IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-24
[2024] NZHC 726

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under s 299 of the RMA
BETWEEN	FEDERATED FARMERS SOUTHLAND INCORPORATED Appellant
AND	SOUTHLAND REGIONAL COUNCIL Respondent
AND	SOUTHLAND FISH & GAME COUNCIL Interested Party
	Parties continued over

Hearing:	30 October 2023
Appearances:	B S Carruthers KC for Appellant (CIV-2023-409-24) D J Minhinnick, S A Kilgour for Appellants (CIV-2023-409-25) P A C Maw and I F Edwards for Appellant (CIV-2023-409-44) M C Wright, P D Anderson for Interested Parties (Southland Fish & Game Council and Royal Forest & Bird Protection Society of New Zealand Inc)
Judgment:	9 April 2024

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 9 April 2024 at 11 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

BALLANCE AGRI-NUTRIENTS LIMITED
Interested Party

ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
Interested Party

RAVENSDOWN LIMITED
Interested Party

FONTERRA CO-OPERATIVE GROUP LIMITED
Interested Party

DAIRYNZ LIMITED
Interested Party

CIV-2023-409-25

BETWEEN	FONTERRA CO-OPERATIVE GROUP LIMITED Appellant
	DAIRYNZ LIMITED Appellant
AND	SOUTHLAND REGIONAL COUNCIL Respondent
	SOUTHLAND FISH & GAME COUNCIL Interested Party
	BALLANCE AGRI-NUTRIENTS LIMITED Interested Party
	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Interested Party
	FEDERATED FARMERS SOUTHLAND INCORPORATED Interested Party

RAVENSDOWN LIMITED
Interested Party

CIV-2023-409-44

BETWEEN	SOUTHLAND REGIONAL COUNCIL Appellant
AND	SOUTHLAND FISH & GAME COUNCIL Interested Party
	BALLANCE AGRI-NUTRIENTS LIMITED Interested Party
	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Interested Party
	FEDERATED FARMERS SOUTHLAND INCORPORATED Interested Party
	RAVENSDOWN LIMITED Interested Party
	FONTERRA CO-OPERATIVE GROUP LIMITED Interested Party
	DAIRYNZ LIMITED Interested Party

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Introduction

[1] The Southland Regional Council (the Council) has notified the Southland Water and Land Plan (the proposed Plan) under the Resource Management Act 1991 (RMA). It is now at the stage of appeals being heard in the Environment Court.

[2] The proposed Plan includes a rule, Rule 24, which permits incidental contaminant discharges from specified farming activities as long as they meet the criteria listed in the Rule.

[3] Appeals have been filed in the Environment Court in relation to the proposed Plan by the Royal Forest & Bird Protection Society of New Zealand Inc (Forest & Bird) and Southland Fish & Game Council (Fish & Game). In respect of Rule 24 they sought to add additional criteria to it before such a discharge would qualify as a permitted activity.

[4] The Environment Court's fifth interim decision (which is the subject of these appeals) includes interim and final findings with regard to Rule 24.[1] Those findings are set out at [23] to [35] below. However, in summary, the Court questioned whether Rule 24 complied with s 70 of the RMA (which constrains the ability of a regional council to include a rule permitting discharges in its regional plan) and made statements which suggested it had jurisdiction to approve the rule in its totality rather than simply modify it as proposed in the appeals.

[5] The three appellants in these proceedings challenge the Environment Court's decisions in respect of Rule 24 on the following grounds:

(a) Fonterra Co-operative Group Ltd and DairyNZ Ltd (the Dairy Interests), say that the Environment Court:[2]

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1 *Aratiatia Livestock Ltd & Ors v Southland Regional Council* [2022] NZEnvC 265.

2 The notice of appeal expressed the grounds differently, but this is how the errors of law were summarised in the submissions of the Dairy Interests.

(i) failed to take into account the scope of appeals before it, which only sought to introduce a new standard into Rule 24 and did not seek to alter the balance of Rule 24;

(ii) applied the wrong legal test in interpreting s 70 of the RMA as applying to both point source and non-point source (i.e. diffuse) discharges;

(iii) took into account matters it should not have taken into account in its interpretation of s 70 of the RMA, namely that the mind of the "Southland Water and Land Plan's author" aided the Court's interpretation; and

(iv) failed to take into account the requirements of Rule 24, and therefore proceeded to undertake its assessment of s 70 from an incorrect starting point.

(b) Federated Farmers says that the Environment Court erred in law in:

(i) defining its role as including the approval of the uncontested parts of Rule 24;

(c) the Council says that the Environment Court erred in law because:

(i) it applied the wrong legal test with respect to its consideration of s 70 of the RMA;

(ii) it failed to take into account the entry conditions of Rule 24, and therefore proceeded to undertake its assessment of s 70 from an incorrect starting point; and

(iii) its reasoning discloses an evident logical fallacy, with the Court erroneously requiring itself to be satisfied about an effect that is not permitted by Rule 24. In the circumstances of Rule 24, s 70 of the RMA does not require the Court to be satisfied as to

effects when the entry conditions of the rule in question preclude those effects from occurring.

[6] There is some overlap between those three appeals. The key issues they raise are:

(a) whether the Environment Court had scope to amend Rule 24 beyond deciding whether to add the further conditions sought by Forest & Bird and Fish & Game;

(b) whether the Environment Court was right to say that s 70 applied to the discharges covered by Rule 24; and

(c) whether the Environment Court was right to conclude that s 70 could be contravened by the Rule.

[7] Fish & Game and Forest & Bird oppose the appeals and support the Environment Court's decision on these issues. In particular, they say:

(a) s 70 of the RMA is applicable to the types of discharges that Rule 24 authorises;

(b) compliance with s 70 is not achieved by simply quoting the s 70 standards within Rule 24;

(c) the Environment Court was correct to find it did not have jurisdiction to confirm Rule 24 on the evidence before it; and

(d) all other findings with respect to what amendments should be made to Rule 24 are interim findings and not able to be appealed.

Principles governing these appeals

[8] The appeals are brought pursuant to s 299 of the RMA. This section provides that appeals may only be brought on a question of law. In the context of appeals under

s 299 of the RMA, this Court has said that the Environment Court may have made an error of law if it:[3]

> (a) applied a wrong legal test; or
>
> (b) came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come to; or
>
> (c) took into account matters which it should not have taken into account; or
>
> (d) failed to take into account matters which it should have taken into account.

Any error of law found must materially affect the result of the Environment Court's decision before the High Court should grant relief.[4]

[9] In the present case, there was no dispute that the points raised would, if upheld, constitute errors of law, so I need say no more on this topic.

The proposed Plan

[10] The proposed Plan has had a long gestation. It was notified in 2016. Submissions were heard on the proposed Plan over several months in 2017. The Council publicly notified its decision on the proposed Plan on 4 April 2018. Twenty-five appeals were filed in the Environment Court against the Council's decision. Over the following years a number of hearings were held in the Environment Court regarding the appeals, with the Environment Court issuing interim decisions following each tranche of hearings. There are still a number of topics to be heard.

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3 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (High Court) at 153.

4 At 153.

[11] The proposed Plan contains a number of objectives that apply region-wide and these objectives were settled through the Environment Court's first interim decision.[5] Relevantly, for the purposes of this appeal, Objective 6 provides that:

> Water quality in each freshwater body, coastal lagoon and estuary will be:
>
> (a) maintained where the water quality is not degraded; and
>
> (b) improved where the water quality is degraded by human activities.

[12] This objective is implemented through various policies in the proposed Plan. These include prescribing the action to be taken when certain water quality standards are met and the action to be taken when those water quality standards are not met.[6]

[13] As Rule 24 deals with discharges, it is important to consider the policies in the proposed Plan that relate to discharges. Policy 13 of the proposed Plan recognises that the use and development of Southland's land and water resources enables people and communities to provide for their social, economic and cultural wellbeing, but also acknowledges that land use activities and discharges need to be managed to maintain water quality where it is not degraded and improve water quality where it is degraded.

[14] Policy 16 applies to farming activities that affect water quality. It provides that adverse environmental effects (including on the quality of water in lakes, rivers, artificial watercourses, modified watercourses, wetlands, tidal estuaries and salt marshes, and groundwater) from farming activities are to be avoided where reasonably practicable or otherwise minimised.

[15] There are a number of rules in the proposed Plan that regulate discharges. However, Rule 24, which is the focus of these appeals, applies to certain incidental discharges from farming activities. The Council submits this only relates to discharges that occur as a result of the following activities:

> (a) farming;
>
> (b) intensive winter grazing;

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5 *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208.

6 See, in particular, policies 15A and 15B.

(c) pasture-based wintering of cattle;

(d) cultivation;

(e) the use of sacrifice paddocks;[7] and

(f) certain bed disturbance activities by sheep.

[16] The Council points out that these land use activities are permitted activities if they are carried out in compliance with certain conditions, including compliance with a certified Farm Environment Management Plan.

[17] Rule 24 does not apply to discharges occurring independently or as a result of other activities. Such discharges are regulated by other rules, including rules that deal with discharges including of agrichemicals,[8] pest control poisons,[9] non-toxic dyes,[10] fertiliser,[11] stormwater,[12] water treatment processes,[13] and wastewater systems,[14] as well as rules that deal with discharges of surface water[15] and discharges to surface water bodies.[16]

Rule 24

[18] Rule 24 as approved by the Council following the hearing of submissions reads as follows:

> **Rule 24 – Incidental discharges from farming**
>
> (a) The discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene

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7 A sacrifice paddock is a paddock where stock are temporarily contained, particularly during extended periods of wet weather and the resulting damage caused to the soil by pugging is so severe as to require resowing with pasture species, to protect the balance of the pasture and maintain its productivity.
8 Rules 9 and 10.
9 Rule 11.
10 Rule 12.
11 Rule 14.
12 Rule 15.
13 Rules 17 and 19.
14 Rule 26.
15 Rule 8.
16 Rules 5, 6 and 9.

section 15(1) of the RMA is a permitted activity, provided the following conditions are met:

(i) the land use activity associated with the discharge is authorised under Rules 20, 25 or 70 of this Plan; and

(ii) any discharge of a contaminant resulting from any activity permitted by Rules 20, 25 or 70 is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:

(1) any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or

(2) any conspicuous change in the colour or visual clarity; or

(3) the rendering of fresh water unsuitable for consumption by farm animals; or

(4) any significant adverse effects on aquatic life.

(b) the discharge of nitrogen, phosphorus, sediment [or] microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA and that does not meet one or more of the conditions of Rule 24(a) is a non-complying activity.

[19] The Council points out that the provisions in Rule 24(a)(ii) intentionally reflect the requirements in s 70(1)(c)–(g) of the RMA. That section provides:

[1] Before a regional council includes in a regional plan a rule that allows as a permitted activity–

(a) a discharge of a contaminant or water into water; or

(b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,–

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

(c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) any conspicuous change in the colour or visual clarity:

(e) any emission of objectionable odour:

(f) the rendering of fresh water unsuitable for consumption by farm animals:

(g) any significant adverse effects on aquatic life.

If any of the conditions in Rule 24(a)(ii) are not met, then resource consent is required as a non-complying activity under Rule 24(b).

Forest & Bird's and Fish & Game's appeals

[20] While Fish & Game's notice of appeal provided more detailed reasons for the relief it sought on appeal than Forest & Bird's notice of appeal, both organisations sought identical relief in respect of Rule 24. Specifically, they sought to amend Rule 24 by adding the following conditions into it.

(1) where the water quality upstream of the discharge meets the standards set for the relevant waterbody in Appendix E "Water Quality Standards", the discharge does not reduce the water quality below those standards at the downstream edge of the reasonable mixing zone; or

(2) where the water quality downstream of the discharge does not meet the standards set for the relevant water body in Appendix E "Water Quality Standards", the discharge must not further reduce the water quality below those standards at the downstream edge of the reasonable mixing zone.

[21] The explanation given by Forest & Bird for seeking these additional conditions was that the Rule, as it stood, did not include "suitable receiving water quality standards to maintain or improve water quality".[17] Fish & Game's Notice of Appeal said that the rule "d[id] not include standards that control the actual and potential adverse effects on water that could arise from the discharges … to ensure they are not contrary to s 70(1)(c)-(g)."[18]

[22] No other appeal was lodged in respect of Rule 24.

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17 Notice of Appeal by *Royal Forest & Bird Protection Society of New Zealand Inc* dated 22 May 2018.

18 Notice of Appeal by Southland Fish & Game Council dated 17 May 2018.

The Environment Court's decision

[23] Before focusing on the Environment Court's decisions in relation to Rule 24, it is necessary to set out some of the introductory findings the Court made in this decision. Specifically, the Court held:

(a) many of Southland's water bodies are likely degraded with water quality falling below the national bottom line or below the minimum acceptable state;[19] and

(b) the discharge of contaminants incidental to farming and other activities is resulting in significant adverse effect on aquatic life.[20]

[24] The Court, in its first interim decision, had raised the question of what is meant by "degraded" in Objective six of the proposed Plan.[21] This led to extensive expert conferencing on water quality and aquatic ecology as directed by the Court. The outcome as recorded in the decision under appeal was a recommendation to map catchments where water quality was degraded by nitrogen, phosphorous, sediment, or microbial contaminants, and to include those maps in a new schedule to the proposed Plan, Schedule X.[22] As a consequence of this work, the Court:

(a) found that "[w]here water quality falls below the national bottom lines or minimum acceptable state … water quality in these water bodies is, or is highly likely to be, *degraded* by human activities and is to be improved (Objective 6)";[23]

(b) was "satisfied that for a range of attributes and minimal acceptable states, water quality in many of Southland's water bodies is, or is highly likely to be, *degraded* …";[24] and

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19 *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [4].
20 At [5].
21 *Aratiatia Livestock Ltd v Southland Regional Council* [2019] NZEnvC 208 at [96].
22 *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [49].
23 At [77].
24 At [78].

(c) approved the inclusion of maps (for nitrogen, phosphorous, suspended sediments, macroinvertebrate community index and e coli, together with a single map for all attributes) in a new Schedule X entitled "Catchments of degraded waterbodies where improvement in water quality is required".[25]

[25] Turning then to Rule 24, the Court recorded its understanding of the parties' positions as follows:[26]

> Forest & Bird/Fish & Game excepted, all parties support rules permitting the discharge of contaminants from authorised land uses associated with farming activities.

[26] However, this is incorrect. Forest & Bird and Fish & Game have confirmed in their submissions that they, too, supported a rule permitting the discharge of contaminants from authorised land uses associated with farming activities, but subject to an additional permitted activity condition being included. In my view, this misstatement of Forest & Bird and Fish & Game's position is relevant to the issue of scope which I address later.

[27] The Environment Court then went on to say that the following issues arose for determination in respect of Rule 24:[27]

(a) Does s 70 apply to both point source and diffuse discharges?

(b) Are contaminant discharges from existing activities resulting in significant adverse effects on aquatic life?

(c) Does the Court have jurisdiction to approve Rule 24?

[28] The first issue arose because the Dairy Interests submitted that s 70 of the RMA applied to point source discharges only and that diffuse discharges (including those from farming activities) were not caught by the section. This was important because

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25 *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [84].
26 At [233].
27 At [237].

if s 70 did not apply to such discharges, the question of whether the Council had complied with it when drafting Rule 24 in the proposed Plan would not arise.

[29] The Environment Court rejected the Dairy Interests' reliance on the Board of Inquiry's decision in *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents* where it was observed that "the term "receiving waters" is well understood to be the waters at the point of discharge".[28] The Environment Court said that *King Salmon* did not involve an interpretation of s 70 and the area of "reasonable mixing" was context-sensitive and did not mean that a reference to "receiving waters" must relate to point source discharges only.[29]

[30] The Environment Court went on to say that the Dairy Interests' submission did not address s 70(1)(b) which provides that the discharge of a contaminant may be onto or into land, including in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water.[30] The Court held as follows:[31]

> The plain and ordinary meaning of the text includes discharges from point source (usually a pipe) and non-point source (that is diffuse discharges, for example, leachate from infiltration, sediment transported via surface flow and the like). There is nothing to indicate a narrower interpretation is to be preferred.

[31] In respect of the second issue identified by the Environment Court it concluded as follows:[32]

> … we find it highly likely that the result of the discharges of contaminants (either by themselves or in combination with the same, similar, or other contaminants), are firstly having significant adverse effects on aquatic life and secondly, the discharges include those that are incidental to farming (land use) activities.

[32] The Environment Court then discussed the third issue it had identified, being whether it had jurisdiction to "approve" Rule 24. The question of jurisdiction was said

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28 *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [255] referring to the Report and Decision of the Board of Inquiry *New Zealand King Salmon Requests for Plan Changes and Applications for Resource Consents,* 22 February 2013 at [1307].

29 At [257]–[259].

30 At [258].

31 At [259].

32 At [265].

to arise because Forest & Bird and Fish Game submitted that the Court did not have jurisdiction to confirm Rule 24 as it stood because the Rule permitted the discharge of contaminants in contravention of s 70 of the RMA.[33]

[33] The Council submitted that under the proposed Plan, which included methods to support the progressive improvement in water quality over time, contaminant losses would be reduced to the smallest amount reasonably practicable and any incidental discharge of contaminants from the relevant farming land use activities would not result in significant adverse effects on aquatic life. The Court understood this to mean "the quality of receiving waters [would] improve and the threshold for ecosystem health value [would] rise above the national bottom line or minimal acceptable state"[34] and so the Court should not be concerned with what has happened in the past but on whether the restrictions on land use activities would mean that such effects do not arise in the future. However, the Court considered this interpretation was not available.[35] While the Court accepted that the entirety of the policies, rules and methods would result in improvement in water quality, the experts had not been cross-examined on whether the thresholds for eco-system health value would rise above the national bottom line or minimal acceptable state. The Court therefore said it could not satisfy itself that it was unlikely that significant adverse effects on aquatic life would result from the discharges.[36] For that reason, jurisdiction to include a rule permitting contaminant discharges had not been established on the evidence before it at that point.

[34] The Court then said that "rather than finally decide the issue now it is our view that procedural fairness requires that we give the parties the opportunity to call expert evidence on the likelihood of effects and their significance for aquatic life".[37]

[35] The Court went on to say that if it found that it did not have jurisdiction to include Rule 24 in the proposed Plan then its tentative view was that "controlled activity [would be] the appropriate classification".[38]

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33 At [267].
34 At [268].
35 At [269].
36 At [271].
37 At [272].
38 At [273].

The issues

[36] In light of the Environment Court's decision, and the issues raised on appeal, I consider three key questions arise:

(a) what scope did the Environment Court have, on appeal, to amend Rule 24?

(b) does s 70 apply to non-point source discharges, such as those covered by Rule 24?

(c) did the Environment Court err in concluding that s 70 could be contravened by Rule 24 when Rule 24 expressly precludes the type of effects referred in s 70?

[37] I address each of these questions in turn.

What scope did the Environment Court have to amend Rule 24 on appeal?

[38] A primary reason for the appeal was the appellants' concern that the Environment Court proposed making amendments to Rule 24 which were beyond the scope of Fish & Game's and Forest & Bird's appeals. In particular, the appellants took issue with the Court's assertion that it was tasked with "approving" Rule 24 and its suggestion that it might reclassify the activities permitted by Rule 24 as controlled activities.

[39] The appellants say the Environment Court had no scope to do that as no party challenged the permitted activity status of the activities described in Rule 24. The only question at large was whether the additional conditions proposed by Fish & Game and Forest & Bird should be added to the Rule.

[40] As submitted by Federated Farmers, the Environment Court's jurisdiction on appeal is not unlimited; its jurisdiction to make amendments to a proposed plan is limited by the scope of the appeals before it. As was said by the Supreme Court in *Waitakere City Council v Estate Homes Ltd*, the Environment Court is charged with

considering the matter that was before the Council, and its decision, "to the extent that it is in issue on appeal."[39]

[41] The starting point is that any amendment sought by an appellant must be within the scope of a submission which was made on the proposed Plan at first instance. The rationale for this is procedural fairness. The purpose of notifying a plan, along with the submissions and further submissions process, is to inform everyone about what is proposed "[o]therwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[40]

[42] The scope of an appeal of the Environment Court is in turn determined by the notice of appeal.[41] A shorthand way of describing the Environment Court's scope on appeal is that it is an outcome which is in "the range between what was in the decision being appealed and the relief sought in the appeal".[42] Again the rationale for confining the Environment Court's jurisdiction in this way is procedural fairness. Those who might seek to take an active part in the hearing before the Environment Court should have sufficient notice to know or be able to foresee what the Environment Court may do as the result of an appeal.[43]

The factual position in this case

[43] In the present case, both Forest & Bird and Fish & Game made submissions in respect of Rule 24 when the proposed Plan was notified. Forest & Bird's submissions:

(a) said the Council must be "satisfied (based on evidence/analysis) that the associated land uses will not cause any of the effects referred to in s 70"; and

(b) supported the Rule if amended as Forest & Bird proposed, including to require that the discharge did not reduce water quality below the water

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39 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29].
40 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].
41 *Scholes v Canterbury Regional Council* [2010] NZEnvC 29 at [13].
42 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387, (2020) 22 ELRNZ 298 at [23] referring to *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC) at [48]–[50].
43 *Westfield (NZ) v Hamilton City Council* [2004] NZRMA 556 (HC) at [74].

quality standards set in the proposed Plan at the downstream edge of the property boundary, (which, if breached, defaulted to a non-complying activity under Rule 24(b)).

[44] Fish & Game's submissions:

(a) said that Rule 24 did not contain standards that "comprehensively control the actual and potential adverse effects of [sic] on water" and did not provide for the water quality standards set in the proposed Plan;

(b) sought relief mirroring Forest & Bird's relief, namely that the permitted activity be retained with an additional condition relating to the effect on water quality at the property boundary.

[45] In response to submissions, the Council decided to amend Rule 24 to include the conditions in Rule 24(a)(ii) as set out at [18] above, thus replicating the provisions of s 70(c), (d), (f) and (g) of the RMA.[44]

[46] Forest & Bird's notice of appeal:

(a) said that the Council's decision on Rule 24 "does not include suitable receiving water quality standards to maintain or improve the water quality"; and

(b) sought to amend the permitted activity standards by the addition of a new condition at Rule 24(a)(iii) as set out at [20] above.

[47] Fish & Game's notice of appeal:

(a) said certain rules, including Rule 24, permitted the "discharge of nitrogen, phosphorus, sediment or microbial contaminants that may result in a contaminant entering water" and so did not accord with s 70 of the RMA and were not considered appropriate; and

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[44] As set out in [19] above.

(b) sought relief in respect of Rule 24 that mirrored Forest & Bird's relief, namely that the permitted activity rule remained, but with the additional condition to be included at Rule 24(a)(iii) as set out at [20] above.

[48] By the time of the hearing in the Environment Court, Forest & Bird and Fish & Game were pursuing amended relief in respect of Rule 24 as follows:

> **Rule 24 — Incidental discharges from farming**
>
> (a) The discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA is a permitted activity, provided the following conditions are met:
>
> (i) the land use activity associated with the discharge is authorised under Rules 20, 25 or 70 of this Plan; and
>
> (iA) the discharge is not contributing nitrogen, phosphorus, sediment or microbial contaminants to a catchment where the receiving environment contains a waterbody identified in Schedule X as being degraded and in need of improvement with respect to those contaminants.
>
> (ii) any discharge of a contaminant resulting from any activity permitted by Rules 20, 25 or 70 is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:
>
> (1) any conspicuous oil or grease films, scums or foams, or floatable or suspended materials; or
>
> (2) any conspicuous change in the colour or visual clarity; or
>
> (3) the rendering of fresh water unsuitable for consumption by farm animals; or
>
> (4) any significant adverse effects on aquatic life.
>
> (b) the discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA and that does not meet ~~one or more of the conditions~~ condition (iA) of Rule 24(a) is a discretionary activity. The discharge of nitrogen, phosphorus, sediment or microbial contaminants onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA and that does not meet condition (a)(i) or (ii) of Rule 24(a) is a non-complying activity.

[49] The revised relief put forward by Fish & Game and Forest & Bird in July 2022 would make the diffuse discharges from farming in catchments where the receiving environment contains a water body identified in Schedule X as being degraded and in need of improvement, a non-complying activity. This, the appellants say, is well beyond the scope of the two appeals on Rule 24.

[50] As the question of whether this amended relief is within the scope is disputed and the Environment Court has not considered this issue, I focus on the relief sought in the appellants' notices of appeal (which no party suggests is not within the scope of the initial submissions on Rule 24).

Submissions for the appellants

[51] The appellants submit that the Environment Court erred when it defined its role as being to "approve" or "confirm"[45] Rule 24 in its entirety, or to decide whether to "include" the Rule in light of s 70.[46] It was because of this erroneous understanding that the Environment Court expressed a tentative view that it could change the activity status of the Rule. However, the appellants submit that the Environment Court was not tasked with approving or confirming Rule 24. Its role was to decide whether the additional conditions sought by Forest & Bird and Fish & Game should be included in Rule 24, either in their original form, or in a revised form falling somewhere between the Council decisions version of the Rule and the relief sought on appeal.

[52] The appellants say that the notices of appeal filed by Forest & Bird and Fish & Game did not suggest that those parties were pursuing anything other than permitted activity status for incidental discharges from farming. Fish & Game's notice of appeal failed to provide the Environment Court with the necessary jurisdiction to amend Rule 24, such that all incidental discharges from farming would require a resource consent and this is even less so for Forest & Bird's appeal which only sought to add the additional standard or condition to the permitted activity status in Rule 24, and did not raise the issue of s 70 at all.

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45 See, for example *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [277].
46 See, for example at [273].

[53] For these reasons, the appellants submit that the Environment Court erred by defining its role as deciding whether to approve the uncontested parts of Rule 24. The only scope for amendment of the Rule on appeal is to add the further conditions proposed by Forest & Bird and Fish & Game.

Submissions for Forest & Bird and Fish & Game

[54] Forest & Bird and Fish & Game confirm that they support a permitted activity rule for the discharge of contaminants from authorised land uses associated with farming activities, but subject to the additional permitted activity conditions proposed. They do not suggest their appeal sought to challenge the Rule in its entirety or to amend the activity status of the rule, (except to propose that a non-complying discharge be categorised as a discretionary activity not a non-complying activity).

[55] However, they interpret the Environment Court's decision differently from the appellants. In their submission, the Court did not find that its role was to confirm Rule 24 in toto; the Court's enquiry was simply focused on whether to approve Rule 24 as proposed by the Council and supporting parties, or whether to amend it in accordance with the relief sought by Forest & Bird and Fish & Game. For this reason, they submit the Environment Court did not err in its understanding of scope to amend Rule 24. Furthermore, the Court has not yet made any finding on that issue and it is not amenable to appeal.

Discussion

[56] I accept that the Environment Court has not yet made a decision on Rule 24 and the statements it has made regarding whether to "approve" or "include" the Rule, or to give controlled activity status to the activities described in the Rule, are not determinations; they merely indicate how the Court intends to approach its decision. It may be after hearing further evidence that the Court simply confirms the Council decisions version of the Rule, or adds an additional condition, as sought by Forest & Bird and Fish & Game. Arguably, therefore, no determination has been made and it is premature to decide whether this is an error which will materially effect the outcome of the proceeding.

[57] However, although the Environment Court has not made a final decision, I am satisfied it has unequivocally expressed its jurisdiction on appeal in a way which goes beyond the scope of the appeals before it. This appears to stem from its erroneous understanding that Fish & Game and Forest & Bird did not support a permitted activity rule.[47] It would be artificial to suggest this cannot be the subject of an appeal on a point of law, but rather, the parties must wait to see if the Environment Court goes on to make a decision which is beyond the scope of the issues raised on appeal.

[58] Although Fish & Game and Forest & Bird suggest the discussion of "approving" the Rule was intended to relate to confirming the Rule in its current form or amending it as they proposed, I consider it is clear that the Court is entertaining a more wide-ranging review of the Rule than that. This is clearly signalled by the suggestion that the status of the activity in the Rule could be changed to a controlled activity. No party has sought an amendment to the permitted activity status.

[59] For that reason, I confirm (as all parties agree), that the appeals do not provide scope to approve Rule 24 in toto, nor is there scope to change the activity status and the Environment Court erred in expressing its jurisdiction in that way. The Environment Court only has scope to approve Rule 24 as proposed by the Council and supporting parties, or to amend it to reflect some or all of the changes sought by Forest & Bird and Fish & Game.

Does s 70 apply to diffuse discharges?

Submissions for the Dairy Interests

[60] The Dairy Interests were the only appellants to pursue the argument that the Environment Court erred in law in interpreting s 70 of the RMA as applying to both point source discharges and non-point source discharges.

[61] The Environment Court queried whether the requirements of s 70 (which are set out at [19] above) had been complied with by the Council in drafting Rule 24. The

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47 Which is what the Court says at [233].

Dairy Interests submit that s 70 does not apply to the type of discharges governed by Rule 24, but only to point source discharges.

[62] The Dairy Interests' submissions commenced by referring to the Legislation Act 2019 which states that the meaning of legislation must be ascertained from its text and in light of its purpose and its context.[48] Mr Minhinnick submits that on a plain and ordinary interpretation, s 70 provides a pathway for regional councils to include permitted activity rules in their plans to authorise discharges even when these may give rise to adverse environment effects, subject to compliance with certain standards. While the Dairy Interests acknowledge that the general reference to "discharge" in s 70(1)(a) and (b) has the potential to be viewed as applying to both point source and non-point source discharges, they say a close reading of s 70, taking into account its context and potential unintended consequences, suggests otherwise.

[63] In Mr Minhinnick's submission the following aspects of s 70 reinforce why a narrower interpretation of the section is required. These are:

(a) the use of the phrase "receiving waters";

(b) the use of the concept of "reasonable mixing"; and

(c) the nature of the constrained effects listed.

[64] Mr Minhinnick points out that the term "receiving waters" is not defined in the RMA or caselaw. The only decision which appears to comment on what that term means is the Board of Inquiry's decision in the *King Salmon* application, where it was said that:[49]

> The receiving waters are well understood to be the waters at the point of discharge. In the context of a salmon farm, that would logically be at the edge of a cage.

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48 Legislation Act 2019, s 10.
49 Above n 25, at [1307].

[65] Because there are not readily defined "points of discharge" in the case of diffuse charges from farming activities on land, there are no readily identifiable "receiving waters".

[66] Mr Minhinnick also points out that s 107, which relates to discharge and coastal permits, has similar restrictions on it. He says that the context of s 70 and s 107 are aligned and reflect requirements at both the plan making and resource consenting stage. He submits it would be entirely impracticable for the "receiving waters" to be construed differently under ss 70 and 107 of the RMA.

[67] The Dairy Interests say the narrow interpretation of s 70 is reinforced by the use of the concept "reasonable mixing" in that section. The reference to reasonable mixing recognises that point source discharges at the point of discharge may result in one or more of the criteria under s 70 being breached, but this will be acceptable if, once diluted within the broader water body, the identified effects will not occur. Mr Minhinnick points out it is simply not possible to identify where the "receiving waters" would be assessed for a diffuse discharge, nor where, when or with what contaminant load, a diffuse discharge has been "reasonably mixed".

[68] Finally, Mr Minhinnick submits that the nature of the particular constraints listed in s 70(1)(c)-(g) also support a narrower interpretation of s 70. The majority of the effects that must not arise under s 70 after reasonable mixing are associated with point source discharges. For example, conspicuous oil or grease films, changes in colour or objectionable odour and the rendering of fresh water unsuitable for consumption by farm animals. These effects are inapplicable in the case of diffuse discharges.

[69] In addition to the guidance which the Dairy Interests say can be taken from the context and language of s 70, they submit that the Environment Court erred when it relied on what it said was the "intention of the author" of the proposed Plan to assist in its interpretation of s 70. Specifically, the Environment Court referred to the fact that the proposed Plan defined "receiving waters" as including water bodies that receive "run-off". The reference to "run-off" in that definition was said by the Environment Court to encompass diffuse discharge of contaminants. The Court,

therefore, concluded that "the plan's author intended the rule apply to both point source and diffuse discharges".[50] The Dairy Interests point out that a definition in a proposed plan produced under the RMA cannot assist in the interpretation of a section in the RMA itself and, by allowing it to do so in this case, the Environment Court erred.

[70] Finally, the Dairy Interests point to what they say are the wider consequences of the Environment Court's broad interpretation of s 70. Given the similarities between s 70 and s 107 of the RMA, interpreting s 70 as the Environment Court has, could effectively prohibit animals grazing on land as well as various diffuse discharges after it rains where significant adverse effects on aquatic health are established due to existing degraded water quality, encompassing extensive area/water bodies nationwide. This would make s 70 almost unworkable when applied to diffuse discharges, an outcome which they say could not have been intended when drafting s 70.

Discussion

[71] I am satisfied that the Environment Court was correct when it said that s 70 applies to the type of discharges that Rule 24 authorises. The starting point is that the term "discharge" is defined broadly in the RMA as including to "emit, deposit, and allow to escape".[51] There is nothing to suggest that that broad definition of discharge was not intended to apply when that term is used in s 70. It is also clear that s 70(1)(b) expressly captures non-point source discharges, being discharges of contaminant that enter water after being released onto or into land.

[72] The reference to "receiving waters" in that section does not confine the discharges to point source discharges, as that term is context-specific. Non-point source discharges can still enter water bodies and those water bodies are the receiving waters.

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50 *Aratiatia Livestock Ltd v Southland Regional Council*, above n 1, at [260].
51 Resource Management Act, s 2(1).

[73] While the concept of "reasonable mixing" may be more apposite to point source discharges, that does not mean the criteria set out in s 70(1)(c)-(g) are irrelevant. In particular, the requirement that there not be any significant effects on aquatic life readily applies to all types of discharges. There is no logical rationale for the RMA imposing these minimum standards on one type of discharge, but not the other. Indeed, those standards are also imposed on the grant of discharge permits and coastal permits under s 107, but that section allows exceptions for:

(a) exceptional circumstances which justify the granting of the permit;

(b) a discharge of a temporary nature; and

(c) a discharge associated with the necessary maintenance work where it is consistent with the purpose of the RMA to allow the discharge.

In a recent decision of *Environment Law Initiative v Canterbury Regional Council*, Mander J considered whether discharges from farming land use activities had to comply with s 107 before consent could be granted and concluded they did.[52] This reinforces my view that all discharges, not just point source discharges, are intended to be governed by these limitations, except where circumstances justify an exception to achieve the purpose of the RMA.

[74] I accept, however, that the Environment Court was wrong to refer to the intention of the plan's author when interpreting that section. Plans must reflect the requirements of the RMA, and the interpretation of the RMA cannot be assisted by the intentions of a particular author of a plan created under the RMA. That said, the Environment Court's decision on the scope of s 70 did not depend on this observation, and I conclude that the Court was correct to hold that the non-point source discharges generated from the identified farming activities listed in Rule 24 are encompassed by s 70 and the Rule had to comply with it.

[75] This ground of appeal is dismissed.

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[52] *Environment Law Initiative v Canterbury Regional Council* [2024] NZHC 612.

Did the Court err in concluding that s 70 could be contravened by Rule 24, when it expressly precludes the type of effects referred to in s 70?

Submissions for the Council

[76] The primary issue on appeal from the Council's perspective (supported by the Dairy Interests) was whether the Environment Court was correct in questioning whether s 70 would be contravened when the conditions of the Rule would preclude the very effects which s 70 was concerned with. As the Council says, Rule 24 sought to provide for incidental discharges emanating from certain authorised farming activities, as a permitted activity, provided certain conditions were met. One of those conditions required any incidental discharge of a contaminant to be managed to ensure that, after reasonable mixing, it did not give rise to any significant adverse effects on aquatic life in the receiving waters.

[77] Mr Maw, for the Council, says this condition operates as an "entry condition" to the permitted activity rule, meaning that if an incidental discharge is going to result in significant adverse effects on aquatic life after reasonable mixing, that discharge would not be permitted and a resource consent would be required under Rule 24(b). As Mr Maw points out, the language reflects the requirements in s 70(1)(g) of the RMA. In the circumstances, he says the Environment Court was not being asked to approve a rule that could permit significant adverse effects on aquatic life.

[78] For this reason, Mr Maw submits the Environment Court misdirected itself as to the application of the law and approached the issue of jurisdiction with respect to Rule 24 from an incorrect starting point. In his submission:

(a) first, the Court should have directed itself as to the types of discharges that Rule 24(a) sought to permit;

(b) this would have identified that the types of discharges being permitted were constrained by the entry conditions, including the condition relating to significant adverse effects on aquatic life; and

(c) in light of the entry conditions the Court should then have asked itself whether it was being asked to include a discharge rule in a regional plan that would have significant adverse effects on aquatic life.

[79] In summary, Mr Maw submits that the inclusion of entry condition a(ii) in the Rule overcomes any jurisdictional bar created by s 70(1)(g). For this reason, no jurisdictional issue arose as the very terms of the Rule precluded it from permitting a discharge contrary to s 70(1)(g).

[80] The Council acknowledges that the question of jurisdiction is distinct from the question of whether a permitted activity rule is appropriate, and the question of appropriateness is something that the Court could consider. However, the Court applied the wrong legal test when it concluded that s 70 of the RMA provided a potential jurisdictional bar to the inclusion of Rule 24 in the proposed Plan.

Discussion

[81] It is difficult to escape the conclusion that the parties were speaking at cross purposes on this issue, and this was exacerbated by the Court's erroneous understanding that it was tasked with deciding whether to approve or include the Rule.

[82] From a purely technical perspective, the Council was correct to say that the Rule, as drafted, excluded incidental discharges from farming activity that would have a significant adverse effect on aquatic life whether on its own, or in combination with other discharges occurring. If the Rule was complied with, such effects could not occur.

[83] However, I also accept that simply replicating the s 70 criteria, and making them conditions of a permitted activity, would not meet the procedural requirements of s 70 of the RMA. As Fish & Game and Forest & Bird submit, the language of s 70 requires the regional council to be satisfied, *before* it includes a rule permitting a discharge in a regional plan, that none of the effects in r 70(1)(c)-(g) are likely to arise in the receiving waters. I accept that the requirement be satisfied "before" the permitted activity rule is inserted indicates the need for an inquiry as part of the planning process as to what the evidence says about the effects of the class of discharge

being considered. This is particularly important in the present case where there will be practical difficulties in determining whether a specific discharge complies given such issues are not readily able to be assessed on a case by case basis and where there will be a live question as to cumulative effects. Council officers granting resource consents should not be tasked with the very enquiry that s 70 envisages will take place prior to the rule being included in the plan.

[84] My view that this enquiry should precede the inclusion of a permitted discharge rule in a plan is reinforced by the decision in *Re Otago Regional Council*.[53] There, submitters sought to include a rule permitting discharges from residential earthworks, without any limitation on scale, if they could demonstrate that the s 70 standards would be met. However, the Environment Court found the submitters' proposal would be ultra vires the Council's powers.[54] One of the reasons for this conclusion was that for a permitted discharge rule to be lawfully included within a regional plan, the regional council would need to be satisfied that none of the effects identified in s 70(1)(c)-(g) would be likely to arise, after reasonable mixing.

[85] In that case, the Court did not have the evidential basis to support the submitters' proposed rule providing for earthworks as a permitted activity, regardless of scale, in the context of the s 70 requirements. It only had sufficient evidence to support the existing permitted discharge rule in respect of small scale earthworks for residential developments and so the submitters' proposed rule was rejected.[55]

[86] In the present case, I do not have the evidence which the Council relied on to include the permitted rule for incidental farming discharges in the plan. It may be that the Council has satisfied itself that the s 70 standards can likely be met by such discharges. Ironically, it does not appear that the Council was originally relying on the conditions which replicate s 70(c)-(g) to achieve compliance with s 70. These further conditions were only added following the Council hearings, to close off a concern that such discharges would not comply with s 70(1)(c)-(g).

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53 *Re Otago Regional Council* [2022] NZEnvC 101.
54 At [257]–[258].
55 At [240]–[244].

[87] In confirming or amending the Rule, the Environment Court must equally be satisfied that there is jurisdiction under s 70 to support a particular version of the rule which is why it has sought to hear further evidence on this issue. That does not mean that the Court has scope to disallow the Rule, or to amend the activity status of such discharges. Were the Court to consider the evidence did not support either version of the Rule by satisfying it that significant adverse effects on aquatic life would not be likely to arise, the matter could only be remedied by directing the Council to prepare a change to the proposed Plan pursuant to s 293 of the RMA.

[88] Other than making those observations I accept, as Fish & Game and Forest & Bird submit, that the Environment Court has not decided what amendments should be made to Rule 24. It is entitled to hear evidence on those matters, although its role, on appeal, is constrained in the way I have just described.

Conclusion

[89] The appellants were justified in raising their concerns about whether the Environment Court properly understood the scope of the appeals on Rule 24. The Environment Court's assertion that it was tasked with approving the Rule and determining the appropriate activity status for such discharges appeared to be based on a misunderstanding of Forest & Bird's and Fish & Game's position. All parties are agreed, and I confirm, that the Environment Court's enquiry should be focused on whether to retain Rule 24 as proposed by the Regional Council and supporting parties, or whether to amend the Rule in accordance with the relief sought by Forest & Bird and Fish & Game. Any other change would have to be advanced through a process initiated under s 293 of the RMA.

[90] The Environment Court was correct to conclude that non-point source discharges such as those covered by Rule 24 are governed by s 70 of the RMA and the Dairy Interests' appeal on that issue fails.

[91] Finally, I accept Fish & Game and Forest & Bird's submission that compliance with s 70 is not achieved by simply reciting the s 70(1)(c)-(g) requirements in the Rule. However, it is not clear that this is what the Council has done. The Environment Court

is entitled to hear the evidence relied on to determine whether the Rule would meet these requirements and that issue is still to be determined in subsequent hearings.

Costs

[92] The parties have had mixed success. Their positions were not as divergent as it might have initially been thought, and the appeal was brought largely because of concerns that the Environment Court had misunderstood the positions of the parties as they related to Rule 24.

[93] In these circumstances, an application for costs is not encouraged, but if one is to be pursued:

(a) the party seeking costs should file and serve a memorandum within 20 working days;

(b) the party or parties from whom costs are sought should file and serve a memorandum in reply within a further 10 working days; and

(c) any response to those submissions should be filed and served within a further five working days.

[94] Costs will be determined on the papers unless I need to hear from counsel.

[95] If any application for costs is not received in the timeframe required, costs are to lie where they fall.

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