IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 150

IN THE MATTER	of the Resource Management Act
1991 AND	an appeal under s120 of the Act
BETWEEN	KAIUMA FARM LIMITED (ENV-2023-CHC-87)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent
AND	MARBERRY ESTATE LIMITED
	Applicant

Court:	Environment Judge P A Steven Environment Commissioner K Wilkinson
Hearing:	via AVL on 9 May 2024
Appearances:	S Ryan and S Thompson for the appellant S Quinn and M Campbell for the respondent S Everleigh for the applicant
Last case event:	7 June 2024
Date of Decision: Date of Issue:	27 June 2024 27 June 2024

DECISION OF THE ENVIRONMENT COURT
REGARDING JURISDICTION

A: We find that the commissioner was wrong to have concluded that he had jurisdiction to allow an amendment to a land use consent to include a s15 discharge permit for the discharge of sediment.

B: Costs are held over until after the substantive decision on appeal.

REASONS

[1] This is a decision on a preliminary determination of a point of law as to whether jurisdiction existed to allow the applicants to amend the application for land use resource consent to include a discharge permit for the discharge of sediment under s15 RMA[1] ('the scope issue').

[2] The scope issue arises in the context of an appeal against a decision to grant land use and discharge permits to Marberry Estate Ltd ('Marberry').

[3] The appellant lodged a Notice of Motion seeking a preliminary determination of the scope issue that was phrased as follows:[2]

> … as to whether jurisdiction existed to allow the applicant to amend the application for resource consent (land use) to include a discharge permit for the discharge of sediment under section 15 RMA, or, if jurisdiction did exist, whether jurisdiction was properly exercised to authorise amendment to the application to include a discharge permit (**the preliminary issue**);

[4] The parties focused on the first limb of the question in legal submissions, that being the focus of the court in this decision.

[5] The hearing was held on 9 May 2024.

[6] Following the hearing, the court issued a Minute[3] to the parties raising

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[1] Resource Management Act 1991 ('RMA' or 'the Act').
[2] Notice of motion, 6 December 2023 at [1(a)].
[3] Minute 13 May 2024.

options for Marberry's consideration, namely, that proceedings be adjourned and that a fresh application for a discharge permit be lodged with the Marlborough District Council ('Council') and directly referred to the court under s87D RMA.

[7] The court's Minute noted the potential for a further issue, being that even if the scope issue was decided in Marberry's favour, s104(3) could arise as a problem given that the amendment to include an application for a discharge permit was made after the notification decision was issued on the land use consent application.

[8] In response to that Minute, Marberry elected to pursue that course of action. However, the appellant asked that the court continue to decide the scope issue and although that was not supported by Marberry or the Council, the court decided that the appellant was entitled to an answer to the preliminary question.

[9] It should be noted at this juncture that the Council elected to file closing submissions addressing the question of whether s104(3)(d) could provide a jurisdictional bar to grant of consent, although that issue is not the subject of this decision. Legal submissions were not sought on that issue. Accordingly, the court will refrain from addressing submissions on the potential application of s104(3)(d).

[10] It is sufficient to note that had we upheld the commissioner's decision on the jurisdictional issue, the appeal would go to a hearing where the court would hear evidence as to the effects of the land use activities and of the discharges, including into the Coastal Marine Area ('CMA').

[11] That evidence, which we emphasise has not yet been filed with the court, could raise the question of whether the discharge permit application ought to have had some form of notification. At this juncture there has been no kind of notification decision at all in relation to that application.

[12] Marberry's decision to make a fresh application ahead of this

decision,

which will now have to be the subject of a decision on notification, rules out its potential application.

Background

[13] The appeal relates to an area of approximately 643ha of plantation forest within Kaiuma forest in Marlborough which is owned by Marberry.

[14] Marberry applied for a land use application from the Council on 16 November 2020, for harvesting of commercial forest and earthworks to facilitate harvesting, and construction of stream crossings. The application included an Assessment of Environmental Effects ('AEE').

[15] The majority of plantation forest proposed to be harvested is regulated by the National Environmental Standard for Plantation Forestry ('NES-PF'), now the National Environmental Standard for Commercial Forestry ('NES-CF'). Part of the forest to be harvested is regulated by provisions of the Marlborough Environment Plan ('MEP'), as located within the Coastal Environment Zone ('CEZ'). The CEZ contains policies and rules implementing the New Zealand Coastal Policy Statement and as they are permitted to be, the MEP rules are more stringent than the NES-PF/CF.

[16] The land use consent application was limited notified, including on the appellant, Kaiuma Farm Limited ('Kaiuma'), and two other organisations. Only Kaiuma lodged a submission in opposition to a grant of consent. In its original submission, Kaiuma raised concerns that the harvesting would inevitably increase run-off, erosion and sedimentation, and give rise to the risk of slope instability, noting that the area has a high rainfall and extreme rainfall events can be predicted during the life of the forestry operations.[4]

[17] Kaiuma is the owner of a 125ha property operated as a dry stock grazing

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[4] Kaiuma submission on resource consent application, 23 February 2021 at [16].

unit on the valley of the floor that is surrounded by the steeply sided plantation forest operated by Marberry. The farm also occupies the floodplains of two major streams which drain the steep slopes and discharge to Kaiuma Bay and Pelorus Sound.

[18] Following limited notification, and receipt of Kaiuma's submission, the application was placed on hold at the request of the applicant. Marberry gave notice to the Council of intended works at the forest under the NES-PF standards which were accepted by the Council on the basis that the activities were compliant.

[19] However, Kaiuma lodged an application for an interim enforcement order supported by evidence of a hydrologist/geomorphologist, who considered that the works were unlikely to comply with the sedimentation standards in the NES- PF, after which interim enforcement orders were granted by consent of the parties, subject to conditions.[5]

[20] An amended application was lodged with the Council in July 2022. This comprised an amended AEE containing an ecological assessment.

[21] About that time, the Council received requests from residents of Kaiuma Bay to reconsider its notification decision or to make a fresh notification decision. However, no fresh notification decision was made as the Council relied on the notification assessment undertaken when the original application was lodged. The Council advised the residents that its notification decision was not able to be reconsidered.

[22] The application was eventually heard by a commissioner acting under delegated authority from the Council. The commissioner issued directions for the exchange of expert evidence in advance of the hearing. In accordance with that direction, Kaiuma exchanged evidence from experts in hydrology and

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[5] *Kaiuma Farm Ltd v Marberry Estate Ltd & Ors* [2021] NZEnvC 198.

geomorphology, from Dr McConchie, and from Mr May, a forestry consultant.

[23] The experts considered that there would not be compliance with relevant permitted activity standards of the NES-PF, that being the basis upon which the application had been lodged with the Council.

[24] Dr McConchie stated:[6]

> In my opinion, the earthworks will not be a permitted activity under Regulation 24 of the NES-PF. It is improbable that the applicant will be able to comply with all NES-PF standards, in particular the sediment control measures (regulations 24, 26, 31-in relation to earthworks, and regulation 65 for harvesting activities).

The amendments

[25] At the hearing, the applicant sought in opening submissions to amend the application for the land use consent to address the consequences of potential non-compliance with NES-PF/CF regs 26 and 65.[7]

[26] During the hearing, the commissioner directed expert witness caucusing during which it was identified that as a consequence of non-compliance with regs 26 and 65, a discharge permit would also be required under s15 of the Act by reason of reg 97(1) and (7) of the NES-PF.

[27] In a Minute dated 7 June 2023, which was issued after the hearing, the commissioner:

(a) invited written submissions from the applicant and submitter as to whether jurisdiction existed to grant a discharge permit under s15 RMA and any consent required under s13; and
(b) directed the Council to advise whether its practice was to issue a

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[6] Agreed statement of facts, 8 March 2024 at [20].
[7] Agreed statement of facts at [22].

single comprehensive permit addressing all relevant Pt 3 RMA restrictions, and whether separate permits are issued for each Pt 3 provision, under ss 9, 13 and 15 RMA.

[28] Submissions were filed by:

(a) Marberry, who submitted that the amendment to include discharge permits (and any consent required under s13 RMA) was within scope;
(b) the Council, who took the same position as Marberry, stated that its practice was to issue a single comprehensive permit addressing all relevant Pt 3 RMA restrictions;
(c) Kaiuma, who submitted that an amendment to encompass the discharge permit under s15 RMA, was not within the commissioner's jurisdiction on the application.

[29] At the Council hearing, there had been a high-level agreement between the experts on hydrology and geomorphology regarding the site being susceptible to erosion and generation of sediment due to slope, soils, geology and rainfall, and that there would be an increase in the risk of erosion, slope instability, and escape of sediment resulting from harvesting the forest.

[30] However, there were differences of opinion as to the relative influence of slope stability versus escape of refined sediment, the potential effectiveness of the proposed consent conditions, the appropriateness of method controls on harvest, the quantum of residual risk to farmland, and the likely sediment escape from the forest into the Kaiuma and Omahakie streams, Kaiuma Bay, and the Havelock estuary of Te Hoiere/Pelorus Sound.

[31] In a decision dated 21 July 2023, the commissioner determined that jurisdiction existed to allow the amendment sought by Marberry to include a discharge permit under s15 RMA, along with resource consent under s13 RMA,

and granted the amended application subject to conditions.[8]

[32] The consequence of amending the application for resource consents to include a discharge permit had not been the subject of express consideration by the planning witnesses reporting under s42A, at the Council hearing. Nor had it been considered by the Council's delegated decision-maker when considering the notification decision on the original land use consent application. The issue was only addressed in written submissions after the hearing had finished but before the commissioner had formally closed the hearing.

[33] The court was told that apart from the present application by Marberry, the Council has not to date issued any discharge permit for sediment from plantation forestry activities for any application processed after the commencement of the NES-PF/CF.[9]

Position of parties before the court

[34] Before the court, the position of the parties reflected that taken at the Council hearing. Kaiuma emphasised that the amendment to encompass a different type of consent bypasses the statutory scheme. Counsel's written submissions focused on the process provisions in Pt 6 RMA, including: the power to consider whether the application is complete (s88); whether to request further information (s92); and notification (s95A-G).

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[8] The conditions include provisions for approval of various management plans including, relevantly, a harvesting and earthworks management plan, an erosion and sediment control plan, water quality monitoring plan, and re-establishment plan.

[9] Commenced 1 May 2018.

The application in further detail

[35] As did the commissioner, the court has focused on the first application lodged with the Council as that preceded the notification decision.[10] Marberry's application was contained in a standard form published by the Council and was accompanied by an AEE. The application states that the type of resource consent being applied for was a land use consent.

[36] In response to various questions posed in the application form under the heading "additional consents that need to be applied for, or have been applied for", Marberry stated, "Not applicable".[11]

How were sedimentation issues addressed in the AEE?

[37] The AEE contains an assessment of the effects on the environment associated with the discharge of the contaminant. Key points of the assessment were cited by counsel for Marberry in her opening submissions, as follows:[12]

> (a) The executive summary records:
>
> > Given that most of the forest is located in an area identified in the National Environmental Standard for Plantation Forestry (NESPF) as potentially having a High (Orange) Erosion Susceptibility Classification, and that the land drains to Kaiuma Bay and in particular the ecologically significant coastal estuarine area at the head of the Bay, an assessment of high risk areas for earthworks has been undertaken and specific mitigation measures for those high risk areas have been identified;
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> (b) The proposal detail explains the erosion risks and refers the reader to Section 5 of the Harvesting and Earthworks Management Plan (**HEMP**);

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[10] The court has thoroughly inspected the amended application which was also for land use consent only. That was prepared on a different version of the Council's published application form, although the information pertaining to whether additional resource consents were needed was the same as the first one.

[11] Marberry resource consent application 16 November 2020.

[12] Marberry legal submissions at [21(a)-(g)].

(c) Section 7.1.3 assesses the effects of sediment runoff on water quality and ecosystems as follows:

7.1.3 Effects of Sediment Runoff on Water Quality and Ecosystems

- The effect of sediment run-off to coastal waters and streams as a result of earthworks operations is well documented.
- Earthworks to form tracks and skids obviously generate bare soil which is susceptible to erosion in the absence of mitigation measures. Mitigation measures to minimise sediment run-off are outlined in the Harvesting & Earthworks Management Plan in Appendix 3 and include good water control, compaction; stabilisation measures such as benching and sowing; no side casting of fill where it may enter streams and; end hauling sections of new road construction where risk is higher. Specific reference to mitigation measures for earthworks are found in Section 4 under the heading Management Practices and for harvesting in Section 6 under the heading Management Practices. Mitigation measures for specific areas that have been identified as a higher risk are found in Section 5 of the Harvesting & Earthworks Management Plan.
- M & R has a freshwater ecologist on its staff. Sediment monitoring has been undertaken in Kaiuma Bay in advance of harvesting commencing to provide a background of pre-harvest sediment levels in the Bay. Monitoring of sediment levels in the Bay will continue throughout the harvesting operation.

(d) Section 7.1.6 on the effects of discharges of contaminants records:

The issue of potential discharge of sediment from earthworks operations has been canvassed above under the heading of Sediment Runoff. No other contaminants are proposed to be discharged.

(e) Section 7.1.7 addresses risks through natural hazards and hazardous installations and states:

There is a window of potential for slip and sheet erosion to occur in extreme storm events when soils are exposed as a result of earthworks and after the forest is harvested. This ‘window’ when exposed soils are particularly vulnerable to such events is about two years after harvest.

(f) Appendix 4 contains an assessment of objectives and policies and includes statements (in respect to Policy 15.1.32 relating to disturbance of the river bed) that:

- Water quality will only be temporarily affected through the release of sediment to water when constructing and removing the temporary drift deck stream crossings.
- An excessive amount of sediment in the stream would reduce habitat and breeding opportunities for fish. It is important that sediment run-off to streams from forest harvest and earthworks operations is minimised as outlined in the Harvest and Earthworks Management Plan.
- There is a risk interval for erosion and sediment run-off immediately after harvest when the soils are more exposed and until the new tree crop and natural regeneration has established. No guarantees therefore can be made as to whether water quality standards can be met, particularly in the event of large scale storm events immediately subsequent to harvest. That aside, it is expected that water quality standards will be met.

(g) The Harvest Earthworks Management Plan (and Harvest Plan) attached as Appendix 3 contains detail on the potential for sediment discharges from the forestry activity, the environment affected, and effects management measures to be taken. Relevant statements include:

- Kaiuma Bay has got many on-site risks that need to be considered and managed as part of this application, namely steep erosion prone land, large catchment and high rainfall.
- The most critical on-site risk is Kaiuma Bay itself and the potential damage to the estuarine areas. This will be the depositional site for any fine sediment produced from the operation.

And:

- Avoiding sediment discharge to water bodies and protecting aquatic ecosystems is a critical element of road construction, even more so in the sensitive environment of Kaiuma Bay. The design process has considered the impact the construction and ongoing use of the road and landing infrastructure will have on the surrounding water bodies in Kaiuma Bay and the estuarine areas. This will be the

> depositional site for any fine sediment produced from the operation.
>
> Footnotes omitted

[38] It is apparent that the application proceeded on the basis that the sedimentation effects of the land use activities fell below the threshold requirements for a discharge permit under either the NES-PF or the MEP. That assumption was confirmed by counsel at the court hearing.

[39] Sedimentation effects assessed in the AEE were associated with the land use activities (earthworks and harvesting) for which a restricted discretionary activity was required under the NES-PF.

[40] For earthworks, land use consent was required under reg 35(2) NES-PF as a restricted discretionary activity because some of the land where the works will be undertaken is within the high erosion susceptibility classification (>25 degrees slope). The earthworks would also involve more than the stated threshold volume for earthworks within a three-month period, although permitted activity regs 25-33 are said to be complied with.

NES-PF regulations

[41] Regulation 26 sets out the permitted activity conditions for earthworks as follows:

> Sediment originating from earthworks must be managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters:
>
> (a) any conspicuous change in colour or visual clarity:
>
> (b) the rendering of fresh water unsuitable for consumption by farm animals:
>
> (c) any significant adverse effect on aquatic life.

[42] Regulations 66-69 relate to land use activities associated with harvesting, although permitted activity conditions for ground disturbance associated with

harvesting also address sediment discharges.

[43] Regulation 67(2) states:

> (2) Disturbed soil must be stabilised or contained to minimise sediment entering into any water and resulting in—
>
> (a) the diversion or damming of any water body; or
>
> (b) degradation of the aquatic habitat, riparian zone, freshwater body, or coastal environment; or
>
> (c) damage to downstream infrastructure and properties.

Council officer's s42A report

[44] At the Council hearing, the officer report addresses the potential for adverse effects of the proposed earthworks which may lead to sediment-laden stormwater running off the site and into the Kaiuma and Omahakie Streams and into the CMA.

[45] The report further notes that the land also drains into the significant wetland at the base of the valley, with approximately the same area also identified as an ecologically significant marine site (the Kaiuma Estuary). The erosion and sedimentation measures associated with the land use activities are summarised as follows:[13]

> **Erosion and sedimentation**
>
> - Employ a high standard of engineering planning, operational management and control in relation to onsite earthworks.
> - Prepare and implement a detailed Erosion and Sediment Control Plan (ESCP).
> - Employ harvesting methodology that minimises ground disturbance from logs as they are being felled or transported across the site.
> - Stage the harvest sequence and harvest smaller coupes to reduce the area of bare earth exposed.

[13] Marlborough District Council officer report, 31 March 2023 at [48].

- Undertake harvesting operations in drier months with lower likelihood of significant rainfall events.
- Apply coupe harvesting during the project over a longer timeframe.
- Pause harvesting between adjoining coupes to a period of at least 24 months.
- Limit construction period for all forestry roads and skid sites to drier months between November to May annually.
- Gravel roads immediately after construction.
- Apply specific erosion and sediment controls during undertaking of works within streams to manage sedimentation effects during construction.
- Locate significant stream crossings in flatter topography.
- Install sediment traps and silt fences prior to works commencing and install road chip material to ensure vehicle tracking of sediment is limited.

Commissioner's decision

[46] The commissioner's decision addressed the scope issue, first setting out the arguments raised by Kaiuma, with reference to the agreement reached in the expert joint witness statement that a discharge permit was required under reg 97(7) of the NES-PF.

[47] The commissioner notes that the application before him had only sought a land use consent, however, he notes that the AEE contains various references to the possibility of discharges associated with the land use activities and the need for monitoring, noting the erosion and sedimentation mitigation measures. He observes that:[14]

> I noted that it is one thing to determine that an amendment to an application falls within scope (by remaining within an envelope of scale and intensity of effects) but arguably another to determine that an application could be granted to override one or more of the restrictions in Part 3 of the RMA, should I find that no application to do so has been made.

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[14] Decision of commissioner, 21 July 2023 at [375].

[48] The commissioner then discusses authorities on the ability to amend an application after it has been notified, including *Atkins v Napier City Council*[15] ('*Atkins*'), *Waitakere City Council v Estate Holmes Ltd*,[16] and *Friends of Pelorus Estuary Incorporated v Marlborough District Council* ('*Friends of Pelorus'*).[17]

[49] The commissioner proceeded on the basis that the scope issue had to be considered in the context of the original application, because the notification decision was made before the updated AEE addressing effects associated with works in streambeds was lodged with the Council.

[50] The commissioner refers to Marberry's AEE checklist being the Sch 4 compliance form where other resource consents are required, referring to Marberry's response to that line item in the following passage:[18]

> In the AEE checklist, the Schedule 4 (compliance) form "ticks" the line item box dealing with whether other resource consent are required.

[51] *Friends of Pelorus* is then distinguished on the facts. This is because in that case the court had found that there was no text within the application documents indicating that a discharge of stormwater to ground, or a discharge of dust to air, was incorporated within the application.

[52] The commissioner then records that Marberry's concession that regs 26 and 65 of the NES-PF might not be met such that a discharge consent would be required under reg 97, was made out of caution, noting that there was no evidence before him that any significant impact would arise beyond the mixing zone or zone of reasonable mixing referred to in the regulations in terms of any conspicuous changes in colour or visual clarity to stream water, or adverse effects on aquatic life.

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[15] *Atkins v Napier City Council* (2008) 15 ELRNZ 84.
[16] *Waitakere City Council v Estate Holmes Ltd* [2007] NZRMA 137.
[17] *Friends of Pelorus Estuary Incorporated v Marlborough District Council* C004/2008.
[18] Decision of commissioner at [387(d)].

[53] Marberry and the Council supported the commissioner's approach and outcome on this jurisdiction point.

Consideration

Interpretation of application form

[54] We have inspected the whole of the original application submitted by Marberry, including the Appendix 5 Analysis of Requirements of Sch 4 of the Act, referred to by the commissioner. This is presented in the form of checklist. The line item referred to by the commissioner addresses "other resource consents" and gives two options for a response:

(a) "[n]ot relevant or applicable" in the first column; and
(b) "[a]ddressed in the application", in the second column.

[55] Marberry had entered a tick under the second column as the commissioner's decision had recorded. However, contrary to the commissioner's interpretation of that response, we do not construe that as an indication that the need for a discharge permit *was* stated in the application.

[56] As to that, we refer to our earlier reference to the information contained on the Council's standard application form, where, in response to a prompt to identify whether additional consents need to be applied for or have been applied for, it states "[n]ot applicable".

[57] The same response was given to the question whether there is a need for any discharge permit.

[58] Accordingly, a tick under the column "addressed in the application" is, on our reading of the application documents, likely to be a reference to the information on the standard form indicating that additional consents were "not applicable", that is, they were not needed and were not being applied for.

Interpretation of the evidence

[59] We note that the evidence before the commissioner had been exchanged in advance of the Council hearing, before the concession was made that a discharge permit would be required.

[60] Accordingly, we are not surprised by the commissioner's finding that there was no evidence before [him] that any significant impact would arise beyond the mixing zone or zone of reasonable mixing referred to in the regulations in terms of conspicuous changes in colour or visual clarity to stream water, or adverse effects on aquatic life.

[61] The application and evidence assumed that these consequences would not come about as any discharges associated with the land use activities would comply with the standards for discharges associated with sedimentation under regs 25-33.

[62] Although we did not see that evidence, it is unrealistic to assume that the evidence would be the same (as to sedimentation effects) had the application been prepared on the basis that the regulatory thresholds in relation to sedimentation would be breached, by the harvesting/earthworks.

[63] As earlier noted, the evidence for the substantive hearing of the appeal in support of both the land use and discharge permit has not yet been exchanged.

[64] Moreover, as observed in *Friends of Pelorus*, *Atkins* was concerned with whether amendments could lawfully be made to a proposal for which a particular type of resource consent had been sought. The issue before the court was not whether an application could be amended to include an application for another type of resource consent.

[65] There are many cases that discuss whether amendments to a resource consent application are beyond the scope of the original application. Many of

the decisions acknowledge that after notification and receipt of submissions to an application, sensible modifications to proposals will likely occur. This has been the law since the Planning Tribunal decision in *Haslam v Selwyn District Council*.[19]

[66] That practice was referred to and endorsed in the High Court,[20] noting that whether there is a need to re-notify an application in light of an amendment to it, will turn on the facts and will often be a question of degree. The extent of the modification and its impact will be critical factors, although underpinning all of these issues are questions around fairness of the process.[21]

[67] In many of these cases, the court has taken a substance over form approach in terms of whether there has been compliance with statutory requirements. However, there must be limits to that. That practice cannot be used to override the statutory requirement in Sch 4, cl 2, as to the information that must be included in an application, including a description of the activity *and* whether any other resource consent is required for the proposal to which the application relates.

[68] These information requirements are reflected in Form 9 as prescribed by reg 9.[22] We acknowledge that these information requirements must be "generally followed". With reference to that requirement, *Currie v Palmerston North City Council,*[23] drew attention to the flexible approach emphasised in the regulations, referring to reg 4, which provides that:

> Use of the form is not invalid only because it contains minor differences from a form prescribed by these regulations as long as the form that is used has the same effect as the prescribed form and is not misleading.

[69] However, there can be little room for flexibility around the Form 9

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[19] *Haslam v Selwyn District Council* (1993) 2 NZRMA 628.
[20] *Collins v Northland Regional Council* [2013] NZHC 3039.
[21] *Collins* at [27].
[22] Resource Management (Forms, Fees, and Procedure) Regulations 2003.
[23] *Currie v Palmerston North City Council* [2022] NZEnvC 32.

requirement that an applicant specifies which type of resource consent, of those listed in s87 RMA, is being sought. This is essential information in the court's view. We note that a consent authority possesses powers under s91 RMA[24] that are consequential upon receipt of an application that discloses that other types of resource consent are required but have not yet been applied for. This provision enables a council not to proceed with notification or hearing until an application for a further type of resource consent has been lodged, if satisfied on reasonable grounds as to the conjunctive requirements in s91(1).

[70] Ever since the decision in *Affco NZ Ltd v Far North District Council*, the court has recognised that:[25]

> good resource management practice requires that in general all the resource consents required for a project should be carefully identified from the outset, and applications for them all should be made so they can be considered together or jointly.

[71] That principle underpins s91. The effectiveness of s91 would be undermined if an amendment to include a different type of resource consent could readily be made during or after a hearing as occurred on this occasion.[26]

[72] In the Council's legal submissions, the decision in *Westfield NZ Ltd v Upper Hutt City Council*[27] was cited as authority for the proposition that an application does not need to specify the class of resource consent under s87 RMA, but merely that consent for an activity is required. However, on our reading of that decision, the court was referring to the requirement that an applicant state the activity status (in terms of s87A) and not the resource consent type.

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[24] This section empowers a consent authority not to proceed with notification if the factors in s91(1)(a) and (b) apply.
[25] *Affco NZ Ltd v Far North District Council (No 2)* [1994] NZRMA 224 at p 233.
[26] We acknowledge that in this case, the council is a unitary authority, although that is not a deciding factor in our view.
[27] *Westfield NZ Ltd & Ors v Upper Hutt City Council* (2000) 6 ELRNZ 335.

Friends of Pelorus

[73] At this point, it is instructive to further consider the circumstances giving rise to the decision in *Friends of Pelorus*. In that case, the court had also held a hearing to determine a preliminary issue as to whether air and water discharge permits were in fact applied for and whether they were needed. The application was for land use consent for an open-cast quarry and construction of an access road to it.

[74] The Council had granted permits for discharges of dust to air and of settling pond effluent to land in circumstances where it was argued that those discharge permits had not been sought. In this extent, the facts of the application are the same as those that arise in the present case. Moreover, the application was lodged to the same council, being a unitary authority.

[75] The court's description of the application refers to the Council's standard form for resource consent, noting provisions on the form for stating the type of consent sought by checking labelled boxes for land use, subdivision, water permits, discharge permit and coastal permit. Only the land use consent box was checked, and not that for a discharge permit.

[76] However, the application contained a discussion of the stormwater and sediment control measures proposed for operation of the quarry, while giving no indication that a discharge of stormwater to ground required a discharge permit, nor whether such application was incorporated in the application or whether it would be subject to a separate application.

[77] The court refers to a report by quarry consultants accompanying the AEE on the operation of the quarry, including the management plan proposed for the site, including under the heading "erosion risks at the site" containing discussion of the proposed mitigation measures.

[78] The court further records that information contained in the application

referred to the default term for land use consent being unlimited, although there was no reference in the application to the limits on the term of the discharge permit prescribed by s123(d).

[79] The officer report is then discussed. The officer report itemised the consents being applied for as including discharge permits to land and to air and not just a land use consent. However, the court observed that aside from the items referred to in the list of consents being applied for, the report contained nothing that expressly or impliedly indicated that the application involved consideration of resource consents in terms of s15 RMA.

[80] The court commenced its consideration by noting the different restrictions in ss 9-15, Pt 3 of Act, noting the different functions of a territorial authority and a regional council in relation to these restrictions.

[81] The court observes that in the normal situation, where the regional council and the territorial authority are separate and different bodies, there would be no scope for doubting whether an application for land use consent is implicitly also an application for a discharge permit. That is because an application for land use consent has to be made to the territorial authority, and an application for a discharge permit has to be addressed to the regional council.

[82] The court then observes that the council before it is a unitary authority, which explains the standard form used for resource consent applications; these providing separate boxes to be checked to facilitate ready identification of whether an application invokes the council's powers as a territorial authority, or its powers as a regional council.

[83] The court refers to s87 of the Act which provides for specific types of resource consent that may be applied for, observing that reg 9 of the Resource Management (forms, fees, and procedure) Regulations 2003 prescribes that Form 9 in Sch 1 to those regulations is to be followed for making resource

consent applications and quoting sections of the form as follows:[28]

> I, *[full name],* apply for the following type(s) of resource consent:
> *[for any activity in the coastal marine area, state coastal permit. Otherwise state 1 or more of the following: land use consent, subdivision consent, water permit, or discharge permit. Describe the activity to which the application relates].*
> ...
> No additional resource consents are needed for the proposed activity *(or* The following additional resource consents are needed for the proposed activity and have *(or* have not) been applied for: *[give details]).*
> …
> Note to applicant
> You may apply for 2 or more resource consents that are needed for the same activity on the same form.
> …

[84] The court then notes that the law relating to resource consent applications may favour substance over form, although it observed that had the applicant used the form prescribed by the regulations, there would be no room for doubt as to what was being sought by the application.

[85] The court then referred to cited cases concerning when specific amendments to proposals the subject of a resource consent application can be permitted, although the court found that many cited to it dealt with a different question.

[86] The court described the question that it was being asked to consider as, whether the application had sought the additional resource consents for discharge permits as well as the land use consent that had plainly been applied for?

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[28] *Friends of Pelorus* at [48].

[87] The court discusses the *Kyriak*[29] and *Wanaka Marina*[30] cases, finding that *Wanaka Marina* was in material respects, like the case before the court, as different types of resource consents were required from a different class of local authority.

[88] The court rejected the applicant's contention that references in the AEE to discharges of dust and contaminated water to land indicate that what is on its face an application for land use consent is also an application for discharge permits. The court held that such references could not be considered as extending the application to seek discharge permits, particularly as Sch 4(1)(d) would require an assessment of the actual and potential effects of the discharges.

[89] The court was ultimately influenced by the fact that the case involved an application under a different statutory provision and a different character of the decision-maker. It was further influenced by the absence of any wording in the application stating or hinting at seeking discharge permits as well as land use consent, observing that the applicant did not believe that discharge consents were required, that being an explanation for why they did not apply for them.

[90] In this case, the question is not so much whether, as a matter of interpretation of the scope of Marberry's application, discharge permits were expressly or impliedly being sought in addition to the land use consent, that being a focus of the court's approach in *Friends of Pelorus*.

[91] However, there are many relevant facts in common with the present situation, including that the cases involve different applications under different statutory provisions, with each involving a different character of decision-maker, despite the one council having functions in respect of each. Moreover, in each case the application was unequivocally for a land use consent involving an activity that by its very nature could also require a discharge permit as a result of

[29] *Kyriak v Northland Regional Council* C146/98.
[30] *Wanaka Marina v Queenstown Lakes District Council* C98/98.

the context in which the land use activities were to be conducted.

[92] It is further relevant to note that in this case, there is little scope to argue that discharge permits were expressly or impliedly within the scope of Marberry's application. As in *Friends of Pelorus*, the discharge permits were not sought in the original application because when the application was being prepared, the applicant assumed that none was required. In this case, Marberry assumed that permitted activity standards under relevant NES-PF regulations for a s15 discharge would be met, such that no discharge permit was needed.

[93] *Friends of Pelorus* is not the only case to comment on the significance of the different types of consent provided for under the RMA. This issue arose in *Hastings District Council*[31] as to whether a subdivision consent had also granted land use for construction of the dwelling. The court observed that this outcome could only result if the resource consent was in fact a subdivision consent and a land use consent. We add that this could only occur where both resource consent types had been sought in the original application.

Findings

[94] Having reflected on the cases cited by counsel, together with the original application, we find that the commissioner was wrong to have concluded that he had jurisdiction to allow an amendment to a land use consent to include a s15 discharge permit.

[95] For completeness, we are not persuaded that it is relevant in this case that the Council is a unitary authority, that not being a relevant consideration when considering potential prejudice to persons who may have been interested in, or be affected by the application, had it included a discharge permit.

[96] Nor are we persuaded that it is relevant that where two types of s87

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[31] *Re Hastings District Council* [2013] NZEnvC 102.

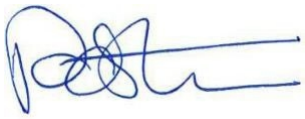
resource consents are sought, the Council will issue a single global consent addressing all relevant Pt 3 restrictions, this being the Council's practice. The form of a resulting resource consent(s) has little bearing on the scope of an original application.

[97] Finally, we note that the discharge permit application that was sought following the conclusion of the hearing, had not been the subject of any notification decision.

Outcome

[98] We find that the commissioner was wrong to have concluded that he had jurisdiction to allow an amendment to a land use consent to include a s15 discharge permit for the discharge of sediment.

For the court



P A Steven
Environment Judge