**Before the Manawatu-Whanganui Regional Council Hearing Commissioners**
**Application No. APP-2013016147.00**

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| **Under** | the Resource Management Act 1991 |
| **In the matter of** | a discharge under Section 15(1)(a) of the Act to discharge stormwater to a channel connecting Lakes Pauri and Wiritoa from the Whanganui Prison |
| **Between** | **Ara Poutama Aotearoa - Department of Corrections** |
| | **Applicant** |

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# Legal submissions for Ara Poutama Aotearoa (Department of Corrections)

**Date:** 17 November 2020

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**TABLE OF CONTENTS**

**MAY IT PLEASE THE PANEL:**

## Overview

1 The Whanganui prison is essential and important infrastructure. It is part of a national prison network and forms an essential part of the applicant's statutory role under the Corrections Act 2004 to administer custodial sentences in a 'safe, secure, humane and effective manner'. The prison cannot be relocated. The collection and discharge of stormwater is a key aspect of the ongoing operation of the prison.

2 This resource consent application is a ‘renewal’ of an existing discharge. The opportunity presented by this application is to improve the existing stormwater network and discharge quality to enable the prison to continue operating. The significant financial value and mitigation effects of these improvements that have already been achieved, and those also proposed, necessitates the consent term as sought.

3 The consent process has involved extensive technical work to understand and substantially improve the stormwater system. A team of independent experts support the consent as now proposed, specifically as the quality of the discharge is such that the effects on the ecological and water quality values of the lakes are negligible.

4 Stormwater discharges from the prison contribute in only a small degree to the existing degraded state of the lakes. This essential feature of the application has not been understood or quantified by Council officers and a number of submitters, leading to overstatement of effects. Quantification of the effects and the

significance of those effects, and the ability of the receiving environment to assimilate, is the essential difference between the parties. Substantial technical work has been undertaken on behalf of Corrections to understand the groundwater dynamics and the various contributions to the receiving environment so that these contributions can be quantified.

5 Corrections cannot take sole or primary responsibility for the current state of the lakes. Degradation has been occurring for many years as a result of multiple activities. The information gathered through this application on these matters is more comprehensive than the Council had available on these matters. This application has been fully assessed and refined to ensure that adverse effects of the stormwater discharge are appropriately avoided, remedied or mitigated.

6 The impact of the stormwater discharge is known. There is much more certainty and knowledge of this discharge than other (potentially unregulated) sources. Corrections does not accept the Council's proposition that the lakes cannot assimilate anything more. Taking that position is the Council effectively turning this activity into a prohibited activity without following a proper process (ie. there is no prohibition in the One Plan to this effect).

7 Preventing the stormwater discharge from the prison site to the lakes will not improve the quality of the lake environment or prevent further degradation. That is a much larger task. To assist in that regard, Corrections is willing to work in partnership with other parties to jointly facilitate improvements to lake quality. Through conditions, Corrections is offering mitigation

measures that go beyond those strictly required to address anticipated effects from this discharge.

8 Corrections has undertaken consultation and has considered all issues raised. It has specifically endeavoured to address concerns raised by iwi. While submitters are all entitled to suggest alternative proposals and raise wider issues through this notified consent process, Corrections seeks that consent is granted for this proposal as sought. All alternative options have been explored, but they have poor or low technical feasibility and no or low likelihood of success, with in some instances greater effects on receiving environments. Even if another alternative option was feasible, it would need to go through a separate consent process, with no guarantee as to outcome.

9 The current application passes through the statutory hurdles in sections 104D, 105 and 107 of the RMA. While the recent introduction of the 2020 version of the National Policy Statement for Freshwater Management (**NPS-FM**) and the Resource Management (National Environmental Standards for Freshwater Management) Regulations 2020 (**NES-FW**) necessitate consideration of additional matters, it is premature to require this consent to 'give effect' to the NPS until the appropriate Council process has been undertaken to amend the One Plan.

10 The evidence presented by Corrections provides a sound basis on which the Commissioners can grant this consent as sought.

**Background**

11 Corrections has sought a resource consent to continue to discharge treated stormwater from the Whanganui Prison to the modified channel that flows into the wetlands and that connects Lake Pauri and Lake Wiritoa in Kaitoke, Whanganui.

12 The resource consent application was lodged in June 2013. The existing consent expired on 15 December 2013. The discharge of stormwater is currently authorised by operation of section 124 of the RMA. The current application will enable the continued operation of Whanganui Prison.

13 It is important to clarify that this hearing relates only to the application for the stormwater discharge. The discharge of wastewater from the Prison is being addressed in a separate application. In addition, while there has only been one application lodged for the stormwater consent, there have been two AEEs lodged with it. The first with the application in June 2013 (MWH AEE), the second in April 2018 (Boffa Miskell AEE) following further expert assessment of the application. Peter Hall addresses this in his planning evidence. The Boffa Miskell AEE should be considered the relevant AEE for this application.

14 A consent with an expiry date of 1 July 2044 has been sought. This aligns with the requirements of Policy 12-5(b) of the One Plan and the common expiry dates listed in Table 12.1. The common expiry date for the Kaitoke Lakes is 2014 with 10-year incremental increases after that. The consent term sought is an essential component of this consent application that reflects the significant expenditure undertaken to date

(upwards of $4.6M) and further investment proposed through the conditions of this consent that necessitate this term. A reduced consent term would undermine the financial viability of this consent due to that expenditure, as committed in the conditions proposed. For example, the proprietary filter proposed to further treat the discharge will cost approximately $3M, with ongoing maintenance costs of $150,000 to $200,000 per year. That is a significant further financial investment. That is not viable for a consent of a shorter period.

Dr Fisher [35] to [46].

**Legal framework**

15 As this resource consent application is for a discharge permit with a non-complying activity status, in addition to the matters in section 104 of the RMA, the following provisions are relevant to this decision:

15.1 Section 104D - the gateway tests. The application passes through both the effects and policy gateways.

15.2 Section 105 - technical assessment has confirmed the nature of the discharge and the sensitivity of the receiving environment and alternative options have been investigated. The current consent application seeks consent for the best practicable option as established through comprehensive technical assessment.

15.3 Section 107 - the discharge does not give rise to any of the matters listed in section 107(c)-(g), and therefore section 107 does not prevent the grant of this consent.

16 These submissions expand on each of these sections and requirements before addressing section 104 of the RMA.

**The gateway tests**

17 Section 104D of the RMA requires that the resource consent application pass through either (or both) of the section 104D gateway 'tests'. The evidence is clear that this consent passes through both.

18 As set out in the comprehensive expert evidence presented by Corrections, the adverse effects on the environment are negligible to minor. As summarised by Mr Hall, the effects from the discharge on the water quality of the lakes, habitats, life supporting capacity, amenity and contact recreation will be negligible (and further minimised by the proposed treatment). The stormwater makes a negligible contribution and will have a negligible impact on water quality. In terms of ecological effects, there is no ecological harm to the willow wetland, the wider Lake Wiritoa system and has no effect on the Lake Pauri system.

Mr Hall, Dr Keesing, Mr Coffin, Mr Cochrane.

19 The cultural effects in terms of cultural values and the mauri of the water will be minor. The lakes are held in very high esteem by iwi submitters and concerns are expressed as to the historic and ongoing effect of the stormwater discharge on Māori cultural values and the mauri of the lakes. The evidence of Mr Coffin places these effects and the issues raised in the CIAs into context. One of the key issues is to separate the specific features of this stormwater discharge from the current state of the lakes, rather than conflate those matters.

20 There are no more than minor effects. The effects gateway test in section 104D(1)(a) is satisfied.

21 In respect of the policy gateway test, in section 104D(1)(b) this requires assessment of the provisions of the regional plan component of the One Plan. The planning assessment undertaken by Mr Hall confirms that the proposal is not contrary to the objectives and policies of the regional plan. This is supported by the section 42A report's conclusion. The section 42A report, while concluding that the application is not consistent with the One Plan, does not conclude that the proposal is repugnant or in opposition to the regional plan objectives or policies. Inconsistent with does not equate to being contrary to. The policy gateway is therefore satisfied.

Ms Adsett supplementary report, paragraph [92].

*NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

22 The gateway test is limited to consideration of the regional plan objectives and policies. That is clear from the wording of that section where it refers to 'the relevant plan', with 'plan' being defined in section 43AA of the RMA as 'a regional plan or district plan'. The objectives and policies that sit in the Regional Policy Statement of the One Plan and those within the NPS-FM are not relevant to this test (acknowledging that there is some cross-referencing within the provisions). They become relevant to the substantive assessment under section 104. For the section 104D assessment, the Panel must assess the relevant provisions from Chapters 12, 13 and 14 of the One Plan. This is covered from paragraph [284] in Mr Hall's evidence.

23 The Panel can continue to consider the merits of the application under the other relevant provisions of the RMA.

**Section 105 - receiving environment and alternatives**

24 Section 105 of the RMA states:

> **105 Matters relevant to certain applications**
>
> (1) If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—
>
> (a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
>
> (b) the applicant's reasons for the proposed choice; and
>
> (c) any possible alternative methods of discharge, including discharge into any other receiving environment.

25 The expert evidence confirms the nature of the discharge and the sensitivity of the receiving environment.

26 There is no dispute that the receiving environment, being the channel, the wetland and Lake Pauri and Lake Wiritoa are degraded. The Lakes do not meet many of the bottom lines in the One Plan or in the NPS-FM. The Council has confirmed that the targets in the One Plan are aspirational targets for this Lake system. That is, they are deliberately set with the aim of improving water quality, but do not reflect the current condition of the receiving environment and its ability to be adversely affected.

Dr Keesing, at [74].

27 When discharged, the quality of the treated stormwater will meet the One Plan targets for Dissolved Zinc, Dissolved Copper, Ammoniacal Nitrogen and *E Coli*. In respect of Total Phosphorus and Total Nitrogen, the high concentrations in the surface water make it impossible for the treated discharge to comply with the One Plan requirements, even though the concentration of Total Nitrogen in the discharge is significantly lower than in the receiving environment and the effect of the discharge of Total Phosphorus would be indiscernible. The effects on water quality are therefore negligible, as are those on ecology. In fact, as set out by Mr Hamill, the stormwater effectively dilutes the lake water nitrogen concentrations and will continue to do so until the lake water quality considerably improves.

Refer evidence of Peter Cochrane, [13] to [17].

Refer evidence of Dr Keesing.

**Alternatives**

28 Several submitters have sought that an alternative discharge method or process is implemented through this consent. That is, a point of discharge that is different to the channel between Lake Pauri and Lake Wiritoa. There are several issues with this position.

29 First, the resource consent that can be granted by the Panel is limited to the scope of the application. The application is for the discharge to the channel between Lake Pauri and Lake Wiritoa, not some other discharge. Any other discharge location would need to be the subject of a separate resource consent process. The Panel must determine the application as it is currently before them.

30 Second, there is no requirement on Corrections to investigate or adopt an alternative option to this

discharge beyond the requirements of section 105 of the RMA and the policy direction within the One Plan. As set out above, section 105 section requires the Panel to have regard to any possible alternative methods of discharge, including discharge into any other receiving environment and Corrections' reasons for the proposed choice.

31 The policy direction of the One Plan relevant to the BPO is at the regional plan level at policy 14-1 and 14-4 and at the RPS level policy 5-9. It requires the management of point source discharges into surface water to have regard to the strategies for surface water quality set out (in policies 5-3, 5-4 and 5-5), while having regard to whether it is appropriate to adopt the best practicable option (amongst other matters). These are not requirements that the best practicable option be adopted by an applicant (even though that is what Corrections has done). It is not a threshold test where disagreement with the BPO report or selection of options provides a ground for decline. Peter Hall provides a comprehensive analysis of the policy direction at both the RPS and Regional Plan level within the One Plan.

Mr Hall, [66] - [71] of his policy attachment.

32 Corrections has commissioned a Best Practicable Option report for this discharge. The options assessed included 6 different discharge locations and 19 potential stormwater management options. The current proposal seeks consent for option 19 of that report (upgrade of the network with a proprietary treatment filter and discharge to the channel connecting lakes Pauri and Wiritoa). That is considered to be the most appropriate option for the reasons set out in that report and evidence. The best practicable option is being pursued.

33 Corrections has carefully and thoroughly looked at alternative methods of discharge. It has given genuine consideration to alternative methods of discharge. Corrections has also carefully and appropriately considered any alternatives suggested to it by iwi.

*Fonterra Co-Operative Group Ltd v Gillespie* [2013] NZEnvC 250.

34 There is no engineering analysis in the Mātauranga Māori report. It covers the cultural aspect and not the engineering constraints, even though the report's author was engaged to address both. This engineering work has instead been completed by experts on behalf of Corrections.

35 Following receipt of the Cultural Impact Assessments and Mātauranga Māori report, Corrections' witnesses, and WSP have assessed the hybrid option proposed. It is important to note that the WSP report concludes that prevention of the entire discharge to the lakes is not reasonably practical from an engineering perspective. The option of a vegetated swale could not fit within the land controlled by the Crown and introduces additional risks which could have a negative impact on the lake. More importantly, due to engineering constraints this swale could not be the naturalised channel pursued as it would need to be engineered, including through concreting and anchoring. Several other environmentally sensitive design components of the hybrid option are not viable at the site, primarily due to the high groundwater table. It is simply not an appropriate option to pursue.

Refer attachments 5 and 6 to Tim Fisher's evidence.

36 The other alternative options, for the reasons set out in the BPO Report and as addressed by Dr Fisher including the hybrid option as assessed in the WSP

attachment, are not appropriate as they all have poor or low technical feasibility.

37 Several submitters have been critical of the decision by Corrections to exclude a cultural layer or factor from the BPO assessment. The reason for this is that a cultural layer can only come after a cultural impact assessment. The cultural impact assessments have only recently been completed following the earlier engagement by Corrections for this work. As set out above, the matters raised have all been considered and excluded due to feasibility constraints. The nature of a best practicable option is to consider whether options are practicable. If an alternative does not work from an engineering perspective then it is not practicable, even if favoured from a cultural perspective. In addition, the cultural impact assessments did not rank or address each of the options included within the BPO, which was an outcome expected by Corrections.

38 The option before the Panel is the best practicable option.

**Section 107 restrictions on grant**

39 Section 107 of the RMA provides that a discharge permit cannot be granted (other than in certain limited circumstances):

> if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:
>
> (c) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
>
> (d) any conspicuous change in the colour or visual clarity:
>
> (e) any emission of objectionable odour:
>
> (f) the rendering of fresh water unsuitable for consumption by farm animals:
>
> (g) any significant adverse effects on aquatic life

40 None of these factors apply to the discharge. Section 107 of the RMA does not need to be considered further.

**Section 104**

41 In addition to the matters above, the matters in section 104 of the RMA must be considered by the Panel.

42 The various effects are set out in the expert evidence presented by Corrections. This includes ecological, water quality and cultural effects. Significant work has been undertaken by Mr Reynolds to ensure an understanding of the groundwater quality and flow patterns in the area and this underpins the work undertaken by other experts. It also highlights the significant contributions the surrounding land uses have to the current degraded state of the lake environment. This extensive work provides a much better understanding of groundwater patterns in this area than the Council previous had available.

43 In addition, the evidence of Dr Fisher illustrates the significant work undertaken by Corrections to improve the quality of the existing discharge by preventing groundwater cross contamination, and how the proposed proprietary filter will further improve discharge quality and the concerns with other engineering options proposed by parties.

44 Specifically, the evidence concludes that the effects from the discharge on the water quality of the lakes, habitats, life supporting capacity, amenity and contact recreation will be negligible (and further minimised by the proposed treatment). The cultural effects in terms of cultural values and the mauri of the water will be minor.

45 Through the condition package proposed by Corrections, the overall effects of the application will be positive. Mr Hamill's evidence is focused on the mitigation proposed in respect of Total Nitrogen and Total Phosphorus and the resulting positive effect of that action.

46 It is acknowledged that Dr Keesing and Mr Brown (for the Council) have differing views as to the ability for the lake system to assimilate the stormwater discharge. Dr Keesing considers that the Lakes continue to have the ecological ability to assimilate and will do for some time. Mr Brown appears to be taking an in principle approach that as the lakes are below the bottom lines there is no ability for the system to assimilate any further contaminants or nutrients.

47 The approach taken by Mr Brown is that *any* discharge of contaminants or nutrients into the lake is unacceptable. This is akin to treating discharges into

this environment as a prohibited activity. That is contrary to the activity status in the One Plan, and the policy framework (which does not contain any avoidance policies for this activity). This is highly inappropriate. If the Council is to impose a prohibited activity status on discharges to Lake Wiritoa and Lake Pauri, it needs to follow the proper process. As set out in *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* prohibited activity status must reflect relevant policies and objectives and must be the most appropriate of the options available. Currently, Schedule B of the One Plan states that a value of Lake Wiritoa is its ability to assimilate pollution.

[2008] 1 NZLR 562.

Dr Keesing, [75].

B-13.

48 The planning framework is comprehensively analysed in Peter Hall's evidence. This includes the NPS-FM and the One Plan (both the regional policy statement component (Chapters 1 to 10) and the regional plan component (Chapters 11 to 19).

49 Section 104(2A) of the RMA provides that when considering an application that is affected by section 124, which this one is, the Panel must have regard to the value of the investment of the existing consent holder. The level of investment in the site is self-evident from review of the site, and its significance is expanded further in the evidence of Mr Nind and Mr Reti. The recent investment into improving the stormwater network is also covered in that evidence, and that of Dr Fisher.

50 In considering alternatives, which the Panel may do under section 104(1)(c) of the RMA, the substantive considerations and actions taken by Corrections have been set out above. The Panel cannot require a full

cost-benefit analysis of alternative locations or options.

51 As to the requirement to consider Part 2, Peter Hall has also assessed this. Previous judicial decisions have determined that in some areas, the One Plan is incomplete or contradictory. Caution must be applied by the Panel when considering the completeness of the One Plan and whether recourse to Part 2 is warranted in accordance with the *Davidson* line of authorities when assessing this application.

For example, *Re Horowhenua District Council* [2018] NZEnvC 163.

*RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

**Conditions**

52 Attached to Mr Hall's evidence is the condition set as proposed by Corrections. It is acknowledged that this has changed from that filed with the application and following receipt of the Council's section 42A supplementary reports.

53 Both the Council through Ms Adsett's section 42A report and iwi through the CIA reports have recommended matters to be included in a condition set. Corrections has carefully considered those and adopted where appropriate. Overall, Corrections has agreed with many of the conditions proposed by the Council, and those considered appropriate that have been proposed by iwi for the reasons set out in Mr Coffin's evidence. The proposed conditions have therefore been updated accordingly.

54 It is important to remember that section 108 of the RMA sets parameters as to what an appropriate condition can be. Further whilst the limitations in section 108AA of the RMA were only codified in 2017 (following lodgement of this consent application), those limits are a reflection of the

Eg, *Waitakere City Council v Estate Homes*

caselaw. Conditions imposed on a consent must be directly connected to the adverse effect of the activity on the environment.

*Ltd* [2007] 2 NZ:R 149.

55 For the reasons set out in the evidence for Dr Fisher, the conditions proposed by Ms Adsett (E and F) in respect of discharge water quality monitoring are not required as the discharge is predictable and understood. Monitoring every 2 months comes with a significant cost and no real benefit given the predictability of the discharge. Corrections has proposed an alternative condition F which will confirm the characterisation of the discharge quality as a baseline for future monitoring, including a section 128 review process.

56 Further, Corrections considers resources are more appropriately invested in better understanding all sources of effect in lake water quality, and not just one large data set on a single discharge. This is currently proposed through condition 17A. Corrections acknowledges that, to date, the Council does not appear to support the proposed conditions 17A and 17B. Those conditions are intended to provide the Council with resources to enable the restoration of the lake environment. Corrections is disappointed with that approach and its expectation is that Council officers would be looking to take advantage of constructive improvements where appropriate, not to outright decline the offer of resources.

57 In respect of circumstances when consent conditions can be reviewed, section 128 of the RMA provides a broad framework. This has been refined in proposed condition 21 to exclude reference to the adoption of a BPO, as Corrections has already done that and it is

therefore redundant. Further, the proposed review condition limits the review to those conditions with monitoring and performance requirements which may need to be amended to manage effects on the environment. This refines the scope of the condition review to appropriate considerations and is considered to be efficient and effective.

**Role of Council**

58 A common theme through the submissions received, discussions held and the Council's section 42A reports is that Corrections has caused the degraded state of the Lake system and the continued discharge is therefore inappropriate.

59 Corrections disputes this both as a matter of evidence (refer to the evidence of Peter Cochrane that confirms Corrections discharge is *negligible or indiscernible* in terms of volume and quality) and as a matter of principle.

60 It is acknowledged that the stormwater discharge to be authorised by this consent is a point source discharge, and that point source discharges are easier to regulate than diffuse discharges. Where the point of discharge is clear, it is, in theory, straightforward to address that discharge (putting to one side that Corrections cannot control when, or how much, it rains). This is in contrast to diffuse discharges from a variety of sources.

61 However, the failure to regulate, mitigate or control diffuse discharges is not Corrections' failure. It is the Council's. The Council has the jurisdiction (and the obligation under the NPS-FM) to implement a planning framework to control the effects of diffuse

discharges. Diffuse discharges must be regulated in a similar fashion to point source discharges, as the same legal tests apply to all discharges. Corrections should not be disadvantaged through this consenting process for the limitations of the One Plan.

62 The degraded state of the Lakes has resulted from a legacy of significant land use change and decades of inaction. The surrounding land use and groundwater flows have resulted in the declining state of the environment. This is reflected in Chapter 1 of the One Plan which states:

One Plan, Chapter 1, 1.3, Issue 1.

> Run-off of nutrients, sediment and bacteria from farms is now the single largest threat to water quality in the Region.

63 Without taking measures to address those sources of contaminant, the Lake system will continue to degrade. Corrections has no control over these matters, and should not be held responsible or accountable for them.

64 Even so, Corrections has offered, on an *Augier* basis (as it is not linked to an effect of the discharge) to contribute a significant sum of money to an environmental fund. It is for the Council to determine the appropriate way and timeframes in which to spend that money, as it must be used as part of a broader catchment-wide programme for the lakes. This is a genuine attempt to contribute to the restoration of the Lakes. Corrections does not have the jurisdiction or resources to completely restore the Lake environment, but it can contribute to the Council's efforts in a meaningful way.

*Augier v Secretary of Statement for the Environment* (1978 38 P & CR 219 (QBD).

Proposed Condition 17A.

65 While the contribution is not necessary in terms of mitigation of the effects, Corrections considers that it

is an appropriate contribution to an important issue for iwi and the community. This is a contribution that is in addition to the contribution towards removal of Nitrogen and Phosphorus set out in the evidence of Mr Hamill. Although the concentration of Total Nitrogen in the discharge is significantly lower than that in the receiving environment, and the effect of Total Phosphorus will be indiscernible, the offered conditions are in recognition of the fact that the treated discharge will not comply with the One Plan targets for these contaminants. The offered conditions in 17B are proposed as alternatives. Either Corrections will contribute a monetary amount or undertake targeted works itself (such as weed harvesting).

66 While Corrections is a central government department, it has limits on funding (especially in a post COVID-19 economy) and must always act in a fiscally responsible manner. Conditions must be necessary to avoid, remedy or mitigate the effects of the discharge and must actually achieve some benefit. Corrections has put considerable effort into targeting proposed conditions into mitigation and initiatives that will make a real difference.

**NPS-FM**

67 There has been a National Policy Statement for freshwater management in place since 2014. In 2017 it was amended. On 3 September 2020 the previous NPS-FM was replaced with the NPS-FM 2020. The NPS-FM contains 1 objective and 15 policies.

68 It is the NPS-FM 2020 that is relevant to this consenting process. Through consideration of the application, the Panel must have regard to the relevant

provisions of the NPS-FM. It is, however, not relevant to the policy gateway test under section 104D. That gateway is limited to consideration of the objectives and policies in the regional plan.

69 This requirement to have regard to the NPS-FM in resource consent decision making is in contrast to the obligations the NPS-FM imposes on the Council. The Council must amend its planning documents to give effect to the NPS-FM. Part 3 of the NPS-FM sets out a non-exhaustive list of the things that the Council must do to give effect to the objective and policies in the NPS-FM.

70 It is the Council's role to give effect to the NPS-FM and not Corrections'. This has not been properly addressed in the section 42A planning report. The Council has not yet given effect to the NPS-FM through its planning documents. It has until 31 December 2024 to notify its plan/plan changes that will do so.

71 Until the Council has notified its new plan provisions, Corrections, its experts and this Panel cannot pre-empt what that framework may look like.

72 There is no dispute that Te Mana o te Wai is the fundamental concept within the NPS-FM. In part, it protects the mauri of the wai. Freshwater is to be managed in a way that gives effect to Te Mana o te Wai.

73 As set out in 1.3(5) of the NPS-FM, there is a hierarchy of obligations in Te Mana o te Wai that prioritises:

73.1 first, the health and well-being of water bodies and freshwater ecosystems;

73.2 second, the health needs of people (such as drinking water); and

73.3 third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

74 However, to properly understand Te Mana o te Wai, the Council must go through the proper process. It must engage with communities and tangata whenua to determine how it applies in the region. Tangata whenua must be actively involved in the process.

75 Until the proper process has occurred, the appropriate values and attributes required to give effect to Te Mana o te Wai in Lake Pauri and Lake Wiritoa cannot be determined. This does not mean all consenting processes should be stalled, or declined until the freshwater planning process has occurred. Instead, the provisions of the current framework must continue to be applied with regard had to the objective and policies of the NPS-FM. That is what the experts for Corrections have done in their evidence.

76 In respect of the current application, and the section 42A report's analysis of it against the NPS-FM, the stormwater pipe is 'other infrastructure'. As defined in the NES-FW, 'other infrastructure' is infrastructure that was lawfully established before, and in place on, 2 September 2020. This is relevant to the assessment of effects on the wetland under the NPS-FM. Specifically, the compulsory policy at 3.22(1) requires that the loss of extent of natural inland wetlands is

Noting that clause 3.22(1) of the NPS-FM is within the implementation

avoided, their values protected and their restoration is promoted, except where, [the loss arises from]…the maintenance or operation of other infrastructure.

part of the NPS.

77 Notwithstanding the effects conclusions of Mr Cochrane and Dr Keesing, the policy direction does not apply to this application. Instead the NPS-FM directs the Council to amend its regional plan to address consents of this nature. That is yet to occur and therefore the Panel is limited in its ability to consider this policy here.

**Consultation**

78 There is no obligation or duty under the RMA for a consent applicant to consult with any party. This is clear from section 36A of the RMA. Corrections has, however, engaged with tangata whenua, the community, other stakeholders and the Council. The extent of this engagement has been set out in previous correspondence with the Council and is addressed in evidence, primarily the evidence of Peter Hall and Antoine Coffin.

79 The duties and obligations imposed on Corrections as part of the Crown, particularly in terms of the principles of the Treaty of Waitangi, whilst of significance, must not be elevated to a duty under the RMA.

80 Corrections has undertaken an appropriate process, although acknowledging that there was an administrative error at the start of the process that meant that the representative from Te Rūnanga o Tupoho was not invited to the first hui in 2018, resulting in one missed hui. That was, however, rectified and an appropriate consultation and

Mr Coffin, at [17] to [23].

engagement process has been completed. Further, the application was publicly notified by the Council. All interested parties have had an opportunity to become involved through the submission and hearing process.

81 There has been criticism from iwi for setting the hearing date without prior agreement with iwi. Corrections considers that iwi have had plenty of time to prepare for the hearing and that it has previously accommodated their requests to delay the hearing. At the request of iwi the August 2020 hearing date was delayed for a month due to the cultural impact assessments not being ready. The resulting September date was further delayed following the delay to the finalisation of the cultural impact assessments.

82 In addition, there have been plenty of hui where there were opportunities for engagement and constructive progression of concerns. Thirteen hui with iwi have occurred between February 2018 and October 2020. However, there was little confirmation as to the reasoning for the opposition to the proposal and whether there was anything that Corrections could do to modify the proposal which might address those concerns until the Mātauranga Māori and CIA reports were received on 12 and 14 October 2020.

83 This must be also considered against the background that the application was initially lodged in June 2013, and criticism that Corrections has been deliberately delaying the application. It is acknowledged that this application has progressed slowly. As a result, in mid-2018 Corrections placed emphasis on getting the application considered by Council. In early 2018, it refreshed its AEE and submitted it to the Council (the Boffa Miskell AEE), the Council considered

application and AEE and made decision to publicly notify. The application was notified in September 2018.

**Prison closure effect**

84 The section 42A report recommends decline with little acknowledgement of the implication of that recommendation on people in Corrections' care or the prison network.

85 At a practical level, declining this consent would require Corrections to cease its point source stormwater discharge. As it cannot stop the rain, it would be required to turn its point source discharge into a diffuse discharge by removing the stormwater network and potentially impermeable surfaces at the prison. This is not realistic.

86 Further without the stormwater consent the prison would need to close or significantly reduce its operations. The impact of this is potentially significant and outlined in the evidence of Mr Pearse. Whanganui Prison is part of the nationwide network of prisons. It would remove 551 beds from the network and impact the employment of 306 staff (1.5% of the workforce in Whanganui). The 2020-21 operational budget of the prison is nearly $31M. Any reduction in the Prisons operations would impact on the local economy.

Mr Pearse, [56] and [60].

Mr Pearse [42] to [45].

87 Whilst there has been a reduction in the prison population over the last 7 months, the prison population is predicted to rise again and the loss of 551 beds out of the North Island prison network would have a significant impact on Corrections' ability to

manage the prison population and meet its goals under Hōkai Rangi.

88 It would also limit Corrections ability to close older sub-optimal beds across the network. The ability to build new capacity is severely constrained. Mr Pearse, at [58].

89 In addition to infrastructure constraints on Corrections, the closure would directly impact on prisoners and their rehabilitation. The preference is to house prisoners where they have strong community and whanau support. This is explained further by Mr Pearse. Mr Pearse, from [46].

**Conclusion**

90 The collection and discharge of stormwater is a key aspect of the ongoing operation of the prison. This resource consent application is a 'renewal' of a continued discharge, and an improvement to the existing stormwater network and discharge quality to enable the prison to continue operating.

91 Corrections has invested significant time, resources and money into improving the quality of its stormwater discharge and has committed further significant resources through the proposed conditions.

92 There is no legal barrier to the grant of this consent. The grant is appropriate, and the Panel can rely on the expert evidence presented by Corrections in reaching a conclusion that the effects of this consent are negligible to minor.

**Date:** 17 November 2020

. . . . . .
S F Quinn / E L Manohar
Counsel for the applicant

**Attachment - Expert Evidence Summaries**

## Key points summary: Reti Pearse

- I am the Prison Director of Whanganui Prison and have long experience in the prison sector.

- My evidence provides you with an overview of the prison and the justice sector.

- In summary, we are working to keep the community safe, to ensure that offenders "do their time" and to provide the 550-odd people in Whanganui Prison opportunities to successfully reintegrate into the community on their release from prison.

- While in prison, we work with offenders to improve their education, their job skills, and their life skills. We do this to reduce the chance that they will reoffend and increase their chances of employment and positive relationships with others. We offer NZQA courses, prisoners work in our concrete plant and plant nursery, and they can undertake programmes to help with drug dependence and antisocial behaviour. Most people in prison have few skills, poor education, and complex social needs.

- In particular we are working to improve the outcomes for Māori in our care. Sixty percent of the inmates in Whanganui Prison are Maori. But Māori make up only 17 percent of the general population. This disparity is unacceptable, and we have an important role in trying to turn it around.

- To do that Corrections has developed Hōkai Rangi. As this strategy is implemented our services and responses to the needs of Māori will become more effective and we should see the rates of Māori incarceration drop. We are working to support Māori in prison as members of their wider whānau and strengthen their whakapapa connections because these things work for Māori. It's a long-term game, but we are working on it.

- One of the keys to achieving good outcomes and reducing reoffending is keeping the prison within the community it serves. If prisoners are to have productive lives in the community after they have served their sentences, they need to maintain and strengthen connections with their communities, whanau, and families while in prison. These relationships are critical as people transition back into the community and back into life with their whānau.

- In practical terms, this means ensuring that there are as few barriers as possible, such as time and cost, to whānau visiting the prison. If Whanganui Prison were unable to continue at the current site the next closest prisons are 80km, 185km, and 225km by road. The time and cost needed for travel would mean that it would not be feasible for Whanganui-based whānau to regularly visit their members if they were in these prisons.

- We employ 306 staff – that is 1.5 percent of the workforce in the Whanganui district

- In 2018/19 our budget for staff and operating costs was $28.6m with a lot of that spent in the local economy. In 2020 -2021 the budget for Whanganui prison is nearly 31 million

- We spent an additional $2.4m on contractors for specific maintenance work and some of that expenditure was with local firms.

- Across the prison system we are also severely stretched by prison capacity. The issue is not about prison population, but the quality and location of prisoner accommodation.

- In terms of the current application, the stormwater system has been in place since the prison opened in 1978 and it has recently had extensive upgrading work done. Simply said, the prison needs a consent to continue to discharge stormwater from the prison to continue to operate.

- In terms of the options for the stormwater discharge my main concern is to make sure that the prison can continue to operate safely and securely, and that ongoing maintenance is manageable.

- My evidence comments on the safety and security concerns with a number of the options; particularly if they would provide an opportunity for contraband to be secreted in the prison or damaged by vandalism.

- Proposed Option 19 would meet our needs on an ongoing basis and maintenance can be undertaken under our maintenance contract. It would create some disruption to prison operations during construction, but this will be manageable.

- Others will provide evidence on the technical details of the options.

## Key points summary: Evan Nind

- I am the National Manager of Project Delivery for Ara Poutama Aotearoa: The Department of Corrections. I have held this position since September 2019 and I'm responsible for the implementation of capital projects across the Department's estate. I have also previously been responsible for managing the maintenance of facilities across the estate.

- The estate is sizeable and includes 18 prisons that house approximately 10,000 people in a secure and humane manner.

- As described by Mr Pearse, the facilities at Whanganui Prison include different types of buildings, roading, and infrastructure such as the nursery and concrete plant. The prison also includes facilities for managing the three waters: drinking water, wastewater, and stormwater. Drinking water and wastewater are managed on-site. It should be noted that water from the concrete plant and from the nursery are not managed through the stormwater system.

- The stormwater network will be described in detail by Dr Fisher. My evidence addresses the arrangements in place for the maintenance of the network, recent work, and recent changes to the maintenance contract.

- Facilities maintenance at Whanganui Prison was done by Departmental staff until 2005, then it was undertaken by Spotless. Since 2018 Downer has held the facilities and maintenance contract.

- The current contract with Downer is for 10 years and covers the entire prison estate nationwide. The contract is worth approximately $53million per year and approximately $8m was spent at Whanganui Prison during 2019/20 under the contract. The contract covers all facilities maintenance – from replacing lightbulbs to operating the wastewater plant.

- The contract requires that Downer maintain capacity to fulfil its contractual obligations, that there is a focus on proactive

maintenance as well as rectifying faults, that Downer assist the Department to optimise its maintenance budget (including meeting environmental objectives) and that Downer assist the Department with new project investments.

- The Department's environmental responsibilities –including those arising from conditions on resource consents – are given effect through the contract. My written evidence details the contractual obligations, which in summary include:

    - Keeping the Department informed of its status and risks in respect of legislative compliance, compliance with consent conditions, and local authority requirements.

    - Having processes and systems to ensure compliance, using these systems, and monitoring that they are followed.

    - Ensuring that the Department is informed of any instances of non-compliance (or the risk of non-compliance)
        - Undertaking timely action to remedy instances of non-compliance
        - Ensuring responsiveness to changes in requirements.

    - Downer has suitably qualified staff, such as environmental advisors, and systems, such as the 'Dynamics' programme to assist it with meeting its contractual requirements. The contract also contains performance standards.

- In 2013 the stormwater network was thoroughly investigated, and others will give detail about that process and its findings. In terms of facilities maintenance, those investigations led to a $5 million investment in a comprehensive programme of work to upgrade the system itself and other facilities that impact on stormwater quality. This work began in 2014 and was completed in September 2020. It is expected to have a 50-year life-span and included:
    - Reducing the discharge of zinc from all roof areas
    - Drain marking with "Save the Drain for Rain"
    - Extensive re-sleeving of the stormwater network
    - Repairs to the stormwater network where CCTV surveys showed damage.

- Through this process it became clear that the contract with Downer for facilities maintenance needed greater specificity in terms of the stormwater system at Whanganui Prison and the *Stormwater Management Plan for Whanganui Prison* was developed for this purpose. It is now in effect and details work, such as surveying roof areas for signs of paint deterioration and cleaning sumps, that is required to maintain the stormwater network.

- It is important for that, while there has been considerable work done on improving the stormwater network at the prison, the prison has always complied with the terms of its resource consent for the discharge of stormwater.

# Key points summary: Tim Fisher

- I am Dr Tim Fisher, a civil engineer with extensive experience in stormwater engineering. My evidence is in respect of the stormwater management and infrastructure, both existing and proposed at Whanganui Prison.

- It is my professional opinion that the work done to date on the prison's stormwater network, and the approach proposed to managing stormwater at the site are best practice considering the relatively low levels of pollution generated at the site and the highly-valued receiving environment. The extensive investigations and studies mean that: the Department and its consultants have a very good understanding of the stormwater infrastructure, site constraints and environment; significant water quality improvements have been made and more are proposed; and the best practicable option has been selected.

- There are four key matters in my evidence:
    - The investigations to assess the state of the stormwater network
    - The work done to improve the stormwater network
    - The proposed approach to managing stormwater at the prison
    - The engineering perspective of the alternative options for the discharge.

## Investigations undertaken

- Following the lodgement of the application in 2013 to re-consent this discharge the stormwater network was extensively investigated resulting in detailed information about stormwater performance and the state of the network. This included visual inspections, taking water samples, and surveys by CCTV. Over 6,700 metres of network and 500 related assets were examined.

- Unsurprisingly, given the original stormwater networks were installed in the 1970s, the older parts of the network were found to be in average condition. It was suitable for its purpose, but also needed maintenance. Notably it was found that groundwater was infiltrating the network, which was contributing nutrients to the stormwater.

## Work done to improve infrastructure

- A comprehensive programme of work followed to improve the state of the network. It was cleaned, sediment and other debris removed, repairs undertaken, and signage put in place (i.e. to identify that discharges to catchpits were to the stormwater system and into the environment). Prison staff were also provided with information about the network and how to care for it (e.g. stormwater management plan).

- Extensive rehabilitation of the stormwater network was undertaken with approximately 2,700 metres of re-sleeving installed and 10 subsoil drains sealed. This has minimised as far is practical groundwater infiltrating the stormwater network and will extend its life.

- Work to replace or paint roofs was undertaken from 2013 – 2017 to reduce Zinc concentrations in the stormwater. Other minor improvement works are covered in my evidence.

## Proposed approach to stormwater management

- The proposed approach to stormwater management uses a stormwater treatment train that includes the following items:

    - Management of higher risk activities such as concrete making and the nursery with specific controls, and monitoring and maintenance of the stormwater system, as detailed in the stormwater management plan.
    - Rainwater harvesting where feasible (concrete plant and nursery areas), which has been added after consideration of the Cultural Impact Assessments and Mātauranga Maori report. This is subject to further feasibility investigation that the Department has committed to.
    - Existing catchpits to capture gross pollutants and coarse sediment.
    - Stormwater conveyance in the re-lined pipe network that now excludes as far as practicable infiltration of groundwater with associated nutrient pollutants.
    - Treatment by a proprietary stormwater filter to remove gross pollutants, sediment, nutrients and heavy metals.
    - A green outfall channel for polishing and energy dissipation prior to the connecting channel between Lake Pauri to Lake Wiritoa. This is subject to consents and landowner approvals that the Department has committed to progress.

- The proposed approach to stormwater management will cost in the order of $10 million.

## Engineering perspective of the alternative options for the discharge

- I have examined the engineering aspects through the Best Practical Options study and again as part of consultation with iwi. My view is that the site, the shallow groundwater, limited space, and the shallow hydraulic environment severely limit the feasibility of draining the stormwater to alternative locations and limit the choice of treatment technologies. Furthermore, the Prison has additional operation requirements for safety and security, which means the stormwater infrastructure inside the Prison be not vulnerable to misuse or vandalism. The proposed approach to stormwater management is feasible from an engineering perspective and significantly improves the quality of the stormwater discharge, which I consider represents responsible stewardship by the Department.

## Key points summary: Tony Reynolds

- My name is Tony Reynolds, I am a hydrogeologist, and my evidence is focused on groundwater.

- In summary: the prison site is underlain by unconsolidated dune sand. Shallow groundwater flows through this material from the east-south-east toward the west-northwest. The groundwater turns to the north-west and north near the western and northern boundaries of the prison. It then flows toward Lakes Pauri and Wiritoa. Nutrients, metals, and coliform contamination have been found in the groundwater. My investigations show that these are highly unlikely to come from the prison or its activities as the higher levels of contaminants were found in groundwater samples taken outside the prison boundary and from wells on the southern and eastern sides (that is, before the groundwater flows under the prison site).

- Before I describe these matters, it is important to note that the Department's application is for the discharge of stormwater and my evidence is focused on groundwater. My evidence is relevant to the application because:
    - Before remedial works were undertaken, groundwater was infiltrating the stormwater network and being discharged by the prison giving the impression that contaminants in the stormwater came from the prison. Dr Fisher has described the extensive work done on the stormwater network.
    - Independent of the prison, groundwater is entering the lakes. My evidence provides useful information for the Council in respect of its wider activities to support and improve the health of the lakes.

- I will give an overview of the geology of the region, the groundwater, and the nutrients and metals found in it.

### Overall geology of the region

- The prison sits in the Manawatu-Whanganui Basin. The geological features of note are that:
    - the coastal region is dominated by unconsolidated sand dunes sitting over sedimentary rock and containing shallow unconfined aquifers.

- the lakes of the region are dune lakes with generally poor drainage to the sea (Dr Keesing will elaborate on the features of dune lakes).
- confined aquifers are located in the deeper sedimentary rock and are separate from the shallow aquifers in the dune sands.

## Groundwater

- To obtain more information about the groundwater, and to supplement research from other sources, 16 monitoring wells were drilled inside and outside the prison's perimeter fence. Most wells were less than 6m deep and two were 15m deep. The deep wells were paired with shallow wells. All wells were used to give information about the depth of the groundwater, its direction of flow, and to enable samples to be collected and tested. My evidence contains a map of the locations of the wells, the processes followed, and details of the findings. The key findings are:
  - The groundwater at the prison site is shallow and is between approximately 0.5 - 4 metres below the ground surface across the site.
  - The shallow groundwater flows from east-south-east towards west-northwest, turning towards the north-west and north near the north-western and northern boundaries of the prison site; that is towards the lakes.
  - Groundwater flows into the lakes but contributes less volume than the streams which flow into them.
  - Water moves from the lakes into the shallow and deep groundwater systems impacting on the amount of surface water discharged from the lakes.
  - The groundwater that flows under the prison site contains nutrients, metals, and other dissolved elements or compounds including: -:
    - Chloride – concentrations are variable and indicative of effects from the prison, agriculture, and silviculture. Pipe repair at the prison, where a kitchen drainpipe had broken, has resulted in decreased chloride levels attributable to the prison's activities. Elevated chloride levels were found in the wells to the south and east before groundwater flows under the prison. It is likely to come from rainfall and off-site land-use.

- Zinc – concentrations of zinc were generally low.
- Copper – concentrations were generally higher than desirable and found at monitoring wells at or near the southern and eastern site boundaries before groundwater flows under the prison. Copper is indicative of agricultural and silvicultural activities and road run-off.
- E. coli – higher concentrations were found in monitoring wells on the southern, eastern, and northern boundaries of the site suggesting that the source of contamination is off-site and the result of the activities on surrounding land.
- Phosphorus – elevated concentrations were found in all monitoring wells. The highest concentrations were found at or near the southern boundary indicating that the source is off-site.

- Nitrogen – again, elevated concentrations were found in all monitoring wells. The highest concentrations were found to the east suggesting off-site sources of nitrogen. The quality of the groundwater, when it reaches the lakes, impacts on the quality of the Lake environment.

# Key points summary: Peter Cochrane

## Introduction

- This provides a summary of my evidence in chief dated 2 November 2020. It deals with stormwater quality and the effects of the discharge of treated stormwater from Whanganui Prison on surface water quality.

## Stormwater quality and effects on surface water quality

- The prison's stormwater contains a range of contaminants in water that are expected for a site of this nature. Stormwater discharged from the site has:

  (a) Very low to moderate concentrations of suspended solids, with the higher concentrations occurring at the beginning of rainfall events.

  (b) Moderate concentrations of zinc, Total Nitrogen, and Total Phosphorus.

  (c) Low concentrations of copper and Ammoniacal Nitrogen.

- The concentration of these contaminants are much lower than those in stormwater from comparable environments across New Zealand.

- Stormwater quality has been improved by measures to minimise groundwater infiltration into the network and by painting and/or replacing roofing materials. Further treatment of stormwater is proposed and this will result in stormwater of a very high quality.

- With the treatment proposed, and with the measures set out in the proposed conditions, the adverse effects of the discharge on water quality in Lake Wiritoa will be negligible.

- Using a factor for dilution or mixing of 5 times (as previously agreed between the Department and Horizons Regional Council) would mean that treated stormwater would meet the One Plan Targets for Total Phosphorus, Total Nitrogen, Dissolved Zinc, Dissolved Copper,

Ammoniacal Nitrogen and E coli prior to it flowing into the Wiritoa Lake arm.

- When existing lake water quality is considered, the high concentrations of Total Phosphorus and Total Nitrogen already present in surface water, makes it impossible for the discharge of treated stormwater to comply with the One Plan Targets for these contaminants, as there is no capacity available for mixing and dilution.

- However, it is important to put this conclusion in context:

  (a) The concentration of Total Nitrogen in the stormwater is much lower than in surface water upstream (in Lake Pauri) or downstream (in Lake Wiritoa) of the discharge. This means that the effect of the discharge is to dilute and reduce current concentrations of nitrogen in Lake Wiritoa.

  (b) The increase in concentration of Total Phosphorus from the discharge of stormwater is marginal (2%), and the effect of the discharge on the concentration of Total Phosphorus in Lake Wiritoa would be undiscernible at start of Wiritoa Lake Arm.

  (c) The discharge of treated stormwater represents less than 2 to 3% of the Total Phosphorus load and 2 to 4% of the Total Nitrogen load in Lake Wiritoa.

- A range of measures to improve surface water quality have been considered by the Department and are outlined in Mr Hamill's evidence. In addition to the measures proposed by the Department to manage and treat stormwater quality, the adoption of additional measures to remove phosphorus and nitrogen loads from Lake Wiritoa or decrease its concentration would help improve water quality in Lake Wiritoa.

**Consent conditions**

- Consent conditions proposed by the Department include the monitoring of stormwater quality and sediment quality.

- Upon my recommendation, an amended new condition (E) proposes an investigation to determine the quality of stormwater discharging from the site following the construction of the proposed proprietary stormwater treatment device. This investigation will characterise stormwater quality following treatment and demonstrate that the objectives of treatment have been achieved.

- The Department proposes to monitor sediment for copper and zinc, as these are indicative of the Site's stormwater discharge. The adoption of the Australian New Zealand Guideline Values default guideline values as triggers for further investigation (or action if necessary) would ensure the protection of aquatic species in the vicinity of and downstream of the stormwater discharge point.

- The Department is offering to assist Horizons Regional Council to improve water quality in the Lake, and has proposed a condition specifying a contribution for a range of measures that will inform the creation (and subsequent implementation) of a lake restoration plan including activities to reduce nutrient loads in lakes Pauri and Wiritoa which I support. These initiatives would see the removal of nutrient to levels as if the discharge were complying with the One Plan Targets for nutrients, but it needs to be recognised that for these targets to be achieved, a much larger programme of initiatives (both catchment-wide and in-lake) would be needed.

**Section 42A report**

- Two reports were prepared by Mr Brown as a part of Horizons Regional Council's S42A report, and while I agree with his assessment of the current state of Lake Wiritoa, I do not agree with the significance that he places on the Department's stormwater discharge as a contributor to its current state or to its decline.

- The majority of nutrient loads into Lake Wiritoa are from groundwater, surface water sources and release of nutrients from sediment, with stormwater being a very minor contributor.

- While removing the discharge as discussed by Mr Brown would remove this nutrient source it would not materially improve water

quality in the Lake. Removing the discharge would result in a move away from the One Plan Target for Total Nitrogen, and the increase in residence time in the lake (due to the removal of the stormwater discharge) could result in the potential for further water quality decline.

- In paragraph 67 of Ms Adsett's s42A Supplementary Report she relies by Mr Brown's assessment to conclude that "…this discharge will, due to the sink like nature of the lakes, continue to contribute to this degraded state and potentially exacerbate it." However, for Total Nitrogen the discharge of treated stormwater from the Prison is above the National Bottom Line, and above current concentrations in Lake Wiritoa – so the discharge of this contaminant will not contribute to this degraded state and will in fact improve it and move it towards the One Plan Target. For Total Phosphorus, the concentration of treated stormwater is below the National Bottom line, but the effect of this exceedance on Lake water quality is effectively immaterial.

- With the treatment of stormwater to the degree proposed by Dr Fisher, and the measures proposed by Mr Hamill to reduce nutrients, and as set out in the Department's proposed consent conditions, the discharge of stormwater would not result in further degradation of lake water quality, it would certainly not exacerbate it, and would (in concert with catchment-wide initiatives) see an improvement in lake water quality.

## Key points summary: Vaughan Keesing

- My name is Dr Vaughan Francis Keesing. I am an experienced and qualified ecological consultant with Boffa Miskell Ltd and have the qualifications and experience as laid out in my evidence in chief.

- I have provided my expert opinion on the ecological issues in this application. I have extensive relevant experience, have visited the site several times (including in different seasons), and undertaken research to inform my analysis and conclusions.

- My overall conclusion is that the proposal for the prison's improved quality storm water to continue to discharge into the modified stream channel that flows into the wetlands, and that connects Lake Pauri and Lake Wiritoa, is sound from an ecological perspective.

- This view is based on three main factors:

    - Firstly, that the discharge from the prison will contain low levels of contaminants, none at a harmful level, and I doubt that these reach Lake Wiritoa;

    - Secondly, that the receiving environment is a robust, largely exotic, and tolerant ecosystem. The prison's stormwater discharge has little, if any, impact on it; and

    - Thirdly the water quality proposed to be discharged will not restrict the restoration of the lake (if that were feasible).

- I expand on these points and comment on the alternative options for the discharge.

### Prison discharge: contaminants and their path through the receiving environment (the lake-lagoon and its margins)

- Others have provided evidence on the quality of the stormwater discharged by the prison before and after remedial works were done at the site. They conclude that the quality of the stormwater discharged by the prison will meet (at least the great majority of the time) the requirements of the One Plan (Schedule E). Certainly, the discharge from the prison contains low levels of contaminants of concern from an ecological perspective, and contributes, at a catchment level, a low proportion of what the lake receives.

- The stormwater first enters the discharge pool, then the modified channel, then the Willow Wetland, prior to the southern end of the lake. These first three zones are the primary receiving environment.

- There are two key points to note about the primary receiving environment. Firstly, that there is an effective mixing zone before the discharge reaches Lake Wiritoa and Horizons Regional Council and the Department have agreed that a dilution factor of five is appropriate for this environment. Secondly, the Willow Wetland is sediment heavy and will entrap any suspended metals that are not captured by the channel. Without wishing to oversimplify, it is my view that as a result the stormwater enters Lake Wiritoa basically without a contaminant load.

- The stormwater then works through to Lake Wiritoa, but largely in the south and towards the outlet. Lake Wiritoa is large, deep, and has considerable capacity to manage any contaminant load that does makes its way into it. In part this is because it has long ago lost any species that might have been sensitive and is now largely driven by internal cycling of a large nutrient load and large biomass of weed.

**Receiving environment is robust and tolerant**

- When compared to the aspirational goals set out in the One Plan Lake Wiritoa is clearly in poor health. And indeed, this is recorded in many places (LAWA for example). I agree with others that this is a regrettable situation but stress that, the prison's stormwater has little impact – positive or negative – on this situation. I also note that Mr Brown from Horizons Regional Council and I are largely in agreement about the ecology of the receiving environment.

- All three parts of the receiving environment: the channel, the wetland, and Lake Wiritoa are dominated by exotic species of flora and fauna, and many pest species (e.g. perch, pond weed, hornwort, crack willow). The invertebrate community of the wetlands is 'species-poor'. I have examined the site in person and found little native taxa of value in any part of the receiving environment. My research indicates that this has increasingly been the state of the receiving environment since at least 1970.

- The state of the receiving environment is a result of the topography and hydrogeology of the region; and historical deforestation and intensive agriculture over the last 150 years.

- Lake Wiritoa is a deep dune lake. As such its outflow is low, it accumulates material and its water stratifies seasonally. There is also considerable flow of groundwater into the lake. When these natural features are combined with intensive agriculture, and human recreation and use, over a prolonged period, the result is an accumulation of phosphate and nitrogen in the lake, dominance of exotic aquatic pest species, seasonal recycling of these nutrients, algal blooms, and the lake being in super-eutrophic condition. This seasonal internal cycle becomes the dominant determinant of the health of the lake.

- Even if there were a high contaminant load in the prison's stormwater it would do little to damage the ecology of Lake Wiritoa today. The lake is now a robust exotic and tolerant system.

- I further note that, the prison's stormwater discharge is not a hindrance to efforts to improve the quality of the ecology of the lake. The restoration to a better quality class (say C in terms of the NPSFW) is supported by the proposed stormwater discharge quality, but to move the lake from a D to a C status would take substantial time and resources and effort, because the existing internal nutrient cycling and weed biomass requires considerable and experimental work.

## Alternative options for the prison's stormwater

- I have examined the alternative options for the discharge of the prison's stormwater and particularly the options to discharge the stormwater to the outlet stream from Lake Wiritoa. I do not support these options because of the ecological damage that would result. Damage would primarily be from markedly increasing the volume of water flowing down the stream. Currently the flow is low and intermittent (consistent with Lake Wiritoa being a dune lake). The flora and fauna of the stream environment is adapted to this low volume of water. Introducing the prison's stormwater would increase the flow from 5-70 l/s (depending on the season) to up to a maximum of 550 l/s. An increase of that magnitude would significantly change the stream ecology. Further minor effects could be expected from introducing the low level of contamination in the stormwater to an environment that currently receives no contamination.

## LAKE WATER QUALITY MITIGATION

### Summary of evidence for Keith Hamill

1 My name is Mr Keith Hamill, I am a Principal Environmental Scientist with River Lake Ltd and have extensive experience in New Zealand with respect to lake water quality monitoring and management. My evidence focuses on potential options to mitigate the effects of Whanganui Prison stormwater on lake water quality.

2 The effects of the prison stormwater after treatment on eutrophication in Lake Wiritoa will be small and difficult to detect. However, Lake Wiritoa currently has high nutrient concentrations, is in a super-trophic condition and does not meet either the NPS-FM bottom-line values for lake eutrophication or the One Plan targets. If One Plan targets for the lake are to be achieved then the cumulative nutrient load from catchment and in-lake sources will need to reduce.

3 I have calculated the load of nitrogen and phosphorus to the lake that would need to be reduced from the prison stormwater that is proportional to lake water quality achieving the One Plan targets in the long term. This would require further reducing the nitrogen load to the lake by 5.9 kg N/yr and further reduce the phosphorus load by 3.63 kg P/yr.

4 Reducing the phosphorus load is particularly relevant in respect to this consent because the phosphorus concentration in the prison stormwater is typically higher than average concentrations in the lake water; in contrast the total nitrogen concentrations in the treated stormwater will be better than the current lake water quality, better than NPS-FM bottom-line values and close to the One Plan targets. The stormwater effectively dilutes the lake water nitrogen concentrations and will continue doing this until the current lake water quality considerably improves.

5 A whole of catchment approach is commonly used to achieve lake nutrient targets (e.g. Rotorua lakes). There are multiple actions that can mitigate the nutrient load from the stormwater and ensure that the overall cumulative effect on eutrophication in Lake Wiritoa is either negligible or a net benefit. Catchment mitigations to reduce the nutrient load might include installing Detainment Bunds, while in-lake mitigations include macrophyte removal. It is feasible to implement either of these nutrient reduction mitigations so as to achieve an overall net reduction in nitrogen and phosphorus load.

6 All of the stormwater P load to the lake could be mitigated, and a net phosphorus load reduction to the lake achieved, by reducing in-lake or catchment loads by 5.3 kg P/yr. This would roughly equate to harvesting the equivalent of 100 tonnes of lake weed (wet weight) every three-years from either Lake Wiritoa or Lake Pauri. Alternatively, this level of load reduction could be achieved by installing one Detainment Bund[PS120] in the catchment with a contributing catchment of greater than about 10 hectares.

7 I have worked with Mr Hall in the development of condition 17A and 17B and am satisfied that through implementation of these conditions, there will be an overall net benefit to lake water quality.

## Key points summary: Antoine Coffin

- Tēnā koutou ko Antoine Coffin tōku ingoa. I am qualified and experienced in Māori resource management and cultural heritage planning. My experience covers a diverse range of consenting, public policy, cultural advisory, and infrastructure projects including Māori cultural matters relating to freshwater.

- In summary, my opinion is that, while processes have not always been ideal, the Department has engaged genuinely and effectively with tangata whenua in respect of this application, resourced cultural impact assessments and a Mātauranga Māori report and has considered their perspectives, and sought to take them into account in the proposed approach to the stormwater discharge. There are also now arrangements in place for constructive engagement on an ongoing basis. I am also of the view that the obligations set by the Resource Management Act and the NPS-FW 2020 that relate to Māori cultural values are met in respect of this application. There is, of course, the opportunity for more to be done to give effect to the interests of tangata whenua and I understand that the Department is open to an ongoing dialogue about riparian planting and facilitating tuna passage.

- My evidence will consider the key matters from a Māori cultural perspective. It addresses issues that have been raised by iwi, are set out in the Resource Management Act, or otherwise require consideration and comment.

### Process

- Ngāti Apa and Ngāti Tupoho (and their respective hapū) are the two main iwi groups with traditional relationships with the site. Engagement with Ngāti Apa began in 2013. Ngāti Tupoho has a formal Memorandum of Understanding with the Department that should have facilitated early engagement. However, this did not occur in a meaningful way until 2018. It is unfortunate that engagement was not better at the beginning. The Department has, however acknowledged this failing and since 2018 there has been regular and constructive consultation. The parties are also mindful that consultation does not mean they will ultimately agree on all issues.

- There have been about 10 meetings between the parties, considerable information exchange, opportunities to identify issues, site visits, and hui. The Department has also supported the iwi by funding

independent consultants to assist with a Cultural Impact Assessment and engineering assessments.

- The process has also resulted in the establishment of the Whanganui Prison Tangata Whenua Engagement Group. This group represents tangata whenua and Ara Poutama Aotearoa (the Department) and provides a forum for ongoing discussions.

## Alternative discharge locations

- Tangata whenua would prefer the stormwater to by-pass the lakes altogether. They also note that building a swale along Pauri Domain Road, constructing a wetland, and daylighting the discharge pipeline would all be preferable from a cultural perspective. These matters have all been given active consideration by the project team in the work on the best practicable option.

- Constructing a wetland as an alternative discharge location was also preferred from a technical perspective. That proposal could not progress because the land was unavailable from the Whanganui District Council (who is the current landowner).

## Restoration of the lakes, enhancing native species, and mahinga kai

- Iwi support the work done to date on restoring the lakes and note that the lakes were a source of kai in the past. Iwi have not set out a vision for the restoration of the lakes, nor identified that the lakes are currently an important source of mahinga kai. I also note Dr Keesing's evidence that records do not show the lakes as important in respect of inanga spawning or passage.

- That said, I am also aware that records are poor and that there has been historic alienation of tangata whenua from traditional mahinga kai areas, including through other laws that restrict the harvesting of mahinga kai. I understand that the iwi would like the lakes to be a source of mahinga kai in the future, even if that is an aspirational goal.

- The importance of mahinga kai is identified in the NPS-FW 2020 where it is one of the four compulsory values that comprise Te Mana o te Wai and must be given effect. I also note that there is a considerable process to go through to identify the mahinga kai values of the lakes and determine how those values could be given effect through resource use constraints. Currently the lakes are not identified as

having any mahinga kai values; this is most likely due to their current poor health.

- In my view, it is simply premature for mahinga kai considerations to be determinative in assessing the Department's application.

## Mauri of the lakes

- Iwi seek for the mauri of the lakes to be maintained and enhanced and I consider this is achieved by the proposal. 'Mauri' is not a term that is easily defined in English. It can be thought of as the vital essence of an entity. I note that the NPS-FW 2020 seeks for it to be articulated by tangata whenua at a local level. While mauri does not lend itself readily to definition, much less quantification, there is guidance as to what would enhance or detract from mauri in respect of freshwater. In this case, I consider that the mauri of the lakes is not diminished by the Department's proposal and may indeed be enhanced by it because:
    - the lakes are already heavily modified by human activity and tolerant (as described by Dr Keesing).
    - the stormwater is being kept within its natural catchment. That is, without the prison the rainfall from the site would still flow into the lakes just as it does now.
    - the proposal includes measures to improve the quality of the stormwater discharge and the surrounding ecology.

## Protecting sites of significance

- I have consulted relevant literature and visited the site and concluded that the proposal does not raise any concerns with respect to scheduled archaeological sites and wāhi tūpuna. Similarly, alternative discharge options that used areas adjacent to Pauri Domain Road would not raise concerns. There are, however, features near the ephemeral stream that flows from Lake Wiritoa that may raise concerns if this were pursued as a discharge location and further examination of the archaeological extent of the features would be required.

## Treaty of Waitangi settlements, NPS-FW 2020, and the RMA

- Treaty of Waitangi settlements. There are outstanding historical land claims that affect the site, the lakes, and associated recreation areas. Based on my experience my view is that these processes take

considerable time to unfold and they will include arrangements to resolve any conflicts and other matters in respect of existing uses, activities, and rights. A decision about the Department's application for this discharge consent should not be fettered by what may or may not be included in a future Treaty settlement.

- National Policy Statement – Freshwater Management 2020. The NPS-FM 2020 has recently come into effect. At a high level the NPS-FM 2020 seeks for the frameworks, policies, objectives and methods used for strategy and planning to be more culturally responsive. A key method for achieving this is for tangata whenua to have greater involvement in the relevant processes and for there to be collaborative engagement between parties. The NPS-FM 2020 also articulates Te Mana o Te Wai more explicitly and requires the health of water bodies and ecosystems to be prioritised over other matters. In particular it seeks for mahinga kai values to be given effect.

- In practice the NPS-FM 2020 will be given effect over time. For Lake Wiritoa there is currently, under the One Plan, no identified mahinga kai value. The identification of any values will require processes to be established and collaborative discussions undertaken between tangata whenua and the Regional Council. I expect that this process would take several years.

- For where things stand at present, I believe that the Department's application is consistent with the broader direction of the NPS-FM 2020. That is, it protects the mauri of the water, goes some way to restoring and preserving the balance between the water, the wider environment and the community, and provides mechanisms for ongoing engagement with tangata whenua.

- Resource Management Act sections 6, 7 and 8. I have assessed the proposal against sections 6-8 of the RMA and find that the requirements in these sections are met by:

    - the establishment and ongoing operation of, and information sharing with, the Whanganui Prison Tangata Whenua Engagement group. I note that monitoring and sharing information about water quality on an ongoing basis is important.

    - the commitment to put a proprietary filter in place, undertake riparian planting, and contribute to a lake restoration plan. There may be additional measures that could be undertaken that would strengthen these commitments to restoration and

enhancing the relationship between tangata whenua and the environment (e.g. planting and supporting tuna passage).

- there being no damage proposed to sites of significance.
- there being consistency with the principles of the Treaty of Waitangi.

- For completeness I note that there are no Fisheries Protocols that affect the lakes, nor are there any Iwi Management Plans that cover the proposal area.

## Cultural Impact Assessment

- Cultural Impact Assessments for Ngāti Apa and Ngāti Tupoho have been resourced by the Department. These reports contain extensive recommendations, particularly if the hearing panels was of a view to grant consent. The thrust of the CIAs is to avoid a discharge to the lake, to undertake further assessments of options, and to implement a range of measures in respect of restoration activities. The extent of these recommendations in light of the modest footprint of the infrastructure and not being a barrier to access and existing recreational activities are in my view not commensurate with the modest scale and scope of the activity proposed nor with the Department's responsibilities in undertaking them.

**Whanganui Prison Stormwater Discharge – Department of Corrections Ara Poutama Aotearoa**

**Peter Hall – Summary Statement (Planning)**

1. My name is Peter Hall. I am a planning consultant and hold the qualifications of Bachelor of Planning and am a full member of the New Zealand Planning Institute. I have over 25 years' planning experience. I have provided planning advice to the Department on the Whanganui Stormwater discharge since 2016.

2. The discharge of stormwater from rain falling on the roofs and paved surfaces of the Prison at the current discharge point has occurred since it was established in the 1970s. Resource consent for a non-complying activity is required under the One Plan to continue this discharge. This is because the receiving environment is classified as a type of wetland (ie a lake and its margin) in the One Plan, which in turn means any discharge (whether containing contaminants or not) requires consent as a non-complying activity. A resource consent for a non-complying activity is also required to discharge water within, or within a 100 metre setback from, a natural wetland under the National Environmental Standards for Freshwater 2020 which came into effect on 3 September 2020.

3. As described in the evidence of others, various measures in recent years have resulted in significant improvements to the quality of the stormwater discharge from the prison, with further improvements proposed through further mitigation.

4. I have been part of the team assessing alternative ways to manage stormwater from the prison and co-authored the Best Practicable Options report. In my opinion the BPO report and the methodology I describe in my evidence have applied a rigorous (and not cursory) assessment of all reasonably possible alternatives against criteria which have had appropriate regard to some very real constraints of the site and its local environment (including physical and security/operational) and the likelihood of success, as well as the various receiving environments and their sensitivities. The results of this work have shown that the subject proposal is the best practicable option, with the others considered having no or very low likelihood of success, and in some cases giving rise to greater effects on receiving environments.

5. I have been involved in consultation on the proposal, including attending the majority of hui through the Whanganui Prison Tangata Whenua Engagement Group. This consultation has been appropriate and has allowed the Department to explain the project and the outcomes sought, the views of others to be understood, and issues and options raised to be investigated by the Department.

6. The Prison is established social infrastructure of considerable importance regionally and nationally. Having a consented and operationally certain stormwater discharge is necessary supporting infrastructure for the prison, and in turn allows it to realise its positive social and economic effects and its core purpose of protecting the safety of people and the community. The adverse effects of not having a viable and consented stormwater discharge are significant.

7. The degraded state of the water quality and environment of Lakes Wiritoa and Pauri is well-documented. The evidence of Dr Fisher, Mr Reynolds, Mr Cochrane and Dr Keesing has described the causes of this in the catchment and the relatively small contribution the prison's stormwater makes to lake water quality and quantity. On the basis of their evidence, I conclude that adverse effects from the discharge on lake water quality, including the various attributes it supports (eg habitats and life supporting capacity, amenity values and recreation) and on any flooding issues, will be in most instances negligible and certainly, with reference to the 104D gateway tests for non-complying activities, not more than minor.

8. I understand that the lakes are held in very high esteem by tangata whenua. Concerns as to the historic and ongoing effect of the stormwater discharge on Māori cultural values and the mauri of the lakes have been made clear through submissions, during hui and through the CIAs prepared. After taking into account the actual contribution that the Prison's discharge makes to these values as identified in the CIAs, as well as putting the Prison's discharge into context compared to what I understand would be much more significant adverse effects, I have concluded these effects to be no more than minor. I am guided here also by the conclusions made by Mr Coffin.

9. In my opinion, the proposed discharge, with the mitigation offered, is consistent with the objectives and policies of the Horizons One Plan. The One Plan is a combined Regional Plan and Regional Policy Statement and sets enhancement objectives for degraded water bodies. Such aspirational outcomes require long term action and wider in-lake and catchment initiatives well beyond that of the impact of the prison's discharge. However, the Department will appropriately contribute to these initiatives through proposed conditions 17A and 17B. The discharge also accords with the objective and policies of the National Policy Statement for Freshwater Management 2020 which took effect on 3 September 2020. In particular, the health and well-being of the lakes as water bodies and their freshwater ecosystems has been prioritised in both the decision making on alternatives and the mitigation undertaken already and further proposed.

10. A consent term until 2044 is sought. Allowing that term recognises the need for operational certainty for the prison, and the expenditure already undertaken and further proposed to minimise contaminants in the stormwater and the need for environmental benefit return on this investment. A shorter consent term is not required to manage uncertainties and will impose unnecessary consenting risk. The quality and effects of the prison's

discharge are well understood, and will be assured across the full duration of the consent through the proprietary treatment device and consent conditions, including monitoring requirements and a s128 review.

11. I have read the Council section 42A reports from Ms Adsett and Mr Brown. In my opinion, the position in the s42A reports inappropriately draws the focus of lake water quality on the very small contribution from the Prison's discharge, when a much wider and long-term programme of action is needed. It also ignores the fact that the Prison is an established and nationally and regionally significant part of this catchment. In my view, a more appropriate and integrated resource management approach would seek measures to improve the quality of the Prison's stormwater discharge through minimising contaminants and encouraging positive benefits to the lakes and their environment, as is proposed with this application.

12. In my opinion, the application satisfies both the section 104D 'gateway tests' for non-complying activities. Overall, for the reasons summarised above and explained further in my evidence, it is appropriate in my opinion to grant consent to the application for the consent term sought, subject to the conditions proposed as I have set out in **Annexure Three** to my evidence.