

Staff opening statements

August 2018

Hearings for the Proposed Regional Plan for Northland

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Purpose of the report

1. This report covers the opening statements from council staff for the hearings on the Proposed Regional Plan for Northland (the Plan). The opening statements focus on matters staff want to bring to the attention of the Hearing Panel following the release of the Section 42A reports. The statements do not repeat anything that is already included in the Section 42A reports or the Section 32 report. Nor does this report include staff responses to evidence – this will be done in the staff reply at the end of the hearings.
2. Questions from the hearing panel have been answered in a separate report - [Staff response to hearing panel questions, August 2018](#).

Scope of the Plan to address land-based effects

Author: Jon Trewin

3. In the response to question 129 in *Staff response to hearing panel questions* I said that we were seeking legal advice about the legality of objectives, policies and rules addressing the land-based effects¹ of water-based activities². This advice is included in Appendix 1.
4. To put the legal advice very simply, the Plan can include objectives and policies addressing the land-based effects of water-based activities, and rules can include land-based effects as a matter of control³ or discretion⁴.

Aquaculture – land based effects

Author: Ben Lee

5. The legal advice in Appendix 1 is also relevant to question 58 in *Staff response to hearing panel questions*, where the question was asked in relation to the proposed new matter of control for rule C.1.3.1:

¹ Effect outside of the coastal marine area and fresh waterbodies.

² Activities in the coastal marine area and fresh waterbodies.

³ For controlled activities.

⁴ For restricted discretionary activities.

Effects arising from the use of public facilities and infrastructure associated with the operation of the marine farm.

6. Based on the legal advice, I continue to recommend the inclusion of the new matter of control (10) in rule C.1.3.1 (and as a matter of discretion in rules C.1.3.2 – 4).

Taking the Ngati Kuri Trust Board Plan into account

Author: Keir Volkerling

7. In my response to question 148 in *Hearing Panel S42A questions and council staff responses* I had said:

After the closing of submissions to the PRP an iwi planning document was received from Ngati Kuri. This was analysed for issues to be taken into account in the PRP and a copy of the analysis sent to Ngati Kuri for their comment and feedback. No reply had been received at the date of writing.

8. Ngati Kuri have subsequently responded that they agree with the analysis with respect to the PRP, and that it has no omissions or errors.

Policy D.1.1

Author: Keir Volkerling

9. Policy D.1.1 includes the following note:

The continued inclusion of clause 4 in this policy depends on the outcome of the appeals on the matter in the Regional Policy Statement.

10. Clause 4 is:

4) the use of genetic engineering and the release of genetically modified organisms to the environment, or

11. The appeals on the genetic engineering and genetically modified organisms provisions in the Regional Policy Statement have been settled. Federated Farmers withdrew their appeal to the Court of Appeal on 31 October 2017. They appealed the High Court's decision that there is jurisdiction for the Regional Policy Statement to

include provisions for managing genetic engineering and genetically modified organisms. Consequently, the note in Policy D.1.1 can be deleted.

Marsden Point Port Zone

Author: Michael Day

12. The *S42A report - Coastal Structures* has recommended the inclusion of a new zone called the 'Marsden Point Port Zone', alongside a suite of associated rules and amendments to policy. Consequently, section I (Maps) of the Plan needs to be amended to refer to the Marsden Point Port Zone – the map layer description currently states that Northland's coastal marine area is split into five zones but the inclusion of Marsden Point Port Zone will make six.

Map layer	Description
Coastal zones: <i>Coastal Commercial Zone</i> <i>Marina Zone</i> <i>Mooring Zone</i> <i>Whangārei City Centre Marine Zone</i> <i>General Coastal Marine Zone</i> <u>Marsden Point Port Zone</u>	Northland's coastal marine area is split into five <u>six</u> zones: <ul style="list-style-type: none"> • The Coastal Commercial Zone are locations within the coastal marine area where the primary purpose is to accommodate commercial activity. This zone includes existing ports and wharves used for commercial operations. • The Marina Zone are locations in the coastal marine area where the primary purpose is to accommodate or develop marina structures and/or activities. • The Mooring Zone are locations in the coastal marine area where the primary purpose is to accommodate and manage moorings. • The Whangārei City Centre Marine Zone is located upstream of the Te Matau a Pohe bridge in the Hātea River. It includes all areas of the coastal marine area located upstream of the bridge that are not identified as either a Marina Zone or a Mooring Zone. • The General Coastal <u>Marine</u> Zone is the coastal marine area that is not zoned Coastal Commercial, Marina, Mooring or Whangārei City Centre Marine zones. This encompasses most of Northland's coastal marine area. ⁽¹⁾ • <u>The Marsden Point Port Zone is the coastal marine area adjacent to Northport and Refining New Zealand.</u>

Bay of Islands Planning Ltd – request to rezone Okiato ferry ramp

Author: Michael Day

13. In their original submission, Bay of Islands Planning Limited requested that the Okiato car ferry ramp be re-zoned to Coastal Commercial Zone – it is currently zoned General Marine Zone. This submission point was not addressed in any of the Section 42A reports and is therefore addressed now.
14. I note that the original submission did not demonstrate why the relief sought was appropriate. However, the Statement of Evidence (prepared by Jeff Kemp) has subsequently provided details on why it should be re-zoned to Coastal Commercial.
15. After considering the submitters evidence, I am of the opinion that it would be appropriate to re-zone the Okiato ferry ramp to Coastal Commercial. This is because I consider that the activities undertaken at this location are consistent with the description for this zone:

The Coastal Commercial Zone are locations within the coastal marine area where the primary purpose is to accommodate commercial activity.

16. I consider that the primary purpose of activities in this location are directly associated with coastal transport infrastructure, which is commercial in nature.

Bay of Islands Planning Ltd – request to re-format section C.1.1

Author: Michael Day

17. In their original submission, Bay of Islands Planning Limited submitted that the rules applicable to structures in the coastal marine area (contained in section C.1.1 of the Proposed Plan) are confusing and that it is difficult to ‘trace’ the status of activities through the sequence of rules. They requested to reformat the rules to improve readability. This submission point was not addressed in any of the Section 42A reports and is therefore addressed now.

18. I do not support this relief sought and consider that the layout of rules is clear with regards to determining whether an activity can comply with the relevant rules and with regards to what coastal 'zone' the activity can occur within.

Re-consenting existing discharges to air

Author: Michael Payne

19. It has come to my attention that there is inconsistency between paragraph 84 of *Section 42A report - Air Quality* and the recommendation to insert a new restricted discretionary rule for re-consenting industrial discharges to air, as shown in paragraph 86 of the same Section 42A report.
20. Paragraph 84 discusses the merits of including the new rule as a controlled activity rather than a restricted discretionary activity as recommended. Paragraph 84 states;

In my opinion, the key to successfully managing this activity as a controlled activity is ensuring the matters of control provide adequate scope to impose conditions that adequately manage effects. I have discussed this matter with Stuart Savill, council's Consents Manager and we believe this can be achieved.

21. In their submission GBC Winstone seek a controlled activity for re-consenting air discharges. Initially it was my view that a controlled activity was appropriate and I drafted a 42A response on that basis.
22. Following several discussions with council staff and further consideration, I was unable to support the proposal by GBC Winstone (to manage re-consenting discharges of contaminants to air as a controlled activity). In my opinion, it would be more appropriately managed as a restricted discretionary activity. Paragraph 84 of the 42A report was not amended to reflect my change in recommendation.
23. In my opinion, a controlled activity will limit council's ability to adequately undertake its regulatory functions, particularly where;
- there is scientific uncertainty or uncertainty regarding the effects of an activity. In this instance, council may seek to manage this uncertainty through monitoring and by granting a short duration resource consent. The

effectiveness of this approach would be severely limited by a controlled activity, requiring council to grant any subsequent consents for the activity.

- the environment surrounding the activity changes overtime. In this case, it is possible that a discharge of the same scale, intensity or duration may no longer be appropriate.
- there is non-compliance with resource consent condition to the extent where it would be inappropriate to grant a replacement resource consent.

24. In conclusion, the recommended activity status (restricted-discretionary) in the Proposed Regional Plan s42A recommendations version is my preference.

Significant ecological areas

Author: James Griffin

25. In *S42A report - Significant natural and historic heritage* (page 83) I recommended a mapping change so that the new Significant Ecological Area layer for Ruakaka estuary includes the entire estuary, in response to Patuharakeke Te Iwi Trust's submission. However, in making the change I did not exclude a small area of modified habitat at 26 Princes Road, which Kerr and Associates (the consultants who prepared the maps) confirmed should be excluded. This issue is illustrated in Appendix 2.

Dust from unsealed roads

26. Staff met with representatives from Kaipara and Whangarei District Councils on 6 August 2018 to discuss Rule C.7.2.5 *Discharges of dust to air from the use of unsealed public roads by motor vehicles - permitted activity*.
27. Although no agreement was reached on the wording of the rule which the district councils oppose, I wish to clarify a couple of points.
28. The first point relates to the use of the term 'dust sensitive areas' and concern that it is too broadly cast and would capture most of the unsealed road network. Many of these areas listed as dust sensitive in the Plan are also relevant matters for

consideration in the NZ General Circular Investment (No. 16/04) ⁵including: *‘Number of dwellings (houses/km), other locations where people are likely to be exposed (e.g. schools, marae or hospitals) (sensitive locations/km), ecologically sensitive areas such as rare species habitats or wetlands (sensitive locations/km), horticultural sensitive areas such as fruit orchards (sensitive locations/km).*

29. The wording of the rule relates to ‘priority sites’ and no single factor would determine whether a locality was a priority site. Rather it would be an overall combination of factors (those with the greatest number of contributing factors are effectively the highest priority sites) so the situation envisaged by the district councils of large parts of the unsealed road network being captured by the rule would not arise.
30. The second point relates to the use of the term ‘programme’ and concern with what this term means. In my mind, a programme relates to a list of sites of descending priority order with proposed actions alongside them. Such a programme is already contained in the Regional Land Transport Plan for each district council (at the time of writing, Kaipara District Council does not have any proposed actions for its priority sites). District councils point out that ‘programme’ could be interpreted as something wider, akin to a ‘strategy’ which may include measures other than road sealing or dust suppression e.g. setting speed limits, voluntary agreements with forestry companies, education. While I agree that this is part of a ‘package’ of responses to the issue, those areas that are the highest priority sites are likely to require sealing or other dust suppression methods. As stated, district councils have already tabulated these sites based on criteria in the NZ General Circular.

Acid Sulphate Soils

Author: Jon Trewin

31. There was also discussion with Kaipara and Whangarei District Councils on acid sulphate soils. Although I am still not convinced of the need for specific rules and have concerns on the accuracy of the mapping (for setting rules) I do believe the

⁵ The NZ General Circular Investment: No 16/04 provides an assessment criteria to determine the risk to human health from dust on unsealed roads. Those deemed at high risk will probably receive funding through the National Land Transport Programme subject to a robust business case. Those deemed at medium risk may be funded.

issue could be addressed through better information and advice. This could sit outside the Plan and involve the regional council to the extent expertise allows.

Catchment specific livestock exclusion rules

Author: Justin Murfitt

32. It has come to my attention that there is some unintended inconsistency between the catchment specific and region-wide livestock exclusion rules in *Proposed Regional Plan for Northland – S42A recommendations*.
33. Catchment specific livestock exclusion rules apply in both the Mangere and Whangarei Harbour catchments (Rules E.0.7 and E.0.9 respectively). These differ from region-wide Rule C.8.1.1 in terms of the exclusion required and the timeframes applied as set out in the tables for each rule. Otherwise, the intention is that they are consistent with Rule C.8.1.1
34. The differences appear to have arisen as recommended changes to Rule C.8.1.1 in response to submissions have not been transferred into catchment specific rules – these are limited to the text used in the rule preceding the Tables for Rules E.0.7 and E.0.9. Examples include the recommended inclusion of the term “indigenous” in Condition 1 and the exception for deer recommended in Condition 3 of the s42A version of Rule C.8.1.1 – neither of which have been carried into the catchment specific rules (note: there are several other minor changes to be made as well).
35. I recommend that catchment specific livestock exclusion rules (Rules E.0.7 and E.0.9) be amended to be as consistent with region-wide Rule C.8.1.1 where this does not affect the primary intent of these rules (which is to require more extensive livestock exclusion or apply earlier timeframes). This will make application and interpretation of the livestock exclusion rules easier for both for landowners and council – there is also no material reason for such minor variations between catchment specific and region-wide livestock exclusion rules. This means amending the conditions preceding the Table in both rules to use the same terminology as that used in Rule C.8.1.1. I do not consider this materially changes the catchment specific rules and is in effect a consequential amendment or clarification.

Appendix 1 – Legal advice on addressing land-based effects

WYNNWILLIAMS
LAWYERS

23 August 2018

Attention Ben Lee
Northland Regional Council
Private Bag 9021
WHANGAREI 0148

By email: BenL@nrc.govt.nz

Dear Ben

PROPOSED REGIONAL PLAN FOR NORTHLAND – ABILITY TO ADDRESS EFFECTS ON LAND-BASED VALUES

1. Northland Regional Council (Council) has recently notified the Proposed Regional Plan for Northland (pRPFN). The pRPFN is a combined regional coastal plan and also a regional plan.
2. We understand that several provisions of the pRPFN, including Policy D.2.9 (which was drafted as a recommended inclusion in the s42A report), seek to address land-based effects of activities occurring within the CMA. We understand that there are similar provisions in relation to freshwater bodies.
3. A question has arisen regarding whether some of these provisions may be ultra vires in that they purport to manage functions that are outside the scope of section 65 and 68 of the Resource Management Act 1991 (RMA).
4. In particular, you have asked us to consider whether a regional plan and/or regional coastal plan can include provisions (objectives, policies and/or rules) to manage effects on land-based values and/or require the provision of land-based infrastructure, from activities that take place within the coastal marine area (CMA) and freshwater bodies?
5. As a related issue, some controlled and restricted discretionary rules in the pRPFN require the consideration of effects on outstanding natural features and outstanding natural character without qualifying whether they are on the land or in the water. You have asked whether a regional plan and/or regional coastal plan can include rules that require the consideration of the effects of an activity on outstanding natural features (ONF) and outstanding natural landscape (ONL) areas mapped on land (e.g. outside the coastal marine area and freshwater bodies), or is the consideration of these effects limited to ONFs and ONLs mapped in the coastal marine area and freshwater bodies?

Executive summary

6. To the extent that the pRPFN is a regional coastal plan, we consider that the pRPFN can include objectives and policies relating to managing the effects on land-based values and requiring the provision of land-based infrastructure for activities within the CMA where the objectives and policies relate to integrated management. In this situation the objectives and policies will fall within the Council's functions under

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section 30(1)(a). Notably, section 64 of the RMA places no constraints on a regional council in relation to the functions for which a regional coastal plan can be prepared.

7. We do not consider that the Council can include rules within the pRPFN which seek to control land for the purposes of integrated management as these will be ultra vires under section 68(1) of the RMA.
8. However, in our opinion it is open to the Council to include matters of discretion in relation to rules falling within the Council's functions under section 30(1)(d) which seek to address the 'on-land' effects of these activities. This will depend on the Hearing Panel being satisfied that the matters of discretion relate directly to the actual or potential effects of the use, development or protection of land (within the CMA) under section 30(1)(d)(v), rather than being a matter of discretion in relation to the control of land on the landward side of mean high-water springs.
9. To the extent that the matter of discretion relates to the Council's integrated management functions under section 30(1)(a), we consider that section 68 does not extend to prohibiting a rule which regulates activities in the CMA from including a matter of discretion relating to land-based effects and the provision of land-based infrastructure. However, this is untested, and we cannot rule out such a matter of discretion being considered ultra vires if this matter were challenged.
10. We consider that the same position applies in relation to regional plan provisions (as opposed to regional coastal plan provisions). While section 65(1) only enables a regional plan to be prepared in relation to the specific functions listed in the section (which do not include integrated management of resources), we do not consider that this prohibits a Council from including an objective or policy in a regional plan which seeks to address the 'on-land' effects associated with an activity occurring within a freshwater body where that objective or policy relates to the Council's integrated management functions under section 30(1)(a). This is because sections 63 and 66 of the RMA require regional plans to be prepared in accordance with all of the Council's functions under section 30 of the RMA. If Parliament had intended that regional plans could not include objectives and policies in relation to its integrated management functions then these sections would have reflected this and there would have been no need for section 68(1) to limit the Council's rule making powers in relation to its section 30(1)(a) and 30(1)(b) functions.
11. In relation to ONL and ONFs in our opinion the fact that a regional council's functions do not extend to controlling land which comprises an ONL or ONF, does not prohibit it from considering the effects on 'on-land' ONLs and ONFs from activities that occur within the CMA and freshwater bodies where the activities being regulated fall within the Council's functions. For similar reasons to the above, we also consider that the Council may include matters of discretion or control within its rules which do not delineate between CMA ONLs and ONFs and on-land ONLs and ONFs (provided the activities being regulated fall within the Council's functions). Although we do note it will not fall within the Council's jurisdiction to map on-land ONLs and ONFs.

Extent of Council functions in relation to regional coastal plans

12. Given that the RMA addresses regional coastal plans separately from regional plans we have considered the position in relation to the CMA and other freshwater bodies separately.
13. The purpose of regional plans (which are defined to include a regional coastal plan) is to assist a regional council to carry out any of its functions in order to achieve the purpose of the RMA.

14. Under section 64 of the RMA, there must be, at all times, for all of the CMA in the region, one or more regional coastal plans prepared in the manner set out in Schedule 1. The CMA is defined in the RMA as being the foreshore, seabed and coastal water, and the airspace above it, of which the landward boundary is generally the line of mean high water springs. Within the CMA itself (i.e. the seaward boundary of mean high water springs), section 30(1)(d) provides the regional council with the function to control (in conjunction with the Minister of Conservation) "land and associated natural and physical resources".
15. Section 64 (unlike section 65 in relation to other regional plans) does not purport to restrict the functions under section 30 that a regional coastal plan can be prepared for. In fact, section 64 explicitly recognises the integrated management issues and recognises that activities within the CMA, may also have effects that cross this boundary. Section 64(2) provides that:

...a regional coastal plan may form part of a regional plan where it is considered appropriate in order to promote the integrated management of the coastal marine area and any related part of the coastal environment.
16. A regional coastal plan, and a regional plan, must comply with the other statutory obligations in the RMA, including to give effect to the New Zealand Coastal Policy Statement, any national policy statements and the regional policy statement under section 67.
17. In the case of the pRPFN, where a combined regional coastal plan and regional plan has been prepared a question arises regarding the extent of the Council's functions to control land or consider effects on the landward side of mean high-water springs, particularly where this is necessary to achieve integrated management.
18. In the case of a regional coastal plan, sections 63, 64, 66, 67 and 68 are the key sections applying to the preparation and change of this part of the pRPFN.
 - a. Section 63 and 66 require a regional coastal plan to be prepared in accordance with the Council's functions under section 30 of the RMA.
 - b. Section 64 of the RMA does not contain any limit on the functions for which a regional coastal plan can be prepared for.
 - c. Section 67 requires a regional plan to state the objectives for the region, and policies to implement the objective and the rules (if any) to implement the policies.
19. In respect of the Council's functions under section 30, the most relevant functions in this situation are:¹
 - a. Section 30(1)(d) which clearly provides the Council with functions within the CMA itself and in relation to the actual or potential effects of the use, development or protection of land within the CMA.
 - b. Section 30(1)(a) also provides the Council with the function for "the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region."

¹ Section 30(1)(gb) provides for the strategic integration of infrastructure with land use through objectives, policies and methods. However, we do not consider that the definition of infrastructure will extend to parking facilities and have therefore not considered this further.

20. While regional councils have some functions in relation to the use or control of land (above mean high water springs) these are limited to those in section 30(1)(c)² and some other parts of section 30(1)³, none which would be relevant in the case of the matters that the Council is seeking to control in this situation.
21. This is contrasted with the function of a territorial authority, for which section 31 provides:
- The control of any actual or potential effects of the use, development or protection of land.
22. This demonstrates that the direct control of land-based issues such as a lack of parking or suitable infrastructure is within the control of the territorial authority, as it is not for one of the narrowly specified purposes in section 30(1)(c) or the other section 30 functions which seek to control land.
23. However, in this case the Council is not seeking to directly control land, but is instead seeking to include objectives and policies, and matters of discretion within rules which relate to the land-based effects of activities occurring in the CMA. Accordingly, we consider the application of the Council's functions under section 30(1)(d) and section 30(1)(a) further as follows.

Extent of functions under section 30(1)(d)

24. Section 30(1)(d) provides the Council with the function to control (within the CMA) relevantly:
- a. land and associated natural and physical resources (section 30(1)(d)(i)); and
 - b. any actual or potential effects of the use, development or protection of land, including the avoidance or mitigation of natural hazards (section 30(1)(d)(v)).
25. It is clear that section 30(1)(d) provides the Council with the function to control land within the CMA itself. However, there is limited case law specifically considering the extent of the Council's functions under section 30(1)(d)(v) and whether or not this extends to considering land-based effects.
26. Based on a plain reading of section 30(1)(d), to the extent that the land-based effects are an actual or potential effect of the use or development of land within the CMA, then we do consider that these will fall within the Council's functions under section 30(1)(d)(v).⁴
27. There is limited case law addressing this issue. In *Auckland Yacht and Boating Association v Waikato Regional Council*⁵ the Environment Court considered whether it should impose controlled activity status or discretionary activity status for certain activities relating to existing marine farms. One of the matters of control was in relation to the nature of disturbance to natural character of the land.
28. The Court stated:

² Being to control the use of land for specific purposes, such as soil conservation, maintenance and enhancement of ecosystems and the quality of water, and the avoidance or mitigation of natural hazards.

³ See *Federated Farmers of New Zealand v Manawatu-Wanganui Regional Council* [2011] NZEnvC 403.

⁴ Although noting that section 30(1)(d)(v) is concerned with the use of land within the CMA only, not the use of land more generally. See *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342.

⁵ *Auckland Yacht and Boating Association v Waikato Regional Council* EnvC Auckland A211/2002, 31 October 2002.

...we agree with the case put forward by the appellant that, critical to sustainable use and development of natural and physical resources in relation to marine farming opportunities in the CMA, is the potential for adverse environmental effects, including cumulative effects on the coastal environment.⁶

29. In the end, the Court held that discretionary status would be more appropriate, however, there is no suggestion in this case, that a Council could not consider the land-based effects of an activity occurring within the CMA when making rules in a regional coastal plan.

Extent of functions under section 30(1)(a)

30. We have also considered the extent of the Council's integrated management functions under section 30(1)(a) where these functions would address the landward effects of activities occurring within the CMA.
31. As set out above, sections 63 and 66 require a regional coastal plan to be prepared in accordance with the Council's functions under section 30 of the RMA and section 67 requires a regional plan to state the objectives for the region, and policies to implement the objective and the rules (if any to implement the policies). Section 64 does not limit the functions for which a regional coastal plan can be prepared.
32. Accordingly, we do not consider that there is any jurisdictional constraint on including objectives and policies in the regional coastal plan where these relate to integrated management.
33. However, the position in relation to rules is different.
34. Relevantly in this situation, section 68 provides that:
- (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].
35. In our opinion, this means that rules that purport to apply to control land in order to achieve integrated management will be ultra vires.
36. The decision of the Environment Court in *Wainui Beach Protection Society v Gisborne District Council*⁷ describes this distinction:
- Policies, objectives, and rules control activities in the coastal marine area component (CMA). The landward portion contains no rules about activities, but provides objectives and policies to assist in consideration of resource consents for land use activities.
37. For this reason, we consider that the Council is not able to include rules within the pRPFN that control the use of land in terms of the effective provision of infrastructure or land based activities, even though those rules might be addressing the integrated management of resources. We specifically address the matter of discretion proposed by the Council further below.

⁶ *Auckland Yacht and Boating Association v Waikato Regional Council* EnvC Auckland A211/2002, 31 October 2002, at [77].

⁷ *Wainui Beach Protection Society v Gisborne District Council* EnvC, A113/2004 Auckland, 25 August 2004, at [11].

38. We note that the Environment Court decision in *Careys Bay Association Incorporated v Dunedin City Council*⁸ dealt with a similar issue, but in relation to the extent to which a territorial authority could control activities in the CMA. In this case, the issue largely concerned whether the Dunedin City Council had jurisdiction to include rules in their District Plan to take into account noise created within the CMA. In this instance, noise was being emitted by ships within the CMA.
39. The Environment Court defined the role of a territorial authority, and held that a territorial authority is limited by the boundaries of its district.⁹ The Court determined that section 31 of the RMA did not authorise the territorial authority to directly or indirectly control activities outside its territorial area.¹⁰ Ultimately, the territorial authority could control noise emitted by the Port (being landward of the CMA), but it was up to the regional council to control the noise emitted from within the CMA.

Is a matter of discretion part of a rule for the purposes of section 68?

40. The Council's section 42A report includes within Rule C.1.2.8 a matter of discretion for certain moorings in specified mooring zones "effects on parking, toilet facilities, refuse disposal and dinghy storage." The rule only proposes to address the 'land-based' issues as a matter of discretion. The rule does not directly purport to control the use of land.
41. In relation to the potential for overlap between regional council and territory authority rule making functions the Court of Appeal decision in *Canterbury Regional Council v Banks Peninsula District Council*¹¹ makes it clear that there may in some cases be 'overlapping rules' in both district plans and regional plans, but that the Council's ability to make rules is dependent on those rules falling within its functions.
42. To the extent that the matter of discretion relates to the Council's functions under section 30(1)(d)(v), then we consider that there is no jurisdictional issue with its inclusion, as section 68 only restricts rules relating to the Council's functions under section 30(1)(a) or 30(1)(b). This will depend on the Hearing Panel deciding that the effects of the use of the CMA for swing moorings extends to including the land-based effects for the purposes of section 30(1)(d)(v).
43. Potentially relevant to the assessment of whether the matter of discretion falls within the Council's section 30(1)(d) functions are the following factors:
 - a. The fact that when activities in the CMA are being considered in a section 104 context, that all the effects, including those on land will be considered.¹²
 - b. If classified as a discretionary activity, these effects would be able to be taken into account. In *Re Waiheke Marinas Ltd* the Environment Court confirmed there was a cross boundary integration issue between activities in the CMA and "its necessary relationship with the land".¹³ However, in determining the

⁸ *Careys Bay Association Incorporated v Dunedin City Council* EnvC Dunedin C165/2002, 10 December 2002.

⁹ *Careys Bay Association Incorporated v Dunedin City Council* EnvC Dunedin C165/2002, 10 December 2002, at [29].

¹⁰ *Careys Bay Association Incorporated v Dunedin City Council* EnvC Dunedin C165/2002, 10 December 2002, at [36].

¹¹ *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (CA).

¹² *Re Canterbury Regional Council* A89/94 confirms that a regional council is not limited to considering the adverse effects of activities directly related to its functions when considering an application for resource consent.

¹³ *Re Waiheke Marinas Limited* [2015] NZEnvC 218, at [88].

application for activities within the CMA, the Court clearly had regard to the effects associated with on-shore facilities, including traffic and amenity effects.

- c. We are also aware of consenting decisions which explicitly address plan requirements detailing the need for on-shore facilities.¹⁴ Although such decisions do not explicitly address the vires of these plan provisions.
 - d. Again, while not determinative we are aware of other regional coastal plans which seek to include matters of discretion addressing shore-based activities in restricted discretionary rules (for example, the Waikato Regional Coastal Plan).
 - e. While not directly considering the scope of section 30(1)(d)(v), as noted above, the Environment Court decision in *Auckland Yacht and Boating Association v Waikato Regional Council* did not suggest that a matter of control in relation to land-based effects was a reason for not imposing controlled activity status.
44. For completeness and in the event that the Hearing Panel does not consider that the land-based effects on parking and shore facilities, are an effect of the use of the CMA for swing moorings (and are instead related to the Council's functions under section 30(1)(a)), then we have also considered whether the matter of discretion forms part of the 'rule' for the purposes of section 68(1).
 45. We are unaware of any case law that specifically addresses whether the references to a 'rule' within section 68 includes the matters of discretion specified in the rule.
 46. A 'regional rule' is defined in the RMA as a rule made as part of a regional plan or proposed regional plan in accordance with section 68.¹⁵
 47. Based on a literal interpretation, we consider that a matter of discretion for a restricted discretionary activity still forms part of the rule and therefore the matter of discretion would be captured by the prohibition in section 68(1) (but only to the extent that the Hearing Panel does not find that it falls within Council's functions under section 30(1)(d)).
 48. The literal interpretation is based on the wording in section 77B of the RMA which refers to the duty of a local authority to specify "in the rule" the matters over which it has restricted its discretion in relation to the activity. Based on this interpretation, any matter within the rule (including the matters of discretion) which did not fall within section 68(1) would be ultra vires.
 49. However, in the absence of case law addressing this particular point, even if the Hearing Panel does not consider that the matter of discretion relates to the Council's section 30(1)(d) functions, we consider that it is arguable, applying a purposive interpretation, that Rule C.1.2.8 (and in particular the matter of discretion 1) is not ultra vires:
 - a. A regional rule is defined as a rule made as part of a regional plan or proposed regional plan in accordance with section 68. There is nothing in section 68 to suggest that a matter of discretion within a rule is limited by section 68(1).

¹⁴ *Nelson Fisheries Ltd v Marlborough District Council* PT, Wellington, W098/95, 28 August 1995.

¹⁵ RMA, s 43AAB.

- b. The rule itself controls activities within the CMA. This clearly falls within the Council's functions under section 30(1)(d). The matter of discretion is not seeking to control land outside of the RMA.
 - c. The factors set out at paragraph 43(a) to (d) will also apply.
50. We note that even if the pRPFN contains a matter of discretion addressing some of the land-based effects associated with activities in the CMA, that the extent to which the Council is in fact able to impose conditions on coastal permits applied for under this rule for land-based matters will depend on the adverse effect and condition being directly connected to the activity occurring within the CMA.¹⁶ This is not a matter we have considered in detail in considering the vires of the rule, but we can provide further advice on this if required. It may go to the appropriateness of the proposed rule, bearing in mind the requirements of section 32 of the RMA.
51. We also note that given the function to control land is held by the relevant territorial authorities that to the extent the pRPFN seeks to include objectives and policies to help achieve integrated management in relation to these issues, that a district plan must not be inconsistent with a regional plan, so providing further guidance as to how this integrated management is to take place may alleviate the issues and allow for more co-ordination as to how these effects could be managed.

Extent of Council functions in relation to the regional plan

52. We understand that Policy D.2.9 is intended to apply to activities in the CMA, and also freshwater bodies and so the same questions arise in the context of regional plans (as opposed specifically to regional coastal plans) in relation to the extent to which this policy might be ultra vires.
53. In relation to freshwater bodies, we note that activities on the surface of freshwater bodies are within the control of territorial authorities. To the extent that an activity relating to freshwater comes within the functions of a regional council, we consider that for the control of any land-based effects the position would be the same as for the CMA, and that a regional plan can include objectives and policies and other methods (but not rules) where necessary to achieve integrated management of resources.
54. Section 65 (which relates to the preparation of regional plans) states that a regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g) or (ga).
55. While we have not been able to locate any case law specifically addressing the limits expressed in section 65(1) and whether objectives and policies can be included in a regional plan (as opposed to a regional coastal plan) which address the integrated management of resources, we do not consider that section 65(1) prohibits a Council from including objectives and policies in its regional plan that relate to its other section 30 functions. This is because:
- a. Sections 63 and 66 of the RMA require regional plans to be prepared in accordance with all of the Council's functions under section 30 of the RMA. If Parliament had intended that regional plans could not include objectives and policies in regional plans in relation to its integrated management functions then these sections would have reflected this.

¹⁶ Section 108AA requires that a condition can only be imposed if it is directly connected to either an adverse effect of the activity on the environment, or an applicable regional rule.

- b. Further, if regional plans were limited to only addressing the functions specified in section 65(1), there would have been no need for section 68(1) to limit the Council's rule making powers in relation to its section 30(1)(a) and 30(1)(b) functions.
- c. While not directly on this point, we do note that the High Court in *Albany North Landowners v Auckland Council* summarised the requirements for the adoption of the Auckland Unitary Plan as follows:¹⁷

The AUP was to meet the requirements of the following planning instruments:

- (a) A regional policy statement (RPS): an RPS achieves the purposes of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region;
- (b) A regional plan: the purpose of a regional plan is to assist the Council to carry out its region-wide functions, including:
 - (i) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region; and
 - (ii) Preparation of objectives and policies in relation to any actual or potential effects of the use, development or protection of land which are of regional significance. ...

(Footnotes omitted)

- 56. We note that other statutory directions, such as the requirement to give effect to the National Policy Statement for Freshwater Management 2014, also specifically require regional councils to improve integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land, associated ecosystems and the coastal environment.¹⁸
- 57. From the correspondence with you, we are not aware of any rules with the pRPFN which purport to control land or address land-based effects as part of implementing Policy D.2.9 so have not addressed the ultra vires issues of any rules in the pRPFN in this context.

ONLs and ONFs

- 58. We also understand that some controlled and restricted discretionary rules in the pRPFN require the consideration of effects on outstanding natural features and outstanding natural character without qualifying whether they are on the land or in the water. You have asked whether a regional plan and/or regional coastal plan can include rules that require the consideration of the effects of an activity on ONF and ONL areas mapped on land (e.g. outside the coastal marine area and freshwater bodies), or is the consideration of these effects limited to ONFs and ONLs mapped in the coastal marine area and freshwater bodies?
- 59. From your question we do not understand the Council to be seeking to regulate activities on land in relation to the protection of ONLs and ONFs, but rather the Council is questioning whether it is entitled to include rules that require consideration of the effects of an activity (occurring with the CMA or a freshwater body) on an ONF

¹⁷ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [11].

¹⁸ Objective C1 of the National Policy Statement for Freshwater Management 2014.

and ONL on areas mapped on land. We also understand that the Council is not seeking to separately map ONLs and ONFs that occur on the land.

Effects of activities in the CMA

60. As set out above, section 68 of the RMA enables a regional council to include rules within a regional plan for any of its functions under section 30, other than section 30(1)(a), or section 30(1)(b).
61. Activities within the CMA fall within the Council's functions under section 30(1)(d). Clearly the Council may include rules in the pRPFN regulating matters that fall within this function.
62. As set out above, section 30(1)(d)(v) provides the Council with the function of controlling the actual or potential effects of the use, development, or protection of land within the CMA. Section 30(1)(d)(vii) provides that it is a function of a regional council to control activities in relation to the surface of water in the CMA.
63. To the extent that the activities regulated by the Council under section 30(1)(d) will have effects on ONLs and ONFs beyond the CMA, we consider that there is no jurisdictional bar on the Council including matters of discretion or matters of control in relation to these matters (despite the fact that the Council does not have a function enabling it to control land uses outside of the CMA for the purposes of managing effects on ONFs and ONLs).
64. While not determinative of the extent of the Council's functions, we do consider it relevant that in making a rule regulating an activity within the Council's functions under section 30(1)(d), section 68(3) requires the Council to have regard to the actual or potential effect on the environment of activities, including in particular any adverse effect. We do not consider section 68(3) to place any jurisdictional limit on only those effects that relate to or occur on land within the regional council's functions (i.e. land below mean high water springs).
65. While we consider that there is no jurisdictional limit on a regional coastal plan including a matter of discretion or matter of control relating to effects on ONLs or ONFs outside of the CMA, this will go to the appropriateness of any such rule. In terms of case law, there is limited case law specifically considering this issue:
 - a. We note that in the Environment Court decision in *Moturoa Island Limited v Northland Regional Council*¹⁹ that the Environment Court did not make any adverse comment about an objective in the regional coastal plan which provided for the protection of ONF/ONL identified in district council assessments. While this case was not specifically considering the ability to include matters of control or discretion, we consider that it still supports this interpretation. We note that the mapping of land-based ONLs and ONF will not fall within the Council's functions.
 - b. As noted above, in *Auckland Yacht and Boating Association v Waikato Regional Council*²⁰ the Environment Court considered whether it should impose controlled activity status or discretionary activity status for certain activities relating to existing marine farms. One of the matters of control was in relation to the nature of disturbance to natural character of the land. In the end, the Court held that discretionary status would be more appropriate,

¹⁹ *Moturoa Island Limited v Northland Regional Council* [2013] NZEnvC 227

²⁰ *Auckland Yacht and Boating Association v Waikato Regional Council* EnvC Auckland A211/2002, 31 October 2002.

however, there is no suggestion in this case, that a Council could not consider the land-based effects of an activity occurring within the CMA.

66. On the basis of the above, we consider that it is open to the Council to include matters of control and matters of discretion for rules regulating activities in the CMA that require consideration of effects on land-based ONLs and ONFs.

Effects of activities in freshwater bodies

67. In relation to freshwater bodies, as noted above, activities on the surface of freshwater bodies are within the functions of territorial authorities. Accordingly, any rule which sought to control the surface of water bodies and thereby require consideration of the effects of activities on the surface of waterbodies on land-based ONLs and ONFs would fall outside of the functions of the Council and is at risk of being ultra vires.
68. However, to the extent that any of the activities that the Council regulates within its section 30 functions directly affect land based ONLs or ONFs then we do not consider that rules with the pRPFN need to make a distinction between those ONLs and ONFs that are land-based and those that are not.

Conclusion

69. We trust that the above advice is of assistance. If you have any questions or wish to discuss, then please do contact us.

Yours faithfully
Wynn Williams



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Appendix 2 – Ruakaka Estuary SEA correction

