BEFORE THE INDEPENDENT HEARINGS PANEL FOR PROPOSED WAIKATO REGIONAL PLAN CHANGE 1

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments: Parts C7 – C10

REBUTTAL STATEMENT OF EVIDENCE BY PHILIP HUNTER MITCHELL ON BEHALF OF OJI FIBRE SOLUTIONS (NZ) LIMITED FOR PART C7 – C10 HEARINGS

15 JULY 2019

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1. INTRODUCTION

1.1 My full name is Philip Hunter Mitchell.

1.2 My experience and qualifications are set out in paragraphs 2.2 – 2.10 of my statement of planning evidence dated 15 February 2019, prepared on behalf of Oji Fibre Solutions (NZ) Limited (**OjiFS**), in respect of the Part A and Part B hearing considering Proposed Plan Change 1 – Waikato and Waipā River Catchments (**PC1)**.

1.3 I confirm that although these proceedings are not before the Environment Court, I have read the Environment Court's Code of Conduct for Expert Witnesses and I agree to comply with this code.

2. SCOPE OF REBUTTAL EVIDENCE

2.1 I prepared a primary statement of planning evidence, dated 5 July 2019, on behalf of OjiFS in respect of the "Block 3" hearings for PC1 (**my primary evidence**).

2.2 This statement of evidence is prepared:

2.2.1 In rebuttal of matters raised in the primary evidence of the following planning witnesses:

2.2.1.1 Ms Helen Marr, on behalf of Auckland-Waikato Fish and Game (**Fish & Game**); and

2.2.1.2 Ms Deborah Kissick, on behalf of the Director-General of Conservation (**DOC**); and

2.2.2 To address several matters raised by the answers provided on 5 July 2019 by the section 42A report authors in response to questions posed by the panel in its Minute of 7 June 2019.

3. MS MARR'S EVIDENCE

3.1 In Section 7 of her evidence, Ms Marr raises two matters relating to forestry activities, as follows:

3.1.1 Because of the importance of small rivers, lakes, wetlands and streams, Ms Marr considers that PC1 should be amended to include provisions that are more stringent than the National Environmental Standard for Production Forestry (**NES-PF**).[1] The NES-PF allows for this to occur[2], and in order to give effect to the National Policy Stement for Freshwater Management (**NPS-FW**)[3], a new rule should be included in PC1, as follows[4]:

> In the Waikato and Waipā Catchment, Plantation Forestry activities managed by the NESPF and required to produce a forestry earthworks management plan or a harvest plan, the plan must include identification of all waterbodies (regardless of size) within the affected area and must identify risks of mobilised sediment on all sites (not only those with a perennial river).

3.1.2 On that same basis, Ms Marr considers that a new rule should be included in PC1 to apply more stringent riparian setbacks to forest harvesting operations than those required by the NES-PF, as follows[5]:

> In the Waikato and Waipā Catchments, the following activities associated with the harvest of plantation forest, occurring in any continuous 12 month period:
>
> 1. Vegetation clearance which is within 20 metres on either side, of the banks of a permanently or intermittently flowing river water body of greater than 50 metres in length per kilometre of that water body,
>
> 2. Vegetation clearance which is within 20 metres of a lake or wetland,
>
> and any associated deposition of slash into or onto the beds of rivers and any subsequent discharge of contaminants into water or air are **controlled activities** (requiring resource consent) subject to the standards and terms as specified in Section 5.1.5."

[1] Evidence of Helen Marr – 5 July 2019 – paras 7.12 and 7.13

[2] Ibid – para 7.14

[3] Ibid

[4] Ibid – para 7.16

[5] Ibid – paras 7.22 – 7.24

3.2 I agree with Ms Marr that the NES-PF does provide for regional plans to have more stringent standards than those specified in the NES-PF, but not with her assessment of its applicability in the way she suggests, as I now explain.

3.3 Section 6 of the NES-PF states:

> **6 Plan rules may be more stringent than these regulations**
>
> ***National instruments***
> (1) **A rule in a plan may be more stringent** than these regulations **if the rule gives effect to—**
> **(a) an objective developed to give effect to the National Policy Statement for Freshwater Management:**
> (b) any of policies 11, 13, 15, and 22 of the New Zealand Coastal Policy Statement 2010.
>
> ***Matters of national importance***
> (2) A rule in a plan may be more stringent than these regulations if the rule recognises and provides for the protection of—
> (a) outstanding natural features and landscapes from inappropriate use and development; or
> (b) significant natural areas.
>
> ***Unique and sensitive environments***
> (3) A rule in a plan may be more stringent than these regulations if the rule manages any—
> (a) activities in any green, yellow, or orange zone containing separation point granite soils areas that are identified in a regional policy statement, regional plan, or district plan:
> (b) activities in any geothermal area or any karst geology that are identified in a regional policy statement, regional plan, or district plan:
> (c) activities conducted within 1 km upstream of the abstraction point of a drinking water supply for more than 25 people where the water take is from a water body:
> (d) forestry quarrying activities conducted over a shallow water table (less than 30 m below ground level) that is above an aquifer used for a human drinking water supply.
> (4) The areas and geology referred to in subclause (3)(b)—
> (a) may be identified in a policy statement or plan by any form of description; and
> (b) include only areas and geology where the location is identified in the policy statement or plan by a map, a schedule, or a description of the area or geology. [**emphasis added**]

3.4 Ms Marr cites section 6(1)(a) of the NES-PF as the basis for her proposed rules for forest harvesting and riparian setbacks. Section 6(1)(a) is a generally framed provision and, in my opinion, guidance as to how it should be applied is informed by reading the whole of Section 6.

3.5 In that regard, Sections 6(2) and 6(3) clearly only apply in circumstances where the "best of the best" resources are involved – that is specifically where there are "matters of national importance", and "unique or sensitive environments" involved. That makes sense to me as a National Environmental Standard is, as the name connotes, a standard that is intended to apply across the country. Therefore, I would expect any NES, including the NES-PF, to only be departed from in quite special, and hence limited, circumstances.

3.6 Secondly, the NPS-PF was prepared well after the promulgation of the NES-FW. In other words, when preparing the various permitted activity and controlled activity rules contained in the NES-PF, the requirements of the NPS-FW were well established. Logic suggests that the drafters of the NES-PF would have been well aware of them and that they would, all things being equal, be complementary to one another.

3.7 Thirdly, the central North Island contains the largest production forestry area in the country (some 567,000 hectares),[6] and approximately one third of the national total.[7] It therefore seems difficult to accept the proposition that the NES-PF would not apply to at least a very significant portion of that area.

3.8 Given all the above, I consider that the exemptions contemplated by section 6 of the NES-PF should be reserved for "special cases" and, hence, only applied to specific, very highly valued resources, in specific locations. In my opinion, they were not, as Ms Marr suggests, intended to apply to the generic region-wide categories of "all small lakes, wetland and streams", "harvesting within 20 metres of a …. flowing river….", or "harvesting within 20 metres of a lake or wetland".

3.9 Thus, while I accept that there is the ability to impose more stringent standards than those contained in the NES-PF, doing so should only occur in those relatively isolated cases when location specific

[6] Facts and Figures 2017/18 - New Zealand Plantation Forest Industry – Produced by the New Zealand Forest Owners Association

[7] Ibid

environmental resources, having “best of the best” qualities, are involved.

3.10 Accordingly, I consider that the two forest harvesting rules proposed by Ms Marr should not be included in PC1 and, instead, the rules of the NES-PF should prevail.

4. MS KISSICK’S EVIDENCE

4.1 In paragraphs 122 – 126 of her evidence, Ms Kissick addresses riparian setbacks for forest harvesting, and presents an evaluation very much along the same lines as Ms Marr. As such I do not address her evidence specifically, and my Section 3 above applies equally to Ms Kissick’s evidence.

5. MATTERS RAISED IN THE SECTION 42A AUTHORS’ ANSWERS TO PANEL QUESTIONS

5.1 The memorandum from the section 42A report authors dated 5 July 2019, raises two issues that I wish to comment on, namely:

5.1.1 The wording of Rule 3.11.5.8; and

5.1.2 The wording of Policy 10.

Rule 3.11.5.8

5.2 Rule 3.11.5.8 states as follows:

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

(d) any significant adverse effects on aquatic life.

5.3 Clause 2 of Rule 3.11.5.8 effectively mirrors the wording used in section 70(1) of the RMA, which states [**my emphasis added**]:

> **Before a regional council includes in a regional plan a rule that allows as a permitted activity—**
>
> (a) a discharge of a contaminant or water into water; or
> (b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—
>
> **the regional council shall be satisfied that none of the following effects are likely to arise** in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):
>
> **(c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:**
> **(d) any conspicuous change in the colour or visual clarity:**
> **(e) any emission of objectionable odour:**
> **(f) the rendering of fresh water unsuitable for consumption by farm animals:**
> **(g) any significant adverse effects on aquatic life.**

5.4 Thus, a permitted activity rule can only be included in a regional plan if the council is satisfied that none of those various criteria would be breached if the rule was included in the plan.

5.5 That is a much different proposition from including the criteria themselves in a permitted rule, as it seems the section 42A authors have proposed.

5.6 It is well-established that a permitted activity rule must be able to be interpreted on its face, and any permitted activity rule that includes a standard requiring (for example) that there be no "significant effects on aquatic life" in order for the activity to be permitted, is clearly *ultra vires*.

Policy 10

5.7 In response to the question whether Policy 10 can be read as a controlled activity rule policy, the section 42A report authors have suggested a possible rewording of Policy 10, as follows:

> When deciding resource consent applications for point source discharges of nitrogen, phosphorus, sediment and microbial pathogens to water or onto or into land, ~~provide for~~ have regard to the benefits of:

a. Continued operation of regionally significant infrastructure; and
b. Continued operation of regionally significant industry.

5.8 I do not support that change for several reasons.

5.9 Firstly, if by "controlled activity rule policy" the Panel means a policy designed to cascade into the rules, I do not accept that this is a feasible or realistic interpretation of Policy 10. PC1 does not contain rules for point source discharges as these are already found in other chapters of the Regional Plan. Instead, the words in the policy "[w]hen deciding resource consent applications…" provide the direction for decision makers.

5.10 Secondly, if any question about the policy being a controlled activity rule policy remains, I do not accept that the wording "provide for" creates an expectation that the associated rule(s) **must** always be controlled activity rules, although they **may**.

5.11 In my opinion, the term "provide for" connotes that there be specific recognition in the rules that regionally significant infrastructure and industry need to be afforded a higher priority than other infrastructure and industry, but not that the inevitable result is to assign controlled activity status.

5.12 An analogous situation in my mind would be section 6(h) of the RMA which requires, as a matter of national importance, that the "management of significant risks from natural hazards" is to be "recognised and provided for". "Recognise and provide for" is more directive than "provide for", yet in the natural hazards space there is no suggestion that, for example, all coastal protection structures or flood management schemes should be controlled activities. Rather, such initiatives are matters that the relevant planning documents must elevate to a higher plane than other matters.

5.13 I also consider that the suggestion to "have regard to the benefits of" regionally significant infrastructure / industry creates an inappropriate downgrading of the direction that Policy 10 is intended to provide.

Accordingly, I consider that the originally proposed wording should remain. Notwithstanding that, if the Panel was concerned about the implications of the term “provide for”, one option that I would support would be to use the term “appropriately provide for”.