

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

**Decision No. [2023] NZEnvC 84**

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First  
Schedule of the Act

BETWEEN ARATIATIA LIVESTOCK  
LIMITED

(ENV-2018-CHC-29)

(and all other appellants listed in the  
Schedule attached)

Appellants

AND SOUTHLAND REGIONAL  
COUNCIL

Respondent

Court: Environment Judge J E Borthwick sitting alone under s 279  
of the Act

Hearing: in Chambers on the papers

Last case event: Application for partial stay of proceedings dated 2 May  
2023

Date of Decision: 9 May 2023

Date of Issue: 9 May 2023

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**DECISION OF THE ENVIRONMENT COURT  
ON APPLICATION TO RECALL SIXTH INTERIM DECISION AND  
ON APPLICATION TO STAY PROCEEDINGS**

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## REASONS

### Introduction

[1] On 23 March 2023, the court issued its Sixth Interim Decision concerning appeals against the Regional Council's decisions on pSWLP.<sup>1</sup>

[2] An issue was raised at the April 2023 pre-hearing conference whether the court's Sixth Interim Decision approved a different activity status for Rule 78 or only for those sub-clauses of Rule 78 that were the subject matter of evidence. The court summarised its findings concerning Rule 78 in its Minute dated 18 April 2023, in which we accepted that the decision on this matter is not clear and gave parties an opportunity to apply to recall the Sixth Interim Decision.

[3] The Regional Council has applied to recall all parts of the Sixth Interim Decision relating to Rule 78, including paragraphs [268]-[295].<sup>2</sup> Federated Farmers supports the Council's application for partial recall of the decision. No party opposed the application for recall.

[4] Following the pre-hearing conference, Federated Farmers appealed the court's decision on grounds concerning scope of the appeals on Rule 78. Federated Farmers also applied for a partial stay of these proceedings pending determination of:<sup>3</sup>

- (a) Federated Farmers' appeal to the High Court against the Sixth Interim Decision; and
- (b) the application by the Regional Council to recall parts of the Sixth Interim Decision of the Environment Court filed on 28 April 2023.

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<sup>1</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 051.

<sup>2</sup> Memorandum of counsel for the Southland Regional Council seeking recall of Sixth Interim Decision, dated 28 April 2023.

<sup>3</sup> Application to stay part of proceeding pending determination of appeal in the High Court and application to recall, dated 2 May 2023.

[5] Federated Farmers' application relates only to appeals on Rule 78, noting that the Environment Court is currently hearing other aspects of appeals against the Regional Council's decision on the pSWLP. In a memorandum accompanying its application, Federated Farmers indicated its appeal to the High Court would be withdrawn if the Environment Court were to partially recall its decision.

### **Application to recall part of the Sixth Interim Decision**

[6] Section 278 RMA provides the Environment Court (and its judges) with the same powers as the District Court. In this case, Rule 11.9 of the District Court Rules 2014 provides that a judge may recall a judgment given orally or in writing at any time before formal record of it is drawn up and sealed.

[7] In *Lai v Auckland Council*, the court addressed the wording of Rule 11.9 of the District Court Rules and the issue of sealing a decision. The court held that the Environment Court procedures for sealing are different from those which apply in the District or High Court, and concluded that the sealing of the report does not create an impediment to the application for recall.<sup>4</sup>

[8] The Regional Council relies on the third category for recall in *Horowhenua County v Nash (No 2)*, that "for some other very special reason justice requires that the judgment be recalled".<sup>5</sup>

[9] The Regional Council is not seeking to relitigate Rule 78, but seeks resolution of the confusion and considers that a partial recall is in the best interests of justice in the circumstances. It says any resulting clarification would be of benefit to all parties involved and would result in a more efficient use of all parties' time and resources.<sup>6</sup>

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<sup>4</sup> *Lai v Auckland Council* [2011] NZEnvC 308.

<sup>5</sup> *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.

<sup>6</sup> Memorandum of counsel for the Southland Regional Council seeking recall of Sixth Interim Decision, dated 28 April 2023 at [15]-[16].

[10] It is unclear in the court's decision whether the Court approved a different activity status for Rule 78 or only for those sub-clauses of Rule 78 that were the subject matter of evidence. I consider that the parts of the decision concerning Rule 78 can be excised without affecting the remainder of the decision. As the proceeding on other aspects of appeals against the pSWLP is ongoing, there is still the opportunity for the relevant scope of the appeals to be revisited and indeed facilitated conferencing on this topic was directed at the pre-hearing conference held on 13 April 2023,<sup>7</sup> and subsequently confirmed in the Minute dated 18 April 2023.<sup>8</sup> The topic of Rule 78 (and its related policy, Policy 30) were set down for hearing in the week commencing 29 May 2023.

[11] I consider in this case that the interests of justice dictate this aspect of the decision be recalled.

### **Federated Farmers' application to stay proceedings**

[12] Federated Farmers' application to stay proceedings also applies to those parts of the decision concerning Rule 78. As noted above, the application concerns Federated Farmers' appeal to the High Court and the Regional Council's application to recall part of the Sixth Interim Decision.

[13] In its grounds supporting the stay application, Federated Farmers submits the proceeding should be stayed until there is a determination by the High Court, if the decision is not recalled, or, if it is recalled, then a decision on the scope of the appeals on Rule 78 by the Environment Court.

[14] Presumably, if the stay is granted, the court would cancel the directions made on 13 April 2023 and subsequently confirmed in the Minute dated 18 April 2023. Further, as the stay would impact the sense check on Appendix N: FEMP

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<sup>7</sup> See Registry email to parties dated 14 April 2023 confirming those directions.

<sup>8</sup> Minute 'Recall of Sixth Interim Decision' dated 18 April 2023.

scheduled for hearing on 29 May 2023,<sup>9</sup> the court would need to turn its mind to whether the sense check hearing should proceed as scheduled. Leaving only the scope arguments would be heard on that date.

[15] Given that the experts have been engaging on Rule 78 over the past three weeks, expert conferencing on the rule has been scheduled for Monday 15 and Thursday 18 May 2023 and given also the costs and expenses incurred to date, I am presently not minded to grant the application to stay.

[16] However, before deciding the matter I will direct any party opposing the application to give notice succinctly but comprehensively setting out the grounds for opposition. As Federated Farmers wishes to be heard in relation to its application, the matter will be set down for an **urgent** hearing (AVL).

#### **Outcome – application for recall**

[17] The Regional Council's application to recall that part of the Sixth Interim decision relating to Rule 78 (including paragraphs [268]-[295]) is granted. I confirm again, parties are to address these issues at the May 2023 hearing:

- (a) is there scope for a different activity status in relation to Rule 78?
- (b) is there scope for a new rule to be included in the plan limited to the sub-clauses under appeal? The status of a new rule is something other than a permitted activity;
- (c) if there is no scope in relation to activity status *per se*, then whether the court allows or declines the appeals seeking new or amended sub-clauses to Rule 78.

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<sup>9</sup> Policy 30 and Rule 78 are to be referred to the participants on the sense check as directed at the pre-hearing conference held on 13 April 2023.

**Directions – application to stay proceedings**

[18] Any party opposing Federated Farmers’ application to stay proceedings is to give notice by **1 pm Thursday 11 May 2023** as directed above.

[19] Federated Farmers’ application for stay is set down for an **urgent** hearing. Counsel for Federated Farmers and any opposing party are directed to attend. If unavailable, counsel will brief alternate counsel to attend on their behalf. A notice of hearing will shortly issue.

Jane S.



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**J E Borthwick**  
**Environment Judge**

### Schedule – List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-27	Fonterra Co-operative Group Limited
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co Limited
ENV-2018-CHC-31	Gore District Council & others
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand (Southland Province) Inc
ENV-2018-CHC-44	Wilkins Farming Co Limited (previously Campbell's Block Limited)
ENV-2018-CHC-45	Wilkins Farming Co Limited (previously Robert Grant)
ENV-2018-CHC-46	Southwood Export Limited & Others
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated