In the matter of: Clauses 6 and 8 of Schedule 1 – Resource Management Act 1991 – Submissions on publicly notified plan change and variation – Proposed Plan Change 1 and Variation 1 to Waikato Regional Plan – Waikato and Waipa River Catchments

And: **Wairakei Pastoral Ltd**

Submitter

And: **Waikato Regional Council**

Local Authority

LEGAL SUBMISSIONS FOR WAIRAKEI PASTORAL LTD

Block 2 Hearing Topics

Dated: 28 May 2019

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LEGAL SUBMISSIONS OF COUNSEL FOR

WAIRAKEI PASTORAL LTD

SUMMARY

1 These legal submissions regarding the Block 2 Hearing Topics are divided into seven parts:

1.1 Part A: Background and framework (paragraphs 1-86).

1.2 Part B: Staging the transition to the 80-year goal (paragraphs 87-105).

1.3 Part C: Making reductions in diffuse discharges via catchment wide rules, FEPs and the NRP (paragraphs 106-299).

1.4 Part D: Restricting land use changes (paragraphs 300-321).

1.5 Part E: Managing point-source discharges (paragraphs 322-333).

1.6 Part F: Flexibility of the use of Te Ture Whenua and settlement land (paragraphs 334-346).

1.7 Part G: Conclusions (paragraphs 347-351).

2 The PC1 policy and rule framework pertaining to farming activities is primarily addressed in Part C of these Block 2 legal submissions.

Making reductions

3 PC1 includes a suite of 19 provisions designed to make reductions in diffuse discharges primarily from farming activities.

4 **Rule 3.11.5.4** (as notified) includes **priority dates** that trigger the need to apply for land use consent. For land in Priority 3 sub-catchments the rule prevents landowners from applying for consent until 1 January 2026. This will not implement Objective 3 or achieve the freshwater objectives in Table 3.11-1.

5 FEPs will not be put in place, mitigations will not be implemented, and stock will not be excluded from water bodies in Priority 3 sub-catchments until 2026. A similar position will also apply in Priority 2 sub-catchments where (at best) WRC predicts only 50% compliance by 2026.

6 PC1 as notified provides for **consenting at scale**: properties and enterprises (**Rule 3.11.5.6**), sub-catchments (**Method 3.11.4.5**), and industry/sector schemes (**Rule 3.11.5.3**). Consenting at scale streamlines process by reducing the number of consents potentially required by PC1.

7 **Rule 3.11.5.3** is however problematic as notified because certifying industry/sector schemes is not a local authority function, and because preparing an effective FEP requires an element of discretion that is not compatible with permitted activity status.

Consistent restricted discretionary activity pathway

8 WPL therefore recommends a more consistent restricted discretionary activity pathway under **Rule 3.11.5.6** for assessing the effects of farming activities at scale:

8.1 **Rule 3.11.5.6A**: properties and enterprises.

8.2 **Rule 3.11.5.6B**: sub-catchments.

8.3 **Rule 3.11.5.6C**: industry/sector schemes.

9 **FEPs** are the driving engine of these consent pathways: adaptive management, avoiding inappropriate development and use on vulnerable land, and mitigations to meet the freshwater objectives in **Table 3.11-1**. Put simply, a precautionary approach is adopted consistent with the Vision and Strategy.

Benefits from consenting at scale

10 In particular, providing a restricted discretionary activity pathway for sub-catchment consents provides real benefits that would not otherwise be available: LUC methodology works at sub-catchment scale (**Scenario 5**), and undeveloped Treaty settlement land can be brought into productive farming use without adverse effects on water quality (**Scenario 7**).

11 Provision is made for low and medium intensity farming activities (under 20ha) as permitted and controlled activities.

12 Including the proposed new interim rule (**Rule 3.11.5.1A**) is sensible to provide for existing farming activities that do not qualify for existing use rights under s 20A of the RMA.

Priority dates

13 Based on the WPL science evidence the priority dates are critical for the success of PC1 during the period 2016-2026 because:

13.1 Quicker flow effects will manifest within the next 5-15 years in sub-catchments where pastoral conversion occurred immediately before 22 October 2016.

13.2 Without mitigation under FEPs water quality in the Waikato River catchment will continue to deteriorate when compared against the 2010-2014 current state baseline.

13.3 To meet the short-term (2026) freshwater objectives in Table 3.11-1 FEPs should ideally have been put in place approximately 6-12 years previously (i.e. 2014/2020) in order for any implementation (mitigation) effects to be observed by 2026.

13.4 Mitigation via riparian setbacks and planting may take up to 40 years (post FEP implementation) for the full benefit of these actions to eventuate.

14 Mr Williamson and Dr Neale consider that FEPs should be put in place as soon as possible. While the remaining time before 2026 is now likely insufficient to achieve fully the short-term freshwater objectives, doing something would (in the interests of precaution) be better than doing nothing.

15 Amending the priority dates to enable landowners to apply for land use consent for farming activities at any time *before* the priority dates occur is "the" single most important amendment that should be made to PC1.

16 This will encourage landowners motivated by a strong ethic of stewardship to put FEPs in place and implement them as soon as practicable. While some landowners may prefer to continue business as usual under existing rights, many landowners will prefer to abandon their existing rights by applying for consent.

17 WPL therefore recommends that the priority dates in the **farming activity rules** should be amended to require land use consent applications to be made:

17.1 **By** 1 July 2020 for land in Priority 1 sub-catchments.

17.2 **By** 1 July 2022 for land in Priority 2 or Priority 3 sub-catchments.

18 This will not open the "flood gates" because (as noted above) PC1 includes streamlining pathways for consenting at scale to reduce the number of consents required.

19 The farming activity rules (noted above) are amended as a consequence.

Land use change constraints

20 **Rule 3.11.5.7** as notified requires non-complying activity consent for all land use change to farming above 4.1ha: regardless of the character, intensity, or scale of any adverse effects. The underlying intention behind the rule was to control "significant" effects. The rule does not comply with s 32 or s 68(3) of the RMA.

21 The **Block 2 Section 42A Report** amends PC1 by substituting Rule 3.11.5.7 with new provisions (inserted into the farming activity rules) that make **all** existing farming activities non-complying where more than 4.1ha of land use change has occurred since 2016: regardless of any effects, and regardless of whether the land use change occurred lawfully. This is more restrictive than PC1 as notified.

22 These amendments do not comply with s 32, s 68(3), or s 85 of the RMA. They also preclude the development of Treaty settlement land.

23 WPL therefore recommends a more consistent and effects based consenting pathway for land use change under **Rule 3.11.5.7** and Policy 16:

23.1 **Rule 3.11.5.7A**: restricted discretionary where the freshwater objectives in **Table 3.11-1** are met.

23.2 **Rule 3.11.5.7B**: restricted discretionary where **Policy 16** is met regarding the development of Treaty settlement land.

23.3 **Rule 3.11.5.7C**: non-complying activity where neither the freshwater objectives in Table 3.11-1 nor Policy 16 are met.

24 **Policy 6** and the farming activity rules (noted above) are amended as a consequence.

25 Beyond that, it is questionable under s 32 of the RMA why any land use constraint rules are required, *if* the suite of 19 provisions designed to make reductions in diffuse discharges from farming activities work as intended: other than from an abundance of caution as a "belt and braces" approach.

Rules about discharges

26 Dispelling myths about discharge rules:

26.1 The proposed new rules included in PC1 by the **Block 2 Section 42A Report** (**Rule 3.11.5.8** and **Rule 3.11.5.9**) are not consistent with the *Carter Holt Harvey* (Lake Taupo: Variation 5) decision: because the permitted activity

discharge rule was included on the basis of limited legal argument and the Court did not refer to s 70 of the RMA. No other discharge rules were included.

26.2 At a strategic level WRC has a choice under s 30 of the RMA between including land use rules in PC1 that address any adverse effects of activities by maintaining and enhancing the quality of water in water bodies, or alternatively including discharge rules in PC1, or *theoretically* including both.

26.3 The obligation in s 15(1)(b) of the RMA can be excused by a rule in a regional plan, including a permitted activity land use rule under s 9 of the RMA. Thus there is no legal *obligation* to include a discharge rule in PC1 when a land use rule has already been proposed. A "belt and braces" approach is not required.

26.4 The practical considerations arising from the findings of the *Board of Inquiry into the Tukituki Catchment Proposal* mean that it would not be appropriate or reasonably practicable to include discharge rules in PC1 pertaining to diffuse discharges from farming activities.

26.5 Subsequent cases have relied solely on land use rules (under s 30(1)(c)(ii) of the RMA) to control the effects of farming activities on water quality (e.g. *P & E Ltd* and *Mawhinney*).

27 **Rule 3.11.5.8** and **Rule 3.11.5.9** recommended in the **Block 2 Section 42A Report** should therefore be deleted.

OVERSEER and NRP

28 PC1 as notified relies on OVERSEER based NRPs to "hold the line" by ensuring that properties and enterprises do not exceed their N discharges beyond their 2016 existing use rights.

29 The limitations inherent in using OVERSEER as the mandatory DST in a regulatory context such as PC1 are well documented in the PCE Report. Continued reliance on OVERSEER as the mandatory DST used for calculating NRPs and preparing FEPs does not reflect the "latest available scientific methods" and is not consistent with the Vision and Strategy. For example:

	OVERSEER	**RDST**
Does the DST enable horizontal comparison between properties etc	No	Yes

Does the DST predict groundwater effects below the root zone	No	Yes
Does the DST include a range of models (e.g. MODFLOW) to predict groundwater effects	No	Yes
Does the DST consider N attenuation between the paddock and the stream	No	Yes
Has the DST as a whole been subject to external peer review	No	Yes

30 WPL has developed a DST (the **RDST**) that couples three primary models and overcomes the limitations with OVERSEER noted by the PCE. The RDST predicts the effects of farming activities on water quality "from paddock to stream" and is designed to operate at any scale (above 20ha). The RDST has been populated with data from the Upper Waikato River FMU sub-catchments and has been used to run scenario modelling to test the environmental effectiveness and economic efficiency of the PC1 provisions (**Scenario 4**) and the WPL amendments (**Scenario 6**). The RDST has also been used to develop a model FEP for the Wairakei Estate that will be presented with the Block 3 evidence.

31 Comparatively, **Scenario 6** demonstrates superior environmental and economic outcomes for the health and wellbeing of the Waikato River catchment and sub-catchments and for people and communities. Other scenarios noted above (**Scenario 5** and **Scenario 7**) demonstrate the benefits of providing for sub-catchment scale land use consents.

32 PC1 (**Schedule B** and **Schedule 1**) should therefore provide for any appropriate DST to be used and the unfettered discretion of the CEO should be deleted.

33 Penultimately, consequential amendments are made to **Policy 4** to provide for maximum 25year land use consent durations, and the **Schedules** to give effect to the WPL recommendations. The recommendations are fully addressed in the WPL Block 2 evidence.

34 The Nitrogen Reference Point Development Guidelines (November 2018) tabled by WRC on 20 May 2019 should as matter of fairness be left for consideration in Block 3.

BLOCK 2 HEARING TOPICS

PART A: BACKGROUND AND FRAMEWORK

1 These legal submissions are made on behalf of Wairakei Pastoral Ltd (**WPL**) regarding the Block 2 Hearing Topics.

2 To assist the Commissioners, these submissions generally adopt a similar format and structure to the Block 2 Section 42A Report. The same abbreviations are also used where relevant. The Block 2 statements of evidence and rebuttal filed for WPL by the following witnesses also follow the same approach:

2.1 Mr Nicholas Conland, Director, Taiao - Natural Resource Management – an expert environmental consultant.

2.2 Dr Martin Neale, Director, Puhoi Stour – an expert freshwater ecologist.

2.3 Mr Jonathan Williamson, Director, Williamson Water & Land Advisory – an expert hydrologist and hydrogeologist with expertise in data collection and analysis, and modelling.

2.4 Dr Phillip Jordan, Director, Hydrology and Risk Consulting – an expert hydrologist and water resources engineer with experience in water quality modelling.

2.5 Dr Richard Creswell, Senior Principal, Eco Logical Australia – an expert hydrogeologist with expertise in hydrodynamics, geochemistry and isotopes.

2.6 Mr Stuart Ford, Director, AgriBusiness Group – an expert agricultural and resource economist.

2.7 Mr Dwayne McKay, Director, Thornton Environmental – an expert planning and resource management consultant.

3 Their evidence fully addresses the matters raised by WPL and covered by the Block 2 Hearing Topics. A glossary of the terms used in the WPL submissions and evidence is **attached** as Appendix 1.

Wairakei Pastoral Ltd and the Wairakei Estate

4 The factual background about WPL, the 25,723ha Wairakei Estate (**Estate**), and the relatively modest remaining area for land use change (1,800ha) were fully addressed in the Block 1 legal

submissions and in the Block 1 evidence of Mr Green and Mr Conland. They emphasised:

4.1 The strong commitment of WPL to the ethic of stewardship and the desire to do "the right thing by the land".[1]

4.2 The long-term vision for the Estate, by setting a benchmark of "international best practice".[2]

4.3 The establishment and implementation of land use management protocols designed (inter alia) to maintain and enhance water quality.[3]

4.4 The investment made in stock exclusion, water quality monitoring, and development of the Ruahuwai Decision Support Tool (**RDST**) to inform decision-making about ongoing farming activities and land use change both on the Estate and within the wider sub-catchments in the Upper Waikato River Freshwater Management Unit (**FMU**).[4]

4.5 The commitment by WPL to sustainability leadership.[5]

5 In particular, it is for note that WPL anticipates that the modest further land use change contemplated on the Estate can be undertaken in such a way as to ensure that the Nitrogen Reference Point (**NRP**) or a Total Annual Nitrogen Discharge (**TAND**) derived from existing pre-notification activities (as at 22 October 2016) is not exceeded.

Plan Change 1 framework

6 Plan Change 1 (**PC1**) is designed to achieve the Vision and Strategy for the Waikato River catchment by "reducing contaminant losses (primarily) from pastoral farm land". The new Chapter 3.11 inserted into the operative Waikato Regional Plan (**WRP**) approaches this objective via provisions regarding:[6]

6.1 Stock exclusion from water bodies.

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1 Mr Green, Block 1 EIC paras 6, 20, and 21.

2 Mr Green, Block 1 EIC para 14.

3 Mr Conland, Block 1 EIC para 64.

4 Mr Conland, Block 1 EIC paras 57-70.

5 Mr Green, Block 1 EIC para 23.

6 PC1, 3.11 Background and explanation, Full achievement of the Vision and Strategy will be intergenerational.

6.2 Farm Environment Plans (**FEPs**) "that ensure industry-specific good management practice, and identify additional mitigation actions to reduce diffuse discharges by specified dates".

6.3 A property scale NRP "established by modelling current nutrient losses from each property, with no property being allowed to exceed its reference point in the future and higher dischargers being required to reduce their nutrient losses".

6.4 An accreditation system for "people who will assist farmers" to prepare their FEPs.

6.5 Non-regulatory approaches (Method 3.11.4.5) that "allow contaminant loss risk factors to be assessed at a sub-catchment level, and implement mitigations that look beyond individual farm boundaries to identify the most cost-effective solutions".

7 Other aspects of the PC1 framework designed to achieve the Vision and Strategy for the Waikato River (**Vision and Strategy**) include:[7]

7.1 Controlling point source discharges via existing rules in the operative WRP.

7.2 Requiring municipal and industrial point source dischargers to meet the freshwater objectives in Table 3.11-1 via the renewal of existing resource consents.

7.3 Controlling forestry activities via existing rules in the operative WRP and additional requirements regarding the preparation of harvest plans and notifying WRC about harvest activities introduced by PC1.

7.4 Land use change to animal grazing and dairy farming "will be constrained" during the short-term (2016-2026).

8 These approaches are evaluated by the Section 32 Report (Part E) under "seven key policy" themes:

8.1 Staging the transition to the 80-year goal (Part E.2).[8]

8.2 Making reductions: Catchment wide rules, Farm Environment Plans and Nitrogen Reference Point (Part E.3).[9]

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[7] PC1, 3.11 Background and explanation, Full achievement of the Vision and Strategy will be intergenerational.

[8] Topic C1.6.

8.3 Restricting land use changes (Part E.4).[10]

8.4 Managing point source discharges (Part E.5).[11]

8.5 Managing Whangamarino Wetland (Part E.6).

8.6 Flexibility of the use of Te Ture Whenua and settlement land (Part E.7).[12]

8.7 Prioritisation and sub-catchment planning (Part E.8).

9 Five of these key policy areas are therefore directly relevant to the Topics and PC1 provisions considered in Block 2. They are addressed (where relevant) below.

Legal and statutory framework

10 The legal and statutory framework for the policies, methods, and rules in PC1 is set out in the hierarchy of provisions in the Resource Management Act 1991 (**RMA**).[13]

11 The purpose of preparing and implementing PC1 is to assist WRC to carry out its functions in order to achieve sustainable management:[14]

11.1 In this case the relevant WRC functions under s 30(1) of the RMA are:

(a) The control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies.

(b) The control of discharges of contaminants into or onto land or water.

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[9] Topic C1.1.12; Topic C1.1.16; Topic C1.2; Topic C1.3; Topic C1.4; Topic C1.6; Topic C1.6.7; Topic C1.6.9; Topic C1.6.11; Topic C2; Topic C3; Topic C4.

[10] Topic C1.5.

[11] Topic C6.

[12] Topic C5.

[13] *Long Bay-Okura Great Park Society v North Shore City Council* EnvC Auckland A78/08, 16 July 2008 at [34]; *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [1] – [10] and [1] – [14]; *Colonial Vinyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17] – [24].

[14] RMA, s 63(1).

11.2 Following *King Salmon* sustainable management will (in the PC1 context) be defined by the National Policy Statement for Freshwater Management (**NPS-FM**)[15] and the Vision and Strategy for the Waikato River (**Vision and Strategy**) in the operative Waikato Regional Policy Statement (**WRPS**).[16]

12 Without limiting WRC's power to prepare regional plan changes at any time, s 65(3) of the RMA indicates that regional councils should consider the desirability of preparing regional plan changes (inter alia) where any of the following considerations are likely to be relevant:

12.1 Any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources.[17]

12.2 The restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration.[18]

12.3 The implementation of any NPS.[19]

12.4 Any use of land or water that has actual or potential adverse effects on water quality.[20]

13 These considerations underpin the preparation of PC1 and will be addressed by giving effect to the NPS-FM and the Vision and Strategy.

14 At a strategic level WRC therefore has a choice of methods to address the restoration and protection of water quality in the Waikato River catchment. WRC may choose to address these matters solely via land use controls. Alternatively, WRC may choose to address these matters via discharge controls. On the other hand, WRC could choose to address these matters by a combination of both land use controls and discharge controls.

15 The choice of methods will however be guided by the relevant law and, in particular, by the s 32 evaluation.

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[15] National Policy Statement for Freshwater Management 2014 (as amended 2017).

[16] *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38; WPL Block 1 Legal Submissions, paras 4, 96-102.

[17] RMA, s 65(3)(e).

[18] RMA, s 65(3)(f).

[19] RMA, s 65(3)(g).

[20] RMA, s 65(3)(h).

16 As discussed below, WPL considers that the relevant law remains unsettled as to whether associated diffuse discharges from farming activities could be regulated under s 15 of the RMA.

17 Regardless of whether associated diffuse discharges from farming activities could *theoretically* be regulated under s 15 of the RMA, WPL considers that diffuse discharges are fundamentally different from point-source discharges and that the proposed rules (recommended in the Block 2 Section 42A Report) will not satisfy the s 32 tests because they are not appropriate and because they are not reasonably practicable.

18 WPL therefore considers that restoration and protection of water quality in the Waikato River catchment should appropriately be addressed solely via land use controls to manage any adverse effects from farming activities on the quality of water in water bodies.

Preparing PC1

19 Under s 66(1) of the RMA, WRC must (inter alia) prepare PC1 in accordance with:

19.1 Its functions under s 30 of the RMA (noted above).

19.2 The provisions of pt 2 of the RMA (but only where one of the three exceptions in *King Salmon* applies).

19.3 The s 32 evaluation report (addressed below).

19.4 Any regulations (e.g. NES).

20 Under s 67 of the RMA:

20.1 PC1 must include objectives to achieve sustainable management, policies to implement the objectives, and rules to implement the policies.[21]

20.2 PC1 must give effect to (inter alia) any NPS and the WRPS (including the Vision and Strategy).[22]

20.3 PC1 must not be inconsistent with any other regional plan for the Waikato region.[23]

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[21] RMA, s 67(1).

[22] RMA, s 67(3).

[23] RMA, s 67(4).

20.4 PC1 must record how WRC has allocated any natural resources (e.g. the assimilative capacity of water to absorb contaminant discharges) if it has done so via PC1.[24]

21 WPL agrees that the PC1 objectives (as amended by Mr McKay in his evidence) are suitable for achieving sustainable management, and will give effect to the NPS-FM and the Vision and Strategy. But WPL considers that the policies and rules pertaining to farming activities will not (unless amended) implement the PC1 objectives.

22 In particular, the critical short-term (2016-2026) objective, Objective 3, will not be implemented by the policies and rules pertaining to farming activities either as notified or as now recommended to be amended by the Block 2 Section 42A Report.

General considerations about rules

23 WRC has discretion under s 68(1) of the RMA to include rules in PC1 for the purpose of carrying out its functions under s 30 of the RMA (noted above), and for the purpose of achieving the objectives and policies in PC1.

24 Additionally, when including a rule in PC1, WRC is required under s 68(3) of the RMA to have regard to the actual or potential effects of activities on the environment, particularly, any adverse effects. This requirement is relevant in relation to determining the appropriate activity class relative to the likely effects of activities on the environment and the degree of discretion that may be required to regulate them appropriately.

25 Subject to allowing for reasonable mixing of contaminant discharges, s 69(3) of the RMA provides that WRC shall not set standards in PC1 that result (or may result) in a reduction of water quality in any waters at the time of public notification of PC1 unless that would be consistent with promoting sustainable management. Put simply, current state matters and provides the benchmark for setting water quality standards.

Hybrid rules

26 The notified PC1 rules pertaining to farming activities[25] are framed as hybrid rules that attempt to regulate both:

26.1 Land use activities; and

[24] RMA, s 30(1)(fa) and s 67(5).

[25] Rule 3.11.5.1, Rule 3.11.5.2, Rule 3.11.5.3, Rule 3.11.5.4, Rule 3.11.5.6.

26.2 The associated diffuse discharge of contaminants onto or into land in circumstances where it may result in contaminants entering water.

27 The question of whether rules should be framed as hybrid discharge rules and land use rules, or simply as land use rules, arose in *Carter Holt Harvey Ltd v Waikato Regional Council*[26] regarding the provisions now found in Chapter 3.10 of the operative WRP pertaining to the Lake Taupo catchment.

28 Carter Holt Harvey had sought to amend the rules to make them hybrid rules by inserting the words "and the associated discharge of nitrogen to land" into the rules. This amendment was opposed by Federated Farmers and other parties representing the farming interests. The Environment Court noted that:

> The central issue of concern to the farming interests is to avoid any implication that non-point source discharges, and in particular from animal emissions and nitrogen fixing plants, as a consequence of normal farming activities, could be unlawful under section 15(1)(b).[27]

29 However, the Court was reluctant to make a ruling on this question due to the national significance of the issue, and considered (inter alia) that resolution of this question "should more properly have been sought by way of an application for declaration with supporting affidavit evidence", because the issue had not been directly addressed by the scientific and planning evidence, and because resolving the question "would require a greater legal and factual analysis".[28]

30 Separately, the Court found that "combining discharge permits and land use rules within one rule could create administrative difficulties for the processing of, and decisions on, resource consent applications".[29] In particular, the Court observed that:

(i) Section 9(3) creates a presumption that land may be used unless a regional plan provides otherwise. By contrast, section 15(1) prohibits discharges unless allowed by a regional plan or resource consent;

(ii) Sections 105, 107 and 108(8) describe matters relevant to discharge applications and

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[26] *Carter Holt Harvey Ltd v Waikato Regional Council*, A123/2008.

[27] A123/2008, at para [172].

[28] A123/2008, at para [175](i), (ii), and (iii).

[29] A123/2008, at para [196].

restrictions on their grant. These sections do not apply to land use consents;

(iii) Section 108(2)(e) specifically allows the imposition of a condition on a discharge permit requiring the holder to adopt the best practicable option. But no corresponding provision exists for land use consents;

(iv) The default duration for land use consents is unlimited, whereas the default duration of a discharge permit is 5 years (with a maximum duration of 35 years);

(v) Land use consents attach to the land, whereas discharge permits may be transferred in certain circumstances; and

(vi) Section 128(1)(b) enables the review of a discharge permit to meet, among other things, standards of water quality promulgated in an operative regional plan. No such review applies to a land use consent.[30]

31 Accordingly, the Court held that the proposed discharge rules should be "clearly differentiated" from the land use rules.[31]

32 The Court, however, remained reluctant to make a ruling on the central issue of "whether discharges from farm animals are discharges within the meaning of section 15".[32] It noted that:

> Environment Waikato seeks to ensure that the rules … are framed in such a way as to encompass and properly authorise all aspects of activities to which the rules relate, including, if necessary, discharges from farm animals. It did not seek a specific finding on the issue of whether farming non-point source discharges are contrary to section 15. Its concern was to ensure the wording of the rules is sufficient to authorise such discharges, *if such authorisation is necessary*.[33] (Emphasis added)

33 On this basis, the Court found that a "catch all" permitted activity discharge rule could be included in Chapter 3.10 and stated:

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[30] A123/2008, at para [196].

[31] A123/2008, at para [197].

[32] A123/2008, at para [202].

[33] A123/2008, at para [203].

> … Such a rule could expressly allow discharges of nitrogen from specific activities; in accordance with a detailed Nitrogen Management Plan, compiled to ensure that an NDA is complied with, or in accordance with specific land use activities; and which would otherwise contravene section 15. …[34]

34 WRC selected the second option and Rule 3.10.5.10 provides for N, effluent, and fertiliser discharges associated with farming activities authorised under the rules in Chapter 3.10 as a permitted activity, subject to conditions requiring compliance with other WRP permitted activity rules pertaining to pig farm effluent, feed pads and stand-off pads, farm effluent, and fertiliser application.[35]

35 WPL agrees (on reflection) that hybrid land use and discharge rules would not be practicable for the reasons given by the Court in *Carter Holt Harvey* noted above.

36 However, the option chosen by WRC in *Carter Holt Harvey* is unlikely to now be available because the WRP permitted activity rules cross-referenced in Rule 3.10.5.10 are (with the exception of Rule 3.9.4.11) proposed to be amended by the PC1 consequential amendments to clarify that they apply to point-source discharges only. Before 22 October 2016 these rules were commonly regarded as applying generally to both diffuse and point-source discharges. While the first option mooted by the Court of promulgating a rule that expressly allows discharges from specific activities in accordance with a detailed management plan remains *theoretically* possible it would be unlikely to satisfy the requirements of s 32 and s 70 of the RMA for the reasons given below.

37 Put simply, the Court and WRC pursued a belt and braces approach from an abundance of caution. The decision in *Carter Holt Harvey* did not resolve the central question of whether discharges from farm animals are discharges within the meaning of s 15 of the RMA in a jurisprudential way. The issue remains at large and has not been expressly addressed by any subsequent decided case. More importantly, the Court in *Carter Holt Harvey* did not refer to s 70 of the RMA when deciding to promulgate the catch all Rule 3.10.5.10 now found in Chapter 3.10 of the WRP.

Rules about discharges

38 Before WRC includes a rule in PC1 that expressly allows the discharge of contaminants into water, or onto or into land in circumstances where that contaminant may enter water as a permitted activity, WRC must be satisfied that (after reasonable

[34] A123/2008, at para [204].

[35] WRP, Rule 3.5.5.1, Rule 3.5.5.2, Rule 3.5.5.3, Rule 3.9.4.11.

mixing) none of the effects specified in s 70(1)(c)-(g) of the RMA are likely to arise in the receiving waters.

39 As noted in the Block 1 legal submissions,[36] WPL does not consider that diffuse discharges from farming activities (i.e. the resultant urine patches) can be addressed by a rule under s 15 of the RMA for the reasons given by the Board of Inquiry into the Tukituki Catchment Proposal.[37]

40 The Block 2 Section 42A Report has redrafted the PC1 rule structure so that, while the s 9 land use rules are retained, diffuse discharges from farming activities are authorised by a new separate permitted activity rule under s 15(1) of the RMA.

41 The separate discharge rule as recommended by the Section 42A Report reads:

> **3.11.5.8 Permitted Activity Rule – Authorised Diffuse Discharges**
>
> The diffuse discharge of nitrogen, phosphorous, sediment and or microbial contaminants from farming onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA is a permitted activity, provided the following conditions are met:
>
> 1. the land use activity associated with the discharge is authorised under Rules 3.11.5.1 to 3.11.5.7; and
> 2. the discharge of a contaminant is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving water:
>
> (a) any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or
> (b) any conspicuous change in the colour or visual clarity; or
> (c) the rendering of fresh water unsuitable for consumption by farm animals; or
> (d) any significant adverse effects on aquatic life.

42 The redrafting follows the reasoning of the Environment Court in *Carter Holt Harvey* (noted above) relating to Variation 5 (Lake

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[36] WPL Supplementary Legal Submissions – Block 1 Hearing Topics, 13 para 57.

[37] Final Report and decisions of the Board of Inquiry into the Tukituki Catchment Proposal (June 2014).

Taupo catchment).[38] At paragraphs [298] and [299], the Section 42A Report states:

> On this basis, Officers recommend that all of the relevant rules be section 9 'land-use' rules, with a separate rule for the associated section 15 'discharges'. Officers are aware that this framework has been used elsewhere in the country (including the Taupo catchment under the WRP's Variation 5), and appears to be robust.
>
> …
>
> Recommended new Rule 3.11.5.8 and 3.11.5.9 for PC1 would then explicitly authorise discharges from the land under section 15(1) of the RMA, consistent with the approach directed by the Environment Court for Variation 5.

43 As noted above the proposed new rules are *not* entirely consistent with the Court's decision.

44 For example, s 15(1)(b) of the RMA states:

> **Discharge of contaminants into environment**
> (1) No person may discharge any—
> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
> unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

45 In *P & E Ltd v Canterbury Regional Council*, the Environment Court noted that policy A4 in the NPS-FM seems to contemplate that allowing stock to urinate onto ground is a discharge within the scope of s 15.[39]

46 In *Mawhinney v Auckland Council* the Environment Court said that the first function is usually a land use control under s 9 of the RMA, while the second function is related to s 15 duties. The Court noted that, when dealing with water quality in relation to non-point discharges, regional councils tend to use a land use rule under the

[38] *Carter Holt Harvey Limited v Waikato Regional Council* Decision A123/08, 6 November 2008.

[39] *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106 at [37].

first function (s 30(1)(c)(ii)), rather than a discharge rule under the s 30(1)(f) function.[40]

47 The obligation in s 15(1)(b) can be excused by a rule in a regional plan, which would include a s 9 permitted activity rule.

48 Further, s 66(1) of the RMA requires PC1 to accord with WRC's functions under s 30(1) of the RMA, which in relation to water quality include:

> (c) The control of the use of land for the purpose of:
> …
>
> (ii) the maintenance and enhancement of the quality of water bodies and coastal water.
>
> …
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water.

49 Support for this can be found in the following passage from the Ministry's Guide to the NPS-FM 2014 (as amended 2017):[41]

> Policy A4 requires that a regional council has regard to certain matters when assessing and determining an application for a discharge permit. It applies, once a plan is amended to include the transitional policy.
>
> Policy A4 applies to decisions on discharge permits required under the current regional plan involving new discharges or changes/increases in any discharge.
>
> It does not apply to:
>
> - land use (or other) consents that involve a discharge that is authorised by a permitted activity rule in a regional plan unless, or until, additional or new consents are required
> - consents for an existing consented discharge where there is no change or increase in the discharge.

[40] *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [156]-[158].

[41] Ministry for the Environment, A Guide to the National Policy Statement for Freshwater Management 2014 (as amended 2017), at p.47.

50 WPL submits that diffuse discharges from farm animals should be dealt with only by way of a s 9 land use consent rule, as was the approach taken by the Board of Inquiry in its final decision on Plan Change 6 to the Hawke's Bay Regional Management Plan: Tukituki Catchment.[42]

51 The Board in the Tukituki decision was required to give effect to the NPSFM 2011, which was in effect at the time of its decision-making (June 2014).

52 The NPS-FM 2011 included transitional policy A4, which required regional councils to have regard to certain matters when assessing an application for a discharge permit. The policy stated that it applies to new discharges or changes/increases to discharges and includes a diffuse discharge by any person or animal.

53 The NPS-FM 2014, which replaced the NPS-FM 2011, also contained policy A4. It was the same as the 2011 version except that it added a second matter for consideration.

54 The NPS-FM 2014 was amended in 2017. The amended NPSFM superseded the 2014 NPS-FM on 7 September 2017. It too included policy A4.

55 The Board of Inquiry in the Tukituki approved a rule dealing with the use of production land on farm properties pursuant to s 9(2) of the RMA. Rule TT1 is a s 9 permitted activity rule applying to all production land in the Tukituki River catchment. Proposed Plan Change 6 aimed to give effect to the NPS-FM 2011.

56 Rule TT1 imposed controls to manage diffuse discharges. In order for any farm property exceeding four hectares to be a permitted activity under rule TT1 it must keep records and those records have to be used to prepare a Nutrient Budget, a Phosphorus Management Plan, stock exclusion requirements and other aspects relevant for a Farm Environmental Management Plan.

57 Plan Change 6 did not include a separate discharge rule pursuant to s 15(1) of the RMA. Significantly, there was no issue about the fact that farmers were not required to apply for a separate discharge permit under s 15. Nor was there any suggestion that diffuse discharges from stock, as a consequence of normal farming activities, could be unlawful under s 15(1)(b) of the RMA.

[42] Final Report and Decisions of the Board of Inquiry into the Tukituki Catchment Proposal, 18 June 2014.

58 Various parties appealed the decision of the Board of Inquiry to the High Court.[43]

59 There were no concerns raised by the High Court that diffuse discharges from farm animals should be authorised by a separate discharge rule under s 15.

60 It could be argued that the reason why the Board of Inquiry considered that it did not need a separate discharge rule was because Plan Change 6 included a land use permitted activity rule that involved the discharge (Rule TT1).

Practical considerations raised by the Board of Inquiry

61 When considering DIN limits in receiving water the Board of Inquiry considered that it would be "inappropriate to require individual farmers or applicants for resource consent" to meet such limits because:

- the DIN concentration in the receiving water will be the result of many discharges and it is impractical for the individual farmer to be held responsible for effects arising from other farmers' activities;
- the DIN concentration in the receiving water will vary as stream flows vary and as natural processes like denitrification occur. Both of these factors are beyond the control of an individual farmer;[44]
- attenuation of nitrogen concentrations will occur between nitrogen release at the root zone and arrival in the receiving water, a natural process not controlled by the farmer which may take some time;
- it is the responsibility of HBRC to avoid the exceedance of DIN limits in receiving water by regulating the level of nitrogen discharged at the root zone by the farmer and monitoring the subsequent DIN concentration in the receiving water. If observed DIN levels are too high then future adjustment by HBRC of the LUC root zone leaching rates may be required; and

[43] *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191, [2015] NZRMA 131.

[44] This finding by the Board of Inquiry reflects the similar conclusion reached by the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 at 77 concerning groundwater contamination where the court found that the contaminants had "passed beyond the control" of the landowner and "had become irretrievably lost in the ground below".

- it is then clear that the responsibility of the farmer is simply to comply with the LUC root zone leaching rates set in the resource consent or as permitted by Rule TT1.[45]

62 Put simply, the Board considered that diffuse contaminant discharges from farming activities should more appropriately be regulated by land use rules.

63 Similar considerations will apply in this case regarding the diffuse discharge of N, P, sediment and microbial pathogens (from farming activities) onto or into land in circumstances that may result in those contaminants entering water. It would be inappropriate and impractical to expect landowners and consent holders to comply with matters (beyond the root zone) that are outside their control.

Section 32 considerations

64 PC 1 must meet the requirements of s 32, including whether the rules are the most appropriate for achieving the objectives and policies of the plan. The evaluation includes assessing the efficiency and effectiveness of the rules in achieving the objectives.

65 In *Rational Transport Society Incorporated v New Zealand Transport Society,*[46] the High Court defined the term "most appropriate" in the following way:

> Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior.

66 WPL accepts that the proposed rule need not be superior, but submits that it should at least be suitable for its intended purpose.

67 WPL considers that the new separate discharge rule is inappropriate, inefficient and ineffective in terms of s 32(1) of the RMA. Discharges from a specific point source, such as an outfall from a sewage treatment plant, enter the surface water. In the case of a diffuse discharge from farming activities, however, the run-off enters the groundwater. It may take many years for the discharge to enter the receiving waters.

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[45] Final Report and decisions of the Board of Inquiry into the Tukituki Catchment Proposal (June 2014), para [449].

[46] *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at 45.

68 It will be difficult for individual farmers to ensure compliance with Condition 2 of the new rule, which requires satisfaction that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include "the rendering of fresh water unsuitable for consumption by farm animals" and "any significant adverse effects on aquatic life".

69 The Section 42A Report does not assess how those requirements might be met in the case of non-point or diffuse discharges.

70 WPL considers, therefore, that using the s 30(1)(c)(ii) function and the approach taken by the Board of Inquiry in the Tukituki case would be the most appropriate way to manage water quality in relation to diffuse discharges. Discharges from a specific point can be dealt with under the more direct s 30(1)(f) function.

71 To apply s 30(1)(f) and s 15 in the circumstances anticipated there, the suggested interim permitted activity rule would not be enforceable in that it is not practicable or possible for an application to assess the s 70 matters in respect of groundwater and surface water where there is inter-connectivity and contributions from other land users and water users.

Conclusions about discharge rules

72 Accordingly, including rules about discharges in PC1 in relation to the associated diffuse discharge of contaminants from farming activities that may enter water will be unlikely to satisfy the tests in s 32(1)(b) of the RMA in terms of being the "most appropriate" way to achieve the PC1 objectives or a "reasonably practicable" option for achieving the PC1 objectives.

73 In particular, it is for note from the general discussion regarding the use of the OVERSEER model in PC1 below that any effects on receiving water will not be assessed (unless other DSTs are used) because the OVERSEER model is not designed to assess the environmental effects of diffuse contaminant discharges beyond the root zone. Mr Williamson in his Block 2 rebuttal considers that the effects of any diffuse contaminant discharges beyond the root zone are unlikely to be discernable in groundwater,[47] and Dr Neale in his Block 2 evidence considers that (immediate) stock exclusion and suitable riparian setbacks should be appropriate to avoid or mitigate any surface water runoff from farming activities.[48]

74 From the perspective of the WRC functions under s 30 of the RMA, the focus should therefore be firmly placed on the "control of the

[47] Mr Williamson, Block 2 Rebuttal para 5.

[48] Dr Neale, Block 2 EIC para 24.

use of land for the purpose of … maintenance and enhancement of the quality of water in water bodies" under s 30(1)(c)(ii) of the RMA in order to give effect to the NPS-FM and the Vision and Strategy and to achieve the PC1 objectives.

75 PC1 as notified provides for small, low intensity and low risk farming activities as permitted activities under Rule 3.11.5.1 and Rule 3.11.5.2. WPL considers that this approach is appropriate because the character, intensity, and scale of effects are likely to be less than minor, and (to the extent that s 70(1) of the RMA applies to land use rules designed to maintain and enhance water quality) WRC should be satisfied that small, low intensity and low risk farming activities are unlikely (in so far as they may be discernable) to result in the kind of effects contemplated by s 70(1)(c)-(g) of the RMA.

76 These practical considerations arising from the findings of the Board of Inquiry into the Tukituki Catchment Proposal (noted above) also mean that it would not be appropriate or reasonably practicable to include any other class of discharge rules in PC1 (e.g. non-complying) pertaining to associated diffuse discharges from farming activities.

77 In summary:

77.1 At a strategic level WRC has a choice under s 30 of the RMA between including land use rules in PC1 that address any adverse effects of activities by maintaining and enhancing the quality of water in water bodies, or alternatively including discharge rules in PC1, or including both.

77.2 The obligation in s 15(1)(b) can be excused by a rule in a regional plan, which would include a s 9 permitted activity rule. Thus there is no legal obligation to include a discharge rule in PC1 when a land use rule has already been proposed.

77.3 As noted above there are some legal and practical considerations that dictate against including discharge rules in regional plans to regulate diffuse discharges.

WPL evidence

78 Mr McKay therefore recommends in his Block 2 evidence that proposed Rule 3.11.5.8 and Rule 3.11.5.9 regarding discharges should not be included in PC1 as recommended by the Block 2 Section 42A Report.[49]

[49] Block 2 Section 42A Report, 51 para 299.

Section 32 evaluation

79 The evaluation under s 32 of the RMA focuses on whether the policies, methods, and rules in PC1 are the most appropriate way to implement the PC1 objectives.

80 In particular, the evaluation process tests whether each of these provisions will implement the PC1 objectives by:

80.1 Identifying any other reasonably practicable options.

80.2 Assessing the efficiency and effectiveness of the PC1 provisions.

81 When assessing the efficiency and effectiveness of the PC1 provisions the RMA also requires functionaries to:

81.1 Identify, assess, and (if practicable) quantify the benefits and costs of the cultural, economic, environmental, and social effects that are anticipated to arise from implementing the provisions.

81.2 Consider whether opportunities for economic growth or employment are likely to be provided or reduced by implementing the provisions.

81.3 Adopt a precautionary approach to decision-making.

82 Section 32 of the RMA recognises that a number of options will be available when making policy choices about how to implement the PC1 objectives. In the context of PC1, these policy choices will be influenced by the interaction between:

82.1 The wellbeing of the Waikato River on the one hand;[50] and

82.2 The wellbeing of Waikato-Tainui, the Waikato River Iwi, and the Waikato Region's communities on the other hand.[51]

83 Economic wellbeing is clearly an integral part of the Objectives for the Waikato River in the Vision and Strategy (WRPS) that must (as a statutory document) be given effect to under s 67(3) of the RMA.

[50] Vision and Strategy, WRPS, Objectives for the Waikato River 2.5.2(a).

[51] Vision and Strategy, WRPS, Objectives for the Waikato River 2.5.2(b), (c), and (d).

More importantly, wellbeing (including economic wellbeing) is a mandatory relevant consideration.[52]

84 Questions about whether a particular PC1 provision will "achieve" the PC1 objectives, or whether a particular PC1 provision will be "effective" are simply different ways of questioning whether the particular PC1 provision will in practice "implement" the PC1 objectives.[53] Put simply, the PC1 provisions must be reasonably practicable. They must be fit for purpose.

85 Beyond that, s 85 of the RMA provides a mechanism for proposed rules to be modified, deleted, or replaced where they make any land incapable of reasonable use and place an unfair and unreasonable burden on landowners.[54]

86 The key policy themes from the s 32 evaluation relevant to the PC1 provisions discussed in the Block 2 Section 42A Report are addressed in the following parts of these Block 2 legal submissions.

PART B: STAGING THE TRANSITION TO THE 80-YEAR GOAL

87 Part E.2 of the Section 32 Report evaluates staging the transition to the 80-year goal.[55]

88 The relevant objectives to achieve staging the transition to the 80-year goal are Objectives 2, 3, and 4. WPL considers that Objectives 2, 3, and 4 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

89 Objective 2 addresses maintenance of social, economic and cultural wellbeing in the long-term (2026-2096). Mr McKay recommended that Objective 2 should be amended as follows:

> Waikato and Waipa communities and their economy benefit from the <u>restoration and protection</u> ~~maintenance and improvement~~ of water quality in the Waikato and Waipa

[52] *Hawke's Bay Regional Development Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106 at [131].

[53] *King Salmon* [2014] NZSC 38 at [77]; Paul Martin and Amanda Kennedy (eds), *Implementing Environmental Law* (Edward Elgar Publishing 2015); Michel Prieur and Mohamed Ali Mekouar, "Measuring the effectivity of environmental law through legal indicators in the context of Francophone Africa" in *Mélanges pour Professor Charles Odidi Okidi* (2019); Michel Prieur, "Legal indicators of effectiveness of Environmental Law" (Seminar, Faculty of Law, University of Waikato, 13 March 2019).

[54] WPL Block 2 Legal Submissions, Appendix 2.

[55] Section 32 Report, 131-140.

> Rivers' sub-catchments, which enables the people and communities to continue to provide for their social, economic and cultural wellbeing.

90 Objective 3 addresses the short-term improvements in water quality required in the first stage of restoration and protection of water quality for each sub-catchment and FMU (2016-2026). Mr McKay recommends that Objective 3 should be amended as noted below under Topic C1.2.

91 Objective 4 addresses people and community resilience. Mr McKay recommended that Objective 4 should be amended as follows:

> A staged approach to change will be provided via policies, methods, and rules that enables people and communities to undertake adaptive management to continue to provide for their social, economic and cultural wellbeing while:
>
> (a) The Short Term and 80-year water quality objectives from Table 3.11-1 are met by maintaining or improving freshwater quality within the Waikato and Waipa River catchments and their sub-catchments; and
>
> (b) Recognising that further contaminant reductions will be required within in some sub-catchments by subsequent regional plans and signalling anticipated future management approaches that will be needed to meet Objective 1.

92 Objectives 2, 3, and 4 are implemented by Policy 5, Policy 7, and Policy 17.

93 Policy 5, Policy 7, and Policy 17 are (in turn) implemented by Method 3.11.4.7, Method 3.11.4.8, Method 3.11.4.10, Method 3.11.4.11, and Method 3.11.4.12.

94 The analysis and recommendations regarding the submissions on the PC1 provisions relevant to the key policy theme of staging the transition to the 80-year goal are discussed in the Block 2 Section 42A Report under Topic C1.6.

Topic C1.6 Other relevant policies and schedules

95 This topic in the Block 2 Section 42A Report addresses Policy 4, Policy 5, Policy 8, Schedule A, and selected Definitions.

96 Policy 4, Policy 8, and Schedule A form part of the suite of nineteen provisions discussed under Topic C1.2 in Part C of these Block 2 legal submissions below in relation to making reductions in diffuse discharges.

Policy 5

97 WPL made submissions on Policy 5 that provides for a staged approach to implementing PC1 during the periods 2016-2026 and 2026-2096.[56] WPL supported and opposed the provision in relevant part.

98 WPL requested that Policy 5 should be amended to provide for an adaptive management approach to risk assessment, and to provide for sub-catchment resource consents.

99 WPL also made a submission on Var1 regarding Policy 5 and emphasised that:

> … the whole thrust of the WPL PC1 submission is to enable land owners to start on the journey of achieving the anticipated environmental outcomes (sought by PC1 and the Variation during the plan period and beyond) as soon as possible rather than being delayed by artificial regulatory dates, and to enable them do so at whatever scale may be practicable from a land owner perspective – e.g. property, enterprise, or sub-catchment scale. Enabling voluntary action early should be encouraged and facilitated, while regulatory dates remain important from an enforcement and implementation perspective by setting minimum expectations for compliance.[57]

100 WPL also made further submissions regarding Policy 5 opposing and supporting the decisions requested by other submitters.[58]

WPL evidence

101 Mr McKay concludes in his Block 2 evidence that Policy 5 will not implement Objective 2 unless the policy is amended to provide a better connection between cultural, economic, and social wellbeing on the one hand, and securing restoration and protection of water quality in the Waikato River catchment and sub-catchments on the other hand.[59]

102 He therefore recommends that Policy 5 should be amended to provide express guidance regarding timely stock exclusion from water bodies and implementation of FEPs, the protection of vulnerable land from inappropriate use and development, the

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[56] PC1-11345; V1PC1-659.

[57] WPL submission on Var1, Appendix E para 43.

[58] Department of Conservation ID 71759 – PC1-10661; The Royal Forest and Bird Protection Society of New Zealand Inc ID 74122 – PC1-8257.

[59] Mr McKay, Block 2 EIC para 58.

requirement to meet the freshwater objectives in Table 3.11-1. Additionally, Mr McKay recommends that Policy 5 should provide for low-intensity farming activities as permitted activities, and provide for consenting at various scales (property, enterprise, sub-catchment, and industry/sector schemes).[60]

103 These amendments should enable people and communities to provide for their wellbeing while meeting the PC1 freshwater objectives. Put simply, he considers that Policy 5 should provide a foundation for the long-term (2026-2096) objective via the action taken by landowners now under PC1.[61]

Block 3

104 Policy 7 regarding preparing for allocation in the future, and Policy 17 that considers the wider context of the Vision and Strategy are not addressed by the Block 2 Section 42A Report and are left for consideration in Block 3.

105 Additionally, Method 3.11.4.7, Method 3.11.4.8, Method 3.11.4.10, Method 3.11.4.11, and Method 3.11.4.12 are not addressed by the Block 2 Section 42A Report and are also left for consideration in Block 3.

PART C: MAKING REDUCTIONS IN DIFFUSE DISCHARGES VIA CATCHMENT WIDE RULES AND THE NRP

106 Part E.3 of the Section 32 Report evaluated the suite of PC1 provisions designed to achieve making reductions in diffuse discharges via catchment wide rules and the NRP.[62]

107 The relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. These objectives were considered in Block 1. WPL considers that they are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

108 Objective 1 addresses the restoration and protection of water quality for each sub-catchment and FMU during the long-term (2026-2096). Mr McKay recommended that Objective 1 should be amended as follows:

> The 80-year freshwater objectives from Table 3.11-1 are met by the restoration and protection of ~~maintaining or improving~~

[60] Mr McKay, Block 2 EIC Appendix 1.

[61] Mr McKay, Block 2 EIC paras 60, 61, 63, 65.

[62] Section 32 Report, 141-183.

> freshwater quality within the Waikato and Waipa River catchments and their sub-catchments by 2096.

109 Objective 3 addresses the improvements in water quality required during the short-term (2016-2026) for restoration and protection of water quality for each sub-catchment and FMU. Mr McKay recommended that Objective 3 should be amended as follows:

> The Short-Term freshwater objectives from Table 3.11-1 are met by the restoration and protection of freshwater quality within the Waikato and Waipa River catchments and their sub-catchments by 2026.

110 These objectives are implemented by:

110.1 Policy 1, Policy 2, Policy 3, Policy 4, and Policy 8.

110.2 Rule 3.11.5.1, Rule 3.11.5.2, Rule 3.11.5.3, Rule 3.11.5.4, Rule 3.11.5.5, and Rule 3.11.5.6.

110.3 Schedule A, Schedule B, Schedule C, Schedule 1, and Schedule 2.

110.4 Method 3.11.4.1, Method 3.11.4.2, and Method 3.11.4.3.

111 Objectives 1 and 3 are therefore intended to be implemented by an integrated suite of 19 provisions in PC1. In particular, these provisions will implement Objective 3 during the short-term (2016-2026).

Failure to provide a holistic evaluation

112 However, notwithstanding the emphasis placed on this integrated suite of 19 provisions in making reductions during the short-term by the Section 32 Report, it is for note that some of these provisions are not addressed in the Block 2 Section 42A Report, namely: Policy 3; Rule 3.11.5.5; Schedule 1; and Method 3.11.4.1, Method 3.11.4.2, and Method 3.11.4.3. These provisions are left for consideration in Block 3.

113 While Policy 4, and Policy 8, and Schedule A are addressed in the Block 2 Section 42A Report, they are considered separately from Policy 1 and the overall rule framework. Similarly, although Policy 2 is addressed in the Block 2 Section 42A Report, it is not considered in conjunction with Schedule 1 (FEPs) despite the obvious connection between Policy 2 and Schedule 1. Instead, Schedule 1 (as noted above) is left for consideration in Block 3.

114 As a result, the Block 2 Hearings will not provide an opportunity for a holistic evaluation of the suite of 19 notified provisions that were

considered to be appropriate under s 32 of the RMA to implement (in particular) Objective 3 in PC1 "with regard to making reductions in diffuse discharges" during the short-term (2016-2026).[63]

115 Significantly, the Block 2 Section 42A Report observes that:

> Plan Change 1 includes two policies (Policies 1 and 2) that provide specific direction on the management of diffuse discharges of N, P, sediment and microbial contaminants. PC1 includes a set of rules and schedules to manage farming activities, which will mean that most farming activities need to complete a FEP, implement a range of mitigations and a significant proportion will need to obtain a resource consent. This is to be achieved over the next several years, so that FEPs and resource consents are *in place* by 2026.[64] (Emphasis added)

116 This analysis emphasises the relative importance of Policy 1 and the Policy 2, the overall PC1 rule framework, and Schedule 1 in achieving Objective 3 by 2026.

117 It is however for note that the Block 1 Section 42A Report stated in relation to Objective 3 that:

> Actions put *in place and implemented* by 2026 to reduce diffuse and point source discharges of nitrogen, phosphorus, sediment and microbial pathogens, are sufficient to achieve the short-term water quality attribute states in Table 3.11-1.[65] (Emphasis added)

118 The critical difference between the analysis of the Objective 3 anticipated environmental outcome in the Block 2 Section 42A Report and the recommended text for Objective 3 is that the latest analysis merely contemplates that actions are in "place" by 2026, whereas the recommended text for Objective 3 requires that actions should be *both* in "place" and "implemented" by 2026. The analysis in the Block 2 Section 42A Report therefore casts real doubt about whether Objective 3 will actually be achieved. Put simply, this exposes an implementation gap in the PC1 framework. WPL will address this critical issue further in the context of Rule 3.11.5.4 below.

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63 Section 32 Report, 141.

64 Block 2 Section 42A Report, 39 para 208.

65 Block 2 Section 42A Report, 69 para 400.

Block 2 Section 42A Report

119 The analysis and recommendations regarding the submissions on the PC1 provisions relevant to the key policy theme of making reductions in diffuse discharges are discussed in the Block 2 Section 42A Report under the following Topics:

TOPIC C1. DIFFUSE DISCHARGE MANAGEMENT

120 Topic C1 in the Block 2 Section 42A Report addresses diffuse discharge management.

Four contaminants

121 PC1 manages the diffuse discharge of four contaminants (nitrogen (**N**), phosphorus (**P**), sediment, and microbial pathogens) from farming activities in order to restore and protect the health and wellbeing of the Waikato River and give effect to the NPS-FM and the Vision and Strategy.

122 Dr Neale notes in his Block 2 evidence that multiple "lines of evidence" demonstrate that algal growth in the Waikato River is driven more by P than N, and that the PC1 focus on N "may produce little change in any of the other contaminants discharged to the river".[66] He recommends that a more balanced approach should be taken to managing all four contaminants. Dr Neale emphasises the importance of Table 3.11-1 as the "cornerstone" that sets the "short-term and long-term freshwater objectives for the Waikato and Waipa Rivers and their tributaries" but notes the table is "not currently fit for purpose" unless amended to address the concerns and issues raised by a number of expert witnesses (including Dr Neale).[67]

123 Mr Williamson also summarises key points from his Block 1 evidence in his Block 2 evidence:

123.1 There will be no long-term N load to come manifesting over several decades because redox chemistry reactions in groundwater will result in N depletion and denitrification.[68]

123.2 N concentration increases will occur in the short-term (5-15 years) as a result of quicker flow processes to both surface water and groundwater.[69]

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[66] Dr Neale, Block 2 EIC paras 5-6.

[67] Dr Neale, Block 2 EIC paras 7-9; Dr Neale, Block 1 Rebuttal paras 5, 6, and 8.

[68] Mr Williamson, Block 1 EIC paras 17 and 19; Mr Williamson, Block 2 EIC para1.1.

123.3 The short-term period (2016-2026) is therefore most critical in terms of meeting the freshwater objectives in Table 3.11-1 and Objectives 1 and 3.[70]

123.4 PC1 adopts a blanket approach to the landscape and does not therefore take account of spatial variability and assimilative capacity (i.e. attenuation) across sub-catchments. This should be considered when deciding land use consent applications.[71]

124 These matters are addressed further (below) in relation to the priority dates in Rule 3.11.5.4 and the matters of discretion in Rule 3.11.5.6.

125 Mr Conland also emphasises the importance of Table 3.11-1 in his Block 2 evidence. He states:

> The role of Table 3.11-1 in providing both numeric freshwater objectives … and a temporal and spatial direction for achieving the Vision and Strategy is key to the successful implementation of PC1.[72]

126 As notified, Table 3.11-1 does not include any express limits or targets. Currently, the 75th percentile N leaching value mechanism (effectively) operates as a limit on resource use under the NPS-FM definition but as noted by Mr Conland in his Block 2 evidence this mechanism is not effects based.[73] Accordingly, Dr Neale and Mr Conland proposed in their Block 1 evidence that Table 3.11-1 should be amended to include loads for TN and TP.[74] In the context of the NPS-FM the proposed loads for TN and TP would operate as limits or targets in situations where the relevant freshwater objectives in Table 3.11-1 are "no longer being met".[75] Table 3.11-1 has been referred to expert witness conferencing and (at the time of writing) the joint witness statement has yet to be filed.

127 The science evidence generally emphasises the critical importance of the twin engines that will drive the implementation of PC1: Table 3.11-1 that sets the freshwater objectives to be achieved by 2026,

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69 Mr Williamson, Block 1 EIC para 18; Mr Williamson, Block 2 EIC paras 1.2 and 164.

70 Mr Williamson, Block 2 EIC para 1.3.

71 Mr Williamson, Block 2 EIC paras 1.4 and 1.5.

72 Mr Conland, Block 2 EIC para 6.

73 Mr Conland, Block 2 EIC para 37.

74 Dr Neale, Block 1 EIC para 40 and Appendix 3; Mr Conland, Block 1 Supplementary Evidence paras 44-49.

75 NPS-FM 2014 (as amended 2017), Interpretation.

and Schedule 1 that sets out the requirements for FEPs that will put in place the actions required to achieve the freshwater objectives and give effect to the NPS-FM and the Vision and Strategy.

Topic C1.1 OVERSEER and NRP

128 The use of the OVERSEER model in PC1 is addressed in this section of these Block 2 legal submissions. The related PC1 provisions: NRP (Topic C1.1.12 and Topic C1.1.16), FEPs (Topic C1.3), and the 75th percentile (Topic C1.4) are addressed in subsequent sections of these legal submissions.

129 The Block 2 Section 42A Report concludes that:[76]

> PC1's primary use of the NRP and Overseer model is as a decision support for development of the FEP. PC1 aims to *hold the line* in terms of a farm's nitrogen leaching, other than for properties with a Nitrogen Reference Point greater than the 75th percentile nitrogen leaching value for the FMU in which they reside. Those farms must reduce their nitrogen to losses down below the 75th percentile NRP by July 2026. Overseer is therefore used to test potential changes in the farm system, so that farm management changes that do not increase modelled farm nitrogen leaching (or that decrease nitrogen losses for the high leaching 25 percent of farms), relative to the NRP benchmark, may be adopted and included in the FEP. Farm management changes, that when modelled by Overseer would result in modelled discharges of nitrogen greater than the NRP benchmark, should not be included in the FEP.[77] (Emphasis added)

130 Put simply, OVERSEER is the model currently used by PC1 to calculate the NRP, and the NRP is generally designed to reflect existing use rights and provide a benchmark for continued farming activities during the PC1 period (2016-2026) that will be managed by FEPs.

131 Managing the effects of farming activities via FEPs is conceptually sound. But reliance on the OVERSEER model as the sole decision support tool (**DST**) available to landowners and applicants for land use consent is problematic for the following reasons:

PCE Report

132 The OVERSEER model was recently reviewed by the Parliamentary Commissioner for the Environment (**PCE**) in the report "Overseer and regulatory oversight: Models, uncertainty and

[76] Block 2 Section 42A Report, 39 para 207.

[77] Block 2 Section 42A Report, 39 para 207.

cleaning up our waterways"[78] (**PCE Report**). The findings from the PCE Report should have a critical impact on how OVERSEER is used in PC1.

133 Critically, the PCE Report notes that OVERSEER was designed to improve the efficiency of fertiliser application on land, and that it was not designed for use in a regulatory setting.[79] The model focuses primarily on N loss:

> Vertically, Overseer does not consider the leaching of nitrogen beyond the bottom of the root zone … *This means that the model provides no information about nitrogen transport and transformations between the root zone of a farm and a receiving water body*.[80] (Emphasis added)

134 Generally, the OVERSEER model estimates P loss from the root zone less well, but does not model sediment or microbial pathogens (E.coli).[81]

135 Absent any New Zealand guidance the PCE Report uses the United States Environmental Protection Agency's (**USEPA**) framework for evaluating environmental models, both generally and specifically in relation to the question of whether OVERSEER is currently fit for purpose.[82] The USEPA framework is adopted by Mr McKay in his Block 2 evidence and recommended amendments to PC1 Schedule B.[83]

136 The PCE Report records a number of concerns about whether the OVERSEER model is fit for purpose in a regulatory context. First, limited documentation is currently available regarding the scientific basis for the model, including in particular "the urine patch component of the nitrogen leaching model".[84] This finding reflects the concerns about causation noted by the Board of Inquiry into the Tukituki Catchment Proposal (above). Second, in terms of translating the science into "mathematical relationships" within the model the OVERSEER source code (in particular) is not "publicly available".[85] Third, limited documentation is available regarding the

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78 PCE, *Overseer and regulatory oversight: Models, uncertainty and cleaning up our waterways* (December 2018).

79 PCE Report, 89 and 91.

80 PCE Report, 34.

81 PCE Report, 27 and 44.

82 PCE Report, 67-68.

83 Mr McKay, Block 2 EIC Appendix 1.

84 PCE Report, 71.

85 PCE Report, 71.

assumptions and limitations of the OVERSEER model.[86] Fourth, the OVERSEER model as a whole has not been subject to external independent peer review.[87] Fifth, quality assurance for the OVERSEER model is currently under construction but in the interim the lack of any holistic quality assurance does not "contribute to trust and confidence" in the model.[88] Sixth, issues regarding data availability and quality are highlighted (e.g. "user-defined inputs", "estimates of model parameters", and "model evaluation") that are compounded either by the lack of publicly available information about the model or because they have not yet been undertaken (e.g. model evaluation).[89] Seventh, while comparable test cases have been undertaken to demonstrate that the OVERSEER model software is "working in a reliable and consistent way" they have not been published.[90] Eighth, while sensitivity and uncertainty analysis in terms of how a model approximates to real-world conditions assists in providing confidence about the use of particular models but such analysis has not yet been undertaken or published regarding OVERSEER.[91] Ninth, a full corroboration of the OVERSEER model in terms of calibrating the model results with observations has not yet been carried out. Tenth, while some research has been carried out regarding benchmarking to compare OVERSEER with other models the PCE recommended that further investigation is required to understand the discrepancies between N loss estimates derived from the model results.[92] Eleventh, the spatial and temporal scale of the OVERSEER model is limited to "block and farm scales" that produce "long-term annual outputs".[93] This has a particular impact on the use of the OVERSEER model in relation to riverine environments. For example, the report stated:

> As a result, much of the temporal and some of the spatial variability is averages within Overseer. This means that although input information for a specific year can be added, the rate of nutrient losses represents the long-term trend, not necessarily the rate for the particular year. Setting aside attenuation beyond the root zone, Overseer's long-term nutrient loss predictions are a better fit when the receiving body is also broadly sensitive to long-term impacts (eg. aquifers and lakes). Conversely, *rivers are more sensitive to*

[86] PCE Report, 72.

[87] PCE Report, 73.

[88] PCE Report, 75.

[89] PCE Report, 75-76.

[90] PCE Report, 76.

[91] PCE Report, 77-78.

[92] PCE Report, 79-80.

[93] PCE Report, 80.

> *fluctuations of nutrient inputs at shorter timescales, which Overseer does not predict*.[94] (Emphasis added)

137 Twelfth, the lack of public information about certain aspects of the OVERSEER model noted above has an effect on perceptions about the transparency of the model and its results both from a scientific and community perspective. This has an impact on the overall level of trust and confidence in the model.

138 Recognising the limitations inherent in the OVERSEER model the PCE Report observed that:

> … to understand the environmental impacts of excess nutrients on water quality, regional councils need to couple the farm-level estimates that Overseer generates with additional catchment-scale information.
>
> In particular they need answers to these questions:
>
> - How much of the nutrients leaving a farm actually makes it to a waterbody?
> - What sort of waterbody do the nutrients end up in? How *vulnerable* is it?
> - What other factors affect the impact nutrients have, including contributions from other sources?
>
> All of these factors need to be considered when thinking about how to manage nutrients to improve water quality …[95] (Emphasis added)

139 These factors are addressed by the RDST (below) including (inter alia) MODFLOW in relation to groundwater modelling,[96] and via the amendments recommended to the PC1 provisions (providing for vulnerable land criteria) by the WPL expert witnesses in their Block 2 evidence. The PCE Report concludes that there is a need to "augment" our understanding of these dynamic processes by using other models. It states:

> Access to these models and databases, and future investment in them, should ensure that we give ourselves the

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94 PCE Report, 80.

95 PCE Report, 99.

96 PCE Report, 108; Mr Williamson, Block 2 EIC 59-82.

> best chance of realising the goal of protecting 'the life-supporting capacity of air, water, soil and ecosystems'.[97]

140 Based on the findings and conclusions from the PCE Report it is difficult to understand why CEO approval should still be required under PC1 Schedule B and Schedule 1 for the use of other "models or methods" either in conjunction with OVERSEER or as an alternative approach to answering the critical questions identified by the PCE that OVERSEER currently leaves unanswered.

141 Overall, the PCE Report highlights the issue of N attenuation beyond the root zone. It states:

> Excess nutrients from farms reach waterbodies through a number of pathways. Being highly mobile in water, nitrogen tends to go with the flow – down into groundwater, laterally through soil closer to the surface, or travelling via surface water. Phosphorous, in comparison, is much less mobile and mainly enters waterways with soil and sediment, although losses into groundwater have been noted recently in a few cases.
>
> The speed and form in which nitrogen reaches water bodies varies. Nitrogen changes its chemical form depending on the surrounding conditions and these forms have different fates. Nitrogen may stay in the water as mobile nitrate and be temporarily stored (eg taken up by annual plants that generally grow prolifically in summer and die back in winter and decay). Or microbes may turn it into gaseous forms and permanently remove it from the water by a process called denitrification. Climate, topography, hydrology, soils, and underlying geology all play a role in determining which of these processes occurs.
>
> Collectively, processes that reduce the amount of nitrogen as it travels from the root zone to the waterbody are known as *attenuation*. Depending on the conditions, the amount of attenuation can be trivial or can significantly reduce the amount of nitrogen reaching water bodies …
>
> For example, researchers at Massey University have shown that the rate of nitrogen attenuation varies between 30% to 70% across different sub-catchments in the Tararua Groundwater Management Zone. Clearly depending on where they are situated, the contribution of identical farms to water quality degradation will differ significantly.[98]

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97 PCE Report, 11 and 124 (Recommendation 10).

98 PCE Report, 100.

142 This matter is not addressed by the OVERSEER model but is addressed by the RDST below.

WPL evidence

143 Mr Conland notes in his Block 2 evidence that OVERSEER is useful as an "on farm" methodology for "comparative scenario testing" but is not suitable for comparative analysis across different properties or enterprises or subject land areas managed under sub-catchment or industry/sector consents; that the OVERSEER assumption that GFP is adopted by all landowners is not "well understood" or verifiable; and that the OVERSEER model is limited by its "steady state" characteristics and reliance on long-term climate data to derive annual average N leaching losses.[99]

144 Dr Cresswell in his Block 2 evidence agrees with the OVERSEER critique in the PCE Report and concludes that:

> The use of OVERSEER® as the nutrient transport model is restrictive, due to its fundamental steady-state (static and time-averaged), empirical (data-driven and constrained), deterministic (repetitive and in-flexible) nature which fails to capture spatial and temporal variability and cannot model the consequences of changing practice, nor predict future outcomes, including under changed climate scenarios or changing landuse.[100]

145 Mr Ford in his Block 2 evidence also agrees with the OVERSEER critique in the PCE Report, and notes the acknowledgment in the Block 2 Section 42A Report that OVERSEER "cannot be used to definitively identify how much nitrogen is actually leaching from the farm" and that "an OVERSEER derived NRP should not be a point of compliance, but a tool to ensure that farm changes described in the FEP do not result in increasing nitrogen leaching".[101] He therefore concludes that:

> While there will no doubt be a number of properties that could be adequately served by the use of OVERSEER in the estimation of their alternative options for mitigation (reducing diffuse contaminant discharges) there will likely be many other properties and enterprises who would be better served by an alternative decision support tool that is better able to

[99] Mr Conland, Block 2 EIC paras 33-36.

[100] Dr Cresswell, Block 2 EIC para 9.

[101] Mr Ford, Block 2 EIC paras 37-38; Block 2 Section 42A Report, paras 19 and 21.

> estimate all of the four contaminants and to project their pathway from the farm to the river.[102]

146 Overall, these conclusions demonstrate the need for PC1 to provide for other models and methods to be used for calculating NRPs and preparing FEPs. The role of accredited CFNAs and CFEPs in leading these processes will provide WRC with assurance that appropriate models and methods will be used and that the results derived will be appropriate for assessing the environmental effects of land use consent applications for farming activities under PC1. The PC1 requirements for CEO approval before other models and methods can be used should therefore be deleted.

RDST and scenario modelling

147 Mr Williamson describes the Ruahuwai Decision Support Tool (**RDST**) developed by WPL in his Block 2 evidence. Put simply:

> The RDST is a paddock to stream calculator of hydrological flow and constituent mass, and therefore considers attenuation that occurs between the paddock and the stream. The RDST computations are performed on a daily basis, which permits analysis of effects from both storm events and seasonal responses.[103]

148 In contrast with OVERSEER, the RDST is a dynamic decision support tool (**DST**). The RDST couples three primary models to generate superior data for use when calculating NRPs and preparing FEPs, namely:

148.1 The Agricultural Production Systems Simulator (**APSIM**) to simulate land use and for benchmarking;

148.2 MODFLOW and MT3DMS with the GMS software interface package to simulate groundwater flow, advection (i.e. the transfer of heat or matter by flow), diffuse TN attenuation, and for calibration; and

148.3 SOURCE to simulate all aspects of water resource systems from a range of spatial and temporal scales (e.g. rainfall; water demand; and contaminant generation, retention, transport, and decay), and for calibration.[104]

[102] Mr Ford, Block 2 EIC para 43.

[103] Mr Williamson, Block 2 EIC para 13.

[104] Mr Williamson, Block 2 EIC paras 15, 22, 26, 27, 54, 77, and 139.

149 The model inputs and outputs occur either at the level of 9ha cells or sub-catchment level depending in the particular model requirements.[105]

150 The RDST has been populated with data from the 10 sub-catchments in the Upper Waikato River FMU to demonstrate its capability and effectiveness. As a proprietary DST, the RDST framework could readily be used in the context of any other FMU or sub-catchment when populated with the relevant data pertaining to the subject area. It provides an appropriate and effective alternative to the OVERSEER model. The RDST has been extensively peer reviewed by external independent experts.[106] Additionally, Dr Jordan and Dr Cresswell provide peer review evidence in Block 2.

151 When comparing DSTs or models (e.g. OVERSEER and the RDST) the relative accuracy of the models is important, and it is reasonably clear from the PCE Report that a DST based on a series of coupled models (such as the RDST) will provide a greater level of confidence.[107]

152 Mr Williamson also outlines the nine modelling scenarios generated (based on the 1972-2018 climate data series and data from 11 HWRO monitoring sites) using the RDST.[108]

Scenario modelling

153 Mr Conland describes in his Block 2 evidence how the RDST has been used to generate a series of land use and mitigation scenarios to test the efficiency and effectiveness of the PC1 provisions. The scenarios were run across the 10 Ruahuwai sub-catchments in the Upper Waikato River FMU.

154 DSTs have been used by WRC and WPL (and other submitters) to test the PC1 provisions under s 32 of the RMA. For example, WRC used the HRWO model as the basis for the Section 32 Report as described by Dr Doole in his Block 1 evidence for DairyNZ.[109]

155 In summary, the RDST scenario modelling tested inter alia:

155.1 Scenario 1: the risk of doing nothing (i.e. withdrawing PC1).

[105] Mr Williamson, Block 2 EIC para 16.

[106] Mr Williamson, Block 2 EIC Table 1.

[107] PCE Report, 105-109, Box 7.3.

[108] Mr Williamson, Block 2 EIC paras 149-152.

[109] Mr Conland, Block 2 EIC paras 14-21.

155.2 Scenario 2: putting FEPs in place and implementing them using the WPL protocols for land management and OVERSEER based good farming practice (**GFP**).

155.3 Scenario 3: illustrates the transition from GFP to best farming practice (**BFP**) where significant mitigations are implemented by landowners.

155.4 Scenario 4: the PC1 policy and rule framework based on putting FEPs in place and implementing them using OVERSEER based GFP and requiring reductions in diffuse discharges via the 75th percentile N leaching value mechanism.

155.5 Scenario 5: is based on putting FEPs in place and implementing them using OVERSEER based GFP but where farming activities are restricted by land use capability (**LUC**) limits on productivity (similar to the approaches used by Dr Doole in his HRWO reports and proposed by the Beef+Lamb submissions).

155.6 Scenario 6: is based on WPL submissions and evidence where FEPs are put in place and implemented (transitioning from GFP to BFP) and where farming on vulnerable land (as defined by Mr Conland)[110] is appropriately mitigated.

156 The comparative results of the scenarios are illustrated in Mr Conland's Figure 3.[111] This demonstrates that Scenario 6 would deliver an improved environmental outcome in terms of water quality (based on the TN annual average) during the short-term (2016-2026) under the PC1 amendments recommended by WPL, compared with Scenario 4 representing the notified PC1 provisions. Scenario 6 is therefore the preferred environmental outcome and would (if the WPL amendments are accepted) achieve Objective 3 and give effect to the Vision and Strategy.

157 While the LUC approach illustrated by Scenario 5 could provide a superior environmental outcome Mr Conland concludes that such benefits would only be likely to occur where sub-catchment scale resource consenting is utilised,[112] whereas the benefits under Scenario 6 should generally result regardless of the scale of the consented land area (above 20ha).

158 Mr Conland found that the difference between the predicted environmental outcomes under Scenarios 2, 3, and 4 was

[110] Mr Conland, Block 2 EIC para 78.

[111] Mr Conland, Block 2 EIC p21.

[112] Mr Conland, Block 2 EIC para 94.

"negligible" because they implement substantially similar mitigation actions.[113]

159 Dr Neale considered the RDST scenario modelling in terms of "how such as model can be used to inform and improve management of the catchment" and "to underpin adaptive management".[114] He assessed Scenarios 4 and 6 that focused on data for the three monitoring sites closest to the Wairakei Estate in terms of their environmental effectiveness, and found that (with the exception of TN at Ohakuri):

> It is noteworthy that for the majority of parameters at these sites the notified PC1 freshwater objectives are the same as the current state of water quality (PC1 Table 3.11-1). Therefore, to meet the freshwater objectives in PC1 at these locations generally requires the protection or maintenance of existing water quality.[115]

160 Dr Neale found that the numeric values for Scenario 6 (the WPL rule framework) are "consistently lower" than the numeric values for scenario 4 (the PC1 rule framework), while they are both within the same NPS-FM band. He therefore concludes that:

> The better water quality outcomes from Scenario 6 is a key finding as it indicates that freshwater outcomes can be achieved under an alterative management framework. In this case, one that provides for some land use flexibility, whilst meeting (or exceeding in some cases) the water quality outcomes predicted to eventuate from a more restrictive management framework (i.e. PC1 provisions) …[116]

161 To address any uncertainty in the modelling Dr Neale recommends that "an Adaptive Management approach" should be adopted because it represents "the most appropriate way to manage the effects of land use".[117] This reflects the precautionary approach in the Vision and Strategy.[118]

162 Mr Ford considered the RDST scenario modelling from an economic efficiency perspective. He concludes that Scenario 6, "the Vulnerable Land FEP and mitigations scenario is the most attractive

[113] Mr Conland, Block 2 EIC para 74.

[114] Dr Neale, Block 2 EIC para 27.

[115] Dr Neale, Block 2 EIC para 34.

[116] Dr Neale, Block 2 EIC para 37.

[117] Dr Neale, Block 2 EIC para 39.

[118] Vision and Strategy, WRPS, Objectives for the Waikato River 2.5.2(f).

option from both a financial and economic perspective".[119] He states:

> When considering this result in a Section 32 framework it is the most effective and efficient because it achieves a significant level of progress towards meeting the freshwater objectives in Table 3.11-1 while still achieving the highest returns in terms of Gross Revenue and Net Cash Position and in the flow-on metrics for Gross Output, Value Added and Employment of the scenarios modelled. This means that it will have the greatest impact on community wellbeing because it will create the greatest amount of economic growth and employment in the Waikato Region.[120]

163 These conclusions are illustrated comparatively in Figure 2 regarding the results of financial modelling of the RDST scenarios, and Table 4 regarding the results of the flow on impact of the RDST scenarios in Appendix 1 of Mr Ford's Block 2 evidence. The flow on effects reported in Table 4 take account of whether PC1 (as notified) and the WPL recommended amendments would be likely to increase or reduce economic growth and employment opportunities. This work is based on Insight Economics report which found that:

- Once fully operational, and including flow-on effects, the daily operations of the estate will boost regional GDP by $134 million per annum, regional employment by 354 full-time equivalents, and regional incomes by $24 million per annum.

- The corresponding national impacts will be GDP of $90 million, fulltime employment for 776 people, and household incomes of $41 million.[121]

164 Generally, in relation to the relevance of economics when making decisions about PC1, Mr Ford notes that:

> In my view, the Vision and Strategy provides for a complete consideration (in terms of sustainable management) that includes economics and other considerations (environmental, cultural, etc).[122]

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[119] Mr Ford, Block 2 EIC para 6.

[120] Mr Ford, Block 2 EIC para 7.

[121] Insight Economics, *Wairakei Estate Financial and Economic Impact Assessment* (2014), 1; Mr Ford, Block 2 EIC Appendix 2.

[122] Mr Ford, Block 2 EIC para 28.

165 Mr Ford's financial analysis (Appendix 1) demonstrates that Scenario 6 is the most efficient and effective option for achieving the PC1 objectives and giving effect to sustainable management as reflected in the Vision and Strategy.

Topic C1.1.12 Schedule B

166 Schedule B forms part of the suite of 19 provisions designed to achieve making reductions in diffuse discharges. These provisions are considered holistically under Topic C1.2 below.

167 WPL made submissions on Schedule B that provides the methodology for calculating a NRP for properties and enterprises.[123] WPL supported and opposed the provision in relevant part.

168 The calculation is derived using the OVERSEER model but Schedule B as notified provides that other models approved by the Chief Executive (**CEO**) of WRC may be used. However, no criteria are included to guide such decision-making.

169 Essentially, the CEO is given unfettered discretion that could only be challenged outside of the RMA by judicial review.

170 WPL therefore requested that Schedule B should be amended to provide for other models to be used without requiring approval by the WRC CEO, and that the NRP reference period should be amended to take account of any currently planned (as at 22 October 2016) or consented future land use.

171 WPL also made a submission on Var1 that requested that the dates when a NRP should be provided to WRC under Schedule B should be amended to be consistent with the priority dates in Rule 3.11.5.4 (as amended by the WPL submission).

172 WPL also made further submissions regarding Schedule B opposing and supporting the decisions requested by other submitters.[124]

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[123] PC1-11384; V1PC1-688.

[124] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-11211; Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6227, V1PC1-466, V1PC1-471; Auckland / Waikato Fish and Game Council ID 74085 – PC1-11021, V1PC1-376, V1PC1-1539; Ballance Agri-Nutrients Ltd ID 74036 – PC1-6570; Beef + Lamb New Zealand Ltd ID 73369 – PC1-11506, V1PC1-1665, V1PC1-1723; CNI Iwi Land Management Ltd ID 74026 – PC1-10804; DairyNZ ID 74050 – PC1-10254, V1PC1-714; Department of Conservation ID 71759 – PC1-11065, V1PC1-423; Farmers 4 Positive Change (F4PC) ID 73355 – PC1-10428; FarmRight ID 73720 – PC1-5416; Federated Farmers of New Zealand ID 74191 – PC1-10850, V1PC1-717; Fertiliser Association of

WPL evidence

173 Mr Conland notes in his Block 2 evidence that Schedule B as notified is unlikely to provide any assistance with determining environmental effects because the NRP calculation is based on the OVERSEER model, and he concludes that Schedule B should be simplified to focus on assessing changes in land use intensity using an appropriate benchmark.[125]

174 Additionally, Mr McKay concludes in his Block 2 evidence that Schedule B will not (unless amended) implement the relevant PC1 objectives and policies. He recommends that Schedule B should be amended to include criteria that will enable appropriately qualified experts including Certified Farm Environment Planners (**CFEPs**) and Certified Farm Nutrient Advisors (**CFNAs**) to select any appropriate DSTs or models for calculating NRPs (and preparing FEPs), and that the reference period should be amended so that existing use rights as at 22 October 2016 are not excluded from the NRP calculation.[126]

175 For example, s 20A(1) of the RMA is a savings provision and preserves existing use rights regarding the activities lawfully carried out on properties and enterprises on 22 October 2016. Existing use rights will therefore subsist until 6 months after PC1 is made operative (unless abandoned earlier or discontinued).

176 To ensure that any DSTs or models used to calculate NRPs are fit for purpose Mr McKay also recommends that they should be

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New Zealand ID 73305 – PC1-10642; Fonterra Co-operative Group Ltd ID 74057 – PC1-10517, V1PC1-1369; Fonterra Shareholders Council ID 72610 – PC1-10645; Genetic Technologies Ltd ID 73953 PC1-3219; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5786; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10190, V1PC1-1601; Matamata-Piako District Council ID 73419 – PC1-3678; Miraka Ltd ID 73492 – PC1-8896; Ngati Haua Tribal Trust ID 73025 – PC1-1975; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8743, V1PC1-1141; Pamu Farms of New Zealand ID 74000 – PC1-5849; Perrin Ag Consultants Ltd ID 73859 – PC1-3379; Primary Land Owners Group ID 71427 – PC1-11180; Ravensdown Ltd ID 74058 – PC1-10165, V1PC1-284, V1PC1-1347; Rotorua Lakes Council ID 73373 – PC1-2533; Save Lake Karapiro Inc ID 72459 – PC1-5717; South Waikato District Council ID 72892 – PC1-4161, V1PC1-389; Taupo District Council ID 74207 – PC1-8169; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-8132, V1PC1-989, V1PC1-1476; Waikato Dairy Leaders Group ID 74049 – PC1-11269; Waikato Regional Council (WRC) ID 72890 – PC1-3553, V1PC1-195, V1PC1-218, V1PC1-222, V1PC1-229, V1PC1-1494; Wairarapa Moana Inc ID 72480 – PC1-2146; Waitomo District Council ID 73688 – PC1-10341.

[125] Mr Conland, Block 2 EIC paras 37 and 40.

[126] RMA, s 20A(1) and s 85.

audited (before use) by a suitably qualified and experienced person.[127]

177 From a legal perspective, the unfettered discretion given to the WRC CEO is not appropriate or practicable (and is likely unlawful)[128] because it is difficult to predict whether any other DSTs or models could be used, and it is not consistent with general resource management practice where DSTs or models used to assess environmental effects under sch 4 of the RMA are normally selected by the applicant based on advice from an appropriately qualified and experienced resource management consultant (e.g. CFEPs and CFNAs).[129] Regulations do not usually dictate that only one particular DST or model should be used in all cases. It is also for note that an accreditation system for CFEPs and CNFAs to assist landowners to prepare their FEPs and NRPs is a key aspect of the PC1 framework, and that it will be entirely appropriate to rely on the skill and judgment of these, or other consultant experts, in selecting the appropriate DSTs or models to use in any particular circumstances. Failing to do so would not take advantage of new emerging methodologies, and would not be consistent with promoting "best practice methods for restoring and protecting the health and wellbeing of the Waikato River" in accordance with the Vision and Strategy.[130]

178 WPL therefore requests that Schedule B should be amended by deleting all references to CEO approval for the use of DSTs or models, to expressly provide that any DSTs or models (selected in accordance with PCE based criteria) can be used to calculate the NRP, by substituting the reference period with the financial year 2016/2017 or with a specific reference date (22 October 2016), and by focusing the assessment on changes in land use intensity.[131] Subject to these amendments the recommendations in the Block 2 Section 42A Report regarding Schedule B are generally acceptable. OVERSEER may still be used where landowners prefer to use that model.

NRP Development Guidelines

179 WPL understands that WRC now intends to introduce guidelines regarding NRP development into PC1 by reference. There may be some issues with this approach:

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[127] Mr McKay, Block 2 EIC paras 36-37.

[128] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030 and 1060; *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [53].

[129] Mr Conland, Block 2 EIC paras 25-29.

[130] Vision and Strategy, WRPS 2.5.3(i) Strategies for the Waikato River.

[131] Mr McKay, Block 2 EIC Appendix 1.

179.1 The Nitrogen Reference Point Development Guidelines are a 30 page document dated November 2018.

179.2 WPL understands that the guidelines were tabled by WRC on 20 May 2019 (Day 18 of the Hearing).

179.3 It is unclear why the guidelines were not produced much earlier by WRC, either before the start of the Hearing or via the formal circulation of evidence so that submitters or their experts could respond appropriately.

179.4 If the guidelines are intended to be incorporated into PC1 by reference it would appear that the process under pt 3 of sch 1 to the RMA may not have been followed.

179.5 There may therefore be questions of jurisdiction and natural justice that may need to be resolved.

180 WPL will address this matter further in Block 3 unless directed to file supplementary legal submissions and expert evidence earlier.

Topic C1.1.16 Nitrogen Reference Point

181 WPL made further submissions regarding the definition of "Nitrogen Reference Point" in the Glossary of Terms opposing and supporting the decisions requested by other submitters.[132] The definition should be amended to align with the WPL submission on Schedule B and should provide for any DSTs or models to be used.

Topic C1.2 Policy 1 and the overall rule framework

182 This topic considers the majority of the Block 2 provisions designed to achieve regarding making reductions in diffuse discharges via catchment wide rules and the NRP. Some general observations will be made about the s 32 evaluation and the relevant PC1 objectives before considering the specific Block 2 provisions.

[132] Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6284; Federated Farmers of New Zealand ID 74191 – V1PC1-804; Fonterra Co-operative Group Ltd ID 74057 – PC1-10580, V1PC1-1373; Fonterra Co-operative Group Ltd ID 74057 – PC1-10580, V1PC1-1373; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10234, V1PC1-1645; Miraka Ltd ID 73492- PC1-8905; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8941, V1PC1-1156; Pamu Farms of New Zealand ID 74000 – PC1-5932; Ravensdown Ltd ID 74058 – PC1-10202; Waikato Regional Council (WRC) ID 72890 – PC1-3673, V1PC1-1532.

WPL evidence

183 Generally, Dr Neale concludes in his Block 2 evidence that the overall rule framework is unlikely to implement Objective 1 from an ecological perspective. He states:

> … meeting Objective 1 requires more comprehensive management of P and sediment at a catchment scale, including explicit management of TP at all sites …[133]

184 As a result, Policy 1 and the overall rule framework will need to be amended to provide more express direction for the risk assessment in Schedule 1 in relation to all four contaminants.

185 Dr Neale also considers that Objective 3 (2016-2026) is unlikely to be achieved unless more generous riparian setbacks are required under Schedule 1, existing vegetation is left in situ and riparian planting is timetabled over the medium-term to avoid sediment release, and stock are excluded immediately.[134] Stock exclusion is addressed below in relation to Rule 3.11.5.4 and Schedule C, while the other Schedule 1 matters are left for consideration in Block 3.

Policy 1

186 WPL made a submission on Policy 1 that requires reductions in "sub-catchment-wide" diffuse discharges of N, P, sediment and microbial pathogens.[135] WPL supported and opposed the provision in relevant part.

187 WPL requested that Policy 1 should be amended to clarify that water quality should be protected or maintained in sub-catchments where high water quality already exists and the freshwater objectives in Table 3.11-1 are met. WPL also requested that Policy 1 should be amended to provide for sub-catchment resource consent applications to be made.

188 WPL also made further submissions regarding Policy 1 opposing and supporting the decisions requested by other submitters.[136]

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[133] Dr Neale, Block 2 EIC para 21.

[134] Dr Neale, Block 2 EIC para 24.

[135] PC1-11272.

[136] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-9536; Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6120; Auckland / Waikato Fish and Game Council ID 74085 – PC1-12569, PC1-10875, V1PC1-1561, V1PC1-1590; Ballance Agri-Nutrients Ltd ID 74036 – PC16704; Beef + Lamb New Zealand Ltd ID 73369 – PC1-11485, PC1-12575, PC1-12576, PC1-12577, V1PC1-1661, V1PC1-1667, V1PC1-1668, V1PC1-1669; CNI Iwi Land Management Ltd ID 74026 – PC1-10776; DairyNZ ID 74050 – PC1-

WPL evidence

189 Based on the WPL Block 2 evidence Mr McKay recommends that Policy 1 should be amended so as to implement Objectives 1 and 3 by providing for FEPs to be put in place by 2022 so that implementation can start within the PC1 planning period, to exclude stock from water bodies by 2022, to provide greater direction for low risk permitted activities, and to provide direction on the responses required where the freshwater objectives in Table 3.11-1 are not met for the sub-catchment.[137]

Policy 2

190 WPL made submissions on Policy 2 that provides for a tailored approach to reducing diffuse discharges from farming activities and is addressed under Topic C1.3 below.

Policy 4

191 WPL made a submission on Policy 4 that enables activities with lower discharges to continue or to be established while signalling further changes may be required in future.[138] WPL supported and opposed the provision in relevant part.

192 WPL requested that Policy 4 should be amended to provide for sub-catchment resource consent applications to be made.

12592, PC1-10196; Department of Conservation ID 71759 – PC1-10643; FarmRight ID 73720 – PC1-5384; Federated Farmers of New Zealand ID 74191 – PC1-10815, V1PC1-162; Fertiliser Association of New Zealand ID 73305 – PC1-9707; Fonterra Co-operative Group Ltd ID 74057 – PC1-10469, V1PC1-1364; Genesis Energy Ltd ID 74052 – PC1-8736; Genetic Technologies Ltd ID 73953 – PC1-3231; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5378; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10050, V1PC1-1629; Matamata-Piako District Council ID 73419 – PC1-3482; Mercury NZ Ltd ID 73182 – PC1-9516, V1PC1-1102; Miraka Ltd ID 73492 – PC1-8810; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-6395, V1PC1-1182; Primary Land Owners Group ID 71427 – PC1-12643, PC1-11143; Ravensdown Ltd ID 74058 – PC1-10101; Save Lake Karapiro Inc ID 72459 – PC1-5609; South Waikato District Council ID 72892 – PC1-4036; Taupo District Council ID 74207 – PC1-8108; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-7804, V1PC1-1431; Waikato Regional Council (WRC) ID 72890 – PC1-2996, V1PC1-1484; Wairarapa Moana Inc ID 72480 – PC1-2084.

[137] Mr McKay, Block 2 EIC para 79 and Appendix 1.

[138] PC1-11344.

193 WPL also made further submissions regarding Policy 4 opposing and supporting the decisions requested by other submitters.[139]

WPL evidence

194 Mr McKay recommends in his Block 2 evidence that (in order to implement Objectives 1 and 3) Policy 4 should be amended to provide an adaptive management approach to land use consenting for farming activities under PC1.[140] He also considers that provision should be made for land use consents at sub-catchment scale.

Policy 8

195 WPL made submissions on Policy 8 that provides for the prioritised implementation of PC1.[141] WPL supported and opposed the provision in relevant part.

196 WPL requested that Policy 8 should be amended to provide for sub-catchment resource consent applications to be made.

197 WPL also made a submission on Var1 supporting the reinsertion of the reference to the Whangamarino Wetland.

198 WPL also made further submissions regarding Policy 8 opposing and supporting the decisions requested by other submitters.[142]

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[139] Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6126; Auckland / Waikato Fish and Game Council ID 74085 – PC1-10874, V1PC1-1564; Beef + Lamb New Zealand Ltd ID 73369 – PC1-11488, V1PC1-1672; CNI Iwi Land Management Ltd ID 74026 – PC1-10779; Department of Conservation ID 71759 – PC1-10655; FarmRight ID 73720 – PC1-5388; Federated Farmers of New Zealand ID 74191 – PC1-10820, V1PC1-188; Fertiliser Association of New Zealand ID 73305 – PC1-9784; Fonterra Co-operative Group Ltd ID 74057 – PC1-10471, V1PC1-; Genetic Technologies Ltd ID 73953 – PC1-3240; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5608; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10055, V1PC1-1631; Matamata-Piako District Council ID 73419 – PC1-3489; Miraka Ltd ID 73492 – PC1-8816; New Zealand Forest Owners Association Inc ID 73524 - PC1-9956; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-6401, V1PC1-1172; Primary Land Owners Group ID 71427 – PC1-11147; Ravensdown Ltd ID 74058 – PC1-10105; South Waikato District Council ID 72892 – PC1-4040; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-7818, V1PC1-1434; Waikato Regional Council (WRC) ID 72890 – PC1-3002, V1PC1-1486; Wairarapa Moana Inc ID 72480 – PC1-2102.

[140] Mr McKay, Block 2 EIC paras 98-99 and Appendix 1.

[141] PC1-11348; V1PC1-662.

[142] Department of Conservation ID 71759 – PC1-10670.

WPL evidence

199 In order to implement Objectives 1 and 3 Mr McKay recommends in his Block 2 evidence that Rule 3.11.5.4 should be amended to provide for FEPs to be put in place by 2022 to implement Policy 8, to provide vulnerable land criteria in relation to land use consenting, and to exclude stock from water bodies by 2022.[143]

200 The 75th percentile N leaching value is addressed under Topic C1.4 below.

Rule 3.11.5.1A

201 The Block 2 Section 42A Report recommends that a new proposed Rule 3.11.5.1A should be included in PC1 that provides for interim permitted farming activities. WPL agrees that including this new rule is appropriate to provide for existing farming activities (that do not qualify as existing lawful activities under s 20A of the RMA)[144] to continue until the priority period for obtaining land use consent expires.

202 Put simply, it provides a window for landowners to apply for land use consent for farming activities that will not be permitted under Rule 3.11.5.2. The proposed new rule addresses the requirements of s 9(2) of the RMA.

203 Mr McKay recommends in his Block 2 evidence that the priority dates in proposed new rule Rule 3.11.5.1A should be amended to align with the urgent need to ensure that Objective 3 will be implemented, and that the restrictions on land use change should be deleted.[145] These issues are addressed further in relation to Rule 3.11.5.4 and Rule 3.11.5.7 below.

Rule 3.11.5.1

204 WPL made a submission on Rule 3.11.5.1 that (as notified) provides for small and low intensity farming activities undertaken on a single property that is generally less than or equal to 4.1 hectares in area.[146] WPL supported the provision and requested that it should be retained as notified or amended by similar wording to like effect.

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[143] Mr McKay, Block 2 EIC para 103 and Appendix 1.

[144] As explained in these Block 2 legal submissions below, landowners are free to abandon existing use rights at any time before they expire.

[145] Mr McKay, Block 2 EIC Appendix 1.

[146] PC1-11370.

205 WPL also made further submissions regarding Rule 3.11.5.1 opposing and supporting the decisions requested by other submitters.[147]

WPL evidence

206 The Block 2 Section 42A Report recommends that Rule 3.11.5.1 should be deleted and that the substantive provisions contained in the rule should be included either in Rule 3.11.5.2 or in a proposed new Rule 3.11.5.2A the provides for medium intensity farming. WPL generally agrees with this approach.

207 Mr McKay generally agrees with the Section 42A Report recommendations in his Block 2 evidence, but considers that farming activities above 20ha should more appropriately require controlled activity land use consent.[148]

Rule 3.11.5.2

208 Rule 3.11.5.2 is considered under Topic C2 below (together with proposed new Rule 3.11.5.2A) regarding cultivation, slope and setbacks.

Rule 3.11.5.3

209 Rule 3.11.5.3 is considered under Topic C3 below regarding CIS.

Rule 3.11.5.4

210 WPL made submissions on Rule 3.11.5.4 that (as notified) provides for farming activities with a FEP not under a CIS as controlled activities requiring resource consent.[149] WPL also made a submission on Var1. WPL supported and opposed the provision in relevant part.

211 WPL requested that the priority dates in Rule 3.11.5.4 should be amended to enable resource consent applications for farming activities to be made at any time after 22 October 2016.

212 WPL also made further submissions regarding Rule 3.11.5.4 opposing and supporting the decisions requested by other submitters.[150]

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[147] Federated Farmers of New Zealand ID 74191 – V1PC1-327.

[148] Mr McKay, Block 2 EIC para 118 and Appendix 1.

[149] PC1-11374; V1PC1-678.

[150] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-11208; Auckland / Waikato Fish and Game Council ID 74085 – PC1-10999,

WPL evidence

213 Much ado has been made about the priority dates in Rule 3.11.5.4 and Schedule C for the preparation of FEPs and stock exclusion. However, WPL considers that it would not be appropriate for the parties to the PC1 Hearings to become distracted by mere "static interference" when the message "transmitted" by the Vision and Strategy is clear like "an alarm bell in the night":[151] There is now a pressing and urgent need to implement PC1 in the short-term (2016-2026) if the long-term freshwater objectives for the Waikato River catchment and sub-catchments are to be met with any degree of certainty by 2096.[152]

214 WPL acknowledges that existing farming activities are saved by s 20A(1) of the RMA as at 22 October 2016, and that some landowners may choose to continue business as usual without any mitigation until 6 months after the PC1 farming activity rules become operative. Many, if not most, landowners are however likely to be motivated by a strong ethic of stewardship and the desire to do right by the land and would (if allowed by the PC1 provisions) prefer to make a start on the journey toward the restoration and protection of water quality sooner, rather than later, by applying for land use consent now.

215 For example, existing use rights are based on the presumption against:

V1PC1-366, V1PC1-1578; Beef + Lamb New Zealand Ltd ID 73369 – PC1-11503, V1PC1-1664, V1PC1-1720; CNI Iwi Land Management Ltd ID 74026 – PC1-10800; DairyNZ ID 74050 – PC1-10245, V1PC1-721, V1PC1-722; Department of Conservation ID 71759 – PC1-11057, V1PC1-420; Farmers 4 Positive Change (F4PC) ID 73355 – PC1-10427; FarmRight ID 73720 – PC1-5398; Federated Farmers of New Zealand ID 74191 –V1PC1-468; Fertiliser Association of New Zealand ID 73305 – PC1-10626; Fonterra Co-operative Group Ltd ID 74057 – PC1-10500, V1PC1-788, V1PC1-1725; Genetic Technologies Ltd ID 73953 – PC1-3272; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5774; Matamata-Piako District Council ID 73419 – PC1-3701; Mercury NZ Ltd ID 73182 – PC1-9600, V1PC1-1081; Miraka Ltd ID 73492 – PC1-8892; New Zealand Forest Owners Association Inc ID 73524 – PC1-9961; Ngati Haua Tribal Trust ID 73025 – PC1-1971; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8113, V1PC1-1136; Pamu Farms of New Zealand ID 74000 – PC1-6010; Perrin Ag Consultants Ltd ID 73859 – PC1-3392; Primary Land Owners Group ID 71427 – PC1-11177; Ravensdown Ltd ID 74058 – PC1-10148, V1PC1-280, V1PC1-1345; Save Lake Karapiro Inc ID 72459 – PC1-5711; South Waikato District Council ID 72892 – PC1-4216, V1PC1-386; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 PC1-8080, V1PC1-986, V1PC1-1470; Waikato Dairy Leaders Group ID 74049 – PC1-11028; Waikato Regional Council (WRC) ID 72890 – PC1-3420, V1PC1-190, V1PC1-1516; Wairarapa Moana Inc ID 72480 – PC1-2142; Waitomo District Council ID 73688 – PC1-10332.

[151] Thomas Jefferson, Letter to John Holmes (11 April 1820), US Capitol.

[152] Dr Neale, Block 2 EIC para 41.

> … the retrospective operation of newly introduced planning law and out of regard for the fact that in our form of society, with private ownership of land, the character of a neighbourhood cannot suddenly be changed by the stroke of the planner's zoning pencil.[153]

216 Existing use rights can be abandoned (as a matter of common law) like other property rights or discontinued (under statute), and expire after a limited period. In particular, existing use rights can be abandoned where:

> … the owner intends that the use of the land for the existing purpose use, or the right to use it, be given up *or that he have the intention to do something which is inconsistent with its continuance*.[154] (Emphasis added)

217 For example, applying for land use consent early would signal the intention to be bound by the FEP requirements in PC1 and would be inconsistent with continuing business as usual without mitigation.

218 When considered in context, arguments to delete or extend the priority dates in Rule 3.11.5.4 and Schedule C become unimportant. They should therefore be rejected because the 2016-2026 period will be critical for the success of PC1:

218.1 Rule 3.11.5.4 requires FEPs for land in priority 3 sub-catchments to be approved in 2026. This will not implement Objective 3 and the short-term freshwater objectives in Table 3.11-1 will not be met.

218.2 Quicker flow effects will manifest within the next 5-15 years in sub-catchments where pastoral conversion occurred immediately before 22 October 2016.[155]

218.3 Without mitigation under FEPs water quality in the Waikato River catchment will therefore deteriorate when compared against the 2010-2014 current state baseline.[156]

218.4 To meet the short-term (2026) freshwater objectives in Table 3.11-1 FEPs should ideally have been put in place

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[153] *North Sydney Municipal Council v Boyts Radio and Electrical Pty Ltd* (1989) 16 NSWLR 50 at 57 per Kirby J; Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2008), 58; *Voullaire v Jones* [1997] 4 ELRNZ 75.

[154] *Hudak v Waverley Municipal Council* (1990) 18 NSWLR709 at 713; Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2008), 62.

[155] Mr Williamson, Block 2 EIC para 158.

[156] Mr Williamson, Block 2 EIC para 163.

> approximately 6-12 years previously in order for any implementation (mitigation) effects to be observed by 2026.[157]

219 Mr Williamson therefore considers that FEPs should be put in place as soon as possible.[158] While the remaining time before 2026 is now likely insufficient to achieve the short-term freshwater objectives, doing something would (in the interests of precaution) be better than doing nothing.

220 While Dr Neale notes that mitigation via riparian setbacks and planting may take up to 40 years for the benefit of these actions to eventuate, he also concludes that this should not justify any delay in taking action.[159]

221 From an economic perspective, Mr Ford considers that the priority dates in Rule 3.11.5.4 (as notified) are "inequitable" and that Objective 3 is unlikely to be met.[160]

222 The critical point is that Rule 3.11.5.4 as currently structured precludes landowners from applying for land use consent, because consent is required "from" the priority dates and farming activities will be permitted until such dates occur. Rule 3.11.5.4 therefore creates a barrier that impedes giving effect to Objective 3.

223 Amending the priority dates in Rule 3.11.5.4 to enable landowners to apply for land use consent for farming activities at any time *before* the priority dates occur is likely "the" single most important amendment that should be made to PC1. Absent such amendment the short-term freshwater objectives in Table 3.11-1 will not be achieved and Objective 3 will not be implemented. Absent such amendment the 2030 and 2040 national targets for water quality improvement in the NPS-FM (Appendix 6) will not be met. Absent such amendment the objectives for the Waikato River in the Vision and Strategy will not be given effect to, and the journey toward achieving the restoration and protection of the health and wellbeing of the Waikato River will be significantly delayed. Absent such amendment sustainable management will not be achieved.

224 Rule 3.11.5.4 should therefore be amended as recommended in Mr McKay's Block 2 evidence.[161]

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[157] Mr Williamson, Block 2 EIC para 163.

[158] Mr Williamson, Block 2 EIC para 166.

[159] Dr Neale, Block 2 EIC paras 23 and 44.

[160] Mr Ford, Block 2 EIC paras 53-54.

[161] Mr McKay, Block 2 EIC Appendix 1.

225 In summary, Mr McKay recommends in his Block 2 evidence that land use consent for farming activities should be required:

225.1 By 1 July 2020 for land in Priority 1 sub-catchments; and

225.2 By 1 July 2022 for land in Priority 2 or Priority 3 sub-catchments.[162]

226 WPL notes that the Block 2 Section 42A report recommends that the priority dates should be deleted from Rule 3.11.5.4 and inserted into the proposed new interim permitted activity Rule 3.11.5.1A. While it may be appropriate to refer to the priority dates in proposed new Rule 3.11.5.1A, WPL considers that it would also be appropriate to refer to the priority dates (from an abundance of caution as a belt and braces approach) in the PC1 controlled activity rule pertaining to farming activities.

227 The Block 2 Section 42A Report also recommends that the activity class for Rule 3.11.5.4 should be changed from controlled to restricted discretionary. Mr McKay however considers that controlled activity classification should be retained.[163] Rule 3.11.5.4 also now precludes land use consent from being granted under this provision where land use change of 4.1ha or more has occurred after 22 October 2016. This amendment is opposed by WPL as discussed in relation to Policy 6 and Rule 3.11.5.7 below.

Rule 3.11.5.6

228 WPL made a submission on Rule 3.11.5.6 that (as notified) provides for farming activities as restricted discretionary activities requiring resource consent.[164] WPL supported and opposed the provision in relevant part.

229 WPL requested that Rule 3.11.5.6 should be amended to provide for sub-catchment resource consent applications to be made, to clarify the matters of discretion, and to provide certainty regarding the duration of consent.

230 WPL also made further submissions regarding Rule 3.11.5.6 opposing and supporting the decisions requested by other submitters.[165]

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[162] Mr McKay, Block 2 EIC para 122 and Appendix 1.

[163] Mr McKay, Block 2 EIC Appendix 1.

[164] PC1-11378.

[165] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-9573; Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6198; Auckland / Waikato Fish and Game Council ID 74085 – PC1-11001, V1PC1-1580; Beef +

WPL evidence

231 Mr McKay recommends in his Block 2 evidence that Rule 3.11.5.6 should be replaced by a suite of four restricted discretionary activity rules pertaining to land use consents for farming activities carried on at property, enterprise, sub-catchment, and industry/sector scale.[166] He also recommends that the restrictions on land use change should be deleted. Additionally, Mr Conland outlines 10 "basic steps" (in his Block 2 evidence) that should be followed to ensure that robust FEPs are prepared under Schedule 1 in relation to sub-catchment scale land use consent applications or generally in relation to land use consents at scale.[167] These "steps" will be considered further in the WPL Block 3 evidence.

232 The approach to consenting at scale recommended by Mr McKay is consistent with the design of PC1 as notified:

232.1 Rule 3.11.5.4 and Rule 3.11.5.6 provide for consent to be granted for properties and enterprises.

232.2 Properties are defined as land in single ownership (whether comprised in a single certificate of title or multiple certificates of title for adjacent land).

232.3 Enterprises are defined as land managed by a legal person or entity as a single operating unit, and may include land in single or multiple-ownership and there is no requirement for the land parcels managed by the enterprise to be adjacent or contiguous.

232.4 Method 3.11.4.5 encourages sub-catchment approaches to reducing contaminant discharges by properties and

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Lamb New Zealand Ltd ID 73369 – PC1-11504, V1PC1-1684; CNI Iwi Land Management Ltd ID 74026 – PC1-10801; Department of Conservation ID 71759 – PC1-11058; Farmers 4 Positive Change (F4PC) ID 73355 – PC1-10433; FarmRight ID 73720 – PC1-5402; Federated Farmers of New Zealand ID 74191 – V1PC1-572; Fertiliser Association of New Zealand ID 73305 – PC1-10631; Fonterra Co-operative Group Ltd ID 74057 – PC1-10506, V1PC1-1351; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5781; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10149, V1PC1-902, V1PC1-1640; Ngati Haua Tribal Trust ID 73025 – PC1-13075, PC1-1974; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-13076, V1PC1-1186, PC1-8707, V1PC1-1185; Pamu Farms of New Zealand ID 74000 – PC1-6011; Ravensdown Ltd ID 74058 – PC1-10156; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-8082, V1PC1-1445; Waikato Regional Council (WRC) ID 72890 – PC1-3477, V1PC1-1518, PC1-3480, V1PC1-1519; Wairarapa Moana Inc ID 72480 – PC1-2143; Waitomo District Council ID 73688 – PC1-10334, PC1-13125.

[166] Mr McKay, Block 2 EIC para 135 and Appendix 1.

[167] Mr Conland, Block 2 EIC para 101.

enterprises as an efficient and effective way to implement PC1.

232.5 Rule 3.11.5.3 provides for farming activities under a CIS where appropriate governance arrangements are in place to manage liability under the RMA and ensure compliance with PC1 requirements by CIS members.

233 The common denominators of consenting at scale are therefore:

233.1 Consent will apply to a specific geographical area defined in the application.

233.2 Consent will be held by a legal person or entity recognised under New Zealand law.

233.3 The consent holder will (ultimately) be responsible for ensuring compliance with the consent.

234 In practice, resource consents are held by all kinds of different legal persons and legal entities recognised under New Zealand law (e.g. natural persons, companies, cooperatives, incorporated and unincorporated societies, joint ventures, partnerships, trusts, etc). Liability for consent compliance is determined by a combination of the RMA provisions and the general law pertaining to the specific kind of legal person or legal entity that holds the particular consent. How legal entities enforce liability in terms of their members is generally an internal matter. There is however nothing new or novel about consenting at scale either as proposed by PC1 or as recommended by WPL.

235 Similarly, there is nothing new or novel about consents applying "globally" across a larger geographical area (e.g. a milk supply area). Irrigation schemes and water user groups typically operate across a wide area (e.g. Central Plains Water Trust). The key issues for WRC will be knowing which properties or enterprises are at any time operating under a CIS consent,[168] requiring landowners entering into CIS arrangements to surrender any existing relevant consents in order to provide regulatory certainty, ensuring that landowners leaving a CIS understand that they will need to apply for new consents to manage their farming activities after exit, and requiring the consent holder to put appropriate performance bonds in place as a default mechanism to cover any residual liability. Again, these are all commonly used techniques under the RMA, that are regularly included via consent conditions, and that will be

[168] This could easily be achieved by requiring updated details of the properties and enterprises to be provided within 20 working days of any person joining or leaving the CIS. Similar techniques are currently used by WRC to manage water transfers in relation to water user groups.

currently used by WRC in regulating consents pertaining to freshwater and other activities. Where different environmental conditions or requirements apply to different parts of a larger area, the RMA typically applies the most stringent regulations to the whole activity carried out across the subject land area. The only limit on the efficacy of a CIS is that it will not be possible under an existing CIS consent to expand the geographical envelope of the subject land area, unless a new replacement consent is obtained. This is again not new or novel.

236 As noted above, providing for consenting at scale in PC1 will streamline processing and should substantially reduce the number of land use consents for farming activities that will be required under PC1. For WRC streamlining substantially reduces the number of consents under PC1 that will need to be processed, monitored, and enforced. Given the advantages of efficiency and effectiveness identified in Method 3.11.4.5 implicit in sub-catchment approaches to reducing diffuse discharges WPL requested that sub-catchment consents should be provided for via the PC1 rules. Mr McKay has recommended an appropriate pathway to design and implement sub-catchment consent rules in his Block 2 evidence.[169] Including these provisions in PC1 should therefore assist by reducing further the number of land use consents ultimately required for farming activities.

237 Mr Ford also supports the inclusion of an appropriate consenting pathway for CIS in his Block 2 evidence and notes:

> Making better provision for Certified Industry Schemes … would also reduce the number of consents required to be processed. For example, the Block 1 evidence from Miraka suggests that the CIS manager or consent holder would be responsible for preparing a generic FEP that all CIS members within the subject land area covered by the consent would be required to comply with. The same situation could potentially apply to Fonterra globally across the whole catchment, and for other sectors such as Beef + Lamb it is possible that as few as 74 or 75 consents could be required.[170]

238 From the perspective of people and communities, the scenario modelling generated by the RDST (noted above) also demonstrates that providing for sub-catchment consents has particular benefits in relation to LUC approaches (Scenario 5), and in relation to the development of Treaty settlement land (Scenario 7).

[169] Mr McKay, Block 2 EIC para 135 and Appendix 1.

[170] Mr Ford, Block 2 EIC para 57.

New discretionary activity rule

239 The Block 2 Section 42A Report recommends that a new proposed discretionary activity rule (Rule 3.11.5.6A) should be included in PC1 as a "catch all" rule to provide a consenting pathway for farming activities that do not comply with Rule 3.11.5.2 (permitted), Rule 3.11.5.2A (controlled), or the PC1 restricted discretionary activity rules.

240 WPL generally agrees that including this new rule in PC1 will be appropriate, subject the amendments recommended by Mr McKay in his Block 2 evidence.[171] But WPL does not (for the reasons given below) agree that non-complying activity resource consent should be required where land use change exceeding 4.1ha has occurred.

New rules regarding diffuse discharges

241 The Block 2 Section 42A Report recommends that additional rules should be included in PC1 regarding discharges. Rule 3.11.5.8 provides for authorised discharges that satisfy the requirements in s 70(1) of the RMA as permitted activities. Rule 3.11.5.9 provides for unauthorised discharges (that do not comply with Rule 3.11.5.8) as non-complying activities requiring a discharge permit. These proposed additional rules are opposed by WPL for the reasons given above in Part A of these Block 2 legal submissions.

242 The WPL submissions made on PC1 requested (against the background context of the notified hybrid rules pertaining to farming activities) that appropriate transfer rules should be included in PC1.[172] WPL acknowledges that such rules will not be required, *if* the additional rules regarding diffuse discharges (noted above) are not included in PC1.

Schedule A

243 WPL made submissions on Schedule A.[173] WPL also made further submissions regarding Schedule A opposing and supporting the decisions requested by other submitters.[174]

WPL evidence

244 Generally, Mr McKay considers that Schedule A is appropriate as a permitted activity condition and as an information requirement when

[171] Mr McKay, Block 2 EIC Appendix 1.

[172] PC1-11382.

[173] PC1-11383; V1PC1-687.

[174] Department of Conservation ID 71759 – PC1-11060.

applying for land use consent. He recommends amendments to the PC1 rules to reflect this position in his Block 2 evidence.[175]

Schedule B

245 Schedule B that provides the methodology for calculating a NRP for properties and enterprises is addressed under Topic C1.1.12 above.

Schedule C

246 Schedule C that provides for stock exclusion from water bodies is considered under Topic C4 below.

Schedule 1

247 Schedule 1 is one of the twin-engines that will drive the implementation of PC1 and is considered (briefly) under Topic C1.3 below regarding Policy 2 and FEPs. This provision will be considered further in Block 3.

Schedule 2

248 Schedule 2 is considered under Topic C3 below regarding CIS.

Block 3

249 Policy 3; Rule 3.11.5.5; Schedule 1; Method 3.11.4.1, Method 3.11.4.2, and Method 3.11.4.3 are not addressed by the Block 2 Section 42A Report and are left for consideration in Block 3.

Topic C1.3 Policy 2 and Farm Environment Plans

250 Policy 2 and Schedule 1 regarding FEPs form part of the suite of 19 provisions that are designed to implement Objective 3. They should therefore be considered in the context of the overall rule framework evaluated in Part E.3 of the Section 32 Report.

Policy 2

251 WPL made submissions on Policy 2 that provides for a tailored approach to reducing diffuse discharges from farming activities.[176] WPL supported and opposed the provision in relevant part.

252 WPL requested that Policy 2 should be amended to provide for sub-catchment resource consent applications to be made, to

[175] Mr McKay, Block 2 EIC Appendix 1.

[176] PC1-11273; PC1-12956.

introduce the need for an adaptive management and mitigation approach and outline how this approach will work in practice, and to clarify the mitigation actions and timeframes.

253 WPL also made further submissions regarding Policy 2 opposing and supporting the decisions requested by other submitters.[177]

WPL evidence

254 Mr Conland emphasises the importance of FEPs in his Block 2 evidence. He observes that FEPs will provide "a manual for sustainable farming practices and achieving the Vision and Strategy for the Waikato River" regardless of the scale of consenting (i.e. property, enterprise, sub-catchment, or industry/sector scheme).[178] In particular, he notes that while more monitoring and reporting will be required when preparing FEPs for consenting at scale, that "the economies of scale should make it less time consuming overall".[179] Mr Conland generally agrees with the proposed amendments to Policy 2 recommended in the Block 2 Section 42A Report but considers that more clarity and greater direction is required regarding the preparation of FEPs both in Policy 2 and in the PC1 land use rules requiring consent for farming activities. In particular, he considers that these provisions should include the following "key elements":

1. Vulnerable land;

2. Assessment of land use intensity via a DST;

3. Mitigations which are focused on achieving the [freshwater objectives] in the sub-catchment(s);

4. Catchment management mitigations;

5. Adaptive Management where the sub-catchment is over its target load or not meeting the [freshwater objectives]; and

6. Guidance for GFP and BFP to ensure there is a uniform improvement in farm systems.[180]

[177] Auckland / Waikato Fish and Game Council ID 74085 – PC1-12692, PC1-10876; Beef + Lamb New Zealand Ltd ID 73369 – PC1-12709, PC1-12710, PC1-12711; Department of Conservation ID 71759 – PC110646; Federated Farmers of New Zealand ID 74191 – PC1-12754, PC1-12755, PC1-10816.

[178] Mr Conland, Block 2 EIC para 147.

[179] Mr Conland, Block 2 EIC para 150.

[180] Mr Conland, Block 2 EIC para 155.

255 Mr Williamson also addresses "vulnerable land" in his Block 2 evidence. He observed that land in close proximity to perennial streams is highly vulnerable in terms of the potential reception of TN. Similarly, land areas with shallow groundwater were assumed to be highly vulnerable as a matter of precaution. Generally, Mr Williamson observes that: "land becomes less vulnerable with distance from perennial streams, which typically corresponds with higher elevation areas".[181] This analysis is consistent with redox chemistry principles explained in Mr Williamson's Block 1 evidence. The two key factors for TN effects on water quality are "proximity to surface waterways or length of groundwater flow path" and "groundwater denitrification potential".[182] Mr Williamson also describes two case studies (using the RDST) that were carried out to define the time taken for any water quality effects to manifest as a result of land use change. The studies show that effects manifest within 2-4 years in relation to land proximate to streams, and within 6-15 years in relation to land at a significant distance from streams.[183]

256 Additionally, Mr Conland considers that FEPs should be "put in place immediately (e.g. by 2020/2022)" in order to provide sufficient time for some mitigation results to be observed, and to meet the short-term and long-term aspirations in Objective 3 and Objective 1.[184] The question of time is addressed further in relation to Rule 3.11.5.4 and the priority dates below.

257 Based on the WPL Block 2 evidence (and in order to implement Objectives 1 and 3) Mr McKay recommends in his Block 2 evidence that Policy 2 should be amended to provide greater direction in relation to mitigations to achieve the freshwater objectives in Table 3.11-1. These amendments include: identifying vulnerable land and appropriate mitigation actions, putting FEPs in place by 2022, stipulating assessment criteria for FEPs, and providing clearer policy direction for sub-catchment and industry/sector scheme consents.[185]

Schedule 1

258 As noted above, Schedule 1 that sets out the requirements for FEPs is not addressed by the Block 2 Section 42A Report and is left for consideration in Block 3.

[181] Mr Williamson, Block 2 EIC para 189.

[182] Mr Williamson, Block 2 EIC para 191.

[183] Mr Williamson, Block 2 EIC para 192.

[184] Mr Conland, Block 2 EIC para 156.

[185] Mr McKay, Block 2 EIC para 82 and Appendix 1.

259 However, Mr Conland makes some preliminary observations in his Block 2 evidence about the amendments required to Schedule 1 in order to make appropriate provision for adaptive management approaches to be properly applied when land use consent applications are made for farming activities under PC1.[186] These matters will be addressed further in the WPL Block 3 evidence.

Topic C1.4 Reductions (75th percentile)

260 WPL made a submission on Var1 regarding the 75th percentile N leaching value definition in the Glossary of Terms as amended by Var1.[187] WPL supported and opposed the provision in relevant part.

261 WPL requested that this definition should be amended by including express methods requiring WRC to advise all landowners in any FMU when the 75th percentile nitrogen leaching value has been exceeded, and as to what voluntary action they should all take as a result.

262 WPL also made further submissions regarding the 75th percentile N leaching value definition opposing and supporting the decisions requested by other submitters.[188]

WPL evidence

263 The Block 2 Section 42A Report recommends that the 75th percentile N leaching value definition should be amended by including a deeming provision that enables the CEO to determine the 75th percentile N leaching value for any FMU based on aggregated data. Mr Ford notes in his Block 2 evidence that:

> This definition causes me considerable concern because of the uncertain nature of the definition as to the nature of the data provision.[189]

264 He also notes that the definition as notified has "no relationship with the amount of N in the river" and that it assumes wrongly "that all

[186] Mr Conland, Block 2 EIC paras 116-125.

[187] V1PC1-692.

[188] Auckland / Waikato Fish and Game Council ID 74085 – V1PC1-379; DairyNZ ID 74050 – PC1-10253, V1PC1-716; Department of Conservation ID 71759 – V1PC1-461; FarmRight ID 73720 – PC1-9634; Federated Farmers of New Zealand ID 74191 – V1PC1-790; Fonterra Co-operative Group Ltd ID 74057 – PC1-10573, V1PC1-1371; Fonterra Co-operative Group Ltd ID 74057 – PC1-10573, V1PC1-1371; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-12312, V1PC1-1147; Ravensdown Ltd ID 74058 – V1PC1-285; Waikato Regional Council (WRC) ID 72890 – PC1-3664, V1PC1-1526; Wairarapa Moana Inc ID 72480 – PC1-2158.

[189] Mr Ford, Block 2 EIC para 80.

properties and enterprises have the same degree of impact on the river".[190] Put simply, it is not based on effects or factual reality. The amended definition in the Block 2 Section 42A Report compounds these issues and is likely unlawful.[191]

265 Mr Conland also critiques the 75th percentile N leaching value mechanism in his Block 2 evidence. He notes that the 75th percentile N leaching value can only be derived when the NRPs for all properties or enterprises within an FMU have been provided to WRC; that the NRPs cannot be used for comparative analysis across different properties or enterprises; and that the 75th percentile N leaching value is "biased more by biophysical attributes which are independent of effects than inefficient farming systems".[192] Mr Conland therefore recommends that all references to the 75th percentile N leaching value in PC1 should be deleted, that the rules pertaining to farming activities[193] should be amended to protect vulnerable land (e.g. erosion prone land and riparian margins) from inappropriate use and development via FEP mitigations, and that Schedule 1 should be amended to include vulnerable land criteria that should be used when assessing risk.[194] As noted above, the RDST modelling Scenario 6 demonstrates that adopting vulnerable land criteria as the basis for risk assessment and generating mitigation actions when preparing FEPs will provide improved environmental outcomes.[195] The criteria for identifying vulnerable land are set out in Mr Conland's Block 2 evidence.[196] Put simply, using vulnerable land criteria will be effects based and avoid farming effects on the pathways that could otherwise result in contaminants entering water, and will assist in meeting the freshwater objectives in Table 3.11-1.[197]

266 Mr McKay agrees with these conclusions in his Block 2 evidence and recommends that the 75th percentile N leaching value mechanism should be deleted from PC1 and replaced by the adoption of vulnerable land assessment criteria.[198]

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[190] Mr Ford, Block 2 EIC paras 74-75.

[191] *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2015] NZRMA 131 at [141], [152], [153], [189], [190], [191], [193], [194], [195], [196].

[192] Mr Conland, Block 2 EIC para 37.

[193] Rule 3.11.5.1, Rule 3.11.5.2, Rule 3.11.5.3, Rule 3.11.5.4, and Rule 3.11.5.6.

[194] Mr Conland, Block 2 EIC para 85.

[195] Mr Conland, Block 2 EIC paras 82-83 (Figure 3, p21).

[196] Mr Conland, Block 2 EIC para 78; Mr Williamson, Block 2 EIC para 167.

[197] Mr Conland, Block 2 EIC para 76.

[198] Mr McKay, Block 2 EIC para 159 and Appendix 1.

Topic C1.6.5 Definitions

267 WPL made further submissions on the following definitions in the Glossary of Terms that should be retained as notified or amended by wording to like effect:

Topic C1.6.7 Certified Farm Nutrient Advisor

268 WPL made further submissions on the definition of "Certified Farm Nutrient Advisor" in the Glossary of Terms. WPL opposed and supported the decisions requested by other submitters.[199]

Topic C1.6.9 Diffuse discharges

269 WPL made further submissions on the definition of "Diffuse discharges" in the Glossary of Terms. WPL opposed and supported the decisions requested by other submitters.[200]

Topic C1.6.11 Farming activities

270 WPL made further submissions on the definition of "Farming activities" in the Glossary of Terms. WPL opposed and supported the decisions requested by other submitters.[201]

TOPIC C2. CULTIVATION, SLOPE AND SETBACKS

271 Cultivation, slope and setbacks are also considered in Part E.3 of the Section 32 Report regarding making reductions in diffuse discharges via catchment wide rules and the NRP including (inter alia) identifying small, low intensity and low risk farming activities.[202]

272 As noted above, relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

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[199] Ballance Agri-Nutrients Ltd ID 74036 – PC1-7090; DairyNZ ID 74050 – PC1-10251; Genetic Technologies Ltd ID 73953 – PC1-3290; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10235, V1PC1-1604; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8884, V1PC1-1148; Ravensdown Ltd ID 74058 – PC1-10199; Waitomo District Council ID 73688 – PC1-10851.

[200] Fertiliser Association of New Zealand ID 73305 – PC1-10666.

[201] Federated Farmers of New Zealand ID 74191 – V1PC1-797; Taupo District Council ID 74207 – PC1-8171.

[202] Section 32 Report, 141-183.

273 Objectives 1 and 3 are implemented by Policy 1, and Policy 1 is (in part) implemented by Rule 3.11.5.2 as part of the suite of provisions designed to make reductions in diffuse discharges from farming activities.

Rule 3.11.5.2

274 WPL made submissions on Rule 3.11.5.2 that (as notified) provides for other (small, low intensity and low risk) farming activities as permitted activities.[203]

275 In particular, Rule 3.11.5.2 (as notified) provides (inter alia) for other farming activities on a property or enterprise that is greater than 20ha in area, but limits the diffuse nitrogen discharge allowance to whichever is the lesser of the NRP or 15kg nitrogen/hectare/year for the property or enterprise.

276 WPL supported the provision and requested that it should be retained as notified or amended by similar wording to like effect.

277 WPL also made a submission on Var1 regarding the date by which additional information about farming activities should be provided to WRC.

278 WPL also made further submissions regarding Rule 3.11.5.2 opposing and supporting the decisions requested by other submitters.[204]

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[203] PC1-11371; V1PC1-672.

[204] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-9571; Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6192; Auckland / Waikato Fish and Game Council ID 74085 – PC1-10997, V1PC1-399, V1PC1-1577; Ballance Agri-Nutrients Ltd ID 74036 – PC1-6901; Beef + Lamb New Zealand Ltd ID 73369 – PC1-11502, V1PC1-1663, V1PC1-1718; CNI Iwi Land Management Ltd ID 74026 – PC1-10798; DairyNZ ID 74050 – V1PC1-718; Department of Conservation ID 71759 – V1PC1-418; Federated Farmers of New Zealand ID 74191 – V1PC1-338; Fertiliser Association of New Zealand ID 73305 – PC1-10621; Fonterra Co-operative Group Ltd ID 74057 PC1-10492, V1PC1-765; Genetic Technologies Ltd ID 73953 – PC1-3256; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5771; Matamata-Piako District Council ID 73419 – PC1-3700; Miraka Ltd ID 73492 – PC1-8890; Ngati Haua Tribal Trust ID 73025 – PC1-1969; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8083, V1PC1-1138; Primary Land Owners Group ID 71427 – PC1-11173; Ravensdown Ltd ID 74058 – PC1-10140, V1PC1-277, V1PC1-1343; South Waikato District Council ID 72892 – PC1-4206, V1PC1-383; Taupo District Council ID 74207 – PC1-8164; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-8078, V1PC1-983, V1PC1-1468; Waikato Regional Council (WRC) ID 72890 – PC1-3117, V1PC1-187, V1PC1-1514; Wairarapa Moana Inc ID 72480 – PC1-2140; Waitomo District Council ID 73688 – PC1-10328.

WPL evidence

279 As noted above the Block 2 Section 42A Report recommends that Rule 3.11.5.1 and Rule 3.11.5.2 should be merged into a new combined rule (Rule 3.11.5.2) providing for low intensity farming activities as permitted activities, and that a proposed new rule (Rule 3.11.5.2A) should be included in PC1 providing for medium intensity farming as a controlled activity.

280 Mr Conland therefore suggests in his Block 2 evidence that the "bright line" between permitted and controlled farming activities could be set at 20ha, and that farming on vulnerable land should be appropriately mitigated under FEPs.[205]

281 Mr McKay generally agrees that merging notified Rule 3.11.5.1 and Rule 3.11.5.2 into a single amended rule is appropriate, but he agrees with Mr Conland that the "bright line" between permitted and controlled farming activities should be set at 20ha. He does not support the inclusion of proposed new Rule 3.11.5.2A in PC1 and recommends that notified Rule 3.11.5.4 should be retained as a controlled activity rule. Mr McKay recommends that Rule 3.11.5.4 should be amended to provide a clearer set of matters for control addressing (inter alia) vulnerable land.[206]

TOPIC C3. CERTIFIED INDUSTRY SCHEMES

282 Certified Industry or Sector Schemes (**CIS**) are also considered in Part E.3 of the Section 32 Report regarding making reductions in diffuse discharges via catchment wide rules and the NRP.[207]

283 As noted above, relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

284 Objectives 1 and 3 are implemented by Policy 1, and Policy 1 is (in part) implemented by Rule 3.11.5.3, Schedule 2, and Method 3.11.4.2 as part of the suite of provisions designed to make reductions in diffuse discharges from farming activities under CIS.

[205] Mr Conland, Block 2 EIC para 161.

[206] Mr McKay, Block 2 EIC para 123 and Appendix 1.

[207] Section 32 Report, 141-183.

Rule 3.11.5.3 and Schedule 2

285 WPL made submissions on Rule 3.11.5.3 and Schedule 2 regarding CIS.[208] WPL supported and opposed these provisions.

286 While CIS are laudable, developing and approving these schemes (as notified) is outside the functions, powers and duties of WRC under the RMA or the LGA.

287 WPL therefore requested that Rule 3.11.5.3 and Schedule 2 should be deleted.

288 WPL also made further submissions regarding Rule 3.11.5.3 opposing and supporting the decisions requested by other submitters.[209]

WPL evidence

289 In particular, Rule 3.11.5.3 and Schedule 2 are streamlining methods designed to reduce the number of resource consents that could otherwise be required for farming activities to continue.

290 Mr McKay generally agrees in his Block 2 evidence that CIS can lawfully be provided for as restricted discretionary activities requiring land use consent in order to avoid the difficulties pointed out in the WPL submission. He recommends a proposed new rule (Rule 3.11.5.6C) and amendments to Schedule 2 to better provide

[208] PC1-11372; V1PC1-676; PC1-11390.

[209] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-11209; Auckland / Waikato Fish and Game Council ID 74085 – PC1-10998, V1PC1-346, V1PC1-1546; Beef + Lamb New Zealand Ltd ID 73369 – V1PC1-1719; CNI Iwi Land Management Ltd ID 74026 – PC1-10799; DairyNZ ID 74050 – PC1-10246, V1PC1-719; Department of Conservation ID 71759 – PC1-11056, V1PC1-419; Federated Farmers of New Zealand ID 74191 – V1PC1-357; Fertiliser Association of New Zealand ID 73305 – PC1-10624; Fonterra Co-operative Group Ltd ID 74057 – PC1-10496, V1PC1-779; Fonterra Shareholders Council ID 72610 – PC110641; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5773; Mercury NZ Ltd ID 73182 – PC1-9599, V1PC1-1092; Miraka Ltd ID 73492 – PC1-8891; New Zealand Forest Owners Association Inc ID 73524 – PC1-9959; Ngati Haua Tribal Trust ID 73025 – PC1-1970; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-8084, V1PC1-1137; Pamu Farms of New Zealand ID 74000 – PC1-6007; Primary Land Owners Group ID 71427 – PC1-11174; Ravensdown Ltd ID 74058 – PC1-10144, V1PC1-279, V1PC1-1344; Save Lake Karapiro Inc ID 72459 – PC1-5709; South Waikato District Council ID 72892 – V1PC1-384; Taupo District Council ID 74207 – PC18168; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-8079, V1PC1-985, V1PC1-1469; Waikato Dairy Leaders Group ID 74049 – PC1-11026; Waikato Regional Council (WRC) ID 72890 – PC1-3417, V1PC1-189, V1PC1-1515; Waikato River Authority ID 74033 – PC1-11564, V1PC1-1016; Wairarapa Moana Inc ID 72480 – PC1-2141; Waitomo District Council ID 73688 PC1-10330.

for CIS in the context of consenting for farming activities at scale as a streamlining mechanism.[210]

Block 3

291 Method 3.11.4.2 is not addressed in the Block 2 Section 42A Report and is left for consideration in Block 3.

TOPIC C4. STOCK EXCLUSION

292 Stock exclusion is also considered in Part E.3 of the Section 32 Report regarding making reductions in diffuse discharges via catchment wide rules and the NRP.[211]

293 As noted above, relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

294 Objectives 1 and 3 are implemented by Policy 1, and Policy 1 is (in part) implemented by Schedule C as part of the suite of provisions designed to make reductions in diffuse discharges from farming activities.

Schedule C

295 WPL made a submission on Schedule C regarding stock exclusion.[212] WPL generally supported this provision.

296 In particular, Schedule C provides for stock exclusion from water bodies to occur on a sub-catchment basis in accordance with the priority dates referenced in both paragraph (4) of the schedule and in Rule 3.11.5.4 noted above.

297 WPL also made further submissions regarding Schedule C opposing and supporting the decisions requested by other submitters.[213]

[210] Mr McKay, Block 2 EIC para 119 and Appendix 1.

[211] Section 32 Report, 141-183.

[212] PC1-11388.

[213] Department of Conservation ID 71759 – PC1-11055.

WPL evidence

298 Mr Conland generally supports stock exclusion but notes in his Block 2 evidence that the riparian setbacks in PC1 (e.g. Schedule 1, para 2(b)(iii)) are "too narrow" to produce the desired environmental outcomes, that a 15m minimum requirement would be more appropriate, and that Schedule C should be amended to take account of emerging stock exclusion technology that does not require fencing in all situations.[214]

299 Based on the Block 2 evidence of Dr Neale (noted above) regarding the immediate need to exclude stock from water bodies as a key implementation method for achieving Objective 3, Mr McKay recommends that Schedule C should be amended to require stock exclusion by 2023.[215]

PART D: RESTRICTING LAND USE CHANGES

300 Restricting land use changes is evaluated in Part E.4 of the Section 32 Report.[216]

301 The relevant objectives to achieve restricting land use change are Objectives 1 and 3. These objectives were considered in Block 1. WPL considers that they are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject (as noted above) to the amendments recommended by Mr McKay in his evidence.

302 Objectives 1 and 3 are implemented in relation to restricting land use changes by Policy 6, and Policy 6 is (in turn) implemented by Rule 3.11.5.7.

303 The analysis and recommendations regarding the submissions on the PC1 provisions relevant to the key policy theme of restricting land use changes are discussed in the Block 2 Section 42A Report under Topic C1.5.

Topic C1.5 Restricting land use change

304 This topic addresses Policy 6 and Rule 3.11.5.7.

[214] Mr Conland, Block 2 EIC paras 163-164.

[215] Mr McKay, Block 2 EIC paras 141-143 and Appendix 1.

[216] Section 32 Report, 184-193.

Policy 6

305 WPL made a submission on Policy 6 that (as notified) provides for restricting land use change.[217] WPL supported and opposed the provision in relevant part.

306 WPL requested that Policy 6 should be amended to enable land use change consent to be granted where the freshwater objectives in Objective 3 and Table 3.11-1 are met through adaptive management and mitigation, and to enable sub-catchment resource consent applications to be made.

307 WPL also made further submissions regarding Policy 6 opposing and supporting the decisions requested by other submitters.[218]

WPL evidence

308 Based on the WPL evidence (noted below) Mr McKay recommends in his Block 2 evidence that Policy 6 should be retained but completely reworded in order to better implement Objectives 1 and 3.[219]

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[217] PC1-11346.

[218] Advisory Committee on Regional Environment (ACRE) ID 72441 – PC1-9529; Ata Rangi 2015 Limited Partnership ID 74045 – PC1-6133; Auckland / Waikato Fish and Game Council ID 74085 – PC1-10879, V1PC1-251, V1PC1-1565; Ballance Agri-Nutrients Ltd ID 74036 – PC1-6864; Beef + Lamb New Zealand Ltd ID 73369 –PC1-11490, V1PC1-1662; CNI Iwi Land Management Ltd ID 74026 – PC1-10781; DairyNZ ID 74050 – PC1-10230; Department of Conservation ID 71759 – PC1-10664; FarmRight ID 73720 – PC1-5391; Federated Farmers of New Zealand ID 74191 – PCQ-10822, V1PC1-194; Fertiliser Association of New Zealand ID 73305 – PC1-9788; Fonterra Co-operative Group Ltd ID 74057 – PC1-10473, V1PC1-1349; Fonterra Shareholders Council ID 72610 – PC1-10638; Genetic Technologies Ltd ID 73953 – PC1-3252; Hancock Forest Management (NZ) Ltd ID 73724 – PC1-5633; Horticulture New Zealand (HortNZ) ID 73801 – PC1-10057, V1PC1-1632; Matamata-Piako District Council ID 73419 – PC1-3494; Mercury NZ Ltd ID 73182 – PC1-9538, V1PC1-1061; Miraka Ltd ID 73492 – PC1-8820; New Zealand Forest Owners Association Inc ID 73524 – PC1-9957; Oji Fibre Solutions (NZ) Ltd ID 73725 – PC1-6404, V1PC1-1118; Pamu Farms of New Zealand ID 74000 – PC1-6000; Primary Land Owners Group ID 71427 – PC1-11152; Ravensdown Ltd ID 74058 – PC1-10107; Rotorua Lakes Council ID 73373 – PC1-2504; South Waikato District Council ID 72892 – PC1-4042; Te Whakakitenga o Waikato Inc (Waikato-Tainui) ID 74105 – PC1-7848, V1PC1-1452; The Royal Forest and Bird Protection Society of New Zealand Inc ID 74122 – PC1-8258; Waikato Dairy Leaders Group ID 74049 – PC1-11011; Waikato Regional Council (WRC) ID 72890 – PC1-3005, V1PC1-1503; Wairarapa Moana Inc ID 72480 – PC1-2111; Waitomo District Council ID 73688 – PC1-10317.

[219] Mr McKay, Block 2 EIC para 173 and Appendix 1.

Rule 3.11.5.7

309 WPL made a submission on Rule 3.11.5.7 that (as notified) provides for land use change as a non-complying activity requiring resource consent. WPL supported and opposed the provision in relevant part.

310 Consistent with the WPL submission on Policy 6, WPL requested that Rule 3.11.5.7 should be amended to provide for land use change consent to be granted as restricted discretionary or discretionary activities (including sub-catchment resource consent applications, and land use change applications that enable the development of tangata whenua and Treaty settlement land); to clarify the matters of discretion; and to provide certainty regarding the duration of consent.

WPL evidence

311 Mr Ford in his Block 2 evidence notes that these provisions will "effectively preclude land use change on non-vulnerable land that could otherwise be carried out in a way that meets the freshwater objectives in Table 3.11-1".[220] He considers that Rule 3.11.5.7 (as notified) is a "particularly blunt instrument" and notes that it "will have an impact on the delivery of the significant economic and employment opportunities that contribute to community wellbeing" unless amended.[221] Based on Mr Williamson's evidence he recommends that Rule 3.11.5.7 should be based on attenuation.

312 More importantly, Mr Ford found that these provisions were included in PC1 to:

> Restrict and manage specified, *major* changes in land use that are likely to result in *additional* diffuse discharges of nitrogen, phosphorus, sediment and microbial pathogens.[222] (Emphasis added)

313 The notified provisions are clearly not effects based because they capture all land use change from planted production forest to farming activities above 4.1ha regardless of the character, intensity, or scale of effects. They do not therefore comply with s 68(3) of the RMA.

314 The Block 2 Section 42A Report recommends that Policy 6 and Rule 3.11.5.7 should be deleted but inserts the same restrictions on

[220] Mr Ford, Block 2 EIC para 89.

[221] Mr Ford, Block 2 EIC para 95.

[222] Section 32 Report, 184.

land use change in the land use rules regarding farming activities. For example:

314.1 Rule 3.11.5.1A includes condition 6 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

314.2 Rule 3.11.5.2A includes condition 6 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

314.3 Rule 3.11.5.3 includes condition 5b that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

314.4 Rule 3.11.5.4 includes condition 7 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

314.5 Rule 3.11.5.7 now provides that farming activities that do not comply with either Rule 3.11.5.3 (condition 5b) or Rule 3.11.5.4 (condition 7) are *non-complying* activities.

314.6 Rule 3.11.5.7 now applies indefinitely until replaced by a subsequent plan change, and is no longer set to expire on 1 July 2026.

315 Previously, the most restrictive activity class applied to farming activities under PC1 was restricted discretionary regardless of whether any change of use had occurred. Now all farming activities are classed as non-complying activities where land use change exceeding 4.1ha has occurred regardless of whether the land use change was expressly allowed by resource consent.[223] The amended land use rules are therefore more restrictive than PC1 as notified. The scope to make these amendments is questionable because there is a "real risk" that some persons may "have been denied an effective opportunity to respond to those additional changes in the plan change process".[224]

316 Beyond that, there is no justification for the amendments under s 32 of the RMA because the Block 2 Section 42A Report continues to indicate that land use change restrictions are required to achieve the PC1 objectives as "most land use changes are likely to result in *significantly increased* contaminant discharges" and should be "managed through a non-complying activity resource consent

[223] RMA, s 139(10) provides that any certificate of compliance issued under s 139 shall be treated as if it were an appropriate resource consent.

[224] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [91](e).

process" (emphasis added).[225] Again, this approach is not effects based.

317 It is also important to note that the PC1 framework has been designed to ensure that no property or enterprise should be allowed to exceed its NRP by including the suite of 19 provisions that should make reductions in diffuse discharges via the catchment wide rules and FEPs.[226] Similarly, the Block 2 Section 42A Report advises that "PC1 aims to *hold the line* in terms of a farm's nitrogen leaching" (emphasis added).[227] There is therefore a strong legal argument that Policy 6 and Rule 3.11.5.7 are not required under s 32 of the RMA, *if* the suite of 19 provisions designed to make reductions in diffuse discharges work as intended and hold the line.

318 *If* there is a case for including interim constraints on land use change in PC1, including a non-complying activity rule to constrain land use change is not effects based. Likewise, including a non-complying activity rule to constrain all farming activities where more than 4.1ha of land use change has occurred is not effects based.

319 Beyond that, is also for note that s 20A of the RMA is a savings provision and enables land use change to occur lawfully in accordance with any relevant certificate of compliance (or deemed resource consent) issued under s 139 of the RMA, notwithstanding Rule 3.11.5.7:

319.1 While some type of consent may subsequently be required after the PC1 rules become operative, retrospective consent for land use change will not be required (as a matter of law) in cases where the land use change was carried out in accordance with a deemed resource consent and occurred *before* the relevant rule (e.g. Rule 3.11.5.7 as notified) becomes operative.[228]

319.2 In such cases, land use consent to continue the farming activity would likely be required when the relevant rule becomes operative (e.g. under Rule 3.11.5.6).

320 As a consequence, the amended provisions that now constrain land use change as a result of the Block 2 Section 42A Report recommendations (noted above) are likely unlawful because they offend against the principle of retroactivity.

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[225] Block 2 Section 42A Report, 76 para 433.

[226] See: Part A of these Block 2 legal submissions above.

[227] Block 2 Section 42A Report, 39 para 207.

[228] *An application by Hastings District Council* [2013] NZEnvC 102 at [24].

321 Policy 6 and Rule 3.11.5.7 should therefore be amended as recommended by Mr McKay in his Block 2 evidence.[229]

PART E: MANAGING POINT-SOURCE DISCHARGES

322 Managing point source discharges is evaluated in Part E.5 of the Section 32 Report.[230]

323 The relevant objectives to achieve managing point source discharges are Objectives 1 and 3. These objectives were considered in Block 1. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject (as noted above) to the amendments recommended by Mr McKay in his evidence.

324 Objectives 1 and 3 are implemented in relation to managing point-source discharges by Policy 10, Policy 11, Policy 12, Policy 13, Policy 17, and by the definition of "Point source discharges" in the Glossary of terms.

325 The analysis and recommendations regarding the submissions on the PC1 provisions relevant to this key policy theme of managing point-source discharges are discussed in the Block 2 Section 42A Report under Topic C6 and Topic C1.6.12.

TOPIC C6. URBAN/POINT SOURCE DISCHARGES

326 This topic addresses Policy 10, Policy 11, Policy 12, and Policy 13, together with the definition of "point-source discharges".

Policy 10, Policy 11, Policy 12, and Policy 13

327 WPL made submissions on Policy 10, Policy 11, Policy 12, and Policy 13 pertaining to point-source discharges.[231] WPL supported and opposed these provisions in relevant part.

328 WPL requested that Policy 10, Policy 11, Policy 12, and Policy 13 should be amended to provide guidance for farming activities generally, to provide for significant primary production activities in accordance with the WRPS, and (in particular) to provide guidance regarding the duration of resource consents for farming activities under PC1.

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[229] Mr McKay, Block 2 EIC para 181 and Appendix 1.

[230] Section 32 Report, 193-200.

[231] PC1-11350; PC1-11351; PC1-11352; PC1-11353.

329 WPL also made further submissions regarding Policy 10, Policy 11, Policy 12, and Policy 13 opposing and supporting the decisions requested by other submitters.[232]

WPL evidence

330 As noted by Mr McKay in his Block 2 evidence the substantive point made by WPL has been addressed in part by the Block 2 Section 42A Report amendments to Policy 4 regarding consent duration. Mr McKay generally agrees with the amendments to Policy 4 but recommends that a 25year maximum consent duration should be provided for in relation land use consents for farming activities.[233]

Topic C1.6.12 Point-source discharges

331 WPL made a submission on the definition of "Point-source discharges" in the Glossary of Terms.[234] WPL supported and opposed the provision in relevant part.

332 WPL requested that the definition of "Point-source discharges" should be amended to apply (in addition) to discharges associated with farming activities regulated under Chapter 3.5 of the WRP. This would be consistent with the consequential amendments made to the WRP by PC1.

Block 3

333 Policy 17 regarding the wider context of the Vision and Strategy in relation to biodiversity, wetland values, ecosystem functions, and recreational values is not addressed by the Block 2 Section 42A Report and is left for consideration in Block 3.

PART F: FLEXIBILITY OF THE USE OF TE TURE WHENUA AND SETTLEMENT LAND

334 The flexibility of the use of Te Ture Whenua and settlement land is evaluated in Part E.7 of the Section 32 Report (pp208-219).

335 The relevant objective to achieve flexibility of the use of Te Ture Whenua and settlement land is Objective 5. This objective was considered in Block 1. WPL considers that Objective 5 is suitable for achieving sustainable management and giving effect to the

[232] Department of Conservation ID 71759 – PC1-10676; Department of Conservation ID 71759 – PC1-10694; Department of Conservation ID 71759 – PC1-10738; Federated Farmers of New Zealand ID 74191 – PC1-10829; Department of Conservation ID 71759 – PC1-10739.

[233] Mr McKay, Block 2 EIC para 191 and Appendix 1.

[234] PC1-13141.

NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his evidence.

336 Objective 5 addresses protecting and restoring tangata whenua values. Mr McKay recommended that Objective 5 should be amended as follows:

> Tangata Whenua values are integrated into the co-management of the rivers and other water bodies within the catchment such that:
>
> (a) tangata whenua have the ability to:
>
> (i) Manage their own lands and resources, by exercising mana whakahaere, for the benefit of their people; and
>
> (ii) Actively sustain a relationship with ancestral land and with the rivers and other water bodies in the catchment; and
>
> (b) new impediments to the flexibility of the use of both tangata whenua ancestral lands and land returned via treaty settlements are minimised; and
>
> (c) improvements in the rivers' water quality and the exercise of kaitiakitanga increase the spiritual and physical wellbeing of iwi and their tribal and cultural identity.

337 Objective 5 is implemented by Policy 16 and the definition of "Tangata whenua ancestral lands" in the Glossary of Terms.

338 The analysis and recommendations regarding the submissions on the PC1 provisions relevant to this key policy theme regarding the flexibility of the use of Te Ture Whenua and settlement land are discussed in the Block 2 Section 42A Report under Topic C5.

TOPIC C5. MAORI TREATY SETTLENT LAND

339 This topic addresses Policy 16 and the definition of "Tangata whenua ancestral lands".

Policy 16

340 WPL made a submission on Policy 16 that provides flexibility for development of land returned under Te Tiriti o Waitangi settlements

and multiple owned Maori land.[235] WPL supported and opposed the provision in relevant part.

341 WPL requested that Policy 16 should be amended to provide for adaptive management and mitigation approaches and for sub-catchment resource consent applications as methods that could assist Maori in developing Treaty settlement land.

342 WPL also made further submissions regarding Policy 16 opposing and supporting the decisions requested by other submitters.[236]

WPL evidence

343 Mr Conland explains in his Block 2 evidence how RDST Scenario 7 was modelled regarding Sub-catchment 66A (Tahorakuri).[237] Scenario 7 (like Scenario 6) is based on WPL submissions and evidence where FEPs are put in place and implemented (transitioning from GFP to BFP) and where farming on vulnerable land is appropriately mitigated, but assumes that the use of undeveloped Treaty settlement land in Sub-catchment 66A is changed from planted production forest to dairy farming. Figure 6 (in Mr Conland's Block 2 evidence) demonstrates that such land use change can occur when both existing farming activities and land use change are managed in an integrated way at sub-catchment scale. The predicted environmental effects under Scenario 7 are substantially similar to the effects of merely continuing existing farming activities with mitigations etc (as at 22 October 2016) under Scenario 6.[238]

344 The Scenario 7 modelling supports the amendments to Policy 6, Policy 16, and Rule 3.11.5.7 recommended by Mr McKay in his Block 2 evidence.[239]

Tangata whenua ancestral lands

345 WPL made a submission on Var1 regarding the definition in the Glossary of Terms for "Tangata whenua ancestral lands".[240] WPL supported and opposed these provisions in relevant part.

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[235] PC1-11355.

[236] Department of Conservation ID 71759 – PC1-10745.

[237] Mr Conland, Block 2 EIC para 166.

[238] Mr Conland, Block 2 EIC p33.

[239] Mr McKay, Block 2 EIC para 188 and Appendix 1.

[240] V1PC1-694.

346 WPL requested that the amended definition of "Tangata whenua ancestral lands" should be retained as notified by Var1 or amended by similar wording to like effect.

PART G: CONCLUSIONS

347 In conclusion:

347.1 PC1 as notified will not promote sustainable management of natural and physical resources in accordance with pt 2 of the RMA.

347.2 PC1 as notified is not within the functions of regional councils as provided for in s 30 of the RMA.

347.3 PC1 as notified does not comply with s 32 of the RMA:

(a) The objectives are not the most appropriate way to achieve sustainable management.

(b) The provisions are not the most appropriate way to achieve the objectives.

(c) PC1 will not promote opportunities for economic growth or employment.

(d) The evaluation report for PC1 does not (in relevant part) comply with the requirements of s 32 of the RMA, and is not (fully) supported by evidence of probative value.

347.4 PC1 as notified does not comply with relevant provisions in pt 5 of the RMA, including: s 68 and s 70.

347.5 PC1 as notified is not consistent with or does not give effect to the NPS-FM.

347.6 PC1 as notified is not consistent with or does not give effect to the WRPS including the Vision and Strategy.

347.7 PC1 as notified (in respect of controls on land) will render interests in land incapable of reasonable use.

347.8 The rules in PC1 as notified are not clear and simple, or capable of consistent application.

348 WPL has therefore requested a series of carefully crafted amendments to the PC1 provisions addressed in the Block 2

Section 42A Report that (if accepted) will enable PC1 to become operative.

349 WPL reserves the right to address the PC1 provisions left for consideration in Block 3 in a holistic way.

350 Given the duration and nature of these Hearings WPL considers that it would be helpful for all counsel to file closing submissions 5 working days prior to the date set for WRC to give its reply.

351 Finally, as indicated in Block 1, WPL considers that there is merit in the Commissioners carrying out a site visit at Tutukau Bridge to observe (for themselves) the difference between the lacustrine and riverine characteristics of the Waikato River at this location that justify the subdivision of Sub-catchment 66 into Sub-catchments 66A and 66B, and to visit the nearby Wairakei Estate to view the mitigations put in place to date as exemplars of what could be achieved under FEPs.

RJ Somerville QC / T Daya-Winterbottom

Counsel for Wairakei Pastoral Ltd

28 May 2019

APPENDIX 1

Glossary of Terms

B+LNZ Beef and Lamb NZ

CSG Collaborative Stakeholder Group

CSG report Overview of Collaborative Stakeholders Group's Recommendations for Waikato Regional Plan Change No 1 - Waikato and Waipa River catchments

DO dissolved oxygen

Estate Wairakei Estate

ETS Emissions Trading Scheme

Fe^{2+} dissolved iron

FEPs Farm Environment Plans

FMUs Freshwater Management Units

FWO Freshwater Objectives

GFP Good Farming Practice

GMP Good Management Practice

HRWO Healthy Rivers Wai Ora

LDA linear discriminant analysis

LGA Local Government Act 2002

LSR land surface recharge

MfE Ministry for the Environment

Mn^{2+} dissolved manganese

MRT mean residence times

N nitrogen

N_2 nitrogen gas

NES-PF National Environmental Standards for Plantation Forestry 2017

NES-SHDW National Environmental Standards for Sources of Human Drinking Water 2007

NH_4 ammonium

NO_3^- nitrate

NOF National Objectives Framework

NPS-FM National Policy Statement for Freshwater Management 2014 (as amended)

NPS-REG National Policy Statement for Renewable Energy Generation

NRP Nitrogen Reference Point

NTNK Ngati Tahu – Ngati Whaoa

NZCPS New Zealand Coastal Policy Statement 2010

P phosphorus

PAMU Landcorp Farming Ltd

PC1 Proposed Waikato Regional Plan Change 1

PCE Parliamentary Commissioner for the Environment

RDST Ruahuwai decision support tool

RLAA Resource Legislation Amendment Act 2017

RMA Resource Management Act 1991

RMSE root mean square error

S^{2-} sulphide

Section 32 Report Section 32 Evaluation Report

Settlement Act Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

SO_4^{2-} sulphate

TAND Total Annual Nitrogen Discharge

TLG Technical Leaders Group

TN Total nitrogen

TP Total phosphorus

TSS total suspended solids

Var1 Variation 1

Vision and Strategy Vision and Strategy for the Waikato River

WPL Wairakei Pastoral Ltd

WRC Waikato Regional Council

WRP Waikato Regional Plan

WRPS Waikato Regional Policy Statement

APPENDIX 2

An unfair and unreasonable burden on landowners

1 Section 85 of the RMA proceeds on the basis that compensation is not payable as a result of the promulgation of new land use rules. However, where a landowner considers that a proposed new rule would render their interest in the subject land incapable of reasonable use s 85(2)(a) of the RMA provides an avenue for the affected landowner to challenge the rule on such grounds when making a submission on the plan change under Schedule 1 of the RMA.

2 Where a rule is challenged in this way, the Environment Court is given the power to direct WRC (in the case of PC1) to modify, delete, or replace the rule under s 85(3)(a) of the RMA. Before giving such a direction, the Court must have regard to s 9(3) regarding land use rules and s 85(1) of the RMA regarding the absence of compensation and be satisfied that the proposed rule renders land incapable of reasonable use and places an unfair and unreasonable burden on the affected landowner.

3 In *Steven v Christchurch City Council*,[241] the Environment Court approached these provisions in two stages. First, the Court considered the question of whether the proposed provision had rendered the land incapable of reasonable use by interrogating the alternatives put forward by the parties. Second, the Court embarked upon an objective assessment of whether the proposed provision imposed an unfair and unreasonable burden on the affected landowner. To answer this latter question the Court found that it was required to consider a number of factors, namely:

3.1 The nature of the physical resources in the case.

3.2 That no reasonable (alternative) use can be made of the land.

3.3 The statutory purpose of promoting sustainable management.

3.4 The inference drawn from s 9(3) of the RMA that protecting property rights will (prima facie) promote sustainable management.

3.5 The relevant provision in the proposed plan or change.

3.6 The rebuttable presumption, that the challenged plan provision is effective and efficient.

[241] [1998] NZRMA 289.

3.7 The personal circumstances of the affected landowner, because an objective view of their ability to carry out the burden imposed by the provision is relevant.

4 The PC1 provisions place an unfair and unreasonable burden on landowners in three ways because:

4.1 The NRP reference period as defined by PC1 deprives landowners of part of their existing use rights that would otherwise have accrued as at 22 October 2016.

4.2 The non-complying activity class for land use change over 4.1ha in Rule 3.11.5.7 (as notified) precludes land use change of non-vulnerable land regardless of the character, scale, or intensity of effects.

4.3 The Section 42A Report amendments require non-complying activity resource consent to continue all existing farming activities where land use change of more than 4.1ha has occurred since 2016 regardless of the character, scale, or intensity of effects.

5 The "reasonable" alternative use considered in the Section 32 Report is to revert to planted production forest.[242]

NRP reference period

6 For WPL the NRP reference period (Schedule B) based on the financial years 2014-2016 results in the following land being excluded from the NRP calculation:

6.1 Land converted from planted production forest ready for use for farming activities during the 2014/2015 financial year and handed over to tenants on 1 July 2015 that was not stocked by 22 October 2016 = 71ha.

6.2 Land converted from planted production forest ready for use for farming activities during the 2015/2016 financial year and handed over to tenants on 1 July 2016 that was not stocked by 22 October 2016 = 565ha.

7 Because the land use change occurred before 22 October 2016 (regardless of whether these land areas were stocked by that date) WPL and its tenants and successors have existing use rights under s 20A(1) of the RMA that will continue to subsist until the farming activity rules in PC1 become operative. Effectively, the 2014-2016 NRP reference period deprives landowners of these rights. This

[242] Section 32 Report, 133.

imposes an unreasonable burden on landowners and the NRP reference period should therefore be amended.

8 The land use change is crystallised when WPL has completed all pastoral conversion work and land is ready for hand over it its tenants on the next following 1 July. For example, the Environment Court in the *Application by Hastings District Council* (using a subdivision analogy) found that:

> In the context of a subdivision of rural land, once roads and accessways are formed and sealed, building platforms are contoured, and drainage and other services are installed, it seems to me that the use of the land has changed. The use is no longer agricultural, or whatever it once was – it has become residential land, even if it awaits the arrival of house(s) and their residents.[243]

9 In relation to pastoral conversion, the land will no longer be planted production forest, it will have become farming land, and the land use change will have occurred, even if the tenant has yet to construct milking sheds and stock the land with cattle.

10 If it is necessary to specify a reference period for DST and modelling purposes (e.g. OVERSEER) then the NRP reference period should be the 2016-2017 financial year. Otherwise, the NRP reference period should be substituted by a NRP reference date of 22 October 2016 to reflect any accrued existing use rights.

11 Reflecting existing use rights correctly is important in setting the baseline for continued farming activities particularly in the context of any reductions in diffuse discharges that may be required when land use consent applications are decided under the PC1 rules. Otherwise the NRP reference period offends against the principle of retroactivity and landowners are deprived of part of their existing use rights.

Rule 3.11.5.7 as notified

12 The non-complying activity class for land use change over 4.1ha in Rule 3.11.5.7 (as notified) precludes land use change of non-vulnerable land regardless of the character, scale, or intensity of effects. This approach does not comply with s 68(3) of the RMA. More importantly, in the context of the "reasonable" alternative use (considered in the Section 32 Report) being to revert to planted production forest, the notified provision imposes an unreasonable burden on landowners absent any adverse effects.

[243] *Application by Hastings District Council* [2013] NZEnvC 102 at [24].

Rule 3.11.5.7 as amended by the Section 42A Report

13 The Block 2 Section 42A Report recommends that Policy 6 and Rule 3.11.5.7 should be deleted but inserts the same restrictions on land use change in the land use rules regarding farming activities. For example:

13.1 Rule 3.11.5.1A includes condition 6 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

13.2 Rule 3.11.5.2A includes condition 6 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

13.3 Rule 3.11.5.3 includes condition 5b that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

13.4 Rule 3.11.5.4 includes condition 7 that excludes properties and enterprises where land use change exceeding 4.1ha has occurred after 22 October 2016.

13.5 Rule 3.11.5.7 now provides that farming activities that do not comply with either Rule 3.11.5.3 (condition 5b) or Rule 3.11.5.4 (condition 7) are *non-complying* activities.

13.6 Rule 3.11.5.7 now applies indefinitely until replaced by a subsequent plan change, and is no longer set to expire on 1 July 2026.

14 Previously, the most restrictive activity class applied to farming activities under PC1 was restricted discretionary regardless of whether any change of use had occurred.

15 Now all farming activities are classed as non-complying activities where land use change exceeding 4.1ha has occurred regardless of whether the land use change was expressly allowed by resource consent.[244]

16 The amended land use rules are therefore more restrictive than PC1 as notified.

17 More importantly, in the context of the "reasonable" alternative use (considered in the Section 32 Report) being to revert to planted production forest, the amended provisions impose an unreasonable burden on landowners absent any adverse effects.

[244] RMA, s 139(10) provides that any certificate of compliance issued under s 139 shall be treated as if it were an appropriate resource consent.

18 The scope to make these amendments is questionable because there is a "real risk" that some persons may "have been denied an effective opportunity to respond to those additional changes in the plan change process".[245]

Conclusion

19 To avoid any unreasonable burden on landowners the above provisions should be amended as requested by WPL and recommended in the Block 2 evidence given by its experts.

[245] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [91](e).

APPENDIX 3

Block 2 Topics and PC1 Provisions left for Block 3

Topic B3 Science and economics

1 Table 3.11-1.

Topic C1 Diffuse discharge management

2 Policy 3.

3 Policy 7.

4 Rule 3.11.5.5.

5 Method 3.11.4.1.

6 Method 3.11.4.3.

7 Method 3.11.4.7.

8 Method 3.11.4.8.

9 Method 3.11.4.10.

10 Method 3.11.4.11.

11 Method 3.11.4.12.

12 Schedule 1.

Topic C3 Certified industry schemes

13 Method 3.11.4.2.

Topic C6 Urban/point-source discharges

14 Policy 17.