

**BEFORE A COMISSIONER APPOINTED  
BY THE SOUTHLAND REGIONAL COUNCIL**

**IN THE MATTER**      the Resource Management Act 1991

**AND**

**IN THE MATTER**      of resource consents to occupy the Coastal Marine Area  
with a tide gate and weir and to dam and divert water

**AND**

**IN THE MATTER**      of an application by **SOUTHLAND REGIONAL  
COUNCIL**

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**CLOSING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT  
10 December 2024**

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## MAY IT PLEASE THE COMISSIONER

1. Environment Southland (**Applicant**) lodged a retrospective consent application for an existing set of tide gates, a weir and a diversion located on the Titiroa Stream about 160m upstream of the Tokanui-Gorge Road Bridge on State Highway 92 (**Gates**).
2. Prior to the consent hearing, the Applicant amended its application, reducing the consent term sought and proposing a suite of offsetting and monitoring conditions<sup>1</sup> (see summary of application below). In making these, and subsequent changes the Applicant saw an opportunity for a mutually beneficial consent that would strengthen knowledge of the use of tide gates around the country, whilst also managing water levels in the immediate environment of lawfully established pastoral agricultural.<sup>2</sup>
3. At the conclusion of the hearing, the Commissioner directed ecology and planning expert conferencing, which has been completed and the outcomes are discussed below.<sup>3</sup>
4. The Applicant has endeavoured to work constructively with submitters to achieve the best possible outcome. Over the course of this application, the Applicant has amended the conditions to reflect the concerns of the Director-General for Conservation (**DOC**) and Te Ao Marama Incorporated (**TAMI**). A final set of proposed conditions are attached as Appendix 1.
5. Recently a significant flood event occurred in Southland<sup>4</sup> that brought the purpose of this application into focus, highlighting one reason why the Applicant wishes to manage water levels around the Titiroa Stream.
6. These submissions follow the following structure:
  - (a) Outline of the proposal.

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<sup>1</sup> See Submissions of Counsel for the Applicant 29 August 2024.

<sup>2</sup> See Joint Witness Statement- Planning 13 November 2024 at [1].

<sup>3</sup> Minute 3.

<sup>4</sup> Addressed in the Memorandum of Counsel for the Applicant 4 October 2024.

- (b) An analysis of the policy position, including comment on the s 42A writer's final recommendation.
- (c) Cultural effects.
- (d) Discussion on key issues from expert conferencing.
- (e) Proposed conditions.

### **The Proposal**

7. The proposal is:

- (a) A consent term of five (5) years from the date of grant of consent.<sup>5</sup>
- (b) Channel, diversion and weir to remain in situ.
- (c) Three, side hung, gates to remain in situ.
- (d) A 600 x 200 'letterbox' in the middle gate to allow for fish passage (**Letterbox**).
- (e) Boulder placement in the diversion channel to provide for fish refuge.
- (f) Comprehensive monitoring of the activity, informed by expert ecological advice, including:
  - (i) Inanga spawning surveys;
  - (ii) Fish passage monitoring to determine the effects of the Gates and the effectiveness of the Letterbox;
  - (iii) Consultation with Te Ao Marama on the execution of the fish surveys on taonga species, including retention of TAMI for the same if possible;

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<sup>5</sup> Based on a nominal grant date of 20 January 2025, being 20 January 2030.

- (iv) Water quality monitoring addressing salinity, dissolved oxygen and temperature.
- (g) Inanga spawning habitat enhancement (0.6ha) and tributary enhancement (0.53ha) in accordance with a certified habitat enhancement plan.<sup>6</sup>
- (h) A wide review condition, including provision for a review if the monitoring identifies adverse effects on the ecological values of the Titiroa Stream.

### **Section 42A Report Writer Final Recommendation**

- 8. Mr West's final recommendation is the application should be declined, however he recognised that there could be a policy pathway open to the Commissioner to grant a short-term consent.<sup>7</sup> It may have assisted to provide more detail on this pathway he had in mind but the Applicant has carefully considered the same, in light of *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency (East West Link)*.<sup>8</sup>
- 9. Materially, that case established that “a *genuine, on-the-merits exception, ... will not subvert a general policy, even a directive one*” because that is consistent with the sustainable management purpose of the Act.<sup>9</sup> This means appropriate exceptions to national policy statement directives can be drafted into plans and be consented.
- 10. Here, to the extent there are directive policies that apply, it is submitted reading the National Policy Statement for Freshwater Management 2020 (**NPSFM**) and New Zealand Coastal Policy Statement 2010 (**NZCPS**) together, along with the Proposed Southland Land Water Plan (**pSWLP**), this application can be seen as a genuine on-the-merits

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<sup>6</sup> Refer evidence of Laura Drummond from 46.

<sup>7</sup> Titiroa tide gates application APP-2021135 – s 42A reporting officer final review dated 25 November 2024.

<sup>8</sup> [2024] NZSC 26.

<sup>9</sup> See [109].

exception that “*threads the needle*”.<sup>10</sup> This is the key submission that is developed on in the following paragraphs.

### **Planning context**

11. This case hinges on the interpretation of national policy statements and how they are given effect to in inferior plans.
12. As an initial point, the Resource Management (Freshwater and Other Matters) Amendment Act 2024 came into force 25 October 2024. Section 23 amended s 104 RMA so that a consent authority may not have regard to the hierarchy of obligations in the objective of the NPSFM.<sup>11</sup> Clause 43 Schedule 12 RMA was also enacted, which gave that amendment retrospective effect to applications before a consent authority where a decision had not yet been made. Therefore, you must not have regard to the hierarchy of obligations when undertaking your s 104 assessment.

### *Policy 11 NZCPS v policy 7 NPSFM*

13. Counsel considers the key policy issue to be the relationship between policy 11 NZCPS, policy 7 NPSFM and policy 28A pSWLP.
14. Key legal points when interpreting the instruments are:
  - (a) Close examination of potentially competing policies will often resolve any apparent tension.<sup>12</sup>
  - (b) The examination of an instrument requires a fair appraisal of the objectives and policies read as a whole.<sup>13</sup>
  - (c) However, it is not correct to put all the objectives and policies “in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened”.<sup>14</sup>

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<sup>10</sup> At [88].

<sup>11</sup> See cl 2.1.

<sup>12</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

<sup>13</sup> *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

<sup>14</sup> *East West Link* at [80].

- (d) Attention must be paid to objectives and policies both on their own terms and as they relate to one another in the overall policy statement or plan.<sup>15</sup>
15. It is this careful examination of the words in the policies that has guided the Applicant when reaching its final position. It considers this proposal can “thread the needle” on account of the pathways in the pSWLP, notwithstanding the NZCPS. This is due to the nature of the adverse effects and mitigation proposed, meaning any harm/adverse effects are mitigated or not material.<sup>16</sup>
16. The Commissioner directed expert planning conferencing to consider the statutory documents that apply on the landward side of the Gates. They agreed the landward side of the Gates is not in the CMA.<sup>17</sup>
17. The experts agreed the following statutory documents apply to the landward side of the floodgate structure:
- (a) NPSFM.
  - (b) National Policy Statement for Indigenous Biodiversity.
  - (c) Southland Regional Policy Statement (**SRPS**).
  - (d) PSWLP.
  - (e) Southland District Plan (**SDP**).
18. The experts did not agree on whether the landward side of the Gates is in the Coastal Environment. The answer to this question will be relevant for application of policy 11 NZCPS.

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<sup>15</sup> Ibid.

<sup>16</sup> See *Trans-Tasman Resources Limited v Taranaki-Whangai Conservation Board* [2021] NZSC 127, approved in *Port Otago Limited v Environmental Defence Society Inc* [2-23] NZSC 112:

[65] This Court in *Trans-Tasman* said that the standard was protection from material harm, albeit recognising that temporary harm can be material. Although in a different context, the comments are nonetheless applicable to the NZCPS. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the “avoid” standard by bringing the level of harm down so that material harm is avoided.

<sup>17</sup> See joint witness statement- planning 13 November 2024 at [2]

19. The Applicant submits you should prefer the evidence of Mr McSoriley. Mr McSoriley has comprehensively explained that both the SRPS and the SDP give effect to policy 1 NZCPS<sup>18</sup> and identify that the landward side of the Gates is not in the Coastal Environment.<sup>19</sup>
20. The Commissioner asked the experts to consider how policy 7 and clause 3.24 NPSFM can be reconciled with policy 11 of the NZCPS. The experts did not find a consensus on how to reconcile the policy direction in the NZCPS and NPSFM. However, the experts did agree the following:
- (a) The RCP does not give effect to the NZCPS or the NPSFM.
  - (b) Ms Blair and Mr McSoriley agreed that the SDP gave effect to the NZCPS.
  - (c) The pSWLP does not entirely give effect to the NPSFM but, materially, the river policy (cl 3.24) is given effect to through a 2024 amendment to the pSWLP inserting policy 28A.
21. Policy 7 NPSFM is a directive policy to avoid the loss of river extent and values *to the extent practicable*. The term ‘practicable’ has been defined in the Supreme Court to mean the following:
- [65] “Practicable” is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account....<sup>20</sup>
22. It is important to recognise that infrastructure in the Coastal Marine Area is provided for in the NZCPS. *East West Link* explains it like this:
- [44] Infrastructure is expressly supported in the NZCPS and future planning is encouraged. A key qualifying criterion for a CMA location is “functional need”, meaning “the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment”.

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<sup>18</sup> Extent and characteristics of the coastal environment.

<sup>19</sup> See joint witness statement- planning 13 November 2024, Appendix 1.

<sup>20</sup> *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc* [2017] NZSC 199 at [65].

Where there is such a need, the directive is to provide for the activity in “appropriate places”.

23. Consistently with this, the effect of the mandatory policy required by cl 3.24 NPSFM, policy 28A is to allow activities where there is a functional need for them to occupy rivers and the effects management hierarchy is applied.<sup>21</sup> In other words, activities that are consistent with policy 28A can be considered deserving exceptions to policy 7.
24. As already noted, *Dye* identifies the need for a fair appraisal of the objectives and policies read as a whole when interpreting policy. As noted in my opening,<sup>22</sup> there is an extensive suite of policies that need to be considered to properly interpret policy 28A. For instance, objective 17 pSWLP is important. That objective seeks to preserve rivers and their margins, including channel form, from inappropriate use and development. It is to be interpreted by understanding what is sought to be protected. The values to be preserved are to be protected from *inappropriate* development.
25. In addition, and importantly, the Applicant submits there is a functional need for the Gates to occupy the Titiroa pursuant to policy 28A; ‘functional need’ meaning “the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.”<sup>23</sup> As discussed below, the mitigation hierarchy has been applied and any effects remedied and mitigated.
26. The SDP means there is no doubt the gates are outside the Coastal Environment,<sup>24</sup> albeit the gates are also shown as the extent of the CMA. What this means, is that the NPSFM should be given significant weight when you are having regard to it under s 104.
27. Policy 7 NPSFM is key and, as discussed below, provides for the genuine exceptions pathway contemplated in *East West Link*. The presence of “avoid” policies, including in other policy instruments,

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<sup>21</sup> *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency* SC [2024] NZSC 26 at [100] – [102].

<sup>22</sup> See from [76].

<sup>23</sup> Ministry for the Environment | Manatū Mō Te Taiao National Planning Standards (November 2019) at 58.

<sup>24</sup> Refer evidence of Mr McSoriley.



should not be treated in an absolute sense because to do otherwise may frustrate the sustainable management purpose of the Act.

28. Returning to policy 11 NZCPS, it is submitted that the correct way to approach this policy is in light of the direction provided by the Supreme Court in *East West Link*. This is what Mr McSoriley has done in the JWS Planning.<sup>25</sup> I may not have gone quite as far he did, saying the NZCPS is not generally relevant for a resource consents, however the outcome is the same.

29. While the Supreme Court tells us policy 11 has a powerful shaping effect, the reference to the word “avoid” does not exclude a margin for necessary exceptions where factually, the relevant policies are not subverted, and sustainable management demands it:

[101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully.

30. The Gates are infrastructure (like a lighthouse) that must be located on the Stream to perform their function. It cannot be the case that policy 11 NZCPS prohibits tide gates on account of their effects on fish passage. In light of the Act’s sustainable management purpose, that does not make sense.

31. Moreover, here the effects of the Gates on fish passage have been mitigated to the point where they are either offset or not material – this is the subject of the next section of the closing.

32. It is therefore submitted that this should not be seen as approaching a routine undermining of policy choices in the NZCPS, and therefore policy 11 is not subverted.

33. As to whether sustainable management provides for the Gates, it is submitted the pSWLP provides a pathway for infrastructure where doing

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<sup>25</sup> See his answer to question 3.

so promotes the sustainable management purpose of the Act. Mr McSoriley has discussed this in his evidence and explained the role of the gates as regional infrastructure.<sup>26</sup>

34. Thus, Counsel's submission from the opening is repeated and relied upon, subject to the addition in square brackets:

It is submitted the PSWLP policies demonstrate a planning framework, giving effect to Mana o te Wai that seeks to balance competing interests within the context of the objectives of the Plan [and the policy direction in the NZCPS in order to achieve the Act's sustainable management purpose]. It is submitted infrastructure of the sort proposed by this Application is precisely the type of activity that a close reading of the Plan allows, if appropriate mitigation or compensation/offsetting can be provided.<sup>27</sup>

#### *Offsetting*

35. The Supreme Court has said about offsets:

[176] ... The relevant question is not how to define an offset or what kinds of offsets can satisfy avoid policies; it is whether the relevant adverse effect can be avoided in fact.

36. The following points discussed in *East West Link*<sup>28</sup> illustrate where expert evidence can be relied on to determine whether offsetting techniques can be applied to meet avoid policies:

- (a) Whether an offset avoids effect is a question of fact and degree to be measured against the policy.
- (b) Whether the impact of the offset must be in situ or deployed elsewhere will depend on the context.
- (c) The conclusions will depend on the environmental element or value to be protected and the nature of the adverse effect to be offset.

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<sup>26</sup> Refer from [26].

<sup>27</sup> At [85]. Note the reference to Te Mana o te Wai is in the context of plan making not the application of the priorities under s 104, now prohibited.

<sup>28</sup> *East West Link* at [176]

37. The Applicant has identified inanga as a vulnerable and in situ species in the Titiroa and has provided targeted offsetting measures.<sup>29</sup>
38. The Applicant submits, and Mr West agrees, that policy 11 of the NZCPS has been satisfied through the inanga spawning habitat enhancement.<sup>30</sup> Along with the proposed Letterbox, any residual adverse effects on inanga are provided for through general habitat enhancement. The Applicant submits that the Gates do not breach policy 11 as the adverse effects of their operation on fish passage are offset in net terms.
39. The Applicant recognises that Mr West refers to the uncertainties around the effects on kanakana. However, Mr West errs in approaching this issue in an 'absolutist' sense – for instance, at 3.4 “*There it is unclear that all fish passage effects will be avoided, or minimised and offset*” [original emphasis]. This thinking means he does not recognise that some effects, either through imposition of conditions<sup>31</sup> or by their nature<sup>32</sup>, are not material.
40. That said, the Applicant recognises the concerns regarding the potential effects of the Gates on kanakana, and addresses this below.

### **Cultural Effects**

41. The Applicant's position is that the application appropriately addresses cultural effects through the proposed conditions, most notably through the proposed cultural monitoring and short term of the consent.
42. As indicated in the opening, the Applicant accepts that its engagement with Nga Runanga could have been more effective. This has led to the regrettable situation of the Council's partners submitting against this application.
43. Since instructing Counsel, the Applicant has contacted TAMI to discuss the application. The responses from TAMI have been constructive

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<sup>29</sup> The inanga habitat restoration.

<sup>30</sup> s 42A reporting officer, above at n 7, see 4.11

<sup>31</sup> *Trans-Tasman Resources*.

<sup>32</sup> *Port Otago*.

although a resolution has been unable to be reached. TAMI have responded positively to suggestions that it be involved in the monitoring of the effectiveness of the fish passage mitigation (discussed further below).

44. The short-term nature of this consent will allow the Applicant to continue to work with their iwi partners and consult with the wider community, to determine the long-term future of the gates and the impact they have on the form and function of the Titiroa Stream. It is anticipated that this will include how any cultural effects of the activity can be addressed, particularly in light of inanga and kanakana monitoring, which will inform the knowledge base on those taonga species.

### **Expert Conferencing**

45. Turning now to the key matters of evidence to support the submission that the effects can be appropriately managed. Some key matters addressed at expert conferencing were:
  - (a) What is the environment?
  - (b) What is the optimal design of the 'letterbox' and what monitoring conditions should be put in place to establish its effectiveness?
  - (c) Will inanga habitat enhancement endure if the Gates were removed?
  - (d) What is the appropriate level of inanga habitat enhancement that should be provided to offset adverse effects of the Gates?<sup>33</sup>
  - (e) Are the proposed conditions adequate?
  - (f) What is the correct planning framework to consider the Gates?
46. To attempt to assist, the outcomes of expert conferencing on these key matters is summarised below.

### **The Environment**

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<sup>33</sup> See cl 3.21 NPSFM.

47. The planning experts agreed the physical, legal environment on the landward side of the Gates is lawfully established pasture, predominantly characterised by rural land use activities.<sup>34</sup>
48. The experts were asked whether the wider environment is:
- (a) Drained and improved, lawfully established pasture?
  - (b) Drained and improved, lawfully established pasture that will revert to wetland?
  - (c) Something else?
49. While the experts were aligned on the environment being characterised by pastoral farming they did not agree on an answer to this second question.<sup>35</sup>
50. The Applicant submits the environment must be taken as it is found, which is pastoral farmland. Mr McSoriley considers that without the Gates that pastoral farmland would revert to the poorly drained land, which was the experience of Mr Frisby when the Gates were inoperative in 1982.<sup>36</sup> The answer to the question is therefore (a) drained and improved, lawfully established pasture.

### **Fish Passage & the Letterbox**

51. As you are aware, the Applicant proposes a 'Letterbox' be installed to enhance fish passage when the Gates are closed.<sup>37</sup> Attached as Figure 2 to the conditions is a drawing showing the proposed design of the Letterbox.<sup>38</sup>
52. The design of the Letterbox was a significant discussion topic at expert ecology conferencing. The experts agreed on the following substantive matters<sup>39</sup>:

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<sup>34</sup> See joint witness statement- planning 13 November 2024 at [1]

<sup>35</sup> As above.

<sup>36</sup> See Mr Frisby brief of evidence at [6] 16 August 2024

<sup>37</sup> See fourth memorandum of counsel for the Applicant 24 October 2024

<sup>38</sup> See dimensions at paragraph [7(d)] above.

<sup>39</sup> See the joint witness statement on ecology, agenda item 1.

- (a) The Letterbox is a novel approach and monitoring data would be beneficial and necessary to inform future decision making on its effectiveness, which may be helpful for its use nationwide.
  - (b) Monitoring should be a condition of consent.
  - (c) The proposed design of the Letterbox could be improved to enhance fish passage. Namely, the number of 'letterboxes' and its dimensions.
53. The Applicant recognises the novelty of the Letterbox and submits that any concerns are managed by the robust monitoring regime, the nature of which was substantively agreed by the experts.
54. It is accepted that a greater number of letterboxes (i.e. two or three c.f. one in the centre gate) could improve fish passage. However, it is submitted the appropriate approach is to undertake the proposed monitoring to determine how successful a single Letterbox is first. The concern is if more letterboxes were installed the increase in flow upstream could affect the performance of the Gates for limited or no benefit for fish passage. It is therefore considered that a cautious approach, that balances reasonable management of effects with the purpose of the Gates, is the better way to go.
55. In terms of the dimensions of the Letterbox, the Applicant has carefully considered the same and the dimensions provide for larger fish (trout and tuna) passage.
56. Finally, the experts differed on the use of stiffeners/counterweights to keep the Gates open for longer. The Applicant has never supported this approach and has not changed its position, preferring the approach of Ms Drummond. Ms Drummond has highlighted that keeping the gates open is unlikely to meaningfully enhance fish passage, because the letterbox provides an opening whether the Gates are closed or not.<sup>40</sup>

*Kanakana monitoring*

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<sup>40</sup> See M Drummonds rebuttal evidence 30 August 2024 at [10].

57. The Applicant recognises that it was difficult for the experts to discuss kanakana passage through the Letterbox when their presence in the Titiroa Stream is uncertain due to limited information on their presence and behaviours.<sup>41</sup> In this situation the Applicant is proposing a short-term consent accompanied by monitoring to improve the knowledge base. This is an appropriately precautionary approach.
58. Along with confirming their presence, the Applicant submits that the proposed monitoring conditions will assist to understand the effects of the Gates and other similar river structures on kanakana migration. The experts are agreed that that targeted monitoring/observations of kanakana movement at the Gates would increase the current understanding of how the Gates impact their migration and assist with informing future decision-making. This is a positive effect of the application.
59. Additionally, the Applicant submits the proposed offsetting measures will provide benefits for kanakana as a taonga species. Ms Drummond and Ms Bowen considered that fish refugia habitat (boulders) downstream could provide an ecological improvement for fish with delayed migration.<sup>42</sup>
60. The Applicant has incorporated TAMI's proposed monitoring methodology into conditions to provide for cultural monitoring. The condition as drafted has, however, been careful to ensure any inability by TAMI to undertake the monitoring will not be a failure to comply with the conditions.

### *Fish bypass*

61. Ms Drummond and Ms Bowen also explored the possibility of a fish bypass at conferencing. The Applicant is open to further consideration of a fish bypass through the consent term as a deeper understanding of the effectiveness of the Letterbox is gathered.

### *Monitoring results*

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<sup>41</sup> This is not to overlook the evidence from Ms Blair that kaumatua have sourced kanakana from the Stream in the past.

<sup>42</sup> See the Joint Witness Statement on Ecology, agenda item 5.

62. Council is alert to fish passage being an issue that is important for tide gates nationwide. It has proposed a monitoring programme to provide some insight into the effectiveness of use of letterboxes on tide gates. The intent is that this monitoring will contribute to the knowledge base to help infrastructure owners and stakeholders determine the effectiveness of letterboxes to mitigate adverse effects on fish passage. The Council proposes to share its monitoring data with the Director-General and Te Ao Marama Inc. The Applicant has indicated to both parties it would be happy to record this as a condition of consent (on an *Augier* basis). At this stage parties haven't confirmed their support for this suggestion, so it is not included in the conditions. The Applicant would not oppose the condition if it was included.

### **Habitat Restoration Offsetting**

63. The Commissioner directed the expert ecologists to consider the extent of habitat restoration that would be required to address residual adverse effects of the Gates.<sup>43</sup> The Commissioner also queried the longevity of any such restoration if the Gates were subsequently removed after a short-term consent.
64. The experts agreed that where inanga habitat enhancement is successful a 1:1 ratio as a minimum is suitable e.g. tributary enhancement.<sup>44</sup>
65. The experts agreed there while not as 'optimal' as inanga habitat restoration, there was ecological benefits in general habitat enhancement, such as riparian planting, other fish passage opportunities, or further research into the ecological values of the catchment (increased knowledge base). The offsetting ratio required would be higher, as general habitat enhancement does not provide the 'like-for-like' that inanga spawning habitat does.
66. The Applicant has been clear that the proposed offsetting package is limited by land ownership. There was partial agreement amongst the

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<sup>43</sup>Clause 3.24(3)

<sup>44</sup> See the Joint Witness Statement on Ecology, agenda item 2.



experts that an 'optimal' offsetting area can include subjective considerations such as what is feasibly possible.

67. The Applicant has proposed a suite of conditions that provides for both inanga spawning habitat restoration and general habitat enhancement that is intended to offset the residual adverse effects of the Gates.
68. Expert ecologists for the Applicant and for DOC agreed that the proposed habitat enhancement would still be of ecological value if the Gates were removed. Ms Blair did not comment nor disagree. The two experts considered that the extent of inundation upstream would need to inform planting along the banks and the conditions that contemplate this. The downstream tributary enhancement would not be affected if designed with the potential future hydrological changes as the downstream water level change has been modelled to be minor. The Applicant submits that the modelling of Mr Gardner can assist in this and has proposed a condition requiring a Habitat Enhancement Plan to be certified by the consent authority.

#### **Other conditions & term**

69. The expert ecologists for TAMI and DOC retained their position that the Gates should be removed but conceded that a 5-year term from the date of the grant of consent is preferable to a longer term consent. Ms Drummond considered the 5-year term is an appropriate period to determine if the Letterbox is successful in improving fish passage.
70. The expert planners noted that boulder placement could require resource consent under Rule 10.2.4 of the RCP. However, the diversion channel is part of the tide gate infrastructure and the scope of the consent contemplates mitigations like the boulders. There is no jurisdictional constraint to imposing this condition.
71. The expert planner for TAMI proposed, following the closing of expert conferencing, that condition 12 (now 16) should be amended to reflect the requirement for monitoring, designed and undertaken by TAMI, as part of overall fish passage monitoring. It is understood, this was at the Applicant's invitation for TAMI to consider monitoring for matters of

concern to local rūnanga to help inform future decision-making and improve engagement. The Applicant can accept this and has suggested slightly modified drafting of the condition to give some flexibility as to how that monitoring is undertaken in partnership with TAMI.



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CP Thomsen  
Counsel for the Applicant  
10 December 2024

## Appendix 1

### Updated Draft Conditions of Consent

10 December 2024

Schedule of Draft Conditions Titiroa Weir and Tide Gates APP-20211135

Expiry date: 20 January 2030

#### Purpose for which permit is granted:

- Occupation of crown land in the coastal marine area by a weir structure
- Occupation of land in the coastal marine area by a tide gate structure
- Damming and diversion of water

#### Standard Conditions

1. This consent authorises occupation of the coastal marine area and the damming of tidal waters with a weir and tide gate structure, as described in the application for resource consent dated 8 March 2021.
2. The consent holder shall always during the term of this consent maintain the weir and tide gate structure in good repair, appearance and condition.
3. The consent holder shall notify the Consent Authority (escompliance@es.govt.nz), of any alteration to the structure which is carried out without resource consent pursuant to a permitted activity rule in an operative regional plan.
4. In consideration of the right to occupy Crown Land for the activity specified above, the consent holder shall, each year, pay to the Consent Authority the appropriate coastal occupation charge specified in the Regional Coastal Plan. Each financial year, commencing 1 July, the charge shall be adjusted for inflation in accordance with the Consumer Price Index. The sum payable in the first year of this consent (or the proportion thereof for which the consent is current) is \$..... plus GST, and shall be payable in advance on invoice. The revenue from this charge shall be used only for the purpose of promoting the sustainable management of the coastal marine area.

#### Habitat Enhancement

5. The consent holder shall undertake inanga spawning habitat enhancement upstream of the tide gates over a minimum area of 0.6 ha as detailed on Figure 1.
6. The consent holder shall undertake 0.53 ha of tributary enhancement for inanga spawning and native fish habitat downstream of the gates as detailed on Figure 1.
7. Habitat enhancement shall commence within 1 year of grant of this consent and be in accordance with the Habitat Enhancement Plan detailed in condition 8 - 11.

#### Habitat Enhancement Plan

8. Prior to habitat enhancement required under conditions 5 and 6 commencing, the Consent Holder shall submit a Habitat Enhancement Plan (HEP) to SRC for certification. The objectives of the HEP are to:

- (a) Ensure habitat enhancement is undertaken in an appropriate and effective manner to improve the current bank conditions or vegetation for inanga spawning. For example, by reducing the bank angle to optimise the potential spawning area to increase tidal level fluctuations in proximity to the salt wedge.
  - (b) Ensure native fish habitat enhancement is undertaken to improve current instream conditions within the unnamed tributary, downstream of the tide gates.
9. The HEP shall include, as a minimum, the following details:
- (a) An assessment of habitat enhancement options for inanga spawning, including methodology, timing to minimise adverse effects of works, and pre and post enhancement monitoring.
  - (b) Detailed identification of the areas and sites for restoration, including baseline condition data for post enhancement comparison.
  - (c) Detail on how enhancement is going to be undertaken, including any instream works and associated mitigation (fish salvage etc.) and culvert remediation.
  - (d) Follow up reporting on the success of enhancement works, via post works inanga spawning surveys (as per Condition 12).
10. The certification process for the HEP shall be confined to confirming the Plan gives effect to its objectives, consent condition requirements, and contains the required information.
11. The HEP may be submitted in parts or in stages to reflect a staged implementation of the habitat enhancement.

#### Inanga Spawning Surveys

12. Three inanga spawning surveys shall be undertaken over the peak spawning months of March to June and a report shall be provided to the Consent Authority after completion of the last survey. Inanga spawning surveys are to include observations on egg development. The surveys shall be supervised and the report written by a suitably qualified and experienced person.

#### Fish Passage

13. The consent holder shall undertake boulder cluster installation in the diversion channel downstream of the tide gates to provide refugia habitat from predators and resting zones for fish. Boulder cluster placement shall be informed by measurements of velocity for optimal results including velocity measures through the letterbox opening (vertical slot). Boulders may be added below the sill of the tide gate structure to improve passage for benthic species and provide additional refugia habitat.
14. The consent holder shall alter one tide gate to provide a letterbox opening (vertical slot) or similar opening, to provide for improved native fish passage when the gates are closed. The design of the letterbox opening (vertical slot) shall generally be in accordance with Figure 2 (200mm in width by 600mm in height). These works shall be completed as soon as practical after the first round of inanga spawning surveys and no later than 30<sup>th</sup> June 2026.

### Fish Passage Monitoring

15. The consent holder shall monitor of the effects of the tide gates on fish passage three times within 24 months of fitting the letterbox opening (vertical slot) or similar opening on the tide gate. This shall be undertaken via a fish survey targeting native fish moving through the opening during migratory periods. A report on the monitoring undertaken shall be provided to the Consent Authority after completion of the last survey. The monitoring shall be undertaken and the report written by a suitably qualified and experienced person.
16. The consent holder shall monitor the effects of the tide gates on fish passage three times within 24 months of fitting the letterbox opening (vertical slot) or similar opening on the tide gate. This shall be undertaken via a fish survey targeting the following:
  - a) native fish moving through the provided opening during inanga and longfin eel migratory dates, and
  - b) taonga species identified by mana whenua moving through the provided opening during migratory periods.

The provision of a report of the monitoring is to be provided to the Consent Authority after each survey. The monitoring outlined in a) above shall be undertaken by a suitably qualified and experienced person. The monitoring outlined in b) above shall be designed and implemented by a person or agency suitably qualified to undertake that monitoring.

### Fish Monitoring Plan

17. Prior to fish monitoring required under conditions 15 and 16 commencing, the Consent Holder shall submit a Fish Monitoring Plan (FMP) to SRC for certification. The objectives of the FMP are to:
  - (a) Ensure appropriate and effective monitoring of fish passage through the letterbox opening (vertical slot) on the tide gate.
18. The FMP shall include, as a minimum, the following details:
  - (a) Methodology for fish trapping and monitoring.
  - (b) Details for a specific mark and recapture monitoring event as an option for the third fish survey event required under condition 11. If a specific mark and recapture monitoring event is not undertaken the third monitoring event shall be letterbox survey of all fish species.
19. The certification process for the FMP shall be confined to confirming the Plan gives effect to its objectives, consent condition requirements, and contains the required information.

### Water Quality Monitoring

20. The consent holder shall undertake three salinity surveys in the Titiroa Stream over a range of flow conditions to determine the salt wedge location and provide a report on these surveys to the Consent Authority within 1 year of grant of this consent.
21. The consent holder shall monitor dissolved oxygen and temperature upstream and downstream of the tide gates during summer low flows via use of a continuous logging probe and provide a report of this monitoring to the Consent Authority.

## Review Condition

22. The Consent Authority may, in accordance with Sections 128 and 129 of the Resource Management Act 1991, serve notice on the consent holder of its intention to review the conditions of this consent during the period 1 February to 30 September each year, or within two months of any enforcement action being taken by the Consent Authority in relation to the exercise of this consent for the purposes of:
- (a) determining whether the conditions of this consent are adequate to deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.
  - (b) If the monitoring undertaken under the conditions of this resource consent identifies adverse effects on the ecological values of the Titiroa Stream, determining whether the conditions of this consent are appropriate to any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage.
  - (c) ensuring the conditions of this consent are consistent with any National Environmental Standards Regulations, relevant regional plans and/or the Environment Southland Regional Policy Statement

Figure 1

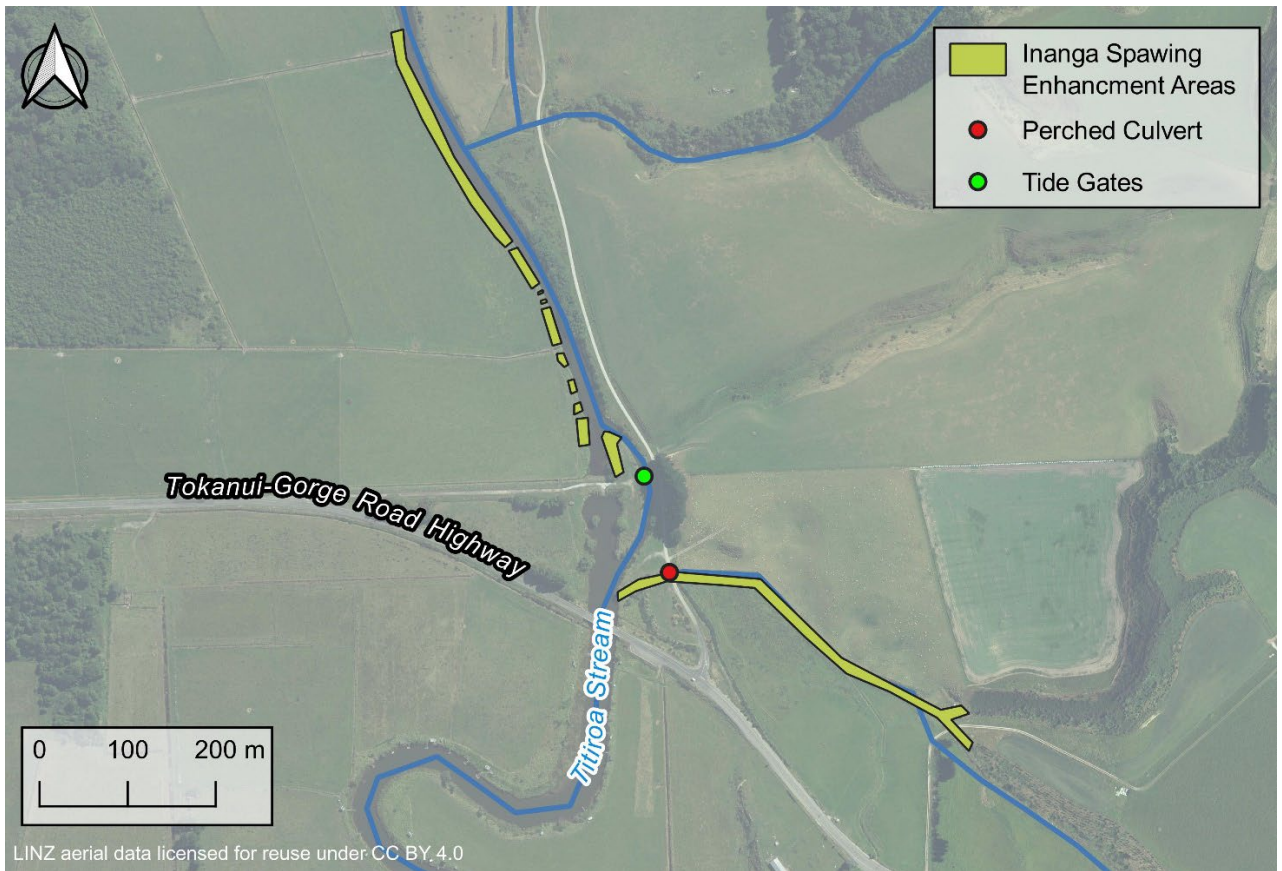


Figure 2

