

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

AT CHRISTCHURCH

ENV-2018-CHC-000036

IN THE MATTER

of the Resource Management Act 1991

AND

of an appeal under clause 14 of the First
Schedule of the Act

BETWEEN

Director-General of Conservation/Te

Tumuaki Ahurei

Appellant

(ENV-2016-CHC-000036)

AND

Southland Regional Council

Respondent

**BRIEF SETTING OUT POSITION STATEMENT OF LINDA ELIZABETH KIRK
IN RELATION TO EXPERT CONFERENCING MATTERS ON 6 & 7 AUGUST 2020**

Dated 3 August 2020

Department of Conservation

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Introduction

1. My full name is Linda Elizabeth Kirk. My experience and qualifications are set out in my evidence in chief dated 15 February 2019 on behalf of the Director-General of Conservation.
2. I reiterate that while I am employed by the Department of Conservation, and the Department has an advocacy function under the Conservation Act 1987, my role in preparing this brief is as an independent planning expert. In my role with the Department, I am required to ensure that my advice is in accordance with recognised standards of integrity and professional competence. As well as having a duty to the Court (and I have noted below that I agree to abide by the Environment Court Code of Conduct for Expert Witnesses), I also have a duty to my profession.
3. In providing this brief, I have been authorised by the Department of Conservation to provide any evidence that is within my planning expertise which goes outside the Department's advocacy function.

Code of Conduct

4. I confirm that I have read the code of conduct for expert witnesses as contained in section 7.1 of the Environment Court's Practice Note 2014. I have complied with the practice note when preparing this written brief and will do so when I participate in expert conferencing.
5. The data, information, facts and assumptions I have considered in forming the opinions expressed are set out in my brief to follow. The reasons for the opinions expressed are also set out in this brief.
6. Unless I state otherwise, the opinions expressed in this brief are within my sphere of expertise and I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Scope

7. I have been asked to provide in a brief a statement of my planning position in relation to the matters raised by the Environment Court in its Minute of 13 July 2020.

8. In preparing this brief, I have had discussions with two other planning witnesses involved in this matter in order to clarify or seek to resolve issues. The planning witnesses I have had these discussions with are Mr McCallum-Clark and Mr Janan Dunning.
9. I have read and considered the documents as outlined in my evidence in chief of 15 February 2019 and planning evidence of 13 May 2020, in particular:
 - (a) First Interim Decision of the Environment Court: Aratiatia Livestock Ltd v Southland Regional Council [2019] NZEnvC 208;
 - (b) Second Interim Decision of the Environment Court: Aratiatia Livestock Ltd v Southland Regional Council [2020] NZEnvC 93;
 - (c) Third Interim Decision of the Environment Court: Aratiatia Livestock Ltd v Southland Regional Council [2020] NZEnvC 110;
 - (d) Brief prepared by Mr Matthew McCallum-Clark in Relation to Expert Conferencing on 6 & 7 August 2020, dated 20 July 2020; and
 - (e) The Court's Minutes and the Memoranda filed by Counsel.

Position Statement

10. In Appendix 1 to this brief is a table which sets out my position with regards to the Topic A provisions. For completeness, the table shows resolved provisions (and identifies how these were resolved), sets out my position on unresolved provisions, and reasoning, ahead of the scheduled caucusing. My comments respond to Mr McCallum-Clark's brief of 20 July 2020.



Linda Elizabeth Kirk

3 August 2020

APPENDIX 1 – POSITION STATEMENT OF LINDA KIRK TO MATTHEW MCCALLUM-CLARK’S 20 JULY 2020 BRIEF

KEY

DV = Decisions Version

1st ID = First Interim Decision

2nd ID – Second Interim Decision

Provision	Status and how	Linda Kirk’s Position and Reasoning
Objective 1	Resolved – 1 st ID	
Objective 3	Resolved – 2 nd ID	
Objective 2	Resolved – 1 st ID	
Objective 4	Resolved - DV	
Objective 5	Resolved - DV	
Objective 6	Largely resolved. Outstanding question regarding the types of waterbodies it applies to.	<p>I agree with amendments to include the additional waterbodies as this will help embody ki uta ki tai and the interconnectedness of the waterbodies as well as being consistent with the higher planning documents of Policy A1 of the NPSFM and the RPS, specifically Objectives WQUAL.1 and WQUAL.2, as set out by Mr McCallum-Clark.</p> <p>With respect to not including the word “improved” in Objective 6 as sought in my evidence in reply dated 13 May 2020, I agree with Mr McCallum-Clark in that Objective 6 will endure beyond the FMU processes, in particular for contaminants that are not specifically addressed in freshwater objectives, limits and targets. The objective still gives effect to water quality objectives and policies (Objectives WQUAL.1 and WQUAL.2, and Policies WQUAL.1 and WQUAL.2¹) of the Southland Regional Policy Statement 2017 (RPS).</p> <p>No further changes are required.</p> <p>Recommendation:</p> <p>Objective 6</p>

¹ Please refer to the RPS in the common bundle of documents.

		<p><i>Water quality in each freshwater body, coastal lagoon and estuary will be:</i></p> <p><i>(a) maintained where the water quality is not degraded; and</i></p> <p><i>(b) improved where the water quality is degraded by human activities.</i></p>
Objective 7	Resolved – 1 st ID	
Objective 8	Resolved - DV	
Objective 9 and 9A	Largely resolved. Outstanding question in relation to use of 'life-supporting capacity'.	<p>The Court's Minute 29 June 2020 stated that:</p> <p>[5] Further to paragraphs [139]-[140] of the first Interim Decision, what does 'life-supporting capacity' mean and secondly, how does the inclusion of this phrase assist the Regional Council to carry out its functions if the pSWLP does not enlarge on the same?</p> <p>In my opinion, the term "life-supporting capacity" needs to be retained in the objective.</p> <p>The definition of "ecosystem health" in the NPSFM is a Compulsory National Value with various water quality attributes, however, ecosystem health does not necessarily consider the extent or quantity of a species per se.</p> <p><i>"Ecosystem health – The freshwater management unit supports a healthy ecosystem appropriate to that freshwater body type (river, lake, wetland, or aquifer).</i></p> <p><i>In a healthy freshwater ecosystem ecological processes are maintained, there is a range and diversity of indigenous flora and fauna, and there is resilience to change. Matters to take into account for a healthy freshwater ecosystem include the management of adverse effects on flora and fauna of contaminants, changes in freshwater chemistry, excessive nutrients, algal blooms, high sediment levels, high temperatures, low oxygen, invasive species, and changes in flow regime. Other matters to take into account include the essential habitat needs of flora and fauna and the connections between water bodies."</i></p> <p>In addition, the phrase life supporting capacity is also used in the NPSFM in the objectives and policies on water quality and quantity e.g. 'To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water...'. The baseline of what "life-supporting capacity" is could be defined in terms of diversity or abundance of a species. The term "ecosystem health" does not infer the abundance of a species.</p> <p>Both terms should be retained in the objective so as to ensure the qualitative and quantitative aspects are considered.</p>

		<p>Recommendation: Retain “life supporting capacity” in Objective 9/9A.</p> <p>Objective 9/9A</p> <p><i>The quantity of water in surface water bodies is managed so that:</i></p> <p>(a) the aquatic ecosystem health, life-supporting capacity, the values of outstanding natural features and landscapes, the natural character and historic heritage values of waterbodies and their margins are safeguarded;</p> <p>(b) ...</p> <p>(c) ...</p>
Objective 9B	Outstanding questions in relation to the wording of the Objective, giving effect to the RPS and issues it is seeking to address.	<p>I agree with Mr McCallum-Clark and have provided a minor redrafting (in red and underlined) to the issues on page 17 of the pSWLP that Objective 9B relates to as follows:</p> <p>Objective 9B Issues: Page 17:</p> <p><i>Some of these activities can have positive effects on the natural environment, for example, bridges and culverts allow access across a river without disturbing the bed. Others s-activities, such as infrastructure, are important to enable people and communities to provide for their have important economic, <u>cultural</u>, and social <u>wellbeing benefits, for example, erosion control works protect community assets.</u> However, <u>These</u> activities <u>in the beds of rivers and lakes</u> can also have adverse effects on the environment, including generating sediment, disturbing habitat and preventing fish passage.</i></p> <p>Recommendation:</p> <p>Amend Objective 9B Issues: Page 17:</p> <p><i>Some of these activities can have positive effects on the natural environment, for example, bridges and culverts allow access across a river without disturbing the bed. Others s-activities, such as infrastructure, are important to enable people and communities to provide for their have important economic, <u>cultural</u>, and social <u>wellbeing benefits, for example, erosion control works protect community assets.</u> However, <u>These</u> activities <u>in the beds of rivers and lakes</u> can also have adverse effects on the environment, including generating sediment, disturbing habitat and preventing fish passage.</i></p>
Objective 10	Resolved – 1 st ID	

Objective 11	Resolved - DV	
Objective 12	Resolved - DV	
Objective 13	Largely resolved. Outstanding question in relation to the structure of the Objective.	<p>I agree with the revised structure as recommended by Mr McCallum-Clark to draft in a positive way. Additional minor wording change suggested.</p> <p>Recommendation:</p> <p>Objective 13/13A/13B</p> <p><u>Land and soils are may be used and developed to enable the economic, social and cultural wellbeing of the region provided that:</u></p> <p>(a) the quantity, quality and structure of soil resources are not irreversibly degraded through land use activities or discharges to land; and</p> <p>(b) the health of people and communities is safeguarded from the adverse effects of discharges of contaminants to land and water; and</p> <p>(c) ecosystems (including indigenous biological diversity and integrity of habitats), are safeguarded.</p> <p>then land and soils are used and developed to enable the economic, social and cultural wellbeing of the region.</p>
Objective 14	Largely resolved. Outstanding question in relation to use of 'life-supporting capacity'.	<p>I disagree with Mr McCallum-Clark as for Objective 9/9A above, and seek to retain the term "life-supporting capacity". The term 'health' is not needed as this is encompassed in the phrase "life-supporting capacity".</p> <p>I agree with Mr McCallum-Clark that the term "types" is superfluous and is not needed.</p> <p>Recommendation:</p> <p>Objective 14</p> <p><u>The range, health and diversity of indigenous ecosystems types and habitats within rivers, estuaries, wetlands and lakes, including their margins, and their life-supporting capacity are maintained or enhanced.</u></p>
Objective 15	Resolved - DV	
Objective 16	Not subject to Topic A	Agree – not in the Topic A Table produced by SRC Memorandum of counsel dated 19 September 2018.

Objective 17	Largely resolved. Outstanding question in relation to the guidance provided by the Objective, especially in relation to 'significance'.	<p>I support the deletion of “that are of significance to the region” from Objective 17 for the reasons that Mr McCallum-Clark provides in his brief.</p> <p>In my opinion, I consider that the scale of significance is not in either definition of “natural character” in the RPS nor “natural character values” in the pSWLP (which are identical).</p> <p style="text-align: center;">RPS definition of “natural character” and pSWLP definition of “natural character values” are the same: <i>The qualities of the environment that give it recognisable character. Embraces ecological, physical, spiritual, cultural, intrinsic and aesthetic values, and includes modified and managed environments.</i>”</p> <p>While the RPS does refer to natural character throughout a range of provisions, it does not do so in a manner that is only in reference to “significance” for all values that the term “natural character” encompasses. Scale of significance is only in relation to biodiversity/significant indigenous vegetation and habitats of indigenous fauna (Schedules 2 and 3 of the RPS) which gives effect to s6(c) of the Act. The other ‘values’ in the definition have no such scale identification. I note that s6(a) of the Act does not refer to scale of significance.</p> <p>The level of protection of the natural character values, from inappropriate use and development, can be adequately assessed on a case-by-case basis, ranging from preservation where the values are very high, to little protection where the natural character values are very low, and such an assessment is implied.</p> <p>In my opinion, I do not think that Objective 17 should be limiting the values to be preserved to regional significance as a result.</p> <p>The pSWLP should not limit itself to “regional significance” in all values of natural character – that is not the intent of the RPS nor of s6 of the RMA. This “regional significance” is only in relation to biodiversity and natural habitats in my understanding.</p> <p>Recommendation:</p> <p>Objective 17</p> <p><i>Preserve the natural character values of wetlands, rivers, lakes and their margins, including channel and bed form, rapids, seasonably variable flows and natural habitats that are of significance to the region, and protect them from inappropriate use and development.</i></p>
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Objective 18	Questions in relation to what the Objective is seeking to achieve.	<p>I disagree with Mr McCallum-Clark as set out in his 20 July 2020 brief.</p> <p>The Third Interim Decision has now confirmed the incorporation of the interpretation statement and the risk-based approach for the physiographic zone policies 4-12. Therefore, with the inclusion of the interpretation statement and the ongoing need to ensure that the policies reflect the demonstration of how land use and water management practice is undertaken, this should identify how behaviour change is to be demonstrated going forward. Therefore, I consider Objective 18 no longer relevant as it is provided for by other provisions in the plan.</p> <p>For example, Policies 4-12 use the risk-based approach in the management of contaminant risk, requiring the resource user to identify the contaminant pathways within the respective physiographic zone. The implementation of good management practices and the Farm Environmental Plans provide clear demonstration tools of a person’s land use and water management practice. It is from these tools that an assessment can be made if a person’s land use and water management practice has met the other respective outcomes sought.</p> <p>Recommendation: <i>Delete Objective 18 in its entirety.</i></p> <p>Objective 18 <i>All persons will demonstrate improved land use and water management practice.</i></p>
Policy 1	Resolved – DV	
Policy 2	Resolved - DV	
Policy 3	Confirmed in 1 st ID	
Policies 4-12	Largely resolved. Outstanding questions in relation to whether they apply to farming only, dairy farming ‘of	<p>I agree with Mr McCallum-Clark that “of cows” is deleted as dairy farming can apply to other species as well. I have no issue with the rewording of the chapeau to each physiographic zone policy as recommended by Mr McCallum-Clark.</p> <p>Recommendations: Amend the chapeau to each physiographic policy 4-12 to read:</p> <p><i>In the YYY physiographic zone, avoid where practicable, as a first priority, risk to water quality from contaminants, and where avoidance is impractical, requiring risk to water quality from contaminants to be minimised by:...</i></p>

	cows' and a potential policy gap	Amending the second or third subclause to Policies 5, 10, 11 and 12 to read: <i>avoid dairy farming of cows and intensive winter grazing where contaminant losses will increase as a result of a proposed activity.</i>
Policy 45	To be reviewed in light of the 2020 amendments to the NPSFM.	Agree. The advice note to Policy 45 could be deleted as unnecessary due to amended wording of Policy 45 in 1 st ID. However, retention of the advice note does not detract from the policy.
Policy 46	To be reviewed in light of the 2020 amendments to the NPSFM.	Agree.
Policy 47	To be reviewed in light of the 2020 amendments to the NPSFM.	Agree.