BEFORE AN INDEPENDENT HEARING PANEL

OF THE WAIKATO REGIONAL COUNCIL

IN THE MATTER OF	the Resource Management Act 1991 (**RMA**)
AND	
IN THE MATTER OF	of the Proposed Waikato Regional Plan Change 1: Waikato and Waipā River Catchments

---

STATEMENT OF EVIDENCE of PATRICK GERARD LYNCH ON BEHALF OF WAIKATO REGIONAL COUNCIL AS SUBMITTER

Technical - Block 3

DATED 5 July 2019

Table of Contents

Introduction

1. My full name is Patrick Gerard Lynch.

2. I am the Manager of Investigations and Incident Response at the Waikato Regional Council ("**Council**") within the Resource Use Directorate **("RUD").**

3. One of the responsibilities of my role is to provide oversight in respect of regulatory matters particularly relating to matters of compliance and specifically dealing with non-compliance under the Resource Management Act **("RMA").**

Qualifications and Experience

4. I have a total of 31 years' experience directly related to regulatory, investigative and enforcement work. Nearly 14 years of this time was spent with the New Zealand Police where I was a qualified Detective. I also had some four years' with, the then, Ministry of Fisheries enforcing fisheries legislation, before commencing employment with Council in late 2005.

5. I am the author of the 'Basic Investigative Skills for Local Government' manual which is in its sixth edition. **(Available at** https://www.waikatoregion.govt.nz/services/regional-services/investigation-and-enforcement/basic-investigative-skills-for-local-government/**).**

6. Through the course of 2017 and 2018 I sat on an advisory panel for Ministry for the Environment ("MfE") assisting and overseeing the development of the Best Practise Guidelines for Compliance Monitoring and Enforcement of the RMA. **(Available at** https://www.mfe.govt.nz/publications/rma/best-practice-guidelines-compliance-monitoring-and-enforcement-under-resource).

7. I confirm that I am familiar with the Code of Conduct for Expert Witnesses as set out in the Environment Court Practice Note 2014. I have read and agree to comply with the Code. Except where I state that I am relying upon the specified evidence or advice of another person, my evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.

Scope of Evidence

8. Council's original submission on Proposed Plan Change 1 (PC1), dated 7 March 2017, raised the importance of effective implementation of the proposed rules from a compliance and enforcement perspective (see Submission Sections: Parts 2.1, 2.1.1 and 2.1.2, and Submission Points: 124, 125, 131, 132, 133, 140, 160/161, 175, 182, 221).

9. I understand that the Panel has received evidence from a number of submitters regarding compliance and enforcement matters. My evidence provides a brief commentary on the implementation of the rules contained in Plan Change 1 (PC1) from this perspective.

10. The specific aspects of PC1 that I address include:

    a. The use of Overseer in a regulatory context;

    b. The use of Good Farming Practise in a regulatory context;

    c. The use of minimums standards in a regulatory context;

    d. Permitted vs Consented regimes.

11. In addition, my Appendix 1 includes some commentary on Compliance and Enforcement Theory that may be of assistance to the Commissioners.

Use of Overseer

12. My understanding is that PC1 proposes to use the nitrogen reference point (NRP) as the point of compliance for a nitrogen limit, set either via a permitted activity rule or through a resource consent process. I understand the NRP would likely be calculated by Overseer or another approved model.

13. However, I understand that it is not possible to know solely through the use of Overseer whether or not a party is meeting that NRP on any given day. That being the case, I would not consider a NRP, in itself, to be a sound basis for rule compliance.

14. What can be known, and proven by both the regulated party and the Council, is whether the inputs that have contributed to reaching that NRP are being met. Therefore an input based condition of a rule or resource consent could potentially form the basis for compliance expectations.

15. If the regulation is to use inputs as primary means of determining compliance, it will still be necessary to ensure that the wording of the regulation is such that subjectivity is removed or reduced to the extent practicable; and the expectations on the regulated parties are absolutely clear as to how to achieve compliance.

Use of Good Farming Practice

16. My understanding is that there is a proposal to incorporate Good Farming Practice (GFP) into PC1 so that farm environment plans would be developed based on the principles of GFP. I also understand that the application of GFP would likely differ from farm to farm.

17. If there is an expectation that the requirements of GFP are able to be enforced, the exact wording of any rule that refers to GFP, and indeed the GFP's themselves, would become critical.

Minimum Standards

18. If the commissioners decide to incorporate GFP into farm environment plans then it may also be beneficial to craft a series of minimum standards. Minimum standards can be prescriptive, without subjectivity, and potentially could be aimed at the environmental 'low hanging fruit' or obvious and generally accepted high risk activities.

Permitted vs Consented

19. Determining whether a regulation should sit within a permitted activity regime or requiring consent to authorise the activity is also an important consideration.

20. In my experience one of the key implementation challenges that exists with a permitted activity regime, as opposed to a consented regime, is that in a consented regime the resource user has

had to engage one-on-one with the regulator to be able to authorise their activity. This process helps ensure that the resource user has a heightened understanding of what the expectations are on them in respect of meeting their regulatory requirements.

21. However, in a permitted activity regime there is usually no requirement to engage with the regulator at all. There is simply an assumption that the resource user will be aware of the permitted activity rules and will voluntarily and proactively comply with the conditions that govern the use of that permitted activity. In my view, a permitted activity regime should be reserved for very low risk activities that do not, individually or collectively, have a significant detrimental impact on sustainable management of natural and physical resources.

Appendix 1 - Compliance and Enforcement Theory

23. By way of scene setting it may be helpful to understand some aspects of compliance and enforcement theory and practise.

24. The regulatory model, which supports sustainable management of natural resources, can be described as sitting within a three-stage cycle, the components of which can be termed ‘science’, ‘policy’ and ‘compliance’.

25. These components revolve around the aim or objective of the sustainable management project. The concept being that good science, or facts, will help inform policy. If the policy is correctly written, based on good science, then compliance with that policy will ensure the project objective(s) will be met.

26. As somewhat of an aside, in my experience, a consideration in this model that is often overlooked at the science and policy stage is truly accounting for non-compliance. There are very few, if any, regulatory settings that can boast 100 percent compliance. In my view, the inevitable proportion of non-compliance is generally not taken into account when forming policy condemning the model to never being able to meet its objective.

27. Appendix 2 illustrates the contemporary regulator’s approach to achieve the highest likelihood of compliance, and thereby positive behaviour change. It suggests that the best chances of positive behaviour change in a regulatory setting is to take a comprehensive spectrum approach. This is the approach that the Resource Use Directorate (RUD), the regulatory arm of the Waikato Regional Council, strives towards.

28. This approach means that a regulator needs to be able to identify those who are early adopters of regulation, in fact may be in advance of regulation or exemplar in their adoption. A high performing contemporary regulator would ensure that those parties are recognised and rewarded, or incentivised, in some meaningful and public way.

29. For various reasons people will lapse into non-compliance. A vital component for any modern regulator is that a comprehensive education and communication package is in place to ensure that those who are simply not conversant with the regulations, or the need for them, are provided with meaningful and timely information to encourage them to make the decision to comply.

30. A full spectrum approach to regulatory compliance also must have the ability to respond to heightened, or more serious, incidents of non-compliance. Generally the respective legislation will provide a number of enforcement tools that will allow the regulator to take a graduated approach to enforcement where each individual case can be visited on its own merits and the appropriate enforcement tool used.

31. It is vital that a credible contemporary regulator has in place, or at least supports, all of these components.

32. It is wrong to assume that a regulatory setting has a sole focus of enforcement as the only tool available to encourage compliance.

33. This point generates a completely standalone discussion as to whether something should be a regulation in the first place or left as a guideline. Obviously, there is no scope to require anyone to comply with a guideline. If something is purely a matter of choice, free of consequence, then many will simply not meet the requirements of the guideline.

34. However, there are challenges dealing with non-compliance in a regulatory setting. With regulation comes expectations in respect of compliance. Conversely, there are expectations in dealing with non-compliance.

35. When there is non-compliance under the Resource Management Act there are a number of tools available to the regulator to use to bring about behaviour change. We term these as directive tools and punitive tools.

36. Directive tools include abatement notices and enforcement orders which are directions for people to comply by ceasing or prohibiting a particular activity or taking a particular action.

37. On the punitive side of things there are formal warnings, infringement notices and prosecution. Though formal warnings do not sit in statute they are available and can be used for various levels of offending. The RMA infringement notice regime was introduced for the purpose of dealing with minor environmental breaches.

38. The harshest form of punitive action available to a Regional Council, when there are breaches of the Resource Management Act, is to file criminal charges and initiate District Court proceedings against a Defendant or Defendants.

39. At a ratio level the use of prosecution is relatively infrequent and is reserved for the most serious breaches of the RMA. However, best practice for the regulator when gathering information about breaches must be carried out on all occasions because it is simply not known at the time the information is gathered what enforcement tool, if any, will be appropriate to respond to the any identified non-compliance.

40. To assist in describing the process associated with dealing with non-compliance, including the enforcement options available, the formal Enforcement Policy of the Waikato Regional Council can be referred to. **(Available at https://www.waikatoregion.govt.nz/services/regional-services/investigation-and-enforcement/enforcement-policy/**)

41. If an allegation of offending is made the onus, or burden, of proof sits solely with the regulator.

42. That means that should a Defendant defend the RMA charge that they are facing then they need not proffer a specific defence but can simply put the regulator to the test of proving the allegation.

43. As prosecutions taken under the RMA are criminal prosecutions, they also are required to meet the criminal standard of proof. That being that the regulator is required to prove each ingredient, of each offence, beyond a reasonable doubt to result in a successful prosecution.

44. The same onus and standard apply should a person, or company, defend an RMA infringement notice.

45. Even the content and form of an abatement notice, which technically has a relatively low legal threshold for issuing, can potentially be challenged to the extent of the criminal onus and standard of proof.

46. What that means for any derivative regulation that comes from the RMA, whether it be a rule in a regional plan, a consent condition, or a national environmental standard is that it must be written in such a way to be able to be understood clearly by the parties being regulated, but also equally identifiable by the regulator as to whether the party is compliant or non-compliant in any given situation.

47. Unfortunately many current rules do not meet this standard and all care should be taken to ensure new rules do not also fall short.

48. What this means in respect of the current proceedings is that any aspects of Plan Change 1 that have a regulatory basis need to be written in such a way that land users can understand clearly how it is they can be compliant, at any given time, and likewise that the regulator is able to assess that compliance for themselves, without any input or information whatsoever from the regulated party.

49. The clarity of rules, and importantly definitions within rules, becomes absolutely paramount. If required I am able to provide generic examples of what a 'good rule' looks like and what a 'poor rule' looks like. A poor rule means essentially that the regulated party cannot necessarily even know whether they are compliant or not and hence it becomes unenforceable and all expectations around compliance are lost.

50. It is important to remember that each breach of the RMA needs to be treated on a case-by-case basis. The RMA is somewhat of a blunt tool in that it is very simple to breach the RMA, so quickly the regulator has to apply a process of determining 'what does that mean and what makes it serious'. To aid in the decision-making once there is a breach Regional Councils have developed a set of factors which are relevant to gather information on to determine the seriousness of this breach. The list of factors are contained in the aforementioned Enforcement Policy**.**

51. It is not appropriate to take a paint by number or matrix-type approach to the decision-making as the individual circumstances around each of these factors differs from case to case. It is a matter of the regulator weighing and balancing what is the appropriate action to take, if any, following the identification of a breach and gathering the information associated with that breach.

Appendix 2 – Contemporary regulators approach to compliance