Government to clarify discharge consent provisions in the Resource Management Act.

The Government announces more rapid changes are to come for the Resource Management Act, following recent decisions of the High Court.

Two High Court decisions released this year have taken a stringent approach to legislative requirements for discharge permits, as set out in sections 70 and 107 of the Resource Management Act 1991 (**RMA**). In response, the Government has recently announced that it considers these decisions have made the law surrounding discharge consents unworkable and it intends to address this urgently through amendments to section 107. This article sets out the requirements in sections 70 and 107 and how they are impacted by the High Court decisions, before discussing the Government's recent announcement.

Legislation

Section 70 relates to discharge rules in regional plans. A regional council can only make a rule permitting discharges to water, or to land where the discharge may enter water, if the Council is satisfied that this will not lead to several listed adverse effects in the receiving waters after reasonable mixing. The listed effects include the production of conspicuous suspended materials, a conspicuous change in colour or clarity, objectional odour, rendering water unsuitable for consumption by farm animals, or a significant adverse effect on aquatic life.

Section 107(1) sets out restrictions and prohibitions on granting certain discharge consents if, after reasonable mixing, the same effects listed above arise in the receiving waters. Subsection (2) provides limited exceptions to this rule, where there are exceptional circumstances justifying grant of consent, the discharge is temporary in nature, or the discharge is associated with necessary maintenance work. Subsection (3) provides the ability to impose consent conditions to ensure the consent holder meets requirements of subsection (1) upon the consent expiring.

High Court decisions

Environmental Law Initiative v Canterbury Regional Council

In 2021 Environment Canterbury (**ECan**) reconsented the discharge of nitrogen from farming, across an area served by Ashburton Lyndhurst Irrigation Limited's (**ALIL**) irrigation scheme. One important aspect of the resource consent was that it included a staged reduction in nitrate-nitrogen discharge over time.

The Environmental Law Initiative (**ELI**) filed legal proceedings to judicially review ECan's decision on three grounds, including relevantly the incorrect application of section 107.

The Commissioner appointed to make ECan's decision had determined that the groundwater, associated surface water and ecological values in the lower reaches of the Hakatere/Ashburton River and its hāpua were significantly degraded and continuing to decline. This was due to past and current land use practices in the discharge area. The Commissioner also had no evidence before her that the increases of nitrogen in the receiving waters had stabilised or that the proposed reduction in nitrogen discharges would result in measurable improvements to the groundwater quality and ecological health. Instead, the Commissioner found the consented activity would continue to contribute to significant adverse cumulative effects on aquatic life. However, consent was granted in reliance on a staged approach to reduce the nitrogen load over time, resulting in improvements in water quality and ecological values over the life of the consent.

As noted above,. On appeal, ELI submitted that resource consent should not have been granted, as it did not satisfy the s107(1) requirement that a discharge consent must not be granted where this will result in significant adverse effects on aquatic life. The High

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Court agreed with ELI, stating that the current state of the environment was due to a longstanding history of unsustainable discharge of contaminants which would continue to have ongoing adverse effects. The High Court concluded the prohibition in section 107(1) is clear. If a consented activity will breach subsection (1) then it must meet an exception set out in section 107(2). In respect of section 107(3), the Court ruled this was an avenue for consent authorities to satisfy themselves that adverse effects are not likely to arise if resource consent is granted and it was not Parliament's intention for subsection (1) to be bypassed by issuing a resource consent on the basis that the likely continued prohibited effects would be complying by the time the consent ended.

As a result, the Court found a material error of law in the approach to the application of section 107 (as well as other grounds of appeal argued) and set aside the decision granting the discharge consent. This decision has been appealed to the Court of Appeal. More information about the decision is available here.

Federated Farmers Southland Inc v Southland Regional Council

This case concerned Rule 24 of the proposed Southland Regional Council Water and Land Plan which permitted incidental contaminant discharges from specified farming activities where they met the standards listed in the Rule. The standards reflected the section 70(1) criteria for permitted discharge rules.

The Environment Court had to determine:

(a) does section 70 apply to both point source and non-point source discharges;

(b) are contaminant discharges from existing farming activities having significant adverse effects on aquatic life; and

(c) does the court have jurisdiction to approve Rule 24?

The Environment Court ruled that the plain and ordinary meaning of section 70 is that it applies to both point source and non-point source discharges. The Court also acknowledged that Rule 24 is worded similarly to section 70, applies to discharge of contaminants onto or into land in circumstances which could result in contaminants entering water, and that the proposed plan defines "receiving waters" as including water bodies that receive run-off. The Court held that the reference to run-off encompasses non-point source discharges of contaminants and that the intention of the plan was to apply to both point source and non-point source discharges.

In respect of the aquatic life, the Court held it was highly likely that the discharge of contaminants, either by themselves or in combination with other contaminants were causing significant adverse effects on aquatic life and that this included discharges incidental to farming activities.

In respect of the Courts jurisdiction to approve the Rule, whilst the Court acknowledged that the policies, rules and methods will have some improvement in water quality, the prediction that ecosystem health will rise above national bottom lines was not put to expert witnesses. The Court was unable to satisfy itself that it would be unlikely that significant adverse effects on aquatic life will result from the discharges. Therefore, jurisdiction to include a rule permitting contaminant discharges was not established. However, the Court gave the parties the opportunity to call expert evidence on the likelihood of the effects of future discharges of contaminants and their significance for aquatic life.

On appeal, the High Court considered:

(a) whether section 70 applies to non-point source discharges, such as those covered by the Rule; and

(b) whether the Environment Court made an error in concluding that section 70 could be contravened by the Rule when the Rule

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expressly precludes the types of effects referred to in section 70.

In its decision, the High Court confirmed it was clear that s70 applies to both point source discharges and non-point source discharges.

The High Court also found that simply replicating the section 70 criteria and making them conditions of a permitted activity would not meet the procedural requirements of the RMA. A council needs to be satisfied before it includes a rule permitting a discharge, that none of the effects under section 70 are likely to arise in receiving waters. This indicates a need for an inquiry as part of the planning process into the evidence about the effects of the class of discharge being considered. The Court noted that this would be particularly important in instances such as the present case, where there are practical difficulties in determining whether a specific discharge complies because such issues are not readily able to be assessed on a case by case basis and there is a live question regarding cumulative effects.

Proposed changes – watch this space!

The *Environmental Law Initiative* decision has potential far-reaching implications for discharge consents, including replacement of expiring consents, where the receiving environment is significantly degraded. It increases the risk that necessary consents for a range of discharges, including for farming, primary produce processing, and wastewater discharges, will be declined.

As a result, the Government has announced time critical amendments will be made to section 107 of the RMA. It is understood that these changes are intended to be brought in urgently to give council's and consent applicants clarity and certainty so they can plan ahead. A bill making the next tranche of amendments to the RMA is expected to be introduced later this year and become law in 2025.

The *Federated Farmers* decision will necessitate greater consideration of the potential effects arising from discharges that are proposed to be permitted. As a result, permitted activity rules may be more limited in scope, therefore requiring more discharges to obtain resource consent. While the Government announcements have noted the challenges posed by section 70, it remains to be seen whether RMA amendments also address this section.

Want to know more?

Please contact our Resource Management team if you want to better understand the implications of these High Court decisions. An updated article will be posted on the Anderson Lloyd website when more information is released.

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