

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First  
Schedule of the Act

BETWEEN ARATIATIA LIVESTOCK  
LIMITED

(ENV-2018-CHC-29)

(and all other appellants listed in  
the Schedule attached)

Appellants

AND SOUTHLAND REGIONAL  
COUNCIL

Respondent

---

**MINUTE OF THE ENVIRONMENT COURT  
‘Avoid where reasonably practicable, or otherwise remedy or mitigate’  
(31 March 2022)**

---

**Introduction**

[1] In this Minute the court addresses the phrase ‘avoid where reasonably practicable, or otherwise remedy or mitigate’ and how this is to be interpreted and applied in the context of resource consent applications.

[2] We do so as we are unable to evaluate<sup>1</sup> the changes proposed to certain

---

<sup>1</sup> RMA, s 32AA.



policies (and their implementing methods) without a proper understanding of their intended meaning.

[3] We are grateful for the Regional Council's submissions on the meaning of 'reasonably practicable' and for the submissions of other parties who have engaged with the court.

[4] In this Minute we set out our preliminary view on the interpretative issues. Any party holding a different view is to respond as directed.

### **Context**

[5] The parties propose to amend eight policies<sup>2</sup> to replace *avoid, remedy or mitigate* phrasing with 'avoid where reasonably practicable, or otherwise remedy or mitigate'.

[6] The phrase *avoid, remedy or mitigate*, was introduced into the decisions version of the plan weakening, in Mr McCallum-Clark's opinion, some of the policies.<sup>3</sup> Fish and Game appealed seeking to delete 'remedy or mitigate' from the relevant policies.

[7] The intent of agreed changes is to place greater emphasis on the 'duty to avoid adverse effects' in the first instance, before moving to consider whether those effects can be remedied or mitigated. The new phrasing is said to render the policy more consistent with the hierarchy of Te Mana o te Wai in the NPS-FM 2020.<sup>4</sup> However, having agreed the change there was no close consideration as to what the term 'reasonably practicable' means and how it applies in context.<sup>5</sup>

---

<sup>2</sup> Policies 15A, 15B, 16A, 17, 17A, 20, 28 and 30.

<sup>3</sup> Transcript (McCallum-Clark) at 86.

<sup>4</sup> Consent documentation including memoranda in support of the consent orders and supporting affidavits.

<sup>5</sup> Transcript (McCallum-Clark) at 91-92.

## **The issue – the intent of the change proposed**

[8] The reason given by the witnesses for the change, is to place greater *emphasis* on the *duty* to avoid adverse effects in the first instance before considering whether effects are remedied or mitigated.

[9] We want to know whether it is intended by the parties that the proposed wording obliges applicants to avoid adverse effects where reasonably practicable leaving any (residual) effect that is not avoided to be remedied or mitigated or, as suggested by the Regional Council, minimised. The key difference being that the amended wording, when compared with the decisions version of the policies, restricts the applicant's election between avoiding or remedying or mitigating actions.

[10] In this Minute we set out our interpretation and application of 'avoid where reasonably practicable' for the parties' consideration.

## **Interpretation and application**

[11] The interpretation and weight to be given to provisions are not matters for evidence but rather issues of law for the consent authority or court (on appeal) to determine.<sup>6</sup>

[12] Except where expressly stated, there is no absolute requirement to avoid the adverse effects of proposed activities<sup>7</sup> under the pSWLP policies and objectives.

[13] Depending on context, the term 'practicable' may have a narrow or wide meaning. Where the context requires, the narrower focus is often on what is able to be physically done and the wider focus being on what can reasonably be done

---

<sup>6</sup> *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [123].

<sup>7</sup> 'Avoid' meaning must not be allowed to occur.

in the particular circumstances, taking a range of factors into account.<sup>8</sup>

[14] Adopting a purposive approach, the law will usually import considerations of reasonableness where ‘practicable’ is used, unless the context demands otherwise. Most parties in this case wish reasonableness to be expressly stated.

[15] With the above in mind, the interpretation of reasonably practicable is ‘entirely flexible, depending on the context in which the phrase is used’<sup>9</sup> and in the context of a plan this includes the plan’s objectives and policies. These considerations are in addition to those identified in SRC’s example. For this reason, we do not endorse the seven factors identified by SRC<sup>10</sup> as being the only factors that apply in every case as was suggested by some parties.<sup>11</sup>

[16] Inherent in the concept of ‘reasonably practicable’ is the notion of proportionality.<sup>12</sup> We think ‘proportionality’ concerns whether the effort to avoid adverse effects is a proportional response to the outcomes to be secured under the plan’s objectives.

[17] Following a factual enquiry, it is a matter of judgement for the consent authority whether the effort required is a proportional response.<sup>13</sup> By ‘effort’<sup>14</sup> we mean the resources that would be expended by the applicant to avoid the adverse effect.

---

<sup>8</sup> *Wellington International Airport Ltd v New Zealand Air Line Pilots Assoc Industrial Union of Workers Inc* [2017] NZSC 199, [2018] 1 NZLR 780 at [65].

<sup>9</sup> per *Porter v Bandridge Ltd* [1978] ICR 943 (CA) at 951-952 cited in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749 at [86].

<sup>10</sup> This was in the context of Policy 15B.

<sup>11</sup> In some circumstance fewer/more/different considerations may be relevant – depends on facts – a judgement is required, consistent consent authority function

<sup>12</sup> *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749 at [83].

<sup>13</sup> Note: we do not regard the phrase ‘avoid where reasonably practicable, or otherwise remedy or mitigate’ as establishing a test. Rather, what is called for is judgement following an objective assessment of the relevant factors (see Territorial Authority submissions dated 24 March 2022 at [10]).

<sup>14</sup> Our ‘effort’ is instead of the term ‘financial implications’ in SRC’s list of factors at [77] of SRC opening submissions dated 14 March 2022.

[18] Whether avoidance is reasonably practicable and therefore a proportional response in a particular case, will almost always engage with the risk and impact of the adverse effect(s) if not avoided.

[19] Impacts, including those on Te Mana o te Wai,<sup>15</sup> on the mauri of water and its attendant capacity to provide for the health<sup>16</sup> of the environment, waterbodies and of the people (Objective 2) and water's capacity to enable economic, social and cultural wellbeing of the region (Objective 3) may require consideration.<sup>17</sup> This is in addition to those objectives that directly address the natural resource in question. These impacts are to be accounted for, when reaching a decision that the effort to avoid an adverse effect is not reasonably practicable or – put another way – whether the effort is too great.

[20] Is this the interpretative path and result that the parties have in mind? And – if it is not – then is more wording required to secure what is intended?

## **RMA s 32**

[21] Until we have clarity on what is intended, we cannot satisfy ourselves that pursuant to RMA s 32AA, the changed provisions are 'most appropriate' while not necessarily being the 'superior method'; per *Rational Transport Society Inc v New Zealand Transport Agency*.<sup>18</sup> It follows that the court will not give provisional approval to any of the policies affected until we have clarity on this matter.

## **Directions**

[22] Counsel for any party holding a **different** view are to address the court's interpretation and any alternative wording required to secure what was intended in their opening submissions to the court at the 'disputed provisions' hearing.

---

<sup>15</sup> NPS-FM 2020, cl 1.3(1).

<sup>16</sup> More particularly, health and mauri.

<sup>17</sup> With the risk associated with particular effects assessed through the lens of s.3(e) and (f)".

<sup>18</sup> *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [45].

Counsel, who respond, should address the wording of the policies at footnote 2 in the context of both the objectives they implement, and the methods/rules used to implement the policies, noting any matters that may arise between different policies.

[23] Leave is granted for the parties to seek further (or other) directions.

Jane S.



---

**J E Borthwick**  
**Environment Judge**

Issued: 31 March 2022

### Schedule – List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-27	Fonterra Co-operative Group Limited
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co Limited
ENV-2018-CHC-31	Gore District Council & others
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand (Southland Province) Inc
ENV-2018-CHC-41	Heritage New Zealand Pouhere Taonga
ENV-2018-CHC-44	Wilkins Farming Co Limited (previously Campbell's Block Limited)
ENV-2018-CHC-45	Wilkins Farming Co Limited (previously Robert Grant)
ENV-2018-CHC-46	Southwood Export Limited & Others
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated