

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

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**Notice of Opposition by the Royal Forest and Bird Protection Society of  
New Zealand Inc**

**18 December 2024**

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**Royal Forest and Bird Protection Society of New Zealand Inc** **Counsel: S Gepp KC /S Galbreath**

Solicitor acting: E Toleman  
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Wellington

Tel: 021988315

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GORE DISTRICT COUNCIL,  
SOUTHLAND DISTRICT COUNCIL &  
INVERCARGILL DISTRICT COUNCIL  
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DIRECTOR-GENERAL OF  
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TE RUNANGA O NGAI TAHU,  
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ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NEW  
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(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

**To**                   **The Registrar of the Environment Court**  
**And to**               **Southland Regional Council**  
**And to**               **Appellants and section 274 parties**

**Notice of Opposition to Application by Southland Regional Council to stay proceeding**

1. The Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) opposes the application by Southland Regional Council for a stay of part of these proceedings (Rule 24) pending the making of changes to section 70 RMA.
2. The grounds of opposition are:
  - a. There is no power to grant a “stay” under Rule 18.10 District Court Rules 2014.
  - b. The Court should not exercise its discretion under s 269 RMA to grant an adjournment. Under s 21 RMA, the Court is required to do any thing for which no time limits is prescribed as promptly as is reasonable in the circumstances. Under s 272 the Environment Court must hear and determine all proceedings as soon as practicable after they are lodged unless, in the circumstances of a particular case, it is not considered appropriate to do so. Granting an adjournment would be neither reasonable (in terms of s 21) nor appropriate (in terms of s 272):
    - i. Where the reason for seeking to adjourn is that Parliament has signalled a law change. The Court’s role is to apply operative law, not adjust its processes based on how the law may change in future.
    - ii. Given the state of water quality in Southland, which requires an urgent response.
    - iii. Given that implementation of Farm Environment Management Plans, which are a key method to implement the SWLP objectives and policies, is now delayed until after mid-2026 (according to Council’s interpretation).
    - iv. In circumstances where the Bill to amend s 70:
      1. Does not contain transitional provisions that would make the amendments relevant to resolution of Rule 24 appeals.
      2. Proposes amendments to 70 that would require further evidence on Rule 24 (if the amendments apply to resolution of Rule 24 appeals).
3. The following documents are filed with this Notice of Opposition:

- a. Affidavit of Chelsea Kim Jessie McGaw dated 17 December 2024.
  - b. Memorandum of Counsel dated 18 December 2024.
4. As the Council has stated that it wishes to be heard on its Application, Forest & Bird also wishes to be heard.

18 December 2024



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Sally Gepp KC

Counsel for Forest & Bird

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

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**Affidavit of Chelsea Kim Jessie McGaw for the Royal Forest and Bird  
Protection Society of New Zealand Inc**

*17th* December 2024

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**Royal Forest and Bird Protection Society Counsel: S Gepp KC /S Galbreath  
of New Zealand Inc**

Solicitor acting: E Toleman  
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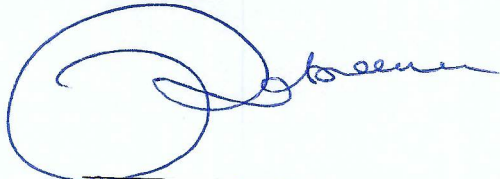
I, Chelsea Kim Jessie McGaw, Regional Conservation Manager – Otago and Southland, of Dunedin, solemnly, sincerely, and truthfully declare and affirm:

1. I am employed by the Royal Forest and Bird Protection Society of New Zealand Inc ("Forest & Bird") as the Regional Conservation Manager for the Otago and Southland regions.
2. A paginated bundle of documents referred to in my affidavit is annexed and marked "CM-1". References to documents in that bundle in this affidavit are in the following format: **CM-1/page number**.
3. By letter dated 11 November 2024, Forest & Bird asked Southland Regional Council when it considered Farm Environmental Management Plans to be required under rules in the SWLP that require a FEMP as a permitted activity condition. The letter asked how many certified FEMPs had been provided to Council since 17 May 2024 (when rules requiring a FEMP became operative) (**CM-1/1**).
4. On 21 November 2024, the Beehive released a press release stating that it was taking action to ensure Southland farmers and growers are not affected by unreasonable regional farm plan deadlines. The press release says that the change, which will affect Southland only, comes after Ministers "worked closely with Environment Southland" (**CM-1/3**).
5. On the same date, Southland Regional Council issued a press release. The press release describes farm plans as a cornerstone of Southland's approach to managing farming's environmental contamination risks, and welcomes the extension to mid-2026 (**CM-1/6**).
6. By letter dated 9 December 2024, the Council advised that it considers farmers will need to have prepared and submitted their freshwater farm plans for certification by 27 May 2026 (**CM-1/10**).

Affirmed at Dunedin


on 17<sup>th</sup> December 2024

before me:



Emily Kate Robertson

A registrar/deputy registrar/solicitor of the High Court of New Zealand

)  
)  
)   
) \_\_\_\_\_

Name

Chelsea Kim  
Jessie McGaw

**EXHIBIT STAMP**

This is the exhibit marked **CM-1** referred to in the annexed affidavit of **Chelsea Kim Jessie McGaw** sworn/affirmed at **Dunedin** this **17<sup>th</sup>** day of **December** 2024 before me:

*[Signature]*

.....  
A Barrister/Solicitor of the High Court of New Zealand  
*Emily Kate Robertson*

CM-1/01



**SALLY GEPP**  
BARRISTER

Southland Regional Council

For: Chief Executive - Wilma Falconer  
General Manager, Integrated Catchment Management – Lucy Hicks

By email: [service@es.govt.nz](mailto:service@es.govt.nz)

11 November 2024

Dear Ms Falconer and Ms Hicks

**Southland Water and Land Plan – Farm Environment Management Plans**

1. I act for the Royal Forest & Bird Protection Society of New Zealand Inc. I am writing on behalf of my client to request information relating to implementation of the Southland Water and Land Plan (SWLP).
2. Various rules in the SWLP require that a Farm Environmental Management Plan (FEMP) is prepared and certified, and compliance with it is audited, as a condition of the rule. For example, Farming Rule 20(a) states that the use of land for a farming activity is a permitted activity provided conditions are met including:
  - (iii) a Farm Environmental Management Plan is:
    - (1) prepared, and certified, and compliance with it is audited, in accordance with Appendix N; and
    - (2) implemented by the landholder completing the practices, actions, and mitigations specified in the Farm Environmental Management Plan in accordance with the timeframes set out in that Plan.
3. Similarly, the use of land for a farming activity that does not meet permitted activity conditions is a restricted discretionary activity subject to meeting conditions including preparation, certification and audit of a FEMP. Relevant parts of the SWLP were made operative on 17 May 2024.
4. Please advise:
  - a. Southland Regional Council's position regarding the date by which FEMPs must be:
    - i. Prepared and submitted for certification.
    - ii. Certified.

- b. How many certified FEMPs have been provided to Southland Regional Council since 17 May 2024.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sally Gepp". The signature is written in a cursive, flowing style.

Sally Gepp

Barrister

## Releases (/releases)

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21 NOVEMBER 2024

# Government action provides Southland farmers more time to meet plan requirements



**HON TODD MCCLAY**(/MINISTER/HON-TODD-MCCLAY)



**HON PENNY SIMMONDS**(/MINISTER/HON-PENNY-SIMMONDS)



**HON ANDREW HOGGARD**(/MINISTER/HON-ANDREW-HOGGARD)

[Agriculture \(/portfolio/nationalactnew-zealand-first-coalition-government-2023-2026/agriculture\)](/portfolio/nationalactnew-zealand-first-coalition-government-2023-2026/agriculture)

[Environment \(/portfolio/nationalactnew-zealand-first-coalition-government-2023-2026/environment\)](/portfolio/nationalactnew-zealand-first-coalition-government-2023-2026/environment)

The Government is taking action to ensure Southland farmers and growers are not affected by unreasonable regional farm plan deadlines, Agriculture Minister Todd McClay, Environment Minister Penny Simmonds and Associate Environment Minister Andrew Hoggard say.

“Cabinet has agreed to provide more time for farmers and growers to comply with regional rules in the Southland Water and Land Plan, by providing alternate national timelines,” Mr McClay says.

“Southland’s regional plan contains a requirement for farmers to prepare a farm plan by the end of this year, if the national system is not in place.

“Cabinet’s decision will remove uncertainty for farmers in the region who would have been unable to meet these timeframes, giving them until mid-2026 to meet the regional requirements.

“We do not want to see hard-working farmers and growers in the region impacted through no fault of their own.”

In October, the national freshwater farm plan system was paused to enable improvements to make it more cost-effective and practical for farmers.

“Our action will avoid unnecessary duplication and give farmers more time to develop farm plans which are practical and fit-for-purpose,” Mr Hoggard says.

“We are committed to simplifying the system and removing red tape.”

Cabinet’s decision will enable the change to take effect in Southland only.

“We have worked closely with Environment Southland to swiftly come up with a workable solution to support Southland farmers,” Ms Simmonds says.

“This targeted change will mean that national and regional farm planning systems are well aligned to avoid duplication, uncertainty, and cost.

“We intend to finalise changes to the national freshwater farm plan system by mid-2025.”



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# **Te Kāwanatanga o Aotearoa** **New Zealand Government**

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News

# Farm plan solution for Southland

21 Nov 2024, 4:15 pm News

Environment Southland welcomes the Government's announcement to support Southland farmers and growers with farm plans.

The Government has put in place a regulatory change that provides Southland farmers with a further 18 months (until mid-2026) to comply with the rules in the Southland Water and Land Plan and submit a farm plan for certification.

Without this new timeframe, Southland farmers would have been required to have a farm plan by the end of November 2024.

Farm plans have long been a cornerstone of Southland's approach to managing environmental contamination risks associated with farming activities and are a key tool in the Southland Water and Land Plan.

Environment Southland Chairman Nicol Horrell said it was a common-sense solution for Southland farmers and growers.

"For many years we've worked alongside farmers to provide support because we recognise the value of risk-based farm plans for getting environmental improvements.

"The really good thing about the Southland Farm Plans is the requirement in our plan to tailor them to the unique circumstances of individual properties and the catchments they are in."

Chairman Horrell said the Environment Court process for the Water and Land Plan led to a strengthened role for farm plans, which was supported in principle by all parties.

“Given the long history of working with farm plans in Southland, I’m confident farmers here will comfortably move forward with the Southland Farm Plans.” CM-1/07

Updated and simplified national regulations are expected in the first half of next year and Environment Southland is also looking at how it can make improvements to its farm plan rules.

The next two years will be focused on working with the community and stakeholders at both the catchment and property scale to encourage positive action. Over the coming months, Environment Southland will be sharing catchment-specific information with opportunities for action to support farmers to develop and refine their Southland Farm Plans.

“Our message to farmers continues to be – ‘start pulling together the information for your farm plan now’. We will be there to support you to share the latest information we have.” Chairman Horrell said.

Updated material including guidance for creating a farm plan is being tested with farmers currently and will form part of the rollout over the coming months.

For further advice on farm plans, please call Environment Southland on 0800 76 88 45 or go to [www.es.govt.nz/farmplans](http://www.es.govt.nz/farmplans)

## Ministers' Press Statement

**Hon Todd McClay - Minister of Agriculture**

**Hon Penny Simmonds - Minister for the Environment**

**Hon Andrew Hoggard - Associate Minister for the Environment**

21 November 2024

### **Government action provides Southland farmers more time to meet plan requirements**

The Government is taking action to ensure Southland farmers and growers are not affected by unreasonable regional farm plan deadlines, Agriculture Minister Todd McClay, Environment Minister Penny Simmonds and Associate Environment Minister Andrew Hoggard say.

“Cabinet has agreed to provide more time for farmers and growers to comply with regional rules in the Southland Water and Land Plan, by providing alternate national timelines,” Mr McClay says.

“Southland’s regional plan contains a requirement for farmers to prepare a farm plan by the end of this year, if the national system is not in place.



“Cabinet’s decision will remove uncertainty for farmers in the region who would have been unable to meet these timeframes, giving them until mid-2026 to meet the regional requirements.” CM-1/08

“We do not want to see hard-working farmers and growers in the region impacted through no fault of their own.”

In October, the national freshwater farm plan system was paused to enable improvements to make it more cost-effective and practical for farmers.

“Our action will avoid unnecessary duplication and give farmers more time to develop farm plans which are practical and fit-for-purpose,” Mr Hoggard says.

“We are committed to simplifying the system and removing red tape.”

Cabinet’s decision will enable the change to take effect in Southland only.

“We have worked closely with Environment Southland to swiftly come up with a workable solution to support Southland farmers,” Ms Simmonds says.

“This targeted change will mean that national and regional farm planning systems are well aligned to avoid duplication, uncertainty, and cost.

“We intend to finalise changes to the national freshwater farm plan system by mid-2025.”

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## Contact us

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Waikiwi

Invercargill 9810

New Zealand



Our reference: 2024 073  
Enquiries to: [service@es.govt.nz](mailto:service@es.govt.nz)

9 December 2024

Sally Gepp KC  
3 Brookside  
Nelson 7010

By email to: [sally@sallygepp.co.nz](mailto:sally@sallygepp.co.nz)

Dear Sally

***Request for Information regarding Southland Environmental Management Plans***

I refer to your letter dated 11 November 2024, regarding the implementation of the Southland Water and Land Plan (SWLP). In your letter, you asked the Council to advise:

- (a) Southland Regional Council's position regarding the date by which Farm Environmental Management Plans (FEMP) must be:
  - (i) Prepared and submitted for certification;
  - (ii) Certified.
- (b) How many certified FEMPs have been provided to Southland Regional Council since 17 May 2024.

Because your letter requests information from the Council, we have treated your email as a LGOIMA request.

**Application of Regulations to Southland region**

I note that since receiving your letter, the Government has issued the Resource Management (Application of Part 9A – Freshwater Farm Plans: Southland) Order 2024 (**Order**). This Order confirms that Part 9A of the Resource Management Act 1991 (**RMA**) applies to the Southland region, from the commencement of the Order on 27 November 2024.

Appendix N of the SWLP confirms that a Farm Environmental Management Plan is either:

- (a) a freshwater farm plan prepared, implemented and audited in accordance with regulations under Part 9A and which apply within the Southland region, plus any additional information or components required by Part B of Appendix N; or
- (b) if freshwater farm plans under Part 9A of the RMA are not yet required in the Southland region, a Farm Environmental Management Plan will be prepared and implemented in accordance with Parts A to C of Appendix N.

For now  
& our future



As the Resource Management (Freshwater Farm Plans) Regulations 2023 (**Regulations**) are in force in the Southland region, a Farm Environmental Management Plan must meet the requirements of the Regulations, plus any of the information in Part B of Appendix N that is not otherwise addressed by the Regulations.

The application of Part 9A to the Southland region means that farmers will need to have completed the preparation of their freshwater farm plans by 27 May 2026, and submitted them for certification by that date (i.e., within 18 months from 27 November 2024).

#### **Certification of Freshwater Farm Plans**

Part 3 of the Regulations prescribes the timeframes that apply for certification. Once a Freshwater Farm Plan is submitted for certification, the certifier must provide their draft decision and assessment report to the farm operator within 30 working days after the farm operator has submitted their plan to the certifier for certification. Clauses 22 to 26 of the Regulations prescribe further timeframes, depending on whether the farm operator agrees with the draft decision.

#### **Certified farm plans received to date**

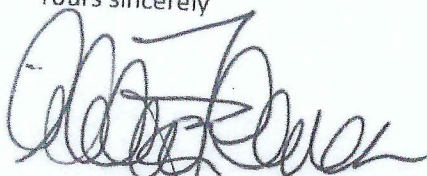
Southland Regional Council has not yet received any certified Farm Environmental Management Plans since 17 May 2024.

#### **LGOIMA Request**

You will be aware that if you are not satisfied with this response, you are able to refer this matter to the Office of the Ombudsman under s27(3) of the LGOIMA.

Should you require any further information or clarification, please do not hesitate to contact Liz Devery in the first instance.

Yours sincerely



Wilma Falconer  
Chief Executive

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**Memorandum of counsel for the Royal Forest and Bird Protection  
Society of New Zealand Inc**

**18 December 2024**

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**Royal Forest and Bird Protection Society of New Zealand Inc** **Counsel: S Gepp KC /S Galbreath**

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Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

## Introduction and summary

1. The Royal Forest and Bird Protection Society of New Zealand Inc (“Forest & Bird”) opposes the application by Southland Regional Council for a stay of the proceeding on the grounds set out in the Notice of Opposition dated 18 December 2024, and for the reasons set out in this Memorandum. It relies on the affidavit of Chelsea McGaw, dated 17 December 2024.
2. In summary, Forest & Bird submits that there is no power to grant a “stay” as sought by the Council. The Court may adjourn a step in a proceeding, but should not exercise its discretion to do so in this case. It is not appropriate for the Court to delay consideration of an appeal on the basis of a future law change. Furthermore, the state of Southland water quality demands an urgent response through an effective regional plan. A recent change to extend the date by which Farm Environment Management Plans (“FEMP”) are required in Southland region to mid-2026 renders the SWLP’s methods entirely ineffective at implementing its objectives and policies or achieving sustainable management in the meantime. In that context, it is crucial that Rule 24, which manages discharges incidental to farming land uses, is concluded as soon as practicable. For those reasons, delaying resolution of appeals on Rule 24 is both unreasonable<sup>1</sup> and inappropriate.<sup>2</sup>
3. This memorandum addresses:
  - a. Relevant context.
  - b. Power to grant stay / adjournment.
  - c. Grounds for stay / adjournment.

## Relevant context

### *Timeline*

4. The proposed SWLP was developed in 2015 and 2016, and notified in June 2016. The decisions version was accepted by Council on 4 April 2018.
5. There were 25 appeals to the Environment Court. Forest & Bird was an appellant and also joined several appeals as an interested party. Following mediations, the Environment Court held hearings through 2018 to 2023, and released nine interim decisions between 2019 and 2023. Rule 24 was dealt with in the Court’s fifth interim decision in 2022.<sup>3</sup>
6. The fifth interim decision was appealed to the High Court by Federated Farmers Southland Inc, Southland Regional Council, Fonterra Co-Operative Group Limited and DairyNZ Limited. Forest & Bird joined the appeals as an interested party. Forest & Bird applied for a priority fixture for the appeals on the basis that, considering the state of water in Southland, it was in the public interest for the case to be heard promptly: the Environment Court would then be enabled to issue its findings on rule 24 and the Southland

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<sup>1</sup> In terms of s 21 RMA

<sup>2</sup> In terms of s 272 RMA

<sup>3</sup> *Aratiatia Livestock Ltd and Ors v Southland Regional Council* [2022] NZEnvC 265



Regional Council could then implement the rule in light of those findings.<sup>4</sup> The High Court granted the priority fixture, for reasons including the interests of justice in concluding the SWLP as quickly as is justly possible:<sup>5</sup>

[23] The public interest factor present weighs in favour of granting a priority hearing. The number of appearances and the interests represented by those appearing indicates the significance of the appeal to a variety of sectors, organisations, and entities. The PSWLP, by its nature, is of major consequence for Southland. It is in the interests of justice that such an influential document be finalised as quickly as is justly possible.

7. On 10 March 2023, the Environment Court granted an application by Southland Regional Council to stay that part of the proceeding that relates to Rule 24.<sup>6</sup> The application sought to stay the proceeding pending determination of its High Court appeal, and was not opposed.
8. The High Court issued its decision in April 2024, upholding part of the Federated Farmers appeal but declining the other appeals.<sup>7</sup>
9. Southland Regional Council appealed to the Court of Appeal. As respondent to the appeal, Forest & Bird applied for the application to be placed on the Court of Appeal fast track. The primary reason given was the urgency in improving Southland's water quality. Referral to the fast track was directed by the Court.<sup>8</sup>
10. The Court of Appeal heard the appeal on 28 August 2024 and released its decision on 3 October 2024, less than five weeks after hearing it.<sup>9</sup>
11. On 2 December 2024, Southland Regional Council applied to stay the Environment Court proceeding in relation to rule 24 until such time as section 70 RMA has been amended.

#### *The state of water quality in Southland*

12. The state of water quality in Southland was the subject of a large volume of evidence before the Environment Court. State of the environment evidence produced by Southland Regional Council witnesses was alarming. In summary, that evidence demonstrated that:<sup>10</sup>
  - a. *Groundwater*: Anthropogenic contamination of groundwater is widespread in Southland. In particular, nitrogen and faecal contamination are of primary concern, both from a human and ecosystem health perspective. For the 17 year period 2000 to 2016, increasing trends in groundwater NNN have been determined at 15

<sup>4</sup> *Federated Farmers Southland Inc v Southland Regional Council* [2023] NZHC 686 at [26]

<sup>5</sup> *Federated Farmers* (priority decision) at [23]

<sup>6</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 39

<sup>7</sup> *Federated Faermers Southland inc v Southland Regional Council* [2024] NZHC 726

<sup>8</sup> Direction of Justice Mallon dated 25 July 20254.

<sup>9</sup> *Southland Regional Council v Southland Fish and Game Council* [2024] NZCA 499

<sup>10</sup> The evidence referenced below is all within the Court's file in relation to the SWLP appeals, but for ease of reference a link to the evidence on Southland Regional Council's website is also provided.

of the 23 (65%) regional SoE monitoring sites with sufficient data for analysis.<sup>11</sup>

- b. *Estuaries and lakes*: There are many estuaries and lagoons located along the coast in Southland. The main catchments in Southland all end in estuaries or lagoons and the catchments for the Waiau Lagoon, Jacobs River Estuary, New River Estuary and Toetoes (Fortrose) Estuary represent the majority of the land area (not including conservation land) in Southland. New River Estuary, Jacobs River Estuary and Toetoes (Fortrose) Estuary are all currently receiving sediment and nutrient inputs beyond their assimilative capacity and show signs of eutrophication and expansive degraded areas. A reduction of nutrient and sediment inputs is required to prevent further deterioration. Waikawa Estuary and Haldane Estuary are currently in a moderate to good health state. However, an approximate doubling of nutrient input from land use change and/or intensification is likely to result in a deterioration of conditions, similar to those seen in New River and Jacobs River Estuary. Waituna lagoon is a stressed lagoon, which is showing clear signs of poor water quality and eutrophication via cyanobacterial and algal blooms.<sup>12</sup>
- c. *Rivers and streams*: Non-point source agricultural inputs, such as leaching and runoff, are the main source of nutrient contaminants in Southland's rivers. There is elevated microbial contamination in lowland rivers and streams, resulting in a high risk to human health. NNN trends for the 17 year time period from January 2000 to December 2016 illustrate deteriorating concentrations at 15 of 34 and 4 of 6 sites with sufficient data and improvements in concentration at 2 of 34 and 1 of 6 sites, with trends at the balance of sites being indeterminate.<sup>13</sup>

13. Evidence from Kate McArthur, a freshwater ecologist called by Forest & Bird, supported the Council's evidence:<sup>14</sup>

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<sup>11</sup> Evidence of Ewan Rodway for Southland Regional Council dated 14 December 2018 at 14(a) and (c). <https://www.es.govt.nz/repository/libraries/id:26gi9ayo517q9stt81sd/hierarchy/about-us/plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background-documents/evidence/Southland%20Regional%20Council%20-%20Evidence%20in%20chief%20-%20Ewen%20Rodway>

<sup>12</sup> Evidence of Nicholas Ward for Southland Regional Council dated 14 December 2018 at 14 – 20 <https://www.es.govt.nz/repository/libraries/id:26gi9ayo517q9stt81sd/hierarchy/about-us/plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background-documents/evidence/Southland%20Regional%20Council%20-%20Evidence%20in%20chief%20-%20Nick%20Ward>

<sup>13</sup> Evidence of Roger Hodson for Southland Regional Council dated 14 December 2018 at 13. <https://www.es.govt.nz/repository/libraries/id:26gi9ayo517q9stt81sd/hierarchy/about-us/plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background-documents/evidence/Southland%20Regional%20Council%20-%20Evidence%20in%20chief%20-%20Roger%20Hodson>

<sup>14</sup> Statement of Evidence of Kathryn Jane McArthur dated 15 February 2019: <https://www.es.govt.nz/repository/libraries/id:26gi9ayo517q9stt81sd/hierarchy/about->

16. Many of Southland's rivers, lakes, lagoons and estuaries are in a poor state with respect to water quality and ecosystem health. Shallow groundwater is also affected in many areas. The state of water quality has been declining over the last two decades, largely attributable to expansion and intensification of land used for dairying and winter feeding of dairy stock and associated land management and drainage practices. Diffuse contamination of surface and groundwater is the primary source of contamination of Southland's aquatic ecosystems. Anthropogenic impacts are degrading freshwater values across multiple aquatic ecosystem types.

17. A number of freshwater sub-catchments within Southland have been identified as being of national priority for protection (including wetland and lagoons ecosystems) and contain nationally and regionally important communities and populations of indigenous fish, many species of which are threatened with extinction.

18. The poor state and declining trends in water quality and indicators of ecosystem health warrant an urgent and effective management response at the regional level. It is clear that water quality in Southland is degraded as a result of land use (human activities) and is 'over-allocated' with respect to the pervasive level of water quality degradation, degrading trends in water quality, and the adverse effects this is having on freshwater values such as ecosystem health, human health for recreation, human drinking water, and cultural values including mahinga kai. Southland presents a clear case of a need to improve water quality, not simply to halt decline.

14. In its first Interim Decision,<sup>15</sup> the Environment Court held that "it is not seriously contested that many of the region's waterbodies are likely degraded".<sup>16</sup> Further, the Environment Court recorded the water quality experts' agreement on water bodies or segments of water bodies where water quality is below national bottom lines or minimum acceptable states.<sup>17</sup>
15. There is a need for urgency in improving Southland's water quality. In considering whether the pSWLP should seek to "hold the line" (stop any further degradation) or to also commence improvement of water quality, the Court noted that "the risk to ecosystem health, if improvement in water quality was deferred until after the completion of a future [planning] process, was described by Ms McArthur as "devastating, particularly for the region's unique and threatened freshwater ecology".<sup>18</sup>

#### SWLP

16. The SWLP is largely operative. Some objectives were made operative in 2021. All other parts except 5 outstanding provisions (Policy 42, Rules 24, 54 and 78, and Appendix L.5) were made operative on 17 May 2024.

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[us/plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background-documents/evidence/Royal%20Forest%20and%20Bird%20Protection%20Society%20of%20NZ%20-%20Evidence%20in%20chief%20-%20Kathryn%20McArthur](https://www.govt.nz/our-plans-and-strategies/regional-plans/proposed-southland-water-and-land-plan/documents/background-documents/evidence/Royal%20Forest%20and%20Bird%20Protection%20Society%20of%20NZ%20-%20Evidence%20in%20chief%20-%20Kathryn%20McArthur)

<sup>15</sup> *Aratiatia Livestock Limited v Southland Regional Council* [2019] NZEnvC 208

<sup>16</sup> At [8]

<sup>17</sup> At [55]

<sup>18</sup> At [117]

### Land use rules and Farm Environmental Management Plans

17. The SWLP contains a suite of objectives, policies and methods to manage the effects of agricultural activities on freshwater. Rules 20 to 23, 25 and 70 seek to manage farming-related land uses primarily to mitigate impacts on waterbodies. Some of those rules contain conditions (e.g. setbacks, spatial limits on intensive winter grazing) that must be met in order for farming land uses to qualify as permitted activities, but all of the farming rules rely on a condition requiring preparation, certification and implementation of a certified FEMP as the key method. For example, Policy 16(c) (Farming activities that affect water quality) is to require all farming activities to be undertaken in accordance with a FEMP, and under Rule 20 the use of land for a farming activity is permitted provided that a FEMP is implemented by the landholder. The FEMP must (inter alia):
- a. include a nutrient budget;<sup>19</sup>
  - b. demonstrate that losses of nitrogen, phosphorus, sediment and microbial contaminants to water bodies do not increase compared to a benchmark;<sup>20</sup> and
  - c. demonstrate that adverse effects on water quality will be reduced, if the farm is within a degraded catchment identified in Schedule X.<sup>21</sup>
18. The FEMP is the mechanism for requiring those outcomes. The Environment Court's fifth interim decision recorded that:<sup>22</sup>
- All parties are agreed on the use of Farm Environmental Management Plans as **the key method** for giving effect to the proposed plan's policies and objectives. The Management Plan adopts a risk management process which is appropriate ahead of a plan change giving effect to the National Policy Statement for Freshwater Management 2020, and given the current state of knowledge concerning some farming activities
- (emphasis added)
19. The Court's ninth decision similarly described FEMPs "an important method to achieve the plan's objectives and policies".<sup>23</sup>
20. The suite of farming land use rules requiring a FEMP as a permitted activity condition became operative on 17 May 2024. Under Appendix N, a FEMP must be either a freshwater farm plan prepared, implemented and audited in accordance with regulations under Part 9A RMA plus additional components required by Part B of Appendix N, or if freshwater farm plans are not yet required under Part 9A, a FEMP prepared and implemented in accordance with Parts A to C of Appendix N.

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<sup>19</sup> Appendix N, Clause (8)

<sup>20</sup> Appendix N, Clause (9)(a)

<sup>21</sup> Appendix N, Clause (9)(a)(iv)

<sup>22</sup> At [9]

<sup>23</sup> *Aratiatia Livestock Ltd v Southland Regional Council* [2023] NZEnvC 204 (ninth interim decision) at [6]

21. Council considered that FEMPs would have been required by November 2024.<sup>24</sup> However, the Council's interpretation is that freshwater farm plans are now "required" under Part 9A RMA by mid-2026 and as such no FEMP is required prior to that date.<sup>25</sup>
22. Forest & Bird disagrees with that interpretation. Its position is that FEMPs were required to be adopted on 17 May 2024 (where relied on to meet a permitted activity rule) or an application for resource consent needed to have been lodged by 17 November 2024 (relying on s 20A RMA). Regardless of Forest & Bird's opinion, the approach that the Council will take to implementation of the SWLP is that no farm plans are required to be in place until after the mid-2026 certification date. There may be separate industry-specific requirements for farm plans for certain farms, but those are not sufficient to achieve the SWLP objectives and policies.

#### Rule 24

23. Rule 24 authorises incidental farming discharges as a permitted activity where specified standards are met. The Environment Court found (in summary) that it could not be satisfied that Rule 24 would ensure that farming discharges will not have significant adverse effects on aquatic life, and thus could not be satisfied that Rule 24 was consistent with s 70 RMA. The Environment Court invited parties to provide evidence to demonstrate that with the improvements to SWLP methods put in place through the Court's decisions, the s 70 standards would be met.<sup>26</sup>

[279] Any party arguing in support of the proposition that under the plan provisions, future discharges of contaminants are unlikely to cause a significant adverse effect on aquatic life either by themselves or in combination with the same, similar or other contaminants, is to propose timetable directions for the filing of supplementary evidence.

24. While that evidentiary process is yet to come, Forest & Bird anticipates that the evidence will demonstrate that it is necessary for *at least some* incidental farming discharges that contribute to *at least some* catchments identified in Schedule X (Catchments of degraded waterbodies where improvement in water quality is required).<sup>27</sup>
25. As set out above, there is urgency in concluding Rule 24 and for it to become operative, because the state of Southland's degraded waterbodies and their effects on aquatic life require an urgent response.

#### Implications of delaying FEMPs

<sup>24</sup> Southland Regional Council Press release dated 21 November 2024 (**CM1-6**)

<sup>25</sup> Letter Southland Regional Council to Forest & Bird dated 9 December 2024 (**CM-1/3**). The Resource Management (Application of Part 9A – Freshwater Farm Plans: Southland) Order 2024 was made in November 2024, and commenced on 27 November 2024. It specifies that Part 9A RMA applies to the Southland Region. The Council's interpretation is that this means that freshwater farm plans under Part 9A are required in the Southland region, and that the date by which farm plans must be submitted for certification is 27 May 2026.

<sup>26</sup> Fifth Interim Decision at [279]

<sup>27</sup> Discussed in the Court's fifth interim decision at [40] – [84] and Annexure 4

26. The SWLP was notified in 2016. The “key method” for giving effect to the SWLP objectives and policies will not be in place until at least mid-2026.
27. Had the requirement for FEMPs been implemented once SWLP farming rules became operative, there would be less urgency for final determination of Rule 24 as an important method for reducing contaminant discharges and thereby contributing to achievement of the SWLP objectives and policies would already have been in place. Without that method, there is very little in the SWLP (other than those limited mechanisms such as setbacks) to start to achieve any improvement in the dire state of Southland’s water quality.

*Introduction of amendment to s 70 RMA*

28. On 10 December 2024, the Resource Management (Consenting and Other System Changes) Amendment Bill 2024 (“Bill”) was introduced. The Bill would amend s 70 as set out below:

**15 Section 70 amended (Rules about discharges)**

(1) In section 70(1), replace “Before” with “Except as provided in subsection (3), before”.

(2) After section 70(2), insert:

(3) A regional council may include in a regional plan a rule that allows as a permitted activity a discharge described in subsection (1)(a) or (b) that may allow the effects described in subsection (1)(g) if—

(a) the council is satisfied that there are already effects described in subsection (1)(g) in the receiving waters; and

(b) the rule includes standards for the permitted activity; and

(c) the council is satisfied that those standards will contribute to a reduction of the effects described in subsection (1)(g) over a period of time specified in the rule.

29. The Bill would insert transitional provisions,<sup>28</sup> but these do not address cl 15. Accordingly, unless the transitional provisions are amended, even if the Bill becomes law the Environment Court’s determination of appeals concerning Rule 24 is to be completed as if s 70 had not been amended.<sup>29</sup>
30. If the Environment Court is required to determine Rule 24 appeals in accordance with an amended version of s 70, evidence will be required:
- a. To establish the “period of time” to be referred to in Rule 24.
  - b. To demonstrate to the Court’s satisfaction that any standards in Rule 24 will contribute to a reduction of the effects described in s 70(1)(g) within that period of time. Such evidence will need to take into account that FEMPs will not now be required until 2026.
  - c. Potentially, to support additional standards in Rule 24, in order to provide that satisfaction.

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<sup>28</sup> Bill cl 72 and Schedule

<sup>29</sup> Legislation Act 2019, s 33.

### **Powers to grant stay / adjournment**

31. Southland Regional Council relies on ss 269 and 272 RMA and rule 18.10 District Courts Rules.
32. Rule 18.10 District Courts Rules does not apply, as it is concerned with “a stay of proceeding in relation to the decision appealed against,” which is not relevant in the present case. The Council’s submission that the principles are relevant on the basis that the amendments to s 70 “are a direct consequence of the litigation” is not persuasive. Nor should weight be placed on statements by the Minister of Agriculture in a press release regarding the implications of the High Court decision.<sup>30</sup>
33. There is no power to grant a stay.<sup>31</sup>
34. However, section 269 RMA provides that the Environment Court may regulate its own procedure, subject to a requirement to regulate its proceedings in a manner that best promotes their timely and cost-effective resolution. Section 21 RMA requires every person who exercises or carries out functions, powers, or duties, or is required to do anything, under this Act for which no time limits are prescribed, to do so as promptly as is reasonable in the circumstances. Section 272 provides that the Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so.
35. Those provisions enable the Court to adjourn a step in a proceeding, but only where the delay would not be unreasonable or inappropriate.<sup>32</sup>

### **Grounds for stay / adjournment**

36. Southland Regional Council seeks a stay on the basis that:
  - a. If the proceeding is not stayed, evidence preparation would be required and would need to be “framed through the lens of the legal framework applying to discharges, as articulated in s 70.” If s 70 changes, that legal framework would change. A second round of evidence could be required.
  - b. Amendment of s 70 may enable the Environment Court to approve permitted activity status without the need for further evidence. This possibility means the balance of convenience favours considering the Government’s amendments to s 70 before deciding the scope of further evidence.
  - c. The Court’s resources can be utilised more efficiently to address remaining issues in dispute between parties to the SWLP appeals.

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<sup>30</sup> At 18 - 19

<sup>31</sup> Discussed without a final determination in *St John’s College Trust Board v Auckland Council* [2011] NZEnvC 70 at [14]-[15]

<sup>32</sup> As, for example in *Royal Forest and Bird Protection Society of New Zealand Inc v Wset Coast Regional Council* [2019] NZEnvC 65 and *St John’s College Trust Board v Auckland Council* [2011] NZEnvC 70

- d. There may be a significant impact on third parties as a result of a consenting obligation for farmers and the Council if the matter progresses in the absence of s 70 amendments.
  - e. The interests of justice are best served by the stay.
37. The Council's application is essentially seeking to delay a Court proceeding on the basis that Parliament has signalled a law change, and that law change is anticipated to be favourable to the Council's position in the litigation. The Council has not provided any examples of the Court having stayed a proceeding on that basis before, and Forest & Bird submits that the Court should be very cautious about proceeding in this way. The Court's role is to apply operative law, not to adjust its processes based on how the law may change in future.
38. The Council does not mention the impact on Southland's water quality and aquatic ecosystems from further delaying a decision on Rule 24. Forest & Bird submits that this must be a significant consideration, deserving of considerable weight. The High Court and Court of Appeal were satisfied of the need to prioritise each appeal hearing on the basis of the public interest in making Rule 24 operative as promptly as reasonably practicable.
39. The Council does not refer to the implications of its interpretation of the SWLP and national regulations as not requiring FEMPs until mid-2026. Any assessment of the reasonableness and appropriateness of delaying resolution of Rule 24 must be informed by consideration of whether the balance of the SWLP will implement Council's functions, and the RMA's sustainable management purpose, in the meantime. Forest & Bird submits that without a requirement for FEMPs to be prepared and implemented, the SWLP is toothless, and the existing trajectory of declining water quality will continue at least late-2026 once FEMPs have been certified and start to be implemented.
40. The Bill had not been introduced at the time that Council lodged its stay application. It is now apparent that several of the Council's grounds are not borne out by the Bill itself:
  - a. Given the lack of a relevant transitional provision, the s 70 amendments will not affect resolution of Rule 24 appeals.
  - b. If the amendments do affect resolution of Rule 24 appeals, further evidence will be required – this is not a scenario where the Court could simply sign off on the existing Rule.
41. The Council refers to the Court's resources being used to address remaining issues in dispute between parties to the SWLP appeals, but does not expand on this. Forest & Bird is not aware of any issues still in dispute, other than issues that are stayed or on hold.
42. For those reasons, Forest & Bird submits that adjourning the proceeding to wait for the outcome of Parliament's consideration of the Bill would be



unreasonable and inappropriate, and as such the Court should decline the application.

A handwritten signature in black ink, appearing to read "Sally Gepp". The signature is written in a cursive, flowing style.

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Sally Gepp KC  
Counsel for Forest & Bird