BEFORE THE HEARING PANEL OF SOUTHLAND REGIONAL COUNCIL

In the matter of sections 88 to 115 of the Resource Management Act 1991

And

In the matter Applications for resource consents by:

WOLDWIDE ONE LIMITED, WOLDWIDE TWO LIMITED, WOLDWIDE FOUR LIMITED, WOLDWIDE FIVE LIMITED

Applicants

APPLICANTS' SUBMISSIONS IN REPLY

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INTRODUCTION

1 These submissions are filed by way of a reply for four Applicants seeking changes to their dairy farms including to increase cow numbers by less than 12% on their respective dairy platforms. Two Applicants (WW1 and WW2) apply jointly for a single land holding containing two dairy platforms. WW4 and WW5 apply concurrently but separately each for their own set of resource consents to operate their own dairy platforms. The modest increases in cow numbers are required to fund significantly improved mitigation of a range of adverse effects, including nutrient loss.

2 Having heard all of the evidence and submissions it is now for the Panel to determine whether it is more likely than not that the proposals before it will achieve the purpose of the Resource Management Act (the Act) as expressed through the applicable policy hierarchy[1].

3 The only submissions in opposition to the granting of the consents come from the Ministry of Education, whose concerns have been fully addressed through the proffering of additional mitigation, and local iwi. The latter oppose out of a principled opposition to increase in cow numbers. From their evidence and answers to questions it does appear that their most critical concerns arise from possible effects on water quality. If the Panel can be satisfied that the mitigation proffered is likely to result in reduced adverse effects on water quality when compared to past practices with the existing number of cows, then it is submitted that those water quality concerns will have been addressed as well.

4 Neither of these submitters provided any detailed technical evidence demonstrating that:

4.1 There will not be a decrease in contaminant losses overall; or

4.2 That there will be any material nutrient loss-related adverse effects that will occur if these consents are granted, but will be avoided if they are refused.

[1] *Director-General of Conservation v Marlborough DC* C113/04, *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316

5 The strongest opposition to the granting of the applications has come from a s42A officers, who appear to have also enlisted legal counsel to submit on their behalf.

6 Because of this the type of consensus that is often seen between the Applicants' experts and the s42A officers was not present, as a result of which the Panel now has to determine an unusually high number of matters that remain in dispute, but which would frequently otherwise have been resolved as between those persons on a technical basis. These matters have varying degrees of impact on whether the consents should be granted or not. It is submitted that the ultimate determinations are:

6.1 Whether the effects of the proposals are capable of being kept to a level where the grant is appropriate, through a set of reasonable, enforceable consent conditions that do not frustrate the purposes of the grant; and

6.2 If so, whether those conditions should be those proposed by the s42A officers, those proposed by the Applicants or a limited variation or combination determined by the Commissioners.

7 The Applicants submit that given the proffering of a condition that will deal with those of the Ministry of Education's concerns that have a demonstrated causal nexus with the Applicants' proposed activities, the only issue that would really raise matters where the Panel would need to be satisfied at a level higher than more likely than not had been addressed. The Applicants have provided the Panel with sufficient independent expert evidence on which it can find that it is more likely than not that the conditions proposed by the Applicant will ensure a set of effects and benefits that are consistent with the purposes of the Act as expressed through the applicable policy hierarchy.

KEY LEGAL ISSUES

Landholding

8 A key focus of the s42A officers' case has been that all four dairy platforms and the various support blocks to which the applications refer are all part of one "land holding". The key legal principles applying to interpretation of these term have been set out in the opening legal submissions for the Applicants.

9 The s42A officers have accepted there is no reference to the term landholding in the objectives and policies to which Rule 20 must give effect, which requires the very wide purposive approach argued for by their counsel, which differs from the previous approach taken by the same firm. There is no indication in the Proposed Southland Water and Land Plan (PWLP) that the use of common directorships and shareholdings to transfer nutrients from one catchment to another is a problem. There is no policy requiring it to be addressed and no basis on which to conclude that the definition of landholding is the method implemented to achieve that.

10 Counsel for the s42A officers has argued that the "landholding" definition is a tool intended to achieve that which the Canterbury Land and Water Regional Plan intends to achieve with the term "farming enterprise". That Plan also includes the term "property", which is used in much the same way as the term "landholding" in the current plan. For example the on-site waste disposal rule, Rule 5.27 has condition 4, which requires that *"The discharge is only of refuse produced on the property where the pit is located"*. Compare this with the use of the word "landholding" in Rule 42 of the PPWLP. This is but one of very many examples.

11 The two relevant definitions from the Canterbury Land and Water Regional Plan are included below.

> *"Farming enterprise means an aggregation of parcels of land held in single or multiple ownership (whether or not held in common ownership) that constitutes a single operating unit for the purpose of nutrient management."*
>
> *"Property means any contiguous area of land, including land separated by a road or river, held in one or more than one ownership, that is utilised as a single operating unit, and may include one or more certificates of title."*

12 From these it is evident that the definition used for "property" is almost identical to that of "landholding" in the current plan and does not resemble at all the definition of "farming enterprise". If one is intending to manage the transfer of nutrient between properties, or between zones, then it is obvious that one would choose wording that resembles that of the farming enterprise definition. If one is intending to prevent operators of single "farms" from doubling up on limits intended to apply per farm by subdividing the property into multiple titles, then one would use wording closer to that of the "property" definition. That is what has occurred here with the "landholding" definition.

13 The other significant difference between the wording chosen and that of "farming enterprise" is that there is no mention of this being for nutrient management purposes only. That distinction is important. If the qualifier "for nutrient management purposes" is added, all that needs to be established is that the various component properties are joining together in order to be able to pool their nutrient management functions and allowances. That would allow a set of companies with their own separate budgets, management teams and properties to be regarded as a single unit for this purpose, simply because of their co-operation for nutrient management purposes.

14 In contrast a "single operating unit" without any qualification denotes a very high level of integration on all fronts. For example companies can be one "person", but have multiple "operating units" and multiple "business units". Local bodies often have operating or business units that are not a "LATE", but still seen as a separate operating or business unit. This shows that the integration within a "unit" is often higher than within a company.

15 However, the following points from the evidence of Mr and Mrs De Wolde excludes that high level of full integration:

15.1 There are five separate companies (six including Woldwide Three Ltd);

15.2 Each has its own management team;

15.3 Each has its own business plan;

15.4 Each has to make a profit in its own right;

15.5 Each as the freedom to purchase services it currently purchases from companies of which Mr and Mrs De Wolde are shareholders and directors, from companies of which they are not;

15.6 They are not reliant on being able to purchase these services from those companies to make a profit;

15.7 They do not subsidise each other and there is no one company that will run at a loss to allow the others to operate at a profit (profit is measured per company, not per group of companies);

15.8 Each has been set up so that it can be sold off as an autonomous profitable going concern that can continue to be that irrespective of whether Mr nor Mrs De Wolde holds any shareholding, directorship or ownership role in that company.

16 The Canterbury Land and Water Regional Plan rules that refer back to the farming enterprise make it clear that it cannot be used across zones. For example, rule 5.46 condition 3 requires that *"The properties comprising the farming enterprise are in the same surface water catchment and Nutrient Allocation Zone, as shown on the Planning Maps."*

17 In contrast, Rule 20 PWLP uses no such limitation. As a result, under the s42A officers' approach the Applicants could use 100ha of the 385ha Merriburn Block for Intensive Winter Grazing under Rule 20(a)(iii) rather than the maximum of 57.75ha that represents the 15% maximum if it is a separate landholding. That allows more nutrient transfer, not less. At least in that situation nutrient would be going from a highly affected zone to a less heavily affected zone, but there is nothing then to prevent the reverse from occurring.

18 If a farmer owns a 567ha block in a less affected zone and a 100ha block in a more affected zone, there would also be nothing stopping the farmer from using all 100ha in the more affected zone for IWG rather than the 15ha that would be available under the Applicants' approach. This is an extreme example, but it illustrates that there may well be situations where many times the 15% considered appropriate can be achieved by transferring between zones if the s42A officers' approach is used, but this is prevented by the Applicants' approach. The s42A officers' approach is therefore not an effective means of managing the transfer of nutrients. If anything it is capable of achieving the exact opposite.

19 Mr Erceg, when questioned on 20 November 2019 regarding the approach to the physiographic zone policies, indicated that the assessment should not be on a "per landholding" basis. This is actually diametrically opposed to the contention that it is necessary for nutrient management purposes to include in the same landholding all properties which share ownership and/or directorship links, including those in different physiographic zones.

20 In addition, the s42A officers have provided no answer to the other situations where they appear to adopt one interpretation for the purposes of rule 20 and then an entirely different interpretation when it comes to other rules, such as

the take and use of water. While Ms Grant indicated that she has no problem with her preferred interpretation applying to water takes, neither she nor Mr Erceg have updated the s42A report's assessment of the water takes in accordance with this. That was undertaken on the basis that there were several landholdings and not one large one, as argued for by Ms Grant. It is simply not plausible legally or technically to have one word in a regional plan that can have one meaning in one rule and another in a different rule. That is clearly why Environment Canterbury uses different words for different rules.

21 What the s42A officers have not addressed either is another potentially unworkable consequence of their approach. That is that it would result in large accumulations of farms throughout the region being treated as single land holdings. They have not established that this is indeed what the planning documents seek to achieve. With investment companies owning large number of farms, some of which may be dairy while others may be predominantly sheep and beef with only a part used for dairy support for the dairy farms, this issue becomes very real. There are examples of companies which own 14 separate subsidiaries, all part of one group. There cannot be a suggestion that it was intended that all 14 would be part of the same landholding. Some such companies have holdings in both Southland and West Otago. Under the s42A officers' approach potentially areas outside the Region become part of the same landholding.

22 The most important matter not to be addressed by the s42A officers is that the consents for which the Applicants choose to apply and the activity for which they seek them is a matter entirely for the Applicants themselves. If they seek consent to operate as separate landholdings then that is what they will be authorised to do and what should be assessed. As the Panel has helpfully observed, what goes on within the boardroom is beyond the scope of this Panel. As the Court held in the *Marlborough Rail*[2] decision, whether a particular approach is economically viable is a matter for the Applicant. In that regard, if the Applicants choose to apply on the basis that the three land holdings do not require the other properties in order to be viable, that is a matter for them.

23 They have made the decision for Woldwide 1 and 2 to seek consents as one common landholding, but not for WW4&5. The matters pointed to by the s42A officers therefore cannot overcome the Applicants' directors' own

[2] *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC)

evidence that there are simply three landholdings for which consent is sought, not one.

24 To hold otherwise would defeat much of the purpose of the farm development and improvement and in particular the ownership structures implemented, which have as a key purpose enabling the individual on sale of the individual companies as a going concern with sustainable effects on the environment. The market itself will determine whether this is feasible or not. If it is not they will remain within the same group in any event and there is no need to stretch or strain the interpretation of the term landholding to achieve that.

25 In summary:

25.1 Under the s42A officers' approach the "landholding" definition actually is "*any aggregation of multiple areas of land, including land separated by other properties, roads, zone boundaries any number of rivers or water bodies, and any distance apart….*". This is so different from what is written in the text of the PWLP that it does violence to that text.

25.2 There is nothing in the wording that allows it to be extended only a little bit, for example to a property that is possibly only separated by another property, or only two, or three property boundaries, or is in the same physiographic zone.

25.3 There is nothing in the text of the PWLP, the regional policy statement, any national policy statement, or the purposes of the Act that requires or justifies such a significant departure from the meaning of the text.

25.4 The approach the s42A officers seek to take results in multiple absurd and unworkable results, which are avoided with the ordinary meaning of the text as supported by the Applicant.

25.5 As such the ordinary meaning of the text is to be preferred, and only properties which are a single area of land, only separated by a boundary, river, or artificial drain can be a single landholding.

25.6 This accords with the way the Applicants have applied for their consents.

MERRIBURN AND MERRIVALE BLOCKS

26 Related to the above matter is the issue of whether the Merriburn and Merrivale Blocks are to form part of the same overall landholding and therefore are subject to the land uses for which consents need to be obtained and can be granted. The former is leased by Woldwide Farm Ltd and the latter is owned by that company, which provides young stock grazing and intensive winter grazing to other companies on a commercial basis with both blocks. Those other companies include the four Applicants, with which it shares directors and shareholdings.

27 A key reason put forward by the s42A officers as to why these blocks should form part of the same landholding is that it would prevent the transfer of nutrients between catchments. As explained above, that is not a sustainable reason for adopting an interpretation that would incorporate it into the same "landholding" as the pieces of land owned by various other companies with similar shareholding to the lessee of the Merriburn Block and owner of the Merrivale Block.

28 It is has been accepted by the Applicants that consequential effects are relevant. Nevertheless, in relation to the Merriburn and Merrivale Blocks, it is submitted that it has not been demonstrated that the nutrient loss resulting from the use of those Blocks for young stock grazing is an effect of granting these applications; the requisite causal link[3] between activity and alleged effect has not been established. There is nothing to say that if these Applicants' young stock are not grazed there other young stock, owned by other dairy farmers, will not be grazed or wintered there.

29 On the contrary, the owners of the Merriburn block (the lessors) have provided a submission, from which it is very clear that they wish to keep the baseline for that block as high as possible. The only logical reason for that is to enable precisely the maximum amount of nutrient loss to continue as expressly provided for by the applicable rules. It may not be nutrient lost from WW1, WW2, WW4 or WW5-owned young stock, but the receiving environment does not care who owns the stock from which the nutrient loss comes. Applying simple causality, there is no basis on which to conclude that but for the grant of these consents, the nutrient losses associated with the

[3] *Estate Homes Ltd v Waitakere CC* [2006] 2 NZLR 619

use of the Merriburn block in accordance with the permitted activity rules will not occur or be lower.

30 Given the need for each of the Woldwide companies to operate as an independent financially sustainable unit, if for some reason young stock from the Applicant's farms were not grazed on the Merrivale Block, Woldwide Farm Ltd would most certainly be providing those services and intensive winter grazing to other dairy farms on a commercial basis. That is part of its key business. While the relationships with the other Woldwide companies may make it easier for Woldwide Farm to sell those services to those companies, there is no economic necessity to sell them only to those companies. On this basis the causal nexus between granting these consents and the loss of nutrients from young stock grazing on the Merrivale Block is not established either.

31 There is therefore no evidence that granting these consents will result in an increase in the amount of nutrient lost from the Merriburn or Merrivale Blocks. Those losses are therefore not a consequential effect of the type addressed by *Aquamarine*. In the *Aquamarine* decision there would be ships in locations, at times and for durations, which would not contain similar ships in such locations for such durations if the consents were not granted. The situation would have been quite different had the Applicant in *Aquamarine* been able to show that even if the consent were not granted, the same amount of ships with the same risks would be in the same place. That is effectively what can be demonstrated for the current situation.

32 Further in *Aquamarine* case the consequential effects arise from activities not controlled by the plan at all. In the current matter the consequential effects are from activities expressly allowed by the applicable planning rules and provided for as permitted[4]. It is submitted that those effects are therefore deemed to be acceptable under the objectives and policies to which those rules must give effect.

33 The important issue is that Rule 20 makes no distinction between zones when it comes to conditions for farming land use permitted activities, including intensive winter grazing. Wherever the young stock are grazed within Southland, the same permitted activity rules apply. On this basis, whether the Merriburn lease is renewed or young stock grazing occurs

[4] Rule 20 PWLP

elsewhere within Southland, the same level of effects will be generated as of right, unless the Applicants proffer mitigation over and beyond that required to comply with Rule 20.

34 That is precisely what the Applicants have done. With the conditions proffered (on an *Augier* basis) they are providing a higher degree of mitigation than would be required to comply with Rule 20's permitted activity requirements for farming activities including Intensive Winter Grazing. Because those requirements are not bound to zones within the Region, that mitigation is transferrable to other locations within the Region to which their young stock may go for grazing if the Merriburn Block lease is not renewed.

35 On that basis the Merriburn Block does not need to be included in the "landholding" for any of the four dairy platforms seeking consent in order to secure the mitigation of any effects of grazing the young stock from these dairy platforms. To do so would be to bind a third party, namely the lessors/owners of that block, to a consent and conditions to which they have not consented.

36 In any event, the s42A officers have not demonstrated that the Merriburn Block is held in the same "ownership" as the other properties subject to this application. It clear that it is not; its owners have lodged a submission. They are not the Applicants. They have no ownership of or control over WW1, WW2, WW4 or WW5's land or an involvement in those companies' management. While the Merrivale Block is owned by a connected company, as has been pointed out above, the s42A officers have not provided sufficient proof that it is part of the same "operating unit" as the Applicants' respective platforms.

37 Given that Woldwide Farm Ltd provides young stock grazing services to all the Applicants via both these blocks, these two blocks either form part of one "landholding" with all the respective Applicants' respective properties or they do not. It is not feasible to say that Merriburn is part of the same landholding as all the other properties, or just with one or two of them, but Merrivale is not. Nor is it feasible to say it both are part of the same landholding as one or two of those other properties and not all of them.

38 Given that Merrivale cannot be part of the same landholding as all of the respective Applicants' respective properties, it must follow that neither can Merriburn. Further, the submission above that the s42A officers have not

met the very high threshold for “single operating unit” as between all five properties further makes it impossible to include these two blocks within the same “landholding” as that of any of the Applicants.

39 The s42A officers have not provided any basis on which this Panel would have jurisdiction to grant a land use consent for the Merriburn and Merrivale Blocks if the Applicants do not intend to use that land in a manner that contravenes a regional rule. The only scenario under which it could breach a regional rule is if they form part of the same “landholding” as WW1 WW2, WW4 and WW5.

40 Given that the above demonstrates that it they cannot, there is no basis on which to conclude that any of the Applicants intends to use the Merriburn or Merrivale Blocks in a manner that contravenes a Regional Rule. Despite the fact that (under threat of an, in my submission, inappropriate threat of s88(3) rejection) this block was included in the land use consent applications, the Panel therefore lacks jurisdiction to grant consent for the Merriburn Block, because its land use will not contravene a regional rule.

41 There is therefore no need or ability to include the Merriburn or Merrivale Blocks in the “landholding” or to issue a land use consent for its intended use by WW1 and WW2. The conditions proposed by the Applicants include nutrient loss limits of 25kg/ha for grazing of the respective Applicants’ stock, irrespective of whether that occurs on the Merriburn Block or elsewhere. This limit is lower than what would be expected under a typical permitted runoff/dairy support (including intensive winter grazing) use permitted by Rule 20. This will ensure that granting of these consents will not result in consequential nutrient loss on that block or any other property within the Region that is used to graze the young stock from owned by any of the Applicants.

COLLIES BLOCK

42 An issue for the Panel remains how to deal with the evidence provided by Dr Freeman at the resumption of the WW4&5 hearing regarding the assurances given by the processing officer Ms Grant as to the appropriateness of including the Collies Block as a dairy farm in the modelling of existing nutrient losses. That evidence has not been refuted, nor is the fact that the Applicant modified its position in reliance on that assurance.

43 At the resumption on 19 November Counsel also accepted that the fairness issue raised by the *Anzani* decision cited is a matter arising under s104(1)(c), while the issue of the existing environment is a matter arising under s104(1)(a), being part of the assessment of the effects on the environment. The Applicant accepts that the issue of fairness cannot be used to amend what the existing environment would be.

44 Nevertheless, it is submitted that simply to put to one side entirely this issue on that basis would be grossly unfair. However, that approach is not necessary. The key policies have the word "generally", which is accepted to signify that there is room for situations where increases in dairy cow numbers would be appropriate, even where not all the requirements of those policies are met. It is submitted that the Panel is able to give particular weight to the fairness consideration under s104(c) to find that this is such a situation.

45 The grounds on which that could be done would be to accept that fairness would require that the Applicant ought to be put in the position in which it would be had the consent authority adhered to its commitment, or as close to that as is reasonably achievable. That can be achieved by recognising that if the consent authority had adhered to its commitment, the Applicant would only have been required to demonstrate a reduction below the land use as modelled as if the erroneously surrendered consent had been implemented.

46 On this basis, the Panel can rely on that implicit exception to find that in this situation:

46.1 Provided the Applicant satisfies it that there will be a reduction in nutrient loss in comparison with the Collies Block modelled as having had that surrendered consent implemented -

46.2 It would be appropriate to grant consent, even though a reduction from the actual existing environment has not been demonstrated.

47 Nevertheless, if the Panel chooses not to take this approach, Mr Crawford's evidence has shown that with appropriate mitigation, there will still be a reduction from its modelling as being used for sheep and beef. The Applicant has provided conditions to ensure this is achieved. The key point is however that the fair approach is to give the Applicant the benefit of Ms Grant's assurance, which reinforces that there is no reason to conclude that the losses from this block would require a refusal under the applicable policies.

INTERPRETATION OF PHYSIOGRAPHIC ZONE POLICIES

48 Another issue that arose from the Panel's questions to the s42A officers is whether the "generally not grant" requirements relate to an overall increase, or an increase for any part or block. Mr Erceg indicated that he considered it was per block, the implications of which for the landholding issue have already been discussed above.

49 The Applicants submit that it should be done on a "per landholding" basis. While it is accepted that the policies themselves provide no overt guidance as to how this is intended to apply, s5(2)&(3) Interpretation Act 1999 make it clear that indications can also be found elsewhere in the "enactment". It is submitted that Rule 20 can be looked at for this purpose. This is different from allowing one particular aspect of that rule to drive the interpretation of a term like landholding that is used for many other purposes besides nutrient management.

50 Rule 20 actually provides the methods whereby the requirements of those "generally not grant" policies are given effect. What emerges from a consideration of that rule is that:

50.1 The permitted activity of farming applies on a per landholding basis, irrespective of whether it covers more than one physiographic zone[5];

50.2 The restricted discretionary activity of farming that does not meet the permitted activity requirements in Rule 20(a) is required to show that there is no increase of nutrient loss on a per landholding basis[6].

51 These have to be strong indications that plan's drafters did not intend a "per block" approach as suggested by Mr Erceg, because otherwise one would expect to see a qualification to that effect or a requirement for no increase per physiographic zone included in those rules. The requirement is for no increase per landholding, with such a restriction.

52 That deals with the concerns the Panel had about there perhaps being an increase in loss within the Aparima catchment from WW4. The key is that it is not an increase for each landholding.

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[5] Rule 20(a)
[6] Rule 20(d)(ii)(1)

53 Over and above that, Mr Crawford's modelling strongly indicates that the mitigation in the WW5 part of the Aparima catchment will more than offset the increase in loss from the WW4 portion that is in the Aparima catchment. To ensure that that will be the case, a condition can be inserted requiring that the WW5 consents cannot be relied on until all steps taken in order to be able to rely on the WW4 consents have been taken.

54 This would ensure that when the WW5 consents are relied on, the WW4 consents already form part of the existing environment. Such a condition can be proffered by these Applicants, because they both agree to it on an *Augier* basis. If a future owner of WW4 wishes to remove any of its mitigation, it will have to seek a change of consent conditions, which can then be assessed on the basis that it will have a cumulative effect with the consents for WW5. The decision maker for that application can then assess whether such an effect is appropriate.

CONSENT CONDITIONS

General

55 There is a significant variance between the suite of conditions proposed by the s42A officers and those supported by the Applicants. The Applicants' disagreement with the extent and detail of the s42A officers' conditions is essentially that they go very considerably beyond what is essentially a less than 12% increase of cow numbers per dairy platform coupled with significantly improved and considerably more than offsetting mitigation. It is at this point, helpful to set out the Newbury principles[7], widely adopted by New Zealand Courts in relation to consent conditions. They require that such conditions must:

(a) be for a resource management purpose and not an ulterior one; and

(b) fairly and reasonably relate to the activity for which consent is being granted; and

(c) not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.

[7] As explained in *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (CA)

56 The conditions sought by the s42A officers go considerably beyond what would be fair and reasonable and appropriate under these principles, given their extreme detail and onerousness.

57 A key principle is that the conditions must not defeat the purpose of a grant[8]. It is submitted the approach adopted by the s42A officers comes very close to seeing to achieve that. The conditions should not make life so difficult that they practically amount to a refusal by another route. That is what the proposed conditions do.

58 The evidence of Dr Freeman and Ms Legg has demonstrated that the level of detail for mitigation secured by the conditions supported by the Applicants is sufficient.

59 To the extent that the Panel may have concerns about the ability to control consequential effects, sufficient conditions have been proffered and reliance on the *Augier* principle to satisfy the Panel that the mitigation will be achieved. Given the fact that the nutrient loss figure of 25kg/ha applies irrespective of where young stock are grazed, this is achieved.

Standard Conditions

60 A key matter raised repeatedly by Mr Erceg in his verbal evidence was the fact that a number of conditions of his proposed conditions are "standard conditions" used by the Southland Regional Council. It is submitted that the only relevance of that is that:

(a) It indicates that those conditions that are standard conditions were not suggested previously in order to treat these Applicants more harshly than others;

(b) There may be some benefit for enforcement and perceptions of fairness if there is some consistency between consents for the same types of activities between various consent holders; and

(c) If the justification is that they are "standard conditions" rather than that they are conditions that have been assessed as appropriate for these particular consents, it makes it more likely that Mr Erceg has

[8] *Ravensdown Growing Media Ltd v Southland RC* EnvC C194/00

not satisfied himself personally that each of such condition is consistent with the Newbury principles.

61 The simple fact that they are standard conditions does not constitute any evidence that they are appropriate, in accordance with the Newbury Principles, valid or necessary. It is possible for a consent authority to be consistent, but wrong on a particular approach. These consents are being processed as fully discretionary activities, precisely because they do not fit a standard mould. While it is not suggested that a condition will be inappropriate because it is standard, the point is that it must still be given the same level of scrutiny as a non-standard condition to ensure that it is appropriate; it cannot be assumed to be appropriate simply because they are standard.

62 There are conditions that are "standard", but in the Applicants' submission, wrong or inappropriate. One such condition is the "concurrent exercise" condition, which is addressed in more detail below.

63 It would be wrong as a matter of law to fetter or abrogate the consent authority's obligation or its ability to satisfy itself of the matters in s108 regarding which conditions are appropriate. With a complex proposal that is fully discretionary such as this one, it is submitted that a "standard" approach is less likely to be helpful and it is important simply to consider the conditions on a case-by-case basis.

64 The benefits of consistency extend also to recently granted consents for similar activities. In this regard, it is submitted that the conditions put forward by the s42A officers are significantly more onerous than and different from those imposed for the recent Adams consent, which raises a far more significant consistency issue than not including "standard" conditions that are not shown to be appropriate.

Concurrent Exercise Conditions

65 The Applicants continue to oppose the inclusion of the concurrent exercise conditions – "in conjunction with". The key issue is that they cause uncertainty in view of the types of consents involved. A literal reading of this type of condition is that the land use of farming could only be lawfully undertaken if at the same time water was actually being taken or effluent was being discharged under the other consents, in a manner that would be unlawful but for those consents.

66 While the Applicants acknowledge that the mitigation for the various activities is linked, so that there is an assumption that all the mitigation will be occurring concurrently, it is submitted that the "concurrent exercise" condition is not the appropriate means of achieving that. The Applicants also accept that there is benefit in ensuring that the Applicants cannot "mix and match" between old and new consents or keep changing between them.

67 It is submitted that the Commissioners' concerns in this area could be better addressed by conditions on:

67.1 The farming land use consents requiring that that land use consent cannot be relied on until the discharge and water permits that are being replaced have either expired or been surrendered;

67.2 The water permits, requiring that they cannot be relied on until the discharge permits that are being replaced have either expired or been surrendered;

67.3 The discharge permits, requiring that they cannot be relied on until the water permits that are being replaced have either expired or been surrendered;

67.4 The discharge and water permits, that they authorise only discharges and water takes occurring as part of a farming land use authorised by the relevant new land use consents.

68 Under this scenario either all new consents are relied on or none, but there is no uncertainty. It is submitted that this is more appropriate than the "concurrent exercise" wordings put forward by the s42A officers.

Requirement to surrender a consent

69 Mr Erceg has suggested that there should be a condition that requires another resource consent to be surrendered. This would be *ultra vires*[9] and the approach suggested above would address what appears to be Mr Erceg's concerns without encroaching on this, because it does not impose a requirement to surrender another consent, but simply puts in place a requirement that limits when the new consent can be relied on.

[9] *Dart River Safaris v Kemp*, AP600/00

Wintering Barn Construction Conditions

70 It is accepted that providing deadlines for the construction of the wintering barns is an appropriate means of mitigating the farming land use consent effects. For this reason, any such conditions should be attached to that consent and not the wintering barn construction land use consent.

Ministry of Education Condition

71 Conditions have been proffered to deal with the extremely low risk which Dr Freeman was not able to exclude absolutely. Specifically he concluded that the grant of the consents might conceivably result in a potential negligible increase in the risk of microbiological contamination of the local school's drinking water supply. However, he noted that the significant reduction of nitrogen leaching to groundwater would improve quality of nitrate nitrogen in the groundwater upgradient of the bore. The conditions proffered include:

71.1 A mitigation component, in that steps are proffered to ensure that the more serious effect of adverse effects on schoolchildren's health are avoided by preventative treatment and maintenance of the water treatment equipment;

71.2 Additional benefits, in the form of providing water quality monitoring data that will assist the Council in its understanding and management of water quality in the area.

72 The Ministry of Education now suggests that the Applicants need to take action if there is an increase in any of the contaminants monitored, irrespective of whether it can be established that such an increase was caused by the Applicants' activities or other activities by other parties in the same catchment. Given the standard of the Applicants' on-farm mitigation and the fact that there are at least two other farms down-gradient of the closest Applicant's property, but up-gradient of the school, it is more likely than not that any such increase will be caused by a third party beyond the Applicants' control and not by the Applicants. This would therefore be an *ultra vires* condition, being one that requires the Applicant to control third parties' conduct, which is beyond its control. It is not a condition that will mitigate an effect caused by the Applicants' activities. It lacks the necessary causal nexus.

73 The conditions proposed by the Applicants eliminate sufficiently the risk of adverse health effects on the schoolchildren using the water supply in

question that there is no longer a "real risk" of such an effect. As the Court has found in *Director-General of Conservation v Marlborough DC* C113/04 there is no basis on which to invoke s3(f) where there is the mere raising of "a scintilla of evidence of a low risk" of something that might have a high impact adverse effect. It is submitted that in view of the effect of the Applicants' proposed conditions there is less than a scintilla of evidence of a low risk of adverse effects on schoolchildren's health being caused by the activities for which consent is sought.

74 There is therefore no basis on which to refuse consent on the basis of a s3(f) effect, or to require the type of condition sought by the Ministry of Education.

Braxton soil cracking

75 Dr Freeman and Ms Legg have suggested a technical definition of significant cracking to address this technical matter. The Applicants are conscious that the reporting officers may not have had an opportunity to comment on this. To assist in resolving this we would have no objection to the reporting officers providing specific comment to the commissioners on this specific matter on Monday 9 December 2019.

Duration

76 To his credit, Mr Erceg has moved away from the very short duration initially proposed in the s42A report, however he still adheres to a maximum of 10 years. It is clear that there must be a valid planning reason for a shorter duration of a resource consent[10]. However, Mr Erceg did not provide any concrete reasons other than reference to Environment Canterbury practice, which seems unsubstantiated[11], and that it was a "standard" term. The comments made above regarding standard conditions are equally applicable to his position in relation to the duration.

77 The s42A report and Ms Grant had referred to past non-compliances. However, in relation to those:

77.1 The allegations of reporting non-compliance have been refuted by the statement of evidence by Mr Wesley de Wolde filed along with the Applicants' submissions on the existing environment dated 8

[10] *Woolley v Marlborough DC* [2014] NZEnvC
[11] See **enclosed** example of an ECan farming land use consent

November 2019**.** No rebuttal of that evidence was provided by the s42A officers;

77.2 All other allegations seem to be of a fairly minor and temporary nature[12]. The Applicants have proffered a self-monitoring and reporting condition involving a suitably qualified person, which will minimise the risk of such incidents recurring;

77.3 The s42A officers have provided no evidence that a 15 year duration with this type of condition will not be able to deal with that risk in a manner that a ten year duration would;

77.4 That matter aside, there is no evidence of serious, long-term or persistent offending that is beyond the capacity of the Council under its normal enforcement powers to deal with, if a 15 year term rather than 10 years were imposed.

78 There is no specific date that is particularly relevant to justify the 10 years rather than 15 years duration. The imminent imposition of new allocation limits is likely to occur well within the 10 years supported by Mr Erceg. Although regional plans have to be reviewed every 10 years, there is little evidence of rigid adherence to this by Councils. In any event, the PWLP is not yet fully operative and there is no indication when it might become so. There is therefore nothing to suggest that the plan will be reviewed in ten years' time, which would therefore require a 10 year duration. If anything, it seems more likely that any review of this plan would only take effect in 15 years' time, or at least become operative by then. This provides no justification for a 10 year consent either.

79 The Court of Appeal has confirmed that a shorter duration should not be used as a substitute for a review under s128, or perceived lack of evidence[13]. It is submitted that in view of this and the ability to review consents where new allocation regimes are imposed or new rules or national requirements are made[14], there is no justification for the shorter duration.

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[12] Contrast the *Woolley* situation, where data had been withheld that was necessary to assess actual and reasonable use. It is also common knowledge that Mr Woolley had been convicted of RMA offending prior to this decision.
[13] *Ngati Rangi Trust v Genesis Power Ltd* (2009) 15 ELRNZ 164 (CA)
[14] S128(1)(b)-(bb)

80 The Applicants are incurring very considerable cost in constructing wintering barns with a life beyond the 35 year maximum term provided for by s123. Security of investment is a relevant consideration[15]. The duration of 15 years is very modest in view of this. Reduction below this duration is something that is contrary to the applicable principles for duration, given the need for security of investment.

81 Also relevant is that the purpose for making this investment is directly linked to an important animal welfare issue, as demonstrated by Mr Abe de Wolde's own evidence and confirmed by the report of the Intensive Winter Grazing Working Group, circulated by the Applicants after the adjournment of the hearing.

CONCLUSION

82 It is respectfully submitted that the above demonstrates that:

82.1 All concerns and queries raised by the Panel have been addressed or are capable of being addressed through mitigation secured by conditions proposed or supported by the Applicants;

82.2 The matters raised by the submitters in opposition and the s42A officers have been addressed by the Applicants and leave no proper basis on which to refuse the consents sought or prefer the types of conditions proposed by the s42A officers or the Ministry of Education;

82.3 All issues have been responded to by the Applicants to the level necessary to enable the Panel to grant all consents sought, subject to the conditions proffered by the Applicants, for a term of 15 years.

Dated 6 December 2019

J M van der Wal
Solicitor for the Applicants

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[15] *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty RC* (2010) 16 ELRNZ 312, *Crest Energy Kaipara Ltd v Northland RC* [2011] NZEnvC 26