

**BEFORE THE NORTHLAND REGIONAL COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** 22 resource consent applications for new Water Permits for the taking and use of groundwater and 2 applications for changes to consent conditions of current Water Permits from the Waihopo, Houhora, Other, Motutangi, Waiparera, Paparore, Waipapakauri, Ahipara, and Sweetwater aquifer management sub-units of the Aupōuri Aquifer, Northland

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**MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANTS**

**DATED 2 March 2021**

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**BROOKFIELDS  
LAWYERS**

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**AUCKLAND**

**May it please the Hearings Panel:**

1. This memorandum is filed on behalf of the Applicants to update the Hearing Commissioners on progress that has been made since recommencing consultation with the Department of Conservation on behalf of the Director-General of Conservation (**the Department**) and the Northland Regional Council (**the Council**) in the New Year. The memorandum addresses:
  - a) Additional tasks and further information put forward by the Department, and the Applicants' response;
  - b) The Applicants' proposed way forward through further facilitated conferencing.

**The Department's additional tasks and further information**

2. Additional tasks were put forward by the Department on 16 October 2020, and were conferenced on in good faith by the Applicants. As is reflected in the JWS dated 27 November, the additional tasks were considered to be unnecessary by Mr Williamson and would not in his opinion inform the Commissioners' decision making in a meaningful way. The Council's hydrogeologist agrees with this assessment and the Department's hydrogeologist did not attend this conferencing.
3. As was noted in the Joint Memorandum dated 22 December 2020, the Department's experts had circulated further information (dated 16 December 2020) outlining their residual concerns with the monitoring regime proposed by the Applicants and the Council during witness conferencing. Ms Ongley advised, at a later date, that this information had been issued on a 'without prejudice basis'. Both Williamson Water & Land Advisory (**WWLA**) and the Council have responded that the further information circulated by the Department is not on its face sufficiently relevant to the management of adverse effects of the groundwater takes to satisfy the test in Section 108AA RMA and justify the additional monitoring sought. Nevertheless, WWLA assumes that the Department's interpretation of 'jointly agreed' schedule of tasks includes those which the Department circulated on 16 December 2020.
4. The Department has indicated<sup>1</sup> that it would have difficulty moving into meaningful planning discussions without an understanding of the ambit of a 'jointly agreed schedule of tasks'. WWLA's understanding of the wider 'jointly agreed schedule of tasks' is that it includes those which were '*identified through Minute and Direction #2*

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<sup>1</sup> Email S. Ongley (the Department) to M. Letica (Applicants Planner) on 11 February 2021, RE *Process matters – 24 consent applications (Aupouri Aquifer)*.

*and reported on by Mr Williamson in his supplementary evidence dated 28 September 2020*<sup>2</sup>. In contrast, WWLA's understanding is that the Department considers a wider task list to include additional tasks raised on 16 October 2020 and additional without prejudice tasks of 16 December 2020.

5. To bridge this gap, the Applicants have clarified that it is happy for planning conferencing to address all of the Department's proposed additional tasks, but that its hydrogeological evidence is that these tasks are not required to be implemented. The Applicants have also suggested further hydrogeological conferencing on the Department's additional tasks (16 October and 16 December 2020) to further explain why these tasks are not warranted on the basis of hydrogeological evidence. The Department's hydrogeological expert would be invited to attend.

#### **The Applicants' Way forward – Facilitated conferencing**

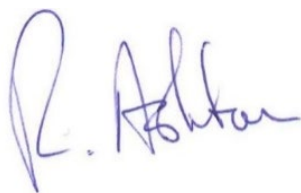
6. Although there seem to be some technical matters from the task list which remain unresolved, the plan to address the unmapped wetland issue has been resolved as is clearly documented in Task 6 of the 16 December 2020 JWS. The position for the Applicants is that there is a sound basis of technical evidence for the parties' planners to conference to determine whether, in their opinion, the GMCP is sufficient for the purpose outlined in Paragraph 4 of Direction #3, or could be, with further indicated refinement, after which they are to advise the Panel accordingly.
7. A key expectation in moving into conferencing on the consent conditions with the Department and the Council is that the Environment Court Practice Note 2014 should guide these interactions. In this regard, Ms Marlene Oliver was engaged at the request of the Department, at the Applicants' expense, as an Independent Facilitator.
8. While the Department had earlier indicated a preference to use an Independent Facilitator for both expert witness conferencing and planning conferencing (see Annexure A), counsel for the Department has since retracted this request in respect of the planning conferencing. As was indicated in the end of year Joint Memorandum, the Applicants' strong preference is to retain the services of Ms Oliver as facilitator for planning conferencing. The Applicants are carrying the cost of Independent Facilitation and do not wish to spend additional downtime and money introducing and briefing a new Independent Facilitator to this case (as was mentioned by the Department if Independent Facilitation were to continue (see Annexure B)).

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<sup>2</sup> As specified at Paragraph 7 of Minute #4

9. The Applicants trust that this memorandum provides a helpful update to the commissioners as to the status of matters. The Applicants are hopeful that arrangements as to further conferencing can be promptly agreed between the parties. If this is not the case, then directions will need to be sought from the commissioners to chart the way forward.

**DATED** this 2<sup>nd</sup> day of March 2021



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**Andrew Green / Rowan Ashton**  
Counsel for the Applicant

## Annexure A



Martell Letica &lt;martell.letica@wwla.kiwi&gt;

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## Anapouri Aquifer consent applications

1 message

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**Sarah Ongley** <sarah@ongley.co.nz>

23 October 2020 at 14:50

To: stuart@nrc.govt.nz

Cc: Alissa Sluys &lt;alissas@nrc.govt.nz&gt;, Martell Letica &lt;martell.letica@wwla.kiwi&gt;, Stephanie Kane &lt;stephanie@landsandsurvey.co.nz&gt;, Lisa Sutherland &lt;lsutherland@doc.govt.nz&gt;

Dear Stuart,

Cc: Martell Letica, Stephanie Kane, Alissa Sluys,

In the context of the above applications, DOC experts are engaged in conferencing. The scope of that engagement, as directed by the Hearings Commissioners, is set out below in this email.

The purpose of this email is to request that the Northland Regional Council provide a Facilitator for this conferencing. Currently I understand that one of the Council's technical experts Brydon Hughes is undertaking this task. With no disrespect to Mr Hughes, it is very difficult for an expert involved in the conferencing to also act as Facilitator. DOC's experts are experiencing some communications difficulties and consider that a Facilitator would help to ensure that all experts views are heard/communicated. For example, there appears to be a discrepancy between what NRC and DOC's ecologist consider as part of the 'plan', versus the Applicant's hydrologist. I have recently had the comment (from the Applicant's planner) that DOC has not completed one of its task assignments and I have spoken to the relevant expert who says that is an unfair representation of what has occurred.

DOC considers an Independent Facilitator would also be very valuable for the planning conferencing that is yet to occur. An example of a problem that has occurred here is ostensible planning conferencing between the Applicant's Planner and the Council's Planner (producing a statement) without DOC's planner being present. The Applicant and NRC planner may have thought this was unimportant, but it indicates a failure to appreciate the nature/procedures for expert conferencing.

DOC realises that this will involve more resources but considers that this is required if conferencing is to be effective and enduring. Ideally this person would be independent from the parties but if it is to be a NRC person, the more important matter is that they have experience/knowledge as to what is involved in expert conferencing.

### Directions from Commissioners Minute #3 dated 16.09.20:

4. We note that further caucusing around areas of agreement and disagreement may be necessary as part of the process, but that is not the end point that is now required.

The Panel requires the parties' relevant experts to agree an overall plan for resolving this issue and then to be advised whether that plan is sufficient in itself for

incorporation as an adaptive management condition (if granted) or, alternately, could

be implemented and completed within a reasonable time period and the results

confirmed before final decisions are made on the applications.

5. Having considered that request we make the following directions:

(a) The hydrogeologists for the Applicant, NRC and DoC, together with DoC's ecologist and, as necessary the Applicant's and NRC's ecologists, are to confer with the intention of **developing an agreed plan to address the wetland issue.**

(b) When that plan is sufficiently developed, **planners for those parties** are to confer to determine whether, in their opinion, the plan is sufficient for the purpose outlined in paragraph 4 above, or could be with further indicated refinement, and advise the Panel accordingly.

Can you please consider this request and revert to either myself or Lisa Sutherland (DOC's Legal Advisor). We look forward to hearing from you.

Thank you

Sarah Ongley

(Counsel for the Director-General of Conservation)

**S J Ongley**

**Barrister**

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## Annexure B





Martell Letica &lt;martell.letica@wwla.kiwi&gt;

## Aupouri Groundwater Consents

1 message

**Herb Familton** <hfamilton@doc.govt.nz>  
To: Martell Letica <martell.letica@wwla.kiwi>

16 December 2020 at 16:53

DOC appreciates that there has been good progress in identifying the wider task list and technical conferencing as required by Commissioners. We have received a number of finalised Joint Witness Statements today; noting this is 5 working days before Christmas close down, and that there is one report on additional monitoring to be received.

Further to your request for the planners to confer before Christmas, there is one further essential consideration necessary before the parties' planners can confer in a fruitful way. This step was summarised by Sarah Ongley on November 18 in an email to Marlene Oliver suggesting it was included as a covering note as part of Technical Conferencing:

***"...In relation to the tasks, the Technical Experts are requested to consider the following so that the Planners may consider whether the consents are receptive to an 'adaptive management' set of conditions:***

- ***Whether the relevant task(s) could be implemented and completed within a reasonable time period and the results confirmed before final decisions are made on the applications. (This was requested by the Commissioner – if any or all of you consider this is possible, please set out what is the 'reasonable timeframe').***
- ***If not:***
  - ***the extent of the environmental risk (including the gravity of the consequences if the risk is realised) – broken down to each of the relevant risks;***
  - ***the degree of uncertainty with respect to the environmental risk;***
  - ***the extent to which an adaptive management approach could sufficiently diminish the risk and the uncertainty including:***
    - ***through the use of trigger levels to represent levels of effects that require a 'cease take'/'reduce take' should the trigger level be met or exceeded;***
    - ***the ability to set appropriate 'trigger levels' before baseline data is collected;***
    - ***the extent to which actual and potential impacts would be reversible e.g. through a 'cease take'/'reduce take' requirement & the estimated timeframe for reversing such impacts.***
  - ***Any other comments you have on the possible use of adaptive management conditions, within your field of expertise...."***

DOC technical experts will now consider the matters above which will assist DOC's planner (and legal counsel) to then confer in the new year. We consider this is a fundamental precursor to a discussion on adaptive management in accordance with current law. As Christmas and holidays are upon us all (and our Planner is currently injured) we do not anticipate completing this step until sometime in the week of 18<sup>th</sup> January.

We appreciate the offer to retain a facilitator but reiterate that we do not believe one is necessary in order for us to 'confer', and then our preference is for Mr Geoff Sharp. If a facilitator is deemed necessary by Commissioners, we would like the opportunity to discuss how the current process is working before proceeding.

Kia pai tō rā

(have a good day)

Herb Familton | BA (Hons) MRRP Member NZPI

RMA Planner | *Kaiwhakamahere Penapena Rawa*

Planning, Permissions and Land Unit | *Wahanga Whakamahere Tutohu*

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