BEFORE THE ENVIRONMENT COURT

IN THE MATTER OF	appeals under clause 14 of the First Schedule to the Resource Management Act 1991 concerning Proposed One Plan for the Manawatu-Wanganui Region
BETWEEN	**FEDERATED FARMERS OF NEW ZEALAND ENV-2010-WLG-000148**
AND	**MERIDIAN ENERGY LTD ENV-2010-WLG-000149**
AND	**MINISTER OF CONSERVATION ENV-2010-WLG-000150**
AND	**PROPERTY RIGHTS IN NEW ZEALAND ENV-2010-WLG-000152**
AND	**HORTICULTURE NEW ZEALAND ENV-2010-WLG-000155**
AND	**WELLINGTON FISH & GAME COUNCIL ENV-2010-WLG-000157**
	Appellants
AND	**MANAWATU-WANGANUI REGIONAL COUNCIL**
	Respondent

STATEMENT OF REBUTTAL EVIDENCE OF SHANE ALEXANDER HARTLEY

ON BEHALF OF FEDERATED FARMERS

1.0 INTRODUCTION

1.1 My name is Shane Alexander Hartley. I have the qualifications and experience set out in my evidence in chief, dated 17 February 2012.

1.2 My further evidence is in respect of three outstanding matters following planner conferencing held on the 27 February 2012 and the subsequent memorandum dated 6 March 2012. These matters relate to:

(i) The wording of Policy 7-2A (e) (iv);

(ii) The wording of Policies 12-5 (b) and (c); and

(iii) Discretionary v non complying activity status for activities involving rare or threatened habitats.

Policy 7-2A (e) (iv)

1.3 Since the planner conferencing, alternative wording for Policy 7-2A(e)(iv) was circulated by Counsel for the Minister of Conservation; being

> (iv) not restrict the existing use of production land^ where the effects of such land use on rare habitat*, threatened habitat* or at risk habitat* remain the same or similar in character, intensity and scale.

Federated Farmers has advised the Minister that it accepts this alternative wording, which I support as being more useful in providing policy support for existing lawful activities that might be affected by the land use biodiversity rules being applied as Regional Plan rules and therefore having no protection under Section 10 RMA.

Policies 12-5 (b) and (c)

1.4 Ms Marr proposes the introduction of the word "may" to replace the words "must generally" in 12-5 (c) in reference to consent being granted for resource use activities in an at-risk habitat assessed not to be significant. While at first glance the change appears to be rather innocuous, I consider it in fact has direct implications for the overall policy thrust the Hearing Panel has applied. It is clear from both the

Objectives and Policies, and the Council decision report, that the focus of the biodiversity protection provisions is on RMA S6(c) and significant habitats. The Hearing Panel also accepted, based on expert advice, that in following the Schedule E approach (as opposed to trying to map significant habitats) not all habitats captured by the Schedule would necessarily be s6(c) RMA areas[1].

1.5 Ultimately I consider that the Council is entitled to apply policies that establish the extent to what and how it wishes to regulate, provided that it does so within its obligations under the RMA. In this case the Council has determined that biodiversity regulation should limited to significant habitats falling as a matter of national importance under S6(c) RMA. In taking this approach the Hearing Panel noted that:

> In relation to what activities should be regulated, it is important to recognise that not all biodiversity issues are addressed by rules in the POP and that non-regulatory approaches are also used. It did not seem to be in dispute that there will be s 6(c) RMA areas and areas important for maintaining indigenous biological diversity that are not rare habitats, threatened habitats or at-risk habitats in Schedule E. The intent is for those areas to be addressed by non-regulatory means.[2]

1.6 As the Council policy decision is to focus on significant S6(c) areas, and to use a scheduling (with its inherent potential for inaccuracies) rather than a mapping or surveying method, I consider the directive policy approach taken in both 12-5 (b) and (c) is appropriate – the first leaning to refusal in the case of rare, threatened and at-risk habitats, the other towards granting in at-risk habitat where vegetation or habitat is not significant.

Discretionary v non complying activity status

1.7 Ms Marr extensively traverses the appropriate activity classification in her paragraphs 52 to 112 of her Primary Statement, concluding in paragraph 111 that "*... the non-complying activity status will be more effective in achieving the objectives of the Regional Plan and achieving and implementing the relevant policies. I also believe it would be more efficient*".

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[1] Para 5.5.2.5; Biodiversity and Heritage Hearing – Volume 1 – Part 5; Proposed One Plan Decisions
[2] Para 5.5.2.7; Biodiversity and Heritage Hearing – Volume 1 – Part 5; Proposed One Plan Decisions

1.8 Ms Marr's rationale for "efficiency" is outlined in paragraphs 85 and 86 of her evidence and is essentially based on the analysis that because of the gateway tests imposed by S104D that legalistic process acts as a "*deterrent*" leading to fewer resource consent applications and therefore not wasting "*time and resources for applicants, councils and also submitters, such as groups with an interest in biodiversity*".

1.9 This deterrent effect of a non-complying activity is guided by Ms Marr's consideration that non-complying consents will only be granted in exceptional or limited circumstances.[3] The expectation that only a handful or very few non-complying activities should be expected to be consented in any district or region in the course of a year is one that I acknowledge is typically the prevailing view at both Council and Environment Court level.

1.10 At the same time, it is my experience that many councils are both establishing more non-complying activities than there have been in the past, and also introducing very specific policies that have the effect of tightening the gateway threshold by constraining the ability to find that a particular proposal is not contrary to objectives and policies in the plan.

1.11 In my opinion, one of the problems in applying non-complying activity status to activities without extremely good reason is that it prevents land owners and developers from proposing activities which, although not able to meet specific controls or provisions in a Plan, might be highly meritorious, simply because they are unable to pass through either of the 104D gateway tests. The outcome uncertainties and high cost of proposing a non-complying activity application therefore become the dominant factor, and not the environmental outcome.

1.12 My concern in regard to the application of a non-complying activity status to land uses is heightened where either or both the physical or qualitative dimensions of an activity lack definition or absolute certainty. In the case of the biodiversity provisions relating to rare and threatened habitats, the facts clearly seem to be that both the spatial and qualitative make-up of the areas identified in Schedule E need to be defined "in the field". There is no spatially defined 'edge' to these habitats, and consequently, a land owner, developer or

[3] Paragraphs 82 to 86, Helen Marr's Statement of Evidence; 17 February 2012

infrastructure provider cannot identify them with any certainty, nor make fast or final decisions associated with their farming or other business until the quality of a habitat is defined by experts when they are able to attend the site.

1.13 In overall terms, I consider that it is important to accept that the Council has adopted in DV POP a biodiversity management regime and policies that enables judgements and balances to be made as to whether either or both the public interest or environmental benefits might warrant the alteration or modification of part of some habitats falling within Schedule E.

1.14 This approach was clearly signalled in paragraph 5.5.2.8 of the Hearing Panel's decision in regard to non-complying versus discretionary activity status, and as is further outlined in paragraph 55 of Ms Barton's evidence and the further analysis she makes in paragraph 56. I especially adopt and endorse Ms Barton's view that "*the gateways for Non-Complying activities recognise exceptions. Addressing exceptions in the context of indigenous biodiversity is in my opinion, best addressed in policy not jurisdictional tests*".[4]

1.15 It is important also that the discretionary activity status currently applied in the decisions version of the biodiversity provision contained highly specific and directive policies in respect of a discretionary assessment of any proposal to undertake activities within Schedule E areas containing significant biodiversity habitat.

1.16 Policies 12-5(b) and (c) as they stand are clear in the direction they give to a consent authority, and the protection they require in the first instance of any significant indigenous vegetation or habitat; along with a cascading policy consideration of avoidance, remediation, mitigation and offsetting options associated with a proposed activity.

1.17 In the context of these policies I consider that the 'deterrent effect' identified by Ms Marr in respect of the value of a non-complying activity status is no less so for a discretionary activity status, but it is a deterrent based at an environmental effects analysis level, and one that can include both positive and negative effects. Furthermore, as a

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[4] Paragraph 56(b), Clare Barton, Evidence

planner in private practice with most clients in the private sector and many in a farming situation, I can say that I would be extremely cautious in giving a client advice to proceed with a discretionary activity application in the context of these policies – particularly in a potentially 'rare' or 'threatened' habitat - and the assessment procedures under S104. Those in themselves are a deterrent enough for all but the most valid of applications.

Shane Hartley

14 March 2012