

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

**MEMORANDUM OF COUNSEL FOR FONterra CO-OPERATIVE GROUP
LIMITED IN RELATION TO MATTERS RAISED BY THE COMMISSIONERS AT
THE HEARING**

2 SEPTEMBER 2016

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MAY IT PLEASE THE COMMISSIONERS:

1. The Hearing Commissioners raised a number of questions regarding the submissions and evidence of Fonterra Co-operative Group Limited ("Fonterra") on Proposed Plan Change 5 to the Canterbury Land and Water Regional Plan ("Plan Change 5").
2. This memorandum addresses the questions from the Commissioners regarding:
 - (a) Fonterra's primary submission on Plan Change 5.
 - (b) The proposed relief sought by Fonterra set out in the evidence of Mr Willis.
 - (c) The scope for the relief sought by Fonterra in relation to:
 - (i) the alternative consenting path to the proposed Farm Portal; and
 - (ii) the "sinking lid" approach of Plan Change 5 to nitrogen loss rates.
3. We also confirm the final relief sought by Fonterra to Plan Change 5 is that contained in Schedule 1 of the evidence of Mr Willis.

PART A - FONTERRA'S PRIMARY SUBMISSION

4. Schedule 1 of Fonterra's primary submission sets out the detailed relief that was initially sought by Fonterra on Plan Change 5. Commissioner Sheppard raised a number of questions in relation to the relief sought in Schedule 1, which we address in turn below.

Submission point 33

5. The comments section on submission point 33 (which relates to Rule 15B.5.27.2(b)) cross-referred to submission point 3 above. This should instead be a cross-reference to submission point 4.

Submission point 37

6. The proposed amendment to matter of discretion 8 in Rule 15B.5.45 is no longer sought by Fonterra as it is recommended that this matter be deleted by the reporting officers in the Section 42A report.

Submission point 41

7. The proposed amendment to Policy 15B.4.12 is no longer sought by Fonterra.

Submission point 43

8. The proposed amendment to Policy 15B.4.20(d) is no longer sought by Fonterra.

Submission point 46

9. Commissioner Sheppard asked for an explanation of how the new activity rule for farming enterprises sought by Fonterra in its primary submission is within scope. Fonterra is no longer seeking a new rule. Amendments to existing rules relating to farming enterprises to provide for the alternative consenting path are set out in Appendix 1 of Mr Willis' evidence. The scope for the alternative path is addressed below.

PART B - QUESTIONS ARISING FROM PLANNING EVIDENCE

Amendments to Policy 5.44B

10. Commissioner van Voorthuysen asked whether flexibility in the application of the "sinking lid" approach to nitrogen loss rates could be provided through amending the matters of discretion (such as matter of discretion 5 of rule 5.44), rather than deleting that matter as proposed by Mr Willis.
11. Mr Willis considers that flexibility can be provided by making the matter of discretion subject to the policy proposed at paragraph 11.12 of his evidence. The matter of discretion could then read (new changes shown in red):

Where determined appropriate in accordance with Policy 4.xx,
Methods that require the farming activity to operate at or
below the Good Management Practice Loss Rate (or where
applicable the Assessed Good Management Practice Loss
Rate), in any circumstance where that Good Management
Practice Loss Rate (or where applicable the Assessed Good
Management Practice Loss Rate), is less than the Baseline
GMP Loss Rate; and

Amendment to Policy 15B.4.25(c)

12. Commissioner van Voorthuysen asked why the amendment to Policy 15B.4.25(c) (which concerns consents for farming activities in the Valley

and Tributaries Freshwater Management Unit) suggested in Schedule 1 of Mr Willis' evidence did not align with the explanation given for that amendment at paragraph 13.19.

13. After reviewing the rule, we suspect that Commissioner van Voorthuysen may have been intending to refer to the discussion of the proposed amendments to Policy 15B.4.25(c) at paragraph 13.9 of Mr Willis' evidence. The discussion at paragraph 13.19 concerned Policy 15B.4.4 regarding flows in Whitney's Creek.
14. As noted, at the hearing Mr Willis advised that paragraphs 13.1 to 13.9 of his evidence should be deleted; therefore removing any inconsistency.

Amendment to proposed Rule 15B.5.16A

15. Commissioner van Voorthuysen was concerned that proposed Rule 15B.5.16A (which provides an alternate path to consent for farming activities in the Ahuriri Zone and Upper Waitaki Hill Zone) does not include an entry condition for when consent under the proposed alternative path would be appropriate. The concern was that this might provide a "clear pass" around the use of the Portal in every circumstance.
16. Mr Willis agrees there would be greater certainty that the alternative path is only available where it is appropriate, if the gateway test in proposed policy 15B.4. is also incorporated as an entry condition to the corresponding rules (including proposed Rule 15B.5.16A and the other rules proposed as part of the alternate path to consent¹). Mr Willis proposes that an additional condition therefore be included in the relevant proposed rules as follows:

An [Accredited Farm Consultant/Certified Farm Environment Plan Auditor] certifies either:

(a) That the Assessed Baseline GMP Loss Rate applicable to the property, and submitted with the application, is appropriate because:

- (i) All the good management practices specified in Schedule 28 are modelled as having been adopted on the property over the period 1 January 2009 – 31 December 2013; and
- (ii) One or more of the Good Management Practices modelled as having been adopted on the property was not adopted in a manner that is represented by the

¹ The additional condition would also need to be added to the Rules 5.46AA, 5.51, 5.55AA, and 5.58AA.

applicable OVERSEER settings, methodologies and rules described in Schedule 28; and

(iii) Despite (ii) above, the manner in which the Good Management Practice was modelled as being adopted and which was adopted on the property over the period 1 January 2009 – 31 December 2013 represents good management practice having regard to the document entitled Industry-agreed Good Management Practices relating to water quality – dated 18 September 2015; and/or

(b) OVERSEER® cannot generate an output file for the property, or cannot do so without the input data being manipulated in such a manner as the input file does not accurately reflect the farming system undertaken on the property.

Query regarding paragraph 10.26(d) of planning evidence

17. Appendix 2 of the Canterbury Regional Policy Statement ("CRPS") lists the relevant matters that an "integrated solution" to freshwater management within the meaning of Policy 7.3.9 of the CRPS should address. Mr Willis has set out an abbreviated list of those matters at paragraph 10.26 of his evidence.
18. Commissioner Sheppard asked if the reference to "activities" in the matter listed at paragraph 10.26(d) of Mr Willis' evidence should be read as being "land use activities". Paragraph 10.26(d) of Mr Willis' evidence is a direct quote of the matter listed in Appendix 2 of the CRPS. Mr Willis advises that, in his opinion, the reference to "activities" in this matter should be interpreted to include, but not be limited to, land use activities.

Response to rebuttal evidence of Ms Davidson for Ngāi Tahu regarding the "sinking lid"

19. Commissioner Sheppard asked whether Mr Willis had any comment on the concerns expressed by Ms Treena Davidson (in her rebuttal evidence on behalf of Ngāi Tahu) about the new policy proposed in paragraph 11.2 of Mr Willis' evidence.
20. The new policy proposed by Mr Willis would provide the Council discretion to allow a loss rate for a farm that is higher than the Portal-generated GMP Loss Rate, where atypical factors have led to that rate being lower than the Baseline GMP Loss Rate.
21. Mr Willis disagrees with Ms Davidson's concern that this proposed policy would remove any assurance that Plan Change 5 would result in a reduction in nitrogen loss rates. Plan Change 5 requires compliance by

farming activities with their Baseline GMP Loss Rate, which Mr Willis considers will achieve a reduction in nitrogen loss rates.

22. Contrary to Ms Davidson, Mr Willis also considers that his proposed new policy is consistent with the overall intentions of Plan Change 5:
 - (a) The purpose of Part A of Plan Change 5 (which proposes region-wide amendments) is not to ensure that nitrogen loss rates are achieved that meet the desired standard for the particular receiving environment standard. Policy 4.9 of the Canterbury Land and Water Regional Plan ("CLWRP") provides that this is the role of the sub-regional provisions.
 - (b) The purpose of Plan Change 5 is, in large part, to meet the obligation under Policy 4.11 of the CLWRP to codify good management practices and include that codification within the CLWRP by October 2016. Mr Willis' proposed new policy does not cut across that purpose.
23. In terms of Ms Davidson's suggestions (at paragraph 5.5 of her rebuttal evidence) for re-drafting the policy proposed by Mr Willis, Mr Willis considers that:
 - (a) The proposed new policy is consistent with Ms Davidson's suggestion at paragraph 5.5(b) that the Council have discretion whether to apply the policy.
 - (b) It is not clear how, as suggested by Ms Davidson at paragraph 5.5(a), the policy framework of Plan Change 5 could be amended so that this new policy is "subservient or lower in the hierarchy".
 - (c) It would be possible to prescribe the exceptions and atypical situations to which the proposed new policy should apply, as suggested by Ms Davidson at paragraph 5.5(c). However, as explained at paragraph 11.13 of Mr Willis' evidence, it would be challenging to apply such a policy in practice and it is unclear how it could assist with the consideration of consent applications submitted prior to the requirement for compliance with the GMP Loss Rate applying (ie prior to 1 July 2020).

Question regarding the "sinking lid"

24. Commissioner van Voorthuysen asked whether the statement at paragraph 4.6 of Mr Willis's evidence was correct when it said that "over time a nitrogen loss limit can go down but can never go up to a previous level".
25. Mr Willis would like to elaborate on his answer as follows. The concept of the Good Management Practice Loss Rate imposed as a limit means that every four year period's average nitrogen loss must comply with the average nitrogen loss in the four year period that preceded it (on a rolling four year period basis). Hence, in any one year nitrogen loss might exceed a previous year's loss but the four year average cannot exceed the previous four year average. To the extent that the most recent four year average is lower than the preceding four year average, the nitrogen loss limit would reduce and that new lower limit would apply as the maximum allowed as the average loss over the following four year period. So, while a single year might increase relative to the preceding year, there is no means by which a four year average rate can increase.

PART C - QUESTIONS IN RELATION TO SCOPE

26. A number of questions were raised by Commissioner Sheppard regarding the Commissioners' scope to grant the relief sought by Fonterra below. We set out below the general principles in relation to scope and then address each of Commissioner Sheppard's questions.

General Principles

27. The right to make a submission in respect of a proposed plan change is contained in Clause 6 of Schedule 1 RMA, which provides that persons may make a submission on a proposed plan change to the relevant local authority.
28. In terms of whether there is jurisdiction for the Commissioners to consider the inclusion of the relief sought in a submission on Plan Change 5, the submission must address the extent to which Plan Change 5 proposes to change the status quo (ie the operative CLWRP), and must adequately

inform and offer a real opportunity for participation to those who are potentially affected by the relief sought in the submission.²

29. The test for jurisdiction, as set out in *Clearwater*, can be summarised as follows:
 - (a) First, the proposed relief in the submission must clearly be "on" the plan change. The relief must not be "from left field" or something "completely novel".³
 - (b) Second, those persons potentially affected by the relief sought must have been adequately informed by the submission of its potential impact on them and offered a real opportunity for participation; or, to put it another way, are there potential submitters who would have lodged a further submission had the primary submission sought the proposed relief.
30. Without losing sight of the importance of primary submissions clearly setting out relief so that the interests of potentially affected parties are not prejudiced, care must be taken not to set the bar too high. This is particularly so when, as in this case, planning processes are being completed within increasingly tight timeframes, exacerbated by the need for submitters to obtain technical evidence to support their relief.
31. The Council, as the proponent of the water quality plan changes throughout Canterbury, has had a lengthy period of time to develop the provisions, and carefully justify the rules being sought. However, submitters in this and the related processes have not had the luxury of being in control of the timing of the process.
32. It will be inevitable that thinking will develop as technical work is completed and as submitters compare notes and test ideas. Subject to there being jurisdiction (approached in a pragmatic and not overly formalistic manner, and so long as prejudice is not caused to people who would have submitted but did not), the primary focus should, we respectfully submit, be the overall quality of the planning instrument.

² *Clearwater Resort v Christchurch City Council HC Christchurch AP 34/02*, 14 March 2003 ("Clearwater"); *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 ("Motor Machinists").

³ *Clearwater Resort v Christchurch City Council HC Christchurch AP 34/02*, 14 March 2003, at [69].

Scope for the alternative consenting path

33. Commissioner Sheppard asked Fonterra to explain why it considers that there is scope for an alternative consenting path to the Farm Portal to be provided by Plan Change 5.
34. In its primary submission, Fonterra sought an alternative path to consent for farming activities that are unable to meet Farm Portal-generated GMP loss rates, where the Farm Portal generates a limit that is inaccurate. Fonterra's primary submission also clearly explained its rationale for its proposal of an alternate consenting path.
35. Schedule 1 of Fonterra's primary submission proposed the following amendments to the provisions of Plan Change 5 to provide an alternate consenting path:
 - (a) new definitions of "Loss Rate Assessed as Good Management Practice" and "Loss Rate Assessed as Baseline GMP",⁴ and
 - (b) amendments to all rules and policies referring to Baseline GMP and GMP Loss Rate so that they refer as an alternative to "Loss Rate Assessed as Baseline GMP" and "Loss Rate Assessed as Good Management Practice".
36. An alternative consenting path was also proposed in the primary submission of the Combined Canterbury Provinces, Federated Farmers of New Zealand ("Federated Farmers"). That primary submission was supported by Fonterra in its further submission.
37. In our submission, and with reference to the general principles at paragraphs 27 above and 38(b) below, the Commissioners have jurisdiction to amend Plan Change 5 to provide an alternate consenting path:
 - (a) The relief sought in the Fonterra and Federated Farmers submissions in respect of the alternative path was clearly *on* the proposed provisions introduced by Plan Change 5. Plan Change 5 proposes to introduce the concepts of GMP, GMP Loss Rate and the Farm Portal to the operative CLWRP. The

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These definitions are designed to allow nitrogen loss rates to be estimated by OVERSEER based on the adoption of Good Management Practices, rather than relying on the Farm Portal.

alternate consenting path can be provided by amending the provisions of Plan Change 5 that introduce those concepts.

- (b) Other parties, in their submissions and evidence, also commented on the appropriateness of the alternative consenting path.⁵ Accordingly, this is not a case where a person might not have realised from the submissions that they would not be affected by the proposed alternative path at all; the alternative path was clearly raised in submissions, and could fairly be expected to be included in the final relief sought by Fonterra.⁶ The proposed relief has not undermined "robust, notified, and informed public participation in the evaluative and determinative process",⁷ and nor would this relief represent the "submisional side-wind" of concern in *Motor Machinists*.⁸
- (c) No concern was raised by the Section 42A Report on the scope or jurisdiction aspect of Fonterra's submission, whereas concerns were raised by the reporting officers as to the scope of relief sought in submissions by other parties.
38. Commissioner Sheppard also raised a specific question in relation to whether the Commissioners have scope to introduce proposed new Policy 4.38BA.
39. This new policy was proposed in the primary evidence of Mr Willis. It was proposed in light of the Council's concerns about the proposal for alternate consenting pathway expressed in the section 42A Report.⁹ The new policy is designed to provide a clear "gateway test" for when consent under the alternate path would be appropriate.
40. In our submission, while new Policy 4.38BA was not specifically raised in Fonterra's primary submission, the Commissioners have jurisdiction to include this new policy in Plan Change 5:

⁵ Primary submission of Central Plains Water Ltd, PC5LWRP-518; primary submission of Ravensdown Limited and Others, PC5LWRP-1727; evidence of Scott Pearson and Angela Christenson for North Canterbury and Central South Island Fish and Game Councils, at [39]; evidence of Eva Harris for BCI; evidence of Dr Metherell for Ravensdown.

⁶ *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EC), where there was no suggestion that there was to be any rezoning of land.

⁷ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290, at [77].

⁸ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290, at [82].

⁹ Mr Willis also considered that the alternative consenting path should not undermine the existing management framework, and must not be open ended such that it "opens the flood gates" for every person operating a farming activity to argue that because they are operating at GMP they should be granted consent.

- (a) The new policy does not expand the relief sought in Fonterra's primary submission - it simply operates to more tightly confine the circumstances in which the alternate path to consent is available.
- (b) While it is good practice to provide preferred wording in an original submission,¹⁰ the legal requirement is merely that "precise details" be given.¹¹ In our submission, it would be inappropriate to elevate that requirement to require that specific wording be provided in the original submission and that parties are confined strictly to that wording for the duration of the process.
- (c) In that regard, more recent cases have confirmed that:
 - (i) It is necessary to take a realistic and workable approach rather than one founded on legal nicety.¹²
 - (ii) A party is not necessarily restricted in the matters it can raise by the express words of a submission.¹³
 - (iii) Failure to specifically request relief is not fatal to a proposed amendment, and consequential changes which logically arise from the grant of relief requested and submissions are permissible provided they are reasonably foreseeable.¹⁴
 - (iv) Such changes can extend to consequential policy changes following agreed relief regarding rule changes (emphasis added):¹⁵

[46] The Court is satisfied that the amendments sought are sufficiently inferential to the extent that other submitters would have been aware that the issue of ranking and the activity status of demolition relating to those rankings were in contention.

¹⁰ *Romily Properties Ltd v Auckland City Council* A95/96.

¹¹ Form 5, Resource Management (Forms, Fees and Procedure) Regulations 2003.

¹² *Cephas Group Ltd v Tasman District Council* [2013] NZEnvC 239, at [17].

¹³ *Cephas Group Ltd v Tasman District Council* [2013] NZEnvC 239, at [18]. Note while the case referred to in that paragraph referred to jurisdiction in respect of an Environment Court reference, the same principle should apply to a submission (being the foundation for the reference).

¹⁴ *Cephas Group Ltd v Tasman District Council* [2013] NZEnvC 239, at [18].

¹⁵ *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166, at [47].

[47] It is fair and reasonable that as part of the relief sought in relation to the ranking system that the accompanying policies would be amended. The ranking system, the relative activity status of demolition and the policies in support are all interconnected. They do not operate in a vacuum. It is unlikely that an amendment would be made to one without parallel changes being made to the other.

- (v) There is implied jurisdiction to make consequential amendments to rules following changes to objectives and policies on the principle that regional and district plans have an internal hierarchical structure.¹⁶
- (d) In plan changes as complex as Plan Change 5, there will inevitably be an evolution in thinking, and expert witnesses must be afforded necessary scope to alter their views as to preferred relief, based on the opinion of other experts. While counsel acknowledge the importance of procedural fairness, so as to not cut out from the process potentially affected parties, those procedural fairness concerns can be met by the tests set out in *Motor Machinists* and those summarised in sub-paragraph (c) above, without reverting to a much more stringent test of being strictly limited to "wording" provided in an original submission. Adopting a strict process could unnecessarily prevent experts' opinions (as amended) being properly incorporated into any final decision making process by the Commissioners, despite there not being any substantive procedural risks.
41. Other minor consequential changes were suggested by Commissioner Sheppard to more carefully confine Policy 4.38BA at the hearing. Fonterra agrees that those minor changes are appropriate and within scope, for the same reasons set out above.
- Scope for the sinking lid**
42. Commissioner Sheppard also asked Fonterra to explain why it considers there is scope for the deletion or amendment of the provisions that apply a "sinking lid" approach to nitrogen loss rates.
43. In its primary submission, Fonterra expressed concern with how Plan Change 5 proposed to require farmers to make GMP improvements over

¹⁶ *Clark Fortune McDonald and Associates v Queenstown Lakes District Council* (C89/2002), at [17].

time in order to reduce their nitrogen loss rates. Fonterra's concern was that under Plan Change 5 as notified, a farming activity must operate at or below the GMP Loss Rate, calculated on a four year rolling average, in all circumstances where that GMP Loss Rate is less than the Baseline GMP Loss Rate. This means that farmers will be unable to return to their GMP Baseline loss rate, even where situations beyond their control (such as sickness, market fluctuations, etc) have resulted in an artificial lowering of their GMP Loss Rate.

44. Fonterra proposed in its primary submission that all references to GMP Loss Rates be deleted in order to remove the sinking lid effect of the Plan Change 5 provisions. Alternatively, Fonterra suggested an amendment to the definition of GMP Loss Rate, so that the rate is calculated as the highest annual rate (as determined by the Farm Portal) over the most recent four year period, rather than that rate being calculated as the average loss rate over the four year period.
45. In our submission, the Commissioners have jurisdiction to amend Plan Change 5 so that it does not apply a sinking lid to nitrogen loss rates:
 - (a) The relief sought in Fonterra's primary submission in respect of the sinking lid effect was plainly *on* Plan Change 5. Plan Change 5 proposes to introduce the concept of GMP Loss Rates to the operative CLWRP. The sinking lid effect of Plan Change 5 can be addressed by deleting references to GMP Loss Rates, or amending the definition of that new concept, as requested in Fonterra's primary submission.
 - (b) The sinking lid effect of Plan Change 5 was clearly raised in Fonterra's primary submission. Potential submitters were put on notice by Fonterra's submission that it was seeking amendments so that a sinking lid effect would not apply. There were opportunities to raise any concerns with Fonterra's proposed relief in the further submissions, evidence, and rebuttal evidence, as shown, for example, by the rebuttal evidence of Ms Harris for Barrhill Chertsey Irrigation and Ms Davidson for Ngāi Tahu that both addressed the relief sought by Fonterra in relation to the sinking lid.
 - (c) Within the primary Fonterra submission, the intended relief was sufficiently clear such that the outcome sought by Fonterra is

reasonably foreseeable, despite the amendments to the not being fully reflected in Schedule 1 to Mr Willis' evidence.¹⁷ For the reasons set out at 40 above, we submit that the proposed relief is within scope.

- (d) As above, no concerns regarding scope were raised on any aspect of Fonterra's submission by the reporting officers in the Section 42A Report.
46. In his evidence, Mr Willis supported amendments to Plan Change 5 so that its provisions did not apply a sinking lid to nitrogen loss rates (Mr Willis suggested that further reductions from the Baseline GMP should be achieved through subsequent plan changes). In the alternative, Mr Willis suggested that the Council be given some flexibility not to apply the sinking lid approach, where the GMP Loss Rate was not representative of the farm system. Mr Willis therefore proposed a new policy 4.36 that would allow the Council not to apply the sinking lid approach where it would be inequitable to do so.
47. Should the Commissioners decide not to remove the sinking lid effect of Plan Change 5 altogether (which is Fonterra's preferred relief), we submit that the Commissioners have jurisdiction to include proposed Policy 4.36 in the Plan Change. This new policy simply narrows the preferred relief sought in Fonterra's primary submission by allowing the Council some flexibility not to apply the sinking lid in appropriate circumstances. It logically follows from the original relief sought by Fonterra, and is therefore within scope.¹⁸
48. At the hearing, Commissioner Sheppard questioned whether new Policy 5.44B matter of control five could be amended, instead of deleted, in order to addresses Fonterra's concern regarding the sinking lid effect.¹⁹ In light of this, Mr Willis has drafted new wording for the matter of control (this is set out in paragraph 11 above). Should the Commissioners prefer that amendment, it is our submission that the Commissioners have jurisdiction to consider the inclusion of this relief. While this amendment was not introduced in Fonterra's primary submission or evidence, it is logically connected to the relief sought by Fonterra and is a reasonably foreseeable alternative to that relief. The relief sought by Fonterra in its

¹⁷ *Cephas Group Ltd v Tasman District Council* [2013] NZEnvC 239, at [18].

¹⁸ *Cephas Group Ltd v Tasman District Council* [2013] NZEnvC 239, at [18].

¹⁹ The amendment suggested by Commissioner Sheppard would also need to be made to all other provisions that Fonterra seeks to delete that apply the sinking lid.

suggested amendments narrows the relief sought in Fonterra's primary submission, which, as set out above, is clearly in scope.

DATED: 2 September 2016



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