

**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)

**MEMORANDUM OF COUNSEL FOR THE SOUTHLAND REGIONAL
COUNCIL REGARDING APPENDIX N**

8 May 2023

Judicial Officer: Judge Borthwick

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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

- 1 This Memorandum of Counsel is filed on behalf of the Southland Regional Council (**Council**) regarding the Minute of the Environment Court issued on 28 April 2023 (**Minute**).
- 2 The Minute addressed the sense check of Appendix N:FEMP and the resultant JWS. In that Minute, the Court acknowledged that it had no difficulty in principle with the recommended changes to cl 6(b), cl 7(b), (g), (h) and (i), cl 9(a)(ii) and cl 10(d), but indicated that in respect of certain amendments, evidence may be required.
- 3 The Court directed the Council to confer with the parties about the best way to respond, and to propose directions by Friday 5 May 2023. As advised to the Court, due to unavailability of counsel, the Council was not able to respond by Friday 5 May 2023.¹
- 4 Pursuant to the Minute, this Memorandum proposes directions, noting that the week of 29 May has been set aside to, amongst other things, ask questions of the sense check participants. For this reason, counsel notes at the outset that a number of the questions posed in the Minute could be asked of the sense check participants orally.

Questions to be answered by the sense check participants at the hearing

- 5 The following questions have been identified by the Council as being suitable to be addressed by the sense check participants, orally, at the forthcoming hearing:

[6] In relation to cl 7(b) we wonder whether 'predominant' rather than 'dominant' may be a better fit. We would appreciate technical evidence on the granularity of information needed to inform the FEMP and whether this is captured in the suggested edits; e.g. are there circumstances in which soil types other than the predominant type could be relevant and should be recorded?

...

[8] We understand the variables in cl 8(c)(i) – crop area/yield, crop rotation length, type of crops grown, stocking rate or stock

¹ Counsel notes that responses have been received from the Director-General of Conservation, Ngā Rūnanga, the Dairy Interests, Ravensdown Limited, and Ballance Agri-nutrients Limited.

type – are inputs into a nutrient budget or nutrient loss risk assessment tool. Parties are to say if this is not the case.

...

Clause 8(c)

[12] Is the recommended change to include ‘irrigation and effluent areas’ made clearer if the reference is to ‘effluent disposal areas’?

[13] The participants in the sense check are to elaborate on the statement at [32] of their JWS that crop yield is less foreseeable e.g. are they referencing the situation where yield/harvest is less than planned due, for example, to an adverse weather event or something else.

...

Clause 10(c)

[21] Would the uncertainty noted in the JWS be addressed if the word ‘significant’ was omitted? On our reading the meaning of the clause is unaltered if it reads ‘upgrades’ rather than ‘significant upgrades’.

Clause 10(d)

[22] Parties are to confirm whether ‘pasture’ is to be captured in this clause and if so, should ‘crop’ be amended to read ‘plants’.

- 6 The answers given by the sense check participants will then inform any supplementary planning evidence, if required.

Questions posed by the Court that require technical input from the farm systems experts

- 7 The Council has considered the contents of the Minute and identified a number of matters that could be addressed by the farm systems experts:

Clause 13(g)

[29] The term ‘armouring’ was used in evidence by planning and technical witnesses. We are advised farmers and farm systems advisors may be unfamiliar with this term.

[30] That being the case a new term or phrase is required to convey the idea of the residual root system and vegetative cover provided by pasture retained on the paddock.

Clause 13(i) and Notes (a), (b) and (c)

...

[33] To that end the farm systems advisors (who have not participated in the sense check) having conferred with the planning witnesses are to propose a range of scenarios for the sense checkers to test the relationship where land area, total planned feed and stocking density is changing.

[34] For example, if the area for intensive winter grazing is reduced from 15% to 10% of the landholding, can total planned feed over the next 12 months support an increase in stock density under 13(i) and FEMP generally? Our understanding is that total planned feed may support an increase in stock density grazing on the reduced area of land. If this were to occur this may result in an increase in contaminants (N and *E.coli* at least).

- 8 Dr Monaghan, the Council's farm systems expert, is considering the Court's comments at paragraphs [29]-[30], and the Council intends to circulate his suggested amendments to the other parties for comment. This will then inform how much further evidence may be required (for example, whether a supplementary statement from Dr Monaghan would suffice, or whether other parties call separate evidence).
- 9 With respect to the Court's request for farm systems advisors and the planning witnesses to propose a range of scenarios for the sense checkers to test the relationship where land area, total planning feed and stocking density is changing, the Council canvassed a number of alternative approaches/responses for this with the parties. No party expressed a strong preference for a particular approach/response. The Council's preferred approach is for Dr Monaghan and Mr McCallum-Clark to prepare a range of scenarios, circulate these to the parties for comments, with the agreed scenarios then put to the sense check participants either as part of the hearing process, or the sense check participants conference on one of the days during that week while the parties are dealing with the Rule 78 issues and present their views later in the week.

Questions posed by the Court that require a planning response

- 10 The following questions have been identified as requiring a planning response:

Material Change*

...

[9] What is a 'material change*' and what is to happen in response is set out in cl 16. Clause 16 is focused on risk. Would it be clearer if cl 16(a) was amended to read:

The FEMP must be reviewed by the landholding owner, or their agent, as follows:

(a) when there is a material change* in farming activities on the landholding. A material change* is one that increases the risk of not achieving the plan's objectives, and where that change is not provided for within the landholding's certified FEMP; and

Clause 7(k) and (l)

[10] If not resolved between the parties directly, we seek evidence responding to the JWS concern around lack of clarity in the phrase 'other significant values and uses (if known) of nearby land and waters' (cl 7(l)). While not mentioned, the same issue may arise in cl 7(k) which uses the phrase 'if known'.

Clause 9(a)(iii)

...

[18] An issue has been raised in the JWS whether this clause acts as a sinking lid on contaminants. This is a good question.

[19] Our understanding of Appendix N: FEMP is that gradual improvement in farm management and reduction in contaminant losses over successive Farm Environmental Management Plans is an outcome. If incorrect, parties are to comment.

Clause 11(c)

...

[28] Regardless of the solution, cl 11(c) does not appear to implement Policy 16 and parties are to respond, calling evidence (if required).

- 11 The Council intends to circulate Mr McCallum-Clark's proposed amendments and comments regarding the matters raised in the Minute to the other parties, with a view to ascertaining whether the other parties support those amendments. This will then inform how much further evidence may be required (for example, whether a supplementary statement from Mr McCallum-Clark would suffice, or whether other parties call separate evidence).

Other matters

- 12 Paragraph [20] of the Court's Minute asks the parties to explain how the term 'margin' is to be understood and applied in a FEMP. Counsel for the Council considers this is a matter of interpretation and propose to address this in legal submissions during the week of 29 May 2023. No party expressed a different view on this matter.

- 13 The parties wish to clarify which experts the Court was referring to in paragraph [32] of the Court's Minute (noting the reference to "the experts' views"), as follows:

[32] The court is particularly interested in the experts' views on the likely effectiveness of cl 13(i) and the above Notes as a method to implement the outcomes of Policy 16 i.e. there is no increase in contaminants and contaminants are minimised. As explained in the fifth interim decision our intention was that the FEMP is responsive to the relationship between contaminant losses and total feed, area and stocking density.

- 14 The parties' tentative views are that this is directed at the farm systems experts but would appreciate further clarification from the Court in this regard.

Directions sought

15 The parties respectfully seek the following directions:

- (a) The Council is directed to circulate to the parties the suggested amendments of Dr Monaghan and Mr McCallum-Clark in relation to the matters raised in the Court's Minute by Wednesday 10 May 2023;
- (b) The parties are directed to respond to the Council regarding the suggested amendments by Friday 12 May 2023; and
- (c) Any further technical and planning evidence required is to be filed with the Court by Friday 19 May 2023.

DATED this 8th day of May 2023



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P A C Maw / A M Langford
Counsel for the Southland Regional Council