

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

UNDER the Resource Management Act 1991

IN THE MATTER of appeals under Clause 14 of the First Schedule of the Act

BETWEEN

TRANSPOWER NEW ZEALAND LIMITED
(ENV-2018-CHC-26)

FONTERRA CO-OPERATIVE GROUP
(ENV-2018-CHC-27)

HORTICULTURE NEW ZEALAND
(ENV-2018-CHC-28)

ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

(Continued next page)

**APPLICATION TO STAY PART OF PROCEEDING PENDING AMENDMENTS
TO SECTION 70 OF THE RMA**

2 December 2024

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WILKINS FARMING CO
(ENV-2018-CHC-30)

**GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT
COUNCIL & INVERCARGILL CITY COUNCIL**
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME COUNCIL
(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

**SOUTHWOOD EXPORT LIMITED, KODANSHA
TREEFARM NEW ZEALAND LIMITED, SOUTHLAND
PLANTATION FOREST COMPANY OF NEW ZEALAND**
(ENV-2018-CHC-46)

**TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA,
WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE
RUNANGA O ORAKA APARIMA**
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

**ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND**
(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

To The Registrar of the Environment Court

And to The Appellants

And to The section 274 parties

Application to stay proceeding

- 1 The Southland Regional Council (**Council**) applies for a partial stay of these proceedings pending the making of changes to section 70 of the Resource Management Act 1991 (**RMA**), as signalled by the Government.
- 2 This Application is made pursuant to sections 269 and 272 of the RMA and rule 18.10 of the District Court Rules 2014.
- 3 In particular, this Application relates to appeals on Rule 24 of the proposed Southland Water and Land Plan (**pSWLP**).
- 4 The following documents are filed in conjunction with this Application:
 - (a) Affidavit of Elizabeth Ann Devery dated 2 December 2024; and
 - (b) A Memorandum of Counsel for the Southland Regional Council dated 2 December 2024.

Background

- 5 Rule 24 is one of the final provisions in the pSWLP yet to be resolved. Rule 24 relates to incidental discharges from farming activities.

Environment Court

- 6 In the Environment Court's Fifth Interim Decision, the Court considered legal arguments regarding the interpretation of section 70 of the RMA and determined it did not have jurisdiction under section 70 to approve Rule 24 as proposed to be included in the pSWLP.¹

Appeals to the High Court

- 7 The Fifth Interim Decision was then appealed to the High Court by Federated Farmers Southland Incorporated, Fonterra Co-operative

¹ *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 from [237].

Group Ltd and Dairy NZ Ltd, and the Council. The outcome of those appeals was as follows:

- (a) Federated Farmers' appeal was partially successful, with the High Court finding that the Environment Court's interpretation of the scope available to it when making the decision on the appeals on Rule 24 was erroneous:²

...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 section 293 of the RMA.

- (b) Fonterra Co-operative Group Ltd and DairyNZ Ltd's appeal was unsuccessful, with the High Court finding that the Environment Court was correct to conclude that non-point source discharges, such as those covered by Rule 24, are governed by section 70 of the RMA.³
- (c) The Council's appeal was also unsuccessful, with the High Court finding that compliance with section 70 was not achieved by simply reciting the section 70(1)(c)-(g) requirements in Rule 24. However, the High Court noted that it was not clear that this is what the Council had done, concluding that the Environment Court was entitled to hear the evidence relied on to determine whether Rule 24 would meet the section 70 requirements. That issue is still to be determined in subsequent hearings.⁴

Court of Appeal

- 8 The Council sought leave to appeal the High Court's decision to the Court of Appeal, and leave was granted. Ultimately, the Council's appeal was unsuccessful, with the Court of Appeal agreeing that the requirements of section 70 of the RMA must be satisfied *before* including

² *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726 at [89].

³ *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726 at [90].

⁴ *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726 at [91].

a proposed rule in a plan, and that the Environment Court was entitled to hear further evidence to determine if the requirements of section 70 are in fact satisfied.⁵

- 9 Consequently, the Environment Court's Fifth Interim Decision in relation to the interpretation of section 70 of the RMA stands.⁶

Existing Stay

- 10 When the appeals to the High Court were first filed, an application to stay part of the Environment Court proceedings (relating to Rule 24) was sought and duly granted.⁷ In the decision granting the stay, the Court directed the Council to report to the Environment Court within five working days of the final disposition of the appeals.

- 11 The date of the final disposition of the appeals was 1 November 2024, with the Court of Appeal issuing its decision on 3 October 2024, and no application for leave to appeal the Court of Appeal's decision having been filed.

- 12 The effect of the Court of Appeal's decision is that the decision on Rule 24 is remitted back to the Environment Court.

- 13 Further to the Council's reporting memorandum dated 8 November 2024, the Council now applies for a further partial stay of these proceedings, pending the making of further changes to section 70 of the RMA.

The Court's powers

- 14 The Court's powers to stay a proceeding derive from sections 269 and 272 of the RMA, and rule 18.10 of the District Court Rules 2014. The Court summarised its powers in the case of *Selwyn Quarries Limited v Canterbury Regional Council*, as follows:⁸

Section 272 of the Act provides that the Environment Court shall hear and determine all proceedings as soon as practical after the date on which the proceedings are lodged unless, in the particular circumstances

⁵ *Southland Regional Council v Southland Fish and Game Council* [2024] NZCA 499 at [23].

⁶ *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 from [237].

⁷ *Aratiatia Livestock Limited v Southland Regional Council* [2023] NZEnvC 39.

⁸ *Selwyn Quarries Limited v Canterbury Regional Council* [2018] NZEnvC 194 at [9]-[10].

of the case, it is not appropriate to do so. That provides the court with the flexibility it needs to manage its case (pursuant to s 269) and recognises that it may be appropriate to stay or adjourn a proceeding for a variety of reasons.

Through s 278 of the Act, the Environment Court has the powers of a District Court which enables it to utilise the District Court Rules. Rule 18.10 District Court Rules 2014 allows the court, pending the determination of an appeal, to stay a proceeding subject to any conditions it thinks just.

Legal principles with respect to applications to stay proceedings

- 15 The over-arching principle applying to any application for the adjournment (or stay) of a proceeding must be the interests of justice overall.⁹
- 16 In determining whether to grant a stay, the Court must weigh a range of factors to determine the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal succeeds.¹⁰
- 17 The relevant principles for consideration in an application for stay pending appeal were set out by the High Court in *Bergman v Bergman* and have since been applied by the Environment Court:¹¹

[9] The principles relevant to applications for stay pending appeal are well known. The factors generally to be considered in balancing the competing rights are:

- (a) Whether the appeal may be rendered nugatory by the lack of a stay;

⁹ *Director-General of Conservation v Waikato Regional Council* A232/02 at [16]. See also *Selwyn Quarries Limited v Canterbury Regional Council* [2018] NZEnvC 194 at [11], and *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 196 at [11], citing the original stay decision in *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 110.

¹⁰ *Duncan v Osborne Building Limited* (1992) 6 PRNZ 85 (CA) at 5. See also *Te Rununga o Ngati Awa v Bay of Plenty Regional Council* [2020] NZEnvC 52 at [24] and *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2021] NZHC 201 at [18].

¹¹ *Bergman v Bergman* [2014] NZHC 1567; see also *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 196 at [11], citing the original stay decision in *Gibbston Vines Limited v Queenstown Lakes District Council* [2021] NZEnvC 110.

(b) The bona fides of the applicant as to the prosecution of the appeal;

(c) Whether the successful party will be injuriously affected by the stay;

(d) The effect on third parties;

(e) The novelty and importance of questions involved;

(f) The public interest in the proceeding; and

(g) The overall balance of convenience.

18 Although the present Application does not involve a stay pending an appeal, the principles listed in [9](d) and (g) are still relevant, given that the signalled amendments to section 70 of the RMA are a direct consequence of the litigation regarding this matter.

19 In a recent Beehive press release issued on 21 October 2024, the Hon. Todd McClay, Minister for Agriculture, was quoted as saying, “The recent High Court decision threatens to require consents for previously permitted discharges into waterways, imposing costs that would hinder the primary sector’s ability to improve freshwater quality over time.”¹²

20 The Environment Court in *St John’s College Trust Board Progressive Enterprises Limited v Auckland Council* noted that the wise use of parties’ and the Court’s resources should also be considered in relation to an application to stay proceedings:¹³

[28] Progressive submitted that there is a presumption in the Act against delay. I do not agree. The critical question is whether there is unreasonable delay. In some cases awaiting the outcome of another court’s decision will amount to delay that is unreasonable, but in others it will not. Financial factors are one aspect to be considered, but overall the wise use of the parties and the Court resources must be taken into account in deciding whether or not a delay is such that it becomes unreasonable. I accept that speedy resolution is a goal, but I

¹² Affidavit of Elizabeth Ann Devery, Exhibit B.

¹³ *St John’s College Trust Board Progressive Enterprises Limited v Auckland Council* [2011] NZEnvC 70; see *Selwyn Quarries Limited v Canterbury Regional Council* [2018] NZEnvC 194 at [11].

agree that it should be afforded no additional priority over saving expense or indeed the appropriate allocation of the court's resources. It is all a question of balancing these factors in the context of the particular case before the Court.

- 21 The wise use of parties' and the Court's resources is particularly relevant to the present Application, given that if the proceeding continued in the absence of a stay, the next step is the preparation of evidence.¹⁴ We address this further below.

Grounds for Stay Application

- 22 The Council's Application is made on the following grounds:
- (a) The Government has signalled that it intends to amend section 70 of the RMA to align with changes that have already been made to section 107 of the RMA. These changes will be included in the second Resource Management Amendment Bill.¹⁵ The changes to section 107 of the RMA, which came into effect from 25 October 2024, provide a pathway for consent authorities to, relevantly, grant a discharge permit that may give rise to significant adverse effects on aquatic life, if the consent authority:
- (a) is satisfied that, at the time of granting, there are already effects described in subsection (1)(g) in the receiving waters; and
 - (b) imposes conditions on the permit; and
 - (c) is satisfied that those conditions will contribute to a reduction of the effects described in subsection (1)(g) over the duration of the permit.

Therefore, it is reasonable to assume that the changes to section 70 of the RMA will similarly provide a mechanism for the Council to introduce a permitted activity rule permitting certain incidental discharges, provided that the rule includes conditions that require improvement over time with respect to the effects of such incidental discharges.

¹⁴ *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 at [483].

¹⁵ Affidavit of Elizabeth Ann Devery, Exhibit B.

(b) Clause 46 of Schedule 12 to the RMA provides that the amendments to section 107 of the RMA apply to applications lodged with a consent authority on or after commencement of the RMA amendments, but also before the commencement of the amendments if:

(i) the consent authority has not, before commencement, served notice of its decision on the application; or

(ii) the consent authority's decision on the application was the subject of judicial review proceedings and was referred back to the consent authority for reconsideration, as long as the consent authority has not, before commencement, served notice of that decision.

On this basis, any changes to 70 of the RMA may have similar retroactive transitional provisions.

(c) The Government has signalled that it intends to introduce the second Resource Management Act Amendment Bill before the end of 2024, with it being passed into law by mid-2025.¹⁶ If the proceeding is not stayed, evidence preparation would be required. That evidence would need to address “the likelihood of effects and their significance for aquatic life...”¹⁷ arising from incidental discharges associated with the farming land-use rules in the pSWLP. This evidence would also need to be framed through the lens of the legal framework applying to discharges, as articulated in section 70 of the RMA. Significant evidence would be required to address this issue, not only from a range of technical experts but also from planning experts too,¹⁸ putting the parties to significant effort and cost. If, as has been signalled, section 70 of the RMA is changed, that legal framework would change, thus impacting on the approach to the preparation of evidence. If evidence is prepared under the existing legal framework, parties could well be prejudiced in the event of legislative change requiring the preparation of a second round of evidence.

¹⁶ Affidavit of Elizabeth Ann Devery, Exhibit A.

¹⁷ *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 at [272].

¹⁸ Affidavit of Elizabeth Ann Devery at [15].

- (d) Further, there remains the possibility that once the Government amends section 70 of the RMA, the Environment Court may approve permitted activity status without the need for further evidence. The Environment Court acknowledged there were “cogent reasons for the permitted activity classification” with respect to Rule 24 at [272] of the Court’s Fifth Interim Decision.¹⁹
- (e) With the possibility of the Environment Court approving Rule 24(a) as a permitted activity, the balance of convenience is such that it is considered appropriate to first consider the Government’s amendments to section 70 of the RMA before deciding the scope of any further evidence required.
- (f) If further consideration of Rule 24 is stayed until such time as section 70 of the RMA is amended, parties will not incur additional cost with respect to calling further evidence and the Court’s resources can be utilised more efficiently to address remaining issues in dispute between the parties to the appeals on the pSWLP. Although the speedy resolution of the appeals on the pSWLP is an important goal, as acknowledged in *St John’s College Trust Board Progressive Enterprises Limited v Auckland Council*, it is equally important to save the parties from incurring additional, and potentially unnecessary expense, as a result of calling further evidence on the likelihood of effects on aquatic life.
- (g) Further, if the matter progressed in the absence of the signalled amendments to section 70 of the RMA, there may be a significant impact on third parties, as noted by this Honourable Court in its decision on the Council’s first application for stay:²⁰

However, the Council noted (and I accept) that if the court’s interpretation is correct, and resource consent is required for all incidental discharges associated with farming land use activities in Schedule X catchments identified in the pSWLP, that will result in a significant consenting obligation for farmers and the Council. The Council estimates there are over 3,000

¹⁹ *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2022] NZEnvC 265.

²⁰ *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2023] NZEnvC 39 at [9].

farming activities requiring resource consent. *That is a significant effect on third parties.*

(Emphasis added).

Such an effect could be avoided by staying any further consideration of Rule 24 until such time as section 70 of the RMA has been amended.

- (h) The interests of justice overall are best served if an order for partial stay with respect to Rule 24 is granted.

Hearing

23 The Council wishes to be heard on this Application.

DATED this 2nd day of December 2024



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P A C Maw / I F Edwards

Counsel for the Southland Regional Council