BEFORE INDEPENDENT HEARING COMMISSIONERS

AT HAMILTON

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

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

BLOCK 3 – HEARING 18 SEPTEMBER 2019

13 SEPTEMBER 2019

RICHMOND
CHAMBERS

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MAY IT PLEASE THE COMMISSIONERS:

1. OVERVIEW

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

1.2 Fonterra's significant interest in Plan Change 1 (**PC 1**) in respect of both the "on farm" implications of the PC1, and the proposed controls on point source discharges, have been set out in the legal submissions and evidence presented in respect of the Block 1 and Block 2 hearings.

1.3 In respect of this Block 3 hearing, Fonterra's on-farm interests have focussed their evidence and these submissions on the following matters:

(a) Fonterra's opposition to the Council's reworking of the FEP schedule by the insertion of objectives and principles, which in Fonterra's opinion will significantly compromise the FEPs' effectiveness and the ultimate environmental improvement that FEPs are designed to drive.

(b) Fonterra's concern that those seeking a resource consent framework for FEPs will use the consent process to seek "open ended" exceptions to the FEP standards, such that the FEPs will become inconsistent and the overall effectiveness will be compromised.

(c) To address (a) and (b) above, Mr Willis has presented on behalf of Fonterra an amended FEP schedule that will provide an effective and efficient (and in my opinion lawful) basis for the permitted activity rule for farming proposed by Fonterra.

1.4 Finally, in respect of the Table 3.11-1, Fonterra's manufacturing interests oppose the suggested addition of temperature to the attributes in Table 3.11-1. Short submissions supporting Mr Willis' planning evidence on this issue are set out in section 3 below.

2. ON FARM – FARM ENVIRONMENT PLANS

2.1 Fonterra's position on the Block 3 matters are primarily addressed in their evidence, with my submissions taking a more thematic approach to a range of key issues that underlie Fonterra's concerns.

2.2 The first key difference between Fonterra and a number of other parties is that those parties do not believe that the contents of the FEP schedule can be defined with sufficient certainty. That then leads those parties to the position of "every farm needing a consent". Fonterra does not agree with that underlying premise, and has demonstrated how the FEP schedule can be amended to be sufficiently certain.

2.3 The second key difference relates to the desire for flexibility in the FEPs. Fonterra accepts that not all FEP schedule requirements may be practicable on every farm; but they will be practicable on the vast majority of farms. Fonterra considers that the better approach (by a significant margin) is to have a tightly defined FEP schedule together with a permitted activity rule that together will regulate the vast majority of farms, while leaving open a consent process for those farmers seeking different FEP outcomes or different methods of achieving certain outcomes.

General objectives and principles cf certain standards

2.4 For the reasons outlined in the evidence of Mr Allen and Mr Willis, Fonterra strongly opposes the Council's recommended move away from certain standards directing the contents of an FEP to a more general guidance by way of objectives and general principles.

2.5 This approach will be inefficient and ineffective. It will lead to inconsistent decision making, and a costly and frustrating process that will inevitably be shelved within a short timeframe.

2.6 The suggestion from the Council in its most recent evidence would be for the Council to grant a generic consent and FEP but, if after auditing, a farmer was found not to be complying, then s 128, RMA, could be used to insert more stringent conditions into the consent, which could then be enforced. Councils are loath to use s 128 process at the best of times and, in consent processes I have been involved in, Waikato Regional Council has repeatedly stated its reluctance to use this process. It would

inefficient and poor planning to put in place consent framework that would appear to rely on the need to "fix up" consent conditions subsequently through the relatively cumbersome s 128 process. Surely, it's better to get it right – right from the outset.

Significant risks and no benefits from a resource consent framework for FEPs

2.7 Fonterra's position on the lawfulness of the permitted activity rule have been spelt out in some detail in its submissions presented in Block 1 and Block 2 hearings. Leaving the legalities aside, I would encourage the Panel to carefully scrutinise any suggestion that it would be a more appropriate approach (in a s 32 planning sense) for a resource consent and FEP to control a farming activity, as opposed to a permitted activity rule and FEP.

2.8 Even those ardently opposed to the use of the permitted activity rule would have to accept that processing 5,000 or more resource consents merely for the purpose of imposing a FEP would be an incredibly costly and time-consuming process for Council and landowners (even leaving aside future monitoring, review and other costs that would in this scenario be borne by Council).

2.9 In that case, what are the benefits of requiring a resource consent? Whether or not a consent is required, Fonterra's firm view is that the FEP should be suitably directive so as to drive meaningful on-farm change. Fonterra would be very concerned about those seeking a resource consent to authorise an FEP just so the FEP can be "generic", or that a landowner might be able to seek an FEP that is on an "open slather" basis. As Mr Allen says at [3.4], "Tailored FEPs should not be used as a smokescreen for inaction on what is clearly just poor farming practice."

2.10 That would be the worst of all options.

2.11 Not only would the communities face the costs associated with obtaining the resource consents and monitoring it, but you also have a FEP that is vague and potentially unenforceable, and which risks not achieving the desired level of on farm change. There is also a serious risk of inconsistent assessment and decision making by the Council.

2.12 Fonterra maintains its position that the most appropriate approach is a permitted activity, together with a carefully defined FEP (overseen by a certified sector scheme that supports farmers to comply and assists the Council to carry out its functions in an efficient manner). To the extent that a farmer might wish to depart from that FEP, then a resource consent could be sought *for the extent of the departures*. This reduces the scope of any consent assessment, minimises the degree of uncertainty that follows from a more loosely defined (or less onerous) FEP, and minimises the extent of any monitoring that would be required pursuant to the consent.

FEP Schedule – Amendments proposed by Mr Willis

2.13 I have explained earlier why Fonterra does not support the Council's recent change of tact that will take the FEPs into far more uncertain territory. Mr Willis' evidence contains a detailed rewrite of the FEP schedule, about which he can answer questions. These amendments effectively seek to reverse the changes sought by Council, and then to make further changes to the notified version so as to further enhance the certainty of the schedule and therefore effectiveness of the FEP.

2.14 Mr Willis has also reviewed evidence of other parties – particularly that of Miraka's planning witness – and he is available to answer any questions about amendments proposed by others.

3. MANUFACTURING – ADDITION OF TEMPERATURE

3.1 In its amended Minute dated 25 June 2019, the Hearing Panel directed that any legal submissions relating to the proposed addition of attributes to Table 3.1.1-1 be raised as part of their legal submissions on Block 3.

3.2 These submissions are presented by Fonterra's manufacturing interests, in opposition to the proposed addition of the temperature attribute. Evidence was filed by Mr Willis, on behalf of Fonterra's manufacturing interests, on this issue.

3.3 Fonterra's position is as follows:

(a) There is no legal jurisdiction to add temperature as an attribute, at this stage in the hearing process.

(b) If there is jurisdiction, then:

(i) the costs and benefits of doing so have not been assessed under s 32, RMA; and

(ii) given that temperature is already addressed by other provisions in the Waikato Regional Plan, adding temperature to Table 3.11-1 is neither the most efficient nor effective method of regulating the environmental effect of concern.

Jurisdiction

3.4 I have reviewed and gratefully adopt the legal submissions filed on behalf of Mercury NZ Ltd, dated 14 March 2019, paras [10] - [29], and those dated 2 August 2019, paras [7] - [31] in respect of the limitations on the Hearing Panel validly expanding Table 3.11.1 with additional attributes. (Mercury's earlier submissions were responded to by legal submissions on behalf of the Department of Conservation, paras [11]-[39].)

3.5 Of particular concern to Fonterra's manufacturing interests is the addition of a temperature attribute. In that regard, with reference to the legal submissions filed on jurisdiction:

(a) Fonterra agrees that there are a range of attributes, beyond N, P, *E.coli* and sediment, that contribute to the health and wellbeing of a waterbody, and Fonterra also agrees that this broader range of attributes will need to be addressed by planning provisions. However, particularly with regard to temperature, Fonterra does not consider that there is any necessity to address that issue as part of PC 1. The reasons for this are discussed in the section below.

(b) Unlike some parameters of concern that are more focussed on long term mass load (eg, N, P etc), temperature effects are primarily an issue for the immediate receiving water environment.

(c) While I agree that the Department of Conservation's submission raised "temperature" as a matter which the Department wanted addressed in PC 1, there was no detail about how or what relief

was being sought in that regard. (Nor to my recollection was there any assessment about what was wrong with the current provisions in the Waikato Regional Plan addressing temperature.)

(d) Industrial activities within the Waikato and Waipa River catchments that discharge to those rivers or their tributaries would be directly and materially affected by additional controls on temperature. The control of temperature in a discharge can be an incredibly expensive process, and there are some practical limitations on what can be achieved, even with the use of the best available technology. For example, even with the use of cooling towers, Fonterra faces practical limits on how much it can cool its condensate, particularly in hotter summer months when the ambient air temperature is high. For illustrative purposes and acknowledging that this evidence is not before this Hearing Panel, in the recent Te Awamutu hearing, the expert evidence filed by Fonterra confirmed that the costs ranged from $350,000 (cooling tower) to between $1.48M to $2.9M (refrigeration options) *for each degree the condensate was cooled*.

Most efficient and effective method

3.6 In my submission, even if it were within jurisdiction of the Hearing Panel to do so, the addition of an attribute relating to temperature:

(a) cannot be practically implemented at this stage in the process;

(b) but, even if it were able to be:

(i) it is not necessary to achieve the objectives of PC 1; and

(ii) it is not the most efficient and effective method, having regard to the existing controls on temperature in the Regional Plan.

3.7 I endorse and respectfully adopt the submissions of Mercury, where Ms Somerville-Frost noted that:

> 22 The JWS is not a particularly clear or useful document and should be treated with some caution. In relation to most attributes, it does not outline a clear or overwhelmingly supported outcome. It does not (in many instances) propose a mechanism or amendments to incorporate the attribute into PC1. While that is understandable given the JWS is a document prepared by technical experts, the result is that the Panel would be forced to undertake an extensive drafting exercise and apply a great deal of interpretation of statements included in the JWS. Submitters on the other hand are left to guess how the attributes could be brought into PC1.
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> 23 Mercury considers that drafting key operative provisions essentially 'from scratch' is beyond the Panel's remit in terms of considering and making a decision on PC1 (as well as the scope issues raised above). By way of example, the JWS noted that the numerical thresholds for periphyton had not been discussed or agreed and the JWS provided only general guidance regarding standards that could be provided as an interim approach.[16]

3.8 As Mr Matthews, expert witness for Genesis, observed: "With respect to temperature, I note that there was no agreement or consensus with respect to including temperature as an attribute in Table 3.11-1[1] and some agreement (at least 5 witnesses) with not including temperature as an attribute.[2] "

3.9 Fonterra supports and adopts the expert evidence of Mr Matthews, paragraphs [24] – [31], to the effect that:

(a) There is no obvious rationale for a limit of 20 degrees to be included as an attribute, other than this is currently a permitted activity standard in the Waikato Regional Plan. There is no explanation of why this standard should now be a strict limit (Matthews, [24]).

(b) Nor is there any explanation as to whether, and if so why, this limit should apply to all parts of the main stems of the Waikato and Waipa Rivers, and to all tributaries thereof (Matthews, [29]). There are a range of receiving waters characteristics in terms of width, depth, flow rate, existing riparian shading, all of which would contribute to its sensitivity or otherwise to temperature fluctuations, which together imply that a blunt "one size fits all" approach to temperature would be unlikely to be appropriate.

(c) In respect of those experts seeking the imposition of a temperature attribute, it is unclear what the planning implications

would be if this limit were not able to be met in the receiving waters. Is the activity prohibited at that point? In that regard, there are likely to be many cases where the ambient temperature upstream of a point source discharge would already exceed 20 degrees (Matthews, [26]). This was the exact situation with respect to the Mangapiko Stream adjacent to the Te Awamutu manufacturing site, which was referred to by the Independent Commissioners in the recent consent decision for that site.

3.10 As pointed out by Mr Willis, the Waikato Regional Plan already specifically addresses the issue of temperature, and none of those provisions are proposed to be amended by PC 1.

3.11 For those reasons, Fonterra does not accept that it would either be lawful, or appropriate, to include an attribute for temperature into the Table 3.11-1.

4. WITNESSES FOR FONTERRA

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

(a) Mr Richard Allen, Fonterra

(b) Mr Gerard Willis, consultant planner from Enfocus

B J Matheson

Counsel for Fonterra Co-operative Group Ltd