Before the	**CANTERBURY REGIONAL COUNCIL**
Under the	Resource Management Act 1991
In the matter	of an application by **OCEANIA DAIRY LIMITED** for the resource consents necessary to construct and operate an ocean outfall to discharge treated wastewater from the Oceania Dairy processing plant at Glenavy.

LEGAL SUBMISSIONS FOR THE APPLICANT

14 July 2020

Duncan Cotterill
Solicitor acting: Ewan Chapman
PO Box 5, Christchurch

Phone +64 3 372 6466
Fax +64 3 379 7097
ewan.chapman@duncancotterill.com

INTRODUCTION

1 Scope of Submissions

1.1 These legal submissions support the applications for resource consent to Canterbury Regional Council (the **Council**) by Oceania Dairy Limited (**Oceania** or **the Applicant**) to enable the construction and operation of an outfall to discharge treated wastewater from the Oceania dairy processing plant at Glenavy to the Pacific Ocean.

1.2 The Council's s 42A report (the **Officer's Report**) advised that is was unable to recommend that the resource consents be granted, due to concerns about the uncertainty on the level of effects on the following matters:

1.2.1 Whether the level of wastewater treatment is adequate to protect coastal water quality;

1.2.2 Whether potentially adverse effects on Ngāi Tahu cultural values are addressed and mitigated.

1.3 Following the circulation of that report, during the Covid-19 Alert Level 4 and subsequently, a great deal has happened. Evidence has been filed sequentially; a series of questions has been directed to each of the witnesses by the Commissioners; responses have addressed the issues raised above, together with the Commissioner's own issues with an understanding of the evidence circulated.

1.4 In addition, following the Minute of Commissioners dated 29 June 2020, expert witnesses for Oceania, the Council and (where relevant) iwi/Ngāi Tahu conferenced on outstanding issues of disagreement. The concerns contained in the Officer's Report were addressed, and these have been dealt with fully by the Oceania experts.

1.5 These submissions provide an outline of the proposal and some of the key legal issues associated with it, and in particular where legal issues arise out of the concern indicated by the Officer's Report.

2 Oceania and the application in context

2.1 Oceania is a wholly-owned subsidiary of Monolia Yili Industrial Group Co. Limited (**Yili Group**). Yili Group produces and distributes dairy products and mixed foodstuffs, including milk powder for infants. It distributes its products primarily in the domestic Chinese market.

2.2 The Oceania factory, located at 30 Cooneys Road, Morven (**the Factory**) was established in August 2014. The Factory produces around 47,000 tons of powder per year, from standard whole milk powders through to specialty infant formula.

2.3 It is under on-going development – both in terms of its product range, and its on-site quality control and testing.

2.4 As outlined in the pre-circulated evidence, the current discharge of wastewater from the factory is to land, by way of irrigation. As a Panel you have indicated that you wish to focus in particular on those matters that remain in contention, and I submit that the matter of discharge to land compared to a discharge to ocean remains one of the primary issues of contention, particularly between the applicant and the submitters.

2.5 As well as the technical reasons for preferring an ocean outfall, as has been fully explained in the evidence of Shane Lodge, Paul Duder, Matt Savage and Nathaniel Wilson, there are other contextual matters that you should bear in mind when considering this issue of discharge to land.

2.5.1 Firstly, Yili Group is a foreign company, and so purchasing land for discharge is controlled by the Overseas Investment Office. Even if land were available for purchase, which is not always the case, it is not straightforward for Yili Group to purchase large areas of land for wastewater discharge. It runs against Government policy.

2.5.2 As Dr Wilson considers, the current regional planning framework around discharges of nutrients to land from wastewater are problematic. There are relatively few farms in the area that are not already currently irrigated, and with a Nitrogen baseline that could support wastewater discharge.

2.5.3 The Regional Council regime is for farmers to obtain discharge to land consents, and to operate within those consents. There is no "fat in the system" to allow another layer of discharge to land on new sites under current nutrient management rules.

2.5.4 The makeup of wastewater discharged to land is quite different to that proposed to be discharged by way of the ocean outfall. Farmers generally consider the nutrients contained within wastewater advantageous, and so the level of treatment for land discharge is considerably less than the ocean outfall.

2.5.5 Several submitters seek that Oceania expand its discharge to land, and in the same breath allege that Oceania is non-compliant with its current discharge to land consents. There appears to be a lack of understanding that a discharge to land of **wastewater** is treated quite differently than a standard irrigation consent. It is critical that you keep this distinction at the front of your mind, when considering the assessment of alternatives that Oceania has prepared.

2.5.6 Practically, dairy processing is now a year-round process, with winter milking and reconstituting milk powder during the winter months. The dairy processing model doesn't align with the traditional peak milk production period in summer, where water demand from farmers irrigating wastewater is much higher.

2.5.7 Finally, the application before you is one for ocean outfall, and the technical evidence that Oceania has engaged when preparing this application fully supports the proposal.

3 Two systems better than one

3.1 The overriding reasoning which Oceania is presenting to you today is that a dual functioning wastewater system is better than reliance solely on a land-based irrigation discharge.

3.2 In a world where the focus is on "robustness", "resilience" and "contingency planning" all boxes are ticked by this application.

3.2.1 It permits sensible use of nutrient rich water to land, at times when the land (the root zone) can take up those nutrients – as an alternative to dosing the land with inorganic fertilizers; and

3.2.2 It strips out the nutrients at times when the land is saturated, or unable to absorb and use the nutrients and provides a discharge to ocean which is low in pathogens, nutrient and bacteria.

3.3 These are two "modes"; two distinct pathways, which in my submission, results in a reduction in the overall effect on the environment.

3.4 It is also consistent with the practice of other dairy processing operations both in this region and in other places, and in very many respects it provides a far higher standard of wastewater discharge than is currently operated by many industrial processes and municipal waste discharges.

4 Evidence to be Presented

4.1 In light of the technical nature of this proposal and that it would allow a discharge into the CMA, Oceania has undertaken a comprehensive assessment of effects, and has filed evidence from 12 witnesses. Their overall assessment is that the adverse environmental effects, including cumulative effects, are low, and can be avoided, remedied or mitigated through conditions of consent.

4.2 Where relevant to their field of expertise, each witness has addressed issues raised in submissions and in the Officer's Report, and has commented on the suite of conditions volunteered by Oceania.

4.3 11 of the briefs of evidence were pre-circulated in accordance with the directions from the Commissioners. The twelfth, the evidence of Dr. Matthew Savage, was filed on Monday 13th of July.

5 The existing irrigation consents

5.1 This Application relates to the discharges to the Coastal Marine Area (the **CMA**) from the Oceania wastewater treatment plant (**WWTP**), the earthworks and dewatering required to lay the pipeline, and to the disturbance and occupation by the outfall and diffuser structures of the CMA. The relevant resource consents sought are detailed below at section 6.

5.2 The Panel is therefore restricted to that part of the Oceania operations before them, and must disregard any effects on the environment generated by the balance of the network for which Oceania holds separate resource consents. Oceania holds consents to discharge treated wastewater to land[1] (**the Irrigation Consents**). However, the effects relating to the irrigation activity do not form part of the current application.

5.3 Where relevant, the evidence and these submissions discuss the Irrigation Consents to explain how the ocean outfall will dovetail in with the existing discharge to land. Those consents are useful background, but not before the Panel for amendment.

5.4 Whilst it might be trite to say it, because the irrigation discharge consent is not before the panel, there is a danger of being too focussed with the effects of this application rather than the benefits.

---

[1] Resource consents RM165114 – RM165116

5.5 If the land irrigation system is continued to be used, with discharges occurring within the parameters of that consent, where do people think that nutrients end up? Particularly those nutrients which are irrigated to land at times of poor root-zone uptake?

5.6 This plant is only 7km from the ocean. In my submission, part of the existing environment is that there are non-point source discharges of N and P into the CMA from the land right now. The evidence, particularly for cultural reasons, is that "added discharges" are not welcome. But no regard is paid to the betterment that occurs, in an holistic sense, from this overall management of nutrients.

5.7 Our technical evidence is not attempting to quantify this betterment. Given that the discharge sits behind a whole rural hinterland from the Main Divide to the coast, the betterment will be infinitesimally small. But the critical factor remains that the starting point for evaluation is not a deterioration of the marine environment.

6 Resource consents sought

6.1 As summarised in the Application, Oceania is seeking six consents – three connected to the construction of the pipeline landward of the CMA, and the remaining three relating to the construction and operation of the outfall within the CMA. By way of summary, the consents comprise:

6.1.1 **CRC201187:** to <u>undertake earthworks</u> associated with the installation of a wastewater pipeline in road reserve land;

6.1.2 **CRC201191:** to <u>take groundwater</u> for the purposes of site dewatering during construction of the pipeline.

6.1.3 **CRC201192:** to <u>discharge groundwater</u> from site dewatering to land during construction of the pipeline;

6.1.4 **CRC201188:** to <u>disturb the coastal marine area</u> and construct an ocean outfall in coastal hazard zones 1 and 2 using a micro-tunnelling method;

6.1.5 **CRC201190:** <u>to occupy the coastal marine area</u> including an underground pipeline to three diffusers located approximately 300 metres offshore; and

6.1.6 **CRC201194:** to <u>discharge treated dairy processing wastewater</u> to the coastal marine area.

6.2 The activities above are classified as either **restricted discretionary** or **discretionary** under the Canterbury Land and Water Regional Plan (**LWRP**) and the Regional Coastal Environment Plan for the Canterbury Region (**RCEP**).

6.3 As noted by Ms Walker in her Officer's Report, the activities are linked to such a degree that it is appropriate to 'bundle' them and apply the most restrictive activity class. The overall status of the activity is therefore **discretionary**.

7 A Note on Submissions

7.1 As noted in the Officer's Report, a total of 127 submissions were received on the Application, 5 in support, 119 in opposition and 3 which are neutral. Key concerns raised in submissions relate to the ecological effects of the discharge, especially cumulatively with other ocean outfalls in the region and cultural effects associated with a discharge to the CMA.

7.2 With respect to cultural effects, Oceania recognises that discharges to water raise particular concerns to tangata whenua, and that consultation is a key component of the resource consent application process. Oceania has engaged with Te Runanga o Waihao directly and through the consultancy Aukaha Limited, has facilitated a hui post-lodgement of the application and obtained feedback from attendees on cultural concerns. A cultural impact assessment was obtained from Aukaha, and this is considered further below in relation to cultural issues.

EFFECTS ON THE ENVIRONMENT

8 Introduction

8.1 The effects of the application, both positive and adverse, are central to the Panel's assessment under section 104, and also to how the relevant provisions of the statutory policy and planning instruments are considered, including the New Zealand Coastal Policy Statement, and the RMA's sustainable management purpose.

8.2 The key effects for consideration are noted in turn below.

9 Positive Effects

9.1 As explained by Mr Lodge, Oceania is one of the major employers in the Waimate District and is a contributor to the national economy. Mr Lodge provides evidence that the dual system of allowable discharges will, over time, improve the overall management of wastewater from the plant. The Glenavy plant is very important to the social and

economic wellbeing of the community. The MGI Irrigation scheme, which is directly surrounding the plant, has submitted in support of the application, and that submission is highly relevant. Ms Singh discusses the positive effect of employment in the local community in her evidence.

10 Adverse Effects

10.1 As concluded in the Application and the evidence on behalf of the Applicant, the effects upon the environment based on the numerical modelling and a comprehensive analysis of the existing environment, are minor and acceptable.

10.2 The key categories of actual and potential adverse effects to be considered by the Panel are:

10.2.1 effects on surface water quality and ecological values arising from the discharge of treated wastewater to the Pacific Ocean;

10.2.2 effects from the disturbance and occupation of the coastal marine area from the construction, use and maintenance of the pipe and diffuser outlet structures;

10.2.3 effects from earthworks and dewatering required to install the landward section of the pipeline;

10.2.4 effects on cultural values associated with the mauri of the Pacific Ocean; and

10.2.5 effects on recreational values of this part of the Pacific Ocean coastline.

10.3 The Panel has indicated a strong preference to focus primarily on those matters in contention. The matters at 10.2.2, 10.2.3 and 10.2.5 above are dealt with extensively in both the application and the expert evidence for Oceania, and the s42A report prepared by Council. On that basis, I do not comment on them further in these written submissions.

11 Surface Water Quality and ecological values

11.1 The issues of ecological values have been agreed between the experts for Oceania and Council, and it was concluded that conferencing did not need to take place, as the evidence for both parties was consistent. In particular, in relation to species which are considered taonga by Ngāi Tahu, the expert evidence is agreed that dolphins and seals are sufficiently mobile, and their habitat is so extensive, that the introduction of the discharge will have less than minor effects.

11.2 Conferencing has occurred between the relevant experts in relation to water quality, and a Joint Witness Statement has been prepared and circulated. The remaining issue of contention is, as I understand it, one of the scale and relevance of the cumulative effect of the discharge on the formation of algal blooms. As outlined in the evidence for Oceania, Dr Wilson considers that although the discharge will result in an infinitesimal increase in nutrients, the increase is of such a small scale that it will not impact on the establishment of algal blooms. The experts are agreed that there will be no algal blooms that form **due to** the discharge (i.e. within the zone of reasonable mixing).

12 Cultural values

12.1 The submissions lodged by Te Rūnanga ō Waihao and Te Rūnanga ō Arowhenua address the cultural effects of the discharge, and oppose the consent sought by Oceania on that basis. Te Runanga ō Ngāi Tahu lodged a submission supporting the submissions of Te Rūnanga ō Waihao and Te Rūnanga ō Arowhenua. Each submitter prefers a discharge to land approach. The submission of Aukaka, on behalf of Te Rūnanga ō Waihao, and the following cultural impact assessment prepared by Aukaka, set out six main areas of concern:

12.1.1 Insufficient information provided in the application for an informed assessment to be provided;

12.1.2 Diminished opportunity for kaitiakitanga and rangatiratanga because of a lack of information;

12.1.3 The proposed pipeline will disturb native skink habitat;

12.1.4 The discharge of wastewater directly into water, which is culturally offensive;

12.1.5 Visual impact on the cultural landscape from the wastewater plume; and

12.1.6 Destruction of culturally significant sites during construction.

12.2 The submission on behalf of Te Rūnanga ō Arowhenua noted the following areas of concern:

12.2.1 Impact on native marine mammals which are taonga, particularly Hector's dolphins;

12.2.2 What happens in the event of a failure of the treatment system or the outfall;

12.2.3 Cumulative effects of other outfalls in this area; and

12.2.4 The overall negative effects on the mauri of the ocean.

12.3 We also understand that the effects of the proposal on mahinga kai are of concern to iwi, in particular are explained in the evidence of Mr King.

12.4 Each of these issues is addressed below (bundled together where applicable).

12.5 It is my submission that the application for Oceania was detailed and contained information that accurately outlined the scale of the proposal, and the anticipated effects arising from that. Oceania accepts that the application as lodged did **not** include a cultural impact assessment, however one had been commissioned and was lodged as an addendum to the application as soon as it was received.

12.6 The application considers the 'backstops' that apply if there is a failure somewhere in the WWTP or the outfall infrastructure. This is detailed fully in the evidence of Dr Savage and Mr Duder but in summary includes:

12.6.1 Frequent testing of water quality at the WWTP, and immediately prior to discharge, to ascertain that the water quality conditions of the consent are complied with (and no deterioration in water quality is happening along the course of the pipe);

12.6.2 Balance tanks within the wastewater treatment system to attenuate flows/ or redirect flows through the system again.

12.6.3 Three diffusers, which allows maintenance to occur to one diffuser without impacting the discharge from the other two;

12.6.4 The existing irrigation consents, which can be relied on in the unlikely situation that the ocean outfall has to be unexpectedly stopped for a period of time.

12.7 The evidence of both Oceania and the Council considers the effects of the proposal on native marine mammals, including the Hector's dolphin. Both experts have concluded that the effects will be negligible. No expert conferencing occurred between experts, as both parties agreed that there was consensus in their evidence.

12.8 Oceania, in its proposed consent conditions, has included a condition requiring a Lizard Management Plan, to ensure there are no adverse effects on native skinks/lizards, and an accidental discovery protocol which will apply the entire time that construction occurs.

12.9 Oceania appreciates the strong desire of tangata whenua to avoid discharges of wastewater to the sea. As noted in Mr Duder's evidence, the feasibility of a continued and expanded discharge to land system was considered as part the assessment of alternative options, with cultural effects being front of mind during this process. Ultimately, however, the difficulties in finding suitable land near the Oceania processing plant with the capacity to accept nutrient-rich water, and the restrictions on when and how much water can be applied throughout the year, makes this option impractical Instead, as stated in the Application and in evidence, Oceania intends to use the existing land discharge system to complement the discharge to water system. This intention for the two systems in tandem has been explained in evidence, and is a fundamental aspect of the proposal.

12.10 Oceania accepts that, despite the low scale of biophysical effects, the proposed discharge to the CMA is nonetheless offensive to tangata whenua. However, it is submitted that the effects on cultural values are mitigated through the volunteered consent conditions which include:

12.10.1 Chemical and microbiological monitoring of the quality of the wastewater discharge;

12.10.2 Benthic monitoring;

12.10.3 A proposed Lizard Management Plan;

12.10.4 An accidental discovery protocol; and

12.10.5 A community liaison group, which includes Te Runanga o Waihao, if they wish to join.

12.11 In relation to cumulative effects, this was assessed in the application, and found that effects were entirely acceptable. We anticipate that this reference by submitters to cumulative effects is directly relevant to the Fonterra Studholme plant, and also other plants (such as Pareora and Clandeboye) which are significantly further removed from the application site. In relation to cumulative effects, it is my submission based on the evidence of Dr Wilson that they are much more relevant when the residence time is

longer (such as a lake or lagoon), rather than in the dynamic environment of this coastal area.

Relevant RMA considerations when determining cultural effects

12.12 The RMA, at Part 2, contains three sections which require considerations of cultural values:

12.12.1 Section 6(e) – the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;

12.12.2 Section 7(a) – kaitiakitanga; and

12.12.3 Section 8 – the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

12.13 The Court in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*[2] stated that

"In sections 6 to 8 of the Act. In achieving the purpose of the Act there are diminishing notional multipliers (of costs and benefits, or of weights depending on the evaluative metaphor the Court is using) in those sections. The formulae are, in decreasing general order of importance of application:

- *to recognise and provide for (section 6);*
- *to have particular regard to (section 7);*
- *to take into account (section 8).*

In respect of section 7 and 8 matters the Court has a discretion as to whether to provide for the relevant principles in any given situation. Only in respect of the section 6(e) matter is there a duty to provide for it"[3]

12.14 When determining resource management matters that intersect with cultural effects, there are two key considerations:

12.14.1 The weight to be given to cultural concerns (i.e. a 'balancing act' of section 6(e) matters); and

12.14.2 The evidence required to establish or uphold the concern.

---

[2] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111.
[3] *Ibid a*t paragraph [36].

Weight to be given to cultural concerns

12.15 The courts have been clear in stipulating that although section 6(e) requires recognition and provision of "the relationship of Maori and their culture and traditions … with their ancestral … taonga", that section does not create a right of veto for Maori and that it does not trump other matters[4] . That is where the 'balancing act' comes in, when assessing the relevant weight to attribute to cultural concerns.

12.16 The Environment Court in the case referred to as *Port of Tauranga*[5] set out that:

> *the provisions of Part 2 of the Act dealing with Maori interests where well founded in the evidence, give no veto power over developments under the Act. Rather, these interests must be balanced against the other matters listed in Part 2 and the over-riding purpose of the Act under s 5 to promote the sustainable management of natural and physical resources.*

12.17 It is therefore my submission that the decision before you must balance the cultural effects outlined by Ngāi Tahu with all other evidence before you, as no single factor carries 'veto power', either for or against the application.

Evidence to uphold a cultural concern

12.18 It is also useful to refer to case law to understand the Court's views relation to the evidential circumstances of cultural matters.

12.19 The High Court in *Heybridge Developments Ltd v Bay of Plenty Regional Council*[6] concluded that a party who asserted a fact, bore the evidential onus of establishing that fact by adducing sufficiently probative evidence. An honest belief did not establish the existence of a fact. In that case, the Court accepted the submission that if Pirirakau (the local iwi) alleged that s 6(e) of the RMA required the Court to recognise and provide with their relationship with the site on the basis of waahi tapu, it was for Pirirakau to establish the existence of the waahi tapu. It was not for Pirirakau simply to assert a belief and for Heybridge to be required to disprove it.

---

[4] *Freda Pene Reweti Whanau Trust v Auckland Regional Council* 21 December 2004, Environment Court Auckland, A166/2004 – (2004) 11 ELRNZ 235,[50].

[5] Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402, 21 December 2011 (Judge Smith, Judge Fox, Commissioners Sutherland, Beaumont), at [298].

[6] *Heybridge Developments Ltd v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593

12.20 The Court in *Heybridge* found that the recognition and provision which was required to be made pursuant to s6(e) of the RMA was to reflect the relationship established on the evidence, but that did not extend to providing for a relationship founded on a belief, no matter how genuinely held.

12.21 In *Marr v Bay of Plenty Regional Council*[7], the appellants to a resource consent based their claims of adverse effects from the applicants discharges on perceptions and cultural concerns, but were unable to call scientific evidence to support these claims. By contrast, the applicants called a number of scientific experts to support their position that their actions were environmentally responsible and that the proposed conditions provided certainty that they would remediate the rivers declined condition over the 25-year period.

12.22 Additionally, the actual and potential effects of water discharges were determined to be minor. They were not inconsistent with the provisions of relevant planning instruments, and could be mitigated by appropriate conditions.

12.23 It is my submission that the Oceania application is consistent with *Heybridge* and *Marr* above. Although Ngāi Tahu have legitimately held concerns in relation to effects on cultural issues, these are based on a "feeling", rather than established facts (such as adverse effects on an area used for gathering of mahinga kai). In contrast, the evidence for Oceania establishes that there will be no adverse effects on water quality.

<u>Iwi Management Plans</u>

12.24 These are discussed in the evidence of Ms Singh, in relation to the New Zealand Coastal Policy Statement.

REGULATIONS AND PLANNING DOCUMENTS

13 Introduction

13.1 Section 104 also requires the Panel to have regard to relevant provisions of certain regulations and statutory planning documents, and 'other matters' which are considered appropriate and relevant.

13.2 The relevant policy documents have been the matter of discussion in evidence. Oceania considers it is important that all relevant policies are considered in the round, and not "cherry-picked" by groups advancing a particular position. On that basis, Ms Singh has

---

[7] *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347, (2010) 16 ELRNZ 197.

prepared a table which identifies all the applicable policies, including comments from the s42A officer and submitters evidence where relevant. I consider that this will be particularly useful to the Commissioners.

14 New Zealand Coastal Policy Statement 2010 (NZCPS)

14.1 The policies of the NZCPS (and assessment of this proposal against those policies) are included in full in the addendum to Ms Singh's evidence filed concurrently with these legal submissions. The application of the NZCPS in the context of this application is that the Panel must "have regard to" (amongst other things) any relevant provisions of the NZCPS (as required by section 104(1)(b)(iv)).

14.2 I am sure the Panel will be very familiar with the decision of the Supreme Court in *King Salmon* (2014) 17 ELRNZ 442, and the subsequent line of case law as that decision relates to applications for resource consents, in particular the Court of Appeal decision in *R J Davidson*. Therefore, I state only briefly that the NZCPS **does not** fall within one of the three categories (being invalidity, incomplete coverage, or uncertainty of meaning) that the Courts have identified, where resort to Part 2 would be required (although I do note that the regional planning documents pre-date the NZCPS, and so most regard should be had to the national guidance). On that basis, and with the background of the full assessment provided by Ms Singh, I have addressed those matters from the NZCPS below which are either particularly relevant to this application, or which have been of particular interest in similar discharge consent decisions.

14.2.1 Objective 1 requires the safeguarding of the integrity, form, function and resilience of the coastal environment, and to sustain its ecosystems. There are all matters that are best addressed by technical evidence, and reports and evidence have been obtained by Oceania to support this application that demonstrate this safeguarding.

14.2.2 Objective 2 requires the preservation of the coastal environment, and protection of natural features and landscapes. Again, this is a factual assessment, with the proposed site not located within any area identified as containing natural features of specific importance. The proposed infrastructure will have short term above-ground impacts as the pipe is laid, but once in place, there will be no visible sign of the pipeline within the environment.

14.2.3 Objective 3 and Policy 2 requires the assessment and consideration of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), tangata whenua and Maori heritage. For the reasons outlined elsewhere in these submissions in

relation to cultural effects, as well as the assessment of the Iwi Management Plan and comments on consultation in the evidence of Ms Singh, I consider that the Oceania application is not inconsistent with this Policy.

14.2.4 Policy 3 requires the adoption of a precautionary approach where effects on the coastal environment from an activity are uncertain, unknown or little understood, but potentially significantly adverse. I submit that this Policy is not relevant, as the effects of ocean outfalls, and in particular ocean outfalls from dairy processing plants, are well known.

14.2.5 Policy 5 relates to land of waters managed or held under other Acts. I consider that this has been fully dealt with, in relation to the proposed MPA, at section 17.2 onwards of these submissions.

14.2.6 Policy 23 relates to the discharge of contaminants to the coastal environment. As identified by Ms Singh, this is an enabling policy which contemplates a discharge to the coastal environment, as long as particular requirements can be met. The evidence presented by Oceania, and in particular the evidence of Ms Stott, Dr Wilson, Mr Coutinho and Ms Coates, has had particular regard to the considerations in Policy 23(1), including:

(a) The sensitivity of the receiving environment;

(b) The nature and concentrations of contaminants to be discharged, and how that will achieve the water quality at the discharge point (noting its current capacity to assimilate);

(c) The avoidance of significant adverse effects on ecosystems and habitats;

(d) The size of the mixing zone, and the minimisation of effects within the mixing zone.

15 Regional Coastal Environmental Plan for Canterbury (RCEP)

15.1 The RCEP was prepared before the 2010 NZCPS came into effect and as a consequence gives effect to the previous 1994 NZCPS version. Importantly, this Application is fully discretionary meaning that you are able to draw guidance from the NZCPS in making a decision.

15.2 Ms Singh's evidence contains an in-depth assessment of the relevant Objectives and Policies of the RCEP. However, due to the subsequent updating of the NZCPS, we consider that most weight should be afforded to that document, rather than the RCEP. We do not consider that there are any particularly relevant regional issues that the RCEP considers differently from the NZCPS.

STATUTORY FRAMEWORK

16 Section 104(1)(a) - Assessment of effects

16.1 The following paragraphs provide the context within which the assessment of effects under section 104 must take place. This sub-section requires a decision maker to have regard to any actual and potential effects on the environment of allowing the activity.

Existing Environment

16.2 The true "effects" of a proposed activity are those effects not already impacting on the environment as at the time of the application. It follows that, to identify these effects, the character of the 'existing environment' must be considered.

16.3 This includes the effect of any currently implemented resource consents and designations. These effects have been considered by the relevant experts.

16.4 By way of summary, Oceania's processing plant is located on Cooneys Road, near the township of Glenavy. The landward section of the pipeline will be approximately 7.5 km long, and will be follow a route corridor within the road reserves of Cooneys Road and Archibald Road. This section will connect with a 350 m long submerged outfall pipeline, which will have an array of three diffusers connected to it, each with pipeline sections adding an additional 50 m to 150 m to the total outfall length.

16.5 The immediate receiving environment for the treated wastewater is the Pacific Ocean. Expert evidence describes this as a high energy area, with significant movement from currents, wave systems and wind.

16.6 The treated wastewater is discharged into this high energy environment approximately 300 m offshore. Strong current flows and rapid mixing result in the treated wastewater being rapidly dispersed, with expected concentrations to be diluted to 1:300 within 50 metres of the discharge point.

16.7 There are some existing ocean outfalls located along the coastline, however the closest outfall is the recently consented (as yet unconstructed) Fonterra Studholme outfall which is 15km to the north. As the evidence before you outlines, the separation between outfalls means that there will be no cumulative effects arising from the Oceania proposal.

17 Section 104(1)(b)&(c)

17.1 In addition to the effects of a proposal, section 104 requires a decision maker to consider,:

17.1.1 Any relevant regulations and provisions of statutory planning documents; and

17.1.2 Any other matter the consent authority considers relevant and reasonably necessary to determine the application.

MPA – "Other Matters"

17.2 The disposal pipeline and diffuser structure, as proposed, would sit on and in the seabed, and would cut through the South-East Marine Protection Forum's proposed 'Site C1 - Waitaki' MPA. Some disturbance of the seabed would occur during construction, but the expert assessment of effects submitted with the application concludes that the effects on ecological values would be 'very low'.[8]

17.3 Many of the submitters in opposition to this resource consent application consider it inappropriate that the outfall will be established in a proposed 'marine reserve'. However, much of the concerns centre on the effects of the actual discharge, which we note would not be controlled under the MPA prohibitions as recommended to Government.

17.4 As explained below, although the proposed MPA might be a matter considered by a decision maker under section 104(1)(c), it currently has no legal status. It is very much a draft for discussion, and will be subject to extensive further consultation and review. As at 13 July, the consultation period (which started in February 2020 and was impacted by the Covid-19 Alert Level 4 response) had recommenced, with consultation open until 3 August 2020. There are no draft regulations or implementation plan, and no clear picture as to whether the proposed Ban applies beyond minerals exploration and extraction. Given this, its weight and relevance is low, and far more can be gained from an assessment of the actual effects on the environment of the proposed activity.

---

[8] Assessment of Ecological Effects: Oceania Dairy Ocean Outfall, Annabelle Coates, Bioresearches Limited, August 2019, page 2

17.5 Type 2 MPAs afford a lower degree of ecological protection than 'Marine Reserve' MPAs, which are created under the Marine Reserves Act 1971 for the purposes of scientific study, and which have a blanket ban on the removal of any marine life or habitat.

17.6 By contrast, some level of effect, including providing for tourism, recreational enjoyment and economic activities,9 is usually allowed in a Type 2 MPA, as long as the 'MPA protection standards' can still be met.

17.7 The 2008 MPA Policy and Implementation Plan states that the management tools implemented for an MPA must be sufficient to meet the MPA 'protection standard'. This is to enable the maintenance or recovery of the site's biological diversity at the habitat and ecosystem level to a healthy functioning state. In particular, the management regime must provide for the maintenance and recovery at the site of:[10]

a) physical features and biogenic structures that support biodiversity;
b) ecological systems, natural species composition (including all life-history stages), and trophic linkages;
c) potential for the biodiversity to adapt and recover in response to perturbation.

17.8 Although draft MPA management tools could be relevant under section 104(1)(c) of the RMA, the matters to be considered within this subsection are not in any way mandatory;[11] the discretion to consider them rests with the decision maker. Further, the Courts have made clear that the weight to give to 'other matters' depends on the circumstances, with factors such as integration into planning documents increasing that weight.[12]

17.9 In our submission, there are several issues with an RMA decision maker having significant regard to a draft MPA control on "bottom disturbance and seismic testing" when considering the effects on the environment of installing the pipeline and diffuser structures. These are as described below.

Actual Effects

[9] A New Marine Protected Areas Act: Consultation Document, Ministry for the Environment, 2016, Page 10
[10] Marine Protected Areas Policy and Implementation Plan, Department of Conservation and Ministry of Fisheries, 2008, at [83].
[11] *Howick Residents and Ratepayers Assn Inc v Manukau City Council* Environment Court, Auckland, 6/1/2009, Whiting Judge, Sutherland Commissioner, Prime Commissioner, A001/09
[12] Ibid at [41]

17.10 The assessment of effects shows that the effects of the construction and operation of the outfall on ecological values will be "very low". Given this, the MPA protection standards are not being jeopardised by the bottom disturbance.

Applicability

17.11 It is not clear that the Forum intended the ban on bottom disturbance to apply beyond exploration and extraction connected to the minerals industry. The prohibition appears to be in response to concerns about disturbance via minerals exploration and extraction, and is discussed repeatedly under that heading in the Forum's report.

Uncertain Status of the MPA Regulations

17.12 The Ministers of Fisheries and Conservation decided last year to "consult on proceeding" with the Network 1 option (which includes Site C1).[13] This is far from a guarantee that each of the prohibitions will be enacted as recommended by the Forum, or indeed that they will be blanket bans on any bottom disturbance as opposed to a case-by-case analysis of effects.

17.13 The Government's precise position on the recommendations is not clear, and any legislative change would require further formal public consultation. A joint DOC and Fisheries consultation document is expected to inform this, but has not yet been released.

17.14 This process, as well as the consultation document, will no doubt attract submissions on both the extent and precise management tools for the MPAs, with fisheries interests and PEPANZ once again being able to voice concerns. The consultation will also include sectors which have not perhaps participated to-date, including from those with existing structures and non-fisheries activities in the MPAs.

17.15 Given the further work to be done, the final shape and form of the MPA regulations will most likely not be the same as those recommended by the Network 1 group within the Forum.

17.16 It is accepted that when making decisions under the RMA, that a sliding scale operates to determine the weight given to proposed plans as compared to operative ones, should there be a conflict between the two. The closer a proposed plan is to being operative, or

---

[13] Department of Conservation Media Release, 11 May 2019

the narrower the points under appeal are, the more weight a decision maker will afford it.[14]

17.17 At a general level, this sliding scale approach can be applied here as well, with the distinction being that the Forum recommendations are more analogous to a pre-notification 'discussion document' than a proposed plan in the sliding scale of weight and relevance. In my submission, a decision maker should therefore proceed with caution in placing too much weight on the possible MPA control, especially where the expert evidence shows that the effects of the construction and operation of the outfall on ecological values will be "very low".

18 Section 104B

18.1 Given the overall discretionary status of the activities, section 104B applies, and gives the Panel the discretion to grant or refuse an application and, if the application is granted, to impose conditions under section 108.

18.2 A comprehensive suite of conditions has been proposed by Oceania. These conditions are based on the conditions that were included with the Officer's Report, with changes by Oceania tracked in.

19 Section 105 and 107

19.1 As the Project involves various discharge permits and coastal permits, the Panel must also consider sections 105 and 107 of the RMA.

Section 105

19.2 In relation to the discharge consents sought, section 105(1) of the RMA requires a decision maker to have regard to:

19.2.1 the nature of the discharge and the sensitivity of the receiving environment to adverse effects;

19.2.2 the applicant's reasons for the discharge; and

[14] *Hanton v Auckland CC* [1994] NZRMA 289

19.2.3 any possible alternative methods of discharge, including discharge into any other receiving environment.

19.3 Taking each of these matters in turn:

19.3.1 the nature of the discharges and sensitivity of the receiving environment (the Pacific Ocean) are addressed in the evidence of Mr Coutinho and Ms Coates. In essence, Oceania's position is that:

(a) there will be no adverse effects on ecological values or on water quality beyond the designated mixing zone of the discharges; and

(b) The conclusions as assessed are considered to be conservative, based on the model used compared with the infrastructure as proposed.

19.3.2 The reason for the discharge is to effectively and responsibly dispose of treated wastewater. The proposal will allow for expansion at the ODL plant, and address concerns raised by members of the public in relation to irrigation discharge.

19.3.3 As is fully explained in the Application and in the evidence of Mr Lodge, Mr Duder and Dr Wilson, Oceania has very carefully considered the alternatives to the discharge to the coastal environment, including continuing to discharge all of the treated wastewater to land. This evaluation process has confirmed that discharge to coastal waters, complemented by the existing discharge to land system, is the preferred solution.

19.3.4 The question of alternatives is also relevant in terms of clause 6(1)(d) of Schedule 4 of the RMA. From a legal perspective, the duty to consider alternatives rests solely with the applicant, and it is not for a decision maker to substitute its own judgment as to which site and method of discharge is to be preferred.[15] Rather, the decision maker's role is to find whether, in proposing a discharge of contaminants, the applicant gave adequate consideration to alternatives that would avoid, remedy or mitigate the effects of the discharge of contaminants, and made a reasoned choice.[16]

19.3.5 The term "adequate" is not defined in the RMA, however direction can be found in judicial commentary on "adequate consideration" in the context of designations

---

[15] *Tainui Hapu v Waikato Regional Council* Environment Court, RMA305/99, 10 May 2004 at [148] and *Auckland Volcanic Cones Society v Transit NZ* [2003] NZRMA 316

[16] Ibid

provides useful guidance here. A territorial authority is required under section 171(1)(b) in certain circumstances to have particular regard to "whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work". I submit that the use of the term "adequate" is much the same between section 171 and section 105.

19.3.6 It is well established that "adequate consideration" does not require every possible alternative option to be eliminated,[17] or even that the option put forward is the "best" option. Judge Borthwick has summarised the duty imposed by section 171 as follows:[18]

> *"I remind the parties that the focus of s 171(1)(b) is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration."*

19.3.7 The above highlights that adequate consideration of alternatives is a process focused approach which should be carried out in a satisfactory manner, nothing more and nothing less. The process itself of identifying alternatives in a genuine manner becomes more important than the merits of the alternatives or the final option selected.

19.3.8 A particularly relevant factor when determining the adequacy of a consideration is the effects of the discharge on the environment.

19.3.9 The Court in *New Zealand Transport Agency v Architectural Centre Inc*[19] considered a 'sliding scale' approach where a wider consideration of alternatives was required where the adverse effects were greater. Judge Brown noted that an assessment of alternatives is very dependent on the circumstances, however the Court leaned towards the idea of more consideration being applied as effects increased by stating:

---

[17] *Villages of NZ (Mt Wellington) Ltd v Auckland City Council* Environment Court, Auckland, 20 March 2009 at [44]

[18] *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84 at [61]

[19] 19 ELRNZ 163

"… it is simply common sense that what will amount to sufficient consideration of alternatives sites will be influenced to some degree by the extent of the consequences of the scenarios".

19.3.10 It is submitted that the thorough and reasoned analysis of alternatives presented with the Application and explained in the evidence of Mr Lodge, Mr Duder and Dr Wilson easily meets the standard of 'adequate consideration' required of an applicant. In addition, the fact that the adverse effects of the ocean outfall are assessed by technical experts at falling well at the 'minor' end of the scale, means that comparatively less consideration is required than for an application where significant effects were anticipated.

Section 107

19.4 Section 107 of the RMA restricts the grant of certain discharge consents that would contravene sections 15 or 15A of the RMA, which relate to the discharge of contaminants into the environment.

19.5 Section 107 is triggered only where, after reasonable mixing, one of the effects in the receiving waters that are listed in section 107(1)(c) to (g) arise. Importantly, the Panel is not barred from granting consent because of s107(1) effects. Sub sections (2) and (3) provide a pathway for a grant of consent subject to conditions.

19.6 We note that the mixing zone applied in this project is only 50 metres from the discharge points

19.7 The split multiple outfall was identified through numerical dispersion modelling by eCoast to result in the efficient dilution of the outfall discharge.[20] Even with the relatively small mixing zone and the inbuilt conservatism of the model, there will be no conspicuous oil/grease slicks, scums or foams in the vicinity of the discharge, and there are no adverse effects on colour and visual clarity after reasonable mixing.

20 Section 108 – Conditions

20.1 Section 108 of the RMA empowers decision makers to impose conditions on a consent. A range of conditions have been proposed by Oceania to address the potential adverse effects, including in Appendix 6 to Ms Singh's evidence. Since evidence was filed, ODL has reviewed the evidence of submitters, and also considered any other changes that

[20] Oceania Dairy Outfall Dispersion Modelling

may improve the consent conditions as proposed. As explained previously, these are the conditions as proposed by the Officer's Report, with Oceania changes tracked in for ease of reference. Comments are included to explain the reason for the change (including reference to evidence), where appropriate.

20.2 Our comments in relation to legal issues arising from the conditions as proposed are outlined further below.

21 Role of the 'Best Practicable Option' in the RMA

21.1 As discussed in Mr Duder's evidence, Oceania's dual system of discharges to both land and the ocean is the best scenario on current technology for the treatment and disposal of wastewater.

21.2 Section 108(2)(e) of the RMA provides that:

> (2) A resource consent may include any one or more of the following conditions:
>
> (e) ....requiring the holder [of any discharge permit] to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source.

21.3 Where the best practicable option (**BPO**) is in relation to the discharge of a contaminant, a consent authority must be satisfied that it is the best method for preventing or minimising the adverse effects on the environment, having regard to:[21]

> (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
>
> (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
>
> (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

21.4 The Courts have held that the requirements of section 108(e) will be satisfied by "ensuring that the contaminants discharged by the applicant are at a level which on the

---

[21] Section 2, Resource Management Act 1991

best scientific and technical information available constitutes the best practicable option of minimising adverse effects on the environment".[22]

21.5 There is also recent judicial comment that the consideration of alternatives provides a key input to the process to determine the BPO for a project, and that the BPO needs to be determined on a ‘whole of project’ basis.[23]

21.6 Oceania undertook a comprehensive review of alternative methods of discharge (as outlined by Mr Duder), and has also volunteered chemical and microbiological water quality standards for the discharged wastewater. Both of these factors inform the assessment of the BPO, and Dr Savage and Mr Duder are satisfied that each of the three limbs of the BPO definition above are met. In other words, Oceania consider that the current application represents the BPO for the treatment and discharge of treated wastewater, and that the volunteered review condition will allow a reassessment of this conclusion against new technologies, if required.

21.7 With respect to the first limb of the BPO definition, the expert evidence for Oceania sets out that the matters included in the condition suite as proposed, including various management plans, will adequately address any adverse effect on the receiving environment over the consent term sought.

21.8 Mr Duder considered the financial implications of the alternative options considered, and his evidence outlines the conclusion that for a variety of reasons (of which financial played a part), the ocean outfall is the best option. This is particularly relevant when considered against the low levels of effects assessed by the Oceania experts. The expert evidence before you is that the ocean outfall will have effects on the environment that are at least as good as, if not better than, the alternatives considered.

21.9 The proposed option is used currently around New Zealand, with the closest consented outfall from a dairy factory at Studholme (Fonterra). The treatment at the WWTP proposed is considered by Oceania to be the best level of treatment available, and is used successfully by other WWTP here and internationally. Oceania is confident that the WWTP will act exactly as the evidence anticipates it will.

---

[22] Medical Officer of Health v Canterbury Regional Council (PT) Wellington W109/94 15 November 1994 at pages 25 and 26.

[23] *Horowhenua District Council v Manawatu-Wanganui Regional Council* [2018] NZEnvC 163 at [160]

CONSENT CONDITIONS

22 Duration of Consent

22.1 Under section 123 of the RMA, the Panel may grant discharge consents for a term not exceeding 35 years. The Officer's Report proposes a consent duration of 35 years, provided that the concerns raised in the report regarding treatment level of the wastewater and suitable mitigation for effects on Ngāi Tahu cultural values are addressed. Several submitters, including Waihao Runanga, Forest and Bird and Waitaki Irrigators Collective Limited consider that a shorter consent period should be applied.

22.2 Case law has held that a decision maker's discretion to grant up to 35 years is to be determined by reference to the purpose of the RMA (being sustainable management),[24] and assessed against the statutory decision-making framework.

22.3 In *PVL Proteins Ltd v Auckland Regional Council ("PVL")*[25] the Court reviewed relevant case law and found a number of factors which are relevant to a decision on the term of consent. These are:[26]

22.3.1 The potential conditions imposed on the resource consent; for example, conditions:

(a) requiring adoption of the best practicable option;

(b) requiring supply of information relating to the exercise of the consent,

(c) requiring observance of minimum standards of quality in the receiving environment; and

(d) reserving power to review the conditions; and

22.3.2 The uncertainty that an applicant faced with a short consent term and the need to protect their investment meant that an applicant should be given security with a longer consent term, so far as the term is consistent with the sustainable

---

[24] Section 5; *Bright Wood NZ Ltd v Southland RC EnvC* C143/99; *PVL Proteins Ltd v Auckland Regional Council*, 3 July 2001, Auckland EnvC A61/2001.
[25] *PVL Proteins Ltd v Auckland Regional Council*, 3 July 2001, Auckland EnvC A61/2001. This decision addressed a discharge to air from a meat works.
[26] *PVL Proteins Ltd v Auckland Regional Council*, 3 July 2001, Auckland EnvC A61/2001 at [67]

management. The Court said this was in line with the statutory purpose, which includes enabling people to provide for their economic well-being.

22.4 The Court in *PVL* commented that the review and BPO conditions may be more effective than a shorter term for the consent, if the goal is to ensure systems and conditions do not become outdated, irrelevant or inadequate. On the balance of the above factors the Court extended the duration of the resource consent from that imposed by the Council.

22.5 Subsequent case law has applied the factors discussed in *PVL* to decide on the appropriate term for consent. In *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty Regional* Council,[27] the applicant had applied for consents to take water and discharge treated wastewater, stormwater leachate and landfill leachate back into the Tarawera River, as part of its pulp and paper operations at Tasman Mill. On appeal, the High Court found the Environment Court was justified in granting a long term for the consents in order to protect the significant existing and future investment by the applicant including installing a boiler for the operations, because the effects of the discharge on the environment would be mitigated with stringent monitoring and review conditions.[28]

22.6 It is submitted that the proposed conditions suite (updated from those recommended by Council) addresses each of the *PVL* criteria.

22.7 As set out in Mr Duder's evidence, the investment required for this operation is significant, and necessitates certainty and security of investment. Further, the expense involved in the resource consent process itself is considerable. Repeatedly burdening Oceania with these costs through shorter term consents is not justified where the more effective, more targeted and cost efficient mechanism of review through conditions is available.

22.8 A further, much-cited case which has parallels with this current situation is *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49, where the decision maker was invited to grant a consent to discharge to air for only 5 years on the basis that compliance with conditions and effects on air quality should be reassessed afresh at that time. The Planning Tribunal held that the consent review process provided a more rigorous and effective mechanism, and 'very much tighter supervision of the operation'[29] than the somewhat blunt instrument of limiting the term of the resource consent.

---

[27] *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty Regional Council* [2010]16 ELRNZ 312.
[28] Ibid at [92]-[94].
[29] *Officer of Health v Canterbury Regional Council* [1995] NZRMA 49 at page 19

22.9 Finally, I submit that there needs to be an element of consistency in how the Council treats like cases. The Fonterra discharge consent was granted for a period of 35 years, for various reasons as are also adduced by Oceania. It is appropriate that, should this consent be granted, it is treated the same way.

USEFUL COMPARISONS

23 Recently consented ocean outfalls

23.1 This section outlines what we consider to be the two most relevant recent decisions on ocean outfalls in New Zealand:

23.1.1 The decision in *Pan Pac Forest Products Limited v Hawke's Bay Regional Council*[30], as the most recent Environment Court view on ocean outfall; and

23.1.2 The Environment Canterbury decision in relation to the Fonterra Studholme application in June 2016, as a very similar activity in the vicinity of the application site.

Pan Pac Forest Products Ltd v Hawke's Bay RC

23.2 Pan Pac operates a pulp and paper mill, located centrally in the Hawke's Bay, and across the water from Napier City. Treated wastewater from the mill is discharged into the sea.

23.3 The context of the site is considerably different to the Oceania application, as the Pan Pac mill site and discharge location is surrounded by dwellings all along the coast, and the area of water where the discharge occurs is regularly used for recreational and food gathering purposes, including fishing, sailing, recreation at the beach etc. In addition, the Court acknowledged that the discharge was into an area known as Tangitu, which has high historical and cultural significance to Tanagata Whenua and Tangata Moana.

23.4 This application was to replace expiring consents, and so there is a difference with the Oceania application in that the effects of the discharge were already known, through monitoring of the previous consent. However, there were also previous non-compliances by Pan Pac in relation to the outfall, which included a coloured discharge, and a leaking pipe, which was a history that the Court took into consideration.

---

[30] [2019] NZEnvC 114

23.5 The Court's decision in *Pan Pac* was significantly guided by the high level of agreement that was achieved between the applicant and other parties in Court appointed mediation. In particular, there was acceptance that the biophysical effects on the environment were minor (at worst case), however there were cultural effects that sat separately from that assessment.

23.6 A better understanding of the cultural effects in play here can be gleaned from *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*[31], which was the 2016 decision of the Environment Court when considering a change of conditions to the previous Pan Pac consent, to authorise the coloured discharge that had unexpectedly arisen. The Court, at paragraph [105], summarised the evidence on behalf of Maungaharuru-Tangitu Trust, and listed 9 specific matters outlining the high cultural importance of the place of Tangitu for the Hapu. This included matters such as Tangitu and all natural resources within it being identified as taonga belonging to the Hapu, Tangitu and its rocks and reefs being a vital source of a wide variety of mahinga kai, and the principal importance of Tangitu as reflected in many things, including the name of the Trust.

23.7 The Court ordered mediation resulted in the development of an Environmental Trust, which had broad purposes including a benefit to the Hawke's Bay community by "promoting enhancement, restoration and protection of the environment, and the offset of cultural effects on defined Mana Whenua Hapu". Pan Pac undertook to provide up to $100,000 per annum to the Environmental Trust, in order for the above goals to be met.

<u>Distilling the various elements of this decision in the context of Oceania:</u>

23.8 The scale of the operations was significantly greater - the reasonable mixing zone for Oceania is 50m from the point source. The plume in Pan Pac was widely visible.

23.9 The Coastal environment from a recreational and use perspective is context-specific. Pan Pac's point of difference was that while it was an historical discharge, it was discharging into an area of high recreational and fisheries values, including reefs, and direct sailing and boating opportunities;

23.10 From the Hapu, direct and tangible evidence informed the Court of values, but essentially the mediated approach resulted in the outcome endorsed by the Court.

---

[31] [2016] NZEnvC 232

23.11 It is submitted that the identification of the specific mahinga kai values and the high cultural importance of place which was attributed <u>directly to the area, and mixing zone was an important distinction leading to this outcome.</u>

Fonterra Studholme

23.12 The decision in relation to the Fonterra Studholme application is somewhat in contrast to the *Pan Pac* decision above. Although both consents were ultimately granted (subject to conditions).

23.13 Although the Fonterra Studholme site is geographically close to the proposed Oceania discharge site (Fonterra is located approx. 15 kilometres to the north), on the evidence the receiving environment is quite different. The Fonterra application had to consider the Wainono Lagoon (defined as an Outstanding Natural Landscape), which is located 2 kilometres north of the proposed development. The Lagoon has known mahinga kai values, and is known as Te Kai Hinaki O Rakihouia (the food basket of Rakihouia). In the vicinity of the Fonterra application, the area including the lagoon, a portion of the Waihao River catchment, Waituna Stream and Hook River is known as the Waihao Mataitai Reserves. These areas are traditional fishing grounds holding cultural significance to local Māori. Thus the Fonterra discharge was in proximity to areas valued for both landscape and cultural reasons.

23.14 The Fonterra application was for a total discharge of 24,000 cubic metres daily, a volume that is double what Oceania has applied for.

23.15 The Waihao Rūnanga had met with Fonterra, and an agreed set of resource consent conditions were tabled at the hearing in place of evidence. On that basis, the decision of the Panel when determining cultural effects on Ngāi Tahu values was that any effects would be less than minor, particularly due to consent conditions offered.

23.16 The conditions proposed by Oceania with its original application were based on the Fonterra Studholme consent conditions as granted, including the relevant conditions sought by the Waihao Rūnanga.

<u>Distilling the relevant aspects of this decision to the present application:</u>

23.17 The sites are in the same geographic area.

23.18 From a cultural perspective, the same Mataitai Reserves are referred to in addition to the same river catchments and lagoons, but Oceania is 15 kilometres further away from the identified areas.

23.19 It is accepted that non-specific cultural values based on principles espoused in the relevant iwi management plans are the same in both cases.

23.20 The decision reflected that the prescriptive nature of consent conditions were regarded as a relevant matter against which to assess cultural values.

23.21 Again, as in *Pan Pac*, the starting point for evaluation was the identification of site specific cultural values.

23.22 There does appear to be an inconsistency between how cultural effects have been addressed between the Fonterra Studholme application, and this one. In particular, the issues raised in the evidence of Ms Hall and Mr King for Ngāi Tahu (collectively Te Rūnanga o Waihao, Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu) of matters relating to the abhorrence of a discharge, and concerns around effects on mahinga kai and the mātaitai reserves differ significantly from the views expressed by Te Rūnanga o Waihao when agreeing to the Fonterra Studholme application, subject to conditions.

23.23 I accept that there is a cumulative aspect to this application which did not exist in the same way for the Fonterra Studholme application, and I acknowledge that cumulative effects was one issue raised in Ms Hall's evidence. However, my thoughts on this are two-fold:

23.23.1 Firstly, the technical evidence supporting the Oceania application specifically contemplates cumulative effects, from other wastewater discharges, and discharges from land that make their way to coastal waters. That evidence concludes that there will be no adverse effects arising from the cumulative discharges, in part due to the significant distance between the two outfalls. Physical separation is also important in view of the size of the reasonable mixing zone of 50m.

23.23.2 Secondly, I would appreciate guidance or further information from Ngāi Tahu in relation to this application when compared to Fonterra Studholme. Due to the proximity of the Fonterra discharge to areas with explicit cultural value, and the relative distance of this application from those same areas, I am struggling to understand the different way the two applications have been addressed by Ngāi Tahu.

23.24 While I appreciate that the views expressed are profoundly held, I do not think that the RMA processes is about "picking winners". By effectively condoning one application,

over another, more distant, application leaves the applicant in a position to justify this grant of consent on the science of the discharges.

23.25 If the issue is about more culturally valued sites in the sphere of influence of this discharge, then our approach would be assisted by the identification of a site; a value, a mahinga kai area that is closer to Oceania than to Studholme.

Guidance from recent decisions

23.26 I consider that useful guidance can be taken from the above two cases, when you consider the Oceania application:

23.26.1 The science supporting an application is critical. Like the *Pan Pac* and *Fonterra* cases above, the Oceania evidence establishes that the biophysical effects from the discharge will be minor, at worst.

23.26.2 Cultural effects are highly relevant when considering an application for ocean outfall. When determining those effects, the **actual values** must be considered, and quantifiable effects on those values. It is my submission that there is a difference between the specific values identified by Maungaharuru-Tangitu Trust in relation to the Pan Pac discharge and the more general values identified by Ngāi Tahu (and particularly when compared to the approach in relation to the Fonterra application).

24 CONCLUSIONS

24.1 Your primary task in exercising your power of decision on this discretionary use application is to firstly gather information before any form of evaluation is conducted under s104.

24.2 A second step is to define the existing environment, and in this regard the current resource consents held by Oceania are relevant. An understanding of the planning framework, in its widest sense, is required at this stage.

24.3 The third step is to evaluate the evidence received, where possible exercising a preference as to the evidence. In this step you are fully entitled to have regard to the condition's suite proffered by the applicant and the Council – to the degree that it ameliorates a concern or value expressed by a submitter in these proceedings.

24.3.1 In this step you'll need to evaluate, for example, whether the evidence of the irrigators in close proximity of the plant, is to be preferred over the wider irrigation interests expressed by WIC.

24.4 Fourthly, whilst not prescribed specifically by the RMA, you have to have front of mind that this consent, when exercised in combination with other consents held, will produce a better overall environmental outcome for the community.

24.5 Fifthly there is a principle which requires that like applications should be determined in a like manner, unless:

24.5.1 There are changes to the law in the interim which require a different approach; or

24.5.2 There are cumulative effects which can be tangibly quantified on the evidence presented.

24.6 Sixthly, you will irretrievably be drawn in to exercising a preference as to whether the science of an application is to be preferred over the unquantifiable but profoundly held cultural effects. The guidance in this area also calls for you to assess the value of proposed conditions for both regular testing; and liaison /community input type conditions and conditions which indirectly improve habitat values.

24.7 And finally, having articulated your reasoning, you need to make a decision.

24.8 Having regard to all of the above, the case for the applicant is that from both the science, and the views expressed to co-operate with the community, the application can be granted subject to the conditions proposed. Afterall, this plant relies deeply on its community for its resource. This applicant is not seeking to be a processing island – but rather to improve outcomes for the community which have been expressed in relation to its overall operations.

24.9 I respectfully request that the Panel grant the resource consent Applications for a term of 35 years and subject to the conditions proposed by Oceania.

E J Chapman / J A Robinson
Solicitor for Oceania Dairy Limited