

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2025] NZEnvC 77

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First
Schedule of the Act

BETWEEN TRANSPOWER NEW ZEALAND
LIMITED

(ENV-2018-CHC-26)

(and all other appellants listed in the
Schedule attached)

Appellants

AND SOUTHLAND REGIONAL
COUNCIL

Respondent

Court: Environment Judge K G Reid
Sitting alone under s279 of the Act

Hearing: at Christchurch on 5 March 2025

Appearances: P A C Maw and I F Edwards for Southland Regional
Council
S R Gepp KC for Royal Forest & Bird Protection Society
of New Zealand Inc
N Edwards for Federated Farmers Southland Inc

Last case event: 5 March 2025

Date of Decision: 18 March 2025

Date of Issue: 18 March 2025



**DECISION OF THE ENVIRONMENT COURT
ON APPLICATION FOR STAY AND ADJOURNMENT
OF PROCEEDINGS**

A. The court orders:

- (a) these proceedings, so far as they relate to rule 24 of the Southland Water and Land Plan, are adjourned pending the passing of the Resource Management (Consenting and Other System Changes) Amendment Bill into law;
- (b) within two weeks of the Amendment Bill receiving royal assent the Southland Regional Council shall consult with the parties to the proceeding and file a reporting memorandum containing a proposal for the future progress of these proceedings, including proposed timetabling in advance of a hearing.

REASONS

[1] This application concerns the future case management of the appeals on the proposed Southland Water and Land Plan (pSWLP). The proceedings have been awaiting the outcome of appeals to the High Court¹ and subsequently the Court of Appeal, on the Environment Court's fifth interim decision.² The Court of Appeal decision was delivered in October 2024.³

[2] The High Court and Court of Appeal decisions clarified the interpretation of s70 of the Resource Management Act 1991 (RMA). Section 70 is relevant to the resolution of appeals on rule 24 of the pSWLP.

¹ *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726.

² *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265.

³ *Southland Regional Council v Southland Fish and Game Council* [2024] NZCA 499.

[3] The Southland Regional Council (‘Council’ or ‘SRC’) has applied for a partial stay of the proceedings⁴ as they relate to rule 24 pending the passing of the Resource Management (Consenting and Other System Changes) Amendment Bill (Amendment Bill). If passed, the Amendment Bill would make changes to s70.⁵

[4] The application to stay is supported by Federated Farmers Southland Inc (Federated Farmers),⁶ and is opposed by Royal Forest and Bird Protection Society of New Zealand Inc (Forest & Bird).⁷ Other parties have indicated that they abide the decision of the court.⁸

[5] As filed, the application was framed as an application to partially stay the proceedings under ss 269 and 272 of the RMA and rule 18.10 of the District Court Rules 2014. In a memorandum dated 18 December 2014 counsel for Forest & Bird questioned whether rule 18.10 was relevant given that it is concerned with a “stay of proceeding in relation to the decision appealed against”.⁹ In this case the stay is not sought pending the outcome of an appeal.

⁴ Dated 2 December 2024.

⁵ Cl 15 of the Amendment Bill.

⁶ Federated Farmers memorandum of counsel dated 18 December 2024.

⁷ Notice of opposition dated 18 December 2024.

⁸ Aratiatia Livestock Limited, Rayonier New Zealand Ltd and Transpower New Zealand Limited each advised the registry by email (10 December 2024) that each would abide the court’s decision and did not wish to be heard. Ngā Rūnanga memorandum of counsel dated 11 December 2024 confirmed its position that it would neither support nor oppose the application and do not wish to be heard on the matter. Director-General of Conservation Tumuaki Ahurei filed its memorandum of counsel dated 10 December 2024 confirming it will abide the court’s decision and did not wish to be heard on the matter. Beef+Lamb New Zealand Limited filed its memorandum dated 17 December confirming support for the application, confirming they would abide the court’s decision and did not wish to be heard. DairyNZ Limited and Fonterra Co-operative Group Limited (together, Dairy Interests) and Wilkins Farming Company Ltd each filed memoranda dated 6 December 2024, recording support for the application, confirming they would abide the court’s decision and neither wished to be heard.

⁹ At [32].

[6] All parties now accept that this application is more appropriately regarded as an application for an adjournment under s269 of the RMA and I deal with it on that basis.

Background

[7] These proceedings commenced when appeals were filed with the Environment Court in May 2018. Twenty-five appeals were originally lodged. Following a lengthy Environment Court process handled by Judge Borthwick's division of the court, there are only a small number of appeal points which remain to be resolved. Appeals, by Forest & Bird and Southland Fish and Game Council (Fish & Game) on rule 24 address one of the few remaining unresolved matters.

[8] Following Judge Borthwick's retirement in 2024, I have assumed responsibility for case management of this proceeding.

[9] Before considering the adjournment application I discuss rule 24 and the matters that remain in issue.

Rule 24

[10] As approved by the Council following the hearing of submissions, rule 24 permits incidental contaminant discharges from specified farming activities as long as they meet the criteria listed in the rule.

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

- (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.

[11] The relief sought by Forest & Bird and Fish & Game's appeals seek to add additional criteria to rule 24 before farming related discharges would qualify as permitted activities.

Fifth interim decision

[12] Before the Environment Court Forest & Bird and Fish & Game submitted that pursuant to s70 RMA, before a rule permitting the discharge of contaminants can be inserted into a plan, the court must be satisfied that the discharge will not have a significant adverse effect on aquatic life.¹⁰

[13] Forest & Bird argued that even if contaminants are reduced under the provisions of the proposed plan, rule 24 would be breached immediately and would not be acceptable in its current form as significant adverse effects on aquatic life are likely to occur for some time.¹¹

¹⁰ At [234].

¹¹ At [235].

[14] Forest & Bird therefore argued in favour of amendments to rule 24 with the effect that discharges of contaminants in a Schedule X catchment that are incidental to farming, would require consent for a discretionary activity.¹² Schedule X to the pSWLP includes (already final) maps of Southland identifying farming areas where surface water catchments are degraded. The degraded areas cover most farming areas of Southland.

[15] The Council submitted that s70 is not a jurisdictional bar to the inclusion of rule 24 in the plan because the rule permits discharges subject to a condition that the discharge, after reasonable mixing, does not give rise to significant adverse effects on aquatic life.¹³ The court said:

[251] We find this subtle argument overlooks the s 70 requirement that [SRC] is to be satisfied ‘before’ a rule is inserted into the plan that the relevant effects are unlikely to arise. We hold that jurisdiction to include rules permitting discharges only arises if [SRC], or this court on appeal, has satisfied itself as to the relevant effects. Whether the discharge is classified as a permitted activity or something else is a separate, albeit related, matter.

[252] Alternatively, [SRC] submits that the court has jurisdiction to approve the rule if it is satisfied that the land use rules and methods will ensure the discharged contaminants will not likely give rise to significant adverse effects on aquatic life. If there is jurisdiction to include a permitted activity rule, the court will then need to consider the classification of the activity. We accept this interpretation.

[16] The court then found that:

[265] ... 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.

¹² At [236].

¹³ At [250].

[17] The court then turned to consider whether there was jurisdiction to approve rule 24, and said:

[270] Taking into consideration the entirety of the policies, rules and methods the court would approve, while we accept there will be improvement in water quality, the prediction that the thresholds for ecosystem health value will rise above the national bottom line or minimum acceptable state applicable, was not put to the expert witnesses.

[18] The court then found that it was “unable to satisfy [itself] that it is unlikely that significant adverse effect on aquatic life will result from discharges, jurisdiction to include a rule permitting contaminant discharges has not yet been established”.¹⁴

[19] The court then said:

[272] Given that the plan provisions were being continually revised up to and including closing submissions, and given also the cogent reasons for the permitted activity classification, 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.

[273] If the court finds that it does not have jurisdiction to include Rule 24 in the proposed plan, then our tentative thinking is that controlled activity is the appropriate classification.

Appeal to higher Courts

[20] A number of parties appealed the fifth interim decision to the High Court. The process for hearing evidence on the rule 24 and s70 issues signalled by the Environment Court was suspended, pending the outcome of that appeal process.

[21] Relevant outcomes of the High Court appeal were:

¹⁴ At [271].

- (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 decisions on the appeal on rule 24 was erroneous. The High Court said:¹⁵

[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.

- (b) the Fonterra Co-operative Group Ltd and Dairy NZ Ltd appeals were 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 s70 RMA;¹⁶
- (c) the Council's appeal was also unsuccessful, with the High Court finding that compliance with s70 was not achieved by simply reciting the s70 requirements and 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 s70 requirements. That issue is still to be determined at subsequent hearings.

[22] The Council sought leave to appeal the High Court decision to the Court of Appeal. Leave was granted but ultimately the Council's appeal was

¹⁵ *Federated Farmers Southland v Southland Regional Council* 25 ELRNZ 894 at [89].

¹⁶ At [90].

unsuccessful. The Court of Appeal agreed with the High Court that the requirements of s70 RMA must be established before including a proposed rule in a plan, and the Environment Court was entitled to hear further evidence to determine if the requirements of s70 are in fact satisfied.

Proposed legislation

[23] An affidavit from Ms Elizabeth Devery was filed by SRC in support of the application. That affidavit annexed a copy of a letter received by SRC from the Hon Chris Bishop, the Minister responsible for RMA reform. The letter references an intention to pass the Amendment Bill “by mid-2025”.¹⁷

[24] The Amendment Bill was introduced to Parliament on 10 December 2024 and is currently before select committee.

[25] Clause 15 of the Amendment Bill would (if passed into law) amend s70 of the RMA as tracked below:

70 Rules about discharges

- (1) ~~Before~~ Except as provided in subsection (3), before a regional council includes in a regional plan 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,

¹⁷ Devery affidavit dated 2 December 2024, Annexure A.

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.
- (2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to –
- (a) the nature of the discharge and the receiving environment; and
 - (b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment –

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

- (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.

[26] The effect of the amendment (if passed) would be to allow a rule providing for discharges as a permitted activity, where the discharges are likely to give rise to significant adverse effect on aquatic life in the circumstances set out in s(3)(a)-(c).

[27] As currently framed the Amendment Bill contains no transitional provisions specifying how the amendments to s70 are to be dealt with in legal proceedings underway at the time the Bill is passed into law.

[28] The parties made detailed submissions before me on the issue of whether the amendments to s70, if passed, would affect the court's consideration of

rule 24.¹⁸ The issue in part turns on what, if any, transitional provisions are included in the final form of legislation (if, and when, it is passed). Section 33 of the Legislation Act 2019 is also relevant.

[29] On the current version of the Amendment Bill there are arguments that go both ways as to whether the s70 amendments will apply to the current process or not. However, I do not see any value in the court engaging in an exercise of statutory interpretation in relation to a Bill that is currently before a Select Committee. It is clear to me from the context and timing that the proposed amendments to s70 are in response to the judgement of the Court of Appeal in October 2024. I therefore think that it is very likely, if not inevitable, that when the amendments come into effect in their final form, they will apply to the current process to resolve rule 24.

Water quality context

[30] Forest & Bird emphasised the degraded state of many of Southland's waterbodies which has been the subject of evidence before the Environment Court in previous hearings on the pSWLP. After hearing extensive evidence, the court said in its first interim decision that "it is not seriously contested that many of the region's waterbodies are likely degraded".¹⁹

[31] Forest & Bird submitted that the need to improve Southland's water quality is urgent and that delaying the resolution of appeals on rule 24 in this context is both unreasonable and inappropriate.²⁰

[32] Federated Farmers submitted that there are regulatory and non-regulatory

¹⁸ The combined effect of ss 9 and 33 of the Legislation Act 2019 is that amending legislation does not affect the completion of any proceeding in progress under the legislation, unless the legalisation or context provides otherwise.

¹⁹ *Aratiatia Livestock Limited v Southland Regional Council* [2019] NZEnvC 208 at [117].

²⁰ Forest & Bird submissions at [5].

methods in place to ensure no further degradation of water quality.²¹ Both Federated Farmers and the Council pointed out that the majority of the objectives, policies, rules and other methods in the pSWLP are now operative and address many farming and other activities related to water quality. These provisions require compliance regardless of the unresolved nature of rule 24.

[33] In my view, the current state of Southland waterways means that the resolution of the rule 24 appeals must be treated as a high priority.

Process to resolve rule 24 appeals

[34] The parties made submissions on the process that would apply to resolve rule 24 if no adjournment is granted, compared to waiting until after the Amendment Bill is passed. I note that either way, the final form of the process to resolve rule 24 is in the end a matter for this court.

[35] The first step in the process signalled by the Environment Court in the fifth interim decision is to resolve the issue of the likelihood of effects from future discharges and their significance on aquatic life. Ms Devery stated her understanding that this would likely involve input from a number of technical disciplines, including both freshwater and estuarine ecologies, farm systems experts, and evidence to model the losses identified by farm systems experts, plus evaluative evidence from planning experts.²²

[36] The Council submitted that the technical evidence would be framed through the lens of the legal framework applying to discharges, as articulated in s70 of the RMA. That evidence would be framed quite differently if rule 24 is determined under the Amendment Bill version of s70.²³

²¹ Federated Farmers submissions at [1.5].

²² Devery affidavit at [15].

²³ SRC submissions at [59]-[60].

[37] For Federated Farmers, Ms Edwards submitted that the likely process was as follows:²⁴

- a. Before the Court makes a final finding as to whether there is jurisdiction to approve rule 24 is a permitted activity, there is to be an opportunity for parties to call expert evidence on the likelihood of effects and their significance for aquatics life. Such evidence is likely to be technical and complex.
- b. If a final finding, that there is no jurisdiction under s 70 to approve incidental diffuse discharges (from certain activities in certain catchments) in rule 24 as a permitted activity, is made there would need to be a direction that the Council is to initiate a process under s 293. A s 293 process would likely involve:
 - i. An interim finding of the court that directs the Council to commence a s293 process.
 - ii. A proposal containing the amendments to rule 24 and a s32/32AA assessment.
 - iii. Given that the proposal would have implications for a wide range of farming activities (over 3,000 farms of resource consent is required for incidental discharges from farming land uses in Schedule X catchments), there would need to be a public notification and consultation process for any interested parties to provide written comments to Council for it [to] submit to the Court.
 - iv. There would then need to be a final decision from the Court on the wording of rule 24.

[footnotes omitted]

[38] By comparison, Ms Edwards submits that after the amendments to s70 are made the process, much of these processes could be avoided. Planning evidence would likely be required as to the wording of rule 24 but that would be a considerably narrower and less resource intensive process.²⁵

[39] Ms Edwards indicated that there would need to be evidence about what the

²⁴ Federated Farmers legal submissions 24 February 2025 at [2.14].

²⁵ At [2.15].

words “after reasonable mixing” in s70 mean in the current context, and how this is allowed for. This issue is also likely to be technical and complex.²⁶

[40] Forest & Bird disagrees that a s293 process will be required if the proceeding continues prior to the amendment. The relief sought by Forest & Bird sought an additional permitted activity standard and rule 24 as set out above. Forest & Bird argued that the purpose of this amendment was to ensure consistency with s70 and that relief is available without a s293 process.²⁷

[41] In contrast, Forest & Bird submits that it is unlikely the court could approve a version of rule 24 that specifies a “period of time” (as required to comply with amended s70) without its s293 process.²⁸

Consideration

[42] If the court proceeds now to determine the Forest & Bird and Fish & Game appeals in advance of the Amendment Bill, the first step will be to determine the issue of whether rule 24 will ensure that the permitted activities will not likely give rise to significant effects on aquatic life in receiving waters, after reasonable mixing.

[43] I accept that the issue of whether rule 24 is acceptable (in any particular form) will be technical and complex and directed at the test set out in s70 that must be satisfied before a permitted activity rule is adopted.

[44] If s70 is amended in the way proposed by the Amendment Bill, the focus of the evidence required for this proceeding would be quite different. Under the current form of s70 the focus is on the jurisdictional threshold in s70(1). Evidence under the amended s70, if passed in the current form, would focus on the “standards in the proposed rule” (s70(3)(b)), and whether the standards would

²⁶ Transcript, at [29].

²⁷ Forest & Bird submissions at [3].

²⁸ Forest & Bird submissions at [3].

“over a period of time specified in the rule”, contribute to a reduction in adverse effects (s70(3)(c)).

[45] Under the current s70, if jurisdiction for a permitted activity rule is not established, the focus will be on what form of rule 24 would be acceptable. The court indicated a preliminary view that controlled activity status would be appropriate. As a result of the findings of the High Court, controlled activity status could only be achieved via a process under s293 of the RMA.

[46] In my view it is too early to be definitive as to whether a s293 process will in fact be required. However, given the Environment Court’s previous findings in the fifth interim decision, and the findings of the High Court on appeal, it is my view that absent the amendment, a s293 process is highly likely.

Timing issues for hearing

[47] Mr Maw indicated that approximately two weeks’ hearing time would be required for the hearing on jurisdiction under s70. Prior to that, there would need to be a timetable for evidence exchange, expert witness caucusing and other pre-hearing arrangements. The court can currently accommodate a two-week hearing in October 2025, with a decision to follow.

[48] If as currently indicated the Amendment Bill is passed by mid-year, it may well be that a timetable for the exchange of evidence can be accommodated between the passing of the amendment and an October 2025 hearing. Whether that is the case will only be able to be determined once the Amendment Bill is passed.

[49] However, if the court were to schedule an October 2025 hearing now and put a timetable in place, any delay with the indicated mid-year timeframe for the Amendment Bill may well end up intersecting with the preparation of evidence, the timetable and/or the hearing. That would be very undesirable. In that case evidence already prepared would likely need to be redone. If the hearing had taken

place an issue would arise as to whether the hearing should be reconvened to allow any amended evidence addressing the amended form of s70 to be heard.

The court's powers

[50] The court has the power to regulate its own proceedings in such a manner as it thinks fit in accordance with s269(1) of the RMA. Subsection (1)(a) provides that the Environment Court must regulate its own proceedings in a manner that best promotes their timely and cost-effective resolution.

[51] Section 272 RMA provides the Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings were lodged unless, in the circumstances of a particular case, it is not considered appropriate to do so.

[52] In the end the over-arching principle applying to any application for an adjournment is the interests of justice.²⁹

Legal principles – adjournment pending law change

[53] The most significant issue in this case is whether the prospective legislation currently before Parliament is a matter I can take into account in determining whether to adjourn these proceedings (or in determining what, if any, timetabling arrangement should be made). If I can take it into account, does it justify the proposed adjournment (or should it otherwise influence timetabling arrangements) in this case?

[54] Both parties referred to a series of High Court authorities commencing with *Fitzgerald v Muldoon*,³⁰ where the Court took into account that there was “little doubt” legislation would be enacted in deciding on appropriate discretionary relief.

²⁹ *Selwyn Quarries Limited v CRC* [2018] NZEnvC 194 at [11]

³⁰ *Fitzgerald v Muldoon* NZSC Wellington, 11 June 1976; [1976] 2 NZLR 615 at 623.

In *Turners & Growers Limited v Moyle*³¹ the High Court was considering whether to have regard to the Primary Products Marketing (Regulations Confirmation) Bill. The court said:³²

The opening question is whether I should notice the Bill at all. It is, at this moment, of no present legal effect. I see no difficulty in taking appropriate notice in this particular case. These incidents of Bills, or even prospective Bills, has been noticed before today. In *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394, 422 Cooke J took into account the then Building Performance Guarantee Corporation Bill as recognising a perceived policy. In *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 623 Wild CJ took into account a situation in which there was “little doubt” that legislation would be enacted, in deciding upon appropriate discretionary relief. However, care may be necessary.

[55] In *R v Morgan*³³ the High Court declined to adjourn Mr Morgan’s sentencing pending legislation to change the three strikes legislation which would have otherwise applied to Mr Morgan’s sentencing. The court analysed the cases concerning the circumstances in which a court may take into account pending legislation and said:³⁴

[27] I accept that the interests of justice may extend to granting an adjournment where a legislative change is imminent or could otherwise be categorised as “inevitable” and that the Court may have regard to the parliamentary process. However, because of the court’s obligation to apply the law as it currently exists, those circumstances must necessarily be rare and limited. In the present case, the Bill has only recently been introduced and, while the Executive has announced its determination to repeal the three strikes regime, any legislative change is the sole preserve of Parliament. Despite the Government’s majority, it cannot be presumed the law will ultimately take a particular form, or that by the time of its

³¹ *Turners & Growers Exports Limited & Others v Moyle* HC Wellington CP720/88, 15 December 1988.

³² At 67.

³³ *R v Morgan* [2021] NZHC 3352.

³⁴ At [27].

proposed enactment on 1 July 2022 the present terms of the Bill will not have changed.

[56] In *Genesis Power Ltd v Environment Court of New Zealand*,³⁵ the High Court considered an application for judicial review of a decision by the Environment Court to adjourn the hearing of 58 applications for resource consent related to the operation of the Tongariro Power Development. The basis of the adjournment by the Environment Court was unclear. The court said:

[28] Prospective amending or validating legislation if inevitable can be a basis to defer a decision of the courts (see *Fitzgerald v Muldoon* [1976] 2 NZLR 615; *Turners & Growers Exports Ltd and others v Moyle* (HC, Wellington, CP 720-88, 15 December 1988, McGechan JJ)).

[29] This however is rare. The important principle is that the Court's function and that of Parliament and the Executive are obviously separate. The function of the Courts is to deal with its business on the law that applies when the case before it is heard. Expressions of legislative intent by Ministers are no more than that. The letter from the Minister herself expressly recognises that truth. The Minister's letter proposed no more than the possible introduction of legislation. For this to come to fruition and affect Genesis, the Government and iwi would need to agree on a settlement which affected Genesis consents. And Parliament would need to pass any Bill introduced which gave effect to such a settlement. As the Minister earlier recognised, legislation would be required to effect Genesis' consents. It may be that legislation would need to be retrospective.

[30] The principle against granting adjournments based on prospective legislation can be seen in such cases as *Ngai Tabu Trust Board v Attorney-General* (HC Wellington, CP553/87, 1 November 1989, McGechan and Greig, JJ) and more recently in *Meggitt Overseas Limited & Ors v Ned Grdovic* [1998] 43 NSWLR 527 where the New South Wales State Court of Appeal considered an adjournment based on the contents of a Ministerial announcement. Mason P observed:

The learned judge erred in taking into account the prospect of legislative

³⁵ *Genesis Power Ltd v Environment Court of New Zealand*, HC Wellington CP249/02, 17 December 2002.

amendment as a controlling factor in the decision granting the adjournment. The error was compounded by the apparent intent that the hearing date will, as presently advised, be deferred until the amending legislation is passed and the plaintiff becomes thereby entitled to take advantage of it. (page 529 at (g))

...

Does such an announcement qualify in any way the judicial branch's obligation to uphold the existing – I emphasise the word “existing” – law? And does it enliven a power to grant a contested adjournment of proceedings fixed for hearing so as to enable one party to gain the benefit of proposed legislation to the detriment of another party? The answer to each question must be a categorical “no” (page 53 at (f))

...

In my view, Judge Armitage erred in granting the contested adjournment of the fixed hearing date on the basis that he did. It is clear that his reason was to enable one party to the litigation to be in a position to take advantage of legislative change, substantive and not procedural in nature that would accrue to that party's benefit. In so doing, his Honour contravened the principles which I have endeavoured to state. (page 536 at (c))

...

If a court were to exercise a discretion to adjourn pending litigation by reference to the substantive benefits foreshadowed by proposed legislation, it would inevitably be drawn into the type of considerations referred to in the passage I have just quoted. A court of law cannot choose to favour one class of litigants over another without lawful authority. (page 537)

[57] The courts in each of the above cases indicated that judicial notice may in appropriate cases be taken of prospective legislation, although it was ultimately only in *Fitzgerald v Muldoon* and *Turners & Growers* that the court actually did so (in both cases in the context of determining discretionary relief).

[58] Using the language adopted in *R v Morgan*, Mr Maw submitted that the

impending law change is both inevitable and imminent.³⁶ On this basis he distinguished *Genesis*, where the Crown had started negotiations with Māori that might ultimately result in legislation affecting Genesis' rights, but that prospect was a mere possibility signalled in a Minister's letter.³⁷

[59] There were two Environment Court cases of relevance relating to hearings scheduled immediately following the Canterbury earthquake sequence. In *Cashmere Rural Land Holdings Incorporated v Canterbury Regional Council*,³⁸ the Environment Court considered an application to adjourn hearings scheduled relating to Change 1 and variations 1-4 of the Canterbury Regional Policy Statement. Judge Jackson noted:

[8] After I had expressed my concerns about the proposed emergency legislation setting up a Canterbury Earthquake Recovery Authority ("CERA") with, it appears, powers to over-ride any regional policy statement or local authorities' plans, Mr Hughes-Johnson QC submitted that the proper "constitutional" course is that the court should proceed regardless. He is correct if it comes to a substantive hearing: the court must apply the law as it stands at the hearing. However, I consider proposed legislation is in some circumstances a matter that a court may take into account when setting a hearing.

[60] In *Prestons Road Ltd v Canterbury Regional Council*,³⁹ the Environment Court considered a further application in relation to the same hearing. By that time the Canterbury Earthquake Recovery Act of 2011 ('CERAct') had been passed. Under the CERAct a recovery strategy or recovery plan was to be prepared. There was the possibility that these plans could be inconsistent with Change 1. As well, the Minister could at any time revoke Change 1.⁴⁰

[61] The court referred to the following list of matters to take into account when

³⁶ Transcript at 5.

³⁷ *Genesis* at [29].

³⁸ *Cashmere Rural Landowners Incorporated v Canterbury Regional Council* [2011] NZEnvC 90.

³⁹ *Prestons Road Ltd v Canterbury Regional Council* [2011] NZEnvC 131.

⁴⁰ At [43].

considering an adjournment:⁴¹

- (a) the Environment Court’s duty to hear and decide proceedings as soon as practicable;
- (b) the timing of an application to adjourn;
- (c) the circumstances and convenience of the parties;
- (d) the availability of witnesses and/or evidence; and
- (e) any special factors.

[62] After considering (a)-(e) above and concluding that the hearing should not be adjourned, the court then said:

[38] The real question for me was whether the existence of the CER Act 2011 and the uncertainty it has created – understandably in the unusual circumstances facing Christchurch – outweighs the conclusion I came to in respect of the usual factors.

[63] The court noted the potential for a recovery strategy or plan to override Change 1 at any time but said:

[44] Against that I considered that the rule of law is an important principle here, as I was reminded by Mr Hughes-Johnson QC at the 31 March 2011 hearing. The court should not adjourn the hearing because various powerful overriding revisions are contained in the CER Act and might be exercised to make the whole exercise nugatory. Rather, the court should hear and decide proceedings without regard to whether these powers are exercised. After that “que sera, sera”.

[64] Ms Gepp urges that the court should take the same approach here, as Judge Jackson took in *Preston’s Road*. That is, proceed down the track of determining the rule 24 appeals under the unamended s70 ignoring the impending amendment. If s70 is amended before that process is concluded – *que sera, sera*.⁴²

⁴¹ At [30].

⁴² Forest & Bird submissions at [24].

[65] Ms Gepp submitted that there are no circumstances where impending legislation could be a valid basis to adjourn a proceeding such as the present. She noted that the New Zealand authorities set out above where pending legislation was had regard to, only concern the exercise of the court’s discretion in granting relief.⁴³

[66] Ms Gepp referred to *Willow Wren Canal Carrying Co Ltd v British Transport Commission*⁴⁴ where the UK Chancery Division declined a stay of an injunction application until a bill, which was before Parliament, might become law. The court said:⁴⁵

this court is not concerned with what Parliament may think it wise to do in relation to the rights of the parties, but the plaintiff is entitled to come to this court and say, “In the normal course of events my action will very soon be ripe for hearing. I desire that the court should hear it.” If subsequently to that Parliament in its wisdom thinks it right by some enactment to affect the rights of the parties even to the extent of modifying or abrogating the effects of any judgement which the plaintiffs may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. It is plain, however, that it is not right for this court either now or at the hearing to take into account the possible effect of a Bill which is at present before Parliament and which, so far as this court is concerned, may never become law, or, if passed into law, may contain provisions which ultimately do not affect the rights of the parties before the court. In other words, it is a matter of speculation on which the court will not embark whether a Bill at present before Parliament will be passed into law in its present form.

[67] Ms Gepp referred to *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*⁴⁶ and *Re Te Hika O Pāpāuma Mandated Iwi Authority*⁴⁷ as cases where New Zealand

⁴³ Forest & Bird submissions at [17].

⁴⁴ *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567.

⁴⁵ At 569.

⁴⁶ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142.

⁴⁷ *Re Te Hika o Pāpāuma Mandated Iwi Authority* [2024] NZHC 3745.

courts have applied *Willow Wren*.⁴⁸

[68] Mr Maw argued that in the present case an adjournment would not benefit any party. Rather, the purpose of the adjournment is to ensure that resources are not wasted preparing extensive evidence and running a hearing based on a legal test which then changes (due to the passing of the Amendment Bill) before that process is complete.

[69] On the issue of whether the adjournment would benefit one party over the other, Ms Gepp submitted that the Council had unsuccessfully pursued appeals in the High Court and Court of Appeal on the s70 issue.⁴⁹ Having had that clarification of the law the Council now seeks an adjournment while the law is changed.⁵⁰

Conclusion on whether the court can take into account pending legislation

[70] The approach taken in *Willow Wren* can readily be understood in the context of proposed legislation which could potentially affect the substantive private rights of the parties. That is not the case here. These proceedings arise out of the public process of plan development and concern competing views on the wording of a rule in a regional plan that will have a wide application. The question before this court concerns how the proceedings should be managed, through the process of preparing and exchanging technical expert evidence, expert witness conferencing, and other preparatory steps to a hearing given an imminent law change.

[71] I have no doubt that in appropriate cases the court may have regard to impending legislation. That is consistent with the dicta in *Turners & Growers*,

⁴⁸ Forest & Bird submissions at [12].

⁴⁹ *Southland Regional Council v Southland Fish and Game Council* [2024] NZCA 499 at [17].

⁵⁰ Transcript at 49.

Fitzgerald v Muldoon, *R v Morgan*, and *Genesis*. The courts will however only do so in rare cases.

Consideration

[72] I consider the matters listed by Judge Jackson in *Prestons Road Ltd*.⁵¹

Duty to hear and decide proceedings as soon as practicable

[73] The duty in s272(1) is to hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged unless, in the circumstances of a particular case, it is not considered appropriate to do so. Mr Maw submits that it is not practicable in the present circumstances to proceed with evidence preparation regarding “the likelihood of effects and their significance for aquatic life” given the impending legislative changes.⁵²

[74] In my view, it would be practicable to proceed with evidence preparation, but not appropriate to do so given the overall circumstances in this case.

Timing of the application to adjourn

[75] The application was made promptly following the Court of Appeal judgement and announcement by the Minister that amending legislation would follow. No timetables for evidence preparation are in place, nor is a hearing date set.

Circumstances and convenience to the parties

[76] Mr Maw submits that putting the parties to the time and cost of potentially preparing evidence twice does not represent the best use of the court nor the parties’ resources. The best use of the parties and court’s resources would be to

⁵¹ *Prestons Road Ltd v Canterbury Regional Council* [2011] NZEnvC 131 at [30].

⁵² SRC submissions at [62].

require evidence preparation once s70 is amended.⁵³ I agree.

Special factors

[77] The question I must consider is whether I am persuaded that this proceeding is one of the rare cases where it is in the interests of justice that the pending legislation should lead to an adjournment of the proceedings. I have decided that it is for the following reasons:

- (a) the path that these proceeding will take in terms of evidence and prospective s293 process will diverge significantly depending on which version of s70 applies to the resolution of rule 24;
- (b) the prospective legislation is likely to become law in a matter of months (by mid-year). It has been introduced to Parliament and is currently before select committee. The final form of the legislation is not known; however I consider that in the context of this case a change to s70 is imminent;
- (c) no date for the hearing has currently been set and no timetabling arrangements are in place for the preparation of evidence. In this respect the current case is quite different to cases such as *Genesis* where the long scheduled hearing was imminent;
- (d) it would be highly disruptive if the passing of the Amendment Bill intersects with the timetable for evidence preparation and exchange and other aspects of case management required prior to a hearing, and/or the hearing itself;
- (e) I recognise that resolving the final form of rule 24 so that it can become operative is a matter of high priority given the water quality status of waterbodies in Southland. However, as I see it, starting the process of hearing the rule 24 appeals now is not likely to result in resolution of those appeals sooner than adjourning until the legislative

⁵³ SRC submissions at [70]-[71].

process is completed.

Outcome

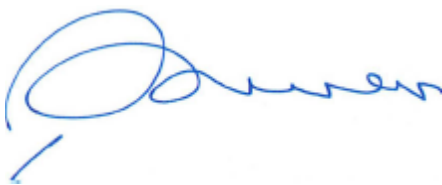
[78] The court will pencil a two-week hearing of the rule 24 appeals commencing 13 October 2025 in Christchurch. Depending on the ultimate form of the amendment to s70, it may be that less hearing time is required.

[79] It is the court's intention to hold the hearing in the October 2025 slot if at all possible. Bearing in mind that a timetable would need to be set after the Amendment Bill is passed the court will, if necessary, consider an abbreviated timetable to meet the hearing date.

[80] If the timing of the Amendment Bill is such that the October 2025 hearing cannot proceed, an alternative hearing will be arranged.

[81] In the meantime, I make the following orders:

- (a) these proceedings, so far as they relate to rule 24 of the Southland Water and Land Plan, are adjourned pending the passing of the Resource Management (Consenting and Other System Changes) Amendment Bill into law;
- (b) within two weeks of the Amendment Bill receiving royal assent the Southland Regional Council shall consult with the parties to the proceeding and file a reporting memorandum containing a proposal for the future progress of these proceedings, including proposed timetabling in advance of a hearing.



K G Reid
Environment Judge



Schedule – List of appellants

ENV-2018-CHC-27	Fonterra Co-operative Group Limited
ENV-2018-CHC-28	Horticulture New Zealand
ENV-2018-CHC-29	Aratiatia Livestock Limited
ENV-2018-CHC-30	Wilkins Farming Co Limited
ENV-2018-CHC-31	Gore District Council & others
ENV-2018-CHC-32	DairyNZ Limited
ENV-2018-CHC-33	H W Richardson Group Limited
ENV-2018-CHC-34 & 35	Beef + Lamb New Zealand
ENV-2018-CHC-36	Director-General of Conservation
ENV-2018-CHC-37	Southland Fish and Game Council
ENV-2018-CHC-38	Meridian Energy Limited
ENV-2018-CHC-39	Alliance Group Limited
ENV-2018-CHC-40	Federated Farmers of New Zealand (Southland Province) Inc
ENV-2018-CHC-41	Heritage New Zealand Pouhere Tāonga
ENV-2018-CHC-42	Stoney Creek Station Limited
ENV-2018-CHC-43	The Terraces Limited
ENV-2018-CHC-44	Campbell's Block Limited
ENV-2018-CHC-45	Robert Grant
ENV-2018-CHC-46	Southwood Export Limited & Others
ENV-2018-CHC-47	Te Rūnanga o Ngāi Tahu, Hokonui Rūnaka, Waihopai Rūnaka, Te Rūnanga o Awarua & Te Rūnanga o Oraka Aparima
ENV-2018-CHC-48	Peter Chartres
ENV-2018-CHC-49	Rayonier New Zealand Limited
ENV-2018-CHC-50	Royal Forest and Bird Protection Society of New Zealand Incorporated

