BEFORE INDEPENDENT HEARING COMMISSIONERS

AT HAMILTON

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions on Proposed Plan Change 1 to the Waikato Regional Plan

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LEGAL SUBMISSIONS ON BEHALF OF FONTERRA CO-OPERATIVE GROUP LTD (74057)

BLOCK 2 – HEARING 19 JUNE 2019

12 JUNE 2019

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MAY IT PLEASE THE COMMISSIONERS:

1. OVERVIEW

1.1 These submissions are presented on behalf of Fonterra Co-operative Group Ltd (**Fonterra**).

1.2 Fonterra has a significant interest in Plan Change 1 (**PC 1**) in respect of both the "on farm" implications of the PC1 and the proposed controls on point source discharges, as set out in the legal submissions and evidence presented in respect of the Block 1 hearings.

1.3 In evidence and legal submissions in respect of **point source discharges**, Fonterra:

(a) Supports Policy 10 but requests an express reference to both Policies 11 and 12.[1]

(b) Requests that Policy 11 be clarified so that any offsetting proposed by an applicant:

(i) Occurs only after the application of BPO on site; and

(ii) Is only required to address significant residual adverse effects (ie there is no requirement for *all* residual effects to be offset).[2]

(c) Supports Policy 12, but requests clarification of the policy to avoid any suggestion that the mitigation of point source discharges will enable water quality targets to be met.[3]

(d) Supports Policy 13 subject to amendments to provide greater certainty around consent duration – and in particular, what constitutes a "long term" consent.[4]

[1] Willis, primary, [12.7]-[12.13]
[2] Willis, primary, [13.1]-[13.15]
[3] Willis, primary, [14.1]-[14.9]
[4] Willis, primary, [15.1]-[15.9]

(e) Identifies, as an issue for the Hearing Panel, potential practical issues that may arise from splitting the land use and discharge rules for farming activities, and where an industrial discharge is being beneficially irrigated (discharged) to land on which a range of farming activities might be occurring.[5] This includes issues around the calculation of the NRP, and also how to integrate any FEP required for farming activities from the comprehensive management plan that would be required as part of any discharge permit.

1.4 And in respect of **on farm** matters, Fonterra:

(a) Requests changes be made to Policy 1 to further clarify the amendments recommended in the s 42A Report.[6]

(b) Opposes the proposed rewording of rule 3.11.5.3 from a permitted to a restricted discretionary activity.

(c) Agrees in principle that the use of Overseer to always assess compliance with an NRP is neither efficient nor effective, and agrees that there can be a simplified assessment of key factors that identify low intensity farms that might not need an NRP. But Fonterra does not accept that it is appropriate to use Overseer to derive the NRP, but then use a very crude assessment of one or two simple parameters to gauge how a farm is operating relative to that NRP.

(d) Opposes exempting low intensity farms of greater than 20 ha from the requirement to develop and comply with an FEP.

(e) Opposes the proposed changes to Certified Industry Schemes.

(f) Says that if there is a need to prioritise the development of FEPs, then that prioritisation should be based on more than N. Fonterra will address this issue further in the Block 3 hearings.

[5] Willis, primary, [16.1]-[16.7]
[6] Willis, primary, [9.1]-[9.7]

1.5 In respect of specific matters raised by other parties' legal submissions, not covered above:

(a) The ability to, or appropriateness of, the Hearing Panel considering issues of Council implementation of the proposed provisions of PC 1.

PART A – MANUFACTURING INTERESTS

2. POINT SOURCE DISCHARGES

Policy 10

2.1 The matters of particular concern to Fonterra have been identified in Mr Willis' evidence.[7]

2.2 Some submitters have suggested that all point source discharges cease by 2026 (Section 42A Report, [1065]). That suggestion is simply not credible. Because point source discharges include both discharges to land or to water, it would effectively mean that there could be no industrial activities and, for that matter no wastewater treatment plants, in the region. Basically, everyone would have to leave.

2.3 From a legal perspective, in respect of the definition point raised:

(a) It would be helpful to use a definition of regionally significant industry (at Section 42A Report, [1070]), however the definition refers to certain activities "identified in regional or district plans". Accordingly, simply using the RPS definition in the regional plan may give rise to a circular definition. It would preferable therefore for the relevant district plan to identify what is considered to be regionally significant.

(b) If a list is used, then I agree that Fonterra's manufacturing sites identified by Ms Buckley should be included within that list.

2.4 I also strongly support an express cross reference within Policy 10 to Policies 11 and 12. While policies should be read together, in

[7] Willis, Primary, at [12.7]; Section 42A Report, C6.5, [1019]

circumstances where – as here – there is potential for debate around relative weighting of policies, then that weighting should be made clear. In this case, Fonterra's position is that Policy 10 should be subject to Policies 11 and 12 and Policy 10 should be explicit about that (cf Section 42A Report, [1058]).

2.5 Finally, I endorse Mr Willis' identification of the fact that Policy 10 refers to the continuation of the industry (or infrastructure), not to the continuation of any particular point source discharge. This is a subtle but important distinction because over time, and as technology evolves, there will almost certainly be situations where existing activities look to amend the nature or location of any discharge (eg, moving from river-based discharge to land based, or a new location, or a combination or river-based and land based). This flexibility will be an important element in point source dischargers achieving the reductions being sought over the long term, and being able to adopt the best practicable option as new alternatives emerge.

2.6 Ms Marr (at 5.14 onwards) recommends that Policy 10 be deleted, a suggestion that Mr Willis has responded to in his rebuttal evidence. From a legal perspective, I agree with Mr Willis that there is a very strong and direct basis for Policy 10 in the WRPS (at Policy 4.4). Furthermore, it is trite law that, unless the provisions expressly provide otherwise, all objectives and policies need to be read and applied as a whole. Accordingly, there is no basis to suggest that Policy 10 is seeking to give regionally significant industry "primacy" over primary production or environmental goals.

3. POLICY 11, BEST PRACTICABLE OPTION AND OFFSETTING

3.1 Fonterra's evidence on Policy 11 describes the key issues of concern.[8]

3.2 Policy 11 will, in my submission, play a key role in enabling PC 1 (and subsequent plan changes) to achieve the Vision & Strategy in the timeframes desired, while ensuring that the social and economic consequences on the communities are "survivable".

[8] Willis, Primary, at [13.1] – [13.15]; Section 42A Report, C6.6, [1073] -

3.3 Both Mr Willis and Dr Neale have addressed Policy 11 in their primary and rebuttal statements of evidence. Again, without repeating their evidence, I wish to highlight and elaborate on the following matters:

(a) Contrary to the submission from Forest and Bird, offsetting is appropriate (and internationally is well established) in a water quality context (Section 42A Report, [1078]).

(b) Policy 11 appears to conflate (and confuse) the concept of BPO and that of offsetting. It is unclear where one starts and the other ends.

(c) The legal position as regards any requirement for offsetting is clear. Offsetting cannot be required by a consent authority; but it can be imposed if it is offered by an applicant for consent (s 104(1)(ab), RMA).

(d) While there are well-developed principles governing biodiversity offsetting, that is completely different from water quality offsetting (as explained by Dr Neale). It is entirely inappropriate to seek to incorporate elements of the former into the latter, without a close examination of whether or not they "work" in the new context.

3.4 In my submission:

(a) There is no requirement in the RMA, or in PC 1 or in the Vision and Strategy, for an activity to have "no effects" on the environment (Section 42A Report, [1079]).

(b) The requirement to adopt BPO should be a standalone obligation and it should be a minimum obligation on all those undertaking a point source discharge (ideally this would be in a separate policy). But any policy should not set out what BPO is – in other words, it would be entirely inappropriate to have the tail (desired water quality or contaminant load outcome) wagging the dog (BPO analysis of what is an appropriate treatment regime) by specifying, for example, that a BPO *had* to achieve a certain water quality outcome. It is simply not possible to know what the

water quality outcome of a BPO process is, until you have been through the BPO process in respect of a particular discharge.

(c) Offsetting should remain as an available option for a consent applicant, and there should be helpful guidance in the policy about how that offsetting scheme should be developed and what conditions might be imposed to implement that offset.

4. POLICY 12

4.1 Fonterra's evidence on Policy 11 describes the key issues of concern.[9] In summary, Fonterra supports Policy 12 and the amendments suggested by the s 42A Report, but that report did not address Policy 12(c) and nor does Policy 12 adequately recognise that point source dischargers will increasingly face diminishing returns in terms of the costs of treatment (in other words, as the treatment levels increase, it will become progressively more and more expensive to reduce the contaminant loads in the discharge).

4.2 In respect of the first point:

(a) It is not possible for any point source discharge to be treated so as to "meet" the water quality attribute states set out in Table 3.11-1 because these are receiving water limits.

(b) At most, a point source discharge could be treated such that the treated discharge (ie with a lower contaminant load) *contributes towards* the meeting of those desired attribute states in Table 3.11-1. This needs to be reflected in both Policy 12 (a) and (c), as recommended by Mr Willis (his para [14.9]).

4.3 In respect of the second point, Mr Willis has recommended specific wording in Policy 12 to address the issue of diminishing returns and the appropriateness, particularly in that scenario, of the use of offsets (his para (14.9]). In my submission, it is important for policies to reflect the practical realities and limitations that will face those point source dischargers who are already implementing high levels of treatment and

[9] Willis, Primary, at [14.1] – [14.9]; Section 42A Report, C6.7, [1129] -

who will face an increasingly difficult task in order to continue the same magnitude of improvements going forward. In those circumstances, it may well be a far better environmental outcome if a point source discharger was able to look at using a water quality offset to provide additional improvement to the catchment overall. It is important to note that this matter for consideration is only one of 4 in Policy 12, and there is no suggestion that this new sub-policy (d) would somehow provide an "out" so that point source dischargers do not need to do their fair share in achieving the water quality outcomes required by PC1. Nor would it allow any degradation of water quality at the source of discharge – not only would be quality of the discharge already be very good (ie well treated), but there are specific restrictions preventing the use of offset if there are localised significant adverse effects (see Policy 11(a)).

5. POLICY 13, CONSENT DURATION

5.1 Fonterra's evidence on Policy 11 describes the key issues of concern.[10] Fonterra supports Policy 13, subject to amendments to provide greater certainty around consent duration – and in particular, what constitutes a "long term" consent.

5.2 The duration of regional consents (generically, those that have a maximum term of 35 years) has long been a vexed issue for applicants, and has been the subject of a number of Environment Court decisions. In the Waikato Region, the issue of an appropriate consent term is often the last remaining issue outstanding as between the Regional Council and Fonterra.

5.3 The issue of consent term is particularly important to a large industrial site because it is the consent term that gives security of operation, and it is therefore over the term of any consent that any investment in plant and equipment must be "paid back". The operator of an industrial site therefore wants as long a term as possible. A regional council, on the other hand, appears (at least in the case of the Regional Council) to prefer a shorter term because a "full, new consent process" is seen to provide a greater opportunity for a regional council to "turn the screws" on the quality

[10] Willis, Primary, at [15.1] – [14.9]; Section 42A Report, C6.8, [1156] -

of any discharge. Interestingly, as noted by Mr Willis, the Waikato Regional Plan has a specific policy that directs that the term of a consent should be as sought by an applicant, subject to any particular reasons for why a shorter term is more appropriate. (There is no proposal under PC 1 to amend that policy.) The Regional Council also, helpfully, has internal guidance that it applies when deciding upon an appropriate consent term. (Further details of these arguments, and an assessment of the Regional Council's guidelines in the context of Fonterra's Te Awamutu site, are set out in the legal submissions presented at the very recent Fonterra Te Awamutu hearing, a copy of which is provided in **Schedule 1** attached.)

5.4 I make those comments simply to lay the groundwork for my submission that what is a "long term" consent is very much in the eye of the beholder. In my submission, retaining the phrase "long term" is simply kicking the can down the road. At any later hearing, a s 42A report author or a submitter in opposition will argue that a 15-year consent is a "long term consent", whereas an applicant will be arguing that in the context of a potential 35-year consent, a term less than the half the maximum, cannot on any objective basis be considered to be "long term".

5.5 I strongly recommend that the Hearing Panel include a specific period in Policy 13, so as to provide helpful guidance and avoid the types of debates that will otherwise inevitably occur.

6. COMMON CATCHMENT EXPIRY DATES

6.1 A number of submitters have suggested that point source discharges should all be subject to common catchment expiry dates. I understand that to mean that submitters are requesting that all point source discharges in the catchment or potentially an FMU (the scope is not clear) would expire at the same time. The intention, I presume, is for the applications for any replacement point source discharge permits to be assessed together.

6.2 The s 42A Report at [1183] commented as follows:

> [1183] In relation to requiring a common catchment expiry date, Officers note that such an approach can potentially be helpful where you are wanting to apply a particular regime across all consents. However, the effect of this approach is that multiple consents will expire and require renewal at the same time,

> potentially causing resourcing issues to manage all consents at once. For point source discharges, the consideration of each consent is more likely to be a consent-by-consent consideration. To the extent that such an approach might be warranted in a particular catchment, the Council could in any case undertaken a review under section 128 of the RMA.

6.3 Mr Willis also addressed this in his rebuttal evidence (paras [3.6] – [3.13]).

6.4 In my submission, there is no resource management basis for a common catchment expiry of the nature proposed, and any such approach would be fraught with practical difficulties for all concerned. Rather than encouraging an efficient and effective consent process, with a continuing clear downward trajectory, the likely outcome is a consent process that effectively becomes stalled and all dischargers would be reliant on the interregnum provisions to continue to operate (ie s 124, RMA). My reasons for this conclusion include:

(a) From a legal perspective, any applications for discharge permits would, to a greater or lesser extent, be competing for a limited resource (the assimilative capacity of the water body into which they were proposing to discharge), and accordingly those applications would need to be dealt with on a "first in, first served" basis.

(b) A common expiry date would mean that all applicants would be consulting with all key interested stakeholders at the same time (eg, River Iwi, local hapu, Fish & Game, Department of Conservation). This will put significant pressure on those stakeholders. Because each site would have unique characteristics, it is unlikely that any real efficiencies could be gained from joint meetings.

(c) There would also be significant pressure put on those consultancies specialising in the discharge of treated wastewater. Many of the point source dischargers would use the same consultancies, and those consultancies would have to prioritise the work flows (ie it would be doubtful that all applications could be progressed simultaneously).

(d) Even if those applications were able to progress simultaneously, it is inevitable that some of the applications will be in better shape

than others – some of the applicants will be very good operators proposing clear and definite further improvements where they could, other applicants not so. The inevitable impact would be that some applications would be ready for notification/hearing before others. It is unreasonable to expect that all applications for replacement consents would be held up, pending the "worst" application becoming ready for hearing.

(e) At the end of that process, which would literally take "years", all applications could be ready for a hearing and potentially all applications could be heard by the same hearing panel. But, under the current law, those consents would still have to be decided on the basis of "first in, first served".

6.5 The most that could be achieved as a result of the inevitable delay and cost from the above processes would be some greater consistency of consent conditions. But that consistency could be achieved by appointing a set group of commissioners to hear any point source discharge applications in the Waikato and Waipa River catchments. It could be also achieved, as suggested by some submitters, by having a common review date. At these key dates, all point source discharges could be examined, and those that need a further shunt in the right direction could be formally reviewed. Others, that remain on a downward trajectory, could be omitted from any formal review process.

PART B – ON-FARM INTERESTS

7. POLICY 1

7.1 While Fonterra agrees with some of the changes to Policy, it considers that, overall, the changes have made the policy internally inconsistent, confusing and one that will be problematic to implement.[11]

7.2 Mr Willis's evidence explains these concerns in more detail. For my part, I wish to emphasise the following:

(a) Policies are at the core of resource management planning documents – they are "where the work gets done", and it in the policies that the inevitable tensions that exist in planning need to be carefully reconciled. The central importance of policies was emphasised by the Supreme Court in the *New Zealand King Salmon* decision. It is therefore essential that policies are worded accurately, are internally consistent, and, to the greatest extent possible, lack ambiguity.

(b) Policy 1 in PC1 plays a central role, and will be carefully scrutinised through future planning processes, particularly if (as is currently proposed), resource consents are required for a great deal more farming activities than was anticipated by PC1 as notified.

(c) Policy 1 should be equally focussed on all four diffuse contaminants; as expressed elsewhere in Fonterra's evidence, there is strong focus on N, with the risk being that the other contaminants can be overlooked. There is no legal basis in PC1 to place more weight on N than the other 3 contaminants, and it is apparent that, unless all 4 contaminants are addressed, the Vision & Strategy will not be achieved.[12] Accordingly, I strongly support Mr Willis's proposed amendment to Policy 1(b).

[11] Willis, Primary, at [9.1] – [9.7]; Section 42A Report, C1.2, [230] *et seq*

[12] The importance of all 4 contaminants is expressed recognised by the Section 42A Report, see [284]

(d) Various PC1 policies refer to a requirement for a "proportionate" improvement in discharge quality. In Policy 1, for example, it refers to a requirement to reduce discharges "proportionate to the amount of (2016) discharge and the water quality improvements required in the sub-catchment". From a legal perspective, that wording is not sufficiently clear and is fertile ground for debate. I support Mr Willis's proposed clarification to this sub-policy (b). In particular, given that N is dealt with in sub-policy (b1), sub-policy (b) should be limited to the 3 other contaminants.

(e) Urgent clarification is also required as to when "better than GFP" performance is required, and exactly what "better than GFP" performance might mean in practise. I accept that, as Mr Willis expresses it, GFP is not "a black and white metric". While it appears, from Mr Willis's analysis, that the definition of GFP is a matter to be dealt with at a later hearing, any definition given to GFP does affect how effective (or not) Policy 1 will be.

(f) Of particular concern is the phrase "real and enduring reductions", as proposed to be required of farmers between the 50th and 75th percentile. I am not aware that this phrase has been judicially defined. I expect "enduring" would be interpreted as "permanent" or "long-lasting", which could be problematic given the need for farmers to constantly evolve their farming systems, but the phrase "real reduction" could literally mean any reduction at all. It appears that the new focus on the 50th percentile has come as somewhat of a knee-jerk reaction, with little thought being given to exactly what would be required, and no consideration of the inequity as between farmers farming above the 75th percentile (who must reduce to that percentile), and farmers in the 50th-75th percentile who might be required to make a greater reduction.

8. RULE 3.11.5.3

8.1 Fonterra agrees that the rule structure could be simplified, and that there is some benefit in separating out the combined land use/discharge rule

into separate rule[13]. Fonterra strongly opposes the recommendation to change rule 3.11.5.3 from a permitted activity to one requiring a restricted discretionary activity resource consent.

8.2 Fonterra does not agree with the observation in the Section 42A Report that rule 3.11.5.3 "may not comply with section 70(1)". Mr Willis's evidence (at [6.24] – [6.43]) rebuts this suggestion in some detail, and I endorse his comments.

8.3 While conscious of the timeframes that all participants are under, including the reporting officers, there appears to be little or no substance behind that observation made (and recorded at [8.2] above). That lack of analysis is not excusable, given the central importance of rule 3.11.5.3 to many submitters, and the practical and implementation challenges to Council were all 5,000 (or more) farms in the catchment required to obtain a resource consent.

8.4 From a legal perspective, there is no basis in any of the evidence that I have read to properly conclude that an appropriately worded rule 3.11.5.3 would fall foul of s 70, RMA:

(a) There is no analysis of what components of s 70(1)(c)-(g) (collectively, **adverse water quality outcomes**) the reporting officers consider might be "breached" by rule 3.11.5.3, nor where or for how long any such effects might last.

(b) The questions asked by the Panel, and recorded in its Minute dated 7 June 2019, referred in the context of s 70 to a cumulative "effect on aquatic ecosystems". Section 70, however, references to "Any *significant* adverse effects on aquatic *life*."

(c) As noted in my legal submissions for the Block 1 hearings:

(i) The legal test is whether a Council is "satisfied" that none of the adverse water quality outcomes is "likely" to arise in "the receiving waters".

[13] Section 42A Report, C1.2, [299] – and [795], [802] etc

(ii) There is caselaw to suggest that "receiving waters" are "well understood to be the waters at the point of discharge" [14], which further supports my argument (developed in the Block 1 hearings) that s 70 is directed towards point source, rather than diffuse, discharges.

(iii) The Council must have a reasonable basis on which to be "satisfied" or not that the adverse water quality outcomes would be "likely" to arise. Note that the test is "likely" not "possibly". Any failure to have a reasonable evidential basis to be satisfied as to the likelihood of those outcomes occurring would constitute an irrational decision.

(iv) In defining a permitted activity, a hearing panel must have regard to any permitted activity standards (and that panel must assume that those standards will be complied with).

(d) The effect of the reporting officer's observation would be to make a proposed permitted activity require a resource consent (in this case, it is suggested to move from permitted to restricted discretionary). The thrust of s 32, confirmed by recent caselaw (*Royal Forest and Bird Protection Society of New Zealand Incorporated v Whakatane DC* [2017] NZEnvC 051), is that plans should regulate to the least extent possible, while still achieving the desired resource management outcomes. In this case that would mean that if a permitted activity rule could achieve, through proper drafting, the desired resource management outcomes, then the activity status should be permitted and not restricted discretionary.

8.5 As Mr Willis notes [15] the reporting officers' conclusion that 3.11.5.3 is contrary to s 70 (and therefore cannot be a permitted activity rule), but that rule 3.11.5.2 is not contrary, is completely inconsistent.

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[14] Board of Inquiry Final Report and Decision *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents*, 22 February 2013, at [1307].

[15] Willis, primary, [6.42]

8.6 Finally, Mr Willis accurately observes that the reporting officers have, in proposed new rule 3.11.5.8, provided a neat solution to their own concerns with respect to rule 3.11.5.3. Any "discharge" activity must comply with 3.11.5.8 (2), and if these are complied with, then s 70 must also be complied with.

8.7 For all those reasons, there is no arguable or rational basis to conclude that rule 3.11.5.3 contravenes s 70 such that the rule could not lawfully be classified as a permitted activity.

9. FARM INPUT DATA/NITROGEN RISK SCORECARD

9.1 Fonterra opposes the proposed use of selected farm input data to measure progress against an NRP as an alternative to Overseer, and instead requests the use of significantly more comprehensive and reliable Nitrogen Risk Scorecard (**NRS**). The benefits of the NRS have been discussed by Mr Allen in his evidence for both Block 1 and Block 2, and by Mr Willis in his evidence on Block 1. The reporting officers have commented on the use of the NRS in the Section 42A Report and have criticised it as seeming "to create an overly complicated solution".[16]

9.2 From a legal perspective, I cannot understand how the Council's proposed focus on "stocking rates" can be anywhere near suitably robust. It would be irrational for rules to focus on stocking rates, given technical evidence confirming that discharges of contaminants from land can in fact increase, despite "stocking rates" staying the same or reducing. In those circumstances, any such rule would fail s 32 as it would not be "effective". Similarly ineffective would be generic requirements to "demonstrate that the key farming activities that influence the farm's nitrogen leaching rates are not changing" (Section 42A Report, [108]).

9.3 To the extent the NRS was "criticised" for being complicated; that is a simple reflection of multiple variables that all feed into a risk matrix for farming. If the Council is to rely on farm input data as an alternative to regular Overseer assessments, then it is essential that the data is collected in a consistent and transparent manner, that the data is robust,

[16] At [104] – [106]

and that the outcomes can be clearly explained and understood by the people that matter most – the farmers themselves.

10. EXEMPTION FOR LOW INTENSITY FARMS GREATER THAN 20 HA

10.1 Fonterra opposes exempting low intensity farms of greater than 20 ha from the requirement to develop and comply with an FEP.[17] Fonterra's opposition is both "in principle" as well as to the specific form of the rules proposed. Reasons include:

(a) Effects on water quality in the Waikato and Waipa River catchment have arisen largely from the cumulative effect of all landholdings of different sizes. While there should be some threshold below which an FEP is not required, land greater than 20 ha, even if used for low intensity purposes, can over time generate contaminants that affect water quality. The use of an FEP would reduce that contaminant load. On the basis that improving water quality should be responsibility of all landowners, and on the basis that "every little bit counts", there appears to be no rational reason not to require all landowners with more than 20 ha to have an FEP in place.

(b) The current wording of the rule creates a loophole that could allow for reasonably large and intensive farms to avoid the requirement for an FEP (and potentially even avoid a NRP). This should be amended to refer to intensity being measured across the "effective area" rather than across the total farm area.

(c) Nor is the current rule sufficiently certain about how stock intensity should be calculated. As Mr Allen observes, calculating stock intensity is more complicated than might first appear. The reporting requirements are also confused (Allen, 3.16).

(d) The likely overall effect of the recommended package of rules is a significant number of large farms are likely to get no oversight at all under PC 1 (Allen, primary, [3.17])

[17] Allen, primary, [3.12] – [3.23]

11. CERTIFIED INDUSTRY SCHEME (TOPIC C3)

11.1 In my submissions on Block 1 hearings, I commented on the use of Certified Industry Schemes (CIS) and the associated use of FEPs and activity status of farming. The relationship between these components of PC1 is recognised by the Section 42A Report:

> 781. The CIS concept is a primary method in PC1 for supporting the preparation and implementation of FEPs, therefore it is closely linked to the content of Schedule 1 and the requirements for FEPs. The activity status of Rule 3.11.5.3 has a significant impact on WRC's implementation of PC1 – if not permitted, several thousand farms would require resource consent that were assumed would come under a CIS framework.

11.2 Subject to confirmation of legality and potentially some amendments to the structure, most submitters supported the use of CIS:

> 780. Most submitters support in principle the proposal to establish and use CISs as a method for achieving the objectives of PC1. However, some submitters have raised concerns with the legal basis for the provisions. Most submitters, whether in support or opposition, have sought increased certainty and clarity around how CISs will operate. Many submitters have sought specific amendments to strengthen requirements around audit, monitoring and enforcement.

11.3 Despite the level of support, and, with respect, the obvious efficiency benefits likely to flow from the use of CIS, the Section 42A Report proposes some changes to CIS.

11.4 In summary, Fonterra strongly opposes the proposed changes to Certified Industry Schemes, and it disagrees with the few submitters that have directly challenged the lawfulness of the CIS process. (Fonterra has no objection to the change of name from CIS to Certified Sector Schemes, or **CSS**.). The themes of opposition comprised (Section 42A Report, [791]):

(a) Legal basis for the provisions

(b) Effectiveness of CISs

(c) Alternative approaches

(d) General uncertainty about the CIS provisions

(e) Audit, monitoring and enforcement

11.5 In respect of themes (a)-(b) and (d)-(e), Fonterra's response is as follows.

Legal basis for CIS

11.6 The challenge to the legal basis generally revolves around the notion that a CIS is an unlawful delegation or transfer of powers and duties (Section 42A Report, [793]. (A related issue was raised around the *vires* of Rule 3.11.5.3, which has been addressed earlier in these submissions.)

11.7 Fonterra disagrees that there is any unlawful delegation or transfer of powers. None of the legal submissions that I have reviewed have done more than simply assert this is the case; there has been no analysis of exactly what function or power is being unlawfully transferred or delegated. Specifically:

(a) Fonterra disagrees with the characterisation of the reporting officers that the "CIS is providing [the] oversight instead of WRC" (Section 42A, [779], [783]).

(b) As a permitted activity standard, there is no requirement to approve any FEP. (This is not a situation where a certificate of compliance is being sought). Accordingly, there is no power of "approval" to the FEP being transferred. It would remain equally possible for a permitted activity standard to require the preparation and provision of an FEP meeting certain requirements to the WRC. In this case, the fact an FEP is prepared by a CFEP, as opposed to an individual farmer or non-certified expert, will ensure additional rigour.

(c) Nor is there any monitoring or reporting power being transferred to the CIS. In respect of monitoring, while the CIS will undertake some monitoring and reporting functions, that is monitoring or reporting that would otherwise be undertaken by a farmer (or by anyone else undertaking a permitted activity that relied on compliance with standards on an on-going basis). The Council will remain able (and would be required legally) to monitor the compliance with the FEP and other permitted activity standards as and when it wishes to.

(d) Nor is there any enforcement power being transferred from the Council to CIS. This is expressly excluded from the role of a CIS.

The role of enforcement and prosecution remains solely with WRC.

11.8 To the extent that there are any deficiencies in the wording of the CIS, or the associated rule framework, then this can be amended by wording changes, including those as noted by the WRC's opening legal submissions (Section 42A Report, [801]).

Effectiveness / Efficiency

11.9 The touchstone of s 32 is the relative efficiency and effectiveness of different rules. In this regard, the Section 42A Report's overall recommendation in respect of CISs appears contradictory:

(a) The primary concern about the lawfulness of CISs appears to be Rule 3.11.5.3 and not the CIS itself (Report, [806]).

(b) The proposed solution is to change the activity status of Rule 3.11.5.3 from permitted to restricted discretionary (Section 42A Report, [806]).

(c) This change in activity status would have a significant detrimental effect on the efficiency of the rule:

> 807. However, Officers acknowledge that this will significantly increase the plan implementation burden for WRC. The section 32 report[115] states that approximately 5000 farms in the Waikato and Waipā catchments will require FEPs, and that the CIS concept is a method for delivering these with comparable oversight to a resource consent process without generating 5000 individual resource consent applications. If farming activities required resource consent, WRC would need to reconsider its implementation process to ensure that there was capacity to process this number of applications. It may be necessary to stage implementation over a longer period or to prioritise particular areas or types of activities.

(d) The Section 42A Report then concludes that if parties joining a CIS still need a restricted discretionary activity consent, then there may not be sufficient incentive to join a CIS, and "the Hearing Panel may wish to consider whether this is strong enough to retain the CIS provisions" (Section 42A Report, [809]).

11.10 Fonterra's position is that, if there is a requirement for an RDA activity for farmers who are members of a CIS, then Fonterra would not proceed to develop such a scheme. It would be unlikely that other schemes would be developed either. Accordingly, the WRC would not receive the other

significant benefits of the CIS, including in particular the proposed standardised reporting/monitoring programme proposed.

11.11 The Officers' concerns about permitted activity Rule 3.11.5.3 has essentially emasculated the proposed CIS scheme. This will result in a unrealistic workload for the WRC, certainly in the short term. Despite the concerns about the WRC "delegating out" its responsibilities, the almost certain outcome is that WRC will contract out to third party providers the processing of consents and the reviewing of FEPs. Accordingly, the exact same delegation will occur as envisaged by the CIS, except without the significant safeguards and quality control that would accompany a CIS process. The effect will almost certainly be that many farms, at least in the short term, will remain unregulated at worst, or poorly regulated and monitored at best.

11.12 Accordingly, the Council's proposed approach to Rule 3.11.5.3 and the CIS is neither as effective nor as efficient as that proposed in notified PC1 (potentially with minor refinements to Schedule 2).

General uncertainty

11.13 The Section 42A Report has identified some areas of "general uncertainty" [832].

11.14 I have reviewed that section of the report, and to the extent they are substantive concerns, are all capable of being resolved through wording changes. I support the Officers' endorsement of Fonterra's requested changes in order to enhance clarity and certainty (eg, by all of the Schedule 2 matters being "standards" and ensuring that these matters are as clear and non-discretionary as possible) – Section 42A Report, [838]).

Audit, monitoring and enforcement

11.15 As recorded in its submissions in the Block 1 hearings, Fonterra strongly supports rigorous auditing, monitoring and enforcement of FEPs and CISs. This will be essential if public confidence in these components is to be retained over the long term, and also to ensure that FEPs are effective at delivering the environmental outcomes desired. Fonterra considers that there should be both internal as well as external auditing of

FEPs. (Note that the external audit recommended by Fonterra, was not included within PC1 as notified or in the s 42A Report.)

Reworded CIS provisions

11.16 Fonterra has reviewed the proposed reworded CIS provisions and, subject to the more fundamental issues discussed above, is comfortable with the proposed rewording of Schedule 2.

Response to legal submissions addressing CIS

11.17 The legal submissions for Wairakei Pastoral acknowledge the potential benefits of the CIS, object to it on the basis that developing or certifying CIS is not a function of the Council under either the RMA or the LGA. In my submission there is ample scope within the RMA, LGA or a local authority's power of general competence to undertake the role set out in Schedule 2.

11.18 Fish and Game's legal counsel have addressed CISs and the related Rule 3.11.5.3 at [5.1] – [5.9]. In response to the matters raised:

(a) While you need to be able to objectively determine whether the standards of a permitted activity are met, in this case the standard would be existence of an FEP. It is permissible for there to be some subjectivity in the wording of that FEP.

(b) A direct parallel in that regard is a permitted activity in the the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011. Performance standard (a) on that permitted activity is that "the activity must be done in accordance with the current edition of *Guidelines for Assessing and Managing Petroleum Hydrocarbon Contaminated Sites in New Zealand*, Wellington, Ministry for the Environment:" (reg 8(1)(a)). These Guidelines[18] contain some very generic and subjective requirements, including in respect of risk assessment, ecological and human health risks.

[18] (https://www.mfe.govt.nz/sites/default/files/user-guide-jun99.pdf)

(c) The criticism of Schedule 2 is unfounded (Fish & Game legal submissions, [5.2]). Schedule 2 does not set out the requirements of a permitted activity. Schedule 2 sets out the requirements for a CIS. The details of the permitted activity are within the rules, and, by extension, within the requirements for an FEP.

(d) Fonterra agrees that transparency is important, and that conflicts of interest need to be avoided. Fonterra considers that CFEP will, like all professional advisers who advise in the RMA field, ensure that their professional independence is maintained. In that way, CFEPs will be no different to any other independent expert assisting resource users. Fonterra supports a robust third-party auditing process.

(e) Concerns about delegating monitoring and enforcement functions (Fish & Game legal submissions, [5.4), have been responded to earlier in these submissions. There is no such delegation occurring.

(f) Issues relating to s 70 have also been addressed earlier in these submissions (Fish & Game legal submissions, [5.6]).

12. PRIORITISATION OF FARM ENVIRONMENT PLANS

12.1 Fonterra says that if there is a need to prioritise the development of FEPs, then that prioritisation should be based on more than N. Fonterra will address this issue further in the Block 3 hearings.

13. REQUESTS FOR NITROGEN ALLOCATION/LUC

13.1 A number of submitters have sought that PC1 bring in a nitrogen allocation now, rather than this being the subject of a further plan change.

13.2 For reasons explained in its evidence, Fonterra strongly opposes any allocation of nitrogen as part of PC1. From a legal perspective, there has been no assessment of the relative costs and benefits of bringing in an allocation regime, and there is simply not the information before the Hearing Panel for it to undertake the necessary s 32 analysis of any such

alternative regime. Furthermore, any allocation approach at this stage would rely on "absolute/exact numbers" from Overseer, which, based on current concerns about Overseer, is somewhat of an oxymoron. Finally, if there were to be any allocation of the assimilative capacity of the waterbodies, then presumably it should be all 4 contaminants allocated – not just N.

13.3 Fonterra supports the River Iwi's legal submission, where, at para 4(f), their counsel records their position being to "[set] aside the question of allocating long-term rights to discharge contaminants at a property-scale (based on current discharges) until there is sufficiently detailed information to properly inform such a debate."

PART C – OTHER LEGAL ISSUES

13.4 I understand that some parties (or the Council staff) have suggested that the Hearing Panel either should not or cannot have regard to the ability of Council to implement any changes proposed. With respect, that proposition is completely wrong and is contrary to the core elements of section 32 – the requirement to identify "reasonably practicable" alternatives to achieve an objective; and the requirement to test the effectiveness of an identified alternative:

(a) The core element of s 32 is that any proposed planning provisions are the most appropriate method of achieving a certain objective, having regard to the relative efficiency and effectiveness of reasonably practicable alternatives for achieving the objective(s).

(b) In *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* (citation above) the Environment Court, applied the following factors to identify reasonably practicable alternatives:

> [53] We consider that these statutory provisions and cases together illustrate a consistent approach to the meaning of "reasonably practicable" which we respectfully adopt in this case in considering the options before us. We accordingly proceed to consider RPS Policy MN 8B and District Plan Policy IB2(1)(b) and identify reasonably practicable options for achieving the objectives of the proposed District Plan by examining the options having regard to, among other things:
>
> i) The nature of the activity and its effects;
>
> ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;
>
> iii) The likelihood of adverse effects occurring;
>
> iv) The financial implications and other effects on the environment of the option compared to other options;
>
> v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;
>
> vi) The likelihood of success of the option; and
>
> vii) An allowance of some tolerance in such considerations.

(c) For current purposes, factor (vi) is key: the "likelihood of success of the option". Success is to be taken as achieving the objective. If a proposed set of provisions will not be able to be implemented (eg because the nature and extent of resourcing is impracticable), then those provisions will not be successful.

(d) Likewise, even if an option were identified as being reasonably practicable (and in my submission an option that has a very low chance of success because it cannot be implemented should not pass that test), then that option still must be assessed in terms of its relative effectiveness. For obvious reasons, if a set of provisions cannot be implemented by Council or by any other parties within the system (farm advisers etc), then those provisions will not be effective.

14. WITNESSES FOR FONTERRA

14.1 The following witnesses will present evidence on behalf on Fonterra:

(a) Ms Brigid Buckley, National Policy Manager, Fonterra

(b) Mr James Allen, farm management adviser from AgFirst Waikato

(c) Dr Martin Neale, water quality scientist from Puhoi Stour

(d) Mr Richard Allen, Environmental Policy Manager, Fonterra

(e) Mr Gerard Willis, consultant planner from Enfocus

B J Matheson

Counsel for Fonterra Co-operative Group Ltd

Table 1: Assessment of Horizons' One Plan reasoning for not classifying farming as a permitted activity (at [5-199])

	Horizons One Plan judgment	Response – PC 1 provisions
1.	Rule 13-1 proposes a one farm consent to manage all contaminant vectors (not just N) based on a systems approach to farm management commended by the Parliamentary Commissioner for the Environment.	The suite of permitted activity controls, including the FEPs, will address all contaminant vectors, including in particular the 4 identified by PC1. More importantly, in Horizons Region, consent is only needed in highly sensitive catchments (ie majority of farms do not need consent, as opposed to the proposal for PC1). Even with a relatively small number of farms needing consent (estimated to be around 400), the plan provisions have not been able to be implemented.
2.	Managing N leaching (effectively) would require significantly more interaction between a local authority and farmer than a *permitted* activity would allow.	The complex set of controls, including the requirement to provide NRP, the FEP, and reporting obligations, are all as rigorous as would be proposed by a resource consent. Because of the combined monitoring/reporting that would be undertaken by a Certified Sector Scheme (CSS), there would be more effective interaction under a permitted activity rule with a CSS than simply a resource consent.
3.	There is limited transactional efficiency given the consent needed for discharges of effluent (an activity caught by Rule 13-1 as ancillary to dairy farming).	The proposed rule framework would be a permitted activity for both the land use consent and the diffuse discharge consent (s 15). Under PC 1, there is significant transactional efficiency. (Note, the analysis in the Horizons' decision did not directly comment upon the ability of the Regional Council to effectively and efficiently process and monitor all of the consents that might be required.)
4.	The *permitted* activity rules proposed would only really work on a fixed and not a graduated step-down in N leaching.	There is no suggestion that the proposed step down of N in this case (whether that is down to 75th percentile or that threshold and some lower threshold) is not able to work effectively as a permitted activity.

5.	A consent provides much greater certainty for a farmer than *permitted* activity status (which could be changed at any time).	Given the proposal to implement a second plan change (probably with a nitrogen allocation regime) in about 2026, and because any consents granted for farming activities would likely only be for 10 years), a permitted activity rule would give just as much certainty for farmers as a resource consent.
6.	Control of land use to achieve water quality outcomes of *the commons* is best achieved by a consent identifying the metes and bounds of the farming activity, with explicit conditions, available for inspection as a public record, and with monitoring (at the expense of the consent holder) and enforcement.	In this case, improvement of the Waikato and Waipa Rivers is the core purpose of PC1. In this case, the proposed CSS will be suitably transparent, and the conditions imposed on farms will also be transparent (as permitted activity standards). While the bulk of the controls will be in the FEPs, that will be the case whether or not a consent is required, or the activity is classed as a permitted activity. In respect of the costs of monitoring, with the proposed CSS scheme, those costs will be with the farmers.
7.	A *permitted* activity rule would allow some farmers to leach up to the relevant threshold number without any control on management practices (with undesirable results).	This concern can be overcome by proper drafting of the permitted activity rules.
8.	Mr Hansen acknowledged the benefits that having better on-farm information would have for future plan change decisions. Fonterra considered a *controlled* activity regime would deliver that information directly to the Council, allowing them to check and verify it within a resource consent process and a better approach.	In this case, the proposed permitted activity standards, the monitoring required of N leaching, and the identification of the NRP, together with the proposed information to be provided through the CSS reporting on behalf of its farmer members, will allow better, more accurate and consistent information, than farmers reporting individually and not through a CSS.
9.	Section 70 requires that before a rule that allows, as a *permitted* activity, a discharge of a contaminant into water, or onto land in circumstances where it may enter water, can be included in a regional plan, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s70(I)(g), ... *any significant adverse effects on aquatic life.* There was no evidential basis on which we could conclude that the requirements of s70 would be met.	The combination of controls on any further intensification – and in fact the requirements of farms to remain within or reduce leaching, including through the implementation of FEPs - all mean that there will not be any increased effects from those currently existing. Accordingly, there is no evidential basis that allowing those existing activities to continue – with less leaching and discharge of other contaminants – will lead to a "significant adverse effect on aquatic life". Furthermore, as noted earlier in these submissions, this requirement has been inserted as a

		standard of a permitted activity – accordingly, in the unlikely effect that these effects are occurring, then the activity would require a resource consent.
10.	The application of the OVERSEER model means there will be a level of discretion and uncertainty which is not appropriate for a *permitted* activity rule.	There will be no more uncertainty under the application of a resource consent than under a permitted activity – both will to the same extent need to rely on Overseer. To the extent, reliance is placed on other mechanisms (ie Nitrogen Risk Scorecard), then this uncertainty could be reduced equally for a permitted activity as for a controlled or restricted discretionary activity.
11.	It would not allow an iterative process between farmers and the Council, including the careful record keeping and auditing of the OVERSEER inputs and assumptions needed to ensure sound environmental outcomes.	For the reasons discussed above, the provision of such information is far more likely (and the quality of information will be far better) under a permitted activity and CSS scheme, than simply through requirements of consent conditions.
12.	While the Council may have powers to impose a targeted rate under other legislation, that does not substitute for the direct recovery of the Council's actual and reasonable costs under the RMA from those persons carrying out an activity with actual and potential effects on the environment.	See row 6 above

Schedule 1 – Legal submissions – Te Awamutu

Refer separate document.

BEFORE INDEPENDENT HEARING COMMISSIONERS

AT TE AWAMUTU

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions on applications for resource consent by Fonterra Limited for the manufacturing site at Te Awamutu

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LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED

(19 MARCH 2019)

RICHMOND
CHAMBERS

Counsel Instructed
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PO Box 1008
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Auckland 1140

MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. These submissions are presented on behalf of Fonterra Ltd (**Fonterra**), in respect of its applications for replacement consents authorising aspects of the Te Awamutu manufacturing site (**site**).

2. The site description, procedural background, and description of the relevant statutory framework are comprehensively set out in the s 42A Report and the planning evidence filed by Fonterra.

3. There is very little disagreement between the reporting officer and Fonterra, other than the two substantive issues set out below, namely:

   (a) the proposed condition governing the temperature of the discharge into the Mangapiko Stream (**temperature condition**); and

   (b) the appropriate term of the resource consents.

4. To assist the Commissioners, a marked up set of consent conditions from the s 42A Report is submitted with these submissions as **Appendix 1**. These mark ups have corrected some errors in the conditions, and have included Fonterra's proposed wording for the two outstanding matters set out above.

Temperature condition

5. An essential part of the manufacturing process is the drying of the milk. This process occurs at high temperatures and the water component of the milk that is evaporated subsequently cools and condenses (hence being referred to as condensate or, more colloquially, as "cow water"). Condensate is an inevitable outcome of the milk drying process, and the volume of condensate produced will fluctuate with the volume of milk accepted into the site.

6. In the existing resource consent for the discharge from the site, the temperature condition reads as follows:

> The discharge temperature shall not exceed 40 degrees Celcius [sic] until the rock filter has been installed. After the rock filter is installed, the discharge temperature shall not exceed 50 degrees Celcius. The discharge shall not cause the temperature of the Mangapiko Stream to increase by more than 1.5 degrees Celcius, after complete mixing, during the months of December, January, and February each year.

7. The temperature condition recommended in the s 42A Report reads as follows[1]:

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8A	Within a period of not less than 6 years, beginning on the date the consent commences and ending on the first 30th June after that 6 year period, the final discharge temperature shall not exceed 35 degrees Celsius. The discharge shall not cause the temperature of the Mangapiko Stream to increase by more than 3.0 degrees Celsius between monitoring sites US1 and DS2M, and shall not cause the
8B	Following the expiry of the period specified in Condition 8(A), the final discharge temperature shall not exceed 28 degrees Celsius. The discharge shall not cause the temperature of the Mangapiko Stream to increase more than 2.0 degrees Celsius between monitoring sites US1 and DS2M. In addition, the discharge shall not cause the Mangapiko Stream temperature to exceed 25.0 degrees C at monitoring site DSM2. For the purposes of this consent, the 25 degrees C requirement overrides the 2 degrees requirement.
8C	From 1 June 2029, in addition to the limits set out in Condition 8(B) above, the final discharge shall not cause the Mangapiko Stream temperature to exceed 19.0 degrees Celsius at monitoring site DS2M during the months of October and November.

8. Fonterra proposed, and is therefore comfortable with, a consent condition that limits the temperature of the discharge to 35°C for the first 6 years, and to 28°C thereafter.

9. Fonterra is also comfortable with the requirement that Fonterra's discharge should not increase the temperature of the Mangapiko Stream between the upstream and downstream monitoring stations by more than 3°C in the first 6 year period, and 2°C thereafter.

10. However what Fonterra cannot accept is the additional condition proposed by the reporting officers in 8C and on the end of 8B that would prohibit any discharge from causing the instream temperature to exceed 25°C. The effect of this condition would be to require Fonterra to cease discharging into the Mangapiko Stream at any time when the stream was at or above about 23°C.

11. That drastic restriction would apply notwithstanding that:

[1] A different version of the temperature condition is presented on page 50 of the s 42A report.

- No consent has been sought for any alternative method or location of discharge for the condensate and practically there is no ability for Fonterra to simply cease discharging condensate or wastewater if the stream temperature exceeded the trigger level for more than 2 hours.

- The increase in upstream temperature is caused by factors completely beyond Fonterra's control.

- Any "thermal barrier" caused by higher temperatures in the stream from the site's discharge is unlikely to have any effect due to higher temperatures existing downstream that would constitute a thermal barrier to upstream migrating fish, and arising from discharges unrelated to Fonterra and direct sunlight onto the surface water.

- Accordingly, if there is any adverse thermal barrier effect, the expert evidence filed by Fonterra concludes that the nature, extent and duration of such an effect, is of a minor or less than minor degree.

12. In my submission such a restriction is lawfully inappropriate, and, based on the probative evidence before the Hearing Panel, both unnecessary and unreasonable.

Legal principles – temperature conditions

13. The legal principles governing consent conditions will be well known to the members of the Hearing Panel. In summary they include:

- Adverse effects must be assessed against the existing environment. The existing environment must include the upstream water quality and temperature, and the downstream water quality and temperature (adjusted for any effects of the Fonterra discharge).

- While cumulative effects above the existing environment are a relevant effect, those cumulative effects are only relevant to the extent that Fonterra's discharge causes an effect above the existing environment.

- A condition must be logically connected to the effect that is the subject of the condition (or part of the condition): *Waitakere City Council v Estate Homes Ltd* [2007] NZLR 137 (SC).

- Conditions must be reasonably related to what is being authorised: *Matamata Piako DC v Matatmata Piako DC* A041/96.

- To be reasonable, conditions should be proportionate to the potential effect being considered, and should not be onerous or impractical in the long term: *Munro v Manukau CC* (A074/01).

- There is no jurisdiction for a consent authority to impose a condition as part of a resource consent when the application documents expressly exclude such conditions. Consent cannot be granted for something which the applicant did not intend nor seek to do: *Sustainable Ventures Ltd v Tasman DC* [2012] NZEnvC 235.

- It is a fundamental principle of resource management law that neither a consent authority nor the Court may impose conditions on a resource consent which could effectively nullify the consent: *Richmond v Kapiti Coast DC* [2016] NZEnvC 1.

Evidence – temperature conditions

14. The s 42A Report discusses temperature at [9.18] onwards (Report, [45]). In respect of the position set out in that report:

    - No formal expert evidence has been filed by the Regional Council in respect of its position on the temperature conditions. Subsequent to the s 42A Report being received, an email was provided from a Waikato Regional Council water quality scientist (Appendix 12.12) dated 28 February 2019 and headed "Technical comment re water temperature".[2] This addendum is dated after the date of the s 42A Report. This input was therefore presumably

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[2] This technical review makes the comment '*The length of the consent will also be important as temperature effects can be considered likely to increase due to climate change*" – but it fails to note that climate change effects are predicted over periods significantly greater than the consent term of 35 years, and the difference between climate change temperature between a 20 year consent and 35 year consent are not discussed. It is therefore difficult to understand how, in any meaningful sense, climate change effects are relevant to this consent process.

not considered by the reporting officers in their conclusions in the s 42A Report (that report being dated 26 February 2019).

- A number of references in the report refers to Fonterra needing to "cease the discharge" when the upstream temperature of the Mangapiko Stream reaches 23 to 23.5°C. Nowhere in the report does it explain what is supposed to happen to the condensate and treated wastewater during these periods.

- Despite several references to the Te Awamutu Sewage Treatment Plant consent application, the s 42A Report's authors fail to describe what temperature conditions were imposed on that consent (or explain why that was considered unnecessary). Despite the incredibly onerous conditions being imposed on Fonterra in respect of temperature, there appears to have been no such focus on the discharge from the Te Awamutu Sewage Treatment Plant. To put it bluntly, Fonterra considers this disparity in assessment and conditions to be inequitable and inappropriate.

- The s 42A Report acknowledges that "in practice the temperature keeps increasing downstream (not related to Fonterra)" (Report, [48]).

- There is a reference to correspondence from Fish & Game on 13/2/19 that supposedly "supports the proposed WRC staff conditions 8A to 8C". This is not elaborated on in any detail.

- Accordingly, with very little analysis or expert support in terms of the actual and/or potential effects of the elevated temperature discharge from the Fonterra site, the s 42A Report concludes "WRC staff consider that there is a need to reduce the Fonterra discharge temperature, as it contributes to stream temperatures above 19°C in November, and to the stream temperature exceeding 25°C at times (albeit infrequently) at Bowman Rd."

15. Fonterra has comprehensively addressed the issue of temperature, both in respect of effects as well as the steps taken by Fonterra to reduce the temperature:

    - Evidence of Paul Kennedy, addressing the aquatic ecological environment.

    - Evidence of Stephen Gillespie, summarising the proposed cooling towers proposed by Fonterra and costs associated with that proposed upgrade.

    - Supplementary evidence of Stephen Gillespie, providing further information on the existing and proposed temperature of the combined discharge, and consequential temperature differential in the Mangapiko Stream.

16. Mr Kennedy's conclusions, as summarised in the planning evidence of Mr Chrisp at [3.15] are:

    - There will be no significant adverse effects on aquatic ecosystems;

    - There will be no adverse effects on flow regimes, uses of water reliant on the characteristics of flow regimes or the range of reasonably foreseeable uses of ground water and surface water;

    - There will some enhancement of the quality of the Mangapiko Stream (being a 'degraded waterbody') including a significant reduction in nitrogen and phosphorus and a two-step improvement / reduction in temperature; and

    - None of the adverse effects listed in Policies 4, 6 and 7 will arise as a consequence of Fonterra's discharges from the Te Awamutu Site.

Submissions

17. The proposed consent condition is not lawful. Having regard to the legal principles and evidence summarised above, I respectfully submit that:

- The existing environment represents a stream that can have elevated temperatures both upstream of the Fonterra site, and elevated temperatures downstream of the Fonterra site, both of which are unrelated to Fonterra's activities.

- While Fonterra's discharge will cause an increase in the temperature of the Mangapiko Stream immediately downstream of the discharge point, this increase will be limited to a change of 3°C and then 2°C (maximum), and most of the time the change will be far less. Furthermore, there is an additional layer of control through the imposition of a maximum temperature of the discharge itself (which is significantly lower than the temperature condition in the current resource consent).

- There is no evidence to suggest that this increase in temperature would cause a thermal barrier to fish migration past the Fonterra site, but, even if it did, the effect (in terms of intensity and/or duration) on that fish migration would be minor.

- Even if the discharge might cause a thermal barrier at the Fonterra site, other unrelated activities would cause a greater thermal barrier further downstream.

- In those circumstances, a requirement to close down a manufacturing site with a replacement value of more than $600M at times when the Mangapiko Stream's upstream temperature is at or above 23°C is completely disproportionate to the adverse effect purported to be addressed by the condition. Furthermore it is simply not possible to close down and restart the site as the temperature in the stream fluctuates, and accordingly such a condition is both onerous and impracticable in the long term.

- The consent condition envisages that the final discharge, being condensate and treated wastewater, could be diverted. There is no application before the Hearing Panel for a resource consent to discharge condensate and treated wastewater elsewhere in that manner. Accordingly, it is not appropriate for a consent condition

to require steps to be taken for which consents are required but have clearly not been sought.

- Finally, it is inappropriate to impose a consent condition that would have the effect of nullifying the grant of consent. In this instance, granting consent subject to the condition proposed by the Regional Council would be to effectively nullify the grant of consent. This is because Fonterra would not be able to shut down the site when the temperature of the stream exceeded 23°C and there is no option available to divert the condensate and treated wastewater.

18. As a more general point, the s 42A Report appears to be interpreting the relevant temperature guidelines in the Regional Plan as some sort of environmental bottom line. Properly interpreted they are permitted activity standards, which if breached would simply require a resource consent to be obtained (refer evidence of Mark Chrisp, [3.10]-[3.15]). Through that consent process, as has occurred here, the potential effects of the breach of the temperature standard can be assessed and any appropriate conditions imposed. It would be nonsensical in those circumstances to impose a consent condition effectively requiring the permitted activity standard to be met. That defeats the entire purpose of seeking a resource consent.

Term

19. If the Hearing Panel decides to grant consent, there remains a dispute about an appropriate term. Fonterra seeks 35 years for all 3 consents. The s 42A Report recommends a maximum term of 20 years.

20. The appropriate term, as assessed against the relevant planning framework, has been comprehensively assessed by Mr Chrisp for Fonterra and his analysis is relied on for the purposes of this assessment.

21. The starting point is Policy 6 in Section 1.2.4 of the Waikato Regional Plan, which states:

> **Policy 6: Consent duration**
>
> When determining consent duration, there will be a presumption for the duration applied for unless an analysis of the case indicates that a different duration is more appropriate having had regard to case law, good practice guidelines, the potential environmental risks and any uncertainty in granting the consent.

22. Given that policy's direct relevance to the issue before the Panel, it is strange that this policy was not referred to in the s 42A Report or included within the reporting officers' assessment.

23. However, as correctly noted by the s 42A Report, s 113(1)(b) requires that reasons be given for imposing a consent duration that is less than that sought. Those reasons and Fonterra's responses are summarised in the sections below.

Legal principles – Consent Term

24. In considering an appropriate duration of consent, the Environment Court has held that (case references for these propositions can be provided):

- a "decision on what is the appropriate term of the resource consent is to be made for the purpose of the [RMA]" (in other words, any term selected must promote sustainable management);
- assessing an appropriate term of consent is "not a process of calculation, but of judgment";
- "uncertainty for an application of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term";
- the life expectancy of the asset for which consents are sought is a relevant consideration; and
- the decision maker must consider the lack of efficiency in requiring consent holders to submit new applications following a short term consent.

25. In *Bright Wood v Southland Regional Council*, the Environment Court concluded that a consent term of 25 years, as sought by the appellant (rather than the 15 years originally recommended by the Regional

Council) was appropriate for consent to discharge contaminants to air from a timber processing operation at Otautau.

26. In confirming the term of 25 years, the Court determined that:

> If there are adverse effects from that discharge the review conditions should, as Mr Chapman submitted, be adequate to avoid or remedy them. To protect its investments on the site Bright Wood is entitled to as much security of term as is consistent with sustainable management.

27. The Environment Court has found that review conditions may be more effective than a shorter term consent to ensure that conditions do not become outdated and safeguard against any potential adverse effects. The Planning Tribunal in *Medical Officer of Health v Canterbury Regional Council* held that a review condition is:

> ...a mechanism by which a consent authority can ensure that conditions imposed on a resource consent do not become outdated, irrelevant or inadequate.

28. In addition, the RMA Quality Planning Resource's 2013 guidance document titled Consent Steps - Resource consent conditions states:

> A condition limiting the duration of consent to a short term period, may not be the best way to address uncertainties about and [sic] adverse effect. Assuming that there is no further information that would reduce the uncertainties and that they are not so significant that the consent application should be declined, a range of adaptive management, monitoring/reporting and review conditions may at times be more appropriate.

Regional Council's internal guidelines

29. In respect of the 22 matters listed in the Regional Council's guidelines, I have considered each of these in light of the evidence filed and record my submissions below. Many of these factors are unavoidably subjective, and in my opinion these are simply one element of an overall assessment that needs to be made by the Hearing Panel on the question of term:[3]

- (1) There is a high degree of certainty as to the nature, scale, duration, frequency, longevity and consistency of adverse effects from the discharge. This certainty has arisen out of the existing operation to date and the data collected, and this certainty will be further enhanced by the treatment plant upgrades that will further

[3] Refer also Evidence of Mark Chrisp, Attachment A, pp 27-29

reduce the fluctuations in outputs from the treatment plant. This is not a situation where there is any prospect of some new contaminant needing to be discharged, or some significant new effect on the environment being generated, such as might occur in other discharge consents. This is not a reason to impose a term shorter than that requested by Fonterra.

- (2) Related to the above, there is a very low risk of any unforeseen adverse effect arising from the activity. The processing of milk products is a stable process, and while there may be process improvements and changes in the products manufactured, if those changes result in any changes to the nature or degree of contaminants being discharged then a variation to consent will be needed. This is not a reason to impose a term shorter than that requested by Fonterra.

- (3) and (9) The manufacturing site represents an investment of some $616M (replacement value) and contributes significantly to the district and regional economy. The manufacturing site has an expected lifespan well beyond any current consent term, and accordingly these criteria weigh in favour of the maximum term of 35 years.

- (4) Relevant to this hearing, the resource to be used is the assimilative capacity of the Mangapiko Stream. There is a reasonable level of knowledge about the stream, however the current consent conditions require a range of measures that will significantly enhance that knowledge. This includes more detailed temperature readings and flow gauging, and Mātauranga Māori involvement in the monitoring and assessment processes. There is nothing in this criterion that would warrant a term shorter than 35 years.

- (5) There is no suggestion that this is a speculative application for a scarce resource. It is an existing, regionally significant industry, recognised as such in the Waipa District Plan. This criterion is not relevant.

- (6) The rate of change of the mitigation technology has been addressed by Fonterra in its evidence. While technology will improve over time, the evidence before the Hearing Panel is that there is unlikely to be a step change in treatment technology that would *significantly* further reduce adverse effects. Nonetheless, Fonterra has proposed a technology review condition specifically designed to require an assessment of any new technology. If the outcome of that review is that there is a significantly better treatment option that would represent BPO, then the Council has the legal power to commission a formal review process to require Fonterra to adopt it. Out of all of the criteria, because it is likely there will be some technological advancements over the term of any consent if granted, this is probably the only criterion that might weigh in favour of a shorter term than requested by Fonterra, however as discussed this can also be accommodated within the term of consent proposed by Fonterra.

- (7) There is no particular reliance on modelling, given that this is an existing activity. While predictions have been made in terms of likely future effects, these are conservative predictions and the actual effects are likely to be less. There would be no basis under this criterion to impose a term shorter than 35 years.

- (8) Other than the issue of temperature (see above submissions), there is no dispute as to the appropriateness of conditions or the proposed monitoring, the latter of which will have both scientific and Mātauranga Māori methods. The site has an excellent record of compliance. These factors weigh in favour of a long term consent of 35 years.

- (10), (11) and (18) This is a replacement consent, with an existing capital investment of $616M (replacement value) together with a proposed capital upgrades proposed of $16M over the next 6 years. As noted above, the site has an excellent environmental compliance record. There is no record of any "considerable public disquiet" as a result of the application; in fact there is no disquiet at all. These factors, together with the projected lifespan of the

site's manufacturing assets, all weigh very strongly in favour of term of consent of 35 years.

- (12) There is very strong alignment with the national and local policy instruments, in particular with the Proposed Plan Change 1 (PC 1). The only aspect not in compliance is with respect to temperature, which is not contrary to any overarching objective or policy and is not regulated by PC 1, but is simply contrary to one permitted activity standard in the Waikato Regional Plan. Furthermore, this exceedance is largely related to the existing upstream environment. For those reasons, this criterion weighs in favour of a long term consent duration.

- (13) The receiving environment, the Mangapiko Stream, is not particularly sensitive, however Fonterra is, through the upgrades proposed, further improving the quality of the discharge into the stream. There is nothing related to this criterion that would warrant a shorter term consent.

- (14) Fonterra does not consider that the effects of the discharge are more than minor. Notwithstanding that, Fonterra has assessed the costs of and benefits of alternatives means of disposal (i.e. to land). This alternative method of disposal does not represent BPO. This criterion does not weigh in favour of either a longer or shorter term.

- (15) While there are no consent conditions requiring the adopting of BPO, Fonterra has proposed a technology review condition that will require a report to be provided to Council advising of any technological improvements that might represent an advancement on BPO. It would be inappropriate for Fonterra to commit at this stage to adopting any future BPO option, without being able to assess what that option involved. To the extent that any condition requiring that a consent holder adopt a (non-specified) BPO at any time in the future is appropriate or reasonable, then this criterion would be neutral or would weigh in favour of a term of consent of

between 20-30 years. (This criterion is linked with criterion (6) above.)

- (16) The site will remain industrial for the foreseeable future. There is no land use change that will be affected by the discharge. This criterion does not weigh in favour of any shorter term of consent than what has been requested.

- (17) The stability of the manufacturing process and the extent of the conditions, together with the technology review condition and general review conditions, all mean that the consent conditions will remain effective in the long term at managing the effects of the discharge. This criterion weighs in favour of a term of 35 years.

- (19) The mitigation of effects is largely automated, with appropriate redundancy. This criterion weighs in favour of a longer term consent.

- (20) and (21) PC 1 proposes a very strict desired attribute state in the long term for both the Waikato and Waipa Rivers. Accordingly, while there may be changes to the control of contaminants other than those listed in PC 1, the outcome for those 4 contaminants is known now. If and when any additional plan changes or NPSs or NESs are promulgated then that will, if necessary, offer an ability for the Regional Council to call for a review of the conditions. Fonterra considers it unlikely however that it will be required to significantly further reduce its contaminant load during the term of the consent, given the stringent nature of the conditions proposed for this consent. Furthermore, as discussed in the planning assessment, specific policies of PC 1 anticipate a term of consent for point source discharges of more than 25 years provided certain criteria are met. I submit those criteria are met, and accordingly this criterion would weigh in favour of a term longer than 25 years.

- (22) Administrative efficiency would count strongly in favour of granting a longer term of consent of up to 35 years. Imposing a

consent condition of 20 years for no good environmental reason is administratively inefficient.

30. Out of all of those 22 factors above, only two would call for a term significantly shorter than the 35 years sought by Fonterra. In my submission, the extent these criteria are weighed by the Hearing Panel in their deliberations (and it is a helpful list), then the criteria should be looked at holistically. It would, with respect, be inappropriate to place too much weight on those very few factors that would weigh in favour of a term shorter than that requested by Fonterra. This overall assessment is particularly important given that, under Policy 6 in Section 1.2.4 of the Waikato Regional Plan, the starting point is the term of consent requested by an applicant. (The s 42A Report did not start with that policy, and it did not assess all these factors systematically, and nor did it provide any guidance as to what it saw as either significant matters or priority matters that might justify an outcome different to that sought by an applicant.)

Three matters the Regional Council says are irrelevant [73]

31. The s 42A Report says that security of investment *per se* is not relevant. It is unclear what distinction the report is endeavouring to make in this respect. Fonterra has never said that it seeks a longer term solely because of security of investment, but rather it is seeking that a longer term be granted because to do so is consistent with sustainable management of physical resources (i.e. the manufacturing site) – refer legal principles summarised above.

32. Despite the s 42A Report referring to the caselaw being ambiguous in respect of the relevance of s 128 to the question of term, no details are given of these cases. In respect of s 128, there is no suggestion that the activity on site would become inappropriate in 20 years such that consent should be declined – hence the only need for a review would be to tweak conditions or impose new conditions. Accordingly, the more limited powers of a s 128 review are more appropriate and taking that approach rather than requiring a replacement consent application to be made is

administratively more efficient. A Council's reluctance to use a s 128 process is not a reason to impose a shorter term on an applicant.

33. I agree that imposing a shorter or longer term for reasons outside of the RMA would be entirely inappropriate. There is no suggestion that either Fonterra is seeking a shorter or longer term because of a non-RMA related matter, however at least one aspect of the Council's reasoning for a shorter term consent is beyond the RMA's ambit (see paragraph [42] below).

Value of investment and expected life of capital assets

34. This issue has been addressed above. In response to the matters raised, while Council staff may have "assumed" an asset life of 20 years for the existing WWTP or proposed upgrades (which happens coincidentally to match their recommended term), I can advise that the expected life is more than 30 years.

Planning timeframes proposed by Fonterra

35. This reason given in the s 42A Report would appear to imply that if Fonterra's upgrades were spread over a longer period, then that would justify a longer term. Fonterra has, very responsibly, committed to installing the upgrades within a shorter timeframe so as to achieve the environmental benefits as soon as practicable. It would be a perverse outcome if implementing environmental upgrades immediately counted against an applicant in respect of the term of consent granted by a consent authority.

Case law

36. The Environment Court has determined the appropriateness of term on a number of occasions. While those decisions can provide helpful principles, attempting to use the specific durations granted (as the s 42A Report appears to be doing) is inappropriate as each case is very context specific.

Expected changes to the planning regime and societal expectations

37. Fonterra accepts that there will likely be a continuing drive for water quality improvements generally, however it says that within the Waikato River and Waipa River catchments the Vision & Strategy and the long term (80 year) desired attribute states are likely to represent the "high water mark" for water quality. These long term targets will be very challenging for those within the catchments, however the advantage for Council is that it has visibility of those targets now. While those desired attribute states cannot be (and are not intended to be point source discharge limits), they provide a useful benchmark against which to assess any particular point source discharge's contribution to those overall targets. With that in mind, in my submission there will not be any seismic shift in terms of society expectations for the Mangapiko Stream and certainly not anything that would require the appropriateness of Fonterra discharge to be re-examined in 20 years.

38. The s 42A Report has also referred to technology change generally, and while that is an interesting comparator, it is a largely irrelevant. The likelihood of significant changes in wastewater treatment has been specifically addressed in the expert evidence filed by Fonterra. This expert evidence, by Mr Fullerton of Beca, is consistent with previous evidence from Mr Russell, of Fonterra, which was filed in respect of the Tirau manufacturing site which I discuss below. (In case it is of interest, I have provided a copy of that evidence with these submissions. For the avoidance of doubt, that evidence is not filed as evidence in these proceedings. It is simply for context and it represents a consistent approach by Fonterra to this same issue raised by Council staff on a previous application for re-consenting.)

39. Finally, I note that the conclusion in respect of term appears to be limited to that of temperature. In particular at [75] the s 42A Report states that it "is not tenable to grant a long term for the Fonterra Te Awamutu discharge, until the thermal discharge is either eliminated in summer, or there is effective mitigation (perhaps by extensive riparian shade planting). At present Fonterra is offering neither of these." In response:

- For the reasons proposed above, Fonterra does not consider that such a condition on temperature in the nature proposed is lawful, appropriate or reasonable. (Remembering that Fonterra is agreeing to conditions on temperature, and is only refusing to agree to a condition that would put the operation of the site at the mercy of the upstream temperature of the Mangapiko Stream.) Accordingly, the failure to agree to such a condition cannot represent a ground for not imposing the term sought by the applicant.

- Secondly, and without resiling from the submission above, Fonterra is now proposing a contribution to riparian planting. Fonterra has committed to working with the Lower Mangapiko Streamcare Group for an immediate project on four properties identified ($30,000) and given a concern that establishment and maintenance of previous projects has seen a need to re-plant, a further $50,000 is approved. Accordingly, even on the Report's own recommendation, a longer term would accordingly be appropriate.

Typical range of terms granted by the Waikato Regional Council

40. For similar reasons to that discussed above under the heading "caselaw", reference to previous terms granted by WRC is also of limited relevance to this Panel's decision. Nonetheless, Fonterra wishes to briefly comment on this section as follows:

- The reference to Fonterra Tirau as being granted for 19 years is incorrect. In that case, similar to here, the Council had proposed a term of 19 years that was opposed by Fonterra. Fonterra sought a term of 27 years, as that date accorded with a catchment wide review process and corresponded with other consents expiring on the site. Term was the only issue outstanding after lodgement and consultation. After the presentation of the s 42A Report and the exchange of Fonterra's evidence and legal submissions, the Regional Council changed its position and agreed to a term of 27 years without the need for a hearing.

- Despite the reporting officer (correctly) noting that each consent is evaluated on its merits, the Report then comments that in "all of the above examples, there were no significant conflicts with the WRP water classification standards, as occurs with the Mangapiko Stream temperature, and Fonterra's heat discharge exacerbating an already degraded water body". With the greatest of respect to the authors of the s 42A Report, relying on a "breach" of one permitted activity standard with respect to the effects of temperature on (primarily) trout – which are not even present in the stream – to try and separate out Fonterra from the other applications listed is simply not credible. It cannot be the case that the environmental effects of, say, the Pukekohe STP would be less than Fonterra's Te Awamutu site, let alone the discharges from Inghams, Wallace and Affco, all of which received a term longer than recommended in this case.

Review conditions as defaults for long duration

41. Again this matter has been addressed above. However, I need to correct the legally incorrect statement that there are "key differences between the two, particularly with respect to public consultation and involvement." Under the RMA, once a review is triggered, the process for a review is identical to that for a replacement consent. Accordingly, there is *no difference* with respect to public consultation and involvement.

42. Very strangely the Report's conclusion, at [76], that there "is clearly a level of comfort held by iwi and the community as a whole, for the proposed WWTP upgrades", is then followed by a comment that the community's views about the discharge and its effects will change over the years and "that a shorter term would be more effective to ensure that Fonterra consults widely with the community".

43. Any suggestion that Fonterra be subject to a shorter term in order to "ensure that Fonterra consults widely with the community" is a completely unlawful ground for imposing a shorter term. It is a very good example of an *ultra vires* reason of the type referred to in the s 42A

Report. As the Hearing Panel will be aware, there is no requirement in RMA to consult.

Uncertainty and potential environmental risks

44. Despite agreeing that the risks of unforeseen events or uncertainties in effects are low, the s 42A Report nonetheless concludes that "it [presumably the application] does not in itself lead to the maximum possible term, or a term close to that." The reasoning here is very difficult to follow. I would have thought the reason a s 42A Report for a major discharge might conclude that the effect of the discharge is relatively minor would be because … the effect is relatively minor. Furthermore, I would have thought that the proposed upgrades and mitigation would absolutely be a factor in favour of a longer term. Indeed, if, a maximum term (or close to it) is not available in circumstances where the effect is relatively minor and significant upgrades and mitigation are proposed, then when would such a term be appropriate?

Proposed Plan Change 1 (Healthy Rivers)

45. The s 42A Report records that the proposed WWTP upgrade will result in a proportional reduction in catchment loads of N and P, and the s 42A Report further notes that "*E Coli* and sediment loads do not need to be reduced as they are very minor already" (Report, [76]).

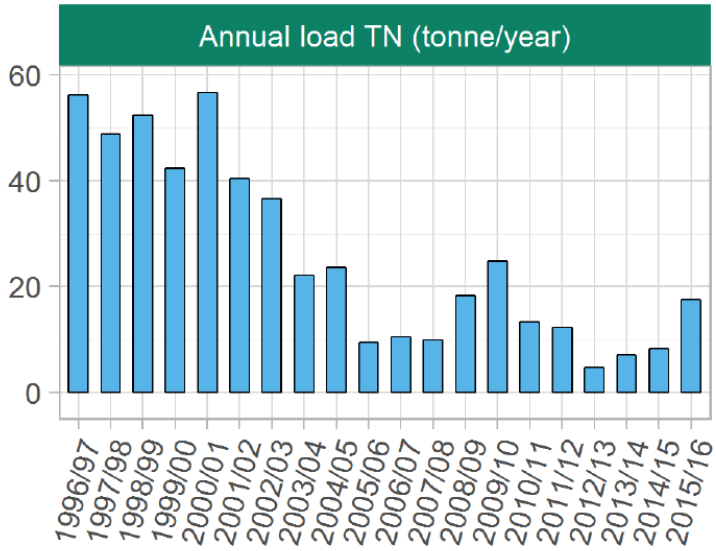
46. The s 42A Report also records that the proposed WWTP upgrades represent BPO in 2024, but not agree that this will represent BPO in 2035, 2045 or 2054 (35 year term). This issue is addressed below, however in summary it is my legal submission that any assessment of BPO must be undertaken now and that it would be illogical and unreasonable to require a BPO assessment now for some time period in the future.

47. The s 42A Report refers to Fonterra's proposed condition to report on BPO by 2035, but then says that "there is little hope that [any BPO option] will be implemented by Fonterra. This type of condition has been included in some discharge consents granted by WRC for at least the last 2 decades, and reports prepared, but to date not a single upgrade has

occurred to my knowledge." This appears to be getting to the genuine core of the reporting officer's concern about term. In response, I would submit:

- The content and nature of those reports is not visible to Fonterra, however just because upgrades have not occurred directly relating to those reports does not mean that upgrades have not occurred.

- Fonterra at this, and other sites, adopts a process of continuous improvements and improves over time. This provides a better environmental outcome than "saving up" the upgrades for a consent process". See for example, the following graph from p 9 of the Golder Report, Appendix E of the AEE showing reductions in the discharge of TN during the term of the current consent.



Submitters' views on term

48. I am unaware of any RMA provision or principle set out by the Environment Court that would make any submitters' view relevant to the question of term. If it is relevant, it certainly cannot be determinative, because that would be to delegate the decision making power (or recommendatory power) to a submitter rather than sitting with the Regional Council or its authorised delegate (i.e. a hearing panel).

49. To the extent that the submitter views are relevant and state a term, all of the submitters would accept a term greater than the 20 years recommended by the Report.

50. The issues relating to Policies 11, 12 and 13 are addressed below.

Other matters

Policies 11, 12 and 13

51. At [77] the s 42A Report concludes that because the requirements in Policies 11 and 12 are not met (in the opinion of its authors), then Policy 13 (a term exceeding 25 years) should not apply. The matters not met appear to be an assertion that:

- The upgrades will not represent BPO in 2054 (or before then)
- Fonterra has not proposed any "offset measures or mitigation for residual effects"

52. I address each of these below:

- The Report's reasoning implies that to meet Policy [13] what is being proposed must meet the requirement for BPO not only now, but also at the expiry of any consent being granted. With respect, that conclusion is nonsensical:

  (1) If a proposed treatment technology represents BPO in 20 or 35 years, then by definition it would *exceed* the BPO now. So, if the Council's interpretation were adopted, to meet Policy 13 you would need to exceed the BPO now (i.e. adopt treatment technology that was better than the BPO). That is not what the policy says, and nor is it how the BPO obligation has ever been interpreted or imposed by the Environment Court.

  (2) More fundamentally, any requirement to meet the BPO at the expiry of any consent would require a Hearing Panel to know what that BPO would be. Because that would be impossible, it is likewise impossible to ever meet the policy test such that you could obtain a term of consent longer than 25 years. It is not

credible to suggest that policy was drafted, or should be interpreted, in a manner that would be impossible to ever be able to achieve.

- In respect of Policies 11 and 12, the Report has applied a test whereby all residual effects must be offset or mitigated (see [76]), and other statements that "Fonterra has not proposed any offset measures or riparian planting to provide mitigation for the residual adverse effects" ([60]). Fonterra is not required to fully offset any or all of its adverse effects. This is clear from the relevant part of Policy 11 "***Where it is not practicable to avoid or mitigate all adverse effects*** …". Fonterra has mitigated all effects associated with its discharges, including through the cooling towers reducing the temperature of the condensate at the point of discharge; there is certainly no requirement for complete mitigation. Furthermore, under PC 1, nor is temperature one of the 4 listed contaminants.

- Elsewhere in the Report this obligation is phrased differently (and correctly), for example: "if it is not practicable to avoid or mitigate adverse effects, an offset measure may be acceptable"(see [59]). Fonterra has complied with this (correct) elucidation of the requirement because Fonterra has certainly mitigated all of its effects (including temperature).

53. Because Fonterra has met the requirements of Policies 11, 12 and 13, in my submission the starting point under the PC 1 policies should be for a term "exceeding 25 years."

54. For completeness, and as observed by Mr Chrisp, the Report has misquoted Policy 10, and omitted the reference to regionally significant industry (which the Te Awamutu site most certainly is) (cf [59] with the below):

> **Policy 10: Provide for point source discharges of regional significance/Te Kaupapa Here 10: Te whakatau i ngā rukenga i ngā pū tuwha e noho tāpua ana ki te rohe**
>
> When deciding resource consent applications for point source discharges of nitrogen, phosphorus, sediment and microbial pathogens to water or onto or into land, provide for the:

a. Continued operation of regionally significant infrastructure´; and

b. Continued operation of regionally significant industry´.

55. "Regionally significant industry" is defined in the Waikato Regional Policy Statement as:

> **Regionally significant industry** - means an economic activity based on the use of **natural and physical resources** in the region and is identified in regional or district plans, which has been shown to have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits.

56. In turn, Section 7.1.6 of the Waipa District Plan recognises the Te Awamutu site as significant:

> The existing dairy manufacturing sites at Te Awamutu and Hautapu are significant industries that are important to the local and regional economy.

Weight to be given to PC 1 provisions

57. I acknowledge the PC 1 is at a relatively early stage the submission and hearing process (with first stage hearings only commencing last week), and that there is a question as to the weight that can be given to it. The High Court has confirmed that "the closer the proposed plan comes to its final content, the more regard is to be had to it." (*Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815 at [9]).

58. In my submission, despite its early stage, more weight than usual should be placed on the provisions of PC1. This is because PC 1 is designed to give effect to the Vision & Strategy (itself an operative planning instrument of very high importance), because PC 1 represents a paradigm shift in the Regional Council's approach to the management of the Waikato and Waipa River catchments, also because of the extensive consultative procedure that preceded the notification of PC 1. (I acknowledge that despite that process, there remains a very large number of submissions, seeking a wide variety of outcomes to PC 1 as a whole.)

59. However, whatever weight this Panel gives to the PC 1 provisions, then that weight must be consistent. In other words, it would be

inappropriate, in my submission, to give more weight to some provisions of PC 1 than others.

Evidence

60. The following witnesses have filed evidence in support of Fonterra's application:

- **Mr Dave Wright**, Consent Manager, Fonterra Ltd, will describe the site, the public consultation, and the engagement with Waikato Regional Council staff.

- **Mr Stephen Gillespie**, Senior Process Engineer of Worley Parsons, will briefly summarise his reports examining cooling options for the condensate.

- **Mr Daryl Irvine**, Technical Director and Environmental Engineer, Pattle Delamore Partners, will summarise his investigations in irrigation as an alternative disposal mechanism.

- **Ms Rachael Shaw**, Technical Director and Wastewater Engineer at Beca Ltd, will describe the findings of her report evaluating options for upgrading the site's wastewater treatment plant.

- **Mr Rob Fullerton**, Senior Technical Director of Environmental Engineering at Beca Ltd, will examine and describe the extent to which wastewater treatment is likely to evolve and in particular whether any BPO review is likely to yield substantive changes in wastewater treatment technology.

- **Mr Paul Kennedy**, Principal Environmental Consultant at Kennedy Environmental Ltd, will address certain technical matters raised by the s 42A Report, including in particular the predicted effects of temperature.

- **Mr Mike Copleland**, Consulting Economist and Managing Director of Brown, Copeland and Company, will summarise his 2016 Assessment of Economic Impact of the Te Awamutu site.

- **Mr Mark Chrisp**, Director and Principal Environmental Planner at Mitchell Daysh Ltd, will provide a full planning assessment of the proposal.

61. Of those witnesses, the Hearing Panel has requested only that certain witnesses appear and answer questions. Those witnesses will now present their evidence.

Bal Matheson
Counsel for Fonterra Limited
19 March 2019

APPENDIX 1 – MARKED UP CONSENT CONDITIONS

(See separate PDF)