BEFORE THE ENVIRONMENT COURT In the matter of appeals under clause 14 of the First Schedule to the Resource Management Act 1991 concerning the Proposed One Plan for the Manawatu-Wanganui Region.

FEDERATED FARMERS OF NEW ZEALAND
ENV-2010-WLG-000148
and **MERIDIAN ENERGY LTD**
ENV-2010-WLG-000149
and **MINISTER OF CONSERVATION**
ENV-2010-WLG-000150
and **PROPERTY RIGHTS IN NEW ZEALAND**
ENV-2010-WLG-000152
and **HORTICULTURE NEW ZEALAND**
ENV 2010-WLG-000155
and **WELLINGTON FISH & GAME COUNCIL**
ENV-2010-WLG-000157

Appellants

MANAWATU-WANGANUI REGIONAL COUNCIL

Respondent

STATEMENT OF PLANNING REBUTTAL EVIDENCE BY DAVID LE MARQUAND ON THE TOPIC OF BIOLOGICAL DIVERSITY ON BEHALF OF TRANSPOWER NEW ZEALAND LIMITED AND POWERCO LIMITED

Dated 14th March 2012

INTRODUCTION

1. My name is David le Marquand and I have the qualifications and experience set out in my evidence in chief. I confirm that I have read the Code of Conduct for Expert Witnesses and agree to comply with it.

2. My rebuttal evidence focuses on the outstanding matters not agreed following planner conferencing on the topic of biodiversity. The matters agreed and not agreed are recorded in the conferencing statement dated 6th March 2012.

3. In particular my rebuttal evidence addresses:
   - the policy wording highlighted in yellow in Appendix 2 to the record of planner conferencing that remain outstanding;
   - the matter of non-complying activity status as addressed by Ms Helen Marr in her evidence in chief on behalf of the appellants.

POLICY WORDING NOT AGREED BY THE PLANNERS

4. To assist the Court, I set out below the parts of the policies not agreed by the planners (from the record of planner conferencing) and follow this with an explanation of my position. The yellow highlighted sections indicate the parts of the policies not agreed by all planners.

Policy 7-2A(c) The Regional Council must protect rare habitats and threatened habitats and at risk habitats identified in (b) and maintain and/or enhance other at-risk habitats by regulating the activities through its regional plan and through decisions on resource consents.

5. I support the inclusion of the word "or" in Policy 7-2A(c) It is, in my view, intended to better reflect that, for at-risk habitats not assessed as being an area of significant vegetation, enhancement would not be required in every instance.

Policy 7-2A(e)(ii) consider indigenous biological diversity mitigation offsets in appropriate circumstances as defined in Policy 12-5, which may include the establishment of infrastructure and other physical resources of regional or national importance as identified in Policy 3-1,

6. The appellants propose to delete the highlighted section of policy 7-2A(e)(ii). I do not support the deletion of this reference to infrastructure in the Policy Statement section of the Plan. It provides additional and useful guidance, and balance in terms of recognising the role of transmission and renewable energy.

Policy 7-2A(e)(iv) not unreasonably restrict existing use of productive land.

7. The appellants wish to delete (iv) in its entirety. I am not concerned about the deletion of 7-2A(e)(iv), however I can see no particular reason to delete it. I can understand why the Hearing Panel wished to provide some assurance to the rural sector in light of the uncertainties and potential costs that the decisions version approach provides.

Policy 12-5(a) For activities regulated under Rule 12-6 and Rule 12-7, the Regional Council...

8. Reference to rule "12-7" in policy 12-5(a) is dependent upon the outcome of the activity status argument and whether any additional rules are included in the Plan (e.g. a specific discretionary rule providing for renewable generation and transmission).

Policy 12-5(a)(v) for electricity transmission and renewable energy generation activities, any national, regional or local benefits arising from the proposed activity.

9. The above reference to electricity transmission and renewable energy in Policy 12-5 (v) is proposed to be added by the appellants if the activity status is changed to non-complying. I do not consider the additional wording is necessary if the activity status remains discretionary. There is already a reference in Policy 12-5(a)(i) to the RPS and therefore to the specific benefits of infrastructure in Chapter 3. However, in the event that the Court was minded to change the activity status to non-complying then I consider there is merit in including a more explicit directive to

infrastructure in Policy 12-5. This is particularly so given the current RPS specifically singles out the biodiversity objective and policy (objective 7-1 and policy 7-2A).

Policy 12-5(b)(ii) Where any more than minor adverse effects ~~which~~ cannot reasonably be avoided, they are remedied or mitigated within the area of habitat affected by the activity ~~are offset~~ to result in a net indigenous biological diversity gain.

Policy 12-5(b)(iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated within the area of habitat affected by the activity, and/or where it will result in a greater net indigenous biological diversity gain than under (b)(ii), they are offset outside of the area of habitat affected, provided there is a net indigenous biological diversity gain.

Similar wording is proposed for Policy 12-5(c)(ii) and (c)(iii)

10. The amendments shown above were discussed by the planners but not agreed. The appellants do not consider the policies provide a clear enough "mitigation hierarchy" ie the order in which types of mitigation should be preferred. I am ambivalent about the application of a mitigation hierarchy in these policies. In my view, when developing a project and preparing an AEE an applicant should always look at or assess the level of effects being generated at source and consider how the application can address/mitigate those in the first instance. The question is whether the policy needs to direct the applicant to only consider offsets off site (i.e. outside the affected habitat) when it is not reasonable to mitigate at source. If the policy outcome is about ensuring and delivering a net indigenous biological diversity gain when mitigating or offsetting (my understanding of the outcome of planner conferencing is that there should be a net biological gain), then such a cascade is, in my view, less significant and the wording as drafted above would be acceptable to me. In my view it would not mean that there would be no mitigation within the site affected but rather the focus is on where the net gain is finally achieved.

Policy 12-5(c) Consent ~~must generally~~ may be granted ...

11. I am ambivalent about the replacement of "must generally" with "may" in 12-5(c). I can accept "may" on the basis that decision makers are required to exercise discretion and can refuse an application in any event. However the "must generally" (in the decisions version) is a very strong policy signal and infers there must be

compelling reasons to not follow that approach. I can understand Federated Farmers reluctance to move away from that level of certainty, given the suite of other changes that are proposed by the appellants.

Policy 12-5(d)(iii) the appropriateness of establishing infrastructure and other physical resources of regional or national importance as identified in Policy 3-1.

12. Policy 12-5(d)(iii) is proposed to be deleted by the appellants. I do not support its deletion. This is a particularly strong signal to applicants and decision makers and in my view is recognition of the constraints and technical requirements relating to infrastructure. It should also be noted that the request to delete this provision by the appellants is counterbalanced by other provisions that the appellants included in relation to transmission and renewable energy activities by way of attempting to define "appropriate circumstances". In the absence of any other suggested wording, my view is that it should remain. If it is to remain it also needs to be preceded by the words "have regard to" as those words have otherwise been deleted from 12-5(d).

NON COMPLYING ACTIVITY STATUS – a response to the evidence of Helen Marr

13. One of the key messages I have taken from the evidence of Ms Marr is that a "protection" requirement under the RMA and/or in terms of regional policy should automatically be translated into a non-complying activity status. I do not accept that position in the circumstances we have before us. I will now address the key aspects of Ms Marrs argument.

CERTAINTY AND UNNECESSARY COSTS

14. Ms Marrs evidence states in paragraph 66 that Objective 11A-1 and Policies 11A-1 and 11A-2 are relevant when considering the activity status that should apply. It is Ms Marr's view that non-complying status is most appropriate to implement the objectives and policies for rare and threatened habitats. In my view, the proposed non-complying activity status is unlikely to achieve the following objective. Objective 11A-1 states:

> ***Objective 11A-1: Resource Management in the Manawatu-Wanganui Region***
>
> *(a) The regulation of activities in a manner which maximises certainty and avoids unnecessary costs on resource users and other parties.*
>
> *(b) The regulation of activities in a manner which gives effect to the provisions of Part I of this Plan, the Regional Policy Statement.*

15. In my opinion the evidence of Ms Marr does not fully acknowledge the innovative approach being taken in the Plan and the various uncertainties that arise with that approach including the fact that these areas will remain unmapped. Indeed, as it stands the existing approach relies on specialists to determine the location of the relevant habitat areas. As identified in the evidence of Ms Barton (paragraph 49), the Hearing Panel took these matters into account in their decision to make the new rule 12-6 a discretionary activity and thereby allow all applications to be assessed under section 104. All applications will have the opportunity to be assessed on their merits, guided by the robust policy framework. In fact, Ms Marr's only reference to "certainty" is in paragraph 66 and in relation to the strong direction around certainty of policy outcome for the resource and not the resource user. However, Objective 11A-1 raises certainty in terms of the regulation of activities and in my view is better achieved through discretionary status.

16. I accept the level of uncertainty that arises from the approach taken by Council (and agreed by the ecology experts) in the decisions version of the Plan, on the basis of the discretionary activity status. In my opinion moving to a non-complying activity status will add a further level of uncertainty for resource users over and above the existing approach for the following reasons:

- Reliance on specialists to determine habitats and therefore activity status.
- Activity status may not be determined until late in the route selection process for a lineal transmission project, although I accept this may not be such an issue for a specific site related project.
- There is uncertainty for applicants that a merits argument under section 104 may not be able to be made should an application fail the threshold test.
- Application of the bundling principle creates uncertainty. Not only because it is a test against the whole suite of plan objectives and policies, some of which have yet to be finalised and/or which could arise from future plan changes, but also because of the uncertainty around when parts of a project may be considered to be discrete.
- Bundling may even extend to provisions beyond the Regional Plan e.g. where there is a significant project, a joint hearing is to be held and the hearing committee decide to issue a joint decision. I am aware of a recent application in my office where the Auckland Council has bundled the regional and district consent requirements.

17. In my opinion, a non-complying activity status will not avoid unnecessary costs on resource users or other parties:

- Existing costs will already be significant in order to achieve a net biodiversity gain for any project (desired outcome as agreed by the planners).
- There will need to be on-going monitoring of plan changes on a broader front (i.e. all objectives and policies) because the goal posts under section 104D can keep moving. This is particularly so given there are no designation powers available for regional land use rules.
- For large transmission and renewable energy projects it may not necessarily add costs *per se* to the overall consent process, but there will be costs associated with the uncertainty of location of habitat and therefore the activity status, and from the bundling principle (e.g. potential additional submitters and/or grounds for opposition). It must also be recognised that the overall approach to biodiversity in the Plan will require a significant investment in appropriate expertise. In fact most of the mapping

will effectively be undertaken by applicants with the current approach. The move to non-complying will likely impose a higher level entry cost for smaller projects, and this is intended and acknowledged in Ms Marr's evidence in terms of a "deterrent effect". While the Council is currently funding their own in house experts this could change over time, and therefore retention of expertise will fall to applicants.

- It has the potential to disincentivise some landowners from contacting or cooperating with Council and undermine the collaborative approach I understand the Council has been undertaking. It may result in unanticipated adverse effects on biodiversity in that some people will be more likely to take action without consent. I have seen similar behaviours in relation to urban tree protection rules.
- I accept the "deterrent effect" may mean less cost on council (although it can always cost recover) and submitters opposing such applications, but it will not necessarily avoid additional costs for applicants.

PROVISION FOR INFRASTRUCTURE – GIVING EFFECT TO THE REGIONAL POLICY STATEMENT

18. In my opinion non-complying activity status will not give effect to the provisions of Part 1 of the Plan (the RPS) and in particular Policy 3-3 which states:

> ***Policy 3-3: Adverse effects^ of infrastructure^ and other physical resources of regional or national importance on the environment***
>
> *In managing any adverse environmental effects^ arising from the establishment, operation*, maintenance* and upgrading* of infrastructure^ or other physical resources of regional or national importance, the Regional Council and Territorial Authorities^ must:*
>
> *(a) allow recognise and provide for the operation*, maintenance* and upgrading* of all such activities once they have been established, no matter where they are located,*
>
> *(b) allow minor adverse effects^ arising from the establishment of new infrastructure^ and physical resources of regional or national importance, and*
>
> *(c) avoid, remedy or mitigate more than minor adverse effects^ arising from the establishment of new infrastructure^ and other physical resources of regional or national importance, taking into account:*
>
> *(i) the need for the infrastructure^ or other physical resources of regional or national importance,*

(ii) any functional, operational or technical constraints that require infrastructure^ or other physical resources of regional or national importance to be located or designed in the manner proposed,

(iii) whether there are any reasonably practicable alternative locations or designs, and

(iv) whether any more than minor adverse effects^ that cannot be adequately avoided, remedied or mitigated by services or works can be appropriately offset, including through the use of financial contributions.

19. Policy 3-3(a) specifically relates to infrastructure that has already been established. In many instances the Regional Plan gives effect to this policy by providing for these activities as permitted.

20. Policy 3-3(b) provides for new infrastructure and signals that minor effects should be allowed. In my view, strictly speaking new infrastructure is not "allowed" by the Plan provisions on biodiversity as it requires a discretionary activity resource consent, however it can be argued it is provided for. In my view a non-complying activity status is clearly not "allowing" or providing for minor adverse effects in accordance with 3-3(b).

21. Policy 3-3(c) reinforces my view that non-complying is not an appropriate activity status for regionally significant infrastructure. This is because Policy 3-3(c) acknowledges that infrastructure may have more than minor effects, but that a number of other factors will need to be considered, including:

- The need for infrastructure;
- The functional, technical and operational constraints of infrastructure;
- Whether there are reasonably practicable alternative locations or designs; and
- The principle of off-setting for more than minor effects that cannot be avoided, remedied or mitigated.

22. If an application required non-complying consent it may fail to pass the section 104D gateway test before allowing these considerations to be addressed.

23. I accept that it would be difficult to provide for and determine an acceptable permitted level of minor adverse effects. On balance a discretionary consent process is an appropriate means to assess this.

24. In her evidence in chief, Ms Marr, in paragraph 66, identifies that clause (e) in Policy 11A-1 (non-complying activities) is the most suitable for rare and threatened habitats because of the potential for very significant adverse effects on the environment. Policy 11-A-1 states:

> *(d) classify as **discretionary** those activities for which the Regional Council needs to retain its discretion to decline consent owing to the potentially significant level of adverse effects^, and it is not practicable to restrict the exercise of the Regional Council's discretion to a specified list of matters*
>
> *(e) classify as **non-complying** those activities for which the Regional Council would generally not grant a resource consent^ owing to the potential for very significant adverse effects^ on the environment^*

25. This view is reached notwithstanding that the policy framework in 12-5 and the RPS does indicate an acceptance of minor adverse effects. The nature and scope of the rule will capture a whole suite of activities that may have only minor effects but require them to be assessed as non-complying. I understand and accept that it is not practicable or appropriate to set a threshold approach in these rules (such as providing an areal disturbance threshold of $100m^2$ as a permitted activity), and therefore it is appropriate to require a consent, but the broad range of activities captured by the provisions do not, in my view, warrant non-complying status, particularly given the other matters set out above.

SCRUTINY

26. Ms Marr argues in paragraph 78 of her evidence that with a non-complying activity *"the provisions, direction and intent of the plan are given more weight"* when compared to a discretionary activity. This is argued because "*A decision maker is allowed less discretion under a non-complying activity status because the decision maker may not turn their mind to and then disregard policies, as with a discretionary activity, but must be satisfied that a proposal is not contrary to them.".* In her paragraph 80 it is implied that unless the activity status is non-complying it would be a "toothless mechanism". I do not accept that a discretionary activity will receive any less scrutiny or that it is a toothless mechanism.

27. The biodiversity policy framework provides a very strong and clear direction and, in my view, it would be difficult for decision makers to disregard it. It certainly has not

been my experience that discretionary activities get any less scrutiny, in fact the trend I have seen, and where I operate most, is that there has been an increasing degree of scrutiny of applications over time.

28. I do not consider that the application of section 104 judgement is somehow a less robust examination of a proposal. In fact, the section 104 assessment requires a fuller assessment of all the relevant provisions in the plan and any other matters (a number of supporting documents are discussed in Ms Marr's evidence). I also note that once a non-complying activity has made it through the gateway in section 104D that section 104 applies in the same way as for discretionary activities.

29. What the non-complying test does do is require an application to meet the gateway tests in section 104D. If an application has more than minor effects it is subject to the fundamental wording and construction of the objectives and policies of a particular plan. In my view, the biodiversity policy framework would not appear to pose a closed gate, however I have not assessed all the other provisions that would apply and there are some that are still in dispute, so the risk remains that a project that would otherwise meet the test of sustainable management may not make it through the gateway.

CONCLUSION

30. I accept that in some circumstances "protection" could translate into non-complying activity status. I remain concerned, however, that in these circumstances that the appellants consider "protection" should automatically result in non-complying activity status, notwithstanding that there remain significant uncertainties and associated costs with such an approach and that it does not appropriately give effect to the balance struck in the RPS. The current regime and strong policy framework can in my opinion achieve protection of the regions biodiversity. It is a strong policy direction and a discretionary status will not lead to "weaker" decision making. There will be no less scrutiny by decision makers but it will enable projects that meet the tests of sustainable management to be considered on merit without the risk of failing to make it through the section 104 gateway.

31. In my view, there is a risk in proceedings such as this that look at one issue, to some extent, out of context of the rest of the Plan, can result in one particular issue having a trumping effect. The overall balance and judgement struck through the One Plan and in section 5 of the RMA may be distorted. In this regard, retention of a discretionary activity status along with the robust biodiversity policy will ensure adequate protection of the regions biodiversity and enable sustainable management outcomes to be achieved.

David le Marquand
14th March 2012