

Proposed Southland Water and Land Plan
Response to Questions of the Hearing Panel

Philip Maw (PM)

Rules 20, 21, 23 and 25 (noting Rule 22 is recommended to be merged with Rule 21) are in part RMA section 9(2) permitted activity land use rules that do not overtly control the discharge of contaminants.

- **Do the permitted activity portions of Rules 20, 21, 23 and 25 need to comply with RMA section 70(1) or is it Rule 24 (a section 15(1)(b) discharge rule) which cross-refers to Rules 20, 21 and 23 that must instead comply with RMA section 70(1)?**

In short, Rules 20, 21, 23 and 25 do not need to comply with section 70(1), but Rule 24 does.

Section 70(1) requires that before a regional council includes a permitted activity rule in a regional plan that allows either:

- a. the discharge of a contaminant or water into water; or
- b. 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 must 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:

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

Under the RMA, there is a presumption that the use of land is permitted, unless controls are specified in a national environmental standard, regional rule or district rule.¹ However, the reverse presumption applies in respect of the discharge of a contaminant into water, or onto or into land in circumstances which may result in that contaminant entering water, which must be expressly allowed in a planning document (e. g. as a permitted activity) or by a resource consent.²

Section 70(1) expressly refers to permitted activity rules allowing the discharge of a contaminant into water, or onto or into land in circumstances which may result in that contaminant entering water, which are activities regulated by section 15 of the RMA. Section 70 does not refer to permitted activity rules regulating the use of land (as regulated under section 9 of the RMA). Further, there is a presumption that land use is permitted under the RMA unless otherwise stated. Accordingly, there does not always need to be a decision to "permit" land uses, in contrast to discharges, which is where section 70 is relevant in that it seeks to ensure certain effects are considered before a discharge is permitted. It is submitted that section 70 does not

¹ RMA, s9.

² RMA, ss12, 13, 14 and 15.

apply to permitted activity land use rules. However, section 70 does apply to the incidental discharge rule (Rule 24) (and any other permitted activity discharge rule in the pSWLP). This is addressed further below.

▪ **Why does Rule 24 not cross-refer to Rule 25?**

Rule 25 states that the use of land for cultivation is a permitted activity provided certain conditions are met. Cultivation is defined in the pSWLP as "[p]reparing land for growing pasture or a crop by mechanical tillage or spraying (excluding spot spraying)".³

Rule 25 is a section 9 land use rule. It does not seek to authorise a discharge.

For completeness, it is noted that the definition of *cultivation* does include spraying. However, the discharge of agrichemicals is authorised by Rule 10. As such, it is not considered necessary (or desirable) for Rule 24 to cross-refer to Rule 25. Doing so may have unintended consequences as it might permit the discharge of sediment from cultivation carried out in inappropriate circumstances (i.e., in or when rainfall is expected), or the discharge of agrichemicals not otherwise permitted by Rule 10.

▪ **In either case, in terms of complying with RMA section 70(1), would the insertion of a condition modelled on clause 26 of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017, which is a permitted activity rule for sediment originating from earthworks, suffice?**

Section 70(1) requires that Environment Southland must be satisfied that none of the effects set out at section 70(1)(c)-(g) are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of a contaminant by way of a permitted activity. If Council is satisfied that none of those effects are likely to arise, then it does not need to add anything further to Rule 24.

However, if the Council is not satisfied that those effects are unlikely to arise, then out of an abundance of caution it could include a requirement in Rule 24 that an activity is only permitted if those effects set out in section 70(1)(c)-(g) are also avoided (i.e. as per the example of clause 26 of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017).

Amendments to Rule 24 are set out below (with the previous changes recommended as part of the section 42A Report shown in black underline/strikeout and the additional amendments in response to the question above shown in red underline/strikeout):

Rule 24 – Incidental discharges from farming

- (a) The discharge of nitrogen, phosphorus, sediment and 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 s are is met:
- (i) the land use activity associated with the discharge is authorised under Rules 20, 21, 22 or 23-; and
- (ii) any discharge of a contaminant resulting from any activity permitted by Rule 24(a)(i) is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:

³ pSWLP (tracked version), 'Cultivation' at p134

- (1) any conspicuous oil or grease films, scums or foams, or floatable or suspended materials;
- (2) any conspicuous change in the colour or visual clarity;
- (3) any emission of objectionable odour;
- (4) the rendering of fresh water unsuitable for consumption by farm animals; and
- (5) any significant adverse effects on aquatic life.

- (b) The discharge of nitrogen, phosphorus, sediment and 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 ~~does not comply with~~ is not authorised by Rules 20, 21, 22 or 23 is a non-complying activity.