

**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)

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**MEMORANDUM OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL IN  
RELATION TO THE INITIAL PLANNING STATEMENT  
19 October 2018**

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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**  
(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 The Minute of the Court dated 12 September 2018 (in respect of the record of the pre-hearing conference) directs the Council to file its Initial Planning Statement (and may file its updated section 32 evaluation) by 19 October 2018.
- 3 This Memorandum accompanies the Initial Planning Statement, which is attached as **Appendix A**. This Memorandum addresses:
  - (a) The background and content of the Initial Planning Statement;
  - (b) The Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (**NES-PF**); and
  - (c) Site visit.

**The background and content of the Initial Planning Statement**

- 4 In its Minute dated 25 July 2018, the Court considered that it would be of assistance if the Council was able to provide an early explanation of the pSWLP's relevant underpinnings and design approach by way of an "initial planning statement".<sup>1</sup>
- 5 The Court noted that the section 32 and section 32AA reports and other material that informed the pSWLP decisions would elucidate things to some extent, but that those reports are now outdated insofar as those decisions have changed the notified version of the pSWLP. The Court stated that it saw value in a refreshed and comprehensive analysis being provided in advance of mediations in the form of planning evidence by the Council's lead planning witness (being a witness with appropriate understanding of these matters, supported by relevant reference material).<sup>2</sup>

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<sup>1</sup> Minute dated 25 July 2018 at [6].

<sup>2</sup> Minute dated 25 July 2018 at [7].

- 6 At paragraph 8 of its Minute dated 25 July 2018, the Court identified specific questions that could be usefully covered in the Initial Planning Statement.
- 7 To provide a “refreshed and comprehensive analysis” the Council Officers have prepared an updated section 32 evaluation that aligns with the decisions version of the pSWLP and the reasoning in the associated Decision Report. The updated analysis is shown by way of marked up changes to the original section 32 report, with additions shown in red underlining and deletions shown in ~~red strikethrough~~. The updated section 32 evaluation is attached as **Appendix A**.
- 8 The original Section 32 Report, much of which remains, was prepared by a number of staff and consultants to the Council. It is not based on the opinion of a single person. That Section 32 Report was adopted by the Council and notified, along with the pSWLP. The updating and tracked changes in the updated version that accompanies this Memorandum and which forms the Council’s Initial Planning Statement, has similarly been prepared by a range of staff and consultants to the Council, including planners and scientists. It also incorporates parts of the Section 42A Report developed for the hearing and the Hearing Panel’s Decision Report on the pSWLP.
- 9 Accordingly, updated section 32 evaluation / the Initial Planning Statement should not be considered solely to be the Council’s lead planning witness, Mr McCallum-Clark’s, expert planning opinion.
- 10 The Court’s specific questions set out at paragraph 8 of its Minute dated 25 July 2018 largely fall within the ambit of the updated section 32 evaluation. Accordingly, to avoid duplication, the Court’s specific questions have been addressed in the updated section 32 evaluation. The table below sets out where each of the Court’s specific questions have been addressed.

<b>Specific Environment Court questions</b>	<b>Part of Updated section 32 evaluation where question is addressed</b>
(a) What NPSs are the pSWLP intended to give effect to? Is that qualified, in any relevant sense, for any of the relevant NPSs (referring, for instance to the statement concerning the National Policy Statement for Freshwater Management 2014 (‘NPSFM’)	Section 2.2.1.  The Council’s revised Progressive Implementation

that prefaces the region-wide objectives)?	Programme for fully implementing the National Policy Statement for Freshwater Management 2014 is set out in Appendix C. <sup>3</sup>
(b) Are there any relevant national environmental standards?	Section 2.2.3
(c) Is it the respondent's view that the Southland Regional Policy Statement 2017 is fully up-to-date in giving effect to relevant NPSs and, if not, how is this intended to be managed in the consideration of the pSWLP?	Section 2.2.4
(d) What is the relevant state-of-the-environment information underpinning the pSWLP, including in respect of the provisions on Physiographic Zones and the water quality of related water bodies?	Sections 3.4 and 4
(e) What s30 RMA functions (particularly as pertaining to use of land, river beds, take and use of water and discharges) and Part 2 purpose and principles are intended to be addressed by the pSWLP's provisions?	Section 2.1
(f) What are the relevant linkages as between pSWLP including: (i) objectives and related policies and rules? (ii) appendices and related rules? (iii) definitions and related provisions?	Appendix B
(g) What rules specify relevant assessment matters, standards and controls for the determination of resource consent applications for: (i) water take/use? (ii) land uses? (iii) discharges?	Section 2.3
(h) Pending the processes intended for provision of Freshwater Management Units ('FMUs'), under existing rules, can related policies be achieved or are there any gaps in being able to do so?	Section 2.4

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<sup>3</sup> The Council resolved to adopt and publicly notify the revised Progressive Implementation Programme on 17 October 2018. Counsel understands that the revised Progressive Implementation Programme will be publicly notified in due course.

(i) Does the pSWLP seek to regulate over-allocation both in terms of water quantity and quality or just water quantity (noting the reference to 'quality' in Policy P16.1(b)(ii))? If it seeks to regulate over allocation in a quality sense, which rules do so?	Section 2.4
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- 11 In respect of the Court's indication that the Council may wish to traverse drafting infelicity issues in the Initial Planning Statement,<sup>4</sup> the Council Officers consider that any infelicity issues are best addressed in parallel to, or after, the merits of the appeals are dealt with.

### NES-PF

- 12 As noted by the Court in its Minute dated 12 September 2018, Rayonier has sought directions in relation to section 32(4) and section 293 of the Resource Management Act 1991 (**RMA**) in respect of the NES-PF.
- 13 There are 20 rules in the pSWLP that may be relevant to "plantation forestry activities" (as that term is defined in the NES-PF) that the Council considers are more stringent than the NES-PF in certain circumstances (e.g. depending on the particular activity being undertaken).<sup>5</sup> Of these 20 rules, 15 are directly under challenge by various appeals<sup>6</sup> and fall into the following topics:
- (a) Surface waterbodies;
  - (b) Stormwater;
  - (c) Cultivation;
  - (d) Take and use of water;
  - (e) Structures in river, lakebeds, and wetlands;

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<sup>4</sup> Minute dated 25 July 2018 at [9]-[10].

<sup>5</sup> Being Rules 4, 5, 6, 15, 25, 38, 49, 52, 55A, 57, 58, 59, 62, 66, 68, 69, 74, 76, 77, 79. See the Council's assessment table of the rules that are more stringent than the NES-PF:

<https://www.es.govt.nz/Document%20Library/Factsheets/Other%20factsheets/Comparing%20the%20National%20Environmental%20Standards%20for%20Plantation%20Forestry%20to%20the%20proposed%20Southland%20Water%20and%20Land%20Plan.pdf>

<sup>6</sup> Rule 4, 38, 55A, 69, and 76 are not directly under appeal.

- (f) Bed disturbance activities; and
  - (g) High country burning.
- 14 Counsel notes that section 32 will be relevant to the Court's determination of the pSWLP appeals, and also notes the Court's comments that section 293 of the RMA could potentially be relevant at some stage (being after hearing the appeals against the provisions of the pSWLP).
- 15 However, at this stage of the proceedings, an assessment in accordance with section 32(4) of the RMA has not been carried out for the following reasons:
- (a) The original Section 32 Report (dated 3 June 2016) prepared in respect of the pSWLP as notified did not address the NES-PF, as the NES-PF was not gazetted or in force at that time (so it did not need to be considered).
  - (b) The pSWLP decision was publicly notified on 4 April 2018. At this point in time, Regulation 6 of the NES-PF provided that rules in a regional plan could only be more stringent than the NES-PF where they gave effect to a "freshwater objective" developed to give effect to the National Policy Statement for Freshwater Management (**NPSFM**). The decisions version of the pSWLP included reference to the NES-PF (by way of an advice note), for which a section 32AA evaluation had to be, and was, carried out. However, the Decision Report and the pSWLP (decisions version) both make it clear that the objectives contained in the pSWLP are not "freshwater objectives" as that term is defined in the NPSFM 2014. Accordingly, at the time of the pSWLP decision, none of the rules in the pSWLP could have been more stringent than the NES-PF, as Regulation 6 (as it then was) did not apply.
  - (c) On 26 April 2018, after the pSWLP decision was made and publicly notified, the NES-PF was amended by deleting "freshwater" from Regulation 6, so that rules in a regional plan can be more stringent than the NES-PF where they give effect to "an objective" developed to give effect to the NPSFM.<sup>7</sup> This change

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<sup>7</sup> see Resource Management (National Environmental Standards for Plantation Forestry) Amendment Regulations 2018.



now means that rules in the pSWLP can be more stringent than the NES-PF. That is because the rules in the pSWLP “give effect to” (or implement) objectives that give effect to the NPSFM.

- (d) Accordingly, there is no discretion for the Council to decide whether the existing rules in the pSWLP that are more stringent than the NES-PF should prevail over the NES-PF. Whether the rules prevail over the NES-PF occurs simply by application of Regulation 6 of the NES-PF. Either an existing rule in the pSWLP meets the requirements of Regulation 6 and prevails over the NES-PF, or it does not.
- (e) In relation to the pSWLP rules that are beyond challenge and that are more stringent than the NES-PF, there is no legal requirement for a local authority to carry out a retrospective section 32(4) assessment in respect of existing plan rules that are more stringent than the NES-PF.
- (f) In relation to the pSWLP rules that are more stringent than the NES-PF and which are under appeal:
  - (i) The Council’s lead planning witness, Mr McCallum-Clark has carefully considered whether an analysis under section 32(4) can be carried out at this point in time. However, as the amendments to the NES-PF (which changed how the NES-PF applies to the rules in the pSWLP) occurred after the Council made its decisions on the pSWLP, there has been no technical analysis as to the difference in the effects on the environment due to the more stringent pSWLP rules, compared to the NES-PF. Technical analysis will be required to carry out an assessment under section 32(4) of the RMA.
  - (ii) Further, the rules in the pSWLP that are more stringent than the NES-PF may change as a result of any amendments to the pSWLP rules that are made as part of the pSWLP appeal proceedings (either as a result of the Court granting consent orders and/or the Court’s decision after hearings).
  - (iii) Accordingly, it is submitted that the appropriate point in the proceedings to carry out this assessment in relation to section 32(4) is in parallel to, or after, the merits of the

appeals and any amendments to the wording of the rules in the pSWLP are dealt with.

**Site visit**

16 Counsel consider that the Court may be assisted by carrying out a site visit of parts of the Southland region prior to the commencement of the Topic A hearings on the pSWLP. If the Court is minded to carry out a site visit, the Council is willing to assist with the preparation of a proposed itinerary.

**DATED** this 19<sup>th</sup> day of October 2018



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

**Appendix A**

**Initial Planning Statement - Updated Evaluation Report dated 19 October 2018**