

**IN THE HIGH COURT OF NEW ZEALAND    CIV-  
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
ŌTAUTAHI ROHE**

**UNDER**

SECTION 299 OF THE RESOURCE  
MANAGEMENT ACT 1991

**IN THE MATTER OF**

AN APPEAL OF THE EIGHTH  
INTERIM DECISION OF THE  
ENVIRONMENT COURT ON THE  
PROPOSED SOUTHLAND WATER  
AND LAND PLAN

**BETWEEN**

SOUTHLAND FISH AND GAME  
COUNCIL, 17 EYE STREET,  
INVERCARGILL

ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW  
ZEALAND INC, 205 VICTORIA  
STREET, WELLINGTON

*APPELLANTS*

**AND**

SOUTHLAND REGIONAL  
COUNCIL, 15 FORTH STREET,  
INVERCARGILL

*RESPONDENT*

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**NOTICE OF APPEAL OF THE 8TH INTERIM DECISION OF THE  
ENVIRONMENT COURT ON THE PROPOSED SOUTHLAND WATER AND  
LAND PLAN**

**DATE: 21 AUGUST 2023**

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**Instructing solicitors:**

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TO: The Registrar of the High Court at Christchurch

AND TO: The Registrar of the Environment Court at Christchurch

AND TO: Southland Regional Council

AND TO: All parties to the Environment Court appeals.

TAKE NOTICE that Southland Fish and Game Council and the Royal Forest and Bird Protection Society of New Zealand Inc (the Appellants) will appeal the decision of the Environment Court in *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2023] NZEnvC 158 (Decision) delivered and notified on 1 August 2023 UPON THE GROUNDS that the Decision is erroneous in law.

**Decision or part of the Decision appealed against**

1. The Decision is the Eighth Interim Decision of the Environment Court on the proposed Southland Water and Land Plan (“pSWLP”).
2. Rule 78 of the pSWLP applies to weed and sediment removal from modified watercourses in the Southland region. The Appellants appeal those parts of the Decision relating to Rule 78, and a new (related) Rule 78A, introduced by the Court.
3. The relevant parts of the decision are:
  - a. at paragraphs [74] to [120];
  - b. excluding those parts of paragraphs [114] to [120] in which the Court’s finds that there should be amendments to Appendix N of the pSWLP but including the parts of those paragraphs (in particular the second to fifth sentences of paragraph [118]) relating to the Court’s decision to approve the Decisions Version of Rule 78 and to introduce Rule 78A; and
  - c. excluding the directions at paragraph [120] relating to Appendix N amendments.
4. By way of summary/context only:
  - a. The Appellants’, along with other appellants to the Environment Court, sought by their appeals amendments to Rule 78 such that weed and sediment removal in modified watercourses could not be undertaken as a permitted activity, and would instead require resource consent, where it would involve the removal of sediment that is composed of 5% or more gravel, or where the activity would occur in habitats of threatened native fish, or where the activity would significantly adversely affect the habitat or health of taonga species

identified in the pSWLP. The Appellants subsequently sought to give effect to this relief by seeking a restricted discretionary activity rule for weed and sediment removal in modified watercourses.

- b. The Court decided to uphold the version of Rule 78 that was approved by Commissioners appointed by Southland Regional Council (the "Decisions Version"), and not make any amendments to Rule 78 as sought by those parties that appealed the Commissioners' decision to the Environment Court (including the Appellants).
- c. The Court decided that there would be a new rule 78A for weed and sediment removal from modified watercourses that would apply only where the applicant for resource consent is a local authority. The Court invited the parties to respond to the Court's drafting of Rule 78A.
- d. The evidence was that approximately 1270km of modified waterways are managed by Environment Southland for drainage capacity, which may include mechanical clearance from time to time. There are approximately 3800km of waterways with similar characteristics on private land that are also likely to be managed for drainage capacity.<sup>1</sup>

### **Error of law**

5. The Court erred in approving the Decisions Version of Rule 78 and introducing Rule 78A (subject to finalisation of the wording of Rule 78A), for the reasons set out in the grounds of appeal below.

### **Question of law**

6. Did the Court err:
  - a. In approving the Decisions Version of Rule 78? and/or
  - b. In deciding there would be a new rule (Rule 78A) applicable to local authorities only?

### **Grounds of appeal**

#### *First ground – s 70 RMA*

7. The Court erred in law in approving the Decisions Version of Rule 78, without excluding the habitats of threatened native fish or taonga species, despite finding that the discharge component of Rule 78 (when undertaken by mechanical methods) has significant adverse

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<sup>1</sup> Joint Witness Statement dated 15 May 2023 at [8]

effects on aquatic life (at [84] and [94]-[95]) meaning that the Decisions Version does not meet the requirements of s 70 of the RMA.

*Second ground – scope (Rule 78)*

8. The Court erred in law in determining that there was no scope to reclassify Rule 78 as a restricted discretionary activity rule (at [80] and [88]).

*Third ground – scope (Rule 78A)*

9. The Court's findings on scope to reclassify Rule 78 (at [80] and [88]) were inconsistent with its subsequent finding that there was scope for a new restricted discretionary rule applicable to local authorities only, and not to farmers, being Rule 78A (at [106] and [108]).
10. Despite finding there is scope for a new restricted discretionary activity rule, the Court directed Southland Regional Council, having conferred with the parties, to file a Memorandum responding to the Court's drafting of Rule 78A, suggesting changes to that drafting, and advising "if the Court lacks scope to approve of the above" (at [120]). In that Memorandum, Southland Regional Council takes the position<sup>2</sup> that there is no scope for Rule 78A.
11. If it eventuates that there no scope for Rule 78A:
  - a. The rule framework for weed and sediment removal from modified watercourses in the pSWLP will be limited to Rule 78 Decisions Version (along with a habitat-related objective in Appendix N (Farm Environmental Management Plan Requirements)).
  - b. The Court erred in placing reliance on Rule 78A as part of the rule framework for management of this activity if it is subsequently not upheld.

*Fourth ground – natural justice*

12. In breach of the principles of natural justice, the Court erred by deciding that there would be a new restricted discretionary activity rule applicable only to local authorities (at [106]) in circumstances where no party had sought such a rule, and without affording the parties the opportunity to address the Court on such a rule.
13. The Court's reasons for approving a rule applicable to local authorities only (at [106] – [112]) are affected by this error.

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<sup>2</sup> Memorandum of Counsel dated 18 August 2023

14. The Court's subsequent direction allowing parties to address it on the wording of Rule 78A (at [113] and [120]) does not address the breach of natural justice in circumstances where it has made a final decision that there would be a rule applicable only to local authorities.

*Fifth ground – Part 2 RMA*

15. The activity authorised by Rule 78 has significant adverse effects on features whose protection is a matter of national importance under the RMA, including significant indigenous vegetation, significant habitats of indigenous fauna, and the relationship of Māori and their culture and traditions with their ancestral water and other taonga. The Court erred in deciding to approve the Decisions Version of Rule 78 contrary to Part 2 RMA.

*Sixth ground – National Policy Statement for Freshwater Management*

16. The decision to approve the Decisions Version of Rule 78 is contrary to the requirement to give effect to the National Policy Statement for Freshwater Management 2022 (and previous versions), in particular the fundamental concept of Te Mana o Te Wai and Policies 2, 9 and 10.

*Seventh ground – pSWLP objectives and policies*

17. The Court erred in law in approving the Decisions Version of Rule 78 having found (at [85]) that other proposed versions of Rule 78 would not implement the objectives and policies of the pSWLP. It follows from that finding, as a matter of logic, that the Decisions Version of Rule 78 must also fail to implement the objectives and policies of the pSWLP. The Court erred in upholding the Decisions Version of Rule 78 in circumstances where it does not implement the pSWLP objectives and policies.

*Eighth ground – enforceability / irrelevant consideration*

18. In approving the Decisions Version of Rule 78, the Court found that:

- a. Several conditions of Rule 78 are unclear, uncertain and unlikely to be enforceable.
- b. The Court does not have scope to address these shortcomings.
- c. The Court declines to add additional permitted activity standards which create "further permitted activity rule implementation challenges".
- d. This means the decisions version of Rule 78(a) is not amended and applies, warts and all (at [89] – [91]).

19. To the extent that the Court was drawing an inference that the additional permitted activity standards would be unenforceable, the Court erred. The additional permitted activity standards are enforceable.

20. The Court erred in finding that shortcomings it identified in the existing conditions of Rule 78 (that they are unclear, uncertain and unlikely to be enforceable) meant it should not amend Rule 78 as sought by some parties. Enforceability of existing parts of Rule 78 not under appeal was irrelevant to the Court's decision on the proposed amendments.

*Ninth ground – s 32 / s 32AA*

21. The Court erred in approving a new restricted discretionary activity rule applicable only to local authorities when there was no assessment under s 32 or s 32AA of such a rule framework.

*Tenth ground – circumventing Rule 78A - unreasonable decision / failure to have regard to evidence*

22. The Court's Rule 78A applies where the applicant is a local authority, but can be circumvented where the activity is undertaken by third parties that contract to the local authority. The Court received evidence from one farming witness of an existing practice where that farmer contracts to Southland Regional Council to undertake the activity on their own land.<sup>3</sup> The expansion of that practice would enable Rule 78A to be rendered ineffective. The Court failed to have regard to:

- a. that evidence and its implications for whether Rule 78A could provide for effective management of the activity's effects on the environment; and/or
- b. whether Rule 78A could simply be circumvented by a contractual arrangement.

*Eleventh ground – adverse inference regarding use of herbicide*

23. The Court received planning evidence of a "risk" that farmers might apply more herbicide if they were subject to a rule requiring them to obtain a resource consent for mechanical removal of weeds from modified watercourses. The Court received no ecological or cultural evidence that the application of herbicide would be a worse environmental or cultural outcome. The Court erred in drawing an adverse inference from the planning evidence and placing weight on that evidence in its reasons not to apply a consenting regime to

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<sup>3</sup> Notes of Evidence, page 69, line 33-34

farmers as part of its decision to apply Rule 78A to local authorities only (at [109]).

## Relief

24. The Appellant seeks:

- a. That its appeal be allowed;
- b. That the matter be referred back to the Environment Court for reconsideration in light of the findings of this Court; and
- c. Costs.

Dated: 21 August 2023



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Craig Morice

Solicitor for the Southland Fish and Game Council



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Peter Anderson

Solicitor for the Royal Forest and Bird Protection Society of New Zealand Inc

This document is filed by Craig Morice, solicitor for the Southland Fish and Game Council, of the firm Rout Milner Fitchett. The address for service of the Appellants is 167 Hardy Street, Nelson 7010.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at PO Box 580, Nelson 7040; or
- (b) emailed to the solicitor at [craig@rmf-law.co.nz](mailto:craig@rmf-law.co.nz) and to counsel at [sally@sallygepp.co.nz](mailto:sally@sallygepp.co.nz) and [shoshona@sallygepp.co.nz](mailto:shoshona@sallygepp.co.nz)