

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

CIV-2023-

UNDER the Resource Management Act 1991

IN THE MATTER of an appeal pursuant to section 299 of the Act

BETWEEN **SOUTHLAND REGIONAL COUNCIL** being a regional council constituted pursuant to the Local Government (Southland Region) Reorganisation Order 1989

Appellant

NOTICE OF APPEAL
31 January 2023

Appellant's Solicitor
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To The Registrar of the High Court at Christchurch

and

To The Registrar of the Environment Court

and

To The parties to the Environment Court appeals

This document notifies you that –

The Southland Regional Council (the **Appellant** or **Council**) appeals to the High Court against a final finding in the fifth interim decision (**Decision**) of the Environment Court on the appeals under clause 14 of the First Schedule of the Resource Management Act 1991 (**RMA**) relating to the proposed Southland Water and Land Plan (**pSWLP**).¹

The Appellant is the Respondent to the appeals on its decision on the pSWLP currently before the Environment Court.

Parts of the Decision appealed against

- 1 The part of the Decision appealed specifically relates to the Environment Court's interpretation of section 70 of the RMA.

Errors of law alleged by the Appellant

- 2 The Appellant alleges that the Environment Court made the following errors of law with respect to its interpretation of section 70 of the RMA and its finding on the inclusion of Rule 24 in the pSWLP:
 - (a) It applied the wrong legal test when concluding that it did not have jurisdiction to include Rule 24 in the pSWLP on the basis of section 70 of the RMA (**First Error of Law**);
 - (b) It failed to take into account the fact that any incidental discharges resulting in significant adverse effects on aquatic life would not be permitted by Rule 24(a) and would instead require resource consent under Rule 24(b) (**Second Error of Law**); and

¹ *Aratiatia Livestock Limited v Southland Regional Council* [2022] NZEnvC 265.

- (c) Its interpretation of section 70 of the RMA was based on an evident logical fallacy because it was not required to further satisfy itself as to significant adverse effects on aquatic life given that Rule 24(a) did not permit those same effects (**Third Error of Law**).

Questions of law

- 3 The above errors give rise to the following questions of law:
- (a) Whether the Environment Court applied the wrong legal test when it concluded that section 70 of the RMA provided a jurisdictional bar to the inclusion of Rule 24 in the pSWLP?
- (b) Whether the Environment Court failed to take into account a relevant consideration, being that any incidental discharges resulting in significant adverse effects on aquatic life would not be permitted by Rule 24(a), when finding that section 70 of the RMA provided a jurisdictional bar to the inclusion of Rule 24 in the pSWLP?
- (c) Whether the Environment Court's interpretation of section 70 of the RMA was based on an evident logical fallacy because it was not required to further satisfy itself as to significant adverse effects on aquatic life given that Rule 24(a) did not permit those same effects?

Grounds

- 4 Section 70 of the RMA contains certain requirements in respect of permitted activity rules about discharges. Section 70(1)(g) provides, relevantly, that before a regional council (or the Environment Court on appeal) includes in a regional plan a permitted activity rule for the 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 (or the Environment Court on appeal) shall be satisfied that any significant adverse effects on aquatic life are not likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant.
- 5 Section 70(1) states:
- (1) Before a regional council includes in a regional plan a rule that allows as a permitted activity –

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

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

- (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
- (d) any conspicuous change in the colour or visual clarity:
- (e) any emission of objectionable odour:
- (f) the rendering of fresh water unsuitable for consumption by farm animals:
- (g) any significant adverse effects on aquatic life.

6 Rule 24 of the pSWLP seeks to regulate incidental discharges from farming activities.

7 The Council's final relief in respect of Rule 24 sought to provide for those incidental discharges as a permitted activity, provided certain conditions were met. One of those conditions required that any incidental discharge of a contaminant must be managed to ensure that after reasonable mixing it did not give rise to any significant adverse effects on aquatic life in the receiving waters.

8 The Council's final relief in respect of Rule 24 is set out below:

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, 20A, 20B, 25, 35B or 70 of this Plan; and

(ii) any discharge of a contaminant resulting from any activity permitted by Rules 20, 20A, 20B, 25, 35B 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.

9 On the Council's wording, incidental discharges from farming activities would only be permitted if the land use activity giving rise to the discharge was authorised under Rules 20, 20A, 20B, 25, 35B, or 70 of the pSWLP.²

10 If the conditions of Rule 24(a) are *not* met, then resource consent is required as a non-complying activity. Therefore, if an incidental discharge from a farming activity would result in a significant adverse effect on aquatic life, that incidental discharge would not be permitted under Rule 24(a) and would instead require resource consent.

11 On this basis, Rule 24 does not permit a discharge that would have a significant adverse effect on aquatic life.

First Error of Law

12 The Council's primary submission with respect to section 70 of the RMA was that the Environment Court was not being asked to approve a rule that permits significant adverse effects on aquatic life which is the relevant effect in this case. To the contrary, it was submitted that Rule 24 only permits discharges subject to a condition that the discharge, after reasonable mixing, does not give rise to significant adverse effects on aquatic life. On this basis it was submitted that there was no jurisdictional bar to Rule 24's inclusion in the pSWLP.

13 The Environment Court did not accept this submission and instead held that section 70 of the RMA contains a requirement for the Council (or the Environment Court on appeal) to be satisfied "before" a rule is inserted

² Those rules relate to the following activities; farming, intensive winter grazing, pasture-based wintering of cattle, cultivation, sacrifice paddocks, and stock exclusion from water bodies.

into the pSWLP that the relevant effects are unlikely to arise (i.e., significant adverse effects on aquatic life):³

We find this subtle argument overlooks the s 70 requirement that the Regional Council 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 the Regional Council, 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.

(emphasis added).

- 14 When making this finding, the Environment Court failed to consider the effect of entry condition 24(a)(ii)(4) which specifically excludes discharges that result in significant adverse effects on aquatic life.
- 15 The Environment Court concluded that jurisdiction to include rules permitting such discharges only arises if the Environment Court has satisfied itself as to the relevant effects.
- 16 However, in the light of the entry conditions to Rule 24(a) the Environment Court was not required to further satisfy itself as to such effects because Rule 24(a) simply does not permit discharges resulting in significant adverse effects on aquatic life.
- 17 For these reasons, the Court applied the wrong legal test when interpreting the requirements of section 70 of the RMA, and erroneously rejected the Council's primary submission as to jurisdiction.

Second Error of Law

- 18 In concluding that section 70 of the RMA provided a jurisdictional bar to the inclusion of Rule 24(a), the Environment Court failed to take into account the operation of Rule 24(b).
- 19 If an incidental discharge was going to result in significant adverse effects on aquatic life, that discharge would not be permitted by Rule 24(a) and would instead require resource consent pursuant to Rule 24(b).

³ *Aratiatia Livestock Limited v Southland Regional Council* [2022] NZEnvC 265, at [251].

- 20 The entry conditions to Rule 24(a) ensure that Rule 24 does not permit discharges that will have significant adverse effects on aquatic life, and therefore does not raise a jurisdictional bar with respect to section 70 of the RMA.

Third Error of Law

- 21 When interpreting section 70 of the RMA in the context of Rule 24, the Environment Court has introduced an additional requirement of needing to be satisfied that significant adverse effects on aquatic life are not permitted, notwithstanding a condition of Rule 24 precluding those same effects.
- 22 There is an evident logical fallacy with the Court requiring itself to be satisfied about an effect that is not permitted by Rule 24. Section 70 of the RMA does not require the Court to be satisfied about such effects if the rule in question precludes those effects from occurring.

Relief sought

- 23 The Appellant seeks:
- (a) That the appeal be allowed;
 - (b) That the High Court refer the matter back to the Environment Court for reconsideration in the light of the findings of this Honourable Court;
 - (c) Such further or other relief, including consequential relief, as may be appropriate;
 - (d) Costs.

DATED this 31st day of January 2023



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P A C Maw / I F Edwards

Counsel for the Southland Regional Council

This notice is filed by Philip Andrew Charles Maw, counsel for the Appellant, of the firm Wynn Williams. The address for service of the Appellant is Wynn Williams, Level 5, Wynn Williams House, 47 Hereford Street, Christchurch 8013.

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

- (a) Posted to PO Box 4341, Christchurch 8140
- (b) Emailed to philip.maw@wynnwilliams.co.nz /
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