

**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)

(Continued next page)

**MEMORANDUM OF COUNSEL FOR THE SOUTHLAND REGIONAL
COUNCIL**

7 March 2023

Judicial Officer: Judge Borthwick

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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, 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 is filed on behalf of the Southland Regional Council (**Council**) regarding the appeals on the proposed Southland Water and Land Plan (**pSWLP**).
- 2 This memorandum responds to the directions issued at the pre-hearing conference on 1 March 2023 and recorded in the Record of Pre-Hearing Conference dated 3 March 2023.

Appendix N sense check

- 3 Enclosed with this Memorandum is a brief for the sense check of Appendix N (see **Attachment 1** below).’ The parties have conferred regarding the content of the brief.
- 4 No further directions regarding the sense check are sought at this time. The parties understand that the sense check process will be facilitated and the Council will provide a scribe.
- 5 A meeting between the participants, Mr McCallum-Clark, and the facilitator will be convened remotely, before the sense check process occurs in-person at a later date to be determined.
- 6 The parties also understand that the sense check process is to be completed within six weeks of the pre-hearing conference, being **Wednesday, 12 April 2023**, and that a Joint Witness Statement is to be filed the week thereafter, being **Wednesday, 19 April 2023**.
- 7 Counsel will inform the participants that the Joint Witness Statement is evidence before the Court and that the participants are to attend court at the resumed hearing to answer questions on the Joint Witness Statement (on or after 24 April 2023).

Rule 25

- 8 No party has opposed the Court’s amendment to Rule 25(a) to make clear that a FEMP is to be prepared. On that basis, the Court directed the Council to identify scope for the Court’s suggested amendment.
- 9 Scope for the Court’s version of Rule 25(a)(vi) can be found in the appeal by Southland Fish and Game Council (**Fish & Game**) and as a consequence of the changes to the Objectives made through Topic A.

Fish & Game's appeal sought various amendments to Appendix N, including the addition of:

- (a) a requirement to produce an assessment of adverse environmental effects and risks associated with the farming activities on the property and how the identified effects and risks will be managed including for cultivation;¹
- (b) an objective which requires the avoidance or minimisation of nutrient and sediment losses from farming activities to ground and surface water to maintain or improve water quality;² and
- (c) an objective which requires the management of waterways (including ephemeral or intermittent waterways), wetlands and their margins to avoid stock damage and avoid or minimise inputs of nutrients, sediment and faecal contaminants to ground and surface water to maintain or improve water quality.³

10 These amendments all seek to introduce additional safeguards around the loss of sediment and nutrients from farming activities, particularly to waterways. Counsel considers that it is within scope for these changes to follow through into Rule 25, to ensure that the intent of those changes is achieved through the rule framework.

11 Further, the Court's decision on Topic A made it clear that the pSWLP embodies ki uta ki tai and upholds Te Mana o Te Wai. The changes proposed to the pSWLP through Topic B aim to do this, in part, by significantly strengthening the FEMP requirements. It follows that, in order to achieve Objectives 1 and 2, Rule 25 must be strengthened to require compliance with a FEMP.

Rule 51

12 The Director-General of Conservation does not consider the Court's proposed amendment to Rule 51(e) is necessary (i.e., the reference to Rule 51(b) in Rule 51(e)). Meridian Energy Limited, Fish & Game, and Royal Forest and Bird Protection Society Incorporated similarly agree with the Director-General of Conservation.

¹ Notice of Appeal – Southland Fish and Game Council, at p 50.

² Notice of Appeal – Southland Fish and Game Council, at p 51.

³ Notice of Appeal – Southland Fish and Game Council, at p 51.

- 13 The Court has directed any party that initially supported the proposed amendment to the rule to advise whether they continue to do so. The Council supports the positions articulated by counsel for the Director-General of Conservation and Meridian Energy Limited and acknowledges that it is not necessary to exclude Rule 51(b) from Rule 51(e), given the reference in subclause (iii) to exclude any natural wetland. On this basis, the Council supports an amendment to Rule 51(e) so that it reads, "Notwithstanding Rule 51(d), the diversion of water...".

Sacrifice Paddocks

- 14 In the Memoranda dated 9 February 2023 and 27 February 2023, the Council addressed various suggested amendments with respect to sacrifice paddocks and the use of the term in Appendix N.
- 15 For completeness, the Memorandum of Counsel dated 9 February 2023 addressed the Council's position with respect to clause 13(d), as follows:⁴

With respect to the FEMP, the Council considers that overall, the Winter Grazing Plan provisions appear helpful to manage the effects of sacrifice paddocks. Clause 13(d) is applicable to Intensive Winter Grazing, and possibly pasture-based wintering, but is not appropriate to apply to sacrifice paddocks, especially in respect of deer. Merging clause 13(d) with clause 13(e), may resolve this. Sacrifice paddocks could potentially be included in clause 13(h), to be treated the same as Intensive Winter Grazing, and possibly pasture-based wintering activities.

- 16 In the Memorandum of Counsel dated 27 February 2023, the Council advised that the FEMP should address all high-risk activities, given the permitted activity rule framework in the pSWLP for farming activities, and that this should include sheep on the equivalent of 'sacrifice paddocks' or when they are managed in a similar way as to intensive winter grazing or pasture based wintering activities. The winter grazing plan specifically addresses stock other than cattle and deer, through item (c) at [12] of Appendix N, where the list of activities that require a winter grazing plan are identified:

⁴ At [38].

(c) *for stock other than cattle, where pasture is to provide less than 50% of the animal's diet and supplementary feed will be offered on the paddock; ...*

- 17 In addition, [13(b)(i)] of Appendix N requires the winter grazing plan to identify any critical source areas and how stock (i.e., not just cattle or deer) are to be excluded from those areas.
- 18 [13(b)(ii)] of Appendix N requires the identification of any water bodies and features from which stock must be setback and excluded, explaining how this will be done. Clarification regarding setbacks or a specific requirement for exclusion of sheep from water bodies could be added to [13(g)(ii)] of Appendix N, but is not recommended. A specific setback distance was not preferred as the FEMP is intended to give some flexibility as to the ultimate response. On that basis, no specific amendments were proposed to the pSWLP on this topic.
- 19 At the pre-hearing conference, the Court directed the Council to clarify its thinking on the Court's proposed amendment to clause 13(d), as follows:
- excluding sacrifice paddocks, confirm how the following practices are to be implemented:
- (i) downslope grazing or a 20m 'last-bite' vegetated strip at the base of the slope; and
- (ii) back fencing to prevent stock entering previously grazed areas.
- 20 The Court's proposed amendment is sensible and the Council supports the addition. It is the Council's understanding that sacrifice paddocks are generally not 'break fed', and therefore the last bite and back fencing elements of this provision should not be required for sacrifice paddocks.
- 21 The Court also directed the Council to indicate whether the FEMP's winter grazing plan provisions at clause 13 should include a sacrifice paddock provision requiring the identification of paddocks to be resown after grazing, and when this is to occur, weather permitting.
- 22 Council supports the addition of sacrifice paddocks to clause 13(e), as the evidence would suggest resowing after use is generally required. However, the Council notes that Rule 35A, in relation to sacrifice

paddocks, requires any resowing to be undertaken as soon as practicable in any event.

- 23 Suggested wording to include sacrifice paddocks in this clause in Appendix N is:

(e) for intensive winter grazing and sacrifice paddocks, (~~to~~) identify paddocks to be resown after grazing and the date by which this is to occur, weather permitting.

Amendments proposed to Appendix N by Federated Farmers

- 24 At the outset, we note that the Council does not have a strong view as to whether the winter grazing plan should address sheep more widely than when they are being intensively winter grazed.
- 25 However, the Council has considered the amendments proposed to Appendix N by Federated Farmers in the Memorandum of Counsel dated 16 February 2023.
- 26 The Council's position is that it agrees with some aspects of the amendments proposed by Federated Farmers, but disagrees with others.
- 27 The Council agrees that mapping in a more general manner may be appropriate given the rotation of those activities across farm.
- 28 The Council considers there may be uncertainty in the interpretation of the phrase "land to be actively farmed", proposed by Federated Farmers to replace Clause 7(h). While the Council acknowledges the intent behind the drafting, being to ensure that the activities rotated around the farm are mapped annually without requiring the FEMP map to be updated annually, the Council does not consider the wording proposed sufficiently addresses that intent. This is an issue that both the Council and Federated Farmers consider could usefully be explored through the sense check.
- 29 The Council agrees with the deletion of references to "of cattle" in 13(f) and "(including cattle)" in 13)(h) and also considers "of cattle" should be deleted from 12(c). Council notes that the words are used in the heading of Rule 20B, but also notes that the definition of pasture-based wintering is limited to cattle, so the inclusion of the words in these clauses is redundant and possibly confusing.

- 30 The definition of sacrifice paddock is similarly limited to cattle and deer in this definition. Therefore, the Federated Farmers suggestion to delete clauses 12(c) and 13(g) would have the effect of removing any consideration of sheep, except when being intensively winter grazed.⁵
- 31 The Council's preference is for sheep on the equivalent of 'sacrifice paddocks' to be included in a winter grazing plan, noting that [12(c)] of Appendix N extends beyond the equivalent of sheep on 'sacrifice paddocks' to capture a wider range of activities. Given the exclusion of sheep from the definition of 'sacrifice paddock', that term cannot be used with an expectation that sheep will be addressed. Therefore, the Council's preference is to retain clauses 12(c) and 13(g).
- 32 Finally, the Council does not support the alternative wording proposed by Federated Farmers for clause 13(g) on the basis that this would not capture sheep, given the definition of sacrifice paddock, and the explicit reference to sacrifice paddocks in clause 13(g).
- 33 Further guidance as to whether the Court intended [12(c)] of Appendix N to be limited to capturing sheep on 'sacrifice paddocks' would be beneficial. This will then inform the sense check process with respect to Appendix N.

DATED this 7th day of March 2023



.....
P A C Maw / I F Edwards
 Counsel for the Southland Regional Council

⁵ Clauses 13(a), (b), (c) and (d), as well as 13(g) would not apply to stock other than cattle.

Appendix N – Sense Check

Participants:

- Hemi Bedggood
- Arron Hutton
- Cain Duncan
- Bernadette Hunt
- Sean Wilkins

Mr McCallum-Clark is also available to attend the sense check as a professional resource to explain factual plan and RMA context matters (as opposed to contributing on the merits).⁶

Purpose:

Southland's freshwater quality is degraded in many places, and where degraded it requires improvement. Where not degraded, water quality must be at least maintained. FEMP prepared in accordance with Appendix N are an important method to improve degraded water quality and maintain other water quality. As set out in the Court's fifth Interim Decision, the purpose of the sense check exercise is not to walk back the Court's interim decision determinations, but to review their practical suitability for application in the field and recommend any changes accordingly.⁷

With this purpose in mind, the following questions have been prepared for the participants to consider:

1. Are there any phrases used in Appendix N that are unclear, open to interpretation, or require local specific context to understand?
2. Is it sufficiently clear what information is required to be compiled in the FEMP at paragraphs [6] and [7] of Appendix N? Is this information able to be readily collated by farmers?
3. Is the content in paragraph [8] of Appendix N regarding nutrient budgets / nutrient loss risk assessments able to be readily understood and readily applied?

⁶ *Aratiatia Livestock Limited v Southland Regional Council* [2022] NZEnvC 265 at [485(d)].

⁷ *Aratiatia Livestock Limited v Southland Regional Council* [2022] NZEnvC 265 at [486].

4. Is the content in paragraphs [9], [10] and [11] of Appendix N regarding the objectives of the FEMP able to be readily understood?
5. Is the content of the winter grazing plan in Appendix N able to be readily understood and readily applied?
6. Is it possible to collate, record and identify all necessary information required by the winter grazing plan?
7. Is it sufficiently clear what additional information will be required for industry-prepared FEMP templates and guidance material to comply with the requirements of Appendix N?
8. Is the certification and auditing process set out in Part C of Appendix N sufficiently clear?

Attachments:

- Schedule X Maps