

**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
(ENV-2018-CHC-30)

**LEGAL SUBMISSIONS ON BEHALF OF SOUTHLAND FISH AND GAME
COUNCIL AND THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF
NEW ZEALAND INC IN REPLY TO FEDERATED FARMERS SUBMISSION ON
SCOPE**

8 September 2023

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

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

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

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

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

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

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

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

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

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

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

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

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

ROBERT GRANT
(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED,
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. The Court has issued directions dated 4 September 2023 that:

If scope exists the court will approve the proposed objective, Objective 9 (c) to Appendix N.

Any party that does not support Federated Farmers submission dated 1 September 2023 regarding scope, is to file a reply by Friday 8 September 2023.

2. The proposed new Objective 9(c) is as follows:

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) are to be safeguarded through the timing, frequency, extent, and method of carrying out flood conveyance activities.*

3. This objective is an important one in light of the agreed and uncontested joint evidence on the significant adverse effects of drainage maintenance.
4. The Royal Forest and Bird Protection Society of New Zealand Inc ("Forest & Bird") and Southland Fish and Game Council ("Fish & Game"):
 - a. do not support Federated Farmers submission dated 1 September 2023, and
 - b. consider that scope does exist for the Court to approve the proposed objective, Objective 9(c) to Appendix N.
5. The reasons for this are set out below.
6. For completeness we note that as the Court has indicated that if scope exists it will approve proposed Objective 9(c), these legal submissions do not specifically address the alternative, namely the proposed amendment to Objective 9(b), but Forest & Bird and Fish & Game also consider scope would exist for that proposed amendment.
7. For the purposes of these submissions, counsel adopts the law on scope set out in the legal submissions of Southland Regional Council dated 12 July 2022. Further key principles were also highlighted in the closing submissions of counsel for Fish & Game and Forest & Bird on scope dated 1 June 2023.

Scope of Appeals

8. The relevant parts of the appeals concerning rule 78 and Policy 30 were detailed in the closing submissions of counsel for Fish & Game and Forest & Bird on scope dated 1 June 2023.
9. Below we have also set out the relief sought specifically in relation to Appendix N in the appeals.

Relief Sought in relation to Appendix N

10. The submissions by Federated Farmers state that as no appellant sought an amendment to Appendix N as part of their appeal on Rule 78, any change to Appendix N needs to be consequential to the relief or reasons for the appeals on Rule 78. However, the appeals did include Appendix N and relief was included that was particular to that appendix as set out below.
11. With respect to Appendix N the appeal by Fish & Game sought to include the following objectives:

6. Objectives

A description of how each of the following objectives will, where relevant, be met:

(a) Irrigation system designs and installation: To ensure that all new irrigation systems and significant upgrades meet Industry best practice standards;

(b) Irrigation management: To ensure efficient on-farm water use that meets crop demands and minimises losses;

(c) Nutrient and soil management: To avoid where practicable, or otherwise minimise, nutrient and sediment losses from farming activities to ground and surface water to maintain or improve water quality;

(d) Waterways and wetland management: To manage waterways (including ephemeral or intermittent waterways), wetlands and their margins to avoid stock damage and avoid where practicable, or otherwise minimise, inputs of nutrients, sediment and faecal contaminants to ground and surface water to maintain or improve water quality; and

(e) Collected animal effluent management: To manage the operation of animal effluent systems to avoid adverse effects on water quality; and

(f) Drainage maintenance: To manage drainage maintenance activities to avoid significant adverse effects on water quality and aquatic habitat.

(emphasis added)

12. The appeal also sought to include the following to the list of Good Management Practices:

(vi) avoidance where practicable, or otherwise mitigating, of adverse effects from drainage maintenance activities on water quality and **maintaining or enhancing** aquatic habitat value.

(emphasis added)

13. The reasons for the appeal include (amongst other matters) the following:

7.a.v. The pSWLP includes a suite of objectives, policies and rules relating to land use activities that provide for activities which will cause further degradation of water quality and adverse effects on water bodies.

7.a.vi The pSWLP provides an imbalance in favour of primary production generally, above other relevant activities and values.

14. Fish & Game's appeal seeks, in addition to specified relief, any alternative wording that would address the reasons for its appeal and any consequential changes made necessary by the relief sought.

15. The appeal by Ngā Rūnanga includes the following in relation to Appendix N:

Retain Appendix N as provided for in the Section 42A Report with the following amendments:

Part B: Retain clause relating to Farm Environmental Plans including known and recorded heritage sites and significant biodiversity. Include in Part B(5) the following:

A good management practices section which identifies:

The range of good management practices that minimises the effects on taonga species listed in Appendix N and any significant indigenous biodiversity.

16. The reasons for the relief are:

The amendment to Appendix N has become so broad as to provide no certainty to Ngai tahu as to what activities farmers will be implementing to achieve good management practice on their farms. There is no provision for showing how a farm will protect taonga species that the proposed plan has identified as important.

Analysis

17. The submissions by Federated Farmers state:

The appellants sought amendments to protect threatened fish, taonga species and non-migratory galaxiids from the maintenance of modified water courses, and minimise the removal of gravels from the bed of modified watercourses. None of their reasons or relief could reasonably be seen as extending to safeguarding or progressively improving "in-stream, riparian habitat wetland and cultural values and the sustainable customary use of mahinga kai" per the Court's proposed change to Objective 9(b).

18. It is clear from the relief sought relating specifically to **Appendix N** as set out above that:

- a. Fish & Game sought to include an objective in Appendix N (6(d)) that seeks to maintain or improve water quality. That objective sought related to waterways (including ephemeral or intermittent waterways), wetlands and their margins. The objective sought at (d) is general in nature and would therefore apply to all activities leading to sediment in waterways.
- b. Fish & Game sought an objective in Appendix N (6(f)) to manage drainage maintenance activities to avoid significant adverse effects on water quality and aquatic habitat. This is not particular to modified watercourses and would apply to all rivers and streams. Federated Farmers are therefore incorrect when they say that "*there is simply no appellant that sought a new objective be included in Appendix N to manage flood capacity of streams and rivers.*"
- c. The Good Management Practice that Fish & Game sought to include refers specifically to "maintaining or enhancing" aquatic habitat value.
- d. The relief sought by Te Runanga is focused on the protection of taonga species. We note that Fish & Game in its appeal also sought an amendment to Objective 15 so that Taonga species

as set out in Appendix M, and related habitats, are recognised and protected.

19. Although the wording of the proposed new objective differs from the particular relief sought on Appendix N it is important to recognise the key principles from case law referred to in earlier submissions filed on behalf of Forest & Bird and Fish & Game, including:

a. The High Court in *General Distributors Ltd v Waipa District Council*¹ observed that:

Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.

b. In *Shaw v Selwyn District Court* the High Court stated that the “realistic and workable fashion” referred to in earlier authorities requires consideration of the whole relief package detailed in each submission.² This principle was adopted by the High Court in *Albany North Landowners v Auckland Council*, which summarises previous case law as follows.³

...A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public’s contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic, workable fashion, rather than from the perspective of legal nicety. The ‘workable’ approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

c. As provisions in plans do not operate in a vacuum, the Environment Court has recognised an implied jurisdiction to make consequential amendments where an amendment made may require parallel changes to other provisions.⁴

¹ *General Distributors Ltd v Waipa District Council* HC Auckland, CIV 2008-404-4857, 19 December 2008 at [56].

² *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [44].

³ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

⁴ For example, in *The Church of Jesus Christ Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [48].

20. It is therefore relevant to consider the wider relief package in the appeals; and the changes that can be made as consequential amendments.
21. For example this wider relief package includes changes proposed by Fish & Game to Objective 18, which sought that the objective be amended to include a reference to “maintain and improve ecosystems in freshwater”:

All activities implement the best practicable option to optimise efficient resource use and achieve the following:

1. Soil conservation
2. Maintain and improve water quality
3. Maintain or improve water quantity; and
4. Maintain and improve ecosystems in freshwater

22. With reference to the relief sought on **Policy 30 and Rule 78:**
- a. Forest & Bird sought an addition to specify that the modified watercourse is not a habitat of threatened native fish.
 - b. Fish & Game’s appeal sought an addition to Policy 30 (drainage maintenance) so that the reference to effects on the aquatic environment includes “*water quality, aquatic ecosystem health, life supporting capacity, natural character and riparian margins, mahinga kai, indigenous vegetation and fauna.*” Broadening Objective 9(b) or introducing the proposed Objective 9(c) is consistent with this range of features raised in Fish & Game’s appeal.
 - c. Fish & Game also sought an amendment to Policy 30 so that clause 2 includes “*maintains or enhances habitat value, including fish passage, gravel spawning habitat and bank stability*” and that wording has been adopted in Policy 30 as approved by the Court. Requiring the safeguarding of riparian habitats as set out in the Court’s proposed objective is consistent with that.
 - d. The reasons for the appeal by Te Runanga on rule 78 states that “*the rule applies to modified watercourses, but does not recognise or protect taonga species or their habitat that may be*

found or established within the watercourse...” The safeguarding of taonga as set out in the objective proposed by the Court addresses the reasons in the appeal.

23. When considering the issue of consequential relief the wider objective and policy framework in the plan is relevant. Policies and rules should be driven from the top down.⁵
24. The primary concern of Federated Farmers appears to be the requirement to safeguard the specified values. The Court in the 8th interim decision stated:⁶

... 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).

25. We also add to the list of provisions that use the term ‘safeguarding’ Objective 13 which provides:

Provided that:

- (a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and*
- (b) the health of people and communities is **safeguarded** from the adverse effects of discharges of contaminants to land and water; and*
- (c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded,*

then land and soils may be used and developed to enable the economic, social and cultural wellbeing of the region.

(emphasis added)

26. Incorporation of the ‘safeguarding’ terminology in Appendix N can be considered a consequential amendment to ensure alignment with higher order objectives in the pSWLP.
27. Further, the Environment Court has previously confirmed an overarching purpose statement regarding Te Mana o Te Wai in

⁵ *Federated Farmers of New Zealand (Inc) v Mackenzie District Council* [2017] NZEnvC 53 at [177].

⁶ At para [117].

Appendix N, for which no party disputed scope. This is set out in the 5th Interim Decision as follows:

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.

28. The specific objective now proposed for inclusion is consequential on that amendment and is therefore within scope.



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Sally Gepp / Shoshona Galbreath

Counsel for Southland Fish and Game Council

and the Royal Forest and Bird Protection Society of New Zealand Inc

Date: 8 September 2023