

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

**UNDER** the Resource Management Act 1991

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

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

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

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

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

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**JOINT MEMORANDUM IN SUPPORT OF CONSENT ORDER**

**TOPIC B3 - ISSUES 2, 5, 7, 9 & 10  
RELATING TO  
POLICY 32, RULE 74, AND APPENDIX A**

**3 February 2022**

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Judicial Officer: Judge Borthwick

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

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(ENV-2018-CHC-37)

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(ENV-2018-CHC-38)

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(ENV-2018-CHC-39)

**FEDERATED FARMERS OF NEW ZEALAND**  
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**HERITAGE NEW ZEALAND POUHERE TAONGA**  
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**THE TERRACES LIMITED**  
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**SOUTHWOOD EXPORT LIMITED, KODANSHA  
TREEFARM NEW ZEALAND LIMITED, SOUTHLAND  
PLANTATION FOREST COMPANY OF NEW ZEALAND**  
(ENV-2018-CHC-46)

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

**PETER CHARTRES**  
(ENV-2018-CHC-48)

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

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

**Appellants**

**AND**

**SOUTHLAND REGIONAL COUNCIL**

**Respondent**

**MAY IT PLEASE THE COURT**

- 1 This joint memorandum relates to appeals against Southland Regional Council's decision on the proposed Southland Water and Land Plan (**pSWLP**), in respect of provisions relating to Topic B3 Wetlands and Indigenous Biodiversity.
- 2 The parties participated in Court-assisted mediation on these appeals on 26 May 2021.
- 3 During Court-assisted mediation the parties reached agreement on the resolution of the following provisions under appeal:
  - (a) Issue 2 – Policy 32;
  - (b) Issues 5 and 7 – Rule 74; and
  - (c) Issues 9 and 10 – Appendix A.
- 4 This joint memorandum is filed in support of a draft consent order to resolve the appeals relating to provisions referred to at paragraph 3 above.
- 5 This joint memorandum has been signed by each of the Appellants, the Respondent, and each of the section 274 parties.

**The changes agreed, the rationale for the same, and draft Consent Orders**

- 6 The changes to the provisions referred to in paragraph 3, as agreed between the parties, are detailed in the draft Consent Order included at **Appendix 1** to this joint memorandum.
- 7 The changes, including the rationale for the same, are also explained in more detail in the affidavit of Lauren Maciaszek dated 2 February 2022, attached as **Appendix 2** to this joint memorandum. This affidavit provides an evaluation of the agreed changes in terms of section 32AA of the Act and (where relevant) the higher order policy documents, including in particular the National Policy Statement for Freshwater Management 2020 (**NPSFM**).
- 8 Counsel also record at the outset, that the parties, throughout mediation and informal discussions, were cognisant of the findings in the Court's Interim Decisions<sup>1</sup> and are satisfied that all changes agreed to are

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<sup>1</sup> [2019] NZEnvC 208, [2020] NZEnvC 93, [2020] NZEnvC 110, and [2020] NZEnvC 191.

consistent with those findings and/or, within the bounds of scope, bring the pSWLP closer to the direction in those decisions.

### **Details of appeals**

- 9 The sub-sections below detail the provisions that were appealed, who appealed each provision, what those appellants sought, and who joined those appeals as section 274 parties.
- 10 As the rationale for the changes agreed and an analysis in line with section 32AA has been provided in the affidavit of Lauren Maciaszek, such detail is not reproduced here. Rather, cross-referencing to that reasoning is provided to assist with readability of the suite of documents filed in support of orders being made by consent.

### **Issue 2 – Policy 32**

- 11 Policy 32 provides policy direction regarding the protection of significant indigenous vegetation and significant habitats of indigenous fauna associated with natural wetlands, lakes and rivers and their margins.
- 12 Policy 32 of the pSWLP was appealed by Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**).
- 13 Forest and Bird sought to amend the policy to add a requirement to maintain indigenous biodiversity associated with the listed waterbodies.
- 14 The following parties joined this appeal as section 274 parties:
- (a) Meridian Energy Limited;
  - (b) Aratiatia Livestock Limited; and
  - (c) Director-General of Conservation.
- 15 Through mediation the parties agreed to amend Policy 32 as set out in the draft consent order and paragraph [15] of the affidavit of Lauren Maciaszek in relation to Topic B3.
- 16 The rationale for the changes agreed are also included in that affidavit at paragraphs [16] – [21].

### **Issues 5 and 7 – Rule 74**

- 17 Rule 74(a) provides for the use of land within a wetland for the purposes of maintaining or enhancing the wetland or maintaining existing authorised structures within the wetland as a permitted activity, provided

conditions are met. If those conditions are not met, such activities are discretionary activities. Rule 74(ab) provides for the use of land within a wetland for commercial peat harvesting as a discretionary activity, provided conditions are met. Finally, the use of land within a wetland for any other purpose is a non-complying activity.

- 18 Rule 74 of the pSWLP was appealed by Te Rūnanga o Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima (**Ngā Rūnanga**).
- 19 Ngā Rūnanga sought to delete Rule 74(ab), and to amend Rule 74(a)(1) to provide for removal of plant species for mahinga kai purposes.
- 20 Two aspects of Rule 74 are included in the above appeal; the deletion of Rule 74(ab) (Issue 5) and amendments to Rule 74(a) (Issue 7).
- 21 In relation to the deletion of Rule 74(ab), the following parties joined as section 274 parties:
- (a) Peter Chartres<sup>2</sup>;
  - (b) Director-General of Conservation;
  - (c) Southland Fish and Game Council;
  - (d) Forest and Bird; and
  - (e) Dairy Holdings Limited.<sup>3</sup>
- 22 In relation to the amendments to Rule 74(a), the following parties joined as section 274 parties:
- (a) Peter Chartres;<sup>4</sup>
  - (b) Director-General of Conservation;
  - (c) Forest and Bird; and
  - (d) Dairy Holdings Limited.<sup>5</sup>

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<sup>2</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeal and interests as a section 274 party.

<sup>3</sup> Dairy Holdings Limited did not attend mediation.

<sup>4</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeals and interests as a Section 274 party.

<sup>5</sup> Dairy Holdings Limited did not attend mediation.

- 23 Through mediation the parties agreed to amend Rule 74 as set out in the draft consent order and paragraph [26] of the affidavit of Lauren Maciaszek in relation to Topic B3.
- 24 The rationale for the changes agreed are also included in that affidavit at paragraphs [27] – [43].

***Issue 9 and 10 – Appendix A***

- 25 Appendix A lists the Regionally Significant Wetland and Sensitive Water Bodies in Southland.
- 26 The advice notes of Appendix A of the pSWLP were appealed by Southland Fish and Game Council.
- 27 Southland Fish and Game Council sought to amend the advice note in Appendix A to state that the Appendix only identifies those wetlands that have been formally assessed and found to be of regional significance, and to note that additional wetlands may be identified through plan change processed and added to the Appendix.
- 28 The following parties joined the appeal as section 274 parties:
- (a) Peter Chartres;<sup>6</sup>
  - (b) Federated Farmers of New Zealand;
  - (c) Director-General of Conservation; and
  - (d) Royal Forest and Bird Protection Society of New Zealand Incorporated.
- 29 Appendix A and Q of the pSWLP was also appealed by Ngā Rūnanga.
- 30 Ngā Rūnanga sought to ensure that those waterbodies in Appendix Q of the notified pSWLP that are not already listed in Appendix A are added to Appendix A.
- 31 The following parties joined the appeal as section 274 parties:
- (a) Aratiatia Livestock Limited;
  - (b) Director-General of Conservation;

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<sup>6</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeal and interests as a Section 274 party.

- (c) Federated Farmers of New Zealand;
- (d) Royal Forest and Bird Protection Society of New Zealand Incorporated; and
- (e) Southland Fish and Game Council.

32 Through mediation the parties agreed to amend Appendix A as set out in the draft consent order and paragraph [48] of the affidavit of Lauren Maciaszek in relation to Topic B3.

33 The rationale for the changes agreed are also included in that affidavit at paragraphs [49] – [57].

### **Orders sought**

34 All parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

35 For the avoidance of doubt, the parties are satisfied that the amendments give effect to the National Policy Statement for Freshwater Management 2020, insofar as there is scope to do so.

36 The parties are also satisfied that the changes appropriately respond to the direction from the Court in its Interim Decisions.<sup>7</sup>

37 The parties therefore respectfully request that the Court make the orders sought in **Appendix 1** to this memorandum.

38 No party has any issue as to costs.

39 For completeness, it is noted that the order, if granted, resolves all appeals in relation to:

- (a) Policy 32 (Issue 2); and
- (b) Appendix A (Issues 9 and 10);

and partially resolves the appeals in relation to:

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<sup>7</sup> [2019] NZEnvC 208, [2020] NZEnvC 93, [2020] NZEnvC 110, and [2020] NZEnvC 191.



(c) Rule 74 (Issues 5 and 7). Rule 74 remains under appeal in relation to Issues 6 and 8 of Topic B3.

**DATED** this 3<sup>rd</sup> day of February 2022



.....

**P A C Maw / A M Langford**

Counsel for Southland Regional Council

.....

**D Allan**

Counsel for Aratiatia Livestock Limited

.....

**B Williams**

Counsel for Dairy Holdings Limited

.....

**P Williams**

Counsel for Director-General of Conservation

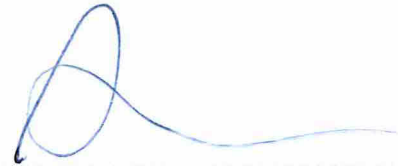
- (c) Rule 74 (Issues 5 and 7). Rule 74 remains under appeal in relation to Issues 6 and 8 of Topic B3.

**DATED** this 3<sup>rd</sup> day of February 2022

.....

**P A C Maw / A M Langford**

Counsel for Southland Regional Council

A handwritten signature in blue ink, consisting of a large, stylized initial 'D' followed by a long, horizontal flourish.

.....

**D Allan**

Counsel for Aratiatia Livestock Limited

.....

**B Williams**

Counsel for Dairy Holdings Limited

.....

**P Williams**

Counsel for Director-General of Conservation

- (c) Rule 74 (Issues 5 and 7). Rule 74 remains under appeal in relation to Issues 6 and 8 of Topic B3.

**DATED** this 3<sup>rd</sup> day of February 2022

.....

**P A C Maw / A M Langford**

Counsel for Southland Regional Council

.....

**D Allan**

Counsel for Aratiatia Livestock Limited



.....

**B Williams**

Counsel for Dairy Holdings Limited

.....

**P Williams**

Counsel for Director-General of Conservation

- (c) Rule 74 (Issues 5 and 7). Rule 74 remains under appeal in relation to Issues 6 and 8 of Topic B3.

**DATED** this 3<sup>rd</sup> day of February 2022

.....

**P A C Maw / A M Langford**

Counsel for Southland Regional Council

.....

**D Allan**

Counsel for Aratiatia Livestock Limited

.....

**B Williams**

Counsel for Dairy Holdings Limited

*P Williams*  
.....

**P Williams**

Counsel for Director-General of Conservation

*Phil U.*

*P. Wilson*

~~R. Gardner~~

~~Counsel~~ for Federated Farmers of New Zealand

.....  
**S Christensen**

Counsel for Meridian Energy Limited

.....  
**S Gepp**

Counsel for Forest and Bird

.....  
**S Gepp**

Counsel for Southland Fish and Game Council

.....  
**J Winchester / S Lennon**

Counsel for Ngā Rūnanga

.....

**R Gardner**

Counsel for Federated Farmers of New Zealand

  
.....

**S Christensen**

Counsel for Meridian Energy Limited

.....

**S Gepp**

Counsel for Forest and Bird

.....

**S Gepp**

Counsel for Southland Fish and Game Council

.....

**J Winchester / S Lennon**

Counsel for Ngā Rūnanga

.....

**R Gardner**

Counsel for Federated Farmers of New Zealand

.....

**S Christensen**

Counsel for Meridian Energy Limited



.....

**S Gepp**

Counsel for Forest and Bird



.....

**S Gepp**

Counsel for Southland Fish and Game Council

.....

**J Winchester / S Lennon**

Counsel for Ngā Rūnanga

.....

**R Gardner**

Counsel for Federated Farmers of New Zealand

.....

**S Christensen**

Counsel for Meridian Energy Limited

.....

**S Gepp**

Counsel for Forest and Bird

.....

**S Gepp**

Counsel for Southland Fish and Game Council

*Adelene Lennon*

.....

**J Winchester / S Lennon**

Counsel for Ngā Rūnanga



**Appendix 1 – Draft consent order**

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

**UNDER** the Resource Management Act 1991

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

**BETWEEN**

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

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

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

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

**WILKINS FARMING CO**  
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**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT  
COUNCIL & INVERCARGILL CITY COUNCIL**  
(ENV-2018-CHC-31)

**DAIRYNZ LIMITED**  
(ENV-2018-CHC-32)

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

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**CONSENT ORDER**

**TOPIC B3 - ISSUES 2, 5, 7, 9 & 10  
RELATING TO  
POLICY 32, RULE 74, AND APPENDIX A**

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Judicial Officer: Judge Borthwick

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

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

**SOUTHLAND FISH AND GAME COUNCIL**  
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(ENV-2018-CHC-43)

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

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(ENV-2018-CHC-45)

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TREEFARM NEW ZEALAND LIMITED, SOUTHLAND  
PLANTATION FOREST COMPANY OF NEW ZEALAND**  
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**TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA,  
WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE  
RUNANGA O ORAKA APARIMA**  
(ENV-2018-CHC-47)

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(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**

- [A] Under section 279(1) of the Resource Management Act 1991, the Environment Court, by consent, orders that the appeal is allowed in accordance with Annexure A to this Order.
- [B] Under section 285 of the Resource Management Act 1991, there is no order as to costs.

## REASONS

### Introduction

- 1 The following parties have appealed provisions of the proposed Southland Water and Land Plan as they relate to Topic B3:<sup>1</sup>
  - (a) Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**);
  - (b) Southland Fish and Game Council (**Fish and Game**); and
  - (c) Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihōpai Rūnaka, Te Rūnanga o Awarua, and Te Rūnanga o Oraka Aparima (**Ngā Rūnanga**).
  
- 2 The Court has read and considered the joint memorandum of the parties dated 3 February 2022, which proposes to resolve the appeals that relate to:
  - (a) Policy 32 (Issue 2); and
  - (b) Appendix A (Issues 9 and 10);and partially resolve the appeals in relation to:
  - (c) Rule 74 (Issues 5 and 7). Rule 74 remains under appeal in relation to Issues 6 and 8 of Topic B3.
  
- 3 The Court has also read and considered the affidavit of Lauren Maciaszek dated 2 February 2022, which provides an analysis of the changes proposed by the parties in terms of section 32AA of the Resource Management Act 1991 (**Act**).
  
- 4 The following parties gave notice of their intention to become parties under section 274 of the Act and have signed the joint memorandum of the parties dated 3 February 2022:<sup>2</sup>
  - (a) Aratiatia Livestock Limited;

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<sup>1</sup> The particular provisions each party has appealed is set out in the joint memorandum of the parties dated 3 February 2022.

<sup>2</sup> The particular appeal each party has joined as a s274 party is set out in the joint memorandum of the parties dated 3 February 2022.

- (b) Chartres P<sup>3</sup>;
- (c) Dairy Holdings Limited;
- (d) Director-General of Conservation;
- (e) Federated Farmers of New Zealand;
- (f) Fish and Game;
- (g) Forest and Bird; and
- (h) Meridian Energy Limited.

5 The Court is making this order under section 279(1)(b) of the Act; such order being by consent pursuant to section 297, rather than representing a decision or determination on the merits. The Court understands that for the present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Act, including in particular Part 2.

### **Order**

6 Therefore, the Court orders, by consent, that the proposed Southland Water and Land Plan be amended as set out in **Annexure A** to this Order.

7 The Order resolves the appeals as they relate to the following provisions:

- (a) Policy 32; and
- (b) Appendix A;

and partially resolves the appeals in relation to:

- (c) Rule 74.

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<sup>3</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeal and interests as a section 274 party.

8 There is no order as to costs.

**DATED** this                      day of                      2022

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J E Borthwick  
Environment Judge



## ANNEXURE A

### Topic B3 – Agreed changes to provision(s)

Amended text for Policy 32, Rule 74 and Appendix A (deleted text in strikethrough, new text underlined):

#### **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.

#### **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 purpose 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:~~

~~1 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.

## **Appendix A – Regionally Significant Wetlands and Sensitive Water Bodies in Southland**

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Lake Te Anau

Lake Manapouri

Lakes on Stewart Island

The reservoir (lake)

Waituna Lagoon

New River Estuary

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**Note 1:** *For wetlands, this appendix only identifies those which ~~are~~ have been formally assessed and found to be of regional significance. There are also rules in this plan that manage activities in relation to all wetlands not only those identified in this appendix.*

**Note 2:** *A plan change process may identify additional wetlands to be included in this appendix.*

**Appendix 2 – Affidavit of Lauren Maciaszek dated 2 February 2022**

**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)

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(ENV-2018-CHC-27)

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

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

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**AFFIDAVIT OF LAUREN MACIASZEK**

**TOPIC B3 - ISSUES 2, 5, 7, 9 & 10  
RELATING TO  
POLICY 32, RULE 74, AND APPENDIX A**

**2 February 2022**

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Judicial Officer: Judge Borthwick

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COUNCIL & INVERCARGILL CITY COUNCIL**  
(ENV-2018-CHC-31)

**DAIRYNZ LIMITED**  
(ENV-2018-CHC-32)

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

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

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

**Appellants**

**AND**

**SOUTHLAND REGIONAL COUNCIL**

**Respondent**

I, Lauren Rachel Maciaszek, of Invercargill, Principal Policy Planner, solemnly and sincerely affirm:

- 1 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 Vienna, Austria. I am employed by the Southland Regional Council (**Council**) as a Principal Policy Planner and have been in the Policy and Planning division since October 2019. Prior to this, I worked in Council's Consents division for five years.
- 2 While this affidavit in part records the reasoning and conclusion of the parties present at mediation, in places I express my professional opinion. For this material, I confirm that I have read and am familiar with the Code of Conduct for expert witnesses contained in the Environment Court Practice Note 2014. I agree to comply with that Code. Other than where I state that I am relying on the evidence of another person, my opinions are 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.
- 3 This affidavit provides an evaluation in accordance with section 32AA of the Resource Management Act 1991 (**Act**) to accompany the draft consent order to which this affidavit relates.<sup>1</sup> Within the context of the section 32AA assessment, I have also assessed the higher order policy documents including in particular, the National Policy Statement for Freshwater Management 2020 (**NPSFM**) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**).
- 4 As with any negotiated outcome, the position arrived at by the parties does not necessarily reflect my professional opinion of what the best wording would be. In my opinion, in part, some of the wording is acceptable rather than preferred. That said, the agreed outcome was the result of considerable discussion and investment in time and thought, which I respect. I have attempted to set out below the reasoning that the Court has required to be provided, based on my understanding and recollections of the discussion that occurred.

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<sup>1</sup> Minute of the Environment Court dated 22 October 2020, at [12].

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### Introduction

- 5 This affidavit relates to those issues under Topic B3 where an outcome has been agreed between the parties, namely:
- (a) Issue 2 – Policy 32;
  - (b) Issues 5 and 7 – Rule 74; and
  - (c) Issues 9 and 10 – Appendix A.
- 6 In this affidavit I first set out the relevant legal tests under s32AA of the Act and then provide an evaluation in accordance with s32AA for each of the provisions that have been agreed.

### Section 32AA of the Act

- 7 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...*
- 8 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*
- ...
- 9 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.

- 10 Section 32(3) is not relevant given the proposed Southland Water and Land Plan (**pSWLP**) is not an amending proposal, rather it is a whole new plan.
- 11 Section 32(4) may be relevant where the provision is a rule and will impose a greater or lesser restriction on an activity to which a national environmental standard applies than the existing restrictions in that standard. In particular, the NES-F is relevant in the context of the appeals on Rule 74 (Issues 5 and 7). It is considered specifically in the context of these Issues.

**Evaluation in terms of section 32AA of the Act for each provision where a change has been agreed**

- 12 In accordance with the requirements of sections 32(1) and 32(2), in relation to each provision where a change has been agreed I:
- (a) list the most relevant objectives;
  - (b) explain the "other reasonably practicable options" for achieving the objectives;
  - (c) summarise the reasons for the changes agreed; and
  - (d) provide an assessment of benefits, costs, and risks as required by section 32(2).

**Issue 2 – Policy 32**

- 13 Policy 32 of the pSWLP was appealed by Royal Forest and Bird Protection Society of New Zealand Incorporated.
- 14 The following parties joined this appeal as section 274 parties:
- (a) Meridian Energy Limited;
  - (b) Aratiatia Livestock Limited; and
  - (c) Director-General of Conservation.

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- 15 The mediated outcome for Policy 32 is (new text underlined):

**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.

*Relevant objectives*

- 16 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether Policy 32 is the most appropriate way to achieve the objectives, the most relevant objectives are Objectives 1, 2, 14, and 15.

*Reasonably practicable options*

- 17 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, and the agreed wording shown in tracked changes in paragraph 15 above.

*Explanation and reasons for the changes agreed*

- 18 In my opinion, the inclusion of “and maintain indigenous biodiversity” in Policy 32 is more efficient and effective in achieving the objectives of the pSWLP. The objectives are not limited to protecting significant habitats or significant indigenous vegetation, and the additional wording better implements Objectives 14 and 15. The agreed change to also maintain indigenous biodiversity in waterbodies and their margins better implements Te Mana o te Wai, which was recognised during the mediation discussion.
- 19 The agreed change to Policy 32 is not considered to make a substantial change to the way the policy is implemented, but does provide additional certainty that biodiversity will not be lost as a result of activities and ensures that the policy more effectively achieves the objectives of the pSWLP. On this basis, pursuant to section 32AA1(c), my evaluation of the agreed change to the Policy is brief.

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*Benefits, costs and risk assessment*

- 20 With respect to the assessment of benefits, costs and risks required by section 32(2), the key difference would be in circumstances where a proposed activity would be protecting significant indigenous vegetation and significant habitats of indigenous fauna, but not necessarily maintaining indigenous biodiversity. This may occur if the vegetation or habitat was not considered 'significant'. Overall, environmental and cultural benefits would be expected through ensuring that indigenous biodiversity is not lost. There may be economic costs where additional detail is required in assessments of environmental effects provided with consent applications, where applicants need to modify their activities, or where applications are declined due to indigenous biodiversity not being able to be maintained. However, I consider that this outcome would be consistent with Te Mana o te Wai and would appropriately achieve the objectives of the pSWLP.
- 21 Overall, having considered the options, the wording of the provision agreed by the parties (and set out at paragraph 15 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP.

**Issues 5 and 7 – Rule 74**

- 22 Rule 74 of the pSWLP was appealed by Te Rūnanga o Ngai Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima.
- 23 Two aspects of Rule 74 are included in the above appeal; the deletion of Rule 74(ab) (Issue 5) and amendments to Rule 74(a) (Issue 7).
- 24 In relation to the deletion of Rule 74(ab), the following parties joined as section 274 parties:
- (a) Peter Chartres<sup>2</sup>;
  - (b) Director-General of Conservation;
  - (c) Southland Fish and Game Council;
  - (d) Royal Forest and Bird Protection Society of New Zealand Incorporated; and

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<sup>2</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeal and interests as a section 274 party.

- (d) Dairy Holdings Limited.<sup>3</sup>
- 25 In relation to the amendments to Rule 74(a), the following parties joined as section 274 parties:
- (a) Peter Chartres;<sup>4</sup>
- (b) Director-General of Conservation;
- (c) Royal Forest and Bird Protection Society of New Zealand Incorporated; and
- (d) Dairy Holdings Limited.<sup>5</sup>
- 26 The mediated outcome for Rule 74 is (new text underlined and deleted text in ~~strikeout~~):

**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 purpose 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,

<sup>3</sup> Dairy Holdings Limited did not attend mediation.

<sup>4</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeals and interests as a Section 274 party.

<sup>5</sup> Dairy Holdings Limited did not attend mediation.

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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.

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*Section 32(4)*

- 27 The NES-F has regulations relating to activities in or close to<sup>6</sup> natural wetlands. Despite this, section 32(4) is not directly relevant because Rule 74 is for the use of land in a wetland, while the NES-F regulates vegetation clearance, earthworks, and taking, using, damming, diverting, or discharging water.
- 28 The deletion of Rule 74(ab) would make the use of land within a wetland for commercial peat harvesting a non-complying activity under Rule 74(c) of the pSWLP. Peat harvesting would be expected to include one or more of the activities regulated by the NES-F, which would be either a non-complying activity or prohibited activity under regulations 53 or 54 depending on whether drainage of the natural wetland would occur.
- 29 While Section 32(4) is not directly relevant, the parties present at mediation considered that deleting Rule 74(ab) to make the use of land in a wetland for commercial peat harvesting a non-complying activity would better align with the NES-F.
- 30 In terms of the changes to Rule 74(a), the agreed changes are consistent with the NES-F. Regulation 37 of the NES-F states that Subpart 1 ('Natural Wetlands') does not apply to the customary harvest of food or resources undertaken in accordance with tikanga Māori. The Decisions Version of Rule 74 currently places more restriction on mahinga kai than the NES-F, and I consider that the agreed change appropriately aligns Rule 74 with the NES-F.

*Relevant objectives*

- 31 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether the deletion of Rule 74(ab) is the most appropriate way to achieve the objectives, the most relevant objectives are Objectives 1, 2, 14 and 17.
- 32 In terms of assessing whether the amendments to Rule 74(a) are the most appropriate way to achieve the objectives, the most relevant objectives are Objectives 1, 2, 3, 4, 5, 14, and 17.

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<sup>6</sup> Depending on the activity, within either 10 or 100 metres of a natural wetland.

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*[Signature]*



*Reasonably practicable options*

- 33 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, and the agreed wording shown in tracked changes in paragraph 26 above.

*Explanation and reasons for the changes agreed*

- 34 The deletion of Rule 74(ab), in my opinion, is more effective and efficient in achieving the pSWLP objectives by ensuring that an application to use land within a wetland for commercial peat harvesting has to pass the ‘gateway test’ of Section 104D. This is consistent with ensuring that Te Mana o te Wai (as reflected in Objective 2 of the pSWLP, and the Objective of the National Policy Statement for Freshwater Management 2020 (NPSFM)) is upheld by prioritising the health and wellbeing of wetlands and ecosystems.
- 35 Parties recognised that the deletion of Rule 74(ab) would also better align with the Policy 6 of the NSPFM, as the policy requires that there is no further loss of extent of natural inland wetlands. This is further expanded on in Clause 3.22 of the NPSFM that requires a policy is inserted into every regional council’s operative plan(s). While the policy cannot be inserted into pSWLP until it becomes operative, a non-complying activity status for commercial peat harvesting would be more consistent with this direction than the current discretionary status.
- 36 Parties were in agreement that in general, the activity of commercial peat harvesting does not appear to be well aligned with the NPSFM, the NES-F, or the objectives of the pSWLP. As a result, it was recognised that removing discretionary activity status as sought was a logical consequence.
- 37 The agreed change to delete Rule 74(ab) is not considered to make a substantial change to the overall outcome for an application for commercial peat harvesting, due to the activity status of related activities under the NES-F being either non-complying or prohibited. On this basis, pursuant to section 32AA(1)(c), my analysis below in relation to the efficiency and effectiveness of the changes to Rule 74 is brief.

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- 38 In terms of the agreed amendments to Rule 74(a), in my opinion, the inclusion of the additional purpose allowing removal of plant matter for mahinga kai in Rule 74 is more efficient and effective in achieving the objectives of the pSWLP, and in particular Objectives 4 and 5. The inclusion is also consistent with section 6(e) of the RMA and appropriately takes into account the principles of the Treaty of Waitangi by the active protection of tangata whenua interests. This was recognised during the mediation discussion.
- 39 The parties were also cognisant that the inclusion of the words would better align with the direction in section 3.22(a)(i) of the NPSFM. Parties present at mediation also agreed that the inclusion of the words "undertaken in accordance with tikanga Māori" would ensure that the activity would not be inconsistent with other objectives of the pSWLP, such as Objectives 14 and 17.
- 40 The agreed change to Rule 74 will have the specific consequence of allowing mahinga kai to be undertaken as a permitted activity rather than requiring consent.

*Benefits, costs and risk assessment*

- 41 With respect to the assessment of benefits, costs and risks required by section 32(2), the outcomes of the deletion of Rule 74(ab) are difficult to distinguish from the decisions version of the rule when considered in the context of the NES-F regulations which would also apply. The requirements of Section 104D mean that the consent application process would be more stringent, with consent to use land within a wetland only able to be granted if either the adverse effects of the activity on the environment would be minor or if the activity would not be contrary to the objectives and policies of the pSWLP. This would likely result in economic cost, both through the application process and through applications being more likely to be declined. However, I consider that ensuring a more stringent application process will result in environmental benefits by providing better protection for wetlands. In doing so, the agreed change better implements the objectives of the pSWLP and the NPSFM, and is more consistent with the NES-F.
- 42 In terms of the amendments to Rule 74(a), the agreed change is expected to result in cultural, social, and economic benefits to tangata whenua. While there may also be some environmental cost through

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wetland disturbance, this is expected to be minimal as the agreed wording requires that the mahinga kai is carried out in accordance with tikanga Māori and the activity is therefore expected to be consistent with the objectives of the pSWLP and uphold Te Mana o te Wai.

- 43 Overall, having considered the options, the wording of Rule 74 agreed by the parties (and set out at paragraph 26 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP and section 3.22 of NPSFM.

**Issue 9 and 10 – Appendix A**

- 44 The advice notes of Appendix A of the pSWLP were appealed by Southland Fish and Game Council.

- 45 The following parties joined the appeal as section 274 parties:

- (a) Peter Chartres;<sup>7</sup>
- (b) Federated Farmers of New Zealand;
- (c) Director-General of Conservation; and
- (d) Royal Forest and Bird Protection Society of New Zealand Incorporated.

- 46 Appendix A and Q of the pSWLP was also appealed by Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Ōraka Aparima (**Ngā Rūnanga**)

- 47 The following parties joined the appeal as section 274 parties:

- (a) Aratiatia Livestock Limited;
- (b) Director-General of Conservation;
- (c) Federated Farmers of New Zealand;
- (d) Royal Forest and Bird Protection Society of New Zealand Incorporated; and
- (e) Southland Fish and Game Council.

- 48 The mediated outcome for Appendix A is (new text underlined):

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<sup>7</sup> Mr Chartres attended mediation and signed the mediation agreement, but has since withdrawn his appeal and interests as a Section 274 party.

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## Appendix A – Regionally Significant Wetlands and Sensitive Water Bodies in Southland

.....

Lake Te Anau

Lake Manapouri

Lakes on Stewart Island

The reservoir (lake)

Waituna Lagoon

New River Estuary

.....

**Note 1:** *For wetlands, this appendix only identifies those which are have been formally assessed and found to be of regional significance. There are also rules in this plan that manage activities in relation to all wetlands not only those identified in this appendix.*

**Note 2:** *A plan change process may identify additional wetlands to be included in this appendix.*

### *Relevant objectives*

- 49 While all the objectives of the pSWLP are relevant and have been considered, in terms of assessing whether Appendix A is the most appropriate way to achieve the objectives, the most relevant objectives are Objectives 1, 2, 6, 9/9A, 14, and 17.

### *Reasonably practicable options*

- 50 Section 32(1)(b)(i) requires the identification of “other reasonably practicable options” for achieving the objectives. The reasonably practicable options I have identified and considered are the Decisions Version wording, and the agreed wording shown in tracked changes in paragraph 48 above.

### *Explanation and reasons for the changes agreed*

- 51 When the pSWLP was notified in 2016, Regionally Significant Wetlands were listed in Appendix A and Sensitive Waterbodies were listed in

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Appendix Q. During the hearing process, staff recommended that the appendices were combined due to overlap. As a result, Appendix Q was deleted and Appendix A was titled 'Regionally Significant Wetlands and Sensitive Waterbodies'. However, the waterbodies in Appendix Q that were not already in Appendix A are not listed in Appendix A, and the appeal is seeking correction of the oversight.

- 52 In my opinion, the inclusion of additional waterbodies in Appendix A is more efficient and effective in achieving the pSWLP's objectives through the policy and rules which refer to sensitive waterbodies (Policy 16, Rule 20, Rule 51, and Rule 70). By recognising the waterbodies which have been previously identified as sensitive, the pSWLP is better able to uphold Te Mana o te Wai and ensure that the health and well-being of those waterbodies is prioritised.
- 53 The change to the existing advice note and the additional advice note do not alter the outcome of the pSWLP's provisions, but may provide some further clarity to users of the pSWLP. Parties present at mediation considered that the agreed changes to the notes would be of neutral effect; in other words, improvements in the pSWLP's efficiency or effectiveness in achieving the objectives are not expected, but the changes are not likely to reduce the pSWLP's efficiency or effectiveness either.
- 54 The agreed changes to Appendix A are not considered to make a substantial change to the way the Appendix or the pSWLP is implemented. On this basis, pursuant to section 32AA(1)(c), my analysis in relation to the efficiency and effectiveness of the changes to Appendix A is brief.

*Benefits, costs and risk assessment*

- 55 With respect to the assessment of benefits, costs and risks required by section 32(2), the key difference would be that the inclusion of the agreed wording ensures that the sensitive water bodies previously included in Appendix Q will be re-inserted into Appendix A. This will ensure that Te Mana o te Wai is better able to be upheld in relation to these water bodies through the provisions applying as intended. This would result in environmental benefits by way of greater protection for the additional sensitive water bodies, but may also result in some

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economic cost by way of restricting activities carried out in close proximity to those water bodies.<sup>8</sup>

56 As explained in paragraph 53 above, the additional detail in the notes of the Appendix is not expected to result in any different outcome when compared to the decisions version. As a result, I do not consider that there will be any environmental, economic, social, or cultural costs or benefits as a result of the agreed change.

57 Overall, having considered the options, the wording of Appendix A agreed by the parties (and set out in paragraph 48 above) is considered to be the most appropriate way to achieve the objectives of the pSWLP.



Lauren Maciaszek

Affirmed at Invercargill )  
this 2<sup>nd</sup> day of February )  
2022, before me: )

Roosje Aryan Rabusa  
Solicitor  
Invercargill



A Solicitor/Deputy Registrar of the High Court of New Zealand/  
Justice of the Peace

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<sup>8</sup> Policy 16 relates to farming activities that affect water quality, Rule 20 (in relation to intensive winter grazing) and Rule 51 (in relation to diversions of water for the purpose of land drainage) have permitted activity conditions referring to Appendix A, and Rule 70 (stock exclusion) prohibits the disturbance of bed of water bodies listed in Appendix A by stock. I have not assessed the implications of the changes to these provisions in any further detail because all of them are subject to other appeals to be heard by the Court.