

Before the Independent Hearings Panel

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*under:* the Resource Management Act 1991

*in the matter of:* Submissions and further submissions in relation to the proposed Otago Regional Policy Statement (Freshwater parts)

*submitter:* **Fonterra Limited**  
Submitter ID FPI019

Legal submissions on behalf of Fonterra Limited

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Dated: 5 September 2023

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## LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED

### INTRODUCTION

- 1 These submissions are provided on behalf of Fonterra Limited (*Fonterra*), who is a submitter and further submitter on the Freshwater Planning Instrument parts of the Proposed Otago Regional Policy Statement (*FPI-PORPS*).
- 2 In summary:
  - 2.1 Fonterra generally supports the approach recommended in the section 42A report for the FPI-PORPS;
  - 2.2 Fonterra's primary interest revolves around the continuation of discharge activities from its Stirling milk processing site.
- 3 These submissions provide a high-level overview of Fonterra's interests in the FPI-PORPS. They also address the National Policy Statement for Freshwater Management 2020 (*NPSFM-2020*) and statutory framework for discharge permits, then turn to briefly discuss the key relief sought by Fonterra.
- 4 It is however also emphasised at the outset that the same comprised Panel has already heard from Fonterra (as a part of the 'non-freshwater' hearing process) and in the case of its sought relief for this hearing, there appears to be a large degree of alignment between the Officers and Fonterra. Although appreciating the latter is not binding on the Panel, these submissions do take a more limited approach.
- 5 Fonterra has filed evidence from:
  - 5.1 **Ms Suzanne O'Rourke**, Fonterra's National Environmental Policy Manager (being taken as read);
  - 5.2 **Mr Morgan Watt**, Site Operations Manager for Fonterra;
  - 5.3 **Ms Katherine McCusker**, Farm Environment Consultant (being taken as read); and
  - 5.4 **Ms Susannah Tait**, Planner.
- 6 Brief summary statements are being provided for/from each witness.

### FONTERRA'S INTERESTS IN THE FPI-PORPS

- 7 The background to Fonterra's interests in the broader PORPS (i.e. non-freshwater parts) were set out in legal submissions provided on behalf of Fonterra dated 7 February 2023 in relation to the non-

freshwater parts of the PORPS. The key aspects relevant to the freshwater provisions are set out below:

- 7.1 Otago is home to key Fonterra infrastructure including:<sup>1</sup>
- (a) the Stirling Milk Processing Site near Balclutha; and
  - (b) the Mosgiel Distribution Centre.
- 7.2 the Stirling site processes up to 1.8 million litres of milk per day, and is the largest cheese producer in Australasia, producing over 200 tonnes of cheese at the site each day. The site does not operate in isolation, and is instead part of a large operations region which includes Fonterra's Edendale processing site in Southland. The site operates within the ambit of a number of resource consents, including to take and use water, and to discharge contaminants to air, water and land.
- 7.3 the Mosgiel Distribution Centre is Fonterra's lower South Island logistics hub. Finished product is supplied to it from both the Stirling and Edendale processing sites, and then subsequently moved primarily to the Port of Otago for export to Fonterra's international markets. Its functioning is reliant on a safe and efficient road and rail network, and its ability to undertake its operations (and expand) in a suitably zoned area (i.e. industrial) with appropriate protection from reverse sensitivity effects.
- 8 The Mosgiel site, being a distribution centre, does not discharge process/waste water. The Mosgiel site is therefore not addressed further, except to reiterate that Fonterra's 'broader PORPS case' is that the operation of the Mosgiel and Stirling sites contributes significantly to the local, regional and national economy and its operations in Otago need to be appropriately recognised and protected in the PORPS.
- 9 With respect to the Stirling site, Fonterra's primary interest in relation to the FPI-PORPS is that the provisions provide for continued discharges to water where that provides the better environmental outcome.
- 10 To this end, it is noted that Fonterra is investing heavily in ensuring that its sites are achieving continual improvements in its operations and particularly discharges to land, water and air. **Ms O'Rourke's** evidence describes Fonterra's internal 'Freshwater Policy'. Fonterra

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<sup>1</sup> See generally Ms O'Rourke's evidence

has developed this Policy to ensure there is a consistent approach to freshwater policy matters at a national, regional and local level.<sup>2</sup>

- 11 Relevantly, as **Ms O'Rourke** explains, the Freshwater Policy sets out that Fonterra's preference is to discharge wastewater to land; however, the Policy also recognises that there may be practical and operational limitations that mean discharges to land are not always practicable.<sup>3</sup>

### **THE NPSFM-2020**

- 12 The Hearings Panel will be well aware that the PORPS must give effect to the NPSFM-2020. It is useful to start with the overall context of the changes and the purpose of the Essential Freshwater package.
- 13 The NPSFM 2020 came into effect on 3 August 2020. It is part of the central government's Essential Freshwater package, which aims to:<sup>4</sup>
- 13.1 prevent further degradation of freshwater;
  - 13.2 start to make immediate improvements so water quality improves within five years; and
  - 13.3 to reverse past damage to bring waterways and ecosystems to a healthy state within a generation.
- 14 The objective of the NPSFM 2020 is to ensure that freshwater is managed to prioritise first the health and well-being of waterbodies and freshwater ecosystems, then the health needs of people, and finally the ability of people and communities to provide for their social, economic and cultural well-being now and into the future. The NPSFM contains 15 supporting policies that set out how to implement this objective.
- 15 In achieving the above, the NPSFM 2020 places a greater emphasis on 'Te Mana o te Wai'. Te Mana o te Wai is 'not new' and has been part of the NPSFM framework since 2014 – although the NPSFM 2020 now provides greater detail on how the concept is to be described and how it must be implemented. In particular, it is described in section 1.3 of the NPSFM as:

Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri

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<sup>2</sup> Evidence of Suzanne O'Rourke dated 28 June 2023 at [35].

<sup>3</sup> Evidence of Suzanne O'Rourke dated 28 June 2023 at [37].

<sup>4</sup> <https://www.mfe.govt.nz/publications/fresh-water/essential-freshwater-overview-factsheet>

of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

- 16 In understanding the concept it is important to emphasise that it includes **both**:
- 16.1 a substantive change in how we view freshwater, with a need to ensure the health and well-being of the water is protected and human health needs are provided for before enabling other uses of water; and
- 16.2 a procedural change in how it is implemented, with greater emphasis on engagement and discussion between regional councils, communities and tangata whenua as the means by which it is determined how Te Mana o te Wai is applied locally in freshwater management. The direct obligation is on Regional Councils as set out in Section 3.2(1):
- Every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region.
- 17 The degree to which Te Mana o te Wai introduces substantive and procedural change will vary considerably in context.
- 18 It is also important to remember that the purpose of the PORPS is to provide an overview of the resource management issues of the Otago region and policies and methods to achieve integrated management of the natural and physical resources of the region.<sup>5</sup> In achieving this purpose, it is important the PORPS is not overly directive. By this I mean that the PORPS should not 'drill down' into the detail or specifics of how resource use is governed.
- 19 At the same time, when considering the implementation of the NPSFM 2020 it is important to recognise that Te Mana o te Wai is relevant to **all** values and interests that attach to freshwater. In particular, care needs to be taken to ensure that the PORPS is not confined to or outright prioritises (for example) ecological or cultural matters.
- 20 In short, the PORPS should set the appropriate pathway that enables desired environmental outcomes at the same time as enabling social, cultural and economic wellbeing (which in many cases relies on the use of freshwater or has inevitable impacts on water).
- 21 Fonterra submits that the PORPS should leave enough scope for the regional plan to set appropriate rules addressing *how* freshwater is

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<sup>5</sup> Resource Management Act 1991, s 59.

managed in a way that achieves the best outcome overall for the environment.

### **FURTHER COMMENT ON RELIEF SOUGHT**

- 22 These submissions do not address each submission point or each individual item of relief sought by Fonterra (which has been comprehensively set out in Fonterra’s original and further submissions and the evidence of **Ms Susannah Tait**). Instead, in the following paragraphs we briefly address the key relief sought by Fonterra, with its main interest revolving around the continuation of discharge activities from its Stirling milk processing site.

#### **Phasing out of discharges to water**

- 23 The reporting officer recommends a new ‘Region-wide objective for freshwater’ be added to the PORPS, LF-VM-OA1. Subclause (8) of the LF-VMOA1 directs that in all FMUs and rohe in Otago with within specified timeframes, direct discharges of wastewater to water bodies are phased out to the greatest extent practicable.
- 24 Fonterra generally supports the phasing out of direct discharges of wastewater to water. As set out above and in the evidence of **Ms O’Rourke**, Fonterra’s preference is to discharge wastewater to land. However, Fonterra emphasises the importance of the ‘qualifier’: in most cases the better option will be land disposal but, in some circumstances, the better environmental outcome will be discharges to water.
- 25 For example, **Mr Watt** describes constraints on discharges to land that are present at the Stirling site. These include topographical considerations, land constraints, and soil limitations.<sup>6</sup> **Ms McCusker**’s evidence considers the limitations of discharge wastewater to land in her evidence and concludes that, if the Stirling site discharges all of its wastewater to land, Fonterra would be applying large volumes of wastewater to land that does not have a soil deficit for most of the year.<sup>7</sup> This would increase the risk of pugging and soil compaction.<sup>8</sup> Therefore, **Ms McCusker**’s evidence is that usually wastewater should be discharged into a reticulated system, unless alternative treatment and disposal methods to surface water will result in improved environmental outcomes.<sup>9</sup>
- 26 In terms of the ‘qualifier’ part of the objective (i.e. that discharges to wastewater are phased out ‘to the greatest extent practicable’), Fonterra queries how this would be applied in practice. Arguably by definition something is either practicable or it is not – and there may

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<sup>6</sup> Evidence of Morgan Watt dated 28 June 2023 at paragraph [29].

<sup>7</sup> Evidence of Katherine McCusker dated 28 June 2023 at paragraph [50].

<sup>8</sup> Evidence of Katherine McCusker dated 28 June 2023 at paragraph [46].

<sup>9</sup> Evidence of Katherine McCusker dated 28 June 2023 at paragraph [48].

not necessarily be a sliding scale in every case. It is submitted that consideration should be given as to whether 'to the extent practicable' or 'reasonably practicable' or tying the qualifier to something more widely known such as 'best practicable option' would be more appropriate.

- 27 To this end:
- 27.1 Fonterra sees robust Regional Plan provisions (with appropriate water quality and quantity limits, as informed by the NPSFM and any operative regional policy statement) **in combination** with, if mandated, the need to consider the best practicable option as being effective measures to achieve improved water quality and quantity; and
- 27.2 Fonterra also notes that s 290 of the Natural Built Environment Act 2023, which relates to consideration of applications for a discharge permit, requires consideration of any possible alternative methods of discharge as well as the best practicable option for the discharge; and
- 28 In practice, adding on the likes of 'to the greatest extent practicable' may create uncertainty and not add as much as first appears in relation to giving effect to maintenance or improvements in water quality.
- Distinguishing between sewage and wastewater**
- 29 Fonterra's submission and the evidence of **Ms Tait** outline Fonterra's position on distinguishing between sewage and wastewater in the PORPS.
- 30 As notified, LF-FW-P15 addressed both stormwater and wastewater discharge. The reporting officer recommends splitting this policy so that LF-FW-15 addresses stormwater discharges and LF-FW-16 addresses wastewater discharges.
- 31 Fonterra generally supports the recommendation to split the policy to distinguish between stormwater discharges and wastewater discharges. **Ms Tait's** evidence discusses some further amendments that are sought to be made to LF-FW-16.
- 32 In addition, Fonterra considers that industrial and trade waste should be treated (i.e. from a planning perspective) differently to sewage. This is on the basis that industrial process water does not include sewage, and therefore it might not give rise to quite the same level of cultural/social offence as the discharge of sewage. It is acknowledged that a direct discharge of sewage to a surface water body would likely be unacceptable at least in some contexts (particularly on cultural grounds). The same may not necessarily be true for treated industrial process water (which includes distillate and essentially wash down water).

- 33 On the whole, however, Fonterra is generally content with the 'split' between stormwater discharges and other discharges, provided the PORPS enables consideration of whether discharges of wastewater to water results in better environmental outcomes than discharges to land.

### CONCLUSIONS

- 34 Fonterra's principal concerns with the PORPS-FPI are to ensure it can continue its discharge activities from the Stirling milk processing site.
- 35 The amendments recommended in the s 42A report to various provisions have gone a long way to satisfying many of Fonterra's concerns. Fonterra acknowledges and appreciates the work of the Council staff and others in improving the FPI-PORPS.
- 36 Fonterra's remaining concerns can be addressed by the amendments proposed in the evidence of **Ms Tait**, and by further consideration of the 'qualifier' relating to the phasing out of discharges to water.
- 37 In our submission, the Panel should accept the remaining relief sought by Fonterra as per the evidence of **Ms Tait**, and otherwise retain the provisions of the FPI-ORPS as currently proposed.

Dated: 5 September 2023



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Ben Williams