

**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)

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**MEMORANDUM OF COUNSEL FOR THE SOUTHLAND REGIONAL  
COUNCIL SEEKING RECALL OF SIXTH INTERIM DECISION**

**28 April 2023**

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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 18 April 2023 (**Minute**).
- 2 The Minute addressed the Sixth Interim Decision of the Environment Court, 23 March 2023 (**Sixth Interim Decision**).<sup>1</sup> In the Minute, the Environment Court identified that parts of the Sixth Interim Decision were unclear, and raised whether parties may consider requesting the Environment Court to partially recall the Sixth Interim Decision. It therefore issued the Minute to provide parties an opportunity to recall the Sixth Interim Decision.<sup>2</sup>
- 3 The purpose of this memorandum is to respectfully request that the Court partially recalls its Sixth Interim Decision.

**Sixth Interim Decision and Rule 78**

- 4 At paragraphs [268]-[295] of the Sixth Interim Decision, the Court discusses Rule 78 of the Proposed Southland Water and Land Plan.
- 5 Rule 78 provides for the removal of aquatic weeds, plants and sediment from modified watercourses as a permitted activity for the purposes of 'maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity' subject to certain standards.<sup>3</sup>
- 6 In the Court's Sixth Interim Decision, summarised in the Court's Minute, it made the following decisions regarding Rule 78:
  - (a) The Court recognised that the entirety of Rule 78 had not been appealed, and discussed the rule's shortcomings generally;<sup>4</sup>
  - (b) The Court noted that the amendments proposed by the parties to Rule 78 did not address the shortcomings of the rule, noting that:<sup>5</sup>

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<sup>1</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51.

<sup>2</sup> Court's Minute dated 18 April 2023 at [1].

<sup>3</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [246].

<sup>4</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [269].

<sup>5</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [271].

[271] Amendments sought by the parties do not redress the shortcomings identified in the permitted activity rule in the preceding section. Rather, in the Court's evaluation, they would create further permitted activity rule implementation challenges.

- (c) The Court held that the conditions of the permitted activity rule proposed by the parties were unclear and uncertain. The Court further found that a permitted activity rule was not the most appropriate method to implement the objectives, stating:<sup>6</sup>

[281] For modified watercourses maintained by the Regional Council, we are not satisfied that the permitted activity rule will be effective in implementing higher order policy provisions and have concluded the permitted activity status is not appropriate.

- (d) The Court concluded that absent effective permitted activity provisions, a consent regime was required;<sup>7</sup>
- (e) The Court also briefly touched on whether there was scope for the Court to decide on a consenting regime.<sup>8</sup>

7 As the Court identified in its Minute, an issue was raised at the pre-hearing conference on 13 April 2023 as to whether the Court approved a different activity status for Rule 78 or only for those sub-clauses of Rule 78 that were the subject matter of evidence.<sup>9</sup>

### **The Court's powers in respect of recall**

8 Section 278 of the RMA provides Environment Judges with the same powers of the District Court.<sup>10</sup> Relevantly, Rule 11.9 of the District Court Rules 2014 provides that:<sup>11</sup>

[A] Judge may recall a judgement given orally or in writing at any time before formal record of it is drawn up and sealed.

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<sup>6</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [281].

<sup>7</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [292].

<sup>8</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 51 at [284].

<sup>9</sup> Court's Minute dated 18 April 2023 at [2].

<sup>10</sup> RMA, s 278(1). See also *Re Wairakei Pastoral Limited* [2020] NZEnvC 63 at [10].

<sup>11</sup> District Court Rules 2014, r 11.9.

## Relevant legal principles

9 Section 278 of the RMA allows the Court to look to the District Court Rules for guidance, however, it is not bound by these rules as it can regulate its own procedure.<sup>12</sup>

10 The leading decision on recall is the Court of Appeal judgment in *Horowhenua County v Nash (No 2)*:<sup>13</sup>

Generally speaking, a judgement once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty.

There are, I think, three categories of cases in which a judgement not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice required that the judgement be recalled.

11 In *Lai v Auckland Council*, the Environment Court addressed the wording of Rule 11.9 of the District Court Rules and the issue of sealing a decision. The Court held that the Environment Court procedures for sealing are very different from those which apply in the District or High Court.<sup>14</sup> The Court concluded that:<sup>15</sup>

[19]... the sealing of the report does not create an impediment to the application for recall, as the affixing of it was simply for authentication purposes. To hold otherwise would mean that there were no circumstances in the Environment Court where a judgement could be recalled, given that the practice is for all Environment Court decisions to have the seal affixed to them.

12 *Lai v Auckland Council* has subsequently been applied in a number of other Environment Court cases.<sup>16</sup>

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<sup>12</sup> RMA, s 269(1). See also *Lai v Auckland Council* [2011] NZEnvC 308 at [14].

<sup>13</sup> *Horowhenua County v Nash (No 2)* [1968] NZLR 525 at [633].

<sup>14</sup> *Lai v Auckland Council* [2011] NZEnvC 308 at [17].

<sup>15</sup> *Lai v Auckland Council* [2011] NZEnvC 308 at [19].

<sup>16</sup> For example see: *Re Wairakei Pastoral Ltd* [2020] NZEnvC 63; *Granger v Dunedin City Council* [2019] NZEnvC 143; *Middleton Family Trust v Queenstown Lakes District Council* [2019] NZEnvC 149; *Selwyn Quarries Ltd v Canterbury Regional Council* [2018] NZEnvC 139.

### **Very special reasons justice requires a partial recall of the Sixth Interim Decision**

- 13 The Council considers there are very special reasons justice requires the Court to recall all parts of the Sixth Interim Decision relating to Rule 78, including paragraphs [268]-[295].
- 14 The Court has acknowledged that its decision with respect to Rule 78 is unclear. In particular, whether the Court approved a different activity status for Rule 78 or only for those sub-clauses of Rule 78 that were the subject matter of evidence, is unclear.
- 15 The Council is not seeking the partial recall of the Sixth Interim Decision for the purposes of re-litigating Rule 78.<sup>17</sup> Rather, it seeks resolution of the resulting confusion and considers that a partial recall is in the best interests of justice in the circumstances.<sup>18</sup>
- 16 Any resulting clarification would be of benefit to all parties involved and would result in a more efficient use of all parties' time and resources.
- 17 For these reasons, it would be in the interests of justice that the Sixth Interim Decision be partially recalled.

### **Conclusion**

- 18 For the reasons set out above, Counsel respectfully requests:
- (a) the recall of all parts of the Sixth Interim Decision which relate to Rule 78, including paragraphs [268]-[295]; and
  - (b) the subsequent reissue of its decision on Rule 78.

**DATED** this 28<sup>th</sup> day of April 2023



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

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<sup>17</sup> *Granger v Dunedin City Council* [2019] NZEnvC 143 at [27].

<sup>18</sup> *Re Wairakei Pastoral Limited* [2020] NZEnvC 063 at [9].