
In the matter of: Clauses 6 and 8 of Schedule 1 – Resource Management Act 1991 – Submissions on publicly notified plan change and variation – Proposed Plan Change 1 and Variation 1 to Waikato Regional Plan – Waikato and Waipa River Catchments

And: **Wairakei Pastoral Ltd**

Submitter

And: **Waikato Regional Council**

Local Authority

MEMORANDUM OF COUNSEL FOR WAIRAKEI PASTORAL LTD
Expert Conferencing Table 3.11-1

Dated: 8 March 2019

MEMORANDUM OF COUNSEL FOR WAIRAKEI PASTORAL LTD

Expert Conferencing on Table 3.11-1

- 1 The Commissioners have advised that they intend to direct expert conferencing regarding Table 3.11-1 in accordance with the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014.
- 2 Wairakei Pastoral Ltd (**WPL**) welcomes the directions made by the Commissioners for expert witness conferencing, given the vital role of Table 3.11-1 as one of the twin engines that will drive the implementation of PC1.
- 3 In particular, the importance of Table 3.11-1 is emphasized by the references to the Table in Objectives 1, 3, and 4; Method 3.11.4.7; and Rules 3.11.5.3, 3.11.5.4, and 3.11.5.6 (as notified) where it is a jurisdictional and consenting requirement that a risk assessment is carried out in accordance with Schedule 1 having regard to the sub-catchment targets in Table 3.11-1.
- 4 WPL also welcomes the initiative of Waikato Regional Council (**WRC**) in attempting to collate a joint memorandum from counsel in response to the directions, and will continue to work with WRC and other parties in that regard in a constructive way.
- 5 This memorandum provides a response from WPL to the four questions asked by the Commissioners (Minute of 27 February 2019) regarding the mechanics of the expert conferencing on Table 3.11-1, and to the matters raised in the memorandum filed by WRC on 7 March 2019.

Which submitter's expert freshwater science experts are willing to participate in expert conferencing?

- 6 Dr Neale and Mr Conland will participate for WPL as the relevant freshwater science experts.
- 7 In addition to the witnesses who have filed evidence regarding Table 3.11-1, the memorandum filed by WRC (paragraph 5) suggests that other experts, who have not filed evidence, should participate in expert witness conferencing because they are knowledgeable about the Table and can therefore assist the conferencing process. However, the rationale for this approach appears to confuse two matters:

- 7.1 The general rule in resource management hearings is that decision-makers can receive whatever material they consider helpful in deciding matters; and
 - 7.2 The requirements of procedural fairness that underpin the Hearing Procedures and Directions issued by the Commissioners and the Code of Conduct for Expert Witnesses issued by the Environment Court.
- 8 In particular, allowing other experts who have not to date filed any evidence to participate in the expert conferencing:
- 8.1 Does not appear to be consistent with the Code of Conduct for Expert Witnesses;
 - 8.2 While other experts may be able to assist, they could (consistent with the Code) only be invited to attend the conferencing by the agreement of, and at the request of, the witnesses who have already filed evidence on Table 3.11-1;
 - 8.3 Put simply, it is a matter for the witnesses who have already filed evidence on Table 3.11-1 to determine whether it would be helpful for any other experts to attend and answer any questions or queries they may have regarding the Table;
 - 8.4 Generally, allowing other experts to attend the conferencing raises issues of procedural fairness in relation to those parties who have complied with the Hearing Directions and Procedures in good faith by filing evidence and/or rebuttal from witnesses who can assist the Commissioners in relation to Table 3.11-1.
- 9 WPL therefore suggests (as a matter of fairness) that:
- 9.1 If any parties wish other experts to participate in conferencing on Table 3.11-1, they should be directed to give notice to the Hearings Coordinator by 15 March 2019 of the names of any other experts and that such other experts should file statements of evidence regarding the Table with the Hearings Coordinator by 22 March 2019 and prior to any conference meeting; OR
 - 9.2 Attendance at conferencing by other experts who have not filed evidence should otherwise only occur by the agreement, and at the request, of the witnesses who have filed evidence and/or rebuttal, that their attendance should be strictly limited by the Facilitator to answering any questions or queries that the witnesses may have, and that their attendance should be strictly time limited by the Facilitator to a period of up to 3 hours only. No new material that was not already publicly

available on the Plan Change 1 website on 13 December 2018 should be introduced by any other experts invited to attend the conferencing.

- 10 WPL suggests these safeguards are appropriate to avoid the potential for attendance by other experts to morph into participation (when they are not witnesses) and taint the conferencing process.
- 11 Beyond that, it is unclear why Dr Scarsbrook and Mr Vant have not previously been requested to file expert witness evidence by WRC given their knowledge of Table 3.11-1 and their ability to assist the Hearing process, when most (if not all) submitters have filed their best evidence to help the Commissioners with their deliberations. The concerns and issues regarding the Table will not have come as a surprise to WRC because they were fairly raised in the submissions made about PC1, and also at the Information Forum initiated by the Commissioners, and held on 21 and 22 November 2018. In addition, it has always been clear that Table 3.11-1 was a Topic included in Block 1 of the Hearing schedule.
- 12 In terms of evidence for witness conferencing, WRC suggests (paragraph 8 of the draft agenda attached to the WRC memorandum) that all experts should now file “will say” statements. WPL considers that this is not appropriate because:
- 12.1 Witnesses for all parties have to date already filed full and complete evidence and/or rebuttal regarding Table 3.11-1; and
- 12.2 Further will say statements are not required (and would be an unnecessary expense) because it will be clear from the evidence filed what those witnesses opinions are about the Table.
- 13 Should other experts wish to participate in witness conferencing, then as noted at paragraph 9.1 above it will be appropriate for them to file full statements of evidence in short order.

What the brief for the expert conferencing should be, including the questions to be posed to the experts?

- 14 WPL agrees with the comments made by WRC in paragraph 4 of the memorandum filed on 7 March 2019, namely, that deciding on the specific issues or questions to be resolved is a core function of the witnesses participating in conferencing in accordance with the Code of Conduct, and that this is best done in the context of the conferencing sessions by the witnesses themselves with assistance from the Facilitator as appropriate.

- 15 Based on the comments made by WRC (noted above) there is no need for these matters to be addressed in the draft agenda for conferencing, and paragraphs 6 (in full) and 7 (in part, namely, paragraphs (a) to (f) only) should accordingly be deleted from the draft agenda attached to the WRC memorandum.
- 16 WPL notes that most witnesses appear to have given careful thought to the issues and questions that could be the focus of conferencing in their evidence and rebuttal that has already been filed. For example, Dr Neale has carefully summarised the issues and questions regarding Table 3.11-1 raised in his evidence in paragraphs 8.1-8.6 of his rebuttal. Dr Neale also summarised the issues and questions raised by other witnesses in their evidence in paragraphs 5.1-5.3 of his rebuttal. Evidence of this kind from Dr Neale and the other witnesses should greatly assist the agenda setting process at the start of conferencing.
- 17 However, from an abundance of caution, should the Commissioners consider that it would be appropriate at this stage to propose an agenda and questions for conferencing then WPL suggests that paragraph 7 in the proposed WRC agenda should be replaced by the substitute paragraph set out in **Appendix 1** to this memorandum.
- 18 But as indicated in paragraph 15 above, WPL considers that it would be more appropriate to delete paragraphs 6 and 7 from the draft agenda attached to the WRC memorandum as recommended above, and to leave these matters in the capable hands of the witnesses and the Facilitator.

The suggested process for, and likely duration of, any expert conferencing?

- 19 WPL agrees with the process set out in paragraph 9 of the draft agenda for conferencing attached to the WRC memorandum setting out the steps required to complete witness conferencing. But WPL notes that the WRC draft agenda does not appear to address the preliminary steps that will likely be required to prepare for efficient and effective conferencing. WPL therefore suggests that the draft WRC agenda should be amended by including the following steps to prepare for conferencing as follows:
- 19.1 In accordance with the Vision and Strategy and relevant case law, the experts should use best scientific methods throughout the conferencing process.
- 19.2 The Facilitator should work directly with the expert witnesses by email and phone (including conference calls as appropriate) to make all necessary arrangements for expert witness conferencing, confirm the agenda with the expert

witnesses, ensure that all relevant information is available before conferencing starts, and ensure that the expert witnesses have identified from their filed Block 1 evidence:

- (a) The issues and concerns with Table 3.11-1 identified by the expert witnesses;
- (b) Any additions to Table 3.11-1 recommended by the expert witnesses;
- (c) Any other amendments to Table 3.11-1 recommended by the expert witnesses.

19.3 The Facilitator and expert witnesses should identify a logical order for working through all matters.

19.4 All expert witnesses should pre-circulate (to the Facilitator and all other witnesses) all relevant data and information available to them pertaining to the above matters at least 2 working days before the start of expert witness conferencing to facilitate efficient and effective conferencing. All material filed or pre-circulated by the experts should be listed appropriately in a technical bibliography.

20 WPL agrees with the timetable proposed by WRC for conferencing, and the remaining part of paragraph 7 of the agenda attached to the WRC memorandum (not deleted as requested above) should be amended to read:

It is proposed that the conferencing occur over two days (with at least a week between the days).

21 Expert conferencing should start as soon as convenient, and end on 29 April 2019 with the joint witness statement of evidence being filed with the Hearings Coordinator by close of business on that date.

22 Finally, the steps to complete conferencing (paragraph 9 of the draft agenda attached to the WRC memorandum) should be supplemented by provision being made for the joint witness statement to be finalised by email under the control of the Facilitator (over the 10 working day period suggested by WRC).

What opportunity (if any) should be provided to all parties to the PC1 hearings to review and comment on the outcome of the expert conferencing?

23 The WRC memorandum (paragraphs 7 and 8) does not address the question about what opportunity should be provided to the parties to review and comment on the outcome of the expert

witness conferencing. Instead, WRC suggests that this can be left for further directions at the post-conferencing stage. However, this does not appear to be an efficient or effective way to progress matters within the confines of the Hearing timetable.

24 WPL therefore suggests that the parties should be provided with an opportunity to review and comment on the outcome of the expert conferencing, namely:

24.1 All parties should be given the opportunity to file supplementary legal submissions addressing any matters arising from the joint witness statement of evidence and recommendations within 5 working days of the joint witness statement of evidence being filed with the Hearings Coordinator. Any supplementary legal submissions should include a 3-page summary.

24.2 The Commissioners should convene a special 1-day sitting of the Hearings Panel (either at the end of Block 1 or at the start of Block 2) to enable them to ask any questions they may have of the expert witnesses or counsel arising from the joint witness statement of evidence (including any revised Table 3.11-1) and any legal submissions.

24.3 The joint statement of evidence and recommendations, the revised Table 3.11-1, and legal submissions should (apart from the above) be taken as read.

25 Given that a number of submitters have raised concerns or issues regarding Table 3.11-1, it would appear to be sensible (as a matter of natural justice) to understand whether or not such concerns or issues have been resolved by the outcome of the conferencing. WPL considers that the procedures outlined above should appropriately address this aspect. For convenience a marked up copy of the WRC draft agenda is attached as **Appendix 2** to this memorandum.



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APPENDIX 1

Brief and questions for expert witness conferencing

- 1 Based on the matters identified by the expert witnesses in their filed evidence and rebuttal, expert conferencing should focus on the following matters regarding Table 3.11-1:
 - 1.1 Are there any errors and/or inconsistencies in the current water quality attributes of Table 3.11-1? If so, what are they and how should these be corrected? For example:
 - (a) Potential changes to the freshwater objectives arising from issues associated with discrepancies in current state assessments;
 - (b) Potential changes to the freshwater objectives arising from detection limit issues (e.g. ammonia; chlorophyll a);
 - (c) Potential changes to the freshwater objectives arising from numerical inconsistencies (e.g. median greater than maximum; nitrogen species greater than total nitrogen);
 - (d) Potential changes to the freshwater objectives arising from outcomes sought (e.g. lower or higher objectives);
 - (e) The potential inclusion of additional attributes (e.g. dissolved oxygen; MCI) or locations;
 - (f) The potential addition of new time bound medium term objectives.
 - (g) Any requests made by the expert witnesses for:
 - (i) Changes to the numeric values in the table;
 - (ii) The inclusion of additional attributes or locations; and
 - (iii) The addition of new time bound medium term objectives.
 - (h) Any inconsistent requirements regarding sampling in all flow conditions versus sampling at baseflow only.

- (i) Are any key sub-catchment sites not included in Table 3.11-1? If so, what are they?
- (j) Where should water quality for each of the attributes apply in the Waikato-Waipā sub-catchments?
- (k) Should the current state of water quality in each of the sub-catchments be recorded in the Table?
- (l) The need to include in Table 3.11-1 limits and targets for TN and TP that underpin the sub-catchment approach (partly) included in PC1.

APPENDIX 2

Draft outline of Agenda for expert conferencing on Table 3.11-1

WPL amendments are shown in ~~strikethrough~~ and underline

- 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.
- 4 The conferencing will be facilitated by an independent Facilitator.

Attendees

- 5 The Minute specifically requests conferencing between “freshwater science experts”. Therefore, it is proposed that the conferencing involves the following experts:
 - 5.1 Dr Mike Scarsbrook, Mr Bill Vant, and Dr Bryce Cooper (for the Regional Council);
 - 5.2 Dr Craig Depree (for Dairy NZ);
 - 5.3 Ms Kathryn McArthur, Dr Hugh Robertson, and Dr Ngaire Phillips (for the Director General of Conservation);
 - 5.4 Mr Dean Miller (for Mercury Energy Ltd);
 - 5.5 Dr Martin Neale and Mr Nicholas Conland (for Wairakei Pastoral Ltd);
 - 5.6 Mr Anthony Kirk (for the Waikato Regional Territorial Authorities);
 - 5.7 Mr Garrett Hall (for Watercare Services Ltd);
 - 5.8 Dr Hannah Mueller, Dr Gerry Kessels, and Dr Chris Dada (for Beef and Lamb);
 - 5.9 Mr Adam Canning and Mr Adam Daniel (for Auckland/Waikato & Eastern Region Fish and Game Councils);
 - 5.10 Dr Olivier Ausseil (for Waikato and Waipa River Iwi);
 - 5.11 Ms Gillian Holmes (for HortNZ).
- ~~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 below must be interpreted and applied to best achieve this purpose.~~
- 7 It is proposed that the conferencing occur over two days (with at least a week between the days), ~~and proceed as follows:~~
 - ~~7.1 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;~~
 - ~~7.2 Overview of issues raised by submitters’ experts;~~

- ~~7.3 Key principles/considerations: what are the key matters that should be considered when determining the content of Table 3.11-1;~~
- ~~7.4 Table structure: are there improvements that can be made to improve clarity, alignment with the NPS-FM etc?~~
- ~~7.5 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))?~~
- ~~7.6 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. Witnesses for most parties have to date already filed full and complete evidence and/or rebuttal regarding Table 3.11-1. Any witnesses who have not filed evidence to date should file statements of evidence regarding the Table with the Hearings Coordinator by 22 March 2019 and prior to any conference meeting.
- 9 Attendance at conferencing by other experts who have not filed evidence should otherwise only occur by the agreement of, and at the request, of the witnesses who have filed evidence and/or rebuttal, their attendance should be strictly limited by the Facilitator to answering any questions or queries that the witnesses may have, and their attendance should be strictly time limited by the Facilitator to a period of up to 3 hours only. No new material that was not already publicly available on the Plan Change 1 website on 13 December 2018 should be introduced by any other experts invited to attend the conferencing.
- 10 In accordance with the Vision and Strategy and relevant case law, the experts should use best scientific methods throughout the conferencing process.
- 11 The Facilitator should work directly with the expert witnesses by email and phone (including conference calls as appropriate) to make all necessary arrangements for expert witness conferencing, confirm the agenda with the expert witnesses, ensure that all relevant information is available before conferencing starts, and

ensure that the expert witnesses have identified from their filed Block 1 evidence:

- 11.1 The issues and concerns with Table 3.11-1 identified by the expert witnesses;
 - 11.2 Any additions to Table 3.11-1 recommended by the expert witnesses;
 - 11.3 Any other amendments to Table 3.11-1 recommended by the expert witnesses.
- 12 The Facilitator and expert witnesses should identify a logical order for working through all matters.
 - 13 All expert witnesses should pre-circulate (to the Facilitator and all other witnesses) all relevant data and information available to them pertaining to the above matters at least 2 working days before the start of expert witness conferencing to facilitate efficient and effective conferencing. All material filed or pre-circulated by the experts should be listed appropriately in a technical bibliography.
 - 14 Expert conferencing should start as soon as convenient, and end on 29 April 2019 with the joint witness statement of evidence being filed with the Hearings Coordinator by close of business on that date.
 - 15 Within 10 working days of the completion of the conferencing the experts must:
 - 15.1 Produce a joint witness statement of evidence 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
 - 15.2 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;
 - 15.3 Lodge the joint witness statement of evidence with the Hearings Co-ordinator (in accordance with paragraph 14 above).
 - 16 The joint witness statement of evidence should be finalised by email under the control of the Facilitator during the above period.

- 17 All parties should be given the opportunity to file supplementary legal submissions addressing any matters arising from the joint witness statement of evidence and recommendations within 5 working days of the joint witness statement of evidence being filed with the Hearings Coordinator. Any supplementary legal submissions should include a 3-page summary.
- 18 The Commissioners should convene a special 1-day sitting of the Hearings Panel (either at the end of Block 1 or at the start of Block 2) to enable them to ask any questions they may have of the expert witnesses or counsel arising from the joint witness statement of evidence (including any revised Table 3.11-1) and any legal submissions.
- 19 The joint witness statement of evidence and recommendations, the revised Table 3.11-1, and legal submissions should (apart from the above) be taken as read.