

**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)

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**STATEMENT OF EVIDENCE OF MATTHEW MCCALLUM-CLARK ON  
BEHALF OF THE SOUTHLAND REGIONAL COUNCIL**

**TOPIC B OVERVIEW**

**22 October 2021**

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Judicial Officer: Judge Borthwick

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**WYNNWILLIAMS**

**WILKINS FARMING CO**  
(ENV-2018-CHC-30)

**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**

## Introduction

- 1 My full name is Matthew Eaton Arthur McCallum-Clark.
- 2 I am a Resource Management Consultant and a director of the firm Incite, which has offices in Auckland, Wellington and Christchurch.
- 3 I hold a Bachelor of Laws from Canterbury University, a Bachelor of Commerce (Economics) from Otago University and have undertaken a postgraduate diploma in Environmental Auditing through Brunel University in the UK. I am also a qualified and experienced independent hearing commissioner with chair endorsement under the Ministry for the Environment's Making Good Decisions Programme.
- 4 Apart from a short period at a city council, I have been a resource management consultant for about 26 years. For over 10 years I have specialised in providing policy advice to a range of clients, particularly local authorities. This has included significant involvement in regional plan development for the Canterbury, Waikato and Southland Regional Councils, and the Marlborough District Council.
- 5 I was the lead consultant engaged to assist with preparing the proposed Southland Water and Land Plan (**pSWLP**), I supervised the preparation of the Section 32 Report, was an author of the Section 42A Report and Section 42A Reply Report and sat through the hearing process.
- 6 I have been engaged by the Southland Regional Council (**Council**) to prepare evidence for these proceedings.

## Code of Conduct

- 7 I confirm that I have read the Code of Conduct for expert witnesses as contained in the Environment Court Practice Note 2014. I have complied with the Code of Conduct when preparing my written statement of evidence and will do so when I give oral evidence.
- 8 The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence. The reasons for the opinions expressed are also set out in my evidence.
- 9 Other than where I state I am relying on the evidence of another person, my evidence is within my area of expertise. I have not omitted to

consider material facts known to me that might alter or detract from the opinions that I express.

### Scope

- 10 This evidence provides an overview of the issues relevant to the Topic B hearings, as directed in the Minute dated 4 October 2021.<sup>1</sup> In summary, this evidence addresses:
- (a) an outline of the key findings from the Topic A Interim Decisions;<sup>2</sup>
  - (b) updates to superior planning documents (e.g. the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**)) since the Topic A Interim Decisions;
  - (c) an outline of other new regulations (e.g. the national Environmental Standards for Freshwater (**NES Freshwater**), and the Stock Exclusion Regulations) released since the Topic A Environment Court Hearings;
  - (d) an outline of the Council's Freshwater Planning Process; and
  - (e) an outline of the fundamental issues raised in Topic B appeals.
- 11 The pSWLP was publicly notified in June 2016. It went through the submissions and hearings process and the decisions version was accepted by Council and replaced the notified version on 4 April 2018.
- 12 Twenty-five parties appealed various parts of the pSWLP to the Environment Court. The Environment Court process separated the provisions under appeal into two groups to be heard consecutively:
- (a) Topic A – background and architecture of the pSWLP and the 'higher-order' provisions including most of the Objectives, the Ngāi Tahu Policies, Physiographic Zone Policies, and the Freshwater Management Unit Polices;
  - (b) Topic B – remaining policies, rules and appendices.

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<sup>1</sup> Minute of the Environment Court dated 4 October 2021 at [15(e)].

<sup>2</sup> Being [2019] NZEnvC 208 (the "First Interim Decision"), [2020] NZEnvC 93 (the "Second Interim Decision"), [2020] NZEnvC 110 (the "Third Interim Decision"), and [2020] NZEnvC 191 (the "Fourth Interim Decision").

- 13 The Topic A provisions were heard in mid-2019 and June 2020, with four Interim Decisions being released between December 2019 and November 2020.
- 14 Environment Court assisted mediation has occurred on some of the Topic B provisions in the first half of 2021, and has had some success in reaching agreed outcomes.<sup>3</sup>

### **Key findings from the Topic A Decisions**

- 15 The Topic A decisions are:
- (a) The First Interim Decision, dated 20 December 2019, which is a substantial decision providing the overall context of the Plan, findings in relation to the NPSFM and the concepts of Te Mana o te Wai and ki uta ki tai and the Treaty of Waitangi. This Interim Decision then assesses and reaches conclusions with respect to the majority of the Objectives under appeal (with the exception of Objective 16) and Policies 3-12A (the physiographic zone policies) and Policies 45, 46, and 47.
  - (b) The Second Interim Decision, dated 29 June 2020, which considers the construction of the Plan and the inclusion of an interpretation statement within the Objectives.
  - (c) The Third Interim Decision, dated 23 July 2020, which considers a number of discrete issues, including the interpretation statement, Objectives 2 and 9/9A, and the physiographic zones.
  - (d) The Fourth Interim Decision, dated 06 November 2020, considers the Council's s32AA report, section 8 of the RMA in relation to the Treaty of Waitangi, and the NPSFM 2020.
- 16 Broadly speaking, the second, third and fourth Interim Decisions build on and refine the conclusions reached in the first Interim Decision. There are also a number of Minutes and Directions posing questions and seeking information that these later Interim Decisions respond to.

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<sup>3</sup> See Memorandum of Counsel for Southland Regional Council dated 24 September 2021.

- 17 The opening paragraphs of the first Interim Decision outline the Court's understanding, confirmed in subsequent Interim Decisions, that this Plan has, at its heart, a change in approach from managing the effects of resource use to the protection of the health and mauri of freshwater.<sup>4</sup> Those opening paragraphs also record acknowledgement that work is required to understand what degraded water quality means, significant change will be required to effect change, and that this is a long-term process.
- 18 In the context of a significant discussion in the first Interim Decision on the NPSFM (2014 as amended 2017), the Treaty of Waitangi, the Regional Policy Statement (**RPS**), and Te mana o te Wai and ki uta ki tai, the Court came to three "key understandings" on Te Mana o te Wai:
- (a) As a matter of national significance, the NPS-FM<sup>5</sup> requires users of water to provide for hauora (health) and in so doing, acknowledge and protect the mauri of water.
  - (b) As a matter of national significance, the health and wellbeing of water are to be placed at the forefront of discussion and decision-making. Only then can we provide for hauora by managing natural resources in accordance with ki uta ki tai.
  - (c) The NPS-FM makes clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about fresh water.
- 19 The first Interim Decision posed a question, which was resolved through the subsequent Interim Decisions, regarding the overall architecture of the Plan, and in particular the emphasis to be placed on Objectives 1 and 2 (renumbered from 3). As discussed below, the interpretation agreed by the parties and confirmed by the Court is recorded in an interpretation statement included at the beginning of the Objectives.

### ***Findings in relation to Objectives***

- 20 The second Environment Court hearing, and the second and third Interim Decisions, considered the need for an interpretation statement to

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<sup>4</sup> At paragraph [7].

<sup>5</sup> Noting that this reference in the NPS-FM is to the 2014 version (as amended in 2017).

clarify the correct framework within which the Objectives and the wider Plan should be considered. The Third Interim Decision confirmed the addition of the Interpretation Statement. The Interpretation Statement makes it clear to plan users that the Plan upholds Te Mana o te Wai and embodies ki uta ki tai.<sup>6</sup>

- 21 The Interpretation Statement expressly recognises Te Mana o te Wai and ki uta ki tai (set out in Objectives 1 and 2) as the foundation of the Plan by providing an overarching statement on the management of water and land. All Objectives are to be read together and considered in the context of Objectives 1 and 2.
- 22 Objective 3 (renumbered from 2) was amended to remove the specific attention given to primary production. This was to remove the possible interpretation that the Objective was an enabling objective for primary production, which could then create tension with subsequent objectives.
- 23 The consideration of Objective 6 was a core part of the first hearing and the First Interim Decision. Consideration of this Objective also triggered the expert conferencing on degraded water quality which is discussed below at paragraph [34]. Objective 6 was amended with the removal of the reference to “overall” water quality and the addition of “each freshwater body”. These changes remove the risk of improvements in one freshwater body being “traded off” against the declining water quality in another. Further, it was clarified that Objective 6 will apply both before and after the FMU/National Objectives Framework (**NOF**) process to come.
- 24 The amendments to Objective 7 make it clear that the objective applies only once the FMU/NOF processes have occurred. The addition of sub-clause (a) into Objective 7 provides a transition between Objectives 6 and 7, ensuring that Objective 6 is still able to address those

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<sup>6</sup> The Interpretation Statement sits at the beginning of the Objectives and reads:  
*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.*



contaminants that are not subject to an allocation regime once the FMU/NOF process is complete.

- 25 Objectives 9 and 9A have been remerged into one objective, after having been separated out into two objectives by the Council's Hearing Commissioners. When the provision was separated, the prioritisation of the sub clauses was lost. By remerging the objectives the prioritisation is reinstated which ensures that, among other things, the life-supporting capacity and aquatic ecosystem health of surface water bodies are safeguarded before water can be used for the needs of the people. This is a direct reflection of Te Mana o te Wai.
- 26 Amendments to Objective 9B will see that any development, operation, maintenance or upgrading of significant infrastructure in the region is undertaken in a way that is both sustainable and effective. The Court concluded that infrastructure has both clear benefits and comes with associated environmental effects, and that the overall structure of the Plan, including the Interpretation Statement, was important as it placed a qualifier on this enabling objective.
- 27 Objective 10, which addresses hydroelectric generation in the region, is now only relevant to the Manapōuri Power Scheme. Similarly to the other objectives, its integration with Objectives 1 and 2 was a key consideration. The Court considered that it was unhelpful to reference the existing environment or 'enhancement' of the Scheme. It was noted that Meridian considered that Objective 9B was sufficient to provide for any future enhancement of the Scheme and no longer sought to have 'enhancement' included in Objective 10.
- 28 The decisions version of Objective 13 separated the management of soil and contaminants into three objectives. The Interim Decisions remerged these objectives into a single objective, and made it clear that pre-conditions addressing the quality, quantity and structure of soil resources, and safeguarding human health and ecosystem health must be met before land and soils may be used and developed to enable economic, social and cultural wellbeing.
- 29 The Court considered that the decisions version of Objective 17 restated the higher-order provisions without advancing them. The amendments made to Objective 17 make a distinction between 'preserve' and 'protect' and increase the emphasis on preserving natural character values.

- 30 Objective 18 has been amended to reflect that the responsibility to safeguard the region's land, soils and water, maintain or improve water quality and quantity, and efficiently use resources sits with all resource users, regardless of the activities being undertaken.

***Findings in relation to Physiographic zones and related policies***

- 31 Through Topic A, the Court has set out changes to the physiographic zone policies. However, these changes will not be finalised until the remaining appeal points are discussed through Topic B. The changes set out include a greater emphasis on a risk-based approach, clarity around avoidance of effects and higher-risk activities in more sensitive physiographic zones and the need to focus on the way contaminants get to waterbodies. Overall, the physiographic zone policies are now more directive and have a greater focus on protection of water quality.
- 32 The Court gave provisional approval to include the physiographic maps in the pSWLP, but identified that how to utilise the mapping should be covered in mediation or expert conferencing for Topic B.

***Comments on Topic B issues***

- 33 In the four Interim Decisions, and various Minutes and Directions, the Court has indicated a number of issues for consideration through Topic B, or indicated shortcomings in the Topic A evidence. The matters include:
- (a) The need for assessment of whether a risk-based/pre-emptive framework is more effective and practical for managing diffuse discharges than effects-based methods.<sup>7</sup>
  - (b) Merely maintaining degraded water quality, such that it does not get any worse ahead of the FMU processes, is insufficient.<sup>8</sup>

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<sup>7</sup> First Interim Decision at paragraph [122] and Third Interim Decision at paragraph [15].

<sup>8</sup> First Interim Decision at paragraph [111]: "...As we have recorded, at the conclusion of the hearing no party advocated there should not be improvement in the quality of water (where degraded) in advance of the FMU processes."

- (c) The use of terms such as “Good Management Practice” and “Best Practicable Option”<sup>9</sup>
- (d) A preliminary view that the pSWLP should identify (ahead of the FMU process) degraded water and that land management responses to that degradation should be required.<sup>10</sup>
- (e) The need to better assess higher-order planning documents.<sup>11</sup>
- (f) The need to specifically address Te Tiriti o Waitangi.<sup>12</sup>
- (g) Respect for the Court’s findings on Topic A in the consideration of Topic B matters, particularly in relation to the physiographic zone policies.<sup>13</sup>
- (h) That the Plan provisions are not to be read down and considered in isolation, separate from Objectives 1 and 2.<sup>14</sup>
- (i) The need for parties seeking amendments to assess s32 and s32AA in evidence.<sup>15</sup>

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<sup>9</sup> First Interim Decision at footnote 310: “Whether “best practicable option” it is intended to be limited this way under Policy A3 of the NPS-FM is a live question for the Topic B hearing.”; and paragraph [310] “While the definition of “good management practice” in this plan has been criticised and is a matter to be addressed in the Topic B hearing, we agree with the primary sector that the term should be retained.”

<sup>10</sup> First Interim Decision at paragraph [119]: “If there is to be improvement in degraded waterbodies ahead of the FMU process then our preliminary view is that it is essential the narrative and numeric attributes for degraded water are known and that land management of individual properties address the linkages between those attributes and the contaminant pathways.” “additional policy defining what is meant by degradation and further rule support.” and at paragraph [122] “A matter for Topic B hearing is whether the initiative is more effective and practicable than the effects-based assessment methods employed by the Regional Council.”

<sup>11</sup> Fourth Interim Decision at paragraph [2]: “we were conscious of the fact that only a few planning witnesses comprehensively addressed the higher order planning instruments to which this Regional Plan would give effect when proposing amendments to the same.”

<sup>12</sup> Second Interim Decision at paragraph [18]: “The parties are aware of the duty of the court under s 8 of the Resource Management Act 1991. How is the court to take into account the principles of the Treaty, if not given evidence on this topic? We will come back to the question later but in the meantime, we remind the parties that they will need to be cognisant of s 8 in future hearings and/or ADR processes.”

<sup>13</sup> Fourth Interim Decision at paragraph [3], and orally at the conclusion of the second Environment Court hearing.

<sup>14</sup> Second Interim Decision at paragraph [10].

<sup>15</sup> Minute dated 22 October 2020 at paragraph 13: “If settlement is not reached, all planning witnesses, if proposing to amend any provisions, will be directed to evaluate the amendment in accordance with s 32 and/or s 32AA in evidence, giving reasons for their support.”

### ***Ecological and cultural indicators of health***

- 34 A key issue the Court heard evidence on was whether the provisions in the pSWLP were sufficient to ensure improvement of degraded waterbodies.<sup>16</sup> This led to the Court directing parties' experts on water quality, freshwater ecology, environmental science, and cultural issues/Mātauranga Maori to undertake expert conferencing to determine what "degraded" meant in relation to Southland waterbodies and to identify which waterbodies are degraded/not degraded. The conferencing resulted in a number of joint witness statements being agreed and one memorandum submitted. These included statements on ecological and cultural indicators of health and areas of degraded water quality.<sup>17</sup>
- 35 The Court noted in the first Interim Decision that the indicators of health should apply on an interim basis and that additional consideration would be required to assess how these will be included and used in the pSWLP.<sup>18</sup>

### **Updates to superior planning documents**

#### *National Policy Statement for Freshwater Management 2020 (NPSFM 2020)*

- 36 The NPSFM 2020 came into effect in September 2020, over two years after the Council's decision on the pSWLP was made and following the lodgement of appeals.<sup>19</sup> The fourth Interim Decision is the only decision to postdate the NPSFM 2020 coming into effect. Since September 2020, there have been no further updates or amendments to the NPSFM 2020.<sup>20</sup>

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<sup>16</sup> For example, at paragraph [119].

<sup>17</sup> Joint Witness Statement - River Water Quality and Ecology – Draft 13 May 2019 and Joint Witness Statement - Lakes, Estuaries and ICOLLs Water Quality and Ecology 13 May 2019, Joint Witness Statement - Water Quality and Ecology (Rivers and Lakes) 4 September 2019, Joint Witness Statement - Water Quality and Ecology (Rivers and Lakes) 17 October 2019 Joint Witness Statement - Water Quality and Ecology (Rivers and Lakes) 22 November 2019, Memorandum of Counsel for Ngā Rūnanga regarding cultural indicators of health 29 November 2019.

<sup>18</sup> First Interim Decision at paragraph [119].

<sup>19</sup> The Decisions Version of the pSWLP replaced the notified version on the 4 April 2018.

<sup>20</sup> On 25 May 2021, the Minister for the Environment indicated that there may be changes to the wetland provisions in the NPSFM 2020. Changes are currently being consulted on by the Ministry for the Environment, with feedback closing late October 2021.

37 The NPSFM 2020 provides updated direction on how local authorities are to manage freshwater. The Ministry for the Environment's website provides a useful summary of the requirements of the NPSFM 2020:<sup>21</sup>

- Manage freshwater in a way that 'gives effect' to Te Mana o te Wai:
  - through involving tangata whenua
  - working with tangata whenua and communities to set out long-term visions in the regional policy statement
  - prioritising the health and wellbeing of water bodies, then the essential needs of people, followed by other uses.
- Improve degraded water bodies, and maintain or improve all others using bottom lines defined in the Freshwater NPS.
- An expanded national objectives framework:
  - two additional values - threatened species and mahinga kai - join ecosystem health and human health for recreation, as compulsory values
  - councils must develop plan objectives that describe the environmental outcome sought for all values (including an objective for each of the five individual components of ecosystem health)
  - new attributes, aimed specifically at providing for ecosystem health, include fish index of biotic integrity (IBI), sediment, macroinvertebrates (MCI and QMCI), dissolved oxygen, ecosystem metabolism and submerged plants in lakes; councils will have to develop action plans and/or set limits on resource use to achieve these attributes.
  - tougher national bottom lines for the ammonia and nitrate toxicity attributes to protect 95% of species from toxic effects (up from 80%)
- Avoid any further loss or degradation of wetlands and streams, map existing wetlands and encourage their restoration.
- Identify and work towards target outcomes for fish abundance, diversity and passage and address in-stream barriers to fish passage over time.
- Set an aquatic life objective for fish and address in-stream barriers to fish passage over time.
- Monitor and report annually on freshwater (including the data used); publish a synthesis report every five years containing a single ecosystem health score and respond to any deterioration.

38 The NPSFM 2020 is required to be given effect to as soon as reasonably practicable. The NPSFM 2020, in conjunction with the Freshwater Planning Process,<sup>22</sup> prescribes a number of procedures that the Council must undertake in developing the Council's next plan change. Policy 5 of the NPSFM 2020 requires freshwater to be managed

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<sup>21</sup> At: <https://environment.govt.nz/acts-and-regulations/national-policy-statements/national-policy-statement-freshwater-management/>

<sup>22</sup> As set out in Section 80A of the RMA.

through a National Objectives Framework. The NOF is critical to the implementation of the NPSFM 2020 and, as described further below at paragraph [56], the Council commenced work in 2018 on a significant programme to implement the NOF which is occurring in parallel with this appeal process. In addition to the NOF requirements, the other elements of the Freshwater Planning Process (including the development of visions and incorporation of them into the RPS, involvement of tangata whenua, and action plans to respond to water quality and quantity issues) are extensive and prescriptive.

- 39 Clause 3.26 of the NPSFM 2020 requires an objective<sup>23</sup> relating to fish passage be incorporated into the pSWLP without using the RMA Schedule 1 process. As directed by the NPSFM 2020, this Objective has now been included in the pSWLP.
- 40 While the NPSFM 2020 requires a number of specific changes to the RPS, it is also evident that a number of the provisions relating to freshwater in the RPS are now out-of-date or misaligned with the policy direction of the NPSFM 2020. This includes both policies of the RPS that anticipated specific processes under earlier versions of the NPSFM, and objectives and policies that do not incorporate the prioritisation inherent in the Objective of the NPSFM 2020. As discussed at paragraph [62(a)], Council is commencing the process to resolve these misalignments.

#### *National Policy Statement for Indigenous Biodiversity (NPS-IB)*

- 41 While not currently in effect, the NPS-IB is intended to set out the objectives and policies to identify, protect, manage and restore indigenous biodiversity in the terrestrial environment. At the time of drafting this statement of evidence, it is understood the Government have extended the timeframe for the delivery of the NPS-IB to the end of 2021. If this timeframe is upheld, a further superior planning document will be in force ahead of the Topic B Environment Court Hearings.

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<sup>23</sup> Included in the pSWLP as Objective 19: *The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.*

## New Regulations

### *Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES Freshwater)*

- 42 The NES Freshwater came into force in September 2020.<sup>24</sup> The regulations contained in the NES Freshwater cover:
- (a) farming activities (including, feedlots and stock holding areas; intensive winter grazing; and application of synthetic nitrogen);
  - (b) agricultural intensification (including conversion of plantation forestry to pastoral uses; conversion of land on a farm to dairy farm land; irrigation of dairy farm land; and use of land as dairy support land)<sup>25</sup>;
  - (c) various activities as they relate to natural wetlands;
  - (d) reclamation of rivers; and
  - (e) passage of fish affected by structures.<sup>26</sup>
- 43 Since September 2020, there have been minor changes to the NES Freshwater, to fix errors, change the pugging definition and to delay the implementation of the intensive winter grazing provisions.<sup>27</sup> In addition, several adjustments to wetland provisions and intensive winter grazing provisions are currently being considered by the Ministry for the Environment. Several activities that are managed by the pSWLP provisions that are part of Topic B are also managed under the NES Freshwater. The relationship between an NES and regional plan provisions is set out in sections 43B and 43A of the RMA.
- 44 Section 43B provides that a rule in a plan that is more stringent than a NES prevails over the NES, if the NES allows rules to be more

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<sup>24</sup> With the exception of the intensive winter grazing, stockholding areas and synthetic nitrogen provisions. The intensive winter grazing provisions come into force on 1 May 2021 (as of March 2021 delayed until May 2022) and provisions related to stockholding areas and synthetic nitrogen come into force on 1 July 2021.

<sup>25</sup> These provisions are in place until the Council has given public notice of amendments to its plans to give effect to the NPSFM 2020. In accordance with Section 55(2A) of the RMA.

<sup>26</sup> for any culverts, weirs, flap-gates, dams and fords built after 2 September 2020.

<sup>27</sup> Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2020; and Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2021.

stringent.<sup>28</sup> A rule is more stringent than a NES if it prohibits or restricts an activity that the NES permits or authorises.<sup>29</sup> The NES Freshwater explicitly states that district rules, regional rules and resource consent conditions can be more stringent than the NES Freshwater.<sup>30</sup> The RMA also allows rules to be more lenient than a NES, if the NES expressly allows that. There is only one case where rules or consent conditions may be more lenient than the NES Freshwater, which is where a structure is there to prevent fish passage to protect a particular fish species.<sup>31</sup>

- 45 However, notwithstanding the above, section 43A(5) provides that if the NES Freshwater allows an activity as a permitted activity and the pSWLP's rules deal with effects of the activity that are the same as those dealt with in the terms or conditions in the NES Freshwater, then the terms and conditions of the NES Freshwater prevail. Careful consideration will need to be given to the way in which activities are described, and the effects that are sought to be managed with respect to those activities when considering the application of section 43A(5).
- 46 Section 44A provides that any rule in the pSWLP that duplicates a rule in the NES Freshwater must be amended to remove the duplication without using a Schedule 1 process.<sup>32</sup> If a rule in the pSWLP is more lenient than the NES Freshwater then it will be in conflict with the NES Freshwater. Any conflict must also be removed without using a Schedule 1 process.<sup>33</sup>
- 47 The appeals on the pSWLP were lodged prior to the NES Freshwater coming into force, and as a result there are no appeals (or submissions) that clearly provide scope to align the provisions of the pSWLP with the NES Freshwater. As part of the information circulated by the Council in advance of Environment Court assisted mediation, an analysis of whether there is duplication or conflict between the provision of the pSWLP and relevant regulations of the NES Freshwater was undertaken. This analysis also considered whether the relief sought by

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<sup>28</sup> Section 43B(1) of the RMA and clause 6(1) of the NES Freshwater.

<sup>29</sup> Section 43B(2) of the RMA.

<sup>30</sup> Clause 6(1) of the NES Freshwater.

<sup>31</sup> Clause 6(2) of the NES Freshwater.

<sup>32</sup> Section 44A of the RMA.

<sup>33</sup> Section 44A of the RMA.



the appeal point would result in duplication or conflict and whether the appeal point in itself is moot due to the NES Freshwater.

- 48 This analysis showed that the level of duplication and conflict is variable across Topic B. The level of duplication and conflict is highest for the Farming (B5) and Wetland (B3) topics and the existing pSWLP provisions are difficult to align with the NES Freshwater due to the complexity of stringency assessments required by the RMA, the existence of partial conflicts and overlaps, and limited scope provided by appeals.

*Resource Management (Stock Exclusion) Regulations 2020 (Stock Exclusion Regulations)*

- 49 The Stock Exclusion Regulations came into force in September 2020 and were made under section 360 of the RMA. Since the Stock Exclusion Regulations came into force, there have been no further amendments to those regulations. However, adjustments to slope maps are currently being considered by the Ministry for the Environment.
- 50 The Stock Exclusion Regulations require the exclusion of stock from specified natural wetlands, lakes, and “wide rivers”.<sup>34</sup>
- 51 The relationship between regional plan provisions and section 360 regulations are addressed in section 360(2F) of the RMA. This allows regulations to require the removal of rules that are inconsistent with the regulations, without using a Schedule 1 process. The Stock Exclusion Regulations do not specify that rules inconsistent with it are be withdrawn or amended pursuant to section 360(2F). Accordingly, any amendments to align the pSWLP with the Stock Exclusion Regulations must be made using the Schedule 1 process.
- 52 Similar to the NES Freshwater, appeals on the pSWLP were lodged prior to the Stock Exclusion Regulations coming into force and as a result there are none which provide particular scope for alignment. The existing farming provisions are difficult to align with the Stock Exclusion Regulations due to the existence of partial duplications and conflicts,

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<sup>34</sup> “Wide river” is defined as “a river (as defined in the Act) with a bed that is wider than 1 metre anywhere in a land parcel.”

and the inability to grant resource consents that might conflict with the Stock Exclusion Regulations.<sup>35</sup>

### *Freshwater Farm Plans*

- 53 Freshwater Farm Plans are a component of the Essential Freshwater policy package and are a new legal instrument required by Part 9A of the RMA. It is expected that Freshwater Farm Plans will come into effect from mid-2022 and may be accompanied by further regulations. The Ministry for the Environment is currently seeking feedback on the implementation and transition of farmers to the Freshwater Farm Plan system.
- 54 Freshwater Farm Plans are intended to be a tool to demonstrate how regulatory requirements (such as the NES Freshwater and Stock Exclusion Regulations) are being met on farm and reduce the need for resource consents. Under the pSWLP, Farm Environmental Management Plans are a tool for managing farming activities and their requirements are set out in Appendix N of the pSWLP. While the final version of Freshwater Farm Plans is not yet certain, the discussion document from the Ministry for the Environment states that existing farm environment plans could be used as the basis for Freshwater Farm Plans and could assist with the risk assessment component.<sup>36</sup>

### *Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 (revised 2020)*

- 55 While these Regulations have been updated since the Topic A hearings and Interim Decisions, they have no bearing on the outstanding Topic B appeal points and are not assessed further.<sup>37</sup>

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<sup>35</sup> RMA, s 104(3)(c)(iii).

<sup>36</sup> See Ministry for the Environment and Ministry for Primary Industries. 2021. Freshwater farm plan regulations: Discussion document. Wellington: Ministry for the Environment.

<sup>37</sup> Confirmed to me by Ms Maciaszek, Council's planner in relation to this sub-topic.

### Council's Freshwater Planning Process<sup>38</sup>

- 56 The Council has been actively making progress towards implementing the NPSFM (2014), NPSFM (2014, as amended in 2017) and now the NPSFM 2020 for many years. At the outset, the pSWLP was intended to be the foundation, with a “limit setting” plan change to follow in accordance with the Progressive Implementation Programme anticipated by the previous versions of the NPSFM. This planning approach has always been paired with Council’s non-regulatory initiatives through the ‘Action on the Ground’ workstream, with the majority of these initiatives oriented toward improving farming practices and reducing diffuse discharges prior to the limit setting plan change.
- 57 A core part of this process is the People, Water and Land Programme, which has at its heart a partnership between the Council and Te Ao Marama Inc (**TAMI**).<sup>39</sup> That programme had made good progress toward implementing the NPS-FM (2014, as amended 2017), including the finalisation of FMUs, identification of values, and development of draft freshwater objectives.<sup>40</sup> Under that Programme, a “Regional Forum” was also established in 2018, to consider and recommend options for limits and methods to achieve the draft freshwater objectives. While the Forum members represent the community, wider community input is sought to assist the Forum in their task.
- 58 Given the considerably different requirements of the NPSFM 2020 and the Freshwater Planning Process, compared with the process under the NPSFM 2014 (as amended 2017), Council has recently completed an assessment to align existing workstreams and outputs with the requirements of the NPSFM 2020 and the updated NOF process. That alignment assessment has identified that large parts of the work already completed are helpful, but there remain some gaps to be filled, particularly regarding community consultation and the much more detailed requirements of each NOF step in the NPSFM 2020.

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<sup>38</sup> Much of the information in this section has been provided to me by Council staff or has been obtained from the Council’s water and land website:  
<https://waterandland.es.govt.nz>

<sup>39</sup> Te Ao Mārama Incorporated represents rūnanga in Murihiku/Southland, with the key purpose to assist ngā rūnanga with resource management and local government matters.

<sup>40</sup> See Draft Murihiku Southland Freshwater Objectives – providing for hauora, the health and well-being of waterbodies in Murihiku Southland, 25th Nov 2020.

- 59 The NOF process requires that community engagement occurs at every step of the process, along with engagement with tangata whenua. The Local Government Act 2002 also requires that consultation is undertaken with people who will or may be affected by the decision to be made. Considerable engagement with the Southland community has already been carried out, and the Regional Forum programme to date has included a number of public workshops. Tangata whenua are actively engaged throughout, both in a joint governance role with Councillors, and also at a staff level, between TAMI and council staff.
- 60 The current programme, working toward the plan change to implement the NPSFM 2020 (now referred to as Plan Change Tuatahi), includes:
- (a) Drafting provisions, where possible, ahead of the Regional Forum's advice.
  - (b) November 2021 – NOF process and outcomes of alignment assessment between 2017 and 2020 NPSFM documents; refreshing the values and environmental outcomes; along with draft visions, to be considered by Council and TAMI.
  - (c) First half of 2022 – Papers based on direction of travel indicated by the Regional Forum, to show implications for the plan change.
  - (d) Mid 2022 – Notification of changes to the Freshwater chapter of the RPS, including Te Mana o te Wai and visions.
  - (e) Mid 2022 – Regional Forum's advice provided to Council and TAMI Board – decision point for values, environmental outcomes, methods, and limits.
  - (f) Second half of 2022 – Assessment of recommendations from the Regional Forum, to show implications for the plan change.
  - (g) Late 2022 - early 2023 – Development of Plan Change Tuatahi provisions and consideration of action plans.
  - (h) Mid 2023 – Consultation on draft Plan Change Tuatahi.
  - (i) December 2023 – Notification of Plan Change Tuatahi.
- 61 This December 2023 timeframe is 12 months ahead of the December 2024 deadline in section 80A of the RMA. This earlier deadline reflects

the progress already made by Council, TAMI and the Southland community toward implementing the NOF process.

62 Two key elements of this process warrant further explanation, due to implications for Topic B appeal points and evidence:

- (a) As mentioned earlier at paragraph [40], a review of the RPS provisions related to freshwater, particularly in the Freshwater and Biodiversity chapters, has identified a range of alignment issues with the policy direction of the NPSFM 2020. Initial drafting of changes to these provisions is underway, alongside drafting of the mandatory changes set out by the NPSFM 2020. While it was identified in the Topic A Interim Decisions that better assessment of RPS provisions should be provided in planning evidence,<sup>41</sup> misalignment of several of those provisions with the NPSFM 2020 may reduce the utility of a detailed assessment at this point in time.
- (b) Action plans are required by the NPSFM 2020 for specific target attributes, and may also be prepared in relation to other target attributes or in response to particular events, such as declining water quality trends. Action plans are able to be broader in scope than the content of regional plans. The development of the plan change is expected to incorporate a combination of methods, with some content being included in the Southland Water and Land Plan, and some content being dealt with by way of action plans, prepared either concurrently or by defined timeframes in the future. Both the pSWLP plan change and action plans will be required in order to give effect to the NPSFM 2020. This may reduce the division between what are seen as 'regulatory' and 'non-regulatory' methods. It will also help ensure that a holistic and integrated approach is taken. As action plans are a new tool in the NPSFM 2020, there are some uncertainties as to their role and effect, and the role that action plans can play may evolve over the coming years.

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<sup>41</sup> See above at paragraph [32(e)].

**Fundamental issues for Topic B hearing**

63 The list below sets out what I consider to be the ‘fundamental’ issues of Topic B which require an answer – ones upon which other issues rely or are of such importance that they clearly impact upon the achievement of the objectives of the pSWLP. I accept that other parties may disagree with the relative importance that I have placed on these issues.

***Farming (B5)***

- 64 How to respond to the Topic A decision – the evidence before the Court is clear that water quality is degraded in large parts of Southland, and that the trend is of further decline in some areas for some contaminants. The Court has indicated that the pSWLP needs to show how that decline will be stopped and improvement started. However, Council’s Plan Change Tuatahi (to be notified in just over two years’ time), will also make significant changes to the pSWLP. The amount of change required by the pSWLP and how can this be done in a way that helps, rather than hinders, Plan Change Tuatahi is an area of considerable uncertainty.
- 65 Ephemeral rivers – the pSWLP currently generally excludes ephemeral rivers from any setbacks, stock exclusion, cultivation and intensive winter grazing controls. There are appeals seeking deletion of this exclusion, and significant questions arise as to whether deletion is appropriate, and if so, whether other provisions will need adjusting to provide clarity and reduce any unintended consequences.
- 66 Farm Environmental Management Plan content and in particular any need for strengthening of Farm Environment Management Plan provisions, and integration with the RMA Freshwater Farm Plan process, of which the content and timing is uncertain.
- 67 Physiographic zones, related rules and activity status. The Court has indicated that physiographic zone mapping should be included in the Plan, and there are numerous references in the Interim Decisions to potential benefits of a risk-based approach that responds to contaminant pathways.
- 68 Waterbody setbacks – this affects cultivation, fertiliser spreading, intensive winter grazing, and stock exclusion. Some appeals generally

seek greater setbacks (10m) and inclusion of a wider set of waterbody types. Other appeals seek reduction, especially for cultivation.

- 69 Interaction with the NES Freshwater and the Stock Exclusion Regulations – the NES Freshwater and the Stock Exclusion Regulations will limit further water quality degradation, but on their own may not be adequate for the Southland situation. Further, the existing farming and wetlands provisions are difficult to align with the NES Freshwater and the Stock Exclusion Regulations.

***Infrastructure (B6)***

- 70 The activity status and requirements for the Manapouri Power Scheme.

**DATED** this 22<sup>nd</sup> day of October 2021



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**Matthew McCallum-Clark**