IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA221/2022
[2024] NZCA 51

BETWEEN	ADRIAN NEIL PAGE First Appellant	
	JULIE MAREE CROSBIE Second Appellant	
AND	GREATER WELLINGTON REGIONAL COUNCIL Respondent	

Hearing:	9 November 2023 (further submission received 16 November 2023)
Court:	Collins, Brewer and Muir JJ
Counsel:	S J Iorns, J C Sylvester, V M E Krebs and J M Elliot for Appellants R J B Fowler KC, A S Bagchi and A W M Britton for Respondent
Judgment:	11 March 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeals are allowed (both appellants) in respect of charges 2, 4–8, 10, 11 and 14–34 and we direct that the convictions in respect of said charges be set aside and judgments of acquittal be entered.

B In respect of appropriate penalties for Mr Page and Ms Crosbie, and the applicability of enforcement orders (A)–(D) identified in the District Court's Sentencing Notes, we invite submissions on the timetable indicated.

C We reserve costs on the appeal pending receipt of further submissions filed in accordance with the timetable in [128].

REASONS OF THE COURT

(Given by Muir J)

Table of Contents

Introduction

[1] On 15 February 2023, this Court granted leave[1] to Mr Page and Ms Crosbie to bring a second appeal from a decision of the District Court in which Judge Dwyer found the appellants guilty of 35 offences under the Resource Management Act 1991

[1] *Page v Greater Wellington Regional Council* [2023] NZCA 20 [Leave judgment].

(RMA) relating, substantially, to activities within areas identified as "wetlands".[2] Following the District Court decision, Mr Page was sentenced to three months' imprisonment and Ms Crosbie was fined $118,742.[3] An enforcement order for remediation of the property was also made.[4] A subsequent appeal to the High Court was unsuccessful.[5]

[2] Before both the District and High Courts, the appellants were unrepresented. Nor did they call expert evidence.

[3] In granting leave, both to bring a second appeal and to admit additional evidence from a senior ecologist, Dr Vaughan Keesing, and a senior hydrologist, Dr Jack McConchie, this Court concluded that the absence of any expert evidence at trial raised a real risk that a miscarriage of justice may have occurred.[6] This Court also considered that late hard copy disclosure of voluminous prosecution evidence in circumstances where the applicants were self-represented and "had technological difficulties" further created a risk of a miscarriage of justice.[7]

[4] In response to the admission of Drs Keesing and McConchie's evidence, the respondent (the Council) filed evidence from ecologist, Ms Melanie Dixon, and hydrologist, Mr Bryon Hughes. In turn, reply evidence was filed and all four experts were cross-examined in this Court. As a result, we have the benefit of much more comprehensive expert assessments than were available in the District Court, where the only relevant expert evidence was from Mr Owen Spearpoint, a senior environmental monitoring officer employed by the Council.[8]

[5] The exchange of expert evidence has also refined the issues to the extent that the Council now concedes that, of the four alleged wetlands which featured in the

---

2 *Greater Wellington Regional Council v Page* [2021] NZDC 16019 [Verdicts judgment] at [23].
3 *Greater Wellington Regional Council v Page* [2021] NZDC 23312 [Sentencing notes] at [34] and [51]. Mr Page has now served the sentence imposed on him. Ms Crosbie's fine has not yet been paid.
4 At [52] and [54].
5 *Page v Greater Wellington Regional Council* [2022] NZHC 762 [High Court appeal judgment].
6 Leave judgment, above n 1, at [28].
7 At [25]–[26].
8 The extent of his expertise is challenged by the appellants and is the subject of subsequent discussion. See [66] post.

prosecution, the charges in respect of Area 4 cannot be considered proven beyond a reasonable doubt, with the result that the convictions are appropriately set aside.[9]

Background

[6] All charges against the appellants relate to an 11.13 hectare parcel of land in the Nikau Valley in the Kāpiti District. The property had been actively farmed until approximately 2000 when the development of lifestyle properties in close proximity presaged an alternative use. In 2019, Ms Crosbie purchased the block with the intention of farming it as a dry stock unit. Subsequently, livestock were reintroduced to the property and extensive development work was undertaken by Ms Crosbie's partner, Mr Page. This included the construction of access tracks and stream crossings, reclamation of four areas considered by the Council to be wetland, and installation of water takes. In respect of the third of these alleged wetland areas, the Council considered it to have three distinct parts, Areas 3A, 3B and 3C. The Council brought 35 charges against the appellants relating to unlawful activities undertaken in relation to the alleged wetlands.

[7] Each of the Council's charges were brought against both appellants on the premise that Mr Page undertook the contravening activities and Ms Crosbie, as owner of the property, allowed the activities to occur.[10]

[8] Thirty-four of the 35 offences were alleged to have taken place in the period 30 May 2019 to 5 August 2020 and to have involved either introduction of stock into wetland areas or modification of such areas. The 35th charge related to an alleged contravention of an interim enforcement order obtained by the Council from the Environment Court on 22 December 2020. The conviction in respect of this charge is not challenged on appeal. It related to a failure by the appellants to exclude livestock from an effluent disposal field established under easement arrangements in favour of a neighbouring property. It did not engage any of the wetland-related issues which otherwise feature in the appeal.

---

9 Charges 4, 16, 32 and 34. As these charges are no longer in dispute, we do not refer to them further in the subsequent analysis.

10 See Verdicts judgment, above n 2, at [2].

[9] In the District Court, Judge Dwyer grouped the charges into three categories:[11]

(a) Twenty-five "operational charges" against the RMA which related to allowing cattle to access wetlands, disturbing wetlands, undertaking earthworks in water bodies, depositing substances into water or where they could enter it, taking water and depositing soil onto a riverbed.

(b) Nine "abatement notice charges" which reflected the fact that several alleged "operational charges" were also alleged breaches of abatement notices which had been served on the appellants on 24 January 2020.

(c) The single interim enforcement order charge.

The District Court's verdicts and sentencing judgments

[10] In his verdicts judgment, Judge Dwyer acknowledged Mr Spearpoint as an expert in terrestrial ecology and wetland delineation, and said that he "overwhelmingly" preferred his evidence to that of the defendants in all respects, including as to historical use of the property and the existence of "natural wetlands" for the purposes of the Council's Proposed Natural Resources Plan (pNRP) and the "wetland" definition under s 2 of the RMA.[12]

[11] In his subsequent sentencing notes, the Judge emphasised the ecological importance of wetlands generally, although accepting that only a small area had been damaged.[13] In respect of Mr Page, he considered an aggravating feature of the offending to have been that it was "deliberate, prolonged, and defiant" in the face of Council abatement notices and the Environment Court's enforcement order.[14]

---

11 Sentencing notes, above n 3, at [6]–[9].
12 Verdicts judgment, above n 2, at [99] and [110]. All parties accept that the pNRP was binding on the appellants by virtue of the Resource Management Act 1991, s 9(2).
13 Sentencing notes, above n 3, at [14]–[16] citing Verdicts judgment, above n 2, at [17]–[23].
14 Sentencing notes, above n 3, at [21].

The High Court appeal

[12] In the High Court, Gendall J referred to the trial Judge's "extensive and detailed Verdicts Judgment" and acknowledged the "specialist" nature of the Court from which the appeal had been taken.[15] He emphasised the "absence of compelling evidence, and particularly expert evidence which suggest[ed] an error has occurred", and said that Mr Page had not been able to "qualify himself as an expert here".[16] Accordingly, he was satisfied that neither error nor a real risk of an unfair trial had been established. Nor was he persuaded that a miscarriage of justice had occurred.

The approach to a second appeal

[13] Second appeals are governed by s 240 of the Criminal Procedure Act 2011 which states that if the second appeal court is satisfied that any of the grounds described in s 232(2) are established, that appeal must be allowed.[17] Accordingly, this Court must allow the appeal against conviction if satisfied that:[18]

> …
>
> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.

[14] In any other case, the Court must dismiss the appeal.[19]

[15] In *Sena v Police*,[20] the Supreme Court refined the approach to be taken in respect of appeals against convictions entered in judge-alone trials, stating that they were to proceed by way of rehearing in accordance with the principles established in *Austin, Nichols & Co Inc v Stichting Lodestar*.[21]

---

15 High Court appeal judgment, above n 5, at [101] and [58] respectively.
16 At [58].
17 Criminal Procedure Act 2011, s 240(2).
18 Section 232(2).
19 Section 240(3).
20 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575.
21 At [32] citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [26]–[32].

[16] Accordingly, the appellants are entitled to judgment in accordance with the independent opinion of this Court, with the usual caveats that:[22]

(a) They bear the onus of persuading this Court to reach a different conclusion by identifying the respect(s) in which the judgment under appeal is said to be in error.

(b) In determining whether the judgment was wrong, this Court will take into account any particular advantage enjoyed by the trial court.

[17] Essentially, our task is to independently assess whether, on the basis of all the evidence now before this Court, the Council can be said to have proved, beyond reasonable doubt, the relevant ingredients of the charges and, in particular, whether Areas 1, 2, 3A, 3B and 3C were "wetlands" for the purposes of the RMA, or "natural wetlands" or "significant natural wetlands" for the purposes of the pNRP.

The relevant statutory plan and policy statement provisions

[18] There are several definitions relevant to the appeals. We start with the definition of "wetland" in the RMA:[23]

> **wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions

[19] For the purposes of the pRNP, "[n]atural wetland" is defined as follows, notably incorporating the RMA definition of "wetland":[24]

> … a permanently or intermittently wet area, shallow water and land water margin that supports a natural ecosystem of plants and animals that are adapted to wet conditions, including in the beds of lakes and rivers, the coastal marine area (e.g. saltmarsh), and groundwater-fed wetlands (e.g. springs). **Natural wetlands** do not include:
>
> (a) damp gully heads, or wetted pasture, or pasture with patches of rushes, or

---

22 *Sena v Police*, above n 20, at [38].

23 Resource Management Act, s 2(1), adopted by Greater Wellington Regional Council *Proposed Natural Resources Plan: Decisions Version – Part 1 for the Wellington Region* (Greater Wellington Regional Council, July 2019) [pNRP 2019] at 29. Relevant to charges 8, 31 and 33.

24 pNRP 2019, above n 23, at 29. Relevant to charges 5, 6, 7, 14, 15, 17, 19, 20 and 24–30.

(b) areas of wetland habitat that have established in or around bodies of water specifically designed, installed and maintained for any of the following purposes:

(i) water storage ponds for

a) public water supply, or

b) hydroelectric power generation, or

c) firefighting or

d) irrigation, or

e) stock watering or

(ii) water treatment ponds for

a) **wastewater**, or

b) **stormwater**, or

c) nutrient attenuation, or

d) sediment control, or

e) **animal effluent**, or

(iii) beautification, landscaping, amenity, or

(iv) drainage.

[20] In turn, the pNRP defines "significant natural wetland" as:[25]

> A **natural wetland** that meets one or more of criteria (a) to (d) listed in Policy 23 of the Regional Policy Statement 2013 being: representativeness; rarity; diversity; ecological context.
>
> (Note - Schedule F3 lists identified **significant natural wetlands** for the purpose of managing **livestock** exclusion under Rule R97).

[25] pNRP 2019, above n 23, at 34. Relevant to charges 2, 10, 11, 18, 21, 22 and 23. The pNRP (2019) also includes the following note:

> Note that, because of the rarity of wetlands in the Wellington Region, all **natural wetlands** will meet the representativeness and rarity criteria listed in Policy 23 of the Regional Policy Statement 2013 and therefore meet the definition of **significant natural wetland**.

[21] Policy 23 of the Regional Policy Statement (RPS) provides:[26]

> **Policy 23: Identifying indigenous ecosystems and habitats with significant indigenous biodiversity values – district and regional plants**
>
> District and regional plans shall identify and evaluate indigenous ecosystems and habitats with significant indigenous biodiversity values; these ecosystems and habitats will be considered significant if they meet one or more of the following criteria:
>
> (a) Representativeness: the ecosystems or habitats that are typical and characteristic examples of the full range of the original or current natural diversity of ecosystem and habitat types in a district or in the region, and:
>
> (i) are no longer commonplace (less than about 30% remaining); or
>
> (ii) are poorly represented in existing protected areas (less than about 20% legally protected).
>
> (b) Rarity: the ecosystem or habitat has biological or physical features that are scarce or threatened in a local, regional or natural context. This can include individual species, rare and distinctive biological communities and physical features that are unusual or rare.
>
> (c) Diversity: the ecosystem or habitat has a natural diversity of ecological units, ecosystems, species and physical features within an area.
>
> (d) Ecological context of an area: the ecosystem or habitat:
>
> (i) enhances connectivity or otherwise buffers representative, rare or diverse indigenous ecosystems and habitats; or
>
> (ii) provides seasonal or core habitat for protected or threatened indigenous species.
>
> (e) Tangata whenua values: the ecosystem or habitat contains characteristics of special spiritual, historical or cultural significance to tangata whenua, identified in accordance with tikanga Māori.

[22] To succeed in proving its case in respect of the majority of charges faced by the appellants (being those premised on the existence of a natural wetland or

---

[26] Greater Wellington Regional Council *Regional Policy Statement for the Wellington region* (Greater Wellington Regional Council, 24 April 2013) [Regional Policy Statement] at 104–105.

significant natural wetland),[27] the Council was required at the outset to establish to the criminal standard: a permanently or intermittently wet area, shallow water and land water margin that supports a natural ecosystem of plants *and* animals that are adapted to wet conditions. It was then required to prove to the same standard that none of the exemptions identified in subparas (a) and (b) of the pNRP natural wetlands definition applied.[28] In the particular context of the case, proof was required that the stock watering exclusion did not apply to Area 2 and the damp gully head exclusion did not apply to Areas 1, 3A, 3B and 3C.

[23] In respect of those charges alleging disturbance of a "significant natural wetland",[29] the Council was additionally required to prove significant indigenous biodiversity values as evidenced by any one or more of the criteria in Policy 23.[30]

[24] In respect of three charges,[31] the requirement was only to prove the existence of a wetland as defined in the RMA. We note that this definition likewise references the existence of a natural ecosystem of plants *and* animals adapted to wet conditions.

---

27 Being charges 2, 4–11 and 14–34. Charges 24–26, concerning water takes, were particularised as "being from within 50 metres of a significant natural wetland". However, the elements of the offence with reference to rr 136, 141 and 142 of the pNRP require proof of a "natural wetland" only. Charges 1 and 9 relate to Area 3C and an affected stream. Regardless of the issue of whether Area 3C is proven beyond reasonable doubt to be a natural wetland for the purposes of the pNRP, charges 1 and 9 could also be proved on the basis that the affected stream was a "river". The appellants do not contend otherwise or dispute the trial Judge's findings under this alternative approach.

28 See *De Silva v R* [2018] NZCA 457 at [16]; and *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897 at [114].

29 Charges 2, 10, 11, 18 and 21–23.

30 Regional Policy Statement, above n 26, at 104–105.

31 Charges 8, 31 and 33.

The Council's approach to proof of natural wetland in the District Court

[25] As we have indicated, in the District Court the Council's evidence in this respect was given by Mr Spearpoint. In identifying Areas 1, 2, 3A, 3B and 3C (and 4) as natural wetlands for the purposes of the pNRP, he applied (or as the appellants say, purported to apply) the so-called "Clarkson Method".[32] The name derives from a December 2013 paper prepared by Ms Beverley Clarkson of Landcare Research entitled "A vegetation tool for wetland delineation in New Zealand".[33] The summary page to her paper provides a useful overview of the background and approach:[34]

> **Summary**
>
> **Project and Client**
>
> - Meridian Energy contracted Landcare Research to provide a vegetation-based tool to assist in the identification and delineation of wetlands in New Zealand.
>
> - The USA has developed a robust wetland delineation system for regulatory purposes comprising three criteria: vegetation, soils, and hydrology. This project trials and adapts the USA vegetation criterion to New Zealand wetland ecosystems.
>
> **Objectives**
>
> - Develop a vegetation-based tool to delineate wetlands in New Zealand based on the USA wetland delineation approach.
>
> **Methods**
>
> - Classify New Zealand wetland species according to fidelity to wetland (wetland indicator status rating): obligate wetland (OBL: occurs almost always in wetlands), facultative wetland (FACW: occurs usually in wetlands), facultative (FAC: equally likely in wetlands or non-wetlands), facultative upland (FACU: usually in non-wetlands) or obligate upland (UPL: almost always in non-wetlands).
>
> - Integrate species abundance and wetland indicator status ratings to set decision rules in relation to meeting the hydrophytic vegetation (wetland) threshold at a site.
>
> **Results**
>
> - A species list was produced comprising the wetland indicator status ratings of more than 900 native and exotic species found in New Zealand wetlands.

---

32 See Verdicts judgment, above n 2, at [44].

33 Beverley R Clarkson *A vegetation tool for wetland delineation in New Zealand* (Landcare Research, December 2013) [Clarkson report].

34 At v (emphasis added).

- Protocols and field sheets for assessing New Zealand vegetation at putative wetland sites were adapted from the USA wetland delineation system.

Conclusions

- The vegetation criterion *is a useful tool* for delineating wetlands at most sites. Caution should be exercised, however, for delineation of sites where vegetation cover is sparse (e.g. mudflat), where plant communities have been disturbed (e.g. sites destroyed by fire), or where there are strong elements of FAC species (e.g. pakihi, gumland). In these cases, additional assessments of soils and hydrology may be required.

Recommendations

- The vegetation criterion approach *should be expanded to incorporate all three USA environmental criteria* – vegetation, soils, and hydrology – to provide a standardised wetland delineation system for the full range of wetlands in New Zealand.

[26] Essentially, therefore, what was proposed was a plant-based categorisation tool for undisturbed sites based on the fidelity of individual plants to wetland habitats, and their dominance and prevalence within relevant sampling areas.

[27] In terms of the various categorisations of plant, the paper records that lists were collated and analysed for consensus classification into the five categories previously identified with the following occurrence incidence:[35]

(a) Obligate Wetland (OBL): estimated probability greater than 99 per cent occurrence in wetlands.

(b) Facultative Wetland (FACW): estimated probability 67–99 per cent occurrence in wetlands.

(c) Facultative (FAC): estimated probability 34–66 per cent occurrence in wetlands.

(d) Facultative Upland (FACU): estimated probability of one to 33 per cent occurrence in wetlands.

---

35 At 2–3.

(e) Obligate Upland (UPL): estimated probability less than one per cent occurrence in wetlands.

[28] In respect of what it described as the "Routine Method", the paper proposed the following steps:[36]

> 1. Determine project area.
>
> 2. Decide whether the 'normal' circumstances are present. The Routine Method should not be applied for atypical situations, e.g. abnormal environmental conditions (drought, flood) or recent disturbances (landslides), or wetlands that have been filled, drained or cleared. In those situations use the Comprehensive Method as outlined in the 1987 Corps Manual.[37]
>
> 3. Identify and map the major vegetation types in the project area.
>
> 4. For areas ≤ 2 ha, establish a representative plot in each major vegetation type…
>
> 5. For areas > 2 ha, establish representative plots along transects running perpendicular to the suspected wetland boundary… At least one plot for each vegetation type should be sampled and therefore located on at least one transect …
>
> 6. Sample the plot using the Dominance Test and Prevalence Index…
>
> 7. Refine the wetland boundary on the ground, by using visual clues such as changes in topography (e.g. flat – hillslope interface), vegetation or soils …

[29] In terms of sampling, it proposed:[38]

(a) estimating a percentage cover for each species;

(b) adding individual percentages to give total cover;

(c) assigning wetland indicator status ratings for each species from a New Zealand plant list; and

---

36 At 4–5 (footnote inserted).

37 Being a reference to Environmental Laboratory, US Army Corps of Engineers *Corps of Engineers Wetlands Delineation Manual* (online ed, Vicksburg, 2020) [Corps Manual]. The so-called "Clarkson Method" was derived from the Corps Manual.

38 Clarkson report, above n 33, at 6.

(d) calculating the "Dominance Test" and "Prevalence Index" for the plot.

[30] It recommended both the Dominance Test and Prevalence Index be carried out for wetland delineation, suggesting that:[39]

> If both tests are met, the area is highly likely to be wetland. If neither is met, the area is probably not a wetland. If only one test is met, or if the scores are marginally under the threshold, then additional tests will need to be undertaken which should include soils and hydrology…

[31] The Dominance Test involves ranking all species in each stratum from most to least abundant and then identifying the dominant species by applying the so-called "50/20 rule".[40] The Dominance Test threshold is considered met if "more than 50% of the dominants from all strata are OBL, FACW, or FAC".[41]

[32] The Prevalence Index involves the application of a vegetation-based method of weighed averages falling between one (all OBL species) and five (all UPL species). Ms Clarkson's paper notes a caution in academic literature that "vegetation alone was not accurate between Prevalence Index values 2.5 to 3.5".[42]

[33] A mathematical formula is provided for calculating the Prevalence Index:[43]

> 1. Fill in Prevalence Index worksheet by ranking all species by cover in each Indicator Group from the most to least abundant. …Sum the covers for species in more than one stratum.
>
> 2. Multiply Total Group % Covers accordingly: OBL by 1, FACW by 2, FAC by 3, FACU by 4, UPL by 5.
>
> 3. Divide the Product Total (B) by the Total Cover by Group (B).
>
> 4. The Prevalence Index (B/A) threshold is met if ≤ 3.0 (i.e. the vegetation is considered hydrophytic).

---

39 At 7.

40 Which involves selecting plant species from the ranked list in descending order until the cumulative coverage immediately exceeds 50 per cent of the total cover for the stratum, then adding any other species that comprise at least 20 per cent of the total cover in the stratum. All these species are then considered to be "dominant species", see Clarkson report, above n 33, at 7.

41 Clarkson report, above n 33, at 7. In Mr Spearpoint's Dominance Tests, he refers to: "OBL, FACW and/or FAC". We consider this to be what was intended.

42 Clarkson report, above n 33, at 7–8, citing TP Wentworth and others "Designation of wetlands by weighted averages of vegetation data: preliminary evaluation" (1998) 24(2) Water Resources Bulletin 389.

43 Clarkson report, above n 33, at 8.

[34] The paper concludes by identifying the hydrophytic vegetation parameter as "on its own [being] a useful tool for delineating wetlands" but that caution should be exercised where "vegetation cover is sparse", "plant communities have been disturbed" or there are "strong elements of FAC species".[44]

[35] Importantly, the paper concluded with the following expanded recommendations:[45]

> **7 Recommendations**
>
> To provide an ecologically based, standardised wetland delineation system for the full range of New Zealand wetlands the wetland delineation approach should be expanded to incorporate all three environmental criteria – vegetation, soils, and hydrology – as is used for regulatory purposes in the USA. This will ensure a more robust approach to wetland delineation particularly in cases where assessments based solely on vegetation are inconclusive or misleading.
>
> National guidance on applying the soils and hydrology criteria would require concordance of the New Zealand soils classification … with the USA soils classification used in the Corps of Engineers approach …

[36] The importance of these recommendations can, in our view, only fully be understood in the context of the US Army Corps of Engineers Wetlands Delineation Manual (Corps Manual) on which the Clarkson Method is based.[46] Significantly, what the Corps Manual describes as the "technical guideline for wetlands" requires positive wetland indicators be present for each parameter (vegetation, soils and hydrology) except in the limited circumstances identified in the Corps Manual.[47]

[37] To that end, the Corps Manual provides:

> 9. Part II focuses on the technical guideline for wetlands, and stresses the need for considering all three parameters (vegetation, soils, and hydrology) when making wetland determinations. …
>
> 10. Part III contains general information on hydrophytic vegetation, hydric soils, and wetland hydrology. Positive wetland indicators of each parameter are included.

---

44 At 9.

45 At 9.

46 Corps Manual, cls 9–10.

47 Clause 7(b), contrasting its approach with the classification system developed by the US Fish and Wildlife Service which required that a "positive indicator of wetlands be present for any one of three parameters". See Cowardin and others *Classification of Wetlands and Deepwater Habitats of the United States* (Washington DC, 1979).

[38] Clause 19, in turn, highlights an issue significant in terms of the appeal:[48]

> 19. Explicit in the definition [of wetlands] is the consideration of three environmental parameters: hydrology, soil, and vegetation. Positive wetland indicators of all three parameters are normally present in wetlands. Although vegetation is often the most readily observed parameter, sole reliance on vegetation or either of the other parameters as the determinant of wetlands can sometimes be misleading. Many plant species can grow successfully in both wetlands and nonwetlands, and hydrophytic vegetation and hydric soils may persist for decades following alteration of hydrology that will render an area a nonwetland. *The presence of hydric soils and wetland hydrology indicators in addition to vegetation indicators will provide a logical, easily defensible, and technical basis for the presence of wetlands. The combined use of indicators for all three parameters will enhance the technical accuracy, consistency, and credibility of wetland determinations. Therefore, all three parameters were used in developing the technical guideline for wetlands and all approaches for applying the technical guideline embody the multiparameter concept*.

[39] For what it described as "normal circumstances" (being those where the wetland has not been "inadvertently or purposefully removed or altered as a result of recent natural events or human activities"),[49] the US Army Corps methodology is then to divide cases into those where a "Routine" approach is appropriate and those where a "Comprehensive" approach is necessary.[50] It describes the "Routine" approach as that which "normally will be used in the vast majority of determinations" but, significantly, identifies the "Comprehensive" approach as appropriate where the wetland is "very complex and/or is the *subject of likely or pending litigation*".[51]

[40] Where the "Routine" approach is regarded as sufficient, the manual presumptively requires an assessment of whether each of hydrophytic vegetation, wetland hydrology *and* hydric soils are present.[52]

[41] However, detailed examination of hydrology is not considered necessary if:[53]

(a) the entire project area is occupied by plant communities in which all dominant species are OBL; or

---

48 Emphasis added.
49 Corps Manual, cl 12(a).
50 Clause 20–22.
51 Clause 21–22 (emphasis added).
52 Assuming the availability of appropriate data for the entire project area. See cl 62 and Figure 13.
53 Clause 62, STEP 3, (a) and (b).

(b) the project area contains two or more plant communities, all of which are dominated by OBL and/or FACW species and the wetland/non-wetland boundary is abrupt.[54]

[42] If (a) or (b) are met, "it is only necessary to confirm that there has been no recent hydrologic alteration of the area".[55]

[43] Likewise, determination of whether hydric soils are present is not considered necessary if either (a) or (b) above apply *and* there is no evidence of recent hydrological alteration *or* if "wetland hydrology presently occurs on the area". If those requirements are met, "hydric soils can be assumed to be present".[56]

[44] For a Comprehensive Determination, as recommended in the case of likely or pending litigation, a multi-step process is set out requiring characterisation of each of plants, soil and hydrology with a requirement to confirm that "the soil series is a hydric soil" and whether "wetland hydrology" is present.[57]

Suitability of plant-based methodology for criminal prosecutions under the pNRP/RMA

[45] At this point it is convenient for us to identify what we regard as several limitations inherent in the Clarkson Method when it comes to proving the existence of a "natural wetland" to the criminal standard. We essentially summarise some of the key points from the previous section.

[46] Each of the Clarkson Method and the Corps Manual methodology from which it is derived are vegetation-based tools, whereas proof of a natural wetland under the pNRP requires proof of a natural ecosystem of adapted plants *and* animals.

---

54 At n 1, additionally:
> There must be documented evidence of periodic inundation or saturated soils when the project area: (a) has plant communities dominated by one or more FAC species; (b) has vegetation dominated by FACW species but no adjacent community dominated by OBL species; (c) has a gradual, nondistinct boundary between wetlands and nonwetlands; and/or (d) is known to have or is suspected of having significantly altered hydrology.

55 Clause 62, STEP 3.

56 Clause 62, STEP 4.

57 Clause 70, STEP 11 and STEP 12.

[47] The Corps Manual methodology emphasises that, in a litigation context, a comprehensive assessment is necessary involving analysis of both hydrology and soils, in addition to vegetation. Even in respect of what it describes as Routine Determinations, it identifies the importance of pedological and hydrological evaluation, other than in the clearest cases. So too, Ms Clarkson recommends that to create a standardised wetland delineation system, her approach should be expanded to include all three environmental criteria — vegetation, soils and hydrology.[58] She suggests this will ensure "a more robust approach".[59] The implications in terms of any criminal charge requiring proof of a wetland beyond reasonable doubt are obvious.

[48] Even on its face, the Clarkson Method suggests a potential mismatch between the criminal standard, and what Ms Clarkson and other ecologists may regard as a wetland. For example, if, as indicated by Ms Clarkson, FACW plants have a 67–99 per cent occurrence rate in wetlands and FAC plants a 37–66 per cent occurrence rate, then the Dominance Test can be considered satisfied even though, taken together, the identified FAC and FACW plants have a one to 66 per cent estimated probability of occurring in areas other than wetlands.[60] Although application of the associated Prevalence Test may ameliorate this level of uncertainty, there remain, in our view, significant questions about whether the high standard of criminal proof is ever likely to be satisfied by a vegetative tool alone, at least in the absence of the criteria referenced in [41] above. Even then, a prudent prosecution would, in our view, reference hydrology and soils also.[61] And, of course, at least in the pNRP context, there would also need to be proof of a natural ecosystem of animals adapted to wet conditions.

The appellants' case

[49] In our previous discussion about the Clarkson Method and Corps Manual methodology, we anticipate many of the high-level points which the appellants take on this appeal.

---

58 Clarkson report, above n 33, at 9.

59 At 9.

60 At 7. As indicated, the Dominance Test threshold is considered met if "more than 50% of the dominants from all strata are OBL, FACW, *or* FAC (i.e. the plan community is considered hydrophytic". (Emphasis added.)

61 As the Corps Manual methodology requires, see Corps Manual.

[50] They submit that the Clarkson Method is "demonstrably unfit for purpose" when it comes to proving the existence of a natural wetland to the criminal standard. They say so for the reasons already broadly identified, namely that a focus on vegetation alone neither addresses the type of ecosystem which must be established (that is, of plants and animals) nor the recognised limitations of any analysis which does not also take into account soils and hydrology. They particularly emphasise the level of doubt inherent in the Clarkson plant classification system.[62]

[51] In addition to this generic attack, applicable to all the wetlands in issue, the appellants bring additional challenges in respect of each of the individual Areas 1, 2, 3A, 3B and 3C.

[52] In respect of Area 1,[63] they say that on the basis of its own expressed limitations, the Clarkson Method was inappropriate because at the point Mr Spearpoint investigated the site, it was already highly modified as a result of the works undertaken by Mr Page. As such, they say (relying on the evidence of Dr Keesing) that the site was "atypical", and the Council should have defaulted to an analysis including hydric soils and hydrology. They point out that the Council's expert, Ms Dixon, agrees that best practice was not complied with.

[53] Additionally, the appellants say that the damp gully head exclusion in the pNRP applies,[64] noting that it is now accepted by the Council that the area concerned

---

62 The tests undertaken by Mr Spearpoint in relation to Area 1 are an example of the point made, see O Spearpoint *Natural Wetlands Investigation 127 Anlaby Road Parapararumu* (Greater Wellington Regional Council, October 2020) [Spearpoint report]. Two plots were identified (Plots 9 and 16). In both cases, he said the percentage of dominant species that are OBL, FACW or FAC was 100 per cent. With Plot 9, however, only 30 per cent dominance was identified by an OBL species (*isolepis prolifera*). A further 50 per cent comprised FAC species, *ranunculus repens* (creeping buttercup), *holcus lanatus* (Yorkshire fog) and *lotus pedunculatus* (lotus). So, the 50 per cent Dominance Test threshold was only satisfied by reference to plants with an up to 66 per cent occurrence rate in non-wetlands. No Prevalence Index was assessed despite the Clarkson method stating that "[b]oth the Dominance Test and Prevalence Index are recommended to be carried out for wetland delineation in New Zealand", see Clarkson report, above n 33, at 7. Ms Dixon has subsequently calculated the Prevalence Index as 2.2 for Plot 9 and 1.4 for Plot 16.

63 Stated by Mr Spearpoint to be "a shallow basin that drains into [Area] 2" and originally occupying approximately 780 square metres. At the time of his initial visit only an area of approximately 140 square metres towards the head of the basin could be determined as wetland "based on the vegetation present". See Spearpoint report, above n 62, at [5.2]-[5.3].

64 See definition of "natural wetland", subpara (a), at pNRP 2019, above n 23, at 29.

is a gully head, albeit that the Council argues it was "wet" rather than "damp", and that the exclusion does not therefore apply.

[54] In respect of Area 2,[65] where, as with Area 1, only two plots were analysed and Mr Spearpoint applied the Dominance Test but not the Prevalence Index,[66] the appellants rely on the evidence of Dr Keesing to say that there is doubt as to whether "the data was sufficient to reliably determine that [A]rea two as a whole was a natural wetland".

[55] In addition, the appellants invoke the exclusion for wetland habitats in or around a body of water "specifically designed, installed, and maintained for … stock watering".[67] They rely on the evidence of Dr Keesing (including aerial photographs taken in 1973, 2007 and 2018) that "it is most probable that the pond … is a product of damming (for farming) and digging as well as the influence of the roading in the 1970's …".

[56] They submit that all that is necessary for the body of water to be "maintained" for stock-watering purposes is for the area concerned to retain the ability to hold water. Contrary to the position of the Council, they say that the fact the pond may not have been used for such purposes (either by direct access or as a source of water for troughs) during the period that the land was not actively farmed and that hydrophytic plants, palatable to stock, may have re-established themselves in the area during that period, is irrelevant to application of the exclusion.

---

65 Stated by Mr Spearpoint to be a 572 square metre area "situated in a gully from the outlet of the shallow basin that drains from [Area] 1 down the gully to the end of Angus Way." He identified this area as historically part of [Area] 1 and made up of two parts, the first being a seepage wetland "at the head of the pond and up the gully above" and the second part being a swamp with a "plant assemblage of aquatic and taller wetland vegetation surrounding the open water pond." See Spearpoint report, above n 62, at [5.4].

66 In her evidence Ms Dixon says that she calculates that the two plots in Area 1 and the two plots in Area 2 satisfied the Prevalence Index.

67 See definition of "natural wetland", subpara (b)(i)(e), at pNRP 2019, above n 23, at 29.

[57] In respect of Area 3A,[68] the appellants rely on the fact that out of Mr Spearpoint's three plots, one (Plot 7) failed the Dominance Test and on the Prevalence Index produced an ambiguous result (2.4).[69]

[58] Relying on Dr Keesing's evidence, they say that the area was "atypical", necessitating (even on the Clarkson Method) default to an analysis of hydric soils and hydrology.

[59] They accept that Dr Keesing acknowledged one of the three plots (Plot 11) to be "more strongly wetland" but say that the entire area falls within the damp gully head exclusion. They note that in this Court, the Council has conceded the area is a gully head and again reject the proposition that, because the area may have been periodically wet, it is not appropriately categorised as damp for pNRP purposes.

[60] In respect of Area 3B,[70] they again rely on the damp gully head exclusion. Again, it is acknowledged by the Council that the area is a gully head and again the essential argument is whether, on a proper construction of the pNRP provision, areas that are wet or boggy properly qualified in terms of the exclusion.

[61] The appellants note that initially (February 2020) only one plot selection occurred (Plot 6) and rely on Dr Keesing's evidence that, although in May 2020 two additional plots were added (Plot 13 and Plot 14), insufficient data was collected for representative sampling purposes.[71] They say that, insofar as both Mr Spearpoint and Ms Dixon purport to supplement their vegetation-based observations with information

---

68 Stated by Mr Spearpoint to be a 339 square metre area "situated at the head of a small valley also containing [Areas] 3B and C" and being a "much steeper narrower gully head than found at [Area] 1". Mr Spearpoint also noted the presence of an interceding bund. See Spearpoint report, above n 62, at [5.6].

69 Spearpoint report, above n 62, at [5.6]. Ms Dixon says there was an error in Mr Spearpoint's Plot 7 Dominance Test calculation and that the test was, in fact, satisfied.

70 Stated by Mr Spearpoint to be an area of 1,534 square metres "situated down the gully from [Area] 3A and above [Area] 3C" with much of the wetland in the gully floor and with two steeper, narrower gullies to the west. See Spearpoint report, above n 62, at [5.8].

71 See Spearpoint report, above n 62, at [5.8] where Mr Spearpoint describes the plots established on each of the February and May 2020 visits.

about hydrology,[72] neither are hydrologists and qualified to give hydrological evidence to the standard required in a criminal prosecution.

[62] We note that in respect of this area, again only a Dominance Test was undertaken by Mr Spearpoint with no application of the Prevalence Index.[73]

[63] In respect of Area 3C,[74] the appellants acknowledge that neither the body of water for stock-watering purposes nor damp gully head exclusions apply. However, they rely on the evidence of Dr McConchie that the alleged wetland area is adjacent to a perennial stream channel, the depth of which means that "during periods of low flow, the saturated zone would be drawn down by at least 300mm below ground level" (and significantly lower at the distal end of the area) with the result that it is "unlikely that the hydrology in this area would support a sustainable and resilient wetland". The appellants say that neither Mr Spearpoint nor the Council's Environmental Protection Officer, Mr James Luty, were qualified to dispute this hydrological assessment which also went substantially unchallenged in the evidence which the Council called in this Court from Mr Hughes.

[64] Again, only a Dominance Test was undertaken by Mr Spearpoint in respect of this area with no application of the Prevalence Index.[75]

---

72 Ms Dixon records Mr Spearpoint's oral evidence that "it was a very wet seepage so there was a good flow of water again coming out of it", it was "the largest and wettest" of seeps on the property, and "…it was the deepest that my gumboots were seeping into… up to calf deep…in the mud". He described this observation as having occurred after a period of "very dry conditions". Dr McConchie was highly critical of this description. He said "you've had a person trying to do some hydrology who actually doesn't understand basic hydrology". He pointed to the fact that the Waikanae area has a very steep rainfall gradient and the fact that Mr Spearpoint's rainfall data was taken from the coast. We find this criticism persuasive.

73 See Spearpoint report, above n 62, at [5.8]. Under cross-examination, however, Ms Dixon stated that the Plot 13 results would also satisfy the Prevalence Index. She gave no evidence about whether the index was satisfied in respect of the other two plots in Area 3B (6 and 14).

74 Stated by Mr Spearpoint to be a 388 square metre area "situated in the bottom of, and down the gully from [Area] 3B" in an area of the valley floor "which becomes narrower with steeper sides as the gully descends". See Spearpoint report, above n 62, at [5.10].

75 Spearpoint report, above n 62, at [5.10].

Discussion

Proof of an ecosystem of animals adapted to wet conditions

[65] We identify this as a discrete issue appropriately addressed before consideration of individual Areas 1, 2, 3A, 3B and 3C. We do so because:

(a) If satisfied that this element has not been proven to the criminal standard in respect of any one or more of these areas, we regard a finding of miscarriage of justice as inevitable.

(b) The issue is potentially decisive in respect of the majority of the charges we are concerned with, being:

(i) The 15 charges requiring proof of a "natural wetland" (charges 5–7, 14–15, 17, 19–20 and 24–30).

(ii) The seven charges requiring proof of a "significant natural wetland" (charges 2, 10–11, 18 and 21– 23).

(iii) The three charges requiring proof of a "surface water body" by reference to "wetland" (charges 8, 31 and 33).[76]

(c) To the extent we find a miscarriage of justice in this respect, we consider that the appellants' alternative challenges can be dealt with more economically than would otherwise be necessary.

[66] It is common ground that no analysis of animal species (whether vertebrate or invertebrate) was undertaken by Mr Spearpoint at any of the plots which he established. Nor did he have the requisite professional qualifications to do so. We accept the appellants' submission that, although he may have, in his words, delineated "over 70 wetlands in the Wellington region using the Clarkson [M]ethod",

[76] We do not include in this list charges 4, 16, 32 and 34 relating to Area 4 for which we intend to allow the appeal based on the Council's concessions.

he is not formally qualified as an ecologist (or hydrologist or pedologist). His only relevant academic qualification is a trades certificate in horticulture.

[67] Consistent with his adherence to the Clarkson Method and its focus on vegetation, his evidence about fauna was limited to general observations about:

(a) the *effects* of the work undertaken by Mr Page;[77] and

(b) the typical characteristics of seepage wetlands, namely that they "contain[ed] a disproportionate number of rare and threatened flora and fauna",[78] and provided a habitat for "distinct invertebrate assemblages" and "unique assemblages of micro fauna and flora both on the surface and subsurface".[79]

[68] However, we note the expert evidence in this Court from the Council's witness, Ms Dixon, who "disagree[d]" with Mr Spearpoint's assessment regarding seepage wetland presence and who considered "all wetlands on the property to be palustrine (freshwater) swamps fed by both overland flow and groundwater discharge (seepage)". And although Mr Spearpoint elsewhere described "fen wetlands … again perform[ing] the same ecosystem functions as a seepage wetland":[80]

(a) this was a reference to functions and not fauna populations; and

(b) there was no evidence that any of the "wetlands" on the property were properly described as "fens".[81]

[69] However, although Mr Spearpoint's evidence about fauna was only of a generalised nature, we accept that given the admission of additional evidence before

---

77 See for example, his observation in respect of Area 2 that the works would cause "[Area] 2 to dry out significantly…affecting the wetland fauna" and in respect of Area 3B that "the loss of bare soils and silt will cause siltation of the [Area]…affecting [characteristic] flora and fauna". See Spearpoint report, above n 62, at [5.3] and [5.9], respectively.

78 Spearpoint report, above n 62, at [6].

79 At Appendix 2.

80 At [6].

81 Fens being peat-forming wetlands relying on groundwater input and requiring up to thousands of years to develop.

this Court, any assessment of miscarriage must take into account such additional evidence as well, even if, to some extent, this has resulted in an opportunity for the Council to "backfill" its prosecution.

[70] The relevant evidence in this respect is that of Ms Dixon for the Council and Dr Keesing for the appellants.

[71] In respect of Ms Dixon, we set out what we regard as the key passages from her cross-examination and re-examination, with comments interposed via footnote as appropriate:

> Q. There's no scientific basis to assert that just because *isolepis prolifera*[82] is there, there will also be animals adapted wet conditions, is there?
>
> A. With *isolepis prolifera*, I wouldn't necessarily say there are animals adapted to wet conditions. It's hard to say.
>
> Q. It's hard to say because, as you mentioned earlier, establishing that there are animals adapted to wet conditions, is harder, isn't it?
>
> A. That's right, and the bulk of our animals are going to be invertebrates and there's not a lot of research that's been done in that particular area. A wetland of this nature in terms of animals, I think we are looking at the fish fauna being the most likely.
>
> Q. And if you are looking at a fish fauna and you want to assess that they are there, ecologists do surveys, don't they?
>
> A. Well, that's right. But if you've gone out to do a wetland determination and you do a survey for fish, and maybe actually relying on that habitat, you may not find it there at that time.
>
> Q. So, you might have to do a number of surveys over a period of time to establish what species are present in any given stream or waterway or wet area?
>
> A. That's right. Yes.
>
> Q. And there is a whole database – the New Zealand freshwater fish database – that does that, isn't there?
>
> A. Yes, yeah.
>
> Q. So, that's something ecologists do?

---

[82] We observe this is an OBL plant with between 20 and 50 per cent dominance in all Mr Spearpoint's plots.

A. Yes, but not as part of a wetland, not part of a wetland determination.

Q. Because the Clarkson method doesn't tell them to?

A. No, the Clarkson method doesn't tell us to, but even prior to that, prior to the adoption of the Clarkson method, determinations on whether an area was a wetland or not are primarily based on the plants.

…

Q. Now, if you were approached in your expertise as an [ecologist] and the brief was, ignore the Clarkson method. I'd like you to prove the existence of a natural ecosystem of plants and animals and give me a report for Court, you wouldn't look at vegetation alone, would you?

A. No, I wouldn't. But, my observations of hydrology would be as complicated as how wet my gumboots got. If that helps?[83]

Q. What I am getting at is more, not the grounds of hydrology, because I think you and I are in agreement there, … Where I am getting to there, is if you are asked to prove a natural ecosystem that supports plants and animals adapted to wet conditions, you wouldn't look at vegetation alone, would you?

A. I would quite likely look at vegetation alone. It depends on the type of wetland and some I would need to look at soils as well. I'd go back and say a ropo swamp. I wouldn't necessarily try and work out what the soils were.

Q. Were there some that would be crystal clear and some that wouldn't?

A. That's right, yeah.

[72] We observe at this point an apparent contradiction between the comments "no I wouldn't [look at the vegetation alone]" and "I would quite likely look at vegetation alone". This is possibly explained by Ms Dixon reverting on the second occasion to a discussion of what a scientist may regard as a wetland as opposed to whether the key components of the pNRP and/or RMA definitions of wetland are satisfied.

[73] The issue was subsequently addressed in the following exchange with the Court:

COLLINS J: Right, thank you. Just before you move on, Ms Dixon, the question that was last asked of you was that if you were asked

---

83 Dr McConchie was highly critical of any hydrological observations based on how muddy or wet Mr Spearpoint or Ms Dixon's gumboots might have become because soil "impermeability" may mean that, although the surface of an area was wet, this is not a result of groundwater. He said the hydrology in the subject area was in fact "quite complex" requiring "hydrological rigor". Again, we find this persuasive.

to do a report on a natural ecosystem concerning plants and animals that are adapted to wet conditions so that if you are asked to do a report of a natural ecosystem involving plants and animals that are adapted to wet conditions, your answer was that you wouldn't look beyond plants or hydrology.

A. If the purpose was to determine whether an area was a wetland, I wouldn't necessarily do any fauna surveys as part of that. Certainly, I would make observations as to any fauna I did encounter and I would make some broad conclusions in terms of the habitat value of the particular area. If the plants are there, we can assume there will be fauna there that has adapted to living in the wetland area. It's just, I can't reliably find in any – if I was to go out to a wetland area, birds may not be there. Might have flown away. In fact, they usually do fly away when I start stomping around in an area. So, we do rely on the plants for identifying these areas.

[74] Significantly, we note that her discussion about the difficulty in identifying fauna appears, in this extract, to relate to vertebrates.[84] That appears consistent with her earlier evidence that little research has been done in the area of invertebrates with the result that "we are looking at the fish fauna being the most likely".

[75] The same limitations were emphasised in a subsequent exchange with the Court:[85]

BREWER J: So, what if in that land depression,[86] it was dominated by pasture and other exotic species, there were some wetland-type plants, but there were also invertebrates adapted to wet conditions living there. …

…

A. *We don't know enough about the invertebrate fauna to go in there and sample and say that one is particular to wetland conditions. We'd expect to find –*

BREWER J: And I'd assume that they are there. Does that turn it into a wetland?

A. Not using the current protocols that we've got because we rely on the plants and the hydrology and the soils to do the determination. We don't have any guidance as to how to use the fauna to make a determination.

---

84 Although later in re-examination, she referenced invertebrates.

85 Emphasis added.

86 A reference to Area 1.

[76] The cross-examination then included the following:

> Q. Now, as a general proposition, we don't have any data relating to animals participating in these ecosystems, do we?
>
> A. Sorry, are we talking in general?
>
> Q. We are talking in relation to this case?
>
> A. In relation to these, no we don't have any fauna observations.
>
> …
>
> Q. As far as you're aware, there was no assessment of bio-diversity values in the site, was there?
>
> A. I agree.[87]

[77] Finally, under re-examination, the following question and answer is recorded:

> Q. The other point I want to ask you about, you were asked and gave an answer relating to the presence of fauna. You said, "If the vegetation has adapted to wet conditions, the fauna will be there". What fauna were you referring to?
>
> A. The fauna I was referring to was primarily invertebrates. However, in a wetland of this kind with near permanent wetness – bearing in mind it was wet in February after a dry summer – there does have the potential to support fish and probably the most [adapted] to wetland conditions and most likely to be there would be the short-finned eel.

[78] In respect of Dr Keesing, the relevant evidence was elicited first under cross-examination:

> Q. Would you also agree with Ms Dixon that you would expect in terms of this type of vegetation for these wetlands that there would be short-finned eels present?
>
> A. Are we talking about the site, the property?
>
> Q. Yes.
>
> A. I think it's probably unlikely that there are short-finned eel in many of those areas because of the passage issues that exist.
>
> Q. But would you agree with her that there will be invertebrates?
>
> A. Wetland?

---

[87] Earlier she acknowledged it was "hard" to make an ecological value assessment "without the fauna data".

Q. Yes.

A. I think in [Area] 2 in the pond area and in [Area] 4 in the pond area there will be aquatic related invertebrates. I think it's probably less likely in [Areas] 1 and 3 that there are wetland associated invertebrates. I have some experience in this because I am also a freshwater ecologist who samples invertebrates.

[79] Then, under re-examination, there was a further relevant exchange:

Q. Dr Keesing, you were asked about invertebrates and suggested that… I heard your answer to be, and forgive me if I am paraphrasing, but I understood your answer to be that there were probably wetland invertebrates in [Areas] 2 and 4?

A. Correct.

Q. Now when you say 'probably', can you expand on your degree of certainty that there were wetland invertebrates?

A. I am virtually certain given the water presence and the plant species presence that there will be aquatic invertebrates in both the pondings of [Area] 2 and the pondings of [Area] 4, not necessarily the drier vegetation above the open water.

[80] When we consider the expert evidence in totality, we come to the following conclusions:

(a) It is undisputed that no fauna observations were made at the time of Council's initial investigations, nor have they been made subsequently.

(b) We find elements of Ms Dixon's evidence confusing as, for example:

(i) The observation that the bulk of the animals are going to be invertebrates but that for these particular wetlands "we are looking at the fish fauna being the most likely".

(ii) The apparently contradictory statements about whether she would look at vegetation alone if asked to give a report for Court purposes about the existence of a natural ecosystem of plants and animals.

(iii) Her "assumption" that if the plants are there so too will there be "fauna … that has adapted to living in the wetland area" when she earlier said that, in areas where the OBL plant *isolepis prolifera* was present (identified by Mr Spearpoint as up to 50 per cent dominant), "I wouldn't necessarily say there are animals adapted to wet conditions. It's hard to say".

(c) Ms Dixon confirms that there has been little research to date about whether the invertebrates which might be potentially found in wetland areas are "particular to wetland conditions"[88] and are therefore part of an ecosystem of animals "adapted to wet conditions" for the purposes of the RMA and pNRP.

(d) In respect of the likelihood of fish fauna and, in particular, short-finned eels, we prefer the evidence of Dr Keesing, having regard to passage issues.

(e) We accept Dr Keesing's expertise in relation to freshwater invertebrate sampling and must, in a criminal context, give significant weight to his conclusion that although there "will be" invertebrates adapted to wet conditions in the pond area of Area 2, they are "probably less likely in [Areas] 1 and 3".

[81] Therefore, even allowing for all the additional evidence which we have heard, we do not consider that the Council has established beyond reasonable doubt the existence of fauna adapted to wet conditions in any of the alleged wetlands other than that in the open water pond in Area 2 (and, we would accept, any permanently inundated marsh land immediately adjacent to it). As such, the Council has not established beyond reasonable doubt that the relevant areas are "natural wetlands" nor a fortiori, "significant natural wetlands".

[82] It follows that we consider there to have been a miscarriage of justice in respect of the appellants' convictions for those charges (excluding those relating to Area 2)

---

88 Ms Dixon's terminology.

where the existence of fauna adapted to wet conditions was necessarily proven, being charges 6–7, 15, 17, 19–20 and 24–30 (relating to alleged natural wetlands, Areas 1, 3A, 3B and 3C), 2, 10–11, 18 and 21–23 (relating to alleged significant natural wetlands Areas 1, 3A and 3B) and 8 (insofar as it relates to Area 1).[89] This means that we need not consider the balance of the appellants' challenges except insofar as we are asked to identify a miscarriage of justice in respect of the charges relating to Area 2.[90] That said, we will however make some brief observations about the principal alternative arguments which were advanced.

Area 1

[83] We consider there to be a number of other difficulties with the prosecutions involving Area 1,[91] which individually and/or collectively reinforce us in our conclusion that a miscarriage has occurred.

[84] Even putting to one side the fact that the Clarkson Method invoked by Mr Spearpoint does not, in its terms, capture the Corps Manual direction that each of plants, soils and hydrology be assessed in the case of "likely or pending litigation", it is clear (and accepted by Ms Dixon) that the Clarkson Method was not applied as it should have been. That is because the area was "atypical" for Clarkson-Method purposes,[92] with the result that the assessment needed "[o]ther environmental criteria (i.e. soils, hydrology)".[93] Ms Dixon confirms that a "comprehensive or atypical delineation … should have been undertaken, which includes an analysis of vegetation, soils and hydrology", including "at least one soil core for a quantitative description of water levels". Although Ms Dixon did go on to say that there was evidence in the

---

89 Charge 8 also relates to Area 2. We accept that although charge 8 required proof only of a wetland for RMA purposes and this definition is said to be one that "includes permanently or intermittently wet areas … that support a natural ecosystem of plants and animals that are adapted to wet conditions", see Resource Management Act, s 2(1), we should approach the prosecution on the basis that proof of animals was required. We note that Ms Dixon considered the word "including" was better read as "meaning" in this context and that counsel do not contend that we should adopt any different test for charge 8. We also note that, as charge 8 was laid in respect of *both* Areas 1 and 2, we consider that if a miscarriage of justice is established in respect of *either* Area, the charge cannot stand.

90 Charges 5, 8 (insofar as it relates to Area 2), 14, 31, and 33. We note again that charges 1 and 9 relating to Area 3C are otherwise proven by reference to the definition of "river".

91 Charges 8, 11, 15 and 26 (we exclude charge 1 for the reasons previously explained, see above n 27 and n 90).

92 Having been heavily modified.

93 Clarkson report, above n 33, at 2.

Spearpoint report and accompanying photos to show the area passes the primary hydrological indicators, we note Dr Keesing's comment that he had not seen any data to support that conclusion.

[85] We consider that cumulatively these omissions left the Council well shy of having proved the charges to a criminal standard.

[86] We have doubts also as to whether the Council discharged its onus of disproving, to the same standard, the application of the "damp gully head" exception. Certainly, as Ms Dixon conceded, Mr Spearpoint "didn't look at it correctly".

[87] The appellants say that in trying to draw a distinction between areas that are wet and those that are simply damp, the Council fails at the first hurdle as a matter of statutory interpretation. This is because damp gully heads cannot be *excluded* from the definition of natural wetlands (as subpara (a) of the pNRP definition purports to do) if they do not meet the definition of natural wetlands in the first place. To do so, they must be "permanently or intermittently wet areas". Therefore, the proposed damp/wet distinction is untenable because all damp gully heads will necessarily be permanently or intermittently wet.

[88] However, as Mr Fowler KC submits, what it is said "natural wetlands do not include" may simply operate by way of clarification, in turn narrowing the definition of natural wetlands.[94]

[89] Nevertheless, the natural-wetland exclusion remains a particularly problematic provision in our view for the reasons that:

(a) where the demarcation lies between "damp"[95] and wet will often be difficult to define; and

---

[94] Accepting that it is nevertheless something which, within the scheme of the definition, has to be disproved.

[95] Defined by the Oxford English Dictionary as "slightly wet", see *Oxford English Dictionary* (online ed).

(b) damp areas, just like any other area (including those ordinarily described as dry), may be periodically wet or even completely inundated.

[90] The problem is exemplified in the following passage from Ms Dixon's evidence-in-chief:

> In terms of "damp", I think it was at paragraph 61, I talked about how damp differed from wet. I still state that wetlands need to be wet for a period of a couple of weeks in order to be wetlands really – in order to have those changes to the stores in the hydrology. But outside of that timeframe, they can dry out quite a lot. So, I do concede that there can be wetlands found in damp gully heads. However, where I would differ as to what species they would support in a damp gully head as opposed to a wet gully head.

[91] In cross-examination she was brought back to the same issue:

> Q. … I just want to be clear, Ms Dixon, on your interpretation, a damp gully head wouldn't be a wetland in the first place, would it?
>
> A. A damp gully head could be a wetland that then meets the exclusion, so, it's not a natural wetland.
>
> Q. And in order for it to be a wetland, it would have to have sufficient obligate and facultative for wet plants, on your evidence?
>
> A. On the Clarkson method, yes. There are wetlands that are dominated by facultative wetland plants but then those are always delineated with reference to soils and hydrology.
>
> Q. Could you have one of those in the damp gully head?
>
> A. Yeah, absolutely.

[92] So, on Ms Dixon's evidence you could, within an area which, in totality, is properly described as a damp gully head (and is thus not a natural wetland for pNRP purposes due to the exclusion), have a wetland dominated by facultative wet plants (albeit she would also require delineation with reference to soils and hydrology).

[93] This is, in our view, an unsatisfactory basis for any criminal prosecution. We are reminded that Mr Page received a three-month prison sentence.[96] Owners of properties containing gully heads and into which water periodically flows or seeps should, in our view, and by reference to some better metric, be able to determine whether grazing and/or works are possible in such areas, certainly when facing the prospect of prison terms.

[94] We are satisfied therefore that in respect of all charges relating to Area 1, there has been a miscarriage of justice and that the appeal is appropriately allowed. The convictions for charges 8, 11, 15 and 26, must be set aside and a judgment of acquittal entered for each.[97]

Area 2

[95] We make the following preliminary points:

(a) Contrary to what the Clarkson Method required, Mr Spearpoint did not apply the Prevalence Index to either of the plots established by him.[98] We note Ms Dixon's evidence, however, that the Prevalence Index is, on her calculations, satisfied.

(b) No expert hydrological or pedological evidence was provided to the District Court in respect of either plot.

(c) In respect of Plot 8, Mr Spearpoint identified OBL *isolepis prolifera* as a dominant species,[99] but this was also the case with FAC *holcus lanatus*.[100]

---

96 Albeit for nine charges relating to abatement notices and one charge in respect of an Environment Court Enforcement Order. One of the abatement notice charges (charge 15) related to Area 1. Moreover, as described in [116] post, the District Court's sentencing took into account its guilty verdicts in relation to the operational charges, including charges 8 and 11 in respect of Area 1, and the convictions and discharges entered in respect of them. See Sentencing notes, above n 3.

97 Criminal Procedure Act 2011, ss 233(2), 233(3)(a) and 241.

98 Mr Spearpoint established Plot 8 adjacent to the open water pond on 10 February 2020 and Plot 15 further up the gully on 1 May 2020, see Spearpoint report, above n 62, at [5.4].

99 50 per cent cover, see Spearpoint report, above n 62, at Appendix 5, table 3.

100 25 per cent cover, with a total identified FAC cover of 55 per cent, see Spearpoint report, above n 62, at Appendix 5, table 3.

(d) As a result, even under the Corps Manual Routine Assessment criteria, both an examination of hydrology and soils was necessary for a wetland determination.[101] But with litigation in prospect, that was a Corps Manual requirement in any event, irrespective of what plant communities were identified.[102] And we note again that even the Clarkson Method recommends expansion "to incorporate all three environmental criteria – vegetation, soils and hydrology …".[103]

(e) Having regard to Dr Keesing's evidence, we would not consider a miscarriage of justice to have arisen simply on account of the Council's failure to establish beyond a reasonable doubt the existence of animals adapted to wet conditions in the open water pond or adjacent permanently inundated marsh land (assuming there is any). This is because we consider that the existence of animals adapted to wet conditions in and around the Area 2 pond was ultimately proven on the totality of the evidence before this Court, specifically Dr Keesing's evidence set out above at [78]. But we reiterate our concerns about the inadequacy of the overall assessment having regard to the Clarkson Method and (importantly) its US progenitor.

(f) In respect of Plot 15, the same issues arise in respect of the presence of adapted animals as are present in respect of Areas 1 and 3. We do not, on the totality of the evidence, consider this ingredient established beyond a reasonable doubt, and therefore consider a miscarriage to have resulted in respect of any convictions relating to activities in this area.

(g) Our conclusion in that respect is fortified by the absence of further testing (particularly soils testing) in that area.

[96] That leaves us in a position where we:

---

101 See the discussion at [41]–[42] ante. See also Corps Manual.
102 A Comprehensive Assessment being recommended in that context, see Corps Manual, cl 22.
103 Clarkson report, above n 33, at 9.

(a) consider a miscarriage to have arisen in respect of any charge relating to the upper gully area in the vicinity of Plot 15;[104] and

(b) start with significant reservations about whether the standard of proof has been discharged in respect of the lower area in the vicinity of Plot 8.

[97] We go on, however, to consider the appellants' principal argument in relation to the lower area, namely that the Council failed to prove that it was not an area of wetland habitat specifically designed, installed and maintained as a water-storage pond for stock watering or as a treatment pond for stormwater or sediment control.

[98] In the District Court, Mr Spearpoint's evidence was that the origin of the pond could not be determined, albeit he was unable to rule out the possibility it had been "purposefully built".[105] Assuming it to have been purposefully built, he in turn appears to have assumed that the purpose was stock watering. He then purported to exclude application of the stock-watering exception by saying that because, when he visited the site in February 2020, the margins of the pond contained palatable species, this "suggest[ed]" that the pond had not been maintained for stock watering purposes "for some time".[106] He therefore appears to have proceeded on the assumption that the pond was not being maintained for stock-watering purposes unless stock had direct access to it for hydration.

[99] In this Court, Dr Keesing considered it "probable" that the pond was a product of "drainage for farming" as well as "influence of the roading in the 1970's". He referenced aerial photography indicating its creation sometime after 1973 and before 2007.

[100] Hydrologist, Dr McConchie, was even more specific. He said it is "most likely" that the pond was originally used for stock watering. He referenced the fact that it was "throttled" (that is, controlled) by a weir and an outflow pipe, meaning

---

104 Although it is not entirely clear from the record, this appears to be suggesting a miscarriage in respect of charge 8.

105 Spearpoint report, above n 62, at [5.4].

106 At [5.4]. Dr Keesing was critical of this approach because had grazing been the maintenance method then, "it is probable that the feature that he measured and determined as wetland would not have been present (it would have been grazed pasture)".

that the "water level within the pond is therefore definitely 'controlled' to provide storage". As such, he considered there to be "no doubt" the pond met the stock watering exemption.[107] He also considered that the pond was "likely to provide some stormwater and sediment control".[108]

[101] We consider that, at a minimum, it is a reasonable possibility the pond was constructed for stock watering purposes and/or stormwater/sediment control. The question is whether it has been "maintained" as such. We do not, in that context, consider the presence of edible vegetation in the vicinity of the pond decisive as a pond can provide storage for stock watering without direct stock access. And to maintain it in that condition requires only that it does not leak. Likewise, to the extent the pond and its immediate surroundings were designed to attenuate stormwater flows or control sediment discharge, all that was necessary is that the bund remain in place, which has been the case for what is likely to be upwards of 30 years.

[102] We accept the evidence suggests that property was not actively farmed for a period of over a decade, but when we come to interpret the water storage for stock watering exception in its context, we are not persuaded that the Council has excluded it simply because stock have not *used* the pond (or water from it) for drinking purposes in that period. If the pond was maintained in the sense that it continued to hold water on a property which could lawfully be used for farming purposes and to which stock could therefore be introduced at any time, we would not consider Council to have proven beyond a reasonable doubt that the pond was not being "maintained" for stock watering. Moreover, because we consider the pond's original purpose to have likely been multi-faceted, its ongoing sediment and stormwater functions are also appropriately recognised.

[103] We are satisfied that in respect of all charges relating to Area 2, there has been a miscarriage of justice and that the appeal is appropriately allowed. The convictions for charges 5, 8, 14, 31 and 33 must be set aside and a judgment of acquittal entered for each.

---

107 See definition of "natural wetland", subpara (b)(i)(e), at pNRP 2019, above n 23, at 29.
108 See definition of "natural wetland", subparas (b)(ii)(b) and (d), at pNRP 2019, above n 23, at 29.

Areas 3A, 3B and 3C

[104] Our previous conclusions inform the outcomes of the prosecutions in respect of each of these areas.[109] All suffer from an absence of proof beyond reasonable doubt that they support a natural ecosystem of animals that are adapted to wet conditions and are therefore "natural wetlands" for the purpose of the pNRP. In respect of Areas 3A and 3B, neither are we satisfied that the damp gully head exclusion has been disproved. Our response to the other issues raised in the appeal is therefore economical.

Area 3A

[105] This area was conceded by Mr Spearpoint to be "atypical" in terms of the Clarkson Method, but no expert hydrological or pedological survey was conducted as indicated in "atypical" situations. Although Mr Spearpoint does comment on what he says were iron deposits and gleyed soils, he did not undertake any hydric soil testing as prescribed in the Corps Manual methodology.[110] Nor could he be considered an expert hydrologist.

[106] We note also that his initial plot was established on a bund which demonstrates hydrological modification in the past. This failed the Dominance Test and produced an ambivalent Prevalence Index result (2.4).[111] Mr Spearpoint himself conceded this did not satisfy the hydrophytic vegetation parameters for delineating wetlands but, without initially identifying any other plots, concluded that the area above the bund was wetland.[112] When he later returned and established two further plots (Plots 11 and 12) the results in one (Plot 12) were ambiguous — a Prevalence Index of 2.3 close to what he regarded as uncertain for Plot 7 and a Dominance Test result showing only OBL or FACW cover of 32 per cent only with near equal pasture and wetland species

---

109 Excluding in regard to charges 1 and 9 in respect of Area 3C above, as indicated the change can be proven on the basis that the affected steam is a "river" — a proposition which the appellants do not resist.

110 The Clarkson Method mandates application of the Corps Manual Comprehensive Method (including hydrological analysis and hydric soil testing) in respect of atypical situations, including where wetlands have been filled, drained or cleared, see Clarkson report, above n 33, at 4; and Corps Manual, cl 63, STEP 12–15.

111 Spearpoint report, above n 62, at Appendix 3, tables 5–6.

112 At [5.6].

(allowing for the area of bare ground).[113] And on neither his initial or subsequent visits did he undertake hydric soils testing.

[107] Again, therefore, we have a number of concerns beyond the headline issues already identified.

Area 3B

[108] In respect of this area, we are sympathetic to Dr Keesing's criticism about the inadequacy of plot selection. This was the largest and longest of the alleged wetlands, yet initially only one plot was established (Plot 6). Although two further plots were later analysed (Plot 13 and Plot 14), Dr Keesing remained critical of the quantity of data collected having regard to the claimed area of wetland. We note that in respect of all three plots, only a Dominance Test was undertaken by Mr Spearpoint.[114]

[109] We also share the appellants' criticism that although Mr Spearpoint and Ms Dixon sought to supplement their vegetation-based observations with comments about hydrology, neither have expert qualifications to do so. We accept the evidence of Dr McConchie that the hydrology is "quite complex" requiring "hydrological rigor".

[110] Our comments in [107] above therefore apply equally to Area 3B.

Area 3C

[111] We note that in respect of this area, five plots were established, in two of which (Plots 1 and 5) Mr Spearpoint identified the pasture exemption in the pNRP as applying.[115] Unusually, however, he did not then establish proximate plots to determine the boundaries of the exempted area. In respect of the intermediate Plots 2, 3 and 4, he found the Dominance Test was satisfied but did not apply the Prevalence Index.[116]

---

113 Yorkshore fog, tall fescue and lotus.

114 Spearpoint report, above n 62, at Appendix 3, tables 11–13. As indicated, Ms Dixon said the Prevalence Index was satisfied in respect of Plot 13. She did not address application of the Prevalence Index to Plots 6 and 14.

115 Spearpoint report, above n 62, at [5.10].

116 At Appendix 3, tables 15–17.

[112] Dr Keesing was critical of the methodology, stating that what appeared to have occurred was that Mr Spearpoint chose "a few plots from some subjective criteria not disclosed", some of which met the vegetative criteria under the pNRP and RMA and may have been "chosen because of that". He contended that a very much more systematic survey was required and that, in the absence of a fuller analysis, "we do not know if the wetted pasture or pasture with patches of rushes exclusions apply, by averaging out the dominance over the site as a whole". We find these observations persuasive. In any event, we consider hydrological analysis and hydric soils testing was required to satisfy the criminal standard of proof.[117]

[113] We accept that within the full length of Area 3C the photographic record identifies large areas where there is an incised stream channel and note Dr McConchie's evidence that "during periods of low flow the saturated zone would be drawn down by at least 300 mm below ground level" (but considerably more at the distal end of the zone where there is greater channel incision). However, even Dr McConchie appears to acknowledge that this does not result in automatic exclusion from the pNRP and RMA definitions given that both include "land water margin[s]", that support the required ecosystem.

Summary in respect of Areas 3A, 3B and 3C

[114] We are satisfied that in respect of all charges relating to Areas 3A, 3B and 3C (albeit for slightly different reasons in respect of each), that there has been a miscarriage of justice and that the appeal is appropriately allowed. The convictions for charges 2, 6–7, 10 and 17–30 must be set aside and a judgment of acquittal be entered for each.

The remaining charges

[115] This leaves six charges only for which convictions stand:

---

[117] This was never a Routine Assessment for Corps Manual Methodology purposes but even if it had been, analysis of both hydrology and soils would have been required, at least in respect of Plots 2 and 3, because in neither were all dominant species OBL and it was not suggested that the wetland/non-wetland bounding was "abrupt" (see [41] to [42] ante).

(a) charges 1 and 9 (relating to the creation of a track adjacent to Area 3C which, in part, subsided into the intermittently flowing stream at the base of the gully);[118]

(b) charges 3, 12 and 13 (relating to disposition of soils/sediment in the bed of a river or where it could enter water); and

(c) charge 35 (contravention of Environment Court Enforcement Order relating to livestock grazing in the effluent disposal field referred to in [8] above).

[116] None of these convictions are challenged (or at least substantively challenged).

Implications in terms of sentence

[117] As indicated, Mr Page was sentenced to three months' imprisonment.[119] This was imposed concurrently in respect of ten charges: nine relating to abatement notices and one in respect of contravention of an Environment Court Enforcement Order.[120]

[118] In respect of the balance (25 charges), which the Judge identified as "operational offences", Mr Page was convicted and discharged. However, we consider it likely that the District Court took its approach to sentencing in respect of the operational offences into account when sentencing for the abatement and enforcement order charges. It referenced the importance of deterrence in the context of "35 offences defiantly undertaken over a long period of time in the course of development work on a farm property",[121] and noted that Mr Page had not shown "any willingness to co-operate with the requirements of the Council" in respect of remediation of wetlands.[122] We surmise that what occurred was a sentence on the abatement/contravention charges

---

118 Contrary to pNRP 2019, above n 23, r 101.
119 Sentencing notes, above n 3, at [51].
120 Charge 14, relating to Area 2; charge 15, relating to Area 1; charge 16, relating to Area 4; charge 19, relating to Area 3B; charge 20, relating to Area 3C; charge 29, relating to Area 3A; charge 30, relating to Area 3B; charge 33, relating to Area 2; charge 34, relating to Area 4; and charge 35, the enforcement order charge.
121 Sentencing notes, above n 3, at [46].
122 At [47].

"bulked up" by the other convictions which were then dealt with by discharge, a not uncommon approach, particularly in the District Court.

[119] The question then becomes whether, in light of the judgments of acquittal we intend to enter, s 236 of the Criminal Procedure Act is engaged. One of the potential problems in this respect is that, in our provisional view, a conviction and discharge as directed in respect of the 25 operational charges is unlikely to be considered a "sentence" for the purposes of s 236(1)(b), even if the District Court's attitude to those charges may have informed its sentence on the abatement and contravention charges.[123]

[120] On the other hand, authority in respect of the predecessor provision to s 236 and current academic commentary in respect of s 236 itself, favour an interpretation sufficiently broad to ensure that the sentence for the remaining offences accurately reflects the seriousness and culpability of each offence and the totality of the offending.[124]

[121] We are also conscious of the operation of s 30 of the Sentencing Act 2002 which prevents imposition of a sentence of imprisonment on a person who has not been legally represented, as was the case in respect of Mr Page at both the District Court and High Court levels.[125]

[122] For these reasons, we consider further submissions are necessary in respect of the sentence appropriately imposed on Mr Page as a result of this judgment, recognising of course that the sentence of imprisonment has already been served — a reality from which we cannot escape.

---

123 See Sentencing Act 2002, s 10A, which refers to the hierarchy of sentences and orders. In listing the hierarchy of sentences and orders, "discharge or order to come up for sentence if called on" is the only option not explicitly identified as a sentence. Section 108 also refers to conviction and discharge as an option "instead of imposing sentence".

124 See Mathew Downs (ed) *Adams on Criminal Law — Criminal Procedure* (online ed, Thomson Reuters) at [CPA236.02]; and *R v Collie* [1997] 3 NZLR 653 (CA) at 665. For post-Criminal Procedure Act cases, see *Men v R* [2022] NZCA 455 at [49]–[52]; and *Flavell v R* [2015] NZCA 336 at [37]–[41].

125 Sentencing Act, s 30(1).

[123] In respect of Ms Crosbie, total fines in the sum of $118,742 were imposed, consisting of:[126]

(a) fines of $1,900 on each of the 25 operational charges (totalling $47,500);

(b) fines of $2,638 on each of the 9 abatement notice charges (totalling $23,742); and

(c) a fine of $47,500 on the enforcement order charge.

[124] She was also required to pay solicitor's costs fixed in accordance with the Costs in Criminal Cases Regulations 1987 and court costs of $130 in respect of each charge.[127]

[125] Applying the same approach and overlaying our conclusions in respect of the convictions, the total fine would be $57,000 with costs applied in respect of the six remaining charges.[128] Provisionally, we consider such a result appropriate but again invite submissions.

[126] We note also that four enforcement orders were made, pursuant to s 339(5) of the Resource Management Act, including three against Ms Crosbie requiring "implementation of a wetland restoration plan",[129] and a fourth (applying to both defendants) prohibiting them from "breaching the requirements of the Regional Plan and National Environmental Standards for Freshwater within the wetlands on the Anlaby Road property".[130]

[127] We are uncertain as to which of these orders, if any, remain appropriate, having regard to the five convictions for "operational charges" which still stand. We assume that to the extent we consider natural wetlands not to have been proven (or relevant exemptions disproven), a wetland restoration plan will no longer be appropriate.

---

126 Sentencing notes, above n 3, at [34].
127 At [34].
128 $1,900 in respect of each of charges 1, 3, 9 and 12–13; and $47,500 for charge 35.
129 Sentencing notes, above n 3, at [53].
130 At [53]–[54].

The remaining "operational" convictions may, however, justify the existing (or an amended) prohibition order against both appellants. Again, further brief submissions are appropriate.

[128] We make the following directions for submissions on penalties and enforcement orders:

(a) Appellants' submissions, due **29 March 2024**.

(b) Respondent's submissions, due **12 April 2024**.

(c) Appellants' submissions in reply, due **19 April 2024**.

Costs

[129] We note that the appellants seek to be heard on costs in this Court. This Court has jurisdiction to order costs in relation to the appeal under the Costs in Criminal Cases Act 1967.[131] Brief memoranda may be filed on the same timetable.

Result

[130] The appeals are allowed (both appellants) in respect of charges 2, 4–8, 10, 11 and 14–34, and we direct that the convictions in respect of said charges be set aside and judgments of acquittal be entered.

[131] In respect of appropriate penalties for Mr Page and Ms Crosbie and the applicability of enforcement orders (A)–(D) identified in the District Court's Sentencing Notes, we invite submissions on the timetable indicated.

---

131 Costs in Criminal Cases Act 1967, s 8.

[132] We reserve costs on the appeal pending receipt of further submissions filed in accordance with the timetable in [128].

Solicitors:
Upper Hutt Law Limited, Upper Hutt for Appellants
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent