

**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)

(Continued next page)

**SUPPLEMENTARY LEGAL SUBMISSIONS FOR SOUTHLAND REGIONAL
COUNCIL**

TOPIC B TRANCHE 1 - DISPUTED PROVISIONS HEARING

13 May 2022

Judicial Officer: Judge Borthwick

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ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

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 These supplementary legal submissions are filed on behalf of the Southland Regional Council (**Council**).
- 2 In these submissions I address each of the matters set out in the Minute dated 2 May 2022 (replicated below) for which a legal response is required.¹ Mr McCallum-Clark, by way of a supplementary statement of evidence dated 13 May 2022, addresses each of the matters in the Minute which required an evidential response by today's date.
- 3 The Minute dated 2 May directed the Council:
 - (a) to file supplementary evidence and legal submissions (as appropriate):
 - (i) explaining the Regional Council's FEMP certification and auditing process;²
 - (ii) addressing what, in its view, would constitute a breach of the farming activity rules (Rules 20, 20A, 20B, 70 and 76);
 - (iii) related to (ii) above, advising whether a failure to implement a 'mitigation' within a timeframe specified in the FEMP constitutes non-compliance with the rules. Secondly, is a non-compliance with the timeframe specified in a FEMP a matter able to be cured on a review and amendment of an FEMP pursuant to pSWLP, Appendix N, clause 7(3)?
 - (iv) comparing farm plan regimes in the Canterbury Land and Water Regional Plan with Southland Water and Land Plan proposed FEMP framework;³
 - (v) if not already in evidence, produce Map Series 8;
 - (vi) propose directions for filing of s32AA evidence and submissions addressing scope for amendments the Regional Council supports.

¹ Minute of the Environment Court dated 2 May 2022 at [13].

² This has been identified by the Court as an evidential matter and has been addressed in the statement of evidence of Mr McCallum-Clark dated 13 May 2022.

³ This has been identified by the Court as an evidential matter and has been addressed in the statement of evidence of Mr McCallum-Clark dated 13 May 2022.

- (b) to file supplementary evidence identifying overlapping pSWLP and NES-F provisions;
- (c) to address in legal submissions the position reached by the parties in relation to Policy 28, including whether a decision on scope is required; and
- (d) to confirm in legal submissions that NES-F regs 26 and 27 have not commenced.

The Farm Environment Management Plan regime

The Regional Council's Farm Environmental Management Plan (FEMP) certification and auditing process

- 4 The evidence of Mr McCallum-Clark dated 13 May 2022 explains the Council's plans and current actions regarding the proposed FEMP certification and auditing process.

What, in Council's view, would constitute a breach of the farming activity rules (Rules 20, 20A, 20B, 70 and 76)?

- 5 At the outset, I note that Mr McCallum-Clark in his evidence dated 13 May 2022 has suggested some amendments to the FEMP condition in the farming land use rules. As identified by Mr McCallum-Clark, the JWS version of the FEMP condition was not explicit in its requirement that a landholder must fully comply with the FEMP in order to qualify for the permitted activity rule. Mr McCallum-Clark's proposed amendments make it explicitly clear that the practices, actions, and mitigations in the FEMP, including the timeframes for those as set out in the FEMP, must be complied with in order to comply with the permitted activity rule. For these reasons, the Council supports Mr McCallum-Clark's proposed amendments.
- 6 The Council would also support any necessary changes to Appendix N to reinforce that FEMPs need to have timeframes attached to each action and mitigation.
- 7 For the purposes of these submissions, counsel has considered the following question: What would constitute a breach of the FEMP condition in these permitted activity rules?

- 8 Prior to answering that question, it is helpful to consider the legal requirement of a valid permitted activity rule. The Courts have determined that any permitted activity rule must:
- (a) be comprehensible to a reasonably informed, but not necessarily expert, person;⁴
 - (b) not reserve to a council the discretion to decide by subjective formulation whether a proposed activity is permitted or not;⁵ and
 - (c) be sufficiently certain to be capable of objective ascertainment.⁶
- 9 Therefore, in order for a permitted activity rule to be legally valid, the standards, terms, and conditions of the rule (that must be met for the activity to be permitted) need to be stated with sufficient certainty so that compliance is able to be determined readily without reference to discretionary assessments.
- 10 Within that legal framework, I now address the question of enforceability by using Rule 20 as an example. Assuming that each of conditions 20(a)(i), (a)(iii), (a)(iv), and (a)(ii)(1)-(3) and (6) are met, the remaining condition – (a)(ii)(4) – requires that a FEMP for the landholding must:
- (a) be prepared in accordance with Appendix N;
 - (b) be certified in accordance with Appendix N;
 - (c) be audited in accordance with Appendix N;
 - (d) be implemented by the landholder through that person completing the practices, actions, and mitigations that are specified in the FEMP, in accordance with the timelines for those practices, actions, and mitigations as set out in the FEMP.
- 11 A person undertaking a farming activity that is required to have and implement a FEMP, in accordance with condition (a)(ii)(4), but which is not complying with any of the four elements in paragraph 10(a) to 10(d) above would be in breach of the permitted activity condition in Rule 20

⁴ *Re Application by Lower Hutt City Council* EnvC Wellington W046/2007, 31 May 2007 at [10].

⁵ *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [63].

⁶ *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [64].

and would require resource consent. A breach of those conditions could include:

- (a) not preparing a FEMP;
- (b) not having any FEMP for the landholding properly certified; and
- (c) not implementing an action or mitigation required by the FEMP for the landholding within the timeframe specified in the FEMP.

Would a failure to implement a 'mitigation' within a timeframe specified in the FEMP constitute non-compliance with the rules?

- 12 On the basis of the amendments proposed by Mr McCallum-Clark, yes; a failure to implement a mitigation within the timeframe specified in the FEMP would constitute a non-compliance with the rules.

Is a non-compliance with the timeframe specified in a FEMP a matter able to be cured on a review and amendment of a FEMP pursuant to pSWLP, Appendix N, clause 7(3)?

- 13 I note that clause 7 of Appendix N relates to winter grazing plans and does not appear to be relevant to the Court's question.
- 14 I have assumed that instead, the Court is referring to Part C clause 3. This provides for the review and amendment of FEMPs. It requires a FEMP to be reviewed by the landholding owner or their agent where any of the following applies:
- (a) there has been a material change to the nature of the farming activity which is not provided for in the landholding's certified FEMP;
 - (b) a review has not been undertaken in the last 12 months; or
 - (c) to respond to the outcome of an audit. Specifically, amendments must be made to the FEMP where (a) above applies and/or where the audit identifies that amendments are required.
- 15 In answer to the Court's question, I submit that as soon as a timeframe in a FEMP is not complied with, there would be a breach of the permitted activity rule due to the FEMP not being implemented as required. That would then expose those in control of the landholding to compliance, monitoring, and enforcement action. A subsequent change to the timeframes (or actions or mitigations) in the FEMP, by way of Part C

clause 3 of Appendix N, would not be a defence against a prosecution as the person would not have been complying with the permitted activity rule at the relevant point in time.

Comparison of the farm plan regimes in the Canterbury Land and Water Regional Plan with Southland Water and Land Plan proposed FEMP framework

- 16 The evidence of Mr McCallum-Clark dated 13 May 2022 compares the Canterbury Land and Water Regional Plan (**CLWRP**) farm plan regime with the proposed pSWLP FEMP regime.
- 17 The critical difference between the two regimes, is that the consenting regime in the CLWRP was put in place following the establishment of limits and targets under the NPS-FM that was then in place. In contrast, limits and targets have not yet been set under the pSWLP.

Map Series 8

- 18 The Court noted in the 2 May Minute that “Map Series 8” has been referred to in the context of Rule 78,⁷ and directed the Council to, if not already in evidence, produce Map Series 8 or direct the Court as to where this may be found.⁸
- 19 Map Series 8 is a new map / series of maps proposed to be included in Part B of the pSWLP to inform plan users of the modified watercourses to which proposed new Rules 78(xiv) and (xv) apply.
- 20 The Director-General for Conservation and the Council are seeking the inclusion of a new condition (xiv) on Rule 78(a) requiring that the activity is not occurring in a modified watercourse shown in Map Series 8 as a habitat of threatened non-diadromous galaxias. Two maps showing the modified watercourses known to include habitat of non-diadromous galaxias have been produced in the evidence of Ms Kirk dated 22 February 2022.⁹ The Director-General and the Council propose that these maps, or an amalgamation version of these maps,¹⁰ be included in the pSWLP as Map Series 8.

⁷ Minute dated 2 May 2022 at [7].

⁸ Minute dated 2 May 2022 at [13](a)(v).

⁹ Per the proposed new Rule 78(xiv) supported by the Council and the Director-General of Conservation.

¹⁰ Counsel notes that the detail of these maps is still to be tested through the hearing process. The Council reserves its position in relation to the exact detail to be shown in these maps.

- 21 The Director-General for Conservation also seeks to include a new condition (xv) on Rule 78(a) requiring that the activity is not occurring in a modified watercourse shown in Map Series 8 as a habitat of lamprey/kanakana or tuna in the Waituna catchment of Mataura and Waikawa. No mapping of such habitats has been produced in evidence. Further, it is noted that there does not appear, on its face, to be scope within the Director-General of Conservation's Notice of Appeal for such relief.
- 22 Forest and Bird seeks a new condition (xiv) on Rule 78(a) which requires that the activity is not undertaken in a modified watercourse that is a habitat of threatened native fish. Forest and Bird sought in its Notice of Appeal the addition of a schedule to identify habitats of threatened native fish, however, this has not been produced in evidence.
- 23 Ngā Runanga seeks a new condition (xiv) on Rule 78(a) which requires that the activity is not undertaken in a modified watercourse that is shown in Map Series 8 as a habitat of threatened native fish. It is noted that there does not appear, on its face, to be scope within the Ngā Rūnanga Notice of Appeal for such relief.¹¹ Similarly to the Forest and Bird position, no mapping of the habitats of threatened native fish has been produced in evidence by Ngā Rūnanga.

Section 32AA assessment and submissions addressing scope for amendments the Council supports

- 24 In the 2 May Minute, the Court directed the Council to propose directions for filing of section 32AA evidence and submissions addressing scope for amendments the Council supports.
- 25 As set out in my opening legal submissions dated 11 April 2022, I intend to address scope for the changes ultimately supported by the Council in my closing legal submissions.¹² If directions are required, I respectfully seek directions that the Council address scope for the changes it supports in its closing submissions.
- 26 In respect of the filing of a section 32AA evaluation of the ultimate position of the Council on the outstanding matters, I propose that the

¹¹ Although it is acknowledged that the same relief is sought by Forest and Bird.

¹² At [8].

Council be directed to file such an evaluation 3 weeks after its closing submissions have been given.

Supplementary evidence identifying overlapping pSWLP and NES-F provisions

- 27 The evidence of Mr McCallum-Clark dated 13 May 2022 identifies the provisions in the pSWLP which regulate the same activities as the regulations in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**). His evidence includes brief notes identifying the tension between the provisions and/or the reason for overlap.

Policy 28

- 28 At the all of parties' hearing, the Court questioned the appropriateness of the parties' joint position on Policy 28 and the scope to make the changes sought. The Court subsequently directed the parties to further discuss the proposed relief, and report back whether an agreed position has been reached, including as to scope.¹³
- 29 The Council and Fish and Game have discussed the proposed relief and have agreed upon some changes which both parties consider are appropriate, as follows:

Policy 27A – Loss of river extent and values

[Advice Note - Placeholder for direct insertion of policy required by clause 3.24 of the National Policy Statement for Freshwater Management 2020 Policy 3.24]

Policy 28 – Structures and bed disturbance activities of rivers (including modified watercourses) and lakes

Subject to Policy 27A, mManage structures, bed disturbance activities and associated discharges in the beds and margins of lakes, rivers and modified watercourses, to avoid, where reasonably practicable, or otherwise remedy or mitigate adverse effects on:

¹³ Minute dated 2 May 2022.

...

13. landscape values; and

14. historic heritage values.

30 I submit, with the support of Counsel for Fish and Game, that these changes can be made by the Council by way of clause 16(2) of Schedule 1 of the RMA.

31 Clause 16(2) provides that:

A local authority may make an amendment, without using the process in this Schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

32 A local authority has the discretion to determine whether an alteration is of minor effect, or whether the correction of a minor error is required. Any amendment made under clause 16(2) occurs without further formality or particular proceedings being required, and there is no right of appeal of that decision.

33 What amounts to "minor" is a question of fact, and the likely effects of altering a public document without public input need to be examined.

34 In *Re an Application by Christchurch City Council* the Court stated:¹⁴

In deciding what might or might not have drawn a submission I consider the touchstone should be, does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16.

35 Accordingly, the test to establish whether an amendment is one of "minor effect" is to determine whether the amendment affects the rights of some members of the public, or whether it is merely neutral. Only if it is neutral may such an amendment be made under clause 16.

36 In relation to proposed new Policy 27A, I submit that the insertion of that Policy as a placeholder for the policy wording required by the NPSFM 2020 will have no effect on the rights of any members of the public.

¹⁴ *Re an Application by Christchurch City Council* (1996) 2 NLRNZ 431 (EnvC) at 9-12.

Accordingly, I consider that its insertion would have a neutral effect and is able to be made by way of clause 16(2).

- 37 Policy 28 is proposed to be amended to make it subject to Policy 27A. Until the substantive content of Policy 27A is inserted by Council, the insertion of the phrase “subject to Policy 27A” will have no effect as Policy 27A is simply a placeholder. Accordingly, it too is a permissible alteration by way of clause 16(2).
- 38 Once the substantive wording of the NPSFM direct insertion policy is inserted in Policy 27A, Policy 28 will be subject to the substantive Policy 27A. New Policy 27A is a straight “avoid” policy, whereas Policy 28 is “avoid, where reasonably practicable, or otherwise remedy or mitigate”. Accordingly, Policy 27A is more directive and cannot be read down by Policy 28.¹⁵ On this basis, I submit that the insertion of “subject to Policy 27A” in Policy 28 would not change the way that those two policies would be interpreted/weighed as against one another. Therefore, the insertion of the phrase “subject to Policy 27A” is a change of neutral effect, or, if not neutral, at least minor effect.
- 39 As agreement has now been reached as between the Council and Forest and Bird on this matter, I submit that this is not an issue which requires the Court’s determination (either with respect to scope, or with respect to the timing by which the direct insertion policy in the NPSFM 2020 must be inserted).

Amendments to the NES-F

- 40 On 1 May 2022 the Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022 (**Amendment Regulations**) came into force. The Amendment Regulations, among other things, amended the date on which Regulations 26 and 27 come into force. These regulations now come into force on 1 November 2022 (rather than 1 May 2022).

¹⁵ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [80] - “A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction”.

- 41 In addition to changing the date upon which Regulations 26 and 27 come into force, the Amendment Regulations made the following changes to the NES-F:
- (a) The definition of “annual forage crop” was amended to make it clear that pasture and arable and horticultural crops are excluded.
 - (b) The definition of “drain” was amended so that in Regulation 26 it excludes any subsurface drain.
 - (c) The definition of “intensive winter grazing” was amended to make it explicit that, in relation to the application of section 20A(2) of the RMA, intensive winter grazing includes activities on a farm that support intensive winter grazing and may occur year-round, such as the preparation and sowing of land for grazing and the cultivation of annual forage crops.
 - (d) A new definition was added for “critical source area”.
 - (e) Regulation 26 was amended to add a method for measuring slope of land, remove the pugging and replanting requirements, add a requirement that critical source areas are not grazed and are maintained with vegetative ground cover, and to widen the scope of the information that must be provided to Council enforcement officers.
 - (f) New Regulation 26A was added with a simplified pugging condition that requires all reasonably practicable steps to be taken to minimise adverse effects on freshwater of any pugging.
 - (g) New Regulation 26B was added with a more flexible replanting condition that requires that areas used for intensive winter grazing must have vegetative ground cover established over the whole area as soon as practicable after grazing is finished.

Amendments to consolidated plan

- 42 Finally, the Court directed the Council to update the consolidated version of the plan showing all parties’ relief to make any corrections and include the policies, rules, and methods which the Court has indicated it provisionally approves.
- 43 I advise that this has been done, however in the interests of simplicity, the Council is awaiting the filing of supplementary evidence by parties on

Friday 20 May so that any changes required by that further evidence can also be included in the updated consolidated plan. The Council expects to be in a position to circulate the updated consolidated plan by Wednesday 25 May at the latest.

DATED this 13th day of May 2022



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