

**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)

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

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**AFFIDAVIT OF MATTHEW EATON ARTHUR MCCALLUM-CLARK**  
**21 August 2020**

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Judicial Officer: Judge Borthwick

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**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**

I, Matthew Eaton Arthur McCallum-Clark, of Ohoka, Planner, solemnly and sincerely affirm:

- 1 My qualifications and experience are set out in my Statement of Evidence in Chief dated 14 December 2018, and updated in my Statement of Evidence in Chief dated 17 April 2020.
- 2 While this affidavit in part records the reasoning and conclusion of the planners I discussed the matters with,<sup>1</sup> in places I express my professional opinion. For this material, I confirm that I have read and am familiar with the Code of Conduct for expert witnesses contained in the Environment Court Practice Note 2014. I agree to comply with that Code. Other than where I state that I am relying on the evidence of another person, my opinions are 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.
- 3 As directed by the Court in the Minute dated 17 August 2020, this affidavit seeks to explain some of the changes to the Objectives and Policies included within the joint memorandum of counsel dated 4 August 2020. While I was involved in many of the discussions between the planning witnesses, I was not involved in discussions between counsel; directly between parties; or conversations between other planners. Further, the discussions I was involved in were on a without prejudice basis.
- 4 As with any negotiated outcome, the position arrived at by the parties does not necessarily reflect my professional opinion of what the best wording would be. In my opinion, in part, some of the wording is acceptable rather than preferred. That said, the agreed outcome was the result of considerable discussion and investment in time and thought, which I respect. I have attempted to set out below the reasoning that the Court has required to be provided, based on my understanding and recollections of the discussion that occurred.

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<sup>1</sup> Direct discussion occurred between myself and Susan Ruston for Balance, Ravensdown, Federated Farmers and HortNZ, Linda Kirk for the Director General, Ben Farrell for Fish & Game and Forest & Bird, Janan Dunning for Gore DC, Southland DC and Invercargill CC, and Treena Davidson for Ngā Rūnanga and Te Rūnanga o Ngāi Tahu.

*Matthew*  
C.R.S

5 The topics addressed in this affidavit are in the same order as the directions in the Court's Minute dated 17 August 2020.

**Objectives 13/13A/13B, 17 and 18**

6 At paragraph [4] of the Minute dated 17 August 2020, the Court states:

*[4] Insofar as some of the amendments are in tension with the decisions of the court, I will direct the Regional Council to file an affidavit explaining the changes sought. Responding to the court's first Interim Decision, the affidavit will explain the changes proposed to the following objectives and policies:*

- (a) Objectives 13, 13A and 13B;*
- (b) Objective 17; and*
- (c) Objective 18 (identifying the source of the court's jurisdiction to delete the objective and secondly, describing the impact on linkages within the plan because of the deletion of the objective).*

**Objective 13/13A/13B**

7 In my brief dated 20 July 2020<sup>2</sup>, I discussed the structure of this Objective and suggested an alternative structure, without any substantive adjustment to the wording.

8 In discussion with other planners, there was a level of discomfort about the directive nature of the objective, particularly in implying that land and soils must be used. To alleviate this, the planners agreed that less directive "may be used" language was more appropriate.

9 While the interim decision identified that the structure of the Objective was deliberate, putting the conditions of use first, the planners were largely in agreement that the revised structure of the Objective was unlikely to have a significant impact on outcomes, and in combination with the less directive wording, considered the revised Objective was appropriate. While the planners understood the reasoning of the Court,

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<sup>2</sup> At paragraphs [33] – [37].

*M. J. S.*  
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in considering the Objective could be structured to logically follow importance of the pre-conditions as identified in cross examination, the planners considered that most other provisions in the Plan, such as other policies and rules,<sup>3</sup> were structured in a more traditional manner that still maintained the importance of the pre-condition elements.

- 10 No disrespect was intended to the Court, or to move away from the intent of the first Interim Decision. The change recommended to the Objective is in the nature of a change of syntax, rather than outcome. On this basis, the planners considered that it was an improvement, but I do not understand that any of the planners considered that it was a critical change to make.

### **Objective 17**

- 11 In my brief dated 20 July 2020, I set out my reasoning for recommending the deletion of 'that are of significance to the region' from the Objective.<sup>4</sup>
- 12 There were a range of views on this from other planners. A number of different permutations were discussed, and there remained mixed views on the recommended change. Some planners considered, as natural character had been reduced by a significant extent in Southland, the remaining natural character ought to be preserved, and that tangata whenua understandings of natural character may not be appropriately considered. Some planners considered that a high bar was set by use of the phrase 'that are of significance to the region', in that values of a specific locality may be overlooked. Other planners considered that the simple removal of the phrase 'that are of significance to the region' could lead to the impression that the Objective extends beyond the extent required by section 6(a) of the RMA, and would lead to a desire to preserve every component of natural character in every location.

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<sup>3</sup> For example, a typical rule format is:

*Rule 50 Community water supply*

*The taking and use of water for a community water supply is a controlled activity provided:*

- 1) *The application is for the replacement of an expiring water permit pursuant to section 124 of the Act and the rate of take and the volume and use of the water is not changing; and*
- 2) *A water demand management strategy is lodged as part of the application.*

<sup>4</sup> At paragraphs [47] – [48].

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C.R.

- 13 Among the planners there was some discussion about the alternative use of 'preserve' and 'protect'. However, the planners acknowledged that this had been argued before the Court and the Court's findings on this were clear in the first Interim Decision.<sup>5</sup>
- 14 Further discussion with some planners identified that the preservation of natural character values does not necessarily require the avoidance of any effect on every element of indigenous biodiversity, natural form or function. I remain of the view that further adjustment of Policies 18, 20, 28, and 33, along with the policies required to be inserted by the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**), will assist in this regard.
- 15 I note that the recently released NPSFM 2020 requires the inclusion of two relevant policies<sup>6</sup> that are related to this Objective. The two policies<sup>7</sup> require avoiding the loss of river extent and values and natural inland wetland extent and values (whether significant or not), unless specific criteria are met.
- 16 As a final point, Mr Maw, counsel for the Council, has also advised that there is little, if any, scope within the appeals lodged to add substantive criteria or further policy direction to implement a significance criteria. Further, some of the planners were not supportive of a significance criteria being added to the Plan, as I had suggested was an option.<sup>8</sup>

### **Objective 18**

- 17 Objective 18 was the subject of considerable discussion before the Court in the first hearing, and more recently between the planners. There was a diversity of views as to whether the Objective should be kept at all, whether it was capable of being worded as an objective while retaining a useful function, and whether it was actually more appropriate as a policy. There were a number of discussions about specific wording.

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<sup>5</sup> At paragraphs [272] and [279].

<sup>6</sup> See 3.22 of the NPSFM 2020 in relation to natural inland wetlands and 3.24 in relation to rivers.

<sup>7</sup> See Annexure 1 for the required content of these two policies.

<sup>8</sup> At paragraph [48] of my brief dated 20 July 2020.

*Maw*  
C.R.S.

- 18 There was also considerable discussion about the potential for overlap between the Interpretation Statement relating to Objectives 1 and 2 and the intent of Objective 18. The planners considered that the behaviour change anticipated by Objective 18 will also be triggered by the inclusion of the Interpretation Statement, particularly the second sentence:

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

- 19 In the end, consensus was not reached on wording and the overall view was that deletion was the most appropriate option.
- 20 At paragraph [4(c)] of the Minute dated 17 August 2020, the Court has requested 'the source of the Court's jurisdiction to delete the objective and secondly, describing the impact on linkages within the plan because of deletion of this objective'.
- 21 Mr Maw, counsel for the Council, has informed me that the Notice of Appeal of Ngā Rūnanga provides jurisdiction for the Court to delete Objective 18. Ngā Rūnanga's notice of appeal states that "Te Mana o te Wai is fundamental to the integrated framework for freshwater management in Southland", and that the Plan should "ensure that Te Mana o te Wai is at the forefront".<sup>9</sup> The amendments that have been made to the Plan by inserting the Interpretation Statement and re-ordering the objectives achieve this outcome.
- 22 Consequential to these amendments, Objective 18 was now being seen as attempting to paraphrase the outcomes sought in the Interpretation Statement and Objectives 1 and 2, but was doing so in an inaccurate manner that was detracting from those very outcomes. On balance, it was considered that the outcome sought by Ngā Rūnanga was better achieved by the Interpretation Statement and Objectives 1 and 2, and the deletion of Objective 18 in its entirety. Accordingly, it is within the scope of Ngā Rūnanga's notice of appeal to delete Objective 18 in order to ensure that Te Mana o te Wai remains at the forefront of the Plan and is not weakened by a subsequent objective that seeks to inaccurately paraphrase the intended outcome.

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<sup>9</sup> Ngā Rūnanga Notice of Appeal dated 17 May 2018, at 8(d).

*M. Maw*  
C.R.



- 23 I note that the updated section 32 report identified that Objective 18 was implemented by all policies and rules. In discussion with other planners, there was general agreement that the intent of Objective 18, being improved practices, was now addressed by the re-ordered Objectives 1 and 2 and the Interpretation Statement. While the updated section 32 report identified implementation by the remainder of the provisions in the Plan, I do not consider that there are any provisions that are solely reliant on Objective 18, or only implement Objective 18. Therefore, the deletion of Objective 18 will remove those linkages, but those linkages are effectively replaced by linkages to the strengthened positioning of ki uta ki tai and Te Mana o te Wai.

### **Impractical**

- 24 At paragraph [5] of the Minute dated 17 August 2020, the Court has directed that 'an interpretation of "impractical" in the physiographic zone policies' be provided.
- 25 "Impractical" was suggested as a part of a change to all physiographic zones that sought avoidance of risk to water quality:
- In the YYY physiographic zone avoid, 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:*
- 26 "Impractical" is defined in the Oxford New Zealand Dictionary as: *Not practical*. "Practical" in this context is defined as: *Suited to use or action; designed mainly to fulfil a function and feasible; concerned with what is actually possible*. In contrast, the Interim Decision word used is "practicable", which is defined as: *That can be done or used and possible in practice*. As this word is used in the Interim Decision in a negative context, the meaning of the phrase would be 'not able to be done or possible in practice'. In my opinion, in the context of the physiographic zone policies, 'impractical' effectively means the same as 'not practicable', and a definition of 'not suited for use or action; not feasible' is appropriate.
- 27 In adding these words, the intent was to fill a potential policy gap, through establishing a clear hierarchy of preferences in the policy, not to

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change the outcome. While I do not suggest alternative wording, if the Court wished to use wording more in line with the Interim Decision, then the following wording may be suitable:

*In the YYY physiographic zone, avoid where practicable, risk to water quality from contaminants, and where avoidance is not practicable, requiring risk to water quality from contaminants to be minimised by:...*

### **Additional evidence**

28 At paragraph [6] of the Minute dated 17 August 2020, the Court has directed that further evidence be provided, as sought in paragraphs [5], [7]-[10], [13], [14], [15], [16] and [18] of the Court's minute dated 29 June 2020. I have set out each of these paragraphs and provided a response immediately following each of those paragraphs.

*[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?”*

29 Evidence on the meaning of ‘life-supporting capacity’ was limited in the first hearing. Dr Death<sup>10</sup>, at paragraphs 6.3 and 6.8, considered that the term has the same meaning as ‘ecosystem health’. At paragraphs [20] and [21] of my brief dated 20 July 2020, I explained my interpretation, after discussing with Mr Hodson of Southland Regional Council. That resulted in my suggestion that the term be deleted.

30 In discussion with other planners, it was clear that some planners held the view,<sup>11</sup> that there was a ‘quantity’ element that was not well represented by ‘ecosystem health’. The example given to me was a river with very substantial water takes from it – it may have similar ecological health by way of water quality metrics, but is likely to have

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<sup>10</sup> Evidence in Chief of Russell George Death dated 15 February 2019.

<sup>11</sup> As I understood it, after discussing with their technical experts.

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less life supporting capacity on account of it being physically smaller due to the water takes.

- 31 These planners were clear that life supporting capacity should not be deleted or replaced with ecosystem health, as life supporting capacity entailed both ecosystem health and the 'amount' of habitat available, and as such would provide additional guidance to the users of the Plan and the Regional Council. While subtle, in my opinion, the concept is already incorporated in the Plan, particularly in the water quantity criteria in Appendix K, so while I have no difficulty with the term being used in the Objective, the concern expressed by the planners about the quantity of habitat being overlooked may be unwarranted.

*[7] – “At paragraphs [175]-[180] of the first Interim Decision, we said that by not addressing infrastructure’s integration with land use activities and the environment, the objective did not give full effect to RPS Objective INF.1. At paragraph [180] of the first Interim Decision, we also said that the meaning of ‘sustainable and effective’ concerned both the infrastructure per se and secondly, the manner of its development relative to the environment.”*

*[8] - “With reference to the Interpretation Statement, do the planning witnesses agree Objective 9B (as proposed to be amended by the court) gives effect to the RPS? Secondly, do the planning witnesses also agree ‘sustainable and effective’ is concerned with both the infrastructure and secondly, the manner of its development relative to the environment? If they do, is the court’s proposed wording clear or do they recommend further change?”*

- 32 With respect to the first parts of paragraphs [7] and [8], I refer to paragraph 31 of my brief dated 20 July 2020. In that paragraph, I express my view that Objective INF.1 of the RPS applies to a range of planning documents and that the pSWLP gives effect to it to the extent required. The other elements of Objective INF.1, particularly relating to the integration of land-use and infrastructure are, in my opinion appropriately given effect to primarily through other planning documents such as district plans and growth and development strategies, particularly those prepared under the National Policy Statement on

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*C.R.*

Urban Development 2020. In discussion, no other planner raised concerns about this viewpoint.

- 33 With respect to the matter raised in the second parts of paragraphs [7] and [8], in my brief dated 20 July 2020 I agreed that sustainable and effective apply to both the development of infrastructure and its ongoing operation.<sup>12</sup> Again no other planner disagreed with this statement.
- 34 While I speculated that I had a residual concern about the use of the word 'sustainable', in discussion with other planners, that concern was not shared, such that we agreed that the Court's wording was clear and appropriate.

*[9] – “Further to paragraphs [162] and [183(i)], we will direct the planners to confer and identify the issues that the plan seeks to address in relation to infrastructure and secondly, to say whether – in their opinion – these issues should be identified in the plan pursuant to s 67(2)(a) RMA.”*

- 35 At paragraphs [29] and [30] of my brief dated 20 July 2020, I addressed this matter, and recommended changes to the issues discussion on page 17 of the Plan. I acknowledge that the way that the infrastructure objective and policies have been added through the Council decision-making process has led to a degree of incongruity, in that the infrastructure provisions are somewhat less cohesive than the remainder of the Plan.
- 36 My suggested additional words were in the nature of addressing this defect in a way that results in relatively minor changes to the plan. The planners with a particular interest in this topic discussed these words directly and arrived at some further adjustment to the wording, and no other planners disagreed with this or sought further change.

*[10] – “Further to paragraph [183(iii)], do the planning witnesses agree the plan may be amended by including the definition of “regionally*

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<sup>12</sup> At paragraph [32].

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C.R.

*significant infrastructure” and deleting the definition of “critical infrastructure”?”*

- 37 This matter is addressed at paragraph [28] of my brief dated 20 July 2020, and the associated footnotes. As addressed in that paragraph, all three definitions are included in the pSWLP and are identical to those in the RPS.
- 38 I further note that ‘critical infrastructure’ is used in Policy 26A and in Rule 9. Therefore, in directly answering the question in paragraph [10], “regionally significant infrastructure” is already defined in the pSWLP, so the plan need not be amended to include it, and deletion of the definition of “critical infrastructure” has not yet been considered in the context of Policy 26A and Rule 9. Given that Rule 9 is a permitted activity rule, the additional certainty provided through the definition of critical infrastructure may be warranted.
- 39 In terms of the adjustment to Objective 9B, the planners that I discussed the matter with were in agreement that ‘critical infrastructure’ could be deleted from that Objective, as it was included in the definition of ‘regionally significant infrastructure’.

*[13] – “Respecting the court’s findings, the planners will be directed to conference on the structure and wording of the objective as proposed to be amended by the court.”*

- 40 This paragraph relates to Objective 13/13A/13B, and the issues raised have been addressed earlier at paragraphs [7] to [10] of this affidavit.

*[14] – “Further to paragraph [259] of the first Interim Decision, the planners will be directed to conference on the retention of “life-supporting capacity” in this objective.”*

- 41 The same matters addressed above<sup>13</sup> with respect to paragraph [5] of the Court’s Minute of 29 June 2020 applies to the consideration of ‘life-supporting capacity’ in this Objective.

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<sup>13</sup> At paragraphs [29] to [31] of this affidavit.

*John*  
C.R.

[15] – “Further to paragraphs [262] to [280] of the first Interim Decision, the planners will be directed to conference and respond to the issues raised in the interim decision. When doing so, planners are to consider the direction given and the RPS as to the subject matter of this objective and whether the amendments proposed by the court respond appropriately to the same. If they agree with the court that it is the natural character values that are of significance to the region, are the values of significance identified in the pSWLP and secondly, is there scope under any appeal for the inclusion.”

- 42 The issues raised in relation to paragraph [15] have been addressed earlier at paragraphs [11] to [16] of this affidavit.

[16] – “While the DV wording of this objective is problematic for the reasons we have identified, we nevertheless regard this objective as being of critical importance to the outcomes for water quality under this plan.”

[18] – “Conferencing will – in particular – address the goal or outcome to be secured by this objective. Planners are to bear in mind the court’s observations in the first Interim Decision that paraphrasing (inaccurately) other objectives or listing outcomes is unhelpful and may prove quite cumbersome for plan users.”

- 43 The issues raised in relation to paragraphs [16] and [18] have been addressed earlier at paragraphs [17] to [23] of this affidavit. The recommended deletion of the Objective responds directly to these concerns.

#### **National Policy Statement for Freshwater Management 2020**

- 44 While the NPSFM 2020 may require further discussion, for completeness, I note that it requires, at clause 3.26(1), the inclusion of an objective on fish passage, using the following wording, or words to the same effect:

*“The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some*

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*fish species in order to protect desired fish species, their life stages, or their habitats.”*

45 Clause 1.7 of the NPSFM 2020 states that such a change must be made without using Schedule 1 of the RMA. Therefore, the Regional Council will be inserting this Objective into both the Regional Water Plan and the proposed Southland Water and Land Plan, and any set of Objectives produced in future by the Regional Council in these proceedings will include such an objective on fish passage.



Matthew Eaton Arthur McCallum-Clark

Affirmed at Kaiapoi )  
this 21<sup>st</sup> day of August )  
2020, before me: )

**Courtney Rose Smythe**  
Solicitor  
Christchurch



A Solicitor/Deputy Registrar of the High Court of New Zealand



A Solicitor / Deputy Registrar of the High Court of New Zealand

**Annexure 1 – National Policy Statement on Freshwater Management 2020**  
required policy content

**Courtney Rose Smythe**  
Solicitor  
Christchurch

**Courtney Rose Smythe**  
Solicitor  
Christchurch

Every regional council must include the following policy (or words to the same effect) in its regional plan(s):

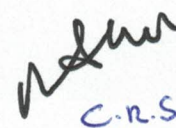
*"The loss of river extent and values is avoided, unless the council is satisfied:*

- (a) *that there is a functional need for the activity in that location; and*
- (b) *the effects of the activity are managed by applying the effects management hierarchy."*

Every regional council must include the following policy (or words to the same effect) in its regional plan(s):

*"The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:*

- (a) *the loss of extent or values arises from any of the following:*
  - (i) *the customary harvest of food or resources undertaken in accordance with tikanga Māori*
  - (ii) *restoration activities*
  - (iii) *scientific research*
  - (iv) *the sustainable harvest of sphagnum moss*
  - (v) *the construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
  - (vi) *the maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)*
  - (vii) *natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or*
- (b) *the regional council is satisfied that:*
  - (i) *the activity is necessary for the construction or upgrade of specified infrastructure; and*
  - (ii) *the specified infrastructure will provide significant national or regional benefits; and*
  - (iii) *there is a functional need for the specified infrastructure in that location; and*



C.R.S



- (iv) *the effects of the activity are managed through applying the effects management hierarchy.”*

*Adrian*  
C.R.S