BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2020] NZEnvC 110

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14 of the First Schedule of the Act
BETWEEN	ARATIATIA LIVESTOCK LIMITED
	(ENV-2018-CHC-029)
	... (continued on last page)
	Appellants
AND	SOUTHLAND REGIONAL COUNCIL
	Respondent

Court:	Environment Judge J E Borthwick Environment Commissioner R M Bartlett Environment Commissioner S G Paine
Hearing:	In Chambers at Christchurch
Date of Decision:	23 July 2020
Date of Issue:	23 July 2020

THIRD INTERIM DECISION OF THE ENVIRONMENT COURT

REASONS

Introduction

[1] At the parties' request, this decision addresses four discrete matters on the papers.[1]

[1] Including in particular the reporting memoranda for the Regional Council dated 10 and 16 July 2020.

Interpretation Statement

[2] The parties proposed that their agreed Interpretation Statement be included in the Region-wide objectives section after the italicised 'Note'. We agree with the proposed location but, to emphasise its importance relative to the preceding 'Note', the same font and size used for the text of the objectives are to be applied, together with the bolding of the sub-heading 'Interpretation Statement'. We approve of the introductory words proposed by Fish & Game and Forest & Bird and set out in Annexure "A", finding these are necessary to make clear the role and importance of the Interpretation Statement to the Plan.

Objective 2 (renumbered)

[3] Subject to what we say next, as no party opposed the editorial changes recommended by the court to this objective, the changes are approved and are set out in Annexure "A".

[4] That said, a stray 'and' – not present in the Decision Version – has found its way into the objective and has been deleted also.

Objective 9/9A

[5] In the first Interim Decision the court enquired whether the parties supported the inclusion of a new sub-clause (b) as proposed by the primary sector. While no party opposed the inclusion of the sub-clause, some sought to amend the provision.

[6] The wording of sub-clause (b) in the first Interim Decision is as follows:

> (b) there is integration with the freshwater quality objectives (including the safeguarding of human health for recreation); and

[7] Fish & Game and Forest & Bird (only) prefer to see reference to the safeguarding of 'values', in line with the National Policy Statement for Freshwater Management, which differentiates between the values of freshwater and the freshwater objectives which are to describe the intended outcome in a Freshwater Management Unit. Secondly, these parties are concerned that the sub-clause could be narrowly constructed such that the freshwater quantity and quality objectives pertain only to human health outcomes for

recreation. To overcome this, they propose sub-clause (b) be amended to read:

> (b) there is integration with the freshwater quality objectives, such that together the freshwater quality and quantity objectives safeguard values (including human health for recreation); and

[8] On the other hand, the Regional Council and Ngā Rūnanga submit that the phrase 'freshwater quality objectives' is ambiguous and could be construed narrowly as pertaining to new provisions for Freshwater Management Units to be introduced under a future plan change. To avoid this outcome, they would delete this phrase and refer instead to '...there is integration with objectives relating to freshwater quality...'[2] or 'objectives for freshwater quality'.[3] They do not support the inclusion of 'values' in the sub-clause, with Ngā Rūnanga submitting that this is unnecessary. Thus, they would amend sub-clause (b) to read:

> (b) there is integration with objectives relating to freshwater quality (including the safeguarding of human health for recreation); and[4]
>
> or
>
> (b) there is integration with objectives for freshwater quality (including the safeguarding of human health for recreation); and[5]
>
> [The differences between the parties' preferred wording is underlined].

[9] We accept the Regional Council's and Ngā Rūnanga's position that the objective applies to the region-wide objectives of the pSWLP and – it follows – that any provision on the same subject matter in a relevant Freshwater Management Unit (including Freshwater Objectives) must give effect to the same.[6] We also agree with the Regional Council and Ngā Rūnanga that the inclusion of 'values' in the objectives is unnecessary for the reasons stated by Ngā Rūnanga and also for the reason that the wording proposed by Fish & Game and Forest & Bird would introduce an entirely new standard of

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2 As per the Regional Council.
3 As per Ngā Rūnanga.
4 As per the Regional Council.
5 As per Ngā Rūnanga.
6 Policy 45 pSWLP.

'safeguarding' values. Being part of the Freshwater Management Unit process, these 'values' – and it follows the outcomes in relation to the same – have yet to be determined.

[10] Finding the drafting style clearer, we provisionally approve Ngā Rūnanga's proposed wording for the sub-clause (b) as set out in Annexure "A". A final determination will be made once we hear from parties and their witnesses on the meaning of 'life-supporting capacity', as previously directed.

Physiographic Zone Policies – Policies 4-12A

[11] Policies 4-12A, amongst others, implement Objective 18. We regard Objective 18 as being of critical importance to the attainment of outcomes for water quality.[7] As the final wording of Objective 18 has not been determined, any findings in relation to the physiographic zone policies in this decision remain provisional.

[12] We invited the parties to address whether the policies adopt a risk-based or effects-based approach. We do not summarise the submissions made in support of risk-based policies as we largely agree with the relevant parties.[8]

[13] The primary sector[9] support effects-based language submitting that this is more consistent with the focus of the Resource Management Act 1991. In contrast, 'risk', they submit, is conceptually broad and includes both low probability/high consequence events as well as high probability/low consequence events; risk also includes opportunity lost from missing a positive event".[10]

[14] Addressing the opportunity cost of the policy, we surmise the primary sector is concerned not to lose the benefit of advancing, in an application for resource consent(s), the positive effects of an activity.[11] "Positive effects" is not defined and could relate to the benefits for an applicant or the environment if consent were to be granted.

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[7] First Interim Decision at [281].

[8] Being the Regional Council, Director-General of Conservation, Forest & Bird, Fish & Game and Ngā Rūnanga.

[9] Primary sector being Ravensdown, Ballance Agri-Nutrients and Federated Famers but excluding Fonterra and DairyNZ who initially wished the matter be referred to an expert conference in the reporting memorandum dated 10 July 2020 at [47].

[10] Reporting memorandum for the Regional Council dated 10 July 2020 at [45].

[11] This would be consistent with the case advanced by Federated Farmers at the first hearing.

[15] In contrast, physiographic zones are a tool to assist in the management, pre-emptively, of the risk to water quality from land use activities.[12] The physiographic zones are concerned with the practices and zone-specific circumstances by which contaminants discharged[13] to land may enter water and thereby degrade it. Risk assessment to be applied on land within each zone looks at the likelihood of such discharges occurring in that zone and the outcomes / consequences if they do. In managing risk, a person would look at the activity or factor that could contribute to contamination and assess the likelihood and consequences to water quality if it does. Whether you call this "assessing and managing risk" or "assessing and managing effects" may not change the outcome. What this court is keen to see is a change in approach to a purposeful assessment of the risk of activities before they are allowed to commence.

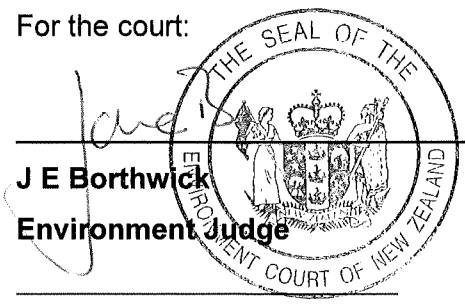
[16] Physiographic zones are not concerned with the relative merits of positive effects over adverse ecological effects. Whether framed as risk-based or effects-based, the policies are working on the problem of contaminant losses and the cumulative effect of contaminant losses. Conceptually, a risk-based approach is the more appropriate policy response for a risk assessment tool, particularly in a context where the attribution of an adverse effect to a single consent holder is difficult to substantiate.

[17] We therefore confirm a risk-based approach to the physiographic zone policies.

Other matters

[18] Finally, in the Minute dated 29 June 2020, we said at paragraph [19] that if taonga species are not listed in the Plan, the parties are to comment whether there is scope (and any appetite) for this to occur under any appeal. We now see taonga species are listed in Appendix M to the Plan. That said, the direction made at paragraph [16] of the Minute dated 13 July 2020 is confirmed.

For the court:

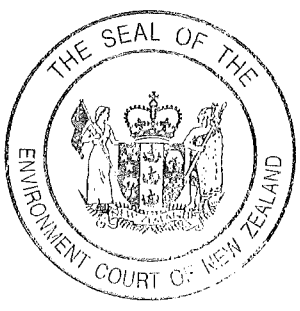


J E Borthwick
Environment Judge

[12] First Interim Decision at [296] and [299].
[13] We do not use 'discharge' in any technical sense as applying, say, only to fertilizer as per the pSWLP rules.

List of appellants

ENV-2018-CHC-26	Transpower New Zealand Limited
ENV-2018-CHC-30	Wilkins Farming Co
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-39	Alliance Group Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand
ENV-2018-CHC-41	Heritage New Zealand Pouhere Taonga
ENV-2018-CHC-47	Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima and Te Rūnanga o Ngāi Tahu
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated



Annexure 1

Interpretation Statement

All persons exercising functions and powers under this Plan and all persons who use, develop or protect resources to which this Plan applies shall recognise that:

(i) Objectives 1 and 2 are fundamental to this plan, providing an overarching statement on the management of water and land, and all objectives are to be read together and considered in that context; and

(ii) The plan embodies ki uta ki tai and upholds Te Mana o Te Wai and they are at the forefront of all discussions and decisions about water and land.

Objective 2 (renumbered and approved)

The mauri of water will be acknowledged and protected so that it provides for te hauora o te taiao (health and mauri of the environment), ~~and~~ te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).

Objective 9/9A (b) provisionally approved

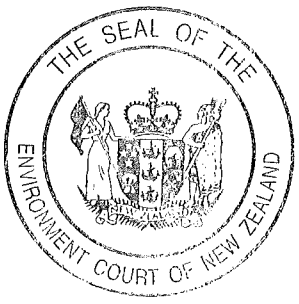
The quantity of water in surface waterbodies is managed so that:

(a) ~~the~~ aquatic ecosystem health, life-supporting capacity,[1] <u>the values of</u> outstanding natural features and landscapes, the natural character and <u>historic heritage values of waterbodies</u> and their margins are safeguarded;

(b) there is integration with <u>objectives for freshwater quality</u> (including the safeguarding of human health for recreation); and[2]

[1] Seeking further submissions on meaning of life-supporting capacity.
[2] As per Ngā Rūnanga.

(c) provided that (a) and (b) are met, surface water is sustainably managed~~,~~ in accordance with Appendix K to support the reasonable needs of people and communities to provide for their economic, social and cultural wellbeing.[3]



[3] Reordered in line with Objective 2.