

**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)*

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**STATEMENT OF EVIDENCE OF LAUREN MACIASZEK ON BEHALF OF  
SOUTHLAND REGIONAL COUNCIL**

**PLANNING**

| **11 February 2022 (amended 15 February 2022)**

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Judicial Officer: Judge Borthwick

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(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)

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(ENV-2018-CHC-38)

**ALLIANCE GROUP LIMITED**  
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**FEDERATED FARMERS OF NEW ZEALAND**  
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**HERITAGE NEW ZEALAND POUHERE TAONGA**  
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**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**

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## **Summary**

- 1 The scope of my evidence is specific to Topic B3 – Wetlands. In particular:
  - (a) The majority of appeals on Topic B3 – Wetlands were resolved through mediation. A joint memorandum, draft consent order, and supporting affidavit has been lodged with the Court.<sup>1</sup>
  - (b) While no further appeals were resolved through expert conferencing, the issues were narrowed. I understand that the Court may wish to consider these matters in the “all of parties” case, and my evidence addresses these matters in paragraph 17. Specifically, the matters agreed were:
    - (i) That the reference in Rule 51(e) should be to ‘natural wetlands’ rather than ‘wetlands’; and
    - (ii) The appeals on Rule 74 would be more appropriately addressed through the appeals on Rule 51 and Rule 70.
  - (c) The remainder of my evidence focusses specifically on Rule 51 and Rule 70(cb), using the text recorded in the JWS.
- 2 I confirm agreement with the text recorded in the JWS.

## **Introduction, Qualifications and Experience**

- 3 My name is Lauren Rachel Maciaszek. I am employed by the Southland Regional Council (**Council**) as a Principal Policy Planner. I hold the qualifications of Bachelor of Environmental Management from Lincoln University and Master of Natural Resources Management and Ecological Engineering, jointly awarded by Lincoln University and BOKU University in Austria. I have been employed by Council since 2014, first working in the Consents division for five years and then the Policy and Planning division from October 2019. Since joining the Policy and Planning division, one of my primary areas of work has been in relation to the pSWLP appeals, including in relation to Topic B1 – Water Takes and Topic B3 – Wetlands in particular. To date, this has included preparation of documents for circulation as directed by the Court prior to

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<sup>1</sup> See also paragraph 16.

mediation, participation in mediation, preparation of Will Say statements, and participation in expert conferencing.

- 4 I have been asked by the Southland Regional Council (**Council**) to prepare evidence for these proceedings.

### **Code of Conduct**

- 5 I confirm that I have read the Code of Conduct for expert witnesses as contained in the Environment Court Practice Note 2014. I have complied with the Code of Conduct when preparing my written statement of evidence, and will do so when I give oral evidence.
- 6 The data, information, facts, and assumptions I have considered in forming my opinions are set out in my evidence. The reasons for the opinions expressed are also set out in my evidence.
- 7 Other than where I state I am relying on the evidence of another person, my evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.
- 8 I acknowledge that I am an employee of the Respondent, Southland Regional Council. Notwithstanding that, I confirm that I prepared and will present my evidence as an independent expert and in compliance with the Code of Conduct.

### **Scope**

- 9 I participated in expert witness conferencing in relation to these proceedings, and signed the resulting Planning Joint Witness Statements dated 17-18 November 2021, 17-19 November 2021, and 10 December 2021. My involvement in these conferences was largely limited to Topics B1 and B3.
- 10 I have been asked by the Council to provide evidence in relation to the Joint Witness Statements I am a signatory to. In particular, this evidence relates to the outstanding appeals in Topic B3 – Wetlands, which are in relation to Rule 51 and Rule 74, and by extension to Rule 70(cb).
- 11 Appendix 1 to this evidence contains a list of information and documents I have considered in preparing this evidence.

## Section 32AA of the Act

12 Section 32AA of the Act requires:

- (1) *A further evaluation required under this Act—*
  - (a) *is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the changes); and*
  - (b) *must be undertaken in accordance with section 32(1) to (4); and*
  - (c) *must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and...*

13 The core of section 32 of the Act is in sub-section (1), which requires a decision-maker to (relevantly):

- ...
- (b) *examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
  - (i) *identifying other reasonably practicable options for achieving the objectives; and*
  - (ii) *assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
  - (iii) *summarising the reasons for deciding on the provisions; and*
- ...

14 Sub-section (2) specifies how the analysis under section 32(1)(b)(ii) is to be undertaken. In summary, this requires an assessment of the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions, and an assessment of the risk of acting or not acting if there is uncertain or insufficient information.

15 Section 32(3) is not relevant given the pSWLP is not an amending proposal, rather it is a whole new plan.

16 Section 32(4) is relevant to both Rules 51(e) and 70(cb), in the context of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**). Where the provision will impose a greater or lesser restriction on an activity to which a national environmental standard applies than the existing restrictions in that

standard, the evaluation must examine whether the greater or lesser restriction is justified.

### JWS - Planning

17 The tracked changes to Rule 51 and Rule 70 discussed in the JWS are appended as Appendix 2. I note that while tracked changes were recorded, there had not been complete agreement recorded by planners in the JWS.

18 For completeness, I have also included the text for Rule 74 as shown in the JWS despite no changes being recorded. This version shows the changes for which draft consent order has been filed.

### Status of Topic B3 – Wetlands appeals

1719 The majority of issues in Topic B3 were agreed through the mediation facilitated by the Court. A joint memorandum, draft consent order and supporting affidavit has been lodged with the Court, and I have not addressed those matters in further detail in this evidence.

1820 Following the mediation, appeals remained outstanding on Rules 51 and 74, and also Rule 70 through connection to the appeal by the Southland Fish and Game Council (**Fish and Game**) on Rule 74. These matters were discussed at expert conferencing and, as shown by the Joint Witness Statement dated 10 December 2021 (**JWS**), the planners are in agreement that:

- (a) In respect of the appeal by Fish and Game on Rule 74, the drainage activities are more appropriately addressed by Rule 51 and the grazing of stock within wetlands is more appropriately considered in the context of Rule 70, especially in the context of other appeal points.
- (b) In respect of the appeal by Ngā Rūnanga<sup>2</sup> on Rule 74, that the drainage activities are more appropriately addressed by Rule 51<sup>3</sup>.

1921 While Mr Wilson's evidence does not provide any further discussion on Rule 74, I understand that Federated Farmers have indicated

<sup>2</sup> Comprising Waihōpai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu.

<sup>3</sup> I note that both Fish and Game and Ngā Rūnanga are section 274 parties to the appeal on Rule 51 by the Royal Forest and Bird Society of New Zealand Incorporated.

disagreement with the JWS position on Rule 74<sup>4</sup>. Accordingly, I consider that there are no outstanding matters to be addressed in evidence in respect of Rule 74 and my evidence does not address it any further.<sup>5</sup>

2022 The remainder of my evidence focusses on Rule 51 and Rule 70.

2123 While appeals on Rule 70 have been managed as part of Topic B5 – Farming, there is a connection to Topic B3 – Wetlands through the appeal by Fish and Game on Rule 74 as explained in paragraph 20(a) above.

2224 It is my understanding that all other appeals on Rule 70 (and also on Policy 18, which relates to stock exclusion from water bodies) have been agreed through the JWS, with the exception of the reference in Rule 70(a) to an “ephemeral flow path” or “ephemeral river”, which is addressed under Topic B5. For this reason, I have addressed the outstanding appeal on Rule 70(cb) in my evidence<sup>6</sup>. For completeness, I also note that Policy 18 and the other resolved matters of Rule 70, and the matters relating to “ephemeral flow paths” or “ephemeral rivers” are addressed in the evidence of Mr McCallum-Clark..

2325 I confirm that I agree with the positions recorded in the JWS in relation to Rule 51. These are that:

- (a) I consider that changes to the wording of Rule 51 should specify ‘natural wetlands’ rather than ‘wetlands’. This was agreed by all planners, but I note that no justification was included in the JWS. It is my opinion that specifying ‘natural wetlands’ rather than ‘wetlands’ better aligns with the regulations of the NES-F and in doing so reduces the potential confusion for users of the Plan. It was my understanding that the planners participating in expert conferencing also agreed with this reasoning.

<sup>4</sup> Memorandum of Counsel for Southland Regional Council dated 8 February 2022.

<sup>5</sup> Note that changes were agreed to Rule 74 at mediation. These are detailed in the application for consent order for Topic B3 – Wetlands.

<sup>6</sup> My Will Say statement ahead of expert conferencing did not include matters relating to Rule 70, and so while I participated in the discussion insofar as there was potential for overlap with the appeals on Topic B3 – Wetlands, I was not a signatory to the outcomes recorded for Rule 70 in the JWS by way of the explanation that the participants participated in the discussions that related to the provisions traversed in their Will Say statements. However, I agree with the wording shown as Rule 70(cb) in the JWS.

- (b) I consider that the most appropriate resolution to the appeal would be to specify that diversions from natural wetlands for the purpose of land drainage are non-complying activities. The remainder of my evidence below on this provision explains why I consider this to be most appropriate.

2426 I also confirm my agreement with the wording of Rule 70(cb) recorded in the JWS.

### **Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F)**

2527 The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) came into force on 3 September 2020, which was after the decisions version of the proposed Southland Water and Land Plan (**pSWLP** or **Plan**) had been notified (4 April 2018). The NES-F includes a section of regulations specific to activities occurring within or in close proximity to natural wetlands, with regulations specific to each of the following purposes:

- (a) Restoration of natural wetlands;
- (b) Scientific research;
- (c) Construction of wetland utility structures;
- (d) Maintenance of wetland utility structures;
- (e) Construction of specified infrastructure;
- (f) Maintenance and operation of specified infrastructure and other infrastructure;
- (g) Sphagnum moss harvesting;
- (h) Arable and horticultural land use; and
- (i) Natural hazard works.

2628 With the exception of sphagnum moss harvesting and arable and horticultural land use, the NES-F provides for one or more activity statuses for diversions of water<sup>7</sup> in relation to each of these purposes listed above. Most of these activities have a permitted activity status for

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<sup>7</sup> In addition to the taking, use, damming, and discharge of water, earthworks, and vegetation clearance.

diversions of water within a natural wetland, or within 100 metres of a natural wetland, provided that conditions are met. If those conditions are not met, the activity is then restricted discretionary or discretionary.

2729 Where an activity is not for one of the specified purposes or does not meet conditions for the permitted, restricted discretionary, or discretionary regulations specific to the purpose, it would be either non-complying or prohibited under regulations 52-54 of the NES-F. The relevant regulation would be dependent on whether the diversion was within the natural wetland or outside it, and whether or not the diversion would result in the complete or partial drainage of all or part of the natural wetland.

### Rule 51

2830 By contrast, Rule 51 in the pSWLP is specific to diversions of water, and provides activity statuses for diversions of water as follows:

- (a) Rule 51(a): Despite any other rule in the Plan, the diversion of water is permitted (subject to further conditions) within a river or lake bed<sup>8</sup> and for the purposes of undertaking a permitted activity under Rules 55 to 79, or for the purposes of habitat creation, restoration or enhancement, or hydrologic research;
- (b) Rule 51(b): The diversion of water is permitted for the purpose of land drainage, provided that the diversion is not from a Regionally Significant Wetland or Sensitive Waterbody identified in Appendix A or any natural wetland (among other conditions);
- (c) Rule 51(c): Diversions of water are permitted at the mouths of specified drains on the Tiwai Peninsula (subject to conditions); and
- (d) Rule 51(d): Unless controlled by any other rule in the Plan, the diversion of water for the purpose of land drainage that does not meet Rules 51(a) to (c) is a discretionary activity.

2931 The following rules in the pSWLP are also relevant to diversions in the context of wetlands or natural wetlands:

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<sup>8</sup> The rule specifically refers to only ‘a river or lake bed’. Elsewhere in the Plan, references to water bodies include wetlands and its omission from Rule 51(a) is deliberate, as set out in paragraph 319(xiv) of the Report and Recommendations of the Hearing Commissioners.

- (a) Rule 49(b) provides for the taking, diversion, and use of surface water as a restricted discretionary activity provided that one of three conditions is met;
- (b) Rule 49(c) provides for the taking, diversion, and use of surface water as a discretionary activity, where Rule 49(b) does not apply but the total rate of authorised surface water abstraction does not exceed the primary allocation specified in Appendix K;
- (c) Rule 49(d) states that except as provided by specified rules in the Plan<sup>9</sup>, the diversion of surface water<sup>10</sup> is a non-complying activity.
- (d) Rule 52 is specific to water abstraction, damming, diversion, and use from the Waiau catchment, and (except for as provided by Rule 49) provides for diversion of water from the Waiau catchment as a discretionary activity if conditions are met, or otherwise as a non-complying activity.
- (e) Rule 52A is specific to the Manapōuri Hydro-electric Generation Scheme, and provides for the diversion of water as a controlled activity provided that conditions are met, or otherwise as a non-complying activity.

3032 Given the difference in activity statuses (and conditions) between the NES-F and the pSWLP, one of the following outcomes would apply:

- (a) An activity would be permitted under the NES-F but require consent under the pSWLP;
- (b) An activity would require consent under both the NES-F and the pSWLP. The activity status could be restricted discretionary, discretionary, or non-complying under either planning instrument; or
- (c) An activity would be prohibited under the NES-F but require consent under the pSWLP.

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<sup>9</sup> Rules 49(b), (c), and (d) all include a list of exceptions, with Rule 49(d) including the greatest number as follows: 49(a), 49(ab), 49(b), 49(c), 50(a), 50(b), 51(a), 51(b), 51(c), 52(a), 52(b), 52A(a) and 52A(b).

<sup>10</sup> Defined in the Southland Regional Policy Statement 2017 as “Fresh or geothermal water in a river, lake, stream, pond, or wetland, or any part thereof, that is not located within the coastal marine area but excludes water in an artificial water course.”

3133 When considering any potential outcome on this appeal point, it is also relevant to note section 44A of the Resource Management Act 1991 (the Act), which requires that where a rule in a plan conflicts or duplicates with a national environmental standard then the local authority must remove the duplication or conflict. The planners were cognisant of this during conferencing, and I have considered this in the preparation of my evidence. For completeness, I also acknowledge that the scope of the appeals is limited and so the potential for conflict or duplication between the two planning instruments could not be entirely removed by way of the appeals.

### **Positions of Planners**

3234 I have summarised the positions of the planners below, as recorded in the Joint Witness Statement and their statements of evidence dated 20 December 2021 and/or 4 February 2022. All planners agree with the insertion of Rule 51(e), but the exact wording is not agreed:

(a) Mr Farrell<sup>11</sup> and Ms Kirk<sup>12</sup> are seeking:

“The diversion of water from a natural wetland is a non-complying activity.”

(b) Ms Davidson<sup>13</sup>, Ms Whyte<sup>14</sup>, and I agree with the addition of Rule 51(e) as set out in the JWS:

“The diversion of water from a natural wetland for the purpose of land drainage is a non-complying activity.”

(c) Federated Farmers is a section 274 party to the appeal by Ngā Rūnanga on Rule 74. This appeal sought that the draining of any natural wetland is a prohibited activity through a new Rule 74(d). The JWS records that planners were in agreement that the ‘drainage’ aspect of the appeals on Rule 74 are more appropriately addressed through Rule 51 (due to Rule 74 being a land use rule). Paragraph 9.6 of Mr Wilson’s evidence suggests a direct reference

<sup>11</sup> For the Southland Fish and Game Council and the Royal Forest and Bird Protection Society of New Zealand Incorporated.

<sup>12</sup> For the Director-General of Conservation.

<sup>13</sup> For Ngā Rūnanga (Waihōpai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu).

<sup>14</sup> For Meridian Energy Limited.

to the NES-F may resolve the issue he has described, with the following text which I have interpreted as the relief sought:

“Apart from natural hazard works as defined in clause 51 of the National Environmental Standard for Freshwater Management<sup>15</sup>, the diversion of water from a natural wetland for the purpose of land drainage is a non-complying activity.”

3335 In summary, I consider that there are two key aspects to address:

- (a) Whether proposed Rule 51(e) should include reference to natural hazards; and
- (b) Whether proposed Rule 51(e) should apply to all diversions from natural wetlands or whether it is specific to the purpose of land drainage.

### Natural Hazard Works

3436 I do not agree with Mr Wilson’s suggestion that Rule 51(e) should include reference to the natural hazards regulations of the NES-F, primarily because I do not agree that ‘natural hazards works’ could be considered to fall under ‘land drainage’.

3537 Mr Wilson states in paragraph 9.1 of his Evidence in Chief that ‘natural hazard works’ (defined in regulation 51(1) of the NES-F) “are intended to allow landowners to clean up after natural hazards, usually floods, and to also protect their property against immediate hazards”.<sup>16</sup>

3638 Regulation 51(1) of the NES-F states:

*“In this regulation, natural hazard works means works for the purpose of removing material, such as trees, debris, and sediment, that –*

- (a) *is deposited as the result of a natural hazard*<sup>17</sup>; and

<sup>15</sup> The reference to the NES-F would require correction if the relief sought were to be adopted.

<sup>16</sup> Statement of Evidence of Peter Wilson dated 20 December 2021 at [9.1].

<sup>17</sup> ‘Natural hazard’ is defined by the Act as “any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire or flooding) the action of which adversely affects or may adversely affect human life, property or other aspects of the environment.”

(b) *is causing, or is likely to cause, an immediate hazard to people or property.”*

3739 My interpretation of this definition is that the word ‘and’ means that works would only be considered to be ‘natural hazard works’ if they are removing material which has been deposited as the result of a natural hazard which is presenting an immediate hazard to people or property. In other words, I consider that both of the circumstances specified in (a) and (b) of the definition must apply, rather than only one.

3840 I also note that providing an exemption from Rule 51(e) would not mean that the natural hazard works would be permitted under the pSWLP, as the diversion of water would require consent under one of the rules described in paragraph 31.

3941 ‘Land drainage’ is not defined in the pSWLP or in any of the other documents under the Act. As the term ‘natural hazard works’ is not used in the pSWLP either, I consider it more appropriate to leave any reference to an exemption for natural hazard works out of the rule than it would be to cross-reference to the NES-F. Cross-referencing to the NES-F could also cause confusion for Plan users in terms of how the provisions of the NES-F and pSWLP relate to one another, especially as the pSWLP has a slightly different definition of ‘natural wetland’ than the NES-F. It may also mean that once the Council has undertaken the requirements of section 44A, that there is inconsistency between Rule 51(e) and the approach taken for other provisions of the Plan.

4042 I consider that ‘natural hazard works’ is a separate activity from land drainage. I note that the term ‘land drainage’ appears six times in the decisions version of the pSWLP: in the ‘groundwater’ section of the Issues chapter, in Policy 30, in Rule 13(a) and 13(b), and in Rule 51(b) and 51(d). Works that do not meet both of the components of the ‘natural hazard works’ definition would be either non-complying or prohibited (depending on the specific circumstances of the works) under regulations 52-54 of the NES-F.

4143 I consider that in the event of an application being made for a diversion of water for the purpose of natural hazard works, that it would be most appropriate to determine based on the specifics of the application whether the activity was considered to be for the purpose of ‘land

drainage' or whether it would instead fall under another rule in the pSWLP.

4244 For completeness, I note that if a definition were to be added to the pSWLP, then the implications for Policy 30 and Rule 13 would also need to be carefully considered to ensure that there are no unintended outcomes of a definition.

### Purpose for Land Drainage

4345 Mr Farrell and Ms Kirk consider that no purpose should be specified in Rule 51(e), so that the non-complying activity status applies to all diversions from natural wetlands. I have considered their evidence, but still conclude that it is more appropriate to restrict the scope of the non-complying activity to specifically land drainage. I also consider that the JWS wording aligns with the issues of wetland loss occurring through land drainage. In my opinion the specific purpose of 'land drainage' also better aligns with Rule 51(b) and Rule 51(d).

4446 Where an activity would be permitted under the NES-F but restricted discretionary or discretionary under the pSWLP, the conditions of the NES-F combined with the requirement for consent in the pSWLP provide an appropriate level of protection for the wetland. In particular, the general conditions of regulation 55 of the NES-F require that the activity must not alter the natural movement of water into, within, or from any natural wetland,<sup>18</sup> with the exception provided in the instance of diversions of water around a work site, in which case:

- (a) The activity must be undertaken only for as long as necessary to achieve its purpose;
- (b) Before the activity starts, a record must be made (for example, by taking photographs) of the original condition of any affected natural wetland's bed profile and hydrological regime that is sufficiently detailed to enable verification of compliance with:
- (c) The bed profile and hydrological regime of the natural wetland must be returned to their original condition no later than 14 days after the start of the activity.

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<sup>18</sup>

NES-F, Reg 55(3)(c).

4547 I consider that the above conditions in particular will ensure an appropriate level of protection for works in wetlands that can be carried out as permitted activities under the NES-F, which are limited to the purposes described in paragraphs 27~~0~~ and 28~~28(a)~~ above. Diversions carried out in accordance with these conditions can avoid causing the loss of wetland extent, and the diversions could be small in scale or over a short time period. The pSWLP is already more stringent than the NES-F and I do not consider that it needs to be made more stringent again by applying the non-complying activity status to all diversions from natural wetlands.

4648 While the conditions for natural hazard works under the NES-F are different to the conditions for other purposes under the NES-F<sup>19</sup>, I still consider that the limited circumstances resulting from the specific definition of 'natural hazard works' combined with the requirement for consent in the pSWLP means that it is not necessary to make diversions from natural wetlands for natural hazard works (or any purpose other than land drainage) a non-complying activity.

4749 I also note that where consent is required under the NES-F, the specificity of the conditions of the NES-F mean that there is a high level of scrutiny required in order to determine the activity status, particularly when considered in conjunction with the rules of the pSWLP. For example, the processing officer of an application would need to determine the activity status under the NES-F (which would include identifying whether any of the permitted activity conditions are not met) to ensure that the activity status was not non-complying or prohibited under the NES-F, in which case that activity status would prevail over the pSWLP.

4850 The policies of the pSWLP most directly relevant to this appeal are Policies 32<sup>20</sup>, 33, and 34:

***Policy 32 – Protect significant indigenous vegetation and habitat***

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

<sup>19</sup> As detailed in paragraph 36 of Mr Farrell's s274 evidence.

<sup>20</sup> The wording shown for Policy 32 is that agreed by parties at mediation and set out in the application for consent orders for Topic B3 - Wetlands.

**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.*

**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 and 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.*

4951 I consider that the JWS wording of Rule 51(e) would still achieve outcomes consistent with Policies 32 and 33, because the conditions of the NES-F are comprehensive. The JWS wording of Rule 51(e) would not preclude an activity from being processed as a non-complying activity where it was restricted discretionary or discretionary under the pSWLP but non-complying under the NES-F because the NES-F conditions could not be met.

5052 I consider that the JWS wording appropriately addresses the identified issue of wetland loss as a result of land drainage and conversion to pasture, which is described in the evidence in chief of Dr Kitson<sup>21</sup> and Mr Farrell<sup>22</sup>

5153 I consider that the JWS wording of Rule 51(e) would be more consistent with Policy 34 than the wording sought by Mr Farrell, as allowing the diversion of water for other purposes, such as restoration of existing wetlands, to be undertaken as a restricted discretionary or discretionary activity<sup>23</sup> where conditions can be met better encourages the maintenance and restoration of existing natural wetlands.

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<sup>21</sup> Paragraph 19.

<sup>22</sup> Paragraphs 57-59.

<sup>23</sup> For example where the activity would be restricted discretionary under Rule 49(b) or discretionary under Rule 49(c).

## **Objectives and higher order planning documents**

**5254** While all objectives of the pSWLP are relevant, Objectives 1 and 2 relate to Te Mana o te Wai and ki uta ki tai and are fundamental to the Plan. The Interpretation Statement explains that all objectives are to be read together and considered in that context:

### **Objective 1**

*Land and water and associated ecosystems are sustainably managed as integrated natural resources, recognising the connectivity between surface water and groundwater, and between freshwater, land and the coast.*

### **Objective 2**

*The mauri of water provides for te hauora o te taiao (health and mauri of the environment), te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).*

**5355** Other objectives in the Plan that relate in particular to this appeal are Objective 9/9A, Objective 9B, Objective 10, Objective 14, Objective 15, and Objective 17:

### **Objective 9/9A**

*The quantity of water in surface water bodies is managed so that:*

*(a) the life-supporting capacity and aquatic ecosystem health, the values of outstanding natural features and landscapes, the natural character and the historic heritage values of waterbodies and their margins are safeguarded.*

*(b) there is integration with the freshwater quality objectives (including the safeguarding of human health for recreation); and*

*(c) provided that (a) and (b) are met, surface water is sustainably managed in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.*

### **Objective 9B**

*The importance of Southland’s regionally and nationally significant infrastructure is recognised and its sustainable and effective development, operation, maintenance and upgrading enabled.*

### **Objective 10**

*The national importance of the existing Manapōuri hydro-electric generation scheme in the Waiau catchment is provided for and recognised in any resulting flow and level regime.*

### **Objective 14**

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

### **Objective 15**

*Taonga species, as set out in Appendix M, and related habitats, are recognised and provided for.*

### **Objective 17**

*Preserve the natural character values of wetlands, rivers and lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats, and protect them from inappropriate use and development.*

5456 Of the higher order planning instruments, I consider the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) and the NES-F to be of particular relevance because they both came into force after the decisions version of the Plan was notified and they both contain provisions specific to natural wetlands.

5557 The regulations of the NES-F are described in paragraph 27~~0~~ and have been discussed throughout my evidence above.

5658 Te Mana o te Wai is also identified as a fundamental concept in the NPSFM 2020, with a hierarchy of obligations established that is reflected in the objective:

*The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:*

- (a) *first, the health and well-being of water bodies and freshwater ecosystems*
- (b) *second, the health needs of people (such as drinking water)*
- (c) *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

5759 The following policies of the NPSFM 2020 are particularly relevant to this appeal:

*Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

*Policy 9: The habitats of indigenous freshwater species are protected.*

5860 Clause 3.22 of the NPSFM 2020 requires that the following policy (or words to the same effect) is included in (operative) regional plan(s). The policy will be inserted into the pSWLP when it becomes operative:

*The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:*

- (a) *The loss of extent or values arises from any of the following:*
  - (i) *The customary harvest of food or resources undertaken in accordance with tikanga Māori;*
  - (ii) *Restoration activities;*
  - (iii) *Scientific research;*
  - (iv) *The sustainable harvest of sphagnum moss;*
  - (v) *The construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
  - (vi) *The maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020);*
  - (vii) *Natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or*

(b) *The regional council is satisfied that:*

- (i) *The activity is necessary for the construction or upgrade of specified infrastructure; and*
- (ii) *The specified infrastructure will provide significant national or regional benefits; and*
- (iii) *There is a functional need for the specified infrastructure in that location; and*
- (iv) *The effects of the activity are managed through applying the effects management hierarchy.*

5961 The policy in clause 3.22 is more lenient than the other provisions identified from the NPSFM 2020 and pSWLP, by way of expressly allowing for the loss of natural inland wetland extent or values arising from activities for the purposes specified in the NES-F. The other provisions identified above consistently direct a high level of protection for natural wetlands with an emphasis on avoiding loss of extent.

6062 Even in this context I consider it appropriate to allow for diversions of water from natural wetlands to occur as a restricted discretionary or discretionary activity under the pSWLP, particularly where a diversion may be limited in scope and/or time, and not result in the loss of wetland extent (for example, a temporary diversion in order to undertake restoration or scientific research work).

6163 I have also considered the provisions of the National Policy Statement for Renewable Electricity Generation 2011, National Policy Statement on Electricity Transmission 2008, Southland Regional Policy Statement 2017, and Te Tangi a Tauira 2008.

6264 I consider that the wording of the JWS is consistent with these documents. Of these documents, the most specific direction is in section 3.5.18 of Te Tangi a Tauira, as follows:

*Policy 3.5.18.1: Avoid the direct or indirect drainage or modification of any existing wetland area.*

6365 As stated earlier in my evidence, I consider that the NES-F contributes to ensuring a robust level of scrutiny is applied to the consent process. The greatest degree of ‘risk’ that could occur by retaining the restricted discretionary and discretionary activity statuses would be if the matters

of restricted discretion could not appropriately address effects on natural wetlands. However, Rule 49(b) includes “*any effect on a natural wetland*” in addition to “*any effects on river flows (including effects on minimum flows, flow variability and duration of flows), wetland or lake water levels, aquatic ecosystems, aquifer storage volumes, the availability and reliability of supply for existing users, and water quality*” among the matters of restricted discretion.

### **Section 32AA Assessment**

**6466** In undertaking this assessment, I am considering the following four options:

- (a) Option A: The decisions version of the pSWLP;
- (b) Option B: The wording recorded in the JWS, preferred by Ms Davidson, Ms Whyte, and myself (requiring that diversions from natural wetlands for the purpose of land drainage are non-complying activities);
- (c) Option C: The wording preferred by Mr Farrell and Ms Kirk (requiring that all diversions from natural wetlands are non-complying activities); and
- (d) Option D: The wording preferred by Mr Wilson (incorporating reference to natural hazard works).

**6567** I consider that the three changes sought (Options B, C, and D) would result in environmental benefits and cultural benefits<sup>24</sup> compared to Option A, by ensuring that a higher consenting test is applied to diversions from natural wetlands for the purpose of land drainage (or for any purpose in accordance with Option C). There may be the potential for Option C to result in an environmental opportunity cost, if the non-complying status were to prevent or discourage appropriate restoration work or scientific research from being undertaken. Options B, C, and D could also all result in economic, social, or cultural costs (depending on the purpose of the application) through applications being declined or by persons being discouraged from applying for consent. I consider Option C to have the highest likelihood of these costs due to its wider scope.

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Based on the evidence of Ms Cain, in which she explains the significance of wetlands to Ngāi Tahu ki Murihiku in paragraphs 31-34.

**6668** I do not consider that there is uncertain or insufficient information to the extent that Option A would be more appropriate than the other options. Relevant information to be considered would be in the context of an application for consent. In addition, diversions could occur for purposes other than land drainage (such as the purposes specified in the NES-F) which could be carried out in a way that is appropriate and consistent with the objectives of the pSWLP. I consider that there is minimal risk in allowing for these to be restricted discretionary or discretionary activities as applicable under the pSWLP, as the framework of objectives and policies, combined with suitable matters of restricted discretion, would mean that the application process would result in appropriate outcomes.

**6769** In relation to section 32(4), Options B, C, and D are all more appropriate than Option A because Option A is less restrictive than the NES-F by not ensuring that diversions from natural wetlands for the purpose of land drainage are non-complying. I also note that NES-F allows for a regional rule to be more stringent than the NES-F<sup>25</sup>, but does not allow for a regional rule to be more lenient<sup>26</sup>. Options B, C, and D all better align with the NES-F than Option A insofar as the scope of the appeal allows (for example, all three options would be more lenient where the activity would be prohibited under the NES-F). All four options are also more stringent than the NES-F, as there are no permitted activity diversions in relation to natural wetlands.<sup>27</sup> I do not consider that the further stringency of Option C is necessary for the reasons set out in paragraphs 45 to 53 above.

**6870** Overall, for the reasons outlined in paragraphs 67 to 69 above, I consider that Option B (the JWS wording) would most efficiently and effectively achieve the objectives of the pSWLP.

### Rule 70

**6971** The outstanding appeal on Rule 70 relates to the wording proposed in the JWS for Rule 70(cb):

<sup>25</sup> Regulation 6.

<sup>26</sup> Section 43B(3) of the Act states that a rule that is more lenient than a national environmental standard prevails over the standard if the standard expressly says that a rule may be more lenient than it. The NES-F only allows for regional rules to be more lenient than regulations 70 to 74, which do not relate to this appeal.

<sup>27</sup> I note that there is no scope for this to be considered through appeals so I have not assessed this further in terms of section 32(4) of the Act.

*"The use of land within a natural wetland or the disturbance of the bed of a water body within a natural wetland for access or grazing by stock is a non-complying activity."*

7072 The JWS records that all planners agree on the wording of Rule 70(cb) except for Mr Wilson. I also agree that the wording of Rule 70(cb) is appropriate.

7173 I have considered the evidence presented by Mr Wilson.<sup>28</sup> However, my evidence is focussed on the requirements of the NES-F as I consider the regulations relating to vegetation clearance to be the crux of the issue.

7274 As laid out in paragraph 270 above, the NES-F includes regulations for activities specific to a range of purposes occurring in or in close proximity to natural wetlands. I note that one of those purposes is for 'arable and horticultural land use', but only where the activity is outside of a natural wetland but within 10m of it.

7375 In the case of grazing by stock, the activity would fall under the definition of 'vegetation clearance', and would be a non-complying activity under regulation 54 of the NES-F. The definition of 'vegetation clearance' in the NES-F is laid out below:

*Vegetation clearance-*

- (a) *Means the disturbance, damage, destruction, or removal of vegetation by any means (for example, by cutting, crushing, application of chemicals, or burning); and*
- (b) *Includes activities that result in the disturbance, damage, destruction, or removal of vegetation (for example, over-planting, applying the seed of exotic pasture species, mob-stocking, or draining away water); but*
- (c) *Does not include-*
  - (i) *The removal of sphagnum moss for the purpose of a harvest in accordance with regulation 48 or 49; or*

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<sup>28</sup> Mr Wilson's evidence seeks a permitted activity as Rule 70(cb) enabling stock grazing of wetlands subject to conditions, with a subsequent non-complying activity as Rule 70(cc) where the conditions are not met.

- (ii) *The crushing of other vegetation for the purpose of maintaining the dominance of sphagnum moss, if the crushing is carried out during a harvest of sphagnum moss or to rehabilitate the moss after it is harvested; or*
- (iii) *An activity described in paragraph (a) or (b) that is for the maintenance or construction of fencing for the purpose of excluding stock or marking property boundaries; or*
- (iv) *An activity described in paragraph (a) or (b) that is for the maintenance of shelter belts; or*
- (v) *The grazing of improved pasture within the relevant setback from a natural wetland.*

7476 In particular, this definition is clear that grazing of stock falls within ‘vegetation clearance’ because:

- (a) Grazing stock would be a means by which vegetation was disturbed, damaged, or destroyed;
- (b) Neither the means of vegetation clearance described in part (a) of the definition nor the activities described in part (b) of the definition are limited to the examples given;
- (c) The specific exclusion in part (c)(v) of the definition for the grazing of improved pasture within the relevant setback (outside) of the natural wetland also indicates that grazing of stock would be included as a form of vegetation clearance; and
- (d) I also note that the vegetation is not limited to indigenous vegetation, and would include pasture species or pest species being grazed within a wetland (as referred to by Mr Wilson in his paragraph 10.4).

7577 I consider it relevant to acknowledge the differences in definition and wording between the pSWLP and the NES-F:

- (a) The definition of ‘natural wetland’ is slightly different between the two documents:
  - (i) The NES-F refers to the NPSFM definition as follows:

***Natural wetland***

*Means a wetland (as defined in the Act) that is not:*

- (a) *a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or*
  - (b) *a geothermal wetland; or*
  - (c) *any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling.*
- (ii) The pSWLP definition is:

***Natural wetland***

*Includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions, but excludes:*

- (a) *wet pasture, damp gully heads, or where water temporarily ponds after rain or pasture containing patches of rushes;*
  - (b) *effluent ponds;*
  - (c) *artificial storage facilities and detention dams;*
  - (d) *artificial watercourses such as conveyance and drainage canals;*
  - (e) *reservoirs for firefighting, domestic or community water supply; and*
  - (f) *engineered soil conservation structures.*
- (b) The activity set out in Rule 70(cb) in the JWS refers to ‘access or grazing by stock’, while the activity in the NES-F is ‘vegetation clearance’.
- (c) Despite these differences, I consider that there would be significant overlap between wetlands which would be considered to be ‘natural wetlands’ under the pSWLP and the NES-F. I also consider that access or grazing by stock would constitute

vegetation clearance to the extent that it would be inconsistent with the NES-F to allow for access or grazing by stock to occur with a more permissive activity status when it would also be a non-complying activity under the NES-F. Further, it would be more likely to be confusing or misleading to Plan users if grazing stock in wetlands remained a permitted activity under the pSWLP, but resulted in non-compliance with the NES-F.

7678 The Resource Management (Stock Exclusion) Regulations 2020 include requirements to exclude stock<sup>29</sup> from natural wetlands in the following circumstances:

- (a) Regulation 16 requires the exclusion of stock from any natural wetland that is identified in a regional or district plan or a regional policy statement that is operative on the commencement date<sup>30</sup>;
- (b) Regulation 17 requires the exclusion of stock from any natural wetland that supports a population of threatened species as described in the compulsory value for threatened species in the NPSFM 2020;
- (c) Regulation 18 requires that all stock on low slope land must be excluded from any natural wetland that is 0.05 hectares or more.

7779 Each of the above three regulations applied from the commencement date of the regulations (3 September 2020) for stock in a new pastoral system. Otherwise, Regulation 16 will apply from 1 July 2023 and Regulations 17 and 18 will apply from 1 July 2025. When the regulations are applied, access by stock will be effectively prohibited from natural wetlands in the three circumstances set out above. Until that time, or for natural wetlands not falling under the circumstances set out above, vegetation clearance by way of stock access or grazing in a natural wetland would be a non-complying activity under the NES-F.

7880 I refer to the evidence in chief of Dr Burrell, which considers the permitted activity proposed by Mr Wilson and concludes that there is not good evidence to support it. Dr Burrell's evidence also refers to the Ecology JWS, in which it was agreed by the ecology experts that sheep can impact wetlands via grazing, ground disturbance, and faecal

<sup>29</sup> Defined as beef cattle, dairy cattle, dairy support cattle, deer, or pigs.

<sup>30</sup> 3 September 2020.

contamination. Regardless of the definition of ‘vegetation clearance’ in the NES-F, I consider that Dr Burrell’s evidence and the Ecology JWS provide sufficient grounds to exclude sheep from wetlands.

7981 I consider that the most relevant policies in the pSWLP to this appeal are Policy 18 and Policies 32-34. The wording of Policy 18 recorded in the JWS is shown below with red tracking, and the text of Policies 32-34 are shown in paragraph 50 above:

### **Policy 18**

Reduce Avoid where practicable, or otherwise remedy or mitigate, any adverse effects from the discharge of sedimentation and or microbial contamination of contaminants to water bodies and improve river (~~excluding ephemeral rivers~~) and riparian ecosystems and habitats by:

1. requiring progressive exclusion of all stock, except sheep, from lakes, rivers (~~excluding ephemeral rivers~~), natural wetlands, artificial watercourses, and modified watercourses on land with a slope of less than 15 degrees by 2030;
- 2a. requiring the management of sheep in critical source areas and in those catchments where *E.coli* levels could preclude contact recreation;
3. encouraging the establishment, maintenance and enhancement of healthy vegetative cover in riparian areas, particularly through use of indigenous vegetation; and
4. ensuring that stock access to lakes, rivers (~~excluding ephemeral rivers~~), natural wetlands, artificial watercourses and modified watercourses is managed in a manner that avoids significant adverse effects on water quality, bed and bank integrity and stability, mahinga kai, and river aquatic and riparian ecosystems and habitats; and
5. showing, in a Farm Environmental Management Plan prepared and implemented in accordance with Appendix N, how 1-4 will be achieved and by when.

8082 The JWS wording for Rule 70 is more consistent with the emphasis on avoidance of adverse effects shown in the JWS wording of Policy 18.

While there are aspects of the policy that are not consistent with Rule 70(cb) (such as exempting sheep from Policy 18(1)), I understand this to be a reflection of the limited scope of appeals in the context of the decisions version having been notified before the NES-F came into force.

**8183** The wording of Policies 32 and 33 provide strong support for Rule 70(cb), in particular through the direction to maintain indigenous biodiversity in Policy 32 (as agreed by parties at mediation) and through the direction to prevent the reduction in area, function and quality of natural wetlands in Policy 33. By requiring consent as a non-complying activity, Rule 70(cb) is also more consistent with Policy 34, as it recognises the importance of (natural) wetlands and better encourages the maintenance and restoration of existing natural wetlands.

### **Objectives and higher order planning documents**

**8284** While all objectives of the pSWLP are relevant, Objectives 1 and 2 relate to Te Mana o te Wai and ki uta ki tai and are fundamental to the plan. The text for these provisions is shown in paragraph 54 above.

**8385** Other objectives of the pSWLP that relate in particular to this appeal are Objectives 14, 15, and 17. The text for these provisions is shown in paragraph 55 above.

**8486** As with the assessment for Rule 51, I consider the NPSFM 2020 and the NES-F to be of particular relevance among the higher order planning documents because they both came into force after the decisions version of the plan was notified and they both contain provisions specific to natural wetlands.

**8587** The regulations of the NES-F are described in paragraph 270 and have been discussed throughout my evidence above.

**8688** Te Mana o te Wai is also identified as a fundamental concept in the NPSFM 2020, with a hierarchy of obligations established that is reflected in the objective:

*The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:*

- (a) *first, the health and well-being of water bodies and freshwater ecosystems*

- (b) *second, the health needs of people (such as drinking water)*
- (c) *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

8789 The following policies of the NPSFM 2020 are particularly relevant to this appeal:

*Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.*

*Policy 9: The habitats of indigenous freshwater species are protected.*

8890 Clause 3.22 of the NPSFM 2020 requires that the following policy (or words to the same effect) are included in the (operative) regional plan(s). The policy will be inserted into the pSWLP when it becomes operative:

*The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:*

- (a) *The loss of extent or values arises from any of the following:*
  - (i) *The customary harvest of food or resources undertaken in accordance with tikanga Māori;*
  - (ii) *Restoration activities;*
  - (iii) *Scientific research;*
  - (iv) *The sustainable harvest of sphagnum moss;*
  - (v) *The construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
  - (vi) *The maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020);*
  - (vii) *Natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or*
- (b) *The regional council is satisfied that:*

- (i) *The activity is necessary for the construction or upgrade of specified infrastructure; and*
- (ii) *The specified infrastructure will provide significant national or regional benefits; and*
- (iii) *There is a functional need for the specified infrastructure in that location; and*
- (iv) *The effects of the activity are managed through applying the effects management hierarchy.*

8991 I consider that the provisions detailed above provide clear direction to protect natural wetlands and encourage restoration. When considered in conjunction with the evidence of Dr Burrell, I consider that the JWS wording for Rule 70(cb) is more appropriate than the wording proposed by Mr Wilson.

9092 I have also considered the provisions of the Southland Regional Policy Statement 2017, and Te Tangi a Tauira 2008.

9193 I consider that the wording of the JWS is consistent with these documents. Of these documents, the most specific direction is in section 3.5.18 of Te Tangi a Tauira, as follows:

*Policy 3.5.18.1: Avoid the direct or indirect drainage or modification of any existing wetland area.*

*Policy 3.5.18.4: Require that wetlands are fenced in any area where they may be at risk from stock damage.*

### **Section 32AA Assessment**

9294 In undertaking this assessment, I am considering the following three options:

- (a) Option A: The decisions version of the pSWLP, which includes grazing in natural wetlands in Table 1<sup>31</sup>
- (b) Option B: The wording of Rule 70(cb) as recorded in the JWS; and

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<sup>31</sup> Table 1 allows for grazing to occur as a permitted activity until the specified date, after which it would be discretionary.

- (c) Option C: The wording proposed as Rule 70(cb) and (cc) in paragraph 10.17 of Mr Wilson's evidence.

9395 I consider that there will be little difference in environmental, social, cultural, or economic benefits or costs between the Options B and C in practice, because regardless of the wording in the pSWLP consent would still be required as a non-complying activity by the NES-F. The JWS wording would align with the NES-F, resulting in similar outcomes, and I consider it would be arbitrary to consider the options in the absence of the NES-F. Option C, when combined with the requirement for consent under the NES-F, may have similar environmental outcomes to Option B due to the NES-F but introduces additional constraints or requirements which may have a social or economic cost (for example, through additional requirements for the Farm Environmental Management Plan beyond those shown in the JWS version of Appendix N). I consider that Option B would result in environmental benefits<sup>32</sup> and cultural benefits<sup>33</sup> by requiring consent sooner than Option A, but may also result in economic and social costs particularly where consent would be required earlier than in Option A.

9496 I do not consider that there is uncertain or insufficient information to support Option B, and refer to the technical evidence discussed in paragraph 80 above. In contrast, Dr Burrell has concluded that there is insufficient information to demonstrate the suitability of Option C (which would also apply to Option A). The risk of acting on insufficient information and adopting Option C would be continued impact on natural wetlands and habitat within natural wetlands.

9597 Section 32(4) is relevant because the appeal relates to the provisions of the NES-F. While the activity is described differently (access or grazing by stock in the pSWLP and vegetation clearance in the NES-F), in practice access or grazing by stock could not occur in a natural wetland without also triggering the NES-F. I consider that the JWS wording most appropriately aligns with the NES-F.

9698 Overall, I consider that the JWS wording is the more appropriate option given the regulations of the NES-F. However, I also consider that it is the

<sup>32</sup> Based on the evidence of Dr Burrell and the Ecology JWS.

<sup>33</sup> Based on the evidence of Ms Cain, in which she explains the significance of wetlands to Ngāi Tahu ki Murihiku in paragraphs 31-34.

more effective and efficient option in achieving the objectives of the pSWLP.

### Conclusion

9799 For the reasons set out in my evidence above, I consider that the wording recorded in the JWS is the most appropriate in relation to both Rule 51(e) and 70(cb).



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Lauren Maciaszek  
**11 February 2022**

## Appendix 1 – Documents and Information Considered

- 1 Decisions Version of the pSWLP dated 26 March 2021;
- 2 The Interim Decisions issued by the Court on Topic A, dated 20 December 2019, 29 June 2020, 23 July 2020, and 6 November 2020;
- 3 The national direction planning instruments, including in particular:
- 4 National Policy Statement for Freshwater Management 2020 (NPSFM);
- 5 Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F);
- 6 Resource Management (Stock Exclusion) Regulations 2020;
- 7 National Policy Statement for Renewable Electricity Generation 2011; and
- 8 National Policy Statement on Electricity Transmission 2008.
- 9 Planning instruments specific to Southland/Murihiku, in particular:
- 10 Southland Regional Policy Statement 2017; and
- 11 Te Tangi a Tauira 2008.
- 12 The Topic B Overview evidence filed by Mr McCallum-Clark, dated 22 October 2021;
- 13 The Joint Witness Statements signed during expert conferencing held between 17 November and 10 December 2021, including in particular:
- 14 The Joint Witness Statement signed by Freshwater Ecology experts (1 December 2021) (JWS – Ecology);
- 15 The Joint Witness Statement JWS signed by Farm Systems experts (22 November and 6 December 2021) (JWS - Farm Systems); and
- 16 The Joint Witness Statement JWS signed by Planning experts (10 December 2021) (JWS – Planning);
- 17 The Evidence in Chief of each planner and technical expert filed with the Court on 20 December 2021 or 4 February 2022, in relation to the scope of my evidence as described above;
- 18 The Evidence in Chief of Dr Greg Burrell (dated 11 February 2022).

## Appendix 2 – Provisions as shown in the JWS

Tracked changes key:

**Blue** = previously agreed by parties (draft consent order filed with the Court)

**Red** = proposed changes appended to JWS

### Rule 51<sup>34</sup> – Minor diversions of water

**Note: In addition to the provisions of this Plan and any relevant district plan, any activity which may modify, damage or destroy pre-1900 archaeological sites is subject to the archaeological authority process under the Heritage New Zealand Pouhere Taonga Act 2014. The responsibilities regarding archaeological sites are set out in Appendix S. Due to the high concentration of recorded archaeological sites in the vicinity of the above sites, it is possible that works will require an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014. No work (even if permitted under the rule or authorised by resource consent) should commence without first contacting Heritage New Zealand.**

- (a) Despite any other rule in this Plan, the diversion of water within a river or lake bed is a permitted activity provided the following conditions are met:
  - (i) the diversion is for the purposes of undertaking a permitted activity under Rules 55 to 79, or for the purposes of habitat creation, restoration or enhancement, or hydrologic research; and is carried out in accordance with the following conditions:
    - (a1) the general conditions set out in Rule 55A other than conditions (i), (j) and (k) of that Rule;
    - (ii) the diversion is carried out completely within a river or lake bed (i.e. no water is diverted outside of the river or lake bed);
    - (iii) the water is returned to its original course after completion of the activity, no later than one month after the diversion occurs;

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<sup>34</sup> Appeal to Environment Court by Royal Forest and Bird Protections Society of New Zealand Incorporated ENV-2018-CHC-000050

- (iva) the diversion does not occur within 12 metres of a network utility structure, unless the activity is for the purpose of maintaining, upgrading or developing that network utility;
  - (iv) the diversion does not compromise the ability of any other person to exercise a resource consent or undertake an activity permitted by this Plan; and
  - (v) the diversion does not result in a net loss of water from the catchment.
- (b) Despite any other rule in this Plan, the diversion of water for the purpose of land drainage is a permitted activity provided the following conditions are met:
- (i) the diversion and associated discharge does not cause erosion or deposition;
  - (ii) the diversion does not cause flooding of downstream or adjacent properties; and (iii) the diversion of water is not from a Regionally Significant Wetland or Sensitive Water Body identified in Appendix A or any natural wetland.
- (c) Notwithstanding any other rule in this Plan, the diversion of water at the mouth of:
- (i) a drain known as the North Drain on the Tiwai Peninsula, at about Map Reference NZTopo50 CG10 463 308;<sup>35</sup> or
  - (ii) a drain known as the West Drain on the Tiwai Peninsula, at about Map Reference NZTopo50 CG10 457 302;<sup>36</sup> or
  - (iii) a drain known as the South Drain on the Tiwai Peninsula, at about Map Reference NZTopo50 CH10 456 298<sup>37</sup>
- is a permitted activity provided the following conditions are met:
- (1) the work is carried out under the direct control of the body or person responsible for the maintenance of the drain;

<sup>35</sup> The equivalent NZTM2000 coordinates are 1246300 mE 4830800 mN

<sup>36</sup> The equivalent NZTM2000 coordinates are 1245700 mE 4830200 mN

<sup>37</sup> The equivalent NZTM2000 coordinates are 1245600 mE 4829800 mN

- (2) machinery only crosses through a drain to obtain reasonable access to the side of the drain from which the work is to be undertaken;
  - (3) the diversion is constructed at right angles to the line of the beach;
  - (4) any excavated spoil is removed from the site and legally disposed of or spread over non-vegetated areas adjacent to the diversion;
  - (5) the body or person responsible advises the Southland Regional Council of the details of the time and extent of the work to be undertaken, prior to the work commencing; and
  - (6) in the event of a discovery, or suspected discovery, of a site of cultural, heritage or archaeological value, the operation ceases immediately in that location and the Southland Regional Council is informed. Operations may recommence with the permission of the Southland Regional Council.
- (d) Unless controlled by any other rule in this Plan, the diversion of water for the purpose of land drainage that does not meet Rules 51(a) to (c) is a discretionary activity.
- (e) The diversion of water from a natural wetland for the purpose of land drainage is a non-complying activity.

*Note: In addition to the provisions of this Plan and any relevant district plan, any activity which may modify, damage or destroy pre-1900 archaeological sites is subject to the archaeological authority process under the Heritage New Zealand Pouhere Taonga Act 2014. The responsibilities regarding archaeological sites are set out in Appendix S. Due to the high concentration of recorded archaeological sites in the vicinity of the above sites, it is possible that works will require an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014. No work (even if permitted under the rule or authorised by resource consent) should commence without first contacting Heritage New Zealand.*

## Rule 70 – Stock exclusion from water bodies

- (a) ~~From 1 July 2020, t~~Ithe disturbance of roosting and nesting areas of the black fronted tern, black billed gull, banded dotterel or black fronted dotterel located in the bed of a lake, river (~~including an ephemeral river~~), modified watercourse, or ~~natural wetland~~ by stock including cattle, deer, pigs or sheep is a prohibited activity.
- (b) ~~From 1 July 2020, t~~Ithe disturbance of the bed of a Regionally Significant Wetland or Sensitive Water Body listed in Appendix A by stock including cattle, deer, pigs or sheep is a prohibited activity.
- (c) The disturbance of the bed of a river (~~excluding ephemeral rivers where stock access is permitted under Rule 20(aa)~~) or modified watercourse for the purposes of moving stock including cattle, deer, pigs or sheep (but excluding dairy cattle on a dairy platform or on land used for dairy support) is a permitted activity provided the stock are being supervised and are actively driven across the water body in one continuous movement.
- (ca) The disturbance of the bed of a lake, river or modified watercourse by sheep, other than as regulated by Rule 70(a) and 70(b), is a permitted activity, provided the following conditions are met:
  - (i) the waterbody is not already fenced to prevent sheep access;
  - (ii) the sheep are not being break fed or intensively winter grazed;
  - (iii) there is no significant de-vegetation leading to exposure of soil of the bed and banks, pugging or alteration to the profile of the bed and banks, other than at fords or stock crossings; and
  - (iv) a Farm Environmental Management Plan for the landholding is prepared, certified, implemented and audited in accordance with Appendix N, and shows how access by sheep will be managed;
- (cb) The use of land within a natural wetland or the disturbance of the bed of a water body within a natural wetland for access or grazing stock is a non-complying activity.
- (d) Bed disturbance activities that do not comply with Rule 70(c) are a non-complying activity.
- (e) Other than as provided for by Rules 70(c), 70(ca) and 70(d), the disturbance of the bed of a lake, river (~~excluding ephemeral rivers where stock access is permitted under Rule 20(aa)~~), modified watercourse, open

drain, or natural wetland by cattle, deer or pigs is a permitted activity prior to the dates set out in Table 1 for the land having listed land slopes after which time it is respectively a discretionary activity on that land.

**Table 1: Timetable for stock exclusion from water bodies**

	<b>Land slope (as classified by the LRI slope dataset)</b>		
<b>Farm/stock type</b>	<b>Plains (0-3°)</b>	<b>Undulating/rolling land (&gt;3-15°)</b>	<b>Steeper land (&gt;15° and over)</b>
Dairy cattle (on dairy platforms) and pigs	All water bodies ( <u>including open drains</u> ) that are: <ul style="list-style-type: none"> <li>• over 1 metre wide from 1 July 2017 on all slopes</li> <li>• less than 1 metre wide from 1 July 2020 on the plains and undulating/rolling land</li> </ul>		
Dairy support <del>(on either land owned/leased by the dairy farmer or third party land)</del>	All water bodies, <u>and open drains</u> from 1 July 2022	All water bodies, <u>and open drains</u> over 1 metre wide from 1 July 2022	All water bodies, <u>and open drains</u> where break feeding occurs from 1 July 2022
Beef cattle and deer	All water bodies ( <u>including open drains</u> ) from 1 July 2025	All water bodies ( <u>including open drains</u> ) over 1 metre wide from 1 July 2030, unless the average stocking rate on the land directly adjacent to the water body is less than 6 stock units per hectare	All water bodies ( <u>including open drains</u> ) where break feeding <u>or supplementary feeding</u> occurs from 1 July 2022

### Rule 74 - Wetlands

- (a) The use of land within a wetland for the purposes of:
- (i) maintaining or enhancing the wetland, or
  - (ii) maintaining existing authorised structures within the wetland; or
  - (iii) removing plant matter for the purposes of mahinga kai undertaken in accordance with Tikanga Māori;
- is a permitted activity provided the following conditions are met:
- (1) there is no destruction or removal of any indigenous vegetation from any natural wetland, unless the activity is for the purpose of mahinga kai undertaken in accordance with Tikanga Māori;
  - (2) there is no reduction in the size of the wetland;
  - (3) there is no flooding or ponding caused on any land owned or occupied by another person; and
  - (4) there is no establishment of pest plant species that:
    - (A) are listed in the Regional Pest Management Strategy for Southland 2013 or any replacement plan prepared under the Biosecurity Act, or Biosecurity NZ Register of Unwanted Organisms, in circumstances where the planting of those pest plant species is restricted under the Biosecurity Act; or
    - (B) may damage existing biodiversity values of the wetland; or
    - (C) will form the dominant vegetation type in the wetland.
- (ab) The use of land within a wetland for commercial peat harvesting is a discretionary activity provided the following conditions are met:
- (i) the applicant can show, by way of aerial photographs or other documentary evidence, that a commercial peat harvesting operation occurred within the wetland at some time during the period between 30 June 2006 and 30 June 2016; and
  - (ii) there is no establishment of pest plant species that:
    - (1) are listed in the Regional Pest Management Strategy for Southland 2013 or any replacement plan prepared under the

~~Biosecurity Act, or Biosecurity NZ Register of Unwanted Organisms, in circumstances where the planting of those pest plant species is restricted under the Biosecurity Act; or~~

- ~~(2) may damage existing biodiversity values of the wetland; or~~
- ~~(3) will form the dominant vegetation type in the wetland.~~

- (b) The use of land within a wetland (excluding a natural wetland) that is for one or more of the purposes listed in Rule 74(a) but which does not comply with the conditions of Rule 74(a), or the use of land within a wetland that is not a natural wetland that is not for one or more of the purposes listed in Rule 74(a), is a discretionary activity.
- (c) The use of land within a natural wetland that is not for one or more of the purposes listed in Rule 74(a) ~~or 74(ab)~~ is a non-complying activity.