BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under Clause 14 of the First Schedule of the Act
BETWEEN	**TRANSPOWER NEW ZEALAND LIMITED** (ENV-2018-CHC-26)
	FONTERRA CO-OPERATIVE GROUP (ENV-2018-CHC-27)
	HORTICULTURE NEW ZEALAND (ENV-2018-CHC-28)

(Continued next page)

MEMORANDUM OF COUNSEL FOR THE SOUTHLAND REGIONAL COUNCIL REGARDING THE EIGHTH INTERIM DECISION

8 July 2026

Respondent's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 3 379 2467

Solicitor: Michelle Mehlhopt
(michelle.mehlhopt@wynnwilliams.co.nz)
Counsel acting: P A C Maw
(philip@philipmaw.co.nz)

WYNN WILLIAMS

ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

WILKINS FARMING CO
(ENV-2018-CHC-30)

GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT COUNCIL & INVERCARGILL CITY COUNCIL
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME COUNCIL
(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED, KODANSHA TREEFARM NEW ZEALAND LIMITED, SOUTHLAND PLANTATION FOREST COMPANY OF NEW ZEALAND
(ENV-2018-CHC-46)

TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA, WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE RUNANGA O ORAKA APARIMA
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
(ENV-2018-CHC-50)

Appellants

AND **SOUTHLAND REGIONAL COUNCIL**

Respondent

MAY IT PLEASE THE COURT

Introduction

1 This Memorandum of Counsel is filed on behalf of the Southland Regional Council (**Council**) and responds to the direction contained in the Court's ninth interim decision.[1] The Court directed the Council to report to the Court within five working days of the final disposition of the High Court appeal by Southland Fish and Game Council (**Fish and Game**) and Royal Forest and Bird Protection Society of New Zealand's (**Forest and Bird**), of the Environment Court's eighth interim decision in *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 158 (**Appeal**), in relation to Rule 78, and proposed new rule, Rule 78A, of the proposed Southland Water and Land Plan (**pSWLP**).

2 The following parties gave notice of their intention to be heard on the Appeal:

(a) The Council;

(b) the Director-General of Conservation;

(c) Federated Farmers Southland Inc;

(d) Fonterra Co-operative Group Ltd and Dairy NZ Ltd; and

(e) Ngā Rūnanga (made up of Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua, and Te Rūnanga o Oraka Aparima).

3 Fish and Game, Forest and Bird, and the parties listed in paragraph 2 above are referred to collectively as the "**Parties**".

4 The High Court issued its decision in respect of the Appeal on 1 July 2026.[2] A copy of the High Court's decision is attached as **Appendix 1**.

5 The period of time to apply for leave to appeal the High Court's decision expires on 30 July 2026.

6 The Council wishes to indicate that it intends to seek directions from the Environment Court to use its powers under section 293 of the Resource

---

1 *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 204 at [4]-[5].

2 *Southland Fish and Game Council and Royal Forest and Bird Protection Society of New Zealand Incorporated v Southland Regional Council* [2026] NZHC 1900.

Management Act 1991 (**RMA**) with respect to the reconsideration of appeals on Rule 78.

7 Further background to these proceedings is set out in further detail below.

Background

8 Rule 78 (and proposed Rule 78A) relate to weed and sediment removal for drainage maintenance.

9 In the Environment Court's eighth interim decision, the Court considered legal arguments regarding whether there was scope for the Court to amend Rule 78 and apply a different activity status, and determined it did not have scope to amend Rule 78.[3]

10 In addition, in the Environment Court's eighth interim decision, the Court decided to add a new rule, Rule 78A, in relation to weed and sediment removal for drainage maintenance carried out by local authorities only,[4] and issued a direction inviting parties to address the Court on the wording of Rule 78A.

Appeal to the High Court

11 The eighth interim decision was then appealed to the High Court by Fish and Game and Forest and Bird. The Appeal concerned, amongst other things, the scope of appeals on, and vires of, Rules 78 and 78A.

12 Following the filing of that appeal in August 2023, the Parties engaged in alternative dispute resolution in relation to matters raised in the High Court Appeal concerning the Environment Court's eight interim decision.

13 The Parties subsequently reached agreement as to how the High Court appeal could be resolved, and filed a joint memorandum of counsel seeking orders, accordingly.

14 Notwithstanding the agreement reached between the Parties, the High Court properly recorded that it remained for that Court to reach its own determination on the issues raised on appeal.

---

3 *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 158 at [79]-[91].

4 *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 158 at [119].

15 The outcome of the Appeal was that the High Court found the Environment Court erred by:[5]

(a) breaching the rules of natural justice when deciding to introduce Rule 78A, in circumstances where no party sought the introduction of such a rule and where the rule would apply to all local authorities in the Southland region, three of which were not involved in the hearing of the appeals on Rule 78;

(b) reaching a conclusion that was not tenable by declining to amend Rule 78 when presented with amendments to the rule the Court acknowledged were an improvement on the Decisions Version, in circumstances where, as a matter of logic, the Decisions Version of Rule 78 does not meet the objectives and policies of the pSWLP;

(c) taking into account an irrelevant consideration, being the enforceability of existing parts of Rule 78 not subject to appeal; and

(d) applying the wrong legal test by failing to carry out an assessment pursuant to sections 32 and 32AA of the RMA when approving the introduction of a new rule, Rule 78A.

16 The High Court ordered that the proceeding is remitted to the Environment Court to reconsider the appeals on Rule 78 in light of the High Court's findings.[6]

Existing Stay

17 When the Appeal to the High Court was first filed, an application to stay part of the Environment Court proceedings (relating to Rules 78 and 78A) was sought and granted.[7] In the decision granting the stay, the Court directed the Council to report to the Environment Court within five working days of the final disposition of the Appeal.

18 Given that all Parties to the High Court appeal had reached agreement as to the basis on which that appeal could be determined, and given that

---

5 *Southland Fish and Game Council and Royal Forest and Bird Protection Society of New Zealand Incorporated v Southland Regional Council* [2026] NZHC 1900 at [48].

6 *Southland Fish and Game Council and Royal Forest and Bird Protection Society of New Zealand Incorporated v Southland Regional Council* [2026] NZHC 1900 at [49].

7 *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 204 at [5].

the determination ultimately made by the High Court was in accordance with the agreement reached between the Parties, it is highly unlikely that any party will seek leave to appeal the High Court's decision. Therefore, the date of the final disposition of the appeal is likely to be 1 July 2026 (the date that the High Court issued its decision).

19 As set out above, the effect of the High Court's decision is that the decision on Rule 78 is remitted back to the Environment Court in light of the High Court's findings.

Directions sought

20 As recorded at [6] above, the Council intends to seek directions for the Court to exercise its powers under section 293 with respect to the reconsideration of appeals on Rule 78. The Council will require some time to prepare that application.

21 In all these circumstances, the Council respectfully seeks directions that:

(a) the Council is required to file a further reporting memorandum by **Friday, 31 July 2026**, setting out the date by which it intends to file its application for directions for the Court to exercise its powers under section 293 of the Act.

DATED this 8th day of July 2026

.....

P A C Maw | M A Mehlhopt
Counsel for the Southland Regional Council

Appendix 1

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-475
[2026] NZHC 1900

BETWEEN	SOUTHLAND FISH AND GAME COUNCIL AND ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC Appellants
AND	SOUTHLAND REGIONAL COUNCIL Respondent

Hearing: On the papers

Appearances:
S R Gepp KC and S R Galbreath for Appellants
P A C Maw and I F Edwards for Respondent
B S Carruthers KC and M Buddle for Federated Farmers Southland Inc as Interested Party
A Hill and P Williams for Director-General of Conservation as Interested Party
J G A Winchester and JA Riddell for Ngā Rūnanga as Interested Party

Judgment: 1 July 2026

JUDGMENT OF OSBORNE J

Introduction

[1] The appellants, Southland Fish and Game Council (Fish and Game), and Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird), (the appellants), appeal the Eighth Interim Decision of the Environment Court which related to the proposed Southland Water and Land Plan (Plan).[1] The Plan is now partly operative and is a regional plan intended to give direction and guidance on the

[1] *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 158 [Environment Court Decision].

sustainable use, development and protection of land and water resources in the Southland region.

[2] The Plan was publicly notified by the Southland Regional Council (Council) in June 2016, pursuant to clause 5 of the First Schedule of the Resource Management Act 1991 (the Act). The Council delegated the hearing of submissions and evidence on the Plan to a Hearing Panel, pursuant to section 34A of the Act.

[3] Hearings on the Plan were conducted during 2017. The Hearing Panel issued a Report and Recommendations on the Plan dated 29 January 2018. The Council accepted the Report and Recommendations as its Decision on the Plan pursuant to clause 10 of the First Schedule, at a meeting in April 2018. Twenty-five appeals were lodged in the Environment Court (Court), against Council's Decision. In relation to those appeals (heard from 2018 to 2023), the Court issued 9 interim decisions, many of which contained final findings as to certain provisions in the Plan.

Rule 78 of the Plan

[4] Rule 78, subject of the Eighth Interim Decision, provides:

> **Rule 78 – Weed and sediment removal for drainage maintenance**
>
> The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a permitted activity provided the following conditions are met:
>
> (a) general conditions (e), (f), (g), (h) and (l) set out in Rule 55A; and
>
> (i) the activity is undertaken solely to maintain or restore the drainage capacity of a modified watercourse that has previously been modified or maintained for drainage maintenance or restoration purposes at that location; and
>
> (ii) the activity is restricted to the removal of aquatic weeds and plants or sediment deposits; and
>
> (iia) the removal of riverbed material other than aquatic weeds, plants, mud or silt is avoided as far as practicable; and
>
> (iii) any incidental bed disturbance is only to the extent necessary to undertake the activity and must not result in lowering of the bed below previously modified levels; and

(iv) upon completion of the activity, fish passage is not impeded as a result of the activity; and

(v) the operator takes all reasonable steps to return any fish captured or stranded by the activity to water immediately; and

(vi) between the beginning of June and the end of October, there is no disturbance of the spawning habitat of trout; and

(vii) where the modified watercourse is spring-fed, removal of aquatic weeds and plants is only to the extent that is necessary to undertake the activity and is kept to the absolute minimum.

[5] Rule 78 therefore controls the removal of weeds and sediment from modified watercourses. The version of r 78(a) approved by the Council in its original decision (referred to as the Decisions Version) currently provides for the removal of aquatic weeds, plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge, as a permitted activity.[2]

[6] Rule 78 was appealed to the Court by four parties; Fish and Game; Forest and Bird; the Director-General of Conservation; and Ngā Rūnanga (made up of Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua, and Te Rūnanga o Oraka Aparima). Federated Farmers Southland Inc (Federated Farmers) appeared as an interested party before the Environment Court on each of the appeals.

This appeal

[7] This appeal is concerned with the Court's (Eighth Interim) Decision regarding r 78.

[8] Upon service of the appeal, the following gave notice of their intention to appear on the appeal:

(a) the Council;

(b) the Director-General of Conservation;

---

[2] No resource consent is required to authorise a permitted activity.

(c) Federated Farmers;

(d) Fonterra Co-operative Group Ltd and Dairy NZ Ltd; and

(e) Ngā Rūnanga.

[9] For convenience, I will refer collectively to the appellants, the respondent and those other entities as the "Parties".

[10] Following the filing of this appeal in August 2023 there was a lengthy and commendable period of consultation between the Parties in relation to matters concerning the Court's Eight Interim Decision. A working party assembled by the Parties worked on resolution of the issues involved. By March 2026 the Parties reached an agreement in principle as to a settlement of all issues as between the Parties.

[11] Notwithstanding the agreement reached between the parties it remains for this Court to reach its own determination on the issues raised on appeal.

Approach on appeal

[12] The Parties to the proceeding before the Environment Court had the right to appeal to this Court on a question of law.[3]

[13] Pursuant to r 20.19(1) High Court Rules 2016 this Court, after hearing an appeal, may make any decision it thinks should have been made and may direct the decision-maker to consider or determine again any matters the court directs. Pursuant to r 20.19(2) this Court must state its reasons for giving a direction in relation to reconsideration.

Environment Court decision

[14] The Court's decision records:[4]

> [79] Rule 78(a) sets out the conditions wherein the removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose

---

3 Resource Management Act 1991, s 299(1).
4 Environment Court Decision, above n 1 (footnotes omitted).

of maintaining or restoring drainage outfall and associated discharges, is a permitted activity. Absent a specific rule for the discharge of sediment from maintenance/restoration work done by farming activities, general Rule 78(a) applies. Where permitted activity conditions are not met, the activity is classified as a discretionary activity.

[80] The Regional Council and Federated Farmers gave consideration as to whether there was scope for the court to amend Rule 78(a) and apply a different activity status. We accept their submissions, for the reasons they outline, and find that there is no scope for the court to reclassify Rule 78(a).

[81] The consequence of the above ruling is that the court does not have jurisdiction to approve replacing Rule 78 with the draft rule set out in the 2023 Planning JWS (the 'JWS rule').

…

[83] In its Sixth Interim Decision, the court took special care to set out the evidence and its findings on Rule 78(a). As noted earlier, part of that decision, concerned with the planning evidence and plan response, was recalled following an application by the Regional Council. The court's findings on the ecological evidence were not recalled.

[84] At the resumed hearing Dr Burrell was unchallenged in his view that the proposed plan permits "widespread large destruction of habitat over a massive scale; [and] large discharges of [sediment]" impacting a wide range of species. The maintenance and restoration of drainage capacity in Southland's watercourses is a "destructive and damaging activity", the impact of which extends well beyond the locality of the activity. We find that the discharges arising from mechanical methods are having significant adverse effects on aquatic life. That said, we are mindful also that in places the activity is important to the viability of farming.

[85] While an improvement on Rule 78 (DV), the ecologists, Drs Burrell and J Kitson and secondly, Ms A Cain, giving evidence on culture and policy, were unsupportive of two of the alternative methods put forward at the resumed hearing. They are concerned that those methods do not support the emergence of different practices. Overall, as found in the Sixth Interim Decision, the methods will not ensure that natural and physical resources are managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystem and, we (again) find, they are unlikely to implement the objectives and policies of the plan. While we may have overlooked the evidence, the ecologists did not give an opinion on the JWS rule.

…

[89] The supplementary ecological and planning evidence given at the resumed hearing confirms the correctness of the court's observation "that several conditions for this permitted activity rule are unclear, uncertain and unlikely to be enforceable so as to make the rule ineffective". While pointing out that there is no appeal on point, the planners acknowledge the conditions of the rule want for certainty.

[90] Lacking scope to address the shortcomings identified in the permitted activity rule, some parties continue to seek that new conditions be simply

added to Rule 78(a), specifically supporting the version of the rule set out in paragraph [255] of the Sixth Interim Decision. We decline to approve amendments which, as we have already observed, create further permitted activity rule implementation challenges.

[91] This means the decision version of Rule 78(a) is not amended and applies, warts and all.

…

[106] The rule will apply to local authorities only.

[107] We have considered whether the rule should apply to requiring authorities. While we expect some requiring authorities maintain artificial watercourses, we received no evidence concerning their activities in relation to modified watercourses. Given this, we are not able to assess the cost/benefits of the rule under s 32AA and have decided against the rule's application to these entities.

[108] The rule will not apply to farmers. …

[15] The Court then decided to add a new rule, r 78A (subject to finalisation of wording):[5]

Rule 78A – [title needed]

(a) the removal of aquatic weeds and plants and sediment from any modified watercourse undertaken without mechanical equipment for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a permitted activity, provided the following conditions are met:

(i) general conditions (a), (b), and (1) set out in Rule 55A; and

(ii) the removal of river-bed material other than aquatic weeds, plants, mud or silt is avoided.

(b) Where

(1) the applicant for resource consent is a local authority; and

(2) the application for resource consent is for a network consent; and

(3) the activity is to be conducted in a modified watercourse shown on Map Series 8 as a habitat of threatened non-diadromous galaxias or any taonga species listed in Appendix M or is the habitat of threatened native fish –

5 Environment Court Decision, above n 1, at [119].

> the removal of aquatic weeds and plants and sediments by mechanical equipment for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a restricted discretionary activity provided the following conditions are met:
>
> (i) general conditions (a), (b), (e), (f), (g), (h) and (1) set out in Rule 55A; and
>
> (ii) the application for resource consent includes an Ecological Management Plan, that includes:
>
> (1) an objective of avoiding, where reasonably practicable, or otherwise minimising residual adverse environmental effects on threatened or at- risk aquatic biota, taonga species and mahinga kai, including where located in Ngā Rūnanga Statutory Acknowledgement Areas;
>
> (2) Identification of risks of the maintenance activity, including on the habitats of threatened and taonga species, and how the activity will be carried out to achieve the objective of the management plan; and
>
> (3) Identification of how in-stream, riparian habitat and cultural values will be safeguarded and improved progressively.

[16] The Court subsequently issued a direction inviting the parties to address it on the wording of r 78A.

The appeal

[17] The stated overall ground of appeal is that the Court "erred in approving the Decisions Version of Rule 78 and introducing Rule 78A (subject to finalisation of the wording of Rule 78A)". The question of law raised is framed in the Notice of Appeal as follows:

> Did the Court err:
>
> (i) In approving the Decisions Version of Rule 78?
>
> (ii) And/or in deciding there would be a new rule (Rule 78A) applicable to local authorities only?

[18] Eleven grounds of appeal were identified in the Notice of Appeal. The parties now assert four of those grounds of appeal are established, relating to:

(a) natural justice (ground four):

(b) plan objectives and policies (ground seven);

(c) enforceability/ irrelevant considerations (ground eight); and

(d) sections 32 and 32AA considerations (ground nine).

Questions of Law

[19] Questions of law recognised in case law include where the decision-maker either:[6]

(a) applied the wrong legal test (by misinterpreting the law or incorrectly applying the law);

(b) came to a conclusion without evidence or one to which on the evidence it could not reasonably have come;

(c) took into account matters it should not have taken into account; or

(d) failed to take into account matters it should have taken into account.

[20] Pursuant to r 20.19 of the High Court Rules and ss 300–307 of the Act, the parties seek an order that the matter be remitted to the Court to reconsider the appeals on r 78 as set out below.

Grounds of appeal

Ground four — natural justice

[21] The Notice of Appeal states:

> 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

---

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 153. See also *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

> rule, and without affording the parties the opportunity to address the Court on such a rule.
>
> The Court's reasons for approving a rule applicable to local authorities only (at [106]–[112]) are affected by this error.

[22] The Parties assert the Court's subsequent direction allowing parties to address it on the wording of r 78A does not address the breach of natural justice in circumstances where the Court has made a final decision that there would be a rule applicable to local authorities only.

[23] For the Parties, counsel make the following submissions in relation to natural justice.

[24] Decision-makers, including the Courts, may not proceed to determine a matter of which the parties have not had notice. In *Tainui Maori Trust Board v Treaty of Waitangi Fisheries Commission*, the Privy Council overturned a decision of the Court of Appeal on the basis the Court had proceeded to answer a question not directly before it without giving proper notice to counsel of its intention to do so, and so deprived counsel of a proper opportunity to address argument upon the question. [7]

[25] The Environment Court decided to introduce a new rule, r 78A to apply to all local authorities in the Southland region (three of which were not involved in the hearing of the appeals on r 78) without any party seeking such relief. In the circumstances, it was therefore not foreseeable the Court would create a new restricted discretionary activity rule to apply only to local authorities—the findings were implicit neither in the nature of the inquiry before the Court nor obvious from the conduct of the hearing.

[26] The parties were never put on notice that the Court intended to make a finding creating a restricted discretionary activity rule for local authorities, so the parties did not have an opportunity to make submissions on the possibility of that eventuality. This finding deprived the parties of an opportunity to respond and to adduce additional evidence that might have deterred such a finding. Rather, the parties were simply

---

7 *Tainui Maori Trust Board v Treaty of Waitangi Fisheries Commission* [1997] 1 NZLR 513 (PC) at 521.

directed to respond to the Court's drafting of Rule 78A and "advise whether the RDA rule, Rule 78A(b), entry conditions are to specify locations that the draft rule applies to, or alternatively, and more simply, whether it should apply to the whole region. If the latter, sub-cl (b)(3) will need editing (to amend or delete the same)."[8] In the circumstances, the Court's decision to introduce Rule 78A amounts to a breach of the principles of natural justice and constitutes an error of law.

Ground seven — Plan objectives and policies

[27] The Notice of Appeal states:

> 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 [Plan]. 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 [Plan]. The Court erred in upholding the Decisions Version of Rule 78 in circumstances where it does not implement the [Plan] objectives and policies.

[28] Counsel made the following submissions in relation to the plan objectives and policies.

[29] Regional plans must state the objectives for the region, the policies to implement the objectives, and the rules (if any) to implement the policies, pursuant to section 67(1) of the Act. On appeal, as decision-maker, the Court must therefore be satisfied the requirements of section 67(1) of the Act are met when approving the objectives, policies and rules of a regional plan. Rule 78 is intended to implement Policy 30 of the Plan, a specific policy focussed on drainage maintenance. During the hearing on r 78 in May and June 2023, the Court heard further evidence from ecological experts regarding the impacts of weed and sediment removal activities in modified watercourses, as well as evidence on the cultural impacts of these activities.

[30] The Court's finding in the light of that evidence was:[9]

> Overall, as found in the Sixth Interim Decision, the methods will not ensure that natural and physical resources are managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystem and, we

---

8 Environment Court Decision, above n 1, at [120(b)].
9 At [85].

(again) find, they are unlikely to implement the objectives and policies of the plan.

[31] Despite being presented with amendments to r 78 that the Court specifically acknowledged were an improvement on the Decisions Version of r 78,[10] the Court ultimately declined to amend r 78.

[32] The version of r 78 that was before the Court was a derivative of the Decisions Version of r 78. If the version before the Court in the Eighth Interim Decision was an improvement on the Decisions Version but was still found by the Court to be unlikely to implement the objectives and policies of the Plan, it logically follows that the Decisions Version of r 78 could equally not be seen to meet the objectives and policies of the Plan.

[33] An evident logical fallacy occurs when the Court's ultimate conclusion is not tenable as a matter of both fact and logic.[11] By declining to amend r 78, in the Environment Court's own words, "the decision version of Rule 78(a) is not amended and applies, warts and all."[12] As a result, the Court erred in approving the Decisions Version of r 78, on the basis of an evident logical fallacy.

Ground eight — enforceability/ irrelevant consideration

[34] The Notice of Appeal states:

> 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]).

---

10 At [85].

11 *Enterprise Miramar Peninsula v Wellington City Council* [2021] NZHC 549 at [19]; and *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at 681.

12 Environment Court Decision, above n 1, at [91].

> 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.
>
> 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.

[35] Counsel made the following submissions in relation to irrelevant considerations.

[36] The parties assert the Court took into account an irrelevant consideration with regard to the enforceability (or otherwise) of existing parts of r 78. They say the Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal is brought; an appeal is a de novo hearing.[13] In addition, s 290A of the Act provides "[i]n determining an appeal or inquiry, the Court must have regard to the decision that is the subject of the appeal or inquiry." This section clarifies that in the context of a de novo hearing, the Court must have regard to the decision appealed from, but there is no jurisdiction to inquire into the process that led to the making of that decision.[14]

[37] Importantly, in the context of this case, the Court must consider the issues raised in the appeals on r 78, and the Council's decision, but only to the extent that those issues are under appeal.

[38] The Decisions Version of r 78 (above at [4]) contains two clauses, r 78(a) and r 78(b). The focus of the appeals on r 78 was largely on r 78(a). Within r 78(a), there are nine subclauses ((ai), (i), (ii), (iia), (iii), (iv), (v), (vi), (xiii). The appeals focussed on the drafting of four of those, being subclauses (iia), (iii), (iv), and (xiii). The Court's inquiry was therefore focussed on those subclauses. There was no ability for the Court to make findings regarding the enforceability or otherwise of provisions that were not the subject of appeal. Counsel submit the Court, in making findings in relation to the

---

13 Resource Management Act 1991, s 290(1).

14 *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council* EnvC W077/08.

enforceability of existing conditions of r 78 that were not under appeal, took into account irrelevant considerations.

Ground nine — sections 32 and 32AA

[39] The Notice of Appeal states that:

> 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.

[40] Counsel say the Environment Court applied the wrong legal test by failing to undertake a s 32 or s 32AA assessment.

[41] Counsel make the following submissions on this ground.

[42] When preparing a proposed policy statement or plan, cl 5 of the First Schedule of the Act requires a local authority to prepare an evaluation report for that proposed planning document, in accordance with s 32 of the Act. Section 32AA of the Act requires further evaluation to be made in respect of changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed.

[43] The Council duly prepared and notified a s 32 report at the time the Plan was developed. That s 32 report contained an evaluation of r 78 as it was drafted at the time (i.e., at the time the Plan was notified in 2016).

[44] In deciding to introduce a new rule, r 78A, to apply to local authorities' modified watercourse maintenance activities, the Court, as decision-maker, was obliged to undertake an assessment of that new rule. That assessment had to involve consideration of the appropriateness of r 78A in terms of achieving the objectives of the Plan, through the lens of the efficiency and effectiveness assessment articulated in section 32(1)(b) of the Act. The assessment also had to involve consideration of the environmental, economic, social, and cultural effects anticipated from the implementation of r 78A.

[45] Counsel submit no such assessment was undertaken by the Court, despite the Court making a final finding it would introduce a new restricted discretionary rule applying to local authorities only. There are only two references to the requirement of section 32AA in the Court's Eighth Interim Decision in relation to r 78A:[15]

> [107] We have considered whether the rule should apply to requiring authorities. While we expect some requiring authorities maintain artificial watercourses, we received no evidence concerning their activities in relation to modified watercourses. Given this, we are not able to assess the cost/benefits of the rule under s 32AA and have decided against the rule's application to these entities.
>
> …
>
> [109] Firstly, if the rule applies generally (i.e. not limited to local authorities) this will likely incur significant financial costs associated with consenting. Given how destructive of the environment these mechanised methods are, by itself, financial cost is not a sufficient reason to exclude a comprehensive consenting regime. However, the planners were concerned that a response to consenting costs could be a deferment of flood conveyance work or an increased use of herbicides (the use of herbicides is permitted by a rule in the plan subject to certain conditions). While the latter potential was noted in the planners' JWS s 32AA assessment, the likelihood of occurrence and environmental effects are not discussed.

[46] Counsel submit the Court did not undertake an assessment under s 32AA despite being aware of the need to undertake an assessment under s 32AA. Instead, the Court introduced a new rule to apply to local authorities only, in the absence of further evaluation. Accordingly, the Court erred in approving the new r 78A without also preparing an evaluation pursuant to sections 32 and 32AA of the Act. Counsel say the Court applied the wrong legal test by failing to comply with the requirements of sections 32 and 32AA of the Act.

[47] I have set out counsels' submissions in detail as, on my assessment, they are comprehensive and identify for the reasons advanced by counsel that the four aspects of the Environment Court decision now focused upon each involve errors of law.

Discussion

[48] In particular, I am satisfied the Environment Court erred by:

---

15 Environment Court Decision, above n 1.

(i) breaching the rules of natural justice when deciding to introduce r 78A, in circumstances where no party sought the introduction of such a rule and where the rule would apply to all local authorities in the Southland region, three of which were not involved in the hearing of the appeals on r 78;

(ii) reaching a conclusion that was not tenable by declining to amend r 78 when presented with amendments to the rule the Court acknowledged were an improvement on the Decisions Version, in circumstances where, as a matter of logic, the Decisions Version of r 78 does not meet the objectives and policies of the Plan;

(iii) taking into account an irrelevant consideration, being the enforceability of existing parts of r 78 not subject to appeal; and

(iv) applying the wrong legal test by failing to carry out an assessment pursuant to ss 32 and 32AA of the Act when approving the introduction of a new rule (r 78A).

Orders

[49] The proceeding is remitted to the Environment Court to reconsider the appeals on r 78 in light of this Court's findings.

[50] There is no order as to costs or disbursements.

Solicitors:
Wynn Williams, Christchurch
Crown Law Office, Wellington

Counsel:
Sally Gepp King's Counsel, Nelson
Bronwyn Carruthers King's Counsel, Auckland
James Winchester, Barrister, Havelock North