

**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)

*(Continued next page)*

---

**LEGAL SUBMISSIONS OF COUNSEL FOR THE SOUTHLAND REGIONAL  
COUNCIL - TRANCHE 1 - SCOPE FOR AMENDMENTS TO RULE 78**

**7 June 2023**

---

Judicial Officer: Judge Borthwick

---

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

**WYNN WILLIAMS**

Solicitor: P A C Maw  
(philip.maw@wynnwilliams.co.nz)

**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 These legal submissions are given on behalf of the Southland Regional Council (**Council**) in relation to Topic B, Tranche 1 of the hearing on the proposed Southland Water and Land Plan (**pSWLP** or **Plan**).
- 2 These submissions address the scope for amendments to Rule 78.

### Scope – Rule 78

- 3 In the Environment Court's decision on the application to recall the sixth interim decision, the Court directed the parties to address the following issues during the hearing:<sup>1</sup>
  - (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 sub-clauses to Rule 78.
- 4 These submissions address the first two questions but given the substance of Rule 78 is still subject to further consideration, I have not addressed the Court's third question as to whether the Court should allow or decline the appeals.

### *Rule 78 – notified and decisions versions*

- 5 The notified version of Rule 78 provided for 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, as a permitted activity, subject to certain conditions being met. If any of the conditions were not met, the activity would fall to be assessed as discretionary.
- 6 The conditions of the permitted activity rule were amended in the decisions version of the pSWLP, a copy of which is set out in **Appendix A**, for the Court's reference.

---

<sup>1</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 84 at [17].

*Law on scope*

- 7 I have previously given legal submissions to this Court on the law in relation to scope in planning matters.<sup>2</sup> I rely on those submissions and do not repeat them here, except to summarise the basic principles, as follows:
- (a) The Environment Court's jurisdiction to make changes to the Plan is not unlimited.<sup>3</sup> Any amendments made through the appeals process must be both:
    - (i) within the scope of a notice of appeal on the Plan;<sup>4</sup> and
    - (ii) within the scope of a submission on the Plan.<sup>5</sup>
  - (b) To be within the scope of an appeal, it is sufficient if the changes can fairly be said to be foreseeable consequences of any changes directly proposed in the notice of appeal.<sup>6</sup>
  - (c) To be within the scope of a submission, the proposed relief must be fairly and reasonably within the general scope of:
    - (i) an original submission;
    - (ii) the proposed plan as notified; or
    - (iii) somewhere in between.<sup>7</sup>
  - (d) Consequential relief may be granted, subject to the considerations of fairness and the application of *Motor Machinists*.<sup>8</sup>

---

<sup>2</sup> Legal Submissions of Counsel for Southland Regional Council, Tranche 1 – Disputed Hearing, Scope dated 12 July 2022.

<sup>3</sup> *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

<sup>4</sup> *Scholes v Canterbury Regional Council* [2010] NZEnvC 29 at [13].

<sup>5</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC), at page 41.

<sup>6</sup> *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC), at [73]; *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

<sup>7</sup> *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC), at [19]. See also *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [19].

<sup>8</sup> *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at [69].

8 I also note this Court's observations in Annexure 1 to the Fifth Interim Decision, citing the High Court decision in the *Gertrude Saddlery* case:<sup>9</sup>

[3] What follows then is a brief synopsis of the legal principles to set the context for our decision. We commence with the overview of the plan making processes in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*.<sup>10</sup>

[27] ...The RMA process for preparing, changing and reviewing plans, as set out in sch 1 to the RMA, is designed to:

(a) progressively refine the disputed issues as the proposed plan goes through the submission and appeal process; and

(b) promote the principles of procedural fairness and natural justice by ensuring potentially affected parties know what changes to the proposed plan are sought so they can choose to participate in decisions being made on that issue.

[4] While consequential amendments may be made to a plan, for there to be scope the amendments must be 'necessary and desirable' and 'foreseen as a direct or otherwise logical consequence of a submission'.<sup>11</sup> Observing that consequential amendments generally include uncontested matters, such as amending planning maps to reflect the substantive changes sought, the High Court in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* held changes should not be made to the plan through the appeal process that could not have been anticipated from reading the notice of appeal.<sup>12</sup>

## Appeals

9 Five parties lodged appeals on Rule 78.<sup>13</sup> One of those parties also lodged an appeal on Policy 30. I set out below the specific relief sought in relation to Rule 78 by Forest and Bird, Fish and Game, the Director-General of Conservation and Ngā Rūnanga.

### *Forest and Bird – original submission and appeal*

10 Forest and Bird supported the notified version of Rule 78, with amendments. In its original submission, Forest and Bird sought the following amendments:

---

<sup>9</sup> *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2022] NZEnvC 265, Annexure 1.

<sup>10</sup> *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [27].

<sup>11</sup> *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

<sup>12</sup> *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

<sup>13</sup> Director-General of Conservation, Southland Fish and Game Council, Ngā Rūnanga, Royal Forest and Bird Protection Society of New Zealand Inc, and Heritage New Zealand Pouhere Taonga.

(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 and the gravel removed shall comprise not more than 5% of the total sediment removed ;

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

Add schedule to identify habitats of threatened native fish

- 11 Forest and Bird also pursued the addition of a schedule identifying habitats of threatened native fish in its Notice of Appeal. No such schedule was included in the original submission, further submission, or Notice of Appeal, and nor has one been produced in evidence before the Court. In the absence of a schedule or map, there is a very real risk that potentially interested persons were not put on notice as to the extent of the changes sought by Forest and Bird and have therefore been deprived of the opportunity to be heard on the true extent of the changes sought.
- 12 However, there is clear scope for the amendments sought in relation to gravel size and this has been incorporated in the amendments proposed to Rule 78 by Mr McCallum-Clark and supported by the Council in its Memorandum of Counsel dated 25 May 2023.

*Fish and Game – original submission and appeal*

- 13 Fish and Game opposed Rule 78 and noted that changes were needed to the rule to:
- (a) Prevent significant gravel removal as a permitted activity because of the more than minor adverse effects; and
  - (b) Address the need to avoid over-deepening which results in increased bank slumping, further sedimentation of the bed and further degradation of habitat.
- 14 The specific changes sought to the rule where to clauses (ii) and (iii) of the notified version, as follows:
- (ii) the activity shall be restricted to the removal of aquatic weeds and plants and / or sediment deposits for drainage maintenance / restoration purposes *and such deposits shall contain less than 5% gravel (>10mm diameter)*
  - (iii) any incidental bed disturbance ~~and removal of gravel~~ shall only be to the extent that it is necessary to undertake the activity and shall be kept to the absolute

minimum and shall not result in lowering of the bed below previously modified levels;

- 15 Fish and Game's Notice of Appeal pursued the following relief in relation to Rule 78:

...

(ii) the removal of river bed material, including gravel, other than aquatic weeds, plants, mud or silt is ~~avoided as far as practicable~~:

- (1) only to the extent that is necessary to undertake the activity and shall be kept to the absolute minimum; and
- (2) shall not exceed more than 5% gravel (>10mm diameter) by volume; and

...

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

...

(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~~ shall be kept to the absolute minimum.

...

- (b) The removal of aquatic weeds and plants and fine 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.

- 16 The amendments sought by Fish and Game with respect to gravel size have been incorporated in the amendments proposed to Rule 78 by Mr McCallum-Clark and supported by the Council in its Memorandum of Counsel dated 25 May 2023.

*Director-General of Conservation – original submission and appeal*

- 17 The Director-General's original submission on the pSWLP supported in part Rule 78, but sought changes to (a) as follows:

**Rule 78 – Weed and ~~sediment~~ mud removal for drainage maintenance**

(a) The removal of aquatic weeds and plants and ~~sediment~~ mud 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, is a permitted activity provided the following conditions are met:



(i) the activity shall be undertaken solely to maintain or restore the drainage capacity of a modified watercourse that has previously been modified or maintained for drainage maintenance/restoration purposes at that location;

(ii) the activity shall be restricted to the removal of aquatic weeds and plants and/or ~~sediment~~ mud deposits for drainage maintenance/restoration purposes;

(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 and the gravel removed shall comprise not more than 5% of the total sediment removed;

(iv)-(xiii) Retain as notified.

(xiv) the modified watercourse is not a habitat of Gollum or alpine galaxias as shown in the Appendix of this submission.

- 18 Similarly, in the Notice of Appeal, the Director-General continued to pursue the relief seeking the inclusion of maps illustrating the location of non-migratory galaxiids and a specific condition of the permitted activity rule ensuring that the modified watercourse was not a habitat of non-migratory galaxiids.
- 19 Crucially, the Director-General's original submission and Notice of Appeal included maps identifying the locations where Gollum and alpine galaxias habitat was present. By including these maps, people were put on notice as to the specific locations where, if the Director-General's relief was accepted, weed and sediment removal activities for drainage maintenance would not be able to occur as a permitted activity by virtue of the presence of those species (and instead, resource consent as a discretionary activity would be required).

*Ngā Rūnanga – original submission and appeal*

- 20 Ngā Rūnanga supported in part the notified version of Rule 78(a). Specifically, Ngā Rūnanga sought the inclusion of additional clauses to Rule 78(a), as follows:

Weed and sediment removal for drainage maintenance

---

(xiv) No activity in relation to drainage maintenance shall result in greater sediment loss to the drain.

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

- 21 The appeal by Ngā Rūnanga continued to seek the addition of clause (xv) to Rule 78:

(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.

22 In addition, Ngā Rūnanga also sought amendments to Part B of Appendix N, as follows:

The range of good management practices that minimises the effects on taonga species listed in Appendix N and any significant indigenous biodiversity.

23 The relief sought by Ngā Rūnanga may give rise to issues of procedural unfairness because the spatial extent of taonga species has not been made clear to persons who may be interested in the application of the permitted activity rule (i.e., no maps have been provided by Ngā Rūnanga, in contrast to the Director-General, for example).

24 The Court will need to satisfy itself that no issues or procedural unfairness or natural justice arise, noting the Court's comments in the *Gertrude Saddlery* case and the need to ensure that potentially affected parties know what changes are proposed to the pSWLP so that they can choose to participate in decisions being made on those issues.

25 The relief sought by Ngā Rūnanga in relation to protecting taonga species through Appendix N gives this Court scope to further strengthen the content of the FEMP in relation to those species.

### **Response to the Court's questions**

26 There is no clear scope to change the activity status of Rule 78(a) from being a permitted activity. However, there are ways in which to strengthen the conditions of the permitted activity rule and these were supported by the Council at the close of the last hearing on this rule. Therefore, in response to the Court's questions:

- (a) There is no scope for a different activity status in relation to Rule 78; and
- (b) There is scope to include a new rule (something other than a permitted activity rule) in the Plan limited to the sub-clauses under appeal, given that if a condition of the permitted activity rule cannot be satisfied, the activity falls to be assessed as discretionary. Discretionary activity status would form the bookend of scope and so activity statuses between permitted and discretionary are available.

- 27 In my submission, the Court has jurisdiction to make the following changes to Rule 78(a), in the light of the appeals lodged:
- (a) Add a condition to the permitted activity rule relating to the modified watercourse not being habitat of non-migratory galaxiids.<sup>14</sup> This is shown in Rule 78(a)(xiv).
  - (b) Restrict the amount of gravel that can be removed (as a permitted activity) when undertaking sediment removal to no more than 5% gravel over 10mm diameter.<sup>15</sup> This is shown in the addition to Rule 78(a)(ii).
- 28 Further, Fish and Game's appeal sought to amend Policy 30 by:
- (a) Requiring that the margins of modified watercourses are also managed by the Policy.
  - (b) Requiring avoidance of effects as a first priority, before remediation or mitigation can be considered.
  - (c) Deleting "significant" so that "any" adverse effects on the aquatic environment are avoided, remedied, or mitigated.
  - (d) Specifying that the aquatic environment includes water quality, aquatic ecosystem health, life supporting capacity, natural character and riparian margins, mahinga kai, and indigenous vegetation and fauna.
  - (e) Specifying that habitat value includes fish passage, gravel spawning habitat, and bank stability.
  - (f) Requiring that drainage maintenance activities are managed in a way that mitigates the quantity of sediment released, including in overland flow entering the artificial or modified watercourse.
- 29 On the basis of the amendments sought to Policy 30, the Court could make consequential changes to Rule 78(a), to strengthen those permitted activity conditions, but not to change the activity status itself.

---

<sup>14</sup> On the basis of the Director-General's appeal.

<sup>15</sup> On the basis of the Fish and Game and Forest and Bird appeals.

**DATED** this 7<sup>th</sup> day of June 2023

A handwritten signature in blue ink that reads "P. Maw". The signature is written in a cursive style with a large initial 'P' and a trailing flourish.

.....  
**P A C Maw / I F Edwards**  
Counsel for the Southland Regional Council

**Appendix A – Rule 78 as per Council Decision, with tracking showing changes from Notified Version**

**Rule 78 – Weed and sediment removal for drainage maintenance**

- (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 the carrying out of the activity, is a permitted activity provided the following conditions are met:
- (ai) general conditions (e), (f), (g), (h) and (l) set out in Rule 55A;  
and
  - (i) the activity ~~shall be~~ 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~~ or restoration purposes at that location; and
  - (ii) the activity ~~shall be~~ is restricted to the removal of aquatic weeds and plants ~~and/or~~ and/or sediment deposits ~~for drainage maintenance/restoration purposes;~~ and
  - (iia) the removal of river bed material other than aquatic weeds, plants, mud or silt is avoided as far as practicable; and
  - (iii) any incidental bed disturbance ~~and removal of gravel shall be~~ is only to the extent ~~that it is~~ necessary to undertake the activity and ~~shall be kept to the absolute minimum must not result in lowering of the bed below previously modified levels;~~ and
  - (iv) upon completion of the activity, fish passage ~~shall~~ is not be impeded as a result of the activity; and
  - (v) the operator shall 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 ~~shall be~~ is no disturbance of the spawning habitat of trout; and

- ~~(vii) between the beginning of November and the end of May, there shall be no disturbance of banks within the tidal river habitat that floods at spring tide habitat;~~
- ~~(viii) no fuel storage or machinery refuelling shall occur on any area of the bed;~~
- ~~(ix) no contaminants, other than sediment released from the bed, shall be discharged to water during the activity unless allowed by a relevant permitted activity rule or a resource consent;~~
- ~~(x) there are no known archaeological sites or wāhi tapu in the bed, at the site of the activity. In the event of the discovery of a site of potential historical or cultural importance (for example, archaeological site or wāhi tapu), the activity shall cease and Environment Southland's Director of Policy, Planning and Regulatory Services shall be informed immediately. The activity may not recommence without the permission of the Director of Policy, Planning and Regulatory Services;~~
- ~~(xi) before any equipment, machinery, or operating plant is moved to a new activity site from any other area it shall be effectively cleaned to prevent the spread of "pest" or "unwanted organisms" as defined in the Biosecurity Act, 1993;~~
- ~~(xii) all equipment, machinery, operating plant and debris associated with the bed disturbance activity shall be removed from the site on completion of the activity;~~
- (xiii) where the modified watercourse is spring-fed, removal of aquatic weeds and plants shall be is only to the extent that is necessary to undertake the activity and shall be is kept to the absolute minimum.

**Note: In addition to the provisions of this Plan and any relevant district plan, any activity which may modify, damage or destroy pre-1900 archaeological sites is subject to the archaeological authority process under the Heritage New**

*Zealand Pouhere Taonga Act 2014. The responsibilities regarding archaeological sites are set out in Appendix S.*

- (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 above conditions of Rule 78(a) is a discretionary activity.