

Report to the Collaborative Stakeholder Group – for Agreement and Approval

File No: 23 10 02
Date: 15 December 2015
To: Collaborative Stakeholder Group
From: Chairperson – Bill Wasley
Subject: Property Management Plans – activity status, compliance with catchment wide rule and reference to third party
Section: **Agreement and Approval**

Disclaimer

This report has been prepared by Waikato Regional Council policy advisors for the use of Collaborative Stakeholder Group Healthy Rivers: Wai Ora Project as a reference document and as such does not constitute Council's policy.

1 Purpose

The purpose of this report is to provide information for the Collaborative Stakeholder Group (CSG) to refine the Property Management Plan policy option, by considering more information on permitted activities, industry schemes and third party auditing and the capacity to use property management plans for compliance with catchment wide rules.

Recommendations:

1. That the report [Property Management Plans – activity status, compliance with catchment wide rule and reference to third party] (Doc #3591205 dated 15 December 2015) be received.

That the collaborative Stakeholder Group use the information in this report in considering:

- a. The activity status for the property management plan rules, and
- b. The property management plan subgroup meets in mid January 2016, so that they can report back a proposal to the CSG on the purpose and outline of Property Management Plans in the first stage toward achieving Scenario 1 (the Plan Change in 2016), and roles and responsibilities.

2 Background

During CSG discussions questions have been raised by members about property management plans (PMP) as a permitted activity and specific consideration around industry schemes in terms of the legality of third party auditing.

This report covers some considerations about property management plans including permitted activities and council discretion to approve the PMP, activity status and what council can put conditions on, other councils' approaches to property management plans, complying with a catchment wide rule via a property management plan and third party documents.

3 Property Plans subgroup

A report¹ and presentation was provided at the last CSG workshop 20 (December 9-10) with examples of Property Management Plan rules and some information on the differences between controlled and permitted activities. This report/presentation also posed some questions about the rules e.g. thresholds, triggers, mechanism for sharing responsibility for change and scope that still need to be decided. Some members of the CSG nominated themselves to work on PMP rules outside of CSG workshops and report back to the CSG; George Moss, James Houghton, Graeme Gleeson, Sally Millar, Gwyneth Verkerk, Charlotte Rutherford. Chris Keenan also asked the CSG if a HortNZ planner could be involved in this property plan subgroup and Al Fleming indicated that an Environment/NGOs staff member might like to be included in this subgroup. Other industry sector staff names were suggested.

Some of the matters discussed at CSG workshop 20 were planning details that can be filled in once high level decisions that need have been made. These are related to the discussion CSG is having on 17th-18th December (CSG 21) on options for managing within limits.

A key matter is that the property managed plan CSG sub-group would need to cover is the purpose of property management plans in the first stage toward scenario 1 (the Plan Change in 2016) and roles and responsibilities.

4 Permitted activities

The CSG has received a report and presentation on implementation considerations at CSG 19 (December 9-10) that provided some information on the differences between controlled and permitted activities² (WRC 2105 Property Management Plan (PMP) rules 2 December 2015 DM#3625488). Some points from this session with WRC staff and CSG included:

Typically there is more scrutiny of consents relative to a permitted activity which generally reflects the relative risk of activities and their effects in an RMA sense. But the enforcement options available are the same.

Ideally, anything permitted is something where there is confidence that it can be undertaken without regulatory intervention, because its effects both individually and cumulatively will be acceptable.

To the extent that the policy approach expects those "must-do" parts of Property Management Plans to be complied with, then they must be written in language which enables this. That is clear, unequivocal language which enables them to be easily

¹ WRC 2105 Property Management Plan (PMP) rules 2 December 2015 DM#3625488

² From the WRC implementers presentation at CSG 19

"Permitted activity vs. a consent

What best achieves the behaviour change sought?

Essentially a PA is a free resource consent

Both are subject to the same enforcement options

Consents arguably allow for more direct engagement between Council and land-owners

Charging mechanisms are fundamentally different – equity issue for PA approach?

Consents – greater administration cost to those affected?" (implementation Presentation DM#3616740)

understood and, as importantly, readily enforceable. There should be an expectation that those aspects of the PMP will be enforced³.

5 Permitted activities and council discretion to approve the property plan

Permitted activities should not rely on any sort of additional approval process by the council.

There is the potential for legal impediments or issues if a permitted activity seeks to retain Council discretion to “approve” the PMP. The council can, however, take compliance and enforcement action on the elements of the plan not meeting the Waikato Regional Plan requirements.

6 Permitted vs. Consented activity status

Permitted activity rules require landholders to meet a range of conditions that if not met prompts the need to get a resource consent. If landholders cannot meet the conditions in a permitted activity, the activity covered by the rule is no longer permitted. There is no discretion for the Council to negotiate the actions the landholder must take to meet the Permitted Activity conditions. For instance, permitted activity conditions could specify the template to be used, and that a certified person completes and signs the template.

If conditions of a permitted activity can not be met, another rule usually⁴ provides for the activity through a resource consent. As with all rules, the council monitors compliance and is able to take enforcement action.

A resource consent may be granted on any condition that the consent authority considers appropriate (refer to section 108 RMA). The Council, for example, may include conditions that the holder of a resource consent supply information relating to the exercise of the resource consent, require the holder of the consent to take samples and measurements etc. The council could reserve control over the mitigations in the PMP under a consented approach.

7 Complying with a catchment wide rule via a property plan

The CSG has had a number of discussions about the thresholds and feasibility of catchment wide rules. In these conversations the concept of compliance with catchment wide rules in the property management plan has been raised.

If the CSG chooses a permitted activity, the landholder needs to have certainty that if they meet all the conditions then they are in compliance with the rule. The consent process allows some flexibility (in conditions of the consent – matters council maintain control over) in the actions a landowner undertakes as part of their property management plan, whereas a permitted activity does not. If landholders cannot meet the conditions in the property management plan permitted activity, there is not the discretion for the Council to identify alternative means of meeting the rule requirements (i.e. conditions). In other words, it is not possible to have permitted activity property management plans which give landowners the choice of how they are going to meet catchment wide requirements.

³ Implementation considerations presentation CSG 19 DM#3616740

⁴ For a prohibited activity a resources consent cannot be applied for

For instance, the CSG could choose to have a permitted activity to undertake farming activities as long as a property management plan was submitted to council (by a date, using the template, prepared by a certified person). However, if there is also a catchment-wide rule that takes effect by 2017 to exclude all cattle from waterways, then the permitted activity property management plan could not re-negotiate 'on these mapped waterways, stock will have access till 2020'.

When the question about compliance with the catchment wide rules in a property management plan was posed to the WRC implementers at CSG 19, they felt that for practical reasons exemptions should be incorporated into the catchment wide rules themselves rather than combining catchment wide rules discretion being applied via individual property management plans (i.e. allowing exceptions from meeting rule requirements – e.g. extra time to complete fencing if catchment wide rules require it) (Workshop 19 notes DM#3629626).

The Tukituki Catchment Plan Change 6 does have an example of a rule that refers to property management plans as a means of meeting rule requirements (within the same rule). This specifically stipulates that stock exclusion requirements (for areas outside high risk catchments, where slope is 15degrees or steeper and stocking rate greater than 18 stock units per ha), alternative measures may be used to manage P loss if stock exclusion is not "reasonably practical" in areas of the property (HBRC 2015) (Refer to Appendix 4 for rule⁵).

8 Permitted activity for property management plans and s70 considerations

There has also been some CSG conversation about section 70 of the Resource Management Act 1991 related to the need to satisfy that the effects likely to arise from the activity to meet the requirements for including a permitted activity rule (Refer to Appendix 1). These conversations raised questions about the appropriateness of permitted activity status versus some for of consented activity for property management plans.

CSG has raised concerns that having the property management plan approach as a permitted activity status may fail a legal challenge (workshop 19 notes). This is related to permitted activity rules not being clear and unambiguous to the plan user and the community. For instance, conditions that give discretion to third parties to 'approve' matters, or conditions that reference an external document that may change.

9 Roles and responsibilities to develop and check actions in the plan are completed

Several approaches have been discussed by the CSG, and differ in the role of council and the sector /industry to develop plans and check if actions in the property management plan are undertaken.

The Council staff have interpreted from the several approaches being discussed by the CSG that what is being proposed is working with industry to implement property management plans and incorporate industry assurance schemes. This does not amount to Council giving

⁵ The plan change also has a definition of "Low intensity farming system: Means farm properties or farming enterprises that contain no more than 8 stock units per hectare including permanent horticultural and viticultural crops (such as orchards, vineyards) and lifestyle properties; but does not include
a) Properties used for the production of rotational vegetable crops;
b) Dairy farms;
c) Grazed forage crops" Page 35 HBRC 2015.

away responsibility to do monitoring and enforcement i.e. it is not a transfer of Council's functions⁶. The council cannot relinquish its monitoring and enforcement roles to implement the rules in the Plan Change and its role in ensuring the water quality outcomes are met.

Developing the Property Management Plan

Whether the approach is via a permitted activity or consent, it is likely that there would be external providers involved in working with the landowner to develop the Property Management Plan. The property management plan would be based on a clear and specific template as to the nature and extent of its content, and particular mitigations would be determined by reference to the specific water quality objectives/targets relevant to that part of the region.

Ensuring the property management plan was sufficient

The PMP would be certified and signed off by a qualified person, giving more confidence to the community and council that the property management plan met the regional plan requirements. Council would then give the property management plan a final approval as meeting the requirements of the Permitted Activity or the consented rule (whichever applied). In the case of a consented activity, council would issue a consent that contained the list of actions and timeframes to be achieved as set out in the PMP attached to the consent. The role of external providers would be to provide support and resources beyond the council's capacity to implement, and to give a separation between the applicant and the regulator.

Monitoring

Under the RMA, the Council would play an important role in the monitoring and enforcement of property management plans, so this needs to be accommodated in any chosen approach. Public perceptions regarding the integrity of the process overall will be important, and the independence of monitoring and enforcement is central to this.

10 Land and Water Forum - Regulating GMPs, Industry assurance scheme for primary production sector

In its latest report the Land and Water Forum (LAWF) made some recommendation and consideration regarding discharges, regulating Good Management Practices (GMPs), activity status and Industry Assurance Schemes. Below are just a few relevant points from the LAWF report, refer to Appendix 3 for the details.

Some relevant points from the report:

- Just moving everybody to GMP may not be enough to meet limits.
- There is varying information and understanding across different regions and sectors on both what constitutes GMP and the level of GMP in place.
- Farm plans set out the proposed and/or already implemented actions and commitments of the farmer that contribute to achieving desired catchment outcomes.
- Whether a land use activity is permitted or requires a discharge or land use consent will generally depend on the level of risk associated with the activity.
- The legitimacy of any permitted activity rule must be clearly demonstrated.
- Should the Forestry National Environmental Standard be implemented, it is intended that forestry activities complying with the Standard would be given permitted activity status in regional plans.

⁶ Regional Council functions are defined in s30(1) of the Resource Management Act (RMA) as including "the control of the use of land for the purpose of ...maintenance and enhancement of the quality of water". Transfer of the Council's functions (RMA s33) can only be made to public authorities.

“Recommendation 17: Discharges should be managed through the Resource Management Act by way of a consent requirement unless the council demonstrates using permitted activity rules will be sufficient for achieving the limits within the agreed timeframes. Whatever approach is used, there must be a transparent process to audit performance, either through an approved independently audited industry self-management scheme and/or a council compliance process that is documented and clear to both land and water users and the groups involved in the planning process”.

11 Legality of Permitted Activity conditions referring to third party documents

The CSG has asked questions about the legality of permitted activity standards referring to third party documents.

A legal opinion requested by Fonterra from Russell McVeagh by Fonterra on the question of permitted activity standards referring to third party documents has recently⁷ provided via the CSG dairy sector delegate to WRC, and permission given for this to provide to the CSG. Refer to Appendix 2 for a copy of this legal opinion. Comment has been provided on this legal option from WRC legal advisor Shaun Plant.

The following comments have been made by WRC legal advisor Shaun Plant on 16 November 2015 based on a query on the legal option attached. See Appendix 2 Legal opinion requested by Fonterra from Bal Matheson of Russell McVeagh, dated 21 October 2015.

“Russell McVeagh has confirmed that Fonterra is comfortable with the letter of advice dated 21 October being circulated to CSG. I have reviewed the advice and agree with the analysis and conclusion. I think that his examples of valid and invalid performance standards at paragraph 10 and the associated analysis is very useful. My only other comments to add to the issue are that:

- a) As with any Regional Plan provisions, a proposed Permitted Activity rule and its performance standards needs to be assessed in s32 terms;
- b) When drafting consider the reasonableness, practicality and enforceability of any proposed provisions; and
- c) WRC cannot abdicate its monitoring and enforcement roles.”
(pers comms Shaun Plant, 16 November 2015)

12 Summary

This report provides further information on the property management plan policy by considering more on permitted activities, industry schemes and third party documents and ability to use property management plans for compliance with catchment wide rules.

This included permitted activities and council discretion to approve the PMP, activity status and what council can put conditions on, complying with a catchment wide rule via a property management plan referring to third party documents in a rule and some comments from legal advisors on one aspect of rule drafting.

⁷ Email to Justine Young on 21 October 2015, attaching legal opinion.

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Appendix 1 RMA sections 30, 33, 70, 108.

Appendix 2 Legal opinion provided to WRC from Fonterra (Bal Matheson Russell McVeagh dated 21 October 2015).

Appendix 3. Expert from LAWF Fourth report.

Appendix 4. Tukituki production land use permitted activity rule.

13 References

HBRC (2015) Plan Change 6 to the Hawke's Bay Regional Resource Management Plan–Tukituki Catchment Final as at the 25 June 2015 <http://hbrc.govt.nz/HBRC-Documents/HBRC%20Document%20Library/Tukituki%20PC6%20decisions%20-%20June%202015.pdf>

Land and Water Forum, 2015. The Fourth Report of the Land and Water Forum

Resource Management Act 1991. Downloaded from www.NZ Legislation 7 December 2015.

Waikato Regional Council (2015). Collaborative Stakeholder Group workshop 19 notes DM#3629626.

Waikato Regional Council (2015). Options for Tailored Property plans. 9 October 2015 DM#3563987.

Waikato Regional Council (2015). Property Management Plan rules, 2 December 2015 DM#3625488.

Waikato Regional Council 2015. Report to the Collaborative Stakeholder Group – for information (updated 20 November) Intensive engagement period 2 quantitative feedback, 17 November 2015 DM#3615281 (note that this is the correct DM number – it was incorrectly reported in the document recommendation as DM#3410308).

Appendix 1 - RMA sections 30, 33, 70 and 108

The following RMA 1991 sections are provided:

1. Section 30 Functions of regional councils under this Act
2. Section 33 Transfer of powers
3. Section 70 Rules about discharges
4. Section 108 Conditions of resource consents

Experts⁸ from the Resource Management Act 1991 (RMA):

Functions, powers, and duties of local authorities

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

- (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
- (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:
- (c) the control of the use of land for the purpose of—
 - (i) soil conservation:
 - (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:
 - (iii) the maintenance of the quantity of water in water bodies and coastal water:
 - (iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:
 - (iv) the avoidance or mitigation of natural hazards:
 - (v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:
- (ca) the investigation of land for the purposes of identifying and monitoring contaminated land:
- (d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—
 - (i) land and associated natural and physical resources:
 - (ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:
 - (iii) the taking, use, damming, and diversion of water:
 - (iv) discharges of contaminants into or onto land, air, or water and discharges of water into water:
 - (iva) the dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:
 - (v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:
 - (vi) the emission of noise and the mitigation of the effects of noise:
 - (vii) activities in relation to the surface of water:
- (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
 - (i) the setting of any maximum or minimum levels or flows of water:
 - (ii) the control of the range, or rate of change, of levels or flows of water:

⁸ Refer to RMA for full details

- (iii) the control of the taking or use of geothermal energy:
 - (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:
 - (fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:
 - (i) the taking or use of water (other than open coastal water):
 - (ii) the taking or use of heat or energy from water (other than open coastal water):
 - (iii) the taking or use of heat or energy from the material surrounding geothermal water:
 - (iv) the capacity of air or water to assimilate a discharge of a contaminant:
 - (fb) if appropriate, and in conjunction with the Minister of Conservation,—
 - (i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:
 - (ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:
 - (g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—
 - (i) soil conservation:
 - (ii) the maintenance and enhancement of the quality of water in that water body:
 - (iii) the maintenance of the quantity of water in that water body:
 - (iv) the avoidance or mitigation of natural hazards:
 - (ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:
 - (gb) the strategic integration of infrastructure with land use through objectives, policies, and methods:
 - (h) any other functions specified in this Act.
- (2) A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.
- (3) However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control aquaculture activities for the purpose of avoiding, remedying, or mitigating the effects of aquaculture activities on fishing and fisheries resources.
- (4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:
- (a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and
 - (b) nothing in paragraph (a) affects section 68(7); and
 - (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and
 - (d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—
 - (i) allocate all of the resource used for an activity to the same type of activity; or
 - (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
 - (e) the rule may allocate the resource among competing types of activities; and
 - (f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3) (b) to (e).

33 Transfer of powers

(1) A local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section.

(2) For the purposes of this section, public authority includes—

- (a) a local authority; and
- (b) an iwi authority; and
- (c) [Repealed]
- (d) a government department; and
- (e) a statutory authority; and
- (f) a joint committee set up for the purposes of section 80; and
- (g) a local board.

(3) [Repealed]

(4) A local authority shall not transfer any of its functions, powers, or duties under this section unless—

(a) it has used the special consultative procedure set out in section 83 of the Local Government Act 2002; and

(b) before using that special consultative procedure it serves notice on the Minister of its proposal to transfer the function, power, or duty; and

(c) both authorities agree that the transfer is desirable on all of the following grounds:

- (i) the authority to which the transfer is made represents the appropriate community of interest relating to the exercise or performance of the function, power, or duty;
- (ii) efficiency;
- (iii) technical or special capability or expertise.

(5) [Repealed]

(6) A transfer of functions, powers, or duties under this section shall be made by agreement between the authorities concerned and on such terms and conditions as are agreed.

(7) A public authority to which any function, power, or duty is transferred under this section may accept such transfer, unless expressly forbidden to do so by the terms of any Act by or under which it is constituted; and upon any such transfer, its functions, powers, and duties shall be deemed to be extended in such manner as may be necessary to enable it to undertake, exercise, and perform the function, power, or duty.

(8) A local authority which has transferred any function, power, or duty under this section may change or revoke the transfer at any time by notice to the transferee.

(9) A public authority to which any function, power, or duty has been transferred under this section, may relinquish the transfer in accordance with the transfer agreement.

70 Rules about discharges

1. Before a regional council includes in a regional plan a rule that allows as a permitted activity—

- (a) a discharge of a contaminant or water into water; or
- (b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

- (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
 - (d) any conspicuous change in the colour or visual clarity:
 - (e) any emission of objectionable odour:
 - (f) the rendering of fresh water unsuitable for consumption by farm animals:
 - (g) any significant adverse effects on aquatic life.
2. Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—
- (a) the nature of the discharge and the receiving environment; and
 - (b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

108 Conditions of resource consents

- (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
- (2) A resource consent may include any 1 or more of the following conditions:
- (a) subject to subsection (10), a condition requiring that a financial contribution be made:
 - (b) a condition requiring provision of a bond (and describing the terms of that bond) in accordance with section 108A:
 - (c) a condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:
 - (d) in respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):
 - (e) subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:
 - (f) in respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 87A(2)(b) or (3)(a)):
 - (g) in respect of any resource consent for reclamation granted by the relevant consent authority, a condition requiring an esplanade reserve or esplanade strip of any specified width to be set aside or created under Part 10:
 - (h) in respect of any coastal permit to occupy any part of the common marine and coastal area, a condition—
 - (i) detailing the extent of the exclusion of other persons:
 - (ii) specifying any coastal occupation charge.

- (3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.
- (4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do 1 or more of the following:
- (a) to make and record measurements:
 - (b) to take and supply samples:
 - (c) to carry out analyses, surveys, investigations, inspections, or other specified tests:
 - (d) to carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
 - (e) to provide information to the consent authority at a specified time or times:
 - (f) to provide information to the consent authority in a specified manner:
 - (g) to comply with the condition at the holder of the resource consent's expense.
- (5) Any conditions of a kind referred to in subsection (3) that were made before the commencement of this subsection, and any action taken or decision made as a result of such a condition, are hereby declared to be, and to have always been, as valid as they would have been if subsections (3) and (4) had been included in this Act when the conditions were made, or the action was taken, or the decision was made.
- (6) [Repealed]
- (7) Any condition under subsection (2)(d) may, among other things, provide that the covenant may be varied or cancelled or renewed at any time by agreement between the consent holder and the consent authority.
- (8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to—
- (a) the nature of the discharge and the receiving environment; and
 - (b) other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment—
the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.
- (9) In this section, financial contribution means a contribution of—
- (a) money; or
 - (b) land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent), but excluding Maori land within the meaning of Te Ture Whenua Maori Act 1993 unless that Act provides otherwise; or
 - (c) a combination of money and land.
- (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—
- (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
 - (b) the level of contribution is determined in the manner described in the plan or proposed plan.

Appendix 2 Russell McVeagh Legal opinion

RUSSELL McVEAGH

21 October 2015

PARTNERS

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Dear Charlotte

LEGALITY OF PERMITTED ACTIVITY STANDARDS REFERRING TO THIRD-PARTY DOCUMENTS

Introduction

1. Fonterra is considering seeking that regional plans provide for farming activities as permitted activities provided that the farm is part of an industry audited self-management scheme. It has been proposed that a permitted activity standard could be drafted that determines compliance based on whether or not an activity and property are included on a list of industry audited self-management participants.
2. You have asked us to provide our legal opinion on whether such an approach is lawful. Our detailed advice is provided below.

Review of case law and planning instruments

3. Under section 87A(1) of the Resource Management Act 1991 ("RMA") resource consent is not required for a permitted activity, provided that it complies with the requirements, conditions and permissions, if any, specified in the RMA, regulations or relevant plan.
4. Case law has provided an additional gloss to section 87A(1), requiring that applicants be able to ascertain whether, on the face of the plan, a proposed activity complies or not. It is a well established principle that a permitted activity standard will be invalid if it relies on discretionary judgement, or is too wide, vague or uncertain. One of the leading High Court cases (although in the context of the RMA's predecessor) summarises this as follows:¹

The authorities cited establish two distinct propositions. The first is that a Council may not reserve by express subjective formulation, the right itself to decide whether or not a use comes within the category of predominant use. Council cannot, for example, put forward an Ordinance which says A will be a predominant use "if the Council is satisfied situation B exists". Predominant uses fall for objective ascertainment. That much certainty always is required. The second is that predominant use

¹ *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, at 372-373

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rights must not be described, even in objective fashion, in terms so nebulous that the reader is unable to determine whether or not a use may be carried on in the zone. This second aspect does not involve any express subjective formula. It involves, simply, invalidity through inherent vagueness.

5. However, the Court did go on to identify that some level of evaluation is permissible, stating:²

The law does not require predominant uses to be defined ("specified") with scientific or mathematical certainty. Some degree of flexibility is permissible. A decision-making body frequently must hear evidence, and reach a conclusion after weighing competing factors. In the end, the question reduces to one of degree: is the subject description too wide, or too vague, to have "some measure of certainty"? That is not an inquiry assisted by imported references to "discretion" and value judgements". It is not a situation for automatic condemnation because some degree of evaluation is involved.

6. This approach has been applied in many instances, including recently in *Friends of Pelorus Estuary Inc v Marlborough District Council*.³ In that case Judge Sheppard confirmed that some degree of evaluation is appropriate, provided that sufficient meaning can be drawn from the standard:

Within the range of evaluative conditions, I accept that the terms *significant* and *best practicable option* (to which the RMA expressly attributes a meaning) have sufficient meaning to be capable of being applied in practice. I do not accept FPEI's submission that they are too subjective to support a decision relying on them.

7. Another relevant decision is *Twisted World Ltd v Wellington City Council* W024/2002. That case involved a permitted activity standard that stated:

Signs must be displayed only on plain wall surfaces where they do not obscure windows or architectural features.

8. There was a debate in the case about what "obscure" and "architectural features" meant. The Court concluded:⁴

We accept that concepts of subjective formulation and vagueness should be distinguished.

On the first, we accept the submissions of both parties that a district plan may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity. Permitted activities fall for objective ascertainment. On the second, we also accept that if a rule defining a class of activity incorporates an element that is so uncertain that the definition is not functional, the rule might be invalid for inherent vagueness.

It is in the nature and purpose of district plans that some classifications and rules cannot be expressed in measurable units, such as of height or area. Objectively phrased conditions of permitted activities are not necessarily ruled out merely because they require an exercise of judgement. But they are to be assessed for validity on their own degree of certainty or lack of it. So we accept the submissions of counsel for the appellants that

² *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, at 375
³ *Friends of Pelorus Estuary Inc v Marlborough District Council* C004/08, at [108]
⁴ *Twisted World Ltd v Wellington City Council* W024/2002, at [62]-[64].

we have to consider whether the condition in question is too wide or too vague to have that element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing competing factors.

9. Finally, we are aware of other plans that contain permitted activity standards that determine activity status by reference to the existence of external documents. An example is the partially operative Canterbury Land and Water Regional Plan 2015, which includes the following "condition" that must be met by certain permitted activities:⁵

5. Where the take is from a water race, irrigation or hydro-electricity canal or storage facility, the abstractor holds a current written agreement with the holder of the resource consents for the taking of water into the water race, canal or storage facility;

...

Analysis

10. Based on that review, the essential test is whether the permitted activity standard is capable of objective ascertainment, without relying on any form of "subjective formulation". Two examples best illustrate this point:

- (a) A theoretical example of a valid performance standard would be:

Farming is a permitted activity subject to the following conditions:

1. *The farming activity and the property on which it is undertaken are listed on the register of industry audited self-management (IASM) participants located on the IASM participant website.*

- (b) A theoretical example of an invalid performance standard would be:

Farming is a permitted activity subject to the following conditions:

1. *The Regional Council considers that the farming activity and the property on which it is undertaken comply with the requirements of the IASM participant website.*

11. In the first case it is clear whether or not the farm is listed on the website; in the second example, it would not be possible to ascertain objectively whether or not in any particular case the farm was complying with the relevant obligations. Rather, the question would have to be asked (and answered) - does the Regional Council consider that the requirements have been met?
12. While we accept that ultimately there may be some judgement or approval required in order to be listed on the website, that does not remove the fact that the existence of the farm activity and property on the register is capable of objective ascertainment, without relying on any form of discretionary decision. In principle, this is no different from situations, like that evident in the Canterbury Land and Water Regional Plan 2015, whereby there would have been all manner of negotiations and decisions made leading up to an agreement between the abstractor and the holder of consents for the water race, canal, or storage facility.

⁵ Canterbury Land and Water Regional Plan 2015, rule 5.111.

13. Please let us know if you would like to discuss this in greater detail.

Yours faithfully

RUSSELL McVEAGH

A handwritten signature in blue ink, appearing to read "Bal Matheson", with a long horizontal flourish extending to the right.

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Appendix 3 – LAWF fourth report

Land and Water Forum, 2015. *The Fourth Report of the Land and Water Forum*

Excerpts from LAWF fourth report

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Management of Discharges

129. The Forum's third report recognised the importance of good management practice (GMP) for setting and managing within limits. Recommendation 15 stated that GMP should be defined and adopted in all catchments and included recommendations to maximise the contribution from GMPs and to ensure their effectiveness as essential methods in achieving limits and freshwater objectives. The report defined GMPs as:

an evolving suite of tools or practical measures that are being put in place at a land user, sector and industry level to assist in achieving community agreed outcomes (in this case for water quality).

130. This reflects the responsibility to use the water and assimilative capacity available within the limit efficiently to free up resources for new uses within the catchment while still ensuring environmental outcomes are achieved.

131. Just moving everybody to reasonable water use and GMP may not be enough to meet limits in some catchments. Other tools will be needed to create a system that incentivises innovation and efficiency improvements to free up resources for other economic uses and to manage to limits. Management approaches will also need to consider:

- a. including infrastructure development and catchment- scale mitigations
- b. using discharge allocation approaches to manage contaminants where possible. These approaches may:
 - i. set discharge caps that apply at the property scale (to individual properties or groups of properties)
 - ii. create transferable discharge allowances that are allocated via individual or group consents and are able to be transferred
- c. managing non-allocated contaminants by requiring better management practices and/or controlling inputs and/or land use.

132. When deciding the specific tools and interventions to be used, the impact of the various steps should be modelled to check that they should result in the limit being managed within. Subsequent monitoring will check whether or not expected results are being achieved within desired timeframes. Catchments will then be managed adaptively, with actions adjusted in the light of their results. Further steps, including land use change, may be needed where limits are not being met.

133. The discussion below is focussed primarily on water quality in a rural context, with water quality in urban environments discussed in a later section. However, much of the material also applies in an urban context.

Regulating GMPs for primary production sector

134. GMP, including how it is recognised in regulation, needs to be considered in the context of the system within which GMP tools are created and improved over time, rather than just a list of practices. As set out in Figure 2 below, a wide range of matters need to be considered to ensure development and, equally importantly, the up-take and implementation of GMP is effective and efficient in achieving desired water quality outcomes.

Figure 2 [not included - refer to actual report]

135. GMP continually evolves with new technology and innovation. Therefore it is important that any regulation of GMP as far as possible allows for GMP to evolve, rather than locking it in as a static concept.

136. GMP is the minimum requirement for all industries, and is central in contributing to managing within limits. This means that increased attention is being given to understanding and documenting what GMP is, including for modelling and accounting purposes as reflected in recommendation 13. This focus needs to continue.

137. There is varying information and understanding across different regions and sectors on both what constitutes GMP and the level of GMP in place. Information is improving as limit setting processes are occurring. A notable example is the *Industry Agreed Good Management Practices related to Water Quality* document [<http://ecan.govt.nz/get-involved/mgmproject/Pages/matrix-good-management.aspx>]. This list of high-level industry-agreed GMPs has been developed by Environment Canterbury to estimate the “footprint” of nitrogen and phosphorus loss for the range of Canterbury farm systems, assuming operation at GMP. The practices have been developed in conjunction with some key national primary sector groups to cover the dairy, sheep and beef, deer, horticulture, arable and pork sectors. It does not cover all primary sector groups (for example, forestry), and will need to be supplemented by other recognised sectoral GMPs.

138. While it will not be possible to make detailed national prescriptions for each element of GMP in a particular catchment, some degree of national understanding about a framework for thinking about agricultural GMP would be useful and prevent councils and communities from unnecessarily having to reinvent the wheel. As a starting point, councils and their communities should consider the *Industry Agreed Good Management Practices related to Water Quality* material when developing GMP-related policies for the primary sectors mentioned above. Similarly, other sectors have also developed good practice material (e.g. the *NZ Environmental Code of Practice for Plantation Forestry* developed by the Forestry Owners' Association) that will prove useful. It is important that industry GMP documents are regularly reviewed and updated.

139. In most cases determining exactly what GMP is will be context specific given the particular circumstances. The risks that need to be managed will vary with land uses and land and soil types, the myriad of activities and management decisions made on a daily basis and the particular water quality issue of concern in a catchment. Some councils are requiring farm plans as a way to identify tailored management actions that are appropriate for managing key risks to water quality associated with the enterprise. Farm plans set out the proposed and/or already implemented actions and commitments of the farmer that contribute to achieving desired catchment outcomes. The Farm Environment Plans National Collaborative Working Group has provided a useful platform for discussing how farm plans can be designed and implemented in a way that helps lift farmer capability and promotes sustainable and profitable farming within environmental limits. A number of councils are requiring farm plans as part of a consent requirement. Primary industry bodies are assisting their members by working with councils to explore using existing (or improved) industry programmes (e.g. Beef and Lamb's *Land and Environment Plan Toolkit*) where such plans are required.

140. Whether a land use activity is permitted or requires a discharge or land use consent will generally depend on the level of risk associated with the activity. Consent requirements are

more likely where catchments are not meeting desired water quality outcomes, where properties contain hotspots or areas of ecological significance, or for unusual activities.

141. Determining where consents are required and the nature of permitted activity rules necessary for managing within limits will need to be part of a planning process at the regional or catchment level. The legitimacy of any permitted activity rule must be clearly demonstrated as these tests are not always robustly applied in practise when a permitted activity rule is set. Care must be taken when devising any permitted activity rule that it is consistent with the NPS-FM and the Resource Management Act (RMA). Clarity and certainty are important as uncertainty can lead to litigation, increase risks of failure to operate within limits, less effective management of activities, and unclear and unreliable distribution of costs and benefits. Permitted activity rules should therefore only be used if a council can demonstrate that the proposed rule (and its standards):

- a. is clear, capable of consistent interpretation and enforceable
- b. is consistent with s69(3) of the RMA
- c. will fulfil the specific requirements in s70 of the RMA.

142. The regional planning process will also consider requirements for other rural land uses (e.g. septic tanks on life style blocks), and management of urban land uses.

143. Permitted activity status may be adequate where risks are low and/or can be adequately managed (e.g. by being part of a Sustainable Land Use Initiative programme that is included as a method in a plan and accounted for and monitored, or through membership of a suitable industry scheme). Should the Forestry National Environmental Standard be implemented, it is intended that forestry activities complying with the Standard would be given permitted activity status in regional plans. Approaches such as discharge caps, where activities are permitted providing that the nutrient discharge cap (modelled on Overseer) is not exceeded, have also been given permitted activity status in some plans.

Recommendation 16: Good Management Practice is the minimum requirement for all industries. In developing GMP-related policies and methods, councils should consider in the first instance the national *Industry Agreed Good Management Practices related to Water Quality* framework and other recognised sector GMPs.

Recommendation 17: Discharges should be managed through the Resource Management Act

by way of a consent requirement unless the council demonstrates using permitted activity rules will be sufficient for achieving the limits within the agreed timeframes. Whatever approach is used, there must be a transparent process to audit performance, either through an approved independently audited industry self-management scheme and/or a council compliance process that is documented and clear to both land and water users and the groups involved in the planning process.

Appendix 4 – Tukituki production land use permitted activity rule

Plan Change 6 to the Hawke’s Bay Regional Resource Management Plan– Tukituki Catchment Final as at the 25 June 2015

<http://hbrc.govt.nz/HBRC-Documents/HBRC%20Document%20Library/Tukituki%20PC6%20decisions%20-%20June%202015.pdf>

Rule	Activity	Classification	Conditions/Standards/Terms/Matters of Control and Discretion /Notification
TT1 Production land use Refer to POLs TT1 to TT5	The use of production land on farm properties or farming enterprises in the Tukituki River catchment pursuant to s9(2) RMA.	Permitted	a. For farm properties or farming enterprises exceeding 4 hectares in area: <ul style="list-style-type: none"> (i) the records specified in Schedule XXI shall be retained for each year (1 June to 31 May) from 1 June 2013 onwards to enable a Nutrient Budget to be prepared, or (ii) copies of Nutrient Budget input and output files that have been prepared in accordance with an industry programme approved by Hawke’s Bay Regional Council shall be kept; and those records or files shall be provided to the Hawke’s Bay Regional Council upon request.³⁹ b. For farm properties exceeding 4 hectares in area a Farm Environmental Management Plan shall be prepared in accordance with Schedule XXII by 31 May 2018 and thereafter implemented by 31 May 2020. The Farm Environmental Management Plan shall be updated at 3 yearly intervals from 1 June 2018 and include; <ul style="list-style-type: none"> (i) a Nutrient Budget⁴⁰, incorporating the measurement or modelling of whole of property nutrient losses (kg/ha/year) calculated using the annual records specified in Schedule XXI and the Overseer Nutrient Budget model (or an alternative model approved by Hawke’s Bay Regional Council); and (ii) a Phosphorus Management Plan including details specified in Schedule XXII; and (iii) All other information relevant to the farm property required for Farm Environmental Management Plans by Schedule XXII. c. The records kept in accordance with condition (a) (i) and (a) (ii) shall be reviewed annually in accordance with an industry programme approved by Hawke’s Bay Regional Council (or in the absence of an industry programme, as directed by Hawke’s Bay Regional Council) to assess whether any farm system changes are evident. If such a change is evident, the Nutrient Budget for the farm system and from 31 May 2018 the Farm Environmental Management Plan must be updated to determine whether the nitrogen leached from the land exceeds the Tukituki LUC Natural Capital; Nitrogen Leaching Rates in Table 5.9.1D on a whole of farm property or whole of farming enterprise basis. All reviews and amended Nutrient Budgets must be made available to the Hawke’s Bay Regional Council upon request.

		<p>d. For farm properties or farming enterprises exceeding 4 hectares in area, after 1 June 2020 the nitrogen leached from the land (measured or modelled as a loss from the root zone using Overseer or an alternative model approved by Hawke’s Bay Regional Council) shall not exceed Tukituki LUC Natural Capital; Nitrogen Leaching Rates in Table 5.9.1D on a whole of farm property or whole of farming enterprise basis, estimated using a 4 year rolling average;</p> <p>e. For single paddocks on land delineated in Schedule XX41 as having a slope of 15 degrees or less all livestock (other than sheep) shall be excluded from the beds and margins of any lake, wetland and flowing river (whether intermittent or permanent) by 31 May 2020;</p> <p>f. For single paddocks on production land delineated in Schedule XX41 as having a slope of greater than 15 degrees and where the stocking rate of livestock excluding sheep exceeds 18 stock units per hectare either:</p> <ul style="list-style-type: none"> (i) all livestock (other than sheep) shall be excluded from the beds and margins of any lake, wetland and any flowing river (whether intermittent or permanent) by 31 May 2020; <p>or</p> <ul style="list-style-type: none"> (ii) Outside of the Papanui, Porangahau, Maharakeke, Tukipo, Kahahakuri and upper Tukituki corridor catchments (as shown in Schedule XIV), for individual farm properties or farming enterprises exceeding 4 hectares in size, by 31 May 2020 a Phosphorus Management Plan shall be prepared as part of a Farm Environmental Management Plan and it shall include stock exclusion requirements where stock exclusion is reasonably practicable and alternative phosphorus loss mitigation measures where stock exclusion is not reasonably practical. (iii) Within the Papanui, Porangahau, Maharakeke, Tukipo, Kahahakuri and upper Tukituki corridor catchments (as shown in Schedule XIV) Rule TT1(f)(i) must be complied with. <p>g. Notwithstanding conditions (e) and (f), grazing of a permanently fenced riparian margin may occur for weed control purposes provided that:</p> <ul style="list-style-type: none"> (i) The total period of grazing in any year does not exceed 7 days; (ii) The fenced riparian margin shall be grazed no more than twice in any year during the period 1 November to 30 April. <p>h. Notwithstanding conditions (e) and (f), stock may continue to utilise managed stream crossing points (where stock are usually excluded from the surface water body but are actively herded across the surface water body by the farmer).</p> <p>i. Permanent and intermittent rivers that are crossed by formed stock races shall be bridged or culverted by 31 May 2020.</p> <p>j. After 31 May 2020, for farm properties or farming enterprises exceeding 4 hectares in area excluding:</p> <ul style="list-style-type: none"> (i) Low intensity farming systems; and <p>Those that solely comprise plantation forestry (being forestry operations deliberately established for commercial purposes), nitrogen leached from the land shall be demonstrated⁴² to be not causing or contributing to any measured exceedance of the Table 5.9.1B limits for the 95th</p>
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		<p>percentile concentration of nitrate-nitrogen or the limit for dissolved inorganic nitrogen at the downstream HBRC monitoring site nearest to the farm property or farming enterprise in the relevant mainstem or tributary of a river or to any measured exceedance of the Table 5.9.2 groundwater quality limits for nitrate-nitrogen.⁴³</p> <p>k. For farm properties or farming enterprises exceeding 4 hectares in area, contaminants leached from the land shall be demonstrated⁴² to be not causing or contributing to any breach of the Resource Management (National Environmental Standards for Human Drinking Water) Regulations 2007 or the guideline values or maximum acceptable values for determinands in the Drinking Water Standards of New Zealand (2005 Revised edition 2008) or subsequent version for any registered drinking water supply takes. (Note: Hawke's Bay Regional Council is satisfied that this permitted activity rule will not cause or contribute to any such breach for any registered drinking water supply but condition k. is included here for completeness.)</p> <p>l. Notwithstanding conditions (a) to (d) and (j) to (k) above, where a farm property or farming enterprise meets the Glossary definition of a low intensity farming system the requirements of conditions (a) and (b) above, shall only apply where the farm property or farming enterprise exceeds 10 hectares in area.</p>
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