IN THE MATTER **of the Resource Management Act 1991**

AND

IN THE MATTER **of the hearing of submissions on Proposed Plan Change 1 (and Variation 1) to the Waikato Regional Plan**

TOPIC 2

BY **FEDERATED FARMERS OF NEW ZEALAND INC, FEDERATED FARMERS OF NEW ZEALAND (WAIKATO REGION) 1999 INCORPORATED, FEDERATED FARMERS OF NEW ZEALAND – ROTORUA TAUPO PROVINCE INCORPORATED, FEDERATED FARMERS OF NEW ZEALAND (AUCKLAND PROVINCE) INCORPORATED**

("FEDERATED FARMERS")

Submitter with ID: 74191

To **WAIKATO REGIONAL COUNCIL**

LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS ON HEARING TOPIC 2

15 July 2019

FEDERATED FARMERS OF NEW ZEALAND

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INTRODUCTION AND ISSUES

1. Federated Farmers (**FFNZ**) has made comprehensive written submissions on the Proposed Plan Change 1 and Variation 1 (**PC1**) to the Regional Plan by Waikato Regional Council (**Counci**l).

2. These legal submissions on Topic 2 cover the following:

    a. An outline the evidence for FFNZ.

    b. Legal submissions that will address the following issues:

        i. Risk of regulatory failure;

        ii. Land use and diffuse discharge;

        iii. Section 70 and permitted activity status;

        iv. Delegation of power and functions;

        v. Value judgment and permitted activity;

        vi. Activity status for land use change; and

        vii. Restricted discretionary activity status.

SUMMARY

3. The risk of regulatory failure is a matter that the Hearing Panel has to consider in its evaluation under s32 of the Resource Management Act 1991 (**RMA**) and in accordance with other provisions of the RMA.

4. I submit that with the correct wording only land use controls in the rules are required. The wording of the land use controls should cover the same aspect of the overall activity as discharge controls would.

5. The legal test in s70 of the RMA with regards to regional plan rules permitting discharges is whether a Council is "satisfied" that none of the adverse water quality outcomes are "likely" to arise in "the receiving waters" and the reference in s70 is to "significant" adverse effects on aquatic "life". There are controls already in place to satisfy the Council that none of the adverse water quality outcomes are likely. Any risk could be further managed by requiring a FEP to be obtained as a permitted activity for low intensity farming activities. I also submit that a permitted activity status for farmers in the Certified Sector Scheme is appropriate with the right design.

6. In my submission, the functions, powers and duties of the Regional Council as set out in s30 of the RMA will continue to be those of the Regional Council and the provisions of proposed PC1 will not delegate these to the Certified Industry Scheme.

7. There are several legal principles to consider when looking at value judgments and a permitted activity status, each with its own distinct elements:

   a. A consent authority entrusted with judicial decision duties cannot delegate the performance of such duties unless authorised by the RMA. Decisions of a CFEP (as part of certifying a FEP prepared for a CSS as a permitted activity) relate to skill and experience and are not an arbitral or judicial decision.

   b. The Council will be acting ultra vires if it reserves itself some subjective formula or test to accept or reject an otherwise permitted activity. However if the subject matter is capable of being measured against external standards then it is considered to be an objective test. In my submission, the permitted activity provisions for FEPs prepared under a CSS can be made objectively determinable rather than leaving matters to subjective judgment by the Council.

   c. A permitted activity must not be expressed in inherently vague terms so that it is invalid. I submit this legal test can be met through drafting

and designing to ensure that the permitted activity terms are not too wide or vague to make the provision invalid for uncertainty.

d. Simply because the CSS and FEP provisions can have a permitted activity status does not mean a permitted activity status is the most appropriate way in a s32 of the RMA sense to achieve the objectives and policies of the plan. As FFNZ will explain in Block 3, by reference to the evidence filed for that hearing, the permitted activity status for FEPs prepared under a CSS (or under the low intensity rule) are the most efficient, effective and least restrictive way of achieving the objectives.

8. A discretionary activity status for land use change would address the concerns of the owners of Maori land. It would do so in a way that focuses on effects as opposed to ownership status. I submit that this is a more appropriate means of addressing the concerns of the owners of Maori land.

9. The s42A report recommends that the permitted activity rule for farming activities in a CSS and the controlled activity rule for farming activities not in a CSS be replaced with a single restricted discretionary activity rule with discretion over the content of FEPs and actions and timeframes. The test when deciding between activity status for a rule is which is the most appropriate activity status to achieve the purpose of the Act/objectives.

10. A permitted activity status is appropriate for FEPs prepared under a CSS (and this will be expanded on in Block 3 by reference to the evidence regarding the FEP assessment under Schedule 1) and a controlled activity status for those farming activities not in a CSS is the most appropriate, efficient and effective means of achieving the objectives of PC1.

EVIDENCE AND SCHEDULE OF WITNESSES

11. I briefly repeat matters raised in Topic 1 to frame the evidence presented by FFNZ.

12. The Hearing Panel's task is to decide how the mandatory requirements in the RMA will be met (including how to give effect to the Vision and Strategy, NPS-

FM and RPS) and thereby achieve the objectives of PC1 in the most efficient and effective and least restrictive manner.[1]

13. The objective against which the assessment ought to be based is whether the provisions achieve the short-term targets in the most efficient and effective and least restrictive manner.[2]

14. The provisions proposed in the as notified PC1 will deliver much greater than 10% reductions in N, P, Sediment and *E.Coli* which is the short-term targets.[3]

15. The region will more than achieve the objective of PC1 without more restrictive provisions, such as the more onerous stock exclusion and setback standards recommended in the S42A report.

16. The theme of FFNZ's evidence is that:

    a. FFNZ's proposal will satisfy the mandatory requirements in the RMA; and

    b. do so in the most efficient and effective manner (and with the least restrictions).

17. Mr Millner, Mr McGiven and Dr le Miere's evidence, in regards to the stock exclusion and setbacks, sets out the benefits of tailored actions as proposed by FFNZ when compared to the stock exclusion and setback standards proposed in both PC1 and the S42A report. A one-size-fits-all solution to the application of riparian intervention measures to reduce stream bank erosion as proposed by the S42A report (and PC1) is unlikely to be appropriate or effective everywhere. Tailored actions can be much more cost effective than non-targeted requirements but with the similar improvements in water quality.

18. The stock exclusion and setback standards are inefficient when compared to the FFNZ proposal and can be less effective than the tailored actions in a Farm Environment Plan as proposed by FFNZ.

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[1] Legal Submission on behalf of FFNZ dated 21 March 2019 at [13].
[2] Statement of primary evidence of Grant Robert Eccles on Topic 2 dated 10 May 2019.
[3] Statement of primary evidence of Paul le Miere on Topic 1 dated 15 Feb 2019.

19. Mr Eccles and Dr le Miere raise concerns with regulatory failure. The RMA is not a no-risk statute. However, the level of risk of regulatory failure, if the recommendations of the S42A report is adopted, is unacceptable. Provisions that cannot be properly implemented are not the most efficient or effective way to achieve the objectives of PC1.

20. Mr Milner's evidence also explains that the new restrictions as proposed in the S42A report that require farmers in the 50th to 75th percentile range to demonstrate "real and enduring" N reductions will add significant costs. Mr Eccles' evidence also sets out why the most effective and efficient way of achieving the short term targets is a focus on GFP rather than the N reductions for farms in the 50th and 75th percentile.

RISK OF REGULATORY FAILURE

21. Mr Eccles, in his evidence, raises concerns about a risk of regulatory failure for PC1.[4] Several other submitters have raised the same or similar concerns and produced evidence to substantiate the basis for their concern.[5] The s42A report also acknowledges that there may be issues with the practicability of implementing the proposed provisions of PC1.[6]

22. As explained in Dr le Miere's evidence, FFNZ's primary concern about the risk of regulatory failure arises from several key changes recommended in the s42A report, which will have the effective of significantly increasing the volume of resource consents (at least 5,000) to be processed in a short timeframe:[7]

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[4] Statement of primary evidence of Grant Robert Eccles on Topic 2 dated 10 May 2019 ("PE of Mr Eccles") at [3], [4], [5], and [22] – [29].
[5] Evidence of Bent Sinclair and Christopher McLay for Waikato Regional Council as Submitter Block 2; Evidence of Gerard Willis for Fonterra for Block 2; Evidence of Lee Antony Matheson on behalf of the New Zealand Institute of Primary Industry Management Block 1.
[6] For example see [807].
[7] Statement of primary evidence of Paul Frederick le Miere for Federated Farmers on Hearing Topic 2 dated 3 May 2019 at [17].

a. All FEPs will have to obtain consent, including those that are under a Certified Sector Scheme (these were a permitted activity under the notified version of PC1).

b. The activity status for most activities will be restricted discretionary (FEPs prepared outside the CSS were controlled activities under the notified version of PC1). From an administrative point of view, FFNZ's concern with the higher activity status is that it will increase the time to process consents and require a more rigorous assessment.

c. Seven additional sub-catchments are to be treated as Priority 1, all dairy farms could be treated as priority 1, and the timeframes for obtaining consents in priority 1 sub-catchments could be just six months after PC1 becomes operative.

23. I submit that the risk of regulatory failure is a matter that this Hearing Panel has to consider in its evaluation under s32 of the RMA. This Hearing Panel has to decide the most appropriate provisions to "*achieve* the objectives" and the most appropriate objectives to "*achieve the purpose of the Act*". Simply put, if the provisions cannot successfully be implemented, then the provisions cannot achieve the objectives or purpose of the Act.

24. Further, the S32 evaluation of the efficiency or effectiveness in achieving the objectives of PC1 have to take account of the risk of regulatory failure, because:

a. Effectiveness assesses how successful the provisions are likely to be in solving the problem they were designed to address.[8] If the provisions are unlikely to be properly implemented then the provisions are unlikely to achieve the ten year targets of Objective 3 (or set the course for the long term targets). Accordingly, the greater the risk of regulatory failure, the less effective the proposals should be regarded.

[8] A guide to section 32 of the Resource Management Act 1991, MfE p18.

b. Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest total cost to all members of society, or achieves the highest net benefit to all members of society.[9] I submit that the higher the risk of regulatory failure of a proposal the more inefficient the proposal should be regarded. This is because the cost and effort incurred in the design and undertaking of the failed provisions by the Council and other parties will be wasted.

25. Other provisions of the RMA[10] also require the Hearing Panel to consider the likelihood of regulatory failure, including:

a. PC1 must give effect to the Vision & Strategy and national policy statements (amongst others).[11] "Give effect" simply means "implement".[12] The provisions of PC1 cannot give effect to the Vision & Strategy or national policy statements if the provisions cannot be successfully implemented.

b. The Council must prepare and change the regional plan in accordance with its functions.[13] The Council has a function to implement the provisions to achieve integrated management of the natural and physical resource of the region.[14] Working back, if on the evidence it is unlikely that the Council can successfully implement the provisions of PC1 then PC1 is not changing the regional plan in accordance with its functions.

26. There are examples in case law for decision makers considering difficulties with implementation of provisions as part of the evaluation of provisions of a plan. One such example is the administrative difficulty in implementing a

[9] A guide to section 32 of the Resource Management Act 1991, MfE p18.
[10] Other than under s32.
[11] RMA, s 67(3).
[12] *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [75].
[13] RMA, s 66(1)(a).
[14] RMA, s 30(1)(a).

hybrid style rules being the reason for the Court in the Variation 5 deciding to decouple the land use and diffuse discharge rules.[15]

SECTION 9 v SECTION 15

27. The (as notified) PC1 rules contained a combination or hybrid of land-use and discharge controls for the same rule. In the S42A report, the Reporting Officer recommends, "all of the relevant rules be section 9 'land-use' rules, with a separate rule for the associated section 15 discharges."

28. The reason for stating the same activity as section 9 (land use rules) and section 15 discharge rule[16] seems to be "out of an abundance of caution" due to concern if, in the future, Parliament or the Court decide that non point source discharge from animal emissions and nitrogen fixing plants are discharges under s15(1)(b) of the RMA.[17]

29. However, if one section in part 3 of the RMA covers the same aspect of the overall activity as another section in part 3 then it does not need different consents[18] and accordingly rules. Both s9 (land use) and s15 (discharge) are in Part 3 of the RMA. Consequently, if a land use rule covers the same aspect of the overall activity as a discharge rule would, then two separate rules are not required.

30. It is only if it is different aspects of one activity or different activities that more than one rule would be required.[19]

31. The relevant activity of concern is the use of land for farming activities, be it by keeping farm animals and the associated diffuse discharges to land via

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[15] *Carter Holt Harvey Limited v Waikato Regional Council* Environment Court decision A123/2008 at [196].
[16] Whether using a hybrid style or by adding a catch all discharge.
[17] *Carter Holt Harvey Limited v Waikato Regional Council* ("Variation 5") Environment Court decision A123/2008 at [169].
[18] *Brook Valley Community Group Incorporated v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [71] to [86].
[19] *Brook Valley Community Group Incorporated v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 at [79], [81] and [85].

urine and manure, having nitrogen fixing plants or applying fertiliser that may cause discharge contaminants to enter water.

32. I consider that with the correct wording only land use rules (save potentially for CVP) are required. The wording of the land use controls should cover the same aspect of the overall activity as discharge controls would.

SECTION 70

33. Before including rules in a regional plan to provide for either the discharge of contaminants or water into water, or the discharge of contaminants onto land in circumstances where they may enter water, as permitted activities, regional councils must be satisfied that (after allowing for reasonable mixing) the discharge will be unlikely to give rise to certain adverse effects.[20]

34. The legal question focuses on whether the Council can be satisfied that the potential permitted activity rules are unlikely to give rise to the adverse effects listed in s70.

35. I agree with the analysis of s70 and the legal test in the legal submissions on behalf of Fonterra at the Block 2 Hearing at [8.4]. Mr Matheson states that the legal test is whether a Council is "satisfied" that none of the adverse water quality outcomes is "likely" to arise in "the receiving waters" and he reminds the hearing panel that the reference in s70 is to any "significant" adverse effects on aquatic "life".

36. Therefore in these submissions I focus on the controls already in place to satisfy the Council that none of the adverse water quality outcomes are likely.

37. The (as notified) PC1 proposes two permitted activity rules for low intensity farming.[21] The (as-notified) PC1 permitted activity rules intend to apply to low risk farming activities only. Similarly the S42A report recommends a permitted activity rule (Rule 3.11.5.2) to cover low risk farms.

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[20] RMA, s 70(1).
[21] Rule 3.11.5.1 and 2.

38. I consider due to scale of risk and with the right qualifiers (to disqualify high risk activities and practices), a council can be satisfied that the effects of the permitted activity rules will be less than minor or unlikely to result in effects contemplated by s70.

39. As an example of the controls on the risk of adverse effects, the S42A report recommended permitted activity (Rule 3.11.5.2) qualifiers like the exclusion of commercial vegetable production, dairy farming or grazing of dairy cattle[22] as well as qualifiers around feedlots, sacrifice paddocks, cropping, stocking rate, cultivation, grazing, stock exclusion and setbacks for cultivation.

40. These recommended controls should also be considered together with existing rules in the operative Regional Plan to control:

    a. Discharge of drainage water and stormwater to water or onto or into land (rule 3.5.10.1-3, 3.5.11.4, 5, 6, 7, and 8);

    b. Fertiliser application (rule 3.9.4.11) and discharges of agrichemicals into Air (rule 6.2);

    c. Discharge of farm animal effluent onto land including controls over effluent ponds, feed pads and stand-off pads (rule 3.5.5.1 to 3.5.5.4);[23]

    d. Discharge of treated farm effluent (rule 3.5.5.5 and 3.5.5.6);[24] and

    e. River and Lake bed disturbance (including livestock exclusion of waterbodies, planting of vegetation and tree layering, clearance of vegetation – see Rule 4.3.5.4-9).[25]

41. This risk could be further managed by requiring a FEP to be obtained as a permitted activity for low intensity farming activities. This will be discussed

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[22] Mr Eccles' recommendation in his Block 2 evidence at [80] is that the words "grazing of dairy cattle" are deleted so that only dairy farming as an activity supported by milking shed infrastructure is excluded.
[23] A consequential amendment recommended by the s42A report is that that Rule 3.5.5.1 – Rule 3.5.5.6 are to be amended to apply only to point source.
[24] A consequential amendment recommended by the s42A report is that that Rule 3.5.5.1 – Rule 3.5.5.6 are to be amended to apply only to point source.
[25] A consequential amendment recommended by the s42A report is that that Rule 4.3.5.4-9 do not apply to the Waikato and Waipa catchments as control on livestock access to water bodies in these catchments are set out in Chapter 3.11.

further in Block 3 where we will explain that if the Hearing Panel is minded to adopt a new FEP schedule for CSS and/or low intensity farming activities, this could be provided for.

42. I also consider a permitted activity status for farmers in the Certified Sector Scheme is appropriate with the right design. This issue is addressed in FFNZ's evidence for Block 3 and will be discussed in more detail there.[26] In summary, with the appropriate framework around the CSS, the Council should be satisfied that the permitted activity status for farmers under the Scheme is unlikely to result in the effects contemplated by s70.

DELEGATION

43. A question raised by Fish & Game about the Certified Sector Scheme was whether the Council, as a local authority, has delegated to the Certified Sector Scheme its functions, powers and duties in breach of s34 or s34A of the RMA.

44. The s42A report set out the terms for the Certified Sector Scheme.[27] The terms of CSS does not devolve or assign to a Scheme any S30 RMA duties, functions or powers of the Regional Council. The functions, powers and duties of the Regional Council as set out in S30 of the RMA will continue unfettered to be those of the Regional Council.

VALUE JUDGMENT IN A PERMITTED ACTIVITY

45. An issue that has arisen during this hearing is whether, and if so to what extent, provisions classifying uses as permitted activity can incorporate value judgments. I submit there is no black and white answer and there are several

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[26] For example, Mr Millner explains in his Block 3 evidence the additional benefits associated with the CSS and the reasons for his opinion that the CSS will be achieve better and greater farm system change than WRC could alone. Mr Eccles explains in his Block 3 evidence the various aspects of PC1 that provide assurance to Council that a permitted activity status is appropriate for the CSS including the modelling of the policy mix, the additional benefits from the CSS and the risk of regulatory failure.

[27] S42A Report at 126-127.

legal principles to consider, each with its own distinct elements. I will examine each in turn below but in summary the legal principles are:

a. A consent authority entrusted with judicial decision duties cannot delegate the performance of such duties unless authorised by the RMA. This is the principle set out by the Court of Appeal in *Turner v Allison*[28].

b. The two requirements for certainty set out in *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd:*[29]

   i) That the Council will be acting ultra vires if it reserves itself some subjective formula or test to accept or reject an otherwise permitted activity. However if the subject matter is capable of being measured against external standards then it is considered an objective test ie sufficiently certain to be capable of objective ascertainment.

   ii) A permitted activity must not be expressed in inherently vague terms so that it is invalid. It must not be described in terms so nebulous that the reader is unable to determine whether or not a use may be carried on in the zone.

c. The test when deciding between competing activity status is:[30]

   i) Which type of activity is the most appropriate way to achieve the objectives and policies of the plan?

   ii) Which type of activity would better assist the Council to carry out its functions so as to achieve the purpose of the Act?

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[28] *Turner v Allison* [1971] NZLR 833 (CA).
[29] *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, 372-3.
[30] *Carter Holt Harvey v Waikato Regional Council* A123/08 ("Variation 5") at [114].

Principle in Turner v Allison

46. The Court of Appeal in *Turner v Allison*[31] established the principle that a consent authority entrusted with judicial decision duties cannot delegate the performance of such duties unless authorised by the RMA or statute.[32] The question to be answered was stated in that case in terms of whether the person making the decision was acting as a certifier or an arbitrator.[33] However the test was whether there had been an unauthorised delegation of a judicial function.[34]

47. While the Court of Appeal held that, "a tribunal entrusted with judicial as opposed to merely administrative duties cannot delegate the performance of such judicial duties to someone else," it held that requiring the approval of professionals does not amount to delegation[35]. Richmond J for the Court of Appeal concluded on this point:[36]

> It seems to me there is a fundamental difference between the duties conferred upon Miss Northcroft by conditions 2, 5 and 7 on the one hand and by condition 18. Under the first three conditions her task is to set a standard using her own skill and judgment. It is a situation closely analogous to that which arises in building contracts and in commercial contracts containing provisions whereby something has to be done to the satisfaction or approval of an architect, engineer or other person having special technical skills and qualifications.
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> …
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> In my view the effect of conditions 2, 5, and 7 is to impose conditions whereby the external appearance of the supermarket and landscaping and planting are required to be carried out to standards set by Miss Northcroft by reference to her own skill and experience. They do not purport to confer upon her an arbitral status. In my opinion therefore those three conditions cannot be attacked upon the basis that they purport to confer on Miss Northcroft a judicial function.

48. I submit this reasoning of the Court of Appeal in *Turner v Allison* will apply to PC1 i.e. decisions of a CFEP (as part of certifying a FEP prepared for a CSS

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[31] *Turner v Allison* [1971] NZLR 833 (CA).
[32] *Turner v Allison* [1971] NZLR 833 (CA) at 855 at line 40.
[33] *Turner v Allison* [1971] NZLR 833 (CA) at 856 at line 45 to 857 at line 5.
[34] *Turner v Allison* [1971] NZLR 833 (CA) at 857 at line 6.
[35] *Salis v Dunedin City Council* [2017] NZHC 2281 at [44].
[36] *Turner v Allison* [1971] NZLR 833 (CA) at 856 at [line 38 to 47 and 857 at line 1.

as a permitted activity) relate to skill and experience and are not an arbitral decision.

Certainty

49. It is settled law that a consenting authority may not reserve itself a discretion to approve a permitted activity. A consenting authority cannot retain itself the right to subjectively decide whether or not an activity is permitted. In saying this, it is widely accepted that some element of judgment or degree of evaluation is permissible.[37]

50. If the Council reserves itself some subjective formula or test to accept or reject an otherwise permitted activity then it will be acting ultra vires. However, if it is capable of being measured against external standards then it is considered an objective test.

51. I submit that the permitted activity provisions for FEPs prepared under a CSS can be made objectively determinable rather than leaving matters to subjective judgment by the Council (or the CFEP certifying the FEP). For example if put in a way that the user has to have a FEP certified by a CFEP as meeting standards then this will be a factual question leaving no room for a Council discretion. The CFEP either has certified the FEP or he/she has not.

52. The second test of certainty is that a permitted activity must not be expressed in inherently vague terms so that it is invalid.[38] It must not be described in terms so nebulous that the reader is unable to determine whether or not a use may be carried on in the zone.

53. Under this test of certainty a degree of flexibility and element of judgment in its ascertainment is allowed. The question reduces to one of degree: is the

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[37] *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, 372-3

[38] *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, 372-3

subject description too wide, or too vague, to have "some measure of certainty"? That is not an inquiry assisted by imported reference to "discretion" and "value judgments". It is not a situation for automatic condemnation because some degree of evaluation is involved.[39]

54. I submit this legal test can be met through drafting and designing to ensure that the permitted activity terms are not too wide or vague to make the provision invalid for uncertainty. As identified above, this issue is addressed in FFNZ's Block 3 evidence (including through a proposed new Schedule 1A if the Hearing Panel decides that Schedule 1 contains too much subjectivity for use as a permitted activity standard).

Section 32 decision

55. Simply because the CSS and FEP provision can have permitted activity status does not mean permitted activity status is the most appropriate way to achieve the objectives and policies of the plan.

56. As FFNZ will explain in Block 3, by reference to the evidence filed for that hearing, the permitted activity status for FEPs prepared under a CSS (or under the low intensity rule) are the most efficient, effective and least restrictive way of achieving the objectives.

Examples

57. There are several examples of permitted activities where value judgments are required by third parties.

    a. Many regional air plans allows discharges to air as a permitted activity as long as there is no "offensive or objectionable" smoke or odour beyond the subject property. This assessment of offensive and objectionable will take into account the FIDOL factors which are frequency of occurrence;

[39] *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362, 372-3

intensity of the odour; duration of exposure to the odour; offensiveness of the odour; and location of the discharge.[40]

b. Otago Regional Water Plan Rule 12.C.1.3.(a) and (b) was decided by the Environment Court after appeal and allows for a permitted activity where the nitrogen leaching rate is not exceeded as calculated by a certified Nutrient Management Advisor using OVERSEER version 6.

c. Auckland Unitary Plan Rule PA Standard E35.6.1.2(2) permits new and modified feedpads and permanent standoff pads provided that they are certified as to the permeability of the sealing layer and the certification submitted to the Council upon completion of the system.

d. Gisborne's Regional Freshwater Plan Schedule 11 requires a nutrient budget which at b. for dairy farms requires the nutrient budget to be prepared by a suitably qualified person, using an OVERSEER nutrient budget or equivalent model prepared by the Shared Services Science Manager of the Gisborne District Council.

e. Northland's Regional Plan requires Erosion Control Plans in several catchments (for example see E.3.1.1 Erosion control plans in the Doubtless Bay catchment). E3.1.1 is a controlled activity rule from 1 January 2025, unless an erosion control plan has been developed. The definition of an Erosion control plan is a plan developed by a suitably qualified professional and the definition sets out what "suitably qualified professional" means.

f. Others include Environment Southland Proposed Land and Water Plan (this provision is subject to an appeal) Rule 32D (a) ii (1) (b) and (2).

[40] For example see Bay of Plenty Regional Air Plan Rule 1(d), 5(a).

LAND USE CHANGE

58. As explained in Mr Eccles' Block 2 evidence, FFNZ's concern with the non-complying activity status for land use change is that when coupled with the wording of Policy 6 (the s42A report recommends moving it to Policy 1, it amounts to a de facto prohibition on land use change.[41] Mr Eccles recommends a discretionary activity status.

59. A discretionary activity status would also likely address the concerns of the owners of Maori land. In my submission, it would also do so in a way that focuses on effects as opposed to ownership status. I submit that this is a more appropriate means of addressing the concerns of the owners of Maori land.

60. The Council's functions are determined by section 30 of the RMA. Those functions do not include the ability to differentiate between individuals or groups or give preference to a particular section of the community in allocation. Instead, the Act (and Council's functions under it) focuses on the authorisation of activities by reference to a particular class of activity or by reference to the effects of activities.[42]

61. In these circumstances, FFNZ's submission is that a discretionary activity status would provide for such an effects based assessment.

RESTRICTED DISCRETIONARY ACTIVITY STATUS

62. The s42A report recommends that the permitted activity rule for farming activities in a CSS (Rule 3.11.5.3) and the controlled activity rule for farming activities not in a CSS (Rule 3.11.5.4) are replaced with a single restricted discretionary activity rule with discretion over the content of FEPs and actions

[41] Statement of Primary Evidence of Grant Robert Eccles dated 10 May 2019 at [101].
[42] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [52] – [57] and *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZ EnvC 380 (Variation 6) at [436].

and timeframes. In the alternative, the report recommends two restricted discretionary rules.[43]

63. Section 77A(2) of the RMA provides for six activity status for rules from permitted activity to prohibited activity status. The test when deciding between activity status for a rule is which is the most appropriate activity status to achieve the purpose of the Act/objectives.[44]

64. Whether an activity is appropriately classified in a rule as a restricted discretionary, controlled or permitted activity will be a merit based assessment. I explain above the reasons for my submission that a permitted activity status is appropriate for FEPs prepared under a CSS (and this will be expanded on in Block 3 by reference to the evidence regarding the FEP assessment under Schedule 1).

65. Turning to FEPs not prepared under a CSS, my submission is that a controlled activity status is the most appropriate status.

66. The primary rationale in the s42A report for recommending that the activity status is changed to a restricted discretionary activity is that the officers consider that there is a need to be able to decline an application for consent.[45] The corollary of changing the activity status is the implementation issues that are likely to arise (from a more stringent assessment accompanying the higher activity status) and the additional costs to applicants.[46]

67. It is submitted that the fact that the applications for consent would concern existing farming activities which do not intend to change its land use[47] is relevant for assessing the appropriate activity status. The matters to be addressed by these provisions are not new uses or activities or even a change in land use for which use of discretion to decline the application is necessary or appropriate. As explained in Mr Eccles' evidence, a restricted discretionary

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[43] S42A Report at [810] to [811].
[44] *Rangitata Diversion Race Management Ltd v Canterbury Regional Council* [2015] NZHC 2174 at [36] and *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 at [28].
[45] S42A report at [293].
[46] S42A report at [294].
[47] Land use change is controlled by proposed Rule 3.11.5.7

activity status may be appropriate where the Council needs to tell an applicant, for example, that a piece of land is suitable for sheep and not dairy, and therefore needs the ability to turn down the application.

68. The applications under Rule 3.11.5.4 will concern existing farming activities with any proposed land use change dealt with under stricter provisions. Rule 3.11.5.4 is concerned with ensuring that the existing farming activity comply with clear requirements. A controlled activity status can appropriately address the risk associated with the activity because existing farming activities must comply with the requirements and conditions specified in the controlled activity provisions[48] or the resource consent must be declined.

69. I submit that a controlled activity status is appropriate for existing farming activities for the reasons in Mr Eccles' evidence i.e. the focus is on the parameters within which the farming operation continues (such as those above the 75th percentile for N leaching reducing, which are suited as matters of control) not on determining whether the farming operation should continue (which would be a reason to decline consent).[49]

70. It is accepted that a condition cannot be imposed on a consent so as to frustrate the consent (conditions of such a nature that it will effectively prevent the activity taking place). However, the types of situations that the Council will encounter under Rule 3.11.5.4 are not those which would anticipate such conditions. This issue is expanded on by Mr Eccles in his Block 3 evidence regarding Schedule 1 and the FEP content.

71. It is submitted that when the appropriate activity status is considered in the context of the risk of regulatory failure (explained above), this further confirms that a controlled activity status is the most efficient and effective means of achieving the objectives of PC1. Mr Eccles explains his concerns about the risk of regulatory failure as a result of the recommended restricted discretionary activity status in the context of the very real issues experienced

[48] RMA, s 87A(2)(c)
[49] Statement of primary evidence for Grant Robert Eccles for Block 2 dated 10 May 2019 at [91].

in the implementation of Variation 5.[50] This is further reinforced by the evidence of Mr Sinclair for the Regional Council as submitter during his presentation to the Hearing Panel.

72. Mr Sinclair emphasised three key elements to the success of implementing Variation 6 (which generated 2,300 consent applications, with decisions still to be made on 300 of them):

    a. Controlled activity status.

    b. Non notification.

    c. Appropriate phasing of the implementation, with support from the relevant industry groups.

73. Dr le Miere presents additional evidence regarding the likely increased cost to the applicant associated with a restricted discretionary activity.[51] There is also a question mark as to whether a higher activity status will result in any additional rigour in circumstances where Dr Doole's modelling shows the policy mix will significantly overshoot the 10 year targets and where there are question marks about whether Council will have the capacity, capability and timeframes to scrutinise 5,000 odd restricted discretionary consent applications.[52]

74. Accordingly, in all of these circumstances, I submit that a controlled activity status is the most appropriate, efficient and effective means of achieving the objectives of PC1.

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[50] Statement of primary evidence for Grant Robert Eccles for Block 2 dated 10 May 2019 at [89].
[51] Statement of Primary Evidence of Paul Frederick le Miere dated 3 May 2019 at [39] to [49].
[52] See for example, Dr le Miere's Block 2 evidence at [29].

PRESENTATION

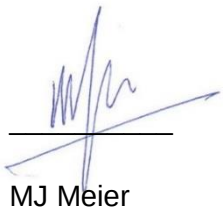
75. FFNZ will present its evidence on Topic 2 of PC1 in the following order:

a. Mr McGiven, president for Federated Farmers Waikato, will present his evidence on the impact of proposals on his farm.

b. Dr le Miere will present his evidence on policy matters.

c. Mr Millner will present expert evidence on impacts of proposals on farms and different farm mitigation actions.

d. Mr Eccles will present expert planning evidence on behalf of FFNZ.



MJ Meier