BEFORE THE SOUTHLAND REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Environment Southland's Catchment Operations Division application (APP-20211135) for a series of consents in relation to the Titiroa tidegates, adjacent to Middleton Road South, Fortrose.

DECISION OF COMMISSIONER

Allan Cubitt

27 January 2025

TABLE OF CONTENTS

1. Introduction

[1] I have been delegated the authority to hear and determine APP-20211135 made by Environment Southland's Catchment Operations Division for a retrospective consent in relation to the Titiroa tidegates, adjacent to Middleton Road South, Fortrose. The consents sought authorise the occupation of the coastal marine area (CMA) with a tidegate and a weir structure, and for the associated ability to dam and divert water in the Titiroa Stream. The purpose of this infrastructure is to protect land to the north (inland) from tidally influenced flooding and to enhance land drainage. The previous consent expired on 29 October 2020 and as a consequence, this infrastructure is neither legally occupying the CMA or legally damming and diverting the flow of the Titiroa Stream.

[2] The application was publicly notified on the 14th of August 2023. Eight submissions were received, with four being in opposition and the remaining four in support. Five of the submitters requested to be heard and the hearing was held in Invercargill on the 30th of August 2024. A lengthy post hearing process took place, which involved further reporting from the applicant and joint witness conferencing. The s42A report authors review was received on the 25th of November with the applicant's written reply being provided on the 10th of December 2024. The hearing was formally closed on the 13th of December 2024.

[3] I advise here that I have determined that the consent should be **granted** for a short duration subject to conditions imposed under Section 108 of the Act. The conditions are shown in the attached decision certificate.

2. The Proposal

[4] The proposal is fully described in the application documentation and summarised in the s42A report prepared by Principal Consents Officer, Mr Stephen West, and the evidence of the applicant's team, but I briefly set out the key facts here. The Titiroa Stream has a catchment area of about 223 km^2, and flows into Toetoes Harbour. Mr West advised that given its shape, the river is likely to be modified due to past straightening and drainage activities. The stream is dammed approximately 8km from the ocean by a weir and diverted through an artificial channel which contains the tidegates. It then returns to its former channel downstream of the weir. The stream has a width of about 20 metres upstream of the gates, and is about 25-

30 metres wide downstream, although the 'bypass channel' is narrowed to about 6 metres wide either side of the gate location. The tidegates are located in a part of the river that is tidally influenced, and the salt wedge (the seawater) extends about 160 metres upstream of the gates.

[5] Titiroa Stream in the vicinity of the tidegates is within the statutory acknowledgement area for the Matāura River. This acknowledges Ngāi Tahu's cultural, spiritual, historic and traditional association with the area. The statutory acknowledgement notes the importance of the area for mahinga ka. The Stream is not, however, part of the protected waters under the Water Conservation (Mataura River) Order 1997.

[6] There are a range of indigenous and exotic species present in the stream, many of which are taonga, with some of them classified as threatened or nationally vulnerable. The stream is a popular whitebaiting river, with about 100 whitebait stands downstream of the bridge.

[7] Tidegates were first installed on the river in 1918 and have operated almost continuously since then. The current gates were installed in the mid-1980s and were consented up until 29 October 2020, when Coastal Permit 204122 expired. The purpose of this infrastructure is to protect approximately 9km^2 of improved pastureland north of the tidegates from tidally influenced flooding and to enhance land drainage. Much of this land was purchased by the Catchment Board under the Public Works Act back in the 1980's to address flooding issues. There are now seven leases, with 3-year terms, on Council land within the affected area. The income from the leases is used for purposes associated with the provision of flood protection works and maintenance in the catchment. There are also two private farm properties protected by the floodgate.

[8] The tide gates are a passive gate design, and comprise three vertically hung gates, hinged at the side, supported by a concrete structure. A positive head differential on the downstream side (i.e. higher water level) closes the gates. A positive head difference on the upstream side causes the gates to open and release water downstream. The duration of each tide gate opening depends on the height of the tide and the flow and water level of Titiroa Stream upstream of the gates. The gates are closed for half the tidal cycle, which is generally for a period of time between 4- 6 hours.

[9] This application seeks to reauthorise the existing situation, albeit with additional mitigation measures.

3. The Process

[10] The application was publicly notified on 14 August 2023. Eight submissions were received, with four in opposition and the remainder in support. Each submission point is summarised in Mr West's report and is not repeated here.

[11] I visited the site and its environs on the 29th of August 2024. The hearing was conducted the following day at Invercargill. The following people attended:

The Applicant

Environment Southland's Catchment Operations Division was represented by the following people:

- Chris Thomsen (Legal Counsel)
- Leslie Frisby (member of the Mataura Catchment Liaison Committee, and farmer in the affected area)
- Dave Connor (Team leader, Catchment Operations, Environment Southland)
- Colin Young (Hydraulic Engineer)
- Laura Drummond (Freshwater Ecologist)
- Matthew Gardner (Water Resources Engineer)
- Luke McSoriley (Planning consultant)

Council Staff

The Council was represented by the following people:

- Stephen West (Principal Consents Officer and s42A report author)
- Catherine Ongko (Consents Co-ordinator)

Submitters

Kerry Morton and Alexander Holms appeared on their own behalf while Te Ao Mārama Inc. (TAMI), on behalf of Awarua Rūnanga, were represented by

- Dean Whaanga (Kaupapa Taiao Kaiwhakahaere at TAMI)
- Stevie-Rae Blair (Kaitohutohu Kaupapa Taiao at TAMI)
- Margaret Ferguson (Planner)

The Director-General of Conservation (DOC) was represented by:

- Matt Pemberton (Legal Counsel)
- Alan Christie (Freshwater Ranger)
- Jane Bowen (Freshwater Ecologist), via Teams
- Ashiley Sycamore (Planner)

[12] Mr West's s42A report along with the evidence of the applicant, the Director-General of Conservation and Te Ao Mārama Inc was pre-circulated in the usual manner and was taken as read at the hearing. Mr West recommended decline because he considered that adverse effects on fish passage, inanga spawning and cultural effects had not been adequately addressed. He also considered more information on the benefits of the proposal was required.

[13] Prior to the applicant presenting their case, I had several questions for Mr West in relation matters arising out of his s42 report. Mr Thomsen then commenced the applicant's case with legal submissions. The applicant's witnesses then presented summary statements of evidence and answered questions.

[14] The TAMI witnesses then presented their evidence, followed by Mr Pemberton's legal submissions on behalf of DOC. Ms Bowen and Ms Sycamore then presented their evidence on behalf of DOC, but Mr Christie was excused from presenting his, although it has been had regard to. Both TAMI and DOC raised concerns about the limited time they had available to them to consider the changes and further mitigation proposed by the applicant through evidence. Both Mr Morton and Mr Holms then talked to their submissions. Southland Fish and Game were not able to attend the hearing but made it clear that their submission still stood.

[15] At the conclusion of the presentation, a discussion took place on how best to move forward with the process. As a consequence of that discussion, it was agreed to provide the submitters with a further period of time to consider the amended proposal put forward by the applicant at the hearing. It was agreed by the applicant that they would liaise with the

submitters on a timetable for that. Following that process, ecological and planning expert conferencing would occur, and the hearing would be reconvened, if necessary.

[16] Prior to that occurring, however, I directed the applicant to provide further information so that all parties could better understand the proposal. Once that was provided, submitters provided their feedback and joint witness conferencing took place. Mr West's review and the applicants reply were then provided in writing. Upon reviewing all the information provided, I determined that I was satisfied that I had enough information to determine the application without the need to reconvene, and the hearing was formally closed on 13 December 2024.

[17] Copies of the statements of evidence and submissions presented at the hearing are held on file by ES. I do not separately summarise the matters covered here but refer to or quote from that material as appropriate in the remainder of this decision. The decision largely takes an 'exceptions' approach, by dealing with only the matters in contention after conferencing.

[18] I wish to record here my thanks to Mr West for his comprehensive s42A report and Ms Ongko for her assistance throughout the process. Given the history of this application, I also wish to acknowledge the cooperative attitude and approach of the submitters. It is clearly a very disappointing situation to be in, given the applicant is part of the consenting authority so should have known better than to have not only let the consent lapse but to fail to undertake the requirements of the previous consent conditions. As a consequence, the Council is clearly on notice that it must do better in relation to this consent.

4. Assessment of Proposal

(i) Introduction

[19] Mr West discusses the status of the activity at section 2.3 of his report. He concludes that the occupation of the coastal marine and the damning of coastal water by the tidegates are both discretionary activities pursuant to Rule 9.1.1 of the Regional Coastal Plan and s87B of the Resource Management Act, respectively. However, he considers the application for the damming and diversion of water to be less clear-cut but considers the damming is discretionary under Rule 4, and the diversion of flow is restricted discretionary under Rule 49(b), of the proposed Southland Water & Land Plan. Mr West bundled the various activities

in accordance with the usual practise and treated them collectively as a discretionary activity. This was not contested by any of the parties and the application has been treated as a discretionary activity in this decision.

[20] Section 104 of the Act sets out what must be considered when deciding a resource consent application. Section 104B provides that once those matters have been considered, I can grant or refuse an application for a discretionary activity. If the application is granted, conditions may be imposed under Sections 108 of the Act. Because this is a discretionary activity, it does not need to first pass through the Section 104D gateway test before it can be considered for consent. The matters contained in Section 104 have all been considered in arriving at this decision.

[21] It has generally been accepted by all parties that the proposal has adverse environmental effects on fish passage, inanga spawning habitat, and cultural values, with the degree of those effects being in contention. There are also a number of contextual matters in contention that are significant in the assessment of these effects. There are as follows:

- What is the environment.
- The effect of the directive policies (in particular on policy 11 of the NZCPS), and whether they present a bar to the activity;
- whether the effects management hierarchy has been appropriately followed;
- whether there are more appropriate alternatives to the existing gate design.

[22] These matters are traversed below.

(ii) Preliminary Matters

[23] Counsel for the Director-General of Conservation (DGC), Mr Pemberton, identified at his paragraph 13 four broad options available to me to deal with this application. The fourth option was to decline the application on the grounds that I do not have adequate information to determine the application (as per section 104(6) of the Act). As will be evident from this decision, I essentially adopted Mr Pemberton's option 2 and required the applicant to provide further information and then directed expert conferencing on the key issues.

[24] Both the DGC and Awarua Rūnanga (via Te Ao Mārama Inc), in their response to the further information, were still concerned that some information was lacking. While I understand the concern raised, this application deals with dynamic physical processes and in my experience exact certainty cannot always be provided. However, the evidence of Mr Gardiner along with the experience of those who have long term experience in the catchment (Mr Young and Mr Frisby) provide enough certainty for me to understand the effect of the tidal gates. Accordingly, I am comfortable that enough information has been provided to allow the consent to be granted, with comprehensive monitoring and mitigation conditions, for a short-term period. Those conditions should assist all parties in their understanding of the effectiveness of utilising letterboxes on tidal gates mitigation, along with a better understanding of native fish movement in the stream itself. This is considered a positive of the application as granted.

(iii) The environment

[25] All parties acknowledge that because there is no resource consent in place for the weir and tide gates, they are not part the legal environment. This therefore has implications for the assessment of the effects the activity may have on the environment, although that would always have been the situation as renewal applications must also be assessed this way. To determine the significance of those effects, I need to understand what that environment is. There is no dispute that the environment with the gates operating is pasture that has been improved by significant drainage works. Mr West also suggests that *the "shape the Titiroa Stream or river is likely to be a modified river due to past straightening and drainage activities"*.

[26] All the planners consider the environment on the landward side of the floodgate structure to be lawfully established pasture, predominately characterised by rural land uses but differ slightly on how that environment will change with the absence of the gate. Mr West and Ms Sycamore believe the pasture will revert to wetland or least poorly drained land. Mr McSoriley considers this will only occur in parts of the landward area while Ms Ferguson considers it will revert to a 'wet' area or wetland.

[27] In closing, the applicant's counsel noted that the experts weren't in agreement on the effect of removing the gates and submitted that the environment is "drained and improved, lawfully established pasture"[1]. Counsel did acknowledge Mr McSoriley's position that without the gates, the current pastoral farmland will revert to the poorly drained land, which reflected the experience of Mr Frisby when the gates were inoperative for a period in 1982. All the planners were of this view but were not aligned on the extent.

[28] While I agree with the applicant's Counsel that at the time the gates would be removed, the existing environment would be "drained and improved, lawfully established pasture", over time that pasture would obviously revert to poorly drained land. The whole purpose of the application is to stop that from happening. Hence, the ongoing existing environment will be one that changes to a lesser state of drainage and pasture quality. The issue is to what degree the land degrades, and that is far from clear. Obviously how wet the land becomes will vary across the area, which will be dependent on a number of factors such as distance from the tidal influence, elevation, the ongoing impact of the existing drainage systems. How productively it could be farmed in this state is also unclear, but it is unlikely that the area will ever return to a natural state given the significant modification to this environment that has taken place over a long period of time.

[29] Mr Young's evidence details some of this modification, noting the original gates were installed just after WW1 (in 1918) and have operated almost continuously since then. He also described the gate's role in the Lower Mataura Catchment Flood Scheme and the effect of the cut-off diversion between Titiroa Stream and the Mataura River located about 9.7km above the gates. This cut-off reduces the normal amount of water flowing down the stream and is also designed to manage flood flows in the stream catchment, some of which spills over into the Mataura River.

[30] Mr Young also detailed the flood protection investigations and works that have occurred in the Mataura Catchment since the 1970's and 1980's. He advised that building a floodbank on the true left bank of the Matara River was considered but was cost prohibitive, which lead

---

[1] *Applicants closing at [50]*

to the purchase of the land in the Titiroa Catchment for further flood protection works, in accordance with central government policy of the day.

[31] The evidence of Mr Frisby illustrates the investment individual farmers have made in respect to drainage and other land improvements. He estimated the cost of developing his property to be in the order of $1,000,000, and considered costs would be similar for others in the location. Mr Connor discussed the leases in place with a number of these farmers, while there are also freehold owners that also farm in the area under the understanding that the land is protected from inundation. Mr Connor also referred to economic impact advice received by the Council if this area was lost to production. He advised that it was estimated that a 500ha property would directly contribute just over $1,000,000 to the regional economy.

[32] I have highlighted these matters because the actual physical environment as determined by the control of tidal flow by the gates has existed for over 100 years, with further flood management controls and land improvements following on from that. Ms Ferguson considers that the tide gates have created a 'false sense of land security', however that view overlooks the fact that they predate the current regulatory framework and were always intended to be permanent. Policy 1(2) of the NZCPS recognises that the coastal environment includes "physical resources and built facilities, including infrastructure, that have modified the coastal environment."

[33] As a consequence, the existing social and economic environment in the protected area has developed around this. The definition of 'environment' in the Act includes "*the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters".* While not discussed at the hearing, the ability to farm the land, some of which is protected by leases, under protection from flooding would appear fall within the scope of this part of the legal environment. These are arguably social and economic matters which both affect, and are affected by, the matters in (a) to (c) (which includes infrastructure).

[34] Hence, the existing environment, in a planning context, is complex and uncertain. The best that can be said is that it is a farmed environment in a modified catchment that will become wetter, in social and economic circumstances that expect it to remain dry.

(iv) The Coastal Environment

[35] The other issue of contention with respect to the environment is whether the landward side of the gates is coastal or not. This question is relevant to the statutory planning documents that might apply to the area as opposed to any particular coastal environmental effects of the proposal.

[36] The planners were asked to consider this question in their conferencing, with all the planners except Mr. McSoriley agreeing that it was. This view was based on the area aligning with Policy 1(2)(c), (h) and (i) of the NZCPS. Mr. McSoriley disagreed on the basis that it is not located within the coastal environment shown on the Southland District Plan (SDP) planning maps, which he says give effects to Policy 1 of the NZCPS. He also stated the SDP gives effect to the RPS which in turn gives effect to the NZCPS. I understood that Mr. West in fact agreed in the JWS that the SDP does give effect to Policy 1 of the NZCPS.

[37] There is some force in Mr. McSoriley's argument but the direction in the RPS around the identification of the coastal environment appears more focussed on the concerns of a district plan – i.e. where use and development is appropriately located in the coastal environment. The operation of the tidal gates may have led to the District Council discounting the natural processes under 1(2)(c), (h) and (i) of the NZCPS identified by the other planners when determining the coastal environment. The gates are in fact in place to restrict tidal influence, which extends someway up the stream. The landward boundary of the intertidal zone is defined in the NZCPS as "*is the extreme high water of spring tides, which is the average of the two highest tides at the period of the year when the range of the tides is greatest*." The influence of these tides is not significant when the gates are operating (so subsection c may not apply) but are likely to be significant when they are not operating, which is the legal environment as it stands now. Hence, it is difficult to conclude that this area is not part of the coastal environment despite its distance from the actual coastline and the lack of other coastal features.

(v) The Policy Pathway

[38] One of the complexities of this particular application is the numerous statutory planning documents it invokes. These policy documents contain a number of conflicting policy directions, both within the documents themselves and between each other. It is not surprising then, that one of the key areas in contention is whether or not there is a policy pathway available to consent the proposal. The planning JWS generally agreed on what the relevant planning documents are, with the exception that Mr McSoriley suggested that the influence of NZCPS is less the further inland the activity occurs and again highlighted the Southland District Plans depiction of the 'coastal environment'.

[39] In his closing, Mr Thomsen advised that because of the Resource Management (Freshwater and Other Matters) Amendment Act 2024, I can no longer have regard to the NPSFM hierarchy of obligations when undertaking my s104 assessment. While that Act only came into force 25 October 2024, that amendment was given retrospective effect to applications before a consent authority where a decision had not yet been made.

[40] All parties appeared to agree that the floodgates and associated works are flood and drainage infrastructure managed by the SRC. Mr McSoriley discusses their status under the various planning documents at his paragraphs 26 to 29. I accept his evidence on this and adopt his findings accordingly.

[41] All the relevant planning documents contain provisions that recognise and provide for infrastructure, which acknowledges its importance in the sustainable management of natural and physical resources. I will return to those provisions later in this decision but must first address the tension in the higher order documents, in particular Policy 11 of the NZCPS, which is to 'avoid' adverse effects on threatened or at risk biodiversity, and Policy 7 and the associated clause 3.24 (incorporated into the pSWLP as Policy 28A) of the NPSFM, which allows the loss of river extent and values in limited circumstances. I consider these provisions apply on both sides of the gate given the discussion on the coastal environment above, and the definitions relevant to the application of the NPS-FW.

[42] While not all the planners addressed Policy 11 directly in their EIC, it is reasonably clear from the ecological evidence of Ms Drummond and Ms Bowen that the proposal cannot 'avoid'

adverse effects on threatened or at-risk biodiversity. Ms Feguson stated in her EIC that even if there is a functional need for the tide gates, "*this does not negate the applicant having to meet the environmental bottom line requirements of the directive 'avoid' policies in the NZCPS"* (and I assume, the similar policies in the regional planning documents). The question then becomes is there a consent pathway under Policy 7 of the NPS-FM and the regional planning documents available to this proposal. The planners JWS did not comprehensively address the question on reconciling Policy 11 and Policy 7, with Ms Ferguson, Ms Sycamore and Mr West merely stating that they consider the more specific Policy 11 of the NZCPS should be given more weight than Policy 7 of the NPS-FM. It does appear that the planners accept that Policy 7 of the NPS-FM does provide a pathway, but they were concerned (with the exception of Mr McSoriley) that the relevant test was not met. Mr McSoriley wasn't convinced that the NZCPS applied, but he felt the pathway under Policy 7 was available and the criteria where met.

[43] Mr Thomsen helpfully provided the legal framework around resolving such issues, noting in his opening submission that while there are no conflicting directive policies in this case per se, it would be useful to apply the 'structured analysis approach' outlined in the *Port Otago*[2] case. This case revolved around the application of NZCPS policies, and the Supreme Court observed that if policies are properly construed, conflicts are likely to be rare, even where they appear to be pulling in different directions.

[44] In his closing, Mr Thomsen provided a 'structured analysis' of the various policy documents in the context of the test in the *East West Link*[3] case (decided by majority), which also dealt with the NZCPS and the provision of infrastructure. Policy 11 was central to that case. Mr Thomsen observed that *East West Link* 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. In his view, this is an application that can be seen as a genuine on-the-merits exception that "threads the needle", as the *East West Link* decision put it.[4]

---

[2] *Port Otago Ltd v Environmental Defence Society [2023] NZSC*
[3] *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency [2024] NZSC*
[4] *Applicants closing at [8] to [10]*

[45] Mr Thomsen sets out his reasoning at paragraphs 19 to 34 of his closing. Having considered these submissions closely, I accept that this is a case that "threads the needle" as he submits. I do repeat the full detail of his analysis, but it is worth highlighting what the Supreme Court says about Policy 11:

> *[99] …but we do agree that, in principle,* ***flexibility in the application of Policy 11 does not inevitably subvert it****. On the contrary, despite Policy 11 being rule-like and containing something in the nature of a bottom line,* ***there will still be room for deserving exceptions that do not subvert the policy's purpose. In short, wriggle room is built into the policy layers of the system.***
>
> *…*
>
> *[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…*
>
> *…*
> *[105] Policy 11 is different. It is directive to be sure, in a way that Policies 6 and 10 are not. And, like Policies 13 and 15, it has "the effect of what in ordinary speech would be a rule". But its subject matter (biodiversity in indigenous ecosystems, habitats and taxa) is set at a high level of generality and applying its thresholds (adverse or significant adverse effects) to particular cases may involve fine judgments.* ***In other words, while Policy 11 is designed to avoid adverse effects, it is not intended to produce perverse outcomes in pursuit of that high level purpose. Rather, its broad terms mean it does—indeed, must—leave room for deserving exceptions, even if, in almost all cases, its effect is clearly "not allow" or "prevent the occurrence of".*** *These exceptions are necessary for the broad language of the policy to work as intended in the innumerable places and circumstances to which it must be applied, and without producing outcomes plainly at odds with Part 2.* ***The residual discretion is simply a mechanism to ensure that the policies are applied in accordance with the purpose of the RMA.***
> ***…***
>
> ***[109] ... The corollary is that a genuine, on-the-merits exception, by its nature, will not subvert a general policy, even a directive one. On the contrary, true exceptions can protect the integrity of the subject policy from the corrosive effect of anomalous or unintended outcomes.*** *There is a fundamental difference between allowing consent authorities to routinely undermine important policy choices in the NZCPS (as rejected in RJ Davidson), and permitting true exceptions that will not subvert them…*

[110] That is why the broad subject matter of ***Policy 11 admits of exceptions****. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself. To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making,* ***but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.*** [my emphasis]

[46] As Mr Thomsen notes, the NZCPS also provides for infrastructure. Of importance are the following provisions:

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;
…

(2) Additionally, in relation to the coastal marine area:
…

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

[47] The NPS-FW takes a different approach to early NPS's and does not specifically identify the importance of infrastructure in its policy suite. It does, however, contain the following policy which encompasses infrastructure provision:

Policy 15: *Communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with this National Policy Statement.*

[48] Specifically in relation to rivers, which the Titiroa Stream is, it requires the following policy to be included in the regional plan:

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

(a) *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."*

[49] It also includes specific definitions in relation to rivers, including 'specified infrastructure' which includes "*public flood control, flood protection, or drainage works".* This is a clear indication of what might be expected to impact on the 'loss of river extent and values'.

[50] As both the NZCPS, in relation to the coastal environment, and the NPS-FW, in relation to rivers (and also wetlands), identify that there will be things, including infrastructure, that have a functional need to locate within these environments, it follows that these are the very things that might fall within the 'exceptions' permitted by Policy 11, as discussed by the Court in paragraph [110] of *East West Link*. Thus, I agree with Mr Thomsen at his opening paragraph 83, that plans can be mindfully drafted to provide for 'true exceptions' to avoid policies to enable the sustainable management purpose of the Act.

[51] As has already been discussed, the NPS-FW requires the inclusion of such a policy in the pSWLP, which has been done through the incorporation of Policy 28A. Objective 9B of that plan requires the enablement of Southlands regionally significant infrastructure. Policy 26A requires this to be done in a way that "*avoids where practicable, or otherwise remedies or mitigates, adverse effects on the environment."*

[52] The coastal provisions of the RPS and the Coast Plan itself contain similar provisions, with Policy COAST.4 of the RPS requiring that provision be made for such infrastructure that has a *"functional, operational or technical need to be located within the coastal environment"*. Policy 4.2.1 reflects that direction in the CMA and requires the justification of functional necessity or demonstration that there are no practical alternatives outside the CMA. The policies also contain a number of other tests, such as the requirement to consider alternative sites and methods where effects are more than minor (Policy 4.2.2.), and the preference for structures that provide public benefits (Policy 11.2.3). Policy 11.4.4 sets out the criteria for providing the continuance of 'existing' facilities and infrastructure, which includes those that facilitate or contribute to the social and economic values of the region.

(vi) The 'Exception' Criteria

[53] Distilling this down, the key attributes that an activity in 'difficult cases' would require to be an exception to the 'avoid' policies of both the higher order documents and the lower order documents, would seem to be the following:

- The work must be 'critical' or 'regionally significant' infrastructure;
- The works must have a functional need to locate within the CMA and the riverine environment;
- There are no practical alternatives outside the CMA;

- Alternative sites and methods have been considered;
- The structure will provide public benefits;
- Existing facilities and infrastructure must facilitate or contribute to the social and economic values of the region; and
- the effects of the activity are managed by applying the effects management hierarchy.

I deal with each of these matters below.

(a) Critical' or 'regionally significant' infrastructure

[54] This work is recognised as 'critical' and 'regionally significant' infrastructure in the various Council policy statements and plans. All parties accept that. There are numerous policy provisions in the lower documents that are enabling of such infrastructure (see Policy BRL.2, Objective COAST 2, Policy COAST.2, Policy INF.1 of the RPS; Policy 11.4.4 of the Coastal Plan; Policy 26A of the pSWLP).

(b) Functional need and Alternatives Sites and Operating Regimes

[55] To achieve the purpose of the work, it must be located within both the stream and the CMA, which was accepted by all parties. While it can be located in other locations within these environments, there is no practical alternative outside the CMA or the stream. Alternatives were considered in the application AEE at section 5. However, they were limited to doing nothing, removing infrastructure, or retaining the infrastructure. Submitters were concerned over a lack of information on alternatives. They questioned what area was being protected by the gates and what other options were available to achieve the same or similar outcomes. Through the process, further consideration was given to alternative methods including changing the tidal gate operating regime to allow the gate to be open for a longer period, which was modelled by Mr Gardner. His evidence was that this would likely *"significantly decrease the performance of the drainage network resulting in land which is waterlogged and less freely draining".*

[56] If the purpose of the gates is to protect agricultural land from inundation so it can be productively farmed, then the operating regime that best provides for this is, within reason, the appropriate regime. A slightly longer period of completely unimpeded fish passage does

not appear to provide such a significant improvement to warrant the current land drainage regime to be compromised now that the letterbox approach has been adopted. I therefore accept that the current regime is appropriate given the short duration of the current consent. There may be options to provide for a different operating regime in the future, but this will rest on the Council decisions around how it wishes to manage the land it owns closest to the gates.

[57] In relation to the design of the floodgates, both ecologists recommended the use of automated gate systems, self-regulating "fish friendly" gates in accordance with the New Zealand Fish Passage Guidelines. Ms Drummond noted *"that the Guidelines state that where operational constraints prevent the use of automated gate systems, side hinged gates (as are present) are preferable over top hinged gates, as they require a smaller hydraulic head to open them, therefore they stay open for longer."*

[58] Ms Bowen also suggested that the feasibility of an effective fish pass around the embankment and tide gates should be considered. However, she acknowledged the difficulties with this and considered that it is likely better to improve the tide gate design and operating regime. Mr Thomsen advised that this matter was also explored at conferencing and *"that 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."*

[59] In his opening, Mr Thomsen stated that the applicant has considered various forms of fish-friendly gates but noted that what is meant by fish-friendly gates depends greatly on the circumstances. He submitted that *"there is no single structure that can authoritatively be called a 'fish-friendly gate', as it depends on the circumstances of the water body, the species that are present and, dare I say it, budget."* As a consequence, the applicant is not offering the installation of newer, more modern gates but are proposing a 'letterbox' opening to enhance fish passage, which I address later. Ms Drummond stated in her rebuttal evidence (paragraph 10) that keeping the gates open with the use of stiffeners/counterweights is unlikely to meaningfully enhance fish passage, because of the letterbox provides an opening whether the Gates are closed or not.

[60] Given the short duration of the consent, and the various mitigation and monitoring conditions, I am comfortable with allowing the retention of the current gates. However, this

may need to be revisited if the applicant intends to seek a longer consent period at the end of this consent term.

(c) Public Benefits and Social and Economic Value

[61] Turning now to the public benefits, and the social and economic value to the region, this has been discussed above. Mr Connor discussed the economic value of agricultural production to the region in his evidence. That was estimated to amount to just over $1,000,000 per 500ha farm property. This is reasonably significant given Mr Gardner's estimate of around 1,200 hectares of farmland being protected by the infrastructure and Mr Young's observations over the past 40 years that the area protected extends significantly further than this, up to the old railway embankment, about 7.3km from the application site.[5] Mr Young also highlighted the wider flood protection benefits of the infrastructure as outlined above.

[62] I accept that the gates provide a public benefit and a degree of social and economic value that is reasonably significant at a regional level. The gates are recognised as regionally significant infrastructure because of the level of protection they provide.

(d) Effects management hierarchy

[63] The main area of contention in relation to these exception criteria, is whether the 'effects management hierarchy' has been applied correctly. All planners in JWS agree that *"with respect to adverse effects on inanga spawning and fish passage, the Ecology JWS provides certainty with regard to the effects management hierarchy on those matters"* and that *"this may or may not have covered off the cultural values component noting that a TAMI representative was part of the Ecology JWS in respect of mātauranga maori input."* Ms Ferguson stated that *"the effects management hierarchy has not covered off adequately the cultural values component. Given the level of intervention and system change the mauri of the stream has been so affected it undermines all other iwi values*." In his review, Mr West *"did not consider that the applicant has adequately applied the effects management hierarchy to all river values affected by the proposal, particularly effects on cultural spiritual values hierarchy."*

---

[5] *EIC of Mr Young, para 9*

[64] Mr Thomsen took issue with Mr West's approach at his closing paragraph 39. He highlighted the fact that caselaw has determined that some effects, either through the imposition of conditions or by their nature, are not material.

(e) The 'letterbox' mitigation and habitat offsetting

[65] With respect to the 'letterbox' approach proposed, I agree with Mr Thomsen that the monitoring proposed should be undertaken first before any decisions are made on the long-term future of the gates. Mr Thomsen addressed the phrase 'to the extent practicable' within policy 7 of the NPSFM at paragraph 21 of his close. He set out the Supreme Court meaning of 'practicable' as follows:

> *[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….*[6] [my emphasis]

Given the short-term nature of this particular consent, any requirement to make significant capital outlay would be unreasonable at this stage.

[66] This is also relevant in terms of the habitat offsetting. It is not reasonable in the circumstances of a 5-year consent to expect extensive restoration work. I consider what is proposed here to be reasonable in such circumstances. The results of habitat enhancement plan required under condition 8 can be used to inform any further work that may be considered necessary in the future, should a longer-term consent be pursued.

(f) Cultural Effects

[67] With respect to cultural effects, the evidence of Mr Whaanga and Ms Blair was comprehensive. Mr West, in his review noted the evidence provided by Te Ao Marama Inc identified that the tide gates:

> *i are within a significant cultural landscape to Ngāi Tahu because of historical and contemporary associations*
> *ii are within an area known for mahinga kai*

---

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

iii are detrimental to the mauri, the health and well-being of the Titiroa Stream and its ecosystem

iv adversely impact threatened indigenous species and their habitats that are taonga

[68] Mr Whaanga and Ms Blair concluded in their EIC that:

87. We consider that the effects on frameworks and cultural values are significant, particularly ki uta ki tai, rangatiratanga and mauri.

88. We believe we should be implementing a more natural use of the flood plain including restoring wetlands, bush and waterways by repurposing some of the land owned by Environment Southland that provides long-term environmental outcomes for our hāpori and wider community.

[69] It is beyond my jurisdiction to require the Council put in place a restoration programme for the land it owns inland of the gates. I do note, however, that there are a number of policies in the planning documents that do encourage the restoration of wetlands, coastal environments and mauri that may be degraded (see Policy 6 NPS-FW; Policy 14 of the NZCPS; Policy 13 of the NPS-IB; Objective TW.3, Policy BIO.5 and 8, Objective COAST.4 of the RPS). Large areas of wetlands and indigenous vegetation have been protected by the Council as part of these works in the past. I therefore expect this policy framework will be had regard to when the Council makes a final determination about the future of this particular flood protection system.

[70] As part of the ecological conference, Ms Blair (along with Ms Bowen) requested a more comprehensive investigation into the presence of kanakana within the Titiroa catchment. She, again with Ms Bowen, felt there is not enough evidence to determine if the letterbox will increase the ability for kanakana to migrate past the gates when closed. Ms Blair requested a consent condition requiring cultural monitoring, which would include Kanakana monitoring, to be resourced by the applicant. She advised that TAMI have their own cultural monitoring methodology that could be used, which is similar to the Cultural Health Index. She believed this would assist with informing future decision making and improving engagement. Ms Drummond felt that a comprehensive investigation into the presence of kanakana within the Titiroa catchment would improve the knowledge base but that this level of investigation is more suited to a multiyear research project, not a short duration consent.

[71] Mr Thomsen addressed cultural effects in his closing. His position is that cultural effects are appropriately addressed through a new condition promoted by Ms Ferguson after the close of expert conferencing, along with the short duration of the consent. Ms Ferguson sought condition 12 b*e "amended to reflect the requirement for monitoring, designed and undertaken by TAMI, as part of overall fish passage monitoring through the proposed conditions, most notedly through the proposed cultural monitoring and short term of the consent."* Mr Thomsen advised that the final condition proposed (now condition 15) has been amended slightly from Ms Ferguson's draft *" to give some flexibility as to how that monitoring is undertaken in partnership with TAMI".*

[72] I deal with the term of the consent below. In relation to the condition proposed, I can confirm I am comfortable that the reference to "taonga species identified by mana whenua" will address the matter of concern to iwi, with the monitoring requirements providing the opportunity for their involvement. This condition is consistent with Policy 2 (f) 0f the NZCPS and Policy TW.4 of the RPS and would have been imposed if it had not been offered. I have not seen the original condition promoted by Ms Ferguson but note that section 133A of the Act provides the opportunity to correct any minor mistakes or defects if this is necessary to more accurately reflect her intent although as I confirm above, the condition does enable iwi involvement.

(h) Conclusion on Exception Test

[73] In conclusion, I am satisfied that the proposal, as modified by the applicant throughout the process, meets the 'exceptions' test required to ensure it does not subvert the directive 'avoid' policies of the planning documents.

5. Term and Conditions

[74] The applicant originally applied for a consent period of 15 years. TAMI and DOC retained their position throughout that the gates should be removed but were of the view that if consent was to be granted, it should be for a 5-year term only. Mr West's recommendation, if I was to grant, was also to limit the term to 5-years for a range of reasons set out in section 4.3 of his report. I also note that Ms Drummond considered that a 5-year term is an

appropriate period to determine if the 'letterbox' proposal is successful in improving fish passage.

[75] As a consequence of this, the applicant has accepted a 5-year term is appropriate in the circumstances. Mr Thomsen submitted that this would allow the Applicant to continue to work with their iwi partners (along 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. In his view, this is likely to *"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."* As I noted above, I expect this conversation to occur given the policy suite outlined above that promotes restoration.

[76] The 5-year consent term provides for Council legal obligations in respect to the leases and is long enough to enable the necessary conversations to be had about the future of the gates. Cultural matters, along with the impacts on private landowners, should be the forefront of that conversation. Regardless of the outcome of this application, there was always going to be adverse effects. Retaining the gates would continue adverse effects on fish passage and cultural values while removing them would have significant adverse effects on the productive nature of the land the gates protect, and the livelihoods of those who rely on it (although acknowledging this not an adverse effect in the context of the legal environment. It is however a positive effect of allowing the activity).

[77] The applicant provided a final set of conditions with their reply. These conditions are a refined and updated version of those provided at the hearing, generally reflecting the outcomes of expert conferencing. As discussed throughout this decision, I consider the level of mitigation and off-setting proposed reasonable given the short term of this consent and the fact that the long-term future of the gates is unknown.

[78] There was some concern from the expert planners that the boulder placement could require resource consent under Rule 10.2.4 of the RCP but they acknowledged that the diversion channel is part of the tide gate infrastructure so can be provided for under this consent. In his closing, Mr Thomsen confirmed that *"the scope of the consent contemplates mitigations*

like the boulders" and accordingly, *"there is no jurisdictional constraint to imposing this condition."* I agree and have imposed the condition as proposed.

[79] The conditions are largely unchanged from the final set provided although some minor amendments and additions have been made for certainty purposes. The usual advice notes have been included.

6. Summary and Conclusion

[80] It is accepted by all parties that the infrastructure has adverse environmental and cultural effects that cannot be totally avoided. Hence, it does not align with the policy direction that requires avoidance of adverse effects on threatened and at-risk biodiversity. However, the infrastructure has been in place, in some shape or form, since 1918 and the land it protects has been developed for productive purposes. The planning documents that contain the 'avoid' policies, which have come into force around 100 years later, also contain policies that recognise and provide for significant infrastructure.

[81] Mr Thomsen drew my attention to the *East West Link* case which dealt with a similar situation. That case made it clear that there will be 'true exceptions' to avoid unintended outcomes, where sustainable management clearly demands it. In my opinion, the circumstances of this case are indeed a true exception, where sustainable management demands the consent be granted, at least for a short term. The relevant planning documents contain a number of thresholds for an activity to pass through before it can be considered a true exception. This proposal has passed through those thresholds, and I have determined that it should be granted.

[82] However, that is not to say that the current situation should remain in perpetuity. There are conflicting values in the area, all of which have policy support. The various planning documents promote restoration of habitats, coastal environments as well as Māori cultural values. These policies must be a factor in Councils assessment of the future of the land they lease to farmers just above the tide gates. If there is a desire to retain the gates, then the monitoring conditions may determine that a different approach is necessary, one that may reduce adverse effects further than this proposal seeks to achieve. The five-year term allows

these matters to be considered prior to any decision being made before the consent period expires.

DATED at Dunedin this 27th day of January 2025.

Allan Cubitt

Independent Hearings Commissioner