

BEFORE THE INDEPENDENT HEARINGS PANEL

IN THE MATTER

of the Resource Management
Act 1991

AND

IN THE MATTER

of Plan Change 1: Waikato and
Waipā River Catchments to the
Waikato Regional Plan

**MEMORANDUM OF COUNSEL FOR THE WAIKATO REGIONAL COUNCIL
(as plan change proponent)
CONCERNING PROPOSED EXPERT CONFERENCING ON TABLE 3.11-1
7 March 2019**



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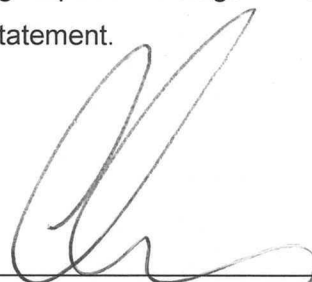
1. This memorandum responds to the Panel's minute of 27 February 2019 requesting that expert conferencing occur in relation to Table 3.11-1 (**Minute**). The Minute finishes with a request that "legal counsel confer in advance of them responding in order that as far as practicable, the Panel is provided with a joint position on the questions posed above".
2. The **attached** Draft Agenda sets out the Council's suggested approach to the conferencing.
3. In an endeavour to provide the Panel with a "joint position" a draft Agenda was circulated to key submitters on Tuesday 4 March, and comments have been received.¹ The tracking on the attached Draft Agenda reflects changes that have been made to reflect *some* of the submitters' comments.
4. In terms of the submitters' comments that have *not* been reflected in changes to the Draft Agenda – these largely relate to various requests that the specific issues/questions² to be resolved are expressly stated in the Agenda. The Council does not support this approach because:
 - (a) Deciding on the specific issues/questions to be resolved is a core function of the experts, in accordance with the code of conduct.
 - (b) This is best done in the context of the conferencing where, with the assistance of the facilitator, a concise set of relevant issues/questions can be determined by the experts.
 - (c) Setting out the level of detail requested by some submitters has the potential effect of inappropriately and unnecessarily pre-determining or influencing the scope of the matters to be addressed at conferencing.
5. The Draft Agenda lists Dr Mike Scarsbrook and Mr Vant attending the conferencing, along with Dr Bryce Cooper (for the Council). Counsel for Wairakei Pastoral has raised a concern with Dr Scarsbrook being part of the conferencing because he has not provided evidence. With respect,

1 On behalf of Wairakei Pastoral, Director-General of Conservation, Waikato and Waipa River Iwi, Fish & Game Councils, Federated Farmers, Watercare Services/Waikato Regional Territorial Authorities, DairyNZ, Mercury Energy and Beef+Lamb. We have also considered comments on the Minute provided directly to Mr Rice from Hort NZ, and Winstone & Fulton Hogan.

2 The requests differ in terms of the nature and scope of the questions/issues.

that is an overly 'technical' approach. The purpose of the conferencing is to assist the Panel to address the issues raised in the Minute in the best way possible. Dr Scarsbrook has an in-depth knowledge of the development of the Table and is very well placed to assist the conferencing in that regard. He is part of the broader team of experts providing technical advice to the Council (and, when required, the Panel). The same applies in relation to Mr Bill Vant. But, if necessary, leave is sought from the Panel for Dr Scarsbrook and Mr Vant to participate in the conferencing.

6. The attendees listed in the draft Agenda reflect the evidence that has been lodged so far. There is a prospect however that some submitters have not lodged evidence from a freshwater expert but wish to have an expert involved. Accordingly, it is suggested that the Panel give notice to all submitters that they can seek leave (within a relatively short timeframe) to have an expert participate in the conferencing (acknowledging that this has, to some extent, been done though notification of the Minute).
7. In terms of post-conferencing steps we tend to agree with counsel for Watercare and the Territorial Authorities (see paragraph 2.10 of their memorandum of 5 March) that:
 - (a) it is difficult to say what (if any) opportunity should be given to parties to review etc the conferencing statement – in the absence of seeing the finished statement; but
 - (b) at least the parties should have an opportunity to make legal submissions.
8. Accordingly, we submit that it is premature for the Panel to make directions about post-conferencing steps at this stage. This can be done following completion of the joint statement.



Gerald Lanning / Jim Milne
Counsel for the Waikato Regional Council

Draft outline of Agenda for expert conferencing on Table 3.11-1
Draft 04-07 March 2019

1. The Panel hearing submissions on Proposed Change 1 to the Waikato Regional Plan (PC1) has issued a minute dated 27 February 2019 requesting that expert conferencing occur in relation to Table 3.11-1. In particular, the Minute states that:

Given the significance of Table 3.11.1 in PC1, the Panel agrees that it is desirable that expert conferencing between the freshwater science experts be undertaken. This is in order to provide an opportunity for the freshwater science experts to clarify the issues with Table 3.11.1 and address (and resolve if possible) the concerns regarding its robustness and the level of 'uncertainty' and 'completeness' of the provisions and whether the current attributes/objectives collectively ensure that PC 1 will "give effect to the National Policy Statement for Freshwater Management and the Vision and Strategy (to the extent this is possible within the life of PC 1).

...

The Panel therefore intends to direct that expert conferencing occurs in accordance with the Code of Conduct for Expert Witnesses of the Environment Court's Practice Note 2014.

2. In terms of the scope to modify Table 3.11-1 the Minute says:

The Panel proposes that expert conferencing proceed on the basis that scope issues do not constrain the recommendations the experts make and that, to the extent that those recommendations turn on legal or planning issues, the experts identify the competing positions and provide recommendations in the alternative.

3. It is understood that the reference to "scope issues" is a reference to the scope of submissions, rather than the scope of PC1 itself. It is understood therefore, that any recommended changes to Table 3.11-1 must still achieve the objectives and policies of PC1, and, in particular their focus on managing nitrogen, phosphorus, sediment and microbial pathogens.

- 3.4. The conferencing will be facilitated by an independent facilitator.

Attendees

- 4.5. The Minute specifically requests conferencing between "freshwater science experts". Therefore, it is proposed that the conferencing involves the following experts:

- (a) Dr Mike Scarsbrook, Bill Vant [complete] and Dr Bryce Cooper (for the Regional Council)
- (b) Dr Craig Depree (for Dairy NZ)
- (c) Kathryn McArthur, Dr Hugh Robertson and Dr Ngaire Phillips (for the Director-General Department of Conservation)
- (d) Dean Miller (for Mercury Energy Ltd)

Commented [SG1]: This is based on the evidence that has been lodged and the comments on the draft Agenda that have been received. The Panel will need to determine whether/how other parties should be given an opportunity to nominate relevant freshwater experts to participate.

- (e) Dr Martin Neale and Nicholas Conland (for Wairakei Pastoral Ltd)
- (f) Anthony Kirk (for the Waikato Regional Territorial Authorities)
- ~~(f)~~(g) Garrett Hall (for Watercare Services Ltd)
- ~~(g)~~(h) Dr Hannah Mueller, Dr Gerry Kessels and Dr Chris Dada (for Beef and Lamb)
- ~~(h)~~(i) Adam Canning and Adam Daniel (for Auckland/Waikato & Eastern Region Fish and Game Councils)
- (j) Dr Olivier Ausseil (for Waikato and Waipa River Iwi)
- (i) Gillian Holmes (for Hort NZ)
- (i) [Complete]

Commented [SG2]: See previous comment

Proposed agenda and questions-matters to be considered

6. The purpose of the conferencing is to assist the Panel to address the questions and issues raised in the Panel's minute (quoted above). The matters listed below must be interpreted and applied to best achieve this purpose.

5.7. It is proposed that the conferencing occur over two days (with at least a week between the days), and proceed as follows:

- (a) **Overview by the Regional Council experts** of the development of Table 3.11-1, including technical advice given to, and decisions made by, the CSG
- (b) **Overview of issues** raised by submitters' experts
- (c) **Key principles/considerations:** what are the key matters (within the relevant areas of expertise) that should be considered when determining the content of Table 3.11-1
- (d) **Table structure:** are there improvements that can be made to improve clarity, alignment with the NPS-FM etc?
- (e) **The Table as notified:** what (if any) changes to the current numeric values for the freshwater attributes should be made and why (taking into account the matters discussed at item (c) (above))?
- (f) **Additions to the Table:** what (if any) freshwater attributes should be added to the Table and what numeric values should be associated with

each FMU or sub-catchment (taking into account the matters discussed at item (c) (above))?

8. All submitters' experts are to provide "will say" statements in relation to items (b) – (f) above at least 5 working days before the first conferencing session. The "will say" statements should cross-refer, where relevant, to the evidence that has been filed.

9. Within 10 working days of the completion of the conferencing the experts must:

(a) produce a joint statement stating their findings and conclusions of each of the matters included in the conferencing agenda. The report should include their expert recommendations for any changes to Table 3.11-1 that they consider appropriate based on their findings and conclusions, including an explanation of the changes and a recommended version of Table 3.11-1 for use in PC1; and

(b) in the event of any disagreement on any matter, the joint statement should identify the expert witnesses in agreement and the expert witnesses in disagreement. The expert witnesses in disagreement on any matter should record their reasons for any disagreement;

(c) lodge the joint statement with the Hearings Co-ordinator.

