

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

**UNDER** of 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 LIMITED**  
(ENV-2018-CHC-27)

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

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

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**CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE DAIRY INTERESTS  
RECONVENED TRANCHE 1 HEARING  
FARMING PROVISIONS (SCHEDULE X MAPS)  
1 JUNE 2023**

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**Solicitor acting:**

Katherine Forward  
Duncan Cotterill  
PO Box 5, Christchurch

Phone +64 3 379 2430  
Fax +64 3 379 7097

[katherine.forward@duncancotterill.com](mailto:katherine.forward@duncancotterill.com)

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

**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)

**STONY CREEK STATION LIMITED**  
(ENV-2018-CHC-42)

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

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

**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. These submissions are filed on behalf of Dairy NZ Ltd (DairyNZ) and Fonterra Co-operative Group Ltd (Fonterra), collectively referred to as the Dairy Interests.

**Scope of submissions**

2. In its Seventh Interim Decision<sup>1</sup> the Court questioned the Regional Council's approach in producing maps and layer plans for DIN and DRP for inclusion in schedule X. The Court considered, in context, that the mapping of these values is inconsistent with paragraphs [62 – 65] of the Court's Fifth Interim Decision<sup>2</sup>. The Dairy Interests agree.
3. Further, when in session on 29 June 2023 the Court confirmed that it was not expecting maps for DIN and DRP to be produced, rather it considered that maps for TN and TP would be included in schedule X to reflect the Court's findings in the Fifth Interim Decision.
4. The Fifth Interim Decision approves<sup>3</sup> the maps prepared by Dr Snelder for inclusion in a new schedule<sup>4</sup>. Footnote 94 to paragraph [84] provides further particulars and directs that the maps approved are those:

*Individual maps for nitrogen, phosphorus, suspended sediments, MCI(<90) and E.Coli together with a single map for all attributes. Segments of degraded water quality are to be distinguished from upstream catchments contributing contaminants as he has shown*<sup>5</sup>

5. The Court has subsequently issued directions<sup>6</sup> confirming that the Court is not minded to include maps produced for catchments 'degraded' by DIN and DRP in schedule X.

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<sup>1</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 87 at [8].

<sup>2</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265.

<sup>3</sup> Emphasis added by the Court

<sup>4</sup> Note 2 at [84(a)] and footnote [94].

<sup>5</sup> *Ibid.*

<sup>6</sup> Email from Michael Tinkler to the parties, 30 May 2023 at 11.22am.

6. The Dairy Interests consider that the Court's findings in relation to this issue are final, and the Court is functus officio with respect to the same. It follows that, short of recall, there is no pathway for the Court (or the parties) to revisit finding(s) as set out in the Fifth Interim Decision.
7. An appeal to the High Court aside, it is for the Court and the Court alone to confirm its expectations in relation to findings made in the Fifth Interim Decision. It is not open to the parties to make submissions as to how the Court ought to interpret its own decision. It is for this reason that these submissions are limited to the following:
  - 7.1 Consideration of whether the Court's finding with respect to the schedule X maps (as contained in the Fifth Interim Decision) is final.
  - 7.2 Reference to reasons in support of the exclusion of DIN and DRP maps as outlined in the Fifth Interim Decision.
  - 7.3 Comment on Counsel for Fish and Game and Forest and Bird's memorandum.
  - 7.4 The practical implications of exclusion of the DIN and DRP maps.

**Final finding?**

8. It is submitted that the Court's use of the term 'approve' means to officially agree or accept as satisfactory – it is therefore final. Use of the term does not give rise to further debate as to the maps that are to be included. The term is used throughout the Fifth Interim Decision as the Court's preferred way of confirming outcomes/ recording its findings on the evidence.
9. It is acknowledged that footnote [94] refers to 'nitrogen and phosphorus' rather than 'TN and TP' however little turns on this. The discussion and reasoning set

out in the Fifth Interim Decision (discussed below), together with the Court's recent clarification<sup>7</sup> resolves any perceived uncertainty.

10. Further, in testing the finality of the Court's finding, support is drawn from the Court's concluding directions where some provisions are subject to drafting suggestions by the Court and/ or responses from the parties were directed prior to final determination<sup>8</sup>. No provision is made for further input from the parties in relation to the schedule X maps. It flows that this is a final determination.
11. Support is also found in the Court's note to paragraph [84] which provides that the parties may revert to the Court regarding the map titles and keys. This direction does not provide an opportunity for parties to revisit the maps to be included in schedule X, rather it presents a limited invite for the parties to address the Court only on map titles/ keys.

#### **Reasons in support**

12. The Fifth Interim Decision records that it is beyond the scope of the proposed plan to establish limits on resource use to achieve target attribute states or to support other environmental outcomes<sup>9</sup>. This finding mirrors that set out in the First Interim Decision<sup>10</sup>.
13. It is clear from paragraphs [62 – 65] that the Court considers these proceedings are not the forum to determine threshold values for DIN and DRP, therefore it makes no finding of degradation with respect to the same, and in any event considered the evidence before it was not of a standard that would allow it to make such a finding<sup>11</sup>.

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<sup>7</sup> Paraphrasing as transcript not yet available: the Court was expecting maps for TN and TP only. The 5<sup>th</sup> Interim Decision made a finding that these proceedings are not a forum to determine the threshold values for DIN and DRP, and on this basis the Court is not prepared to identify catchments/ segments that are degraded in terms of DIN and DRP. It follows that the Court cannot introduce a map for these parameters where there has been no determination on degraded status.

<sup>8</sup> Note 2 at [483]

<sup>9</sup> Note 2 at [7].

<sup>10</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [4] and [5].

<sup>11</sup> Note 2 [65].

14. The reference to ‘thresholds’ is important. Evidence has established that the schedule X maps are informed by the thresholds adopted in the water quality JWSs. As the Court has found there is no scope to determine threshold values for DIN and DRP it logically follows that maps reliant on these thresholds to depict degradation (relative to DIN and DRP) cannot be approved.
15. This finding is fundamental to confirm why inclusion of the DIN and DRP maps within schedule X would be inconsistent with the Fifth Interim Decision, as is the Court’s confirmation that:
- (a) *it is beyond scope of this plan to include target attribute states, instream concentrations or other nutrient criteria;*
  - (b) *the NPS-FM has a process for setting target attribute states, including that those target attribute states must be set above the national bottom line and a process for consulting with tāngata whenua and the community; and*
  - (c) *the purpose of the mapping and whether the maps produced serve that purpose.*<sup>12</sup>
16. The schedule X maps were a key focus of the Dairy Interests case and reasons advanced in support of Dr Depree’s maps over those produced by Dr Snelder (including exclusion of DIN and DRP from the mapping exercise) are thoroughly traversed in evidence<sup>13</sup>, legal submission<sup>14</sup> and within the Fifth Interim Decision<sup>15</sup>.

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<sup>12</sup> Note 2 at [73].

<sup>13</sup> Statement of primary evidence of Dr Depree, 20 December 2021 at [4 – 5.14], Statement of primary evidence of Mr Willis, 20 December 2021 at [5.20 – 5.30], Rebuttal evidence of Dr Depree, 22 February 2022, at [6 – 8], and Rebuttal evidence of Mr Willis, 22 February 2022, at [6]

<sup>14</sup> Opening legal submissions for tranche 1 ‘disputed provisions’ hearing on behalf of the Dairy Interests, 11 April 2022 at [42 – 53] and closing legal submissions for tranche 1 ‘disputed provisions’ hearing on behalf of the Dairy Interests, 16 August 2022 at [7 – 13].

<sup>15</sup> Note 2 at [69 – 70]

## Memorandum of Counsel for F&G and F&B

17. In her memorandum<sup>16</sup>, Counsel for F&G and F&B suggests that support for inclusion of the DIN and DRP maps can be inferred from the Court's preference of Drs Canning, Snelder and J Kitson and Ms McArthur evidence over that of Dr Depree<sup>17</sup>. The Court's preference (in the paragraph referred to by Ms Gepp) relates solely to the topic of MCI and dispute between the witnesses as to the suitability of MCI (a single metric) serving as proxy for the aquatic life component of ecosystem health. The statement of 'preference' for the listed witnesses cannot be extrapolated further.
18. Similarly, the suggestion that Dr Snelder's evidence is the catalyst for a finding that the DIN and DRP maps ought to be included is unfounded<sup>18</sup>. The quotation referred to by Counsel for F&G and F&B is preceded by:

*We are satisfied that for a range of attributes and minimum acceptable states, water quality in many of Southland's water bodies is, or is highly likely to be, degraded and it is our judgement that Policy 16 should respond to this finding.*<sup>19</sup>

19. The Fifth Interim Decision finds that where water quality falls below the national bottom lines or minimum acceptable state, water quality in these waterbodies is, or is highly likely to be degraded, and is to be improved<sup>20</sup>.
20. The key takeaway here is that DIN and DRP are not listed anywhere in the Fifth Interim Decision as attributes that the Court finds fall below national bottom lines or minimum acceptable states. The reason for this is simple. Neither DIN nor DRP attract national bottom lines in the NPSFM<sup>21</sup>.

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<sup>16</sup> Memorandum of Counsel for Southland Fish and Game Council and the Royal Forest and Bird Protection Society of New Zealand Inc on Seventh Interim Decision, 18 May 2023

<sup>17</sup> Ibid at paragraph 5.

<sup>18</sup> Note 14 at [7].

<sup>19</sup> Note 2 at [78].

<sup>20</sup> Note 2 at [77 - 78].

<sup>21</sup> Rebuttal evidence of Dr Depree, 22 February 2022, Table 1.



21. In contrast, at paragraph [264] the Court lists the narrative attributes that it considers fall below a national bottom line or minimum acceptable state – phytoplankton, suspended fine sediment, macroinvertebrate, macroalgae biomass indicator and phytoplankton biomass indicator.
22. As outlined above, because the Court has found there is no scope to determine threshold values for DIN and DRP it follows that maps reliant on these thresholds to depict the spatial extent of degradation (relative to DIN and DRP) cannot be approved. In contrast, TN and TP do have prescribed national bottom lines.
23. In addition, the title to the schedule X maps has been approved as ‘catchments of degraded water bodies where improvement in water quality is required’<sup>22</sup>. This title does not support inclusion of the DIN and DRP maps where the Court has made no findings that give rise to a threshold against which degradation can be assessed.

### **Practical implications**

24. When comparing the series of maps appended to the Regional Council’s memoranda<sup>23</sup>, it is clear that the MCI and *E.coli* maps collectively depict a significant area of Southland falls within a degraded catchment or segment. It is submitted that when suspended sediment, TN and TP are included (as per the composite map) there is little to no risk that land that could be captured within DIN and DRP maps would fall outside of a schedule X catchment. This comparative exercise was undertaken and set out in Dr Depree’s evidence<sup>24</sup>.

### **Conclusion**

25. The Dairy Interests agree with the Court and for the reasons outlined above consider that schedule X maps should exclude DIN and DRP layers and maps.

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<sup>22</sup> Note 2, Annexure 4.

<sup>23</sup> Memorandum of Counsel for Southland Regional Council, 17 February 2023 and Memorandum of Counsel for the Southland Regional Council regarding the schedule X maps, 24 May 2023.

<sup>24</sup> Note 12 at [5.6 – 5.9].

For the avoidance of doubt, the DIN and DRP layer should also be removed from the composite map.

Dated 1 June 2023

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end.

Katherine Forward

Solicitor for the Dairy Interests