

**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 6)

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**Legal Submissions on behalf of Wellington Regional Council  
Hearing Stream 6**

**Date:** 25 May 2018

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**MAY IT PLEASE THE PANEL:**

- 1 Hearing Stream 6 deals with the topics of natural hazards, the Coastal Marine Area (**CMA**), historic heritage, contaminated land, hazardous substances and community drinking water supply protection areas.
  
- 2 The following section 42A authors and supporting technical experts will be providing evidence at this hearing:
  - 2.1 Tim Blackman - Activities in the CMA:
    - 2.1.1 Expert input to that report provided by Dr Iain Dawe.
  
  - 2.2 Richard Sheild - Natural Hazards:
    - 2.2.1 Expert input to that report provided by Dr Iain Dawe.
  
  - 2.3 Paul Denton - Management of the CMA:
    - 2.3.1 Implementation examples will be provided by officers from the Environmental Regulation team.
  
  - 2.4 Yvonne Legarth - Significant Historic Heritage:
    - 2.4.1 Expert evidence provided by:
      - (a) Chris Cochran.
      - (b) Michael Kelly.
  
    - 2.4.2 Implementation examples will be provided by an officer from the Environmental Regulation team.

2.5 Barry Loe - Contaminated Land and Hazardous Substances:

2.5.1 Implementation examples will be provided by officers from the Environmental Regulation team.

2.6 Barry Loe - Community Drinking Water Supplies:

2.6.1 Expert evidence provided by:

(a) Mike Thompson.

(b) Mike Toews.

2.6.2 Implementation examples will be provided by officers from the Environmental Regulation team.

3 These legal submissions address the following:

3.1 The relevant Resource Management Act 1991 (**RMA**) context for:

3.1.1 Regulating activities in the CMA.

3.1.2 Natural hazards.

3.1.3 Heritage.

3.1.4 Contaminated land.

3.1.5 Hazardous substances.

3.1.6 National Environmental Standards.

## THE COASTAL MARINE AREA

- 4 The proposed Plan deals with the management of the CMA and regulates activities in the CMA. We set out below the relevant RMA provisions in respect of the management of the CMA that provide for the regulation of activities in the CMA.
- 5 The Regional Council is responsible for preparing a regional coastal plan under the RMA (which is mandatory). In this case, the Regional Council has chosen to incorporate the Regional Coastal Plan (**RCP**) within the proposed Plan, as it is entitled to do under section 64(2) of the RMA (where it considers it is appropriate to promote the integrated management of the CMA in the region and any related part of the coastal environment in that region). Section 64(1)
- 6 While the provisions of the proposed Plan relate to the Wellington Region as a whole, where the rules are part of the RCP, a coastal icon has been used to illustrate that fact. This icon identifies the parts of the proposed Plan that the Minister of Conservation is required to approve under section 64(3) of the RMA.
- 7 Section 67(3) of the RMA requires that the RCP (incorporated within the proposed Plan) must give effect to the New Zealand Coastal Policy Statement (**NZCPS**), any other NPS and the RPS. We have previously set out for the Panel what 'give effect to' requires - ie, it simply means 'implement'. Section 67(3)  
Hearing Stream 1  
at [49]
- 8 As set out in our submissions in Hearing Stream 1, the purpose of a regional plan (which includes the RCP by definition) is to assist a regional council to carry out its functions under the RMA and a regional plan should be prepared in accordance with its functions, provisions of Part 2, section 32, any national policy statements and regulations. Section 63(1)  
Section 66(1)(a)

## NATURAL HAZARDS UNDER THE RMA

Section 42A  
Report at [18]

9 The proposed Plan provides a range of objectives, policies and methods that relate to natural hazards. We set out below the relevant RMA provisions that relate to natural hazards.

10 Under section 30(c)(iv) of the RMA, the functions of the Regional Council with regard to natural hazards are:

(c) The control of the use of land for the purpose of -

...

(iv) the avoidance or mitigation of natural hazards.

(d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

...

(v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards:

...

(g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

...

(iv) the avoidance or mitigation of natural hazards:

11 'Natural hazards' are defined as:

any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment.

12 We also note that 'the management of significant risks from natural hazards' was added to section 6(h) of the RMA as part of the Resource Legislation Amendment Act 2017 (**RLAA**).

However, as set out in our Hearing Stream 1 legal submissions, the RLAA does not apply to the proposed Plan because it was notified before the amendments to the RMA came into force. Accordingly, it does not need to be considered by the Panel.

Dated 20 April  
2107, para 76

### **Natural hazards and 'cross over' with District Councils**

13 The Council does not hold the sole responsibility for natural hazard management. There is clearly a 'cross over' between the Regional and District Council's in terms of functions which relate to the management of natural hazards.

14 Under section 31, a territorial authority has the function of:

- (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
  - a. ...
  - b. the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
    - i. the avoidance or mitigation of natural hazards

15 Given this 'cross over', the proposed Plan focuses on restricting activities in the CMA and the beds of lakes and rivers and it seeks to restrict inappropriate use and development in high hazard areas. 'High hazard areas' are defined as all areas in the CMA and the beds of lakes and rivers.

Proposed Plan  
definitions

### **HERITAGE**

16 As with natural hazards above, both regional councils and District Councils have functions that allow them to manage historic heritage issues and address historic heritage issues in their Regional and District Plans.

17 In particular, the proposed Plan provides for the protection of significant historic heritage values from inappropriate modification, use and development under objective O34. It also identifies sites with significant historic heritage values (in Schedule E1 to E5) and has provisions that refer to those Schedules.

18 However, the scope of the proposed Plan is limited in that it only provides for heritage where that arises within the CMA, or within the beds of lakes and rivers. In other words, it regulates historic heritage values within the areas which Regional Council has jurisdiction.

Section 42A  
Report at [44] and  
[48]

19 In addition, there is a further restriction in relation to the provisions in the proposed Plan relating to historic heritage. Put simply:

19.1 There are no rules that relate to historic heritage structures in beds of lakes and rivers (although there are policies that do - P46 and P47).

19.2 There are rules in relation to historic heritage structures within the CMA (rules R149, R165, R168-R172), as well as policies (P46 and P47).

20 The reason for this stems from section 68 of the RMA, which provides:

**68 Regional rules**

- (1) A regional council may, for the purpose of—
- (a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and
  - (b) Achieving the objectives and policies of the plan,—
- include rules in a regional plan.

21 In other words, by virtue of section 68(1)(a) of the RMA, the Regional Council cannot create rules for the purpose of carrying out its functions under sections 30(1)(a) and 30(1)(b) of the RMA (but it can create objectives and policies). The Regional Council's ability to make rules relating to the use of land in beds of lakes and rivers is restricted to the specific matters set out in section 30(1)(c) of the RMA, as follows:

**30 Functions of regional councils under this Act**

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
  - (c) The control of the use of land for the purpose of—
    - (i) Soil conservation:
    - (ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:
    - (iii) The maintenance of the quantity of water in water bodies and coastal water:
    - (iiia) The maintenance and enhancement of ecosystems in water bodies and coastal water:
    - (iv) The avoidance or mitigation of natural hazards:
    - (v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

22 This means that the Council cannot make rules specifically for the purpose of protecting historic heritage outside the CMA, as it is not specifically provided for in section 30(1)(c) of the RMA. The Council can only incorporate historic heritage into rules, if it is for the purpose of addressing one of the matters set out in section 30(1)(c) of the RMA. (However, the focus will always be on the section 30 matter, such as soil conservation or maintenance of water quality - the historic heritage aspect will be a side issue).

23 In addition to objectives, policies and rules, the RMA allows for the Regional Plan to contain '*methods, other than rules, for implementing the policies for the Region*'. Accordingly, there is scope for including methods in the proposed Plan (as long as they are not rules) to implement policies it may make in reliance on section 30(1)(a) or (b) of the RMA.

Section 67(2)  
RMA

24 The CMA is different because section 30(1)(d) of the RMA provides wider functions in relation to the use of land in the CMA:

**30 Functions of regional councils under this Act**

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(d) in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(i) land and associated natural and physical resources:

...

(v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards:

25 The Court of Appeal decision in *Canterbury Regional Council v Banks Peninsula District Council* confirms this and is clear in its interpretation of the functions of regional councils under section 30 of the RMA and the limits on the ability of regional councils to make rules. In particular:

[1995] 3 NZLR  
189 at 195

A regional council may, to the extent allowed under s 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s30(1)(c)-(h)... Neither a regional council nor a territorial authority

has the power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions...

- 26 The exclusions in section 68 were also touched on in *Property Rights in NZ Inc v Manawatu-Wanganui Regional Council*, [2012] NZHC 1272 at [30] which stated:

First, s68(1) plainly empowers the Council to make rules for the purposes of carrying out any functions conferred on it under the Act, save those in s30(1)(a) and (b). Parliament did not see fit to also except s30(1)(ga). By virtue of the latter provision, one of its functions is the establishment, implementation and review of objectives, policies and methods for maintaining indigenous biological diversity. So plainly the Council may make rules in its regional plan...for that purpose.

- 27 The scope of sections 30(1)(a) and 30(1)(b) of the RMA are sufficiently wide to enable the Council to make objectives and policies relating to the protection of historic heritage outside of the CMA, as long as:

- 27.1 It is for the purpose of 'achieving integrated management of the natural and physical resources of the region', or
- 27.2 Where those policies and objectives are for the purpose of addressing 'any actual or potential effects of the use, development, or protection of land which is of regional significance'.

- 28 Accordingly, there are rules relating to historic heritage within the CMA, but not in the beds of lakes and rivers. This is consistent with:

- 28.1 Section 12 (1)(g) of the RMA which provides that no person may, in the CMA, '*destroy damage or disturb any foreshore or seabed...in a manner that*

*has or is likely to have an adverse effect on historic heritage'.*

- 28.2 Policy 17 of the NZCPS, which requires protection of historic heritage in the coastal environment from inappropriate subdivision, use and development by identification, assessment and recording of historic heritage and including 'objectives, policies, rules and other methods' in relation to that in regional plans. Policy 17(a) and (f)

### **Heritage and 'cross over' with District Councils**

29 The Regional Council does not hold the sole responsibility for protection of historic heritage from inappropriate use and development. There is clearly a 'cross over' between the Regional and District Council's in terms of functions relating to historic heritage.

30 Under section 31, a territorial authority has the function of:

- (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
  - a. the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district
  - b. the control of any actual or potential effects of the use, development, or protection of land,...

31 Given this 'cross over', the proposed Plan focuses on addressing historic heritage in the CMA and the beds of lakes and rivers. The territorial authorities address historic heritage outside of those areas.

## CONTAMINATED LAND

32 There is also a cross over in terms of Regional and District Council functions for the management of contaminated land. Under section 30(1)(ca), the Regional Council has functions relating to the investigation of land for the purposes of identifying and monitoring contaminated land and the control of discharges of contaminants. The District Council, under section 31(1)(b)(ia) has the following function:

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

...

(ia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

33 The two functions are distinct, with the Regional Council having obligations that relate to identification and monitoring of contaminated land (and controlling discharges of contaminants) and the District Council around the prevention and mitigation of adverse effects which may arise from the development, subdivision or use of contaminated land.

34 Given this, the proposed Plan provides for the investigation of contaminated land, and restricts discharges from contaminated land. Rules 54, 48, 49, 55, 140

## HAZARDOUS SUBSTANCES

35 In his section 42A Report on Contaminated Land and Hazardous Substances, Mr Loe correctly identifies that prior to RLAA the Regional Council had an explicit function to control the use of land (including in the CMA) for the purpose of preventing or mitigating any adverse effects of the storage, use, disposal or transportation of hazardous Paragraphs 22-31  
Section 31(1)(c)(v) and (d)(v) of the RMA, pre RLAA

substances.

36 As Mr Loe sets out, the RLAA removed the control of hazardous substances as an explicit function of the Regional Council. However, as set out in our Hearing Stream 1 legal submissions, the RLAA does not apply to the proposed Plan because it was notified before the amendments to the RMA came into force.

Dated 20 April  
2107, para 76

37 However, Mr Loe's report sets out that the proposed Plan is generally consistent with the amended functions as the provisions focus on the Regional Council's functions relating to the control of discharges of contaminants, including hazardous substances, to land, air and water. These functions can be used by the Regional Council to place controls on hazardous substances under the RMA, if the HSNO controls are not adequate to address the environmental effects of hazardous substances:

Paragraph 28

Section 30(1)(f) of  
the RMA

**142 Relationships with other Acts**

...

- (6) Any controls prescribed under any other Act for any hazardous substance shall not contravene the provisions of EPA notices issued under sections 75 and 76 unless—
  - (a) there is a provision in that other Act that expressly provides that controls made under that other Act for specified purposes may contravene the provisions of EPA notices issued under this Act; and
  - (b) the controls are made for the purposes provided for in that Act.

Section 142(6) of  
HSNO

38 In other words, the RMA and Regional Plans only need to deal with particular risks or activities that are not already managed by the controls under HSNO. Mr Loe addresses these provisions in more detail in his section 42A report and it is submitted that the provisions proposed are likely to fall in the category identified in section 142 of HSNO in any event

as they relate to the control of discharges and the effects of those discharges, which is an RMA issue.

- 39 Given this, the proposed Plan contains a framework to manage the adverse effects of the discharges of hazardous substances.

O51, P90, R57

## **NATIONAL ENVIRONMENTAL STANDARDS**

- 40 Mr Loe provides a section 42A Report that relates to the National Environmental Standards for Sources of Human Drinking Water 2007 (**NES-SHDW**), and one which addresses the National Environmental Standards for Assessing and Managing Contaminants in Soil to Protect Human Health 2011(**NES-C**).

- 41 Mr Loe sets out a very good summary of the impact of the NES-SHDW in his section 42A report on Community Drinking Water Supplies, which we agree with.

Paragraphs 26-43

- 42 To assist the Panel, we refer to our previous submissions on the RMA as it relates to a NES - in particular, in Hearing Stream 5 and how duplication and conflict between the NES and the proposed Plan needs to be addressed. In summary:

- 42.1 Section 44A of the RMA sets out what the Council should do if the proposed Plan contains a rule that duplicates or conflicts with a regulation in the NES. Where there is a duplication or conflict, the Council must amend the proposed Plan to remove the duplication or conflict, without using a Schedule 1 process.

Sections 44A(3), (4) and (5) of the RMA

- 42.2 Section 44A(2) of the RMA (supported by section 43B(2)(a) of the RMA) specifies that a rule in the proposed Plan conflicts with a provision in a NES if:

42.2.1 the rule prohibits or restricts an activity that the NES permits or authorises, and the NES does not specifically say a rule may be more stringent, or

42.2.2 the rule in the proposed Plan is more lenient than a provision in the NES and the NES does not expressly specify that a rule may be more lenient than the provision in the NES.

43 Section 43B of the RMA states that a rule that is more stringent than a NES prevails over that NES, provided the NES specifically says that a rule can be more stringent.

44 Regulation 13 of the NES-SHDW provides that rules in a regional plan can be more stringent than those set out in the NES-SHDW:

**13 Consent authority may impose requirements more stringent than requirements in these regulations.**

A consent authority may do either or both of the following:

- (a) make or amend rules in a regional plan that are more stringent than the requirements of these regulations:
- (b) impose conditions on resource consents that are more stringent than the requirements of these regulations.

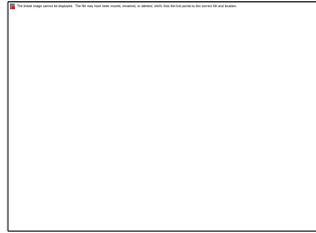
45 In addition, rules in the proposed Plan cannot be more lenient than the NES-SHDW, as the NES-SHDW does not expressly specify that a rule may be more lenient.

46 The NES-C does not provide for the proposed Plan to be more stringent or more lenient.

47 As both of these NES's were in effect when the Regional Plan

was drafted, the officers have ensured the provisions are consistent with what is provided for in those documents.

**Date:** 25 May 2018



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Regional Council