



Corner Ruakura  
& Morrinsville Roads  
Private Bag 3221  
Hamilton 3240  
New Zealand

**Ph** +64 7 858 3750

**Fax** +64 7 858 3751

[www.dairynz.co.nz](http://www.dairynz.co.nz)

Level 4, Wellington Chambers  
154 Featherston Street  
Wellington 6011, New Zealand  
PO Box 121  
Wellington 6140, New Zealand

**FEDERATED  
FARMERS  
OF NEW ZEALAND**

**WELLINGTON**

Lambton Centre  
Level 4, 117 Lambton Quay  
PO Box 715, Wellington  
6140  
T 0800 327 646

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Hon Andrew Hoggard  
Associate Minister for the Environment  
**PARLIAMENT BUILDINGS**

**By Email:** [andrew.hoggard@parliament.govt.nz](mailto:andrew.hoggard@parliament.govt.nz)

Dear Associate Minister

## **PROPOSED AMENDMENTS TO SS 70 & 107 RMA - DISCHARGES**

1. This letter is written on behalf of Beef + Lamb New Zealand Limited (**B+LNZ**), Federated Farmers of New Zealand Incorporated (**FFNZ**) and DairyNZ Limited (jointly, the **Farming Interests**).
2. This letter is to alert you to issues of concern to the Farming Interests that arise from three recent court decisions addressing ss 70 and 107 Resource Management Act 1991, and to propose some changes to ss70 and 107 to address those concerns. Particularly, we are concerned about impact of these decisions on pastoral farmers' ability to farm in an efficient, productive and sustainable fashion. However, the issues addressed in this letter go beyond specific concerns for the Farming Interests and note concerns for other vital sectors, industries and communities in Aotearoa/New Zealand.

### **Structure**

3. This letter is structured as follows:
  - (a) Background.
  - (b) Statement of problem.
  - (c) Industries and activities that may be affected.

- (d) Proposed solutions.

## Background

4. Section 70 RMA restricts the ability of a regional council to make a permitted activity rule in a plan for discharges to water, or to land where the discharge may enter water, if the discharge/s will lead, “after reasonable mixing”, to the following effects in the “receiving waters”:
  - (a) The production of conspicuous oil, grease films, scums or foams, or floatable or suspended materials.
  - (b) A conspicuous change in colour or visual clarity.
  - (c) Objectional odours.
  - (d) Freshwater being unsuitable for consumption by farm animals.
  - (e) Significant adverse effects on aquatic life<sup>1</sup>.
5. Section 107 RMA is similar, and prohibits the granting of discharge permits if, “after reasonable mixing” the same effects arise in the “receiving waters”.<sup>2</sup>
6. Since the enactment of the RMA, most parties appear to have accepted that ss 70 and 107 apply to point source discharges only i.e. discharges from an identifiable source, such as a pipe. That ‘conventional approach’ has been how the Farming Interests have approached ss 70 and 107.
7. However, three recent court decisions have moved away from the conventional approach. In summary:
  - (a) *In Aratiatia Livestock Limited v Southland Regional Council*<sup>3</sup> the Environment Court held:
    - (i) Where attributes of water bodies are below a national bottom line or minimum acceptable state in the National Policy Statement for Freshwater Management 2020 (**NPSFM**) then discharges would be “highly likely” to have significant adverse effects on aquatic life.<sup>4</sup>
    - (ii) Section 70 applies beyond point source discharges to diffuse discharges of contaminants, such as those from pastoral farming activities.<sup>5</sup>

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<sup>1</sup> See s 70(1)(c) - (g).

<sup>2</sup> See s 107(1)(c) – (g).

<sup>3</sup> [2022] NZEnvC 265.

<sup>4</sup> See [265] – [266].

<sup>5</sup> See [259].

- (iii) This means that a permitted activity rule for discharges from pastoral farms in Southland<sup>6</sup> would be unlawful and all farmers would require a resource consent to farm.
  - (b) The application of s 70 to diffuse discharges was appealed to the High Court in *Federated Farmers Southland Incorporated v Southland Regional Council*<sup>7</sup> (**Section 70 Decision**). The High Court confirmed the Environment Court's decision that s 70 applies to diffuse discharges.<sup>8</sup>
  - (c) In a separate case, the High Court in *Environmental Law Initiative v Canterbury Regional Council*<sup>9</sup> judicially reviewed the Canterbury Regional Council's decision to grant discharge consent to Ashburton Lyndhurst Irrigation Ltd for the diffuse discharge of nitrogen from the farming activities of its shareholder farmers. The High Court found the Council failed to recognise that the existing cumulative significant adverse effects on aquatic life, including from the proposed diffuse discharge of nitrogen, prevented the granting of consent under s 107(1)(g).
8. The High Court decision regarding s 107 has recently been appealed (by Environment Canterbury and by Ashburton Lyndhurst Irrigation Ltd). There is a possibility that the s 70 Decision will also be appealed. Despite the possibility of further consideration of these sections by the appellate court, our concern is that there is ambiguity in the application of ss 70 and 107 for a wide range of activities and, even if successful, there would still likely be a need to clarify the application of these sections.

### Implications of Decisions

9. The Farming Interests do not consider it was ever the legislature's intent that ss 70 and 107 would apply to diffuse discharges.
10. The Farming Interests also consider the three decisions (referred to in paragraph 8 above) will have a significant impact on the efficient and continued operation of a number of industries and activities. In particular, where waterways (note: not catchments or sub catchments) have one or more attributes below national bottom lines or minimum acceptable states in the NPSFM:
- (a) A proposed regional plan cannot authorise a diffuse or point source discharge as a permitted activity (note: the High Court interpretation of s 70 is unlikely to affect regional plan permitted activity rules that are operative). This will have wide implications for the drafting of rules in freshwater regional plan changes to implement the NPSFM (either the current version or a future version).

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<sup>6</sup> Given a finding that water was degraded on a regional scale.

<sup>7</sup> [2024] NZHC 726.

<sup>8</sup> See [71] – [74].

<sup>9</sup> [2024] NZHC 612.

- (b) Where a regional plan requires a diffuse or point source discharge to obtain resource consent, the effect of s 107 will be to effectively prohibit the granting of discharge permits.
11. Where waterways have one or more attributes below national bottom lines or minimum acceptable states in the NPSFM, the three decisions will impact:
- (a) All pastoral farming, arable cropping and horticulture activities (because these all have an associated diffuse discharge of contaminants).<sup>10</sup> This could prevent farming and growing in some catchments, or even regions.
  - (b) Irrigation of dairy shed effluent, water for irrigation, dairy shed and stock yard wash down and the application of fertiliser and agrichemicals. Many regional plans currently have permitted activity rules for these activities if they comply with certain standards and set out thresholds beyond which resource consent is required.
  - (c) Point source discharges from industrial activities, including pulp and paper and dairy processing factories.
  - (d) Stormwater discharges in urban and rural areas. The issue could be particularly acute for discharges into urban waterways, where the presence of human activities can make those waterways more susceptible to being below the standards in the NPSFM.
  - (e) Wastewater treatment plants and discharges of treated wastewater.
12. Even where waterways are not below national bottom lines or minimum acceptable states, the three decisions will arguably impact pastoral farming, arable cropping, horticulture and other activities that are likely to result in sediment discharges, through to the operation of ss 70(1)(d) and 107(1)(d) (which relate to discharges that are likely to result in a conspicuous change in colour or visual clarity in the receiving waters).
13. The Farming Interests consider the inability to make permitted activity rules for pastoral farming, cropping and horticulture activities is particularly concerning. Because s 70 relates to effects on “receiving waters”, a single failure to comply with an NPSFM attribute’s bottom line or minimal acceptable state means the additional discharges will contribute to a significant adverse effect on aquatic life and a rule requiring resource consent would be required. Due to the current drafting of attribute states and national bottom lines in the NPSFM, it could be that many rural regions (as well as urban areas) are impacted.
14. Furthermore, when the nature of plans, which often address regulation on a regional or catchment basis, is considered, the risk that parties would argue it is unsound for *any* permitted activity rules to be made in plans for regions where water quality is considered degraded is real. This would be inefficient and undesirable. This has the greatest effect on farming activities, which are numerous and frequently rely on

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<sup>10</sup> For instance, nitrogen (in its various forms), phosphorous, microbial pathogens and sediment.

permitted activity status in plans. Point source discharges typically require authorisation under resource consents and so the application of s 70 tends to be less of an issue for those types of discharges.

15. The prohibition on granting a discharge permit in s 107, which is on the same grounds, then creates a regulatory roadblock that no farm or farmer can pass through. This would lead to the loss of pastoral farming and associated rural communities in parts of Aotearoa/ New Zealand.
16. Across our respective organisations, we work with farmers on ways to improve water quality, and to assist with the achievement of better water quality outcomes over time. The Farming Interests consider that a risk-based approach to the making of regulation should be adopted and farmers should be able, through tools like risk-based farm environment plans, to manage their activities on farm in a way that contributes to the improvement of water quality overall. A risk-based approach, where solutions are targeted to the specific issues on-farm is more effective than blanket rules, providing for better environmental outcomes. Where resource consents are required, the analysis of the impact on water quality from diffuse and other discharges from farming, in light of mitigation measures proposed, should be able to be considered. In other words, the existing processes in the RMA for making plans and granting resource consents can manage the adverse effects from diffuse discharges.
17. Pastoral farming, cropping and horticulture activities contributed an estimated \$49 billion in exports in 2023. Economic costs resulting from a lack of clarity in these matters will not be limited to these activities. It is thought that the problem arising for territorial authorities and the granting of discharge consents under s 107 is just as severe. This is because the bar on granting resource consents under s 107 could require alternative disposal methods to be determined because, notwithstanding the level of treatment of wastewater or stormwater, the assessment of the effects includes cumulative effects of all discharges within the wider catchment.

## The Solutions

18. The Farming Interests respectfully suggest that direct engagement with other interested parties, including territorial authorities would have merit.
19. **Attached** is an appendix to this letter are suggested legislative amendments ss 70 and 107, which are intended to clarify the application of these two sections. In particular:
  - (a) New subsections 70(3) and (4) to clarify that s 70 applies to certain point source discharges only:
    - (i) It does not apply to diffuse discharges or to point source discharges *intended* to be disposed of into or onto land.
    - (ii) Address any potential for uncertainty about whether discharges are point source or diffuse by itemising in s 70(4).

- (iii) By way of example, the application of our suggested changes would mean that the application of fertiliser to land would not be captured by s 70 (i.e. it could be authorised as a permitted activity but the discharge of contaminants from a drum of buried DDT could not be authorised as a permitted activity).
- (b) A new s 107(2)(d) to clarify that consent may be granted for discharges where conditions are imposed which require the contribution to cumulative effects to be managed over time:
  - (i) This subsection would apply to any discharge, whether it is point source or diffuse, provided it is not authorised as a permitted activity under s 70.
  - (ii) By way of example, the application of our suggested changes would mean that an application for consent for diffuse discharges of nitrogen from pastoral farms seeking consent as part of an irrigation scheme could be consented subject to conditions requiring reductions in nitrogen discharges over time. Likewise, an application for the disposal of treated wastewater to land could be granted subject to conditions requiring reductions in contaminants over time.
  - (iii) This subsection also ensures there is a pathway for controlled activities for diffuse discharges of agricultural contaminants to be granted, avoiding legal arguments about the suitability of controlled activities for these discharges.

Yours sincerely



**Campbell Parker**  
Chief Executive  
DairyNZ



**Terry Copeland**  
Chief Executive  
Federated Farmers of New  
Zealand



**Sam McIvor**  
Chief Executive  
Beef+Lamb New Zealand

cc. Hon Chris Bishop  
Minister Responsible for RMA Reform  
Parliament Buildings  
Email [chris.bishop@parliament.govt.nz](mailto:chris.bishop@parliament.govt.nz)

Hon Penny Simmonds  
Minister for the Environment  
Parliament Buildings  
Email [penny.simmonds@parliament.govt.nz](mailto:penny.simmonds@parliament.govt.nz)

Hon Todd McClay  
Minister for Agriculture  
Parliament Buildings  
Email [todd.mcclay@parliament.govt.nz](mailto:todd.mcclay@parliament.govt.nz)

The Secretary for the Environment  
Ministry for the Environment  
Wellington  
Attention: James Palmer  
Email: [james.palmer@mfe.govt.nz](mailto:james.palmer@mfe.govt.nz)

## APPENDIX 1 – ss 70 & 107 AMENDMENT OPTIONS

Proposed additions to ss 70 and 107 in red.

### 70 Rules about discharges

(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.

(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) This section shall only apply to a point source discharge.

(4) For the purposes of this section, point source discharge means a discharge from an identifiable and confined point but excludes:



- (a) any discharge of contaminants intended to be disposed of onto or into land, such as disposal of stormwater to ground, irrigation of effluent or wastewater, or application of fertiliser;
- (b) the discharge of contaminants from or caused by animals.

## 107 Restriction on grant of certain discharge permits

(1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—

- (a) the 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; or
- (ba) the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant, —

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

- (c) the production of any 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.

(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

- (a) that exceptional circumstances justify the granting of the permit; or
- (b) that the discharge is of a temporary nature; or
- (c) that the discharge is associated with necessary maintenance work.
- (d) that any of the effects identified in subsection (1) above is only likely to arise because of a cumulative effect of the discharge in combination with other discharges and that the discharge permit includes conditions requiring any contribution of the discharge to that cumulative effect to be managed over time.

and that it is consistent with the purpose of this Act to do so.

(3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of

the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.