

**BEFORE THE INDEPENDENT HEARINGS PANEL**

**IN THE MATTER**

of the Resource  
Management Act 1991

**AND**

**IN THE MATTER**

Plan Change 1 to the  
Operative Waikato  
Regional Plan

**STATEMENT OF EVIDENCE OF MURRAY KIVELL**

**FOR THE SOUTH WAIKATO DISTRICT COUNCIL**

**AND**

**THE MATAMATA – PIAKO DISTRICT COUNCIL**

**BLOCK 2 HEARINGS**

**PART C1-C6**

**Submitter Number: 72892**

**Submitter Number: 73419**

Dated: 3 May 2019

## **A. INTRODUCTION**

1. My name is Murray Spencer Kivell. I am providing planning evidence on the Block 2 Topics of Plan Change 1 to the Operative Waikato Regional Plan. I provided and presented a statement of evidence dated 15 February 2019 on Block 1 matters to the Panel on 18 March 2019. My experience and qualifications are set out in section C of that evidence-in-chief.
2. In this evidence I consider the relevant South Waikato District Council (SWDC), and Matamata-Piako District Council (MPDC) submission points on the topics included in Block 2 of the hearings from a planning/resource management perspective.
3. In doing so, I remind the Panel of the evidence of Mrs Jenny Shattock, the Mayor of South Waikato and Mr James Thomas, the Deputy Mayor of Matamata-Piako District Council who presented in the Block 1 hearings. Their evidence underpins and therefore is relevant to much of my planning commentary that follows.
4. I make reference to the statement of evidence on Block 2 topics by Mr Gray Baldwin, a South Waikato District Councillor, a farmer and business person regarding his appraisal of the rules based on his experience in farming and commerce in the district.

## **B. EXECUTIVE SUMMARY**

5. This statement focuses on the questions of the interpretation and the practical application and implementation of Plan policies and rules as methods to give effect to Regional Plan Change 1 (RPC).
6. In summary:
  - a. The provisions as amended are better grounded in the practical application of the concept of sustainability and sustainable management;
  - b. A better balance has been established between the use of the 'carrot and stick' approach that can 'reward' good land managers rather than hinder primary production activities through blanket regulation and the imposition of unnecessary compliance costs;

- c. The move to incorporate Good Farming Practices (GFP) is assumed to be made with reference to *Good Farming Practice: Action Plan for Water Quality 2018*, and an enhanced capacity for Farm Environment Plans (FEPs) to manage property-specific mitigation to promote reduced contaminant discharges in the amended policy framework are both supported. The move to acknowledge NRP as a guide to manage the direction of change for nitrogen leaching is also supported. These reflect three significant and positive policy adjustments in my opinion.
  - d. The rules have been refined yet broadened in their scope to provide for a clearer definition for Permitted Activities and the cascading of the activity consenting classes in a more understandable way. There has therefore been an improvement in the rule structure.
7. However, while heading in the right direction challenges remain with the rule drafting, their interpretation and threshold setting. Both Councils' submission points re-stated in section D therefore remain relevant because the section 32 effectiveness and efficiency tests still need to be satisfied – can the amended rules be understood and applied by land managers to determine whether their activity/activities is/are permitted or is resource consent required, still remains the 'litmus test'.
8. To present my review, I restate the 'merits-based criteria' developed by the Councils to aid with their community focused assessment of the Plan Change (Section D) and then review the Policy framework and Rule framework (Section E) and suggest the revision of some provisions. My Conclusion is presented in Section F.

### **C. CODE OF PRACTICE**

9. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note 2014 and have complied with that practice note in preparation of this report. I agree to comply with it in presenting this report and any evidence at the hearing. The opinions and assessment within this report are within my area of expertise, except where I have stated my reliance on other identified evidence. I have considered all material facts that are known to me that might alter or detract from the opinions I express in this evidence.

## **D KEY THEMES UNDERPINNING A MERITS BASED APPROACH**

10. I re-state the five guiding principles that the two Councils have applied throughout this planning exercise to form their merits-based assessment of the Plan Change provisions. They remain relevant to my consideration of the policies and rules. They are:
1. *Effects-based provisions that accommodate changes in land use activity, provide for multiple land use opportunities, innovation and diversification, and can be supported by sustainable land management practices.*
  2. *A sub catchment approach to managing the four contaminants.*
  3. *A sensible, practical, certain, fair and simple implementation regime with realistic timeframes for reporting and deadlines for compliance.*
  4. *Methods of implementation that are affordable to land owners and communities and minimises the impacts on the social, economic and cultural well-being of communities.*
  5. *An evaluation that can satisfy section 32 RMA to inform decision-making that the Plan Change and or alternative approaches are fit for purpose to promote sustainable management of natural and physical resources.*

## **E ASSESSMENT OF 'BLACK TRACK CHANGES' RECOMMENDED BY COUNCIL OFFICERS: BLOCK 2 - PARTS C1-C6: POLICIES, RULES & SCHEDULES (MOST)**

### High Level Observations

11. The recommended amendments presented in the s42A report provide a much-improved set of provisions and rules to achieve an implementable and therefore a workable regulatory framework for the Plan Change. The provisions as amended are better grounded in the practical application of the concept of sustainability that I discussed in my Executive Summary, at paragraphs 3-7 of my evidence in chief (EIC). However, while heading in the right direction, I still consider there remain questions and further refinements that can be made to those provisions and this is the focus on the following commentary.
12. Those refinements aim to meet the five principles outlined above.

## E.1 Policy Framework

13. I consider both Councils' original submission point(s) which were essentially identical submissions, with respect to each policy where relevant in the following format:
- Original submission point presented in table format (the Policy); and
  - Response (& Suggested Refinements to the s42A amended provisions).

### Original Submission Point: General

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policies: 1-17	<b>Oppose in part</b> General lack of clarity in the drafting of the policies leads to uncertainty about their application when considering future resource consent applications	Review, redraft to improve clarity, meaning and certainty of the policies for their application in decision making on resource consents.

### Response

14. The amended provisions generally enable land managers to manage, that is, self-manage primary production and forestry activities so better environmental performance and sustained behavioural changes in management practices can be achieved. A better balance has been established between the use of the 'carrot and stick' approach that can 'reward' good land managers rather than hinder primary production activities through blanket regulation and the imposition of un-necessary compliance costs.
15. The move to incorporate Good Farming Practices (GFP) that is assumed to be made with reference to *Good Farming Practice: Action Plan for Water Quality 2018* in the policy framework, and an enhanced capacity for Farm Environment Plans (FEPs) to manage property-specific mitigation to promote reduced contaminant discharges are both supported. The move to acknowledge NRP as a guide to manage the direction of change for nitrogen leaching on a dairy farming property is also supported. These reflect three significant and positive policy adjustments in my opinion.
16. My assessment with respect to the relevant policies is made in the context of the respective submission points lodged, and is as follows:

## Policy 1: Diffuse Discharge Management

### Original Submission Point

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWSDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policy 1: Manage diffuse discharges of nitrogen, phosphorous, sediment and microbial pathogens	Support in part. Meaning of the terms referred to in 'a.' and 'b.' respectively – 'low level of contaminant discharge' and 'moderate to high levels of contaminant discharge..'	Amend to incorporate an agreed, measurable and enforceable baseline for each of the four diffuse discharges from which these general terms can then be measured or benchmarked.

### Response

17. The amendments provide a more considered, practical yet informed policy response in six parts (a-b). This integrated policy approach is supported because, in summary:

- It moves away from the reliance on Overseer to set a permitted baseline for nitrogen leaching – that is, a reliance on an NRP as an absolute (and therefore sole) reference value to determine compliance (clause a2);
- It adopts and relies on the flexibility of management approaches provided in “Good Farming Practice” (GFP) to address local farm practices (clause a1), and therefore is supported;
- It enables/permits low level contaminant discharges for those activities proportionate to the amount of the discharge and the water quality improvements required (clause b.);
- It appears to band nitrogen discharge control to ‘high’ (over 75<sup>th</sup> percentile), ‘medium’ (assumed to be between the 50<sup>th</sup>-74<sup>th</sup> percentile), and ‘low’ (assumed to be less than 50<sup>th</sup> percentile) nitrogen dischargers (clause b1.) – however, it needs to be clear that these stepped reduction bands are in the context of the first stage 10% reduction targets; and
- It guides decision making on ‘land use change’ (clause b4.) albeit it still brings administrative challenges.

18. My remaining concerns are understanding:

- What is meant by the phrase “*Establishing, where possible, a Nitrogen Reference Point for all properties or enterprises*” in clause a2, and once established what is its purpose – I assume that it is to be as an indicator of the comparative change in NRP value for a property over time?

- What is meant by the terms ‘low level of contaminant discharge’, ‘moderate to high levels of contaminant discharge’ in clause b – I assume that the banding described in paragraph 17 above is for the purpose of providing that ‘definition’?
- Whether the determination of the 75<sup>th</sup> percentile is the most appropriate – I now understand that the 75<sup>th</sup> percentile is settled and is to be a simple ranking of each property’s NRP and therefore this approach is not sensitive to area/scale of the dairy enterprise; that is, it is improvement in the bottom 25% of properties that is required and not the bottom 25% of land area in a catchment supporting dairy that are required to reduce N levels to, at, or below the 75<sup>th</sup> percentile level;
- What is meant by ‘clear and enduring’ in clause b3; and
- What does clause b4 as a whole actually mean – it is difficult to interpret and therefore to guide decision making on resource consents, and in my opinion, it is not the “change” in land use that is critical it is the nature and scale of the resultant environmental effects that need scrutiny and the mitigation proposed to manage future discharges that are critical. The inference is that a reduction in all discharges is required and that may not be necessary at a sub-catchment level.

19. Therefore, I recommend clause b4. is redrafted to improve clarity and intention.

### Policy 2: Farm Environment Plans

#### Original Submission Point

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policy 2: Tailored approach to reducing diffuse discharges from farming activities	Support in part. Support reference to Farm Environment Plan as a management mechanism. Sub-clause ‘c.’ should inform on the means to provide for a Nitrogen Reference Point. Sub-clause ‘e.’ sets a blanket timeframe of 1 July 2026 for stock exclusion that may not be realistic to adopt on a property or enterprise basis and should be reviewed.	Amend ‘c.’ to read: <i>c... Establishing a Nitrogen Reference Point for a property or enterprise based on using industry or sector group accepted models or similar.</i> Amend ‘e.’ to read: <i>e. Requiring stock exclusion to be completed within the timeframes set out in a Farm Environment Plan.</i>

#### Response

20. The retention of the Farm Environment Plan (FEP) as the key management tool for farm specific actions to reduce on-farm contaminant loss is supported. The move away

from establishing a Nitrogen Reference Point (NRP) as an integral part of Farm Environment Plans (clause c.) is supported while acknowledging the points noted above in paragraphs 17 and 18. The deletion of the requirement for stock exclusion within a timeframe is also supported (clause e.). These are policy outcomes that will enable a farm manager to comprehensively assess what property-specific management options are available, can be implemented, can be afforded and the likely effectiveness of the works individually and collectively, to achieve the environmental enhancements sought.

21. While the move to incorporate GFP in Farm Environment Plans (FEPs) is supported for the reasons outlined in paragraph 362 of the s42A report, it is unclear what is meant by the phrase “*..and timeframed minimum standards for Good Farming Practices*”? It could be that when condition setting on a property-specific basis then minimum standards could be adopted; however, at a regional level are there generically broad standards that could apply? Paragraph 366 of the s42A report also alerts the Panel to this point.
22. The iterative and progressive nature for developing and refining FEPs and their capability to respond to changes in a dynamic farming /business world is also supported. The greater use and reliance on FEPs as a management tool also is a theme strongly advocated in Mr Baldwin’s evidence.
23. In this context, it is important to again note that in some sub-catchments reductions in all four contaminants may not be required and therefore FEPs should acknowledge this and focus on those ‘locally relevant’ contaminants. Affordability also remains a relevant consideration, so it seems reasonable and responsible to focus FEPs on getting ‘the best bang’ for a property owner’s money to achieve targeted contaminant reductions.
24. This is implied from my reading of the policy as a whole but if this is not the case then drafting amendments are necessary to make this point clear.
25. To address these shortcomings noted, I therefore recommend Policy 2 is further redrafted to provide clarity of intent.



### Policy 4: Future discharge reductions

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policy 4: Enabling activities with lower discharges to continue or be established while signalling further change may be required	Support in part. Clarify meaning of the term 'new low discharging activities'. Clarify meaning of the phrase '.. provided that cumulatively the achievement of Objective 3 is not compromised.' Explain why reference is made solely to Objective 3, and not Objectives 2 and 4.	Redraft as per the relief set out under Policy 1 to provide for agreed, measurable and enforceable base lines for each of the four diffuse discharges that are required to be monitored on a case by case basis. Amend to read: <i>Policy 4 Enable activities with discharges of low volumes and concentrations of contaminants to continue or to establish while signalling further contaminant reductions may be required.</i> <b>add amended text</b>

### Response

26. I support the deletion of the first sentence for the reason stated in the s42A report at paragraph 553 that it is a duplication of part of Policy 1.
27. However, and despite the relief stated above, I am now unclear what this amended policy intends, and therefore question whether the policy is necessary at all. This is on the premise that this first-step Plan Change is always going to be 'enabling' of this first step. It does not need stating that a future Plan Change(s) will be necessary to achieve the long-term water quality improvements striven for. In my opinion, the second (now first) sentence should also be deleted. Furthermore, this matter is acknowledged in Policy 5.
28. The new (third) sentence suggests that consent terms be set that are not going to be reliant of review clauses (section 128 RMA 1991) but will align with the anticipated timing of future Plan Changes. This seems to be an arbitrary policy stance to take in my opinion, and needs justification in a section 32 assessment.
29. This policy will therefore pose challenges for Plan administrators along with further uncertainties and burdens to consent holders regarding the long-term viability of their activities if consent terms are capped on the basis of future Plan Change decisions. Ultimately, it may discourage rather than encourage desirable behavioural change and the uptake of innovative land management practices.

30. Further, to promote a policy that guides decision makers to grant ‘short duration resource consents’ (section 42A report, paragraph 557) on the basis of a possible future and un-specified Plan Change is not reflective of sound environmental practice in my opinion and is compounded by the evidential burden to demonstrate ‘clear and enduring ongoing reductions’ to achieve conformance with the policy.
31. Therefore, I recommend Policy 4 is further redrafted to provide clarity of intent or is deleted subsequent to its re-assessment under s32.

Policy 5: Staged approach

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policy 5: Staged approach	Support in part. Add the words to reflect that an intergenerational time period is at least 80 years and not just 80 years Add ‘...to minimise social disruption on a sub catchment or catchment basis...’	Amend to read ‘..targets set out in Table 11-1 will need to be staged over <u>at least 80 years..</u> ’ Amend to read: ‘...to minimise social disruption <u>on a sub catchment or catchment basis...</u> ’

Response

32. Policy 5 has been re-drafted. The redrafted policy has deleted explicit reference to the 80-year timeframe, accepts that a whole-of-community approach is necessary and critically in clause c. states: *‘the rate of change will need to be staged over the coming decades to minimise social, economic and cultural disruption...’* (Emphasis added)
33. This policy is of paramount importance given the divergent opinions presented to date regarding the status and interpretation of the Vision and Strategy in relation to Part 2 and section 5 RMA matters. I support this amendment to the extent that it addresses a point I emphasized in my EIC at paragraph 6:
- Moreover, while the Vision and Strategy may guide us with aspirational statements, the real test is with determining the preferred methods of implementation to achieve the overall sustainability purpose of the RMA and not just the Vision and Strategy.*
34. The point is that change to achieve and sustain improved environmental outcomes can only occur where economic, social and cultural wellbeing can themselves be sustained over time by people, communities and businesses.

Policy 10: Provide for point source discharges of regional significance

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO POLICIES (3.11.3)	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Policy 10: Provide for point source discharges of regional significance	<p>Support in part.</p> <p>Allows consented water users to continue for the duration of the term of their consent.</p> <p>Provide certainty for significant investment in publicly managed network infrastructure services such as water, stormwater and wastewater (3 Waters) by defining and including the term 'regionally significant infrastructure' in Plan Change, as sourced from Regional Policy Statement.</p> <p>Define and include the term 'regionally significant industry' in the Plan Change as sourced and further amended from Regional Policy Statement to provide clarity as to what this term means.</p>	<p>Retain with amendments that define:</p> <p><i>Regionally significant infrastructure means 'municipal wastewater treatment plants, water supply treatment plants and bulk water supply, wastewater conveyance and storage systems, municipal supply dams and ancillary infrastructure.'</i></p> <p><i>Regionally significant industry means 'an economic activity based on use of natural and physical resources in the region which have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits or a combination thereof. Regional significant industry includes:</i></p> <ul style="list-style-type: none"> <li><i>a) Dairy manufacturing sites;</i></li> <li><i>b) Meat processing plants;</i></li> <li><i>and</i></li> <li><i>c) Pulp and paper processing plants.</i></li> </ul>

Response

35. I agree with the policy change proposed insofar as it aligns the Plan Change definition with the definition of 'regionally significant infrastructure' from the RPS (s42A report at paragraph 1052), and therefore is supported.
  
36. I disagree with the conclusion in the s42A report regarding 'regionally significant industry' because it is at odds with the RPS guidance on this point (section 42A report at paragraph 1054). I maintain that it is appropriate to recognise at a policy level regionally significant industry such as dairy processing plants and pulp and paper processing plants because they are by their very scale of operation for example, the Fonterra plant at Lichfield or the Oji plant at Kinleith (both are in South Waikato District), significant in terms of employment and income at a district, regional and national level. And to further emphasize this point, the economic and employment profile provided as part of Mrs Shattock's evidence highlights the critical importance of these two primary production sectors to the district's wellbeing.
  
37. I continue to support the inclusion of both these terms in Policy 10 acknowledging that this would not preclude such industries from avoiding, remedying or mitigating adverse

effects from their operations as is required under other policy directives in this Plan Change.

## E.2 Rule Framework

38. There have been extensive revisions and deletions to the recommended Rules in Section 3.11.5 of the Plan Change. This does not readily enable a direct comparison to be made with both Councils' original submission points on the respective rules. For this reason, the original submission points are attached as an Appendix and apart from the general submission point below, I do not make further reference to them.

### General Submission Point

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO RULES	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SWDC & MPDC WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Rule 3.11.5 (comprising Rules 3.11.5.1-3.11.5.7)	<p>Oppose in part.</p> <p>There is an onerous and annual obligation on every landowner running a primary production enterprise to comply with these rules and conditions/standards.</p> <p>Proof of compliance may be at one point in time during the farming year and these rules do not take into account the dynamic nature of these farming enterprises.</p> <p>The costs associated with landowner reporting underpinned by the need for and cost associated with commissioning expert advice is onerous.</p> <p>It has not been adequately demonstrated that the s32 effectiveness and efficiency 'tests' support the adoption of all these rules and thresholds and how these rules will and can be enforced to assure their compliance.</p>	<p>Review the suite of rules to ensure rules that are understandable, robustly formulated, practical and able to be implemented by land owners and managers to achieve compliance and enforceable by the regulator.</p> <p>Examine alternative approaches that incorporate the use of performance standards for the range of primary production activities that are able to establish as 'small and low intensity farming activities' (currently defined under Rules 3.11.5.1 and 3.11.5.2) throughout the region.</p>

### General Observation

39. The rules have been refined yet broadened in their scope to provide for Permitted Activities and the cascading of the activity consenting classes in a more understandable way. There has therefore been an improvement in the rule structure.
40. However, challenges remain with interpreting the rules and applying the threshold settings. These above Council submission points therefore remain relevant because the section 32 effectiveness and efficiency tests still need to be satisfied – can the amended rules be understood and applied by land managers to determine whether

their activity is permitted or resource consent is required. This remains the 'litmus test' – are the rules the most “most appropriate” way to achieve the objectives of the Plan Change.

#### 3.11.5.1A Interim Permitted Activity Rule - Farming

#### 3.11.5.2 Permitted Activity Rule – Low intensity farming

#### Response

41. I support the deletion of the notified version of Rule 3.11.5.1 Permitted Activity for the reasons restated above in the two Councils' original submissions.
42. With respect to 3.11.5.1A however, I would suggest:
  - The deletion of the calendar dates as this adds confusion when the alternative wording will suffice; that is, retain “ *...or 6 months after this Plan becomes operative...*”;
  - The revision of clause .6 as it is problematic to determining compliance. This is because the clause still does not acknowledge the dynamic and complex nature of primary production activities in responding to seasonal, market and financial considerations for example. The performance standard is couched with four implied thresholds or triggers all of which will be subject to interpretation: firstly, the term ‘*...cumulative net total*’, secondly, the phrase ‘*...of change in land use*’, thirdly, ‘*...from that which was occurring at 22 October 2016*’ and fourthly ‘*...within the property or enterprise*’ for the three pre-selected land production/change options.
  - The ‘land use change’ clause (clause ‘6’) is conditional on being less than 4.1 hectares, and is problematic in both its application and interpretation – a point I discuss further below.
43. The challenge is for both the land manager and the regulator to ‘deduce’ whether there is compliance or whether a non-compliance requires the activity be subject to a resource consent. As with all rules, their interpretation must be clear and this is critical for determining the permitted baseline for a farming property under Rule 3.11.5.1A (Farming in the ‘interim’).
44. It is unclear what is the rationale for the 4.1-hectare threshold or trigger. It also is unclear how this will be interpreted. Overall, this rule is complex and confusing, and potentially

is extremely limiting in applying as a proxy for managing the effects of changing land use.

45. I illustrate this point by posing some hypothetical questions:

- If there is an additional 4.2 hectare increase in the land use to dairying for an existing dairy unit achieved through conversion from forestry (following harvesting on the property) then this land use change is caught? And what if the manager intends to plant trees on another part of the dairy unit in the foreseeable future when cashflow permits?
- If there is an additional 4.2 hectare increase in land use to dairying achieved through land purchase or leasing land from a neighbour, then this land use change is caught?
- If either of these two scenarios plays out in any subsequent year then this staged or sequenced land use change also is caught?
- If land use change is only 4.1 hectares in either scenario, thereafter any further land use change is caught by this rule and consent will be required?

47. These may be hypothetical examples, but the reality of farming is reflected in the progression in land use practices over two generations on the now dairy unit of Mr (and Mrs) Gray Baldwin and is more fully described in his evidence. The difference is that the scale of land use change has been considerably greater as he moves to a more mixed farming (forestry, dairying, maize production) enterprise. Mr Baldwin says that overall his contaminant discharges have declined due both to his farm management changes, the mitigation measures developed (riparian planting, feed pad and treatment system, and wetland are his examples) and the funding from his primary production activities that have enabled these physical 'upgrade' works to be made on his property.

48. In my opinion, these changes haven't been driven by regulation but by Mr Baldwin's passion to be a 'good' farmer, to care for his farming enterprise and farm environment, and to provide for the wellbeing of his family. These outcomes are inter-linked; each is dependent on the other to achieve and sustain these complementary outcomes.

49. Returning to administrative matters associated with this and the other rules equally, who triggers this consenting exercise and how would the consenting process work for a land manager and the regulator given the activity is likely to be triggered by seasonal

factors and its timing/implementation by financial considerations? Would a consenting process be triggered 6 months in advance by a farmer determining in the autumn to 'clear' land for springtime planting of grass for example? Any resource consent would need to be lodged and consented by the October to enable resowing to occur. Further, the onus on reporting (from the land manager) monitoring (by the Council and auditor) and auditing (the Council or auditor) will potentially be significant and burdensome for all parties. If not a permitted activity, is this a definable class of a consentable activity?

50. If this clause is meant to exclude dairy farming from this consenting regime then the insertion of commas might assist to improve its clarity:

*Any farming activity, other than dairy farming, to dairy farming*

51. My interpretation of 3.11.5.2 Permitted Activity Rule - Low Intensity Farming, is that this rule establishes the permitted baseline but, as is reflected in my comments above, and noted in the s42A reporting officer report at paragraph 210.4:

*Acknowledging that there are some activities that have low levels of losses of the four contaminants – these are difficult to define in a rule framework, but might be able to be described or thresholds set after considering the evidence.*

52. Mindful of these comments, when establishing the baseline under this Rule:

- What does clause 2A mean when referring to '...not form part of an enterprise'?
- What is meant by clause 2D which refers to 'No feedlots or sacrifice paddocks are used on the property'? The terms are not defined to aid interpretation.
- What is the rationale for the 5% trigger or cap for land to be used for 'cropping, including winter forage crops'; Has this been benchmarked from farming records across different land use classes and across the Region for example?  
  
Mr Baldwin's farming operations would repeatably be caught 'out' by this provision.
- What is the rationale for the stock unit triggers (6 stock units, 6-10 stock units) used in clause C.1 and clause C.3?; Has this been benchmarked from farming records across different land use classes and their applicability across the Region for example?
- Without having the triggers settled, I would support a change to the rule that would increase the degrees (of steepness) to which land can be cultivated and

the degrees (of steepness) under which grazing can occur in relation to clauses C.3.c and c.1. This also needs to be benchmarked based on fieldwork.

- For properties over 20 hectares, under clause C.f the annual provision of stock numbers, fertiliser application rates and animal feed brought on to the property and Overseer files suggest to me that situations will arise where some properties will 'fall in and out of' permitted activity status. How will this be recognised?

53. Again, I would suggest that Mr Baldwin's dairy unit operation would be very unlikely to fit this permitted activity rule notwithstanding that his NRP and contaminant discharge levels are likely to be comparatively low and declining from levels of even 5-10 years ago.

54. I therefore suggest that this rule providing for 'low intensity farming' needs further scrutiny to finetune a more reasoned and practical set of provisions.

#### 3.11.5.2A Controlled Activity Rule - Medium intensity farming (Option)

55. This rule establishes the second tier consenting regime for farming activities. My concerns with this rule again relate to:

- the assumptions underpinning establishing and relying on the 75<sup>th</sup> percentile to control nitrogen leaching – a point already discussed;
- the assumptions underpinning the 4.1-hectare trigger under clause 6 (which should refer to clause 9) - also a point already discussed; and
- the rationale for settling on '*18 stock unit per hectare and has not increased above the rate during the reference period*' under clause 8.b – a general point previously discussed.

56. This rule reserves a control for the Council to assess '*the content, compliance with auditing of the Farm Environment Plan*' (sub-clause i) and '*the actions and timeframes to achieve Good Farming Practices or better...*' (sub-clause ii). This introduces scope for the pragmatic consideration of farm system relevant approaches espoused under twenty-one principles (that are presented under six headings: General Principles, Nutrients, Waterways, Land and Soil, Effluent and Water and Irrigation) in the *Good Farming Practice Action Plan for Water Quality 2018*. The authors are essentially central



and regional government and selected sector groups and so represent a credible multi-party agency response. This approach seems to sit comfortably alongside the pathways outlined in the report *'As an Approach to Reducing Contaminant Losses from Farms in the Waikato and Waipa Catchment under PPC1'* dated 19 October 2018, authored by Rob Dragten when considering and applying GFP principles. Mr Dragten offers support at least in principle, for this approach too.

57. I also support such an approach as it strengthens the role for FEPs and the adoption of practical measures (the mitigations) by the land manager to deliver demonstrable improvements to the environment with the general support of the Council. This should give confidence to the public sector that environmental improvements are being made on a sustainable basis.
58. Again, with reference to Mr Baldwin's evidence, it is clear to me that in his case a FEP would be able to record the suite of proposed changes in on-farm land use practices (forestry, dairy grazing, cropping) along with the proposed 'whole of farm' mitigation measures, their performance expectations in association with their timing for installation and maintenance (and costs) and their anticipated overall effectiveness to decreasing the four contaminants in a prioritised way. Periodic auditing would still be required to confirm the environmental improvements gained onsite.

#### 3.11.5.3 Restricted Discretionary Activity Rule (Option) - Farming with a Farm Environment Plan under a Certified Scheme

#### 3.11.5.4 Restricted Discretionary Activity Rule – Farming with a Farm Environment Plan

59. I consider these two rule pathways together as it is unclear why there are two separate rules for the consenting of FEPs. Can they not be integrated under one rule approach with one set of discretions?
60. The discretion to achieve Good Farming Practices as part of the consent terms is appropriate.

#### 3.11.5.6A Discretionary Activity Rule

#### 3.33.5.7 Non-Complying Activity Rule

61. I consider these two rules together as they are drafted with any non-compliances under Rules 3.11.5.3 or 3.11.5.4 triggering the need either for a Discretionary or a Non-Complying Activity consent.

62. A breach of the two critical performance standards under either 3.11.5.3.5b or 3.11.5.4.7 triggers the Non-Complying activity status for a farming activity. The performance standard (or condition as it is referred to) is:

*There has been less than a cumulative net total area of 4.1 hectares of change in the use of land from that which was occurring at 22 October 2016 within a property or enterprise from:*

1. *Woody vegetation to farming activities; or*
2. *Any farming activity other than dairy farming to dairy farming; or*
3. *Any farming activity to Commercial Vegetable Production.*

63. I am not clear on the rationale, and do not support retaining the Non-Complying activity status for 3.11.5.7 when the 4.1-hectare trigger is, on the face of it, set at such a low threshold. As a consequence, this sets the bar at a high evidential level for land managers to secure consent for comparatively 'small-scale' changes in land use when the change is to dairying, accepting that land under dairy production and the potential for increased contaminant discharges is the 'target' land use activity.

64. The message I take from Mr Baldwin's evidence is that regulation needs to have practical workability, and recognise that flexibility and responsiveness to cope with changes are the cornerstone of farming. Put bluntly is the following one-line sentence at paragraph 30 in Mr Baldwin's evidence:

*'Influencing the rate of change by farmers solely by regulation will certainly fail'.*

65. The barriers for land use change or intensification should not be set too high as to inhibit change under a managed regime, and for this reason I endorse the rationale in Mr Baldwin's evidence at paragraph 46 that:

*'If your FEP clearly sets targets for the outputs of the four contaminants and you can comply with that FEP across the whole farm, why would land use change even require consent.'*

66. How would the Council administer this Rule having regard to the mitigation measures developed over the period 2000-2015 for example, as has been set out in paragraph 53 of Mr Baldwin's evidence. I contend that it is unlikely that Mr Baldwin would have proceeded with these 'environmental upgrades' under the proposed regulatory regime yet the picture painted to date suggests environmental gain is likely for all four contaminants as a result of his on-farm works.
67. I therefore consider there are demonstrable practical, administrative and enforceability reasons for the review of this rule, and to consider:
- at least the liberalisation of the activity status to Discretionary as sought in both Councils' original relief; and
  - whether there is any merit in retaining the land area change threshold and if so, what that threshold should be; and
  - whether the sciences can settle on four quantifiable/verifiable discharge output standards.
68. Overall, the Rule options needs review with respect to the section 32 obligation.

## **F. CONCLUSION**

69. The amended and recommended Rural policies and rules as provided by the s42A reporting team have improved their overall clarity and in some cases their interpretation and administration. However, given the provisions do impact on the management of all farming enterprises directly then the rules should be set to enable and foster innovation in management approaches through Farm Environment Plans, Good Farming Practices and regulation that provides for and does not direct the changes necessary to achieve the purpose of the Plan Change.
70. The five principles set out in Section D of my evidence continue to provide a useful yardstick to judge that refinements are still necessary to give farm and land managers confidence and certainty about their production enterprises in the future and the regulator the confidence to know that the direction of travel is towards the goals of this first-step Plan Change.

**Murray Kivell**

**3 May 2019**

Appendix 1: South Waikato District Council Submission (Rules)

**SOUTH WAIKATO DISTRICT COUNCIL SUBMISSION (ORIGINAL VERSION APPENDIX 1 TO SUBMISSION LODGED 6 MARCH 2017)**

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO RULES	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SOUTH WAIKATO DISTRICT COUNCIL WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
Rule 3.11.5 (comprising Rules 3.11.5.1-3.11.5.7)	<p>Oppose in part.</p> <p>There is an onerous and annual obligation on every landowner running a primary production enterprise to comply with these rules and conditions/standards. Proof of compliance may be at one point in time during the farming year and these rules do not take into account the dynamic nature of these farming enterprises.</p> <p>The costs associated with landowner reporting underpinned by the need for and cost associated with commissioning expert advice is onerous.</p> <p>It has not been adequately demonstrated that the s32 effectiveness and efficiency 'tests' support the adoption of all these rules and thresholds and how these rules will and can be enforced to assure their compliance.</p>	<p>Review the suite of rules to ensure rules that are understandable, robustly formulated, practical and able to be implemented by land owners and managers to achieve compliance and enforceable by the regulator.</p> <p>Examine alternative approaches that incorporate the use of performance standards for the range of primary production activities that are able to establish as 'small and low intensity farming activities' (currently defined under Rules 3.11.5.1 and 3.11.5.2) throughout the region.</p>
Rule 3.11.5.1 Permitted Activity Rule-Small & Low Intensity farming activities	<p>Point 4:</p> <p>Support in part</p> <p>4. Amend the provision: <i>The farming activities do not form part of an enterprise being undertaken on more than one property to make the provision specific to the two catchments only in the Plan Change area</i></p>	<p>Point 4 is amended to read:</p> <p><i>4. The farming activities do not form part of an enterprise being undertaken on more than one property <u>within the Waikato River and or Waipa River catchments.</u></i></p>
	<p>Point 5.</p> <p>Support in part.</p> <p>The term "grazed land" is not defined or described. It is necessary to define this term to improve the understanding and administration of this clause.</p>	<p>Point 5 is amended to clarify the meaning of the term 'grazed land' to mean <i>land that is fenced and in pasture throughout most/all of the year.</i></p>
	<p>Point 5:</p> <p>Oppose in part.</p> <p>Clarification of how this threshold of '6 stock units per hectare' was determined.</p>	<p>Evidence that the section 32 rationale confirms this is the preferred approach to adopt to achieve the objectives of the Vision and Strategy.</p>
	<p>Point 6:</p> <p>Support in part.</p> <p><i>No arable cropping occurs</i></p> <p>Clarification of when and how this performance standard is to be applied by the landowner and the regulator.</p>	<p>Review the reasons for the adoption of this performance standard.</p> <p>Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard</p>

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO RULES	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SOUTH WAIKATO DISTRICT COUNCIL WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
	Clarification of why this performance standard was adopted considering section 32 effectiveness and efficiency tests. Farming is a dynamic land use and varies in response to a variety of pressures annually and seasonally. Stock carrying capacity and land under arable cropping varies throughout the year and from year to year.	
	Point 7: Support in part. <i>7. The farming activities do not form part of an enterprise being undertaken on more than one property</i>	Point 7 is amended to read: <i>7. The farming activities do not form part of an enterprise being undertaken on more than one property <u>within the Waikato River and or Waipa River catchments.</u></i>
Rule 3.11.5.2 Permitted Activity Rule-Other farming activities	Introductory sentence. Support in part: Clarify how this threshold of '6 stock units per hectare' was determined for a permitted activity; and Clarify what the phrase <i>"..is used for arable cropping"</i> means and how this provision will be applied.	Review the reasons for the adoption of these performance standards. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
	Point 3a. Support in part. Amend the provision: <i>The farming activities do not form part of an enterprise being undertaken on more than one property</i> to make the provision specific to the two catchments only in the Plan Change area.	Add the words (underlined): <i>The farming activities do not form part of an enterprise being undertaken on more than one property <u>within the Waikato River and Waipa River catchments.</u></i>
	Point 3b.i and ii. Oppose the adoption of the term 'at 22 October 2016'. What does this actually mean for determining compliance and enforcement.	Review the reasons for the adoption of these performance standards. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
	Point 4a. Oppose. What is the Nitrogen Reference Point and is it to be applied as a standard requiring compliance or is it to be treated as a guideline?	Review the reasons for the adoption of this performance standard as a condition for a permitted activity. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
	Point 4c. Oppose. <i>No part of the property or enterprise over 15 degrees slope is cultivated or grazed.</i>	Review the reasons for the adoption of this performance standard as a permitted activity. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO RULES	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SOUTH WAIKATO DISTRICT COUNCIL WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
	What does this provision actually mean for determining compliance by the landowner and enforcement by the regulator?	
	Point 4e.i and ii. Oppose. The 5 metre and 3 metre separation distances from nominated water bodies is at variance to South Waikato District plan rules for riparian management under Rule 28.	Review the reasons for the adoption of these performance standards as a permitted activity. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
	Point 4d. Oppose. <i>No winter forage crops are grazed in situ.</i> What is the rationale and s32 justification for this intervention.	Review the reasons for the adoption of this performance condition as a permitted activity. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
	Point 5a.-c. Oppose. Annual reporting. What is the rationale and s32 justification for this intervention.	Review the reasons for the adoption of this performance condition for a permitted activity. Confirm that the approach meets the section 32 efficiency and effectiveness tests, otherwise delete the standard.
Rule 3.11.5.4 Controlled Activity-Farming Activities with a Farm Environment Plan not under a Certified Industry Scheme	Oppose in part. The adoption of ‘grandparenting’ nitrogen leaching when read in relation to Schedule C. This means the right to pollute is retained by the biggest polluters. The Council questions the fairness of this approach and promotes alternative approaches to address sustainable land and water management. There is insufficient justification in terms of section 32 to support this.	An allocation approach with rules and performance standards to manage nutrient discharges and water quality. Work with landowners, sector groups and communities to provide alternative practicable measures to achieve the same environmental outcomes.
Rule 3.11.5.7 Non-Complying Activity Rule-Land Use Change	Oppose. The Plan Change establishes the ‘existing environment’ to 22 October 2016 being the date of public notification of the Change. This in turn establishes the permitted baseline but is either a landowner or the regulator confident of this benchmark being established and agreed through the passage of the ten-year planning horizon. The rule effectively places a moratorium on land use change during the first ten-year planning horizon. The adoption of ‘grandparenting’ land use means the past or current use of land will govern its future use and this is contrary to the purpose of sustainable resource management. The Council questions the fairness of this	Review the reasons for the adoption of this approach and the justification under section 32 regarding the efficiency and effectiveness of this method and rule. Provide for the Land Use Change Rule to be at least (meaning no more restrictive than) Discretionary Activity. Work with landowners, sector groups and communities to provide alternative practicable measures to achieve the same environmental outcomes.

SPECIFIC PROVISIONS THAT COUNCIL SUBMISSION RELATES TO RULES	COUNCIL SUBMISSION Support/Oppose and with reasons	DECISION THAT SOUTH WAIKATO DISTRICT COUNCIL WOULD LIKE THE WAIKATO REGIONAL COUNCIL TO MAKE
	<p>approach and re-iterates the community's desire to promote alternative approaches to address sustainable land and water management. There is insufficient justification in terms of section 32 to support this 'high' activity status of Non-Complying.</p>	