

---

*in the matter of:* the Resource Management Act 1991

*and:* submissions and further submissions in relation to proposed **Plan Change 7** to the Canterbury Land and Water Regional Plan

*and:* **Fonterra Co-operative Group Limited**  
*Submitter*

Legal submissions on behalf of Fonterra Co-operative Group Limited

---

Dated: 30 October 2020

---

REFERENCE: BG Williams (ben.williams@chapmantripp.com)

chapmantripp.com  
T +64 3 353 4130  
F +64 3 365 4587

PO Box 2510  
Christchurch 8140  
New Zealand

Auckland  
Wellington  
Christchurch



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

### INTRODUCTION

- 1 These submissions are provided on behalf of Fonterra Co-operative Group Limited (*Fonterra*) in relation to proposed Plan Change 7 (*Plan Change 7*) to the Canterbury Land & Water Regional Plan (*LWRP*).
- 2 Fonterra's involvement in Plan Change 7 is focused on its manufacturing interests affected by the Plan Change. In particular, Fonterra's Clandeboye Manufacturing Site (*Clandeboye Site*) is located within the Orari-Temuka-Opihi-Pareora (*OTOP*) Sub-region and affected by Part B of Plan Change 7.
- 3 Fonterra is generally supportive of the overall intent of the notified version of Plan Change 7, but is seeking a number of amendments relating to the application of the provisions to its manufacturing activities, including associated water takes and wastewater discharges.
- 4 Evidence has been provided for Fonterra from;
  - 4.1 **Brigid Buckley**, Fonterra's National Policy Manager, outlining the Clandeboye Site and systems;
  - 4.2 **Neil Thomas**, hydrogeologist at Paddle Delamore Partners, relating to the groundwater aspects of the Part B provisions that apply to the Clandeboye Site; and
  - 4.3 **Gerard Willis**, director at Enfocus Ltd, addressing the provisions affecting the Clandeboye Site, including proposed amendments.
- 5 Subsequent to this evidence being filed, the Canterbury Regional Council (*Council*) provided in a memorandum of counsel dated 23 September 2020 new information in relation to groundwater allocation accounting in the OTOP Sub-region through an attached internal memorandum dated 21 August 2020 (*Groundwater memo*).
- 6 The Groundwater memo is highly relevant to Part B of Plan Change 7 and the relief sought by Fonterra. Accordingly, much of this submission is intended to record further discussion that has occurred between Counsel, **Mr Thomas** and **Mr Willis** to the potential application of this further information, which is outlined in these submissions.

## OUTLINE OF SUBMISSIONS

- 7 These submissions focus on:
- 7.1 the groundwater allocation issues and associated provisions affecting the Clandeboye site; and
  - 7.2 the nutrient management provisions of Part B that effect the management of nutrient losses from land used for the disposal of Clandeboye's industrial wastewater.
- 8 Fonterra maintains its other original and further submissions in their entirety, unless otherwise amended in these submissions or the evidence noted above.

## BACKGROUND

### Fonterra's Clandeboye Site and interests in OTOP sub-region

- 9 The Clandeboye Site is located seven kilometres northeast of Temuka and is within the Orari Freshwater Management Unit, Orari-Opihi groundwater allocation zone, and proposed to be included in the Rangitata-Orton High Nitrate Concentration Area (*HNCA*) under Plan Change 7.
- 10 Treated wastewater from the Clandeboye Site is discharged onto the 630 hectares of nearby farmland.
- 11 A significant number of resource consents are associated with the Clandeboye Site, outlined in **Table 1** of **Ms Buckley's** evidence. These include consents to:
- 11.1 take groundwater for manufacturing and irrigation;
  - 11.2 discharge waste from the site to land (up to 15,000m<sup>3</sup> of wastewater per day); and
  - 11.3 to use land for farming.
- 12 As **Mr Willis** explains in his evidence, Fonterra extracts water from eight bores for manufacturing requirements, taking 5.26 million cubic metres in the 2018/2019 season.<sup>1</sup> And as outlined by **Ms Buckley**, this follows a significant commitment to sustainability and efficient water use.
- 13 To ensure Fonterra could provide as best informed position as it could to this Plan Change 7 process, pump testing of a representative Fonterra bore has been undertaken, which confirms

---

<sup>1</sup> At [21]-[22].

that groundwater taken for the site has a low stream-depleting effect.<sup>2</sup>

### **AMENDMENTS SOUGHT TO PART B OTOP PROVISIONS – GROUNDWATER ALLOCATION**

- 14 The notified version of Plan Change 7 (along with the original evidence provided by Fonterra) was premised on the Council's then position that there were significant allocation issues in the Orari-Opihi Groundwater Allocation Zone (GAZ).
- 15 The Council's position was however also confusing with, for example:
  - 15.1 the stream depleting portion of groundwater takes seemingly being effectively 'double counted' for against both the groundwater and surface water allocations;<sup>3</sup> and
  - 15.2 the section 32 and section 42A report stating that the GAZ is 'over-allocated', but then going on to identify that the proposed T allocation consists of the current Orari-Opihi allocation limit not currently allocated.<sup>4</sup>
- 16 The Groundwater memo appears to largely address the previous uncertainty noting:
  - 16.1 a catchment accounting methodology has been developed in accordance with Schedule 13 of the LWRP and Schedule 9 (as proposed through Plan Change 7); and
  - 16.2 differences between the original and new method result in significance variances in the allocated groundwater volumes in the OTOP Sub-region (mainly in relation to a different approach being taken in relation to the discounting of volume associated with stream depleting groundwater).<sup>5</sup>
- 17 The new method is to be applied consistently by the Council across the LWRP - and for the Levels Plains and Orari-Opihi GAZs that were previously of concern, it means these are now considered to be below the allocation limit.<sup>6</sup>

---

<sup>2</sup> Evidence of Neil Thomas at [47].

<sup>3</sup> Evidence of Gerard Willis at [28]-[31].

<sup>4</sup> Evidence of Gerard Willis at [32].

<sup>5</sup> Page 2.

<sup>6</sup> Page 2.

- 18 The Groundwater memo outlines three options in this respect (which for ease of reference are repeated below):
- 18.1 Option 1: retain the existing GAZ limits, providing additional allocation which would be applied on a first-in basis, including potentially being used to swap existing depleting takes to lower stream depleting groundwater; or
  - 18.2 Option 2: cap the Levels Plains and Orari-Opihi GAZs at current abstraction, which would not provide a pathway for the replacement of surface water or stream depleting takes; or
  - 18.3 Option 3: retain the existing limits but split into 'A' and 'T' blocks, with the 'A' block being the 'discounted' allocation resulting from the new methodology and the remaining volume being assigned as a 'T' block.
- 19 *Prima facie*, all three options presented in the Groundwater memo would be acceptable to Fonterra, on the basis that its takes are low depleting and all three options would provide certainty regarding the ability to renew consents in the future.
- 20 However to assist the Hearing Panel in reaching a final decision on the issue, it is noted that:
- 20.1 **Mr Willis**, and Fonterra have previously noted their support for the recommendation to revert to a single allocation block as a simpler, more certain regime;<sup>7</sup>
  - 20.2 upon further discussion with **Mr Willis** and **Mr Thomas**, in preparation for this hearing, reasons for this preference include that:
    - (a) the surface water catchment is considered over-allocated taking into account 'aggregated' groundwater **and** surface water takes, therefore, any allocation approach should seek to prevent any outright new allocation from either surface water or groundwater while such over-allocation remains in issue;
    - (b) using the 'A' and 'T' allocation blocks would result in a complex system of allocation that may be difficult to practically manage because:

---

<sup>7</sup> At [51].

(i) it is unclear how any additional allocation would be managed under the 'A' and 'T' block system if it became available through:

(A) some of the existing takes in the 'A' groundwater allocation block being found to be moderately stream depleting; or

(B) an 'A' allocation consent reducing on renewal,

and

(ii) it is likely that there are some consents (such as that referred to in the Dairy Holdings Limited presentation) that would take from more than one allocation block and would be difficult to manage against a split allocation regime,

and

20.3 some allowance and incentive should be provided for existing connected surface water takes and shallow groundwater takes to move to deep groundwater, as this will help to reduce pressure on surface water resources.

21 Accordingly, Fonterra remains of the view that a single allocation block would be the most workable and simple approach for the Sub-region. This approach is similar to Option 1 proposed in the Groundwater memo. However, in adopting this approach, it would be appropriate to ensure that access to the allocation block be restricted (perhaps in the RDA rule 14.5.9) to replacement takes and to takes that surrender a surface water or direct, high or moderate stream depleting groundwater take.

22 Fonterra therefore seeks that the amended framework adopting a single allocation block includes the following amendments to Plan Change 7:

22.1 Policies 14.4.7 and 14.4.8 are either deleted, retained but amended to provide additional clarity as to how those provisions will operate;

22.2 Policy 14.4.25 is amended as per the Fonterra submission;

22.3 Rules 14.5.7-14.5.11 are clarified, in accordance with **Mr Willis's** evidence;

22.4 the new policy outlined in **Mr Willis's** evidence at [69] that indicates how groundwater allocation levels against the 71.1Mm<sup>3</sup> allocation are to be determined; and

22.5 Table 14(zb) is amended in accordance with the new limits.

23 As noted elsewhere, unless otherwise specified, Fonterra still seeks the relief included in its original and further submission.

#### **AMENDMENTS SOUGHT TO PART B OTOP PROVISIONS – NUTRIENT MANAGEMENT**

24 Fonterra has three concerns relating to nutrient management in Part B of Plan Change 7, namely:

24.1 the ability to access the equivalent Baseline GMP and GMP Loss Rate for properties that receive discharges from the Clandeboye site;

24.2 the limited durations for farming land use activities, including where that activity is occurring in conjunction with a separately consented discharge; and

24.3 the requirements for reductions of N loss, and not load, from point source discharges.

25 These concerns and Fonterra's proposed solutions are set out below.

#### **Equivalent Baseline GMP and GMP Loss Rate**

26 Fonterra holds five resource consents to discharge a range of waste products from the Clandeboye site to land within the Rangitata-Orton HNCA. These include industrial wastewater, sewerage effluent and DAF sludge, which all contain nitrogen at various levels (as required by the conditions of consent) and in various forms.<sup>8</sup> Separately, Fonterra holds a land use consent for a farming activity to authorise the farming land use on its two irrigation farms nearby.<sup>9</sup>

27 As **Mr Willis** has explained, farms that receive industrial wastewater and other waste products do not have standard or easily modelled nutrient input and loss characteristics.<sup>10</sup> Fonterra therefore submitted in support of the inclusion of policies 14.4.19 and 14.4.20B in Part B of Plan Change 7, which enable the use of an Equivalent Baseline GMP and GMP Loss Rate where the Farm Portal is unable to accurately model the farming system.

---

<sup>8</sup> See the evidence of Gerard Willis at [84].

<sup>9</sup> Evidence of Gerard Willis at [85].

<sup>10</sup> Evidence of Gerard Willis at [89].

- 28 The Council's section 42A report recommended that Policy 14.4.20B and 14.4.20C are deleted on the basis that those provisions are repeated in the Section 4 general provisions of the LWRP. While **Mr Willis** in his evidence agreed in principle with the removal of unnecessary duplication of provisions across the LWRP, **Mr Willis** noted a potential concern associated with the direction in Section 4 of the LWRP that more specific sub-regional policies take preference over the general policies of the LWRP.<sup>11</sup>
- 29 The Section 4 direction mirrors the generally accepted approach to statutory interpretation and the interpretation of plans prepared under the RMA.<sup>12</sup> *Prima facie* this would suggest that where there is a conflict between general and specific provisions in a plan, the specific prevail.<sup>13</sup>
- 30 It is therefore important in reducing duplication across the LWRP to ensure that specific policies in the sub-regional chapters do not unintentionally override the important general policies, including access to this equivalent pathway.
- 31 In order to ensure access to the equivalent pathway remains available, Fonterra seeks that either:
- 31.1 the provisions are retained as notified in the Sub-regional chapter; or
- 31.2 if it is essential that this minor duplication is removed, there is at least a note included at the bottom of Policy 14.4.20 clarifying that Policies 4.38D and 4.38E apply as appropriate to the application of that Policy.<sup>14</sup>
- 32 While **Mr Willis's** proposed solution is supported, a more simple approach may be to retain the provisions as notified.
- Farming land use consent durations**
- 33 The policy direction in proposed Policy 14.4.18 (as per the Section 42A Report recommendations version of Plan Change 7) is problematic when considered against the dual consenting requirements for Fonterra's wastewater irrigation farms.<sup>15</sup>
- 34 While notified Policy 14.4.19 directs that consents should not be granted for a farming land use for durations greater than 10 years (which the Section 42A Report recommends moving to Policy

---

<sup>11</sup> See the evidence of Gerard Willis at [94].

<sup>12</sup> *Brownlee v Christchurch CC* C102/01.

<sup>13</sup> *Caltex Oil (NZ) Ltd v North Shore City Council* A1/93.

<sup>14</sup> See the evidence of Gerard Willis at [96].

<sup>15</sup> See the evidence of Gerard Willis at [90].



14.2.18), where that farming land use is largely controlled and directed by a separate discharge consent, it is appropriate that the terms of the two consents align.

- 35 As **Mr Willis** has already identified, it appears that the Council has misinterpreted the rationale for Fonterra's submission point in this respect, incorrectly citing investment decisions as the reason for seeking a greater maximum consent duration.<sup>16</sup> **Mr Willis** correctly notes that the point here is that the discharge and land use consents should line up to avoid a perverse planning outcome, and there is no policy reason why any discharge consent needs to be limited in duration.<sup>17</sup>
- 36 As the Hearing Panel will be aware:
- 36.1 good resource management practice requires that, in general, all the resource consents for a project or activity should be carefully identified from the outset, and applications for them all should generally be made so that they can be considered together or jointly<sup>18</sup> - an approach that would logically extend to renewals;
- 36.2 it is often desirable, looking at an application broadly in terms of the environment involved, to have common expiry dates for the consents for the same activity;<sup>19</sup>
- 36.3 section 123 of the RMA gives a decision-maker a wide discretion to decide the duration of the consent (as discussed in *PVL Proteins Ltd v ARC*);<sup>20</sup> and
- 36.4 an applicant is entitled to as much security of term as is consistent with sustainable management.
- 37 On that basis, it is Fonterra's position that it is appropriate for decision-makers considering an application for a farming land use activity that occurs in conjunction with the discharge of treated wastewater to grant the consent for a duration that 'synchronises' with the associated discharge consent. In making that decision, and still taking into account the Policy expectation that farming land use consents would not be granted for terms greater than 10 years, the decision-maker should be able to consider all relevant factors relating to term, include the desirability for a term which would

---

<sup>16</sup> See the evidence of Gerard Willis at [97].

<sup>17</sup> Evidence of Gerard Willis at [99]-[104].

<sup>18</sup> *AFFCO NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224 (PT).

<sup>19</sup> *Curador Trust v Northland Regional Council EnvC Whangarei*, A069/06, 31 May 2006, at [35].

<sup>20</sup> A061/2001, Sheppard J, 26 March 2001.

allow a replacement consent to be considered in conjunction with the associated discharge activity.

- 38 Fonterra therefore seeks the amendment to Policy 14.4.18 as outlined in **Mr Willis's** evidence.<sup>21</sup>

**N loss for point source discharges**

- 39 Policy 14.4.28 provides for a 30% reduction in N losses from point source discharges.

- 40 As **Ms Buckley** notes, Fonterra does not oppose a requirement that its discharges to land should reduce their nitrogen *load* by 30 percent.<sup>22</sup> However, Fonterra's wastewater discharges are already essentially capped by the land use consent it holds for farming the land used for wastewater disposal, for which there is a proposed 10 percent reduction required for these activities over the same period. The discharge consents restrict nutrient loadings (i.e. the nutrient levels in the water and other waste products at the time that they are discharged to land).<sup>23</sup>

- 41 Fonterra's issue with Policy 14.4.28 is that, as currently drafted, it seeks to limit the discharge of nutrients from the land to groundwater, which is a separately consented activity. What Fonterra seeks is that the 30% reduction requirement limits the levels of nutrients being discharged to the land in the first place. That distinction can be made clear by replacing "loss" with "load" in the Policy.

- 42 **Mr Willis** has helpfully worked an example through, where a 30% load reduction requirement over a 15 year period would reduce Fonterra's discharge of nitrogen to land from 600 to 420 kg N/ha/yr, while the overall N loss combining this discharge with the associated farming activity would reduce by at least 10% over the same period.<sup>24</sup>

- 43 As **Mr Willis** notes, the section 42A report acknowledges this submission point but does not discuss it in any detail and proposes no amendments. In my submission, the reference to "loss" in this Policy is clearly an error, which does not make sense nor appear to have any direct resource-management related basis.

---

<sup>21</sup> At [105].

<sup>22</sup> Evidence of Ms Buckley at [39].

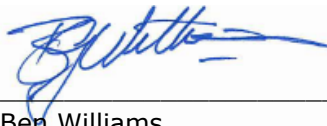
<sup>23</sup> Evidence of Brigid Buckley at [38].

<sup>24</sup> Evidence of Gerard Willis at [112].

**RELIEF**

- 44 Accordingly, Fonterra seeks amendment to Plan Change 7 to include the key changes set out in **Schedule 1** that are discussed in these submissions.
- 45 Fonterra still seeks the changes set out in Fonterra's original and further submissions, except as otherwise noted in Fonterra's evidence and these legal submissions.

Dated 30 October 2020



---

Ben Williams

Counsel for **Fonterra Co-operative Group Limited**

**SCHEDULE ONE**

**Key relief sought by Fonterra**

Blue = amendments proposed in Section 42A Report

Red = amendments proposed by Fonterra

This is prefaced on the basis that the 'T' allocation is removed and a single allocation block is confirmed, consistent with Option 1 in the Groundwater memo.

Policy/Rule	Relief sought	Submission point
Policy 14.4.18	<p>Water quality is improved <del>in the Orari, Opihi and Timaru Freshwater Management Units</del> by:</p> <ul style="list-style-type: none"> <li>a. <u>requiring additional reductions of nitrogen losses in defining the Rangitata Orton High Nitrogen Concentration Area, Fairlie Basin High Nitrogen Concentration Area and Levels Plain High Nitrogen Concentration Area within which targeted reductions of nitrogen in accordance with Table 14(zc) are required; and</u></li> <li>b. <u>avoiding the grant of any resource consent that will result in the nitrogen loss calculation from a farming activity exceeding the Baseline GMP Loss Rate, except where Policy 14.4.20 applies.; and</u></li> <li>c. <u>unless (d) applies, limiting the duration of any resource consent for a farming activity that is required to make further reductions in nitrogen loss (beyond Baseline GMP Loss Rates or consented nitrogen loss rates) to no more than ten years; and</u></li> <li>d. <u>the duration of a resource consent for a farming activity that is required to make further reductions in nitrogen loss (beyond Baseline GMP Loss Rates or consented nitrogen loss rates), may be for greater than 10 years if the farming activity is undertaken on land used for industrial or trade waste disposal activities and a period greater than 10 year would allow for the alignment of land use and discharge consents.</u></li> </ul>	PC7-416.19
Policy 14.4.25	<p>In the Orari Freshwater Management unit all <del>all</del> permits for groundwater takes from the Orari Catchment within the conjunctive use zone <del>and where the screen is less than 30 m deep</del> shall have minimum flow conditions <u>in</u></p>	PC7-416.6

	accordance with the environmental flow and allocation regime set out in table 14(h), unless the application for resource consent demonstrates that the take will not have a direct <del>or high or moderate</del> degree of stream depletion effect as determined through field testing in accordance with Schedule 9 <del>consistent with the minimum flow sites and allocations in Table 15.</del>	
Policy 14.4.28	Assist in achieving water quality targets in the Rangitata Orton High Nitrogen Concentration Area by requiring, <del>before 1 January 2035</del> , in addition to Policy 14.4.1918, point source discharges of nitrogen from industrial or trade waste disposal activities to reduce nitrogen <del>losses</del> load by a minimum of 30% below <del>the rate authorised at 20 July 2019 current consented rates by 1 January 2035.</del>	PC7-416.11
New Policy	<p><del>When determining whether groundwater allocation limits of Table 14(zb) are exceeded, the regional council will take into account:</del></p> <ul style="list-style-type: none"> <li><del>a. the proportion of groundwater take that is regarded as stream depleting in accordance with Schedule 9; and</del></li> <li><del>b. The level of groundwater take that is recorded against the relevant surface water limits of Tables (h) to (za); and</del></li> <li><del>c. The level of uncertainty about the level of stream depletion and the need for precaution in ensuring sustainable groundwater limits are not exceeded.</del></li> </ul>	<p>Evidence of Gerard Willis at [69].</p> <p>Within the scope of submissions PC7-416.1, PC7-416.18, PC7-416.3.</p>
Rule 14.5.9	<p><b><u>The taking and use of groundwater is a restricted discretionary activity, provided the following conditions are met:</u></b></p> <ol style="list-style-type: none"> <li>1. <u>For stream depleting groundwater takes with a direct or high stream depletion effect, the take, in addition to all existing consented takes does not result in an exceedance of any minimum flow in Tables 14(h) to (za); and</u></li> <li>2. <u>The take:</u> <ol style="list-style-type: none"> <li>a. <u>will replace a lawfully established take affected by the provisions of Section 124-124C of the RMA, and the rate, seasonal or annual volume of the take, in addition to all existing consented takes, does not exceed;</u></li> </ol> </li> </ol>	<p>Evidence of Gerard Willis at [63].</p> <p>PC7-416.21</p>

	<ul style="list-style-type: none"><li>i. <u>the allocation limits in Tables 14(h) to 14(zb) where the take is direct, high or moderate surface water depleting;</u></li><li>ii. <u>the allocation limits in Table 14(za) where the take is low surface water depleting; or</u></li></ul> <p>b. <u>will not replace a lawfully established take affected by the provisions of Section 124-124C of the RMA, and the rate, seasonal or annual volume of the take, in addition to all existing consented takes, does not exceed:</u></p> <ul style="list-style-type: none"><li>i. <u>the allocation limits in Tables 14(h) to 14(zb) where the take is direct, high or moderate surface water depleting;</u></li><li>ii. <u>the allocation limits in Table 14(za) where the take is low surface water depleting;</u></li></ul> <p><u>or</u></p> <p>3. <u>If the take will not replace a lawfully established take affected by the provisions of Section 124-124C of the RMA, an existing surface water take permit or an existing direct, high or moderate stream depleting groundwater take permit with the same or a greater seasonal or annual volume is surrendered; and</u></p> <p>34. <u>Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the bore interference effects on any groundwater abstraction other than an abstraction by or on behalf of the applicant are acceptable, as determined in accordance with Schedule 12.</u></p> <p>Matters of discretion: ...</p> <p>9. <u>Whether the benefit of the surrender of the existing permit for surface water is sufficient to offset the additional groundwater take.</u></p> <p>...</p>	
--	--	--

Rule 14.5.10	The taking and using of groundwater that <u>will replace a lawfully established take affected by the provisions of Section 124-124C of the RMA that</u> does not comply with one or more of conditions 2a or 3 of Rule 14.5.9 is a non-complying activity.	Evidence of Gerard Willis at [60].  PC7-416.15, PC7-416.22
Rule 14.5.11	The taking and using of groundwater that <u>will not replace a lawfully established take affected by the provisions of Section 124-124C of the RMA that</u> does not comply with one or more of conditions 1 or 2b of Rule 14.5.9 is a prohibited activity.	Evidence of Gerard Willis at [61].  PC7-416.23, PC7-416.16