

Tabled at Hearing 06/05/2013

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of the Proposed Canterbury Land
and Water Regional Plan

**SUBMISSIONS OF COUNSEL FOR FONTERRA CO-OPERATIVE GROUP LIMITED
AND DAIRYNZ FOR THE GROUP 2 HEARING**

1. INTRODUCTION

- 1.1 My submissions respond to legal questions arising from the submitters' evidence and précis the evidence addressing some of Fonterra and DairyNZ's chief concerns.

2. STRUCTURE OF THE PLAN

- 2.1 Fonterra and DairyNZ support the general approach of the Plan to the broad package of controls on farming and the process that the Regional Council has adopted. Fonterra and DairyNZ support in particular the establishment of an interim regime that will take effect and that will manage water quality until such time as the collaborative limit setting approach contemplated by the Canterbury Water Management Strategy can be undertaken and introduced into the Plan by way of Plan Change under the Resource Management Act. Such an approach of catchment-by-catchment limit setting is entirely consistent with the approach of the National Policy Statement for Freshwater Management and will ultimately ensure that any regulation is tailored to catchment-specific circumstances, targets the right contaminants and activities and ensures that people and communities can set and manage to values that they have determined to be appropriate for their local conditions. In the long term, this approach will ensure that some of the temporary challenges posed by the coarseness of large-scale "zoning" maps such as those included in the Plan will

be overcome. The ultimate approach may be non-uniform, but appropriately tailored to the special circumstances of each catchment.

- 2.2 This process will take time, although it is noted that in the Council's Long Term Plan prepared under the Local Government Act, a number of the catchment-specific Plan changes will be introduced to the Regional Plan this year.¹ In the meantime, the Council does not propose to do nothing. It has proposed a comprehensive (in fact in the Plan as notified a two-step) interim regime that at a broad scale evaluates the allocation status of catchments and puts in place measures to ensure that any further nitrogen loss and water quality reductions are prevented. Fonterra and DairyNZ support this approach.
- 2.3 Whilst much argument from many parties (including Fonterra and DairyNZ) focuses on the detail of these provisions, it is important not to lose sight of the fact that they are but an interim or fallback measure and that the Council's expressed intention as committed to under the Local Government Act is to introduce more specific provisions for catchments in the short through to the medium term.

3. FARMING IN THE INTERIM

- 3.1 Fonterra and DairyNZ accept that water quality and quantity in the Canterbury Region require careful management. That management cannot wait until such time as catchment-specific or sub-regional plans are devised, introduced and adopted through the Schedule 1 process. Fonterra and DairyNZ accept that farming, amongst other activities, is a legitimate target for management in that intervening period. Fonterra and DairyNZ accept the Council's new approach of controlling a land use activity, namely farming, with a view to ensuring water quality is appropriately managed.
- 3.2 It is important at this juncture to reflect upon the s 5(2) definition of "*sustainable management*". That term is defined as:

"managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities

1. Environment Canterbury Long Term Plan, p.108 sets targets involving five sub-regional catchment plans for the 2013 year.

to provide for their social, economic, and cultural wellbeing and for their health and safety while" achieving specified environmental ends.

- 3.3 The directive that management of natural and physical resources occur in a way or at a rate that enables people and communities to provide for themselves is important. Management change may be need to achieve the purpose of the Act. But the way that change occurs, or its rate, should not be such as to leave communities or people bereft in terms of their social, economic or cultural wellbeing. It is fundamental that the interim regime that the Council establishes until such time as more specific catchment-based solutions are finalised does not inflict change of such a magnitude and at such a pace that local people and communities are unable to adjust or can adjust only at great social, economic or cultural expense.
- 3.4 Mr Butcher sets out that there is potential for continued growth in dairying farming in Canterbury.² Mr Butcher goes on to detail the regional economic impacts and the pure financial benefits of that conversion to dairying.³ As Mr Butcher notes, Rule 5.45, in concert with a number of the Plan's proposed policies⁴ is most likely to effectively prevent changes in land use which would achieve the economic and financial outcomes that Mr Butcher describes. That situation arises because of the non-complying activity status imposed by Rule 5.45 to land use change (which would include conversion to dairy farming) within the Red zone and the policy framework that strongly requires the achievement of outcomes in Table 1, in an environment where Red zones do not already achieve those outcomes.
- 3.5 The staff report, of course, recommends a softening of these provisions. The staff report recommends the use of a discretionary activity status for new farming even in the Red zone. That change is justified in part through the requirement that existing farmers prepare and audit a Farm Environment Plan that amongst other matters identifies environmental effects and risks, addresses those effects and risks and has a high likelihood of appropriately avoiding, remedying or mitigating those effects.

2. Statement of Evidence of Geoffrey Butcher for the Group 2 Hearing, section 3.
3. Statement of Evidence of Geoffrey Butcher for the Group 2 Hearing, section 4.
4. Particularly Policies 4.1, 4.2, 4.31, 4.32, 4.34 and 4.76.

- 3.6 This is a novel regulatory approach. Existing farms in the Canterbury Region have never been subject to a requirement to prepare such a Plan nor to take the steps required by it under any regulatory requirement before. Nevertheless, Fonterra and DairyNZ support the introduction of such a Plan.
- 3.7 You will have read evidence from Messrs Cullen and Ryan in particular seeking changes to the detail of the Farm Environment Plan. Do not mistake this evidence as criticism; it is provided because Fonterra and DairyNZ can see the power in the tool that the Council proposes. They are keen to make sure that this tool works. The Farm Environment Plan is firmly embedded in the regulatory framework that requires its preparation, dictates that its content has substance and requires auditing to ensure that an individual farmer is on track to achieving the outcomes or resolving any identified issues. Failure to provide such a Plan, to audit it or to achieve it has regulatory consequences.
- 3.8 Dr Marsh appears to infer that only the Fish & Game proposal constitutes a “*firm regulatory framework*”,⁵ but this is not correct. Although Dr Marsh states “*over time the NZ primary sector may reach the view that an appropriate regulatory structure provides an essential supporting framework to enable industry led audited self-management to be effective.*”⁶ as section 3 of Mr Ryan’s rebuttal evidence makes clear, Fonterra and DairyNZ accept that, consistent with the recommendations of the Land and Water Forum, audited self-management and the adoption of good management practices within a regulatory framework are an effective mechanism and the one the Council should adopt.
- 3.9 The Farm Environment Plan is a double-edged sword. On the one hand it is a new regulatory requirement that can lead to “*punishment*” or harsher treatment of an applicant if he or she fails to achieve compliance with its requirements. On the other hand, it is a tool to assist farmers to identify and address the issues facing them in terms of water quality. As will be evident from the evidence of Messrs Cullen and Ryan, the sector has been working on its own measures in this regard for some time. The dairying sector welcomes the

5. Rebuttal Evidence of Dan Marsh on behalf of North Canterbury, Nelson/Marlborough and Central South Island Fish & Game Councils dated 10 April 2013, para 22.

6. Para 25.

opportunity to make use of this work and incorporate it (rather than replicate it) within a regulatory framework.

3.10 Dr Marsh for Fish & Game has stated:⁷

“Experts for Fonterra/DairyNZ, Ravensdown appear to have provided no evidence on the effectiveness or efficacy of the proposed approach in regards to the regionally significant freshwater resource in the Canterbury region. No evidence has been provided in regards to the change in leaching that will be achieved by their respective approaches or the impact that this will have on water quality.”

3.11 Because of the simultaneous exchange of rebuttal evidence, Dr Marsh would not have had the benefit of seeing the rebuttal evidence of Mr Ryan, when he prepared that statement. Mr Ryan’s rebuttal evidence refers to the work of Professor Elinor Ostrom that demonstrated that community outcomes were maximised when resource users collaborated at the local scale through clearly defined rules and boundaries. Mr Ryan’s rebuttal evidence confirms that research carried out in a number of dairy catchments shows that the adoption of good management practices by farmers supports environmental improvements and noted examples in Canterbury where farmers had taken voluntary action to improve environmental outcomes.⁸ Because Dr Marsh was not involved in the Group 1 hearing, he may also not have familiarised himself with the evidence of Mr Cullen for that hearing. You may recollect that Mr Cullen detailed a number of highly successful collaborative sustainability initiatives within the Canterbury region including the Canterbury Dairy Effluent Group and work undertaken as part of Whakaroa Te Waihora (the Joint Restoration Plan). Dr Marsh may also be unfamiliar with the work of the Pahau Enhancement Group, whose voluntary actions reduced the level of phosphorus in the Pahau River and hence the Hurunui River.⁹

3.12 Fonterra and DairyNZ welcome the recommendation in the staff report that with the introduction of the rigorous Farm Environment Plan framework, applications to convert more land to dairying could be considered on their merits as a

7. Rebuttal Evidence of Dan Marsh on behalf of North Canterbury, Nelson/Marlborough and Central South Island Fish & Game Councils dated 10 April 2013, para 20.
8. Statement of Rebuttal Evidence of James Ryan for Group 2 hearing, para 3.8 and footnotes 9 and 10 in particular.
9. This matter is referred to in para 133 of the Commissioners’ recommendation report in relation to the proposed Hurunui and Waiau River Regional Plan, released 27 April 2013. ISBN: 978-1-927234-62-4 (Web).

discretionary activity without a presumption either for or against the granting of any particular consent. Such an approach would leave the Council's discretion unfettered to do whatever was appropriate in the circumstances of a particular application. As Ms Hayward has recorded in her evidence, there will be situations throughout the Region including in the Red zone where consents to a new or larger nitrogen discharge can properly be granted consent without having any significant adverse effect upon water quality.¹⁰ Ms Hayward also identifies two general areas where such an outcome can be expected on a broader rather than an ad hoc basis.

4. APPROPRIATENESS OF RED ZONE FOR TEMUKA AND ASHLEY-WAIMAKARIRI

4.1 As Ms Hayward details, the water quality data for both the Temuka and Ashley-Waimakariri zones indicate that those zones should be classified as "*at risk – Orange*" rather than "*not meeting water quality outcomes – Red*". Fonterra and DairyNZ seek that these areas be rezoned in accordance with Ms Hayward's evidence.

5. FARMS IN TRANSITION TO DAIRY FARMING

5.1 By default, the Act protects those who rely on district plan rules from the risk of future changes to those rules by providing existing use rights.¹¹ However, those who rely on regional plan rules are only provided with a 6 month period in which to apply for any resource consent newly required as a result of a change to a regional plan's rules,¹² and no assurance that such a consent will be granted.

5.2 Here, because of the novel way in which the Plan is drafted, the limited protection ordinarily afforded by s 20A is not available to farmers in the process of changing their farming activity to dairying. Section 20A provides that an activity that a proposed plan regulates may continue until the rule becomes operative if before the rule took legal effect the activity was permitted, was lawfully established, and has effects of the same or similar character, intensity and scale.

10. Statement of Evidence of Shirley Hayward for the Group 2 hearing.

11. RMA, s 10.

12. RMA, s 20A

5.3 The difficulty with satisfying these requirements in the context of land use change is underscored by the definition of that term in the Plan:

"Means a change in land use, calculated on a per property basis that arises from either:

1. *A resource consent to use, or increase the volume of, water for irrigation on a property; or*
2. *An increase of more than 10% in the loss nitrogen from land used for a farming activity above the average nitrogen loss from the same land for the period between 1 July 2011 and 30 June 2013. The amount of nitrogen loss shall be calculated using the Overseer™ model for the 12 months preceding 1 July in any year and expressed as kilograms/hectare/year."*

5.4 A farmer who obtained a resource consent to use water for irrigation on a property (or to increase the volume of water so used) on 12 August 2012 would have triggered the first limb of this definition, thereby qualifying as a changed land use and triggering Rules 5.42 to 5.45 of the Plan. That activity was not lawfully established before the Plan was notified on 11 August and thus no existing use right exists. In a similar vein, where the second limb of the definition is triggered through an increase of nitrogen loss by more than 10%, then s 20A's requirement that the effects of the activity be the same or similar in character, intensity and scale to the effects that existed before the rule took legal effect will not be met.

5.5 Mr Griffiths sets out the substantial nature of the investments already made by a number of farmers in the Region who are in the process of converting to dairying. He is aware of 51 such farms. Mr Griffiths records that the 51 converting farmers have committed in the order of \$236 million of capital expenditure to convert to dairying. Of the 51 farmers, 16, whose change is one captured by the Plan, are located in the proposed Red Zone. Their financial commitment totals around \$4.8 million on average, ranging from approximately \$2 million to \$12 million.

5.6 The commitment Mr Griffiths describes takes a variety of forms: resource consents have been applied for or obtained, irrigation schemes have been committed to, funding has been obtained, deposits for equipment and services have been paid, livestock purchases have been made, pasture land has been

re-grassed, existing livestock has been sold and contracts have been entered into.

- 5.7 The farmers in the Red zone face a particularly onerous change. Their intended activity, in which they have made substantial investment, has changed from permitted to non-complying status (under the notified Plan) or discretionary status (if the s 42A Report's recommendation is accepted). In either case, those farmers no longer have any certainty that their conversion process will be able to be completed or that their land use will be able to be maintained in the longer term, once their increase in nitrogen loss becomes apparent at the end of the 2013-2014 dairy season. Those farmers face uncertainty not as to a component part of their operation but as to the entire operation itself. They cannot know that their operation will be able to continue.
- 5.8 In my submission, the Plan should not unseat the settled legitimate expectation of those farmers who commenced conversions before the Plan rules were notified. The Plan ushers in major changes to the regulatory framework around those farming activities.
- 5.9 As I argued earlier, whilst careful regulation of activities including farming may be required by s 5 of the Act, any major management changes necessary to achieve an aim such as freshwater quality should occur "*in a way, or at a rate*" that allows existing commitments made by farmers in the Region to be protected. There is no environmental imperative so pressing that the livelihood of any individual should be completely destroyed through the uncaring introduction of absolute rules. As Mr Butcher details¹³ the farms that have already incurred conversion costs will suffer a pure loss per hectare if that conversion is unable to be completed. That cost could be sizeable and would affect the on-going value of the un-converted land.
- 5.10 If the Commissioners agree that provision should be made for those farmers caught mid-conversion, there is more than one way in which this issue could be resolved. Fonterra's submission sought the inclusion of a new permitted activity rule with a number of alternate wordings. Mr Willis suggests a controlled activity rule for and definition of "farms in transition", with an accompanying

13. Statement of Evidence of Geoffrey Butcher for the Group 2 hearing, paragraph 5.2.

policy. Fonterra is amenable to any remedy that will ensure that the converting farmers' substantial investments are not wasted and that these farmers can continue their conversions with certainty of the outcome.

6. FISH & GAME PROPOSAL

- 6.1 Fish & Game has sought that the Council adopt a tougher line in relation to land use and nitrogen loss. It has sought that new farming in the Red zone be non-complying and that existing farming in Red and Orange catchments be a controlled activity only if it can meet a limit of 20kg N kg/ha/yr. In addition, in order to enjoy controlled activity status, minimum practice standards must be met.
- 6.2 Leaving aside for one moment the fact that nitrogen is not the limiting nutrient for all zones for all rivers within the Canterbury Region,¹⁴ Dr McCall outlines his view that 20kg N/ha/yr is not easily achievable for most dairy farmers.¹⁵
- 6.3 The justification for the 20kg N/ha/yr threshold is also not immediately obvious. As Ms Hayward notes, Dr Cook for Fish & Game modelled a range of scenarios incorporating different nitrogen caps. That modelling showed that nitrogen caps in the range of 30 – 40kg N/ha/yr plus the irrigation scenario would hold nitrogen loads near current levels.¹⁶ The best justification for the 20kg N/ha/yr requirement appears to be provided by Mr Percy,¹⁷ who notes that this level of nitrogen leaching is not sufficient to achieve the targets that Associate Professor Death has specified for the Ashburton River. Ms Hayward does not agree that Associate Professor Death's 0.47mg/L target is an appropriate one to bring from its Schedule 5 location to become a standard in Table 1.¹⁸

14. Rebuttal Evidence of Shirley Hayward for the Group 2 hearing, para 4.3.

15. Statement of Rebuttal Evidence for the Group 2 hearing. See for example his para 3.8 setting out the results from whole of catchment studies in both Hurunui and Selwyn-Waihora, both of which resulted in mean N loss of more than 20kg/ha, substantially more in the case of Selwyn-Waihora.

16. Refer Rebuttal Evidence of Shirley Hayward for the Group 2 hearing, para 3.4.

17. Combined Evidence in Chief and Rebuttal Evidence dated 10 April 2013, paras 13 and 15.

18. Ms Hayward sets out her position and the reasons for it in section 3 of her Rebuttal Evidence for the Group 1 hearing as well as in para 4.5 of her Rebuttal Evidence for the Group 2 hearing.

6.4 Ms Dewes states¹⁹ that:

"...20kg N per Ha per year as a threshold is satisfactory, as it delineates what levels of N loss might be achieved through the implementation of advanced mitigation techniques and implementation of a suite of best management practices, on fine textured soils, and less intensive farming systems on coarse soils."

6.5 This suggests that the figure of 20 has been settled on only because it is the maximum reduction that might be attained. Dr McCall shows that such a figure is unlikely to be widely achieved. He also criticises the validity of Ms Dewes' case studies, one of which in any event required a capital outlay of \$1,725,000.²⁰ Even Ms Dewes goes on to concede that:²¹

"However, as shown by the test farm modeling undertaken for Fish and Game, if actual farm data is used to populate Overseer those highly intensive farmers on coarse soils may find it difficult to reach 20, without the use of advanced farm mitigation approaches such as 24/7barns."

6.6 The Fish & Game proposal requires that where farming cannot meet a discharge limit of 20kg N/ha/yr, but can achieve a nitrogen leaching reduction of at least 20% in each 5 year interval, restricted discretionary activity status is available. It is not clear whether this 20% is by reference to the previous 5 year period or the original period. Neither Mr Percy nor any of the other witnesses give any evidence in support of such a 20% reduction standard, nor whether such an incremental approach is viable in practice given the large capital investments suggested as being required by Ms Dewes. .

6.7 If that standard cannot be met, then the Fish & Game proposal makes existing farming a non-complying activity. Mr Willis observes²² that there is no basis for determining or even examining whether the Fish & Game approach is more

19. At para 177 of her statement of evidence.

20. Another option for a different farm involved capital expenditure of \$1,390,000. Ms Dewes acknowledges at para 211 that the outlay to build in a degree of system change "*can at times be a barrier to implementation.*"

21. Para 177.

22. Second Statement of Rebuttal Evidence of Gerard Willis (responding to Mr Percy), section 6.

effective and efficient in terms of s 32 of the Resource Management Act than the approach proposed by Council.²³

- 6.8 It is not clear to me whether this approach is intended by Fish & Game only to be an interim position until such time as the sub-regional plans are devised or whether Fish & Game would dispense with those documents and persist with a single Region-wide approach in the long term.
- 6.9 In my submission the general approach proposed by Council and particularly the approach proposed in the recommendations of the s 42A report should be preferred. This approach provides firm rules that require action on the part of farmers and yet also provide assistance to farmers in making any necessary practice changes to ensure water quality does not deteriorate further whilst catchment-specific plan provisions are being determined. By contrast, Fish & Game proposes an unrealistic framework, where most existing farms will need a non-complying activity consent – a consent that under the Fish & Game proposed policy framework they would be unlikely to obtain. Such an approach ignores its own calamitous social, economic and cultural ramifications.

7. STOCK EXCLUSION

- 7.1 The evidence dealing with the issue of stock exclusion from the beds of rivers has become relatively lengthy.²⁴ To summarise succinctly: Fonterra and DairyNZ agree that cattle should not have access to the active beds of rivers. Whether this extends beyond dairy cattle is not of concern to Fonterra nor to DairyNZ. The difficulty arises because of the particular wording of the definition of “bed”. All that Fonterra and DairyNZ seek to achieve is to ensure that farmers are not precluded from continuing to graze pasture that has been grazed for decades and for all intents and purposes appears just as another paddock on the farm, but which might be construed as being part of the “bed”.

23. It appears that the high capital costs of mitigations modeled by Ms Dewes (para 84 records these as \$8,800 per ha) do not appear to be considered by Dr Marsh in his cost modelling of \$70 and \$170 per hectare.

24. See in particular the Evidence of Mathew Cullen for the Group 2 hearing, section 7; Statement of Evidence of Gerard Willis for the Group 2 hearing, section 6; Second Statement of Rebuttal Evidence of Gerard Willis (Responding to Mr Percy) for the Group 2 hearing, section 7; and the Combined Statement of Evidence and Rebuttal Evidence of Mr Percy for the Group 2 hearing.

The definition of “active bed” was proposed as a means of avoiding this (hopefully unintended) consequence of the rules as drafted in the notified plan.

7.2 Fonterra and DairyNZ certainly do not seek that dairy cattle be allowed access to streams. However, they seek to avoid that the Plan inadvertently prohibit activities that have been long-established in the Region without any evidence of any adverse effects on the environment.

8. CONCLUSION

8.1 Fonterra and DairyNZ call the following evidence:

- (a) Mr Mat Cullen (evidence in chief, rebuttal and rebuttal addressing Mr Percy’s evidence);
- (b) Mr James Ryan (evidence in chief and rebuttal evidence);
- (c) Mr Phil Griffiths (evidence in chief only);
- (d) Mr Geoff Butcher (evidence in chief and rebuttal);
- (e) Ms Shirley Hayward (evidence in chief and rebuttal);
- (f) Mr Gerard Willis (evidence in chief, rebuttal and rebuttal addressing Mr Percy’s evidence);
- (g) Mr David McCall (rebuttal only).

8.2 Fonterra and DairyNZ also adopt the evidence of Messrs Antony Roberts and Andrew Curtis.

8.3 The precise relief sought by Fonterra and DairyNZ can be found in Mr Willis’ evidence in chief and rebuttal evidence addressing Mr Percy’s evidence.