

**BEFORE THE ENVIRONMENT COURT  
AT WELLINGTON**

**ENV-2016-**

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

**AND**

**IN THE MATTER** of an application for declarations under sections 310  
and 311 of the Act

**BETWEEN** **WELLINGTON FISH AND GAME COUNCIL**

**AND** **ENVIRONMENTAL DEFENCE SOCIETY INC**

**Applicants**

**AND** **MANAWATU-WANGANUI REGIONAL COUNCIL**

**Respondent**

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**MEMORANDUM OF COUNSEL ACCOMPANYING APPLICATION FOR DECLARATIONS**

**16 September 2016**

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**Counsel instructed**

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**May it Please the Court**

1. The Wellington Fish and Game Council and Environmental Defence Society Incorporated have made an Application for Declarations relating to the Manawatu Wanganui Regional Council's ("Respondent's") implementation of the rules and policies of the Manawatu Wanganui Regional Policy Statement and Regional Plan combined (the "One Plan").
2. This Memorandum sets out the Applicants' approach to the service of the Application, and indicates that the Applicants will seek urgency in relation to the hearing of the Application.

**Service**

3. Section 312 of the Act requires that an applicant for declaration serve notice of the application on "*every person directly affected by the application*" within five working days after the application is made. The Application lists the parties that are considered to be directly affected. These persons are:

3.1 The Manawatu Wanganui Regional Council.

3.2 Eighteen individual consent holders whose consents for intensive land use are appended to the affidavit of Ms Marr in support of the Application. These are consents that have been obtained from the Respondent through requests made under the Local Government Official Information and Meetings Act 1987 ("LGOIMA"), as described in the affidavit of Mr Gary Taylor. They are referred to here as 'example' consents and ten of these example consents are the subject of declarations sought (being the 2015 and 2016 consent examples).

3.3 Parties that most actively participated in the Environment Court hearings on the appeals on the One Plan Water Quality Topic, particularly relating to the issue run-off of nitrogen (N) from farming activities. The declarations sought in the Application relate to the interpretation of the rules and policy framework of the One Plan regulating that issue. Those

persons are Federated Farmers of NZ, Horticulture NZ, Fonterra, the Minister of Conservation and Mr Andrew Day.<sup>1</sup>

3.4 Dairy NZ, a party that has 'partnered' with the Respondent in consent application processes, as evidenced by the document "*Dairy Farming under the One Plan – Your guide to obtaining a land use consent for an existing dairy farm*" (Horizons Regional Council and Dairy NZ 2014).<sup>2</sup>

3.5 Iwi groups in the Region.

4. It is intended that these persons will be served individually.
5. It is expected that the Application will attract broad public interest including from other persons within the Manawatu Wanganui Region. This could include *other* persons that hold a consent under the relevant rules of the One Plan, or that may require a consent in the future.<sup>3</sup> Although such persons may become parties to the proceedings if meeting the requirements under section 274, it is not considered that these persons are "directly affected" such that individual service is required.<sup>4</sup>
6. In *Northland City Council v Auckland Regional Council A70/94* it was accepted that the public generally does not need to be served with an application for declaration, the Planning Tribunal stating (page 8):

*"Section 312 requires that an application for a declaration is to be served on every person directly affected by the application. In that regard I accept... that every person who lodged a submission ... on Chapter 4 of the proposed regional policy statement, and every person who has an interest in land in the vicinity of the proposed metropolitan limits, is not thereby directly affected by the application. It is to be remembered that what the Tribunal is being asked to do by this application is to declare what the law is. The Tribunal is not being asked to express any opinion about what the Regional Council's*

<sup>1</sup> The Environment Court issued its decision approving the terms of the One Plan on 25 March 2013: [2013] NZEnvC 45.

<sup>2</sup> Annexure E to Mr Peter Taylor's affidavit.

<sup>3</sup> Under Rules 4.1 - 4.2 for existing intensive land use and Rules 4.3 - 4.4 for *future* intensive land use.

<sup>4</sup> Within the meaning of section 312 of the Act.

*metropolitan urban limits policy should be. If anyone's interests are directly affected by the law the Tribunal declares it to be, that does not mean that person is directly affected by the application, even though he or she may have an interest in the application. Any person having an interest in the proceedings greater than the public generally would be entitled to be heard on them, having given the notice required by section 274."*

7. In *An Application for a Declaration under section 311 of the Act by Te Runanga O Ngai Tahu C133/2000* it was accepted that the public generally did not need to be served with a declaration regarding the need for a local authority to consult tangata whenua prior to notification of proposed policy statements or proposed plans. In that case, His Honour Judge Jackson directed service on local authorities in the South Island of New Zealand and Local Government New Zealand Limited.
8. Counsel notes that in the case *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council [2015] NZEnvC 219* the Court made directions for service of the proceedings in newspapers circulating in the New Plymouth District and beyond. However those proceedings included an application for enforcement orders which orders could have directly affected individual property owners in relation to notations on the New Plymouth District planning maps. The current Application is for declarations that seek clarification on requirements for consent processing under the rules of the One Plan regulating intensive land uses (agriculture). Other than the persons listed above, no other persons are considered to be directly affected, at least by the proceedings currently before the Court.

#### **Request for Urgency**

9. The Applicants consider that there are fundamental flaws in the approach that the Respondent has taken and continues to take in processing consent applications under Rules 4.1 to 4.4 of the One Plan. As Ms Marr states:

*"Instead of applying the natural capital approach set out in the policies and in Table 14.2 [of the One Plan], the Council appears to be*

*applying a 'grandparenting' and 'best management practice' or 'mitigation' approach to assessment. The current leaching as stated in the Applications is accepted, based on the information provided by the applicant on the farming system for the 2012/2013 year. However, I can see no evidence in the consent files that there has been any attempt by the Council to verify that current leaching. Reductions below this 'baseline leaching' are considered 'mitigations', and on the basis of the 'target' leaching being less than the 'baseline' leaching, the Decisions conclude that the intensive farm is implementing good management practice and that the environmental effect is reducing.*<sup>5</sup>

and

*"In my opinion an exception to the strong policy presumption that the cumulative nitrogen leaching maximums should be achieved should be accompanied by a detailed examination of the effects of that exception, and an examination of how that exemption will affect the achievement of the One Plan's water quality objectives."*<sup>6</sup>

10. The flaws that Ms Marr identifies in her evidence traverse the requirements under section 88, sections 104/104C and section 108 of the Act. The flaws are evidenced by example applications from the years 2015 – 2016.<sup>7</sup>
11. A Report considered by the Respondent's Environment Committee on 14 September 2016 indicates that 27 consent applications have been lodged with the Respondent and are presently being processed. A further 82 consent files are with consultants or awaiting to be assigned to a consultant. This is an immediate precursor to lodging of those consent applications.<sup>8</sup>
12. The evidence of Ms Marr is that consents processed under Rule 14.2 of the One Plan earlier this year, not meeting cumulative nitrogen leaching

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<sup>5</sup> Marr paragraph 119.

<sup>6</sup> Marr paragraph 112.

<sup>7</sup> For an Executive Summary of the issues arising under these sections of the Act, refer the paragraph 25 of Ms Marr's affidavit.

<sup>8</sup> As described in Mr Peter Taylor's affidavit. The latest numbers for consent processing are set out in Mr Taylor's affidavit paragraph 44 referring to Report 16-187.

maximums in Table 14.2, are being given terms of up to 17 years with little or no analysis of cumulative adverse effects.<sup>9</sup> Although review clauses are contained in the consents, the Applicants are concerned that the incorrect processing of consents is creating unrealistic long-term expectations for landowners. This is at the expense of water quality outcomes that have been thoroughly scrutinised by the Environment Court during the hearings on the One Plan appeals, and to which the Respondent has failed to have regard to in its decision making. The Applicants intend to request that the Respondent cease processing consent applications under Rules 4.2 and 4.4 of the One Plan except in accordance with the process outlined in Ms Marr's affidavit.<sup>10</sup>

13. The case-by-case assessment adopted for consent applications, as distinct from measurement against the limits in Table 14.2, creates a lack of consistency and transparency and potential inequities between consent holders.<sup>11</sup>
14. Given the above, following the standard period in which parties may join the proceedings (15 working days), Counsel intends to propose a confined evidence timetable to enable the Application to proceed to a hearing at the earliest possible time.
15. Finally, it is respectfully suggested that, given the extensive background, it would be desirable for the same Court that heard the appeals on the One Plan to hear the current Applications.

DATED this 16<sup>th</sup> day of September 2016



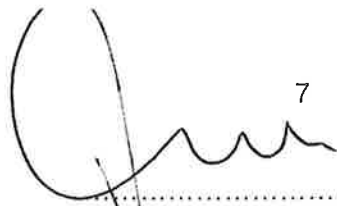
**Sarah Ongley**

**Counsel for the Wellington Fish and Game Council**

<sup>9</sup> Ms Marr's Table 2 and attachments set out the consent terms for the various consent examples.

<sup>10</sup> Summarised in her paragraph 166.

<sup>11</sup> Refer paragraph 42 of Mr Peter Taylor's affidavit in which the Respondent acknowledges that consistency and transparency is an issue.



John Burns

Counsel for the Environmental Defence Society Inc