

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 3

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

8 AUGUST 2019

CONTENTS

1. INTRODUCTION.....2
2. SUMMARY OF POSITION ON S42A REPORT ISSUES:2
3. AMENDMENTS PROPOSED TO RULES REGULATING FORESTRY5
4. SUMMARY8

MAY IT PLEASE THE COMMISSIONERS:**1. INTRODUCTION**

- 1.1 Oji Fibre Solutions NZ Limited (“OjiFS”) and Hancock Forest Management (NZ) Limited (“HFM”) appear in support of their submissions on Plan Change One (“PC1”) to the Waikato Regional Plan.
- 1.2 Evidence in chief and rebuttal evidence will be presented by Dr Philip Mitchell (planning) and rebuttal evidence by Ms Sally Strang, for HFM. Dr Frank Scrimgeour (economic) also appears to address his rebuttal evidence presented at the Block 2 hearings, due to his previous unavailability.
- 1.3 The legal submissions address the following key issues:
 - (a) Summary of the submitters’ positions on various s42A report issues
 - (b) Amendments proposed to the regulation of forestry by Fish and Game and the Department of Conservation.

2. SUMMARY OF POSITION ON S42A REPORT ISSUES:*The Implementation Methods included in PC1*

- 2.1 The OjiFS and HFM position is that these methods should be deleted but if any Implementation Methods are to be retained, they should be amended to reflect the policy framework and approach set out by Dr Mitchell in his Block 2 evidence.

The changes to Schedule 1 (Farm Environment Plans) proposed in the section 42A report

- 2.2 PC1 requires that an FEP be prepared in accordance with Schedule 1 and be approved by a certified Environment Planner.
- 2.3 For reasons outlined in its previous legal submissions and planning evidence OjiFS and HFM consider that diffuse discharges from the vast majority of farming operations should be primarily regulated via resource

consents rather than by permitted activity rules.¹ Reasons for not using permitted activity rules as the primary means of regulating dairy and intensive sheep and beef farming operations are provided by the Environment Court in the One Plan Case and were upheld by the High Court.²

- 2.4 It is submitted that the redrafted FEP creates an uncertain dual approach to reducing discharges. It simultaneously seeks to drive reductions through good farming practices (Objective 1) while on the other hand requiring the NRP to be met (via Objective 3). If a farm's NRP is being met, how will the certifier interpret this in terms of additional good farming practices that are required through the other principles? What discretion will the consent authority exercise to impose additional good farming practices where the NRP is already being achieved? How will there be consistency applied to consent applications? The hallmark of consent conditions is certainty and this has a direct bearing on enforceability.³
- 2.5 Referring to the changes proposed by the s42A report, Dr Mitchell considers the FEP still needs to provide greater certainty to confirm the standards required when issuing resource consents.⁴ Specifically:
- (a) the specific provisions of the FEP need to avoid directing different outcomes;⁵
 - (b) any objectives should relate to that particular farming activity and how it will be managed to achieve the standards specified in the resource consent;
 - (c) reference to NRP should be deleted altogether⁶
 - (d) clarification is required as to when changes can be made to the FEP.⁷

¹ Block 2 legal submissions at 2.1

² *Day v Manawatu Wanganui Regional Council* at [5-177]. The decision of the Environment Court was upheld in all material respects by the High Court in *Horticulture New Zealand v Manawatu Wanganui Regional Council* [2013] NZHC 2492 at [90]

³ In order to be enforceable, a condition requires specificity, clarity and accuracy of expression leading to certain measure of certainty. *Ferguson v Far North District Council* [1998] NZRMA 238 at 244

⁴ EIC Block 3 Dr P Mitchell at 4.4

⁵ EIC Block 3 Dr P Mitchell at 4.2 – eg Objective 1 which references managing according to GMP vs Objective 3 which references meeting the NRP

⁶ EIC Block 3 Dr P Mitchell at 4.2

⁷ EIC Block 3 Dr P Mitchell at Appendix One, part D

- 2.6 Amendments proposed by Dr Mitchell are set out in the appendix to his evidence in chief.

The definition of good farming practice vs best environmental practice;

- 2.7 The s42A report agrees with OjiFS's submission on the definition of "good farming practices" that it is not appropriate to refer to "industry agreed and approved" practices and actions. However, in removing these words from the definition it leaves a definition that for all intents and purposes allows for any practice that manages the risk of contaminants entering a water body, to amount to a good farming practice. As this definition is integral to the FEP it is important that there is clarity about what constitutes good farming practice. Dr Mitchell recommends replacement of the term "good farming practice, with "best environmental practice" as a means of incorporating best practice.⁸

- 2.8 The legal submissions for Block 1 addressed the references in the key planning documents to "best practice" noting that best practice is part of the Vision and Strategy and the Regional Plan.⁹

- 2.9 The difficulties with the expert's approach to Table 3.11-1 reinforces that a more appropriate short /medium term option is the adoption of a best practice approach.¹⁰

Policy 7 – Future Allocation;

- 2.10 The s42A report recommends deleting Policy 7 in its entirety. It notes that submitters are concerned that the policy is "confusing for farmers and does not provide enough certainty or flexibility to invest in mitigations best suited to a property".¹¹ However, as has been demonstrated through evidence presented by OjiFS and HFM,¹² this is a concern associated with grandparenting, rather than Policy 7 *per se*.

- 2.11 It is submitted that Policy 7 should be retained but with emphasis on information gathering relevant to future policy development requirements. That is important because it will be vital in reviewing alternative options

⁸ EIC Block 3 Dr P Mitchell, section 6.

⁹ Block 1 Legal submissions at 2.23

¹⁰ EIC Block 3 Dr P Mitchell, section 8

¹¹ Para 447

¹² Refer to the evidence for Block 1 from P Buckley and H Mowbray.

for the next stage of the plan. Dr Mitchell has proposed revisions reflecting this approach.¹³

3. AMENDMENTS PROPOSED TO RULES REGULATING FORESTRY

- 3.1 Key drivers of PC1 were the need to give effect to the Vision and Strategy and to the NPS FM, both of which had been promulgated since the current Regional Plan became operative. The rules in PC1 focus on managing diffuse discharges from farming activities.
- 3.2 Forestry is managed by the rules in Chapter 5.1.4 of the regional plan. The regional plan rules were recently modified to give effect to the National Environmental Standards for Plantation Forestry Regulations 2017 (“NES PF”) so that plantation forestry activities are now regulated solely by the NES PF. The NES PF has come into effect since both the National Policy Statement for Freshwater Management (“NPS FM”) (including the 2017 update) and the Vision and Strategy.
- 3.3 HFM’s primary submission supported Part B of PC1 and the retention of the key rules and standards in the Regional Plan that provide for the management of plantation forestry.¹⁴

Fish and Game’s submissions

- 3.4 Auckland / Waikato Fish and Game and Eastern Region Fish and Game (“Fish and Game”) seeks to remove the exclusion in the existing plan rules for plantation forestry in the Waikato Regional Plan and to replace those with more stringent provisions governing plantation forestry activities, including reduced setbacks, restrictions on the amount of a catchment that can be harvested in any one year and amendments to the timeframes for replanting. The Department of Conservation has produced evidence from Ms Kissick seeking the introduction of a new rule in Schedule 1 to require forestry be set back 20m from all water bodies, despite any primary submission or further submission seeking or supporting such relief.

¹³ EIC Block 3 Dr P Mitchell at 7.2

¹⁴ 5.1.4.11 and 5.1.5, refer PC1-5808. “Given plantation forestry has been regulated under Regional Plans since the outset of the RMA, and to date as far as we are aware any concerns that Waikato Regional Council have had with sub-standard operations have been able to be enforced via the existing rules, this would suggest the rules are sufficient.”

- 3.5 Dr Mitchell examines the basis for adopting plan rules that may be more stringent than the NES PF regulations. He concludes that reading regulation 6 of the NES PF as a whole creates a context where exemptions should be adopted in only “special cases”.¹⁵ He notes that the NES PF was drafted well after the promulgation of the NPS FM. Lending support to this argument is the guidance document Resource Management (National Environmental Standards for Plantation Forestry Regulations 2017) Plan Alignment Guide, May 2018, referred to by Ms Strang.¹⁶ That document acknowledges that the NES PF took account of the 2017 amendments to the NPS FM. Importantly it states that the provisions of the NES-PF are “generally expected to be sufficient to give effect to the NPS FM”¹⁷ and that the “NES-PF includes a range of provisions to manage sediment...”¹⁸ The Guidance Document acknowledges that in certain circumstances councils and their communities may go through the process of giving effect to the NPSFM and determine that more stringent rules are required.” The Guidance Document also states that to meet the requirements under Regulation 6(1)(a) there would need to be “a clear link between how a more stringent rule that applies to plantation forestry activities gives effect to (implements) a particular objective in the plan.”¹⁹ In the context of a plan change containing rules that relate only to farming activities, I would add that it also needs to be clearly demonstrated that there is a consistent approach to the regulation of all land use activities that discharge sediment.
- 3.6 Section 12(4) of the Settlement Act²⁰ provides that a rule included in a plan for the purpose of giving effect to the Vision and Strategy prevails over a NES if it is more stringent. The Settlement Act does not direct rules to be more stringent *per se*.
- 3.7 Determining whether a rule is required to give effect to the Vision and Strategy remains subject to a full section 32 evaluation.
- 3.8 In the context of a plan change process;

¹⁵ Rebuttal Dr P Mitchell at 3.8

¹⁶ Rebuttal S Strang at 4.6-4.7

¹⁷ 4.3.1

¹⁸ Need reference

¹⁹ 4.3.1 at page 20

²⁰ This includes the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (“The Settlement Act”), and corresponding provisions in the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the Nga Wai o Maiapoto (Waipa River) Act 2012.

- (a) that is primarily focused on rules managing farming activities;
- (b) where the CSG process has not identified water quality from forestry as an issue;²¹
- (c) where water quality restoration has been noted as requiring a considerable amount of land to be changed through methods such as afforestation if the Vision and Strategy is to be achieved;²²
- (d) where the NES PF already includes a range of provisions to manage sediment, considered in the context of the NPS FM, expert evidence and evaluation;
- (e) where the catchment includes a large proportion of the forest in the North Island that has no significant generic differences from any other region (particularly in the context of the “special areas referred to in regulation 6);²³
- (f) where the submitters propose stricter standards on forestry activities compared to comparable farming activities;²⁴
- (g) where there has been no meaningful opportunity for the wider community to engage in what amounts to a significant departure from the key issues under consideration as part of PC1;
- (h) where the provisions of the NES PF are undergoing a one year review;²⁵ and
- (i) where there is no section 32 evaluation, including any assessment of the efficiency (including risk assessment or cost benefit analysis, for example of lost productive area of additional setbacks) of the submitter’s proposed amendments compared to the existing NES PF provisions²⁶;

²¹ Section 32 Report

²² PC1 – Section headed “ Full achievement of the Vision and Strategy will be intergenerational”, first paragraph.

²³ Rebuttal Dr P Mitchell at 3.7

²⁴ Rebuttal S Strang at 7.6 – a farmer undertaking new planting would be required to plant back 20m from an ephemeral waterway to enable permitted harvesting but alternatively could fence to 1m and graze the 19m strip with cattle or livestock.

²⁵ Rebuttal S Strang at 4.9

²⁶ Section 32(4) with reference to s32(1)(b)(ii)

any consideration of the amendments sought by the Fish and Game and supported by the Department of Conservation is premature, inefficient and otherwise unnecessary to give effect to the Vision and Strategy.

- 3.9 In case the Panel considers that it is appropriate to examine this matter further, Ms Strang's evidence sets out a detailed technical / operational response to the amendments sought.

4. SUMMARY

- 4.1 As we near the end of the hearings process it is worth briefly reflecting on the framework that was notified, has been modified by the s42A report and how that could be further modified.

- 4.2 There has been much detail in relation to the specific provisions but throughout this process OjiFS's and HFM's fundamental concern is regulatory equity – ensuring all resource users share the obligation to improve the river in proportion to the effects of their activities on it. OjiFS and HFM are particularly concerned that grandparenting nitrogen allocation rights will increase inequities and cause other, consequences, as discussed in detail in previous submissions and evidence.

- 4.3 OjiFS is also substantially concerned with the point source discharge provisions but to a certain extent these can be ringfenced with a proviso that any approach to PSD and NPSD should be principled / equitable.

The notified framework and the s42 Report proposals

- 4.4 PC1 as notified, largely focused on N from farming activities as a means of obtaining water quality improvements. The section 42A report has recommended a much broader focus on the four contaminants but retains the NRP as the means for setting individual property owner's obligations for N management.

The most appropriate way forward?

- 4.5 OjiFS and HFM consider that as long as the NRP remains, so does the fundamental premise that diffuse nitrogen discharges occurring at some date in the past confer a proportional right to continue.

- 4.6 It is not clear how the Council's FEP requirement to adopt good farming practices will, to any extent, mitigate the environmental implications of

grandparenting. There is a lack of clarity as to what sort of consent conditions will be applied (via the FEP), particularly in circumstances where the NRP is being complied with.

4.7 OjiFS and HFM have attempted to focus on modifications to the plan framework that are integrated, that will incentivise better environmental management, achieve greater equity between sectors and avoid distorting investment. It is submitted that OjiFS and HFM have proposed an alternative approach that more appropriately meets the clear directions in the statutory documents, particularly in the Vision and Strategy and the NPSFW, to adopt / implement best practice / the best practicable option or achieve betterment / continuous improvement.²⁷ That approach:

- (a) recognises that as a discharger of nutrients and contaminants, the primary sector is no different from any other industry. It has the same obligations to operate within limits and internalise effects, or mitigate those effects where absolute internalisation is not possible;
- (b) is premised with 'getting on with the job' by not delaying the implementation of best practice;
- (c) acknowledges that adopting the status quo, or grandparenting existing discharges is plainly not consistent with those concepts.

4.8 A revised integrated framework is set out in legal submissions on Block 2 and the statements of evidence of Dr Mitchell.

Gill Chappell

Counsel for OjiFS

²⁷ In the first block Oji presented evidence from famers about the way in which PC1 acted as a deterrent to adopting improved practices and from foresters that opportunities for economically efficient land use change would be met. (legal subs 3.22)