

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

UNDER the Resource Management 1991

IN THE MATTER of of appeals under Clause 14 of the First Schedule of the Act

BETWEEN

TRANSPOWER NEW ZEALAND LIMITED
(ENV-2018-CHC-26)

FONTERRA CO-OPERATIVE GROUP
(ENV-2018-CHC-27)

HORTICULTURE NEW ZEALAND
(ENV-2018-CHC-28)

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

WILKINS FARMING CO
(ENV-2018-CHC-30)

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**MEMORANDUM OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL IN
RESPECT OF THE ACTIVITY STATUS OF RULE 52A
21 December 2018**

Judicial Officer: Judge Borthwick and Judge Hassan

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**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT
COUNCIL & INVERCARGILL DISTRICT COUNCIL**
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME COUNCIL
(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED Act 1991
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

**SOUTHWOOD EXPORT LIMITED, SOUTHLAND
PLANTATION FOREST COMPANY OF NZ,
SOUTHWOOD EXPORT LIMITED**
(ENV-2018-CHC-46)

**TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA,
WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE
RUNANGA O ORAKA APARIMA**
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

**ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND**
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

MAY IT PLEASE THE COURT

- 1 This Memorandum of Counsel is filed on behalf of the Southland Regional Council (**Council**) in respect of the appeals against the Council's decision on the proposed Southland Water and Land Plan (**pSWLP**).
- 2 This Memorandum addresses the Council's position regarding Rule 52A of the pSWLP.

Background

- 3 Rule 52A provides for the consenting of the Manapōuri hydro-electric generation scheme as a controlled activity, provided certain conditions are met.
- 4 At the Council hearing, in their section 42A Reply Report, Council officers (which included Mr McCallum-Clark) recommended that restricted discretionary activity status was the most appropriate activity status for Rule 52A.¹
- 5 However, the Hearing Panel recommended that controlled activity status was the most appropriate activity status for Rule 52A (based on the evidence and legal submissions presented by Meridian Energy Limited).² The Council ultimately adopted the Hearing Panel's recommendations as its decision on the pSWLP.
- 6 A number of parties have appealed the activity status of Rule 52A, seeking that Rule 52A be amended to either restricted discretionary or discretionary activity status.³
- 7 A number of section 274 parties have joined the appeals on the activity status of Rule 52A, both in support and opposition of restricted discretionary or discretionary activity status.⁴
- 8 Counsel notes that Rule 52A will be heard as part of the Topic B hearing, however Objective 10 and Objective X⁵ relate to Rule 52A and

1 Officer's Reply for Council Reply Hearing dated 3 November 2017, at para 4.304.

2 Report and Recommendations of the Hearing Commissioners, pp 59- 61.

3 Including Federated Farmers of New Zealand (Southland); and Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga O Awarua, Te Rūnanga O Oraka Aparima, and Te Rūnanga O Ngāi Tahu.

4 Including Southland Fish and Game Council, Aratiatia Livestock Limited, and Meridian Energy Limited.

5 Being a new objective sought by Meridian Energy Limited.

these objectives will be heard as part of Topic A. In light of this, Counsel consider it appropriate to provide early notice to the Court and the parties of its position regarding the activity status of Rule 52A.

Council Position

- 9 The Council's planning witness Mr McCallum-Clark largely supports the Objective and Policy framework in the decisions version of the pSWLP (including Objective 10). However, Mr McCallum-Clark considered that restricted discretionary activity status was (and is) the most appropriate activity status for Rule 52A (as set out in the Section 42A Reply Report).
- 10 As the Council has engaged Mr McCallum-Clark to provide expert planning evidence on behalf of the Council for the pSWLP hearing, the Council is placed in a somewhat difficult position in respect of the appropriate activity status for Rule 52A. Although the Council could call another planner to give evidence on this aspect of the pSWLP appeal proceedings, the Council may then be in the position of having conflicting evidence before the Court on this issue, both in respect of the appropriate activity status for Rule 52A and potentially the appropriate wording of the related objectives and policies (i.e., if that planner considered changes were required to the related objectives and policies to support controlled activity status for Rule 52A).
- 11 In these circumstances, Counsel advise the Court and the parties to the appeals, that the Council will abide the Court's decision on the appropriate activity status for Rule 52A and does not intend to present any evidence on that issue.
- 12 The Council does intend to be actively involved in the mediation and/or hearing of the appeals on the wider pSWLP framework as it relates to Rule 52A (e.g. the objectives and policies)⁶ and the drafting of Rule 52A, aside from the appropriate activity status.
- 13 Counsel considers that no person is prejudiced by the Council abiding the Court's decision on the appropriate activity status of Rule 52A for the following reasons:
- (a) The Council, by way of this Memorandum, has provided early notice to all parties to the proceedings that it will abide the Court's

⁶ Including Objective 10, New Objective 'X' sought by Meridian Energy Limited, and Policy 26.

decision and not put forward evidence on the appropriate activity status for Rule 52A. This provides the parties with sufficient time to produce their own evidence in support of controlled activity status should they choose to do so (noting that Rule 52A will be heard as part of Topic B).

- (b) Counsel for the Council has liaised with Counsel for Meridian Energy Limited (**Meridian**) who has confirmed that Meridian will put forward a case in support of the controlled activity status of Rule 52A. Accordingly, the Court will be presented with evidence in support of controlled activity status on this issue (i.e. the decisions version of Rule 52A of the pSWLP) regardless of the Council's position.
- (c) The Council is not required to defend its original decision.⁷
- (d) Public confidence in the integrity of the Resource Management Act 1991 and Court processes will be maintained as the Court will still be able to decide the issue having heard evidence both in support of and in opposition to controlled activity status for Rule 52A. As noted above, Meridian will be supporting the Council's decision on controlled activity status, being appropriate for Rule 52A.
- (e) Mr McCallum-Clark was the reporting officer for the Council hearing and was the author of the section 42A Reply Report in relation to Rule 52A. Despite the Council's decision to abide the Court's decision on the activity status of Rule 52A, the Council is willing to make Mr McCallum-Clark available to assist the Court and other parties, by providing his evidence given at the Council hearing, as set out in the section 42A Reply Report (noting that Mr McCallum-Clark supported a restricted discretionary activity status in the Section 42A Reply Report).

⁷ *Canterbury Regional Council v Christchurch City Council* [2000] NZRMA 512 provides that a council may, where it has good reason to do so, resile from its decision and call evidence in support of a new decision. More generally, this case supports the premise that a council is not required to defend its decision on appeal.

Conclusion

14 The Council gives notice that it will abide the Court's decision on the appropriate activity status for Rule 52A and will not present any evidence on that issue.

DATED this 21st day of December 2018



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P A C Maw / K J Wyss
Counsel for the Southland Regional Council