

*Tabled at Hearing
23-08-16*

**BEFORE THE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE CANTERBURY
REGIONAL COUNCIL**

UNDER THE

Resource Management Act 1991

IN THE MATTER

of Submissions and Further Submissions by
Federated Farmers on Plan Change 5 to the
Canterbury Land and Water Regional Plan

**OPENING SUBMISSIONS ON BEHALF OF THE COMBINED CANTERBURY PROVINCES OF
FEDERATED FARMERS OF NEW ZEALAND**

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INTRODUCTION

1. I appear for the Combined Canterbury Provinces¹ of Federated Farmers of New Zealand ("Federated Farmers"). Federated Farmers made submissions and further submissions on Plan Change 5 to the Canterbury Land and Water Regional Plan ("PC5").
2. Federated Farmers is also a member of the Canterbury Primary Sector Group ("CPSG"). This group comprises key members of Canterbury's primary sector, including Irrigation New Zealand; Dairy NZ; Fonterra; Horticulture New Zealand; Beef & Lamb New Zealand; Ravensdown; several irrigation companies and the Fertiliser Association of New Zealand.
3. The CPSG has been meeting together regularly to discuss key issues and the industry's response to these. While each of the members will be calling their own witnesses throughout the hearing process, they will also adopt or rely on some of the expert evidence of other partners in the course of their evidence and submissions. The particular evidence of other partners which Federated Farmers relies on will be explained in the course of these submissions.
4. The Section 42A Officer's Report on PC5 records that the key outcomes of Part A of PC5 include:
 - i. All farming activities operating at Good Management Practice;
 - ii. An equitable framework that retains on-farm decision-making flexibility;
 - iii. Removing compliance uncertainty associated with OVERSEER version changes;
 - iv. Providing a framework within which regulation is proportionate to risk;
 - v. Ensuring the nutrient management framework continues to achieve the CLWRP water quality outcomes by maintaining water quality and improving water quality where degraded.²
5. Federated Farmers supports these important outcomes in principle. However, as I will go on to discuss, Federated Farmers has significant concerns about whether PC5 as notified does in fact achieve these outcomes.
6. The general matters which Federated Farmers wish to raise in relation to PC5 can be grouped into the following topics:

¹ These comprise the North, Mid and South Canterbury provinces and the North Otago and High Country provinces.

² Section 42A Report page 5

- i. The process undertaken by Environment Canterbury in relation to the proposed plan change;
 - ii. Issues with the use of the Farm Portal as a tool for determining activity status;
 - iii. A proposed alternative consenting pathway;
 - iv. Problems with the permitted activity thresholds; and
 - v. Flexibility of landuse.
7. The Submission and Further Submission made by Federated Farmers set out in detail the specific changes which are sought in relation to the Plan Change. I do not intend to cover these changes in detail today, but rather to discuss the broad issues which underly the submissions.
8. I note also that these opening submissions are intended to present an overall summary of Federated Farmers' concerns and to identify the related legal issues in this respect. Given the breadth of evidence and extensive reports that have recently become available in relation to PC5, and the length of the hearings that are scheduled, Federated Farmers also respectfully seeks leave to provide further detailed Closing Legal Submissions, if necessary, to allow the legal issues arising to be explored in more detail and to respond to any additional matters emerging during the course of the hearing.

Evidence to be called by Federated Farmers

9. Dr Lionel Hume will be the first witness for Federated Farmers. He is the Senior Policy Advisor for Federated Farmers. Dr Hume's evidence discusses the potential environmental impacts of farming, including a discussion of the reasons that N discharges fluctuate from year to year; discusses the importance of FEPs as an alternative tool for achieving environmental outcomes; considers the issues of soil water and the importance of the reliability of water supply; discusses Canterbury soil types; describes the option of flexibility caps deals with particular issues with PC 5 for farmers in the Sensitive Lakes Zone; and briefly discusses the Matrix of Good Management project.
10. Federated Farmers will also call Mr Andrew Barton and Mr Neil Campbell. Mr Barton and Mr Campbell discuss some specific, real life examples of issues arising with the current Plan Change wording. Mr Barton discusses an example of how the Plan Change does not provide sufficiently for lawfully established intensification and associated increases in nitrogen loss during and after the baseline period associated with irrigation development. Mr Campbell discusses the limitations and practical consequences of the current wording of the winter grazing permitted activity threshold.
11. Federated Farmers also adopts the planning evidence of Ms Murchison.

THE PLAN CHANGE 5 PROCESS

12. So I will turn now to the various concerns of Federated Farmers that I mentioned previously. The following passage from the High Court decision in *Rangitata Diversion Race Management Limited v Canterbury Regional Council*³ (a case also concerning the Proposed Land and Water Regional Plan), provides a useful starting point to this discussion. The Court stated, quoting the Environment Court case of *Fairley v North Shore City Council*⁴:

“As to the framework within which a plan change must be considered, the approach was summarised in [Fairley] where the Environment Court stated:

In the circumstances of this Council initiated Plan Change the otherwise lengthy list of factors to be analysed can be compressed. We consider whether the terms of the Plan Change:

- *Accord with and assist the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act;*
- *Take account of effects on the environment;*
- *Are consistent with, or give effect to (as appropriate) applicable national, regional and local planning documents; and*
- *Meet the requirements of s32RMA, including whether the policies and rules are the most appropriate for achieving the objectives of the plan”.*⁵

13. As I will discuss throughout these submissions, Federated Farmers has various concerns over the effectiveness of PC5 in meeting these relevant factors.

14. The first of the concerns raised by Federated Farmers is with the PC5 process itself and in particular the quality and appropriateness of the Section 32 Report and to the limited timeframes for the plan change process.

Adequacy of the Section 32 Report

15. It is Federated Farmers' submission that the Section 32 analysis carried out in respect of PC5 does not meet the requirements in section 32 of the Act. Section 32 relevantly states in this respect:

³ [2015] NZHC 2174

⁴ [2010] NZEnvC 208

⁵ *Rangitata Diversion Race Management Limited v Canterbury Regional Council* [2015] NZHC 2174 at [30]

- (1) *An evaluation report required under this Act must—*
- (a) *examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and*
 - (b) *examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
 - (i) *identifying other reasonably practicable options for achieving the objectives; and*
 - (ii) *assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
 - (iii) *summarising the reasons for deciding on the provisions; and*
 - (c) *contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.*
- (2) *An assessment under subsection (1)(b)(ii) must—*
- (a) *identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—*
 - (i) *economic growth that are anticipated to be provided or reduced; and*
 - (ii) *employment that are anticipated to be provided or reduced; and*
 - (b) *if practicable, quantify the benefits and costs referred to in paragraph (a); and*
 - (c) *assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.*
- (3) *If the proposal (an amending proposal) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—*
- (a) *the provisions and objectives of the amending proposal; and*
 - (b) *the objectives of the existing proposal to the extent that those objectives—*

*(i) are relevant to the objectives of the amending proposal;
and*

*(ii) would remain if the amending proposal were to take
effect.*

16. There are a number of aspects of the Section 32 Report with which Federated Farmers take issue. I will deal with specific matters regarding the Section 32 Report in the context of my general discussion below. However, I do make these preliminary observations concerning the Report's consideration of the policy principles relevant to the plan change, as the approach to these principles permeates the discussion throughout the Section 32 Report.
17. The discussion of the policy approach for PC5 is discussed in Part 5 of the Section 32 Report. The policy principles are set out in table form, along with a discussion of the interpretation of these principles that has been applied to the planning framework.⁶ It is submitted that the policy principles referred to in Part 5 have not been adequately translated into the planning framework, with important issues not being given adequate consideration not touched upon at all.
18. For example, the policy principles include the following:

*“The provisions are clear and minimise uncertainty for land owners e.g.
Overseer “version” changes”.*

19. In response to this principle, the Section 32 Report states that the Plan Change clearly defines thresholds between permitted and consented farm activities and that nitrogen loss calculations are not used to differentiate between permitted activities and those requiring consent. However, there is no discussion of the fact that OVERSEER is still relied on as the basis for the classification of activities that do require consent. In particular, it is significant for land owners that (in some zones) an activity may be classified as prohibited on the basis of results driven by the OVERSEER model, but there is no mention of this. This is despite the fact that the principle above and other commentary in the Section 32 Report acknowledges that there has been a problem with updates to the OVERSEER model causing changes to the modelled budget, despite there having been no change to farming practices.⁷ Changes in OVERSEER versions therefore still have the potential to create significant uncertainty for landowners as to the classification of their farming activities. The effects of this issue are even more significant given the problems with the narrative permitted activity thresholds, which I will discuss shortly.
20. Another policy principle noted in the Section 32 Report is that *“land is managed according to the risk of nutrient loss”*. In response to this principle, the Report states that the policies and rules in PC5 focus on farming activities with the greatest potential for nutrient losses, with low risk activities being exempt from the Plan or subject to simplified requirements. However, as I will go on to

⁶ Section 32 Report pages 5-6 and 5-7.

⁷ See for example page 4-8.

discuss, it is Federated Farmers' submission that the permitted activity thresholds as currently worded will not exempt all low risk activities, many low N dischargers will still be caught.

21. The following policy principles are also referred to in the Report:

"limitations with the MGM numbers are recognised"

and

"FEPs and auditing are the 'main tools' for implementing good management practice".

22. The Section 32 response is that the potential for MGM numbers and practices to change over time is recognised in the policies and the rules and that FEPs remain the principal method for implementation of GMPs. Again, there is no recognition that the "MGM numbers" are being relied on to determine activity status for non-permitted activities, in some cases resulting in prohibited activity status.
23. Federated Farmers' evidence is that FEPs are a more certain way to achieve environmental outcomes and it agrees that the FEPs should be the "main tools" for implementing GMPs. However, it is Federated Farmers' submission that as drafted PC5 does not achieve this, as too great a reliance is made on the numbers generated by the Farm Portal.
24. Finally, I refer to the cost/benefit evaluation set out on pages 7-17 – 7-18 of the Section 32 Report. It is submitted that this analysis is not sufficiently robust given the significant impact PC5 will have on existing permitted farming activities.
25. In particular, in terms of economic costs, the Report states that in relation to the implementation of GMP this *"is likely to involve some additional costs to [farming] activities"*. However, the Report states that it is not possible to quantify what the cost could be to farmers of having to implement GMP due to there being insufficient information about the number of farms that are already operating at GMP levels. Despite this lack of knowledge, all farms are required to comply with GMPs in less than 4 years. It is submitted that proceeding with this Plan Change on the basis of such limited information is not appropriate and does not comply with Section 32.
26. There is also no reference in the cost/benefit evaluation to the fact that changes in OVERSEER versions will potentially create a significant economic burden for farmers from an administrative perspective, as discussed in the Evidence in Chief of Ms Harris.⁸ Ms Harris refers for example to the amount of time required to re-submit data into new versions of OVERSEER and to maintain accurate records of the baseline period following version changes. Mr Ford similarly discusses the potential for a landowner to incur considerable costs for the OVERSEER modelling required under

⁸ Evidence in Chief of Ms Harris from paragraph 88.

PC5.⁹ The costs are potentially significant, particularly when coupled with a limited number of appropriately qualified people to carry out the modelling. However, this issue is not addressed in the cost/benefit analysis.

27. Furthermore, the cost/benefit analysis does not include any recognition of the social cost to farmers of PC5. The potential implications for farmers in respect of the farming activities they are currently carrying out are significant and at present the plan change creates a great deal of uncertainty for farmers as to how their activities will be affected. This places a significant burden on farmers and their ability to provide for their well-being, but this has not been considered in the Report.

Limited Timeframes

28. Federated Farmers is concerned that the timeframes adopted for the plan change process, including for the making of submissions and further submissions, have been the minimum timeframes under the Act. Furthermore, only two months were allowed for the preparation of evidence following the further submission period, and this hearing is beginning only one month after a significant volume of evidence has been filed on the plan change. Given the size, complexity and importance of this Plan Change, along with the large volume of relevant documents, this timeframe for the plan change process is, in Federated Farmers submission, not appropriate. This is particularly so given the limited right of appeal available under the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

ISSUES WITH THE USE OF THE FARM PORTAL

29. As has been well traversed in the evidence, all farming activities on land greater than 10 hectares are required to register with the Farm Portal. For farming activities that do not fall within the narrative permitted activity thresholds, the Farm Portal is used to calculate a Baseline GMP Loss Rate and GMP Loss Rate. The Portal achieves this by applying a series of modelling proxies to a farmer's OVERSEER files. The proxies are set out in Schedule 28 of the Plan Change. These proxies are intended to model the Good Management Practices set out in the *Industry-agreed Good Management Practices relating to water quality* document, dated September 2015.
30. The activity status for a farming activity which does not fall within the narrative permitted activity thresholds will be determined (from July 2020) on the basis of whether the nitrogen loss calculation for the property exceeds the Baseline GMP Loss Rate. The particular status will depend on which Nutrient Allocation Zone the farming activity falls within. For properties within the Red Zone and the Lake Zone, the farming activity will be prohibited if the Baseline GMP Loss Rate is exceeded. For farming activities within the Orange, Green or Light Blue Zones, the activity will be non-complying if the Baseline GMP Loss Rate is exceeded.

⁹ Evidence in Chief of Mr Ford, from paragraph 50.

31. There are two fundamental issues with the Farm Portal process. The first relates to the suitability of the OVERSEER model, and the second to the ability of the modelling proxies to accurately represent GMPs.

Issues with OVERSEER

32. The briefs of evidence relating to PC5 provide a great deal of information about the problems of using OVERSEER as the basis for a regulatory tool.
33. Firstly, issues arise because OVERSEER is a model, not an exact tool. Various witnesses note that PC5 is trying to use OVERSEER in a manner it was never designed for.¹⁰ As Dr Dennis discusses in his evidence, the background to the OVERSEER model is that it was developed for the purposes of making fertiliser recommendations. However, if the model is to be used for regulatory purposes, it requires a much greater level of precision than was ever intended when the model was developed.¹¹ An extract from his evidence at paragraph 8 illustrates this issue:

“Overseer modelling is partially an art, informed by science. Translating a real farm into Overseer is as much a simplification as translating a real person into a pen-and-ink caricature. This is because Overseer does not, and will never contain enough options to truly represent every aspect of a farm correctly. The modeller must simplify reality to squeeze it into Overseer. This involves judgment calls – particularly around the level of simplification to be applied.”

34. Ms Harris also notes that it has been *“very difficult and in some cases impossible to have confidence in the use of OVERSEER for modelling farms for compliance purposes”*.¹²
35. A related issue is that OVERSEER does not presently accurately represent all farming systems. Again this issue is discussed by many witnesses.¹³ Their evidence shows that OVERSEER is currently less well developed for sheep and beef, arable and horticultural crops. OVERSEER also currently does not have a pig farming module or free range poultry model. Furthermore, the model does not easily reflect mixed farming systems. Dr Dennis states that any non-standard farming system is considered not GMP by the Portal proxies and is removed entirely from the farm. He states that this results in these systems having far lower Portal derived GMP losses than are realistic.¹⁴

¹⁰ See for example the Evidence in Chief of Mr Harris from [57] and the Evidence in Chief of Dr Dennis

¹¹ Evidence in Chief of Dr Dennis paragraphs 9 and 10

¹² Evidence in Chief of Ms Harris paragraph 40

¹³ See for example the Evidence in Chief Ms Harris at paragraph 81, the Evidence in Chief of Dr Dennis at paragraph 16, the Evidence in Chief of Mr Ford and the Evidence in Chief of Dr Metherell from paragraph 15.

¹⁴ Evidence in Chief of Dr Dennis at paragraphs 16 and 17

36. A number of witnesses also comment on the need for “workarounds”, when OVERSEER does not work for a farming system, or generates an error based on the information submitted. These workarounds, which are required in order to obtain a report from OVERSEER in these situations, further weaken the robustness of the modelling. Furthermore, the potential impact of these workarounds when combined with the issues with the proxies (which I will discuss shortly) is unknown.
37. A further issue noted by Ms Murchison is where the OVERSEER model does not recognise or allow for some GMP practices that are commonly adopted by farmers. Examples of this are set out in paragraph 21 of her Evidence in Chief.
38. Finally, there are the issues with updated versions of OVERSEER. New versions of the model are typically released twice per year. It is acknowledged in the Section 32 and Section 42A Reports that these updates can result in significant changes to the estimates of nutrient losses from farming activities, even in situations where the activities themselves may not have changed. The Section 32 Report also notes that the Farm Portal will need to be checked and possibly adjusted each time a new version of OVERSEER is released, to ensure the Portal is compatible with the latest version. However, farmers will have no control over this and the potential effects are not clear.
39. As I discussed earlier, the Section 32 Report states that the issue of updates to OVERSEER is dealt with by including narrative permitted activity thresholds. However, this does not take into account the fact that OVERSEER is used as the basis for classifying non permitted activities.

Issues with the Use of Proxies

40. The Industry Agreed Good Management Practices are set out in narrative form in the GMP document dated September 2015. These GMPs were developed through the Canterbury Matrix of Good Management project, with input from a number of industry players. The modelling proxies adopted in the Farm Portal to represent these GMPs are contained in Schedule 28 of PC5. It is Federated Farmers’ submission that these proxies are inconsistent, technically flawed and not validated, and that these issues compound the problems within the OVERSEER model which I have discussed. Furthermore, how the proxies will convert to on farm application is not properly understood.
41. The difficulty is that the proxies cannot provide an exact representation of the narrative practices in the GMP document. Even the Section 42A Report describes the proxies as being “*reflective*” of GMPs¹⁵, not a direct representation.
42. The Matrix of Good Management Overview Report acknowledges various issues with the development and testing of the proxies. Relevant, and concerning, comments include the following:

¹⁵ Section 42A Report page 26

“The GMP modelling proxies are intended to reflect the intent of the industry-agreed GMPs within the OVERSEER model. The proxies are not intended to indicate a prescriptive action that a farmer must do in order to be at good management practice. As they are a proxy it would be inappropriate to use them in a prescriptive way.”¹⁶

and

“as well as being complex, farm systems are also dynamic systems, both spatially and temporally. For this study, we simplified the production systems in order to collect information and construct appropriate farm systems to populate the matrix. It is likely that there were aspects of the actual farm systems present in Canterbury that these constructed systems did not fully reflect. This simplification however is a necessary, pragmatic step to enable modelling of nutrient loss across the region. But it is recognised that it also had the potential to mask some of the differences, in some cases significant differences, between the actual, real-world farms, and therefore represents a source of uncertainty in the modelled results”.¹⁷

and

“[referring to the data confidentiality agreement with farmers involved in the study] the confidentiality agreements did make subsequent use of the data more challenging however, as, for example, we didn’t know where each farm was which made testing some of the GMP modelling proxies difficult.”¹⁸

and

“the time constraints of the project, although it was recognised as important to have an end date, were thought by some to undermine the collaborative effort, strain relationships within the project, and impact on the overall quality of the product”.¹⁹

¹⁶ Matrix of Good Management Overview Report, page 82

¹⁷ Ibid, page 206

¹⁸ Page 206

¹⁹ Page 206

43. Given this level of uncertainty in the modelling and testing of the proxies, it is submitted that they should not yet form the sole basis for the classification of farming activities under PC5.
44. A further issue with the proxies is the lack of clarity around how the proxies in fact operate upon the OVERSEER files, and around how changes in on farm practices may influence the Farm Portal results. While the proxies are listed in Schedule 28, a disclaimer to the Schedule states that it may not contain all of “*the detailed figures, parameters and formulae applied by the Farm Portal*” when modelling GMP losses. Because of the interaction between the OVERSEER inputs and the proxies within the Farm Portal, there is no way for farmers to check the veracity of the information that is produced by the Farm Portal. Furthermore, where a discharge limit beyond the Baseline GMP level is indicated, it will be difficult for farmers to identify how to rectify this (if any action can in fact be taken at all).
45. The Evidence in Chief of witnesses for Dairy NZ and Irrigation NZ also deals in particular with issues relating to the irrigation proxy and N fertiliser proxy.
46. The practical outcome of all of these issues is illustrated in the evidence of Ms Harris for Barrhill Chertsey Irrigation Limited. At paragraph 12 of her evidence she notes that serious issues with the Farm Portal proxies have been identified through FEP Audit results. Ms Harris states that their findings have been that farms audited as meeting GMP after onsite inspections are still required to make an average reduction of 29% to meet the Farm Portal GMP Loss Rates. Ms Harris states that “*these reductions are beyond even best farm practice, are not reflective of GMP according to the description in the [GMP document], and are definitely not achievable by 2020*”.

Implications

47. These issues all combine to create a situation of considerable and unacceptable uncertainty for farmers. The requirement for the planning framework to provide certainty is a well-established planning principle. In *Discount Brands v Westfield (NZ)*²⁰ the Supreme Court considered the function of the plan making process. The Court stated:

“the district plan is key to the Act’s purpose of enabling ‘people and communities to provide for their social, economic, and cultural well being’. It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance”²¹[emphasis added].

²⁰ [2005] NZSC 17

²¹ *Ibid* at [10]

48. These comments were affirmed by the High Court in *Rangitata Diversion Race Management Limited v Canterbury Regional Council*²² as being equally applicable to regional plans. *Rangitata* also concerned the Proposed Canterbury Land and Water Regional Plan.
49. It is submitted that the current rules proposed in PC5 do not allow people and communities to order their lives with “some assurance”. The opposite is in fact true, a great deal of uncertainty is created by the rules, as a result of the issues with the OVERSEER model and the proxies discussed above. The implications for the farming community caused by this uncertainty are unacceptable and have not been adequately assessed in the Section 32 Report. This is particularly concerning given that the issue could be addressed, at least to some extent, by providing an alternative consenting pathway, as discussed below.
50. I note that in respect of the issue of certainty, the Section 42A Report suggests that a lower degree of certainty is required in the consenting framework compared to determining the threshold for permitted activities.²³ The cases of *Carter Holt Harvey Ltd v Waikato Regional Council*²⁴ and *Day v Manawatu-Wanganui Regional Council*²⁵ are cited in this regard. It is respectfully submitted that those cases are not concerned with the type of uncertainty that arises in the current circumstances. The *Carter Holt Harvey* case was concerned with whether a rule should classify an activity as permitted or controlled. In finding that the rule should provide for controlled activity status, the Environment Court considered it relevant that the rule was complex and required considerable expert technical input and so it could not easily be drafted as a permitted activity thresholds. The case is not authority for a proposition that rules providing for activity status other than permitted do not need to be certain, but rather that permitted activity rules should not include matters of judgment, whereas this may be appropriate for other activity status.²⁶ *Day* involved similar considerations, again with a comparison between a potential controlled or permitted status. In contrast, the uncertainty created by PC5 is not caused by the application of judgement or the need for technical input. Rather, the uncertainty exists because activity status can change under the Farm Portal system without there having been any change in the underlying activity for which consent is required. Furthermore, there is no clarity around how changes in on-farm practices will influence the results of the proposed rules.
51. Turning back to *Rangitata*, the appellants in that case sought to argue that the taking and use of water for hydro-electricity generation and regionally significant infrastructure, such as irrigation, should be a controlled activity under the plan. When considering whether this activity status could properly be applied, the Court stated that when assigning activity status to a particular activity, what is required is a merits-based assessment of the best activity status to give effect to the Council’s functions, and the purpose of the RMA. In terms of the ability to make rules, the Court considered

²² [2015] NZHC 2174

²³ Section 42A Report page 42

²⁴ A123/08 EnvC at [128] – [140]

²⁵ [2012] NZEnvC 182, at [5-197] to [5-200]

²⁶ *Carter Holt Harvey Ltd v Waikato Regional Council* A123/08 EnvC at [144]

that if a particular rule can be tied to the purpose of the RMA and the objectives and policies of the plan it will be justifiable.

52. In terms of rules imposing prohibited activity status in particular, the following comments in *Thacker* are also noted:

“The imposition of prohibited activity status on any activity or activities is the most draconian form of control available under the RMA. A prohibited activity is not only one for which a resource consent must not be granted by a consent authority, but a proponent of such an activity may not even make an application for it. Although not specifically stated by any of the parties to these proceedings there was an implicit acceptance that prohibited activity status was not one which should be imposed lightly and without detailed consideration.”²⁷

53. It is submitted that in terms of PC5, the sole reliance on the Farm Portal to determine activity status for particular activities is not justified in terms of a merits based assessment or as against the purpose of the RMA and the objectives and policies of the Plan. This is particularly so given that application of the rules can result in non-complying or prohibited activity status. It is submitted that there is still too great an uncertainty in the Portal results to justify its use. Furthermore, given this uncertainty, it could not be assumed that reliance on the Farm Portal numbers will in fact lead to the Plan’s objective of promoting the use of GMPs on-farm.
54. The reliance on uncertain and inaccurate results from the Farm Portal to determine activity status could have significant financial implications for farmers in terms of consenting and monitoring costs. In addition, it could lead to the potential need to make otherwise unnecessary on farm changes to try and achieve Farm Portal results. These potential impacts, which could also impact on future production and infrastructure decisions, are significant and have not been adequately examined in the Section 32 Report, due to a cited lack of information. Farmers may also be exposed to enforcement activity and/or fines if they are not able to meet the requirements generated by the Farm Portal.

AN ALTERNATIVE CONSENTING PATHWAY

55. The issues identified in relation to the use of OVERSEER and with the Farm Portal proxies have it is submitted not been adequately dealt with in the Section 32 and Section 42A Reports, on the basis that these numbers do not influence the permitted activity threshold. However, as previously stated, these issues do impact upon activity status and so must still be acknowledged and dealt with. This is reflected in the policies that are meant to underpin PC5, which I discussed earlier.

²⁷ *Thacker v Christchurch City Council* C026/09 EnvC at [42]

56. It is Federated Farmers' submission that an alternative consenting pathway is needed in PC5, to be used when the Council or a consent applicant considers that the Portal results are inaccurate for that farmers actual or proposed farming activity. This would provide an alternative process for a farmer to demonstrate that they are complying with identified GMPs. As Ms Harris notes in her evidence in chief, the GMPs are on farm practices and so they should be the starting point for determining whether a farm is operating at GMP. If a farm is identified as operating at GMP through a FEP audit, but the modelled results via the Farm Portal suggest it is not, the issue can only be with the modelling tool.²⁸ In these cases some alternative process must be provided.
57. Various alternative consenting pathways have been suggested in evidence. Federated Farmers generally supports the alternative consenting pathway proposed by Fonterra in its submission, as discussed and amended by the Evidence in Chief of Mr Willis.²⁹ The only exception to this is that Federated Farmers does not agree with Fonterra's proposal that the alternative pathway should automatically default to a requirement for a full discretionary activity resource consent. This unfairly penalises applicants for whom the Farm Portal does not work, when this is not due to any fault on their part.
58. The proposal put forward by Fonterra sets out an appropriate, tightly drafted gateway test for use of the alternative pathway,³⁰ and requires that an applicant explain in the resource consent application why the Farm Portal has not generated an appropriate Baseline GMP Loss Rate. This will ensure that the alternative can only be used in true situations where the Farm Portal has failed to generate an appropriate result. Furthermore, an applicant applying this approach will still need to provide an FEP prepared by an Accredited Farm Consultant who must certify that all applicable GMPs are being adopted. As a result, the alternative pathway retains an appropriate focus on the on farm implementation of GMPs.
59. It is Federated Farmers' submission that this alternative consenting pathway should be used either permanently, or at least until issues with the Farm Portal are addressed. In this respect, Federated Farmers also considers that a process should be developed to identify abnormal results from the Portal and to develop solutions to rectify these issues, so that the robustness of the Portal and the proxies can be improved over time.

PROBLEMS WITH THE PERMITTED ACTIVITY THRESHOLDS

60. The intent of the current narrative permitted activity thresholds in PC5 is said to be to separate high and low risk activities (according to the Section 32 Report). However, Federated Farmers has serious reservations about the wording as currently proposed. It is Federated Farmers' submission that the thresholds will still capture a significant number of low N dischargers. Federated Farmers

²⁸ Evidence in Chief paragraph 56

²⁹ From paragraph 4.4 and 9.1, and set out in full in Appendix 1 of his evidence in chief

³⁰ Discussed from paragraph 9.4 of Mr Willis' Evidence in Chief.

submit that if area thresholds are to be relied on, they need to be related to property area and recognise the constraints and needs of different farming systems.

61. In particular, the winter grazing threshold is problematic. An example of the problems created by the practical application of the winter grazing threshold is discussed in the evidence of Mr Campbell. Ms Murchison also discusses the problems with the threshold from paragraph 44 of her evidence. The Section 32 analysis notes at 7-24 that the threshold is likely to generate a requirement for more applications for consent, but states that exactly how many is not known because of a lack of information on winter grazing in Canterbury – yet this threshold is still being relied on to set the permitted activity threshold.
62. In respect of the winter grazing threshold, Federated Farmers adopts the recommendations made by Ms Murchison. That is, amending the definition of winter grazing by introducing the concept of a minimum stocking rate for cattle grazing and increasing the area threshold to the greater of 20ha or 10% of the farm.³¹
63. In terms of the appropriateness of the area threshold for permitted activity status, Ms Murchison notes that there are examples of vintners, horticultural operations and extensive dryland sheep and beef operations in North Canterbury that would fail to meet this threshold and yet have low N baselines.³²

FLEXIBILITY OF LAND USE

64. A strong focus of PC5 is on preventing intensification of land use. However, the plan change does not it is submitted adequately take into account the practical reality of farming, which requires some flexibility of land use. In order to continue to operate, farmers need to be able to respond to matters such as physical conditions (e.g. climate) and market factors. Farming is cyclical in nature and cannot be carried out effectively if a static state is sought to be imposed upon it.
65. Ms Murchison provides an illustration of this in paragraphs 14 to 18 of her evidence, where she discusses the diverse land use decisions that have been made in relation to her farm, based on the season and the interests of herself and her husband as owners. Ms Murchison states that *“in my view that diversity is an essential part of being able to make reasonable use of farm land”*.
66. The evidence of Ms Harris also provides a practical illustration of these issues. Ms Harris discusses (at paragraph 108), the following potential situations where a farm might exceed its Baseline GMP Loss Rate, but still be operating within the same farming system as in the 2009-2013 baseline period:

- i. A dry summer and autumn resulting in more irrigation and fertiliser;

³¹ Evidence in Chief of Ms Murchison paragraphs 48 - 51

³² Evidence in Chief Ms Murchison paragraph 62

- ii. Deer payout better than lamb this year, so increase the proportion of deer and reduce sheep;
- iii. Switch low protein straw silage to higher protein grass silage as it could be sourced locally that year; or
- iv. The fodder crop rotation happens to lie within lighter soils for a season.

67. These examples illustrate how a focus on the Baseline GMP, instead of on farm practices has a wrong emphasis and could unnecessarily restrict the choices available to farmers. This is a particular problem when coupled with the issues with the permitted activity thresholds, which can mean that low N dischargers do not qualify for permitted activity status and are consequently very limited in their farming options.

68. It is Federated Farmers' submission that a better approach to allow appropriate flexibility would be to use flexibility caps – levels up to which any increase in N losses is a permitted activity. Flexibility caps allow farmers to respond to changes in factors such as market conditions and climate by making reasonable changes to land use. As Dr Hume notes, the advantage of flexibility caps is that they take account of total property area, unlike the currently proposed narrative thresholds. Flexibility caps have been used in Plan Change 1 and Proposed Plan Changes 2 and 3 of the LWRP. Federated Farmers suggest that a two tiered system should be used, based on soil type - similar to the approach in proposed Plan Change 3.

CONCLUSION

69. In conclusion, Federated Farmers agrees with the policy behind PC5, that encouraging the implementation of industry agreed Good Management Practices on farm is the way to achieve positive environmental results. However, establishing GMP Loss Rates via the Farm Portal is not the best method to achieve this, particularly given the significant issues identified with OVERSEER and the Farm Portal proxies. It is Federated Farmers' submission that a greater focus should be placed on implementing GMPs via the FEP process; and that an alternative consenting pathway should be introduced into PC5, at least until the issues relating to the Farm Portal are addressed.

70. In addition, PC5 currently does not allow sufficient flexibility for farmers to respond to the various cyclical changes that are part of normal farming practice. This is particularly problematic for those low N dischargers who are nevertheless caught by the permitted activity thresholds. Federated Farmers submit that amendments are required to the permitted activity thresholds and that flexibility caps should be introduced to allow greater flexibility in land use, while still maintaining a focus on the implementation of GMPs.

Dated this 23rd day of August 2016



K G Reid

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