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*In the matter of:* Clauses 6 and 8 of Schedule 1 – Resource Management Act 1991 – Submissions on publicly notified plan change and variation – Proposed Plan Change 1 and Variation 1 to Waikato Regional Plan – Waikato and Waipa River Catchments

*And:* **Wairakei Pastoral Ltd**

Submitter

*And:* **Waikato Regional Council**

Local Authority

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**LEGAL SUBMISSIONS FOR WAIRAKEI PASTORAL LTD**

**Block 3 Hearing Topics**

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*Dated:* 9 September 2019

*Counsel:* Dr RJ Somerville QC / Dr T Daya-Winterbottom

*Solicitors:* Harmos Horton Lusk, Auckland (Mr G Horton)

**LEGAL SUBMISSIONS OF COUNSEL FOR  
WAIRAKEI PASTORAL LTD**

**SUMMARY**

- 1 These legal submissions regarding the Block 2 Hearing Topics are divided into nine parts:
  - 1.1 Part A: Background and framework (paragraphs 1-6).
  - 1.2 Part B: Technical information (paragraphs 7-26).
  - 1.3 Part C: Objectives (paragraphs 17-22)
  - 1.4 Part D: Staging the transition to the 80-year goal (paragraphs 23-45).
  - 1.5 Part E: Making reductions in diffuse discharges via catchment wide rules, FEPs and the NRP (paragraphs 46-90).
  - 1.6 Part F: Managing point-source discharges (paragraphs 91-95).
  - 1.7 Part G: Managing Whangamarino Wetland (paragraphs 96-105).
  - 1.8 Part H: Prioritisation and sub-catchment planning (paragraphs 106-117)
  - 1.9 Part I: Conclusions (paragraphs 118-121).
- 2 In summary, the WPL evidence for Block 3 recommends that Policy 9 and Schedule 1 should be amended regarding farming activities, suggests some amendments that could be made to Policy 3 and Rule 3.11.5.5 regarding CVP systems, recommends that Policy 17 should be deleted, and agrees that Policy 7 and the PC1 methods should be deleted. Key points from the WPL Block 3 evidence include:

**Table 3.11-1**

- 3 Despite the efforts made the expert witnesses during conferencing the concerns and anomalies identified in the Block 1 evidence have not been fully resolved by the JWS. Further work (as summarised by Dr Neale in response to the Hearings Panel's questions) is

required to ensure that Table 3.11-1 is fit for purpose. Specific amendments are required regarding Ammonia and TP, the selection of current state data, and detection limits.

- 4 Table 3.11-1 is critical as one of the twin-engines (together with FEPs) that will drive the implementation of PC1.
- 5 It is also likely to be a work in progress (after becoming operative) as further amendments are likely to be required to address the extended list of attributes now included in Tables 1-23 of the proposed (new) NPS-FM recently released by the Minister.

### **Making reductions in diffuse discharges**

- 6 Schedule 1 governing the preparation of FEPs is the other twin-engine of PC1. WPL recommends substantive amendments to Schedule 1 to ensure that any appropriate model can be used by landowners as an alternative to OVERSEER without going through an arbitrary CEO approval process outside the RMA, to provide for sub-catchment level consents as a regulatory method, to provide for risk assessment based on vulnerable land criteria, and provide for appropriate, compliance, enforcement, and monitoring requirements. These matters are critical points of difference between the text of Schedule 1 as recommended by WPL and the texts in PC1 as notified and the Block 3 Section 42A Report (with the latter being a pared down and substantially weaker mechanism). The WPL recommendations are also consistent with the recent *Federated Farmers* decision (noted below) and the draft NES recently released by the Minister.
- 7 In particular, the Schedule 1 text recommended by WPL provides for consenting at various levels: property, enterprise, sub-catchments, and industry/sector schemes to provide maximum flexibility and opportunity for implementing PC1 in the most efficient and effective way. The proposal in the Block 3 Section 42A report to delete the definition of “enterprise” is therefore a retrograde step and is not consistent with the draft NES recently released by the Minister that makes express provision for “enterprises” in the consent matrix for restoring and protecting water quality.

### **Prioritisation and Sub-catchment planning**

- 8 Sub-catchment level consents are recommended by WPL as a streamlining mechanism to reduce the number of consents that could ultimately be required to comply with PC1. They perform a similar streamlining function to industry/sector schemes.
- 9 Providing for sub-catchment consents is consistent with the architecture of PC1 and the inherent reliance on sub-catchments as the basic spatial unit for analysis, modelling, and monitoring water

quality. This approach is also consistent with the NPS-FM and the proposed amendments recently released by the Minister.

- 10 The WPL evidence from Blocks 1 and 2 has also argued strongly and convincingly for the PC1 priority dates to be amended to ensure that Objective 3 and the related freshwater objectives in Table 3.11-1 can be implemented within the PC1 period (2016-2026). It is essential that landowners should be able to apply for consent early. The draft NES and related draft regulations recently released by the Minister place greater emphasis stock exclusion from water bodies and preparing FEPs/FW-FPs than PC1 as notified. These proposals require stock exclusion by 1 July 2021 in relation to dairy farming and require FW-FPs to be in place by 31 December 2025. The WPL submissions are entirely consistent with the trajectory of national direction under the RMA.

### **Methods**

- 11 WPL agrees in the Block 3 evidence that the PC1 methods should be deleted but does not agree with the reasons for deleting them given in the Block 3 Section 42A Report. Instead, WPL has agreed to delete them contingent upon similar amendments made to the PC1 policies and rules being accepted by the Hearings Panel.
- 12 Subsequently, the Minister has released the proposed (new) NPS-FM, draft NES, and related draft regulations that appear to place more emphasis on methods than hitherto. Mr McKay has included some suggested amendments to the PC1 in Appendix 3 to his Block 3 evidence and these suggestions may be helpful if the Hearings Panel would prefer to retain methods in PC1.
- 13 Finally, a glossary of the abbreviations and defined terms used in these legal submissions is **attached**.

## BLOCK 3 HEARING TOPICS

### PART A: BACKGROUND AND FRAMEWORK

- 1 These legal submissions are made on behalf of Wairakei Pastoral Ltd (**WPL**) regarding the Block 3 Hearing Topics.

#### **Legal and statutory framework**

- 2 The relevant legal and statutory framework is fully addressed in the Block 1 and Block 2 WPL legal submissions and supplementary legal submissions.<sup>1</sup> Accordingly, this part of these Block 3 legal submissions focus on recent legal developments.

#### **Proposed Plan Change 10: Lake Rotorua Nutrient Management**

- 3 The interim decision regarding Proposed Plan Change 10: Lake Rotorua Nutrient Management (**PC10**), *Federated Farmers v Bay of Plenty Regional Council*, was issued by the Environment Court on 9 August 2019.<sup>2</sup> Key points from the decision include:
  - 3.1 Nutrient Management Plans (NMPs) are used as the primary monitoring and compliance methods in PC10 similar to FEPs in PC1 and FW-FPs in the proposed new NPS-FM 2019;<sup>3</sup>
  - 3.2 Reliance on GMP alone was not considered to provide an adequate level of certainty that desired nutrient reduction targets will be achieved in the most efficient way;<sup>4</sup>
  - 3.3 NMPs should focus on “risks” similar to the concept of vulnerable land put forward in the PC1 amendment requested by WPL;<sup>5</sup>
  - 3.4 NMPs should be updated at no more than 5 yearly intervals to ensure that adequate compliance monitoring by the

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<sup>1</sup> WPL Block 1 Legal Submissions, paras 34-102; WPL Block 2 Legal Submissions, paras 10-86.

<sup>2</sup> *Federated Farmers v Bay of Plenty Regional Council* [2019] NZEnvC 136 (Judge Kirkpatrick, Commissioners Dunlop and Hodges).

<sup>3</sup> [2019] NZEnvC 136 at para 172.

<sup>4</sup> [2019] NZEnvC 136 at para 174.

<sup>5</sup> [2019] NZEnvC 136 at para 185.

consent authority (a particular concern of the Court) will be in place;<sup>6</sup>

- 3.5 While the Court ultimately supported the use of OVERSEER (absent any alternative models being presented to the Court),<sup>7</sup> the Court was critical about the use of OVERSEER in a regulatory context and noted that new and more scientifically robust methods are being developed and that plan changes should not put unnecessary barriers in place that would prevent other (new) models being used.
- 4 The amendments recommended by the WPL evidence are generally consistent with the Court's interim decision.

### **Essential Freshwater**

- 5 The Minister for the Environment released proposals for a new NPS-FM, NES for Freshwater, and Stock Exclusion Regulations under s 360 of the RMA for consultation on 5 September 2019. Key aspects of the consultation documents include:
  - 5.1 Continued focus on FMUs as the appropriate unit for freshwater management under the NPS-FM;
  - 5.2 A clear focus on the integrated management of the effects of the use and development of land on water quality;<sup>8</sup>
  - 5.3 The inclusion of interim freshwater targets in regional plans set at intervals of not more than 10 years;<sup>9</sup>
  - 5.4 Identifying limits on resource use that will achieve freshwater targets;<sup>10</sup>
  - 5.5 Compulsory values are set for human contact (including swimming and food gathering) regarding (inter alia) pathogens and sediment;<sup>11</sup>
  - 5.6 Numeric limits are set for (inter alia) Total Nitrogen and Total Phosphorus;<sup>12</sup>

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<sup>6</sup> [2019] NZEnvC 136 at para 186 and 188.

<sup>7</sup> [2019] NZEnvC 136 at para 368.

<sup>8</sup> NPS-FM 2019, 3.4.

<sup>9</sup> NPS-FM 2019, 3.9(5)(b).

<sup>10</sup> NPS-FM 2019, 3.10.

<sup>11</sup> NPS-FM 2019, Appendix 1A, para 2.

<sup>12</sup> NPS-FM 2019, Tables 3 and 4.

- 5.7 National targets are retained to ensure that water bodies are suitable for primary contact (including swimming): 71% by 2017, 80% by 2030, and 90% by 2040;<sup>13</sup>
  - 5.8 Enterprises: consenting at scale is provided for in relation to land in multiple ownership;<sup>14</sup>
  - 5.9 Freshwater Farm Plans (**FW-FPs**) are required within 2 years from entry into force of the NES for CVP systems and by 31 December 2025 for other farming properties, they are to be certified and audited by appropriately qualified and experienced persons approved by the Minister for the Environment and the Minister of Agriculture, and will include a risk assessment of vulnerable land;<sup>15</sup>
  - 5.10 Land use change (10ha or more) for dairy farming will require discretionary activity resource consent;<sup>16</sup>
  - 5.11 OVERSEER is not generally required to be used when preparing FW-FPs apart from a limited number of specified catchments (excluding the Waikato River catchment);<sup>17</sup>
  - 5.12 Stock exclusion from water bodies is required by 1 July 2021 in relation to dairy farming and by 1 July 2023 in relation to beef farming.<sup>18</sup>
- 6 The decisions requested by the WPL submissions are generally consistent with the future national direction for freshwater management. For WRC the proposals released by the Minister will require key amendments to be made to the PC1 policies and rules (similar to the amendments requested by WPL).

## PART B: TECHNICAL INFORMATION

- 7 Part C of the Section 32 Report outlines the process for populating a Waikato objectives framework in Table 3.11-1 in accordance with the NPS-FM.<sup>19</sup>

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<sup>13</sup> NPS-FM 2019, Appendix 3.

<sup>14</sup> NES, Subpart 3: Definitions.

<sup>15</sup> NES, Subpart 3.

<sup>16</sup> NES, 35.

<sup>17</sup> NES, Subpart 4 and Schedule 1.

<sup>18</sup> Stock Exclusion Regulations.

<sup>19</sup> Section 32 Report, 52-91.

### **TOPIC B3. SCIENCE AND ECONOMICS**

- 8 Dr Neale recorded four significant anomalies and concerns regarding Table 3.11-1 in his Block 1 evidence, namely:
- 8.1 Current state discrepancies;<sup>20</sup>
  - 8.2 Selection of current state data;<sup>21</sup>
  - 8.3 Decimal places and detection limits;<sup>22</sup>
  - 8.4 Medians, maximums and 95<sup>th</sup> percentiles.<sup>23</sup>
- 9 To resolve the concerns and anomalies raised by Dr Neale and other expert witnesses in their Block 1 evidence the Hearings Panel gave directions for expert witness conferencing.<sup>24</sup>
- 10 Following conferencing, the JWS was filed by the relevant expert science witnesses and the Hearings Panel gave further directions (a) for supplementary planning evidence to be filed commenting on the implications arising from the JWS findings and conclusions,<sup>25</sup> and (b) for the expert science witnesses to file written answers in response to questions from the Hearings Panel.<sup>26</sup>
- 11 The questions from the Hearings Panel to Dr Neale focused on (a) decimal places and detection limits, and (b) medians, maximums and 95<sup>th</sup> percentiles. Dr Neale was asked whether these matters had been satisfied by the JWS or were no longer relevant.
- 12 From the WPL perspective the JWS has potentially resolved one of the matters raised by Dr Neale in his Block 1 evidence, it has potentially resolved two matters in part, and one matter has not been resolved at all. The position is as follows:
- 12.1 Current state discrepancies:
- (a) Matters that have been satisfied by the JWS or are no longer relevant:
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- <sup>20</sup> Dr Neale, Block 1 EIC paras 50-60.
- <sup>21</sup> Dr Neale, Block 1 EIC paras 61-71.
- <sup>22</sup> Dr Neale, Block 1 EIC paras 73-80.
- <sup>23</sup> Dr Neale, Block 1 EIC paras 81-86.
- <sup>24</sup> Hearing Panel Minutes, Expert Conferencing Table 3.11-1 (27 February 2019 and 13 March 2019).
- <sup>25</sup> Hearing Panel Minute, Expert Conferencing Table 3.11-1 (25 June 2019).
- <sup>26</sup> Hearing Panel Minute, 24 July 2019.

- (i) These matters were not explicitly considered during the expert conferencing. However, Dr Scarsbrook had corrected several errors in the current state estimates for Nitrate in his evidence dated 11 March 2019 that have satisfied Dr Neale's concerns in part.<sup>27</sup>
- (b) Matters that have not been satisfied by the JWS:
  - (i) There remain some issues with the calculation of TP and Ammonia current state that have not been addressed by the expert conferencing or by Dr Scarsbrook's evidence.
  - (ii) These remain of consequence for the setting of freshwater objectives where the objectives are set at the current state and therefore Dr Neale's concerns remain in relevant part regarding Ammonia and TP.<sup>28</sup>

### 12.2 Selection of current state data:

- (a) Matters that have been satisfied by the JWS or are no longer relevant:
  - (i) None.
- (b) Matters that have not been satisfied by the JWS:
  - (i) It is listed as an issue not yet addressed in the JWS.<sup>29</sup> Therefore, Dr Neale's concerns remain.<sup>30</sup>

### 12.3 Decimal places and detection limits:

- (a) Matters that have been satisfied by the JWS or are no longer relevant:
  - (i) The issue of excessive **decimal places** is no longer relevant if the thresholds recommended by the majority of experts for nutrients are adopted in Table 3.11-1 (i.e. the recommendation for Nitrate and Ammonia in the

<sup>27</sup> Dr Neale, Block 1 EIC paras 59-60.

<sup>28</sup> Dr Neale, Block 1 EIC paras 50-54 (Ammonia) and 55-58 (TP).

<sup>29</sup> JWS, 5 bullets 6 and 7.

<sup>30</sup> Dr Neale, Block 1 EIC paras 61-71.

mainstem and tributaries of the Waikato River,<sup>31</sup> and the approach in Option 1C of the JWS for Total Nitrogen in the mainstem of the River) are accepted by the Hearing Panel.

- (b) Matters that have not been satisfied by the JWS:
  - (i) The implications of setting objectives below **detection limits** was not addressed by the JWS and Dr Neale's concerns remain.<sup>32</sup>

#### 12.4 Medians, maximums and 95<sup>th</sup> percentiles:

- (a) Matters that have been satisfied by the JWS or are no longer relevant:
    - (i) This issue is no longer relevant if the thresholds recommended by the majority of experts for nutrients are adopted in Table 3.11-1 (i.e. the recommendation for Nitrate and Ammonia in the mainstem and tributaries of the Waikato River,<sup>33</sup> and the approach in Option 1C of the JWS for Total Nitrogen in the mainstem of the River) are accepted by the Hearing Panel.
  - (b) Matters that have not been satisfied by the JWS:
    - (i) None.
- 13 While there is agreement and consensus from the JWS regarding decimal places and medians, maximums and 95<sup>th</sup> percentiles, this is dependent on the expert conclusions being accepted by the Hearings Panel.
- 14 Absent any agreement or consensus in the JWS regarding current state discrepancies pertaining to Ammonia and TP, the selection of current state data, and detection limits, Dr Neale's Block 1 evidence should prevail and Table 3.11-1 should be amended accordingly.<sup>34</sup>

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<sup>31</sup> JWS, 20.

<sup>32</sup> Dr Neale, Block 1 EIC paras 73-79.

<sup>33</sup> JWS, 20.

<sup>34</sup> Dr Neale, Block 1 EIC paras 50-54 (Ammonia), 55-58 (TP), 61-71 (selection of current state data), 73-79 (detection limits), 93 (overall conclusion), and Appendix 3 (amended version of Table 3.11-1).

- 15 Overall, this position is not satisfactory and Table 3.11-1 (while essential for the proper functioning of PC1) will not be fit for purpose unless further amended in the way recommended above.<sup>35</sup>
- 16 It is also clear that Table 3.11-1 will (likely) also require amendment to provide for the expanded list of attributes in Tables 1-23 of the draft (new) NPS-FM recently released by the Minister. Table 3.11-1 will therefore be a work in progress until the Essential Freshwater programme is complete.

### **PART C: OBJECTIVES**

- 17 Part D of the Section 32 Report outlines the PC1 objectives for achieving sustainable management.<sup>36</sup>
- 18 Objective 1 addresses the restoration and protection of water quality for each sub-catchment and FMU during the long-term (2026-2096), and Table 3.11-1 sets out the freshwater objectives for the Waikato River catchment and sub-catchments and is one of the twin engines (together with Schedule 1) that will drive the implementation of PC1.
- 19 In particular, the Section 32 Report explains the relationship between Objective 1 and Table 3.11-1:

... Read in conjunction, these tables show the current state, the desired state, and whether any changes in water quality are required to move from the current to the desired state *or if water quality needs to be maintained at the current level.* ... (Emphasis added).<sup>37</sup>

- 20 This finding from the Section 32 Report is important and should be borne in mind when considering the PC1 framework. Put simply, it is abundantly clear from the Section 32 Report that the objective of PC1 is to protect water quality where the desired state is met, and to require restoration of water quality in cases where the desired state is not met. The freshwater objectives in Table 3.11-1 are intended to provide the benchmarks against which water quality can be assessed, and the responsibilities to protect or restore water quality can be determined.
- 21 The PC1 objectives were addressed in Block 1 under Topic B4 and the amendments recommended by Mr McKay are (for completeness) set out in the strikethrough version of PC1 based on

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<sup>35</sup> Mr McKay, Block 3 Supplementary Evidence paras 20 and 22.

<sup>36</sup> Section 32 Report, 92-127

<sup>37</sup> Section 32 Report, D.4.4 Appendix 1, 105.

the WPL submissions and recommendations in Appendix 5 of his Block 3 evidence.

- 22 The recent decision in *Federated Farmers* (noted above) and the latest documents issued by the Minister as part of the Essential Freshwater consultation process indicate that the PC1 objectives (as amended by Mr McKay) remain suitable for promoting the sustainable management of water resources in the Waikato River catchment.

#### **PART D: STAGING THE TRANSITION TO THE 80-YEAR GOAL**

- 23 Part E.2 of the Section 32 Report evaluates staging the transition to the 80-year goal.<sup>38</sup>
- 24 The relevant objectives to achieve staging the transition to the 80-year goal are Objectives 2, 3, and 4. WPL considers that Objectives 2, 3, and 4 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in Appendix 5 of his Block 3 evidence.
- 25 Objective 2 addresses maintenance of social, economic and cultural wellbeing in the long-term (2026-2096), while Objective 3 addresses the short-term improvements in water quality required in the first stage of restoration and protection of water quality for each sub-catchment and FMU (2016-2026), and Objective 4 addresses people and community resilience. Policy 5, Policy 7, and Policy 17 implement these objectives.
- 26 Policy 5, Policy 7, and Policy 17 are (in turn) implemented by Method 3.11.4.7, Method 3.11.4.8, Method 3.11.4.10, Method 3.11.4.11, and Method 3.11.4.12. Policy 5 was addressed in Block 2 under Topic C1, and WPL considers that it is (*inter alia*) the most efficient and effective way of achieving the key policy theme of staging the transition to the 80-year goal, subject to the amendments recommended by Mr McKay in Appendix 5 of his Block 3 evidence.

#### **Block 3**

- 27 Policy 7 regarding preparing for allocation in the future, and Policy 17 that considers the wider context of the Vision and Strategy were left for consideration in Block 3.
- 28 Additionally, Method 3.11.4.7, Method 3.11.4.8, Method 3.11.4.10, Method 3.11.4.11, and Method 3.11.4.12 were also left for consideration in Block 3.

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<sup>38</sup> Section 32 Report, 131-140.

### **Policy 7**

29 Policy 7 concerns preparing for allocation in the future and considers that preparation for further diffuse discharge reductions and any future property or enterprise-level allocation of diffuse discharges may be required by subsequent regional plans to fully implement the suite of PC1 policies and methods. Policy 7 focuses (in particular) on the data collection and research required to prepare for future reductions. Policy 7 also sets out the principles that could inform any future allocation mechanisms. Overall, the Block 3 Section 42A Report recommends that Policy 7 should be deleted because the future national direction is in a state of flux and hard to predict as a result of the Government’s “Essential Freshwater” programme and likely changes to the NPS-FM, and because property-level allocation may not prove to be the best approach in the future.<sup>39</sup>

30 Mr McKay agrees that Policy 7 should be deleted.<sup>40</sup>

### **Policy 17**

31 Policy 17 considers the wider context of the Vision and Strategy and supports actions being taken now to enhance biodiversity, wetland values, ecosystem functioning, access, and recreational values. The Block 3 Section 42A Report recommends that Policy 17 should be amended by deleting the reference to “secondary benefits” to remove any implication that Policy 17 does not focus on matters of primary concern.<sup>41</sup>

32 Mr McKay however recommends that Policy 17 should be deleted because PC1 is not an omnibus proposal designed to implement the Vision and Strategy in full and has a more limited focus on water quality by inserting (new) Chapter 3.11 into the WRP and proposing a series of consequential amendments.<sup>42</sup> A further plan change will therefore be required to address any matters in the Vision and Strategy that are not related to water quality and that are not currently reflected in the WRP.

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<sup>39</sup> Block 3 Section 42A Report, 106-107, paras 479 and 482.

<sup>40</sup> WPL Submissions, PC1-11347; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>41</sup> Block 3 Section 42A Report, 115 para 538.

<sup>42</sup> WPL Submissions, PC1-11356; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

**Method 3.11.4.7, Method 3.11.4.8, Method 3.11.4.10, Method 3.11.4.11, and Method 3.11.4.12**

- 33 Method 3.11.4.7 regarding information needs to support any future allocation recognises the need for informed scientific research and information gathering to inform any future framework for the allocation of diffuse discharges. The Block 3 Section 42A Report recommends that Method 3.11.4.7 should be deleted because regional plans are reviewed periodically under the RMA; and because any review will be guided by the NPS-FM, the Vision and Strategy, and the WRPS.<sup>43</sup>
- 34 The WPL submissions requested that Method 3.11.4.7 should be amended to provide that an adaptive management and mitigation approach should be adopted for sub-catchments regarding the allocation of diffuse discharges.<sup>44</sup>
- 35 Method 3.11.4.8 also pertains to reviewing Chapter 3.11 of the WRP (inserted by PC1) and developing an allocation framework for the next regional plan, and requires WRC to develop discharge allocation frameworks for properties and enterprises based on the best available information and to use such information to inform the future management of discharges. The Block 3 Section 42A Report recommends that Method 3.11.4.8 should be deleted because regional plans are reviewed periodically under the RMA; and because any review will be guided by the NPS-FM, the Vision and Strategy, and the WRPS.<sup>45</sup>
- 36 The WPL submissions requested that Method 3.11.4.8 should be amended to provide that any adaptive management and mitigation approach adopted for sub-catchments should be monitored and reviewed to determine a discharge allocation regime during the PC1 period (2016-2026).<sup>46</sup>
- 37 Method 3.11.4.10 regarding accounting systems and monitoring sets out the requirements for WRC to establish and operate an accounting system and monitor FMUs. The Block 3 Section 42A Report recommends that Method 3.11.4.10 should be deleted because it overlaps with other statutory requirements and generally

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<sup>43</sup> Block 3 Section 42A Report, 92 para 389.

<sup>44</sup> Block 3 Section 42A Report, 91 para 382; WPL Submissions, PC1-11364; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>45</sup> Block 3 Section 42A Report, 94 para 400.

<sup>46</sup> Block 3 Section 42A Report, 94 para 395; WPL Submissions, PC1-11365; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

accepted good practice for implementing plan changes pertaining to water quality.<sup>47</sup>

- 38 The WPL submissions requested that Method 3.11.4.10 should be amended to provide that the proposed information and accounting system for diffuse discharges to manage diffuse discharges at property, enterprise, and sub-catchment-levels.<sup>48</sup>
- 39 Method 3.11.4.11 regarding monitoring and evaluation of the implementation of Chapter 3.11 of the WRP (inserted by PC1) sets out how WRC will review and report on achieving the freshwater objectives in Table 3.11-1, including preparing research methods and data collection. The Block 3 Section 42A Report recommends that Method 3.11.4.11 should be deleted because regional plans are reviewed periodically under the RMA; and because any review will be guided by the NPS-FM, the Vision and Strategy, and the WRPS.<sup>49</sup>
- 40 The WPL submissions requested that Method 3.11.4.11 should be amended so that research, data collection, and information collation should support the adoption of an adaptive management and mitigation approach for diffuse discharge allocation at (inter alia) enterprise and sub-catchment-levels.<sup>50</sup>
- 41 Method 3.11.4.12 regarding supporting research and dissemination of best practice guidelines to reduce diffuse discharges identifies the need for WRC to implement and support research into best practice guidelines to reduce diffuse discharges. Method 3.11.4.12 supports Policies 1 and 2 and the FEP framework. Overall, the Block 3 Section 42A Report recommends that Method 3.11.4.12 should be deleted.<sup>51</sup>
- 42 The WPL submissions requested that Method 3.11.4.12 should be amended by deleting references to “best management practices” and substituting them by references to “good management practices”.<sup>52</sup>
- 43 The WPL submissions also requested that similar amendments should be made to Policies 1, 2, 4, 5, 8, 14, and 16. Mr McKay

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<sup>47</sup> Block 3 Section 42A Report, 98 para 420.

<sup>48</sup> WPL Submissions, PC1-11367; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>49</sup> Block 3 Section 42A Report, 99 para 429.

<sup>50</sup> Block 3 Section 42A Report, 99 para 426; WPL Submissions, PC1-11368; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>51</sup> Block 3 Section 42A Report, 101 para 438.

<sup>52</sup> Block 3 Section 42A Report, 100 para 433; WPL Submissions, PC1-11369; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

recommended in his Block 2 evidence that these policies should be amended to reflect the WPL submissions, and these amended policies are (for completeness) set out in the strikethrough version of PC1 in Appendix 5 of his Block 3 evidence.

- 44 Based (inter alia) on these amendments to Policies 1, 2, 4, 5, 8, 14, and 16, Mr McKay agrees that Methods 3.11.4.7, 3.11.4.8, 3.11.4.10, 3.11.4.11, and 3.11.4.12 should be deleted.
- 45 As noted above, Method 3.11.4.12 supports (inter alia) Policy 2 and Schedule 1 that outline the FEP framework. Mr McKay recommends that Schedule 1 regarding FEPs should be amended for the reasons given by Mr Ford in his Block 3 evidence. These amendments to Schedule 1 are set out in Appendix 3 of Mr McKay's Block 3 evidence. They will be addressed further below.

#### **PART E: MAKING REDUCTIONS IN DIFFUSE DISCHARGES VIA CATCHMENT WIDE RULES AND THE NRP**

- 46 Part E.3 of the Section 32 Report evaluated the suite of PC1 provisions designed to achieve making reductions in diffuse discharges via catchment wide rules and the NRP.<sup>53</sup>
- 47 The relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. These objectives were considered in Block 1. WPL considers that they are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his Block 1 evidence. These amendments are (for completeness) set out in the strikethrough version of PC1 in Appendix 5 of Mr McKay's Block 3 evidence.
- 48 In particular, Objective 1 addresses the restoration and protection of water quality for each sub-catchment and FMU during the long-term (2026-2096), and Objective 3 addresses the improvements in water quality required during the short-term (2016-2026) for restoration and protection of water quality for each sub-catchment and FMU.
- 49 These objectives are implemented by:
  - 49.1 Policy 1, Policy 2, Policy 3, Policy 4, and Policy 8.
  - 49.2 Rule 3.11.5.1, Rule 3.11.5.2, Rule 3.11.5.3, Rule 3.11.5.4, Rule 3.11.5.5, and Rule 3.11.5.6.

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<sup>53</sup> Section 32 Report, 141-183.

- 49.3 Schedule A, Schedule B, Schedule C, Schedule 1, and Schedule 2.
- 49.4 Method 3.11.4.1, Method 3.11.4.2, and Method 3.11.4.3.
- 50 Objectives 1 and 3 are therefore intended to be implemented by an integrated suite of 19 provisions in PC1. In particular, these provisions will implement Objective 3 during the short-term (2016-2026).

### **Block 3**

- 51 Policy 3; Rule 3.11.5.5; Schedule 1; Method 3.11.4.1, Method 3.11.4.2, and Method 3.11.4.3 were left for consideration in Block 3.

### **TOPIC C1. DIFFUSE DISCHARGE MANAGEMENT**

- 52 This topic considers (*inter alia*) Policy 1 and the overall PC1 rule framework, and Policy 2 and FEPs, and the CVP provisions.
- 53 The Block 3 Section 42A Report regarding the CVP provisions traverses a number of matters that are relevant for both farming activities and CVP systems.

### **OVERSEER model**

- 54 For example, in relation to the use of OVERSEER the Block 3 Section 42A Report observes that:

Overseer is a fundamental component of PC1 which is suitable for pastoral uses ... removing the use of Overseer as a tool to measure N losses completely from PC1 is not desirable as it is beneficial in aiding landowners to understand losses and implement measures to reduce them.<sup>54</sup>

- 55 The Block 3 Section 42A Report concludes that:

The section 32 report outlines that while alternatives should be considered, there are benefits in using one modelling system as this enables comparisons between land use activities and the aggregation of sub-catchment nutrient loads. If multiple models are used, these comparisons would be difficult, if not impossible, and sub-catchment loads may not be able to be determined.<sup>55</sup>

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<sup>54</sup> Block 3 Section 42A Report, 12 para 46.

<sup>55</sup> Block 3 Section 42A Report, 13 para 54.

Overall, Officers consider models such as APSIM be addressed through the Overseer alternative process, where such issues can be considered and addressed more comprehensively than in a Plan framework.<sup>56</sup>

- 56 Five critical points can be made regarding the statements in the Block 3 Section 42A Report about the OVERSEER model:
- 56.1 First, while the use of models to measure to calculate NRPs, prepare FEPs, and measure compliance with the freshwater objectives in Table 3.11-1 is a fundamental component of PC1, reliance on OVERSEER is not because the WPL Block 2 evidence demonstrates that a range of the other models are available for performing these tasks, and because using a combination of models (e.g. the RDST) can provide greater confidence in the accuracy and reliability of the results for application in real-world settings.
  - 56.2 Second, WPL has not suggested that OVERSEER should be removed from PC1 but has instead requested that landowners should be free to select whichever models they consider are fit for purpose. This does not preclude the use of OVERSEER (as some landowners may prefer to use that model notwithstanding its published shortcomings).
  - 56.3 Third, the PC1 evidence that OVERSEER does not enable comparisons to be made between different properties, and at best only enables vertical comparisons to be made regarding the same property subject to there being no fundamental changes between different OVERSEER model versions.
  - 56.4 Fourth, aggregation under PC1 does not depend on a single model being used (as other models could potentially be used through the non-regulatory CEO approval process) and will simply be a mathematical calculation of the sum of all numeric NRPs within a sub-catchment or FMU.
  - 56.5 Fifth, the non-regulatory CEO approval process included in PC1 that would operate outside the RMA is entirely unsatisfactory as an exercise in unfettered discretion, with no guiding criteria or appeal or objection rights, and would be subject only to judicial review for breach of administrative law principles. It is unlikely that the merits of any CEO decision could be challenged. WPL therefore maintains the position that landowners should be free to select whichever models they consider are fit for purpose, and should not be constrained to using OVERSEER alone.

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<sup>56</sup> Block 3 Section 42A Report, 14 para 60.

- 57 These points are given added force by the criticism of the OVERSEER model in the recent *Federated Farmers* decision (noted above), and by the fact that OVERSEER is not used universally for all catchments in the draft NES recently released by the Minister.

### **Nitrogen reference point**

- 58 In relation to the NRP the Block 3 Section 42A Report notes:

The NRP is not a transferable discharge right and is associated with the use of specific land. There are no mechanisms in PC1 that allow N transfer, consequently the concept of allowing an enterprise to hold a NRP raises practicality issues.<sup>57</sup>

- 59 The Block 3 Section 42A Report concludes that:

Officers have residual concerns about how the local effects of a sub-catchment-wide consent might be assessed, particularly cumulatively if there are many of these consents in a sub-catchment.<sup>58</sup>

- 60 Because the PC1 rules regarding existing farming activities and CVP systems are now expressed as land use rules under s 9 and s 30(1)(c)(ii) of the RMA (as a result of the amendments proposed in the Block 2 Section 42A Report), consents granted under the PC1 rules will automatically be associated with use of specific land and the related NRPs will not be transferable independent of the land and will be derived from existing activities that were lawfully taking place on the subject land on or before 22 October 2016. More importantly, this position will be the same regardless of whether land use consent is granted at property, enterprise, sub-catchment, or industry/sector scheme level. NRP will run with the subject land and the consent holder (whoever that may be) will be primarily responsible for compliance with any limits that the NRP may impose on use of the land. In short, the comments in the Section 42A Report are not sound.

### **Definition: Enterprise**

- 61 Accordingly (contrary to the suggestion in the Block 3 Section 42A Report)<sup>59</sup> there are now no sound reasons for deleting the definition of “enterprise” from PC1 because it is now clear that NRP will run with the subject land, that it will be managed by the consent holder,

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<sup>57</sup> Block 3 Section 42A Report, 20 para 103.

<sup>58</sup> Block 3 Section 42A Report, 22 para 111.

<sup>59</sup> Block 3 Section 42A Report, 118 para 560.

and that “ownership” of the NRP (to the extent that it can be owned) will be vested in the relevant landowners of the subject land. But given that consents under PC1 are likely to be granted for fixed periods of time (e.g. 25 years) NRPs will in practice merely be an incident of the current land use consent.

- 62 The Block 3 Section 42A Report also suggests that the definitions of “property” and “enterprise” are interchangeable.<sup>60</sup> This is not correct. “Properties” are defined by PC1 as contiguous areas of land in single ownership, whereas “enterprises” are defined by PC1 as parcels of non-contiguous land in multiple-ownership. The definitions are therefore clear and distinct and there are no credible reasons to amend or delete them.
- 63 Accordingly, the definition and all references to “enterprises” in PC1 should be retained without amendment.<sup>61</sup>
- 64 It is also for note that the reasoning in the Block 3 Section 42A Report is not supported by the draft NES recently released by the Minister that includes a definition of “enterprise” substantially similar to the definition in PC1 as notified.

### **TOPIC C3. CERTIFIED INDUSTRY SCHEMES**

- 65 Certified Industry or Sector Schemes (**CIS**) are also considered in Part E.3 of the Section 32 Report regarding making reductions in diffuse discharges via catchment wide rules and the NRP.<sup>62</sup>
- 66 As noted above, relevant objectives to achieve making reductions in diffuse discharges are Objectives 1 and 3. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject to the amendments recommended by Mr McKay in his Block 1 evidence. These amendments are (for completeness) set out in the strikethrough version of PC1 in Appendix 5 of his Block 3 evidence.
- 67 Objectives 1 and 3 are implemented by Policy 1, and Policy 1 is (in part) implemented by Rule 3.11.5.3, Schedule 2, and Method 3.11.4.2 as part of the suite of provisions designed to make reductions in diffuse discharges from farming activities under CIS.

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<sup>60</sup> Block 3 Section 42A Report, 116 para 546.

<sup>61</sup> WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>62</sup> Section 32 Report, 141-183.

### **Method 3.11.4.2**

- 68 As noted above, the Block 3 Section 42A Report questions the value of the PC1 implementation methods and whether they will remain relevant throughout the PC1 period (2016-2026) and recommends overall that the methods (including Method 3.11.4.2 that pertains to CIS) should be deleted in their entirety.<sup>63</sup> Mr McKay agrees in his Block 3 evidence that Method 3.11.4.2 should be deleted.<sup>64</sup>

## **TOPIC C7. COMMERCIAL VEGETABLE PRODUCTION**

- 69 This topic considers the CVP provisions. WPL generally supports the CVP provisions subject to the limited amendments suggested by Mr McKay in his Block 3 evidence.

### **Policy 3**

- 70 Policy 3 provides for a land-specific approach (via the requirements for resource consent and FEPs) to reducing diffuse discharges from CVP systems. The WPL submissions requested that Policy 3 should be amended to clarify that the 10% reduction in diffuse discharges is to be achieved during the PC1 period (2016-2026). Mr McKay suggests in his Block 3 evidence that Policy 3 should be amended to provide for consenting at scale for CVP systems at property, enterprise, sub-catchment, and industry/sector scheme levels; and (as noted above) to clarify that the 10% reduction in diffuse discharges is to be achieved during the PC1 period. These amendments are set out in Appendix 3 of his Block 3 evidence.<sup>65</sup>

### **Rule 3.11.5.5**

- 71 Rule 3.11.5.5 as notified provides that controlled activity resource consent is required for existing CVP to continue. The WPL submissions generally support Rule 3.11.5.5 and requested that it should (if necessary) be amended to be consistent with Policy 1 and the overall PC1 rule framework, and Policy 2 and FEPs. Mr McKay suggests in his Block 3 evidence that Rule 3.11.5.5 should be amended to provide for consenting at scale for CVP systems at property, enterprise, sub-catchment, and industry/sector scheme levels; and to provide for Vulnerable Land to be identified and appropriate mitigation actions put in place via FEPs as an alternative to the 75<sup>th</sup> percentile N leaching value being applied to CVP systems. Vulnerable land is defined as including erosion prone

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<sup>63</sup> Block 3 Section 42A Report, 85 para 333.

<sup>64</sup> WPL Submissions, PC1-11358; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>65</sup> WPL Submissions, PC1-11277; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

land, riparian margins, and nitrogen risk areas. These amendments are set out in Appendix 3 of his Block 3 evidence.<sup>66</sup>

### **Schedule 1**

- 72 Schedule 1 that sets out the requirements for FEPs (as noted above) is one of the twin-engines that will drive the implementation of PC1 and will be addressed below.

### **Methods**

- 73 Method 3.11.4.2 pertaining to CIS, and Method 3.11.4.3 pertaining to FEPs are addressed (respectively) above and below.
- 74 Overall, the Block 3 Section 42A Report questions the value of the PC1 implementation methods and whether they will remain relevant throughout the PC1 period (2016-2026) and recommends that the methods (including Method 3.11.4.1 that pertains generally to WRC working with other stakeholders to implement PC1) should be deleted in their entirety.<sup>67</sup> Mr McKay agrees in his Block 3 evidence that Method 3.11.4.1 should be deleted.<sup>68</sup>

## **TOPIC C9. FARM ENVIRONMENT PLANS**

- 75 Schedule 1, Method 3.11.4.2, Method 3.11.4.3, and Method 3.11.4.11 pertaining to FEPs are addressed in the Block 3 Section 42A Report.

### **Schedule 1**

- 76 The Block 3 Section 42A Report explains that:

Farm Environment Plans are a key component of PC1. They are intended to guide the adoption of a range of farm-specific actions to reduce contaminant losses.<sup>69</sup>

- 77 Schedule 1 implements Policy 2.<sup>70</sup> FEPs are required to be prepared by the key dates referenced in Rule 3.11.5.4 for most properties and enterprises over 20ha, and certified by a CFEP as meeting the requirements of Schedule 1.

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<sup>66</sup> WPL Submissions, PC1-11377 and V1PC1-685; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>67</sup> Block 3 Section 42A Report, 85 para 333.

<sup>68</sup> WPL Submissions, PC1-11357 and V1PC1-666; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>69</sup> Block 3 Section 42A Report, 34 para 178.

<sup>70</sup> Block 3 Section 42A Report, 35 para 182.

- 78 The Block 3 Section 42A Report recommends that substantial amendments should be made to Schedule 1 to “pare back” the notified provisions and increase the reliance on non-statutory guidelines that are to be prepared by WRC outside the RMA plan change process. The text for the amended Schedule 1 was prepared by WRC (as a PC1 submitter rather than as the PC1 proponent) via limited invitation workshops.<sup>71</sup> Notwithstanding the fact that all submitters on Schedule 1 were not invited to participate in the workshops, the Block 3 Section 42A Report states that the amended Schedule 1 text will “essentially supersede the majority of the specific submissions” (emphasis added) outlined in the Section 42A Report. It is also for note that some submissions on Schedule 1 (including the WPL submissions) are not referenced in the Block 3 Section 42A Report.<sup>72</sup> This approach to submissions fails to have regard to the rules of natural justice.
- 79 The recommendations in the Block 3 Section 42A Report regarding Schedule 1 are based on the report “Proposed Revisions to Schedule 1 to incorporate Good Farming Practice into Farm Environment Plan” (Rob Dragten Consulting 2019). This report outlines the conceptual approach to implementing PC1, namely, reducing contaminant loads by at least 10% of the gap between the current state of water quality and the 80-year freshwater objectives in Table 3.11-1 during the period 2016-2026. This will be achieved by:
- 79.1 Restricting the conversion of land to uses that tend to be associated with higher losses (Rule 3.11.5.7).
  - 79.2 Requiring some farms to reduce their nitrogen losses (75<sup>th</sup> percentile N leaching value) while restricting the remaining farms from increasing their nitrogen losses.
  - 79.3 Requiring existing farms to implement actions known to reduce contaminant losses (via FEPs).<sup>73</sup>

80 For example, the report notes that:

PPC1 achieves points 2 and 3 by requiring the majority of farmers ... to produce a property scale farm environment plan (FEP) that identifies the various sources of the four contaminants on the farm, and to implement a tailored set of

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<sup>71</sup> Block 3 Section 42A Report, 41 para 210.

<sup>72</sup> WPL Submissions, PC1-11389, PC1-12546, PC1-12547; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>73</sup> “Proposed Revisions to Schedule 1 to incorporate Good Farming Practice into Farm Environment Plan” (Rob Dragten Consulting 2019), 8.

mitigation actions and management practices necessary that will reduce contaminant losses from that particular farm.<sup>74</sup>

- 81 The recommended amendments to Schedule 1 depend entirely on the use of the OVERSEER model for calculating the NRP and auditing predicted nitrogen losses under the FEP. For example, the report indicates that CFEPs “may not be able to have a high level of confidence that a farm is consistent with the NRP unless Overseer is used to model the farm system” and indicates that annual Overseer reports may be required to demonstrate compliance with the NRP.<sup>75</sup> However, notwithstanding the reliance on the OVERSEER model the report notes that:

A number of recent reviews of Overseer as a regulatory tool have recommended that an Overseer-derived numeric value should not be used as a threshold for differing regulatory obligations.<sup>76</sup>

- 82 Beyond that, the report confirms that the 75<sup>th</sup> percentile N leaching value for each FMU can only be published after all NRPs have been received. As previously noted, this event is unlikely to occur until after 1 July 2026 (i.e. outside the PC1 period) unless landowners are encouraged to apply for consents as early as possible as requested by the WPL submissions.
- 83 The continued reliance on OVERSEER as the sole model for calculating NRPs and preparing FEPs is also inappropriate in light of the draft NES recently released by the Minister that does not generally require OVERSEER to be used (except in a handful of limited catchments that do not include the Waikato River).

### **Methods**

- 84 Method 3.11.4.3 regarding Farm Environment Plans sets out the requirements for FEPs in terms of who can prepare FEPs and what FEPs must cover. It provides that FEPs must (*inter alia*) include actions to reduce diffuse contaminant discharges, and sets out how WRC will monitor FEPs. The Block 3 Section 42A Report recommends that Method 3.11.4.3 should be deleted because it can be subsumed within amendments to Schedule 1.

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<sup>74</sup> “Proposed Revisions to Schedule 1 to incorporate Good Farming Practice into Farm Environment Plan” (Rob Dragten Consulting 2019), 8.

<sup>75</sup> “Proposed Revisions to Schedule 1 to incorporate Good Farming Practice into Farm Environment Plan” (Rob Dragten Consulting 2019), 14.

<sup>76</sup> “Proposed Revisions to Schedule 1 to incorporate Good Farming Practice into Farm Environment Plan” (Rob Dragten Consulting 2019), 14.

- 85 The WPL submissions requested that Method 3.11.4.3 should be amended to ensure that “an appropriately qualified or experienced person” would prepare any FEP.<sup>77</sup>
- 86 Mr McKay agrees that Method 3.11.4.3 should be deleted because other submission points made by WPL regarding the PC1 policies and rules will (more appropriately) address this matter.
- 87 Method 3.11.4.11 regarding the monitoring and evaluation of the implementation of Chapter 3.11 (inserted in the WRP by PC1) sets out how WRC will review and report on achieving the freshwater objectives in Table 3.11-1, including preparing research methods and data collection. The Block 3 Section 42A Report recommends that Method 3.11.4.11 should be deleted because periodic review of the WRP is required under s 79 of the RMA, the effectiveness and efficiency of plan provisions will (in particular) be reviewed under s 35 of the RMA, and specific guidance is provided by the NPS-FM.<sup>78</sup>
- 88 The WPL submissions requested that Method 3.11.4.11 should be amended to reflect an adaptive management and mitigation approach to managing water quality in each sub-catchment.<sup>79</sup>
- 89 Mr McKay agrees that Method 3.11.4.11 should be deleted because other submission points made by WPL regarding the PC1 policies and rules will (more appropriately) address this matter.

#### **Definition: Certified Farm Environment Planner**

- 90 The Block 3 Section 42A Report also recommends that the CFEP definition should also be amended to refer to the specific qualification currently offered by Massey University.<sup>80</sup> This amendment is not appropriate because there is no guarantee that this qualification will not be discontinued during the PC1 period (2016-2026) and because other comparable qualifications may be offered by other tertiary education institutions during this period. Paragraph (b) of the CFEP definition should therefore be amended to refer simply to “advanced training or an appropriate tertiary qualification in sustainable nutrient management”.

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<sup>77</sup> WPL Submissions, PC1-11359; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>78</sup> Block 3 Section 42A Report, 99 para 429.

<sup>79</sup> Block 3 Section 42A Report, 99 para 426; WPL Submissions, PC1-11368; WPL Further Submissions are listed in Mr McKay’s Block 3 EIC, Appendix 4.

<sup>80</sup> Block 3 Section 42A Report, 47 para 249.

## PART F: MANAGING POINT-SOURCE DISCHARGES

- 91 Managing point source discharges is evaluated in Part E.5 of the Section 32 Report.<sup>81</sup>
- 92 The relevant objectives to achieve managing point source discharges are Objectives 1 and 3. These objectives were considered in Block 1. WPL considers that Objectives 1 and 3 are suitable for achieving sustainable management and giving effect to the NPS-FM and the Vision and Strategy in the WRPS, subject (as noted above) to the amendments recommended by Mr McKay in his Block 1 evidence. These amendments are (for completeness) set out in the strikethrough version of PC1 in Appendix 5 of his Block 3 evidence.
- 93 Objectives 1 and 3 are implemented in relation to managing point-source discharges by Policy 10, Policy 11, Policy 12, Policy 13, Policy 17, and by the definition of “Point source discharges” in the Glossary of terms.
- 94 Policy 10, Policy 11, Policy 12, and Policy 13, together with the definition of “point-source discharges” were addressed in Block 2.

## TOPIC C6. URBAN/POINT SOURCE DISCHARGES

- 95 Policy 17 regarding the wider context of the Vision and Strategy in relation to biodiversity, wetland values, ecosystem functions, and recreational values was left for consideration in Block 3 and is addressed above.

## PART G: MANAGING WHANGAMARINO WETLAND

- 96 Part E.6 of the Section 32 Report evaluated the suite of PC1 provisions for managing Whangamarino Wetland.<sup>82</sup>
- 97 Relevant objective is Objective 6 that is implemented by: Policy 15 and Policy 17; and Policy 15 and Policy 17 are (in turn) implemented by: Method 3.11.4.4, Method 3.11.4.5, and Method 3.11.4.6.

### Block 3

- 98 Policy 17, Method 3.11.4.4, Method 3.11.4.5, and Method 3.11.4.6 were left for consideration in Block 3. Policy 17 and Method 3.11.4.5 are addressed above.

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<sup>81</sup> Section 32 Report, 193-200.

<sup>82</sup> Section 32 Report, 201-207.

## TOPIC C10. MISCELLANEOUS

- 99 This topic addresses various miscellaneous provisions (forestry, wetlands and lakes, and consequential changes) not addressed elsewhere in the Section 42A Reports.

### **Method 3.11.4.4**

- 100 Method 3.11.4.4 regarding the Whangamarino Wetland seeks to develop catchment plans for the Wetland building on existing management plans pertaining to shallow lakes. This method provides further detail to support the implementation of Policy 14 and FEPs. Overall, the Block 3 Section 42A Report recommends that Method 3.11.4.4 should be deleted.<sup>83</sup>
- 101 The WPL submissions requested that Method 3.11.4.4 should be retained as notified.<sup>84</sup>
- 102 Mr McKay however agrees that Method 3.11.4.4 should be deleted because other amendments to the PC1 policies and rules requested by WPL will (more appropriately) address the submission points made about the PC1 methods.

### **Method 3.11.4.6**

- 103 Method 3.11.4.6 regarding funding and implementation sets out how WRC will provide the funding and resources required for implementing the methods (including rules) in PC1 via (*inter alia*) LGA annual plans and long-term plans. The Block 3 Section 42A Report recommends that Method 3.11.4.6 should be deleted because it overlaps with other statutory requirements generally accepted good practice for implementing RMA plans pertaining to water quality, and business as usual for WRC.<sup>85</sup>
- 104 The WPL submissions requested that Method 3.11.4.6 should be amended to provide for the adoption of an adaptive management and mitigation approach in relation to sub-catchment planning, and to enable enterprises to apply for consent (regarding existing farming activities) in advance of the PC1 priority dates (i.e. at any time after 22 October 2016).<sup>86</sup>

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<sup>83</sup> Block 3 Section 42A Report, 88 para 358.

<sup>84</sup> WPL Submissions, PC1-11360 and V1PC1-670; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>85</sup> Block 3 Section 42A Report, 91 para 379.

<sup>86</sup> WPL Submissions, PC1-11363; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

- 105 Mr McKay however agrees that Method 3.11.4.6 should be deleted (again) because other amendments to the PC1 policies and rules requested by WPL will (more appropriately) address the submission points made about the PC1 methods.

#### **PART H: PRIORITISATION AND SUB-CATCHMENT PLANNING**

- 106 Part E.8 of the Section 32 Report evaluated the suite of PC1 provisions designed to implement prioritisation and sub-catchment planning.<sup>87</sup>
- 107 Relevant objectives are Objective 1 and Objective 3 that are implemented by: Policy 8, Policy 9, Policy 14, Policy 15, and Policy 17.
- 108 Policy 8, Policy 9, Policy 14, Policy 15, and Policy 17 are (in turn) implemented by: Method 3.11.4.4, Method 3.11.4.5, Method 3.11.4.6, and Method 3.11.4.9.

#### **Block 3**

- 109 Policy 17, Method 3.11.4.4, Method 3.11.4.5, Method 3.11.4.6, and Method 3.11.4.9 were left for consideration in Block 3. These provisions (with the sole exception of Method 3.11.4.5) have been addressed above.

#### **TOPIC C8. SUB-CATCHMENT PLANNING**

- 110 Method 3.11.4.5 regarding sub-catchment scale planning promotes the development of non-regulatory sub-catchment scale plans by WRC. This method supports the implementation of Policy 9.
- 111 The first point to make about sub-catchment planning is that it is *not* an alternative approach. Sub-catchment planning is an integral part of PC1 as notified. For example, the Block 3 Section 42A Report explains that:

Prioritisation of which sub-catchments would be required to start implementing FEPs first is based on the size of the gap between the current state of water quality and the desired future state, in terms of water quality attributes for N, P, E. coli and clarity.<sup>88</sup>

...

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<sup>87</sup> Section 32 Report, 220-233.

<sup>88</sup> Block 3 Section 42A Report, 25 para 128.

For Priority 1 sub-catchments and properties with a NRP greater than the 75<sup>th</sup> percentile N leaching value, a FEP must be complete by 1 March 2022 and stock exclusion must be complete by 1 March 2025. For Priority 2 sub-catchments, a FEP must be complete by 1 March 2025 and stock exclusion must be complete by 1 July 2026. For Priority 3 sub-catchments, a FEP and stock exclusion requirements must be complete by 1 July 2026.<sup>89</sup>

...

PC1 is inherently based on sub-catchments, in terms of the water quality modelling in Table 3.11-1.<sup>90</sup>

...

As highlighted in a number of submissions, PC1 does not include specific provisions (including objectives, policies, methods, and rules) which implement sub-catchment planning approaches in a regulatory framework.<sup>91</sup>

112 Sub-catchment planning is clearly an integral part of the PC1. It is based on the monitoring points throughout the catchment used by WRC to measure water quality and to determine compliance with Table 3.11-1 at sub-catchment and FMU levels. It has been used to define geographically and hydrologically the sub-catchments shown on Map 3.11-2. PC1 also proposes to use sub-catchment planning as the basis for voluntary arrangements with stakeholders to restore or protect water quality in certain sub-catchments where there is a collective will to do so. But despite the concern of WRC to streamline consenting under PC1 and reduce the number of consents required to comply with PC1, it has to date chosen to reject submissions on PC1 made by WPL and other submitters designed to implement sub-catchment planning as a regulatory method by amending relevant policies and rules.

113 The Block 3 Section 42A Report concludes that:

As identified in the Block 1 s42A Report (Page 27), the Officers have significant concerns about sub-catchment approaches that do not take a catchment-wide view to reducing contaminant losses, particularly of those

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<sup>89</sup> Block 3 Section 42A Report, 26 para 129.

<sup>90</sup> Block 3 Section 42A Report, 26 para 131.

<sup>91</sup> Block 3 Section 42A Report, 26 para 132.

contaminants that are cumulative across the whole catchment.<sup>92</sup>

...

The Wairakei Pastoral Ltd framework is comprehensive and reflects considerable investment in monitoring and modelling. Officers are concerned about enshrining a framework in PC1 that is more applicable to one or two sub-catchments, and likely less applicable to the majority of sub-catchments. Further, Officers are concerned at the limited matters of discretion available in the suggested framework for the assessment of any restricted discretionary activity resource consent application, *and given the risks inherent in further intensification in the upper parts of the catchment, consider that the framework requested is not adequately precautionary.*<sup>93</sup> (Emphasis added)

...

A policy and rule regime that does not preclude this happening is considered a better approach than one where the policies and rules set out how this can happen and try to specify the required pre-conditions.<sup>94</sup>

...

Officers understand that the monitoring results for each sub-catchment will provide an indication of progress towards the outcomes in Table 3.11-1, with all of the sub-catchments within an FMU being used to establish whether the FMU is meeting or making progress towards the freshwater objectives. In the Officers' opinion this paints a more nuanced picture of water quality in each FMU, rather than relying on a single monitoring site, which could easily have some areas not making progress and others overachieving. Officers recommend addition of wording to PC1 to clarify that this is a further use of the sub-catchment approach.<sup>95</sup>

- 114 The conclusions given in the Block 3 Section 42A Report for rejecting a regulatory approach to sub-catchment planning are (with respect) not coherent or logical. For example:

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<sup>92</sup> Block 3 Section 42A Report, 29 para 156.

<sup>93</sup> Block 3 Section 42A Report, 30 para 161.

<sup>94</sup> Block 3 Section 42A Report, 30 para 162.

<sup>95</sup> Block 3 Section 42A Report, 30-31 para 164.

- 114.1 PC1 uses the sub-catchment planning approach to monitor water quality and measure compliance against the freshwater objectives in Table 3.11-1, and to aggregate these findings at FMU level in accordance with the NPS-FM. These are the methods used to guarantee overall water in the catchment as a whole. Providing for sub-catchment level consents is entirely consistent with the PC1 architecture.
- 114.2 While the number of sub-catchment consents ultimately held under PC1 may not be considerable, evaluating a requested regulatory method solely in terms of numbers is not credible or relevant. For example, it is unlikely that there will be more than a handful of industry/sector schemes under the CIS provisions in PC1 but this has not been put forward by any party as a bar to including such provisions in PC1 given the potential for streamlining the number of consents required to comply with PC1.
- 114.3 Providing for sub-catchment level consents will have *no* effect on further intensification anywhere in the catchment, because sub-catchment consents are proposed by WPL as part of the suite of amendments to the rules pertaining to “existing” farming activities and CVP systems that will enable activities that were lawfully established on or before 22 October 2016 to continue.<sup>96</sup>
- 114.4 Failing to make express provision for sub-catchment consents in PC1 will not provide any certainty for stakeholders and is likely to result in unreasonable delay and impasse when applications are made. The default position under the RMA will be discretionary assessment with no relevant policies to provide guidance as to how such applications should be decided: and this would be an entirely unsatisfactory outcome.
- 114.5 Providing for sub-catchment consents (in relation to existing farming activities and CVP systems) will have no impact whatsoever on the PC1 monitoring framework. This will continue to occur as notified using the WRC sub-catchment monitoring points and aggregating the results at FMU level in accordance with the NPS-FM.
- 115 Overall, the Block 3 Section 42A Report recommends that Method 3.11.4.5 should be deleted.<sup>97</sup> Mr McKay agrees that Method 3.11.4.5 should be deleted but he considers that PC1 should be amended to provide for sub-catchment level consenting as recommended in his Block 2 evidence. The amendments to the

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<sup>96</sup> Rules 3.11.5.4, 3.11.5.5, and 3.11.5.6.

<sup>97</sup> Block 3 Section 42A Report, 90 para 372.

relevant policies and rules are (for completeness) included in the strikethrough version of PC1 in Appendix 5 of his Block 3 evidence.<sup>98</sup>

- 116 Beyond that, the sub-catchment approach in PC1 (Map 3.11-2) as the spatial basis for analysis and modelling of water quality is entirely consistent with the NPS-FM and the proposed amendments to the NPS-FM released by the Minister and justify a regulatory approach to sub-catchment planning. The proposed NES and regulations will also (likely) require amendments to the PC1 priority dates for stock exclusion from water bodies that is now proposed be in place by 1 July 2021 for dairy farming and 1 July 2023 for beef farming. Likewise, the PC1 rules will also (likely) require amendments to ensure that FW-FPs will be in place by 31 December 2025. Landowners (particularly in Priority 2 and 3 Sub-catchments) therefore need to be able to apply for consents much earlier (as requested by the WPL submissions).

#### **Definition: Sub-catchment**

- 117 The Block 3 Section 42A Report also recommends that the definition of "Sub-catchment" should be amended by deleting the words "and used as the basic spatial unit for analysis and modelling".<sup>99</sup> Given the conclusions reached in the Block 3 Section 42A Report about how monitoring will occur in practice (noted above) this amendment is unwarranted and should not be accepted. For completeness, the definition of "Sub-catchment" should be amended by increasing the number of sub-catchments from 74 to 75 to reflect the request made by WPL for the subdivision of Sub-catchment 66 into Sub-catchments 66A and 66B in the WPL Block 1 evidence.<sup>100</sup>

### **PART I: CONCLUSIONS**

- 118 In conclusion, absent the amendments to PC1 requested by the WPL submissions and evidence:

118.1 PC1 as notified will not promote sustainable management of natural and physical resources in accordance with pt 2 of the RMA.

118.2 PC1 as notified is not within the functions of regional councils as provided for in s 30 of the RMA.

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<sup>98</sup> WPL Submissions, PC1-11361; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>99</sup> Block 3 Section 42A Report, 32 para 177; WPL Submissions, V1PC1-693; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

<sup>100</sup> WPL Submissions, PC1-11253 and V1PC1-437; WPL Further Submissions are listed in Mr McKay's Block 3 EIC, Appendix 4.

118.3 PC1 as notified does not comply with s 32 of the RMA:

- (a) The objectives are not the most appropriate way to achieve sustainable management.
- (b) The provisions are not the most appropriate way to achieve the objectives.
- (c) PC1 will not promote opportunities for economic growth or employment.
- (d) The evaluation report for PC1 does not (in relevant part) comply with the requirements of s 32 of the RMA, and is not (fully) supported by evidence of probative value.

118.4 PC1 as notified does not comply with relevant provisions in pt 5 of the RMA, including: s 68 and s 70.

118.5 PC1 as notified is not consistent with or does not give effect to the NPS-FM.

118.6 PC1 as notified is not consistent with or does not give effect to the WRPS including the Vision and Strategy.

118.7 PC1 as notified (in respect of controls on land) will render interests in land incapable of reasonable use.

118.8 The rules in PC1 as notified are not clear and simple, or capable of consistent application.

119 WPL has therefore requested a series of carefully crafted amendments to the PC1 provisions addressed in the Section 42A Reports that (if accepted) will enable PC1 to become operative.

120 As indicated in Block 1, WPL considers that there is merit in the Commissioners carrying out a site visit at Tutukau Bridge to observe (for themselves) the difference between the lacustrine and riverine characteristics of the Waikato River at this location that justify the subdivision of Sub-catchment 66 into Sub-catchments 66A and 66B, and to visit the nearby Wairakei Estate to view the mitigations put in place to date as exemplars of what could be achieved under FEPs.

121 Finally, WPL reserves the right to file closing submissions within 5 working days from the last Hearing day (19 September 2019) i.e. by 26 September 2019.



T Daya-Winterbottom

**RJ Somerville QC / T Daya-Winterbottom**

*Counsel for Wairakei Pastoral Ltd*

9 September 2019

## APPENDIX 1

### **Glossary of Terms used in the WPL evidence and submissions**

**B+LNZ** Beef and Lamb NZ

**CSG** Collaborative Stakeholder Group

**CSG report** Overview of Collaborative Stakeholders Group's Recommendations for Waikato Regional Plan Change No 1 - Waikato and Waipa River catchments

**CVP** Commercial Vegetable Production

**DO** dissolved oxygen

**Estate** Wairakei Estate

**ETS** Emissions Trading Scheme

**Fe<sup>2+</sup>** dissolved iron

**FEPs** Farm Environment Plans

**FMUs** Freshwater Management Units

**FW-FPs** Freshwater Farm Plans

**FWO** Freshwater Objectives

**GFP** Good Farming Practice

**GMP** Good Management Practice

**HRWO** Healthy Rivers Wai Ora

**JWS** Joint Witness Statement

**LDA** linear discriminant analysis

**LGA** Local Government Act 2002

**LSR** land surface recharge

**MfE** Ministry for the Environment

**Mn<sup>2+</sup>** dissolved manganese

**MRT** mean residence times

**N** nitrogen

**N<sub>2</sub>** nitrogen gas

**NES** National Environmental Standards

**NES-PF** National Environmental Standards for Plantation Forestry  
2017

**NES-SHDW** National Environmental Standards for Sources of  
Human Drinking Water 2007

**NH<sub>4</sub>** ammonium

**NO<sub>3</sub><sup>-</sup>** nitrate

**NOF** National Objectives Framework

**NPS-FM** National Policy Statement for Freshwater Management  
2014 (as amended)

**NPS-REG** National Policy Statement for Renewable Energy  
Generation

**NRP** Nitrogen Reference Point

**NTNK** Ngati Tahu – Ngati Whaoa

**NZCPS** New Zealand Coastal Policy Statement 2010

**P** phosphorus

**PAMU** Landcorp Farming Ltd

**PC1** Proposed Waikato Regional Plan Change 1

**PCE** Parliamentary Commissioner for the Environment

**RDST** Ruahuwai decision support tool

**RLAA** Resource Legislation Amendment Act 2017

**RMA** Resource Management Act 1991

**RMSE** root mean square error

**S<sup>2-</sup>** sulphide

**Section 32 Report** Section 32 Evaluation Report

**Settlement Act** Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

**SO<sub>4</sub><sup>2-</sup>** sulphate

**TAND** Total Annual Nitrogen Discharge

**TLG** Technical Leaders Group

**TN** Total nitrogen

**TP** Total phosphorus

**TSS** total suspended solids

**Var1** Variation 1

**Vision and Strategy** Vision and Strategy for the Waikato River

**WPL** Wairakei Pastoral Ltd

**WRC** Waikato Regional Council

**WRP** Waikato Regional Plan

**WRPS** Waikato Regional Policy Statement