

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I MUA I TE KOOTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

UNDER THE Resource Management Act 1991 ("**Act**")

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)

(Continued on next page)

**LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS SOUTHLAND
INCORPORATED IN RESPECT OF SCOPE TO AMEND RULE 78**

7 JUNE 2023

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

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

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

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

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, HOKONUJ 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:

Introduction

1. Of the five appeals on Rule 78 in the proposed Southland Water and Land Plan (**pSWLP**), Federated Farmers Southland Incorporated (**Federated Farmers**) is a s 274 party:
 - (a) in opposition to the relief sought in:
 - (i) ENV-2018-CHC-000036: Director-General of Conservation
 - (ii) ENV-2018-CHC-000037: Southland Fish and Game Council
 - (iii) ENV-2018-CHC-000050: Royal Forest and Bird Protections Society of New Zealand Inc
 - (b) in general support of the relief sought in:
 - (i) ENV-2018-CHC-000047: Te Runanga o Ngai Tahu & Others
2. Federated Farmers supported the version of Rule 78 pursued by the Regional Council, and others, at the hearing of disputed provisions in 2022.
3. However, it has taken the “big hint” in the now recalled Sixth Interim Decision and “grasped the nettle” with the preparation of an example of a strengthened Rule 78¹ together with an example appendix of practices that the rule could require to be adopted in an Appendix N Farm Environment Management Plan (**FEMP**).² It has done so as a s 274 party, endeavouring to assist the Court with finding a solution to this “wicked problem.”
4. Before the parties move forward with any further refining of the examples, it would be of assistance for the Court to confirm:
 - (a) whether such changes could be within scope of the appeals; and
 - (b) whether the changes set out in Appendix 2 to the May 2023 Planning Joint Witness Statement (**JWS**) are within scope of the appeals.

¹ May 2023 Planning JWS, Attachment 1, para [24], with the example found at page 15.

² May 2023 Planning JWS, Attachment 1, para [22], with the example found at pages 16

5. Federated Farmers' position is that:

Scope of Appeals

- (a) There is no scope to remove the permitted activity status for maintenance of modified watercourses on farm.
- (b) There is scope to impose *new permitted activity standards* relating to:
 - (i) Avoiding significant adverse effects on the habitat and health of any Appendix M taonga species;
 - (ii) Avoiding habitats of non-migratory galaxiids;
 - (iii) Avoiding habitats of threatened native fish; and
 - (iv) The extent of gravel to be removed.
- (c) The consequence of not meeting the permitted activity standards in the decision version is becoming a discretionary activity. There is no scope to change this.
- (d) It would be within scope to introduce a controlled or restricted discretionary activity for circumstances where a *new permitted activity standard* is not met.

Methods

- (e) The method put forward by Southland Regional Council and others in August 2022 is within scope of the appeals.
- (f) The method put forward by Forest & Bird and Fish & Game in August 2022 was not within scope of the appeals. Counsel understands that version is no longer supported by those appellants.³
- (g) The method put forward by Ms Ruston in Attachment 1 to the May 2023 Planning JWS is aimed at better protecting the habitat and health of Appendix M taonga species, non-migratory galaxiids and threatened native fish and minimising the removal of gravels in the framework of a permitted activity in reliance on a FEMP that adopts

³ Memorandum of counsel for Southland Fish & Game Council and the RFBPSI dated 25 May 2023, paras 6 – 7.

good management practices, where the activity otherwise defaults to a discretionary activity. This is within scope of the appeals.

- (h) The method put forward in Appendix 2 to the May 2023 Planning JWS is not within scope of the appeals.

6. We address these matters in further detail below.

Legal principles re scope

- 7. The agreed legal principles applying to scope were set out in the Legal Submissions of Counsel for Southland Regional Council, dated 12 July 2022, and summarised in Annexure 1 to the Fifth Interim Decision.
- 8. Generally speaking, scope is narrowed as one moves through the Schedule 1 process. The issue must be first raised in a submission at the Council-level, and then in an appeal filed with the Environment Court. It is for this reason that we first step through the background to Rule 78.

Background to Rule 78

Notified version

- 9. In the notified version of the pSWLP, Rule 78(a) made weed and sediment removal for drainage maintenance a permitted activity subject to conditions.

Submissions to Council

- 10. Fish & Game, Forest & Bird, Ngā Rūnanga and the Director-General of Conservation all submitted on Rule 78:
 - (a) Fish & Game sought amended conditions to Rule 78(a) to limit the removal of gravel and avoid over-deepening of the drain during drainage maintenance undertaken as a permitted activity;
 - (b) Forest & Bird sought amended conditions to Rule 78(a) to limit the removal of gravel and require drain maintenance to not occur in the habitat of threatened native fish;
 - (c) Ngā Rūnanga sought the addition of conditions to Rule 78(a) to limit sediment loss and the effects on the habitat or health of any taonga species; and
 - (d) The Director-General of Conservation sought to amend the conditions to Rule 78(a) so that only mud removal was permitted,

gravel removal was limited as part of the permitted activity, and drainage maintenance is limited to outside the habitat of Gollum or alpine galaxias.

11. Three of them (Fish & Game, Ngā Rūnanga and the Director-General of Conservation) made further submissions supporting other submissions on Rule 78. None of those supported submissions sought a change in activity status in Rule 78.

Decisions version

12. In the decisions version of the pSWLP, there was no change to the permitted activity status in Rule 78(a) for weed and sediment removal for drainage maintenance.

Appeals

13. Fish & Game, Forest & Bird, Ngā Rūnanga and the Director-General of Conservation all filed appeals on Rule 78:

- (a) Fish & Game sought to:⁴
 - (i) clarify that river bed material in (a)(iia) includes gravel;
 - (ii) replace the phrase “avoided as far as practicable” in (a)(iia) with a requirement the removal of river bed material:
 - (aa) be only to the extent that is necessary to undertake the activity and be kept to the absolute minimum; and
 - (bb) not exceed more than 5% gravel (>10mm in diameter).
 - (iii) replace “as a result” in (a)(iv) with “because”;
 - (iv) replace “is” in (a)(xii) with “shall be”;
 - (v) limit the application of (b) to the removal of aquatic weeds and fine sediment (not gravel);

⁴ ENV-2018-CHC-000037.

- (b) Forest & Bird sought to:⁵
 - (i) amend (a)(ia) to restrict any gravel removed to not more than 5% of the total sediment removed; and
 - (ii) include a new standard in (a) that the modified watercourse is not a habitat of threatened native fish;

for the specific reason that Rule 78 “does not adequately protect threatened native fish from disturbance associated with drainage maintenance activities”;

- (c) Ngā Rūnanga⁶ sought to include a new standard in (a) that the activity shall not significantly adversely affect the habitat or health of any taonga species as identified in Appendix M; and
- (d) The Director-General of Conservation⁷ sought to include a new standard in (a) that the modified watercourse is not a habitat of non-migratory galaxiids (and to map the same).

14. For completeness, Heritage New Zealand Pouhere Taonga also filed an appeal on Rule 78.⁸ That appeal has been resolved by consent order.⁹

Disputed Provisions hearing

15. The request to delete the permitted activity rule in Rule 78(a) (retaining the discretionary activity rule in Rule 78(b)) was first put forward by Fish & Game and Forest & Bird in February 2022¹⁰ simultaneously with the exchange of rebuttal evidence for the disputed provisions hearing.

16. In closing submissions:

- (a) the Regional Council acknowledged that “parties seek a range of alternative relief with respect to Rule 78”, including “full discretionary activity status”.¹¹ This comment was made in reference to the relief

⁵ ENV-2018-CHC-000050.

⁶ ENV-2018-CHC-000047.

⁷ ENV-2018-CHC-000036.

⁸ ENV-2018-CHC-000041.

⁹ *Aratiatia Livestock Limited and ors v Southland Regional Council* [2022] NZEnvC 266.

¹⁰ Memorandum of Counsel for Southland Fish and Game Council and the Royal Forest and Bird Protection Society of New Zealand Incorporated – Preferred Relief, 22 February 2022, page 20.

¹¹ Closing Legal Submissions for Southland Regional Council, 25 August 2022, at [205(e)].

first pursued in February 2022 and subsequently set out in the Consolidated Plan dated 9 August 2022. The Regional Council provided no analysis for the basis of this relief at that time.

- (b) Forest & Bird and Fish & Game asserted there is scope to delete the permitted activity rule and rely instead on a consenting regime through Forest & Bird's appeal:¹²

The Forest & Bird appeal sought a permitted activity standard specifying that the modified watercourse is not a habitat of threatened native fish. As it turns out, that activity standard potentially applies throughout the region and it cannot be known with any certainty where it does or does not apply. The alternative relief to give effect to the reasons for Forest & Bird's appeal (including achievement of Council's s 30 function of maintenance of indigenous biodiversity) is a consenting regime.

Is relief within scope?

Specific relief in appeals

17. The specific relief sought in the appeals by Fish & Game, Forest & Bird, and Ngā Rūnanga to Rule 78(a) is within scope of their submissions.
18. It is, however, questionable whether Fish & Game's appeal relating to Rule 78(b) is within scope of its submission.¹³ Neither Fish & Game's submission, nor any submission they made a further submission on, sought to amend the discretionary activity rule in Rule 78(b).
19. It would have been beyond the scope of any of the original submissions for the appeals to seek a consenting regime for this activity, or more stringent standards than what were first requested.

¹² Closing Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Incorporated and the Southland Fish and Game Council, 16 August 2022, at [81].

¹³ Seeking to limit the application of (b) to the removal of aquatic weeds and fine sediment (not gravel).

Alternative relief seeking to remove permitted activity status

20. None of the appeals sought to amend the permitted activity status of Rule 78(a). The Director General of Conservation has acknowledged this in relation to her appeal.¹⁴
21. At the Disputed Provisions hearing, Ms Gepp placed some reliance on paragraph 8 of the Forest & Bird appeal, which reads:¹⁵
- Where specific wording changes are proposed by way of relief, Forest & Bird seeks in the alternative any wording that would adequately address the reasons for its appeal. Forest & Bird also seeks any consequential changes made necessary by the relief sought below.
22. The specific reason for the relief sought in the Forest & Bird appeal is that Rule 78 “does not adequately protect threatened native fish from disturbance associated with drainage maintenance activities”.
23. The general reasons for the Forest & Bird appeal are simply that the provisions appealed against:
- (a) Do not give effect to the relevant provisions of the higher order documents;
 - (b) Are not consistent with Part 2 of the Act;
 - (c) Do not implement the Council’s functions under s30 of the Act; and/or
 - (d) Do not represent best resource management practice.
24. It is the third of these “general reasons” that Ms Gepp relied on in her closing submissions for the Disputed Provisions hearing.¹⁶
25. Akin to the finding in Annexure 1 to the Fifth Interim Decision, we submit the consenting regime in Appendix 2 to the May 2023 Planning JWS “does not flow from the relief sought on appeal and could not be anticipated by the public from

¹⁴ Memorandum for the Director-General of Conservation Tumuaki Ahurei Re Topic B Tranche 1 continued hearing of week 29 May 2023 on Appendix N provisions Sense Check, Policy 30, and Rule 78, 25 May 2023, at [8].

¹⁵ Notice of Appeal by the Royal Forest and Bird Protection Society of New Zealand Inc, 22 May 2018, at [8].

¹⁶ Closing Submissions of Counsel for the Royal Forest and Bird Protection Society of New Zealand Incorporated and the Southland Fish and Game Council, 16 August 2022, at [81].

general and specific reasons for the appeal when read and understood together”:¹⁷

- (a) As Fish & Game, Forest & Bird, and Ngā Rūnanga’s appeals only sought amendments to the permitted activity standards, a consenting regime for **all** modified watercourse maintenance “could not have been anticipated from reading [these notices of appeal]”.¹⁸
- (b) The reference to implementing Council’s s 30 functions in the “general reasons” for the appeal cannot be read alone.
- (c) Introducing a consenting regime for all drain maintenance would run counter to the principles of procedural fairness and natural justice by depriving parties potentially affected by such a regime from participating in decisions made on Rule 78.¹⁹ Not only do such parties include the various agricultural interests that have been involved in other aspects of the pSWLP appeals²⁰ and individual farmers across the region, but also the various infrastructure operators referred to in questioning²¹ as well as the various local authorities who undertake these works and the facilities affected in the event the works no longer proceed.²²
- (d) A consenting regime cannot be “foreseen as a direct or otherwise logical consequence” of alternative wording for amendments to the permitted activity conditions.²³ A participant in the plan change process would not reasonably be able to apprehend that a consenting regime could be the outcome.

26. For these reasons, Federated Farmers submits that the scope of appeals on Rule 78 does not allow the Court to grant relief in the manner of a consenting regime such as that pursued by Forest & Bird and Fish & Game at the Disputed Provisions hearing or the alternative now put forward in Appendix 2 to the May 2023 Planning JWS.

¹⁷ Fifth Interim Decision, Annexure 1, at [27].

¹⁸ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

¹⁹ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [27(b)].

²⁰ Such as the Dairy Interests and Beef + Lamb.

²¹ Such as Waka Kotahi NZTA and KiwiRail.

²² Such as the Invercargill Airport.

²³ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

Strengthened permitted activity framework

27. It is, however, within scope to amend the permitted activity rule to better protect the habitat and health of Appendix M taonga species, non-migratory galaxiids and threatened native fish and to minimise the removal of gravels.
28. The version of the rule pursued by Council²⁴ with the support of others at the Disputed Provisions hearing, is one option within scope.
29. In our submission, while less clear, scope can also be found for the example put forward by Ms Ruston in Attachment 1 to the May 2023 Planning JWS. This is on the basis that the proposed changes are aimed at:²⁵
- (a) Responding to the specific reasons and specific relief sought in the appeals; and
 - (b) To the extent they attempt to address the lawfulness, implementation and workability issues identified by the Court in the now recalled Sixth Interim Decision, the amendments aim to improve the effectiveness of the rule and therefore the level of protection it provides.
30. It is, however, important to confirm the potential extent of scope to amend Rule 78(a) before any party or witness incurs further time or expense refining the example.
31. Federated Farmers is therefore grateful for the opportunity to address the Court on scope at this point and requests an interim decision on the issue before further steps are taken.

DATED 7 June 2023



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²⁴ Recorded at [255] of the since recalled Sixth Interim Decision.

²⁵ Joint Witness Statement (Planning), 15, 18 and 23 May 2023, Attachment 1, at [10] – [13].