

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2023- -

I TE KŌTI MATUA O AOTEAROA
KI ŌTAUTAHI

UNDER THE Resource Management Act 1991 ("**Act**")

IN THE MATTER OF an appeal under section 299 of the Act

BETWEEN **FEDERATED FARMERS SOUTHLAND
INCORPORATED**

Appellant

AND **SOUTHLAND REGIONAL COUNCIL**

Respondent

**NOTICE OF APPEAL IN RESPECT OF
ENVIRONMENT COURT'S FIFTH INTERIM DECISION ON APPEALS ON THE
PROPOSED SOUTHLAND REGIONAL LAND AND WATER PLAN**

31 JANUARY 2023

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TO: The Registrar of the High Court at Christchurch

AND TO: The Registrar of the Environment Court at Christchurch

AND TO: The First Respondent, Southland Regional Council

AND TO: The parties to the Environment Court appeals

TAKE NOTICE that Federated Farmers Southland Incorporated (**Appellant**) will appeal the decision of the Environment Court in *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2022] NZEnvC 265 (**Decision**) delivered and notified on 23 December 2022 **UPON THE GROUND** that the Decision is erroneous in law.

SCOPE OF APPEAL

1. The Appellant appeals against all aspects of the Decision that relate to:
 - (a) The interpretation of section 70 of the Resource Management Act 1991 and its application to Rule 24 of the proposed Southland Water and Land Plan; and
 - (b) The factual findings at [266] and [278] that:
 - (i) water quality attributes that are below the national bottom line or minimum acceptable state are causing significant adverse effects on aquatic life; and
 - (ii) incidental discharges from farming activities on land are the likely cause of water quality attributes falling below the national bottom line or minimum acceptable state.

ERRORS OF LAW

2. The Environment Court erred in law in:
 - (a) finding at [259] that section 70 applies to diffuse discharges from farming activities;
 - (b) finding at [266] and [278] that:

- (i) water quality attributes that are below the national bottom line or minimum acceptable state are causing significant adverse effects on aquatic life;
 - (ii) the significant adverse effects on aquatic life are likely the result of contaminant discharges from land-based farming activities.
- (c) defining its role at [267] – [274] as including the approval of the uncontested parts of Rule 24.

GROUNDS OF APPEAL

Context

3. Section 70(1) of the Resource Management Act 1991 reads:

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.***

(emphasis added)

4. Rule 24(a) of the proposed Southland Water and Land Plan reads:

(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*
- (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.*

5. The two appeals challenging Rule 24 seek to add a new condition (iii) that reads:

- (iii) 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) 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.*

Diffuse Discharges

6. In finding that section 70 applies to both point source and diffuse discharges, the Environment Court:

- (a) correctly recorded that the term “receiving waters” is well understood to be the point of discharge (para [255]);
- (b) correctly recorded that the proposed Southland Water and Land Plan defines “receiving waters” as including waterbodies that receive run-off (para [260]);
- (c) correctly recorded that the “area of ‘reasonable mixing’ is context-sensitive (para [257]);
- (d) then concluded the plain and ordinary meaning of the text of section 70 includes discharges from both point source and diffuse discharges (para [259]);

without taking into account:

- (e) the purpose and context of section 70;
- (f) the wide range of potential diffuse discharges;
- (g) the limited subset of potential diffuse discharges that can lead to an identifiable area of reasonable mixing, such as those in *King Salmon*;
- (h) the contextual difficulty identifying the receiving waters for incidental discharges from farming activities on land; and
- (i) whether the purpose and context of section 70 means it applies to incidental discharges from farming activities on land.

Significant Adverse Effects

7. In finding that water quality attributes being below the relevant national bottom line or minimum acceptable state equates to causing significant adverse effects on aquatic life the Court:

- (a) recorded at [263] that it did not accept the legal submission “that there is no evidence of diffuse discharges from farming activities,

either individually or cumulatively, causing adverse effects including significant adverse effects on aquatic life”;¹

- (b) set out at [264] the “narrative description” for the ecosystem health value attributes from the National Policy Statement – Freshwater Management where the current water quality is below a national bottom line or minimum acceptable state;²
- (c) referred in footnotes 219 and 220 for [264](d) and (e) to paragraph 14 in the Joint Witness Statement of the Water Quality Experts dated 1 August 2022 which reads:

With respect to question in para 7 of the Court Minute, the narrative descriptions of ecological state associated with bands C and D for the macroalgal and phytoplankton attributes are provided in Plew et al. (2020)³ for macroalgae (Table 2) and phytoplankton (Table 4). To summarise, band C and band D defines moderately and heavily impacted ecological communities, respectively. The minimum acceptable state is the transition between moderately impacted and heavily impacted estuarine ecology (i.e., the C/D threshold). For the avoidance of doubt, estuaries that are assessed as D-band are referred to as ‘degraded’ (or ‘in need of improvement’) and estuaries that are A, B or C band were classed as ‘not degraded’. Neither expert used A/B or B/C band thresholds to map/identify ‘degraded’ estuaries.

- (d) by reference only to those narratives and paragraph 14 of the Joint Witness Statement, found at [265]:
 - (i) “it highly likely” that the result of the discharges of contaminants are having significant adverse effects on aquatic life; and
 - (ii) the discharges include those that are incidental to farming activities on land.
- (e) found at [266] that attributes that are below the national bottom line or minimum acceptable state are causing significant adverse effects on aquatic life; and

¹ Para [263].

² Para [264].

³ Footnote reads: Waiau River Estuary, Waimataku Estuary and Bluff Harbour.

- (f) found at [278] it is likely the result of contaminant discharges from farming activities on land;

when there was no evidence before the Court that:

- (g) water quality below a national bottom line or minimum acceptable state is equivalent to causing significant adverse effects on aquatic life; or
- (h) incidental discharges from farming activities on land, either individually or cumulatively, are causing significant adverse effects on aquatic life.

Environment Court's role on appeal

- 8. In its consideration of Rule 24 the Court:
 - (a) failed to have regard to the limited scope of the appeals to Rule 24;
 - (b) failed to have regard to the Court's role on appeal; and
 - (c) erred when it recorded it was being asked to confirm or approve a part of a rule that is not subject to appeal.

QUESTIONS OF LAW

The questions of law to be decided are:

- 9. Does section 70 apply to all incidental discharges from land-based farming activities?
- 10. Was there evidence before the Court that significant adverse effects on aquatic life are inevitable when a water quality attribute is below a national bottom line or minimum acceptable state set out in the National Policy Statement Freshwater Management 2020?
- 11. Was there evidence before the Court that the incidental discharges from farming activities on land are causing significant adverse effects on aquatic life?
- 12. Do the appeals seeking to introduce a new permitted activity standard to Rule 24 provide scope to amend the existing permitted activity standard in Rule 24?

RELIEF SOUGHT

13. The Appellant seeks:
- (a) That its appeal be allowed;
 - (b) That the matter be referred back to the Environment Court for reconsideration in light of the findings of this Honourable Court; and
 - (c) Costs.

DATED 31 January 2023



B S Carruthers KC

Counsel for Federated Farmers Southland Inc

This document is filed by Nicola Jane Edwards, solicitor for the appellant, of Federated Farmers of New Zealand. The address for service of the Respondent is 444 Anglesea Street, Hamilton 3240.

Documents for service on the appellant may be left at that address for service, or may be:

- (a) posted to the solicitor at PO Box 447, Hamilton 3240; or
- (c) emailed to nedwards@fedfarm.org.nz and bcarruthers@shortlandchambers.co.nz