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at PCI reconvened
hearing

Before the West Coast Regional Council
IN THE MATTER OF the Resource Management Act 1991

And

IN THE MATTER OF the Plan Change 1 to the West Coast Regional Land
and Water Plan.

**SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF
CONSERVATION FOR RECONVENED HEARING**

DATED: 30 JANUARY 2019

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INTRODUCTION

1. These legal submissions are filed on behalf of the Director-General of Conservation (**the Director-General**) in relation to reconvening of the hearing (scheduled for 31 January 2019) on Plan Change 1 to the West Coast Regional Land and Water Plan (PC1).

PROCESS TO DATE

2. The Director-General made a submission on PC1 when notified in 2016. The submission sought the following relief relevant to this reconvened hearing;

“Retain the reference guides and Maps for the Schedule 1 or 2 wetlands as notified except for

- *Schedule and Map for wetlands FOUP016 South Westport and FOUP052 Okari road*
- *Schedule and map for Wetland BRU003 Lake Poerua*
- *Schedule and Map for Wetland HOKP107 Serpentine and Acre Creeks.”*

3. Accordingly, other than three wetland maps, which were discussed separately in the submission (and which are not the subject of this reconvened hearing) the Director-General’s submission sought the retention of the wetland maps as notified.
4. Contrary to the position put forward in the Council officers’ s 42A report when this hearing was originally convened in June 2018, the Council officers have issued supplementary s42A reports (dated December 2018 and January 2019) which now recommend boundary adjustments to 9 of 13 mapped wetlands (that is, removal of all or part of a wetland) from Schedule 2 of the West Coast Land and Water Plan.
5. At the hearing in June, it was noted in legal submissions for the Director-General, in relation to the mapping of wetland boundaries;

Prior to PC1 being notified, Department of Conservation (DOC) staff worked with West Coast Regional Council (WCRC) staff to assess the boundaries of many schedule 2 wetlands. Through that process, the vast majority of proposed boundary adjustments were able to be agreed in advance between

DOC and WCRC staff, and there were only a small minority of wetlands where questions remained as to the appropriateness of amending the mapped boundaries. These wetlands were identified in the Director-General's submission.

Since lodging the submission, further discussions have occurred between DOC and WCRC staff. As a consequence, the proposed amendments to boundaries for the remaining wetlands identified in the original submission, are now accepted by the Director-General and are no longer challenged.

6. Accordingly, it is noted that in the period leading up to the notification of Plan Change 1, there was a close degree of co-operation between Department and Regional Council staff regarding the identification of wetland boundaries, which led to a high degree of agreement between agencies regarding the appropriate mapping of those boundaries. In contrast, following the hearing in June 2018, the Department has had no opportunity to engage with regional council staff regarding proposed boundary changes, other than through this formal hearing process.

EVIDENCE

7. The Director-General is calling evidence from one expert witnesses at this reconvened hearing.
8. Dr Jane Marshall is a botanist and ecologist employed by DOC and based in Hokitika. She provided evidence at the June 2018 hearing. Her evidence reviews the brief provided to the Council assessor, and the methodology applied by her in conducting her assessments. Dr Marshall reviews the conclusions reached by the Council assessor, and the evidence cited in support of those conclusions. In respect of a number of wetland sites, Dr Marshall explains why the assessor's conclusions either lack robustness, or are not supported by the evidence available.

PLAN CONTEXT

9. At issue in this reconvened hearing, is a proposal to remove part or all of a number of mapped wetland areas, from schedule 2 of the West Coast Regional Land and Water Plan (**the Plan**). Accordingly, before considering the specific areas proposed to be removed, it is necessary to consider the relevant parts of the Plan in context.
10. By way of summary, chapter 6 of the Plan relates to 'wetland management'. Objective 6.2 is to '*provide for the protection of the natural character, indigenous biodiversity and other values of wetlands in the region*'. There are five policies set out in 6.3. Relevantly, they are:
- 6.3.1 *To recognise the significant wetlands in Schedule 1 and to identify and protect their values by controlling activities in those wetlands and their margins to ensure their natural character and ecosystems (including ecosystem functions and habitats) are sustained.*
 - 6.3.2 *To recognise the significant wetlands in Schedule 2 that are shown to meet any one of the ecological criteria in Schedule 3, and to identify and protect their values by controlling activities in those wetlands and their margins to ensure their natural character and ecosystems (including ecosystem functions and habitats) are sustained.*
 - 6.3.3 *To recognise that there is no hierarchy of significance between wetlands included in Schedule 1, and wetlands included in Schedule 2 that meet any one of the ecological criteria in Schedule 3.*
 - 6.3.4 *To provide protection for any wetlands not in Schedule 1 or 2 that are shown to meet any one of the ecological criteria in Schedule 3, and to identify and protect the values of those wetlands and their margins to ensure their natural character and ecosystems (including ecosystem functions and habitats) are sustained.*
 - 6.3.5 *To recognise and provide for the protection of wetlands by promoting the maintenance and enhancement of the natural values of all wetlands in the region and by managing adverse effects of activities on the values present, including natural character, ecosystems (including ecosystem functions and habitats), aesthetic values or amenity values.*
11. I have highlighted reference to the margins of wetlands, in the policies, because in this context it is important. The intent of the policies is to control activities not only within

wetlands, but also within the margins of wetlands, to ensure the natural character and ecosystems (including ecosystem functions and habitats) are sustained. This makes obvious sense. To achieve the relevant objective, i.e. the recognition and protection of the natural character, indigenous biodiversity and other values of wetlands in the region, the Council needs to be able to control not only activities occurring within a wetland that might have adverse effects on that wetland, but also activities (such as drainage), occurring within the wetlands margins which may have an adverse effect on the wetland itself.

12. The explanation to policy 6.3.2 emphasises this point:

Mapping of Schedule 2 wetlands has taken into account possible adverse effects of adjoining activities on the hydrology of a wetland (including those in Schedule 1). Mapping included sufficient margins where necessary to control adjoining land drainage activities that might otherwise affect the natural water level within the wetland itself and have adverse effects on the values present.

13. Accordingly, the scheduled wetland maps are intended to include not only areas which meet the definition of a wetland, but also areas on the margins of the wetland, (which may themselves not hold wetland values or demonstrate wetland attributes), but where control needs to be reserved over activities such as land drainage which could adversely affect the values of the adjoining wetland.

14. I also note that method 6.4.6 provides:

6.4.6 Where assessment of any wetland (whether in Schedule 1 or 2, or not yet identified in the Plan) is required under the Plan for a plan change, variation or resource consent, it shall be carried out in accordance with the ecological criteria set out in Schedule 3.

15. Notwithstanding that this is a plan change process, and a number of wetlands, and their margins, have been assessed, it is noted that the WCRC has not applied the criteria in Schedule 3 in assessing the wetlands in issue, or their margins.

16. The Plan glossary includes a definition of wetland:

Wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of native plants and animals that are adapted to wet conditions and excludes areas of pasture where water ponds after rain.

17. The Plan's definition differs slightly from that in the Resource Management Act 1991 [the Act]:

Wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.

18. For the purposes of PC1, there are several relevant points to note arising from the definitions.

19. Both definitions encompass 'permanently or intermittently wet areas'. Accordingly, merely because an area is not wet on a particular day, or at a particular time of the year, does not mean that it is not a wetland. Some wetlands may appear to be dry at times. As the Environment Court has observed when determining whether an area was a wetland as defined in the West Coast Land and Water Plan:¹

[37] Accordingly, within a wetland there will be plants that are particularly adapted to permanent wetness through to those that are used to intermittent inundation to those that are tolerant of higher than normal ground water levels but are rarely inundated at all. We have concluded that the definition of wetland does not support a view that only those plants that are tolerant to nearly permanent water inundation or regular inundation are within a wetland. These will often be in the beds of lakes and rivers. We particularly note the definition words land water margins as indicating that a wetland may be situated on land yet nevertheless fit within the definition of wetland provided the natural ecosystem of plants and animals has adapted to wet conditions.²

[39] [Quoting and affirming Dr Gerbeaux's evidence]

¹ *DG of Conservation v Ferguson*, C19, 2006, Environment Court, at [37], [39] and [40].

² *DG of Conservation v Ferguson*, at [37]

“Some wetlands are continually flooded, whereas others are flooded only briefly at the surface or even just below the surface. Similarly, because fluctuating water levels can vary from season to season and year to year in the same wetland type, the boundaries of wetlands cannot always be determined by the presence of water at any one time.”

*[40] Dr Gerbeaux then goes on to discuss ephemeral wetlands where the fluctuation of water level is so pronounced that it can lead to complete drying in summer months or in dry years. Dr Gerbeaux then discusses that part of the area the subject of these proceedings which is a wetland, being shallow water on its lakeward side. He then discusses the sedge, rush and grass species, particularly *Carex sinclairii*, *C. virgata*, *Juncus articulatus*, *Juncus* spp, and *Agrostis* spp, and signs of erosion.*

20. The presence of a ‘natural ecosystem of plants and animals that are adapted to wet conditions’ is an indicator that an area is a wetland. Under the Plan definition, the word ‘native’ is added prior to the word ‘plants’. However, the definitions do not require that an area be pristine, or (in respect of the Plan definition) that the ecosystem present is comprised only of native plants and animals. Again, the matter was the subject of consideration by the Environment Court in the *Ferguson* decision:³

[50] The addition of the word native to the [Plan] provision is somewhat more problematic. It was not included in the Plan as notified and was added in subsequent decisions. In the reasons for the decision the Council included the comments:

As the definition did not intend exotic plants to be included as wetland plants, it is useful to add the further text to the RMA definition

It is clear from this comment that the Council was making assumptions about Parliament's intention in respect of the RMA, which would, if accepted, create serious inconsistency between the Proposed Plan and the RMA.

[51] The parties accept that the decision of the Court in Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council is correct, namely that there is a continuum of natural character from pristine natural landscape

³ *DG of Conservation v Ferguson*, [50]–[54].

to cityscape. Mr Dwyer for the Fergusons accepted that the wetlands in this case had natural character. The issue is as to whether this area was a natural character of native plants and what proportion of native plants was required before it met the Council definition in addition to the statutory definition. This difference in definitions will not avail the respondents to the extent that the wetlands are below 3.00 malbd because it does not expressly permit activities within the bed of a lake. It is of course of considerably more moment in relation to the land use. If the definition of wetland does not apply to the area in which the activity is undertaken, then it could be undertaken without constraint provided it met the various criteria of the Plan.

[52] We have concluded that the omission of the words native vegetation from the Act's definition of wetland is deliberate. Its inclusion would engage the Court and parties in exhaustive analysis of the entire wetland to ascertain whether the wetland was: (a) exclusively native; (b) the extent of any exotic encroachment; (c) whether it remained predominantly native or not; (d) what was defined as native and not native.

[53] We have concluded that the essential statutory test in respect of any wetland ecosystem is whether it is natural and this will encompass issues as to whether it is self-sustaining. In this case it was accepted by the parties that the wetland, even on land, constituted a natural ecosystem.

[54] Hence as the new Plan definition of wetland differs from that of Act then there will be a class of wetland that the Plan does not deal with (i.e. exotic ecosystems forming wetlands). To that extent the Plan will fail to recognise and provide for these wetlands under section 6(a) of the Act. Having said that we prefer Mr Gerbeaux's evidence that the area (if any) beyond the 3.00 malbd contour will still include areas of wetland as that term is defined in the Proposed Regional Plan. This is because:

- (a) there is still a natural ecosystem of native plants;
- (b) the Plan definition does not require that there only be native plants but only that native plants form a natural ecosystem;
- (c) exotic plants have incorporated into the natural ecosystem of native plants;
- (d) exotic plants do not dominate the ecosystem;
- (e) although successional natives have been suppressed in the dryer areas the native ecosystem is still sustainable.

21. In summary, drawing on the provisions in the Plan, the Act, and caselaw, it is submitted that there are a number of legal and factual tests which need to be satisfied before it can be determined that an area is not a 'wetland', or its margin, and should be removed from Schedule 2 of the Plan.

- Is the area proposed for removal 'intermittently or permanently wet, shallow water, or a land water margin', (recognising that some wetlands can be completely dry at times)?
- Does the area proposed for removal support a natural ecosystem of native plants and animals that are adapted to wet conditions (recognising that naturalness does not equate to pristineness)?
- Could land drainage activities in the area proposed for removal otherwise affect the natural water level within any adjoining scheduled wetland and have adverse effects on the wetland values present?
- Is the area proposed for removal pasture where water ponds after rain?

22. As the Court found in *Ferguson*, the presence of introduced species does not itself mean that an area is not natural, or is not a wetland as defined in the Plan, and Act.

23. More recently, in *Tasman District Council v Baigent* [2018] NZEnvC 155, the Environment Court found factors that confirmed an area to be a wetland included;⁴

- The area being identified in the Council's earlier wetland identification programme.
- The area being part of a remnant of a much larger wider historical wetland system.

24. In particular, the Court was careful to distinguish between the process of identifying whether an area was a wetland (albeit a degraded one), and the process of assessing the degree of ecological significance of the wetland.

*"... an assessment of "particular significance" of the wetland pursuant to Policy 30.1.3.27 of the District Plan ... is a different matter to determining whether or not it was a wetland to begin with."*⁵

⁴ At [22].

⁵ *Baigent*, at [22].

25. Robust, probative evidence is required to support any decision to remove an area from the mapped schedules on the basis that it is not a wetland. Assessment of the evidence should be undertaken with the relevant plan objective in mind, - to *“provide for the protection of the natural character, indigenous biodiversity and other values of wetlands in the region.”*
26. In this respect I note a number of limitations of the Council Assessor’s report, which in turn limit its probative value in addressing the relevant legal and factual considerations in determining whether a particular area is a wetland:
- The Assessor appears to have no hydrological expertise, and does not appear to have assessed the hydrological implications of drainage within areas proposed for removal, on scheduled wetland areas.
 - The assessments make no quantitative survey of plants species (native or non native) abundance or distribution, and do not provide any objective quantitative assessment of the naturalness of the ecosystem.
 - The assessments make no survey of fauna present, other than to record occasional casual observations of species.
27. If the evidence indicates, on balance of probabilities, that the area in question is likely to be a wetland, to include areas that are a wetland, be part of a larger wetland system, or be hydrologically buffering a wetland, then it should not be removed from the scheduled maps. Similarly, if the area is wetland, albeit degraded wetland, it is still wetland for the purposes of the Plan, and Act, and should not be removed from the maps. Assessment of the significance of a wetland, should be undertaken using the criteria in Schedule 3 of the Plan.

WETLANDS

28. As described in the evidence of Dr Marshall, no issue is taken with the amendments to mapped wetland boundaries described in the Assessor’s “Schedule 2 Wetland Boundary Review” report as attached to the Council Officer’s s 42A report dated December 2018 in respect of 6 of the wetland sites. These sites, being MAIP003 (Fletcher Creek), HOKP099 (D Chinn), HOKP018 (Whiley Creek), HOKP079 (Cropp Road), HOKP064 and 009 (Totara

Lagoon) and HAAP012 Turnbull Waitoto, are accordingly not discussed further in these submissions, except to note that the Department reserves its position, and would likely oppose, any further amendment to the mapped boundaries of these sites, beyond that as described in the Assessor's report.

29. Council's assessor undertook an additional assessment of site HOC004 Candlelight Pakahi (Foster), in December 2018, with an additional s 42A report issued in January 2019. The photographs provided by the Assessor, and included in the January s 42A report confirm the area to now be developed pasture. If the photos are accurately representative of the entire site on this property, it should be removed from Schedule 2.

BULP050 Oweka.

30. It is submitted that the balance of evidence clearly shows this mapped area supports a natural ecosystem of native plants adapted to wet conditions. Native wetland species present include kahikatea, flax, rimu, *Astelia grandis*, *Blechnum novae-zelandiae*, sedges and rushes. Accordingly, the area meets the definition of a wetland in accordance with the definition in the Plan and Act and should not be removed from Schedule 2.

PUNP001 Part Maher Swamp, Barrytown Flats.

31. The Assessor's report confirms the area to be "boggy", with surface water (e.g. Figure 87). Photos confirm the presence of native wetland species such as kahikatea, and wetland sedges, forming a natural ecosystem of native plants adapted to wet conditions. Again, it is submitted that the evidence shows the areas which are not developed pasture, are wetland as defined in the Plan, and should not be removed from Schedule 2.
32. Furthermore, part of the area recommended for removal from the mapped schedule, adjoins a larger scheduled wetland area. There has been no assessment of the hydrological effects on the neighbouring scheduled wetland areas, of the proposed removal of this wetland area.

HOC004 Candlelight Pakihi (Bradley)

33. The Assessor's report is extremely limited regarding this site. Two plant families are identified, but not to the species level. These plant families include wetland species.
34. Dr Marshall has visited the site, and in her evidence confirms the presence of a diverse range of wetland plant species. Dr Marshall also confirms the natural hydrological

function occurring in this wetland area. While efforts have clearly been made to drain this area, it remains a wetland in accordance with the definition in the Plan and Act, and should not be removed from Schedule 2.

HOKP099 Little Houhou Creek (Allan Lowe)

35. The Council's Assessor reports standing surface water, and also a number of native wetland plant species, including kahikatea, *Isolepis prolifera* and *Carex coriaceae*. Accordingly, it is submitted that the area meets the definition of a wetland in both the Plan, and Act, and should not be removed from Schedule 2. This is confirmed by the Assessors photographs, for example Figures 45, 46 and 48.

HOKP119 Lake Mudgie

36. An area approximately 300m x 100m is proposed to be removed from this scheduled wetland. The extent of the area accessed by the assessor was limited. Photos show extensive areas of native wetland vegetation forming a natural ecosystem, although it is unclear what parts of the wetland they were taken in. The aerial photography does not show a clear differentiation between the area proposed to be removed from the map and the balance of the scheduled wetland. Nor has there been any assessment of the potential hydrological impacts of development within this area on the scheduled wetland. It is submitted that the balance of evidence confirms the area to be a wetland as defined, and does not support the removal of this area from the mapped wetland area.

HOKP086 Ross

37. Again, it is submitted that the assessment supports the conclusion that this area meets the definition of a wetland, as included in the Plan and Act. Although access was limited (ironically due to the density of wetland plant species), the presence of a number of native wetland species, such as flax, kahikatea, cabbage trees, and rushes was confirmed. Accordingly, the area should not be removed from Schedule 2.

HARP021 Lake Ianthe

38. Applying the statutory and plan definition of wetland, it is submitted that the area in question should properly remain part of the mapped wetland area. The Assessor's report confirms the presence of native wetland plants, including kahikatea, manuka, and sedges and rushes. Furthermore, there has been no assessment of the hydrological impacts of

development of drainage within this area on the adjoining scheduled wetland areas. The area should not be removed from the Schedule.

KAGP008 Lake Kini

39. The Assessor concludes that three areas within the Lake Kini mapped wetland, do not have wetland values. The analysis and supporting evidence is inconsistent and contrary. Access by the Assessor was limited, in part due to pooling of water, conditions are described in places as being soft underfoot and dominated by moss, and other wetland species such as kahikatea flax and rushes are present. The assessment confirms this is a large and important wetland, although there are some areas that are drier than others, and some developed pasture land.
40. As previously noted, and confirmed in Dr Marshall's evidence, areas of developed pasture should be removed from the mapped area. However, it is submitted that it is inappropriate to dismiss the clear evidence that the mapped area includes substantial wetland values. Changes to the Plan to recognise and acknowledge the significant cultural and spiritual values of this site for Te Rūnanga o Makaawhio and Ngāi Tahu, are entirely appropriate. But those changes should not need to down play the wetland values present. There is no reason why the Plan can not recognise both the cultural and spiritual values, and ecological values. Indeed, the Act recognises all such values and requires that they be protected and sustainably managed.

CONCLUSION

41. In conclusion, it is submitted that while some adjustments to boundaries of some mapped wetland areas (as set out in paragraphs 28 and 29 of these legal submissions) are appropriate, for the remaining sites that are discussed in the Council's December s 42A report, any further amendments would be inappropriate. As set out in paragraphs 30 -40 of these legal submissions, the balance of evidence supports the view that these sites are wetlands, as defined in both the Plan, and Act.
42. If the wetland is degraded, or the ecological significance of a wetland is being disputed, as appears to be the case in a number of submissions or evidence filed, then that is to be properly assessed against the criterion set out in Schedule 3 of the Plan.

A handwritten signature in black ink, appearing to read 'D van Mierlo', with a stylized, cursive script.

D van Mierlo

Counsel for the Director-General of Conservation

30 January 2019