BEFORE THE MANAWATU-WANGANUI REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER hearing of submissions to the Proposed 'One Plan' - LAND Section

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STATEMENT OF EVIDENCE
BY
DAVID FORREST

Introduction

1. My name is David James Forrest and I reside in Palmerston North. I am the Planner Principal of Good Earth Matters Consulting Limited, an environmental engineering, asset management, planning and resource management consultancy practice based in Palmerston North.

2. I hold the degrees of Bachelor of Arts (Hons) and Master of Science (Resource Management) and I am a full member of the New Zealand Planning Institute.

3. I have been engaged in planning and resource management practice for almost 30 years. In particular, I have been involved in the provision of planning and resource management advice for the preparation and administration of a number of District Plans in both the North and South Islands.

4. I have been requested by a Territorial Authority (TA) Collective (comprising the Horowhenua, Wanganui, Rangitikei, Ruapehu, Manawatu and Tararua District Councils) to prepare evidence in relation to common TA submissions to various aspects of the Proposed One Plan (POP).

5. I confirm that I have read and am familiar with the Code of Conduct for Expert Witnesses in the Environment Court Consolidated Practice Note (2006). I have approached the preparation of this evidence in the same way that I would for the Environment Court. I agree to comply with the Code of Conduct.

6. The evidence to follow covers the following matters:

   - RPS (Part I) Chapter 5, Polices 5-1 to 5-5
   - Plan (Part II) Chapter 12, Rules 12-2 and 12-3 in particular
   - Plan (Part II) Chapter 12, Policies 12-1 and 12-2
   - Plan (Part II) Chapter 12, Policies 12-3 and 12-4; Rules 12-1 and 12-3 to 12-6

RPS (Part 1), Chapter 5: Policies 5-1, 5-2 and 5-5

7. The Territorial Authorities (TAs) comprising the TA Collective, have made submissions concerning Polices 5-1, 5-2 (re Whole Farms Business Plans) and 5-5 (Codes of Practice) being more akin to methods rather than policies. The relief sought seeks to include the material from Policies 5-1, 5-2 and 5-5 in Part II of the Proposed One Plan, probably in Chapter 12.

Policies 5-1 and 5-2

8. Mr Percy, in his RMA Section 42A Officer's Report, in section 4.9.2 Evaluation, makes the following comment:
"The submitter requests that material from Policy 5-2 is included in the RP section of the POP. The submitter refers to the relationship between the RPS and the RP sections of the POP. This relationship is discussed in more detail in the Planning report by Helen Marr on the Overall One Plan. The POP already contains reference to the relationship between the two sections and it is not considered necessary to include material from this policy in Chapter 12 of the POP."

9. His recommendation is to *"reject submissions that request that cross references to other chapters are included (340/33)."*
The first point that I would make is that the submitter 340/33 (Manawatu District Council) was not necessarily asking that cross references to other chapters be included. What was requested was that the material from Policy 5-1 and 5-2 ought to be included in Part II of the Plan, probably in Chapter 12. It is my opinion that Rule 12-1 'Vegetation Clearance and Land Disturbance Not Covered by Other Rules', is required to give effect to a particular policy or policies and an objective. This requirement under RMA sections 67 and 68 has been discussed in my evidence to the Overall Plan section of these hearings. Given that Rule 12-1 specifically refers to 'Vegetation Clearance and Land Disturbance' being a permitted activity if it is carried out in accordance with a Whole Farm Business Plan, it follows that there ought to be at least one policy and one objective to which this rule relates. At the very least, there ought to be a cross reference to Policies 5-1, 5-2 and Objective 5-1. Whether this is done by means of appropriate cross referencing or whether it includes separate objectives and policies in the Regional Plan Section, Chapter 12, will be dependent on the outcome of the Hearing Committee's deliberations on matters pertaining to the Overall Plan and its form or structure. It is my opinion, as expressed in the Overall Plan Section of these hearings, that separate objectives and policies relating to specific rules in this chapter ought to be specifically included in this chapter and clearly linked.

RPS (Part I), Chapter 5: Policies 5-3 and 5-4

10. In Mr Percy's Officer's Report (page 43) under paragraph (i), he makes the comment that *"… three territorial authorities request that the land chapter is amended to make provision for the maintenance of infrastructure as a permitted activity, particularly in relation to vegetation clearance and land disturbance (151/53, 291/56 and 340/35)."* I would note that in fact there were six TAs making such a request, namely the three mentioned by Mr Percy plus the Tararua District Council (172/23), the Horowhenua District Council (280/24) and the Rangitikei District Council (346/23).

11. All these Territorial Authorities acknowledge and support the recognition provided for infrastructure, in particular the roading network, in Policy 5-3 (a)(iii). What the TA's seek is the ability to undertake maintenance, emergency response and minor improvement works in relation to Territorial Authority infrastructure and in particular that relating to roads.

12. I note that Mr Percy in his report accepts, in part, this request and has recommended a change to Policy 5-3(a) by adding a new sub-clause (vii). I would note that Mr Percy on page 108 of his report makes a statement as follows:
"To ensure that the maintenance of public roads is enabled, I also recommend that Policy 5-3 refer specifically to those roads."

13. There is no specific reference to roads in the amended Policy 5-3(a) recommendation on page 111 of Mr Percy's report. I have assumed that this is an oversight and will be remedied when the relevant provisions are considered as a whole, particularly in relation to the rules in Chapter 12.

In a following section of this evidence, I have made specific comment on these rules and made suggestions for change which will necessitate changes to this particular policy.

RPS (Part 1), Chapter 5: Policy 5-5

14. Policy 5-5 refers to Codes of Practice and best management practices. The TA submissions request that this policy be included in the Regional Plan (Part II) Section of the POP. In particular, I am of the view that Policy 5-5(b) ought to be incorporated into Chapter 12 in such a way as to make it clear that codes of practice will only be accepted as meeting Plan requirements, if the code has first been through due process under the RMA (i.e. the 1st Schedule). I support Policy 5-5(b) but would like to see the words *"… will be recognised and incorporated within the regulatory framework"* made clearer (i.e. by reference to having been incorporated into the Plan by due statutory (1st Schedule RMA, Part 3, clauses 30 to 35) process.

RP (Part II), Chapter 12: Land Use Activities: Rules 12-2 and 12-3

15. The TAs have submitted that some rules in Section 12 of the Plan do not provide certainty as to activity status and, therefore, it may be difficult for a landowner or a district planner administering the land use provisions of a District Plan to discern whether or not a consent is required, and if required, what type of consent. Rule 12-2 in relation to 'Production Forestry' is provided as a particular example. In Mr Percy's Section 42A Officer's Report (page 253), he states that *"submitters seeking clarification of the rule, particularly in relation to its activity status, do not describe the area of uncertainty. I am of the opinion that the rule, as currently arranged, is able to be interpreted appropriately and is sufficiently clear."*

16. I have reconsidered this particular rule and remain of the opinion that areas of uncertainty remain. These areas are as follows:

17. The activity status of the proposed activity is dependent on meeting the 'conditions / standards / terms' in the fourth column of Rule 12-2. If the 'conditions / standards / terms' in the fourth column are met, then the activity is a "controlled activity". If any of the 'conditions / standards / terms' are not met, then it follows that the activity will be considered as a "discretionary activity" under Rule 12-6. Also, activity status will be determined, in part, as to whether it fits within the activity description in column 2 of Rule 12-2. In my opinion, what this means is that these two columns, and the associated Schedule E, need to provide clear criteria that landowners can consider and be able to determine whether they meet them or not, and if they do not, what category of activity they would then find themselves within.

18. For example, 'condition / standard / term' states *"(a) the activity shall not take place in any rare or threatened habitat* or at-risk habitat*."* An *at-risk habitat** is defined in the Plan as (amongst other things) *"an area of indigenous vegetation of a type identified in Table E1 as being at-risk, which meets the criteria described in Table E2 for determining whether an area of indigenous vegetation constitutes a habitat for the purposes of this Plan."*

19. Now, if I am a farmer wanting to develop land for production forestry for my retirement plan, and I don't wish to engage the services of an ecologist or a specialist in indigenous tree identification, I would have great difficulty determining whether I had threatened or at-risk or no-threat species of beech forest in my indigenous vegetation remnants. If I were to state in my application that my land contained only a small pocket of red beech forest, would this be confirmed or otherwise by a field inspection by a suitably qualified Regional Council employee? Were such a Council officer to inspect my remnant trees and determine that the activities to take place were in an 'at-risk habitat*', it follows that the 'conditions / standards / terms' will not be met and that the application would then become a discretionary activity under Rule 12-6. Given this change in activity status (from controlled to discretionary) and the time and cost implications of pursuing a resource

consent for a discretionary activity, I may decide not to pursue my plans to develop a production forest. This being the case, the only way to have avoided having to make the controlled activity application for resource consent and to have the council officer investigate whether it complied or not as a controlled activity, would be to engage an indigenous vegetation specialist to undertake this assessment prior to preparing and lodging the controlled activity application. A rule that depends on the opinion of an ecologist or a specialist in indigenous vegetation identification probably doesn't meet the test of providing reasonable certainty.

20. Apart from identifying all the rare or threatened habitat or at-risk habitat in the region, and mapping and scheduling these areas in the same way that the Department of Conservation has attempted to do in the past with protected natural areas (PNAs), I know of no easy way of providing the required degree of certainty.

21. The second matter of concern is that the activity column in Rule 12-2 relies on the slope of the land being determined. I would question whether determining the slope of the land can be done with sufficient certainty for the activity status to be able to be determined. What proof will the Council require that the slope parameters are met? Or alternatively, will the Council send staff out to a site to determine the slope, using suitable instruments or appropriate means?

22. The third matter of concern relates to the 'conditions / standards / terms' in column 4 of Rule 12-2, and in particular item (d) which reads *"that in the event of an archaeological site, waahi tapu or koiwi remains being discovered or disturbed while undertaking the activity, the activity shall cease and the Regional Council shall be notified as soon as practicable. The activity shall not be recommenced without the approval of the Regional Council."* This provision ought not to be a 'condition/standard/term' for a "controlled activity", as it cannot be complied with before the activity commences. Also, given that control is reserved over such matters in item (j), in the fifth column of Rule 12-2, the Council is able, and it would be appropriate, to set a condition of consent which says the same as 'condition/standard/term' (d).

23. The fourth area is in terms of the reference to 'highly erodible land*' (HEL) in the 'activity' column under clause (e) referring to land mapped as HEL and its identification in Schedule A. The TA submissions raised the issue of the scale of this map being such that landowners located near an identified boundary wouldn't be able to tell whether the rule applied to them or not. Rule 12-3 also has the same problem, as it refers to "highly erodible land". My understanding from discussions with Council officers, and reading their Section 42A Officer's Reports, is that this matter has been subject to a number of submissions and a definition is being developed which is not reliant on a map of the scale included in the POP. Provided any landowner or occupier or TA officer can use the defined land description or definition to determine whether someone has met the activity exclusion in Rule 12-2(e), I would be satisfied that the TA concerns in this regard will have been met.

Part II, Chapter 12: Policy 12-1 and 12-2: Recognition of Industry Standards

24. Policy 12-1 states that when making decisions on resource consent applications, and setting consent conditions, for vegetation clearance and land disturbance, the Regional Council will have particular regard to:
"(c) any industry standards that are relevant to the activity in accordance with Policy 12-2."

25. Policy 12-2 states that "the Regional Council will examine relevant industry based standards and codes of practice, including those for production forestry and will accept compliance with industry standards as being adequate to avoid, remedy or mitigate adverse effects to the extent that such standards address the matters in Policy 12-1." In Mr Percy's report (page 182), he makes the comment that any addition of standards relating to roading activities to the POP would follow a public submissions process (by way of a plan change application) at which time road controlling

authorities would have an opportunity to consider the standards if they had not already done so. I accept that what Mr Percy is saying is correct, but I remain of the opinion that Policy 12-2 requires amendment by adding the words after Policy 12-1 "and have been subjected to due process (RMA 1st Schedule)".

Part II, Chapter 12: Vegetation Clearance and Land Disturbance (Policies 12-3 and 12-4; Rules 12-1 and 12-3 to 12-6)

26. The TA's submissions to these provisions request that normal maintenance and minor improvements of existing infrastructure, in particular roads, be provided for as a "permitted activity".

27. In Mr Percy's report (page 14, para 3.9), he acknowledges these requests and states that *"given that maintenance of these activities is generally of a minor nature, and that the cost and time required to obtain the resource consents would be considerable for little or no environmental benefit, it is agreed that provisions should be made in the POP to enable this activity"*. This is reinforced on page 167 of his report where he states *"this is recognised as an appropriate activity to occur without resource consent as the extent of the works is likely to be small and the effects on accelerated erosion no more than minor"*. I am pleased that this matter has been accepted, however, the means of giving effect to this acceptance requires further consideration.

28. Mr Percy, on page 335 of his report, states *"as discussed in the section of this report which address Rules 12-3 and 12-4, I consider that it is appropriate to exclude maintenance of existing infrastructure from having to require resource consent. Rather than amend the definitions of land disturbance, I have recommended that specific exclusions in relation to the relevant rules are inserted into the POP."*

29. If one follows through the logic of the suggested changes, we end up with an interesting and unacceptable result, which I shall attempt to demonstrate.

30. Mr Percy makes recommendations in respect of amendments to Rule 12-3 (refer page 267 of his report) and Rule 12-4 (refer page 277 of his report). In the case of each of these rules, he is recommending that a new point (f) after activity clause (e) be added as follows:
"(f) for the purposes of maintaining existing infrastructure (this is a permitted activity under Ruler [sic] 12-1)"*.
The POP's glossary contains a definition of "infrastructure" which provides in (g) for *"structures for transport on land by … roads … or any other means"*.

31. Turning now to Rule 12-1, it is clearly an enabling provision in that it permits *"any vegetation clearance* or land disturbance* pursuant to s9 RMA that is not specifically regulated by any other rule in this plan"*. These activities would have been regulated in HEL land by Rules 12-3 and 12-4, were it not for the exclusions proposed by Mr Percy.

32. However, Rule 12-1 only permits vegetation clearance* and land disturbance* as defined in the glossary of the POP. The glossary specifically **excludes** *"normal maintenance of legally established structures, roads, …"* from the definition of 'land disturbance*' but doesn't exclude it from 'vegetation clearance*'. Therefore, if 'land disturbance*' is involved in maintenance to, say, an existing road, it would not be permitted by Rule 12-1 and would therefore fall to be considered as a 'discretionary activity' under Rule 12-6. This outcome is clearly not what was envisaged by the TAs in making their submissions, nor I suspect is it the intention of the Regional Council given the positive and constructive comments of the Council's Reporting Officer, Mr Percy. To remedy this situation, it is my opinion that we need an enabling rule and/or a change to the definitions.

33. If Mr Percy's amendments to Rules 12-3 and 12-4 are to be accepted, then the definition of 'land disturbance' would need to be amended by deleting the last sentence, so that the definition would

read as follows:

*"**Land disturbance** means the disturbance of land surfaces by any means including blading, blasting, contouring, cutting of batters, excavation, ripping, root raking, moving or removing soil or earth. ~~This definition excludes normal maintenance or~~ [sic] ~~legally established structures, roads, tracks and railway lines.~~"*

What the TAs are seeking would then be enabled by Rule 12-1. To be absolutely clear (using a belt and braces approach), it would be appropriate to also add a further statement in the 'Activity' column of Rule 12-1 under the *"for the avoidance of doubt …"* statement as follows:

"and includes normal maintenance and minor improvements of legally established structures, roads, tracks and railway lines"

34. I am willing to answer any questions that the Council's Hearing Commissioners may wish to put to me.

David Forrest

26 June 2008