IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 24

IN THE MATTER	of the Resource Management Act 1991
AND	an application for declarations under s310 of the Act
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED
	(ENV-2023-CHC-002)
	Applicant
AND	MINISTER FOR THE ENVIRONMENT AND MINISTER OF FORESTRY
	Respondents

Court:	Environment Judge P A Steven Sitting alone under s309 of the Act
Hearing:	at Christchurch on 27 October 2023
Appearances:	R Enright and C Woodhouse for the applicant A Hill and S Eldridge (via AVL) for the Minister for the Environment and Minister of Forestry G Chappell for the Forestry Interests
Last case event:	8 November 2023
Date of Decision:	29 February 2024
Date of Issue:	29 February 2024

DECISION OF THE ENVIRONMENT COURT REGARDING JURISDICTION

A: The Environment Court does not have jurisdiction to make declarations two, three and four as sought.

B: A judicial conference will be held to discuss the way forward in relation to declaration one.

C: Costs are reserved.

REASONS

Introduction

[1] The Environmental Defence Society Incorporated ('EDS') has applied for the following (amended) declarations pursuant to s310 of the Resource Management Act 1991 ('RMA'):[1]

> **Declaration 1:**
> Section 43A(3) of the RMA imposes continuing obligations in respect of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (NES-PF).
>
> **Declaration 2:**
> Classification of harvesting and earthworks in orange zones of the Marlborough Sounds as a permitted activity in subparts 3 and 6 of the NES-PF results in significant adverse effects to coastal water quality and indigenous flora, fauna, and their habitat.
>
> **Or**
> Classification of harvesting (and related earthworks activities) as permitted activities in the orange zones of Marlborough Sounds under subparts 3 and 6 of the NES-PF breaches:

[1] Application for amended declarations by Environmental Defence Society Inc dated 25 May 2023.

(a) section 43A RMA; and/or

(b) s17 RMA

because it allows activities that have significant adverse effects on the environment as a permitted activity.

Declaration 3:

The NES-PF adopts an unlawful "deeming" approach to sediment risk from harvesting of plantation forests, and related earthworks, under subparts 3 and 6 of the NES-PF. Harvesting and earthworks on orange zoned land are deemed not to have significant adverse effects on coastal water quality and indigenous flora, fauna, and their habitat, but these activities do have those effects.

Declaration 4:

Subparts 3 and 6 of the NES-PF rely on the orange land classification of the erosion susceptibility classification (ESC) to identify permitted activities in the Marlborough Sounds. The ESC is based on inaccurate or unreliable data, and does not address sediment risks caused by harvesting and earthworks to coastal water quality and indigenous flora, fauna, and their habitat.

Advice note: these declarations rely on defined terms in the NES-PF 2023 for "erosion susceptibility classification", "harvesting", "earthworks, and "orange zone".

[2] EDS advised that declaration one relies on s310(a) RMA, and declarations two, three and four rely on ss 310(1)(a), (c), or (h) RMA.[2]

[3] The application is opposed by the Minister for the Environment; the Minister of Forestry (the Ministers); New Zealand Forest Owners Association Inc and Top of the South Wood Council Inc (collectively, the Forestry Interests) who appeared at the hearing as s274 parties.

[4] Forest & Bird and Mana Taiao Tairāwhiti joined the appeal as s274 parties. However, they did not appear as they take no position on the jurisdictional issues.

---

[2] Joint memorandum of parties in response to court Minute dated 7 June 2023, dated 19 June 2023, at [6].

These parties will abide the court's decision.[3]

Application for further amendment to application

[5] On the morning of the hearing, EDS filed a memorandum proposing to further simplify the declarations. However, the court had issued a Minute on 3 July 2023 following the filing of amended directions after legal submissions had been prepared by the parties.

[6] That Minute included a direction (sought by the opposing parties) that "no amended declarations may be filed without the leave *before* the date of the hearing of the preliminary jurisdiction issue".[4] A direction was also made for the filing of updated legal submissions responding to the amended declarations. Submissions were duly filed and were read by the court prior to commencement of the hearing.

[7] Other parties had not had time to take instructions on the further amendments proposed by EDS. To avoid prejudice to parties, leave to further amend the declarations was declined.

Jurisdictional issues

[8] The Ministers and the Forestry Interests (the opposing parties) had raised jurisdictional issues with the declarations, noting questions for determination as a preliminary matter are whether EDS's amended declarations two, three and four are within scope of s310 RMA, including whether they amount to a challenge to validity of the NES-PF and are therefore within the Environment Court's jurisdiction.

[9] EDS had filed affidavits in support of the declarations sought from Mark

---

[3] Joint memorandum of parties in response to court Minute dated 7 June 2023, dated 19 June 2023, at [8].
[4] Minute of the Environment Court, dated 3 July 2023, at [6(g)].

Bloomberg, Robert Davidson, James Griffiths, Sean Handley and Gary Taylor.[5] That evidence addressed technical aspects of the ESC; the vulnerability of the Marlborough Sounds marine environment and its biological values, to sedimentation from plantation forestry harvesting and earthworks.

[10] However, following a telephone conference, the court decided that the preliminary jurisdictional questions did not require reference to the evidence filed by EDS, a position that was supported by the opposing parties, all of whom had stated that the evidence was (or would be) disputed.[6]

Scope of this decision

[11] This decision is limited to addressing jurisdiction and does not address the merits of the application.

Agreed facts

[12] The parties prepared an Agreed Statement of Facts (agreed facts). The agreed facts in respect of national environmental standards are as follows:[7]

> National environmental standards are regulations made by Order in Council. The process for preparing national direction (which includes national environmental standards) is set out in section 46A – 52 of the RMA.
>
> In contrast to local authority policy statements and plans, there is no right of appeal to the Environment Court against a decision by the Minister for the Environment on national environmental standards.
>
> Sections 43B, 43C, 43D, and 43E RMA deal with the relationship between national environmental statements and rules, consents, water conservation orders,

---

[5] Affidavit of Mark Bloomberg, affirmed 30 January 2023; affidavit of Robert Davidson, affirmed 1 February 2023; affidavit of James Griffiths, affirmed 31 January 2023; affidavit of Sean Jeffrey, affirmed 24 January 2023; affidavit of Gary Taylor, affirmed 2 February 2023.

[6] Record of Telephone Conference, dated 21 September 2023.

[7] Updated Agreed Statement of Facts, dated 13 October 2023, at [2.1] – [2.5].

designations and bylaws. Relevantly, local and consent authorities must observe and "enforce the observance of national environmental standards to the extent to which their powers enable them to do so".[8] This can be compared to the direction to "give effect" to national policy statements.

Under section 43A of the RMA, national environmental standards may allow an activity. If an activity is allowed it may state that a resource consent is not required for the activity or may permit the activity on specified terms, conditions or rules.

Under section 43A(3) of the RMA, if an activity has a "significant adverse effect on the environment", a national environmental standard must not:

a) Allow the activity, unless it states that a resource consent is required for the activity; or

b) State that the activity is a permitted activity.

[13] In relation to the NES-PF, more specifically, the agreed facts are:[9]

The NESPF was gazetted on 3 August 2017 and came into force on 1 May 2018. The process set out in section 46A(3)(b) of the RMA was followed and consultation occurred prior to gazettal.

The NESPF applies to eight core activities associated with plantation forestry: afforestation, replanting, pruning & thinning, earthworks, river crossings, quarries, harvesting and mechanical land preparation. Plantation forestry is a forest of at least 1 ha of continuous forest cover of forest species that has been established for commercial purposes to be harvested or replanted and includes all associated forestry infrastructure.

The NESPF creates nationally consistent planning and compliance requirements for the core forestry activities, by classifying them as either permitted, controlled, restricted discretionary or discretionary on a New Zealand wide basis.

---

[8] Section 44A RMA.

[9] Updated Agreed Statement of Facts, dated 13 October 2023, at [3.1] – [3.11].

Schedule 2 of the NES-PF incorporates the Erosion Susceptibility Classification ("**ESC**") tool by reference. The ESC has legal effect as part of the NES-PF.[10]

The ESC is the system that determines the risk of erosion on land based on its environmental characteristics and classifies land as one of four categories according to level of risk: green (low), yellow (moderate), orange (high) or red (very high). It is accessible through an electronic tool.

The ascribed risk profile is used as a basis for applying some environmental controls on the use of that land.

The RMA states that a plan rule or a resource consent may be more stringent than a national environmental standard if the standard states that a rule or consent can be more stringent than it. The NESPF provides for greater stringency, in limited circumstances, in Regulation 6.

Relevant to the current proceedings, Regulation 6 of the NESPF enables a rule in a plan to be more stringent than the NESPF if:

a) the rule gives effect to an objective developed to give effect to the National Policy Statement for Freshwater Management[11]

b) the rule gives effect to any of policies 11, 13, 15 and 22 of the New Zealand Coastal Policy Statement 2010[12]

c) the rule provides for the protection of significant natural areas;[13] or

d) the rule manages any activities in any green, yellow, or orange zone containing separation point granite soils areas that are identified in a plan.

In 2021 Te Uru Rākau released a report on the Year One Review of the NES-PF.[14]

---

[10] Schedule 1AA RMA, Section (1)(3) RMA.
[11] Regulation 6(1)(a).
[12] Regulation 6(1)(b).
[13] Regulation 6(2)(b).
[14] Report on the Year One Review of the National Environmental Standards for Plantation Forestry, 2021, Te Uru Rākau.

On 2 October 2023 the Government made amendments to the NESPF.[15] The amendments will enter into force on 3 November 2023. The amendments include (most relevant to the current proceedings):

a) Changing the name of the regulations to the Resource Management (National Environmental Standards for Commercial Forestry) Regulations 2023 ("NESCF");

b) New permitted activity standards applying to the regulation of slash from harvesting (amending regs 69 – 71);

c) A new definition of 'sediment control measures' (amending reg 3);

d) New requirements for forestry earthworks management plans (amending reg 27 and replacing schedule 3 with new schedule 4) and harvest plans (amending reg 66 and replacing schedule 3 with new schedule 6);

e) New provisions allowing plans to make more stringent or lenient rules for establishing new commercial forests (afforestation) (amending reg 6). No other amendments were made to the stringency provisions;

f) New provisions which apply to exotic forests planted for carbon sequestration (new regs 71A – 71C);

g) Updates to the link to the ESC tool in Schedule 2.

The NESCF continues to classify harvesting of plantation forest as a permitted activity on orange ESC land provided certain permitted activity standards are met.

Statutory context

[14] The function of making a recommendation of the making of national environmental standards is given to the Minister for the Environment in s24(b) of the Act in addition to the function of monitoring the effect and implementation "of this Act", including "any regulations made under it", inter alia, in s24(f).

[15] National environmental standards are made by Order in Council; they have the status of regulations. Accordingly, it is a statutory function of the Minister for

---

[15] Resource Management (National Environmental Standards for Commercial Forestry) Amendment Regulations 2023.

the Environment to monitor the effect and implementation of a national environmental standard. That is implicitly an ongoing function.

[16] A local authority is obliged to enforce the observance of national environmental standards to the extent to which their powers enable them to do.

[17] Sections 43B, 43C, 43D and 43E deal with the relationship between national environmental standards and rules, consents, water conservation orders, designations and bylaws. These provisions exist within subpart 1 of Pt 5 of the RMA (headed "National Direction").

[18] This subpart addresses national environmental standards, national policy statements, New Zealand coastal policy statements and national planning standards. Unlike all other national direction documents, a national environmental standard does not govern the content of lower order instruments.

[19] National direction documents *are* referred to in ss 310(b)(ba)(bb), although the focus is on whether a local authority policy statement and/or a plan "does not or is not likely to give effect to" a national direction.

Section 310

[20] The declarations are sought under s310(a), (c) and (h). Section 310 states:

> **310 Scope and effect of declaration**
>
> A declaration may declare–
>
> (a) the existence or extent of any function, power, right, or duty under this Act, including (but, except as expressly provided, without limitation) –
>
> (i) any duty under this Act to prepare and have particular regard to an evaluation report or to undertake and have particular regard to a further evaluation or imposed by section 32 or 32AA (other than any duty in relation to a plan or proposed plan or any provision of a plan or proposed plan); and
>
> (ii) any duty imposed by section 55; or

(b) whether, contrary to section 62(3), a provision or proposed provision of a regional policy statement –

(i) does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement or New Zealand coastal policy statement or a national planning standard; or

(ii) is, or is likely to be, inconsistent with a water conservation order; or

(ba) whether a provision or proposed provision of a regional plan, –

(i) contrary to section 67(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement for the region or a relevant provision or proposed provision of a national planning standard; or

(ii) contrary to section 67(4), is, or is likely to be, inconsistent with a water conservation order, any other regional plan for the region, or a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996; or

(bb) whether a provision or proposed provision of a district plan, –

(i) contrary to section 75(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement or a relevant provision or proposed provision of a national planning standard; or

(ii) contrary to section 75(4), is, or is likely to be, inconsistent with a water conservation order or a regional plan for any matter specified in section 30(1); or

(c) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act, regulations made under this Act, or a rule in a plan or proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or

(d) whether or not an act or omission, or a proposed act or omission, is a permitted activity, controlled activity, discretionary activity, non-complying activity, or prohibited activity, or breaches section 10 (certain activities protected) or section 20A (certain existing lawful activities allowed);

(e) the point at which the landward boundary of the coastal marine area crosses any river; or

(f) whether or not a territorial authority has made and is continuing to make substantial progress or effort towards giving effect to a designation as

required by section 184A; or

(g) the matters provided for in section 379 (provisions deemed to be plans or rules in plans); or

(h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 95 to 95G have been or will be contravened.

Opposing parties' positions

[21] I heard comprehensive submissions on behalf of the Ministers[16] and Forestry Interests[17] (the opposing parties). There was a high degree of commonality in the legal argument from each counsel. I propose to address a summary of the arguments in common.

[22] Their position on the declarations is that:

(a) declarations two and three amount to a challenge to the lawfulness and validity of the NES-PF – they are effectively seeking judicial review of delegated legislation; and

(b) none of declarations two, three and four are within the scope of s310 RMA.

[23] Counsel observe that the declarations are intended to raise the same issue, in that "[t]he declarations adopt increasing particularisation (from general to specific), meaning that not all declarations will need to be granted to address the issues in contention between the parties".[18]

[24] While accepting that declaration one could fairly be characterised as relating to the existence or extent of the Minister for the Environment's powers, functions,

---

[16] Legal submissions for the Minister for the Environment and Minister of Forestry: Jurisdiction, dated 20 July 2023.

[17] Legal submissions for New Zealand Forest Owners Association Inc and Top of the South Wood Council Inc as to jurisdiction, dated 20 July 2023.

[18] Legal submissions for the Minister for the Environment and Minister of Forestry: Jurisdiction, dated 20 July 2023, at [5].

or duties under the RMA, and so is within scope of s310(a), counsel say that if declaration one is intended to be a more general expression of declarations two to four rather than a discrete question about the extent of the duty in s43A(3), it would appear to suffer from the same issues as those declarations.

On scope of s310 generally

[25] The opposing parties submit that the scheme of the RMA does not provide for challenge to ministerial decision-making on secondary legislation in the Environment Court, leaving such matters for the High Court's judicial review jurisdiction.

[26] Counsel note that it is consistent with the legislative scheme and the distinct nature of national direction instruments that s310 does not provide an avenue to challenge national direction against the empowering provisions of the RMA.

[27] The Ministers refer to the only instance (that their counsel is aware of) in which a challenge to the lawfulness of an RMA national direction has been brought. That involved High Court judicial review proceedings.

[28] While s310(a) confers a potentially broad power, it has been carefully and narrowly applied.[19] Section 310 contains a closed list of matters. Moreover, the Environment Court does not possess inherent jurisdiction.

[29] Section 310 does not list, as a matter for declaration, whether an instrument of national direction is inconsistent with the empowering provisions in the RMA, nor does s310 appear to allow scope to consider the merits of provisions in national direction instruments.

---

[19] Referring to for example, *Berryman v Waitakere City Council* A046/98 and the authorities cited in *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [58] – [62].

Section 310(a)

[30] As to s310(a), counsel submit that this is limited to a declaration about the existence and extent of a function, power, right, or duty under the Act. This provision does not extend to all matters which *involve or relate to* statutory powers, rights, or duties.

[31] Nor does s310(a) extend to allow scrutiny of the *exercise of* statutory powers, rights, or duties. Its (narrower) focus is on the *existence* and *extent* of duties, functions, rights or powers.

[32] Accordingly, s310(a) affords no scope to examine the extent to which a national environment standard recommended by the Minister contravenes the empowering provisions of the RMA or of the duty under s17.

[33] Counsel point to the fact that ss 310(b) – (bb) uses language with a clear focus on contravention, by reference to planning documents and their relationship with higher order national direction documents. Through subsections (b) – (bb), a declaration may test the provisions of regional policy statements, regional plans and district plans against higher order documents.

[34] To the extent national direction documents are included in ss 310(b) – (bb), the primary focus is on whether policy statements and plans give effect to that national direction. The national directions identified in these provisions do not include a national environmental standard.

[35] Finally, counsel submit that declarations should not be made in circumstances that are factually abstract; the purpose of the declaration is to deal with a real issue between the parties.

[36] However, s310(a) does not allow a declaration where the questions sought from the court involve purely factual findings where the facts are disputed.

Section 310(c)

[37] Section 310(c) RMA applies to "acts or omissions" and is focused on compliance. If the "act or omission" is the decision of the Minister to recommend the NES-PF provisions for Order in Council (as EDS contends) this would require an interpretation of s310(c) permitting scrutiny of decision-making tantamount to a judicial review of that decision.

[38] However, that runs afoul of long-standing authority which establishes that s310 does not enable the Environment Court to engage in such scrutiny.[20] Moreover, it would be inconsistent with the identification of planning instruments in subsections (b) – (bb) to imply scope into s310(c) to scrutinise the provisions of planning instruments against higher order documents or the Act itself.

[39] An "act or omission" in s310(c) should be interpreted narrowly.[21] In this case, the declarations are not focused on an "act or omission". Rather they seek to interrogate the effectiveness of the NES-PF against the statutory tests and empowering provision in the RMA (in addition to s17).

Section 310(h)

[40] The opposing parties contend that the scope of "any other matter" in s310(h) is not unlimited. Section 310(h) is not a stand-alone source of declaratory power; it is a catch-all to fill gaps arising from the more specific provisions. Accordingly, this provision does not operate to enlarge the list in (a) – (g) to create a source of power to scrutinise national direction against the empowering provisions and Part 2 of the Act.

[41] The express scope to assess local authority policy statements and plans

---

[20] Referring to *Kirkland v Dunedin City Council* [2001] 1 NZLR 184 (CA), at [20], and the authorities cited in *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [58] – [62].

[21] Referring to *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [67]; *Berryman v Waitakere City Council* A046/8.

against higher order planning instruments in s310(b) – (bb), and the lack of equivalent paragraph relating to national direction, tends against an interpretation that s310(h) impliedly grants the Environment Court this jurisdiction.

EDS[22]

[42] EDS say there is no jurisdictional impediment to the making of any of the declarations. Counsel points to the mandatory and directive language of s43A(3), noting that this operates in the nature of an environmental bottom line, in that the NES-PF "…must not…" enable permitted status for a plantation forestry activity that results in significant adverse effects on the environment.

[43] EDS submits this is an ongoing requirement that must be always satisfied in relation to the content of an NES-PF.

[44] In summary EDS considers that:

(a) the Environment Court is well placed to assess whether a statutory "bottom line" for a national direction instrument has continuing force, and whether it is (in reality) being met at a regional level;
(b) whether s43A(3) RMA imposes a continuing duty, is a question of statutory interpretation within the Environment Court's jurisdiction; in much the same way as the meaning of "give effect to" in ss 62(3), 67(3) and 75(3), or the meaning of "contrary" in s104D, is within the Environment Court's remit; and
(c) the question whether reliance placed by the NES-PF on an external standard (the EDS) is misplaced and results in significant adverse effects, is also a relevant issue for the Environment Court in terms of jurisdiction (and merit).

[45] EDS states the court's jurisdiction was deliberately selected "as the best

---

[22] Updated reply submissions for EDS, dated 3 August 2023.

forum, capable of examining how erosion controls, intended to protect the habitat of nationally and regionally significant biodiversity and water quality from forestry activities, are grossly failing".[23]

[46] The NES-PF deems harvesting as a permitted activity when such activities result in significant adverse effects on the marine environment in breach of s43A(3). EDS describes that as a factual and legal fiction.

[47] EDS contends that the Environment Court has jurisdiction to assess whether sediment discharge from harvesting and earthworks in plantation forestry may result in significant adverse effects to marine biodiversity and water quality which results in the NES-PF being in breach of s43A(3), the statutory empowering provision.

[48] Counsel emphasises that the declarations do not seek to declare the NES-PF invalid. EDS acknowledges that the Environment Court does *not* have the power to make such a finding or to direct the Minister to amend the NES-PF.

[49] However, making the declarations sought in the application is sufficient remedy. The court does not need to concern itself with how the Minister will respond to the declarations. EDS submits that a disputed factual matrix is not a reason to preclude the court from hearing the declarations.[24]

[50] EDS acknowledges that the Environment Court's jurisdiction is limited to the matters set out in s310(a) – (h), although subsection (h) is expressed in broad terms and is intended to provide the Environment Court with extensive powers to ensure administration of the RMA.

[51] EDS submits the declarations sought are orthodox because they involve,

---

[23] Updated reply submissions for EDS, dated 3 August 2023, at [6].

[24] That said, EDS had noted that neither the Forestry Interests nor the Ministers had filed competing evidence despite indicating that it disputed the evidence filed to support the application.

or relate to the exercise of statutory powers, rights and duties under the Act:

(a) Forestry Interests rely on the permitted status of harvesting in orange zones, to undertake harvesting, despite the significant effects identified in the evidence filed in the court; and

(b) consent authorities rely on the ESC to identify orange zones within which no additional rules are imposed to trigger resource consent requirements for harvesting.

[52] EDS disagrees with the assertions that s310(a) does not extend to the scrutiny of the *exercise* of functions, powers, rights or duties.

[53] EDS submits the Environment Court has previously held that issues such as whether a use complies with statutory duties or whether a local authority has carried out (i.e., exercised) its statutory functions are issues that may be dealt with by way of declaration.[25]

[54] EDS is not seeking a declaration as to the adequacy of the exercise of the statutory function (in s43A(3)), rather that the exercise of duties and functions, as permitted by the NES-PF, is resulting in significant adverse effects on the environment, in breach of s43A RMA. EDS submits that whether and how the NES-PF classifies an activity as permitted *relates to* a right or duty under the Act.

[55] EDS disagrees with the interpretation of s310(c) posited by the Ministers and the Forestry Interests. EDS does not consider that the "act or omission" is the *classification* of activities in the NES-PF, or the *substance* of those provisions, or the decision to recommend the NES-PF for Order in Council.

[56] EDS submits that the "act" in question is the undertaking of plantation forestry activities as a permitted activity, enabled by the NES-PF's classification of

---

[25] Referring to *Hay v Waitaki District Council* [2011] NZEnvC 160.

activities, in breach of Part 2, s17 and s43A RMA.

[57] EDS submits that should the court find it does not have jurisdiction under s310(a) or (c), then s310(h) applies. EDS submits that the declarations are not substantial expansions of preceding subsections and relate to the administration of the RMA.

[58] Public interest factors support having a readily available remedy of recourse to the Environment Court (as the specialist court) to seek declarations on the interpretation and implementation of national direction instruments, rather than reliance on traditional judicial review thresholds and remedies which are directed at matters considered at the time that the instrument was approved. The RMA jurisdiction is forward-looking and future predictive.

Evaluation

[59] The Environment Court's declaratory role under s310 RMA differs from the inherent jurisdiction held by the High Court. While the Environment Court is a specialist tribunal its declaratory powers are limited by the matters listed in s310(a) – (h) and its declaratory powers should not pre-empt the inherent jurisdiction and judicial review powers of the High Court.

Do questions relate to the existence or extent of a statutory function?

[60] No. I find that none of the contested declarations fall within the scope of s310(a). I agree entirely with the position of the opposing parties, the essence of which I have summarised.

[61] I find that declarations two and three do not relate to the existence or extent of the functions, powers or duty of the Minister under s43A(3). Instead, these questions seek to scrutinise the content of the NES-PF itself against ss 43A(3) and 17 of the RMA considering the evidence brought by EDS as to the implementation of these regulations.

[62] However, that amounts to a challenge to the way in which the Minister's function was exercised in formulating the NES-PF provisions. I accept that EDS is not inviting consideration of the evidence upon which the Minister's recommendation was based. Indeed, the court has not been appraised of the underlying evidential basis for that recommendation.

[63] EDS seeks declarations related to the present state of the marine environment (from forestry activities) as opposed to that which existed when the Minister's statutory function was exercised, that being the orthodox basis upon which a decision would be scrutinised in a judicial review proceeding.

[64] However, even if not amounting review of the Minister's statutory function under s43A(3), the questions come close to usurping the Minister's s24(f) monitoring functions.

[65] EDS is effectively challenging the ongoing effectiveness of implementation of the permitted activity classification of harvesting and earthworks considering evidence it has collected as to the effects of such activities on the marine environment.

[66] Whether and how the NES-PF classifies an activity as permitted is said to relate to a right or duty under the Act in legal submissions for EDS. These questions are said to be consequential upon (and accordingly, relate to) the Minister's exercise of a statutory function and I accept that.

[67] However, "whether and how" the NES-PF classifies an activity as permitted, considering the evidence filed by EDS about the environmental effects of that activity are merit questions. The answers sought by EDS would (indirectly) challenge the Minister's recommendation.

[68] The questions raised by EDS in declarations two (A) and (B) are not *whether* it is within the statutory power of the Minister to recommend that permitted activity status be given to the activity of harvesting and earthworks; the questions

are (in substance) whether on the basis of the evidence from EDS, that activity status ought to have been afforded to those activities (or should continue be afforded) due to the limits to that permitted activity proscription in s43A(3).

[69] In legal submissions, EDS refers to an early decision of the Environment Court where declarations made as to the extent of a Council's duty to gather information, monitor and keep records in relation to the activities of a mining company operating within its district in *Hay v Waitaki District Council*[26] *(Hay*).

[70] However, *Hay* was decided in the context of a factual background where that monitoring function had been attributed to the mining company as the person responsible for preparing an assessment of effects for resource consent application and not to the Waitaki District Council.

[71] *Hay* identified the real underlying issue with respect to the declarations being sought, being whether the resource consent had been properly processed and was sufficient to manage adverse effects of aspects of the mining activity. The *extent* of the Council's functions under s35 arose for consideration in that factual context.

[72] *Hay* does not support the making of the declarations sought by EDS as the questions raised by EDS do not explore the *extent* the Minister's function under s43A(3).

[73] Fundamentally, because of the evidence available to EDS (which has been filed with the court), the Minister's decision to afford permitted activity status to harvesting of plantation forest within the Marlborough Sounds is being called into question considering the evidence gathered by EDS.

[74] However, s310(a) does not extend to a consideration of the adequacy of an NES considering evidence as to the state of the environment subsequently

---

[26] *Hay v Waitaki District Council* [2011] NZEnvC 160.

gathered since the decision being considered (in this case it was a recommendation). Describing the questions as *relating to* or *being about* the exercise of functions is too tenuous a connection to bring them within the scope of this provision.

Do the questions relate to an act or omission?

[75] No. If the "act or omission" is the Ministers decision to draft the NES-PF and/or recommend the NES-PF for Order in Council on the terms in which it was gazetted, again, then this amounts to a scrutiny of the merits of the Minister's decision-making.

[76] However, during the hearing, EDS clarified that the act is that of harvesting (by the foresters) and not the act of promulgating the NES-PF. EDS contends that these activities will result in significant adverse effects in contravention of s43A(3) and s17 of the Act.

[77] The problems with this approach are like those that relate to s310(a) in that:

(a) the Minister has formulated the NES-PF having come to a contrary conclusion following an evaluation of the adverse effects of harvesting (based on evidence that is not before the court);
(b) s43A empowers the Minister to promulgate a national environmental standard; that section has no (direct) restrictive effect on forestry activities. On that basis, the activity of harvesting cannot be said to be in breach of s43A(3);
(c) even if the effects of the activity of harvesting could be evaluated under s17, none of the questions are framed in this manner. Moreover, the NES-PF has constituted that activity a permitted activity. The court is not able to scrutinise the reasons for that in a declaratory proceeding brought under s310 for reasons already stated in this decision. Nor is it able to scrutinise or make findings as to the effectiveness of the implementation of these regulations.

Reference to case law relied on by EDS

[78] For completeness I have considered the cases referred to EDS in legal submissions. However, the questions asked by EDS can be distinguished from those which arose in *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council*,[27] *(RFBS)* a decision which was referred to in the *Trustees of the Motiti Rohe Moana Trust*,[28] *(Motiti)* decision of the High Court.

[79] *RFBS* was directed at recognition of and provision for areas of significant indigenous vegetation and significant habitats of indigenous fauna (referred to as SNAs) in the district plan for New Plymouth. SNAs were identified by the application that ought to have been included but which were omitted.

[80] Declarations and enforcement orders (under ss 310(bb)(i) and 310(c)) were sought to require the Council to notify a change to its district plan to remedy the omission. The court made declarations concerning the content of the plan:

(a) as to the extent of the Council's duty in relation to the protection of SNAs within its district under the Act;
(b) that certain of the district plan methods give effect to the NZCPS and RPS in relation to protection of indigenous biodiversity; and
(c) that the omission to include certain SNAs identified by the applicant within its district plan is in contravention of the Council's duty to protect in s6(c) RMA, in consequence of which the plan fails to give effect to the NZCPS and RPS for Taranaki.

[81] In this case, s310(bb) is not triggered. Moreover, as noted in *Motiti,* s310(c) was relevant in *RFBS* because of an omission to include SNAs within the plan

---

[27] *Royal Forest and Bird Protection Society Incorporated v New Plymouth District Council* [2015] NZEnvC 219.
[28] *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846.

which was in breach of s6(c).

[82] The relevant "act" challenged in *Motiti* was the withdrawal of a plan change which was said to be in contravention of s8. However, the High Court observed that the appellant was effectively seeking a declaration that the decision-making (the how and why) behind the act of withdrawal was in contravention of the RMA as the Council clearly had the power to withdraw a plan change.

[83] The High Court held that a question could be asked about the scope of the cl 8D powers, a declaration regarding the process undertaken by a Council when withdrawing a plan change is a matter for judicial review.[29]

[84] Accordingly, there is no "act or omission" that enables the declaration to sit comfortably within the confines of s310(c).

Are the questions within the scope of s310(h)?

[85] No. Section 310(h) is a catch-all provision designed to fill any gaps arising from the more specific provisions that precede it.[30] The Environment Court has held that s310(h) should not be interpreted to expand substantially the ambit of the specific powers to make declarations. Nor can this be read to include judicial review of administrative action under the RMA.[31]

[86] *Malvern Hills Protection Society Incorporated v Selwyn District Council*[32] (*Malvern Hills*) concluded that s310(h) "is intended to be utilised rarely and in situations where there is either no guidance or discretion or where it otherwise achieves the primary purpose of the Act under Part 2."[33]

---

[29] At 58.
[30] *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [68].
[31] *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [67] – [69].
[32] *Malvern Hills Protection Society Incorporated v Selwyn District Council* C105/07, 9 August 2007.
[33] *Malvern Hills* at [66].

[87] In *RFBS*, the court held that s310(h) gave the court a wide power to make declarations on issues or matters other than those specifically identified in s310(a) – (g). However, in that case there was a clear basis for making declarations under other subsections of s310.[34]

[88] Section 310(h) was inserted by the Resource Management Amendment Act 2003. *Motiti* observed that the principal issue at the time related to the forum in which challenges to a Council's notification decisions (made under ss 95 – 95G RMA) should be considered.[35]

[89] However, that exclusion does not mean that s310(h) allows for other questions within the review powers of the High Court. Section 310(h) must be read in the context of the more specific preceding subparagraphs. Subsections 310(a) – (g) address a closed list of matters.

[90] While subsections (b) – (bb) enable declarations testing the provisions of regional policy statements, regional plans and district plans against higher order documents, as observed by the opposing parties, these subsections do not include national environmental standards.

[91] If Parliament had intended the Environment Court to be able to scrutinise a national direction against the Act, (including as to its ongoing effectiveness) this would have been stated in the Act. To enable these declarations to be considered through s310(h) would over-extend the ambit of this section and stray into the inherent jurisdiction of the High Court.

[92] I now elaborate on my findings as to scope for each of the declarations.

---

[34] *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219, at [101] – [105].
[35] *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180, at [65].

Declaration two

[93] Declaration two contains mixed questions of fact and law. The questions asked in declaration two (A) are largely questions of disputed facts, though containing inferred questions as to lawfulness of the NES-PF.

[94] The questions go to the merits of the permitted activity classification of harvesting and earthworks. Declaration two (B) is fundamentally a question as to the rationality or reasonableness of the NES-PF and whether the regulations serve the purpose of the Act.

[95] The questions assume the facts to be as asserted by EDS, through the evidence filed in support of the application. However, that evidence would be disputed. Counsel for the opposing parties note that as a general proposition, it is not appropriate to seek a declaration when the factual position is disputed.

[96] As a general principle, declarations should be based on an agreed set of facts to be considered against a legal proposition within the scope of any of subsections 310(a) – (h).

[97] In *Mistral Farm Ltd v Sylands Ltd (Mistral Farm*) the court stated that matters of fact are not amenable to declarations under ss 310(a) or (h).[36] Further, a contested fact is not an issue or matter relating to the interpretation, administration, and enforcement of the Act.[37]

[98] In *Palmerston North City Council v New Zealand Windfarms Ltd* the court concluded that it could resolve contested facts in a declaration proceeding.[38] However, the court had heard argument that declarations should come before the court based on agreed facts, which the court acknowledged was the preferable

---

[36] *Mistral Farm Ltd v Sylands Ltd* [2014] NZEnvC 168, at [121].
[37] *Mistral Farm,* at [115].
[38] *Palmerston North City Council v New Zealand Windfarms Ltd* [2012] NZEnvC 133.

position.

[99] There will be cases where the court will have to make findings of fact to determine an application as to whether a given situation is (or is not) within the law.

[100] In this case, the declarations expressly seek factual findings on evidence that would be disputed. Indeed, the prime objective of EDS in bringing the application is to obtain factual findings.

[101] I agree with the opposing parties and find that:

(a) declaration two refers to the way that the NES-PF classifies an activity – i.e., the content of the NES-PF – this does not relate to the existence or extent of a function, power, right or duty in the declaration involved by s310(a);
(b) there is no "act or omission" that could contravene the Act under s310(c). Section 310(c) does not authorise scrutiny of the contents of regulation for the consistency with the RMA; and
(c) declaration two is a challenge to the vires of the regulations, determining the matter under s310(h) would over-extend the sections ambit and stray into the inherent jurisdiction of the High Court.

Declaration three

[102] Similarly, declaration three involves questions of fact, statutory interpretation, and a challenge to the lawfulness or vires of the regulations, there being three parts to the question:

(a) do harvesting and earthworks on orange zoned land have significant adverse effects on coastal water quality and indigenous flora, fauna, and their habitat?
(b) is the approach to sediment risk from harvesting of plantation forests,

and related earthworks, under subparts 3 and 6 of the NES-PF a deeming approach?

(c) if so, is the deeming approach unlawful?

[103] I agree with the opposing parties and find that:

(a) the declaration goes to the effectiveness of regulations within the NES-PF; as such there is no relationship with the existence or extent of a function, power, right or duty in the declaration pursuant to s310(a);

(b) there is no "act or omission" that could contravene the Act under s310(c); and

(c) because this declaration challenges the lawfulness or vires of the regulations, determining the mater under s310(h) would over-extend the section's ambit and stray into the inherent jurisdiction of the High Court. It is the court's general approach to decline to deal with mixed questions of fact and law in a declaratory context.

[104] I would add to that list that the questions, if not directed at the evidential basis for the Minister's recommendation, they impinge on (if not usurp) the Minister's monitoring function.

[105] During the hearing I questioned EDS what was meant by the reference to a "deeming approach" in formulating a permitted activity rule in this context and whether that added anything further to questions two (A) and (B).

[106] Counsel referred to the decision of *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council.*[39] The High Court had been asked to consider whether the Board of Inquiry made an error of law when it inserted factual deeming provisions into a regional plan, the import of which was that farms over four hectares which comply with Land Use Capability leaching rates are

[39] *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191.

deemed to comply with the in-stream Dissolved Inorganic Nitrogen (DIN) limits, even though the farms are not in fact complying.

[107] The High Court observed that the deeming provision in the relevant rule created a factual fiction resulting from the fact that 615 farms are deemed by the rule not to be contributing to excessive quantities of DIN entering waterways in the catchment area when in fact they would be likely to do so.

[108] The High Court found that the parties challenge was to the Board's evaluative judgment in the context of s32, that not being a question of law able to be considered by the High Court in its appellate jurisdiction.

[109] The NES-PF does not on its face, incorporate regulation based upon a factual fiction; there is no express deeming provision contained in the NES-PF. Moreover, the substance of these questions challenges the evaluative judgement made by the author of these regulations, that not being amenable to a declaration under s310.

[110] Counsel agreed that the question does not take matters very much further than the other questions.[40] On that basis, the question of whether the deeming approach is unlawful will not be further considered.

Declaration four

[111] Similarly, declaration four asks a purely factual question and does not relate to the existence or extent of functions, powers, or duties under the Act. To the extent that this question is said to *relate to* the implementation of the Minister for the Environment's functions, powers, or duties, it suffers from the same problems as declarations two and three.

[112] For all the reasons given above, I conclude that there is no jurisdiction for

---

[40] NOE, at p 74.

the Environment Court to consider declarations two, three and four.

Declaration one

[113] The Ministers accept declaration one is within scope of s310(a). The Ministers did submit that if declaration one is intended to be a more general expression of declarations two through four, rather than a discrete question, it would appear to suffer from the same issues as those declarations.

[114] The parties have not filed detailed submissions and/or evidence in respect of declaration one. The focus of this decision is the jurisdiction to consider declarations two through four.

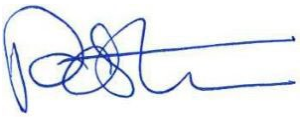
[115] I will hold a judicial conference to discuss the way forward regarding declaration one.

Outcome

[116] The Environment Court does not have jurisdiction to make declarations two, three and four as sought.

[117] A judicial conference will be held to discuss the way forward in relation to declaration one.

[118] Costs are reserved.



P A Steven
Environment Judge