BEFORE THE INDEPENDENT COMMISSIONERS APPOINTED BY WAIKATO REGIONAL COUNCIL

In the matter of	the Resource Management Act 1991
And	submissions and further submissions on Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments ("PPC 1")
Submitter's Name:	Theland Farm Group Limited ("Theland") Southern Pastures Limited Partnership ("Southern Pastures") Ata Rangi 2015 Limited Partnership ("Ata Rangi")
Submission Number:	Theland submitter number: 82022 Southern Pastures submitter number: 74062 Ata Rangi submitter number: 74045
Hearing Topic	**BLOCK 2** **C1: Diffuse discharge management** **C2: Cultivation, slope and setbacks** **C3: Certified Schemes** **C4: Stock exclusion** **C5: Treaty settlement and Maori ancestral land** **C6: Urban/point source discharges**

LEGAL SUBMISSIONS
ON BEHALF OF ATA RANGI 2015 LIMITED PARTNERSHP, THELAND TAHI FARM GROUP LIMITED AND SOUTHERN PASTURES LIMITED PARTNERSHIP – BLOCK 2
Dated 4th July 2019 (for appearance on 8th July 2019)

TOMPKINS | WAKE

Westpac House
430 Victoria Street
PO Box 258
DX GP 20031
Hamilton 3240
New Zealand
Ph: (07) 839 4771
Fax: (07) 839 4913
tompkinswake.co.nz

Solicitor: Marianne Mackintosh
Marianne.Mackintosh@tompkinswake.co.nz

MAY IT PLEASE THE HEARING PANEL

1. These submissions are made on behalf of Ata Rangi 2015 Limited Partnership ("Ata Rangi"), Theland Tahi Group Limited ("Theland"), and Southern Pastures Limited Partnership ("Southern Pastures"), together referred to as ("the Submitters"). Ata Rangi and Southern Pastures made submissions on PPC 1 as originally notified. Theland made a submission on Variation 1 to PPC 1. Ata Rangi and Theland made further submissions on both PPC 1 and V1. Together the Submitters seek the same fundamental outcomes from the hearing process – that farming activities, including any land which has been the subject of "land use change" from forestry to pasture since 22 October 2016[1], have a clear consenting pathway and a compliance framework that is appropriate and capable of being implemented – all within the context of the objective of improving water quality within sub-catchments and, it follows, at the broader "all of catchment" scale.

2. In accordance with the format of the hearing schedule, these submissions only address those aspects of the Submitters' submissions (and further submissions) relating to the Block 2 topics. As signalled during the Block 1 hearings, Theland and Southern Pastures have reserved their positions regarding all matters. While Ata Rangi was not formally represented in the Block 1 hearings, it remains actively interested in PPC 1 and the hearing process and similarly reserves its position. The Submitters have advised that they wish to be heard jointly in the Block 3 hearings.

PURPOSE OF EVIDENCE AND LEGAL SUBMISSIONS ON BLOCK 2

3. For the purposes of Block 2 of the PPC 1 hearings, on behalf of the Submitters', Mr Mark Chrisp (planning) and Dr Debbie Care (environmental science) have prepared and lodged statements of evidence in chief. The purpose of Dr Care's evidence is primarily to

---

[1] Regardless of whether the land or property in question is subject to a valid certificate of compliance for land use change (conversion) from forestry to pasture.

highlight matters relating to farm environment planning and nutrient management "on farm" which were addressed in the section 42A report, albeit that those matters, and sub-catchment approaches are the focus of Block 3. In addition, Dr Care's evidence addresses (in summary) the issue of land use change and considers that restricting land use change in the manner proposed through the amendments to the rules does not make sense from a farm management and nutrient management perspective.

4. Mr Chrisp's evidence opposes the proposed changes to Rule 3.11.5.7 (land use change rule) as set out in the section 42A report. He supports the need for the rules in PPC 1 to provide a consenting pathway for land use change and farming activities where that has already occurred, or where it may yet occur, in circumstances where the effects of that change can be mitigated or remedied.

5. The Submitters' submissions and further submissions cover a range of matters which are the subject of Block 2. However, due to resourcing constraints, for the purposes of the hearings on Block 2 the evidence and legal submissions focus on the most critical issues for the Submitters – land use change and Farm Environment Plans/nutrient management "on farm".

6. Against this background, the purpose of these submissions is to address the specific issues arising in response to the section 42A report's proposed amendments to Rule 3.11.5.7, and to briefly introduce the evidence being presented on behalf of the Submitters.

7. With respect to the broader matters covered in Block 2, the Submitters support the position of Wairakei Pastoral Limited ("WPL"), including its evidence on Block 1 and Block 2. In that regard, counsel considers the relief being pursued by WPL to be within the scope of the Submitters' submissions and further submissions. To the extent that there may be some inconsistency in the detailed points of submissions and relief

sought, that inconsistency may be addressed at a later stage through withdrawal of relief sought (if that is considered necessary or appropriate).

Re-cap of Block 1 background

8. By way of background, the position of each submitter in relation to Block 1 and PPC 1 is summarised as follows:

   (a) Both Ata Rangi and Southern Pastures have an interest in PPC 1 in its entirety and support the underlying principles of PPC 1 which seek to give effect to the Vision & Strategy for the Waikato and Waipa Rivers ("Vision & Strategy"). However, each seek amendments to the provisions of PPC 1 which will provide better certainty of meaning as well as providing for opportunities for flexibility in land use management.[2] That includes the ability for land use change to occur and be consented where the effects are acceptable. Ata Rangi and Southern Pastures believe that those farmer stakeholders who have implemented environmental policies and adhere to best practice should not be penalised because of the actions of other stakeholders who may not do the same.

   (b) Theland essentially supports the position of Ata Rangi and Southern Pastures. It supports the purpose of PPC 1/Variation 1 to give effect to the Vision & Strategy and the National Policy Statement-Freshwater Management ("NPS-FM"). However, it has concerns about the merits of the provisions as notified and similarly has concerns about the recommendations from the WRC section 42A report writer.

9. Following the Block 2 (and Block 3) hearings, the Commissioners must determine what rules and methods are the most appropriate to give

[2] Ata Rangi and Southern Pastures each hold certificates of compliance for land use change from forestry to pasture.

effect to the objectives of PPC 1. These in turn must give effect to the NPS-FM, the Vision & Strategy and Part 2 of the Resource Management Act 1991 ("RMA")[3]. The evaluation for determining what is most appropriate is prescribed by section 32/section 32AA of the RMA.

10. As previously submitted in relation to Block 1 the relationship between the Vision and Strategy and the NPS-FM is a matter to be considered by the Commissioners when determining the outcomes of the submission hearing process. While the Vision and Strategy prevails in circumstances where there may be any inconsistency, the Vision & Strategy cannot be said to establish "environmental bottom lines" in the same sense as in the *King Salmon* decision. That proposition is made on the basis that the Vision and Strategy is not a document which has been promulgated under the RMA and therefore has not considered the requirements of Part 2.

11. It follows also that where the two caveats of *King Salmon* as identified previously are in play[4], the Commissioners may have recourse to Part 2 of the RMA. That requires an overall broad judgement as to whether a particular provision achieves the purpose of the RMA. In my submission, the relief sought by the Submitters – that there be a permitted and/or consented pathway for farming activities including land use change – is the most appropriate to give effect to the Vision and Strategy and NPS-FM and achieve the purpose of the RMA. That proposition is discussed in the evidence of Mr Chrisp.

RULE 3.11.5.7

12. The Block 2 section 42A report has recommended that the core aspects of Rule 3.11.5.7 be relocated to and become conditions within Rules 3.11.5.3 and 3.11.5.4. Failure to comply with these conditions then results in non-complying activity status under an amended Rule 3.11.5.7.

---

[3] Counsel acknowledges that the National Policy Statement on Urban Development Capacity is also relevant to PPC 1.

[4] *Environmental Defence Society v New Zealand King Salmon Company Limited* [2014] NZSC 38. (Uncertainty and incompleteness.)

13. The proposed amendments are not supported by evidence or a s32AA evaluation, are outside the scope of PPC 1 as notified and, are consequently, unlawful. The key concerns of the Submitters' are detailed in the evidence of Mr Chrisp:[5]

> "The aspect of these changes that are of greatest concern is the fact that failure to comply with Condition 5b of Rule 3.11.5.3 or Condition 7 of Rule 3.11.5.4 renders not only the land use change component of a farming activity a non-complying activity, but the entire farming activity becomes a non-complying activity (i.e. "the use of land for farming" to quote the rules)."

14. The proposed amendments have changed the nature of the rule so that it is no longer a rule addressing land use change *per se*. Rather, it is now framed as a "farming activity" rule. In my submission, it is not within the jurisdiction of the Commissioners to make amendments to PPC 1 which would, in effect, make amendments to Rule 3.11.5.7 which means that farming activities lawfully established and/or existing as at 22 October 2016 become "retrospectively" non-complying activities as a consequence of land use change which may have occurred after that date.

15. The Submitters' seek the relief described in Mr Chrisp's statement of evidence that the rules in PPC 1 provide a pathway for land use change to be able to occur (either as a Permitted Activity or by way of resource consent) where it can be demonstrated that there will not be unacceptable adverse effects on the environment. This includes land use change that has occurred, or is proposed, in circumstances where the proposal can demonstrate the ability of the sub catchment to achieve the Freshwater Objectives, Targets and Limits (Total Nitrogen and Total Phosphorus) in Table 3.11-1).[6]

---

[5] Statement of Evidence of Mark Chrisp, 8 May 2019 at para 2.
[6] Statement of Evidence of Mark Chrisp, 8 May 2019 at para 6.

16. These submissions in conjunction with the evidence filed on behalf of the Submitters set out the basis for this position.

RMA STATUTORY REQUIREMENTS

17. As the Commissioners will be well-aware, the RMA sets out the statutory functions of regional councils and the need for a section 32 evaluation for any proposed plan change promulgated under Schedule 1 of the RMA. Nevertheless, the key points are recapped for the purposes of explaining the position of the Submitters.

18. Section 30 of the RMA sets out the functions of regional councils. Waikato Regional Council's ("WRC") functions for the purpose of PPC 1 are:

    (a) The control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies; and
    (b) The control of discharges of contaminants into or onto land or water.

19. The purpose of the preparation, implementation and administration of PPC 1 is to assist WRC to carry out its functions under the RMA in order to promote the sustainable management of natural and physical resources within the Waikato Region.[7]

20. Pursuant to section 66(1) of the RMA, WRC must prepare PPC 1 in accordance with its functions under section 30, the provisions in Part 2, its obligation to prepare an evaluation report in accordance with section 32, the NPS-FM and the Vision & Strategy[8], and any regulations.

21. Section 67 of the RMA sets out the content of a regional plan and it follows that PPC 1 must:

[7] Section 63(1); section 5 RMA.
[8] As well as the NPS-UDC – however that is not a matter at issue in the context of the farming activity rules *per se.*

(a) include objectives to achieve sustainable management, policies to implement the objectives, and rules to implement the policies;

(b) give effect to any national policy statement, and the Waikato Regional Policy Statement ("**WRPS**");

(c) not be inconsistent with any other regional plan for the Waikato Region; and

(d) record how WRC has allocated any natural resources if it has done so via PPC 1.

Section 32

22. As described above, the objectives, policies, methods and rules in PPC 1 must be evaluated pursuant to section 32 of the RMA. The Submitters raised concerns regarding the substantive content of the section 32 evaluation for PPC 1 as notified. A further report is required in support of proposed changes to PPC 1 as notified which are anticipated through the decision-making process. Accordingly, it is reasonable to expect that the section 42A report author(s) would provide a s32/s32AA evaluation in support of the amendments proposed in that report. The section 42A report for Block 2 does not include such an evaluation and the recommended changes are made without substantive justification. This is particularly relevant to the recommended changes to Rule 3.11.5.7.

23. Section 32 requires an evaluation report to:

(a) Examine the extent to which the objectives of the proposal being evaluated are the *most appropriate* way to achieve the purpose of the RMA; and

(b) Examine whether the provisions in the proposal are the *most appropriate* way to achieve the objectives by:

(i) Identifying other reasonably practicable options for achieving the objectives; and

(ii) Assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) Summarising the reasons for deciding on the provisions; and

(c) Contain a level of detail that corresponds to the scale of the environment, social, and cultural effects that are anticipated from the implementation of the proposal.

24. An evaluation report must also, in relation to examining whether provisions are the most appropriate way to achieve the objectives:

(a) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for –

(i) Economic growth that are anticipated to be provided or reduced; and

(ii) Employment that are anticipated to be provided or reduced; and

(b) If practicable quantify the benefits and costs referred to in section 32(2)(a); and

(c) Assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

25. The Commissioners will be familiar with the line of authorities regarding the requirements of section 32 in the context of a proposed plan change.[9] I do not repeat those here. The critical point when considering Rule 3.11.5.7 (and other farming rules) is to determine what is the "most appropriate" method. Case law has determined that the "most appropriate" method does not need to be the superior method.

26. Rather, section 32 requires a value judgment as to what, on balance, is the most appropriate when measured against the relevant objective(s).

[9] *Long Bay-Okura Great Park Society Inc v North Shore City Council*(A078/2008).

"Appropriate" means suitable.[10] In *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council,*[11] the Court held that where the purpose of the RMA and the objectives of the plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement to examine the efficiency of the provision. It also promotes the RMA by enabling people to provide for their well-being while addressing the effects of their activities.

27. This should be borne in mind by the Commissioners when considering what the most appropriate methods are in PPC 1, particularly against the background of Scenarios which were identified by the CSG.[12] It therefore follows that objectives, policies, rules and methods which are less restrictive than those contained in PPC 1 as notified and/or as recommended by the section 42A report, but which give effect to the Vision and Strategy and the NPS-FM, may be the most appropriate.

28. In *Long Bay-Okura Great Park Society Inc v North Shore City Council*[13] the Court considered what was required of the risk analysis in section 32. The Court considered that the risk analysis required reference back to the definition of 'effect' in section 3 of the RMA. The Court considered that local authorities are required to examine both the probability of an effect and its consequences or costs (i.e. the risk).[14] Accordingly the assessment of each alleged effect, its consequences and its probability is a separate and necessary step in the Court's judicial functions under section 32. While a section 42A report makes recommendations it is to be expected that some degree of section 32 evaluation would be provided to justify proposed changes. This analysis is absent in the section 42A report, particularly regarding Rule 3.11.5.7.

[10] *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at 45.
[11] *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].
[12] As pointed out in submissions on PPC 1, Scenario 2 was considered to give effect to the Vision and Strategy and NPS-FM. This would logically have transpired into a less restrictive regime.
[13] *Long Bay-Okura Great Park Society Inc v North Shore City Council* (A078/2008).
[14] *Long Bay-Okura Great Park Society Inc v North Shore City Council* (A078/2008) at [45].

29. With regard to economic considerations, section 32(1)(c) requires an evaluation report to contain a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal. Furthermore, "efficiency" and "benefits and costs" are relevant to the evaluation under section 32(1)(b) and (2). In that regard, the evaluation requires the measurement of these factors to be made relative to the objectives, policies, rules or other methods. Again, such an analysis is absent in the section 42A report, particularly in relation to Rule 3.11.5.7. Indeed, the proposed amendments do not consider the economic consequences of its implementation, including the costs to those landowners who have invested millions of dollars in farm infrastructure and systems which are highly efficient and reflect "best practice". Furthermore, the costs of the investments made to implement land use change in reliance on permitted activity rules, including in some instances a valid certificate of compliance, has either been disregarded or not considered at all.

Section 68

30. Section 68 of the RMA sets out the legal framework for regional rules. When including a rule in PPC 1, section 68(3) requires that WRC shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect. There is no evidence to demonstrate that the section 42A author had any regard to the actual and potential effect on the environment when making the recommendations to amend Rule 3.11.5.7.

31. While, section 68(3) does not require every rule in a regional plan to have an effects-based rationale, the proposed amendments to Rule 3.11.5.7 have no basis at an effects level or otherwise for the purpose of WRC discharging its duty in section 63(1) to carry out any of its functions in order to achieve the purpose of the RMA. The rule requires analysis of

the effects on the environment as well as the purpose of the RMA in section 5. In my submission, the section 42A report fails to do this and therefore does not comply with the statutory requirements prescribed in the RMA.[15]

32. The proposed amendments to Rule 3.11.5.7 (and indeed Rule 3.11.5.7 as notified), do not comply with section 68(3) of the RMA. The analysis of a rule requires a great deal more than just the effects on the environment. In that regard, counsel considers that the section 42A report recommendations are clearly not effects based because:

    (a) The proposed amendments seek to make all farming activities which include land use change from planted production forest to farming activities above 4.1ha non-complying, regardless of the character, intensity, or scale of effects.

    (b) The rule does not provide flexibility to land use change activities that are based on land use suitability considerations and could lead to better outcomes from an environmental effect perspective (e.g. retiring areas of land such as steeper high areas, in exchange for conversion of suitable land into pasture).

33. In short, the proposed amendments do not comply with section 32 and section 68(3) of the RMA. It is questionable under a section 32 evaluation as to why land use change is constrained in the manner proposed in Rule 3.11.5.7 particularly as proposed to be amended (as per the section 42A report recommendations). It follows that Rule 3.11.5.7 is not the most appropriate method to implement the policies, achieve the objectives of PPC 1 or to give effect to the Vision and Strategy NPS-FM.

---

[15] This is noted in the evidence of Dr Care with regard to the 80-year targets already being met in a number of sub-catchments in the upper Waikato.

Principle of retroactivity[16]

34. Rule 3.11.5.7 as recommended in the section 42A report is considered unlawful to the extent it is contrary to the principle of retroactivity. An existing lawfully established farming activity as at 22 October 2016, which has subsequently been subject to land use change since that date[17], including land use change that is carried out pursuant to a certificate of compliance (deemed resource consent) under section 139 RMA, would be classified as a non-complying activity following PPC 1 (and Rule 3.11.5.7) becoming operative.

35. The existing farming activity land use (as at 22 October 2016) and any activity carried out pursuant to a certificate of compliance would "retrospectively" become non-complying. Rather than the issue being the change of land use since 22 October 2016, the proposed amendments have the effect of changing the status of the existing lawful activity which was occurring at that date. In the context of a certificate of compliance, once the "use" has changed, it is contrary to the principle of retroactivity to require a retrospective resource consent for that change in use.

36. While it is acknowledged that some type of resource consent for farming activities will be required, that should be determined on an effects basis – not an arbitrary question of whether there has been 4.1 hectares or more of change in the use of land.

[16] Section 7 of the Interpretation Act states that enactments do not have retrospective effect. For the purposes of the Interpretation Act, "enactment" includes regulations. Under section 76(2) of the Act a rule in a district plan has the force and effect of a regulation in force under the Act. Common law has determined that in general, an interpretation which does not give a provision retroactive effect is to be preferred. Refer to *Arapata Trust v Auckland Council* [2016] NZEnvC 236 for a discussion on the common law principle of retrospectivity in the context of resource consents.

[17] Of more than a "cumulative net total of 4.1hectares of change in the use of land".

No scope to make proposed amendments to Rule 3.11.5.7

37. It is doubtful that the Commissioner have scope to make the changes to Rule 3.11.57 as recommended by the s42A authors. In the notified version of PPC 1, there was no blanket non-complying activity rule in relation to any farming activity and the most restrictive activity class applied to farming activity under PPC 1 was restricted discretionary (regardless of whether any land use change had occurred on the land). In that regard, it is questionable whether the amendments to Rule 3.11.5.7 are within scope of the notified PPC 1. [18]

38. While the section 42A report cites specific submissions as providing jurisdiction to make the proposed amendments, a review of those submissions indicates that the submissions do not provide the scope relied on by the authors of the section 42A report. Indeed, the citations in some instances are potentially misleading when the relief sought is reviewed. The Submitters are an example where an issue raised as to the lack of clarity around the status of the farming rules (land use, discharge or a "hybrid") is relied on to support the proposed change to Rule 3.11.5.7. These points lead to the final matter addressed in submissions which is the relevance of section 85 of the RMA.

Relevance of section 85 RMA

39. Section 85 of the RMA provides two mechanisms for challenging a provision whereby that provision renders a landowner's interest in land "incapable of reasonable use" and places an "unfair and unreasonable burden on them".[19] Section 85(1) states that any person who considers

[18] The legal tests for whether the change to Rule 3.11.5.7 is within scope of the notified PPC 1 is set out in the cases of *Clearwater Resort Ltd v Christchurch City Council,* W Young J, (HC) Christchurch AP 34/02, 14 March 2003 and *Palmerston North City Council v Motor Machinists Limited* [2014] NZRMA 519. The main issue with the proposed changes is that the Rule has become more restrictive following notification and consequently there is a "real risk" that those who may be affected by the rule did not have the opportunity to participate in the PPC 1 process. In that regard, we consider that there is a real risk that persons directly or potentially affected by Policy 6 and Rule 3.11.5.7 have been denied an effective response to those changes and may be prejudiced as a result.

[19] Section 85(3B) RMA.

that a provision or proposed provision (in a plan) would render their interest in land incapable of reasonable use may challenge that provision on those grounds in a submission under Schedule 1 to the RMA in respect of a proposed plan or change to a plan.

40. The consequence of the proposed amendments to Rule 3.11.5.7 mean that section 85 is potentially triggered for some landowners, particularly those who have undertaken "land use change" where that amounts to more than 4.1ha. Those landowners would effectively be forced to "re-purpose" lawfully established pastoral farming activities to some other use which is not a reasonable use of the land and create an unfair and unreasonable burden on them.

41. The question of application of section 85 was not raised in submissions. That point serves to demonstrate that the proposed changes are outside the scope of PPC 1 and any submission lodged. Indeed, any directly or potentially affected person could not have been aware of the implications of the proposed changes to Rule 3.11.5.7 and therefore would not have considered it necessary to make a submission.

42. PPC 1 places an unfair and unreasonable burden on the Submitters (and others) to the extent that Rule 3.11.5.7 may render an entire farming activity non-complying and potentially unable to obtain a resource consent to operate. This would be an outcome if resource consent for a non-complying activity under PPC1 is declined. Declining the consent would effectively impose positive obligation on a landowner to undertake any alternative land use may be beyond the experience and expertise of the landowner. It follows that requiring a farming entity to "change expertise" is unfair and unreasonable.

CONCLUSION

43. The fundamental proposition of the Submitters' submissions is that the farming activities – regardless of whether that occurs on land that has been, or could be, converted to pastural farming from other uses – should be provided with either a permitted or consented pathway in PPC 1. Furthermore, those farmers who have made significant capital investment in the best farming technology and infrastructure, who have implemented significant environmental mitigations across farms and who demonstrate a highest and best use of their land, should not be penalised by the regulatory regime.

44. The regulatory regime should encourage change and encourage innovation. Substantive changes to farming practices which will result in improved water quality as sought in the Vision and Strategy and the NPS-FM will not be realised unless farmers are incentivised to change. Penalising those who are actively implementing positive changes is counter intuitive to the purpose of PPC 1 and the RMA.

EVIDENCE OF MR CHRISP AND DR CARE

45. On that point, Dr Care will present her evidence on the environmental science considerations in the proposed amendments to policies, rules and methods. Again, I note that this has been lodged in anticipation of the substantive matters relating to Farm Environment Plans being addressed in Block 3.

46. Mr Chrisp will then present his planning evidence, which is focussed primarily on Rule 3.11.5.7.

M Mackintosh

Counsel for Ata Rangi 2015 Limited Partnership, Theland Tahi Farm Group Limited and
Southern Pastures Limited Partnership

4th July 2019