BEFORE THE NORTHLAND REGIONAL COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (the **Act**)
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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CLOSING SUBMISSIONS OF COUNSEL ON BEHALF OF THE APPLICANTS

DATED 21 JUNE 2021

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MAY IT PLEASE THE HEARING PANEL

1. INTRODUCTION

1.1 These closing submissions are filed on behalf of the Applicants.

1.2 Since this hearing was adjourned in September 2020, there has been a significant process of engagement between the Applicants, the Department of Conservation (**DoC**), and the Northland Regional Council (**NRC**). This process has enhanced the information base in support of the applications in relation to wetland Areas of Interest (**AOIs**) and refined the proposed conditions of consent and Groundwater Monitoring and Contingency Plans (**GCMPs**). The Applicants are grateful for the engagement in relation to those matters. These submissions seek not to unnecessarily repeat material addressed in the joint witness statements and the supplementary section 42A report. They focus on the key issues remaining in dispute.

1.3 There remains a fundamental disagreement between NRC and the Applicant on the one hand, and DoC on the other, as to the baseline information necessary to implement an adaptive management regime for the applications and the appropriate parameters of an adaptive management regime. This disagreement centers around the degree of hydrogeological connectivity between the proposed takes in the deep aquifer, with the shallow aquifer and surface water bodies. Given this key issue, the Applicants wish to record their disappointment that DoC's hydrogeologist only participated in the first expert conferencing session in September 2020 and was not retained to participate in the remainder of the expert conferencing sessions. The Applicants consider that had Mr Baker been retained for these later sessions, the residual issues before the Panel would likely be more focused.

1.4 The factual technical report prepared by WWLA on behalf of the Applicants demonstrates that there is very limited connectivity between the deep aquifer and the shallow aquifer because of the hydrogeology of these systems.[1] In fact, the hydrogeological evidence of DoC also supports these findings.[2] Any drawdown effects would need to propagate through the shallow aquifer before reaching surface water and having any effect on surface water. Furthermore, in elevated areas where water ponds in sand dune systems to form lakes, there is separation between the

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1 WWLA (2020). Aupouri Aquifer Groundwater Model. Factual Technical Report – Modelling. WWLA0184 | 4. 28 February 2020. Section 2.4.1.

2 EIC Tim Baker, Paragraphs 20 to 22.

water in the dune lake and the shallow aquifer groundwater level (e.g. Lake Waiparera, Lake Heather, Lake Rotoroa) [3] [4]. There is an array of groundwater level monitoring dating back to the late 1970's to the mid 1980's.[5] This monitoring forms an excellent baseline for assessing hydrogeological effects (in conjunction with the baseline in and around the Kaimaumau wetland established through the first 12 months of MWWUG monitoring).[6]

1.5 We therefore submit that the Commissioners have *"an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk"* such that the Supreme Court's threshold test in Sustain Our Sounds for the availability of adaptive management is met.[7] The ground truthing of potential wetlands within the key AOIs is not required prior to the grant of consent in order for there to be an adequate evidential foundation for adaptive management,[8] it is the foundation of hydrogeological information that is crucial.

1.6 Your task, under *Sustain Our Sounds,* is then to assess the following factors to determine whether adaptive management is consistent with a precautionary approach:[9]

(a) The extent of the environmental risk (including the gravity of the consequences if the risk is realised);

(b) The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

(c) The degree of uncertainty; and

(d) The extent to which an adaptive management approach will *sufficiently diminish* the risk and the uncertainty.

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3 JWS dated 22 September 2020. Aupouri Aquifer Water User Group (AAWUG) Expert Conferencing.
4 JWS dated 16 December 2020. Task 6 - List of AOI for Potential Wetlands Risk Analysis.
5 Section 2.7. WWLA (2020). Aupouri Aquifer Groundwater Model. Factual Technical Report – Modelling. WWLA0184 | 4. 28 February 2020.
6 JWS 16 December 2020. Task 9(f) Threatened Species. Para 5.
7 *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 at [125] [emphasis added]
8 Reply evidence of Ms Letica at paragraph 6.15
9 *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 at [129].

1.7 The RMA is not a "no risk" regime. The question is whether risk and uncertainty are *"sufficiently diminished."* As the Environment Court held in *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66:[10]

> Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.

1.8 In counsels' submission, the evidence demonstrates that the proposed framework for adaptive management sufficiently reduces uncertainty while adequately managing any remaining risk. There is strong evidence to establish that the surface water features and threatened species (if present, although the ecological experts seemed to lack hard evidence on their existence[11]) will not experience any effects unless any such effects propagate from the deep aquifer to the shallow aquifer (which itself is not an anticipated event on the hydrogeological evidence). The GMCP monitoring regime is intensively focused on the hydrogeological effects in both aquifers, providing the early time warning 'canary in the mine'.[12] Significantly, the statement from DoC experts Messrs. West, Drinan and Blyth, while questioning the adequacy of the proposed regime, agrees that *"shallow aquifer monitoring is a pragmatic means to indicate any signs of potential effects on surface waters"*.[13] There is therefore a consensus that shallow aquifer monitoring is an appropriate proxy for identifying any effects on surface water bodies. This is how avoidance of adverse effects is achieved as required by the policy framework.

1.9 These submissions now address:

(a) Legal issues raised in relation to:

(i) Decisions of the Environment Court in relation to the Proposed Regional Plan for Northland which have issued since the hearing was adjourned;

(ii) Resource Management (National Environmental Standards for Freshwater) Regulations 2020;

(iii) Section 104(3) and the relevance of existing the MWWUG consents.

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10 Citing with approval the Chief Justice of the Supreme Court of the United States of America in *AFL-CIO v American Petroleum Institute* (1980) 448 US 607 per Burger Cl

11 JWS dated 16 December 2020. Task 9(f) - Threatened Species. Para 6.

12 JWS dated 16 December 2020. Task 9(f) - Threatened Species. Para 4(iii).

13 JWS dated 11 December 2020. Relating to shallow aquifer monitoring in relation to potential surface water impacts. Para 7(a).

(b) The robust prediction of potential adverse effects on an individual and cumulative basis which underpins the Applications;

(c) The evidence to support the adequacy of the monitoring regime to inform the adaptive management system;

(d) The appropriateness of the decision making framework and mechanisms under the GMCPs; and

(e) Conclusion.

2. LEGAL ISSUES

Proposed Regional Plan

2.1 The decisions of the Environment Court in *Minister of Conservation & Ors v Northland Regional Council* [2021] NZEnvC 001 and [2021] NZEnvC 033 have amended Policy H.4.2 to provide a minimum water level for dune lakes of "no change in lake levels". An associated note states:

> Dune Lakes are subject to natural variation in lake levels. "No change" means that as a result of the abstraction of water median water levels, mean annual water level fluctuations, and patterns of water level seasonality (relative summer versus winter) remain unchanged.

2.2 As addressed in the reply evidence of Mr Williamson[14] and Ms Letica[15], the applications comply with this policy direction. Dune lakes will not be affected by abstraction from the deep aquifer and as such no analysis of ecological effects on dune lakes is required. Moreover, as addressed in Ms Letica's reply evidence, this policy is not in fact engaged by the applications.[16]

Resource Management (National Environmental Standards for Freshwater) Regulations 2020

2.3 The supplementary s42A report questions whether additional consents may be triggered under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) and suggests that the commissioners may choose to expand any consents granted to include consent under the NES-F. Legal submissions for DOC note that section 43B of the Act sets out how the NES-F

14 Reply evidence of Mr Williamson at 2.6
15 Reply evidence of Ms Letica at 3.5
16 Reply evidence of Ms Letica at 3.4

relates to resource consents and refers to case law to the effect that it is not open to the Commissioners to expand any consents granted to include consent under the NES-F.[17] However, as the Court noted in the Mt Messenger decision, it was not clear that consent under the NES-F was actually required. Section 43B prescribes certain circumstances in which resource consents will prevail over a national environmental standard:

> (5) A land use consent or a subdivision consent granted under the district rules before the date on which a national environmental standard is notified in the *Gazette* prevails over the standard.
>
> (6) The following permits and consents prevail over a national environmental standard:
>
> (a) a coastal, water, or discharge permit:
>
> (b) a land use consent granted in relation to a regional rule.
>
> (6A) Subsection (6) applies—
>
> (a) if those permits or consents are granted before the date on which a relevant national environmental standard is notified in the *Gazette*:
>
> (b) until a review of the conditions of the permit or consent under section 128(1)(ba) results in some or all of the standard prevailing over the permit or consent.
>
> **(7) This subsection applies to a resource consent not covered by subsection (5) or (6). The consent prevails over a national environmental standard if the application giving rise to the consent was the subject of a decision on whether to notify it before the date on which the standard is notified in the *Gazette*. However, the consent does not prevail if the standard expressly provides otherwise.**
>
> [emphasis added]

2.4 The decision to limited notify the Applications was made on 29 August 2019 before the NES-F was notified in the *Gazette* on 5 August 2020. The NES-F does not expressly provide that consents for applications notified prior to it being notified in the Gazette do not prevail over it. Therefore, if granted, the consents will prevail over the NES-F.

2.5 The NES-F remains a relevant consideration under s 104(1)(b)(i) RMA and is addressed in Ms Letica's reply evidence.[18] The applications are submitted to meet the intent of the NES-F.

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17 Director-General of Conservation v Taranaki Regional Council [2021] NZEnvC 27

18 Reply evidence of Ms Letica at Section 5

Non derogation and s 104(3) RMA

2.6 DoC's legal submissions of 4 June 2021 note that the Applicants have not provided written consents from MWWUG consent holders and suggest that "effects on those consent holders will need to be considered'. MWWUG consent holders were given notice of these applications and all but two chose not to submit.

2.7 The middle group GMCP retains a priority for MWWUG consent holders in the unlikely event that trigger levels are breached. This arrangement was presented to the MWWUG consent holders in a memorandum circulated 16 September 2020 and further discussed at a meeting held at Waiharara Hall on 18 September 2020 – an attendance log is attached as Appendix E to Ms Letica's reply evidence. Participants at the meeting confirmed that their preference for their resource consents was to place the additional takes in a separate GMCP to theirs rather than grouping them altogether as they felt this would 'open up' their resource consents in a way that differs to how they were initially granted.

2.8 The issue has been raised as to whether there is a risk of infringing the "non-derogation" principle in respect of existing consent holders. Non-derogation does not apply in the resource management context. In *Hampton v Canterbury RC* (2015) 18 ELRNZ 825, the Court of Appeal held that a grant of a water permit to one party could not amount to derogation from the grant of an earlier consent. The Court found that the High Court in the earlier case of *Aoraki Water Trust v Meridian Energy Ltd* (2004) 11 ELRNZ 207 (HC) was wrong to have relied upon the non-derogation principle because the statement by the Court that a water permit allows the holder to remove "property" even though "owned by the Crown" was incorrect. Furthermore, referring to s 122(1) it said that "since no property interest is purportedly given it is difficult to see how the non-derogation principle can apply". While the Court of Appeal rejected the basis for the non-derogation principle in *Aoraki Water Trust*, the Court emphasised that it was not suggesting that the wrong result was reached in that case. It noted that in that case it was undisputed that the resource was fully allocated to Meridian and other consent holders. It noted that as was said in *Aoraki Water Trust*, granting further rights to use an already over allocated resource seems the antithesis of the RMA's purpose.

2.9 As such, the issue for the Panel is whether the grant of the Applications would amount to an over allocation of the groundwater resource. It is submitted that the

evidence of Mr Williamson and Mr Hughes establishes that this is simply not the case.

3. PREDICTION OF POTENTIAL ADVERSE EFFECTS

3.1 Clause 1.6 of the National Policy Statement for Freshwater Management 2020 (**NPSFM**) requires the use of the best information available at the time. Clause 1.6 provides:

> 1.6 Best information
>
> (1) A requirement in this National Policy Statement to use the best information available at the time is a requirement to use, if practicable, complete and scientifically robust data.
>
> (2) In the absence of complete and scientifically robust data, the best information may include information obtained from modelling, as well as partial data, local knowledge, and information obtained from other sources, but in this case local authorities must: (a) prefer sources of information that provide the greatest level of certainty; and (b) take all practicable steps to reduce uncertainty (such as through improvements to monitoring or the validation of models used).
>
> (3) A person who is required to use the best information available at the time:
>
> (a) must not delay making decisions solely because of uncertainty about the quality or quantity of the information available; and
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> (b) if the information is uncertain, must interpret it in the way that will best give effect to this National Policy Statement.

3.2 The groundwater model developed by WWLA on behalf of the Applicants is the best available information. The model has pedigree, having been based on work of Mr Williamson that was started in 2000[19], then updated from the work of Lincoln AgriTech in 2015 for the MWWUG, updated again in 2019 to include the AAWUG, and then again in early 2020 after NRC discovered some of its survey data did not match the high-tech LIDAR survey recently flown at that time. Each phase of modelling was a progressive improvement in the robustness and accuracy of the model.

[19] EIC Mr Williamson. Para 5(S).

3.3 The applications have taken into account the modelling re-run in February 2020[20] in their analysis of potential impacts on surface bodies. Cumulative effects were re-assessed for all applications each time a new applicant was added or the model was changed. This includes the analysis undertaken in response to questions from the Commissioners.[21]

The Aupōuri Aquifer Model

3.4 The rerun of the Model does not illustrate an over reliance on modelling as contended by DoC.[22] Rather, the Model was rerun because of new data provided by the NRC that contradicted previous data supplied by it in relation to bore collar survey levels. The updated and re-run model improved in accuracy as measured by root mean square error analysis.

3.5 The presence of a degree of uncertainty is inherent in modelling.[23] However, any uncertainties associated with the Model are alleviated by in the first instance:

(a) calibration to a long period of measured groundwater level data; and

(b) utilisation of aquifer hydraulic parameters that are within the range obtained by the numerous bore test pumping exercises undertaken.

3.6 Residual uncertainty is ultimately managed and reduced over time by applying appropriate monitoring conditions that are cognisant of the development progression (i.e. as abstraction rates and volumes increase over time) under the GMCPs.

3.7 The calibration of the water balance (bucket) model for the Kaimaumau wetland (only), was undertaken to test the hypothesis that the wetland is rainfed, rather than through groundwater inputs because it was observed during mid to the later part of the 2019/2020 summer drought that water levels in the wetland receded at a far greater rate than that of the shallow aquifer adjacent to the wetland (Motutangi piezo).[24]

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20 EIC Mr Williamson. Para 28, 29, and Figure 4.

21 Statement of Supplementary Evidence of Jon Williamson for the Aupōuri Aquifer Water Permit Applicants. Dated: 28 September 2020. Section 2.

22 Legal submissions on behalf of the Director-General of Conservation 2 September 2020 at [16].

23 Legal submissions on behalf of the Director-General of Conservation 2 September 2020 at [18].

24 LWP (2020). Motutangi-Waiharara Water User Group. Staged Implementation and Monitoring Programme Review. Section 2.3. Figures 17 and 18.

3.8 DoC contends that "Conclusions are at a coarse scale"[25]. This contention is not accepted. The groundwater model resolution ranges 40 m in areas of interest (orchards, monitoring bores, wetland and streams) to 1,000 m in areas of little interest.[26] This is an appropriate level of granularity in relation to the nature of the applications and the effects which are modelled.

3.9 DOC refers to two examples to illustrate its concerns with an alleged "lack of refined analysis".[27]

3.10 First, DOC references the AEE for the Elbury Holdings Ltd application and has concerns that the small magnitude of drawdown (0.3 m) predicted in the shallow aquifer beneath Lake Rotoroa would affect the lake. However, as indicated in the potential wetland risk mapping work associated with Task 6, the lakes are perched above the regional groundwater table and therefore were not identified as being at risk. Lake Rotoroa itself has groundwater at approximately 10 m below lake water levels. Monitoring piezometers on Te Make Farm (previously named Sweetwater Station) confirm this. Similarly, the adjacent Lake Heather to the north has shallow groundwater levels at approximately 15 m below the water level of the lake. This clearly demonstrates the surface water lake systems are perched and therefore separate from the local shallow groundwater system.

3.11 Second, DoC assesses the Aupōuri Commercial Development application. DoC's concerns regarding surface water depletion impacts, which were premised on analyses undertaken in the Te Aupouri Commercial Development Ltd's (and Elbury) AEE. Subsequent to these applications being lodged and processed, further applications were lodged. The analysis methodology in these subsequent applications changed from the methods used originally to a full regional numerical model that could assess the cumulative effects (i.e. the Aupouri Aquifer Groundwater Model). All subsequent applications required cumulative effects assessments, and a number of rounds of s 92 questions were addressed by Mr Williamson on behalf of the Applicants with regard to cumulative drawdown effects. This same model was applied to address the cumulative stream depletion effects as summarised in Mr Williamson's Supplementary Evidence dated 28 December 2020. The section 92 responses to NRC dealing with cumulative effects

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25 Legal submissions on behalf of the Director-General of Conservation 2 September 2020 at [19].

26 WWLA (2020). Aupouri Aquifer Groundwater Model. Factual Technical Report – Modelling. WWLA0184 | 4. 28 February 2020. Section 3.1.

27 Legal submissions on behalf of the Director-General of Conservation 2 September 2020 at [31] and [36]

and Mr Williamnson's Supplementary Evidence supersede the effect assessments undertaken in the individual applications. The criticism in the DoC opening submission is therefore in respect of information that was out of date at that time.

4. EVIDENCE TO SUPPORT THE ADEQAUCY OF MONITORING

4.1 Counsel refer to the reply evidence of Mr Williamson which sets out why the additional monitoring sought by Mr Baker is not necessary.[28] Counsel for DoC refer to the tests in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL) and *Estate Homes Ltd v Waitakere City Council* 12 ELRNZ 169 in relation to the validity of conditions. It is noted that the dicta from these cases should be read in light of the statutory test in section 108AA(1)(b) RMA that conditions must be directly connected to 1 or both of the following:

(a) an adverse effect of the activity on the environment; and

(b) an applicable district or regional rule, or a national environmental standard.

4.2 This qualifies the “fair and reasonable” relationship test from *Estate Homes*. If the Panel finds that additional monitoring is warranted as “directly connected” with an adverse effect on the environment or an applicable rule, then this is within your jurisdiction to impose.

5. DECISION MAKING FRAMEWORK AND MECHANISMS UNDER THE GMCPS

5.1 Counsel for DoC refer to the Court of Appeal’s decision in *Trans Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86. This case arose in the differing statutory and factual context of an application for consents for offshore iron sands mining under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

5.2 It is acknowledged that, of course, the Commissioners must have sufficient baseline information and a substantive decision making function cannot be delegated to the administration of the GMCPs. However, the precedent which is on point in regard to these issues under the RMA is that of the Environment Court in *Burgoyne v Northland Regional Council* [2019] NZEnvC 28. That decision expressly endorsed the framework proposed in these applications as a lawful adaptive management regime. Those findings can be relied upon by the Panel.[29] Ms Letica’s addresses

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28 Reply evidence of Mr Williamson at 3.1 to 3.2

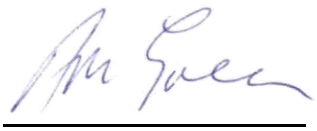
29 See for instance *Burgoyne v Northland Regional Council* [2019] NZEnvC 28 at [49-[53].

outstanding issues as to the detail of the proposed GMCPs. The mechanism of the GMCPs remains as endorsed by the Court in *Burgoyne*.

6. CONCLUSION

6.1. In conclusion, it is submitted that the Model provides a comprehensive and detailed assessment of the effects of the proposal which is supported by comprehensive baseline data. Residual uncertainty is adequately addressed through extensive and precautious monitoring conditions and the proposed adaptive management approach. As such, the Panel can be reasonably assured that directive policies requiring adverse effects on surface water to be avoided will be met.

DATED this 21st day of June 2021



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