

Before an Independent Hearings Panel

The Proposed Waikato Regional Plan Change 1

IN THE MATTER OF the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF the Proposed Waikato Regional Plan Change 1, Block 3 Hearings:
Parts C7-C9

**PRIMARY EVIDENCE OF ELIZABETH KIM HARDY
ON BEHALF OF MIRAKA LIMITED**

Planning

Dated: 5 July 2019

BUDDLE FINDLAY

NEW ZEALAND LAWYERS

Barristers and Solicitors

Auckland

Solicitor Acting: **Jennifer Caldwell / Mathew Gribben**

Email: Jennifer.caldwell@buddlefindlay.com / mathew.gribben@buddlefindlay.com

Tel 64-9-358 2555 Fax 64-9-358 2055 PO Box 1433 DX CP24024 Auckland 1140

1. EXECUTIVE SUMMARY

- 1.1 Miraka Limited (Miraka) submission and further submission generally supports the provisions of Plan Change 1 (**PC1**) and Variation 1 (**V1**).
- 1.2 A number of changes are proposed in the Miraka submission to the plan objectives, policies and rules to enhance equity amongst landowners and require deliberate action to improve practice change.
- 1.3 In this statement I set out the proposed amendments to the plan definitions, polices and rules on the following matters:
- (a) Methods and sub-catchments;
 - (b) Farm Environment Plans and permitted activity status;
 - (c) Enterprise and Property definitions; and
 - (d) Methods related to Policy 7.
- 1.4 These amendments rely on the statements of Dr Gavin Sheath, Mr Grant Jackson, and Ms Jude Addenbrooke, on the assumption that the commissioners accept the evidence contained within those statements.
- 1.5 A track changes copy of the amendments sought to the plan change provisions in response to the Miraka submission points addressed in this statement and its evidence for Blocks 1- 3 is attached as Appendix 1.

2. INTRODUCTION

- 2.1 My full name is Elizabeth Kim Hardy. I have over 25 years' experience in resource management planning. My qualifications and experience are set out in my Block 1 evidence.
- 2.2 My evidence is given in support of the submission made by Miraka to PC1 and V1.
- 2.3 I have read the Environment Court's Code of Conduct for Expert Witnesses, and I agree to comply with it. My qualifications as an expert are set out above and in my Block 1 evidence. I confirm that the issues addressed in this brief of evidence are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.

2.4 I would be available for expert witness conferencing should that be requested by the panel.

3. SCOPE OF EVIDENCE

3.1 This statement of evidence is focused on my planning interpretation of the factual and technical positions put forward by Dr Sheath, Mr Jackson and Ms Addenbrooke. I set out amendments necessary to the planning framework should Ms Addenbrooke and Dr Sheath's technical positions be accepted by the panel.

3.2 The specific provisions of the PC1 and V1 planning framework that I comment on in this Block 3 statement of evidence include:

- (a) Methods and sub-catchments;
- (b) Schedule 1 Farm Environment Plans and permitted activity status;
- (c) Definitions of Enterprise and Property;
- (d) Policy 7.

4. MIRAKA STATEMENTS OF EVIDENCE

4.1 In preparing this statement of evidence I have relied on the following statements of evidence:

- (a) Dr Gavin Sheath – Agricultural Consultant (advisor to Miraka);
- (b) Mr Grant Jackson – Miraka;
- (c) Ms Jude Addenbrooke – Environmental Management Consultant.

4.2 The recommendations and my track changes version of the PC1 provisions in this statement of evidence focus solely on the amendments sought by Miraka and supported by its witnesses. I have used the version of the provisions as recommended to be amended in the Section 42A Report and identified the amendments now sought by Miraka (Including Block 1, 2 and 3 amendments).

4.3 I consider the Miraka position as an interdependent package of amendments. I have not been asked to consider a hybrid of the positions and options put forward to Commissioners by the various parties.

4.4 I have considered the amendments to the provisions sought by Miraka against the statutory planning framework including the higher order documents and the provisions of Section 32AA.

5. METHODS AND SUB-CATCHMENTS

Methods

5.1 At paragraph 333 of the Section 42A report the Officers question the value of the implementation Methods and whether they will remain relevant and helpful through the 10 year life of the Plan and recommend that the implementation methods are deleted in their entirety. There is very limited analysis in the Section 42A Report about the implications and costs and benefits of removing the Methods and the impact that could have on implementation of the Plan. The only clear reason for removing the Methods is that they *may* become outdated.

5.2 Removal of all of the implementation methods as proposed is a substantial change to the PC1 planning framework. As currently drafted the Methods provide a transparent link between the statutory objectives, policies and rules of PC1 and the principles of the management framework that the Council proposed to implement in support of PC1. In addition the Methods establish an intention of parallel management support to implementing the statutory provisions of the plan. Each method starts with '*Waikato Regional Council will...*' and is directive on actions to be carried out by the Council. Miraka's evidence is that practice change is a critical part of achieving the Stage 1 water quality targets and a large number of the actions and processes that are necessary to achieve practice change are contained within the objectives.

5.3 I consider that the inclusion of Methods is good planning practice and will make a significant contribution to the successful implementation of Plan Change 1.

Sub-catchment planning

5.4 Dr Sheath has a particular interest in the policy and method focus on sub-catchment planning and is concerned to ensure that the PC1 provisions adequately enable and support positive practice change. I rely on his evidence.

5.5 The Officers' analysis of the submissions on the sub-catchments does not result in any substantive changes to the definition of sub-catchment and does not include any consequential amendments to the plan provisions. Subject to the amendment below I agree with their analysis that the existing plan provisions enable sub-catchment

management to be undertaken (without specifying who should do that) and ensure the outputs of sub-catchment planning can be reflected in a resource consent assessment.

- 5.6 However, the recommendation to remove all of the methods results in the deletion of method 3.11.4.7 'Information needs to support any future allocation'; and method 3.11.4.10 'Accounting system and monitoring'. This removes a critical step that will assist with sub-catchment management.
- 5.7 My recommendation is that all of the methods are retained with minor track changes to methods 3.11.4.7 and 3.11.4.10 to ensure specific reference to sub catchments.
- 5.8 In addition, a small change can be made to Schedule 1 relating to FEPs to further acknowledge the value and encourage sub-catchment management by including the following:

PART E – CATCHMENT PLANNING

Description of actions undertaken to address FMU/sub-catchment community catchment plan objectives including but not limited to:

1. Freshwater targets.
2. Community identified farm practice change targets.
3. FMU/Catchment monitoring and auditing practices.
4. Community education initiatives.

- 5.9 Should Commissioners decide to remove all the methods then this amendment to Schedule 1 would ensure some specificity around expectations to undertake sub-catchment planning is included in the provisions.

6. FARM ENVIRONMENT PLANS AND PERMITTED ACTIVITY STATUS

Farm Environment Plans

- 6.1 The Council officers have undertaken a comprehensive review of the requirements for Farm Environment Plans in Schedule 1 and propose substantial changes. Although a change in approach was signalled the scale and extent of the change and the amount of entirely new text is substantial. This has made the task of responding to the Section 42A report challenging. I have read the Dragten report and support the overarching approach to FEPs being based on outcomes and principles. However, I consider there is an opportunity to explore whether more specificity can be provided so that the presence of a robust FEP is also applied as a method for determining permitted activity status.

- 6.2 The amended Schedule 1 comprises a management framework of objectives and principles with each FEP required to demonstrate consistency with these objectives and principles. The expectation is that all FEPs will be lodged to council as part of the package of information required to support a resource consent application, except where the farming activity is a permitted activity.
- 6.3 The majority of farming activities are expected to require resource consent as a controlled, restricted discretionary or discretionary activity. Miraka is still keen to pursue the permitted activity status and as such I have taken the approach of whether and how the permitted activity status could be supported, notwithstanding indications from Commissioners during the Block 2 hearings that they may have some concerns with this approach.
- 6.4 The new FEP objectives and principles predominantly require each FEP to 'identify', 'maintain' or 'manage' certain activities. There is a clear shift towards identifying principles rather than actions or mitigations and relying on a Farm Environment Planner to apply expert judgement as to what actions or mitigations are appropriate. It seems that the list of specific actions or mitigations would be determined between the farmer and the Farm Environment Planner and sit outside the Plan, under the Section 42A approach.
- 6.5 Once the appropriate actions are identified, a Farm Environment Planner is also required to provide an expert opinion as to 'whether the farming activities on the property are being undertaken in a manner consistent with the objectives and principles set out in Part B of this schedule'.
- 6.6 The FEP framework has been redrafted to reflect its status as part of a resource consent approval process. Since the FEP is not expected to be used to determine permitted activity status, it contains less specificity and independent evaluations will be required to confirm whether a FEP is consistent with Schedule 1 and whether a farmer is farming in accordance with PC1 and Good Farming Practice.
- 6.7 I consider there is a clear alternative approach to the FEP framework that involves a list of more specific actions and perhaps minimum standards. Such an approach would support a permitted activity status in the event the Panel considered that the FEP framework needed to be more specific and involve less judgement (which was a matter raised by the Panel in Block 2).
- 6.8 I understand that Federated Farmers, Fonterra and Dairy New Zealand have collectively worked on the preparation of alternatives to Schedule 1 aimed at supporting

a permitted activity rule Framework by linking specific actions and standards to the objectives and principles in the revised Schedule 1.

6.9 Schedule 1 needs a greater specificity than that provided in the current alternative put forward in the notified version if it is to successfully support a permitted activity rule framework. At the Block 2 hearing there was discussion around the need for Council officers and/or Certified Farm Environment Planners to be able to 'tick boxes' in order to provide certainty that a particular farming activity can be confirmed as a permitted activity. From my review of the options provided to Miraka by Dairy New Zealand, Fonterra and Federated Farmers, the opportunities for greater specificity in Schedule 1 include the development of standards based on the following criteria:

- (a) Loss of sediment, microbial pathogens, phosphorus and nitrogen to water (including NRP);
- (b) Maintenance and/or enhancement of soil structure;
- (c) Nutrient loss to water and nutrient efficiency;
- (d) Soil P levels; and
- (e) Quantum, rate, timing and weather during application of Nitrogen fertiliser.

6.10 However, further work is required to determine how Schedule 1 can be best adapted to include these specific criteria/standards and I anticipate that iterative versions of the Schedule will be presented during the evidence which Miraka will respond to. The challenge is to develop an FEP framework in Schedule 1 that can be equitably applied to a range of land tenure and management structures ranging from individual family farms and large scale farming enterprises to Maori land ownership and management structures. The overarching objectives of the FEP could be to:

- (a) Establish permitted or other consent status;
- (b) Establish a baseline of data and GFP actions for future measurement and monitoring;
- (c) Provide a degree of certainty for both farmers and Council as to the consent status of the activity and the actions required to ensure continued GFP.

- 6.11 Other Miraka experts and I would be happy to participate in any conferencing to resolve differences and reach an agreed approach.
- 6.12 The Dragten report also acknowledges that the flexibility and pragmatism of the expert judgment review approach creates challenges for enforceability. This will be a key issue in relation to the amended Schedule 1 and how it relates to the activity status of farming.

Permitted Activity Status

- 6.13 At this stage no changes to the permitted activity framework recommended in my Block 2 evidence are necessary. There are at least two ways in which the permitted activity framework can be supported:
- (a) Using the existence of a certified FEP which meets the requirements of Schedule 1 and which is being adequately implemented as the key PA standard. The Level of Confidence approach outlined in the Dragten Report could be used to identify whether a farm is implementing its FEP. Farms with consistent results below a certain LOC would lose their permitted activity status. A priority for the FEPs as drafted is the establishment of the NRP for each property or enterprise with the review process being the key tool for determining whether consent is required should circumstances change over time.
 - (b) Including specific actions and mitigations within Schedule 1. One option could be to include a new PART A1 – “PERMITTED ACTIVITY CRITERIA/STANDARDS’ and include a suite of standards based on for example the criteria in 6.9 above.
- 6.14 I understand that Miraka’s preferred approach is option A given that it retains the permitted activity status but provides a degree of flexibility for farmers with the assistance of Certified Farm Environment Planners to select the most appropriate mitigation and GMP for each farm, rather than having to choose only from a pre-selected list of options.
- 6.15 As I stated in my Block 2 evidence the priority is to identify the trigger point for consent within Schedule 1 should an FEP not be approved by the Certified Farm Environment Planner; or the CFEP approves but records a lower level of confidence in the ability of the farm to meet the objectives.

- 6.16 My interpretation of Rule 3.11.5.3 is that resource consent will be required if the farming activity does not demonstrate compliance with condition 5 requiring an approved FEP. This should give Council confidence that consent can be required should condition 5 not be satisfied.
- 6.17 Should Commissioners consider that Schedule 1 cannot be amended to provide the necessary level of specificity (through criteria/standards) for permitted activity status then controlled or restricted discretionary approach to the rule framework would likely be required.

7. DEFINITION OF ENTERPRISE AND PROPERTY

- 7.1 I have evaluated the definitions of enterprise and property within the policy and rule framework and considered the recommendations of the s42A report to remove the definition of enterprise.
- 7.2 I have also considered the issues raised by Mr Jackson in his statement of evidence¹. Specifically in relation to **Enterprise** the need to:
- (a) Provide for flexible management and ownership structures acknowledging that land used for pastoral farming can be part of a wider farm management structure and be an integral and potentially individual or collective part of a Good Farm Management Programme.
 - (b) Recognise the historical changes and diversification initiatives (such as retiring steeper land to forestry) that have already been implemented by farmers to improve farming practice and reduce the overall impact of their farming activities.
 - (c) Allow the NRP to be calculated across an entire enterprise including the use of land within the catchment for non-pastoral farming activities.
- 7.3 Then, in relation to Property, the need to acknowledge the range of ownership and land tenure structures that can underpin farm management structures.
- 7.4 Both the definitions of enterprise and property should be consistent in their reference to 'management structures' to acknowledge the issues set out in above. Ensuring a

¹ Statement of Evidence of Grant Jackson Block 3 para 5.5.

holistic assessment of an individual farm or farming enterprise that takes into account all relevant farming activities regardless of the underlying land tenure status incentives and enables good farm practices.

- 7.5 I support the Council's definition of property including the amendments proposed in the s42A report. However, I suggest the following additional change to the definition to ensure the 'same management structure' can be acknowledged and that 'property' is not limited to land tenure status only. I support the reference to single and multiple certificates of title in the definition. Together with my proposed amendments, the definition enables collective consideration of property with individual land tenure arrangements provided it is under 'the same management structure'.

Definition of Property:

For the purposes of Chapters 3.3, ~~and 3.4~~ and 3.11 means one or more allotments contained in a single certificate of title, and also includes all adjacent land that is under the same management structure OR in the same ownership, -but contained in separate certificates of title. For the purpose of Rule [3.11.5.3 and] and 3.11.5.4, a property is considered to be within a sub-catchment if more than 50% of that property is within the sub-catchment.'

- 7.6 Council officers have recommended that enterprise is removed and replaced with 'property'. The use of 'property' is preferred by officers for consistency across provisions and because calculating NRP on a property basis will ensure that N is fixed to the relevant property and not able to be shifted between multiple, non-contentious blocks over time or sold or purchased. The term 'enterprise' is also considered too broad and not appropriate for a controlled or permitted activity rule status.
- 7.7 Mr Jackson in paragraph 6.5 sets out his support for retention of the term enterprise as it supports and incentivises land suitability practices.
- 7.8 I consider it appropriate that the NRP could be connected either to the overarching land tenure and/or management structure. Depending on the individual circumstances that land tenure/management structure could comprise:
- (a) One certificate of title;
 - (b) Multiple certificates of title;
 - (c) Non – contiguous allotments;
 - (d) Leasehold land;
 - (e) An overarching land management structure; and/or

(f) Any combination of the above.

- 7.9 Flexibility needs to be provided in the plan provisions to enable consideration of a range of land tenure and management structures, including land that is non-contiguous but under the same management structure. I understand that it is not uncommon for land to be farmed under one management structure but held in multiple ownerships and comprise non-contiguous and leasehold land.
- 7.10 Schedule B as currently drafted enables this flexibility as it states that the NRP must be calculated for the 'property' or 'enterprise'. Should Commissioners accept the Council officer's recommendation to delete enterprise my proposed amendment to the definition of property would ensure calculation of the NRP could be based on any one or combination of (a) to (f) in 7.6 above and hence flexibility retained.
- 7.11 I consider it fundamental that the definition of property provide for the range of land tenure and management practices set out in (a) to (f) above so as not to place greater restriction on farm activities that operate under a less traditional ownership model.
- 7.12 At paragraph 571 of the Section 42A report Council officers have stated that the exclusion of non-contiguous allotments from the definition of property means that a resource consent application will be required to farm such properties.
- 7.13 The Section 42A report expresses a concern that the if an enterprise held an NRP then certain properties within the enterprise could be sold or subdivided and there is no certainty about what would happen to the NRP for the land that was sold/subdivided and the land that was retained. The same problem could arise in relation to the current definition of Property, since it could encompass more than one certificate of title or parcel of land. I therefore do not consider that the issue can be that significant if the Section 42A report recommends retaining the definition of Property.
- 7.14 More fundamentally the transfer or subdivision of an NRP could be easily dealt with through a consent condition, a term of an FEP or even a permitted activity to provide a framework for what happens to the NRP in those circumstances.
- 7.15 Should Commissioners consider that Enterprise be retained then my recommendation is that the definition is also modified for consistency to include reference to 'under the same management structure':

Definition of Enterprise:

Enterprise/s: means one or more parcels of land **under the same management structure** held in single or multiple ownership to support the principle land use or which the principle land use is reliant upon, and constitutes a single operating unit for the purposes of management. An enterprise is considered to be within a sub catchment if more than 50% of that enterprise is within the sub catchment.

8. POLICY 7 – FUTURE ALLOCATION

- 8.1 The s42A report recommends deletion of Policy 7 on the basis that *'Policy 7 and the associated implementation method are at best a statement of intent. Any future planning regime will be required to reassess a property level allocation mechanism, if indeed one is appropriate without pre-judgement as to the best approach'*².
- 8.2 Ms Addenbrooke in her statement of evidence considers it vital that decisions around future allocation are fair and equitable and developed under a robust decision making process before quantitative assignments are made. In her experience considerable work will be required to determine allocation rights and this is best undertaken under a separate process in Stage 2 of Healthy Rivers.
- 8.3 The policy as currently drafted is essentially a direction to collect information and undertake research. It does however also go further and is indicative of a prospective future policy position on allocation. I agree with the reasons outlined in Ms Addenbrooke's evidence and the Section 42A Report that such a policy is inappropriate and not soundly based on a reasoned examination of the different options. There is currently a high risk of a change in approach or direction from central government on the issue of allocation.
- 8.4 Retaining this policy in PC1 would mean that these allocation principles could become a de facto 'allocation policy', relied upon in decision making processes, until a robust allocation policy framework is developed under the appropriate statutory process.
- 8.5 I acknowledge that there is some value in having longer term certainty beyond the 10 year horizon of the Plan Change. However, the Plan Change has a whole signals a clear intention to reduce discharges and improve water quality over time, so the overall strategy is clear.
- 8.6 I support the Council Officer's position that the policy should be deleted.

² Section 42A Report – Block 3 para 482, page 107.

9. CONCLUSION

9.1 The recommended changes to PC1 arising from my review of the Miraka expert evidence and the Section 42A report are set out in the attached track changes version of PC1 and include:

- (a) Retention of the methods with minor amendments to specifically reference sub-catchment planning;
- (b) Addition of criteria to Schedule 1 so that Farm Environment Plans can be used to determine permitted activity status;
- (c) Amendment to the definitions of property and enterprise so that they are consistent and allow for consideration of land 'under one management structure'.
- (d) Deletion of Policy 7 so that allocation is addressed appropriately under Stage 2 Healthy Rivers.

Kim Hardy

5 July 2019