

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

**UNDER** the Resource Management 1991

**IN THE MATTER** of 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)

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

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

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**MEMORANDUM OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL  
13 March 2019**

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Judicial Officer: Judge Hassan and Judge Borthwick

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**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT  
COUNCIL & INVERCARGILL DISTRICT 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 Act 1991**  
(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, SOUTHLAND  
PLANTATION FOREST COMPANY OF NZ,  
SOUTHWOOD EXPORT LIMITED**  
(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

- 1 This Memorandum of Counsel is filed on behalf of the Southland Regional Council (**Council**) in respect of the appeals against the Council's decision on the proposed Southland Water and Land Plan (**pSWLP**).
- 2 This Memorandum addresses the evidence in chief filed by the Southland Fish and Game Council (**Fish and Game**), in particular the evidence-in-chief of Professor Russell Death dated 15 February 2019 and the evidence-in-chief of Ben Farrell dated 15 February 2019.
- 3 Counsel considers that there are two potential issues with the evidence in chief on behalf of Fish and Game:
  - (a) The relief sought in respect of Objectives 6 and 7 appears to be outside of the scope of the relief sought and the issues raised in its (and any other) appeal; and
  - (b) Some of the matters covered by the evidence are issues that the Court has previously directed form part of the Topic B hearing.

### Scope of relief sought

- 4 In evidence provided on behalf of Fish and Game and Forest and Bird, Mr Farrell has recommended that an amendment is made to either Objective 6 or 7 of the pSWLP to provide reference to region-wide numeric outcomes as a bottom line for ecosystem health,<sup>1</sup> prior to the limit-setting and Freshwater Management Unit (**FMU**) process.
- 5 Mr Farrell suggests the following amendments
  - 82 I recommend amending Objective 6 as follows:  
Objective 6  
There is no reduction in the ~~overall~~ quality of freshwater, and water in estuaries and coastal lagoons, by:
    - (a) maintaining the quality of water in waterbodies, estuaries and coastal lagoons, where the water quality is not degraded; and
    - (b) improving the quality of water in waterbodies, estuaries and coastal lagoons, that have been degraded by human activities.

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<sup>1</sup> Statement of Evidence of Ben Farrell, dated 17 February 2019, at [83], [91], [95]-[96].

83 Subject to any amendments to Objective 7, as discussed below, I also recommend consideration be given to amending Objective 6 to provide a reference to region wide numeric outcomes as a bottom line for ecosystem health.

...

95 I consider the following amendment to Objective 7 coupled with supporting numerical outcomes to help define “practical overallocation”, or similar amendments with similar effects, would be more appropriate than the Decisions version and the suggested amendment being sought by Fish & Game.

96 I recommend amending Objective 7 as follows:

*Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes, or earlier where the resource is being used to a point where a region-wide freshwater numeric outcome(s) are no longer being met.*

6 At the outset, there appears to be an issue with scope, as this relief is not specifically requested by Fish and Game or the other Appellants on these provisions (being Forest and Bird, and Ngā Rūnanga).

7 Fish & Game is an Appellant on Objective 6 and 7.

8 It is a well-established principle that the scope of an appeal to the Environment Court is to be determined from the document which initiated the proceedings.<sup>2</sup> In the context of a resource consent appeal, the Environment Court has recognised that scope is to be distilled from the application for consent, any relevant submissions and the notice of appeal, with the proviso that each successive document can limit the preceding ones but cannot widen them.<sup>3</sup> The Court has considered:<sup>4</sup>

in a planning case it is imperative to spell-out specifically the relief sought, ... so that the evidence and the Tribunal’s attention can be focused on the scope of the inquiry.

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<sup>2</sup> *Te Runanga a Iwi o Ngati Tametera Inc v Thames Coromandel District Council* EnvC Auckland A149/00, 27 November 2000, at [9]; cited in *Scholes v Canterbury Regional Council* [2010] NZEnvC 29. See also *Eastgate v Auckland Council* [2015] NZEnvC 038, at [40].

<sup>3</sup> *Hinton v Otago Regional Council* EnvC Queenstown C005/04, 28 January 2004 at [17].

<sup>4</sup> *Fletcher Forests Ltd v Taumaranui County Council* (1983) 11 NZTPA 233, at 13; recently cited by *Vernon v Thames-Coromandel District Council* [2017] NZEnvC 002.

- 9 For these reasons, it is clear that evidence and any relief requested has to be focused within the scope of the appeal, to avoid enlarging the scope of the appeal unlawfully.
- 10 The Fish and Game appeal does not request relief to include reference to region-wide numeric outcomes as a bottom line for ecosystem health, prior to the limit-setting and FMU process in relation to Objectives 6 and/or 7.
- 11 The relief requested in the notice of appeal is the deletion of the word “overall” in Objective 6 (which Counsel accepts is clearly within the scope of the appeal), and the addition of the words “or earlier when considering relevant consent applications” to the end of Objective 7.
- 12 Fish and Game also seek amendments to Policies 15A to 15C (which seek to maintain or improve water quality both ahead of and after the FMU process) and amendments to Appendix E – Receiving Water Quality Standards.
- 13 Fish and Game do note in the reasons for its appeal that:<sup>5</sup>
- The decision and Proposed Plan takes the community in a backward step by not providing water quality limits and deferring limit setting to the Freshwater Management Unit Process. The community input into the Operative Regional Freshwater Plan (and in particular) its targets for water quality are being undermined and risk being forgotten. The Proposed Plan will not meet Environment Southland’s commitment to “holding the line”.
- 14 Although Fish and Game considers the community is going in a backward step, this does not specifically refer to a requirement for a region-wide numeric outcome prior to the FMU process and no specific amendments implementing this approach are specified.
- 15 In his evidence, Mr Farrell recognises that the relief sought differs to that previously sought by Fish and Game in relation to Objective 7:<sup>6</sup>
- I consider the following amendment to Objective 7 coupled with supporting numerical outcomes to help define ‘practical over-allocation’ or similar amendments with similar effects, would be more appropriate than the Decisions version and the suggested amendments being sought by Fish & Game.

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<sup>5</sup> Notice of Appeal of Southland Fish and Game Council, dated 17 May 2018, at [7(c)].

<sup>6</sup> Statement of Evidence of Ben Farrell, dated 17 February 2019, at [95].

- 16 Counsel notes that Fish and Game has sought amendments to Policies 15A and 15B to widen their application so that the Appendix E receiving water quality standards apply to any discharge, rather than only applying to new discharges. Fish and Game have also sought that Rule 13, 15 and 24 include reference to Appendix E. Amendments are also sought to the water quality standards in Appendix E, in the form of providing different standards to be assessed, as well as amendments to the numerics for the standards contained in the Appendix E.
- 17 It is submitted that neither of these amendments/relief sought provide scope to introduce region-wide numeric outcomes/limits in the Objectives that would have the effect of determining freshwater overallocation ahead of the FMU process.
- 18 It is accepted that amendments sought to Appendix E are within the scope of Fish and Game's appeal. However, the Court has previously directed that the appeals on Appendix E are to be considered as part of the Topic B hearing, as discussed below.
- 19 While it is accepted that the relief sought may be slightly different from that set out in a Notice of Appeal, it is submitted that inclusion of a region-wide numeric outcomes is not within the scope of the Fish and Game appeal.
- 20 Fish and Game is also a section 274 party to the appeals lodged by Royal Forest and Bird Protection Society of New Zealand (**Forest and Bird**) and Ngā Rūnanga<sup>7</sup> on Objective 6.
- 21 Forest and Bird and Ngā Rūnanga are the only other appellants on Objective 6. Fish and Game is the only Appellant on Objective 7.
- 22 Under section 274 of the RMA, a party that joins a proceeding under section 274 of the RMA cannot call evidence unless it is on matters within the scope of the appeal, inquiry, or other proceeding.<sup>8</sup>
- 23 Fish and Game has joined both of the appeals on the basis that it made a submission and further submission on the pSWLP, and that it has an interest greater than the general public.

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<sup>7</sup> Comprising Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu.

<sup>8</sup> Resource Management Act 1991, s 274(4A).

- 24 The Environment Court has previously recognised that while a party qualifying under the “interest greater than the general public” test is not confined to matters raised in its submission, it is still restricted to matters within the scope of the appeal it has sought to join.<sup>9</sup>
- 25 It is clear from previous Environment Court authority that the scope of the appeal (being the range between what was in the decision being appealed and the relief sought in the appeal<sup>10</sup>) defines the limits of what a section 274 party may pursue by way of relief.<sup>11</sup> The section 274 party is not entitled to enlarge the scope of the proceedings to matters not raised by the appeal.<sup>12</sup>
- 26 Forest and Bird’s appeal does not refer to the inclusion of a limit setting process prior to the FMU process. There is a general statement that it considers the pSWLP does not give effect to the NPS-FM, but the only relief sought in relation to Objective 6 is the deletion of “overall”, as requested by Fish and Game.
- 27 Ngā Rūnanga’s appeal does not refer to region-wide numeric outcomes or bottom lines being necessary prior to the FMU process.
- 28 Ngā Rūnanga notes as part of its reasons for appealing that it:<sup>13</sup>
- is concerned that there have been centuries of declining water quality and that the current state of freshwater is not an acceptable benchmark for water quality and quantity. This is does [sic] not provide for “Te Mana o te Wai”. Ngāi Tahu is concerned that the current state of the region’s environment (particularly water quality) will not be confronted and maintained or improved through this process. For Ngā Rūnanga it is unacceptable for the present poor state of the environment to be used as a justification for enabling a continuation or expansion of inappropriate activities and land uses, or as a basis for “grandfathering” currently unsustainable practices.
- 29 As part of its relief, Ngā Rūnanga seeks that the psWLP:<sup>14</sup>
- avoids any further deterioration of water quality and does not preclude the ability for greater regulation of water bodies where necessary through the Freshwater Management Unit (**FMU**) process.

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<sup>9</sup> *Beasley v Wellington City Council* EnvC Wellington W027/06, 4 April 2006, at [17].

<sup>10</sup> *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC), at [48]-[50].

<sup>11</sup> *Calveley v Kaipara District Council* [2015] NZEnvC 69, at [12].

<sup>12</sup> *Director-General of Conservation v Northland Regional Council* [2010] NZEnvC 169, at [22].

<sup>13</sup> Notice of Appeal of Ngāi Tahu, dated 17 May 2018, at [8(a)].

<sup>14</sup> Notice of Appeal of Ngāi Tahu, dated 17 May 2018, at [8(e)].



- 30 Ngā Rūnanga agrees with Fish and Game's proposed deletion of "overall" from Objective 6, but makes no comment on region-wide numeric outcomes in relation to this objective or Objective 7 (or the pSWLP more generally).
- 31 On this basis, neither of the Ngā Rūnanga or Forest and Bird appeals appear to have scope to introduce region-wide numeric limits. As a consequence, Fish and Game as a section 274 party is restricted to calling evidence within the scope of the appeals.
- 32 It is submitted that none of the three appeals raise the issue of the introduction of region-wide numeric water quality outcomes/limits.
- 33 Accordingly, parties have not been "on notice" as to the inclusion of region-wide numeric outcomes/limits from the appeals. It is submitted that these appeals do not provide scope for the introduction of region-wide numeric outcomes prior to the FMU process.
- 34 If the Court disagrees and considers that there is scope in the appeals to consider the introduction of region-wide numeric outcomes in the Objectives prior to the FMU process, Counsel also considers that some aspects of Fish & Game's evidence should be addressed as part of the Topic B hearing, as discussed below.

### **Scope of the Topic A hearing**

- 35 The Topic A hearing covers the over-arching provisions of the pSWLP that are important to setting the high-level direction of the pSWLP, including the Issues (including state of the environment matters), Physiographic Zones, Objectives, Ngāi Tahu Policies 1 and 3, Physiographic Policies 4 to 12, and Freshwater Management Unit Policies 45 to 47.
- 36 Counsel acknowledges that Objectives 6 and 7 form part of the Topic A hearing. However, it is submitted that if the Court considers that there is scope to consider the introduction of region-wide numeric outcomes in Objective 6 and/or 7, prior to the FMU process, that the discussion of what the specific numerics should be, should form part of the Topic B hearing.
- 37 It is submitted that it would be more efficient to first have the Court's interim decision on whether Objective 6 and/or 7 should be amended to

include reference to region-wide numeric outcome or limits, prior to hearing evidence on what those outcomes/limits should be.

- 38 Further, the inclusion of region-wide limits may have implications for Appendix E of the pSWLP, which contains receiving water quality standards. Prior to the FMU process (and freshwater objectives and limits being established), Policies 15A and 15B seek to maintain water quality where existing water quality meets the water quality standards contained in Appendix E or bed sediments meet the ANZECC sediment guidelines in Appendix C, and to improve existing water quality where it does not meet these standards.
- 39 Following the establishment of freshwater objectives and limits under the Freshwater Management Unit process, Policy 15C seeks to maintain and improve water quality where it is degraded to the point where freshwater objectives are not being met, and to otherwise maintain water quality.
- 40 Fish and Game, and Forest and Bird has previously sought to include Policies 15A to C and Appendix E in Topic A. Fish and Game noted that it wished to call water quality evidence at the Topic A hearings on Appendix E relating to:<sup>15</sup>
- (a) where the 'line' should be set if water quality is to be maintained;
  - (b) relationship between the water quality standards in Appendix E, the compulsory national value of ecosystem health, and the National Policy Statement for Freshwater Management; and
  - (c) whether it is possible and appropriate for freshwater objectives to be set on a Region-wide basis, to guide future FMU processes.
- 41 However, in its Minute dated 5 November 2018, the Court issued directions in respect of the Topic A hearing and, relevantly, declined to hear the appeals on the following provisions as part of the Topic A hearing:
- (a) Policies 15A to C; and
  - (b) Appendix E.

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<sup>15</sup> Memorandum of Counsel on behalf of Fish and Game and Forest and Bird dated 26 September 2018 at [3].

- 42 The Court has clearly ruled that the appeal points on the Policies 15A to C and Appendix E are to form part of the Topic B hearing.
- 43 In addition, it is submitted that it would be more efficient to consider and hear evidence on what any region wide outcomes/limits should contain and what the numerics should be, in conjunction with Policies 15A to C, and Appendix E as part of the Topic B hearing.
- 44 Further, some parties who have appealed or are section 274 parties to Policies 15A to C and/or Appendix E may not be involved in the Topic A hearing, and risk not being involved in the discussion on what region-wide water quality standards / limits should be included in the pSWLP prior to the FMU process and how these may differ from the standards in Appendix E.<sup>16</sup>
- 45 Professor Death's evidence relates to Objective 7, Policy 45 and Policy 47 of the pSWLP, and addresses:<sup>17</sup>
- (a) An explanation of the meaning of "ecosystem health", referring to the definition in the National Policy Statement for Freshwater Management 2014;
  - (b) The essential parameters necessary to protect ecosystem health in the streams and rivers of Southland, with a focus on water quality.
  - (c) An explanation of why the water quality numerics he proposes for water body classes are necessary for maintaining ecosystem health; and
  - (d) the proportion of river and stream reaches that currently have water quality characteristics that do not meet the numerical outcomes that he proposes.
- 46 It is submitted that Professor Death's evidence, in so far as it relates to the identification of parameters that should be included in region-wide outcomes/limits, and what the numerics should be, should be considered

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<sup>16</sup> The following parties are Appellants on Appendix E but are only section 274 parties on Objectives 6 and/or 7: Aratiatia and Alliance. The following parties are section 274 parties on Policies 15A to C and/or Appendix E but are not involved in Objective 6 and/or 7: Transpower New Zealand Limited, Dairy Holdings Limited, Hamish English, Robert Kempthorne, Grant & Rachel Cockburn, and Waiau Rivercare Group.

<sup>17</sup> Statement of evidence of Professor Death on behalf of Southland Fish and Game Council dated 15 February 2019 at [2.1]-[2.2].

as part of Topic B. It is submitted that Professor Death's (and to an extent Mr Farrell's) evidence should be dealt with as follows:

- (a) Any description or information related to the current state of environment – Topic A;
- (b) Any amendments to Objectives 6 and/or 7 to refer to region-wide numeric outcomes/limits (subject to the issue of scope as discussed above) – Topic A;
- (c) Any amendments to the pSWLP to set out what the numeric outcomes/limits should contain (e.g. the parameters and numbers) – Topic B.

### **Directions**

47 Counsel respectfully seek directions on:

- (a) How the Court wishes to deal with the issue of whether there is scope in Fish and Game's appeal (or any appeals) to introduce region wide limits / numeric outcomes as part of the Objectives in the pSWLP, ahead of the substantive hearing on Topic A.
- (b) That Professor Death's (and to an extent Mr Farrell's) evidence should be dealt with as follows:
  - (i) Any description or information related to the current state of environment – Topic A;
  - (ii) Any amendments to Objectives 6 and/or 7 to refer to region-wide numeric outcomes/limits (subject to the issue of scope as discussed above) – Topic A;
  - (iii) Any amendments to the pSWLP to set out what the numeric outcomes/limits should contain (e.g. the parameters and numbers) – Topic B.

48 Counsel notes that evidence-in-chief for the section 247 parties opposed to the Appellants is due Friday 15 March 2019, and that the directions sought may have implications for the evidence exchange timetable. Whilst this timing is unfortunate, Counsel has brought this matter to the attention of counsel for Fish and Game; however, no suitable outcome has been reached.

**DATED** this 13<sup>th</sup> day of March 2019



.....  
**P A C Maw / K J Wyss**  
Counsel for the Southland Regional Council