

IN THE MATTER of the Resource Management Act 1991
AND of appeals under Clause 14 of the First Schedule
of the Act

BETWEEN **SOUTHLAND FISH AND GAME COUNCIL**
Appellant

AND **SOUTHLAND REGIONAL COUNCIL**
Respondent

Memorandum of Counsel
on behalf of the Southland Fish & Game Council
Dated: 20 March 2019

COUNSEL for SOUTHLAND:
FISH AND GAME COUNCIL

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MAY IT PLEASE THE COURT

1. This Memorandum responds to the Memorandum of Counsel filed on behalf of the Southland Regional Council (“Council”) on 13 March 2019.
2. Council raises two potential issues with Fish & Game’s evidence in chief:
 - a) The relief sought for Objectives 6 and 7 is said to be outside the scope of Fish & Game’s Notice of Appeal.
 - b) Some of the matters covered by the evidence are said to be issues that the Court has previously directed form part of the Topic B hearing.
3. In relation to the first issue, Counsel for the Council questions whether Fish & Game (or Royal Forest & Bird Protection Society Inc’s or Ngā Rūnanga’s) appeals support the pSWLP providing reference to region-wide numeric outcomes prior to the limit-setting and FMU processes.
4. The basis upon which Fish & Game says that the relief sought is within the scope of *its* Notice of Appeal is set out below.
5. If the Court is minded to rule the relief out of scope, or to exclude Fish & Game’s evidence on this matter during the entire course of the hearings, Counsel for Fish & Game seeks to be heard in person. A preliminary hearing on ‘scope’ would be required because this matter is so central to the relief Fish & Game seeks on the pSWLP.

Farrell EIC

6. Mr Farrell’s planning evidence for Fish & Game suggests changes to Objective 7 that differ from the exact changes sought in Fish & Game’s appeal. First, Mr Farrell is an independent expert witness so his evidence may not entirely agree with Fish & Game’s appeal. Secondly, the relief sought by Fish & Game at the hearing does not need to be identical to the words stated in the appeal. Thirdly, Mr Farrell’s evidence may still be relevant to the Court if, after hearing the evidence, section 293 is applied (subject to proper process).
7. In any event, Fish & Game submits that the words Mr Farrell recommends be added to Objective 7 *are* within the scope of its appeal.
8. For Objective 6, the relief set out in Mr Farrell’s evidence is exactly the relief in Fish & Game’s appeal, and so that Objective is not considered further in

this Memorandum. (Mr Farrell simply raised whether amendments will be required to Objective 6 consequential on the Court's consideration of Objective 7.)

Fish & Game's appeal on Objective 7

9. Appendix A to Fish & Game's appeal requests following underlined text be added to Objective 7:

"Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes or earlier when considering relevant consent applications".

10. The Notice of Appeal also said that:¹

"[8] Fish and Game seeks the following relief:

- a. The changes to the provisions listed in paragraph 6 above, as shown in the attached Appendix A; and
- b. Such other changes to the provisions listed in paragraph 6 above that address the reasons for this appeal; and
- c. Consequential changes; and
- d. Costs of and incidental to this appeal."

(Emphasis added)

11. Mr Farrell's evidence recommends the following words for Objective 7, that differ from Fish & Game's appeal (underlined):

"Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes or earlier where the resource is being used to a point where a region-wide freshwater numeric outcome(s) are no longer being met".

12. The "reasons" for the appeal include that the pSWLP:

¹ Fish & Game Notice of Appeal page 8 at [8]: Noting that paragraph 6 of Fish & Game's appeal includes reference to Objective 7.

"[d]oes not include sufficient identification or direction for decision-makers to phase out over-allocation when considering resource consent applications"²; and

"[t]he decision and Proposed Plan takes the community in a backward step by not providing water quality limits and deferring limit setting to the Freshwater Management Unit Process"³.

(Emphasis)

13. Fish & Game's appeal on FMU Policy 47 seeks that "region-wide" freshwater objectives be set and that FMU sections "support the implementation of region wide objectives".
14. Fish & Game's appeal on FMU Policy 45 seeks "Region-wide Objectives and Region-wide Policies" for water quality, quantity and aquatic ecology, and that the "provision in the relevant FMU Section of this plan is not more lenient".
15. It is not credible to say that other parties reading Fish & Game's Notice of Appeal did not understand that interim numerical freshwater attribute states/outcomes were sought. That matter is raised throughout Fish & Game's appeal.
16. Although the exact words in Mr Farrell's evidence may differ, Fish & Game's 'relief sought' squarely raises the issue whether decisions on water over-allocation can be made prior to FMU processes. That involves the sub-issue as to whether over-allocation can be *defined* prior to FMU processes. That sub-issue was also specifically raised in the reasons in Fish & Game's appeal.
17. Fish & Game's appeal also raises this matter in relation to Policies 15A, 15B, 15C and Rules 13, 15 and 24. A reading of the whole of the Notice of Appeal shows that:
 - i) it seeks 'bottom lines' for freshwater quality; and
 - ii) it seeks a wider application of Appendix E of the pSWLP, or a new Appendix, setting outcome states for water quality.

² [7(a)(ix)].

³ [7(c)(x)].

18. Consideration of the original submission also shows that Fish and Game sought freshwater outcomes be set prior to the FMU processes.

Original submission and background to appeal

19. The reasons in the original submission of Fish & Game on the pSLWP, included:⁴

"The pWLP in its current form does not adequately provide for/or give effect to:"

...

"[p] Set numerical water quality and quantity standards, freshwater objectives, or limits or targets to protect freshwater values including safeguarding life supporting capacity and ecosystem health and processes, and give effect to the NPS Freshwater Management ...;"

...

"[r] Ensuring that land use activities and development are managed so that where numerical water quality and quantity objectives, outcomes, standards, or limits are currently being achieved that they continue to be met, and where water quality and quantity objectives, outcomes, standards, or targets are not met (currently degraded) that water quality and quantity is restored to meet them over time."

20. Parties at the Council-level hearing clearly understood that the question of defining over-allocation prior to FMU processes was at issue. The decision at Council-level records:⁵

"We also accept the submissions from Fonterra and FANZ, amongst others, that Objectives 7 and 8 should be amended to clarify that NPSFM compliant freshwater objectives are yet to be developed and the concepts of degradation and over-allocation cannot have a full and proper meaning until NPSFM compliant freshwater objectives have been established for Southland's Freshwater Management Units. We recommend amendments to Objectives 7 and 8 accordingly."

21. Following this reasoning, the decision at Council-level added the following words to Objective 7 (underlined):

⁴ At [36].

⁵ Report and Recommendations of the Hearing Commissioners 29 January 2018 at [139].

“Any further over-allocation of freshwater (water quality and quantity) is avoided and any existing over-allocation is phased out in accordance with freshwater objectives, freshwater quality limits and timeframes established under Freshwater Management Unit processes”.

22. These words were intended to clarify that over-allocation could not be determined prior to FMU processes setting freshwater objectives and limits.

23. Mr McCallum Clark’s evidence on Objective 7 states (emphasis added):⁶

[63] There are 11 s274 notices lodged in response to Fish and Game’s appeal. Seven of these oppose the changes sought, primarily on the basis that decisions on water allocation should not be made until after the FMU process has been completed. Of the four remaining parties, three have a general interest in the proceedings and one supports the Objective as giving effect to the NPS-FM and RPS.

[64] In Southland, the only water body confirmed as being over-allocated, ahead of the FMU-based freshwater objective and quality limit process, is the Cromel Stream. This water body is controlled by Rule 49(e) which makes any additional water takes, diversions, or uses of water a prohibited activity. In addition, the pSWLP sets out how water quantity over-allocation is to be addressed through Policy 42(2) which states that:

(2) except for non-consumptive uses, consents replacing an expiring resource consent for an abstraction from an overallocated water body will generally only be granted at a reduced rate, the reduction being proportional to the amount of over-allocation and previous use, using the method set out in Appendix O; and ...

[65] There may be benefit in a change to Policy 42(2) to lessen the discretion currently afforded through the phrase generally only be granted. Given Objective B2 of the NPS-FM requires existing over-allocation to be phased out, the above sentence could benefit from more surety, while still allowing some flexibility should circumstances require it. Fish and Game have appealed Policy 42(2) and have sought relief similar to the above suggestion and that may be a more appropriate place to address this concern.

[66] With respect to water quality, and water quantity where limits have not yet been set, it is my understanding that the NPS-FM sets out a process, in Policies CA1 to CA4, to establish freshwater objectives, limits and targets. This process is prescriptive and is the subject of the Regional

⁶ McCallum-Clark EIC for Southland Regional Council at [63] – [69].

Council's recently updated Progressive Implementation Programme. This programme has commenced but is still some time from developing these freshwater objectives, limits and targets.

[67] The NPS-FM defines overallocation as: "*Over-allocation*" is the situation where the resource:

- (a) has been allocated to users beyond a limit; or
- (b) is being used to a point where a freshwater objective is no longer being met.

[68] Both "limit" and "freshwater objective" are defined in the NPS-FM. As stated above, freshwater objectives have not yet been established, and nor have limits for water quality in the region and water quantity in many locations. Council's legal advice, with which I agree, is that in advance of the FMU freshwater objective, limit and target setting process, it is not possible to ascertain "overallocation", as defined by the NPS-FM.

[69] For practical purposes, it would appear that some waterbodies in Southland are degraded, when this term is used colloquially. By this, I mean that some could be below national bottom lines in terms of the NPS-FM, or below commonly acceptable water quality. In my opinion, other objectives and policies of the pSWLP, such as Objectives 3 and 6, and Policies 15B, 17A, 40 and 42, provide sufficient direction in the interim period such that any resource consent is likely to be granted to maintain, if not improve, the existing situation and is likely to be for a comparably short duration, so that the forthcoming FMU processes are not compromised.

24. So Mr McCallum-Clark's evidence recognises that the key issue on Objective 7 is whether over-allocation can be defined prior to FMU processes.

25. Mr Farrell's evidence for Fish & Game, responding to Mr McCallum-Clark's evidence:

- a) Opines that Objectives 3 and 6 and Policies 15B, 17A, 40 and 42 do not provide sufficient protection in the interim period (prior to FMU processes occurring).⁷
- b) Opines that it is appropriate to amend Objective 7 so that it captures Mr McCallum-Clark's concept of 'practical over-allocation'.⁸

⁷ Farrell EIC at [87] – [90].

⁸ Farrell EIC at [91].

- c) Relies on the evidence of Professor Death, as a way to achieve interim definition of over-allocation.
- d) States that he does not consider the use of the term “over-allocation” inherently problematic prior to FMU processes occurring, however another term could be used, such as exceeding a waterbodies’ “assimilative capacity”.⁹

26. Mr Farrell’s evidence responds to the primary matter at issue for Objective 7, as is also was also understood by Council’s own planning expert.

Summary - position on scope

27. Inclusion in the pSWLP of numeric outcome states for the purpose of determining ‘over-allocation’ prior to FMU processes is a matter within the scope of Fish & Game’s Notice of Appeal (whether these be called ‘interim’ limits/outcomes or otherwise).

Death evidence: Topic A or Topic B?

28. The Court has declined to hear Appendix E (and Policies 15A – C) at the Topic A hearing.¹⁰ Counsel accepts that Appendix E will be a matter that is the subject of Topic B hearing.

29. Counsel for the Council seek that Professor Death’s evidence should be dealt with as follows:

- a) Any description or information related to the current state of environment – Topic A;
- b) Any amendments to Objectives 6 and/or 7 to refer to region-wide numeric outcomes/limits (subject to the issue of scope) – Topic A;
- c) Any amendments to the pSWLP to set out what the numeric outcomes/limits should contain (e.g. the parameters and numbers) – Topic B.

30. Fish & Game has filed Professor Death’s evidence for the Topic A hearing in order to support the following points:

⁹ Farrell EIC at [93].

¹⁰ Environment Court Minute 5 November 2018 at [15].

- a) that it is *possible* to set region-wide freshwater outcomes and/or determine over-allocation at this time according to the compulsory NPSFM value of “ecosystem health”;¹¹ and
- b) if baseline numeric outcomes for MCI, Nitrate-Nitrogen and Dissolve Reactive Phosphorus are set according to the compulsory NPSFM value of “ecosystem health”, a number of the water body classes in the Southland Region are over-allocated by a large percentage.¹²

31. Counsel for the Council appears to accept these are both matters within Topic A.

32. Professor Death’s evidence needs to be read as a whole to support his central conclusion on SOE, set out in Professor Death’s Table 5 (page 34). Indeed, for all of the evidence, including Mr Hodson’s evidence for the Council, SOE conclusions are closely related to the numeric states against which SOE is measured.

33. The difficulty Fish & Game has with Counsel for the Council’s suggested approach is that, when discussing the matters in Topic A, e.g. in conferencing, freshwater ecologists will need to discuss appropriate ‘baselines’ for ecosystem health. To that extent, they will need to discuss ‘numeric outcomes/limits’, for their SOE conclusions. Topic B matters, including importantly Appendix E, will therefore be informed by the Topic A evidence of all freshwater ecologists (including the ‘compulsory bottom line’ evidence of Professor Death). However Fish & Game accepts that any final determination on numeric outcomes/limits for Appendix E will await hearings on Topic B.

Potential prejudice to other parties

34. Counsel for the Council’s Memorandum states:¹³

“Further, some parties who have appealed or are section 274 parties to Policies 15A to C and/or Appendix E may not be involved in the Topic A hearing, and risk not being involved in the discussion on what region-wide

¹¹ Relevant to Objective 7 and Policies 45 and 47.

¹² Particularly ‘lowland hard bed’, ‘lowland soft bed’ and Mataura 3’ reaches: Refer Table 5 of Prof Death’s EIC.

¹³ At [42].

water quality standards/limits should be included in the pSWLP prior to the FMU process and how these may differ from the standards in Appendix E.”

35. Parties listed by Counsel for the Council, with comment, are:

Party	Comment
Transpower New Zealand Limited	Transpower have withdrawn from Topic A following receipt of all parties' EIC and are legally represented. ¹⁴ No prejudice.
Aratiatia Livestock Ltd Alliance Group Ltd	Section 274 parties on Fish & Game's appeal on <i>inter alia</i> Objectives 6, 7 and Policy 45 so are involved in the Topic A hearing on these matters. No prejudice.
Hamish English, Robert Kempthorne, Grant and Rachel Cockburn and Waiau Rivercare Group.	No section 274 interest in Fish & Game's appeal on Objectives 6, 7 or Policy 45 (Topic A). No section 274 interest in Fish & Game's appeal on Policies 15A, 15B, Appendix E (Topic B). Interest in Appendix E relates to section 274 status in support of the appeal by Aratiatia Livestock . This relates to the exemption in instances where a water quality standard is breached as a result of the Manapouri Power Scheme.
Dairy Holdings Ltd	No section 274 interest in Fish & Game's appeal on Objectives 6, 7 or Policy 45 (Topic A). No section 274 interest in Fish & Game's appeal on Policies 15A, 15B, Appendix E (Topic B). Section 274 interest in support of the appeal by Alliance Group on policies 15A and 15B but no

¹⁴ Memorandum of Counsel for Transpower dated 8 March 2019.

	section 274 interest in Appendix E.
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36. A party that has not lodged a section 274 interest in Fish & Game's appeal on Objective 6 & 7 or FMU Policies 45 & 47 cannot now claim to be prejudiced by Fish & Game leading evidence in support of those appeal points.
37. The exemption issue that Hamish English, Robert Kempthorne, Grant and Rachel Cockburn and Waiau Rivercare Group have raised, related to the Manapouri scheme, can be considered at Topic B hearings on Appendix E. That is a relatively isolated matter.
38. From the above, all parties having an appeal or a section 274 interest in the 'big picture' question of whether it is possible to set numeric outcomes for ecosystem health prior to FMU processes, are either involved in Topic A or have had the opportunity to be involved but have withdrawn (Transpower).

Direction sought

39. Fish & Game seeks to rely on the evidence of Professor Death in its entirety at the Topic A hearings, in order to support the following parts of its appeal:
- i) Objectives 6 & 7 and policies 45 & 47; and
 - ii) Evidence on the state of the environment in the Southland Region.
40. Freshwater ecologists should not be constrained from considering numeric outcomes states for "ecosystem health", or for safeguarding life-supporting capacity, as that matter is highly relevant to Topic A issues (acknowledging it will also be relevant to Topic B particularly Appendix E).



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Dated: 20 March 2019

