

BEFORE THE SOUTHLAND REGIONAL COUNCIL

APP-20191150 and APP-20191703

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of applications for resource consents for the
Lake 2 Lake multi use trail

BY **THE FIORDLAND TRAILS TRUST**
Applicant

SUBMISSIONS OF COUNSEL FOR THE APPLICANT

10 June 2020

FLETCHER VAUTIER MOORE
LAWYERS
PO BOX 3029
RICHMOND 7050

Telephone: (03) 543 8301
Facsimile: (03) 543 8302
Email: cthomsen@fvm.co.nz
Solicitor: CP Thomsen

MAY IT PLEASE THE COMMISSIONER:

1. The Fiordland Trails Trust is a charitable trust that has been the driving force behind the successful multi-use Lake 2 Lake Trail between Te Anau and Manapouri.
2. The Lake 2 Lake Trail will consist of six legs between the two townships and travels through the Te Anau Basin. Legs 1 – 4 and 6 are usable right now. Leg 5 has not yet been constructed and users travel along the State Highway for this section.
3. Its trustees are a group of highly committed volunteers who have been creating and promoting the Trail for the benefit of the wider Southland Region. They have worked closely with the Department of Conservation on the acquisition of land for the trail, pest management and planting and education programs.
4. This application effects a small section of leg 6 of the Trail – some 35 metres¹. It is, in effect, a retrospective consent application, although some elements have not been constructed.
5. The Trail crosses an area of wetland, triggering the need for these resource consents. Mr Beale describes it as marsh in his report accompanying the application and his brief of evidence. It is defined by two streams located at the northern and southern ends.
6. As such, the activity can conveniently be summarised as wetland modification. That is, the clearance of wetland to enable the construction of 35 metres of trail suitable for walking and cycling, along with the construction of three culverts to drain water downstream where the Trail would otherwise impede that flow.
7. The culverts at the northern and southern ends of the Trail are located in existing channels². The third culvert is roughly in the centre of the Trail.
8. You have two applications before you. In a memorandum filed on 17 March 2020 I have explained the relationship between the two

¹ For convenience when I refer to the Trail I am referring to the 35 metre section of trail that this application relates to.

² Notwithstanding this is a retrospective resource consent application I will refer to all Trail works in future tense and generally will not distinguish between those works that have been completed and those that have not.

applications. They are effectively one application that, it is submitted, should be dealt with as a single activity.

9. The first application was made in February 2018 and following amendments and RFIs was set down for hearing in September 2019. When briefing the evidence for that hearing the need for further resource consents was identified; specifically, for a third culvert the Applicant's hydrologist, Mr Hamilton, had recommended. The hearing was adjourned and the second application lodged in October 2019. The Applicant elected to request notification to enable a joint hearing because the third culvert is part of the mitigation proposed and the third culvert cannot, and will not, proceed without the land use consents for the Trail being granted.
10. At Appendix 1 is a further plan the Applicant has prepared where you can see the extent of the wetland habitat immediately affected by the application, including the extent of the area that will subject to the proposed weed management.
11. In addition, filed with these submissions is an aerial photograph that shows the context of the section of the trail subject to the application.

Jurisdictional issue – Rodway Submission

12. There is one jurisdictional issue to be addressed on the admissibility of parts of Mr Rodway's submission.
13. The submission was lodged on 24 January 2020 following the public notice of the third culvert application. It addresses matters that go to the first application, which he did not submit on. Those parts of the submission are therefore inadmissible unless a waiver to file a late submission is sought and granted.

The Plans

14. There are two relevant regional plans:
 - (a) Southland Regional Water Plan (Operative Plan); and
 - (b) Proposed Southland Water and Land Plan (Proposed Plan).

15. I agree with the Reporting Officer that the Proposed Plan's rules have legal effect³ and that both plans are relevant for the purposes of ss 104 and 104D.
16. The Environment Court has released its first interim decision on the Proposed Plan appeals in *Aratiatia Livestock Limited v Southland Regional Council*⁴. This decision focuses on the high level policy framework of the Plan and leaves a number of (mainly) objectives and (some) policies undetermined beyond giving high level direction about where it sees them heading. I will therefore need to spend some time analysing *Aratiatia*. I have included a copy of the decision with these submissions.

Resource Consents Required

17. There is no resource consent required for wetland modification under the Operative Plan.
18. The following consents are required⁵:
 - (a) Non-complying activity under rule 74(c) Proposed Plan for wetland modification to construct the Trail (including two culverts);
 - (b) Non-complying activity under rule 74(c) Proposed Plan for wetland modification to construct the third culvert in the centre of the Trail;
 - (c) Discretionary activity as an innominate activity under the Proposed Plan pursuant to s 87A to divert water in a wetland through the third culvert; and
 - (d) Discretionary activity under rule 20(c) Operative Plan to divert water from a naturally occurring wetland.
19. The water permits to divert water have been sought out of an abundance of caution to address the effect the third culvert will have on the natural flow of water downstream by diverting it through that culvert.

³ Under either s 86B(1) or (3).

⁴ [2019] NZEnvC 208.

⁵ Ordered as sought in the two applications.

Because the two other culverts are in existing channels no consent for diversions have been sought.

20. While the wetland modification is permitted under the Operative Plan, I nonetheless briefed Mr McSoriley to consider its objectives and policies. It is questionable how useful an analysis against the Operative Plan is because the objectives and policies are implemented by a permitted activity rule. Nonetheless, because that plan is operative, it is necessary to analyse it under ss 104 and 104D(1)(b)(iii). It is the weight given to it that becomes an issue.

Issues

21. It is submitted that, at its heart, this application is about the proper interpretation of the Proposed Plan. There is no evidence from the ecologists or hydrologist of adverse effects of concern. Instead the issue seems to be whether this plan can tolerate a reduction in wetland habitat, no matter how small and regardless of the effects.

The Applicant's Position

22. In summary it is the Applicant's position that:
- (a) The proposed location of the Trail represents the most appropriate alignment because it:
 - i. Is the most practical alignment available for trail geometry reasons;
 - ii. Avoids additional significant wetland to the west and minimises the length of the wetland crossing;
 - iii. Avoids locating the Trail within formed road corridors⁶;
 - iv. The alignment complies with the conditions of land use consent granted to the Applicant by Southland District Council for leg 6 of the Trail⁷ and the authorities obtained from the Department of Conservation (as landowner).

⁶ See Mr Boniface's evidence from paragraph 16.

⁷ See Appendix B to the application.

- (b) The mitigation package proposed is comprehensive and will lead to enhancement of wetland habitat overall.
- (c) The third culvert should be granted because:
 - i. It mitigates any risk of localised drying at the approximate centre of the track should surface and sub-surface water be diverted into the existing channels;
 - ii. It provides an opportunity for enhancement through the wetting of areas suitable for wetland habitat, particularly once proposed weed control work is undertaken;
 - iii. The proposed stop logs will control flow and ensure there is no upstream dewatering.

Submissions and Affected Persons Consents

- 23. The submissions were overwhelmingly in support. There is a pragmatism to those submissions, recognising the benefits of the Trail, and that the mitigation proposed by the Applicant will lead to the best outcome.
- 24. There have also been affected persons consent from DOC, Te Ao Marama and Fish and Game Southland⁸.

The Law

- 25. I am aware that the Commissioner is an experienced RMA decision-maker and will therefore not spend any significant time addressing the fundamentals of part 2, ss 104 and 104D. I will simply focus on what I think are material legal issues that require highlighting.

Retrospective Consents

- 26. The law is clear on retrospective consents. The fact that no resource consent was obtained before the activity was undertaken does not influence the outcome of the process and nor does the Applicant obtain any benefit from that earlier irregular conduct⁹.
- 27. A resource consent process is not to be used in a punitive fashion, that is what enforcement provisions are for. It is noted that here an

⁸ Fish and Game to the Trail construction application only.

⁹ *Colonial Homes Limited v Queenstown Lakes District Council* W104/95 and *Hinsen v Queenstown Lakes District Council* 2004 NZRMA 115.

abatement notice has been used to address the non-compliance with the Proposed Plan and the Applicant responsibly reacted to that abatement notice¹⁰.

Part 2

28. The *R J Davidson Family Trust* line of cases provide guidance on how part 2 is applied in s 104. In the final word on the matter¹¹ the Court of Appeal adopted a more nuanced approach than the High Court and explained that the words *Subject to part 2* require consideration of part 2 when appropriate. It said:

We do not consider however that *King Salmon* prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome.¹²

29. It goes on to say that where a plan has been *prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes* then reference to part 2 would not add anything and does not justify an outcome that departs from it¹³.

30. I agree with the Officer's analysis and conclusion that you can have a high degree of confidence the Proposed Plan has been prepared in light of our modern understanding of how part 2 functions, including the role of the National Policy Statement for Fresh Water Management. However, this is subject to the unresolved issues highlighted in *Aratiatia*.

31. The Operative Plan is in a different position because of its age and the same conclusion may not be sound. In my submission this is how you might address the issue of a permitted activity, and its attendant policy support, changing to non-complying. You would look at its policy framework in light of (*subject to*) part 2.

32. That all being said, there is a practical reason why the focus of the Applicant's case is on the Proposed Plan. Rule 74 is well advanced

¹⁰ See Mr Boniface's evidence at paragraphs 20 – 21.

¹¹ *R J Davison Family Trust v Marlborough District Council* [2018] NZCA 316.

¹² At [82].

¹³ At [74].

through the Schedule 1 process¹⁴ and not under appeal. Therefore, there can again be a high degree of confidence that the policy framework will continue to reflect that activity status. I accept there is an element of the tail wagging the dog in this submission¹⁵, but it is noted that given what we know about the loss of wetland habitat in this region, the chance of a fundamental shift in the Proposed Plan back to permissive rule regime is slim¹⁶.

33. Thus, when the weight between the plans is considered, it is submitted the best approach is to give more weight to the Proposed Plan because its objectives and policies support the non-complying activity status.

The Right Order of Things

34. There has been a lack of clarity as to the right approach to the ordering of ss 104 and 104D analyses when decision-making.
35. On the one hand the High Court has said the order is vital and getting it wrong will be an error of law¹⁷. On the other, in *Harewood Gravels Co Ltd v Christchurch City Council*¹⁸ the High Court has confirmed approaching s 104D as a gateway in the traditional sense is not strictly necessary and you may undertake a detailed examination of effects under that section¹⁹.
36. In my submission you will not be in error whichever way you consider most convenient to approach the question.
37. My approach has been to assess the plan provisions and effects in a global discussion. Intuitive in that assessment is consideration of s 104D. I have made specific submissions on the gateway tests to mimic, as you will be aware, the need to make findings on those legal tests in your decision.

¹⁴ *Keystone Ridge Limited v Auckland City Council* HC Auckland AP24/01, 3 April 2001.

¹⁵ And, in theory the rule could be amended depending on the policy outcomes.

¹⁶ See *Aratiatia* at [278].

¹⁷ See *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 817, which found that the gateway under s 104D should be considered first.

¹⁸ [2018] NZHC 3118.

¹⁹ See also *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194, where the Environment Court cast doubt on the correctness of *Queenstown Central*.

Section 104D

38. To deal firstly with the policy gateway in subs (b)(iii), the Environment Court has reminded us recently²⁰ that an holistic view of the objectives and policies is required in the s 104D analysis.
39. The nature of non-complying activities means they are unlikely to find direct support in the plan, but consent may be granted if the activity is *not contrary*²¹. *Not contrary* requires repugnancy or opposition²².
40. It is accepted there may be objectives and policies so fundamental that notwithstanding the broad approach described above, that an application may be contrary to the objectives and policies. It is a question of context and interpretation.
41. The consideration of whether adverse effects will be more than minor under s 104D(1)(a) is also holistic and involves envisaging what the future environment may be. You must therefore consider the entire application and range of effects (excluding positive effects)²³. This includes mitigation and conditions that are proposed²⁴.
42. The mitigation proposed by the Applicant is to those onsite effects arising from the proposal; for instance, the loss of wetland area, which is to be mitigated by weed species management to improve the form of the wetland. Secondly, any loss of function will also be mitigated through localised hydrological remediation, preserving wetting and weed management.

True Exception Test

43. The loss of wetland habitat is an issue of critical importance in the Southland Region, which has been made clear in *Aratiatia*²⁵. It appears

²⁰ *Clearwater Mussels Limited v Marlborough District Council* [2016] NZEnvC 21 at [242].

²¹ *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323.

²² *Outstanding Landscape Protection Soc Inc v Hastings DC* [2008] NZRMA 8.

²³ *SKP Inc v Auckland Council* [2018] NZEnvC 81 at [49] citing *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194.

²⁴ See *SKP* at [48].

²⁵ See [278].

this concern may well be driving the Officer's recommendation. Cumulative effects are raised by Dr Lloyd.

44. There may also be an underlying concern that precedent could be an issue because cumulative losses of small areas of wetland will compromise overall extent. In other words, precedent and/or plan integrity²⁶. One way to address this issue is to make findings as to what distinguishes an application from others²⁷. This is often known as the "true exception test" as described in *Russell v Dunedin City Council*²⁸.
45. It is submitted that the following matters make this application a true exception:
 - (a) Mr Boniface has explained in his evidence why the route was chosen²⁹;
 - (b) There is an extant Southland District Council consent that constrains the location of the Track;
 - (c) The Court has found that the clearance and drainage of wetlands for agriculture is the primary cause of wetland loss, along with afforestation, peat mining and horticulture³⁰. It is submitted you may take judicial notice of the fact that loss of habitat from similar activities to this will be de minimus; and
 - (d) There is no evidence before you suggesting that the effects will be anything other than minor or less than minor.
46. It is therefore submitted it is unlikely that this set of circumstance would be repeated and the application has unusual qualities that make it an exception.

Consideration of Mitigation under s 104

47. It is submitted you are entitled to take account of proposed conditions in your s 104 assessment³¹, see *Guardians of Paku Bay v Waikato Regional Council*³². The proposed conditions have been refined and

²⁶ See *Harris v Central Otago District Council* [2016] NZEnvC 52.

²⁷ See *Harris* at [66].

²⁸ 92/03.

²⁹ See paragraphs 16-19.

³⁰ See [278].

³¹ See earlier submission on taking account of conditions under s 104D.

³² [2012] 1 NZLR 271 at [129].

formulated based on the (mostly) consistent advice of the two ecologists to remedy or mitigate the actual and onsite effects of the proposal.

48. Because of the two-stage approach to the hearing, the Reporting Officer had the opportunity to see the Applicant's September evidence before completing her s 42A report for the third culvert application. That evidence included the mitigation proposed, which was also addressed in correspondence between Dr Lloyd and Mr Beale. However, that information did not influence her conclusion and the March Addendum Report makes the same recommendation as that from September.
49. It is submitted the Officer's conclusions are flawed because she fails to consider the entire application, specifically the proposed mitigation. For instance, in her analysis of objective 14³³ she says that the application is inconsistent with the objective because the activity is for the modification of a natural wetland rather than its enhancement. In maintaining that conclusion she has no regard to the evidence of Mr Beale that the proposed weed species control includes the opportunity to increase the extent of the wetland³⁴. Since then³⁵ he and Mr Hamilton have given evidence that the third culvert will provide an opportunity for wetland enhancement in the area identified in Mr Hamilton's Figure 1³⁶ and shown on Appendix 1.
50. She does acknowledge the remediation and enhancement work the ecologists recommend at the end of her discussion, but surprisingly does not analyse it.
51. Thus, as a matter of law it is submitted that the proposed mitigation should be considered, and the Reporting Officer has made an error in not doing so in a meaningful fashion.

The Proposed Plan

52. Mr McSoriley has undertaken a comprehensive assessment of the objectives and policies of both the Proposed Plan and Operative Plan

³³ See page 30 September report.

³⁴ See 8.4.

³⁵ Post the circulation of the s 42A reports in March.

³⁶ See Mr Hamilton's paragraph 12.

in his evidence.³⁷ He has taken us through the objectives and policies and identified three rough categories that they fit into:

- (a) High level / strategic objectives and policies.
- (b) Infrastructure policies.
- (c) Wetland policies that address land use and form, function and quality.

Plan Architecture - *Aratiatia*

53. The circumstances surrounding the weight to give to the two plans are complex. On the one hand there is an operative plan, which has a policy framework in place that supports a permitted activity regime and is therefore of minimal assistance in determining this application, given the activity status is non-complying. On the other, we have a Proposed Plan that is presently in the middle of appeals. To make matters worse we are in the unenviable position of having a decision that signals alterations to a number of objectives and policies of the decisions version of the Proposed Plan but no findings as to their final form.
54. To attempt to address this issue I will take you through what *Aratiatia* tells us. Ultimately in my submission the usual weighting exercise is going to need to be undertaken to determine what weight you give to various objectives and policies. If both plans favour the granting of consent then there is no need to weigh the two plans³⁸. If you reach a different conclusion to the Applicant's witnesses, then you will need to consider weight, which will depend on the stage the Proposed Plan has reached³⁹. As noted above, notwithstanding the uncertainty, in my submission more weight should be given to the Proposed Plan.

Proposed Plan Structure

55. The Court has indicated that the Proposed Plan is to be interpreted and applied in a manner that gives effect to *Te Mana o te Wai* and implemented in accordance with *ki uta ki tai*. The Proposed Plan

³⁷ As I will come back to, some of the objectives and policies he has analysed in the Proposed Plan are not applicable given the guidance we have received in *Aratiatia*.

³⁸ *O'Connell Construction Ltd v Christchurch City Council* [2003] NZRMA 216 at [81].

³⁹ *Ibid.* at [80], citing *Bayley v Manukau City Council* [1991] 1 NZLR 568.

appears to be structured so that all the objectives are read together progressively to implement that approach⁴⁰. It has warned that if the Plan is not to be interpreted in this way a number of the objectives are “weakly drawn” because they do not elaborate on a particular outcome⁴¹. However, this issue is not resolved by the decision and is subject to further consideration.

56. Nonetheless, objective 1 directs the Proposed Plan be implemented in an integrated way that recognises the interconnectedness of water (*ki uta ki tai*). Objective 3 reflects the requirements of the NPSFWM expressed by *Te Mana o te Wai* to manage fresh water in an integrated and holistic way that sustains health (*hauroa*) of the environment, the waterbody and people⁴². These principles are to be applied to all decision-making under the Plan⁴³, as the health and well-being of waterbodies is to be at the forefront of all discussions and decisions about fresh water in accordance with the NPSFWM⁴⁴.
57. It is submitted that in this application, the direction given by the Court, is contemplated by the evidence and in the analyses of the witnesses and Council Officer. While reaching different views, no one has overlooked these fundamentals.
58. For the purpose of your decision, it is submitted it would be appropriate for you to record the direction of the Court and to turn your mind to the extent the application recognises the Trail’s effect on the integrated management of the wetland and how the health and well-being of the wetland is effected by the proposal. This can be informed by your analysis of the material objectives and policies (particularly policies 32 – 34).

Objective 9A

59. The first significant change that the Environment Court’s decision has brought about is in respect of objective 9A⁴⁵, which is discussed by Mr

⁴⁰ See [65].

⁴¹ See [70].

⁴² See [17], [47] and [56] - [58].

⁴³ Referred to as a *korowai* and/or a thread by parties whose approach found favour with the Court, see [58] and [77].

⁴⁴ See [62].

⁴⁵ See from [132] and [156], leading to the ultimate outcome of objectives 9A and 9B being reinstated back into one.

McSoriley. Materially the Court has indicated that objective, and its companion objective 9B, are water quantity objectives, which means they have little application to this matter.

Objective 13

60. The Court has also amended objective 13 in a way that may affect Mr McSoriley's analysis. In my submission, even if the amendments do change his conclusion the objective ultimately has minimal significance to this proposal and therefore I do not intend on addressing further.

Infrastructure Objectives and Policies

61. Mr McSoriley considers it significant that the Trail fits the definition of *infrastructure* in the Plan. He is careful to highlight that the enabling of infrastructure is contextual in light of what is being managed and the mitigation proposed⁴⁶. Consistently, with his analysis of these provisions, the Court in *Aratiatia* notes the Proposed Plan does not enable infrastructure by giving less weight to environmental outcomes⁴⁷. This is supported by the Operative Regional Policy Statement at policy INF.2.
62. While the Court's leaves the issue for determination in a later decision, subject to its eventual conclusions as to plan architecture, it is submitted that the Court's approach is robust and Mr McSoriley's conclusions and analysis are available to him on either form of the policy. Namely, that the Trail will be effective infrastructure, while managing the effects of the land use.

Wetland Objectives

63. There are at least four objectives that address wetlands, objectives 1, 3, 14 and 17. I have already discussed objectives 1 and 3.
64. Objectives 14 and 17 are more targeted and address ecosystems, including habitat and natural character. They provide:

⁴⁶ See paragraph 71 and further discussion at paragraph 79 in the context of policy 26A.

⁴⁷ See [175].

Objective 14

The range and diversity of indigenous ecosystem types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.

Objective 17

The natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats, are protected from inappropriate use and development.

65. Mr Beale says that the wetland is an area of significant indigenous vegetation as contemplated by s 6(c)⁴⁸. Objective 14 provides for maintenance and enhancement of the life-supporting capacity of wetlands, along with their range and diversity⁴⁹. He concludes that the range and diversity of the indigenous wetland vegetation and habitat is not compromised and the life-supporting capacity of the wetland will be maintained. He goes on to describe the outcome as a lack of any reduction in *quality* of the wetland, which it is submitted refers to the quantifiable measures in the objective⁵⁰.
66. Mr McSoriley comes to the same conclusion on the basis of the total loss of wetland habitat (on a purely mathematical basis) and proposed mitigation⁵¹. I note here that the s 104D(1)(a) test should not be approached from a purely mathematical basis. That is not to say a calculation of a percentage of loss of habitat is irrelevant, but when you make your decision you must still undertake an evaluative judgment of what that mathematical calculation means⁵².
67. The Court discusses objective 17 in *Aratiatia*, emphasising that protection against inappropriate use and development under s 6(a) is understood by reference to what is sought to be protected⁵³. The outcome the objective seeks is the protection of natural character.

⁴⁸ At 5.1.

⁴⁹ The Court does not disturb this objective in *Aratiatia*.

⁵⁰ At 8.2 – 8.3.

⁵¹ See paragraphs 73 and 74 September evidence.

⁵² *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

⁵³ See [271] citing *King Salmon* and noting objective B4 NPSFM.

68. The Court has indicated that the objective in the decisions-version of the Plan lacks direction because it does not assist to understand the amount of change the (relevantly) wetland can absorb without substantially altering its natural character⁵⁴. It is therefore proposing changes to the objective that focus on areas of regional significance to provide that direction⁵⁵.
69. It is submitted this potential change does not make a material difference to this application because the evidence about the significance of the wetland habitat is clear. Secondly, the evidence contemplates and provides you with clear direction as to the ability for natural character to absorb change.
70. Therefore, the conclusions of Mr Beale and Mr McSoriley as to objective 17 may still be relied upon, particularly that:
- (a) Natural ecological character is compromised; but
 - (b) The proposed conditions will mitigate the localised effect on natural character⁵⁶. In other words, the change proposed will not substantively alter natural character and the effects will be minor.

Wetland Policies

71. It is submitted that the correct approach to the key wetland policies at 32, 33 and 34 is to read them together. The policies provide:

Policy 32 – Protect significant indigenous vegetation and habitat

Protect significant indigenous vegetation and significant habitats of indigenous fauna associated with natural wetlands, lakes and rivers and their margins.

Policy 33 – Adverse effects on natural wetlands

Prevent the reduction in area, function and quality of natural wetlands, including through drainage, discharges and vegetation removal.

⁵⁴ See [277].

⁵⁵ See [279].

⁵⁶ See Mr Beale at 8.4 and Mr McSoriley at paragraph 77.

Policy 34 – Restoration of existing wetlands, the creation of wetlands and riparian planting

Recognise the importance of wetlands and indigenous biodiversity, particularly their potential to improve water quality, offset peak river flows and assist with flood control, through encouraging:

- (1) the maintenance and restoration of existing natural wetlands in the creation of new wetlands; and
- (2) the establishment of wetland areas and associated indigenous riparian plantings, including on-farm, in subdivisions, on industrial sites and for community sewerage schemes.

72. Policy 32 contemplates protection of areas of significant indigenous vegetation and is apposite for Mr Beale's conclusion as to s 6(c). That policy has not been considered by the Court yet, but I do not anticipate it will survive in its present form, given it adds little to s 6(c) and gives no real direction as to what course of action we are to adopt to achieve the outcomes in the objectives.
73. Nonetheless, on its present basis the policy does provide scope for mitigation of adverse effects in its application. Protection is defined as to "*defend or guard from danger or injury ...; to keep safe; to take care of*"⁵⁷. Protection may therefore be achieved where the effects can be mitigated and it does not mean *prohibit* or forbid change and, in some instances, protection may be best achieved by some change. It is submitted the mitigation proposed here does just that and therefore achieves the protection imperative in the policy and protection outcome in objective 17, along with maintenance and enhancement in objective 13.
74. Nor should policy 33 be seen as a de facto prohibited activity rule, particularly where the loss is minor and the significant wetland habitat is protected as contemplated by policy 32. It is submitted this is a significant proposition because it is the answer to the suggestion that policy 33 forbids (prevents) *any* loss of wetland habitat because to do so would be a *reduction in area*. Accordingly, the policy, properly understood, is not so fundamental as to support a conclusion that the

⁵⁷ See *Aratiatia* at [272].

proposal is contrary to the objectives and policies viewed on an holistic basis.

75. Wetland modification will often lead to a loss of wetland area, so the role of mitigation becomes important to establishing a link to policy 32. It is submitted this will be particularly influential where the quality and function of the wetland are not compromised. This is made clear in Mr Beale's (in particular) and Mr Hamilton's evidence. The function of the wetland will be maintained (*inter alia*) by preserving the existing channels that define the wetland and the third culvert in respect of surface and subsurface flows.
76. We then move to policy 34 where, as discussed by Mr McSoriley⁵⁸, that policy is achieved through mitigation recognising the importance of wetland habitat through active management of the wetland by the Applicant.
77. Mr Beale highlights the mitigation's focus on protecting the wetland habitat that has been assessed as ecologically significant under s 6(c). This leads to, as opined by Mr Beale, an integrated approach to remedying the adverse effects of the Trail on the wetland⁵⁹ as directed by objectives 1 and 3 and, ultimately, the NPSFWM. As just noted, the function off the wetland is maintained, but additionally the area and form are enhanced. The form will be enhanced through the weed management program that will improve cover of wetland plants⁶⁰. The area has the potential to be enhanced downstream of the Trail through permanently wetting areas of ground near a seed source and the opening up of the wetland through the complementary weed management program⁶¹.
78. As such, the application is consistent with the course of action the policies require to achieve the outcomes contemplated in the objectives, which themselves give effect to the NPSFWM as a statement of how to achieve the purpose of the Act. In an *R J Davidson* sense, in my submission further consideration of part 2 under s 104 is therefore not warranted.

⁵⁸ At paragraph 86, citing Mr Beale's evidence at 85.

⁵⁹ At 8.6.

⁶⁰ See 6.12.

⁶¹ See 6.15 – 6.16.

Proposed Plan Provisions – bringing it all together

79. Protection against inappropriate use and development is understood by reference to what is sought to be protected⁶². In my submission it can be looked at in the following way:

- (a) The Act preserves and protects natural character of wetlands against inappropriate use and development and protects areas of significant indigenous vegetation;
- (b) Inappropriate use and development and how to protect is understood through the approach directed by objectives 1 and 3 and outcomes that objectives 14 and 17 seek;
- (c) Policy 32 – 34 are the course of action to be taken to achieve the outcomes.

80. Thus:

- (a) Objective 14 - protects range and diversity and life-supporting capacity;
- (b) Objective 17 - protects the natural character of wetlands in a way that only accommodates change that will not substantively alter natural character⁶³.

81. The policies achieve the outcome by:

- (a) Policy 32 – protecting significant indigenous vegetation and habitat;
- (b) Policy 33 – preventing adverse effects, being the reduction in area, function and quality of natural wetland;
- (c) Policy 34 – encouraging maintenance and restoration of natural wetlands.

82. Importantly, there is no evidence⁶³ that the effects on any of the matters addressed in the policies will not achieve the outcomes in the two objectives. There is no threat to range, diversity of life-supporting capacity of this wetland or the region's natural wetland habitat. The only adverse effect is the loss of some habitat. However, the natural

⁶² See *King Salmon*.

⁶³ See *Aratiatia* at [277].

ecological character identified by Mr Beale and Dr Lloyd is preserved and, in fact, enhanced by the mitigation proposed.

The Officer's Reports

83. In her September Report the Officer advises that on the "*basis of the technical assessment provided*" the "*residual*" adverse effects are more than minor⁶⁴. The statement she seems to rely on was from an 8 April 2019 report from Dr Lloyd where he took that view⁶⁵. Then on 11 April 2019 Dr Lloyd provides another report where he says:

In our opinion, the residual adverse effects of wetland vegetation clearance caused by track construction can be addressed by the positive effects of weed control over the 2000 metre squared area centred on the wetland and its riparian margins. Overall, the ecological effects on the wetland should be no more than minor if these actions, and the actions suggested earlier, are undertaken with sufficient care and diligence [my emphasis].

84. While some of the mitigation he was proposing was not possible⁶⁶ he has not substantively changes his view from that 11 April letter in his 7 March statement of evidence. All the mitigation he has proposed in that evidence has been supported by Mr Beale and accepted by the Applicant.

85. A second error made by the Reporting Officer is her interpretation of policy 33. The Reporting Officer says in her September report⁶⁷:

In my opinion the application does result in the reduction in wetland area, due to the installation of a formed trail which by its nature has resulted in changes to the natural landform and vegetation ... By undertaking the remedial works proposed by the applicant, the remaining vegetation and habitat would be protected. However, in my opinion this does not overcome a reduction in area and function from the modification of the wetland through the installation of culverts and track.

86. It is submitted that there are at least two errors with this analysis.

⁶⁴ At page 6.

⁶⁵ See page 221 September agenda.

⁶⁶ For instance, the removal of willows.

⁶⁷ At page 31.

87. Firstly, she concludes there is a reduction in wetland function but there is no basis in the evidence for that conclusion. Mr Hamilton's evidence is that with the infilling of the water table at the side of the track the hydrological functioning of the wetland would be restored⁶⁸. Mr Beale relies on Mr Hamilton and agrees with Dr Lloyd, concluding:

...the remedial and compensatory measures ... will in my opinion maintain the function and quality of the wetland and address the reduction in the area of wetland affected by the trail [my emphasis].⁶⁹

88. It is accepted Dr Lloyd does not support the third culvert, but he concludes that the other two, along with the mitigation proposed, will mean the ecological effects on the wetland will be less than minor⁷⁰. This means the only evidence-based conclusions available to the Officer are that the functioning will be maintained, or it will be maintained if the application for the third culvert is declined.

89. Secondly, she appears to read the policy as a prohibition on the reduction of *any* area of wetland in the region⁷¹ or that any mitigation to address those effects should be disregarded. If this was the correct interpretation of the policy then it should be implemented by a prohibited activity rule. The rule is non complying and it is trite to say that that is not the same as a prohibited activity⁷².

90. Next the Reporting Officer takes the view⁷³ that:

When considering this application through the lens of the policies of Regional Plans, specifically the proposed Southland Water and Land Plan, it is considered that adverse effects resulting from the activity will be more than minor, as the plan sets out very clear and directive objectives and policies that adverse effects of activities on wetlands should be avoided [my emphasis].

91. It is not clear to me what is meant by viewing effects through the *lens* of the policies. If what she is meaning is that for the purpose of s 104D

⁶⁸ See paragraph 15.

⁶⁹ See 8.7.

⁷⁰ See page 2 of the 11 April 2019 letter at page 225 of the September Officer's Report.

⁷¹ See page 30 September Report – *Policy 33 ... requires the prevention of the reduction in area.*

⁷² See *Price v Auckland City Council* (1996) ELRNZ 843.

⁷³ See page 38 September report.

you need to understand if adverse effects are more than minor by looking at the policies⁷⁴, that is not right.

92. Firstly, it runs the risk of double counting the objectives and policies gateway test.
93. Secondly, it is settled that the extent of the effects of an activity is a question of fact⁷⁵, not a question of fact that is coloured by the plan's policy framework. In *Neil Construction* the Court explicitly rejected evidence that a plan's provisions (a rule) recognises the level at which an activity will have a minor impact on the environment⁷⁶. It is submitted, by analogy, that the same must apply here and the policies of the Proposed Plan do not define whether the effects are minor.
94. It is submitted the correct approach is to determine whether an effect is minor or not as a question of fact and then under s 104 have regard to the relevant provisions of the plans to determine if your conclusions on the effect mean that the granting of consent would be consistent or otherwise. You can then undertake your s 104D assessment to determine if the activity is contrary.
95. In numerous places in her September and March reports the Officer refers to viewing either the application or policies in isolation. That is not the correct approach because of the need to assess the objectives and policies of a plan as a whole. Mr McSoriley addresses the issue at his paragraph 84. He notes the Trail fits the definition of *infrastructure* and objectives and policies addressing infrastructure should be considered and thereby demonstrates the error in viewing the application in isolation.

Proposed Conditions

96. The proposed conditions are attached to Mr McSoriley's two briefs of evidence. They are fairly similar to those drafted by the Officer.
97. The changes to conditions 1 and 2 of APP-20191150 (wetland modification) to refer to three culverts have been superseded by the third culvert application and are no longer pursued.

⁷⁴ And presumably objectives.

⁷⁵ *Neil Construction v North Shore City Council* W136/95.

⁷⁶ In that case the residential environment from a medical centre.

98. Condition 3 requires amendment to reflect Mr Beale's recommendations at 6.4 of his evidence, as follows:

The Consent Holder shall infill the excavated ditch shown on plan X⁷⁷ back to the ground level of the wetland using peat/silt material sourced onsite by 31 December 2019 1 November 2021. Provided that the works may only be undertaken between 1 April and 31 August in any calendar year. The Consent Holder shall notify the Consent Authority in writing (escompliance@es.govt.nz) on commencement and ~~upon~~ completion of the works.

99. Condition 4 should also be amended to improve its drafting and to address a lack of enforceability at (c).

The Consent Holder shall undertake three ~~monitoring~~ site visits to monitor the ground level of the works required by condition 3. The site visits shall be involving walk-over assessments and photographic evidence shall be obtained. ~~during each assessment along with an A~~ written assessment documenting each site visit ~~completed which~~ shall be provided to the Consent Authority ~~in writing~~ (escompliance@es.govt.nz). The Consent Holder shall:

- a) Undertake the first ~~monitoring~~ site visit ~~assessment~~ immediately after the ~~remedial~~ works required in condition 3 have been completed ~~implemented, to demonstrate the remediated ground level;~~
- b) Undertake the second ~~monitoring~~ site visit ~~assessment~~ no more than six months after the works are completed by March 2020 to assess whether ~~there has been any~~ settling. If settling has occurred the applicant Consent Holder shall undertake additional infilling back to the to reinstate ground level as required by condition 3 of the wetland if there has been settling; and
- c) Undertake the third ~~monitoring~~ site visit ~~assessment~~ no more than twelve months after the works are completed by 1 October 2020 to confirm if rautahi has colonised the infilled area. ~~The third assessment will also provide a recommendation as to the need~~

⁷⁷ Refer to Appendix 1.

~~for any further monitoring if rautahi has not colonised
the infilled area.~~

100. In respect of (c), while there is nothing unlawful with the Applicant giving recommendations as to whether further monitoring is required, any recommendations would not be enforceable so I query their utility. Condition 15 contemplates the monitoring program being amended under ss 128 and 129, so if the rautahi does not re-establish and further monitoring is required it could be addressed that way.
101. Condition 5 is a duplication of condition 4 and can be deleted.
102. Condition 12 could be amended to refer to the plan at Appendix 1 and appended to the consent on an 'in general accordance' basis. Specific reference to the target species in Mr Beale's 6.11 could also be included in the condition but should not limit the program.

Section 104D Gateways

103. When properly understood the application is not contrary to the objectives and policies of either plan.
104. There is no evidence that the adverse effects are more than minor. In fact, both ecologists agree that the adverse effects are no more than minor.
105. Accordingly, it is submitted that this application may pass through either gateway or both.

Rodway Evidence

106. Mr Rodway's evidence was provided to the Applicant approximately half way through Wednesday 10 June by the Consent Authority. It was not posted on the website. On account of existing commitments and travel requirements of counsel and witnesses it has not been possible to address that evidence meaningfully in these submissions. Counsel reserves the Applicant's position in respect of the timing of receipt of that evidence in all respects.

Evidence

107. The Applicant is calling four witnesses:
 - (a) David Boniface – representative of the Applicant. He has prepared one brief of evidence dated 26 May 2020;

- (b) Simon Beale – ecologist, who has prepared one brief of evidence dated 16 March 2020⁷⁸;
- (c) David Hamilton – hydrologist, who has prepared one brief of evidence dated 13 March 2020; and
- (d) Luke McSoriley – planner. Mr McSoriley has prepared two briefs of evidence:
 - i. 4 September 2020 – consents under paragraph 18(a) above;
 - ii. 16 March 2020 – consents under paragraphs 18(b) – (d) above.



CP Thomsen
Counsel for the Applicant
10 June 2020

⁷⁸ Wrongly dated 2019.

Appendix 1



NOTES:

NO	REVISION	DATE
A	DEVELOP PLANS SUBJECT TO CLIENT	
B	AREAS AFFECTED	

PRELIMINARY



Invercargill Office
48-121-288

PO Box 947
Invercargill 9300
New Zealand

NO	REVISION	DATE
A3		

SCALE APPROXIMATELY 1:500 @ A3
 DESIGNER: J.L. Boyle
 APPROVER: J.L. Boyle
 CHECKED: J.L. Boyle
 VERIFIED: J.L. Boyle
 APPROVED DATE: YYYY-MM-DD
 VERIFIED DATE: YYYY-MM-DD

PROJECT: FIORDLAND TRAILS TRUST LEG 8 LAKE TO LAKE SECTION PROPOSED MITIGATION / REMEDIATION WORKS

TITLE: PLAN

PROJECT (DRAWING NO. / SUB-DRAWING)	SHEET NO.	TOTAL SHEETS
B-VQ422.20	P01	8

CONSENT

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