

IN THE MATTER OF **An appeal pursuant to s Resource
Management Act 1 of Environment**

BETWEEN **TE RUNANGA O RAUKAWA
NGĀ TI TURANGA
ANDREW EDWARD DAY
WELLINGTON FISH AND GAME
COUNCIL
Appellants**

AND **MANAWATU -WHANGANUI
REGIONAL COUNCIL

FEDERATED FARMERS OF NEW
ZEALAND

HORTICULTURE NEW ZEALAND

ROYAL FOREST AND BIRD
SOCIETY OF NZ INC

VIVIENNE TAUEKI
Respondents
S 274 PARTIES (Interested Parties)**

Hearing Commenced: 12 June 2024 held in Courtroom Environment 5.01

Court: Environment Judge: Judge L Semple
Environment Commissioner K Edmonds
Environment Commissioner J Hodges

Appearances: S Ongley for the Appellant Te Runanga o Raukawa
Ngāti Turanga
M Wright for the Appellant A E Day
S Johnston Manawatu Regional Council
N Edwards for Federated Farmers of New Zealand
N Buxeda for Horticulture New Zealand
P Anderson and T Williams for Royal Forest and Bird
V Taueki appears in Person

**NOTES OF EVIDENCE (PART-HEARD) TAKEN BEFORE THE ENVIRONMENT
COURT**

PARTIES INTRODUCE THEMSELVES

MS ONGLEY:

Just on the A3 printed version that you have. I wanted to address you on that. So the third column four versus three provisions updated to the 10th of June. Now blue represented Mr Carlyon's amendments

THE COURT: JUDGE SEMPLE

Yes, had a note of that.

MS ONGLEY:

And purple represented the position for the Wellington Fish and Game Council and if we can go please to page 9, you will see – it is hard to distinguish from the black. But you will see in the top right there, the purple words. Now I wasn't able to discuss this with Mr Carlyon before this was filed, but Mr Carlyon does support those words. I mean, they might just as well be blue.

THE COURT:

Yes, okay thank you.

MS ONGLEY:

And if the Court has any questions, Mr Carlyon is available via AVL.

THE COURT:

And Ms Edwards, I think I saw you on screen. Yes I did, I wanted to acknowledge your presence as well, thank you. Good morning.

MR WILLIAMS READS OPENING SUBMISSIONS

Well, your Honour, Commissioners, beginning with the opening submissions. I have set out at paragraph 2 very briefly Forest & Bird's interest in these proceedings which is essentially an interest in measures that are designed to maintain and improve the health of freshwater bodies, which, of course, Forest & Bird is concerned with protection of indigenous biodiversity there is a clear connection.

At paragraph 3 I have explained that –

3. Forest & Bird supports the operative One Plan's limits-based approach to the regulation of nitrogen leaching or on-loss based on estimated outputs and the natural capital of land. Forest & Bird considers this approach is more likely to achieve better outcomes in the long term for both human communities and indigenous ecosystems and it also offers a better potential for consistent regulation of different land uses.

So that's the position which could be rolled out, beyond the year.

4. Forest & Bird opposes any substantial departure from this approach to the regulation of N-loss in the context of PC2. The alternative controlled activity consenting pathways that have been proposed by council are based either on risk assessment, or on a "hybrid" form of grandparenting of N-loss (by which is meant specified reductions from historic leaching rates of individual farms).
5. Although these alternatives would be likely to achieve some measure of reduction in N-loss from IFLUs, they are not consistent with the underlying philosophy of the One Plan, and they would not achieve a trajectory towards compliance with the freshwater and groundwater sulphate and nitrogen target states contained in the One Plan.

6. As the Court has observed, the proposed specified reduction pathways or SRPs would introduce alternative limits for N-loss and having regard to human behaviour and economic imperatives, the likelihood is that the specified reductions from a farm's historic leaching levels would become the de facto maximum reduction, regardless of whether greater reductions could be achieved by IFLUs in practice.
8. Forest & Bird is particularly concerned that these proposed changes have not been communicated to members of the public in an appropriate way for a plan change. This raises issues of scope, which Forest & Bird has focused on in its submissions.
9. These scope issues are especially concerning because council is now engaged in the Oranga Wai consultation process. PC2 was not intended to change the status quo of regulating N-loss according to output limits and the natural capital of land. Changing this underlying regulatory philosophy would have potentially wide-ranging implications that should be considered as part of the Oranga Wai process.
10. Forest & Bird adopts the submissions of Fish and Game and Mr Day on the general merits of council's proposed alternative controlled activity pathways and supports the plan provisions proposed by Mr Day.

At paragraph 11, I have set out the structure of the submissions and so beginning at (A) with I'm turning now to the issues of scope your Honour. So the scope for the Nitrogen Risk Assessment Tool. I tried to sort of summarise this in paragraph 12 I suppose.

12. The reason the proposed NRAT is out of scope is relatively simple. Essentially, it would constitute a move away from an output-based approach towards a risk-based approach. This would represent a

substantial departure from the One Plan's output-based and limits-based methodology of controlling nitrogen discharges (N-loss) from IFLUs. This departure was not contemplated by PC2 as notified and cannot fairly be said to be a foreseeable consequence of PC2 submissions or notices of appeal.

Your Honour this scope for the NRAT has been addressed in previous submissions as you will be aware. Paragraphs 14 to 58 in these opening submissions were included as appendix B to the joint memorandum of counsel on behalf of Forest & Bird and Fish & Game back in November last year. So I'd essentially reproduced those paragraphs and I'm really in your hands as to whether you would like me to take me through them in detail because they have been with the Court, I'm aware, for some time now.

THE COURT: JUDGE SEMPLE

Q. No, that is fine, thank you.

A. So we can take those as read?

Q. You can take those as read, thank you, we are clear on that.

A. So I won't go. We can move swiftly on to B.

Q. B.

MR WILLIAMS CONTINUES READING OPENING SUBMISSIONS

(B) SCOPE FOR THE SPECIFIED REDUCTION PATHWAYS (SRPs)

This issue has also been addressed in previous submissions which are dated the 30th of May and the Court will have those, parties also, expand on those submissions a little bit in paragraphs 60 to 63, so I'll just take you through those and then if we could turn to those earlier submissions.

60. Understanding why the proposed SRPs are out of scope requires a closer reading of the relevant policies...

Than in relationship to the NRAT which my submission issues a scope of really very clear as you will have read.

...Essentially, the SRPs would result in a substantial departure from a natural capital approach to regulation of IFLU that (a) was not anticipated by PC2 as notified; and (b) is not supported by Policy 5-8 of the RPS.

Now just expanding on those submissions does also raise a sort of merits point as well but in my submission it is also important for the issue of scope in that it's important to consider the proposed changes that have been made to policy 5-8 to accommodate or to attempt to accommodate the SRPs after notification of the plan change. Just say it again that –

61. That the submissions in support of the SRPs were not properly “on” the plan change and essentially that is the main submission in relation to scope.
62. Forest & Bird acknowledges that PC2 anticipates a wider discretionary consenting pathway enabling consents to be granted to IFLU that cannot achieve their CNLMs in Table 14.2. However, the proposed SRPs cannot properly be described as exceptions to meeting CNLMs. Instead, as the Court has observed they can better be described as establishing alternative limits.

Your Honour if I could just take a step back there. You will see there is a footnote to paragraph 61 which refers to the original submission of Federated Farmers on the plan change which is exhibit H in these proceedings and reading those submissions, it is apparent that – well you will be aware that the SRP was introduced based on the submissions made by Federated Farmers and Dairy NZ at the hearing and when one reads the submissions, it is apparent that were in, main part, a challenge to the natural capital approach to regulating nitrogen loss and essentially that was the justification provided for the SRPs in those submissions. It was a challenge to the natural capital approach and in

my submission, that is telling when you come to consider whether the SRPs are within scope because the submission opposing natural capital, clearly it wasn't.

THE COURT: JUDGE SEMPLE

- Q. Sorry, just take me back. Just say that last bit again?
- A. The Federated Farmers submissions that that PC2 should depart from regulation according to a natural capital approach was not on the plan change.
- Q. I understand what you are saying. You don't dispute though, do you, that the submission itself – I mean it uses the phrase, I think, refresh my memory, it says fundamentally flawed. It says that that natural capital approach it considers to be fundamentally flawed. So the submission itself as clear as to what was being put forward wasn't it. It wasn't sort of implicit anywhere, it was fairly directly identified that Federated Farmers at least considered that the approach that was being used, the One Plan, not just in PC2, was fundamentally flawed, in its submissions?
- A. Certainly your Honour it was very clear. The problem is that it wasn't the right time or place to be making those submissions.
- Q. All right, I understand your position, thank you.

MR WILLIAMS CONTINUES READING OPENING SUBMISSIONS:

Paragraph 63, this then raises the question of whether – going back to the idea that these SRPs are alternative limits.

63. This raises the question of whether these limits have been set in accordance with Policy 5-8. Of the regional policy statement. Forest & Bird submits that this is not the case, and that the proposed changes which seek to align Policy 5-8 with the SRPs are out of scope.

So your Honour I can skip over paragraphs 1 and 2 which are essentially introductory. And again I really am in your hands as to the detail that you want me to go into on this because I understand that you have read the submissions already.

THE COURT: JUDGE SEMPLE

Yes.

MR WILLIAMS:

So if you would like me to skip over parts or to take them as read, I would be happy to do so.

MR WILLIAMS CONTINUES READING OPENING SUBMISSIONS

Paragraph 3. The SRPs would involve changes to Policy 14-5. Included, perhaps this is helpful but the footnote refer to the re-numbering in the One Plan.

3. The SRPs would involve changes to Policy 14-5 and Rule 14.1 of the One Plan and would introduce a new controlled activity status for IFLUs that can demonstrate a specified reduction in nitrogen leaching loss or N-loss.
4. The SRPs also rely on changes being made to Policy 5-8 and this is because the SRPs do not require the council to regulate IFLUs to achieve the nitrogen leaching maximums that have been established in the regional plan.

So if you look at the wording of 5-8 that is the direction as to what the council should be doing.

5. Forest & Bird's position is that there is no scope for the introduction of SRPs in PC2 and this is on the grounds that I have said already, that the submission seeking the SRPs were not "on" PC2. The purpose of PC2 was to re-introduce appropriate discretion for decision-makers in cases where CNLMs could not be achieved. And PC2 wasn't intended to change the underlying approach.

At 6, and we have touched on this already your Honour.

6. The submissions from Federated Farmers and Dairy NZ sought SLPs to be added to PC2 and the Hearing Commissioners accepted that PC2 does not provide a basis for relitigating the building blocks of LUC and Natural Capital that form the basis for the CNLMs. However, in my submission, the Commissioners then made two critical errors. Firstly, they found that the SRPs were not a new or materially different policy or regulatory approach. And secondly, they also found that the purpose of PC2 is simply to produce a viable consenting pathway for existing IFLUs first suite of policy and rule changes.
7. These findings, in my submission, are incorrect. The SRPs are a new and materially different approach. They are fundamentally different to the natural capital approach that is anticipated by PC2. And when considering the purpose of PC2 the Commissioners overlooked that, while the purpose of PC2 is to provide a viable consenting pathway, **any such pathway was not intended to depart from a CNLM based regulatory approach.**
8. In the context of PC2, the SRPs are a new and materially different approach to CNLMs, when PC2 anticipated the CNLM-based regulatory approach. And as such, submissions seeking the SRPs were beyond scope.
9. The fact that there is no scope for SRPs is confirmed when the council's preferred changes to Policy 5-8, 14-5 and Rule 14.1 are analysed...

And again I have said that –

...These preferred changes are a fundamental shift from the natural capital and CNLM approach.

10. PC2 as notified did not include SRPS, as we will be aware. The SRPs were proposed in submissions made on behalf of Federated Farmers and DairyNZ. So the key issue is then whether those submissions were “on” the plan change.

And your Honour at paragraph 11 I have referred to the section 32 report and one purpose of PC2 was to address a perceived “policy roadblock”. That’s the term that has been used in these proceedings by Ms Foster; created by the directive terms used in relation to CNLMs in operative Policy 5-8 to achieve and Policy 14-5 does not exceed. So then I quoted the section 32 report there with reference to: “... a workable pathway for landowners to apply for consent for existing intensive farming land use activities that cannot achieve Table 14.2,” from two CNLMs.

12. The s 32 report was very clear that this aspect of PC2 – the other aspect was to respond to the version changes and Overseer – this aspect of PC2 was simply intended to respond to unanticipated developments in RMA case law that have placed greater emphasis on applying directive language. Council considered that these developments in case law meant that:

...directive policies in relation to ‘achieving’ (Policy 5-8) or ‘not exceeding’ (Policy 14-5) the limits in Table 14.2 now make it very difficult for resource consent to be granted in circumstances where the limits are not met.

13. The s 32 report also clearly stated that PC2 would not change the underlying approach to managing IFLUs based on CNLMs. The intention was merely to re-introduce an appropriate margin of discretion for decision-makers in cases where CNLMs could not be achieved.

Which have been closed off essentially by the changes in case law.

Paragraph, I'm skipping over some of the quoted remarks. But paragraph 14 I've referred to the fact that:

14. The question of scope for SRPs was considered by the Commissioners in their Panel Report & Recommendation and they noted that:

... the parties to the plan changed generally accepted that PC2 does not provide a basis for relitigating the building blocks LUC and Natural Capital that form the basis for the CNLMs.

And they recognised that any changes to this approach will be matters for future changes to the One Plan to implement the NPS-FM 2020.

15. However, having made these observations and findings, the Hearing Commissioners then went on to do precisely that which they had found should *not* be done in the context of PC2.
16. The Commissioners mistakenly accepted the submission, made on behalf of Federated Farmers and DairyNZ, that the SRPs do not "... introduce a new or materially different policy or regulatory approach". No reasoning was provided in support of this conclusion and it is submitted that it is plainly wrong: the SRPs would introduce a parallel regulatory pathway which ignores natural capital and which –

And I should say potentially

– does not require the council to regulate IFLUs in a manner that will achieve (at some point in time) the CNLMs that have already established in accordance with Policy 5-8.

17. In relation to scope, the Commissioners misdirected themselves when they found that "... the function of the purpose of PC2..." is

“... producing a viable consenting pathway for existing IFLUs through a suite of policy and rule changes”, without referring again to the limiting factor that PC2 was *not* intended to depart from a CNLM-based regulatory approach.

18. It was this overly wide understanding of scope that led the Hearing Commissioners to find that the submissions advancing SRP controlled activity consenting pathways were “on” PC2.

Your Honour, I've now moved the following paragraphs I've set out in case law and relating to whether the proposed changes on a plan or whether a submission rather is on a proposed plan change.

THE COURT: JUDGE SEMPLE

- Q. You can probably take that as read unless there is anything specific you want to draw our attention to.
- A. Just again to emphasise that what you're looking at is the extent to which the proposed plan change alters the status quo and so in order to understand that it's obviously important to understand what the relevant status quo is and again at paragraph 22 it's Council regulation of IFLUs to achieve the CNLMs that have been established. But that is the status quo and how far the plan change intended to depart from that and then submissions should not go beyond that extent.
- Q. So if we could perhaps skip on then to paragraph 31.

MR WILLIAMS CONTINUES READING OPENING SUBMISSIONS

Specified Reduction Pathways

31. The SRPs currently supported by council would require commercial vegetable growing (CVG) to achieve a minimum reduction in N-loss of 35% relative to the baseline growing period and would require other IFLUs to achieve a minimum reduction in N-loss of 20% relative to the nitrogen baseline. Farms would need to provide a

nutrient management plan in their application for resource consent, demonstrating that these specified reductions can be achieved within two years of the grant of consent.

And at paragraph 32 I've referred to the definitions of "Baseline Growing Period" and the "Nitrogen Baseline" and at paragraph 33 I've suggested that –

33. The absence of relevant data for most farms would present a practical obstacle for the implementation of the proposed SRPs.

But that is something that you have now heard evidence on, your Honour. It's been, well, the Court has heard that. Farms will of course keep – most farms I suppose will keep records of their activities and so they can then look back at stocking rates and so on and use those figures to, you know, run a – oversee a model and thereby establish those figures.

It is my submission it is still though – I present to you a problematic exercise. It's looking back that far you know, it may be that those records aren't available, it may be difficult to verify so in my submission there is still a problem there with using these old figures which in cases where it doesn't already hold that information.

34. The Council seeks to provide for the SRPs through changes to One Plan provisions...

And I've referred again to 5-8, Policy 14-5 and Rule 14-1.

35. The purpose of operative Policy 5-8 is:
 - (a) to provide the criteria for *establishing* CNLMs for IFLUs (Policy 5-8-1a); and
 - (b) to require council to regulate IFLUs to *achieve* the CNLMs once they have been established (Policy 5-8-1b – c).

36. The process for establishing the CNLMs is intended to involve consideration of the various criteria in Policy 5-8-1a. **Achieving the strategies for water quality is a strict requirement**, but no deadline is set by Policy 5-8 for achieving the surface water quality targets set out in Schedule 5, or the surface water management values in Schedule 2.
37. Instead, Policy 5-8 directs CNLMs to be set at a level that will be achievable by most farms, using good management practices, within appropriate timeframes. The flexibility built into Policy 5-8, in terms of defining GMPs and providing for appropriate timeframes, enables a balance to be found between water quality objectives and practicability *when setting* the CNLMs.
38. If it is true that the CNLMs, which have already been established in accordance with Policy 5-8, are *not* achievable on most farms using good management practices, then the solution involving the least modification of the operative plan provisions would be for council to reconsider the CNLM figures in Table 14.2 to ensure that they do give effect to Policy 5-8. Instead, council has resolved to amend Policy 5-8 itself. An important question for the Court to determine is whether the current preferred amendments to Policy 5-8 are within scope for PC2.

To assess whether scope exists it's necessary to consider the proposed changes as notified and compare them to the council's current preferred changes. So I've done that at the beginning of paragraph 40.

So this is the notified changes set against the operative One Plan provision. And of course I won't read through all of those but I would draw your attention to subclause (iia) which provides the exception to meeting CNLMs and in the notified version you will note that IFLUs must still be regulated to reduce the nitrogen leaching which is in excess of the nitrogen leaching maximum so the

CNLMs to minimise the degree of non-compliance. So the exceptions to meeting the CNLMs still require council to regulate according to the CNLMs essentially.

Now this means at paragraph 41:

41. These notified changes to Policy 5-8 would **not** have enabled the introduction of SRPs, as I have said there, (iia) would require council to “minimise the degree of non-compliance” with CNLMs, having regard to the “feasibility, practicality and cost” of achieving compliance and also to the water quality strategies.

But actually, it’s the first point not I think – probably I should just delete the “and groundwater quality strategies” because the SRPs could achieve those but what the SRPs don’t do is to regulate according to the CNLMs.

- 42: The Council’s current preferred changes to operative Policy 5-8 are as follows:

And there I have set out the current preferred changes, again set against the operative plan. And turning again to sub-clause (iia) note there have been substantial changes to that part of the policy. So now on the proposal is that IFLUs must be regulated to reduce nitrogen leaching loss from the land to the maximum extent reasonably practical in the shortest feasible timeframe by implementing measures including good management practice and additional measures, having regard to a number of factors. So essentially the requirement to regulate according to CNLMs has been changed.

I said at paragraph 43:

43. That these changes to Policy 5-8 **would** enable the `introduction of SRPs...

I should probably say “would arguably” because that is, of course, the council’s position that they would, because –

...Council’s assessment is that the SRPs would represent the maximum reduction in N-loss “...that is reasonably practical in the shortest feasible timeframe.”

And I will come back to this when we return to the opening submissions but in my submission it certainly is arguable whether the SRPs do have proper regard to the factors that are set out there because essentially the approach that has been taken is a very high level one based on modelling at a catchment level, rather than looking at individual farms and applying those factors.

At paragraph 45: “The details of the SRPs would be introduced in Policy 14-5,” and again your Honour I have set out the relevant proposed changes to the operative One Plan.

And I submit at paragraph 46: “The overall effect of Council’s preferred amendments to Policy 5-8 and Policy 14-5 would be to introduce a parallel system for regulating IFLUs which is not based on achieving CNLMs.” And at the risk of repeating myself many times, would represent a substantial departure from the status quo.

It is important to note, in my submission, that natural capital is recognised in the One Plan by including it as one of the criteria for establishing the CNLMs. This means that the parallel SRP consenting pathway also departs from the natural capital approach to regulating IFLUs because it departs from regulating importance for CNLMs.

Finally, in terms of the SRP amendments to the One Plan, the council is proposing changes to Rule 14.1 and I suggest that it isn’t really necessary to go to those in detail because of course if the policy are out of scope, then so is the rule.

And your Honour perhaps I could take the remaining paragraphs as that as read because I am conscious of the time. I have just set out the fact that, yes the SRPs don't really address the Overseer, absolute number issue which I will return to and then conclusions which reiterate the Overseer.

THE COURT: JUDGE SEMPLE

All right, Part C 293

MR WILLIAMS:

Your Honour, now turning to section 293.

MR WILLIAMS CONTINUES READING OPENING SUBMISSIONS

(C) SECTION 293

1. If the Court agrees that the NRAT is out of scope for PC2, council has suggested that the Court should exercise its discretion to direct changes to be made under s 293 of the RMA. A similar submission can be expected in relation to the SRPs if the Court finds that these are also out of scope.

But that submission hasn't been made in fact yet.

65. Forest & Bird submits that the Court should not choose to exercise its powers under s 293 in this case for the following reasons:

- (a) The absence of scope for the NRAT and SRPs is profound.

The argument in relation to scope from the applicants, our position, is stronger on the NRAT because there really was no submission which supported that approach, but in my submission whether or not the provisions are on the plan change is actually a more important consideration when the Court comes to consider section 293. I'm expanding on the written submissions here but section 293 is more appropriate in my submission where council or submitters

haven't thought of a particular solution that would otherwise be end scope rather than been used as a method of introducing changes that were not on the plan change.

So it's where the Court sees a solution which the parties haven't thought of. It is on the plan change and you can then direct the council to go back and consider that.

- (b) By using its s 293 powers in these circumstances, the Court would be inappropriately entering the planning arena.
- (c) The public consultation that would be needed would be extensive and would be likely to interfere with the current Oranga Wai process.
- (d) In relation to the NRAT, there are substantial evidential difficulties resulting from the way in which out of scope evidence has been presented to the Court in anticipation of a s 293 process.

And your Honour you heard submissions on this at the very start of the case.

- (e) Furthermore, the NRAT is currently untested and has not been subject to peer review. It is critical that new tools like the NRAT are introduced through proper planning processes. This would provide for a full s 32 evaluation, public notification, submissions, a council hearing, and appeals. These provide vital checks and balances and stand in stark contrast to the development of this tool through expert conferencing.

Paragraph 66 I've just set out section 293 for reference and at paragraph 67.

67. It is well-established that s 293 of the RMA may be used by the Environment Court to grant relief beyond the express scope of an appeal, but that situations like this will arise only rarely. The discretion under s 293 "... is to be exercised cautiously and sparingly" (quoting now from the MacKenzie case) because it "... deprives potential parties or interested persons of the right to be heard by the local authority", and because the Court must "... be careful not to step unnecessarily into the planning arena."
68. The same underlying principles of public participation and procedural fairness apply to the exercise of judicial discretion under s 293. This means that: Although the s 293 jurisdiction "... is not limited to the express words of the reference", the relief sought must still be a foreseeable consequence of the changes proposed in the reference. This has also been described by the High Court as requiring "... a nexus between the reference itself and the changed relief sought."

So the matter for the Court will be to consider whether that nexus exists.

Perhaps your Honour I could take paragraphs 69 and 70 as read. I've referred to the Invercargill case which my friend, Ms Johnston also referred the Court to in opening submissions. There's a number of factors set out there and I have sought to apply those factors in paragraph 72 onwards.

72. Firstly, this is not a case in which a s 293 application has been jointly made: the use of s 293 in this matter is opposed by several parties, including the parties whose notices of appeal are relied on for a finding of scope. As in *Thacker*, the parties are deeply divided on this issue. Ngāti Turanga and Fish & Game, whose notices of appeal are relied on for scope, both oppose the s 293 application.
73. Although problems with using Overseer in a regulatory context have been understood for some time, it was only following publication of the SAP Review that Council decided that changes to PC2 were

required to address the use of Overseer N-loss estimates as “absolute numbers”.

74. This timeline has meant that addressing problems with the use of Overseer outputs as “absolute numbers” in the context of PC2 has not been the subject of public consultation or submissions.
75. The potentially wide-ranging implications of changing from an output-based to a risk-based approach mean that it is not possible to be confident there are no other parties that would be interested in commenting on the NRAT option.

And I have referred there to Dr Jolly’s evidence that the NRAT has created a large amount of interest among commercial vegetable growers. In my submission this level of public interest and engagement is really a good reason to follow the usual planning process, not to circumvent it.

76. The fact that interested parties have not had the opportunity to be heard by the Council on this topic is a procedural defect which cannot be adequately remedied by directions under s 293.
77. The proposed changes do not relate to “a discrete piece of land”. Although a limited number of WMSZs are currently regulated, the relevant One Plan provisions (especially Policy 5-8) can be more accurately described as district-wide policies and objectives.

And they do potentially have implications for the future regulation of other types of land use, other water management (inaudible 10:47:54).

78. The evidence has not demonstrated that the NRAT or SRPs would better achieve the objectives of the One Plan. Neither option is primarily directed towards achieving the water quality targets set out in Schedule E.

The point there is sort of just expanding on that your Honour it's not intended to be a response to trying to comply with higher order policy directions.

79. There has already been considerable delay in implementing this plan change, but it is unlikely that engaging s 293 would avoid further delay. It would be more likely to result in more complication, the need for extensive Court directed consultation, and the potential for further legal challenges.
80. The NRAT proposal can only be described as large scale and complex; and can also be described as "ad-hoc" in the sense that it has been developed as a response to the SAP Review, which was published during this appeal process.
81. It would be difficult to establish prejudice to specific individuals who are not parties to this appeal. However, there has been no public consultation at all on the NRAT proposal and, as above, there is reason to believe there would be many interested parties. The parties actively opposing the NRAT proposal, including Forest & Bird, have all been prejudiced by the fact that this proposal has not been considered as part of the usual submissions process.

And then at paragraph 82, I have quoted from the Dunedin City Council case Royal Forest & Bird Protection Society in Dunedin City Council where it was said that the:

... use of the "use of the s293 jurisdiction is more appropriate where there is a clearly identifiable category of persons who might be interested in the changes being considered who can then be consulted by the Council, and if interested in commenting further, are able to join the court process under s274. However, that is a less than perfect process than following the Sch 1 process under the RMA for matters of such wide interest and importance as are raised in this case

And my submission a similar conclusion is appropriate in the circumstances of the case that you are hearing.

83. Although there have been exceptional cases in which the Court has engaged section 293 despite the need for extensive further consultation such as the well-known *Mackenzie Basis* case which concerned outstanding natural landscapes, these have been cases, that certainly was a case in which changes were needed to ensure compliance with high order policy in the RMA.

As I mentioned before.

84. Such considerations do not apply in the present case; the existing Table 14.2 are RMA compliant and consistent with the NPS-FM. council's arguments for introducing the NRAT and SRPs are not premised on a need to achieve compliance with national or regional policy statements. Instead, as discussed above in relation to scope, introducing these new limits would drive changes to higher-order policy in a back-to-front and unorthodox way.

The council sees a desirable pathway and then it works back to the policies to try and change those policies in order to accommodate that pathway.

85. Council has argued that the SRPs are needed to give effect to Policy 5-8 because of the requirement contained in the policy that CNLMs should be "achievable on most farms using good management practices". Council argues that this is no longer the case, and therefore alternative limits should be established.

Although perhaps without using the first alternative limits, but that is the fact in my submission for the Council's position.

86. Forest & Bird submits that this argument is flawed. It elevates the “most farms” criterion in Policy 5-8 to a standalone policy direction, when it should be considered in an integrated way together with the other Policy 5-8 criteria. Most importantly, the “most farms” criterion cannot or should not be used to introduce alternative limits that do not have regard to the natural capital of land.

So “most farms” sits together with Natural Capital in Policy 5-8. It is not appropriate to take out the “most farms” and apply it separately without considering the Natural Capital criteria.

At paragraph 87 I have referred to deficiencies which were identified by the hearing panel although deficiencies perhaps are a fair term. They did identify there were problems with their consultation process although they ultimately found that they didn’t really, or they weren’t sufficient to require the Council to go back and do that consultation again. But problems were identified and the lack of engagement in relating to the NRAT, the NRAT is of course completely understandable given that the NRAT has been developed in expert conferencing during the appeal process but it is nevertheless another important factor which counts against the use of section 293 in my submission.

At paragraph 88 I refer to Forest & Bird original submissions which noted that: “There are various alternative options for GMPs which are potentially relevant to developing” – and these would potentially be relevant to developing – “a risk based control methodology for N-loss. Evidence about those alternative options hasn’t been guarded or considered while developing the NRAT proposal.”

89. The risk brackets that have been described in relation to the NRAT again in schedules X and Y are based on some form of correlation between farming practices and N-loss risk and the evidence has been that this has been “road-tested” using aggravated farm data provided by Fonterra based on its Nitrogen Risk Scorecard. In my submission, it is concerning that there is no direct evidence from

Fonterra about the nature and content of this data, or the way in which it has been collected and aggregated, and no real opportunity for public or judicial scrutiny.

90. Council's argument that the NRAT would be equivalent to Table 14.2 in terms of identifying low-risk farms, is not a convincing reason for adopting it. Firstly, Forest & Bird has doubts as to whether this suggested correlation is accurate in relation to CVG activities. The evidence presented by Horticulture New Zealand has been to the effect that only a very limited number of CVG operations will be able to meet their year 10 CNLMs yet the expectation appears to be that a greater number of CVG operations would be classified as "low risk" under the NRAT.

So there appears to be a lack of equivalence.

91. Secondly, if it is true that similar outcomes can be achieved using recalibrated Table 14.2 CNLMs, then in the context of PC2 it would be better simply to retain the original methodology.

At paragraph 92 I set out the issue relating to evidence which you heard at the start of the case.

92. ... Essentially, if the Court accepts that the NRAT option is out of scope, this means that the evidence that has been presented in support of the model was also out of scope and therefore should not be admitted. Forest & Bird submits that this presents difficulties for the Court under section 293 because there would be no evidential basis on which the Court would be able to make directions in respect...

So the process has been a little back-to-front and it creates evidential difficulties in my submission.

(D) PROBLEMS WITH OVERSEER

93. Forest & Bird agrees that the Overseer version issue can be resolved by recalibrating Table 14.2 and retaining reference files in the manner proposed by Council.
94. The problems with using Overseer outputs as “absolute numbers” in a regulatory context are more difficult to address, particularly while remaining within the scope of PC2.
95. Overseer is a model which estimates N-loss from intensive farming activities. The evidence before the Court suggests that Overseer works well when used to model the likely implications for N-loss of practice changes on a farm (i.e. it can be used to assess relative change from a baseline position). However, because Overseer is a model, it cannot accurately measure actual N-loss from individual farms. This means that Overseer output numbers should not be solely relied upon in a regulatory context (or in other words, they should not be used as absolute numbers to determine a grant of consent or an enforcement decision).

It is my understanding, your Honour, of the absolute number issue.

96. Forest & Bird acknowledges the complexities that this presents for Council in terms of applying appropriate consent conditions while also attempting to direct IFLUs towards the Table 14.2 CNLMs.
97. Forest & Bird also acknowledges that there does need to be an appropriate degree of discretion to enable Council to grant consents in circumstances where a farm can demonstrate GMPs and a good trajectory in terms of reducing N-loss including in circumstances where the Overseer output numbers of that farm will not correspond with CNLMs.

98. Nonetheless, Forest & Bird maintains that using Overseer as a drafting gate to determine the activity status (discretionary or non-discretionary) for an IFLU, is still appropriate. Furthermore, if a farm can demonstrate that it can meet its CNLMs based on its Overseer outputs, then Overseer can also be used in a relative way to model the likely impacts of practice changes on farm that will enable the same farm to meet its Year 20 CNLMs.
99. Council's proposed alternative limit still retains CNLMs as one possible controlled activity in pathway. They also still use Overseer to model outputs (directly for the SRPs and indirectly for the NRAT). Therefore, these alternative limits, the SRPs and the NRAT, which also act as drafting gates, in my submission, do not address the problem of using Overseer outputs as absolute numbers.
100. The "absolute number" problem becomes acute at the level of consent conditions. On the proposed provisions for both Council and Mr Day provide for nutrient management plans, which can be used by Council to inform consent, review, and enforcement decisions. Forest & Bird's expectation is that these nutrient management plans would need to be used by Council in a way that can avoid the "absolute number" problem.

That ends the final section, your Honour I've referred to some of the specific policy provisions, the main policy provisions.

(E) SPECIFIC POLICY PROVISIONS

101. Forest & Bird supports the policy provisions to be presented by Mr Scott on behalf of Mr Day. Forest & Bird submits that these provisions address the problem of providing appropriate direction for granting consents to IFLU that cannot achieve their CNLMs (as modelled by Overseer) on a discretionary basis.

Policy 5-8

102. Operative Policy 5-8 requires CNLMs to be set having regard to a list of factors, and then requires Council to regulate IFLUs to achieve these CNLMs. There are two main problems with Council's proposed changes to Policy 5-8.

103. Firstly, as has been submitted in relation to scope, the proposed changes no longer require Council to minimise the degree of non-compliance with CNLMs when granting consents. Instead, they would introduce alternative limits, which would enable IFLUs to be regulated without having regard to CNLMs (only requiring reductions in N-loss "... to the maximum extent reasonably practicable in the shortest feasible timeframe").

104. Secondly, Council's proposed SRPs and NRAT would not be consistent with the Council's proposed changes to Policy 5-8:

- (a) contrary to the proposed wording in the 5-8(a)(ia), the SRPs and NRAT would not be used only to regulate IFLUs "which do not comply" with CNLMs, instead they would be available to all existing IFLU as an alternative to CNLMs;

And this is something your Honour that was touched upon in questions to Ms Foster. **You don't need to demonstrate failure in order to move to the alternative pathways.**

- (b) the SRPs and NRAT also do not have regard to matters (A) to (E) in respect of specific IFLU activities, instead they adopt a high-level assessment of these matters at a catchment level based on Dr Snelder's modelling evidence.

105. More substantial changes to Policy 5-8 would have been obviously out of scope, and Council has therefore sought to minimise the

changes. However, the result has been a lack of consistency in the proposed plan provisions.

106. In contrast, Mr Scott's provisions are consistent, because the proposed discretionary pathway still directs Council towards achieving CNLMs (while enabling consents to be granted in appropriate cases when achieving CNLMs will not be possible within Table 14.2 timeframes).

Method 5-13

107. Forest & Bird supports an appropriate reference file system that will address the problems associated with Overseer version changes.

I think both counsel and Mr Scott's proposed provisions seek to achieve that.

Policy 14-5

108. Council's preferred version of Policy 14-5 would introduce the NRAT and SRPs and is therefore not supported by Forest & Bird.
109. As noted above, the % reductions that would be required by the SRPs are based on modelling and averaging at a catchment level together with various assumptions about GMPs. Forest & Bird does not consider that this approach would give effect to Policy 5-8.
110. Furthermore, the modelling that has been relied on does not consider more localised effects on waterbodies, and the effects of the proposed SRPs has not been adequately modelled. Forest & Bird will adopt the submissions to be made on behalf of Mr Day on these points.
111. In addition, Forest & Bird observes that abandoning the proposed 75th percentile limit would enable the highest leaching farms to

continue to operate well above their CNLMs on a controlled activity basis. Forest & Bird submits that this is problematic in terms of the message that it sends to farmers in the region, as well as in terms of more localised effects on waterbodies.

Policy 14-6

112. Again, Forest & Bird supports Mr Scott's proposed provisions. In Council's provisions, the primary discretionary consenting pathway is provided for in 14-6(g)(i), with reference to reducing N-loss "to the maximum reasonably practicable extent as soon as practicable". Although decision-makers must have regard to the matters subsequently set out (which include LUC-class and Schedule E targets), the guiding consideration remains practicability.

113. This would mean that consents can be granted for all IFLU activities in the region, so long as a farmer can demonstrate that "practicable" measures are being taken to reduce N-loss. This approach to regulation has previously been rejected in the context of the One Plan.

114. In contrast, Mr Scott's provisions would require farmers to demonstrate "... a trajectory of staged reductions in nitrogen leaching". Whether the proposed trajectory is acceptable will then need to be assessed based on the matters subsequently set out. This approach remains focused on achieving regional water quality targets and does not treat a farmer's individual circumstances as a determinative factor (for example, some farmers may need to reduce the intensity of their farming operation or move their operations to a different LUC-class).

Conclusions

115. For the reasons set out above, Forest & Bird:

- (a) submits that both the NRAT and SRP controlled activity pathways are out of scope for PC2;
- (b) submits that it would not be appropriate for the Court to exercise its power under s 293 to direct Council to adopt either the NRAT or SRPs; and
- (c) supports the policy provisions which have been proposed by Mr Scott on behalf of Mr Day.

Your Honour, those are my submissions, unless the Court has any questions.

QUESTIONS FROM THE COURT: JUDGE SEMPLE

Q. Thank you might have a question or two. So if you can go to your paragraph – I think I know the answer to this, I just want to clarify in my mind, the 30 May submissions, your paragraph 38, and if I put that together with your paragraph 86 in the – in today's submissions, in the 17 June submissions, is that am I right in understanding that Forest & Bird's position is if you start from a proposition and we had some evidence sitting around was sort of 50/50 as to who can achieve and where that sits on a most can achieve and so you're saying in your paragraph 86, that that is the most farms criteria is a – it is a consideration in policy 5.8, needs to be considered in an integrated way alongside the other policies, that policy criteria that sit within that, and so if you reach the position or the Court reaches the position that most farms, that on the basis of Table 14.2, most farms, that's CNLM limit is not a limit that most farms can achieve, so that, that hasn't been met, either if you consider it stand alone or in an integrated way, if you determine the evidence shows it hasn't been met, I understand from your paragraph 38 that you say the appropriate answer to that is to look at that limit again and so the Court has heard evidence that when those limits were originally set, based on the science but also using some assessments around what was achievable and practical, and those limits set in accordance with that. So

are you saying that what should have happened is that the council should have gone back and re-set those, not simply recalibrate, but have in fact gone through a similar process to what it did originally, looking at practicability or economic consequences, or is that effectively what you are saying should have happened?

A. Well, on the basis that the Court finds that the most farms criteria –

Q. Yes.

A. – has not or is not currently being met.

Q. Yes.

A. And of course, the evidence about that is – there's, you've heard different evidence about that –

Q. Yes, yes, appreciating that.

A. Yes, the Policy 5-8 really – those first part of Policy 5-8 in my submission has been completed, so that tells the Council how to set the CNLMs and sets out the factors that Council needs to look at when doing that. That has been done so yes, if it emerges that in fact due to some change in circumstances perhaps those criteria are no longer met the most consistent – the approach that's most consistent with the way that the One Plan works would be to go back and look again whether that meant those limits need to be – the CNLMs need to be reconsidered. But the problem of course is scope and if you don't do that then scope issues are – scope issues also arise with the Council's approach, yeah, to a sort of

Q. Yes, well I think I was putting the proposition at the level of which you were contemplating CT2.

A. Yes.

Q. That your submission is that that would have been the more appropriate way.

A. I suppose in colloquial language Council has sort of attempted a kind of a work around rather than really going back to what may be the fundamental issue which is that the CNLMs are not appropriate.

Q. And so on Forest & Bird's position the next most appropriate approach, if you like, having perhaps missed that opportunity or is to have that potentially greater number of farms go through a discretionary activity consent process, that might or might not get you to a most farms.

Potentially it does not solve the problem of your CNLM being set at a level that may not, as you say, holistically integrate that requirement with the other requirements in Policy 58.

A. Well the intention I think was that **most farm requirement relates to the CNLM.**

Q. Yes.

A. Rather than to the discretionary pathway.

Q. Yes.

A. So there was always the expectation that even with most farms meeting a CNLM there would still be the opportunity for farms to be granted a consent on a discretionary basis and, yes, Forest & Birds position is that given the way the plan changes developed the most appropriate course of action is to essentially – would in effect be to expand that discretionary pathway so that more farms are passing through that to consent and that would also enable Council to meet the important requirement that most farmers should be able to achieve a consent. **So I can understand that a situation in which most IFLU activities would have been refused consent is not really tenable.** So you – yes, so it enables Council to, you know, address that issue while retaining a focus on outputs, you know, and limits and, you know, keeping to that fundamental philosophy of the one.

Q. All right, I think I understand where you are coming from. Just one further question from me and that relates to the last part of your submissions where you worked through Forest & Bird support for Mr Scott's proposed provisions. I do not think that you have specifically addressed his proposed changes to Policy 14-6, (b)(a)(7) where he specifically introduced the idea of the 35%. I would be interested to know of Forest & Bird's position on that.

A. It's one of the discretionary matters of discretion.

Q. Yes.

A. Yes, well it needs to –

Q. It is quite a specific matter of discretion.

A. Yes, a specific matter, a very specific matter of discretion which addresses the very specific issues that the Court has heard arise in relation to CVG operations, but it isn't an alternative control pathway, it's

something that would need to be considered in context together with the other matters of discretion as I understand it.

- Q. If it had a particular regard direction to the decision-maker.
- A. Yes. So the decision-maker would also be able to look at the other matters in a sort of holistic way in order to determine whether the trajectory of reducing N-loss is adequate, I suppose.
- Q. Yes. So well I mean, no doubt we will ask Mr Scott about those provisions but I am interested to understand what Forest & Bird's position is on those. I take it because you have said you adopt those and support those that they are supported. I just wanted to note –
- A. Yes thank you, your Honour, yes they are supported and I think it sort of acknowledges the very particular issues that arise in relation to CVG operations which we have heard. And the issues in relation to the difficulties that the CVG operations do face and the importance of those operations to security and so on.
- Q. Thank you. Let me just check if there is anything else I have for you. No that answers my questions.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

- Q. I just had one and it was in relation to your paragraph 111 on page 21. It was your observations in terms of abandoning the proposed 75th percentile limit. You made an observation and you submitted that this is problematic in terms of the message, that it seems to farmers in the region that should be on this journey as well as in the terms of all localised effects. So I was a little unclear as to what I would take out of that. You have observed – if there were some directive elements of looking at the 75th percentile limit and thinking about the fact that it addressed individual water management sub-zones, so you did get some differentiation, if you like. Would Forest & Bird necessarily be opposed to that?
- A. I think the submission Commissioner is that, well Forest & Bird was opposed to the SRPs on the basis that they did include that 75th percentile.
- Q. Sure, I am not talking about it necessarily in an alternative pathway sense. I am talking about this, I guess, more in relation to the fact that you just

talked about, having particular regard to the 35% reduction for CVG as a kind of example. This might be another sort of example of something that might inform decision-making perhaps?

A. It is something I may need to take instructions on. But I am on my feet, so I suppose it is better but it does a particular issue with very high leaching farms in a limited way. I am not sure I can do much better than that.

Q. Sure. I guess it is just that, having gone back through some of the old decisions and things; a tricky point seems to be this trajectory issue and in terms of how might the policy help inform decision-making on that, I guess is the thing that I have been struggling with.

A. Yes. Maybe a question for Mr Scott.

Q. Oh I had intended to ask Mr Scott the question, but I thought I might ask you too.

A. But I mean, the point I was trying to make is that the SRP pathway becomes even less attractive, in my submission, without the 75th percentile reduction, if you follow that.

Q. Well, I wasn't asking you about that the pathway.

A. No, I know, you – I know, (inaudible 11:20:30), no, yes, of course.

Q. I was asking you about a discretionary pathway.

A. Yes, I'm sorry, I understand.

Q. With a little bit more direction in it, perhaps, yes. Thank you.

QUESTIONS FROM THE COURT: COMMISSIONER HODGES

Q. Good morning, Mr Williams. I come at planning provisions from practicality and how they are applied in this kind of thing mainly because I have been on the other side of a coin before I joined the court, and so I'd just like to make sure I understand what your intention is and I'm talking about the discretionary activity pathway. In a practical sense, we're now probably 10 years through the 20-year period so we're really looking at being able to achieve the 15- and 20-year CNLMs, is that your understanding?

A. 10- and 20-year, yes.

- Q. Okay and the process would be that the – an applicant would have to demonstrate they would be able to meet those in those timeframes, is that your understanding?
- A. That, yes, in order to sort of follow the Table 14.2 pathway?
- Q. Yes.
- A. Yes.
- Q. Yes, so assuming that 14.2 –
- A. The recalibrated Table 14.2.
- Q. Yes, so that's – they're the figures we're looking at. Would you see any advantage in having an element of the SRP where the council has indicated that – or sorry, Professor Horne has indicated that they could get certain reductions within two years by doing certain things which would have environmental benefits, would you see any, any merit in that or would it still be problematic in terms of scope?
- A. It probably would still be problematic in terms of scope. I mean, it depends – it would depend, of course, on how the policy framework is developed, but where you have essentially a choice between controlled activity pathways and which –
- Q. Sorry, I'm not talking about a controlled activity pathway.
- A. Oh, you're not? I'm sorry.
- Q. No, I'm purely focusing on discretionary.
- A. Both, I see.
- Q. Yes, so a matter of discretion or something that is taken into account by the decision maker, maybe the extent to which they can achieve that 20% reduction in two years, which is – which seems to me to be something that would be attractive for the environment, anyway, because we get better benefits. Would you see any merit in that and would there still be scope issues?
- A. No I don't – I think the scope issues would, (inaudible 11:23:11) but the scope issues really are primarily directed towards having an alternative controlled activity pathway.
- Q. Right, okay.
- A. Which would enable or which could mean that the council is not regulating according to CNLMs at all. But I think that once, you know, you remove

that element of it and you're talking about a discretionary pathway, there are more options certainly for the Court.

Q. Okay and my understanding of what you're saying in supporting Mr Scott's proposals is that one of the things that council would definitely have to consider is how close an applicant gets to achieving the Table 14.2, that's the first thing, is it?

A. Mr Scott's provisions and the discretionary pathway, as I understand it, yes, the applicant needs to demonstrate a trajectory and then the council would look at the factors in order to – I hope I'm presenting this correctly – in order to decide whether that trajectory justifies a consent. so yes.

Q. Okay and I just –

A. Yeah, yeah.

Q. – that was my understanding of what you're looking for. And the other one that is interesting me is the extent to which any lower limit than the 14.2 increases the difficulty in getting to the SIN target for that particular receiving environment, is that something you're interested in or not?

A. So you might need to explain – any lower limits to Table 14.2?

Q. Maybe if I use some random numbers which says that the, the limit in the stream is – if the Table 14.2 limit was expected to contribute so much to achieving the SIN target and the consent was for a lower level of contribution, that would mean that in getting to the same limit later they would have to do more work again. Is that something you are interested in or not?

A. My apologies Commissioner, I think perhaps I still not understand the point. If you – I mean the Table 14., I mean in a discretionary context farmers wouldn't be expected to go beyond Table 14.2.

Q. No less than Table 14.2.

A. I see or above Table 14.2 I suppose.

Q. Or there above well I do not think you are going to complain here. No, I am meaning the situation where a farmer cannot meet 14.2 and there's a level below 14.2 that means that when they finally have to come to meet the SIN target they have got even further to go than they would have from 14.2.

A. Well yes, but in meeting the SIN target is – I sort of – we’re looking into quite far into the future as I understand it potentially beyond the timeframe of this plan.

Q. Sure but it is integrated management.

A. Yes, but I always acknowledge that it would take substantial time to reach those SIN targets so I think if it’s a little bit longer than would otherwise be the case then so long as, you know, the correct matters are being considered that’s I think the reality.

Q. Okay, thank you.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.52 AM

THE COURT: JUDGE SEMPLE TO MS WRIGHT

Q. Ms Wright.

A. Good morning, your Honour.

Q. Good morning, again.

A. Now to start with preliminary points, I just want to check that the bench has two sets of submissions for Mr Day?

Q. Yes.

A. The first set are the SRP submissions and the second set address the balance of the issues before the Court and I may I take those as read, your Honour?

Q. Yes.

A. And you will also have the attachment A table hand up which I hope is helpful.

Q. Yes, thank you.

A. Before I get into the detail of the submissions for Mr Day, I would just like to make a couple of points on the duration issue which Ms Ongley passed the buck on to me.

Q. Yes.

A. To assist the Court, just so you have the most recent documentation or version of the plan provisions, I have printouts of chapter RPIP integrated policies which are the same in substance as chapter 12 –

Q. 12.

A. – but how it is now presented, so –

Q. Yes, thank you.

DOCUMENTS HANDED UP TO THE COURT

A. Your Honour, I don't intend to spend a lot of time on this, but just to attempt to provide some clarity to the Court and Mr Scott has, in fact, addressed duration in his evidence and so is also able to answer any questions the Court may have.

Q. Yes, thank you.

MS WRIGHT MAKES OPENING SUBMISSIONS

But as a starting point, it is common ground between the parties that a 10-year duration resection on discretionary activity consents is something that should be included in the – in chapter 12 and the reasons for this are set out in Mr Scott's primary evidence to start and the reference for that is 204.2230. And then they are also neatly summarised in his supplementary evidence with the reference being 501.0074. And in summary, the first point is to incentivise farmers to seek controlled activity status and we've heard from Professor Horne from a farm systems perspective he considers that is likely to be an effective incentive. And then the second is to attempt to avoid (inaudible 11:55:19) effects and barriers to the future ability to decrease nitrogen levels because significantly elevated levels have essentially been locked in for an extended period of time.

What I would add to that, is that it ensures that the regional land use component of the rules in chapter 14 aligns with the One Plan's approach to duration for discharge consents in chapter 12. So just as a reminder, in chapter 14 rules **it is essentially a hybrid rule where you are dealing with a regional land use rule under section 9 and that's actually the more general intensive farming which the Table 14.2 aspect relates to and then you have the specific discharge rules relating to section 15.**

And in chapter 12 which is addressed in reasonable detail in Mr Scott's supplementary evidence, there is essentially a presumption that the starting point is a 10-year duration for those discharge consents with criteria that needs to be applied to determine if you are going to go beyond that, but chapter 12 doesn't apply that presumption to the land use component of the rule.

And so in my submission, what bring that into chapter 14 does is it makes it clear that for the activities in that discretionary category you have a 10-year and it also makes it clear that it is a hard 10-year.

Your Honour, unless there are any specific questions on duration which I thought I could address now, I will turn the detailed submissions for Mr Day.

THE COURT: JUDGE SMITH

No, I don't think there are any questions, just let me check.

THE COURT: COMMISSIONER HODGES TO MS WRIGHT

Q. You have indicated the duration issue in terms of discretionary activities.

A. Yes.

Q. I would have thought the same applies to controlled activities if they were granted for 35 years for high discharges from LUC 1 and 2 lands? So aren't there – isn't there some kind discrepancy between those two approaches?

A. I guess the first point in response, your Honour, is that the discharge component of any applications under that, say, a Table 14.2 controlled pathway or any controlled pathway would fall to be considered under the presumption in chapter 12, so you would have that 10-year presumption applying to the discharge aspects of that application, so that would be the starting point. I agree that it would be setting in place the levels of leaching set out in Table 14.2 and there may need to be increased levels beyond that, but at this point, as my friend pointed out, we are at the point of needing to embark on –

Q. Sure.

A. – progress towards achieving those targets.

Q. Yes.

A. And we know on the evidence that Table 14.2 is designed to do that. So in trying to find a way to begin that shift in a science-based effort, we do need to look to some of the incentives that that can apply.

Q. Okay, thanks.

THE COURT: JUDGE SEMPLE TO MS WRIGHT:

Q. Right, where would you like to take us next?

A. Your Honour, I don't propose to read through my submissions as the bench has read them.

Q. No, thank you, we have had a chance to.

A. Instead, I am going to talk to them.

Q. Yes.

MS WRIGHT CONTINUES OPENING SUBMISSIONS

And to start, I just want to make the point that in my submission, Mr Day's case is simple. Table 14.2 should be the only controlled activity threshold limit. It just needs to be updated and enabled to remain current and that can be done and is proposed to be done on Mr Scott's provisions.

Farms with proposed leaching that exceed or are in excess of Table 14.2 should be applying for a discretionary activity resource consent and the policies should be framed on trying to put in place analogous expectations on those applicants as they do on controlled activity applicants.

No further controlled activity threshold limits are justified and I would like to add that the limits proposed by council are indeed limits, they are not exceptions to Table 14.2. An exception is something that allows a departure from a set starting point and that interpretation is consistent with the common meaning but it is also consistent with how the term exception is used in the Operative Plan.

Policy 14.6 refers to exceptions to Table 14.2 and those exceptions under the operative plan fall into a restricted discretionary activity situation and that in my submission is not what Council's limits provide. That regime is reflected in provisions proposed by Mr Scott and at paragraph 1(c) of the submissions most recently filed for Mr Day I have set out seven reasons there why it is submitted that the Court should prefer those submissions, those provisions and I will work through those but before I do I would like to note that of those points the one that is at the heart of Mr Day's case is ensuring equitably treatment of all land use activities that have a nitrogen leaching component to them and critically a rating that will enable those activities to be treated in the same way when they're brought into a regular regime even if they are not in that regime now and Mr Day will comment and make some comments to the Court on those points.

That point has underpinned Mr Day's position for the last 17 years that he has been involved in the One Plan and over those 17 years Mr Day's position has also been consistent but that is best achieved by a regime which allocates

nitrogen leaching loss allowances based on the underlying land resource and its natural productive capability.

Turning to those points at paragraph 1(c) of my submissions, the primary position for Mr Day on the Council's alternative controlled activity threshold limits is that there is no jurisdiction to include those limits. I don't propose to comment on the NRAT, in my submission that's been dealt with in detail at the start of the hearing and most recently by my friend.

THE COURT: JUDGE SEMPLE

Yes.

MS WRIGHT CONTINUES OPENING SUBMISSIONS

I would, if the bench is minded to give me a moment, like to make some additional submissions on the specified reduction pathway endeavouring not to repeat my friend, Mr Williams.

THE COURT: JUDGE SEMPLE

Yes.

MS WRIGHT CONTINUES OPENING SUBMISSIONS

The test for whether a submission is on a plan change was clarified by Justice Kos in *Motor Machinists* decision and that remains the leading authority on this point.

In summary a submission is only fairly on a plan change if it is addressed to the extent which the plan change amends the status quo and that's the primary test, the primary consideration and this is something more than having a general connection with the words used in *Clearwater* with what a plan change address is. So Justice Kos' method for how to assess this primary consideration is to ask whether the management regime in the plan for a particular resource is altered by the plan change and if it is not a submission that's set to alter that management regime is not fairly on the plan change.

Now turning to apply that test the situation before the Court. The existing regime's controlled activity threshold limits reflect a resource space regime using LUC and that purposely allocates higher nitrogen losses to land that has high capability and lower losses to land with lower capability and those nitrogen losses were as Dr McKay explained based on reductions that were required in the stream and also scientifically based on the productive potential available from different LUC classes.

Now the notified text of plan change 2 did not change that controlled activity threshold limit and the section 32 report was clear that it was not intended to change that underlying regime it's reflected in that limit and I provided the references to the section 32 report in my submissions.

What it intended to do was to update those limits to match the new version of overseer and then to provide what was called a viable or a workable pathway for farms that exceeded those limits through opening up the policy framework.

Submissions that therefore sought to introduce the specified reduction pathways, as an alternative limit, requested a fundamental alteration to the One Plan's regime for managing nitrogen losses when that was not altered or intended to be altered by plan change 2. And the reason it is a fundamental alteration is (1) that it is new controlled activity threshold limit. It is a new limit that is underpinned by a fundamentally different premises, to the premise underpinning Table 14.2 because it allocates nitrogen loss allowances based on historic leaching, not on the underlying land resource and as Dr Drury has explained in cross-examination last week, these are fundamentally different because historic leaching levels do not necessarily align with productive capability.

In my submission, it is reasonable to expect that a change of that magnitude would have been addressed, in detail, in the section 32A report if it was intended in the same it is addressed in detail in the section 42A report prepared by Dr McKay for the original One Plan as appended to Mr Day's prime evidence.

Justice Kos' secondary consideration as to whether or not a submission is on a plan change is also at play, in this instance in my submission and that it is reasonable to assume that there would be people who would want to make a submission on that fundamental regime change and they would not be afforded that ability. If the Court disagrees with those submissions, it is nevertheless submitted that the alternative controlled activity threshold limits should still be rejected on the merits, as should Council's proposed – and I will use the word adopted by Mrs Foster, what has turned out to become a bit of a blender policy considerations informing a discretionary consent application.

Now to expand on that submission, I will turn to the remaining six factors that are set out at paragraph 1(c) of my submissions.

The first point is that, in my submission, Mr Scott's provisions provide the most equitable regime for regulating nitrogen leaching loss. **Now the starting point is actually the point I used as my end point in the written submissions which is that there is no equitable solution in this situation because the Court is not faced with a clean slate. It is not an untouched, unused environment.** So the challenge for this Court is therefore finding the most equitable solution and in my submission that is not giving nearly all farmers a controlled activity consent and then signalling to farmers through policy direction, that all that is required are reductions to the maximum extent reasonably practical in the shortest feasible timeframe, noting the subjectivity of those elements. I accept that there is an aspect of fairness in giving all farmers a consent but when you are dealing with highly degraded catchments, finite resources, an existing regime that currently applies to some activities in leaching nitrogen and not other activities and complex businesses where people have made different decisions about the time and nature of investments and how they may expand. The question of equity is in my submission a much more sophisticated question than simply giving consents away.

The regime before the Court which enables all of those challenging factors to be accommodated in a fair way, is one which **allocates nitrogen based on the underlying land resource** and that is part of Mr Scott's recommended regime

and the fundamental part of that regime. And this is because it treats everybody the same, every bit of the activity the same, provided they have the same land resource and in doing so it avoids rewarding historically high polluting activities. It avoids punishing those who have kept their leaching down. It avoids preventing realisation of a potential, of highly productive land. And then to manage implications for high leachers Mr Scott has provided a discretionary activity opportunity for farmers that cannot meet those limits and that's an opportunity that provides all farmers with a genuine opportunity to apply for and have their consent application considered on the merits. But in providing that opportunity he has been careful to not create other equities and this has been done by applying the same high-level expectations on a discretionary consent applicant as on a controlled consent applicant. There needs to be a trajectory of nitrogen loss reductions over time. Higher leaching activities need to be located on higher productive, higher capability land and the extent of non-compliance with Table 14.2 is the underlaying comparator.

In my submission not only is this most equitable regime but for similar reasons it is the most efficient and affective regime of the regimes before the Court. As Dr MacKay's written evidence says, and as he explained on the stand, there is a finite area of land available for primary production within the region but also within the country and only a small part of that is highly productive and in simple terms, higher productivity soils will produce more and require less import for output. The ability for the region's waterways to assimilate nitrogen is also finite.

The Table 14.2 controlled activity threshold limit was specifically designed with an eye to those two finite characteristics and the scarcity of elite soils and in doing so the goal was to try and meet the dual requirements of continued economic growth enabling some flexibility and land use while making that movement towards meeting water quality targets and improving the greater waterways within the region and the result was essentially a rationing of nitrogen that can be admitted from farmers that maximises economic return and make scientifically based progress towards instream targets.

The planning decision may have been made, well was made in policy 5.8 that the nitrogen leaching reductions required would be achievable on most farms using good management practice but that was not the goal in and of itself. It was a means of achieving the goal.

Turning to the third point, it is submitted that Mr Scott's provisions represent the best workable regime for the health and wellbeing of the waterbody – of waterbodies within the region and freshwater eco systems. They provide the planning framework that best aligns with Dr Snelder's best workable case scenario for water quality. Everyone who can meets Table 14.2 and then everybody else is pushed as close to Table 14.2 as they can. It also reserves discretion for the Council to make a decision that some leaching is just too much.

Dr Snelder's comments on the stand, also confirm in my submission, that the benefits of that best workable case scenario are greater than the small decimal place difference between the different scenarios that are shown in his comparison table and that's at attachment 2 to his primary evidence.

And there are three reasons for this. The first is that that table focuses on the mean relative difference, the average across all monitoring sites and this hides the potential difference in gains between the two different scenarios which Dr Snelder explained while he was on the stand.

Second, there is potential for localised water quality and ecosystem benefits from pushing reductions past 20 and 30% to say 40% was the example given to Dr Snelder. Third, the scenarios that have been modelled do not in fact capture the council's proposed regime.

First, proposed pathway B is by both name when one looks at attachment B to Dr Snelder's primary evidence and detail, in my submission, an example of a Table 14.2 controlled activity threshold limit and a discretionary pathway. Under that example, farms that were allocated to the discretionary pathway reduced by 20%. Under the other proposed pathways following on, C and D,

analysis was looked at, at what would happen if they – those discretionary farms were consented at with greater reductions required.

It is not a scenario where most farms have been set at a 20% reduction and it is certainly not a scenario that is looking at having farms at a 20% reduction, a 35% reduction or at the NRAT and that scenario has not been modelled before the Court.

What the Court has is at the best workable case scenario is Table 14.2 and the ability to drive farms as close to Table 14.2 as possible and in my submission that is reflected in the provisions proposed by Mr Scott with Table 14.2 as the controlled activity threshold limit and the specific policy considerations that have been put in place.

Now those comments on the water quality outcomes that are submitted will be achieved through Mr Scott's provisions also lead neatly into why those provisions, in my submission, give effect to Policy 5-8. I think the most straight-forward way to make these submissions to the court is if we actually just have a look at Policy 5-8 and that's on the front page of the large A3 table that I provided.

I am looking at Policy 5-8(a) nutrients and then the direction that nitrogen leaching maximums must be established in the regional plan which achieve a list of things in specific ways. There are different – there is different language used in the directions.

The first one I would like to comment on is B and there is different wording proposed before the Court. The council has proposed that it is re-written to say "will contribute to implementation of the strategy and the RPS provisions" and Mr Scott has retained the wording of the Operative Plan "will achieve the strategies". In my submission, regardless of which of those phrases the Court prefers, of the controlled activity threshold limits before the Court which this provision speaks to, on the evidence it is **only Table 14.2 that has been**

prepared with a science-based line of sight to the targets that those policies refer to and orientate reductions towards.

Moving down to C, another matter which the maximums must align with, and this has not been changed as between the different versions, is recognise the productive capability of land in the water management sub-zones. As I have already noted, Table 14.2 does this, the specified reduction pathways do not, and Dr Dewes confirmed that and explained that on the stand.

In my submission, the evidence shows to the Court that the NRAT also does not and that is a consequence of the evening-out of the allowances that was undertaken first at a softer level by Professor Horne but then more actively by Dr Le Miere to even out those allowances across the different land types to reflect what I understood to be his view of what would be a fair allocation.

Third, moving to D. The nitro leaching maximums which are achieved on most farms using good management practices and the Council's versions include best management practices. Mr Scott's version does not and as explained in his supplementary evidence that was a response to the evidence on the stand from Professor Horne that in essence controlled – apologies, good management practices and best management practices are one of a big pool and there is not a lot to be gained but with respect potentially a lot of confusion from referring to both practices.

Now first beginning with the word “achieved” or “achievable.” In my submission there is actually little difference between those two words. The common meaning of achievable is “can be achieved”. Turning to whether most farms can in fact achieve the nitrogen leaching maximums as reflected in Table 14.2, using good management practices.

I have set out the evidence that my submission relies on in detail in the written submissions. The outcome of that evidence is in my submission that there is a reasonable basis for this Court to conclude that most farms can in fact meet Table 14.2.

Now I recognise that the collective nature of that most farm directive in policy 5.8 does result in a situation where commercial vegetable growing, green vege, and brassica operations are likely going to be need to apply for a discretionary activity consent because of their high leaching levels and there will be a number of intensity dairy farms which are also in the same boat and need to apply for a discretionary consent. But in my submission that is an appropriate outcome in this situation.

As Judge Kirkpatrick explained in the *Eden* decision which I have referred to in my submissions, controlled activity status should only be used where there is confidence that consent for a particular activity should always be granted on the conditions that apply to that activity and the evidence simply shows that that is not the case in this situation. Those commercial vegetable growing operations are very diverse and the commercial vegetable growing operators on the stand confirmed that. There has been various uptake of good management practices and there are also a huge spectrum of good management practices that could apply and they will be farm specific as all of the experts before this Court have been at pains to emphasise.

CVG also has very high leaching per hectare for those type of operations and is shown in the evidence for the water quality expert for Horticulture New Zealand for example in the Hokio 1A target to water management sub-zone. You are looking at 25% of the nitrogen load coming off 7% of the land.

In all of those practical farming matters, they are all at play in an environmental context where you have significantly degraded catchments and we also have the potential for localised games as well as overall games from reductions in nitrogen leaching and those factors in my submission support Council retaining the ability to have a proper look at applications that exceed Table 14.2 against the objectives and policies of the One Plan and that is afforded by discretionary activity status.

The final point listed in paragraph 1(c) of the written submissions in support of Mr Scott's recommended provisions, is that they use Overseer in a way that is acceptable in a regulatory framework.

After working through the different reports on the issues with Overseer generated initially by the Parliamentary Commissioner for the Environment Report which raised a red flag about its use, my take homes from those analysis are essentially summarised in the April MFE guidance as Overseer output numbers should not be used as absolute numbers in regulation and regulators should aim to use a multi evidence approach when assessing nutrient losses where they can. And I have set out at paras 470 to 475 of my written submissions why it is submitted Mr Scott's proposed provisions are consistent with those directions and I would just like to highlight two points in respect of each.

So starting with the not used as absolute numbers in regulation, the first point I'd like to make is that in my submission there is a difference between something being absolute in a lay sense and in a regulatory sense. In a lay sense the numbers generated from Overseer are absolute numbers, they are a single number. In a regulatory sense, as they are used in the One Plan, they are not because they do not ultimately determine whether farming can go ahead or not. Where (inaudible 12:25:54) they are a point at which activity status changes.

The second point I'd like to make is that all experts agree, as recorded in the joint witness statement, that Overseer is good for assessing risk and Professor Horne explained in cross-examination, the key architect of the NRAT, that it in fact provides a more refined picture of risk than the NRAT does. Dr Tavernet gave an example of how an Overseer number can be used to do this and that is by comparing outputs from different farms and using that comparison to identify riskier farms and prioritising them from remediation. Correctly viewed that is, in my submission and as Dr Dewes explained, exactly what Table 14.2 does.

The group of farms that can meet Table 14.2 are considered low-risk because they can meet nitrogen allowances that were based on instream targets so it's not just a risk assessment there is a scientific-based limit aspect to it and it is using that scientifically-based limit as the determiner of risk and then farms that do not meet those limits in Table 14.2 are essentially high-risk and they're prioritised for remediation through the additional oversight that discretionary activity consent offers.

Turning to the direction on using a multi-evidence approach where this is possible, the first point I'd like to make is that the discretionary activity opportunity is the only opportunity that truly provides for a multi-evidence approach to be adopted in the sense of being able to use different pieces of information generated from different sources to inform an application and to inform a decision. And the presentation of alternative controlled activity threshold limits as a multi-evidence approach is, in my submission, incorrect. Those are different limits based on a different tool.

The second point is that they are different limits based on a different tool that is not being held to the same standards by the council and its supporting parties as they are holding Overseer to. It has not been peer reviewed, it provides a less-refined picture of risk, it appears from some of the comments from Dr Parlato on the stand that there may still need to be some tweaks made in relation to the mitigations for wetlands and that raises the question of whether other tweaks are required and which a peer review would point out. It is not as good as Overseer – as at many of the things that Overseer was being criticised for. In my submission, it is simply not ready to be used as a controlled activity threshold limit at this point. It may be in the future, but it is not now.

It is not just the nitrogen risk assessment tool but many aspects of this case which raise, as the bench has pointed out, uncertainties. There is uncertainty in the water quality modelling, in Overseer estimates, in the current leaching levels from some of the existing farms given the lack of data, in the extent of GMPs and which GMPs a farm would ultimately adopt. But the practical reality is, in my submission, that Voltaire was on the money when he said: "Uncertainty

is an uncomfortable position but certainty is absurd.” There is almost no situation where that comment is more true than in environmental management when you are dealing with very complex environments and the diversity and complexity of human operations and needs.

In my submission is therefore about dealing with those uncertainties in the most efficient and effective way and in this case that is done through using table 14.2 as the only controlled activity threshold limit with a discretionary activity opportunity coming in behind with carefully crafted policy considerations. This ensures that the line between low risk and high-risk farms is drawn based on a limit that is science based and derived from the One Plan targets and the productive potential of the land within the region. It uses the best tool available despite its flaws for assessing nitrogen loss from the root zone and the risks associated with that.

Critically for my client, it treats all activities equally by allocating nitrogen loss allowances based on the underlying land resource and in doing so it enables the regime to be rolled out across the catchment on a whole catchment basis in the future which is consistent with policy 2 of the national policy statement and also as has been commented on by Commissioner Hodges in particular it is something that is likely going to need to happen if the targets are ultimately going to be met.

It also enables a multi-evidence-based assessment of farms within that high-risk category. For those reasons, and the reasons I've outlined and in the written submissions, it is submitted that Mr Scott's recommended provisions should be adopted by this Court as sought by Mr Day.

Those are the submissions for Mr Day, the appellant. I am happy to answer any questions.

QUESTIONS FROM THE COURT: JUDGE SEMPLE

Q. Just probably two questions from me to start off with and the first of them you might want to question Mr Scott. It comes again, your submission is

that the land resource is the constant I guess and it should not matter what activity you are undertaking on that land resource that the land resources is the determining factor in the regime and should continue to be so and I am just interested again to wonder about this distinction that I referred to in the policy framework for CVG for a discretionary activity to put some – have particular regard to components around a particular activity seems inconsistent with the approach that you are advocating which is whatever activity is that should not be the determining factor. The determining factor should be the resource on which the activity takes place. Do you have any thought about that that you can just help me reconcile what appears to just potentially be slightly, a slightly different approach?

A. So the first point is that I understand from Mr Scott's evidence the reason that was included as a – have a particular regard to a consideration was to recognise some of the challenges for CVG in using Overseer.

Q. Yes.

A. The second point on that broader inconsistency question would be that the way in which the different policies and directions and policy 14.6 fall to be applied is going to turn on the language that is used.

Q. Yes.

A. And they all need to be looked at and applied.

Q. Yes.

A. The 35% policy consideration starts with a particular, have particular regard to.

Q. Yes.

A. So turn your mind to in a meaningful way, that sits alongside other policy considerations that are framed in a different way.

Q. Yes.

A. One of which is to make a decision consistent with which in my submission is a more directive policy consideration. Having more intensive land uses on land units of high productive capability and discouraging more intensive land uses on land units with lower productive capability. So when you look at those policy considerations together if you have an application, in a theoretical sense of course, that came in

and said: “I done a 35% reduction.” That would be something that would speak in favour of an application but if that 35% reduction was of a very high leaching activity on class 7 land, then this policy consideration would ensure that the decision maker had to ask the question, even though it is 35%, is that nevertheless consistent with achieving this overall outcome. And in my submission, your Honour, that would be a challenging question to answer yes.

Q. Right, thank you, that's helpful. And this question though, is probably consistent again with that and the question about that decision making framework, or the policy framework sitting behind that discretionary decision, because you said that the best water quality outcome is that which takes into account Table 14.2 and then pushes everyone else as close as possible. And of course, the argument against that is that a discretionary framework that doesn't push people as close as possible to 14.2 might well mean that consents are granted with much higher leaching and so that potentially isn't – doesn't get you to where you want to go in terms of meeting your water quality targets. And so I am interested in how tight that policy framework is now considered to be? And again, it might be a question and it will be a question that no doubt Mr Scott will give consideration to.

A. Yes, I am also happy to comment. It does again come down to the words –

Q. Yes.

A. – that are used in each of those provisions, from a pure plan writing point of view. There are, of course, implementation questions and with respect those are questions that are in my client's mind given the circumstances to date, but focusing specifically on the words, it comes down to the words that are used. I have taken you to one direct provision.

Q. Yes.

A. Another, in my submission, and I'm looking at Mr Scott's provisions, is also only grant consent if doing so aligns with the strategies for water quality and references Policies 5-2, 3, 4 and 5. Now, in essence, those provisions say that the targets need to inform productions and where you are degraded you reduce. The best marker, in my submission, for

whether or not an intensive farm is aligning with those is its proximity to Table 14.2. So that provision needs to be, when it's looked at, it needs to be looked at with the actual words of those other RPS policies in one's mind and then also the direction that you're looking at that extent of non-compliance with Table 14.2.

Q. So this might be a planning question but in my experience often the planning and legal parts of these are closely, closely interwoven.

A. Indeed.

Q. So if I – if you work down that list for me, in 14-6, isn't it, (ba), if you were to reorder those based on the most directive to the least directive, what would that order be?

THE COURT: COMMISSIONER EDMONDS

Indeed, I was wondering that too.

QUESTIONS FROM THE COURT CONTINUES: JUDGE SEMPLE

Q. There's something in my brain that would want it to cascade down in a way that –

A. Certainly, your Honour.

Q. Mhm.

A. And I caveat this by Mr Scott –

Q. Might have a different –

A. May have a, may have different view.

Q. – may have a different view, but that in itself is informative to me if the lawyers and the planners don't agree on which is the most directive, that tells me they might need more work, so I'm just interested to see what your – if you were, if you were looking at it, and you know potentially putting a case for it forward for a applicant, what would you say?

A. I would say that the, the starting point is that you need to look at your extent of non-compliance and have that in your mind. Then in terms of directiveness, I would start with the – just want to make sure I'm using the right words – make a decision that is consistent with, so that is your (iv) –

Q. Right, over only grant, only grant consent if –

A. Well, I was going to put that.

- Q. Yes, next?
- A. Next.
- Q. Okay.
- A. And the reason for that is that, that consistent with (inaudible 12:40:00) potential, that is down in chapter 4 in that Table 14.2.
- Q. Yes, yes.
- A. And then we're looking upwards with the next provision to the RPS and you would be doing that with that extent of non-compliance in your mind's eye.
- Q. In your mind, absolutely.
- A. As a starting point.
- Q. Then I think we've got three have –
- A. After that, I would, I would put –
- Q. – have (inaudible 12:40:25) have particular regards to?
- A. I would put probably (iv) consider the potential effects. Because that's going to be something that you're looking at – apologies, (v) – when you're thinking about alignment with those RPS policies also. And then in my submission the particular regards can come at the back end and could be tidied up essentially with a particular regard to bullet, bullet.
- Q. So you would, you would put a “consider” over – as, as more directive than “I have particular regard to”?
- A. I would put it up, well, it's more that I see that speaking directly to how you're thinking about the RPS provisions.
- Q. Okay, all right.
- A. But I agree, the particular regard is telling you to pinpoint focus.
- Q. Yes.
- A. I guess I'm thinking about that in a slightly different way as opposed to a generic “consider” it's more an informative factor to thinking about alignment with those RPS policies.

THE COURT: JUDGE SEMPLE

So – I knew you had a question?

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. Well, no, I want to take you up a box into B. And how three at the end where you've got a trajectory of staged reductions and nitrogen leaching is demonstrated with achieving the cumulative nitrogen leaching maximums and the relationship of that, what you've just been talking about in relation to these matters that might be considered?

A. Apologies, Commissioner, I actually struggled to hear a little bit there. Would you just mind asking me –

Q. Sure, no –

A. It's not a (inaudible 12:42:12) I just didn't quite catch –

Q. – I've gone up a box. I've gone up a box.

A. Yeah.

Q. Into B.

A. Okay.

Q. Which starts with an exception.

A. Yes.

Q. And then at the very end of that, it says: "And it's trajectory of staged reductions."

A. Yes.

Q. Do you have that now?

A. Yes.

Q. So my question related to the relationship of that to what you've just been through in terms of BA.

A. Certainly, thank you for clarifying. The way in which B was framed was to align with the way in which the Operative Plan is drafted in Policy 14-6 and as Commissioner Edmonds will well know it sets out exceptions had been made and it has two very limited circumstances and one is in relation to a combination of rainfall and LUC class and one is where you achieve those – the nitrogen leaching maximums within four years, so it sets up a framework where you are saying: "You can't meet Table 14.2.2, we give you two exceptions when you can apply." This policy is intend – this part of the policy is intended to that same thing. It is saying "you cannot meet Table 14.2, we are giving you some specified exceptions when you can apparently and one of those is if you application shows that

you are committing to a staged reduction in your nitrogen losses. The policy provisions that we have just been talking to would come in when you have shown that to assess whether that stage reduction of nitrogen losses is going to cut the mustard.

Q. So that's how you see the relationship?

A. Yes.

Q. Yes. I partly ask the question because this whole issue about the trajectory of stage reductions and how, how acceptable or not acceptable that might be, has been fraught in the history of the One Plan and consenting.

A. I agree, Commissioner, you know, one answer is to use words or words to similar effect as those recommended by Mr Carlyon and that is essentially going to say you – and indeed the operative One Plan – you need to commit to achieving Table 14.2 at some point and that gives you a specific end goal to measure what you are proposing against. The problem that Mr Scott has identified in his evidence is that that risks turning and in relation to submissions I have made, would in practical effect turn those numbers into absolute numbers which doesn't respond to some of the uncertainties associated with Overseer that we have also been talking about. So it is in that context that Mr Scott's provisions recommend if you are going to meet Table 14.2 – if your Table 14.2 applicants are required to show a trajectory of reductions, so should discretionary applicants. We then have to turn our mind to the extent to which those are acceptable to make a decision about grant or decline. I agree with you, there is, you know, there is inherent uncertainty and the fact there is a discretionary activity. Mr Scott has attempted to give directive policy direction that is aiming to deliver on the water quality evidence of Table 14.2 and as close as you can get with the ability say "sorry, it's just not enough", is the best workable scenario and by "workable" I mean everybody has an opportunity to apply on the merits for a consent. Which is ultimately the problem that drove Plan Change 2 in the first place as summarised quite neatly, actually, in the Ellis – Ellis (inaudible 12:46:15) and Beca report commissioned by the Minister for Environment.

THE COURT: COMMISSIONER EDMONDS

Sorry, I interrupted.

THE COURT: JUDGE SEMPLE

No, no, no, that's, no, that's fine. I think they were the only two questions that I had noted here anyway. So if you have other questions I am happy to hand over to you, Commissioner.

THE COURT: COMMISSIONER EDMONDS

I think I might just leave my questions for Mr Scott, that's –

MS WRIGHT:

That's fine, Commissioner.

THE COURT: COMMISSIONER EDMONDS

Given that some of this, some of the things I want to ask him is just along similar lines to the questions that you have been asked about how it might work.

MS WRIGHT:

And they are, ultimately, Mr Scott's provisions, not mine, so many of those questions, in terms of intent, are often best directed to him.

QUESTIONS FROM THE COURT: COMMISSIONER HODGES – NIL

THE COURT: COMMISSIONER HODGES

Thank you, your Honour. I don't have actually have any clarification or questions, but I have to say that based on my experience with the Court in recent years, Voltaire was right. Uncertainty is an uncomfortable position and it seems to be in just about every case that comes before us.

MS WRIGHT:

Indeed. Very interesting, 1770 and still right.

THE COURT: COMMISSIONER HODGES

It's the norm, it's the norm.

THE COURT: JUDGE SEMPLE

All right, thank you, Ms Wright.

MS WRIGHT:

Thank you, your Honour.

LEGAL DISCUSSION – HOUSEKEEPING (12:47:33)

COURT ADJOURNS: 12.48 PM

COURT RESUMES: 1.49 PM

MS WRIGHT CALLS

ANDREW EDWARD DAY (AFFIRMED)

Q. Good afternoon, Mr Day, do you confirm that your name is Andrew Edward Day?

A. Yes, that's correct.

Q. And that prior to hearing you participated in mediation?

A. Yes, I did, yep.

Q. And you've prepared one statement of evidence dated 6 November 2023?

A. Yes.

Q. And that evidence is prepared in your individual capacity not as an expert on farm systems?

A. That's correct.

Q. And do you have any corrections that you'd like to make?

A. I think I need one, but there's a couple of little typos but only one material one in paragraph 7.1 where it starts: "It's worth remembering" et cetera. If you could delete that sentence. I was obviously incorrect in that.

UNIDENTIFIED MALE SPEAKER:

Sorry which paragraph was that?

WITNESS:

7.1 and it starts: "It's worth remembering." Effectively it's the clock has already started and I was incorrect in that.

EXAMINATION CONTINUES: MS WRIGHT

Q. With those corrections, Mr Day, is your evidence true and correct to the best of your knowledge and belief?

A. Yes, it is.

MS WRIGHT ADDRESSES THE COURT – PRODUCE FLOW DIAGRAM
(13:50:37)

EXAMINATION CONTINUES: MS WRIGHT

- Q. Mr Day, could you please explain to the Court what you're showing in this picture which I understand is essentially a pictorial representation of some of the points made in written form of evidence?

WITNESS REFERRED TO DIAGRAM

- A. Yes, just a correction to (inaudible 13:52:20) as well, this is – I had actually done this in back in 2012 I think when I was on the stand on whiteboard I think from memory. And technically it's 90 degrees out if you do it – like that's the feedback I've had from someone that's actually more correct at drawing diagrams than me so time on this one is running down as opposed to across the page and the top two boxes of green and orange are loosely based on the upper Manawatū catchment where half the nitrogen load was coming from intensive uses which in the upper Manawatū is mostly dairy and a few sheep, (inaudible 13:53:03) sheep and beef and half coming from the remainder of the catchment which is largely sheep and beef and forestry. And just reflecting that as you go down in time if you grandparent resource or as I've termed it "preferential grandparenting" so you only give some people the opportunity to grandparent so that's where my preferential comes from. If you give some people an opportunity to grandparent, then that portion of the load gets to carry value over a long period of time and then effectively that transfers the liability to the remainder of the catchment that's if you have an objective to improve water quality. It's conditional on that so, yeah, that's what this diagram is trying to show.

CROSS-EXAMINATION: MS ONGLEY

- Q. Good afternoon, Mr Day. I understand you have there a copy with you of your legal counsel's legal submissions?
- A. Yes, I do, yep.
- Q. Could I take you please to paragraph 4.27 of Ms Wright's legal submissions.

WITNESS REFERRED TO MS WRIGHT'S LEGAL SUBMISSIONS

- A. Yep.

- Q. Before I get to that, so we've heard that your key concern here is equity and that's underpinned your position for the last 17 years and that you don't support allocation of N-loss limits based on historic leaching. Now in paragraph 4.27 you've said, your counsel has said: "A resource regime like Table 14.2 can be rolled out in a way that avoids punishing activities for being brought into the framework late. It sends important signals..." and then in the last sentence it states: "...This helps to disincentive a rush to increase leaching in the short-term"?
- A. Yes.
- Q. Now first of all whether grandparenting would incentivise a rush to increase leaching would depend on the baseline you're going to use for the grandparenting, and you've discussed that in your evidence about why the 2012/13 baseline was chosen for the IFLU haven't you?
- A. It in part but I also I think I would also reflect on the consents that have also been granted as well so that's partly what I would be personally reflecting on.
- Q. What do you mean by that?
- A. I could get you to produce the table but the spreadsheet of the consents that granted and prior hearings I'd also got quite a raft of consents that have been granted so I'm well aware that there are a bunch of consents that are granted that speak exactly to this point so that when there was a, not quite sure what the right term, but a reasonably loose consenting regime that the Council – there was a bunch of people that took advantage of that and did precisely this.
- Q. And so are you saying there that your concern would be that that would form their baseline in the future?
- A. Well yes it does.
- Q. Yes, all right. In terms of incentivising an increase in nitrogen, we're talking about grandparenting obviously. Can you speak about your experience amongst the farming sector about how realistic you think that proposition is?
- A. I guess from my own personal experience, yes, I'm involved in this process but I also run a business as well and there's a point where volunteership gets penalised, which perhaps it's the slightly reverse way

of looking at it, but I also run a commercial business as well so in that basis I would be interested in as much nitrogen as I could get and I guess that's what I was trying to portray with this as well is that I'm not wanting anything more than 14.2 particularly, but I don't want anything less and I don't think the – anyone's produced evidence from people that want less than 14.2. I certainly don't and I don't think anyone has produced that which we are assuming that under a grandparenting regime that that's the situation.

CROSS-EXAMINATION: MS JOHNSTON

- Q. Mr Day, I just have a few questions for you and firstly I just want to thank you for your evidence. Just confirming that your farm is outside what you've described as the regulated catchments, isn't it?
- A. Yes, that's correct. I live in the Mangahao catchment. Both my properties are in the Mangahao.
- Q. And so you're not able to give evidence or not proposing to give evidence about the workability of being able to meet the table or an alternative consenting pathway in that context within which of farming within one of those priority catchments?
- A. Yeah, I guess – I agree with that to a degree but I would also – I haven't seen anyone proposing an alternative for the other catchments that are also in the region and I guess that's part of my long-term strategy for protecting my business I guess is to try and ensure that I can get a share of a resource as well and if I was able to I would certainly be wanting to apply for a consent.
- Q. But you'll appreciate, Mr Day, that that's a different issue to the one that I just put to you which is your ability to be able to assist the Court as to the workability of the consenting pathways on the basis of your farm experience, where it's located, you can't do that as part of this proceeding, can you?
- A. If, if the location means that I am not, well, both I'm located outside the target water management zones and I am also outside of the IFLU land use types as well, so that's correct, yes.

- Q. Thank you and you haven't undertaken any of your own modelling of your own farm for the purpose of this proceeding?
- A. No, I haven't, I was one of the original test farms in the farm strategy, both as a sheep and beef and a dairy conversion and in that time it was reasonably comprehensively analysed but I haven't subsequent to that, no.
- Q. And your farm as part of that farms test scenario was carried forward into the reporting though, was it, because it wasn't an intensive farming use, it wasn't counted as part of the calculation that was relied on by council experts at the time?
- A. No, the dairy conversion would have been under a new IFLU, not as an existing one.

CROSS-EXAMINATION: MS EDWARDS

- Q. So good afternoon, Mr Day. I'd like to start with some questions to understand your farm system, acknowledging what my learned friend has just asked you and that you're not impacted by these rules, but just so I can understand where you're coming from, you are a – you say in your evidence that you farm on just over 1,200 hectares and you describe yourself as sheep, beef, wind, and occasionally dairy support farmer, is that correct?
- A. Yes, that's right.
- Q. I assume that that means that you breed and finish sheep cattle?
- A. Predominantly, yeah, and I also buy in dairy beef and I also graze dairy heifers on contract as well from time to time, or not currently but I have over the period of this 17.
- Q. And your dairy heifers, is that just young stock R1 and R2s or are you wintering dried off milking herds?
- A. Predominantly that's on one year June to June contracts and then occasionally I trade – carrying over dairy cows as well but that's only occasionally.
- Q. So do you plan to carry them this year?
- A. No.
- Q. No, and did you do them last year?

- A. No.
- Q. And do you grow any crops?
- A. I grow brassica crop for wintering of dairy heifers, eight to 10 hectares of that and then also summer crops of plantain and chicory and so forth, yeah.
- Q. And they're consumed in situ?
- A. Yes.
- Q. By cattle, aren't they?
- A. Yep, well mostly lamb finishing on those actually, but, yeah.
- Q. But summer, the winter and the summer crops are lamb finishing?
- A. Yes.
- Q. Or just the summer crops are lamb finishing?
- A. Sorry, yeah, the summer crops lamb finishing and the winter is beef.
- Q. Beef, and I assume that you do a range of other activities in support of those main activities like spreading fertiliser?
- A. Yes.
- Q. And making hay and/or silage?
- A. Very seldom, no.
- Q. Very seldom make hay or silage?
- A. Sometimes I will buy that in but, yeah.
- Q. Yeah?
- A. Generally I would avoid it if I can.
- Q. And I assume you clean drains?
- A. Clean drains, yes, I do, yeah.
- Q. And you do a range of earthworks for things like tracks and maintenance?
- A. Yes, actually over the last, what would it be now, four or five years we've had a wind farm project on part of the farm so there's been a massive amount of that in the last period.
- Q. And that wind farm project, that's what you mean by when you say you're a wind farmer I assume you've got wind turbines on the steeper windier parts of your farm?
- A. On the more elevated but flatter generally I would say is where they're located. So it's on the Tararua ridgeline as part of the Tuatara Project.

- Q. And then I suppose you've got sheep and cattle yards as well (inaudible 14:05:26) farm?
- A. Yes, yes.
- Q. And do you capture effluent runoff from the yards?
- A. On two – the main cattle yard and the secondary sheep yard I do but not on the main sheep yard.
- Q. And Overseer assumes any end run off from yards is captured isn't it, so the extent that I think you said your main sheep yard doesn't capture effluent if there's any nitrogen coming off that that wouldn't have been modelled in an Overseer number, would it?
- A. It was an observation of Andrew Anderson who did the detailed study originally that that was a source of concern to him, yes. So it wasn't – he wasn't modelling it at that stage, but I guess subsequent to probably the Havelock situation I would probably argue that the (inaudible 14:06:31) et cetera coming off those yards is more relevance to offsite affects than the nitrogen.
- Q. And do you agree that all farms should be doing the right thing regardless of whether or not they meet the CNLMs in Table 14.2?
- A. No, I disagree with that.
- Q. Can you explain to me why you don't think farms should be doing the right thing if Table 14.2 doesn't apply to them?
- A. If it doesn't apply to them?
- Q. Yeah?
- A. Sorry. I guess my brutal business analyst of having been through this process is that if you don't stand up for yourself someone else will take a slice of nitrogen that they think belongs to them and you might think belongs to you and from a purely cynical business point of view yes you can volunteer and I do some volunteer stuff around. For example, riparian planting and some of those sorts of things, but I guess the reason that I am still here is that I'm not particularly inclined to give my interests in my land to other people.
- Q. In terms of water quality, do you agree that different sectors might have different contaminant issues. So nitrogen might be a particular issue for

dairy farms, but sediment or E. coli might be more of an issue for sheep and beef farms?

A. Yeah, in general I would say that's correct. For my farms sediment is probably the largest externality and then obviously we've got carbon and methane nowadays as well which are quite significant along with E. coli but I also would add for instance that winter brassica that I grow that also on a per hectare basis that actually also has quite large offside effects as well. So I guess I would say that I would be captured by all of those things really as far as externalities go.

Q. All of those contaminants or –

A. Yeah.

Q. – issues. And do you agree that to address those contaminants the mitigations might be different the different farms of different sectors would be to adopt but they could still equally be expensive – what a dairy farmer might have to do to address its contaminants might be expensive likewise what a sheep and beef farmer might have to do would be expensive?

A. Yeah, I think probably Dr MacKay covered that in a reasonable detail in his 42, section 42 report in that some of those mitigations are more difficult on higher LUC land so, yeah, I do agree that there are different ones that would suit different land and different activities.

Q. So sheep and beef farm might be about excluding stock from water bodies, management of critical source areas, poplar pole planting on erosion prone land, retirement of LUC 6E, 7 and 8 land to address your erosion and settlement, those kinds of things you might need – not you but sheep and beef farmers might need to do to address their contaminants of issue?

A. Yeah, I'd be struggling if I was retiring my Class 6 and 7 to be honest because that's the bulk of what I had but, yeah, general premise I don't disagree with but there's different measures for different classes of land, yeah, I agree with that.

Q. And do you agree that improving water quality in the future, particularly what's been signalled through Oranga Wai, might require some significant reductions of phosphorus sediment and E. coli as well as nitrogen?

- A. Yes, I think that's quite likely and it's partly why I'm disinclined to gift nitrogen because I understand the value of that to a farm business as well.
- Q. But PC2 doesn't require you to gift nitrogen to anyone, does it?
- A. Not specifically but I still believe that the diagram I drew in 2012 is largely still at play for the non-IFLU farms in the catchments.
- Q. And in terms of that diagram, and I've got – I haven't seen – I've got a copy on my phone that someone's taken a photo kindly and sent to me when you were discussing it because I didn't know what you were looking at?
- A. Sorry.
- Q. But the difference between what's depicted in your diagram and what's now proposed for PC2 as I understand it, that green portion which I think says: "Existing dairy farms" are locked in by resource consents. Over time that green proportions going to get smaller because what the Council's proposing is that at least the dairy farms are going to be reducing by 20% and then if they have – if they don't do that alternative control pathway and reduce by 20% they're going to have to do a discretionary activity and still make a reduction. So that green portion will still get smaller, it's not going to be the non IFLUs shown in that orange box that are making up for the entire 20% water quality improvement in the future?
- A. It is a schematic and it's a very simplified summary of it because arguably you could have another box which would be the consents that have already been granted that have expanded over the period. So this is just carrying them straight down yes if they reduce by 20% then that would be a reduction on their baseline value but if you were actually a more nuance there's also a – there's also slices in there that have gone the opposite way as well.
- Q. Are you meaning for new farms that have intensive conversion to dairy?
- A. No, no, sorry, I mean the farms that are already consented. There's a bunch –
- Q. Those farms have made reductions though, haven't they?
- A. Some.

- Q. They just haven't made the Table 14.2 reduction.
- A. No, some have but there's – I haven't got those folders with me, but there's also a bunch in there that made no next to no – well next to no significant reduction and I don't have the files with me but in the order I can recall ones in the order of 50 kilos that are going to 49 over 30 years that type of – so there have been consents granted at that type of thing and then there's the odd one where they've increased their intensity through the consenting process as well beyond 14.2 as well. So –
- Q. But not beyond where they were to start with?
- A. Yes.
- Q. So everyone's made a reduction, it's just they haven't made as much of a reduction as Table 14.2?
- A. No, no.
- Q. Which is required.
- A. No, some have increased from over that period as well.
- Q. From where they were – increased above their 14.2 number or increased –
- A. Yes, yeah.
- Q. – they've increased above their 14.2 number?
- A. Yeah, so say their 14.2 number for their farm might've been 30 and they were – and they've sought consent at 40 for instance.
- Q. But that's less than what they were at the time they applied for consent?
- A. No.
- Q. So they might've got consent for 40?
- A. No, they've gone up in – there's the odd example where they've gone up in intensity through the consenting process as well when it was at its most permissive.
- Q. But you can't point me to one of those examples?
- A. I don't have it with me but I can certainly provide it to the Court if you wanted to.
- Q. So – but getting back to this diagram, and what might have to happen in the future, under a future planning regime it might be that the dairy farmers have to do more. It might not – you've assumed that it will be

solely non-IFLU that have to do something in this diagram, but it could be that dairy farmers have to do more?

A. I think there's plenty of evidence to suggest that everyone's going to have to do more would be my –

Q. That was going to be my next question for you is that 50% of the load comes from dairy and 50% comes from dry stock and you've got to make more than a 50% reduction, it's going to have to come from everyone, yeah?

A. Yeah, and I certainly agree with that.

Q. In terms of you being part of these test farms, could you turn to volume 3 tab 3. It should be the Manderson Test Farm Project Report and it starts at 301.0121?

WITNESS REFERRED TO MANDERSON TEST FARM PROJECT REPORT

A. Sorry, was that tab 3, is that right?

Q. Three, yep.

A. And the page sorry, oh, yep, yep.

Q. It should be 301.0121?

A. Yes, yep.

Q. And if you go to page 301.0140?

A. Yep, yep.

Q. That's a map of your farm, isn't it?

A. It's the bulk of it is. The block on the top of the page I leased at the time. I no longer lease that, and I lease a block that joins between those two bits, and I farm a bit more, one more section on that and I have another farm as well on top of that. So that, that – the bulk of it that is the home property at that time I guess is the – and including the –

Q. At the time, yeah, so that's back in 2007-ish when you participated in the project?

A. Yeah. That's correct.

Q. And then over the page at 301.0141?

A. Yes.

Q. That's the assessment of or the summary of the case study of your farm and if you were to – if you had to comply with the Table 14.1 that's the assessment of if you'd had to meet your Table 14.1 requirements, this

goes a little bit further though doesn't it because it looks at if you had to meet all the requirements in Rule 14.1 which includes things like excluding stock from water bodies. You're nodding your head, so I think you agree with me?

A. Yeah, for instance it's got the riparian fencing I think was, yeah, yeah, that's in there.

Q. And there's other requirements too in Rule 14.1 aren't there. There's fencing, there's fertiliser standards, there's standards around storage of brought on feed, and things like that all targeted at controlling nitrogen losses from farms, isn't it?

A. They probably all have an effect on nitrogen but some of them would have are probably there for broader reasons than nitrogen than I would suggest.

Q. Yeah, but so in terms of the rules in chapter 14 it's not just about – so we quite often talk about dairy farms or intensive land use as having to comply with Table 14.1, 14.2 sorry, but it's actually the broader than that because they have to comply with that as well as a range of other rules in Rule 14.1?

A. Yes, and if my memory serves me correctly, that when I was probably advancing trading more voraciously than I am this time around. I thought that was actually one of the major pluses of having trading and that you could link the same other compliance costs to the land that was involved in trading so broaden out the area of a catchment that was captured effectively.

Q. So in terms of what it says on this page that the heading is: "Case study number 4 range fed sheep and beef farm near Pahiatua"?

A. Yes.

Q. In the second paragraph there's contaminant assessment?

A. Yes.

Q. And that says that your current end leaching is 10 kgs and if you go down to the next paragraph it says that you meet your 20-year target which would be 10 kgs?

A. Yes.

- Q. So under Table 14.2 if that applied to you, you don't have to do anything – well back then you wouldn't had to do anything more to meet year 20 but then likewise you couldn't have intensified your system?
- A. Yes, that's the, yeah.
- Q. And then in that second paragraph, contaminant assessment, it says your phosphorus loss to water is assessed as high?
- A. Yes.
- Q. And sediment loss is 3,400 tonnes and I think you said earlier that you're quite high for sediment?
- A. Ah, it's a lot, but it's – that's most of my class 7 land is actually relatively low erosion class 7. Is a small portion, maybe 30 hectares which is highly erodible class 7, so it's more concentrated on parts of the farm than – so that high erodible class 7 land, the bulk of that would be in that area.
- Q. And then in, looking at that page again, there's a heading, it's about fourth paragraph "mitigation options", and there's a list of – there's a table with a list of options?
- A. Yes.
- Q. And in the last column there, well, there's economic implications where it talks about the cost of doing those mitigation options and then the last one, the last column is practicality?
- A. Yes.
- Q. And they're ranked low, moderate, medium – low, medium and high, my understanding where they say "required" that's because that's what you would be required to do if Rule 14.1 applied to your farm?
- A. Yes, that would be – that's my understanding without going back to the actual, the balance of the rules, but yes.
- Q. Yeah and then below that the second paragraph below that table "compliance cost estimate".
- A. Right.
- Q. It would be really expensive for – if you did full One Plan compliance it says 455–475,000, that's an awful lot of money, isn't it?
- A. Ah, yes it is. Yeah (inaudible 14:22:11) yes, it is, yeah.
- Q. And then down in the conclusion, oh, at the farm, the very last paragraph, the last thing it says there is that your farm identified a number of issues

including (a) potentially high compliance costs for sheep and beef operations if they had to fully comply with Rule 14.1?

A. Right.

Q. You agree with that?

A. Ah, it doesn't –

Q. That you see that paragraph?

A. Yeah, I see the paragraph, it doesn't say 14.1, but yeah, I agree –

Q. Yeah, well –

A. – that (inaudible 14:23:00), yeah.

Q. And if you go back up, it's assessing compliance with the One Plan. So if at some point, because you've talked about – I understand your desire is to be brought – your desire is that Table 14.1 is in force, there is strict compliance with it unless you satisfy a discretionary pathway, show your trajectory over time towards meeting Table 14.2, so I understand you would like to be brought within this regime, and have 14.2 apply to you?

A. Yes.

Q. That's correct and if it's one – if at some stage there is a – that proposal to do that, it would be fair to you to consider the costs and practicality of meeting the other, in terms of – in meeting those other requirements in Rule 14.1, you'd like cost and practicality to be taken into account, wouldn't you, when you're looking at things like what's your activity status going to be, are you going to be permitted or controlled or discretionary, what timeframe would you have to do to fence waterbodies, how many of your waterbodies would you need to do, would it only be flat land or steep land, you'd like that cost and practicality to be taken into account, wouldn't you?

A. Yeah, it's certainly relevant, yeah.

MS BUXEDA:

Your Honour, I know I haven't indicated on the timetable, but I have questions, but just two questions that have arisen in my mind.

CROSS-EXAMINATION: MS BUXEDA

- Q. Mr Day, you don't have commercial vegetables growing on your farms, is that correct?
- A. Sorry, can you just –
- Q. Sorry, you don't have commercial vegetables growing on your farms, is that correct?
- A. That is correct, yes.
- Q. Thank you and your, therefore your focus is on dairy and pastoral land uses?
- A. Ah, how do I explain that. I guess I have a dual focus. I'm – as I've probably already gone over a couple of times, is ensuring there's a slice of the pie left when I'm brought in, when I'm brought into the regime, so that's one focus and probably more historically than current, but I also spent a lot of time on waterways and so forth as well so there is that as well. So sort of the dual, yeah.
- Q. And so your experience with those two dual purposes has arisen from your farming experience on your two farms?
- A. Yeah, farming and recreation as well.

RE-EXAMINATION: MS WRIGHT – NIL**QUESTIONS FROM THE COURT: COMMISSIONER HODGES**

- Q. Good afternoon, Mr Day, you have been very patient sitting there waiting for your moment in the chair there?
- A. Yes.
- Q. I always like to try and understand from the farmer some of the practical issues involved?
- A. Sure.
- Q. And one of the messages we have got is that the NRAT will assist in managing risk of the farm. Do you have a view on that as an experienced farmer?
- A. I think it will assist as a sort of a gateway kind of opportunity for people to get exposed to the whole process but probably gateway is not the right word to use actually in this context.

- Q. In this context, no.
- A. But, yeah, I don't – when you're stacking up the options that are before the Court I don't believe it's much more than a kind of a warmer for farmers or are getting them exposed to what some of the options might be. I don't really, I don't really see that it's comparable with the likes of Overseer or –
- Q. I was thinking of it more from a practical farm management point of view rather than (inaudible 14:27:12) consenting.
- A. Sorry, yeah, from a practical practices point of view, I think it does have some merit in that as Dr Horne explained it is about practice change on the farm but to my mind there's sort of a higher-level discussion that needs to be had about what's the fear of the common that you can then operate your practices within. I don't see the practice operation superseding the share of the commons.
- Q. I understand that. I was just trying to look at it from a practical farm management point of view?
- A. Yes.
- Q. Okay, thank you. And coming onto the specified reduction pathway briefly, if that was part of a discretionary activity consent where the ability of a farm to comply to a 20% reduction within two years would that have any merit from your point of view?
- A. In some ways I think I'd almost repeat the previous conversation that it has some merit as far as perhaps change but to me that sits below the slice of the pie discussion.
- Q. No I understand that.
- A. And from my perspective.
- Q. And one last question please and it's one I've never yet still had a satisfactory answer on, is wintering off. When a farm moves his cows off its property onto another property, do you know whether that would still be within the same catchment or would it be in one where there were not so many environmental concerns. Do you have any familiarity with that issue?
- Q. Yes, I do, yep. I was in a car with two dairy farmers neighbouring of mine on Monday night. One who was presenting evidence for Feds so I live in

a, you know, a small mixed community with mixed different enterprises and the other person who hasn't been the court, their dairy farm is in the – just above the Manawatū Gorge so it's captured in the rural stream and their runoff is between the blocks that were shown that I've previously used to lease so they're coming back up into the top of the Tararuas on my boundary for the, for the winter so that's technically outside the water management zone that is regulated but it's still within the Mangahao catchment in that instance, but the stock trucks will go wherever, all over the, you know, the stock will go to where they can have arrangements or so forth as well, so it's not – I wouldn't say it's geared around where the nitrogen ends up going, it's probably more around the commercial relationship, I would suggest.

A. Nothing we can do about it now, but I'm just interested.

Q. Yeah.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. Morning there – afternoon, sorry.

A. Afternoon, yep, yep.

Q. So just looking at your evidence, one of the propositions that you've put in your 6.4, have you got your 6.4?

WITNESS REFERRED TO BRIEF OF EVIDENCE

A. Yes, yeah.

Q. And that was in relation to matching step-wise reductions in terms of the – comparing that with Table 14.2 and the requirement there.

A. Yes.

Q. – to do the step-wise reductions over the 20 years.

A. Yes.

Q. Is that very much a sort of an equity-driven approach or is there much more to it than that?

A. I think it's recognising if you go into the Table 14.2 that you've got a – you know, admittedly, we've got the problem where we're 10, you know, we're already at year 10, so that is a problem, but there's an expectation that over time you're going to be improving practice and external impact and that if you've gone down the discretionary route that you should be at

least, in my view, at the very least matching the reductions that the people within the Table 14.2 are doing.

Q. But I am just trying to understand this a little better.

A. Sure.

Q. So if they're not in a very good starting position relative to Table 14.2, which is after all why they're going down the discretionary pathway –

A. Right

Q. – how were you thinking about that in terms of the point that you might start or the factors that might inform the point you start at?

A. But it's kind of getting into generalisations a little bit, but some of the – where some of the dairy systems have evolved have been because of excessive rainfall that they've been able to have grass effectively growing throughout the lactation.

Q. Right.

A. And that was sort of predicated on the (inaudible 14:33:25) being completely free and limitless and then some of those farms if you start putting a cost on that they become very different to operate those types of enterprises in those specific parts of the catchment. But I would also add equally there is probably other, other parts of the catchment nowadays which would be much more suitable than they were historically because of the opportunity to run a successful dairy system in a lower rainfall environment with the ability to import feed that, historically, that, you know, like going sort of 30, 40 years ago that wasn't the, that wasn't the situation, so farm systems have evolved over time so that they're – which is part of the reason we've got this problem, I guess, but it's they've evolved over time so they're less reliant on a pasture growth curve than what they historically were. I'm not sure if that's helping you, no.

Q. Well, it's just –

A. That's just the –

Q. – I'm trying to sort of turn that into some sort of factors that might inform –

A. I guess –

Q. the point at which you would be starting on your step-down track and where you would be expected to end up?

- A. What I would suggest is that there are some farms that are starting at very, very high levels, but that's because of the absence of – and whether it's back in 2012 or now, that is still the situation for some people that they have a long way to go, yeah. I mean, I guess for me it's frustrating that we don't have other commercial mechanisms in what's evolved.
- Q. Oh, I do recall you coming along and talking about trading at the first hearing, yes.
- A. So, yeah, it is I'm starting to put the right pieces into the mix at the right time, but it is a frustration for me that we are having farmers facing you know more expensive changes and some of the lower cost options have been effectively excluded from the absence of some of the other financial mechanisms that we kind of normally have in business.
- Q. Any other thoughts before I can say I have had my turn?
- A. That's a dangerous question for me. No, not specifically but, yeah, I don't think I really have any particular –
- Q. Sure, that's helpful, thank you.

QUESTIONS FROM THE COURT: JUDGE SEMPLE

- Q. Just a couple of questions from me thank you, Mr Day. The first question is in relation to your paragraph 5.4 just regarding Overseer and I just wondered this evidence was obviously written late last year and there has been yet another update at least and another report that has been produced and I just wondered whether that has shifted your thinking or your position at all in relation to Overseer?
- A. I think it actually probably it's probably firmly up my view on Overseer.
- Q. Right?
- A. Yeah, I don't discount that there are and have been problems over time with it but of the tools that we've got available, yeah, I still see it as the best we've got at present and, yeah, it was unfortunate I think some of how the Commissioner for the Environment how it sort of framed the need for improvement in Overseer. In my view it's been a strength of Overseer that it has been able to accommodate improvements over time and I think that with the ability to have sort of base files then we're allowing for that to carry on to occur, so I think that's a good thing. I don't doubt there are

further improvements that could be made around some of the transparency of the algorithms and so forth that are sitting in the – in behind it.

Q. Thank you, the other question that I wanted to ask you again just with the passage of time. You, I think you and Ms Foster are the only witnesses who have been here every day, all day, in this hearing and I really was just interested to know whether there was anything that had particularly struck you in terms of your understanding of what the problem and indeed the potential solutions to the problem during the time that you have been sitting here and I just wanted to give you that opportunity given that you have been here all day every day. And obviously have been deeply involved in this for 17 years.

A. Yeah, I think really when I've probably been reflecting on it the biggest factor why I still supporting what we're putting forward as the land use classification is it's not perfect but it captures the resource that's out there that people are operating on in a reasonably fair and transparent way and that it's a physical resource that you can go and look at and it's essentially it's a geological timeframe that's made LUC it's not a model that's changing with iterations and to me that's the real strength of what we're still proposing is that it's got that physical basis for allocating the resource and I still think that's sort of the critical element. And I think some of the debate, particularly in the farming community, has probably been overly generated by farmers thinking that it was specifically targeting dairy farmers, whereas I don't see it that way, I see it as a sort of a effectively warning shot over the bow of all, all landowners and that's partly why I, you know, **I'm being sort of brutally honest, I want my slice of the pie, I don't want to be missing out, effectively.**

Q. So just when you say "it was targeting" what's the "it" in that sentence?

A. The "it" was probably the way the – there's only small parts of the catch – of the region that had been captured by the regulation, so there's only, it's only the IFLU which are only in the most degraded catchments, so it's kind of got the farming community's hackles up because it's seen as targeting –

Q. A particular type of activity?

- A. Yes, when in reality and from my view it would have been better if the council had broadened it out so that there was a much more nuanced debate amongst farmer about the slice of the pie and how – what might be a reasonable expectation on that and I think, to me, that would have been more helpful, you know, right back in the 2006 or '07 or whenever it was being developed, because I think it's kind of led or pushed the farming community into trying to protect one group of people and I don't think that's been particularly constructive for trying to address the problem.
- Q. And what I understand of your position is that it is to shift the focus from the activity to what the and is capable of –
- A. Yes.
- Q. – of achieving or (inaudible 14:42:05).
- A. Yeah, because the sort of little box diagram that was in Alec MacKay's 14.2, to me that's the essence of the, essence of the plan, really, and where the table has come from, because it does recognise the economics. So effectively, if I owned the whole region, the land use class 1 and 2 would be where I would want to get the maximum production because I would get the maximum economic return and it's – and then when you slice it into what each individual owner has, then that's where some of the tensions have come from, but as a region I still think if we can use our best land to its most advantage then that's the best outcome economically and as far as sort of minimising environmental impact as well.

QUESTIONS ARISING: MS WRIGHT – NIL

WITNESS EXCUSED

**MS WRIGHT CALLS
MICHAEL SCOTT (AFFIRMED)**

- Q. Good afternoon, Mr Scott.
- A. Good afternoon.
- Q. Can you confirm that your name is Michael Scott?
- A. Ah, yes, Michael John Scott.
- Q. And you – Michael John Scott, thank you – and you prepared a statement of primary evidence dated 6 November 2023?
- A. I did.
- Q. And a statement of supplementary evidence dated the 28th of March 2024?
- A. That's correct.
- Q. And you've also prepared updated version of the provisions that were attached to that supplementary statement which have been provided to the Court in an attachment on 10th of June 2024?
- A. Yes.
- Q. And you participated in caucusing and signed joint witness statements on 1 May and 27 May 2024?
- A. Yes, I did.
- Q. And your expertise is as set out in your primary evidence?
- A. Yes.
- Q. And can you please confirm for the Court that you have read the *Code of Conduct* and agree to comply with it?
- A. I have and yes I do.
- Q. And do you have any corrections to make to either of your statements?
- A. No, I don't.
- Q. So can you please confirm that both statements are true and correct to the best of your knowledge and belief?
- A. I do.

**MS WRIGHT ADDRESSES THE COURT – THREE SUPPLEMENTARY
QUESTIONS (14:45:06)**

EXAMINATION CONTINUES: MS WRIGHT

Q. So, Mr Scott, do you have the attachment A Table in front of you?

WITNESS REFERRED TO ATTACHMENT A TABLE

A. I do.

Q. I'll just take you to Policy 5-8 to start?

A. Yes.

Q. Can you please explain to the Court how you see this policy working as it presented now in this final version of your provisions?

A. Sure. So these are the key matters directing the regional plan. Section 5-8, 5A, A, sorry Policy 5-8(a) sets the direction for setting the CNLMs, the cumulative nitrogen leaching maximums and then it sets out the exceptions to that in the later policies and the later clauses to the policy. Having reflected on the joint witness statement that conferencing and on Ms Foster's most recent evidence, I made some changes. Broadly I took out the direction that it was directing decision makers, it's really about plan making because it's RPS. Removed the issue of duration and left that for the plan and included some, reincluded some of the matters from the decisions version. I think broadly we're mostly at a similar place in terms of the RPS level directions now.

Q. Thank you, Mr Scott. I'll now take you to Policy 14-6?

A. Yep.

Q. It does spread over a few of the pages in the table, apologies. I have the same question for you essentially which is, can you please explain how you now see this clause as it's now presented working?

A. Sure. So 14-6 is the policy that sets out what the considerations are for decision making in relation to exceptions to Table 14.2. There had been – there's been a lot of discussion around 14-6. I think that's really where everything is resting now. I did after the first week of hearings hear some concern from the Court that it was very large and that there was a long list of considerations, and some rationalisation might be helpful in terms of focusing on the key matters to be considered and ensuring that those don't get diluted by adding lots of other things. So I've – that's where I've arrived at that latest iteration of 14-6. Again, I took into account the latest evidence from Ms Foster and changed some of the wording there and so

there was some small amendments to that as well. I know there was some discussion earlier about ordering of the matters in 14-6. I guess I do – I have a view on it too that if I was to order them and I do think that that would be a helpful thing to do, having reflected on it over the lunch I think where I would see it is the first one would be (vi) in the list, only grant consent if doing so aligns with the strategies. In reflecting on it, I think that sort of needs to be read together with the consider potential effects of nutrient leaching, the nitrogen leach – nutrient leaching, sorry, in (v) because they, they are what the strategies are trying to control, so those are sort of read together. The next one is “make a decision consistent with having more intensive land uses on land units”, so number (iv) on the list, and that’s to ensure that the decision maker has in mind the productive capacity of the land in making their decision. So if – so allowing higher levels of leaching initially or perhaps longer to get down to the CNLMs or somewhere near the CNLMs because there’s a recognition that for class 1 and 2, the higher class soils, that’s really where the greater intensity land uses ought to be in terms of getting the greatest environment – ah, economic return on the land and providing the most economic benefit to the region for the – within the environmental limits. And then after that, there’s “have particular regard to” and they would probably go under one clause and in the order that they’re in there, I guess. Number one: “The maintenance and enhancement of mana whenua values.” Number two – sorry, I’ve just noticed it’s three on that list: “The extent and duration of non-compliance.” And number seven: “The commercial vegetable growing having 35% reduction.” I think, does cover everything?

Q. Thank you, Mr Scott. My final question, there have been a number of questions from the bench to various witnesses about the data benefits from using Overseer and I appreciate you’re not a farm systems expert but from a planning perspective do you have any comments on that question?

A. I do. I understand the concern around the use of Overseer, the use of Overseer numbers as an absolute value, and I have looked very carefully at making sure that there’s flexibility built in, that it’s not locking in a

number that might later should have a different value, and I think it's important, it's important not to throw the baby out with the bathwater because Overseer is recognised by experts as being the best model for nitrogen loss and it's an imperfect model, but all models are imperfect, it has served as the basis for the creation of the other models, both the specified reduction pathway and the NRAT were developed in part using Overseer and we were also, during the course of the hearing, able to look at past consents and compare numbers across the last 12 years of using – of the One Plan being operative looking at Overseer numbers. Ah, accepting that those numbers perhaps should have the flexibility to move along with the new versions of Overseer, which where both us – both my provisions and the council preferred provisions have a mechanism now for doing that. If the alternative pathways were to be included in the plan, 10 years from now, if people were to look back at consented farms, they would get effectively a patchwork of specified reductions and Overseer numbers and NRAT risk scores and it would be, I believe, a lot less useful to those decision makers in future and I think there's a real potential to lose valuable data by not collecting those, ensuring that Overseer is used across the board.

MS JOHNSTON ADDRESSES THE COURT –CROSS-EXAMINATION ORDER (14:56:04)

CROSS-EXAMINATION: MS JOHNSTON

Q. Good afternoon, Mr Scott.

A. Good afternoon.

Q. I'm going to start with some questions regarding the basis for Plan Change 2.

A. Mhm.

Q. And the matters informing it and then I want to deal with some of the areas of difference between you and Ms Foster with regard to the provisions and when I refer "the provisions" I'm talking about the provisions that were filed on Monday alongside my friend Ms Wright's legal submissions. So do you have those with you and in front of you ready to go?

WITNESS REFERRED TO PROVISIONS

- A. The provisions, yes, I do.
- Q. Great. I just want to confirm that that represents your most current position on the provisions, doesn't it?
- A. Yes, it does.
- Q. And as I understand it, it reflects on Mrs Foster's more recent evidence and the outcomes of the conferencing sessions that you were involved in, in May, is that right?
- A. That's correct.
- Q. I also just want to confirm for my own understanding that there is some blue text representing additions for Mr Carlyon on behalf of Ngāti Tūranga, that's right?
- A. Yeah, that's correct, yeah.
- Q. Could you confirm for me whether you support those additions on behalf of Ngāti Tūranga?
- A. Ah, yes, yeah, I do.
- Q. And then there's an addition that represents the position of Fish and Game, as I understand it, at Policy 14-6B –
- A. Yes.
- Q. And that's at page –
- A. Page 9.
- Q. – page 12 of your provisions? And that's shown in purple font, if my colour –
- A. Yeah, I think it's page 9.
- Q. Page 12 on my written copy that was printed.
- A. I have two versions in front of me and they're both 9, but you – I think we're both talking about the same thing.
- Q. No, that's good to know. I might just grab these, so you might have to bear with me because I have referenced page numbers from the version that I have got, but I'll just have this here as a reference. So page 9, the purple text and I apologise for any confusion. That reflects there on the end of (iii) "a trajectory of stage reductions in nitrogen leaching is demonstrated", that's the end of your text, isn't it?
- A. That's correct.

- Q. And then “toward achieving the cumulative nitrogen leaching maximums” that’s the Fish and Game position”, isn’t it?
- A. That’s right.
- Q. And again for my own benefit, I understand from Ms Wright in terms of submissions that that wording isn’t supported by Mr Day but I’m curious as to your position, Mr Scott, do you support that wording?
- A. I – in previous versions, I have put in something similar, that the trajectory should be towards achieving the CNLMs because they’re a definite limit, it’s clear to everyone what’s being achieved, and it’s clear what the target is. **Part of the criticism of that position was that’s then a prohibited activity by stealth if you, if you make that the requirement then no one has the chance of applying for anything else, which is the reason why I removed it.**
- Q. Thank you.
- A. I understand that there is a recent case law that maybe have a bearing on that, that position of the wording representing a prohibited activity, that there might be some flexibility of recent case law, but I think I’ll leave that to the lawyers to –
- Q. Okay.
- A. – to deal with that.
- Q. I understand and thank you. From your planning perspective though, you have not supported that wording being added to your provisions as presented to the Court?
- A. That’s correct.
- Q. So I just want to go back to the problem definition and I am going to try and be efficient this afternoon because I am sure that everybody wants to get home, but it is important, I think, to reflect on where we started and where we’ve ended up because as you will be aware, Mr Scott, issues of scope have arisen more recently in terms of the specified reduction pathway, that’s right?
- A. Yes.
- Q. And if we start with the problem definition, you’d agree that the plan change seeks to address issues with the One Plan and consenting of existing IFLU, that’s right?

- A. That's my understanding.
- Q. And the plan hasn't been working as intended and it was no longer the case that most IFLU could meet Table 14.2 and there was no consenting pathway for activities that exceeded the table, that's right?
- A. It's my understanding that the issue was farms were artificially, the leaching numbers were artificially high because the One Plan didn't match the latest version of Overseer. The Table 14.2 was out of synch with the latest version of Overseer and it was artificially inflating the nitrogen limits that farms had artificially high nitrogen as a result of their Overseer run as compared with Table 14.2.
- Q. Were you listening the other day when I spoke to Ms Foster about the purpose of Plan Change 2 and the problem statement recorded in section 32?
- A. I was.
- Q. And do you recall I took her to section 1.2 of the section 32 report?
- A. I am sure you did, I don't remember it specifically, but I am sure you did.
- Q. Well, how about we go there now.
- A. Sure.
- Q. So that's volume 3 tab 2. And that particular section, I'll just let you find that.
- A. Yeah, I have tab 2.
- Q. And I'm at para – page 301.0050.
- A. Yes.
- Q. And you'll see section 1.2 down there?
- A. Mhm.
- Q. And it sets out: "The purpose of Plan Change 2 is to address issues with the One Plan provisions for controlling existing intensive farming land use activities," you see that?
- A. Yes.
- Q. "While at a high level the existing approach is still considered appropriate to implement the overall policy direction of the One Plan, some of the provisions are no longer working as intended when the One Plan was introduced. Practically speaking it is no longer the case that the nitrogen leaching maximums identified in Table 14.2 of the One Plan are

achievable on most farms using good management practices as anticipated by Policy 5-8 with there being only a very limited path, if any, for those activities which exceed Table 14.2 to seek resource consent under the existing provisions.” Now is that your understanding of the purpose and problem statement for Plan Change 2?

A. Yes, it is.

Q. And you’ll agree that that problem statement or the purpose of the plan change is important in the context of an amending proposal under the Act, wouldn’t you?

A. Sorry an amending proposal, you mean a subsequent change to the provisions?

Q. No, I mean an amending proposal which doesn’t alter the objectives of the plan that’s been changed. Are you aware of an amending proposal under the Act, Mr Scott?

A. You might have to take me through that sorry.

Q. Well when it’s an amending proposal under the RMA, the objective of the plan change, the purpose of the plan change is one of the objectives against which the plan changing its provisions is assessed?

A. Mhm.

Q. Were you aware of that?

A. Broadly, yep.

Q. So you would have a counter for that in your assessment of this plan change in the section 32AA and those sorts of matters that you’ve completed?

A. Yes.

Q. And when we look at that problem statement, you’d agree that there was always the intention that activities which did not meet Table 14.2 would be consented or have the opportunity to be consented. You’d agree with that, Mr Scott?

A. Sorry can you repeat that.

Q. You’d agree that one of the issues confronting the plan was that it was always intended that activities that could not meet Table 14.2 would have the opportunity to apply for consent under the plan framework, you’d agree with that?

- A. Yes.
- Q. And the problem that Plan Change 2 grapples with is a plan framework that doesn't enable those activities to be considered in an appropriate manner, is that fair?
- A. The operative One Plan, yes.
- Q. And that problem was compounded, wasn't it, by continuing Overseer updates?
- A. Yes.
- Q. Thank you. So the plan change sets out to address a range of matters, doesn't it?
- A. The plan change set out to update Table 14.2 and to make sure there wasn't the circularity leading back to Table 14.2 is my understanding. Broadly that was the goal was to make sure that there was a pathway for exceptions and that Table 14.2 is updated.
- Q. If we could just go back to section 1.2 that we were just visiting?
- A. Mhm.
- Q. Under that problem statement that we agreed there's three bullet points, isn't there?
- A. Yes.
- Q. And they refer to updating the cumulative nitrogen leaching maximums that you've just referred to, yes?
- A. Yes.
- Q. It refers to reinforcing good management practices as part of intensive farming land use activities, that's correct?
- A. That's correct.
- Q. And it refers to 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. Now those are the three bullet points that describe what Plan Change 2 proposes to do, aren't they?
- A. Yes, they are.
- Q. Thank you. And those steps were only proposed for existing intensive farming land uses, that's right?
- A. And intensive farming land uses in the target catchments, yes.

- Q. Yes, and so the plan change we've been described is narrow in terms of its scope in that regard wouldn't it?
- A. That's correct.
- Q. I just want to reflect on the size of the problem. So we've talked about some of the issues and now we're going to reflect on the size. As I understand Ms Foster's evidence, there's 235 unconsented existing IFLU in the region, is that your understanding?
- A. That is.
- Q. And that's to be fair to all the experts, that's an approximate number because there could be more, couldn't there?
- A. Absolutely.
- Q. And of – then following on from that it was Ms Foster's January evidence relying on data provided by Horizons that there had been 237 consents issued for existing and new IFLU in the region. That's your recollection?
- A. Yes.
- Q. So about half again still require consents, don't they?
- A. That's right.
- Q. And of the 237 consents issued, it was her evidence that 35 of those have obtained a controlled activity consent as in existing intensive farming land use. That's your recollection?
- A. It is.
- Q. So on that basis 35 of those farms remained within the productive capacity of the land as described in Table 14.2, that's fair?
- A. Even, yes. Even 14.2 as it stands at present, yep.
- Q. And the 35 consents that have been granted, most of those predominantly they before 2017, weren't they?
- A. That's right.
- Q. On review of the table attached to Ms Foster's evidence it seemed to me that only six have been granted consent as a controlled activity since 2017. Have you had a chance to review that?
- A. I have read it. I'll take your word that that's what it says.
- Q. And from those consents granted since 2017 there have been compliant with the original, the operative Table 14.2. Is that your understanding of the evidence?

- A. It is.
- Q. And that makes sense doesn't it because Mr Day's appeal was on the recalibrated values within the table proposed as part of Plan Change 2, wasn't it?
- A. Sorry can you say that again.
- Q. The grant of controlled activity consents since 2017 of which there have been six, they complied with the original operative Table 14.2 and you agreed to that and then I've put to you that makes sense, certainly since Mr Day's appeal, because he appealed the recalibration of Table 14.2, the values that were in the table. Is that your understanding of his appeal?
- A. The recalibrate in the decisions version?
- Q. Yes?
- A. I think that the appeal goes much wider than just the numbers in the table.
- Q. Part of Mr Day's appeal?
- A. Okay, yes.
- Q. Involved the numbers in the table?
- A. Yes.
- Q. So when we talk about equity and I accept my friend's submission today which is that we don't start from a clean slate, but when we reflect on equity would you accept that there's also a position of equity in terms of the number of consents that are still to come?
- A. I'm not sure I understand what the equity issue is with the consents to come. Can you elaborate a bit.
- Q. Well as I understand the position is that the equity issue is that those that have stayed within the productive capability of their land it's inequitable for them, the Council to suggest a plan change whereby there might be other ways of regulating exceedances of Table 14.2. That's how I understand the equity argument that you're putting, is that right?
- A. That's right, yes.
- Q. And I've just put to you that out of the 400-and-something farms that relate to intensive farming land use in the region, and you agreed, only 35 have stayed within the productive capability and I'm saying that there's still a

lot more consenting to come isn't there when you're considering that equity issue?

A. So those consents that have gone through since 2017 have been against the now out of date Table 14.2 that hasn't been recalibrated against the latest version of Overseer which is I believe a lot of the reason why we're here. The evidence that I've heard from the experts is that if Table 14.2 is updated many more of the farms would be able to meet Table 14.2. In fact most would be able to meet 14.2.

Q. We'll come onto the question of "most" but I think I understand your equity point better now, thank you. I'm going to take you to the plan framework?

A. Yep.

1515

Q. And the issues that Plan Change 2 looked to address and we've traversed those three bullet points in section 1.2, that's right?

A. Yes.

Q. And you agree that alongside the section 32 there was a set of notified provisions, that's right?

A. Yes, that's right.

Q. And you've reviewed those provisions?

A. Yes.

Q. And it was never simply the case was it of recalibrating the table? There was additional changes that were required to address the issues that Plan Change 2 sought to overcome?

A. Yes.

Q. And if we could just start then with the recalibrated table? As I understand it that recalibrated table is now accepted by Mr Day?

A. Yes, that's right.

Q. And –

A. Well, accepted by me.

Q. You and Ms Foster are in agreement about a reference file approach?

A. Absolutely.

Q. And that approach will address the Overseer changes as they go up and down, that's right?

A. That's right.

- Q. And the difference seems to me now to be whether or not that reference file approach is dealt with in a separate method as you propose, or whether it's addressed in an existing method arising out of a decisions version, that's a fair summary of the difference between you and Ms Foster on that point?
- A. Yes.
- Q. The reference file approach didn't overcome all the issues with Plan Change 2 though did it? Or all the issues that Plan Change 2 sought to address, did it?
- A. No the reference file issue only, was only targeted at making sure that we didn't have, have to go through this again next time there was an Overseer update. This is really something that came up during the hearing is my understanding and the reference file approach aims to keep everything current with the fact that Overseer gets updated every, every so often.
- Q. We've just agreed that it wasn't just recalibration that Plan Change 2 looked to address so, just, outside that reference file approach there are still issues that need to be considered amongst the Plan Change 2 framework isn't there?
- A. Yes, my understanding is that the plan was seen as unworkable because not only was Table 14.2 out of date, but there was a circularity in the policy framework that led the decision maker back to needing to comply with Table 14.2 which is out of date, so there was nowhere to go for applicants.
- Q. And the range of issues that the plan change sought to address have been well documented, since 2017, you'd accept that?
- A. Yes.
- Q. And Ms Foster's evidence refers to a suite of reporting that informed Plan Change 2, do you recall those reports?
- A. Yes.
- Q. And those reports address policy issues and road blocks and also difficulties with Overseer and compliance, that's a fair recollection, isn't it?
- A. Yes.

Q. That included the section 35 report, prepared for these provisions, didn't it?

A. I'm sure, yep.

Q. Have you read the section 35 report Mr Scott?

A. I have but there's, yep. I have, yes.

Q. Well, I'm going to take you to it so, I've got copies here. You'll recall that this report was referenced in the section 32 report as one of the technical reports informing the plan change?

WITNESS REFERRED TO SECTION 35 REPORT

Q. So the title page is *The Manawatū-Whanganui Regional Council One Plan Section 35 Report: Intensive Farming* and it's dated July 2018. Is that the report that you have in front of you?

A. Yes, it is.

Q. And it was your evidence just prior that you've read this report?

A. Yes.

Q. And you'll recall that it's referenced in Ms Foster's evidence as well, wouldn't you?

A. Yes, I'm sure.

Q. And this report informs the Plan Change 2 response along with the suite of technical advice underlying section 32, didn't it?

A. Yes, it did.

Q. So I just want to start with page 39 and that's section 4.8 and that's titled: "The current impasse with intensive farming land uses and the provisions of chapters 5 and 14" is that what you've read there?

A. Yes.

Q. About the same place?

A. Yes.

Q. Great, and if we turn over the page we see there that the report writer, which to be fair to them was Hill Young Cooper, sets out the four pathways under the Operative One Plan. Do you recall these pathways, Mr Scott?

A. Yes.

Q. (1) you could meet your CNLM and obtain a controlled activity consent.
(2) you met your CNLM, but you fail on one of the other standards.

- A. Yes.
- Q. (3) you are an existing IFLU that does not meet CNLMs but one of the two exceptions apply.
- A. Mhm.
- Q. And (4) you are an existing intensive farming land use that does not meet any CNLMs and there's no policy exceptions that apply to you either. Those were the four consenting pathways under the operative plan, you'd agree with that?
- A. Yes.
- Q. And if you read on, you'll see there's reference there to a particular policy barrier applying to pathway four and that is that existing IFLU regulated must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the CNLM values for each year contained in Table 14.2 unless the circumstances in Policy 14-6 apply and no such circumstances exist." That's your recollection of that road block?
- A. Yes, I believe I just summarised that road block before, but yes.
- Q. And if you go on down, you'll see actually there that that stems from Policy 14-5(d) and (e) that's referenced there?
- A. Yes.
- Q. And there's also underneath there the Regional Plan Policy 14-5(d) and (e) gives effect to 5-8(a)(2) and (3), that's your understanding of how that cascade works?
- A. Yes.
- Q. Thank you. I'm just going to reflect on a few additional points. If you could move to page 43, actually 42 first, sorry?
- A. Yep.
- Q. You'll see that that refers to some advice that the Regional Council also obtained from In Focus in 2017 and there's a third bullet point down there that references Rule 14-2 which is the RDA rule isn't it?
- A. That's correct.
- Q. It refers to: "The issue being that there is no upper limit or nitrogen leaching from intensive farming land uses and therefore no guidance as to what is an acceptable extent of non-compliance, therefore any farm that cannot comply with the CNLMs is to be considered as an RDA

regardless of whether the farm model is near or far from the limit or has any intention or ability to reach the limit and remain viable.” It goes on to note the variation between individual farms depending on geographic, climate, soil, you’ll recall this part of the report?

A. Mhm.

Q. Thank you. If we could turn to the next page, the section 35 writer expands on that doesn’t it within the second paragraph, the second to last sentence commencing: “Hence...”?

A. Mhm.

Q. “If it’s to be considered as an RDA that does not comply and that is the case whether there is a reduction or an increase in nitrogen leaching proposed regardless of the extent of noncompliance that is there is no upper limit and regardless of whether the inability to comply is a matter of timing or an inability or alleged intent to ever comply.” That’s your understanding of part of the difficulties with the rule framework?

A. Yes.

Q. It goes on in the next paragraph, second sentence commencing: “Therefore if gaps exist in the One Plan as to how to consider an application that does exceed the CNLMs and for which the specified exceptions do not apply.” And it goes on to talk about how this is an illogical planning outcome in the framework. Again, is that your recollection of this report?

A. It is.

Q. Thank you. If we could just go over now, to page 47? There’s a section here on Overseer? And again to be fair to the report writers this was in July 2018 but it references the Freeman advice that was available around Overseer at the time.

A. Yes.

Q. You recall that Freeman report Mr Scott? And it goes on to talk about how you might be able to deal with some of the recommendations in Freeman and managing Overseer and some of the uncertainties, as known at that time. You’ll recall that? If you turn over the page, the Freeman report is quoted in terms of potential implications of Overseer version changes, that’s right? Yes?

A. Yes.

Q. And then the report goes on to talk about some of those factors in the context of the table, and this is where we see some work referenced by Massey University and I'm over on page 49. When some of the early work that was done around the table values, is that your understanding?

A. Yes, it is.

Q. If we could move on then to page 53? The report then removes, moves on to consider the matters of discretion under Rules 14.2 and 14.4, that's right isn't it?

A. Yes.

Q. And the reason why they did that is, it says here: "As shown above, it is reasonably accepted that under the current planning framework applications for resource consent will be processed as a restricted discretionary activity, either under Rule 14.2 or Rule 14.4," and to be fair Rule 14.4 is new, we're not concerned with that here and that this is typically what has been observed by the Council. And the report writer goes on: "To therefore assess the matters to which" decision, "discretion has been restricted." Do you recall that aspect of the report Mr Scott?

A. Yes.

Q. Thank you. And you'll turn the page onto page 54?

A. Yes.

Q. And I'm at the second paragraph commencing: "In Rules..."? And the second or the third sentence: "In Rule 14.2 a decision maker considering an application for resource consent for an intensive farming land use activity currently has no guidance as to what is an acceptable extent of non-compliance and what is an unacceptable exceedance." You'll recall that?

A. Yes.

Q. And then it goes on to consider: "But that's not the policy intention of the plan, then you would need to look at potentially a different type of activity consent status." Doesn't it?

A. Yes.

Q. And then the last paragraph refers to: "Consideration of measures to avoid, remedy or mitigate nutrient leaching, faecal contamination and

sediment losses.” It goes on to recommend that it could be improved by requiring consideration of good management practices and having these defined by industry standards.” That’s again your recollection of this report’s assessment?

A. Yes it is.

Q. And finally if we could just turn over, in this section anyway, to page 55 and I’m at the paragraph commencing: “As discussed above, this refers to matters relating to feasibility, practicality and cost being notably absent from the matters of discretion in Rules 14.2 and 14.4”?

A. Yes.

Q. It refers to the fact that: “Rule 14.2 only relates to the extent of non-compliance with the table and the management of adverse effects, it does not identify the matters previously considered by Council in consent processes such as feasibility, practicality and costs and this absence has caused difficulties,” as highlighted by some of the advice received by Council and they are set out there in bullet points 3, three bullet points?

A. Yes.

Q. And the third bullet point in particular: “CNLMs in Table 14.2 applying to both controlled and restricted activity rules with no real framework for an activity that exceeds CNLMs.” That’s your understanding of that problem?

A. Yes.

Q. Thank you. I’m just going to turn over the page to the last point which is that there was some discussion about learnings in case studies with implementation and there’s a section there on horticulture, isn’t there?

A. Yes, it is.

Q. And the last paragraph there: “The problems with horticulture in the context of the One Plan intensive farming land use provisions is that growers are likely to have the greater succinct of noncompliance with the CNLMs.” And it sets out some of the reasons for that, that’s your recollection?

A. Yes.

Q. And if we turn over the page the third paragraph: “The level of nitrogen loss from horticulture intensive land use activities means that any

application for resource land use consent will be firmly in the restricted discretionary activity classification from which the plan provides an unviable consenting pathway.” That’s your problem statement there, isn’t it?

A. Yes.

Q. And turning the page to 58 and 59, there are some other case studies of where difficulties have arisen. That’s your recollection?

A. Mhm.

Q. And I don’t think that the report writer was intending to limit those issues to those case studies, but they were examples of how some of the problems within the plan framework were bearing out in practice. Is that a fair summary?

A. Sorry can you say that again.

Q. I’m just simply pointing out and perhaps I’ll help you. If we go to the first sentence under section 5.3 at 56. I was simply just indicating that these are case studies, examples, they’re not necessarily the end or start of the issues with your plan framework but they’re case studies. They’re particular examples of how the plan framework has been having some difficulties. You’d accept that?

A. Yes, I would.

Q. So against that context, you’d accept that there were a range of issues and problems that informed Plan Change 2 in the approach that was taken in developing the alternatives and the evaluation of those alternatives as part of the section 32, wouldn’t you Mr Scott?

A. I would accept there was a lot of work that went into scoping out the issue, yes.

Q. Thank you. Then section 32 also identifies circumstances where the plan framework and Overseer wasn’t working as intended, that’s right?

A. I’m sorry, again.

Q. In the section 32 also went on to build on that and discuss how Overseer and the policy and the plan framework wasn’t working as intended, that’s right?

A. Yes.

Q. And it did so informed by that section 35 and the other technical reports referred to by Ms Foster. You'd accept that?

A. Yes, I would.

Q. And if we go to –

THE COURT ADDRESSES MS JOHNSTON – BREAK (15:33:52)

COURT ADJOURNS: 3.33 PM

COURT RESUMES: 3.52 PM

THE COURT: JUDGE SEMPLE ADDRESSES COUNSEL - TIMETABLING (15:52:21)

CROSS-EXAMINATION CONTINUES: MS JOHNSTON

Q. So Mr Scott, we had traversed the purpose of the plan change, some of the information informing it, I now just want to go the reasonably practicable options that were considered as part of the section 32 report.

A. Mhm.

Q. So we're back, on my notes, at volume 3 tab 2.

A. Yes.

Q. And it's bundle reference 301.0074. Take your time. I was wondering how quickly I was going to have to talk to get through it all, so we can all take a breath, Mr Scott.

A. 301, sorry?

Q. 301.0074.

A. Yes.

Q. The beginning of that section, it refers to the analysis of identifying and evaluating the most appropriate options to achieve the objective, the purpose of Plan Change 2?

A. Mhm.

Q. And you'll be familiar with the seven options identified within that section and forming part of the evaluation in the section 32 report, wouldn't you?

A. Yes.

- Q. Those seven options span no – doing nothing?
- A. Mhm.
- Q. Deleting the table?
- A. Yep.
- Q. Replacing it with a new regime, recalibrating the table with the most up-to-date version of Overseer, introducing a new policy mechanism to account for version changes, introducing CNLM tailored to specific water management sub-zones, introducing amendments that provide a viable policy rule framework for existing IFLU that cannot achieve Table 14.2 and introducing new regional plan provisions to enable activities to transition out. Those are your understanding of the breadth of options considered as part of the 32?
- A. Yes, they are.
- Q. And the 32 goes on to evaluate all of those options, doesn't it?
- A. Yes.
- Q. You can turn the page. I'm going to take you now to page 38 of that 32 report.
- A. Mhm.
- Q. And that heading is: "Evaluation of preferred options for the provisions."
- A. Yes.
- Q. Are you there?
- A. Mhm.
- Q. And this section sets out a range of options considered most likely to resolve the issues which arise in implementation of the rule and policy framework for existing IFLU, that's your understanding of that section?
- A. Yes, it is.
- Q. And I don't know if you heard my questioning in re-examination of Ms Foster the other day, where I put to her and she confirmed that it required a bundle of options to address the issue that Plan Change 2 looked to confront and resolve. Do you agree with that?
- A. Yeah, I'd accept that.
- Q. And those bundle of options are set out there in that section, aren't they?
- A. No.
- Q. Pardon?

- A. Ah, no. Oh, they are.
- Q. The bundle of options are set out?
- A. The bundle of options on the next page?
- Q. Yes?
- A. Yeah.
- Q. Yes, set out there in those four bullet points under section 8?
- A. I see, yeah, mhm.
- Q. The notified provisions then go on to reflect this bundle of options, don't they?
- A. Mhm, yes, they do.
- Q. Those provisions were more than just recalibration of Table 14.2 or changing of wording of some policies, weren't they, they were an extensive suite of amendments to address this bundle of options, would you agree with that?
- A. Ah, yes, I would.
- Q. And the breadth of those changes was evidenced through the submissions received on the plan change, wasn't it?
- A. Sure, yeah.
- Q. I'd just like to take you to one of them now as an example and it's exhibit H, it's the Federated Farmers, do you have the exhibit folder there, Mr Scott?

WITNESS REFERRED TO EXHIBIT H

- A. Yes, I do.

THE COURT: JUDGE SEMPLE

- Q. I think it is the other exhibit folder, sorry, the one that is lying flat, if you swivel right around, there is a folder lying flat.
- A. Thank you.

CROSS-EXAMINATION CONTINUES: MS JOHNSTON

- A. Exhibit 8?
- Q. H.
- A. These ones are numbered 1 to 20?
- Q. Oh, sorry, I –

THE COURT:

H is correct, but I think there is a schedule, yes.

CROSS-EXAMINATION CONTINUES: MS JOHNSTON

A. Oh, I see, it is 8, yep, no. Yes.

Q. So just to orientate us, the front page says: "Federated Farmers of New Zealand submission on proposed Plan Change 2 to the Horizons One Plan"?

A. Yes.

Q. Are you familiar with this submission, Mr Scott?

A. At a high level, yes.

Q. And you've read the submissions that were received on Plan Change 2?

A. I've looked over them, yeah, yes.

Q. Thank you. Well, I just want to take you to paragraphs 2.8 to 2.11 of that submission.

A. Mhm.

Q. Where it sets out what Federated Farmers sees to be the issues with One Plan and the sorts of matters that it wants addressed through the provisions as notified and at 2.9, it refers there doesn't it to: "Changing the numbers in Table 14.2 would only provide a controlled activity consenting pathway for around half of the unconsented dairy farmers, none of the unconsented growers and an unknown number of irrigated sheep and beef properties. In addition changing the numbers in the table will only assist these farmers for as long," or for so long or as long: "As there are no significant Overseer version changes, which are almost certainly likely to happen at some point. For those who cannot meet the controlled activity pathway, Federated Farmers does not agree that the discretionary activity consenting pathway provides sufficient certainty or addresses the more fundamental issues with the proposed rule structure." That's your understanding of a key concern of Federated Farmers, having reviewed the 32 and the notified provisions?

A. Yes.

Q. If I could go on to 2.10: "Changing the numbers in Table 14.2 also does not address any implementation and compliance issues that are likely to

arise, both for farmers who obtained consents in accordance with the current version of Table 14.2 but can no longer comply, or for farmers who will attain consents in accordance with the revised version of Table 14.2 but subsequently cannot comply due to Overseer version changes.” So Overseer was also squarely part of the discussions, part of the submission, wasn’t it?

A. Yeah and specifically the issue about version changes and updating Table 14.2.

Q. And it goes on to address a second point, so its submission was two-pronged: “That changing the numbers in the table does not address the fundamental issue that LUC is not an appropriate proxy and there’s no relationship between the LUC approach and the One Plan in desired water quality outcomes.” So it goes on to say that and that’s the second prong of their submission, isn’t it?

A. Yes, it is.

Q. And then it goes on to refer at 3.1: “That it seeks a framework that provides a reasonable consenting pathway for all intensive farming activities while the Regional Council works on the plan change necessary to implement the NPS-FM.” That’s correct?

A. Yes, it is.

Q. And then if you turn the page, at 3.4 it acknowledges that the revised Table 14.2 will provide a consenting pathway in the short term, doesn’t it?

A. Yes.

Q. And part of its request was not to delete Table 14.2 but was to shorten its application and duration to farmers, wasn’t it? So it wasn’t the case that this submission sought to completely remove the LUC or the natural capital approach from the plan change framework, did it?

A. No, it didn’t.

Q. Then going on to 3.5: “In addition Federated Farmers considers that there ought to be a reasonable controlled activity consent pathway for those farmers who cannot meet the table, but who are making reasonable efforts to reduce their nitrogen leaching. This would assist the majority of unconsented farmers who could not – cannot comply with the revised

Table 14.2 and those farmers who in the future cannot comply as a result of an Overseer version change. Not only would it provide certainty for these farmers but it would also deliver tangible and timely reductions in nitrogen leaching.” That’s your understanding of the thrust of that submission there, around a controlled activity pathway?

A. Yes, it is.

Q. If you go to 3.7: “Federated Farmers also considers that there ought to be a reasonable policy framework to guide discretionary activity consent applications. It proposes changes to the policies to achieve this. Without those changes there is an inadequate policy support for a discretionary activity pathway and any consent applications made under that consent pathway are likely to be declined.” So the scope of that submission in addressing the notified provision deals with a breadth of matters that you and I have traversed in terms of issues that led to the 32 and the notified provisions, doesn’t it?

A. Yes, it does.

Q. Thank you. We are going to turn to the provisions now, Mr Scott, if I may.

A. Okay.

Q. Now, as a starting point and I believe you’ve acknowledged this, but your provisions is represented in the right-hand column, the furthest, have moved on a bit since November, haven’t they?

A. Yes, they have.

Q. There is more alignment now with Ms Foster’s approach to the plan framework, you’d agree with that?

A. In some aspects, yes, definitely.

Q. How I would describe it and again I will just put this to you, you can tell me if I have it wrong, but the differences between you and Ms Foster now really come down to what I would say are in principle differences in terms of the policy framework, would you agree with that?

A. Yeah, yes, I would.

Q. To ensure I’ve understood your approach properly and believe you’ve responded to Ms Wright on this, but it’s meet the table as a controlled activity or be considered as a discretionary activity informed by the policy

considerations that you've provided and that as of today you've prioritised, is that fair?

A. That's fair.

Q. The evidence before the Court is that more than half of the unconsented IFLU in the region would require a discretionary activity pathway consent, wouldn't they?

A. Ah, that's not been my understanding of the evidence heard today. I – there's a lot that goes into the "most farms" conversation but from what I understand from Dr Parlato's evidence, more than half of farmers can meet their year 10 CNLMs. I also understood from Professor Horne's evidence that 15 to 20% of those that can't meet, could meet it if they were pushed and incentivised, they would be able to meet Table 14.2 at a push. And there's also other elements of conservatism that have been included in that. So "most farms" should include all, all farms that – all farms in the region, not only those that haven't been consented but all of them, and from what I understand more than half of those farms and potentially considerably more than half of those farms could meet the CNLMs.

Q. Yes, so I just want to break that down a little bit. First of all, Professor Horne gave evidence relating to the ability of dairy farms to meet Table 14.2, that's fair?

A. That's fair.

Q. And you've referred to some evidence where he's allegedly described 15 to 20% of those that he says can't meet the CNLM, being able to get there if they stretch further, is that right?

A. That's my recollection, yes.

Q. Do you also recall Professor Horne's evidence of the difficulty it was to make that stretch to reduce by a further 2 kgs, do you recall that evidence?

A. Yes.

Q. You were listening the other day when he –

A. I was.

Q. – told the Court that?

A. Mhm.

- Q. And you would have reviewed his 17 May 2024 evidence, wouldn't you?
- A. Yes.
- Q. And if perhaps we go there, so we're at volume 5 tab 10?
- A. Yep.
- Q. And in particular, I want to take you to page 6 paragraph 28?
- A. Yes.
- Q. It's Professor Horne's evidence there that a 20% reduction will require the widespread adoption of GMP and BMPs across the dairy IFLUs?
- A. Yes.
- Q. And as a consequence of rainfall and soil type a reduction of 20% in leaching rates will be major challenge on many pastoral IFLUs, that was his evidence?
- A. Yeah.
- Q. If you go on to paragraph 32?
- A. Yes.
- Q. Just checking, I think my reference might've been wrong there. I might leave that, I'm going to have to come back to that reference. Page 11 paragraph 52?
- A. Yes.
- Q. He says there: "I acknowledge both Dr Jolly and myself have argued that a 20 and 35% reduction is a challenge and so the number of IFLUs who can make further reductions in order to meet their CNLM may not be large, but it is likely that some will try to reduce to meet their year 20 CNLM. Whether this is feasible for any particular farm will be the driving factor." So he caveats that insensitive, doesn't he?
- A. Yes.
- Q. Thank you. And then I just want to reflect on the fact that Professor Horne moved beyond the dairy considerations and then considered that alongside the other IFLU when considering how many IFLU in the region would be able to comply with 14.2. You understand he looked at dairy, irrigated sheep and beef, commercial and vegetable growing and cropping. That's your understanding?
- A. That's my understanding.

- Q. And when he looked at that the ability for farmers to comply reduced to a range of 41 to 49%, that's his evidence isn't it?
- A. That is his evidence, yes.
- Q. And that accounted for the year 20 CNLM, that's right?
- A. That's right.
- Q. You'll be familiar with the consenting regime for IFLU under the proposed plan, Mr Scott?
- A. Yes.
- Q. And you will appreciate that in order to obtain a consent a farmer needs to be able to demonstrate compliance with the year 10 and also how they're going to meet their year 20 within the stipulated timeframe, that's how the consenting regime works isn't it?
- A. Yes, it is.
- Q. On that analysis year 10 and year 20 are relevant to any consent application that the Regional Council will process. You'd agree with that?
- A. Yes, I would.
- Q. You'd also agree that it's appropriate that Professor Horne and Dr Parlato looked at all IFLU when considering whether 5-8(a) was implemented by the CNLM. You'd appreciate and agree with that?
- A. I'm sorry can you say that again that 5-8(a) was implemented by the CNLM.
- Q. You would also agree that when a farm systems advisor is analysing how many farms can meet the maximum in Table 14.2, you would agree that they should look at all of the intensive farming land use not just one particular group of those farming land uses. You'd agree with that?
- A. Yes, I would.
- Q. Thank you. Right, I'm going to now turn to chapter 5 if I may. A good starting point is actually going to be the operative plan provisions and I'm at volume 3 tab 16?
- A. Yes.
- Q. I'm just going to go over the Policy 5-7 which is in the bundle at 302.0778?
- A. Yes.

- Q. And we start at Policy 5-7 don't we when we look at the cascade of RPS policies that apply to discharges and land use activities affecting water quality?
- A. That's correct.
- Q. To be fair, the only reason it is in Ms Foster or your table, is that there is no amendments to Policy 5-7 as part of Plan Change 2?
- A. Mhm.
- Q. But this policy sets up the framework within which the management of land use activities affecting ground water and surface water occurred. You'd accept that?
- A. Yes, I would.
- Q. At (a) "It must identify in the regional plan the targeted water management sub-zones. (2) or (b) "You must identify the regional plan, the intensive farming land use activities."
- A. Mhm.
- Q. And (c) "You must actively manage the intensive farming land use activities identified in (b) including through regulation in the regional plan in the manner specified in Policy 5-8." That's the overarching framework, you'd agree?
- A. Yes.
- Q. And then if we turn to Policy 5-8 and it might be helpful if we have your provisions. We could just keep an eye to the operative Policy 5-8, so maybe keep that folder open?
- A. Yes.
- Q. We're at 5-8, we've got 5-8(a) which directs how the nitrogen leaching maximums are established in the regional plan. Then we have (2) which says that: "Existing IFLU must be regulated to achieve the nitrogen leaching maximums except as provided in (iia) and (iib)." That's your understanding?
- A. Yes, it is.
- Q. And you also agree that the wording: "Except as provided for in (iia) and (iib)" was added as part of the notified Plan Change 2 provisions?
- A. Yes, I would.

Q. And to put that beyond doubt if we look at the operative Policy 5-8 at 302.0779 you'll see there (2) did not have any wording after (i), that's right?

A. That's correct.

Q. So the addition of the Policy pathways for (iia) and (iib) they set up a framework for regulating activities that do not comply with Table 14.2, don't they?

A. Yes, they do.

Q. So you're either on the face of 2 regulating to achieve the maximum or you're regulating existing IFLU in another way, aren't you?

A. You're regulating IFLU under criteria set out underneath that. So in a different way than using the CNLMs by themselves, yes.

Q. Yes, and when we consider that there's no – if we look at (iia) and (iib), there's no direction within those alternative pathways as to compliance with a maximum is there?

A. No because they're exceptions.

Q. And in fact if you look at (iia) and (iib) those pathways were regulating in another way are silent as to how that regulatory framework might eventuate other than setting out the matters which a plan maker must regard to. You accept that?

A. I would accept that they don't have fixed limits. They don't prescribe a secondary limit for those exceptions. Yes, I do.

Q. So you're either regulating to meet the maximum under 5-8(a) or you're regulating in another way under (iia) and (iib), that's right?

A. That's right.

Q. You'll accept that when you are looking to regulate under (iia) and (iib) you must have regard to a range of factors?

1620

A. Yes.

Q. And your evidence is that you and Ms Foster are fairly well aligned on what those considerations are, now aren't you?

A. Yes, I think so, yeah.

- Q. And certainly your position in the joint witness statement as I understood it was that you supported the version of 5-8(iia) and (iib) as proposed by Ms Foster, is that right?
- A. Yes, I think so, of (iia), of (iib) at least.
- Q. (iib) sorry, yes, no (iia) and (iib), yes? So I'm at volume 5, tab 13, it's the joint witness statement of the planning experts and in particular I'm at page 501.0583?
- A. Sorry, I have the wrong volume here.
- Q. Oh, that's okay.
- A. Sorry, what was the reference again?
- Q. 501.0583?
- A. No.
- Q. Under row 6 or number 6 I should say? The second column, the middle column, which says at the bottom: "All experts support Policy 5-8(a) (2) and (iib) as proposed by CF, Christine Foster and the council reply provisions. So that leaves at large (iia), if I understand that correctly?
- A. Yes, that's right, yes.
- Q. We'll come on to (iib) but there is some differences in wording between your version of (iib) and Ms Foster's, isn't there?
- A. In (iib)?
- Q. Yes. Why don't we take a moment and fix that folder because –
- A. Yeah, thank you. Yeah, I don't want a disaster here.
- Q. – it's stressing me out, so it must be stressing you out.
- A. Thank you.
- Q. Somehow it will be Mr Sinclair's fault.

LEGAL DISCUSSION – BROKEN FOLDER (16:22:46)

THE COURT:

- Q. All right, where were you?
- A. Tab 13, wasn't it.

CROSS-EXAMINATION CONTINUES: MS JOHNSTON

- Q. Yes.

- A. I'm going to flip them more carefully this time.
- Q. And we've agreed anyway, I think the essence of the point which is that you supported Ms Foster's (iib) but the wording of (iia) was still at issue between you?
- A. Yes.
- Q. And the point that I just wanted to clarify with you is that when I compared your track change (iib) with Ms Foster's (iib) the wording was different.
- A. Mhm, I don't think that was intentional. Can you tell me what the differences were?
- Q. Yes, I had wondered. When you talk of it, it is more framed in a regional plan type threshold type way, as opposed to setting up a framework. You refer to: "But which demonstrate the intention to transition to an alternative intensive farming land use are able to continue to leaching nitrogen at levels above the nitrogen leaching maximums." Whereas Ms Foster is still using the language of the RPS: "Must be regulated to ensure."
- A. Mhm.
- Q. So I figured that it was potentially aged wording, but I just wanted to give you the opportunity to confirm your joint witness position which is that you were content with Ms Foster's wording of (iib)?
- A. Yes, yeah.
- Q. And if you need to take time to reflect on that, Mr Scott, do so now, because I accept that I reviewed this and thought that it looked like an inadvertent wording carryover?
- A. The only important difference I can see is the ref – oh, no, five years is there, no, I think, I think you're right, I think it was possibly –
- Q. Thank you.
- A. – relying on wording from elsewhere.
- Q. I want to go to (iia) now then.
- A. Mhm.
- Q. And I'm in your column and I also just wanted to confirm that item (c) in that column, the productive capability of land and the water management sub-zone should also be underlined, that's an addition by you that's different to Ms Foster, isn't it?
- A. Different to Ms Foster? Yes (inaudible 16:28:19).

- Q. And in essence as I understand the difference between you, you have your (c) and she has her (d) and that is really the nub of the difference of approach under (iia)?
- A. Yes, that would be right.
- Q. Her (d) refers to land use capability class?
- A. Mhm.
- Q. And your (c) refers to the productive capability of land –
- A. That's correct.
- Q. – in the water management sub-zones?
- A. Yes. I had thought there was a reference in the decisions version to that same wording, but I can't find it right now, so...
- Q. There is –
- A. So yes –
- Q. – but it is under 5-8(a) which deals with the maximums, Mr Scott.
- A. Yes, ah, that's it.
- Q. So this wording is in addition –
- A. No, that's not it.
- Q. – to –
- A. Mhm.
- Q. – the considerations you say a decision maker needs to have regard to when they're looking to regulate in a manner which does not require compliance with a CLNM, do you accept that?
- A. Yes, I do.
- Q. If we could –
- A. I also think they really speak to the same issue. The wording might be different, but I think the intent is broadly the same that it's about land use capability. It's about the actual capital having taken into account the actual capital of the land.
- Q. Ms Foster's (d) looks at the feasibility, practicality, and cost of implementing measures by reference to the land use capability class though doesn't she?
- A. She does, that's right.

- Q. You'll recall the section 35 that we traversed earlier where those were factors that had been identified as missing from the plan framework, do you recall that?
- A. I recall that being part of the Federated Farmers submission, yes.
- Q. Also the section 35 that we traversed earlier, Mr Scott?
- A. Yes.
- Q. Thank you. I'm just going to go now to policy or chapter 14. So on your numbering of the provisions start at page 6?
- A. Yes.
- Q. Before we move there, you'd confirm and as I've understood your evidence earlier, the RPS framework sets up chapter 14 in terms of how it manages the intensive farming land use activities. You'd accept that?
- A. Yes, I would.
- Q. And if we look at Policy 14-5(a) it identifies those intensive farming land uses at Policy 5-7 refers to?
- A. Mhm.
- Q. Policy 14-5(b)(i) identifies the location of existing intensive farming land use by reference to Table 14.1, doesn't it?
- A. Yes.
- Q. It confirms at 14-5(c) that nitrogen leaching maximums have been established in the Table, that's right?
- A. That's correct.
- Q. And 14-5(d) goes on to give effect to Policy 5-8 too, doesn't it and it sets out the way in which the intensive – the existing IFLU are regulated, doesn't it?
- A. Yes, it does.
- Q. Under your provisions you regulate it only reference to the CNLM in Policy 14-5, that's your approach?
- A. That's correct.
- Q. And Ms Foster implements (iia) in 14-5 as well, doesn't she? This is where she includes the CNLM and the specified reduction pathway and NRAT, that's right?
- A. Sorry implements (iia) from 5, from Policy 5 to 5(a)(iia)?
- Q. Yes, 'cos we've just talked about how 14-5(d) implements Policy 5-8(2)?

- A. Mhm.
- Q. And we've confirmed earlier, haven't we, that that policy enables you to regulate to meet the maximum or regulate in the manner provided for in (iia) and (iib) that's right?
- A. That's right.
- Q. And another, the difference here between you and Ms Foster is that she provides for the regulatory pathways under 5-8(i) and 5-8(a) within Policy 14-5 whereas you just include the regulatory pathway provided under 5-8(a). That's correct?
- A. (no audible answer 16:34:43).
- Q. You deal with just the maximums in terms of this policy?
- A. So 5-8(iia) to me applies to exceptions from the CNLMs established under 5-8(a) and those exceptions in my view are best managed as discretionary activities. So they would be the exceptions that come under 14, Policy 14-6.
- Q. Yes, you and Ms Foster have placed the response to Policy 5-8(iia) in different parts of the plan, haven't you?
- A. Yes, we have.
- Q. And the approach there reflects the intent of Plan Change 2 to ensure that activities that cannot meet Table 14.2 are still able to apply for consent. That's correct?
- A. The intent in my version or Ms Foster's version?
- Q. In both versions?
- A. In both, yes.
- Q. You would accept that Policy 14-5, under either approach implements 5-8 in this regard, wouldn't you?
- A. Yes, I would.
- Q. I just want to stay with the exceptions. I'm going to stay with Ms Foster's for now and her exceptions are set out at (d): "Exceptors provided for in Policy 14-6(g)." That's right?
- A. Yes.
- Q. So we're talking about Ms Foster's discretionary pathway now?
- A. Yes.

- Q. She provides for exceptions to, in there to meet the parameters under here, over in 14-6(g)?
- A. Yes.
- Q. And (g)(i) refers to: "Where 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 practical extent as soon as practical." That's, my understanding of what that says, I think it's there in black and white?
- A. Yes.
- Q. That's an exception that Ms Foster anticipates a discretionary activity could be lodged or made under, that's right?
- A. That's right?
- Q. And when we reflect on the specified reduction pathway, that is produced through 5-8(iia), Ms Foster's evidence is that that implements or gives effect to this exception for a proportion of farmers, doesn't it? That's her evidence?
- A. That it, sorry, say again?
- Q. It's Ms Foster's evidence that the specified reduction pathway that she's provided for in the provisions, for a proportion of the farmers that would be captured by this exception, implements it doesn't it? The specified reduction pathway captures that exception for a group of farmers?
- A. It provides an exception for a group of farmers.
- Q. So those farmers have to make specific reductions in specified timeframes?
- A. Yes.
- Q. There's no ambiguity around the rate of reduction or the extent of reduction under that pathway, is there?
- A. No, there's no, no that's correct.
- Q. You'd accept that there were a range of submissions that sought greater clarity and particularity and certainty in terms of the consenting pathway for discretionary activities as notified?
- A. I would, yes and –

- Q. You'd agree that there was a criticism that there wasn't enough guidance around the extent of the exceedance that might be required under that pathway, you'd accept that?
- A. I would accept that and I, I do recognise that this 20% reduction provides the certainty, but I also think certainty isn't the only issue at play here. I think equity is also an important consideration and the specified reductions pathway providing a, as a controlled activity, a blanket 20% reduction across the board to everyone as moving well away from the underlying philosophy of nitrogen leaching regulation in the One Plan in my view.
- Q. We've already agreed though, haven't we, that these pathways are established under 5-8(iia) in the RPS?
- A. Yes.
- Q. That's what directs the framework within which these activities are captured, we've agreed that, haven't we?
- A. We have.
- Q. And under Ms Foster's version, you don't need to account as directly for the productive capacity of the land, do you, that's your addition to the matters in (iia) that one has to have regard to when setting up the policy framework?
- A. Yes, I'd accept that. I would –
- Q. You'd also accept – no, you go?
- A. So I'd also add that in Ms Foster's version there is still a reference to the land use capability class which I would say isn't given effect to in our specified reduction pathway because it's that blanket – it would apply equally to LUC1 as it would to LUC8.
- Q. We've already traversed, haven't we, that that is caveated on the basis that you're considering the feasibility, practicality and was it cost of achieving – I'm going to go back to the wording: "The extent or the feasibility, practicality and cost of implementing measures to achieve the nitrogen leaching maximums specified and having regard to the land use capability class." That's a different proposition to the one that you just put to me, isn't it?
- A. Yes, it is.

- Q. Thank you. And we were talking about the submissions and also I'd add to that the section 35 and other reports informing the 32 about the absence of guidance in the plan framework around the extent of reductions, you will recall that discussion, yes?
- A. Yes.
- Q. And there was a gap identified in terms of that pathway around how you might consent activities that were not caught by the exceptions yet under the rule framework could seek consent to exceed the cumulative nitrogen leaching maximums, you'll recall that conversation?
- A. Yes.
- Q. Ms Foster's proposed framework addresses that issue, doesn't it?
- A. It, ah, it addresses it in her view in an appropriate way.
- Q. Ms Foster's evidence is that she's had regard to Policy 5-8(ii) and (iia) and the chapter 14 policies in developing those pathways, that's her evidence, isn't it?
- A. Yes.
- Q. Her evidence alongside Professor Horne and Dr Jolly and others is that the discretionary activity pathway will still be required for farmers that cannot make the 20% reduction, that's her evidence and evidence of Professor Horne and Dr Jolly, isn't it?
- A. Yes, it is.
- Q. In that regard, the policy framework for the discretionary activity pathway remains important in Ms Foster's views, doesn't it?
- A. In Ms Foster's view, yes.
- Q. And what we've just traversed from Policy 5-7 through 5-8, through the Policies 14-5 and 14-6, that's the approach, that's the approach represented in Ms Foster's 32(aa) and her evidence to this Court, isn't it?
- A. It is.
- Q. In terms of activity status, you'll accept that Plan Change 2 as notified introduced a new consenting pathway, a new activity status as a discretionary consent, you'll accept that?
- A. Yes.

Q. And Ms Foster in her review of those notified provisions made recommendations in response to submissions that raised the adequacy of that consenting pathway, that activity status, you'd accept that?

A. I would.

Q. You'd agree that it's appropriate to impose the least restrictive regulation necessary to achieve the desired environmental outcome in this case?

1645

A. The least restrictive regime necessary? Yes I would.

Q. You've had regard to that in your section 32(aa)?

A. Yes.

Q. Ms Foster has as well?

A. Yes.

Q. You've reached a different view as to what is the most efficient and effective outcome when considering activity status, for the group of farmers that cannot meet Table 14.2? That's a fair summation, isn't it?

A. That is a fair summation.

Q. I want to turn now to Policy 14-6. This is on the big pages at page 8. I'm in your column, so the right-hand column and I'm at "(b)", these set out the three exceptions that you've provided to accommodate the large number of farmers that cannot meet Table 14.2, that's correct?

A. The farmers that can't meet 14.2, yes.

Q. Yes. So there's three exceptions?

A. Yes.

Q. Transition to an alternative non-intensive land use over a period of five years? Exceedance of the table due to Overseer overestimating end loss?

A. Correct.

Q. And where you cannot meet Table 14.2 and you have a trajectory of staged reductions?

A. That's correct.

Q. I understand that in assessing these exceptions, a decision maker would turn to your (b)(a)?

A. Yes.

- Q. And prior to this afternoon I was going to put to you that you've essentially accepted Ms Foster's hierarchy of policies where some are given particular regard and others are considered. I just wanted to revisit that in light of your evidence this afternoon. Do you still agree that some policy considerations should have particular regard given to them by a decision maker?
- A. Some should be given more weight than others, yes.
- Q. How does that fit with the list of priorities that you just gave to the bench this afternoon?
- A. Well I think that has a list of priorities with it. Well only with the strategies, in chapter 5 being the most important one, that it is actually going to deliver on the water quality outcomes and the values in schedule (b) and objective 14-1, the rest of objective 14-1, the life supporting capacity of water and then following that maintaining the One Plan philosophy of assigning greater or allowing a greater exceedance or a greater level of leaching to land that has higher productive potential and then the other matters after that.
- Q. The reason why I check is that the matters that you have just listed as having the greatest priority don't have particular regard in front of them, in your list, so that's where my confusion arises. Are you revisiting your provisions this afternoon Mr Scott?
- A. No, I think "only grant consent" in my view carries more weight than "have particular regard". I think "have particular regard" is, means you need to turn your mind to it and give it serious thought. "Only grant consent" is more directive than that.
- Q. What about consider –
- A. And "make a decision consistent with".
- Q. Yes.
- A. Is also quite directive, that means if it isn't consistent with having more intensive land on, land units with high productive capacity then it is inappropriate to, that where there's a high leaching above the CNLM and it's a lower LUC class, that's an indication that that's probably not an appropriate activity to happen in that place.

- Q. You'd agree that Mr Day's evidence focussed on certainty for farmers, that was a key part of his evidence to this court, wasn't it?
- A. Yes.
- Q. And when a decision maker comes to the list in your (b)(a) and how you've just described it to me, do you think that that's obvious?
- A. I think it could be reordered, I think it could be improved. You know, this has been a moving feast through the, through the weeks of the hearing. Do I think I have it exactly right, perhaps not. I think it could be improved. I think it's been mentioned before that the planners could probably go through it again with some more direction from the Court, but the intent of this, of Policy 14-6(b)(a) is to, to point decision makers towards those matters that are most essential and that give them the support to look at declining consent to those activities that are fundamentally not appropriate for the LUC class that they're on and to provide support for that decision, because that is a hard decision to make and there needs to be enough direction in the plan that, that decision makers can stand behind it and if that isn't what's delivered here, then that is definitely the intent.
- Q. Well let's work through those. So there isn't anywhere in this list of provisions in (b)(a) that gives specific guidance on the extent or nature of the downward trajectory that you've referred to in your exception above, is there?
- A. No it's a combination of things, so I think the intent was that where there's a LUC class with 1 for example, there's an acknowledgement that that's the best place for intensive farming land use to take place and that if it takes, if they take longer to get that leaching down that that should be, that there should be some thought towards accommodating that. There's –
- Q. If I could just clarify that Mr Scott if I may, is that your roman numeral (iv) or I think with the strikeouts probably roman numeral (iii). That's the point that you're making there?
- A. Yes, that's right.
- Q. And these factors, in order for the decision maker to be informed by them, you'd accept that a consent applicant would need to have an

understanding of how to frame an application to respond to these matters, wouldn't you, you'd accept that?

A. Yes.

Q. And you'd accept that that was important given that the exceptions that you have set out above provide the consenting pathways that you are proposing for a number, putting aside our difference about the extent, a number of intensive farming land use activities in the region?

A. Yes.

Q. So these are fundamental application drivers, aren't they? These considerations, you'd accept that?

A. Yes, I would.

Q. How would an applicant address your roman numeral (iii)? Picking up the plan tomorrow, how would they articulate an application in a way that would give them certainty that a decision maker will approach it in the way that you've just described to me?

A. I think reading the, reading all of the clauses there together, I think it would be clear to an applicant that LUC, high LUC classes are favoured, that the difference between where they are presently and where the CNLMs are is very important, that reduction, especially the, how quickly they came down in also important. I guess the issue that still concerns me is, is I guess having the clarity of where does that lie. In a previous version I did suggest that they show a trajectory towards achieving the CNLMs at some point in the future. That was, that was thought to be too strong a direction because that was then a prohibited activity by stealth if you like, so that was removed. Reluctantly, because I do think that there's an issue with making sure that it's signalled what the, to what extent it's still okay to exceed the CNLMs and the two and obtain consent. The whole idea though is that this is a potential pathway for any applicant that wants to exceed the CNLMs. If you put in a hard limit then you'll get criticism that you're putting in a secondary limit and it's prohibited for everyone else. That is an issue that I think still perhaps remains to be answered.

Q. And you'd accept that on the evidence of Ms Foster and the council experts that their answer to that is by establishing the acceptable, in their

view, reduction to occur within a particular timeframe, be provided those parameters as part of a pathway, you'd accept that?

A. We're talking about the controlled, the alternative pathways? I accept that they've suggested that, yes.

Q. And then, in terms of the discretionary pathway under the council provisions you would be dealing with farmers that need to be looked at very carefully, you would agree with that?

A. I would.

Q. I just want to talk about the weighting a little bit more and in particular regarding the: "Particular regard to be given to CVG and a 35% reduction," and if I could take you there, you've got that in front of you?

A. I do.

Q. And just to be clear, where does the 35% reduction fit in with your priority of factors now?

A. So that would just, that would be one of the criteria under: "Have particular regard to." So that would be alongside the values to mana whenua and the extent of and duration of non-compliance in that one.

Q. So it would come after the?

A. "Only grant consent" and after –

Q. The effects, I think that that was your order, having regard to the effects and the extent of non-compliance, is that right? That was your order?

A. It would sit alongside the extent of non-compliance, yeah. The intention of the CVG clause in there was an acknowledgement that Overseer doesn't, that Overseer's very good at pastoral, at modelling leaching from pastoral land. It does less well in terms of modelling leaching from commercial vegetable growing.

Q. Can you see the –

A. And –

Q. Oh sorry, go.

A. And so that clause was a recognition that as a starting point, what I understand from previous evidence is that 35% is achievable and allowing a bit more direction for CVG, as a particular exception because, because Overseer does less well.

Q. When we're considering that explanation that you've given and we look at your consideration there to have particular regard to the extent and duration of non-compliance with the CNLM?

A. Yep.

Q. Alongside, having particular regard to a 35% reduction by CVG?

A. Yes.

Q. How does a decision maker balance that when the evidence is that CVG have a very difficult time meeting the CNLM as a starting point? How does a decision maker weigh those considerations in your view Mr Scott?

A. So I think the first thing to say would be, because CVG is so high leaching I, my view is that the discretionary activity pathway is the most appropriate for CVG where they're leaching much higher than the CNLMs. Those two clauses sitting alongside each other mean, to me, where there's a, as a starting point there should be a 35% reduction over three years from the baseline, that's been pointed out to be achievable. There's also reference to the land use capability class, which I understand for CVG is usually class 1 and 2 soils, so there's an acknowledgement that, that activity, that intensive farming land use is most suited for those soils. If they're not perhaps that's not the right place to be doing commercial vegetable growing and, but there needs to be, they need to be looking to reduce further from the 35%, so there should be a trajectory after that of further reductions. But as a starting point 35% in the first three years should be, should be the starting point.

Q. I'm sorry that's, I didn't understand that after the 35% they needed to continue to make a trajectory. Is that referring back up to the exception above in 14-5(b)?

A. The extent and duration of non-compliance, yeah (b), 3.

Q. You understand that the evidence before this court is that commercial vegetable growing has had difficulty with Table 14.2, given Overseer but also how it was set up without reference to their individual needs or expectations. You understand that that's their evidence, HortNZ .

A. I do.

Q. And Dr Jolly for the council has reiterated those concerns, hasn't she?

A. Yes.

- Q. Is it your position that (b)(a)(vii) addresses those concerns adequately?
- A. (b)(a) roman numerals (vii)?
- Q. Yes.
- A. Yes, I think it's quite a fraught area and I do understand the position of commercial vegetable growing, but at the same time the objective, 14-1 is about water quality and about meeting the, providing to the values in schedule B . It's not for, it's not about providing for commercial vegetable growing specifically, it's looking at environmental limits and within those environmental limits providing for the best economic outcomes within those limits.
- Q. You'd accept, and we traversed this right at the outset though, that alongside those existing objectives a decision maker, a plan maker in this context also needs to have regard to the purpose of the plan change. You'd accept that?
- A. Yes.
- Q. Thank you. I just want to go to the joint witness statement.

**THE COURT: JUDGE SEMPLE ADDRESSES MS JOHNSTON –
OVERNIGHT PROTOCOLS (17:04:20)**

COURT ADJOURNS: 5.05 PM

COURT RESUMES ON THURSDAY 13 JUNE 2024 AT 9.30 AM**THE COURT: JUDGE SEMPLE**

Good morning everyone. Anything overnight that we need to deal with? If not, call the next witness.

CROSS-EXAMINATION CONTINUES: MS JOHNSTON

Q. Good morning Mr Scott.

A. Good morning.

Q. I had to refresh my memory this morning about where we were up to so I thought perhaps you and I could do that together. But I recall that we left our discussion on Policies 14-5 and 1406. Do you have those in front of you?

A. Yes.

Q. In particular we were discussing the exceptions you have provided for in 14-6(b) and the considerations, a decision-maker is directed to take into account, through 14-6(b)(a).

A. Mhm.

Q. Just for the Court's benefit, you will confirm that Ms Foster's equivalent, in terms of the discretionary pathway that the council is proposing, that's captured by 14-6(g) and 14-6(h) in the middle column, isn't it?

A. Yes, that's right.

Q. When we concluded yesterday, we were focussing our discussion on exception 3 in your 14-6(b) and that was the exception where an existing farm activity cannot meet the CNLM and is showing a trajectory of stage reductions. That's where I thought we were at in terms of our discussion and we were testing that with some of the policy considerations that are set in the policy that follows in b(a).

A. Mhm

Q. You'd agree wouldn't you Mr Scott, that this is an important exception, this exception 3 in 14-6(b) wouldn't you? The exception where you don't meet the CNLM and you are showing a trajectory of stage reduction.

Q. You'd accept that that's an important circumstance that you have set out, that an activity, farming activity could apply under a consent.

- A. I agree that's important, yes.
- Q. You'd also agree that the majority of the existing intensive farming land use activities that cannot meet the CNLM will be looking to rely on this exception. You'd accept that?
- A. Yes, I would.
- Q. You'd accept under Policy 14-6(b) those exceptions need to be established before a decision-maker goes on to consider the considerations in Policy (b)(a)?
- A. Yes.
- Q. And that's reflected in the wording at the beginning of Policy 14-6(b)(a) isn't it?
- A. Mhm.
- Q. Where it states: "Where resource consent is sought for an existing intensive farming land use on the basis of the exception specified in 14-6 (2) or (3), the decision-maker must. Is it your evidence that 14-6(b) forms some sort of gateway then before a decision-maker can get on to consider the matters in (b)(a)?
- A. Yes it is.
- Q. This makes the trajectory of stage reduction very important then for a potential applicant looking to rely on that exception, doesn't it?
- A. Yes, it does.
- Q. On your evidence the decision-maker doesn't get to consider the matters in (b)(a) until the threshold is established under (b) then, that's your evidence?
- A. That's correct.
- Q. We've been talking about the weighting of policy considerations in (b)(a) and in particular you will recall that we talked about – and I put to you the difficulties that a CVG activity might have in relying on a 35% reduction when compared with a decision-maker also having to have particular regard to the nature and duration of the non-compliance with the CNLM. You will recall that discussion we had yesterday?
- A. Yes.

- Q. And I record your response was, along the lines of: "That it is appropriate that CVG are considered as a discretionary activity because they are high leaches." That's right?
- A. That's right.
- Q. I would like to go now to the joint witness statement of the planning experts that dealt with CVG components. And in particular this is, I will reference the Court and yourself, this is volume 5 tab 12. And I am at page 5010578, page 7 of that statement.
- A. Sorry, 0578?
- Q. Yes. There's a discussion at (d) about the intention to achieve a 35% reduction in nitrogen leaching. That's the column with the letter (d) in it. You see that?
- A. Yes I do.
- Q. And if we go into the middle column, you will see next to the initial CF which is Ms Foster. She supports a PC2 framework that provides for CVG that makes a minimum 35% reduction in leaching for the first three years following a grant of consent. That's your recollection of Ms Foster's position?
- A. Yes.
- Q. And that represents the specified reduction pathway for CVG doesn't it?
- A. Yes it does.
- Q. If we could move to the furthest column, the right column. This records your view that the 35% reduction should be an exception and it is not a gateway – and I am at the second to last sentence. "It is not a gateway and sits alongside other valid policy considerations." And I am assuming that that should read: "Which will also be sought to bear on applications for a discretionary consent. MS considers that in most cases a 35% reduction would be sufficient to be granted consent." That was you recorded in that statement, wasn't it?
- A. Yes, it was.

0940

- Q. If we return to the policy considerations in (b)(a), they don't speak to that view that most CVGs should be able to obtain a consent if they make a 35% reduction, do they?
- A. I think (vii), having particular regard to CVG where there is a 35% reduction in three years is a strong indication that that would be seen favourably and then –
- Q. It doesn't indicate to a decision-maker though that the drafter of these plan provisions thought that that particular consideration would enable most CVG in most cases that that would be sufficient to grant a consent, it doesn't send that level of direction, does it?
- A. The level of direction that most should be granted consent?
- Q. That in most cases, a 35% reduction would be sufficient to be granted consent. A decision-maker coming to these policy considerations would not be directed to that outcome, would they?
- A. No. Because they'd be assessing them on their merit, they – if it's for a discretionary consent, they should be assessed on their merits, a 35% reduction in three years is, is a good starting point and that would be seen favourably. If there's other reductions that could be brought to bear and depending on how far above the CNLMs the application is, it would depend on that as much as other things.
- Q. And that goes to your point that this gets weighted alongside all those other matters in (b)(a)?
- A. Yes.
- Q. I just want to reflect also your evidence yesterday which caught me a little bit by surprise where you indicated to me and the Court and others that alongside the 35% reduction, CVG farmers would also still need to be on a downward trajectory making staged reductions as well, that was your evidence yesterday?
- A. Staged reductions or meeting the CNLMs. Yes, I think so.
- Q. Your evidence this morning was that a decision-maker wouldn't be able to get on to consider the 35% reduction until CVG were falling within the exception in (b) and showing a staged – trajectory of staged reductions, that's right?
- A. That's right.

- Q. So they would have to do more than a 35% reduction under this exception pathway, wouldn't they?
- A. Within the remaining 10 years of, of until year 20, yes, they would.
- Q. And the calculation of the 35% reduction and also demonstrating the staged reduction, that would be reference to Overseer most likely, wouldn't it?
- A. At discretionary stage, there's the potential to bring other things in. I could see the NRAT being quite useful at discretionary stage to show that it's – that reductions are being made. I don't have a problem with NRAT as a tool to be used alongside Overseer at the discretionary stage. I think it's not – I think it's still fairly new and I don't think it's comparable to Overseer as a controlled activity gateway but I could see it being useful at discretionary stage to show that there are actions being taken to reduce further leaching.
- Q. Thank you for that evidence. I would like to just move on to some of the other exceptions in 14-6. And one of them in particular we briefly touched on yesterday and this was around the grant of consent where an activity would align with the strategies that surface – of surface water quality and ground water quality, that's your (vi)?
- A. Yes.
- Q. In your evidence yesterday that, as I – if I understood it, was your words were "you couldn't be more directive than in that particular sub-clause" that was your evidence, do you recall that?
- A. Mhm, I do.
- Q. In terms of the orders of priority then, you place this at the outside?
- A. That's correct.
- Q. Presumably that means if this is the most directive you could get, if a IFLU activity couldn't demonstrate alignment with these strategies your expectation is that they would not obtain consents, is that right?
- A. That's correct.
- Q. What does "align" mean in this policy consideration, Mr Scott?
- A. It means that the consent needs to not frustrate the ability to deliver on those strategies, meaning if it's being consented at considerably higher rates than the CNLM, that the water management sub-zone will be

over-allocated as a result of this and other activities in the water management sub-zone, that that's frustrating the intent of those policies.

Q. Is your evidence in that regard require there to be some sort of direct correlation between the CNLM and the Schedule E targets?

A. Ah, Policy 5-8(a) directs that the CNLMs are drawn up with the intent of delivering on the values in Schedule B and that the targets in Schedule E are aligned with that.

Q. You'd accept the evidence of Ms Patterson before this Court, however, that compliance with Table 14.2 was never expected to deliver on the Schedule E targets?

A. I understand that.

Q. Thank you.

A. But I also understand that that was seen as a, as a starting point, but that was the – the intent was to get there and then potentially need to take it further in the future.

Q. Yes and Ms Patterson's evidence was also that the table would be used alongside a range of tools in a particular catchment to drive water quality on this journey towards the targets, that was her evidence, do you recall that?

A. Yes.

Q. When an applicant is looking to show alignment with these strategies, is it your view that they'd need to show that their activity individually or cumulatively would not make a significant contribution to elevated contaminants in the catchment and they would need to meet the target?

A. Not meet the target, but that that they would – there may be other activities in the water management sub-zone that have reduced leaching, there might be other mitigation strategies that have come to bear elsewhere in the catchment. The – but yeah, the intention would be that they would – and definitely in terms of the duration of the consent, that the application should show that there is – that leaching is being reduced over time and that if it's considerably higher than the CNLMs that the duration should be shorter or that consent should be declined.

- Q. And your position is that an individual farming applicant would need to demonstrate that in terms of their impact on the catchment, is that your evidence?
- A. Their impact on the water management sub-zone.
- Q. And you'd accept, wouldn't you, that that's a very onerous obligation for an applicant in terms of an evidential basis within an application, you'd accept that?
- A. I'd accept that it's, it's something of a burden, but it's – we're talking about delivering on water quality for the entire region in catchments that are seriously degraded. I think the council can probably help in that regard in terms of providing information to them, but I think that's probably appropriate given the state of the waterways.
- Q. And as a – you've got experience in consent applications?
- A. Yes, I have.
- Q. In preparing consent applications, what type of information would you expect an applicant to have to have to hand to be able to establish that their single farming operation didn't have the type of effect you're suggesting on surface water quality in a sub-management water zone – a sub-management water zone – I think I've mangled those words, but you get my intent?

0950

- A. What information would I expect them to provide? Well the starting point would be the Overseer run. The comparison with the CNLMs, so the volume of leaching per year that they were over the CNLMs. Any information that the council had available about what other leaching was going on in the water management sub-zone and the mitigation strategies that they were recommending to put in place and then an assessment of what the cumulative load was in the water management sub-zone and over the period of time that they were applying for consent, what would the effects be of granting consent.
- Q. And that would be in terms of their individual contribution to that water management sub-zone. That's right?
- A. Their contribution to the cumulative load, yes.

Q. You have been present for the evidence of Dr Snelder through the course of these proceedings?

A. Yes, I have.

Q. And you would have heard his evidence that the impact of these farms on SIN concentrations in the receiving environment does not go a long way at all to meeting the schedule (E) targets. That was his evidence, wasn't it?

A. It was his evidence, yes.

Q. And that his evidence was also that the scenarios that have been modelled do not add up to a lot of change in overall end loss across the target catchments at all, that was his evidence?

A. That was his evidence. I also heard the evidence of Dr Parlato and Dr Dewes that – if I get this right – that was based on 70 farms and that that also assumed that all of the other farms in the water management sub-zones were at a set rate across all the comparisons, so it is not surprising that there was very little change in water quality for the 70 farms.

Q. Well I recall their evidence around that in terms of pathway (b) and I am not going to accept that evidence today for you because you are not a water scientist.

A. Yes.

Q. I am going to talk to you now although about your understanding of that evidence. Have you read or reviewed the table of modelled outcomes and scenarios that Dr Snelder presented to this Court?

A. I have read it, yes.

Q. And you will accept that, I am just going to add them up – there is 12 scenarios that he records in his table and I could take you there if you like. It's at 2020801.

A. So volume 2?

Q. Volume 2 and it is at the back of tab 12.

WITNESS REFERRED TO BUNDLE OF DOCUMENTS

A. The back of tab 12?

Q. Yes. And you will see that there is a range of scenarios there from pre--regulation to dairy sector pathway (b) isn't there?

A. Yes.

Q. And you will recall, if you were present, that there's been various questions about proposed pathway (b) but in my questioning of Dr Jolly I highlighted proposed pathway (e) and proposed pathway (f). Do you recall my questioning of her in that regard?

A. Mhm.

Q. And I put to her in re-examination whether she understood and recalled these modelling scenarios, and her answer was yes.

A. Yes.

Q. What's your understanding of proposed (e) and (f) Mr Scott?

A. That (e) and (f) are based on the implementation of good and best management practices, alongside a discretionary pathway for IFLU that don't meet the controlled activity status.

Q. But that modelling there looked at a kg reduction from current leaching rates and also a percentage reduction for CVG doesn't it?

A. Yes it does.

0955

Q. So the types of scenarios that Dr Snelder looked at extended beyond just reductions for dairy, for example, there were scenarios that also applied percentage reductions to farms within those water sub-zones?

A. Yes.

Q. And Dr Snelder's evidence, you'll recall, was that between all of these scenarios, the difference in – mean relative difference and the difference in water quality outcomes is very small, that was his evidence, wasn't it?

A. That was his evidence, yes.

Q. And do you recall that Dr Snelder responded to your evidence about a – your preferred or what you considered to be the most relevant scenario which is recalibrated Table 14.2 alone?

A. Mhm.

Q. He responded to that proposition in his reply evidence, didn't he?

A. Yes, sure.

Q. And for your benefit, that's at 202.0807 – and Mr Sinclair will just give me the tab for that, the next one.

A. 2 13?

- Q. That's right.
- A. What was your reference, sorry, 0807?
- Q. Yes and I'm at paragraph 15 which is 0807?
- A. Mhm.
- Q. And Dr Snelder there talks of the difference between the water quality outcomes under the alternative pathways and he refers to proposed pathway D and proposed path E of the mean relative difference of the outcome for the scenario that Mr Scott considers is the most relative, he discusses that comparison at that paragraph, doesn't he?
- A. Yes, he does.
- Q. And he goes on: "In my opinion, these differences to the modest improvement represented by the best-case scenario recalibrated Table 14.2 alone are not of practical importance to the environmental characteristics that are affected by river nitrogen levels." That's Dr Snelder's evidence, isn't it?
- A. Yes, it is.
- Q. There is no other water quality scientist giving evidence in these proceedings, is there?
- A. No, that's correct.
- Q. Thank you. I'm going to return now to Policy 14-6 and we were – and we're nearly finished with this policy – but we were discussing the water quality direction that is given in your (vi) and that one is given priority, in your view, over the others?
- A. Yes.
- Q. And we've spoken that in terms of the others, you'd expect there to be a waiting – a balancing exercise undertaken by a decision-maker?
- A. Yes.
- Q. If I could just return to 14-6(b) and I'm going to dwell again on this wording about the trajectory of staged reductions. And you and I have discussed your wording but we haven't really discussed the wording that's been added by Fish and Game to represent their position, so they go on to put that: "This wording should be extended to acknowledge that the staged reductions are towards achieving the cumulative nitrogen leaching maximums." That additional wording still doesn't provide guidance on

how far away from the cumulative nitrogen leaching maximum an applicant needs to be to meet this exception, does it?

A. No, I'd agree with that. It suggests that it's moving in the direction of the CNLMs but doesn't state that it has to at some point meet them, although that might be inferred.

Q. It also doesn't state how close or far an applicant needs to be from those CNLM when they're making the downward trajectory, does it?

A. No, it doesn't.

Q. It doesn't indicate the amount of reduction at any given time over those stages either, does it?

A. That wording doesn't, no.

Q. It doesn't indicate to a decision-maker the acceptability of the exceedance of the CNLM in any given scenario, does it?

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A. So the acceptance of the CNLM?

Q. The acceptability of the exceedance, of the CNLM in any given scenario. It doesn't tell a decision-maker where that line is, does it?

A. No it doesn't.

Q. And your evidence today is that an applicant needs to rely on this wording to establish themselves as an exception before they can even go on and rely on any of the considerations in (b)(a). That's your evidence today?

A. It is. So I think when it is talking about a need to show a trajectory of stage reductions, that's to be considered for the exceptions under (b)(a). So there just has to be a trajectory of stage reductions. It doesn't speak to the level of acceptability that comes under (b) (a). So when it is being assessed, those are the criteria to assess it.

Q. That's slightly different to what you told me earlier where an applicant needs to establish these exceptions as a gateway before you get on to consider the matters in (b)(a).

A. No I think that these are the criteria to be considered for whether it is suitable to be considered and then those are the matters that are considered, once you get there.

Q. But you would agree that the need for an applicant to understand how they will fall into the exception set out in (b) is very important?

- A. Yes.
- Q. Mr Scott, we've talked about various iterations of how your policy considerations will work over the last few days.
- A. Yes.
- Q. You would accept that there are no limits in this discretionary activity pathway, are there?
- A. No set numerical limits, no. I would agree with that. There's a lot of, there are lots of different elements at play there. There's the closeness to the CNLMs, there's the land use capability class. There's what happening in the water management sub-zone. There's CVG compared to partial farming, there's a lot going on. I have really struggled to find a definite limit. I have looked at that but there's so much there that I have not managed it.
- Q. There's no set limit and you'd also accept that it is unlimited in terms of its exceedance of the CNLM?
- A. That there is no explicit limit to it. I would accept that, yes.
- Q. And there's no restriction or guidance as to the timeframe over which those reductions need to be made, is there?
- A. There's no set time limit. There is a set duration for the consents to be considered as a discretionary activity of 10 years. There's not a set timeframe for them to achieve the reductions but it does say a staged trajectory of stage reduction, so over time it is sinking. But no, there's no must achieve this by this year and this by this year.
- Q. Under this pathway there's no certainty and outcome for an applicant's poor water quality is there Mr Scott?
- A. I think there is certainty of having a pathway to apply for consent which was, I believe, the main issue at play when plan change 2 was notified, was that there was no certainty in terms of farmers to have a pathway to apply for consent.
- Q. Would you accept this proposition, that if one of the considerations is that an individual applicant needs to establish their individual impact on water quality in a sub-management water zone otherwise their consent will be declined. Do you accept that that risks creating circularity in the

provisions and creating a situation that this plan change is looking to overcome?

- A. I don't see that personally but if it is the view of the Court, I expect that will be changed, certainly not the intention.

1005

- Q. I'm going to take you now to our last topic and it's Overseer. Your evidence has gone into some detail around Overseer, hasn't it?

- A. Yes.

- Q. And you'll accept presumably that that evidence is given within the context of your planning expertise?

- A. Yes, definitely. Yes, I'm not an Overseer expert.

- Q. And so like all of us, you will also be informed by the joint witness statement signed by the Overseer experts in these proceedings, won't you?

- A. Yes.

- Q. All of the witnesses in that conferencing session agreed that Overseer should not be used to produce an absolute number, didn't they?

- A. Yes, they did.

- Q. They also agreed that there were inherent uncertainties around the predicted or estimated value arising out of Overseer, didn't they?

- A. I accept that, yes.

- Q. And as I understood their position, that was because actual end loss could be above or under the CNLM on any given occasion, that's right?

- A. That's right.

- Q. All of those experts agreed that it was impossible to determine the extent of uncertainty on an individual farm basis, didn't they?

- A. Yes, I'm sure that's correct.

- Q. If you, we can go there if you would like, if you would prefer that?

- A. I'm happy to accept that as what they said.

- Q. I'm at page 5 of their joint witness statement and that is at volume 4, tab 2 and tab, tab 15.

- A. Tab 15?

- Q. Thank you Mr Sinclair. And I'm just at the paragraph starting: "Overseer provides an estimated end loss value"?

- A. Sorry, which page is this?
- Q. Page 401.0407, page 5.
- A. Okay, yes.
- Q. "Overseer provides an estimated end loss value. The actual end loss value at the farm level that Overseer attempts to predict is unknown in an exact sense because of the uncertainties associated with sample-based measurements," and that was an agreed position by all experts in that conferencing session and you'd also accept from your reading of the evidence that Dr Tavernet and other experts are clear that Overseer estimates end loss, doesn't it?
- A. Yes.
- Q. Overseer doesn't measure actual end leaching does it?
- A. No, it doesn't. Yeah, it's my understanding Overseer is very good at estimating long term average leaching, but because of variability in weather, rainfall and heat and things that it does change, there's variation there that Overseer can't predict.
- Q. So when the planning framework relies on Overseer it's not directly regulating outputs is it?
- A. No.
- Q. It's assessing the risk of end leaching, isn't it Mr Scott?
- A. Yes, it is.
- Q. And that's consistent with your own evidence where your view is that use of the CNLM to represent a level of confidence that activity has a low risk of excessive leaching is appropriate?
- A. Yes.
- Q. Thank you. Are you familiar with Dr Tavernet's will stay statement?
- A. I've read it, I don't remember what's in it, but I have read it.
- Q. You'll recall then if I could prompt your memory that he discussed situations where you can avoid comparison with limits based on absolute values, do you recall that discussion?
- A. At a high level.
- Q. Well, let's go there?
- A. Yeah, let's go there.
- Q. Tab 2 in that folder?

- A. Thank you.
- Q. And I'm at page 401.0017 of the bundle?
- A. Yes.
- Q. Paragraph 35?
- A. Mhm.
- Q. Dr Tavernet notes: "To avoid comparison with limits based on absolute values, the implementation of a relative approach can be considered," that's his evidence, isn't it?
- A. Yes, it is.
- Q. And he goes on to give some examples and including two of the ones that are most commonly utilised?
- A. Mhm.
- Q. And these are examples of plan frameworks and at (a): "Relative reduction as used in several zones within Canterbury where relative risk of N-loss is determined based on factors such as stocking rate, irrigated area and/or area of winter cropping, depending on the starting point farm systems are then required to reduce their N-losses by a relative amount, example 25%. As Overseer versions change, the absolute numbers may change but the direction of travel and required reduction percentage remains intact." That is describing the specified reduction pathway isn't it, Mr Scott?
- A. That's describing – that's applying the relative reduction that I believe he was talking about on each farm and applying a – an average across all farms to be achieved which is different to what I believe he was talking about which was on a particular farm you can look at the inputs and determine an amount that it should reduce by. But the specified reduction pathway talks about achieving a 20% reduction across the board so everyone has to reduce by 20%, irrespective of where their leaching levels are at the beginning.
- Q. You'll accept that Professor Horne in arriving at that 20% recommendation reviewed a large number of individual farms and their data sets, didn't he?
- A. Yes, yes.

- Q. And in doing so, he accounted for a range of circumstances, scenarios, rainfalls, soil type, accepted good management and best management practices in this region in the Horowhenua/Manawatū Whanganui region, didn't he?
- A. Yes.
- Q. I'm just going to go up now to paragraph 34, 34(a), this supports the approach that Dr Tavernet notes is a way to overcome use of Overseer as an absolute value where he talks about quantifying relative trends and changes despite uncertainties and absolute N-loss estimates and this talks about the idea that Overseer assesses a direction of travel in its application, doesn't it?
- A. Yes.
- Q. Thank you.
- A. I'd also add that I think my provisions also speak to a direction of travel in that and also a relative reduction. I forget the reference, if you give me a minute I will find it for you.
- Q. I think I have it, if it helps, it's your evidence which is that: "Overseer is better for relative reductions rather than absolute numbers," and that's at paragraph 236 page 9 of your supplementary statement, that's the evidence you're referring to?
- A. No, I was talking about the provisions themselves.
- Q. You'll recall that evidence though?
- A. Yes.
- Q. That evidence where you say that: "The better use of Overseer is for relative reductions rather than absolute numbers," you recall that evidence?
- A. Yeah, yes, that's correct. Yeah. So, in my 14-6(c)(vi): "Any nitrogen leaching reductions required as a condition of consent are expressed as a percentage relative to the relevant Overseer reference file." So it's talking – it's aiming to express the reduction in terms of the inputs required to achieve a certain Overseer projected number and not using the Overseer number itself as a fixed target to be achieved.

- Q. You would accept, however, that to get to the point where we are imposing consent conditions, you first must need to obtain a consent by reference to an absolute number. You would accept that?
- A. By reference to a projection in Overseer, yes.
- Q. Which is represented as an absolute number in a table isn't it Mr Scott?
- A. It is. I don't believe that the MFE guidance was talking about the use of Overseer as an absolute number.
- Q. I am putting to you Mr Scott that the estimated leaching value is put into an absolute number in the table and you must meet that as a gateway before you go on to have conditions of consent imposed. Do you accept that?
- A. Yes.

CROSS-EXAMINATION: MS BUXEDA

- Q. Good morning Mr Scott.
- A. Good morning.
- Q. My name is Ms Buxeda. I am here representing Horticulture New Zealand. I have a few questions regarding your proposed provisions. Thankfully, on A3, which I think makes it easier including the Court and I sort of plan to build a little bit on discussions you have just had with my friend, solely in relation to commercial vegetable growing. As you will understand, that is my focus here today.
- A. Of course.
- Q. And I think I just – and I know we have discussed this but I sort of would like to go through this with a very clear lens on CVG. Can I talk you through your proposed provisions as they relate to CVG.
- A. Mhm, sure.
- Q. So I'd like to start with Rule 14.1. And I know there has been a lot of discussion about Policy 14-6 and I am sure we will come back here but let's jump forward a little bit.
- A. Mhm.
- Q. To Rule 14.1 which I believe sits at page 15 of this A3.
- A. Yes.
- Q. The controlled activity pathway.

- A. Mhm.
- Q. Now your proposed provisions remove the specified reduction pathway of 35% and reference to the NRAT for CVG which in my understanding means that to get a controlled activity consent, any CVG activity has to meet Table 14.2 numbers as calculated with Overseer and using reference files to account for changes in software versions, is that correct?
- A. Yes.
- Q. And then sort of skipping through that. If the CVG operation does not meet the 14.2 figures as calculated with Overseer files, they go down a discretionary pathway at Rule 14.2(a).
- A. Yes, that's right.
- Q. And both of these options require and rely on the use of Overseer, is that correct?
- A. Sorry, say that again?
- Q. Both of these options are controlled, and the discretionary pathways rely on the use of Overseer?
- A. That's correct.
- Q. Without any alternative methods of assessment.
- A. Well when it gets to discretionary stage, there's the option to bring in any other material that is relevant to the application. So I anticipate that Overseer will be used because it's the controlled activity gateway but other things could be brought to bear at the same time.
- Q. So just touching on that and I understand that takes us back to Policy14--6.
- A. Mhm.
- Q. And you had a discussion with my friend about this but my reading, and I think the sheet is full of this but to get through the discretionary pathway, Policy 14-6(b) requires that those must be established first so an exception may be made for an existing intensified land use and in this conversation, I am specifically talking about CVG, to enable a transition to alternative non-intensive. That's not what we are looking at.
- A. No.

- Q. The exceedance of the CNLMs due to a calculation against overestimation, now that one involves Overseer, is that correct?
- A. Yes.
- Q. And then we come to the third option, where the existing land use cannot meet the CNLMs in Table 14.2, involving Overseer or the equivalent maximums produced using reference file and a trajectory of stage reductions as demonstrated towards achieving the CNLMs, which also rests on Overseer, is that correct?
- A. Yes, that's correct.
- Q. Thank you, so it's my understanding that, to get the discretionary pathway you'd need to pass through the exceptions in (b) and all of those come back to Overseer?
- A. There is in (b)(ii), there's the option to bring to bear other alternative means of assessment that doesn't include Overseer. So: "As shown by the results or more scientifically robust models that estimate nitrogen loss and the opinion of the person who has a certificate of completion." So it's, it allows for other models that aren't Overseer, at, so it brings the option of if you believe that Overseer is overestimating end loss then you can use other models. Suitably robust models and supported by a suitably qualified person, you could do that.
- Q. But yet the CNLMs, the exceedance of those CNLMs, those CNLMs are fundamentally based on the Overseer calculation? So that Overseer is used to establish those CNLMs?
- A. Yes.
- Q. And I guess and I probably haven't made this clear, my concern with that arises from discussion with Dr MacKay previously in the week. Were you aware of this, where the CNLMs, his comments were: "The CNLMs were established without reference to any CVG files." So there's no CVG input.
- A. Yeah, I accept that.
- Q. Excellent and I think that the struggle that I'm trying to highlight here maybe is that CVG is required to engage with their Overseer to demonstrate compliance, or not, with CNLMs, that is correct?
- A. That's correct.

- Q. The CNLMs have been established using Overseer but no reference to CVG in those established limits?
- A. Yeah and I understand there's a suggestion that there should be a reference file set up for CVG and I would support that.
- Q. Thank you. That reference file is only in relation to CVG, CNLM updates, is that correct, not the fundamental setting of the CNLM limits, which had no reference to CVG, is that correct?
- A. That's true, yeah.
- Q. Excellent, thank you and I would like to sort of take this a bit further and explore how Overseer has particular struggles in relation to CVG and I know from discussion you are fundamentally aware of this but I would just like to discuss this. Are you aware that CVG is unable to model various crop types and rotation cycles?
- A. Yes.
- Q. Thank you and are you aware of the evidence regarding the scientific robustness of the NRAT for CVG?
- A. I'm aware that it's been developed by Professor Horne with input from Dr Le Miere and Dr Parlato. To my understanding that's the extent of the scientific development that's gone into it. To my understanding it hasn't been peer reviewed and it hasn't been field tested.
- Q. I would just like to take those comments a little bit further and I'd like to take you to Andrew Barber's reply evidence and I can read this or I can take you there directly, I can give you the citation for that. We have volume 2, tab 22.
- A. Yes.
- Q. Thank you and I'm looking at 202.1257 or maybe I'm looking at 1258 but I'm looking at paragraph 10 specifically. The NRAT has been ground-truthed and tested, initially amongst seven growers representing over 1,000 hectares and then later more widely as part of the HortNZ Growing Change FEP rollout." Would that not count as testing?
- A. Yes, I suppose that does count as testing.
- Q. Thank you.
- A. Doesn't count as peer review, but yes it, yeah.

- Q. But the NRAT has been developed in consultation with a range of experts, so we have specifically CVG, Dr Jolly was involved and Andrew Barber as well as experts for pastoral, so there was a range of people involved in that development and it's gone through various iterations, is that correct?
- A. Yes, that's my understanding.
- Q. Thank you and you mentioned evidence from Drs Parlato and Dewes and in your evidence you state: "In summary and relying on the evidence from Drs Parlato and Dewes, I believe that these alternative pathways are less scientifically robust, create greater uncertainty and issues of inequity, will create gaps and are less likely to deliver." Now are these conclusions that you have here in relation to CVG or just pastoral farming?
- A. So in relation to all of that, but I do recognise that Overseer has particular issues with CVG so to me it's more a case of Overseer doesn't do particularly well with CVG, I think it – the Overseer analysis said that it does moderate-to-well but the pastoral – but Overseer does much better for pastoral.
- Q. Okay.
- A. And so – and NRAT does – I wouldn't say that NRAT does a better job, but it also models N-loss as well.
- Q. Thank you, and I just –
- A. Or risk of N-loss.
- Q. Or risk of N-loss. I would just like to take you back to that statement in your evidence where you say that you rely on the evidence from Drs Parlato and Dewes in conclusion.
- A. Mhm.
- Q. Are you aware that neither of these doctors provided evidence in relation to CVG?
- A. Yes.
- Q. And do you rely on any CVG-specific evidence in reaching your conclusion regarding the alternative pathways?
- A. It's my understanding from listening to the – from reading the material and listening to the hearing, I understand that CVG has some particular problems and one of them being that no model works particularly well for

it but that it does – CVG has a problem with very high leaching. That being the case, I think it seems to fit best in the discretionary category that, that has potential high level of adverse effects on the water management sub-zone and the waterways in the areas that it is grown in, that it is based in. And that at discretionary stage any models can be brought to bear on that, including NRAT and I don't think that's inappropriate. I think that that's perfectly fine and that aligns with the MFE guidance of using Overseer alongside other models.

Q. Thank you. Are you aware of evidence, you mention the impact on water quality, are you –

A. So – mhm?

Q. – sorry, you mention impact of CVG on water quality there and I'd just like to follow that up – are you aware of evidence from Horticulture New Zealand that for nitrogen phosphorus and sediment the contribution of CVG is a proportion of total contaminant load is small, sitting at 0.7% of the nitrogen load, 0.4% of the phosphorus load and less than 0.5% of the total sediment load in the region?

A. I would accept that because I am aware that CVG is less than 1% of the total area.

Q. Thank you and I do think it's important to take that into – that context into consideration here, given the impact of the small amount of CVG in the area. Thank you and I think we'll leave that there. In your supplementary statement you provide additional provisions and obviously they've been updated before the Court. And in the supplementary statement of evidence, you say in relation to the Overseer version updates and reference files, that this would ensure that applications are always assessed against the appropriate CNLMs in a manner that is fair, equitable, protects water quality and provides certainty to all farms that have estimated leaching below the levels set by the plan that consent would be granted.

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A. Yes.

Q. Now I quite like this sentence. I would like to explore those four concepts. So you have mentioned fairness and equity, water quality and certainty.

I understand that your issue with equity and fairness is that existing consent holders who went through Table 14.2 were required to work hard to get to that level and they cannot exceed it but the alternative pathways which are proposed, would allow farmers to innovate below the CNLMs. Is that a correct summation of your concern on equity?

A. To innovate below the CNLMs? Sorry I don't understand that phrase. It is my understanding that the specified reductions pathway provides a blanket 20% or 35% reduction for CVG as a controlled activity and that the NRAT would, based on criteria set out in the schedules, provide a score that relates to a risk profile.

Q. Can I please take you to the document –

A. Sorry I will just finish that.

Q. – sorry.

A. I don't believe that either of those two pathways. Well I think if a farmer could show that they are below the CNLMs, they would use Table 14.2 because they have the certainty of longer consent durations but that the other two would mostly be used by farmers who don't expect 14.2 so they would be above the CNLMs. So they won't be innovating below them, they would be having the opportunity to gain control activity status for activities that are considerably higher than the CNLMs.

Q. In terms of the innovate below the CNLMs. Can I please take you to volume 5, tab 13, the joint witness statement.

A. Yes.

Q. And I am looking at 501.0585, that's volume 5, tab 13. Almost at the end of that, the second to last page at point 12. In the right-hand column, second paragraph, "Ms", yourself "Considers that it is an important equity issue to allow farmers who have been consented below Table 14.2 to have the flexibility to innovate below the CNLMs in the same way available to other farmers."

A. Yes. So that was in relation to the council's provision that already consented farms would not have the ability to increase their leaching level above what they were already consented at, even if it was within the CNLMs.

Q. Okay, thank you. So as I understand it, your equity issue is that you have problems with growers who have been able to get consent, complying with Table 14.2 and your concern that this alternative pathway creates equity issues with other growers trying to get through without meeting Table 14.2 limits.

A. Yes.

Q. Are you aware that only one commercial vegetable grower has been able to get consent under the One Plan?

A. Yes, I am.

Q. And we had a discussion with **Mr Plaque** in week 2 of this hearing that that consent was granted when the regional council was granting consents under a good management practice. So no growers had been able to successfully gain consent under an Overseer pathway?

A. Yes I accept that. The Overseer pathway has had that problem with circularity and being out of date and things but yes, I accept that.

Q. And just to encapsulate that. No CVG growers have gained consent through Overseer table.

A. Currently no.

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Q. And by your statements, this means that extremely limited issues of equity and fairness arise for CVG growers from alternative consenting pathways because nobody has gone through that table?

A. Sorry, can you say that again?

Q. This raises limited issues of equity and fairness for CVG growers because no CVG grower has met that table?

A. I'm not sure how that has – what you mean by “limited equity issues”, can you spell that out for me a bit?

Q. It appears to me that your concern about equity and fairness is that where operations have gone through Table 14.2, should there be an alternative pathway this would have raised equity issues between the two?

A. Yes.

Q. But no grower has been able to get through 14.2?

A. Right, I think my point in this table was saying in response to the council provisions that said that those activities that have been through 14.2 and

got consent for below 14.2 wouldn't have – wouldn't be able to gain another controlled activity consent and I understand that the, the issue was concern that they would use the alternative pathways to allow for a greater extent of leaching as a controlled activity.

Q. Sorry, I think less in relation to the table, more in relation to your conception of equity and fairness, where there – would be two classes where somebody has been forced to go through the table and meet those limits and then with an alternative consenting pathway there would be, in your Honour opinion, inequity between those two?

A. No, I think you've misunderstood the reference in the joint witness statement.

Q. Okay, so stepping back from the joint witness statement. In your evidence, you state the fairness and equity issues this potentially raises as between different operators are self-evident. Farmers who work hard to ensure their operation can qualify as a controlled activity under Table 14.2 should not have a less restrictive regime than those who cannot or choose not to meet it?

A. Yes.

Q. And I take us back to the fact that we're looking at this from a CVG lens, no CVG growers are able to meet 14.2?

A. Right. Is what you're saying that there are no CVG operators to, to, to object to the fact that other CVG operators might obtain consent more easily?

Q. I am.

A. Yeah, that's fair.

Q. Fantastic, thank you. I would like to briefly discuss the water quality improvements. In your original evidence you state: "With the appropriate revisions to the policy statement and the introduction of the full discretionary pathway, I believe this is the most appropriate way to use Overseer and the most appropriate way to deliver on the water quality outcomes." And I believe you're referring to 14.2 as a controlled activity and a discretionary pathway for those who cannot meet it, is that correct?

A. Yes.

Q. Which water quality evidence did you base this conclusion on, can you recall?

A. I think at a high level the direction of Policy 5-8(a) is that the CNLMs need to be established under the set criteria that aim to deliver on the strategies for water quality.

Q. Thank you and in formulating that opinion did you do an assessment or was there any assessment that you looked at of the water quality improvements arising from the NRAT or the specified reduction pathways for commercial vegetable growing?

A. Sorry, can you repeat that?

Q. In formulating the opinion that this was the most appropriate way to deliver on the water quality outcomes in the plan, this Table 14.2 and discretionary, did you look at any assessment of the water quality improvements arising from the NRAT or the specified reduction pathways for CVG?

A. Ah, I understand that there are, you know, based on the evidence of Professor Horne and Dr Snelder that there are improvements, that there are potential improvements from – for CVG from using those, I'd accept that.

Q. Thank you. I would like to talk about certainty next. In your opinion, is a controlled activity application more certain than a discretionary activity application?

A. Yes, yes.

1040

Q. Thank you. Now I promised that we'd go back to it, but can I take you to Policy 14-6?

A. Yes.

Q. Now, and I know that you've talked at length with my friend about this and I'd like to look at (b)(a).

A. Yes.

Q. Now from my notes you ordered these in a hierarchy and you specifically said that all the "have particular regards to" are at the bottom of that hierarchy so we have "only grant consent," we have "consider potential effects" and we have "make a decision consistent" and then we have, at

the bottom of that hierarchy “have particular regard” and my notes say that you said that those should be structured as they fall. So: “Have particular regard to the contribution made by improving nutrient management,” first: “Have particular regard to the extent and duration of non-compliance,” second and then: “Have particular regard where the CVG, the growing area does not exceed the baseline and within three years will achieve minimum reduction of 35%,” that one falls last?

A. Sure.

Q. So that is right at the bottom of all of those considerations? And in building on the discussions you had with my friend would you agree that if grower, looking to get a CVG consent, reading 14-6 (b) and (b)(a) may not be certain whether they could get through that?

A. I guess that’s the nature of a discretionary activity, as you’ve said, but the, when reading through the list the reference to commercial vegetable growing, that’s the only one that’s specific to commercial vegetable growing, so that one’s quite directive when you’re, if you’re a commercial vegetable grower. That one is very relevant to their, their activity, to their application.

Q. Look I agree that it’s relevant to their application but there’s no indication in there for a decision maker or an applicant that that should therefore have, should therefore fall differently in your hierarchy, is that correct?

A. Perhaps but it’s also the only one that has a turn limit and a percentage reduction, so it’s quite directive about what the expectations are on commercial vegetable growing.

Q. And I understand the directiveness but I guess my concern here is there is a lack of, no sorry let me rephrase that and I guess my point goes to certainty here. Based on the evidence would you agree that it’s certain that CVG will not meet the table. Well, at least for greens, will not meet the table?

A. I would accept that it is unlikely to.

Q. Thank you, so the discretionary pathway is uncertain I understand that, but it seems to me that the only certainty for CVG here is that they are not, there is no available option for them to get the controlled activity pathway?

- A. It's not –
- Q. Thank you.
- A. It's not denied to them, they still have the potential to meet it if they're able.
- Q. But the evidence before the Court is that no leafy greens are able to do that?
- A. Yeah, that's fair.
- Q. Thank you. I would like to turn to a discussion about "most". So Policy 5-8(a), you mentioned this in your evidence-in-chief, in which you comment on your understanding of the word "most"?
- A. Yes.
- Q. And you specifically say that the meaning of the term "most" is important to assessment of PC2 and whether Table 14.2 is achieving what it needs to give effect to the RPS?
- A. Yes.
- Q. And I can take you to the point in your evidence if you would like?
- A. If you like.
- Q. We are looking at volume 2, tab 37.
- A. Which book is that, 3?
- Q. I don't have –
- A. 4?
- Q. And I'm looking at paragraph 6-11, which is 204.2209?
- A. Yes.
- 1045
- Q. And we are talking about policy and you regard this as using the term "most" as in the greatest quantity amount, measure degree or number, the majority of instances, greatest as in size or extent?
- A. Mhm.
- Q. So it is your understanding that Table 14.2 needs to establish nitrogen leaching maximums which are achievable on the majority of farms, is that correct?
- A. Yes.
- Q. And you are aware of evidence that only two of the 48 CVG growers can meet the year 10 CNLMs in the table?

- A. I am. And I am aware that CVG also has, as we have talked about before, has a problem with high leaching and that they only represent less than 1% of all the area grown. So I think that's a case where they only represent a very, very small number but that they have proportionally a big problem with leaching. In that case I would say the majority of farms can still meet the majority. Specifically CVG farms probably can't but I think that's appropriate.
- Q. You are aware of evidence for Horticulture New Zealand about the importance of food security and food affordability for New Zealanders.
- A. Yes.
- Q. And you are aware of the uncertainty of the discretionary pathway to get consent?
- A. I accept that it is somewhat uncertain but I have tried in my provisions to provide more – at least a starting point for CVG growers to get consent and basically to be pushed as hard as they can, as a discretionary activity, because I think that is appropriate. And also discretionary activity, I think, is the place where you can bring together those tools. It is recognised as high risk. I mean the discretionary activity pathway I think is for those activities that are recognised as having the potential to have a high level of adverse environmental effects and that is where you can bring together other tools to assess.
- Q. And you have acknowledged in question that the impact of CVG on the region is extremely small?
- A. The region is very big and CVG is very small. Yes I accept that their impact on the whole region is small; their impact on their local environment is probably much more significant.
- Q. We are looking at the region here. I would just like to draw attention to one more comment in your evidence.
- A. Mhm.
- Q. You say: "When the purpose of PC2 is considered, the new proposed controlled activity pathways are not necessary. Professor Horne estimates that most farms can achieve the Table 14.2 CNLM now they are updated and you say this means there is no policy gap needing to be filled such that other controlled activity pathways are needed." Now given

the only two CVG operations can, in fact, meet Table 14.2. Do you agree that there is still an existing policy gap for CVG/

A. No that goes to what I just said before.

Q. Are you confident supporting an interpretation and implementation of the policy which establishes nitrogen leaching maximums, which are unachievable in 96% of CVG operations?

A. Yes.

Q. And are you still comfortable in your assessment to the Court, that Table 14.,2 is achieving what it needs, to give effect to the RPS in relation to CVG.

A. In relation to intensifying land use yes and in relation to CVG specifically. As I said before, I think it is an activity that has a high impact, so yes I think that is appropriate.

Q. Now I would like to loop back to our earlier topic of discussion on fairness. We heard from Mr Day yesterday, do you agree with his opinion that the most productive land should be used for the most productive use?

A. Yes I do.

Q. Do you agree that vegetables are considered a highly productive use, given the health benefit in National Food Security implications?

A. Absolutely.

Q. Can I please take you to a document that my friend took you to yesterday. The section 35 report. You still have that in front of you?

A. Yes, I do.

1050

Q. Fantastic, can we look at page 58 please, right at the bottom, 58 and going over the page 59.

A. Yes.

Q. “This called into question whether the framework holds true to the concept of natural capital as each farming system should comply regardless of land use types.” And I actually wonder if I need to read a little bit more ,that’s merely the point that I highlighted but it says: “It is currently unknown with a high level of certainty what the N-loss rates from commercial vegetable growing is likely to be in relation to Table 14.2” – well, we know now that nobody can meet that and it is shown that few

resource consents have been granted for commercial vegetable growing and it is because they exceed the CNLMs in Table 14.2 which as we know were made without reference to CVG and due to the policy wording in Chapter 14.

A. Yes.

Q. And I just want to highlight here that there has been doubt whether this natural capital framework works in relation to CVG, because CVG is grown on LUC 1 and 2, however, it has never been able to get consent?

A. I understand that, but I – that's because of the problem with Overseer version updates as much as anything else and the fact that the policy, if you couldn't meet 14.2, the policy is very circular so there was no way through.

Q. So just taking that back to Overseer version updates?

A. Probably less to do with Overseer updates for CVG because –

Q. Because if it was –

A. – perhaps they wouldn't meet them anyway.

Q. – somebody would have got through the table but nobody has got through the table?

A. No.

Q. So on a, on a natural capital where the higher production of land should be used for the most productive use, under this CVG is barred from that?

A. Sorry, I missed that word, what was that?

Q. Under, under 14.2, CVG wouldn't get consent even while it's a highly productive land use on highly productive land?

A. I would accept that because it's –

Q. Thank you.

A. – a high leaching activity.

THE COURT: JUDGE SEMPLE

Ms Edwards.

CROSS-EXAMINATION: MS EDWARDS

Q. Good morning the Court and good morning Mr Scott.

A. Good morning.

- Q. I wanted to, I want to just start with a couple of general questions. And I think I heard you say yesterday that you agreed as a general planning principle that regulations should be the least stringent needed to achieve the environmental outcome?
- A. Yes.
- Q. And in terms of choosing activity status from a planning perspective, do you agree that if there was no obvious or quantified benefit from a more stringent activity status, but it would take longer to process, cost more and create greater uncertainty, it wouldn't be appropriate to choose the stringent activity status?
- A. Yeah, I'd accept that.
- Q. In terms of Plan Change 2, you'd agree that the section 32 report say that the main driver of the plan change was a return to business as usual regulation of existing IFLU as soon as reasonably practicable?
- A. Yes, that it established a workable framework and updated CNLMs.
- Q. But this key driver was timeframes or, you know, doing this as soon as reasonably practicable, so timeliness was a key consideration in terms of how long it would take to get the plan operative, how long it would take to process consents and how quickly mitigations would be implemented, would you agree with that?
- A. I'd agree that it was seen as timely to rectify the situation, that was the unworkability of the plan and that unregulated activities were regulated, yes.
- Q. And you agree as well, in terms of getting – it was also timeliness in terms of getting farms consented and getting farms implementing mitigations to improve water quality?
- A. Yes, I'd accept that.
- Q. Yeah. And I'd like to ask you a few questions about equity. First of all, equity is mentioned in the RMA, is it?
- A. No. Not specifically.
- Q. And what we're required, or what the RMA requires is, in terms of a new plan, is a section 32 assessment about whether PC2 is the most appropriate way to achieve the purpose of the Act by assessing the

efficiency and the effectiveness of the proposal in achieving the objectives, that's correct, isn't it?

A. Yes.

Q. And you agreed yesterday that PC2 is an amending proposal, so in terms of section 32 the objective of PC2 is the purpose of the plan change?

A. Yes, yes.

1055

Q. And you were taken to the purpose of PC2 yesterday and I don't think we need to go there, but you'd agree that it is about improving the workability of the provisions for IFLU by updating the CNLMs, by providing a viable consenting pathway for activities that don't achieve the CNLMs and that's an order to return to a regulation of IFLU as soon as practicable?

A. Yes, I'd accept that and that also the amended plan that resulted from PC2 as the most effective and efficient way of delivering on the objective of the Regional Plan 14.1, the objective there, in terms of –

Q. Yes.

A. – life supporting capacity of the water and meeting the values in schedule (b).

Q. And that's because PC2 didn't substantively amend the objectives, so the objectives, the water quality section of the RPS are still relevant, but my specific question to you was about the purpose of PC2, which is also relevant because it doesn't introduce any new objectives? So getting back to my questions around equity, in terms of equity your evidence has considered equity from the perspective of a farmer who's worked hard to meet and be consented under Table 14.2?

A. Yes, in terms of the equity.

Q. Yes.

A. And it's also, there's an emphasis also on allocating the limited nitrogen capacity to assimilate nitrogen according to the land use capability of the land.

Q. But that's not you've looked at it from equity, in your evidence you say equity from the perspective of a farmer who's worked hard to achieve best CNLMs?

A. Yes.

- Q. Under Table 14.2?
- A. Sorry, yes.
- Q. And then in response to questions yesterday you agreed that the evidence is that there's 35 farms who have been consented under Table 14.2 and in terms of those farms have been consented under Table 14.2 have had to work hard to get their consent. The actual number might be less than 35 because that 35 will include some that were below 14.2 or already at 14.2?
- A. Yes.
- Q. And equity or fairness might differ depending on your perspective of your experiences or your situation?
- A. Sure, I think another equity issue is the one that Mr Day spoke to yesterday about the ability when other farming land uses are brought into the system as everyone seems to think that it will, that there's some allocation left for them after this.
- Q. So that's equity from the perspective of a farmer who's not regulated by PC2?
- A. That's right.
- Q. Yes and PC2 arose from a perceived unfairness in enforcing the operative One Plan provisions, didn't it?
- A. Arose from a perceived unfairness of enforcing the One Plan provisions because of the problem with the Overseer updates and the policy framework.
- Q. Circularity of the policy?
- A. Absolutely, yes.
- Q. And so that was from the perspective of the unconsented IFLU, unfairness to the unconsented IFLU, wasn't it?
- A. Yes.
- Q. And if we took, for example, the perspective of an unconsented dairy farmer, who had developed and invested in their farm in accordance with the social licence that applied at the time. So they lawfully established, lawfully intensified, lawfully developed, lawfully invested and they might propose to work extremely hard to make a 20% reduction but they still don't meet Table 14.2. From the perspective of that farmer, they might

find it unfair that since 2017 they've, through no fault of their own, they've been sitting in limbo, as Mr Passey describes it and they've been unable, they've had to deal with uncertainty and risk and there's been no consenting pathway for them, they might find that has been unfair, mustn't they?

1100

A. Yes I would accept that. I would also point out that the One Plan has been operative since 2012, so they have had, now, 12 years to acclimatise to what is in the One Plan or they have bought a farm in the intervening period and have, you know, if they have done their due diligence they would know what the regulatory environment has set for them.

Q. But they have been unable to get consent and the evidence from the farmers was that they were facing – it was a risky situation for them in terms of risky with their bank, they were unable to sell their farms And they felt that could be considered unfair from their perspective.

A. I will accept that.

Q. They might also consider it unfair if compliance with Table 14.2 meant that they couldn't operate a financially viable business.

A. Yes I accept that.

Q. And they might it unfair if their only option was to apply for an expensive and uncertain discretionary activity consent?

A. That being the case they would be letting it very irate and the One Plan is quite directive about wanting to restore the health of those water ways and that it sets those limits in order to achieve that. That is the point of chapter 14 of the One Plan.

Q. Remembering that I am talking about the farmer that is going to be making a 20% reduction, so they are making a substantial reduction. They might also find it unfair that a single metric, being LUC has been used to determine their nitrogen limit in Table 14.2 when their actual impact on the environment might actually be lower if you took into account things like rainfall, attenuation, distance from water body.

A. Yes that's fair but I think that should come in at the discretionary stage. All of that information can be brought to bear at the discretionary stage.

If they think they have a good case, then they would be confident that they would get consent.

Q. My question to you though is they might find it unfair that they have to go to that discretionary phase to do that, compared with the council's provisions which would have allowed them to go as a controlled activity, do a 20% reduction which is significant for them and not have to go through that expensive and uncertain discretionary pathway to have to argue that factors such as rainfall, attenuation, distance from water body, should be taken into account.

A. I acknowledge that they would feel that way but I feel that the council preferred version, I think, provides too much ability for allowing leaching that would be above the CNLMs, that wouldn't deliver on the water quality outcomes and I think Dr Snelder's evidence supports that. That the best outcome for delivering on the water quality targets in the One Plan is that everyone achieves 14-2 and all those that can are driven as close as they can to it.

Q. And you would accept, and I think my friend for the council took you there, that Dr Snelder looked at a range of different scenarios and there wasn't a significant difference between the different water quality scenarios.

A. I accept that but as I said before, I defer to the evidence of Dr Dews on that score.

Q. And that evidence wasn't accepted by other witnesses was it. That was Dr Dew's evidence?

A. Yes.

Q. And in terms of natural capital, so moving to a different topic. You'd agree there is no direct measure of natural capital, so Table 14.2 has used LUC as a proxy for that?

A. Yes.

Q. And you agree, because it is a proxy, it might not accurately reflect the actual natural capital or the actual nitrogen leach and vulnerability of a particular farm?

A. I would accept that it doesn't model it perfectly. I think it best models it of all of the alternatives but it does it imperfectly as all models do.

- Q. Well, there is no other alternatives that have been considered to LUC, that have been considered in this proceeding though are there?
- A. Well, the NRAT has biophysical characteristics and that coarse – that I understand coarsely model elements of natural capital.
- Q. But that's not being proposed instead of LUC is it?
- A. The pathway is being proposed instead of LUC.
- Q. Well, in alternative, but it is not replacing LUC?
- A. Ah, the pathway is – means the LUC won't be a factor. If it's – if the NRAT is –
- Q. LUC is still in the plan though, LUC is still in the plan?
- A. LUC is still in the plan.
- Q. Yeah. In terms of the CNLMs in Table 14.2, you'd agree that if all IFLU meet them, we won't achieve Schedule E water quality targets, will they?
- A. I would – I'm not a water quality expert, I'll defer to them.
- Q. But that was one of the scenarios that Dr Snelder modelled wasn't it, compliance with – full compliance with Table 14.2?
- A. Yes.
- Q. And we didn't achieve the Schedule E targets, did we?
- A. No. But did, did get closer to it.
- Q. Okay, but we didn't get there, there was still – and you see Ms Patterson's reply evidence, I assume you're read Ms Patterson's reply evidence?
- A. Yes.
- Q. And in there, she talks about one site being Manawatū at Hopelands and she says that even full compliance with Table 14.2, you exceed the load by so much, there's – you still wouldn't achieve the Schedule E target?
- A. I would accept that and I guess in response –
- Q. Yeah.
- A. – does that mean that we should allow any level of pollution there. The –
- Q. No, and that – no, no, that's not my point. My, my – solely what I was putting to you was that CNLM tar – achieving CNLMs isn't going to achieve Schedule E, further reductions are going to – or further reductions or mitigations or strategies are going to be needed and this is the Ms Daly and Ms Patterson's evidence that further strategies and reductions are going to be needed in the future to achieve those targets?

- A. Yes.
- Q. Yeah. And you'd accept – so and moving on to the pathways in PC2. You'd accept PC2 was – it was always contemplated in both the One Plan and PC2 that there would be farms that couldn't meet their CNLMs and they'd need to – and there would need to be a pathway for them to apply for consent?
- A. Yes, absolutely.
- Q. Under your proposal, those farms would need a discretionary consent and – yes?
- A. Yes.
- Q. – and my client's particular focus is on the unconsented dairy farms and whether there's a workable pathway for them to return to regulation as soon as practicable. Professor Horne's evidence is that there are around 167 unconsent dairy farms and he says 47 to 67% of them might not be able to achieve their year 20 CNLM after a 20% reduction in nitrogen loss.
- A. Yes.
- Q. So if his analysis is correct, you'd agree that there could be 78 to 95 dairy farms needing to apply for a discretionary consent under your provisions?
- A. I understand what he said last week was that an additional 15 to 20% of those farmers could at a stretch could meet 14.2 if they were pushed and incentivised they would be able to make the changes necessary to meet 14.2. So that brings it down by quite a, quite a considerable amount.
- Q. Well, 10% on 78 would be seven or eight farms?
- A. Fifteen to 20% I think he said.
- Q. Okay, well, my recollection was he said 10, 10 to 20% when he was pushed on that. He said it was more like 10%. He said, as well I recall, that they might be incentivised to do that but a one or a two kg extra reduction when they were already making a 20% reduction was quite a big effort for them?
- A. I would accept that, but he did say that at a push they could make it. I would also point out –
- Q. So on the best case scenario, we might be talking – I'm just trying to say there's a lot of farmers, on beset case scenario we might be talking then about 60, worst case scenario 95 dairy farms?

A. Okay.

1110

Q. And compared with a controlled activity, so taking your – having that number of dairy farms in our mind and taking your proposal that they would be discretionary, compared with a proposal under which they'd be controlled if they did 20% reduction, you'd agree that it would take longer to prepare applications and to process applications for a discretionary consent compared with a controlled consent?

A. Yeah, I would accept that.

Q. And the process would also take longer if consents were notified and if there were – needed to be a council hearing and if there were potentially appeals through Environment Court?

A. Yes, I –

A. Yeah, it –

A. – I don't know what the risk would be of that, but yeah, yeah, I'd accept that that's a possibility.

Q. And you'd agree that it would cost more to process control – discretionary consents compared with controlled?

A. Yes.

Q. And you'd agree there would be more discretion about what reduction an individual farmer would need to make under a discretionary consent?

A. Sorry, can you –

Q. Compared with a 20 –

A. – say that again?

Q. - so compared with a 20% controlled activity reduction, there would be greater discretion about the reduction an individual farmer would need to be – would need to make under your discretionary activity rule?

A. Yes, I think that's the point, that they could be, they – it would depend on the circumstances, there, there are some farms that are very high leachers and I think a 20% reduction would be appropriate as an – as a controlled activity. They might be reducing from I think Professor Horne said last week from 100 kgs to 80 and that doesn't seem appropriate to me, especially as a controlled activity.

- Q. But it would be for that farmer to make their case to the – when they – or to the decision-maker and it would be for the decision-maker to decide. So the dis – that’s where I’m coming from, the discretion compared with in the scenario you just gave, the farmer would know that it’s a 20 kg reduction in nitrogen they’ve got to make?
- A. I would accept that that gives them more certainty, yes.
- Q. And it also would give the community more certainty and the council more certainty about the water quality outcomes that would be achieved?
- A. I’m not sure that’s true. If they’re in – at the discretionary stage, the decision-maker should be looking at what can be achieved, how high they are above the CNLMs, what the LUC class and ultimately is that the right activity on that soil.
- Q. But looking at the plan, the community for example, plan users wouldn’t know what’s going to be delivered by that discretionary pathway in a quantitative sense?
- A. What do you mean “in a quantitative sense”? You mean in terms of that – the total amount –
- Q. It’s going to depend on, it’s going to depend on each individual farmer making their consent and each individual decision-maker as to what quantitatively you are going to achieve in terms of water quality?
- A. I guess that’s a fair comment, they won’t know the exact amount. I would hope and expect that it’s more than the 20% but yes, it’s not –
- Q. There’s nothing in there which says it’s got to be more than 20%?
- A. In that sense, yes.
- Q. Yeah. So finally, on this topic, do you agree that the longer timeframes for preparing and assessing and deciding on these activities wouldn’t be considered consistent with a “business as usual” return to regulation as soon as reasonably practicable?
- A. I, I believe it deals with the – and it gets back to the, the purpose of Chapter 14 in the One Plan to regulate intensifying land use to control nitrogen leaching in the area and does it appropriately and to the best extent that it can. I don’t support providing for controlled activity pathways for activities that I wouldn’t be sure aren’t leaching at higher rates than they should be. I can understand the council’s wish to get back to a

regulated state, that everything is regulated and that there's not all these uncontrolled – unconsented activities out there. But I think the most important thing is that they're regulated in the appropriate way.

1115

Q. And as far as PC2 the purpose of that plan change goes, there was this timeliness element to it but the idea – it needed to happen as soon as soon as practicable. They wanted to get people consented, making reductions, getting on with it, not dragging things out, like the delay we've had for the past 12 years since the plan became operative.

A. Sure. Yes I can understand that, yes.

Q. Turning to the topic of Overseer. At the start of the evidence which you gave yesterday, in response to questions from your counsel, you said that you thought it would be helpful having a spreadsheet of Overseer numbers for decision-makers. You made a comment around the appendix to Ms Foster's February or January evidence, providing a helpful spreadsheet of numbers.

A. Yes that was in the context of reflecting on a value of Overseer. Its been used in these proceedings to show past leaching rates that have been consented and I think the value of Overseer going forward shouldn't be underestimated because it can provide a really vital data set in terms of understanding the nitrogen dynamics in these target water management sub-zones and you know, potential for nitrogen accounting in the future.

Q. But you would accept that the spreadsheet numbers only relates to some land uses, some catchments, and only ever a snapshot in time and dependent on the particular Overseer version.

A. Yes, I would accept that. I think the reference file system would probably assist with that too because you could record the table for each update and you could use that to calculate what the values are in each subsequent version. So you could keep it current, but yes the numbers –

Q. And I want to get on to the reference files but just dealing with the numbers and just getting with my point. If you just had a spreadsheet like that attached to Ms Foster's evidence, that spreadsheet alone is only a snapshot in time and you are not even comparing this, you don't even know if you are comparing the same version numbers.

- A. You could be sure that you were comparing them but that would involve further steps, but yes.
- Q. Further steps. You would accept that the council doesn't need Overseer numbers for a catchment accounting purposes?
- A. Yes I would accept that but I think they would be a useful tool.
- Q. Yes. And you would also accept, based on the MFE guidance and the evidence from the experts in this proceeding, that if you were using those Overseer numbers to compare how two farmers were against each other, that would be using them in an absolute sense, wouldn't it?
- A. Sorry, can you repeat that?
- Q. If you were using your Overseer numbers in that spreadsheet, to assess how two farmers compare against each other. Farmer X has 40 kgs, Farmer Y has 50, you are using them in an absolute sense, aren't you, those numbers?
- A. It is a useful comparison. You would want to make sure that you are comparing it with the same version and you know, I would acknowledge that it is ultimately on the farms. It is about reducing their contribution to the cumulative load but yes I still think it would be a useful spreadsheet to have, to be able to compare different farms. To see what they are all doing, how quickly they are reducing, all of that sort of thing.
- Q. I want to put it to you that that is exactly what MFE says we shouldn't be using Overseer to do. MFE says we should be using it to assess relative change within a farm, to check we're on a right trajectory, that mitigations are resulting in this farm reducing, that it is inherently unreliable if you are using it to compare two different farms, with different farm systems, different location, a range of other variables that are impacting on that farm at that particular point in time, that are different for those two farms that Overseer cannot model well and that's why you cannot use it as an absolute number.
- A. I, my provisions have attempted to suggest a system for setting conditions that do speak to relativity, relative to the relevant Overseer reference file.
- Q. But can I just stop you there, I'm not talking about your provisions, I'm talking about your statement that having absolute Overseer numbers would be helpful and having a spreadsheet of those. All I'm trying to put

to you is that, that would be looking at absolute numbers and it wouldn't actually be helpful for decision makers because it could give them a false sense of precision or false information, if they were relying on that to say farmer A was higher than farmer B?

A. I wasn't anticipating them using it to determine whether a farm should get consent or not, I was talking about it more in a, in the sense that you'd be able to track progress over time against the CNLMs and test the water quality and compare that with what the consented leaching rates were in the water management subzone. If you didn't have that material, you would be comparing some Overseer numbers with some risk profiles with some percentage reductions and you wouldn't have a data set that, it would be much more difficult to pull together that sort of information based on three different sets of criteria.

Q. But you agreed with me that council can still do catchment accounting, without having that information?

A. It could but I think that could be, it would add a great deal of value to it if that was available.

Q. That's something I think you and I disagree on, but I'll accept that that's your opinion. Just the last question I wanted to ask you, the very last topic that my friend for the council discussed with you was around these reference files and you took her to your provision, Policy 14-6 (c)(vi) where you said that you have to express your Overseer number as a percentage of a reference file? I just wanted to clarify with you, that particular paragraph only applies to exceptions to CNLMs, it doesn't apply to a CNLM?

A. To a controlled activity.

Q. Yes.

A. Yeah, that's fair.

Q. The other thing I'd wanted to just clarify with you is that the purpose of expressing end reductions as a percentage of the reference file is to get around the Overseer version change issue, isn't it?

A. Yes, because that –

Q. To provide for updating.

A. Absolutely.

- Q. You were listening when Dr Dewes gave evidence last week?
- A. Yes.
- Q. And she said that in Rotorua they've got an Overseer reference file approach?
- A. Yes.
- Q. And that their numbers are expressed as a percentage of reference?
- A. Yes, yes.
- Q. And you will have also heard her say that in Rotorua Overseer has been used in absolute sense too?
- A. Yes, I'd accept that. I also understand from having conversations with people at Bay of Plenty Regional Council that their reference file system is different to the one in the Horizons One Plan, but yes they do have reference files and...
- Q. But what does it say and I'm very familiar with the reference file system there as well having been involved in Plan Change 10, they, but what is the, that the, so the calculation of the reference file is different, but what is the same is expressing the Overseer output number as a percentage of a reference file. That's what you're proposing here?
- A. Right, yes. You see, if I can elaborate on that, really what I meant by that was, I still think that the Overseer, well the MFE guidance says that Overseer is very good at predicting long term average leaching and that due to the variability in everything that it can't model exactly what's going to happen because rainfall changes, all that sort of thing. I agree that we should be looking at controls on, well looking at setting what the farmer has control over, so stocking rates and applications of fertiliser and that sort of thing. But I still think that there's a lot of value in using Overseer to set the boundaries of that and that their activities could be used against an Overseer number but that that Overseer number does change with different versions, so that it doesn't become out of date and they're not being held to a different standard, based on Overseer updating.

MS EDWARDS ADDRESSES THE COURT - APOLOGIES FOR BACKGROUND NOISE (11:26:33)

THE COURT ADDRESSES COURTROOM – ADJOURNMENT (11:27:22)

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.51 AM

LEGAL DISCUSSION – EXHIBITS (12:40:08).

MS WRIGHT ADDRESSES THE COURT – TIMING MATTERS

MS ONGLEY TO THE COURT: JUDGE SEMPLE

Q. There was also the question of Mr Carlyon?

A. Yes. At this stage I don't think we did have any additional questions for him, would there?

THE COURT: COMMISSIONER EDMONDS

Yes, Mr Hodges did.

THE COURT: COMMISSIONER HODGES TO MS ONGLEY

Q. I do have one that I was going to ask Mr Scott, because he's supported, I think, that proposal. So hopefully that will resolve the issue. But other than that, it is quite an important one, it's to do with the tangata whenua values and how they're going to be evaluated as, by a decision maker. Because that could have very wide implications and I just want to understand what's proposed there.

A. Well Mr Carlyon is still on standby so that's fine.

THE COURT: JUDGE SEMPLE

Yes.

MS ONGLEY:

Thank you.

THE COURT: JUDGE SEMPLE

All right, thank you. So I mean I think I'm happy for us to go into the –

THE COURT: COMMISSIONER EDMONDS

Past one.

THE COURT: JUDGE SEMPLE

– Lunch, past one o'clock if we look like we're going to end, so that people can get away.

MS ONGLEY:

Thank you, your Honour.

THE COURT: JUDGE SEMPLE

All right, thank you.

RE-EXAMINATION: MS WRIGHT

Q. Hello Mr Scott.

A. Hi.

Q. I've just got a few, a handful of questions in re-examination covering four topics. The first relates to questions just put to you by counsel for Federated Farmers and it was put to you that your framework as set out in the attachment provided to the Court is not a "return to business as usual regulation." Do you recall that?

A. I do.

Q. Can you please tell me what the rule framework in the current operative One Plan is?

A. The rule framework is meeting the CNLMs established in objective 5(a) and providing for limited exceptions to meeting, to not meeting, that Table 14.2.

Q. So high level, am I correct that it's one controlled activity opportunity and one restricted discretion opportunity?

A. That's correct.

Q. So can you please comment whether in your opinion a framework which has one controlled activity opportunity and one discretionary activity opportunity with a broad framework, is in fact just returning to business as usual?

A. Yes, I think it is.

- Q. I've now got a question about Table 14.2 and it was put to you a number of times that Table 14.2 is not going to get to the targets in the One Plan, do you recall that?
- A. I do.
- Q. And you also discussed with counsel that more will be required in the future to do that, do you recall that conversation?
- A. Yes.
- Q. Can you please comment, in your view, on which of a resource-based regime, like Table 14.2, or a historic leaching-based regime is going to make changes in the future to reach those targets an easier or more straightforward thing to do?
- A. I would consider that making, assessing applications against Table 14.2 is the easier, more the clearer path to better regulation in future.
- Q. And is that because a resource-based regime is easier to roll out?
- A. Yeah, that's right.
- Q. Across all -
- A. Across all, other activities and other subzones.
- Q. - I've now got some questions about the Policy 14-6, in response of some of the propositions put to you. And the first is that you were asked some questions about the extent to which an applicant for a discretionary activity would need to show individual or cumulative impact on water quality and that this would be quite onerous. Do you recall that?
- A. I do.
- Q. Can you please comment on the extent to which you see the limits in Table 14.2 acting as a guide for applicants, in that regard? About what's expected?
- A. Yes, I see them as being very important, they, that's the controlled activity limit. I think the policy wording is quite clear about the importance of still looking at the degree of non-compliance with the CNLMs. So I would suggest that that's quite strong guidance to decision makers as to what is appropriate.
- Q. And there have been a number of questions put to you about the certainty or specificity of the policy direction that you've recommended in Policy 14-6, putting a hat as a consents planner on with an application

being given to you to consider, can you please comment on which type of framework you consider is, provides clearer direction? One with five matters that you have to have particular regard to and eight regard to, or a short list of concise considerations?

- A. I would find the concise list of considerations clearer and more easy, simpler to or more directive, more easy to understand what the key points are.

THE COURT: JUDGE SEMPLE TO MS WRIGHT – LEADING WITNESS

RE-EXAMINATION CONTINUES: MS WRIGHT

- Q. I have now got some questions for you in relation to the water quality evidence.

- A. Mhm.

- Q. And my friend for HortNZ put the regional CVG contribution to you of 0.7%.

- A. Yes.

- Q. And made a comment that we are looking at the region here. Are you aware of the water quality evidence in relation to the target water management sub-zone contribution of horticulture?

- A. I am.

- Q. Can you please comment on the extent to which you factored in those differing levels, I guess, of water quality information and what you put more weight on and why?

- A. Well my understanding is that commercial vegetable growing mostly happens in the hoki catchments around Horowhenua. In terms of the region wide contribution, it is only less than 1% of all of the area in the region but in terms of those hoki catchments, it is a considerable contribution, considering they have high reaching rate. So there is potential for, my understanding is there is potential for water quality gains in those specific catchments as a result. So as a result of better management, of nitrogen leaching in those catchments.

- Q. Thank you Mr Scott.

QUESTIONS FROM THE COURT: COMMISSIONER HODGES

- Q. Good morning Mr Scott, I am going to start off with a planning question which sort of puts me on the back foot a little bit.
- A. Okay.
- Q. But it is one regarding duration of consent and my understanding is the concept is that anything other than a Table 14.2 option would have a maximum 10-year consent, is that correct?
- A. Yes.
- Q. I would like to understand what is proposed with consent duration for Table 14.2 compliance because we have a very clear message from a number of the questions, that the incentive to use Table 14.2 is the long term consent. Can you please explain exactly what your expectation is of term of consent granted for compliance with Table 14.2 and what is the planning background for that, from your opinion?
- A. So my expectation would be that it would be granted for longer terms than 10 years. Perhaps up to 35 years and that would be as a result of – because the activity would be seen as a low-risk nitrogen leaching activity that it was contributing – the contribution towards the cumulative nitrogen leaching load was at a reasonable level and that meeting that target was delivering on the strategy set out in chapter 5.
- Q. Okay, that was my understanding but I needed to get your view on it, so that is good. Now my follow up question is that in the upper Manawatu catchment, we have been told that even removal of all IFLUs wouldn't meet the SIN targets. I think that is Ms Patterson's evidence. So there is going to be some very, very substantial reductions that are going to be required over and above Table 14.2 And I understand also that the LUC class in that part of the region is LUC 2, 3 you know, quite high. Therefore you could have consents granted for 30 to 40 kilograms of nitrogen per hectare per year for 35 years. That must inevitably compromise the ability to reduce future nitrogen discharges quickly if they are granted long term consents. But this is my non-planner's understanding of the planning framework, but I'd appreciate your comments on my observation please?
- A. It's my understanding, I may be wrong here, but it's my understanding that in those catchments there's considerable other activity that's not

currently IFLU, that there might be extensive sheep and beef or other activities that if brought into the regulatory regime would also make a big contribution towards reducing nitrogen leaching loads but, as I say, I'm not certain of that.

- Q. Yes, this is the difficulty, because I think there are some – the way the plan is written could cause quite a lot of problems in terms of being able to achieve the long-term objectives relatively quickly if consents are granted for 35 years. Do you see any mechanism by which that could be reduced, the term reduced within the scope of the current plan change?
- A. I would – the consent term isn't guaranteed at 35 years. Controlled activities still have the potential, I mean, you still set a duration on, on those consents, so there's a – there is a mechanism there for planners, for the processing planner to apply a shorter term of consent. As things are currently, no, I don't see there's anything more directive than that and perhaps there should be.
- Q. My difficulty is, I've sat on five hearings down here under the One Plan, they are wastewater ones which are slightly different potentially, but each of them the starting point was 35 years and the message that we've been given and presumably will be given by other parties is that if you go Table 14.2 you'll get a long-term consent. And so I do see that as being problematic, I don't know what we can do about it, but it is a concern.

THE COURT: COMMISSIONER HODGES

Your Honour, is there anything you want to add at this point?

QUESTIONS FROM THE COURT: JUDGE SEMPLE

- Q. We've had – we've been having a conversation about this and trying to get our heads around it collectively and I wanted to understand again in relation to this idea that people are incentivised to use Table 14.2 as a result of the planning framework, I wanted to understand what I, what I heard I think yesterday in relation to Chapter 12 in the One Plan and the consent durations there, and particularly and I can take you to this in the volume if that would help, it's in volume 3 "exhibits and planning documents" and I'm at page 302.0798. That is tab 17. And particularly

Policy 12-5 in relation to consent durations and the catchment expiry dates and so the extent to which if you are – if your, from the look of it, your discharge consents are going to be controlled by those provisions in relation to the catchment, and so I was trying to understand the interplay between consents that you obtained here under Table 14.2, other consents relevant to your farming operation or your CVG operation and the extent to which the whole planning framework does incentivise you to a Table 14.2 in a practical way and so any comment that you could provide on that would be of assistance?

A. Mmm. Yeah, reflecting on it, the potential for obtaining a controlled activity consent is also quite an incentive in itself –

Q. Activity status –

A. The activity status.

Q. – and certainty of outcome?

A. That's right. And the simplicity of the application, perhaps there is not, not so much expected of a controlled activity resource consent application, so that that in itself is another incentive.

Q. Yes.

A. Mmm, I think if there was a feeling that there was a more – if there was a particularly problematic area a shorter consent would be appropriate. Yes. I guess the consent term is an incentive to – there is a recognition that for these farmers getting down to 14.2 is quite a struggle and that we need to balance it against other factors than continuing to provide for their livelihood and perhaps that's the most we can expect from this plan change. I guess there is an issue with; is that, in future, frustrate a future freshwater plan change and that is still a live issue I guess. It would be up to the consent processing planner to look at it as, is a shorter duration appropriate in the circumstances. If there is an indication that it is going to frustrate further improvement, then perhaps the consent activity status in itself would be enough incentive. If it is not and I think the duration is going to be the added incentive needed to get farmers down the path.

Q. But you can't help me on whether that – I mean duration is up for grabs, I think is what I am hearing.

A. Yes.

- Q. Still within the purview of the consent authority to determine duration and in fact there might be other considerations that come in via Policy 12-5 which mean that associated consents, if not the consents themselves, might end up at a shorter duration anyway.
- A. Yes, that's valid. Yes I think that's right. Consents could be aligned to have a common expiry date under Policy 12-5.
- Q. Yes or the applicant themselves might not think it is much of an incentive but other consents that they need in order to conduct their farming operation are of shorter duration anyway. The longer duration that you might get for one consent might not help for much is what I was more thinking of.
- A. Right.
- Q. You know, that one would generally look at a package of consents required for your operation and if one of them that is necessary is constrained to a lesser duration, a longer duration for another one may not provide that incentive that we have talked about when we look at it in isolation is really what I was trying to understand.
- A. Essentially I guess. I think the non point discharge issue probably is a consent that, you know, as we have talked about, farmers are quite nervous about, because there is a less degree of control. If it is a point discharged, there is a lot they can do about it, it is the non point discharge is more dispersed and perhaps weighs more heavily on their mind, so a longer term consent would probably help with that.
- Q. Right. So is it fair to say, from your perspective, duration can be an incentive but it is not – duration is not clearly definitive in this current planning framework under either the council's option or your option?
- A. Yes I would agree with that.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

- Q. Well I was just reflecting back on the original One Plan case and so I did go and have a look at the decision and noted. I will just read you out the piece I'm referring to. It's a reference to potential terms and it does say 20 years which was indicated as the likely term, so I guess that was the thinking at the time and I guess, you know, now thinking about the – when

the common catchment dates come in and the discharge consents that permits that are going to be required, that might have been a reason for the 20 years we were – that was being indicated. Do you have any thoughts about that? As to why 20 years might have, might have been the period? In fact, some of the ones I looked at the other day, they did seem to be for 20 years, these – yes, I can't put them to hand immediately, but some definitely were, some I understand weren't and Ms Foster did give us some evidence on that?

A. Yeah, I could only speculate, I haven't gone into the consents in detail but with common expiry dates 20 years would allow for a review period after 10 years and then – and another 10 years of reassessment of the consent and perhaps that's where the 20 years perhaps came from.

Q. You don't think it might have been something to do with the Table 14.2 with its trajectory out to 20 years, might that have been another element?

A. Yeah, within the lifetime of the, of the plan.

Q. Because the next part of the decision goes on to talk about a journey in time and there's been a lot of evidence about the journey in time that might be needed. Yes.

A. And the travel, the direction of travel for everyone, yes, it's –

Q. The travel, yes.

A. – yeah.

Q. The next point, too, in terms of signalling the position a long way out and allowing people to be aware of and take responsibility for the externalities of their farming activities. I mean, that might have been another, another thing, maybe?

A. Yeah, yes, absolutely. Yeah. Sorry –

Q. That was – I'm sorry, that was 5 – 121, page with paragraph 121.

A. Sorry, which volume was that in? Volume 5?

Q. I don't want you to look at it, I just think that the lawyers will probably have a hunt for it, so –

THE COURT: JUDGE SEMPLE

That's that original decision, yes.

QUESTIONS ARISING CONTINUES: COMMISSIONER EDMONDS

Q. – of the original decision, yes.

FURTHER QUESTIONS FROM THE COURT: COMMISSIONER HODGES

Q. Thanks, your Honour, I've just got a couple more questions. I guess my concern with that, Mr Scott, is that I got a very clear impression that there is a lot of expectation in this room that consents will be granted for a long term because that's an incentive and I think that's an unfortunate message to be given when there is more to be done, we don't know how it's going to be done, even a 20 year consent could be challenging now if the original 20 years finishes in 10 years' time. So yes, it is something that I think needs to be thought through a little bit more. My other two questions are not quite so significant, I guess, anymore – well, they probably are, actually. The first one isn't, it's in relation to your 14-6(b)(ii) which is relating to the ability to challenge the Overseer files when someone thinks they are higher. And I just wonder, the practicality, the reality and the potential for going down rabbit holes there could be quite significant. It's not something I've ever seen before, I'm not sure how you do it and are you inviting everyone to challenge it?

A. I'm not inviting everyone to challenge it, but I guess acknowledging the, the MFE guidance and the, the idea that's been put forward that Overseer isn't as accurate as people would like it to be and if people feel that the Overseer number isn't fair to them and that they are being denied because of an absolute number, that is an opportunity for them to come up with other robust models that would show that. I don't anticipate it being used very much unless another solid alternative to Overseer comes along in which case perhaps that would be useful. I wouldn't regard NRAT as being something that does that. But perhaps there is an alternative to Overseer out there that potentially could be a utility and that's what that speaks to.

Q. Okay thank you. And the other one that I raised, with Mr Turoa I think it was, about this issue of how you look at the maintenance and the enhancement of mana whenua values. He'd mentioned that he was required to a cultural impact assessment for a water bore. In this

particular case we are looking at maybe 230 new consent applications. Depending on when the new plan change comes in, there could be another 100 renewals, or perhaps even more, up to 150 depending on timing. So there could be anywhere between two and 400 new consent applications. In terms of assessing the effects on the maintenance and enhancement of mana whenua values, my understanding is that only mana whenua can make those judgments. So does that mean that there has to be a cultural impact assessment for every consent application?

A. I'm not the one who came up with those and I am not –

Q. I am aware of that, that is why I wasn't sure whether Mr Carlyon would need to be involved.

A. – but I do represent other iwi groups.

Q. I know.

A. In the country, so I would suggest that possibly the best way to deal with it would be to look – I am not actually sure if there is any re-management plan or hapu management plan that covers that area but a consideration of their activity against the direction of the iwi or hapu management plan would be a good start and then engagement with mana whenua having done that would be another step towards that. Whether it needed a CIA would be up to mana whenua at that point.

Q. Well having been involved in many consent processes, the consent officer will probably take a precautionary approach and require something to be done. So I just think there is a level of uncertainty with that as to what is intended; it makes me quite nervous. So maybe Mr Carlyon could be ready to just respond to that your Honour. That is all my questions, thank you for your evidence.

FURTHER QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. I just wanted to follow up on the question that I put out there yesterday in relation to Forest & Bird's opening. That was having seen what you have done with CVG in terms of your particular regard to point, where you have basically picked up what is in the path way that the council are proposing for a controlled activity under the decisions version. I guess I have been wondering why you hadn't gone the whole hog and done something

similar in relation to the pastoral farming sector. So I am not advocating that necessarily.

A. No I understand.

Q. I am just wanting to understand why you made the distinction that you have, in terms of having the commercial vegetable growers in that perhaps advantage category, depending on your perspective, I guess.

A. Yes.

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Q. Because it maybe doesn't confer all the advantages you might think, but why not look at something similar for the pastoral farming sector?

A. So the reason for that is to my understanding Overseer does a good to very good job of modelling N-loss in pastoral farms and that clause was an acknowledgement that probably CVG will be mostly processed as a discretionary activity because they have high leaching levels and offering some guidance to where the starting point should be for processing a CVG application. That 35% reduction as a starting point, from what I understand, is achievable from baseline and then and that provides some, some direction for the processing of those consents. And that other the other criteria, then you'd look at where does it go from there. So 35% is a start and then further reductions after that. And the reason why I haven't gone to pastoral farming under the same system is that I think Overseer does a good job and more than half of those farms will be able to get a controlled activity consent and I believe that's the better pathway for them to go.

Q. But just thinking about that long tail that we were told about in terms of the 75th percentile and the Table 14.2(a) which the counsel has walked from now, but that table did attempt to look at that long tail in terms of the different water management sub-zones –

A. Yeah, that's fair comment, it does make me very nervous that the 75th percentile has come out, because under that specified reduction pathway, 20% would be all that's required and there are, I understand, some very high leachers out there that would only need to reduce by 20%. I think if the Court preferred to have the specified reduction pathway in, I would strongly recommend having the 75th percentile in there and I would

hope that the provisions would provide the direction that at least the very high leaches would have to come down very strongly towards the perhaps not achieving but towards the Table 14.2 in that if the 75th – if reduction to the 75th percentile was helpful in that regard, then I would agree with them being included.

Q. So I wasn't talking about the controlled activity pathway, I was talking about how –

A. Yes, sure.

Q. – and whether it might be useful to inform the sort of consideration of a discretionary activity because then there's still quite a lot of matters to be addressed here and looked at, hasn't there, so where are the –

A. That's true.

Q. – the strong signals in terms of the direction of travel?

A. Yeah, I guess from my perspective that's still applying the blanket 20% to all farms and from what I understand there's a great deal of variation out there in terms of what land class – land use capability class they're farming on, how far above the CNLMs they are and whether 20% reduction will achieve the same thing on different farms and I am – I hope and expect that that's what my provisions would have the decision-maker look at those different factors and that's why it's hard to set a fixed number because there's so much variability there. I think I would expect that the decision-maker looking at a very high-leaching farm on vary LUC land that wasn't able to reduce by very much would be looking at a decline. And whereas a land use on LUC 1 that was above the CNLMs, perhaps 10 kg above, could be given more time to come down because it's recognised that that's where the intensive land uses is suitable for that land –

Q. Well –

A. – I just feel perhaps more gains could be made by allowing the flexibility to look at the individual farms rather than applying a 20% to all of them.

Q. So I guess is always this issue about flexibility and certainty, isn't there?

A. Absolutely.

Q. And I mean, we had a situation where the council decided by various ways and means they did have a lot of flexibility to operate so I guess

getting that right now might be quite important because we don't really want a "going around the Mulberry bush" –

A. Absolutely.

Q. – again on this matter, do we?

A. Absolutely. And I think that goes to the point that Mr Carlyon made about the importance of implementation and yeah, not –

Q. Yes, I guess – mhm?

A. – not just what's in the plan, but applying the plan is very important.

Q. Yes, yes, so have you got any thoughts about that in terms of more direction that might be included? Well, there's the plan provisions, so I think I need to focus on that rather than what might be done administratively.

A. Mhm. I'm sure more direction can be provided. I think it would – I think the planners could get there if we put our heads together, with some direction from the court, I think we – I can't – there's nothing I can think of right now that would further improve the provisions, but I'm – I accept that more could be done.

FURTHER QUESTIONS FROM THE COURT: JUDGE SEMPLE

Q. I am perplexed by that in some ways. Because it seems to me that effectively what I understand you to say is that you expect that the majority of CVG will end up in a discretionary pathway and so the intention is to provide some more policy guidance to decision-makers about how they assess an application for CVG. And so you put in the 35% and it can be whatever number, 35% over three years, so if an applicant can only – can show 34% in – a 34% reduction three years, are they a prohibited activity after that? And is that the same as the issue that you'd identified above when you talk about a prohibited activity by stealth in terms of a trajectory of reduction?

A. I don't think that would be a prohibited activity by stealth. It says: "Have particular regard where," which means sort of view more favourably if they can meet the 35% within three years. If it was 34% within three years, I think that would be still somewhat in their case depending on what happened after that.

- Q. Is it, is it open, in your view, to a decision-maker to look at an application that comes before them that says: "Well, I can do 20% over five." If that's my set of circumstances: "I can do 20% over five," is it open to the decision-maker to grant the consent still?
- A. Mmm, it would be open to them, I guess, but I think in that case that wouldn't sound appropriate to me. Depending on the other factors and things, that sounds like it would be well outside the direction of that "have particular regard" clause. Yes, they would have an opportunity to apply. I think the policy direction is clear enough that they would be unlikely to be granted consent.
- Q. So the way the policy direction works at the moment in your provisions, as long as you show any reduction then you are through the gate.
- A. Then you can be considered, yes.
- Q. Any reduction gets you the ability to apply.
- A. Yes.
- Q. Doesn't it? And I am not certain that I understand this idea that, you know, towards achieving the cumulative nitrogen leaching maximum makes any difference to that, to the way that that is worded. You have to show a reduction from something or towards something for it to make sense. So it is either a reduction from some kind of current or a reduction towards some kind of future state to get you. So you are going to have to identify some sort of mark that you are being assessed against. So that gets you through the gate. So any reduction will get you through, well 1%. Half a percent will get you through.
- A. Any stage 2 reductions, yes.
- Q. So if I say, if I come in with my application and say I can do half a percent in year 1 and a full percent in year 2.
- A. Mhm.
- Q. The former lawyer in me would argue that I am through the gate in respect of that and so then I am faced with an assessment of whether that reduction is going to be enough to get me a consent if I am applied. Now the question is, is that going to be enough to convince a decision-maker that they should sign on the dotted line and give me a consent and then you are, I think, suggesting in respect of CVG, that you are probably not

going to get a consent unless you can show a 35% reduction within three years.

A. That would be fair, yes.

Q. So it is a bit of a double-edged sword for CVG. It is more policy guidance but actually if you don't meet it, it is a good reason for a decision-maker to say no.

A. Yes, that's fair.

Q. So then I am going to go back to Commissioner Edmonds' question. Why wouldn't you do the same thing in relation to – I am not certain that I yet understand the distinction. If you want to provide that level of policy guidance to a decision-maker as to when they should or shouldn't, then why wouldn't you do the same thing in relation to pastoral?

A. I guess, thinking about it, potentially a famer on LUC 1 land, leaching at 30% above the CNLMs, if they had slightly longer than others to reduce down to 10% above the CNLMs or somewhere else close to it, that would seem like a, that might be appropriate. That could be, you know, their starting point isn't too high. They will show a series of stage reduction, it might take them a bit longer but they would get there. That would be, I guess, a situation where perhaps the 20% wouldn't necessarily benefit. Because ultimately that's the soils that we want to direct intensive farming to.

Q. All right. If you were acting for an applicant, as a planner acting for an applicant in consent for this. Would you, if you were pastoral and you couldn't meet Table 14, you were in this, you were looking at stage reductions, would you use the 20% number simply as a result of the fact that it has been the topic of this hearing and that there is evidence to suggest that it is a – I don't know what word I might use if I was the planning involved, but satisfactory, adequate level of reduction or has been considered to be, or there is evidence to suggest that it is an adequate level of?

A. If they were able to meet it, then yes, I would.

Q. So I guess my question is, is the 20% out there now, already?

A. Already, yeah, perhaps a –

Q. As a, as a –

- A. As a de facto?
- Q. As a de facto, yes.
- A. The m – mhm.
- Q. So that when an applicant comes along under your set of provisions and is attempting to make their case for something other than Table 14.2, is 20% likely to become that de facto starting position, 35% if you're CVG, 20% if you're pastoral, does it start to become the norm?
- A. As a consultant planner, if my client was leaching at 100 kgs per hectare per year and, and they were, and they were proposing dropping it to 80, I don't know if I would be confident of them getting consent. I think that the directions are clear that substantially more would be expected of high leachers. Especially if they're on lower class soil. But I guess, yeah –
- Q. But might I argue that the council put forward a proposition that said that would be satisfactory, I could be a controlled activity if I had achieved that, on the current version, I could, I could have become controlled activity if I – if that, if the Court in all it's infinite wisdom had chosen that instead of your set of provisions, I would have been a controlled activity, so surely that gives you as a decision-maker some idea of where the –
- A. I guess that depends on what the Court decides – if it decides that 20% is the appropriate reduction then I guess that's the direction that it takes. I mean –
- Q. Well, I'm more interested in, in if I'm looking at your provisions which doesn't have the 20% reduction in it –
- A. No.
- Q. – it does have the 35 so that's directing me towards "where did the 35 come from", well, it came from this – the evidence in this hearing.
- A. Yeah.
- Q. That's going to direct me to the 20 as well.

THE COURT: COMMISSIONER EDMONDS

Well, there's also the decisions version, we shouldn't forget that.

THE COURT: JUDGE SEMPLE

Correct, that's right.

THE COURT: COMMISSIONER EDMONDS

That's a modified version that the council brought in.

THE COURT: JUDGE SEMPLE

Yes, that's right, yes.

THE COURT: COMMISSIONER EDMONDS

Well, just lately, in fact.

FURTHER QUESTIONS FROM THE COURT: JUDGE SEMPLE

Q. Yes, so I guess what I'm trying to understand is whether these provisions and particularly when you put the 35 in and send a signal that the evidence that was heard in this hearing had some weight and 35 was picked up and considered to be appropriate, whether I might also then say "well, 20% is the default" –

A. 20% is a point, yes.

Q. – "highest level of reduction that, that the council would have accepted as a controlled activity, therefore why wouldn't I get a consent as a discretionary activity if I could show 20%"?

A. Sure, well, you would also look to the evidence as to why the 20% didn't go in and I guess why the 75th percentile also didn't go in. I, I can see your point that the 35% reduction for CVG creates a, mhm, not an expectation but I guess an indication that the 20% might be okay, I think that would be tested, but yeah, I could see how some people would, would infer that perhaps. But there's just still the question as to if my provisions are preferred, as to why the 20% didn't go in and that, as I said, is because I think, you know, Overseer does, does a good job of modelling N-loss for pastoral farms and they should, they should look to Overseer and the reductions against or towards meeting those CNLMs.

Q. All right.

THE COURT: COMMISSIONER HODGES

Your Honour, could I ask a follow-up question while (inaudible 12:45:00).

THE COURT: JUDGE SEMPLE

Absolutely.

FURTHER QUESTIONS FROM THE COURT: COMMISSIONER HODGES

Q. There's no requirement to adopt the best practicable option under the plan, is there?

A. No.

Q. Is that something that may assist in this matter? I know it's – you've got its detractors and otherwise and I know there's one sitting at the other end, but basically we want people to do the best they can and –

A. Absolutely.

Q. – it's got to include affordability, I guess?

A. Mhm, the problem that I have with practicability and it's in my evidence is that it does create a grounds for arguing about what – what's practical and what isn't and that it's, in my view, it's quite difficult to decline a consent if there's practicability in there because the argument is “well, everything that's practicable has been done so there's an expectation that that has been fulfilled and there may be an expectation of consent being granted there.

Q. Haven't you got exactly the same issue with good management practice?

A. Mmm.

Q. Because that comes down to what can be afforded and what you get – what benefits you get, exactly the same, isn't it?

A. It is. I guess in my provisions good management practice is not the – isn't the key to the controlled activity pathway. Whereas it is for the NRAT.

Q. Okay.

A. And just on that, I was reflecting on it last night, that because the good management practices all have scores and everything in the schedule for the NRAT, that would mean if there's improvements and understanding in that area, that those tables would need to be updated and that would take a plan change, just like we're going through now, in order to update the tables, you know, which is now been overcome for the Overseer

version. With the reference file system, I don't think the same thing could be done for NRAT.

FURTHER QUESTIONS FROM THE COURT: JUDGE SEMPLE

Q. I just think I have one further question for you which came out of questions that were asked by Ms Edwards around the volume of and also Commissioner Hodges around the volume of consents that might need to be processed in a reasonably short time under your provisions and that triggered for me the question of notification. On your provisions, would all of those discretionary – is there any notification provision in the plan around those consents? Would they all fall to the normal test for notification or might there be – if there isn't, might there be something that could be done around non-notification?

A. There isn't in my provisions.

Q. Right.

A. But certainly that is something that the Court could direct a non-notification decision. I guess that's – there's a balance there between assisting with processing times against the potential environmental effects of an application that comes in that's very high-leaching and I don't know if I would – given that there's a lot to be processed, I would expect that the bulk of – even without a non-notification clause in there, the bulk of them would, I expect, would be non-notified. They'd be marginal applications.

Q. Right.

A. The ones that were not marginal I expect might be notified because that's the nature of it. I think that would probably be appropriate.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS

Q. I've got a question, so back in the day when all this was restricted discretionary, that had a non-notification clause didn't it?

A. Ah, I don't recall. I will take your word for it.

Q. Maybe it didn't, fine.

FURTHER QUESTIONS FROM THE COURT CONTINUES: JUDGE SEMPLE

Q. So what, just to be clear, what's your professional position in relation to notification, you think that the standard test should apply?

A. Mmm, yes, I think the standard test should apply.

QUESTIONS ARISING – NIL

WITNESS EXCUSED

MS ONGLEY TO THE COURT: JUDGE SEMPLE

A. Yes Ma'am, Mr Carlyon is still on standby.

Q. Mr Carlyon, yes, let's get him on screen.

A. Yes. Mr Carlyon, can you hear me? I'll just text your Honour, sorry.

Q. No, there he is.

A. It just, re-calling Mr Carlyon to answer questions. Not sure if he needs to be sworn in again?

Q. Yes, well it's been some time for us to suggest that he's still under his original oath, we might just swear him in I think.

A. Yes.

THE COURT: JUDGE SEMPLE

Mr Registrar, if you could thank you.

MS ONGLEY RE-CALLS:

GREG CARLYON (RE-AFFIRMED) (VIA AVL)

THE COURT: JUDGE SEMPLE

Q. Mr Carlyon, I think it's just a question from the Bench and I apologise that we've had you on standby this whole time, for probably one or two questions but they are important questions and so I'll hand you over to Commissioner Hodges.

A. Thank you, your Honour.

QUESTIONS FROM THE COURT: COMMISSIONER HODGES

- Q. Good afternoon Mr Carlyon. You heard the question?
- A. Kia ora.
- Q. Did you hear the question?
- A. Yes, I did Sir.
- Q. Yes, because I raised this with Mr Turoa and he said he wasn't aware of it, my recollection was that he wasn't aware of this proposal and so I wondered, exactly how you would see it working. What does it involve?
- A. Well thank you and subsequent to the examination of Mr Turoa, there's been further discussions with representatives of the regional council, so his position might have matured a little bit in that time. **There's been really constructive discussions with Ms Foster and the executive team in particular.** So I think there are a couple of key elements to have under consideration when contemplating the way in which Māori rights and interests are provided for in consenting, through the discretionary pathway and the two elements of the plan that are relevant are the method at 5-15 and then 14, is it 6(b)(a)(i). And perhaps if I start with the method that will give more the context. I don't have the bundle with me Sir, but I think you've been working off the set of provisions that Mr Scott provided, so I'm at page 7, method 5-15: "Hapū and Iwi," at (a)(iii), (b)(iii) provisions.

MS ONGLEY

- Q. It's page, yes page 5 in our version, page 5.

QUESTIONS FROM THE COURT CONTINUES: COMMISSIONER HODGES

- Q. Right, oh yes.
- A. So Sir, I think are two ways through the challenge associated with engagement with iwi and hapū. The first is that it requires, any process requires a really conscious recognition of the values held by mana whenua and that's going to occur either at the consent level or it's going to occur through the application of the method at 5-15. And if I recall correctly, Mr Turoa made it clear that the very strong preference of the hapū that he represents within Ngāti Raukawa is for the issues to be addressed at the level of the method. So that would require work with...

- A. the regional council to determine the aspirations and values of hapū and just set out the way in which they might be provided for in decision-making, so it might be as specific as to say: “As long as these outcomes are provided for then we have no interest in this exercise, that specific granting of a consent in a specific site.” And I understand that to be Mr Turoa’s position and to me that is the most practical and pragmatic and respectful for what is a really hard consent exercise to be undertaken. So to me it’s not unlike the requirement for catchment accounting in respect of biophysical values and water quality measures to have the regional council lead out this process with the iwi and hapū within the region so that those positions are on the table. It might come through an (inaudible 12:56:08) or hapū management plan, as you said earlier, or it might come through a specific statement as this method sets out. So – yes, sorry Sir?
- Q. That’s my understanding of what Mr Turoa told us as well, that he wanted it dealt with at the regional level if possible.
- A. Yes. And so the second, the second part of it is that in the event that that is not provided for through that method and the council appears to me to be committed to developing these, agreements and position statements with iwi and hapū, although there are, I can’t remember the total number, but approximately 20 iwi and possibly 90 hapū in the region, but maybe half of that are impacted by the provisions of this particular plan change. In the event that that’s not in place, then it requires the resolution of that issue on a per consent basis and as you well know from recent, recent cases, the process of developing that cultural impact assessment is really quite varied between hapū and the level of interest is quite varied. So it in my view will be very challenging, but it critically necessary for the purposes of making a discretionary decision.
- Q. That’s really why I asked the question because I think first of all it puts huge expectations on iwi and hapū who want to be involved that they’re unlikely –
- A. Yes.
- Q. – to be able to meet in terms of the number of consents and what does it do in terms of the effect on processing time and various other aspects of

the consent process. So it is a – I understand exactly why it's there, but I think the implication of it are not exactly clear to me.

- A. Yes and but I think, as you set out Sir, the impact on hapū is significant, both in terms of the requirement of them to participate in the process but what's underpinning their interest is the same issues that have sat at the core of this hearing which is providing for water quality outcomes. So there is a commitment from hapū to engage in that space for that reason, but if it can be reduced or lessened through the leadership of the regional council to prepare these broader statements then I think that is by far and away the best path. And just to complicate things further, of course, it's not just one iwi or one hapū, there are overlapping interests. If you take a catchment like the Manawatū, there is at least four iwi in there and many dozens of hapū who might have an interest for different reasons.

QUESTIONS FROM THE COURT: COMMISSIONER EDMONDS – NIL

QUESTIONS FROM THE COURT: JUDGE SEMPLE – NIL

QUESTIONS ARISING – NIL

WITNESS EXCUSED

EVIDENCE CONCLUDES

LEGAL DISCUSSION – HOUSEKEEPING (13:00:01)

COURT ADJOURNS: 1.03 PM

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Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	Indicates interruption: Q. I think you were – (<i>Interrupted by A.</i>) A. I was – (<i>Interrupted by Q.</i>) Q. – just saying that – (<i>First dash indicates continuation of counsel's question.</i>) A. – about to say (<i>First dash indicates continuation of witness' answer.</i>) This format could also indicate talking over by one or both parties.
Long dash (within text)	Long dash within text indicates a change of direction, either in Q or A: Q. Did you use the same tools – well first, did you see him in the car? A. I saw him through – I went over to the window and noticed him.
Long dash (part spoken word)	Long dash can indicate a part spoken word by witness: A. Yes I definitely saw a blu – red car go past.
Ellipses ... (in evidence)	Indicates speaker has trailed off: A. I suppose I was just... (<i>Generally witness has trailed off during the sentence and does not finish.</i>) Q. Okay well let's go back to the 11th.
Ellipses ... (in reading of briefs)	Indicates the witness has been asked to pause in the reading of the brief: A. "...went back home." The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted. A. "At the time...called me over."
Bold text (in evidence)	If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking, with the <i>first</i> instance only of the interpreter speaking headed up with the word "Interpreter": Q. How many were in the car? A. Interpreter: There were six. Q. So six altogether? A. Yes six – no only five – sorry, only five. (<i>Interpreter speaking – witness speaking – interpreter speaking.</i>)
Bold text in square brackets (in evidence)	If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets: Q. So you say you were having an argument? A. Not argue, I think it is negotiation, ah, re – sorry. Negotiation, bartering. [I think that's what he meant] Yeah not argue.