

**Before the Hearings Panel
At Wellington**

Under the Resource Management Act 1991

In the matter of Proposed Natural Resources Plan for the Wellington Region
(Hearing Stream 4)

**Wellington Regional Council legal submissions for
Hearing Stream 4: Water Quality and Stormwater**

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MAY IT PLEASE THE PANEL:

Introduction

- 1 These submissions address the legal framework relevant to the subject matter of Hearing Stream 4. Hearing Stream 4 covers three main topics - water quality, wastewater to water and stormwater.

- 2 As with the legal submissions presented at the start of other hearing streams, these submissions provide an overview of the main legal issues identified through *preparation* of the section 42A reports. It is anticipated that the Panel will have other specific questions arising throughout the hearing which can either be answered orally, or through written legal submissions in reply.

- 3 These submissions cover the following topics:
 - 3.1 Definitions of some terms used in, or related to, higher order documents:
 - 3.1.1 'safeguard'
 - 3.1.2 'manage'
 - 3.1.3 'have regard to'
 - 3.2 The relevance of 'minor or transitory' effects to 'avoid' policies.
 - 3.3 The scope of the stormwater discharge rules in terms of diversion.
 - 3.4 The status of discharges to pipes.
 - 3.5 The appropriateness of an 'overall water quality' approach.

- 4 We address each issue in turn below.

DEFINITIONS

5 Submitters have sought the replacement of some specified terms, with others, in the proposed Plan. This section of our submissions outlines the legal interpretation of the terms 'safeguard' and 'manage'.

Safeguard

6 As set out in Ms Pawson's report, the term 'safeguard' is used in Objective O25 of the proposed Plan. This is consistent with the language used in both the National Policy Statement for Freshwater Management (NPS-FM) and the Regional Policy Statement. A submitter (Hammond Estate Ltd (S132/003)) has sought that the word 'safeguard' is replaced in the Objective O25 with 'provide for' because the submitter states that 'safeguard' is the equivalent of 'protect', which is too absolute.

7 The New Zealand Oxford Dictionary defines safeguard as:

(v.) guard or protect right (rights etc.) by a precaution or stipulation.

8 While not a RMA case, *Ralph v Henderson and Pollard Ltd* [1968] NZLR 759 did consider the meaning of 'efficient safeguard' under previous health and safety legislation and said:¹

All I can say about it is that the test of an efficient safeguard is the same as the test which I have explained for the meaning of the word 'securely' - that the purpose of this provision is to protect both the careful and inadvertent or inefficient employee from foreseeable - that is, reasonably foreseeable - risk of injury ...

As I understood Mr Tompkins' argument, he contends that, in effect, I told the jury that nothing can amount to an "efficient safeguard" unless it is as effective a protection as a secure fence would be. In his submission, there may be an efficient safeguard which affords a lesser degree of protection than would a secure fence. With this latter proposition I do not disagree but, reading my summing-up as a whole, I am satisfied that all that I said to the jury was that a safeguard would not be

¹ At 761-762, line 46.

"efficient" unless it had the effect of protecting workmen against reasonably foreseeable risk of injury, having regard not only to the foreseeable conduct of a skilled workman intent on his task but also to the foreseeable conduct of careless, inattentive workers.

[Emphasis added]

- 9 Based on the above, we agree with Ms Pawson that 'safeguard' does not have the same meaning as 'provide for'. The ordinary meaning of 'safeguard' is to protect or prevent and to change this to 'provide for' would be reading down the requirements of the higher order documents.

Manage

- 10 Some submitters have sought the replacement of the word 'minimise' in policies with the word 'manage'. In the context of this hearing, in respect of Policy P65, Ms Pawson recommends rejecting the relevant submissions.

- 11 While both 'manage' and 'minimise' are common RMA terms, the most relevant case law guidance on the term 'manage' comes from the Hazardous Substances and New Organisms Act 1996 regime. In *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, the Court observed:²

When there is a reference, as in this statute, to "managing effects" the position becomes more obscure. Whatever the purity of concepts, it is possible within the ordinary use of language to say one can "manage" adverse effects inter alia by preventing those effects. If an official is required by statute to "manage" the effects of tuberculosis in New Zealand one avenue for such management" of effects - and it might well be thought the prime avenue - is to prevent the disease arising. The official can of course also "manage" by seeing to a stock of vaccines, arranging hospitalisation in isolation, arranging detection screening and the like; but it does not strain language to say one way of managing the adverse effects is to ensure the disease does not arise.

In that light, I construe s7 reference to "managing adverse effects" as including managing by reduction of risk such effects will ever arise. "Management" of effects foes to risk reduction as well as to damage control...

² At [156] - [157].

- 12 Manage can therefore be a reference to a range of actions including, but not limited to, avoidance or reduction of the relevant effect/harm/risk.

Have regard to

- 13 The submission from Rāngitane ō Wairarapa Inc (S279/113) seeks that Policy P62 is amended so that 'promote' (in terms of discharge of contaminants to land rather than water) be amended to 'have regard to' discharging to land prior to discharging direct to water. In respect of Policy P62, Ms Pawson recommends accepting that submission. The meaning of 'have regard to' has been judicially considered and its meaning is well defined³:

By way of starting point, the High Court refers to *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* where Wylie J said:

“We do not think there is any magic in the words ‘have regard to’. They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function.”

Similar observations are made by the Court of Appeal in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* and by the High Court in *Foodstuffs (South Island) Ltd v Christchurch City Council*. Provided that the court gives genuine attention and thought to the matters in question it is free to allocate weight as it sees fit but does not necessarily have to accept them.

³ *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 123 at [51] - [52].

MINOR AND TRANSITORY

Context for 'minor' or 'transitory' effects

14 In a slightly different frame, this next section of our submissions covers the meaning of 'minor' or 'transitory' effects. This is in the context of the New Zealand Coastal Policy Statement (NZCPS), and the meaning of the term 'avoid'. Although the Supreme Court in *New Zealand King Salmon* considered that 'avoid' in the NZCPS meant 'do not allow' or 'prevent the occurrence of', it considered that it was possible for minor and transitory effects to be acceptable even where the avoid language was used:⁴

Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word “effect” is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

The definition of “effect” in s 3 is broad. It applies “unless the context otherwise requires”. So the question becomes, what is meant by the words “avoid adverse effects” in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development”. Policy 13(1)(a) (“avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character”) relates back to the overall policy stated in the opening words. It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

15 Since that decision several cases have considered whether effects are in the category of minor or transitory:

⁴ *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, at [145] - [145].

15.1 In *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 260, following the release of the *King Salmon* decision, the Court reassessed its interim decision under section 104 to:⁵

...see whether they might fit within the evidently narrow compass of "minor or transitory adverse effects"

15.2 The Court in *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229 implicitly endorsed the *New Zealand King Salmon* approach. In considering submissions on whether an overlay would give effect to a particular policy (which was an 'avoid' policy), it accepted the submission as to the law, but not the facts when it said:⁶

We do not accept there is any certainty in Mr Lang's propositions that the proposed overlay would involve minor or transitory effects on the efficiency, safety and function of the transport network, or be an enhancement.

The decision references Mr Lang's submission as relying on the passage from *New Zealand King Salmon* quoted above.

16 This is particularly relevant for the Panel in respect of Policy 23 of the NZCPS and the proposed Plan's policy and rule framework addressing stormwater and wastewater discharges into coastal water.

The NZCPS

17 Policy 23(2) of the NZCPS states:

Discharge of contaminants

...

(2) In managing the discharge of human sewage, do not allow:

⁵ At [17].

⁶ At [164].

- (a) discharge of human sewage directly to water in the coastal environment without treatment; and
- (b) the discharge of treated human sewage to water in the coastal environment unless:
 - (i) there has been adequate consideration of alternative methods, sites and routes for undertaking the discharge; and
 - (ii) informed by an understanding of tangata whenua values and effects on them.

18 While the policy does not use the word 'avoid', given the Supreme Court in interpreting the NZCPS considered that 'avoid' meant 'not allow', the direction to 'not allow' in the same document must have the reciprocal meaning (ie, it means 'avoid'). In addition, the Supreme Court was clear that Policy 23 was one of the 'directive' policies in the NZCPS, akin to those policies it was directly considering.

The proposed Plan

19 Regarding the proposed Plan, of particular relevance to this issue are Policy P68, Policy P76, Rule R50, R51 and Rule R61. Combined (with the amendments recommended through the section 42A Reports for this Hearing Stream of Ms Carter and Ms Pawson), these rules provide a strong policy framework that:

- 19.1 untreated human wastewater discharges into coastal waters are to be avoided, but
- 19.2 allows as controlled activities (in the very short term) and restricted discretionary activities, discharges of stormwater from local authority networks that may include untreated wastewater in limited circumstances (ie, due to overflows in heavy rainfall events), and
- 19.3 provides for discretionary activity status for any discharges of wastewater to coastal water.

- 20 In our submission, the officers' recommended amendments to Policy P68 and Policy P76 ensure the proposed Plan gives effect to Policy 23(2) of the NZCPS. While the strong direction within the proposed Plan (as amended) may cause some concern for submitters (such as Wellington Water), the policy direction of the NZCPS is clear - untreated human sewage discharge are to be avoided. In any event, in our submission, based on the *King Salmon* assessment set out above, discharges of untreated human sewage may still be consistent with the policy direction, provided the effects are minor or transitory in nature.
- 21 Due to the clear policy direction and Supreme Court authority on the meaning of 'avoid' we do not consider it necessary to import the 'minor or transitory' language into the proposed Plan directly as it must apply when assessing the policy framework in any event under section 104 of the RMA.
- 22 Whether an adverse effect is minor or transitory will require a case by case assessment.

SCOPE OF DISCHARGE RULES

Summary of the issue

- 23 Submissions have been filed on the proposed Plan querying how the diversion of stormwater is addressed.⁷ In particular, raising concerns that diversion of stormwater is not covered under the stormwater discharge rules and therefore, it defaults to the 'catch all' discretionary rule (R135). The submitters seek that stormwater diversion is addressed by authorising the diversion in the stormwater discharge rules.
- 24 For the reasons that follow, the Council has not proposed a new discharge rule as it considers that the diversion activity is already covered by the relevant rules:

⁷ Roading, Parks and Gardens and Solid Waste departments of Hutt City Council and Upper Hutt City Council (S85/075) and NZDF (S81/021).

- 24.1 There is a distinction between 'discharge' and 'divert' under the RMA. They are two different activities.
- 24.2 A discharge occurs when stormwater leaves the effective control of the discharger. A diversion occurs when the original path of the water is altered.
- 24.3 Rules R48 to R53 refer to a 'discharge of stormwater' and 'stormwater' is defined as runoff that has been channelled/diverted.
- 25 Accordingly, these rules capture the diversion aspect because that is part of being 'stormwater'.

Meaning of divert

- 26 Diversions are addressed by section 14 of the RMA. That is, generally no person can divert water unless allowed by a rule in the regional plan (among other things).
- 27 The Court has found 'divert' to mean 'turning aside, deflecting or changing the direction of water'. In *Chatham Island Seafoods Ltd v Wellington Regional Council* the Environment Court considered the situation where excavation took place, which had the effect that groundwater was intercepted and collected in the excavated area.⁸ The Court held that a diversion of water took place to which section 14 applies, commenting that due to the excavation the:⁹

...water followed a path that was different from that preceding the excavation. The channel and excavation had the effect that the groundwater was intercepted and collected in the excavation that would not have done if the work had not been done. The result is that water was turned aside and displaced to take a different position than it would if the excavation and channel had not been made.

⁸ EnvC Auckland A018/2004, 13 February 2004.

⁹ Ibid, at [35].

28 This tends to suggest that any circumstances that alter the path of stormwater will be a diversion that would need resource consent, unless the proposed Plan provides for it as a permitted activity. Channelling stormwater into a stormwater drain will most likely divert the path it would have taken without that channelling and therefore, meeting the definition of diversion.

Meaning of discharge

29 Discharges are addressed by section 15 of the RMA. That is, generally no person can discharge water into water or a contaminant onto land where it may enter water, unless allowed by a rule in the regional plan (among other things).

30 Under section 2 of the RMA discharge includes 'emit, deposit, and allow to escape'. Accordingly, allowing channelled stormwater to enter a stormwater drain will be a 'discharge' because the person is at that point allowing it to escape (ie, there is no means of getting it back once it enters the stormwater drain). There will also be a further 'discharge' where that drain ends.

Status of diversion under the proposed Plan

31 The submitters are concerned that the diversion of stormwater has discretionary status under the proposed Plan, under Rule R135.¹⁰

32 Rules R48 to R53 in the proposed Plan deal with the discharge of stormwater into water or onto or into land where it may enter water, in a range of circumstances. Rules R48-53 do not reference the diversion of water. However, the definition of 'stormwater' does:

¹⁰ Rule R135: General rule for taking, use, damming and diverting water – discretionary activity: The damming or diverting of water that would otherwise contravene sections 14(2) or 14(3) of the Resource Management Act 1991 and is not permitted, controlled, restricted discretionary, discretionary, non-complying or a prohibited activity is a discretionary activity.

Runoff that has been intercepted, channelled, diverted, intensified or accelerated by human modification of a land surface, or runoff from the external surface of any structure, as a result of precipitation and including any contaminants contained therein.

- 33 In other words, due to the definition of 'stormwater' the rules that relate to 'the discharge of stormwater' will include the diversion aspect because that is part of being 'stormwater'.

OVERALL WATER QUALITY

- 34 Several submitters, including Fonterra (S316/031) and Federated Farmers (S352/073) have sought to amend Objective O23 to manage for 'The overall water quality...'.¹¹

- 35 At the outset, it is important to record that the Council is not proposing to take an overall water quality approach here. This is both for the practical reasons set out in Ms Pawson's section 42A report but also for legal reasons.

- 36 In the case of *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 the Environment Court expressly considered the appropriateness of taking an overall water quality approach in a regional plan.

- 37 That decision is clear - such an approach is unacceptable. The Court considered that the phrase 'overall quality' enabled an overs and under approach to water quality.¹¹ An overs and unders approach meant that deterioration in one area could potentially be tolerated if there was an improvement in another area. The Court found that the approach was:

37.1 Inconsistent with the unqualified function imposed on regional councils under section 30(1)(c)(ii) of the RMA to maintain and enhance water quality;¹²

¹¹ At [56].

¹² Ibid.

37.2 Incompatible with section 69 of the RMA which precludes a regional council from setting standards which might result in a reduction of water quality.¹³

38 This was even though the NPS-FM at the time contained the following objective:

Objective A2

The overall quality of freshwater within a region is maintained or improved while:...

39 The Court reconciled this by considering that, in light of Objective A2:¹⁴

It might, perhaps, be appropriate for a council to regard *overall quality* as permitting some increase in a type of contaminant (nitrate-nitrogen, for instance) in a particular water body, so long as that was matched or exceeded in its adverse effects by, say, a reduction in some other contaminant, so that the...*quality of the water*...taken overall, was at least no worse.

40 Through the most recent amendments to the NPS-FM (August 2017) that objective has been amended as follows:

The overall quality of freshwater within a ~~region~~ freshwater management unit is maintained or improved while:...

41 This amendment refined the objective but does not change the position taken by the Court in our view.

42 We consider Objective A2 is an acknowledgement that some freshwater bodies will degrade over time due to natural reasons beyond the effective control of Council's, and therefore, the requirement is on Council to maintain or improve the *overall* quality as that is seen as achievable. It is not a mechanism by which the Council can actively allow degradation of quality through its regional plan or consent decisions.

¹³ Ibid, at [57].

¹⁴ At [60].

43 As stated at the outset, an overall water quality approach is not something that the Council is recommending the Panel adopt.

Date: 12 January 2018

A handwritten signature in black ink, consisting of a large, stylized initial 'K' followed by a horizontal line extending to the right.

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Kerry Anderson/Emma Manohar
Counsel for Wellington Regional
Council