allocation to be constrained to 'land suitability' (rather than making an informed decision, based on the exploration of a range of allocation mechanisms). With respect to Implementation Methods 3.11.4.7 and 3.11.4.8, I consider that if Policy 7 is retained with amendments (which is my preference) then the methods could be deleted, but if Policy 7 was deleted, I consider that it is important that the methods are retained, although they could be combined into a single method. This recommendation is more aligned to that of Helen Marr's.

12. Bridget Robson's recommended amendments to Policy 7 and her new recommended method seem to place more emphasis on preparing for further diffuse discharge reductions of the four contaminants than on preparing for allocation in the future, and I consider that there is too much emphasis on land suitability, which is one of a number of potential allocation mechanisms that should be explored.

13. With respect to Gillian Crowcroft's re-drafted method to replace Policy 7, I note that it does not refer to the future allocation framework – it's focus is on collecting data and information, undertaking research and developing modelling tools to prepare for future plan changes generally.

14. With respect to Philip Mitchell's recommendation to amend Policy 7, while I consider that it is important that the policy refers to the need to gather information relevant to future policy development requirements, I consider that his recommended amendments go a step too far, by removing all references to future allocation of diffuse discharges and the specific reference to "Allowance for" flexibility of development of tangata whenua ancestral land. In my opinion, his recommended amendments remove the justification for gathering the information and would result in PC1 being silent on the need to prepare for allocation in the future.

15. However, there are elements of Philip Mitchell's recommended amendments to Policy 7 that I support, as they provide clarification. With reference to Mr Mitchell's recommended amendments, the amendments requested in the River Iwi's submission, and the amendments I recommend in my evidence for the Block 3 hearing, I consider that Policy 7 should be amended as follows:

> ***Policy 7: Preparing for allocation in the future / Te Kaupapa Here 7: Kia Takatū ki ngā tohanga he ngā tau e heke mai ana***
>
> *Prepare for further diffuse discharge reductions and any future property ~~or enterprise-level~~ allocation of diffuse discharges of nitrogen, phosphorus, sediment or microbial pathogens that ~~will~~ may be required by subsequent regional plans, by ~~implementing the policies and methods in this chapter. To ensure this occurs,~~ collecting information and undertake~~e~~ing research to support this~~,~~. This includ~~inge~~s collecting information about current discharges, developing appropriate modelling tools to estimate contaminant discharges, and researching the spatial variability of land use and contaminant losses and the effect of contaminant discharges in different parts of the catchment that will assist in ~~defining 'land suitability'~~ preparing any new allocation or management regime.*
>
> *Any future allocation regime should consider the following principles:*
>
> ~~*a. Land suitability[5] which reflects the biophysical and climate properties, the risk of contaminant discharges from that land, and the sensitivity of the receiving water body, as a starting point (i.e. where the effect on the land and receiving waters will be the same, like land is treated the same for the purposes of allocation); and*~~
>
> *a~~b~~. Allowance for flexibility of development of tangata whenua ancestral land; and*
>
> *b~~c~~. Minimise social disruption and costs in the transition to ~~the 'land suitability'~~ any new approach; and*
>
> *c~~d~~. ~~Future allocation decisions should take advantage of~~ ~~n~~New data and knowledge relevant to contaminant discharges and allocation of contaminant loadings.*

16. In addition to my recommendation to retain Implementation Methods 3.11.4.7 and 3.11.4.8 and combine them, if the Panel is of a mind to delete Policy 7, I consider that the combined methods should also be amended to include the principles set out under Policy 7 that should be considered for any future allocation regime.

Policy 17: Considering the wider context of the Vision and Strategy

17. Grant Eccles considers that Policy 17 should be deleted, or at a minimum, significantly re-drafted, as he fails to see the linkage from it to the objectives of PC1 in s32 terms (i.e. effective and efficient means of achieving the 10-year targets). He considers that application of the policy has the potential to impose very significant obligations on applicants when

applying for consents to continue existing farming activities, and the costs of the obligations have not been quantified or assessed against potential benefits[11].

18. Chris Scrafton (Watercare Services Limited) considers that Policy 17 is likely to create significant uncertainty in the context of future resource consent processes, as there is a statement in the Introduction chapter of PC1 (page 11) which states that Chapter 3.11 prevails over other parts of the Waikato Regional Plan. He questions what the "matters" in the Vision and Strategy are, what is meant by "secondary benefits" and considers that the policy is outside the scope of Chapter 3.11. He therefore considers that Policy 17 should be deleted[12].

19. The Officers recommend[13] retaining Policy 17, as the existing Waikato Regional Plan was evaluated against the Vision and Strategy and it was identified that changes were required to give effect to it, including a wider context. They consider that opportunities to recognise co-benefits and other opportunities for enhancement ought to be included and it is appropriate to make the most of opportunities to advance the Vision and Strategy outcomes in other ways. Officers also consider that the policy could be of benefit to resource consent applicants by providing policy support for the wider consideration of the benefits of additional environmental, access and recreational benefits along with the environmental effects of the activity being applied for. However, they recommend deleting the wording in Policy 17 which refers to 'secondary benefits', as they consider that it may imply that the values and matters of the wider context of the Vision and Strategy are not of primary concern, and it may cause confusion.

20. The Section 32 Evaluation Report for PC1 states that Policy 17 supports the preparation of the future by encouraging actions now to enhance biodiversity, wetland values, ecosystem functioning, access and recreational values that are part of the wider goals of the Vision and

[11] Paragraphs 9.2-9.3 of Grant Eccles' Statement of Evidence in Chief for the Block 3 hearing.
[12] Paragraphs 3.6-3.11 of Chris Scrafton's Statement of Evidence in Chief for the Block 3 hearing.
[13] Paragraphs 536-540 of the section 42A report for the Block 3 hearing.

Strategy[14]. It also notes that Policy 17 is part of supporting the intergenerational, staged approach being taken to address water quality problems. The Section 32 report links Policy 17 to the following objectives, policies and methods[15]:

(a) Objective 1: Long-term restoration and protection of water quality for each sub-catchment and Freshwater Management Unit

(b) Objective 2: Social, economic and cultural wellbeing is maintained in the long term;

(c) Objective 3: Short-term improvements in water quality in the first stage of restoration and protection of water quality for each sub-catchment and Freshwater Management Unit;

(d) Objective 4: People and community resilience;

(e) Objective 6: Whangamarino Wetland;

(f) Policy 5: Staged approach;

(g) Policy 7: Preparing for allocation in the future;

(h) Method 3.11.4.4: Lakes and Whangamarino Wetland;

(i) Method 3.11.4.5: Sub-catchment scale planning;

(j) Method 3.11.4.6: Funding and implementation;

(k) Method 3.11.4.7: Information needs to support any future allocation;

(l) Method 3.11.4.8: Accounting system and monitoring;

(m) Method 3.11.4.10: Accounting system and monitoring;

(n) Method 3.11.4.12: Support research and dissemination of best practice guidelines to reduce diffuse discharges.

[14] Page 134 of the section 32 Evaluation Report for PC1.
[15] Sections E.2 Staging the transition to the 80 year goal, E.5 Managing point source discharges, E.6 Managing Whangamarino Wetland and E.8 Prioritisation and sub-catchment planning of the Section 32 Evaluation Report for PC1.

21. I therefore consider that Policy 17 is relevant and should be retained but amended as recommended by the Officers.

22. With reference to Chris Scrafton's concern that it is uncertain what "matters in the Vision and Strategy" are, I consider that this issue could be overcome if the wording of Policy 17 was amended further to refer to the "wider objectives of the Vision and Strategy".

23. I consider that the words "*that fall outside the scope of Chapter 3.11*" are somewhat misleading and should be deleted. The Vision and Strategy is the primary direction setting document for the restoration and protection of the Waikato and Waipā Rivers and particular regard must be had to it when considering an application. Implementation of the objectives, policies and methods in PC1, in conjunction with the wider objectives of the Vision and Strategy, are all part of an holistic approach to realising the 'vision' of the Vision and Strategy, which is "*for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River and all it embraces, for generations to come*".

24. Given the above, I consider that Policy 17 should be amended as follows:

> ***Policy 17: Considering the wider context of the Vision and Strategy / Te Kaupapa Here 17: Te Whakaaro ake ki te horopaki whānui o Te Ture Whaimana***
>
> *When applying policies and methods in Chapter 3.11, seek opportunities to advance ~~those matters in~~ the wider objectives of the Vision and Strategy and the values for the Waikato and Waipa Rivers ~~that fall outside the scope of Chapter 3.11, but could be considered secondary benefits of methods carried out under this Chapter~~, including but not limited to:*
>
> *a. Opportunities to enhance biodiversity, wetland values and the functioning of ecosystems; and*
>
> *b. Opportunities to enhance access and recreational values associated with the rivers.*

Implementation Methods

25. I note that Grant Eccles and Gillian Crowcroft share my opinion that some of the methods recommended by the Officers to be deleted are matters that are critical to the successful implementation of PC1. For example, Mr Eccles refers to Method 3.11.4.5 that refers to sub-catchment Scale Planning, which is linked to Policy 9 (Sub-catchment [including edge of

field] mitigation planning, co-ordination and funding). He notes that both the policy and method are important to the Farm Environment Plans (**FEPs**) as they reflect work that the Council is currently doing on the preparation of sub-catchment profiles and which will contribute to informing the content of the FEPs[16].

26. Ms Crowcroft sees little value in implementation methods that prescribe an action already required by statute (e.g. Method 3.11.4.6 – Funding and implementation) or are Council's "business as usual", as they do not add value to PC1[17].

27. Kim Hardy also considers that the inclusion of methods is good planning practice and will make a significant contribution to the successful implementation of PC1[18]. Deborah Kissick considers that the inclusion of non-regulatory methods can provide useful guidance on how plan objectives and policies are to be achieved and are useful for plan users and the community to understand the commitments signalled by the Council to progress outcomes of PC1. Ms Kissick considers that the wholesale deletion of the non-regulatory implementation methods proposed by the Officers is unhelpful and unnecessary[19].

28. The evidence of the other Planners noted above supports what I have stated in my evidence – that Implementation Methods enable a plan to identify other ways to meet the plan's objectives and policies and helpfully complete the wider 'picture' of everything (both regulatory and non-regulatory) that is proposed to be done. In my evidence, I recommend that Implementation Methods 3.11.4.2, 3.11.4.6, 3.11.4.9 and 3.11.4.11 (and potentially 3.11.4.1) should be deleted, as they are 'business as usual', and the remaining Implementation Methods should be retained, with some amendments[20].

[16] Paragraphs 6.1-6.5 of Grant Eccles' Statement of Evidence in Chief for the Block 3 hearing.
[17] Paragraphs 3.5-3.13 of Gillian Crowcroft's Statement of Evidence in Chief for the Block 3 hearing.
[18] Paragraph 5.3 of Kim Hardy's Statement of Evidence in Chief for the Block 3 hearing.
[19] Paragraphs 39-44 of Deborah Kissick's Statement of Evidence in Chief for the Block 3 hearing.
[20] Paragraphs 45-51 of Janeen Kydd-Smith's Statement of Evidence in Chief for the Block 3 hearing.

Definition - Property

29. Kim Hardy supports the Officers' recommendation to retain the consequential amendments to the definition of property within the Waikato Regional Plan provided for in PC1[21]. However, she suggests that the following additional amendments be made to the definition to ensure the 'same management structure' can be acknowledged and that 'property' is not limited to land tenure status only, as follows (Ms Hardy's amendments are highlighted in yellow):

> ***Definition of Property:***
>
> *For the purposes of Chapter 3.3, ~~and~~ 3.4 and 3.11 means one or more allotments contained in a single certificate of title, and also includes all ~~adjacent~~ land that is under the same management structure OR in the same ownership, but contained in separate certificates of title. For the purpose of Rule 3.11.5.3 and 3.11.5.4, a property is considered to be within a sub-catchment if more than 50% of that property is within the sub-catchment.*

30. The Officers acknowledge that the definition of property excludes non-contiguous allotments, but they consider that this does not preclude the ability for a person or entity to apply for several properties to be included under one consent and FEP[22]. I concur with the Officers' recommendation and consider that the amendments requested by Ms Hardy are unnecessary. I also note that, as the definition also applies to Chapter 3.3 and 3.4 of the Waikato Regional Plan, the amendments sought by Ms Hardy may potentially have unintended consequences for the implementation of provisions within those chapters[23].

Definition – Good Management Practice

31. The Officers recommend that the definition of Good Management Practice be changed to "Good Farming Practice" and amended as follows:

> ***Good ~~Management~~ Farming Practice/s:*** *For the purposes of Chapter 3.11, means ~~industry agreed and approved~~ practices and actions undertaken on a property or enterprise that manage, reduce ~~or~~ and minimise the risk of contaminants entering a water body.*

[21] Paragraph 7.5 of Kim Hardy's Statement of Evidence in Chief for the Block 3 hearing.
[22] Paragraph 571 of the s42A report for the Block 3 hearing.
[23] I have not assessed the potential for unintended consequences, but raise it here as a possibility.

32. Grant Eccles refers to the technical evidence of Ian Millner (for Federated Farmers) who supports using the words "manage and/or reduce"[24].

33. Mr Millner[25] refers to the assessment that is required to be made against Good Farming Practice (**GFP**) principles in Schedule 1 and raises concerns about the general theme of the objectives in Schedule 1 to "minimise" the loss of contaminants. Mr Millner considers that this creates a lot of subjectivity about the level of loss of contaminants to be reduced and is open to interpretation - noting that at one extreme, losses are minimised where there are zero discharges, but at the other extreme any reduction (no matter how small) could result in the discharge being minimised (or no reduction may be required if the assessment is that the discharge is already minimised). Therefore, for the purposes of Schedule 1, Mr Millner considers that the word "minimise" should be replaced with "manage and/or reduce" to provide better clarity.

34. Mr Millner notes that this is consistent with the changes to the definition of GFP recommended by the Officers[26]. However, he refers to the definition focussing on 'risk' of contaminants entering a water body, as opposed to assessing the loss of contaminants (noting that losses are the focus of the objectives and principles in Schedule 1). Mr Millner considers that assessing risk and minimising risk are different to assessing losses and minimising losses. For that reason, Mr Millner supports Mr Eccles' recommendation[27] to amend the definition of GFP (i.e. in addition to the amendments recommended by the Officers) so that it refers to "manage, reduce and/or minimise" the risk of contaminants entering a water body.

35. I consider that the focus on minimising risk of contaminants entering waterbodies in the definition of GFP is not appropriate, as it does not align with Policy 1 or Policy 2, which refer only to 'managing and reducing' catchment-wide and sub-catchment 'diffuse discharges' of nitrogen, phosphorus, sediment and microbial pathogens from farming activities on

[24] Paragraphs 3.17-3.20 of Grant Eccles' Statement of Evidence in Chief for the Block 3 hearing.
[25] Paragraphs 3.27- 3.32 of Ian Millner's Statement of Evidence in Chief for the Block 3 hearing.
[26] Paragraph 285 of the s42A report for the Block 3 hearing.
[27] Paragraph 3.20 of Grant Eccels' Statement of Evidence in Chief for the Block 3 hearing.

properties. In my opinion, the definition of GFP should be amended to reflect that, as follows:

> ***Good ~~Management~~ Farming Practice/s:*** *For the purposes of Chapter 3.11, means ~~industry agreed and approved~~ practices and actions undertaken on a farm property ~~or enterprise~~ ~~that~~ to manage~~,~~ and reduce ~~or~~ ~~and minimise the risk of~~ the diffuse discharge of contaminants ~~entering~~ to a waterbody.*

Maximum Area Cap for CVP - Offsetting Diffuse Discharges

36. The Officers suggest that, in order to better enable the expansion of existing Commercial Vegetable Production (**CVP**) operations or new entrants, greater policy support is recommended for new areas of CVP land, provided that there are offsets within the sub-catchment of the losses of all four contaminants that are equal to or greater than the increase from the CVP production. This could be through enhanced mitigation techniques, such as a wetland or the reduction in losses from existing high loss activities[28].

37. Mr Vance Hodgson (for Horticulture NZ) considers that offsetting for diffuse discharges is a worthy method that can be considered through the consent process (to be offered by the applicant), where land use intensification could occur without impacting on sub-catchment attribute targets and states[29].

38. Offsets are only provided for in PC1 in relation to point source discharges under Policy 11, and there is a definition of Offset/s.

39. Policy 11 requires any person undertaking a point source discharge of the four contaminants to, as a minimum, adopt the Best Practicable Option. It enables an offset measure to be proposed in an alternative location or locations for point source discharges when:

    (a) any adverse effects from the discharge(s) cannot be reasonably avoided or reasonably mitigated; and

[28] Paragraph 99 of the section 42A report for the Block 3 hearing.
[29] Paragraphs 40-41 of Vance Hodgson's Statement of Evidence in Chief for the Block 3 hearing.

(b) the purpose of the offset measure is to ensure positive effects on the environment to lessen any residual adverse effects of the discharge(s) that will or may result from allowing the activity.

40. Policy 11 also includes a number of provisos (under clauses a. to d. of the policy), such as a requirement for the offset measure to be for the same contaminant, and for the offset measure to occur within the same sub-catchment in which the primary discharge occurs.

41. In my rebuttal evidence for the Block 2 hearing[30], I supported the recommendation from Helen Marr to add a new clause e. to Policy 11 which states "*Offset measure provides for a net decrease in the amount of the relevant contaminant in the receiving environment*"[31]. This was because I considered it was helpful in clarifying that, overall, the offset should provide a net decrease in the amount of contaminant in the receiving environment.

42. In my opinion, the type of offsets suggested by the Officers and Mr Hodgson, that would enable the expansion of existing CVP operations or new CVP entrants, are not supported by the objectives and policies of PC1, particularly if they do not result in a reduction in diffuse discharges of the four contaminants from CVPs. This is because the outcome of offsetting would have the effect of only replacing 'like for like' (i.e. the offset would apply only to the increase from the CVP production and not the losses from the existing land use). As I mentioned in my Rebuttal Evidence for the Block 2 hearing[32], the Block 1 legal submissions by Counsel for Waikato Regional Council referred to the *Puke Coal Ltd v Waikato Regional Council* and the *EDS v King Salmon* Environment Court decisions, where the Court's conclusion through these decisions was that:

> *"[…] it is no longer sufficient for an applicant to demonstrate that adverse effects are avoided, remedied or mitigated. Instead, an applicant must now demonstrate that the application will result in some positive benefit contributing to the restoration of the Waikato River (as defined), proportionate to the activity in question".*[33]

[30] Paragraph 18 of Janeen Kydd-Smiths Rebuttal Evidence for the Block 2 hearing.
[31] Paragraph 5.30 of Helen Marrs' Evidence in Chief for the Block 2 hearing.
[32] Paragraph 18 of Janeen Kydd-Smith's Rebuttal Evidence for the Block 2 hearing.
[33] Paragraphs 28-36 of Submissions by Counsel for Waikato Regional Council, dated 11 March 2019, for the Block 1 hearing.

43. It was for that reason that I also recommended in my Rebuttal Evidence for the Block 2 hearing that the definition of Offset/s should be amended as follows:

> "***Offset/s:*** *For the purpose of Chapter 3.11 means for a specific contaminant/s a~~n~~ measurable action, demonstrated through robust and appropriate methodology, that reduces the intensity, extent and/or duration of residual adverse effects on water quality and will result in a positive benefit contributing to the restoration of the Waikato and Waipā Rivers*."

RESPONSE TO HEARINGS PANEL QUESTIONS

Question 6: Permitted activities and section 70

44. The Hearing Panel asked about the "*Appropriateness of s70 - Whether a permitted activity discharge rule can satisfy section 70 in this catchment given section 70 clearly includes cumulative effects? If the panel come to the view that they agree that cumulatively, agricultural discharges have an effect on aquatic ecosystems – should it be written into the rule "thou shalt not have a cumulative adverse effect on aquatic life' as a precondition to the PA rule even though it is understood no one can satisfy that?*".

45. Mr McCallum-Clark considers that it is not appropriate (in this case) to 'cover off' the section 70(1) test by incorporating it as a condition of the permitted activity rule (Rule 3.11.5.8). In particular, it would not be appropriate to include a condition requiring there to be no 'cumulative effect on aquatic life', as he considers that this would be too unworkable and uncertain for a permitted activity rule. Mr McCallum-Clark therefore advises that the Officers intend to recommend reverting back to a 'hybrid' rule framework in PC1[34].

46. I concur with Mr McCallum-Clark that the hybrid rule framework is the better approach to take in this case, as it reflects the fact that the effects of diffuse discharges are being managed by controlling land use and it overcomes the issues raised around whether Rule 3.11.5.8 can satisfy

[34] Paragraphs 60-61 of Mr McCallum-Clark's Memo – Response to the Hearings Panel questions, dated 5 July 2019.

section 70(1).

Question 18: Tangata whenua ancestral lands definition

47. The Hearing Panel asked: "*Is there an issue with the PC1 definition of Tangata Whenua ancestral lands in relation to 'returned'? And does it apply to Wairarapa Moana? The Panel noted they received land through settlement in the catchment however it is arguably not ancestral land returned as they are an iwi from Wairarapa. (20 March)*".

48. Mr McCallum-Clark advises that the definition of tangata whenua ancestral lands in PC1 gives effect to section 6(e) of the Resource Management Act (**RMA**) as land that has been returned through Treaty of Waitangi Settlement processes. This definition provides for the relationship Māori have with their ancestral lands and does not apply to Wairarapa Moana as the settlement land they received is not ancestral land that has been returned. He notes that Wairarapa Moana are not tangata whenua of the Waikato and Waipā River catchments, and Officers understand that the Collaborative Stakeholder Group and the Waikato Regional Council made a deliberate decision on this point, and therefore the existing definition aligns with this section.[35]

49. The definition of 'tangata whenua ancestral land' in PC1 is:

> *"Tangata whenua ancestral lands: means land that has been returned through settlement processes between the Crown and tangata whenua of the catchment, or is, as at the date of notification (22 October 2016), Māori freehold land under the jurisdiction of Te Ture Whenua Maori Act 1993."*

50. There are two separate and distinct criteria that satisfy the definition of tangata whenua ancestral land:

    (a) Land that has been returned through settlement processes between the Crown and tangata whenua; or

    (b) Land that is, as at the date of notification (22 October 2016), Māori

[35] Paragraph 120 of Mr McCallum-Clark's Memo – Response to the Hearings Panel questions, dated 5 July 2019.

freehold land under the jurisdiction of Te Ture Whenua Māori Act 1993.

51. The Panel's question, and Mr McCallum-Clark's response, was directed to land owned by Wairarapa Moana that comes under the first criterion. For completeness, to the extent that Wairarapa Moana administers Māori freehold land, I consider that that land comes within the definition under the second criterion.

52. I note that the clear intention to include Māori freehold land, as a distinct category of land within the meaning of tangata whenua ancestral land, is identified in the Section 32 Evaluation Report rationale for Objective 5 (page 98):

"*This objective reflects the following points:*

"Māori freehold land under Te Ture Whenua Māori Act 1993 and settlement land must be recognised as an important component of tangata whenua ancestral land;"

Question 19: Policy 10

53. The Hearing Panel asked: "*Can Policy 10 be read as a Controlled Activity Rule policy? If that's not the intention, can clarification of the correct intention be provided?*".

54. Mr McCallum-Clark considers that the words "provide for" in Policy 10 does not mean "permit" or "always grant", although he acknowledges that it has quite an enabling implication[36].

55. In my Evidence in Chief for the Block 2 hearing I advised that I considered that the words "provide for" do not mean that the Council's discretion is restricted, or that the continued operation of regionally significant infrastructure and regionally significant industry must be provided for above all else – particularly as Policy 10 needs to be read in conjunction with other matters to be considered under Policies 11-13 (also relating to

[36] Paragraph 122 of Mr McCallum-Clark's Memo – Response to the Hearings Panel questions, dated 5 July 2019.

point source discharges). In my evidence, I suggested that the wording of Policy 10 could be amended by adding the words "subject to consideration of the matters set out in Policies 11 to 13" at the end of the policy.[37]

56. Mr McCallum-Clark suggests the following revised wording for Policy 10:

"When deciding resource consent applications for point source discharges of nitrogen, phosphorus, sediment and microbial pathogens to water or onto or into land, ~~provide for~~ have regard to the benefits of:

a. Continued operation of regionally significant infrastructure; and

b. Continued operation of regionally significant industry."

57. On further reflection, I consider that the amendment suggested by Mr McCallum-Clark is better than my suggested amendments, as they more simply convey that the Waikato Regional Council has discretion to have regard to the benefits of the continued operation of regionally significant infrastructure and regionally significant industry when making a balanced decision on a resource consent application for a point source discharge.

Question 20: Numeric value for the 75th percentile

58. The Hearing Panel asked: "*At what point in time would the information be able to be made available to derive the number for the 75th percentile? How do the dates for the 75th percentile, the NRP and the staging of the priority sub-catchments align?*"

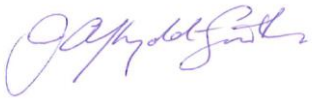
59. Three timelines for key PC1 dates were attached in Appendix E to Mr McCallum-Clark's response: one for the notified version of PC1 (as amended by Variation 1); one with the dates as they appear in the s42A report tracked changes version of PC1; and one with the Officers' current thinking regarding key potential dates (subject to finalisation) to recommend at the close of the hearings, assuming that a 2026 'deadline' is to be maintained.

60. In my Statement of Evidence in Chief for the Block 2 hearing, I considered that the end date of 2026 in Rule 3.11.5.7 should be retained, as it is

[37] Paragraphs 106-108 of Janeen Kydd-Smith's Statement of Evidence in Chief for the Block 2 hearing.

important for sending a clear signal to the Regional community that Rule 3.11.5.7 is an interim measure and must be replaced with a new regulatory framework. With regard to the issue raised by the Officers' in the s42A report for the Block 2 hearing, about the status of activities after the end date (if there is no other relevant rule to replace it), I considered that activities under Rule 3.11.5.7 would default to being a Discretionary Activity under section 87B(1) of the RMA.[38]

61. I consider that if an end date of 2026 is not considered by the Hearings Panel to be realistic or is deemed to be unworkable, then an alternative would be to replace the wording "*until 1 July 2026*" in Rule 3.11.5.7 with "*until 10 years from the date on which this Plan became operative*", which I consider would achieve the same outcome.



Janeen Kydd-Smith

19 July 2019

[38] Paragraphs 64-71 of Janeen Kydd-Smith's Statement of Evidence in Chief for the Block 2 hearing.