

**IN THE ENVIRONMENT COURT
AT WELLINGTON**

**I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA**

Decision No. [2022] NZEnvC 1

IN THE MATTER

of an application for a declaration under
s 310 and for an order under s 293 of
the Resource Management Act 1991

BETWEEN

WELLINGTON REGIONAL
COUNCIL

(ENV-2021-WLG-000033)

Applicant

Court: Environment Judge BP Dwyer sitting alone under s 309 of the
Act
Last case event: Memorandum dated 8 November 2021
Date of Decision: 12 January 2022
Date of Issue: 12 January 2022

INTERIM DECISION OF THE ENVIRONMENT COURT

- A: The application for a declaration is granted.
- B: Determination of the application under s 293 is deferred pending the receipt
of further advice from the Council.

REASONS

Introduction

[1] Wellington Regional Council (the Council) has discovered that it made an error
in its Proposed Natural Resources Plan for the Wellington Region (PNRP) by



RE WELLINGTON REGIONAL COUNCIL

omitting text describing how the location of river mouths in the region should be determined. This is important for determining the landward boundary of the coastal marine area which has consequences for determining jurisdiction between the Council and the territorial authorities within its region and also in respect of the application of the Regional Coastal Plan aspect of the PNRP.

[2] The operative Regional Coastal Plan (to be replaced by PNRP) contained a list of specified river mouths and coastal marine area boundary locations. Text containing a deeming provision then followed the list, addressing non specified river mouths:

For the remaining rivers in the Wellington Region, the mouth is deemed to be a straight line representing the continuation of the line of Mean High Water Springs on each side of the river at the river outlet.

[3] The Council had intended to include this text (or an equivalent) in the PNRP but inadvertently failed to do so. It seeks to address that error by making an application under s 310(e) Resource Management Act 1991 (RMA) and asking for a consequential order under s 293 RMA to include appropriate text in the PNRP.

[4] The Council has applied for a declaration determining the location of unmapped river mouths in the PNRP. The declaration sought is:

When determining the location of a river mouth in the Wellington Region, not shown on Maps 42 to 48, the mouth is deemed to be a straight line representing the continuation of the line of Mean High- Water Springs on each side of the river at the river outlet.

[5] As consequential relief to implement the declaration (if granted by the Court) the Council applies for an order under s 293 RMA to insert the following text into the PNRP in Chapter 13 and placed immediately above Map 42 (below the heading which reads: 'Coastal marine area and river mouth boundaries'):

Maps 42 to 48 show where the Coastal Marine Area and river mouth boundaries are located. For the remaining rivers in the Wellington Region not shown on Maps 42 to 48, the mouth is deemed to be a straight line representing the continuation of the line of Mean High Water Springs on each side of the river at the river outlet.

The Coastal Marine Area means the foreshore, seabed, and coastal water, and the air space above the water—

- (a) of which the seaward boundary is the outer limits of the territorial sea:
- (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
 - (i) 1 kilometre upstream from the mouth of the river; or
 - (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

[6] The Council lodged an affirmation of Dr IN Dawe dated 1 October 2021 in support of its application.

[7] The Council applied for directions as to service. It requested a direction that its applications be served on the Minister of Conservation, territorial authorities within the Wellington Region with a coastline and appellants and s 274 parties to the appeals on the PNRP, but not the wider public. The Court considered the Council's request and granted it on 22 September 2021. The Council confirmed on 8 October 2021 that service had been completed. No person joined as a party to the proceedings.

[8] The Council lodged a memorandum on 8 November 2021 requesting that the applications be decided on the papers.

Background

[9] The Council has functions with respect to land and water in the coastal marine area (see s 30(1)(d) RMA). Counsel for the Council says the main issue with the error relates to the ability to identify the landward boundary of the coastal marine area in relation to the mouth of a river. This has potential consequences for determining jurisdiction between the Council and the territorial authorities in its region and also application of the Regional Coastal Plan.

[10] Counsel for the Council explains that while the main river mouths' boundaries have been agreed to and are mapped in the PNRP (Maps 42-48) many smaller river

mouths and stream boundaries have not been mapped and the landward extent of the coastal marine area is not delineated. The consequences of this are uncertainty for both local authorities and plan users in terms of the extent of the coastal marine area.

[11] As notification of the PNRP has already occurred the only avenue available to determine the location of the mouth of a river is an application under s 310(e) RMA.¹

[12] Counsel notes that the Court's powers under s 310 RMA are declaratory in nature. Counsel submits that it is unclear whether the Council can simply amend its PNRP in response to such a declaration. Accordingly, it applies for an order under s 293 RMA to make the amendment to the PNRP to give effect to the declaration (if the declaration is granted).

Discussion

Declaration

[13] Section 310(e) RMA provides:

310 Scope and effect of declaration

A declaration may declare—

...

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

[14] Dr Dave explained that the river mouths mapped in Maps 42 to 48 and their associated coastal marine areas were “rolled-over” from the operative Regional Coastal Plan. The mapped rivers were selected because they are managed for flood protection purposes (e.g. flood schemes, stop banks, mouth dredging, mouth cutting, mouth clearance) and there is a need to define legal boundaries in order to know what rules apply (i.e. freshwater or coastal rules). There are over 320 river and stream mouth outlets in the Wellington Region that flow over the mean high water springs boundary. Of these, only 25 have scheduled river mouth and coastal marine area

¹ Counsel relied on *Re Auckland Regional Council* NZEnvC Auckland A046/97, 3 April 1997.

boundaries. It was deemed not feasible to undertake a consultation programme to determine the river mouth and coastal marine area boundaries for every stream or river.

[15] Dr Dawe outlined the consequences of the Council's error. If the coastal marine area boundary in relation to river mouths cannot be determined then there is a jurisdictional uncertainty (which Council has jurisdiction, which rules (e.g. discharge standards) apply at these locations) and also potentially undue costs to applicants to determine where the coastal marine area boundary is located in relation to a particular river or stream.

[16] Dr Dawe deposed that the Council's proposed approach is efficient as it allows a pragmatic assessment to be made by the Council, without territorial authorities, landowners and infrastructure providers having to commission surveys every time a determination of the mean high water springs is required. Common activities that would require such a determination are flood protection works, gravel extraction, culvert or stormwater outfall maintenance.

[17] The RMA defines "coastal marine area" as follows:

coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—

- (a) of which the seaward boundary is the outer limits of the territorial sea:
- (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
 - (i) 1 kilometre upstream from the mouth of the river; or
 - (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

[18] "Mouth" is also defined in s 2 RMA:

mouth, for the purpose of defining the landward boundary of the coastal marine area, means the mouth of the river either—

- (a) as agreed and set between the Minister of Conservation, the regional council, and the appropriate territorial authority in the period between consultation on, and notification of, the proposed regional coastal plan; or
- (b) as declared by the Environment Court under section 310 upon application made by the Minister of Conservation, the regional council, or the territorial authority prior to the plan becoming operative,—

and once so agreed and set or declared shall not be changed in accordance with Schedule 1 or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of Conservation, the regional council, and the appropriate territorial authority agree

[19] Dr Dawe explained that the mapped locations of the river mouths in the operative Regional Coastal Plan were “rolled over” into the PNRP and that the Council decided not to “renegotiate” the existing scheduled river mouths. I assume that means that the mapped river mouths have been agreed (sometime in the past) between the persons listed in para (a) of the definition of “mouth”. The Council also planned to include in its PNRP a note to the same effect as the one that appeared in the operative Regional Coastal Plan.

[20] It is clearly necessary to have some such method in the PNRP in order to simply determine which authorities have jurisdiction and which sets of rules apply to any particular activity. To leave the PNRP without such a method could breach the obligation on the Council to preserve the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and to protect them from inappropriate subdivision, use, and development (s 6(a) RMA). Dr Dawe impressed upon the Court the sensitivity and the importance of the ecosystems affected. The Council has determined to reproduce the same method it included in its operative Regional Coastal Plan so the method proposed is not “new”, and plan users may already be familiar with that method.

[21] I accept that a declaration should be made in this case and, on the basis of Dr Dawe’s evidence, that the method proposed is appropriate. I will make a declaration accordingly.

Application under s 293

[22] Section 293 RMA relevantly provides:

293 Environment Court may order change to proposed policy statements and plans

- (1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to—
- (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court;
 - (b) consult the parties and other persons that the court directs about the changes;
 - (c) submit the changes to the court for confirmation.

[23] The Council submits that determining whether or not the Court will exercise its s 293 powers requires consideration at two levels:²

- First, does the Court have jurisdiction to exercise the powers in question; and
- Second, if the Court does have jurisdiction, should it exercise its discretion to do so on the merits.

[24] The Council referred to *Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council*.³ The High Court said in that case that the fundamental purpose of s 293 is to give the Court power to direct changes to a proposed plan (or plan change) which are not otherwise within the Court's jurisdiction due to the scope of the appeal before it.⁴ The High Court also held that the s 293 power is not unlimited and noted that it deprives potential parties or interested persons of the right

² *Friends of Nelson Haven and Tasman Bay (Inc) v Tasman District Council* NZEnvC Wellington W013/08, 13 March 2008 at [22].

³ *Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616, [2015] NZRMA 52 (HC).

⁴ *Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616, [2015] NZRMA 52 (HC) at [120].

to be heard by the local authority.⁵

[25] Dr Dawe deposed that there are no appeal points that provide scope for this error to be remedied through the appeals process. The Council raised the error with the Minister of Conservation and the relevant territorial authorities. They agreed with the Council's proposed resolution of the error. In addition, the Council's memorandum of 23 April 2021 to the Court raised the Council's intention to seek that the Court utilise s 293 RMA to correct the error which gave the Court and all parties to the PNRP appeals process notice of the Council's intention.

[26] The Council submits that allowing the error to be corrected to identify the boundaries of the coastal marine area will ensure that the Council fulfils its functions under s 30(1)(d) of the RMA in relation to control of the coastal marine area, as referenced in s 66(1)(a). It will also assist in ensuring that the requirements of the New Zealand Coastal Policy Statement 2010 are met as it will clarify the extent of the coastal marine area.

[27] Dr Dawe undertook an analysis of the proposed addition to the PNRP pursuant to s 32 RMA. He considered that this addition is the most appropriate way to achieve the purpose of the Act. He compared the reasonably practicable options and outlines the costs of those options. Dr Dawe considered that it is effective and efficient to implement this proposed amendment to the PNRP to remove any confusion relating to the location of the coastal marine area boundary at river mouths not shown on Maps 42-48.

[28] The Council submits that this is a situation where it is appropriate for the Court to exercise its powers under s 293 of the RMA to correct the defect in the PNRP.

[29] Dr Dawe said that the main parties affected are the territorial authorities and the Council and, to a lesser degree, infrastructure providers, the Department of Conservation and landowners with streams that flow through their properties. The

⁵ *Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616, [2015] NZRMA 52 (HC) at [121].

Court ordered the service process outlined in para [7] above. No persons became parties to the proceedings. In addition, Dr Dawe explained that some parties had already been consulted and had approved the Council's proposed resolution.

[30] I accept Dr Dawe's evidence that other options would be more time consuming and costly. The option of requiring every applicant for resource consent to map or survey mean high water springs every time an activity is proposed in the vicinity of a river mouth would impose a high cost to applicants and result in lengthy delays. The option of having the Council map all rivers and streams that enter the coast would also be time consuming and expensive given the high number of rivers and streams (estimated to be about 300) involved. I accept that awaiting the next plan change is not a reasonably practicable option.

[31] In terms of the risk of acting or not acting, I accept Dr Dawe's evidence that there is potentially a moderate-high cost to the environment if action is not taken as river mouths are sensitive and important ecosystems in the environment and commonly have high biodiversity values. Dr Dawe deposed that the coastal rules in the PNRP have been developed to recognise the values these areas have and it is important to ensure the correct rules are applied to ensure good kaitiakitanga/stewardship of these high value ecosystems.

[32] All of those things point to the need to correct the shortcomings in the PNRP arising out of failure to incorporate a method to identify unmapped river and stream mouth boundaries and also consequently identify the landward extent of the CMA in the vicinity of those river and stream mouths. Regrettably however, I do not consider that I have jurisdiction to determine this matter pursuant to s 293 as sought by the Council.

[33] I note Dr Dawe's advice that the change proposed to the PNRP is outside the scope of the appeals to the proposed plan. That of itself would not preclude the Court exercising its powers pursuant to s 293 which gives the Court a wide discretion to direct the preparation of changes to a proposed plan. The problem for the Court is that jurisdiction to direct the preparation of changes to a proposed plan arises...

“After hearing an appeal...”⁶ In this case the Council seeks that the Court exercises that jurisdiction after making a declaration pursuant to s 310 rather than after hearing an appeal.

[34] I am of course aware of the appeals to the PNRP which have been subject to a lengthy mediation and resolution process. It is my understanding that any appeals relevant to the coastal marine area which might have provided a platform for resolution of the river mouth issue by application of s 293 at request of the Council (even by sidewind) have been subject to consent orders and the Court is now functus officio in that regard.

[35] It is my understanding that the following topics remain open for resolution under the appeals process for PNRP:

- Topic 41 (wetlands);
- Topic 47 (balance of beds of lakes and rivers); and
- Topics 29 (water quality management objective), 30 (water management objectives) and 31 (water quality).

[36] I do not understand any of the remaining appeals (all of which are presently under consideration for resolution by consent orders) to relate in any way to the river mouth delineation matter involved in these proceedings. I do not believe that they provide an appropriate appeal platform for exercise of s 293 powers relating to delineation of river mouths, notwithstanding my acceptance that there is a need to correct the shortcomings of PNRP in that regard.

[37] It appears to me that there are two ways to potentially resolve the jurisdictional impasse:

- Firstly, I give the Council the opportunity to advise the Court if it

⁶ RMA, s 293(1).

considers that there is potential to deal with the river mouth matter under any of the remaining extant appeals before the Court. In order to do that I would need to be convinced that there is some relevant connection between any remaining appeal and the river mouth matter;

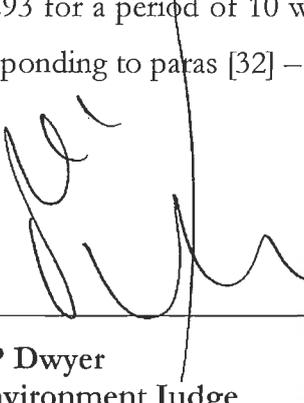
- Secondly, I express the view that failure to include a method adequately identifying the location of unmapped river mouths in the PNRP is a mistake, defect or uncertainty of the kind identified in s 292 RMA which might be remedied by direction of the Court immediately PNRP becomes operative. The declaration made in these proceedings provides a basis for making such a direction should the Council make an anticipatory request accordingly.⁷

Outcome

[38] Pursuant to s 310(e) RMA the Court declares:

When determining the location of a river mouth in the Wellington Region, not shown on Maps 42 to 48 of the PNRP, the mouth is deemed to be a straight line representing the continuation of the line of Mean High- Water Springs on each side of the river at the river outlet.

[39] I adjourn the Council's request for the Court to exercise its powers pursuant to s 293 for a period of 10 working days to enable the Council to file a memorandum responding to paras [32] – [37] (above).


BP Dwyer
Environment Judge



⁷ My preliminary view is that the amendment is significant enough that the Council cannot use its power to correct “minor” errors of information (RMA, First Schedule, cl 16).