

**BEFORE THE HEARINGS PANEL**

**IN THE MATTER OF** the Resource Management  
Act 1991 ("the Act")

**AND**

**IN THE MATTER OF** hearings on submissions  
concerning the **Water**  
provisions of the Proposed  
One Plan notified by the  
Manawatu - Wanganui  
Regional Council

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**LEGAL SUBMISSIONS ON BEHALF OF THE MINISTER OF  
CONSERVATION**

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Dated: 4 March 2010

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## *Introduction*

1. These submissions address the submission, and further submission made by the Minister of Conservation (“the Minister”) in relation to the ‘water chapters’ of the Proposed One Plan (“POP”) for the Manawatu-Wanganui Regional Council (“Horizons”).
2. The Minister supports the identification of the key water management issues for the Manawatu / Wanganui Region and appreciates the challenge that Horizons faces in preparing a document that will promote the sustainable management of the water resources of the Region. The Region’s waters clearly have important economic, social, and cultural values. They also have significant ecological values which in the Minister’s submission must also be given due weight in decisions required under the Resource Management Act 1991 (“the Act”).
3. For the most part the Minister’s submission and further submission strongly supported the approach to the provisions of the POP relating to water management being considered at this hearing. In particular, the Minister’s submissions supported the POP’s approach of:
  - (a) setting out the values which apply to waterbodies within water management zones and which underpin the management objectives for each zone;
  - (b) setting out measurable standards to be applied for the safeguarding, maintenance or achievement of the identified values; and
  - (c) specifying objectives, policies and methods to achieve the management objectives.
4. The identification of Sites of Significance (both Aquatic and Riparian) and recognition of these sites in the POP’s objectives, policies and rules is particularly supported.

5. Evidence on behalf of the Minister relevant to this hearing has been prepared by:
  - (a) Mr Julian Watts (planning) - 19 October 2009 statement and 1 March 2010 supplementary statement;
  - (b) Mr Logan Brown (aquatic ecology) - 19 October 2009 and 1 March 2010 supplementary statement.
  
6. The Minister also adopts the evidence prepared on behalf of the Wellington Fish and Game Council and the Royal Forest and Bird Protection Society of:
  - (a) Mr Gary Williams (river engineering) – 19 October 2009;
  - (b) Dr Ian Fuller (fluvial geomorphology) – 19 October 2009.
  
7. Department of Conservation staff have held useful discussions with Horizons officers on many of the matters raised in the Minister’s submissions, including since the October 2009 evidence was lodged. The Department wishes to thank the officers for their commitment to this pre-hearing process. Significant progress has been made towards resolution of issues and the evidence and supplementary evidence of both Mr Watts and Mr Brown set out where they support particular officer recommendations.
  
8. However, some issues remain outstanding. These are discussed in Mr Brown’s and Mr Watts’ evidence and cover:
  - (a) Water quality, particularly the enhancement of surface water quality where water quality standards are not met;
  - (b) Water quantity and allocation, particularly minimum flows and provision in times of water shortage;
  - (c) Some specific matters relating to the identification of particular sites as SOS-A and SOS-R; and
  - (d) Provisions in Chapter 6 relating to natural character, Rule 16-13 and the Environmental Code of Practice for River Works (“ECOP”); in particular the regime in the POP’s failure to

assess and address continuing and/or cumulative effects on natural character of rivers and their margins.

9. These legal submissions relate to the following matters:
- (a) Objective 6-1 and Policy 6-4 – setting a target date;
  - (b) Cross-referencing between different parts of the POP;
  - (c) Allocation below minimum flow for “essential” and other takes;
  - (d) Definition of waterbodies;
  - (e) Beds of rivers and lakes; and
  - (f) Gravel extraction.

***Objective 6.1 and Policy 6.4 – Setting a target date***

10. The Minister’s submission supported Objective 6-1 as notified, subject to an amendment which the officers’ recommend is accepted. As notified Objective 6-1 stated:

**Objective 6-1: Water management values**

Surface water bodies are managed in a manner which sustains their life – supporting capacity and recognises and provides for the values set out in Schedule D.

11. Submissions of other parties concerning Objective 6-1 opposed Objective 6-1 on the grounds that it did not stipulate the timeframe over which this is to be achieved. In response the Officer’s Report recommended that Objective 6-1 be amended to insert a “target date” of 2030.
12. In my submission, the suggested addition of the 2030 target date is misplaced and does not appropriately recognise the place of objectives in a regional policy statement. Objectives are just that – objectives. They are a statement of broad, high level goals, and policies are the means by which objectives are to be met. Methods, including rules, set out the course of action to give effect to a policy.<sup>1</sup> It is in the structure and

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<sup>1</sup> *Re an Application by North Shore CC [1995] NZRMA 74 (PT)*

content of policies and methods that matters to do with timing and implementation of an objective can be addressed.

13. Mr Watts' and Mr Brown's October 2009 evidence sets out the implications of inserting a 2030 target date (Watts para 29 – 45, Brown para 62-70) including that the date appears to assume that there is little or no urgency for meeting the standards in the POP and that issues of timing and practicability are appropriately addressed by policies.
14. In response to similar submissions seeking certainty that the provisions of the Schedules (previously D, recommended Ba) would not be applied immediately, the officers also recommended that Policy 6-4 be amended to provide that where existing water quality does not meet the relevant water quality standard "...activities shall be managed in a manner which maintains or enhances existing water quality in order to meet the water quality standard...".
15. This amendment is opposed for the policy reasons set out in Mr Watts' and Mr Brown's statements (Mr Watts' paras 33-45 and Mr Brown paras 94-96). In my submission however, the amendment should be rejected as it simply does not make sense. The Policy applies when existing water quality standards are not met. As notified it required that where the existing situation is such, activities shall be managed to enhance existing water quality *to meet the standards shown in Schedule D*. However, given the policy applies when existing standards are not met, activities cannot be managed to maintain water quality in order to meet the standards. The amended policy is unreasonably uncertain.

***Cross referencing between different parts of the POP***

16. The Officers have now recommended that a large number of the Regional Policy Statement's (RPS) policies relating to water management be relocated into the relevant regional plan chapters of the POP and that

some of the policies in the POP are cross-referenced back to particular relevant policies in the RPS.

17. In my submission the proposed amendments have brought issues to do with cross-referencing between the regional plan and the RPS into clear relief and careful cross-referencing will be required. The concern is that if some parts of the RPS are directly referenced, less consideration will be given to those parts not directly referenced.
18. The Minister is particularly concerned about the links between the water provisions and Chapter 7 (Living Heritage) and Chapter 12 (Land Use Activities and Land-based Indigenous Biological Diversity) of the POP (for example). These Chapters contain policy relevant to the sustainable management of the beds and rivers and lakes in particular. The specific provisions of concern are set out in Mr Watts' supplementary statement.

***Allocation below the minimum flow for essential and other takes***

19. The Minister's submission supported the minimum flow regime established in the POP. An issue remains however with respect to the POP's approach to abstractions below minimum flows, when there is potential for the identified values to be significantly compromised.
20. The key policy is Policy 6-19 (Policy 15-11 as now recommended). The Policy concerns the management of takes from rivers at or below minimum flow. It distinguishes between "permitted", "essential" and "non-essential" takes.
21. In my submission the POP can contain provisions to guide allocation when rivers are at or below minimum flow. An issue does arise with respect to those abstractions covered by section 14(3)(b) which can occur if "the taking or use does not, or is not likely to, have an adverse effect on the environment". In my submission what the Policy does, in respect of such uses, is to define limits below which the taking or use will not, or

is not likely to have, an adverse effect on the environment. Consideration case by case will be required in terms of Rule 15-5. It is important to note that Policy 15-11 covers a much wider suite of uses than those “protected” in section 14(3)(b).

22. With respect to Policy 15-11 Mr Watts’ October 2009 statement questioned the meaning of the term “low flow”. The officer’s report recommends that that term be replaced with “... at or below its minimum flow” and this clarification is supported. However, a number of concerns with the Policy remain, including the scope of those activities designated as “essential takes” in clause (b) of the Policy (Watts Supplementary, paras 16-21).

23. Of further concern is the overly directive nature of the Policy. In some cases it provides that takes “shall be allowed to continue regardless of river flow” and in others this is somewhat qualified as “shall be allowed to continue regardless of river flow, but shall be required to minimise the amount of water taken to the extent reasonable”. As set out by Mr Watts in his supplementary evidence, this Policy should be amended to provide that all takes identified as “essential” shall be subject to the requirement to minimise the amount of water taken and to take all other reasonable measures to avoid, remedy or mitigate adverse effects on the environment.

24. Section 329 of the Act provides a mechanism (water shortage directions) that regional councils may adopt in times of water shortage. It provides:

**329 Water shortage direction**

- (1) Where a regional council considers that at any time there is a serious temporary shortage of water in its region or any part of its region, the regional council may issue a direction for either or both of the following:
- (a) That the taking, use, damming, or diversion of water:
  - (b) That the discharge of any contaminant into water, - is to be apportioned, restricted, or suspended to the extent and in the manner set out in the direction.

25. In my submission it is possible that the overly directive wording of Policy 15-11 allowing certain takes to continue “regardless of river flow” could be interpreted as restricting the Council’s ability to issue and implement water shortage directions. The Policy should be amended to refer to water shortage directions as recommended by Mr Watts in his supplementary statement.

26. A further issue arises as to how the Policy relates to existing consents which may not be subject to conditions requiring abstraction to cease once the minimum flow set in the POP is reached. Section 68(7) of the Act states:

“68 **Regional Rules**

(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality, or ranges of temperature or pressure of geothermal water, the plan may state –

- (a) Whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
- (b) That the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.”

27. Rule 15-5, the key means for implementing this policy, does not explicitly address existing consents. It is therefore taken that the intention is that existing consents are not to be affected in the manner provided for by section 68(7)(a). In this regard however, the meaning of Policy 15-11(b)(iii) which refers to “takes which were lawfully established at the time of this Plan being notified...” is unclear. Mr Watts’ supplementary statement recommends that a footnote be added after the term “lawfully established” to clarify that the Policy is intended to be apply when existing consents expire and new consents are sought for the same activities.

28. Other than reviews of existing consents, there are other ways this Policy could be implemented for existing consent holders including, as described above, water shortage directions and voluntary agreements between water users. These mechanisms are not explicitly mentioned in



the POP – not even in the “Methods” section which follows the Policy. Reference to these methods would address the concern I raised earlier about the wording of the Policy potentially limiting the council’s ability to implement a water shortage direction.

29. Officers have recommended that this Rule be amended to stipulate when takes may continue when a river is at or below minimum flow “for the purposes of stock drinking water and domestic needs, or public water supplies predominantly for domestic use” (Rule 15-5(b)(i)). This part of the Rule links back to Policy 15-11.
30. The Minister would be satisfied with this recommended wording provided that there is still an ability to impose conditions on such takes to require that the amount of water taken be minimised, and that all other reasonable measures be taken to avoid, remedy or mitigate adverse effects on the environment when water is taken below minimum flow. The proposed amendments to Policy 15-11 set out in Mr Watts’ supplementary evidence (paragraph 22) combined with the existing wording of the matters over which control is reserved in Rule 15-5 would address this.

#### ***Definition of “waterbodies”***

31. The term “water body” is defined in section 2 of the Act as follows:

“water body means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area”

32. The POP (as notified) adopted the Act’s definition of the term. However, it was used throughout the POP to refer to more than the water itself. For example, Rule 13-9 classified as permitted activities *Discharges of water to water* subject to conditions, including:

“(b) The discharge shall not cause any scouring or erosion of any land or **waterbody** beyond the point of discharge.

(c) The discharge shall not alter the natural course of any **waterbody**.”

33. Ms Barton addressed this issue in her supplementary report of November 2009 and recommended “the insertion of a definition for water body to apply to both the water and beds of a water body.”<sup>2</sup>
34. A recommended definition to address this but limited to rivers and lakes was contained in the November 2009 (Pink) version as follows:
- “**Water body** means a river<sup>^</sup> or lake<sup>^</sup> and includes, unless the context otherwise requires, both the water in the river<sup>^</sup> and lake<sup>^</sup> and bed<sup>^</sup> of rivers<sup>^</sup> and lakes<sup>^</sup>”.
35. While I agree with Ms Barton that a replacement definition (or a replacement term) is required, the above definition should be amended to include all of the bodies included in the Act’s definition as follows:
- “**Water body** means a river<sup>^</sup>, lake<sup>^</sup>, stream, pond, wetland<sup>^</sup>, or aquifer, or any part thereof, and includes, unless the context otherwise requires, both the water in the river<sup>^</sup>, lake<sup>^</sup>, stream, pond, wetland<sup>^</sup>, or aquifer and their beds<sup>^</sup>.”
36. This proposed amendment is important to ensure that the term wetland is included in the definition. In some places the POP expressly notes that a reference to water bodies includes wetlands (for example Policy 6-25 (recommended Policy 15-16)), however, in most instances the POP does not expressly mention wetlands alongside a reference to waterbodies.
37. I acknowledge that in some instances where the POP currently refers to “waterbodies” the term is intended to apply only to rivers and lakes and not the other “wet areas” listed in the Act’s definition of the term. If the above definition is accepted, these references to waterbodies will need to be replaced with a reference to rivers and lakes and their beds as is already the case in a number of places in the POP.
38. Finally, the November 2009 version of the ECOP uses the Act’s definition of the term waterbody and should be amended to be consistent with the POP definition. Further confusion also arises from the fact that

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<sup>2</sup> Supplementary Report of Clare Barton paragraph 12 (e).

the term “surface waterbody” (which is not defined in the POP) is defined in the November 2009 version of the ECOP as follows:

**“Surface waterbody:** The freshwater in a river, lake, stream, pond, wetland or drain that is not located within the coastal marine area.”

This will require clarification.

### ***Beds of rivers and lakes***

39. Activities in the beds of rivers and lakes can potentially have significant adverse effects on aquatic habitats and natural character of waterbodies and their margins. Effects include loss of habitat variability, sediment suspension, sediment deposition, direct loss of aquatic biodiversity and indirect displacement of fauna (Brown, October 2009 statement, para 136).

40. The POP in relation to the beds of rivers and lakes:

(a) Sets out an objective (6-4) requiring that:

“All significant values of river and lake beds are recognised and provided for, including enabling future use and development of river and lake beds, provided other values of the river or lake are not compromised.”

and contains policies that link the management of the beds of rivers and lakes to the water management values and zones identified in the POP (now Schedule Ba);

(b) Provides that various activities undertaken by Horizons in water bodies valued for flood control or drainage are “permitted” when undertaken in accordance with an Environmental Code of Practice for River Works (ECOP) – Rule 16-13;

(c) Incorporates the ECOP into the POP by reference; and

(d) Regulates the activities of others in the beds of rivers and lakes without reference to the ECOP.

41. The Minister’s position in respect of the POP’s provisions relating to the beds of rivers and lakes has been characterised by others as seeking the

return of rivers to their “natural state”. That is not the case. The submission raised concerns that the POP’s approach did not adequately address the effects of activities in the beds of rivers and lakes on natural features and patterns and sought amendments to promote a management system which:

“incorporates preventative flood hazard management measures along with initiatives to maintain and where practicable restore and rehabilitate the natural values of the region’s river systems – ideally serving both objectives.”<sup>3</sup>

42. The submission sought a number of specific amendments to the policy framework, and in relation to the rules, most significantly the deletion of Rule 16-13 (the rule that provides for a wide range of council activities in the beds of rivers and lakes as permitted activities relying on the ECOP).

43. I will now discuss issues concerning both the policy approach and the related issue of the ECOP and its relationship to the POP.

#### Policy approach

44. The Minister’s submission raised concerns that the policy approach in the POP did not adequately address the effects of activities in the beds of rivers and lakes and their margins on the natural character of these waterbodies (section 6(a) of the Act).

45. The key changes sought were to Objective 6-4 and associated policies and methods (Watts, November 2009, para 133-135). The amendments would ensure that appropriate provision is made for the preservation and, where appropriate, restoration or rehabilitation of the natural character of rivers and their margins.

46. Officers have recommended a number of amendments to objectives and policies and these are discussed in Mr Watts’ supplementary statement.

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<sup>3</sup> Submission by the Minister of Conservation, page 18.

For the most part these are supported subject to further amendments to provide:

- (a) more comprehensive cross referencing to different parts of the RPS;
- (b) amendment to Policy 16-13 to clarify the wording of the policy relating to effects on natural character;
- (c) further amendments to Method 6-9 as recommended by officers to provide clearer direction as to how the relevant provisions of Chapters 6, 7 and 16 relating to the natural character of the region's rivers are to be implemented. The amendments to Method 6-9 seek principally to ensure that Horizon's research, monitoring and reporting programme are fed into a long term assessment of sustainable flood plain management.

47. Additionally Mr Brown's October 2009 statement discusses an amendment recommended by officers to amend Policy 6-28 (recommended Policy 16-4) to provide that:

**Policy 6-28: Activities in water bodies with a Value of Natural State, Sites of Significance – Cultural, or Sites of Significance – Aquatic**

In those Water Management Sub-zones with a Value of Natural State, Sites of Significance – Cultural, or Sites of Significance – Aquatic, as shown in Schedule Ba, activities in, on, under or over the beds of rivers and lakes shall be managed in a manner which:

- (a) avoids or mitigates adverse effects on these values
- (b) maintains the habitat and spawning requirements of the species identified in Schedule Ba as being significant within the subject Water Management Sub-zones.

48. In my submission the words "or mitigates" should not be added to the Policy. Avoiding adverse effects is a permissible policy stance and, in my submission there is no legal imperative that requires the full "avoid, remedy or mitigate" suite set out in section 5(2)(c) of the Act to be applied in every case. The identified sub-zones are those with the highest ecological value and the methods implementing Policy 6-28 are indeed themselves restrictive and designed to avoid adverse effects. There are,

in my submission good reasons under Part 2 of the Act as to why the policy direction should, in this case, emphasise “avoids”.

49. Mr Watts’ October 2009 recommends a new method (Method 6-10) establishing a pilot programme for approaches to sustainable management of flood plains and wider catchment management to be carried out within 10 years of the POP becoming operative. I acknowledge that inclusion of such a method will not bind Horizons to undertake the programme. It would however, provide a clear policy imperative, and signal to the public Horizon’s intention to put resources into this critical work during the life of the POP.

#### Environmental Code of Practice for River Works

50. As noted above the Minister’s submission sought deletion of Rule 16-13 (the link between the ECOP and the POP). Reasons included the largely unlimited scale, frequency and duration of activities permitted by the rule, the lack of ability to consider cumulative effects (both inside and outside of scheme plan areas), inconsistencies between the ECOP and the Act and lack of certainty as to whether a particular activity is covered by the rule.
51. Since the Minister’s submission was lodged there have been ongoing discussions between Department of Conservation and Horizon’s staff about the ECOP and revised versions of it have been produced, the latest being the November 2009 version. Additional possible amendments to the November version and Rule 16-13 are discussed in the supplementary evidence of Mr Cook for Horizons.
52. It is the Minister’s position now that this November 2009 version improves on the April 2007 version, although as noted in Mr Watts’ and Mr Brown’s evidence, some further amendments are necessary. The question that arises then is how to give affect to these amendments.

53. I note Mr John Maassen's opinion that modification and changes to material incorporated by reference may be made in response to Part 1, First Schedule submissions. The First Schedule does not prohibit submissions on the content of incorporated material included as part of a notified plan.<sup>4</sup>
54. An alternative view is that Part 3 of the First Schedule and clause 31 in particular provides that amendments to documents incorporated by reference in a proposed plan can not be made in response to submissions and that, if Horizons wishes to amend such documents it must do so by variation after fulfilling the requirements relating to public notice and submissions in clause 34.
55. If the content of the ECOP per se can be amended through submissions and decisions, the options with respect to the ECOP would appear to be:
- Option One: Adopt the April 2007 version;
  - Option Two: Those parts of the ECOP comprising the "standards" themselves could be included into the POP (possibly as an Appendix). Rule 16-13 would be amended to refer to the standards. The remainder of the ECOP would then be a document outside the POP. A question of scope does arise, but in my submission this option is within the scope of the Minister's submission which sought a change to the POP to delete Rule 16-13. Under this option the Rule would not be deleted but amended to address the Minister's express concerns;
  - Option Three: The November 2009 version could be approved (together with, in my submission, the amendments sought in evidence on behalf of the Minister);
  - Option Four: Horizons could resolve to notify a Variation incorporating the November 2009 (or later version after further discussion with stakeholders).

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<sup>4</sup>J W Maassen, Documents Incorporated by Reference, 26 January 2009.

56. Option One above would not meet the concerns raised in the Minister's submission, would not take into account the developments made since the April 2007 version, and is not supported. Option Four would need to be the subject of a Horizons decision and is not addressed further here.
57. Options Two and Three would both meet the Minister's concerns. Both options involve distinguishing those parts of the ECOP which are actually standards from supporting material. Mr Watts' supplementary evidence discusses which parts of the ECOP can properly be called "standards".
58. Either of these two options, subject to the amendments set out in Mr Watts' and Mr Brown's statements, would meet the Minister's concerns about Rule 16-13 and the ECOP as set out in the POP. In particular, certainty would be improved by increased clarity about which parts of the ECOP applied when determining if the permitted activity criteria were met.
59. These options would not in themselves address the concerns about the cumulative effects of activities in the beds of rivers and lakes. Mr Cook states in response to Mr Watts' evidence on cumulative effects "What happens outside Scheme areas is not a matter for Schemes to be concerned with".<sup>5</sup> However, in my submission such effects are clearly a matter for the POP which should consider the cumulative effects of separate works. The definition of "effect" in section 3 of the Act includes cumulative effects and is not geographically restricted to the location of permitted activities.
60. Although expressed in the Minister's submission as a concern with Rule 16-13 and the ECOP, the difficulty in dealing with cumulative effects on a case by case basis through resource consents is acknowledged. To this end the amendments to the Methods section of the POP as set out in Mr

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<sup>5</sup> Supplementary Evidence of Allan Cook regarding the Environmental Code of Practice, page 4, table 2.



Watts' statements (addressing monitoring in particular) would meet the Minister's concerns about cumulative effects.

61. The third matter of concern is related to the site specific standards that would apply in SOS-A and SOS-Rs. Mr Logan for the Minister and Mr Lambie for Horizons have had ongoing discussions about these as recorded in Mr Brown's supplementary evidence. It is his view that the remaining few points of disagreement highlighted in his evidence may be able to be reduced even further. These would be recorded in either the POP itself together with the other "standards" (Option Two) or in that part of the ECOP referred to in Rule 16-13 (Option Three).

62. In summary then, the Minister's concerns in relation to the POP's provisions relating to activities in the beds of rivers and lakes would be addressed if (taking the Pink version of the POP and the November 2009 version of the ECOP) the changes set out in Mr Watts' and Mr Brown's supplementary briefs are made.

### *Gravel extraction*

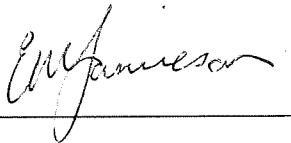
63. The Minister's submission raised concerns about the provisions relating to gravel extraction, particularly Policy 6-32 (Policy 16-8 as recommended by officers.) Policy concerns are covered in Mr Watts' evidence. There are two concerns about the wording of Policy 16-8 which in my submission require consideration.

64. Policy 16-8(b) provides that for identified reaches the annual volume of gravel available for extraction "shall generally be limited to the quantities stated in the table, unless ...(three exceptions specified)". The Policy is qualified twice: "generally" and "unless". In my submission the "generally" should be deleted. The limits should apply unless one of the three exceptions does.

65. Table 16.1a which is referred to in Policy 16-8(b) is recommended by officers to be entitled "Average annual allocable volumes of gravel". The meaning of "Average" in this context is uncertain. Does this mean that the allocable volumes of gravel will actually be determined year by year and the figures in this Table are indicative?

***Conclusion***

66. I am happy to answer any questions. As noted earlier, the Minister's witnesses are Mr Watts and Mr Brown. They would also be happy to answer any questions that you may have.



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Eleanor Jamieson

Counsel for Minister of Conservation

4 March 2010