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

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

9 APRIL 2019

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION AND BACKGROUND

1.1 Oji Fibre Solutions NZ Limited ("OjiFS") Oji and Hancock Forest Management Limited ("HFM") made submissions and further submissions on PC1. As they have similar interests in the outcomes of PC1 they appear jointly in support of their submissions on Proposed Plan Change One to the Waikato Regional Plan ("PC1").

Evidence

1.2 Evidence is called as follows:

(a) **Mr Philip Millichamp** (Group Manager: Environment and External Relations at Oji Fibre Solutions) sets out OjiFS's interests in the region as well as in the plan change, and its involvement in the CSG process;

(b) **Mr Guy Salmon** (Specialist in environmental strategy, policy and governance) addresses the development of the CSG process, his findings regarding the outcomes of the process, and his early advice to the Council;

(c) **Mr Peter Buckley** (Waikato dairy farmer) explains the adoption of best management practices on his dairy farm and his involvement in the development and adoption of the CSG as a former Councillor;

(d) **Mr Harry Mowbray** (Waikato organic dairy farmer) outlines his organic dairy farming operation, practises adopted to reduce the environmental effects of his operations and the impacts of PC1 on his farm;

(e) **Ms Sally Strang** (Environmental Manager, HFM) sets out her involvement as the alternate forestry representative on the CSG, the outcomes of the process for forestry, and HFM's forestry interests in the region;

(f) **Dr Frank Scrimgeour** (economist) provides an economic analysis of PC1;

(g) **Dr Philip Mitchell** (planner) examines PC1 against the relevant statutory documents.

Summary of the submitters' interests in the region

OjiFS

1.3 The Kinleith Pulp and Paper Mill, located South of Tokoroa and owned by Oji Fibre Solutions (NZ) Limited ("Oji"), relies heavily on the natural resources of the region, including the outputs of sustainably-grown planation forests and the Waikato River resources. It has been in operation for over 60 years, currently employs over 500 people and contributes over $0.5 Billion in sales to the economy. The Kinleith Mill operations are a critical part of the Waikato and broader North Island forest products sector. The importance of natural and physical resources to the Kinleith Mill, including the Waikato River and other matters are addressed in the evidence of Mr Millichamp. Consenting issues related to the Mill are referred to in the planning evidence of Dr Mitchell.

HFM

1.4 HFM manages approximately 236,000 ha of plantation forest located in the North Island in a variety of ownerships and with a variety of land use capability classes (LUC 3-7). Within the Waikato Region the HFM estate equates to about 87,000 ha or 28% of the region's total plantation forest. More detail about the estate and the contribution plantation forestry makes to improved water quality outcomes is set out in the evidence of Ms Strang.

Approach to the hearing

1.5 OjiFS and HFM's primary interest lies in ensuring that the statutory framework is applied equitably and efficiently:

(a) with outcomes that recognise that statutory obligations to continuously improve need to be placed on non-point source and point source dischargers consistently; and

(b) with outcomes that ensure that forestry, including afforestation, is not discouraged in the region.

1.6 These legal submissions:

(a) principally focus on those parts of the statutory framework that provide direction about how the Vision and Strategy is to be implemented;

(b) outline the inconsistencies associated with the PC1 approach to regulating farming activities, relative to the statutory documents, point source discharges and case law;

(c) address the practical effects of PC1 from a forestry perspective and from the perspective of farmers who have adopted best management practices;

(d) do not challenge the underlying issues of PC1 but do question its process of development via the CSG, the merit and outcomes of that process and its application to PC1;

(e) outline changes sought in relation to the provisions of PC1 that form part of the first block of hearings; and

(f) otherwise defer issues associated with s32 to the Second Block of hearings while recognising that the division of the hearings means that there may be some overlap as it is difficult to separate the overarching issues from the policy framework

2. LEGAL AND STATUTORY FRAMEWORK

2.1 The functions of regional councils are set out in s30 of the RMA. That Act contemplates a broad range of circumstances in which a Regional Council should consider preparing a regional plan (s65(3)). PC1 must also meet the relevant statutory criteria in section 66(2) including to have regard to any management plans and strategies prepared under any other Acts. PC1 must give effect to policy statements including the National Policy Statement on Freshwater Management ("NPSFW") and the Waikato Regional Policy Statement ("RPS"). Section 68(3) refers specifically to the making of rules and requires the regional council to have "regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect".

2.2 The purpose of the RMA is to be achieved (s63(1)) and any Regional Plan is to be in accordance with the Councils' functions and the provisions of Part 2 of the Act (s66(1)). The Supreme Court in

Environmental Defence Society Inc v the New Zealand King Salmon Company Limited placed a gloss on this requirement by finding that in the context of a plan change it was implausible that regard should be had to Part 2 of the RMA "absent any allegation of invalidity, incomplete coverage or uncertainty of meaning".[1]

2.3 As part of a plan change process the decision-maker's obligation under section 32 includes an evaluation of the most appropriate way to achieve the purpose of the Act.

2.4 The RPS is the Regional Council's primary planning instrument. Under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 ("The Settlement Act"), the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the Nga Wai o Maiapoto (Waipa River) Act, the Vision and Strategy is deemed, in its entirety, to be part of the RPS.[2]

The effect of the Vision and Strategy

2.5 Because the Vision and Strategy is part of the RPS, the Vision and Strategy must be given effect to.[3]

2.6 The Vision and Strategy prevails over any inconsistent provision in a national policy statement[4] and any amendment of the RPS or Regional Plan must not be inconsistent with the Vision and Strategy.[5] Where there is any internal inconsistency in the interim period prior to amendment of the RPS, the Vision and Strategy prevails. This also applies to any future reviews of the Vision and Strategy.[6]

2.7 The Vision and Strategy has been described as the primary direction setting document for the Waikato River and activities within its catchment affecting the river.[7],[8]

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[1] [2014] 1 NZLR 593 at [112-116]
[2] See s11 of the Settlement Act. For the purpose of these submissions, the Settlement Act alone is referred to, acknowledging that all three Acts contain similar provisions for the purpose of PC1.
[3] s67(3)(c) of the RMA
[4] S12(1)(a) of the Settlement Act.
[5] S12 (3) of the Settlement Act
[6] S11 of the Settlement Act which is also summarised in section 2.4 of the RPS.
[7] *Carter Holt Harvey Limited v Waikato Regional Council* [2011] EnvC 380 at [93] (the Variation 6 case)
[8] The Variation 6 case also sets out the background to the development of the Vision and Strategy in some detail at [86] to [100]

2.8 Reconciling the interrelationship between the RMA and the Settlement Act is complex. Specifically, s10 of the Settlement Act addresses the relationship of sections 11 to 15 of the Settlement Act with the RMA. It provides that ss11-15 of the Settlement Act prevail over ss 59-77 of the RMA.[9],[10]. In relation to this process those sections of the RMA that are relevant are:

(i) Section 63 – purpose of Regional Plan

(ii) Section 65 – preparation and change of regional plan

(iii) Section 66 – matters to be considered

(iv) Section 67 – contents of Regional Plans

(v) Section 68 – regional rules

(vi) Section 69 – rules relating to water quality

(vii) Section 70 – rules about discharges

2.9 In summary, these provisions relate to the promulgation of the regional plan, including rules.

2.10 Sections 11-15 of the Settlement Act address:

(a) How and when the Vision and Strategy is to be incorporated into the WRPS and that it prevails in the interim (s11);

(b) The effect of the Vision and Strategy on RMA planning documents, including what documents it prevails over (s12);

(c) How RMA planning documents are to conform with a reviewed Vision and Strategy (s13);

(d) The effect of the Vision and Strategy on resource consent conditions and designations (s14);

(e) The statements that the Vision and Strategy has been given effect to that must be included in certain planning documents (s15);

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[9] Note that this is incorrectly summarised in the WPL submissions at para 82 where Counsel assumes the reference is to ss11-15 of the RMA instead of the Settlement Act / refer also para 86

[10] A regional plan is a document defined in s55(1).

2.11 Although section 10 of the Settlement Act provides that ss11-15 'prevail', some parts of ss59-77 of the RMA will continue to apply. For example, ss11-15 of the Settlement Act do not deal with the ability to include rules in a regional plan (*cf* s68(1) of the RMA) or when rules about discharges may not be permitted (*cf* s70 of the RMA). "Prevail over" is defined as "be victorious over or gain mastery".[11] It is not the same as "replace" and the Settlement Act would have said that if that was the intention. In the context, it is submitted that the need for sections 11-15 to 'prevail' only arises where there is an inconsistency with the exercise of the function or power utilised under the Settlement Act. The legal submissions for WRC give an example of when this might occur where they conclude that for activities in the catchments subject to the Vision and Strategy it is no longer sufficient for an applicant to demonstrate that adverse effects are avoided, remedied or mitigated. Instead an applicant must now demonstrate that the application will result in some positive benefit contributing to the restoration of the Waikato River proportionate to the activity in question.[12]

2.12 Section 17(3) of the Settlement Act, imposes a duty to have particular regard to the Vision and Strategy, but that only applies to those persons exercising functions and powers under the RMA if those functions and powers are <u>not</u> covered by ss11-16 of the Settlement Act. Whether particular regard must be had to the Vision and Strategy is therefore a question to be asked depending on the power or function being exercised.[13] However, in a practical sense, for the purpose of making decisions on PC1, it is submitted that because the Vision and Strategy must be given effect to (i.e implemented[14]) the duty "to have particular regard to" the Vision and Strategy has already been applied.[15],[16]

2.13 In terms of the duty to be applied, all things being equal, the Vision and Strategy is a document with the equivalent force and effect of, most

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[11] New Zealand Oxford Dictionary, Oxford University Press 2008 "(often foll. by *against, over)*"
[12] WRC legal submissions at [34]
[13] Counsel for OjiFS and HFM respectfully disagrees with the conclusions of Counsel for WPL on this matter – refer to para 86
[14] The Supreme Court in *King Salmon* held that "give effect to" means "implement". The Supreme Court also said "On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it." at [77].
[15] Specifically, subsection (3) provides that a local authority must not amend a regional plan if the amendment would make the document inconsistent with the Vision and Strategy.
[16] Refer to para 28 of the legal submissions for WRC where the analysis is that this is an additional obligation.

relevantly the NPSFW. Where things are not equal; i.e are inconsistent, the Vision and Strategy prevails.

2.14 The Council's submissions set out the position in relation to the Vision and Strategy and the legal cases that determine that betterment is required including references to the *Puke Coal* case where the Court were "unanimously of the view that the Vision and Strategy for [sic] Waikato River and its consequent adoption in the Regional and District Plans has led to a change in the interpretation of the provisions of Part 2 for the Waikato Region." Further, every application needs to demonstrate ways in which it protects the river in proportion to various factors including the activity to be undertaken and any historical adverse effects.[17]

Other relevant provisions of the RPS, regional plan and other plans

2.15 The RPS includes a range of applicable provisions in addition to the Vision and Strategy to which PC1 must give effect. Several of these are outlined in the evidence of Dr Mitchell.

2.16 PC1 must also be considered within the context of the relevant issues, objectives and policies of the Operative Regional Plan. Dr Mitchell notes that there is a very strong imperative in the Operative Waikato Regional Plan for point source discharges to be improved during the term of resource consents granted for such activities.[18]

2.17 The Panel's attention is drawn to Policy 4.4 which provides for Regionally Significant Industry and Primary Production as follows:

> a. identifying appropriate provisions, including zones, to enable the operation and development of regionally significant industry, which for new development is consistent with Policy 6.14 and Table 6-2;
>
> b. maintaining the life supporting capacity of soil to support primary production;
>
> c. maintaining and where appropriate enhancing access to natural and physical resources for regionally significant industry and primary production, while balancing the competing demand for these resources;
>
> d. recognising the potential for regionally significant industry and primary production activities to have adverse effects

[17] *Puke Coal v Waikato Regional Council* [2014] NZEnvC 223 *at [133]*
[18] EIC P Mitchell at [5.17]

beyond its boundaries and the need to avoid or minimise the potential for reverse sensitivity effects;

e. recognising the need to ensure regionally significant industry is supported by infrastructure networks of appropriate capacity;

f. recognising the benefits of enabling the co-location of regionally significant industry to support efficient use of infrastructure, and minimise transportation requirements;

g. recognising and balancing the competing demands for resources between regionally significant industry, primary production and other activities;

h. ensuring the adverse effects of regionally significant industry and primary production are avoided, remedied or mitigated; and

i. promoting positive environmental outcomes.

2.18 As noted by Counsel for WRC, PC1 resulted from the statutory direction to remove inconsistencies with the Vision and Strategy from the Regional Plan.[19] The effect of PC1 is to generally alter the existing policies and rules of the Regional Plan to clarify that non-point source discharges associated with farming land use in the Waipa and Waikato catchment are addressed in Chapter 3.11;[20] In that sense, Chapter 3.11 is a "one-stop shop" for non-point source discharges from the Waipa and Waikato catchments. Point source discharges continue to be dealt with by the other policies and rules in Chapter 3, as well as some of the objectives and policies in Chapter 3.11.

2.19 As noted above, PC1 must also "give effect to" the NPSFM.[21]

2.20 For national environment standards ("NES"), there is a requirement that PC1 not be more lenient than any NES[22] and to have regard to other planning documents.[23]

2.21 The legal submissions for Wairakei Pastoral Limited outline a number of key planning documents, including the Ministry for the Environment workstreams, to which regard must be had. Those submissions are adopted.[24] I add to that list, as another matter to which the Panel must have regard, a strategy document drafted to inform development of the

[19] Legal submissions for WRC at [19]
[20] See the consequential amendments section of PC1 – pages 88-101
[21] s67(3)(c) of the RMA
[22] S67(3)
[23] S66(2) of the RMA
[24] Paras [64] to [78]

2018-2028 long term plan under the LGA: The 2017 Waikato Freshwater Strategy was "designed to tackle significant pressures on water availability and quality in the region". It is worth observing that it was signed off by councillors after the CSG process had concluded. It is noted that, of the two priority areas relating to Freshwater Strategy (set out below), it is difficult to reconcile the second priority area with the policy framework of PC1:

> • Manage freshwater more effectively to maximise regional benefit.
>
> • Positively influence future land use choices to ensure long term sustainability.[25]

References in key planning documents to best practice

2.22 One of the key themes emerging from the statutory framework relates to the adoption or application of best practice or the best practicable option:

(a) Best practice is not defined in the RMA. Best practicable option is defined in s2.[26]

(b) A resource consent to do something that would otherwise contravene s15 may include a condition requiring the holder to adopt the best practicable option.[27] A consent can be reviewed to require adoption of the best practicable option to remove or reduce any adverse effect on the environment.[28] Consideration must be given to whether adopting the best practicable option is the most efficient and effective means of removing or reducing that adverse effect.[29]

(c) Section 70(1) requires the Council to satisfy itself whether a rule allowing a s15 discharge as a permitted activity meets the

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[25] Page 20

[26] Best practicable option, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and (b) the financial implications, and the effects on the environment, of that option when compared with other options; and (c) the current state of technical knowledge and the likelihood that the option can be successfully applied.

[27] RMA s108(2)(e)

[28] RMA s128(1)(a)(ii). Note that s14(2) of the Settlement Act provides for a review of a resource consent under s128 to make the conditions of a consent consistent with the Vision and Strategy.

[29] RMA s131(2)

specified tests. Before including a rule requiring the adoption of the best practicable option the tests in s70(2) must be met:

> (2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—
>
> (a) the nature of the discharge and the receiving environment; and
>
> (b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—
>
> the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

(d) The Vision and Strategy provides that "the following strategies will be implemented…":

> 9. Encourage and foster a 'whole of river' approach to the restoration and protection of the Waikato River, including the development, recognition and promotion of best practice methods for restoring and protecting the health and wellbeing of the Waikato River. (emphasis added)

(e) The NPSFW requires Councils to "enable communities to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quality, within limits. (Objective A4) Under Policy A3 the objectives are to be achieved "by Regional Councils":

> (a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met; and
>
> (b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a 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.

(f) The phrase 'where permissible" is likely to have been inserted to refer back to s70 which allows use of the best practicable option in the circumstances described above. There is no distinction between non-point source and point source discharges.

(g) To date the Regional Plan has encouraged the use of good practice in land use activities:

> 3.9.4.1 Good Practice
>
> Waikato Regional Council will encourage the use of good practice in land use activities and practices that reduce non-point source discharges. Waikato Regional Council will, in conjunction with organisations and industry groups, provide guidance in the development, implementation and review of good practice guidelines and codes of practice for land use activities which cause non-point source discharges.

(h) PC1 itself defines "best management practices" for the purposes of Chapter 3.11 as meaning "maximum feasible mitigation to reduce the diffuse discharge of nitrogen, phosphorus, sediment or microbial pathogens from land use activities given current technology. "Good management practices" is also defined in PC1 as follows:

> For the purposes of Chapter 3.11, means industry agreed and approved practices and actions taken on a property or enterprise that reduce or minimise the risk of contaminants entering a water body".

(i) The term "best management practices" is only used in two provisions of PC1: Policy 16 and Method 3.11.4.12. Policy 16 provides for flexibility for development of certain settlement and multiple owned Maori land and the method relates to supporting research and dissemination of best practice guidelines.

Analysis

2.23 The statutory framework anticipates, and in some cases directs best practice or adoption of the best practicable option (ref: the NPSFW and the Vision and Strategy). Although the terminology differs, it is submitted that there is no inconsistency between the two terms as the best practicable option is a form of best practice anticipated by the RMA. The issue is whether PC1 in its current form gives effect to the best practice directions of the NPSFW and the Vision and Strategy. More specifically:

(a) For the Vision and Strategy, does PC1 implement a strategy that encourages and fosters a whole of river approach including the development, recognition and promotion of best practice methods?

(b) For the NPSFW, firstly, is it permissible in terms of s70 of the RMA to adopt a best practicable option approach, and secondly if so, does it do so?

(c) If PC1 does not give effect to those directives now, on what basis is it appropriate to delay the implementation of today's understanding of best practice?[30]

2.24 These matters will be addressed more specifically by evidence for the Block Two hearings in the context of the policies and rules. For the purpose of this hearing, Dr Mitchell has examined the statutory provisions and case law that relates specifically to point source discharges as well as the specific consent conditions for the discharges to land and water for the Kinleith Mill. Dr Mitchell also cites the well-known case of *Puke Coal* and the Court's conclusions that some element of betterment is intended.[31] His conclusion that, the Vision and Strategy results in "a significant obligation on consent applicants to identify and use best practice, ensure tangible improvements and ensure that their water related activities do not adversely affect the waterway involved" aligns with the Council's position and the statutory obligations as outlined.[32]

2.25 Dr Mitchell further reasons that the provisions, expectations, drivers and imperatives already applicable to point source activities are equally applicable to the activities addressed under PC1 and should be applied consistently.[33] He adds:

> [5.30] ... The suggestion that it may be too hard to implement new measures or that there should be some protection for the way that things have always been done with new directives only applying to changes or intensification in land use is, in my opinion, erroneous and inconsistent with the need to progressively implement the improvement and restoration of water quality required by the Vision and Strategy and NPSFM.
>
> [5.31] In particular, PC1 should seek to specify or incentivise implementation of best practice land use techniques on an ongoing basis to ensure that the restoration and protection of the Waikato and Waipā Rivers is achieved in the timeframe required.

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[30] The Parliamentary Commissioner for the Environment in 2012 in the Overview Comment "Water Quality in New Zealand; understanding the science" noted that "We need… to know when more science is not needed. A call for more science to be done can sometimes be a way of delaying difficult decisions.". Page 7
[31] Supra note 17
[32] EIC P Mitchell at [5.8] and the legal submissions for WRC at paras 28-36.
[33] EIC P Mitchell at [5.30]

3. WHAT ARE THE WIDER IMPLICATIONS OF THE PC1 APPROACH?

3.1 PC1 seeks to achieve its objectives by regulating diffuse discharges from farming activities through:

(a) Permitting small and low intensity farming activities (Rule 1);

(b) Permitting other farming activities greater than 20 ha where the Nitrogen Reference Point ("NRP") is not exceeded or the enterprise discharges less than 15kg N /ha / year (Rule 2);

(c) Permitting farming activities with a Farm Environment Plan ("FEP") under a certified industry scheme (Rule 3);

(d) Requiring consent as a controlled activity for farms with an FEP outside a certified industry scheme (Rule 4);

3.2 Key facets of the rules are that:

(a) Only the worst 25% of dischargers of N have an obligation to reduce their NRP.[34]

(b) There are minimum standards gradually imposed for permitted and controlled activities such as requiring stock exclusion, fencing requirements and setbacks from waterways.[35]

(c) The FEP does not compel farmers to adopt practices (beyond the minimum standards prescribed in the rules), if their NRP is not exceeded other than in (a) above.

(d) The adoption of the NRP as a proxy for a limit means that any gains in water quality achieved by the minimum standards[36] can be used by the farmer to increase diffuse discharges elsewhere, including by off-setting.

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[34] Refer cl 5 of Schedule1 RMA
[35] If the activity standards are not complied with within the timeframes the activity is classified as restricted discretionary (Rule 6)
[36] If fencing and exclusion of animals from waterbodies etc are adopted prior to the review date for PC1.

3.3 Various planning witnesses,[37] including Dr Mitchell, consider that the provisions of PC1 serve to grandparent existing levels of discharges of the four contaminants.

> For the majority of farming activities, the NRP approach effectively "grandparents" existing land use behaviour in terms of the land use leading to diffuse discharges of nitrogen and does not take account of situations where nitrogen loss has already been significantly reduced or where poor practice has led to greater losses than should be readily achievable.

Case law

3.4 The consideration of, and decision on submissions is to proceed on the basis that there is no presumption in favour of the provisions of the plan change as proposed by the local authority; nor any onus on submitters to show that the contents of the plan change are inappropriate. Rather, the local authority's duty is to consider the submissions and evidence and find what are the most appropriate and suitable provisions of the plan change in accordance with the law.[38],[39]

3.5 There is no presumption in the RMA that existing lawfully established activities can continue without further controls or restrictions. Aside from the possibility that existing activities may be assessed under s32 in a more favourable way than new ones, there is no other provision that could be said to be an entitlement. Section 20A provides a measure of protection where, on the coming into effect of a plan, resource consent is needed for an existing lawful activity, and s85 provides for the Environment Court to direct a local authority to amend a plan provision that renders land incapable of reasonable use and imposes an unfair and unreasonable burden on someone with an interest in the land.[40]

3.6 The polluter pays principle states that the costs of pollution should be internalised to those who produce it or to those who enjoy its benefits.

> Insofar as pollution costs are not borne by those who cause pollution, or by the purchasers of their products, some part of the total benefits resulting from economic activity in the community

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[37] EIC C Jordan at [25] "I consider this to be a "grandparented" approach to managing nitrogen" and at [194] - the applicant holds a resource consent which authorises a particular amount of nitrogen to be lost from the property; EIC P Mitchell at [6.2]; EIC B Robson [10].
[38] *Wellington Club v Carson* [1972] NZLR 698 (SC); applied to the RMA in *Leith v Auckland City Council* [1995] NZRMA 400
[39] *Kerr Trusts v Whangarei District Council* NZEnvC Auckland 060/2004, 28 April 2004.
[40] These propositions were accepted as consistent with the law by the Hearings Commissioners including retired Judge Shepherd on Plan Change 2 to the Canterbury Land and Water Plan at [233]

> is wrongly redistributed away from the victims of pollution to other groups in society. In order to correct this market failure, the government must intervene to impose financial costs or penalties which bring the external costs back to the polluter.[41]

3.7 These concepts were encapsulated in the Rio Declaration on Environment and Development, to which New Zealand is a signatory. Principle 16 states:

> "National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment"

3.8 With reference to the Rio Declaration the High Court considered that s7 of the RMA explicitly recognises the importance of having environmental laws which are economically efficient.[42] Thus s7 provides in part:

> "7. Other matters —
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to — …
>
> (b) The efficient use and development of natural and physical resources:"

3.9 More generally, section 5 of the RMA encapsulates the concept of "polluter pays" through the purpose of the Act (the promotion of sustainable management), and its embodiment of the need for activities to avoid, remedy or mitigate their adverse effects on the environment. After considering the King Salmon decision, the High Court in the Hawke's Bay Plan Change 6 case concluded that:

> In summary, s 5(2) of the RMA "contemplates environmental preservation and protection as an element of sustainable management of natural and physical resources. This is reinforced by the terms of s 6(a) and (b)", which, although not giving "primacy to preservation or protection [means] that provision must be made for preservation and protection as part of the concept of sustainable management".[43]

3.10 These Part 2 matters must have informed the various references to the adoption of the best practicable option and best practice that exist in the statutory framework, including the Vision and Strategy and the NPSFW.

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[41] *Machinery Movers v Auckland Regional Council* (1993) 1A ELRNZ 411 at 416
[42] Ibid
[43] *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191 at [150]

3.11 In the context of water quality in other regions, Boards of Inquiry and the Courts have expressed significant concern regarding the grandparenting of existing pollution because it does not require an activity to internalise its adverse effects.

3.12 "Grandparenting" was defined in the *Day* (One Plan) case as "allowing existing operators to carry on producing current levels of effects, particularly adverse effects, and imposing restrictions only upon new entrants to whatever activity is being dealt with."[44] Whether as a pure or hybrid version it was regarded by the Environment Court "as an unattractive option" which would have the "inherent disadvantage of failing to provide an incentive to reduce leaching".[45]

3.13 The Report of the Board of Inquiry on Hawkes Bay Regional Plan Proposed Change 6 concluded that grandparenting is inconsistent with the NPSFW and that all sectors have the same general obligations: [46]

> [388] … Such an approach rewards existing high leaching farming operations or poor performing operations, which would not give effect to the NPSFM.
>
> [442] … 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.

Practical effect of PC1 on the management of rural activities

3.14 Whether "grandparenting" or some variation of "grandparenting", the effect of the approach adopted by PC1 is to allow the majority of activities that are the key source of nutrient contamination (i.e intensive pastoral agriculture) to continue business as usual, without significant requirements to avoid, remedy or mitigate the adverse effects on the environment of their activities.

3.15 If the status quo is largely adopted for activities responsible for the majority of N discharges, the concern is that the plan must seek to achieve the water quality objectives in other ways.

3.16 Conversely, for other activities, PC1:

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[44] *Day v Manawatu Wanganui Regional Council* [2012] NZEnvC 182 at [5-128]
[45] *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
[46] Final Report and Recommendation Vol 1, 18 June 2014

(a) stipulates that point source discharges are expected to continuously improve, adopt the best practicable option and simultaneously offset;

(b) penalises activities associated with low diffuse source discharges from land uses such as organic agriculture and all forms of forestry, by foreclosing on the opportunity of optimising the land's capital value through limiting development to the same or less intensive land uses.

3.17 The practical effect of PC1's provisions is to:

(a) incentivise farming activities to keep their N levels high for fear that a failure to do so will undermine their capital value;

(b) create indirect disincentives to afforest or adopt other less impactful land uses. This will discourage investment in activities like organic and less intensive agriculture, wood processing and recycling and potentially impede delivery of existing climate change policies.[47]

Evidence

3.18 Mr Buckley's evidence outlines how he has worked over a long period to reduce the adverse effects of his dairying operation, going so far as to construct a wetland that effectively reduces N and P to negligible levels. This has been to the benefit of the entire sub-catchment. His testimony is an example of how adopting best practices and trialling improvements can complement and enhance a profitable dairy farming operation. His proactive and innovative management has been 'rewarded' with a comparatively low NRP[48] which reduces options to use about half of his land for its highest and best use (arable cropping).[49] With his long experience in dairy farming in the region Mr Buckley is of the view that the effect of establishing NRPs based on the period of time when returns (and hence production) were the highest in the history of dairy farming means that most dairy farmers will have headroom based on current

[47] EIC F Scrimgeour at [23]
[48] By comparison, the EIC of Mr M Newman at [7.4] records that of the 26 dairy farms assessed using OVERSEER sixty percent had a N leaching range between 30 and 50 kilograms per hectare.
[49] EIC P Buckley at [1.5]. The NRP for the farm is 20kg/N/ha although this figure is questioned by Mr Buckley given the negligible readings of N and P post wetland treatment (at [4.11].

production.[50] Those farmers operating in the top 75th percentile are likely to be operating at a level which provides adequate scope for less impactful and more efficient management of their discharges.[51]

3.19 Dr Scrimgeour echoes Mr Buckley's observations from an economic perspective:

> …to be efficient the plan must effectively impact the choices of all land managers at the level of the business, and be consistent with sub-catchment and catchment goals. It is important to understand and implement best management practices that are relevant in specific locations and are associated with specific land uses….Regulations to facilitate environmental outcomes that cause additional costs, reduce land values. However, regulations focused on implementing best management practices result in effective avoidance and mitigation expenditures and a lower reduction in land values.[52]
>
> There should be consistent regulatory expectations that incentivise all landowners to avoid or minimise the adverse effects of their preferred land use in direct proportion to the risk of harm. A regulatory framework that incentivises rather than discourages improvement, particularly where coupled with the expectation that acceptable mitigation options will change as understanding and technology improves, is dynamically efficient. It does not lock activities into a pattern of production which is no longer optimal and which does not align with contemporary markets.[53]

3.20 As an organic dairy farmer Mr Mowbray outlines the steps he has taken to convert a conventional dairying operation to a successful organically certified dairy farm. By increasing plant species and revising fertiliser application he has significantly lowered the NRP of the farm to 19kg/ha/pa. He also notes that the NRP is likely to have been assessed as higher than the actual output, as Overseer© does not take into account specific issues.[54] Advice he has received is that the low NRP is the reason why his farm is struggling to sell,[55] with his conclusion being that the best operators from an environmental point of view are the ones most severely affected by the present proposals. The corollary is that "PC1 serves as a stark warning to those contemplating voluntary and innovative methods to improve local and regional water quality, or even innovation for business reasons". [56]

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[50] EIC P Buckley at [4.11]
[51] EIC P Buckley at [5.2]
[52] EIC F Scrimgeour at [21]
[53] EIC F Scrimgeour at [27]
[54] EIC H Mowbray at [4.7]
[55] EIC H Mowbray at [5.1]
[56] EIC H Mowbray at [5.3]

3.21 The Buckley and Mowbray farms have applied the same continuous best practice improvement approaches to their discharges as have been required of industrial discharges, but having implemented mitigation they are penalised relative to other farmers who have not done so. As with industry, they are now faced with an uneven playing field where a failure by others to act is cemented in place, as a minimum, for the duration of the plan. Experience with the Bay of Plenty Regional Council's PC10 (the proposed regional plan change that addresses nutrient discharges to Lake Rotorua), shows that unwinding an 'interim' rule has proven to be fraught with misunderstanding and litigation.[57]

3.22 For new forestry planting, PC1 acts as a deterrent because of the signal that a further allocation regime will be introduced in ten years' time. The forest industry is therefore concerned that "landowners will be deterred from planting trees in the knowledge that such planting could effectively lead to elimination of any higher and better use options in future and a consequent reduction in land value.".[58] This results in lost opportunities for economically efficient land-use change needed to improve water quality,[59] as well as issues of supply for the Kinleith Mill where stagnant rates of afforestation, and progressive genetic improvement in planting stock, reduce the availability of wood residues for pulp and paper production.[60]

3.23 Dr Scimgeour assesses PC1 as both environmentally inefficient and economically inequitable. Notwithstanding issues of equity, economic efficiency is maximised over time where regulation incentivises rather than discourages necessary environmental outcomes."[61]

Conclusions

3.24 The premise is that the principles of Part 2 of the Act, are encapsulated in the statutory documents to which the Council must give effect or have particular regard in preparing PC1. As a result, there are clear directions, particularly in the Vision and Strategy and NPSFW, to adopt / implement best practice / the best practicable option or achieve

[57] At recent hearings on Bay of Plenty Regional Council PC10 before the Environment Court, Federated Farmers challenged the "interim" nature of rule 10 which had locked in existing land use prior to development of a new plan, asserting that the status quo should be retained.
[58] EIC S Strang at [5.6]
[59] EIC S Strang at [4.4]-[4.7]
[60] EIC P Millichamp at [5.3]
[61] EIC F Scrimgeour at [35]

betterment / continuous improvement. As an approach, adopting the status quo, or grandparenting existing discharges is plainly not consistent with those concepts.

3.25 In view of the finding that major point sources contribute approximately 7 percent of nitrogen loads to the Waikato-Waipa River Catchment compared to 60 percent from land use activities[62], OjiFS and HFM question how it is that the majority of farmers are not only largely exempt from the obligation to improve but are disincentivised to achieve betterment? In summary, OjiFS and HFM consider that:

(a) the provisions of the Vision and Strategy must be at the forefront of the Panel's analysis; and

(b) that there is a failure to give effect to or have appropriate regard to some of the provisions of the above documents.

3.26 These issues will be addressed in more detail at the second hearings which focus on the specific provisions of PC1.

4. APPLICATION OF THE CONSULTATIVE PROCESS

4.1 Clause 3 of Schedule 1 of the RMA sets out the parameters for consultation. It is a requirement to consult with various ministers, local authorities and tangata whenua. A local authority may consult with anyone else during the preparation of a proposed plan. As part of consulting with the wider public a local authority must follow the principles of consultation set out in section 82 of the Local Government Act 2002 ("LGA"). Section 17(6) of the Settlement Act requires particular regard to be had to the Vision and Strategy as part of the LGA consultative process.

4.2 Schedule 1 part 4 of the RMA, which introduces a new, optional, consultative process for the development of plans, was inserted into the RMA taking effect on 19 April 2017. Although the WRC has elected to use a similar collaborative process to inform the development of PC1,

[62]Presentation Bill Vant B 2014. *Sources of contaminants in the Waikato-Waipa catchment. Presentation to CSG5*. Document #3431327: Note that background sources contribute 29% of the overall N load.

Schedule 1, Part 4 does not apply to PC1 because it was notified in 2016.

4.3 There is no directive to consider the CSG outcomes as giving the proposed plan any more (or less) weight than applied to any other proposed plan, however, that is not the end of the issue.

Outcomes of the CSG process

4.4 The use of the CSG process to develop PC1 is outlined in Part B of the s32 Report. Part of that process involved the development of Policy Selection Criteria ("PSC"). In the evaluation of the provisions' effectiveness and efficiency criteria, relevant criteria from the PSC have been considered in addition to those matters specified in s32 of the RMA.[63]

4.5 It is clear that the CSG drove the direction and drafting of PC1. The Chief Executive of the WRC confirms that PC1 was not authored by the Council Staff or elected members, [64] though it is clear that the Healthy Rivers Wai Ora Committee, in its role as the joint decision-making body of River Iwi Councillors and regional councillors, adopted the recommendations of the CSG.[65]

4.6 The evidence on behalf of OjiFS, HFM and other parties establishes that:

(a) The process was flawed, principally because it allowed for voting on key issues, such as grandparenting and allocation.[66],[67] This created an incentive to those who were well organised and thinking strategically, to over-ride the interests of others by force of numbers at the very end of the process.[68,69]

(b) There was disagreement and exclusion: participation was non-transparent and by invitation from the Regional Council only.[70] It excluded OjiFS despite it possibly being the largest non-farming

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[63] S32 Report at page 128
[64] EIC V Payne at [21]
[65] PC1 page 4
[66] EIC G Salmon at section 3.
[67] EIC S Strang at section 6
[68] EIC G Salmon at [3.4]
[69] EIC B Robson at [17]
[70] EIC P Buckley at [3.7] and

and non-energy industrial operator in the region.[71] This resulted in the endorsement of "the preferences of a limited group of vested interests".[72] The final decisions on key issues came down to a majority vote as opposed to development of an agreed output resulting in an outcome that was characterised by major differences on fundamental issues.[73],[74]

(c) The flaws in the process have undermined PC1 by failing "to recognise that equitable, effects-based management of the region's water quality requires all sectors to implement their respective best practice measures forthwith".[75]

4.7 Counsel for WRC submissions submits that the "role of the panel is to give a decision on the proposed plan change provisions and the matters raised in submissions. It does not have any jurisdiction to adjudicate over any dispute about a non-statutory process".[76]

4.8 Rather than adjudicate over any dispute, the conclusion that OjiFS and HFM ask the Panel to draw is that the CSG process has limited value, and that as a corollary, limited weight should be given to the overall policy direction created by the CSG and encapsulated in PC1. In effect, the CSG outcomes are only matters to which the panel should have regard, as part of its own s32AA evaluation, as with any other submission. Furthermore, the WRC cannot have it both ways. On the one hand it cannot distance itself from ownership of what the CSG has written on its behalf, while on the other use the CSG outcomes as one of the cornerstones of its section 32 analysis and as a reason for not recommending changes in the s42A report.[77]

5. AMENDMENTS TO THE OBJECTIVES

5.1 PC1's objectives need to be assessed against whether they give effect to the various statutory documents that impose that duty. It is therefore

[71] EIC P Mitchell at [3.2] EIC P Millichamp at [6.2]
[72] EIC P Millichamp at [6.10]
[73] EIC P Buckley at [3.7], EIC S Strang at [1.4]
[74] EIC G Salmon at [1.1]
[75] EIC P Mitchell at [3.4]
[76] Legal submissions WRC at [108]
[77] EIC M McCallum-Clark at [22] "I am very hesitant to suggest changes to a set of collaboratively developed "where we are going" parameters. Therefore, the changes that have been recommended are primarily relating to clarity, simplicity, drafting and robustness, rather than fundamentally shifting the outcomes."

vital for the Panel to understand the direction that the plan is travelling before it can make such decisions. In the context of the issues raised above, Dr Mitchell sets out various amendments to the objectives. He considers that PC1 must ensure that a consistent regulatory and policy framework is applied across all point source and land use activities affecting water quality and that "there is no room for reliance on unsustainable land use management practices when seeking to achieve water quality improvements across the catchment."[78] Dr Mitchell supports a medium term goal (to 2066) to reflect "the magnitude of the problem and the need for demonstrable improvement now.".[79] The concept of a medium term goal is supported by several planners.[80]

5.2 Changes to Objective 3 are also proposed to enable actions to be implemented at any time to achieve the relevant targets, while a new objective specifically references the adoption of best practice options which echoes the best practice strategy that must be implemented under the Vision and Strategy.

5.3 Some planners have raised concerns that Objective 3 could be interpreted to require industrial point source discharges to upgrade by the dates set out in Objective 3 to achieve the short term (or proposed medium term) water quality in table 3.11-1.[81] or that upgrades achieve a single step reduction.[82] That interpretation would be inconsistent with the *Puke Coal* decision that the Vision and Strategy "does not intend that the first applicant is responsible for the entire upgrade of the river catchment, nor could such an approach be in accordance with the Act.".[83]

5.4 That issue is identified at this juncture as one that may require further clarification through revisions to the policies in Block 2.

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[78] EIC P Mitchell at [7.1]
[79] EIC P Mitchell at [7.3]
[80] EIC D Kissick (Director General of Conservation) at [280]-[287] who supports an additional 20% improvement by 2030; EIC H Marr (Fish & Game) at [21] who supports a further 20 year goal (2040).
[81] EIC Ryan (HCC), Rebuttal G Willis (Fonterra) at [2.3]
[82] Rebuttal P Ryan (Objectives) (HCC) at [7]
[83] Supra note 17 at [138].