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,
Applicants

Next event date

OPENING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS
2019

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INTRODUCTION

1 This hearing is to determine joint applications by two persons, being Woldwide One Ltd (WW1), Woldwide Two Ltd (WW2) to undertake activities that would, if not expressly allowed by a resource consent, contravene:

1.1 Section 9(2), namely to use land in a manner that contravenes a rule in a regional plan, by using land identified in their respective applications for a farming activity and/or for the use of a wintering barn, in a manner that is classified as a discretionary activity by the applicable regional plans;

1.2 Section 14(2)(a), namely to take and use water at identified locations for the purposes of dairy shed and stock water supply;

1.3 Section 15(1)(b), namely to discharge a contaminant, namely dairy effluent, to land specified in their respective applications, in a manner where that contaminant or any other contaminant emanating as a result of natural processes from it may enter water.

2 Each of these persons owns and operates a dairy platform. There are two dairy platforms before the Panel in this hearing. The applications are required in order to allow the applicants to operate in a manner that increases efficiencies and production, while reducing overall nutrient loss and other contaminants that can result in adverse effects associated with the operation of the platforms.

3 Each platform operator either owns or leases the land it uses for the farming and wintering barn land use activities requiring consent, and the land on which it wishes to take and use water. WW1 and WW2 (together WW1&2) have chosen to apply jointly, as by cooperating they can best achieve the efficiencies and environmental gains sought. In addition to seeking consent to discharge effluent to land they own or lease, they also seek consent to discharge effluent to land they do not own or lease, so that the owner of that land can discharge effluent on it in reliance on the Applicants' consents.

4 The applicants make no secret that there are connections between these persons. Specifically, they share common directors and shareholders. As indicated, there is an arrangement whereby another land owner can discharge slurry from the Applicants' land on its land in reliance on their consents. The applicants have also entered into arrangements for wintering

of stock with another person that has a similar connection with these applicants.

5 Most importantly for these applications, WW1&2 can show that by co-operating and applying jointly, they will be able to ensure a net overall reduction in contaminant loss and associated adverse effects across these two properties, while at the same time improving efficiencies and profitability.

6 This gives effect to the purposes of the Resource Management Act (the Act) and is consistent with the policy framework through which those purposes are required to be given effect. The connections between these various persons have made it easier to facilitate these outcomes, in the same way as neighbours, friends or relatives can share connections that facilitate such co-operation to achieve such outcomes.

7 A second hearing is scheduled for later this week, to determine applications by two further persons, namely Woldwide Four Ltd (WW4) and Woldwide Five Ltd (WW5), also for activities that would otherwise contravene sections 9(2), 14 and 15. As will become evident in the hearing for those applications, there are connections between those applicants and the current applicants. They are however all distinct "persons"; WW1&2 are joint applicants for one suite of consents applying to two dairy platforms, while WW4 and WW5 are each separate applicants who have agreed to have their separate applications heard at the same time. Importantly, neither they nor their applications are currently before this Panel in this particular hearing, although parts of these submissions may be relied on in the opening for that second hearing and likewise, significant portions of their evidence is the same as that before this hearing.

8 The s42A report has recommended that all consents sought be refused. It is submitted that the recommendations are based on findings that in turn are based on fundamental errors of law and fact. Without those errors the findings and the recommendation are not available.

9 Essentially, the s42A report has failed to confine the assessment to what is properly before the consent authority as the "applications" and "proposal". The S42A report appears to require the applicants to provide an impracticable level of certainty not required by law. It has failed to assess the effects of the proposal on "the environment", by focusing on a "baseline" approach prescribed by a rule provision that is subject to appeal and not

applicable to the applications, rather than an overall assessment of the effects of granting the applications against those of refusing them. It has improperly rejected modelling information that will be demonstrated to be an entirely suitable means of discharging the Applicants' burden to show that the effects of allowing the activities are more likely than not to meet the applicable objectives and policy and Part 2 itself. These errors are compounded by a series of further technical and legal errors.

10 The Panel's task is primarily an exercise of the Council's statutory discretion under s104, which is not capable of being amended by a regional plan, let alone a proposed regional rule that remains subject to appeal. When the discretion imposed by the statute is properly exercised, without the legal and factual errors arising in the s42A report, subject to the correct standard of proof, then the appropriate decision will be to grant the consents sought, subject to the additional mitigation proffered through the Applicants' evidence and subject to appropriate conditions. That is because that the evidence will show that it is more likely than not that such a decision better gives effect to the overall applicable policy hierarchy and purposes of the Act, than the s42A report's recommendation.

11 The factual errors will be addressed in the Applicants' evidence, which will consist of:

11.1 Factual evidence as to the basis, form and reason for the applications, provided by Mrs De Wolde (supported by Mr De Wolde), who are directors of the Applicants authorised to give evidence for the Applicants;

11.2 Expert nutrient loss modelling evidence by Mr Cain Duncan;

11.3 Expert evidence on soil sampling and effluent pond testing by Mr John Scandrett;

11.4 Expert soils and further expert nutrient modelling evidence by Dr Anthony Roberts;

11.5 Expert water quality evidence by Dr Michael Freeman;

11.6 Overall planning evidence by Ms Nessa Legg.

12 The legal errors are addressed below. However, before that, it is appropriate to acknowledge that the reporting officers are dealing with a very new and largely untested plan, many key parts of which are still subject to appeal. They have had the very difficult task of assessing against this plan and preparing reports for not just one, but two hearings by four applicants in total, each of which includes complexity and levels of innovation that even the most experienced and well-resourced of reporting officers would have found challenging. It is also acknowledged that the applicants have made changes to the applications in an effort to further reduce adverse effects and it is acknowledged that this has created additional challenges for the reporting officers. This while they have assumed their roles relatively recently and did not have access to the types and depth of resources typically available to larger regional authorities.

13 Although these submissions are critical of the s42A report and some of the processing approaches taken, this should in no way be regarded as an attack on the officers themselves, who have clearly put an extraordinary amount of effort into the report. It is important to signal here that it is acknowledged that the source of the errors identified in these submissions may well be matters beyond the control of the authors of the s42A report themselves.

14 Nevertheless, the Applicants are themselves very significantly disadvantaged by the errors made. Those errors have to be addressed and corrected in order to provide the Applicants with the assessment to which the Statute intended them to be entitled. The mere fact that the authors of the report may find it difficult to see so much criticism of their very hard work is insufficient reason not to identify and correct those errors. It is hoped that they will have some understanding of that.

PRELIMINARY LEGAL ISSUES ARISING FROM THE S42A REPORT

Incorrect Fundamental Approach

15 At the heart of the errors in the s42A report is the fact that the approach to the proposal appears to be driven by a focus on the Proposed Southland Water and Land Plan (PSWLP) Rule 20(d), which is a proposed rule still subject to appeal. That rule provides that a land use application for the land use of farming that contravenes Rule 20(a) or (b) can only be processed as a restricted discretionary activity if, amongst other things, it is shown that there is no increase from a “baseline” consisting of the previous five years.

16 If it is not possible to demonstrate that, then the land use becomes a fully discretionary activity under PSWLP Rule 20(e), which contains no prescriptions or requirements as to what has to be demonstrated or how. As a fully discretionary activity the decision maker is not limited in what it can consider or how. That is simply determined by the provisions of the Act and in particular ss104 and 104B. The other land use consents sought are to authorise two feedpads/lots as discretionary activities under Rule 35A. PWLWP.

17 The other activities for which resource consents are sought are not land uses, but are discharges and a water take and use. The discharges are fully discretionary under Rule 35(c) (and Rule 23 of the Regional Water Plan/RWP), while the water take and use are fully discretionary activities under Rule 54(d) (and Rule 23 of the RWP). Neither makes any mention of baselines or previous years' nutrient losses.

18 It seems therefore that the s42A's focus on the assessment under PSWLP Rule 20(d) is as it were, the tail wagging the dog. It is nothing more than a rule that is to give effect to the objectives and policies of the plan, which in turn have to give effect to the objectives and policies of the regional policy statement, national planning documents and Part 2. At best it signals that if the very specific land use with which it deals is to qualify for assessment with a restricted set of matters, rather than the full range under a fully discretionary activity, the applicant has to provide certain information.

19 *King Salmon*[1] would certainly not be authority for or even support the proposition that it must be deemed to be an expression of how Part 2 is to be given effect. That decision applies to plan changes and indicates that high level policy documents are such an expression. In this setting, it is accepted that the national policy documents, the Southland Regional Policy Statement (SRPS), the operative Regional Water Plan for Southland (RWP), and to a lesser extent the proposed policies and objectives to which the rule is to give effect, can be an expression of how Part 2 is to be given effect. However, a proposed rule under which none of these applications is made cannot be seen as an expression of that, particularly when it is still subject to appeal.

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[1] Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38

20 As observed elsewhere below regarding the applicable policy hierarchy to which the rules under which consents are required for this proposal under both the RWP and PSWLP give effect:

20.1 None mention any baseline (other than the permitted baseline) or specify any means of measuring the "effects on the environment of allowing the activity";

20.2 The policy hierarchy includes emphasis on enabling as well, as is to be expected to policies that must give effect to Part to, including the enabling parts of s5. It is telling that the s42A report places no weight on these enabling policies;

20.3 None focus or are reliant on the term "landholding".

21 It is established law that plan provisions are to be interpreted in accordance with the Interpretation Act 1999[2]. That dictates that their text in the light of their purpose is the starting point. A rule's purpose is to be found in its wording, the policy hierarchy to which it is to give effect and ultimately the Purposes of the Act. While context and arrangement are matters that can be considered, there is no authority for the proposition that policies and objectives are to be interpreted in the light of, or can have their purpose derived from, the rules which must give them effect. That would allow the tail to wag the dog.

22 Fundamentally, that is what has occurred in the s42A report. It has allowed the provisions of Rule 20(d) to drive its interpretation of the planning provisions and substitute that rule's very specific and narrow baseline test for "the effects of allowing the activity". For these reasons it is flawed at its very basis to a degree that its conclusions and recommendations are fundamentally flawed and cannot be relied on. Notwithstanding this error of law, the applicants' expert evidence is that the proposal is highly likely to result in reduced contaminant losses to water when compared to the existing environment, or the historical "baseline".

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[2] Brownlee v Christchurch CC [2001] 12 NZRMA 539 (EnvC)
Interpretation Act Section 5(1) "*The meaning of an enactment must be ascertained from its text and in the light of its purpose.*"

Correct Basis

23 This Panel does not need reminding that its fundamental task in determining these applications is governed by sections 104 and 104B, and the other specific provisions following, which apply to specific considerations and provide specific powers (such as s108 concerning conditions). No subordinate legislation can fetter the discretions given to the Panel by the statute. Those provisions do not need to be set out in full. Their key features are:

23.1 The s104 consideration is "subject to Part 2". While *King Salmon* is authority for the proposition that higher level planning documents can be seen as an expression of what is required to give effect to Part 2, it is certainly not authority for the proposition that an inapplicable rule that is subject to appeal can supplant the words "subject to Part 2". On the contrary, it supports the Applicants' submission, which is that in this application Part 2 must be given some weight, in view of the status of the proposed rule at the heart of the s42A report's approach;

23.2 The considerations in 104(1)(a)-(c) sit side by side. The consideration of (a) is not "subject to" or restrained by the matters in (b). The correct approach is to determine the effects of allowing the activity and then weigh those against the relevant policy considerations and framework derived from (b) to understand whether the effects will give effect to Part 2 as expressed through those policies;

23.3 There is an unfettered discretion given by s104(2) to disregard effects permitted by the plan, when undertaking the assessment in 104(1). This cannot be fettered by any plan provision; if a plan permits an effect, then nothing in that Plan can prevent the decision maker from exercising the discretion in s104(2).

24 These are all features not properly acknowledged or applied by the s42A report. There are a number of questions that have to be addressed when properly applying these statutory tests, which the s42A report has failed to address correctly.

What is the Activity?

25 It is obvious that one cannot undertake the assessment in s104(1)(a) without knowing what "the activity" is. **Attached** to these submissions is a letter sent to the s42A officer on 22 August, which addresses that key issue at paragraph 3. It is clear that on the basis of the case law and the scheme and arrangement of the provisions relevant to the lodging and processing the application, including s88-120 and the 4th Schedule, that it consists of:

25.1 A proposal, i.e. something that does not yet exist in reality, but is an abstract set of activities described in the application documentation as modified by responses to further information requests and other written amendments of the proposal (which can reduce, but not extend the scope of the application);

25.2 By a "person" to do one or more "activities", being conduct that that person will not be able to undertake without contravening one or more of sections 9, 11, 12, 13, 14 or 15 (the "Prohibition Sections"), unless that conduct is authorised by a resource consent. These Prohibition Sections are pivotal, because they trigger the need for resource consent and are the means of ensuring that there is compliance with the conditions of the consents through prosecutions[3]. They all start with the words "no person may", which makes it entirely clear that the consent is required before the person commences the relevant activity[4].

26 At the heart of this, in particular *Gillies Waiheke Ltd v Auckland CC* is that a person cannot obtain consent for more than what it has sought in its "application" (with all that that entails). That for which the applicant has actually applied in writing is the determining factor. The consent authority simply has no jurisdiction to consider, much less grant consent for, a specific aspect or activity for which the applicant as not <u>applied</u>. Nor can the applicant subsequently undertake conduct that extends beyond that for which it applied.

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[3] *Gillies Waiheke Ltd v Auckland CC* [2004] NZRMA 385 (CA)
[4] There might be an argument that the situation is somewhat different for so-called "retrospective" applications, of which the current applications are not examples.

27 If the applicant is undertaking an activity that contravenes one of the Prohibition Sections in the absence of a resource consent, but has not sought resource consent to do that, it has to:

 27.1 Cease that activity or amend it so that it is authorised by an existing rule, national environmental standard or resource consent, or

 27.2 Lodge an application to authorise that activity.

28 The mere fact that an applicant may have done something in the past that might have required a resource consent does not mean that that applicant can now be assumed to be including that activity in its proposal. That proposal is limited to the application documentation as submitted by the applicant.

29 The s42A report has assessed effects of conduct or activities for which the applicants have not applied. For example, it has included the use of land for a farming activity on for example the land known as Woldwide 3. This is in part based on an error of law in the interpretation of Rule 20, which will be addressed separately below. It has also listed activities that it alleges that "the applicants" undertake, which are allegedly unlawful and will require consent. Examples include the use of land for a bore.

30 This information is irrelevant and is beyond the scope of the Panel to assess, because it does not form part of "the proposal", as neither applicant has applied for resource consent to do the particular activities that report alleges would trigger the need for consent. There are many explanations for that. For example, with the bore land use, that is something that is capable of being modified so that it complies with a permitted activity rule, thereby not requiring a resource consent. That is exactly what the applicants have already done for the bore.

31 What is more, s91 specifically contemplates a scenario where an applicant does identify that part of its proposal includes an activity that would contravene one of the Prohibition Sections without resource consent, but has not sought consent for that particular activity. In that situation the applicant can only be required to lodge the additional application if that would be required in order to better understand the "…nature of the proposal". If that had been the case here, it would be expected that the consent authority

would have issued a s91 requirement for that extra consent to be lodged. It did not.

32 For the avoidance of doubt, there are no activities that form part of the proposal, which will require an additional consent that must be sought in order to better understand the nature of the proposal.

33 The other fundamental issue that also arises, from paragraph 25.2 is the issue of the assessment of the "land use" activities on land other than the land on which the applicants propose to undertake the farming activities that would contravene rule 20 without a resource consent (the dairy platforms themselves). That arises partly from the incorrect interpretation of the term "landholding" and partly from procedural irregularities, which will each be addressed in specific detail separately elsewhere below.

34 What will be demonstrated by the evidence of Mrs (and Mr) De Wolde is that:

34.1 The "persons" who undertake land uses on the land other than the dairy platforms of WW1 and WW2 are not Woldwide One Ltd or Woldwide Two Ltd, but other "persons", namely Woldwide Farm Ltd and Woldwide Runoff Ltd. Those other persons all undertake land uses that do not contravene s9(2), because they do not contravene Rule 20. That includes activities such a cut and carry operations and providing wintering services to other persons, including WW1 and WW2. Contrary to the s42A report, neither of these other persons have lodged an application for land use consent;

34.2 The Applicants do not propose to undertake any land use that would contravene Rule 20 without a land use consent, on land other than their own dairy platforms;

34.3 The only reason land owned by one of these other persons (Woldwide Runoff Ltd) was included in the land use applications was because the processing officer, relying on what will be demonstrated to be an incorrect interpretation of Rule 20, stated that processing could not continue unless those blocks were included in the land use[5]. It was included by WW1&2, not by any other "person". None

[5] The questionable exercise of the s88(3) power involved is examined separately under Procedural Irregularities" below.

of these other persons have lodged any of the applications before this particular hearing.

35 A few fundamental legal principles are relevant in view of this:

35.1 No Regional Council has jurisdiction to require or grant a land use consent for a land use that the applicant does not propose to undertake and which will not contravene s9(2);

35.2 To the extent that the Panel would agree that aspects for which land use consent was sought fall into that category, there is nothing to prevent the Applicants from removing those aspects from their land use consent applications, as that would only be a reduction of the scope of the applications.

36 As will become clear in the examination of the interpretation of the term “landholding”, this does not amount to a submission that the effects of those other land uses are irrelevant. To the extent that Woldwide Farm Ltd and Woldwide Runoff Ltd can be demonstrated to be causing consequential effects that would not occur but for the proposal currently before the Panel, those effects are still relevant and have been fully addressed by the Applicants’ evidence.

Interpretation of Landholding

37 Since this issue is part of understanding correctly “the activity” before the Panel, it is dealt with at this juncture. A letter was sent to the processing officer on 22 August 2019. The Panel received a copy. For completeness it is **enclosed** with these submissions. It is adopted as part of these submissions and its contents are not repeated below. A few additional observations are however made.

38 While the s42A report has attempted to respond to that letter, the response is, with respect, contrary to the settled principles of plan interpretation. Conspicuous by its absence is the listing of policies using that term in a way that supports the interpretation in the report. That is with good reason. The term “landholding” does not feature at all in the key policies and objectives to which Rule 20 gives effect. This is the case for the plan itself, as well as the regional and national policy statements.

39 What the report does contain is an acceptance at Paragraph 4.5.9 that Woldwide Runoff complies with the permitted activity rules for stock drinking water. As will be clear from examining Rule 54 PSWLP, that would not be possible unless that property is a separate "landholding". Paragraph 4.5.9 of the report therefore relies on an interpretation of "landholding" for the take and use of water, which contradicts its interpretation for the purposes of Rule 20, but is consistent with that of the Applicants.

40 As indicated by the letter, the term "landholding" is used in many rules and provisions. The plan contains only one definition, which, being in the definitions section, is intended to apply to the entire plan, to ensure the term has one consistent meaning throughout the plan. There cannot be any suggestion that it can have contradictory meanings in different situations.

41 There can only be one correct meaning. It is submitted that the correct interpretation is that applied for the purposes of Rule 54, which reinforces the points made in the 22 August 2019 letter.

42 If the purposes for which both the definition and Rule 20 were implemented, as reflected in the policy hierarchy and Part 2, to which they must give effect, required the approach that the s42A officer has taken, there would have been a separate definition for the purposes of Rule 20. That definition would have been worded very differently, perhaps more along the lines of the Canterbury Land and Water Regional Plan's "farming enterprise". The words in the "landholding" definition that require effectively a single geographical operating unit would have been absent.

43 The key points are:

43.1 There is no ambiguity in the wording of the definition that requires recourse to other indications of meaning to provide clarity;

43.2 The plain and ordinary meaning of the definition results in no absurdities or outcomes contrary to the purposes for which it was inserted;

43.3 The meaning adopted by the s42A report is not only contrary to the plain meaning of the definition, but it also results in absurd and unworkable results. It is fundamentally wrong and must be rejected in favour of the interpretation set out in the 22 August 2019 letter.

44 Another matter not addressed in any detail is the role of the particular Prohibiting Provision that has to trigger the need for a land use consent in the first place, before an application can be made or granted, namely s9(2). It specifies that:

> *"No person may use land in a manner that contravenes a regional rule unless the use—*
> *(a) is expressly allowed by a resource consent; or*
> *(b) is an activity allowed by section 20A".*

45 Both applicants each meet the definition of "person", each being "a corporation sole". Although the definition also provides for "a body of persons" to be regarded as a "person", the Court of Appeal in *Cometa United Corp v Canterbury RC* [2007] NZRMA 266 (HC) requires a significant level of proof of the "body of persons" being a single person. The evidence of Mrs De Wolde will demonstrate that the applicants are persons in their own right and that there is not the type of constitution and set of rules that *Cometa* requires in order to demonstrate that there is another "person", of which these two persons make a part.

46 Importantly, there are only two persons who have lodged applications. They are Woldwide One Ltd and Woldwide Two Ltd. The best evidence the Panel has before it is the applications and evidence submitted by those persons. It excludes the possibility of any other "person" having sought consent, unless the applicants had been misleading. It is submitted that the Panel would require very strong evidence to show this was the case. This is particularly so because of the fact that any consents gained as a result of misleading information would be of very little value, given the effects of *Gillies* and s128(1)(c).

47 Most importantly, there is no evidence to demonstrate that either of these applicants seeks to undertake a land use outside of their own dairy platforms that would contravene Rule 20 in the absence of a resource consent. It is an offence under s338(1)(a) to contravene s9(2). The evidence required to establish that either Woldwide One Ltd or Woldwide Two Ltd is itself intending to undertake land uses that would contravene Rule 20 and thus s9(2) on any of the other land referred to as part of the same "landholding" by the s42A report is simply not there.

48 The evidence of Mrs De Wolde specifically demonstrates that other persons (be that Woldwide Farm Ltd, Woldwide Runoff Ltd or Woldwide Three Ltd) are the persons using those other pieces of land and intending to do so. They do so for land uses that either do not contravene Rule 20 or are expressly allowed by a land use consent.

49 The fact that they have applied for discharge permits to authorise the discharge of effluent on land outside their dairy platforms cannot, as a matter of law, establish that they are undertaking a land use on that land that contravenes Rule 20. A discharge is an entirely different "activity", which is controlled separately by various rules in the RWP and PSWLP. It is not a "land use" and even if it were, it does not appear anywhere in Rule 20. Because Section 9(2) has a permissive default (the land use is lawful unless it contravenes a rule), it would therefore not contravene s9(2).

50 In any event, the evidence of Mrs De Wolde confirms that it is the owner of the Horner Block (Woldwide Farm Ltd), that will discharge the agricultural effluent (slurry) to land instead of buying in an equivalent amount of artificial fertiliser. Under s3A it is perfectly entitled to do so with the implicit or explicit permission of the holders of those discharge permits. Because Woldwide Farm Ltd is both the owner and occupier of the Horner Block, once granted, the applicants can transfer those parts of their discharge permits that apply to the Horner Block Woldwide Farm Ltd as of right and by operation of law, under s137.

51 In contrast, if Woldwide One or Two Ltd wished to transfer their water permits to Woldwide Farm Ltd, Woldwide Runoff Ltd or Woldwide Three Ltd, they could not do so as of right under 136, which has the same approach as s137. This is because the applicants and not those other entities, are the owners and occupiers of the land of the dairy platforms.

52 The approach the s42A report has taken to the interpretation of the term "landholding" and its application to Rule 20 and the evidence is contrary to:

52.1 The principles of sound statutory interpretation[6]; and

52.2 The facts properly before the Panel.

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[6] See *Brownlee v Christchurch CC* [2001] 12 NZRMA 539 (EnvC)

53 It is a key plank on which the recommendation to refuse consent is founded, which cannot stand. That has significant consequences for that recommendation.

What are the effects of allowing the activity?

54 This issue has been properly and authoritatively addressed by the Court of Appeal's decision in *Queenstown Lakes DC v Hawthorn Estate Ltd* [2006] NZRMA 424, with which the Panel will be intimately familiar. It is submitted that its approach can best be summarised as follows:

> A comparison of the effects that will or are likely to occur if the consents for which approvals are sought are granted with the effects of what will or is likely to occur if those consents are not granted, when taking into account the authorisations in place and more likely than not to be relied on.

55 The PSWLP cannot amend the statute or "overturn" this binding authority on how "the effects on the environment of allowing the activity" must be interpreted. It would certainly be wrong as a matter of law to substitute that approach with the assessment required in order for a land use caught by Rule 20 to be processed as a restricted discretionary activity under Rule 20(d). That is particularly the case for the fully discretionary land uses for which consents are sought under Rules 20(e) and 35A, and the discharge permits and water permits sought.

56 What the evidence for the Applicants has therefore does is to compare the effects that would result from granting the applications with those that would result if it were not granted. That is the correct way of assessing the "effects on the environment of allowing the activity". The applicants' evidence then assesses those effects against the provisions listed in s104(b).

57 For completeness, the Applicants' evidence has also assessed the nutrient losses using a methodology that approximates the approach of Rule 20(d) as closely as possible, given that only four years of data, rather than five, was available. Under that approach it is also demonstrated that there is an environmental gain.

58 When the overall assessment is made, there is a real improvement in the overall effects on the environment if the consents are granted, over what will occur if they are not. As will be demonstrated subject to the clarifications on

policy interpretations below, that gain will be consistent with the broad policy direction against which these effects are to be assessed under s104(1)(b) and also with Part 2.

Section 108

59 As *Gillies* has established, the consent conditions are an essential means of limiting the extent of the application and the effects authorised. As a matter of law, it is essential that the consent authority:

59.1 Forms its view of the effects of allowing the activity, on the effects as they will be where there is full compliance with all consent conditions proffered;

59.2 Also turns its mind to whether effects that could potentially render the proposal contrary to the applicable statutory tests, can be mitigated by the imposition of further conditions. Of course, the consent authority is not limited to the conditions proffered by the Applicants.

60 It is therefore regrettable that the s42A report has provided no suite of conditions that it considers could be imposed to improve the manner in which the adverse effects of the various activities for which consents have been sought. It is considered that this is an important oversight, as it fails to assist the Panel with assessing how the powers provided by s108 could be exercised to ensure that the adverse effects of the proposed activities are properly avoided, remedied or mitigated. Without this critical assessment, the assessment of "the effects on the environment of allowing the activities" is incomplete.

61 In addition to the self-monitoring condition that will be proffered, the Applicants will provide a set of draft conditions, which their evidence will show will ensure the appropriate avoidance, remediation or mitigation of the adverse effects on the environment of the activities for which consent is sought. Draft conditions from the reporting officer have yet to be received and the applicants are willing to contribute to developing appropriate suites of conditions.

Are these effects consistent with the applicable policy framework and Part 2?

62 If there were a policy framework with at its heart a clear policy direction to "avoid any increases in cow numbers or land used for milking dairy cows", then the approach of the s42A report would be more understandable. The

key is that there is no such policy direction. Certainly there is no policy that can be compared with the NZCPS bottom line for natural character that underpinned the Supreme Court's approach in *King Salmon*.

63 On the contrary, the plan deals with land uses, discharges and water takes by means of their own policies, under which:

63.1 Consents to do activities that would contravene s15 are subject to various policies including Policy 15B, which has no absolute bottom line, but seeks to improve water quality where the Appendix E Water Quality Standards are not met;

63.2 Consents to take and use water are dealt with under Policy 20 onwards. None of these policies provide the type of bottom line approach that seems to be implied by the s42A officer.

63.3 The specific land uses caught by Rule 20 are caught by clause 3 of the applicable physiographic zone policies and by Policy 16, which identify the land uses of dairy farming with cows and intensive winter grazing.

63.4 The applicable physiographic zone policies essentially aim to *"avoid, remedy, or mitigate adverse effects on water quality from contaminants, by decision makers generally not granting resource consents for additional dairy farming of cows or additional intensive winter grazing where contaminant losses will increase as a result of the proposed activity."*

63.5 Policy 16 (b) has similar wording, but:

63.5.1 Uses the term "*to intensify*" rather than increase cow numbers or Intensive Winter Grazing, but it seems from the context and other policies, that increasing area or cow numbers for these two particular land uses is what is intended by "intensify";

63.5.2 Has three alternative situations in which such land use consents are general not to be granted, any one of which will trigger the "generally not be granted" requirement.

64 In relation to the last points in particular, it should be noted that:

64.1 The policies do contemplate certain situations arising where decision makers grant land use consents for increased cow numbers or farm areas where contaminant losses will increase (in the case of the physiographic zone policies) or any one of the three triggers in Policy 16(b)(i)-(iii) are triggered. If that were not the case the word "generally" would be rendered meaningless. An interpretation that gives meaning to all the words is to be preferred.

64.2 The physiographic zone policies' requirement of such applications generally not being granted is only triggered where it is demonstrated that contaminant losses "*will increase"* as a result of the proposed land use. This will be revisited below when addressing the burden of proof, but it is significant in that it does not state "*where it cannot be established that there will be no increase in contaminant loss…"* .

65 In addition, as has been indicated above, the interpretative approach should not allow the tail to wag the dog by having Rule 20(d), which is after all only one of the methods by which these policies are given effect[7], to drive the interpretation of these policies.

66 This being a consideration of fully discretionary activities, the stricter test of s104D of not being contrary to the policies does not apply. Instead, the proper approach is whether, as a whole the proposal is consistent with the policy direction of the applicable objectives and policies[8].

67 The policy framework that applies, reflecting the "enabling" part of Section 5 of the Act, refers to *"enabling people and communities to provide for their social, economic and cultural wellbeing".* See for example Objectives 2 and 13 and Policies 13.1 and 20.1A of the PSWLP, Policy WQAL7, WQUAN7, RURAL.1 of the SRPS Statement, and Objective A4, Policy A7, Objective B5 and Policy B8 of the National Policy Statement of Freshwater Management 2014.

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[7] *Beach Road Preservation Society Inc v Whangarei District Council* (2000) 7 ELRNZ 1 (HC), at [34]; citing J Rattray & Son Ltd v Christchurch City Council (1984) 10 NZTPA 59 at [61].
[8] *Day v Manawatu-Wanganui Regional Council* [2012] NZENVC 182; BC201266433 at [3-115].

68 It is remarkable that the s42A report fails to assess or give any weight to these policies, while such a key part of the proposal is enabling precisely these types of positive outcomes. That is a serious failure to consider relevant matters and importantly, a key part of the policy matrix that applies and determines whether the proposal is consistent with the applicable policies and objectives, overall. When these policies are properly taken into account, they significantly alter how one views the manner in which this proposal is consistent with the overall policy framework.

69 Importantly, they also provide part of the guidance as to when the exception implied by the word "generally" in the land use policy wording is to be applied. It is not submitted that this exception needs to be relied on, because in this case, the evidence will show that it has not been established that there will be an increase in nutrient loss. On the contrary, the evidence will show that it is more likely than not that there will be a decrease.

70 Another matter that may have skewed the assessment is Policy 39 of the Proposed Water and Land Regional Plan. It purports to exclude the application of the permitted baseline. The Panel has a discretion whether or not to apply the permitted baseline. It is imposed by s104(2). No subordinate legislation can amend its enabling statute. Policy 39 cannot, as a matter of law, remove or constrict the discretion provided by s104(2). It is *ultra vires* and must be disregarded.

71 In the event, it causes no real issues, because the consideration of the receiving environment, including the reasonably foreseeable future environment, relating to consents and permitted activities that are likely to be relied on, is mandatory. That establishes what the "baseline" is against which the proposal is to be assessed.

72 Nevertheless, the permitted baseline is relevant in that it was inserted into the Statute as codification of case law that recognised that permitted activities are expressions of what the planning framework considers acceptable effects. To that extent, it is a relevant consideration that the effects that the proposal will cause elsewhere, which are permitted by the rules of the plan, do provide an indication that the plan regards those effects as consistent with the policies and statutory aims to which those rules much give effect.

73 A final matter to observe concerning the policy framework, is that there is not one policy or objective requiring the application of the precautionary principle

when it comes to the management of land use effects or discharge effects. The policy framework does not require uncertainty to be eliminated in the way suggested by the s42A report. That approach is simply absent from the policies addressed by the report and the planning witnesses.

74 When all these matters are considered together, then it becomes clear that the finding of the s42A report that the proposal is inconsistent with the applicable objectives and policies, is critically flawed and unsustainable, as it is based on a fundamental misapplication of the policy framework. The Applicants' evidence will show that granting the proposal is consistent with that framework.

Is this Consistent with Part 2?

75 Although the s42A report accepts that it is appropriate to consider Part 2, it fails to recognise and give appropriate weight to the enabling aspects of the proposal, as required by a proper application of Section 5. Furthermore, it fails to recognise the very significant efficiency improvements that will be achieved by the proposal, which is a matter to which particular regard must be had under s7(b).

76 As a result, the findings of inconsistency with Part 2 cannot be sustained either. Rather, the evidence of the Applicants will show that granting the applications is more consistent with Part 2 than refusing them.

Evidentiary Standard and Burden

77 It is established law that it is for the applicant to discharge the evidentiary burden to establish those matters in s104 and related section in order to demonstrate that the statutory basis for granting consent has been established. The standard of evidence that applies is on balance of probabilities. It is simply "more likely than not".

78 There is no presumption against granting that the applicant has to negate. Importantly, it is not incumbent upon the applicant to remove all or even reasonable doubt. The only exception applies where either a policy prescribes the precautionary principle, or where s3(f) applies, where there is a potential effect of low probability but high potential impact.

79 The s42A report does not rely on this section. Indeed it cannot, because for it to apply, it has to provide evidence of a real risk of high or irreversible

impact[9]. That has not been provided. Importantly, the Applicant's evidence will show that any issues about drinking water supply cannot be linked evidentially to the proposed activities, much less be demonstrated to constitute a real risk that exists as a result of the proposed activities rather than the existing environment.

80 Given the s42A report's heavy reliance on uncertainty for the recommendation to refuse, this is a significant issue. Indeed, it appears to underpin the rejection of the Applicants' modelling, which rejection will not only be demonstrated to be incorrect in terms of the assertions as to uncertainties, but also the consequences that can be properly attached to the uncertainties. The modelling information provided will not only show that it is more likely than not that the applications will not lead to an increase in contaminant loss, but will show that it is more likely than not that they will lead to a reduction in contaminant loss. Importantly, they will result in an improvement in the overall mitigation of adverse effects on the environment.

81 As a matter of law, it is therefore incorrect to rely on uncertainty in the way done by the s42A to underpin a refusal of the consents sought.

Amendments to the Applications

82 Much is made in the s42A report and was made previously by the processing officer about amendments to the applications. This is addressed by the **attached** letter to the processing officer of 3 September 2019, a copy of which the Panel will already have.

83 There seems to be an underlying suggestion that applicants ought not to amend their applications after having initially lodged them. Such a suggestion would be directly contrary to the very large body of decisions on which particular changes are permissible at which stages of processing. It is clear that an amendment that does not go beyond the scope of the original application and, after notification, the scope of the notice, but remains within it (including a reduction of the application) can be made at any time, right up to the Applicants' right of reply.

84 Any suggestion that the applicants have acted improperly or have done anything untoward by way of their amendments is firmly rejected. On the contrary, they have endeavoured to keep the processing officers appraised of

[9] *Shirley Primary School v Christchurch CC* [1999] NZRMA 66 (EnvC)

amendments that, by rights, they would have been entitled to make by way of their evidence.

85 They have done nothing on which the Panel can place any weight in support of any negative considerations against the Applicants.

FURTHER LEGAL ISSUES

Procedural Irregularities

Misuse of Section 88(3)

86 A key factor that has been alluded to above is the threat to reject the applications under s88(3) if land use consent applications were not included for the Woldwide Runoff block, which the s42A officer considered was part of the "landholding", but which the Applicants firmly consider are not. A copy of the email sent to Ms Legg setting out this threat is **enclosed** with these submissions.

87 From that email it will be immediately evident that the email did not identify matters that would have rendered the applications so deficient that they would not have met the requirements of s88, the Fourth Schedule and the applicable regulations to a degree that they could be rejected as incomplete. Obviously at the heart of this threat was the erroneous interpretation of the term "landholding", which has been addressed above.

88 Aside from that, this was not a matter that gave the Council the power to reject the applications as incomplete. Perhaps there might have been an ability to issue a s91 requirement for a further application, but that would only have been available had the officer's interpretation of "landholding" been correct. As has been demonstrated above, it was very much incorrect.

89 One might view this as an abuse of the power in s88(3), were it not for the fact that it does seem that this was not a conscious misuse, but rather a failure to understand the appropriate means of using that power. That does seem to be rooted in a relative lack of experience, rather than any conscious decision to use the power for something other than that for which it was intended.

90 Nevertheless, it was an incorrect exercise of that power, which ought never to have occurred. It effectively forced the applicants to apply for activities that

did not require consent and that therefore not only do not require consent, but are therefore beyond the powers of this Panel to authorise. It is submitted that it would be appropriate for this Panel to provide a ruling on the interpretation of the "landholding" issue prior to the provision of the Applicants' right of reply, so that they can withdraw those parts of their applications that ought never to have been made.

Further "Evidence" Commissioned by s42A Officer

91 At paragraphs 2.3.10 and 5.1.4, the s42A officer states that she commissioned further evidence to assess the applications' effects on the environment. That brings into question the admissibility and status of those further reports. The Applicants were made aware of the intention to commission such further reports, but at that stage had no legal representation and importantly, had no reason to suspect that the commissioning would occur other than in accordance with s42A.

92 Section 42A(1) and (1AA) make it clear that the power to commission a report lies with the local authority.The local Authority have the power tocommission either an officer, a consultant, or another person to prepare that report. Neither sections 42A(1) or (1AA) give the person who has been commissioned to prepare the report, the power to commission the report out to another.

93 From the manner in which the matter is addressed in the report, it is evident that the officer was doing it in her capacity as the s42A officer. There is no indication at all that she had the delegation required to do so on behalf of the local authority. As such, as a matter of law, it appears those further reports cannot be valid s42A reports, nor do their authors have the status of s42A officers. It is accepted that there is a possibility that the s42A officer meant to say that reports were commissioned and she did not appreciate the legal distinction, and the need for a person with delegated authority, such as the Consents Manager, to commission such reports.

94 It should be noted that s92(2) provides for the commissioning of extra reports of the type that have apparently been 'commissioned' by the s42A officer. However, that can only occur if the Applicant consents. There was never such consent. The authors of these additional reports are not submitters and therefore their reports seem to be inadmissible and they themselves would not have the right to appear.

95 In any event, the evidence of the Applicants will demonstrate that the matters raised in these additional reports do not provide any basis on which to refuse the consents.

Duration

96 The applicants have sought a duration of 15 years (rather than the unlimited standard for land use consents or 35 year maximum for discharge and water permits), but the s42A report cites alleged non-compliances and the impending imposition of nutrient limits receiving waterways through the "Freshwater Management Units" signalled, to support a duration of just five years. It is understood that Environment Southland is currently consulting with the community for a 'limit setting' plan change scheduled to be notified in 2021 and "implemented" by 2025.

97 The Applicants consider that this recommendation is not only founded on significantly flawed assumptions as to the effects of the activities and their consistency with the applicable policy framework, but also fails to weigh properly all relevant considerations for duration.

New Impending Standards

98 Under Section 128 a review of the consent conditions can be undertaken to:

98.1 Require a holder of a discharge permit to do something that would otherwise contravene section 15, to adopt the best practicable option to remove or reduce any adverse effect on the environment (s128(1)(a)(ii));

98.2 In the case of a discharge permit, when a regional plan has been made operative which sets rules relating to minimum standards of water quality, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met (s128(1)(c));

99 Both address specifically the situation that concerns the s42A report.

Past Non-Compliances

100 The 20 August letter has cited authority that makes it clear that the consent process cannot be used in a punitive way or as a means of an enforcement response. In addition, as will be evident from the Applicants' evidence, to the

extent that there were any non-compliances, these were minor and temporary. Importantly, the Applicants have proffered self-monitoring conditions that will ensure reporting that will avoid such a further risk. That totally addresses any such concerns.

Other Relevant Factors

101 It should be noted that the default duration for consents under s123 is as follows:

101.1 Indefinite for the s9(2) land use consents (including farming activities);

101.2 35 years for the discharge and water permits.

102 The Applicants have sought only 15 years for all, which is less than half the maximum duration for the discharge and water permits.

103 Policy 16.3(b) lists 5 years as the absolute minimum for which land use consents can be granted, not the maximum or the norm.

104 Policy 40.3 and 40.4 require significant weight to be placed on the duration sought and reasons, as well as the capital investments and their permanence. This latter matter is recognised by case law to be an important consideration as well[10]. It will be clear from the Applicants' evidence that the applications involve considerable investments of permanent costly upgrades in infrastructure that render their disestablishment after only five years economically unviable. A duration of only five years would effectively frustrate the purpose of the consent, which is to allow the significant upgrades needed to ensure more sustainable dairy farming by these applicants.

105 For completeness, the considerations arising from Policy 40.1, 6 and 7 are addressed in paragraphs 98-100 above. As for Policy 40.5, all consents sought by these applicants are sought to be subject to a common expiry date.

106 To the extent that there is a basis for a shorter grant, this has already been more than met by the Applicant seeking a confined duration for the otherwise

[10] *Bright Wood NZ Ltd v Southland RC* EnvC C143/99 and *PVL Proteins Ltd v Auckland RC* A061/01

perpetual land use consents and durations of less than half the 35 year maximum for the discharge and water permits.

Evidentiary Weight Opinion Evidence

107 A final issue is the relative weight to be accorded to the opinion evidence provided by expert witnesses. The Panel will be aware that the admissibility of opinion evidence is dependent on the person providing it having appropriate expertise in the area to be able to assist the Panel with their opinion.

108 The Environment Court Expert Witness Practice Note is an example of requirements to be met to ensure that expert opinion evidence is properly provided.

109 The Panel is respectfully requested to accord weight to the opinions provided to it in proportion to the providers of those opinions':

109.1 Compliance with the requirements of the Expert Witness Practice Note;

109.2 Demonstrated impartiality and balance in acknowledging both helpful and unhelpful facts;

109.3 Degree of expertise and experience in the matters upon which the opinions rest.

CONCLUSION

110 From the above and the evidence that will be presented for the Applicants, it will become evident that the refusal and duration recommendations of the s42A report are founded on:

110.1 Significant errors of law when it comes to assessing "the effects on the environment of allowing the proposal";

110.2 Incorrect interpretation and application of the applicable rules, policies and objectives;

110.3 Reliance on irrelevant matters;

110.4 Material Failures to recognise and give weight to important relevant matters;

110.5 Incorrect factual assumptions;

110.6 A failure to apply the appropriate standard of proof; and

110.7 Other matters that will be addressed fully by the Applicants' evidence.

111 Each one of these factors materially influences the conclusions reached by the s42A officers on which the refusal and duration recommendations are based. Their collective effect will be demonstrated to be such that:

111.1 Those recommendations cannot be given any significant weight;

111.2 The conclusions as to the key statutory discretions and their exercise that will be reached by the Applicants' evidence and submissions are to be preferred, as they are not subject to these errors and are based on sound, independent expert evidence.

112 The evidence will demonstrate that granting the applications sought for the full term sought, subject to the mitigation measures addressed by the conditions proffered and anticipated, is more consistent with the applicable policy framework and Part 2, than rejecting them.

Dated 23 September 2019

J M van der Wal
Solicitor for the Applicants