

**BEFORE WAIKATO REGIONAL COUNCIL
HEARINGS PANEL**

UNDER the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF Proposed Plan Change 1 to the Waikato Regional Plan
and Variation 1 to that Proposed Plan Change: Waikato
and Waipā River Catchments

LEGAL SUBMISSIONS

**ON BEHALF OF THE AUCKLAND/WAIKATO & EASTERN REGION FISH AND
GAME COUNCILS (“FISH & GAME”)**

‘Block 2’

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1. INTRODUCTION

- 1.1 At Block 1 Fish & Game led evidence that land use change presents the most cost effective way to achieve (more ambitious) short term objectives for PC 1, as distinct from focussing on costs to existing sectors/mitigations to existing land uses.¹
- 1.2 Fish & Game generally supported the 80 year objective on the basis of the so-called Scenario 1, dependant on appropriate attribute states (freshwater objectives) being included in Table 3.1-11. However the unambitious short-term objective, means that PC 1 relies on a 'miracle happening' between the 10 and 80 year timeframe.
- 1.3 The short term objective relates to a desire to reduce "social disruption to communities", which as an indicator,² does not replace a cost benefit analysis under section 32 of the Act.
- 1.4 Mr Wilson is the Chief Executive of Auckland/Waikato Fish & Game. His evidence at this hearing, expresses the concern held by his Councillors, that a generation will miss out on the hunting and fishing opportunities that should be provided by Waikato lakes and rivers. On this basis, even on a solely anthropogenic analysis, reducing 'social disruption' does not comprise of maintaining the *status quo* for the farming sector and those reliant on that sector.
- 1.5 Fish & Game does not consider that a 'softly' approach, as recommended in the evidence for Fonterra and Dairy NZ,³ is appropriate. Fish & Game says that something more is required in the face of past management decisions. There is a need for urgency. As at the date of writing his evidence, Mr Wilson's states that 5 out of the 9 monitoring lakes in the lower Waikato were covered by health warnings due to high cyanobacteria levels.⁴

¹ Denne evidence, particularly at [6.3] – [6.5].

² CSG process - discussed at pages 73-74 Section 32 Report and at Legal Submissions for Fish & Game (Block 1) at [27] – [29]. 'Social disruption' is also referenced in Policy 5.

³ E.g. Doole Block 2 at [10.2]: "*The current approach proposed within PC1 helps to provide motivation for learning but without placing farm businesses at undue risk of insolvency. This is advantageous for building engagement and trust that are essential for a just transition.*"

⁴ The Waikato DHB's medical officer of health recommends the lakes should not be used for any activity that involves skin contact with the affected water and that "If people still chose to use the lakes when warnings are in place, or any other lake where there are visible changes to water colour, they should shower and change their clothing as soon as possible afterwards, even if no symptoms are noticeable." Wilson at [3.13].

- 1.6 Dr Doole, providing evidence for Dairy NZ, does not address the issue raised in Dr Denne's economic evidence for Fish & Game, that there is no clear threshold in the modelling to support the improvements being set at 10%. Rather, Dr Doole makes the following statements:

7.3 Statistical analysis indicated that a 10%, 20%, 30%, and 40% decrease in nitrogen across dairy farms in the catchment is estimated to lead to around 54, 121, 164, and 463 farms being unable to service their annual debt payments and therefore undergo foreclosure (Figure 8). These numbers correspond to around 2%, 4%, 6%, and 17% of dairy farms in the Waikato River catchment. This represents a significant social impact, particularly as this burden will be borne by many younger farmers. Moreover, it is likely a very-conservative estimate of the number of farms expected to exit the industry because those costs associated with reducing the other contaminants (i.e. phosphorus, sediment, and microbes) has not been considered. The importance of a staged transition involving a careful, graduated reduction in contaminant loss is consequently reinforced.

7.4 Nevertheless, the exit of these farmers would likely allow their replacement with business operators who are more efficient from an economic and/or environmental perspective. This may serve to dampen the negative effects of farm insolvency at the catchment level.

(Emphasis)

- 1.7 Dr Scrimgeour, in rebuttal evidence for OJI Fibre Solutions, also identifies the silences in Dr Doole's evidence, stating:

[9] Dr Doole's evidence is problematic, being presented as a framework of costs and benefits falling on dairy alone rather than on all affected sectors. Commensurate and meaningful calculations are not made for all affected sectors.

[10] ... The statement [of evidence] is silent on grandparenting and the risk of perverse incentives and environmental and economic outcomes associated with the proposed plan. He does not contrast his preferred approach by, for example replacing grandparenting with proposed alternatives such as appropriate allocations per FMU based on biophysical measures (e.g. natural capital), a solution that

may overall generate more equitable and more efficient outcomes and which would at least partly address his concerns about financial impacts on individual dairy farmers.

- 1.8 Panel members will also recall Dr Denne's evidence on the limitations of Input-Output analysis compared to more dynamic models, the importance of full CBA analysis, and research that suggests significant land use change can occur within 10 years.
- 1.9 Dr Doole does not address how the 'softly softly' signal that is provided by PC1, will provide a basis for an allocation approach in the future, that differs from grandparenting (such as under the Waikato Freshwater Strategy).
- 1.10 This lack of an appropriate future signal does not provide investment certainty, and is exacerbated by the lack of a medium-term target.
- 1.11 A medium-term target is sought by Fish & Game, and will be the subject of further submissions after freshwater witness conferencing.

2. NATURAL CAPITAL BASED APPROACHES

- 2.1 It is unclear to Fish & Game how "*getting all farmers moving on a trajectory towards GFP*"⁵ will achieve the 10 year water quality objectives/targets/limits in Table 3.11-1, as referred to in revised Objective 3.
- 2.2 Fish & Game agrees with those submissions that the effect of PC1 not only exempts the obligation on 75% of relevant landowners to improve, but also provides no incentive on them to achieve betterment.
- 2.3 Fish & Game supported the submission from Beef and Lamb and the Director General of Conservation seeking allocating of nitrogen loads to land based on the natural capital of that land.⁶
- 2.4 In this respect, Fish & Game agrees with the evidence of Ms Dewes for Beef and Lamb that:

⁵ Dragten Consulting 2018, in OR at page 63 under "Objectives": "*The plan objectives may need adjusting to state that the plan seeks to achieve the 10-year WQ targets by getting all farmers moving on a trajectory towards GFP.*"

⁶ FSPC1-374 (Director-General) and FSPC1-308 (Beef and Lamb).

- Permissive regimes can result in poor and declining water quality within a few decades and the social and economic costs are borne by a community and future generations as a result of poor policy design and lag phases for change. This is shown in the Waikato and in other regions such as Canterbury and Selwyn.⁷
- *“The approach taken by PC1 is to use a grandparenting approach to allocate nitrogen losses. The plan does not establish an allocation framework which will achieve the limits or targets. The proposed plan does not provide assistance to the Council in determining how individual discharge proposals will influence the achievement of Freshwater Objectives (and limits/targets) when accounting for all other discharges in a catchment. Nor does it provide a framework which incentivises the changes required in farming systems and in some cases land uses to achieve a trajectory of improvement to achieve the water quality outcomes. No framework is provided by which farmers can make investment decisions about their long-term farming futures.”*⁸
- *“Waikato also had no restraint on land use change, and conversions from forestry to dairy in more than 50,000 ha occurred over the past two decades adding in excess of 2000 TN to the Upper Waikato load of N. As a result: all farmers and communities will face a higher level of clawback than if this had not happened. Meaning there is likely to be severe social and economic consequences for family farms as well as other sectors outside dairy.”*⁹

2.5 As stated by Ms Dewes, PC1 provides for a limited suite of input standards to be applied through FEP’s, or through permitted activity rules.

2.6 PC1 also provides for some improved policy guidance for point source discharges (compared to the WRP), which is welcomed by Fish & Game, subject to comments (below).

⁷ Dewes Block 2 at [110].

⁸ Dewes Block 2 at [154].

⁹ Dewes Block 2 at [118] – [119]. Stating the Environment Waikato knew the implications of conversion - citing B Vant Report to Environment Committee 2005 that *inter alia* “... planned increases in the scale and intensity of land use in the catchment of the Waikato River hydrolakes ... are likely to result in breaches of RMA section 70 unless substantial changes are made to the management of the nutrient loads from these land uses”

- 2.7 The Environment Court considering the appeals on the Horizons One Plan¹⁰ observed there is nothing in the scheme of the Act that gives farmers a privileged place “*in the scheme of things*”. This comment responded to a submission that the Horizons One Plan may put farmers out of business. As might face the operator of any business, a farmer would have a decision whether to seek a consent for a more stringent activity status, to change the category of farming or the management regime or intensity, or to move somewhere else.¹¹ A reference to ‘reasonably practicable farm management practices’ was rejected in that case, because that would not *quantify* the amount of nitrogen leaching reduction that would be achieved.¹² That is, without measurement against a yardstick, GMPs/GFPs or variations, risk the non-achievement of water quality objectives.
- 2.8 Fish & Game considers that the ‘policy mix’ must be clearly linked to short term objective, and generally supports those parties seeking a more equitable regime based on land use capability.
- 2.9 In relation to targeting the top 25% of farms leaching nitrogen, I note that in the Environment Court’s decision on the Horizons One Plan, the Court explicitly rejected the approach proposed by Fonterra of setting a nitrogen leaching limit derived as the leaching from the 75th percentile of all dairy farms in that Region (put forward to target the farms where most environmental gains could be made).¹³
- 2.10 In the absence of a regime based on natural capital, Ms Marr states:¹⁴

The necessary, in my opinion, alternative to this, is for PC1 to clearly state in the plan the reductions in each contaminant in each sub-catchment necessary to achieve the objectives of PC1. Resource consent applications for each property in a sub-catchment should be received and processed at a similar time, with consent requirements staged based on catchment priorities. Each and all applications should be assessed as to the extent that individually and collectively they will achieve the required outcomes. Resource consent conditions should allocate the required change equitably amongst all the contributing discharges (and this should include point source discharges as I discuss earlier in this evidence). This should be secured as resource consent conditions specifying particular management actions or restrictions for each property. Collective actions and global sub-catchment consent applications should be

¹⁰ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

¹¹ At [5-176].

¹² At [5-179] – [5-181].

¹³ At [5-137].

¹⁴ At [6.15].

actively encouraged by the PC1 framework. Groups of farmer working together, or collective actions such as edge of field mitigations or offsetting by retirement of land should be considered. This is much more likely to lead to efficient use of land than the 'first up best dressed' individual approach promoted by PC 1.

- 2.11 Other parties have put forward detailed evidence supporting broad scale changes to PC1. Fish & Game has not responded to the various detailed proposals. Fish & Game would support an approach whereby this Panel indicated its interim thinking. If the Panel accepts that PC1 does not 'go far enough', the Panel could signal its preferred approach. That would then allow interested parties to respond, a thorough investigation, and potentially for parties work together to address the details. Fish & Game would be happy to engage in such a process.
- 2.12 In the meantime, Fish & Game focusses its resources on those issues where smaller gains may be made within the current PC1 framework, responding to the recommendations in the Officers' Report.
- 2.13 It is still vitally important that freshwater objectives/limits/targets in Table 3.11-1 are set correctly. Fish & Game's experts Dr's Canning and Daniel are actively participating in that conferencing on that matter.

3. ISSUES WITHIN PC1 CURRENT FRAMEWORK FOR BLOCK 2

- 3.1 The central issues for Fish & Game are:
 - 3.1.1 More appropriate policy for point source discharges, including linking to achievement of the targets, the importance of the concept of proportionality (agreeing with the Officers' Report that adoption of the BPO on its own may not be sufficient), and appropriate offsets policy that accords with accepted principles.
 - 3.1.2 Management of cultivation and stock exclusion from waterbodies as well as provision for riparian planting (and limiting effects of stock crossings).
 - 3.1.3 Locking-in further input standards through either permitted activities or mandatory FEP matters (to extent that this is able to be done across farming practices). This includes the concept of "Critical Source Areas", as explained in the evidence of Dr Eivers.

- 3.1.4 Ensuring enforceability and that there is a 'point of compliance' expressed with clear wording. A resource consent needs to clearly state the environmental outcome sought, the management actions in the FEP need to achieve the outcome, and those actions must be set out in a clear and unambiguous way.¹⁵ Currently PC1 provides for FEPs that can be changed from time to time without explained methodology.
- 3.1.5 Recognising the potentially significant impacts of *sediment* on waterways and clear recognition that management in riparian areas can either contribute to, or adversely effect, achievement of objectives for sediment control (and can affect in-stream habitat).
- 3.2 Dr Daniel's evidence at this hearing reiterates the need for a 'top down' approach to contaminant management. Although he discusses this in the context of managing upstream riparian habitat including intermittent streams, small wetlands and seeps¹⁶, the same high-level approach was put forward by Fish & Game at Block 1. Panel members will recall reference to the following provision in the NPSFM:¹⁷
- if there are nutrient sensitive downstream environments, for example, a lake and/or estuary, derive relevant nitrogen and phosphorus criteria (instream concentrations or instream loads) needed to achieve the outcomes sought for those sensitive downstream environments.
- 3.3 Similarly, Policy 21 of the NZCPS requires provisions to be included in plans to address improving water quality where the quality of water in the coastal environment has deteriorated so that it is having a significant adverse effect on ecosystems, natural habitats, or water based recreational activities, or is restricting existing uses, such as aquaculture, shellfish gathering, and cultural activities.
- 3.4 Dr Eivers evidence is that intermittent waterways, small wetlands and seeps are routinely inappropriately managed by farmers, and treated as they do not

¹⁵ Marr at [6.39].

¹⁶ Daniel Block 2 at [3.6],

¹⁷ NPSFM 2017 page 34. [87] of Legal submissions presented on behalf of Fish & Game at Block 1.

exist.¹⁸ PC1 must manage these sources, and must recognise the fate of contaminants across the landscape.

4. **FISH AND GAME EVIDENCE: BLOCK 2**

- 4.1 Looking at the current framework of PC1 (and disregarding the bigger picture concerns still held by Fish & Game), the relief sought by Fish & Game for Block 2 is contained in Ms Marr's evidence (Appendix 1 – track changed provisions).
- 4.2 Rather than repeat the evidence of Ms Marr, Dr Daniel, Mr Wilson and Dr Eivers, the remainder of these submissions focus on legal issues.

5. **SECTION 70**

Certified Industry Schemes

- 5.1 Fish & Game agrees with Mr Milne's legal submissions (Block 1) that one needs to be able to objectively determine whether the standards of a permitted activity rule are met, and that it would be possible to make the PA rule more certain by specifying with more certainty what must be included in a CIS.
- 5.2 The recommended alterations in the section 42A Report to Schedule 2, do not provide this further clarity. For example language requires "*An outline of timeframes for developing Farm Environment Plans for its members*", but no required timeframe.
- 5.3 Fish & Game's primary concern is with transparency. This includes industry self-monitoring and self-auditing creating the potential for conflicts of interest.
- 5.4 There is a legal question whether provisions inappropriately delegate monitoring and enforcement functions to a third party without complying with section 34 of the Act. If there is a delegation, there is a clear need for

¹⁸ Eivers Block 2 at [5.10].

independence, and to retain an ability for the delegation to be revoked at any time.¹⁹

- 5.5 In the absence of a comprehensive set of plan provisions that overcome these concerns, Fish & Game supports the Officers' recommendation that farming activities with a FEP under a CIS or CSS should require consent.
- 5.6 Fish & Game has not seen anything in the CIS/CSS proposal that would overcome section 70 RMA, which contains the words "*must be satisfied that*", the listed adverse effects are not likely to arise in the receiving waters, 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).
- 5.7 Fish & Game agrees with the second scenario mooted by Mr G Willis²⁰ that if the effects already occur, and do so as a result of the activities to be permitted, then "*unless there can be mitigations imposed through the permitted activity/CIS rule that mean those effects do not occur post implementation of the permitted rule, those effects can be expected to continue.*"²¹
- 5.8 As was accepted in by the Court hearing appeals on the Horizons One Plan²², there must be some evidential basis to conclude the requirements of section 70 will be met.
- 5.9 This matter is also relevant to proposed rule 3.11.5.8 (Permitted Activity Rule – "*Authorised Diffuse Discharges*"), as discussed in the following.

6. HYBRID RULE FOR LAND USE AND DISCHARGE ACTIVITIES ASSOCIATED WITH FARMING

- 6.1 The Officers have proposed a rule that overcomes the legal problems identified in Mr Milne's submissions at the Block 1 hearing, referring to the Environment Court's decision on WRC Variation 5 (Lake Taupo).²³

¹⁹ As outlined in *Just One Life v Queenstown Lakes District Council* (2003) 9 ELRNZ 222 (High Court [42] – [44]).

²⁰ Willis Block 2 evidence at [6.30(b)].

²¹ Mr Willis also comments that actual assessment as to whether those effects already occur as a result of the activities may need to await the outcome of the expert freshwater conferencing.

²² *Day v Manawatu-Wanganui Regional Council* above-cited at [5-199].

²³ *Carter Holt Harvey v Waikato Regional Council* [2011] NZEnvC 163.

- 6.2 But the rule proposed by the Officers, rule 3.11.5.8, simply cites the effects in the receiving waters that are referenced in section 70 of the Act.²⁴ Ms Marr says that it would be practically impossible for an individual discharger to ascertain whether the effects identified in section 70 (particularly “*significant adverse effects on aquatic life*”) are or are not likely to result if their discharge is considered on a cumulative basis (i.e. “*in combination with the same, similar or other contaminants*”), in the absence of sub-catchment accounting and scientific expertise.
- 6.3 Proposed rule 3.11.5.8 is an artificial device to achieve consenting of land uses, separately to discharges.
- 6.4 Rule 3.10.5.10 in the WRP, approved by the Environment Court for the Taupo catchment, is far more certain than the proposal 3.11.5.8.²⁵
- 6.5 Fish & Game supports the ‘hybrid’ rule that was notified, because it reflects practical reality. Fish & Game does not accept that hybrid rules create particular administrative or practical problems.
- 6.6 Other regions use hybrid consents. Ms Marr’s evidence is that it would be entirely appropriate to apply the tests that apply for discharges, along with the land use aspect of the proposal (for example in s107), when the activities are so inextricably linked.

²⁴ In the *Day* decision, I note that the Court also required a link to a *numeric standard* that would indicate whether the factor of ‘*Conspicuous change in colour of Visual clarity*’ was met (at [5-45]).

²⁵ Rule 3.10.5.10 in the WRP:

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.”

Advisory Notes:

If the conditions specified in rule 3.10.5.10 a) to c) cannot be met then a separate discharge consent will be required under rule 3.5.5.4

Dumps and offal holes on production land are authorised by rules 5.2.6.1 to 5.2.6.4. Those rules establish conditions that must be met.

Composting on production land is authorised by rules 5.8.2.1 and 5.2.8.2. Those rules establish conditions that must be met.

The discharge of sludges and liquids from activated sludge treatment processes (biosolids) onto or into land requires a discharge permit under rule 3.5.6.4.

7. POINT OF COMPLIANCE – FEP's

7.1 I deal with this matter to the extent it is possible to do so prior to Officers further discussions with stakeholders and the Block 3 hearing.

7.2 The Officers' Report records:²⁶

the simple numeric limit of a NRP provides a relatively simple threshold for activity status and compliance. Given the issues with Overseer that have been more thoroughly researched and identified of late, the lack of a simple threshold may mean that more analysis, interpretation and judgement is required for individual resource consent applications than was originally envisaged.

7.3 For Policy 2, the Officers' Report proposes to delete the words "*with the mitigation actions to be specified in a Farm Environment Plan either associated with a resource consent, or in specific requirements established by participation in a Certified Industry Scheme*" and to insert a requirement that FEP's:

are flexible and able to be updated so that continuous improvement, new technologies and mitigation practices can be adopted, such that diffuse discharges of nitrogen, phosphorus, sediment and microbial pathogens further reduce over time.

7.4 Compliance needs to be based on a 'simple numeric limit', a FEP (sometimes called 'input controls'), or both. Currently it is difficult to pin down the measure for compliance on a resource consent to be granted under PC1.

7.5 As has exercised the minds of many working in this area, if a numeric limit based on OVERSEER or another model is not utilised as the point of compliance, input controls must be the point of compliance. That provides for an inflexible approach to running a farming business.

²⁶ At [310(3)].

7.6 Although the importance of FEPs is emphasised by the Officers²⁷, alarm bells ring if FEP's are able to be changed from time to time without a clear and transparent process.²⁸

7.7 Rules e.g. 3.11.5.4, require a FEP to be prepared in accordance with Schedule 1. Schedule 1 then includes (at 5.) a requirement for:

a description of the following:

Actions, timeframes and other measures to ensure that the diffuse discharge of nitrogen from the property or enterprise, as measured by the five-year following average annual nitrogen loss as determined by the use of the current version of OVERSEER, does not increased beyond the property or enterprise's Nitrogen Reference Point, unless other suitable mitigations are specified; or

Where the Nitrogen Reference Point exceeds the 75th percentile nitrogen leaching value, actions, timeframes and other measures to ensure the diffuse discharge of nitrogen is reduced so that it does not exceed the 75th percentile nitrogen leaching value by 1 July 2026, except in the case of Rule 3.11.5.5.

(Emphasis)

7.8 So the main requirement is for a FEP. As long as the FEP includes "*actions, timeframes or other measures to ensure that...*", the person will be in compliance. If an OVERSEER analysis later shows that this is not being "*ensured*", it is unclear whether enforcement action could be taken (or the person simply adjust one of the mitigations). There is also an exception stating "*unless other suitable mitigations are specified*" - it is unclear what this means. There would presumably need to be a consent condition requiring the landowner to farm in a manner consistent with the FEP. However the assessment criteria on the rule reserves discretion over

²⁷ [368] Officers' Report stating: "*Officers support the submissions that seek a mechanism by which actions can be checked, improvements made and Council, the community, and the farmer can be confident that appropriate actions are being undertaken in a timely manner.*"

²⁸ A document entitled "*As an approach to reducing contaminant losses from farms in the Waikato and Waipā catchment under PPC1*" Dragten Consulting 2018 states that:

The farmer would submit consent application along with FEP containing benchmark GFP assessment and proposed practices/actions to achieve GFP where not currently being achieved.

Once granted the consent would include conditions requiring the farmer to:

- *Maintain a FEP showing how GFP is being met; and*
- *Include an objective in their FEP which relates to farming in a manner consistent with their NRP (or the 75thile, or relevant input controls if PPC1 adopts this approach as appropriate).*
- *Farm in a manner consistent with the FEP and so as to maintain an A or B audit rating.*

It is unclear how the issuing of a consent that includes conditions relating to the FEP is consistent with the further statement that "*the FEP could be changed by the farmer at any time*".

"Procedures for reviewing, amending and re-approving the Farm Environment Plan" (it is unclear how this would work in practice).

7.9 Reading these provisions, Fish & Game has a concern that its experience in the Horizons Region may be repeated in the Waikato.

7.10 In *Wellington Fish & Game Council v Manawatu-Whanganui Regional Council* [2017] NZEnvC 3, the Environment Court made a declaration that consents (and consent conditions) granted under the Horizons One Plan for diffuse farm discharges must "...adequately define the ambit and scope of the activity authorised." (Declaration 6). This included requiring the activity to be operated in compliance with a "nutrient management plan" prepared by a suitable qualified person "showing that the activity is complying with the nitrogen leaching maximums allowed by the consent." The Environment Court said:²⁹

Such an approach – viz that a consent is to be clear on its face – is not only good and widely accepted practice, but it is essential to ensure that a consent is enforceable.

(Emphasis)

7.11 At [155]-[156] of the decision, the Court agreed that conditions such as requiring streams to be fenced, and stock crossings to be phased out with bridges and culverts, were insufficient to define and delimit the scale and scope of the activity that, in the absence of a nitrogen-loss limit. The Court said:

To fail to impose conditions on those activities, other than stock exclusion, leaves the scale and potential effects entirely unbounded.

7.12 Declaration 6(b) made by the Environment Court required consent conditions that set key parameters including maximum nitrogen leaching allowed over the term of the consent.³⁰

²⁹ At [152].

³⁰ The Environment Court also accepted that, to understand the significance of an effect, there was a need for Horizons Regional Council to consider *cumulative* adverse effects, that is the combined effect of multiple discharges of nutrients (and e-coli, sediment and microbial pathogens in this case). There is a difficulty in understanding cumulative adverse effects on the basis of good management practices alone with no independent check: [68] and [75]. Declaration 6(b) reads "That, in granting resource consents under Rules 14.2 and 14.4 of the One Plan, the Council must adequately define the ambit and scope of the activity authorised, including through consents and consent conditions that... (ii) set the maximum nitrogen leaching allowed over the term of the consents."

7.13 In a subsequent decision that applied the nutrient limit provisions of the Horizons One Plan for the purpose of the discharge of municipal wastewater to land for a farming activity (“the Foxton decision”)³¹, because an OVERSEER root zone limit not be used to define the scope of the activity (due to scope of the original application) the Council stated:³²

... there need to be clear parameters on the load of total nitrogen. One of those limits is a cap on stock numbers, or, as proposed by the Applicant in the alternative, a limit on revised stock units (RSU).

7.14 On this basis an input control (on stock numbers) was imposed by the Court.³³ The activity authorised is:

The use of land for intensive farming (irrigated beef) purposes, for up to 1,20B revised stock units (RSU) as a 5 year rolling average with no additional feed imported to the site, and associated discharges from human wastewater irrigated to land. 1 RSU is equivalent to 6,000 MJ ME intake per year (Animal Reports in OVERSEER (Version 6.2.2)).

7.15 Relegating the NRP or the 75thile to an ‘objective in the FEP’, and allowing a farmer to change a FEP over time without further approval process, would not be an adequate basis to understand the cumulative effects of multiple discharges in the Waikato Region, or to confine the ambit and scope of an individual activity.

(iii) require the activity to be operated in compliance with a Nutrient Management Plan to be prepared by a person who has both a Certificate of Completion in Sustainable Nutrient Management in NZ Agriculture and a Certificate in Completion in Advanced Sustainable Nutrient Management from Massey University, showing that the activity is complying with the nitrogen leaching maximums allowed by the consent and (iv) require environmental or performance standards for phosphorus or sediment loss, or for the matters listed in Rules 14.-5, 14-6, 14-7, 14-9 and 14-11 of the One Plan where they are applicable.”

³¹ *Horowhenua District Council v Manawatu Whanganui Regional Council* Final decision [2019] NZEnvC 13.

³² Above-cited at [7].

³³ There is also a s128 review clause on the Foxton consent that states:

Condition 13: ...

a. “... Where the average nitrogen leaching loss exceeds the original predictions of the OVERSEER® 6.2.3 base file (HDC_BBirrigated_150823 - base file, 28/03/2017 1:15:14 p.m.) by more than 20% as calculated on a 5 year rolling average, then management options to reduce leaching losses back to the initially calculated leaching loss will be put in place within a time period agreed with the Regulatory Manager, and no later than the next review period.

Unless:

b. *A new version of OVERSEER® has been released during the review period and the Consent Holder has demonstrated that the new version is the cause of the exceedance. The cause of the exceedance will be demonstrated by recalculating the nutrient losses of the original system using the benchmark reference input data file HDC_BBirrigated_150823 - base file, 28/03/2017 1:15:14 p.m. and providing a commentary as to what and why there are differences to the Regulatory Manager.*

7.16 In the One Plan declaration case, the Environment Court accepted that although a management plan can provide information as to how the parameters or controls in the consent can be achieved, it is inappropriate for those parameters to be entirely left to the management plan.³⁴ Some may seek to distinguish this case on the basis that the nitrogen limit was clearly the important parameter for the purposes of the One Plan. If, in the Waikato, the FEP and inputs are to be the important parameter, then, as stated, the ability to alter FEP's outside a consent process is problematic.

7.17 An Advice Note on the Horizons consents stating that "updates" to targeted nitrogen leaching or a sustainable milk plan could be approved from time to time (and by an undefined methodology) was found to be unlawful, invalid and contravention of the Act.³⁵

8. POLICY 6: LAND USE CHANGE

8.1 The Officers' Report records that Fish & Game's original submission requested that Policy 6 be amended by inserting the word "meaningful" (clear, enduring and meaningful decreases).

8.2 Fish & Game also made a submission on Variation 1³⁶ that the words "generally be granted" be altered in this Policy. Fish & Game requested that such land use change applications could be "*considered only after assessing the cumulative adverse effects of the whole activity for which consent is sought, against the limits and targets in Table 3.11-1*". (This followed Fish & Game's concern with certain applications for land use change for activities with high existing nitrogen loss - potentially allowing applicants to obtain a large 'allocation' of nitrogen that did not adequately consider reductions required across the catchment or sub-catchment).

8.3 In order to recognise submissions that seek further investment certainty, the Officers provide optional wording in Policy 4 for discharges to have a longer

³⁴ Citing *Wood v West Coast Regional Council* C127/99 pages 6-7 (Judge Skelton presiding).

³⁵ Declaration 7(b): The Environment Court said at [175]: "*We agree with the applicants' position as follows: "Although a management plan can provide information as to how the parameters can and will be met, it is inappropriate for the parameters themselves to be left to the management plan.*

The consent (through conditions) must set the maximum leaching allowed on the face of the consent document – it is inappropriate to leave that matter to a management plan. We agree that the maximum nitrogen leaching (over time) is a fundamental parameter and as such it should be imposed on the face of the consent, and not left to a management plan".

³⁶ V1PC1-251.

term where reduction in losses are above that anticipated by PC1, potentially staged into the future. The wording proposed is as follows:

To grant resource consents that authorise farming activities for a duration that will enable further reductions in contaminant losses to be implemented through replacement resource consents rather than by way of a review consent conditions; unless the application demonstrates clear and enduring ongoing reductions of contaminant losses beyond those imposed in response to the short-term water quality attributes states in Table 3.11-1 and the property is not in a Priority 1 sub-catchment.

- 8.4 This wording would create an opportunity for long term consents to be granted, without deciding upon an equitable allocation regime, and without taking into account the potential future needs of point source discharges. Without a consideration of cumulative adverse effects, as sought by Fish & Game, the Policy could constrain the ability of PC1 to achieve the water quality attribute states in Table 3.11-1. Ms Marr says that long term consents granted under PC1 may place the requirement for further ‘*claw back*’, solely on those *without* such consents in place.³⁷ If such long term consents are granted in the absence of further analysis, there is also the potential for ‘collateral damage’ to the environment and for achieving water quality objectives.
- 8.5 The merits of the wording in Policy 6 (above) turn on whether the Panel is minded to give preference to existing activities, even beyond the term of PC1.
- 8.6 Preference to existing discharges is not required by the Act:
- 8.6.1 for discharges expressly allowed under the operative Waikato Regional Plan, section 20A of the Act sets out the circumstances in which those discharges may continue.

³⁷ The Government has announced a work programme to clarify that Councils can consider the effects of multiple consents together under a limit set in regional rules under the Freshwater NPS, but that has not yet culminated in a Bill and is uncertain. The following statement is contained in the Regulatory Impact Statement (RIS) “*Councils have informed us they face uncertainty regarding their ability to review consents and give effect to the Freshwater NPS.*” Marr at [5.2] on point source discharges states “*The result of that will be that at the next plan review, with allocation for point source discharges lock in for a long term through resource consents, the necessary reductions in contaminant loads will have to come from further reductions in diffuse discharges – farming. This may result in farming being asked to do more than their fair share.*”

8.6.2 in *Ngati Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2984 it was found that because existing consents for water takes (for a hydroelectric scheme) had not been granted in perpetuity that “*water take permits are not permanent and do not carry existing use right protections*”. Neither are *discharges* authorised to continue in perpetuity.

8.7 The (optional) wording now placed in Policy 4 raises the question what reductions “*beyond those imposed in response to the short-term water quality attribute states in Table 3.11-1*” means. It is unclear whether a farming enterprise that is already a high emitter would need to make more significant reductions. We can however expect such a requirement would be consistent with *Puke Coal Waikato Regional Council* [2014] NZEnvC 223.³⁸

8.8 It is also unclear whether reductions would need to continue through the life of the consent. A comparison can be made with Table 14.2 of the One Plan, which sets out in some detail how staged reductions would work over time.³⁹

8.9 If you accept that long-term consents could be granted under PC1, Fish & Game considers that common catchment expiry dates would be essential.⁴⁰

³⁸ *Puke Coal* provides authority that applicants need to demonstrate ways in which the river is protected in proportion to various factors including the activity to be undertaken and any historical adverse effects.

³⁹ Table 14.2 Cumulative nitrogen leaching maximum* by Land Use Capability Class*

PERIOD (FROM THE YEAR THAT THE RULE HAS LEGAL EFFECT ³)	LUC 1	LUC 2	LUC 3	LUC 4	LUC 5	LUC 6	LUC 7	LUC 8
Year 1	30	27	24	18	16	15	8	2
Year 5	27	25	21	16	13	10	6	2
Year 10	26	22	19	14	13	10	6	2
Year 20	25	21	18	13	12	10	6	2

⁴⁰ Fish & Game's submission on Table 3.11-2 included proposed dates.

Ms Kissick’s evidence for the Director-General of Conservation provides cogent reasons for common catchment expiry dates.⁴¹

9. POINT SOURCE DISCHARGES

9.1 For point source discharges, these submissions comment on:

9.1.1 Definition of the “environment” against which a point source discharge is to be considered;

9.1.2 Offsets.

‘Existing Environment’

9.2 The evidence of Dr Mitchell for Oji states:

6.1 What constitutes the “existing environment” is important when considering both land use and discharge permit applications. I think it is well-established that when considering land use applications, the environment is that which exists at that time the application is being considered.

6.2 The situation regarding discharge permits is less clear. In that regard, I am aware of the High Court decision on the New Zealand Energy Limited applications for consents relating to the ongoing operation of the Raetihi Hydro Electric Power Scheme [*Ngati Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NCHC 2948] where the Court held that the existing environment (for the purposes of that application) did not include the power scheme as it currently operated. If that situation was applied to all discharge permit applications the “existing environment” for the Waikato and Waipā Rivers would be the pre-discharge or pristine situation. That would make a mockery of the Vision and Strategy in that there would be no degradation of the river and no ability (nor need) to improve the situation. Such an approach would mean that land use consents and discharge permits would not exist on a level playing field, because the starting point for considering land use activities would be the current (degraded) environment, while

⁴¹ Kissick Block 2 evidence [217] – [223].

for discharges the starting point would be the pristine scenario. That is neither equitable nor logical.

6.3 In my opinion, when considering resource consent applications made under PC1, to give effect to the Vision and Strategy, the “existing environment” needs to be defined as the environment as it exists now – i.e. on the same basis that a land use situation would be.

- 9.3 Fish & Game strongly opposes the suggested relief.
- 9.4 As set out in Mr Wilson’s evidence, arguments around the ‘existing environment’ are encountered by Fish & Game in many of the point source discharge applications it has been involved in.⁴²
- 9.5 Fish & Game relies on the decision of the High Court in *Ngati Rangī*.⁴³
- 9.6 When considering an application for a discharge that already exists, the *Ngati Rangī* case does not postulate that all discharge permits do not exist and so the river is a pristine environment. However, the existing consented discharge for which a new consent is sought, does not form part of the environment for the purpose of considering the application. Therefore, in *Ngati Rangī*, the existing consented take for the hydro-electric scheme did not form part of the ‘environment’. That meant that the full effect of the take was to be considered afresh. It did not mean that *all other* takes (or discharges) were imagined not to exist.
- 9.7 The relief that Dr Mitchell appears to suggest, would mean that no (consented) existing discharges could be reduced in the re consenting process. That approach would be inconsistent with the Vision & Strategy.
- 9.8 The potentially perverse outcomes that Dr Mitchell identifies do not arise if one recognises that a discharge as well as a land use consent is required for the diffuse discharges from farming activities.

⁴² Wilson at [4.3] including reference to the argument that “... intensive farming land use has resulted in the water quality upstream of their discharge being in poor condition and the existing environment is already degraded.”

⁴³ Above-cited at [62]: “[w]ater take permits are not permanent and do not carry existing use rights and protections.” And at [65]: “... a principle has emerged in which it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions.”

Offsets

- 9.9 Fish & Game does not have any fundamental objection to the use of offsets in the freshwater environment. However the Auckland/Waikato Office's experience in dealing with offsets in applications for point source discharges, is that benefits have often been difficult to quantify.
- 9.10 Mr Wilson, Chief Executive of that Region's Office, also has a concern with Fish & Game being left with long term obligations e.g. for wetland maintenance, when positive effects like wetland restoration or funding are proposed.
- 9.11 The relief that Fish & Game seeks for the offset provisions was set out in its original submission. This is further refined by Ms Marr,⁴⁴ who recognises that unlike a biodiversity offset which is preferably '*in perpetuity*', a water offset should be secured for at least for the duration of the effect. In most cases this would also be the duration of the consent (which is the requirement proposed in the Officers' Report and by Dr Neale providing rebuttal evidence for Fonterra).
- 9.12 Although Dr Neale distinguishes *water* offsetting from *terrestrial* biodiversity offsetting, other than the requirement for terrestrial biodiversity offsets to be "preferably in perpetuity"⁴⁵, many elements he proposes for water offsets apply equally to terrestrial offsets.⁴⁶

Based on my review of water quality offsetting documents, I would propose that any such criteria should include at least the following:

- (a) No significant environmental effects associated with the primary discharge.
- (b) The offset is in the same catchment as, and upstream of, the primary discharge.
- (c) The offset results in a net reduction in contaminant load.
- (d) The offset is like for like (i.e. same contaminant).
- (e) The offset is transparent and is part of a formal process (i.e. through a consent process).

⁴⁴ Marr, Block 2, Policy 11 track-changed on page 32.

⁴⁵ Business and Biodiversity Offsets Programme principles for offsets (BBOP; <http://bbop.forest-trends.org/>) under Long-term outcomes: "*The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project's impacts and preferably in perpetuity.*"

⁴⁶ Neale Rebuttal at [3.8].

- (f) The offset is addition to any reduction that would occur in response to the PC1 management framework.
- (g) The offset is monitored and operates for the duration of the point source discharge.
- (h) The offset is protected by a legally binding instrument.

9.13 A key principle missing from this list is the ‘mitigation hierarchy’ that provides:⁴⁷

A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.

(Emphasis)

9.14 (The words “significant residual adverse effects in this principle, are used differently to in the RMA context).

9.15 Dr Neale and Mr Willis for Fonterra also appear to accept the mitigation hierarchy principle.

9.16 So, Fish & Game largely agrees with Dr Neale’s principles for water quality offsetting, except in relation to his (c), which I now discuss.

9.17 Dr Neale proposes that an offset “... *results in a net reduction in contaminant load.*” Dr Neale criticises the proposed definition of “offset” in Ms Marr’s evidence, which would require that the offset “*achieves **conservation outcomes** above and beyond that which would have been achieved if the offset had not taken place*”. Dr Neale points out that, due to the cumulative nature of discharges to water (water mixes), it is difficult to link a net gain “*to a conservation outcome or a change in biodiversity*”.⁴⁸ Dr Neale suggests that, because the exact implications for conservation in the subcatchment would be too difficult to measure, showing a ‘net gain’ in the water context would be done on a *loads* basis.

9.18 Fish & Game does not consider that a net gain on a loads basis, would be acceptable in all cases, because it is relevant to consider the *effect* of the

⁴⁷ BBOP principles - above-cited.

⁴⁸ Neale Rebuttal [3.6(a)] states in relation to Ms Marr’s proposed definition of “offset” that: “*This is challenging in a water quality context as a single action (or offset) to reduce a contaminant load cannot be directly linked to a conservation outcome or a change in biodiversity (i.e. the reverse of cumulative effects).*”

contaminant discharge. In order to ascertain the effect may require more than an analysis of annual load. For example, it may require an analysis of the effect of reasonable distribution of an annual load (an application could reduce an annual load but increase the spring/summer load). It may require an assessment of the sensitivity of the receiving environment e.g. if the discharge is to an important breeding habitat and the discharge made that habitat unsuitable due to acute effects, analysis based on reduction in load would not be sufficient.

9.19 I suggest that Ms Marr's wording would cater for calculation based on a loads basis, in situations where that were appropriate.

9.20 Mr Willis, providing planning evidence for Fonterra, suggests that "significant adverse effect" be defined for the purpose of this policy.⁴⁹ Fish & Game opposes that definition because it is too restrictive. If a definition is required, the Panel could draw from the Horizons One Plan, which in the terrestrial context, applies offsets to "*any more than minor adverse effects*".⁵⁰

Definition of offset

9.21 The Act now recognises that offsetting and compensation may not be the same thing. It would be appropriate for PC1 to distinguish these concepts.⁵¹ The ability to *measure* provides the distinction between these two concepts. If offsets are to be provided for, a definition of offset must be included that says an offset is "*measurable*" and "*demonstrated through robust and appropriate methodology*".

⁴⁹ Mr Willis proposes the following in his rebuttal evidence:

For the purposes of this policy, a significant residual effect is:

- i. In respect of an existing discharge, the extent to which any replacement discharge or discharges fail to reduce the contaminant load of that discharge proportionate to the decrease required to achieve the short-term attribute states in Table 3.11-1 or the progression towards the 80-year water quality attribute states in Table 3.11-1.
- ii. In respect of a new discharge, the extent to which any new discharge will add E Coli, sediment, N or P contaminants to either the Waikato River or Waipa River Catchments

⁵⁰ Policy 13-4(b) and discussed in *Day v Manawatu-Whanganui Regional Council* above cited at [3-76] and [3.92].

⁵¹ Sections 104(1)(ab) requires the decision-maker to have regard to: "*any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity*".

- 9.22 In the recent case of *Oceana Gold NZ Limited v RFBPS* [2019] NZEnvC 41, referenced in Ms Marr’s evidence,⁵² the differences between and offset and environmental “compensation” were in focus.⁵³
- 9.23 The case is consistent with Dr Neale’s statement that “environmental compensation” “*is less stringent and open to greater subjectivity than offsetting (EIANZ, 2018; Maseyk et al, 2018)*”⁵⁴ and should not be listed in the policy. Fish & Game agrees and seeks Ms Marr’s definition of “offset”.
- 9.24 The dangers in opening the door to compensation, are set out in Mr Wilson’s evidence. An example of an offset is attached to Mr Wilson’s evidence.⁵⁵ A great deal of discretion was left to the Council officer charged with approving that offset in the future, however at least methodology for measurement was provided for in the consent conditions. In other cases, Fish & Game have been left in significant doubt regarding the quantity of nutrient reduction that is to be achieved - the approach has equated to compensation, not offset.

10. FLOOD AND DRAINAGE SCHEMES

- 10.1 Fish & Game entirely agrees with the Officers’ Report⁵⁶ that it is not necessary to carve-out specific policy for flood protection and drainage schemes. The schemes do not require any ‘special’ treatment except through the reference to regionally significant infrastructure.⁵⁷
- 10.2 However Mr Mayhew, giving evidence for Waikato Regional Council, proposes amendments to PC1 Policies 11 and 12, seeking particular provisions for all flood and drainage schemes.
- 10.3 Dr Robertson, for the Director-General of Conservation, states:⁵⁸

⁵² Marr at [5.25].

⁵³ Counsel is not aware of any caselaw on *water* offsets, except those cases relating to the SEV methodology for stream loss/disturbance which Dr Neale co-authored e.g. the Board of Inquiry decision approving the Transmission Gully proposal.

⁵⁴ Neale rebuttal [3.14]. Dr Neale says “*For example, environmental compensation is not restricted to like-for-like, and as a result the benefit from environmental compensation may be unrelated to the effects of the activity undertaken.*”

⁵⁵ Inghams Enterprises (NZ) Pty Limited for 2 resource consents to expand site production: Land application of treated wastewater and Discharge of treated wastewater to the Waiheke Stream (Decision, 14 August 2017).

⁵⁶ At [1125].

⁵⁷ Ms Marr has also proposed amendments to that reference so that it sits within Policy 12.

⁵⁸ Robertson rebuttal at [29].

If the proposed amendments of Mr Mayhew to PC1 are adopted a major driver of water quality degradation (the diversion of additional contaminant load into receiving waterbodies from flood and drainage schemes) will not be addressed. In my opinion, this would be inconsistent with the purpose of PC1 and the Vision and Strategy for the Waikato River.

10.4 Dr Robertson also provides evidence that the LWWFS includes a diversion, and is not a true 'flow through' scheme. He says:

... there are feasible and practical measures to avoid or mitigate water quality effects associated with the operation of flood schemes. This includes the application of flocculants for treatment of sediment (and bound-P), construction of settlement basins and development of two-stage channels (incl. constructed wetlands) to treat contaminants that are being diverted into receiving waterbodies.

10.5 In addition, large reductions in load can sometimes be achieved by simply optimising the way the structures are managed - and can be timed when sensitive parts of the wetland are most susceptible.⁵⁹ Fish & Game was involved in the recent section 128 review regarding the discharge of water from the Waikare Gate to the Whangamarino wetland. At the Block 1 hearings Mr Klee (giving evidence for Fish & Game) said that the relevant Consent Order sets targets for reductions in sediment, and such reductions are to be achieved through application to change the conditions of another consent (for the Te Onetea Gate).

10.6 Provisions to avoid, remedy and mitigate *should* apply to flood schemes.

11. VALUES: SECTIONS 3.11.1.1 AND 3.11.1.2

11.1 Legal submissions on behalf of Royal Forest & Bird Protection Society ("RFBPS") for Block 1, question whether amendments sought by Fish & Game in Ms Marr's evidence, are within scope of Fish & Game's submissions. In particular, in relation to the value of introduced fish species (such as trout) under the "Ecosystem Health" value or under its own separate value. The matter is squarely within the scope of Fish & Game's submission on Variation 1.⁶⁰

⁵⁹ Klee Block 1 evidence at [6.17]. See also [6.27].

⁶⁰ Referenced in the summary of decisions requested as V1PC1-204.