**BEFORE THE HEARING PANEL OF SOUTHLAND REGIONAL COUNCIL**

**In the matter** of sections 88 to 130 of the Resource Management Act 1991

**And**

**In the matter** Applications for resource consents by:

**WOLDWIDE ONE LIMITED, WOLDWIDE TWO LIMITED,**
Applicants

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# SUBMISSIONS IN REPLY OF COUNSEL FOR THE APPLICANT AS TO EXISTING ENVIRONMENT

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**INTRODUCTION**

1 These legal submissions are filed on behalf of the Applicants, by way of reply to the legal submissions on behalf of the s42A officers as to why those officers consider that the suite of consents granted in 2017 should be considered to have modified the existing environment. This has become a key pillar of their arguments as to why consents should be refused, because they say that in view of this the proposal will have unacceptable adverse effects when compared with what they say is the existing environment.

2 The proposal is simply to put into effect a plan conceived in 2016 in consultation with Environment Southland (**ES**) consent officers, to enable a more sustainable operation across the two dairy platforms with considerably improved mitigation of key effects, including nutrient loss. The proposal initially included a total increase in cow numbers of 260 to fund the improved mitigation, which would be of such a high standard that it would at the very least offset the effects of the additional cows. That number has now been reduced further to 160, to ensure that there is an overall reduction in loss. The plan conceived in 2016 also included a re-allocation of the land that was to form part of each dairy platform, so that this aligned more closely with ownership. A key part of this was the return to WW1 for inclusion into its dairy platform, some 70ha of highly productive dairy pasture leased by WW2 and used by it as part of its dairy platform.

3 By error, only half the consents needed for the proposal were processed (those for WW2), with the most critical of these (the land use consent for WW2) occurring on a fatally incorrect assumption. That was that the 70ha of WW1-owned highly productive pasture that was leased by WW2 as part of its dairy platform, would be retired from dairy farming entirely, rather than continuing to be used for dairy farming, but by its owner WW1 to form part of its dairy platform.

4 The effect of that error was to reduce the “baseline” that would exist under the 2017 consents in a manner that would make the increase of cows needed to fund the improved mitigation unattainable. That reduction (incorrectly assumed retirement of land from dairy farming) would have made the mitigation proffered as part of the 2017 consents (and included as conditions) unnecessary. Because of this the 2017 suite of consents was not fit for purpose and could not be relied on. Therefore the Applicants resolved, in consultation with ES officers, to start again.

5 Errors were made on both sides with this new suite of consents. Due to a change in personnel at the Applicants' consultants, the application mistakenly referenced the 2017 consents, but this was corrected by the Applicant through its evidence. Importantly, supplementary evidence enclosed with these submissions shows that the modelling never included that error. ES made an error with the first attempt at notifying the applications, which resulted in further delays to processing. Rules and policies changed during this period, but importantly, the only changes to the proposal were to improve mitigation and thereby decrease its scope.

6 The s42A officers now take a very narrow technical approach that would prevent these applications from curing the mistake made in processing the 2017 consents. The effect of that approach is that due to a mistake made by ES, the Applicants must retire some 70ha of highly productive dairy pasture from dairy farming, that was never proffered as being retired (and was not WW2's to retire), implement the mitigation that was to be funded by the (relatively modest) increase in cow numbers, but cannot have the increased cow numbers needed to fund the mitigation.

7 The Applicants submit that the only appropriate comparison is that which allows the critical 2017 error to be unwound, as was the intent. That is to put aside the consents that flowed from that error and assess the current applications on the basis of what would be possible in the absence of those consents. This is available to the Panel through a number of options or combinations of these options:

7.1 Finding that the 2017 consents were not "exercised";

7.2 Choosing to take this approach for reasons of fairness[1];

7.3 Relying on the fact that the critical policies provide for exceptions by using the word "generally".

8 The Applicants have provided detailed expert evidence that conservatively and reliably models what would be possible in the absence of the 2017 consents against what is proposed and shows a real calculated reduction in nutrient losses. This is however only a tool to demonstrate that the mitigation is likely to be effective.

[1] *Anzani Investments Ltd v North Shore CC* A124/01 (CA)

9 The mitigation is extensive. It will enable far more efficient dairy farming, which will reduce nutrient loss well below that permissible with the minimum mitigation required by the permitted activity rules, while enabling more milk solids to be produced[2]. The proposal will significantly improve the way in which the adverse effects on the environment of dairy farming are avoided, remedied or mitigated, while still enabling the applicants and all their employees, contractors and suppliers to provide for their social and economic wellbeing.

10 It meets the aims of Part 2 and high order planning documents implementing these, such as the National Policy Statement for Freshwater Management and the Regional Policy Statement[3]. This can also be demonstrated by evidence outside the modelling; the modelling serves to reinforce that conclusion. It is submitted that the Panel should not interpret and apply the law and the policies (when those most heavily relied on by the s42A officers are still subject to appeal) in a way that defeats these purposes. To adopt the approach urged by the s42A officers will have that effect.

11 Supplementary briefs of evidence responding only to matters raised by the s42A officers' further evidence are provided by Ms Legg and Mr Duncan. They are **enclosed**. A brief statement by Mr Wesley de Wolde confirming the provision of water records is also provided. Specific responses to the legal submissions and legal issues raised for the s42A officers are provided below.

**EXERCISING A RESOURCE CONSENT**

12 The key submissions for the Applicants are contained in the submissions dated 10 October 2019. Those will not be repeated.

13 The submissions for and evidence of the s42A officers raise no fundamentally new matters. They continue to rely on attempting to equate "giving effect" to "exercise", but provide no law to confirm that they are anything other than two separate concepts with different purposes. The case law that applies to giving effect remains unhelpful. The submissions endeavour to rely on decisions that aim to prevent unimplemented consents from remaining in existence for perpetuity, in order to argue (ultimately) that

[2] See enclosed supplementary evidence of Mr Duncan and Brief of Evidence of Janita de Wolde, 16 September 2019, at paragraph 6.
[3] See Evidence of Nessa Legg 16 September 2019, paragraphs 97, 98, 100-102.

the 2011 consents no longer exist, when there is absolutely no doubt that these were "given effect". They rely on authority for situations in which new consents will cease to exist to attempt to keep the new 2017 consents in play.

14 *Katz* does not assist the argument. It is a decision under the Town and Country Planning Act and deals with a planning permission for the construction of a clubhouse. It is nonsensical to apply it to the current scenario, because it is simply not feasible that the clubhouse would have been built, but then simply vanished. It is unhelpful for proposals such as the present, where the physical structures do not trigger the need for the consents, but activities that can be switched on and off, like discharges and water takes. Those were not part of the Town and Country Planning Act regime, which is why there was no equivalent of s126 in that statute.

15 The submissions go on to complain about a subjective approach. The legislature has chosen a word "exercise" that must include intent. It is different from the words chosen for s125 "give effect". This must be deliberate. There is nothing unusual about having to establish intent. The subject person's own statement can be weighed up with other objectively determinable factors. It must weigh heavily.

16 Even if one wishes to consider only objective factors, there is no shortage of those. The most critical is that the consent holders have not done that which would be necessary to be able to rely on the suite of 2017 consents. For the discharge and water permits, that consists of the prior surrender of the previous consents. That has not occurred. For the land use consent, that consists of undertaking that land use "in conjunction with" those other consents. There is no way of interpreting this condition other than that this consent cannot be exercised unless the discharge and water permits with which it is inextricably linked (even in the description of the land use itself) are being fully complied with. There is no way a reasonable person would start exercising such a land use consent without first having done what was essential to be able to comply with the discharge and water permits, namely surrender the consents being replaced.

17 In addition to that, ES continued to charge administration fees for the old consents and the Applicants continued to pay them without protest. The

water permit records were provided under the old consents, not the new consents[4]. Furthermore, Ms Legg's **attached** response refers to a number of permitted activity rules that made it unnecessary to rely on the discharge permit. No enforcement action was taken for a breach of the fundamental preconditions for the lawful exercise of each of the 2017 consents. Importantly, no reasonable consent holder would exercise a consent that involved the unproffered retirement of 70ha of highly productive dairy pasture that was not theirs to retire.

18 However, all of these matters almost become academic in view of the submissions' failure to deal with the key legal submission for the Applicants, which is that, Applicants' intentions aside, the fundamental steps that would be required to "exercise" (and render lawful the activities under) the 2017 consents have not been taken. On the one hand the s42A officers seek to rely on minor temporary non-compliances with permitted activity rule conditions and (incorrect) allegations of failures to provide water take records to exclude activities entirely from the existing environment. On the other hand they seek to include in the existing environment consents where there is a fundamental breach of a precondition to the lawful exercise of these consents.

19 Raising the fact that the land use consent does not require the surrender of other consents follows this inconsistency. There is no doubt from reading the land use consent activity description consent conditions and decision report for the 2017 consents (one common decision) that the grant of the land use consent is inexorably tied up with the water and discharge permits. The mitigation for the land use is inseparable from that for the discharge and water permits. The only reason for that condition is to ensure that that mitigation is fully provided. The reason why it does not require a surrender is because there is no previous land use consent to surrender and the permitted activity land use rule is tied in with the old consents. As soon as those are surrendered, the land use consent becomes necessary, not before. Because of this the condition for concurrent exercise in every way prevents the exercise of the land use consent until the discharge and water permits have been surrendered.

20 Even if the activities that the s42A officers say rely on the 2017 consents were not authorised by permitted activity rules, then their position appears to

[4] See statement of Mr Wesley de Wolde, enclosed.

be that the Applicants knowingly chose to breach these fundamental conditions, which under *Gillies Waiheke*[5] renders these activities illegal, and did not inadvertently breach plan rules. This all occurred without ES's enforcement department noticing it or taking any action, or worse, condoning it.

21 This is contrary to the Common Law Maxim "***omnia*** *praesumuntua rite esse acta"* (being a presumption that everything has been done lawfully, unless there is evidence to the contrary) applied by the High Court in *Grey District Council v Graham*, (2007) 9 NZCPR 32.

22 For these reasons, neither the evidence of, nor the legal submissions for the s42A officers have provided a basis on which to find that the Applicants did exercise the 2017 suite of consents. As a matter of law they cannot have altered irreversibly the existing environment.

**GIVING EFFECT TO A CHANGE OF CONSENT CONDITIONS**

23 The submissions for the s42A officers on this point have added no new law. It is submitted that the Applicants' submissions on this point are to be preferred. There is nothing to be gained by repeating the Applicants' competing submissions, save to emphasise that Counsel for the s42A officers did not submit that it was inappropriate to read down the explicit requirements of s138, enacted after *Sutton v Moule*, to enable "implicit surrender"[6], but in these submissions objects to simply dealing with what appears to be an oversight in s127.

24 While there is a difference as to whether the particular consents in this matter have been exercised, there seems to be no dispute that it is possible for such types of consents not to be given effect after they commence. It seems then both counter-intuitive and unfair if, as in this case, the application to change consent conditions, submitted as part of the same proposal, is not able to remain in the same state as the other applications made along with it.

25 Ultimately it is a matter for the Panel to determine which approach is preferred, unless the Panel can find a basis on which it can give effect to the fairness requirement without making a finding on the law. It is submitted that

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[5] *Gillies Waiheke Ltd v Auckland CC* [2004] NZRMA 385 (CA)
[6] Refer Legal Submissions in Support of the Reporting Officer, 4 October 2019, at paragraph 11.

in this case such an opportunity clearly exists, in that the Panel can decide, for reasons of fairness, to treat the 2017 change of consent conditions as not having been given effect. That is because that decision effectively cements into place consequences of the error made in processing those consents. It was intended as part of a proposal that did not include the retirement of an area of land from dairy farming, but that proposal was incorrectly assessed as exactly that. For that reason it would be unfair to include it. It is far more appropriate to place the Applicants in the position they would have been in prior to the commission of that mistake, which includes the change of consent conditions not having been granted or commenced.

**SCOPE**

26 At paragraph 61 onwards of the s42A officers' further evidence effectively submits that the fact that additional area is sought is not mentioned in the public notice means that the Panel does not have jurisdiction to grant any extra area. There is no law cited in support of that contention.

27 In his legal submissions for the s42A officers their Counsel was careful to highlight the fact that consents are granted for activities, not rule breaches[7]. The notice itself makes it very clear that the Applicants seek a land use consent for the activity of farming. Importantly, as Ms Legg's additional evidence demonstrates, the applications properly identified the full extent of the land to which the land use applied.

28 There are a number of breaches of the controls in Rule 20(a) of the PWLP that render the land use of dairy farming not permitted and result in it becoming restricted discretionary under Rule 20(d), or as in this case, fully discretionary under Rule 20(e). The fact that not all the matters that prevent compliance with the permitted activity Rule 20(a) are mentioned explicitly in the public notice does not render the notice defective of flawed. It must be remembered that his is an application to use land for farming, not to cause certain nutrient modelling numbers in a computer.

29 The legal submissions for the s42A officers helpfully provide reference to a leading case on scope, namely *Atkins.* That decision relates to a situation which is very similar to the current one. In that the application had

[7] Legal Submissions in Support of the Reporting Officer, 2 October 2019, at paragraph 36 and footnote 8.

erroneously indicated that the proposal would comply with the district plan's noise standards, when in fact it did not.

30 The High Court held that the mistake in the application did not deprive the Environment Court of jurisdiction to grant the consents sought. Importantly, it found that scope depends on:

> *"whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:*
> - *The scale or intensity of the proposed activity, or*
> - *The altered character or effects/impacts of the proposal".*

31 When the further clarifications provided by Ms Legg and Mr Duncan as to how the actual nutrient loss effects were modelled is considered and indeed how the entire actual land use was described, then it is clear that there is no significant increase in the scale, intensity, character, effects or impacts of the proposal.

32 Anyone who might have looked at the application documentation on reading the notice would immediately have understood what area was included in the land use application and on what basis the nutrient loss had been assessed. Those fundamental features have not changed. If anything the mistake made by Ms Legg is less significant than the mistake made by the noise expert in *Atkins*. Other decisions, such as *Upper Clutha Enviornmental Society Inc v QLDC*C34/2002 confirm that *"errors in the assessment of effects required by section 88 of the RMA do not necessarily undermine an application so as to make it a nullity".*

*33* In *Canterbury Regional Council v Meridian Energy Ltd* C121/2003 (EnvC) the Court accepted that the test for the notice was whether it did *"contain sufficient information to enable a recipient, without reference to other information, to understand ... whether [the application] will affect him or her; This is a broad requirement: it does not require the notice of an application for a resource consent or of a requirement to specify how, or to what degree a person may be affected. To ascertain that a reader would need to go to:*

- *the Assessment of Environmental Effects ("AEE") required by section88(4)(b) of the Act to be included in the application for a resource consent;"*

34 Given the way in which the application fully identified how the nutrient losses were assessed and the area of land for which land use consent was sought, there is no gap in the information, as the submissions appear to allege. There is no evidence of any prejudice.

35 Once again the s42A officers are being selective with their application of the law. Specifically, if they are right about the effect of the error, then that would mean that the 2017 consents must likewise be a nullity, because they were processed on a non-notified basis in reliance on mitigation (the retirement of 70ha of highly productive dairy pasture from dairy farming), which was never proffered by the applicant. As a matter of law, WW2 could not proffer that retirement, because it was not its land (it was land leased from and owned by WW1). It was entirely beyond WW2's ability to ensure that that land was retired. Without that retirement, on the s42A officers' approach, the effects would have been considerably greater and in all likelihood public notification would have been required.

36 Neither the Submissions nor the extra evidence for the s42A officers raise any matters fatal to scope.

**CONCLUSION**

37 The only reason these applications are now before the Panel is to correct the error made in processing the 2017 consents, which cannot be exercised without retiring some 70ha of highly productive dairy pasture, when that retirement was never proffered and was beyond WW2's capacity to proffer. Despite the introductory comments in the submissions for the s42A officers, the various arguments raised by and on behalf of the s42A officers, while internally inconsistent[8], share the common thread that if they are upheld they will effectively defeat that attempt.

38 The attempt to rely on the absence of objections by the Applicants to the form of the grant of the 2017 consents is illustrative. It is common ground that

[8]See for example the s42A report's and opening legal submissions for the officers dated 2 October 2019, at paragraph 37 stance on the limited value of Overseer modelling vs the statement at paragraph 5 of the 30 October submissions;
the conflicting views taken on the effect of breaching permitted activity rule or old water or consents permit conditions vs the effect of breaching the fundamental preconditions of the 2017 consents; and
the inconsistent application of scope issues to the 2017 consent and current applications

where an applicant does not get the answer to an application for which it was hoping, it has the option to object, appeal or try again. The fact that the Applicants did start again in 2018 makes it very clear that they could not live with the 2017 consents and needed to start afresh. The sheer cost and delays associated with that are totally inconsistent with an acceptance of the 2017 consents. To suggest otherwise is not plausible.

39 The key point that has not been addressed by the s42A officers, is that the Applicants would never have gone down the route of starting again with two fresh applications, if ES officers had given them reason to believe that would not be capable of curing the 2017 consent error. Despite Ms Legg's initial error, the modelling provided left no doubt about what effects were being assessed. If the modelling was as fundamentally wrong as the s42A officers now would have the Panel believe, it is remarkable that they did not alert the Applicants to that, but continued processing the applications.

40 It may well be that the officers genuinely believe they are doing something good for the environment by preventing an increase in cow numbers. However, this requires them to exploit a processing error made by ES to bind the Applicants to surrender nutrient loss baseline they had neither the intention nor the ability to surrender. It also ignores the fact that there is no policy direction that there be no increase in cow numbers. It ignores the evidence that cow numbers can be increased while reducing adverse effects, which is the key issue.

41 A finding that the 2017 consents must be modelled will have the same effect for the Applicants as a refusal of consent, because they are not in a position to remodel. It will in effect amount to a refusal under s104(6). It is submitted that the Panel should not be asking whether it would be helpful to have the extra modelling, but whether, in its absence, it would indeed have inadequate information to determine the applications.

42 Ms Legg has attached to her further evidence a brief summary of the mitigation that will not eventuate if these consents are not granted. The positive effects of the grant will not eventuate.

43 The Panel has the ability to find that modelling the situation with the 2017 consents is not required. It can do so in reliance on the law as set out for the Applicants, including the crucial issue of fairness. This is a set of applications that has been under consideration in some form or other since 2017 and has

had changes of processing staff, changes in consultants, changes in the applicable rules and errors both in the 2017 consents and the first notification of the current suite. It is an increase of only 160 cows over two substantially sized platforms (on average 80 per platform). In this regard the level of detail required should be proportionate[9].

44 The appropriate approach, be that on the law alone or on it and the considerations of fairness it permits, is not to require the situation with the 2017 consents in place to be remodelled.

Dated 8 November 2019

J M van der Wal
Solicitor for the Applicants

[9] 4th Schedule, Clause (3)(c)

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**In the matter** of sections 88 to 115 of the Resource Management Act 1991

**And**

**In the matter** Applications for resource consents by:

**WOLDWIDE ONE LIMITED & WOLDWIDE TWO LIMITED**

Applicants

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# STATEMENT OF EVIDENCE OF NESSA LEGG

**Response to statement of evidence from reporting officers**

**8 November 2019**

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1 This statement has been prepared to response to directions issued by the Hearing Commissioners on the 7th and 11th October 2019 and the Reporting Officers' Statement of 30 October 2019. For clarity, I have referenced paragraphs in the Reporting Officers' Statement where appropriate.

2 In response to paragraph 7, modelling of the proposed dairy platform land area (from 2013/14 to 2016/17 inclusive) provided in the application upon which the AEE was based, pre-dates the 2017 consents. As such, it reflects lawful use of land in those years. I do not consider that an updated AEE of proposed activities against a baseline using the 2011 consents is necessarily required. As per the s42A report, the modelled baseline provided in the application is conflicted with the 2017 suite of consents, not the 2011 consents. I recognise that in relying on the 2011 consents, there is an issue with the 2018/19 modelling information, namely the use of SH96 block as dairy platform. This was provided at the request of the Panel at the hearing but the application and AEE did not include this information.

3 In response to the section entitled "Pre-Application and Application as Lodged," the processing officers refer to a pre-application meeting in June 2018 that was attended by Mr Duncan and I (see attached summary notes).

4 In paragraph 15 the officers state "all advice given in this pre-application meeting was based on that information." The officers clearly indicated they were satisfied that the application would be based on the Overseer modelling as explained by Mr Duncan (for 2013/14 to 2016/17 inclusive). In view of the discussion and agreement on appropriate modelling, I recognise a lack of understanding on what reliance on the 2017 LUC meant in a planning context. That is, the development of a planning argument that modelling years prior to October 2017, which was carried out on lawful use of land in those years, becomes invalid since it includes activities such as cropping and IWG that are implicitly excluded on the 2017 LUC. In other words, modelling of land use prior to Oct 2017 does not count in the baseline because it includes some activities that were not authorised on some land following Oct 2017 and therefore, does not form part of the existing environment.

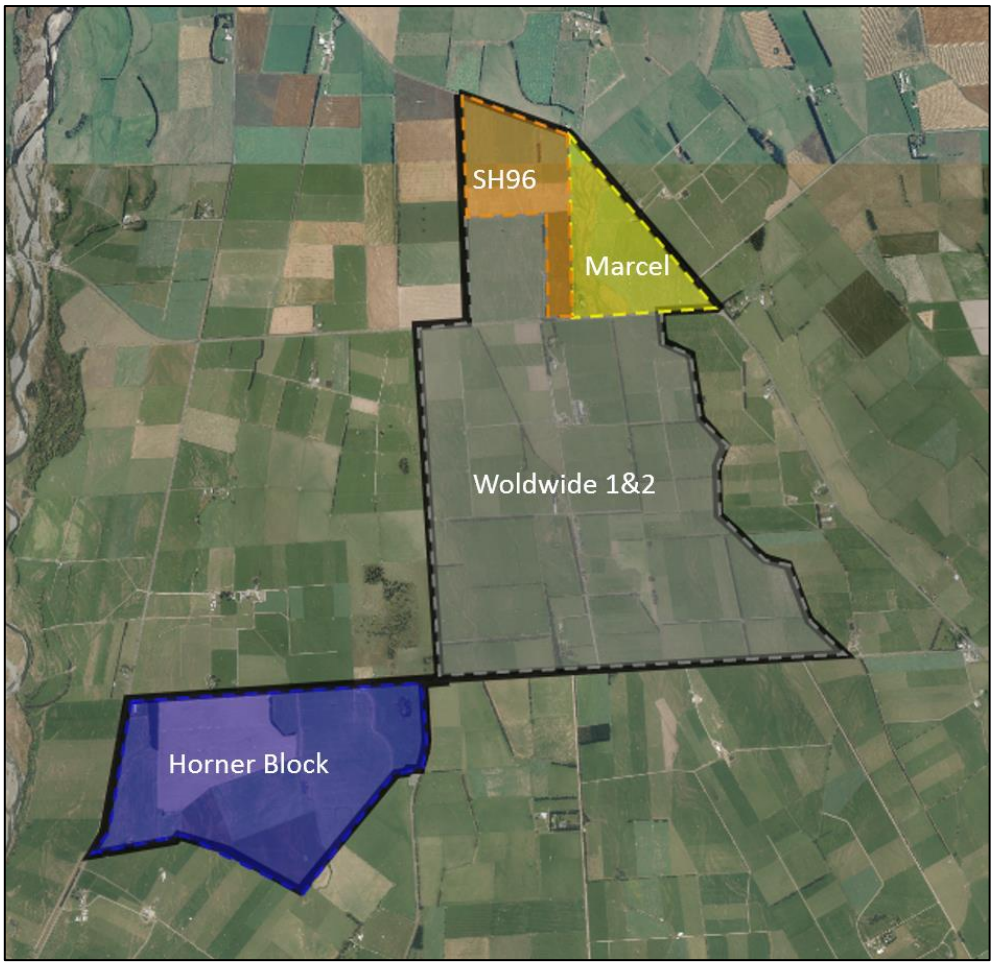
5 The applicants' directors did not attend the pre-application meeting, so could not correct my mistake regarding reliance on the 2017 LUC.

6 In response to paragraph 17, I agree the application was incorrect to state that the expansion does not include new land/increased land into dairy farming:

6.1 Land referred to as Marcel is not listed on the 2011 discharge permit and is outside the dairy farm boundary on accompanying Appendix 1 Map.

6.2 Land referred to as Marcel and SH96 was not dairy platform on 3 June 2016 so under Rule 20 (a) is not authorised to be used as dairy platform (without consent).

6.3 However, the application clearly stated, modelled and assessed effects from all land (WW1, WW2, Marcel and SH96) as dairy platform so the proposed use of new/additional land is as was stated in the application. The AEE, including Dr Freeman's water quality report, did not identify any blocks where contaminant losses are expected to increase or where adverse effects are expected to increase due to proposed activities. Neither were any blocks identified by Council's experts. This includes Marcel and SH96 blocks previously used for dairy support. In fact, contaminant losses and effects from this land are expected to be reduced under proposed use as dairy platform.




7 Paragraphs 25.1 and 25.2, state the 2011 consents do not authorise the discharge of underpass effluent via the agricultural effluent system or the discharge of silage leachate via the agricultural effluent system. This is correct, however, I note that the discharge of underpass effluent is a permitted activity under Rule 35(4) and the discharge of silage leachate is a permitted activity under Rule 41. Neither of these activities require resource consent.

8 The applicants confirm that groundwater is not abstracted from bore ID E45/0727 in reliance on resource consent AUTH-20171278-02. From time to time it is used to supplement domestic supply and stock drinking water, in reliance on s14(3)(b).

9 In response to paragraph 30, the Marcel and SH96 blocks have been "converted to dairy platform" in anticipation of consents being granted. This involves such things as the sowing of appropriate pastures, setting out troughs and lane access. The use of the term "converted to dairy platform" in the application and at the June site visit was not intended to be mean that land was therefore in use as dairy platform. In both a planning and practical sense, I consider there is an important distinction between being "converted" and land being used as dairy platform. The Plan defines a dairy platform as "an area of a landholding where cows being milked on a daily basis are kept during the milking season." The active "keeping" of milking cows during the season is therefore the basis of what forms a dairy platform. If cows being milked on a daily basis during the milking season are not kept on a given land area or if they never have been, then in my view that land is not dairy platform, regardless of what steps have been taken to prepare for that use (such as the sowing of appropriate pastures). Therefore, despite land having been made ready for use as dairy platform, i.e. "converted," if it is not or has not been used for that purpose, then under the Plan it is not a dairy platform.

10 The Marcel block has been "converted" and is ready for use as dairy platform. It is not yet dairy platform since it has not been used for the purpose of keeping milking cows on a daily basis during the season. In relying on the 2011 consents, unless and until consent for this application is granted, it cannot be a dairy platform and will have to be used for other farming purposes.

11 The SH96 block has been converted and was used as dairy platform in the 2018/19 season. The consent holder (WW2) undertook this activity based on SH96 being listed on the 2011 discharge permit (condition 2, Lot 1 DP 14661) and being within the dairy farm boundary on the associated Appendix 1 Discharge Map. In the view of a consent holder, this approach would not seem to be unreasonable and I have observed that this approach has generally been accepted by the consent authority in other situations. Under Rule 20(a), however, SH96 was not authorised (without resource consent) to be used as dairy platform in 2018/19 since it was not a dairy platform on 3 June 2016. As such, modelling SH96 as dairy platform in the 2018/19 nutrient budget is incorrect.

12 In response to paragraph 31, the applicants embarked on a new application process rather than fixing up a suite of consents they did not intend to use.

13 In response to the section on Variations and Horner Block Discharge, legal advice formed the basis of my evidence regarding WW3's 2017 discharge permit variation, which stated that the variation change had not been given effect to. That is a matter of legal interpretation, on which the Panel will make a determination.

14 In relying on its 2011 consents, WW2 is not authorised to apply slurry to 42 ha of the Horner Block (or any area of the Horner Block). If the Panel concludes that it is not possible for WW3 to continue under the unamended consent and not give effect to the 2017 variation, neither is the same 42 ha authorised to receive effluent from WW3 since 2017, when its discharge permit was varied to remove this area. In that scenario, in modelling lawful land use at the Horner Block, slurry application to the same 42 ha should not be modelled in the 2017/18 nutrient budget.

15 In reference to the Overseer Modelling in Application section, I refer to and adopt the statement of evidence from Mr Duncan. I reiterate that the modelling was based on actual land use at the proposed dairy platform land area over years 2013/14 to 2016/17.

16 In response to paragraph 53.5, there were legal submissions at the hearing regarding Rule 20 and the interpretation of “cow” numbers. I agree with legal submissions from Counsel for the applicants on this matter. That aside, in relation to the 2018/19 nutrient budget, I note that a significant portion of cow numbers modelled in August were in fact in-calf R2-heifers and not cows.

17 In response to the Scope section, the proposal for a 502-hectare dairy platform, including land referred to as WW1, WW2, SH96 and Marcel, has not changed compared from what was clearly applied for. It may well be that the Council would have also chosen to include the extra land area in the notice, but I do not think that including it would have led to the application being for a different activity. I consider that an increase in cow numbers and increase in dairy platform land area are the two key dairying intensification triggers of Rule 20 (a). In other words, they are the two key controls over dairy intensification. In listing one (increase in cow numbers), to all intents and purposes, the notification notice described and alerted the public to an application for dairy intensification.

18 In response to paragraph 56, I do not agree that overall effects of the proposal and baseline will be different, including for additional land. It has been shown in the AEE and at the hearing so far, that if the proposal is implemented future effects are highly likely to be no greater, and are in fact expected to be significantly less than in the recent past, including for additional land. This remains so if an unauthorised activity was to be discounted from the proposed dairy platform (i.e. use of SH96 as dairy platform in 2018/19). If there was a risk that overall effects would be increased, including for additional land when assessed in isolation, I would accept a scope issue as being of concern. I do not consider this to be the case.

19 I have attached a table to this statement of evidence, which shows the mitigations that will be achieved if consent is granted compared to the situation if consent is not granted. I consider this shows that through the implementation of key mitigations, meaningful benefit to the receiving environment can be expected if the proposal is implemented.

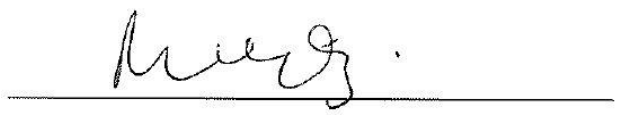
20 In response to paragraphs 59 and 60, I have already acknowledged the mistake in the application, which originated in the pre-application meeting back in 2018, and made the correction in my evidence.

**Consequences for Baseline if 2017 consents are deemed to be relied upon**

21 If the 2017 consents are deemed to be relied upon, land referred to as Marcel and SH96 is consented for dairy farming, use as dairy platform and is considered as dairy platform in the existing environment. Approx. 70 hectares of land at the south of former WW2 dairy farm then sits outside WW2 dairy platform, although it was part of WW2's dairy platform on 3 June 2016. I conclude in relying on the 2017 suite of consents, in the existing environment the subject 70 hectares is not dairy platform. Neither, however, is it "new" land into dairying as it formed part of WW2's dairy platform on 3 June 2016, which is the reference date for the dairy platform area in Rule 20(a). The land area of the proposed dairy platforms for WW1 & WW2 combined is proposed to contain the same subject 70 hectares WW2 did in June 2016. That aside, if the 2017 LUC were relied on, it would not be dairy platform in the existing environment so should be modelled accordingly in a baseline.

22 Where the subject 70 hectares is not authorised for use as dairy platform in the existing environment, it must have some reasonable lawful use. The applicants confirm it would be used for dairy support activities such as IWG/cropping (estimated 25-30 hectares for young stock), cut and carry and young stock grazing. If the panel deem the 2017 LUC is relied upon, I consider the existing environment then includes the use of this land for dairy support and that modelling of any baseline should reflect this.

8/11/19



Nessa Legg

Planner for Woldwide One Limited and Woldwide Two Limited

## Attachment 1

Mitigation Table

| **Mitigations that will be implemented if consent is granted** | **Future if consent is not granted** |
|---|---|
| Nutrient losses at WW1&2, the Horner Block and WRO will be restricted via explicit consent conditions for N and P loss. The farming operations at each land area will be required to operate within these limits. This gives control and certainty over farming activities that drive nutrient losses; e.g. stocking rates, fertiliser application, seasonal activities such as wintering. | There will be no conditions explicitly restricting nutrient losses on land areas at WW1, WW2, Marcel, SH96, or the Horner Block, beyond those required under existing resource consents and permitted activity requirements. |
| No IWG at proposed WW1&2 | Regardless of which WW2 consents are relied upon, some IWG will be carried out on land proposed as WW1&2. Approximately 70 ha of land will be available that will not be permitted to 'milk off' (without consent). This land will be farmed for dairy support, including IWG (estimated 25 – 30 ha), grazing of young stock, and cut and carry:<br><br>- If the 2017 consents are relied upon, dairy support activities will occur on the WW1 platform and former WW2 dairy platform area mid-farm.<br>- If the 2011 consents are relied upon, dairy support activities will occur on land formerly used for support north of Wreys Bush Highway (WW2, SH96, Marcel). Some paddocks within the WW1 and WW2 dairy platforms may be cropped/IWG in some years. |
| Limit IWG at WRO to 78 ha | IWG will meet permitted limits (100 ha).<br><br>Note: It is very likely that the applicants will not renew lease of Merriburn block so controls over this block (though proffered consent conditions) will not occur. The applicants will instead utilise land at/adjoining milking platforms at Heddon Bush for support. |
| WW1 winter barn will house 625 cows | WW1 winter barn will house 400 cows for the foreseeable future. Economically, there is a greater need for the farming enterprise to utilise available land rather than use additionally capacity in the barn, for which consent is firstly required. |
| Winter barns will be used more in the shoulders of the season | Winter barns unlikely to be used more in the shoulders of the season |

| | |
|---|---|
| P Loss Mitigation measures will be implemented as planned and detailed in FEMPs | Measures for P loss Mitigation will be scaled back to meet GMP as defined (PSWLP) in a factsheet on Environment Southland website. E.g. no planting of native grasses will occur in the foreseeable future. |

## Attachment 2

Notes from pre-application meeting June 2018

**Summary of meeting**

**25/6/18**

**Location:** Environment Southland

**Present**: Aurora Grant (ES), Courtney Guise (ES), Cain Duncan (Fonterra Farm Sustainability), Nessa Legg (Dairy Green)

**Regarding**: An upcoming application for expanded dairy farming by Abe and Anita de Wolde (i.e. the applicants) at their Woldwide One (WOL) and Woldwide Two (WLD) dairy farms, Heddon Bush.

The following is a brief summary of items discussed at the meeting:

Nessa explained that it the intention of the applicants to apply for a single land use consent for expanded dairy farming, which will include the WOL and WTL dairy units. The expansion is for an increase of 160 cows. The WOL and WTL dairy units will be managed under a single land use consent. The discharge permits will be replaced with a single discharge permit, the water permits will be replaced under a single water permit. Two dairy sheds and dairy units will be operated. There are two wintering barns, one on each unit. Aurora and Courtney understood the structure of what is being proposed.

Cain explained the background to the nutrient budget analysis and showed maps etc. 3 years of high quality data with evidence has been used to prepare 3 nutrient budgets for the entire land area. A nutrient budget has been prepared for 13/14, which has slightly less land area as a small area (38 ha) was not under the control of the applicants at the time. Cain has used a proxy for this area (i.e. a conservative estimate for a sheep farm of 15 kg N/ha/year) and completed a nutrient budget for the entire land area. With 13/14 included, 4 years of nutrient losses based on high quality data and evidence are available. Aurora and Courtney are satisfied that the application will be based on this.

The application will fall under Rule 20 e) as a discretionary activity. Cain asked if ES would potentially have an issue with an application being based on 4 years of pre-expansion data, instead of 5. Aurora and Courtney confirmed that it will be a higher level activity (i.e. discretionary) but there is no other issue with it. Aurora said if it was based on one year's data it would be different.

Cain explained the sort of evidence that will be submitted to support the NB inputs; Ravensdown fert reports, Fonterra production reports, in-depth dairy consultants reports, fertiliser records for the former support block to the north. The evidence will be submitted in the nutrient budget report appendix. Aurora and Courtney indicated the evidence should be sufficient. They indicated that the auditor/reviewer of the nutrient budgets will review the evidence.

Nessa explained that all land within the proposed boundary has been used for dairy farming for a long time (pre 3 June 2016) or was used for dairy support and subsequently consented for dairy farming in October 2017. Aurora and Courtney confirmed that the interpretation that the expansion does not include new land/increased land into dairy farming, but is an expansion through an increase in cow numbers is correct.

Nessa pointed out that the boundary on WLD's discharge map is incorrect as it has left out a small block. The block left out is however listed in the legal description for WLD on its land use consent. Aurora confirmed that there should be no issue with this as it is on the legal description and the boundary appears to have been drawn wrong.

Aurora asked when the wintering barns will be up to capacity. She recommended that they will need to be in place if they are going to be used as a mitigation measure. Courtney said another mitigation would have to be used if the barns are not upgraded to take all cows over winter. It will be important that the application is clear on the timeline. It will be unacceptable to ES if winter grazing is still used post-expansion if wintering barns are not upgraded.

Nessa asked about the interpretation of Policy 15A and 15B. They seem to apply more to industrial discharge, e.g. sediment quality relating to heavy metals. There was some discussion on this. Aurora said she thought it may relate to industry. Nessa will address it as much as possible but hard to see how it relates to dairy farming and this application specifically.

There was a discussion was around Rule 20 and the term "land holding." Under its definition in the Appendix of the pSWLP, there may be an implication requiring the inclusion of the Horner Block, which receives effluent from WOL and WTL and supplies feed to WOL and WTL (and other dairy farms), in the nutrient budget analysis and in the farm boundary. Cain explained that a nutrient budget analysis of this block will be difficult due to it being used for multiple uses and other enterprises in the past. Also evidence will be challenging. Cain explained that including it would be likely to increase pre-expansion nutrient losses so there is no advantage to the applicant in leaving it out. Aurora reviewed the rule and the definition and came to the inclusion that it may have to be included. She will see if the Council had obtained legal advice on this and communicate back the Council's initial views. It was discussed that if a valid legal argument is made that the Horner Block is a separate business entity then it could fall outside the definition of landholding.

Courtney asked if WOL's application on hold will remain on hold. Nessa and Cain were unsure. Cain commented that the NB analysis for WOL's 2017 application was different and under a different version of Overseer. This time the pre-expansion NBs are based on actual numbers, which in earlier years were well below consented cow numbers. Aurora commented that the approach being taken this time appears to be clear and effective. There was a brief discussion on this.

**BEFORE THE HEARING PANEL OF SOUTHLAND REGIONAL COUNCIL**

**In the matter** of sections 88 to 115 of the Resource Management Act 1991

**And**

**In the matter** Applications for resource consents by:

**WOLDWIDE ONE LIMITED & WOLDWIDE TWO LIMITED**

Applicants

# SUPPLEMENTARY STATEMENT OF EVIDENCE OF CAIN DUNCAN

**Baseline Issues**

**8 November 2019**

**PURPOSE OF REPORT**

1 This statement has been prepared to response to directions issued by the Hearing Commissioners on the 7th and 11th October 2019 and the Reporting Officers Statement of 30 October 2019.

2 Concerns have been raised by the Reporting Officers in relation to the Overseer modelling in the application. The modelling was based on what actually occurred on the applicant's properties in the years modelled. This method was discussed with Environment Southland at pre-application meetings and there was general agreement to that approach. It was not the intention to model any unlawful activities.

3 The current farming system still relies on the intensive winter grazing of crops on support land around WOL and WTL. That occurred on the Marcel Block in 2018/19 but if that had been prohibited due to the 2017 resource consent, it would still have occurred, just on land outside of the area covered by the 2017 land use consent. This modification is unlikely to significantly change the overall nutrient losses that occurred in the 2018/19 season.

4 The 2018/19 nutrient budget includes SH96 (48ha) as part of the dairy platform as this is what occurred in 2018/19 season. The SH96 Block is included as part of the dairy platform in WTL 2011 discharge permit and this has been the common method used by the Council for determining land authorised for dairy use as at 3 June 2019. Marcel (44ha) was not modelled as part of the dairy platform. If on the strict legal interpretation of Rule 20(a)(6) of the pSWLP it is determined that SH96 was unlawfully used as part of the farm's dairy platform in 2018/19 an alternative lawful land use that is likely to have been carried out would need to be modelled for this section of land. Considering the recent history of the land uses on SH96 this could range from winter grazing, rearing of young stock through to a cut and carry operation.

5 In relation to the modelling of the Horner Block, this was given less attention due to the Council's own legal opinion (8th October 2018), which concluded Horner Block did not form part of the landholding of WOL or WTL. It was produced to show that the nutrient losses on the Horner Block from carrying out a cut and carry operation, utilising effluent slurry from the wintering facilities as a primary source of fertiliser, were low and remained so under the proposed system. It was also a very conservative approach to modelling the nutrient losses as outlined in paragraph 59 of my original brief of evidence. For modelling purposes, the source of effluent applied is irrelevant to the modelling outcomes as dairy effluent is imported onto the Horner Block as a fertiliser (Organic – Imported Dairy Effluent) with a specific nutrient content, as tested on farm by AgResearch. If dairy effluent wasn't used the nutrients required for pasture growth would have been provided using traditional solid fertilisers.

6 The nitrogen loading rate from effluent on the Horner Block exceeded 150kg/ha/yr in the modelling undertaken. My response to this is covered in Paragraph 58 of my original brief of evidence.

7 A number of comments are made by the Reporting Officers pertaining to how modelling should be carried out, despite having no significant practical experience in Overseer Modelling. In terms of the

effluent area on Horner Block for Woldwide Three, this is a separate block within the Overseer Nutrient Budget with its own separate effluent inputs. Removing the area associated with Woldwide Three will result in the same reduction in nitrogen and phosphorus loss in the existing and proposed nutrient budgets and have no impact on the difference in nitrogen and phosphorus loss between the two budgets.

8 Comments are made by the Reporting Officers that the modelling is not able to show which consents authorised where effluent or cows originated from. This wasn't the purpose of the modelling and wasn't a key consideration. On Horner Block for example, individual soil types were blocked separately along with the Woldwide Three effluent area. As the effluent areas for WOL and WTL were managed identically (3 x 17$m^3$ applications) there was no reason to add further complexity to the model by adding blocks relating to individual farms discharge consents. If the areas had different applications of effluent then they would have been blocked separately. This is in accordance with the Best Practice Data Input Standards.

9 I understand that the key point of providing this extra evidence is to determine whether the 2017 consents have been exercised and whether the Overseer Modelling by the Applicants is sufficiently reliable or useful. The modelling as it is shows enough to confirm that the mitigations offered will be sufficiently effective to more than offset the increased cow numbers even if relatively minor changes need to be made to the budgets to replace activities that may have been unlawful. The modelling confirms that the project will result in a reduction in nutrient losses compared to what can currently lawfully be carried out.

Cain Duncan - Dated: 8 November 2019

**BEFORE THE HEARING PANEL OF SOUTHLAND REGIONAL COUNCIL**

**In the matter** of sections 88 to 115 of the Resource Management Act 1991

**And**

**In the matter** Applications for resource consents by:

**WOLDWIDE ONE LIMITED, WOLDWIDE TWO LIMITED,**
Applicants

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# BRIEF OF EVIDENCE OF WESLEY DE WOLDE

**8 October 2019**

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## INTRODUCTION

1 My full name is Wesley de Wolde.

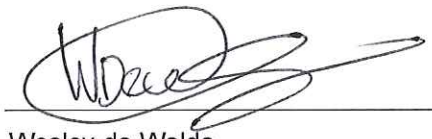
2 I am employed as the Support Manager on Woldwide Farm Ltd and as part of that role I collect water take data for both Woldwide One Ltd (**WW1**) and Woldwide Two Ltd (**WW2**).

## POSITION

3 Those water abstraction records are required under the Resource Consent Conditions for the Resource Consents held by WW1 and WW2 (water permits 301663 and 300627).

4 As required, I have collected and provided those records to Environment Southland on a yearly basis since 2016.

Dated 8 November 2019



Wesley de Wolde