

**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)
ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)
WILKINS FARMING CO
(ENV-2018-CHC-30)

**CLOSING SUBMISSIONS OF COUNSEL FOR SOUTHLAND FISH AND GAME
COUNCIL AND THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF
NEW ZEALAND INC**

FOR HEARING COMMENCING 29 MAY 2023 – ON RULE 78 SCOPE

1 June 2023

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
(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. These submissions address scope and jurisdiction for Rule 78 of the pSWLP.

Procedural history

2. Prior to addressing Rule 78 scope, Forest & Bird and Fish & Game seek to raise their significant concern regarding the manner in which Federated Farmers has conducted its case (or rather, has not conducted its case when directed) in respect of Rule 78. The basis for this concern is addressed below.
3. By Minute dated 11 July 2022, the Court directed:
 - a. Parties to file their final wording for provisions by 13 July 2022.
 - b. That any party disputing scope for relief was to file a memorandum identifying the relevant provision and briefly stating the basis for the challenge by 15 July 2022.
4. Forest & Bird and Fish & Game filed their preferred relief in a Memorandum of Counsel dated 13 July 2022. The preferred relief for Rule 78 was “as shown in 7 June 2022 consolidated Plan”. The relief shown in the 7 June 2022 consolidated Plan was either an additional permitted activity standard stating that the modified watercourse is not a habitat of threatened native fish, or deletion of all of clause (a) and its replacement with a discretionary activity rule:

Fish and Game, Forest and Bird:

Add subclause (xiv) to (a):

(xiv) The modified watercourse is not a habitat of threatened native fish

OR

Delete all of (a) and include the following:

(b) 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 the carrying out of the activity ~~that cannot meet one or more of the conditions of Rule 78(a)~~ is a discretionary activity.

5. The consolidated plan does not show any relief on Rule 78 for Federated Farmers. The Memorandum of Counsel for Federated

Farmers setting out its preferred relief¹ similarly does not show any relief on Rule 78. The Memorandum records that Federated Farmers “takes issue” with proposed methods in the pSWLP controlling intensive winter grazing, pasture-based grazing, cultivation, feed pads/lots, sacrifice paddocks, and stock access to wetlands. There is no mention of weed and sediment removal from modified watercourses.

6. Returning to Forest & Bird and Fish & Game’s preferred relief as specified in June and July 2022, no party challenged the scope of that relief. Federated Farmers filed a Memorandum of Counsel that challenged scope with respect to Rule 20A and Rule 70.² It did not challenge the scope of the relief sought on Rule 78.
7. Federated Farmers also did not produce any evidence in relation to Rule 78. The hearing in April and May-June 2022 then proceeded on the basis of the relief, positions on scope, and evidence that had been produced up to that point. As far as counsel can ascertain from the transcript, Federated Farmers also did not cross-examine any of the witnesses giving evidence on Rule 78 in relation to their Rule 78 evidence.
8. It was not until the Case Management Conference on 13 April 2023 that Federated Farmers for the first time pursued their interest in Rule 78. The manner in which its planning witness has produced evidence in support of a completely new version of Rule 78 as part of the Joint Witness Statement, despite never having produced evidence on Rule 78 previously, was raised in my Memorandum of Counsel dated 25 May 2023. Forest & Bird and Fish & Game’s procedural objection to the admission of the material in Attachment 1 to the JWS remains. This material was provisionally admitted subject to the planners confirming they had debated it.³ While it appears that the proposed rule was discussed at a high level, the responses of the planners during Panel questions did not indicate that they had debated the material titled “Strengthening the Permitted Activity Rule” that was provided one hour before the JWS was due to be filed. Mr Farrell described it as feeling unfair that this material had been provided in this way. That unfairness is not remedied by giving the

¹ Memorandum of Counsel dated 27 July 2022.

² Memorandum of Counsel for Federated Farmers raising challenge to scope dated 29 July 2022

³ Court ruling on 31 May 2023.

planners the chance to make an oral response to the material during panel questions.

9. In summary, Forest & Bird and Fish & Game find themselves in the position of having to address a challenge to the scope and merits of their preferred relief on Rule 78 from Federated Farmers, despite Federated Farmers:
 - a. not having identified its scope challenge when directed to do so;
 - b. not having identified its interest in (or preferred relief for) the provision when directed to do so;
 - c. not having produced any evidence on Rule 78 during the 2022 evidence exchange and hearings; and
 - d. not having produced planning evidence addressing its preferred relief, other than in a joint witness statement and in response to two specific agenda items.
10. It is entirely unsatisfactory for a party to sit on its hands throughout a process and then start to participate after an interim decision has been made and at that point propose a completely new form of relief for the first time. Forest & Bird and Fish & Game have effectively had to run their entire case on Rule 78 twice.
11. It is also unsatisfactory for a planning witness not to have presented planning evidence, other than evidence attached to a joint witness statement addressing two specific agenda items. This resulted in the need for basic questions about the relevance of specific objectives and policies in the pSWLP and NPSFM, and how they are implemented (or not) by the Federated Farmers relief, to be put to the witnesses in cross-examination, which is not an effective way of eliciting this type of evidence.
12. Forest & Bird and Fish & Game reserve their rights in respect to the procedural unfairness and cost that has resulted from the manner in which Federated Farmers has participated in this part of the proceeding.

Options

13. The options before the Court on Rule 78 are:

- a. Option 1: The version of Rule 78 set out at paragraph [255] of the 6th Interim decision, being a permitted activity rule subject to standards including:
 - i. that the activity is restricted to the removal of aquatic weeds and plants or sediment deposits, provided that at least 95% of the sediment removed shall have a grain size of less than 2mm
 - ii. that the site is not habitat of threatened non-diadromous galaxias.⁴
- b. Option 2: A restricted discretionary rule for mechanical weed and sediment removal as set out in Appendix 2 to the Joint Witness Statement – Planning dated 23 May 2023⁵. Forest & Bird and Fish & Game sought additional matters of discretion relating to:
 - i. The flood conveyance and drainage outcomes to be achieved, with reference to the watercourse’s historically modified dimensions and extent and nature of material(s) proposed to be removed.
 - ii. Efficiency gains and consistency of good practice that may be achieved through a network or global (multi-waterbody) consent application.
- c. Option 3: A permitted activity rule for modified watercourses on farms, subject to standards including a requirement for farms larger than 20 ha to have a FEMP that adopts specified management practices.

14. There may be other options available to the Court, such as adopting elements of one or more of those three options.

Law on Scope

15. By Minute dated 16 June 2022, the Court directed the Council to confer with the parties and file supplementary submissions setting out the law in relation to the scope to pursue relief on appeal. The law on scope was set out in the submissions of counsel for the Regional Council dated 12 July 2022. Those submissions record that

⁴ Supported by Southland Regional Council and the Director-General of Conservation.

⁵ Supported by Forest & Bird, Fish & Game and Ngā Rūnanga.

all parties confirmed to Counsel that they agreed with the final submissions set out in those submissions.

16. The following principles (taken from Council's submissions) are particularly relevant:

- a. Issues of scope should be approached in a realistic, workable fashion, rather than from a perspective of legal nicety.⁶
- b. Consequential relief may be granted as a matter of law subject to considerations of fairness and the application of *Motor Machinists*.⁷ Policies and rules should be driven from the top down.⁸
- c. There is no jurisdiction for the Court to make amendments to such an extent that those who are potentially affected have not had the opportunity to participate.⁹
- d. The leading decision on a s 274 party's capacity to seek relief in proceedings it has joined is *Transit New Zealand v Pearson*, in which the Court held that the scope of appeal is the range between what was in the decision being appealed and the relief sought in the appeal.¹⁰ Despite amendments to section 274, *Pearson* remains authoritative on that essential point.¹¹

17. Forest & Bird and Fish & Game's opening submissions dated 11 April 2022 confirmed agreement with the Council's submissions on scope, and added highlighted further key principles, including that:

- a. The High Court in *General Distributors Ltd v Waipa District Council*¹² observed that:

Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a

⁶ *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 408 (HC) at page 10; *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] and [59].

⁷ *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at [69].

⁸ *Federated Farmers of New Zealand (Inc) v Mackenzie District Council* [2017] NZEnvC 53 at [177].

⁹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

¹⁰ *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC)

¹¹ *Calveley v Kaipara District Council* [2014] NZEnvC 182

¹² *General Distributors Ltd v Waipa District Council* HC Auckland, CIV 2008-404-4857, 19 December 2008 at [56].

council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

- b. In *Shaw v Selwyn District Court* the High Court stated that the “realistic and workable fashion” referred to in earlier authorities requires consideration of the whole relief package detailed in each submission.¹³ This principle was adopted by the High Court in *Albany North Landowners v Auckland Council*, which summarises previous case law as follows.¹⁴

...A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public’s contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic, workable fashion, rather than from the perspective of legal nicety. The ‘workable’ approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

- c. As provisions in plans do not operate in a vacuum, the Environment Court has recognised an implied jurisdiction to make consequential amendments where an amendment made may require parallel changes to other provisions.¹⁵

Submissions

18. Schedule 1, cl 14 provides that a person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of a provision included in the proposed policy statement or plan; a provision that the decision on submissions proposes to include in the policy statement or plan; a matter excluded from the proposed policy statement or plan; or a provision that the decision on submissions proposes to exclude from the policy statement or plan.

¹³ *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [44].

¹⁴ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

¹⁵ For example, in *The Church of Jesus Christ Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [48].

19. Rule 78 was “a provision included in the proposed plan”. Both Forest & Bird’s and Fish & Game’s submissions included submission points on Rule 78.

20. The submissions sought similar relief to that sought in the appeals. The substance of the relief sought, and whether it is within scope, is accordingly dealt with below to avoid repetition.

Appeals

21. The following aspects of the Fish & Game and Forest & Bird appeals are relevant:

Fish & Game appeal	
Parts of decision appealed	6.cc Policy 30 6.rr Rule 78
Reasons for appeal	7.a.v. The pSWLP includes a suite of objectives, policies and rules relating to land use activities that provide for activities which will cause further degradation of water quality and adverse effects on water bodies. 7.a.vi The pSWLP provides an imbalance in favour of primary production generally, above other relevant activities and values. 7.a.i The pSWLP contains rules which fail the legal test for a valid permitted activity rule. For example, they: (1) do not include standards that control the actual and potential adverse effects on water that could arise from the discharges (required to ensure they are not contrary to s 70(1)(c)-(g)); ... 7.d. The decision fails to give effect to the Regional Policy Statement (RPS) and/or the National Policy Statement for Freshwater Management (NPSFM)
Statement of relief	Fish and Game seeks the following relief: a. The changes to the provisions listed in paragraph 6 above, as shown in the attached Appendix A; and b. Such other changes to the provisions listed in paragraph 6 above that address the reasons for this appeal; and c. Consequential changes; ...
Policy 30	Amend Policy 30 to provide as follows: “Policy 30 – Drainage maintenance In recognition of the community benefits of maintaining flood conveyance capacity and land drainage, ensure that drainage maintenance activities within artificial watercourses and the beds of modified watercourses <u>and their margins</u> are managed in a way that either : 1. avoids, <u>where practicable, or otherwise</u> remedies or mitigates, <u>significant any</u> adverse effects on the aquatic

	<p>environment, <u>including water quality, aquatic ecosystem health, life supporting capacity, natural character and riparian margins, mahinga kai, indigenous vegetation and fauna; or and</u></p> <p>2. maintains or enhances habitat value, <u>including fish passage, gravel spawning habitat and bank stability; and</u></p> <p>3. <u>Mitigates the quantity of sediment released from drainage activities, including in overland flow entering the artificial watercourse or modified watercourse."</u></p>
Rule 78	<p>Amend Rule 78 to provide as follows:</p> <p>Rule 78 – Weed and sediment removal for drainage maintenance</p> <p>(a) 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:</p> <p>(ai) 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</p> <p>(ii) the activity is restricted to the removal of aquatic weeds and plants or sediment deposits; and</p> <p>(iia) the removal of river bed material, <u>including gravel</u>, other than aquatic weeds, plants, mud or silt is avoided as far as practicable;</p> <p><u>(1) only to the extent that is necessary to undertake the activity and shall be kept to the absolute minimum; and</u></p> <p><u>(2) shall not exceed more than 5% gravel (>10mm diameter) by volume; and</u></p> <p>(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</p> <p>(iv) upon completion of the activity, fish passage is not impeded as a result <u>because</u> of the activity; and</p> <p>(v) the operator takes all reasonable steps to return any fish captured or stranded by the activity to water immediately; and</p> <p>(vi) between the beginning of June and the end of October, there is no disturbance of the spawning habitat of trout; and</p> <p>(xiii) 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 <u>shall be</u> kept to the absolute minimum.</p> <p>(b) The removal of aquatic weeds and plants and <u>fine</u> sediment from any modified watercourse for the purpose of</p>

	maintaining or restoring drainage outfall and any associated bed disturbance and discharge resulting from the carrying out of the activity that cannot meet one or more of the conditions of Rule 78(a) is a discretionary activity.
Definitions	Amend definition of "gravel": Gravel Fluvial inorganic aggregate matter or river bed material of of any size <u>with an individual grain size greater than 2mm.</u>
	Insert a definition of "sediment" <u>Sediment</u> <u>Clay, silt and sand with an individual grain size of less than 2mm.</u>
Forest & Bird appeal	
Parts of decision appealed, reasons for appeal, and relief sought	8. The parts of the decision appealed, reasons for the appeal and relief sought are set out in Table 1 below. Where specific wording changes are proposed by way of relief, Forest & Bird seeks in the alternative any wording that would adequately address the reasons for its appeal. Forest & Bird also seeks any consequential changes made necessary by the relief sought below.
Rule 78 Reasons for appeal	This rule does not adequately protect threatened native fish from disturbance associated with drainage maintenance activities
Rule 78 Relief	Amend: (iii) any incidental bed disturbance and removal of gravel shall be only to the extent that it is necessary to undertake the activity and shall be kept to the absolute minimum <u>and the gravel removed shall comprise not more than 5% of the total sediment removed;</u> (xiv) <u>the modified watercourse is not a habitat of threatened native fish</u> Add schedule to identify habitats of threatened native fish.

22. Rule 78 was also appealed by the Director-General of Conservation, Heritage New Zealand, and Ngā Rūnanga. The Director-General's relief on Rule 78 sought an additional standard:

xiv) the modified watercourse is not a habitat of non-migratory galaxiids.
[D-G seeks to include mapping of non-migratory galaxiids habitat in the Planning Maps]

23. A map was attached to the Director-General's Notice of Appeal, demonstrating that habitat of galaxiids is very widespread throughout Southland's waterways (see Attachment 1 to these submissions).

24. The Ngā Rūnanga appeal sought an additional standard:

xv) No activity in relation to drainage maintenance shall significantly adversely affect the habitat or health of any taonga species as identified in Appendix M.

25. Heritage NZ sought an advice note relating to archaeological sites.

26. Amendments to Policy 30 were initially agreed in mediation and were subject to further amendments in the Court's 6th Interim Decision.

The decision's version of Policy 30 was:

In recognition of the community benefits of maintaining flood conveyance capacity and land drainage, ensure that drainage maintenance activities within artificial watercourses and the beds of modified watercourses are managed in a way that either:

1. avoids, remedies or mitigates significant adverse effects on the aquatic environment; or
2. maintains or enhances habitat value.

27. Approved Policy 30 is:

In recognition of the community benefits of maintaining flood conveyance capacity and land drainage, ensure that drainage maintenance activities within artificial watercourses and the beds of modified watercourses and their margins are managed in a way that:

1. avoids, where reasonably practicable, or otherwise remedies or mitigates, adverse effects on the aquatic environment and riparian habitat in modified watercourses and significant adverse effects on aquatic and riparian habitat in artificial watercourses; or
2. maintains or enhances habitat value, including fish passage, gravel spawning habitat and bank stability;
3. in addition to 1 or 2, minimises the quantity of sediment released from drainage maintenance activities; and
4. recognises the need to reduce the extent and frequency of disturbance, including through changes to land management so that sediment does not enter these watercourses, by improving practices and providing guidance, and improvement of riparian areas and habitat.

Application to options for Rule 78

28. Scope for amendments to Rule 78 derive from appeals on Rule 78, and consequential changes to rule 78 that are appropriate as a result of amendments to Policy 30.

29. Option 1 is within scope as:

- a. The amendment to clause (ii) regarding gravel size gives effect to the Fish & Game relief seeking to define (and thereby distinguish between) gravel and sediment.

- b. The exclusion for non-diadromous galaxias it is effectively the relief sought in the Director-General's appeal.

30. Option 2 is also within scope. Its scope derives from the following matters:

- a. The relief sought in the Director-General's appeal, the Forest & Bird appeal and the Ngā Rūnanga appeal, between them seek that weed and sediment removal in modified watercourses requires a resource consent in habitats of non-migratory galaxiids, other threatened native fish, and where it would significantly adversely affect the habitat or health of any taonga species as identified in Appendix M. The Director-General's appeal included a map showing that galaxiid habitat is very widespread. The Ngā Rūnanga appeal did not include a map, but consideration of the species listed in Appendix M would have indicated to any person interested in this rule that it had the potential to apply to most of Southland's waterways. The ecological and cultural evidence has indeed established that if the rule applies to all of these environmental/cultural features then it is indeed likely to cover most of the modified watercourses in Southland. Accordingly, the permitted activity standards proposed by those appellants could not be met over the majority if not all of Southland's modified watercourses. In practice, the effect of including permitted activity standards as sought by the Director-General, Forest & Bird, and Ngā Rūnanga would be the same as a requirement to obtain consent for all mechanical weed and sediment removal in modified watercourses. In those circumstances, a restricted discretionary rule responds to the need to deal with "the realities of the situation"¹⁶ and are a foreseeable consequence of any changes directly proposed in the appeals.¹⁷
- b. Option 2 is a restricted discretionary activity rule. Under the decisions version of Rule 78 the activity defaulted to a discretionary activity if a standard could not be met. If the additional standards sought by the Director-General, Forest & bird and Ngā Rūnanga were not met, the activity would be a discretionary activity. A restricted discretionary rule is a less

¹⁶ *General Distributors Ltd v Waipa District Council*, above n 13.

¹⁷ *Albany North Landowners v Auckland Council*, above n 15.

onerous activity status that is within the scope of appeals on Rule 78.

- c. Both the Forest & Bird and Fish & Game appeals seek, in addition to specified relief, any alternative wording that would address the reasons for its appeal and any consequential changes made necessary by the relief sought.
- d. The Fish & Game relief sought to distinguish between “gravel” and “sediment” based on definitions relating to grain size, in order to protect gravel as spawning habitat. That was included as a proviso to clause (ii) in Option B but Ms McArthur had reservations about how this might be enforced in practice. Restricted discretionary activity status achieves the intent of this relief.
- e. Forest & Bird’s Notice of Appeal “reason” on Rule 78 is that the rule does not adequately protect threatened native fish from disturbance associated with drainage maintenance activities. The relief is necessary to address that reason for the appeal.
- f. Fish & Game’s Notice of Appeal “reasons” included that the pSWLP contains rules which fail the legal test for a valid permitted activity rule, due to not including standards that control the actual and potential adverse effects on water that could arise from the discharges (required to ensure they are not contrary to s 70(1)(c)-(g)). The ecological evidence establishes that this reason is relevant to the “discharge” aspect of Rule 78. A restricted discretionary rule addresses this reason.
- g. Fish & Game’s “reasons” also include that the pSWLP objectives, policies and rules provide for activities which will cause further degradation of water quality and adverse effects on water bodies, and that the pSWLP provides an imbalance in favour of primary production generally, above other relevant activities and values. The relief is necessary to address those reasons for the appeal.
- h. The approved amendments to Policy 30 are significant, particularly the requirement to “avoid where practicable” adverse effects, and to manage maintenance activities in a way that recognises the need to reduce the extent and frequency of disturbance. A restricted discretionary activity rule is within

the scope of consequential changes to implement amended Policy 30.

31. With respect to Option 3, it is important to be clear that Federated Farmers did not appeal Rule 78. Its relief must therefore be within the scope of appeals (between the decisions version and the appeals). It cannot take the rule in a different direction that is not between the decisions version and the appeals.
32. Option 3 applies only “within a farm boundary”. Weed and sediment removal on modified watercourses not within farm boundaries, such as those managed off-farm by the regional council, district councils or Waka Kotahi, would presumably become an innominate (discretionary) activity. Scope for this could only be established through the Forest & Bird, Director-General and Ngā Rūnanga appeals.
33. Option 3 does not include some of the permitted activity standards in the decisions version of Rule 78:
 - a. (ai) general conditions (e), (f), (g), (h) and (l) set out in Rule 55A;
 - b. (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;
 - c. (ii) the activity is restricted to the removal of aquatic weeds and plants or sediment deposits;
 - d. (iia) the removal of river bed material other than aquatic weeds, plants mud or silt is avoided as far as practicable;
 - e. (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;
 - f. (v) the operator takes all reasonable steps to return any fish captured or stranded by the activity to water immediately; and
 - g. (vi) between the beginning of June and the end of October, there is no disturbance of the spawning habitat of trout; and
 - h. (xiii) 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.

34. No appeals sought to remove those standards, and so the non-inclusion of these standards is not within scope.¹⁸
35. Option 3 also does not include the proviso to clause (ii) that 'at least 95% of the sediment removed shall have a grain size of less than 2mm'. While there is scope not to include this part of the clause (as it was inserted pursuant to Fish & Game's appeal), it is a very important part of Fish & Game's relief because of the importance of gravel as spawning habitat for trout and salmon (as well as native species) and should a permitted activity rule be preferred, Fish & Game would seek that this provision be included.
36. The source of scope to insert a new Appendix with Practices for the Removal of Aquatic Weeds and Plants and Sediment from any Modified Watercourse is unclear.

Court directions on matters to address

37. In the Court's decision on the Council's application to recall part of the 6th Interim Decision and the application to stay the proceeding¹⁹, the Court directed interested parties to address the following points:
- a. Is there scope for a different activity status in relation to Rule 78?
 - b. Is there scope for a new rule to be included in the plan limited to the sub-clauses under appeal? The status of a new rule is something other than a permitted activity;
 - c. If there is no scope in relation to activity status per se, then whether the court allows or declines the appeals seeking new or amended subclauses to Rule 78.
38. On the basis of the submissions above, Forest & Bird and Fish & Game's answers to those questions are:
- a. Yes, see submissions on Option B above.
 - b. Yes, for the same reasons that there is scope for a different activity status in relation to Rule 78 (see Option B above).

¹⁸ Although some of those standards are also not included in Option B, that is within scope as they are able to be considered as part of a restricted discretionary activity.

¹⁹ *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 84 at [17].

- c. The question in c appears to relate to the merits of the appeals, so is not addressed further at this stage except in relation to s 293 below.

Section 70 RMA

39. Section 70 is relevant to the Court's jurisdiction to approve Rule 78. The effect of s 70 on pSWLP discharge rules was squarely raised in Fish & Game's Notice of Appeal. Based on the ecological evidence²⁰, it is submitted that there is no jurisdiction under s 70(1) to approve sediment discharges associated with weed and sediment removal from modified watercourses as a permitted activity, because of the significant adverse effects on aquatic life of such discharges, which extend over a large area. In addition, s 70(2) applies to any discharges that are able to be permitted.²¹

Section 293 RMA

40. Should the Court determine, contrary to these submissions, that the relief sought in Option 2 (or similar) is not within the scope of appeals on the pSWLP, Forest & Bird and Fish & Game will seek that the Court exercise its jurisdiction under s 293 to amend the plan to approve Option 2-type relief. Section 293 relevantly provides:

293 Environment Court may order change to proposed policy statements and plans

(1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to—

(a) prepare changes to the proposed policy statement or plan to address any matters identified by the court:

(b) consult the parties and other persons that the court directs about the changes:

(c) submit the changes to the court for confirmation.

(2) The court—

(a) must state its reasons for giving a direction under subsection (1); and

²⁰ December 2021 JWS and Panel answers on 31 May 2023 and 1 June 2023.

²¹ Section 70(2): Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—

(a) the nature of the discharge and the receiving environment; and

(b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

(b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

41. The fundamental purpose of s 293 is to give the Environment Court power to direct changes to a proposed plan which are not otherwise within the Court's jurisdiction due to the scope of the appeal before it.²² Forest & Bird and Fish & Game seek leave to make submissions on the appropriateness of using s 293 should the Court decide that there is no scope for a version of Rule 78 that is akin to Option 2.

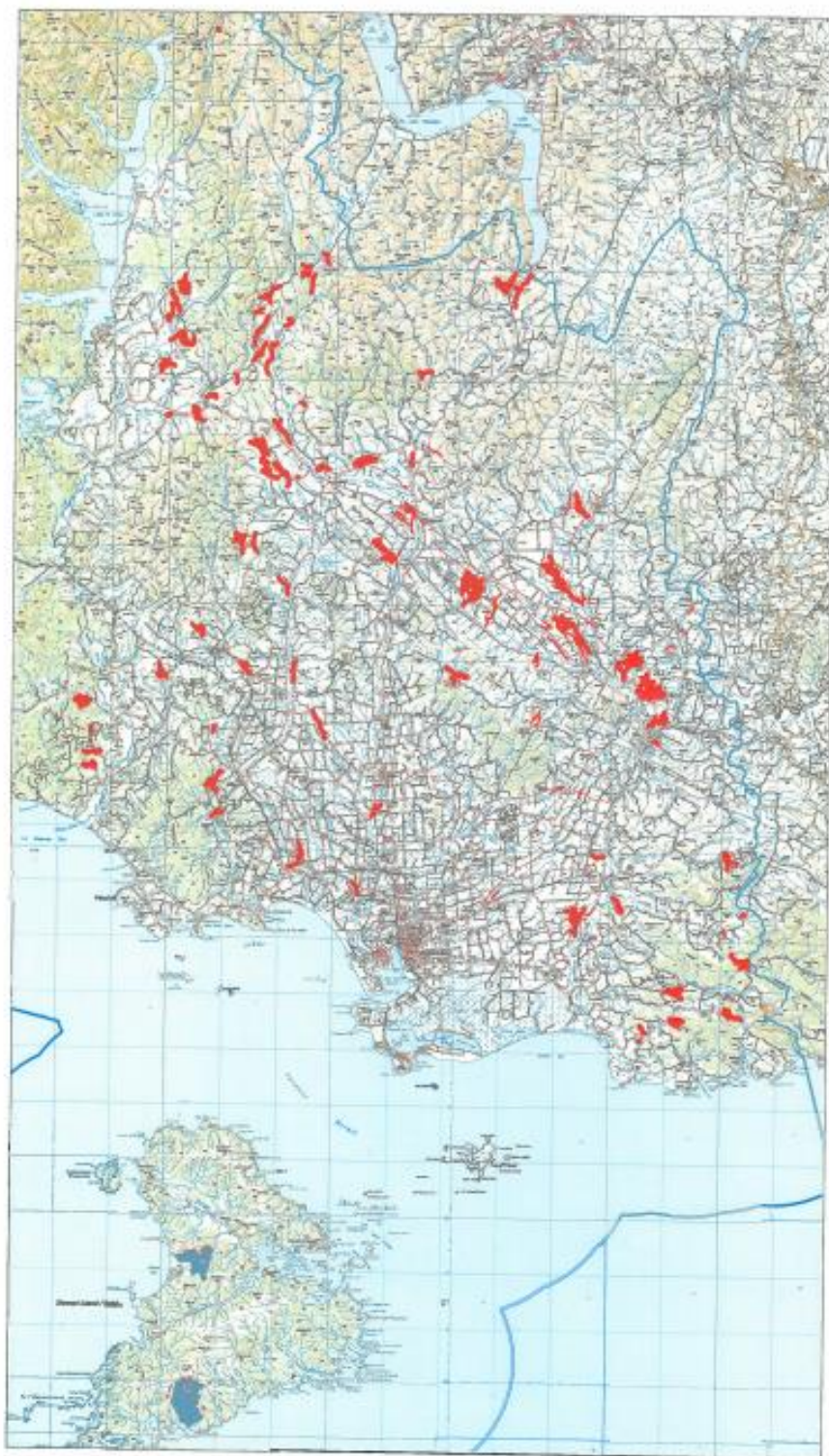
Dated 7 June 2023



Sally Gepp
Counsel for Southland Fish and Game Council and
the Royal Forest and Bird Protection Society of New Zealand Inc

²² *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie DC* [2014] NZHC 2616 [1], [106], [120]–[122], [134]–[138] and [144]–[155].

Attachment 1 – Map attached to Director-General Notice of Appeal



Gollum galaxias habitat extent within the Southland Regional Council boundary

Legend:
■ Gollum galaxias habitat extent
■ Regional Council boundary

Inset Map:
Greymouth, Christchurch, Dunedin, Invercargill

Scale: 0 10 Km
North Arrow: N

Department of Conservation
Te Papa Ataturu
www.doc.govt.nz

ALPD 2000 New Zealand Topographic Database
NZ 10 projection re-imagined
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