IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision [2025] NZEnvC 398

IN THE MATTER	of four appeals under cl 14 of Schedule 1 of the Resource Management Act 1991
BETWEEN	TE RŪNANGA O RAUKAWA
	(ENV-2021-WLG-000020)
	NGĀTI TURANGA
	(ENV-2021-WLG-000021)
	ANDREW EDWARD DAY
	(ENV-2021-WLG-000022)
	WELLINGTON FISH AND GAME COUNCIL
	(ENV-2021-WLG-000023)
	Appellants
AND	MANAWATŪ-WHANGANUI REGIONAL COUNCIL
	Respondent
AND	FEDERATED FARMERS OF NEW ZEALAND HORTICULTURE NEW ZEALAND ROYAL FOREST AND BIRD SOCIETY OF NEW ZEALAND INC VIVIENNE TAUEKI HOROWHENUA DISTRICT COUNCIL
	Section 274 Interested Parties

Court:	Environment Judge L J Semple Environment Commissioner K A Edmonds Environment Commissioner J A Hodges
Hearing dates:	20-24 November 2023 (Wellington) 7-9 February 2024 (Levin) 5-7 June 2024 (Wellington)

	12-13 June 2024 (Wellington)
Last case event:	16 December 2024
Appearances:	S Ongley for the Appellants Te Rūnanga o Raukawa and Ngāti Turanga and Wellington Fish and Game Council M Wright for the Appellant A Day S Johnston and A Sinclair for the Respondent Manawatū-Whanganui Regional Council N Edwards for Federated Farmers of New Zealand P Majurey and N Buxeda for Horticulture New Zealand P Anderson and T Williams for Royal Forest and Bird Protection Society of New Zealand Inc
Date of Decision:	9 December 2025
Date of Issue:	9 December 2025

INTERIM DECISION OF THE ENVIRONMENT COURT

(A) Proposed changes to Table 14.2 in the Manawatū-Whanganui One Plan to update cumulative nitrogen leaching maximums calculated in accordance with paragraph [123] are upheld.

(B) The introduction of new controlled activity pathways providing for a specified reduction in nitrogen losses from existing intensive farming land use activities for pastoral farming and commercial vegetable growing in accordance with paragraph [156] is upheld.

(C) The introduction of a new controlled activity pathway utilising a Nitrogen Risk Assessment Tool is declined.

(D) Proposed amendments to the policy and rule framework relating to existing intensive farming land uses are to be refined in accordance with paragraphs [415]-[416].

(E) Costs are reserved in accordance with paragraph [417].

Table of Contents

REASONS

Synopsis of Decision

[1] The central issue in this case is how the Manawatū-Whanganui One Plan (a combined Regional Plan and Regional Policy Statement) (One Plan) should best regulate the discharge of nitrogen from existing intensive farming land use (IFLU) activities.

[2] While the question of consenting and/or reconsenting such activities was considered and addressed when the One Plan was originally promulgated, it has subsequently transpired that significant deficiencies in the Plan's policy and rule framework, together with version changes to the Overseer model which underpins its provisions, have rendered the Plan's original regulatory approach unworkable. This has resulted in a large number of existing IFLUs remaining unconsented a decade or so after consents were required. Plan Change 2 (PC2) is intended to resolve this.

[3] We note at the outset that the use of Overseer to manage nitrogen is embedded in the One Plan. Against that, we are cognisant that at both a local and national level there is debate surrounding the continued suitability of Overseer and alternative methods to its use.

[4] In particular, we note that other regional authorities are grappling with similar issues including the efficacy of alternative tools such as a nitrogen risk assessment matrix. In that regard, and as the parties are aware, the Court sought the parties' advice as to whether there was merit in hearing this matter alongside Plan Change 1 to the Waikato Regional Plan (given some perceived similarities in issues and possible responses).

[5] Counsel for the Waikato Regional Council and Counsel for the Manawatū-Whanganui Regional Council (Council) cautioned against that approach noting "the different form and context of the risk assessment tools within the respective proposed planning frameworks" and reminded the Court that the various tools needed "to be

determined in the context of the proposed rule frameworks".[1] We accept and concur with that position. While there may be similarities between the issues faced by different regions with respect to nitrogen discharges and water quality objectives and/or targets, context is critical, and the decision which follows pertains solely to the evidence before us and the policy and rule framework of the One Plan.

[6] We are also cognisant that given the scope of PC2, Overseer will continue to be used in the One Plan, including for new IFLU and, as such, we are not satisfied that the inclusion of a new tool for existing IFLU only would be either efficient or effective. We also note that although the suitability of Overseer for use in PC2 was addressed in much detail in submissions and evidence, it was and remains a fundamental building block in the structure of the One Plan and the only appeals relating to its use sought the recalibration of Table 14.2. While Overseer might not necessarily be adopted if the One Plan was being promulgated today (we cannot of course be definitive about that) the reality is that Overseer already underpins this plan and PC2 provides no scope to undo that. As such, we find no scope to amend the One Plan to address issues relating to Overseer's general suitability for use in regulation.

[7] The specific Overseer matter which the Court was required to address was how the original Overseer modelling threshold and approach to Table 14.2 Cumulative Nitrogen Leaching Maximum (CNLM) limits could be amended to reflect Overseer version changes.

[8] This issue was resolved to the satisfaction of the parties during the course of the hearing with amendments proposed by agreement to recalibrate Table 14.2 and adopt a reference file system which allows version changes to be managed into the future without further plan changes. Given further changes to Overseer since the time of the hearing, the Council is directed to provide further information to ensure the reference file system remains appropriate and a more fulsome discussion of this

---

1 Joint memorandum of Councils dated 31 July 2023.

is set out in paragraphs [130] and [131].

[9] Resolving that matter does not, however, resolve all of the issues with the structure of the One Plan. In particular, the Court was also required to consider and determine whether the discretionary activity pathway for existing IFLU which could not meet a recalibrated Table 14.2 controlled activity pathway was sufficient to meet the Plan's objectives or whether there should be additional controlled activity[2] pathways (with supporting policy, rules, methods and other provisions).

[10] More specifically, we were asked to determine whether there should be additional alternative controlled activity thresholds for a specified reduction in nitrogen from existing levels known as a "specified reduction pathway" (SRP).[3] In relation to this option, two pathways were proposed:

(a) for existing pastoral farming a limit requiring a 20% reduction from a 2012 baseline in modelled nitrogen, or where that reduction is greater than the 75th percentile for the individual targeted Water Management Sub-Zone (WMSZ), the 75th percentile, to be achieved within two years of PC2 becoming operative;

(b) for existing Commercial Vegetable Growing (CVG) a limit requiring a 35% reduction from a 2012/2013 baseline in modelled nitrogen to be achieved within two years of PC2 becoming operative.

[11] Secondly, we were asked to determine if there should be (either alongside or in substitution for the SRP) a new threshold for a controlled activity related to achievement of a certain score on a Nitrogen Risk Assessment Tool (NRAT).

[12] Finally, we were asked to consider and determine whether there should be changes to the operative One Plan's pathway for those existing IFLUs that do not qualify for, or wish to use, any of the controlled activity pathways (whatever they were

---

2 We note that a controlled activity must be granted and can be subject to conditions.

3 Introduced in the Decisions Version (DV) but with some proposed amendments in the version now before us.

determined to be).

[13] The parties remained in dispute about these matters throughout the hearing and about whether scope existed to include the above additional controlled activity options (and indeed whether such options were available to the first instance decision makers who inserted the SRP activity pathway in the Decisions Version (DV) of PC2).

[14] As will become clear, much of this case deals with uncertainties, including uncertainties in how regulation should or could be applied. The issues are complex and at times appeared to be unresolvable. An ongoing and significant limitation exists in not being able to measure actual nitrogen losses with the resultant need for focused modelling exercises to underpin any future regulatory regime. The complexity of the issues can be seen in the extensive and evolving evidence presented to the Court with the hearing adjourned several times to allow additional technical work to be undertaken.

[15] Against that background, we have worked methodically through the issues in this decision but say at the outset that PC2 is a proposed change to an operative plan and does not provide the scope or opportunity to solve all of the issues raised in the same way as may be possible in a proposed new plan. Other work is underway and will need to continue in order to resolve the complex issues of nitrogen discharges and water quality into the future. The scope of PC2 is limited and was designed to resolve some very pressing and specific issues.

[16] We have been mindful of ensuring decisions made now do not preclude future options but also cognisant that decisions must be made now. There should therefore be no expectation of precision or a perfect solution. Rather, in seeking to ensure progress is made towards achieving the objectives, this decision seeks to provide a workable and effective regime to deal with the large number of existing unconsented IFLUs which require timely and appropriate regulation.

[17] For the reasons set out in this decision, we find that outcome is most appropriately achieved by a combination of the recalibrated Table 14.2 approach, the addition of SRP pathways for pastoral farming and CVG, and the provision of a

discretionary activity status pathway, with greater policy specificity. We are of the firm view that this achieves the existing objectives of the One Plan and the purpose of the plan change by providing a workable consenting pathway for all existing IFLUs. We are satisfied that scope exists to support these determinations.

[18] We find that the NRAT in the form presented to us cannot be considered as a fully developed and appropriately tested tool for use in regulation at this time and decline to include it as an alternative pathway. As previously outlined, we are conscious that given the scope of PC2, Overseer will continue to be used in other parts of the One Plan, including for new IFLU and, as such, we are not satisfied that the inclusion of a new tool for existing IFLUs only would be either effective or efficient.

[19] For completeness, we record that the Court is aware that the Government has indicated an intention to amend legislation relevant to the issues being addressed in this decision. It is not possible to anticipate what final form those amendments may take, and it is not the role of this Court to speculate on that. This decision is based on the law as it stands at the time of this decision and the evidence presented to us.

[20] This decision is interim because further work is required on the plan provisions to ensure they deliver the outcomes this decision directs. Court-facilitated conferencing on the plan provisions is to be undertaken in accordance with the guidance and directions provided within this decision.

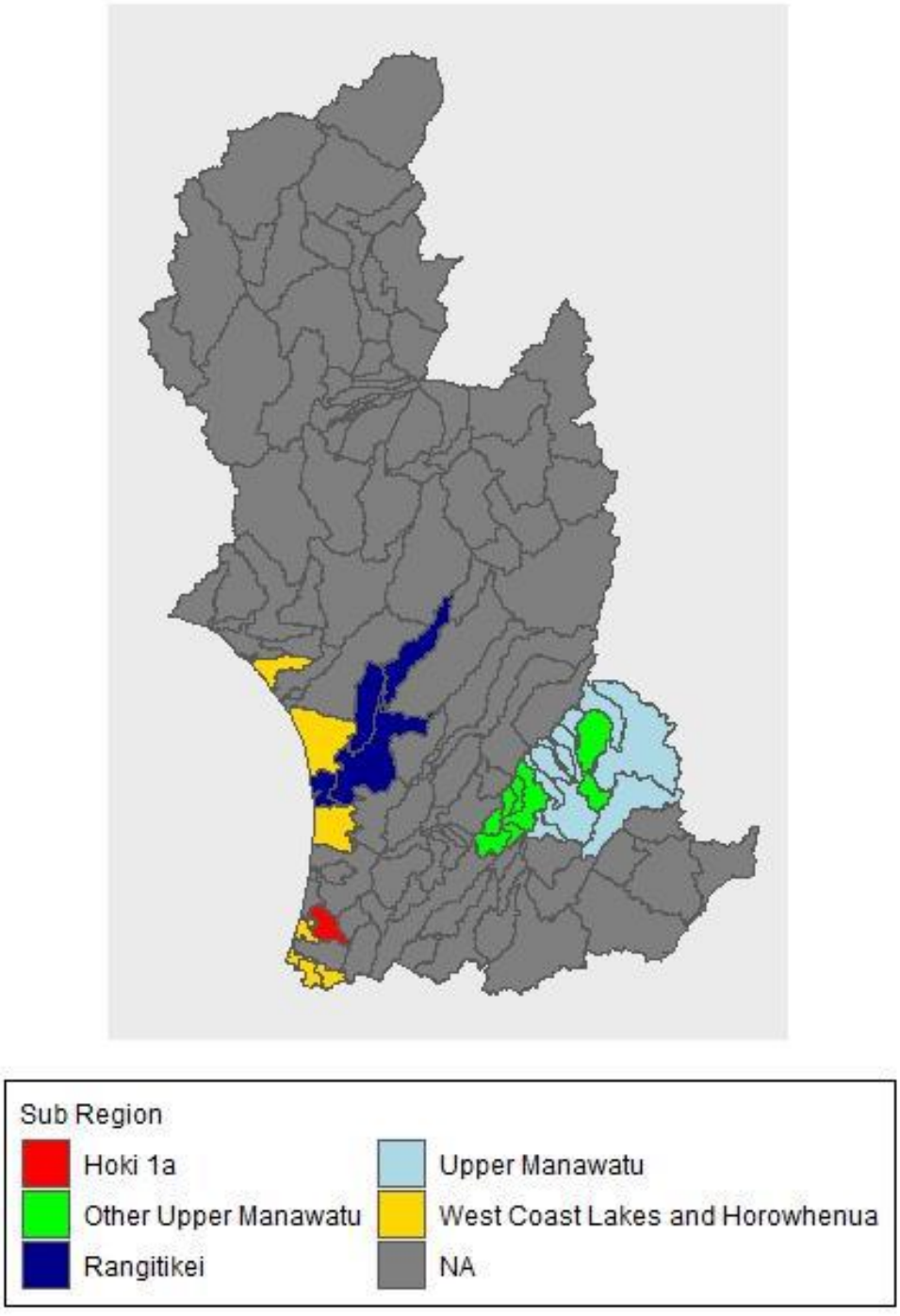
Background

[21] The One Plan was notified in 2007 and became fully operative on 19 December 2014. It includes a consenting regime for existing IFLU activities that relies on either meeting the CNLMs in Table 14.2 to qualify as a controlled activity or otherwise being assessed as a restricted discretionary activity. The plan defines IFLU activities as comprising dairy farming, irrigated sheep and beef farming and CVG on any area of land greater than 4 ha and cropping of any land in excess of 20 ha.

[22] To qualify as an existing IFLU, the activity needs to meet one of the above activity categories and have been undertaken in the WMSZs listed in Table 14.1 from the dates specified.[4] The WMSZs (frequently described in the evidence as sensitive catchments) are identified as follows and shown on the following figure:

1 July 2014	Waikawa
1 July 2015	Lake Horowhenua, Mangatainoka, Other coastal lakes and Coastal Rangitikei
1 July 2016	Upper Manawatū above Hopelands and Manawatū above the Gorge.

[4] The One Plan requirements are different for <u>new</u> intensive farming land use established after the date the Plan had legal effect, which is 24 August 2010 for dairy farming and 9 May 2013 for commercial vegetable growing, cropping and intensive sheep and beef, in any Water Management Sub-zones.



[23] It is fair to say that the One Plan has had a chequered history since its inception. After raising concerns with the Council about the implementation of the One Plan consenting regime for sensitive catchments, the Wellington Fish and Game Council (Fish and Game) and the Environmental Defence Society Inc jointly applied for declarations from the Environment Court that the Council had, in various respects, failed to correctly apply the One Plan.

[24] The 2017 Environment Court Decision on Application for Declarations (Declaration Decision)[5] generally accepted that position, finding that there were significant issues with the way the Council was applying the One Plan provisions and processing resource consent applications dealing with existing pastoral IFLUs.

[25] Shortly after the Declaration Decision, the Council effectively stopped consenting IFLUs that did not comply with Table 14.2. For completeness, we note that following a report by the Parliamentary Commissioner for the Environment (PCE) in December 2018 relating to the suitability of Overseer for use in regulation[6] and the subsequent Science Advisory Panel's Report and Government Response on the Overseer Model (which we return to later in this decision), a short time later consenting also ceased for those (few) applicants that could meet Table 14.2.

[26] In July 2018[7], after completion of a s 35 RMA report, discussions with the Ministry for the Environment (MfE) and its advisers on consenting pathways for dairy and horticulture activities resulted in the completion of an independent review[8] which confirmed that:

(a) recent changes in the Overseer Model outputs have resulted in an increased number of farms unable to meet the CNLMs set out in Table 14.2 of the Plan; and

(b) the wording of Plan policies significantly limited the circumstances in which exceptions to meeting those limits could be assessed, which did not provide an effective consenting pathway for non-compliant farms.

---

5 *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37.

6 Parliamentary Commissioner for the Environment "Overseer and regulatory oversight: Models, uncertainty and cleaning up our waterways*"* (Parliamentary Commissioner for the Environment, December 2018).

7 Horizons "Manawatu-Wanganui Regional Council One Plan section 35 report: Intensive Farming" (Horizons, July 2018).

8 C Kirman (Ellis Gould) and A Linzey (Beca Ltd), "Independent Planning and Legal Advice on the Manawatu-Whanganui Regional Council One Plan – Consenting Pathways for Dairy and Horticultural Activities" (20 November 2018).

[27] That review also concluded:

> … that there are only limited (and potentially not practicable) circumstances where a consenting pathway would exist for a 'typical applicant' (e.g.: a single farm operation). Overall, while the rule regime implies opportunity for discretion, the policy regime of the Regional Plan does not appear to anticipate that applications can be granted where they do not "comply" with the nitrogen leaching maximums set in Table 14.2, irrespective of the potential environmental outcomes of such a proposal.
>
> …
>
> While non-compliance with the maximums in Table 14.2 is not denoted as a prohibited activity in the rules, and clearly the rule framework of the Regional Plan provides a lawful consenting pathway for applications, the policy direction for management in the Regional Plan policies provides almost no scope for the consideration of such activities, or for the specific land use management practices that may be considered appropriate to provide for the 'exception' that is otherwise provided for by the rules.

[28] After further consultation with iwi (although we note concerns expressed by appellant Ngāti Turanga about the nature of that consultation) and key stakeholders and the completion of technical work, PC2 was publicly notified on 22 July 2019 as a response to the identified shortcomings in policy, rules (including Table 14.2) and definitions for managing existing IFLUs. A total of 84 submissions were lodged in response to PC2.

[29] We note that, while it is accepted by all parties that there are a number of activities currently operating without consents, we received varying evidence on the scale of the problem. While the PC2 s 32 Report stated there were 118 unconsented dairy farms in WMSZs[9] the evidence of Ms Christine Foster noted:[10]

> Horizons only holds data on certain types of farms, gathered from consent applications. The information Horizons currently has available is also somewhat limited over more recent years, given that the issues with Table 14.2 and the One Plan have left many farms unconsented … .

[30] Her evidence was that data supplied by the Council recorded 204 consented IFLUs in priority catchments. The Council estimated there are approximately 235

---

9 Section 32 Report at section 4.4.

10 Foster supplementary evidence dated 17 January 2024 at [10].

unconsented activities operating in the Region comprising 167 dairy, 48 CVG, 15 cropping and 5 irrigated beef and sheep farms. This indicates a total of around 440 IFLUs of which less than half would appear to have current consents.

[31] Ms Foster gave evidence that across all WMSZs, 60 IFLU consents were granted as controlled activities (that is, they complied with Table 14.2). Of these, 25 consents were for new IFLUs compliant with Table 14.2 and 35 were for existing IFLUs compliant with Table 14.2. We infer that it is likely that the other 170 existing IFLU consents were granted as restricted or fully discretionary activities. We further note from the information provided that a considerable number of those consents (predominantly for pastoral farming) were issued prior to the Declaration Decision and include discharges well beyond the Table 14.2 limits.

[32] Only one consent for CVG appears to have been granted, which expired in July 2024. No consented nitrogen loss was recorded in that consent.

[33] Fifty-five of the remaining IFLU consents expire in or before 2030, a further 45 expire in 2031, 55 expire in the following five years to 2036 and all but eight of the balance expire before 2040.

[34] To further assist our understanding of this matter, Professor David Horne, who has a PhD in soil science, provided the following table showing the current consent status of dairy IFLU by sub-catchment.

Sub-catchment	**No of consented farms**	**No of unconsented farms**	**Total**
Rangitikei	53	26	79
Horowhenua	33	17	50
Mangatainoka	71	11	82
Upper Manawatu	45	112	157

Total	202	166	368

[35] We also received evidence from Ms Michelle Sands, General Manager of Strategy and Policy with Horticulture New Zealand (HortNZ), outlining that there are 90 vegetable growers in the Region on the HortNZ database and 47 are registered with New Zealand Good Agricultural Practice,[11] which are the main ones affected by and requiring consents under PC2.

[36] It is against this background that the Court is required to hear and determine appeals on PC2. In doing so, we are acutely aware that it is now over (or approaching) a decade since the One Plan should have been implemented in the WMSZs and existing IFLUs were required to have obtained consents.

[37] Given the length of time that has elapsed and the difficulties which have beset the One Plan, we acknowledge that there is some urgency to progressing a workable consenting regime. Based on the above, and assuming any future new plan is not operative until after 2030, most of the approximately 368 dairy farms, with 112 of those in the Upper Manawatū, could be required to apply or reapply for consents under the PC2 provisions.

[38] We also acknowledge that, as a consequence of the Resource Management (Freshwater and Other Matters) Amendment Act 2024 (Amendment Act), there is now likely to be a longer interim position or, as it is frequently described by many of the parties, an "interim fix" than seemed likely at the start of proceedings. Moreover, uncertainty as to the future nature, process and timing of the Oranga Wai (Freshwater Planning Programme or freshwater planning instrument) process currently underway to implement the National Policy Statement for Freshwater Management 2020 (NPSFM 2020) means the trajectory towards a more permanent solution is less clear.

---

11 New Zealand Good Agricultural Practice is an industry assurance scheme administered by HortNZ.

[39] In regard to that specific matter, we also sought submissions from the parties on the potential implications of the Amendment Act on the proposal before us. Parties submitted[12] that there is nothing in that Act which renders any of the provisions put forward to date unlawful.

[40] The Council advised that as PC2 was notified prior to the publication of the NPSFM 2020, it is not a freshwater planning instrument and was never intended to implement the NPSFM. The Council's freshwater planning instrument is being developed as part of its Oranga Wai plan change process, not PC2. The Amendment Act adjusted the framework for freshwater farm plans and revoked the Resource Management (Application of Part 9A-Freshwater Farm Plans) Order 2023 which is not currently applicable to the Manawatū-Whanganui Region. While the definition of "Nutrient Management Plan" (NMP) in the DV, and carried through to the Council's Closing Provisions (Closing Provisions) presented in its reply, allows for a NMP to be provided as part of a freshwater farm plan required under Part 9A of the Act, it is not a requirement, and would not be unlawful if incorporated into the provisions.

[41] For completeness we note that while we are aware that in other current plan changes it is necessary for the Court to consider changes to s 70 relating to permitted activities, that is not at issue in PC2 as all IFLUs require resource consents.

Parties' Positions

[42] The appellants were Ngāti Turanga, Wellington Fish and Game and Mr Andrew Day, a sheep, beef, and occasionally dairy support farmer from Pahiatua. The s 274 parties involved in the hearing were Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird), Federated Farmers and HortNZ.

---

12 Memorandum of Counsel for the Respondent 9 December 2024, Memorandum of Legal Counsel for Horticulture New Zealand 16 December 2024, Memorandum of Counsel for the Appellants and Supporting Section 274 Party 16 December 2024.

[43] The primary position of the appellants and Forest and Bird (the Appellant Parties)[13] is that existing IFLU should meet the Table 14.2 CNLMs to qualify for a controlled activity pathway or otherwise be assessed as a discretionary activity.

[44] The basis of their case is that the CNLM limits in Table 14.2 are tied to the relevant land's Land Use Capability (LUC) class, as a proxy for the productive capability of the land or its natural capital. It is their submission that the intention of the One Plan was that soils with the highest productive capacity have the highest CNLMs and this should be upheld. Although the use of LUC and the foundations on which Table 14.2 in the One Plan were developed were not reviewed by the Council as part of PC2 and were not the subject of appeal, they submit that these matters remain as "key foundation elements" of the One Plan.

[45] The Appellant Parties also challenge the scope for the alternative controlled activity pathways in the Council proposal, both resulting from the SRP introduced in the DV and the new NRAT approach introduced on appeal. The Appellant Parties' position is also that Overseer can be used, unless and until the Council formulates another approach through proper process.

[46] On the basis of the above, the Appellant Parties oppose the Council's alternative controlled activity pathways for existing pastoral and CVG IFLUs (both the SRP and NRAT). The Appellant Parties say that controlled activity status for SRPs and the NRAT would fail to meet higher level policy and create unfairness for those that have organised their affairs on the basis of the CNLMs (Table 14.2) and the LUC/natural capital approach and would send confusing signals to farmers/growers in advance of Oranga Wai.

[47] Conversely, Federated Farmers had a primary concern about the consenting pathway for unconsented existing dairy farms and supported the Council's proposals for alternative SRP and NRAT controlled activity pathways. We note that Federated

---

13 While we refer to the Appellant Parties as a group as their overall position on the provisions is similar, sometimes their reasons are different. We acknowledge that the Appellant Parties worked to co-ordinate their cases in questioning and submissions.

Farmers did not appeal the DV.

[48] Similarly, HortNZ also supported the Council's proposal for an alternative controlled activity pathway for CVG, preferring the NRAT or in the alternative the SRP. We note that HortNZ also did not appeal the DV.

[49] All parties also advanced various views on amendments required to the policy and rules in support of their primary positions. The planning witnesses for the Appellant Parties referred to adopting a "first principles" approach towards their consideration and drafting of matters to be addressed in consenting discretionary activities which differs from the approach in the Council proposal.

[50] For completeness we note that during the course of the hearing the position of the Council on alternative consenting pathways with controlled activity status evolved reasonably significantly. It started with supporting controlled activity status for the NRAT to the exclusion of the alternative SRP introduced through the DV (although when pressed the Council did indicate in opening that the SRP was its "fallback" position). In the later stages of the hearing and in its Closing Provisions, the Council supported inclusion of both the SRP and the NRAT as options available to an applicant.

[51] We also note at this juncture that the Council's initial decision to propose and support the NRAT to the exclusion of the SRP meant that almost all of its original evidence ignored the SRP which created some difficulty for the Court in fully understanding and evaluating the merits of the DV approach. The Council moved to address these evidence gaps in the final weeks of the hearing and before its reply and as we have said, ultimately changed its position to support both the SRP and the NRAT.

[52] We note that in its closing submissions the Council put forward its proposed planning framework, along with a record of proposed changes in its Attachment A. A helpful comparison table was also supplied to note variations between the Closing

Provisions and the Day V3 Provisions generally supported by the Appellant Parties.[14] For completeness we note that both Mr Michael Scott and Mr Gregory Carlyon, planners respectively for Mr Day and for Ngāti Turanga and Fish and Game, were involved in the preparation of the Day V3 (and earlier) provisions and were questioned on them.

Parties' Position on Scope Issues

[53] Unsurprisingly, the Council and its supporting parties argued that there was adequate scope for their proposed approaches and the Appellant Parties advanced contrary views.

[54] We note that some parties had proposed a preliminary hearing as to whether the introduction of the NRAT as an alternative pathway in Rule 14-1 was within the scope of submissions and appeals on PC2. We set out our reasons for declining to do that after a pre-hearing conference.[15] In particular, the Court wanted a full understanding of the factual context in relation to the NRAT (including how it was proposed to be utilised as a regulatory tool within the plan provisions) before making any decision on scope. We did not consider the Court could adequately determine the question of scope prior to hearing all of the evidence, nor did we consider that a preliminary hearing on this matter would necessarily shorten or otherwise more appropriately confine the substantive hearing.

[55] Reflecting back on the complexity of the submissions, evidence and related questions, we observe that it would have been extremely difficult for the Court to understand and address scope as a preliminary issue.

[56] We also note that the scope considerations which subsequently arose and were traversed during the hearing in relation to the SRP (as opposed to the NRAT) had not been raised by the Appellant Parties earlier and were not proposed to be included in

---

14 Day opening submissions dated 10 June 2024, Attachment A.
15 Minute of the Environment Court 11 August 2023.

the preliminary hearing sought.

[57] Further, we record that we received submissions from the Council suggesting that the Court could avail itself of its s 293 powers and discretions if scope proved to be an issue. The Appellant Parties oppose a s 293 process for the purposes of the SRP or the NRAT. They say Oranga Wai consultation is occurring and a s 293 process would undermine that.

[58] Our determination on questions of scope is set out in Attachment 1. We record that we agree with the Council and Fish and Game and Ngāti Turanga that the definitions of existing and new IFLUs which impact on the degree to which crop rotation can be practised by CVG are outside the scope of PC2. That is a matter to be dealt with another day, as we understand HortNZ to concede by the end of the hearing.

The Overseer Model

[59] As we said in the synopsis, much of the body of submissions and evidence presented in this hearing was focused on deficiencies with the Overseer model which underpins many of the provisions in question in the One Plan, particularly Table 14.2.

[60] Early in proceedings we were referred to a review of Overseer by the PCE and a "whole model peer review" that had been undertaken by a central government appointed science advisory panel in conjunction with the owner of the model, Overseer Ltd. The PCE's Report concluded that:

> The assessment contained in this report has revealed that a significant amount of information needed to confirm Overseer's use in a regulatory setting is lacking...
>
> The best way forward is to speedily address important gaps and the shortcomings in transparency, peer review, corroboration, uncertainty and sensitivity analysis, and model documentation raised in this investigation.

[61] The Government review found several issues and deficiencies with the Overseer model and, although it was completed after PC2 was originally promulgated, it prompted the Council to re-evaluate the effectiveness of PC2 in achieving its purpose.

[62] Having reconsidered PC2 in light of the Report, it was the Council's position that the NRAT would better address limitations identified with Overseer in the Report and would more appropriately resolve any limitations of relying on Table 14.2 CNLMs (based on Overseer) as the sole controlled activity pathway for existing IFLU.

[63] In its subsequent reversion to both the SRP and the NRAT, the Council's position was that this still provided a more appropriate response to identified issues with Overseer, despite recognising that the SRP pathways were likely to rely on Overseer modelling to demonstrate the reductions necessary to meet the threshold for controlled activity status.

[64] The Appellant Parties criticised the capability of the additional controlled activity pathways to overcome the issues with Overseer, saying they did not constitute the 'multi-evidence' approach needed to make robust consenting decisions, as recommended by MfE guidance (referred to shortly). Ms Ongley submitted that in particular the use of the NRAT as an alternative controlled activity opportunity, as Ms Foster proposed, did not provide for a multi-evidence approach. In her submission, it simply provided for an alternative controlled activity limit based on a different set of specified numbers and accordingly also has limitations.

[65] We were referred specifically to the MfE guide for councils entitled "Responding to the Overseer model redevelopment review" released in July 2023. An updated version of that guidance was released in April 2024, with its purpose to support councils to assess and respond to the Overseer review 2021 and the subsequent redevelopment, completed October 2023.

[66] That document notes that "[w]hen using OverseerFM, output numbers should not be used as absolute numbers". That recommendation is consistent with the findings of the Environment Court in *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council*[16] that the model should be used to "predict trends and relative changes in farm management systems, rather than absolute values".

[67] However, as we noted in our Minute of December 2023, the guidance also stated by way of general principle that:[17]

> The Ministry suggests councils remain alert to the Science Advisory Panel's concerns and become familiar with the technical reports released publicly on the redevelopment programme. Where possible, within their existing policy and consenting frameworks, councils should adopt a best information approach. They should look for opportunities to support decisions made using OverseerFM data with multiple lines of evidence. When issuing new consents, preparing new regional plans, or changing existing plans, councils should use wording that will provide for maximum future flexibility for assessing nutrient loss from a range of tools that may become available.

---

16 *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136 at [117(c)].

17 Minute 6 December 2023 at [12].

And more specifically:

> Councils can continue with existing plan processes but are encouraged to take account of the findings in the review and redevelopment reports where possible. Councils may wish to consider opportunities through the RMA Schedule 1 process to complement the use of OverseerFM as a nutrient modelling tool.

[68] We accept that there are issues with Overseer but also note that it will continue to be used in the One Plan including for new IFLU. As stated in the synopsis and set out later in this decision, we do not have scope to delete Table 14.2 from the One Plan. Table 14.2 relies on Overseer, thus we are not in a position to simply jettison the model even if we were satisfied that was necessary. Nor do we consider we are required to do so, particularly given the MfE guidance cited above. The MfE guidance is clear that Overseer may continue to be used unless and until a reliable alternative is developed. To date no such model has been developed.

[69] Finally, we note that despite the issues identified with Overseer and advanced in the evidence of the parties, issues with its application were resolved to the satisfaction of all parties in terms of recalibrating Table 14.2.

[70] Against that wider context, we note that a major problem with the workability of the original One Plan rules was Overseer model version changes.

[71] In short, Table 14.2 includes a set of parameters for CNLMs modelled by the version of Overseer current at the time the One Plan was made operative. However, since that time several iterations of the Overseer model have been developed which render the CNLMs in Table 14.2 almost meaningless. The Notified Version of PC2 (NV) proposed to deal with this problem by recalibrating Table 14.2 against the version of Overseer that was then current; however, this did not provide for further iterations of the model that have occurred subsequently and can be expected to continue to occur.

[72] The DV attempted to resolve this issue by adopting a reference file system, which the Independent Hearing Panel (IHP) considered to be a reasoned and elegant solution to dealing with the changes to estimated CNLMs through periodic Overseer

updates. In the IHP's view, given the reference file system sat outside the plan, it would avoid the necessity of going through another plan change process following any significant changes to leaching rates in Overseer model updates. The use of a reference file system is provided for as Method 5-13 in the Council's Reply version of the provisions and discussed further below.

[73] As an additional complication at the appeal hearing (which did not appear to have been contemplated by the experts at the Council hearing), evidence emerged to show that the most recent update to Overseer had resulted in an increase in the CNLMs in Table 14.2 rather than a decrease making it potentially "easier" to meet Table 14.2.

[74] A further issue with Overseer in the specific context of the One Plan relates to the difficulties of using Overseer for assessing nitrogen losses from CVG, an issue raised in the original One Plan hearings and by HortNZ again in these proceedings. We were reminded that in its 2012 interim decision, the Environment Court acknowledged that the horticulture industry expressed reservations about the workability of pastoral and current versions of Overseer for horticulture and cautioned that an alternative means of calculating leachate may need to be found if future Overseer versions did not result in "everything we are hoping [for]".[18]

[75] We note that despite this warning there has been little, if any, progress with alternative models (or other methods) for dealing with CVG in the intervening period. We acknowledge the evidence of Ms Sands (and other witnesses) about other methods and models in use within the sector such as APSIM and SPASMO, but there was no agreement before us that either would provide a suitable alternative regulatory tool to the use of Overseer.

[76] HortNZ witnesses provided evidence that Overseer cannot predict losses from all crop types and was not conducive to modelling the way in which CVG generally operates, with crop types and combinations changing across different

---

18 *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182, at [5-66] (Interim Decision).

locations and temporally in response to market demands, often at short notice.

[77] We heard from Mr Stuart Ford, an agricultural and resource economist that Overseer is not able to model the full range of mitigation practices which are available to growers to reduce nitrogen leaching[19] and that overall, this was said to represent serious challenges when attempting to set representative nitrogen loss rates for consent purposes using a model based on long-term timeframes. He further explained:[20]

> 4. It is my opinion that very few if any CVG growers would have already carried out the modelling for the 2012-2013 growing season in Overseer, because Overseer is not considered to be a valuable modelling tool within the CVG sector. This means that in order to achieve controlled activity consent that modelling would have to be carried out retrospectively for that period.
>
> 5. I doubt that many of the CVG growers would have the exhaustive records which are normally required to input data into detailed Overseer models for pastoral farms. …
>
> 7. … I am of the opinion that the majority of growers would have sufficient records and knowledge to construct an Overseer file which was able to reflect the key determinants that are required. …
>
> 8. In my opinion, this information would be sufficient for achieving the required modelling standards.

[78] HortNZ did not, however, appeal the use of Overseer in the DV, nor oppose the use of the SRP for CVG, which we were advised was likely to be based on Overseer, although its preference was the introduction of the new NRAT pathway. While we acknowledge the difficulties, in the absence of an appeal seeking the removal of the use of Overseer for CVG, it is not a matter that can be addressed in PC2.

---

19 Ford EIC dated 13 October 2023 at [69].

20 Ford supplementary evidence dated 2 February 2024.

The Law

[79] Our jurisdiction on appeal is *de novo*. As such, we have the same powers, duties and discretions as the Council.

[80] A regional council must change a Regional Policy Statement (RPS) in accordance with:[21]

(a) schedule 1 of the Act;

(b) its functions under s 30 of the Act;

(c) the provisions of Part 2;

(d) any national policy statement or the New Zealand Coastal Policy Statement (NZCPS);

(e) its obligations to prepare and have particular regard to an evaluation report prepared in accordance with s 32.

[81] The Council must have regard to the matters and instruments listed in s 61, including (among others) any management plans and strategies prepared under other legislation. The Council must also take into account any relevant planning document recognised by an iwi authority.[22]

[82] An RPS must give effect to a national policy statement, the New Zealand Coastal Policy Statement or a national planning standard.[23]

[83] Those same matters apply when the Council is preparing or changing its Regional Plan.[24] In addition, the Council must ensure that any regional plan gives

---

21 RMA, ss 60–61 and 65–66.

22 RMA, s 61(2A).

23 RMA, s 62(3). "Give effect to" simply means "to implement". On the face of it, this is a strong directive that creates a firm obligation. However, the implementation of this directive will be affected by what it relates to, that is, what must be given effect to by the plans: *Environmental Defence Soc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [77] and [80].

24 RMA, s 66.

effect to the RPS.[25]

[84] Regional plan policies must implement objectives, while any rule must implement the policies.[26] In making regional rules under the RMA, s 68(3) requires a regional council and, on appeal, the Court to have regard to the actual or potential effect on the environment of activities, including any adverse effect. With respect to the matter before us, the focus is on the adverse effects on water quality of rural land uses which discharge nitrogen.

[85] While the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 are relevant to PC2, there were no issues raised in connection with those Regulations that need to be specifically addressed in our decision.

[86] An issue which does arise is whether PC2 "gives effect to" the NPSFM 2020 to the extent it can within the constraints of its timing and scope. The Council submitted that PC2 was never intended to implement the NPSFM 2020, given that it was notified prior to the publication of that document. We note that there were earlier versions of the NPSFM that would have been relevant to PC2 but we received no submissions dealing with that question.

[87] In responding to the Court's Minute on the implications of the Amendment Act the Council submitted that its freshwater planning instrument is being developed as part of its Oranga Wai plan change process, not PC2. PC2 therefore does not include provisions which directly respond to the hierarchy of obligations in the NPSFM, nor does it seek to define how Te Mana o Te Wai is given effect to in the region. HortNZ submitted that the approach taken in PC2 in relation to the hierarchy of obligations is not precluded by the Amendment Act. The Appellant Parties submitted the obligation to give effect to the hierarchy of obligations when preparing planning instruments, both as a component of Te Mana o Te Wai and as the sole

---

25 RMA, s 67(3).
26 RMA, s 67(1).

objective of the NPSFM 2020, remains in force.

[88] We note that the Council pointed out that the planning experts agreed that the extent to which it is possible for PC2 to give effect to the NPSFM is constrained by its timing and scope, but PC2 should not 'run counter to' it. We also note the Appellant Parties' legal submission on the Amendment Act referred to Mr Scott's evidence on the extent to which PC2 can give effect to the NPSFM 2020 as follows:[27]

> … there are aspects of the NPSFM that can be implemented by PC2 and at a minimum, it would be inappropriate to introduce amendments to an operative plan like the One Plan that mean it gives less effect to the NPSFM than it does unamended, or that will create legacy effects that will frustrate meeting the NPSFM's objectives and policies when the time comes to implement them in the One Plan.
>
> The fundamental concept of Te Mana o te Wai, recognised in the NPSFM cl 1.3(5) is the hierarchy of obligations, the first of which being the health and well-being of water bodies and freshwater ecosystems and the third of which being the ability of people and communities to provide for their social, economic and cultural well-being.
>
> That is, to my mind, a clear direction that it would be inappropriate for any new plan change to introduce new material with a differing order of priorities.

[89] Further, the Appellant Parties pointed out that Ms Foster's evidence was that although PC2 was not promulgated as a plan to give full effect to the NPSFM and so cannot give effect to most of the NPSFM 2020's policies and implementing clauses, it can give effect to the hierarchy of obligations.[28]

[90] We acknowledge the position the Council finds itself in. The Declaration Decision makes clear that the One Plan as it stands now does not deliver a workable consenting regime. That must be resolved as a matter of some urgency and prior to the work required to give effect to the NPSFM 2020. PC2 was promulgated and advanced in that environment and cannot be said to give effect to the NPSFM 2020 nor should it be evaluated in that way.

---

27 Scott EIC dated 6 November 2023 at [9.5]-[9.7].

28 Foster EIC dated 7 October 2023 at [227]-[261] specifically at [235]-[239] and [242].

[91] It is of note that even if it were possible to implement the NPSFM hierarchy of obligations in PC2, the Amendment Act inserts s 104(2F) into the RMA, which requires that:

> When considering an application and any submissions received, a consent authority must not have regard to clause 1.3(5) or 2.1 of the NPSFM 2020 (which relates to the hierarchy of obligations in the NPSFM 2020).

[92] We note that Ms Foster identified the nine Treaty Settlement Acts which apply to the Region. We understand that no conflicts with that legislation have been identified, which was acknowledged by Mr Carlyon. Ms Foster also identified eight iwi management plans, the Rangitikei River Water Conservation Order, the Lake Horowhenua Accord, and the Manawatū River Leaders' Accord as relevant to PC2.

[93] Section 32 of the Act requires evaluation of RPS and regional plan provisions as to whether:

(a) The objectives of the plan change are the most appropriate way to achieve the purpose of the Act.

(b) The provisions of the plan change are the most appropriate way to achieve the objectives by:

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

(ii) Assessing the efficiency and effectiveness of the provisions in achieving the objectives, including:

a. Identifying and assessing, and if practicable quantifying, the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated; and

b. Assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

[94] The term "appropriate" in the context of s 32 means suitable and the most appropriate when measured against the relevant objectives. We accept that "appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior.[29] Section 32 requires a value judgement.

[95] We particularly note the MfE Guidance:[30]

> Effectiveness assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address.

[96] Section 32AA of the Act requires a further evaluation to be conducted for any changes that have been made to, or are proposed for, the proposal since the original s 32 evaluation report for the proposal was completed. Further evaluation must be undertaken in accordance with s 32AA.

[97] It is mandatory for us to have regard to the decision appealed against under s 290A RMA. In formal terms the "decision appealed against" in this case is the decision of the Council to adopt the recommendations of the IHP. The IHP Recommendation Report with its reasoning and findings was the foundation for that decision. We have therefore had regard to the Recommendations Report as part of our obligation under s 290A. We refer to reasons and findings of the IHP in relation to matters under appeal where necessary in this decision.

What is the purpose of PC2?

[98] PC2 is an "amending proposal" under s 32(3) because it seeks to amend the existing One Plan. Importantly, the objectives in the One Plan are unaltered by PC2.

[99] Under s 32(3) of the Act, where the proposal amends an existing plan the Court must have regard to the purpose (which is described as an "objective" of PC2), alongside the settled and relevant objectives of the One Plan.

---

29 *Rational Transport Soc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].

30 Ministry for the Environment "A guide to section 32 of the Resource Management Act: incorporating changes as a result of the Resource legislation Amendment Act 2017" (2017) at 18.

[100] Additionally, while it is necessary that each objective must be examined during the evaluation, it is not necessary that each objective individually be found to be the most appropriate way of achieving the purpose of the Act. As the High Court has held, it may be through the interrelationship and interaction of objectives that the purpose of the Act is able to be achieved.[31]

[101] Given the above, the issue of what constituted the purpose of PC2 loomed large in the proceedings.

Council Position

[102] In opening, the Council submitted that PC2 seeks to rectify a policy "roadblock" in the One Plan,[32] and that a primary purpose was providing for exceptions to Table 14.2. It also stated that, in the words of the s 32 report for PC2, its purpose is:[33]

> To improve the workability of the provisions for intensive farming land use provisions by updating the nitrogen leaching maximums and providing a viable consenting pathway for activities that do not comply with them, in order to enable a return to effective regulation of existing intensive farming land uses through the One Plan as soon as practicable.

[103] The s 32 Report expanded on this precis, stating that the provisions of the One Plan are no longer working as intended and the Council is faced with difficulties in taking action to enforce compliance with a planning regime that is no longer fit for purpose and that it is no longer the case that the CNLMs identified in Table 14.2 are achievable "on most farms using good management practices".

[104] Alongside this, the report indicated a need to "[i]ntroduce amendments that provide a viable policy/rule framework for existing intensive farming land use activities that cannot achieve Table 14.2 cumulative nitrogen leaching maximums".

---

31 *Rational Transport Soc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [46].
32 Council opening submissions dated 20 November 2023 at [2].
33 Section 32 Report (July 2019) at section 6, page 30.

[105] Put simply, the Council submitted that PC2 is intended to provide a workable consenting regime for existing IFLU. That includes amendments to Table 14.2 and a viable policy/rule framework for intensive farming land use activities that cannot achieve Table 14.2, allowing consenting and regulation of existing IFLU to recommence until such time as the freshwater planning instrument is completed in accordance with the NPSFM process within the region.

[106] In its reply, the Council reiterated these submissions and also submitted that there is a need for PC2 because the One Plan:

(a) has issues beyond the recalibration of Table 14.2 that need to be addressed as part of PC2;

(b) needs to contain a viable pathway for applicants with discharges above Table 14.2 levels to seek consent;

(c) currently provides no certainty for applicants leaching at levels above Table 14.2;

(d) has particularly acute issues for CVG;

(e) needs to enable a return to regulation of IFLUs as soon as possible.

[107] Further, the Council submitted that these issues justify an interim planning response pending the Oranga Wai plan change. As we have set out previously, the key issue before the Court is what that interim framework should look like and specifically whether it should include alternative controlled activity pathways and, if so, what they should be.

Other parties

[108] In opening, Forest and Bird submitted that the purpose of PC2 was to reintroduce appropriate discretion for decision makers in cases where CNLMs could not be achieved, that is to say, it accepted the Council's position regarding the policy roadblock. However, it argued that the purpose did not extend to changing the underlying approach to regulating IFLUs based on CNLMs.

[109] Consistent with the Council, HortNZ also submitted that the purpose was:[34]

> To improve the workability of the provisions for intensive farming land use by updating the nitrogen leaching maximums and provide a viable consenting pathway for activities that do not comply with them, in order to enable a return to effective regulation of existing intensive farming land use through the One Plan as soon as practicable.

[110] Federated Farmers supported HortNZ's position.

[111] We return to the implications of the purpose of the plan change in determining whether there is scope to introduce alternative controlled activity consenting pathways for existing pastoral farming and CVG activities that do not achieve Table 14.2 later in this decision.

Our conclusion

[112] From the evidence and submissions received, we conclude that the purpose of PC2 was to establish a workable regulatory regime for existing IFLU. That purpose involved amending Table 14.2 in line with Overseer updates and promulgating amendments to other provisions to provide a workable pathway for the consideration of exceptions to compliance with Table 14.2. In short, we agree with the Council's position that the purpose of PC2 was to effectively rectify the policy roadblock.

What to do about Table 14.2?

[113] An important part of the One Plan approach to progressing the meeting of water quality Objectives 5-1 and 5-2 of the RPS and Objective 14-1 of the Regional Plan and providing for the values set out in Schedule B is the setting of CNLMs. This is established by Policy 5-8(a)(i).

[114] The Closing Provisions provide that CNLMs are established which:

> (A) take into account all the sources of nitrogen in the catchment

---

34 HortNZ closing submissions dated 17 July 2024 at [17], referring to the Section 32 Report (July 2019).

(B) will contribute to implementation of the strategy for surface water quality set out in Policies 5-2, 5-3, 5-4 and 5-5 and the strategy for groundwater quality set out in Policy 5-6

(C) recognise the productive capability of land in the Water Management Sub-zone

(D) are achieved on most farms using good management practices and best management practices

(E) provide for appropriate timeframes for achievement.

[115] While we are generally comfortable with the Council Closing Provisions, we comment as follows.

[116] Ms Foster referred to debate at the Council hearing as to whether the term 'achieved' in Policy 5-8(a)(i)(D) inferred that the CNLMs would be required to be achieved rather than being theoretically "achievable". The IHP determined that "achieved" was the most appropriate term and this has been adopted by the Council in its Closing Provisions. By contrast, the Day V3 provisions adopted "achievable". We conclude that "achievable" is the more appropriate term given this policy's placement within the RPS.

[117] In addition, Mr Scott proposed the policy should direct that CNLMs "achieve" the surface water and groundwater strategies in Policies 5-2, 5-3, 5-4, 5-5, and 5-6. We accept the Council's submission that those strategies cannot be "achieved" by the setting of CNLMs and agree that the reference to "contribute to implementation" of those strategies as set out in the Closing Provisions is more appropriate.

[118] The Closing Provisions proposed deleting the words "where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums" from (E). We accept that deletion on the basis that appropriate timeframes for achievement should apply that reflect the particular circumstances, irrespective of what level of investment is involved.

[119] Moving past the so-called policy roadblock in Policy 5-8(a)(ii), to which we return shortly, the CNLMs directed in Policy 5-8 of the RPS are then particularised in the implementing policies, methods and rules set out in Chapter 14 of the Regional Plan. Table 14.2 is a key element in that approach.

[120] Central to our consideration of PC2, Table 14.2 sets the threshold parameters for existing IFLU to qualify for controlled activity status for pastoral farming and CVG. We note however that it also provides the basis for consents for new IFLU and therefore remains relevant under Rules 14-3 and 14-4.

[121] There are eight CNLMs in Table 14.2 based on eight LUC classes. Only the Year 1 CNLMs in Table 14.2 were calculated using Overseer. The Year 5, Year 10 and Year 20 values were calculated using percentage reductions relative to Year 1.

[122] The issue with the operative Table 14.2 is that the CNLMs included in the One Plan and drawn from Overseer were current at the time the Plan became operative but have subsequently become meaningless as subsequent versions of Overseer have superseded the version used in One Plan. A key purpose of PC2 is to resolve this issue.

[123] The parties are agreed that the Overseer version number and CNLM values in Table 14.2 should first be replaced by the most recent Overseer version and values as at the date of decision.

[124] That brings Table 14.2 up to date but does not resolve the issue of future version changes. The agreed approach to that problem is to include a new Schedule [ZA] in the plan setting out a process for using Overseer reference files.[35]

---

35 New Schedule [ZA] *Overseer Reference Files*: Overseer Inputs.

[125] To support that approach, the following additional plan amendments are proposed:

(a) insertion of a new definition of 'Overseer reference file' which refers to the methodology set out in Schedule [ZA];

(b) insertion of an additional clause in Policy 14-5 (clause (h)) requiring IFLU applications that rely on Overseer to demonstrate compliance with the relevant CNLMs using the version of Overseer applicable at the date the application is determined;

(c) changes to the definition of "cumulative nitrogen leaching maximum" to clarify that CNLMs must be calculated using the version of Overseer applicable on the date an IFLU application is determined;

(d) insertion of text in the introduction to Table 14.2 stating that where the applicable version of Overseer differs from the one used to establish the CNLMs in Table 14.2, the applicable CNLM limits are the equivalent Overseer reference files, for the relevant LUC class and year calculated using the same version of Overseer relied on in the application;

(e) addition of a new RPS Method 5-13 describing the above Overseer reference file approach.

[126] The additional policy clause proposed allows that, where the applicable version of Overseer differs from the one used to establish the CNLMs in Table 14.2, the applicable CNLM becomes the Overseer reference file output for the relevant LUC class and year calculated using the same version of Overseer relied on in the application.[36]

---

[36] Where the version of Overseer relied on to determine the *cumulative nitrogen leaching maximum* for a land use differs from Version [6.5.4], the applicable CNLM is to be the equivalent Overseer output(s) for the relevant *land use capability class* and year in Table 14.2 calculated using the *Overseer reference files* in Schedule [ZA] and the same version of Overseer relied on for the land use applied for.

[127] The Council will hold and maintain Overseer subscriptions for these Overseer files and recalculate the Overseer outputs for each reference file whenever Overseer is upgraded. Ms Foster explained that the latter will be necessary in any case, given that, as she understood it, once versions are upgraded, the superseded versions of Overseer are no longer available to users.

[128] We also note the evidence of Ms Foster that an issue remains concerning how Overseer version changes are managed where Overseer-derived CNLM are specified (as they are) in existing IFLU consents. The same problem arises with these consents. There will be differences in Overseer outputs simply because of differences in the current Overseer version compared with the version available at the time the consent was granted. She considered this is already, potentially, an issue in terms of compliance.

[129] Ms Foster also considered that for future IFLU consents granted under the Table 14.2 pathway, this will be less of a problem if the conditions of consent provide for application of the Overseer reference file method to address future version changes. This will, at least, allow compliance to be monitored on a like-for-like basis for future consents.

Our conclusion

[130] We accept that a method of adjusting Table 14.2 may be required but note that more recent updates to Overseer by Overseer Ltd may have resolved this problem, at least in part. We understand from evidence provided to the Court in PC1 that Overseer Ltd now retains records of all Overseer analyses undertaken, including records of all input data and when new versions of the Overseer model are released, all analyses (and publications) in the database are updated using the most recent version. If that is the case, then a reference file method may no longer be required for some uses of Overseer in the One Plan but may be required for others.

[131] On that basis, we direct the Council to consider the extent to which:

(a) the proposed approach taken in PC2 remains compatible with the

internal model upgrading procedures currently used by Overseer Ltd, or whether further amendments are required;

(b) comparison with baseline values will be possible using the new Overseer Ltd system, recognising that data from 2012/3 may not be available; and

(c) the reference file method will appropriately address existing consented activities and amendments to 75th percentile values.

[132] The Council is further directed to provide to the Court a technical peer review of any reference file method included in PC2 undertaken by an appropriately qualified and experienced independent expert unless it has already been done.

[133] Finally, the Council is to advise the Court if any changes to RPS Method 5-13 are required in response to the outcome of the above directions.

What to do about IFLUs that do not meet Table 14.2?

[134] The Court has been asked to consider four different pathways for activities that cannot meet Table 14.2, a discretionary activity pathway, separate SRPs for pastoral and CVG activities and the NRAT.

[135] As we have already mentioned, the Appellant Parties' view is that the discretionary activity pathway should be the sole pathway for exceptions to Table 14.2, and that pathway should be guided by the matters identified in the Day V3 Version.

[136] The Appellant Parties submit that the Day V3 Version most appropriately provides the level of flexibility necessary for a decision-maker to respond to the diversity of farm systems, land types, and freshwater bodies and to address uncertainties, while ensuring clear meaningful progress is made towards instream targets and that decisions are consistent, and farmers are treated equitably.

[137] The Appellant Parties also argue that the introduction of the Council's alternative controlled pathways (rather than using the discretionary pathway only) will

undermine the natural capital approach to resource allocation, as represented by the Table 14.2 CNLMs.[37] They consider that the natural capital approach allows for higher nutrient leaching levels on land that is naturally better equipped to hold on to nutrients and lower levels where soils are less capable, based on LUC class.

[138] The Appellant Parties also expressed the concern that introducing second tier limits via additional controlled activity pathways would undermine Table 14.2. They submitted that the percentage and percentile approaches proposed in the controlled activity pathways failed to address the finite resource of land with greater productive capacity and referred to the prospect of stranded capital if the controlled activity pathways allowed continued intensification on land with lower productive capacity.

[139] Ms Ongley submitted that the original One Plan approach took a longer-term view with Table 14.2 not just providing a credible proposal that went beyond the duration of one planning cycle but also providing signals to farmers and growers for the future. She further submitted that it was intended the approach could extend beyond a 20-year horizon, beyond IFLU, and beyond the targeted catchments. She referred to the longer period of time to make change under the trajectory in Table 14.2 as *advantageous* for farmers.

[140] Ms Ongley also submitted that SRPs would fail to achieve Schedule E targets/Schedule B values in the longer term – because 'more than' 20% (or 35% for CVG) reductions are going to be needed in most WMSZ. She referred to Ms Alison Dewes' evidence that the risk of a 'single figure' approach in the SRP encourages farmers to take the simple, but coarse, option to continue 'business as usual' in the face of more rapid change and potential future threats to their business and submitted that if more transformative measures are going to be required to provide for life-

---

37 The One Plan defines "Natural Capital" as:

> Natural capital means the potential animal stocking rate that can be sustained by a legume-based pasture fixing nitrogen biologically, under optimum management and before the introduction of additional technologies. Using the "Attainable Physical Potential" in stock units/ha for each land unit listed in the extended legend of the LUC worksheets as a proxy for the soil's natural capital, these stocking rates are transformed to pasture production and used in the OVERSEER® nutrient budget model to calculate nitrogen leaching losses under a pastoral use.

supporting capacity in the longer term, the SRPs run the risk of creating stranded capital.

[141] The Council disputed this, arguing that under its approach Table 14.2 would remain in the One Plan as a useable consent pathway for any applicant that wishes to use it. It considered that for those IFLUs that could meet their Year 10 CNLMs and wanted a longer time to make reductions and/ or for those who wanted a longer-term consent, Table 14.2 would likely remain an attractive option.

[142] In addition, the Council stated that the "natural capital approach to resource allocation" has only ever represented part of the framework for regulating existing IFLU under the One Plan. The operative plan was always intended to have a pathway for exceedances of the CNLMs, through exceptions and the restricted discretionary pathway. This remained the case with the NV and the DV, which included amendments to address the policy roadblock for those activities that could not meet Table 14.2 (although as a discretionary not restricted discretionary activity).

[143] The Council also submitted that any benefits from strictly implementing the 'natural capital based' approach sought by the Appellant Parties, are outweighed by the uncertainty, impracticality and cost (for the applicant, the Council and the community) of requiring all farms which cannot or choose not to comply with the CNLMs to apply for discretionary consents (as opposed to only those with higher leaching rates which require additional scrutiny). Further, the Council contends that the Appellant Parties have a different view from the Council on what can be achieved (or is likely to be achieved) through a discretionary activity pathway in terms of taking a natural capital approach. For example, the Day V3 provision (Policy 14-6(ba)(iv)) requires that for a discretionary activity the decision-maker must:

> make a decision consistent with having more intensive land uses on land units with higher productive capability and discouraging more intensive land uses on land units with lower productive capability, based on land use capability class.

[144] The Council's submissions in reply identify what it considers are a number of other significant issues with the Appellant Parties' approach, including:

(a) it provides for exceptions from Table 14.2 but fails to set limits on the extent to which IFLUs are able to deviate from Table 14.2, or how long they may take to make reductions;

(b) the approximately 51–59% of unconsented existing IFLUs which cannot meet Table 14.2 will require a discretionary activity consent, and may vary greatly in the extent to which they are allowed to exceed Table 14.2, if they are granted consent;

(c) it does not provide certainty to farmers as to outcome (either in signalling that consents will be declined or granted), or clarity on how an application should be framed to gain consent;

(d) it generally fails to address the feasibility, practicality and cost of the measures needed to comply with the planning regime, particularly in relation to CVG activities. This includes an assessment of the impact of their individual activity on the wider WMSZ (which is likely to be challenging because catchment scale modelling is not available to individual applicants);

(e) as currently proposed, discretionary applicants will need to contend with a policy framework which provides insufficient guidance (both for applicants and consenting planners) to ensure the outcomes the Appellant Parties assert. There are few matters that actually direct an outcome;

(f) it fails, on the evidence of Professor Horne and Dr Elizabeth Parlato to achieve the directive in Policy 5-8 that 'most' IFLU would be able to meet the CNLMs.

[145] It is on the basis of the above that the Council continues to seek alternative controlled activity pathways in addition to a discretionary pathway (with different provisions than those promoted by the Appellant Parties in the Day V3 provisions).

Our analysis and conclusion

[146] The Appellant Parties place heavy reliance on the Policy 5-8 provision requiring recognition of the productive capability of the land as a reason why alternative controlled activity pathways should not be considered.

[147] We accept that one of the principal mechanisms of managing the effects of IFLU is through the CNLMs specified in Table 14.2, which were based on the productive potential of the land, the "Natural Capital Approach". However, it is important to note, as stated in the s 32 Report that:

> … Table 14-2 now fails to 'give effect to' the policy direction in the RPS that nitrogen leaching maximums set in the Regional Plan must be 'achievable on most farms using good management practices'.

[148] We do not accept the Appellant Parties' position that the One Plan intended to (or does) give priority to the productive capability of land over all other considerations. Rather, we agree with the planning evidence that all of the matters in the policy suite are to be considered and that there is no hierarchy that gives priority to any one matter over any other.

[149] In giving effect to Policy 5-8 it is therefore necessary to consider both the provisions relating to the recognition of the productive capability of land in the WMSZ **and** whether the CNLM limits are achievable on most farms using good management practices (GMPs).

[150] The Appellant Parties contend that a simple majority of pastoral farms meeting CNLM limits through the use of GMPs is "within the ballpark" of what was intended by Policy 5-8 and this supports continued reliance solely on Table 14.2 as the controlled consent pathway. Ms Dewes also notes that the question of 'most' farms does not invite "forensic analysis", as what constitutes GMPs is subjective. Professor Horne agreed there is no nationally consistent definition of GMP and we return to this point later in our decision.

[151] On the basis of the above, the Appellant Parties submitted that if the Court finds that the CNLMs in Table 14.2 do not achieve Policy 5-8(1)(a), the appropriate response is to substantively alter the CNLMs, not completely alter the methodology.

[152] The Council disagrees, saying that a simple majority of IFLUs being able to meet the CNLMs by Year 10 was not what was expected from Policy 5-8. They pointed to the Environment Court Interim Decision on the One Plan which records an initial finding from the first instance hearing that around 20% of targeted dairy farms would not be able to meet the year 20 limit in a practicable and affordable manner.[38]

[153] From our review of this and other information contained in the Environment Court decision,[39] we conclude that there was an acknowledgement that between 10 to 20% of farms would not meet the Table 14.2 limits and would have varying degrees of difficulty and cost implications in reducing their nitrogen leaching to meet the limits. Put differently, we find that the expectation at the time the One Plan was promulgated was that at least 80% of farms could achieve the CNLMs using GMPs. We conclude this to be a much more credible assessment of the expected meaning of "most farms" than a simple majority.

[154] We accept that a workable pathway does not mean <u>all</u> unconsented IFLUs in the targeted WMSZs must obtain consent. The fact that some farms would find it difficult to obtain consent is an outcome anticipated by Policy 5-8 of the One Plan. We also acknowledge Council's confirmation that it was not the intention of PC2 to provide a regime that guaranteed consent to all discretionary activity applications.

[155] We are satisfied that the One Plan was promulgated on the basis that most farms would be granted controlled activity consents. It has been established clearly that that is unachievable within the current policy and rule framework of PC2, and an alternative must be found. That was confirmed by the independent peer review

---

38 Interim Decision at [5-119].

39 Including in the Interim Decision at [5-163].

commissioned by MfE and is stated as a purpose of the plan change in the s 32 Report.

[156] We conclude that the addition of the SRP controlled activity and the amended policy informing discretionary activity decisions provides an appropriate and necessary interim approach to fix the consenting hiatus arising from the original One Plan provisions. That does not mean there is no awareness and consideration of the likely longer-term implications. As we heard, the Oranga Wai process, informed by the NPSFM 2020, is underway with information and engagement on the problem that remains and how it might be addressed beyond PC2.

[157] That process, or any future plan change, is not bound to follow the approach in the original One Plan and as more than compliance with Table 14.2 is likely to be required, a different path may be inevitable. That is not, however, the matter before us now.

The Alternative Controlled Activity Pathway Options

[158] The Council submits that three controlled activity pathways (Table 14.2, SRP and NRAT) are necessary and work together to provide each of the various IFLUs regulated by the One Plan with a viable consenting pathway. On that basis Council propose that controlled activity consents would be available if applicants could demonstrate that their IFLU:

(a) complies with the recalibrated Table 14.2 or the relevant reference file output, which largely aligns with the operative plan approach;

(b) can make a 20% specified reduction from a baseline leaching maximum for pastoral farming IFLUs;[40]

(c) can make a 35% specified reduction from a baseline leaching maximum, for CVG IFLUs; or

(d) can meet the relevant NRAT score to be 'low' risk (either on the day of application for pastoral IFLUs, or within two years for CVG IFLUs).

[159] The Appellant Parties disagreed, emphasising that controlled activity status should only be used if a council "really considers that consent would always [be] granted for a particular activity subject only to the terms and conditions that may be imposed".[41] In their view that requirement is unlikely to be met in situations where "significant values are at play".

[160] They outlined that the waterbodies at issue in this case are of significant value to the region and at its most foundational are "critical for life". They are also in an imperilled state, partly due to significant quantities of nitrogen from intensive farming.

---

40 We note that the DV and DV-PC2 have a different requirement to the Closing Provisions for pastoral IFLUs, requiring them to make the larger of either a 20% specified reduction from a baseline leaching value or a reduction to the 75th percentile leaching value. Our planning conferencing directions require the Council to confirm which is correct.

41 Day opening submissions dated 10 June 2024 at [4.54], referring to *Edens v Thames Coromandel District Council* [2020] NZEnvC 013 at [116].

[161] Alongside that, the Appellant Parties pointed out that green vegetable and brassica growing operations are diverse and complex. There are vastly varying degrees to which operators are using GMPs and as the IHP observed, "it is a difficult industry to manage using a 'one size fits all' approach". This industry also has extremely high leaching per hectare and in the WMSZs in which they are primarily located – the Hoki 1a and West 9b - they make a significant nitrogen contribution to degraded water bodies, despite covering a very small land area.

[162] High leaching dairy farms were said to be in a similar boat, contributing significant quantities of nitrogen to degraded waterways and with a vast array of GMPs that could be adopted.

[163] The Appellant Parties submitted that this situation therefore supports a cautious regime, requiring those farms that do not meet Table 14.2, regardless of which type of intensive farm they are, to be assessed against the One Plan's objectives and policies with discretion to grant or decline consent.

[164] Accordingly, they do not support a controlled activity regime that guarantees consent will be granted for all operations that reduce nitrogen leaching by 20% or 35% from a 2012/2013 baseline, or to a NRAT score that requires even lesser reductions. In their view that approach may provide more certainty to farmers who do not currently have a consent, but it does so at the cost of securing improvements in the health and life supporting capacity of the region's waterbodies and is inequitable.

Our Analysis

[165] To determine whether the Table 14.2 controlled activity pathway can, or should, operate as the only controlled activity pathway within the context of Policy 5-8, requires an understanding of the nature, extent and ability of existing IFLUs to meet the recalibrated Table 14.2 CNLMs.

[166] We received significant evidence in relation to the number of dairy IFLUs which might be able to comply with Table 14.2, but overall, we found this evidence

to be conflicting and as a result somewhat confusing.

[167] Based on the different assessments, predictions and opinions put to us the number of dairy farms which would be unable to comply with recalibrated Table 14.2 and/or need to apply for discretionary activity consent (in the absence of an alternative controlled activity pathway) would be:

(a) 30 to 35% of dairy IFLU based on Professor Horne's evidence in chief;[42]

(b) Greater than 50% of all dairy IFLU based on Professor Horne's sixth statement of evidence;[43]

(c) 7% of high leaching dairy farms based on Professor Horne's supplementary evidence dated 17 January 2024;[44]

(d) 23 dairy farms in the Upper Manawatū catchment based on the findings of the IHP;[45]

(e) 74 out of 166 unconsented dairy farms in the target catchments, based on the position of Federated Farmers and DairyNZ at the Council hearing;[46]

(f) 41 to 49% of all IFLU in year 10 with the implementation of GMPs/ best management practices (BMPs), based on Table 1 in the supplementary evidence of Dr Parlato;[47] and

(g) 39% of the 18 test farms in the Mangatainoka catchment could not achieve the Year 20 CNLMs, based on Ms Dewes' second supplementary statement of evidence.[48]

---

42 Horne EIC dated 6 October 2023 at [42].
43 Horne sixth statement of evidence dated 17 May 2024 at [15].
44 Horne supplementary evidence dated 17 January 2024 at [31].
45 Recommendation Report at [3.32].
46 Recommendation Report at [3.196].
47 Parlato supplementary evidence dated 28 March 2024, Table 1.
48 Dewes second supplementary statement of evidence dated 28 March 2024 at [2.5].

[168] The above range shows the difficulty in predicting how many unconsented or reconsenting IFLUs would need to apply for discretionary consents if Table 14.2 was the only available controlled activity pathway. Based on the above summary, however, it appears likely to be at least 25% and up to 50%. On the basis that there are around 350 unconsented and existing IFLUs that are likely to need to be consented under the PC2 provisions, this equates to between 90 and 175 that may require discretionary activity consents.

[169] With respect to CVG, we note the evidence of Ms Sands that there are three main growing areas in the Region, each supporting a different type of crop rotation. The area to the north around Ohakune is important for supplying winter vegetables, including carrots, potatoes, onions and brussel sprouts but is not within a WMSZ. The central area including Opiki is important for growing potatoes, with the majority of this area not within a WMSZ; however, there are potatoes and seed potatoes grown in the Coastal Rangitikei WMSZ.

[170] The southern growing area is located in the Horowhenua District in the Waiopehu FMU, which is a WMSZ, and extends into the Kāpiti District outside the Region. The area is important for the year-around supply of green vegetables, with over 38 vegetable crops being grown, including brassicas, leafy greens, Chinese greens, salad crops, potatoes and onions. The area includes one large potato grower and the others grow green vegetables with a range of other crops in rotations and produces approximately 20% of New Zealand's brassicas and other vegetables.

[171] The evidence of Mr John Clarke, a director of Woodhaven Gardens, was that this operation is a large fresh cut vegetable growing business in the Horowhenua making up 15% of New Zealand's cut greens market and growing a range of 23 vegetable crops. It crops across the Waiopehu FMU with owned and leased properties in the Ohau, Hokio, Koputaroa, and Waikawa catchments. Mr Clarke described the Horowhenua as having an extremely important role in the supply of vegetables. It enjoys fertile, low slope, LUC 1 and 2 soils that are relatively frost free and has regular summer rainfall, lessening reliance on irrigation.

[172] Mr Ellery Tappin from Market Gardeners Ltd, a grower owned co-operative, gave evidence of the role the region plays in the market and continuity of supply of green vegetables throughout the country.[49] That included in situations of extreme weather events elsewhere that impact on supply from other significant vegetable growing regions in New Zealand.

[173] Ms Sands referred to Table 14.2 requiring that every year a leaching rate of the actual activity on the given farm must be calculated and the leaching rate must be maintained within the maximums. She explained that for vegetable growing, when viewed as a full rotation over time, the full sequence of crops may be within the leaching maximums for some rotations. However, the interannual variability may be such that in some years the phase of the rotation will be well below the maximums and other years may exceed the maximums. This is not as a result of the activity intensifying or because the grower is not operating a best practice for that crop, but simply because the rotation has a variable intensity over time associated with the rotation sequence.

[174] Ms Sands said that there are no growers of green vegetables and brassicas who can meet recalibrated Table 14.2 and it is HortNZ's position that there are no growers of green vegetables and brassicas that could meet the original table, which was developed for a pasture-based system.

[175] When responding to questions about the number of CVG operations that could comply with recalibrated Table 14.2, Dr Anne-Maree Jolly stated that:[50]

> [8] Due to the limited availability of data, it is difficult to provide a precise response to the Court's requests. It is my understanding that there are approximately 50 unconsented CVG operations to which PC2 applies. Most of these operations are located within the Horowhenua targeted WMSZs, and the remaining known operations are located in Coastal Rangitikei.
>
> [10] … the number of growers that are able to meet Table 14.2 is approximately two, …

---

49 NOE at 132-134.

50 Jolly supplementary evidence dated 17 January 2024.

[11] …Based on preliminary investigations comparing the same baseline files between Overseer versions 6.5.0 and 6.5.4, a number of crop rotations have seen large decreases in nitrogen loss and most showed at least some decrease. This means there is a possibility that some intensive vegetables and brassica dominant systems may now meet Table 14.2. However, from available data, it is not possible to say how many. It is likely that most will still need to use the specified reduction or discretionary pathways.

[19] … Based on the information I have on hand, and having regard to Bloomer et al (2020) and my own modelling, my general expectation would be that growers mostly fall into the following consenting groups (noting that there will be some variation between these categories based on the individual growers' circumstances):

(a) Table 14.2: Potato and onion rotations;

(b) Specified reduction pathway: Intensive vegetable rotations; and

(c) Discretionary pathway: Brassica dominant rotations.

Our conclusions

[176] We conclude that if between 25% and 50% of dairy farms need to apply for discretionary activity consents, this would be inconsistent with the policy expectation in Policy 5-8 that **most** dairy farms would be able to achieve controlled activity status. To meet that expectation, the SRP alternative pathway is appropriate and necessary.

[177] Similarly, we conclude that without an alternative controlled activity pathway, most if not all CVG IFLUs would need to apply for discretionary activity consents. That would also be inconsistent with the policy expectation in Policy 5-8 that most would be able to achieve controlled activity status. To meet that expectation, the SRP alternative pathway is appropriate and necessary.

[178] Overall, we are satisfied that the evidence establishes a requirement to introduce additional controlled activity status pathways given the number of IFLUs that are unlikely to achieve the Table 14.2 CNLMs even under the updated Overseer approach.

The Options

Nitrogen Risk Assessment Tool

[179] Following the issue of the Council decision but before this matter came before the Court, the Council had become concerned about the continued use of Overseer given the Science Advisory Group findings on its use. As a result, it had determined that the use of a scorecard developed from a Nitrogen Risk Assessment Tool or NRAT would provide a better (and non-Overseer based) approach for a controlled activity pathway.

[180] In support of this approach, we were advised that Fonterra had stopped using Overseer as part of its dairy farm nitrogen management programme in 2017 and replaced it with a Nitrogen Risk Scorecard (NRS). Dr Paul le Miere[51] gave evidence that this nitrogen risk scorecard has been the primary assessment tool used by Fonterra for its 11,000 supplier farms across New Zealand over the last five years.

[181] The NRAT which has been developed for consideration by this Court, was based on the Fonterra NRS with the addition of rainfall and soil biophysical characteristics. This is important as rainfall and soil types can affect nitrogen leaching rates significantly.[52]

[182] The Council case was that:

(a) dairy farmers have experience using the Fonterra NRS which was the basis for developing the NRAT;

(b) the use of the NRAT pathway is relatively straightforward and low cost;

---

51 Dr le Miere was Group Manager, Regional Policy at Federated Farmers when giving evidence.

52 For completeness we note that the farm systems experts all agreed that the underlying characteristics of land and location that present risk of nitrogen leaching from IFLUs to water quality are critical source areas, soil type and vulnerability to nitrogen leaching, rainfall volume and sub-soil drainage. They mostly agreed slope not to be a majorly influential factor. Further, we note that critical source areas were not considered in the risk scorecard and we understand that to be because they are of most concern for sediment, phosphorus and microbial pathogens, rather than nitrogen.

(c) the NRAT pathway does not rely on having the data or previous Overseer version files (which might disqualify farmers from accessing the other controlled activity pathways);

(d) the NRAT pathway drives reductions in nitrogen leaching within faster timeframes (compared with the Year 20 CNLMs);

(e) the NRAT avoids the uncertainty around Overseer CNLM variance or potential error, including the risk of IFLUs with apparently high leaching rate being drafted into the wrong activity status;

(f) the NRAT regulates at a more 'zoomed-out' level, assessing practices which will make real, practical differences to nitrogen leaching, and assessing them against an overall risk threshold (low) for the farm's soil/rainfall profile;

(g) the NRAT allows a user to see exactly how their on-farm practices and biophysical profile are translated into a risk score, as opposed to an Overseer user, who must trust the internal workings of the model;

(h) while the Council recognises that the NRAT is 'new', it is also consistent, science based, user-friendly, and tied to the propensity of the land to leach nitrogen;

(i) drawing on Dr Jolly's work, Dr Parlato[53] also accepted that the NRAT would result in significant reductions in leaching from CVG.

[183] In its reply the Council submitted that both Overseer and the NRAT assess leaching using a simplified version of reality. However, the Council acknowledged that the NRAT provides a coarser picture of nitrogen leaching than Overseer. It submitted that this does not mean it is wrong to do so, and it also does not mean that Overseer is more appropriate for use in a regulatory setting.

---

53 Dr Elizabeth Parlato has a background in ecology and natural resource management.

[184] HortNZ favoured the NRAT pathway ahead of the DV SRP for CVG. Its case was based on:

(a) unsuitability of the controlled activity Table 14.2 and the SRPs for horticulture with their reliance on Overseer, and the problems with using Overseer to model CVG activities (and the workarounds required);

(b) the lack of a realistic alternative to Overseer in applying the SRP for CVG (notwithstanding that PC2 does not specifically require the use of Overseer);

(c) the approach not requiring consideration of the nitrogen growing baseline;

(d) the fact that only one of the CVG operations has a resource consent;

(e) the evidence of Mr Clarke of Woodhaven Gardens regarding the difficulty of obtaining that consent;

(f) the difficulties of obtaining resource consents for land used for CVG not owned by the operator; and

(g) the need for a pathway that will allow CVG and thereby provide for food security etc.

[185] The Appellant Parties opposed the NRAT for similar reasons to the SRP in terms of compatibility with the fundamental approach in the One Plan together with concerns about how untested or robust the model is. The Appellant Parties also raised significant scope issues given the very late inclusion of the NRAT as an alternative pathway.

Our analysis and conclusions

[186] We find that we can make a determination regarding the NRAT at this early juncture and so set out our evaluation of this tool in full at this point.

[187] We acknowledge that many dairy farmers are familiar with the use of a NRS. Also, that the use of the NRAT has the potential to drive changes in farm management practices and would provide a coarse way of reviewing risk reduction over time in a general sense. However, those advantages do not override our concerns about the approach.

[188] It was evident throughout the hearing that the NRAT is still in the development stage, that further amendments were continuing to be made and added and that some additional "tweaking" was considered possible by Professor Horne. Indeed, such "tweaking" was occurring during the hearing and we would expect that experience of working with the NRAT would result in further changes. Given those circumstances our overall view is that this particular NRAT is not yet in a sufficiently robust form to be suitable for use in regulation. For that reason, while we outline below some of our further findings, we have ruled the NRAT out of contention at this juncture.

[189] Essentially the NRAT would be a new approach based on a tool that was first intended to assist dairy farmers to manage and reduce nitrogen losses. It was not designed for use in regulation and has not been used for that purpose to date. Specifically, the NRAT makes no assessment of likely nitrogen loss and we received no evaluation of its possible shortcomings and associated uncertainties as a regulatory tool.

[190] We also note that use of a risk-based approach has been under consideration by the MfE for more than three years. An Expert Advisory Group assisting MfE started looking at a risk index approach in May 2021.[54] The first version of the tool was recently put online and MfE is working to implement the tool using a staged approach.[55] The Court is aware that it was to be released in phases and will require tailoring for region-specific use but has no other details. Dr Jolly was of the view that too little is known about it to rely on it as a regulatory tool. This indicates to us that MfE is taking considerable care before introducing a risk-based approach as the basis of regulation

---

54 Ms Ongley, NOE at 119.
55 MfE website, accessed 19 September 2025.

and this is taking more time than originally anticipated.

[191] We note the arguments for the NRAT approach being relatively straightforward and low cost for farmers to apply and comply with, while Ms Dewes considers greater rigour is necessary if it is to be relied on. It is unclear what "low risk (under the NRAT)" means in terms of compliance with Table 14.2 and the CNLMs. There are a number of uncertainties about what the NRAT should include and how adequately it would address issues such as irrigation.

[192] Overall, we have concluded that use of the NRAT is not appropriate in this instance or at this time for several reasons.

(a) There is no clear link between risk scores and the extent of nitrogen leaching from a farm, the main contaminant PC2 is intended to control.

(b) Any attempt to demonstrate that the risk matrix would give a similar sort of reduction in nitrogen leaching predicted using Overseer would be a very tentative exercise. Professor Horne stated, "it would be foolhardy for me to deny it's anything other than approximate".[56]

(c) This would present difficulties when planning future nitrogen management as there would be two different and incompatible nitrogen databases and no common baseline from which to establish future nitrogen reduction requirements.

(d) The irrigation management factor in the NRS is not included in the NRAT.[57] As Professor Horne confirmed, nitrate leaching is higher on irrigated farms than comparable non-irrigated farms.[58] At the expert conference on 15 March 2023, the experts agreed that further work

---

56 NOE at 173.

57 This was because the requirements in the risk scorecard were already covered off by Horizons' regulation and the experts agreed that it did not sit well in the Horizons context.

58 This was confirmed by Professor Horne and he explained that with irrigation you grow a lot more grass, so you have more animals, so you use more fertiliser, you produce more milk.

needs to be completed to incorporate irrigated dairy farms.[59] No further work was presented to the Court.

(e) It is unclear based on the evidence how closely the selected biophysical factors (as incorporated later in the development of the approach) would reflect reality.

(f) Expert opinions on how effective the NRAT would be at managing actual nitrogen reductions had not been tested or ground-truthed by field trials or parallel studies alongside Overseer to demonstrate that the risk matrix would give a similar sort of reduction in nitrogen leaching.

(g) There has been no robust independent peer review of its use for regulatory purposes.

[193] Our overall conclusion is that the NRAT in the form presented to us cannot be considered as a fully developed and appropriately tested tool for use in regulation. Accordingly, there is no need to consider the NRAT approach advanced by the Council further as a reasonably practicable option based on the evidence before us and to evaluate it against those matters that we need to address under s 32AA.

[194] For completeness, we note that the NRAT was not before the IHP and accordingly no decision was made on it.

Specified Reduction Pathway – Pastoral

[195] Much of the supporting case for the 20% specified reduction for pastoral farming was based on the evidence of Professor Horne. By way of background to his involvement, Professor Horne explained that when Table 14.2 was prepared in 2012 it was already known that the year 1 targets would be relatively straightforward to meet but the year 20 targets would be very difficult to achieve. His evidence was that at that time a lot of store was placed on emerging technologies such as nitrogen inhibiters, with the expectation that by year 20 those technologies would have developed and

---

[59] JWS Pastoral Farm System Experts dated 15 March 2023.

been implemented such that the targets would be achievable.

[196] However, by the time PC2 was being considered, over 10 years had passed, many of the emerging technologies had failed to meet their original promise and a large number of IFLUs could not meet the Table 14.2 requirements. It was his evidence that when faced with this dilemma, he and others set out to find an alternative pathway to provide a workable component to the One Plan.

[197] In developing the SRP, Professor Horne explained that he always had in mind the Table 14.2 limits and was trying as hard as he could to drive farmer behaviour towards meeting those limits (albeit on a recalibrated basis). Secondly, he was cognisant of the range of GMPs available and was looking for a regime that would drive farmer behaviour towards adoption of those behaviours even if they could not meet Table 14.2. Thirdly, he had water quality firmly in mind because he didn't want to devise an alternative pathway that was going to be so readily achievable that it would not influence positive changes to farmer behaviour and therefore fail to drive improvement in water quality.

[198] Professor Horne outlined that he had looked at Overseer data over a range of farms, concentrating a little more on those in challenging situations. He specifically looked at what would be required to reduce nitrogen losses by 10, 20, 30 and 40% using the mitigation practices and those GMPs that were available, and that farmers could reasonably be expected to put in place. He then considered the effect this might have on water quality via Dr Ton Snelder's[60] modelling.

[199] Relying on Dr Snelder's modelling, Professor Horne concluded that there seemed to be considerable "pain" for farmers in going beyond 20% with not much "gain" in terms of water quality improvement. Under cross examination from Mr Anderson, Professor Horne confirmed his view that there would be marginal returns above 20%. In that regard, he referred to Dr Snelder's scenario for a 40% reduction and noted that, essentially, there was no further improvement in water quality between

---

60 Dr Ton Snelder is natural resources engineer and scientist.

a 20% and a 40% reduction.[61] Professor Horne accordingly concluded that a 20% SRP would provide a workable plan to consent existing IFLUs, where most farmers could be expected to make meaningful improvements to leaching rates and meet the intentions of Table 14.2, even if Table 14.2 itself could not be met.

[200] Dr le Miere agreed with Professor Horne that it was going to get much harder after the 20% tipping point. Dr le Miere described the 20% as the "sort of cost benefit sweet spot - after that the returns are a lot more cost, a huge amount more cost to not so much benefit".[62] Mr Aaron Passey considered that getting to 20% would not be a stretch, but that how to maintain it at 20% is where the challenges would lie.[63]

[201] Ms Dewes stated that, in her experience, farms can reduce contaminant losses and emissions by 10 to 40%, in some cases more, with some farm system modifications and time to adapt,[64] going on to say:[65]

> … the extent of reductions cannot be averaged. It depends on where people start from and depends on their biophysical characteristics that they are farming on, the rainfall, and also their own ability to make changes and their values about how much they want to change …
>
> … there is going to have to be some capital investment to possibly reach the 20 or 30% reduction …
>
> and
>
> … we might not have DCD [a nitrification inhibitor] on the table as an option, but we do have things like Ecotain or plantain which has been included in Overseer which will give up to a 20% reduction in nitrogen leaching alone.

[202] She agreed with Mr Anderson that the information is not available to compare the current and 2012 situations and more work would be required to do that. She considered that in five years there will be a significantly expanded suite of options available compared with 2012. We note from Professor Horne's evidence that there

---

61 NOE at 191.

62 NOE at 302

63 NOE at 310.

64 Dewes EIC dated 6 November 2023 at [22.11].

65 NOE at 1098, 1100, 1105

was a similar expectation at the time the One Plan was developed that new mitigations would achieve the levels of reduction predicted to be achievable. We do not consider that reliance can be placed on expectations of future improvements providing the answer, particularly if there is an associated expectation that it will result in more than a 20% reduction being achieved within the life of PC2.

[203] The Council ultimately accepted Professor Horne's suggested 20% approach and advanced that in PC2, submitting before us that such an approach kept the SRP tightly connected to the Table 14.2 values, and limited the permissible exceptions to Table 14.2 on farms which are more than 20% away from their CNLMs to an appropriate extent given the evidence of diminishing water quality outcomes from Dr Snelder's modelling.

[204] While the Council referred to this approach as also being further supported by the economic modelling undertaken for WSP, and New Zealand Institute of Economic Research (NZIER), we do not consider that was established, as discussed later in this decision.

[205] The Appellant Parties disagreed with the approach submitting that a 'single figure' approach, as provided for in the SRP would work to encourage farmers "to take the simple, but coarse, option to continue 'business as usual' in the face of more rapid change and potential future threats to their business".[66]

[206] The Appellant Parties also submitted that if more transformative measures are going to be required to provide for life-supporting capacity in the longer term (under legislative changes), then SRPs risk creating stranded capital, that is to say capital investment is made on the basis of meeting "reduced" targets which will ultimately have to be increased at a later date to meet water quality targets. In simple terms the Appellant Parties argue that some IFLUs should not be operating where they are and the sooner that realisation is made the better it will be for those operators and for the environment.

---

66 Dewes EIC dated 6 November 2023 at [23.3].

Specified Reduction Pathway – Commercial Vegetable Growing

[207] The need for a SRP for CVG was outlined in more detail by Ms Sands for HortNZ. She stated that growers need the flexibility to consent their activity, recognising the activity is spatially and temporally dynamic. She considered that the Table 14.2 option favoured by the Environment Court in its 2012 decision[67] was always an unrealistic scenario for green vegetable growers who grow in vegetable-dominated rotations on fragmented land with infrequent pasture phases.

[208] We explored predicted reductions of 35 to 45% with Dr Jolly. She acknowledged that the work behind it was "pretty coarse", that there was no s 32AA report and she was not aware that there had been any peer review of the number. Candidly she stated that "rightly or wrongly we've proposed a 35% reduction based off the Bloomer report and his modelling approach and then my modelling following on from that. If another consultant comes on board and picks up their own personal modelling approach, they will come up with a completely different number".

[209] Under cross examination, Dr Jolly acknowledged that the predictions were based on a very high-level exercise, involving only eight of the potential 62 crop rotations, not whole enterprise modelling or farm system modelling, and were just looking at potential crops.

[210] Ms Gillian Holmes, with a background in hydrology and hydrogeology, summarised modelling undertaken on behalf of HortNZ which indicated that at the Waiopehu FMU scale, the effect of the adoption of GMPs and BMPs for the CVG rotations was a predicted reduction in nitrogen load of 34%.

---

67 See [5-81] of the Interim Decision where the Court said "a landowner, who knew or hoped that some of his or her holding might be attractive for such a purpose, to make a *whole of farm* application for a resource consent, with leachate and other factors being assessed at the high but plausible end of the range".

[211] Mr Andrew Barber, an agriculture engineer, was confident there will be a 35% reduction, informed by both the Bloomer Overseer modelling and his own experience of working in this field.[68] At face value, that evidence appears inconsistent with the comment in the Bloomer report that "growers in Levin are generally efficient with their fertiliser use [and with current technology] there are few opportunities to further reduce rates of N applied without increasing the risk of crop failure".[69] Nevertheless, we acknowledge that the Bloomer report found that a 35% reduction was achievable.

What would be the effect of the specified reduction pathways proposed?

[212] We now turn to evaluate the effects of the SRPs proposed in terms of:

(a) Water Quality

(b) Catchment Accounting and Implementation

(c) Economic Effects

(d) Costs of obtaining resource consents

(e) Social Effects

(f) Cultural Effects

(g) Grandparenting

(h) Equity (and fairness) considerations

Water quality

[213] We received expert evidence on water quality and water quality modelling on behalf of the Council from Dr Snelder, an environmental management researcher and consultant, and from Dr Tim Cox, a water resources engineer and scientist specialising

---

68 NOE at 686.

69 D Bloomer, G O'Brien, L Posthuma "Modelled Loss of Nutrients from Vegetable Growing Scenarios in Horowhenua" (January 2020).

in water quality and hydrologic modelling.

[214] A 2020 report titled "Scenario Modelling of Nitrogen Management in Manawatū-Whanganui Region" was attached to Dr Snelder's primary statement and considered 12 scenarios which were presented at the IHP hearing. Dr Snelder addressed subsequent modelling of the SRP options in his evidence-in-chief, as discussed below.

[215] The evidence before us indicated that water quality in the relevant catchments remains highly degraded and is more likely than not to have deteriorated in at least the last 10 years. On that basis and if the One Plan Soluble Inorganic Nitrogen (SIN) targets are to be met, greater contaminant reductions than the One Plan can deliver would be required, and substantially greater in some WMSZs. We note Mr Carlyon's evidence that, when introduced, Table 14.2 only went about halfway to reaching the necessary water quality improvements because of the substantial impacts on the rural economy.

[216] There are significant difficulties in reaching firm conclusions about the extent to which water quality has changed since the One Plan was being developed and became fully operative. Based on the trend analysis and modelling results, water quality has been degrading over the 10 years since the Environment Court's Interim Decision in 2012. It is also clear from all the evidence that SIN concentrations exceed the One Plan targets by substantial amounts and, based on the most recent modelling, by more than 50% at a large number of sites. This is significantly greater than the 31% exceedance levels predicted at the time of the One Plan hearings.[70]

[217] We are unable to draw any conclusions about how much nitrogen loss reduction has occurred as a result of One Plan controls for a range of reasons, including because very few recent activity-specific leaching estimates have been made and we were provided with no evidence on travel times in groundwater between farms

---

70 T Snelder, T Cox, T Kerr "Scenario Modelling of Nitrogen Management in the Manawatū-Whanganui Region" (September 2020) attached to Snelder EIC dated 6 October 2023.

and the receiving environment.

[218] Dr Snelder noted that loads and load reductions in the river are at the downstream ends of the WMSZs and do not account for any 'lead-in' or adjustment time in the regulatory settings, nor any lags in the delivery of nitrogen to rivers. He said this means these simulations represent the long-term 'steady state' (i.e., after all adjustments and lags have come to equilibrium) in-river outcome of achieving the relevant Year 20 CNLMs. It may or may not be some years yet before concentrations peak and an unknown number of years before any reductions resulting from the One Plan provisions will be observed in the receiving environment.

[219] Against that background, we received evidence from Dr Snelder in relation to a number of scenarios he had modelled, including:[71]

(a) pre-regulation, as described in the table in the modelling summary report and which reflects the leaching rate in 2012, prior to consenting;

(b) the "Proposed Consented" scenario, which assumes all unconsented IFLUs comply with recalibrated Table 14.2 and consented activities comply with their consented rates, unless the rates specified in Table 14.2 are higher, in which case the higher rates were applied;

(c) the "Proposed Consented Strict" scenario, which assumes all IFLUs comply with recalibrated Table 14.2 and activities with consent limits lower than their Table 14.2 limit remain at the lower limit;

(d) the "Proposed Pathway E", which was described as the Council's proposed BMP pathway, and requires unconsented and non-compliant IFLUs to achieve a 9 kg/ha/y reduction in leaching rates for dairy and a 36% [sic] for CVG;

(e) the assessment also considered discretionary pathways for non-consented and non-compliant pastoral IFLUs (Proposed Pathways A to

---

71 T Snelder, T Cox, T Kerr "Scenario Modelling of Nitrogen Management in the Manawatū-Whanganui Region" (September 2020) attached to Snelder EIC dated 6 October 2023.

D) which considered nitrogen reductions from current leaching rates of 9, 12, 15 and 18 kg/ha/y. In addition, it considered an alternative to Proposed Pathway E with an 18 kg reduction from pastoral IFLU and a 55% reduction from CVG IFLU (Proposed Pathway F).

[220] Over the course of the Council-level hearing, the experts undertook further modelling of the then proposed alternative controlled consenting pathway, which required farms to achieve reductions of nitrogen leaching equal to 20% (pastoral) or 35% (CVG) below a set baseline. This is the controlled activity pathway now before the Court.

[221] Dr Snelder compared Proposed Pathways A, B, E, and F, on the basis of what he called the "mean relative difference".[72] The differences between them ranged from 40.7 to 41.8% compared to a difference of 39.5% for the "Proposed Consented" pathway, which was based on the implementation of PC2 with no provision for a discretionary activity pathway but provided for existing consents at consented rates. The modelling predicted that Proposed Pathways A, B, E, and F would not meet water quality targets at 30 out of the 35 assessment points and that number would be reduced by one if the Proposed Consented pathway was adopted.

[222] The controlled activity pathway now before the Court showed similarly modest water quality improvements of between 41% and 40% mean relative difference.[73]

[223] Relying on Dr Snelder's analysis, it was the Council's position that all the options before the Court are likely to result in "*modest*" improvements to water quality but that the water quality outcomes under the alternative pathways are not practically distinguishable from that achieved by implementation of recalibrated Table 14.2

---

72 See Snelder EIC dated 6 October 2023 at [22(d)]: the "mean relative difference" is the mean amount by which the SIN concentration at assessment points is greater than the relevant One Plan Schedule E target. It is calculated by dividing the current concentration minus the target by the current concentration and multiplying by 100 to get a percentage.

73 Snelder EIC dated 6 October 2023 at [54] and [55].

alone.

[224] The Appellant Parties raised questions about the basis of Dr Snelder's modelling and what could be taken from it. Specifically, they noted it was unsurprising that a 3kg/ha/yr reduction between each of Proposed Pathways B, C and D had a similar number of points at which the SIN targets are achieved at 20 years because the median contribution of IFLU to the total nitrogen leaching is 50% and in some WMSZ there is a very low proportion of IFLU. The benefits of improved management (of the unconsented farms) will generally be small at the catchment level.

[225] In addition, the Appellant Parties were particularly critical that the outcome for water quality from the uptake of the various pathways had not been modelled. They submitted that given all require lesser reductions than Table 14.2, it is reasonable to conclude that improvements in-stream will be less than Dr Snelder's best or second-best case scenarios (and less than would be achieved under Table 14.2). Their position was that adopting any other regime is, on Dr Snelder's evidence, adopting no better than the third or fourth best option for water quality and the health and well-being of water bodies and freshwater ecosystems.

[226] The Appellant Parties also submitted that if dual pathways are available, some farms may prefer to be consented under Table 14.2 with its more permissive requirements (e.g. LUC 1 and 2) and that the analysis undertaken by the Council's experts failed to acknowledge that SRPs, placed alongside Table 14.2, would provide the 'worst of both worlds' (for water quality). Unconsented farmers/growers would be allowed to leach up to Table 14.2 as always intended by the One Plan (as explained by Dr Alec Mackay, with expertise in soils, land use and water quality) but those in the higher LUC classes would be able to rely on the SRPs. Therefore, the greater allowable N-loss for lower LUC classes would not be 'balanced' by the expected reductions in the higher LUC classes.

[227] In conclusion, Ms Ongley submitted that Dr Snelder's evidence was that:

a. of the regimes he modelled, the best regime for improving water quality is where all intensive farms are required to meet Table 14-2.

> b. the second-best regime for improving water quality is for all existing intensive farms that can meet Table 14-2 to do so, and then to provide for the ability to push the rest as close to Table 14-2 as possible.
>
> [footnotes omitted]

[228] In reply, the Council submitted that there is a difference between Dr Snelder's agreement in the abstract that less nitrogen in river would be better, and the inference that the Appellant Parties attempted to draw from that statement – that is, that their preferred consenting scheme would have a preferable effects profile. Given the nature of the discretionary pathway proposed in the Day V3 provisions (particularly the absence of any guidance on the acceptable level of nitrogen leaching for a discretionary consent to be granted), and the number of farmers who will need to apply for discretionary consent under that rule framework, there is no evidence that the Appellant Parties' provisions would achieve a better result.

Our analysis and conclusions

[229] We note the Appellant Parties' argument on localised water quality effects is based on Dr Snelder's acknowledgement that the benefits of reducing nitrogen from IFLU from immediately downstream of where that reduction occurs will be larger and might realise a reasonable benefit that might be noticeable as compared to the numbers he used for his comparative analysis. He said that the numbers he presented are more of a helicopter view to demonstrate the overall impact of the proposed regulation and how they differ across the different options.

[230] While Dr Snelder stated that greater improvements could occur than the modelled predictions, he did not provide any guidance on which scenarios could be greater or by how much. In light of his acknowledged uncertainty associated with the modelling, we were unable to place any weight on this evidence. The Council accepted that reducing diffuse nitrogen leaching will have the greatest benefits in waterways nearest to where the leaching previously occurred. However, its counter argument is that the One Plan regulates IFLU on a 'targeted WMSZ' basis, and this is the level at which the assessment of water quality has been undertaken. There has therefore been no assessment of where or what those localised effects might be. Further that there is no evidence to support the contention that the Appellant Parties' preferred regulatory

scheme would produce a preferable profile of localised benefits, as compared to the Council's proposed provisions.

[231] By way of a general observation, we accept that there are uncertainties and limitations associated with any catchment-wide scenario modelling and, because of their scale and significance, the mean relative difference for a particular option also would need to be significant for it to be demonstrated as the most appropriate to meet the objectives. The evidence is that there are considerable uncertainties about most if not all factors that influence the effects of nitrogen discharges from individual IFLUs on water quality in the WMSZs, including:

(a) Table 14.2 was never intended in itself to deliver on the Schedule E targets[74] and as noted above, Mr Carlyon's evidence is that Table 14.2 only went about half-way because of the substantial impacts on the rural economy;

(b) the Environment Court accepted that the nutrient limits in Schedule E were established recognising the need for trade-offs between what would be an ideal ecological outcome and social, practical and economic considerations;[75]

(c) baseline data is 10 or more years old and in some cases of uncertain reliability;

(d) there are limited, if any, estimates of nitrogen losses from individual IFLUs based on current data from those IFLUs, and what there are, will be subject to Overseer variability; which many experts agree is likely to anywhere from 20% upwards;

(e) unspecified assumptions were made in the estimates about what nitrogen reductions have been made or can be achieved by different mitigation

---

74 Patterson reply evidence dated 13 November 2023 at [8]-[9].

75 Interim Decision, Part 5.

options on farm and in what time-frames;

(f) diffuse pathways from pasture to river result in travel/lag times of varying durations and nitrogen attenuation rates between IFLU and their receiving environments are often uncertain in catchment water quality modelling.[76]

[232] Dr Cox acknowledged that:

> … there are known uncertainties in the models that, consequently, limit how the models should be used. Sources of uncertainty include the internal model parameterisation and the calibration process, the supporting data sets (e.g. land use data, water quality data, flow data), and the simplified model construct (e.g. lumped attenuation coefficients).

[233] Dr Snelder stated: [77]

> Models are uncertain, and the uncertainty of the key model parameters (the attenuation coefficients) have been demonstrated in this report. This uncertainty is largely unavoidable and results from uncertainty in the water quality station TN loads and estimated sub-catchment TN export coefficients. This uncertainty needs to be considered when using the models to make predictions of TN loads and concentrations under different management scenarios. The estimated loads and concentrations in absolute terms should be regarded as less certain than the relative difference in loads and concentrations between locations and scenarios.

And:[78]

> Catchment water quality modelling is generally highly uncertain because there are always significant limitations in data and knowledge of the processes being modelled. These limitations are so significant that formal quantification of uncertainties, such as with confidence intervals as Dr Parlato suggests, is generally not able to be robustly undertaken.

[234] We note that in its 2012 Interim Decision on the One Plan appeals,[79] the Environment Court referred to the following paragraph included in the Council

---

76 Cox EIC dated 6 October 2023 at [28].

77 Snelder EIC dated 6 October 2023, Attachment A, Executive Summary.

78 Snelder EIR dated 13 November 2023 at [11].

79 Interim Decision at [5-118].

decision:

> The achievement of the year 20 leaching values will not resolve the actual environmental issues of concern (namely the high soluble inorganic nitrogen levels and levels of periphyton in the affected rivers) for those few rivers where Council has been able to assess the effect of Rule 13-1. In some of the target catchments which we have decided should remain in Table 13.l, we have no idea how effective the rule will be.

[235] In our view that remains the case today.

[236] By way of analysis, we note first from Dr Snelder's evidence-in-chief[80] that based on the modelling undertaken prior to the Council hearing, the mean relative difference for the "Proposed Consented Strict" scenario, (which assumed all IFLUs comply with recalibrated Table 14.2 and activities with consent limits lower than their Table 14.2 limit remain at the lower limit) and the Council's proposed SRP approach was 35.3%. This cannot be achieved by PC2 as a large majority of consented IFLUs were granted consent with limits in excess of Table 14.2 limits.

[237] The relative difference for Dr Snelder's "Proposed Consented" was 39.5%, which represents the situation where future consents were granted in accordance with Table 14.2, that is, with no provision for discretionary activity consents to be granted, and existing consents continuing at present rates. The evidence has established that many farms and few, if any, CVG activities, can meet Table 14.2, and consent would have to be declined. That would be contrary to the purpose of the One Plan and PC2.

[238] The mean relative difference for the Council's initially proposed SRP approach was 41.8%. However, as noted above, subsequent modelling of the currently proposed alternative controlled consenting pathway, which required farms to achieve reductions of nitrogen leaching equal to 20% (pastoral) or 35% (CVG) below a set baseline, showed similarly modest water quality improvements of between 41% and 40% mean relative difference.[81] This is a difference of 0.5 to 1.5% compared to the

---

80 EIC dated 6 October 2023, Attachment B, Summary of achievement of SIN targets at assessment points downstream of Target catchment.

81 Snelder EIC dated 6 October 2023 at [54] and [55].

"Proposed Consented" estimate.

[239] When the uncertainties listed above are taken into account, such a small predicted difference falls well short of what would be required to demonstrate that compliance with Table 14.2 will make a significant, if any, difference to water quality outcomes. We note that based on Dr Snelder's evidence,[82] all of these predicted water quality outcomes were an improvement on pre-regulation (45% mean relative difference) estimates of SIN concentrations.

[240] We asked Dr Snelder if it was correct that we have no means of differentiating between Table 14.2 and the other two methods, to which he replied:[83]

> So if you're saying that those results are very similar to one another, yes, they are, the differences in my view, from an ecological perspective, are negligible.

[241] When we then asked if it was correct that we could not use them as a basis for saying Table 14.2 or any of the other two alternative approaches were preferred over the others, he replied:

> … yes, that's correct, from a water quality outcome they are unable to be distinguished from one another.

[242] Even though we accept that there are small differences, the most we can take out of the scenario modelling work is that the greatest gains for water quality occur where the consent regime gets everyone as close to Table 14.2 as possible. That does not take us much further in terms of considering all the issues before us and the requirements of s 32.

[243] While we acknowledge the submission from Ms Ongley on the issuing of a number of restricted discretionary activity consents outside the One Plan's policy and that the 10- and 20-year targets are now more pressing, there is nothing we can do to rectify what has occurred. However, we do need to ensure that the interim policy and rule framework for controlled and discretionary activities is robust and works toward

---

82 Snelder EIC dated 6 October 2023 at [53].
83 NOE at 396.

achieving the outcomes for water quality contained in One Plan RPS Objectives 5-1 and 5-2.

[244] We acknowledge that the Council is seeking to comprehensively address water quality in the region through its Oranga Wai process. Ms Ongley produced Exhibit D from the 'Have your say' page on the Council Website which is a map showing the scale of contamination reduction modelling that it suggests is needed for each contaminant to take those contaminants from the attribute's current state (where we are now) to their potential target states (where we want to be) in each Freshwater Management Unit.

[245] Ms Ongley's point was illustrated clearly by Ms Maree Patterson, who explained in her evidence-in-reply that when the measured SIN load in the Manawatū River at Hopelands was around 785 t N/y, diffuse sources accounted for 760 t and of that, dairy contributed 260 t. The target SIN load in the river was 365 t N/y. She went on to say:

> This total load from IFLU is significantly less than the reduction required to meet target load, meaning that requiring IFLU to meet Table 14.2 was never going to be able to reduce diffuse nitrogen sufficiently to achieve the Schedule E target. In fact, even ceasing all IFLU in the catchment would have left the Manawatu at Hopelands site an estimated 159.5 tonnes of SIN above the Schedule E target.

[246] She considered that "[t]his brief example demonstrates that requiring existing IFLU to meet Table 14.2 in targeted WMSZs was only intended to be one step among many required to achieve the Schedule E targets".

[247] Elsewhere we note the acceptance by the planning witnesses of the problems with assessing water quality effects on an individual application basis. The lack of catchment accounting creates difficulties not only for effective catchment-wide planning, but also for individual applicants.

[248] Based on the above uncertainties, we conclude that the mean relative differences in the achievement of SIN targets for modelling scenarios that can be achieved through PC2 summarised in Attachment B of Dr Snelder's evidence-in-

chief, being within a range of 2%, do not provide a credible basis for concluding that any one of them will produce a better environmental outcome than any other. The ultimate significance of this is that it is not possible to conclude that compliance with Table 14.2 will make a detectable difference in water quality outcomes compared to the SRP.

Effect of individual IFLU discharges on water quality

[249] We note the submission from Ms Ongley that absolute certainty within a fully discretionary pathway is not possible because s 104 of the RMA requires assessment of actual and potential effects on the environment and the effects of individual IFLUs on water quality cannot be accurately measured without sound catchment accounting. We accept that and note that the importance of catchment accounting was made clear by the Environment Court in the Declaration Decision in 2017 and again in the Beca Ellis Gould opinion.[84] We reiterate the need for and importance of this occurring.

[250] However, in the absence of that, the issue of how to assess the individual and cumulative effects of a discretionary activity remains, as conceded by the Appellant Parties. Given the immediacy of the need for discretionary activity consents (with a maximum 10-year duration) to be applied for and processed, the problem of a lack of catchment accounting will not be adequately (or fully) addressed or resolved before consent applications will have to be processed.

Economic Effects

[251] We received economic evidence from Mr Kerry Mayes (on behalf of the Council) relying on evidence on farm scale economic impacts given by Mr Stephen McNally to the Council hearing. That evidence was supported by a report on the costs of changes in nitrogen leaching maximums by Dr Terry Parminter.[85] The initial

---

84 C Kirman (Ellis Gould) and A Linzey (Beca Ltd), "Independent Planning and Legal Advice on the Manawatu-Whanganui Regional Council One Plan – Consenting Pathways for Dairy and Horticultural Activities" (20 November 2018).

85 Parminter, T "An Impact Assessment of One Plan policies and rules on farming systems in the Tararua District and the Manawatu-Wanganui Region" (January 2018).

economic modelling was undertaken in 2020, drawing on the skills of experts in soil/nutrition, farm budget and economics, which included Mr Mayes. Mr Mayes updated the modelling to June 2023. We also received evidence on macroeconomic impacts from Mr Peter Clough on behalf of the Council. Mr Clough was the author of the 2020 NZIER Report "Economic impact assessment of Plan Change 2 of the One Plan" prepared for the Council.

[252] Ms Dewes provided supplementary evidence on Mr Clough's evidence. She listed a wide-range of reports she was referred to when reviewing the various reports attached to Mr Clough's evidence. She acknowledged that she is not an economist, but considered it within her expertise to comment on the ability of farms to reduce their nitrogen and other contaminant footprints and retain economic viability. Ms Dewes raised a number of concerns about some of the documents, noting that she would require more information and the opportunity to discuss the matter with Dr Parminter, to understand why such farms could not adapt and optimise further, in the two decades allowed for. Ms Dewes' concerns had not been addressed by the end of the hearing.

[253] Dr Parminter filed a rebuttal statement to that of Ms Dewes saying that his analysis was based on assuming there to be no change in farmer capability between the current situation within the catchment and year 20. Dr Clough was asked whether systems changes and farmer capability increasing over time, if fed into his macroeconomic analysis, could lead to a different result.[86] He said that it could, but responded that is a common practice in science and economics to look at the change for one particular thing and hold everything else constant. He said that if there are the same impacts on the input side, which he understood from Professor Horne to probably be the case, then he would not expect to see any changes in the modelling outputs. That would mean the costs associated with both option 3 (Table 14.2 and the SRP) and option 2 (Table 14.2) would be similar.

---

86 NOE at 868.

[254] Mr Mayes gave evidence that while there are compliance costs associated with PC2, in contrast to an approach that does not allow consent at all, they are a significant improvement. He also considered that PC2 was a positive influence, in that it shifted farmers away from being 'unconsentable' and closer to the point of positive profitability within the regulatory scheme. It seems likely to us that the same general statement could potentially be said of all the options.

[255] Mr Murray Holdaway, who is Vice President of the Manawatū-Rangitikei Federated Farmers, added to the picture. He said that the direct impacts on dairy farmers in the priority catchments of being unconsented are increased costs of borrowing and restrictions on the ability to sell their farms. He outlined that all banks have a policy about environmental sustainability that impacts on lending rates and margins and that if one is operating without consents or your consent is coming up for renewal, the banks will apply a higher risk margin and higher overdraft rate.

Our analysis and conclusions

[256] We did not find that the macroeconomic evidence dealt with the issues in front of us in a way that assisted us. We accept that there is a cost associated with the current barrier to consenting such that, as Mr Mayes put it, any solution to that impasse will be an improvement economically. We cannot quantify that. Nor can we satisfy ourselves that the SRP proposed at 20% for pastoral farming or 35% for CVG hits a "sweet spot" economically.

Costs of obtaining resource consents

[257] The s 32 report for PC2, which was notified in July 2019, estimated that the application cost for a controlled activity consent would be $8,500, and the cost for a discretionary activity would be $25,500 if non-notified and $45,000 to $55,000 if notified. It is unknown what these costs are based on as the report does not set that out. While inflation is likely to have resulted in an increase in those costs we were not provided with any updated information.

[258] We received very limited data on the costs of producing Overseer files. In relation to CVG, Dr Jolly considered that "even smaller growers probably won't have much loose change of $5,000" for an Overseer file.[87] In response to questions from Ms Buxeda, Mr Clarke estimated the cost to be somewhere between $100,000 and $200,000 to produce an Overseer file on a one off basis for one-fifth of their farm, "so it was extremely onerous for us to try and do that".[88] We were not provided with sufficient detail on what this estimate was derived from to satisfy ourselves as to its robustness.

[259] Dr le Miere referred to the annual subscription charge of Overseer as $690 plus GST. He advised that, based on responses from farm system consultants, the cost of getting an Overseer file prepared for dairy farms may be in the range of $2,000 to $10,000. He considered the cost of a second file would be less; but whether it would be a lot less would depend on a number of factors.[89]

[260] Ms Dewes considered the cost of producing an Overseer file would depend on the complexity of the farm, but for a relatively straightforward farm where you did not need to visit the farm, the cost could be in the order of $2,000.[90]

Our analysis and conclusion

[261] We note that Rule 14-1 provides that controlled activity resource consent applications are non-notified and written approval of affected persons is not required and notice of applications need not be served on affected parties. We accept that controlled activity applications will be less costly than those for a discretionary activity not only in terms of the preparation involved but also the Council processing costs. The amount of work involved in a discretionary activity not just for the applicant but also for the Council and passed on to the applicant will be greater. However, that is not of itself an overriding reason to accord a lower activity status that guarantees a

87 NOE at 764.
88 NOE at 648.
89 NOE at 274.
90 NOE at 1126.

resource consent. We weigh it in the mix but do not consider it determinative.

Social Impacts

[262] Dr Heather Collins gave evidence that the recalibration of Table 14.2 and the introduction of alternative consenting pathways in PC2 would have social benefits in relation to certainty of operation and livelihood for farmers, growers and their staff, with associated flow-on benefits to communities and local and regional businesses. She emphasised that when IFLUs were able to gain consents, there would be positive effects on individuals, families, the community and industry.

[263] Other evidence and submissions addressed the effect of the current resource consent hiatus as uncertainty, stress, and a feeling of being 'in limbo' for the farming community. Mr Passey, a dairy farmer from near Dannevirke, described one piece of feedback from the farming community as "the uncertainty of being in an unconsented position is a killer".[91] The uncertainty has been going on for seven years. Mr Passey was unable to apply for an effluent discharge consent because he did not have an intensive land use consent. He said being unconsented is a big risk for his business as it affects his mortgage interest rates.[92]

[264] Mr Holdaway, when questioned, also gave evidence that the direct impacts on dairy farmers in the priority catchments of being unconsented are increased costs of borrowing and restrictions on the ability to sell their farms. As noted above, all banks have a policy about environmental sustainability that impacts on lending rates and margins. If you are unconsented, or if your consent is coming up for renewal, the banks will apply a higher risk margin and you will have a higher overdraft rate. He indicated it is harder to sell a farm if it is unconsented and the price of any unconsented farm that is sold would be discounted.

---

91 Passey EIC dated 13 October 2023 at [24].
92 NOE at 307 and 312.

Our analysis and conclusions

[265] We accept that options that improve on the unsatisfactory current position and provide certainty that consent applications can be made and dealt with (even if a consent is declined or subject to conditions that are more stringent than applied for) will take farmers, growers and the community out of the current limbo they are in. That will have positive social effects, because of the need for activities to operate and be managed in accordance with the RMA, which they have been prevented from doing for almost a decade through no fault of their own.

[266] We observe that clearly those without resource consents but who require them are likely to prefer a consent pathway that confers greater certainty – a controlled activity pathway that ensures consent is granted. We also note that those with resource consents and potential new pastoral farmers and commercial vegetable growers may have a different view if they have to follow a discretionary pathway. That is not an effect that results from PC2. That is the case for any applicant for a resource consent.

Cultural Effects

[267] We received evidence from Mr Hayden Turoa on behalf of Ngāti Turanga. He was supported by Ngā Hapu o Himatangi, as well as Te Tūmatakahuki, which is a cluster of all Ngāti Raukawa marae in the Horowhenua. Ngāti Raukawa te au ki te tonga hapū are the tangata tiaki of their iwi region.

[268] Mr Turoa expressed concern about the approach to preliminary consultation on PC2 by the Council, with the Council not accepting all the points made. Despite their differences regarding the issue of consultation in this case, the Council made it clear during the hearing and in closing that it wants to continue to work with Ngāti Turanga (and other tangata whenua across the region) on freshwater issues. In reply it said that "[t]he ongoing willingness of both parties to further their efforts collaboratively around freshwater is acknowledged, and the Council hopes this will continue". We acknowledge the Council's recognition that there is clearly work to be done in the future that will require constructive engagement between the Council, Ngāti Turanga and other tangata whenua.

[269] One of the reasons for the appeals by Te Rūnanga o Raukawa and Ngāti Turanga was the impacts on Māori values, including Māori freshwater values. Mr Turoa explained the reasons in more detail and in response to a question from the Court,[93] indicated that Ngāti Turanga want to see "a visible small step in relation to … Māori rights and interests, that's all we're looking for".

[270] In that regard we note that it is proposed to add a new policy element to (new) Policy 14-6(h)(i)[94] which provides that decision makers have particular regard to:

> The contribution made to the maintenance and enhancement of values held by mana whenua for the relevant *Water Management Sub-Zone*.

[271] That said, Ms Ongley submitted[95] that both Mr Turoa and she had expressed concern about mana whenua being implicated in individual consent processes for the purposes of identifying the values they hold and having to address that on a per farmer basis over potentially hundreds of consents. She submitted that it was her preference and, she understood, Mr Turoa's that those issues are better dealt with at a policy level but there was not scope for that.

[272] Mr Turoa referred to Ngāti Turanga's view that applying this Policy must be done in a way that upholds tikanga and kawa. For example, this does not mean a cultural impact assessment for every consent but a more strategic partnership with Council to develop a values statement that could be applied on a per consent basis.

[273] To that end, Mr Carlyon proposed a new Method 5-15 that the Council has accepted with some slight modification, as set out below:

> **Method 5-15 Kawa and tikanga framework for mana whenua values**
>
> **Description**
>
> The Regional Council will work with hapū and iwi in and downstream of the targeted Water Management Sub-zones to develop a kawa and tikanga framework to ensure their relationships with ancestral lands, water, sites, wāhi tapu and other taonga (including wāhi tūpuna) are recognised and

---

93 NOE at 811.
94 In the Council's version.
95 NOE at 554.

> provided for in implementing the One Plan provisions for management of existing intensive land use farming activities.
>
> **Who**
>
> Regional Council and hapū and iwi whose rohe are within or downstream of the targeted Water Management Sub-zones.
>
> **Links to Policy**
>
> This method links to Policy 14-6 (h)
>
> **Target**
>
> To develop and implement a kawa and tikanga framework as soon as practicable with at least one interested hapū or iwi (which may be in the form of a Mana Whakahono a Rohe).

[274] The Council noted that where hapū and iwi wish to engage with the Council in establishing a method based on kawa and tikanga, the method provides for this. Equally, iwi or hapū may wish to deal with these matters on an individual consent basis through a cultural impact assessment.

Our analysis and conclusion

[275] We were particularly assisted by Mr Turoa's evidence that Ngāti Turanga seek "a visible small step in relation to Māori rights and interests". We conclude that proposed new Method 5-15 is a positive amendment that, once given effect to by the Council, should provide that visible step that Mr Turoa is seeking.

[276] In relation to Proposed Policy 14-6(h)(i) we hold some reservations as to how this would be applied particularly in light of Ms Ongley's submissions and Mr Turoa's evidence. The Council position appears to be that iwi or hapū may wish to deal with these matters on an individual consent basis through a cultural impact assessment which would set out the particular cultural values to be considered, however, Mr Turoa indicated that this could place a considerable burden on tangata whenua. He was more supportive of working with Council to produce a values statement that could be applied to individual consents. We are not clear if this would advance the matters that are already in Schedule B (which already references sites of cultural significance).

[277] We are concerned the policy lacks certainty and could potentially result in inequities with different applicants required to provide different supporting documentation which brings into question issues of efficiency and effectiveness. We take that matter up further in our directions on planning conferencing.

Other Matters

Grandparenting

[278] The Appellant Parties are concerned to ensure that the provisions of PC2 do not enable grandparenting, which would mean existing high dischargers of nitrogen would continue at existing levels. In that regard, we were referred to the Environment Court 2012 decision which provided:[96]

> *Grandparenting* in the sense of allowing existing operations to continue to leach nutrients at rates based on their own historic performance should not form part of the rules regime.

[279] The Appellant Parties describe the SRPs proposed as "hybrid grandparenting" on the basis that they use a leaching baseline and then require a reduction from that historic baseline.

[280] By way of reply the Council submitted that grandparenting is well defined in the Environment Court decision:[97]

> *Grandparenting*, taken literally in the RMA context, means allowing existing operators to carry on producing current levels of effects, particularly adverse effects, and imposing restrictions only upon new entrants to whatever activity is being dealt with. It hardly need be said that it is a concept usually favoured by existing operators, who rationalise it by pointing to the investment they have made in the activity, and claiming that it would be unfair to require them to change, (or cease, in extreme cases) the way they do things.

[281] The Council says the SRPs do not allow existing operators to carry on producing current levels of effects but rather require all IFLUs, not just some, to reduce nitrogen pollution. As such, they submit it does not constitute grandparenting

---

96 Interim Decision at 5-78[Q].
97 Interim Decision at [5-128].

in any sense of that term.

Our analysis and conclusion

[282] We accept the Council's argument that the proposed SRP is not a 'do nothing' or 'do little' approach to the issue of nitrogen pollution in its waterways, and is not like grandparenting is in its pure sense. We accept that the starting point for the SRPs is the defined historic baseline. While that could be considered a grandparenting element, the environmental outcomes under the SRP cannot be differentiated from those achieved by complying with Table 14.2 in any practical sense. As such, neither Table 14.2 nor the SRP allow existing operators to carry on producing adverse effects while new entrants are held to a higher standard.

[283] The Table 14.2 leaching rates for the land use capability classes and the rules framework in the original One Plan provide recognition of social and economic factors at a general (although not individual farm) level.

Equity (and fairness)

[284] "Equity" is not a term that is used in the Resource Management Act. There was however no disagreement that equity or fairness could be relevant when assessing the degree to which the alternative proposals in front of us enable people and communities to provide for their economic, social and cultural wellbeing (whilst achieving the other matters in s 5) and that the s 32 evaluation should consider it.

[285] Counsel for Mr Day also submitted that inherent in the sustainable management purpose of the RMA is the requirement to promote the equitable distribution of finite resources.[98] Equity, or fairness, is part of providing for social, economic and cultural well-being and managing resources to meet the needs of future generations.

---

98 *Maclaurin v Gisborne District Council* EnvC Auckland A159/2003, 18 September 2003 at [30].

[286] The Appellant Parties argued that the SRP would create inequities for activities not yet within the One Plan's regulatory regime on the basis that the alternative controlled activity pathway created an easier option than complying with Table 14.2 with lesser reductions in nitrogen required. Put simply, it was said this offered unconsented farmers an exemption from a regime their colleagues had already worked hard to comply with. Further, it was submitted that the SRPs authorise contaminant discharges based on historically high leachers, and disadvantage those who have been actively conserving nitrogen or have not yet had opportunity to realise their capital investments, putting those investments at risk.

[287] Mr Day gave evidence outlining his concern that the additional controlled activity pathways will disadvantage new entrants in the allocation of natural resources.

[288] The Appellant Parties considered that the Council's position seems to be that equity in this situation is achieved by guaranteeing a resource consent to nearly every existing intensive farmer who does not currently have one, and preventing those farmers who were proactive and secured resource consent under Table 14.2 from applying for a new consent on the same new, more lenient, terms as their colleagues.

[289] The Appellant Parties submitted that the regime supported by them means all applications that cannot meet Table 14.2 are considered against a policy framework focused on a trajectory of reductions in leaching; encouraging more intensive activities on land with higher productive potential; and the One Plan's underlying objective of enhancing water quality where it is degraded. All farmers are therefore given a fair and genuine opportunity to seek and be granted consent. And all farmers, regardless of whether they are applying for a controlled (Table 14.2) or discretionary activity consent, are subject to the same, overarching expectations.

[290] In addition, the Appellant Parties submitted that for those few farms that do need to apply for a discretionary activity resource consent under the Council's preferred provisions, the primary test will be whether they are reducing their nitrogen leaching "to the maximum extent reasonably practicable in the shortest feasible

timeframe". As Mr Day explained:[99]

> … "Applicants are able to argue practicability on a myriad of grounds, financial and labour resources, time constraints", and:
>
> "What one farmer may be prepared to consider practicable vs another could be very different. If the [policies] mean consent is essentially granted if someone says they have put forward what is practicable there is a risk of my proactive colleagues carrying the can of the less proactive ones."
>
> [footnotes omitted]

[291] Federated Farmers submitted that equity is a complex issue which is inherently subjective and depends on one's perspective. It says that if equity is to be considered the following matters must also be taken into account:

(a) the administrative efficiency (and economic costs) of requiring a large number of farms to obtain a discretionary activity consent (compared with most of them applying for a controlled activity consent);

(b) farmers being in limbo for the past seven years, with no ability to apply for consents and farmers on unconsented farms hamstrung in reducing their nitrogen losses and improving their farm practices;

(c) farmers facing increased costs of borrowing and restrictions on their ability to sell their farms;

(d) farmers unable to obtain other resource consents needed to operate their farms e.g. effluent consents;

(e) the impacts of the length of time in limbo and introduction of national regulations on top of the One Plan are that there is now an element of it all becoming too much for some farmers and some of them "burying their head in the sand".

---

99 Day submissions dated 10 June 2024 at [4.9(d)].

[292] HortNZ adopted a similar approach, submitting that for CVG:

(a) there are already issues of unfairness because of the difficulties consenting CVG under the limits in Table 14.2 using Overseer;

(b) the One Plan system has standards and measurement tools that do not work for CVG and were not established with CVG in mind. There are therefore external fairness issues between CVG and other land uses for whom the systems were designed;

(c) there is uncontested evidence that only two of 50 CVG operations would meet the Table 14.2 limits;

(d) the discretionary consenting pathway has further uncertainty for CVG given the issues with Overseer applicability to CVG.

[293] For the Council, Ms Foster responded to Mr Scott's assertion that existing IFLUs that achieve consent under the SRP would not have had to work as hard as IFLUs that meet Table 14.2 Ms Foster labelled this as a "perceived equity" issue and relied on Professor Horne's and Dr Jolly's evidence that the practice changes required of operators will be broadly the same irrespective of the pathway chosen. It was her opinion that this is a key advantage of the proposed alternative pathways: providing a more certain, efficient and practical way of driving the on-farm practice changes needed to achieve the modelled water quality outcomes.

Our analysis and conclusion

[294] We are conscious that this decision sits within a background of consenting under the One Plan that has been beset with difficulties. We are aware of concerns about the use of Overseer for CVG, but HortNZ did not appeal the DV. We are aware that there were a number of consents issued before the Declaration Decision with CNLMs above the Table 14.2 limits. Mr Carlyon's view is that a full review of the existing consents granted on an "improper basis" should therefore be undertaken by Council, so that all IFLUs be considered on an equal footing. The Council has provided no indication it intends to do this and the Court is not in a position to direct

that.

[295] We are also aware of the lengthy consenting hiatus that existing IFLUs have been in. While the Appellants placed considerable emphasis on ensuring equity for consented activity for IFLUs that met the nitrogen limits in Table 14.2, seven times as many IFLUs have been unable to apply for consents at all and have been faced with considerable uncertainty about their futures for more than seven years. The Court cannot wind the clock back on that matter either.

[296] We therefore agree with Federated Farmers that equity is complex. We cannot retrospectively fix problems with the One Plan and its consenting, nor can there be solution that is entirely equitable for all. Moreover, we do not think it is the Court's role to do so. Our focus must be on PC2 and what can be achieved through that to best meet the existing objectives of the Plan and meet the purpose of the Act. We consider that is achieved by the findings in this interim decision.

Overall Conclusion on Alternative Controlled Activity Pathways

[297] We find there are important advantages in the SRP controlled activity status given the number of IFLUs that otherwise would be unlikely to achieve the Table 14.2 CNLMs.

[298] We are not satisfied that the inclusion of the NRAT more appropriately meets the settled objectives of the One Plan and consider its development is insufficiently robust to warrant its inclusion. Our underlying concerns about the robustness of the NRAT approach include questions not just about factors like its reliability and uncertainty but also about how it relates to the approach in Table 14.2 and the SRPs. That is important not just for the interim fix we are dealing with, but for any review process to follow.

[299] We are satisfied that the additional SRPs for pastoral farming at 20% and CVG at 35%, together with the retention of a discretionary activity status with greater policy specificity but still with the ability of a decision-maker to assess and make a judgment on whether to grant or decline consent provides a consenting pathway for all existing

IFLU. We consider that best meets the settled objectives of the One Plan and the purpose of PC2.

[300] In terms of the specified reduction value, we note that the IHP relied on the following as support for a 20% reduction for pastoral farming:[100]

> The pathway for dairying was separately proposed by Federated Farmers and Dairy NZ … [and entailed]…:
>
> (a) an alternative controlled activity consenting pathway for dairy IFLU that reduces N leaching to the lesser of:
>
> i. 90% of baseline N leaching rates; or
>
> ii. the calculated 75th percentile N leaching rate for the relevant surface water management zone
>
> from the baseline date of 24 August 2010.

[301] The IHP referred to Professor Horne's calculations showing a 20% reduction in N leaching from the 2010 baseline would reduce total N losses in the Upper Manawatū catchment by 30 tonnes per annum, which is more than a 10% reduction. The IHP concluded that this modest reduction would improve the instream environment, albeit not to the extent that the Macroinvertebrate Community Index (MCI) will improve much or exceedances of periphyton targets reduce much.

[302] During proceedings before us, the Council proposed to delete the DV requirement to comply with the 75th percentile for specific WMSZ if that figure was less than the 20% reduction. When we questioned why the change had been made and what the implications would be, we were advised that it was a combination of practicality and application. Ms Foster explained that there was some complexity in creating an appropriate reference file for the 75th percentile thresholds and Professor Horne indicated that it would impact only really high volume leachers and there were relatively few of those.

[303] Professor Horne subsequently revisited this issue during the hearing, creating a set of 75th percentile reference files with the assistance of DairyNZ data. Professor

---

100 At [3.132].

Horne outlined that the Overseer files for these 'typical' farms along with associated input data would become a set of 75th percentile reference files which would be able to be used in the same way as the Table 14.2 reference files. In contrast to its opening position, the Council's Closing Provisions therefore reinstate the 75th percentile requirement.

[304] In response to these issues, Ms Dewes outlined concerns about the difficulties experienced by Professor Horne in developing the reference files. She considered that meant farmers would also struggle to access sufficient information to establish their baseline leaching rate. She suggested that an alternative approach would be to set a 75th percentile threshold for each WMSZ using the 75th percentile of Overseer files.

[305] The Council responded in its closing submissions that such an approach had two main flaws. Firstly, a plan change would be needed to update the 75th percentile threshold figure each time Overseer is updated and secondly, it would rely on a large, unverifiable dataset of Overseer files. It was the Council's position that while Professor Horne's reference files rely on limited data and assumptions, the individual synthetic farms are set out in its Closing Provisions and can be replicated. Council also considered that farmers will have access to information (fertiliser, stock, and other records) that the Council currently does not which will allow them to establish their baseline leaching rate.

[306] While we understand the Council's position in relation to this matter, we do hold some concern that these issues only came to a head late in the hearing process. We have already indicated that we require further information in relation to reference files. These matters should be considered as part of the requirements referred to in paragraph [415], including proposals relating to the 75th percentile provisions.

[307] In relation to CVG, the IHP referred to as their starting point that water quality in Lake Horowhenua, the catchment which supports a significant proportion of the CVG in the target catchments, is seriously degraded. If lake water quality is to eventually improve, losses of N and P from the catchment need to be reduced

substantially and CVG is a significant part of this. The IHP also noted that there is a lack of information about current N leaching rates on these properties.

[308] On the basis of the evidence it did have, the IHP came to the conclusion that the substantive weight of evidence supported the Council's position that a 35% reduction in N loss leaching from the 2012/13 baseline was achievable by a large majority of CVG growers within the next five years. On that basis, it considered a 35% reduction in N loss from the 2014 baseline was appropriate to form the basis for the alternative controlled activity pathway.

[309] In saying this, the IHP acknowledged that some crops (notably brassica) would still struggle to comply, noting:[101]

> … that a 35% reduction in N leaching rates per property can be achieved by most growers using a range of GMP and BMP. Indeed, it suggests many growers have already met this target in just one year, and more will have achieved it when the 2012/13 year is used as the baseline. However, the evidence is also that such a reduction cannot be achieved by all growers, particularly those of intensive brassica dominated rotations. For them, the discretionary activity pathway remains a viable option.

[310] Based on the evidence presented to us, we accept these findings.

[311] Overall, we find in favour of the SRP provisions other than the NRAT component of the Closing Provisions. However, we find that additional consideration is required of elements of the policy and rule framework informing and directing consenting of these activities. We provide guidance on that and on the discretionary activity provisions in the balance of this decision.

Discretionary Pathway

[312] There is no dispute that a discretionary pathway must also be included in the suite of provisions for existing IFLU. For the Appellant Parties, it is considered to be the only appropriate pathway for exceptions to Table 14.2. For the Council and others, it is considered a further pathway for those who cannot meet Table 14.2 or

---

101 IHP Report at [3.214].

the SRP. Certainly, the evidence before us demonstrates that at a minimum commercial vegetable growers who grow brassicas or green vegetables are likely to find it difficult to meet Table 14.2 or even the SRP, particularly if they do not have areas of fallow or low intensity land use in their rotation. Some higher leaching dairy farms are also likely to need to apply for a discretionary consent.

Policy 5-8(a)(ii) and Policy 5-8(a)(iia)

[313] As Ms Foster explained, Rule 14-2 of the operative plan allows for exceedances of Table 14.2, but the operative wording of Policy 5-8(a)(ii) requires that existing IFLU must be regulated to achieve the CNLMs specified in clause (i) – which are effectively those set out in Table 14.2. This is the circular "roadblock" which has resulted in the current barrier to consenting. If Policy 5-8(a)(ii) is unchanged, it will perpetuate the policy 'roadblock' that PC2 is intended to rectify.

[314] To address this, Ms Foster proposed retention of the amendments to Policy 5-8(a)(ii) proposed in the DV which provide explicitly for exceptions where they are regulated in a particular way. The other planning witnesses did not disagree with the need to explicitly refer to the exceptions but did disagree on the nature of those exceptions. This is then accompanied by a new Policy 5-8(a)(iia) and (iib) which are intended to set out how such exceptions are regulated.

[315] The Council submitted that because Policy 5-8 is in the RPS portion of the One Plan, not the Regional Plan, it should be read as guiding the shape of the rule framework to be established in the plan, not providing a policy for activities to apply for consent under.

[316] On that basis, the Closing Provisions Policy 5-8(a)(iia) reads as follows:

> Existing intensive farming land use activities which do not comply with (ii) must be regulated to reduce nitrogen leaching loss from the land to the maximum extent reasonably practicable in the shortest feasible timeframe by implementing measures, including good management practice and additional measures, having regard to:
>
> (A) the contribution of the nitrogen leaching loss from the land to cumulative nitrogen leaching loss within the Water Management Sub-

zone;

(B) the actual and potential effects of the nitrogen leaching loss from the land on downstream groundwater and the surface water quality;

(C) the extent of non-compliance with the nitrogen leaching maximums specified in (a)(i) and the timing of planned reductions in nitrogen leaching from the land;

(D) the feasibility, practicality, and cost of implementing measures to achieve the nitrogen leaching maximums specified in (a)(i) having regard to the land use capability class of the land; and

(E) the strategy for surface water quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6.

[emphasis added]

[317] By contrast, the Day V3 Provisions provide for existing IFLUs that do not comply with the CNLMs as follows:

Existing intensive farming land use activities which do not comply with [the CNLMs] must be regulated to reduce nitrogen leaching loss from the land having regard to:

(A) the contribution of the nitrogen leaching loss from the land to cumulative nitrogen leaching loss within the Water Management Sub-zone [same as the Council version]

(B) the strategy for surface water quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6. [same as the Council version (E)]

(C) the productive capability of land in the Water Management Sub-zone; and

(D) the extent of non-compliance with the nitrogen leaching maximums specified in (a)(i) and the timing of planned reductions in nitrogen leaching loss from the land.

[318] The underlined words in the Council version replicated above demonstrate a critical difference between the parties. The Council submitted that its wording is more directive than the Appellant Parties' as to timeframe (shortest feasible timeframe) and reductions required (maximum extent reasonably practicable).

[319] Mr Scott, planner for the Appellant Parties, strongly disagreed saying that in his experience, the phrase "practicable" introduces an element of uncertainty given it

is a subjective judgement. He considered that the use of 'practicability' (which he noted followed through in several of the subsequent Council provisions)[102] was at odds with one of the key goals of PC2 which is to reduce uncertainty in the process of reconsenting IFLUs. He explained that where the policy framework allowed an applicant to outline what measures it could take to the "maximum extent reasonably practicable" it invited information on an applicant's individual financial circumstances, labour resources, and the like. In his view this meant a decision-maker was less sure of the appropriateness of accepting or declining the application or of the imposition of conditions. He also noted a concern that the effect of using 'practicable' was often that the uncertainty was externalised and more permissive of adverse environmental effects.

[320] In Mr Scott's opinion, the effect of the multiple uses of 'practicability' concepts within the Council's version, together with a lack of guidance around how far over the CNLM threshold introduces considerable uncertainty into the decision-making process. He was of the view that this meant consents were very unlikely to ever be declined, even at high levels of leaching, as long as the applicant could make the case that they are doing what they can based on adjustments to the status quo that did not impose financial or logistical difficulty, in their opinion. He considered that if this were the case, it would lead to a situation where the discretionary pathway was effectively an easier route for applicants, potentially involving less mitigation and fewer restrictive conditions, with implications for water quality.

[321] Mr Scott's concerns were echoed by Ngāti Turanga and Fish and Game who submitted in opening that "it would be perverse for inequities caused by illegal consenting to be a reason to return to a regime based upon 'reasonably practicable' farming practices".

Our analysis and conclusions on Policy 5-8(a)(ii)

[322] There is clearly a need for an RPS Policy which addresses the approach to be

---

102 Scott EIC dated 6 November 2023 at [8.56].

taken to existing IFLUs which do not comply with Table 14.2. Otherwise, there will be a gap in the planning documents and a likelihood of a continuing policy roadblock.

[323] However, we agree with the Council that as a policy in the RPS, it needs to guide the shape of the rule framework to be established in the regional plan, not provide a policy for applicants and the Council to apply when seeking resource consent. We are not satisfied that either version put to the Court actually does that.

[324] Rather than providing an overarching policy, both the Closing Provisions and Day V3 delve into matters that pertain to individual consents. On our assessment, Policy 5-8(a)(iia) needs to provide the platform for regulation of exceptions, with Chapter 14 of the Regional Plan then determining the parameters within which such regulation occurs. Providing detailed policy direction in an RPS on matters a regional plan should properly regulate risks the same policy roadblocks and barriers which have beset this plan since its promulgation. PC2 should not perpetuate that.

[325] As set out in the synopsis, we consider that these provisions require further review, and we will direct Court facilitated (and targeted) expert planning conferencing on these matters (among others). However, conceptually, we see no reason why Policy 5-8(a)(iia) could not simply read:

> Existing intensive farming land use activities which do not comply with (ii) must be regulated to reduce nitrogen leaching loss from the land to the maximum extent reasonably practicable in the shortest feasible timeframe within the duration of the consent by implementing good management practices.[103]

[326] What constitutes to the maximum extent reasonably practicable, and the shortest feasible timeframe should then be further particularised in Chapter 14 of the Regional Plan which we turn to now.

---

103 Subject to discussion on the use of good management practices, best management practices and additional measures from paragraph [382] onwards.

Policy 14-6: Resource consent decision-making

[327] This is the engine room of the regulatory policy informing the consideration of discretionary activity applications. In giving effect to RPS Policy 5-8, Policy 14-6 provides the framework within which applications for exceptions to the CNLMs in Table 14.2 might be granted. We have already established that the overarching goal (as set out in the RPS) is to ensure that if exceptions are granted they are only granted where the nitrogen leaching is reduced to the "maximum extent reasonably practicable" within the "shortest feasible timeframe" within the consent duration using GMPs. Policy 14-6 should therefore put meat on the bones of those terms.

[328] The Closing Provisions attempt to do this by proposing a new Policy 14-6(g)(i) that provides that when making decisions on resource consent applications and setting conditions for IFLU, the Regional Council must provide for exceptions to the CNLMs only when:

> (i) Good management practices and best management practices are implemented in accordance with a nutrient management plan specifying timelines and targets, along with additional measures (where necessary) to ensure nutrient leaching and run-off, faecal contamination and sediment losses from the land are reduced to the maximum reasonably practicable extent as soon as practicable; or

[329] This is then further particularised in a new policy 14-6(h) which provides that when determining whether to enable an existing IFLU to continue under Policy 14-6(g)(i), the decision maker must have *particular regard* to:

> (i) The contribution made to the maintenance and enhancement of values held by mana whenua for the relevant Water Management Sub-Zone;
>
> (ii) The extent of the activity's exceedance of the relevant limit specified in Policy 14-5(d) and the contribution of the nitrogen leaching loss from the land to cumulative nitrogen leaching loss within the relevant Water Management Sub-Zone;
>
> (iii) The rate of reduction of nitrogen loss towards the relevant limit specified in Policy 14-5(d);
>
> (iv) Proportionality in ensuring that the existing intensive farming land uses that have high nitrogen leaching loss relative to the relevant limit specified in Policy 14-5(d) are required to make appropriately proportionate reductions in nitrogen leaching loss;

(v) Whether further reductions are currently possible for the intensive farming land use based on available mitigation measures that have been tested and proven to be effective at farm scale or through farm system modelling, and

(vi) The feasibility, practicality and financial implications of implementing alternative measures that could achieve the relevant limit described in Policy 14-5(d).

[330] In addition, a decision maker must also *have regard to* the following:

(i) When determining whether to enable an existing intensive farming land use to continue under Policy 14-6(g)(i), also have regard to:

(i) The nature and characteristics of the land, including land use capability class and productive capability, physical characteristics of the soil including in terms of attenuation capacity, climatic conditions, and topography of the property;

(ii) The contribution of the progressive reduction in nutrient leaching and run-off, faecal contamination and sediment losses from the land, over time, to the improvement of water quality within that Water Management Sub-zone and the need for water quality improvement by reference to the relevant Schedule E targets;

(iii) The potential effects of nutrient leaching and run-off, faecal contamination and sediment losses from the land on surface water and groundwater receiving environments, recognising the state, sensitivity and absorptive capacity of the receiving environment and of downstream lakes and wetlands;

(iv) The surface water management values for the relevant Water Management Sub-zone, including the values described in Schedule B and in any relevant treaty settlement documents;

(v) The strategy for surface water quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6;

(vi) The operational crop rotation requirements of commercial vegetable growing necessary to avoid soil-borne diseases and maintain crop health;

(vii) The importance of maintaining food security for New Zealanders to support community well-being;

(viii) The extent to which any off-site mitigation measures will address adverse effects of nutrient leaching and run-off, faecal contamination and sediment losses from the land use on water quality in the Water Management Sub-zone.

[331] Policy 14-6(j) then sets out that if consent is granted, consent conditions must be imposed that require the implementation of the measures set out in a NMP, ensure any nutrient leaching does not increase in the term of the consent, specify the timeframe for reduction of nitrogen losses and the arrangements for any off-site mitigation and set out the monitoring and reporting requirements.

[332] The Day V3 requires a decision-maker, when considering a discretionary application, to:

> (i) have particular regard to the contribution made by improving nutrient management on the land to the maintenance and enhancement of mana whenua values, including those identified in Schedule B; and
>
> (ii) have particular regard to the extent and duration of non-compliance with the cumulative nitrogen leaching maximums or the reference file equivalents; and
>
> (iii) make a decision consistent with having more intensive land uses on land units with higher productive capability and discouraging more intensive land uses on land units with lower productive capability, based on land use capability class; and
>
> (iv) consider potential effects of nutrient leaching and run-off, faecal contamination and sediment losses from the land on surface water and groundwater receiving environments, recognising the state, sensitivity and absorptive capacity of the receiving environment and of downstream lakes and wetlands; and
>
> (v) only grant consent if doing so aligns with the strategies for surface water quality set out in Policies 5-2, 5-3, 5-4, and 5-5, and the strategy for ground water quality in Policy 5-6; and
>
> (vi) have particular regard where, for [CVG], the growing area does not exceed the base line growing area and, within 3 years of the granting of the application, the activity will achieve a minimum reduction in cumulative nitrogen leaching loss from the land of 35% relative to the base line growing area.

[333] Day V3 has an equivalent to Policy 14-6(j) which sets out that, where consent is granted, consent conditions must limit the consent duration to ten years and ensure the implementation of GMPs to minimise nutrient loss. Any nitrogen losses which cannot be minimised, are to be remedied or mitigated, including by other works or environmental compensation. Specific examples of mitigation works are then set out.

Our analysis and directions on Policy 14-6 matters

[334] We have significant reservations as to the efficiency and effectiveness of both sets of provisions provided to the Court and particularly whether they provide the most appropriate method of giving effect to the settled objectives of the One Plan and the purpose of PC2.

[335] As we noted in the synopsis, it is not possible to accurately measure or estimate the actual and potential effects of nitrogen leaching loss from individual farming activities on downstream groundwater and surface water quality limits in Schedule E or on cultural and other values in Schedule B. It is therefore important that policy wording does not lead to an expectation that these effects can and must be quantified and addressed for individual activities. We consider that some of the policies in both sets of provisions fall into this category.

[336] The policy framework should provide appropriate guidance on the things that matter in making a decision. A list of everything that can or might be considered assists no-one.

[337] Moreover, it seems to us that both versions confuse matters that are properly policies with matters that might sit more comfortably as a standard or as an information requirement. We have noted previously that Policy 5-8(a)(iia) was crafted with a level of specificity not required nor in this instance helpful in an RPS policy. The same is true of both versions of Policy 14-6.

[338] As the High Court helpfully pointed out in *Beach Road Preservation Soc Inc v Whangarei District Council*,[104] the plan hierarchy:

> … works from the most general to the most particular and each document along the way is required to reflect those above it in the hierarchy. It is a top-down approach.

---

104 *Beach Road Preservation Soc Inc v Whangarei District Council* [2001] NZRMA 176 (HC) at [39].

[339] We accept of course that policies can be "either flexible or inflexible, either broad or narrow"[105] but also note the difficulties which have arisen in this plan, in part, by virtue of a prescriptive and circular policy framework. We have no desire to see that repeated.

[340] As such, while we tend to favour the Council's Closing Provisions over the Day V3 provisions, we will direct that the Closing Provisions are the subject of further facilitated conferencing and provide the following observations to guide those discussions.

[341] Policy 14-6(e) of the Closing Provisions provides that any consent granted to replace or renew an existing IFLU consent granted before 22 July 2019 does not authorise greater than the CNLMs in Table 14.2. We understand that this is to ensure any 'leaching up' is within the limits imposed by Table 14.2 or otherwise would be the subject of a discretionary activity consent. The DV required leaching to remain at or less than any level specified in an earlier consent on the basis that this would go some way towards contributing to achieving the water quality improvement sought in the policy.

[342] There were questions from Appellant Parties about the equity implications of this restriction and the Council appears to have responded to them with this amendment. We are concerned that the proposed amendment in the Closing Provisions fails to meet the overarching requirement to reduce discharges and as such question the departure from the DV.

[343] Both versions refer to the maintenance and enhancement of mana whenua values. We have already set out our concerns as to whether this provides any meaningful assistance to a decision maker. Specifically, it is unclear to us how the effects of individual IFLU discharges on the values in Schedule B can be assessed with the certainty necessary to determine whether or not a resource consent to continue operating can be granted. We are also particularly concerned that such a policy could

---

105 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).

potentially result in inequities with different applicants required to provide different supporting documentation.

[344] Both versions of Policy 14-6(h) reference the extent and duration of non-compliance with the CNLMs. We accept that the extent and duration of reducing non-compliance with the CNLMs is important but consider there is merit in revisiting parameters that may provide better information for a decision-maker (noting this might be more appropriately cast as an information requirement rather than a policy).

[345] In that regard, there appear to us to be three primary parameters that would need to be provided to inform a decision-maker on an individual consent application:

(a) The extent to which the SIN water quality target in Schedule E of the One Plan is exceeded in the targeted WMSZ. This has already been established by the Council and can be made available on the Council website.

(b) The extent of non-compliance with the CNLMs, using a comparison between an activity's CNLM and the Table 14.2 value.

(c) The contribution of nitrogen leaching loss to the land to cumulative nitrogen leaching loss within the WMSZ, which can again be assessed by comparing an activity's CNLM with a sub-catchment load estimated by the Council and which can be made available on the Council website.

[346] Using (a), (b) and (c) together would allow an assessment of the relative nitrogen contribution from an individual activity to the scale of the nitrogen water quality issue in the WMSZ. In our view this would provide a useful basis for assessment against the existing surface water and groundwater strategies.

[347] There may also be a need to consider the 75th percentile in assessing such applications and the Council is directed to consider whether any matters relating to this should also be included in the above list.

[348] From this information, the extent to which the non-compliance with the Table 14.2 limits will be reduced by the proposed mitigation measures in the shortest feasible timeframe or during the term of consent, whichever is the lesser, can then be discerned.

[349] The Closing Provisions reference consideration of proportionality in ensuring that existing IFLUs that have high nitrogen leaching loss are required to make "appropriately" proportionate reductions in nitrogen leaching loss. When asked what the qualification of "appropriately" was intended to cover, Ms Foster explained that high leachers ought to make matching large, proportional (to the size of contributions), reductions. She indicated that she had struggled to find a more precise or numeric way of expressing that but thought it probably could be done.

[350] Our view of proportionality is that where all of the parameters set out in the above paragraphs are at the high end of the scale, the grant of consent would depend on the decision-maker being satisfied that proportionately large reductions in nitrogen losses will be achieved within the term of consent. Consideration might also usefully be given to whether a definition of "proportionately", or factors informing proportionality should be included.

[351] It is also noted that the policy framework of the One Plan does not require that all activities be granted consent, and it will be important that consent processing officers are cognisant of this when exercising their discretion. Applicants should be aware at the time they prepare their consent applications that consent may not be granted if insufficient mitigations are proposed.

[352] There was considerable questioning during the hearing as to whether the percentage reductions for pastoral farming and CVG would become the de facto "starting point" for consenting under a discretionary pathway. As a matter of law, all discretionary activities will be assessed on their merits in accordance with the relevant objectives and policies. In that regard there is no lawful "starting point" for nitrogen losses. Neither Table 14.2 nor its reference file equivalent nor the 20% or 35% reductions form a permitted baseline and should not be treated as such.

[353] The Appellant Parties were concerned that the consideration of practicability should not become an easy way out for consent applicants who say that they cannot afford to do more than what PC2 requires them to do. This is an understandable concern and one which needs to be addressed by appropriate checks and balances.

[354] The need to consider affordability cannot be side-stepped and the method of doing so is not something that can specified easily in regional plan provisions. It must be considered on an activity specific basis. In that regard, the overall plan framework expects farms to be using GMPs "and additional measures where necessary" (however that is ultimately defined) and by doing so to achieve reductions in nitrogen losses which will assist in improving water quality. Some farms will not be able to achieve the same gains as others, hence the need for a discretionary status to allow those applications to be considered on a case-by-case basis but the policy needs to be clear that simply asserting that this is the best that can be done for financial reasons will not be enough. The environment should not be required to bear that externality unless the decision-maker is satisfied that the lesser extent of reduction or longer duration to reduction is justified.

[355] The Council has gone some way to addressing this concern in its Closing Provisions, which include a requirement to consider whether further reductions are currently possible for the IFLU based on available mitigation measures that have been tested and proven to be effective at farm scale or through farm system modelling, and the feasibility, practicality and financial implications of implementing alternative measures that could achieve the relevant limit described in Policy 14-5(d).

[356] Ms Foster explained that this was designed to give a decision maker the opportunity (and reminder) to examine whether a particular IFLU is doing as well as it can in the circumstances given current technology. She was asked whether the second part of the clause did that. She responded that it includes a consideration of practicality, reasonableness, and financial considerations, and she struggled to see how you could not consider those and look at alternatives. She accepted that they are very general terms which can have a wide set of parameters that fall underneath them. She had resisted requests to make these more central and give them more importance, and

she had tried to de-emphasise them by placing them second in the list.

[357] It is clear to us that the proposal must provide a mechanism to ensure that all reasonably practicable options that are feasible in the shortest timeframe are considered. This should include all management practices and additional measures (including those developed by industry groups) that could reasonably be expected to contribute to achieving the objectives and policies.

[358] It occurs to us that a framework within which what is reasonably practicable in the shortest feasible timeframe can be assessed might be of assistance. That could include considering audited accounts and whether the costs of the mitigations are proportionate to the nature and scale of the activity and to the expected benefits in terms of reductions in risk of contaminant discharges. This should be further considered in conferencing.

[359] Council's Closing Provisions 14-6(i)(i) to (v) also raise concerns. Subclause (i) appears unnecessary as it is our understanding that Overseer estimates would represent a whole of activity assessment of the risk of nitrogen discharges, including taking into account soil characteristics, other biophysical characteristics of the land and the effects of clean water irrigation. Policy considerations (ii) to (iv) fall into the category of matters that cannot be met. Policy (v) refers to RPS strategies further up the hierarchy which are directed at a different purpose.

[360] We have further reservations regarding the specific policies proposed in the Council Closing Provisions to support CVG applications, including:

> (vi) The operational crop rotation requirements of [CVG] necessary to avoid soil-borne diseases and maintain crop health;
>
> (vii) The importance of maintaining food security for New Zealanders to support community well-being;

[361] It is indisputable that crop rotation is an essential component of CVG and not giving consideration to maintaining food security would be fanciful. While we are very concerned to ensure that CVG has a workable pathway toward consenting, we are not satisfied that the addition of these policies particularly assists in achieving that.

Given the evidence we have heard regarding Overseer and its application to CVG, we are of the view that linking consideration of a discretionary activity consent with the percentage reduction which would enable controlled activity status may provide a more appropriate policy setting.

[362] Finally, in relation to Policy 14-6(i)(viii) we note our reservations regarding off-site mitigations.

[363] As to the matters to be considered when imposing consent conditions (Policy 14-6(j)), sub-paragraph (ii) should be amended to require a reduction, not that there be no increase in losses. We note the references to off-site mitigation in subclause (iv) but are unclear as to how this works in practice in relation to the PC2 regime. We received very limited evidence on the topic and there is no specific requirement to provide off-site mitigation. Specifically, there are no provisions to guide decision-makers on:

(a) the circumstances under which off-site mitigation must be provided;

(b) how the extent of effects of different contaminants to be mitigated are to be assessed;

(c) how off-site mitigation is to be determined for all contaminants of concern, but particularly in relation to nitrogen, which riparian vegetation and most wetlands have variable and sometimes relatively limited capacity to remove.

[364] Similarly, we are unclear as to what is meant by "additional measures where necessary" and what criteria are to be used to determine the extent of additional measures to be provided. All of these matters need to be addressed during conferencing.

[365] By way of conclusion to this section, we reiterate our direction that Policy 14-6 must provide a clear focus for decision makers on the matters of importance in determining a discretionary activity consent application for an existing IFLU. That is, what is the gap between what is being proposed here and what might otherwise be

achieved by way of the controlled activity routes, what is the difference in timeframe to achieve a reduction in nitrogen losses and is there reliable evidence that this is the best that can be done on this farm at this time?

[366] The larger the gap between what is sought and what is expected via a controlled activity pathway, the more scrutiny an applicant should expect to bear and the greater and more compelling the evidence on mitigation measures proposed to reduce effects on the environment will need to be. As we have previously said, we accept, as must applicants, the Council and the wider community that the very nature of a discretionary activity is that it requires an exercise of judgement on the part of the decision maker and may result in some consent applications being declined. The One Plan does not state that every existing IFLU must receive consent. The policy framework should provide appropriate guidance on the things that matter in making a decision. A list of everything that can or might be considered assists no-one. Similarly, including requirements that are incapable of being measured assists no-one.

[367] Subject to the above matters being addressed to our satisfaction, we have determined that the Council Closing Provisions relating to policies will more appropriately achieve the objectives than the Day V3 Provisions.

Policy 14-5(d)

[368] One final matter before we turn to the rule framework relates to Policy 14-5(d). Ms Foster noted that the Day V3 Provisions propose the introduction of a new concept of 'projected long-term average' leaching of nitrogen. The definition of CNLM does not currently include averaging and this amendment would introduce a different way of applying the CNLMs than we consider was intended by the One Plan. Ms Foster did not adopt this suggestion. Neither do we. We are very wary of creating new policy blockages to effective processing of applications for consent.

Duration of consents – Policy 14-6(c) and (d)

[369] Consents for a controlled activity under the SRP or for a discretionary activity are limited to a maximum of 10 years, with all parties considering that to be

appropriate. PC2 as notified did not limit the duration of consents for those controlled activity applications that meet the (recalibrated) Table 14.2 and no party proposed that. As such, the maximum length of a consent under Table 14.2 is theoretically 35 years, but, as Ms Foster pointed out, the provisions of Chapter 12 of the One Plan limit this to an extent – consents will typically expire on the next relevant common catchment expiry date (as described in Policy 12-5 and Table 12.1). Policy 12-5(b) provides for consents to be granted for longer than that period where an application is granted within the period three years before the next common catchment expiry date (which vary from catchment to catchment), and in further 10-year blocks in accordance with the criteria at Policy 12-5(b)(i)–(iv). The result of all of that is that duration of consents granted under Table 14.2 is likely to range from 10–20 years (with some consents going beyond this).

[370] The Council made something of the potential difference in consent terms, suggesting that the potential for a longer duration consent under Table 14.2 may act as an incentive to applicants to meet those thresholds.

[371] The Appellant Parties say that if a responsible implementation approach is taken in accordance with existing planning guidance, the term of consents cannot be relied on as a strong distinguishing factor providing an incentive for meeting Table 14.2. We agree with that. To try and guess whether those needing consents will be incentivised to comply with Table 14.2 on the basis of the potential for a longer-term consent, is speculative. We also note that there are potential advantages for those accessing the shorter-term SRP and discretionary activity consents in terms of the value of existing investment remaining a relevant factor in consent 'renewals'. As such, we find the durations suggested appropriate for the SRP and discretionary pathways.

[372] While we recognise that the grant of longer-term consents under Table 14.2 has the potential to create a legacy issue for those consents, should there need to be further reductions on those farms following the Oranga Wai plan change, that is not something this court can deal with.

[373] Ms Foster considered that all conditions of consent should require actions that can be implemented within the term of the consent and not rely on or impose additional actions undertaken beyond the expiry date. As such, it was her expectation that applications for consent lodged after a ten-year duration will be made under the rules of the future freshwater planning instrument depending on the intersection of consent expiry date and the timing of the freshwater planning instrument process. We agree with that.

The Rule Framework

[374] We now turn to consider the rule framework which has to be appropriate to deliver on the policy outcomes addressed above.

Rule 14-1 Existing IFLU - Controlled Activity

[375] The Closing Provisions provide that a NMP must be prepared which demonstrates that the nitrogen leaching loss is consistent with Table 14.2 and the other thresholds and related timeframes. The activity must then be undertaken in accordance with that plan. Matters of control are set out which include, *inter alia*, the content of the NMP, the nitrogen leaching loss, the duration of the consent and the monitoring and reporting obligations. In addition, the Council Closing Provisions refer to "the matters in Policy 14-9" but reference to the matters in Policies 14-5 and 14-6 have been deleted. Day V3 retains all three Policies.

[376] During the course of the hearing, the Court carefully questioned whether the references to Policies 14-5 and 14-6 were meaningful. Ms Foster's recollection was that the references to Policies 14-5 and 14-6 were originally inserted in response to requests from submitters but accepted that not all parts of the policies were relevant. Most of Policy 14-6 is relevant only for activities that do not comply with Rule 14-1 and those parts of Policy 14-5 which are relevant such as exclusion of cattle, culverting and bridge crossings and the like are already addressed by Rule 14-1 conditions. On that basis Ms Foster recommended the deletion of these references in the Council's Closing Provisions and we agree with that approach.

[377] Policy 14-9 is the compulsory consent decision making policy that was required to be inserted by Policy A4 of the 2017 amendment to the NPS-Freshwater Management 2014. It remains relevant. The position is similar for the reference to Policies 14-5 and 14-6 in the discretionary matters for Rule 14-2.

[378] The Court questioned whether Policy 14-3 might be potentially relevant given it requires the implementation of GMPs and additional measures to reduce nitrogen leaching. Ms Foster responded that Policy 14-3 applies to decision making about a wider range of discharges than those under Policy 14-5, and the references within Policy 14-3 to other chapters of the One Plan open up considerations, including best practicable option considerations, more usually appropriate for decision making where unlimited discretion is to be exercised. Her view was that the requirements in relation to GMPs and additional measures to address the effects of IFLUs are already sufficiently described in the conditions of Rules 14-1 and 14-2. Policy 14-3 does not do any more but does have the potential to introduce or suggest wider discretions than these rules actually allow. We accept that.

[379] Finally, Rule 14-1 provides that controlled activity resource consent applications are non-notified and written approval of affected persons is not required and notice of applications need not be served on affected parties. We accept this approach.

Rule 14-1(d) Nutrient Management Plan

[380] Rule 14-1(d) sets out what the NMP must demonstrate.[106] The term "Nutrient Management Plan" is a defined term within the One Plan and we have some reservations as to the accuracy of the wording in the definition (as discussed later in this decision). We are concerned to ensure that an NMP prepared in accordance with the definition will, in fact, be able to demonstrate compliance with the requisite leaching limits. That matter needs to be considered and resolved as part of the planning conferencing. If there is no scope to amend the definition of NMP then it

---

106 By virtue of Rule 14-2 this relates to discretionary activities as well.

may be more appropriate to set out within the Rule the requirements of a management plan that can demonstrate compliance.

Rule 14-2

[381] Day V3 suggests an amendment to the restricted discretionary matters under Rule 14-2 by inserting discretion over the extent of non-compliance with nitrogen leaching maximums. Ms Foster noted in evidence that non-compliance with the Rule 14-1 nitrogen leaching limits is subject to Rule 14-2A (a full discretionary activity) not Rule 14-2. As Rule 14-2 is specifically and only for breaches of the other, non-nitrogen leaching, standards, there is no need for the amendment proposed. We agree with Ms Foster.

Definitions

Good Management Practices and Best Management Practices

[382] There are amended and new definitions introduced through PC2 which apply to both the RPS and the Regional Plan. Most were not in contention by the conclusion of proceedings with the exception of "Good Management Practices" and "Best Management Practices".

[383] It is a requirement of operative Policy 5-8 that CNLMs are achievable on most farms using GMP. GMP was not originally defined in the Plan and the term generated considerable debate throughout the PC2 process.

[384] The NV of PC2 added a definition of "good management practices" as follows:

> **Good management practices** refers to evolving practical measures and methods, including those established in industry-based standards, which are used at a sector or community level to minimise the effects of discharges to land and water.

The DV amended that definition to read:

> **Good management practices** refers to practicable measures and methods,

> including those established in industry-based standards and guidance documents, which are tailored for use at a farm level to minimise the effects of discharges to land and water.

[385] The DV also added a new definition of "best management practices".

> **Best Management Practices** means measures, additional to good management practices that are tailored for a farming or growing system to minimise nitrogen leaching loss from the land to the maximum practicable extent.

[386] The Closing Provisions adopt both DV definitions of GMP and BMP. Day V3 deletes the DV definition of BMP but accepts the DV definition of GMP. The terms are variously used throughout the provisions, sometimes singularly, sometimes in conjunction and sometimes alongside "additional measures" which is not defined.

[387] In evidence Ms Foster stated that where exceptions to Table 14.2 are considered, it may be that GMPs, BMPs and additional measures (for example 'edge-of-field' technologies or off-site mitigation) may be necessary to reduce nitrogen leaching to the maximum practicable extent. For that reason, she used the language "GMPs" and "BMPs" and "additional measures where necessary". Despite Ms Foster's evidence on this, the Closing Provisions remain inconsistent in the use of these terms.

[388] In answer to questions, Ms Foster expressed the view that not all measures necessary to reduce nitrogen leaching to the maximum practicable extent will be specified in 'industry standards' or in codes of practice or guidelines. Further she noted that a point made strongly in evidence to the Council hearing was that IFLU should not be constrained from considering innovation by plan references to fixed standards.

[389] Mr Scott disagreed, preferring the pre-PC2 wording which commits the Council to examining, on an ongoing basis, relevant industry-based standards generally, and not specifically in relation to groundwater or surface water or IFLU activities. The Day V3 Policy 14-3 therefore reads:

> **Industry-based Standards**

> The Regional Council will examine on an on-going basis relevant industry-based standards (including guidelines and codes of practice), recognising that such industry-based standards generally represent current best practice, and may accept compliance with those standards as being adequate to avoid, remedy or mitigate adverse effects to the extent that those standards address the matters in Policies 14.1, 14-2, 14-4 and 14-5.

[390] In Ms Foster's opinion, the wording Mr Scott proposed takes the focus away from directing IFLU applicants to adopt GMPs, BMPs and additional measures and she did not support it.

[391] We are cognisant of the evidence before us that there is a high level of disagreement among those in the agricultural and horticultural sectors about what the terms GMP and BMP mean. We also note the evidence of Professor Horne and Ms Foster and others that delivering the outcomes sought by Table 14.2 or allowed for in the alternative SRPs or from any discretionary consent are likely to require all three concepts to be considered and employed at an individual farm level. We also anticipate that what might be considered to come under the various categories may well evolve with time.

[392] In light of that, we conclude that a focus only on the terminology of what might come into each of these categories will not take us far. It is clear to us that the intention is that a large spectrum of matters is identified that may be deployed as required. The important and overriding factor should be the achievement of the outcomes sought, that is to say, a reduction in nitrogen leaching to the maximum extent reasonably practicable in the shortest feasible timeframe.

[393] Accordingly, we direct a review of the definitions of GMP and BMP and "additional measures where required" together with a reconsideration of their use throughout the provisions. Our preliminary view is that the terms might be more appropriately amalgamated. We would expect that any farming practice that would contribute to a reduction in nutrient discharges, whether included in industry guidelines or not, should be considered as part of the solution, without the need to necessarily categorise it as a GMP or BMP or additional measure.

[394] For completeness, we agree with and accept the reasons given by Ms Foster for not accepting the Day V3 provisions relating to GMP. In particular, it is important that the focus of GMP in PC2 is on ensuring IFLUs implement measures that will reduce the effects of nitrogen discharges on surface water and groundwater. Some good management practices may be included in industry standards for other reasons and requiring them may not contribute to the achievement of the objectives of PC2.

Nutrient management plans

[395] The new definition of "Nutrient Management Plan" refers to a certified freshwater farm management plan and a certified freshwater farm planner, however we note that the Resource Management (Freshwater and Other Matters) Amendment Act 2024 has now revoked the Resource Management (Application of Part 9A—Freshwater Farm Plans) Order 2023 so that Part 9A of the RMA ceased to apply to the Manawatū-Whanganui Region. Accordingly, there may no longer be any need to amend the operative definition. We direct that matter to be considered at the facilitated planning conference.

[396] The parties might also give some thought during conferencing to whether there is scope to correct issues with the operative definition. The Code of Practice referred to would seem to be the Code of Practice for Fertiliser Nutrient Management dated March 2023. However, this Code of Practice appears to address the management of nutrients arising from fertiliser application only and does not address the management of nutrients from animal defaecation and urination or from dairy effluent irrigation or other farming practices that can affect nutrient discharges, nor make any reference to dairy company nutrient management guidelines which address wider issues than fertilizer application. We also note it cannot be applied to CVG activities, for which other industry developed systems are in place.

[397] We are aware that such industry documents may not be suitable as the basis of a definition. That is likely to mean the option we identified earlier of setting out in the Rule the requirements of a management plan that can demonstrate compliance is a more appropriate approach.

[398] Moreover, on our review of the Code it seems to contain several conflicting references to what is sought to be achieved by Rule 14-1(d). It also refers to Booklets (linked to the electronic version) on Practices to Address Risk. Ms Foster said that the intention was not to incorporate these by reference but that is not expressly stated in, or otherwise clear from, the provision.

[399] We direct that this matter to be the subject of further conferencing.

Overall Evaluation and Outcome

[400] As decision makers on this plan change, we must examine whether the provisions in the proposal are the most appropriate to achieve the objectives in terms of the other reasonably practicable options identified for achieving the objectives and assessing the efficiency and effectiveness of the provisions in achieving the objectives.

[401] That assessment must identify and assess, and if practicable quantify, the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth and employment that are anticipated to be provided or reduced. It must also assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

[402] In considering the scope questions (see Attachment 1) we determined that the additional and alternative controlled activity consenting pathways for existing IFLU and policy and rule support introduced in the DV are in scope.

[403] We did not accept the Regional Council's reasons for the inclusion of the newly developed NRAT approach. Accordingly, we did not address the question of whether the NRAT provisions would be in scope.

[404] In undertaking our evaluation, we took into account the following matters:

(a) The One Plan has not met initial expectations of it by a significant margin and it is critical that expectations for PC2 are based on a sound

understanding of what is realistically achievable over the next 10 or so years.

(b) Relying on Table 14.2, with or without including the reference file method does not enable "most" farms to be consented as controlled activities, which is an outcome sought by Policy 5-8 of the operative One Plan, with the same weight as recognising the productive capability of land in the WMSZ.

(c) There is significant uncertainty about most if not all factors that are relevant to determining the effects of nitrogen discharges from individual IFLUs on water quality in the WMSZs.

(d) It is unrealistic to expect that a meaningful and consistent assessment can be made of the effects of an individual IFLU on the WMSZ water quality targets in Schedule E, and/or the relevant Schedule 2 cultural and other values and management objectives that the water quality target is designed to safeguard. Accordingly, it is unrealistic to require that at the time of consent applications. That can only be done at the WMSZ level.

Section 32AA Evaluation criteria

[405] In her s 32AA evaluation, Ms Foster considered the following options:

(a) the Closing Provisions;

(b) DV-PC2 (the SRP provisions);

(c) the Day V3 Provisions;

(d) simple recalibration of Table 14.2.

[406] She compared their performance relative to each other by ranking them as performing well, moderately well, less well or least well. For some criteria she considered them to be neutral (which she separately identified) or to perform equally well.

[407] We have considered the criteria informing the summary comparison undertaken by Ms Foster and also her list of additional matters raised throughout the course of the hearing that might usefully be considered in comparing the merits of the different approaches before us.

[408] For completeness we note that the s 32AA evaluation of Ms Foster concludes at a high level that the Closing Provisions as a package perform markedly better than the Day V3 provisions in most respects and provide a more efficient, effective and more appropriate way of achieving the relevant PC2 and One Plan objectives. In her view the Closing Provisions as a package deliver greater certainty of nitrogen leaching reduction outcomes than the Day V3 provisions, greater certainty of outcome for IFLU and for the community and better drive farm management practice changes to reduce nitrogen leaching.

[409] She considered that the package would engender better engagement by farmers and growers and considered this to be important to successful implementation of the PC2 provisions as early and as efficiently as possible. She also emphasised the importance of the interim plan change being bedded in and working as quickly as possible, so that the Council and community can get on with the next phase of necessary policy development with the Oranga Wai freshwater planning instrument.

[410] However, Ms Foster's s 32AA evaluation includes the NRAT approach as part of the package (Option 1 Council Closing Provisions) and we have decided against that for the reasons given earlier in the decision.

[411] Mr Scott's s 32AA evaluation has a different conclusion on the merits of the Day V3 provisions, finding that these adopt the most appropriate combination of activity statuses and the policy direction for discretionary activity consenting. We have previously indicated we generally consider the Council's Closing Provisions (with some exceptions) better meet the purpose of the plan change and the Act. Moreover, we do not accept that the evidence confirms that is the most appropriate outcome for achieving the objectives of the One Plan and PC2, and for promoting sustainable

management, for the reasons set out elsewhere in this decision.

[412] We have reflected on problems that arose and were covered in the Declaration Decision indicating the need for strong policy for discretionary activity for those activities that do not meet the requirements of a controlled activity. It reminds us of the need to ensure that the discretionary activity pathway is as robust as possible. It is important to break the consenting hiatus that the community has lived with for a long time.

[413] To resolve these issues, PC2 needs to provide greater specificity around the level of nitrogen leaching reduction required to gain consent and the period in which reductions were to occur. We accept that there is still uncertainty around what the discretionary activity pathway will deliver. It is important that the community, applicants and the Council as consent authority have clear direction in the provisions that inform consenting and the achievement of the objectives and policies in the One Plan.

[414] For those who choose not to, or who cannot, comply with the threshold requirements for a controlled activity there is the opportunity to apply for a discretionary activity. Discretionary activity status affords a decision-maker discretion to assess and make a judgement on whether to grant or decline consent. We see the importance of ensuring IFLUs are able to have an application for consent processed and a decision made (even if that is to decline consent without further measures being undertaken than those proffered by the applicant). It will not be in the interests of any party, the community or the environment to have a repetition of what has occurred to date.

Directions

[415] By 27 February 2026:

(a) The Council is to review the reference file process to be used to update CNLM values as a result of Overseer version changes as set out in our conclusions in paragraphs [130] and [131] and provide a technical peer

review undertaken by an appropriately qualified and experienced independent expert of any reference file method to be included in PC2 (unless it has already been done in which case the review should be provided to the Court).

(b) The Council in consultation with the parties is to arrange for planning and legal representatives to attend a Court-facilitated "drafting" session on the plan provisions to discuss and, where possible, agree the following issues as identified in this decision:

(i) Whether Policy 5-8(a)(iia) should be recast given its role as an RPS Policy.

(ii) Whether Policy 14.5(d) is to require that the nitrogen loss is to be 80% of the land's nitrogen leaching baseline as in the Closing Provisions or the lesser of 80% of the land's nitrogen leaching baseline or the 75th percentile nitrogen leaching loss for the relevant water management zone and, if the latter, whether the proposed reference file method is workable. The Court's expectation, from the evidence heard, was that the 75th percentile "bottom line" would remain.

(iii) Whether there are changes required to RPS Method 5-13 or other provisions as a result of conferencing.

(iv) Whether Policy 14-6(e), (h), (i) and (j) should be recast given the matters outlined in this decision.

(v) Review and consolidate the references to good management practices, best management practices and additional measures having regard to the matters raised in this decision.

(vi) Whether the reference to NMPs in Rule 14-1(a) is undermined by the definition of "Nutrient Management Plan" and whether there is any scope to amend the definition if it is.

(c) Such facilitated conferencing will be arranged by the Court as soon as possible upon release of this decision and no later than the week of 9 February 2026.

[416] The Council is directed to undertake a further s 32AA assessment of the amended suite of provisions as part of that conferencing. The parties are to provide a joint memorandum to the Court within 10 working days of the conclusion of the facilitated conferencing or 27 February 2026 whichever is the earlier setting out the agreed provisions and highlighting any areas that remain for the Court's determination.

Costs

[417] Costs are reserved. A timetable will be set for applications and responses in the Court's final decision.

For the Court

L J Semple
Environment Judge

Attachment 1

The Scope Issue for Specified Reduction Pathways (and associated policy and rules)

The Issue and Our Approach

[1] PC2 as notified did not include SRPs. They were adopted by the Hearing Commissioners based on submissions that were made by Federated Farmers and DairyNZ.

[2] The Council's position throughout proceedings was that SRP, or a similar pathway, was explicitly requested in the submissions for HortNZ and Federated Farmers. We do not understand there now to be any argument that the SRP is fairly and reasonably within the scope of those submissions. Accordingly, the challenge to scope for the SRP can only come in the form of an argument that the parts of the HortNZ and Federated Farmers submissions seeking an SRP are not properly "*on*" the plan change.

[3] We received extensive submissions both from individual parties (Federated Farmers and HortNZ), the Appellant Parties separately and in closing together (Fish and Game, Mr Day and Forest and Bird) and the Council. The Appellant Parties advanced their case that there is no scope for specified reduction pathways and associated policy and rules and the other parties opposed their position and provided counter arguments.

[4] In its reply the Council submitted that the Appellant Parties' approach, forensically analysing the impact of policy changes to question the extent of change, is an overly narrow approach to scope. It overlooks the broader challenges that PC2 sought to address and the subtleties in its policy language. In this context, the obvious public understanding of the scope of PC2, as evidenced by the many submissions and further submissions seeking changes to the consenting framework and methodology, should carry weight in determining scope. The argument that the submissions seeking

the SRP were not 'on' PC2 ultimately runs counter to the background material, including the s 32 report, the notified provisions, and the clear public perception of the plan's scope.

[5] After careful consideration of all the submissions we group and deal with the sub-issues in the following order:

(a) What is the law that should inform our decision making on scope?

(b) Do the SRPs involve a fundamental change to the resource-based regime for managing existing intensive farming activities?

(c) What is the problem the plan change is to solve?

(d) What is the purpose of the plan change?

(e) What are we to make of the public notice?

(f) Was it a materially different approach?

(g) What are we to make of extrinsic documents?

(h) Who would have been disadvantaged?

(i) What are we to make of the s 32 Report?

What is the law that should inform our decision making on scope?

[6] We now deal with preliminary points in terms of the submissions on the law informing the scope arguments of the various parties.

[7] To address the question of when a submission is "on" a proposed plan change, the Appellant Parties relied on *Motor Machinists*[107] and *Clearwater Resort Ltd.*[108]

---

107 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 (*Motor Machinists*).

108 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 (*Clearwater Resort*).

[8] In *Motor Machinists*, Kós J began by stating that:

> From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[9] To determine whether a submission is "on" a plan change,[109] it is necessary to begin by identifying the relevant status quo, and then to consider the extent to which the notified plan change would alter this status quo.[110]

[10] As stated by William Young J in *Clearwater Resort*:[111]

> 1. A submission can only be fairly regarded as "on" a plan change if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation

[11] This approach is "in conformity with the scheme of the Resource Management Act which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".[112]

[12] It also guards against accepting submissions that come out of "left field" and would result in limited opportunity for those who may be affected to be informed and to make their own submissions in response.[113]

[13] Ms Wright submitted that the Environment Court decision in *Naturally Best*,[114] which endorsed "fair and reasonable extensions" to a plan change, was overruled by

---

109 RMA, sch 1 cl 6(1).

110 *Clearwater Resort* and *Motor Machinists*.

111 *Clearwater Resort* at [66].

112 *Clearwater Resort* at [68].

113 *Clearwater Resort* at [69].

114 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

the High Court in *Motor Machinists*, and the above approach in *Clearwater Resorts* was re-affirmed.[115]

[14] Further, HortNZ submitted that the Court in *Motor Machinists* provided further guidance on assessing whether a submission is "on" a plan change, including considering whether the submission raises matters that should have been addressed in the s 32 evaluation and report and whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. It was also noted that *Vivid Holdings*[116] states that any decision of the Council, or requested of the Environment Court on appeal, must be fairly and reasonably within the general scope of an original submission, or the proposed plan as notified, or somewhere in between.

[15] The Council submitted:[117]

> [173] The leading authority on whether a matter raised by a submission is properly "on" a plan change, remains *Motor Machinists,* which endorses the bipartite test for scope established in *Clearwater*. In *Motor Machinists*, the Court explained its understanding of the *Clearwater* test:
>
> > First, the submission could only fairly be regarded as "*on*" a variation "*if it is addressed to the extent to which the variation changes the pre-existing status quo*". …
> >
> > Secondly, "*if the effect of regarding a submission as 'on' a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected*", that will be a "*powerful consideration*" against finding that the submission was truly "*on*" the variation. It was important that "*all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate*". If the effect of the submission "*came out of left field*" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "*a submission proposing something completely novel*". Such a consequence was a strong factor against finding the submission to be on the variation.

---

115 *Motor Machinists* at [73].

116 *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC).

117 Closing submissions dated 26 August 2024 at [173].

[16] There does not appear to be any contention between the parties up to this point.

The Regional Council's differing position

[17] The Council then distinguishes *Motor Machinists* and *Clearwater Resort* on the basis that these decisions and the other key scope cases relied on by the High Court (*Option 5*,[118] *Halswater*[119]) relate to lines on maps – noise contours, zoning boundaries, and the like. In these instances, the scope of a proposal is much easier to identify, as the extent of the changes in a notified plan can be readily assessed by reference to changes over defined spatial areas.[120] In contrast, determining the scope of changes involving changes in language used in policies, rules, and methods in region-wide resource management can be more challenging. In such cases, the Council says what is required is not a forensic dissection of the language, but rather a balanced assessment that considers the broader context and the principles of procedural fairness that underly genuine 'scope' enquiries.

[18] Further the Council submits that the Environment Court and the High Court have previously said that assessing the scope of a plan change includes an assessment of:[121]

(a) the policy behind the plan change;

(b) the purpose of the plan change; and

(c) whether a finding that the submissions were on the variation would deprive interested parties of the opportunity for participation.

---

118 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

119 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

120 Closing submissions dated 26 August 2024 at [174].

121 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council (No 6)* [2013] NZEnvC 257; citing *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

[19] In its reply the Council goes on to refer to the Environment Court explaining in the *Mackenzie District Council* line of cases (counsel emphasis added):[122]

> **By "purpose" I apprehend that [the High Court in *Option 5 Inc v Marlborough District Council*] meant the relevant resource management issue which the plan change (or variation) intends to address**. **By 'policy' is meant the approach which the local authority intends to use to deal with the issue**. I note that the approach can be at different levels of the internal hierarchy of objectives, policies and methods within a district plan. The simplest situation is where a plan change or variation simply states new methods of implementation (e.g. amended zone boundaries as in *Option 5*) including rules to implement existing objectives and policies. More complex is to propose new policies and rules; and of course yet further complexity is added if the plan change (or variation) proposes new objectives in addition to policies and rules (as in this case).

[20] As a final preliminary point on the law, the Council argues that the s 32 Report does not define the scope of a plan change. It can be an important tool to explain the purpose and thinking behind a change, and it is relied on extensively by the Appellant Parties but it is ultimately extrinsic to the plan change. The Council points out that the Environment Court recently discussed this point in relation to an appeal against changes to the AUP:[123]

> Fundamentally this Court does not accept that a s 32 report can itself, being evaluative, contain the objectives or policies of any change. A section 32 report is clearly intended to be an evaluation or check against the proposal put for public consultation. Nevertheless, the Report writer stated not only a rationale for the proposed plan change but also stated the matters outside the scope of [the plan change]. Quite simply, we conclude that a Council Officer has no power to do so.

[21] The Council submits that this builds on previous case law around the relevance of a s 32 report. In *Bluehaven*, the Environment Court confirmed that the s 32 analysis will be useful in evaluating whether a submission is within scope but "it may not always be appropriate to be elevated to jurisdictional threshold".[124] The Court went on to state that "the inquiry cannot simply be whether the s 32 evaluation report did

---

122 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council (No 6)* [2013] NZEnvC 257 at [26].

123 *Beachlands South Limited Partnership v Auckland Council* [2024] NZEnvC 35 at [29].

124 *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 (*Bluehaven*) at [36].

or did not address the issue raised in the submission".[125] Said more succinctly, "neither the s 32 report nor the public notice are determinative of scope but each is a document that can assist interpretation of the intention of the notified [plan change]".[126]

Do the SRPs involve a fundamental change to the resource-based regime for managing existing intensive farming activities?

[22] We start with this issue because it is central to the Appellant Parties' case that there is no scope for SRPs and the associated provisions.

[23] To set the scene we set out the argument for Mr Day in full:

(a) The One Plan's regime for managing nitrogen leaching from intensive farming land uses is based on the underlying land resource and its qualities, not on the activities that occur on or within those resources.

(b) PC2 was expressly not intended to change the One Plan's existing regime.

(c) The specified reduction pathways operate in the reverse. They manage nitrogen leaching based on the activities occurring on the land resource, not based on the underlying land resource itself. This is the opposite of the One Plan's existing regime.

(d) Their inclusion therefore represents a fundamental change to that existing regime, which was not the objective of PC2.

(e) Submissions seeking inclusion of the specified reduction pathways were therefore not "on" PC2 and there is no jurisdiction for their inclusion.

[24] In terms of the substantive issue Ms Wright submitted that the SRPs adopt a grandparenting regime, regulating nitrogen leaching based on historic leaching of existing activities requiring a percentage reduction from a baseline year. In her

---

125 *Bluehaven* at [39].

126 *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187 at [42].

submission, this is a fundamentally different approach to one regulating nitrogen leaching based on the inherent characteristics of the land resource on which the activities occur, as Table 14.2 does.[127]

[25] In Ms Wright's submission that fundamental difference means that submissions seeking the SRPs are not on PC2 and there is no jurisdiction to include them. The word "on" means something more than "in connection with", which, on the High Court's interpretation, would open for re-litigation aspects of a plan which had previously passed the point of litigation.[128] Rather, a submission can only fairly be regarded as "on" a plan change if it addressed the extent to which that plan change amends the status quo.[129]

The counter arguments

[27] We note the submission from HortNZ that the Table 14.2 CNLMs were derived using a natural capital approach; and the SRPs direct farmers and growers towards meeting their Table 14.2 CNLMs and therefore do not represent a fundamental departure from the natural capital approach. A limitation of that argument, as identified by the Appellant Parties, is that the SRPs and the controlled activity status do not require consideration of the land use capability classification at all but involve meeting a percentage reduction in nitrogen leaching across a farm (or percentile reduction in the case of pastoral farming) and producing a nutrient management plan to demonstrate how that is to be achieved which will be implemented through conditions on consent.

[28] The Council submitted that while the 'policy' of PC2 is narrow in scope in some senses, it did not intend to affect a great many farms and did not intend to remove the foundation of the nitrogen leaching regulatory regime (Table 14.2). It was recognised by the Council that this was not the time for that, as this was intended to

---

127 Day submissions dated 31 May 2024 at [5.2], citing *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at [81].

128 *Clearwater Resort* at [65].

129 *Clearwater Resort* at [66].

be an interim plan change. However, the Council submitted that PC2 is not narrow in the manner in which it sought to update and reword the regime for the consenting of existing IFLU. A more expansive view of the 'policy' of PC2 can be found in its provisions, which set out the method by which the Council proposes to undertake nutrient management. This included a fully discretionary pathway, additional policy support for exceedances, and changes to the RPS.

[29] The Council's central point was that PC2 did not intend to delete Table 14.2 with its approach to CNLMs, but to provide for exceptions to it. The Council's argument was there was always intended to be a consenting pathway for existing IFLU which exceeded the CNLMs. This included the two specified exceptions in the operative Policy 14-6(b), but was not restricted to these exceptions. Said another way, the restricted discretionary pathway in operative Rule 14-2 is not tied exclusively to those exceptions – they simply receive additional policy support. As such, there currently exists (or there is intended to be) an open-ended pathway for exceptions to the CNLMs in the operative plan.

What do we conclude?

[30] We accept the counter arguments of the Council.

What is the problem PC2 was to solve?

[31] Put simply, the problem to be solved is that the existing provisions of PC2 are unworkable and need amendment to ensure that any alternative provisions can be practically and effectively implemented. At the same time, it is necessary to ensure that measurable progress is made towards achieving the One Plan objectives, even if that is at a slower rate than what was anticipated at the time the One Plan was being developed.

[32] The Council submitted that PC2 sought to vary the status quo in the operative plan to alleviate problems arising from the regulation of existing IFLUs, which were multi-factorial and not as claimed by Forest and Bird "simply intended to respond to

unanticipated developments in RMA case law that have placed greater emphasis on applying directive language".[130]

[33] The Council considered that the problem PC2 seeks to solve is found in the background material to the plan change, which includes the s 35 report predating PC2,[131] the Kirman and Linzey advice,[132] and the s 32 Report.[133] It said that these describe a broad series of issues with the One Plan that required addressing. This included recalibration of Table 14.2, but also the provision of an achievable pathway for exceedances of Table 14.2, problems with Overseer, the failure of Table 14.2 to deal with the problem of 'most' farms, and particularly the unsuitability of the operative provisions for CVG.

What do we conclude?

[33] In our substantive decision we referred to what the Council submitted in reply is a need for PC2 to align with the problems in the operative One Plan, namely that it:

(a) has issues beyond the recalibration of Table 14.2 that need to be addressed as part of PC2;

(b) currently provides no certainty for applicants leaching at levels above Table 14.2;

(c) has particularly acute issues for CVG;

(d) needs to contain a viable pathway for applicants above Table 14.2 to seek consents;

---

130 Forest and Bird submissions dated 30 May 2024 at [12].

131 Section 35 Report "Manawatu-Wanganui Regional Council One Plan section 35 report: Intensive Farming" (Horizons, July 2018).

132 C Kirman (Ellis Gould) and A Linzey (Beca Ltd), "Independent Planning and Legal Advice on the Manawatu-Whanganui Regional Council One Plan – Consenting Pathways for Dairy and Horticultural Activities" (20 November 2018).

133 Section 32 Report (July 2019).

(e) needs to enable a return to regulation of IFLUs as soon as possible.

[34] We further mentioned that the Council submitted that this justifies an interim planning response pending the Oranga Wai plan change and that the key issue before the Court is what the interim framework should look like.

[35] We understand the standard approach to policy analysis, which has informed the RMA and the procedural s 32 requirements, to be to identify the nature of the problem before embarking on identifying the reasonably practicable options for solving it including by way of setting objectives, policies and rules. However, we do not see that identifying the nature of the problem takes us far in considering other matters that inform and define scope in the context of the specified reduction pathways.

What was the purpose of the plan change?

[36] There were differing views on what the purpose of PC2 was.

[37] HortNZ submitted it was:[134]

> To improve the workability of the provisions for intensive farming land use by updating the nitrogen leaching maximums and provide a viable consenting pathway for activities that do not comply with them, in order to enable a return to effective regulation of existing intensive farming land use through the One Plan as soon as practicable.

[38] Federated Farmers also drew on that.

[38] Forest and Bird submitted that the purpose of PC2 was to reintroduce appropriate discretion for decision makers in cases where CNLMs could not be achieved. It was not intended to change the underlying approach to regulating IFLUs based on CNLMs. The first instance Commissioners were wrong to find that the purpose of PC2 is simply to produce a viable consenting pathway for existing IFLUs

---

134 Closing submissions dated 17 July 2024 at [17], referring to s 32 Report (July 2019).

through a suite of policies and rule changes. Any such pathway was not intended to depart from a CNLM-based regulatory approach.

[39] The Council submitted that PC2 seeks to rectify a policy "roadblock" in the One Plan,[135] and that a primary purpose was providing for exceptions to Table 14.2. Also, that the Appellant Parties' arguments in this regard largely amount to merits-based claims about the 'philosophy' of the One Plan, presented using the language of scope-based arguments.

[40] Federated Farmers submitted that the Appellant Parties have adopted a very narrow view of the purpose and scope of PC2, which is not supported by the contemporaneous documents. It refers to the lawful scope of PC2 as being to both update the CNLMs to the latest version of Overseer (a technical update), and to amend the policy and rule framework to provide a viable consenting pathway for existing IFLUs that do not comply with the CNLMs in Table 14.2 (a substantive update).

What do we conclude?

[41] We do not find any of the arguments of the Appellant Parties compelling as to what the purpose of the plan change was. Rather, as set out in the body of the interim decision, we accept that PC2 has as its purpose to establish a workable regulation regime after a long period during which existing IFLU did not and arguably could not obtain the necessary consents. That purpose involved amending Table 14.2 and related policy, method and rule provisions in line with Overseer updates. It also required amendments to provide a pathway involving policy, methods and rules for the consideration of exceptions to compliance with Table 14.2 for existing IFLUs. We acknowledge that amending Table 14.2 and other Overseer related provisions also improved the workability of the One Plan regime for new IFLU but that was a consequence of PC2 not its purpose.

---

135 Council opening submissions dated 20 November 2023 at [2].

Was it a materially different approach?

[42] The Appellant Parties claimed that HortNZ and Federated Farmers' submissions were not on PC2 as they constituted a "materially different approach" to the regulation of IFLUs using the CNLMs in Table 14.2.[136] This refers back to the wording of the IHP, which found that the inclusion of the SRPs would not "introduce a new or materially different policy or regulatory approach" into the One Plan.[137] The Council submitted that the Commissioners were correct in this regard.

[43] The Council submitted that is not the case that PC2 as notified was restricted to a "CNLM-based regulatory approach" in the first place[138] – even the operative plan was not intended to exclusively regulate IFLU based on CNLMs. The problem being addressed by PC2 was informed by a range of considerations, including the need to provide a workable pathway for exceedances of Table 14.2. PC2 cannot be said to have envisioned an exclusively "CNLM-based regulatory approach" when one of the primary changes made to the One Plan by PC2 was to open a discretionary pathway for IFLUs which could not meet the CNLMs.

[44] The discretionary pathway in the notified plan was a clear change to the status quo. From there, it was entirely open to submitters to suggest that the pathway for exceedances of the CNLMs should take a different shape, use a different methodology for assessing compliance (activity standards), or use a different activity status. It is also necessary to consider the requirement that CNLMs are to be achievable on most farms.

[45] The Appellant Parties also claimed that the SRPs are out of scope because they would not achieve Policy 5-8(a)(iia) as notified.[139] The Council submitted that aside from being a merits based argument, it is simply not sustainable – reading the notified Policy 5-8(a)(iia) as a whole, it required the exceptions pathway to minimise non-

---

136 Forest and Bird scope submissions dated 30 May 2024 at [8].
137 Proposed Plan Change 2: IHP Recommendation Report at [3.239].
138 Forest and Bird scope submissions dated 30 May 2024 at [8].
139 Forest and Bird scope submissions dated 30 May 2024 at [40]-[44].

compliance with Table 14.2 (a direction that the SRPs also give effect to), having regard to feasibility, practicality, and cost. This is not equivalent to a simple 'as close to Table 14.2 as possible' approach, as the Appellant Parties suggest. Rather, it is the same general approach as the currently proposed Policy 5-8(a)(iia).

What do we conclude?

[46] We are mindful that the One Plan regime always allowed for exceptions from the CNLMs in Table 14.2 through a restricted discretionary activity application. The NV proposed to replace that restricted discretionary activity status with a full discretionary activity status. That provided for a full consideration by the consent authority rather than the more limited consideration under a restricted discretionary activity status. We accept that the notified RPS Policy 5-8 provisions had sufficient scope for those exceptions.

What are we to make of extrinsic documents?

[47] The Council submitted that the problem PC2 seeks to solve is found in the background material to the plan change, which includes the s 35 report predating PC2, the Kirman and Linzey advice,[140] and the s 32 Report.

[48] In closing for all Appellant Parties, Ms Wright submitted that all of the background documents must be read in light of the amendments proposed to the NV. These did not include a controlled activity rule for farms based on historic leaching levels of existing activities or an alternative controlled activity pathway at all.

What do we conclude?

[49] We are not satisfied that it is reasonable or realistic to expect readers of a plan change to access and understand the implications of all of the background material in order to understand the problem the plan change seeks to solve. The s 32 report and

---

140 C Kirman (Ellis Gould) and A Linzey (Beca Ltd), "Independent Planning and Legal Advice on the Manawatu-Whanganui Regional Council One Plan – Consenting Pathways for Dairy and Horticultural Activities" (20 November 2018).

the plan change itself should provide a clear statement of the purpose of the plan change and in doing so the problem that is sought to be solved. In this instance we accept that PC2 sought to amend Table 14.2 in line with Overseer updates and provide a pathway for exceptions. As notified that pathway comprised only a restricted discretionary activity pathway but that did not, in our view, limit submitters from advocating for a more appropriate method to deal with exceptions. The SRP is an example of that.

What are we to make of the public notice?

[50] The Appellant Parties also referred to the following part of the public notice of PC2 that states it:

> … includes updates to the cumulative nitrogen leaching maximums that apply to intensive farming land uses … in response to updates in the Overseer modelling software. Horizons is also seeking to amend related policies and rules in the One Plan, so as to reinforce good management practices and to provide more policy support for consenting existing intensive farming activities.

[51] Ms Ongley's argument was that the public notice gives no indication that a fundamental change to the resource-based regime for managing existing intensive farming activities is proposed.

What do we conclude?

[51] Firstly, we do not agree with Ms Ongley's proposition that there is a fundamental change, which we dealt with elsewhere. Secondly, we find the public notice to be a general statement that would have put readers on notice that a package of amendments to policies and rules was involved in the context of a long running issue with consenting existing IFLUs. We accept that the public notice could have been better expressed but do not find that a fatal flaw.

[52] The Council submitted that it should go without saying that nothing in Schedule 1 of the Act requires that plan changes cannot be 'materially different' from the operative plan. The Council is entitled to change its plan, and the framework against which a plan change is assessed does not include a requirement that it not

materially change. Even if the inclusion of the SRP was viewed as a 'more material change' than what the Commissioners viewed it as, it would not follow that submissions seeking the SRP are not 'on' the plan change.

What do we conclude?

[53] We accept the Council's submission.

Who would have been disadvantaged?

[54] Federated Farmers submitted that submissions seeking alternative controlled activity pathways did not "come out of left field". There was no prejudice to any party by allowing Federated Farmers' (and DairyNZ's and HortNZ's) submission seeking an alternative controlled activity pathway. Everyone who was likely to have an interest in PC2 participated in the Schedule 1 process.

[55] Further, Federated Farmers submitted that the relief sought was clearly identified in the submission for Federated Farmers (and also in DairyNZ's and HortNZ's submissions). Anyone who had a contrary view could have submitted in opposition – and some did. For example, Beef+LambNZ opposed the amendments Federated Farmers sought to Rule 14-1 on the basis they were inconsistent with a natural capital approach and Forest and Bird opposed Federated Farmers' submission in its entirety.

[56] HortNZ submitted that there had been no denial of participation arising out of the inclusion of the specified reduction pathways either at the Commissioner hearing level or the Environment Court level. Representatives of all interested parties are involved in PC2 including cropping, pastoral, iwi, individual, council, and CVG. The submissions clearly included a pathway for vegetables involving BMP and GMP. The DV included the 35% SRP for CVG. HortNZ submitted that a controlled activity pathway resulting in reduction of leaching for CVG was signalled in its submission, and refined throughout the hearing process, such that any participant would have anticipated the CVG SRP as a possible outcome.

[57] The Council submitted that the second limb of *Clearwater Resort*, as discussed in *Motor Machinists*, draws back to procedural fairness and invites the question of who would have been surprised by HortNZ and Federated Farmers' submissions on these points and potentially excluded from the process as a result.

[58] The Council submitted that it would appear that no one was surprised by submissions seeking the SRPs. In fact, a majority of submissions also sought changes to the consenting framework and methodology, including:[141]

(a) A tailored approach for consenting CVG activities;

(b) A 'direct measurement' based approach to leaching losses for potato growers, to avoid the use of Overseer to model horticultural crops;

(c) A controlled or restricted discretionary pathway for vegetable growing, which was not present in the PC2 as notified;

(d) Alterations to the policy framework for exceptions (i.e., Policies 5-8(a)(iia)–(iib) and 14-6) so as to no longer measure nitrogen loss from activities by specific reference to the CNLMs, and instead by simply looking at whether a reduction in leaching was being made;

(e) Insertion of a new policy framework for CVG which aligned with the Environment Canterbury Land and Water Plan approach, a separate controlled activity pathway for CVG based on a 2017-18 baseline, and a restricted discretionary pathway for those which could not access the controlled pathway;

(f) Additional direction on the level of GMP necessary and/or the quantum of nitrogen leaching reduction to access the consenting pathway provided for in Policy 5-8(a)(iia) and 14-6(d);

(g) Additional direction in the policy framework to clarify the level of reduction required to access the pathway in Policy 5-8(a)(iia);

(h) An additional 'GMP based' policy pathway in Policy 14-6 to provide for IFLUs which did not comply with the CNLMs;

(i) Amendment of the exception pathway in Policy 5-8(a)(iia) to be based on the 'best practicable option' and substantive recalculation of the CNLMs;

(j) An alternative policy framework and a new set of rules for CVG activities (encompassing an entire parallel suite of rules from permitted to non-complying).

[footnotes omitted]

---

141 Council closing submissions dated 26 August 2024 at [194].

[59] Additionally, the Council pointed out many submissions and further submissions were made seeking to reject the proposed changes to the consenting framework, including from the Appellant Parties who did not at that stage argue that the submissions seeking an SRP (or other ideas given) should be rejected because they were not 'on' PC2. Its argument was that it is difficult to accept the Appellant Parties' claim that the possibility for changes to the consenting framework was not signalled to the public, when so many members of the public (both for and against such changes) came forward to participate by contributing ideas in the PC2 process.

What do we conclude?

[60] We accept that it is likely that the problems with and possibility for changes to the consenting framework were well known to the public given the chequered history of the One Plan and the Council's approach to dealing with consenting and enforcement over a long period. We also acknowledge the extent of public involvement in the development of PC2, including through the formal submission process before the Commissioners, highlighted by the Council. In the circumstances we find it unlikely that any party was surprised by or suffered prejudice as a result of the raft of submissions seeking alternative pathways to deal with exceptions to Table 14.2.

What are we to make of the s 32 Report?

[61] Mr Williams for Forest and Bird submitted that because the SRPs raise matters that should have been addressed in the s 32 evaluation and report, submissions promoting the SRPs are unlikely to fall within the ambit of PC2.

[62] We approach the s 32 report with some caution given the proposal involves a complex policy and rule regime and amendments to the RPS policy and implementing regional plan policy and rules. It is not easily or usefully reduced to simple propositions.

[63] We note that a focus of the competing positions related to what the Council described as follows:[142]

> Ultimately, the Council settled on the notified provisions, and in its s 32 providing an overview of its proposal as follows (emphasis added):
>
> > Plan Change 2 therefore proposes to:
> >
> > - Update the cumulative nitrogen leaching maximums in Table 14-2 to reflect improvements in the nutrient modelling software tool, Overseer;
> >
> > - Reinforce Good Management Practices as part of intensive farming land use activities; and
> >
> > - **Providing a workable pathway for landowners** to apply for consent for existing intensive farming land use activities **that cannot achieve Table 14.2 cumulative nitrogen leaching maximums**.

[64] The Appellant Parties pointed to various parts of the s 32 Report in support of their case. Ms Ongley submitted that the "workable pathway" was a discretionary pathway based on GMPs. Also, that the effect of including the SRPs as controlled activities would be for item 2 in the above list ('reinforcing "GMPs") to be completely subsumed and renounce the CNLMs in Table 14.2.

[65] Ms Ongley also construed the flow chart on the front page of the s 32 report as only indicating two pathways – the Table 14.2 controlled activity one and a discretionary activity pathway. Ms Ongley made much of what readers contemplating applications for the consent pathways for IFLU might take from the flow chart if looking to be informed by the s 32 Report. We note that when questioned about the "cover page" Ms Foster, the planning witness for the Council, said:[143]

> Q. … Firstly, the front page that's been put to you as a summary, it's your understanding that that's a cover page?
>
> A. I've always been confused by its purpose. The report doesn't have what I would call a standard cover page but that is all it is.

---

142 Council closing submissions dated 26 August 2024 at [190].

143 NOE at 456.

[66] Ms Wright submitted that omissions from the s 32 Report were also relevant. She referred to variables required to ascertain a 75th percentile, such as spatial scale (whether to be combined with, or separate from, the proposed 20% reduction from baseline for pastoral farms) as an omission. Ms Wright submitted that persons would not have anticipated PC2 as notified, to affect the pre-existing *status quo* of the One Plan's regulation of IFLUs to the extent accepted by the Commissioners in the DV. This limits opportunity for potentially affected persons to participate.

[67] The case for the Appellant Parties is that a failure to consider SRPs and the justification offered for the change having regard to all feasible alternatives explicitly in the s 32 Report is a powerful reason for finding that the submissions advancing the SRPs were out of scope for PC2.[144] Ms Wright submitted that Mr Day's evidence (as a farmer) was that managing nitrogen leaching through a grandparenting regime is inequitable. She said that it is reasonable to assume that there may be other farmers in the region who hold a similar view or simply want to express a view whatever it may be.

[68] The Council drew our attention to other aspects of the s 32 Report. It referred to the statement of the problem PC2 was to solve, the options considered, the records of consultation, and assessments of alternatives as showing that the plan development process included evaluation of changes necessary to ensure a viable consenting pathway for farmers exceeding the Table 14.2 CNLMs. In that context, the Council was of the view that the submissions by HortNZ and Federated Farmers clearly raised matters that had been considered in detail by the Council in the preparation of PC2.

What do we conclude?

[69] We accept the Council's argument that irrespective of whether the s 32 Report had explicitly and satisfactorily considered the SRPs, it would still have been permissible for HortNZ and Federated Farmers to submit seeking the SRPs (or similar). PC2 amended the rule framework for IFLUs exceeding the CNLMs

---

144 Relying on *Motor Machinists* at [76].

(changing their activity status from restricted discretionary to discretionary, among other things), and HortNZ and Federated Farmers sought permissible changes to those amendments.

[70] We also accept the Council's submission that the sch 1 process does not presume that whatever was proposed in the NV is correct or appropriate – rather, "subject to the second limb, [the first limb of the Clearwater test] allows scope for submissions to seek change going beyond the intentions of a notified plan change. In essence, that is a fundamental aspect of the public participation dimension of plan formulation, namely its contest of ideas".[145]

What do we conclude overall?

[71] We find the SRPs and associated policy and rule amendments to be within the scope of PC2.

---

145 Council's closing submissions dated 26 August 2024 at [192] citing *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187 at [77].