

BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 250

ENV-2012-WLG-000090

ENV-2012-WLG-000092

IN THE MATTER of appeals pursuant to s120 of the
Resource Management Act 1991

BETWEEN FONTERRA CO-OPERATIVE
GROUP LIMITED
Applicant/Appellant

AND R W GILLESPIE
Appellant

AND MANAWATU-WANGANUI
REGIONAL COUNCIL
Respondent

Court: Environment Judge B P Dwyer
Environment Commissioner D J Bunting
Environment Commissioner I M Buchanan

Heard: at Palmerston North on 10-11 September 2013

Counsel/ Appearances:

B S Carruthers for Fonterra Co-Operative Group Limited
R W Gillespie in person
N Jessen for Manawatu-Wanganui Regional Council

DECISION

Decision Issued: 18 OCT 2013

- A: Fonterra appeal as to conditions upheld
B: Gillespie appeal against grant of consent declined
C: Costs reserved



Introduction

[1] On 8 August 2012, Manawatu-Wanganui Regional Council (the Council) granted Fonterra Co-Operative Group Limited (Fonterra) four resource consents allowing the discharge of waste products from Fonterra's Mangamutu milk processing factory near Pahiatua.

[2] The consents granted were:

- **Discharge Permit No. 104660:** To discharge up to 2,250m³/day of milk processing condensate to the Mangamutu Stream (a tributary of the Mangatainoka River) until a pipeline and outfall structure are constructed and, once the pipeline is available, to discharge up to 2,250m³/day of condensate directly to the Mangatainoka River (for a term expiring on 8th August 2030) subject to conditions;
- **Land Use Consent No. 104661:** To place, use and maintain an outfall structure on the bed of the Mangatainoka River (for a term expiring on 8th August 2030) subject to conditions;
- **Discharge Permit No. 106045:** To discharge milk processing condensate, by irrigation, onto or into land on properties known as the 'Tui', 'Four Mac's', 'Brechin' and 'O'Brien Estate' farms on the Ranfurly, Avery and Pahiatua Roads (for a term expiring on 6th August 2024) subject to conditions; and
- **Discharge Permit No. 106046:** To discharge contaminants (aerosols) to air associated with the irrigation of milk processing condensate onto or into land on properties known as the 'Tui', 'Four Mac's', 'Brechin' and 'O'Brien Estate' farms on the Ranfurly, Avery and Pahiatua Roads (for a term expiring on 6th August 2024) subject to conditions.

These consents allow Fonterra to continue discharges which it has undertaken for a number of years, albeit on a revised and (Fonterra contends) improved basis.

[3] Two appeals were filed against the Council decision:

- R W Gillespie (Mr Gillespie) filed an appeal against the grant of consent;



- Fonterra filed an appeal against certain of the conditions imposed by the Council's hearings panel on the grant of consent.

[4] The Council and the two Appellants were the only parties to the appeal proceedings. In addition to his own appeal, Mr Gillespie filed a s274 notice in respect of the Fonterra appeal.

[5] Prior to the appeal hearing, discussions took place between the Council and Fonterra which resolved the appropriate form of conditions insofar as those parties were concerned. These parties provided the Court with a schedule of agreed conditions as between them but Mr Gillespie did not agree to the proposed conditions.

Background

[6] Fonterra's processing factory is located approximately 2km west of Pahiatua township. It processes up to 1.4 million litres of milk per day from the Tararua, Wairarapa and Hawkes Bay areas and is the only processing factory on the east side of the lower North Island.

[7] The process undertaken at the Pahiatua factory is that of converting milk into whole milk powder. This is undertaken in two process lines (Plant 1 and Plant 2). The site takes milk from early August each year until the end of June the following year. Plant 1 commences operation at the start of each season but ceases operation some time during May each year. Plant 2 comes online approximately one week after Plant 1 and runs until the end of June each year.

[8] Conversion of milk into whole milk powder involves two stages of water removal from the milk. First of all, milk solids are concentrated in falling film evaporators to approximately 50% total solids and then a spray dryer is used to remove the remaining moisture. This process condenses the evaporated water to create a product called condensate.



[9] Since 1994 Fonterra has held a permit allowing it to discharge condensate into the Mangatainoka River via a tributary known as the Mangamutu Stream¹. This discharge, authorised by Permit 4173, should have expired but remains *alive* due to operation of s127 RMA pending resolution of these current replacement applications. Fonterra accepts that the discharge of condensate into the Mangamutu Stream has adverse effects on that particular stream which are more than minor and need to be addressed (we will describe those adverse effects in more detail later in this decision).

[10] Fonterra proposes to change its operating system for the consents which it now seeks. Those changes involve:

- The installation of a cooling tower (or equivalent system) to ensure that the condensate temperature does not exceed 35°C at all times;
- Total removal of the discharge from the Mangamutu Stream;
- The installation of a new discharge outlet and associated pipeline on the bank of the Mangatainoka River to enable the condensate to be discharged directly to the river;
- Using existing infrastructure on its nearby farms to irrigate the condensate to land in conjunction with the irrigation of other wastewater produced by the factory. Irrigation will occur primarily during the dry months of January, February and March but also potentially at other times in the year, provided in each case that soil conditions are suitable for such irrigation. We will return to the detail of that further in this decision.

[11] Establishing the new processes and systems required to put the above improvements in place requires some time. Accordingly Fonterra seeks continuation of the discharge of up to 2,250m³/day of condensate to the Mangamutu Stream until such time as the new cooling tower has been put in place and the structures necessary to enable discharge directly to the Mangatainoka River have been completed. Initially Fonterra sought a 5-year period for this to be undertaken, but during the Council process agreed to a proposed consent condition requiring the outfall to be



¹ Sometimes referred to as the Brechin Stream. We will refer to it as the Mangamutu Stream.

constructed no later than 30 April 2014. Due to the uncertainty brought about by these appeals (the Gillespie appeal against consent in particular), Fonterra has been unable to commit to the necessary capital expenditure in sufficient time to enable the 30 April 2014 deadline to be met, but agrees to a new deadline date of 30 November 2014. The Council does not oppose that new deadline.

[12] In determining the outcome of these appeals we propose to undertake the following process:

- We will address preliminary legal issues;
- We will identify and discuss the effects of the existing permitted discharges and the new proposed discharges to water, land and air, having regard to the conditions to which those discharges are subject;
- We will identify and discuss relevant provisions of various statutory instruments;
- We will determine whether those parts of the application which require consent as a non-complying activity pass through one the two gateways of s104D RMA;
- We will undertake a Part 2 appraisal in conjunction with consideration of ss104, 105 and 107 RMA.

Preliminary Legal Issues

[13] Prior to undertaking our assessment of the merits of the Fonterra proposals we consider the following preliminary legal issues:

- Prohibited activity Rule 6 of the Manawatu Catchment Water Quality Plan (MCWQ);
- Whether we have jurisdiction to extend the deadline for cessation of the discharge to Mangamutu Stream from 30 April 2014 to 30 November 2014;
- Activity status and bundling;
- The relevance of a local water conservation notice.

Prohibited Activity Rule 6 MCWQ

[14] MCWQ is an operative plan in the Region. It is due to be replaced by the Proposed One Plan (POP) for the Region but that has as yet not occurred although



POP is very close to becoming operative. We will address that issue in more detail in our discussion of the relevant statutory instruments. What is important for the purpose of our considerations is that MCWQ contains a rule which is presently operative and which must be addressed in our considerations.

[15] The rule in question is MCWQ Rule 6, which relevantly provides as follows:

MCWQ Rule 6 Prohibited discharges to water

Any discharge to surface water in the Manawatu catchment

(c) of any contaminant, or water, which contravenes MCWQ Rule 2, 3, 4 or 5, after 1 January 2009, except discharges granted according to Policy 2 of the Plan

Is a Prohibited Activity

[16] It was common ground that the discharge to the Mangamutu Stream would breach the standards referred to in MCWQ Rules 2, 3, 4 or 5 (or at least some of them) and is therefore a prohibited activity on the face of the Rule. It will be seen however that Rule 6(c) exempts from operation of the rule *...discharges granted according to Policy 2 of the Plan*.

[17] Policy 2 of the MCWQ relevantly provides as follows:

2.1 To grant consents for discharges which breach water quality standards in this Plan only where the Council is satisfied;

- a. that exceptional circumstances justify the granting of consent; or*
- b. that the discharge is of a temporary nature; or*
- c. that the discharge is associated with necessary maintenance work - and in any case that it is consistent with the purpose of the Act to do so, and practical alternatives that avoid such discharges to water are not available.*

[18] Does Rule 6 preclude the grant of consent for the discharge to the Mangamutu Stream? Both the Council and Fonterra contended that the discharge fell within the exceptions contained in Policy 2.1(a) and 2.1(b) and was therefore not prohibited.



[19] We consider that there is an even more fundamental issue which precludes the application of Rule 6. In our view, Rule 6 is ultra vires in that it purports to reserve a discretion to the Council to decide whether or not any given proposal might be exempt from operation of the rule.

[20] The exemptions contained in Policies 2.1(a), 2.1(b) and 2.1(c) apply if the Council is *satisfied* that exceptional circumstances justify the granting of the consent or that the discharge is of a temporary nature or that the discharge is associated with necessary maintenance work. In order to assess whether or not one of these exemptions apply, the Council would need to have sufficient information before it to determine whether or not a proposal fits within one of those categories. However, it is not possible for someone proposing to undertake an activity which on the face of it might be prohibited, to make an application for resource consent to the Council as by definition a prohibited activity is one for which *...no application for a resource consent may be made*². In short, there is no process for undertaking the assessment and exercise of judgement which the Council has sought to reserve to itself in the Policies.

[21] Further, the Rule must be void for uncertainty. It is not possible for a potential applicant considering the terms of Rule 6 (and Policy 2.1) to determine whether or not any proposed activity might satisfy the tests. It is fundamental that rules of district or regional plans are sufficiently certain that a potential applicant is able to assess from reading any given rule whether or not they are subject to that rule. That is not possible in the case of Rule 6 where assessment of whether or not a possible application falls within the ambit of the Rule is subject to the application of discretionary judgement on the part of the Council.

[22] In his submissions for the Council, Mr Jessen observed that Rule 6 is *...a perfect example of why it is considered poor planning practice to copy and paste RMA provisions into planning documents*. That is what has happened in this case due to incorporation of Policy 2 into prohibited activity Rule 6.



² Section 87A(6)(a) RMA.

[23] Policy 2 is a *straight take* from s107 RMA which relevantly provides:

107 Restriction on grant of certain discharge permits

(1) *Except as provided in subsection (2), a consent authority shall not grant a discharge permit...to do something that would otherwise contravene section 15...allowing-*

- (a) *The discharge of a contaminant or water into water;*
- (b) *A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*

...

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

- (c) *The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials;*
- (d) *Any conspicuous change in the colour or visual clarity;*
- (e) *Any emission of objectionable odour;*
- (f) *The rendering of fresh water unsuitable for consumption by farm animals;*
- (g) *Any significant adverse effects on aquatic life.*

[24] Subsection 107(2) RMA then provides

(2) *A consent authority may grant a discharge permit...to do something that would otherwise contravene section 15...that may allow any of the effects described in subsection (1) if it is satisfied-*

- (a) *That exceptional circumstances justify the granting of the permit; or*
- (b) *That the discharge is of a temporary nature; or*
- (c) *That the discharge is associated with necessary maintenance work-and that it is consistent with the purpose of this Act to do so.*



[25] It will be seen that Policy 2.1(a)-(c) mirrors the provisions of s107(2). Section 107 precludes a consent authority from granting consent to an application for a discharge permit which breaches certain environmental standards, unless the proposal falls within the identified exemptions. However, s107 RMA is not a prohibited activity rule. It is applicable at the conclusion of the hearing process when a consent authority has considered all the information and evidence relating to a proposal and is exercising its discretion whether or not to grant consent. In the case of Rule 6, the exemptions have been *tacked onto* a prohibited activity rule which precludes any application being made in the first instance.

[26] For all of the reasons above we determine that Rule 6 is both ultra vires, in that it purports to reserve a discretion to the Council as to whether or not the prohibited activity rule applies to any particular proposal, and also uncertain as it is not possible for a potential applicant to know whether or not they fit within the exemptions in any given instance.

[27] If we were considered to be wrong in our determination above on this matter we consider that the discharge to the Mangamutu Stream would meet the exceptions contained in ss107(2)(a) and (b) and Policies 2.1(a) and 2.1(b) in any event.

[28] We refer to the observation of Wylie J in *Te Rangatiratanga O Ngati Rangitahi Inc v Bay of Plenty Regional Council*³ that whether or not exceptional circumstances exist is essentially an issue of fact. In our view there are exceptional circumstances in this case:

- The discharge to the Mangamutu Stream would be for a short, fixed-term and would enable Fonterra to continue operating a dairy factory which is of considerable importance to both the community (as an employer) and the dairy industry (as a processor) while it provides up to date infrastructure which will lead to complete removal of the longstanding discharge from the stream and improvement of the quality of the discharge;
- Although MCWQ remains operative, it is due to be replaced by POP which has been through the hearing and Environment Court appeal



³ (2010) 16 ELRNZ 312 (HC).

process and (it is anticipated) will become operative in the reasonably near future. Under POP, the activity would be a discretionary activity and not prohibited.

[29] We do not consider that Policy 2 or s107(2)(a) RMA require that in order to be exceptional, circumstances must be unique. We take the word exceptional to mean *unusual* or *not typical*⁴. In our view the above circumstances fall into the unusual or not typical category and we find that the proposed discharge to the Mangamutu Stream until 30 November 2014 fits within the exceptional circumstances category.

[30] Secondly, insofar as the issue of whether or not the discharge is temporary is concerned, we understand the normal meaning of the word temporary to be *lasting for only a limited period* or *not permanent*⁵.

[31] In this case, it is requested that the right to discharge to the Mangamutu Stream will expire on 30 November 2014, a period of 1 year or so from the date of this decision. That is in a context where the maximum term for which a discharge permit might be granted is 35 years and the Council and Fonterra have agreed that the discharge permit to the Mangatainoka River should be for a term expiring on 8 August 2030. We consider that in either context, the discharge to the Mangamutu Stream is for a short, limited period of time as compared to either the maximum available or proposed terms, thereby fitting into the temporary category.

[32] Accordingly, we determine that the discharge to the Mangamutu Stream meets the exceptions to Rule 6 contained in Policy 2, and does not fall into the prohibited category even if Rule 6 was to be applied.

Ability to Extend the Deadline for Cessation of the Discharge to Mangamutu Stream

[33] We have previously noted that the date initially agreed to by the Council and Fonterra for cessation of discharge to the Mangamutu Stream was 30 April 2014.



⁴ J Pearsall (ed) *Concise Oxford English Dictionary* (10th Ed. Revised, Oxford University Press, Oxford, 2002).

⁵ J Pearsall (ed) *Concise Oxford English Dictionary* (10th Ed. Revised, Oxford University Press, Oxford, 2002) and *Collins Concise Dictionary* (Revised 3rd Ed, Harper Collins Publishers, 1995).

Because of the delay in the works programme brought about by these current appeals, Fonterra seeks to extend that date to 30 November 2014. Ms L M Shirley (the Council's planning witness) considered⁶ that 30 April 2014 may be an *unrealistically short timeframe* to allow for construction of the outfall structure to the Mangatainoka River, which must be done before the discharge to the stream can terminate. She said that she would support a short extension of time to allow for construction of the outfall if it was within the Court's power to do so.

[34] We do not think there is any jurisdictional reason why we cannot extend the timeframe in question. Fonterra's application initially proposed a period of up to 5 years for the infrastructure work to be undertaken and the discharge in the Mangamutu Stream to cease.

[35] The reduced timetable was offered by Fonterra at the Council hearing to address the concerns of some parties. It represented the shortest possible period required for Fonterra to construct its new infrastructure thereby enabling the discharge to be removed from the Mangamutu Stream. Fonterra's inability to meet that timetable has been brought about by factors outside of its control, namely resolution of these appeals and in particular Mr Gillespie's appeal against the grant of consent. Additionally, some of the upgrade works must be undertaken during plant shutdown and the opportunity for that has gone during the current dairy season.

[36] We do not consider that the extension of time from that offered by Fonterra at the Council hearing is beyond the jurisdiction of the Court. It is the time limit contained in the application which sets the limits of our jurisdiction. In making that comment, we accept that the issue of the duration of the discharge to Mangamutu Stream is a significant matter in these proceedings. We do not know if parties whose concerns had been satisfied by the reduction in time offered by Fonterra at the hearing would have concerns about the brief extension now sought or not, as no party other than the Appellants and the Council took the opportunity to join these proceedings. However, we do not believe that it is reasonable to bind Fonterra to the reduced timetable to which it agreed in light of the circumstances set out in the preceding paragraph.



⁶ EIC, para 201.

[37] We accept the evidence of Mr W J Boakes (Fonterra's Site Operations Manager) that full commissioning of the new infrastructure could be achieved by November 2014 having regard to the factors which he identified in his evidence. We also accept that it was reasonable for Fonterra to delay expenditure on substantial items of infrastructure pending resolution of Mr Gillespie's appeal.

[38] The extended period to 30 November 2014 now requested by Fonterra is still within the 5 year period for decommissioning of the Mangamutu Stream discharge proposed by Fonterra in its application and accordingly remains within jurisdiction. The reasons advanced by Fonterra for seeking a brief extension of the deadline proffered by it at the Council hearing are in our view valid and reasonable. We agree that the appropriate deadline should be 30 November 2014.

Activity Status and Bundling

[39] At the time Fonterra lodged its application for resource consents, it contended that all four consents required by it were discretionary activities under the (then) relevant Plans. Council officers disagreed with that assessment insofar as the application for discharge of condensate to water was concerned. They considered that the discharge to water was a non-complying activity under Rule 8 of MCWQ which relevantly provided:

8.1 Subject to MCWQ Rule 6 any discharge to surface water in the Manawatu catchment which causes any standards in MCWQ Rules 1, 2, 3, 4, 5 or 5A, so far as they are applicable, to be breached is a Non-Complying Activity.

[40] As we understand it, the Council's position was that the discharge to the Mangamutu Stream could not comply with at least some of the identified standards. Fonterra appears to concede that as being the case but pointed to the fact that the discharge to the Mangamutu Stream was a temporary discharge pending establishment of a replacement discharge into the Mangatainoka River. It contended that when a holistic and long term approach was taken to assessment of the effects of the discharge the standards would not be breached and the discharge could be treated as a discretionary activity under MCWQ Rule 7.



[41] We consider that the Council's approach to this issue was correct. Discharge to the Mangamutu Stream is an identifiable discharge in its own right. The discharge was initially proposed to continue for a term of up to 5 years and even under the proposed reduced term would be the only discharge of condensate from the Fonterra premises taking place until November 2014. We note that the term effect includes *...any temporary...effect*⁷. The Council was clearly correct in having regard to the effects of discharge into the Mangamutu Stream in assessing the status of the discharge to surface water application.

[42] We agree that a holistic approach should be taken to assessing the effects of the discharge as contended by Fonterra, but that assessment goes to determination of whether or not the effects overall are more or less than minor rather than the issue of whether the standards in the Rules are breached, thereby triggering the need for a non-complying activity consent.

[43] Ultimately Fonterra seems to have conceded the point. In our view the concession was appropriate and inevitable. However that brings us to the issue of how the non-complying activity status in respect of the discharge to surface water consent affects the remaining applications and whether they ought be *bundled* for the purpose of determining their status.

[44] Bundling is a process used to determine the classification of proposals involving more than one activity and requiring multiple resource consents. Under this process, the activities are bundled together for consent purposes and the most restrictive activity classification is applied to the overall proposal.

[45] The planning witnesses agreed that the consents for the construction of the outfall (104661), discharge of condensate to land (106045) and discharge of condensate to air (106046) were all discretionary consent applications under the relevant regional plans being MCWQ, the Regional Air Plan and POP. They also agreed that the discharge of condensate to water constituted a discretionary activity under POP but that under MCWQ the discharge was a non-complying activity and



that MCWQ was determinative insofar as the status of that particular application was concerned.

[46] Accordingly, the Fonterra proposal contains one component activity (discharge to water) which is a non-complying activity with the remaining component activities all requiring consent as discretionary activities. The planning witnesses who gave evidence to us (Ms C W Taylor for Fonterra and Ms Shirley for the Council) identified the applications as comprising two categories:

- Water discharge applications (consent numbers 104660 and 104661) allowing the discharge of condensate to water and construction of the necessary outfall structures;
- Land discharge applications (consent numbers 106045 and 106046) allowing the discharge of condensate to land and air by spray irrigation.

[47] The witnesses treated the two categories of application separately for the purpose of determining their activity status. They agreed that the water discharge applications constituted non-complying activities and the land discharge applications constituted discretionary activities. It was their common position that the two categories should not be bundled together so that all of the applications required consent as non-complying activities. They considered that the two categories of activity were not directly reliant on each other so that the discharge to water could be operated without the consent to discharge to land and vice versa.

[48] The Council hearings panel had taken a different approach to bundling of the consents and had bundled all of the applications together, considering them as a non-complying activity overall. The rationale for doing so is found in Para 4.16 of the Council decision which stated:

The two applications involve activities and receiving environments that are distinctly different. Although the irrigation farms are within the catchment of the Mangatainoka River, the soil on those farms is a distinctly different receiving environment from the water in the River that passes them. On this basis, it may not be necessary to bundle them all together. However, we understand the rationale for the more conservative approach adopted by



Ms Taylor and have considered all applications collectively in terms of the gateway tests of s104D.

[49] In her evidence to us, Ms Taylor disputed that she advocated bundling and it seems apparent from consideration of her evidence to the Council hearing (which forms part of her brief to us) that she did not in fact do so. Ultimately, nothing turned on the hearing panel's assessment, as even applying the more conservative test to the proposal by treating all of its component activities as non-complying, the hearings panel still determined that it was appropriate to grant consent.

[50] A fundamental principle for consideration when determining whether or not to bundle is whether there is *overlap* between the consents. That principle was described in these terms by Asher J in *Tairua Marine Limited v Waikato Regional Council*⁸:

*[30] It is a longstanding principle that where there is an overlap between two consents, so that the consideration of one may affect the outcome of the other, it will generally be appropriate to treat the application as one requiring overall assessment on the basis of the most restrictive activity.*⁹

[51] We acknowledge the witnesses' contentions that the discharges to water and land involve two separate environments governed by different planning instruments. Notwithstanding, we consider that there is unquestionably overlap between the consents.

[52] All of the consents deal with disposal of the same waste material (condensate) from the same source. All of the proposed consents are necessary to enable an integrated approach to disposal of the condensate. Disposal will be undertaken to land when conditions are appropriate and to water at other times. Although the consents could in theory operate separately, it would not be possible to dispose of all of the condensate generated by the factory process throughout the year in accordance with the conditions proposed for the various component consents



⁸ HC Auckland CIV 2005-485-1490, 29 June 2006.

⁹ Citing *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576 and *John Collingwood King v Auckland City Council* [2000] NZRMA 145 (HC).

unless all of the consents sought are granted. The consents work in lock-step with each other.

[53] For example, Proposed Condition 10a of Discharge Permit 104660 precludes discharge of condensate to the river during the January-March period if the soil moisture level at Fonterra's land disposal area is 85% or less. At that time and in those conditions the discharge of condensate is undertaken to land and air pursuant to Discharge Permits 106045 and 106046. However, if the soil moisture level exceeds 85% then Fonterra must revert to discharge to the river in accordance with Discharge Permit 104660.

[54] We consider that the proposed discharge consents operate in conjunction with each other and overlap. We propose to bundle all of the applications and treat them all as applications for non-complying activities. We accept that this is a conservative approach.

Local Water Conservation Notice

[55] The material which Mr Gillespie provided to the Court included an extract from the New Zealand Gazette of 26 September 1991 notifying a Local Water Conservation Notice called the Mangatainoka River Notice 1991 (the Notice). The Notice constituted an order under the Water and Soil Conservation Act 1967 and sought to protect the Mangatainoka River and its tributaries due to their characteristics and features as a recreational fishery of regional significance. It imposed restrictions on the ability of the Regional Council to grant water rights in respect of the river if any such grant would have a significant adverse effect on the recreational fishery and set standards which any grant must meet.

[56] As we understood Mr Gillespie's case it was (in summary) that:

- The Notice was still applicable;
- The Notice applied to both the Mangatainoka River and the Mangamutu Stream;
- The grant of consents in this case would have a significant adverse effect on the River and Stream as a recreational fishery;



- The discharges proposed in this instance could not meet the standards contained in the Notice particularly insofar as the Mangamutu Stream was concerned;
- The Notice precludes the grant of consent.

[57] The relevance of the Notice was considered by both of the planning witnesses and by counsel for Fonterra, all of whom contended that the Notice was no longer applicable. Ms Carruthers referred to the provisions of s368 RMA which provides:

- (1) Where one or more instruments of the kind referred to in subsection (2) are in force in respect of any part of a region except in the coastal marine area immediately before the date of commencement of this Act, a regional plan (not being a regional coastal plan) shall be deemed to be constituted for that region, which plan shall-*
- (a) Include as provisions of the plan such of those instruments as applied to that part of the region except in the coastal marine area (whether or not those instruments have been repealed or revoked by this Act); and*
- (b) Be deemed to be operative from date of commencement of this Act until it ceases to be operative in accordance with this Part.*

Local Water Conservation Notices were instruments of the kind referred to in s368(1).

[58] Accordingly the Notice would have had effect as a rule in the Transitional Regional Plan on 1 October 1991. However, that Transitional Regional Plan has since been formally revoked by both MCWQ and the Regional Plan for Beds of Rivers and Lakes and Associated Activities. Accordingly, it is no longer an operative document and has no relevance to our considerations.

Assessment of Effects - River and Stream

[59] We have distilled Mr Gillespie's concerns regarding the continued discharge of condensate to the Mangamutu Stream and (following upgrade) directly to the Mangatainoka River into the following issues:



- What are the effects of continuing to discharge condensate to the Mangamutu Stream?
- What are the effects of the discharge on the Mangatainoka River?
- Is the proposed outfall structure appropriately designed and positioned?

[60] Technical evidence on water issues was provided to the Court by Mr P Kennedy (a consultant environmental scientist for Fonterra) and Mr L Brown, (Senior Environmental Scientist for the Council). Mr C Dodds (Environmental Team Leader for Fonterra) and Mr P Blackwood (Investigations and Design Manager for the Council) provided evidence on the outfall structure. Mr Gillespie gave evidence based on his observations of the discharge and river over many years.

Mangamutu Stream

[61] The proposal includes the continuation of the currently consented discharge of condensate to the Mangamutu Stream until the proposed new outfall directly to the Mangatainoka River is available on or before 30 November 2014.

[62] The discharge to the stream directly impacts on approximately 80m of the stream above its confluence with the main river. It was common ground between the expert witnesses that the discharge was causing significant adverse effects on the stream itself. These effects primarily involve a water temperature barrier to fish passage and the prolific growth of filamentous bacteria and fungi collectively referred to as *sewage fungus* on the bed of the stream.

[63] When the plant is in full production the condensate generated enters the stream at temperatures between 30°C and 40°C, dominating the stream temperature at this point. Mr Kennedy and Mr Brown agreed that the resulting in-stream temperature significantly deters the passage of native fish and trout into and out of the Mangamutu Stream.

[64] The condensate discharge contains low levels of organic material that under stable flow conditions promote the growth of sewage fungus on the bed of the stream. Evidence of this occurring in the stream was provided in photographs by Mr Gillespie and confirmed by the expert witnesses. Significant amounts of sewage



fungus on stream beds will smother the habitat of macro-invertebrates and cause diurnal fluctuations in dissolved oxygen (DO) levels that are detrimental to the life supporting capacity of the stream.

[65] The continued discharge of condensate to the Mangamutu Stream will have significant adverse effects on aquatic life, contrary to s107(1)(g) RMA. Fonterra's proposal is to avoid these effects entirely by removing the discharge from the stream prior to 30 November 2014, when the replacement outfall directly to the Mangatainoka River is available. We have previously noted¹⁰ that the short term continuation of the existing discharge meets the exceptions contained in s107(2)(a) and (b) RMA, and therefore is not precluded from the grant of consent by s107(1).

Mangatainoka River

[66] Messrs Kennedy and Brown provided extensive assessment of the technical information available from both Fonterra and the Council monitoring of the existing condensate discharge and surface water parameters. They generally agreed that the discharge of condensate to the Mangatainoka River would have less than minor (if any) adverse effects on the receiving environment. The only aspect where they disagreed was in the potential effects on dissolved oxygen levels in the river. We will return to this issue later.

[67] Mr Kennedy testified that the condensate contained no discernible levels of the indicator bacteria *E. coli*. The condensate originates from a food processing factory where extremely strict hygiene controls are in place that minimise any risk of contaminants entering the condensate discharge. Mr Kennedy opined that there was no potential for the proposal to affect the contact recreation standards applying to the receiving water. Mr Brown supported this opinion.

[68] Mr Kennedy and Mr Brown also agreed that the condensate discharge would not affect the quality of the water taken from the river below the point of discharge for Pahiatua's municipal supply.



¹⁰ Paras [27]-[32] (above).

[69] The amenity value of rivers can be affected by changes in water clarity or the presence of excessive amounts of periphyton growth creating visual effects and slippery surfaces which reduce their attractiveness to users. Mr Kennedy testified that the condensate contains only very small concentrations of particles and had no potential to influence downstream water clarity. Mr Brown provided similar evidence.

[70] In cross examination, Mr Gillespie referred the witnesses to Exhibit 1, a jar of liquid which he said he had collected from the condensate outlet pipe into the Mangamutu stream. This liquid contained small amounts of suspended filamentous material identified by Mr Kennedy as likely to be sewage fungus that from time to time can build up in the pipe and stilling basin of the outlet system. Surges and swirling of condensate can cause some of this material to be released with the discharge. Mr Kennedy opined that this would be in small amounts and have no discernible effect on water clarity.

[71] Mr Kennedy considered that the amount of periphyton in the Mangatainoka River is having an effect on amenity value, particularly during low flow summer months. Conditions in the river in summer are conducive to excessive periphyton growth caused by high nutrient levels, high temperatures and stable flows. This growth is consistent above and below the current point of discharge of condensate. Mr Kennedy provided monitoring evidence that the condensate adds very little dissolved inorganic nitrogen or other nutrients to the river. It was his opinion that the discharge contributes very little to downstream periphyton growth.

[72] Mr Gillespie had concerns about the extent of the mixing zone for the condensate after discharge to the river, together with the potential for dissolved oxygen depletion and increased water temperature resulting from the discharge to create a water quality barrier to fish movement in the river.

[73] Mr Kennedy's assessment of the mixing zone based on monitoring data from upstream and downstream of the Mangamutu stream confluence was that there was no evidence of water quality changes that resulted in a non-physical barrier to fish



passage. It was his opinion that the mixing zone defined in the proposed conditions was appropriate.

[74] As discussed earlier for the Mangamutu stream, increases in water temperature in receiving waters can have significant adverse effects on the life supporting capacity of those waters. The proposal to discharge condensate directly to the Mangatainoka River includes installation of a cooling tower for the condensate at the plant before it is piped to the discharge point. This will reduce the condensate temperature to below the proposed condition limitation of 35°C. Mr Kennedy and Mr Brown considered that at this level any change in river temperature caused by the discharge would be limited to considerably less than the target (3°C in summer, 2°C in winter) change provided for in the relevant planning documents and included in proposed conditions. Any potential adverse effects on aquatic life due to temperature changes were considered to be no more than minor by the witnesses.

[75] Observed diurnal DO fluctuations in the river were interpreted differently by Mr Kennedy and Mr Brown in their initial evidence to the Council hearing.

[76] Mr Kennedy restated his opinion to our hearing that the DO reductions occurred as a result of natural biological processes. High periphyton levels increased biological productivity resulting in the enhanced daily cycles in DO saturation that can be seen in the monitoring data. In his opinion this occurs in the Mangatainoka River irrespective of the discharge of condensate. Mr Kennedy considered that the low amount of biological oxygen demand (BOD₅) in the condensate would have no adverse effect on DO concentrations in the river.

[77] Mr Brown also described the influence of in-stream biological conditions as a major contributor to the observed DO saturation reductions seen in data from the Pahiatua Town Bridge monitoring site. However, he considered that the BOD₅ concentration in the condensate had the potential to add to the naturally occurring DO saturation cycles during stable low flow conditions. This evidence was accepted by the Council hearings panel which imposed a condition requiring removal of the condensate discharge at times when DO saturation in the river falls below 80%.



[78] Fonterra has accepted this approach and it and the Council agreed to amend the proposed discharge permit conditions accordingly. This would ensure the avoidance of any adverse effects from the discharge of condensate to the Mangatainoka River during periods of highest risk.

[79] In summary, the expert evidence supports the conclusion that the discharge of condensate directly to the Mangatainoka River, when the replacement outfall structure is in place, will remove any existing non-physical barriers to fish passage to and from the Mangamutu Stream. The evidence also demonstrated that the discharge will not create any non-physical barriers to fish passage in the Mangatainoka River. Removal of the discharge during summer months and when low DO saturation levels and low river flows are experienced will avoid any adverse effects on DO and river temperatures at a time when potential impacts on the fishery are greatest.

[80] The evidence of Messrs Kennedy and Brown supports the conclusion that at times when condensate from the dairy plant is being discharged to the Mangatainoka River the actual and potential adverse effects on the river will be no more than minor. During the summer months and during periods of low flows or DO saturation less than 80% outside those summer months, any adverse effects are completely avoided by discharging the condensate to land. The discharge will not compromise any of the relevant target parameters of MCWQ or POP.

[81] We have carefully evaluated the evidence presented by expert witnesses for Fonterra and the Council, and in the absence of any contrary expert evidence, we agree with their conclusion that the discharge of condensate to the Mangatainoka River under the specified conditions will have no more than minor adverse effects on the receiving waters.

[82] The inclusion of Condition 10 in Discharge Permit 104660 restricting discharge of condensate to outside the months of December to March or when low river flow or DO saturation occurs outside those months avoids any potential adverse effects on river biota when river conditions are naturally stressed.



[83] River water quality standards in Proposed Condition 25 mirror the requirements of s107(1) RMA and relevant parameters in POP and it is appropriate to include these. The technical evidence supports the conclusion that these standards will not be compromised by the condensate discharge.

Outfall Structure

[84] Fonterra provided engineering design information for the outfall structure and associated protection work on the river bank immediately below the confluence of the Mangamutu stream in the original AEE for the Council hearing. Mr Blackwood had reviewed the design and suggested modifications to enhance the security of the outfall using rock rip-rap protection. These modifications have been incorporated into the proposed conditions of consent for this hearing.

[85] Mr Gillespie challenged the design and positioning of the outfall to the Mangatainoka River. He considered that the river channel had moved away from the proposed outfall position and that significant river works with heavy machinery would be required to keep the river against the true left bank. Mr Gillespie also considered that the protection of the river bank proposed for the outfall site was inappropriate. No expert engineering evidence was called by him.

[86] In response, Mr Dodds referred us to the engineering design in the AEE, although the design engineer was not called in support. Mr Dodds outlined the process by which the outfall site had been selected, including the input from Council river engineers. The conclusion from this process was that flowing river water will cover the outfall at all times that the discharge of condensate is occurring. The only time that there may be a dry river bed at the outfall is during low river flows (below $1.578\text{m}^3/\text{sec}$) when discharge to the river is not to occur under the proposed conditions of consent.

[87] Mr Blackwood, responding to questions from Mr Gillespie, defended the use of rock rip-rap protection as the most appropriate engineering technique available to protect the outfall site from river erosion.



[88] We accept the evidence of Messrs Dodds and Blackwood. We conclude that the design and positioning of the outfall structure is appropriate and will not result in any adverse effects on the river environment.

Land Based Disposal

[89] We have narrowed down the consideration of Mr Gillespie's concerns about the land disposal of the combined wastewater and condensate waste stream to three key issues:

- The effects of the proposed increases in some of the application rates of the combined waste stream discharges compared with the limits in the existing wastewater only discharge permit;
- Why Fonterra is not using additional land which Mr Gillespie claims is available, to enable irrigation to be undertaken for longer periods; and
- The potential for odour and spray drift from the combined waste stream to adversely affect the atmosphere.

[90] Before addressing these issues, we provide brief overviews of the existing land disposal system, what is proposed under the new discharge permits being sought by Fonterra and details of the key conditions contained in these permits. In doing so we draw on the evidence of:

- Dr J Russell (Fonterra's Environmental Technical Group Manager). Dr Russell heads a group in Fonterra which undertakes research into wastewater reduction, water and wastewater reuse, wastewater treatment and the effects of dairy industry wastes on the environment. He has had specific involvement in the assessment of the condensate discharge for the Pahiatua plant.
- Mr H Barnett (an Environmental Scientist with the Council) who was responsible for preparing a s42A report on the land based disposal for the Council hearing.
- Mr Dodds (previously identified) who is responsible for the environmental management of the Pahiatua factory.



Existing System

[91] Fonterra's current discharge permits provide for the disposal of treated wastewater (not condensate) from the Pahiatua plant through a land based spray irrigation system.

[92] The land used for the disposal is spread over four farms, the O'Brien and Brechin Farms to the west of the Mangatainoka River and the Tui and Four Mac's Farms to the east of the river. A network of underground pipes conveys the wastewater to each of the farms, including a pipe laid beneath the bed of the Mangatainoka River to connect the two eastern farms.

[93] Travelling irrigators are used on the Brechin and O'Brien Farms, a fixed in-ground irrigation system is used on the Four Mac's Farm and a combination of a traveller and a fixed in-ground system is used on the Tui Farm.

[94] There are three wastewater storage silos located beside the manufacturing plant and two silos located at the Tui Farm pumping station. These silos are used for equalising the pH and organic content of the wastewater.

[95] Decisions on when and where to irrigate take into account climatic factors such as soil moisture, predicted rainfall, wind speed, wind direction and a visual assessment of the irrigated land for any signs of ponding.

[96] The wastewater discharge permit conditions require a range of monitoring and testing. This includes the daily collection and analysis of dairy processing for COD and pH; bi-monthly groundwater and surface water sampling and analysis; static water level recording in wells and annual soil sampling and laboratory analysis, all measured for compliance with the detailed conditions set out in the discharge permits.

Modifications Proposed

[97] Fonterra now proposes a dual system for discharge of its condensate, whereby in the drier months of the year the condensate would be combined with the wastewater and disposed of to land. In the wetter months, the condensate would be



disposed of through the new outfall pipe which would discharge directly into the Mangatainoka River.

[98] The modifications to the existing system required to enable this dual system have been described in para [10] (above).

Discharge Parameters and Proposed Wastewater plus Condensate Discharge Permits

[99] Dr Russell advises that Fonterra has not proposed any changes to the conditions of its existing wastewater discharge permit (102907). These conditions will continue to apply when only wastewater is being disposed of to land during the wetter months of the year. During the period when condensate is also discharged to land, it will use the wastewater infrastructure and be discharged in conjunction with the wastewater stream.

[100] In the following table, we have highlighted in bold where we have identified differences between the existing wastewater discharge permit (MWRC 102907) and the proposed wastewater and condensate combined discharge permit (106045).

Condition	Wastewater Discharge Permit (MWRC 102907)	Wastewater and Condensate Combined Discharge Permit (106045)
Maximum Daily Discharge	2,500m³ per day	3,200m³ per day (10 day rolling average) with maximum of 3,500m ³ within any 24 hour period
Maximum Application Rates	8mm per hour on Four Macs and Tui Farms (fixed ground irrigation systems) 15mm per hour on Brechin, O'Brien and Tui Farms (travelling irrigator systems) 250m³ per ha in any one application 500m ³ per ha in any irrigation	8mm per hour on Four Macs and Tui Farms (fixed ground irrigation systems) 15mm per hour on Brechin, O'Brien and Tui Farms (travelling irrigator systems) 360m³ per ha in any one application 500m ³ per ha in any irrigation



	cycle	cycle
Rest Period	16 days between each irrigation cycle	16 days between each irrigation cycle
Maximum Nitrogen Loading	500kg-N/ha/yr	350 N/ha/yr

[101] Dr Russell commented on the condition in the existing permit under which Fonterra can apply up to 2,500m³ per day of wastewater onto land and advised that the current application rates are below 1,400m³ per day and typically average 1,000m³ per day. This means that there is unused volumetric capacity of around 1,100m³ per day¹².

[102] At the Council hearing Fonterra sought consent to irrigate condensate to land when the soil moisture on the irrigation farms was less than 85%:

- (a) *in the months of January to March at all river flows; and*
- (b) *in the month of December only when the river flows were less than ½ median flows (4.45m³/sec measured at the Pahiatua township gauging station)¹³.*

[103] Dr Russell advised that a key focus of his evidence at this hearing was to rebut the recommendation of the Council officers that the period of the land based disposal of condensate should include the month of April. That was because the soils on the farms would likely be at or near 100% saturation in April. In his opinion, with both wastewater and condensate being applied from January to March, extending this combined irrigation into April could be problematic with the potential for soil pugging and compaction, restricted grass growth, ponding and surface water run-off. He based this opinion on an assessment he had undertaken of the daily soil moisture levels between 2004 and 2009.

[104] Dr Russell also advised that the Council hearing panel was of the view that a parameters based approach was preferable for determining the conditions and timing



¹² Russell EiC 14 May 2012, para 9.

¹³ Russell EiC 16 May 2013, para 4.

under which the disposal of condensate should switch from a land based system to discharge to the river.

[105] Following the Council hearing, discussions were initiated between Fonterra and Council officers to agree such a parameter based approach. As a result of these discussions, the following conditions have been agreed between the two parties:

Irrigation to land will occur:

- (a) *during the months of January, February and March when the soil moisture is less than 85%;*
- (b) *during December, when:*
 - (i) *the river flow is less than ½ median flows (4.45 m³/sec) and*
 - (ii) *the soil moisture is less than 85%.*
- (c) *at any time (regardless of month) when:*
 - (i) *the level of dissolved oxygen saturation has fallen below 80% for a sustained period; or*
 - (ii) *the river flow is below the mean annual low flow (1.578m³/sec) and soil moisture is less than 85%*

[106] These conditions have been carried forward and form the basis of the proposed discharge permit 106045, the contents of which have been agreed between Fonterra and the Council.

Effects of Proposed Increases in Some Application Rates

[107] Mr Gillespie questioned Mr Dodds and Dr Russell about the level of the increases in some of the irrigation application rates from those permitted under the existing wastewater discharge permit and those proposed by Fonterra (and agreed to by the Council) when combined discharge is operating.

[108] Much of Mr Gillespie's questioning related to historical increases in the application rates contained in the existing wastewater discharge permit for which we had no evidence and we have deemed to have only limited relevance to this appeal.

[109] In responding to Mr Gillespie, Mr Dodds noted that there would be no increase in the maximum permitted discharge between the existing wastewater



discharge permit (500m³ per ha in any irrigation cycle) and the proposed combined discharge. There would also be no reduction in the rest period between these cycles (16 days). There would, however, be an increase in the 250m³ per ha in any one application rate provided for under the existing wastewater permit, to 360m³ per ha under the combined discharge.¹⁴

[110] For his part, Dr Russell pointed out that the 360m³ per ha applies only for a restricted period of the year during the summer months when the soil conditions are generally drier and more suitable for taking the increased volume of effluent¹⁵. When the condensate is being discharged to the river in the wetter months, the existing limit of 250m³ per ha would continue to apply.

[111] Dr Russell advised that he had used the Overseer model to estimate the levels of nitrogen leaching from the two discharge streams, the wastewater stream on its own and the combined wastewater and condensate stream. This modelling has shown that there will be a negligible increase in the applied nitrogen levels between these two streams, (from 250kgN/ha/yr to 253kgN/ha/yr). In addition, groundwater monitoring undertaken since 2005 has shown that ground water nitrate-nitrogen levels have remained relatively constant over this period. In Dr Russell's opinion the effect of the added condensate discharge on these nitrate-nitrogen levels will be less than minor¹⁶.

[112] Dr Russell was also confident that the buffer zones (20m to any water course) will ensure that there is no direct input to surface waters from the irrigation areas and that the increase in the volume of irrigation with the addition of the condensate will have a negligible effect on surface water quality¹⁷.

[113] In her opening legal submissions, Ms Carruthers explained the background to the decrease in the maximum nitrogen loading from 500kg-N/ha/yr under the wastewater permit to 350kg-N/ha/yr for the combined discharges. She advised that while there had been no suggestion prior to the Council hearing for this reduction,

¹⁴ NoE, pages 39, 40.

¹⁵ NoE, page 57.

¹⁶ Russell EiC 14 May 2012, paras 18 – 21.

¹⁷ Russell EiC 14 May 2012, paras 22, 23.



this had been suggested by the Council's planner during the hearing. While Fonterra initially opposed this amendment and did not consider that the hearing panel had the ability to make the reduction, as the existing limit is higher than required, the reduction had been accepted by Fonterra for the new permit on an *Augier* basis¹⁸.

[114] All of this was supported by the Council's witness, Mr Barnett. In his opinion the conditions applicable during times of combined discharge adequately incorporate his suggestions and address his concerns arising from the application¹⁹.

More Extensive Land Based Irrigation

[115] Dr Russell provided a detailed response to Mr Gillespie's claim that Fonterra has additional land available for irrigation which would enable irrigation to be undertaken for longer periods²⁰. His response is best summarised in this reply to a question from Mr Gillespie:

The simple answer to that is we do not have a larger area of land to irrigate onto at this point in time. There are no agreements in place or no permanent agreements in place with the new land area, the Holland farm, and that will not happen until the necessary infrastructure would be built as part of the expansion process. So it's not just a simple matter of saying yes we could secure more land. Securing that additional land also requires (sic-relies) on a number of other parallel operations as part of the expansion and the expansion is not just simply associated with the waste water treatment²¹.

[116] Key to this response is Dr Russell's advice that the additional land area identified by Mr Gillespie is directly related to the discharge permits being sought by Fonterra under a separate application to enable expansion of the factory. This land is not available for effluent disposal under this appeal. In any event, we are satisfied from the evidence which we heard that the area of land which Fonterra proposes for discharge of the condensate is more than adequate for that purpose and if it is undertaken in accordance with the proposed conditions, any adverse effects of the discharge of condensate to land will be no more than minor.

¹⁸ Opening Submission, paras 6.24 to 6.27.

¹⁹ EiC, para 10.

²⁰ Rebuttal Evidence, paras 28 to 31, 47 to 53, 58 to 60, 67 to 68.

²¹ NoE, page 67.



Odour and Spray Drift

[117] We now turn to examine Mr Gillespie's concern about the potential for odour and spray drift from the combined waste stream to adversely affect the atmosphere.

[118] Dr Russell advised that the condensate contains very low levels of contaminants and that the potential for odours from the combined waste stream will be controlled through Fonterra's existing Irrigation Management Plan. The measures contained in this plan include spraying the effluent in a fresh condition, the regular removal of sludge from the storage silos, clean water flushing of the irrigation lines, the monitoring of wind speeds and directions, the avoidance and/or minimisation of ponding and the maintenance of specified buffer distances from farm boundaries and nearby dwellings²².

[119] Mr Gillespie said that when walking up and down the river, on a number of occasions he been assailed by rank and unusual odours²³. He had also observed wastewater lying in ponds on the irrigated land²⁴ and that in his opinion a complaints list maintained by Fonterra... *is dishonest*²⁵.

[120] Mr Dodds outlined Fonterra's procedures for dealing with complaints. In describing these procedures, he acknowledged that in the past the complaints list may not have been accurate. He advised that as a result of a recent review of the complaints procedures²⁶, there had been staff briefings to improve the complaints management practices and from his own perspective, as he has overall responsibility for dealing with complaints, he would be taking a keener interest in complaints management.

[121] Mr Gillespie asked Mr D P Wright (Fonterra's National Consents Manager) how Fonterra proposed to control odour. Mr Wright responded²⁷:

²² EiC 14 May 2012, para 26.

²³ EiC, para 28 on page 16.

²⁴ EiC, para 6 on page 70.

²⁵ EiC, para 3 on page 69.

²⁶ Rebuttal Evidence, paras 19 to 23.
²⁷ NoE, page 50.



Techniques for minimising the potential for odour largely are built around irrigation of waste water as fresh as possible and given the need to dispose of volumes on a, you know, hourly or at least daily basis, there shouldn't be any accumulation or opportunity for the waste water to deteriorate and start to smell, so really, it's around the operation of the irrigation systems and ensuring that the waste water is sprayed as fresh as possible.

And in response to a question from Mr Gillespie about setbacks, Mr Wright said²⁸:

I think a lot of the buffer and setbacks really are a numerical number and that in operating of any irrigation scheme, operations have to take account of things such as wind direction and speed and adjust where they irrigate accordingly, to maintain compliance with those buffer distances. So I don't know that you can simply allude to a number because of an adjacent river body, but you have to consider operational figures in terms of operating the scheme depending upon, you know wind speed, wind direction at times.

And further;

You'd have to then look to have the irrigation, or I s'pose, or the, travelling irrigator stopping accordingly so that the under, under the conditions prevailing at the time, that that buffer distance is maintained and that may mean that the irrigator has to stop earlier than under a windy condition, as opposed to a still condition, or wind blowing in an opposite direction. So yes there's a lot of daily management aspects associated to ensure compliance.

[122] In answer to a question from the Court, Dr Russell advised that the addition of the condensate to the wastewater would not enhance or further increase the odour that is generated by the wastewater. Like Mr Wright, he stressed that the control of odour was very much dependent on good management practices with a key focus being on irrigation of the waste streams in a fresh condition²⁹.

[123] It is evident from these responses that the control of odour places a heavy responsibility on Fonterra to be diligent and pro-active in following the procedures in



²⁸ NoE, page 51.

²⁹ NoE, page 70.

its Irrigation Management Plan. It would seem from Mr Dodd's statements that there is some room for improvement in the way in which Fonterra staff receive complaints, investigate them and respond to them.

[124] Having said that, we accept the advice of Dr Russell that the addition of condensate to the irrigation waste stream should not result in any noticeable increases in odour levels.

Findings on Land Based Disposal

[125] In the absence of any substantive evidence to the contrary, we accept the evidence of the witnesses from Fonterra and the Council that there will be negligible (if any) adverse environmental effects, including any offensive odour or spray drift, from the land based application of the combined wastewater and condensate waste streams. This is on the basis that the combined discharges comply with the conditions set out in the proposed Council's Discharge Permits 106045 and 106046.

Statutory Instruments

[126] In this section of our decision, we identify and consider the various statutory instruments which are relevant to our considerations. We will try to be reasonably concise in doing so. Ms Shirley and Ms Taylor gave extensive evidence on the relevant instruments, both at our hearing and at the Council hearing of these applications. Their assessments of the Fonterra proposals against the objectives and policies of those instruments were not challenged at all at our hearing, except in an extremely limited extent as to one aspect of Ms Shirley's evidence.

[127] Further, the Council hearings panel made a series of findings in its decision, assessing the Fonterra proposal against the statutory instruments. Section 290A requires us to have regard to the decision of the Council hearings panel, which we shall do.

[128] Mr Gillespie did not advance any coherent case to us in either his submissions, evidence or limited cross-examination of the planning witnesses, which led us to the view that the conclusions which those witnesses and the Council had reached in their assessment of the Fonterra proposal against any objectives and



policies of relevant planning instruments were wrong. Accordingly, we propose to undertake this section of our decision on the basis that we will identify the various relevant statutory instruments, identify the relevant provisions of those instruments for the purposes of our consideration and summarise the conclusions of the planning witnesses in respect of those various provisions.

[129] The identified statutory instruments were:

- The National Policy Statement for Freshwater Management (2011) (Freshwater NPS);
- The National Environmental Standard for Sources of Human Drinking Water (2007) (Drinking Water NES);
- Regional Policy Statement for Manawatu-Wanganui (RPS);
- Manawatu Catchment Water Quality Regional Plan (MCWQ);
- Regional Plan for Beds of Rivers and Lakes and Associated Activities (BRL Plan);
- Regional Air Plan for Manawatu-Wanganui (RAP);
- Proposed One Plan (POP);

We have excluded from our consideration the Notice which we have discussed in the Legal Issues section of this decision. We deal with the above instruments in the order set out above.

Freshwater NPS

[130] The Freshwater NPS came into effect after the resource consent applications were lodged, but its water quality objectives are relevant to our consideration.

[131] Ms Taylor assessed the relevant provisions of the Freshwater NPS in these terms:³⁰

61 Objective A1 aims to safeguard the life-supporting capacity, ecosystem processes and indigenous species and their ecosystems when sustainably managing land use activities and the discharge of contaminants. Objective A2 aims to maintain and improve the water quality, while, protecting the quality of



outstanding fresh water bodies and the significant values of wetlands and improving the quality of waterbodies degraded by human activities.

62 *As outlined in the evidence of Mr Kennedy, and in recognising the Proposal as a whole (relocated discharge location, reduction in the maximum discharge temperature to 35°C and irrigation to land during summer months), the life-supporting capacity, ecosystem processes and indigenous species of the Mangatainoka River will be safe-guarded and water quality of the river will also be improved.*

[132] On the basis of those findings, Ms Taylor concluded that the water discharge consents were consistent with the relevant objectives and policies of the Freshwater NPS.

[133] Ms Shirley concluded that as long as the consent conditions applicable to proposed consent 104660 were adhered to, potential adverse effects of the discharge on the river could be avoided or mitigated. She considered that the conditions imposed were feasible and dependable and ... *ensure that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*³¹ Ms Shirley separately considered the ongoing short term discharge to the Mangamutu Stream and concluded that as long as discharge to the stream terminated by (then) 30 April 2014 that ... *as a whole, the overall removal of the discharge from the [Mangamutu] Stream will meet the purpose of the NPS.*³²

Drinking Water NES

[134] The Drinking Water NES is a relevant consideration in this case because the intake for the Pahiatua town water supply is located approximately 1km downstream of the proposed discharge point of the condensate into the Mangatainoka River.



³¹ E.C., para 65.
³² E.C., para 66.

[135] Ms Shirley considered the provisions of Regulations 7 and 12 of the Drinking Water NES and concluded that the proposed discharge would not breach health quality criteria, exceed aesthetic guidelines or cause an event which would have significant adverse effects on the downstream water supply for Pahiatua township. She did not consider the proposal to be contrary to the Drinking Water NES.

[136] Ms Taylor concluded that ... *the Pahiatua drinking water supply will not be affected by the discharge of condensate. On this basis, the drinking water NES does not preclude the granting of the discharge permit being sought by Fonterra.*³³

RPS

[137] Ms Taylor referred to Policies 8.3(z) and 11.3 of the RPS and concluded that the proposal was consistent with these policies.

[138] Ms Shirley considered that the Operative RPS should have little weight in our considerations now being largely (if not entirely) overtaken by POP. She considered objectives and policies contained in Part Four and Part Five of the RPS. She had some difficulty applying the objectives and policies contained in Part Four which related to issues specifically relevant to iwi. She recorded that Fonterra undertook consultation with the two iwi groups having mana whenua over the resources and noted that they filed no submissions in opposition.

[139] Part Five of the RPS has objectives and policies relating to water, natural character and air quality. In each instance, Ms Shirley concluded that Fonterra's proposal was not contrary to or was consistent with, the objectives and policies. She acknowledged that the discharge to the Mangamutu Stream was causing significant adverse effects on that stream and considered that if this was allowed to continue on a long-term basis it would be contrary to the purpose of the Act (and presumably the objectives and policies). However, she concluded that because the discharge to the Mangamutu Stream was to be allowed to continue only for a short term in the context of the overall consent, then it was not contrary to the objectives and policies.



MCWQ

[140] Ms Taylor identified the MCWQ objective to ... *enhance surface water quality in the Manawatu catchment by the year 2009 to a level which meets the needs of all people and communities while safeguarding the life-supporting capacity of the water*. She contended that under Fonterra's amended proposal, surface water quality in the catchment would be enhanced by removal of the discharge from the river over the summer and the proposal to reduce the temperature of condensate which is discharged into the river. She acknowledged the adverse effects of the present discharge into the Mangamutu Stream which would be remedied once the new infrastructure was established.

[141] Ms Shirley referred to Policies 2, 2a, 3, 4, 5, 6, 7 and 9 of the MCWQ and having done so concluded that the water discharge applications were neither inconsistent with nor contrary to, the relevant provisions of that Plan. Ms Shirley similarly referred to the objective identified in Ms Taylor's evidence and the policies which Ms Taylor had discussed. She concluded that:

137 *By removing the discharge from the [Mangamutu] Stream, and by moving the discharge to land during times of low flows when the potential for adverse effects is greatest, I consider, overall, that Fonterra's proposal is not contrary to these policies.*

138 *I also consider that with the imposition of the mitigation proposed by Fonterra in their AEE and with the conditions attached as Annex one to this evidence, that the discharge into the Mangatainoka River will be consistent with these Policies.*

BRL Plan

[142] The provisions of this Plan are only relevant to the outfall consent (application 104661). Ms Taylor identified Objectives 1, 2, and 3, together with Policies 2, 3, 6, 7 and 8 as being relevant considerations in this instance. She considered that the outfall structure was not inconsistent with, or contrary to, these relevant provisions.

[143] Ms Shirley testified that the objectives and policies of the BRL had been taken into account by virtue of the proposed location and the design of the outfall



structure and was satisfied that the proposal was consistent with those objectives and policies.

RAP

[144] Ms Taylor contended that the condensate irrigation activity and associated discharges to air were not inconsistent with the relevant objectives and policies of RAP (inter alia).

[145] Ms Shirley identified the objective and policies of RAP which were relevant to consideration of these applications and concluded:

Having considered the objective and policies of this plan, I am satisfied that the activity is consistent with these provisions based on the consent conditions requiring setback distances (Conditions 16-19) and restricting any discharge beyond the property boundary (Condition 34)

[146] The Council hearings panel agreed with the planning evidence which it heard and concluded that ... *the proposed discharge to air associated with land disposal of condensate will be consistent with the relevant objectives and policies of the Regional Air Plan.*³³

POP

[147] The planning witnesses agreed that because of its advanced stage in the RMA process, POP was the statutory instrument to which greatest weight should be given in terms of the various regional documents. Both witnesses undertook a comprehensive analysis of the proposal against the objectives and policies contained in POP.

[148] Attachment A to Ms Taylor's initial evidence to the Council hearing (which was in turn Appendix A to her evidence for our hearing) was a summary of the objectives and policies contained in POP which were relevant to our consideration of all of the consents sought (both water discharge consents and land discharge consents). She identified nine relevant objectives and 23 relevant policies.



[149] Ms Taylor expressed the view that the water discharge consents were not contrary to the relevant objectives and policies of POP.³⁵ Because she had treated the land discharge consents as discretionary activity consents, she applied a somewhat different yardstick to her consideration of those consents but concluded that they were *not inconsistent* with the relevant objectives and policies of POP (nor any of the other documents to which we have referred).

[150] In her assessment of the applications against the objectives and policies of POP, Ms Shirley concluded that:

- The proposed discharge to the Mangatainoka River is consistent with the relative objectives and policies;
- The construction of the outfall structure is consistent with the relevant objective and policy of POP;
- The continued discharge to the Mangamutu Stream for a short period of time is not contrary to the relevant objectives and policies of POP;
- The proposed discharge to land is consistent with the relevant objectives and policies of POP;
- The discharge to air is consistent with the relevant objective and policy of POP.

[151] Mr Gillespie did not cross-examine Ms Taylor at all on her conclusions about objectives and policies. In both his evidence and cross-examination of Ms Shirley, he raised in some detail the issue of the Notice under the Water and Soil Conservation Act 1967. For the reasons set out previously³⁶ we do not consider the Notice is a relevant instrument for our considerations.

[152] We accept the various assessments and conclusions of Ms Taylor and Ms Shirley as to how the Fonterra proposal sits when measured against the objectives and policies of the various statutory instruments set out above. We have also had regard to and concur with the findings contained in the Council decision regarding



³⁵ EC 14 May 2012, para 94.
³⁶ [148] above.

those matters. We find that the proposal is either consistent with or not contrary to the objectives and policies of any of those instruments.

Section 104D RMA

[153] Section 104D provides as follows:

- (1) *Despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*
 - (a) *the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or*
 - (b) *the application is for an activity that will not be contrary to the objectives and policies of—*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) *the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*
 - (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
- (2) *To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.*

[154] The tests contained in s104D(1)(a) and (b) are known as the *gateway tests*. Consent may be granted to an application for a non-complying activity only if one of the two alternative tests is met. For the reasons identified in Paras [50]-[54] (above), we have bundled all four of the consents sought together so that they all have the status of non-complying activity consents and all must satisfy one or other of the gateway tests.

[155] In considering the effects gateway³⁷ we are required to find that the adverse effects on the environment will be *minor*. In making that assessment, we refer to the preceding sections of this decision entitled *Assessment of Effects – River and Stream* and *Land Based Disposal*.



Section 104D(1)(a) RMA.

[156] In para [81] we agreed with the conclusion of the water quality witnesses that ... *the discharge of condensate to the Mangatainoka River under the specified conditions will have no more than minor adverse effects on the receiving waters.* In para [88] we found that ... *the design and positioning of the outfall structure is appropriate and will not result in any adverse effects on the river environment.*

[157] Our findings on the effects of land based disposal are summarised in para [125] in these terms: ... *we accept the evidence of the witnesses from Fonterra and the Council that there will be negligible (if any) adverse environmental effects, including any offensive odour or spray drift, from the land based application of the combined waste water and condensate waste streams. This is on the basis that the combined discharges comply with the conditions set out in the proposed Council's Discharge Permits 106045 and 106046.*

[158] We have accordingly found that the discharge direct to the Mangatainoka River, establishment of the discharge infrastructure and the discharges to land and air will have adverse effects that are no more than minor.

[159] The problematic discharge in terms of adverse effects is the discharge to the Mangamutu Stream which is to continue until 30 November 2014. There is no doubt (and is conceded by Fonterra) that viewed in isolation, the adverse effects of the discharge on the stream itself are significant and must be categorised as more than *minor*. However, we concur with Ms Carruthers' submission that in assessing the effects we:

- Should undertake a realistic appraisal of the existing and future environment;³⁷
- Should have regard to proposed mitigation;³⁸
- May disregard effects that are remote in probability;³⁹

³⁷ *Living Earth Limited v Auckland Regional Council*, Decision A126/2006 and *Rodney District Council v Eyres Eco-Park* [2007] NZRMA 1 (HC).

³⁸ *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA).

³⁹ *Bayley* (above).



- May have regard to the duration of an effect in determining whether overall the effects are more than minor.⁴¹

[160] Ms Carruthers referred to the Environment Court finding in *Living Earth* that ... *minor means lesser or comparatively small in size or importance; and the judgement is to be made taking the adverse effects as a whole.*⁴²

[161] The ongoing discharge to the Mangamutu is proposed for a short term to enable improvements to be made to Fonterra's discharge system, which will remove the discharge of condensate from the stream altogether by 30 November 2014. At that time, any adverse effects on Mangamutu Stream are avoided altogether. Accordingly, whilst acknowledging ongoing adverse effects for a short term to the Mangamutu Stream, we concur with Ms Taylor's conclusion that ... *given the proposed avoidance, remediation and mitigation measures that are to be implemented, the adverse effects of the Proposal as a whole ... are also minor.* We determine that the proposal passes through the effects gateway of s104D(1)(a).

[162] Insofar as the policies gateway is concerned, we refer to our findings under that section of our decision entitled *Statutory Instruments*. In that section, we identified a range of statutory instruments which were relevant to determination of this proposal.

[163] In considering the policy gateway, it is necessary to consider relevant objectives and policies as a whole. We also observe that when assessing a proposal against objectives and policies, the outcome of the assessment is often driven by conclusions which have been reached as to the effects of that proposal. Objectives and policies commonly seek to achieve certain effects outcomes. In this case, we have found the adverse effects of the proposal when considered as a whole to be no more than minor.



⁴¹ *Living Earth* (above).
⁴² *Living Earth* (above) para [524].

[164] Ms Taylor concluded that having regard to the overall mitigation measures to be adopted by Fonterra, the proposal was not contrary to any objectives and policies of the relevant planning instruments (in the sense of being repugnant to those policies and objectives).⁴³

[165] Ms Shirley concluded that the removal of the discharge to the Mangamutu Stream and the discharge to land meant that Fonterra's proposals were entirely consistent with the objectives and policies of MCWQ and POP.⁴⁴

[166] We accept the evidence of the witnesses in that regard. Even in the absence of direct evidence by the witnesses in that respect, that would have been our finding. Accordingly, we determine that the applications pass through the policy gateway of s104D.

Appraisal

[167] We commence our appraisal of the Fonterra applications by consideration of the provisions of ss104, 105 and 107 RMA. Having done so, we will then consider the provisions of Part 2 and reach a final conclusion as to outcome.

Section 104 RMA

[168] Section 104 relevantly provides:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –

- (a) any actual and potential effects on the environment of allowing the activity; and*
- (b) any relevant provisions of—*
 - (i) a national environmental standard;*
 - (ii) other regulations;*
 - (iii) a national policy statement;*
 - (iv) a New Zealand coastal policy statement;*



⁴³ EIC 14 May 2012, para 135.

⁴⁴ Shirley EIC, para 138 (in relation to MCWQ) and paras 123-130 (in relation to POP).

(v) a regional policy statement or proposed regional policy statement;

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must have regard to the value of the investment of the existing consent holder.

[169] We considered the actual and potential effects on the environment of allowing the activity in the preceding paragraphs [59]-[125]. We have concluded that any adverse effects arising from Fonterra's proposal are no more than minor. The only possible exception to that is the ongoing short term discharge to the Mangamutu stream, which will be avoided in the longer term. We do not give Fonterra any particular credit for that avoidance as it is Fonterra which has created the unacceptable effect on the stream in the first place. However, the significance of removal of discharge to the stream by 30 November 2014 is that when the effects of Fonterra's proposal are assessed holistically, they are no more than minor.

[170] We considered the relevant provisions of the various statutory instruments to which we are required to have regard in paras [126]-[152] of this decision. We have concluded in each case that the Fonterra proposal was not contrary to the objectives and policies of the relevant planning instruments and that in some instances it was entirely consistent with those relevant objectives and policies.

[171] The only *other matter* which might be of some relevance to our considerations in this case is a document called the Manawatu River Leaders Accord (the Accord) which was signed in August 2010. This is a non-statutory document entered into by a group of parties with interests in the Manawatu River, known as the Manawatu River Leaders Forum. The focus of the Forum was the rehabilitation and protection of the health and wellbeing of the Manawatu River Catchment (including the Mangatainoka River) for future generations. Fonterra was a participant in the forum.



[172] The Accord identified six key areas which needed to be addressed for Manawatu River quality to improve. An Action Plan was established under the Accord and page 31 of the Action Plan identified the following actions in relation to Fonterra's Pahiatua site.

- Complete the renewal of the condensate discharge consent;
- Propose to irrigate condensate during summer months;
- Discharge of condensate to the Mangatainoka during winter only;
- Reduce temperature of condensate from 50 to 35 degrees.

[173] It will be apparent that Fonterra's proposals are in accordance with the Action Plan. We do not place any great weight on that in our considerations as the Accord and Action Plan are not statutory documents and there may be some scepticism from other people (such as Mr Gillespie) who might contend that the actions required by Fonterra do not go far enough. However, we accept that Fonterra's proposal is in accordance with its obligations under the Accord.

[174] Section 104(2A) obliges us to have regard to the investment of the existing consent holder when considering an application affected by s124, which applies to situations where existing resource consents are due to expire and the consent holder has applied for new consents for the same activity. Fonterra's proposal falls within the ambit of s104(2A). Both Ms Shirley and Ms Taylor referred to this provision in their evidence and agreed with the conclusions reached on this issue by the Council hearings panel which found that ... *Fonterra's investment in the Mangamutu factory process as well as its commitments to suppliers and markets that rely on that factory are sizeable. It is also plain that the investment is of value to the local, regional and national economies.*⁴⁵

[175] We accept and will have regard to that finding in our determination.



Council decision, para 5.11.

Section 105 RMA

[176] Section 105 relevantly provides as follows:

105 Matters relevant to certain applications

(1) If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—

- (a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
- (b) the applicant's reasons for the proposed choice; and*
- (c) any possible alternative methods of discharge, including discharge into any other receiving environment.*

The matters set out above are mandatory considerations in this case.

[177] The nature of the discharge and the sensitivity of the receiving environment to adverse effects were both matters canvassed in detail in the evidence of Dr Russell and Messrs Barnett, Brown and Kennedy, which we have analysed in some detail in those sections of our decision dealing with the discharges to water and land. We refer to the findings which we have made in paras [81] and [125] (above) in that regard.

[178] Fonterra's reasons for adopting the discharge methods which they propose were also incorporated into the evidence of the above witnesses as well as that of Messrs Boakes, Dodds, and Wright to which we have previously referred. We are satisfied with the reasons which Fonterra has given for the proposal which it now advances. Fonterra seeks to improve its present system of discharge of condensate from the Pahiatua factory and we accept that its proposals achieve that.

[179] We also accept that Fonterra has given genuine consideration to alternative methods of discharge and discharge into other receiving environments. The proposal to switch from entirely river-based disposal to combined river and land-based disposal, as compared to the previous discharge system, intrinsically involved a consideration of alternatives.



[180] Mr Gillespie advanced the alternative of an entirely land-based system of disposal or alternatively disposal by way of land irrigation for a longer period than presently proposed and we refer to the findings which we made in para [116] above.

[181] We conclude that there is nothing in the provisions of s105 which precludes the grant of consent.

Section 107 RMA

[182] Section 107 RMA relevantly provides:

107 Restriction on grant of certain discharge permits

(1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—

(a) The discharge of a contaminant or water into water; or

(b) A discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

(ba) The dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,—

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

(c) The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) Any conspicuous change in the colour or visual clarity:

(e) Any emission of objectionable odour:

(f) The rendering of fresh water unsuitable for consumption by farm animals:

(g) Any significant adverse effects on aquatic life.

(2) A consent authority may grant a discharge permit or a coastal permit to



do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

- (a) That exceptional circumstances justify the granting of the permit; or*
 - (b) That the discharge is of a temporary nature; or*
 - (c) That the discharge is associated with necessary maintenance work—and that it is consistent with the purpose of this Act to do so.*
- (3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.*

[183] We had previously identified that the ongoing discharge to the Mangamutu Stream may contravene the standard contained in s107(1)(g) and accordingly preclude the grant of consent to that discharge on the basis that it has ... *significant adverse effects on aquatic life*. As we noted, the heat of the condensate discharge provides a barrier to the passage of fish. However, we refer to the findings which we made in paras [27]-[32] (above) that the discharge falls into the *exceptional circumstances* and *temporary* categories.

[184] We conclude that the provisions of s107 do not preclude the grant of consent.

Part 2

[185] Ultimately, our Part 2 consideration requires us to make a finding as to whether or not a grant of consent to the proposal advanced by Fonterra will achieve the purpose of the Act, namely sustainable management of the resources in question. In assessing that question we are required to have regard to the provisions of ss 6, 7 and 8 RMA.



[186] Section 6 identifies matters of national importance which are to be recognised and provided for when considering whether or not to grant consent. Those matters are:

- (a) *The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:*
- (b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
- (c) *The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
- (d) *The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*
- (e) *The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*
- (f) *the protection of historic heritage from inappropriate subdivision, use, and development.*
- (g) *the protection of protected customary rights.*

[187] We identify those provisions of s6 which we consider are relevant in this case:

- Section 6(a) – other than the temporary discharge to the Mangamutu Stream, we do not consider that the Fonterra proposal adversely affects preservation of the natural character of the rivers under consideration in this case. We have previously noted that effects on the stream will be avoided by 30 November 2014. The proposed outfall structure into the Mangatainoka River is limited in scale and none of the evidence we heard suggested that it would interfere with ecological and physical processes in the river;
- Section 6(b) - the outstanding natural feature of the river as a trout fishery has been identified in Policy 8.3(z) of the RPS. Again, we accept that ongoing discharge to the Mangamutu Stream impacts on its viability as a trout fishery but that removal of the discharge from the stream will avoid that effect. We refer to our previous findings on the effect of the discharge on the river and



conclude that adverse effects on the outstanding feature of the fishery will be no more than minor (if there are any adverse effects at all);

- Section 6(c) – the proposed conditions of consent require Fonterra to comply with water quality standards/targets of the relevant plans, which had been developed to protect the life supporting capacity of water bodies. Provided the conditions are complied with, effects of the proposal on indigenous fauna will be less than minor;
- Section 6(e) – Fonterra undertook consultation with Ngati Kahungunu and Rangitane o Tamakai Nui a Rua prior to lodging the applications and sought that the applications reflected any concerns expressed by iwi. Neither iwi group submitted in opposition to the proposal. We heard no evidence to suggest that the relationship of Maori with their ancestral lands or waters would be affected by the proposal.

[188] We conclude that the Fonterra proposal is not inconsistent with the relevant provisions of s6.

[189] Section 7 identifies various matters to which particular regard must be had when considering an application for resource consent. Those matters are:

- (a) *Kaitiakitanga:*
 - (aa) *The ethic of stewardship:*
 - (b) *The efficient use and development of natural and physical resources:*
 - (ba) *the efficiency of the end use of energy:*
 - (c) *The maintenance and enhancement of amenity values:*
 - (d) *Intrinsic values of ecosystems:*
 - (e) *Repealed.*
 - (f) *Maintenance and enhancement of the quality of the environment:*
 - (g) *Any finite characteristics of natural and physical resources:*
 - (h) *The protection of the habitat of trout and salmon:*
 - (i) *the effects of climate change:*
 - (j) *the benefits to be derived from the use and development of renewable energy.*



[190] We consider that the following provisions of s7 are relevant considerations in this case.

- Section 7(a) and (aa) - we refer to our findings in respect of s6(e) above and consider that they are relevant in respect of this matter also;
- Section 7(b) - approval of the applications will ensure that a waste product of the Fonterra's dairy factory process is disposed of in an efficient and appropriate manner;
- Sections 7(c),(d),(f) and (h) - we consider that the above matters are intrinsically related in this case where the Mangatainoka River is enjoyed for both its intrinsic qualities and as a fishery. For the reasons previously discussed, we are satisfied that once the discharge to the Mangamutu Stream is removed, the Fonterra proposal will not be in conflict with and will have no effects on these matters which are more than minor.
- Section 7(g) - we recognise that the capacity of the Mangatainoka River to absorb discharges such as that from the Fonterra factory is finite. We are satisfied, that once Fonterra establishes its upgraded discharge system and removes the discharge to the Mangamutu Stream, the discharge of condensate will be well within the capacity of the river to absorb and will not have any adverse effects on the river which are more than minor. We are satisfied that the land area proposed for irrigation over the summer period has sufficient capacity to accommodate the discharge, provided that the conditions of consent are adhered to.

[191] We conclude that the Fonterra proposal is not inconsistent with the relevant provisions of s7.

[192] Section 8 RMA provides:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[193] We refer to our earlier findings with regard to the provisions of s6(e) and 7(a) and (aa). We consider that in general terms the principles of the Treaty have been



taken into account in the consent process through engagement with iwi prior to lodgement of the applications.

[194] Section 5 RMA provides:

5 Purpose

- (1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*
- (2) *In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—*
 - (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
 - (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[195] In this instance, the natural and physical resources with which we are concerned are the Fonterra factory, the Mangatainoka River and its tributaries and the land which Fonterra proposes to use for the discharge of condensate.

[196] We are satisfied that the approval of these applications will enable Fonterra to continue the efficient operation of its dairy factory, which enables both Fonterra and the wider community to provide for their social and economic wellbeing. The dairy factory is an important provider of services to the dairy farming industry and provider of work opportunities in this region.

[197] The Mangatainoka River is an important natural resource which enables people and communities to provide for their social and cultural wellbeing through enjoyment of its natural characteristics, its amenity value and its value as a fishery.

These are matters which must rate no less highly in our considerations than the



economic and related social benefits to which we must have regard. We are also aware of community concerns as to the wellbeing of the Mangatainoka River (and other rivers in the region).

[198] However, we are satisfied that provided the conditions of consent agreed to by the Council and Fonterra in this case are adhered to, the discharges and works proposed in this case will have no more than minor (if any) adverse effects on the river environment (once the discharge is removed from the Mangamutu Stream) nor on the land environment and will satisfy the requirements of s5(2)(a)-(c).

Outcome

[199] The appeal by Mr Gillespie is dismissed.

[200] The appeal by Fonterra is upheld.

[201] Consent is granted to all of the consents sought, subject to the conditions agreed by Fonterra and the Council (with amendment of the date for cessation of discharge to the Mangamutu Stream). The Council is directed to forward to the Court for execution under seal, the resource consents in final form incorporating those conditions.

Costs

[202] Costs are reserved. Any costs applications to be made and responded to in accordance with the Environment Court Practice Note 2011.

DATED at Wellington this 18th day of October 2013

For the Court:

B P Dwyer
Environment Judge

