BEFORE INDEPENDENT HEARING COMMISSIONERS

AT HAMILTON

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions on Proposed Plan Change 1 to the Waikato Regional Plan

---

LEGAL SUBMISSIONS ON BEHALF OF FONTERRA CO-OPERATIVE GROUP LTD (74057)

BLOCK 1 – HEARING 1 APRIL 2019

28 MARCH 2019

RICHMOND
CHAMBERS

Counsel Instructed
B J Matheson
Richmond Chambers
PO Box 1008
Shortland Street
Auckland 1140

MAY IT PLEASE THE COMMISSIONERS:

1. OVERVIEW

1.1 These submissions are presented on behalf of Fonterra Co-operative Group Ltd (**Fonterra**).

1.2 Fonterra's has a significant interest in Plan Change 1 (**PC 1**) in respect of both the "on farm" implications of the PC1, and the proposed controls on point source discharges. This is because approximately 1,890 farmers in the PC 1 catchment supply Fonterra, and because of Fonterra's 5 manufacturing sites in the Waikato and Waipa River catchments – Te Awamutu, Te Rapa, Lichfield, Reporoa and Hautapu. These sites employ over 1,400 staff (excluding corporate/support staff), and together with on-farm, these sites contribute in excess of $2B to the regional economy. In terms of the Waikato RPS, these manufacturing sites are recognised as "regionally significant industry".

1.3 Fonterra welcomes the opportunity to participate in this hearing process, and it acknowledges the wide range of views from many different sector and interest groups. At this time, at the outset of its involvement in the hearing process, Fonterra wishes to place squarely on record the following matters that will underpin its submissions and evidence to follow in this hearing and in subsequent hearings:

(a) Fonterra understands, acknowledges and actively supports Te Ture Whaimana/Vision & Strategy (**V&S**), and in doing so Fonterra appreciates that all resource users within the catchment will need to play their part in order to achieve the objectives of the V&S. Or as explained, the communities within the catchment are responsible for restoring and protecting the health and wellbeing of the Rivers.

(b) While Fonterra has sought amendments to the provisions of PC 1, this should not in any way be taken as a watering down of the overarching obligations from the V&S that have been taken into PC 1. Rather, and as discussed further below, Fonterra simply

wants to ensure that any rule framework developed can be implemented as effectively and efficiently as possible.

(c) Fonterra endorses and supports the collaborative process represented by the Collaborative Stakeholders Group (**CSG**), and the outcome ultimately proposed by the CSG. As a company, Fonterra supports the philosophy of communities being able to collectively consider and develop freshwater outcomes for their regions, within any appropriate regulatory frameworks (which of course here includes not only the NPSFM 2017, but importantly the V&S).

2. KEY ISSUES

2.1 From reviewing the material filed in the Block 1 hearings so far, and having regard to the submissions and evidence filed by the Fonterra, the key matters which I address in these submissions are as follows (noting that some of these will be the subject of more detailed submissions in later topics):

(a) The status and importance of the Vision & Strategy.

(b) The requirement to "restore and protect" and the relative primacy of this relative to the social and economic effects of any planning regime, insofar as this PC 1 process is concerned.

(c) Whether the Certified Industry Scheme process is lawful.

(d) The status of freshwater objectives, and whether some current targets/limits ought to be objectives (or a combination thereof).

(e) Whether or not there is any legal scope to add new parameters to the Attribute Table 3.1.1.

(f) Whether a 20-year mid-point aspect should be added to Objective 3 as suggested by Fish and Game, and if so whether this should include point source discharges.

2.2 Each of these are addressed below.

Status and importance of the V&S

2.3 Fonterra absolutely supports the status and importance of the V&S. As noted in several of the submissions (eg River Iwi, WRA, Regional Council etc), descriptors such as "game changing" and "paradigm shift" are appropriate; the translation of Te Ture Whaimana given by the River Iwi submissions as "the authoritative law" is apt.

2.4 Fonterra agrees with the submissions on behalf of the River Iwi (at [19]-[22]), where the statutory importance of V&S is described. How the V&S is given effect to in PC 1 is discussed further below.

Cultural & Environmental outcomes cf Social and Economic outcomes

2.5 As noted by the River Iwi's legal submissions (at [23]), the role of the V&S in PC 1, and in particular the relationship between the V&S and PC 1 has been addressed by much of the evidence and legal submissions. A particular focus of submissions appears to have been to the effect that water quality outcomes are too heavily weighted, at the expense of social and economic outcomes. The River Iwi's legal submissions then note (at [24]) that three separate issues require consideration:

(a) the legal relationship between Te Ture Whaimana and Part 2;

(b) the implementation of the statutory direction to "give effect to" Te Ture Whaimana;

(c) the interpretation of Te Ture Whaimana (including any question of ambiguity).

2.6 I have read and considered the subsequent analysis of those three matters and, with respect, subject to one aspect am in full agreement with that analysis. In particular, I agree that the obligations of the V&S go beyond merely avoiding effects, but include a positive obligation of restoration, which can be interpreted as continuous improvement and betterment. To that extent, these obligations go beyond and are stronger than a directive obligation to "avoid effects" (ie, the focus of *King Salmon*).

2.7 While I agree that the cultural and environmental outcomes of the V&S must have priority over social and economic outcomes (in the sense that it would not be permissible to "lower the bar" in respect of the former outcomes, in order to reduce adverse effects arising from the latter outcomes), any plan change that gives effect to the V&S must nonetheless contain an element of proportionality (see eg *Puke Coal* decision, [92]). In the case of PC 1, that element of proportionality is captured by those policies addressing individual point source discharges, and is more fundamentally reflected in the timeframes over which the V&S is to be achieved. While not denigrating from the overall cultural and environmental outcomes sought, this nonetheless allows time for technological advances in respect of managing the contaminants, and allows time for any social and economic adjustment that might be required.

2.8 In regard to the question of timeframes I note that the River Iwi support both the short term (10 year) targets, as well as the ultimate objectives (80 year). Fonterra's submission also strongly supported both these timeframes, and it also suggested that any FEPs should all be bought into play as soon as possible (rather than being staggered), so as to allow for environmental improvements to be made on farm through these FEPs as soon as practicable.

GFPs & Certified Industry Schemes (s 42A Report, [134])

2.9 While not within the scope of Block 1, the s 42A Report made initial comments on the requirement to GFP (good farming practices), and certified industry schemes. To provide context for Fonterra's submissions and evidence in later hearing blocks, I have likewise responded to those initial comments.

GFPs

2.10 Fonterra strongly supports the use of GFP (elsewhere known as GMP, or good management practises) as a method for achieving early and effective on farm change leading to reduced contaminant loss on farms. Fonterra agrees with the officers' comments that "this GFP framework has a number of advantages, at a philosophical level in setting outcomes with

continuous improvement, in terms of national research and consistency, and in terms of on-going flexibility."

2.11 As noted in its submission, Fonterra requested that all farms within the catchment should be required to have Farm Environment Plans (FEPs) in place as soon as practicable (by 1 July 2020)[1], rather than being staged over time as is suggested by PC1. This was to ensure that GFPs can be implemented through the FEPs. While acknowledging the potential challenges in terms of resourcing the approval of FEPs that might arise from a requirement to have all FEPs in place as soon as practicable, Fonterra nonetheless continues to support that approach.

Certified Industry Schemes [2]

2.12 The use of certified industry schemes (**CIS**) has drawn some attention in the submissions to PC1, and will no doubt be the subject of some debate in the hearings to come. The s 42A report floats two concerns with respect to CISs – will they provide for "improved practises and reduction in discharges" and will "the permitted activity framework meet the requirements of section 70 of the RMA".

2.13 In my submission, the essential question for the Panel in respect of this method is will such CISs be a more efficient and effective, and therefore more appropriate, method of meeting the objectives of PC1 (s 32, RMA). Again, this topic will be dealt with more fully in later topics, but in my submission:

(a) The alternative proposal against which CISs should be compared is a scenario whereby all farming activity would be required to seek a resource consent. In Fonterra's estimate, this could be in the order of 4,000 – 5,000 consents. Each of these applications would need to be assessed against the relevant criteria in the regional plan, and because of the unique circumstances of each farm, a site visit would need to be made to each farm, consent conditions would need to be developed to reflect that farming operation, and those conditions would need to be monitored. At

[1] Fonterra, primary submission, row 18, pp 21-26
[2] Fonterra, primary submission, row 17, pp 19-20

the expiry of any such consents (and any term is currently uncertain), replacement consents would need to be sought. Even assuming non-notified consents, on a conservative basis, that might involve 20-30 hours of staff time per consent, which would be between 80,000 to 150,000 hours. The CIS would represent a more efficient process.

(b) Would the CIS be more effective than the alternative proposal? I understand this test to require asking whether the CIS would achieve the objective, being in this case the imposition and effective monitoring of permitted activity standards to an equivalent or better standard to that imposed through a resource consent. My understanding is that a CIS will ensure that farms are subject to a requirement to implement improvements faster than if they would be required to seek resource consents (due to the likely delays in processing those consents), and if that is the case then CIS will lead to an effective control on farms sooner than a resource consent process. In terms of the nature of the controls likely to be imposed through the consent process or CIS, I understand those to be equivalent. The only difference is how those controls are imposed and how they are monitored. Overall, Fonterra's position is that the CIS will be at least as effective as the alternative regime, and probably more effective (because of the likely additional delays in resource consent processing). Furthermore, the CIS is able to provide ongoing support and advice to farmers as they implement the FEP actions.

2.14 So in answer to the first concern, in my submission the CIS will be an effective and efficient method for improving practises on farm and reducing discharges.

2.15 The remaining concern related to the requirements of s 70, RMA; I presume this relates to s 70(1) and whether the Council can be "satisfied" the none of the listed effects are "likely to arise in the receiving waters". By way of a high-level response, I would note the following:

(a) Section 70, RMA was likely to have been intended to apply to point source discharges that were discharged either directly into

water, or onto land near water, rather than diffuse discharges from animals or from the application of fertiliser. This is evident from the phrase "reasonable mixing", as well as the fact that almost all of the types of effects of listed (production of oil or grease films, scums or foams; change in colour or clarity; emission of objectionable odour; rendering or freshwater unsuitable for consumption by farm animals) would only arise from a point source discharge. I acknowledge that, cumulatively, diffuse discharges can result in effect (g) significant effect on aquatic life.

(b) To make a permitted activity rule, a Council must be satisfied that none of the listed effects are likely to arise. A Council does not have to be *certain* of that and, more importantly, a Council must be able to assume that any permitted activity standards were complied with. (If that were not the case, then it would be virtually impossible for any permitted activity discharge rule to be lawful; for example, nearly all permitted discharge rules will have some limitation on volume, or nature or extent of contaminants discharged.)

2.16 For those reasons, properly designed, I do not agree that s 70,RMA would preclude the Council from promulgating a permitted activity rule for the diffuse discharge of contaminants from farming activities.

2.17 Fonterra strongly supports CIS because of the need for there to be a strong and robust assessment process for farming activities so as to ensure that the objectives of PC 1 are met, and Fonterra acknowledges that something more than a "basic" permitted activity rule is required for that. Equally Fonterra considers that any regime must be transparent, it must be enforceable, and it must be practicable (by that I mean able to be implemented and be affordable for the Regional Council).

Status of Freshwater Objectives, targets & limits

2.18 This issue is addressed specifically in Mr Willis's evidence. In summary:

(a) The attribute states for N and P, for example, cannot - as an in-stream concentration or load - be considered to be an objective

in and of themselves – the objective is to not facilitate the growth of plants and algae (as proposed to be assessed against Table 3.11-1's Chlorophyll attribute state or by periphyton biomass if such an attribute is included).[3]

(b) It would not appear logical to specify the 2096 (or 80 year) desired outcomes as NPSFM freshwater objectives because there is no specific method for achieving that objective. That does not mean that the 2096 outcome cannot be a regional plan objective as required to be set under section 67 of the Act.

(c) It is difficult to understand why there is a desire to combine objectives and limits and objectives and targets given that *both* objectives and limits can be used to define "over allocation". In other words, and in respect of the s 32 test, how would combining both the objective and the limit be more effective and efficient than not doing so?

2.19 Fonterra does not have a strong view on this debate except to say that it is desirable for regional plans to clearly define which objectives are freshwater objectives for the purposes of NPSFM, and which are other objectives. (This is a key issue in respect of the Southland Regional Plan, for example, which has objectives relating to water quality, but no freshwater objectives formed under Part CA of the NPSFM 2017 because that process has not yet occurred.)

Scope to add new parameters to Table 3.1.1

2.20 Fonterra understands that a number of submissions are seeking to expand Table 3.1.1 to include other attributes. I have reviewed a selection of the legal submissions covering this issue.

2.21 Fonterra's response to this issue is as follows:

(a) At a high level there must be some limit to what is considered in or out of scope in this plan change process. To that extent

[3] Refer NPSFM 2017, p 34, where, in the discussion of the Periphyton Attribute, there is a process for developing N and P *criteria* which, in Note (c) are then to be used in order to achieve the freshwater objectives for the FMU and for any nutrient sensitive downstream receiving environments.

Fonterra cannot accept the underlying premise of the Fish and Game submission which appeared to me to be that anything associated with water quality is "in scope".

(b) Fonterra accepts that there is strong logic in an attribute table (and limits/targets) being set for parameters that directly reflect, or that might be said to measure the effectiveness of, controls on the four main contaminants (N, P, *E Coli* and sediment). To that extent, any economic impact of those additional attributes could be argued to have been assessed within the scope of the economic analysis undertaken to date.

(c) However, Fonterra does not accept there is an unlimited scope to impose additional attributes. In particular, Fonterra does not agree that there would be scope to include targets/limits on temperature and definitely not on water quantity, despite both being closely related to ecological health generally. My understanding is that temperature may be added to the NPSFM in a proposed update being notified later this year, however there is no certainty as to what form that might take. From a jurisdictional perspective, any addition of a temperature parameter would be most certainly a *Motor Machinist* "submissional side wind".

Amendment to Objective 3 sought by Fish and Game

2.22 As Mr Willis noted in his rebuttal evidence (at [2.1]), Ms Marr has suggested an additional clause be added to Objective 3

> *Actions put in place and implemented by 2036 to reduce diffuse and point source discharges of contaminants, are sufficient to achieve the medium-term water quality attribute states in Table 3.11-1 by 2040 (for contaminants other than nitrogen) or 2045 (for nitrogen).*

2.23 Mr Willis does not support that change from a planning perspective, and nor do I support it from a legal perspective. While both point source and diffuse discharges are regulated by PC 1 and need to equally achieve the V&S, PC 1 provides for point source discharges in a different manner that

reflects the different nature of the discharge, the activity and the consenting framework.

2.24 To expand further on those points:

(a) Any substantive point source discharge into the catchment, except perhaps stormwater, is likely to require a full discretionary application. (Such industrial discharges are not, and will never be, permitted or controlled activities in the same manner as many diffuse discharges.)

(b) Under that much more rigorous regime, the full ambit of effects and policies must be assessed. As well as the Waikato Regional Plan, Policies 11-13 of PC1 are directed specifically to point source discharges. Those policies provide a bespoke policy framework for point source discharges, reflecting the requirement to adopt BPO to control contaminants, a recognition of past upgrades and improvements, an assessment of contribution to the catchment load as a whole, and an assessment of what further improvements can be made and at what cost.

(c) The purpose of that bespoke set of policies recognises the relatively low total contribution that point source discharges make to the catchment load, the regional significance of many of those industries (including those defined as regionally significant as per the Regional Policy Statement), the extensive level of treatment provided by many of those activities, and the increasingly limited additional reductions that are possible within the limits of the current technology. Many of the legal submissions presented to date have applied the *Puke Coal* decision, in which the Court expressly acknowledged this concept of proportionality (emphasis added):

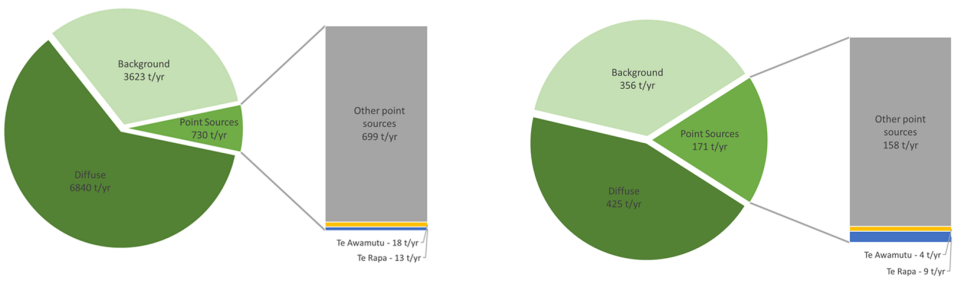
> [91] In this case there was no dispute that the waterway was covered by the Act and was part of the Waikato River as defined. We conclude that this application must, to the extent relevant, protect and restore the river (particularly this portion of it).
>
> [92] Implicit in the Supreme Court decision was the matter of workable practicality **thus any protection or restoration must be**

> **proportionate to the impact of the application on the catchment**. However, it is clear that it intends to go further than avoiding effect. We have concluded protection and restoration includes preservation from future and restoration from past damage. Restoration can only involve recreation of a past state. Thus, some element of betterment is intended. …
>
> [95] **In short, we agree that this application must, to an appropriate extent, protect and restore the Waikato River.** However, we conclude that the applicant can do so by the imposition of consent conditions and appropriate Management Plans.

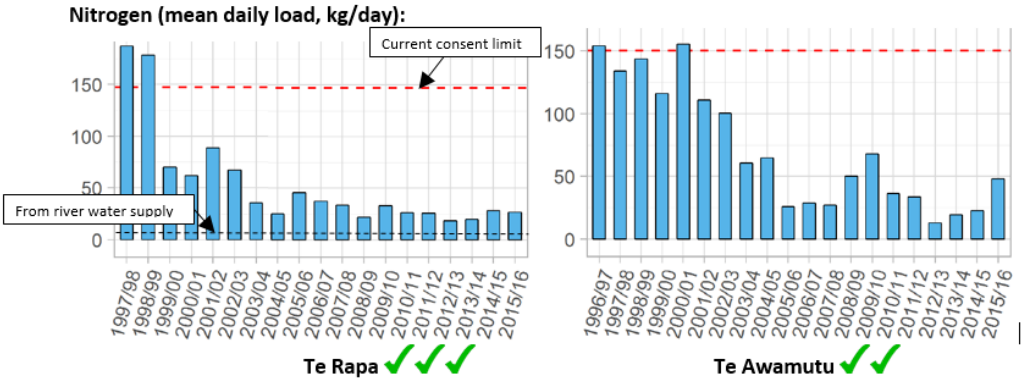
(d) Similar sentiments were expressed in the *Foxton* decision (*Horowhenua DC v Manawatu-Wanganui Regional Council* [2018] NZEnvC 163 (emphasis added):

> [235] Accordingly, we have accepted the evidence of Dr Ausseil in relation to phosphorus load reductions, which demonstrates that the percentage load reduction resulting from the proposal will significantly exceed the average percentage by which the load would have to be reduced across the sub-zone to meet the One Plan water quality target. Even if the highest actual load to the River was to be twice the estimate of highest value in the predicted range of 258 kg/y from paragraph [234], **the reduction would still be more than required to meet a proportional share of the sub- zone-wide reduction.** Similar conclusions can be reached for discharges to the Loop. **In our view, this provides a very acceptable margin for safety and we accept that the proposal will meet and significantly exceed an equitable share of the region-wide phosphorus reduction required.**
>
> [236] We can see no valid basis to require a small contributor to produce greater reductions than the One Plan has determined to be the appropriate average for a zone as a whole unless this could be readily achieved at reasonable cost, which we do not consider to be the case.
>
> [237] In our view, the reductions in phosphorus loads resulting from the proposal are substantial in terms of both total loads and percentages of the total load in the River. We acknowledge that even the very low loads that will result from the treatment plant discharges in the future will contribute to cumulative effects as identified by Mr Brown. In our view, any such contribution will be of minor extent and not sufficient to justify declining the consent, taking into account all of the relevant circumstances.

(e) Below are some high-level graphs of Fonterra's N and P loads in the catchment compared with other uses (N to the left, P to the right). This will be the subject of further technical evidence in later hearings, but is introduced now for context:



(f) The graphs below also indicate how Fonterra has significantly reduced its N concentrations at two of its larger sites in the PC 1 catchment. (The Te Awamutu hearing has just been completed, and Fonterra is proposing a significant wastewater treatment plant upgrade to further reduce N discharges and also to improve consistency of output. The hearing for Te Rapa is expected later this year.)



(g) The limits in Table 3.1.1 are not (and are not intended to be used) as point source discharge limits, and accordingly, given the above, it is difficult to understand how a 20 year interim target as proposed by Fish and Game would directly impact on any consenting of a point source discharge.

(h) Finally, in respect of the proposed 20 year timeframe, the point source discharges on the river do not have a consistent expiry date:

Site	Date granted	Term, years
Te Awamutu STP	2018	25
Pukekohe STP	2017	35
Inghams Enterprises WWTP	2017	25
Wallace Corporation WWTP	2016	25
Fonterra Tirau WWTP	2016	19
Affo Horotiu WWTP	2016	24
Tatua Co-operative Dairy	2016	15
Te Aroha STP	2015	20
Te Kuiti STP	2014	25
Fonterra Waitoa WWTP	2014	19
Huntly STP	2011	18
Ngaruawahia STP	2011	18

(i) Consents tend to range from 35 years down to 15 years. (See table below, from the Regional Council's s 42A Report on the Te Awamutu application – note the Tirau consent term was 27 years, not 19 years.)

3. WITNESSES FOR FONTERRA

3.1 The following witnesses will present evidence on behalf on Fonterra:

(a) Mr Richard Allen, Fonterra

(b) Mr Gerard Willis, consultant planner from Enfocus

B J Matheson

Counsel for Fonterra Co-operative Group Ltd