WATER RESOURCES ACT 1991

WATER ACT 2003

CLOSING COMMENTS ON BEHALF OF

R & J M PLACE LTD AND

ALBERT BARTLETT AND SONS (AIRDRIE) LTD

Introduction

1. In Opening, Place ("P") and Bartlett ("B") set out their "asks" – namely their residual and unavoidable groundwater ("GW") requirements which could not be met in any other way even after all the very significant efforts they had made to reduce their GW requirements.

2. Their primary case has, throughout, been that it was possible to meet their "asks" consistent with the 5% impacts on naturalised flows in the NEAC Model and thus with maintaining the integrity of the SAC on the *EA's* own data and own model without impacting the potential outcomes on appeal of others still "at the table".

3. P/B had further arguments which they would have deployed if necessary to go further – spray irrigation, lack of evidence of harm and the legal issue as to what "serious damage" requires - but their fundamental motivation for being at this inquiry was to secure the essential GW without which their businesses would have been imperilled. They are content that the settlement secures that and thus meets their needs (even though if they had continued through the inquiry they could have achieved more).

4. This Closing does not develop the arguments much beyond the Opening because: (1) the position now reached is what the Opening explained was necessary and justified; and (2) none of the evidence for P/B has been called. In the event that the SoS declines to the make the Directions proposed or those directions are quashed, the position will revert to what it was prior to the settlement with P/B having objections to EA proposals and appeals against EA refusals in respect of which the full range of arguments set out in evidence will be deployed.

Background to Agreement – Inspector's Q1.

5. P/B were previously major abstractors. Through this process over the years, they have carried out major investment to: (1) reduce water use; (2) find alternative sources of supply – B largely through the mains water provided by AWL and P by building large reservoirs which can be filled from

surface water in winter and then used to irrigate crops in summer. The result is that they will both require dramatically less GW than previously (about a 85% drop). However, they both have residual needs arising: (1) in the case of B from the inability of AWL currently to meet their full potable water needs; and (2) in the case of P from the need to have clean GW for various commercial aspects and for their large staff quarters which cannot be served from mains.

6. The "asks" and the basic logic for permitting them consistent with the integrity of the sites and without impacting the appeals of others at the table were set out in Opening.

7. Through the modelling of AB (based entirely on the NEAC Model) P/B showed that there was "residual" water and that the EA had effectively "over-enforced". EA has accepted that, on the base approach (without spray irrigation included) it is appropriate and lawful to meet the "asks" consistent with maintaining the integrity of the SAC and without prejudging the outcome of other appeals of those still at the table.

P/B satisfied with the Agreement – Inspector's Q3

8. The agreement is a ***compromise*** between the demands and expectations of the EA and the needs of P/B which P/B are prepared to accept. It obviously does not give P/B everything they sought but it provides them with the essential comfort that their businesses will be able to continue in their current locations and they are thus satisfied that the agreement removes their objection and that there are no outstanding matters within the jurisdiction of this inquiry (or currently of the SoS) that they are seeking to resolve.

9. For the avoidance of doubt, had they pursued their objections/appeals through to the end of the inquiry process they would have been contending that they were entitled to far more including compensation given that, on their case, the serious damage test was not met.

Impact on other appeals – Inspector's Q4

10. This is a matter for the EA to address. However, P/B simply note:
    a. Their businesses have been shown to be critically dependent on maintaining a small proportion of their former GW take;
    b. Anything less than this compromise would have meant: (i) one of the lines at B would have had to cease causing major business disruption and job losses with the consequent risk to the business as a whole; (ii) P would not have been able to meet its customer requirements in terms of the factory operations - reliant on clean (non-reservoir) water; or more

importantly, to meet the needs of its very large seasonal staff in the on site accommodation. The business would not have been able to continue;

c. They are only retaining about 15% of their former licensed (and in the case of P, trickle) abstraction;

d. In a "beauty parade" between them and any of the other people "at the table", P/B would have shown that on any rational basis their residual needs would necessarily have first call on the residual GW;

e. Notwithstanding this P/B have been prepared to accept the exceptionally conservative (generous to other appellants) modelling assumption that the others retain 100% of their current licences/TLL renewals. That is an implausible assumption on the facts and directly contrary to the approach which the EA has set out to date;

f. it follows that there is no route to this settlement prejudging any of the other appeals – this settlement implausibly assumes those appeals are 100% successful.

P/B Case (as set out in Opening)[1]

11. There were two issues the Inspector would have needed to determine through this inquiry absent this settlement: (1) the terms of any Ground Water Abstractions ("GWA") licences to be granted/maintained; and (2) whether the revocation of the licences was justified under the s.27 serious damage test ("SD").

12. P/B are substantial and well established agricultural/agricultural related businesses.

13. If confirmed, the EA's proposed revocations and refusals ("the EA Decisions") the subject of the P and B objections/appeals ("the Appeals") would have seen: (1) B lose 100% of its groundwater ("GW") or 681,900m^3 fully licenced ("FL"); and (2) P lose almost all its GW. We now know from Ian Pearson ("IP") that the EA also intended to not renew P's time limited licence ("TLL") [IP42(ii)] or the separate licence said to have been erroneously granted [IP84].

14. The result of the total package would have been that well-established businesses who have done everything possible to ensure water efficiencies and secure alternative sources of supply at very substantial cost to themselves at the behest of EA and in response to the RSA programme would have been catastrophically affected. Even with maximising mains supply, B would have had to close <u>*one of its two production lines*</u>. Even after having built two reservoirs at huge cost P would

1 It is not intended to read this out but is included here to confirm what the position of P/B would have been absent the settlement.

have only had a 60% chance each year of having enough irrigation water and, more fundamentally, P would have not been able to carry out essential operations *at all* without a supply of GW. These extreme results were never envisaged and are not necessary.

15. The claimed justification for these very significant steps/measures is said to be the need to protect the SAC (and SSSI's within it) from the risk of an adverse effect on integrity ("AEI").

16. P/B has throughout accepted, of course, that the EA has to act so as to protect the SAC from risks of AEI. As part of that, P/B recognise that it was necessary to assess the total volume of GWA which could be permitted to continue in any given location consistent with avoiding risk of an AEI to the relevant parts of the SAC. As we said in opening, reducing GWA *to the extent necessary* to avoid that risk on a location specific basis is of course appropriate.

17. P/B had also acknowledged [SoC/75] that with all the existing licences across all abstractors there was a need to take some action to avoid the risk of an AEI. The EA was right to take some action. Things, however, have now moved on very significantly to EA's advantage with the withdrawal of objections to very substantial licence revocations – which will now take effect. The EA has, with this settlement, now achieved its full AEI objectives - and there is no basis for the EA Decisions in respect of P/B now to be upheld to their full extent.

18. Even assuming (contrary to P/B's case) that the EA was correct that the current permitted GWA by P/B caused a risk of AEI to the parts of the SAC listed in LPCTR table 6 p19 ("the Routes to Harm") P/B's position in short throughout has been that:
    a. the EA had already, through this process, secured large reductions in GWA – not least as a result of the withdrawal of other objections/appeals. Those reductions in GWA will now occur as a matter of law. A new baseline against which to determine these appeals had been created;
    b. on the EA's own logic (with or without that new baseline), the EA Decisions sought to go far further than required to avoid the risk of an AEI – given the residual water issue (and/or the spray irrigation issue);
    c. its former approach of revoking in full the full extent of all licences has been shown by its own modelling to be an absolutist approach which P/B contend is legally, scientifically, ecologically and factually unjustified on the current facts and the current baseline.

19. Whilst not accepting the EA case on the Routes to Harm and thus the need for *any substantial* changes to their licences for the reasons given by Mr Harding ("MH"), P/B made sensible and

pragmatic proposals which would be adequate to meet their residual needs whilst meeting EA's requirements. Their simple "ask" was simply to continue to be allowed GWA to meet limited residual needs which *could not* be met in any other way and which, even on the EA's case, would not give rise to a risk of AEI.

20. P/B put their case at a number of levels – with the amount of water to be made available to them increasing as one goes down this list:
    a. their "asks" are, on current facts and the current baseline, consistent with the EA methodology and thresholds because there is adequate residual water (even ignoring the spray irrigation issue). There is thus no legally permissible route to refuse the "asks" because accepting them does not create the risk of an AEI;
    b. P/B were not however constrained to their "asks". Consistent with the EA methodology and thresholds, properly understood their case would have been that there is in fact far more residual water available when one takes into account spray irrigation ("the SI Issue"). The EA Decisions could not be sustained to the extent that they ignore this additional residual water. P/B would, on that argument, have been entitled to a far higher level of GWA than their "asks" for the short reason that the AEI basis of revocation beyond that level is wrong. Those first two issues were to be addressed by Mr Black ("AB") and his detailed modelling;
    c. the assertion of risk of AEI from P/B's GWA was to be the subject of contrary evidence from MH. In contrast to Catfield Fen, he would have shown that there is no evidence of harm to the relevant parts of the SAC and no basis on the site specific facts for the assertion of risk of such harm. This would have been a highly technical and contentious area of discussion between the experts but P/B intended to show that none of the elements which justified the decision in Catfield Fen were present here and that it was not appropriate to extrapolate from the precise facts there to the generality where the facts do not support such extrapolation.

21. Our Opening thus noted that it was hoped that the EA will recognise the legal significance of the new baseline, what its own modelling showed on the residual groundwater and accept the "asks" at a. above. That has now been done and it therefore no longer necessary for P/B to pursue b and c above.

<u>The Issues</u>

The Methodology

22. The essential methodology underpinning the issues appears to have been as follows:

a. In deciding which licences to revoke/amend, the EA "needed to develop a way of identifying the individual contribution of each licence to changes of the hydrological regime" – to assess the alone or in combination effects [SOC B3/22 para 3]. The BAM tool was used;
b. 23 cells were chosen as "sample cells" to represent the whole SAC – where the impacts of each abstraction was assessed individually and cumulatively;
c. The impact of each licence on each cell was then ranked "according to their relative contribution" to drawdown of GW in that cell;
d. All licence types were included including time limited licences ("TLLs") (B3/23);
e. The criteria used were, for likely significant effect ("LSE")[2] - 1mm drawdown (either alone or in combination); and for AEI 5mm or 5% (alone or in combination).
f. Relevant licences were then identified under the hierarchy: (1) AEI alone (more than 5mm); (2) AEI in combination (more than 5mm in combination with others); (3) LSE in combination between 1 – 5mm but not such as to cause the threshold for adverse effect to be exceeded; and (4) less than1mm (trivial).
g. the licences which were thus identified were then the subject of the EA Decisions; and
h. subject to some very limited exceptions those identified licences were subject to full withdrawal/refusal under the EA Decisions.

23. There is thus an unstated assumption underlying the EA Decisions – namely that those licences identified under the 5**mm** sieve ***all*** had to be (almost) ***fully*** withdrawn to meet the 5**%** AEI threshold.

24. As we said in Opening, that was and is simply wrong as a matter of maths and revealed a logical flaw in the EA's decision making *on the EA's own modelling*. Just because the total of all the GWA on all the licences combined results in a breach of the 5% does not mean that all the licences have to be fully withdrawn – because that could and here did go far further than necessary to achieve the 5% threshold.

25. As demonstrated by AB, that flawed logic meant that the totality of the EA Decisions would result in GW (and SW[3]) flow impacts from GWA being *very significantly* lower than the AEI Thresholds: see 7A column in his tables 7- 9 derived from *Wood Technical Addendum*..

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[2] "Anything less than 1mm was not considered significant": B3/24 on the basis that it is not possible to measure drawdowns less than this size.

[3] The 10%/SW issue is addressed separately below.

26. The EA was thus seeking to go far further than needed to achieve its own thresholds of AEI.

New Baseline

27. We further contended in Opening (and would have demonstrated through evidence and in legal submissions at the end of the full inquiry) that these appeals/objections (and the statutory questions) had to be considered on the facts as they currently stand and not on the basis of the position at the time of the EA Decisions.

28. There has been a major change in circumstances since the EA Decisions.

29. P/B (and Bracy) are the only parties maintaining their objections/appeals. All others have been withdrawn. All other licence holders have consciously and deliberately chosen not to pursue their statutory rights of objection/appeal. No evidence will thus be presented in support of their former objections and appeals and there will be no basis for the SoS/EA to do other than uphold the EA Decisions for all those other former licence holders.

30. Those EA Decisions will thus take effect and the EA/Inspector cannot proceed on any other basis. They do not need to be considered further and there is no lawful basis to proceed as if those abstractions remain in issue. Those interested in them have voluntarily removed themselves from the table.

31. That creates a new baseline – the position with those licences no longer applying and the GWA in the future being at a level without those licences being available. That means that there is significant residual GW available to the remaining appellants/TLL applicants before the 5% threshold is close to being reached.

32. The statutory question on P/B's Appeals is whether the EA Decisions in respect of them are justified to avoid a risk of AEI through breaching the 5% threshold in the light of the new baseline. The answer is necessarily no and the licences must therefore be retained at a level consistent with the 5% threshold. That is what the settlement achieves (even with 100% retention by all other potential TLL appellants).

33. The question for the inquiry would therefore have been whether it is necessary, justified and proportionate to refuse the Appeals before it given that there is a new baseline of much lower abstraction than at the time of the EA decisions. The answer to that question is no.

34. The question therefore becomes, given that there is residual GW available which will not breach the 5%, is it necessary, justified and proportionate to fully refuse the remaining appeals/objections when partially allowing them will still result in a position below the 5% threshold? The answer is, by definition, no.

35. Contrary to the apparent position of IP, no question of applying EA's approach to prioritization arises. P/B would have shown in Closing that properly understood the law poses the above question and it is the only question given the new baseline. EA practice or procedures cannot substitute its own approach for the correct statutory question. It is understood that the EA is concerned that acceding to this argument might encourage others to pursue appeals to inquiry so that they are "the last person standing". That is to misunderstand the statutory scheme. All parties affected have a right to make objections/appeals against EA Decisions and to present evidence and prove their case through the statutory inquiry processes. Parliament has set the framework for determining these disputes. P/B are using that framework and are entitled to decisions being made within that framework. Others had their chance to use that framework too and have decided not to take it. That is a matter for them. The EA cannot adopt an approach inconsistent with and outside that statutory framework.

36. It is recognised that (because of delay by the EA) there may be a limited cohort of other people at the table – namely Bracy and those who have applied for renewal of TLL which have (still) not been determined. There have been changes to the list of relevant people over time including Rumfold withdrawing its objections.

37. It is accepted that an issue could arise as to how residual groundwater should be shared amongst all those at the table if there was not sufficient to meet all that they are asking for, but in respect of the P/B "asks" that issue does not arise here. The most recent modelling shows that there is sufficient water to meet the "asks" and all the remaining requirements of all those with a seat at the table.

38. For the avoidance of doubt, if there was an issue as to how the water should be shared, that would necessarily favour P/B for the short reason that the impacts on them from the complete revocations are so extreme.

Spray and Return Flows

39. Had the inquiry proceeded, P/B would have shown that spray irrigation had to be taken into account – not least in the light of the answers in XX of RS.

40. Soil moisture, plants and pathways to groundwater recharge make no distinction between rain and spray irrigation – it is all water and that is all they are concerned with.

41. Ignoring spray irrigation would have been shown to be misconceived in principle and have resulted in a failure to address properly both sides of the water balance. The spray irrigation is simply all assumed to be lost and is wrongly left out of account.

42. The academic papers referred to by AB properly treat spray irrigation in essentially the same way as rain and modelling in the UK elsewhere does the same. There is no reason why NEAC should not do so too.

43. The EA (RS) appears to accept that SI should be taken into account although raises issues as to how that should be done.

44. Some issues have been raised by the EA about the way SI has been modelled. Those issues have been taken on board in further work by AB. The final results are awaited (given the need to re-run the model following the Rumford withdrawal) but the short point is clear – there is much more residual water available when SI is taken into account than that necessary to meet the "asks" and the full TLL renewals requests made by others.

SW Flows – 10%

45. If and in so far as the EA attempts to rely on the 10% AEI surface water flow threshold ("the 10% SW Threshold"): (1) that would be inconsistent with its approach to that issue in its Decision making to date – see above footnote; (2) fails to recognise the basic fact that the NEAC model significantly underpredicts (by a factor of nearly 2) SW flows and thus exaggerates the proportionate/percentage impact on such flows). Properly understood the impact on SW flows is far less than the model outputs suggest; and (3) fails to show any link between the 10% SW Threshold and risks to the SAC.

Summary

46. On a correct understanding there is no such need to remove entirely GW from B/P and, in the circumstances now pertaining not least with the withdrawals, the EA was being over-zealous in its approach. There is no legal, environmental, factual or scientific justification for the EA Decisions on the EAs own figures/method. Hence this settlement is correct and appropriate.

Routes to Harm

47. Had there been no settlement, B/P would have continued with their case set out by MH that the routes to harm assumed by EA were not correct.

48. It is of course accepted that where a wetland is GW fed and dependent on that GW feeding for the appropriate chemical composition and water levels and for appropriately low nutrient water, significant reductions in GW flows may create a route to harm to the SAC features (although the justification for the 5% would have been tested in XX) and it may not be possible to rule out the risk of AEI.

49. That was the position in Catfield Fen. There was evidence of deterioration in the SAC features and the decision is clear as to how the conclusion of risk to AEI was reached there.

50. Nothing like the same approach appears to have been adopted by the EA here.

51. Instead the EA appears to have assumed rather than demonstrated that the relevant wetlands (with the exception of SF) are significantly GW rather than SW or rain fed despite their specific geology. It has claimed that recently provided documents demonstrate harm to or reduction in quality of the wetlands over time when that evidence properly understood does not so demonstrate. On the contrary, it would have been shown through XX of NB and through evidence of MH that there is no evidence of deterioration arising from GWA to the areas said to be affected by P/B abstraction even after many years of abstraction at current rates. Further the EA has wrongly understood like for like studies by MH which demonstrate improvement over time – despite P/B's GWA. At SF, the EA has ignored the spread of the key indicator species Fen Orchid.

52. Further, the EA has assumed the success of the wetland is dependent on the chemical composition of the GW even where the SW are the main water source and where its chemical composition is at least as good. It has proceeded on the basis that GW is better for the low nutrient requirements of the key SAC features contrary to the only evidence that the GW has much higher nutrients.

53. In short all the elements which were demonstrated in Catfield Fen have instead either (1) been assumed here without any site specific evidence; or (2) been assumed based on a misunderstanding of the evidence.

54. The precautionary approach applies, of course, but that does not allow one to maintain concerns contrary to the evidence.

The Result

55. The EA has attempted to address what it sees as a significant issue in a robust way. However, there were gaps in its logic (on a correct analysis of the complete current information assessed on current facts and the correct baseline) which this settlement now corrects:

a. the EA methodology had a basic logic flaw - it assumes that any licence which may contribute to an AEI has to be *fully removed* to avoid that risk when the evidence shows unambiguously that that is not the case. On a correct understanding, the EA Decisions went further than was required to achieve the 5% GW Flow Threshold - hence giving space for this settlement. There is on the EA's Decisions properly understood a considerable volume of "residual water" which can be licenced without breaching the 5% GW Threshold;

b. the EA has failed to model spray irrigation ("SI"). That omission means the abstraction for SI is included in the calculations but the other side of the equation – it being sprayed - is ignored and all that water is thus wrongly assumed to be lost from the water balance. Correction of this error would significantly increase the volume of residual water consistent with the 5% GW Threshold (changing any reds in AB's tables to green);

c. the EA appear to now be alive to these two issues but appears to proceed on the wrong basis that: (1) there is no "new baseline" for distribution of residual water; (3) any residual water is not available to the current appellants despite the statutory test that this inspector must ask; and (3) the issue of SI will need to be subject of further work before being taken into account and included in the NEAC model. The answer to (1) and (2) arises from the statutory scheme; as to (3) absent any modelling by EA, there is no reason to consider that the revised modelling by AB is other than robust and an appropriate basis for decision making;

d. The EA relies on the decision at Catfield Fen ("CF") to justify looking much more widely at the impact of GWA. There is no criticism of that decision to look at the issue afresh. However, the CF decision was made on the evidence *there* as to harm and mechanisms for harm. The EA Decisions assume that the same position applies elsewhere but the evidence shows the opposite. There is a contrast between the factual matrix at CF and all the sites said to be at risk from P/B's GWA both as to: (1) evidence of harm to the SAC features - which here do not demonstrate that which justified the decisions at CF; and (2) as to the geology and hydrogeology of the sites in question;

e. Further the assumption that runs through the EA case that the increase in GW flows will lead to the success of the SAC features which depend on the supply of base rich, nutrient poor GW is belied by the basic facts that: (1) the chemical composition of the SW is at least as appropriate for the base dependent features as the GW; and (2) the nitrate content of the GW is demonstrably far higher/far worse than the SW. The EA ignores the former and sd to the latter assumes without evidence and contrary to the precautionary principle that the GW is somehow cleansed before being discharged.

Serious Damage

56. This is the argument P/B would have run but for the Settlement.

57. S.27 only applies when the revocation *is necessary in order to protect from serious damage* any flora or fauna dependent on any water contained in underground strata or inland waters. If it the revocation is so necessary then compensation is not payable. The precautionary approach does not apply in s.27.

58. There are two major points against the approach of the EA: (1) the impact on the SD test if the AEI Thresholds are not exceeded; and (2) the correct interpretation of s.27.

59. As to (1), even assuming EA's 5% GW and 10% SW thresholds are the appropriate thresholds for AEI, that means that anything less than that, by definition, cannot constitute an AEI. Thus any GWA which does not result in the total deviation from naturalised exceeding those thresholds cannot be SD (even on the EA's interpretation of SD). Thus here, if just the "asks" were granted but there was still further residual groundwater available without exceeding the thresholds, the revocation of the permanent licences of P/B *to the extent* of that further residual groundwater would by definition not be SD and would be fully compensatable.

60. As to (2), it is a short but fundamental point. The EA has approached that question of SD on a wrong legal footing for the basic reason that the s.27 test is not the same as the AEI test. The s.27 test is a far higher test than the AEI.

61. Here the EA is not contending that the P/B permanent licences *will cause* an adverse effect on the integrity of the SAC and thus SD. Its case is that *it cannot be satisfied beyond reasonable scientific doubt that there will not be a risk of an AEI*. Being unable to exclude beyond reasonable scientific doubt the risk of SD is not remotely the same thing as it being demonstrated that revocation is "necessary to protect from SD".

62. It is recognised of course that this is not how the SoS has understood the statutory words but there is no authority on the point (as far as we are aware) and the SoS's guidance cannot be relied on to interpret the statutory words. S/B are making the legal point that to rely on s.27 it is necessary for EA to go further than demonstrate the AEI test is met.

63. There is no evidence or claim that P/B's GWA is causing serious environmental damage. The EA places significant reliance on the Catfield Fen decision **[CD7.2]** but the Inspector was not there

considering the effects of abstraction by the P/B there or indeed the effects of abstraction on the protected sites in issue at this inquiry. Mr Harding's more recent evidence in any event shows that the sites are not deteriorating but improving. Calcerous Fen (the main SAC feature at Broad Fen) has increased in quality and extent over the last decade. The Fen Orchid (an SAC feature in its own right) has recently re-appeared at Smallburgh for the first time in 70 years.

Proportionality

64. The legal principles are set out in the Statement of Case and not repeated. Even if the SAC features are not in favourable conservation status it is clear that there are multiple potential causes of that – with GWA being just one. It will be shown that going full out now to restrict GWA is not proportionate, justified or legally required.

Conclusion

65. The settlement (proposed direction) makes it unnecessary to resolve all the issues between the parties. P/B secure the minimum volume of GW they need to continue their operations. They are prepared to drop their wider claims and wider arguments so as to secure their essential needs. The residual water analysis creates the gap to allow for this settlement consistent with the law, the facts, the claims of others "at the table" and ensures no AEI whilst protecting these significant businesses and the contribution they make to the local and national economy. It is commended to the Inspector and the SoS. For the avoidance of doubt, if the Direction sought is not made or is quashed, P/B would revert to their full arguments as set out above.

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Landmark Chambers
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