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| **IN THE MATTER** | of the Resource Management Act 1991 ("RMA") |
| **AND** | |
| **IN THE MATTER** | of the First Schedule to the RMA |
| **AND** | |
| **IN THE MATTER** | of the hearing of submissions on Proposed Plan Change One to the Waikato Regional Plan – Waikato and Waipa Catchments and Variation One to Plan Change One – Block 2 |

# LEGAL SUBMISSIONS IN REPLY ON BEHALF OF OJI FIBRE SOLUTIONS NZ LIMITED AND HANCOCK FOREST MANAGEMENT (NZ) LIMITED

**3 JULY 2019**

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## 1. RECEIVING WATERS

1.1 At the hearing on 26 June 2019 the Panel invited supplementary legal submissions addressing the term "receiving waters", following on from legal submissions on behalf of Fonterra Co-operative Group Limited ("Fonterra")

1.2 Counsel for Fonterra argues that the use of the term "receiving waters" supports his proposition that "s70 is directed towards point source, rather than diffuse discharges".[1]

*The King Salmon Decision*

1.3 In his reply submissions of 26 June 2019, counsel for Fonterra refers to the Board of Inquiry's New Zealand King Salmon (Final Report and Decision)[2] which observes that "the receiving waters are well understood to be the waters at the point of discharge". The full quote from that report is:

> [1307] While "water" is broadly defined in the RMA, "receiving waters is not defined. The receiving waters are well understood to be the waters at the point of discharge. In the context of a salmon farm, that would logically be at the edge of a cage".

1.4 In that decision, the issue was the effects arising from salmon fed on pellets and excreting ammonia / nitrogen and faeces into "receiving waters" and whether this triggered s107 (which reflects the wording of s70). It was determined that the effect caused by the discharge was a deposition to the seabed. As s12 controls the deposition of matter to the seabed, the Board of Inquiry found that "the receiving waters" did not include the seabed and its benthic environment. It was also noted by the Board of Inquiry that "the effects threshold do [sic] not extend to include other aspects of the environment beyond the water itself".[3]

1.5 Importantly, the obiter statement by the Board of Inquiry that "the receiving waters are well understood to be the waters at the point of discharge" needs to be read in the context of that marine farming situation and does not assist in clarifying the meaning of "receiving waters" in this case.

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[1] Block 2 Legal submissions para 8.4 (c) (ii) and Legal Submissions in Reply on behalf of Fonterra dated 26 June 2019.
[2] At [1307]
[3] At [1308]

*Statutory interpretation*

1.6 The meaning of an enactment must be ascertained from its text and in light of its purpose.[4] In the context of s70, "receiving waters" are waters that receive the contaminant that has been emitted, deposited or allowed to escape.[5] When read in this way, the discharges referred to, whether they occur into water, or onto land in circumstances which may result in them entering water, are to be considered against the effects which arise in the water into which those contaminants are "received". The term "water body" or "water" has not been used in place of "receiving waters" as the term "receiving waters" clarifies, for example, that the water into which the contaminant has been "discharged", could be different from the water body that receives the discharge or where the effects occur.

*Caselaw*

1.7 The case of *Taranaki Regional Council v Works Infrastructure Ltd* involved a prosecution under s15.[6] Although the term "receiving" is not used in s15, it is of interest that the Court in this case refers to the "receiving land". It found that the receiving land did not need to be contiguous with the land onto which the contaminant was discharged.

> [16] Section 15(1)(d) does not say " …from industrial and trade premises on to land beneath or adjoining those premises". It is silent as to where the receiving land may be in relation to the premises from which the discharge originates. If I apply a purposive and "mischief" based interpretation to the section I do not need to impose a rider that the two need to be contiguous or joined. What would be the practical difference, for instance, between an abattoir pumping effluent onto nearby (but not directly adjoining) land through a 200 metre pipeline, and the same abattoir moving the same effluent to the same land by way of a truck? The end result is the same. A contaminant has been deposited onto land from industrial premises. Merely the means of conveyance from one point to another has changed. There is nothing in the Act which points to such a distinction being relevant. (emphasis added)

*Summary*

1.8 The use of the term "receiving waters' is neither evidence for nor against the proposition that s70 relates only to point source discharges. The adjective "receiving" is simply a means of clarifying the distinction between

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[4] S5 Interpretation Act 1999
[5] S2 RMA definition of discharge "includes emit, deposit or allowed to escape"
[6] (2002) 8 ELRNZ 75

water at the point at which a discharge occurs and the water where it ultimately ends up.

## 2. FURTHER CASELAW ON S15 DISCHARGES

2.1 For further caselaw in relation to the issue of whether a discharge consent is required for diffuse discharges to land, I refer the Panel to the obiter comments of the Environment Court on the question of whether allowing "large numbers of stock to urinate or defecate on land is caught by s15 RMA" in *P & E Ltd v Canterbury Regional Council*.[7]

> [36]…The application of section 15 of the RMA and the section 2 definition of 'discharge' is relatively simple. When a modern quasi-industrial-scale farming company puts cattle into a paddock, those animals will urinate and defecate on the land. Our understanding is that the urine often contains many times the volume of N that the grass can absorb. A simple question of fact arises: is the farmer allowing the cows to emit urine (a contaminant) in circumstances where it is likely that N (as urea or in some other form which "emanates as a result of natural processes" from the urine) will enter water? While that ultimately needs to be resolved on the facts of each case where it is challenged, the evidence is increasingly strong that the accumulative effects of such discharges from all farms in the relevant catchment are a very important contributor to contamination levels in downstream water bodies.
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> [37] Second, both the application of section 15 to stock emissions of urine and the pLWRP rule seem to be consistent with the National Policy Statement on Freshwater Management ("NPSFM 2014"). Policy A4 [53] includes policies about discharge in all regional plans and then states:
>
> > " …
> >
> > 3. This policy applies to the following discharges (including a diffuse discharge by any person or animal):
> >
> > a. a new discharge or
> >
> > b. a change or increase in any discharge —
> >
> > of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water."

[7] [2015] NZEnvC 106

This seems to contemplate that allowing stock to urinate onto the ground is a discharge, although we are unsure what is contemplated by “diffuse”. The NPSFM 2014 is an important document and must be given effect to as confirmed by the Supreme Court in Environmental Defence Society v New Zealand King Salmon Limited.

[38] Third, in Marlborough District Council v Awarua Farm (Marlborough) Limited, the Environment Court considered an application for enforcement orders in relation to a dairy farming operation. It stated (obiter):

> “We would accept the general proposition that the evacuation of the bladder or bowels of stock is generally regarded as a non-point discharge which is not controlled by the Act. The reasoning would be that the owner has neither intended nor permitted the activity, but it is a natural occurrence.”

There seems to be a logical disconnection in that passage. If a subsequent“ natural process” changing the chemical composition of a contaminant does not alter its status as a contaminant — and the definition in section 2 RMA expressly says so — then why should the initial emission not be seen as a discharge in the sense of “allow to escape”, especially when urinating and defecating are also described by the court as “natural occurrences”? We respectfully doubt whether the Environment Court was correct in that decision. We should note that the questioned passage was affirmed by the High Court in Awarua Farm (Marlborough) Limited v Marlborough District Council, although that seems to be obiter also or possibly, as Mr Anderson submitted, per incuriam.

**Gill Chappell**

**Counsel for OjiFS and HFM**