

IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 158

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First  
Schedule of the Act

BETWEEN ARATIATIA LIVESTOCK  
LIMITED

(ENV-2018-CHC-29)

(and all other appellants listed in  
the Schedule attached)

Appellants

AND SOUTHLAND REGIONAL  
COUNCIL

Respondent

Court: Environment Judge J E Borthwick  
Deputy Environment Commissioner R M Dunlop

Hearing: at Christchurch 29, 30 and 31 May and 1 and 2 June 2023

Appearances: P A C Maw and I F Edwards for Southland Regional  
Council  
K E Forward for the Dairy Interests  
P D Williams for Director-General of Conservation  
Tumuaki Ahurei  
B S Carruthers and M Campbell for Federated Farmers of  
New Zealand Inc and Wilkins Farming Company Ltd  
S R Gepp for Royal Forest and Bird Protection Society of  
New Zealand Inc and the Southland Fish and Game  
Council  
J G A Winchester for Ngā Rūnanga  
M R G Christensen for Ravensdown Limited

Last case event: 17 July 2023

Eighth Interim Decision – Aratiatia Livestock Limited & Ors v Southland Regional Council



Date of Decision: 1 August 2023

Date of Issue: 1 August 2023

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**EIGHTH INTERIM DECISION  
OF THE ENVIRONMENT COURT**

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**REASONS**

**Introduction**

[1] This decision addresses Appendix N and Schedule X maps and, secondly, Rule 78 of the proposed Southland Water and Land Plan.

**Appendix N: Farm Environmental Management Plan**

[2] The Fifth and Sixth Interim Decisions address the drafting of Appendix N: Farm Environmental Management Plan Requirements (FEMP). FEMPs are an important method for implementing the objectives and policies of the proposed Southland Water and Land Plan (pSWLP). Having been settled in draft, the appendix was referred for sense checking by a panel of farmers and farm advisors. They, together with Regional Council's policy planner Mr H Bedggood, reported back to the court on the drafting highlighting issues for further consideration or suggesting amendments. Their report is set out in a joint witness statement dated 3 April 2023. The panel also appeared in court and were available to answer questions.

[3] We reiterate our appreciation for the careful way that the participants went about this exercise.

[4] In a Minute<sup>1</sup> the court advised that we had no difficulty in principle with

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<sup>1</sup> Minute 'Sense check' dated 28 April 2023.

the recommended changes to the following provisions:

- (a) clause 6(b);
- (b) clause 7(b), (g), (h) and (i); and
- (c) clause 10(d).

[5] Having had the benefit of hearing from the panel and secondly, further expert evidence,<sup>2</sup> the following changes are also approved:<sup>3</sup>

- (a) clause 7(b) – amend by including ‘predominant’ and ‘these’ areas;
- (b) clause 9(a)(i) – deleting ‘with any change in farming activity’;
- (c) clause 9(a)(ii) – amend ‘minimised’ to ‘slowed’;
- (d) clause 10(c) – delete ‘significant’ and insert ‘application infrastructure’;
- (e) clause 10(d) – amend ‘crop’ to ‘plant’;
- (f) clause 13(g)(ii) – amend ‘armouring provided by the pasture on the paddock’ to read ‘residual root system and/or vegetative cover’; and
- (g) concerning ‘material change’ in clause 8(c) and clause 16(a), amend the provisions making clear that the risk is in not achieving Objectives 9 and 10 of the FEMP.

[6] The amendments proposed to the above provisions are appropriate for the reasons given by the sense check panel, Dr Monaghan and Mr McCallum-Clark, and are now approved.

[7] The balance of this part of the decision addresses three contentious issues raised by the sense check panel.

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<sup>2</sup> Monaghan, supplementary evidence dated 23 May 2023, McCallum-Clark, supplementary evidence dated 23 May 2023 and 23 June 2023.

<sup>3</sup> Grammatical amendments recommended by Mr McCallum-Clark to cl 11 and cl 13 are also approved and cross-referencing errors in notes (a), (b) and (c) are corrected.

## Issues for determination

[8] The issues are:

- (a) the meaning of certain words and phrases;
- (b) whether clause 9(a)(i) and clause 11(c) implement Policy 16; and
- (c) FEMP purpose statement.

### *Issue: words and phrases*

[9] The first issue concerns the meaning of the following words and phrases:

- (a) ‘significant’, ‘nearby’ and ‘if known’;
- (b) ‘margin’; and
- (c) ‘when compared with existing discharges’.

### *‘significant’, ‘nearby’ and ‘if known’*

[10] The sense check panel queried the meaning of the terms ‘significant’, ‘nearby’ and ‘if known’ in sub-clauses 7(l) and (k). Agreeing ‘if known’ needed greater specificity, Mr McCallum-Clark proposed a new footnote that reads:<sup>4</sup>

“Other significant values and uses (if known)” include personally held local knowledge of the landowner or agent, the catchment context documentation prepared by the regional council, information prepared by a catchment group, and information from the Council’s on-line mapping system that is relevant to the management of risks addressed by the FEMP. In addition, if information on cultural values (including mahinga kai and nohoanga) is not explicitly contained in the catchment context documentation, information (in writing) from Papatipu Rūnanga or their environmental entity.

[11] Supporting the inclusion of the footnote, Ngā Rūnanga’s planning witness,

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<sup>4</sup> Exhibit Regional Council 3.

Ms T Davidson, would amend the same as follows:<sup>5</sup>

[Other significant values and uses (if known)] include]<sup>6</sup> personally held local knowledge of the landowner or agent, **information formally obtained from Papatipu Rūnanga (directly or through their environmental entity)**, the catchment context documentation prepared by the regional council, information prepared by a catchment group, and information from the Council’s on-line mapping system that is relevant to the management of risks addressed by the FEMP.

(Ms Davidson’s emphasis)

[12] Ms Davidson’s amendments are proposed to reduce the risk of someone *not knowing* because they neither asked nor turned their minds to the same. The amendment obligates a farmer to at least make enquiry of Papatipu Rūnanga and, in her opinion, better meets Objective 4 which is to ensure “tangata whenua values and interests are identified and reflected in the management of freshwater and associated ecosystems”.<sup>7</sup>

*Discussion and findings: ‘significant’, ‘nearby’ and ‘if known’*

[13] Both planning witnesses envisage that information of the type to be provided under sub-clause 7(l) and (k) will be held by the Regional Council in the “catchment context”<sup>8</sup> documentation.<sup>9</sup> The Regional Council is required to prepare catchment context documentation under the recently gazetted Resource Management (Freshwater Farm Plans) Regulations 2023 (the ‘Regulations’) and, in collaboration with mana whenua, this work is underway for one or more Freshwater Management Units in Southland.

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<sup>5</sup> Davidson, supplementary evidence dated 19 May 2023 at [14].

<sup>6</sup> Possibly an oversight, Ms Davidson’s footnote omits the bracketed words.

<sup>7</sup> Davidson, supplementary evidence dated 19 May 2023 at [14]-[17].

<sup>8</sup> More specifically, the “catchment context, challenges, and values” in Resource Management (Freshwater Farm Plans) Regulations 2023, reg 4.

<sup>9</sup> Resource Management (Freshwater Farm Plans) Regulations 2023, reg 46.

[14] The information to be provided – if known – concerns the presence of taonga species and other significant values and uses of nearby land and water such as mahinga kai and nohoanga. That information may be recorded in the catchment context documentation but if it is not, then it may be held in the records of Papatipu Rūnanga or within the knowledge of certain individuals in the various Papatipu Rūnanga.

[15] While information is to be ‘formally obtained’ from the Papatipu Rūnanga in Ms Davidson’s formulation, she does not suggest that the FEMP cannot be certified if the information is not provided. Nor does Ms Davidson envisage engagement with the Papatipu Rūnanga over the contents of individual FEMPs.<sup>10</sup>

[16] A concern for some parties, which we are not going to be drawn on, is whether the Papatipu Rūnanga are sufficiently resourced to respond to information requests as we would not expect Ngā Rūnanga to advance drafting without satisfying itself in this regard.

[17] Although attached to clause 7(l) by Mr McCallum-Clark, it appears to us that the clarifying footnote he supports is intended to pertain to both sub-clauses (k) and (l). Rather than footnoting, we suggest addressing the source of information in an advisory note. We have proposed drafting responding to the concerns raised in cross-examination. Parties will note:

- (a) we omit ‘... information on cultural values ... is not explicitly contained in the catchment context documentation ...’. There are different geographical scales at which information may exist. Instead, the advisory note is to direct users to the Papatipu Rūnanga for information (that is, in the absence of the Council’s catchment documentation or online mapping prepared in consultation with Papatipu Rūnanga);

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<sup>10</sup> Transcript May-June 2023 (Davidson) at 105.

- (b) any request for information from the Papatipu Rūnanga is to be made at least two months prior to submitting the FEMP for certification. Proof of request and response to information provided by Papatipu Rūnanga, are matters best left to the Regional Council's certifying and auditing guidelines.

[18] Our suggested drafting follows:

**Sources of information** for the purposes of sub-clauses 7(k) and (l) include personally held local knowledge of the landowner or agent, the catchment context documentation prepared by the regional council, information prepared by a catchment group, and information from the Council's online mapping system that is relevant to the management of risks addressed by the FEMP. Absent Council catchment documentation or online mapping prepared in consultation with Papatipu Rūnanga, persons preparing an FEMP are to seek information on cultural values (including taonga species, mahinga kai and nohoanga) by contacting the relevant Papatipu Rūnanga or their environmental entity. Any request for information from Papatipu Rūnanga or their environmental entity is to be made in writing at least two months' prior to submitting the FEMP for certification.

[19] With the preceding changes, the words 'significant' and 'if known' are now omitted from sub-clauses 7(k) and (l). Plan users will be directed by Appendix N footnotes to the advisory note 'sources of information'.

*Discussion and findings: 'margin'*

[20] The sense check raised a query as to the meaning of 'margin' in clause 9(b) and how this may be defined.<sup>11</sup>

[21] 'Margin' is referred to in the context of habitat management. Specifically,

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<sup>11</sup> Sense check JWS dated 3 April 2023 at [38].

it is an objective that:

**Habitat management:** activities in waterways (including modified watercourses), natural wetlands and their margins are managed so that in-stream and riparian habitat values are not diminished, and where practicable are improved.

[22] Mr McCallum-Clark did not consider a definition was required. Agreeing with him, what is ‘margin’ is informed by the environment and by the risks arising from the different farming activities. What is ‘margin’ is, therefore, to be determined on a site-by-site basis. Further, we note that the risk to the environment may require the ‘margin’ to be wider than the setback from water bodies for activities permitted by a rule in the plan.<sup>12</sup>

[23] The term ‘margin’, therefore, requires no clarification.

*Issue: ‘when compared with existing discharges’*

[24] It is an objective of the FEMP Sixth Interim Decision that losses of nitrogen, phosphorus, sediment and microbial contaminants from farming activities to water bodies do not increase ‘when compared with existing discharges’ and are minimised with any change in farming activity (clause 9(a)(i)). Quite reasonably, the sense check panel asked how are ‘existing discharges’ to be determined and what period does this relate to?<sup>13</sup>

[25] On the one hand, the panel was concerned that if the point of comparison is a fixed point in time, this date may not be representative of farming activities that typically take place on a landholding. There are many reasons why that might be so, including the coincidence of the date with an adverse weather event (e.g. drought), reduction of farming activity due to illness, a lawful increase in contaminant discharges in any later year or the absence of records if ownership in a landholding has changed. On the other hand, setting a date in the future may

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<sup>12</sup> Transcript May-June 2023 (McCallum-Clark) at 157-158.

<sup>13</sup> Sense check JWS dated 3 April 2023 at [34].



encourage landowners to ramp up farming activities and associated contaminant discharges.<sup>14</sup>

[26] The panel participants suggested the provision may be clarified by the insertion of a date range, rather than nominating a single year. Responding, Mr McCallum-Clark introduced a new concept of ‘baseline contaminants’ with this to be the point of comparison for demonstrating that contaminants have not increased and are minimised (clause 9(a) objective, clause 11(c)(i), clause 13(i)(1)).<sup>15</sup>

[27] He proposed to define ‘baseline’ as follows:<sup>16</sup>

‘**previous baseline contaminant losses**’ is the highest annual contaminant losses over any 12 month period commencing 1 July and ending 30 June between 1 July 2018 and 30 June 2023.

[28] Mr McCallum-Clark did not have the opportunity to evaluate the above amendments prior to giving evidence. As was teased out in cross-examination, the difficulty with a date range lies in the perception that the environmental effect of discharges during this period are acceptable when they are not. Second, the definition referring to the ‘highest annual contaminant loss’, adopts an approach that is not precautionary given the degraded state of many of the region’s water bodies. Third, the baseline may be interpreted as the nutrient outcome/quantum which a landowner is to remain below counteracting the plan’s direction to strive for continual improvement. Fourth, the highest annual contaminant loss may not be representative of existing discharges and, if it is not, this year may result in an increase in contaminant losses if selected.<sup>17</sup>

[29] Finally, the term ‘baseline’ and its definition suggest contaminant losses are

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<sup>14</sup> Transcript May-June 2023 (sense check panel) at 14-20 and 33.

<sup>15</sup> Refer to amendments to Attachment 1 to Mr McCallum-Clark’s supplementary evidence dated 23 May 2023. Note: Mr McCallum-Clark proposed a similar change in relation to cl 9(a)(iii) but later withdrew support for the same. See transcript (McCallum-Clark) at 141.

<sup>16</sup> Exhibit Regional Council 3.

<sup>17</sup> Transcript May-June 2023 (McCallum-Clark) at 136-139 and 144.

quantifiable. For sediments and microbial contaminants, we were told that the tools to quantify losses are cumbersome and little used.<sup>18</sup> While there are tools to assess nitrogen and phosphorus loss risks,<sup>19</sup> we are unaware of the efficacy of the same when quantifying loss. It is likely, therefore, that an evaluative judgement will be made when determining whether there is a prospective increase or reduction in contaminant loss.

[30] Reflecting on all of this, Mr McCallum-Clark observed that implicit in Policy 16 and Appendix N is the assumption that there will be continual improvement over time. However, he is concerned that *minimising*, as used in these provisions, would not be applied as requiring continuous improvement in water quality. In response he suggested amending the nutrient and soil management objective to include the following sub-clause:<sup>20</sup>

there is a continual improvement in on-farm nutrient and soil management practices.

*Discussion and findings: 'when compared with existing discharges'*

[31] We find ourselves largely in agreement with Mr McCallum-Clark. The direction to continuous improvement in water quality is not plainly evident in Appendix N. This direction is consistent with the NPS-FM's long-term vision for freshwater and also with the issues identified in relation to water quality and in the objectives and policies of the proposed plan.<sup>21</sup>

[32] While this may change under Plan Change Tuatahi, for now whether a FEMP implements the objectives in Appendix N will be a qualitative judgement

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<sup>18</sup> Transcript May-June 2023 (Monaghan) at 84-86. Monaghan, supplementary evidence dated 23 May 2023 at [18].

<sup>19</sup> Monaghan, supplementary evidence dated 23 May 2023 at [18].

<sup>20</sup> Transcript May-June 2023 (McCallum-Clark) at 148.

<sup>21</sup> The issues in relation to water quality include the adverse effects of the same as a result of point source and non-point source discharges and the need for continuous improvement in relation to levels of contaminant discharges. See pSWLP, Issues at 20. For the framework of this plan in the context of the NPS-FM, see pSWLP, Introduction at 11. See also Objectives 6, 7, 8, and 18.

that is informed by changes in on-farm nutrient and land management practices including (as a minimum) the adoption of measures contained in the conditions of the permitted farming activity rules.

[33] Consequently, we are attracted to the amended sub-clauses Mr McCallum-Clark has proposed for the nutrient and soil management objective (clause 9(a)). However, we struggle with his concept of a 'baseline' as in 'previous baseline contaminant losses' (see above). Implicit in this new term is the ability to measure losses, however the tools to do this are not yet available.

[34] We wonder whether an alternative method is to 'benchmark' future on-farm nutrient and land management practices against the preceding year? While both 'baseline' and 'benchmark' are performance measure tools, the latter is a standard or point of reference against which things may be compared. Unlike a baseline, a benchmark can change over time and may better reflect relevant considerations of the type discussed above. If this resonates, we have suggested alternative drafting for clause 9 nutrient and soil management objective, clause 11 and clause 13 where a comparator is also required.

[35] In our alternative we propose a definition of 'benchmark' which has as its focus land use practices which are improving over time, notwithstanding supervening adverse weather events or change in personal circumstances etc. It reads:

**benchmark** means on-farm nutrient and soil management practices over the preceding twelve months commencing 1 July 2022 and ending 30 June 2023 or another 12 month period in the five years between 2018 – 2023 if accepted by the certifier as being representative of those practices. Benchmarked has the same meaning.

*Issue: do clauses 9(a)(i) and 11(c) implement Policy 16?*

*Discussion and findings*

[36] The sense check raised an issue around implementation of Policy 16 identifying a potentially different treatment of ‘minimised’ in sub-clauses 9(a)(i) and 11(c).<sup>22</sup>

[37] All farming activities are to comply with Policy 16(a). Therefore, all farming activities are to:

- (a) not lead to an increase in contaminant losses when compared with what has occurred in the past; and
- (b) minimise contaminant losses.

[38] For degraded catchments, there is an additional requirement under Policy 16 to reduce the adverse effects on water quality.

[39] By not referring to the requirement that farming activities not increase contaminant losses, clause 11(c) in the Sixth Interim Decision sets an arguably lower threshold than Policy 16(a). Responding, Mr McCallum-Clark proposed a merging and redrafting of clause 11(c) and (d) to read:<sup>23</sup>

- (11)(c) taking into account the risk pathways of the relevant physiographic zone, the catchment context(s), and the risks associated with the farming activities, demonstrate that the actions to be undertaken:
  - (1) will not lead to an increase in contaminant losses when compared with the previous baseline contaminant losses;
  - (2) will minimise contaminant losses; and
  - (3) for Schedule X catchments, will lead to a reduction in adverse effects on water quality.

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<sup>22</sup> Sense check JWS dated 3 April 2023 at [43].

<sup>23</sup> McCallum-Clark, supplementary evidence dated 23 May 2023 at [27].

[40] The merging of the two sub-clauses is a sensible suggestion. Based on clause 13(i) suggested by the court in the Sixth Interim Decision, save for one amendment, the drafting is sound.

[41] The further amendment concerns Mr McCallum-Clark's identical clause 11(c)(iii) and clause 13(i) which presently read:

... for Schedule X catchments, [will] lead to a reduction in adverse effects on water quality.

[42] As worded, Dr Monaghan was unsure how an individual farmer could respond without some sort of catchment-scale analysis of specific farms.<sup>24</sup> Addressing Policy 16(a), these sub-sections apply to catchments of degraded water bodies. The sub-sections are not addressing contaminants, rather the effects of farming activities more generally on the environment.<sup>25</sup> It is not intended that catchment scale proof is required from individual farmers. As suggested by Mr McCallum-Clark,<sup>26</sup> we will amend the sub-clauses to refer instead to contributing to a reduction in adverse effects; a qualitative not quantitative assessment is required.

***Issue: FEMP purpose statement and advisory notes***

*Discussion and findings:*

[43] The final issue concerns Parts A and C of Appendix N. Mr McCallum-Clark advises these parts fall away with the gazetting of the regulations. Amendments to the appendix are required if the FEMP's purpose statement is to be retained.<sup>27</sup> We are grateful to Ms Gepp for suggesting amendments to Part A

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<sup>24</sup> Monaghan, supplementary evidence dated 23 May 2023 at [20]. Transcript (Monaghan) at 82-84.

<sup>25</sup> Transcript May-June 2023 (McCallum-Clark) at 133, JWS dated 23 and 25 July 2022 at [24].

<sup>26</sup> Transcript May-June 2023 (McCallum-Clark) at 133 and 149.

<sup>27</sup> McCallum-Clark supplementary evidence dated 23 June 2023. There being no opposition to the same I admit by consent this brief of evidence.

and retention of notes below Part C.

[44] The court is minded to retain the FEMP purpose statement and the notes that follow clause 17, but will leave it to parties to confer and agree on the amendments required, including retention of the Appendix N [3] linkage to Objectives 1 and 2.

### **Directions**

[45] By **18 August 2023**, and having conferred with the parties, the Regional Council will file a memorandum:

- (a) responding to the court's drafting of 'source of information' and 'benchmark' advisory notes, clause 9(a)(i) and new sub-clause (ii), clause 11(c)(i) and clause 13(i)(1) of Appendix N tracking any changes as may be required; and
- (b) propose amendments to Parts A and C of Appendix N to retain the FEMP objectives and notes.

## **Schedule X Maps**

### **Introduction**

[46] An issue has arisen whether to include maps produced by Dr Snelder locating catchments for Dissolved Reactive Phosphorus ('DRP') and Dissolved Inorganic Nitrogen ('DIN') in Schedule X. Schedule X is a new schedule in the pSWLP that maps catchments of degraded water bodies where improvement in water quality is required.

[47] The maps produced are for Macroinvertebrate Community Index ('MCI'); suspended sediment, *E.coli*, DIN, and DRP. No issues arise in relation to the maps of MCI, suspended sediment and *E.coli*, and these maps are now confirmed.

[48] At the court’s prompting, Dr Snelder then produced maps for Total Nitrogen (“TN”) and Total Phosphorus (“TP”). Again, there being no objection to the same, we confirm the inclusion of maps for TN and TP in Schedule X. The inclusion of these is appropriate given the court’s findings in relation to degraded estuaries and ICOLLS.<sup>28</sup>

[49] As the court did not anticipate maps for DRP and DIN, we queried their production, noting:<sup>29</sup>

SRC has reported on the maps to be appended to Schedule X, however it has not explained why maps and layer plans for DIN and DRP are included. In context, the mapping of these values is inconsistent with paragraphs [62]-[65] and footnote 94 of the Fifth Interim Decision. If estuarine trophic status is correlated with TN and TP loads, should not TN and TP have been mapped? SRC is directed to respond, producing new maps and layer plans (if appropriate).

### **Parties’ submissions**

[50] The Regional Council, together with Forest & Bird/Fish & Game, support the inclusion of the DIN and DRP maps. The Dairy Interests oppose the same.

[51] The Regional Council submits that notwithstanding the court’s findings at paragraphs [62]-[65] of the Fifth Interim Decision, the court directed the Regional Council to produce maps for nitrogen, phosphorus, MCI, *E.coli* and suspended sediments, together with a single map for these attributes combined. It was the Regional Council’s understanding that the court had approved the DIN and DRP maps attached to Dr Snelder’s February 2022 evidence for inclusion in the plan.<sup>30</sup>

[52] Forest & Bird/Fish & Game submit that maps for catchments degraded by DIN and DRP should be included in Schedule X. Criticising the Fifth Interim

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<sup>28</sup> ICOLLS mean ‘intermittently closed and open lakes and lagoons’.

<sup>29</sup> Seventh Interim Decision [2023] NZEnvC 87 at [8].

<sup>30</sup> SRC memorandum ‘regarding Schedule X maps’ dated 24 May 2023 and 19 June 2023.

Decision, counsel argues that the evidence supports a finding to be made by the court as to the threshold values for DIN and DRP and, applying those values, a finding that catchments of water bodies are degraded by the same can be made.<sup>31</sup> Counsel only briefly addresses the directions in the Fifth Interim Decision on what the Regional Council was to produce.<sup>32</sup>

[53] Dairy Interests oppose the inclusion of maps for DIN and DRP submitting that the court findings on the subject matter are final and that the court is *functus officio* and secondly, arguing that there is no scope for the court to approve threshold values for these attributes.<sup>33</sup>

### **Discussion and findings – maps for inclusion in Schedule X**

[54] This court is *functus officio* regarding its finding that the evidence is not of a standard that allowed the court to decide on the threshold values for the DIN and DRP attributes. Having decided that, the court made no finding on whether water bodies in Southland are degraded in relation to these attributes.<sup>34</sup>

[55] The threshold values/minimal acceptable state for certain attributes, are used in this proposed plan as the basis for defining degradation on an interim basis. For those attributes for which a national bottom line is given in the National Policy Statement for Freshwater Management ('NPS-FM'), the national bottom line was adopted as the threshold value. The NPS-FM does not contain threshold values for DIN; for DRP, which is reported on, the NPS-FM does not identify a national bottom line.<sup>35</sup> For attributes other than DRP and DIN, the NPS-FM either gives a national bottom line or – where this is not the case – the minimal acceptable state

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<sup>31</sup> Forest & Bird/Fish & Game submissions 'on DIN and DRP maps' dated 1 June 2023.

<sup>32</sup> Forest & Bird/Fish & Game submissions 'on DIN and DRP maps' dated 1 June 2023 [8(h)] and [22]-[24].

<sup>33</sup> Dairy Interests' submissions 'farming provisions (Schedule X Maps)' dated 1 June 2023 at [6], [8]-[11] and [12]-[15].

<sup>34</sup> Fifth Interim Decision at [49]-[57], [62]-[65].

<sup>35</sup> During the course of this hearing there have been two iterations of the National Policy Statement – Freshwater Management.



was agreed to and supported by expert evidence.

[56] Forest & Bird/Fish & Game invite the court to decide on the minimum acceptable state for DRP and DIN. We say again, the court is *functus officio*. Without resiling from this, in response to Forest & Bird/Fish & Game's criticism, we make three observations.

***Reconciliation of attributes and values in Professor Death's evidence and the JWS***

[57] Giving evidence for Forest & Bird/Fish & Game, Professor Death does not report on the minimum acceptable state for DIN as asserted by counsel.<sup>36</sup> DIN is the sum of nitrite (NO<sub>2</sub>), nitrate (NO<sub>3</sub>) and ammonia (NH<sub>3</sub>). Professor Death is reporting solely on nitrate. Professor Death gives evidence on the threshold value for DRP. DRP is a measure of the dissolved (soluble) phosphorus compounds that are readily available for use by plants and algae and TP is the sum of DRP and particulate phosphorus.<sup>37</sup>

[58] Prior to evidence being given, the court directed expert conferencing on the topic of attributes and threshold values. While Professor Death was not a participant, his evidence/research was considered by the conference participants.

[59] The evidence before the court included two joint witness statements together with the statements of evidence from Professor Death:

- (a) an outcome of the expert conferencing includes a recommendation for the threshold values for DIN:
  - (i) *per* conference of expert witnesses – > 0.5 mg/L for upland water bodies and > 1.0 mg/L for lowland water bodies;
  - (ii) *per* Professor Death - no recommendation made.

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<sup>36</sup> Forest & Bird/Fish & Game submissions 'on DIN and DRP maps' dated 1 June 2023 at [12].

<sup>37</sup> Snelder, affidavit affirmed 21 July 2023, exhibit 1 at [11(a)] and [15].

- (b) the threshold values for DRP:
- (i) *per* conference expert witnesses – > 0.01 mg/L for upland water bodies and > 0.018 mg/L for lowland water bodies;
  - (ii) *per* NPS-FM (2020) Band D – >0.018 mg/L all water bodies;
  - (iii) *per* Professor Death – a range of values less than or equal to 0.006mg/L to 0.19 mg/L for six classes of water bodies.

[60] Based on the above, the court was unable to reconcile the different approaches to water body classification or the different recommended values by Professor Death, NPS-FM and the participants in the conferences.

### *DIN/DRP and MCI*

[61] Professor Death reports on annual median “levels” for nitrate-nitrogen and DRP in order to “assist in meeting the MCI and QMCI desired states”.<sup>38</sup> (MCI but not QMCI values have been adopted by the court to describe degradation of water quality.)

[62] MCI states reported are as follows:

- (a) *per* Professor Death – a range of scores greater than or equal to 90 to 120 for six classes of water body;
- (b) *per* NPS-FM (2020) – MCI (median) a score 90 with no distinction made for water body class or upland/lowland rivers.

[63] The court is unable to reconcile the different approaches to water body classification or the different recommended MCI scores above. But in any event, the court has applied the national bottom line for MCI scores as a basis for finding a river is degraded. The relationship between the professor’s recommended DRP value and MCI score is therefore moot.

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<sup>38</sup> Death, EIC at [10.1].

*Is there an agreed minimum acceptable state?*

[64] Unlike the other attributes approved by the court as a basis for determining whether a river was degraded, the experts did not agree on DRP and DIN. Saliently, the point of disagreement is around ecosystem health in different riverine environments.

[65] In broad strokes, there is a relationship between different concentrations of phosphorus and nitrogen and ecosystem health. In concentration, DIN and DRP may invoke a biological response that includes growth of periphyton. However, whether growth is excessive depends on the features of riverine environment, as periphyton does not attach on all substrates (e.g. sandy riverbed). Thus, the relationship between DIN and DRP concentration and periphyton growth is not invariable. Drs Snelder and Depree were in agreement on this.

[66] Dr Snelder's evidence (cited by counsel) supports the court's understanding. He said:<sup>39</sup>

The issue of plant growth, periphyton, another reason to manage nitrogen is to manage periphyton biomass in rivers. Some rivers have physical characteristics that mean that you don't get a large amount of periphyton growing and they are generally rivers with soft bottoms where the algae is unable to adhere to the bed. In those locations, you don't manage nitrogen to achieve Periphyton outcomes. You manage nitrogen for other reasons, the main [one] of which is managing toxicity ...

[67] Dr Snelder goes on to say that it is very difficult to identify places in Southland where periphyton is not present.

[68] Noted also was Dr Canning's opinion that the threshold DIN and DRP values supported by the participating witnesses at the expert conferences are generally consistent with levels required to manage periphyton (rivers) at the

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<sup>39</sup> Transcript August 2022 (Snelder) at 708.

national bottom line.<sup>40</sup> This was the first occasion (that we can recall) where the values for DIN and DRP and the bottom line for periphyton in the NPS-FM were addressed. Professor Death, on the other hand, recommended values addressing the relationship between nitrates, DRP and MCI scores.

[69] This court does not shy away from making decisions. The subject matter is complex and, as we record in the Fifth Interim Decision, even the Science and Technical Advisory Group commissioned by the Minister for the Environment to report on DIN and DRP were not in full agreement on bottom lines and thresholds they proposed for DIN and DRP (rivers).<sup>41</sup> We quote from Dr Canning’s evidence:

The majority of the STAG (14 out of 19 members) stated that:

*“...the methodologies and data sets used to derive the proposed criteria, bottom lines and thresholds for DIN and DRP for rivers are scientifically rigorous, well explained and well justified...”*

Some were of the view that the proposed national bottom lines were not sufficiently *stringent* to warrant their support, and were concerned that they would lead to inadequate protection for many rivers. They sought tighter and more spatially nuanced numerics and were concerned that a single national bottom-line *“...could have the effect of not triggering a management response in rivers where this is necessary to protect ecosystem health”* (Essential Freshwater Science and Technical Advisory Group, 2019b). That opinion is distinctly different from not supporting “the introduction of DIN and DRP thresholds”.

[70] This was not the case, however, for other attributes and values approved by the court as a basis for determining whether a river was degraded. Where the evidence addressed both the attribute’s numeric and narrative characteristics and secondly, the court was satisfied areas exceeding the relevant threshold values were

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<sup>40</sup> Though not stated we assume the national bottom line is that given in NPS-FM (2020) at Table 2 – Periphyton (tropic state). See Canning, reply evidence dated 22 February 2022 at [36].

<sup>41</sup> Fifth Interim Decision at [63].

able to be mapped, we have approved maps for inclusion in the plan.

### **Outcome**

[71] In the absence of a settled view on the matter, we confirm this court is not the forum to determine DIN and DRP threshold values for Southland rivers, even on an interim basis. If the court made a decision this would likely be interpreted as giving the imprimatur to DIN and DRP threshold values when these values are not settled, and indeed are matters about which central government has engaged the science community.

[72] Our particular finding that the evidence is not of a standard that allowed the court to make a decision on the threshold values for the DIN and DRP attributes simply reflects that the reasons for supporting the values are not adequately reported on in the JWSs or in evidence, nothing more. Nothing that we say here should be taken as a criticism of Professor Death; in highlighting Professor Death's evidence we are directly responding to counsel's criticism of the Fifth Interim Decision. That his evidence and research was considered valuable and informed other expert opinion we are in no doubt.

[73] The court, having made no findings on the threshold values of DIN and DRP, is not in a position to confirm the water bodies degraded by these nutrients. That being the case, the DIN and DRP maps are not approved.

### **Rule 78 - Weed and sediment removal from modified watercourses**

#### **Procedural decision**

[74] The Director-General of Conservation, Fish & Game, Forest & Bird and Ngā Rūnanga appealed Policy 30 and/or Rule 78 which implements the same. Federated Farmers is a s 274 party to the four appeals.

[75] In the Sixth Interim Decision the court held:

[292] We have found that the permitted activity rule supported by the Regional Council is unlikely to be effective in implementing applicable higher order provisions. Amendments sought by other parties will not, in our judgement, adequately remedy the shortcomings identified in the Regional Council's rule and we decline to make the same. **Absent effective permitted activity provisions, we have concluded that a consent regime is required.**

[our emphasis]

[76] On 9 May 2023, and in response to the Regional Council's application, the court partially recalled the Sixth Interim Decision on Rule 78.<sup>42</sup> In doing so we observed the Sixth Interim Decision was unclear as to whether the court approved a different activity status for the entirety of Rule 78 or only for those sub-clauses of Rule 78 that were the subject matter of evidence.<sup>43</sup>

[77] The appeals on Policy 30 were decided in the Sixth Interim Decision and are not subject to the partial recall decision.

### *Legal principles*

[78] The parties agree with the Regional Council on the legal principles that apply when considering whether the court has scope to approve relief.<sup>44,45</sup> We do not set out those principles as they are summarised in the Fifth Interim Decision. To them, Forest & Bird/Fish & Game add that where a party to an appeal is pursuing relief, that party's relief must come within the scope of an appeal.<sup>46</sup> This is important because Federated Farmers did not appeal Rule 78 but rather is a party

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<sup>42</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 51.

<sup>43</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 84 at [10].

<sup>44</sup> SRC, 'Scope' submissions dated 12 July 2022.

<sup>45</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265, Annexure 1.

<sup>46</sup> Section 274(4B). However, in the case of a person described in sub-section (1)(e) or (f), evidence may be called only if it is both—

(a) within the scope of the appeal, inquiry, or other proceeding; and

(b) on matters arising out of that person's submissions in the previous related proceedings or on any matter on which that person could have appealed.

to the four appeals (pursuant to s 274) and at the resumed hearing seeks to promulgate a rule permitting activity within modified watercourses for the purpose of maintaining or restoring drainage capacity. We come back to Federated Farmers' relief when considering the merits of various drafts of the rule.

### **Outcome – Procedural Decision**

[79] Rule 78(a) sets out the conditions wherein the removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall and associated discharges, is a permitted activity. Absent a specific rule for the discharge of sediment from maintenance/restoration work done by farming activities, general Rule 78(a) applies. Where permitted activity conditions are not met, the activity is classified as a discretionary activity.

[80] The Regional Council and Federated Farmers gave consideration as to whether there was scope for the court to amend Rule 78(a) and apply a different activity status. We accept their submissions, for the reasons they outline, and find that there is no scope for the court to reclassify Rule 78(a).<sup>47</sup>

[81] The consequence of the above ruling is that the court does not have jurisdiction to approve replacing Rule 78 with the draft rule set out in the 2023 Planning JWS (the 'JWS rule').

### **A wicked problem<sup>48</sup>**

[82] To quote Dr G Burrell – “Boy this is not easy”.<sup>49</sup>

[83] In its Sixth Interim Decision, the court took special care to set out the

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<sup>47</sup> SRC submissions dated 7 June 2023 at [26]-[29] and Federated Farmers submissions dated 7 June 2023 at [20].

<sup>48</sup> Transcript May-June 2023 (Maw) at 263.

<sup>49</sup> Transcript May-June 2023 (Burrell) at 208.

evidence and its findings on Rule 78(a). As noted earlier, part of that decision, concerned with the planning evidence and plan response,<sup>50</sup> was recalled following an application by the Regional Council. The court's findings on the ecological evidence<sup>51</sup> were not recalled.

[84] At the resumed hearing Dr Burrell was unchallenged in his view that the proposed plan permits “widespread large destruction of habitat over a massive scale; [and] large discharges of [sediment]” impacting a wide range of species. The maintenance and restoration of drainage capacity in Southland’s watercourses is a “destructive and damaging activity”,<sup>52</sup> the impact of which extends well beyond the locality of the activity.<sup>53</sup> We find that the discharges arising from mechanical methods are having significant adverse effects on aquatic life. That said, we are mindful also that in places the activity is important to the viability of farming.

[85] While an improvement on Rule 78 (DV), the ecologists, Drs Burrell and J Kitson and secondly, Ms A Cain, giving evidence on culture and policy, were unsupportive of two of the alternative methods<sup>54</sup> put forward at the resumed hearing. They are concerned that those methods do not support the emergence of different practices.<sup>55</sup> Overall, as found in the Sixth Interim Decision, the methods will not ensure that natural and physical resources are managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystem<sup>56</sup> and, we (again) find, they are unlikely to implement the objectives and policies of the plan.<sup>57</sup> While we may have overlooked the evidence, the ecologists did not give an opinion on the JWS rule.

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<sup>50</sup> Sixth Interim Decision at [268]-[295].

<sup>51</sup> Sixth Interim Decision at [258]-[264].

<sup>52</sup> Transcript May-June 2023 (Burrell) at 208.

<sup>53</sup> Transcript May-June 2023 (Burrell) at 205.

<sup>54</sup> Specifically, Rule 78 as proposed to be amended and Federated Farmers’ draft rule and guideline practices.

<sup>55</sup> Transcript May-June 2023 (Burrell) at 207.

<sup>56</sup> Transcript May-June 2023 (Cain) at 197.

<sup>57</sup> See transcript at 170–208.



### **Relief available on appeal**

[86] At the conclusion of the hearing the following options were supported by one or more parties:

- (a) amend sub-clause (a)(ii) by specifying 95% of sediment to be removed must have a grain size of less than 2 mm;
- (b) amend sub-clause (a)(v) by specifying any fish captured or stranded by the activity are to be immediately returned to a location upstream of the activity;
- (c) amend sub-clause (a) by introducing new conditions excluding the application of the permitted activity rule from known catchments of non-diadromous galaxias habitat, lamprey/kanakana and tuna habitat<sup>58</sup> and excluding also the habitat of threatened native fish;
- (d) amend sub-clause (a) by introducing a condition specifying that the activity is not to significantly adversely affect the habitat or health of any taonga species;<sup>59</sup>and
- (e) include a new permitted activity rule for non-mechanised activities and a new restricted discretionary activity ('RDA') rule for mechanised activities.

[87] Finally, Federated Farmers proposed that where the activity takes place on farmland there be a new permitted activity rule applicable to landholdings 20 ha or greater, that in addition to other standards, requires the adoption of guideline practices for the removal of aquatic weeds and plants and sediment.<sup>60</sup>

### ***Scope for the proposed amendments***

[88] Save in relation to the permitted activity rule that applies to farm

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<sup>58</sup> Kanakana and tuna in the Waituna catchment.

<sup>59</sup> Taonga species are those identified in Appendix M to the proposed plan.

<sup>60</sup> See Planning JWS held 15, 18, 23 May 2023, Attachment 1.

landholdings 20 ha or greater and secondly, the proposed restricted discretionary activity rule (the JWS rule above), we are satisfied that the appeals provide scope for the amendments proposed.

*Rule 78 – as proposed to be amended*

[89] The supplementary ecological and planning evidence given at the resumed hearing confirms the correctness of the court’s observation “that several conditions for this permitted activity rule are unclear, uncertain and unlikely to be enforceable so as to make the rule ineffective”.<sup>61</sup> While pointing out that there is no appeal on point, the planners acknowledge the conditions of the rule want for certainty.<sup>62</sup>

[90] Lacking scope to address the shortcomings identified in the permitted activity rule, some parties continue to seek that new conditions be simply added to Rule 78(a), specifically supporting the version of the rule set out in paragraph [255] of the Sixth Interim Decision.<sup>63</sup> We decline to approve amendments which, as we have already observed, create further permitted activity rule implementation challenges.<sup>64</sup>

[91] This means the decision version of Rule 78(a) is not amended and applies, warts and all.

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<sup>61</sup> Sixth Interim Decision at [269].

<sup>62</sup> Planning JWS held 15, 18, 23 May 2023 at 3.

<sup>63</sup> Memorandum of the Director-General of Conservation dated 25 May 2023 at [8]. Memorandum of Ngā Rūnanga dated 25 May 2023 at [5] sought the version of the rule set out in paragraph [255] of the Sixth Interim Decision but in closing submissions dated 7 June 2023 made clear that it continued to support specific aspects of its relief set out in the notice of appeal. SRC’s memorandum dated 25 May 2023 at [2]. See also the assessed costs of approving this version of the rule in the Planning JWS held 15, 18, 23 May 2023 at Appendix 3 p 7 with which we agree and related aspects of Ms Ruston’s Attachment 1 at 6-8.

<sup>64</sup> Sixth Interim Decision at [271].

*A new permitted activity rule and guidelines to apply to farming*

[92] In response to an agenda set by the parties, Federated Farmers redrafted Rule 78 and guidelines applying to the removal of aquatic weeds and plants, and sediment in modified watercourses. While the rule and guideline practices were discussed at the 2023 planning conference, at least conceptually, the drafting of the provisions was circulated one hour before the JWS was to have been filed. Consequently, the conference participants did not have an opportunity to review or comment on the same.

[93] We accept Forest & Bird/Fish & Game’s criticism that Federated Farmers conducted itself in a way unfair to the other parties.<sup>65,66</sup> While a s 274 party to the relevant appeals, we do not recollect Federated Farmers pursuing its interest in the appeal point, only taking the matter up after the Sixth Interim Decision was released. Appending what is (we find) a brief of evidence to the Planning JWS,<sup>67</sup> was particularly unfair when the court had directed expert conferencing without provision made for the filing of evidence. “Given this [we said], it is critically important that the participating experts give detailed but succinct explanations for any proposed amendments. Reasons in support of changes are as important as the reasons for not supporting changes recommended by other witnesses”.<sup>68</sup>

[94] In the Sixth Interim Decision we observed:<sup>69</sup>

... It is primarily a s 13 RMA bed disturbance rule, but also has a s 15 discharge component. Section 70(1)(g) RMA, is therefore a relevant consideration. Activities that do not meet the permitted activity conditions default to

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<sup>65</sup> Forest & Bird/Fish & Game submissions dated 1 June 2023 at [2]-[12].

<sup>66</sup> Federated Farmers was on notice since February 2022 that Forest & Bird/Fish & Game were seeking relief that would render this activity a discretionary activity throughout much of Southland.

<sup>67</sup> Planning JWS held 15, 18 and 23 May 2023.

<sup>68</sup> Registry email to parties dated 13 April 2023.

<sup>69</sup> Sixth Interim Decision at [246].

discretionary activity status.

[95] Under Federated Farmers' rule, discharges are permitted, however s 70 RMA was not addressed by counsel. That is so, notwithstanding that its planning witness, Ms S Ruston, accepts the activity is having a significant adverse ecological effect on aquatic life.<sup>70</sup>

[96] In common with Rule 78 (DV), as proposed to be amended by the other parties, Federated Farmers' rule adopts an effects management approach prescribing *how* the activity is managed. We accept the planners' opinion that the practice guidelines that would apply to Federated Farmers' rule are an advance on the decision version of the rule, however, neither version has been arrived at following an enquiry into the health and well-being of water bodies and freshwater ecosystems, or the health needs of people, either generally or with flood conveyancing activities in mind.<sup>71</sup> In simple terms, what has yet to be figured out is "what you're managing those systems for"?<sup>72</sup>

[97] Despite being directed, the rule and practice guidelines were not accompanied by a s 32AA assessment in support.

[98] Finally, Federated Farmers has not established the court's jurisdiction to replace Rule 78 with a permitted activity rule limited to locations where the activity is taking place within a farm boundary. We do not accept the submission that while less clear, scope can be found on the basis that the proposed changes are aimed at:<sup>73</sup>

- (a) responding to the specific reasons and specified relief sought in the appeals; and
- (b) addressing the rule's lawfulness, implementation and workability

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<sup>70</sup> Transcript May-June 2023 (Ruston) at 350.

<sup>71</sup> See NPS-FM 2020 (February 2023) Objective 1.

<sup>72</sup> Transcript May-June 2023 (Kitson) at 170.

<sup>73</sup> Federated Farmers submissions dated 7 June 2023 at [27]-[31].

issues identified.

[99] The practice guidelines would constrain current land and waterway management practices where the landholding is 20 ha or more but not in a way that could have been anticipated by the farming community in response to the various appeals. Further, the rule does not apply to weed and sediment removal undertaken other than “within a farm boundary”. In short, it would not catch all maintenance work undertaken by the Council or potentially other public authorities. Ms Ruston’s efforts to draft a responsive rule and method is admirable, but for reasons of procedural fairness and natural justice, we conclude there is no scope to approve the same.<sup>74</sup>

*Bespoke rule*

[100] We accept the Regional Council’s submission that there is scope for a bespoke rule that creates a limited consent regime for those attributes listed at paragraph [86] above.<sup>75</sup> That must be the case where the relief sought on appeal was to exclude those features from the rule for a permitted activity.

[101] The issue that arises then is to what and to whom should the rule apply?

Issue: to what should the new rule apply?

[102] Set out in the 2023 Planning JWS<sup>76</sup> is a new rule (‘the JWS rule’) that is a suitable template for a limited consenting regime. The draft rule distinguishes between mechanical and non-mechanical methods for removing aquatic weeds, plants and sediment. The different scale of effects likely under each method justifies this approach and the classification of the activities as being either

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<sup>74</sup> We accept that due to time pressures Ms Ruston did not have an opportunity to consider the wider application of her draft rule.

<sup>75</sup> SRC submissions dated 7 June 2023 at [26].

<sup>76</sup> Planning JWS held 15, 18, 23 May 2023, Appendix 2 at 6.

permitted or restricted discretionary activities.

[103] We will approve, in an amended form, the proposed permitted activity rule for the use of non-mechanical methods to remove aquatic weeds and plants, and sediment.

[104] The new RDA rule, as envisaged by the court, is based on the JWS rule drafting, but differs in that it applies to the following biota and habitats:

- (a) non-diadromous galaxias habitat;
- (b) the habitat of threatened native fish; and
- (c) the habitat of any taonga species.<sup>77</sup>

[105] We approve of the application of a RDA rule to the above habitats and biota. We accept the Forest & Bird/Fish & Game submission that these are likely to be found widely across Southland.<sup>78</sup> The habitats and biota could either be listed as entry conditions in the RDA rule or – more simply – the rule could apply across the region.

Issue: to whom should the new rule apply?

[106] The rule will apply to local authorities only.

[107] We have considered whether the rule should apply to requiring authorities. While we expect some requiring authorities maintain artificial watercourses, we received no evidence concerning their activities in relation to modified watercourses. Given this, we are not able to assess the cost/benefits of the rule under s 32AA and have decided against the rule's application to these entities.

[108] The rule will not apply to farmers. The principal reasons against the wider

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<sup>77</sup> Kanakana and tuna are taonga species.

<sup>78</sup> Forest & Bird/Fish & Game submissions dated 1 June 2023 at [30(a)].

application of the rule follow.

[109] Firstly, if the rule applies generally (i.e. not limited to local authorities) this will likely incur significant financial costs associated with consenting. Given how destructive of the environment these mechanised methods are, by itself, financial cost is not a sufficient reason to exclude a comprehensive consenting regime. However, the planners were concerned that a response to consenting costs could be a deferment of flood conveyance work or an increased use of herbicides (the use of herbicides is permitted by a rule in the plan subject to certain conditions). While the latter potential was noted in the planners' JWS s 32AA assessment, the likelihood of occurrence and environmental effects are not discussed.<sup>79</sup>

[110] Secondly, there may be a shortfall in the technical capacity (i.e. qualified scientists) to produce the site-specific ecological assessments that would be required.<sup>80</sup> We think local authorities typically have greater resources than individual landowners, including, in some instances, in-house expertise to draw upon. Access to technical expertise and the cost of the same is less likely to be a factor controlling decision-making on consenting by local authorities.

[111] Thirdly, planners recommend requiring global or network consents<sup>81</sup> for catchment or sub-catchment waterways as this supports the integrated management of the natural and physical resources of the region (s 30 RMA). We do not accept, however, their view that the JWS rule proffered will encourage groups [we interpolate 'of farmers'] to obtain network consents for connected waterways.<sup>82</sup> For local authorities the obtaining of a network consent is to be an entry condition and/or one of the matters in relation to which the Regional Council restricts its discretion.

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<sup>79</sup> Planning JWS held 15, 18, 23 May 2023 Appendix 3 at 8.

<sup>80</sup> For example, May-June 2023 transcript (Burrell) at 196; (planners) at 354-356.

<sup>81</sup> The evidence referred interchangeably to global and to network consents.

<sup>82</sup> Planning JWS held 15, 18, 23 May 2023 Appendix 3 at 8.

[112] Whereas the obtaining of network consents may be a reasonable expectation of local authorities, and in particular the Southland Regional Council, the co-operation of many tens if not hundreds of farmers within a catchment/sub-catchment is not. Indeed, we think this outcome unlikely in the absence of any policy or method that encourages the formation and/or engagement of catchment/sub-catchment groups. Managing this activity on a ‘farm-by-farm’ basis<sup>83</sup> is likely to be frustrated by insufficient numbers of qualified experts (including ecologists) and further, has the potential to result in ad hoc and incommensurate responses as between landowners.

[113] We propose wording for a RDA rule for local authorities’ modified watercourse maintenance work in **Outcome** below. Parties, preferably in collaboration, are invited to amend or propose an alternative wording.

#### **Appendix N: FEMP**

[114] We have determined that Appendix N should be amended by either adding a new objective, Objective 9(c), for flood capacity of streams and rivers or by amending existing Objective 9(b), habitat management, so that natural and cultural resources within scope are safeguarded including from the adverse effects of flood conveyance maintenance work mandated by Policy 30. Alternative wordings are provided in **Outcome** below and Annexure 1 attached to this decision.

[115] Missing from Appendix N is an objective to bring about what all witnesses say is a “paradigm shift’ or “system change” needed when thinking about this activity.

[116] Our drafting picks up on key themes discussed during the resumed hearing – in particular the need for flood conveyance activities to be planned so that the timing, frequency, extent, and method of carrying out those activities, safeguards in-stream and riparian habitats, taonga and the sustainable customary use of

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<sup>83</sup> Assuming now that network consents are not sought by catchment/sub-catchment groups.



mahinga kai resources of streams and rivers. The need for progressive improvement was another recurring theme through the hearing.

[117] We note that under the proposed new Objective 9(c) in Appendix N, the shift is both in orientation and in language, with the result that water bodies are not managed as “drains” or “flood infrastructure” but *streams and rivers*.<sup>84</sup> The term “safeguarding” has been adopted because, although used in different contexts, this is the standard in other objectives and policies (pSWLP Objective 9/9a and 12 and Policy B7). “Safeguarding” by planned works year-on-year will, we posit, lead to improved hauora and mauri of the environment, the water body and of the people (Objective 2). The information needed to support this outcome will, we anticipate, be in the catchment context documentation required by the Resource Management (Freshwater Farm Plans) Regulations 2023,<sup>85</sup> or may be available from the Papatipu Rūnanga.

[118] We are satisfied that scope exists to amend Appendix N: FEMP to introduce either a new objective or amendment to the habitat management objective and associated method. We acknowledge the costs (and limitations) around managing this activity in the farming context exclusively under a Farm Environmental Management Plan regime. These are described in the JWS s 32AA assessment; the FEMP is not a complete response to the destructive practices concerned, far from it. It is, however, a step in the right direction to resolving this wicked problem by directing attention onto Te Mana o te Wai. In time, Council may be able to bring an integrated management approach to bear, comprising an appropriate mix of regulatory and non-regulatory methods.

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<sup>84</sup> See transcript May-June 2023 at 291-318 where the need for an appropriate objective is discussed at length.

<sup>85</sup> Regulations 4, 8 and 9.

## Outcome

[119] The plan will be amended to introduce:

- (a) a permitted activity rule for the modified watercourse maintenance activity when carried out without mechanical equipment;
- (b) a new restricted discretionary activity rule for local authorities' modified watercourse maintenance activities;
- (c) a definition of the term 'network consent'; and
- (d) a new Appendix N objective or an amendment to the existing habitat management objective plus a new method in clause 11.

### *Court's proposed wording*

1. Add a new Rule 78A that reads:

#### **Rule 78A – {title needed}**

(a) the removal of aquatic weeds and plants and sediment from any modified watercourse undertaken without mechanical equipment for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a permitted activity, provided the following conditions are met:

- (i) general conditions (a), (b), and (l) set out in Rule 55A; and
- (ii) the removal of river-bed material other than aquatic weeds, plants, mud or silt is avoided.

(b) Where

(1) the applicant for resource consent is a local authority; and

(2) the application for resource consent is for a network consent; and

(3) the activity is to be conducted in a modified watercourse shown on Map Series 8 as a habitat of threatened non-diadromous galaxias or any taonga species listed in Appendix M or is the habitat of threatened native fish -

the removal of aquatic weeds and plants and sediments **by mechanical equipment** for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a **restricted discretionary activity** provided the following conditions are met:

(i) general conditions (a), (b), (e), (f), (g), (h) and (l) set out in Rule 55A; and

(ii) the application for resource consent includes an Ecological Management Plan, that includes:

(1) an objective of avoiding, where reasonably practicable, or otherwise minimising residual adverse environmental effects on threatened or at-risk aquatic biota, taonga species and mahinga kai, including where located in Ngā Rūnanga Statutory Acknowledgement Areas;

(2) Identification of risks of the maintenance activity, including on the habitats of threatened and taonga species, and how the activity will be carried out to achieve the objective of the management plan; and

(3) Identification of how in-stream, riparian habitat and cultural values will be safeguarded and improved progressively.

***The Southland Regional Council will restrict its discretion to the following matters:***

1. The content of the Ecological Management Plan submitted with the application;
2. The adverse effects of the activity on aquatic environments, riparian habitat, tangata whenua cultural values, threatened species, taonga species, and natural character;
3. The timing and methods to be adopted to manage adverse effects and personnel deployed to undertake the work;

4. The extent to which in-stream, riparian habitat and cultural values will be safeguarded and improved; and

5. The benefits of maintaining drainage capacity and the timing, frequency, extent and method of carrying out flood conveyance activities.

(c) The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall and any associated bed disturbance and discharge resulting from the carrying out of the activity that cannot meet one or more of the conditions of Rule 78A(a) and (b) is a **discretionary activity**.

**2. Add a new definition to the Glossary to read:**

**network consent** means: a resource consent for a contiguous length of one or more modified watercourses which drain multiple contiguous landholdings and any tributaries joining such length(s) that are also modified watercourses.

**3. Amend Appendix N Objective 9(b) Habitat management activities to read:**

**(b) Habitat management:** activities in waterways (including modified watercourses<sup>86</sup>), natural wetlands and their margins are managed so that in-stream, riparian habitat, wetland and cultural values, and the sustainable customary use of mahinga kai are safeguarded and improved progressively, including through the timing, frequency and method of carrying out flood conveyance activities.<sup>87</sup>

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<sup>86</sup> See 'modified watercourse' note.

<sup>87</sup> See 'sources of information' note.

**OR**

Retain existing Objective 9(b) and **add a new Appendix N** objective that reads:

- (c) **Flood capacity of streams and rivers:** in-stream and riparian habitats, taonga and the sustainable customary use of mahinga kai resources of streams and rivers (including modified watercourses<sup>88</sup>), are to be safeguarded through the timing, frequency, extent, and method of carrying out flood conveyancing activities.<sup>89</sup>

**4. Add a new Appendix N [11(g)]** that reads:

demonstrate how flood conveyance activities in modified watercourses will be done in accordance with good management practice.

### **Directions**

[120] By **Friday 18 August 2023**, the Council having conferred with the parties is to file a memorandum:

- (a) responding to court’s drafting of Rule 78A, the definition of ‘network consent’, and amendments to Appendix N, suggesting changes (if needed). If the court lacks scope to approve of the above, parties are to advise at the same time.
- (b) advise whether the RDA rule, Rule 78A(b), entry conditions are to specify locations that the draft rule applies to, or alternatively, and more simply, whether it should apply to the whole region. If the

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<sup>88</sup> See ‘**modified watercourse**’ note.

<sup>89</sup> See ‘**sources of information**’ note.

latter, sub-cl (b)(3) will need editing (to amend or delete the same).

[121] Leave is reserved for the parties to seek further (or amended) directions. If further directions are required the court will deal with this at the next judicial conference.

*Jave S.*



**J E Borthwick**  
Environment Judge

### Schedule – List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-27	Fonterra Co-operative Group Limited
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co Limited
ENV-2018-CHC-31	Gore District Council & others
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand (Southland Province) Inc
ENV-2018-CHC-44	Wilkins Farming Co Limited (previously Campbell's Block Limited)
ENV-2018-CHC-45	Wilkins Farming Co Limited (previously Robert Grant)
ENV-2018-CHC-46	Southwood Export Limited & Others
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated

## ANNEXURE 1

### Appendix N – Farm Environmental Management Plan Requirements

- [1] A Farm Environment Management Plan must be:
- (1) a Freshwater Farm Plan prepared, implemented and audited in accordance with regulations prepared under Part 9A of the RMA and which apply within the Southland region, plus any additional information or components required by Part B below; or
  - (2) if Freshwater Farm Plans, under Part 9A of the RMA, are not yet required in the Southland region, a Farm Environmental Management Plan will be prepared and implemented in accordance with Parts A to C below.

#### Part A – Farm Environmental Management Plans

- [2] All FEMPs (prepared in accordance with this Appendix) must include and give effect to the FEMP Purpose Statement.

##### **FEMP Purpose Statement**

This FEMP contributes to the management of Southland's water and land resources under the Southland Water and Land Plan (the SWLP) which embodies ki uta ki tai and upholds Te Mana o Te Wai. These concepts are to be at the forefront of water and land management in the FEMP.



[3] The SWLP, and therefore this FEMP, must give effect to the objectives of the SWLP, including Objectives 1 and 2 which are fundamental to the SWLP. These objectives are:

**Objective 1** (of the SWLP) – 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** (of the SWLP) – The mauri of water provides for te hauora a te taiao (health and mauri of the environment), te hauora o te wai (health and mauri of the water body) and te hauora o te tangata (health and mauri of the people).

[4] A FEMP can be based on either:

- (1) the default content set out in Part B below; or
- (2) industry-prepared FEMP templates and guidance material, with Southland-specific supplementary material added where relevant, so that it includes the default content set out in Part B below; or
- (3) a management plan and nutrient budget prepared in accordance with a condition of resource consent to discharge industrial wastewater onto land that is also used for farming activity, with the default content set out in Part B below included where relevant to the farm receiving the industrial wastewater.

[5] All FEMPs shall be certified and compliance with the FEMP audited in accordance with Part C.

#### **Part B – Farm Environmental Management Plan Default Content**

[6] The FEMP shall contain the following landholding details:

- (a) physical address;
- (b) description of the landholding ownership and the owner's contact details and if different, the name and contact details of the person responsible for implementing the FEMP;
- (c) legal description(s) of the landholding;
- (d) a list of all resource consents held for the landholding and their expiry dates; and
- (e) the type of farming activities being undertaken on the property, such as 'dairy' or 'sheep and beef with dairy support'.

[7] The FEMP shall contain a map(s) or aerial photograph(s) of the landholding at a scale that clearly shows the locations of:

- (a) property and paddock boundaries; and
- (b) the physiographic zones found on the Regional Council's website (and variants where applicable) and predominant soil types (or Topoclimate South soil maps) and any site-specific information that better identifies or delineates these areas; and
- (c) all lakes, rivers, streams (including intermittent rivers), springs, ponds, artificial watercourses, modified watercourses and natural wetlands; and
- (d) all critical source areas; and
- (e) all existing and proposed riparian vegetation and fences (or other stock exclusion methods) adjacent to water bodies; and
- (f) places where stock access or cross water bodies (including bridges, culverts and fords); and
- (g) the location of all known subsurface drainage system(s) and the locations ~~and depths~~ of the drain outlets; and
- (h) land that for the next 12 months is to be:
  - (i) cultivated; or
  - (ii) intensively winter grazed; or
  - (iii) used for pasture-based wintering; and

- (iv) used for a sacrifice paddock; and
- (i) any ~~degraded~~ areas of the land within a catchment of a ~~degraded~~ water body identified in Schedule X; and
- (j) any heritage site recorded in the relevant district plan, on the New Zealand Heritage List/Rārangī Kōrero or on the New Zealand Archaeological Association website; and
- (k) the presence of taonga species listed in Appendix M of the Southland Land and Water Plan within water bodies on the farm (~~if known~~);<sup>1</sup> and
- (l) other ~~significant~~ values and uses (~~if known~~) of nearby land and waters including mahinga kai and nohoanga.<sup>2</sup>

#### Nutrient Budget/Nutrient Loss Risk Assessment

- [8] For all landholdings over 20 ha, the FEMP contains either:
- (a) a nutrient budget (which includes nutrient losses to the environment) calculated using a model approved by the Chief Executive of Southland Regional Council); or
  - (b) a nutrient loss risk assessment undertaken using a nutrient loss risk assessment tool approved by the Chief Executive of Southland Regional Council;
  - (c) the nutrient budget or nutrient loss risk assessment will be repeated:
    - (i) where a material change in land use associated with the farming activity has occurred or is intended ~~that may affect the implementation of cl [9] Objectives (including a change in crop area/yield, crop rotation length, type of crops grown, stocking rate or stock type, irrigation and effluent disposal areas)~~ that increases the risk of not achieving the plan's objectives, as set

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<sup>1</sup> See 'Sources of information' note.

<sup>2</sup> See 'Sources of information' note.

out in clauses 9 and 10, and where that change is not provided for within the landholding's certified FEMP; and

- (ii) each time the nutrient budget or nutrient loss risk assessment is repeated, all the input data used to prepare it shall be reviewed by or on behalf of the landholding owner, for the purposes of ensuring the nutrient budget or nutrient loss risk assessment accurately reflects the farming system. A record of the input data review shall be kept by the landholding owner; and
- (iii) the nutrient budget or nutrient loss risk assessment must be prepared by a suitably qualified person who has been approved as such by the Chief Executive of Southland Regional Council.

#### Objectives of Farm Environmental Management Plans

[9] The following objectives will be met:

(a) **Nutrient and soil management:**

- (i) losses of nitrogen, phosphorus, sediment and microbial contaminants from farming activities to water bodies do not increase (when compared to the previous baseline contaminant losses existing discharges) and are minimised with any change in farming activity; and

Commented [BJ1]: Council drafting.

OR

losses of nitrogen, phosphorus, sediment and microbial contaminants from farming activities to water bodies do not increase when compared to the benchmark<sup>3</sup> and are minimised; and

Commented [BJ2]: Court drafting.

- (ii) there is continual improvement in on-farm nutrient and soil

Commented [BJ3]: Council drafting.

<sup>3</sup> See 'benchmark' note.

management practices;

OR

there is continual improvement in benchmarked on-farm nutrient and soil management practices and actions;

Commented [BJ4]: Court drafting

- (iii) the overland flow of water is ~~minimised~~ slowed to control sediment loss from cultivated paddocks and from paddocks used for intensive winter grazing, pasture-based wintering and for sacrifice paddocks; vegetated setbacks are maintained to slow the overland flow of water, filter and support the infiltration of sediment/nutrients; and sediment trap(s) established where critical source areas are cultivated; and
- (iv) if the farm is within a degraded catchment identified in Schedule X, adverse effects on water quality are reduced. (~~when compared to previous baseline contaminant losses existing~~).
- (b) **Habitat management:** activities in waterways (including modified watercourses<sup>4</sup>), natural wetlands and their margins are managed so that in-stream and riparian habitat values are not diminished, and where practicable are improved.

OR

Habitat management: activities in waterways (including modified watercourses<sup>5</sup>), natural wetlands and their margins are managed so that in-stream, riparian habitat, wetland and cultural values, and the sustainable customary use of mahinga kai are safeguarded and improved progressively, including through the timing, frequency and method of carrying out flood conveyance activities.<sup>6</sup>

Commented [BJ5]: Court drafting

<sup>4</sup> See 'modified watercourse' note.

<sup>5</sup> See 'modified watercourse' note.

<sup>6</sup> See 'sources of information' note.

**OR**

- (c) Flood capacity of streams and rivers: in-stream and riparian habitats, taonga and the sustainable customary use of mahinga kai resources of streams and rivers (including modified watercourses<sup>7</sup>), are to be safeguarded through the timing, frequency, extent, and method of carrying out flood conveyancing activities.<sup>8</sup>

Commented [BJ6]: Court drafting.

[10] If relevant to farming operations, the following objectives will also be met:

- (a) **Intensive Winter Grazing and Pasture-Based Wintering:** ensure the particular risks of these activities are managed effectively, grazing of critical source areas and setbacks are avoided; and the extent and duration of exposed soils is minimised;
- (b) **Collected agricultural effluent management:** manage the discharge of collected agricultural effluent in accordance with industry best practice to ensure the adverse effects of contaminants on water quality do not increase and are minimised;
- (c) **Irrigation system designs and installation:** ensure that all new irrigation systems and application infrastructure ~~significant~~ upgrades meet industry best practice;
- (d) **Irrigation management:** ensure efficient on-farm water use that meets ~~crop~~ plant demands, including through upgrading existing systems to meet industry best practice, ~~standards~~, and ensuring that water and contaminant losses to water bodies do not increase and are minimised.

The FEMP must also identify additional objectives if these are relevant to the farming activities and/or to address environmental risks associated with the farm and the environment within which it is located.

<sup>7</sup> See 'modified watercourse' note.

<sup>8</sup> See 'sources of information' note.

[11] For each (relevant) objective in clauses 9 and 10 above:

- (a) identify how the farm fits within the wider catchment, known as a 'catchment context', including a description of where contaminants lost from the farm end up; and
- (b) identify the risks associated with the farming activities on the property, including the risk pathways of the relevant physiographic zones (and variants), and the risks caused by extreme weather events; and
- (c) taking into account the risk pathways of the relevant physiographic zone, the catchment context(s), and the risks associated with the farming activities, demonstrate that the actions to be undertaken:
  - (i) ~~will not lead to an increase in contaminant losses when compared with the previous baseline contaminant losses what has occurred in the past;~~

Commented [BJ7]: Council drafting.

OR

- (i) ~~will not lead to an increase in contaminant losses when compared with the benchmarked farming activities;~~
- (ii) ~~will minimise contaminant losses; and~~
- (iii) ~~for Schedule X catchments, will contribute to a reduction in adverse effects on water quality.~~
- (d) define the actions to be taken that clearly set a pathway and timeframe for achievement of the objectives; and
- (e) identify any specific mitigations required by a resource consent held for the property; and
- (f) specify the records to be kept for demonstrating mitigations have been actioned and are achieving the objective; and
- (g) demonstrate how flood conveyance activities in modified watercourses will be done in accordance with good management practices.

Commented [BJ8]: Court redraft sub-cl (i)

Commented [BJ9]: Council drafting (ii) and (iii)

Commented [BJ10]: Court drafting.

### Winter Grazing Plan

[12] A Winter Grazing Plan is to be prepared each year for the following activities:

- (a) intensive winter grazing; or
- (b) pasture-based wintering; or
- (c) for stock other than cattle, where pasture is to provide less than 50% of the animal's diet and supplementary feed will be offered on the paddock; or
- (d) sacrifice paddocks.

[13] Implementing the FEMP, the Winter Grazing Plan is to:

- (a) record:
  - (i) the location, paddock slope, land area used, crop type, expected pasture or crop yield and supplementary feed amount and type; and
  - (ii) stock type, numbers and estimated duration of grazing on each paddock.
- (b) identify:
  - (i) any critical source areas, explain how stock will be excluded from them between 1 May–30 September; and
  - (ii) any water bodies and features from which stock must be set back and excluded, explaining how this will be done.
- (c) explain the procedures to be followed in an adverse weather event (including higher than or below average rainfall);
- (d) excluding sacrifice paddocks, confirm how the following practices are to be implemented:
  - (i) downslope grazing or a 20 m 'last-bite' vegetated strip at the base of the slope; and
  - (ii) back fencing to prevent stock entering previously grazed areas.



- (e) for intensive winter grazing:
  - (i) identify paddocks to be resown after grazing and the date by which this is to occur, weather permitting.
- (f) for a sacrifice paddock:
  - (i) identify paddocks to be resown after use as a sacrifice paddock and the date by which this is to occur, weather permitting.
- (g) for pasture-based wintering:
  - (i) explain the intended paddock set-up including:
    - (1) the predicted post grazing residual on each paddock; and
    - (2) identification of paddocks to be resown after grazing and the date this is to occur, weather permitting; and
  - (ii) if a post-grazing residual is intended, explain how the amount of exposed soil will be minimised and the residual root system and/or vegetative cover ~~armouring provided by the pasture on the paddock~~ will be retained.
  - (h) for stock other than cattle, where pasture is less than 50% of the animal's diet and supplementary feed will be offered on the paddock:
    - (i) identify paddocks to be resown after grazing and the date this is to occur, weather permitting; and
- (i) with reference to the planned total feed to be offered to stock<sup>9</sup> and the relevant physiographic zones (and variants), explain how the intensity, operation and location of intensive winter grazing and pasture-based wintering will:
  - (1) ~~not lead to an increase in contaminant losses when compared with the previous baseline contaminant losses~~ what has occurred in the past;

Commented [BJ11]: Council drafting.

OR

<sup>9</sup> An alternative way to express 'planned total feed' may be to refer to crop yield (kg of dry matter per m<sup>2</sup>) and the proportion of crop in the total diet (kg of dry matter offered per cow per day).

will not lead to an increase in contaminant losses when compared with the benchmarked farming activities;

Commented [BJ12]: Court redraft of sub-cl (1)

- (2) minimise contaminant losses; and
- (3) for Schedule X catchments, will contribute lead to a reduction in adverse effects on water quality.

### Part C – Farm Environmental Management Plan Certification, Auditing, Review and Amendment

#### [14] Farm Environmental Management Plan Certification:

- (a) the FEMP must be certified, prior to implementation on the farm, by a Suitably Qualified Person (SQP) who has been approved as such by the Chief Executive of Southland Regional Council;
- (b) the purpose of FEMP certification is to confirm that the farming activities on the farm will be carried out in a way that will achieve the Objectives in this Appendix and will comply with any resource consent for the landholding;
- (c) the FEMP must be re-certified, prior to implementation, following any amendments to the FEMP carried out in accordance with Part C (17) of this Appendix;
- (d) within one month of a FEMP being certified, a copy of the certified FEMP must be provided to the Southland Regional Council.

#### [15] Auditing of the certified Farm Environmental Management Plan:

- (a) within 12 months of the landholding's first FEMP being certified, the landholding owner must arrange for an audit of the farming activities to ascertain and ensure compliance with the FEMP. Thereafter, the frequency of auditing will be in accordance with any conditions of consents held for the landholding, or alternatively, where there are no consent or consent conditions requiring auditing, every two years after receipt of the previous audit report, unless the Chief Executive

of the Southland Regional Council, having regard to the Objectives of the Southland Water and Land Plan, specifies in writing, a shorter or longer period between auditing;

- (b) the auditor must be a SQP who has been approved as such by the Chief Executive of Southland Regional Council and must not be the same person or from the same organisation that prepared the FEMP;
- (c) the auditor must prepare an audit report that:
  - (i) sets out the auditor's findings;
  - (ii) states whether compliance has been achieved; and
  - (iii) sets out any recommendations from the auditor.
- (d) within one month of the final audit report being prepared, the audit report must be provided to the Southland Regional Council by the auditor.

[16] The FEMP must be reviewed by the landholding owner, or their agent, as follows:

- (a) when there is a material change in farming activities on the landholding. A material change is one that increases the risk of not achieving the plan's objectives, as set out in clauses 9 and 10, and where that change is not provided for within the landholding's certified FEMP; and
- (b) at least once every 12 months; and
- (c) to respond to the outcome of an audit.

[17] The outcome of the review is to be documented and amendments to the FEMP must be made where Part C(16)(a) applies, and in circumstances where the annual review identifies that amendments are required.

**Notes:**

- (a) actions and mitigations in a FEMP may be more stringent than permitted activity standards of the pSWLP rules where this is

appropriate to achieve the FEMP objectives;

- (b) the no increase in contaminant loss explanation required by clause 13(i)(1) is to be made in the context of the whole of the relevant land holding consistent with Policy 16(c1) for farming activities that affect water quality. The same approach is to be taken for the explanation of reduced adverse effects on water quality for landholdings located in a Schedule X catchment required by clause 13(i)(3);
- (c) when addressing 'intensity' in Clause 13(i) the factors in Clauses 13(a)(i) and (ii) shall be applied, as relevant, in the required explanation;
- (d) ~~'previous baseline contaminant losses' is the highest annual contaminant losses over any 12 month period commencing 1 July and ending 30 June between 1 July 2018 and 30 June 2023 or other 12 month period if better suited to the farm system(s) involved 2018 – 2023.~~
- (e) benchmark means on-farm nutrient and soil management practices over the preceding twelve months commencing 1 July 2022 and ending 30 June 2023 or another 12 month period in the five years between 2018 – 2023 if accepted by the certifier as being representative of those practices. Benchmarked has the same meaning.
- (f) **minimise** means to reduce to the smallest amount reasonably practicable;
- (g) **intensive winter grazing** means grazing of stock between May and September (inclusive) on forage crops (including brassica, beet and root vegetable crops), excluding pasture and cereal crops.
- (h) **modified watercourse** is a water carrying channel that was existing in some form prior to land development but has been **modified or straightened for drainage or other purposes** and excludes ephemeral rivers.
- (i) **pasture-based wintering** means break feeding cattle, other than lactating dairy cows, on pasture between 1 May and 30 September

Commented [BJ13]: Council drafting.

Commented [BJ14]: Court drafting.

inclusive where supplementary feed offered is more than 10,000 kgDM/ha.

- (j) **person** includes crown, body corporate and 'body of persons'.
- (k) **sacrifice paddock**<sup>10</sup> means an area on which—
  - (i) stock are temporarily contained (typically during extended periods of wet weather); and
  - (ii) the resulting damage caused to the soil by pugging is so severe as to require resowing with pasture species.
- (l) Sources of information for the purposes of sub-cl's 7 (k) and (l) and [subject to a final decision] sub-clauses 9 (b) OR (c) include personally held local knowledge of the landowner or agent, the catchment context documentation prepared by the regional council, information prepared by a catchment group, and information from the Council's on-line mapping system that is relevant to the management of risks addressed by the FEMP. Absent Council catchment documentation or on-line mapping prepared in consultation with Papatipu Rūnanga, persons preparing an FEMP are to seek information on cultural values (including taonga species, mahinga kai and nohoanga) by contacting the relevant Papatipu Rūnanga or their environmental entity. Any request for information from Papatipu Rūnanga or their environmental entity is to be made in writing at least two months prior to submitting the FEMP for certification.

Commented [BJ15]: Court drafting.

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<sup>10</sup> SRC, memorandum 'regarding the fifth Interim Decision' dated 9 February 2023 at [35].