BEFORE THE INDEPENDENT HEARINGS PANEL FOR PROPOSED WAIKATO REGIONAL PLAN CHANGE 1

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments: Parts C1 – C6

REBUTTAL STATEMENT OF EVIDENCE BY PHILIP HUNTER MITCHELL ON BEHALF OF OJI FIBRE SOLUTIONS (NZ) LIMITED FOR HEARINGS PART C1 – C6

10 MAY 2019

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1. INTRODUCTION

1.1 My full name is Philip Hunter Mitchell.

1.2 My experience and qualifications are set out in paragraphs 2.2 – 2.10 of my statement of planning evidence dated 15 February 2019, prepared on behalf of Oji Fibre Solutions (NZ) Limited (**OjiFS**), in respect of the Part A and Part B hearing considering Proposed Plan Change 1 – Waikato and Waipā River Catchments (**PC1**). I attended the hearing to present that statement on 9 April 2019.

1.3 I confirm that although these proceedings are not before the Environment Court, I have read the Environment Court's Code of Conduct for Expert Witnesses and I agree to comply with this code.

2. SCOPE OF REBUTTAL EVIDENCE

2.1 I prepared a primary statement of planning evidence, dated 3 May 2019, on behalf of OjiFS in respect of the Part C hearings for PC1 ("**my primary evidence**").

2.2 This statement of rebuttal evidence addresses matters raised in the primary evidence of other planning witnesses for the Part C hearings of PC1, specifically:

2.2.1 Ms Justine Young, on behalf of Dairy NZ;

2.2.2 Ms Deborah Kissick, on behalf of the Director-General of Conservation ("**DOC**");

2.2.3 Mr Gerard Willis, on behalf of Fonterra; and

2.2.4 Ms Helen Marr, on behalf of Auckland-Waikato Fish and Game ("**Fish & Game**").

2.3 In my primary evidence, I stated:

> 5.9 I am also aware that there is no perfect solution to this issue and there will be as many solutions proposed as there are stakeholders

> and that no proposal is going to meet everyone's expectations/ wishes. As such a degree of pragmatism is needed in trying to find some sort of principled middle ground. In that regard, the initial draft I set out in Appendix 1 should be seen as just that – an initial draft that would benefit from more time and more perspectives.
>
> ……
>
> 7.13 It would be my hope that the Panel provides some interim guidance on the overall shape of the policy framework they consider appropriate, in which case, I consider that witness caucusing could be used to develop a complete and robust set of provisions.

2.4 Having read the planning evidence of other parties to this hearing I remain of the opinion set out in paragraph 7.13 of my primary evidence that there would be merit in the panel providing some interim guidance to the parties on the overall shape of the policy framework they consider appropriate and requiring planning witnesses' caucusing to develop a full set of provisions.

3. EVIDENCE OF MS YOUNG

3.1 At paragraphs 42 – 44 of her primary evidence, Ms Young states:

> **Managing nitrogen**
>
> 42 DairyNZ's submissions about nitrogen is that it is important to manage in the life of this plan change to achieve long term water quality. In Block 1 of the hearing, Dr Craig Depree supported the judgement made by Technical Leaders Group on the importance of managing both phosphorus and nitrogen. The outcome sought by DairyNZ in Block 2 of the hearing, is that greater clarity and streamlining of nitrogen management aspect of policies and rules will assist achieving Objective 3 and that changes recommended in the Officers report are not accepted which have the result of PC1 placing less emphasis on phosphorus, sediment and microbial contaminants as they do on nitrogen.
>
> 43 I am concerned that the scrutiny of the nitrogen by submitters over and above the other three contaminants, and the response in the Officers report to try to tighten council oversight and control of nitrogen, will lead to PC1 outcomes which are inflexible, de-

> incentivise up take of technologies and make PC1 unwieldy to implement. In my experience of Lake Taupo catchment nitrogen cap regulation, there was a similar tightening of implementation control that that resulted in increasing the ongoing costs for council and farmers of implementation, due to intensive scrutiny of farm operations.
>
> 44 In my opinion **there are sufficient checks and balances in PC1 to prevent nitrogen losses creeping up.** These are the NRP, 75th percentile and risk-based FEP. In addition, greater confidence in the use of nitrogen-specific technologies outside of Overseer can be dealt with by adding guidance in policy 2 about the need for their scientific rigour, peer review and testing. [**emphasis added**]

3.2 The clear purpose of PC1 is to give effect to the "Vision and Strategy" for the Waikato and Waipā Rivers. I had thought it was common ground that giving effect to the Vision and Strategy required a substantial improvement in the water quality of the Waikato River and its tributaries. In that regard, and as the Panel is aware, the *Puke Coal*[1] decision included the following passage:

> **Protect and restore surface waters paramount**
>
> [86] We are unanimous in our view that the adoption of the Vision and Strategy Statement of the Settlement Act within the Regional and District Plans, has led to a stepwise change in the approach to consents affecting the catchment of the Waikato River.
>
> [87] We consider that looking at the Waikato River Settlement Act and the Regional and District Plans as a whole, the only reasonable conclusion that can be reached is that there is an intention to improve the catchment of the river and of the river itself within a reasonable period of time (several decades) to a condition where it is safe for swimming and food gathering over its entire length.

3.3 Although a decision in respect of a resource consent application, paragraph [87] of the *Puke Coal* decision is equally applicable here.

[1] *Puke Coal Limited, Par Society Incorporated, Roger Howlett V Waikato Regional Council, Waikato District Council, Ludger Hinse, Peter William Davie*, [2014] NZEnvC 223

3.4 In that regard, Ms Young's statement that under the approach she is proposing "*there are sufficient checks and balances in PC1 to prevent nitrogen losses creeping up*", entirely misses the point. In my opinion, preventing the diffuse discharges of nitrogen "creeping up" falls well short of giving effect to the Vision and Strategy, and, consequently, her analysis is, in my opinion, flawed.

4. EVIDENCE OF MS KISSICK

4.1 Ms Kissick addresses point source discharges in paragraphs 197 – 223 of her evidence, and in doing so suggests amendments to Policies 10, 11, 12 and 13 of PC1. I do not agree with her proposals in respect of Policies 10, 11 and 13, as I will now discuss.

4.2 At her paragraphs 117 – 223, Ms Kissick addresses the duration of resource consents for point source discharges and states, as follows:

> 221 I agree with the Director-General's submission that point source and diffuse discharges should be managed together to achieve the FMU values and water quality outcomes, given that both forms of discharge contribute to their achievement. I also consider that a common catchment expiry date is an effective way of dealing with cumulative effects of discharges within a sub-catchment.

4.3 I do not agree that point source discharges should have a common expiry date, as doing so would be both inefficient and inequitable. For example, the same term of consent would be applied to a discharger already utilising (and having invested in) the world's best practice water treatment technology, as it would be to one who had been recalcitrant in that regard.

4.4 In my opinion, enterprises that have already invested in achieving high standards, need to have a reasonable level of security over the investments made in the technologies that have resulted in those high standards. That same situation also arises when investments in such technologies were being proposed when new or replacement resource consents were being sought.

4.5 Although I do not support common expiry dates, I would not oppose a proposal that had a common date for the review of consent conditions. I address review conditions later in this statement.

4.6 Ms Kissick goes on to propose amendments to Policy 13, as follows:

> **Policy 13: Point sources consent duration/Te Kaupapa Here 13: Te roa o te tukanga tono whakaaetanga mō te pū tuwha**
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> When determining an appropriate duration for any point source discharge consent granted consider the following matters:
>
> a. ~~The appropriateness of a longer consent duration~~ ~~A consent term exceeding 5 years,~~ ~~where~~ Whether the applicant demonstrates that the discharge is consistent with achieving the values of the Freshwater Management Unit and water quality targets attribute states set out in Table 3.11-1 the approaches set out in Policies 11 and 12 will be met; and
>
> b. The magnitude and significance of the investment made or proposed to be made in contaminant reduction measures and any resultant improvements in the receiving water quality; and
>
> c. The need to provide appropriate certainty of investment where contaminant reduction measures are proposed (including investment in treatment plant upgrades or land based application technology); and
>
> d. Any common catchment expiry date listed in Table XX and every 10 years thereafter. For consents granted within three years prior to the common catchment expiry date, the consent duration may be granted to align with the date 10 years after the common catchment expiry date.

4.7 I do not agree with any of the changes she proposes, for the reasons outlined above and because, as I stated in paragraph 4.7 of my primary evidence, the percentage reductions achieved through previous consent processes may not always be able to be continued, especially where treatment is already at or approaching “best practice” levels.

4.8 At her paragraphs 198 - 208, Ms Kissick addresses point source discharges of regional significance, and goes on to propose an amended Policy 10, that reads as follows:

> **Policy 10: Provide for point source discharges of regional significance/Te Kaupapa Here 10: Te whakatau i ngā rukenga i ngā pū tuwha e noho tāpua ana ki te rohe**
>
> When deciding resource consent applications for point source discharges ~~of nitrogen, phosphorus, sediment and microbial pathogens~~ to water or onto or into land, provide for the values of the Freshwater Management Unit and the water quality targets in Table 3.11-1 when considering the:

a. Continued operation of regionally significant infrastructure; and

b. Continued operation of regionally significant industry.

4.9 Those proposed amendments change the entire meaning of the policy and instead of recognising the importance of regionally significant industry and infrastructure, Ms Kissick's wording would serve to further constrain them.

4.10 Accordingly, I oppose her changes to Policy 10.

4.11 At her paragraphs 209 – 214, Ms Kissick addresses Policy 11, which relates to the use of the Best Practicable Option and offsets when considering point source discharges.

4.12 As stated in paragraphs 5.8 – 5.10 of my primary evidence, this is a complex issue and one that I consider would benefit from further technical discussions between the planning witnesses, following some initial guidance from the Panel.

4.13 Ms Kissick discusses amendments to Policy 12 at her paragraphs 215 – 216. I do not oppose those changes, but note that they serve to further negate the need for the changes Ms Kissick proposes to Policy 10.

5. EVIDENCE OF MR WILLIS

5.1 When discussing regionally significant discharges, Mr Willis states, at his paragraph 22.12:

> 12.12 Finally, I just record my agreement with the s42A Report that it would not be appropriate to expand Policy 10 so as to encompass new and additional infrastructure and industrial facilities. Those activities should be subject to general policies if the planning regime is to have integrity.

5.2 I do not agree with this proposition, as doing as Mr Willis suggests would serve to "grandparent" the operations of existing point source discharges. While those existing regionally significant discharges, and the benefits they provide, need to be recognised, PC1 also needs to

provide an appropriate pathway that allows for new point source (and diffuse) discharges to be considered. Accordingly, I prefer the version of Policy 10 contained in Appendix 1 of my primary evidence.

6. EVIDENCE OF MS MARR

6.1 Ms Marr states the following in relation to point source discharges:

> **5 Appropriate policy for point source discharges**
>
> 5.1 The proposed approach in PC1 leaves allocation decisions entirely to later decisions on individual consent applications. This 'case by case' approach will lead to a 'first in first served' allocation scenario where there is a very real risk that individual consent decisions will result in over allocation, and that over allocation will be 'locked in' through long term consent terms.
>
> 5.2 The result of that will be that at the next plan review, with allocation for point source discharges locked in for a long term through resource consents, the necessary reductions in contaminant loads will have to come from further reductions in diffuse discharges – farming. This may result in farming being asked to do more than their fair share.
>
> 5.3 In my opinion, in order to achieve the objectives of PC1 and give effect to the Vision and Strategy, point source discharges ought to be explicitly included in the overall water quality framework of PC1. As I stated in my evidence for Hearing Stream 1, and as I set out later in this evidence in relation to managing farming, PC1 should set out the total catchment load of contaminants in the river that enables the objectives to be achieved. PC1 should then set out how much of that load is to be allocated to diffuse discharges from farming, and how much to point source discharges (including those from infrastructure and industry). The appropriate allocation for industry and infrastructure that recognises their benefits appropriately should be embedded in that overall allocation framework of the plan. Policy should then guide resource consent decisions to ensure that the maximum allocations are not exceeded.
>
> 5.4 A comprehensive allocation approach with the elements I describe above is the only way to ensure that decisions made on individual

> applications will 'add up' to achieve the desired outcome in the river.

6.2 I do not agree with Ms Marr's analysis, for several reasons.

6.3 First and foremost, I see PC1 as being an interim step on a much longer journey. The primary purpose of this interim step (i.e. PC1) is to ensure all dischargers achieve "best practice" in their respective endeavours. It is only following that interim step that any equitable allocation regime could be contemplated (via a subsequent Schedule 1 process), as doing otherwise would serve to "grandparent" the status quo scenario.

6.4 Further regarding grandparenting, I do not agree with Ms Marr that a case by case evaluation of individual resource consent applications will potentially result in "over-allocation", and that this might result in "farming being asked to do more than their fair share".

6.5 It needs to be recognised that resource consents for point source discharges invariably require comprehensive monitoring and reporting of contaminant loads and effects, and for those data to be used to trigger reviews of consent conditions. The importance of the review conditions cannot, in my opinion, be over-emphasised, as it is the mechanism by which an appropriate and proportionate response can, and should, be considered.

6.6 The related point is that point source dischargers have been on this "continuous improvement", regulatory-driven journey for decades – initially under the requirements of the Water and Soil Conservation Act 1967, and, for the past nearly 28 years, under the Resource Management Act 1991. On the other hand, farming land uses have been effectively unregulated over that period – a period that has resulted in a significant increase in dairying in the Waikato Region, and a corresponding increase in the diffuse discharges of contaminants from them.

6.7 As such, I do not consider there is any realistic prospect of farming operations being required to do "more than their fair share".

7. CONCLUSIONS

7.1 Having reviewed the planning evidence of other parties for this part of the PC1 hearings, my conclusions remain as set out in Section 7 of my primary evidence.

7.2 As stated in my primary evidence, I also remain of the opinion that there is no perfect solution to this issue, that there will be as many solutions proposed as there are stakeholders and that no proposal is going to meet everyone's expectations/ wishes. As such a degree of pragmatism is needed in trying to find some sort of principled middle ground. In that regard, the initial draft I set out in Appendix 1 of my primary evidence should be seen as just that – an initial draft that would benefit from more time and more perspectives.

7.3 As also stated in my primary evidence, it would be my hope that the Panel provides some interim guidance on the overall shape of the policy framework they consider appropriate, in which case, I consider that witness caucusing could be used to develop a complete and robust set of provisions.