IN THE MATTER	of the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	of the First Schedule to the RMA
AND	
IN THE MATTER	of the hearing of submissions on Proposed Plan Change One to the Waikato Regional Plan – Waikato and Waipa Catchments and Variation One to Plan Change One – Block 2

LEGAL SUBMISSIONS ON BEHALF OF OJI FIBRE SOLUTIONS NZ LIMITED AND HANCOCK FOREST MANAGEMENT (NZ) LIMITED

26 JUNE 2019

Counsel:
G K Chappell
Vulcan Building Chambers
P O Box 3320
Shortland Street, Auckland 1140
gillian@chappell.nz
Tel: 09 3001259

CONTENTS

1. INTRODUCTION

1.1 Oji Fibre Solutions NZ Limited and Hancock Forest Management (NZ) Limited ("OjiFS and HFM") appear in support of their submissions on Plan Change One to the Waikato Regional Plan as they relate to Block 2.

1.2 Evidence for Block 2 has been prepared by:

(a) Dr Philip Mitchell (planning) (primary and rebuttal)

(b) Dr Frank Scrimgeour (economic) (rebuttal).

1.3 These legal submissions draw on that evidence as well as the evidence given for Block 1. They address the following key topics:

(a) Overview of the PC1 framework;

(b) Certification / approval of Industry Schemes and Farm Environment Plans;

(c) Section 70 issues, and separating land use and discharge rules;

(d) The point source discharges policies and the related definition of regionally significant infrastructure

(e) Land use change;

(f) Precedent issues;

(g) Response to Dairy NZ and Fonterra position on economic issues.

2. OVERVIEW OF THE PC1 FRAMEWORK

2.1 The Block 2 hearings provide the opportunity to examine the objectives and policies framework in the context of changes to the rules as proposed by the Section 42A Report. Reflecting on the approach to PC1 as a whole, Dr Mitchell is of the view that "…in their current form, the objectives and policies set out in the Section 42A report will not result in clear, consistent, equitable and achievable outcomes that give effect to the Vision and

Strategy over the life of the proposed change."[1] He has assessed the framework of PC1 and the changes proposed by the Section 42A Report and taking a top down approach that applies a principled perspective, proposes the following outline:[2]

(a) The objective, policy and rule framework must achieve the Vision and Strategy;

(b) The framework needs to recognise that the current N, P, sediment and microbial pathogen state of the Waikato River is primarily influenced by diffuse discharges but point source discharges also contribute;

(c) The focus of the framework should therefore be on improving diffuse discharges while not ignoring point source discharges (but recognising that the Regional Plan already has objectives and policies that affect point source discharges);

(d) Diffuse discharges should be primarily regulated via resource consents rather than by permitted activity rules;

(e) The framework should require all activities to be undertaken in accordance with "best environmental practice;

(f) The framework should take account of the advances already achieved with point source discharges while recognising that [significant] reductions achieved through previous consent processes may not always be able to be continued;

(g) PC1 needs to create a clear framework for requiring, measuring and reassessing demonstrable improvements over the next approximately 20 years – this being the effective life of PC1;

(h) If Farm Environment Plans are to be used, they should only be a tool to set out "how" outcomes specified in resource consents issued in terms of PC1 will be achieved. Similarly, Nitrogen Reference Points (or any other similar metric) should only be used for the purpose of benchmarking performance of individual operations, not as any form of "entitlement" / proxy for a limit;

[1] EIC Block 2 P Mitchell at [3.8]
[2] EIC Block 2 P Mitchell at section 4

(i) The provisions should make it clear what the expectations / requirements are and should establish explicit proportionate actions required by those responsible for diffuse discharges to reduce N, P, sediment and microbial pathogens in the Waikato catchment;

(j) A clear framework should be established that sets "sinking lid" requirements for diffuse discharges of contaminants, and for those lids to be regularly benchmarked and reviewed downwards;[3]

(k) The provisions should not disadvantage those who have already undertaken measures to reduce N, P, sediment and microbial pathogen contaminants;

(l) Allowances need to be made for the time to transition away from unsustainable land management practices;

(m) Innovation must be encouraged and facilitated, which will only occur if there is land use flexibility.

2.2 As sound planning practice is that the policies should be determined before the proposed rules,[4] Dr Mitchell's evidence fleshes out the framework[5] but suggests interim guidance from the Panel on the overall shape of the policy framework it considers appropriate, followed by witness caucusing to develop a complete and robust set of provisions.[6]

3. RULE 3.11.5.3 - CIS AND FEP CERTIFICATION ISSUES

3.1 In the context of certification, Rule 3.11.5.3 (as notified) has two key elements: A "Certified Industry Scheme" (CIS) that meets the criteria set out in schedule 2, and second, a "Farm Environment Plan" (FEP) approved by a certified Farm Environment Planner.

3.2 The operation of the approval / certification process for the CIS and the FEP under the rule is not sufficiently certain nor transparent. For example,

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[3] EIC Block 2 P Mitchell at [4.9]
[4] *Waimakariri Employment Park v Waimakariri District Council* (C66/2003) at paras 43-44.
[5] EIC Block 2 P Mitchell at section 5
[6] EIC Block 2 P Mitchell at [5.10]

it is not clear how an "appropriate structure, governance arrangements and management will be determined" and what it must achieve. As it is not clear how this scheme will operate in practice, it is not possible to assess the effectiveness and efficiency of the scheme.

3.3 Through the adoption of a CIS approved by the CEO, the Council is reserving to a third party, the right to determine what amounts to sustainable management, in a manner that is *ultra vires*. The same issue arises with respect to approval of the FEP by a certified Farm Environment Planner when considered in conjunction with a CIS.

3.4 The leading authority on the requirement for certainty of permitted activity standards leading to invalidity is the High Court decision of McGeehan J in *A R and M C McLeod Holdings v Countdown Properties Limited*.[7] There the High Court described the level of certainty required of rules establishing predominant uses (the equivalent of permitted activities) under the Town and Country Planning Act 1977:

> " … The authorities cited establish two distinct propositions. The first is that a Council may not reserve by express subjective formulation, the right itself to decide whether or not a use comes within the category of predominant use. Council cannot, for example, put forward an Ordinance which says A will be a predominant use "if the Council is satisfied situation B exists". The second is that predominant uses fall for objective ascertainment. That much certainty always is required. Predominant use rights must not be described, even in objective fashion, in terms so nebulous that the reader is unable to determine whether or not a use may be carried on in the zone. This second aspect does not involve any express subjective formula. It involves, simply, invalidity through inherent vagueness.
>
> … A description of, and condition attached to, a predominant use is not to be condemned simply because there is some element of degree, judgement, or 'value judgement', involved in its ascertainment. There will usually be some element of judgement involved in application of descriptions to factual situations. There will usually be some element of degree. Some matters can be ascertained without undue difficulty and debate. There is a difference, after all, between 'substantial' and 'beautiful'. The law does not require predominant uses to be defined ('specified') with scientific or mathematical certainty. Some degree of flexibility is permissible." [emphasis added]

[7] (1990) 14 NZTPA 362 at pp 373-375

3.5 That case has been subsequently adopted in a number of RMA cases.[8]

3.6 In this instance, as a permitted activity, the approval process for the CIS in combination with the FEP reserves to a third party (the CIS / or Farm Environment Planner) the ability:

(a) For the CIS, to determine what amounts to "the achievement of the water quality targets in Objective 3"; or the purposes of Policies 2 and 3; and

(b) For the FEP, to determine matters such as "appropriate measures to manage …discharges";[9]

3.7 These are matters that go to the heart of sustainable management of the effects of these activities on the environment.

3.8 The Council may only confer upon some other person the function of settling some detail involved in a condition imposed, where the person's own skill and experience are used as a "certifier" in respect of a specified standard. However, there is no precedent for conferring upon some other person the function of an "arbitrator", for example, to determine whether a condition (or in this case an objective or policy) has been complied with:[10]

3.9 The ability to determine how undefined "minimum standards" will be complied with, or the extent to which "actions, timeframes and other measures" will "not increase beyond the property or enterprise's NRP unless other suitable mitigations are specified" (not defined) distinguishes the process from an *intra vires* certification process, such as where a noise consultant certifies that a noise standard (developed under the Standards Act 1988) has been achieved, or where there is compliance with a resource consent.

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8 e.g. *Foodstuffs (Otago Southland) Properties Limited v The Dunedin City Council (1993) 2 NZRMA 497*, *New Zealand Winegrowers v Marlborough District Council* [2013] NZEnvC 7, *Power v Whakatane District Council*, High Court, CIV-2008-470-456 [45]

9 If the FEP is redrafted to require reductions this is more problematic, because it is less a question of certification in terms of determining whether the NRP is met.

10 *Turner v Allison [1971] NZLR 833;(1971) 4 NZTPA 104; 14 NZLGR 348 (CA); Minister of Energy v Broken Hill Pty Co Ltd (1986) 11 NZTPA 198 (HC)* and *Ravensdown Growing Media Ltd v Southland RCEnvC C194/00.* It was held, in *Director-General of Conservation v Marlborough DC [2004] 3 NZLR 127; (2005) 11 ELRNZ 15 (*HC), that a condition requiring a consent authority to decide whether a site was of importance to a species of dolphin, related to the issue of whether the consent should have been granted. This was a decision for the Environment Court to make and was not one that could have been properly delegated to the consent authorities.

Section 42A report

3.10 The Section 42A report acknowledges that there is a lack of clarity about the CIS provisions.[11] It states that it "is understood that one of the primary features of the CIS was to prepare and oversee the implementation of FEPs".

3.11 Officers recommend a range of amendments to address the problems with the CIS concept. The key change is to alter the permitted activity status to a restricted discretionary activity, with the inclusion of a range of restrictions on the exercise of discretion that provide an opportunity to review the CIS and FEP. It is submitted that this approach is necessary to address the *vires* issues arising from a permitted activity rule because the backbone of the mitigation package is appropriately subject to the Council's discretion, as a decision-maker. Notwithstanding all the above, whether there is value in retaining the CIS in PC1 may be a matter best left to the market to determine.

3.12 The detail of FEPs will be addressed in the Block 3 hearings.

4. SECTION 70 ISSUES, LAND USE AND DISCHARGE RULES

4.1 Two issues arise:

(a) Should discharges from farming activities be provided for as permitted activities taking into account s70 considerations?

(b) Should the use of land for farming and the discharges associated with that land use be subject to separate rules?

Should discharges from farming activities be provided for as permitted activities taking into account s70 considerations?

4.2 The test in s70(1) requires that before including a rule in a regional plan allowing discharges as a permitted activity, the Council must be satisfied that none of the effects listed in clauses (c) to (g):

- are likely to arise
- in the receiving waters,

[11] Para 832-833

- after reasonable mixing as a result of the discharge of the contaminant
- (either by itself or in combination with the same, similar, or other contaminants).

4.3 The Section 42A Report observes:[12]

> Officers agree that Rule 3.11.5.3 may not comply with section 70(1) due to the uncertainty about the effects occurring on individual properties (including cumulatively if the assumed very large number of properties are within the CIS framework) and the effectiveness of mitigation measures in place or proposed through FEPs to address those effects.

4.4 OjiFS and HFM concur with the Section 42A Report's conclusions on this issue.

4.5 It is submitted that discharge rules may be permitted activities and able to meet s70(1) if drafted to include standards designed to address the effects in clauses (c) to (g). A case in point is the provision for low intensity farming operations as permitted activities subject to appropriate standards. The Council must also be satisfied that there is some evidential basis to conclude that the effects listed in s70 are unlikely to arise.[13]

4.6 Notwithstanding, it is not sufficiently certain for a permitted activity standard to simply repeat clauses (c) to (g) of s70(1). Permitted activities "must not be described, even in objective fashion, in terms so nebulous that the reader is unable to determine whether or not a use may be carried on".[14]

4.7 It is hard to reconcile the Section 42A Report's conclusions on this issue with its proposals to include separate permitted activity discharge rules subject to compliance with s70(1)(c) to (g). This issue is addressed below.

Should the use of land for farming and the discharges associated with that land use be subject to separate rules?

4.8 The second, but related issue is whether the proposal by the Section 42A Report authors to separate the rules regulating the use of land for farming from the associated discharges, is appropriate.

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[12] Para 802
[13] *Day v Manawatu Wanganui Regional Council* [2012] NZEnvC at [5-199]
[14] Ibid note 16 in *A R and M C McLeod Holdings v Countdown Properties Limited*.

4.9 Taking a step back, Objective 1 of PC1 is focussed on discharges of the four contaminants. The Regional Council may control the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies (s30(1)(c)(ii) and may control discharges of contaminants into or onto land (s30(1)(f). The Plan is clearly about managing those discharges.

4.10 Section 15(1), relating to discharges has the contradictory presumption to s9, as it relates to the use of land. Under s15 no person may discharge any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water unless the discharge is *inter alia* expressly allowed by a rule in a regional plan or a resource consent. But for the discharges, no consent would be required from the regional council to use land for farming purposes (as it relates to PC1).

4.11 Section 87 of the RMA identifies types of consents. Consents to do something that otherwise would contravene s9 or s13 are referred to as land use consents. Consents to do something that would otherwise contravene s15 are called a discharge permit.

4.12 Because, as a matter of policy, principally these are rules authorising discharges, it is submitted that primarily, a discharge permit is required, unless the activity is appropriately permitted (subject to s70 considerations).

4.13 Counsel for Wairakei Pastoral argues that there is a choice about whether to use land use consents or discharge permits to manage discharges. The counter argument is that requiring only a land use consent amounts to a 'work around' of s70 that is inconsistent with the clear directions in that section and other parts of the Act.[15]

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[15] Refer section 26 of legal submissions on behalf of Wairakei Pastoral Limited for Block 2. Note that in the *Mawhinney* case cited [2017] NzEnvC at [156] –[157] the Court said that Councils tended to deal with discharges "through a land use rule because of the difficulties of identifying breaches of section 15 duties for non-point sources of contaminants, as persons who may be going to cause a diffuse discharge of a contaminant to water (or to land in circumstances where it may reach the water usually avoid making an application either because they deny their activities are causing an emission, or because they deny that any contaminant will reach water.". That is not the case here.

4.14 The Environment Court in its Variation 5 decision on the Waikato Regional Plan declined to directly address the question of whether discharges from farming activities must be expressly authorised. Instead, it directed the parties to apply 'a belts and braces' approach and "in the interests of simplicity" incorporate the discharges rules within the plan.[16] It observed that any discharge rules incorporated within the Plan should be clearly differentiated from the land use rules and directed the parties to redraft the rules. The redrafted versions were accepted by the Court. Accordingly, Chapter 3.10 now contains hybrid rules drafted to refer to discharges, as well as a separate discharge rule, as follows:

> 3.10.5.3 Controlled Activity Rule – Nitrogen Leaching Farming Activities
>
> The use of land in the Lake Taupo catchment for any farming activity existing as at the date of notification of this Rule (9 July 2005) that does not meet the conditions for permitted activities under Rule 3.10.5.1 and which may result in nitrogen leaching from the land and entering water is **a permitted activity until 1 July 2007, after which it will be a controlled activity,** subject to the following conditions, standards and terms: …
>
> …
>
> 3.10.5.10 Permitted Rule – Nitrogen, effluent, and fertiliser discharges associated with Land Uses authorised under rules 3.10.5.1 to 3.10.5.9
>
> The discharge of nitrogen, effluent, and fertiliser onto or into land arising from the land use activities authorised under rules 3.10.5.1 to 3.10.5.9 in circumstances which may result in contaminants entering water, where the discharge would otherwise contravene section 15(1) of the RMA, is a **permitted activity** subject to the following conditions:
>
> a. The application of farm animal effluent, (excluding pig farm effluent), shall comply with conditions a to c, e, f and h to j of rule 3.5.5.1;
>
> b. The discharge of feed pad and stand-off pad effluent shall comply with conditions a, b and e to g of rule 3.5.5.2. Additionally the pad shall be located at least 20 metres from surface water;
>
> c. The application of pig farm effluent onto land shall comply with standards and terms 3, a, c, d and f of rule 3.5.5.3.
>
> d. The application of fertiliser into air and onto or into land shall comply with conditions a, b and c of rule 3.9.4.11.

[16] Page 73

4.15 Per the Section 42A Report, the key rationale for separation of the rules seems to be that land use consents "attach to the land" and can be easily transferred between new owners and occupiers (s134), whereas discharge permits pertain to the holder of the permit. Discharge permits may only be transferred to another site if the transfer meets the conditions in subclauses (3) and (4) of s137. For example, both sites must be in the same catchment.

4.16 It is submitted that adopting a solely land use consent approach (as opposed to the Chapter 3.10 approach) creates an artificial construct that is inconsistent with the discharge provisions of the Act:

(a) On its face it appears to avoid the Council having to satisfy itself that the s70 tests are met;

(b) The period for which land use consents are granted is unlimited unless the consent expressly provides otherwise, whereas discharge permits are subject to a maximum 35 year term and a term of five years unless otherwise stated; [17]

(c) Discharge permits may be reviewed for the purposes set out in s128(1)(b), including for the purpose of meeting new water quality standards;

(d) The Council may impose a condition on a discharge permit requiring the adoption of the best practicable option.[18] Before granting a discharge permit the Council must be satisfied that a condition requiring adoption of the BPO is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment;[19]

4.17 Avoiding the need for a discharge permit for farming activities perpetuates the uneven playing field as regards point source and non-point source discharges. Dr Mitchell, in responding to an issue as to the existing environment raised by the evidence of Mr Scrafton in Block 1, notes that the "existing environment" may be assessed differently for land use and

[17] S123(b) and (c) of the RMA
[18] S108(2)(e)
[19] S108(8)

discharge consents. Any inequity arising about the existing environment would be addressed by ensuring that a discharge as well as a land use consent is required for diffuse discharges from farming activities.

4.18 On the other hand, adopting separate land use and discharge rules on the terms proposed by the Section 42A report creates the following issues:

(a) There are issues of certainty associated with the references to s70(1)(c) –(g);

(b) New rule 3.11.5.9 means that famers who are unsure about whether discharges may give rise to the effects described in rule 3.11.5.8 face the alternative prospect of needing consent as a non-complying activity.

4.19 Overall, it is submitted that:

(a) Logically, a discharge permit is required because the issue that PC1 addresses is the effects of discharges of contaminants on water quality;

(b) Activities often require different consents / permits as a result of their multiple effects. Any legal and practical considerations associated with multiple consents under ss9-15 of the Act are regularly managed by Councils through consent processes;

(c) The land use and associated discharge for farming activities should be managed together (as per the notified wording) and that these should be regarded as both a land use consent and a discharge permit, being issued under ss9 and 15 respectively;

(d) Alternatively, if an additional and separate discharge rule is considered more appropriate, the discharge rule should link to the activity status of the land use rule. Dr Mitchell provides an example of policy drafting which requires farming activities, other than those permitted, to apply for a discharge permit.[20] The Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 also provide an example of such drafting (regulation 97).

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[20] EIC Block 2 P Mitchell, Appendix One, policy 5.

5. POLICIES ON (POINT-SOURCE) INDUSTRIAL DISCHARGES

5.1 OjiFS and HFM's position on point-source discharge is summarised as follows:

(a) To date point-source discharges have been actively managed through consenting subject to the Regional Plan. Resource consents for industrial point-source discharges typically require continuous improvements and adoption of the BPO;[21]

(b) Point-source discharges are reducing as compared to diffuse discharges which are increasing;[22]

(c) PC1 needs to avoid applying Objective 3 in a manner that could require industrial point-source discharges to upgrade by the dates set out in Objective 3 to achieve those short-term targets or that upgrades achieve a single step reduction. That interpretation would be inconsistent with the *Puke Coal* decision that the Vision and Strategy "does not intend that the first applicant is responsible for the entire upgrade of the river catchment, nor could such an approach be in accordance with the Act.".[23]

(d) The Regional Policy Statement ("RPS") anticipates and provides for the continued operation and development of regionally significant industry and primary production activities.[24] This suggests that PC1 must not serve to "rule out" expansion of existing industry and new industry in the region where doing so would give effect to the Vision and Strategy.[25] To discount future development would "grandparent" the operations of existing point source discharges, and the benefits they provide.[26]

(e) The RPS provides different direction as to implementation methods for point source discharges and for non-point source discharges and therefore anticipates that each will be managed

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[21] EIC Block 1 P Mitchell and P Millichamp
[22] EIC Block 2 P Mitchell at [4.2]
[23] *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223 at [138].
[24] Section 42A Report at para 1053
[25] EIC Block 2 P Mitchell at [5.8] "there needs to be a pathway for new point source discharges and land use changes". Refer EIC Block 2 P Mitchell, Appendix One revised Policies 10 and 11. Rebuttal evidence Block 2 of P Mitchell to EIC Block 2 G Willis at [5.1]
[26] Rebuttal evidence Block 2 P Mitchell at [5.2] in response to G Willis

differently to achieve the overarching direction.[27] It must be acknowledged that to date, both types of discharges have been managed from opposite starting points, with non-point source discharges being unregulated and point source discharges being regulated on a continuous improvement regulatory-driven journey, requiring comprehensive monitoring and reporting of contaminant loads and effects and for those data to be used to trigger reviews of consent conditions.[28]

(f) A new definition of "regionally significant industry" is required, as directed by the RPS which left the function of identifying specific industry to regional and district plans. The Section 42A Report relies on the reference in the RPS definition to industries that have been shown to have benefits that are significant at a regional or national scale, but appears to overlook the conjunctive use of "and" in the RPS definition, which requires that such industry is identified in regional or district plans. It says that "it is most appropriate to take the definition from the RPS".[29]

(g) Despite that, the proposed definition shown in the tracked changes version subtly alters the RPS definition in such a way as to allow specific industries to demonstrate that they have benefits that are significant at a regional or national scale. As OjiFS's pulp and paper operations at Kinleith Mill are undisputedly regionally significant, the proposed definition suffices for its purposes.[30] Equally, it would not oppose a listing of the types of activities that are regionally significant.

(h) A consent duration policy is required.[31] This should not include a common expiry date on the grounds that this would be inefficient and inequitable bearing in mind existing levels of investment and

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[27] Section 42A Report para 1054
[28] Rebuttal Evidence Block 2 P Mitchell at [6.5]-[-6.6]
[29] Section 42A Report para 1071
[30] Refer to EIC Block 1 P Millichamp
[31] EIC Block 2 P Mitchell at [5.5] "I also consider that a consent duration policy is needed that provides security for the investments made in environmental enhancement initiatives, irrespective of whether the discharge is a diffuse or point source discharge. Where significant and enduring steps are being taken to reduce nitrogen, phosphorus, sediment and microbial pathogens over time, a longer duration consent should be considered for any activity (either point or diffuse source), subject to appropriate review. That duration should only relate to environmental enhancement investments undertaken in response to the requirements of PC1.".

the need for security prior to the implementation of expensive technologies.[32] However, a common date for review is not opposed.

Offsetting

5.2 Policy 11 addresses the concepts of BPO and offsetting. The legal position on offsetting is summarised below:

> Case law has established that environmental compensation is a matter that is legally relevant under the enabling and efficiency provisions of Part 2 and can be relevant and reasonably necessary under s104. However, the "offsetting of effects should not be seen as being intended to achieve a "no effects" result, as that is not a requirement of the RMA. Whether or not any offsetting is required or appropriate will be determined on a case by case basis. The existence of environmental compensation will also not necessarily make the proposal acceptable: it is a question of weight in each case. Valuing environmental compensation is complex because weighing up the benefits of the offset compensation against the adverse effects involves comparing "apples and oranges".[33]

5.3 Taking these points into account, it is submitted that a policy in relation to offsetting is neither helpful nor necessary. It is an option available to any applicant for resource consent, and its complexity lends itself to a case by case assessment. If the Panel wishes to retain the parts of the policy relating to offsetting, it is submitted that:

(a) any policy providing guidance about the use of offsetting should apply to all consent applications, not just point source discharges;

(b) the wording of the Section 42A Report is preferred over the notified version (in particular, the change from "all adverse effects" to "any adverse effects").

5.4 Many of these issues are complex and, as Dr Mitchell' has set out, would benefit from caucusing subject to interim guidance from the Panel.[34]

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[32] Rebuttal Evidence Block 2 P Mitchell at [4.3]-[-4.4]
[33] Nolan, Environmental and Resource Management Law 5th edition, page 309
[34] Rebuttal Evidence Block 2 P Mitchell at section 7.

6. LAND USE CHANGE C1.5 – POLICY 6 AND RULE 3.5.11.7

6.1 Policy 6 is part of the grandparented framework of PC1 and effectively operates to restrict land use change and therefore land use flexibility.[35]

6.2 The approach to land use change is justified in the Section 32 Report as a short term approach[36] necessary in the context of provisions focussed on ensuring that the majority of existing farming operations are not required to decrease their nitrogen discharges.

6.3 The Section 32 Report provides that "the restrictions on land use changes allow for a period of time to enable other land use controls (such as Farm Environment Plans) to be implemented in a way that the effects from these actions will be able to be measured without the additional inputs from significant land use changes.". [37] However, when assessed against the requirements of the FEP as notified, it is submitted that the PC1 approach to land use change instead aims to ensure that existing farmers do not have to do more.

6.4 This is ultimately a self-defeating response to an issue that at its most basic is about how to stimulate an improvement in land use and management. The policy approach creates a direct disincentive for any land owner to plant trees or convert to a lower leaching activity on the basis that once converted there will be no future flexibility. It penalises those land owners who have not been in a position to convert land that is suitable for other higher and better uses, for example as part of a long term tree harvest cycle. In this sense, some forest owners are no different to owners of Maori land, both now being penalised for lower impact land use choices. The only land owners who may have options for flexible use are those with high impact leaching based on rates occurring at some date in the past and therefore with the capacity to achieve 'improvements' on one part of the farm to offset increases on another.

6.5 The effect of a lack of land use flexibility has economic implications including for land values, as described by Dr Scrimgeour:

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[35] Refer legal submissions Block 1.
[36] Section 32 Report page 187
[37] Section 32 Report page 188 "the restrictions on land use changes allow for a period of time to enable other land use controls (such as Farm Environment Plans) to be implemented in a way that the effects from these actions will be able to be measured without the additional inputs from significant land use changes."

> It does not appear that adequate account has been given to the effect on land price of grandfathered "Nitrogen Reference Points (NRP) and related regulatory limits. The probability of economically rational investors purchasing land at capital values commensurate with a grandfathered NRP and then investing in a manner that puts that value at "sovereign risk" by reducing stock loadings or planting trees is low. …

6.6 Dr Scrimgeour contends that "PC1's regulation of land use change appears to be aimed at "preventing land use change rather than preventing environmental degradation", noting also that this approach does not facilitate environmentally beneficial change. A dynamically efficient approach is one that "does not lock activities into a pattern of production which is no longer optimal and which does not align with contemporary markets." He notes that the "modelling work made public does not show the economic impact of the plan change on different users."[38]

6.7 Policy 6 implements the objectives. Objectives 1 and 3 set the water quality targets and Objective 4 refers to a staged approach to reducing contaminant losses. Notably there is no staged approach to land use change (for all intents and purposes it is all or nothing), other than the potentially (but by no means assured) approach under Policy 16 for owners of Maori land.

6.8 The s32 Report states that the "The land use changes rule was considered to be appropriate to have legal effect from notification … as it is an important part of the approach to achieve improvements in water quality (that is by restricting large scale land use change and therefore the associated increases in discharges").[39] The s32 Report describes the interim nature of the rule and its expiry in 2026 as "the key factor" in its acceptability. Importantly, the expiry date was seen as committing the Council to establishing new rules.[40]

Section 42A Report redrafting

6.9 Although the Section 42A Report proposes to remove Policy 6, the proposed redrafting of the rules simply 'moves the chairs around the deck'. It creates more issues than it solves, for example:

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[38] Rebuttal Evidence Block 2 F Scrimgeour at [38]
[39] Page 185
[40] Page 188

(a) by making all of a farming activity non-complying where there has been a cumulative net total of 4.1 ha of change in the use of the land since 2016, regardless of whether allowed as part of a resource consent;

(b) by removing the 2026 sunset clause.

6.10 In relation to the Section 42A Report's proposal to remove the 2026 sunset clause from Rule 3.11.5.7, the evidence of Ms Strang in Block 1 is that:[41]

> The land use change rule was initially proposed as an interim moratorium on land use change, until the building blocks could be put in place to transition to a fairer approach based on natural capital. On that basis the proposal was initially accepted by forestry. However, through drafting of the plan rules, the land use change rule initially appeared with no end date and no indication within the plan that it was ever intended to transition in future. It was only after very robust discussion that an end date of 1 July 2026 was inserted into the rule, along with amendments to Policy 7 to give some indication of an intent to transition to a fairer approach.

6.11 Removal of the sunset clause compounds the problem. In view of the timeframes for PC1 becoming operative, if grandparenting is to form the basis for PC1, as a minimum this clause should be retained as a significant check and balance.

6.12 Dr Mitchell is of the view that there needs to be a pathway for land use changes but acknowledges that this is a complex matter. He accepts that regulation needs to set the expectation for improvement over time, i.e. that transition needs to be provided for. He recommends a degree of pragmatism in trying to find a principled middle ground.[42]

6.13 It is observed that a natural capital allocation theoretically addresses the issue of land use flexibility as land can be utilised to reflect its appropriate uses given bio-geographical constraints. Policy 6 of Beef + Lamb's tracked changes version of the plan illustrates a possible pathway for land use changes with reference to a natural capital approach and limits for land based on Land Use Capability.[43]

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[41] EIC Block 1 S Strang at [6.3]
[42] EIC Block 2 P Mitchell at [5.8]
[43] Noting that the amendments to Rule 3.5.11.7 do not appear consistent with the policy.

6.14 In the absence of adopting a natural capital approach, Policy 7 (yet to be addressed by the Section 42A Report) provides for future allocation that considers land suitability. In the meantime, as a minimum, a staged approach is consistent with Objective 4, bearing in mind that the plan is likely to regulate land use for the next 20 years. OjiFS and HFM's position is that an appropriate interim approach would allow all land owners to manage their land by applying the best environmental practice option until a natural capital approach can be determined. Under Dr Mitchell's proposed framework:

> If the reductions to be achieved within that timeframe are based on the application of best environmental practice measures, then the ultimate target (in specific water quality terms) does not need to be quantified now but can be reviewed as part of the plan review process. Not specifying an end-state now means that the focus of PC1 can be on ensuring that demonstrable short-term progress is achieved, with new standards able to be set as part of subsequent plan reviews.[44]

6.15 The Environment Court has held that an unders and overs approach may not be consistent with Council's obligations including under s 69 of the Act.[45] Section 69(3) provides:

> Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so. *(emphasis added)*

6.16 It is submitted that this approach needs to be considered against the context of the Vision and Strategy which provides for "a 'whole of river' approach to the restoration and protection of the Waikato River, including the development, recognition and promotion of best practice methods for restoring and protecting the health and wellbeing of the Waikato River."

6.17 The proposal for managing all land use activities by applying a best environmental practice approach is not an "overs and unders" approach in the context of the Vision and Strategy, any more than the rules' framework

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[44] EIC Block 2 P Mitchell at [4.8]

[45] In *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at para [56] the Court discusses the concept of an overs and unders approach as it applies to a water quality objective, determining that it is not appropriate in the context of a plan where the thesis of the plan change was the acceptance of a lower water quality than that which could be measured now.

under PC1 is. If a natural capital approach is considered to be premature, a best environmental practice approach, examples of which can be seen in the evidence of Mr Buckley and Mr Mowbray[46], is a staged approach that arises of necessity from:

(a) the reluctance of the PC1 framework to commit to adopting the approach outlined in Policy 7 now;

(b) the desire to encourage water quality improvements in the short term,

(c) the economic implications of incentivising innovation in land use and land management; and

(d) the economic implications of freezing land use.

7. PRECEDENT ISSUES

7.1 In reference to "grandparenting", the Section 42A Report notes that the issue "was canvassed extensively" through the Variation 5 case which "accepted that in a catchment where an overall reduction in N losses was required (similar to what we have with PC1) a grandparenting approach to N losses was appropriate. That precedent holds true for the Waikato and Waipa Regions."

7.2 The Panel is directed to the following provision of the Regional Plan that formed part of the provisions subject to the consent order of the Court: [47]

No Precedent Effect

The Objective, Policies and implementation methods contained in Chapter 3.10 have been developed to address the decline in Lake Taupo water quality in the context of the unique set of circumstances which apply in the Lake Taupo catchment. In doing so the Waikato Regional Council does not intend to create a precedent, either direct or indirect, for any other catchments or water bodies and does not consider that any precedent is created.

Issues of water quality decline in other catchments or water bodies in the Waikato Region will be investigated by the Waikato Regional Council as the need arises. If necessary, regional plan provisions and implementation methods will be developed that are appropriate for the specific circumstances of those catchments or water bodies, following appropriate community consultation and the consideration of efficiency, effectiveness, costs and benefits as required under section 32 of the Resource Management Act.

[46] EIC Block 1 P Buckley and H Mowbray
[47] Chapter 3.10 of the Regional Plan

8. DAIRY NZ / FONTERRA POSITIONS

8.1 Dairy NZ and Fonterra generally support PC1 as notified. Dairy NZ's position is that "there are sufficient checks and balances in PC1 to prevent nitrogen losses creeping up" [48], which Dr Mitchell notes "entirely misses the point" as it "falls well short of giving effect to the Vision and Strategy".[49] Dairy NZ's "dairy-centric" economic evidence "argues for accepting the plan change as proposed and not increasing obligations on the dairy sector" beyond those proposed by PC1.[50] The arguments by Dairy NZ are that there will be major economic implications for the dairy sector and in related industries[51] *inter alia*:

(a) fail to comparatively model alternative approaches or the costs for different sectors;[52]

(b) fail to consider, the capital risk that applies to other land uses;

(c) fail to consider that to achieve water quality improvements all impacted sectors risk a capital loss.[53]

8.2 Rejecting similar arguments about business viability, the Commissioners on Variation 2 to the Canterbury Regional Land and Water Plan (chaired by retired Principal Environment Judge Sheppard) said:

> [297] Business viability or profitability depend in part on private choices made for a business enterprise. In the case of a farming business, those choices may include, for example, amounts committed for purchase of land; amounts borrowed for development such as irrigation infrastructure; and amounts of periodic charges for servicing loans. If the amounts are so great that the profitability or variability of the business is put at risk by working within the constraints on the activity to avoid adverse effects on the environment, that may call into questions whether the amounts committed for land purchase and for borrowings were excessive and whether the business model was unrealistic. But the risk does not justify discarding constraints to safeguard the life-supporting capacity of eco-systems; or to sustain the potential of natural resources to meet future needs; or to preserve the natural character of wetlands, rivers and their margins; or to provide for the relationship of Maori with their ancestral lands, waters and other taonga.

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[48] EIC Block 2 J Young at [44]
[49] Rebuttal Block 2 P Mitchell at [3.4]
[50] Summary of Dr Doole's evidence referred to at para 6 of Rebuttal Statement of Dr Scrimgeour.
[51] EIC Block 2 G Doole, [2 (e)]
[52] Rebuttal Evidence Block 2 F Scrimgeour at [11]
[53] Rebuttal Evidence Block 2 F Scrimgeour at [16]

> [298] As mentioned above, the extent of the constraints for environmental values on business activity, and the timing of them, are to be assessed by reference to the benefits and costs involved. But the very fact that a proposed constraint may place at risk the viability or profitability of a private business does not itself justify lifting the constraint.
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> [299] So we do not accept submissions that nitrogen loss reduction constraints in Variation/Plan Change 2 should be omitted on the ground that compliance with them would render farming businesses unviable or unprofitable. *[emphasis added]*

8.3 The Panel is urged to adopt the same approach.

8.4 The complexity, cost and time commitments for both applicants and council for processing consents for a large number of farms is acknowledged by the Section 42A Report as an issue causing "discomfort" for the Council's implementation team.[54] In response, it is submitted that compliance costs for businesses are a reality and should be compared with the reality of consent processing for businesses that have point source discharges, as well as being considered in the context of the overall nutrient contributions to the river. PC1 staggers consent requirements to address this issue

Gill Chappell

Counsel for OjiFS and HFM

[54] Section 42A Report at para 294