

**IN THE MATTER OF the Resource Management Act  
1991**

**of a notice of motion under  
section 149T(2) to decide proposed  
Plan Change 8 to the Regional  
Plan: Water for Otago (referred to  
the Environment Court by the  
Minister for the environment under  
section 142(2)(b) of the Act)**

**BETWEEN OTAGO REGIONAL COUNCIL**

**Applicant**

Hearing Commenced: 21 March 2022 held in Courtroom 13

Court: Environment Judge P A Steven  
Commissioner J Hodges (via AVL)

Appearances: L de Latour (via AVL) and T Wadworth for  
Otago Regional Council  
P Williams for the Director-General of Conservation  
(via AVL)  
B Watts for Queenstown Lakes District Council (via AVL)  
B Matheson and B Gresson (via AVL) for Willowridge  
Developments Limited  
R Ashton for Remarkables Park Limited  
R Bowman for Friends of Lake Hayes Society Inc  
(via AVL)

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**NOTES OF EVIDENCE TAKEN BEFORE THE ENVIRONMENT COURT**

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## INTRODUCTIONS – KARAKIA

### THE COURT JUDGE STEVEN TO MR MATHESON:

5 Q. Now, are there any housekeeping matters. I know that Mr Matheson, you had reserved, was it you or Mr Ashton, had reserved your position in relation to the memorandum of understanding that the counsel sought to introduce as an attachment to, well I think it might have been a QLDC in actual fact it was an attachment to the legal submissions. Did you?

A. Yes, your Honour. My only point, well I have two questions. One, it wasn't attached, I had to ask for it.

10 Q. Oh, right.

A. and then so my question was could that be put in by consent, because I may have some questions for the witnesses and to the extent my witnesses may at the start of their evidence need to spend a minute addressing it, then I'd like to have the position to do that; it's clearly relevant to the issue before us.

15 Q. Yes, yes all right, so by all means. So I was wondering whether you were going to object to it being admitted, but I'm more than happy for it to be admitted by consent if everyone's happy for it to be admitted by consent, so is there anyone dissenting from that view? No, so we will deal with that at the relevant time but I think it is going to be admitted by consent,  
20 thank you very much.

### THE COURT ADDRESSES COUNSEL – NO OTHER HOUSEKEEPING MATTERS. CONFIRMING THAT COUNSEL MAY SPEAK TO LEGAL SUBMISSIONS WHICH HAVE BEEN READ BY THE COURT AND PARTIES

25 (10:11:27)

### THE COURT: JUDGE STEVEN

I know that Mr Hodges and I have had a discussion and we see that the issues here turn on, well the two legal issues that are going to reflect the decision that we ultimately make are what are the council's functions, the respective  
30 functions of the ORC and the QLDC in relation to specifically discharges, that s 15 discharges; and I need to understand the arguments of the parties who are

wanting no controls for the Queenstown Lakes District Council in respect of the I think it's, I don't know whether it's both the land use controls or the earthworks and the s 15 discharge control or whether it's just one or the other. I need to understand that. But just understand the argument around the direction, 5 supposed direction, and I might be using the wrong word there, but said to be continued in the Operative Regional Policy Statement of 2019, I need to understand how that fits into it. Because nobody has actually referred to the specific provisions in their submissions that are said to have that outcome so I'd like the parties - you're free to say whatever else you want to, but those are 10 the two issues. I think that everything else can then fall into place in terms of drafting to achieve efficiency and effectiveness and avoid replication, but those are the two key legal issues that I think we need to focus on, and I think so. On that basis, Ms Williams [*sic*] I will hand over to you, thank you.

15 **MS DE LATOUR ADDRESSES THE COURT – OPENING SUBMISSIONS**  
(10:13:49)

Thank you your honour, and thank you for your indication that the Court's had the opportunity to read the submissions. What I was proposing to do is I won't necessarily be reading them line by line in light of your indication just now, but 20 I do almost want to do a page turn and deal with issues that I think are particularly important bearing in mind the indication you've made around both being interested in terms of the counsel's functions and then the RPS and the arguments on behalf of the developer parties. Before I get into the substance of the legal issues, I did just want to make a couple of acknowledgements as 25 I've addressed them on written submissions and the first of those is acknowledging the call-in process itself and the fact that it is a somewhat unusual process for the Court being asked to make a decision on submissions for the first time. And related to that, I wanted to acknowledge the parties' participation in mediation. I think it's again somewhat unusual participating in a 30 mediation without the benefit of a counsel decision or in fact a s 42A report, and just yeah wanted to make that acknowledgement and finally, in terms of acknowledgements I wanted to acknowledge the involvement and role of Kai Taha Ki Otago and Ngai Tahu Ki Marihiku in both the mediation but also in

preparing for this hearing. Mr Ellison and Mr Whanga and Mr Davis who you'll hear from later had graciously given their time and I think this really highlights the importance of this issues to tangata whenua and having their voice heard. And along with that, I'd acknowledge Ms McIntyre and Ms Bartlett in terms of the support that they've been giving those witnesses from a planning perspective.

I've summarised the counsel's case from paragraph 6 to 9 but I am not going to read those out because I come back to it. I will first just touch on the purpose of PC8 which I've dealt with from paragraphs 11 onwards. You will recall we discussed in the context of the rural provisions of PC8 the emphasis on this being an interim plan change, and again I acknowledge that there is more to be done in relation to managing freshwater and land in Otago and PC8 is but a step in my submission in the right direction. I have set out the overall purpose in terms of what PC8 is attempting to do and at paragraph 12E I've dealt with the specific objectives of PC8 as they relate to earthworks because I think that this is important in terms of the s 32 analysis, so I've recorded there from the s 32 report both the objectives of the Regional Plan for Water that is relevant to the earthworks provisions, and then because this is a plan change and an amending proposal, the objective of the proposal being that to reduce sediment loss from earthworks for residential development.

#### **THE COURT: JUDGE STEVEN**

Q. Can I just interrupt. Sorry to, I don't like to interrupt but can I just interrupt and ask, the last two lines, the objective of this proposal is to reduce sediment loss from earthworks, is that the author, the s 52A author's interpretation of the objective of the proposal?

A. Yes, that's, well that's what's recorded in the s 32 report.

Q. Yes. Yes.

A. That is a quote from the s 32 report.

Q. Yes, I just didn't know whether it was attributable to the content of the proposal or the author's interpretation of its scope and overall objective, but I'm assuming it's the latter.

A. Yes.

**MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

I've then at paragraph 13, I've referenced the framework, the overall framework applicable to your decision on the submissions and I've attached to appendix 1 what is a repeat of quite a bit of the material that I presented to you in relation to the urban provisions in terms of the overall framework. Now, I'm not proposing to take the Court through any of that detail, it's there for your reference, but I will obviously touch on some issues as I think they are relevant to the earthworks provisions in particular within the substance of these submissions, and that's how I've structured the written submissions also.

Moving to the Part G provisions, Ms Boyd's plan architecture evidence has set out in detail how the current plans for work manages earthworks for residential development and the difficulties that the council's encountered in implementing that framework which essentially relies only on regulating the discharge from earthworks activities rather than addressing land use and discharges in an integrated way. What Part G of PC8 proposes to do is introduce both a new policy and then two new hybrid land use and discharge rules in relation to earthworks associated with residential development throughout the Otago region and that's accompanied by the definition of earthworks which is not amended; there's been one minor amendment as a result of mediation but there is no issues in condition in relation to that definition.

Now, the framework itself consists of the permitted activity 14.5.(inaudible 10:19:39) and that permits the use of that (inaudible 10:19:43) discharge of sediment into (inaudible 10:19:45) or on to water or into land where it may enter water for earthworks subject to a number of conditions. And I haven't set all of those conditions out, they are within Ms Boyd's evidence where she attaches the whole rule framework but there's two in particular which I think are quite relevant to highlight.

1020

One of those is a condition that the area of exposed earth is no more than 2,500 square metres in any consecutive 12 month period per landholding and there's also a condition around setbacks from waterbodies, so the earthworks cannot occur within 10 metres of waterbody, drain or water-race or the coastal marine area. Where a developer is unable to meet the conditions of r 14.12.1.1 then the activity is classified as a restricted discretionary activity under r 14.5.2.1 with

associated matters of discretion. Now obviously the matter in dispute before you today is really the simple, somewhat simple question of whether those rules should apply within the Queenstown Lakes District or not. And the argument, there are three kind of themes I want to address with you. The first is, of those, 5 is the alleged duplication between the (inaudible 10:21:16) rules and what is within Chapter 25 of Queenstown Lakes District Council's proposed District Plan. Again will address, and within that there are a few different aspects that I want to talk to you about. I'll then address Ms Hunter's proposed permitted activity rule because I think there are some legal issues associated 10 with that and then finally there's a question over the scope to include a new definition of residential development which I'll also address. So turning to the duplication point first, essentially I attempted to summarise ORC's case on this at paragraph 27, which I'll take you through but in my submission the rules proposed by PC8 in relation to earthworks clearly fall within ORC's s 30 15 functions. I say that its entirely on open to the Council to have a hybrid land use and discharge rule in relation to earthworks activities given the interconnected nature of the rules.

**THE COURT: JUDGE STEVEN ADDRESSES MS DE LATOUR (10:22:30)**

20 Q. Now can I just interrupt, its, I'm just wondering why you use the word *hybrid* because is it correct that its just a combined, a rule that combines the requirement for land use and s 15 consent or is there something else?

A. No, it is, *combined* would be equally, I've just always characterised a rule like that as hybrid in my mind but it combines both the s 9 and the s 15 element in one rule.

25 Q. That's all right, good. I assumed so but I just wondered by the use of hybrid suggests its something else altogether, but it can't be?

A. No. No, it wasn't intended to mean anything other than it deals with both parts.

30 **MS LATOUR CONTINUES OPENING SUBMISSIONS:**

Whilst the efforts of QLDC in relation to its chapter 25 provisions to improve the regulation of earthworks activities and I accept that they consider water quality



issues, is to be applauded, ORC emphasises that ultimately the regulation of any discharges from earthworks sites sits with ORC and ORC's approach should only regulating the discharge and not the land use, the evidence from ORC is that that ultimately hasn't been working as effectively as it could and

5 I've referenced there in particular Ms Heather's evidence who you'll hear from shortly in terms of some of those challenges that face ORC with respect to its discharge rule only approach. The Council says that PC8 provisions are needed in order for the Council to give effect to Te Mana o te Wai and the obligations under the MPCFM and having regard to the provisions of the

10 proposed Otago Regional policy statement and that clearly forms a shift towards the integrated management of land use and discharges associated with the earthworks activities. Now I haven't separately addressed what the proposed RPS 2019 requires and what the method within the RPS says, but I'm happy to address the Court on that or you'll be hearing, hearing further from

15 the witnesses in relation to that, but in short what I say in relation to that is whilst that directs certain matters to be dealt with within District Plans you'll be reading ... when you read the other methods within the RPS 2019 it doesn't preclude the Regional Council (inaudible 10:25:14) rule of this nature.

**THE COURT: JUDGE STEVEN**

20 Q. Can we just pause for a minute?

**REGISTRAR ADDRESSES MS VAN DER LEN AND MS CURRY –  
DIRECTION RE. TO TURN MICROPHONES/CAMERA OFF, CAUSING  
INTERFERENCE (10:25:32)**

25 **THE COURT: JUDGE STEVEN**

Q. Apologies. It is the method for which specific objectionable policy that I am particularly interested to know about, to be directed to.

A. Certainly. Just bear with me a moment.

Q. But you see, I'm happy for it, I mean that just can be an indication for

30 other counsel, its not really your argument and you can refute it once you've heard the argument in full unless you feel if you can address it now

but this seems to be sort of where everybody is coming from in their arguments to in opposition to the PC8 rule, so ...

A. I think, your Honour, if you're comfortable I prefer to hear their argument in full.

5 Q. Yes, I think so too. Yes, I think so too.

A. They haven't addressed in submissions nor the evidence.

Q. No, all right, so we'll just leave it at that and you can just sort of go on with your argument thank you.

**MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

10 And then I'll come to s 32 in a little bit more detail shortly. So dealing first with the function specifically, in my submission, it is plain from s 30(1)(c) that Regional Councils have the function of controlling the use of land for the purpose of soil conservation and maintenance and enhancement of the quality of water and waterbodies and coastal water. I haven't put the relevant part of

15 s 30 that says they have the function in relation to discharges, but I've put the s 30 within the authorities' bundle, so if the Court needs me to take them to s 30 that says they have the function in relation to discharges but I've put the s 30 within the authorities' bundle so if the Court needs me to take them to s 30 and what it actually says, I can but ...

20 **THE COURT: JUDGE STEVEN**

I'm very familiar with that, thank you very much.

**MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

I've also referred to the Court of Appeal's decision in *Canterbury Regional Council v Banks Peninsula District Council* which I think is informative here,

25 which clearly the Court of Appeal when it was considering the overlap of functions of both the Regional Council and District Councils there I think in relation to vegetation management provisions in a Regional Plan that was being proposed by the Regional Council along with natural hazards, the Court made

30 a very clear statement in the form of a declaration that a Regional Council may, to the extent allowed under s 68 include rules which prohibit, regulate or allow the activities for the purposes of carrying out its functions under s 30(1)(c)-(h).

Now the Court went onto say that the territorial authority may also include rules under its functions which also prohibit, regulate or allow activities for the purposes of carrying its functions under s 30(1). So here in my submission its not a question of whether QLDC had the functions to include it rules. Clearly is

5 accepted that they did. Nor is it a question of whether the ORC has the functions to include the rules it does. In my submission it is quite clear that they fall its s 30 functions, so the issue really comes to the interplay between these two sets of regulations. Now I agree that the RPS is informative in that regard because obviously it can direct who does what with respect to the regulation of

10 activities. Further, to the extent that there is a hierarchy, I would emphasise that the hierarchy is the Regional Plan with the District Plan not being inconsistent with it. Now on the evidence which I've referred to at paragraph 33 of my written submissions, none of the witnesses are actually saying that these rules are inconsistent, and that's the Council's position, they're not inconsistent

15 in terms of the legal test. The question just becomes, well is there a need for those two different sets of regulation. Now I've referred at paragraph 34 to, you know, at a practical level the other examples of where you need resource consents for what if, you know, I say it's the same proposal but they trigger different parts of the Act. In that case, in the *Wanaka Landfills* case that I've

20 referred to, I think there was an overlap between a s 9 and a s 13 consent in relation to works within the bed of a river and ultimately in that case the Court, despite the frustrations the applicant accepted that they both had legitimate rules regulating those activities that fell within their functions.

1030

25 And of course the Act itself recognises that a proposal might require consents from two or more consent authorities and obviously this is quite common for a range of projects and of course there are mechanisms in the Act to dealt with that including the likes of s 102.

**THE COURT: JUDGE STEVEN TO MS DE LATOUR**

30 Q. Can I just intervene again. You would accept that in the case of some of the functions and I think that the functions that were being addressed in the case that you cite, the Banks Peninsula District Council were

completely overlapping, and there are some functions that are completely overlapping.

A. Yes.

Q. They had the same meets and bounds, but that isn't the case here is it?

5 A. No.

Q. They, only the regional council has functions specifically in relation to discharges in terms of s 15.

A. Correct, and that's the council's whole point is that it is only the council that has the s 15 discharges. Managing those discharges alone or as it has been has been ineffective and it wants to manage the discharge with the land use in an integrated way to achieve water quality outcomes for the water bodies of Otago.

10

Q. So it's only in relation to the s 9 activities that the land use component where there is an overlap, because in the extent that the QLDC rule extends to consider the effects of that land use activity on the water quality, that's –

15

A. - correct.

Q. Yes.

A. And so I'll come to that in my written submissions.

20 Q. Yes, all right.

### **MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

Mr Matheson has addressed this to a degree, I think too, where I accept that there are sometimes conditions that are put on QLDC s 9 land use consents which clearly relate to water quality and I'm not saying that they are unlawful but at the end of the day what ends up in the river is ORC's problem, or it's function to regulate. And this just flows into my next point within the written submissions, where I've explained and I take your point around these being combined rules, whatever we call them, Ms Boyd has carefully explained the rationale for why ORC is trying to promote these combined rules and that is the interconnected nature of the land use and the subsequent discharge, and that is because it is the use of the land followed by rainfall events usually that actually results in the discharge. The ways of mitigating the effects in terms of the discharge and what ends up in the water are land use controls or often are

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land use controls, and again this enforces my point, or reinforces my point around why the council's trying to manage the two components together, because there is a difficulty in just saying and I think my friends will be trying to say to you but the council can just regulate the discharge and leave the land use alone but that has been the challenge for the council is how to actually manage the discharge in an effective way without being involved in making decisions around what is happening on the land and the mitigation measures in relation to the land use.

I've acknowledged at paragraph 37 that the rules regulating earthworks in chapter 25 of QLDC's PDP are comprehensive in terms of their functions and they do address water quality matters but I'm sorry for emphasising the point again but irrespective of the overlap the unavoidable point is that no matter how comprehensive those rules might be it is ORC who has to regulate the discharge itself. I've addressed s 15 which I won't take you through. Paragraph 41, I've talked about the fact that the developer's case appears to be relying on the effectiveness of the measures being put in place on QLDC's consents, and in my submission whilst that might be the experience of these particular developers, we are not saying they're not doing a good job but the point is that this is a rule that has to apply across the region and in my submission is needed within QLDC's district as well. The evidence for ORC is that despite QLDC's rules being in place that poor practice with respect to sediment control is continuing to occur on sites within the Queenstown Lakes District and unauthorised discharges do still occur. Ms Heather's evidence, and Ms Heather is a compliance officer for the council, she's highlighted some of the practical difficulties ORC faces in just managing the discharge and constraints around how it monitors resource consent that it grants for earthworks activities at the moment. I also highlight at this point in time the concerns of mana whenua in terms of the management of earthworks activities which I've already touched on Mr Ellison and Mr Davis' evidence. Mr Davis in particular addresses some of the issues that have been experienced within the Queenstown Lakes District and his, what I would say actually quite a unique perspective to offer the Court in relation to that. So from paragraph 43 onwards I've dealt with the fact that QLDC's land use consents often include a discharge limit or in actual fact it's usually through the environmental management plan, the EMP which

includes a limit. Now, obviously they don't have the function to regulate the discharge and whilst I accept that those conditions might in some instances be able to be validly made, it doesn't overcome the fact that what actually ends up within the waterbody is ORC's to manage, and I've just, I have highlighted there  
5 the fact that whilst QLDC might include these discharge limits or references through the EMP to limits, that doesn't deal with the actual regulation of the discharge or the whole framework within the Act in relation to discharges, and I've highlighted there the, for instance, s 105 and 107 that ORC if it processing a consent for a discharge has to consider but because QLDC is only processing  
10 a consent for a land use it obviously isn't a requirement for it to consider either s 105 or 107.

I've dealt with, I'm now essentially at paragraph 53 where I've apprehended when I've drafted my submissions and it seems from reading Mr Matheson's submissions he's touched on this, that the developers are arguing that there's  
15 not an effects based rationale for the PC8 rules because they normally address residential development rather than all different types of earthworks development within the Queenstown Lakes District. Well, my submission in relation to that is, firstly I'd refer the Court to Ms Boyd's evidence around the proportion of development occurring across Otago that is residential versus  
20 other types of development. Now, her brief of evidence has some quite helpful data drawn from building consent data across the region, that really highlights how significant the residential component of earthworks is within the Otago Region, not just within Queenstown, and in that respect what I say is that essentially ORC has deduced that residential activity as a significant aspect of  
25 earthworks development or activity that requires earthworks to be undertaken across the region, and so it has chosen to regulate those first. Now, as I touched on at the beginning of these submissions of course, this is just a step, so there is the land and water plan to come and decisions haven't been made around what other earthworks might be regulated through the new framework  
30 too, but this was identified during the development phase of PC8 as being something in particular that the council wanted to try and regulate more effectively than it had been just relying on its discharge rules.

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I have highlighted in my written submissions and referred the Court to the *Contact Energy* High Court decision which makes it quite clear that whilst there's a requirement under s 68(3) to consider actual potential effects on the environment of activities, rules within plans don't have to have an effects based rationale, so in that *Contact Energy* case the issue in dispute concerned geothermal water abstraction and the Council had picked a somewhat arbitrary limit that the determined whether you needed consent or not and the Court was clear there that it doesn't have to be completely tied to the effects of the activity, and I would say this is the same here. This is about, we've identified this particular type of development causing effects. We're going to regulate that first. We've picked some thresholds that represent risks associated with the development and hence we've got a 2,500 square metre requirement, 10 metre setback etc etc, it's not – it's not a perfect science with respect to what, what condition or what threshold we require a resource consent but this is a level of risk where we've decided actually it's not appropriate to permit this land use activity and it does need to obtain a resource consent from the Council so that they consider it in more detail. In terms of the overlap, and there's been quite a bit of evidence about overlap around both the triggers for requiring resource consent and also overlap in terms of the implementation of these consents under the two frameworks.

In relation to the triggers, what I just highlight, and this is dealt with at paragraph 54 of my written submissions, that the key triggers have been drafted deliberately to ensure as much consistency as possible, so the developers would characterise that as overlap because you're essentially got the same, often the same triggers, but the Council ORC was trying to do that it was consistent for at least some parts of the region as to when you're going to require a resource consent for these earthworks. Now bearing in mind there are different triggers within the earthworks rules of the different districts throughout Otago, the Council recognised that ORC had done quite a bit of work on its planning so tried to align the triggers to the extent that it thought reasonable with QLDC's triggers. There are differences that I want to highlight and touch on here too. So in terms of the matters of discretion under the respective frameworks, and this is, I've dealt with this at paragraph 55, in ORC's submissions there are some quite important differences and these differences

I say reflect the different functions of the two Councils, so one of them concerns Kāi Tahu cultural and spiritual beliefs, values and uses which ORC says is wider than the matters of discretion that QLDC is concerned with and then also quite understandably given ORC's functions the water quality matters of discretion are also border and in my submission reflect the QLDC Ki Uta Ki Tai, mountains to sea, and integrated management approach that is required when managing freshwater. Now I note that QLDC's legal submissions have taken a different view on this and what I would propose is actually have Ms Boyd address that further when she gives her evidence because we don't entirely agree with what Mr Watts has said around what the QLDC matters of discretion provide for versus what ORCs do.

And then finally in terms of the overlap or duplication around the resource consents and the implementation of these consenting frameworks, the evidence for ORC is that issues of implementation can be addressed and the MOU's I suppose in my submission an example of that, where the Council has acknowledged that there are some things that we could – that could be improved in terms of implementation between the respective Councils but that doesn't go to whether or not we should have as rules in place or not in my submission. I'd also note that irrespective of the MOU Ms Heather and Ms Strauss who is consents planner for the Council, have acknowledge that there is a degree of consistency as desirable and that these matters of implementation can and will be addressed if the Court confirms the application of these rules within the QLDC district and that's something that's been addressed in the joint witness statement also.

I now just wanted to turn to the NPSFM in the proposed RPS 2021 in particular, and in my submission its actually quite striking that there has really been very little reference to the relevance of these documents within the other parties' submissions or indeed their evidence and I really just want to highlight the importance of both documents given the statutory test of course to give effect to the NPSFM and I'll come onto the RPS in terms of the "have regard to". But a lot of ORC's whole theory around why it needs these new hybrid or combined rules regulating the land use and the discharge really come from the whole concept of what Te Mana o te Wai means in terms of how we go about managing our land uses and the connected nature of them with our waterbodies



and what is happening in terms of discharges so Ms Boyd has addressed this in her evidence and I say very carefully in terms of explaining the concept of Te Mana o te Wai and it's a fundamental one and what it means with respect to PC8.

5 Now in terms of the legal test and the giving effect to the NPSFM these were traversed previously for the rural provisions. We – the plan change cannot give full effect to the NPSFM, there is a whole process in terms of the development of the new land and water plan that is occurring to ensure that that document is fully given effect to in terms of the procedural steps etc, but Te Mana o te Wai  
10 still has to be fundamental to the Court's decision in relation to the PC8 rules in my submission and I've highlighted again the evidence that Ms Boyd has relied on in reaching the conclusion she has both terms of the cultural evidence but also the technical evidence of Ms Ozanne and Dr Thomas in terms of the effects that systemic fine sediments having within Otago's waterbodies.

15 I have also within my written, written submissions highlighted the Environment Court's decision in *Aratiatia v Southland Regional Council* which the Court I am sure is familiar with, that concerned the Court's decisions on the objectives of the proposed Southland water and land plan, and whilst that decision was actually concerned with the earlier version of the NPSFM, so the 2014 as  
20 amended in 2017, it highlights a couple of things that I just want to draw the Court's attention to. The first of those is of course a paradigm shift in what Te Mana o te Wai means and I've included, I haven't included the full decision within the case authorities because there's a lot of analysis of the particular objectives but the frontend of that decision I thought might be helpful for the  
25 Court just in terms of articulating what that actually means with respect to how we manage freshwater in New Zealand. I also wanted to just, in that, in addition to the health and wellbeing of waterbodies being at forefront under Te Mana o te Wai there's two other things I would highlight with respect to that decision. One of those is the role of Tangata Whenua in terms of articulating  
30 communities' aspirations and what Te Mana o te Wai means and again without wanting to labour the point the role and input of Kāi Tahu ki Otago and Ngāi Tahu ki Murihiku is really important in this respect.

The final point that I just wanted to draw on with respect to that decision is at paragraph 8, right near the beginning of the decision there's quite an interesting

comment that the Court makes around acknowledging that both are urban and rural communities need to make changes with respect to the management of freshwater and I just make the observation that we've discussed, through PC8 already, a lot, the rural community and what it is doing and I merely make the  
5 observation that the urban community also has to expect changes with respect to how freshwater is managed within the Otago region.

1050

I've highlighted at paragraph 68 again, I've just touched again on these differences and the matters of discretion and how these reflect in my  
10 submission the NPSFM and the requirement for this plan change to give effect to that to the extent possible, and I've highlighted in particular in terms of the Kai Tahu cultural and spiritual beliefs, values and uses being broader than the chapter 25 relevant matter of discretion. And would draw again the Court's attention in particular to Mr Ellison's evidence and now he has attached a copy  
15 of the evidence that he produced on the primary provisions, but much of that evidence is just as relevant for the primary sector provisions as the urban provisions in terms of how the fundamental concept of Ki Uta Ki Tai and the interconnectedness of environment systems and the connectedness between the land, the water and the coastal environment mean that land-based activities  
20 that have a direct effect on rivers, lakes and the coastal environment need to be managed in an integrated way and it's this whole concept of integrated management that is underpinning the council's approach and why it is seeking to regulate the land use with the discharge.

I'd also just highlight the water quality matters specifically which Ms Boyd had  
25 addressed in detail in her evidence around again that broader matter of discretion in PC8 reflecting this mountains to the sea approach in integrated management.

In terms of the RPS 2021, in my submission there are reasons for giving that some weight in decision-making. Now, the document itself is, submissions and  
30 further submissions have been made on the RPS so I accept it's at a relatively early stage of the process but importantly what the RPS 2021 does that the RPS 2019 does not is sets out what Te Mana o te Wai means in the Otago region for the first time, and again puts this emphasis on the integrated management approach for managing the effects and use of development of land

to maintain and enhance the health and wellbeing of freshwater. And this is the whole gap within the RPS 2019 that Ms Boyd has identified in her evidence in terms of integrated management and the fact that essentially the approach to date had been to manage discharges alone which has not been proved to be effective in terms of managing these activities and the clear shift towards integrated management within the new RPS.

And specifically, the new RPS reflects this change in terms of the methods that are specified within the RPS 2021 where it actually provides that ORC's new land and water regional plan will manage land uses that may affect the ability of environmental outcomes for water to be achieved by requiring earthworks activities to implement effective sediment and erosion control practices and setbacks from water bodies to reduce the risks of sediment loss to water, so there has been a clear shift in terms of what's in the 2019 document to what's in the 2021 in terms of the direction towards regional plans, managing these in an integrated way.

Turning to s 32 which appears to be a key plank of the Willowridge case, and I'm actually not going to dwell on it to much at this point in time because I want to hear my learned friend's full arguments in relation to the s 32 analysis but there's two points I just wanted to highlight on the s 32 analysis. The first of those is that there doesn't appear to be any debate around whether the objectives are the most appropriate way of achieving the purposes of the Act. Their debate is all centred on whether the provisions or the policies and methods i.e. in particular the rules are the most appropriate way of achieving the objectives.

Now, I've referred the Court to a case I'm sure you'll be familiar with in terms of the *Rational Transport v New Zealand Transport Agency* High Court decision which is in the case authorities bundle too for the Court's reference. That case dealt with the question of what most appropriate means, and it dealt with it in the context of the direction around objectives rather than the methods, but I think the same applies that most appropriate doesn't mean most suitable or the best method; it means what the word appropriate means – sorry, it doesn't mean the best method, it means what the word appropriate means i.e. a suitable method, and it also emphasises that the question of whether the rules are the most appropriate or in that case the objectives are the most appropriate

way of achieving the purpose of the Act is not an exercise to be undertaken in isolation but it needs to be looked at holistically.

I have dealt with also the need to identify other reasonably practicable options for achieving the objectives, because Ms Hunter has in her evidence suggested that there are other reasonably practicable options. In my submission, it's just not clear at this point in time how the non-regulatory methods that Ms Hunter is proposing as other practicable options are in fact practicable because they don't address the whole issue that this plan change is about, and that's what's actually ending up in the water bodies i.e the discharge.

In terms of the alternative rules that have been proposed, my written submissions were obviously based on what was in the evidence at the time and in particular Ms Hunter in the joint witness statement had proposed a version of the rule that it seems now from the Willowridge and RPL submissions that there are in fact potentially two different alternative rules, but I think my submissions kind of hold true whichever of those rules might be proposed and I just wanted to touch on some of the legal issues as I see them with the rule framework that is being proposed.

And the first of the issues really concerns the test for a valid permitted activity rules. Now, under one option of the alternative rule the erosion and sediment control plan would be submitted to ORC for approval essentially, and in my submission that has significant issues in terms of the permitted activity rule, because it's essentially reserving a discretion to ORC as to whether or not the activity is permitted or not, and I've outlined the case law within my written submissions that clearly says that permitted activity rules cannot reserve a discretion to decide whether an activity is permitted or not. The other alternative rule I think essentially provides that the erosion and sediment control plan is simply provided to the ORC. Now, I accept you might be able to draft a rule that's valid that provides for the plan to be submitted to the ORC but that doesn't overcome the whole problem here, because if it's only submitted and ORC can't actually comment on the effectiveness of the measures, then kind of what's the point, it even needs to allow them to say something about the measures and have some input into it, in which case I say it's not a valid permitted activity rules or it's not going to achieve what it needs to with respect to obtaining ORC's input on the proposed measures to mitigate the effects of the land use.

1100

I've also noted within my written submissions some issues that I have with the rule from a legal perspective, so the rule is not just a land use rule, it is also purporting to permit the associated discharges with all of those consents authorised by QLDC and I've got a number of issues with respect to that. One is that, the first of those issues is that the rule has been drafted in a way that it simply has a date at which if you've got a consent from QLDC and you submit your erosion and systemic control plan to ORC your permitted activity, it doesn't tie the land use consent granted by – to QLDC to the chapter 25 rules and I think in Mr Matheson's legal submissions he outlines the fact that for the likes of RPL their land is not actually within the PDP framework yet, so they're still being granted earthworks consents under the ODP rules, the Operative District Plan for Queenstown, and we've got no evidence about the effectiveness of those rules with respect to water quality and I think the evidence of Ms Hunter was that it wouldn't be appropriate in relation to those rules, so I accept that that's a matter of drafting but I just wanted to highlight that as one issue.

The other issue is even if it was tied to the PDP rules we've got no visibility or evidence in relation to what consents have been granted under the rules. I've already highlighted the fact that QLDC is only granting in land use consents so of course its not required to consider s 105 or 107 in terms of the discharge component, so I think it would be entirely inappropriate to be suddenly permitting a range of discharges associated with these activities without having any evidence around actually the effects of that. I'd also, and I've dealt with again on a related matter, the s 70 obligations so under s 70 there are tests that apply before an activity, a discharge activity, can be permitted within a plan and its not clear to me how the proposed alternative rules actually address the s 70 requirements. They essentially would result in the current, albeit an adequate rule within the Regional Plan not applying at all, so that rules been crafted to meet the s 70 requirements and this would bypass that entirely.

I then also dealt with the merits of that rule and I've referred the Court to the Environment Court decision in *Day v Manawatu-Wanganui Regional Council* which I say is informative in this situation. Now I've only included the part 5 decision in the case bundle, but essentially the *Day v Manawatu-Wanganui Regional Council* decision concerned the new One Plan within the Horizons

Regional Council jurisdiction, and one of the sets of provisions that was subject of a lot of debate was new land use rules in relation to farming activities and the Court there was grappling with whether or not those activities could be regulated within a permitted activity framework or it needed to be within a controlled activity framework and I think whilst clearly it was a different activity being regulated, I think there are quite a few similarities that are helpful to think about in terms of whether it is appropriate to permit all of what is proposed in the alternative rule or not and I've already touched on some of these and I've put the main part of the Court's decision within the written submissions because it, it essentially summarised a lot of the Court's reasons as to why it decided it wasn't appropriate to manage that activity as a permitted activity. Now one of those was that the farmers would still need for dairy farms effluent discharge consents, so there was limited transactional efficiency in permitting the land use when you still, as a farmer, had to come in and get a discharge consent.

Now it's a little bit unclear to me whether the developers are accepting that ORC might still be able to craft a rule that requires a discharge consent to be obtained but if that is the case then I'd say, well why not deal with the land use consent and the discharge consent together because you're not really achieving transactional efficiency by not requiring another land use consent. I've touched on the fact that the consent land use and discharge components provide certainty to those undertaking earthworks activities. And the current situation is that essentially the discharge, often it's not until something goes wrong, ie, a rainfall event that wasn't anticipated, that you breach the discharge standards, so its difficult to proactively manage those discharges under the framework, and that's again part of the rationale for the new combined rule. There's the issues of s 70 which I have already discussed and the matters of discretion or the level of discretion within the rule itself which I say doesn't meet the test for permitted activity rule if we want to draft it in a way that actually makes it effective.

And then finally a note the cost implications, so if this was to be provided for in a permitted activity rule of course ORC can't charge for monitoring permitted activity rules, so it's essentially asking the ratepayers to meet those costs rather than the developers having to come in and obtain a consent with the associated costs of obtaining that consent but I think again that's an important matter to bear in mind in terms of whether the costs for this regulation should lie. I'm was

just going to finally move onto the scope point and address you in relation to that. the notified plan uses this this term *residential development* and it didn't include a definition of residential development and through the early stages of implementing the rules ORC experienced quite a bit of debate about what residential development encompassed, in particular whether this visitor accommodation type activities were residential development for the purposes of the rule framework. And so in the course of mediation the parties obviously agreed that including a definition of residential development would be helpful and provide clarity around exactly what term encompasses. Now Mr Ashton or RPL is saying it's not within the scope of the plan change to include visitor accommodation within that. Now he's approached his submission on – his submissions on the basis that the Fish and Game submission that the Council is relying on to provide scope isn't on the plan change and I've approached this, my written submissions more around whether there was scope within a submission and I just want to take you through this in a little bit more detail. Before I get into the detail of the actual scope point I just highlight that. I think everyone is accepting that despite the difference in terminology which I'll call *unprocessed* because some of the relevant provisions in 1.04.9 (e) I think it is, use the word about rather than the usual schedule 1 wording of on a plan change and I think this issue came up in the context of plan change 7 as well and there the Court accepted that all of the case law that applies to whether a submission is on a plan change equally apply despite the difference in the terminology so I've just covered that off for completeness in my written submissions.

25 1110

**THE COURT: JUDGE STEVEN**

Q. So is there a – so that's looking at it in that way, but is there still then a question as to whether there is an evidential basis for –

A. – yes, so I'll come –

30 Q. – you'll come to that?

A. Yes. I'll come to that.

**MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

So the submission that the Council is relying on is one made by Fish and Game and I've addressed this in a little bit more detail at paragraph 113 and Mr Ashton has helpfully attached their submission to his written submissions, but they

5 sought to expand the application of rule 14.5.1 to all earthworks and their submission talks about earthworks for other forms of development such as building for industrial commercial purposes, now I accept that if we had sought to go that far, relying on that submission, that there would be scope issues in terms of what would a member of the public have taken from reading the plan

10 change itself given it referenced residential development the whole way through, whether that – I accept that commercial industrial development wasn't a submission seeking, that wasn't on the plan change in terms of how far it went, but my point is that there is ambiguity around what residential development means and so to resolve that ambiguity and I want to come to the

15 planning definitions because I think is important, that even if we remove the definition of visitor accommodation that Remarkables Park is seeking, that there is still ambiguity around whether it does include visitor accommodation or not. And I just emphasise that, you know, issues of scope have to be approached in a realistic workable fashion rather than from a legal nicety and I don't think

20 its as clear-cut to say that residential development can't include visitor accommodation when you think about that term at a broader level and also note the Regional Plan context versus the District Plan, so I just want to talk about that in a little bit more detail. I refer to Mr Ashton's submissions because he's included definitions from the proposed District Plan, the QLDC PDP, and my

25 first point in relation to that is I think we need to be careful to worry pretty much about QLDC's plan says because this is a Regional Plan applying across the whole of the district and there will be different definitions within each of the districts about what residential activity might, and there's a difference here between a residential activity versus a residential development, about what that

30 term might mean.

The other point I'd highlight from the PDP definitions, even when you look at what Mr Ashton has put in his submission, in and of itself it highlights the difference, you know, there's a term within the PDP residential visitor accommodation and that's something different to visited accommodation and



something again to residential activity, so I think my submission in relation to all of that is we need to be quite careful to worry too much about what the PDP might say and I said I think just think at a higher level well what would have someone taken from the words *residential development* as to what that meant.

5 Now the planning standards, I just want to touch on the planning standards definitions because we've obviously used those to try and crystallise what residential development means and I've included the full set of definitions from the planning standards in the bundle, the authorities' bundle, because I just thought it was more potentially helpful for the Court to see those. Now you'll  
10 see in those, and this is at page 62 of the definition standard, there's a definition of residential activity which –

**THE COURT: COMMISSIONER HODGES**

Q. Sorry, your Honour, can I just find out where we go to find the standards please in the bundle?

15 A. This is the authority, tab 10.

**MS DE LATOUR CONTINUES OPENING SUBMISSIONS:**

Tab 10 of the authorities.

**COURT REFERRED TO AUTHORITIES' BUNDLE, TAB 10 (PAGE 62)**

20 And there's a definition on page 62 of those which is residential activity, now that's the definition that, the new definition of residential development Cross refers to. And that says the use of land and buildings for people's living accommodation. Then there's a separate definition for residential unit which is  
25 buildings or part of a building that is used for residential activity exclusively by one household, and I think that's clearly, in my view, narrower than the residential activity definition, and then since we're on the page and because it's referred to in the definition of residential development that's been proposed there's the retirement village definition. And then separately on page 65 there's  
30 a visitor accommodation definition, and that's land and/or buildings used for accommodating visitors subject to a tariff being paid. Now of course, there's no link within any of these definitions to whether for instance the visitor accommodation definition is intended to be a subset of the residential activity definition, but I would highlight that the residential activity definition just says for

people's living accommodation, it doesn't mean permanent or short term. It's just that simple living accommodation definition and I suppose in reference back to the different types of visitor accommodation for since in the Queenstown District where there's both short term and longer term, my caution with, well if you accept Mr Ashton's submission around removing the visitor accommodation definition from the definition of residential development is, do we just end up in the same position arguing about whether earthworks associated with particular developments actually fall within the residential activity definition.

10 **THE COURT: JUDGE STEVEN TO MS DE LATOUR**

Q. So do I understand your, the essence of your argument is that the use of the word "residential development" is in PC8 is in very broad terms is intended to capture all forms of living accommodation?

A. Yes.

15 Q. Whether for a tariff or includes obviously elderly, you know, the retirement...

A. Correct. It wasn't, you know, this is in a District Plan where there are residential zones and so you're thinking about, you know, I accept if this was a district plan plan change, you know the terms residential can have quite a specific meaning depending on the plan, but this was a regional plan and there are different definitions of residential activity across the different districts, and so that I say that we need to read residential development in a broad manner and this is about clarifying so that there is some certainty in relation to what is within the scope of the rule and what isn't.

25 Q. All right, so thank you for that, because I appreciate that in a District Plan there will be different reasons for you know, taking this microscopic block and creating subsets –

A. – correct, obviously.

30 Q. – of residential development. But then it goes back to the question of the evidential basis and I wonder whether your witnesses will be expanding upon the evidential basis for the inclusion of the controls on residential

development in PC8 when it was first notified and what, you know, what building consents were captured by that, I guess.

A. Yes.

Q. Is what I'm driving at.

5 A. Ms Boyd is the person best to address that in terms of what the, both what the Plan Change was intending to capture and the submissions that were made in relation to that, but I have to accept that in terms of the Fish and Game submission that's been relied on to provide the scope that it was, parts of it I would have to accept were not on the Plan Change because  
10 it sought to broaden it much wider than residential development, and I accept that commercial and industrial development couldn't sensibly have been brought within the Plan Change at that point in time.

Q. Right.

A. The final thing I just wanted to note too for the Court's information on the  
15 planning standards is that term visitor accommodation that's defined within the planning standards doesn't actually appear anywhere else within the planning standards. Nor does the term residential activity other than in one or two of the other definitions. All of the zone standards and things are related to residential, it just uses the word "residential zones".

20 Q. Ah, right.

A. So it's a little bit, you know, I suppose ambiguous around how that visitor accommodation definition is actually intended to fit within the remainder of the planning standards themselves.

Q. Well, that's interesting. So do you think, and I haven't drilled down into  
25 the plan standards in any great detail, but do you think in that very broad categorisation it's intended that in some of those zones it will capture the subsets?

A. Yeah, I, I'm not –

Q. – or do you not know, I mean –

30 A. I don't know and I wouldn't want to give you an answer on that without having actually looked at that further or thought about it, but I just thought it was interesting. It's obvious there is a definition for district plans to use, but I think the kind of the zoning piece is quite separate in terms of what the planning standards say.

Q. Good, all right. I won't go too far off track, thank you.

A. I think that concludes everything that I wanted to address the Court on at this point in time. I have set out from para 117 the evidence being relied on and obviously we have some witnesses who the Court and parties no longer need to question, but we will hear from Mr Ellison and Mr Whanga and Mr Davis and then obviously the three, the compliance officer Ms Heather, and Ms Strauss the consents officer, and then Ms Boyd in due course.

Q. Good, thank you very much.

10 **THE COURT: COMMISSIONER HODGES TO MS DE LATOUR**

Q. Thank you your Honour, thank you Ms De Latour, good morning. Just picking up on this question about what did the residential development include, I wonder could Ms Boyd provide some information on when she did that analysis or whoever did the analysis, was visitor accommodation considered at that stage as part of residential development in coming up with the calculations? And if not, what difference would it make if visitor accommodation was attached. I don't know whether it will make a difference, but it is potentially relevant in terms of what's captured and whatnot in terms of a percentage. And just one other question please, there was quite a lot of discussion amongst experts on certain things that could reduce what people were seeing as conflict or differences of view, one of which was on slope which could be relevant to a permitted activity standard; another one is definitions of landholding and contiguous area, and I don't know whether there's relevant to the Plan Change or implementation, but my question is, is anything intended to happen as a result of those suggestions from the experts that there were areas where some perhaps refinement might be possible?

A. Yes, certainly Commissioner. In terms of this slope issue, in the mediation agreement or one of the matters that the developer parties appeared to be seeking at that time was a slope threshold so that for in the QLDC chapter 25 provisions at a certain slope you actually – sorry, and I can't remember off the top of my head, I think it's less than 10 degrees, you can do up to 10,000 metres of earthworks without

requiring a consent, and there had been some discussion about whether a similar slope threshold should be introduced in the PC8 provisions. Now, Ms Boyd addressed that in her evidence on the assumption that there might be further discussion from the other experts around that but it doesn't appear to me that Woolridge and RPL are specifically pursuing that relief, and so the council, and the council's evidence has been that it's happy with the 2,500 metre threshold as being the trigger for when a consent is required, so I haven't address the scope matters specifically in my legal submissions for that reason, because I wasn't clear that that was still being pursued.

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A. The landholding definition is relevant to the words within the plan itself and Ms Boyd has addressed why she prefers the landholding definition and I don't think anything changed as a result of the joint witness conferencing on that, there are still some differences of opinion and Ms Wood still supports the landholding definition that's within the provisions as they stand at the moment, but I think Ms Hunter does have some, there is a difference of opinion in relation to that.

Q. Thanks very much, I'll follow that up with the witnesses. Thank you, your Honour.

**THE COURT ADDRESSES PARTIES AND COUNSEL – APPROPRIATE TIME FOR BREAK. MS WILLIAMS NEXT TO SPEAK (11:26:09)**

**COURT ADJOURNS: 11.26 AM**

**COURT RESUMES: 11.44 AM**

**MS WILLIAMS ADDRESSES THE COURT – RE. APOLOGY AUDIO BACKGROUND NOISE (11:43:57)**

**MS WILLIAMS ADDRESSES THE COURT – OPENING SUBMISSIONS**

(11:44:08)

So, your Honour, I might perhaps go to paragraph 4 of my submissions and there I've just highlighted that the Director-General's submission has sought an  
5 amendment to rule 14.5.1.1(b) and it wasn't pursued in mediation and formally record that submission. I just wanted to cover that off your Honour.

So your Honour moving to the nub of the hearing which is whether the rules in Part G should apply in the Queenstown Lakes District, the Director-General supports the version of Part G which is I think Appendix 6 of Ms Boyd's evidence  
10 of the 11<sup>th</sup>, sorry 18<sup>th</sup> of February and the Director-General's submission that remains that to give effect to the new policy 7.D.10 these rules should apply throughout the Otago region and I've noted that no submission opposes that insertion in policy 7.D.10. I've referred also along with Ms de Latour to the seminal decision of the *Canterbury Regional Council v Banks Peninsula District*  
15 *Court* High Court and in my submission on the effect what that case amounts to that a District Council that Act wants to control earthworks provided they are not inconsistent with the Regional Plan. It doesn't however preclude the possibility of have the two rule regimes applying to manage adverse effects consistent with each Council's functions. And I've focussed in particularly on s  
20 30(1)(f) which is the discharges function of the Regional Plan, so looking at s 15 that deals with discharges of contaminants. Contaminants are broadly defined but sediment will be a contaminant in relation to water if it changes or is likely to change the physical, chemical or biological condition of water.

So looking at s 15(1)(b) no person may discharge a contaminant onto or into  
25 land in circumstances where it could reach water unless this is expressly allowed by amongst other things a rule in the Regional Plan, so that is what rule 14.5.1.1 does. It is the rule which is provided for 7 in essential earthworks to be a permitted activity where the standards in that rule are met.

We then have rule 14.5.2.1 which is the considerations for a restricted  
30 discretionary activity in the standards in for 14.5.11 are not able to be met. Those rules together are giving an effect to policy 7.D.10 of the Regional Plan seeking to maintain water quality in that I note your Honour was the position that was made at mediation in which Director-General supports, and that gives effect to the objective of the national policy statement for freshwater

management Te Mana o te Wai, to ensure that natural physical resources are managed in a way that prioritises first the health and wellbeing of waterbodies and freshwater eco systems. I do just want to pause there, your Honour, and note that similar to Ms de Latour, I am not submitting that (inaudible 11:48:04) gives full effect to the National Policy Statement for Freshwater Management 2020 but in my submission this particular policy and rule certainly are steps along the way and that's the importance of that there.

And I also did want to refer to policy 3 of the National Policy Statement, that freshwater is managed in an integrated way that considers the effects of the use and development of land on a (inaudible 11:48:34) catchment basis including the effects on the (inaudible 11:48:38) environments and in my submission, your Honour, that policy 3 is also relevant to your decisions in Part G.

Coming back to paragraph 14 of my submissions, with respect, your Honour, I submit that chapter 25 rules in the proposed District Plan cannot give effect to policies in the Regional Plan: Water or authorise a discharge activity under s 15. It is the rules within the Regional Plan that can manage and authorise discharges of contaminants, in this case sediment from earthworks, to maintain water quality.

Thinking about the purposes of District Plans, District Plans are to assist Regional, sorry territorial authorities, the District Councils in this case, to carry out their functions. The functions are set out at s 31 of the Act and while those functions do include control of actual potential effects on the use, development or protection of land, and also the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes, it doesn't include management of discharges.

So we have overlapping controls and as Mr Brass' evidence has noted it is not unusual for there to be overlapping provisions in Regional and District Plans and Mr Brass' evidence has analysed the respective District Plans from the Otago region and how each of them approaches management of sediment of essential earthworks and then I've set out here at paragraph 16, two paragraphs or excerpts from two paragraphs of Mr Brass' evidence.

So based on the evidence, your Honour, I submit that the s 14.5 rules are appropriate to apply to control discharge of sediment from residential

earthworks in Queenstown Lakes District. And I further submit any attempt to try and realign the rules with chapter 25 may result in the rules not giving effect to policy 7.D.10 in the Regional Plan and I have to say looking at the proposed rule 14.5.1(a) I think it is, that's proposed by Ms Hunter, it doesn't seem to me, your Honour, to actually give effect to the policy and that's what rules must do. They should give effect to, they should implement the policies in the plan, so that seems to me to be a fundamental problem.

Coming back to paragraph 18, rules in the District Plan are constructed to give effect to the policies and that which in turn are of course giving, seeking to attain the objectives of that plan to meet the Resource Management issues of the Queenstown Lakes District.

So that really is my submission, your Honour, is that we have this mismatch if we just try to try and pull across the rule for, or a variant for the rule from the District Plan somehow into the Regional Plan, that just, I think there are problems with the gelling because actually the respective rules are intended to achieve different policies to implement different outcomes, so there's just that mismatch going on there, your Honour.

You will recall, your Honour, that I referred to the Lake Wanaka Preservation Act in the rural part of the hearing and I just would like to remind you and Commissioner Hodges of that again, so this is an Act from 1974, it is to preserve the normal water levels and shorelines of Lake Wanaka and maintain and improve its water quality. The Guardians of Lake Wanaka are established under that Act and their functions include consulting with the Regional Council on the Council's functions as they relate to the lake. There is no reference in the Act, your Honour, to the District Council and there is no statutory (inaudible 11:52:49) between the guardians and the District Council. Lake Wanaka, of course, is within the Queenstown Lakes District. Improving controls on sediment from residential earthworks in that district should maintain or improve water quality in Lake Wanaka which is one of the purposes of that Act. If that is not the case the Guardians will be looking to the Regional Council rather than the district Council, which is of course is consistent with the consent functions that each Council has.

And as a conclusion, your Honour, the Director-General supports Plan Change 8, Parts A and H, which I haven't otherwise referred to and also Part G as they



proposed to the amended policy at mediation and that's the version which is in Ms Boyd's evidence and in my submissions Part G should apply throughout the Otago region.

**THE COURT: JUDGE STEVEN**

- 5 Q. Thank you very much, Ms Williams. Your submissions are very clear and I just want to go back and ask a question of clarification and I think I anticipate I know what the answer will be, but it's in relation to your paragraph 3 where you say that one of the gaps relates to sediment from residential earthworks, which is addressed in Part G obviously, I'm
- 10 assuming that you're talking about one gaps that was identified by the ORC –
- A. – yes, your Honour –
- Q. – yes, it's not gap that the Director-General of Conservation identified?
- A. No, Ma'am, so that's part of the section referred to in our
- 15 (inaudible 11:54:23) which the Court is referred to Part G.
- Q. Right, okay, so you didn't have a view on this question of whether residential development should be defined to include visitor accommodation and/or retirement villages? You don't –
- A. – given currently that these submissions, your Honour, are not –
- 20 Q. – no, no –
- A. – the Director-General supports the new definition of residential development –
- Q. – yes –
- A. – as proposed –
- 25 Q. – yes –
- A. – I've listened to my friend Ms de Latour's submissions on the National Planning Standards and the definition of residential activity and the Director-General was comfortable with visitor accommodation being included within the proposed definition of residential development and I
- 30 agree with Ms de Latour that based on her analysis of the National Planning Standard's definitions I think even that too was excluded there's still a potential for visitor accommodation to be captured within residential activity and therefore within residential development.

Q. Good, thank you very much. That was my only question for you. So Mr Hodges did you have any questions?

**THE COURT: COMMISSIONER HODGES**

Q. No, thank you, your Honour. Thank you Ms Williams, I too found your  
5 submissions very clear and I have no questions.

**THE COURT: JUDGE STEVENS TO MR WATTS – RE. AUDIO FEEDBACK**  
(11:56:03)

**THE COURT ADDRESSES MR MATHESON – RE: TAKE TURN NOW, AS**  
**AUDIO ISSUE WITH MR WATTS’ CONNECTION** (11:57:52)

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**MR MATHESON ADDRESSES THE COURT – OPENING SUBMISSIONS**  
(11:57:49):

Similar to Ms De Latour, I know you have read these. I will like my friend just do a short page turn on them, and through that also respond to a number of the  
15 points that have been raised. So starting at, just noting that the submissions are made jointly on behalf of Willowridge Developments and Remarkables Park, and I have Mr Ashton and I have collaborated on these and he’s just addressing the jurisdiction points separately in his submissions to follow.

Proposed Proposed Plan Change 8 includes rules that regulates earthworks  
20 and any discharges associated with the earthworks. What is unusual about the provisions is they only apply to earthworks associated with residential activities, and not to all other forms of earthworks of a similar scale, so golf courses, roads, any forestry activities are probably by the MPS, any forms of infrastructure, commercial developments not covered, and I don’t know what  
25 one’s meant to do if you have retail at ground floor and residential above. The residential activities don’t touch the ground, so do you need an earthworks consent for a residential activity that’s at first floor? I don’t mean to be trite but it does sort of make the point that it’s –

**THE COURT: JUDGE STEVEN TO MR MATHESON**

30 Q. – no, no, hmm.

A. From my client's perspective it's an implementation perspective and it's a keep getting invoices from people to do the same thing perspective that is very frustrating for them. And I will say at the outset my clients did take somewhat aback at the suggestion that the urban developers and particularly my clients are somehow not doing their bit for freshwater quality of Otago, and that's not the case at all, they are very happy to do their bit. They just want to have to apply for two resource consents to do exactly the same activity from two different entities. So I'll come back to that.

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**MR MATHESON CONTINUES OPENING SUBMISSIONS:**

Secondly, they purport to manage the effects of discharge on water quality, despite there being other rules in the Regional Plan that regulate discharges of contaminants to water, and despite the fact that amendments could have been made to those rules. And that will be a common theme. Our case is that if ORC had a problem with its discharge rules it should fix its discharge rules.

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Thirdly, they apply within the Queenstown Lakes District despite Chapter 25 of the Proposed Queenstown Lakes District Plan containing a comprehensive earthworks rule that seeks to protect water quality. And I will take your Honour and remotely Commissioner to the RPS shortly. The submitters oppose the Residential Earthworks Provisions in their current form and as they purport to apply to earthworks in the Queenstown Lakes District. The reasons are as follows: Firstly the residential earthworks provisions are not the most appropriate, having regard to s 32. Firstly, there is no RMA-effects based reason for limiting the rule to earthworks associated with residential activities; the Otago Regional Council made no effort to draft the residential earthworks provisions in a way that works alongside and complements the QLDC provisions – the ORC has failed to apply integrated management, and there is no evidence of any meaningful consultation with any of the TLAs, particularly QLDC, the s 32 report merely indicates they were sent to QDLC in February at the same time they were undertaking a legal review. And no response was received. And this is despite the intention being to work closely with the District Councils in order to manage earthworks as those district councils were required to do by the ORC's own RPS. If the ORC'S primary concern is about the effects

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of discharges of contaminants to water, then the ORC could have enforced its existing discharge rules insofar as discharges from earthworks are concerned, or if those rules are not sufficient, it could have proposed amendments to those rules or promoted a modified discharge rule, as part of PC8. and again, I don't think my clients would be here if ORC had proposed an amended discharge rule, because my client doesn't disagree that it's the ORC's regulatory function to control discharges to land. What my clients object to is that the ORC requires an earthworks s 9 rule which it almost exactly matches what they are required to get from QLDC. So if Plan Change 8 had just been fixing the discharge rule we wouldn't be here.

Changes such as that described in (B) could have applied region-wide, and they could apply to discharge from all activities while not trespassing into the land use component of earthworks activities. This would be a more effective and efficient resource management outcome. If ORC was concerned about the robustness of territorial local authorities' earthworks rules, then there are other processes that could be adopted to ensure those rules were improved.

The submitters request that either the residential earthworks provisions are amended so that they do not apply to land in the Queenstown Lakes District that is subject to the Chapter 25 provisions, that if ORC remains concerned about discharges in the QLD, that ORC promote a plan to amend its discharge rules so as to better regulate those activities, and as part of developing that rule, ORC work with QLDC in order to ensure that ORC's proposed discharge rule, the matters of assessment, and the requirements for EMPs etc, complement, rather than duplicate, the QLDC rules. And member of the Court, the point there is and as I'll come to and explore in cross-examination, there is no reason why a discharge rule cannot require an erosion sediment control plan; it doesn't have to be a land use consent to do that. So all of the same types of integrated management and concerns about erosion and sediment that the ORC purports to say it needs a s 9 consent for could be done under a s 15 consent only.

#### **THE COURT: JUDGE STEVEN TO MR MATHESON**

Q. All right, so can I just pause and ask if any consideration is being given, I don't know what the, I can't recall the wording of the existing discharge

rule that everyone seems to accept is not adequate and which needs to be improved, and you're suggesting that if the Plan Change had just been dedicated to improving that would have been better, but it's got to have a trigger and the trigger's got to be associated with the land use activity, doesn't it, so you can't escape that.

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A. Well -

Q. - and that's, you can't just pluck a discharge rule out that doesn't tie it to the activities, i.e. earthworks associated with development of some kind that is giving rise to the potential for a discharge when rainfall occurs, and that seems to be the, that, and so it's that level of integration that is the reason for both rules. How does just having a discharge rule without tying it to the land use, how does that work?

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A. Well, I guess my answer to that would be it depends on how you worded the discharge rule. I mean, the discharge rule could as a trigger have an area of earth disturbance without necessarily issuing a land use consent, because the consent is not approving the land use activity. So I don't see as a matter of law any reason why you couldn't have a discharge permit that says if you'd have said two and a half thousand square metres of land it will trigger a discharge consent, because you're, and you might need, it might be a permitted activity to do the land disturbance or you might need a land use consent from the District Council, but I don't see any reason at law why the triggers that the ORC say they need can't be attached to a discharge permit. Obviously the limits need to relate to the consent, but in terms of the trigger and the need for it and the management measures such as an environmental management plan, erosion settlement control plan are all quite valid conditions on a discharge permit.

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Q. So it's going as far as the current rule framework contemplates, but it's just only resulting in the issuance of a discharge permit and not a land use consent as well?

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A. Yes. Yep, pretty much. And you'd need to look at the criteria and you'd need to look at the, for example, the ORC criteria for reasons unknown seems to refer to damage to property as a regional council matter which, for a land use consent, which I can't understand, so you'd need to work

through the criteria and the, in the whatever rule you come up with, but it's fundamentally if the concern is you need a trigger and you need to wait, you don't want to wait until sediment discharges into the river, which I can understand, in my submission you can do that without needing a land use rule, as a matter of law.

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Q. Thank you.

A. And then lastly, in B, if the Court considers that a combined s 9 / s 15 rule is to apply then in our submission the rule needs to be amended so as to avoid, to the greatest extent possible, overlap, duplication and inefficiency.

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**MR MATHESON CONTINUES OPENING SUBMISSIONS:**

I note at paragraph 6, that the submitters' position is consistent with the submission of QLDC on that. QLDC has chosen not to call any evidence and as I said, agreed an MIU which to me seems to be an agreement, a non-binding legal, non-legally binding agreement to talk in the future, and to be honest, our submission is that everything they're doing in there they should be doing anyway as part of their obligations from both councils to integrated management and efficient consenting processes. So it was rather disappointing to see that, to be honest, because I mean it's all good stuff but it should be happening anyway and it should have happened much earlier in the process than, you know, at the literally at the eleventh and a half hour.

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The submitters, I've got a comment there on the submitters which I'll take as read at 7 and 8.

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And then paragraph 13 onwards, I'll just talk about the provisions which I think the Court will be well aware of now. In terms of the overview of the legal framework, very grateful to my friend Ms De Latour and her offsiders for preparing that summary. I rather hoped they would do that, and they followed through which was excellent. So I have no comments and respectfully adopt those, that framework.

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In terms of paragraph 24, the submitters say that the following matters are particularly relevant: whether reasonably practicable options other than the residential earthworks provisions have been identified, and if not what other such options exist; and then, whether the residential earthworks provisions are

effective and efficient both in their own right and relative to other options. And just pausing there, and I will come back to this point, in my submission, the requirement under s 32 to assess reasonably practicable alternatives is essential, because if you only, and my reading of the s 32 report there's only two options are assessed, there's the status quo and Plan Change 8, and if you do a s 32 assessment with the status quo and one other option, it's a pretty low bar to get to the one other option – all you've got to provide is it's better than what you've got now, you know, which is a far cry from what I read s 32 as requiring which is stepping back and saying, okay, what are the range of - what's the problem? It's a resource management issue we have, and what are the range of solutions we can apply to that problem, and then test them, and then you go okay, well having regard to these four or five options or whatever, I was rather shocked when I read back through the s 32 report and there seemed like there was only two options assessed.

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**THE COURT: JUDGE STEVEN TO MR MATHESON**

Q. So do your witnesses identify options that could have been considered but which weren't?

A. Yes, they do and I'll come to that too in terms of some other options, but Ms Hunter does, yes.

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**MR MATHESON CONTINUES OPENING SUBMISSIONS (12:10:18):**

So turning then to, so we dealt with 26, meaning effectiveness and efficiency, these will be well-known to the Court. *Effectiveness* is the degree to which something achieves a particular purpose or result. It's got to work. In the context of s 32 effectiveness means the degree to which proposed provisions achieve the objectives of the water plan, particularly those relating to the improvement of and reducing adverse effects on water quality. And then *efficiency*, the production of the required result with little or no wastage. Again in the context of s 32, the test for efficiency can be seen to be the degree to which provisions achieve the objectives of the water plan without losing resources unnecessarily. And again without, this is all cumulative and people might say, well, yes, you know, you need to go and get, you know, the ORC's

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officer might need to, you know, my client, which, and she will address you on, just the other day got a \$1,900 bill for an audit from the ORC officer on top on what they've already paid the QLDC to audit exactly the same activity. Now that happens on every single consent all across the region. You've got the time  
5 staff, you've got the staff at ORC that need to look at the earthworks, you've got the costs associated with the developer, you've got the interaction in terms of having to get two people out on site at the same time to monitor, you've got the delay, you've got the costs associated with not getting the consent and being able to release the properties for sale. It all adds up and its all cumulative and  
10 its all of those factors which in our submission need to be assessed in a s 32 assessment and go, well, you know, is that actually – is the outcome we're getting worth that and how can we design it in a rule or a framework in a way that minimises that. Everything will have a cost and my client is certainly not objecting to paying for experts to address water quality or sediment control,  
15 absolutely not, what they're objecting to again is having to do it at least twice if not more for the same thing.

That then comes nicely to my next point which I've probably bravely termed *the principle of least regulation*, and it really comes out of the, I think its inherent in my submission, its inherent in s 32, but I think it does come out of the  
20 Environment Court's decision in *Royal Forest & Bird* case I've got there which again refers back to earlier *Wakatipu* case. In considering what rule might be the most appropriate in the context of s 32 we consider the presumptively correct approach remains that where the purpose of the Act and the objectives of the plan can be met by a less restrictive regime then that regime should be  
25 adopted. Such an approach reflects the requirements in s 32 to examine the efficiency of the provision by identifying, assessing and if practicable quantifying all the benefits and costs anticipated from its implementation. And I guess here, in that context, it would not only be having a controlled or restricted discretionary rather than discretionary, so in that sense less regulation, but also in my  
30 submission if you don't need to impose an earthworks consent requirement and you can achieve the outcome you need with a discharge permit that would equally be consistent with that principle of blessed regulation. You regulate as little as you can in order to achieve the outcome you need and the submitter's case before the Court is that the ORC can achieve everything it needs to



achieve through a discharge permit. And that would be consistent with the principle of least regulation.

**THE COURT: JUDGE STEVEN TO MR MATHESON**

5 Q. All right, so I assume all of that seems to me be something that you are applying in a type of vacuum divorced from the Regional Council's obligations under the current National Policy Standard on Freshwater Management and this concept of Te Mana o te Wai and this integrated approached Mountains from the Sea which is essential and which underpins the current National Policy Statement as described in the cases that have been referred to by counsel, so would you accept that?

10 I mean –

A. – I'm happy to address you on that –

Q. – I'm hoping that you will.

15 A. Yeah, no, I will and I'm happy to do it now because I mean our witnesses were somewhat criticised for not addressing those issues but I mean the NPSFM I'm integrally involved in it, up and down the country, and we all know that there's another plan change coming to implement it in its entirety, we know all know sediment is the key contaminant, but I also know that you can manage sediment through a discharge permit and the question is, are we really saying that the principal of Ki Uta Ki Tai means you need an earthworks consent rather than a discharge permit, because that seemed to be the submission being made by my friend. I don't disagree with that principle at all, but where I – and I don't disagree with the importance of the NPSFM, my submission is that the outcome of the NPSFM can and will be achieved through a discharge permit, not through an earthworks and a s 9 combined rule.

25 Q. All right, so that's something that I might tease out with the witnesses because I'm particularly interested to know what the discharge permit might end up looking at if its allowed to, in fact if it has to account for the land use activity that is potentially giving rise to the discharge and the extent to which a discharge permit might then have to regulate that land use activity to effectively manage or eliminate the possibility of discharges, because I'm just wondering whether, what you end up is

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looks the same, it's just that its only called a discharge permit and what the, what the efficiency gain is, so anyway but that's something that I'm going to explore with the witness, tease that out.

5 **MR MATHESON CONTINUES OPENING SUBMISSIONS:**

Turning then to the importance of integrated management, and both of my friends have actually referred to this case and we've got both, at 30 and 31, have the, both the original decision of the Court led by Judge Shephard I think it was and then the Court of Appeal's ultimate decision. I don't think there's  
10 any, any disagreement with any of that. I would like to just and I'll put this in my closing, but I would just like to read out one of additional comment because it does, this is from the first decision of the Environment Court or Planning Tribunal as it was. And this was in response to a submission that there are superior instruments and inferior instruments and a hierarchy of planning  
15 instruments and I think its worthwhile bearing this in mind that the Court in that case made the comment: *We've not found it helpful to view the relationship between the various instruments under the Act as a hierarchy nor to view Regional Councils as superior and territorial authorities as inferior. We prefer to acknowledge the Act provides for a variety of instruments and provides means by which the inconsistencies between are to be resolved. It directs that*  
20 *– s 75(2) is one of those – it directs that District Plans are not to be inconsistent with certain other classes of instrument. In our view that does not imply that territorial authorities are inferior in any way to the authorities responsible for those other instruments. Indeed territorial authorities are giving important functions in the carrying out of the Act and particularly in the critical area of a controlled land use activities. No doubt that is because territorial authorities are able to be responsive to the aspirations of the people in the district and local needs and conditions. The requirement that District Plans are not to be inconsistent with other instruments with broader content is for the goal of*  
25 *integrated management of resources, that is a condition of a coherent network of plans and other instruments but does not imply inferiority.* And I guess the point there is QLDC is capable of addressing the land use earthworks components and ORC is capable of addressing the discharge permits.  
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Now if I may take you to the, I will now take you to the Regional Policy statement, the operative regional policy statement, so that's in the common bundle which is volume 1-3, it's number – starts at tab 7.

**COURT REFERRED TO BUNDLE 2, TAB 7**

5 And then probably the best place to go is start at common bundle 546. So at 546 so I'll take you through some policies and these are the ones referred to in the method which we'll come to, so just if you turn the page before, 545, its policy 3.1.7 "Soil Values", so that relates more in my reading of it to the importance of soils as a natural resource.

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3.1.8, over the page, relates to soil erosion. Minimise soil erosion arising from activities by undertaking all of the following: using appropriate erosion control and soil conservation methods, etc. And then the method that's been, had some attention this morning is over on common bundle 610, so the methods  
15 are at the end of the document implementation section.

So at 6.10 method 4.1 City and District Plans will set objectives policies and methods to implement policies in the RPS as they relate to the city or district area's responsibility. All objectives and policies of the RPS must be considered and given effect to and then more specific direction is provided in the following  
20 area and then 4.1.5 policies 3.17, 3.18 and 5.41, by including provisions to manage the discharge of dust and silt and sediment associated with earthworks and land use. That is what the RPS currently operative RPS directs a district council to do, and that is what QLDC have done in their chapter 25.

**THE COURT: JUDGE STEVEN**

25 Q. Now, so is there any separate method in relation to the content of a regional plan? I don't know, that's... I'm not familiar with it, but conceivably – oh yes, it's method 3 and it's on page 608. I don't know whether that's a method in relation to the same subject matter but that's my general question, so if you don't know the answer to it –

30 A. Yeah, no, it is here, I'm just having a quick look.

Q. I would like to know.

A. I can't see anything in it immediately on...

Q. No.

A. Adverse effects of land use on soil and protecting soils but there doesn't seem to be anything obvious, but we can address that in planning.

Q. Mmm.

5 A. But I think as far as the – I mean I can understand, you know, from Mr Watts' submission that he filed, you know, that QLDC's main concern was they might have to change their plan as a result of the ORC's changing position, and I sort of understand why QLDC were a bit grumpy about that having just finished and got chapter 25 basically agreed and operative, but in my submission, you know, as much as the proposed  
10 regional policy statement 2021 might be a twinkle in the regional council's eye, it is just that and it should be given very little weight, submissions have just gone in; however, the High Court declaration, because your Honour may be aware that that's obviously underway as to whether that's a freshwater planning instrument or not, so who knows when that's going  
15 to come out or what's going to happen with that, but in my submission the Operative Regional Policy Statement is the one that must have the most weight, and as far as this Plan Change is concerned that has the method that directs city and district plans to do what it is doing.

Q. So which is, which is this method that you've just...yeah.

20 A. Yes, yes.

Q. All right, so and it's helpful to know exactly what method you're talking to and it's also helpful to appreciate that you're not relying on this method to justify any suggestion that QLDC can actually regulate discharges in a  
25 s 15 context, and I completely, I mean you're not, to the extent that the QLDC plan considers that that's just an effect of the land use which comes within the scope of what is contemplated by these methods, by these directions.

A. Well, almost, and I should, apologies Mr Ashton just reminded me, yes, policy 5.4.1 is the third of the three, if I can just take you that, it's common  
30 bundle 599.

Q. Mhm.

A. So this is something broader. This is manage offensive or objectionable discharge to land, water and air, avoiding significant adverse effects of

those discharges. So that's quite a broad direction, avoiding, remedying, mitigating other adverse effects of those directions.

Q. Do you think that that's in the context of offensive and objectionable discharges to land water and air, it's typically used in the context of odour, isn't it, and there's the specific reference there to human and animal waste, which are the types of activities that would give rise to perhaps an objectionable odour, but what's the scope of that?

A. Well, I think some would say, I mean if sediment was having such an effect that it was harming aquatic life then I'm sure it would be considered to be objectionable as least as far as the cultural values are concerned. I mean, obviously discharge of waste water is objectionable.

Q. Yes it would be.

A. So to that extent, yes. But in terms of managing soil runoff, I mean that's an unusually broad directive to a district and city plan to address in the RPS.

Q. But going back to my question, are you suggesting that this document, whether it's that policy that, the policy that we referred to earlier and the methods to implement that, and this policy, whether it's this one as well, are you saying that the QLDC does have regulatory control over actual discharge

A. No.

Q. – as opposed to the, the discharge being an effect of the land use?

A. Yeah, so in our submission and for the reasons we set out, our position is of course QLDC cannot authorise the discharge. It can't issue a discharge permit, but what QLDC can do is control the adverse effects of land use on water quality, and that's quite clear and in my submission from the case law and from the conditions and from chapter 25, the ORC, the consent order that ORC signed off on, and from the RPS provisions, so, and that's integrated management, I mean it would make no sense at all for QLDC to say, well, we don't care what happens on our land, it goes in the water that's your problem. So it does make sense from an integrated management perspective for a land use, a district council to say, well, yes of course we need to be alive to what's going to happen in the water, we can't authorise that but we can – sorry...

- Q. No, that's all right. Thank you. But does this...and if you accept that the regional council has a proper role, obviously it has the statutory role in relation to the discharge, with that acknowledgement in mind, how much of that gives rise to the potential for duplication including in the audit carried out by the respective councils, I mean QLDC's doing a comprehensive job of managing land use activities to the extent that it's also looking at the effects on water quality and that's giving rise to audits and charges being sent to your clients which could overlap and be repeated with the audits that the council, regional council, gives. I mean isn't that just an inevitable consequence of the fact that there is this, well I won't say it's an overlapping jurisdiction because the regional council have a sole jurisdiction in relation to regulation, and we're stuck with the QLDC plan provisions. When I say stuck with, I don't mean that in a derogatory sense; we can't alter them.
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- 15 A. Mmm, yeah.
- Q. But we're dealing squarely with what are the regional council's functions, what are its obligations and how far does that go in terms of enabling integrated management of earthworks so that discharges can be adequately controlled.
- 20 A. Yes, and in answer to your question, your Honour, it depends on how the rule is worded. I mean, it would be entirely possible to word a rule that is sufficiently discreet, that as I said has a trigger of some land use activity, doesn't mean you need to go and audit it, it's just, it will trigger a resort requirement for a discharge permit, and the extent there's audits going on they'd be limited much more to audits associated with the discharge, as opposed to audits associated with the land use, and that may include for example a requirement to make sure that your erosion settlement control pond has sufficient volume and all the rest of it, 'cos that relates to the discharge, so yes there will be some inevitable overlap, but it depends on
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- 30 how the rule's worded, and we're all speaking hypotheticals because there is no such rule. In our submission that's what Plan Change 8 should have done but they didn't, so we're sort of stuck with what we've got. but again in my submission, I'll just go back to it, it was, I do not consider that

integrated management requires both QLDC and ORC to issue an earthworks consent, a land use consent.

Q. All right, okay.

5 A. And then that brings us to paragraph 35, and the issue of duplication between regional and district rules, and I know this case is somewhat old now but it still has a useful comment; in that case it was the other way round, it was Matamata-Piako endeavouring to have some control over odour, so the reverse of here. And the Court made it clear that: “We think it is wrong in principle for two governments to be regulating the same thing. There will be almost inevitable consequences in cost, duplication, 10 potential inconsistency, blurred accountability and so on. Such a situation should have no place in a contemporary integrated resource management process.” And all my clients would say would be “Hear, hear, absolutely agree.”

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**MR MATHESON CONTINUES OPENIGN SUBMISSIONS:**

And then at 36 which the Court will be aware of, that’s the, it’s not the same here and I make the acknowledgment in 36B that the QLDC rules are what they are, and we can’t as part of this process, change those. And then at 37 20 onwards, and this is really the point where that I made earlier that in our submission QLDC is entitled to control potential effects on water quality as it relates to land use; it just cannot permit the discharge itself. And there’s an example in a QLDC resource consent which is set out there. In our submission, such a condition is valid and enforceable. It is “directly connected” with the applicable Chapter 25 Rule. The Chapter 25 Rule has been promulgated to 25 give effect to the RPS 2019, and the ORC was a signatory to the draft consent order that was presented to the Environment Court to settle the appeals on that chapter.

ORC cannot, on the one hand, direct city and district councils to include 30 provisions in their plans to manage the discharge of sediment associated with earthworks, and then on the other hand say that the conditions imposed pursuant to such rules are unenforceable.

Turning now to s 32 and we’ve covered off a little bit of this. At 39, I do make the point that I made earlier on that assessing reasonably practicable

alternatives is an essential element and is not one to which mere lip service should be given. Its importance lies in the fact that while proposed provisions may seem appropriate, i.e. effective and efficient, in isolation, when compared to other alternatives they may not be seen as appropriate. It depends on what you're comparing it against. Other reasonably practicable alternatives in this case would include the following - and this is at 41: The exclusion of the QLDC from the applicability of the provisions; the amended provisions as proposed by the submitters so in some way recognising that you have an easier consenting pathway if you had a QLDC consent, however that's done; the transfers of powers pursuant to s 33 of the RMA from QLDC to ORC; amendments to the discharge rules under the Regional Plan to provide or better address concerns over existing and past discharges of sediment; and collaboration with QLDC in order to ensure that the proposed discharge rule, the matters of assessment, and the requirements for EMPs etc, complement the QLDC rules.

The submitters do not consider the provisions proposed by ORC are the most appropriate way of achieving the purpose of the Act. The residential provisions are not effective in respect of key land use activities, and we've talked about those, commercial, industrial, infrastructure, golf courses, rural, other activities. There is an inherent inefficiency associated with the provisions due to the duplication of consenting requirements, there will be unnecessary costs resulting from this inefficiency and the environmental benefits can be achieved through reasonably practicable other methods.

And then quickly on effectiveness, and I do concede that a combined rule is valid rule and it can be effective and that's not, the Auckland unitary plan, you know, small earthworks get district council, regional earthworks get regional council as well, and there are limits in between them and you sort of know whether you are applying for that one and whether you also have to get a regional council consent, and I will put it in closing, but I actually found the, I dug up the section in the independent hearing panel's discussion on that and they specifically made the point, yes there will be some duplication but because Auckland is a unitary body we expect these can be dealt with efficiently and effectively, so even in that case the IHP was aware of the potential duplication issue.



**THE COURT: JUDGE STEVEN**

Q. Not to say that if it's not a unitary authority the two councils can still not deal together in a cooperative and effective manner.

5 A. Well, they absolutely should and the difficulty is from a consenting, from an administration perspective, you're applying to two different entities with two different deposit requirements, with two different consenting planners, you know, I mean that's why one of our other options –

10 Q. - but you're not going to avoid that though are you, because you acknowledge that you have to get a discharge consent and the application and I'll tease this out with the witness, the application might have to, well it will have to address the land use activity that gives rise to the discharge and you'll need a land use from the QLDC, so you're still putting two applications in and you're still paying two sets of different fees and you're still going to have monitoring charges by the two separate  
15 councils.

A. Well that's assuming that the earthworks has a discharge.

Q. That's inevitable, with rainfall.

20 A. Well, it's just if there are circumstances though where there's big enough soaking pits, I don't know, but I guess the point is also your discharge permit can relate to how sensitive the receiving environment is, it can relate to, you know, you can actually have a more focussed discharge. I'm not standing here and saying that we might not need a discharge permit.

Q. No.

25 A. You know, and we accept that.

Q. Okay, so, but assuming that you, there is going to be discharge. Assuming that here is going to be a discharge, the PC8 rules will, it's only in that even that the PC rules will be triggered anyway. You will need a discharge, the question is whether in addition to that you need the land  
30 use consent from the region as well.

A. Yes.

Q. Yes.

A. And I guess it's I – and we don't know what this rule could be, but I could imagine you could write a very focussed, very specific discharge rule that

had some upstream to use an appropriate metaphor, had some recognition of some upstream activities in the sense of triggers, or slope could be one, area could be one, that could trigger the need for a discharge permit, but it wouldn't let the council go and dig into the contents of what happens on that land, because that's already been done by QLDC. That's the difference. So, and then at, so we talk about, yeah in terms of effectiveness so we say that the, yeah, as I said, the purpose of the rule there can be a valid rule. We do make the obvious point that the residential earthworks provisions are obviously ineffective for all earthworks associated with activities other than residential. So as a test they are completely ineffective because they deliberately don't cover them.

**MR MATHESON CONTINUES OPENING SUBMISSIONS:**

So in terms of the, compared to other reasonably practicable alternatives at 45, the submitters say that the residential earthworks provisions are no more effective and in some cases less effective because of the existing regulation of earthworks in the QLDC and the PC8 provisions are a duplication, the desired result (being the objectives of the Water Plan) are already achieved, so the point there is just we're happy with the policy proposed, that policy that's been agreed between the parties could equally support a discharge rule only, it doesn't have to necessarily be an earthworks and a discharge rule.

The transfer of powers is an option that should have been considered as part of the 32 assessment.

Turning to inefficiency. The second element of s 32 is whether the proposed rule is efficient. In that regard the submitters say there is duplication. Both PC8 and the PDP provide for residential activities as permitted activities subject to standards. If those standards are not met, the earthworks require consent. The matters to which the two Councils have restricted their discretion are identical in all material respects. And essentially, there are no matters the ORC can consider in assessing applications for earthworks that cannot already be considered by QLDC in assessing the same activity. And just pausing there, that's not to say that there are relevant discharge matters that are, that can be considered by ORC and should be, such as the s 70 matters etc that was

discussed by my friend. While the ORC's evidence reluctantly accepts that there is some overlap, they do not consider this to be duplication. ORC's position is that the provisions are not a duplication on the basis of the discharge component. Because discharge of sediment is a regional and not territorial authority matter, QLDC is not able to enforce discharge standards and so cannot manage certain activities in relation to discharge.

For the reasons set out above, the submitters do not accept that to be the case. While a discharge in itself is not a QLDC matter, QLDC would not have jurisdiction to impose a rule relating directly to discharges, the rules proposed by ORC are at least in part land use rules.

The managing of adverse effects associated with effects relating to discharge is squarely within the ambit of regional councils and I've covered that earlier. QLDC can and does impose land use controls that have the effect of regulating the impact of any discharges. And then whether or not a discharge permit is required will depend on the relevant wording of any regional plan rule relating to discharges.

At 48, I briefly go into the cost benefit analysis. My submission in this point is it's been, Ms Hunter's evidence and Willowridge's evidence and Remarkables Park evidence as one of only two of a number of developers is that they have had to seek significant additional work. In the scheme of things, it might seem small, but in my submission that needs to be read against the entirety of the life of however long this provision is going to last and across the region. And in our submissions ORC has not really made any meaningful attempt to quantify those costs. Which it wouldn't have been difficult to do, in my submission.

In terms of section 50, paragraph 50, sorry, a second argument advanced by ORC in support of the provisions is that they observe poor practice relating to existing management of erosion and sediment management controls relating to earthworks. The submitters accept that under the previous QLDC planning regimes, there were instances of poor practice. However, as identified in the expert environmental management evidence of Mr McIntyre, these processes have improved significantly since the PDP. In any event, even if it were accepted that poor practices existed, it doesn't follow that simply imposing the same requirements from a different council will address that practice. So just because you put another rule in, you're still going to have the same people

doing the same thing, so that shouldn't, that's not a silver bullet. To address these broader matters of consent implementation, the ORC could have considered methods such as further collaboration and education in reviewing and monitoring consents. They do not appear to have been considered in the s 32 analysis.

And then just the last case I just want to take your Honour to is the one which –

**THE COURT: JUDGE STEVEN**

Q. Can I just ask, sorry – can I - reviewing and monitoring which consents?  
The QLDC consents, do you mean, in that paragraph the one that you just read?

A. Yeah, yep. Yes, QLDC consents. Yes. And I guess the frustrating thing, just on that, the frustrating thing from our client's perspective is you know, we, there are these arguments around well it can't be a permitted activity because you know you've got to sign off on an erosion sediment control plan and all the rest of it. The fact is that, and even the MOU, there's no reason why QLDC couldn't have been informally liaising with ORC about some of these provisions and addressing the issues directly.

**20 MR MATHESON CONTINUES OPENING SUBMISSIONS:**

But I just want to take you to this last case, which I do, I have provided in the bundle of authorities and that was a, it's a very recent case and it was the, it's the *Director-General of Conservation v Whangarei District Council*. It was the latest *Kauri Dieback* decision. *Kauri Dieback* is equally a very important issue, and in that case the Department was seeking quite onerous rules requiring resource consents to be sought for gardening in Whangarei. And the thing with *Kauri Dieback* and is, and the judge managed to get *Schrodinger's Cat* in the decision which was an impressive feat. So the Kauri trees are presumed to be infected and uninfected at the same time. And so literally, it was, well you've got all these kauri trees and the kauri hygiene area is three times the width of the branches, and you could have one on your neighbour's property and it could be affecting you and you didn't know you needed a consent and it's all very odd.

The Department of Conservation wanted rules put in place basically requiring resource consents for gardening and cleaning boots and all the rest of it. And the point's not about *Kauri Dieback* but I think at 47 through to 51, and I will put this in reply as well, the Court made these comments on the s 32 assessment.

5 Having considered the matter in general terms, we go now to set the scene for our s 32 analysis, looking at the most appropriate provisions to avoid the spread of *Kauri Dieback*. In doing so we should note that one of the major distinctions between the approaches of the *North Power Accounts v Director General* is the preference by the Director-General to use prescriptive mandatory provisions compared with more cooperative outcome based approach of the council. In 10 assessing the question of most appropriate methodology we must keep in mind, questions of practicality and effectiveness in the real world. To this end, it was notable that the Director-General considered the only methods available were rules. the Act is very clear the provisions to be considered encompass a wide 15 range of approaches including advocacy, education, subsidies, amid other possibilities.

Again it's just reinforcing that the s 32 assessment needs to be broader.

And then just, and I omitted this from the submissions – apologies – but we will of course be calling three witnesses so that's Ms Devlin, Mr McIntyre, and 20 Mr Hunter in due course.

And then the concluding submission at 54 and 55, we consider that the Plan Change 8 as it exists as it relates to the residential earthworks rule: happy with the policy, do not agree with the rule, and so the rule should be deleted, and instead the ORC fix its discharge rule, or, as I say, if the rule is to be retained 25 then it be limited to a discharge rule and that care be taken around it's criteria, so there's two options it seems to me. Either the Court concludes that it's not appropriate, we accept the policy but the rule is not appropriate, and if you agree with our submissions on that, that's the end of it until this next plan comes. And just, I mean I think on that too, we do need to think about questions 30 of proportionality here. Yes, water quality is important, but there will be another plan coming out next year and so I guess there certainly, has to be by 2024, December 2024 is the latest. And so, I guess the question is, you know, what's the, and I'll explore a little bit of this, but what's the actual evidence that

residential earthworks are actually having an effect on sedimentation? And we'll come to that.

**THE COURT: JUDGE STEVEN**

Q. Well, let's just – yes, we'll put that question aside.

5 A. Yes. And but I think, but sorry – where I was going with that was, oh the Court says no, you haven't made a case for it, gone. Or, in our submission, if the rule is to retain it should be limited just to a discharge rule and I think there'd be scope, there's certainly scope to be able to do that as far as this process is concerned. It would still be limited just to  
10 residential earthworks which seems a bit odd, but it is what it is. It would just be limited to a discharge rule only, and I think there's scope, certainly legal scope, because we've asked for it to be deleted. So if the Court was minded that it all came to the view that actually we think you could achieve the outcomes you want to through a discharge rule only, then I think  
15 there's scope and that will require, rather than trying to do it on the hoof, that will require a bit of thought as to how you word it, but I think there is certainly scope to be able to do that. So thank you for your indulgence. Those complete the submissions. Happy to answer any other questions.

Q. All right, so just a couple more questions.

20 A. Yes.

Q. So, and I'm going to work backwards. In your paragraph 52, I'm assuming that in your reference to one of the alternative methods that the council officers could have considered in their s 32 analysis would be further collaboration and education and reviewing and monitoring consents, i.e.  
25 education of QLDC staff, and I suppose you're talking specifically in relation to the regulating the impact of discharges aspect of the QLDC's monitoring of consents, or is it every aspect of – because this goes back to my earlier question about where do you stop, where does the ORC's interests stop; it starts with the earthworks activities and if you're just  
30 going to have a discharge rule, to what extent does the ORC have a legitimate interest in the actual land use activity and management of it that's giving rise to a discharge.

A. Yes.

Q. So what are you meaning by that?

A. Well, it seems to me that the main concern from the ORC is they have a discharge rule that they say doesn't, we don't know about a discharge until the river turns brown, to put it bluntly, right. So I guess the sort of things I was talking about would be to say, well the ORC, the QLDC could say to ORC, Hey there's quite a big earthworks application that's been put in, we're processing it, here's a copy of it. You might like to look at that and check whether you think that will trigger the need for a rule – a consent, under your discharge rule. At that point if ORC looks at it and goes, "Well actually we do have a permitted rule but we think for these reasons it won't meet it," ORC rings up the developer and goes, "We think you also need a discharge rule, a discharge consent," and of course QLDC's got the ability under s 91 to put the application on hold if other consent is required. So that's the sort of implementation step. And likewise, ORC is saying, "We don't know where the discharge points are." You know, QLDC could send a list to ORC of these are the earthworks consents, these are the discharge points, this is the contact name of the person you should talk to. All of that can be provided without getting a resource consent.

20 Q. I'll have to reflect on that. I'm not sure that I completely understand it. And so going back to the QLDC's overlap in relation to, you acknowledge that, and this is your page 18, QLDC can impose land use controls which have the effect of regulating the impact of discharges even though they can't actually consent it. What, where does how to regulate the – and you say whether or not a discharge permit is required in that context depends on the wording of the regional rule. Doesn't whether or not a discharge occurs or not, a discharge permit is required or not, depend on whether a discharge into the water occurs or on to land in circumstances where it might enter water, and in which case there has to be a regional rule regulating that?

A. Well there is in this case, there is a regional rule.

Q. Yes, I know but I'm not sure what... this seems to me, I'm trying to understand the, what you're getting at in the submission.

A. Right.

Q. Are you suggesting that because the QLDC can impose land use controls which have the effect of regulating the impact of the discharges, what's the purpose there, are you saying that you don't even need a discharge permit requirement?

5 A. No, not at all. I'm sorry, not being clear. My submission there was under s 31(1)(b) and the reference to control of land use, that the Court of Appeal confirmed was upheld their planning tribunal's decision which said you can't limit land use to things that are not caught by s 30. So, in other words, land use encompasses all land uses, including control of effects  
10 on water. So that was in my submission the outcome of the Court of Appeal case and then you have the RPS 2019 which says you shall put these methods in your plan to regulate the impacts of land use activities on water, and then the QLDC's promoted Chapter 25 and the resource consents which do exactly what the Regional Policy Statement told them  
15 to do which is manage land use activities to control the effects on water. And so what I was trying to say there was that's happening. And then the question of whether a discharge permit is required from the regional council will depend on the nature of that rule, that rule might say you need a discharge permit, or it's permitted in these circumstances but you need  
20 a discharge permit if, you know, it's into this type of river or into a wetland or into somewhere else, and you'd check it against the discharge permit, do you need a rule or not. That's another, that's entirely separate step from QLDC still managing its...

### **THE COURT: COMMISSIONER HODGES**

25 Q. Thank you, Mr Matheson. You've certainly raised a number of issues. I have to say that I share her Honour's concern about what the actual difference would be is if you didn't have a land use consent, because in my experience with resource consents if there's a discharge consent the consent authority always goes back up the pipe to see what the risks are,  
30 and could well want to ask the same questions as required by their land use consent. Do you have a view on that?

A. Well, as I said, Commissioner, it just does depend on the nature of the rule and it may well be that in circumstances in Queenstown for example



District, where there's a very comprehensive rule, you know, the ORC may have much less inclination to go up the pipe cos they don't need to. In other districts they might, you know, they might want to do more than that. It just, I don't know the answer to the question because it depends on the rule, I mean and it depends on the scope that somebody has when they come and do an audit, but at the moment there's an almost complete overlap without any sort of attention really being given to, does this really need to be looked at by the regional council or not. And I guess that's the discipline that we are asking be applied. because it's all cost, at the end of the day.

5  
10  
15  
Q. I certainly understand your concern about cost. But I imagine that whatever way you go on this there would need to be some triggers above which you start looking, and I thought the permitted activity rule does define those triggers. Now you are saying you don't agree with those triggers, is that right?

A. No. The council said that it, the ORC has said that its permitted activity discharge rule is ineffective. My submission is that if the discharge rule is ineffective, fix the discharge rule and do it for everything, not just residential earthworks.

20  
Q. No, I understand what you're saying, I'm just not sure how far it's going to get you in terms of actual difference. But that's something we'll explore with the various witnesses. So that's fine. Just, you've talked about the transfer of powers from Queenstown Lakes District to the regional council; are you aware of anywhere where that's happened around  
25  
New Zealand, that kind of transfer of powers on earthworks consents?

A. No, it's certainly happened for beds of lakes and rivers, that I'm aware of, which is a similar issue. And I don't, I'm not aware of any to be honest, and it may well actually be that a lot of other regional councils have different triggers but at the point at which you need a regional consent, so, whereas here in some circumstances you may need a regional consent before you need a district consent for an earthworks activity.

30  
Q. Mmm.

A. So it's not a, you know, big earthworks you need a regional consent, little earthworks you need a district consent, which, you know, some

approaches take. But I'm not aware and I'm certainly not suggesting that the Court has any jurisdiction to tell either local government entity to do that, I'm just saying it's one of the options that I would have thought would have been explored.

5 Q. Okay, and do you know of other regional councils around the country that don't require earthworks consents, land use consents for earthworks?

A. Yeah, I don't know, sorry. I mean I imagine some of them would for big earthworks, I don't know.

10 Q. The difficulty I'm having is you're coming up with all these suggestions but we've got no evidential basis for actually comparing them, because there's nothing to say if you did this this is the outcome, we're just being put propositions without any indication as to what actual difference it would make. That's the difficulty I'm having at the moment.

15 A. And I appreciate that, Commissioner. I guess my client's difficult is that analysing these sort of options is the responsibility of the council and it's the s 32 assessment at the start of the process, and that didn't happen so we're left now at the eleventh hour, you know, arguing our case as we're entitled to, saying well it needs to meet the test in s 32. We don't think it does. We don't know what the other solution might be, we're not  
20 the regional council, that's for them, so but I do appreciate your position, Commissioner, I just, I don't know what else we're meant to do other than, we're not the regional council.

Q. Okay, no, I think that's fine. Oh and just one last question. Is your client pursuing the issue of slope?

25 A. Yes, we will be, yes will be.

Q. Okay.

A. And that will get addressed by the witnesses. Thank you.

Q. Okay, thanks very much.

## **THE COURT ADDRESSES PARTIES AND COUNSEL – RE. TIMETABLING**

30 (12:58:21)

**COURT ADJOURNS: 12.59 PM**

**COURT RESUMES: 1.59 PM**

**MR WATTS ADDRESSES THE COURT – OPENING SUBMISSIONS**

(13:59:09)

I know you have already had the opportunity to read my submissions so I don't  
5 propose to read them in full. Your Honour, I'd like to just sort of go through  
them more thematically. I've set out in my submissions some of QLDC's  
primary concerns that motivated it to make a submission on Plan Change 8.  
One of those was whether Plan Change 8 would necessitate a variation to the  
Queenstown Lakes District Council proposed District Plans just settled  
10 earthworks rules. That, we've the Regional Council has provided an assurance  
that that's not its position so that ameliorates one of the –

**THE COURT: JUDGE STEVEN**

Q. Could I just ask why it was thought that that might be, there might be a  
need for that?

15 A. Your Honour, QLDC's position was that there was an inconsistency –

Q. – there was –

A. – and that a variation wouldn't be needed but we were uncertain if that  
was also the Regional Council's view.

Q. All right, okay.

20 A. Based some of the evidence about how effective QLDC's provisions had  
been, we weren't sure if that was the Regional Council's position or not,  
but that's been clarified.

**MR WATTS CONTINUES OPENING SUBMISSIONS:**

25 The second of those concerns that I set out there is the potential for  
inconsistency between conditions imposed on earthworks consents by QLDC  
and by the Regional Council, and that's a – that's a concern driven by our  
monitoring and enforcement functions but also out of a concern for efficiency  
and usability of OR District Plan. And the third concern was the question, it was  
30 really the question that's been highlighted by the developers who have spoken  
before me about the potential for inefficiency and sort of double regulation, so  
that drove QLDC to lodge a submission seeking that its District be exempted

from the application from the residential earthwork rules in Plan Change 8 or alternatively the rules be aligned with those in OR District Plan but it's the first of those that was the District Council's primary submission.

5 QLDC had a number of other, I'd just call them subsidiary submissions relating to matters, some of the other matters that have been agreed, and I can just confirm that that remains the case that none of those matters are in dispute from Queenstown Lakes District Council's perspective. I should include within that the definition of residential development. Just to be clear the Regional Council, sorry the District Council is happy with the definition that was advanced  
10 through the mediation process and that its been offered by ORC. In the time since the mediation QLDC has given serious consideration to the points that were raised by the Regional Council and particularly those questions of jurisdiction that have been one of the key matters for the Court today and QLDC accept that the Regional Council has a function in respect of discharges that it  
15 doesn't, and it's been interesting hearing submissions of the Regional Council and also the developers today as to where they consider the, I suppose the limits of the jurisdiction of the various – of either Council lie and the District Council's view as regards its own jurisdiction is that it can impose conditions on land use consents to address adverse effects and those would include adverse  
20 effects of land users on water quality and associated values but that it can't actually have rules regulating discharges in its Plan or issue discharge permits. So that placed some practical limitations on how far the District Council can go in managing earthwork – in managing discharges from earthworks.

In light of that understanding the District Council, Queenstown Lakes District  
25 Council has largely diverted its efforts from pursuing the relief sought in its submission to working with the Regional Council to figure out how the potential for inconsistency between conditions can be minimised and how the potential for inefficiency and double-regulating can be minimised by co-operation between the Councils and alignment between their approaches to earthworks  
30 and the communications that they have etc, and that's culminated in the MOU that was entered on Friday and I heard my friend Mr Matheson's submission that, you know, that's very impressed because that's something the Councils should have been doing anyway but from my perspective it is something the Councils were already trying to do and we've only just sought to consolidate

that progress and put some timeframes around it and just further develop our thinking and the co-operation between the teams at the two Councils and that's what is reflected in that MOU.

5 I was interested to hear Mr Matheson's submissions about changing the rule in the Regional Plan so that it was really just a – so that it was only a discharge rule and not a land use and discharge rule so a slight change in fact from what I understood was the position prior to submissions but I suppose in that regard I would just note that I had the same concerns that were expressed by your Honour and as regards whether that would have really result in any gains  
10 in efficiency given that applicants would still be dealing with both consent authorities and both of them would be, have to look at the question of land use and the discharges from it in a reasonably holistic fashion in order to do anything meaningful.

So from the District Council's perspective the greatest gains appear to be able  
15 to be made by aligning the way it operates relative to the Regional Council, the way that we communicate about earthworks, the way that we put conditions on earthworks, the way that they're monitored and that is the – so in light of that position the District Council is no longer seeking any further changes to the Regional Plan beyond those that have already been agreed and are set out in  
20 their – in the appendix to Ms Boyd's evidence.

There is a discussion in Part 6 of my submissions about whether or not the PDP provisions have certain shortcomings that were, are alleged to be there in Ms Boyd's evidence as regards the matters that can be considered when a earthworks consent is being determined. Ms de Latour has signalled that Ms  
25 Boyd is going to provide some reply in respect of those matters so I think, well we'll hear what that reply is and then perhaps make any submissions if necessary in closing. And your Honour unless there is – that really concludes the submissions for Queenstown Lakes District Council but happy to take any questions.

30 **THE COURT: JUDGE STEVEN**

Well you eventually got to the point that I was just going to ask you about in terms of your modified position, and I think its useful just to hear that and this in terms of not wanting any more changes and I appreciate that you said where

the greatest gains can be gained, so I don't have any more questions but Mr Hodges might well have some questions for you.

**THE COURT: COMMISSIONER HODGES**

5 Q. Thank you, your Honour, thank you Mr Watts. Just one point of clarification really please, Mr Brass mentioned about the annotated appeals version of the District Plan and used that in the joint witness statement, is that the same as the now operative part of the District Plan?

10 A. Thank you, it's a good question. The answer I think is, no, because the earthworks, the earthworks rules have recently been resolved by way of a consent order so I don't think they will be, well I suppose it depends on how up-to-date the annotated version of the version of the plan is.

Q. Okay, perhaps I could clarify sorry, I forgot to add that the version he's relied on is the 25<sup>th</sup> of February 2022.

A. Oh, that should be fine. That will be correct then.

15 **THE COURT: JUDGE STEVEN**

All right, so that was very helpful, thank you very much Mr Watts so I don't have any more questions but I might have some questions when you do your reply but I think its useful just to hear what you've said this morning, or just now, and so thank you for that.

20 **THE COURT: JUDGE STEVEN**

Q. So now its up to you, Mr Ashton, you're going to address specifically the scope issue.

A. Thank you, your Honour.

25 Q. And we're going to have some, obviously there's going to be some questioning on it but you're obviously going to be reserving your position in terms of the evidential foundation for the rule, is that – I just can't remember, is that an issue that you deal with or you just purely dealing with the scope?

30 A. Well I'm dealing with scope now, your Honour, and the evidential question is one that needs to be put to the witnesses. My understanding of the s

32 materials is that it had addressed residential development in the conventional sense in which I submit should be understood –

Q. – yes –

A. – so that issue is at large but in terms of these submissions its purely  
5 focussed on the jurisdiction of legal questions.

Q. Which is quite separate from a merit question –

A. – yes –

Q. – which is the s 32. All right, thank you very much.

**MR ASHTON ADDRESSES THE COURT (14:12:09)**

10 So as my friends have done, I'll just do a page turn on the submissions and highlight the key points. So at paragraph 1.2 of the written submissions I set out the key reasons why I say there is no scope for the inclusion of visitor accommodation within the proposed definition of earthworks for residential development. Firstly, that the notified provisions of PC8 had a deliberate  
15 confined application to residential development. Secondly, that residential development and visitor accommodation are distinct activities, and I say that both in terms of planning parlance and lay understanding of what those terms mean.

**THE COURT: JUDGE STEVEN**

20 Q. So can I just pause and ask you, for clarification because I think this is important, in examining the scope of PC8 when it talks about residential development, are you looking an understanding of that term through the lens of the District Plan or a District Plan or how? How are you – are you endeavouring to understand what residential development meant in terms  
25 of PC8?

A. I think it has to be approached from the perspective of a reasonably informed member of the public who has some understanding of planning matters, not strictly in terms of terms of art but I do submit that the definitions in the National Planning Standards must be relevant to that  
30 question. So it is a mix of both in my submission.

**MR ASHTON CONTINUES OPENING SUBMISSIONS:**

So turning then to my third kind of key reason, in my submission, the submission of Fish and Game is not on PC8 to the extent that it would confer jurisdiction when it sought to expand PC8 to all other forms of earthworks and it appeared  
 5 from my learned friend Ms de Latour's submissions that that, that is generally common ground, the question is whether a small part of that might be on PC8 as it relates to visitor accommodation.

**THE COURT: JUDGE STEVEN**

Q. Yes, and so that's going to be interesting just to hear more about it, do  
 10 you think a small part of a submission can be on a plan change but the rest not? Isn't it either all in or out? I've got to think about that.

A. Yes.

Q. You know I mean in a submission that expressed in such simple terms it should be extended to commercial and industrial.

15 A. And my submission is that it is not and it does not confer jurisdiction but as I understood Ms de Latour's submission it was that a small part of it may be on PC8 such as to confer jurisdiction to include visitor accommodation.

**20 MR ASHTON CONTINUES OPENING SUBMISSIONS:**

So picking up probably at paragraph 2.1 I set out there and paragraph 2.2 extracts of the s 32 report which accompanied the notified plan change and I emphasised that the s 32 report stated that PC8 and PC1 are limited in scope and then at 3.2 *[sic]* emphasising the language around targeted solutions and  
 25 the two points there which are bulleted, managing earthworks – sorry, managing sediment loss from earthworks for residential development and at 2.3 I set out the various passages of the notified provisions which expressly stated that this was about residential development.

So picking up probably at 3.3 and here I reference appendix 5 of Ms Boyd's  
 30 primary evidence which contains a table with recommended decisions on submissions, and that table purports to find scope to include visitor accommodation in PC8 based on the Fish and Game submission and I set out



the relevant passage of the Fish and Game submission there which sought to open up PC8 to all forms of earthworks.

**THE COURT: JUDGE STEVEN**

5 Q. So it's the other forms of development such as buildings or industrial/commercial so there is the, its all encompassing, it's basically capture all development?

A. Yes so industrial or commercial are referenced in respect of the reasons but then the relief which is sought in the Fish and Game submission is to delete residential development, that term from the plan change so that it  
10 would just apply to earthworks.

Q. Any earthworks?

A. Any earthworks.

Q. Any earthworks, okay. So that is a –

A. Yeah –

15 Q. – it's a sweeping change.

A. A sweeping change.

**MR ASHTON CONTINUES OPENING SUBMISSIONS:**

So turning then to the applicable legal principles it seems to be common ground  
20 now that the first question the Court has to ask is whether the submission is on the proposed plan change and that's in terms of the bipartite test. In the *Motor Machinists* decision. I would note that the decision re. *Otago Regional Council* [2021] NZ ENVC 164, which was cited in Ms de Latour's submissions contains a discussion of this issue in annexure II where Judge Borthwick dealt with scope  
25 challenges on another called-in plan change and there at paragraph 9 the first question which her Honour asks is this by bipartite test of whether the submission is on the change and I'd submit that that's the approach that must be applied here.

Turning to the analysis, the first issue I address is the distinct nature of visitor  
30 accommodation and residential development.

Turning to the National Planning Standards definitions there's probably a few points to pick up on her from your discussion with Ms de Latour. Firstly, the National Planning Standards do apply of course to both Regional and District

instruments so to that extent I would put more weight on those than perhaps the District Plan definitions but I did think it helpful to include how the District Plan is dealing with these terms because that informs how a member of the public would understand also a planning instrument to be applying.

- 5 There was a discussion about the internal cross references within the National Planning Standards definitions and there being an open question as to whether or not the visitor accommodation definition within the National Planning Standards' definition maybe a subset of residential activity. I would submit that its actually quite clear that that's not the case because for the definition of  
10 residential unit, it expressly references residential activity and that, those words are emboldened to illustrate cross reference to related definitions whereas there is no such embolden cross reference in the visitor accommodation definition and it would have been open to make visitor accommodation a subset of residential activity if that had been the intent and in my submission it's plainly  
15 not the intent for National Planning Standards.

#### **THE COURT: JUDGE STEVEN**

- Q. Well that's interesting because the same would apply to retirement because there no embolden there of the phrase residential accommodation in the definition of a retirement village.
- 20 A. Mhm, that's true.
- Q. And yet that clearly, that is clearly a residential, isn't it?
- A. Yes, well –
- Q. – doesn't it just mean it's a reference to another term that is defined but that it still could be a subset without including in its definition a reference  
25 to another defined term?
- A. Well I think with the retirement village definition it is, it is plainly referencing residential generally in the, in the description of the term but I certainly take your Honour's point that it's not used in every instance to cross refer.
- 30

#### **MR ASHTON CONTINUES OPENING SUBMISSIONS:**

There was a line a discussion in relation to there being residential zones only included within the standards and whether some inference should be drawn

from that. I don't think the point was taken particularly far but I would just note that you can have visitor accommodation in commercial zones as we do, you know, in the city centre here. Visitor accommodation occurs in all sorts of places so its not, it's not an activity which is necessarily confined to a particular zone in the way that residential activities often are.

But I suppose my primary submission on the distinct nature of these activities is again they are just clearly distinct in planning terms and in fact in the District Plan expressing mutually exclusive but I think it's also the lay understanding of what these mean and that's a highly relevant part of the test because the question would a reasonably informed observer look at this plan change and go, "Oh, that's to do with residential development, I'm interested in visitor accommodation, that doesn't affect me", and in my submission that risk is live.

So at paragraph 5.5 and 5.6 I address the first *Motor Machinist* test and I say that the Fish and Game submission simply fails that test. It seeks to open up the scope of the plan change to all activities and that does not address the change to the status quo which is anticipated by PC8 and therefore that submission is not on PC8 and cannot confer jurisdiction.

Turning then to the second *Motor Machinist* test. I submit that the Fish and Game submission also fails that test. Persons interested in non-residential forms of development would be entirely within their rights to review the PC8 earthworks rules as notified and the s 32 material and conclude that the plan change had no effect on them at all and these people would be declined an effective opportunity to respond to the relief sought in the Fish and Game submission were that found to be on PC8. And its perhaps striking that the only parties in this room opposing the, or challenging the approach of PC8 are those with an interest in, in residential development, and –

#### **THE COURT: JUDGE STEVEN**

Q. Who has a specific interest in residential? Are you talking about –

A. – well Willowridge.

Q. Yes, okay.

A. Willowridge and RPL although RPL is also interested in other activities but my point, your Honour, is that if this plan change had a broader ambit

it's likely that there would be other parties involved. But of course that's not strictly the test, it's just whether there's a risk that there are persons directly affected who would be prejudiced by the submission coming in and expanding the scope of the plan change.

5

**MR ASHTON CONTINUES OPENING SUBMISSIONS:**

So for those reasons it is my submission that the inclusion of visitor accommodation within the plan change is without scope. RPL accepts that there is jurisdiction for the Court to approve the new definition for the sake of play and clarity and certainty, however that definition should accord with the generally understood meaning of residential development and I set out a track changes version of that decision, sorry that definition at 6.2 and having considered Ms de Latour's point about that definition potentially actually leaving some ambiguity in people's minds as to whether or not visitor accommodation is included, I would submit that that definition then really needs to be expressed about the point and expressly state that visitor accommodation as defined under the National Planning Standards is within the meaning of the residential development.

10

15

**THE COURT: JUDGE STEVEN**

20 Q. Doesn't that amount to an acknowledge that it would be open to the reasonable person reading this document and bearing in mind it's a Regional Plan, so it's not going to get any more specific about the type of residential development, it's only identified in the context as a trigger for earthworks, but they might include it –

25 A. – I accept –

Q. – in that term, from the start?

A. – I accept that there is a potential for ambiguity because its apparent that that may have occurred but I don't accept that that potential for ambiguity means that visitor accommodation falls within the natural and ordinary meaning of residential development. In my submission there's actually quite a clear understanding of what *residential* means and people's living accommodation, where they reside. It doesn't mean places where you

30

go and stay on a temporary basis for payment of a tariff and that's quite

–

Q. – yeah, it does in some plans on a small scale and so it really depends on which district you're coming from, because I know that in Christchurch it does include some forms of visitor accommodation albeit it at a small scale not – not at the scale that you're talking about in Queenstown because you're catering for a tourist market so you have larger scale visitor accommodation development there but just that it's hard, it's hard to actually say that the reasonable, you know, the ordinary person in the street would have, necessarily have a consistent understanding of what that term meant in the very technical sense.

A. Well we are talking about, in my submission, reasonably informed –

Q. – reasonably informed –

A. – persons who are essentially development's interests who engage with these documents and do have an understanding of the distinctions between those terms. In relation to your first point about there being small scale residential, which is also visitor accommodation –

Q. – no, no, it's small scale visitor accommodation which is not residential, it's purely visitor accommodation, albeit small scale. So there's a limit on how many people can stay so it's your B & Bs sort of thing.

A. And certainly in the Queenstown Lakes District there's the Airbnb rule which is where a residential unit is used for visitor accommodation for a defined period of time but in every instance with those situations that planning unit is first constructed as a dwelling and then sought to be an Airbnb –

Q. – yes, no, my point is that in some districts there are buildings that are constructed purely for visitor accommodation, they're just not big hotels and they are within the definition of residential activity in the relevant plan, in the relevant District Plan, they're just small scale and like, and when I say "bed and breakfast", they're not partly used for residential, they're purely used for visitor accommodation but they're not great big hotels.

A. Yes.

Q. I'm just thinking, it's just difficult to understand, you see I think this context of Regional Plan which isn't making the sort of the fine distinctions of

different types of residential accommodation, it's only identified as a trigger for controlling earthworks so the person is going to take a very – isn't the person reading it going to take a fairly broad approach to what residential means in that context because they're going to understand from thereon in it ceases to have any significance in terms of what the rules are all about?

5

A. Well it was certainly not my clients' understanding of what the plan change related to when they read it and made a submission. They were surprised to see visitor accommodation sought to be brought in under that. Look I accept that there may be some people who may see the terms as sufficiently related but equally it will have been understood by many people not to include visitor accommodation.

10

Q. I'm just trying to look at it, tease out the issue from the perspective of the ordinary person who is not a residential developer, you know, has that mindset and understands sort of the, you know, the technical distinctions that come through in a District Plan, that's all I'm doing is just trying to understand and so would you say that retirement villages come within that, the ordinary person's understanding of residential but just not visitor accommodation?

15

A. Again it's a slightly difficult one to categorise. The reason that I've not taken issue with that in terms of the relief sought is that the National Planning Standards do describe that as a residential activity and so it seemed to contrary to a National Standard to take that approach and also in a retirement village that is someone's usual place of residence, it's where they live.

20

Q. All right, thank you. I just wanted to tease that out. Thank you very much.

25

#### **QUESTIONS FROM THE COURT: COMMISSIONER HODGES – NIL**

#### **THE COURT ADDRESSES ALL PARTIES – RE. EVIDENCE ORC WITNESS (14:32:59)**

30

**MS DE LATOUR CALLS****EDWARD WELLER ELLISON (AFFIRMED) (VIA AVL)****DISCUSSION RE. WITNESS WILL BE READING BRIEF.****5 NO FURTHER QUESTIONS SIGNALLED FROM ALL COUNSEL****EXAMINATION: MS DE LATOUR**

Q. Good afternoon Mr Ellison.

A. Afternoon, your Honour. I'm just getting myself organised here.

Q. I just wanted to confirm that your full name is Edwards Weller Ellison.

10 A. Yes it is, your Honour.

Q. Sorry, it's counsel speaking, Mr Ellison. Sorry it's a bit confusing as to who's saying what.

A. Oh, I'm sorry.

15 Q. And you've got the qualifications and experience that you've set out in your brief of evidence dated 11 February 2022.

A. I do, I do. Yes.

Q. And you attached to that evidence is essentially the statement of evidence that you gave in relation to the primary sector provisions which was dated 17 September 2021.

20 A. Yes, yes.

Q. And you confirm that your evidence is true and correct?

A. I do, yes.

25 Q. Your Honour, Mr Ellison doesn't have a specific executive summary in the summary of his earlier evidence but we were just proposing that he read the two and a half pages that confirms the relevance of his earlier evidence as to how it applies to these provisions, so I was just proposing that Mr Ellison that you could read from paragraph 6 onwards.

A. Sorry, I do have a summary. Do you not have that?

**THE COURT:**

30 Okay. It hasn't been circulated to us but that's perfectly fine. If it can be lodged with the Registrar and it can be circulated to us, I'm happy for you to read it, and we won't look at your evidence then.

**MS DE LATOUR ADDRESSES THE COURT – RE. PROCEEDING WITH SUMMARY (14:36:29)**

**WITNESS READS SUMMARY STATEMENT OF EVIDENCE:**

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**PLAN CHANGE 8 - URBAN PROVISIONS: PARTS A AND G EVIDENCE SUMMARY OF EDWARD ELLISON**

**MIHIMIHI SPOKEN**

10

**SUMMARY**

1 Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (collectively referred to as Kāi Tahu ki Otago) represent mana whenua interests within the Otago region.

15

2 The relationship of Kāi Tahu to freshwater (wai māori) is deep and enduring.

3 Kāi Tahu are integrally linked with water and land through whakapapa, and this relationship is fundamental to the identity of Kāi Tahu as mana whenua. This connection carries rakatira rights for mana whenua and also imposes kaitiakitaka obligations to care for wai māori and the life it supports.

20

4 The condition of water is seen as a reflection of the condition of the people - when the wai is healthy, the people are strong and healthy and so too is their mana.

25

5 The protection of mauri is the primary resource management principle for Kāi Tahu, and respect and care for the interconnectedness of between whenua, wai māori and moana is crucial to achieve this.

6 Wai māori is an integral and enduring part of wāhi tūpuna, and mahika kai is also a central part of the relationship of Kāi Tahu with wai māori.

30

Sustaining and passing on knowledge (mātauraka) about cultural traditions and practices relating to wai māori is important to support connections to wāhi tūpuna and sustain Kāi Tahu identity.



- 7 Mahika kai resources in Otago have been significantly degraded by the effects of land development on water quantity and water quality, and this impacts on our ability to pass on mātauraka to the next generation.
- 8 Plan Change 8 will improve management of the effects of land  
5 development on wai māori. This will support the protection and restoration of the mauri of our water bodies, and Kāi Tahu ki Otago 3 support the provisions for management of stormwater, wastewater and earthworks as amended through mediation.

10 **THE COURT ADDRESSES WITNESS – RE: THANK YOU FOR CONTRIBUTION, CONFIRMS NO QUESTIONS FROM THE COURT (14:39:38)**

**CROSS-EXAMINATION: ALL COUNSEL – NIL**

**WITNESS EXCUSED**

**MS DE LATOUR CALLS****DEAN WHAANGA (AFFIRMED) (VIA SHARED AVL)****JANA REWI WILLIAM DAVIS (AFFIRMED) (VIA SHARED AVL)****EXAMINATION OF MR WHAANGA: MS DE LATOUR**

5 Q. Mr Whaanga, do you confirm that your full name is Dean Whaanga and you've prepared a statement of evidence dated 11 February 2022.

A. I do have, I have.

Q. And you have got the qualifications, experience and background set out in paragraphs 2 to 4 of that evidence?

10 A. I have, I do.

Q. And you confirm that that statement of evidence is true and accurate a record of your evidence?

A. Yes.

Q. Thank you, I'd just invite you to read your summary to the Court please.

15 **WITNESS READS SUMMARY STATEMENT OF EVIDENCE**

**MIHIMIHI SPOKEN****SUMMARY STATEMENT OF EVIDENCE**

20 1 As you know from my earlier evidence, Ngāi Tahu ki Murihiku are mana whenua within the Otago region.

2 Our Papatipu Rūnanga are three of seven Rūnanga whose rights, interests and values are relevant to this process.

3 I am here to support my whānau, matua Edward and Jana whose whakapapa is to Ōraka Aparima, to get the regional plan provisions strengthened when it comes to managing sediment from earthworks.

25

4 Our relationships with Otago Regional Council and Queenstown Lakes District Council are really important to us.

5 A lot of what we do with both councils is focussed on improving the conditions of waterbodies in Mata-au and Catlins that have been degraded over time by human actions.

30

6 Our whānau are committed to working together with councils and communities to give effect to Te Mana o Te Wai.

- 7 That fundamental concept in the NPS-FM lines up with the way we look at freshwater management, protecting and restoring mauri and putting the needs of waterbodies at the forefront.
- 8 We have put a lot of time and effort into processes like the Otago  
5 Regional Policy Statement and the QLDC Spatial Plan because we can see these are the tools to help deliver improved freshwater outcomes.
- 9 I was really encouraged while on the Spatial Plan hearing panel to find that there was a high degree of acceptance of those sections of  
10 the plan that expressed whakapapa relationships, Ngāi Tahu values and aspirations.
- 10 We have also invested a lot of time in the Plan Change 8 process because we can see the benefits in having an interim framework in place while we work on developing the new land and water plan.
- 15 11 It has been a great process in terms of being able get to agreement in mediation on a whole range of issues around the rural and urban provisions, so that we could keep focussed on the new land and water plan 2.
- 12 This issue of sediment from earthworks during residential  
20 development is the last thing we have to resolve and the only outstanding matter that we have needed to come and talk to the court about.
- 13 We are clear that the Otago Regional Council and Queenstown Lakes District Council have different roles and responsibilities when  
25 it comes to the risks of sedimentation.
- 14 We need them both to do their part to manage earthworks and the potential for sediment coming from residential developments to harm our wai taonga, like Wai Whakaata as Jana is talking about.
- 15 We need to see those different roles and responsibilities of the  
30 councils clear in their plans and playing out in practice so that they are working together to protect our wai taonga.
- 16 This is the right way forward for Otago to get all the parts of the RMA system supporting te hauora o te wai, te taiao and te tangata.

17 I have attached a copy of some of the material from the footnote references in my evidence so you can see those rather than having to hunt them out.

**QUESTIONS FROM THE COURT: JUDGE STEVEN**

5 Q. Now, I said that I didn't have any questions, but can I ask you a question?

A. Right, yes.

Q. It just struck me when I started to read your paragraph 12, "the issue of sediment from earthworks during residential development is the last thing we have to resolve". Are you just talking in broad terms about the core process or is that, was that from your perspective as a stakeholder in this?

10 A. Just my perspective, just in terms of our input.

Q. So did you see that there was always an issue associated with earthworks specifically with residential? This is just, I'm just getting at this, it's not scope argument but whether you approached PC8 on the basis that there was indeed a need to regulate earthworks associated with residential as opposed to any other form of development.

15 A. Sorry, your Honour, I just missed that last part of that sentence.

Q. Yes, whether you saw there was a need to regulate earthworks associated with residential development as opposed to any other form or all other forms of development?

20 A. On this case, in this case (inaudible 14:45:39) it's just the residential earthworks.

Q. So you came to, on the basis that that was the defined scope of PC8 when it was notified, or did you support it being a targeted approach with residential? Did you support PC8 only tackling residential?

25 A. Just in terms of my evidence, yes.

Q. Yes, okay. All right. Thank you very much for that.

**QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

30 Q. Thank you your Honour. Tena koe Mr Whaanga. I didn't have a question either, but I just wanted to make sure I have a clear understanding. In your paragraph 15, you say we need to see those different roles and responsibilities that the council's clear in their plans and playing out in

practice, you're still supporting the mediated agreement as agreed by the majority of parties, is that correct?

A. Yes that is correct.

**CROSS-EXAMINATION: ALL COUNSEL – NIL**

**5 WITNESS EXCUSED**

**EXAMINATION OF MR DAVIS: MS DE LATOUR**

Q. Mr Davis, do you confirm that your full name is Jana Rewi William Davis?

A. Ae.

5 Q. And you have prepared the statement of evidence dated 11 February 2022?

A. Yes I have.

Q. And you have got the qualifications, background and experience set out in paragraphs 2 through to 8 of that evidence?

A. Ae.

10 Q. And you confirm that it's a true and accurate record of your evidence?

A. Ae, it is.

Q. I'd just invite you to read your summary for the Court, please.

A. Kia ora.

**WITNESS READS SUMMARY STATEMENT OF EVIDENCE**

15

**PLAN CHANGE 8 - URBAN PROVISIONS: PARTS A AND G EVIDENCE SUMMARY OF JANA DAVIS****MIHIMIHI SPOKEN**

20

**SUMMARY**

1 Kāi Tahu have a deep and enduring connection with wai māori and the plants and animals it supports, as described by Mr Ellison and Mr Whaanga in their evidence. That connection gives rise to both  
25 rakatirataka rights and kaitiakitaka obligations to protect the mauri of all water bodies.

2 The health of our wai plays an important role in the balance of ecosystems and the abundance and resilience of mahika kai. We understand that what occurs in the headwaters affects all life all the  
30 way 2 down to the coast. It affects our kaimoana, our fisheries and plants, our birds and ultimately our cultural identity.

3 My mahi is driven by the need to stand up for the mauri of wai māori from the mountains to the sea, and I have spent the last three years campaigning for restoration of Waiwhakaata / Lake Hayes, which I

have seen become degraded in the space of my lifetime. I represent Ngāi Tahu ki Murihiku on the Waiwhakaata Lake Hayes Strategy Group and have also been involved in progressing catchment restoration work through the Lake Hayes Vision Programme.

5        4        The changes that we are seeing in Waiwhakaata because of the impacts of land uses in the catchment are startling, including reduced eel numbers and bird counts, episodic fish kills and algal blooms. I am greatly concerned about the additional impacts that ongoing sediment discharges from urban development will have on the lake.

10       5        Success in the Waiwhakaata catchment requires all parties to be working together for the good of the catchment. This stems from the principle of manaaki – if you take something from the whenua or the wai, you must give something back. The mahi that has been done so far to improve the health of Waiwhakaata could be undone if developers are not required to manage the effects of their activities on the lake and the water sources that feed it.

15       6        An approach that sets different rules in different parts of a catchment such as the Mata-au does not align with the Kāi Tahu understanding that all parts of te taiao are connected ki uta ki tai. The health of wai māori will only be restored by an integrated approach with regional standards to protect the wai for future generations.

20

**THE COURT ADDRESSES WITNESS – RE: THANKS FOR CONTRIBUTION, CONFIRMS NO QUESTIONS FROM THE COURT (14:51:42)**

**CROSS-EXAMINATION: ALL COUNSEL – NIL**

25       **WITNESS EXCUSED**

**MS DE LATOUR CALLS****MELANIE JANE HEATHER (AFFIRMED)**

Q. Good afternoon Ms Heather. Do you confirm that your full name is Melanie Jane Heather?

5 A. I do.

Q. And you've prepared the statement of evidence dated 11 February 2022?

A. I have, yes.

Q. And you're an Acting Team Leader in the Compliance Monitoring Central Otago Team, at Otago Regional Council?

10 A. That's correct.

Q. And with a substantive role as a senior environmental officer based in the Regional Council's Wanaka depot?

A. That's correct.

Q. And you have the other qualifications and experience set out in paragraphs 3-6 of your evidence?

15

A. That's correct.

Q. Sorry.

A. Yes, that's correct. Sorry.

Q. And you've prepared your statement of evidence in accordance with the Expert Code of Conduct as set out at paragraph 8 of your evidence?

20

A. That's correct.

Q. And did you have any corrections to make to your evidence?

A. No, I don't.

Q. And you confirm it's a true and accurate record of your evidence?

25

A. It is.

Q. I will now ask for your answer any questions from my learned friends.

A. Okay.

**CROSS-EXAMINATION: MR MATHESON**

Q. So I'm just going to hand up a set of the legal submissions, that's not because I'm asking you questions about them, but at the back of the legal submissions there are the various rule, the different rules, so I'm just explaining why I'm giving to you, so at – so at, when you get a get a copy and probably I'll give those to you first, so at the, if you just look at the

30



end, there's a series of schedules so its from page, I think it will be easier to ask some questions if we just have them all in one place, so Commissioner Hodges if you can see it, it's on page 27 of the legal submissions, do you have a copy?

5 A. Could I get a copy please?

Q. Sorry, I've got them, I do have a spare one. Sorry, I miscounted.

A. Thank you.

Q. So can I just ask you to turn to page 27, it should be where that tab is hopefully. So Schedule D, so can you just confirm, so these are the PC8  
10 rules as you're currently proposing them? If you have a quick look and make sure you're happy.

**WITNESS REFERRED TO WILLOWRIDGE DEVELOPMENTS LTD & REMARKABLE PARK LTD SUBMISSIONS, SCHEDULE D (PAGE 27)**

Q. Is that generally what you understand to be the current version of the PC8  
15 rules?

A. Yeah, are these, sorry, are these the ones post mediation or before?

Q. They should be post mediation but if not –

A. – yeah –

Q. – we can doublecheck. Do you think there's a change in these to be  
20 made? I'm just going to ask you some general questions, it's not necessarily the details, sorry. It's not a trick question.

A. Okay.

Q. And then if you turn over, on page, on Schedule E, there's a Regional  
25 Plan water rules, can you just cast your eye quickly over those. These will be familiar with you, I imagine.

**WITNESS REFERRED TO SCHEDULE E (PAGE 29)**

A. Yes, yeah, mhm.

Q. So these are the permitted activity rules and then restricted discretionary  
30 and then prohibitive, there should be, there might a prohibitive one there somewhere. So Schedule E is the Regional Plan discharge rules, correct?

A. Mhm.

Q. And Schedule D is the PC8 rules, yes?

A. Yeah.

Q. So I will ask you some questions about those, I just thought it was easier if you had them there.

A. Thank you.

5 Q. And you've got your primary, your first statement of evidence, can I just ask you to paragraph 37 to start off with.

**WITNESS REFERRED TO WITNESS STATEMENT OF EVIDENCE, PARA 37**

A. Yes, I'm there.

10 Q. So you said that these are the issues that you have with, these are the issues that currently exist with the rules in the Regional Plan, the discharge rules?

A. That's correct, yes.

Q. And so the clarity and local sedimentation standard, that could have been amended, that could have been fixed by an amendment to the discharge rule, couldn't it?

15 A. The discharge rule, you mean our current, like the –

Q. – yeah –

A. – permitted activity rule 12C.1.1.

Q. Yeah. You could have amended that to fix any issues you had with the clarity and local sedimentation standards?

20 A. I can't comment on the planning or policy aspects, sorry.

Q. Okay, that's all right. But its just you raise it, you said these are your issues –

A. – yes, that's right –

Q. – so you're not, you're not, you don't have any planning qualifications.

25 A. I'm not a planner, no, so this is –

Q. – okay, so you just take the rules and apply the rules?

A. That's correct, so that's just my experience that the rules –

Q. – well so that's – so I should ask Ms Boyd about that, should I?

A. Yes. Yep, correct.

30 Q. Felicity Boyd.

A. Correct, yes.

Q. Right, I shall do that. Were you involved in the workshops at the Regional Council had in November 2019 in terms of setting up what become Plan Change 8?

A. No, I wasn't.

Q. Could I then ask you to go to, yes, so if I just look at the rules that I just gave you.

A. Mhm.

5 Q. So I read your evidence as saying that you had a concern about the permitted activity rule, for example in relation to colour or clarity because you had to wait until that occurred before you could see whether it was permitted or not. Is that your concern in your evidence?

10 A. So I had concerns with the permitted activity rule 12C.1.1 in respect to a conspicuous change in colour and clarity, particularly the word *conspicuous*, which in our rules means a 40% change in colour and clarity and it's quite a high, high threshold.

15 Q. So but in terms of that as an issue your proposed permitted activity rule in 14.5.1 that you're supporting from a compliance perspective, still requires you to assess any change in the colour or visual clarity, doesn't it?

A. Yeah, but the word *conspicuous* has been removed.

Q. Yes, I understand that, but you still need to do that assessment as a permitted activity in your proposed rule?

20 A. That's correct.

Q. And you won't know that until the activity occurs, will you?

A. In the permitted activity rule, yes, that's correct.

Q. And likewise any or the production of conspicuous oil or grease films.

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25 A. That's correct.

Q. So just looking at your proposed permitted activity rule as part of PC8, is it correct to say that all of the matters under G, G and down, so Roman numeral (i) through to (v), they're all in one form or another, and I accept the change regarding conspicuous, they're all in the permitted activity rules at the moment, aren't they?

30

A. Yes, but the removal of conspicuous is quite significant.

Q. Yes, I understand that, but that, and again I appreciate you're not a planner, but that could have been taken out of the current permitted activity rule, couldn't it?

A. I guess it could, yes.

Q. All right, you raise from a compliance perspective, you raise a number of issues on about paragraph 48-49 onwards, so I just want to ask you some questions about those.

5 A. Okay.

Q. The type of flocculant used in a SRP (a sediment retention pond) that could be notified by QLDC to ORC?

A. It requires co-operation and time and resource to do that.

10 Q. But you don't need a resource consent to ask QLDC what flocculant type you're using in a pond?

A. No, but its using up a lot of Council resource to do that and that falls on the ratepayers.

15 Q. So does ORC not have a process whereby QLDC or any other Regional Council has information publicly available or otherwise can tell ORC what type of flocculant is being used in a certain location?

A. Again that would require quite a lot of effort on both our teams to get that information and to share it.

20 Q. But you don't need a resource consent. The process, what I'm trying to get to is, you could ask for that and that could be given without needing a resource consent, correct?

A. Yes, I could ask for it, yes.

Q. And likewise the location of the discharge points from any sediment pond could be provided by QLDC to ORC without the need for a resource consent?

25 A. That's right but I'd just like to mention that if discharges occur after hours in particular, which they often do, QLDC do not have on-call facilities like we do so it would have to be done before, before the discharge which ...

Q. But your proposed rule might still relate – result in after hours discharge, right?

30 A. Well the thing about the proposed rule is there's that 2,500 metre square which would capture a lot of the problematic sites, so the sites that could potentially discharge.

- Q. But even if you, even you make landowners get a consent and they get a consent, you're still going to have the need for after hours discharges, like they may still occur.
- 5 A. Yeah, we have an on-call service. We have a pollution hotline. Yeah, so we can deal with after hours incidents but under a consenting framework it's far easier for us to deal with.
- Q. Okay. In terms of – in terms of under a consenting framework that consenting framework could be a discharge permit, couldn't it? You just need a resource consent.
- 10 A. I personally, from my experience, I find it very difficult to see how we could divorce the land use and the discharge elements. For me it's been an absolute game changer having these, these new rules and having consents, so I have the ability now to go on site and see the controls in place and I know where potential discharge, you know, potential
- 15 weaknesses on site, whether it could be discharges so, yeah.
- Q. But, and I appreciate you're not a planner, but on – but assuming that the planning, the planners, ORC planners are happy that could occur under a discharge permit rather than a land use consent. You don't –
- A. – no, I don't think so. I think, I think we need land use permit so that we
- 20 can, we can as monitoring officers/compliance officers, we can go on site and we can, you know, assess the on-site controls and it being – like it's, by being proactive and we can work with developers and their project teams and nip issues in the bud fairly early. It's honestly for me it's been a total game changer, yeah. Yeah, it has been.
- 25 Q. So but you're not a planner –
- A. – mhm –
- Q. – and I'm just asking you if the planners were satisfied that you could do all of those things under a discharge permit, would you, would you still the need for a land use consent?
- 30 A. I believe we need the land use consent.
- Q. Even if you could do all of those things under a discharge permit that you've just mentioned, you still need a land use consent?
- A. I don't see how we could so, I mean that's the question for the planner, yeah.

Q. And likewise if there was a discharge permit you could recover costs under that process for monitoring, couldn't you?

5 A. For monitoring the discharge but I'm still struggling to understand how we could carry out sufficient monitoring under a discharge permit because we need to see what's happening on the land to accurately, you know, because I just feel we'd still be in the same boat as looking at the, waiting for a discharge to happen.

10 Q. But that comes down to what the conditions are on the discharge permit, doesn't it? As a compliance officer you enforce the conditions of consent, don't you?

A. That's correct.

Q. And the permitted activities standards, yes?

A. Correct.

15 Q. And so you'd look at the consent conditions and it would just depend on what the consent condition says, won't it?

A. That's correct, yes.

Q. Can I just take you to, its 61-62 of your evidence, you talk about some enforcement action taken?

A. Yes.

20 Q. I'm assuming, I'm assuming the – well you say there that Council has pursued enforcement action in relation to sediment discharges from residential earthworks. How many enforcement actions or investigations were undertaken for any other types of earthworks other than residential?

25 A. I don't have those numbers at hand but just speaking from experience, being an environmental officer with the ORC for five years, the bulk of the issues have been from residential development, the district is growing at a phenomenal rate and it's been a major issue for us and I'm reasonably happy with, yeah, these new rules came in, yeah.

30 Q. But you'd agree though that although you say the bulk of them, there are still clearly, there are still clearly broader issues with ORC's discharge rule than just relating to residential?

A. Could you reframe that question please?

Q. You said that the, you said that there have been enforcement actions or investigation for non-residential earthworks activities, is that correct?

A. I can tell you, personally I haven't been involved with any. I've only been involved with ones in relation to residential because it is a clear problem in our district.

Q. But do you – are you in Queenstown District, are you?

5 A. Yeah, Queenstown and Lakes and Central Otago.

Q. And so you've never investigated, there's never been a concern raised about any other type of earthworks activity other than residential in five years.

A. No, that I've been involved with.

10 Q. Do you – is there anyone else in the ORC who might have the, that broader information, or is it likely to just, are you the only compliance officer in the Queenstown Lakes District Central?

A. No, there is, at the moment there are five.

15 Q. And then in terms of a process and on-site so you'd need to, do you liaise with the QLDC enforcement officer when you go and visit sites?

A. Yes, regularly. Yes, we get on really well with our team.

Q. And do you turn up together?

20 A. It depends on the, it depends on the site really. The high risk sites we have been going together and then on other sites, depending on the nature of it, like for instance a site with wetlands, but a smaller, a smaller development, I've been going and QLDC haven't but we'll feedback to each other on our site visits, so really it depends on the nature of the site.

25 Q. And in terms of the consent conditions, I appreciate you're not a planner, but you're an enforcement officer so it would be in your interests to have consistent consent conditions, wouldn't it?

A. Absolutely, yes, and that's why we've been working really hard to iron that 8, and I've been, the consents team have been really good and I've been feeding into their, their team.

30 Q. So if you have, and ultimately the ideal must be the same consent conditions, wouldn't it?

1510

A. There most certainly will be some conditions that are the same and then there might be other conditions like for instance around wetland that ORC imposes.

- Q. Yeah, but other than things like wetlands which are clearly are more an ORC issue, in terms of the earthworks issues generally, you would expect a situation to arise where ideally the consent conditions being imposed are exactly the same between ORC and QLDC?
- 5 A. Yes, to make it where possible particularly around timeframes, like submitting documents, it's ideal to have them the same.
- Q. And do you require environmental management plans to be submitted or is that a planning issue?
- A. On the consents, on the medium to high risk, I mean this is a question that Kerstin Strauss can better answer but medium to high risk sites will have that requirement for any EMP and erosion sediment control plan.
- 10 Q. So you have a separate for ORC and then another one for QLDC?
- A. Well I think how its been happening is its generally the one, the one plan that's submitted to both Councils.
- 15 Q. So if its signed off by QLDC and then it turns up at ORC, what happens then?
- A. So we've been, up until now, and it might start changing as time moves on but generally applicants have their QLDC consent already, that's how been, I mean Kerstin Strauss will be able to go into this a bit more, but the EMP and erosion sediment control plan are often submitted and then our compliance team has an opportunity to input to the review of those and then again there's usually a condition requiring it to be accepted by the compliance team.
- 20 Q. And what if they don't accept it?
- 25 A. Well I haven't come across that situation yet so I can't comment.
- Q. Right. And from a compliance perspective, do you work together on the – you said you worked together on the consent conditions, but do you work together on the discharge limits?
- A. Yes.
- 30 Q. With QLDC?
- A. With QLDC, no, because usually they're consent has already been, well up until now anyway the consent has usually been issued already and they refer back to their guidelines where we'll usually look at the, you



know, the limit side of it a bit more but I'm not in the planning, the planning team so ...

Q. Right, but from a compliance point of view you're just, you're just enforcing the ORC consents are you, not the QLDC consents?

5 A. Correct, yes.

Q. But you might take turns to go on site visits sometimes?

A. That's correct and it will be a case of talking with my peer at QLDC and say, "Look, can you look at this particular aspect for me while you're on site?" or vice versa.

10 Q. Are you aware of any earthworks applications or sites that because of the unique nature don't have a discharge?

A. There are sites I guess where there is good ground soakage.

Q. And they won't have a discharge consent, will it?

A. I can't answer that specifically, I need to get some examples, see some  
15 examples.

#### **CROSS-EXAMINATION: MR ASHTON**

Q. Good afternoon.

A. Good afternoon.

Q. I'd just like to investigate a couple of other issues from your compliance  
20 perspective. So you'll be aware that Remarkables Park and Willowridge are seeking that a slope requirement or a slope factor be built into the permitted activity standards to recognise that there's less risk associated with a flat site. Are you aware of that?

A. No, I'm not, sorry.

25 Q. Okay, so well then if you could turn to the attachment D, sorry not attachment D, attachment B of the – C, of the legal submissions.

#### **WITNESS REFERRED TO WILLOWRIDGE DEVELOPMENT AND REMARKABLE PARK LEGAL SUBMISSIONS, SCHEDULE C (PAGE 24)**

Q. And this is the QLDC earthworks rule.

30 A. Are you talking about schedule C?

Q. Yes, schedule C, page 24.

A. Yep.

- Q. And so there, under the QLDC rule, there's a standard of 2,500 metres square where the slope is, 10 degrees or greater. Can you see that?
- A. Yes, I see that.
- Q. And then there's a permitted standard of 10,000 metres squared where  
5 the slope is less.
- A. I see that.
- Q. Now Ms Boyd has raised some issues with the practicality of that standard from an application perspective, so I'd just like to discuss that issue with you. Now measuring a site's slope is an issue that ORC should be able  
10 to, from a compliance perspective, manage, is that correct?
- A. I have never been involved with measuring slopes, sorry.
- Q. Are you aware that NES for freshwater adopts slope as a permitted activity standard?
- A. I think to the agricultural side of things –
- 15 Q. – yes –
- A. - (inaudible 15:16:43) –
- Q. – yes, so is that something that ORC compliance department administers in the region?
- A. I can't comment on the agricultural aspect, sorry, I've been predominantly  
20 involved with the urban.
- Q. So you can't comment whether its, whether ORC has assessed slope in that context?
- A. No, I can't.
- Q. From your general experience do you think it would be practicable to  
25 assess slope on the basis of an average across any 20 metres on a site?
- A. Do you mean do I think it could be done?
- Q. Yes.
- A. I don't know because I've never measured slope before. I don't know how to do it. So I can't comment sorry.
- 30 Q. So do you go out on earthworks sites? You do?
- A. Yes, I do. Yes.
- Q. And when you go out on that site can you identify the area over which the earthworks are occurring?
- A. Well we're usually given plans and we know the boundaries of the site.

- Q. What about in an instance where you're undertaking permitted activity monitoring?
- A. That can be difficult.
- Q. It can be difficult?
- 5 A. Mhm.
- Q. How would you go about identifying that, the area over which earthworks were occurring in that instance?
- A. We'd have to get on-site, get out on-site and walk the perimeter of the earthworks activity.
- 10 Q. And that's how you'd identify where the earthworks were occurring?
- A. Correct.
- Q. And if earthworks were occurring on an adjoining site, same scenario. How would you go about assessing where the earthworks were occurring?
- 15 A. I mean if I'm dealing with a permitted activity situation?
- Q. Yes, on two adjoining sites.
- A. Well you'd look up the landowner boundaries so you knew where the legal boundaries were and you'd walk the perimeter of the site, the earthworked area.
- 20 Q. Yes, so but it would be the earthworked area, wouldn't it, rather than the site, the legal site?
- A. If you're trying to get an understanding of the limits of the earthworks areas then, yes, you'd work, you'd work your way around the perimeter of the disturbed earthworked area, yeah.
- 25 Q. And you'd be able to distinguish, wouldn't you, as to whether those areas were contiguous or separated?
- A. I'm not entirely sure what you mean.
- Q. Well you would be able to distinguish in that situation as to whether the earthworks were contiguous, in the sense of being joined up, or whether
- 30 they were separated, couldn't you?
- A. Yes. Yes, there's a clear boundary, mhm.
- Q. And that would be a matter of fact on the ground, wouldn't it?
- A. Yes, if you're there in person, yeah.
- 1520

Q. And another way of perhaps defining that would be that there would be one earthworks project over there and a separate earthworks projects over there?

A. Yes, that can happen, yep.

5 Q. Just moving to a different and slightly more general topic here. do you accept that the Regional Council has a responsibility to manage – to monitor permitted activities occurring under its plan?

A. Yes.

10 Q. And do you accept that there is a community benefit to that permitted activity monitoring?

A. There is but the community bears the cost.

Q. And in instances where permitted activities are undertaken, would it assist in undertaking that monitoring if you were given notice of those permitted activities?

15 A. Can you repeat that please?

Q. Well there's two types of permitted activities for argument sake.

A. Mhm.

20 Q. One permitted activity where the landowner just goes of and does it and then another type of permitted activity where your team is given notice. Is it easier to monitor the permitted activity where you're aware that it's happening?

A. It would facilitate proactive monitoring.

Q. And –

25 A. – but it would still require a lot of resource on Council's behalf and the ratepayer would bear the cost of that.

Q. Do you accept that where the Queenstown Lakes District Council are also undertaking monitoring of earthworks activity that there are efficiencies to be gained by the Regional Council in its monitoring ...

30 A. You mean with our new rules, there could be efficiencies gained between our teams, is that what you're saying?

Q. I'm not talking, I'm not asking in the context of the new rules, I'm asking where QLDC is undertaking a monitoring function in respect of earthworks, do you agree that there are efficiencies which can be gained by ORC working together with QLDC?

A. But that relies, well, yes, there would be efficiencies in Councils working together but that again that relies on Council having the resources available to monitor those permitted activities.

5 Q. So where QLDC goes out and monitors a site for compliance with land use controls and submits that report to ORC, does ORC need to also go out and look at the site?

A. Say again?

10 Q. So where the QLDC has undertaken a monitoring visit and its assessed the land use controls, be they silt fences, be they sediment retention ponds, if then reports on that compliance visit to ORC, does ORC also need to go and look again?

A. Possibly, yes, particularly if we're concerned by potential discharges on site because we've different functions.

15 Q. Would you be able to discern from a QLDC site visit report whether those risks arose or not or would that information assist?

20 A. It's hard to say because I haven't been in that situation before. Possibly. But again I think when we go out on site together we're looking at a site with different lens and I think our focus is very much on any risk to waterbodies. I'm still not entirely sure how QLDC do that to the same extent.

#### **CROSS-EXAMINATION: MR WATTS – NIL**

#### **QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

25 Q. Good afternoon Ms Heather. Have you had the opportunity to go onto an earthworks site that has been given a consent by the Queenstown District Council since the new rules have come into effect?

A. Yes, I've now done about, I've been onto 17 sites with ... and probably out of that 17 maybe at least half with other, with QLDC monitoring officers, maybe a bit more than that.

Q. Okay. And have the same sites had ORC consents?

30 A. Yes, although there has been an instance where I've been added a discharge which doesn't have ORC consent from us more recently.

Q. Okay, so there is one case where consent – a discharge has occurred but wasn't subject to a consent, is that what you've just said?

A. Correct, yes.

5 Q. Okay, and did you see any things on the other 16 sites that you would have done differently to what the District Council did? Probably a fairly hard question, you may not be able to answer that one.

A. Yeah, it is quite a difficult one. I think what I've observed is we've got more of a, I guess more of a focus on the discharge itself and what measures are in place to protect those waterbodies though essentially  
10 we're carrying out very similar audits. There, I've also noticed that on one particular site there were a number of wetlands and our consent explicitly said that the wetlands were not to be drained but in QLDC's consent they talked about not diverting flows away from the wetlands, so QLDC left that, that site for me to audit so I've been auditing that one. So, yeah,  
15 there are some differences but, yeah ...

Q. So in that particular case, duplication was avoided by you doing the inspection because you had more onerous requirements than the District Council doing the inspection, is that correct?

A. That's correct, yes.

20 Q. And is that how you would generally work with each other, to try and avoid that duplication where you can?

A. Yes, so we're still finding our feet a wee bit. We've been working really closely with the District Council so we have a shared on-line spreadsheet and we keep track of, so I update that monthly with any new ORC  
25 consents and then QLDC will go and populate who they're monitoring officer is and then we'll have regular phone conversations and do go out on site together or decide if its better that one goes over the other, yeah.

Q. Okay, thank you. Have you witnessed what you'd consider poor practice on any of those 17 sites?

30 A. There is most certainly, you know, often corrective measures that flow out of site visits.

Q. Would that be poor practice or just a gradual sort of learning experience for people?

A. I'd say the ones I've been on to date are, yeah, probably a gradual learning experience.

5 Q. Now in terms of the Lakes Hayes catchment, the District Council has introduced a new policy I think it is in relation to what can happen there in terms of earthworks. Have you any experience of how successful that's been in the time it has bene operating?

A. So there's only one large site I've been auditing in Lake Hayes and it's been a really good site.

10 Q. Now there's been a suggestion that because the Regional Council, so the District Council uses an approach where the SQEP has got some flexibility in terms of the discharge limits, but that's something that the Regional Council might consider. Do you have a comment on that?

15 A. I didn't really, I didn't realise that there was that discussion. I would see the discharge limits (inaudible 15:29:41) clearly with the Regional Council because we have an understanding of the waterbody and cumulative effects and such like.

Q. Do you see any further ways in which you could streamline the monitoring of consents between the two Councils?

20 A. Yes, absolutely and its really good there is now this MOU in place so depending on the outcome from the Court, I'm really happy to see that because that gives us an opportunity to formalise what we've started because it's been quite hard to put too much time and effort into, into rules that may or may not be here but if they do go through that MOU is a really, really good document and I can see it, because to be honest as a team, you know, we don't want inefficiencies either, we want to be as efficient as possible and I have faith that ourselves and QLDC's team will, will work through that particularly around I think EMP and erosion sediment control reviews, I think that could be, could be worked on over the coming months.

30 1530

Q. So with those are you suggesting that they should be done at the same time by both Councils rather than successively or what are you saying there?

- A. I'd say there's probably an opportunity for technical reviews to be, to be done together but it really depends on the applicant I guess and when they get their applications into, into the Councils.

**QUESTIONS FROM THE COURT: JUDGE STEVEN**

- 5 Q. And I just want to follow on with that questioning and you might not be the right person but just with your experience of the – did you say 17 or 18 consents that have been granted under the new PC8 rules and so I just want to draw down into the sort of getting to a feel for the extent to which there might be overlaps now. Are there, and bearing in mind that you have  
10 a difference focus specifically in the context of the discharge permits as compared to the QLDC, even though they say that they regulate the impacts of land use, the discharge. In your experience of comparing the consents are there any fundamental differences in the conditions that are imposed on other land use activities and/or in the Regional Council's case  
15 the discharges in relation to the potential for discharges? Just from that different perspective.

- A. Yeah, Ms Strauss will be able to go into it in more detail but we've tried to keep the conditions fairly consistent except for generally the discharge elements.

- 20 Q. Right.

- A. Are different.

- Q. So that's where there is the real, real point of divergence because that's sort of –

- A. – yeah –

- 25 Q. – your thing?

- A. Yeah, correct.

- Q. The Regional Council's thing.

- A. Correct, yes.

- 30 Q. And so when you're doing the audits are you, let's go back, both Councils have a requirement for management plans and my understanding of a management plan it is there they're the practical methods for the achievement of conditions and so would your – with the management plan, be by and large the same from what you've seen so far?



A. Yeah, generally the applicants will submit same plan.

Q. So they can be, prepare one plan which could be fit for purpose for both the Regional Council and the District Council.

A. Correct.

5 Q. And they can have the same suitably qualified person to sign off on those or compare them or whatever and in terms of the audit that's undertaken by both the Councils, are they essentially looking at the same thing? They're auditing compliance with the conditions and performance under the management plans?

10 A. Correct. They're be generally the same but then there will be those slightly different conditions –

Q. – and specifically on the discharge?

A. Yeah, or wetlands for instance and things like that.

15 Q. But that's where, but that's triggering a different activity that's regulated by the Regional Council, isn't it, it's not all, or are you, are you managing discharges into the wetland as well?

A. I'm just, I'm just thinking about one particular case where there were a number of wetlands on the site and the land use consent had conditions that were around not draining the wetlands and it was on the land use consent.

20 Q. All right, but sort of putting aside wetlands, are the audits essentially of the same thing?

A. Yes.

25 Q. And for the same purpose, and if there had been any occasions where you've come to different views or do you share notes?

A. We share, we'll often, we'll often after the site inspection we'll have a quick catch up and make sure we're on, on the same page.

30 Q. And so there are efficiency gains that could be made there for the sake of avoiding monitoring fees and auditing charges being imposed by both Councils for effectively the same thing, do you think?

A. I think, I think for the higher risks sites, particularly ones that are discharging from their ponds, I think both Councils should be present but then for the lower risk sites most certainly we, we could be collaborating

more and saying, “right, you know, you do the first audit and I’ll do the subsequent one” or vice versa.

Q. So going back to your statement where you said that these new controls had been a game changer, I completely understand why you say that because effectively under the operative rule there is no trigger for a discharge permit and effectively there would be no ability to, well effectively you’d only become aware the permitted activity standards are breached and there’s been an unlawful discharge at that point, so the current regime is different but I just wonder whether, in the context of whether, and this focussing specifically on the objection that has been raised to the Regional Council having control over the land use side of things, I want to understand your comment about it being a game changer in terms of the Council now regulating that. Is – if it has been a game changer in that sense. Is there any sort of part of the land or any aspect of the land use activity that from your experience in with the consents that have been issues, where you’d just really don’t have an interest and you’re happy to just to leave it to the QLDC in terms of the land use activities, earthworks activity?

A. Yeah, like there might – we might be on site and there’d be, you know, obviously interested by dust and noise and vibration and that side of it, that, you know, well the interest me but noise and vibration wouldn’t really –

Q. – no but I mean that’s a controlling the machines that are used for the earthworks, and dust is just about managing dust –

A. – that’s right –

Q. – from the earthworks, but in terms of how the earthworks are being – I’m trying to figure out whether there is a point at which in the undertaking of the earthworks activity, putting aside dust and noise, it is the trigger for your real interest or whether you just have to be interested in the whole thing? Just so that you can effectively manage the discharge.

A. For me – yeah, well for me it’s just been incredible being able to be on a site and know exactly where there are discharge or points of weakness that could lead to a discharge and understanding it so that there is ever a, well firstly we’re able to intervene if we think there is any weakness in

the current controls and we kind of nip it in the bud before it becomes a problem or before it becomes a discharge and if it does become a discharge that breaches limits we already know, we have a relationship with the consent holder and their project team, we know where the likely points of discharge are, what controls they have or don't have in place, you know, what they're erosion sediment control and EMP plan, you know, or EMP say what they're supposed to, so it makes particularly any follow up enforcement action a lot simpler and easier for us.

5

Q. Yes, so it's really, and that's helpful but it really, it's, this is the question how far up the pipe does it go. I mean is, or is it, do you go onto the site. I'm only interested in the discharge points, I'm not – and I want to make sure you've got an effective sediment control management plan or its really sort of where's the sort of the beginning of the Council's real interests in the actual land use side of things so that you can effectively manage the discharge?

15

1540

A. Yeah, so it's like, it's really ensuring that those controls are in place and they're adequate and that they're managing any effects on the environment so we need just, we need to know what those controls and that they are suitable controls in place and that they're effective and they're doing their job. You know to prevent any discharge. We don't want to see, you know, unauthorised discharges.

20

Q. No. No.

**QUESTIONS ARISING: – NIL**

25 **RE-EXAMINATION: MS DE LATOUR – NIL**

**COURT ADJOURNS: 3.41 PM**

**COURT RESUMES: 3.50 PM**

**MS DE LATOUR CALLS****KERSTIN STRAUSS (AFFIRMED) (VIA AVL)**

Q. Good afternoon Ms Strauss.

A. Good afternoon.

5 Q. Do you confirm that your full name is Kerstin Strauss?

A. Yes, that's correct.

Q. And you are team leader consents at Otago Regional Council?

A. Yes.

10 Q. And you have the qualifications and experience that is set out in paragraph 3 through to 5 of your evidence dated 11 February 2022?

A. That is correct.

Q. And you have prepared two statements of evidence, the first dated 11 February 2022 and a second statement of evidence in reply dated 11 March 2022?

15 A. That is correct.

Q. And you confirm that you have prepared both of those statements in accordance with the Expert Code of Conduct?

A. Yes.

20 Q. And you confirm that your evidence is true and correct record of your evidence?

A. Yes, I confirm.

Q. And do you have any correctness to make to your evidence?

A. No I do not.

Q. Could you please answer any questions from my learned friends.

25 **CROSS-EXAMINATION: MR MATHESON**

Q. Good afternoon. Can I just ask you to have your primary statement of evidence available?

A. Yes I do.

30 Q. And just a couple of quick questions. Were you involved in...can you hear me all right?

A. Yes I can.

Q. Were you involved in the workshopping of the Plan Change 8 Rules?

A. No, that precedes my date of employment with ORC.

- Q. Oh right, so you've only joined, you joined about 16 months ago, so that was before you...
- A. Yes, I joined in October 2020.
- Q. Have you had a look, does your, did your evidence cover or did you consider the degree of consistency between the 2019 RPS and proposed Plan Change 8 as part of your evidence or is that Ms Boyd?
- 5 A. That is Ms Boyd.
- Q. Okay. And you've – just double checking, have you been listening in earlier today?
- 10 A. Yes, I have.
- Q. That will speed it up. So, at paragraph 38 of your evidence.
- A. Yes.
- Q. You say that there that the primary focus was on the potential discharge resulting from land use, thus the matters for discretion are closely related to discharge. And just in light of the last witness we've had and the evidence generally, do you agree that the primary concern of ORC is about discharges and effects on water quality of the discharges?
- 15 A. That is correct.
- Q. And do you agree that, and while it might be a policy question that any obligations or policies under the NPSFM 2020 can be addressed through a discharges rule controlling discharges into water bodies?
- 20 A. Potentially. It depends on the wording of that provision.
- Q. Yes, but and I agree, I acknowledge that the wording at the moment is not good, but you agree that you could word a discharge rule that covered those concerns, that addressed those?
- 25 A. It potentially could if it would allow the consents team to impose relevant and effective conditions.
- Q. Because ultimately, you are interested in what goes into the river, or waterbody.
- 30 A. And into the land where it might enter a water course.
- Q. Or – yeah, but your concern is about the discharge, not about the land use per se.
- A. Not the land use per se, but as we all agree it's obviously the land use does potentially trigger the discharge.

Q. Do you agree that slope's a key factor in risk of discharging?

A. It is one of the factors. I believe and that's why you would have seen as part of my evidence in chief the attachment addresses that for example in the risk matrix as well as a (inaudible 15:56:17) CMB chapter that talks about a multitude of factors that do affect the risk of the potential for discharge and slope may be one of those factors. But it has to obviously be combined with other factors such as a steep slope that is not near a waterbody may not be as risky as a slightly flatter site that is near water bodies, so there's many factors that are important to this.

5

10 Q. But a very large site that's almost dead flat a long way away from any potential waterbody must be a very low risk from sediment discharge into a waterbody, wouldn't it?

15

A. Potentially yes. It really depends on whether the soils can let waters through or water in let's say a rather large storm event as we've had them quite often recently due to climate change and so forth, I imagine that sediment can wash off these sites as well as travel quite a far distance. So whilst I accept that the degree of the effects may be less, that would be expressed in a consent for these sites of works, meaning we would not spend as much time investigating the effects and the conditions would be reflective of that as well.

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Q. Yes, but you agree, I mean as a consents planner you would agree that, you know, you've got to get best bang for buck don't you, so you want to focus the consent requirement on the activities that really need it, correct?

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A. Well, we're focussing on the level of effects, first of all adverse, in order to identify whether it triggers notification or not, and then ultimately we have to assess whether the activity proposed is acceptable or not.

Q. Were you involved in the drafting of the memorandum of understanding?

A. No.

Q. Were you aware of it?

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A. No, but it was, I was involved in the discussions as part of the consents team with QLDC, which ultimately I believe has contributed to the MIU being developed.

Q. So are you just – help me outs - so do the compliance team report to you or are you on a separate area?

A. Consents, consents processing and compliance are separate teams.

Q. Right. So you, so your team's responsible for issuing the consent and then another team and council's responsible for compliance?

5 A. That is correct. Our team is responsible with assessing and hopefully for the customer granting those consents, and once they're granted the compliance team will monitor the implementation of those conditions we have imposed.

Q. Do you agree that it's good planning practice to try and avoid duplication and confusion for users in the Plan?

10 A. Yes I acknowledge that generally as straight lined a process as possible is beneficial for the customer as well as the consents team and (inaudible 15:59:29) compliance. That's why the consents team initiated these discussions with various councils across the Otago region to work towards achieving collaboration.

15 Q. Do you know whether that happened at the time Plan Change 8 was proposed or not?

A. Well, because we didn't have a earthworks rules, I do not believe that any collaboration for these types of rules was possible.

20 Q. But just because you don't have an earthworks rule, that doesn't mean that the consents department or the compliance department couldn't have talked to QLDC and the other councils and asked to be notified of any large earthworks activities.

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25 A. I'm not aware of that because I believe earthworks was not the focus prior to the development of PC8, the concerns around earthworks was a trigger for that.

Q. And do you agree that in terms of a permitted activity the wording of the standards is particularly important?

30 A. It has to be clear for the customer when an activity is permitted and when it is not, when they do have to seek consent.

Q. Are you aware of in your work in Auckland or elsewhere of a permitted activity that has a, as a standard a certified management plan?

A. I cannot recall that in detail but I would assume and it is clearly an assumption that a permitted activity that level of input where it's

questionable whether it's permitted or not might not be the best permitted activity rule.

Q. So you're, but you're –

A. – and I believe that Felicity Boyd will be able to speak to that further.

5 Q. But from a consents perspective, if the requirement, if the standard was and an environmental management plan approved by ORC as a compliance standard, sorry as a permitted activity standard, it would be easy for your team to know whether or not it had been approved by ORC, wouldn't it?

10 A. I'm not 100% sure that I do understand your question, because the consents team is involved in processing consents and would not be involved in assessing permitted activities or the assessment of any types of management plans, so I believe that would be a function tentatively of the compliance team is that was set up that way.

15 Q. So you don't, so your consents team probably by definition you are not interested in permitted activities; that's a Ms Boyd question too, is it?

A. Well, a council cannot grant a consent for a permitted activity as such, the consents team would only ever come across a permitted activity if somebody was seeking a COC. And as you would be aware for a regional type activity, it is quite often a little bit more difficult to confirm whether or not an activity is permitted without quite significant research and information potentially being required, whilst if you had a district plan issue of like say somebody proposing a house and asking whether that or asking for confirmation that it does comply with building coverage, that is reasonably easily determined.

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Q. Right, so in terms of the proposed permitted activity rule, and I did ask the last witness to leave my legal submissions at the witness stand but that will be of no help to you at all, in wherever you are, Dunedin?

A. Yep.

30 Q. Do you have the rule 14.5.2.1 restrictive discretionary activity rule in front of you?

A. As has been notified or?



- Q. No, no, just the latest version, do you have a copy of that? Have you got my legal submissions? You might not. Anyway, I can read out the question.
- A. If you could directly to the volume of the common bundle.
- 5 Q. No, it's, these were provided later. Can I just read out an assessment, a matter to which discretion has been restricted, so any erosion, land and stability, sedimentation or property damage resulting from the activities, can you tell me why ORC is interested in property damage as a result of an earthworks consent? So this is restricted discretionary activity A.
- 10 A. Yep, I see where you're going with this. Yes, I'm not 100% sure that it is purely a regional or a regional function similarly as at QLDC refers to discharges. I think both councils potentially are straying in others' territory o some extent.
- Q. So, just do I take it from that that you are – yeah, okay, I'll leave that. so  
15 in terms of B, effectiveness of the proposed erosion and sediment control measures in reducing discharges of sediment to water or to land where it may enter water, that's directly related to a discharge issue, isn't it?
- A. Yes.
- Q. And the risk of a discharge, yes?
- 20 A. That's correct.
- Q. And that could equally be a requirement on the discharge rule, couldn't it?
- A. Well, it is because this is a (inaudible 16:05:12) rule..
- Q. Yes, but it could just be that it could be a matter to which discretion is  
25 restricted on a pure discharge rule, couldn't it?
- A. Presumably it could be. One of the matters.
- Q. And likewise, the extent to which the activity complies with the erosion and sediment control guidelines for land disturbing activities, and you will be, I imagine you are well familiar with GDO5 which was the reference in  
30 Auckland?
- A. Yep, that is correct. I'm well aware and yeah, well used to utilising that document.

Q. And that, and Auckland obviously is a unitary authority, there's one compliance team, I take it, not one from the district part of the empire and one from the regional part? It's just one compliance team, isn't it?

5 A. Yes, that's my understanding. It was at the time when I left Auckland Council, similarly there's one consents team that assesses everything under the unitary plan.

Q. Yes. And then turning to the next matter of discretion, sorry matter to which discretion is restricted and the ORC's proposed PC 8 rule, any adverse effect on water quality including cumulative effects and  
10 consideration of trends and the quality of receiving water, that's purely a discharge-related issue, isn't it?

A. Yes.

Q. And then adverse effects on Kai Tahu, cultural and spiritual beliefs values and uses, any natural or human use value, if I was an applicant seeking  
15 a resource consent for a discharge from an earthworks sediment – sorry, discharge or sediment or water containing sediment from an earthworks site, how might I assess that?

A. You may have to contact the relevant iwi to get some input.

Q. But that relates to effect from the discharge of sediment into water,  
20 doesn't it?

A. Yes, that is right.

Q. And the use of water bodies or the coastal marine area for contact recreation and food gathering clearly relate to discharge into water,  
doesn't it?

25 A. It does.

Q. From a consent perspective, would you expect somebody to assess the adverse effects on the coastal environment of an activity in Queenstown Lakes District Council?

30 A. That would depend on the magnitude of the discharge. However I would certainly if there were continuous large scale developments that all discharged little bit of sediment bit by bit that cumulatively obviously will possibly have flow-on effects I would have to take guidance there from specialists and potentially the applicant would have to yep provide reports

on that, so definitely the council would have the ability to dig into that a lot deeper than we currently are doing.

5 Q. But again, that's a matter for a discharge isn't it, it's the discharge into the water that then flows 300 kilometres to the coast, that's the concern isn't it?

A. Yep. Yep, the discharge related to the earthworks activity.

Q. So that could be a matter of discretion on a discharge permit couldn't it?

A. Yeah, as it currently is.

10 Q. Can I then take you to...so, my friend will ask you about management plans so I won't go there, but can I just, if I go to your...can I just turn to, in terms of paragraph 67 of your evidence, this is your primary evidence, manage an earthworks under permitted activity rules proven to be ineffective in terms of managing water quality, because you can only take action once a discharge has occurred. But do you agree with my proposition that you could manage the risks through a discharge permit only, based on what –

15 A. – and as I said to you, yes as I said before that would depend on how the provision is worded and whether it clearly relates to the activity at some point.

20 1610

Q. But as a consent planner on a discharge rule you might expect that that would have sensibly appropriate input into for example potentially the size of the sediment retention pond, wouldn't it?

25 A. If I was to assess an application with a (inaudible 16:10:16) land use and a discharge permit or with a purely be for a discharge permit for this type of activity I would be interested the measures that are taken and I would have either avoid the discharge as a first priority or I would minimise the discharge proper at least so that it can meet the s 105 and s 107 test at the very end. Also in order to achieve this purpose I would impose presumably the same or very, very similar conditions on a discharge permit as I currently impose on the land use and the discharge permit. To me a consents planner it would not necessarily matter whether the heading of the consent issued say s 9 or s 15, or whether it only says s

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15, as long as it does achieve the purpose of sufficiently mitigating adverse effect in achieving an acceptable outcome.

Q. Thank you for that. Do you agree then that there would be less duplication and overlap if it was limited to just the s 15 consent?

5 A. No, I do not believe that it would make any change because as I said before I believe the same conditions or very similar conditions would be imposed as I currently impose as part of the land use component. It just all would be contained within the concept document associated with the s 15 consent, so for the customer they would still have to adhere to it and  
10 implement the same types of conditions. It would have still submitted the same type of management plans. So I do not believe it would result any significant efficiencies.

Q. Do you, that's not quite right though is it, because why should, why should an applicant have to assess land instability or property damage resulting  
15 from the activities as part of a discharge permit?

A. Well that's a slightly different topic than you just before mentioned. As I said before in terms of property damage, I would not necessarily consider that to be a matter in terms of the discharge. However, that is one of the few things. Similarly QLDC possibly cannot enforce the matters or  
20 actually cannot enforce the matters in relation to a discharge, so property damage in itself is actually more of a civil matter. It is may have to do with adverse effect on persons and a result in limited notification. But from experience that is generally more often dealt with by the District Council, however in this instance I don't really see any major inefficiency having that in that ORC PC8 version because it doesn't really, yeah, affect  
25 any (inaudible 16:13:10) or so forth. I do not see that we have imposed any conditions that would be particularly difficult or onerous for customers at this point in time that do relate to property damage on neighbouring properties.

30 Q. But you do agree that an applicant has to apply the rules of the Regional Plan and if the Regional Plan requires that to be assessed then they need to be assessed. Do you agree with that?

A. Well in theory the applicant, the application should be of a quality to assess all the relevant matters.

Q. But you agree with me that property damage is an ORC concern?

A. From my experience, I have only ever come across as part of District Plan considerations. However, I do trust the policy team that they have had a reason for including that so I would defer to Ms Boyd.

5 Q. And then from a consents perspective, if I can talk through, well if you can help me understand how this works, so consent applications are made the QLDC and then they are granted and they have subject an EMP, is that right?

A. That is my understanding but I am dealing generally with ORC consents.

10 Q. Yeah, yep, well that was the next question. And then since Plan Change 8 has come in, there applicants may, maybe retrospectively would then need to apply for an ORC Plan Change 8 consent, is that correct?

A. Hopefully that would not be retrospectively and the works would not have  
15 commenced and they would apply for that consent whilst after they have obtained a QLDC consent they would have applied an ORC consent as well, that is correct.

Q. Yeah, sorry, by *retrospective* I wasn't implying for a moment that any of  
20 my clients would do that, it was simply by retrospective I meant after the PC8 rules came into effect. So because they have immediate interim effect. So you've just said the QLDC consent is granted, it requires a range of conditions and then they apply to the ORC for an earthworks and discharge consent, correct?

A. They apply for a earthworks consent. It encompasses a land use and a  
25 discharge component, yes.

Q. And so you look at the QLDC consents, do you cut and paste those? Do you, like what do you do – what happens if you have a different view on a condition than QLDC has?

A. Looking at the matters for discretion and PC8 and the QLDC plan,  
30 Ms Boyd explains it a wee bit further but cutting and pasting is not necessarily an option because their (inaudible 16:16:05) are different and the focus of our system is also different, so its in our consent conditions have been tried to be sort of streamlined and aligned with QLDC conditions as much as possible, so one could get the impression that it

may have been a cut and paste, but it is rather and cut and paste from the conditions, ORC conditions, many of them a QLDC consent, so we'll still have to make sure that the conditions we are imposing are suitable for our purpose.

5 Q. And you said just in your answer that your focus, you have a different focus than QLDC and that's because the ORC's focus is on the discharges, isn't it?

A. That is correct and that's why we're also not utilising any QLDC conditions that may mention discharges.

10 Q. You're just copying all the ones that don't mention discharges?

A. No, we're copying, we're using our own manual that has been developed on the basis of (inaudible 16:17:05) as I've explained in my evidence-in-chief but have ensured that the wording and things like timeframes for submission of our management plans are so forth are generally aligned as much as possible in order to not cause confusion for customers. They may get it wrong let's say ORC requires something to be submitted 15 working days prior to commencement of works, whilst QLDC requires the 10 working days and the customer mixes it up, therefore they're not compliant with both Councils. We don't that, so we want to make easy so in reality it is my understanding that applicants quite often submit exactly the same thing to both Councils where the Councils then have to identify which matters are relevant to them.

20 Q. Okay, so an applicant submits one document to Councils, the Councils then go through and work out as you've said what's relevant to them, so what if the Councils have, if the Council officers have a disagreement about what goes in this document?

A. Well because that usually happens at, I mean the (inaudible 16:18:10) where it happens usually at compliance, so only after that consent has been granted the initial draft will be reviewed by compliance and if we have disagreements they usually relay to matters in relation to discharges as is our focus. There's a disagreement, at the end of the day ORC has to be satisfied that whatever is submitted, we have to be satisfied that it does keep our purpose. We will try to negotiate and make it as easy for customer as possible. However at the end of the day the ORC is

responsible for managing discharge and if the EMP that has been signed by QLDC what is not achieving that purpose, then would have to ask for a different – for a different management plan.

Q. So and then, so that, and then there would be two management plans.

5 There would be a QLDC one and ORC one.

A. Yep, the QLDC one presumably would be wider ranging and include things like, yeah, a lot of things quite often relating to subdivisions and as well as dust measures, traffic management and so forth whilst the plan submitted to ORC would be firmly related to the discharge.

10 Q. So the way you could do that would be to have a discharges section that the ORC signed off on or a separate management plan just relating to the discharges, wouldn't it?

A. Well that's what's happening at the moment because we're only interested in the matters that relate to the discharge as part of the discharge consent granted by ORC.

15 1620

**CROSS-EXAMINATION: MR ASHTON**

Q. Good afternoon.

A. Good afternoon.

20 Q. So I'd just like to ask you a few questions about the EMP and I guess the practical role that this has in your processing of consents, so it's fair to say that the EMP is the key document by which you assess an application, isn't it?

A. That is correct. Usually the EMP the documents that identifies all the measures that are proposed to be implemented in order to avoid or minimise the discharge of sediment.

25 Q. Yes, and you work on the basis that those measures will be adhered to by the consent holder, don't you?

A. That is correct. We cannot assume that somebody will not comply.

30 Q. And Ms Heather told the Court that the aim of an EMP is generally to avoid a discharge. Do you agree?

A. Yes, that is the first aim of, we see, as far as understanding the OPS tries to avoid as much as possible in a way that if it's not practicable then it has to be litigated.

5 Q. And it's from the EMP that you will be able to make a judgment as to whether or not a discharge may occur, is that right?

A. Yes, we usually will utilise the assistance of technical specialists to assess whether or not the EMP is sufficient to unusually – and also in the sense that it is only mitigation that can be achieved because unforeseen events will very, very often result in a discharge. That's why contingency measures are quite important then to consider, especially when you're talking about more sensitive settings for sensitive procedures.

10 Q. And EMPs will consider the receiving environment, won't they, and include contingency measures, often.

A. They absolutely should.

15 Q. And in the circumstance where you look at an EMP and you can see okay there is going to be a discharge here, you'll also be able to discern won't you whether that discharge will meet the permitted activity standards, and the existing rule 12(c)1.1 or not whether those standards will be met or not by the discharge.

20 A. As Ms Heather has explained, that can usually be discerned once the discharge has occurred and not prior to the discharge occurring. Because we will never know how much will actually run off and reach the water, so it is a very, very difficult to ascertain compliance or the, yeah, meeting the permitted activity rule, and that is essentially the reason for the PC8 rules.

25 Q. But from the EMP and the mitigation measures and managements and contingencies in that EMP should you not be able to understand what the quality of any resultant discharge will be?

A. If you were a (inaudible 16:23:47) at a very low risk site, and you had all bells and whistles in the MP we may be able to say the chances of there being a discharge and it meeting the permitted current permitted activity criteria under 12.c-something it can almost be guaranteed how the vast majority of those sites we're currently dealing with is not in that category, so there's always a level of risk, there's always as level of uncertainty,

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and the permitted current permitted activity rule book cannot be relied on.

5 Q. So in those circumstances where you're considering then granting a discharge consent, how do you know whether or not you can grant it if you don't know what the quality of the discharge may be?

A. We are trying to achieve as much mitigation as possible, and then we have to rely on regular reporting and inspections as well as depending on how risky it is. Things like, yeah, monitoring, bench testing and all these kind of things which the monitoring or the compliance team is dealing with.

10 So we are reliant on people actually, our customers doing the right thing, so that the consent holder has to stick to all the measures they have proposed they would be doing, and we also have to be reliant on them maintaining those measures, and this has to be checked that that actually happens, and if a discharge occurs sufficient measures have to be taken to stop the discharge from occurring, and potentially remedy the situation.

15 Q. All of those matters that you've, the last matters that you've just been through are compliance monitoring and enforcement matters, aren't they?

A. In the first instance, we have to be satisfied that with all likelihood it is acceptable to grant and that it meets 1.5 and s 107 because as you would know there are preclusions to granting such a consent, so we have to be satisfied that with all likelihood it can, the activity can proceed. However, as we all know, things don't always go to plan and that's where compliance and enforcement comes in.

20 Q. Yes, so I take it then from your answer just now that in fact you can discern with a reasonably high, a reasonable level of certainty what the quality of a result discharge will be, assuming that the mitigation measures are adhered to.

25 A. I'm not 100% sure what you refer to in terms of quality, whether there's specific limits, which are to my knowledge not included currently in PC8, however what we are assessing is whether overall based on the level of effects positive and adverse effects, maybe adverse, that the activity can proceed because the effects are overall acceptable, so we're not necessarily looking at, purely at the quality of the discharge but what the discharge does do to let's say ecosystems and so forth.

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- Q. Yes. Okay. Could you please turn to the common bundle, tab 16, and this is the QLDC –
- A. – I have a big common bundle, I have nine volumes.
- Q. Yes, well this will be volume 4, I believe, yes volume 4, tab 16 of that  
5 volume.
- A. Yep, that is the QLDC guidelines for environmental management plans?
- Q. Yes, and if you could turn to page 19 of that please.
- A. Yep.
- Q. This is the water quality's protection isn't it, of the EMP guidelines?
- 10 A. Yes, that's what it says, yep.
- Q. And it says performance requirements for water quality in a table. Would those requirements comply with the ORC permitted activity standard, the current one?
- A. I do not know. I'm not an expert in these matters. I would seek technical  
15 specialist advice on these things, which possibly would be the compliance team.
- Q. So then how, how then...all right, you don't know. And so then just turning to the narrative above the table and the final paragraph there, and it states depending upon the circumstances, volumes, waterway, etc, a discharge permit may need to be obtained from the ORC, so any person applying these to a district earthworks consent would know that they may need an ORC consent, wouldn't they?
- 20
- A. I don't know, it depends on whether they read this and I don't particularly I don't find it particularly helpful because it relates to volumes and PC8 doesn't actually have any volume controls in it, just an area control, so I'm not sure whether that would give every customer the idea, but I understand that QLDC now commonly advise customers in pre-application meetings, 'cos we discuss those things, as well as imposes (unclear 16:29:40) as advice notes to their consents, to advise  
25 customers that they may need obviously consents as well.
- 30
- Q. Then it is clear from this and those advice notes that the QLDC consent is not purporting to permit a discharge, is it?
- A. I would assume that they are not, yeah, telling customers that they are granting a discharge permit, no.

1630

**QUESTIONS FROM THE COURT: JUDGE STEVEN**

- 5 Q. So I just want to ask you some questions based on your expertise and you might not, or your experience at least, specifically in the context of the PC8 rule 14.5.1 which sets out the permitted activity standards and it strikes me in terms of the questioning around risk that firstly to be a permitted activity if the earthworks are occurring more than or 10 – more than 10 metres, 10 metres or more from any waterbody then that would be and then provided all other standards are met, then you wouldn't need either a land use consent or a discharge consent under this rule and that's provided all other activity, permitted activity standards are met. That's your understanding?
- 10 A. That is correct.
- Q. Yes.
- 15 A. If because all, they're all linked with an *and* so that means it all those conditions must be met.
- Q. So even if you are undertaking earthworks outside of the, you know, the 10 metre distance from a water, any waterbody, the – I read G, sub paras 1-5 that's a further condition and that's addressing a risk that might nonetheless still arise even if you're further than 10 metres away, but assuming that none of those outcomes will result from the earthworks activity then no consent is required, that's the consequence of the way in which the rule has been constructed?
- 20 A. Yes, if a proposal meets all these requirements listed at the 14.5.1.1 then the activity would be permitted and no consent be it land use or discharge would be required from ORC.
- 25 Q. Since PC8 provisions have had legal effect do you know how many or whether there have been many occasions where earthworks activities have been proposed where permitted activity status for both the land use and the discharge has been able to be achieved under this rule or does that not come across your desk? Does information about that not come across desk?
- 30

- 5 A. I'm not aware that we have received any applications from customers that tried to apply for a PC8 consent, then upon a thorough check it turned out that they didn't require a consent, it's usually the other way round, that people apply for something else and then we tell them they also need a earthworks consent.
- Q. Right so what you're saying to me is that as far as you know there aren't many occasions where this permitted activity status has been achieved by persons proposing to undertake earthworks, is that what you're saying or have I misunderstood?
- 10 A. Well maybe but the thing is we don't get to see them. If a customer is confident that they can meet these criteria we, as a consents team, wouldn't be, yeah, receiving those applications.
- Q. Right, okay, so all right so that's as far I can take that question, but in the context of the situations where, and this goes back to whether you put the application in before to QLDC or the Regional Council first, does your Council's resource consents application form require the applicant to identify whether other consents are needed including from any other Council, ie, from the QLDC?
- 15 A. I believe it, I do believe it does. Most application forms have a section about other consents required so I would imagine this application form does it too, however to acknowledge, and I have acknowledged that in my evidence-in-chief as well that this application form is outdated and actually incorrect and does need to be updated so if that section was missing we would certainly improve it.
- 20 Q. All right, so where I'm angling at is s 91 and I just wanted to know whether if in your experience with a consents team, and its only been 16 months, there have been any cases where an application has come on, landed on your desk and you have identified that another consent is required for the earthworks activity from a Council and hasn't yet been submitted?
- 25 A. I'm not aware of that because we are not aware of all the triggers of all the different TAs within the Otago region. We have started the process of sharing these triggers but our planners are similarly with the ORC plans and not the TA plans and all we would do even we knew that an application from an ATA not just QLDC but in general a TA was required
- 30

you would advise the customer because requiring a consent from a TA would not preclude us granting or not granting or processing the discharge permit. While I do accept that a combined processing like is achievable for unitary authorities would be beneficial it is not necessary in that regard so in my opinion these consents wouldn't be extricably linked because we're purely looking at the – or interested in the discharge from the activity so we would not, in my opinion issue a s 91 and await the lodging of the consent with the TA.

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Q. Right, okay so all right so you see that the s 91 power is primarily for the use of a unitary authority is that your perspective?

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A. No, but I see users of s 91 especially when it relates to earthworks quite often when we're dealing with contaminants site as well, where the applicant has not applied for that respective consent because obviously there is an (inaudible 16:37:11) for disturbing a contaminant (inaudible 16:37:15), if that occurs for a residential development it meets, it triggers, then you do require those consents.

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Q. So you don't think that the s 91 and not that the Court can direct that s 91 be pursued in any event but I'm just wondering whether you see that there's any scope for efficiencies, a streamline consent process and efficiencies to be gained by jointly, you know, a joint consenting process being pursued?

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A. Yes, from experience it is in my opinion more efficient if it is handled by the same person. I don't know how much more efficient it would be if it was handled by two authorities, two planners, they would have communicate quite considerably and I assume as well as the (inaudible 16:38:08) plan frames and so forth, if it was handled, if it was handled by the same person, which is obviously one of the advantages of a unitary authority potentially that would be more efficient but if it handled by two authorities it's possible, absolutely it's possible but it does require a lot more effort from the parties and possibly even from the applicant to agree time framing extensions and like.

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Q. Now just in the, you might have had any experience with situations where only a discharge consent has been issued for discharges associated with earthworks, based on your experience at Auckland, but I just want to ask

you do you know, you were asked about whether you think that a discharge permit could effectively manage earthworks, discharges associated with earthworks, have you had any direct experience in your previous roles with the Council, Auckland Council, where that has in fact occurred?

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A. In all honesty I cannot recall the word, the exact wording of the discharge rules whether it does require a land use as well. I would absolutely have to check that for the regional provisions.

### **QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

10 Q. Good afternoon, Ms Strauss. Could you please me in understanding what the Council looks for when processing an earthworks consent? Do you set limits? Do you like to manage risk to an acceptable level? Do you want to see the use of best management practices or some combination of them all? What is the driver for what you're trying to achieve?

15 1640

A. The first driver would be to avoid the discharge but I think everybody has to acknowledge that that is not always possible especially when unforeseen weather events occur, so we're fine to mitigate the effects as much as possible. It's my understanding that there are no pre-set limits that would be application to all receiving environments, and it might not be beneficial for some environments if there was one level set for all, so some environments may be more sensitive and would require different types of limits, so in that way each application is assessed on a case by case basis, depending on what type of species are living in the waterway, so if there was a discharge occurring, how sensitive were the environments to the discharge and how certain do we have to be or how much do we have to actually ensure that no discharge or very limited discharge occurs. So it's that in a way a combination of all the things you just noticed.

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30 Q. Okay. So, if you don't have discharge limits how do you decide what to expect of an applicant? Presumably you have to understand the risks fairly thoroughly, would that be correct or not?

A. That is correct, yes, and that's why we are with riskier environments are utilising the expertise of specialists to audit the applications, to ensure that depending on the receiving environment the risks are overall acceptable.

5 Q. And they would look at things like flow paths within the site capturing of sediment laden flows, treatment of them, and discharge. Is that the sort of thing you'd expect to be covered?

A. Yep, they would review of audit the proposed letters and first of all determine whether they are appropriate to sufficiently mitigate the discharge. If we were to deal with, let's say, a particularly sensitive receiver with a particularly sensitive ecosystem, for example, we might also brief an ecologist to assess the effect if there was a discharge occurring, a residential discharge, what the effects would be on the environment. If the effects would be unacceptable if even a little bit of discharge was to occur, then we would have to be very, very careful as to what types of conditions we're imposing, we may require additional measures to be implemented onsite to further mitigate it or hopefully almost entirely avoid such discharge.

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Q. Okay. I'm thinking more of the duplication issue onsite, and how far ORC needs to go in understanding risk. Like I would understand that you'd want to know what kind of discharges could occur without treatment, what kind of dis- what could be done to stop those discharge occurring and treatment, those kind of elements, would that be correct or not?

20

A. Yep, we'd have to know what treatment will be occurring on site and to yeah, assess the likelihood and the risk of any discharge that may still occur.

25

Q. Okay, well Mr Matheson asked the question about land instability and related to a third party property and things like that or that discussion went to a third party property, I would have thought if land was unstable and it had collapsed that would have an implication for sediment and possible loss of site, so this is what I'm trying to get an understand of, how far the regional council needs to go in controlling the discharge, and in some cases may well be quite different to the reasons that the district council might look at it. And so that's one of the things we have to work through.

30

A. That's correct.

Q. Okay, well that's good, I think I'm on the right lines there. Do you think your current procedures will change much as a result of the MOU or is that more an implementation side of it?

5 A. I think it's an implementation side and we have already started the process, not only with QLDC but with others, I think we are a little bit further advanced with QLDC because we've had multiple discussions as a consents team, but I think it does come down to finetuning those interactions and really have, have, some yep, defined measures we are  
10 doing, not just as a more casual let's try to work together, but actually a more formal arrangement to align our processes and talk during the processing where possible.

Q. Okay. Do you see, or there has been any discussion on joint hearings?

A. Not as I'm aware, definitely not for earthworks, I'm not even aware we've  
15 notified any so far. For other types of applications, yes, for example, landfills, not so (inaudible 16:45:29) fill, but other types of landfills, there have been discussions whether doing processing or hearings would be beneficial.

Q. Okay, thank you. And do you have an idea of what the typical cost of an  
20 ORC consent might be, including the initial processing, site inspections and ongoing monitoring?

A. That's a very difficult question to answer because it really depends on the project. It will be very different for a project, let's say, for new lots and for building platforms on a reasonably flat site with a few measures  
25 proposed, versus 150-lot subdivision near sensitive receivers up on a hill, so that will be quite different. (inaudible 16:46:20) a figure, as I understand, would be something between probably 2,000 on the lower range and 8,000, 9,000, 10,000, however depending on the quality of the application it may go higher if a lot of discussions and to-ing and fro-ing  
30 has to be had, so quality applications are absolutely encouraged because it will go a long way to reduce the actual processing cost.

Q. Okay, and was that just the processing cost you've given there?

A. Yeah, I'm not aware what the final compliance cost would be because it would also be dependent on whether the consent holder is doing all the



right things and whether the compliance team can actually trust the consent holder to do the right things on an ongoing basis versus consent holders that may require closer supervision due to their actions or inactions.

**5 QUESTIONS ARISING: – NIL**

**RE-EXAMINATION: MS DE LATOUR**

Q. Ms Strauss, my friend asked you a number of questions regarding this theoretical discharge consent and I think you answered that you'd be essentially putting the same conditions on that discharge consent, and following on from Commissioner Hodges' question regarding costs, I just wondered whether you had a view on what, how that discharge only consent might alter your processing costs?

A. I don't think it would be altering it at all, because for example, the deposit is the same so an applicant for example doesn't have to pay for the land use component and the discharge component, they pay one deposit. And in terms of separating out the consent documents, that is pretty much probably a half hour job, so I would not assume that it will result in any significant savings.

**WITNESS EXCUSED**

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**DISCUSSION – RE. TIMETABLING – CONCLUSION DAY 1**

**COURT ADJOURNS: 4.51 PM**

**COURT RESUMES ON TUESDAY 22 MARCH 2022 AT 10 AM****THE COURT: JUDGE STEVEN:**

Any matters arising overnight? I do note that I have received some supplementary statements from Mr Hunter and Mr Quinn and we've also  
5 received the summary of Ms Boyd, but anything else?

**MS DE LATOUR:**

Your Honour, I just wanted to address you on the supplementary statements, because I note that there's been no application seeking leave to introduce this  
10 evidence at this point in time and there is a question of prejudice to the council that I don't think has been addressed at all at this point.

**THE COURT: JUDGE STEVEN TO MS DE LATOUR**

Q. Yes, yes.

A. I just have a couple of points, I guess, I want to make. The first is  
15 that there's issues that the Willowridge and Remarkables Park seek to be addressing that really should have been put to my witness in cross-examination yesterday. There's also the issue of just timing; we've only received this at, I've got the email at 8.35 this morning, and I understand my friend will wish to cross-examine in Ms Boyd on this, but  
20 she's literally, she lives in Parklands and has dropped her children at school and day-care this morning, so I haven't had an opportunity to discuss the evidence with her or anything of that nature either. So as a matter of principal I do need to object to its inclusion.

Q. Yes, look I can fully appreciate this and my attention was drawn to it, I  
25 wasn't sitting in my desk watching my Inbox but my attention was drawn to it by the Commissioner so I've hastily read it. And I think that we both agree that or Ms Hunter at least is making an effort to try and bridge the gap between the, you know, that exists currently with the ORC but I wholly accept as I was reading it, I was thinking, the witnesses, your witnesses  
30 all need the opportunity to fully consider this, and to respond to it, and I wholly agree that witnesses of yours that have gone already ought to have been cross-examined on it, so there is prejudice but I'm just trying to

consider whether there's a way we can work around that and it's, you know, because I see that there is yet a further version of a rule that could be addressed, but it creates a different set of questions that might need to be put to some of your witnesses, your consenting witnesses, and that  
5 being Ms Strauss in particular. So, I'm going to have to give some consideration to how we might overcome that because I think that it's useful if the parties can try and work on coming up with a solution. I'm not sure whether this is, we've got to that point yet, but I just wonder whether I might, I'll hear from you Mr Matheson first, and then I might just  
10 take a break just so that I can confer with the Commissioner on this.

**MR MATHESON:**

Thank you, your Honour. And look, I do appreciate it was late notice, I got it to Ms De Latour as soon as I could this morning, and you know, we talked about  
15 it a lot last night and the purpose was to try and be helpful. I could have put these questions to the witness in cross-examination and taken her through it and I did ask a number of the other witnesses about whether they have any planning experience or policy experience and neither of them did, so I don't actually feel that there's prejudice from a planning and policy perspective. I  
20 specially asked Ms Heather and she said, "No I don't have any planning or policy experience." I did put a number of the matters to her including the matters in the RDA criteria, number A, the effect on the coastal marine area from a compliance point of view, and she gave her answer on that, so actually I did raise a number of the issues in the cross-examination already. I just  
25 thought it was more helpful for the Court to actually consolidate them together and present it so that it could be looked at in the round. Having said all of that, I'm perfectly happy if Ms De Latour does wish to recall any witness, I'm very happy for that, and certainly am in no position to object to that, but as I said I just thought it was more useful to consolidate it rather than effectively lead  
30 Ms Hunter on or her to give answers saying, "Well, I've listened to this and I think you mean this"; it's just much easier if it's all in one place. So that was the purpose.

**THE COURT:**

Q. Well, I appreciate that but the reality is is that questions were put to the witness who hadn't had the benefit of seeing this written piece of evidence consolidating all those thoughts together, and maybe the questions might  
5 have been, her answers might have been different if she'd had that in front of her. I don't know, I mean this does contain a further rule which hasn't been considered by that witness, so I don't know whether, I don't recall that you specifically asked questions relating to this latest iteration of the rules.

10 A. Well, no, but just to be clear, the rule is a refined version of Ms Hunter's more detailed rule, and if you look at them side by side, I'm very happy to take the Court and I was intending to take the witness through the changes. It's clear what the changes are, and they're not particularly extensive changes other than the questions I particularly put to the  
15 witness, including, for example, around whether the property damage etc was a relevant factor, which the Court may recall. And that was specifically put, and that's one of the deletions that we're proposing. So, as I said, I'm very happy if Ms Boyd needs time to consider it, and it would be important that she does because it is quite a key provision, and equally  
20 happy if the Court does, you know, is minded to grant leave for any of the other two witnesses. I'm not sure what Ms Heather would add but if she wanted to comment on it, I wouldn't object.

Q. Well, it's...I mean, I've been looking at it from the angle that the updated rule, and I'm reading paragraph 19 of the evidence, it puts forwards what  
25 is said to be a workable and appropriate framework whereby there is a new permitted activity rules which relies on for permitted activity status the existence of current consent under QLDC Chapter 25 rules, with provision for the ESCP to be provided to the ORC for approval. And this is a novel sort of approach whereby the regional council is being asked  
30 to sign off on a plan in the context of a permitted activity rule, and so it's really addressing the council's powers to do that and whether the, it also talks about cost recovery, it acknowledges that there is no ability for the ORC to recover any costs associated with that, but it's that general framework, the efficiency and effectiveness and whether that is thought

to adequately give effect to the directions under the NPSFM. It's questions of that kind that the witnesses need to consider, as opposed to whether other omissions address other concerns.

5 A. I completely understand the inclusion of the erosion sediment control plan was attached to the joint witness statement and discussed at the planning conference though, that will not come as a surprise.

Q. No, I know. But that's the process that you're proposing here in this updated rule.

A. Well, that, it's the same process that was proposed –

10 Q. – same process?

A. – and in the attachment to the joint witness statement which the planning witnesses discussed at the conference.

Q. All right.

15 A. They expressed their views on it, they said they weren't happy with it, but it simply cannot be said that that would come as a surprise to them, and then in terms of the other matters in the rule that are new, from matters G downwards, those are all directly cut from Plan Change 8, but exactly the same provisions, so literally there's about three or four key changes in that and that's it. One of them is talking about a consent granted under Chapter 25 of the proposed Queenstown Lakes District Plan rather than a date, but the purpose was always that that was the intention.

20

Q. Right.

25 A. That just clarifies it. And matters of B were covered in the joint witness conference. There's some additional detail but that's minor. We laddered in factor 6, how the standards indeed at F to be met by any discharge from the site, which addresses the matter yesterday, and then the matters below in terms of D, E, F, G, H, I are all cut directly from the permitted activity standard that the council put forward. And then in terms of the RDA rule, it's simply a more refined version of the council's, by which simply changes the top to more accurately reflect that there's a site-specific rule for QLDC, and then deleting A because I'd cross-examined on it, and then focussing E on a discharge from the site which again I cross-examined on, and deleting the coastal marine area

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because this is in Queenstown Lakes District, a long way from the coast, so I, with respect I do think the matters have been live but as I said, if the combination of those causes any issue I'm happy for the witnesses to be given time to consider them.

**5 THE COURT: JUDGE STEVEN TO MS DE LATOUR**

Q. All right, so Ms De Latour, would it be satisfactory or possible for you to recall a witness, Ms Strauss in particular, or even Ms Heather, having considered this?

A. Yes your Honour, and I appreciate the Court wants, you know, the best  
10 evidence it can have before it, so I suppose in that sense I begrudgingly accept what's been said, but I still just note my opposition, all of the issues that this rule redrafts seeking to address were in Ms Boyd's reply evidence that was filed on the 11<sup>th</sup> of March, and I do still have a significant concern about how late in the piece they've sought to introduce  
15 this, but having said that I think we can find a way through. I would just also note, Mr Quinn – sorry, Mr McIntyre's –

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Q. – beg your pardon, Mr McIntyre, yes. Yes. (I think we've lost you Ms de Latour) Right, you're back. Sorry.

20 A. Sorry, I'm not sure what happened there.

Q. No, you just froze, so you're talking about Mr McIntyre's –

A. – I was just saying Mr McIntyre's evidence, that was what I was really referring to in terms of things that should have been put to Ms Heather rather than him seeking to address things now but that's by the by. What  
25 I was going to suggest perhaps is if we could have an adjournment so that Ms Boyd can consider the evidence properly and she can then be questioned on it once we've had an opportunity for her to consider that and then I'll think further whether we do in fact need to re-call Ms Strauss to address any further questions.

30 Q. All right, so how long an adjournment do you think you would need?

A. I'd like to say 45 minutes if that would be okay, so I can just have that conversation with Ms Boyd once she's had a chance to read the evidence and I'll have to call Ms Heather to see whether she's available too.

- Q. Yes, all right. Yes, and I was just thinking that whether there was anything useful that we could do in the meantime but you probably want to have a discussion with Ms Boyd once she's read the evidence so I just, we do have, we do have time this week but I'm reluctant to lose too much more time, but can I just confer very briefly with my colleague, with Commissioner Hodges and then we'll just come back to you in a couple of minutes if we just take a very brief adjournment.

**COURT ADJOURNS: 10.12 AM**

**COURT RESUMES: 10.14 AM**

10 **THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (10:14:22)**

Q. All right, so I understand that in my absence Mr Matheson you've decided that you won't persist with your request to produce further evidence from Mr McIntyre.

15 A. No, he just, he did it to be helpful based on yesterday but if people have a concern about it, they can question him on it, so that's fine. So we don't need that statement in.

Q. No, all right.

**THE COURT ADDRESSES MS DE LATOUR (10:14:45)**

20 Q. Okay, so that simplifies things because it means that Ms Heather doesn't need to be re-called but otherwise I agree that Ms de Latour needs the opportunity to talk about the supplementary statement of Ms Hunter with Ms Boyd and Ms Boyd needs the opportunity to read it and so we'll give you a 30 minute adjournment, would that be sufficient, Ms de Latour?

A. Yes, your Honour, thank you.

25 Q. And then we'll make a decision about that. We'll just hear from you. I think that you can, once you've spoken about it with Ms Boyd we'll formally make a decision about whether that can be produced by consent. So we'll just take that –

A. – thank you, your Honour.

Q. All right, so we'll take that 30 minute adjournment now until 10.45 and we'll re-convene then.

**COURT ADJOURNS: 10.15 AM**

**COURT RESUMES: 10.44 AM**

5 **THE COURT: JUDGE STEVEN ADDRESSES MS DE LATOUR (10:44:11)**

Q. Ms de Latour, have you managed to brief Ms Boyd and has she had the opportunity to consider –

A. – yes. Yes, your Honour.

Q. And – yes –

10 A. – I was just going to say at this stage I don't anticipate we would need to re-call Ms Strauss either, but I suppose I just reserve my position on that. If there's something that comes out of the questioning of Ms Boyd or indeed if the Court could be assisted from hearing from Ms Strauss further then we could address that after Ms Boyd has given her evidence.

15 Q. Yes, thank you very much. I'm happy to do that. So on that basis that supplementary statement of evidence of Ms Hunter, Claire Hunter, can go on but its on the basis that Ms de Latour will reserve position about whether Ms Strauss needs to be re-called. So on that basis we'll now move to Ms Boyd.

20



**MS DE LATOUR CALLS****FELICITY ANN BOYD (AFFIRMED)**

Q. Good morning, Ms Boyd. Do you confirm that your full name is Felicity Ann Boyd?

5 A. Yes I do.

Q. And you have got the qualifications and experience set out in your statement of evidence dated 17 December 2021 from paragraphs 2 to 4?

A. Yes I have.

10 Q. And you have prepared three statements of evidence, the first is that dated 17 December 2021, on plan architecture, a statement 18 February 2022 and a statement in reply 11 March 2022?

A. That's correct.

Q. And do you confirm that you've prepared all of those statements of evidence in accordance with the Environment Court's Code of Conduct?

15 A. Yes I do.

Q. And did you have any corrections to make to any of your statements of evidence?

A. Yes I have one correction to make to my statement of evidence dated the 18<sup>th</sup> of February 2022, at paragraph 140A.

20 Q. Could you just please read the correction into your evidence?

A. In 140A I refer to the Auckland Unitary Plan Provisions requiring resource consent for earthworks. That statement is correct; however, it relates to the District Council functions that Auckland Council has, and it should instead retain "2,500 square metres", but delete "1,000 square metres" and replace it with "10,000 square metres". There is a reference to a footnote relying on Table E(12.4.1) which should be E(11.4.1).

25

Q. And other than that correction, do you confirm that your three briefs of evidence are a true and accurate record of your evidence?

A. Yes I do.

30 Q. Now, your Honour, Ms Boyd has prepared a summary, obviously this doesn't reflect Ms Hunter's evidence from this morning but I was proposing that she still might read that summary. Given she's done the three different statements we thought it might be helpful to try and draw some of that together. So if that's acceptable, Ms Boyd will just read that.

**THE COURT: JUDGE STEVEN TO MS DE LATOUR**

Q. Yes, and I wondered, it's open to you but I wondered whether you wanted to lead any evidence from her in light of her reading of that supplementary statement from Ms Hunter, it's over to you but I have no objection if that's what you wanted to do.

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A. I did also flag yesterday, I just wanted to lead some evidence in relation to Mr Watts' submissions on the matters of discretion, but I think if we have Ms Boyd read her statement and then I can deal with...

Q. Thank you.

10 **EXAMINATION CONTINUES: MS DE LATOUR**

Q. Please if you could read your summary.

**WITNESS READS SUMMARY STATEMENT OF EVIDENCE****SUMMARY OF EVIDENCE**

15 1 My name is Felicity Ann Boyd. I am an Associate with Incite, a planning consultancy.

2 The purpose of Plan Change 8 (PC8) to the Regional Plan: Water for Otago (RPW) is to improve the management of specific activities likely to be adversely affecting water quality in Otago while a new regional plan is prepared that gives full effect to the National Policy Statement for Freshwater Management 2020 (NPSFM 2020).

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3 Water quality is degraded in some parts of Otago, particularly in terms of sediment and bacterial contamination (E.coli) but also, in some places, nutrient concentrations. For the past decade, the Otago Regional Council's (ORC) policy position has been to manage the discharge of contaminants to water rather than the uses of land that lead to those discharges occurring. This is the basis for the RPW and the management regime it contains. It has become apparent in recent years that this has not addressed the water quality issues experienced in Otago and that there are significant implementation issues with some of the RPW provisions.

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4 The Council resolved to prepare PC8 in August 2019 and work commenced immediately on its development. PC8 was "called in" by

the Minister for the Environment on 8 April 2020 and referred to the Environment Court for decision under section 142(2) of the RMA. The plan change was then notified by the Environmental Protection Authority on 6 July 2020. A total of 96 submissions and 12 further submissions were made on PC8. The NPSFM subsequently came into effect on 3 September 2020.

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5 Part of Part A,1 and all of Parts G and H, are known as the “Urban provisions” and are the subject of this hearing, although I understand that the Court has indicated it does not need to be addressed on  
10 Parts A and H. The other parts of PC8 have already been heard and decided by the Court. Mediation occurred on the Urban provisions and for Parts A and H a mediation agreement was reached by all parties. For Part G, the majority of parties reached agreement but there remains one unresolved 1 Amendments to Policies 7.C.5 and  
15 7.C.6, and new Policy 7.C.12. 2 matter: whether the PC8 rules should apply within the Queenstown Lakes district.

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6 My first statement of evidence (dated 17 December 2021) sets out the background to PC8 in its entirety, including both the regulatory and environmental drivers for its development. In that statement, I  
20 assessed the Urban topics against the relevant higher order planning instruments and outlined the linkages of PC8 with the RPW as well as within the relevant parts.

20

7 My second statement of evidence (dated 18 February 2022) addressed: (a) The outcomes to be achieved by the remaining part  
25 of Part A, and Parts G and H, of PC8, (b) The submissions on those provisions (including recommendations for decisions on submissions), and (c) The proposed amendments and supporting reasons (including an evaluation under section 32AA where necessary).

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8 My third statement of evidence (dated 11 March 2022) was prepared following joint witness conferencing with Ms Claire Hunter on behalf of Willowridge and Remarkables Park and Mr Murray Brass on behalf of the Director-General of Conservation. There are many agreements between us recorded in the Joint Witness Statement, however

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ultimately there remains disagreement on whether Part G of PC8 should apply within the Queenstown-Lakes District.

- 9 It is agreed by all witnesses that the responsibility for the regulation  
of discharges under section 15 of the RMA lies with ORC. What is in  
5 dispute is whether PC8 is the most efficient and effective way for  
ORC to exercise its functions or whether the provisions of the  
Queenstown-Lake District Council's (QLDC) Proposed District Plan  
(PDP) can be relied on to manage the land use component. In my  
opinion, separating the management of the land use from the  
10 management of the discharge as the RPW has historically done for  
earthworks has not been effective at achieving the objectives of the  
RPW or in maintaining water quality. It does not reflect the integrated  
approach required for managing freshwater by Policy 3 and clause  
3.5 of the NPSFM. As demonstrated by the evidence of Ms Melanie  
15 Heather, it also makes compliance and enforcement action difficult.
- 10 I acknowledge that there will be additional costs for developers where  
resource consents are needed from both QLDC and ORC. I do not  
consider that is inherently inefficient, rather it reflects that the two  
regulatory bodies have different functions, and both are required to  
20 be exercised in order to achieve the purpose of the Resource  
Management Act 1991 (the Act). It is apparent from the evidence of  
Ms Heather and Ms Kerstin Strauss, as well as the legal submissions  
on behalf of QLDC, that there is significantly engagement and  
collaboration between the two councils in order to reduce inefficiency  
25 in the processing of resource consent applications and monitoring of  
consent conditions.
- 11 While PC8 does not, on its own, give full effect to the NPSFM 2020,  
I consider that the plan change is an appropriate and necessary  
response to the need for an interim planning regime that allows ORC  
30 to address ongoing degradation of water quality while preparing its  
new land and water regional plan which will give full effect to the  
NPSFM 2020. I consider that the amendments canvassed in my  
second statement of evidence broadly seek to improve the  
implementation of the provisions (and therefore their efficiency) and

better align their content with higher order documents. In doing so, I consider that the amended provisions continue to achieve the purpose of the Act and are the most appropriate for achieving the objectives of PC8 as set out in the section 32 report.2

**5 EXAMINATION CONTINUES: MS DE LATOUR**

Q. Thank you Ms Boyd. Just as I signalled before, your Honour, Ms Boyd you've considered Mr Watts' legal submissions haven't you, and in particular the points he made around the clarification on some of your evidence in terms of the matters of discretion under the Chapter 25 provisions versus under the proposed PC 8 rule framework?

A. Yes I have.

Q. And in that statement, he contends that the matter of discretion are essentially aligned, and this, whilst not a major point, I just wondered if for the Court's benefit if you could clarify your view on that in light of Mr Watts has said?

A. Sure. I'm aware in the common bundle there are two different versions of the Chapter 25 provisions and I just wonder if someone can confirm for me which version is the most up to date.

Q. I think you should be using the version under tab 9 which is dated, the annotated appeals version, February 2022 which Mr Watts confirmed yesterday was the most up to date version.

A. Thank you. I don't think it's the tab 9.

Q. Yes. It's tab 12.

A. Yes I note that in the Chapter 25 provisions there are matters of discretion to which the council's discretion is restricted in respect of restricted discretionary activities but the plan also contains assessment matters. I note that in the introduction of the chapter, there are instructions on interpreting and applying the rules, which clarifies at 25.3.2.3 that for restricted discretionary activities the council has restrict the exercise of its discretion to the matters listed in 25.7. Matters of discretion. The matters in 25.7 include a list at 25.7.1 of matters for earthworks resource consents which includes, as I pointed out in my reply evidence, 25.7.1.6 cultural heritage and archaeological sites. I see in the table below which I

understand to reflect the consent order issued, that and “archaeological sites” has been struck out, leaving only “cultural, heritage” – I’m unsure what the scope of that matter of discretion is, based on that amendment, however my point is that even if you consider that the assessment matters in 25.8 which are in some respects different particularly on that point, even if you accept that the assessment matters can be considered in addition to the matters of discretion, the matters that are listed under cultural heritage and archaeological values in 25.8.7 are still predominantly focussed on particular sites of cultural significance, including Wahi Tapu, Wahi Taonga, statutory acknowledgement areas and cultural heritage. In my opinion, that is a narrower focus than the matter of discretion in Plan Change 8 which allows for consideration on Kai Tahu cultural and spiritual beliefs, values and uses, and it is not restricted only to sites. I also consider that although the matters listed in the assessment matters for water quality provide some substance to the matter of discretion. I still consider that there are matters listed in schedule 1 of the Regional Plan (Water) that the QLDC would not be able to consider under the matter of discretion and in particular the schedule 1 contains the natural and human use values which are extensive, and it’s not clear to me that all of those would be able to be considered by QLDC under that matter of discretion and I would note in particular the effects on drinking water supplies which under the NES for human drinking water is a regional council function in relation to discharge permits.

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25 Q. Thank you for that clarification. In terms of Ms Hunter’s new rule that you’ve had an opportunity to review this morning, I suspect that Mr Matheson will be questioning you on this, but perhaps your Honour you are happy, Ms Boyd could just outline her views on the rule at the outset now, and obviously I’m sure Mr Matheson will test that further with her. So if you, Ms Boyd, could just please outline your comments on the rule as it stands.

30 A. Sure. As a general statement I would say that it appears that the permitted activity rule proposed by Ms Hunter is establishing a pathway whereby the effects of an activity can be assessed by ORC and in, sorry,

the assessment of mitigation measures can be assessed by ORC through a permitted activity framework. In my opinion when you're managing an activity that requires oversight and consideration of mitigation measures as well as adverse effects, generally the most appropriate way to do that is through a resource consent framework is where the costs of that assessment can be borne by the applicant using the resource rather than the general ratepayers of Otago, most of whom are not located in the Queenstown Lakes District. Some more specific matters that I would like to touch on are that I am not convinced that permitted activity condition B provides ORC with the ability as Mr Hunter states to decline to certify an erosion and sediment control plan on the basis of the mitigation measures being ineffective. I note that the erosion and sediment control plan is required to identify a list of matters and (iv) includes the type and location of measures. In my opinion, identifying the type and location of measures doesn't provide for an avenue for ORC to determine whether those measures are effective or appropriate; it's simply an identification exercise through the erosion and sediment control plan. There was some confusion I noted in Ms Hunter's statement at paragraph 17, she states that if the ORC consider that the ESCP to be inadequate for any reason or the site was likely higher risk for a discharge then they could use the submission of the ESCP as a platform to then require a consent under the existing Water Plan discharge rules, but I note in schedule 1 that Ms Hunter is also proposing a restricted discretionary activity which is not part of the Operative Regional Plan. I also note in that paragraph, Ms Hunter refer to ORC enforcing a separate discharge consent under Rule 12.c.1.1 so I am unclear whether the permitted activity rule proposed by Ms Hunter which purports to manage both the use of land and the associated discharge is as a replacement of 12.c.1.1 or in addition to that rule. I will also note that Ms Hunter has proposed some amendments to the restricted discretionary activity rule proposed by the council and the matters of discretion in that rule. she proposes to remove Clause A which she considers more appropriately covered by the Queenstown Lakes section 9 consent and to make other amendments to restrict the consideration by ORC to the effects of the discharge. However, the

chapeau of the rule continues to manage the use of land and the discharge, so I am unsure why if the council is granting a land use permit and a discharge why it would need to restrict its discretion only to the effects of the discharge. The biggest difference that I note is that the proposal is to remove the area threshold that is currently in the council's permitted activity rule on the basis that applicants would have resource consent from QLDC and the Chapter 25 provisions which do contain an area threshold but I guess I am unsure how that changes the application of this permitted activity rule in comparison to the council's permitted activity rule in terms of whether it captures more or fewer sites. I presume it catches fewer.

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Q. I just had one further question, Ms Boyd. in terms of that you talked about a matter of discretion, A, and its appropriateness for the combined land use and discharge rule. What would your view be on that matter of discretion even if it was just the discharge rule?

20  
25  
A. Matter A relates to erosion, land and stability sedimentation or property damage resulting from the earthworks activities. I note that s 30(1)(c)(4) of the RMA allows the regional council to control the use of land for the purposes of avoiding or mitigating natural hazards. Natural hazard is defined in s 2 of the RMA as any atmospheric or earth or water-related occurrence including land slips, subsidence, sedimentation and flooding, the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment. In my view, that is squarely within the functions of the regional council under s 30 and I consider that those activities arise from the discharge occurring, so whether it, whether the rule is restricted only to discharge or whether it includes the use of land, in my view sedimentation and land instability and erosion result from a discharge.

30  
Q. Ms Boyd, did you have any other comments you wanted to make on the rule at this point in time?

A. Only that the amendment sought in E, I consider considerably restricts the scope of ORC's consideration. The wording proposed by the council is "any adverse effect on Kai Tahu cultural and spiritual beliefs, values and uses". That's not only arising from the discharge but also the related



land use component, and I haven't seen any evidence from Ms Hunter about how that continues to give effect to the NPSFM or considers the provisions of the relevant iwi management plans.

Q. Thank you, Ms Boyd.

**5 CROSS-EXAMINATION: MR MATHESON**

Q. Good morning. So can we just, there's a couple of general principles, so do you agree that rules should be risk-based, from a policy planning perspective?

A. In terms of...

10 Q. Riskier activities should have more stringent rules.

A. Yes, I agree.

Q. And do you agree that there would be more justification for a rule that has a greater environmental effect?

A. Yes I agree.

15 Q. Do you agree with the proposition that's been expressed in some recent court cases that from a policy planning perspective you should apply the least environmental regulation necessary to achieve the desired environmental outcome?

A. My view is that the appropriateness of a provision should be assessed  
20 using the tests of s 32 which does not refer to least regulation.

Q. Well, as a matter of law that's how it's been interpreted. So you don't, you don't think that s 32 essentially requires the rigour of applying the least onerous environmental provision in order to achieve an outcome?

A. I consider that s 32 requires an examination of the efficiency and  
25 effectiveness of a provision in achieving the outcome sought

Q. Well, don't you think a more efficient and effective outcome would be one that achieves the outcome with the least regulation?

A. I'm not convinced that efficiency is only a matter of the degree to which an activity is regulated.

30 Q. To the extent it does relate to the extent an activity is regulated, you would agree with me?

A. I agree that the degree of regulation is a matter to consider within an efficiency examination. But that it's not the only consideration.

Q. Have you had any specific consenting experience?

A. Little consenting experience, I have predominantly been involved in policy planning.

5 Q. Can I ask you to turn to the RPS 2019 so that's in the common bundle volume 1 to 3, tab 7.

**WITNESS REFERRED TO RPS 2019**

A. And you are referring me to the Partially Operative Regional Policy Statement?

Q. Yes, the 2019 version, yes.

10 A. Yes.

Q. So if can just, just as a matter of principle, you agree that this should have greater planning weight than the 2021 version, don't you?

A. I consider that that's what the legal tests require, yes.

15 Q. Can I take you to Method 2, so it's 2.12 which is at common bundle, you might be able to find it quicker than me.

1115

**WITNESS REFERRED TO BUNDLE, PAGE 8**

A. Page 8, CB0607.

20 Q. Yes, that's right. So I'll check everyone is there, probably well ahead of me. So Part C is the implementation section of the RPS, so that tells people who does what, correct?

A. Yes.

25 Q. Okay. Method 2 and 2.1.2, talks about the Regional City and District Councils will work together to ensure plan provisions are complimentary for overlapping or abutting responsibilities.

A. That's correct.

Q. Do you agree that would regard QLDC and ORC to work together in respect of earthworks and discharge of sediment?

A. Yes, I do.

30 Q. In terms of 2.1.3, do you agree that applying an integrated management it requires them working together to apply an integrated management to address relationship between land use and freshwater relevantly? So that would be directed towards management of sedimentation, would it?

- A. The method reads that Regional City and District Councils together will apply an integrated management approach. It does require working together in the same way that 2.1.2 does.
- Q. But collectively they do, right? The RPS envisages that City and District  
5 and Regional Councils will work together to achieve environmental outcomes.
- A. As a general principle, yes. But that's not what the specific wording of this method you've drawn my attention to says.
- Q. 2.1.2 does, doesn't it?
- 10 A. It requires working together to ensure plan provisions are complimentary for overlapping or abutting responsibilities.
- Q. Do you agree the two rules we're talking about today involve overlapping or abutting responsibilities?
- A. Yes, I do.
- 15 Q. So can we then go 2.2, over the page to 608 and at 2.2.3 one of the specific measures is the delegation or transfer of any more or one of the functions powers or duties from one local authority to the other in accordance with s 33. Do you agree as a matter of planning policy this is a situation where either the ORC or the QLDC could transfer  
20 responsibilities to the other under s 33 of the Act?
- A. It's always open to Councils to use the provisions of s 33 in their planning, in the exercise of their planning functions. I don't consider it was a practicable option in the context of Plan Change 8 because of the interim nature of the plan change.
- 25 Q. Why should that make a difference?
- A. In my experience transfers of function under s 33 are not quick processes. There is a lot of discussion that needs to occur between Councils about administrative matters, logistics, funding, that type of issue. This plan change was notified to be an interim or short-term solution to an issue  
30 and I don't consider that spending the amount of time necessary to transfer functions would have been – would have addressed the somewhat issue of water quality degradation.
- Q. You don't know how long the Plan Change 8 rules are going to be in force, do you?

A. No.

Q. And you don't know how long it would take the Regional Council to transfer a very discrete function to the ORC or vice versa, do you?

5 A. I have 10 years' experience of working in and with local Councils and in my experience those types of processes are not speedily executed.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (11:19:14)**

Q. Mr Matheson, we can't direct the Regional Council to transfer any of its functions to the District Council. I'm not sure that this question, line of question has any relevance.

10 A. No, I've finished thank you. I was just putting it on the table.

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

Q. So can we then go to method 3. So just in terms of these methods, so method 3 deals with Regional plans?

A. Yes.

15 Q. And then method 4 deals with City and District plans, correct?

A. That's correct.

Q. So at 3.1.4 refers to policies 3.1.7 and 3.2.18 by including provisions to manage adverse effects of land use on soil and protects significant soil. By all means go to them if you need to, but would you agree with me that they relate to the health and versatility of soils as a productive natural resource as opposed to earthworks?

20

A. Yes, that is the ... yes, I agree.

Q. And then in terms of that particular policy, that doesn't refer to policy 3.1.8 obviously, does it?

25 A. Do you mean the method?

Q. That method, sorry, yes.

A. Yes, that's correct. There's no reference to policy 3.1.8.

Q. There's in that method 3 section that directly requires a regional plan to address sedimentation from earthworks, is there?

30 A. Method 3.1.3 refers to policies, the implementation of policies 3.1.1 and to 3.1.5 and I note that policy 3.1.1 is related to safeguarding the life supporting capacity of freshwater and includes a requirement to maintain

good water quality and enhance degraded water quality and also to maintain or enhance aquatic ecosystem health and I note that in policy 3.1.3 concerns water allocation and use and directs to avoid over allocation resulting from discharges. Both of those policies are implemented by method 3.1.3 which at G requires the Regional Plan to maintain good water quality and improve it where it is degraded. So I agree that the method does not specifically refer to earthworks. However, in my view there is a clear direction that the Regional Plan should be including – must be including provisions to maintain good water quality and improve it where its degraded.

5  
10  
Q. And do you – but the discharge of sediment into a waterbody doesn't give rise to an over allocation, does it, that's a nitrogen issue or another, another issue, isn't it?

A. No, that's not correct. Allocation – over allocation as is used in the NPSFM refers to both quality and quantity and an over allocation of a waterbody can occur by way of a discharge of sediment.

15  
Q. So then turning to 4.1.5 and I gather you were in the Court yesterday.

A. Yes, I was.

Q. So 4.1.5, so is this is what the City Council and District Councils are required to do by including provisions to manage the discharge of dust and silt and sediment associated with earthworks and land use. That is very directive, isn't it?

20  
A. I note that this is a subclause and at 4.1 is the beginning of the method which says that City and District Plans will set objectives, policies and – policies and methods to implement policies in the RPS as they relate to the City or District Council areas of responsibility. So in my opinion you need to read those two parts together.

25  
Q. What, so you're saying that including provisions to manage the discharge of dust and silt and sediment associated with earthworks and land use is not, is not a matter for QLDC?

30  
A. I'm saying that the method states that that matter – the direction in the method is to include provisions as they relate to the City or District Council areas of responsibility.

Q. So do you think there are some things in this list that don't relate to the City or District Councils area of responsibility?

A. I don't consider it's the City or District Councils responsibility to manage the discharge of sediment, no.

5 Q. Despite that's what it's clearly saying?

A. That's correct. The RPS can't direct a Council to undertake functions that doesn't have under the RMA.

Q. But it can manage the effects of sedimentation. There's nothing in there that says its permitting a discharge, is it?

10 A. Well permitting is a form of management.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (11:24:18)**

Q. Mr Matheson, can you be clear. Are you suggesting that by virtue of this that the District Council does have functions in relation to discharges of sediment onto land where it may go into the water?

15 A. Absolutely and –

Q. – so can you point to the provision of the Act that says that or are you just deriving it solely from your interpretation of this policy without qualifying that by the introductory words that Ms Boyd has referred to?

A. Well I'm happy to address that, your Honour. The heading is clearly *City and District Plans*. Regional plans are dealt with in the previous method. It seems inconceivable to me that there'd be aspects in here that weren't within the jurisdiction of the city and district. Otherwise why would they list it and –

Q. – well let's just proceed on the basis that those words are ambiguous. That could be sediment to – it could be a nuisance, a dust related nuisance associated with discharges of sediment. There's nothing there that says "into the water" and I'm going to be reluctant to base a decision on the – on the basis that as a matter of law the District Council does have functions in relation to quality of water under the Act by virtue of this policy. I'm not going to go there.

30

A. Okay.

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Q. Because I think that would be wrong as a matter of law. So I think that's a matter that you can tease out in your closing submissions and I'm not sure that you're going to get any further with this witness on what is essentially that legal question.

5 A. Thank you. And just for the Court's benefit I guess that was covered in the Court of Appeal's decision in the *Canterbury Regional Council* and we will come back to that in reply.

Q. Well you can come back to that but that's where, and I think some of the questions have been slightly imprecised in the sense of suggesting that there are overlapping jurisdictions. There are overlapping jurisdictions in relation to land use activities but there is no overlapping jurisdiction in relation to the regulation of water quality. That is purely a Regional Council function and so that proposition can only go so far in this specific context.

10  
15 A. Okay, thank you, your Honour.

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

Q. Can I just before we go off that one, at 5.2.2 can I just take you to that method.

A. Yes.

20 Q. City and District Councils will, in (b) when considering land use development or subdivision consent, share information with the Regional Council and any identified breaches to relevant regional rules including discharges to water, including or to land in circumstances which may result in the contaminant entering water. That gives a pretty clear direction for there to be an exchange of information between the QLDC and ORC, doesn't it?

25 A. Yes, it requires QLDC to share information with ORC.

Q. Can I now then take you to the NPSFM 2020, which has got some attention.

30 A. Which volume is that?

Q. Volume 2. Sorry, same, same page 325.

**WITNESS REFERRED TO BUNDLE, VOLUME 2, PAGE 325 (TAB 4)**

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (11:28:05)**

Q. So which one are you looking at?

A. 2020. So it's tab 4.

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

5 Q. And if we can start on the common bundle at 325.

A. Objectives and policies.

Q. Yes. So policy 3 I think you've referred to in your evidence. "Freshwater is managed in an integrated way that considers the effects of the use and development of the land on a whole of the catchment basis".

10 A. Correct.

Q. And then so integrated way, if we then turn to 3.5 *Integrated Management*, so that's on common bundle, 329.

**WITNESS REFERRED TO BUNDLE, VOLUME 2, PAGE 329**

15 Q. Just a couple of points. Firstly, 3.5.2. Directs every Regional Council to make or change its regional policy statement to the extent needed. That's, that clearly wouldn't include a regional plan, would it?

A. No, no.

20 Q. In terms of the next point. "In order to give effect to the National Policy statement local authorities that share jurisdiction over a catchment must co-operate the integrated management of the effects of land use and development of freshwater". In respect of erosion and sedimentation, do you agree that QLDC and ORC share responsibility in a catchment for the management of that activity?

A. Yes.

25 Q. Then turning over the page. "Every territorial authority must include objectives, policies and methods in its District Plan to promote positive effects and avoid remedy or mitigate adverse effects including cumulative effects of urban development on the health and wellbeing of waterbodies, freshwater ecosystems and receiving environments". That's very  
30 directive, isn't it?

A. Yes.

Q. That relates to water quality, doesn't it?

A. Yes, it does.



Q. And that's exactly what QLDC Chapter 25 does, isn't it?

A. It is part of what QLDC Chapter 25 does.

Q. Thank you. (I think we're pretty much done with that, so you can pop that  
5 down unless you need it.) I just want to go back in time now that we've  
covered off those two things. Just in terms of the timeline and apologies,  
I did see it in your evidence and I just can't remember the timing, when  
did you start at – when did we start to become involved in PC8?

A. "We"?

Q. Sorry, when did you start to become involved in Plan Change 8?

10 A. August 2019.

Q. Right. Right at the start.

A. Yes.

Q. Excellent. So just quickly whipping through the timeline then. So there  
was a reference I think in your earlier answer to Ms de Latour that the  
15 Regional Council had made a decision to, I can't remember what they call  
it, is it a decision to start work, on the Plan Change 8 in August 2019, is  
that right?

A. The Council, yes the Council decision was dated 14<sup>th</sup> of August 2019 and  
that – the Council confirmed that it wished to progress with a plan change  
20 and it set the scope of the plan change.

Q. And then Professor Skelton's report was received in October 2019?

A. That's correct.

Q. You held one workshop in November 2019 and one in 2020?

A. No, that's not correct unless you're referring to internal workshops with  
25 ORC?

Q. Yeah, that's internal.

A. Okay, yes, we held two internal workshops. One in November and one  
in January and then one with Council, but with Councillors also in  
January.

30 Q. And then legal review February 2020?

A. Yes.

Q. And then that was set out to the territorial local authorities in 2020?

A. There was also a workshop held in November 2019 with the territorial  
authorities.

Q. Is that described in your evidence?

A. It's described in the s 32 report at section 2.1.2.

Q. And so you worked through the proposed rules with all of the TLAs?

A. Yes, that's correct.

5 Q. Did Queenstown Lakes attend?

A. Yes, they did.

Q. And did they, what comments did they – did they support the rule at that stage or ...

10 A. Their concerns were about the matters of potential duplication and they were concerned as Mr Watts has described earlier about the potential that their District Plan would be considered inconsistent with the Regional Plan provisions.

Q. And, sorry, just so what was the date of the s 32 report roughly?

A. The 9<sup>th</sup> of April 2020.

15 Q. So what you discussed at that meeting went into your s 32 report? I think its part of your assessment, the meetings you held, the workshops you held was part of your assessment, was it?

20 A. The – there is a description of the consultation that occurred with the TAs in the s 32 report, but the s 32 report is not, it doesn't contain all of the work that was involved in the plan change.

Q. No, I appreciate that but you would have, you would have had regard to the things raised by the TLAs when you wrote your s 32 report?

A. That is correct, that was the purpose of the workshop.

25 Q. And I think it's, we'll come back to that s 32 report, but can I just quickly then take you to Professor Skelton's report. So that's attachment A to your evidences (so that's for the Court attachment A to Ms Boyd's first statement of evidence).

A. Yes.

30 Q. Is it, is it fair to say that the Professor Skelton's investigation in the report lit a fire underneath ORC?

A. I don't think that the conclusions drawn by Professor Skelton were a surprise to the Regional Council but certainly it was the first formal document setting out the issues with their planning framework.

Q. And I read Professor Skelton's report, as you would expect, Professor Skelton didn't talk to QLDC which surprised me. He didn't speak to any developers. Were you – I mean that's what it says in the appendix, I assume you're aware of that?

5 1135

A. Oh, I'm not familiar with Professor Skelton did or didn't do other than as it's described in this report.

Q. Right, okay. And then in the report, at page, if I can just take you to page 18, he refers there to a number of gaps in the Water Plan.

10 A. Yes.

Q. So this is the Operative Water Plan?

A. Yes.

Q. An inadequate approach to flow allocation and allocation limit setting, failure to recognise, address over-allocation leak divisions for aquatic biodiversity and habitat, a risk of adverse effects arising from the efficiency policy which seemed, so that's relating to use of water. There's nothing in there about sediment, is there?

15

A. Point 2 relates to overallocation which is defined in the NPSFM as including as both quantity and quality.

20 Q. And that's your basis. Is there anywhere else in the report where Professor Skelton mentions the ORC has a sedimentation problem such that it needs urgent action?

A. Professor Skelton's report was primarily based on the water quantity allocation issues in Otago and predominantly as you will be aware as a result of the deemed permits across Otago. I am aware that at the time that Professor Skelton was preparing his report the council had already agreed to progress plan changes regarding discharges.

25

Q. So this is, so just to be clear, so that's the water takes that deemed permits are expiring in 2031, something, anyway 35 years from 1991, whatever it is. Yeah, so that was that one, and then there was water take, there were some catchments that were quite that water allocation was a real problem, that was a focus of Professor Skelton's report as well, wasn't it?

30

A. The allocation of water quantity was a particular focus.

Q. Yes. Okay. So, but I mean other than your reference to overallocation potentially in one part there's no express recognition in Professor Skelton's report about sediment?

5 A. I would note on pages 28 and 29 there are summaries of the stakeholder perspectives on the adequacy of the current planning framework and particularly on the council's performance regarding planning for discharges of contaminants to land and water.

10 Q. And that's it. Okay. So let's go back then to your s 32 report. And then in terms of your s 32 report, so if we can start at common bundle 115, so that's tab 2 in the bundles 1 to 3.

### **WITNESS REFERRED TO WITNESS' SECTION 32 REPORT**

Q. And just quickly, so you were an author of the s 32 report. Were there multiple authors?

A. I was the primary author.

15 Q. Okay. And then I noticed like if I can take you for example to, so the way, so the just, I mean obviously we're interested in a relatively small part of it and in particular the 3.4.4, s 3.4.4 sedimentation to earthworks. So that was where you recorded your assessment of that proposed rule, correct.

A. Part G, yes including the policy rules and definition.

20 Q. Yes. Yeah. And in terms of if I then, just if we work our way through and then at for example if we can go to 114, common bundle 114 so this in respect of a grazing, good farming practice rule, so common bundle 114 at Table 10, there's a list of discounted options for good farming practices, so those were the options that you looked at and said are not worthy of  
25 further consideration.

A. Yes, that's correct.

Q. And that's important, isn't it, because from a transparency point of view people can see that you've actually thought about other options and explained why they were not being pursued?

30 A. That's correct.

Q. You didn't do that for the earthworks rules, did you?

A. No.

Q. Did you not think there were any other possibly reasonably practicable options that could be assessed?

- A. There was an, as described in my first statement of evidence, there was an issues and options paper prepared for each of the topics within Plan Change 8 including the sediment from earthworks topic, that was prepared in October and that paper assessed four options for managing the sediment discharges from earthworks, that included the status quo, non-regulatory option managing only the land use and managing through a combined land use and discharge rule. That issues and options paper was about 15 pages long and assessed the costs and benefits of those options. That was taken to an internal staff workshop in November. It did not make a recommendation on a preferred option, the options were taken to the staff workshop and staff from a different, a range of parts of the council discussed the various options and it was concluded at the, at that workshop that the option to include a combined land use discharge rule would best achieve the objectives of the Plan and of Plan Change 8.
- 5
- 10
- 15 Q. And give effect to the RPS 2019, that was a key part of the discussion, wasn't it?
- A. I don't recall the RPS 2019 being a key part of that discussion but certainly in my planning assessments I considered the provisions of that document.
- 20 Q. Because you're obviously, yeah, regional planning has to give effect to a regional policy statement.
- A. That's correct.
- Q. So it's a key part of an assessment under s 32.

#### **THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON**

- 25 Q. Well, let's just hold it there. If you're suggesting that there is specifically discussion in the s 32 report on that point, then you can point to it, because that, the question has to be that precise. Ms Boyd said what her views are on the adequacy of the 2019 Regional Policy Statement in giving effect to the NPSFM and we have to deal with that and but I don't want you to put a proposition to this witness if there's no basis for it.
- 30
- A. Thank you, your Honour. That's fine. Yeah, it's covered. I think it's covered. I'll ask one more question on that.

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

Q. The issues and options paper's not in your evidence, is it?

A. No that's correct and I accept that it is an oversight that a similar table was not included in the s 32 report.

5 Q. But you agree there are other reasonably practicable alternatives that could have been considered or were considered.

A. There were other options considered. In my opinion they were not practicable because they didn't achieve, they didn't address the issues that the council sought to address with Plan Change 8.

10 Q. But there's no transparent discussion of that in the s 32 report?

A. That's correct, it doesn't appear in the s 32 report because that report focusses on assessing the practicable options.

Q. Which was one.

A. No, there are two.

15 Q. Well, the status quo or your new one.

A. That's two.

**MR MATHESON ADDRESSES THE COURT – APROPRIATE TIME**

(11:43:48)

**COURT ADJOURNS: 11.44 AM**

20 **COURT RESUMES: 11.58 AM**

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

Q. Just, can I please just ask you to go back to the s 32 report, just in fairness, at tab 2, common bundle 153.

**WITNESS REFERRED TO BUNDLE, PAGE 153 (TAB 2)**

25 Q. And I was asking you about the proposed, the 2019 RPS and the method 4.5. Can you just confirm that that is the paragraph, the first paragraph under the Table of CB153, that addresses/confirms the answer you gave me in questions about whether the Plan Change 8 gives effect to the RPS, and the second question is I take it that the RPS 2016 is now the  
30 RPS 2019?

A. On the second question, yes, that's correct.

Q. So that should read, for the purpose of the record that should read 2019 RPS?

A. Yes.

5 Q. And you say there, "The plan changes are considered give effect to proposed regional policy statement 2019 as inserted with one exception". Commences at one – 4.1.5. Correct? And that explains why ...

A. Yes, its – its somewhat unclear I guess because that method is relating to District Plans not the Regional Plan but ultimately I think this paragraph reflects my view which I've stated before that there is a division in responsibilities between the Regional Council and TAs in respect of earthworks.

10 Q. Now and thank you for your answers this morning, and I do apologise for not getting this to you earlier and I do understand times are busy in the morning, so I just – I won't necessarily cover off all of the matters that you discussed this morning, thank you for that, but if I can just ask you to turn to the alternative rules for this, Schedule 1 of Ms Hunter's evidence.

A. Yes.

15 Q. And I just want to quickly sort of take you through these various bits so that I can make sure we'll all on the same page.

20

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:01:00)**

Q. Sorry, is this the supplementary evidence?

A. Yes, sorry. Supplementary evidence Schedule 1, alternative rule.

**CROSS-EXAMINATION CONTINUES: MR MATHESON**

25 Q. The next alternative rule. So just confirming that you understand this would just apply within the Queenstown Lakes District? This rule. This is just for the Queenstown Lakes District, you understand that's the intention?

A. It relies on having resource consent granted by the QLDC so, yes, it would necessarily be restricted to the QLDC area.

30

Q. And so the Plan Change 8 provisions could apply if the relief sought by my clients is accepted, the ORC PC8 rules would apply everywhere else, this would just apply in the Queenstown Lakes District?

A. Yes.

5 Q. And the – and you can only use this rule if you have a consent under Chapter 25 of the QLDC Plan, so if you don't have a consent for earthworks you can't use this rule, you'd have to use the normal rule. Do you understand that?

A. Which is the normal rule?

10 Q. Well the rule that applies to every situation other than when you have a resource consent under Chapter 25?

A. So is that the rule as proposed by Plan Change 8 or –

Q. – yeah –

A. – the existing 12.C.1.1 –

15 Q. – well, no. Sorry, I won't interrupt. So this is proposed as an alternative to sit alongside the ORC's rules. This rule would apply in the Queenstown Lakes District for people that have a Chapter 25 earthworks consent. If for whatever reason people don't get a Chapter 25 earthworks consent they would need to apply under the whatever comes out of this process, under the PC8 rules. So do you understand that as a concept?

20 A. I just want to check that I'm understanding you. If a – if a person holds a resource consent for earthworks under Chapter 25 then they are within the scope of this rule.

Q. Yeah.

25 A. If they don't hold an earthworks consent granted under Chapter 25 they are then managed under the non QLDC permitted activity rule proposed?

Q. No, this would be under the PC8 rules which will – sorry, I misspoke before. The PC8 rules as proposed by ORC would apply everywhere in Otago including Queenstown Lakes District Council. This provides an alternative consenting pathway or permitted activity rule within the QLDC district for people who have a QLDC consent, so its overlapping, so underneath rules apply everywhere just in QLDC and if you have a Chapter 25 consent there may be an opportunity to go through a

30



permitted activity rule and avoid the duplication, so do you understand that as a concept?

A. Sure, yes.

5 Q. And the first standard of the permitted activity rule is that the consent is not being lapsed, surrendered or expired. That would be obvious to you. it's got to be effective if its going to serve its purpose. The second point is an erosion in sediment control plan has been submitted to and certified by the Otago Regional Council and I'll say at the outset I appreciate the ORC's legal position on this, and I appreciate the perspective you put in  
10 your reply submissions, so we don't need to go back over that, but on the basis that this was accepted as being lawful and wasn't included, I just want to talk you through sort of how this might work. So someone has a QLDC consent, as part of that they will have an erosion sediment control plan, correct?

15 A. Correct.

1205

Q. They would then say, "Okay, we need an ORC consent" and they would then go, "Okay, here's our erosion and sediment control plan, ORC are you happy with that erosion and sediment control plan?" If the ORC says,  
20 "Yes, we are happy with it", that in concept could be permitted activity and there's more detail to it but that's – so in order for it to be a permitted activity ORC or potentially a suitably qualified experienced person, the SQEP, because as I understand it or correct me if I'm wrong, I understand that QLDC and ORC are potentially, you know, for bigger sites they'll  
25 contract it out to a specialist earthworks erosion and sediment control person.

A. I'm not involved in that side of the...

Q. Right, okay. Anyway, that's the SQEP but so an erosion and sediment control plan would be presented to ORC and they would say, "Look, this  
30 is our ORC, this is our QLDC erosion sediment control plan and it includes all of these things. We're giving it to you so that you can either certify it or not certify it. If you certify it, then and provided we comply with everything else we're a permitted activity." If for whatever reason ORC

just say 'We're not certifying it', then you need to move to the next rule.  
So do you understand that as a framework?

5 A. I'm not convinced that what you're describing now is what the rule requires. You mentioned that if ORC was happy with the erosion and sediment control plan, it's not my reading that, that's a level of discretion that I'm not sure is provided for in Standard B. The certification appears to be related to, that the plan identifies various things.

Q. Yes, including how the standards in D to I will be met by any discharge from the site.

10 A. Yeah, but that's only identifying, there's no...

Q. Well, identify how it will be met.

A. Yes, I'm not convinced that that allows the council a discretion.

15 Q. So, okay, well let's do it this way. In concept, do you understand the framework that we're proposing, in terms of the presenting of one erosion and sediment control plan to ORC consents team who can then look at it and go, "Actually, this is 150 page document, we're very satisfied after, you know, on the basis that all of these will be complied with that the discharge of sediment will not result in the production of conspicuous suspended sediments or a change in visual colour or clarity or emission, or objectionable odour" (that's probably less relevant), so do you agree that from reviewing that erosion sediment control plan, a council, ORC consents person, could use that erosion sediment control plan to check off the permitted activity standards?

20 A. Well, first of all, I'm not sure that that's a function of the consents team, because by virtue of their function they don't deal with permitted activities, so it isn't clear to me who an ORC would be undertaking this certification and it may be that it's compliance officers that would be better placed to make that assessment. I'm still not convinced I guess that the level of discretion you're describing but in saying that, I agree, I understand in principle the intent of this provision.

30 Q. So the intent is that you prepare one erosion sediment control. If it's the Rolls Royce version under Chapter 25, it's given to ORC. ORC looks and says actually that's got everything we would have wanted in it anyway, we are happy to certify that that will address the issues of concern to us.

And that, if I just finish there, that would avoid the need for a resource consent, wouldn't it, if it was a permitted activity it would avoid the need for a separate resource consent, wouldn't it?

5 A. If you can do that as a permitted activity, then yes it would avoid the need for a resource consent - a second resource consent, I should say.

10 Q. Yes. And that would provide, that level of detail in an erosion sediment control plan approved under Chapter 25 would provide a great deal more detail in terms of things like soil or debris from earthworks is not placed where it can enter a waterbody, drain or race, earthworks will not result in flooding, erosion, subsidence; discharge of sediment does not result in any of the following effects. It will give the councils, whoever at the ORC is certifying it, a very good information base to ascertain whether the permitted activity standards are met, won't it?

15 A. I understand that erosion and sediment control plans are an important component of assessing the effects of an activity for earthworks. So yes, this would require much greater information provision to the council than under the proposed rules.

Q. Which will give the council a lot more certainty, won't it?

A. Certainty about?

20 Q. The environmental effect.

A. Sure. The more information the council has the better it can assess whether a standard is being met.

25 Q. And the erosion and sediment control plan would also identify things like monitoring and maintenance requirements, contingency events, and that could all be specified in there, and you'll see in roman numeral (c) the earthworks activity is carried out in accordance with the certified erosion sediment control plan, so that would give the council's compliance team an easy single one stop shop to assess compliance, wouldn't it, because as a permitted activity standard if that's breached then that's a breach of the RMA isn't it?

30 A. If the compliance officers were monitoring this permitted activity rule and they would only be able to do that insofar as they have funding provided by the general ratepayers.

Q. And other witnesses were asked this question. The regional council has a statutory obligation to monitor permitted activities, doesn't it?

A. It does.

5 Q. And having a single erosion and sediment control plan from a compliance perspective is a lot more efficient than having two, isn't it?

A. I guess it depends on the purpose of those documents. I understand from I think it was Ms Heather's evidence yesterday that generally one plan is already being prepared.

Q. So this rule would match what's currently occurring.

10 A. Well, not match it, no. One, from what I understand from the evidence of Ms Strauss and Ms Heather, applicants are preparing one erosion and sediment control plan generally, and then submitting that as part of their resource consent applications to QLDC and to ORC.

Q. So the only difference is the need for another consent?

15 A. The difference is that the ORC is, can assess that erosion and sediment control plan under its plan provisions and determine whether the measures in that plan are effective or not, and either decline or grant the resource consent.

20 Q. That could form a basis for the certification though, couldn't it, those exact same parameters?

A. Well, firstly I'm not convinced, I remain unconvinced that this provision as drafted allows for that level of discretion, but also essentially it appears to me that this is not dissimilar to a resource consent application whereby a large volume of information is provided to the council and the council is expected to assess that information, and come to some kind of conclusion. The difference to me, I suppose, is that drafting aside, fundamentally this type of process has to be funded by the general ratepayers who predominantly are outside the Queenstown Lakes District Council, whereas under a resource consent the applicant and therefore the user of the resource bears the cost.

25

30

Q. So your main concern is the funding?

A. No, that's not my main concern. It's one of my concerns.

Q. So what's the other concern?

A. I don't think that this is an effective rule.

Q. Because of the drafting?

A. Because it doesn't, it purports to allow, what you're describing in terms of the discretion that it provides is not evident to me in the drafting, and if that discretion is provided then I question whether it's appropriate to be included as a permitted activity rule.

5

Q. Well, we'll leave that for reply. So you couldn't, you couldn't - leaving aside the legality point, you don't think it would be possible to draft a rule that would require or would allow a scenario where the ORC could assess an erosion sediment control plan to help it form a view as to whether the permitted activity standards would be met?

10

A. In my experience, there are difficulties with relying on management plans as conditions of permitted activity rules, and in my experience councils have tended to try and find a way to not rely on that management plan approach.

15

Q. By requiring a resource consent?

A. That's correct.

Q. So, I think you asked the question about whether it was a discharge only rule or a combined discharge land use rule, and just for your information and the assistance of the Court, the position, Ms Hunter's position, and apologies, it probably wasn't clear and it will be clarified in reply, is that from the developer's perspective we're agnostic as to whether it's a discharge only rule or a discharge and land use rule – a combined rule or a discharge rule, we're reasonably agnostic about it with this current proposal, because it essentially achieves the objective of the developers which is to have, if you've got an ESCP under the Chapter 25 rules, there is a permitted activity gateway if ORC are happy. And the developers are entirely happy however we word the wording. If ORC says we're not happy with that, we don't think that that activity that you're proposing and that control and that erosion and sediment control will meet the permitted activity standards dealt with below or deal with it satisfactorily, they can refuse to certify. The only option for a developer in that scenario is to apply for a restricted discretionary activity, isn't it, or to go under the other rules? Well, actually –

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25

30

A. – sorry, I didn't appreciate that was a question. What...can you...?

- Q. So if the ORC refused to certify a plan, an applicant would have to apply under the RDA rules wouldn't it, if they wanted to do the proposal.
- A. If ORC had the ability to not certify a plan, yes.
- Q. And in terms of the RDA rule – oh, just before we go off that, so are you aware that this rule would capture more activities than the ORC's proposed rule?
- 5 A. I'm not sure about that, I haven't seen any evidence about what it would capture or not.
- Q. Okay, well we can deal with that now. So, every resource consent under Chapter 25 that's granted.
- 10 A. Yes.
- Q. Gives you an opportunity to come under this rule.
- A. Yes.
- Q. You have to provide an erosion sediment control plan.
- 15 A. If you are applying for a resource consent.
- Q. No, as part of the permitted activity.
- A. Okay.
- Q. So this permitted activity rule is more onerous than the ORC's permitted activity rule because it doesn't require the provision of an erosion and sediment control plan. Do you agree with that?
- 20 A. (no audible answer 12:17:52)
- Q. The ORC's rule, permitted activity rule.
- A. Yes.
- Q. Doesn't require an erosion and sediment control plan, does it?
- 25 A. No, it does not, but it contains an area threshold that captures more properties than the corresponding area threshold in the QLDC Chapter 25 provisions.
- Q. Yes, which my friend will ask you some questions about so I won't steal his thunder on that, but leaving that aside, leaving that aside, and if you get a resource consent, if you don't need a resource consent under QLDC, then you can't rely on this permitted activity rule, can you?
- 30 A. No that's correct.
- Q. So you'd have to go through the normal pathway, the ORC.
- A. Yes.

Q. So if there was an activity not caught by QLDC rules, you don't need to worry that it would miss, fall through a gap because it would be caught by your general rules, wouldn't it?

A. Insofar as it complied with those conditions, yes.

5 Q. And then turning to the proposed RDA rule, so just for ease of reading, so the underlying, so the chapeau of that rule was essentially just redrafted to reflect it as an RDA rule rather than – an RDA rule reflecting the bespoke rule above, so it's an A rule, if you know what I mean?

A. Yep.

10 Q. Yep. So, as a framework, just leaving aside everything else, as a formwork if that was a permitted activity rule do you think that would be an appropriate form or framework for a restricted discretionary activity rule if you don't meet any of the permitted activity standards?

A. I think it's appropriate for an activity that doesn't comply with permitted  
15 activity standards to be classified as a restricted discretionary activity.

Q. Yep, and you'd need to meet all of the standards to be a permitted activity, wouldn't you?

A. Yes.

Q. So that includes the setbacks from the rivers, all of that, so you can't get  
20 to be a permitted activity just because you have an erosion and sediment control plan, you have to meet every single one of the permitted activity standards. Correct?

A. That's correct.

Q. And that will help minimise the risk further, won't it?

25 A. The risk of...?

Q. Environmental effects.

1220

A. Yes.

Q. So then turning to the restricted discretionary activity rule. In terms of the  
30 proposal in A, and I do understand your answer so I won't go back over that, but you agree though don't you, that this could be more accurately, well firstly do you agree that in terms of an answer I think you gave earlier that conditions can only be imposed in respect to matters to which discretion has been restricted.

A. Yes.

Q. And assessment of effects will assess the matters to which discretion has been restricted?

A. Yes.

5 Q. Like, you don't assess more than what's listed as your assessment process.

A. That's correct, there's a list of matters and you can only think about those things.

10 Q. Right, and from an AEE drafting perspective and efficiency perspective, it's efficient to have a specific list of matters and just address those in the AEE, isn't it?

A. Yes.

15 Q. So with that in mind, do you agree that if the proposal is to delete A, you've explained why you don't support that, which is fine, would you agree with me though that the primary activity of concern is a discharge activity in which case any erosion, land instability, sedimentation or property damage resulting from the discharge activity might more accurately reflect an ORC's concern. For example, if there was a stormwater outfall that undermined a bank downstream or something like that from an erosion and sediment control pond, is that the concern that you're endeavouring to capture in this rule?

20 A. No I think it's more general than that, you know, in a large rainfall event you could have erosion and sedimentation that's not a result of a discharge from a pond.

25 Q. So you are generally concerned about this, so in this rule, in this rule and as per assessed in the, and I think you mentioned in answering your question actually, I forgot to ask this, did you assess the natural hazard risk as part of your s 32 assessment for this rule?

30 A. I'd have to go back to the s 32 report and check. It certainly it was the sedimentation that ORC was primarily concerned about.

Q. Well, okay, in fact that's probably sufficient, and you'd agree that there are other rules around land stability and particularly covered by the QLDC ambit of responsibility, they'd be particularly interested in land stability and property damage, wouldn't they?



A. Yes.

Q. And from an integrated management perspective there would appear to be little benefit both of you assessing and imposing conditions on that, wouldn't there?

5 A. Well, I guess that goes to the question of these proceedings about how far you need to manage a land use in order to manage the discharge.

Q. Yep. And how to achieve integrated management?

A. That's correct. Noting that integrated management requires both councils to be exercising their functions.

10 Q. And then the last change which again I guess just explaining the rational and asking if this changes your view on it, is the concern that for an earthworks rule, matters of cultural significance, of sites etc will be dealt with by the District Council and I think you had a view on that; if the Court's satisfied that the matters relating to the earthworks itself on archaeological sites as Kai Tahu's cultural and spiritual beliefs, values and uses, do you agree that it would be appropriate to refer to any adverse effect of discharge from the site to more properly narrow down the scope in assessment, in the regional council consent application?

15

A. No, because the rule controls the use of land as well as the discharge, so I don't consider it would be appropriate to narrow the consideration of Kai Tahu values to only the discharge component.

20

Q. If the Court was satisfied that it could appropriately address what it needs to address for a discharge only rule, would you agree that that should be limited to effects of the discharge?

25

A. I am not a cultural expert and I am weary of commenting on behalf of iwi, however my understanding of Kai Tahu cultural and spiritual beliefs and values is that they are not, they do not tend to be focussed on divorcing land uses from discharges, and the Schedule 1D in particular speaks of concepts such as Māori kaitiakitaka, rakatirataka, and I am not convinced that those matters are restricted only to the discharge to water. In my view, it is evident from the evidence of the Kai Tahu witnesses that they are also concerned about the use of land.

30

Q. And our opinion is that there is no scope in the district QLDC rules to address that concern?

A. Not to the extent that I think Kai Tahu wishes that to be considered. The QLDC matters assessment matters are predominantly focussed on cultural heritage.

5 Q. Thank you. And last question. Given that this is in the coastal marine – no, given that this is in the Queensland Lakes District Council this rule would only, because this is an RDA rule that would just relate to activities in the Queenstown Lakes District council do you agree that we can delete the reference to the coastal marine area?

10 A. I appreciate that QLDC is some distance from the coastal marine area, but ultimately that is the receiving environment for activities occurring in the QLDC catchment in a lot of cases, most cases, so I am not sure that deleting that is necessary. In my mind, that matter of discretion encourages the consent authority to consider ki uta ki tai and the cumulative nature of these types of adverse effects.

15 Q. The cumulative effects are dealt with in D above, aren't they?

A. Yes they are.

20 Q. Can you imagine, can you envisage a situation, just thinking from an applicant's perspective, of doing a 2,000 square metre land use development in Wanaka and being asked to assess the impacts of sediment discharge from a sediment retention pond in the coastal marine area, how could they possibly even do that without spending an awful amount of money, and from a policy planning perspective do you think that's justified?

25 A. Well, first of all a 2,000 square metre development wouldn't require consent so it wouldn't be triggered by this rule. But I don't, I don't read this as requiring an assessment of, you know, the specific percentage of contribution of sediment from that activity to the coastal marine area and in my view it would be a broader consideration of what the water quality is in the coastal marine area and whether it is suitable for  
30 contact recreation or food gathering. I understand from the evidence of Mr Thomas that sedimentation in the coastal marine area and in estuaries particularly is an issue that is affecting those activities from occurring, and I think it's sensible for a consent authority to be thinking of those

downstream effects and the state of that downstream receiving environment.

Q. So, I will, and you may have answered the question, and apologies if so. So, from your, well I'll ask this two ways: one, do you agree that in an  
5 AEE has to assess the matters to which discretion is restricted, you can't just ignore them?

A. Yes.

Q. So there would require to be an assessment of the effects of a discharge on the coastal marine area some 300-odd kilometres as part of an AEE  
10 for an RDA constant from ORC that takes place in the Queenstown Lakes District?

A. That's correct, and I'm aware that the AEE requirements have a, what do you call it, a, they only have to be as large as they need to be to meet the requirements, so I think you would take into consideration that direction  
15 in Schedule 4. Is it Schedule 4? Yes, still Schedule 4?

1230

Q. Probably. Do you think it would be more efficient, given that this just applies in the Queenstown Lakes District to delete it from the criterion altogether?

20 A. It may be more efficient but I'm not convinced it's more effective.

### **CROSS-EXAMINATION: MR ASHTON**

Q. Good afternoon. You've agreed this morning that the rules in PC8 should be collaborated on a risk-base approach, is that correct?

A. I'm not sure that was my wording. I agree that rules should be risk – well  
25 rules can be risk based and it's a useful, its useful as a trigger for resource consent particularly.

Q. So then turning to those triggers for resource consent in terms of the way that the permitted activity standards in PC8 are proposed to operate, you agreed, didn't you, in the joint witness statement at paragraph 49 that  
30 there may be benefit to using a contiguous area of land instead of per landholding as the basis for the application of those standards as to what unit that would apply to.

A. I'd just like to find the joint witness statement.

Q. It's tab 19 of the evidence bundle, volume 3.

**WITNESS REFERRED TO BUNDLE, VOLUME 3 (TAB 19)**

A. Yes, I agreed that there may be benefits but that further consideration of the implications would be required.

5 Q. Yes. Do you agree that allowing multiple individual landholdings to undertake 2,500 metres squared of earthworks as a permitted activity when a larger landholding, potentially a much larger landholding would be restricted to undertaking the same 2,500 metre square is not an effects base response to the risk posed by earthworks?

10 A. Do you mean that you would add up the permitted earthworks and that they could in some cases exceed the volume of a consented activity?

Q. Yes, and equally the – a single set of earthworks on a larger landholding, that larger landholding could accommodate another set of 2,500 square metres far flown from the other, from the first set, in a way that wouldn't give rise to adverse effects?

15 A. In my view the difficulty with drafting permitted activity standards is setting an appropriate threshold for which greater scrutiny of an activity is required and in my experience it's not fool proof. These thresholds are never 100% reflective of the types of activities that are occurring. I do consider that the size of the area is a relevant consideration in relation to the effects but the potential for adverse effects. I don't agree that its not effects based.

20 Q. So do you consider then that it would be an effects base approach to have multiple approximate 2,500 square metre earthworks on sloping sites as a permitted activity whereas only one set of earthworks, 2,500 squares, on a flat site would be permitted. Which of those poses the higher risk?

25 A. That would require an assessment of the sites. There are more matters to consider when you're talking about risk than only the size of the site and the size of the earthworks being undertaken.

30 Q. All other matters being equal, in terms of the permitted activity standards, these are all occurring as permitted activities, which of those scenarios poses a greater risk?

A. I can't answer that question.

Q. What is the fundamental intent of having the rules, permitted activity standards, apply on a per landholding basis?

5 A. The Council needs, in my view the Council needs an area threshold as a relatively simple way of determining the sites that require a greater level of scrutiny through a resource consent process. And the Council needs a way to identify whether that area of land is – is – what that area of land is. The definition landholding that's used in the Regional Plan: Water which is adopted in the Plan Change 8 provisions set out the bounds of a site essentially, which dictate how this earthwork – this area threshold applies.

10 Q. Were you in court when I asked Ms Heather about how this would apply in practice for a compliance officer?

A. I was in court when you questioned Ms Heather about whether she could in person identify a contiguous area of earthworks, yes.

15 Q. Yes, so from a compliance perspective in terms of understanding what the area of earthworks is, it's not necessary for the rule to be based on per site basis, is it?

20 A. I guess that depends what you're intending to capture. In my view if you are relying the area being the – a contiguous earthworked area, that would encourage people to stage their activities in such a way that they would be multiple smaller areas of earthworks rather than one larger area which is not a particularly effectively way of achieving water quality outcomes.

25 Q. So then I take it from that answer that the intent of the per landholding approach is to really capture earthworks projects, individual earthworks projects.

A. Yes, that's correct.

30 Q. Yes. So perhaps a definition based upon earthworks projects would avoid the potential arbitrariness of a landholding approach whilst meeting the concern that you've raised about earthworks being artificially compartmentalised.

A. I don't think that relying on a contiguous area of earthworks is any less arbitrary than relying on the boundaries of Certificates of Title.

Q. Yes and so the alternative proposition that I've put to you is that, that the standards apply per project, per earthworks project.

A. I'm not sure what I understand what you mean by an earthworks project in that context.

5 Q. Well it's the activity which is sought to be undertaken. It is the project that the earthworks are for, the purpose.

A. Right, so if you had a 20-hectare site being subdivided for residential development the earthworks project to provide for the necessary infrastructure and roading, you would want, in my view you would want to consider the totality of those earthworks rather than one part at a time.

10

Q. Yes. And considering them on a project basis would enable that to be considered, wouldn't it?

A. If it's clear what the bounds of a project is.

Q. Yes, so that's a drafting issue, isn't it?

15

A. I'm not sure its simply drafting. In some respects this is a question about whether the trigger is about the – yes.

Q. I'd like to turn to now the issue of where a slope factor is appropriate to apply in the Queenstown Lakes District and picking up again the JWS at paragraph 47 of that, you stated that you were not opposed to a slope threshold applying in the Queenstown Lakes District if there is clarity and certainty about the application of the threshold in practice. Now just so that we're on the same page here, we're talking about an amendment to the permitted activity standard where the area would be 2,500 metres on a slope greater than 10 degrees and 10,000 square metres on a slope less than or equal to 10 degrees, is that correct?

20

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A. Sorry, I'm just checking my evidence.

Q. The standard is in the common bundle as well.

30

A. So it's a minor point but I understand that the Chapter 25 provisions are 2,500 square metres where the slope is 10 degrees or greater and that for slopes less than 10 degrees its 10,000 square metres.

Q. Right, and so that's clear, isn't it?

A. Yes.

Q. And so my reading of your evidence was that the issue around clarity and certainty of the application was about measuring that in the field, wasn't it?

A. That was one of my concerns.

5 Q. And in your evidence, paragraph 156, you compare two approaches to measurement of slope in the field. One under the proposed Southland Water and Land Plan and one under Regulation 26 of the MUS for Freshwater.

A. That's correct.

10 Q. And the Southland Water Plan uses an approach of measuring average slope over any 20 metre distance, doesn't it?

A. Yes, it does.

Q. Whereas the NES talks about slope across the paddock and that hasn't been defined in terms of the NES how that will be measured, has it?

15 A. The NES talks about the mean slope of a paddock and there is now further clarification on how to calculate that.

Q. Yes, and in your evidence you address that there's been some criticisms of that approach, not having a defined way to measure that and you detail that there's been a review process and the recommendation arising out of that is that a maximum allowable slope over any 20 metre distance would apply to the NES?

20

A. That's correct.

Q. And so that's the same approach that the Southland Plan adopts?

A. Yes.

25 Q. So if the Court were to prefer a slope factor for the Queenstown Lakes District Plan to align – sorry, for the Queenstown Lakes District to align with the District Plan, do you agree that that same approach, maximum slope over any 20 metre distance, should apply?

30

A. As far as I'm aware that is the clearest way to set out what is required in terms of measuring a slope but I don't think that approach is without uncertainties.

Q. And there's a degree of uncertainty in many of the proposed permitted activity standards in PC8, isn't there?

A. There is some degree of uncertainty in some of them.

Q. Often unavoidable, isn't it?

A. Well I'm not sure that its unavoidable. We should seek to avoid uncertainty as far as we can.

5 Q. Yes, as far as we can. So then turning to a different issue and you've answered some questions in relation to this from my learned friend Mr Matheson, its fair to say that a part of your concern about permitted activity rule is the inability for ORC to charge for monitoring of that, is that correct?

A. Do you mean in relation to Ms Hunter's proposed rule?

10 Q. Yes, the alternative which is promoted.

A. It's not so much the monitoring as the assessment required by or purported to be required by ORC in relation to the erosion and sediment control plan.

15 Q. So if it were possible for the costs of monitoring and review of that sediment and erosion control plan to be met by the developer under a permitted activity framework, that would address your concern in that regard, wouldn't it?

A. If it were possible it would address some of my concern.

20 Q. And do you accept that there's a legal issue as to whether or not that's the case?

A. Yes.

#### **RE-EXAMINATION: MS DE LATOUR – NIL**

#### **QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

25 Q. Good afternoon Ms Boyd. I'd like to just go over some of your concerns with the PA rule, the alternative PA rule, and just ask do you consider there might be a way of re-wording it to give you sufficient certainty that there would be adequate discretion to enable the Otago Regional Council to be satisfied that its concerns were being addressed?

30 A. I'm not convinced that a permitted activity condition can reserve the level of discretion –

Q. – no, sorry. Sorry, to interrupt but I'm coming onto that in moment. I'd just like to do this a step at a time if you don't mind, and what I'm asking



is do you think your concerns could be overcome by re-wording of the rule? Putting the legal issue aside just for a moment.

A. No.

5 Q. So what you're saying there's two issues. One, you don't think re-wording would be possible and then you're concerned about this reserving of discretion legal consideration. Would that be a fair comment?

A. Yes.

10 Q. I have to say I was interested in one of the key issues here is trying to minimise duplication and I know here that Mr Matheson is saying that there would be extra work for the Regional Council in checking the ESPs for a whole lot of activities that they wouldn't otherwise have done, so that's something we'll have to consider as well. If there is a way around those two issues you are concerned about, would it be a requirement that the ORC relied on the District Council to monitor the consent and would  
15 that be possible without a transfer of powers?

A. I think that's probably a question for Ms Heather. It appears that the Councils are sharing monitoring of resource consents currently and but ultimately I understand that when site visits are undertaken by QLDC officers the findings of those, those site visits are reported back to ORC as the consent authority, so I guess I'm – I'm not sure.  
20

Q. Okay, so but its working to an extent already so it may be a possibility?

A. It may be if there are no legal issues to overcome.

Q. In terms of this issue of the slope factor and the area of land, when you did your s 32 analysis and everything that goes with it, did you consider  
25 the area of 10,000 square metres and whether that would be acceptable from the Regional Council's point of view?

A. There was discussion in the Council workshop in November 2019 about what would be an appropriate trigger for resource, for requiring resource consent and there were a number of different area thresholds discussed.  
30 Ultimately the view of the compliance officers in particular at that workshop was that earthworks on, you know, a small number of residential sites tend to not be so much of a problem due to the size of the sites and, you know, the sometimes less intensive type of earthworking required in comparison to a large development for, you

know, a 100 Lots or whatnot and the threshold was arrived at as being a way to provide a permitted activity pathway for those smaller types of activities while requiring resource consent for larger activities where there is a greater potential for adverse effects.

5 1250

Q. Okay, so how would the Court address the issue of going from 2,500 to 10,000 square metres, we haven't had any evidence on that.

A. No. I'm not sure.

10 Q. Okay, thank you. You may have been in court yesterday when I was talking about the, whether the calculation of sediment from residential development included the visitor accommodation and retirement villages. Did you hear that question?

A. Yes I did.

Q. Are you able to provide me with enlightenment on that?

15 A. yes I understand you were referring to the building consent information that I included in my statement of evidence.

Q. That's correct.

A. Yes so I have investigated the Statistics New Zealand data and there are two overarching categories for building consents in that data set. There's  
20 residential buildings and non-residential buildings. Under residential buildings there are a number of sub-categories which includes dwellings, houses, townhouses, flats, retirement village units and apartments. The definition of houses includes batches, cribs, chalets. Non-residential buildings include hotels, motels, boarding houses and prisons, so I think  
25 where I have arrived on visitor accommodation is that that is a very broad term that encompasses different types of accommodation, and I think this is evident from the definitions provided in Mr Ashton's submissions in the context of the QLC here visitor accommodation is defined as those more commercial types of activities, hotels, motels and the like, whereas  
30 residential visitor accommodation is more your Airbnb, bookabatch type of activity where if you're getting a building consent it's probably categorised as a house or a townhouse or whatever it is, but then it becomes visitor accommodation by virtue of the fact that it's rented out for parts of the year, so I don't think the building consent data is

necessarily very helpful because I think it would encompass some types of visitor accommodation as residential and others as non-residential.

5 Q. Okay. From a resource management point of view, how significant is it that visitor accommodation is included in the definition of residential activity?

10 A. I think it's important in the context of Queenstown Lakes due to the amount of that type of development occurring, and I'm aware particularly of developments such as the Gibston Valley Resort which has a particular zone in the Queenstown Lakes District Plan and that zone provides for short term and long term worker accommodation, it provides for areas that are primarily residential, there's a real mixture of traditional types of visitor accommodation and what I understand is essentially the development of two bedroom houses which are restricted, which have their occupation by their owner restricted to a certain number of days per year and the rest of the year they are rented out as visitor accommodation, so I don't consider that the Plan Change ever intended to incorporate the likes of commercial development such as a new hotel or motel, but those resort type developments where there is certainly an element of visitor accommodation occurring sometimes within the same dwelling as a living accommodation essentially, I do think that the Plan Change was intended to capture those types of activities.

15 Q. Okay, look that's very helpful, thank you. At least it explains a few things, I'm not sure that it helps me with the answer at this stage, but that's good, thank you. Let me just check my other list of questions. One of the things that a relatively minor detail but the definition of suitably qualified and experienced person, there is a definition in PC8 at the moment for the rural provisions and I just wonder whether for the sake of clarity for everyone using the plan whether it might be appropriate to have such a definition in the plan and would there be any objection to that being the same as the District Council definition?

25 A. I don't have the District Council definition in front of me but certainly the content of the definition as it relates to the rural provisions is significantly different to the way the term is used here, so it certainly would assist in my opinion to differentiate between the different types of SQEPs.

Q. Okay, thank you. And depending on how this alternative rule comes out one of the things that I note is missing is an assessment of major risks, of the main risks, for example if it's downstream of a large catchment where large flows can come through, is that something that you would see as prudent from a consenting point of view, a planning point of view, or not?

5

A. The drafting by Ms Hunter it does include in B2 location of water bodies and other important features including sensitive environmental receptors. I guess there's a level of uncertainty about how far you would go in identifying those receptors, but I agree that it would be useful to know if there was, if it was in a particularly large flow path.

10

Q. Okay, thank you. Thank you very much, your Honour.

### **THE COURT ADDRESSES COUNSEL AND PARTIES – TIMETABLING** (12:57:53)

#### **QUESTIONS FROM THE COURT: JUDGE STEVEN**

15 Q. Ms Boyd, I'm just looking at this alternative rule and I note Mr Matheson has said and it's confirmed in the footnote to this that it could either be a permitted discharge permit or discharge rule or a combined land use and discharge rule which would follow on from the existence of a live land use consent that's been granted by the QLDC, and I'm just drawn to your evidence on page 62 if you just want to talk about that. This is where in simple terms you explain, this is paragraph 208 to 210. The fact that these PC8 rules are hybrid rules and you say that in the case of earthworks it's the use or the disturbance of the land followed by rainfall that results in the discharge, and primary measures for avoiding or mitigating adverse effects from discharge controls are on land uses and for example the implementation of effective erosion and sediment controls measures. so that is the rationale for the council wanting to regulate both land use as well as discharge and you might not be able to help me in the answers because you're not a consenting person, are you?

20

25

30

A. No, I'm not.

Q. No, because I was just wondering whether you are familiar with the extent to which the QLDC consents regulate or manages discharges, you know,

potential for discharges from earthworks by means other than purely the having an erosion and sediment control plan in place. Do you know if they do?

A. No, I'm not sure sorry.

5 Q. No, okay. And so, and so similarly in the case of discharge consent because I assume from this that you are proceeding on the basis that it would be an important component of integrated management would be the land use control but there would also be some conditions on discharge permits. Are you familiar with the range of conditions that might be  
10 imposed on a discharged permit in the context of a discharge associated with earthworks other than just the requirement for an erosion and sediment control plan?

A. I understand Ms Strauss appended some resource consents to her evidence in chief that set out the conditions of the land use and discharge  
15 permits.

Q. Right, okay, so I'd forgotten about that so I can go back and check that.

A. Yes.

Q. All right. Because, and I will check that and I won't make you come back after lunch, but effectively what this rule proposes is a permitted discharge  
20 in circumstances where there might only be a, well it would appear that the only control that the council has in relation to discharges is through this mechanism of the erosion and sediment control plan; would that bother you if that were in fact the case?

A. It would bother me if the ORC didn't have the ability to assess matters of  
25 substance in relation to the effectiveness of that erosion and sediment control plan. simple certification that a plan identifies various things to my mind is not providing much of an avenue for the ORC to examine the degree to which this could meet s 70 or the permitted activity rules.

Q. Now, I did note that Ms Hunter had included a resource consent that had,  
30 an example of a consent that's been issued by the QLDC with an appendix that contains consent conditions and it might be helpful if you use, refer to that, it's in Appendix 1 to her statement of evidence 24 February. And I'm going to question her about it so I might be wrong but my reading of this, these consent conditions, condition 21 if you turn

to that, it states that any discharge that leaves a site shall comply with the water quality discharge criteria outlined in the council's guidelines. Are you familiar with the content of those?

5 A. Only insofar as they've been provided as appendices to evidence. I haven't, I don't have experience in using those guidelines.

Q. Do they address the cultural matters that are specifically referred to in the assessment matters under the RDA rule that's proposed as an alternative rule by Ms Hunter, Kai Tahu cultural and spiritual beliefs, values and uses? Specifically the assessment matters (E)?

10 A. I don't know without taking the time to check and I'm happy to do that if you don't mind me ...

Q. Check. Thank you.

1305

15 A. The section on water quality in the guidelines is primarily based on water quality parameters such as turbidity, waste, pH, etc however I note earlier in the document on page 15 there's a description of the information that must be include in ESCP.

Q. This is the consent conditions, or which document are you referring to?

A. No, sorry I'm referring to the –

20 Q. – oh, the guidelines.

A. – Queenstown Lakes guidelines.

Q. Yes, yep.

A. Which I understand set out the requirements for the erosion and sediment control plans so CB16/86 is the page I'm on.

25 Q. Sorry, say that again, sorry. CB...?

A. 86.

Q. Thank you.

30 A. So in matter B, here the plan is required to identify the location of major features of the site including water bodies and other important features. It doesn't specifically refer to Kai Tahu values there. I guess that you could make an argument that that is a consideration but I'm not seeing in these guidelines particular consideration of Kai Tahu cultural and spiritual beliefs, values and uses to the extent that Plan Change 8 provides for.

- Q. Right, and so I note that the content of the ESCP that's in the proposed rule doesn't necessarily replicate the requirement of an ESCP as required by conditions of the consent, but I'm not going to be too concerned about that because if a different plan has to be produced for the purpose of this permitted activity framework then so be it, but so I'm going to ask you about this particular iteration of the rule and the requirements of the plan as identified in this rule. I note that firstly you only trigger restricted discretionary activity if your, well you don't trigger it if you are in compliance with your activity is being carried out in accordance with the certified ESCP and all other conditions are met, but you don't get to RDR status if you are operating in accordance with that plan. Does it concern you that there are no express requirements for that plan to address cultural matters. It's only once you get to the RDA discretionary activity rule framework that the council then has a discretion to consider cultural values in a discretionary activity consent.
- 5
- 10
- 15
- A. Yes, that does concern me, and I would reflect back on the earlier discussion about the matters of discretion contained in the Queenstown Lakes District Plan in relation to Kai Tahu values which in my opinion are not as broad as those that could be considered under Plan Change 8 and so there may be cultural values worth, you know, that should be considered in a resource consent process that are not covered by a consent granted under Chapter 25.
- 20
- Q. Right. All right. I was just going to ask one last question. I also note that the consent conditions that are attached to Ms Hunter's evidence through the Appendix 1, consent conditions also contemplate that the ESCP may need to be amended from time to time following audits that are regularly carried out by a suitably qualified person, as you would anticipate that they would be and so would it be a concern to you that those could be amended without any further input under the way this rule is currently framed by officers within the ORC?
- 25
- 30
- A. Yes. It concerns me that amendments could be made to that erosion and sediment control plan after ORC's certification.
- Q. So the ORC really should have that kind of involvement as well?

A. Yes, I think if there are going to be amendments to the erosion and sediment control plan then if ORC is relying on the content of that document to permit these activities then it should be aware of any changes to them and have the opportunity to consider those.

5 Q. Thank you very much.

**QUESTIONS ARISING: MS DE LATOUR – NIL**

**QUESTIONS ARISING: MR MATHESON**

Q. There's no assessment of Kai Tahu cultural values in the ORC's version the permitted activity rule, is there?

10 A. That's correct.

**QUESTIONS ARISING: MR ASHTON – NIL**

**WITNESS EXCUSED**

**COURT ADJOURNS: 1.13 PM**

**COURT RESUMES: 2.16 PM**

15



**THE COURT: JUDGE STEVEN TO MR BOWMAN (14:16:56)**

Q. Good afternoon.

A. Good afternoon your Honour.

5 Q. And welcome to this hearing and thank you very much for your very useful statement that you made. Now I understand that you would like to speak to that. I don't know whether you want to actually speak to the document that you've filed with us or whether you have a summary of it that you'd like to read. I'm just in your hands as to how you would like to proceed.

10 A. I'm just, your Honour, I'm just going to speak to the document and just highlight some of the issues I think are of importance just before that for the Court.

A. Yes, thank you very much.

15 ***PLEASE NOTE: THIS WITNESS' EVIDENCE HAS BEEN TRANSCRIBED FROM POOR QUALITY SOUND RECORDING VIA AVL. THE ACCURACY OF THE CONTENT CANNOT BE GUARANTEED. DIALOGUE WHICH IS UNABLE TO BE TRANSCRIBED IS INDICATED BY (INAUDIBLE) AND THE TIME STAMP.***

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**RICHARD BOWMAN (AFFIRMED) (VIA AVL)**

Friends of Lake Hayes Society Inc. wishes to support proposed changes to the Otago Region Water Plan under Change 8 and we'd like to use Lakes Hayes as an example to illustrate why we think the proposed changes are essential to  
25 assist with the improvement of work both at Lake Hayes and elsewhere in the Otago Region.

Lake Hayes as a nationally and internationally renowned waterbody has an ongoing problem with water quality which has significantly impacted on the lake ecosystem and on the cultural and social values around the Lake..

30 We believe the principal cause of the degraded water quality is human activities in the catchment particularly those releasing sediment and nutrients into the lake and we believe at the present time that urban development is one of the prime causes.

Now we want to support these proposed changes because we believe that they will make a significant difference to water quality in Lake Hayes in relation to the activities that take place in the catchment in the future, and as a result, and as parties to the Appeal we strongly opposing an attempt to delete or otherwise  
5 impair the effectiveness of the proposed changes.

Now by way of introduction Friends of the Lake Hayes Society began in about, in fact in October 2008. It has a membership of 200 people and it has an executive committee of 10. Most of the people who are interested or belong to Friends of Lakes Hayes live in or around Lake Hayes. Certainly our executive  
10 members all live within proximity of Lake Hayes. Many of us have lived here for a very long time and have a very close relationship with the lake. So in a sense we are speaking for an informed community of people who use and are affected and live around Lake Hayes. The Society formed because in 2006 there was a serious deterioration of water quality in the Lake which came about  
15 due to the recognition of a new type of algae, called *ceratium*, which turned up in the lake and it substantially changed the function of the lake in many ways. It certainly changed its colour from a normal bright blue colour to quite a dirty muddy brown colour when algae bloom present. It had an affect on the fishery which quite devastating. The trout population used to be extremely good in the  
20 lake, it crashed effectively to the point where there are, there's a fishery but it's a very much degraded fishery. It also affected activities people, like distance swimmers, who got peculiar hay fever like symptoms so it really had an impact on the people living around the lake and at that point it was decided we needed to get together and try and form a group to look at what was going on at the  
25 Lake for the long term.

Now there's been a lot of science on Lake Hayes, going back to probably 1950s and in many respects it's a very well understood waterbody. There's been work done by Otago Regional Council, by Otago University, by Dr Caroline Burns, Dr Marc Schallenbuerg, lots of work done by NIWA. It's actually a well  
30 understood lake. And fundamentally it comes down to the natural balance the lake was before significant human activity in the Basin, is that as human activity has taken place there's been disturbance in the .... (audio faded) ... effectively fertilised the lake.

**AUDIO RE-CONNECTED**

**THE COURT: JUDGE STEVEN ADDRESSES MR BOWMAN (14:22:50)**

Q. Yes, you're back, thank you, good. So just go back –

A. – I dropped out. Can you hear me again please?

5 Q. Yes, we can. So you were taking about the fertilisation of the lake effectively. We can hear, but you can't hear us I think, I think that might be problem. Can you hear me?

A. I can hear you. Can you hear me?

Q. Yes, I can hear you.

**MR BOWMAN CONTINUES ADDRESSING THE COURT (14:23:04)**

10 All right so we'll go back to science again. Look we asked Dr Marc Schallenberg to kind of a review of science (inaudible/unclear 14:23:59) in 2017. It was an excellent report. One of the key recommendations from that report that there should be a focus on land use activities in the catchment to further reduce nutrient and sediment losses from land to water. And that really has become  
15 our focus since receiving that report. Whilst there was a certain amount within the lake its actually really important to reduce the rate at which those nutrients and sediments come in that lake and that effectively exasperate or create those algae bloom. That's been our main sort of driver of recent times.

In the evidence put in, quite a few images and photographs showing how the  
20 lake has been affected by algae bloom, if you look at the colour of the lake on the (inaudible 14:24:48) and show that the fish population has suffered at times and we still dead fish in Lakes Hayes from time to time which we believe is related to algae bloom.

The cyanobacteria on the surface have been responsible for  
25 (inaudible 14:25:06) of lake public use on several occasions in the last three to five years and that's very disturbing for regular users who come to the lake (inaudible/unclear 14:25:17) to walk dogs, they find warning signs there saying you can't go there because it is unsafe, and that is a real, a matter of real concern to us and we feel that's a terribly bad look for Lake Hayes. It's a terribly  
30 bad look for the whole district.

And so these are the sorts of things that have been happening in Lake Hayes and unfortunately they continue. What we've discovered is in a normal water flow, particularly water coming into the lake, there is not a great deal of sediment

or nutrient coming into the lake. The levels coming down through Mill Creek are quite low, but when we have a high rainfall event, such as a flood or a fresh, all of a sudden the amount of nutrients and sediments coming into the lake goes up exponentially, its during these short episodes of high rainfall and flooding that most of the damage is done to the lake by allowing these sediments to come into the lake and of course the sediment is (inaudible 14:26:24), its coming of land and its very difficult to deal with because when you have flood you have a flood. Just to give you an example, there was a particular flood back in 2018, on the 1<sup>st</sup> of February, where we took water samples from the floodwater and found out the phosphorus content was 18 times higher than normal flow and that nitrates were about three times higher than normal flow. We went on a little bit later and analysed data from the Otago Regional Council from the catchment, looking both at concentration and strength flow, and we estimated 2020 17,500 tonnes of sediment came into the catchment through Mill Creek during those high rainfall events including 2.1 tonnes of phosphorus and that was significantly more than what had been seen decades earlier when similar kind of studies had been done.

So what we believe is that as there has been increased development in the catchment, less agricultural activity, more urban development with large scale developments going on as well as smaller residential (inaudible 14:27:44) disturbances (inaudible 14:27:42) events, sediment is lost down into – down the catchment, down the creek and ends up in the lake and that's what driving the blooms today.

Now to help us understand this problem of sedimentation the Nature Conservancy, in a report from (inaudible 14:28:06) policy consultant Jackie Dingfelder, it was called *Approaches for Minimising Water Quality Impacts from Urban Development in Lakes Hayes/Wai Whakaata Catchment, New Zealand* and this was important for us because it gave us a real understanding of the problem, not just from a local perspective but it brought in an international perspective, it brought in the best science from around the world and gave a number of examples of different parts of the world where similar problems exist and how they've been dealt with and I think it's pretty clear to us that what we were seeing wasn't an unusual phenomenon in other parts of the world and can be dealt with. And the report produced several key recommendations and we

believe that the recommendations that they have, that come in that report would all be very much support and underpin the proposed Plan Change 8 in the water plan. So we understand in terms of the problems in waterways what causes them, that these problems could be assisted by having the sorts of measures and policies that are proposed in Plan Change 8. We don't think that the pressure of urban development is going to away at all, in fact we think its going to be significant. We know that the land development in the Basin is high and the Mill Creek/Lake Hayes catchment is a prime area which is going to be significantly developed, probably (inaudible 14:29:41) with the catchment of the future. It's critically important that when, as when that land is developed that we have measures in place that will limit, will reduce the rate at which sediment is lost from those (inaudible 14:29:59) and getting down into the lake to cause the problem. And we think its all very doable because that's what the report that we got from the Nature Conservancy told us. These problems can be dealt anywhere in the world, if you use best management practice. If you've got a good policy environment, a good regulatory environment, it is possible to improve these things.

We have to say that it satisfied with the current policy and regulatory measures that are in place to limit sediment loss and I think the deficiencies of the current District Plan, urban plan, have been seen in practice in the Lakes District in recent years. In Appendix 1 there is a selection of photographs taken from media, probably up to about 2018, which show what can go wrong when you don't get sediment (inaudible 14:30:56) right, you get massive loss of – you get, of sediment, you get erosion, you get some very unsightly, unpleasant things, clearly going to have major downstream effects, and unfortunately even though I think those problems are understood by the authorities we are not really seeing a significant improvement. I know that the District Plan in 2019 came up with some new rules around the management of excavation to try to reduce sediment loss. We're not convinced that they are fully operable or fully effective yet and we quote a couple of examples from Lake Hayes itself. In a rainstorm event in July last year when 36 mm of rain fell over a six hour period and it did quite recently constructed stormwater pieces of infrastructure at Lake Hayes you can see that there is significant sediment pollution in place. And even though these are modern structures, presumably designed for purpose, it's

clear that they're not preventing sediment from getting into Lakes Hayes and the problem that we have there is simply exacerbated. I think what you have to realise in our particular environment here, in the Wakatipu Basin, particularly with our soils, land use, and with climatic events, that when we have heavy, we  
5 get a lot of overland flow and that means that water comes, sheets of water effectively come off the landscape (inaudible 14:32:35) is that when it moves overland it picks sediment particles which contain phosphorus and other nutrients and they're carried straight down into the receiving waterbodies like Lake Hayes. We believe that more could be done to prevent this through design  
10 and implementation and I think regulation monitoring to make sure that these structures are fit for purpose, they do work properly and that they don't make the existing (inaudible 14:33:05)

We'd like to think that we could do better (inaudible 14:33:11) off land, particularly during landfall events and we believe that the Plan Change 8  
15 measures will help us to do that.

There have been some recent initiatives to improve water quality in Lake Hayes. There's the conclusions reached from the Schallenberg Report is that the nutrient levels in Lake Hayes maybe showing a decreasing trend and if this is correct water quality should improve. Now if we development in the catchment  
20 which results in nutrients coming into the lake, then clearly that (inaudible 14:33:50)

It's (inaudible 14:33:51) to try and to reduce this factor to the lake. Now another I think very favourable event was in the Queenstown Lakes District Plan a new policy has been included called 24.2.4.2 and this requires the restricting of  
25 subdivision development and use of land in the Lake Hayes catchment unless it can contribute to water quality improvement in the catchment commensurate with the nature, scale and location of the proposal. Now its really important, we believe that it has the potential to improve the management of excavation, the management of construction, the management of development to reduce the  
30 sediment load coming down the catchment, so it's a really critical thing and again we think that Plan Change 8 changes will help support the outcomes that are sought by this new policy.

In addition in 2020 a local iwi trust, Mana Tahuna vision plan, developed by Friends of Lake Hayes, to restore the catchment using the planting of riparian

buffers on every waterway, the installation and maintenance of sediment traps and the recreation of wetlands. This project has fund of \$4.5 million over the next four years and is expected to make a major contribution to reducing sediment loss form the catchment. So it's a really important like that is supported by the policy and regulatory environment so the good work that is done is maintained and improved through the – through those measures.

So finally, we think that the Plan Change 8, the proposed Plan Change 8, will be good on a couple of levels. One its going to set a consistent, it's going to provide consistent standards for sediment control across the whole of the Otago region, it won't vary from place to place. But it also means that Otago Regional Council will become directly involved in the consenting and regulatory management of urban development activities and we think that in the past Otago Regional Council has not had sufficient involvement or any involvement in some cases in some of these activities and I (inaudible 14:36:18) Regional Council going to step up and play an active role and I think its really important that both the Regional Council and the territorial authorities work closely together on this. I think there's a real teamwork element there and I don't think that one or other is necessarily (inaudible 14:36:38) levels of local government work together.

So while we think these changes are unlikely to provide a complete solution to sediment pollution from urban development in Otago, they're nonetheless a substantial step forward. They will hopefully lead to better protection and improvement of water quality in small, vulnerable waterbodies, like Lake Hayes, and therefore contribute toward meeting national, regional and local water quality goals.

**THE COURT: ADDRESSES MR BOWMAN (14:37:08)**

Q. Is that your evidence Mr Bowman, are you finished?

A. I have finished, thank you.

Q. Yes, thank you very much. So will just remain to answer any questions that any of the lawyers, counsel for parties.

**CROSS-EXAMINATION: MR MATHESON – NIL**

**CROSS-EXAMINATION: MR ASHTON – NIL****QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

Q. Good afternoon Mr Bowman. I'd first of all like to compliment the Friends of Lake Hayes on the quality of your report. It was easy to read, it was clear, concise, well-illustrated and easy reference, easy access to your references. It was a very good report and appreciated by me and I am sure by her Honour in terms of readability, so thank you for that. I only have one question and that's have you noticed any changes in sediment entry to the lake over the last couple of years please?

5  
10 A. Its difficult to measure that because they tend to occur in episodic events and it depends really when you're having heavy rainfall, because heavy rainfall drives it, so I can't give you a direct answer but what I can say is that in the last five years its been closed on several occasions, not this year or the year before and that's the first time it had ever happened. In some cases it was due to fecal coliforms in the water, the counts of E.coli but in (inaudible 14:38:57) that has not happened in my memory.

15  
20 Q. Okay, look that's helpful thank you. It's a very difficult question to answer but you're on the spot and I thought if anyone could give me an answer it would be you, so thank you very much for what you've told. Thanks you very much indeed.

**QUESTIONS FROM THE COURT: JUDGE STEVEN**

Q. Yes, thank you. I was thinking the same, your evidence, your statement is very well written and its been enormously helpful to us just to have a case study I think of a waterbody that's right within the Queenstown Lakes District where it demonstrates the nature of the concerns that we're required to address through this plan change and so it has been very helpful. I just note that the – is July – May, there was 2016 rainfall event that you referred to where there were some photos taken near the rowing club of an outfall where there was sediment flowing. I don't suppose you know whether that consent that authorised the sediment control measures was under the QLDC new regime or not? You might not be able to answer that.



A. Your Honour, I believe it was only (inaudible 14:40:18) last year. I think the new rules came in two thousand, mid 2019. I would assume it be to (inaudible 14:40:29) that they said but you can see from the photographs there's still significant amounts of sediment coming through that structure.

5 Q. Yes, and I understand that really its that type of rainfall event that is going to be the trigger for a sedimentation in the lake. Have there been any similar rainfall events since that one?

A. There have been a couple but not of that magnitude from memory. We do monitor each one but it also depends on the time of year. In wintertime  
10 quite often there's a higher level of sedimentation because there's less cover on the ground due to grazing and just lack of growth, and also if the ground is frozen you get much more surface runoff as well, so it depends on the time of the year as well as the rainfall event as to just how much actual sediment gets (inaudible 14:41:26)

15 Q. And have you been provided with a copy of the latest alternative rule that's been proposed Remarkables Park and Willowridge and the supplementary statement from Ms Hunter? Have you seen a copy of that?

A. I would have a copy but I haven't actually looked at it, but I will do so just  
20 to see.

Q. Yes, I was just wondering. Your statement of evidence was written when you – before this was produced obviously and I just didn't know whether you were satisfied that this modified version of the rule insofar as it applies, is proposed to apply to Queenstown Lakes District would address  
25 your concerns, but if you haven't looked at it it would be unfair to put that question to you so I think I'll just leave that and just say once again thank you very much for your contribution.

**WITNESS EXCUSED**

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5 **TIME STAMP.**

**MS WILLIAMS CALLS**

**MURRAY JOHN BRASS (AFFIRMED) (VIA AVL)**

- Q. Mr Brass, can you just please for the confirm that you are the only person in that room?
- 10 A. I am, that's correct.
- Q. So your full name is Murray John Brass?
- A. Yes.
- Q. And you are a senior RMA planner for the Department of Conservation Te Papa Atawhai?
- 15 A. I am.
- Q. And you prepared a statement of evidence dated the 25<sup>th</sup> of February 2022?
- A. I have.
- Q. And you have set out in that statement your experience and qualifications in paragraphs 3-7?
- 20 A. That's correct.
- Q. And you also noted the Code of Conduct and that you agree to abide by that?
- A. I do, yes.
- 25 Q. Are there any corrections that you'd like to make to that statement of evidence?
- A. Just one. In my para 46 I refer to the evidence of, among others, Mr Davis, and inadvertently have referred to him as Ms Davis, so I'd just like to make that correction into the record.
- 30 Q. Yes, thank you. And other than that correction, do you confirm your statement of evidence is true and correct?
- A. Yes, I do.

Q. You've also participated in a joint witness expert conference on planning on the 8<sup>th</sup> of March, is that correct?

A. That is correct.

5 Q. And you're a signatory to the joint witness statement planning letter dated March 2022?

A. Yes.

**MS WILLIAMS ADDRESSES THE COURT (14:47:23)**

10 Q. Your Honour, we do have the supplementary evidence of Ms Hunter, and I was just wondering if I could please just ask Mr Brass to just comment briefly on that because he has a (inaudible 14:47:31)

A. Yes.

**EXAMINATION CONTINUES: MS WILLIAMS**

15 Q. So Mr Brass, we've had produced to the Court today a supplementary statement of evidence by Claire Elizabeth Hunter, dated the 22<sup>nd</sup> of March. You've had the opportunity to read that?

A. Yes, I have.

Q. I wonder if you could please offer your thoughts, particularly about the amended alternative rule in Schedule 1 permitted activity rule 14.5.1.1A?

20 A. Yes, and really it's just that alternative rule that I would like to speak to and I have like a couple of specific points and a couple of more fundamental concerns. So if the Court has in front of them my first concern is clause (b) where the ESP is to be certified by the Otago Regional Council. The problem I see there is that certification requires certification against something, so it's not discretion, are you happy with something, a government call, it's, you know, is it bigger than this, taller than that, does it meet this water standard and this doesn't include anything there, so there's nothing for Council to certify against which means it would be left to their discretion which to me is not suitable for a permitted activity and so the examples that Ms Hunter has included, the  
25  
30 Forestry one is simply a provision of a document, doesn't require to be certified against anything, the other ones do have things to be certified to and standards that they can be checked against. But if that was an

application process I believe it would need as well something clear it was served by against. And my other content, over the page, clause (1) regarding the sediment of (inaudible 14:50:06), and my concern there is that those are actually the s 1 given, you know the gross effects, they're

5 so bad that under the Act that we wouldn't want them to happen (inaudible 14:50:27) certainty. I am not convinced that that's adequate, actually that is the environmental standards to be met for discharge. If we compare that with, Ms Hunter included an example that (inaudible 14:50:49). In that case, there were standards on (inaudible 14:50:55) so the council

10 have been able to look at it and say, given this type of discharge and this type of location, what are the parameters that we need to control and what are the limits that should apply, and I think that's appropriate for managing, and if we go to the original rule with the 2,500 square metres area so it's larger discharges, I think it's appropriate that they have that

15 case by case analysis of what an appropriate discharge, what standards should apply as opposed to something that really is, as I say, is a national level, the gross effects that we wouldn't want under any circumstances, so that's the two specific concerns at a higher level, I turn my mind to when that rule would implement policy 7D.10 and Policy 7D.10 has the

20 where avoidance is not achievable, best practice guidelines for minimising sediment loss are implemented to maintain water quality, and I don't see in there either a requirement for it to be best practice guidelines. You are relying on your suitably qualified person in that regard, the permitted activity condition doesn't force that, and it definitely

25 is uncertain whether it will maintain water quality, because the only water quality controls that you have in there are those s 107 things that should not happen, so I am left uncertain as to whether it would implement the relevant policy. And then what's probably my fundamental concern with it is that the way it's set up is that an applicant or a developer would

30 prepare a considerable amount of information, they would provide that to council, council would need to go through quite a considerable exercise of reviewing and assessing that, judging it against sort of its internal standards, criteria, processes, council would then approve or not approve it, certify it or not certify it, and then once that's happened there's going

to be an ongoing monitoring and compliance responsibility on council. All of that to me seems to be what the Act has set up in terms of how a consent process works, not a permitted activity. And without being flip essentially if it looks like a consent, it smells like a consent, and I am not sure, by the time you're going to all that trouble I kind of feel like with the if the difference involved is going to be an application fee, you might as well just call it a consent. And so those are my key concerns is that some of those elements of drafting because they have to be addressed. Fundamentally, I consider that the process that it set up would be (inaudible 14:54:23) management (inaudible 14:54:28).

5  
10  
Q. Thank you, Mr Brass, look I've just one clarification question. You referred to examples. Where do you find those examples, please?

A. So the example consent was in Ms Hunter's evidence and it was affixed to that evidence. I don't have a common bundle reference. But I would also note that would be having worked in consents including for Otago Regional Council, applying those standards to a discharge consent is what I would expect is normal practice.

15  
Q. Yes, thank you Mr Brass.

**CROSS-EXAMINATION: MR MATHESON**

20 Q. Good afternoon Mr Brass, I hope you can hear me.

A. Yes, fine.

Q. Thank you. Just in terms of some of the matters of drafting you raised, and I'm not sure, you might not have been here this morning but the intention of the list of matters "1" through to, well yeah 1 through to 6, 7, are the matters against which an erosion and sediment plan would be certified. Those would be the matters for certification. If the drafting was amended to make that clearer than it should have been, do you agree that would give sufficient clarity for somebody to certify a document against?

25  
30 A. My concern there is that it's essentially certified against the contents of the document, not the outcome to be achieved. So, yes it potentially could be drafted that way. It would need, in my opinion, to include the matters covered under I.1.5 or 107 matters, but as I say, I have a concern

that those matters are not necessarily going to give adequate environmental protection to what, you know, in this case could be any scale of earthworks at any location.

5 Q. But you agree that at the moment the ORC's permitted activity rule in PC8 doesn't have any water quality limits at all, does it, other than the permitted activity standards?

A. Yeah, other than the s 107 things carried through, yes.

Q. And do you understand that this rule would only apply if you have a Chapter 25 earthworks consent from QLDC?

10 A. Yes.

Q. And do you agree and accepting that the QLDC consent doesn't permit a discharge, do you agree nonetheless that the QLDC consent and the erosion and sediment plan required by that consent does address water quality issues?

15 A. It addresses water quality issues as an outcome of the matters that it manages, but doesn't have direct control over them, would be the way I would describe it.

Q. Well, may I ask whether you, would it be correct to say that it doesn't permit them or allow them in a legal sense?

20 A. No, it doesn't.

Q. Thank you.

**CROSS-EXAMINATION: MR ASHTON – NIL**

**CROSS-EXAMINATION: MS DE LATOUR – NIL**

**RE-EXAMINATION: MS WILLIAMS – NIL**

25 **QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

Q. Thank you, your Honour. Good afternoon Mr Brass, just one question really. If it was possible to reach agreement on the wording of the alternative rule in terms of something definite to certify a case, would you see that as overcoming your concern about the permitted activity rule not  
30 being able to provide a discretion to a council?

A. Yes, I mean, a rule certainly could be structured to address that element of my concerns, and permitted activity rules are structured in that way and in other cases, yes.

Q. And would you see any other impediment to that being used?

5 A. My concern then would be it, that it doesn't give that sort site-specific what are the standards that should apply ability to the Regional Council and still the underlying concern that really it's a consent type process as opposed to a permitted activity type process.

Q. Thank you very much indeed. Thank you, your Honour.

10 1500

### **QUESTIONS FROM THE COURT: JUDGE STEVEN**

Q. So that's just, in terms of your last answer, that is the fundamental concern that you expressed in the evidence that you just gave –

A. – yes –

15 Q. – in relation to the Hilton –

A. – yes –

Q. – all right, so and so just on that so it sort of looked like a consent but it isn't a consent and so in that context, and I do note that you have had some experience in processing discharge consents in a previous position with a Council, so I'll ask you this question in the expectation you might be able to help. When a Regional Council Officer is required to assess the adequacy of measures contained in an erosion and sediment control plan against whatever outcomes are specified somewhere, they would typically be in the conditions of a consent, do you accept that that would ordinarily occur in a situation where the Council has received an application and an accompanying AEE?

20

25

A. Yes, so it would be part of the consent application and as part of that AEE the environmental context would become part of what's being considered by Council.

30 Q. Have you turned your mind the question of whether a Council officer, Regional Council Officer, can adequately consider the robustness of measures contained in an ESP, ESCP, that is submitted to it without having a copy of the application and AEE, without having having a copy

and having read it? In other words, is it, would it be an exercise in a vacuum or do you not have any concern about that?

5 A. I would have some concern that you could wind up with a plan that's essentially floating in space and that then comes down to if you like a good developer whose doing a well thought through process, you'd hope that they'd provide that wider context as part of that but if what's been certified against is essentially a list of contents, it's hard then to judge the quality of those contents and how they will work –

Q. – yes –

10 A. – that place, in that location, with that activity.

Q. Yes because, and I just look at this rule at face value, if the – and I mean this isn't necessarily the ESP that has been approved by the Queenstown Lakes District and if it contains a description of the works and the area that the consent relates to there's, well in fact it can contain any of those things that its required to state but there's nothing, there's no documents against which to assess the accuracy of those, of that material against, you know that would ordinarily be a check that would be made with reference to the application and AEE. Would that be your experience based on the time you spent as a Council officer?

20 A. That would be my experience and that would also go to the, if you like, the context and the appropriateness so that a – if you just look at a document, a document that might be perfectly acceptable for a direct discharge into a large waterbody with low existing values, that document may contain all the contents to check that list but might not be appropriate for a discharge into a small sensitive waterbody with a threatened fish species or a site of particular significance Tangata Whenua, a short distance downstream, so the – this process doesn't allow you to capture those things and assess what's appropriate for those circumstances, its simply 'has the documentation been provided?' 'does it contain the things it's required to contain?'

30

Q. So do you think the rule could be improved to enlarge upon those things and/or fill those gaps or do you maintain the view that it really needs to be achieved through a discretionary process on a consent application?



A. I think that by the time you were doing that or trying to do that and it would be difficult to cover all circumstances which is, which is why we have a consent process so you can make that case by case assessment –

Q. – yes –

5 A. – so my concern would be that by the time you did that you really are doing something should be through a consent process rather than as a certification under a permitted activity.

**QUESTIONS ARISING: – NIL**

**WITNESS EXCUSED**

10

**MR MATHESON ADDRESSES THE COURT – RE. MR ASHTON TO CALL WITNESS (15:06:38)**

**MR ASHTON CALLS**

**ALISON DEVLIN (AFFIRMED)**

- 5 Q. Good afternoon, your name is Alison Devlin?
- A. It is.
- Q. And you're the General Manager Planning and Development of Williwidge Developments Limited?
- A. I am.
- 10 Q. And you've prepared a statement of evidence in this proceeding, dated 25 February 2022?
- A. Yes.
- Q. You have the qualifications and experience set out in paragraphs, paragraph 1 of that statement of evidence?
- 15 A. Yes.
- Q. Do you have any corrections to make to your evidence?
- A. I do have two corrections to make.
- Q. Please take the Court to those?
- A. The first is section 7, where I have said, "Since the notification of Plan
- 20 Change 8 Willowridge has made three applications for earthworks in the Queenstown Lakes District", that's now four, and that's just in Queenstown Lakes District, just to clarify.
- Q. Thank you.
- A. And then section 11, the deposit fee for the ORC earthworks is currently
- 25 \$1,750, number 4, that I lodged there, it's now \$1,900 because it now includes a \$150 compliance administration fee.
- Q. And with those corrections, is your evidence true and correct to the best of your knowledge and belief?
- A. It is, yes.
- 30 Q. Could you speak to and summarise your evidence for the benefit of the Court?
- A. Yep. The main point of my evidence really is to take the Court through the process we follow when we go through the earthworks consenting

process for both Queenstown Lakes and the ORC, and I've said there that most of our activities trigger the QLDC rule, in fact we haven't had one that hasn't, so what we do, so for a residential subdivision, we'll often include the earthworks as part of the subdivision so we will prepare our subdivision and earthworks application. Occasionally we'll do a bulk earthworks so that we can started prior to, if it's, you know in zone, and then once we've done that we then need to get engineering approval from the Council, so at that level we've already secured a consent, so we're quite confident that the project is going to go ahead, so then we will go to a lot a more detail in preparing our engineering approval and that will, you know, all the servicing and all the roads and it will like, like we'll start to talk to the contractors about how the works will proceed and at that stage we will look at preparing an environmental management plan which includes environment and sediment control plan. And once we've got that completed we then apply to the ORC. Now, the important thing for us in our experience of preparing these plans and going through this process is that the contractors are engaged in the preparation of the sediment control plan and that this is true for the Queenstown Lakes and the ones that we've done in Dunedin City. More often than not the draft erosion and sediment control plan, the contractors will make changes to it because they're the guys that are on the ground, they've got a wealth of experience in civil contracting and they, certain things will work and certain things won't work and certain things have been missed so more often than not they do suggest changes to the plan. So once we've got that all complete we then lodge it to the, we then lodge our application to the ORC and I will say from my experience in the five that I've prepared, that's for QLDC and the one in DCC, we, the main component of the application is this environmental management plan which includes the erosion and sediment control plan and I find that going through the resource consent forms it's often just a case of referring to that document, and so that, the feedback I have had from ORC is that because we lodged that they feel it's a very complete application whereas in my mind that's the main component of the application. And then once we get that issued, we then beginning work on the site and then I got into talk about the, the

two consents to me and to the guys that you know implement them are practically the same. What I would say is what we do for the QLDC condition, the environmental management plan and the sediment controls that we put in place since Plan Change 25 which, you know, was a massive, you know it was a massive education to us, we changed our practices completely as a result of Chapter 25. Since the ORC rules have come in, we don't, there's nothing different than what we would have done under the QLDC rule. And that's where we're coming from in that we've gone through this whole lot of process but were not, you know, there's, to us there's no additional, in there is additional cost, yep, so that's...the monitoring - and I've spoken to our contractors and they have confirmed that the ORC and the QLDC generally undertake monitoring together but we've also got our SQEP going round to the...so our monthly monitoring costs for a site are about \$500 to \$600 by the time...and that's just the SQEP and the two councils, we've also got our contractors stop work to show them round and we've got engineers that go on to site to meet with them and so it is quite an extra cost for us. But, yeah, so basically that's where Willowridge is coming from there.

**CROSS-EXAMINATION: MS DE LATOUR**

20 Q. I've just got a couple of questions, Ms Devlin, the first of those, I just was interested you mentioned the consent that you've had to obtain in Dunedin so the council jurisdiction under the ORC rules. I'm assuming that you also have to obtain a resource consent from DCC for earthworks there as well?

25 A. Correct.

Q. So you're implementing two consents in your sites in Dunedin City Council?

A. We are but the Dunedin City Council's rules and conditions on their consent doesn't go as far as QLDC so there's no requirement for the environment sediment control management plan or whilst we would have implemented that under the ORC rules the DCC have been very impressed by what they've seen with, you know, we're coming from with this experience of having done it at Queenstown, and then implementing

it in Dunedin, they were quite taken aback by what we were doing on site. It's not something that they require.

Q. And I take it, well yeah, Willowridge is exactly that, a good developer and you take your environmental responsibilities seriously.

5 A. Yes we do, we do, and we, you know, follow the conditions of our consents and that's how it comes in.

Q. Would you accept there are other developers in the Queenstown District who don't take their environmental responsibilities as seriously?

10 A. I couldn't speak for the other developers, but I, if they had the same conditions as us then they're bound to the same practices that we are.

Q. I just had a question in terms of the costs that you've talked about and you mention I think the lowest charge to date for an ORC consent being \$2,200.

A. And it excludes monitoring costs.

15 Q. Excluding the monitoring cost, yeah, so just your processing costs, and that's across a, I understand that one to be a 27-lot subdivision, is that right?

20 A. Yes, but having, since I've, we've obviously got another bill from the ORC since I wrote this evidence because it's actually \$4,000 for that one before monitoring. I checked this morning, so....

Q. So that you've had, so that one you were referring to there wasn't, it hadn't actually been granted?

A. Sometimes the invoices lag behind the consents. I don't know if you, quite, by quite a bit.

25 Q. Okay, so you're saying it was \$4,000?

A. Yeah, it was yep, slightly over \$4,000 for it was a 27-lot subdivision, correct.

30 Q. For the 27-lot subdivision, and think you might have heard Ms Strauss give evidence yesterday in response to I think a question from Commissioner Hodges, I think two to ten thousand as a ball park and it really depends on a lot of factors. I'm assuming your experience has been everything has been under \$10,000 too, hasn't it?

A. So far. We do still have monitoring going on for a lot of these projects.

- Q. That's fine. I just had one final set of questions just to understand there's been this issue raised regarding the contiguous site versus the landholding and I just hoped you could assist me from a practical point of view. Am I right in understanding that before you go and lodge your consents, you'd own all of the, no matter whether it's within one certificate of title or more than one, you'd own all of the land that you're seeking the consent for, wouldn't you?
- 5
- A. Well, you, the applicant would, yes.
- Q. Yeah.
- 10 A. So sometimes we'd do something with someone, you know, yeah, but yes the applicant generally would, yes.
- Q. And usually it would be more efficient for you to proceed with an application for, you know, a larger amount of earthworks volumes, you're not going to split it up into small applications, are you?
- 15 A. It depends.
- Q. But you stage the subdivision and do the earthworks consent so that stage at the one time?
- A. Yes, but for example we have a large title which is a mixed use zone, so at one end we are building a block of five retail units and then at the other end we're building a storage facility, so it's, you know, they're quite far apart but they are on the same title.
- 20
- Q. Right.
- A. They'd be completely separate contractors, everything.
- Q. Okay.
- 25 A. Or, not residential but yeah.
- Q. But that's not a residential site?
- A. It has residential on it, yes.
- Q. Okay. That's fine, that was all the questions I had, thank you.

### **CROSS-EXAMINATION: MS WILLIAMS – NIL**

### **30 QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

- Q. Thank you, your Honour. Good afternoon Ms Devlin. You're aware that the council's case is that they've got a statutory obligation to place

controls on discharges and they need to have some ability to understand what's causing those discharges therefore they need to go up the pipe a little bit. Now, it's very difficult for us to say that the council shouldn't comply with the Act, like that's obviously a difficult challenge, but we do understand your concern about duplication. Do you think there's any way in which your method of operating could be modified to reduce the cost to yourself, for example applying for consents from both councils at the same time, submitting the environmental management plan at the same time. Have you given any consideration to those kind of things?

10 1520

A. Well, what I was alluding to with giving the summary a the start, it's really hard to do them at the same time because we don't do that level of detail for the QLDC, it's by condition, because we that's a lot of work to do when there might be risk involved in whether you're going to get the, get consent. And then because we like to have the contractor input to save changes further down the line to the environment and sediment control plan, you don't appoint or you don't get to the detail where a contractor is interested or you know you can come on board until quite far; this is why we're trying to work on coming up with a more streamlined process and lodging the plan to the ORC for the...when we lodge them I know that they get sent up to an independent qualified person generally and the same happens with, Mr McIntyre might be able to confirm this, but the same happens with Queenstown, so in my mind the councils have this memorandum of understanding that they like to work together so have the same SQEPs 'cos they're looking at very similar, it will be the same SQEP I'd imagine, and they can, if councils are confident in employing the same person, looking at the same plan, surely that would tick both councils' boxes.

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Q. Okay, so really from a practical sense there's no way you can change your process that's efficient?

A. No. Not in apply- not, no, to apply for the two consents I would say that we'd still need to do that sequence because it would be too early to prepare it for the QLDC, it's often quite long after we've done the...the whole engineering process can often take a long time.

Q. Yeah, I do understand, I come from that kind of background myself, but I can't give evidence, of course.

A. Yes.

5 Q. So, in terms of the costs, I'd just like to understand that a little bit better and it may be difficult for you to give me exact answers but over a typical year how many consent applications would you imagine you might have to make to the Regional Council?

A. Potentially three or four.

10 Q. Three or four, okay. And how long would the monitoring go on by a council, by the Regional Council, for example, would it be six months or?

A. No it's more on the scale of projects we do it's more like 18 months.

Q. Eighteen months, okay. And would there be a monthly inspection throughout that period?

15 A. I believe, it may be better posed to Mr McIntyre but I believe it is around, or six weeks, yep.

Q. Okay. So in round terms, for each consent you may be talking two to three thousand for the initial application with a little bit of extra safety, and then perhaps 15 site visits for three people including the SQUEP so that would be 15 x \$500 so it's 7,500 over that period of construction, would that be an indicative of cost?

A. I think the 2,000 is on the very low end.

Q. Okay.

25 A. Of a, yep, very low. And for example, I lodged one last week and I paid the 1,900 deposit and within a week I had a letter saying, "We're sending this for an audit, you're audit's going to cost \$1,900 on top of this but please be aware there's likely to be more processing costs after that." So they were at \$4,000 before we got a consent or monitored it. And this is, it's been prepared by an SQEP and it's in line with the QLDC conditions, so...

30 Q. Okay, that's helpful. And in terms of the QLDC consent do you have an idea of what the application costs would be there?

A. We have, often they're bundled with a subdivision but as I've said the deposit for the QLDC if it's just earthworks, I think I've said is in the order of \$4,980, that...and, we've never had a refund, in fact generally we have



additional processing fees with the only, can't say I've ever had a refund from the DCC, but yes so for an earthworks application for the QLDC you'd be looking more at \$10,000.

- 5 Q. Right. Okay, that's very helpful, thank you. And that's all my questions, thank you Ms Devlin. Thank you, your Honour.

#### **QUESTIONS FROM THE COURT: JUDGE STEVEN**

- 10 Q. Thank you, Ms Devlin, I just have questions based upon your own experience and it's interesting to hear you say that the erosion and sediment control plan is not submitted to the council when you get the bulk earthworks consent but it comes later once you drill down into the detail of the engineering plan and I've just checked the consent, you've got a consent attached to your evidence and I'm just looking at page 11 of that condition 17, just to understand the rigour with which QLDC assesses, if that's the right word, the content of that plan, and I see that 15 it has to be prepared in accordance with the Queenstown Lakes District Council guidelines for environmental management plans which is what I understood from an earlier witness, Ms Boyd for the council, for the ORC. And but it has to be submitted to a monitoring enforcement team for review and acceptance, and so there's no, in, I suppose you're involved 20 in that part of the process?

A. Generally our SQEP does that, so that might –

- 25 Q. - your SQUEP, yes, so it's basically just giving them to monitoring staff so they can check that it's the plan contains all of the matters that are required to be contained in the plan with reference to the council's guidelines but without exercising any discretion as to the adequacy of those. Would you know or is it beyond your experience to say?

A. I'd say it's beyond my experience, because what level of discussion is do they engage I'm not entirely sure, or.

Q. No.

- 30 A. But I, yeah, my understanding is it often then gets sent off by the QLDC to a qualified person rather than dealt with in house, which in my mind is quite a good check on something, because...

Q. Yes, okay. And so the suitable qualified person obviously will have expertise in, you know, sort of the land-based expertise in erosion and sediment control aspects but do you know whether they have any expertise on water quality matters?

5 A. Again it's probably one that would be usefully directed at Mr McIntyre, but I –

Q. – all right, so I'll save that question. All right, and have you had the opportunity to look, and I suppose you have the latest alternative rule?

A. Yes.

10 Q. Because it's been presented, and the contents of the erosion and sediment control plan there, does that generally cover all of the matters that are contained in the plans that Willowridge has in place for its subdivisions? Have you had the opportunity to compare?

A. Yes, speaking for Willowridge and our related companies, that's the  
15 minimum yes 'cos it's often an environmental management plan which is –

Q. – so yes, but just in relation the matters within the area of interest of the ORC and the context of PC8.

A. Yes.

20 Q. I know that management plans will often deal with other matters, nuisance and dust and noise and all the rest of it, but –

A. – yeah, it does, it does, it goes into a lot of detail which is yeah, I have read the ones that we've produced and it does meet this.

Q. Right, okay. That's probably as far as I can go with my questions from  
25 you, so...oh no, I was going to ask you. In the context of the monitoring you say that you're concerned about duplication. Have you ever had any monitoring undertaken by the ORC raising issues that are different to the issues that are raised in any monitoring by the QLDC?

1530

30 A. No. Not that I'm aware of, no. The other, maybe I should mention about monitoring is that we do daily and weekly on-site monitoring ourselves as well, it's quite a comprehensive –

Q. – yes –

A. – monitoring which is included in the ESCP in relation to point 7.

Q. Yes, so is –

A. – quite a thorough monitoring regime.

Q. So where's that found. Is that a requirement of the guidelines?

A. Yes, it is B7, of the alternative rule but –

5 Q. – its also in the rule?

A. Yep. Yeah, and it's a written, it's a written record.

Q. Seven. Yes, *Monitoring and Maintenance Requirements*, yes.

A. I would say it's extremely comprehensive.

10 Q. So is the monitoring that the Council does, is that sort of basically reviewing the monitoring – well, first of all, do you provide the monitoring?

A. We do.

Q. The outcome of the monitoring to the Councils?

A. Yes.

Q. To both of them?

15 A. Yes.

Q. And do they do separate monitoring or do they review the monitoring that you've undertaken?

A. I believe they go to site themselves.

Q. They go to the site themselves.

20 A. As well, yep.

**QUESTIONS ARISING: – NIL**

**WITNESS EXCUSED**

**MR ASHTON CALLS****QUINN DAVID MCINTYE (AFFIRMED)**

Q. So your full name is Quinn David McIntyre?

A. Yes.

5 Q. And you are the director of Enviroscope Limited which is an environmental consultancy based in Wanaka?

A. Yes.

Q. And you've prepared a statement of evidence in this proceeding dated 25 February 2022?

10 A. Yes.

Q. And you're also a signatory to a joint witness statement in this proceeding dated 10 March 2022?

A. Yes.

15 Q. You have the qualifications and experience set out in paragraphs 2 to 4 of your 25 February statement of evidence?

A. Yes.

Q. And in preparing that evidence and undertaking conferencing you've adhered to the Code of Conduct for Expert Witnesses?

A. I do.

20 Q. Do you have any corrections to make to your evidence?

A. No.

Q. And so do you confirm that your evidence is true and correct to the best of your knowledge and belief?

A. I do.

25 Q. (Just before McIntyre summarises his evidence, I'd just like to address one matter in chief which may assist.) A series of questions were put to the Court before to Ms Devlin in relation to the process which QLDC takes to audit and certify environmental management plans, or erosion and sediment control plans and how that process would work in the context of  
30 an ORC consent. Could you please provide an explanation of those matters?

A. Yes. So you're asking for my view of how the ORC process works?

Q. Or how the QLDC process works. How they would go about assessing a proposed sediment erosion control plan for certification and how the ORC process would work for that –

A. – okay –

5 Q. – the same issue.

A. Yep. So what usually or what happens is we would prepare an environmental management plan, which includes an erosion and sediment control plan along with all of the other environmental elements that need to be managed through an earthworks project. That then goes  
10 into ORC as part of the application for resource consent. Depending on – on most occasions the EMPs that we've prepared go through with no request for further information. We have had a couple of more complex applications that have some questions and then we would, depending on what's required, there may be some changes made to the erosion and  
15 sediment control plans and also often those, the key conditions out of the erosion and sediment control plans are then followed through and proposed as conditions of consent, so that's then signed off and then into construction and then the various things you need to do there but I don't know whether you want me to carry on with that part, it's a peer review  
20 component though.

Q. Yes, please continue.

A. And, yep, so then once the – on most occasions and its becoming more common now is that the ORC require as built confirmations so the contractor gets the erosion and sediment control plan, they install all the  
25 mitigation controls and then someone like me, if I was managing the job, would go out and check all of the controls, making sure that they've been installed correctly, they're going to work. If there's anything that they encountered out on site that means that the controls that we thought would work don't/aren't going to work, they might have encountered a  
30 rock where silt fence is supposed to go, that you can't remove, there will be changes made and there might be, yeah, minor amendments to the erosion and sediment control plan. Then once the, once we're happy that that's been installed we would contact the Regional Council monitoring team and just advise them of, that that's been done, and then you're

allowed to start your bulk earthworks. From there you, we undertake monthly monitoring so its basically to get out on the site once a month and just check that all of the controls are being undertaken, all of the monitoring, any issues arising that – because you don't always know, at the start when we do an EMP it's, you know, what to the best of our knowledge and how we understand the site but there is certain behaviours of a site that we didn't envisage and we can quickly make changes to the plan to overcome those potential issues. Yeah, and that's basically it and then if anything pops up in between, there might be complaints, often dust, there's dust if the dust mitigation hasn't, contractors might get busy and they didn't water the whole road in a – it might have been a really hot windy day, so that might draw a complaint where we work through those and the regulatory authority may come out and want to check that, so yeah there's various touch points and Ms Devlin discussed really only talked about the monthly monitoring but there's probably also other times where we're going on site with the Council in between those monthly monitoring if things are arising that we need to deal with. Then basically at the end once you get near completion we need to, once earthworks are finished, shaped and re-vegetated, we go out and make sure that its stabilised so 80 – which is generally 80% vegetative cover, once that's done there's ORC require photographic evidence that – of what the site looks like. That's in a nutshell. I – to be fair though I haven't – we haven't got through to the – I think there's been one, maybe two jobs that we've got to the end so I didn't provide the photos, that was the project manager so I can't tell you exactly what happened there at the end but that's in a nutshell how the process works from start to finish.

Q. And just returning to the question of the plans that that all occurs pursuant to, and just the process by which QLDC signs off on those plans and the process by which ORC signs off on those plans. So when QLDC signs off on the plan, what process do they follow?

A. Essentially it's the same process, you know you will prepare an EMP albeit this is in response to a condition of consent. For various reasons that's been set up differently at QLDC. And that will go to a peer reviewer

similar to the type of skills and experience that I understand the ORC panel has, and pretty much exactly the same, the same process is followed. RFIs if required and a signing off of the EMP which includes erosion and sediment control plan.

5 **COURT ADJOURNS: 3.41 PM**

**COURT RESUMES: 3.58 PM**

**CROSS-EXAMINATION: MS DE LATOUR**

Q. Good afternoon Mr McIntyre, hope you can hear me okay?

A. Yes.

10 Q. Thank you for your evidence, it was really interesting getting your perspective and I wanted to start at a high level, asking you some questions about risk, because I think you will hopefully agree with me that Enviroscope's really, you're kind of risk managers in the role you undertake, aren't you?

15 A. Yes. Yes.

Q. And when we're thinking about risks, when it comes to earthworks, would you agree that really the risk we're trying to, or one of the risks we're trying to avoid from ORC's perspective is discharges beyond limits meeting water bodies?

20 A. Yes, that's one of the risks that we're trying to reduce.

Q. And risks in relation to, like in relation to a standard site or a site that you might deal with, there's a lot of different things that contribute to the risk of that happening, i.e. unregulated discharges.

A. Yes.

25 Q. So things like the topography of the land.

A. Yes.

Q. And how much earthworks is being done at any time?

A. Yes.

Q. What controls are in place on the land use.

30 A. Yes.

Q. Sorry, you might have answered; I didn't hear.

A. Oh, yes.

Q. Yep. So based on that, would you accept there is a direct link between the land use and the risk of a discharge?

A. Yes.

5 Q. And obviously one of the challenges for us all is developing frameworks to manage that risk.

A. Yes.

10 Q. And I guess hence why we're here today. Would you also accept that ultimately given the range of different risks, you have to make a judgment within a rule framework?

A. When you say a judgement, in terms of how I design erosion sediment control plan?

Q. Or you have a pick a threshold where you'll look at the risk further, or where you might deem it unnecessary to look at that risk further.

15 A. When we're talking about risk, yeah, there's usually a threshold that you wouldn't go beyond.

20 Q. Yes, and so obviously in PC 8's case the notified provisions provided this 2,500 square metre threshold for residential earthworks as that threshold where the council would have a closer look at the activity and therefore the risks?

A. Yes.

Q. And I talked about some of the connection between land use and risk but in particular from ORC's perspective, all the other things like proximity to water bodies.

25 A. Yes.

Q. That would be a risk.

A. Yes.

Q. And the overland flow paths?

A. Yes.

30 Q. And I think both QLDC's guidelines and ORC's approach in terms of current consenting recognise those different risks.

A. Yes.



Q. So, as I understand it from the guidelines, different requirements with respect to sediment control apply depending on the level of risk, for instance.

A. Correct.

5 Q. And ORC adopts a similar approach?

A. Yep, yes.

Q. And I understand your evidence to be primarily concerned with duplication in terms of land use controls.

A. Yes.

10 Q. You accept that QLDC cannot regulate the discharge?

A. Yeah, I do.

Q. And I think in your evidence and in the joint witness conferencing, there's actually been quite a bit of agreement between yourself and Ms Heather and Ms Strauss in terms of the discharges framework that ORC's been operating under?

15

A. There was a bit of agreement there, yes.

Q. So I think you've all agreed that essentially the current permitted activity rule in the Plan, 12.C, is ineffective?

A. Yes.

20 Q. I can take you to the joint witness statement if you need to refresh your memory on that.

A. That'd be handy, thank you.

Q. So I think that's at paragraph 41 of the JWS, and sorry I shouldn't have used the word "ineffective", I should have said "not suitable".

25 A. Sorry what was the tab there?

Q. Sorry, paragraph 41.

**WITNESS REFERRED TO JOINT WITNESS STATEMENT ON RULE 12.C**

A. Got it here.

30 Q. So you've agreed there that the RPW 12.C permitted activity rules are not suitable in achieving suitable environmental outcomes in terms of water quality?

A. Yes.

Q. And I assume you agree with Ms Heather too in terms of the reference in the current rules, and I'm not talking about PC 8, the conspicuous change in water clarity being an unsuitable standard for discharges.

A. Yes.

5 Q. So you support that change obviously, in terms of the PC 8 rules which now just requires no change in water clarity, sorry no change in colour?

A. Yeah well I probably, that, yeah I do support that, yes.

10 Q. And do you accept Ms Heather's evidence that really there has been a gap in terms of ORC's trying to manage discharges because they can only do so once a discharge has happened and it doesn't meet the standards within the rule?

A. The way that the rule's currently written, that's correct.

15 Q. And in terms, I'll come back to the discharge specifically but I just first, for completeness wanted to touch on the implementation issues because the joint witness statement has addressed a number of these and I know there were differences between the two QLDC and PC 8 framework around site inductions and environmental representatives and SQEPs not being defined, but do you agree that those are matters of detail that can be addressed further if the PC 8 rules are confirmed?

20 A. Yes, they can.

25 Q. And in terms of the discharges specifically, and I'm talking now around your experience of what's been happening under the PC 8 framework, so discharges that have been consented under the PC 8 framework, I think in the JWS at paragraph 20 you agreed that ORC's water quality performance criteria in chemical treatment management plans are suitable and required?

A. Yes.

Q. And would you accept under Ms Hunter's proposed rule, there wouldn't be an opportunity for those matters to be addressed?

30 A. Well, under Ms Hunter's rule I note that there would be an ESCP from QLDC which would cover these matters.

1610

Q. But you've said here in the joint witness statement that ORC's water quality performance criteria are suitable and required.

- A. When I said that, that was, they are required but they all were getting done by QLDC, so...
- Q. So you don't accept that ORC has expertise that QLDC doesn't in relation to some of these matters?
- 5 A. I accept that ORC definitely has that expertise, but I also –
- Q. – and then –
- A. – I also note that QLDC sends these off for peer review to people who do have that expertise also, or at least they should be.
- Q. But we don't know that, that's not within QLDC's rule framework, is it?
- 10 A. It's not in their rule framework but it is in their operations.
- Q. Which they could change, couldn't they?
- A. Yeah, I suppose they could. Yes.
- Q. And then similarly I think at paragraph 28, you've noted and or agreed that, and I think here you're referring to water quality limits, that's the
- 15 heading, you've said that limits are necessary and that the same limits for discharges in all receiving environments is not always the best approach.
- A. That's correct.
- Q. And you agree that discharge limits are required and that a nuanced approach is required on each individual project?
- 20 A. Yes.
- Q. And again, Ms Hunter's rule wouldn't allow for that, would it?
- A. Again, I'd have to say that there would be an opportunity that the ESCP is being reviewed by QLDC's peer reviewers so that should have included that.
- 25 Q. So it should have included a discharge limit within QLDC'S ESCP?
- A. It would include a discharge limit as far as what that site can, what the sites said that they're going to limit, but I do note that that QLDC cant authorise the discharge or enforce it, in the same manner that ORC can.
- Q. Right.
- 30 A. So it's –
- Q. – so –
- A. – so it's more of a –
- Q. – so ORC is still left in the position it was prior to these rules?

- 5 A. Well, I'm pretty sure that Ms Hunter's evidence also says that ORC can certify their ESCPs off, they don't agr- if they're not happy with the discharge limit or discharge performance criteria as it's actually called in the QLDC EMP then perhaps they could go back to the applicant and ask them to change that.
- 10 Q. In fairness to you, I won't ask you questions on the rule construction. I think that I'm best to ask those to Ms Hunter, but I just wanted to clarify your position in terms of the discharge limits, and do you accept that in some instances based on what's been happening under the ORC PC8 framework that ORC has been putting on different discharge limits to QLDC?
- A. Well, back to what we were talking about earlier, it's site specific so I see that ORC put on different discharge limits and I also see that QLDC put on different discharge limits.
- 15 Q. But do you accept that ORC has been putting on different discharge limits?
- A. Yes.
- Q. And you accept that in some circumstances, those discharge limits are more appropriate than QLDC's?
- 20 A. In some cases, yes.
- Q. And you've agreed with Ms Heathers' evidence on that, haven't you, that in some specific instances, I think there's a reference to an example in Bullock Creek where the ORC consent planner's right to question the discharge limit? You've referred that to paragraph 60 of your evidence.
- 25 A. That's correct.
- Q. And you've also agreed that with Ms Heather's evidence that ORC has expertise in relation to discharges and they better understand the cumulative effects of discharges on receiving environments and water bodies?
- 30 A. Yes.
- Q. And would you accept that a sediment control plan, erosion and sediment control plan's just, I accept an important factor, but it is only one factor in reaching a decision on a discharge limit?

- 5 A. I tend to look at it the other way, so in reaching a discharge limit I'd probably look at the receiving environment first to work out what a suitable maximum discharge is, and then work backwards from there to, and when you're looking at the land use component to see if that, the controls and the design of the road and sediment control plan –
- Q. – right, so you have to look at the discharge and the land use –
- A. – well –
- Q. – alongside the land use?
- A. Yeah. Yes.
- 10 Q. Just on erosion and sediment control plans more generally, am I right in understanding they're not in fact required for all sites, are they?
- A. Well, in the QLDC district, they, if you follow the EMP guidelines they do, well they're not required but they quite often, yeah quite often if there's matters of discretion, like if it's a discretionary activity for instance, if there's opportunities to impose conditions QLDC will impose say a low risk EMP which is basically a template that the builder or whoever is managing that project would fill out, so in most cases they are.
- 15 Q. I think, I mean for the Court and your benefit, we can go to look at the guidelines if you like because there's a helpful table. Do you have the common bundle in front of you, Mr McIntyre?
- 20 A. Yes.
- Q. So I think your Honour this is tab 16 of the common bundle and at page CB/1676. Am I right Mr McIntyre that's the different EMP categories that you were referring to?
- 25 A. I'll just confirm I've got the right page, if that's all right.
- Q. Sorry.
- A. So was that number 5, page CB/1676?
- Q. Yeah, correct.
- A. Yep. so, sorry what was your question again?
- 30 Q. So, this was the, is this what you were referring to before when you said that sometimes all that will be required is a short form template?
- A. Yes.
- Q. So that's an erosion and sediment control plan, is it?

A. It's n- well there is an erosion and sediment control part of that plan, I think I can direct you actually to the what's involved in that if you'd like. It's at the back of the Appendix 2 on the CB/1706. These would be for, you know, one small flat site that essentially meets everything in that low risk so if you see on CB/1708 there's an erosion sediment and control plan with a box, it's very basic and straightforward but it's, you know, it's to stop those situ- aim to stop those situations where you have a rain event and a whole heap of different builders, you've got uncontrolled building sites, and they're all pouring sediment off down the driveway and then if I think there's actually a guide, maybe a guide here on CB1711 to show you how to draw up a basic erosion sediment control plan.

1620

Q. So does that cover all of the same things that are within the – Ms Hunter's proposed rule?

15 A. Yeah, well I suppose if the job, I'm only thinking about this for the first time now so but if the, if you went through the categories and you had to have an ESCP for ORC and you found that you fell within the low risk category then, yes, this would be what you would be sending to the ORC I imagine, based on Ms Hunter's rule.

20 Q. Right, so it's not going to require further work to be done to ensure you've met all of the requirements of the rule?

A. What rule are you?

Q. Of Ms Hunter's proposed rule. So for example it requires supporting calculations and design drawings.

25 A. Oh, look, you wouldn't – this, we're getting back to what we talked about earlier about risk, so these are very low risk activities which I note wouldn't be covered under the current PC8 rules, so this would, yeah, you would be going furthermore, this would be more robust I would say than what the PC8 rules are requiring of us. I wouldn't actually prepare these because they don't require a (inaudible 16:22:25 SQEP), these can be done by builders, yeah, it's just, it's a low risk, for low risk jobs and the controls are fairly basic.

30

Q. I fully appreciate that. Mr McIntyre, I'm trying to understand whether Ms Hunter's rule is going to require people to do more than they would have

done under the PC8 rules, and its not entirely clear to me but I think I've probably taken that particular question as far as I can. One other just matter I wanted to understand based on the work you do. I'm assuming you're often dealing with earthworks that are just under QLDC's plan?

5 A. Yes.

Q. And they don't need an ORC consent?

A. No.

Q. And they can be for volumes down to 10 cubic metres, can't they?

A. Yeah. Yes.

10 Q. And there's a whole range of different factors under the Chapter 25 provisions that determine whether you need an earthworks consent.

A. That's correct.

Q. And they'd all be captured by Ms Hunter's rule, wouldn't they?

15 A. I, just thinking on it now, I think that if it was covered by the permitted activity rule and they had to get an erosion sediment control plan, then they would of, they would have to get an erosion sediment control plan because they would have needed a consent.

Q. So under QLDC's framework anything that needs a consent needs an erosion and sediment control plan?

20 A. If its related to earthworks.

Q. Okay. Just a couple, further questions on these plans, they do change, don't they, from time to time through a project?

A. Certainly.

25 Q. And that's part of the, part of why they're a good mechanism is because people can make changes?

A. That's right.

Q. And Ms Hunter's rule wouldn't give ORC any oversight of those changes, would it?

30 A. Yes, it would likely need to be re-drafted to include a requirement for any changes to be re-certified.

Q. And have you come across this situation, and you possibly haven't, you're a good operator but can there be inaccuracies within an erosion and sediment control plan?

A. Yes, I've witnessed those.

Q. Where the information provided to the Council at the outset might actually be inaccurate.

A. That's correct. I've noticed those through peer reviews and the peer review should have ironed those issues out, so I peer review other people's plans.

5

Q. And again there wouldn't be any mechanism at present for dealing with those type of issues either, would there?

A. If I don't, I if understand you correctly, if its going to be peer reviewed by QLDC as part of getting the CP and the EMP, well the SEP is part of approved, it would include a peer review that should pick up any inconsistencies.

10

Q. Right, but again that's not, that's not something provided for in QLDC's framework or anything, that's just how they've been implementing those rules, isn't it?

15

A. That's correct.

Q. I just have a final couple of questions on monitoring. Ms Devlin suggested that ORC monitors monthly and is that your understanding of how often sites are in fact monitored?

A. (no audible answer 16:27:31)

20

Q. By ORC officers –

A. – yeah, yeah –

Q. – I should have –

A. – I think, I think of late the monthly monitoring condition has been imposed more often as ORC has come up to speed with how to implement these consents or how to impose conditions on these consents. In the QLDC has been occurring since 2019 when the guidelines came out, monthly monitoring that is.

25

Q. But again the Council would take a risk based approach to that, wouldn't it, on a higher risks site it might monitor monthly but on a low risk site it may not.

30

A. That's correct, yes.

Q. And –

A. – sorry. Sorry, just to confirm, when you say “monthly monitoring” do you mean monthly monitoring by a SQEP?



Q. No, sorry, I'm talking about the ORC monitor – the compliance officer's visiting the site.

A. Sorry. Well ORC, from what I've seen would usually come out at the start of a, particularly a high risk job, they'd usually always want to be involved at the start and get a feel for what the risks are, have a talk to the SQEP and the project team, get a feeling for their level of engagement and skills of the contractors involved, and then I guess, yeah, depending on what they find, they may pull back or if it, yeah, depending on what their level, I guess it comes back to risk again, they may chose not to come out monthly.

Q. You know so it just it depends on the particular site.

A. Correct.

Q. And one final question on monitoring. Do you agree with Ms Heather's evidence that ORC's focus in monitoring is quite different from QLDC's?

A. Yeah, well to be honest it depends on the officer who comes out actually at this stage and, yeah, I – I would note that in general – generally speaking the ORC are more interested in the discharges and further if we use the Commissioner's analogy of how far up the pipe do you go, they're probably further down the pipe on site and the QLDC seem to take more or look probably more deeply into the actual on-site controls.

1630

Q. And I think would you accept that that reflects their different functions?

A. It must do, yes.

### **CROSS-EXAMINATION: MS WILLIAMS – NIL**

### **25 QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

Q. Good afternoon Mr McIntyre. Its really critically important that the Court understands this process in some detail because it's obviously a point of dispute and we need to have the base facts as correct as we can. So I'd like you to help me in a fairly detailed way to understand the process that both Councils follow. I know that you've been asked to provide a general indication, we need to understand it in detail. So to start of with I think the Queenstown Lakes procedure is quite clear, they've got guidelines,

someone who's putting a new earthworks project – is about to undertake a new earthworks project they would go to the guidelines and that would tell them what they had to do in terms of getting a consent. Is that correct?

A. Yeah to get an EMP approved, yes.

5 Q. Okay, so that's why we need to understand the detail. Do all earthworks require a consent or is it that they require to produce an ESCP or something like that? What does the Queensland *[sic]* District require them to actually do by way of approvals?

10 A. So the key difference there is ORC request the EMP up front so that's part of what they're –

Q. – sorry. Can I just ask you to just focus on the particular question because I need to understand it in bite-sized chunks?

A. Okay.

15 Q. What I'm trying to do at the moment is understand what the Queensland *[sic]* Lakes procedure is. So if we just deal with them. If I'm about to develop some land and I need an earthworks approval from Queensland *[sic]* (Queensland, why do I keep saying that) – Queenstown Lakes, what do I do? I go along to the Council and what will they tell me to do?

20 A. So they'll tell you to get an earthworks consent and when the earthworks consent is approved one of the conditions imposed is the requirement to complete an EMP by a suitably qualified professional which also includes an erosion and sediment control plan.

25 Q. Okay, thank you, that's very clear. That's what I thought but I wanted it from someone who actually is familiar with this. So in terms of the Council process, what, what would an applicant do then? Would they go to the Council or would they look at some document? Who do they decide they need a consent from, the other Regional Council?

30 A. So I can't speak for everyone else who are preparing the plans, but I can speak for what I would do and that is I prepare an EMP that suits the requirements of QLDC and ORC noting that the ORC conditions of consent largely, they are consistent with the QLDC EMP guidelines.

Q. So having – why did you prepare that before you know if a consent is required from ORC?

- A. Because we wouldn't – they'd – it would come in as a request for further information to have an EMP prepared as part of the consent, the application.
- 5 Q. Okay. But are you saying that every earthworks activity in Queenstown Lakes District has to have an ORC consent? Is that what you're saying?
- A. Well at the moment basically if its over 2,500 metres that's the main trigger, then yes.
- Q. Okay, so its as simple as that. If its over 2,500 you've got to get a consent.
- A. Generally speaking, yes.
- 10 Q. So having prepared your EMP, including the ESCP, you send it off to both of the Councils. When you send it off to the District Council, they would send it off to their own external reviewer, would that be the normal thing?
- A. That's correct.
- Q. Okay and would that person be a SQEP, would he be a qualified, you know the same qualifications as you or someone different?
- 15 A. Yes, it would be a SQEP.
- Q. And so the same definition as that applied to you would apply to the independent person that did the checks for the Council?
- A. That's right, it's a peer review.
- 20 Q. And they would review all aspects of the EMP and the ESCP?
- A. Yes.
- Q. So they would go beyond the earthworks component and look at the effects of the discharge as far as the consents, the consent limits in the QLDC part of the plan is concerned, is that right?
- 25 A. Generally speaking but if there was a situation like a Bullock Creek they may ask QLDC to get an ecologist to check that.
- Q. Okay.
- A. If it's a highly sensitive environment.
- Q. Okay, so you've sent your copy off, exactly the same document to the Otago Regional Council, they would send it off to their own independent SQEP or whoever they chose, would that normally be an external person?
- 30 A. So far on the – definitely on the high risk sites. There may be situations where ORC would review more mediate, the more lower end risk projects and there are also situations where it comes back, if we had the changes

that we talked about earlier, they may also choose to peer review or review those themselves. Depending on the complexity of the changes.

Q. Okay, and are you aware of any situations for a high risk site where the ORC went outside, would they use the same peer reviewer or would they be different peer reviewers?

5

A. Sorry, just could you repeat the start of that question?

Q. Sorry. Having sent your EMP to the District Council, they would have an SQEP do a review. The ORC would send it out to a SQEP or someone suitable. Would that be the same one as the District Council uses or would it be someone totally different?

10

A. Totally different.

Q. Okay, I understand. And would that person doing the review for the Otago Regional Council look at the whole thing? Would they look at the discharge component and the earthworks component?

15

A. Yes, they would but I don't know if they would look at all the noise, vibration, all the other stuff that the QLDC require.

Q. Okay, that's very clear thank you, and generally do you get many requests for changes to your documents?

A. From the ORC or QLDC?

20

Q. From either of them.

A. No, not really. Probably, probably I think maybe one in 10, one in 20, I don't, yeah, I would have to check but it's not, not common.

Q. Okay, no, that sounds good. So it sounds as though you're doing something right by the sound of it.

25

A. So far.

Q. So in terms of the changes that go on, on site, the District Council has got procedures where the SQEP can make certain decisions to change the procedures or the controls to take account of a particular experience on site.

30

A. Yes.

Q. And that doesn't then need to go back to the District Council officer for approval?

A. It does, so when – depending on the change, it goes back to the monitoring team and they'll review the change and decide if its within their

level of capability to review it, so if its something small they'll do it themselves but if not they'll send it back to the person who originally peer reviewed the document to get them to decide or at least advise them whether they should accept the change or not.

5 1640

Q. Okay, thank you. And in terms of the Otago Regional Council procedure how would that be done, if there was a change required on site to the ECMP, how would that be dealt with by the Regional Council?

A. In this same way.

10 Q. So the SQEP could make a recommendation and that would go back to the officer?

A. That's right. The only difference though and it's just something, one that's just popped up is because the way that the QLDC sets it up through a condition imposed it's much, they can get the peer reviewer to do the  
15 check as part of a consent condition check, so you don't need to go and, so if it's more complex I understand that ORC may do a s 127 variation to the consent, but I guess in that instance I'd imagine they would be sending the document back to the same review since they've got, they did the original one, they're familiar with the site, the job, so yeah, might  
20 have to wait and see how that plays out but we're in, and that's the first one that's just come up in the last week or so, but we haven't gone through the whole process yet.

Q. Okay, no that's very helpful, thank you. And does it mean that there are three SQEPs involved through the construction phase, yourself and one  
25 for each of the two councils?

A. Yes, yeah, that's right.

Q. Okay.

A. On the jobs where an ORC consent is required, yes, as well, yeah.

Q. Right. In terms of the monitoring process, are the requirements of the  
30 Regional Council in terms of monthly monitoring and weekly monitoring, are they significantly more onerous than what the Regional Council requires?

A. Originally, the Regional Council didn't have quite as often have the same monthly – oh sorry, hang on, I'll need to ask you the same question – are you referring to the council officer's monitoring?

Q. Sorry, no I'm talking about the monitoring required by the applicant.

5 A. Yeah. So, I believe that, well, SQEP monitoring happens monthly so ORC in the last, I don't know, three to six months has probably brought that in, it's more common on a ORC earthworks consent. QLDC have had that for a while so that's monthly monitoring by the SQEP and then there's weekly monitoring and the, I'm pretty sure that the ORC has  
10 adopted the QLDC condition or EMP requirement and condition actually, it is also a condition that there's weekly, I'll just need to check that, maybe someone can check that, weekly monitoring by the environmental representative on the site. But I'm pretty sure, actually I'm pretty sure that the ORC doesn't require an environmental representative, so it might just  
15 be weekly monitoring by someone. I'd have to check that though, sorry, I'll just mull over that.

Q. So there's no requirement to do anything more by the ORC than the District Council is requiring anyway, is that a correct statement?

A. No. No, that's correct.

20 Q. It is correct?

A. Sorry, I was just thinking about what else there was, but no there's nothing else, so that's correct.

Q. Okay, so the fact that the ORC has a consent will add no extra monitoring costs in terms of monthly or weekly monitoring?

25 A. Only by way of having to send out their own when there's, so there's two lots of compliance from two different councils going out but they won't do extra monitoring that QLDC's already doing.

Q. Okay. So I think you've already answered Ms De Latour about the monitoring undertaken by ORC officers. In terms of the District Council  
30 officers, would they take a similar approach?

A. Yes.

Q. Okay, I think that's probably answered all my questions. I think that's all, and I'm sure her Honour will pick up on anything that I've missed.

**QUESTIONS FROM THE COURT: JUDGE STEVEN**

- 5 Q. Thank you, yes. Look, I just have one or two questions and they're specifically related to, well firstly I want to start off with reference to the Bullock Creek catchment in Wanaka, the example that where there had been differing discharge standards, well, a discharge standard that was imposed by QLD consent, but Ms Heather for the ORC thought was not appropriate, bearing in mind the sensitivity of that catchment. So that's your paragraph 60.
- A. Mhm.
- 10 Q. So in terms of the QLDC guidelines and the Appendix 2, well the categorisation of sites whether they're low, medium or high risk sites, in which category would that site have fallen?
- A. Definitely high.
- 15 Q. Definitely high, okay. And so that was an example where I take it from the age of that consent it wasn't one where the ORC where a consent had to be put in under the current framework PC 8 framework for a discharge permit from the ORC? So that was just pure, so it wasn't –
- A. – yes.
- Q. – a case of where there were actually different limits, or?
- 20 A. At the time, I believe at the time when the QLDC issued that consent that PC 8 may not have been around, I'll have to check that though but I do note that that was one of the earlier consents that the QLDC officers issued for such a sensitive environment and that's what I assume was the issue why that issue popped up.
- 25 Q. That that limit wasn't appropriate, mmm. So I wasn't sure from your evidence, you've been asked by Willowridge and Remarkables Park to give this evidence. In your capacity as a professional, have you been involved in any of the consents that Ms Devlin talks about that have been undertaken by Willowridge, the consents you refer to?
- 30 A. Yes.
- Q. Lake Hawea, Wanaka, and then there was another one, another example.
- A. Yes.

Q. Are any of those sites also in a high risk category in terms of the guidelines of that third category?

A. Yeah, yes.

Q. Which one?

5 A. So there's the one that we just talked about, so that's the Bullock Creek one.

Q. Oh, so was that one of theirs?

A. That was one, yes.

10 Q. So let's just check the ev- I didn't appreciate that Ms Hunter was talking about that particular one, so it might just be helpful just to go back to her evidence. I thought it was current, well, recent consents that where they'd gone through the dual consenting process but I might be wrong, so I'll just get it.

A. There are other examples, so that have yeah, more recent than that. Yes.

15 Q. Oh recent, so recent and specifically let's just look at specifically at the paragraph 3 of her evidence, you might just want to look at those, they're subdivisions as opposed to that, I'm not qu- I'm assuming that the Bullock Creek wasn't a subdivision, it might have been something else, I don't know, but –

20 A. - sorry, your Honour, where are we looking?

Q. Paragraph 3 of Ms Devlin's evidence.

A. Is that volume...

Q. It's in the same volume as your evidence, it's just under tab 13, so it's volume 3.

25 A. Volume 3.

Q. If I just flick back a few tabs.

A. And your Honour, we're looking at paragraph?

30 Q. Paragraph 3. it's just the recent subdivisions that Willowridge has been, and I just wondered whether you are involved in any of those specific ones. Let's just confine, forget about Mosgiel but the QLDC, Hawea and Wanaka/

1650

A. Yep, so definitely I've done the two bottom ones.

Q. Yes.



A. My colleague has done the top one. I haven't been involved in that personally. So yeah three there from, well two from me at least.

Q. So where do they fall in those three categories in terms of the risk under the guidelines?

5 A. Yeah, so they would have been both high risk.

Q. Are both high risk?

A. Yep.

Q. The – lake – so both the Wanaka ones, the Wanaka ones?

10 A. Yeah. Basically if you discharging into Bullock Creek it's a sensitive environment so it's a – you basically trigger it straightaway.

Q. Right. So that's the – so that locality I'm not familiar with the location of those, but they discharge into Bullock Creek?

A. That's correct. They're at the headwaters of Bullock Creek.

15 Q. And so in that case there were limits imposed on the TSS? Limits imposed on the QLDC's consent?

A. Yes. Yes.

Q. And there were the same limits imposed on the ORC consents?

20 A. No. So on the, so that's a good example. The Alpha series one, so that's referred to in Ms Heather's evidence where, as I said, the QLDC imposed a limit and then through the ORC consent it was, I think that was actually the first job where there was, it was a dual ORC/QLDC consent.

Q. Right.

A. So it was, yeah, so the –

25 Q. – so a joint, a joint application, the applications were lodged at the same time?

30 A. No, so the QLDC one preceded the ORC one and then when the ORC went to assess the application the discharge limit that was imposed by QLDC was not accepted and so at the time when went through it with the consents planner we were trying to come up with what would be suitable and I was told that if we could demonstrate, because what was happening was the water wasn't discharging straight to the creek, it was going through quite a large Triton arch stormwater attenuation system, then into a attenuation, large attenuation pond, then into the waterway, so there's a bit of work that was required to get an understanding of what sort of

discharge that it would be getting by the time it got to the creek, but my client, Ms Devlin, decided that the earthworks programme was falling behind and we needed to get consent so it was decided that we'd just pump out of a pump into a water truck and drop the water into a large high soakage paddock to get around that, so we never got to the end of the – to find out where we would get to on that one and –

5

Q. – when you say “you never got to the end”, are you talking specifically about the ORC consent process?

A. Yeah, that's right.

10

Q. So you decided to avoid it because it was going to be too hard?

A. Correct.

Q. And so when you say that it was a joint process, it wasn't a joint decision to grant consent. What was joint about it?

A. So, sorry I spoke. So it was a project where we needed QLDC consent and ORC consent.

15

Q. But if Ms Devlin hadn't been so concerned about getting behind in terms of the timeframes for construction, then conceivably had you followed through with the ORC consent, you could have had a consent with different limits?

20

A. Potentially.

Q. With different mechanisms to manage –

A. – potentially –

Q. – sediment?

A. Potentially, yes.

25

Q. So those were my questions. Thank you very much. I have nothing further to ask.

**QUESTIONS ARISING: – NIL**

**WITNESS EXCUSED**

30

**LEGAL DISCUSSION –****MR MATHESON ADDRESSES THE COURT (16:54:41)**

I am sure that your Honour is going to want to have a talk about where to from here.

**5 THE COURT: JUDGE STEVEN**

Yes, we are going to want to have a talk and I haven't had a chance to confer with the Commissioner in terms of whether we do submissions tomorrow orally or whether there's a preference for them to be handed in, in writing. We've got one more witness to go, but, yes, we'll see.

**10 MS WILLIAMS ADDRESSES THE COURT (16:55:04)**

I'm not available tomorrow. I certainly wouldn't be able to provide oral submissions tomorrow. I'm in two minds about whether I need to file closing submissions. I might have a discussion with Ms de Latour. If they were going to be in writing obviously and next week that would be easier for me, so, yes,

15 I'm in the Court's hands.

**THE COURT: JUDGE STEVEN ADDRESSES ALL PARTIES (16:55:31)**

I personally think written submissions. The question is, in fact, I think I can definition say we need written submissions, and the Commissioner is nodding, the question is whether you're going to be – its we're going to require you to  
20 give them in person or whether we we're willing to deal with them on the papers and I think that I'm content to proceed on the basis that we'll decide once we've seen those submissions whether there's the need to further engage with counsel, and so the Commissioner is again nodding at that, so that's the decision that we're going to make. So the question really is when do you think  
25 you will, you can reflect on it overnight because we've still got another witness to go, and you can let the Court know tomorrow. I don't want this to drag on but you can let the Court know when you think you can get the closing submissions in and we'll come up with a timeframe for that and then we will proceed on the basis that we'll read those submissions and decide if we need  
30 to engage with the parties in person about those, in which case we could do

that by another remote hearing or a telephone conference or something like that or otherwise we'll just deal with them on the papers.

**THE COURT ADDRESSES MS DE LATOUR (16:56:50)**

Q. So Ms de Latour?

5 A. I was just going to say thank you, your Honour, Mr Matheson and I have had a conversation regarding this as well in terms of we thought there might be a need for a written submissions. Just as a matter of practicality I wanted to highlight to the Court I am due to go on maternity leave at Easter so if you did want to hear from us I would certainly prefer we didn't  
10 let it drag for too long.

Q. No.

**MR MATHESON ADDRESSES THE COURT (16:57:19)**

Q. So I was just going to say, to assist the Court and Ms de Latour also discussed that it would be, it would be helpful for her process and the  
15 process generally if we provided our closings first –

A. – yes –

Q. – and then Ms de Latour –

A. – obviously, definitely –

Q. – and I've had a talk with my friend and we can commit to Monday for  
20 closing submissions and that should give Ms de Latour a bit of time next week and we'd get well done before Ms de Latour has other more important things to –

A. – yes, look I quite agree. So that's helpful, so thank you very much for that. Its helpful that you have that engagement and I can appreciate the  
25 reasons why you've done that. So we'll proceed on the basis that that's what happens and I think Ms Williams you can file written submissions if you want to.

**MS WILLIAMS ADDRESSES THE COURT (16:58:08)**

Q. Yes, I have no questions for Ms Hunter, your Honour, so if I could be  
30 excused for tomorrow's hearing.

A. Yes, absolutely. Yes, you can. So that's on the basis that if you want to file any closing submissions you can file them at the same time as the Council. Thank you.

**THE COURT: JUDGE STEVEN ADDRESSES MR WATTS (16:58:24)**

5 Q. And just for completeness, Mr Watts, I'm going to ask you, do you think you want to have any further involvement and file any further submissions in light of what you've heard? (I can't hear you, Mr Watts, I can see your lips moving but no sound coming out.)

A. (no audible answer 16:59:05)

10 Q. If you just shake or nod. You do want to. So we will afford you an opportunity, I think that's all we need to know.

**THE COURT: JUDGE STEVEN ADDRESSES MS DE LATOUR(16:59:16)**

Q. And the question is whether, Ms de Latour, do you think you want to respond to any submissions that Mr Watts files for the Council, the QLDC,  
15 do you think they should be filed by next Monday or did you not discuss that with Mr Matheson?

A. We haven't specifically discussed Mr Watts' submissions but I'm happy to liaise with Ms Williams and Mr Watts.

Q. Can you do that, thank you.

20 A. And we'll sort it out.

Q. Let us know that tomorrow, thank you very much.

**THE COURT ADDRESSES COUNSEL – CONCLUSION DAY 2 (16:55:13)**

**COURT ADJOURNS: 5 PM**

25

**COURT RESUMES ON WEDNESDAY 23 MARCH 2022 AT 9.59 AM****MR ASHTON CALLS****CLAIRE ELIZABETH HUNTER (AFFIRMED)**

- 5 Q. Good morning. Your name is Claire Elizabeth Hunter?
- A. Yes.
- Q. And you're a director of the firm Mitchell Daysh Limited?
- A. Yes.
- 10 Q. And you produced a primary statement of evidence in this proceeding dated 24 February 2002?
- A. Yes.
- Q. And you're also a signatory to a joint witness statement dated 8 March 2022?
- A. Yes.
- 15 Q. And you have also produced a supplementary statement of evidence dated 22 March?
- A. Yes.
- Q. You have the qualifications and experience set out in your primary evidence?
- 20 A. I do.
- Q. And you've adhered to the Code of Conduct in preparing your evidence?
- A. I have.
- Q. Do you have any corrections to make to your evidence?
- A. Yes. In terms of my evidence-in-chief and also to the supplementary
- 25 statement, just some minor corrections.
- Q. Please speak to those.
- A. In terms of the evidence-in-chief, it's on Table 1, there is some, appears to be sort of a formatting issue with that table, it's an incrementally put numbering throughout the table which shouldn't be there, so under
- 30 "Earthworks over a contiguous area of land shall not exceed the following area:" and then there's a *1 bulletpoint*, so all of those sort of oddish looking numbers that don't make sense should not be there. Apologies for that.
- Q. Thank you.

A. And then in the terms of supplementary statement at paragraph 21 and in the last sentence the words “to limit” should be added so it should now read, “The other changes relate to the desire to limit the restricted discretionary matters of concern to the ORC, namely the discharge itself”.

5 Q. And so with those corrections do you confirm that your evidence is true and correct to the best of your knowledge and belief?

A. I do.

Q. Could you please speak and summarise your supplementary statement for the Court and then answer any questions from my learned friends.

10 My full name is Claire Elizabeth Hunter.

I have the qualifications and experience set out in paragraphs 1-3 of my evidence-in-chief *and* I re-confirm that I have read and agree to comply with the Code of conduct for Expert Witnesses in the Environment Court Practice Note 2014.

15

In this *supplementary* statement I provide a summary of key points, *most of which were raised within my evidence-in-chief*, and respond to the evidence provided for the Regional Council which I read and heard during the first day of these Environment Court proceedings.

20

*The key matters that I address in that supplementary statement relate to the coverage or adequacy of the Queenstown Lakes Proposed District Plan earthwork provisions. The second matter relates to appropriateness of the rule which I proposed in my evidence-in-chief and then further refined in the planning joint witness statement. These rules are referred to in the legal submissions prepared on behalf of Remarkables Park Limited and Willowridge Development Limited as Option A – Simple Alternative Rule – and Option B – Detailed Alternative Rule. And as you all know I’ve attached a new rule, a further refined rule to the supplementary statement.*

25

30

*And finally within the supplementary statement I provide some commentary regarding the appropriateness of including visitor accommodation in the definition of residential development as part of Plan Change 8 from a planning perspective.*

5

*At paragraph 6. As I set out in my evidence-in-chief at paragraph 8, Remarkables Park Limited and Willowridge Development Limited lodged submissions on Plan Change 8 opposing the residential earthworks provisions. This was primarily because within the Queenstown Lakes District the Proposed District Plan has specific and thorough controls on earthworks, including earthworks for residential activities.*

10

*In my opinion the QLDC Chapter 25 Earthworks Provisions are comprehensive. In fact, they go further than many other District Council examples of earthwork controls that I am familiar with. With respect to sediment control it appears that this was intentional as I have reviewed the section 32 report that was prepared in support of the QLDC provisions. And I note that that's within the common bundle, Volume 4, Tab 13, for reference and I've got some extracts from the QLDC's s 32 report there which I can read out or leave for you to read. I think its key within those sections that there was a direction within the Otago Regional policy statement 2019 that there was an obligation of the territorial authorities to manage the potential effects of erosion and sediment control through the District Plan and QLDC proactively responded to that with the development of Chapter 25.*

15

20

25

*It is also evidence from the s 32 reporting that the Chapter 25 Earthworks Provisions were specifically established to "bridge the gap" between the Otago Regional Water Plan existing discharge rules and establish land-based provisions that deliberately sought to control sediment generation and run-off.*

30

*As I have also sought to demonstrate in my evidence-in-chief at paragraph 41 and within Table 3, in practice there appears to be*



significant duplication between the earthwork consents and conditions that are being issued by the QLDC and the ORC. This reinforces my view that the Chapter 25 Earthwork Provisions and the Plan Change 8 provisions are effectively achieving the same outcomes.

5 I understand however the ORC witnesses are concerned that the QLDC cannot legally enforce conditions related to discharges associated with land use. I am not suggesting that the QLDC is seeking to authorise discharges to waterbodies via its Chapter 25 Earthwork Provisions. Rather they are seeking to impose land based controls on a land use  
10 activity to avoid or mitigate adverse effects arising from erosion and sedimentation runoff. Earthworks are usually a land based activity. The controls to prevent erosion and sediment runoff are also land based. Best practice erosion and sediment control, which have been discussed in the various statements of evidence, are appropriately land based to avoid or  
15 significantly reduce sediment run-off and discharges to surrounding sites and waterbodies in the first place. These land based controls either seek to avoid discharges to waterbodies altogether, or alternatively ensure that sediment laden water is treated on land to such a quality which in my mind should not give rise to discharges which are concerned by s 70,  
20 s 105 or s 107 of the RMA.

I therefore maintain my view that it remains unclear what is missing from the Chapter 25 Earthworks Provisions, that might result in concern for the ORC, to the extent that it needs to introduce additional land based earthworks controls, specifically those which only apply to residential  
25 activities.

As noted above, I do however accept that the QLDC s 9 RMA consent cannot authorise a s 15 RMA discharge permit. I also accept that s 15 sets out that no person may discharge any contaminant to water or to land in circumstances where it may enter water, unless the discharge is  
30 expressly allowed by a rule in a Regional Plan. On this basis, I also accept that the ORC may wish to include a discharge rule to capture

circumstances where there may be a residual discharge from the site which contains sediment. I address this matter further below with regard to the development of the alternative rules.

5 Ms Boyd and Ms De Latour raise some concerns with the drafting of my simple alternative and detailed alternative rules. Specifically that the simple alternative Option A rule would be ultra vires, or uncertain on the basis that it involves a discretion on behalf of the consent authority to certify or accept the plan.

10 There is also concern that if there is no approval process, which is how I have developed Option B, the detailed alternative option in the joint witness statement, then it leaves the ORC with no ability to influence or refine the mitigation responses being proposed within the Erosion and Sediment Control Plan ESCP and nor do they have any ability to require a separate discharge permit.

15 There are also concerns regarding cost recovery.

20 These rules were an attempt to provide a reasonably pragmatic planning solution to the issues at hand. One which recognises the robustness of the Chapter 25 Earthwork Provisions in terms of land based earthworks controls, while also providing ORC a clear pathway to review the erosion sediment control plan and keep a closer eye on the activity, in conjunction with QLDC, from ORC's water quality compliance and enforcement perspective.

25 I had also intended in drafting the rules, that if the ORC consider the erosion and sediment control plan to be inadequate for any reason, or the site was likely to be higher risk for a discharge, then they could use the submission of the erosion and sediment control plan as a platform to then require a consent under the existing Water Plan discharge rules. – *And I note that Ms Boyd yesterday raised, there was a confusion within that statement, and there I am talking about the Option B detailed alternative*  
30 *rule which was attached to the joint witness statement which simply had*

a “you prepare the erosion sediment control and submit it” and that was the only trigger to retain and permitted activity status. So I then thought if the way that worked mechanically in my mind was you submitted the erosion and sediment control plan and you’re permitted, but what I failed to also sort of recognise within that is that that also issued a discharge permit and you were permitted under both the land use and the discharge so therefore you didn’t, they couldn’t really go back and say, “oh, actually you need another discharge permit under the existing water rules”, so yeah, because it was simply you just had to submit that plan was the issue there, so explain it. – I do however accept that the way that alternative rule has been drafted it would also permit the discharge, thereby negating any ability of the ORC to then enforce a separate discharge consent under Rule 12.C.1.1.

In response to these concerns a revised rule has been developed and a copy of which was discussed in reasonable detail yesterday and attached to Schedule 1 of the supplementary evidence.

In my opinion this Updated Alternative Rule provides a workable and appropriate framework whereby:

Matters of efficiency are suitably addressed as an additional consent is not always required if an earthwork consent has been obtained and an erosion and sediment control plan has been required as part of the QLDC consent process.

It will ensure that ORC becomes aware of any earthworks, because ORC will be asked to certify *that plan*.

The requirements of the erosion and sediment control plan are clear and are capable of being certified as to whether those requirements are met in any erosion sediment control plan.

It provides the ORC with certainty on the basis that if a erosion sediment control plan does not exist or ORC reviews the plan and considers that the earthworks activity and/or the mitigation proposed

will not be adequate in all situations to ensure compliance with the other permitted activity standard *which is set out in that Alternative Rule*, then ORC could decline to provide certification. This would trigger a restricted discretionary activity consent *which within the Updated Alternative Rule now includes which was missing from the Option B version in the joint witness statement.*

There are other known planning examples which refer to a management plan or a certified plan being required as part of a permitted activity rule *and I've sought to attach those examples within Schedule 2 of that supplementary evidence.*

I acknowledge that there may be some costs imposed on ORC to review and certify the erosion and sediment control plan and ensure ongoing compliance with it. As a permitted activity, these would not be recoverable via a consenting mechanism *that I'm familiar with in particular.* However, I think that these costs would not be unreasonable on the basis that the Updated Alternative Rule recognises that the applicant has already gone through a robust process with the QLDC to develop the erosion and sediment control plan *and presumably that's been certified by a suitably qualified experienced person or a SQEP* and that there are comprehensive reporting and monitoring obligations inherent within the QLDC consents and conditions *and* having access to this material should assist in providing the ORC with the necessary information it requires, without having to incur significant additional monitoring *review or monitoring* costs.

I have also proposed some amendments to the Council's proposed restricted discretionary activity rule and the matters of discretion. These changes remove clause (a) which in my view are more appropriately *suited to* the QLDC s 9 consents. The other changes relate to the desire the restricted discretionary matters of concern to the ORC *and namely so the focus is on the discharge itself.*

– And then the next few paragraphs I turn to the matter of visitor accommodation and this was covered by Mr Ashton in his legal submissions and I agree with Mr Ashton that in my experience visitor accommodation and residential activity are defined quite separately in district and city plans that I am familiar with and the nature of the activity are quite different, such that visitor accommodation in its purest sense, being hotels, motels and the like, are not often, you know, often require a consent in a residential zone whereas – and they may be more acceptable in a commercial or airport type zones, yeah. So just putting a bit of a planning perspective on those definitions.

And that concludes my supplementary statement unless I could go through the alternative rule but that was covered by Mr Matheson, but if you find that helpful, your Honour.

**THE COURT JUDGE STEVEN ADDRESSES WITNESS – RE: WILL HAVE QUESTIONS, WILL TRAVERSE (10:15:44)**

**CROSS-EXAMINATION: MS DE LATOUR**

Q. Good morning Ms Hunter. I just wanted to start at a high level and understand what your planning opinion is given we've had these various versions of the rule, so are you now accepting that there needs to be some form of regulation within the Queenstown Lakes District as part of PC8?

A. Yes.

Q. And so you, you're not pursuing the complete carve-out anymore?

A. In terms of deleting, sort of, the application of Plan Change 8 on QLDC? No, no.

Q. Yes. And you support the alternative rule attached to the supplementary evidence is the version that you support in light of where the evidence has got to?

A. Yes.

Q. Thanks. And presumably your planning opinion in terms of the fact we need to do something within PC 8 is based on that jurisdictional question

around the fact that ORC is the council that has the function to manage discharges?

5 A. Yes I agree that the Otago Regional Council is the authority that issues s 15 discharge permits; however, there's nothing within s 31 relating to the functions of territorial authorities that limit their ability to manage the adverse effects of water quality from land use activities.

Q. And that's not in dispute, Ms Hunter but I'm just asking that part of the rationale why you do accept that there needs to be some form of regulation is based on ORC's discharge functions.

10 A. Yes.

Q. And you also accept presumably that the Regional Plan for Water framework under the previous permitted activity rule represented a gap in terms of the management of earthworks from ORC's perspective?

A. Yes.

15 Q. And I assume you're accepting the technical evidence that's been filed by ORC in terms of the cumulative effects that sediment's having within the Otago Region, Ms O'Zane and Dr Thomas' evidence?

A. Yes.

20 Q. And the cultural evidence filed on behalf of Kai Tahu and Ngai Tahu (inaudible 10:18:44).

A. Yes.

Q. And would you accept Ms Hunter that Te Mana o te Wai represents a paradigm shift in terms of how we manage freshwater in New Zealand?

A. Yes.

25 Q. And so am I right in thinking that your main concern in terms of your planning opinion as to why the PC8 rules that have been proposed by ORC aren't appropriate, is that based on s 32?

A. Yes.

30 Q. So it's based on the fact that it essentially in your opinion it wasn't efficient and effective for there to be these, this additional regime where ORC controlled land use and discharge in the combined rule?

A. Yes I think there are inefficiencies and ineffectiveness in having two consents that seek the same outcome.

Q. Right, thank you. And so you've thoroughly considered and thought about s 32?

A. Yes.

Q. And the obligations in relation to s 32 analysis?

5 A. Yes.

Q. And are you aware of the requirements of s 32A?

A. Yes.

Q. And I think there's a copy of s 32A so you can refresh your memory that madam registrar or Ms Wadworth will be able to give to you. There's both  
10 a copy of s 32A and the Remarkables Park submission I just want to talk about.

**WITNESS REFERRED TO COPY OF S 32A RMA AND REMARKABLES PARK SUBMISSIONS DOCUMENT**

Q. So s 32A says that a challenge to an objective, policy, rule or other  
15 measure on the ground that the evaluation report has not been prepared or regarded or has not been – sorry, I'm just paraphrasing – or s 32 has not been complied with may only be made in a submission, and then it references various sections or under schedule 1.

A. Yes. Yes.

20 Q. So we would expect to see a challenge to the adequacy of the s 32 report within the submissions?

A. Yes.

Q. And I think you've referred in your evidence to the submissions filed by Willowridge and Remarkables Park. Are you aware that Willowridge in  
25 fact hasn't lodged a submission on PC 8?

A. Yes.

Q. So it's only Remarkables Park who has a submission, is that correct?

A. Well yes and Willowridge has joined their submissions, as I understand it.

30 Q. Yes, so jurisdictionally we're relying on the Remarkables Park submission.

A. Yes.

Q. And I just wanted to, I've got a couple of just issues on the submission I wanted to discuss. One of them relates to the new rule also. Do you have a copy of the submission in front of you?

A. Yes.

5 Q. And that submission essentially says that the opposition was, RPL's opposite was having to obtain a resource consent for earthworks in circumstances where they already have to get one from QLDC. I think there's – sorry, I'm just reading off my computer screen – there's just the notes, two lots of notes I think is what comprised the actual submissions, 10 so there's the box, the first box is "Are you a trade competitor?", the next box is the specific part being submitted on, and then there's a third box about stating your views.

A. Yes. Yes.

Q. And that doesn't refer to, directly to s 32, does it?

15 A. It doesn't say the word s 32, but it does says words like "unnecessary duplication and cost" and "does not achieve environmental benefits or any improved environmental outcomes" and those words and that terminology is certainly used in s 32.

Q. And the submission doesn't refer to the issue around land holding or 20 contiguous area of land, does it?

A. Not specifically, no.

1025

Q. Nor this, there's been some suggestion although I'm not entirely sure whether its been pursued, about the slope requirement and having a 25 higher threshold based on slope.

A. Not specifically, no again.

Q. And just thinking about your new proposed rule which I will come to in a bit more detail in due course, but you – that rule has been drafted so that it will capture activities that wouldn't have been captured by the PC8 rule, 30 ie, those below the 2,500 threshold.

A. You mean in terms of the QLDC there might be other triggers that might capture (inaudible 10:26:01) consent, is that what you mean?

Q. I mean, so under the PC8 rule, it only, putting aside the other standards, the discharge parts of that permitted activity rule, if you were on a site



over 2,500 square metres, you were doing 2,500 square metres of earthworks for a residential development you were captured, this permitted activity rule that you're proposing applies at a lower, just applies if you were doing earthworks for residential development?

5 A. It applies if you've got a consent from QLDC, yes, but I don't think there's anything in the drafting that actually says you can't use the existing Rule 14.5.1.1.

Q. And in terms of the s 32 analysis that you've addressed in your evidence, am I right to understand that essentially your position is that the Chapter  
10 25 provisions are so robust that we shouldn't need to consider the earthworks component at least within the ORC framework?

A. Which paragraph of my evidence are you referring to?

Q. I'm just trying to understand exactly what your position is in terms of – because I think before you, you mentioned that you agree that there's  
15 some form of regulation but your whole premise is that there's overlap based on the land use component between QLDC and ORC.

A. Yes and it's based on my experience in consenting under both.

Q. Yes. And you've referred to the s 32 analysis for QLDC in your supplementary statement at paragraph 7.

20 A. Yes.

Q. And in your primary brief you were critical of the fact that there were various costs that hadn't been factored in by ORC so the likes of the monitoring costs.

A. Monitoring costs of what?

25 Q. Of the ORC's rules. So you were critical of the ORC s 32 analysis because it only considered the costs of obtaining the consent not the monitoring costs.

A. Can you point me to that paragraph please?

Q. Sorry, it might just take me a moment to find it, my notes aren't just  
30 perfect.

**THE COURT: JUDGE STEVEN ADDRESSES MS DE LATOUR (10:29:24)**

Q. It might be easier just to put the question to the witness on the basis of whether that is her view as opposed to whether its stated.

**CROSS-EXAMINATION CONTINUES: MS DE LATOUR**

Q. Ms Hunter, is that one of your criticisms of the s 32 report?

A. Yes, monitoring costs among others.

5 Q. And generally the costs not being quantified was also a criticism, wasn't it?

A. Yes.

Q. And you mentioned the QLDC s 32 report, are you aware whether those types of costs were quantified by the QLDC s 32 report?

A. The costs of what exactly?

10 Q. Monitoring costs of their new rules.

A. No, I'm not.

Q. Well the costs of them requiring consents to be obtained?

A. No.

15 Q. I can take you, in fairness, to the s 32 report that QLDC prepared. It's under Tab 13 of the common bundle.

**WITNESS REFERRED TO BUNDLE, PAGE 1484 (TAB 13)**

Q. And its at CB1484.

A. 1484.

20 Q. Yes. And I think you've written the s 32 report does assess the different parts of the Chapter, so this is just the chapter, if you see the heading at the top, *Issue 3: Earthworks and Soil Erosion Sediment and Generation of Run-off*.

A. Yep.

25 Q. And you'd agree that seems to be the relevant, you know equivalent path of the Chapter 25 that you've seen overlapping?

A. Yes.

30 Q. And it talks in bullet point 6 about volume limits, matters of discretion, assessment matters to manage the environmental effect for earthworks and then it talks about the area limit matters of discretion and assessment matters to ensure where erosion and sediment management is necessary, its effective.

A. Yes, it says that.

Q. And then they've quantified the economic costs, just simply say costs to persons undertaking earthworks to apply for consent where the permitted standards aren't met.

A. It says that.

5 Q. And then it talks about the, I think there's another, if you turn over the page 1486 –

**WITNESS REFERRED TO BUNDLE, PAGE 1486**

Q. – and again they've just qualitatively assessed some of the costs associated with that regulation, haven't they?

10 A. I don't know how they assess the costs, but it talks about costs in that section, yes.

Q. I mean its not quantified is it?

A. I haven't forensically reviewed the s 32 report. I have simply extracted a couple of statements in my supplementary evidence referring to the fact  
15 that there was a gap.

Q. And I think that at just one final question while we're on s 32 generally, and I suppose this goes to the effectiveness of the rules. You've said that in paragraph 45 of your primary brief and I think it's also mentioned sorry in your supplementary brief, that there will be no additional environmental  
20 benefit from the PC8 rules.

A. In the Queenstown Lakes area.

Q. In the Queenstown Lakes area. So you've said that 45 and I believe you've repeated that (sorry, I'm just trying to skim). I think your view will be the same, that there's no added environmental benefit from the full  
25 suite of PC rules that ORC is promoting.

A. In Queenstown Lakes.

Q. In Queenstown Lakes. But you've got no evidence, technical evidence, that you're relying on for that view?

1035

30 A. I've got my experience in consents.

Q. Right. And that allows you to form a view on the environmental benefit of every consent granted by QLDC.

A. No, but I can see where there's clear duplication in conditions, so the outcomes are the same, so there's no benefit in having an additional consent on the face value of the conditions.

Q. On the face value of the conditions.

5 A. Yeah.

Q. But that doesn't go to whether there's an environmental benefit, does it?

A. Well the conditions should regulate the activity in terms of its adverse effects so if both sets of conditions say the same thing, the environmental outcome should be the same or very similar I would have expected.

10 Q. So you're talking just about the land use component, not the discharge?

A. I'm talking about the consents that I have reviewed that have been issued by QLDC and ORC and they are, in most cases, the same.

Q. But the discharge can't be because ORC doesn't grant a discharge.

A. So the ORC discharge permits that I have seen have very few conditions, one of which says that it should be exercised in conjunction with the land use consent and that's effectively it on the discharge permits that I have seen been issued by ORC.

Q. I cant take you to some of Ms Strauss' consents if we need to but we've already heard Mr McIntyre's evidence that the discharge consents and the limits in ORC's consents can be different to the QLDC ones.

20 A. Yeah, they could be different but in terms of achieving those outcomes, its still a land based activity and a land base control that needs to be imposed so, yeah, I still think the same environmental outcomes will be achieved.

25 Q. So you think the same environmental outcomes are going to be achieved because QLDC's framework is so robust that there's no discharge occurring. Is that how you kind of reason that?

A. Either there's no discharge or its of such a quality that it doesn't raise concerns under, you know, s 70, s 105 or s 107.

30 Q. But its not just about raising concerns under those sections, is it?

A. Well they're the key sections that are, you know, in terms of managing discharges, they're the effects you'd certainly want to manage or avoid.

Q. A plan change of this nature is required to give effect to the NPSFM, isn't it?

A. Plan Change 8, yes.

Q. Yeah, and – sorry –

A. – and – no, nothing further.

Q. And the RPS?

5 A. Yes.

Q. And you've already accepted that Te Mana o te Wai is a paradigm shift in how we're managing freshwater?

A. Yes.

10 Q. And so would you also not accept that the discharge that reaches the waterbody is relevant to whether or not the NPSFM for instance is given effect to by this plan change?

A. Yes, but if it's a clean discharge then there should be no concerns.

Q. But QLDC doesn't regulate the discharge?

A. They regulate the land use and the land use controls to manage –

15 Q. – that doesn't regulate –

A. – to manage adverse effects on water quality.

Q. Right, but it doesn't regulate the discharge.

A. No.

Q. And those two things are actually connected, aren't they?

20 A. Yes.

Q. Just since we've moved onto the NPSFM, I think you've already accepted the requirement give effect to it and the RPS also and you've mentioned very briefly the RPS in your summary statement I think, and I assume you accept that the proposed RPS 2016, so the one that the – this plan change has to give effect to, that doesn't give – hasn't been reviewed to give effect to Te Mana o te Wai?

A. Do you mean 2019 or –

Q. – sorry, yeah, sorry it's been referred to as both the 2016 and the 2019, but I mean the 2019 one as opposed to the 2020 one, RPS.

30 A. When it was first written, presumably yes, well it was giving effect to the NPS 2014 amended 2017 version.

Q. But not the current NPSFM 2020?

A. I need to check when decisions were made on the proposed RPS because that would have been a factor depending on the timing of the decisions potentially.

5 Q. Well I think Ms Boyd has addressed this in her evidence and said that the PRS 2021 is the first articulation of Te Mana o te Wai in Otago.

A. Okay.

Q. And I was just curious, you didn't think to mention the NPSFM in your evidence?

A. No, I did not mention it in my evidence.

10 Q. And you didn't mention the RPS either, did you? Either version.

A. No.

15 Q. And presumably given your views on the comprehensive nature of the QLDC Chapter 25 rules and I should be clear here actually, there's no dispute that Chapter 25 is within its jurisdiction and is trying to manage land use as more effectively to address water quality effects but given how comprehensive you think it is and that it manages these effects, you'd expect it to have considered the NPSFM and be giving effect to the NPSFM?

A. Chapter 25 provisions you mean?

20 Q. Yes.

A. They'd have to be prepared to accordance with any national policy statement, so yes.

Q. But that was prepared and notified before the new 2020 NPSFM, wasn't it?

25 A. As far as I'm aware.

Q. So we don't know whether it, for instance gives effect to the NPSFM 2020?

A. Well it hasn't been tested in that regard, no.

30 Q. No. And just a couple of things on the NPSFM itself, I think we're at Tab 4 of the common bundle.

**WITNESS REFERRED TO BUNDLE, PAGE 321 (TAB 4)**

Q. And CB0321 it talks about Te Mana o te Wai and I'm assuming that you think the Chapter 25 provisions are how Te Mana o te Wai, when you look at Part 2 of the concept, it being relevant to all freshwater management

and not just the specific aspects of fresh management referred to in this national policy statement, you'd say that's relevant under the Chapter 25 provisions?

A. Yes.

5 1045

Q. And you'd also accept that under 1.6 which is on CB/0324, we have to try and use the best information available at the time, but under clause 3 we can't delay making decisions solely because of uncertainty about the quality or quantity of the information available?

10 A. It says that.

Q. So that's all relevant to decision-making in this context?

A. Yes.

Q. And in terms of the RPS 2019 were you in the court yesterday when Ms Boyd was being questioned on this?

15 A. Yes.

Q. And there were some questions around method 5.4 which is the method that directs what District Plans have to do?

A. Yeah, which, where is that, in the common bundle, just...?

20 Q. Sorry, it's at tab 7 and the method itself – sorry I've said 5.4 and I should have said 4.1.5 it's at CB/0610.

A. And sorry, what was the question?

Q. And so Ms Boyd was questioned on this method in terms of what district plans have to do. Were you there for that questioning?

A. Yes.

25 Q. Would you agree however that this method isn't saying what the Regional Plan should do?

A. It does not say Regional Plan, no.

Q. No, that method 3.1 isn't it, on page, it's just back a couple, CB/0608.

A. Yes.

30 Q. And Ms Boyd was questioned on this, so I just as a matter of completeness wanted to understand your view. She I think in questioning referred to the fact that under 3.1.3, policy 3.1.1 for instance which is a policy about safeguarding the life supporting capacity of water, he referred to that method as being implemented by Plan Change 8.

A. Yes it seeks to safeguard the life supporting capacity of freshwater and manage freshwater to achieve the outcomes set out between A and G.

Q. Yep. And that's obviously clearly within ORC's functions, isn't it?

A. Yes. Yes, if you didn't hear me, yeah.

5 Q. Yeah, and there's nothing at the beginning of that method. It just says Regional Plans will set objectives, policies and methods to implement the policies as they relate to the Regional Council areas of responsibility.

A. It says that, yep.

10 Q. And it doesn't say anything about whether they're doing that via a land use or a discharge rule.

A. No, not specifically.

15 Q. No. one final question on the RPS, Ms Hunter. There was reference, or so in some of the questioning to policy 5.4.1, there's the one headed, it's on CB/0599. And it's the headed the offensive or objectionable discharges. You've got that one?

A. Yes.

Q. And you will note below that that talks about that being implemented by Regional Plans too, doesn't it?

A. It says that, yep.

20 Q. Thank you. I now want to talk about the rule with you, please. And I first want to talk about what the sediment and control plan needs to do under this rule. So, the rule requires the erosion and sediment control plan to be submitted to and certified by the Otago Regional Council. So the person at the council certifying the plan goes through and essentially ticks each of these statements, don't they?

25 A. Yeah that, that yes.

Q. So does the plan identify the work in the area the consents relate to?

A. It should.

30 Q. And number 2, the location of the surface water bodies and does it identify those?

A. It should, yes.

Q. Yep, and then quite importantly I think would be 4, the type and location of all erosion and sediment control measures?

A. Yes.



Q. And all that they can do is say the plan has these things, they can't say whether they think they're sufficient, can they?

A. They can when it comes to looking at the measures that are set out in C through I of the remaining elements of that permitted activity rule.

5 Q. Well, I'll come on to C through I, but based on this first part of the rule, they're just certifying that the plan identifies those measures.

A. Yes.

10 Q. And you've said in your paragraph 17 that I think you're referring here to your previous version that you'd intended that ORC could consider, if the ORC considered it to be inadequate for any reason, then they could use the submission of the ESCP as a platform to then require consent.

A. Yeah, that was in relation to the first Option A drafting.

Q. Ad so under this option though, if ORC, the ORC certifying officer thinks the measures are inadequate, there's nothing they can do is there?

15 A. Yeah, they would then turn to the matters set out in C to I which is still applicable and they would say based on the matters you've produced in your ESCP we don't think that the erosion and sediment control is going to be sufficient, so that soil or debris from earthworks is not going to be placed where it may enter water or there might be flooding, erosion, or,  
20 you know, beyond the boundary, or the discharge of the sediment, based on your erosion and sediment control measures which you'd set out in your plan, they may, you know, result in some of those effects listed under I, 1 to 5. I think it actually creates more certainty compared to the current drafting of the permitted activity rules.

25 1055

Q. So this is based on you, this is based on 5, you are saying the standards, how the standards in D to I will be met by any discharge from the site.

30 A. Yeah, and also having something a little bit more certain from having the erosion and sediment control plan at hand that the council can then check against those matters set out between C and I.

Q. I think you referred to D and I in there.

A. Yeah, it looks like that, apologies for that

Q. I'll come, I want to come back to D and I separately because it was the –

A. Oh, it was D and I, sorry; C is the, that it's the earthworks activity needs to be carried out in accordance with the plan.

5 Q. Yeah, no I've got some questions on that too. I'll come back to the discharge and D to I and the certification under 5 separately. But you're essentially relying on the sediment and control plan and the measures in it to meet those standards D to I.

10 A. I think it helps give everyone more certainty. You know, whereas if I look at the 14.5.1.1 drafting under PC 8 which I think is in my evidence, (inaudible 10:57:00) just have a look at it, so if you're an activity that doesn't, you know, it's 2,400 metres squared, it's on a steep slope but it's 15 metres away from the waterbody, and it's not within a contaminated site, how is the ORC going to check compliance –

Q. – but you -

15 A. – with those other matters set out in the permitted activity rule without having something like an erosion and sediment control plan.

Q. Ms Hunter you just said to me before that if you're under the 2,500 threshold you just go under the other rule.

20 A. Yeah, but you still have to be permitted under all those other elements of the 14.5,1.1 rule to retain a permitted activity status, so even though you might have slightly less 2,500 square metres, if you trigger – oh, I need it in front of me, bear with me...if your earthworks activity is going to trigger those, you know, sort of more subjective type parameters in the existing rule 14.4.1.1, I don't see how the ORC is going to assess that particularly well without having something like an erosion and sediment control plan to assess that against.

25 Q. But I talked with Mr McIntyre yesterday about risk, and we kind of agreed I think that really what ORC's done is pick a threshold where it wants to have an application, i.e. those above 2,500 and those below, yes there are some limitations with the rule but they just proceed under the normal permitted activity rule, don't they?

30 A. No, they don't. If you trigger one of those permitted activity matters, you need a consent under the ORC rules.

Q. Yes, exactly.

- A. Yep, so it's not just the trigger, the limit trigger, it's not the area. So if you are likely to have a discharge that is going to result in the production of conspicuous change in colour, those, you know, all those matters there, you still need a consent under this rule.
- 5 Q. Under either rule you're going to need a consent if you're going to trigger that.
- A. Yeah, but how is the ORC going to assess that if you've not triggered by the land area? Sorry, that's a question to you.
- Q. But, let's just walk through some examples perhaps in relation to this
- 10 questioning. So you're on a site below 2,500, assuming you meet all of the other triggers. so I'm looking at the OCR PC 8, you meet B through to G.
- A. How do you know that you're going to meet those, what have you done?
- Q. Well, this is how people have been operating under the current
- 15 framework.
- A. Which doesn't work, according to ORC.
- Q. Doesn't work and ORC's picked a level of risk that it's seeking to regulate.
- A. But those parameters still exist within this rule drafting.
- Q. But you just said to me before, Ms Hunter, that if you're below the 2,500
- 20 metre trigger, you just go under the other rule.
- A. If you can and prove that you meet all those other permitted activity standards, like everyone has to.
- Q. Doesn't this highlight one of the issues with this new permitted activity rule? How does someone know which rule they apply under?
- 25 A. Well okay, well let's take a step back to, so under QLDC rules you trigger consents, there's the volume thresholds firstly, and they are quite small in some areas, like particularly sensitive receptors, like outstanding natural features and landscapes and, and near water bodies there's a lower volume threshold, so that's the first step. And then there are a
- 30 whole lot of other sort of site standards and requirements you have to go through to make sure you retain that permitted activity so that if you meet the quite tight volume threshold. And so, in my understanding it would capture quite a lot of earthworks activity under in the QLDC region.
- Q. Sorry what, what would capture a lot of earthworks activities?

A. The rules in the Chapter 25 provisions.

Q. Yes. What's that got to do with the rules we're bringing in under PC 8?

A. So, so, I'm getting there, I've just stepped back a little bit. Under the QLDC framework my understanding of that is that an erosion and sediment control plan is always required in some form whether it's a sort of a simple tick the box type exercise because there's no water bodies or there's no sensitive receptors anyway, you still have to sort of prove that via some sort of erosion sediment control evidence or plan. So something like that exists when you've got a consent for QLDC. So it should be, if it's a low risk site, going through my alternative permitted activity rule, it should be quite straightforward for everybody because there's evidence that you comply with your, you've got a sediment control plan and in doing so you can comply with matters D to I.

Q. But you said to me before, I said won't this capture a whole lot of people who wouldn't have been captured.

A. Yeah, so, so if they don't want to go through a certification process, they could go back and look at their, the other permitted activity rule and go, "Right, I'm below 2,500 metres squared and I know because, you know I've got quite confident, I've got my QLDC consent and I've got an erosion sediment control plan in some form, I'm quite confident that I can achieve those other parameters of that rule so I'm going to rely on that one."

Q. So they just get to pick?

A. That's how rules usually kind of work.

Q. So, I'm still unclear because this is relevant in terms of your rule and us, you know, thinking about it in a s 32A(a) sense, I'm completely unclear what you're saying is captured and what isn't.

A. I think everything's captured one way or another.

Q. But what, are we capturing other earthworks activities that have QLDC consents and they now have to come to ORC for a certification?

A. Not if they're confident they can achieve a permitted activity standard which I think there is more basis to be confident about that because they've gone through a QLDC process and have some form of erosion and sediment control plan to justify that. Otherwise, I think if we go back

to the rule that the PC 8 rule, you might be below the thresholds but you still have to be confident that you can achieve B through G.

Q. But you've said Chapter 25's so comprehensive that originally these shouldn't, rules shouldn't apply at all.

5 A. You shouldn't have to get another consent, yes, if you've already got a comprehensive QLDC consent.

Q. Sorry, I'm still, I'm honestly not clear what's captured by your new rule versus what's not, but going back to your new rule, you've done your erosion and sediment control plan, you've had it certified by ORC, and  
10 you, we've heard about how the, these plans change during the course of an earthworks activity.

A. Yes.

Q. And so you go and change your plan with your SQEP's input and then you immediately don't meet Part C of this rule, do you, because it's no  
15 longer being carried out in accordance with the certified ESCP?

1105

A. If its changed fundamentally that that certification wouldn't still apply, yes.

Q. And so then what happens if you're halfway through your earthworks project to you go back to ORC for another certification?

20 A. Well you could do –

Q. – (inaudible/overtalking 11:05:15)

A. – or it's a matter of drafting and we could add something in to allow an amendment to a process.

Q. I think this just highlights, Ms Hunter, the difficulty, doesn't it, in trying to  
25 draft a permitted activity rule that is really about giving the Council a level of input that you get through a resource consent process.

A. Well having a look at some of those examples that I've set out in Schedule 2 the forestry and management plan has a mechanism to include amendments, so I think something like that could be drafted into  
30 a permitted activity rule.

Q. But you haven't provided for that thus far, have you?

A. No.

Q. And going back towards the discharge point more, ORC, we heard yesterday about Bullock Creek and a situation where ORC didn't agree with QLDC's discharge limit in relation to Bullock Creek.

A. Yes.

5 Q. And so this rule wouldn't deal with that, all that ORC could do is be saying the discharge doesn't result in any of the effects under (I).

A. Yeah, if they had concerns that the limit that was going to be achieved by the amount of erosion and sediment control that you were going to produce as part of your plan was not adequate enough so that, you know, 10 there might be a change in colour and they'd like a tighter limit, then they could say, "yeah, you still need a consent under (I)".

Q. But it might, it meet (I), it just might not be the limit they would have imposed.

A. I would assume the limit needs to be effects based.

15 Q. But ORC has no input into that. We accept (inaudible/overtalking 11:07:25) –

A. – sorry, I thought you were talking about the ORC discharge limit there. So what do you mean by that question?

Q. Well ORC, the s 70 things within the standard, that's just a minimum 20 standard, that might not be correlate at all with what ORC would put on as an actual discharge limit.

A. I think the limit would try to avoid those things though certainly.

Q. Yeah, but we're not debating whether those things might arise, it's more 25 is there another limit that should be imposed. Like in their consenting framework, ORC officers would be able to impose a more stringent limit than just meeting those things.

A. But the limit needs to be effects based.

Q. Yes, having regard to the receiving environment.

A. Yes.

30 Q. So Bullock Creek, a sensitive environment, you might have a different limit.

A. Yeah, to avoid any change in the colour or visual clarity presumably.

Q. It's not just that, it's a much more complex exercise than that, surely.

A. Again limits need to be effects based.

- Q. And you say that these are the only effects that you worry about when you're assessing a discharge of sediment?
- A. They are key matters to consider when assessing a discharge.
- Q. But they're quite different to an assessment under s 104, aren't they?
- 5 A. Different, in what sense?
- Q. Well there might be other effects that aren't listed in those standards, still an effect on the waterbody.
- A. Well presumably, yes, but in – well, yes, there could be.
- Q. And we've heard evidence around the fact that, that QLDC puts on these discharge limits but that's through their EMP, isn't it?
- 10 A. Looking at the QLDC consent that I've got attached to Appendix B of my evidence, the condition says "Any discharge, refer to the definition in the Queenstown Lakes District Council Guidelines for Environmental Management Plan that leaves the site shall comply with the water quality discharge criteria outlined in the guideline," in that consent, it says that.
- 15 Q. Right. And so QLDC is not specifically, you know, they're not considering 105 or 107.
- A. No, not specifically.
- Q. Right, so you're just saying its sufficient to rely on the s 70 matters. That's
- 20 ORC's backstop under your rule, isn't it?
- A. It's also a backstop under the current permitted activity rule.
- Q. Which everyone has agreed is insufficient.
- A. No, I mean the PC8 current permitted activity rule.
- Q. On sites less than 2,500 square metres?
- 25 A. Yes.
- Q. And that's a risk based threshold, isn't it?
- A. Potentially.
- Q. Right. So all of those sites above 2,500 square metres no longer can ORC actually consider what the appropriate discharge limit should be.
- 30 A. Under my framework they get submitted with an erosion sediment control plan for certification and if they don't think the erosion and sediment control measures are adequate and that a tighter could, should be imposed, for matters probably relating to those set out in (I) or those

matters set in (l) directly, then they, they could, they could not certify the plan and require a consent and a tighter discharge limit.

5 Q. Ms Hunter, we're going round in circles here because you've accepted previously that there were issues with your previous version of the rule because to be sufficiently certain for a permitted activity the Council has to be certifying against something and you've accepted that essentially under the Council certifying that the plan identifies those measures, it can't say whether it thinks they're sufficient or not.

10 A. But I think it would have more evidence suggest that, you know section (l) and one of those (l) to, 1 to 5 measures, might be triggered.

15 Q. But it can't, I've just gone through the question with you on (l) and the fact that that's just a minimum standard, which you've agreed, and under the PC8 rules on sites greater than 2,500 square metres the Council requires a discharge, a land use and discharge consent, and it could put on a different limit than what those matters in (l) require. And those requirements are essentially what's in the current plan, that are insufficient.

A. Yeah, but they also exist in the current PC8 rule.

Q. So sites less than 2,500 metres.

20 A. Yes.

Q. So the Council on the bigger sites, the bigger earthworks sites, is just back to essentially where it was other than it gets some oversight on the measures but can't actually say whether they think they're adequate or not, can it?

25 A. Well in terms of how the consents work, I think all the ORC requires generally is the erosion and sediment control plan and, you know, to achieve certain discharge outcomes what needs to happen is improvements in the land base controls, so, yeah, I think they'll have more information certainly, under my rule.

30 1115

Q. More information that they can't do anything with.

A. Well they can as regulators, they can, well they can also talk to QLDC about their limits, you know, there are – I do think it provides more certainty.



Q. More certainty to a developer than having a discharge limit that the ORC's set under a discharge consent?

A. But that limit is achieved by the erosion and sediment control measures.

5 Q. In part. Are there still a discharge of water happening at the end of the pipe in some instances, isn't there?

A. In some, potentially.

Q. We've got no evidence really on when or when not there's a discharge out the end of the pipe.

10 A. Well it depends on lots of things like the site, the ground conditions and the erosion and sediment control measures, you know there's lots of things that factor into that.

Q. And I just want to be really clear. So all ORC is doing is saying it meets the permitted activity standards, standards for the discharge. It can't actually impose a discharge limit, can it?

15 A. It could not certify the plan or it could consider that the measures were not adequate enough to achieve the matters out in (D) to (I) and they require a consenting process. That is the intent of the rule.

20 Q. I am not sure that your intent has been achieved by this. Just one final set of questions on the standards and your point 5. You've said how the standards in (D) to (I) will be met by any discharge from the site. (D) is not about the discharge though, is it, for instance, that's about the earthworks not occurring within 10 metres.

A. Yeah, so that could be (E) to (I).

Q. Or (E) is not about the discharge either, is it?

25 A. That's a matter of drafting, it could be improved certainly.

Q. And we've heard previously about the fact that sometimes you don't know until the discharge is happening, so how does the Council certify that (I) will be met based on the erosion and sediment control plan?

30 A. Because if those measures are effective then the discharges won't be uncontrolled or unmitigated or unregulated in that way.

Q. Based on the condition you've just referred to, the discharges in the EMP, isn't it, not the erosion – the discharge limit that QLDC requires is on the EMP not the erosion and sediment control plan.

A. The example I referred you to doesn't refer to the EMP or the erosion and sediment control plan.

Q. It refers to the guidelines. So it's the discharge limit in the guidelines.

A. That's what that condition says, yes.

5 Q. So the Council somehow, based on the erosion and sediment control plan, which is really about the measures used to prevent ideally the water reaching the waterbody, they're going to certify how the standards in (l) are met from the discharge from the site.

10 A. Yeah, so maybe if I take a step back, so this rule when it was created, I looked at the consent conditions of the QLDC consents, the ORC consents and the guidelines and this is a sort of a combination of all of those outcomes, and I think the erosion and sediment control plan is quite clear in that it seeks to manage water appropriately within the site to avoid or minimise discharges.

15 Q. But it might not have any information about the actual discharge.

A. Well then perhaps they don't certify the plan.

Q. Right, so they don't really get a say on the discharge at all?

A. They don't certify the plan therefore it needs a consent.

20 Q. I just think there's some issues with this rule, Ms Hunter, and your answers unfortunately haven't filled me with a great deal of confidence in relation to them. I just had a couple of questions, further questions, on it. so you have, again we've talked about how comprehensive QLDC process is in terms of looking at water quality matters and we've talked about the NPSFM, so would you expect when QLDC is granting these types of consents for earthworks, they'd be thinking about what the NPSFM requires?

25 A. I know if we were preparing an application we would consider it.

30 Q. And so we could expect, for instance, the application you've attached to your evidence to identify the NPSFM as a s 104 matter they'd have regard to?

A. The Willowridge example?

Q. Yeah, the Willowridge example.

A. Yeah, I didn't prepare that one.

Q. But you'd expect it to have referred to the NPSFM?

A. Yes.

Q. And I'm not sure if you've had a chance to read this AEE, but if you turn to Section 5. Sorry, there's no page numbers on the AEE.

**WITNESS REFERRED TO AEE DOCUMENT**

5 Q. Have you got Section 5 there?

A. I do, yes.

Q. And that sets out that in considering the consent the consent authority has to have regard to the relevant provisions of the National Policy Statement.

10 A. Yes.

Q. And it says there are no National Policy Statement relevant to this application, didn't it?

A. It states that there, yes.

15 Q. And in the decision itself, which is back, sorry again there's no page numbers, but under heading 6. That talks about the relevant District Plan provisions under 6.2 but there's no reference to National Policy Statements there, is there?

A. No.

20 Q. And then in terms of the Ngai Tahu cultural values issues that we were taking about yesterday, under your permitted activity rule those wouldn't be able to be considered, would they?

A. Yes in terms of the erosion and sediment control plan which, as I said, was, that list of criteria was developed from the ORC consent conditions that I've looked at, the QLDC consent conditions that I've looked at and  
25 the Queenstown Lakes guideline and within that guideline it talks about sensitive environmental receptors which include, you know, cultural sites, cultural values type things and, yeah, so I think it's covered there.

Q. But the Council just certifying that the plan says that.

A. Well yes, yeah, it does certify that.

30 Q. It's not just saying that on a site greater than 2,500 square metres needing a discharge consent and the Council considering that as a matter of discretion, is it?

A. Well, no.

Q. And then in terms of your restricted discretionary rule, you – and this is a minor point, but your proposing to delate (a) and I think your rationale is that that's a land use matter.

A. Yes.

5 Q. Is that right?

A. Well particularly the property damage I guess reference there in particular.

Q. But this is a combined land use and discharge rule, isn't it?

10 A. Yeah, but I guess in terms of property damage I, you know, took it more like buildings and structures and things.

Q. Would you not accept that a discharge, for instance, might cause property damage?

A. Well if it was big enough it could, yes.

Q. So it might actually be appropriate to keep that in there, mightn't it?

15 A. Potentially.

Q. And in terms of this rule and the obligations under s 32AA, you haven't done a s 32AA assessment of this rule.

20 A. No I have in terms of option, the first one, which has similarities. But I think is more robust in terms of the fact that it retains those other permitted activity standards.

Q. And you haven't done a s 32 analysis, s 32AA analysis.

A. No, just given the timing more than anything.

Q. So we don't have any evidence in terms of the costs of what's captured by this certification rule versus a PC8 rule?

25 A. No, it's just based on my experience with consenting again in terms of those costs.

Q. And obviously the Council can't recover any costs for certifying under this rule, can it?

30 A. I think that's a legal matter but I have been drawn to the attention of a permitted activity rule in the Horewhenua District Plan which there, to retain and permit an activity status there was a sort of a deposit fee required for some sort of building type inspection report, yeah, so it's a legal matter but looking at that rule, it might be able to be done.

Q. Well based on your planning experience other than that rule, are you aware of that type of mechanism being used?

A. That was the first time I have seen it but it must be, I think it was issued by a consent order, so it must be legal in that regard.

5 Q. Right, and so we don't know what the difference in costs might be for certifying under this rule versus under a consenting framework?

A. I can only, without doing more analysis, base it on the evidence that Ms Devlin has given and my experience in what happens in the consenting process of these applications.

10 Q. But its quite a comprehensive certification, isn't it, that you're asking the Council to do?

A. Well yes but in terms of way, again based on my experience, the erosion and sediment control plan should be quite well developed and should have had input from a SQEP when its time to be certified by the Regional Council.

15

Q. This rule doesn't require it to be the same ESCP as the QLDC one, does it?

A. That's certainly the intent and that's a matter of drafting.

Q. Or that it prepared by a SQEP.

20

A. Yes.

Q. Well there'd be quite a few drafting issues we'd really need to address if this could possibly work.

A. Well I'm sure we can turn to those perhaps in the legal closing to assist if its just a matter of drafting.

25

Q. It's not just a matter of drafting though, is it?

A. But if the framework works then it is a matter of drafting.

Q. Well I'll have to address that in closing if it arises.

A. Just a few more questions.

**THE COURT: JUDGE STEVEN ADDRESSES MS DE LATOUR (11:29:48)**

30

**COURT ADJOURNS: 11.29 AM**

**COURT RESUMES: 11.44 AM****CROSS-EXAMINATION CONTINUES: MS DE LATOUR**

- 5 Q. Ms Hunter, I've just a couple more questions on the rule. I'm trying to understand entirely how it's been proposed to work. So in the footnote it says about the discharge, it could be a discharge only rule or a combined discharge and land rule. Would you accept that if you deleted the use of the land and just made it a discharge rule then based on the existing PC 8 rule, you'd then be captured by the combined land use and discharge rule 14.1.1?
- 10 A. Yes. Yes, you probably would be, yeah.
- Q. And I'm just, and I know I'm slightly going back to old ground but we were talking about the interplay between this rule and the 14.5.1.1 and if you're on a site where the area of exposed earth is more than 2,500 square metres within the Queenstown Lakes District, there's nothing in your rule that is providing for it to be the only permitted activity rule, is it, is there?
- 15 A. (no audible answer 11:46:32)
- Q. You still don't meet the other permitted activity rule and therefore you're a restricted discretionary rule under 14.5.2.1.
- A. Yeah, that is correct. Yep.
- 20 Q. So you'd kind of just end up in the same position?
- A. Yeah.
- Q. And one final point of clarification, if there was some kind of inaccuracy in the erosion and sediment control plan you wouldn't have the same ability to, there's no ability to review it in any way is there under a permitted activity framework?
- 25 A. Not in terms of conditions of a consent requiring that, but there could be a way to for QLDC and ORC to work together in doing that which indicated in terms of the MOU and things that have come out.
- Q. But ORC's just certifying that particular and I've already dealt with the fact it's not necessarily QDLC's erosion and sediment control plan anyway.
- 30 They can't revisit their certification in any way.

- A. No, but they certainly you know and in terms of integrated management they should be involved to a certain extent and that doesn't need to be done with a consent necessarily.
- 5 Q. Right. Just some final questions that I'm just trying to understand the link that this rule has thinking about the wider plan change and the policy which was agreed at mediation, is 7D.10 isn't it?
- A. Yes.
- Q. And do you have that in front of you?
- A. Can you point to me where it is in the common bundle, to make sure I've  
10 got the latest version
- Q. I've just been referring to the version attached to the joint witness statement.
- A. Oh yeah, I'll grab that. Got that.
- Q. So that says that the loss or discharge of sediment from earthworks is  
15 avoided or avoidance is not achievable best practice guidelines for minimising loss are implemented to maintain water quality.
- A. I'd say that yeah.
- Q. And that's different to the policy that the QLDC provisions are implementing, isn't it?
- 20 A. Can you direct me to that policy?
- Q. Sure. It's the rules are in the common bundle under, I just want to get the right version, tab 12.

**THE COURT ADDRESSES MS DE LATOUR – RE. CLARIFYING THAT IS IN VOLUME 4 (11:50:12)**

**25 CROSS-EXAMINATION CONTINUES: MS DE LATOUR**

- A. Which policy?
- Q. It's on CB14/19. 25.2.1.(inaudible 11:50:45). So that talks about minimising sediment generation and runoff discharge – sorry, and of site discharge.
- 30 A. Yep, yes it says that.
- Q. And would you agree that your rule is really in essence relying on the QLDC erosion and sediment control plan?

A. Yes, it does, based on my consenting experience that's what both councils rely on.

5 Q. So there's no real, we haven't actually done any assessment in terms of whether your permitted activity rule implements the policy that's been agreed?

A. I haven't done a forensic analysis of that, just given the timing but having said that I do think that is consistent with achieving those outcomes.

Q. But you've got no evidence that you're basing that on, that's just your planning opinion?

10 A. Yes.

Q. And I don't think even on the earlier versions of the rule your evidence didn't address that policy, did it?

15 A. Yeah, not specifically no, and I just possibly need to add I'm not, certainly not trying to get out, you know, to avoid a way to maintain water quality or, you know, not achieve the NPSFM requirements, this is simply trying to find a pragmatic planning solution to a situation where you end up with two lots of consent conditions that are effectively the same. That's all it's trying to achieve here; it's not trying to not achieve water quality or anything.

20 Q. Right. (I won't go, we don't need to go back over the discharge point Ma'am, we've laboured it enough.) Landholding, I just had a couple of questions about that. Because there's been some divergence in view around the use of the paternal landholding within the main part of the PC8 rule versus contiguous area, hasn't there?

25 A. Yes.

Q. And yare you aware that the word "landholding" is used throughout the Regional Plan for Water?

A. I have seen it used before, yes.

30 Q. And are you aware whether the word "contiguous" is used within that plan?

A. Not that I'm aware, if it does or it doesn't, yeah.

Q. So you haven't turned your mind to the consistent of that term within the use of, within the wider plan itself?

A. No, not specifically.



Q. But would you agree as a matter of good planning practice that it's good to try and achieve consistency in plan drafting?

A. Yes, as a matter of principle.

5 Q. And both where you use landholding or contiguous area, there's a degree of, they're both somewhat arbitrary.

A. Yeah, well they are, but you know rules need to be effects-based too in their development.

Q. But contiguous area you could earthworks one 2,500 metres on your big title and then have a gap and then earthwork another?

10 A. Yeah, potentially yes.

Q. So actually landholding in some instances is going to be more conservative, isn't it?

A. Well, depending on the size of those landholdings, yes.

Q. Yeah, so we just have to, we have to pick a threshold for rules.

15 A. Yes, agree, based on effects and risks, yeah.

1155

#### **RE-EXAMINATION: MR ASHTON – NIL**

#### **QUESTIONS FROM THE COURT: JUDGE STEVEN**

20 Q. Look, I just want to ask some questions of clarification, thank you, just so I have a further understanding and I want to – I'm referring to the QLDC earthworks rules. I think I've only just found now the rule that's in the bundle, but the version of the rules that I have in front of me were the version, versions that were attached to the opening submissions of counsel for Willowridge and Remarkables Park, because I found that's  
25 easy to, an easy summary of the rules, so I don't know whether you have that document in front of you?

A. I've got the earthworks chapter from –

Q. – you've got the earthworks, so it's –

A. – Tab 12, but I don't have the legal submissions.

30 Q. No, okay, so well that's all right, because you see this is, the layout of these, it's got the permitted activity standards in Rule 25.3.

A. Yes, I've got that, yep.

**WITNESS REFERRED TO EARTHWORK RULE 25.3**

Q. And it also summarises the matters of discretion from RDR consent and that includes matters that are specified in clause 25.8.2 and 25.8.6 which encompasses soil erosion and generation of sediments and effects on waterbodies, ecosystems, services, biodiversity etc. You're familiar with those?

A. Yes.

Q. So I want to, but obviously those matters are only triggered in the event that a restricted discretionary activity consent is required, and I just wanted to ask about that activity status with reference to the example of the consent that you've attached to your evidence, your primary evidence for the Willowridge and Ms de Latour had been asking you about that, its said there, and I'm looking at the application on, in clause 7.13 where it says that consent is sought to breach the volume of earthworks permitted for the zone. I'll let you turn to that.

**WITNESS REFERRED TO WITNESS STATEMENT APPENDIX (APPLICATION)**

A. Sorry, what section as that?

Q. It's clause 7.13.

A. Yes, yeah, got it.

Q. Did you prepare this application?

A. I did not.

Q. No, okay, so you don't know, but is that a reference to the RDA?

A. Yeah, so I can, I'm happy to walk you through the Chapter 25 rules in terms of, so the way the QLDC chapter is structured is the first you come along and you look at the zone base thresholds and their volume triggers, so I think if we go back to section, in the application –

Q. – so that's rule –

A. – I think it sets out the rules –

Q. – yes, this just has the AEE. I don't know whether the actual –

A. – so section 4.7 I'm looking at onwards.

Q. 4.7.

A. Then 4.9. Maximum earthwork volumes as set out in Table 25.5.5 of the PDP and that's different to this table that's attached to the legal submissions.

5 Q. So this is not an example of an application that went through the RDA rules where the effects of earthworks on water quality were expressly considered?

A. No, my understanding that restricted discretionary activity status with this one is just applies no matter what threshold of trigger you breach.

Q. So those matters do apply, so they –

10 A. – yes –

Q. – ought to have been considered?

A. Yes.

15 Q. Do you accept, okay, so when we go back to clause 7.13 I think I recall yesterday your counsel to one of the Council witnesses the proposition that in a RDA application you would typically expect to see the assessment matters addressed in an assessment of effects. Is that your – is that how you operate?

A. That's how we would approach it, yes.

20 Q. Do you accept that there isn't such consideration of any of the assessment matters in this particular application? All I can see about the effects of earthworks is that statement in paragraph 7.13.

A. Yes, that appears right, yep.

25 Q. And in fact if you go to the decision and back to the s 104 assessment section, clause 6.1, where it says that the effects of being on the environment as outlined in earlier sections, section 3 and 4 of this report, have been considered and I just – I can't see any reference to any consideration at all of the RDA matters of discretion, more particularly in terms of any effects of the earthworks on water quality. It's just simply not there, is it?

30 A. No, it's not.

Q. So this really, this application and the decision on it, is really not an example, an exemplar example of the extent to which the QLDC does consider on a earthworks application the effects on, of earthworks on

water quality, it just doesn't refer to it at all despite the discretionary activity matters being triggered under the plan.

A. Not in terms of the AEE, agree. But it is certainly there within the conditions of the consent.

5 Q. In the extent that it says, "Prepare an ESEP in accordance with guidelines"?

A. Yeah, so there's a few conditions 12 through to –

Q. – just let me have a look at those –

A. – 24.

10 Q. So that's, "Undertake the works in accordance with the most current version of the EMP" –

A. – yep –

Q. – and it's the process by which the Council – the consent holder goes through or reviews the EMP but there's not specifically in relation to discharge limits or anything?

15

A. In 21 there is, in terms of the discharge to comply with the guidelines, yep.

Q. Yes, so that's essentially it, so effectively the Council's delegating to a SQEP the requirement to address the assessment matters in actual fact, isn't it?

20

A. In the situation, yeah.

Q. And its signed off, it's certified its signed off by an enforcement person within the Council.

A. Yes, that's what the conditions imply, yes.

25

Q. And so just so I understand the process, your intention is that the ESEP, which might be part of an EMP, and possibly will be part of an EMP, will be prepared down the track once the engineering approval has been sought which will be sometime after the QLDC has granted this consent. Just in terms of – I'm just looking at it from the imperatives if developer has got timelines for, you know, for the undertaking of a particular project.

30

A. Yeah.

Q. Its after the consent is granted and there's been some further engineering design work then the ESEP will be submitted to enforcement and monitoring for certification?

Q. Yeah, so maybe if I just talk to an example that we've got within our firm. So the QLDC consent was applied for two years ago to undertake the subdivision and land use development including earthworks and as part of the QLDC consent there's a requirement to prepare an EMP and an erosion and sediment control plan and that wasn't required in such detail when that subdivision consent was granted on the basis that detailed design still needed to progress and, you know, ground true thing and making sure what the grounds like and just a bit more, more detail to firm what needs to be in those plans, and so we are doing currently with that is that we are getting the erosion and sediment control plan certified by the District Council as the same time as we're seeking to get the ORC consent currently.

1205

Q. So, oh exactly at the same time. So I was going to lead into that so in terms of the questioning of Ms De Latour because I'd looked at the latest alternative rule and wondered whether the ECP that has to be submitted to the ORC was one that had already been signed off by the QLDC or whether you submit them to the council for approval at the same time.

A. Well, and that's, and that's, yeah.

Q. Well, I mean, I say, I should 't say approval, I should say certification.

A. Yeah, in that situation yes the QLDC one is going to the EMP and the ESCP is going to QLDC at the same time as we are applying for a ORC consent based on our understanding of what the ORC requires for its consent.

Q. That's the situation now.

A. Yes. Yep.

Q. What about under your proposed rule, that's the scenario that I want to ask?

A. So I think, what I'm intending to do there is knowing what happens in that process is that you get your QLDC consent, you know, some, for a larger subdivision in particular, if this makes sense, that you get your QLDC consent at a point and then you do your detailed design and confirm that it's a viable project, you talk to contractors or the SQEP, you talk to the contractors, you develop your erosion and sediment control plan and

then, and then you get that certified by ORC. So instead of having to get the consent which is what we're doing now, it's just sort of a simply a checklist approach because it's gone through all those processes to develop it.

5 Q. Yeah, I, so just take it one step at a time, you're saying that you're under, so I'm trying to sort of ask you to project yourself into the scenario whereby this rule that you're proposing is operative.

A. Yep.

10 Q. And you've gone through the QLDC consent because you have to as a precondition to the invoking of this rule, and am I correct in understanding that you've also got an approved ESCP from QLDC.

A. QLDC, yes, yes you would.

15 Q. So you're submitting and so that's what I understood so you're submitting a plan that's been approved and it's been left to the SQEP to adequately address effectively the assessment matters in the RDA rule and apply those guidelines and come up with a set of measures.

A. Yes, yes.

20 Q. And you're suggesting that under the rule that you're proposing for PC 8 that the council isn't effectively exercising a certifying role as in the sense of going through a checklist and ticking off which is what the enforcements and monitoring person would do, I imagine, after, cos it's gone through that review, they're just going through that checklist but there is some different function being exercised by the ORC in the sense that they can readdress the adequacy of the measures, and effectively decide to not

25 approve it.

A. Well, they could under the situation, yes.

Q. But do you imagine that, do you appreciate the distinction, and its legalistic, that the Courts have made between certification clauses and approval clauses?

30 A. Yes I understand there is some difference there.

Q. Yes, and so if a rule says certify it could be open to someone down the track to say, "Hey we've got an ESCP that's been certified by the council, you've got no discretion, it ticks all the boxes, you have to certify it, you

can't, you can't say it's not good enough." Can you imagine that this sort of debate might ensue if this rule were to become operative?

A. Um.

5 Q. Bearing in mind that the developer's, you know, ready to get cracking with the subdivision?

A. Again, I've developed this rule on the basis of my experience. And in terms of the ORC requirements when we've applied for consents they require a detailed erosion and sediment control plan that they, you know, they get often reviewed by a SQEP or whatever it is. And then in terms  
10 of their decision making they, some of the decisions I've read, they just, they really rely on the erosion and sediment control plan as meeting those requirements so I do feel if it's a robust erosion and sediment control plan that's submitted at this point it is more of a check-list type approach.

1210

15 Q. Yeah, and that's what the developer's expectations will be, isn't it?

A. Well yes.

Q. Yes, and so it could not, so it may well turn out and so if you were to use an example of this Willowridge consent where effectively the effects of the earthworks on the discharge hasn't been considered through the  
20 consenting process and has been effectively left to the SQEP and the enforcement person going through a check-list process, the operation of this rule would result in a discharge being permitted without the ORC being able to exercise any further regulatory control over the adequacy of the measures that have been approved by the QLDC? You acknowledge that that is –

25 A. – again coming back to the questioning that Ms de Latour had of me I think if there was a concern with the erosion and sediment control plan and they could only go through a check-list type approach, they could, and we got into some debate about this, but you know check against those measures set out in (D) to (I) of that minute activity rule –  
30

Q. – but that goes back to the question of whether it's a certification rule or an approval process –

A. – well I think that that's one thing, so that's you have to achieve all of those permitted activity criteria to continue to be a permitted activity.

- Q. But you acknowledge that there is some uncertainty about the, yeah, how the role would actually play out, because I'm just mindful, you heard the questioning that I had of Mr McIntyre yesterday and the case of one of the applications that involved a discharge into Bullock Creek which is a highly sensitive environment and so that was on the high risk category in terms of the Council's guidelines and I clearly got the impression that the developer having decided, well having been through the QLDC process and got an approved ESEP struck problems with the ORC in that the ORC didn't agree with the adequacy of the sediment, you know the design, with the design of the sediment –
- 5
- 10
- A. – the design, yeah, yeah –
- Q. – and so that is, and so that was an example where the developer decided to abandon the ORC consent process and just truck the water away, which was a good result for the environment but under this rule might they just say, “you've only got a certification rule, we've got a consent, we're proceeding on the basis that our discharge is permitted, tough luck ORC”?
- 15
- A. Yeah, it's not my intent to do that. I is my intent to simply remove the duplication in a, in a framework that I, I see currently operating in terms of how the consents actually work. You know, they, when there has been I think an occasion where we've lodged, it's a smaller site, the QLDC and ORC consent together to avoid, you know for efficiency purposes and the QLDC and with the sort of draft ESCP, and QLDC have been happy to accept that but ORC haven't on the basis that it just needs more detail, it needs to go through that sort of, you know, SQEP type process, and so you end up doing more work then and then things change and you have to go back and perhaps vary the consents or whatever it might be just because it wasn't actually efficient to do all that work at that point anyway, so it's, yeah ...
- 20
- 25
- 30 Q. So if the concern really is about the way the Councils are administering the rules, you also appreciate that QLDC has been administering its rules for a lot longer than the ORC and the ORC, as Mr McIntyre said yesterday, has just started to lift its game in terms of becoming familiar with these rules and streamlining its, its administration processes.



A. Yeah, yes. Yes.

Q. And you could expect that it would continue to improve that with increased co-operation with QLDC?

A. Yes.

5 Q. And that could really go some way towards addressing the concerns.

A. Yes.

Q. And I just wanted to go back to the joint witness statement at – and this isn't considering the overarching policy context, paragraphs 27 and 28 –

**WITNESS REFERRED TO JOINT WITNESS STATEMENT, PARAS 27 & 28**

10 Q. – in the context of the NPSFM 2020 and its all agreed that the NPSFM is relevant, the Regional Plan has to give effect to it.

A. Yes.

Q. And but your opinion in relation to it, you appreciate that Policy 3 is particularly relevant and that's, you know, requiring the contact of integrated management of effects of land use on water quality and so that's a sort of a key part of Te Mana o te Wai and – but you consider that sort of ORC and QLDC jointly working through their own plans can effectively implement that policy by taking that integrated approach?

15

A. Yeah, and I'm guided clause 3.5 I think it is in the NPS that –

20 Q. – so what does it say in 3.5? Is this, this is in the subpart 1 –

A. – I'll find it in the bundle.

Q. – the *Implementation*?

A. Yeah, in *Implementation*, so that's the section that guides the Policy 3. (Can someone tell me where that is?)

25 Q. Yes, sorry. Its page 0329 Case Book, it's under Tab 4.

**WITNESS REFERRED TO BUNDLE, PAGE 329**

Q. I have that open, I was going to come to that.

A. Yeah, and in particular looking at clause 3 and 4 of that section.

Q. Clause 3.4?

30 A. So under 3.5 *Integrated Management*.

Q. Yes, okay.

A. And then 3 and 4.

Q. Okay, yes, "Local authorities share jurisdiction over catchment must co-operate". But if we step back, if we step back to 3.2 where –

- and 3.2 subclause (ii), “Every Regional Council must give effect to Te Mana o te Wai and in doing so must ... (and so there it sets out the subparagraphs (a) through to (e) and I’ll ask you to look at (e) which is on the top of the next page in particular) ... adopt an integrated approach to the management of freshwater”. So first and foremost the Regional Council is directed to take an integrated approach, isn’t it?
- 5 A. Yes and then I mean it does also say, “See clause 3.5” and then in terms of the, back to 3.5 (ii) it tells, it sets out what the Regional Council is required to do and that only refers to the Regional Policy Statement.
- 10 Q. What was that again, sorry?
- A. So just, so your, the clause (e) that you pointed me to –
- Q. – yes –
- A. – it does refer, it says, “See, clause 3.5” to I presume mean look at it for more further guidance or whatever that implies.
- 15 Q. Right, okay, so you’re talking about in an RPS?
- A. Yeah, and then it, in that section it only gives instructions, direct instructions to the Regional Council that it must change its Regional Policy Statement.
- Q. All right. Okay.
- 20 A. And I also, I’m not sure if its helpful or not, but I also looked at the s 32 report that’s in Tab 5 for the NPS and in developing Policy 3 under that s 32 report it says that, “The integrated management policies in the NPSFM 2014, amended 2017, are focussed on the functions of Regional Councils with no specific direction to territorial authorities. While Regional Councils will continue to have a key role in achieving integrated management of land use, particularly rural, rural land use, with freshwater management, so too are territorial local authorities needed to fulfil an integrated management role”.
- 25 Q. So is that the 2019 –
- 30 A. – so that’s the development under 2020, so s 32, its in the Tab 5 –
- Q. – yes. Yes. See I’m stopped by the fact that the QLDC plans provisions on earthworks, as everyone has pointed out, were developed in order to plug what was understood to be a gap in the Regional Water Plan in relation to the effects of earthworks on discharges, and that was clearly

understood to be the case, but – and its done that, but are you saying that the Regional Council no longer needs to plug that gap any longer because QLDC has got that covered despite what the NPSFM now says about the Regional's role, the Regional Council's role. Is that the essence of your case?

5

1220

A. Yes and possibly the QLDC provisions overstep their mark in terms of –

Q. – yeah, because they were a gap filling?

A. They were, yep.

10

Q. And so do you accept that it's a question of law as to whether the Regional Council plan should now fill that gap? It's not really a s 32 argument.

A. They – they are entitled to, yes. Yeah.

#### **QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

Q. Ms Hunter, I went through with Mr McIntyre yesterday the process because we wanted to understand it very carefully. I understand that your primary concern is to eliminate duplication as far as possible, is that a correct statement?

15

A. Yes.

Q. Now I understand from the EMP guidelines that an EMP is required for any medium or high risk site, which means any site with an area greater than 2,500 square metres. Are you familiar with that requirement?

20

A. Yes. Yes, I can agree with that.

Q. Its in Volume 4, Tab 16, at CB1676.

#### **WITNESS REFERRED TO BUNDLE, PAGE 1676**

A. Yes, it does say that, yep.

25

Q. So the requirement of the ORC to have a consent for anything about 2,500 square metres would not significantly change the requirement to produce an ESCP, would it?

A. No, it doesn't, no.

30

Q. So there's no duplication there? There's no extra cost. It's both are requiring the ESCP so there's no extra cost to your clients for doing that. Would you agree with that or not?

A. It probably depends on the timing of when that's produced though, yes, I think.

Q. In broad terms I'm only talking about, you know what I'm talking about.

A. Yes. Yep.

5 Q. Okay, so we heard from Mr McIntyre yesterday that there's unlikely to be any significant additional cost from monitoring because its one lot of monitoring that both Councils require, the same monitoring, and its reported to both Councils, so there's no extra cost involved there even though there may be both Councils requiring the monitoring. Is that a fair comment?

10

A. There will be costs in having two different people looking at it and reviewing it.

Q. Okay, but that would be the type of cost we're looking at rather than –

A. – yes –

15 Q. – two separate lots of monitoring?

A. Well it depends on how they manage. I guess if they do it in a way where they take turns then it might ...

Q. Sorry, just to be clear. The SQEP does monitoring on site monthly and weekly –

20 A. – yes, and then I understand the Councils both come and do their own monitoring on top of that.

Q. A limited amount from what we understood yesterday.

A. Yes.

25 Q. Okay, that's fine. The one area where I felt there was some duplication is where you've got the Regional Council requiring an independent audit by a second SQEP and after the District Council has also required another audit by another SQEP, so at the moment there's three SQEPs either preparing or reviewing the same document and that does seem to be something that maybe the Councils could consider to see if there's a way of reducing that duplication. It doesn't seem that hard to me but its got to be a Council decision. But then in terms of the discharge consent can you just confirm to me that you're not in any way trying to stop the Council exercising its powers under s 15?

30

A. No, not at all. Not at all.

Q. Okay, so in doing that would you consider it reasonable that the ORC would want to understand the ESCP in some detail to make sure that what is said will be discharged, it can reasonably be expected to be discharged?

5 A. Yes, and that's certainly the intent of that, the rule I've tried to develop, yes.

Q. Well I haven't fully read that in it but I need to spend more time doing that but that's, in principle you're very clear on that?

A. Yes.

10 Q. So the only real duplication of any significance that I've seen is the two SQEPs, by the two Councils, some review of the monitoring information and a requirement by the ORC to consider the effects of the discharge on the environment, which is their duty under s 15.

A. Yes. Yep.

15 Q. Correct.

A. Yep.

Q. So where – what have I missed that's causing you such concern?

A. I think it comes down to the practice of the consents that I'm really talking to. You know, in experience the QLDC consent is prepared and submitted and its got conditions that require an erosion and sediment control plan and all those things and then we'll prepare essentially the same ORC consent – the same application that goes to the ORC, and the same conditions come out and so it is, you know, it is effectively just putting two consents in place that do the same thing.

20

25 **QUESTIONS ARISING: – NIL**

**WITNESS EXCUSED**

**LEGAL DISCUSSION –****THE COURT: JUDGE STEVEN ADDRESSES ALL PARTIES (12:28:02)**

That brings us to the close of the evidential case for the parties and so its really just a case of confirming the timeframe for the filing of closing submissions.

**5 MR MATHESON ADDRESSES THE COURT (12:28:17)**

Yes, your Honour, thank you, and just relevant to that and this is really a question for my friend Ms de Latour, there were some questions put in cross-examination which potentially related to a jurisdiction challenge either based on s 32 or on the scope of the submission. We've committed to providing  
10 our closing submissions in three working days. It would be helpful for me to understand, given that neither of these issues have been raised before now in cross-examination there seemed to be – and I don't know whether they're going to be taken any further or not, but I don't want to spend a day and a-half of the three days addressing a jurisdiction issue if its not going to be addressed in  
15 reply, so it would be helpful to know that.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:29:03)**

Well I think my understanding and Ms de Latour can correct me if I'm wrong, is that you were putting questions to the Council's witnesses challenging the adequacy of the s 32 analysis undertaken by the Council and Ms de Latour was  
20 pointing out that that wasn't a matter that was raised in the submission in simple terms.

**MR MATHESON ADDRESSES THE COURT (12:29:26)**

Well, and we're happy to address that as the witness answered the question. The substance of it was a s 32 issue, although the word s 32 weren't used, and  
25 I'm happy to address that. I guess its just, and given we've been talking about efficiency, I guess, I get – I'm just inviting Ms de Latour to maybe let me know tomorrow whether those are matters they're going to address in their reply because we won't get their reply until we've filed ours and unless I know the answer to that, we will have to cover it in our submissions.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:29:56)**

All right. Look I can ask Ms de Latour and I understood that the scope issue was specifically that no relief was sought in relation to slope and/or the other matter, but and so Ms de Latour you just can confirm the extent to which you  
5 are opposing the amendments sought by Willowridge and RPL, supported by Willowridge, is based on a jurisdictional challenge in relation to s 32 or scope?

**MS DE LATOUR ADDRESSES THE COURT (12:30:27)**

On the s 32, look I accept that the Court needs to be satisfied in relation to s 32 so it's not, I'm not going to be saying to the Court there's no ability to consider  
10 that. I just wanted to point out that the submission hadn't actually raised that. In relation to the other two matters, the difficulty I've had is that it hasn't been particularly clear to me through the evidence or indeed the opening submissions whether Willowridge and Remarkables Park were in fact still seeking those changes to the provisions, so I'm not – I'm not clear whether they  
15 are seeking changes to the contiguous – the change from landholding to contiguous area or indeed the requirement for there to be a higher threshold in relation to the slope point.

**THE COURT: JUDGE STEVEN ADDRESSES ALL PARTIES (12:31:17)**

Yes, and I think that's fair enough because, and I think it was only yesterday  
20 that I understood that this latest version of the alternative rule is proposed as an additional rule that will apply to QLDC where a land use consent is held by the person, in which case why does it matter what the other rule looks like?

**MR MATHESON ADDRESSES THE COURT (12:31:36)**

That's fine, your Honour. I guess we're happy to address the substance of it.  
25 The relief sought was deletion of the rule altogether, so from a jurisdiction perspective, in my submission, its up to us to put forward any lesser relief which could include slope, it could include anything, so I'm happy to be very clear in the closing to assist the Court and Ms de Latour and the other parties exactly what relief is being sought. I just didn't want to spend four pages addressing a  
30 jurisdiction issue that might not exist.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:32:07)**

No, and so the question is, and I'll put it to you this specifically, whether, because you've said that the relief you are now seeking is this alternative rule, which I understand would sit as an additional rule alongside the rule that the Council is proposing and which would only apply, well would apply, it can only  
5 apply within the QLDC and only where a land use consent has been issued by the QLDC, and so if that is the case are you seeking changes to the rule but would apply where the perimeters of that alternative rule aren't/don't apply?

**MR MATHESON ADDRESSES THE COURT (12:32:44)**

10 Yeah, and the questioning and answering this morning was helpful in identifying that as an issue and I would like to speak to Ms Hunter about that, so I can't give you an absolute answer but what I can tell you is that that will be made very clear in the closing.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:32:58)**

15 Good. I think that's important.

**MR MATHESON:**

Thank you. Thank you Ms de Latour.

**THE COURT: JUDGE STEVEN ADDRESSES MR MATHESON (12:33:04)**

20 Q. So you were going to file your submissions on Monday.  
A. Yes, it will be Monday night, it will be Monday sometime.  
Q. By the close of Monday.  
A. Yes, thank you.  
Q. And Ms de Latour.

**25 THE COURT: JUDGE STEVEN ADDRESSES MR WATTS (12:33:17)**

And so what is the situation regarding you Mr Watts? Where are you going to land?

**MS DE LATOUR ADDRESSES THE COURT (12:33:31)**



Q. I can probably address you because I've spoken to Mr Watts and Ms Williams and we've agreed that we can all file on the same day and I was proposing next Friday.

5 A. Okay, so that will also include the Director-General of Conservation in the event that they want to file any submissions.

Q. Correct.

**THE COURT: JUDGE STEVEN ADDRESSES ALL PARTIES (12:33:50)**

All right we will close the hearing on the basis that closing submissions are yet to come in on those dates and once we've received the final submissions, next  
10 Friday, we will let you know whether we can deal with it on the papers or whether we need to re-convene in some way but I'm thinking that we clearly understand the respective parties' cases and so I don't think there will be a need to do that but we'll just let you know anyway.

So thank you very much. So on that basis we will adjourn. Thank you very  
15 much.

**COUNSEL:**

As your Honours pleases.

**COURT ADJOURNS: 12.34 PM**

20

# Notes of Evidence Legend

## National Transcription Service

Indicator	Explanation
Long dash –	<p>Indicates interruption:</p> <p>Q. I think you were – (<i>Interrupted by A.</i>)</p> <p>A. I was – (<i>Interrupted by Q.</i>)</p> <p>Q. – just saying that – (<i>First dash indicates continuation of counsel's question.</i>)</p> <p>A. – about to say (<i>First dash indicates continuation of witness' answer.</i>)</p> <p>This format could also indicate talking over by one or both parties.</p>
Long dash (within text)	<p>Long dash within text indicates a change of direction, either in Q or A:</p> <p>Q. Did you use the same tools – well first, did you see him in the car?</p> <p>A. I saw him through – I went over to the window and noticed him.</p>
Long dash (part spoken word)	<p>Long dash can indicate a part spoken word by witness:</p> <p>A. Yes I definitely saw a blu – red car go past.</p>
Ellipses ... (in evidence)	<p>Indicates speaker has trailed off:</p> <p>A. I suppose I was just... (<i>Generally witness has trailed off during the sentence and does not finish.</i>)</p> <p>Q. Okay well let's go back to the 11<sup>th</sup>.</p>
Ellipses ... (in reading of briefs)	<p>Indicates the witness has been asked to pause in the reading of the brief:</p> <p>A. "...went back home."</p> <p>The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted.</p> <p>A. "At the time...called me over."</p>
Bold text (in evidence)	<p>If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the <i>first</i> instance only of the interpreter speaking headed up with the word "Interpreter":</p> <p>Q. How many were in the car?</p> <p>A. <b>Interpreter: There were six.</b></p> <p>Q. So six altogether?</p> <p>A. <b>Yes six</b> – no only five – <b>sorry, only five.</b> (<i>Interpreter speaking – witness speaking – interpreter speaking.</i>)</p>
Bold text in square brackets (in evidence)	<p>If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets:</p> <p>Q. So you say you were having an argument?</p> <p>A. Not argue, I think it is negotiation, ah, re – sorry. <b>Negotiation, bartering. [I think that's what he meant]</b> Yeah not argue.</p>