BEFORE THE INDEPENDENT HEARING COMMISSIONERS
FOR THE PROPOSED TE TAI O POUTINI PLAN

UNDER	the Resource Management Act 1991 (RMA)
IN THE MATTER	of the Proposed Te Tai o Poutini Plan
AND	
IN THE MATTER	of Topic 12: Sites and Areas of Significance to Māori - Ngā Wāhi Tāpua ki te Māori

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JOINT MEMORANDUM OF COUNSEL

TOPIC 12: SITES AND AREAS OF SIGNIFICANCE TO MĀORI

7 June 2024

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MAY IT PLEASE THE HEARING PANEL

Introduction

1 Following the hearing on the Sites of Significance to Māori (**SASM**) provisions of the Proposed Te Tai o Poutini Plan (**TTPP**), an issue has arisen as to the legality of a written approval process to enable a permitted activity status for certain activities occurring within a SASM.[1]

2 In light of the parties' varying positions on the legality of a rule providing for written approval within the SASM identified, the Hearings Panel has directed that Ms de Latour, Ms Scott and Ms Rusher:[2]

(a) Confer and subsequently confirm whether or not they agree with the principles in paragraph 14 of Ms de Latour's Memorandum of the 23rd of November 2023, which states:

It is well established that in order to be properly classified as a permitted activity a rule must:

(a) Not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity;

(b) Be comprehensible to a reasonably informed, but not necessarily expert, person; and

(c) Be sufficiently certain to be capable of objective ascertainment.

(b) Advise if they disagree, including why and what they consider are preferred alternatives with supporting reasons and identification of supporting Court decisions.

(c) Confer and subsequently confirm whether or not they agree that delegation and/or the transfer of power under the RMA is an available option to remedy issues arising from a permitted activity status.

3 Each of these matters is addressed in turn below by Ms de Latour, with the respective positions of Ms Rusher and Ms Scott separately outlined where they disagree with the position portrayed by Ms de Latour.

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1 Minute 26 - Sites of Significance to Māori, Directions by the Hearings Panel for the TTPP dated 8 May 2024 at [2].

2 Minute 26 - Sites of Significance to Māori, Directions by the Hearings Panel for the TTPP dated 8 May 2024 at [5].

Principles of permitted activities in plans

4 Counsel for the TTPP confirms the principles set out in the memorandum dated 23 November 2023 are relevant and applicable to the consideration of permitted activity rules in this circumstance. The most relevant principle to this scenario is that listed at paragraph [14(a)] of the memorandum dated 23 November 2023, being that a permitted activity rule must not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity.[3]

5 In this case, a rule which purports to reserve discretion to a third party to decide whether an activity is a permitted activity or not (i.e. through a written approval), would be unlawful in accordance with these principles.

Ms Scott's position

6 Counsel for Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio and Te Rūnanga o Ngāi Tahu (**Ngāi Tahu**) agrees with the principles set out in paragraph [14] and considers that a written approval rule can be drafted that meets the criteria set out in that paragraph.

7 In relation to the criteria set out in paragraph [14(a)], it is for those who are mana whenua to identify impacts of any proposal on the physical and cultural environment valued by them.[4] On Te Tai o Poutini / the West Coast, an appropriately qualified expert appointed by the relevant Poutini Ngāi Tahu Rūnanga will be the appropriate person to determine whether an activity will have an adverse effect on the Poutini Ngāi Tahu values associated with the SASM site.

8 In the same way that acoustic experts are required to determine, on an objective basis, whether particular activities meet permitted activity noise thresholds, it is for Poutini Ngāi Tahu appropriately qualified experts to determine whether effects on Poutini Ngāi Tahu values are avoided.

9 As counsel discussed with the Panel at the hearing, the written approval approach in the SASM permitted activity rules could be improved to make it clear that the written approval can only address whether the

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3 I adopt the reasoning provided in my memorandum dated 23 November 2023, to avoid duplication.

4 *SKP Inc v Auckland Council* [2018] NZEnvC 81, also cited in *TEPS v Tauranga City Council* [2021] NZHC 1201.

proposed activity will (or will not) have adverse effects on the Poutini Ngāi Tahu values of the site or area.

10 The assessment of effects on cultural values is considered to be an objective assessment undertaken by a suitably qualified and appointed Poutini Ngāi Tahu expert from either Te Rūnanga o Ngāti Waewae or Te Rūnanga o Makaawhio. Re-framing this rule slightly would avoid the perception that the reference to written approvals in the SASM permitted activity rules was granting an open discretion to Poutini Ngāi Tahu to decide whether the activity could go ahead or not, and would clearly meet [14(a)] as referenced above by focusing the written approval on adverse effects on the Poutini Ngāi Tahu values of the site or area. In other words the permitted activity standard would be either the activity:

(a) does have an effect on Poutini Ngāi Tahu values and therefore will not receive written approval; or

(b) does not have an effect on Poutini Ngāi Tahu values and therefore will receive written approval.

11 Counsel considers that [14(b)] and [(c)] would also be met as it is clear that the permitted activity standards require written approval from the relevant Poutini Ngāi Tahu Rūnanga, and it is clear to the relevant territorial authority whether the written approval has been obtained (meaning the activity is permitted) or not.

12 For completeness, counsel for Ngāi Tahu notes that the purpose of the permitted activity rules requiring written approval was to ensure that unnecessary regulation is avoided. Furthermore, as set out in the section 42A report and the evidence presented on behalf of Ngāi Tahu at the hearing, counsel considers that the SASM boundaries have been accurately spatially defined.

Ms Rusher for the Grey District Council's position

13 The Grey District Council agrees with the enunciation of the principles set out in paragraph [14] of the memorandum dated 23 November 2023.

14 The Council also notes that if a SASM is not adversely affected or is affected to the extent that it is less than minor then a planning control for

that activity is not required, or the spatial extent of the SASM can be more precisely defined.

15 A regulatory framework is for the purpose of managing the effects of activities such that adverse effects are avoided, remedied or mitigated (section 5(2)(c). Therefore, it is not good practice (and is a contradiction in terms) to define a regulatory framework to include a control that requires certification of the absence of an adverse effect. A plan rule should therefore avoid the result that it requires certification that effects of an activity on a SASM do not exist.

16 A plan rule may not require certification that the effects on a SASM are less than minor because the assessment of "less than minor" is the exercise of a discretion.

17 It is submitted that the appropriate regulatory response is that SASM are more precisely defined in a spatial sense to define the exact areas for which planning controls (such as resource consents) are required.

Preferred alternatives with supporting reasons

18 As recognised in the memorandum of 23 November 2023, Counsel acknowledge the potential benefits and pragmatism of a rule as proposed in this case.

19 It is considered that there may be a lawful alternative to the proposed "written approval" approach, through a rule providing an activity is permitted provided that it is certified by an appropriately qualified expert that there are no adverse effects on Poutini Ngāi Tahu values (or similar).

20 Certification requirements are commonly found in resource consent conditions, but certification requirements can also be lawfully included in planning documents. For certification requirements in a permitted activity rule in a district plan to be lawful, there are certain principles that must be met. These principles incorporate the principles of permitted activity rules set out in our 23 November 2023 memorandum, as well as the following additional principles:

(a) A certification requirement in a permitted activity rule cannot reserve an unlawful discretion as to whether the activity is

permitted or not.[5] An activity cannot be classified as a permitted activity if classification as such is ultimately left to the *discretion* of the consent authority.[6]

(b) A requirement for written approval (with no parameters as to what will be approved or not) can be distinguished from a requirement for certification.[7] It is not appropriate for a council to make an evaluative judgment as to whether measures are sufficient to achieve the relevant outcomes in order for permitted activity status to apply.[8]

(c) Further, certification decisions can be made by a person using that person's skill and experience but the making of the substantive decision cannot be delegated.[9]

(d) Criteria should be included in certification requirements in plan rules. These criteria should set out what is required for certification and how those requirements can be achieved.

21 Any rule requiring certification as a condition of permitted activity status under the TTPP must be carefully formulated to ensure that the principles set out in the above section are met.[10]

22 Counsel is aware of other rules in district plans around the country that provide for some activities to be a permitted activity, provided certification as to certain effects has been provided. These rules usually encompass certification against a set of criteria also set out in the plan. Examples of some of these rules (not being an exhaustive list) are attached as **Appendix 1**.

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5 *Re Otago Regional Council* [2022] NZEnvC 101 at [217]-[219].

6 *Re Otago Regional Council* [2022] NZEnvC 101 at [228] citing *Twisted World Ltd v Wellington City Council* NZEnvC Wellington W024/2002, 8 July 2002.

7 *Re Otago Regional Council* [2022] NZEnvC 101 at [229]-[232], distinguishing the decision in *Population and Public Health Unit of the Northland District Health Board v Northland Regional Council* [2021] NZEnvC 96.

8 *Re Otago Regional Council* [2022] NZEnvC 101 at [232].

9 *Re Otago Regional Council* [2022] NZEnvC 101 at [234], quoting from the decision in *Re Canterbury Cricket Assoc Inc* [2013] NZEnvC 184 at [125]-[127] which made comments to this effect in relation to management plans. At [233] the Environment Court in *Re Otago Regional Council* concurs with and adopts these comments, and states further that these comments relating to management plans are equally applicable to the situation in that case (which was a proposed certification requirement in a plan).

10 *Re Otago Regional Council* [2022] NZEnvC 101 at [234], as above.

23 While other district plan rules do not confirm that the approach is lawful, in Counsel's view a certification rule could be drafted to conform with the principles outlined above.

24 The examples in other district plans do not relate to mana whenua effects and many of the identified rules in Appendix 1 include certification by a qualified professional. Previous case law has established that "persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them."[11]

25 Although the certification approach for mana whenua effects may be novel, there is no reason why this should not be treated in line with other effects where certification has been deemed appropriate. While there is a limited subset of the population that would be adequately qualified to assess whether there are adverse mana whenua effects, the same could be said for heritage effects – whether the effects exist are still required to be assessed in line with the criteria, and by a qualified person.

26 Provided the rule is drafted to provide for certification in a binary manner (e.g. there either are or are not adverse mana whenua effects), then this would not offend against the principles for reserving a subjective discretion. At that point, the person being asked to certify is not being asked to make an assessment as to the potential level of effects that might occur (and therefore whether the activity should be permitted in light of that level of effects), but simply whether or not the effects exist.

27 For these reasons, provided criteria are outlined that would provide some guidance for the certification of the existence of adverse cultural effects, then a certification approach could be drafted to lawfully achieve similar outcomes to the proposed written approval rule.

Ms Scott's position

28 In principle and as advised at the hearing, counsel for Ngāi Tahu considers that a permitted activity rule could be drafted requiring certification that a proposed activity will not have adverse effects on the Poutini Ngāi Tahu values associated with a SASM site. However, to

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11 *SKP Inc v Auckland Council* [2018] NZEnvC 81, also cited in *TEPS v Tauranga City Council* [2021] NZHC 1201.

date the proposed certification approach has not been fully developed. This approach could replace the written approval approach subject to:

(a) Certification criteria being included in the TTPP; and

(b) Any criteria being developed with input from Ngāi Tahu.

29 Counsel for Ngāi Tahu considers that inclusion of a certification rule is both lawful and orthodox where it meets the requirements as expressed in paragraph [20], and does not amount to a delegation of decision making. Given the careful determination of proposed SASM boundaries (meaning that Ngāi Tahu does not consider they can be refined any further) the certification approach is considered to provide more flexibility than other options, for example requiring resource consent for a broader range of activities within SASM.

30 Should the Panel be open to considering the certification approach further, counsel considers that planner conferencing should be directed to develop the criteria. Ngāi Tahu planner Ms Rachael Pull has offered to participate in any conferencing to develop criteria. Ms Philippa Lynch from Poutini Environmental, who presented planning evidence for Ngāi Tahu at the hearing regarding General District Wide Matters – Part 1, has also advised that she is available to participate in conferencing. As Ms Lynch has been considering written approval requests in accordance with the proposed TTPP SASM provisions that took immediate legal effect she has helpful practical knowledge that may assist during conferencing.

Ms Rusher for the Grey District Council's position

31 The Council agrees broadly with the above statements by both parties, but notes that a decision as to whether activities have adverse effects on a SASM and require a regulatory control to manage effects such as a resource consent is a matter for the hearings panel to determine.

32 A rule that simply requires a permitted activity status to operate on the binary basis of whether or not there are cultural effects on a SASM is in effect, delegating the determination of whether a planning control applies to an entity that is not a consent authority. The Act does not provide for a plan to delegate by means of a plan rule.

33 Further, for the reasons set out above, a certificate confirming that there are no effects is not best practice. The best means of providing for

"permitted activity" status is to draw the spatial parameters of a SASM with precision such that an activity with no adverse effects, (and effects that are not significant enough to warrant control within the regulatory framework) do come fall within the planning framework.

34 Should the panel refer the drafting of a rule to planners, the Council wishes to have its planner included in caucusing for the development of any re-drafted rule as well as having the proposed rule subject to a legal review that includes the Council's legal team.

Is delegation / transfer of powers an available option?

35 Sections 33 and 34A of the RMA address the transfer of powers of a local authority, and the delegation of functions to other persons by local authorities respectively.

36 Section 33 provides that a local authority may transfer any one or more of its functions, powers or duties in accordance with that section, to a public authority provided that it follows the steps set out in that section. These steps include using the special consultative procedure under the Local Government Act, a requirement to serve notice on the Minister for the Environment of its proposal, and both authorities agree that the transfer is desirable on a number of grounds.

37 A public authority as defined in this section includes an iwi authority.

38 Section 34A provides for delegation to other persons, and that a local authority may delegate to any other persons any functions, powers or duties under the RMA except the powers to approve a policy statement or plan, the decision on an application for resource consent, or the making of a recommendation on a requirement for a designation.

39 On its face, there is nothing in the RMA preventing the Committee from either transferring a function to an iwi authority, or delegating a power (other than those listed) to any other person. However, it is unclear in these circumstances which power the Committee would be delegating or transferring, and how this would assist with ensuring the rule itself is lawful.

40 A rule cannot reserve a subjective discretion to determine the activity status, regardless of whether this discretion is reserved to a third party or the Committee / Council itself. For this reason, I do not consider that

the delegation or transfer of powers is a lawful option available to achieve the same outcome as a written approval framework.

41 Given the conclusion on this point, Counsel have not considered whether there is an issue with delegation or transfer of powers in the circumstances where the TTPP Committee has itself been delegated the relevant plan-making functions under the Local Government Reorganisation Scheme (West Coast Region) Order 2019. However, this would be another issue requiring consideration.

42 It is also noted for completeness than any proposed transfer or delegation would fall outside the scope of the delegation made to the Independent Hearing Panel to make recommendations on the TTPP, as such this is not a matter that the Independent Hearing Panel can direct occur.

Ms Scott's position

43 Counsel for Ngāi Tahu agrees with the position set out by Ms de Latour above. Further, while theoretically a transfer of powers could occur, section 33(1)(3) of the RMA requires that a special consultative procedure (as set out in section 83 of the Local Government Act 2002) be followed. As that procedure has not been undertaken to date a transfer of powers could not occur in this instance.

44 Furthermore, counsel agrees that there is no ability for the Independent Hearing Panel to make a recommendation regarding the transfer of powers, nor could it purport to delegate any of the Councils' powers.

Ms Rusher for the Grey District Council's position

45 The Council agrees with the points made above and has no additional comment to make.

Victorian Title

46 Counsel for Ngāi Tahu notes that Minute 26 only directed Ms de Latour to provide a legal view on Victorian Title. This matter is of fundamental importance to Ngāi Tahu and it is not clear why counsel has not been given an opportunity to provide a legal view on this. Ngāi Tahu seeks

leave to enable it to provide a response to Ms de Latour's advice should it have any additional commentary on this matter.

Dated 7 June 2024

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L F de Latour
Counsel for Te Tai o Poutini Plan Committee

.....
S Scott / K Viskovic
Counsel for Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio and Te Rūnanga o Ngāi Tahu

.....
M Bell / K L Rusher
Counsel for Grey District Council

APPENDIX 1: EXAMPLES OF CERTIFICATION RULES

Christchurch District Plan – Chapter 9 Natural and Cultural Heritage

9.3.4.1.1 Permitted activities

a. The following rules apply to heritage items and heritage settings scheduled in Appendix 9.3.7.2 and identified on the planning maps.
b. The activities listed below are permitted activities if they meet the activity specific standards set out in this table.
c. Activities may also be controlled, restricted discretionary, discretionary, non-complying or prohibited as specified in Rules 9.3.4.1.2 to 9.3.4.1.6.
d. The rules in the table below include restrictions on what may be done with heritage fabric. Confirmation that particular fabric is not heritage fabric, and therefore is not subject to those rules/standards, can be obtained by obtaining a certificate in accordance with Appendix 9.3.7.6 - Certification of non-heritage fabric.
e. Exemptions relating to this rule can be found in Rule 9.3.3 m.

Activity		Activity specific standards
P10	Heritage upgrade works for: a. Highly Significant (Group 1) heritage items, where the works are required as a result of damage; or b. Significant (Group 2) heritage items.	a. The works shall be undertaken in accordance with the certified heritage works plan prepared, and certified by the Council, in accordance with Appendix 9.3.7.5

Note: PC13 makes changes to Rule 9.3.4.1.1 P10 but does not change the approach to certification (only changes the activity description).

Ashburton District Plan – Chapter 12 Heritage Values and Protected Trees

12.8 Site Standards

Repair and maintenance of any heritage item shall be a permitted activity if it meets the following standards, as certified by a suitably qualified professional with heritage experience, and as confirmed in writing with the Council:

a) The work involves stabilisation, preservation and conservation as defined in the ICOMOS (NZ) Charter 2010 for the Conservation of Places of Cultural Heritage Value 1993 (ICOMOS (NZ) Charter 2010).

b) The work does not involve alterations, additions (including restoration and reconstruction as defined in the ICOMOS (NZ) Charter 2010), relocation, partial demolition or demolition.

c) The work involves the restoration to sound condition of any existing building or any part of an existing building.

d) The work involves the patching, restoration or minor replacement of materials, elements, components, equipment and fixtures for the purposes of maintaining such materials, elements, components, equipment and fixtures in good or sound condition.

e) Any redecoration work involves the renewal, restoration or new application of surface finishes, decorative elements, minor fittings and fixtures and floor coverings which does not destroy, compromise, damage or impair the appreciation of the historic heritage values of the element being redecorated.

f) The work carried out on the building shall generally match the original in terms of quality, materials and detailing.

g) Repair of material or of a site shall generally be with original or similar materials. However, repair of technically higher standard than the original workmanship or materials may be justified where the life expectancy of the site or material is increased, the new material is compatible with the old and any historic heritage value is not diminished.

h) The work does not result in any increase in the area of land occupied by the building.

i) The work does not change the character, scale and intensity of any effects of the building on the environment (except to reduce any adverse effects or increase any positive effects) and does not include upgrading.

j) No painting is to be applied to any previously unpainted surface or render to previously unplastered surfaces.

k) Repair work will be carried out by a suitably qualified tradesperson with recognised experience in working with heritage buildings.

Hurunui Operative District Plan

Whakatāne District Plan – Part 2 – District Wide Matters – Historical and Cultural Values – Notable Trees

NT-R4 16.2.3, 16.2.3.2, 16.2.3.4, 16.2.3.4. advice notes 2 and 3, 16.4.2, 16.4.2.1, 3.7.20, 3.7.20.1	Trimming or removal - compliance with Electricity (Hazards from Trees) Regulations 2003	
Schedule of Notable Trees - NT-SCHED	Activity status: PER 1. The trimming or removal of a Notable Tree where this is required to comply with the Electricity (Hazards from Trees) Regulations 2003. 2. Before a tree may be trimmed or removed, a report shall be prepared by a suitably qualified person to verify that the tree is causing an adverse effect on the matters listed in NT-R3 and the recommended action required. This report must be provided to and certified in writing by the Council before any work is undertaken on the scheduled tree. Advice Note 1: In many cases the Council may be able to do the report required by this rule. Advice Note 2: Before removing a Notable Tree, a Certificate of Compliance may be applied for under Section 139 of the Resource Management Act 1991 to confirm that these requirements have been met.	Activity status where compliance not achieved: RDIS see RDIS assessment criteria NT-AC1 Activity status where compliance not achieved for CPZ: NC see NC assessment criteria NT-AC3

Tauranga City Plan – Protection Plan Areas

8B.3 Permitted Activity Rules

8B.3.1 Buildings, Structures and Activities to be designed by a Coastal Processes Engineer

All activities shall be certified by a Coastal Processes Engineer, except where those buildings, structures and activities comply with the Coastal Hazard Erosion Plan Area Guidelines.

Note: The Tauranga City Council Coastal Hazard Erosion Plan Area Guidelines are a document incorporated by reference and have been developed to provide a means of compliance, or "Acceptable Solution" for Permitted Activities undertaken within the Coastal Hazard Erosion Plan Area in the Tauranga City Council area.

Ōtorohanga District Plan – Chapter 4 Indigenous Vegetation

4.2 Any indigenous vegetation to be removed or modified in the Rural Effects Area (including within a Landscape of High Amenity Value) outside Coastal Policy Area and Outstanding Landscapes except as provided for in Rule 4.1 is a permitted activity where:

(a) it is proposed to remove up to 5000m2 of indigenous vegetation within any 12 month period;

(b) the vegetation to be removed is more than 10 metres from a water body; and

(c) the vegetation to be removed has been assessed and certified as not being significant in terms of Appendix 2 of this Plan by a suitably qualified person.

Hamilton City Operative District Plan – Chapter City-wide

25.8.3.13 Noise Performance Standards for Activities in the Ruakura Logistics and Ruakura Industrial Park Zones

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d. A noise barrier shall be provided to ensure that the noise limits in Rule 25.8.3.13.a are met and in accordance with the following:

i. The barrier shall be constructed at, or to the north of, the northern-most limit of the Inland Port operations area (Sub Area A (Inland Port)) and in any other locations necessary to ensure the noise limits in Rule 25.8.3.13.a will be met.
ii. The barrier may be constructed in stages to suit staged development of the Inland Port (Sub Area A (Inland Port)).
iii. The barrier shall be designed and constructed in accordance with best practice and certified by a suitably qualified expert.
iv. The barrier shall be designed to avoid or minimise the reflection of noise from passing trains onto residential properties on Ryburn Road.
v. The noise barrier shall form part of the Noise Management Plan for each stage of development of the Inland Port (Sub Area A (Inland Port)).

Regional Plan Water: for Otago – Chapter 14 Land Use other than in Lake or River Beds

14.7 Animal waste systems

14.7.1 Permitted activities: No resource consent required

14.7.1.1 The use of land for the use and maintenance of an animal effluent storage facility that was constructed prior to 25 March 2020 is a ***permitted*** activity providing:

(a) The animal effluent storage facility is sized in accordance with the 90th percentile as calculated by the Dairy Effluent Storage Calculator, and where

relevant using a conversion factor for animals other than dairy cows determined by a Suitably Qualified Person as defined in Schedule 20; and

(b) The animal effluent storage facility is certified by a Suitably Qualified Person as defined in Schedule 20, within the last five years as:

(i) Having no visible cracks, holes or defects that would allow effluent to leak from the animal effluent storage facility; and

(ii) Meeting the relevant pond drop test criteria in Schedule 18 (excluding above-ground tanks, bladders, and solid animal effluent storage facilities); and

(c) A management plan for the purpose of preventing the unauthorised discharge of liquid or solid animal effluent to water is prepared and implemented in accordance with Schedule 21; and

(d) Any certifications under (a) and (b) are provided to the Otago Regional Council upon written request.

Proposed Southland Water and Land Plan

Rule 32D – Existing agricultural effluent storage facilities

***Note**: In addition to the provisions of this Plan and any relevant district plan, any activity which may modify, damage or destroy pre-1900 archaeological sites is subject to the archaeological authority process under the Heritage New Zealand Pouhere Taonga Act 2014. The responsibilities regarding archaeological sites are set out in Appendix S.*

(a) The use of land for the maintenance and use of an existing agricultural effluent storage facility that was authorised prior to Rule 32D taking legal effect is a permitted activity provided the following conditions are met:

(i) the construction of the existing agricultural effluent storage facility was authorised by a resource consent; or

(ii) the construction of the existing agricultural effluent storage facility was lawfully carried out without a resource consent; and

(iii) where the construction of the existing agricultural effluent storage facility was lawfully carried out without resource consent, the landholding owner or their agent must provide information to the Southland Regional Council upon request, demonstrating that any component of an existing agricultural effluent storage facility either:

(1) has a capacity of 35m3 or less, is constructed using an impermeable concrete or synthetic liner, and has no defect that would cause leakage; or

(2) is fully lined with an impermeable synthetic liner, or is of concrete construction and:

(a) has a leak detection system that underlies the entire agricultural effluent storage facility which is inspected not less than monthly and there is no evidence of any leakage; and

(b) has been certified by a Suitably Qualified Person in accordance with Appendix P within the last 10 years as meeting the relevant pond drop test criteria in Appendix P; or

(3) is an above ground storage tank constructed in accordance with a building consent and has been certified by a Suitably Qualified Person within the last 5 years, following an external visual inspection, as having no visible cracks, holes or defects in the tank that would allow effluent to leak or visible leakage from the sides or base of the tank; or

(4) is certified by a Suitably Qualified Person within the last three years as:

(a) having no visible cracks, holes or defects that would allow effluent to leak from the effluent storage facility; and

(b) meeting the relevant pond drop test criteria in Appendix P.