

Joint Witness Statement – Planning

Topic: Proposed Southland Water and Land Plan – Policy 30 and Rule 78

Date of conference: 15, 18, 23 May 2023

Time: 10am on 15 and 18 May and 2pm on 23 May

Venue: Remote AVL

Facilitator: Commissioner Mabin

Attendees

Name	Employed or engaged by	Signature
Matthew McCallum-Clark ¹	SRC	
Sue Ruston	Federated Farmers	
Linda Kirk	Director-General Conservation	
Ben Farrell ²	Fish and Game / Forest and Bird	
Treena Davidson	Ngā Rūnanga	

Environment Court Practice Note

- 1 All participants confirm that they have read the Environment Court Practice Note 2023 and in particular Section 9 (Code of Conduct, Duty to the Court and Evidence of an expert witness) and agree to abide by it.

Experts' qualifications and experience

- 2 The qualifications of the experts are set out in their respective statements of evidence.

Key information sources relied on

¹ Was not present on 18 May 2022

² Was not present on 15 May 2023

3 The participants relied upon:

- pSWLP Environment Court Interim Decisions, particularly the 6th Interim Decision (excluding recalled parts (paragraphs [268-295 inclusive])
- Maps of non-diadromous galaxias habitat in evidence in chief of Linda Kirk (dated 20 December 2021)
- Freshwater Ecology JWS (dated 1 December 2021), including the referenced memo from Dr Michael Greer (dated 23 April 2021)
- JWS – Ecology and Cultural Values (dated 15 May 2023)
- The General Planning Principles of rule drafting are applied (from Quality Planning Website: Writing Effective and Enforceable Rules | Quality Planning)
- Southland Flood Control and Drainage Management Bylaw 2020 (Flood Control Management Bylaw - Environment Southland (es.govt.nz))³
- NPSFM 2020
- Memorandum of Counsel for Ngā Rūnanga regarding Cultural Indicators of Health, 29 November 2019.
- Evidence in chief of Ms Funnell for the Director-General of Conservation (dated 20 December 2021), including Attachment 1 memo from Dr Dunn (dated 18 June 2021)
- Other evidence before the Court in relation to this topic, including previous evidence of the participating planners (excluding Ms Ruston), Mr Burrell, Dr Kitson, Ms Funnell, Ms McArthur, Ms Cain
- Memorandum of Counsel for SRC (dated 10 April 2022) – Appendix 1: plan provision linkage document: App 1 10 April 2022.pdf (es.govt.nz) (note done pre-Sixth Interim Decision)

Questions for consideration

4 Are there any drafting improvements that could be made to the Rule 78 to:

- (a) strengthen the protection of ecological and cultural values identified by the Court in its Sixth Interim Decision (excluding paragraphs 268 – 295 that have been recalled) within the scope of the appeals on the rule; and/or

5 *[MMC, LK, BF, TD] The rule could be strengthened by the inclusion of the additional clauses included within the version of the rule as recorded at*

³ Except BF notes that he is not familiar with this bylaw

para 255 of the 6th Interim Decision. If it is within the scope of the appeals, the rule could be further strengthened by requiring implementation of best-practice requirements through Farm Environmental Management Plans or a management plan approach for watercourses managed by a public entity. However, these changes are unlikely to be sufficient to resolve the fundamental challenges of the rule, as identified in the Ecology JWS.

6 *[SR] Considers the rule can be strengthened – see Appendix 1.*

(b) improve the operation, implementation and/or workability of the permitted activity rule.

7 *[MMC, LK, TD, BF] No. However, it is acknowledged that some permitted activity conditions lack certainty and drafting could be improved. No appeals have sought these changes.*

8 *[SR] Considers the operation, implementation and/or workability of the permitted activity rule can be improved – see Appendix 1.*

9 MMC, LK, BF, TD have not been given an opportunity to review or comment on the content of Appendix 1, as it was provided one hour before this JWS was due to be filed.

10 Notwithstanding any scope issues that may arise, in the event there is a consensus that the permitted activity rule cannot be satisfactorily amended, participants may discuss a consenting regime in the alternative.

11 *While the planners did not agree that the permitted activity rule could be amended, they discussed what a 'consenting regime' could look like. This approach is attached as Appendix 2. The output of that discussion is a three-tiered rule:*

- (a) *A permitted activity for modified watercourse maintenance that is undertaken with hand-tools (or 'non mechanical methods') in the rule;*
- (b) *A restricted discretionary activity for modified watercourse maintenance that is undertaken with machinery, and is subject to an ecological management plan; and*
- (c) *A discretionary activity for modified watercourse maintenance that is unable to meet the conditions of (a) or (b). –*

- 12 *A question arose for the ecologists in relation to impacts of non-mechanical equipment on threatened and taonga species - do the impacts of digging by hand for example, adversely affect the habitat of threatened and/or taonga species? Should such species be excluded from a permitted activity rule?*
- 13 *While the planners were unable to agree on what is the most appropriate rule framework, they consider there are three options before the Court:*
1. *The existing Rule 78, as set out at paragraph [255] of the 6th Interim Decision;*
 2. *A permitted activity rule framework such as the example prepared by Ms Ruston attached as Appendix 1; and*
 3. *The 'consenting regime', for example as attached as Appendix 2.*
- 14 *Given that no agreed rule regime has been arrived at, the planners were not able to prepare an agreed s32AA statement. However, the planners did note that there are a range of costs and benefits associated with each of the options, and have summarised these in Appendix 3.*

Appendix 1 – Please refer to separate attachment

Appendix 2 – Consenting Regime

a) The removal of aquatic weeds and plants and sediment from any modified watercourse **undertaken without mechanical equipment** for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, is a **permitted activity**, provided the following conditions are met:

- (i) general conditions (a), (b), and (l) set out in Rule 55A; and
- (ii) the removal of river bed material other than aquatic weeds, plants, mud or silt is avoided.

b) The removal of aquatic weeds and plants and sediment from any modified watercourse(s) **undertaken with mechanical equipment** for the purpose(s) of maintaining or restoring drainage outfall(s), and any associated bed disturbance(s) and discharge(s) resulting from carrying out the activity, is a **restricted discretionary activity** provided the following conditions are met:

- (i) general conditions (a), (b), (e), (f), (g), (h) and (l) set out in Rule 55A; and
- (ii) the application for resource consent includes an Ecological Management Plan, that includes:
 - (1) an objective of avoiding, where reasonably practicable, or otherwise minimising residual adverse environmental effects on threatened or at-risk aquatic biota, taonga species, mahinga kai and including where located in Ngā Rūnanga Statutory Acknowledgement Areas;
 - (2) identification of risks of the maintenance activity, including on the habitats of threatened and taonga species, and how the activity will be carried out to achieve the objective of the management plan; and
 - (3) identification of how in-stream and riparian habitat values will not be diminished, and where practicable will be improved, over the long term.

The Southland Regional Council will restrict its discretion to the following matters:

1. The content of the Ecological Management Plan submitted with the application;
2. The benefits of maintaining drainage capacity;
3. The timing and methods to be adopted, and personnel deployed to undertake the work;
4. The adverse effects of the activity on aquatic environments, riparian habitat, the spiritual and cultural values and beliefs of the tangata whenua, threatened species, taonga species, and natural character; and
5. The extent to which in-stream and riparian habitat values will be improved.

c) The removal of aquatic weeds and plants and sediment from any modified watercourse for the purpose of maintaining or restoring drainage outfall, and any associated bed disturbance and discharge resulting from carrying out the activity, that is not authorised by Rule 78(a) or Rule 78(b) is a **discretionary activity**.

Commented [MMC1]: Deleted from earlier draft:
 (ii) the activity is undertaken solely to maintain or restore the drainage capacity of a modified watercourse that has previously been modified or maintained for drainage maintenance or restoration purposes at that location;
 (iii) the activity is restricted to the removal of aquatic weeds and plants or sediment deposits, provided that at least 95% of the sediment removed shall have a grain size of less than 2mm;
 (iv) the removal of river bed material other than aquatic weeds, plants, mud or silt is avoided as far as practicable;
 (v) any incidental bed disturbance(s) is only to the extent necessary to undertake the activity and must not result in lowering of the bed below previously modified levels;
 (vi) upon completion of the activity, fish passage is not impeded as a result of the activity;
 (vii) the operator(s) take(s) all reasonable steps to return any fish captured or stranded by the activity to water immediately preferably to a location upstream of the activity;
 (viii) between the beginning of June and the end of October, there is no disturbance of the spawning habitat of trout; and
 (ix) where the modified watercourse is spring-fed, removal of aquatic weeds and plants is only to the extent that is necessary to undertake the activity and is kept to the absolute minimum; and

Commented [MMC2]: Deleted from earlier draft:
 (1) information gained from site investigations and any published sources on the diversity and abundance of threatened and at-risk aquatic species, taonga species and mahinga kai present in the modified watercourse;
 (2) information gained from site investigations and any reliable published sources on bed materials, and any other relevant aspects of the natural environment where the work is proposed to be done. For instance, the presence of adjacent wetlands and the ecological status of riparian vegetation;
 (3) the flood conveyance and land drainage outcomes to be achieved with reference to the watercourse's historically modified dimensions (level, bed depth and width) and extent and nature of material(s) proposed to be removed;
 (4) timing (to avoid impacts on spawning and juvenile recruitment life stages of aquatic species) and methods to be adopted, and personnel deployed to undertake the work in a manner that achieves the management plan objective.

Commented [MMC3]: Suggested by MMC to replace 2-5. LK, TD support. Support in principle BF

Commented [MMC4]: BF, LK seeks this, SR seeks deletion. MMC, TD ambivalent.

Commented [LK5R4]: SR seeks deletion because it will be covered in the ecological management plan and it is not clear what is not meant by personnel deployed

Appendix 3 – Costs and benefits of each option

Option 1 Existing paragraph 255 permitted activity rule

Benefits:

- Reduces consenting burden for landowners and managers, and processing burden for Council
- Potentially lower compliance costs
- Improvement over status quo
- Greater protection of significant areas of the network, through consent requirements where non-diadromous galaxias have been found.

Costs

- As outlined in Ecology and Cultural JWS – poor ecological and cultural practices largely continue.
- Uncertainties in drafting of permitted activity conditions raise compliance/enforcement risk.

Option 2 Permitted activity under a Farm Environment Plan to regulate process

Benefits:

- Reduces consenting burden for farmers, and processing burden for Council
- Utilises FEMP framework and processes
- Potentially lower compliance costs
- More likely that waterways will be seen as a holistic part of the farming operation.
- Potentially reduces extent and frequency of the activity occurring on farms

Costs

- Risk that those who prepare the farm plan have limited capability of those who to identify that the best practices required for that site and in particular any taonga species present
- Limited ability of auditors to assess work has been done appropriately and to prescribed best practice.
- The risk to species and their habitat of auditing timeframes (for example every 3 – 5 years) not being able to pick up any damage done.

Commented [LK6]: SR and LK - do not agree as activity is currently permitted

Commented [BF7]: BF does not agree overall compliance costs will necessarily be reduced, on the basis that there are monitoring and compliance costs associated with permitted activities. Lower compliance costs can be expected if ES does not undertake or require monitoring of, or compliance with, the permitted activity standards.

Commented [LK8]: LK and SR Rework as - Risk that those who prepare, certify and audit FEMPs have limited expertise in aquatic ecology
SR notes - the limited ecological expertise available for preparing, certifying and auditing the FEMP equally applies to option 3 (the consenting regime) in terms of preparing and processing consents and enforcing compliance of the consents.

Commented [LK9]: SR notes the example of the strengthened PA rule requires that SRC are advised of the works prior to the works commencing. This provides SRC with the option of assessing compliance with the rule and the associated FEMPS.

- The current FEMP process does not provide for Rūnanga input into the development of individual FEMP or the auditing process of the FEMP .
- Very reliant on taonga species and their habitat being known and recorded for particular sites and / or landowner honestly identifying these species as being present.
- Risks of poor performance borne by the environment.
- Uncertainty where property is under 20ha with a significant part of a waterway being within the property.
- Does not provide for waterways managed by councils or other authorities.
- Costs associated with preparing and certifying FEMPs

Commented [LK10]: SR notes that this costs applies equally to Option 3 (the consenting regime)

Commented [LK11]: SR notes that this cost applies equally to Option 3 (the consenting regime)

Commented [LK12]: SR notes that this cost applies equally to the development of ecological management plans under Option 3

Option 3 Consenting Regime

Benefits

- Encourages groups to gain global consents for connected waterways.
- Provides ability for ecological protections to be applied through consents
- Can provide for Rūnanga input through resource consent process
- More secure management options available through a consented management plan

Commented [LK13]: SR is unclear what is meant by this bullet - FEMPS are certified and audited and compliance would be a requirement of the PA rule LK - unclear on what "secure" means

Costs

- Assumed lack of capacity for site-specific ecological assessments. Greater efficiency for this could be achieved through coordinated area-wide assessments.
- Assumed potential for degradation of drainage system, leading to potential for increased flooding events, community risk and reduce productivity
- Significantly greater costs to obtain consents and approvals.
- There is a risk that people will switch to greater use of herbicides

Commented [LK14]: SR considers that area-wide assessments would be beneficial to the FEMPS process.

Commented [LK15]: Noting that Rule 9 does provide for discharge of agricultural chemicals onto or into surface water as a permitted activity, and if doesn't meet, then rule 4 would apply - becomes a discretionary activity