

Tabled at Hearing

24/08/2016

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of Proposed Plan Change 5 to the Canterbury
Land and Water Regional Plan

**LEGAL SUBMISSIONS ON BEHALF OF
FONTERRA CO-OPERATIVE GROUP LIMITED**

24 AUGUST 2016

RUSSELL McVEAGH

B J Matheson / R E Robilliard
Phone +64 9 367 8000
Fax +64 9 367 8163
PO Box 8
DX CX10085
Auckland

1. INTRODUCTION

- 1.1 These legal submissions are presented on behalf of Fonterra in relation to Proposed Plan Change 5 ("**Plan Change 5**") of the Canterbury Land and Water Regional Plan ("**CLWRP**").

About Fonterra and its approach to planning

- 1.2 As the Commissioners will be aware, Fonterra is a global co-operative owned by over 10,700 farmers across New Zealand, and is the world's leading exporter of dairy products.
- 1.3 Dairy farming throughout New Zealand contributes significantly to the economic and social wellbeing of many rural communities, including in the Canterbury region.
- 1.4 Notwithstanding that contribution, Fonterra is firmly of the view that:
- (a) an integrated and effective approach to managing the effects of dairy farming is critical, particularly in respect of water quality objectives and outcomes; and
 - (b) all parties have a responsibility to ensure that dairy farming is managed such that it occurs in a sustainable way, enabling positive environmental, social, cultural and economic outcomes for farmers and their communities.¹
- 1.5 Achieving those objectives will require a planning regime that:

¹ Refer to the Final Report and Decisions of the Board of Inquiry into the Tukituki Catchment Proposal, dated 18 June 2014, at [130] - [131]:

[130] Understandably effects arising from intensification of land use, particularly an increase in dairy farming, raise concerns on the part of those supporting improved water quality. Recognising those concerns, counsel for Fonterra and Dairy NZ observed:

"Over the past several decades, New Zealand has seen a period of rapid growth of dairy farming throughout the country, and this growth has contributed greatly to the economic and social wellbeing of many rural communities. But this growth has, at times, lacked an integrated and effective approach to monitoring and managing the effects of dairy farming. That must change."

Counsel told the Board that both Fonterra and Dairy NZ are firmly of the view that both regulators and the dairy industry have a responsibility to ensure that future growth of dairy farming occurs in a sustainable way.

[131] The Board agrees. Managing intensification of land use in a sustainable way is necessary if effect is to be given to the NPSFM. It also reflects the underlying philosophy of the RMA; the promotion of sustainable management of natural and physical resources.

- (a) is effective, efficient, equitable, transparent and certain, for regulators, farmers, stakeholders, and the broader communities;
- (b) sets enforceable environmental outcomes (limits and targets), that are developed by the communities and which recognise the diversity of interests inherent in the protection, management and use of water;
- (c) has appropriate regard to the economic and social impacts of more stringent environmental protection (including by ensuring that any controls are no more stringent than necessary to achieve the desired environmental outcomes); and
- (d) recognises that effective regulation requires both mandatory (rules) and non-mandatory (other methods and industry best practice) components.

1.6 The relief sought by Fonterra in respect of Plan Change 5 incorporates and reflects all of those elements, so as to achieve a planning regime in Canterbury that is effective and enduring in achieving the outcomes sought.

Fonterra's approach to Plan Change 5

1.7 Fonterra supports the overall intention of Plan Change 5, which requires farmers to achieve nitrogen loss rates that represent Good Management Practice ("GMP"). Notwithstanding that, Fonterra has two major concerns with Plan Change 5 as notified. Those concerns are the focus of these legal submissions:²

- (a) Plan Change 5 contains no alternative to using the Farm Portal. There will be farms that have adopted all good management practices, but which cannot achieve the Portal-generated loss rates. While the Portal should remain, an alternative pathway to consent for these farms that does not rely on the Farm Portal must be included within the CLWRP. Failing to include an alternative pathway runs the very real risk of some farming

² Relief is still sought in respect of the other matters raised in Fonterra's submission, as shown in Appendix 1 to Mr Willis' evidence. However, Fonterra's evidence for this hearing focussed on the two major concerns identified in paragraph 1.7 above.

activities being classified as a prohibited activity, despite them operating at GMP.³

- (b) The "sinking lid" approach to nitrogen loss rates is inappropriate. Under Plan Change 5, if a farm's GMP Loss Rate drops below its Baseline GMP Loss Rate it cannot return to its Baseline GMP Loss Rate. This means atypical factors during the four-year calculation period (such as drought or a biosecurity risk which may require the temporary removal of stock from the property) may significantly disadvantage some farmers by not enabling them to return later to GMP Baseline level of production. Where a farmer has experienced an atypical factor that causes the GMP Loss Rate to drop below the Baseline GMP Loss Rate there must be the ability for that farmer to return to the Baseline GMP Loss Rate.

Witnesses

- 1.8 Evidence has been filed on behalf of Fonterra from the following witnesses:
- (a) **Ms Sue Ruston** - Environmental Policy Manager at Fonterra. Ms Ruston summarises Fonterra's Canterbury operations and outlines the processes in place for the management of effects associated with farming practices. Ms Ruston also explains Fonterra's concerns relating to an alternative consenting pathway and the "sinking lid" effect of Plan Change 5.
- (b) **Mr Mathew Cullen** - Environment Program Lead responsible for managing Fonterra's Nitrogen Programme. Mr Cullen's evidence outlines the issues associated with OVERSEER and how these issues may lead to the Farm Portal misrepresenting GMP Loss Rates for individual farms.
- (c) **Mr Gerard Willis** - Director of Enfocus Ltd. Mr Willis has evaluated Plan Change 5 against the statutory framework and considered the efficiency and equity of the proposed nitrogen

³ We accept that where a farm operating at GMP cannot meet Portal-generated loss rates, it would not be prohibited if it reduces production to meet those limits. However, the issue is that farms operating at GMP in accordance with the overall intent of Plan Change 5, should not be unfairly penalised and required to make changes that go well beyond GMP in order to comply with inaccurate loss rates generated by the Farm Portal.

allocation provisions. Mr Willis concludes that the relief sought by Fonterra is more appropriate than Plan Change 5 as notified.

2. ALTERNATIVE CONSENTING PATHWAY TO THE FARM PORTAL

2.1 Plan Change 5 introduces a requirement for farmers throughout the region to achieve a nitrogen loss rate that represents industry-agreed GMP.⁴

2.2 The Baseline GMP and GMP Loss Rates for each farm are determined through the use of the Farm Portal. Plan Change 5 provides no alternative process for determining nutrient loss rates.

2.3 The Farm Portal generates Baseline GMP and GMP Loss Rates by adjusting a farm's OVERSEER input files with good management modelling proxies.⁵ The Portal is intended to:

- (a) Allow quantitative Baseline GMP and GMP Loss Rates to be determined.
- (b) Enable landowners to determine whether they require, or are able to apply for, consent for their farming activity.
- (c) Allow the Council to monitor losses for accounting purposes, as required by Part CC of the National Policy Statement for Freshwater Management ("**NPSFM**").

2.4 Fonterra supports the Farm Portal as a concept. In particular, quantitative loss rates are important for an effective and equitable management regime.

Fonterra's concerns with the proposed Farm Portal

2.5 While Fonterra supports the Farm Portal as a concept, it is concerned the Portal cannot, in many instances, accurately generate Baseline GMP and GMP Loss Rates. There are two reasons for this:

- (a) First, the Farm Portal is reliant on its fertiliser, irrigation and other proxies to generate loss rates for individual farms. The evidence shows that these modelling proxies suffer from serious

⁴ Evidence in Chief of Mr Willis for Fonterra, at 6.2.

⁵ Evidence in Chief of Mr Willis for Fonterra, at 7.7.

flaws.⁶ For example, the application of the fertiliser proxy to properties meeting GMP for fertiliser showed the proxy poorly assesses GMP fertiliser requirements, particularly for dairy support properties.⁷

- (b) Second, the Portal is reliant on OVERSEER.⁸ There is a weight of evidence that OVERSEER in many instances is unable to produce accurate reporting files for individual farms.⁹ Where OVERSEER cannot produce an accurate report, the Portal will necessarily generate inaccurate loss rates for that farm.

2.6 Further to above, Fonterra endorses and adopts the evidence of Ms Harris on behalf of Barrhill Chertsey Irrigation Ltd. Ms Harris' evidence further elaborates on the evidence of Mr Cullen in relation to the technical challenges in using OVERSEER and the Farm Portal. In particular, it provides illustrative examples of:

- (a) the flaws in both OVERSEER and the Farm Portal in the modelling of nitrogen loss;
- (b) the issues associated with the implementation of multiple versions of OVERSEER over the course of each year; and
- (c) the likely time and financial resources necessary to generate accurate and reliable nutrient budgets using OVERSEER and the Farm Portal.

2.7 Fonterra accepts the issues with the Portal's modelling proxies may be fixed over time.¹⁰ However, the issues associated with OVERSEER are more intractable. For the foreseeable future there will be farming systems that OVERSEER is unable to accurately model.¹¹ That means the Portal for the foreseeable future will also be unable to accurately

⁶ In relation to the fertiliser proxy, see evidence in chief of Dr Ledgard for Dairy NZ at 10.5; evidence in chief of Dr Thorrold for Dairy NZ at 4.15; evidence in Chief of Dr Metherell for Ravensdown Limited at [26]; and evidence in chief of Ms Harris for BCI at [140].

⁷ Evidence in Chief of Ms Harris for BCI, at [163].

⁸ The Portal's proxies are applied directly to a farm's OVERSEER file to generate a GMP Loss Rate for the property.

⁹ Evidence in Chief of Mr Willis for Fonterra, at 7.12(b); Evidence in Chief of Mr Cullen for Fonterra, at 5.1; Evidence in Chief of Ms Harris for BCI, at [166]; Evidence in Chief of Mr Neal for Dairy NZ, at 6.1.

¹⁰ Evidence in Chief of Mr Willis for Fonterra, at 7.13.

¹¹ Evidence in Chief of Mr Willis for Fonterra, at 7.12(b).

generate Baseline GMP and GMP Loss Rates for all farming activities in Canterbury.

- 2.8 Whatever the reason for the Portal generating inaccurate loss rates, the fact is that under Plan Change 5 as notified, inaccurate loss rates for farms in the Red and Lake zones may lead to farming activities on those farms being classified as a prohibited activity.¹² This would have obvious and devastating effects on the individual farmers concerned and, depending on the scale of the farms affected, could have adverse social and economic effects for wider communities throughout the region.
- 2.9 In our respectful submission, the Commissioners should not endorse a set of planning provisions whereby established farming activities already operating at GMP are required to cease (or scale back) their existing operations because of a flawed nitrogen loss measurement mechanism. That result would plainly not achieve the sustainable management of Canterbury's natural and physical resources, and it would not be an appropriate or effective method of achieving the objectives of the CLWRP. Nor would such an outcome be consistent with established jurisprudence associated with rules in general, and prohibited activities in particular:
- (a) In *Thacker v Christchurch City Council* C026/2009 the Environment Court recorded:
- [42] The imposition of prohibited activity status on any activity or activities is the most draconian form of control available under the RMA ... 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.
- (b) The strong caution applies not only to the imposition of an activity status per se, but equally to those provisions and definitions that in combination determine whether an activity falls within a prohibited activity rule or not.
- 2.10 Accordingly, in our submission while the Portal can and should remain, the Plan Change 5 provisions must also provide for an alternative consenting pathway. It is to Fonterra's proposal for that alternative that we now turn.

¹² Evidence in Chief of Mr Willis for Fonterra, at 8.5; Rule 5.48A and 5.52A of Part A of Plan Change 5.

Fonterra's proposal for an alternative consenting pathway

- 2.11 Fonterra proposes that any farmer that cannot meet Portal-generated loss rates be able to apply for consent, to test whether those limits accurately represent that farming activity operating at GMP. This has been termed the "alternative consent pathway". Fonterra's proposal is for an alternative consent pathway to be provided in addition to the proposed Farm Portal.
- 2.12 The proposed alternative consent pathway is discussed by Mr Willis,¹³ with the provisions to give effect to the pathway set out in Appendix 1 to Mr Willis' evidence.
- 2.13 The key elements of the alternative pathway are as follows:
- (a) A discretionary activity status. This distinguishes consent applications relying on the alternative pathway from applications under the Portal-generated loss rates, which are either controlled or restricted-discretionary activities.¹⁴
 - (b) A "gateway test" for when consent under the alternative pathway would be appropriate. It is important that the alternative pathway does not open the floodgates for every farmer to seek consent for non-compliance with the Portal limits.¹⁵ A new "gateway test" (new policy 4.38BA) specifies that it is only appropriate to grant consent to exceed the Portal limits where the applicant demonstrates something peculiar about the farm system that cannot be accurately modelled by the Portal and / or OVERSEER.¹⁶
 - (c) A requirement to operate at GMP. Consent under the alternative pathway will only be available where the farming activity is assessed as operating at GMP.¹⁷ The alternative consent pathway is therefore consistent with, and gives effect to, the overall vision of Plan Change 5, which is that every farmer in the region should achieve nitrogen loss rates that represent industry-agreed GMP.

¹³ Evidence in Chief of Mr Willis for Fonterra, at section 9.

¹⁴ Evidence in Chief of Mr Willis for Fonterra, at 9.12.

¹⁵ Evidence in Chief of Mr Willis for Fonterra, at 9.5.

¹⁶ Evidence in Chief of Mr Willis for Fonterra, at 9.9(a).

¹⁷ Evidence in Chief of Mr Willis for Fonterra, at 9.9(c).

Council's response to the alternative consent pathway proposal

- 2.14 The Council does not support an alternative consent pathway being included in Plan Change 5 in addition to the Farm Portal. The reasons for this are set out in the Section 42A Report.
- 2.15 Mr Willis has comprehensively addressed the Council's concerns (as set out in the Section 42A Report) regarding the inclusion of the alternative consent pathway in Plan Change 5.¹⁸ A summary of Fonterra's response to Council follows.
- 2.16 The Council says the inclusion of the alternative pathway would not give effect to the higher-order planning instruments, including Objective A1 of the NPSFM and certain policies of the operative Canterbury Regional Policy Statement ("**CRPS**").¹⁹ Fonterra disagrees:
- (a) The NPSFM requires that freshwater limits are established in accordance with policies CA1 - CA4, and that freshwater limits ensure that freshwater objectives are met. As Mr Willis explains, the inclusion of the alternative consent pathway in Plan Change 5 will not undermine the freshwater limits in section 2.5 of the CLWRP.²⁰ These freshwater limits predate the Farm Portal and were set using the process summarised in the *Waitaki Limit Setting Process: Technical Overview* report.²¹ The Portal has not been designed to generate an aggregate nitrogen loss across the region that achieves the CLWRP water quality objectives.²²
 - (b) Objective A1 of the NPSFM requires the region's water quality to be maintained or improved. The inclusion of the alternative pathway will achieve that objective:
 - (i) The alternative pathway does not contemplate consent being granted where the farming activity will exceed the nitrogen baseline (except where that was lawful at the time of notification of Plan Change 5 in accordance

¹⁸ Evidence in Chief of Mr Willis for Fonterra, at section 10.

¹⁹ Section 42A Report at 6.155, 6.158.

²⁰ Evidence in Chief of Mr Willis for Fonterra, at 10.7 to 10.12.

²¹ Evidence in Chief of Mr Willis for Fonterra, at 10.10.

²² Evidence in Chief of Mr Willis for Fonterra, at 10.11. This exception has also been proposed by the Council in Plan Change 5 as notified in respect of the Farm Portal consent process.

with Policy 4.38A).²³ The alternative pathway will therefore maintain the region's water quality.

- (ii) There will also be reductions from the nitrogen baseline for farming activities consented under the alternative pathway, where the assessed GMP loss rate is less than the baseline.²⁴ The alternative pathway will therefore assist in improving water quality in the region.
- (c) Mr Willis also considers that the inclusion of the alternative pathway (in addition to the Farm Portal) is not contrary to the relevant provisions of the CRPS relating to freshwater quality and management.²⁵ Indeed, the inclusion of the alternative pathway will assist to control land uses so as to ensure the water quality standards in the CRPS are achieved.²⁶

2.17 The Council also considers the inclusion of the alternative pathway in the plan change will result in cumulative adverse effects by enabling an increase in nitrogen loss in over-allocated catchments.²⁷ That is not correct. As set out above, inclusion of the alternative pathway will in fact maintain and improve water quality in the region.

2.18 The Council accepts there will be situations where a farm cannot meet Portal-generated loss rates, even where a farm is adopting GMP.²⁸ Rather than include an alternative consent pathway, it appears that the solution suggested by the Council is to manage non-compliance with Portal-limits through its audit and compliance processes.²⁹ The Council explains its suggested solution at paragraphs 6.190 - 6.200 of the Section 42A Report.

2.19 Our understanding of the Council's proposal is that it will grant consents subject to the Portal limits and then, through the audit / compliance process, will "excuse" failures to meet those limits if the farmer can otherwise demonstrate that all GMPs are being implemented. In our submission, that approach is likely to be *ultra vires* the RMA:

²³ Evidence in Chief of Mr Willis for Fonterra, at 9.9(d) and 10.19(a).

²⁴ Evidence in Chief of Mr Willis for Fonterra, at 10.19(b).

²⁵ Evidence in Chief of Mr Willis for Fonterra, at 10.18 - 10.31.

²⁶ Evidence in Chief of Mr Willis for Fonterra, a 10.22.

²⁷ Section 42A Report at paragraph 6.159.

²⁸ Section 42A Report at paragraph 6.192.

²⁹ Section 42A Report at 6.196.

- (a) The Council has a duty to ensure compliance with consents and their conditions.³⁰
- (b) Given that duty, the Council should not grant consents subject to conditions that it knows cannot be complied with and which it does not intend to enforce.
- 2.20 It is also difficult to see how the Council can maintain its opposition to the inclusion of the alternative consent pathway on the basis that it will allegedly result in an increase in nitrogen loss over and above the Portal limits, while in the same breath it is purporting to turn a blind eye to exactly that situation occurring during the audit and compliance process.
- 2.21 Accordingly, in our submission there is no basis in law or good planning practice for the Council's opposition to Fonterra's proposal. The Council has recognised the very same problem with the operation of the Farm Portal as Fonterra itself identified, but has suggested a solution that is at best inappropriate, and at worst is illegal.³¹

Statutory analysis of alternative consent pathway

Section 32 assessment

- 2.22 Fonterra's proposal to include an alternative consent pathway in Plan Change 5 in addition to the Farm Portal does not require any amendments to the objectives of the CLWRP.
- 2.23 Accordingly, the key test under section 32 is whether the inclusion of the proposed alternative pathway is a more appropriate method for achieving the objectives of the CLWRP than the methods of Plan Change 5 as

³⁰ *Beech Cove Properties Ltd v Queenstown Lakes District Council* [2010] NZEnvC 392 at [32].

³¹ We are also uncertain whether the Council's proposed solution will even be available to it under Plan Change 5 as notified, in respect of farms in the Red zone. Proposed Rule 5.48A provides that a farming activity within the Red zone that does not comply with condition 2 of Rule 5.45A is a prohibited activity. Condition 2 therefore attaches prohibited activity status to farming activities in the Red zone that before 1 July 2020 exceed the nitrogen baseline, and from 1 July 2020 exceed the Portal-generated Baseline GMP Loss Rate (unless the limited exception applies). Section 87A(6) of the RMA provides that no application for consent can be made for an activity described as prohibited. We therefore cannot see how the Council can even accept for processing applications for consent for farming activities that do not comply with the Portal-generated limits (as such activities are prohibited).

notified (in which the Portal is the only path to consent), having regard to the relevant matters set out in section 32.³²

- 2.24 Mr Willis has undertaken an evaluation under section 32 of Fonterra's proposal to include an alternative consent pathway in addition to the Farm Portal, as compared to reliance solely on the Farm Portal to establish Baseline GMP and GMP loss rates. In summary:
- (a) There are a range of costs associated with reliance solely on the Portal-generated loss rates as means to apply for resource consent. The most significant of these are the economic and social costs associated with farming activities operating at GMP, but not meeting Portal-limits, becoming classified as a prohibited activity.
 - (b) The major benefit of including the alternative consent pathway in addition to the Portal is that the costs of farming activities operating at GMP becoming prohibited are avoided. This is on top of the benefits that will accrue from the use of the Portal by those farmers (who will be in the majority) for whom the Portal generates accurate loss rates with which they can comply.
 - (c) The benefits of including the alternative pathway outweigh the costs of this option associated with the potential for added nitrogen loss over and above the Portal-generated limits. As set out above, the inclusion of the alternative pathway will accomplish the vision of Plan Change 5 - namely that every farmer achieves nitrogen loss rates that represent industry-agreed GMP. This in turn means that including the alternative pathway in Plan Change 5 will give effect to the NPSFM requirements to maintain and improve the region's overall water quality, without the significant disbenefits that would accrue in the absence of the alternative pathway.
 - (d) The risk of a large number of farmers seeking consent for non-compliance with the Portal limits can be addressed by the introduction of the "gateway test" (discussed above) for when consent under the pathway should be contemplated. Similarly, the risks associated with differences between the Portal-

³²

Resource Management Act 1991, section 32(1)(b).

generated limits and those established under the alternative pathway can be addressed by the requirements that farming activity must not exceed the nitrogen baseline and must operate at assessed GMP. The risk of not providing an alternative pathway is that farming activities operating at GMP will become a prohibited activity and will not be able to even apply for consent.

- 2.25 Overall, based on the relative costs and benefits and the risks of acting or not acting, Mr Willis concludes that Fonterra's proposal to include an alternative consenting pathway in addition to the Farm Portal is the more appropriate method for achieving the objectives of the CLWRP, than relying solely on the Farm Portal as proposed by Plan Change 5 as notified. In particular, the inclusion of the alternative pathway will more appropriately achieve Objective 3.24, which provides:

All activities operate at good environmental practice or better to optimise efficient resource use and protect the region's fresh water resources from quality and quantity degradation.

Effects on the environment

- 2.26 The environmental effects of including the proposed alternative pathway in Plan Change 5 in addition to the Portal have been considered:³³
- (a) As explained earlier, the inclusion of the alternative pathway will not result in adverse cumulative effects on the environment.
 - (b) The definition of "environment" includes "social and economic conditions".³⁴ In our submission, the evidence demonstrates that the inclusion of the alternative pathway will not give rise to any increased adverse effects compared to those rules provided for in Plan Change 5 as notified. In fact, including the alternative pathway in Plan Change 5 will result in less adverse effects on the social and economic components of the environment, as farming activities will not be unnecessarily classified as a prohibited activity.

³³ Resource Management Act 1991, s 68(3).
³⁴ Resource Management Act 1991, s 2.

Section 30(4) of the RMA

- 2.27 None of the Fonterra amendments contravene the requirements of s 30(4) of the RMA.

Assessment against higher-order documents

- 2.28 The inclusion of the alternative pathway in addition to the Farm Portal would, more fully than Plan Change 5 as notified, achieve the objectives of the higher-order documents in the RMA hierarchy:

- (a) As set out above, the inclusion of the alternative consent pathway will give effect to the NPSFM and the CRPS.³⁵ Under Mr Willis' section 32 analysis, the inclusion of the alternative pathway will give effect to these documents at less cost than Plan Change 5 as notified.
- (b) In making any decision, the Commissioners must have "particular regard to" the vision and principles of the Canterbury Water Management Strategy ("**CWMS**").³⁶ In our submission, including the alternative consent pathway in Plan Change 5 is consistent with, and would promote, the vision and principles better than Plan Change 5 as notified. In particular, being able to achieve the same environmental outcome (nitrogen loss rates that represent GMP) at lesser cost directly gives effect to the vision of the CWMS.³⁷

To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework.

- (c) The NPSFM does not "cover the field" and therefore the Commissioners may have recourse to Part 2 of the RMA.³⁸ In

³⁵ Resource Management Act 1991, s 67(3)(a) and (c).

³⁶ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, section 63.

³⁷ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, Schedule 1.

³⁸ See the Report and Recommendation of the Hearing Commissioners on Variation 1 to the Proposed Canterbury Land and Water Regional Plan, at [298]. The Commissioners found that the NPSFM does not cover the field as it does not contain provisions on the use of fresh water resources in a way, or at a rate, which enables people and communities to provide for their social, economic or cultural wellbeing, and for their health and safety; nor does it directly address matters identified in s 6, RMA as matters of national importance, such as natural character;

that regard, we submit that the inclusion of the alternative pathway - in addition to the Farm Portal - will better achieve the purpose of the Act. In particular, it will better enable social and economic well-being in the region in accordance with section 5(2) of the RMA, while achieving the matters set out in section 5(2)(a) - (c).

3. THE "SINKING LID"

- 3.1 Fonterra's second major concern with Plan Change 5 as notified relates to what it terms the "sinking lid" to nitrogen loss rates.
- 3.2 Plan Change 5 contains a suite of methods (policies and matters of control / discretion) that limit nitrogen loss to the Portal-generated GMP Loss Rate, where that rate is less than the Baseline GMP rate.³⁹ For example, proposed Policy 4.38 provides:

Freshwater quality is maintained within the Orange Nutrient Allocation Zone by:

- (a) restricting nitrogen losses from farming activities to the lesser of the Baseline GMP Loss Rate or the Good Management Practice Loss Rate, except where Policy 4.38A applies...

- 3.3 One reading of this policy is that where the most recent four years of farming activity generates, via the Portal, a GMP Loss Rate that is less than the Baseline GMP Loss Rate, then that lesser rate must apply as a farm's nitrogen loss limit.⁴⁰ This means over time a farm's nitrogen loss limit can go down, but it can never go up again to a previous level (hence the term "sinking lid").⁴¹
- 3.4 With the exception of farm enterprise activities and some zones in the Waitaki sub-catchment, Baseline GMP and GMP Loss Rates are not included as conditions on rules governing activity status.⁴² These

outstanding natural features and landscapes; and areas of significant indigenous vegetation and significant habitats of indigenous fauna. See also the Supreme Court's decision in *Environmental Defence Society v New Zealand King Salmon Ltd* [2014] NZRMA 195.

³⁹ See proposed policies 4.37 (b), 4.38 (a), 4.38AA (b), 4.38A (b) in Part A of Plan Change 5.

⁴⁰ Evidence in Chief of Mr Willis for Fonterra, at 11.3.

⁴¹ Evidence in Chief of Mr Willis for Fonterra, at 11.3.

⁴² Evidence in Chief of Mr Willis for Fonterra, at 11.9.

concepts are only included in the policies and matters of control / discretion.⁴³ As Mr Willis explains, this suggests the Council may have wanted to retain some flexibility as to whether the application of the sinking lid might be appropriate on a case-by-case basis.⁴⁴

3.5 However, as notified the relevant policies are inflexible and do not provide any guidance as to how and in what circumstances a departure from the requirement to comply with the lesser of the Portal-generated GMP Loss Rate or the Baseline GMP Loss Rate might be contemplated.⁴⁵

3.6 Ms Ruston sets out Fonterra's concerns with the strict application of the sinking lid approach.⁴⁶ The heart of this concern is the fact that any number of atypical factors may result in the Portal-generated GMP Loss Rate being artificially lower than it would have been, had those atypical factors not been present. Put another way, Fonterra is concerned there is no allowance under Plan Change 5 for events largely outside a farmer's control, which have nothing to do with operating at good management practices, that may lead to reduced nitrogen loss. There are any number of uncontrollable events that may result in reduction in a farm's nitrogen loss rate, but they are most likely to include environmental events (droughts, disease, etc), changes in markets and changes to personal circumstances (farmers ill-health, death etc).

3.7 In our submission, the strict application of the sinking lid approach is not the most appropriate method of achieving the objectives of the CLWRP as required by section 32(1)(b) RMA:

- (a) The CLWRP objectives do not direct the reduction of nitrogen loss rates without regard to social and economic costs. Water is recognised by the objectives as an enabler of economic and social well-being.⁴⁷ Consistent with that, activities that contribute to economic and social well-being must operate at good environmental practice (or better) to optimise efficient water use, and protect the region's fresh water resources from quality and quantity degradation.⁴⁸

⁴³ Evidence in Chief of Mr Willis for Fonterra, at 11.9.

⁴⁴ Evidence in Chief of Mr Willis for Fonterra, at 11.9.

⁴⁵ Evidence in Chief of Mr Willis for Fonterra, at 11.10.

⁴⁶ Evidence in Chief of Ms Ruston for Fonterra, at section 7.

⁴⁷ CLWRP, Objective 3.11

⁴⁸ CLWRP, Objective 3.24.

- (b) The costs associated with a strict application of the sinking lid are very difficult (and arguably impossible) to quantify, consistent with the unquantifiable range of circumstances that might lead to the sinking lid applying. What is clear is that the sinking lid will result in social and economic costs where it is applied, as farmers will need to reduce production (potentially substantially) in response to reduced Portal-generated GMP loss rates.⁴⁹
- (c) There is no evidence that the environmental benefits of applying the sinking lid will outweigh the social and economic costs. In Mr Willis' opinion, the sinking lid approach creates a perverse incentive for farmers not to voluntarily reduce nitrogen loss below the Baseline GMP, for fear of losing the ability to return to that baseline rate at a later time.⁵⁰ In other words, there may arise a "use it or lose it" mentality.
- (d) In addition to the economic and social costs, the risk of not amending Plan Change 5 to provide the Council with discretion to decline to apply the sinking lid where appropriate is that the Canterbury Region will be left with an inequitable nutrient management regime. In our submission, it is not equitable to permanently reduce nitrogen allocations for individual farms as a result of factors over the preceding measurement period that are beyond farmers' control and which may have led them to involuntarily reduce their nitrogen losses for a temporary period.

3.8 Mr Willis identifies two options for amending Plan Change 5 so as to avoid the costs associated with a strict application of the sinking lid approach:⁵¹

- (a) The sinking lid provisions could be deleted and further reductions from the Baseline GMP achieved through subsequent plan changes for specific sub-regions. The benefit

⁴⁹ The alternative consent pathway will not automatically provide a remedy for farmers in these circumstances. The "gateway" to consent under the alternative pathway requires the applicant to demonstrate there is something peculiar about the farm system that cannot be accurately modelled by the Portal and / or OVERSEER. Atypical factors resulting in artificially lower but nevertheless accurate Portal-generated limits may not, on their own, qualify a farmer to obtain consent for a higher limit under the alternative pathway.

⁵⁰ Evidence in Chief of Mr Willis for Fonterra, at 11.4.

⁵¹ Evidence in Chief of Mr Willis for Fonterra, at 11.8.

of this option is that it provides for a transparent process for assessing the basis and appropriateness of future reductions in nitrogen loss rates. Any catchment or site specific concerns about the proposed baseline period, for example if it were a time of drought, could be addressed through the submission and hearing process on that plan change.

- (b) Alternatively, the sinking lid provisions could be retained but amended so that the Council has discretion to allow a loss rate for a farm that is higher than the Portal-generated GMP Loss Rate, where atypical factors have lead to that rate being lower than the Baseline GMP Loss Rate. Mr Willis has proposed a new additional policy in his evidence that he considers could achieve this outcome; however, he remains concerned that it will be challenging to implement given the broad opportunity it presents for farmers to argue that the policy applies to their particular circumstances. In other words, to catch the wide range of potential worthy circumstances the exception to the sinking lid approach must be broad; but the resulting breadth is so great that the exception could be argued as being applicable (in whole or part) in nearly every circumstance.

- 3.9 On balance, Mr Willis therefore considers the preferred approach is to remove the sinking lid provisions altogether.⁵² That is therefore Fonterra's preferred relief to the sinking lid provisions. Fonterra could accept the retention of those provisions if they are amended so that discretion not to apply the sinking lid where appropriate is provided; however, on the basis of Mr Willis' evidence it may be that this is too difficult to achieve within the Plan Change 5 provisions.

4. CONCLUSION

- 4.1 Fonterra supports the environmental outcomes sought through Plan Change 5. However, Fonterra respectfully requests that the Commissioners include the alternative consent pathway, as set out in the amendments proposed by Mr Willis, in addition to the Farm Portal proposed under Plan Change 5. Fonterra also requests that provisions

⁵²

Evidence in Chief of Mr Willis for Fonterra, at 11.14 and 11.15.

applying the so-called "sinking lid" approach to nitrogen loss rates under Plan Change 5 are deleted.

- 4.2 In our submission, the relief sought by Fonterra will ensure that the intended environmental outcomes of Plan Change 5 are met, while best taking into account the associated social, cultural and economic effects.

A handwritten signature in black ink, appearing to read "B J Matheson" or "R E Robilliard", with a long horizontal line extending to the right.

B J Matheson / R E Robilliard
Counsel for Fonterra Co-operative Group Limited

Section 2.18

1. We should elaborate on this ~~new~~ section of the submissions.
2. Fontera's concern is that farms otherwise operating at GMP are classified as prohibited because they would be operating above Portal generated Loss Rates.
3. It appeared to us that the Council's proposed solution was to effectively issue a consent for the portal generated loss rates (whether those loss rates are in a Farm Environment Plan or otherwise) - effectively at the consent grant stage turning a blind eye to what the actual rates were, - and then to continue to excuse that failure through the audit + compliance process, provided that all GMP were in place.
4. Our criticisms at paras 2.19 - 2.21 are made on that basis.
5. If, as I accept may be the case, the Council does intend to apply strictly the Portal generated loss rates at the consent stage - and have every intention to enforce those limits, subject only to some normal flexibility throughout the consent term to deal with true aberrations then our criticisms would not apply.
^{in that case,}
But, of course, Fontera's primary concern - namely that the Farm Portal is a very blunt tool with no "safety valve" ~~to accommodate~~ would remain.