Ministry for the Environment
Manatū Mō Te Taiao

Briefing: Potential changes to RMA s70 and s107

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MfE priority: Urgent

Actions sought from Ministers		
Name and position	***Action sought***	***Response by***
To Hon Chris BISHOP **Minister Responsible for RMA Reform** Forward to Hon Todd McClay **Minister of Agriculture** Forward to Hon Tama Potaka **Minister for Māori Crown Relations: Te Arawhiti** Forward to Hon Penny Simmonds **Minister for the Environment** Forward to Hon Mark Patterson **Associate Minister of Agriculture, Regional Development, and Rural Communities** Forward to Hon Andrew Hoggard **Associate Minister for the Environment**	**Sign** the briefing	31 May

Actions for Minister's office staff
Return the signed briefing to the Ministry for the Environment (ministerials@mfe.govt.nz). **Forward** to relevant Ministers on agreement from Hon Bishop

Appendices and attachments
Appendix 1: Summary of recent court decisions on s70 and s107 of the RMA

Key contacts at Ministry for the Environment			
Position	***Name***	***Cell phone***	***First contact***
Principal Author	Rowan Taylor		
Responsible Manager	Macaela Flanagan		
General Manager	Sara Clarke	s 9(2)(a)	✓

Minister's comments

Potential changes to RMA s70 and s107

Key messages

1. Environment Canterbury (ECan) and others have requested changes to sections 70 and 107 of the Resource Management Act 1991 (RMA) following recent High Court decisions on the implementation of these sections.

2. Sections 70 and 107 both contain an “adverse effects test” that restricts councils from allowing contaminant discharges where significant adverse effects are likely. Many councils have worked around this restriction by allowing such discharges (via permitted activity rule or resource consent) provided that the discharge is reduced over time.

3. The High Court decisions have found this programmed reduction approach to be unlawful on the basis that a discharge may only be allowed if its likely adverse effects cease when the permission takes effect.

4. The implication of both decisions taken together is that more land-users must now apply for discharge consent (since contaminating discharges cannot be permitted activities), and that more applications for discharge consents will be declined. Besides farms, these rulings will also affect urban development, aquaculture, and infrastructure projects where contaminating discharges have been allowed. The result will be higher compliance costs, increased investment uncertainty and holding costs, and likely disruptive impacts where consent is declined.

5. Councils are also directly affected. The increased consent processing load may compound their existing challenges with consent backlogs. ECan is requesting a change to s107 that would enable councils to keep using the programmed reduction approach when granting consents, thereby balancing economic and environmental needs.

6. Ministry officials conditionally support an amendment to s107 of the RMA in line with ECans suggestion, as this offers a practical way to improve freshwater over time without undue additional cost and disruption.

7. Officials have also identified additional amendments that could be progressed alongside an amendment to s107 that could provide additional clarity to councils on how to interpret s70 and s107.

8. Pending your approval, officials will consider and set out a range of policy options and any Treaty of Waitangi implications through a second briefing ahead of the Bill #2 process.

Recommendations

We recommend that you:

a. **forward** this briefing to Hon Todd McClay, Minister of Agriculture; Hon Tama Potaka, Minister for Māori Crown Relations; Hon Penny Simmonds, Minister for the Environment; Hon Mark Patterson, Associate Minister of Agriculture, Regional

Development, and Rural Communities; Hon Andrew Hoggard, Associate Minister for the Environment

Yes | No

b. **agree** to consider potential amendments to RMA s70 and s107

Yes | No

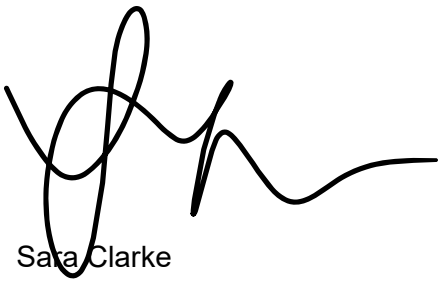
c. **note** that officials are currently preparing you a Cabinet paper and briefing note seeking agreement to the scope of RMA Bill #2

d. **agree** to consider progressing these amendments through the RMA Bill #2 process, as the suitable vehicle, with delegated decision-making to you

Yes | No

e. **note** that, subject to your feedback, officials will progress detailed advice on amendment options, Treaty implications, and timelines

Signatures



Sara Clarke
General Manager – System Enablement
Partnerships, Investments and Enablement

20 May 2024

Hon Chris BISHOP
Minister Responsible for RMA Reform

Date

Potential changes to RMA s70 and s107

Purpose

1. This briefing discusses potential amendments to s70 and s107 of the Resource Management Act 1991 (RMA) and seeks agreement in principle to consider these, pending detailed further advice on options and implications.

Context

2. ECan and several pastoral sector groups have recently written to Ministers requesting changes to s70 and s107 of the RMA following two recent High Court rulings:

    - *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024]: High Court decision on RMA s70

    - *Environmental Law Initiative (ELI) v Canterbury Regional Council* - NZHC 612 [20 March 2024]: High Court decision on RMA s107

3. The main takeaways from the High Court decisions in relation to s70 are that:

    i s70 applies to all discharges, including diffuse discharges, and

    ii councils are in breach of s70 if they adopt a permitted activity rule without first being satisfied that this is unlikely to give rise to any of s70's listed adverse effects on the receiving waters, including on aquatic life.

4. The main takeaways from the High Court decision in relation to s107 are that:

    i s107 applies to all discharges, including diffuse discharges, and

    ii councils are in breach of s107 if they grant consent to discharge contaminants without first being satisfied that this is unlikely to give rise to any of s107's listed adverse effects on the receiving waters, including on aquatic life.

5. Both cases are summarised in Appendix 1.

Management of incidental discharges under the RMA

6. Incidental discharges, most of which are released as diffuse discharges, remain the major challenge to freshwater quality in many parts of New Zealand[1], despite long-standing RMA rules intended to control them.

[1] Ministry for the Environment & Stats NZ (2023*). New Zealand's Environmental Reporting Series: Our freshwater 2023.* Retrieved from environment.govt.nz. ME 1748, ISSN: 2382-0179, ISBN: 978-1-991077-37-0

7. Section 15 (Discharge of contaminants into the environment) of the RMA prohibits the discharge of contaminants to water, whether direct or via land unless the discharge is expressly allowed by a national environmental standard or other regulations.

8. Recent court decisions have affirmed that this prohibition applies to all contaminant discharges, whether they originate incidentally or intentionally, and whether they are released diffusely or via point sources.[2]

9. Sections 70 and 107 require that, as a prerequisite for allowing any discharge (via permitted activity or resource consent), a council must be satisfied beforehand that this is unlikely to give rise to any of the following adverse effects in the receiving waters:

    i conspicuous oil or grease films, scums or foams, or floatable or suspended materials

    ii any conspicuous change in the colour or visual clarity

    iii any emission of objectionable odour

    iv the rendering of fresh water unsuitable for consumption by farm animals

    v any significant adverse effects on aquatic life.

Application of s70 and s107

10. For the first two decades of the RMA's enactment, councils tended not to apply s15, s70 and s107 to diffuse discharges, usually only applying them to point-source discharges.

11. Since 2011, however, when the first National Policy Statement for Freshwater Management (NPS-FM) came into effect, councils have increasingly been using the RMA to regulate diffuse discharges, though generally with a lighter touch than for point source discharges.

12. One approach has been to allow diffuse discharges to continue, provided their adverse effects are reduced over time. This programmed reduction approach lets landowners reduce their discharges over a specified time period, with less disruption, while still setting a trajectory for freshwater improvement.

13. Recently, however, Court decisions[3] have ruled against this approach, finding that, under s70 and s107 respectively, before any discharge can be permitted or consented, councils must first be satisfied that none of the adverse effects listed in these clauses will likely occur *from the moment permission or consent takes effect.*

[2] NZEnvC 265 [23 December 2022], NZHC 612 [20 March 2024], NZHC 726 [9 April 2024]

[3] NZEnvC 265 [23 December 2022], NZHC 612 [20 March 2024], NZHC 726 [9 April 2024]

Implications of the High Court decisions

14. These decisions mean that councils cannot lawfully make discharges a permitted activity, nor grant consent for them, unless satisfied beforehand that the adverse effects listed in s70, or s107, are unlikely to arise. In particular:

    i The decision on s70 means councils will now require more farmers, developers, and infrastructure providers, to seek resource consents (since councils will be less able to make permitted activity rules).

    ii The decision on s107 means that, in sensitive and over-allocated catchments, councils may have to deny consent on the basis that one or more of the listed adverse effects is likely to occur. In such cases, activities may have to cease entirely or, at least, until significant adjustments are made (e.g. land use change with herd reductions).

15. The combined effect of the decisions is to increase the number of farmers, developers, and infrastructure providers now needing consent for discharges from their activities, many of which will be declined if an adverse effect is likely to result. The decisions will also increase the consenting workload of councils, affecting clearance timeframes and consent backlogs.

16. ECan considers that the decision potentially impacts hundreds of consents in Canterbury and may include some of the more significant proposals in the region, including: Akaroa's community wastewater treatment plant, stormwater applications for territorial authorities, Irrigation schemes' discharge permits, and marine aquaculture proposals.

17. ECan has indicated that it will now need to take a more conservative approach to assessing discharge consents (and decline more of them), and that this will impact on its capacity to process the existing backlog of consent applications.

18. Because of these impacts, ECan has suggested amending s107. The suggested change would enable councils to grant consent for contaminant discharges that are reduced over a specified time.

19. Some industry groups[4] have requested other amendments, including the exemption of diffuse discharges from being covered by s70 and s107.

Ministry view

20. Ministry officials consider that changes enabling programmed reduction to s107 are warranted, but that the Court's decision on s70 is aligned with the policy intent. Councils should be satisfied before making permitted activity rules that the impacts of the rule won't cause any of the adverse effects listed.

[4] Beef and Lamb NZ, Dairy NZ, Fonterra, Federated Farmers, Irrigation NZ, Ashburton Lyndhurst Irrigation Ltd.

21. Officials have also identified some proposed amendments to both sections that could provide more clarity to councils about how to make decisions under s70 and s107 of the RMA.

22. If Ministers agree, officials will come back to Ministers with more detailed options giving effect to the suggested changes.

Enable programmed reduction through s107

23. Ministry officials are broadly supportive of ECan's requested amendment to s107 and consider amending it to allow programmed reduction is in line with the initial policy intent. Properly framed and managed, consents based on the programmed reduction of contaminant discharge over time could be a practical way to balance environmental needs with socio-economic ones.

24. As ECan has pointed out, this approach is broadly consistent with the approach taken in the NPS-FM, which allows councils to achieve environmental outcomes over multiple planning periods (generally 10-year tranches) provided the timeframes are 'ambitious but reasonable'.

25. This approach is not without risk to the environment, as evidenced by failures to meet the contaminant reduction timeframes set by councils, so any amendment would need to address this risk.

26. Officials would work with Ministers to ensure amendments to s107 allowing programmed reductions:

    i achieve freshwater outcomes within accountable timeframes,

    ii include mechanisms to appropriately deal with non-compliance, given the long history of such reduction requirements not being met in practice, and

    iii are not subject to iterative extensions.

27. Alongside s107 amendments, officials have identified ways that clarity could be added to both s70 and s107 including through amendments to the adverse effects list; through specifying the contaminants the sections relate to or through clarifying how the councils should consider the relationship with the NZCPS. Options related to these suggested changes would be included in subsequent advice.

Other suggested amendments that have been requested

28. Ministry officials do not support the industry request to remove diffuse discharges from s70 and s107. Given the scale of these discharges, exempting them from the RMA would magnify the risk of adverse freshwater outcomes in many regions in both rural and urban areas.

29. Such an exemption would significantly reduce councils' ability to ensure that diffuse discharges are sustainably managed and that water bodies are sufficiently safeguarded from contaminants generated by human activity. Officials can provide more detail on this rationale when we present proposals for amendments.

30. We consider that the economic concerns underlying this request can be best addressed, not by removing the s70/s107 environmental constraint, which would defeat the core

intent of the RMA, but by enabling this constraint to operate, via programmed reduction, in a way that businesses will find more manageable.

31. Several other industry groups seek various changes to RMA s107 that would:

    i make commercial vegetable growing a permitted activity[5]

    ii expand the exemptions to include effects that are short term (as opposed to temporary)[6]

    iii provide a clearer pathway for replacement consents[7]

32. As above, we consider that the economic concerns underlying these requests can be best addressed by amending s107 to enable programmed reductions via resource consent. This would provide a clear consenting pathway and would leave decisions relating to permitted activities and effects exemptions to the regional plan.

Next steps

33. Officials propose to provide further advice and options on potential amendments to s70 and s107, for inclusion in Reform Bill #2. The initial preferred option would:

    i enable councils to consent programmed reductions for contaminant discharges (s107 only),

    ii add clarity to support councils in their interpretation of s70 and s107 of the RMA.

34. Officials are currently preparing you a Cabinet paper and briefing note seeking agreement to the scope of RMA Bill #2. You are discussing the scope of RMA Bill #2 with your Ministerial colleagues on 22 May.

35. Subject to your approval of the recommendations in this briefing and agreement on the scope of RMA Bill #2, officials will provide you with a further briefing with options regarding s 70 and s 107, and seek your agreement to progress the chosen policy changes through the RMA Bill #2 process.

[5] Horticulture NZ

[6] Forest Owners Association

[7] Oji Fibre Solutions NZ Ltd and Forest Owners Association

Appendix 1: Summary of recent court decisions on s70 and s107

Federated Farmers Southland Incorporated v Southland Regional Council [2024] NZHC 726 [9 April 2024]: High Court decision on RMA s70

1. The lawful use of s70 was at the centre of last month's High Court (HC) decision[1] which partially upheld an Environment Court (EC) interim finding[2] on Rule 24 (Incidental Discharges from Farming) of the proposed Southland Water and Land Plan (pSWLP).
2. Rule 24, as proposed, makes incidental discharge a permitted activity provided (s24a) the discharge is managed so as to avoid the adverse environmental effects listed in s70.
2. The HC found that the EC was correct to find Rule 24 in breach of s70 because the council could not have been satisfied *beforehand* that the permitted discharges were unlikely to have any of the listed adverse effects, including effects on aquatic life.
3. The Court's rationale was that the council would have known that many water bodies in Southland are degraded and that the discharge of contaminants incidental to farming and other activities is likely to be adversely affecting aquatic life. Given this, it would have also known that the proviso clause (s24a) could not prevent or avoid those effects once discharges were permitted.
4. The HC also upheld the EC finding that s70 applies to both point-source and non-point-source (or diffuse) discharges. It noted that "discharge" is defined broadly in the RMA to include "emit, deposit, and allow to escape" and that "s70(1)(b) expressly captures non-point source discharges, being discharges of contaminant that enter water after being released onto or into land."
5. The main takeaways from the HC and EC decisions in relation to s70 are that:
    a. s70 applies to all discharges, including diffuse discharges, and
    b. councils are in breach of s70 if they adopt a permitted activity rule without first being satisfied that this is unlikely to give rise to any of s70's listed adverse effects on the receiving waters, including on aquatic life.

Environmental Law Initiative (ELI) v Canterbury Regional Council - NZHC 612 [20 March 2024]: High Court decision on RMA s107

6. The HC recently upheld an appeal by the Environmental Law Initiative (ELI) against a resource consent granted by ECan to the Ashburton-Lyndhurst Irrigation Company Ltd. (ALIL)[3] .
7. ALIL is a cooperative irrigation scheme owned by 238 farms spanning 30,000 hectares between the Hakatere/Ashburton and Rakaia Rivers, an area whose groundwater has elevated nitrate levels.
8. The Court found that ECan should not have granted ALIL consent to discharge synthetic nitrogen fertiliser across the scheme because:
    a. the consent conditions were insufficient to avoid the significant adverse effects on aquatic life which, under s107, should have prevented consent being granted; and
    b. ECan did not properly consider the cumulative downstream impacts on the coastal marine area, as required by New Zealand Coastal Policy Statement (NZCPS).

9. The decision does not require ALIL to immediately cease its activities/discharges. The RMA allows these to continue under the existing consent until a final decision is made on the new consent, following appeals. Both ECan and ALIL have appealed.
10. The main takeaways from the HC decision in relation to s107 are that:
    a. s107 applies to all discharges, including diffuse discharges, and
    b. councils are in breach of s107 if they grant consent to discharge contaminants without first being satisfied that this is unlikely to give rise to any of s107's listed adverse effects on the receiving waters, including on aquatic life.

[1] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024]
[2] *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265 [23 December 2022]
[3] *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024]