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| **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 2**
**(Submitter No. 74035)**

**10 MAY 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) a Statement of Evidence in Chief in relation to Block 1 dated 15 February 2019;

   (b) a Rebuttal Statement in relation to Block 1 dated 27 February 2019; and

   (c) a Statement of Evidence in Chief in relation to Block 2 dated 3 May 2019.

5. I confirm the qualifications and experience set out in my 15 February 2019 Statement of 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 evidence prepared by the following persons:

   (a) Justine Young (Dairy NZ Limited);

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

   (c) Ian Mayhew (Waikato Regional Council);

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

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

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

   (g) Richard Matthews (Genesis Energy Limited).

8. Due to the significant issues being traversed in the Block 2 hearing, the number of submitters, quantum of evidence and the limited time available to prepare this rebuttal statement, I have not read all of the submitters' planning evidence and have not addressed every relevant matter. I have focused on matters that I consider add value and/or clarification to those matters I have already raised in my Evidence in Chief for the Block 2 hearing.

9. My rebuttal evidence focuses on the following matters:

   (a) Good farming practice;

   (b) Policy 1;

   (c) Policy 2

   (d) Policy 5;

   (e) Policy 11;

   (f) Policy 12

   (g) Policy 13;

   (h) Rule 3.11.5.7; and

(i) Rule framework – Rules 3.11.5.8 and 3.11.5.9.

## EVIDENCE

### Good Farming Practice

10. Justine Young considers that the references to Good Farming Practice (**GFP**) are unclear and recommends that clause a1. of Policy 1 and clause a1. of Policy 2 are amended to refer to applying "industry-agreed" Good Farming "principles".[1]

11. I note that the definition of GFP in the Glossary of PC1 refers to the GFP being "industry agreed and approved practices and actions". In my opinion, there is no need to amend the wording in the policies as the definition already addresses this matter.

### Policy 1

12. Deborah Kissick notes that there is a discrepancy between the wording of clauses a. and b. of Policy 1, where clause a. uses the word "activity" (in relation to "Enabling activities with a low level of contaminant discharge to water bodies") and clause b. uses the words "farming activities" (in relation to "Requiring farming activities with moderate to high levels of contaminant discharge to water bodies")[2]. Ms Kissick considers that clause b. should be amended so that it only refers to "activities".

13. I consider that it would be more appropriate to amend the wording of clause a. of Policy 1 so that it refers to "farming activities", rather than referring to activities generally, which does not appear to be the intention of the policy.

### Policy 2

14. Ian Mayhew considers that Policy 2 can be improved to provide better guidance as to what is expected. He recommends that the words "catchment-wide and sub-catchment" be deleted from the first line (because it is already incorporated into Policy 1) and that the policy be

[1] Paragraphs 24 and 40 of Justine Young's Evidence in Chief for the Block 2 hearing.
[2] Paragraphs 29-30 of Deborah Kissick's Evidence in Chief for the Block 2 hearing.

amended to include specific cross reference to the expectations of reduction of nitrogen and other contaminants in Policy 1[3].

15. I consider that the words "catchment-wide and sub-catchment" should be retained in Policy 2, as it appropriately refers to the scale of the reductions to be achieved through Farm Environment Plans. I generally support Mr Mayhew's recommended amendments to clause a1. and new clause a2. but consider that the words "and minimum standards" should be added after the word "actions".

**Policy 5**

16. I note that Bridget Robson considers that clause a. of Policy 5 should be amended by deleting the words "attribute states in Table 3.11-1" and adding the words "improvement in" before "water quality"[4]. I could not find any reasons within Ms Robson's evidence for the amendment, but I consider that it is inappropriate, as the staged approach is important in achieving the long-term objectives set out in the Vision and Strategy, and as reflected in the water quality attribute states in Table 3.11-1 (acknowledging that Table 3.11-1 is still subject to expert caucusing).

**Policy 11**

17. Helen Marr refers to the Horizons Regional Council One Plan offset policy relating to indigenous biodiversity and considers that the principles included within that policy are relevant to freshwater[5]. The relevant principles cited by Ms Marr are:

- *The offset should provide a net gain;*
- *The gain should be demonstrated with a level of rigour commensurate to the effect;*
- *Some effects or impacts cannot be offset; and*
- *The concept of 'additionality' – that is that the gains made by the offset would not have been achieved without the offset.*

18. Ms Marr recommends that Policy 11 be amended to include these principles, such that the words "*so that it offsets the residual adverse*

[3] Paragraphs 21-23 of Ian Mayhew's Evidence in Chief for the Block 2 hearing.
[4] Page 10 of Bridget Robson's Evidence in Chief for the Block 2 hearing.
[5] Paragraphs 5.21-5.30 of Helen Marrs' Evidence in Chief for the Block 2 hearing.

*effect for at least the duration of effect*" are added at the end of clause d., and a new clause e. is added which states "*Offset measure provides for a net decrease in the amount of the relevant contaminant in the receiving environment*"[6]. I consider that the amendment to clause d. is unnecessary, but new clause e. is helpful in clarifying that overall, the offset should provide a net decrease in the amount of contaminant in the receiving environment. In that regard, 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".*[7]

19. Ms Marr also recommends that the definition of 'Offset/s' in the Glossary of PC1 be amended, as follows:[8]

"***Offset/s:*** *For the purpose of Chapter 3.11 means for a specific contaminant/s a~~n~~ measurable conservation action, demonstrated through robust and appropriate methodology, that reduces the intensity, extent and/or duration of residual adverse effects on water quality and achieves conservation outcomes above and beyond that which would have been achieved if the offset had not taken place*."

20. I consider that Ms Marr's recommended amendments to the definition of Offset/s are helpful in providing further clarification, particularly in relation to achieving a positive outcome towards contributing to the restoration of the Waikato and Waipā Rivers.

21. The definition of 'conservation' in the English Oxford Living Dictionaries means "*prevention of wasteful use of a resource*" and "*preservation,*

[6] Paragraph 5.30 of Helen Marrs' Evidence in Chief for the Block 2 hearing.
[7] Paragraphs 28-36 of Submissions by Counsel for Waikato Regional Council, dated 11 March 2019, for the Block 1 hearing.
[8] Ibid.

*protection, or restoration of the natural environment and of wildlife*", which has an alignment with the objectives of the Vision and Strategy. The definitions of offsetting referred to in the "Biodiversity Offsetting Under the Resource Management Act: A Guidance Document (September 2018)[9]" and the Government's "Guidance on Good Practice Biodiversity Offsetting in New Zealand (August 2014)"[10] also refer to "conservation outcome", so there appears to be some acceptance around the use of the word 'conservation'. However, regardless of this, in the context of PC1 which relates to water quality, the use of the word 'conservation' does not seem appropriate to me. In my opinion, the definition of "Offset/s" could be amended further, in a way that I consider would better reflect the terminology used in the Vision and Strategy, 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*."

22. Gerard Willis considers that clause a. of Policy 11 goes too far by requiring that the primary discharge does not result in "significant or toxic adverse effects at the point of the discharge location". He considers that the wording in clause a. should be amended to include "either significant adverse effects on aquatic life or toxic adverse effects at the point of discharge location", to be consistent with section 70 of the RMA"[11]. I consider that the recommended amendment is not necessary as the current word 'significant' is sufficiently broad to capture a range of adverse effects and section 70 of the RMA is only relevant where a regional council includes in a regional plan a rule that allows a permitted activity. However, if the Panel is of a mind to accept Mr Willis' recommendation, I consider that the word "either" should be deleted, as it is unnecessary.

23. Mr Willis also considers that clause c. of Policy 11 should be amended so that the offset measure occurs preferably "upstream" within the same sub-

9 Section 1.1.1, page 2.
10 Section 2.1, page 3.
11 Paragraphs 13.1-13.15 of Gerard Willis' Evidence in Chief for the Block 2 hearing.

catchment in which the primary discharge occurs, and if this is not practicable, then "upstream" within the same Freshwater Management Unit or a Freshwater Management Unit located upstream. I consider that this amendment is appropriate, for the reasons given by Mr Willis (i.e. that an offset in a sub-catchment (or FMU) upstream of the discharge point will produce a greater benefit than one in the sub-catchment where the discharge occurs)[12].

24. In addition to the above amendments to Policy 11, Mr Willis considers that that a definition of 'significant residual effect' should be inserted below clause d. of the policy. The definition of Biodiversity Offset in the Government's 2014 guidance document (referred to above) includes the words "significant residual adverse biodiversity impacts", while the 2018 guidance document (also referred to above) includes the words "residual, adverse biodiversity effects". In the context of PC1 I consider that including 'significant residual effect' in Policy 11 is inappropriate as it suggests that the residual adverse effect must be 'significant' before it is lessened by offsetting. In my opinion, this is not entirely consistent with Objective1 of PC1 or the Vision and Strategy, which require the protection and restoration of the Waikato and Waipā Rivers (and no further degradation). I therefore consider that the term "residual adverse effect" in Policy 11 should be retained.

25. I note that Richard Matthews[13] considers that Policy 11 should be amended so that it refers to "Environmental Compensation". I do not support this, as environmental compensation is not offsetting and it is not required to adhere to any of the principles of offsetting. In that regard, I refer to the following explanation from "Biodiversity Offsetting under the Resource Management Act: A guidance document"[14]:

*"Environmental compensation is designed to compensate for losses but is not designed to demonstrate a no-net-loss outcome, and therefore does not have to fully account for and balance losses and gains. It is typically a more subjective process than biodiversity offsetting and it is not required to adhere to any of the principals of biodiversity offsetting, especially no-*

[12] Paragraph 13.9 of Gerard Willis' Evidence in Chief for the Block 2 hearing.
[13] Paragraphs 62-86 of Richard Matthew's Evidence in Chief for the Block 2 hearing.
[14] Prepared for the Biodiversity Working Group on behalf of the BioManagers Group by Fleur Maseyk, Graham Ussher, Gerry Kessels, Mark Christensen and Marie Brown, dated September 2018.

*net-loss or net-gain objectives. Therefore, environmental compensation is not biodiversity offsetting, or a form of offsetting at all.*

*Environmental compensation carries the greatest risk for biodiversity outcomes and is the last resort in the effects management hierarchy (Figure 2). To improve outcomes from compensation, best practice and the offsetting principles should be followed as much as possible".*

**Policy 12**

26. Gerard Willis[15] and Richard Matthews[16] both request that clause d. of Policy 12 be reinstated, as there can be a diminishing return on investment in treatment plant upgrades and it is a well-accepted principle of investment in effects management generally.

27. As I stated in my Evidence in Chief[17], I concur with the Reporting Officers that clause d. should be deleted, as it implies that application of the Best Practicable Option (**BPO**) (which includes financial considerations) is sufficient, whereas the application of the BPO alone may not be enough to achieve the outcomes sought in PC1.

**Policy 13**

28. Both Mr Willis[18] and Mr Matthews[19] consider that the reference to "A consent duration exceeding 25 years" should be retained in Policy 13 (as notified), as they consider 25 years is an appropriate consent duration starting point for point source discharges that are consistent with achieving the water quality attribute states in Table 3.11-1.

29. I consider that a consent duration exceeding 25 years should not be the mandatory starting point, particularly for 'achieving' rather than

[15] Paragraphs 14.5-14.8 of Gerard Willis' Evidence in Chief for the Block 2 hearing.
[16] Paragraph 89 of Richard Matthews' Evidence in Chief for the Block 2 hearing.
[17] Paragraph 119 of Janeen Kydd-Smith's Evidence in Chief for the Block 2 hearing.
[18] Paragraphs 15.1-15.9 of Gerard Willis' Evidence in Chief for the Block 2 hearing.
[19] Paragraphs 93-101 of Richard Matthews' Evidence in Chief for the Block 2 hearing.

'exceeding' the water quality attribute states in Table 3.11-1,[20] as a shorter consent duration may be more appropriate.

**Rule 3.11.5.7**

30. Helen Marr notes that, if a farmer is proposing to change land use in the future, it is not obvious which rule that future change in land use would be captured by and it would fall to be an innominate discretionary activity. Ms Marr considers that PC1 should "continue to send a strong message through activity status that increases in contaminant losses through intensification of land use is inappropriate"[21]. As such, she recommends that Rule 3.11.5.7 be reinstated and amended to read as follows*:*

*"The use of land for farming and the associated diffuse discharge of nitrogen, phosphorus, sediment and microbial pathogens onto or into land in circumstances which may result in those contaminants entering water that does not meet [condition (5b) of Rule 3.11.5.3 or] condition (7) of Rule 3.11.5.4 is a non-complying activity.*

*Notwithstanding any other rule in this Plan, any of the following changes in the use of land from that which was occurring at 22 October 2016 within a property or enterprise located in the Waikato and Waipā catchments, where prior to 1 July 2026 the change exceeds a total of 4.1 hectares:*

1. *Woody vegetation to farming activities; or*
2. *Any livestock grazing other than dairy farming to dairy farming; or*
3. *Arable cropping to dairy farming' or*
4. *Any land use to commercial vegetable production except as provided for under standard and term g. of Rule 3.11.5.5*

*is a non-complying activity (requiring resource consent) until 1 July 2026."*

31. I note that Ms Marr's recommended amendments to Rule 3.11.5.7 also relate to her recommendation to retain the 'hybrid' land use and discharge rules in PC1.

32. As I stated in my Evidence in Chief for the Block 1 hearing (paragraph 71), I support the amendments to Rule 3.11.5.7 that are recommended by the Reporting Officers, but I consider that the end date of 1 July 2026 should be retained. This is because an end date is important for sending a clear

[20] Refer paragraph 126 of my Evidence in Chief for the Block 2 hearing (3 May 2019).
21 Paragraph 9.13 of Helen Marr's Evidence in Chief for the Bloc 2 hearing.

signal to the Regional community that Rule 3.11.5.7 is an interim measure and must be replaced with a new regulatory framework.

**Rule Framework - Rules 3.11.5.8 and 3.11.5.9**

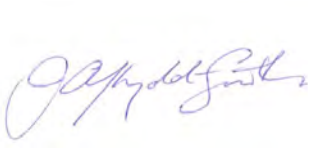
33. Helen Marr raises concerns in her evidence about the legality of Rule 3.11.5.8, noting that section 70 of the RMA restricts the use of a permitted activity rule for discharges to circumstances where the Council is satisfied that certain effects will not arise. She notes that cumulative adverse effects are relevant, as the restrictions under section 70 apply to discharges that cause these effects by themselves or in combination with the same, similar, or other contaminants[22].

34. As such, Ms Marr considers that Rule 3.11.5.8 does not include all the restrictions from section 70 (i.e. s70(1)(e), relating to objectionable odour, is absent from the list) and only individual (not cumulative) effects have been restricted. She also considers that, given changes in visual clarity and significant effects on aquatic life that have been measured in the Waikato and Waipā River catchments, even if the rule was amended to include all of the section 70 restrictions, because of existing cumulative effects the requirements of section 70 will not be met and the rule is unlawful. Ms Marr considers that new Rules 3.11.5.8 and 3.11.5.9 (recommended by the Reporting Officers) should be deleted.

35. The intention of Rules 3.11.5.8 and 3.11.5.9 is to provide a practical and workable alternative to the 'hybrid' land use and discharge rules notified in PC1, and to overcome the potential for discharge consents to be transferred under s137 of the RMA, such that farms may then not be able to continue to discharge some or all of the four contaminants. Ms Marr's recommendation to delete Rules 3.11.5.8 and 3.11.5.9 is one way of

[22] Paragraphs 6.31-6.35 of Helen Marr's Evidence in Chief for the Block 2 hearing.

overcoming the legal issues associated with the drafting of Rule 3.11.5.8. However, I note that it leaves the issue of the hybrid rules.



Janeen Kydd-Smith

10 May 2019