

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)

**MEMORANDUM OF COUNSEL FOR SOUTHLAND FISH AND GAME
COUNCIL AND THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF
NEW ZEALAND INC REGARDING REGULATIONS AND TIMING
IMPLICATIONS OF APPENDIX N**

18 August 2023

Counsel: Sally Gepp/Shoshona Galbreath
Barristers
3 Brookside
Nelson 7010
sally@sallygepp.co.nz
021 558 241

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. This Memorandum of Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) and Southland Fish and Game Council (“Fish & Game”) addresses the issues discussed at the Judicial Conference on 9 August 2023 in respect of the Resource Management (Freshwater Farm Plans) Regulations 2023 (Regulations), and the matters set out in the Memorandum of Counsel on behalf of the Southland Regional Council dated 18 August 2024 under the heading ‘Regulations and timing implications for Appendix N’.
2. In its Record of Judicial Conference, the Court made the following directions with respect to issues that attach to interfacing the Resource Management (Freshwater Farm Plans) Regulations 2023 and pSWLP Appendix N FEMP provisions:

[2] The parties will collaborate in proposing an approach for dealing with the matters at [1], including an appropriate date for when relevant pSWLP provisions are made operative and related Appendix N amendments. The proposed approach is to be included in the Council’s memorandum to be filed 18 August 2023.

[3] Should a party wish to express a different view from the Council on matters traversed at [2], they are to be recorded in the 18 August 2023 memorandum.

3. Counsel for the Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) and Southland Fish and Game Council (“Fish & Game”) provided its position on these matters to counsel for Southland Regional Council for inclusion in Council’s Memorandum, but in light of the Council’s response and a lack of time to resolve differences of opinion, it became necessary for Forest & Bird and Fish & Game to file a separate Memorandum. Counsel request that the Court accepts this Memorandum on the basis it reflects the “different

view” that would otherwise have been recorded in counsel for the Council’s 18 August 2023 Memorandum.

4. The position of Forest & Bird and Fish & Game is as follows.
5. In considering the issue over the timing of when farm plans need to be in place for each FMU under the pSWLP and under the Regulations, it has become apparent that Council takes a different interpretation to Clause 1 of Appendix N to the interpretation that Forest & Bird and Fish & Game had understood to apply. That different interpretation (addressed further below) was only apparent when counsel reviewed the Council’s draft 18 August 2023 Memorandum. The Council’s interpretation has significant implications for when farm plans must be in place.¹
6. We understand the Council’s interpretation to be that if the pSWLP is made operative after 1 January 2024, the requirement for any farm plan at all to be in place for farms in the Matarua FMU would be delayed beyond 1 January 2026. The effect of this interpretation is further explained below:
 - a. Appendix N Clause [1] provides for two options:²

[1] A Farm Environment Management Plan must be:

¹ The Council’s interpretation was not previously apparent to counsel from the material filed in Court. The evidence of Mr McCallum Clark at paragraph 22 addressed the scenario whereby the six month period following the plan becoming operative expires before the requirement to prepare a freshwater farm plan under the Regulations (for Oreti, Waiau and Matarua FMUs) takes effect. However, the situation we are now considering is if the six-month period expires after the requirement to prepare a farm plan under the Regulations comes into effect. This interpretation was also not appreciated from Mr Maw’s discussion of these points during the Judicial Conference. No criticism of Mr McCallum Clark or Mr Maw is intended.

² As set out in the Court’s 6th Interim Decision at Annexure 6.

(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.

- b. Clause 17 of the Regulations relevantly provides that a farm operator must submit a freshwater farm plan for a farm to a certifier within 18 months of the date specified in the Order in Council specifying the date on which Part 9A of the Act applies to the district, region, or part of New Zealand in which the farm is situated. For Maitara FMU, the date is 1 July 2024 so the Regulations require freshwater farm plans for Maitara FMU to be submitted for certification by 1 January 2026.
- c. If Appendix N and associated rules were made operative by the end of September (for arguments' sake) then for the Maitara FMU a freshwater farm plan under the pSWLP would need to be in place by the end of March 2024 (being the 6 month timeframe for complying with a regional rule³). A further/amended farm plan would then need to be prepared in accordance with the Regulations, with the date for this being submitted for certification being 18 months after the date in the Regulations for the relevant FMU (1 January 2026 in the case of Maitara).
- d. However, if the farm plan provisions are made operative on a date after 1 January 2024, Part 9A of the RMA would start to apply to the Maitara FMU before the 6 month time period

³ Section 20A(2)(c), addressed by counsel for the Council at paragraph 22.

under s 20A expires. On Council's interpretation, this means that based on Appendix N Clause [1](2), which is triggered when farm plans are "required" in the Southland region under the Regulations, the farm plan must be prepared in accordance with the Regulations (plus the additional information required by Part B of the pSWLP) rather than under the pSWLP, and the timing of when the farm plan needs to be in place is governed by the Regulations not s 20A. As set out above, for the Maitua FMU this would mean that the farm plan needs to be submitted for certification within 18 months i.e. by 1 January 2026.⁴ The requirement for a farm plan to be in place within 6 months of the pSWLP becoming operative would no longer apply, so no farm plan would be required to be submitted for certification until 1 January 2026.

7. This interpretation of the effect of Appendix N is set out at counsel for the Council's Memorandum at [16]:

[16] ... Once the Regulations apply in a particular FMU, the relevant rules in the pSWLP that require the preparation of a FEMP must be read in the light of the requirement in Appendix N 1, namely that the FEMP must be prepared, implemented and audited in accordance with Regulations (i.e., in accordance with the 18-month certification window).

8. Counsel for the Council presents this as a positive outcome in that it avoids any duplication arising from making the pSWLP operative and the introduction of the Regulations and means farmers are only required to prepare one farm plan that complies with the requirements of both the Regulations and Appendix N. However, this delay until 1 January 2026 for a plan to be submitted for certification

⁴ In accordance with clauses 19 – 26 of the Regulations, it could then be expected to be in place about 6 weeks after that, although extensions of time are provided for.

is of significant concern to Forest & Bird and Fish & Game, particularly as the Mataura FMU includes the Waituna catchment.

9. A similar issue arises on Council's interpretation with respect to the Oreti and Waiau FMUs; that is, farm plans do not need to be submitted for certification until 1 August 2025 despite the pSWLP provisions becoming operative.
10. Counsel for Forest & Bird and Fish & Game do not agree with the interpretation that the Appendix N requirement for a farm plan under the pSWLP (and the associated deadline under s 20A) is superseded by the 18 month timeframe for preparation of a farm plan under the Regulations as soon as Part 9A of the Act applies in the particular FMU.⁵ Rather, they interpret Clauses 1 and (2) of Appendix N as requiring that farm plans are prepared under the pSWLP (within 6 months of it becoming operative) unless a farm plan is required to be in place under the Regulations. Put simply, that unless a farmer has a farm plan in place under the Regulations, the farmer needs to prepare a farm plan under the pSWLP within 6 months of the pSWLP provisions becoming operative. It is submitted that interpretation is the natural and ordinary meaning of clause [1](2) of Appendix N.
11. Further, counsel submits that interpretation is supported by the purpose of the provisions. In introducing clause [1](2), it cannot have been intended that the provision would delay the requirement for farm plans to be submitted for certification by 18 months.
12. If the Court accepts that Council's interpretation is not the intended outcome, Forest & Bird and Fish & Game submit that there are two possible approaches to address this issue:

⁵ Resource Management (Application of Part 9A—Freshwater Farm Plans) Order 2023

- a. Firstly, it is open to the Court to make a finding on the correct interpretation of Clause [1] of Appendix N in the context of approving its provisions.
- b. Alternatively, if the Court considers there is ambiguity in Clause [1], this can be resolved by adjusting the wording as follows:

[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 to be in place in the relevant FMU within the Southland region, a Farm Environmental Management Plan will be prepared and implemented in accordance with Parts A to C below.*

- 13. In either case, this would mean that if the pSWLP is made operative on 1 January 2024 then farmers will have six months to prepare and have certified their Appendix N FEMP (as Freshwater Farm Plans under Part 9A of the RMA farm plans will not be required to be in place at that time). Farmers could elect to address any additional requirements of the Regulations early, at the same time as they prepare a farm plan under Appendix N, or to produce a subsequent farm plan under the Regulations by the due date.
- 14. If the Court considers it appropriate, it may wish to hear from other parties on the options in paragraph 12.

15. Should the Court determine that neither option is appropriate, Forest & Bird and Fish & Game consider that the pSWLP provisions should be made operative as soon as practicable (including in parts as necessary) so that the delay to 1 January 2026 for Maitara FMU farm plans cannot arise. The reasons given by Ngā Rūnanga in this regard are supported.
16. Due to time constraints, counsel has not liaised with other parties with respect to the options at paragraph 12 (other than by providing draft text to the Council for inclusion in its Memorandum) but if it would assist the Court counsel would be happy to liaise and provide a further Memorandum.



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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: 18 August 2023