BEFORE THE CANTERBURY REGIONAL COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of a hearing by the Canterbury Regional Council Hearing Panel on Proposed Plan Change 4 of the Canterbury Land and Water Regional Plan

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REBUTTAL STATEMENT OF EVIDENCE OF DAVID LE MARQUAND FOR Z ENERGY LIMITED, MOBIL OIL NZ LIMITED, BP OIL NZ LIMITED (THE OIL COMPANIES)

19 February 2015

Simpson Grierson

J G A Winchester / S J Scott
Telephone: +64-4-924 3503
Facsimile: +64-4-472 6986
Email: james.winchester@simpsongrierson.com
DX SX11174
PO Box 2402
SOLICITORS
WELLINGTON 6140

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1. INTRODUCTION

1.1 My full name is David William le Marquand. Details of my qualifications and experience have been set out in **Attachment A** of my Evidence in Chief (**EIC**) dated 29th January 2016. I reconfirm my compliance with the Code of Conduct for Expert Witnesses.

1.2 I have read the submitted evidence that is relevant to my EIC. In this statement I respond to some of the matters raised.

1.3 Where I have proposed any minor amendments in response to the submitted evidence, these are included within this rebuttal.

2. SUMMARY

2.1 My rebuttal addresses submitted evidence on the following matters:

(a) Changes to Community Drinking Water Provisions and the evidence of Dr A Humphrey on behalf of Canterbury District Health Board and Mr M Hoggard on behalf of Kaikoura District Council (**KDC**);

(b) Flooding Rule 5.125 and the evidence Mr K Simpson from Waimakariri District Council (**WDC**) and Mr M England from Selwyn District Council (**SDC**);

(c) Construction phase stormwater and the evidence of Dr A Humphrey on behalf of Canterbury District Health Board; and

(d) Stormwater provisions and the evidence of Mr B Norton and Ms J Keller on behalf of Christchurch City Council (**CCC**) and Mr K Simpson from WDC.

2.2 I have retained my opinions expressed in my primary evidence. If a new condition, as proposed through the evidence of Dr A Humphrey, is to be accepted for 5.94A then I also recommend some additional wording changes as outlined in my evidence.

3. CHANGES TO COMMUNITY DRINKING WATER PROVISIONS

3.1 The evidence of Dr A Humphrey, for the Canterbury District Health Board (**CDHB**) seeks to remove from Policy 4.23B the following:

> *(c) the level of additional restriction the proposed protection zone will impose on land users within the proposed protection zone.*

3.2 At pages 6 to 8 of his evidence Mr Humphrey also supports the removal of the assessment criteria in relation to Rule 5.115. He justifies his view on the basis that drinking water is a first order priority in terms of the Canterbury Water Management Strategy, it is an offence under the Health Act to pollute drinking water, and the targets in Policy 4.23 are not currently being met.

3.3 In my EIC (Section 6) I raised the need to retain such consideration in the policy and assessment criteria when imposing a new protection zone because the effects, costs and consequences of a new zone will trigger a range of consents for those activities that otherwise rely on the permitted activity provisions of the Plan, and which may or may not be having an effect on water quality. My concern relates to both the mechanics of the provisions and to the natural justice implications of a new drinking water take changing the activity status for other activities, and potentially having significant consequential effect on the operation and/or existence of existing activities.

3.4 In my view, the actual and potential costs (and benefits) of such a change need to be fully and properly evaluated, otherwise there is a risk of inappropriate outcomes in that activities that are otherwise complying with the permitted requirements of the Plan (the provisions of which should be protective of the environment) will likely have consenting costs imposed upon them that are unfair and/or unnecessary. If there are issues with the permitted thresholds in terms of water quality then that is another matter that would need to be addressed through review. My position as set out in my EIC remains. In my opinion it is important to retain 4.23B(c) and the assessment criteria in 5.115.

3.5 The KDC seeks that the following activities be subject to the same level of protection as community drinking water supplies as outlined within Schedule 1 of the Land and Water Recovery Plan (**LWRP**):

(a) all premises which require licences or a Food Control Plan under the Food Act 2014;
(b) all camping grounds registered under the Camping Ground Regulations 1985;
(c) all properties which provide accommodation for 5 persons or more;
(d) all existing Council Water Supplies which may be used for domestic use; and

(e) Marae.

3.6 The evidence of Mr M Hoggard for the KDC is that such land and facilities should be afforded the same sort of protection as community drinking water supplies for 25 people or more, as in his view the RPS policy direction does not distinguish the requirement of the baseline quality for water supplies based on the population size they service.

3.7 It is also Mr Hoggard's evidence (paragraph 7.3) that the operators of those businesses or facilities may not want to impose constraints on discharging activities and therefore should have the ability to provide written approval to the Regional Council to allow them to occur. Mr Hoggard has not presented any section 32 analysis of the merits of such an approach. In my view there are significant risks and uncertainties with having an activity status effectively determined by a third party approval process, including having the potential to lead to outcomes that may not be environmentally related, given that the decision is made taking into account a broader range of factors. For example approval may be given on the basis of a relationship with the other party not the effects on water quality of the respective discharge.

3.8 It is not clear whether the written approval requirement would apply only to existing activities or to all similar new takes. In my view, if this approach was to be pursued, there is the potential for perverse outcomes to occur where a third party can effectively force a neighbour to obtain consent by virtue of the third party's own actions but can simultaneously agree to waiver that through a written approval. It has the potential to lead to some unsatisfactory practices. I remain opposed to having the ability to effectively amend, extend and/or include additional protection zones, as set out in Schedule 1 in the Plan, without following due process which, in my view, should be via Plan Change.

4. FLOODING

4.1 The evidence of Mr K Simpson for WDC (at paragraphs 6 to 12) is that the amendments to Rules 5.142 and 5.142A should be rejected or the rules deleted altogether. The evidence states that the amendments have changed the meaning and scope of the original rule from a control that addressed human intervention to alleviate flooding effects to one that requires consent for a natural event. I support the reasoning and relief sought.

4.2 The evidence of Mr M England for SDC (at paragraphs 23 to 26) concerns the definition of floodwaters. He seeks that the definition is expanded to read as: *means water that has inundated a property,* so it is not limited to just water over topping banks (which is the current definition, thus limiting the scope of Rule 5.142). I am not concerned about expanding the definition as suggested by Mr England, but note that the Plan only uses the term "floodwaters" in Rules 5.142 and 5.142A. I consider that it is not clear why a definition is necessary, and consider that the ordinary meaning of "floodwaters" could instead be relied upon.

4.3 Notwithstanding my comments above, the evidence of Mr England does not address the efficacy and practicality of the amended rule, the scope of which would be broadened by the changes proposed to the definition. I continue to support of the conclusions reached in the evidence of Mr Simpson and my EIC on Rules 5.142 and 5.142A and, irrespective of the merits or otherwise of the changes to the definition of floodwaters, I would oppose any broadening of the scope of an inappropriate rule. Subject to the scope and appropriateness of the Rule being addressed, then in my opinion either the broader definition proposed by Mr England or its ordinary meaning would be appropriate.

5. CONSTRUCTION PHASE STORMWATER

5.1 In the evidence of Dr A Humphrey the following relief is sought for construction phase stormwater:

> *Include under 5.94A as number 6, the following: The discharge does not occur within the stated set back distances of a drinking water supply intake as specified in schedule 1.*

5.2 His evidence indicates (paragraph 3.5) that the concern particularly relates to surface water. I am not opposed to the intent of the provision in relation to surface water provided compliance can be assessed with reference to the planning maps, however I am concerned that as worded it may inadvertently capture discharges that will not affect drinking water supplies. The rule states:

> *The discharge of construction-phase stormwater to a surface waterbody, or onto or into land in circumstances where a contaminant may enter groundwater or surface water, is a permitted activity, provided the following conditions are met:*

5.3 Under the current phrasing the provision could, in my opinion, be open to being misconstrued. For example, where the network discharge is to surface

water and the discharge point from the network is not near a drinking water take, but where a discharge into that network is within a groundwater protection zone (but not otherwise discharging to groundwater), the condition would not be met. I do not believe that situation is intended to be captured by the Rule. As a consequence, if the provision as sought by Dr Humphrey is to be included, I suggest that its intent be made clearer by making the following changes:

> *The discharge does not occur within the protection zones ~~stated set back distances~~ of a surface water drinking water supply intake as ~~specified in schedule 1~~ detailed in the planning maps.*

6. STORMWATER

6.1 The evidence on behalf of Mr B Norton, CCC, Mr K Simpson, WDC, and of Mr M England, SDC, is that they oppose the change in policy direction signalled by proposed Policy 4.16A, which proposes that the network operators be responsible for inputs into the system. They opine that the change will impose significant resourcing costs, there is a lack of expertise at the district level and they will need to potentially duplicate the expertise of the regional council, and there is limited enforcement scope. Furthermore the evidence of Mr K Simpson (at paragraph 20) and J Keller (CCC) (at paragraph 39) is that there is no agreement in place to facilitate such a change and indeed that no discussions about the proposed changes have occurred.

6.2 As identified in my EIC, I remain concerned for applicants about the pursuit of a potentially significant change in the process in the absence of an agreement between authorities and in considerable uncertainty, as to how things will work under a new regime. From my perspective, it seems a leap of faith to set a date in the future as a means to force agreement over time.

6.3 I am therefore supportive of the City and District Councils' concerns relating to the proposed changes. I consider that the changes should be withdrawn until such time as details of how the process will operate are agreed. As identified in my EIC, I remain concerned with the transparency and consistency around the existing process and I consider that those concerns should also be addressed as part of the broader consideration of any new regime change.

6.4 The evidence of Mr Norton (CCC) is helpful in that is sets out the protocols that are currently in place between Environment Canterbury (**ECAN**) and the

CCC. What the evidence confirms to me is that the existing process is a complex one with little guidance on how the substantial discretion to be exercised in relation to applications is to be applied. Ms J Keller identifies in her evidence (paragraph 29) that:

> *The most common reason for the Council to refuse to allow a discharger to discharge to the Council's system is that the activity or land where the discharger is discharging from, is either a potentially contaminated or contaminated site.*

6.5 The conditions of the global consents (Appendix B in Mr Norton's evidence) make it clear that the key triggers for consent are contaminated land and the LLUR. Mr Norton sets out in his evidence (paragraph 21) the number of authorisations addressed in relation to new discharges into the network since the new Memorandum of Understanding (**MOU**) became operative. I note that the new MOU only applies to residential rebuild sites, so I am not clear if the figures provided only relate to those. ECAN has confirmed to me that the guidance in that MOU only relates to residential sites (refer to email in **Attachment A**). As a consequence, there is still considerable uncertainty around other sites, especially given that non-residential sites are considerably more likely to have potentially contaminated or contaminated land. I remain unclear what discretion (if any), criteria and process apply to other (non-residential) sites, and how many authorisations to non-residential sites have been issued compared to the number of authorisations sought.

6.6 The MOU does, helpfully in my view, set a basis for ascertaining low, medium or high risk activities in relation to contaminated land on residential rebuild sites. In my opinion, that could be the basis upon which a broader approach for other sites could be applied. The MOU also details (paragraph 4) that:

> *The network discharge consents held by Christchurch City Council also allow it to decline discharges from <u>any site</u> which it considers may compromise its ability to meet the outcomes of the consent in relation to stormwater quality.*

6.7 Unfortunately there appears to be little guidance on how that discretion is to be exercised, which raises a concern about consistent and appropriate management. The evidence of Mr K Simpson is that high risk sites are any site set out in Schedule 3 of the LWRP (i.e. any Hazardous Activities and Industries List (**HAIL**) site). Global CCC consent CRC090292 sets a condition

(condition 11) for an audit requirement to identify a minimum number of existing sites or those listed on Schedule WQL 3. Condition 18 of global CCC consent CRC120223 requires CCC to develop a programme to audit all high risk sites and, if sites are unacceptable, to exclude them from the consent (therefore requiring a stormwater discharge consent (non-complying activity) from ECAN). There are similar conditions in global CCC consent CRC131249.

6.8 The point being that the obligation district and city councils have under their global consents to exercise discretion in relation to the current Rule 5.95 is much broader than the basis of the drafting of the current rule, which primarily adopts the presence of contaminated or potentially contaminated land as a trigger for consent. I understand that these councils are also required (by their global consents) to apply a broader discretion over quality and for which they have indicated they do not necessarily have the resources nor experience to do.

6.9 In my opinion, if broader outcomes, including contaminated land, are to be targeted, then this should arise from a clearer and more transparent rule base in the first instance. That should, in my opinion, be the starting point for any change to a new regime - especially if district and city councils are to be tasked with managing stormwater inputs into their systems from industrial and trade premises (or historic/current HAIL sites). In my opinion, the current rule regime for stormwater discharges into reticulated systems needs to be reviewed in concert with any proposed new rule changes and consequent amendment. This will enable greater connection through to appropriate global consent conditions so that the administrative basis is more transparent to councils, applicants and the community, and the plan provisions are capable of delivering consistent outcomes and processes between council jurisdictions, as well as improved certainty (and consequentially less cost and frustration) for industry and other users.

6.10 I therefore retain the position set out in my EIC that the provisions should be withdrawn until such time as there is a comprehensive review and agreement in place on how a new regime will work.

7. CONCLUSION

7.1 I remain opposed to changes to the Community Drinking water provisions that seek to remove the consideration of impacts on other users, and any

expansion of scope for introducing such zones without going through appropriate Plan Change process.

7.2 I support the evidence for WDC in relation to the inadequacy of the flooding provisions in Rule 5.125 and 5.125A. I remain opposed to any change in the definition of floodwaters to broaden the scope of an inappropriate rule, however if the shortcomings of Rule 5.125 are addressed, then the amended definition of floodwaters proposed by Mr England, or in the alternative reliance on its ordinary meaning, would be acceptable.

7.3 In terms of amendments proposed on behalf of CDHB to the construction phase stormwater provisions, I am not opposed to the intent but seek that they are more appropriately targeted to avoid misinterpretation and that the location of such zones are more readily defined, as is appropriate for a permitted activity, by way of reference to the maps.

7.4 I support the concerns of CCC, WDC and SDC in terms of the proposed regime change for stormwater discharges to reticulated networks, in the absence of agreement and transparency as to how the new process will operate, and noting that the existing process is already lacking in agreement and transparency. To proceed in the interim will likely further increase uncertainties and costs. The stormwater discharge provisions need to be comprehensively reviewed, including with respect to its efficacy, application of discretions around the existing regime, and the connection to existing global consent conditions.

David le Marquand
19th February 2016

ATTACHMENT A

David Le Marquand

From: Paul Hopwood <Paul.Hopwood@ecan.govt.nz>
Sent: Tuesday, 12 January 2016 11:08 a.m.
To: David Le Marquand
Subject: FW: Signed copy of Stormwater MOU and attached criteria
Attachments: MOUECan-CCC Stormwater discharges contaminated sites 14 July 2014.pdf; 14 752426 MOU stormwater and HAIL sites Assessment Criteria.pdf

Hi David,

Copy attached of the MOU and assessment criteria. Please note that this only relates to discharges from residential sites and was intended as operational guidance for streamlining the process for stormwater discharges from residential rebuilds on LLUR sites following the Canterbury earthquakes.

Regards
Paul