

IN THE MATTER OF: **THE RESOURCE MANAGEMENT ACT 1991**

AND

IN THE MATTER OF: **REVIEW OF DISTRICT PLAN FOR PORIRUA CITY**

**MEMORANDUM in RELATION
to
DISTRICT PLAN HEARINGS**

DETERMINING LANDWARD LIMIT OF COASTAL MARINE AREA

11 April 2022

MAY IT PLEASE THE PANEL

Overview

1. This Memorandum is filed in relation to the review of the District Plan for Porirua (the PDP).
2. I am a submitter on the PDP (submitter no. 168).
3. My submission asked for the provisions of the PDP (in particular, the maps) to be amended so the extent of the Coastal Marine Area (CMA) throughout the district is accurately determined and referenced in the PDP. This issue was the subject of evidence and representations in Hearing Stream 1 (HS1). In addition, the implications the matter has for the wider PDP (for example, in terms of defining the extent of the 'coastal margin' provision of the PDP) have been highlighted in presentations by me, and on my behalf, in Hearing Streams 2 – 4.
4. This memorandum is filed because recent proceedings before the Environment Court have direct implications for the PDP proceedings and the Panel's consideration of submissions and evidence.
5. I ask that this memorandum and the corresponding attachments (which comprise relevant documents relating to these Court proceedings) be accepted into the hearing record. Further, I suggest that relevant parties to these proceedings be given the opportunity to file further evidence and/or make representations, and that the Panel directs accordingly.

Environment Court Proceedings

6. The Environment Court proceedings to which I refer are those relating to applications by Greater Wellington Regional Council (GWRC) for directions (under s.293 of the RMA) and a declaration (under s.310 of the RMA) [ENV-2021-WLG-000033].
7. In essence, the applications have been made because GWRC wants to address an omission or error in the proposed Natural Resource Plan (pNRP) in terms of how the boundary of the CMA is determined where it crosses unmapped watercourses.¹

¹ The unmapped watercourses being those not depicted in Maps 42-48 of the pNRP.

8. Attached to this memorandum are GWRC's application documents and the Court's decision in respect of the s.310 RMA application.
9. The Court has refrained from giving directions under s.293 of the RMA as the absence of any relevant appeal precludes it from doing so. Instead, the Court has suggested GWRC may wish to make use of the provisions s.292 of the RMA but in doing so the Court noted that this section would only apply once the NRP is operative. I understand some appeals on the pNRP are unresolved and therefore it is not yet operative.
10. The location of the CMA boundary crossing over those watercourses not mapped in the pNRP must be determined by applying the definition of 'CMA', and 'mouth', in the RMA. Those definitions are as follows:

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

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

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

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

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

Relationship to PDP Proceedings

11. It appears GWRC was aware of its omission or error as early as April 2021.² GWRC filed a memorandum dated 23 April 2021 with the Court, a copy of which was apparently sent to all parties to the pNRP appeal proceedings.
12. It also appears GWRC brought Porirua City Council's (PCC), as a territorial authority, attention to the omission or error. Mr Dawe's (policy advisor, GWRC) affirmation (dated 1 October 2021) included in GWRC's applications to the Environment Court does not record the date GWRC gave its advice to PCC but it is likely to have been on, or about, the April 2021 date.
13. GWRC's applications under s.293 and s.310 of the RMA are dated 6 October 2021.
14. The panel will appreciate that Mr Dawe's affirmation on 1 October 2021, and the s.293 and s.310 applications on 6 October 2021, post-date the Panel's hearing of submissions in relation to HS1 by 5 and 8 working days respectively. The hearing for HS1 commenced on 27 September 2021. On 29 September 2021 presentations were made by me, and on my behalf, in support of my submission. Also, on 29 September 2021 the Panel asked questions of Ms Fleur Matthews (GWRC) who was in attendance but did not give evidence.
15. In its Minute 5 dated 1 October 2021 the Panel asked Mr McDonnell (planner for PCC) to respond to several specific questions in his right of reply, and in respect of GIS mapping and the CMA. Mr McDonnell met with Mr Dawe on 5 October 2021 to discuss the Panel's questions. Mr McDonnell filed his right of reply, which included responses to the Panel's questions, on 15 October 2021.

Implications for PDP Proceedings

16. One of the questions the Panel posed in its Minute 5 specially refers to the desirability, or otherwise, of having consistency between the PDP and the pNRP with respect to defining the CMA boundary.

² Refer Para.37 of Affirmation by Mr Iain Dawe dated 1 October 2021 and attached to GWRC's applications.

17. The primary objectives of GWRC’s applications to the Environment Court have been to remove uncertainty about the location of river mouths and therefore the location of the CMA boundary, thereby reducing costs and improving council administration.³

18. Section 310(e) of the RMA, which the Court has relied upon to make its declaration, says:

A declaration may declare the point at which the landward boundary of the coastal marine area crosses any river;

19. In his evidence in chief to HS1 Mr McDonnell supposes that the location of the CMA boundary could be determined on a case-by-case basis, as and when activities are proposed near or adjacent to the location of the “indicative” coastline.⁴ On the face of it this ‘adaptive’ approach is antithetical to what GWRC has sought, and been confirmed by the Environment Court with its definition of river mouth locations.

20. It is likely that the Panel’s consideration and deliberations in this regard could be assisted if it had knowledge and analysis of the parallel proceedings initiated by GWRC with the Environment Court.

21. I have been unaware of these proceedings until very recently. As far as I am aware, the Titahi Bay Resident’s Association (TBRA), which is another submitter on the PDP raising issues relating to coastal mapping, is in a similar position.

22. Section 75(4)(b) of the RMA requires consistency between the PDP and the relevant regional plan, and therefore has implications for the issue of CMA and GIS mapping being considered in the PDP proceedings, and the issue of CMA crossings over rivers being the subject of the Environment Court proceedings in relation to the provisions of the pNRP.

³ Refer Paras. 25, 26 and 27 of Affirmation by Mr Iain Dawe dated 1 October 2021 and attached to GWRC’s applications.

⁴ Refer Appendix A of Mr Torrey McDonnell’s s.42A report for HS1 and his suggested amended text for the “Statutory Context” chapter of the PDP.

Summary and Request

23. The details and scope of the GWRC initiated proceedings with the Environment Court have relevance to the Panel's consideration of submissions on the PDP. I believe these court proceedings have not been previously brought to the Panel's attention.
24. Submitters raising issues about the CMA and GIS mapping have been unaware of these court proceedings, but this is unlikely to be the case for PCC and GWRC representatives.
25. I ask the Panel to:
- consider the issues I have identified; and,
 - grant leave to all submitters in respect of issues relating to GIS mapping and the location of the MHWS and the CMA boundary to file representations (that may or may not be evidential) should they chose to do so; and,
 - direct that any such representations be filed by 27 May 2022.

Conclusion

26. Thank you for your time and consideration.

Dated 11 April 2022.



Robyn Smith

ATTACHMENTS

Attachment A: Copy of GWRC's applications to Environment Court with supporting documents

Attachment B: Copy of Environment Court decision ENV-2021-WLG-000033

ATTACHMENT A: GWRC's APPLICATIONS TO ENVIRONMENT COURT

**Before the Environment Court
At Wellington
I Mua I te Kōti Taiao
Te Whanganui-a-Tara Rohe**

ENV-2019-346-103

Under Clause 14 of Schedule 1, Section 310, and Section 293 of
the Resource Management Act 1991

In the matter of appeals on the Proposed Natural Resources Plan

And

In the matter of an application for a declaration under section 310 and an
order under section 293

Between **Various**

Appellants

ENV-2019-000103, 105-133

And **Wellington Regional Council**

Respondent

**Application for declaration under section 310 and an order under section
293 in relation to the definition of river 'mouth'**

Date: 6 October 2021



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To: The Registrar
Environment Court
WELLINGTON

Wellington Regional Council applies for the following declaration under section 310 of the RMA:

Declaration

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

The grounds for this application are:

- 1 The accompanying memorandum of counsel provides details of the grounds for the application. In summary:
 - 1.1 Through an error, the Proposed Natural Resources Plan (**PNRP**) does not identify river mouths (except for those rivers on Maps 42 to 48).
 - 1.2 This is an error that the Wellington Regional Council (**Council**) seeks to address through the declaration process. The Council relies on (b) of the definition of 'mouth', and section 310(e) of the RMA, both of which state that a declaration may declare the point at which the landward boundary of the coastal marine area crosses any river.
 - 1.3 This approach is endorsed by *Re Auckland Regional Council* Environment Court, Auckland, 3/4/1997, A046/97.
 - 1.4 The Council also relies on the affidavit of Dr Dawe, as providing support for this declaration.

Wellington Regional Council applies for the following orders under section 293 of the RMA:

Orders sought

A That the following text be inserted into the PNRP in Chapter 13 and placed immediately above Map 42 (below the heading which reads: 'Coastal marine area and river mouth boundaries'):

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

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

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

The grounds for this application are:

2 The accompanying memorandum of counsel provides details of the grounds for the application. In summary:

2.1 The Court's powers under section 310 of the RMA are declaratory in nature. They give the Court to power to determine what the appropriate location of the 'mouth' is, but arguably not the power to amend the PNRP to implement this declaration regarding location.

2.2 Given this, a direction is sought under section 293 of the RMA as consequential relief to the above declaration, to

allow for the amendment to the PNRP to give effect to the declaration.

2.3 Section 293 authorises the Environment Court to order a change to the PNRP.

2.4 The affidavit of Dr Dawe provides support for this amendment to the PNRP as being the appropriate correction to address the error.

Date: 6 October 2021



.....
Kerry M Anderson/Kate H Rogers
Counsel for Wellington Regional
Council

This document is filed by Kerry Murray Anderson of DLA Piper New Zealand, solicitor for Wellington Regional Council.

The address for service on Wellington Regional Council is at:

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**Before the Environment Court
At Wellington
I Mua I te Kōti Taiao
Te Whanganui-a-Tara Rohe**

ENV-2019-346-103

Under Clause 14 of Schedule 1, Section 310, and Section 293 of
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And

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Between **Various**

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ENV-2019-000103, 105-133

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Respondent

**Application for directions for service for the application by the Wellington
Regional Council for a declaration under section 310 and an order under
section 293 in relation to the definition of river 'mouth'**

Date: 17 September 2021

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Level 4, 20 Customhouse Quay, Wellington 6011
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To: The Registrar
Environment Court
WELLINGTON

MAY IT PLEASE THE COURT

1 Wellington Regional Council (**Council**) intends to apply for a declaration in relation to the location of river mouths in the Wellington Region, and a consequential application for orders under section 293 of the Resource Management Act 1991 (**RMA**).

2 The declaration sought is to remedy an error in the Proposed Natural Resources Plan (**PNRP**), in that it does not identify river mouths (except for those rivers on Maps 42 to 48, which relate to main rivers). Many smaller river mouths and stream boundaries have not been mapped and accordingly, the landward extent of the coastal marine area is not delineated. The declaration sought reflects the approach taken in the operative Regional Coastal Plan.

3 The declaration sought is that:

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

4 Based on the definition, the location of a river 'mouth' can be as agreed between the Minister of Conservation, the Council, and the appropriate territorial authority *prior* to notification of the PNRP, or via declaration by the Environment Court under section 310 before the PNRP becomes operative. As the PNRP has been notified, and advanced to the point that the majority of appeals on the PNRP have been resolved, with the error only subsequently being discovered, the first option is no longer available. Hence this application.

5 In order to give effect to the declaration, the Council also applies for orders under section 293 of the RMA to insert the following text into the PNRP:

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

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

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

6 The Council is seeking directions from the Court in relation to service of the application under section 312 of the RMA and service of the section 293 application.

7 Section 312(1) of the RMA requires the application is served on every person directly affected by the application within 5 days of the declaration application being made.

8 The Council proposes to notify the following people directly:

8.1 The Minister of Conservation

8.2 All Territorial Authorities in the Wellington Region, being Hutt City Council, Porirua City Council, Upper Hutt City Council, Wellington City Council, Carterton District Council, Kapiti Coast District Council, Masterton District Council, South Wairarapa District Council, and part of Tararua District Council.

8.3 All appellants and section 274 parties on the PNRP.

9 It is submitted that this group will capture the authorities who may be impacted by the change of geographical jurisdiction, and this provides

notification to those parties who are involved in the appeal proceedings which provide a basis for this application.

10 Council seeks directions that the above notice is sufficient to meet the requirements of section 312 and section 293.

11 This position is supported by:

11.1 The affidavit of Dr Dawe, on behalf of the Council (unsworn at this stage).

11.2 Memorandum of Counsel on the application for directions.

12 In addition, draft copies of the following are provided to the Court for further information on the proposed applications:

12.1 Draft application for declaration under section 310 and an order under section 293 in relation to the definition of river 'mouth'

12.2 Draft notice of application for declaration under section 310 and an order under section 293 in relation to the definition of river 'mouth'

12.3 Draft memorandum of Counsel supporting application for declaration and order in relation to the definition of river 'mouth'.

Date: 17 September 2021



.....
Kerry M Anderson/Kate H Rogers
Counsel for Wellington Regional
Council

This document is filed by Kerry Murray Anderson of DLA Piper New Zealand, solicitor for Wellington Regional Council.

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ENV-2019-346-103

Under Clause 14 of Schedule 1, Section 310, and Section 293 of
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In the matter of appeals on the Proposed Natural Resources Plan

And

In the matter of an application for a declaration and consequential orders

Between **Various**

Appellants

ENV-2019-000103, 105-133

And **Wellington Regional Council**

Respondent

Memorandum of Counsel supporting application for directions as to service

Date: 17 September 2021



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MAY IT PLEASE THE COURT

INTRODUCTION

- 1 The Wellington Regional Council intends to apply for a declaration under section 310(e) of the Resource Management Act 1991 (**RMA**) determining the location of unmapped river 'mouths' in the Proposed Natural Resources Plan for the Wellington Regional (**PNRP**).
The declaration to be sought is:

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

- 2 As consequential relief to implement the declaration (if granted by the Court), the Council also intends to apply for an order under section 293 of the RMA to amend the PNRP to include a provision setting out how the location of unmapped river mouths are determined in Chapter 13 of the PNRP, placed immediately above Map 42 (below the heading which reads: 'Coastal marine area and river mouth boundaries'). The provision is as follows:

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

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

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

- 3 The Council has also applied for directions as to service of these applications. It is submitted that the requirements of the RMA will be satisfied if it is served on the Minister of Conservation, territorial authorities within the Wellington Region and those parties who filed an appeal or section 274 notice on the PNRP, but not the broader public.

SERVICE

Requirements

- 4 For a declaration, under section 312(1) of the RMA, the Council must serve notice of the declaration on every person 'directly affected' by the application.

- 5 The Environment Court in *Canterbury Regional Council v Department of Conservation* held that the term 'affected' meant an 'appreciable effect more than minimal, one that differentiates the person from a generality in order to define the direct effect'. Whether a party is directly affected is a matter requiring examination in every case.

EnvC C081/04.
See also High Court in *BP Oil Ltd v Taupo District Council* HC Hamilton M300/85, 31 January 1989

- 6 For a section 293 application, the Court can direct consultation with the 'parties and other persons that the Court directs'. Section 293(1)(b) of the RMA

Consultation

- 7 As set out in the affidavit of Dr Dawe, some consultation has already taken place. The Minister of Conservation and Territorial Authorities within the Wellington Region have been contacted by the Council, to provide an update on the issue and the proposed amendment to the PNRP to address the issue. Those parties have confirmed agreement that an error has occurred in terms of the definition of river mouth in the PNRP and agreed with the Council's proposed amendment to the PNRP to address the error. However, there is still the issue of service of this application for declaration and consequential order under section 293 to provide for the amendment. Affidavit of Dr Dawe at [35] & [36]
- 8 A Memorandum of Counsel on behalf of the Wellington Regional Council updating the Court on this matter (23 April 2021) identified the error and the Council's intention to seek that the Court utilise section 293 of the RMA to correct the PNRP through the inclusion of the paragraph set out at paragraph 2 above. That memorandum gave the Court and all parties to the PNRP appeals process notice of the Council's intentions. No responses or correspondence was received in relation to this issue.

Parties that are directly affected

- 9 The Council submits that the people that should be served with this application are:

- 9.1 The Minister of Conservation.
- 9.2 All Territorial Authorities in the Wellington Region with a coastline, being Hutt City Council, Porirua City Council, Wellington City Council, Carterton District Council, Kapiti Coast District Council, Masterton District Council, South Wairarapa District Council, and part of Tararua District Council. The only Territorial Authorities not included is the Upper Hutt City Council, as its district does not include a coastline.
- 9.3 All appellants and section 274 parties on the PNRP.
- 10 It is submitted that this group will capture the authorities who may be impacted by the change of geographical jurisdiction.
- 11 It also provides notification to those parties who are involved in the proceedings which provide a basis for this application.
- 12 In terms of any other party which may be 'affected', Council has considered what the impact might be on a person who might be contemplating an activity which this may impact on. The affidavit of Dr Dawe also considers which parties are affected by the error.
- 13 It is submitted that the only change will be for an activity which is occurring in a river, or the bed of a river near the river mouth, where that river mouth is not mapped by the PNRP. Under the PNRP, there is no way of determining where the landward boundary of mean high water springs is in those situations, and a

Affidavit of Dr
Dawe at [25] -
[29]

declaration would need to be sought to provide that certainty.

- 14 However, as the Operative Regional Coastal Plan is still in effect, it provides useful guidance as to where this is, and the sensible approach, and one that has been adopted by Council, is that the river mouth is a straight line representing the continuation of the line of mean high water springs on each of the river.
- 15 This is the same approach as is now sought through these applications. As such, general plan users will not be adversely affected and therefore do not need to be notified of this application. Regardless, given that the appeals are live, the Council is suggesting that the appellants and section 274 parties be notified as they have shown to be invested in the PNRP more generally.

Directions sought

- 16 Accordingly, directions are sought from the Court that this matter should be served on the Minister of Conservation, the Territorial Authorities in the Wellington Region, and all appellants and section 274 parties on the PNRP.

Date: 17 September 2021



.....
K Anderson/K Rogers
Solicitor for Wellington Regional
Council

**Before the Environment Court
At Wellington
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ENV-2019-346-103

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**Memorandum of counsel supporting application for declaration and order
in relation to the definition of river 'mouth'**

Date: 6 October 2021



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MAY IT PLEASE THE COURT

INTRODUCTION

1 The Wellington Regional Council applies for a declaration under section 310(e) of the Resource Management Act 1991 (**RMA**) determining the location of unmapped river 'mouths' in the Proposed Natural Resources Plan for the Wellington Regional (**PNRP**). The declaration sought is:

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

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

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

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

- (a) of which the seaward boundary is the outer limits of the territorial sea:
- (b) of which the landward boundary is the line of mean high water springs, except that where that

line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

- (i) 1 kilometre upstream from the mouth of the river; or
- (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5.

- 3 The Council applied for directions as to service of this application, with its submission being that it is served on the Minister of Conservation, territorial authorities within the Wellington Region with a coastline and those parties who filed an appeal or section 274 notice on the PNRP, but not the broader public. This application was approved by the Court on 22 September 2021.
- 4 The reasons for the above applications are set out below.

IDENTIFICATION OF RIVER MOUTH

Error in the Plan

- 5 The Operative Regional Coastal Plan for the Wellington Region includes the following text after its list of specified river mouths and coastal marine area boundary locations:¹

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

¹ Regional Coastal Plan, p221.

6 As set out in the affidavit of Dr Dawe for the Wellington Regional Council (**Council**), this text, or an equivalent, has been omitted in error from the PNRP.

7 While the main river mouths boundaries have been agreed to and are mapped in the PNRP (Maps 42-48), many smaller river mouths and stream boundaries have not been mapped and the landward extent of the coastal marine area is not delineated. This is an error that the Council seeks to address.

Affidavit of Dr
Dawe from
[15]

8 The main issue with the error relates to the ability to identify the landward boundary of the coastal marine area, in relation to the mouth of a river. This has consequences for determining jurisdiction between the Council and the territorial authorities, and also in respect of the jurisdiction of the Regional Coastal Plan and what provisions of the PNRP apply.

9 The relevant part of the definition of coastal marine area is:

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

RMA, section
2.

...

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

(i) 1 kilometre upstream from the mouth of the river; or

(ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

10 'Mouth' for the purpose of this definition is also defined in section 2 of the RMA:

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

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

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

11 Without identifying the river mouths in the PNRP and in light of the period which allows for agreement having expired (ie, the period between consultation on, and notification of, the proposed regional coastal plan) it is impossible to determine the landward boundary of the coastal marine area (for the unidentified rivers) where it crosses a river, unless a declaration is sought from the Environment Court in respect of the same.

12 The consequences of this are uncertainty for both local authorities and plan users in terms of the extent of the coastal marine area.

Affidavit of Dr
Dawe [25] to
[29]

Process for remedy

- 13 In terms of the process for remedying this error, the definition of 'mouth' in the RMA, as set out above, provides guidance about how a river mouth should be included in a plan.
- 14 Based on the definition, the location of a river 'mouth' can be as agreed between the Minister of Conservation, the Council, and the appropriate territorial authority *prior* to notification of the PNRP, or via declaration by the Environment Court under section 310 before the PNRP becomes operative. As the PNRP has been notified, and advanced to the point that the majority of appeals on the PNRP have been resolved, with the error only subsequently being discovered, the first option is no longer available.
- 15 The remaining option is a declaration from the Environment Court under section 310 of the RMA.
- 16 As a consequence, the Council seeks a declaration from the Environment Court regarding the location of the river 'mouths', on a regional basis, as opposed to it being sought on a river-by-river basis as and when issues arise.
- 17 This declaration power is expressly provided for under section 310(e) of the RMA, which states:

A declaration may declare—

...

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

18 Previous caselaw confirms that this approach, seeking a declaration from the Court, is appropriate. In *Re Auckland Regional Council* the Court has stated:

Re Auckland Regional Council
Environment Court,
Auckland
3/4/1997
A046/97 at
page 2

... the definition of the term “mouth” shows an intention that where agreement among the relevant public authorities is not reached before notification of the proposed regional coastal plan, the only other way of establishing the mouth is by declaration by the Environment Court prior to the plan becoming operative.

19 Given this, the Council seeks a declaration from the Environment Court as to the location of river mouths in the Wellington Region, not already mapped by Maps 42 to 48, as follows:

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

CONSEQUENTIAL RELIEF

20 If the Council's application for declaration is successful, the Council also seeks that the PNRP be amended through the insertion of the following text:

To be located in Chapter 13 and placed immediately above Map 42 (below the heading which reads: 'Coastal marine area and river mouth boundaries').

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

Affidavit of Dr Dawe at [30]

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

- (a) of which the seaward boundary is the outer limits of the territorial sea:

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

21 The Court's powers under section 310 of the RMA are declaratory in nature. They give the Court to power to determine what the appropriate location of the 'mouth' is, but it is submitted it is unclear whether the Council can simply amend its PNRP in response to such a declaration.

22 Accordingly, the Council applies for an order under section 293 of the RMA, to make the amendment sought above to the PNRP, to give effect to the declaration, if granted.

23 Section 293 of the RMA provides:

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

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

- (a) must state its reasons for giving a direction under subsection (1); and
- (b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

...

24	Determining whether or not the Court will exercise its section 293 powers requires consideration at two levels:	<i>Friends of Nelson Haven and Tasman Bay (Inc) v Tasman District Council</i> EC Wellington W013/08, 13 March 2008 (Nelson Haven) at [22].
24.1	First, does the Court have jurisdiction to exercise the powers in question; and	
24.2	Second, if the Court does have jurisdiction, should it exercise its discretion to do so on the merits.	

Jurisdiction

25	In <i>Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council</i> (which related to the protection of the Mackenzie Basin as an outstanding natural landscape), the High Court held that the 'orthodox' jurisdictional test is:	<i>Federated Farmers New Zealand (Inc) Mackenzie Branch v Mackenzie District Council</i> [2014] NZHC 2616 at [156].
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...that the matter sought to be addressed must be 'on' the plan change, within the scope of submissions to the council, and be within the scope of the appeals to the Environment Court and the relief there sought. However, this orthodox position is not without exception.

26	It is submitted that this matter is 'on' the plan change, given the plan review is on the entire plan. It is, however, acknowledged that it is not within submissions or any appeal, as if it was, the Council would be seeking the amendment in response to that specific appeal.	Affidavit of Dr Dawe at [34]
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- 27 However, in the above decision the Court held that At [148]
there may be some exceptions to this general approach
in certain circumstances, including (but not limited to)
an inadequate section 32 report, matters under section
74 (which relate to matters to be considered by a
territorial authority in preparing a district plan, and
presumably also extends to the corresponding section
66 for a regional council), or a matter under 293(3)
(which relates to deviation from higher order
documents).
- 28 It is submitted that this is a situation where the
exception to the general jurisdictional requirements
should apply. Allowing the above error to be corrected
(to identify the boundaries of the coastal marine area)
will ensure that the Council fulfils its functions under
section 30(1)(d) of the RMA in relation to control of the
coastal marine area, as referenced in section 66(1)(a).
It will also assist in ensuring that the requirements of
the NZCPS are met, as it will clarify the extent of the
coastal marine area.
- 29 Given this, it is submitted that this is a situation where
it is appropriate for the Court to exercise its powers
under section 293 of the RMA to correct the defect in
the PNRP.

Exercise of discretion

- 30 It is submitted that the Court should exercise its
discretion in this matter. It will resolve an error that has
arisen in the plan review process and will allow for
greater plan certainty for users and all local authorities
(territorial and regional).

31 Dr Dawe provides a section 32 analysis for this amendment and concludes that the above would be an appropriate outcome.

Affidavit of Dr
Dawe, from
[38]

Other options

32 For completeness, the Council has considered what other options may be available to implement the Court's declaration (if one is made).

33 Section 292 of the RMA provides:

- (1) The Environment Court may, in any proceedings before it, direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of—
 - (a) remedying any mistake, defect, or uncertainty; or
 - (b) giving full effect to the plan.
- (2) The local authority to whom a direction is made under subsection (1) shall comply with the direction without using the process in Schedule 1.

34 It is submitted that this section is more 'on point' for implementing the declaration sought by the Council, as it relates to remedying a mistake in a Plan.

35 However, section 292 relates to a 'regional plan', which is defined in the RMA as an operative plan:

regional plan—

- (a) means an operative plan approved by a regional council under Schedule 1 (including all operative changes to the plan (whether arising from a review or otherwise)); and
- (b) includes a regional coastal plan.

Section 43AA
of the RMA

36 The definition refers to 'operative plan' - whether made operative under clause 20 of Schedule 1 or under section 86F (when appeals have been resolved). The PNRP is not yet operative and will not become operative until the resolution of the outstanding appeals on water quality, and the grant of consent orders on the other topics. Given this, the Council considers that section 292 of the RMA is not yet available to the Court.

Section 43AA
of the RMA

CONCLUSION

37 The Council applies for a declaration as to the location of river mouths in the Wellington Region, with consequential relief of an order under section 293 to amend the PNRP.

Date: 6 October 2021



.....
K Anderson/K Rogers
Counsel for Wellington Regional
Council

**Before the Environment Court
At Wellington
I Mua I te Kōti Taiao
Te Whanganui-a-Tara Rohe**

ENV-2019-346-103

Under Clause 14 of Schedule 1, Section 310, and Section 293 of
the Resource Management Act 1991

In the matter of appeals on the Proposed Natural Resources Plan

And

In the matter of an application for a declaration and consequential orders

Between **Various**

Appellants

ENV-2019-000103, 105-133

And **Wellington Regional Council**

Respondent

ADA
Affirmation

~~Affidavit~~ of Iain Nicholas Dawe in support of section 293 application to
correct error in Proposed Plan - definition of river 'mouth'

Sworn: ~~September~~ 2021

1 October



7087072.17

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7087072.17

I, **Iain Nicholas Dawe**, Senior Policy Analyst (Hazards and Coasts), Wellington Regional Council, solemnly and sincerely affirm:

- 1 My full name is Iain Nicholas Dawe.
- 2 I am authorised to make this affidavit on behalf of the Wellington Regional Council (**Council**) in support of its application for a declaration in relation to the location of river mouths in the Wellington Region, and consequential relief under section 293 of the Resource Management Act 1991 (**RMA**) to reflect that declaration in the Proposed Plan.

Qualifications and experience

- 3 I am a Senior Policy Advisor in natural hazards and coasts for the Wellington Regional Council. I have been employed at the Council since 2006.
- 4 I hold a BSc in geography/geology, an MSc with 1st class Honours in environmental sciences with a thesis specialising in coastal geomorphology and a PhD specialising in coastal processes, sediment transport and process geomorphology of mixed sand and gravel beaches, from the University of Canterbury.
- 5 I have been a member of the New Zealand Coastal Society for 20 years, an affiliated group of Engineering New Zealand (*fm.* Institute of Professional Engineers New Zealand) and for which I was the Wellington Regional Coordinator for 10 years from 2007-2017.
- 6 Currently I am the chair of the national Hazard Risk Management Special Interest Group that represents regional councils across New Zealand. The SIG group advocates for integrated hazards management across the local and central government sectors in areas of hazards planning and research.
- 7 As the natural hazards and coasts policy analyst for the Council I provide scientific analysis, commentary and research into natural



hazards that affect the Greater Wellington Region and to write and/or provide expert advice and evidence for hearings, the Environment Court and policy that deals with managing the risks from natural hazards. I provide advice to policy analysts, resource managers, consents officers, engineers and elected councillors in the Region, and to business's and the wider public.

8 I was team leader writing the natural hazards section of the Regional Policy Statement and was a team coordinator for the review of the natural hazards sections of the Proposed Natural Resources Plan (PNRP). I provided broader input into the review of the coastal provisions and was responsible for undertaking or managing and reviewing much of the GIS mapping work in the PNRP.

9 In this affidavit I discuss the error in the PNRP in respect of how river mouths are identified, and the correction sought in respect of the same.

Code of conduct

10 I have read the Code of Conduct for Expert Witnesses set out in the Environment Court's Practice Note 2014. I have complied with the Code of Conduct in preparing this affidavit. My qualifications are set out above. Except where I state I rely on the evidence of another person, I confirm that the issues addressed in this affidavit are within my area of expertise, and I have not omitted to consider material facts known to me that might alter or detract from my expressed opinions.

The Proposed Natural Resources Plan

11 The PNRP is an integrated plan and will replace the five operative regional plans for managing the coast, soil, discharges to land, fresh water and air, including the operative Regional Coastal Plan (RCP). Council's intent in combining the operative regional plans into a single integrated plan reflects the Council's desire to manage the Region's natural and physical resources in a holistic manner.



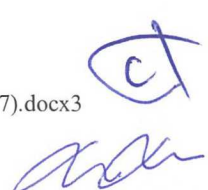
- 12 The PNRP was prepared over a six-year period and was publicly notified on 31 July 2015. Two hundred and fifty-five submissions were received by the closing date of 25 September 2015. A summary of decisions requested by submitters was notified on 26 February 2016.
- 13 The formal hearing proceedings were conducted between 22 May 2017 and 1 August 2018. Council gave notice on 31 July 2019 that it had made its Decisions on the provisions and matters raised in submissions on the PNRP.
- 14 The period for filing appeals with the Environment Court closed on 18 September 2019. The period for lodging any section 274 notice to join an appeal closed on 9 October 2019. A total of 30 notices of appeal were filed with the Environment Court. Appeals not resolved through mediation are due to be heard by the Environment Court in November and December 2021.

The error

- 15 Through the appeals process on the PNRP, an omission was discovered for identifying the 'mouth of the river' for the purpose of delineating the landward boundary of the coastal marine area where the line of mean high-water springs crosses a river.
- 16 The coastal marine area is defined in Part 1, section 2 of the Resource Management Act 1991 (**RMA**) as:

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

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



17 The Operative Regional Coastal Plan for the Wellington Region includes the following text after its list of specified river mouths and coastal marine area boundary locations:¹

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

18 This text, or an equivalent has been omitted in error from the PNRP. Whilst the main river mouths boundaries have been agreed to and are mapped in the PNRP (Maps 42-48), many smaller river mouths and stream boundaries have not been mapped and the landward extent of the coastal marine area is not delineated.

19 The river mouth boundaries in Maps 42 to 48 and their associated coastal marine area boundaries were developed in consultation with the Department of Conservation and territorial authorities during the regional coastal plan development in the late 1990's.

20 There are over 320 river and stream mouth outlets around the Wellington Region that flow over the mean high water springs boundary into the coastal marine area , of these, 25 have scheduled river mouth and coastal marine area boundaries (about 7.5%). For the remainder, it was deemed not feasible to undertake a consultation programme to determine the river mouth and coastal marine area boundaries for every other river and stream that flows into the coastal marine area and that the most efficient and effective approach was to continue using the method established in the operative RCP.

21 Council decided not to renegotiate the existing scheduled river mouth boundaries for the PNRP and they were 'rolled-over' from the operative RCP. The mapped rivers were selected because they are managed for flood protection purposes (e.g., flood schemes, stop banks, mouth dredging, mouth cutting, mouth clearance), and the need to define legal

¹ Regional Coastal Plan, p221.



boundaries in order to know what rules apply (i.e., freshwater or coastal rules).

22 Therefore, the landward boundary of the coastal marine area at many river and stream mouths cannot be determined using the term as set out in Part 1 of the RMA, as it is measured from the 'mouth' of the river and relies on the location of the mouth of the river being defined.

23 'Mouth' is defined in Part 1 of the RMA to mean either:


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

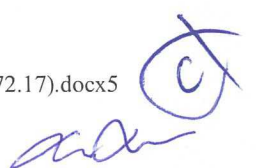
and once so agreed and set or declared shall not be changed in accordance with Schedule 1 or otherwise varied, altered, questioned, or reviewed in any way until the next review of the regional coastal plan, unless the Minister of Conservation, the regional council, and the appropriate territorial authority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

24 The 'mouth' location for a number of rivers (except those in Maps 42-48) in the Wellington Region were not confirmed during the period between consultation on and notification of the PNRP. Accordingly, for the coastal marine area to be determined in reliance on the provisions of the PNRP, this error needs to be remedied.

The consequence of the error

25 The primary consequence of the error is the uncertainty it creates for plan users and Council in determining where the coastal marine area boundary is in relation to river mouths (and therefore whether the regional coastal plan provisions² apply). This uncertainty in turn causes potentially undue cost to the applicant to determine where the coastal marine area boundary is located in relation to a particular river or stream

² Identified with a 'coastal icon' 



mouth. This cost to resource users is outlined more fully below in the section 32 assessment for this application.

- 26 A potential jurisdictional consequence may result from this error, in regard to which territorial authority controls land use activities in this area - does the PNRP apply over the area in question or the relevant city or district plan? This consequence is particularly important for structures (bridges, culvert, pipes, and drainage structures) that are placed in, on, under or over rivers in close proximity to the coastal marine area or upstream of the current coastal marine area boundary. This is pertinent for Councils such as the Kāpiti Coast District Council who administer (and maintain) many structures in this zone.
- 27 Further, there are uncertainties created for Council in the consideration of resource consent applications. For example, the PNRP has different standards for discharges to freshwater and coastal water. If the coastal marine area boundary has not been identified, this places an uncertainty on which discharge standard is to apply at these locations and which objective is to be met for the application to proceed.
- 28 The main parties affected are Territorial Authorities and Wellington Regional Council and to a lesser degree, infrastructure providers, Department of Conservation and landowners with streams that flow through their properties. In the past 20 years since the RCP has been operative, the approach has mainly been invoked to determine what rules apply for works being undertaken in the lower courses of streams close to the coastal marine area . The approach is efficient as it allows a pragmatic assessment to be made by Council, without territorial authorities, landowners and infrastructure providers having to commission surveys every time a determination of the mean high water springs is required.
- 29 Common activities undertaken in these situations includes, damming and diversion of water and disturbance for flood protection purposes (e.g., clearing blocked streams, mouth cutting), gravel extraction (i.e., for aggregate or flood protection purposes) and culvert or stormwater outfall maintenance and/or replacement. These activities are most



commonly undertaken by territorial authority's, and occasionally by infrastructure companies such as Wellington Water or Waka Kotahi. For landowners in remote locations (i.e., eastern Wairarapa), they are required to manage river mouths for their own operations as in most case these rivers and streams do not affect council or company infrastructure.

The proposed amendment

30 In order to remedy the above, the Council proposes that the following text be inserted into the PNRP:

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

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

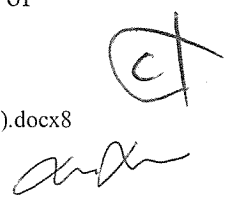
- (a) of which the seaward boundary is the outer limits of the territorial sea:
- (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
 - (i) 1 kilometre upstream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

31 The proposed text outlining where the coastal marine area is located for unmapped rivers and streams, and the definition of the coastal marine area from Part 1, section 2 of the RMA should be included in Chapter 13 of the PNRP and placed immediately above Map 42 (immediately below the heading which reads: 'Coastal marine area and river mouth boundaries'). This location would provide plan users and Council with the appropriate information regarding those rivers or streams not shown on maps 42-48 and the ability to determine the landward boundary of the coastal marine area as defined in section 2 of the RMA.

32 In my view, this would remedy the error outlined above.

Steps taken once discovering the error

- 33 Upon discovering the error, the Council followed a series of steps to confirm this error was in the PNRP as notified on 31 July 2015 and that this error did not arise through amendments made in the Decision's version of the PNRP.
- 34 After confirming the error in the PNRP (Decision version) the Council needed to determine if any appeal point within any Notice of Appeal would provide scope for the remedying the error. In this regard, the Council assessed all of Notices of Appeal that could relate to this error, including other appeal points related to the coastal marine area and river mouth boundaries. The Council can confirm that there are no appeal points that provide scope for this error to be remedied through the appeals process.
- 35 After confirming there was no avenue through the appeal process, the Council's next step was to raise the error with the Minister of Conservation and the relevant territorial authorities and seek their approval (as set out in paragraph 16 above and section 2 of the RMA) with a view to proceeding with this section 293 application.
- 36 The Council contacted the Minister of Conservation and territorial authorities by email and follow-up phone calls. Council received confirmation from all parties that they agreed an error had occurred between the operative regional coastal plan and the PNRP with the wording on river mouth boundaries omitted from the later. The parties agreed with the above proposed resolution to the error; to insert the missing paragraph into the PNRP to give certainty to plan users in determining the landward boundary of the coastal marine area and therefore which PNRP provisions apply to an activity.
- 37 A Memorandum of Counsel on behalf of the Wellington Regional Council updating the Court on this matter (23 April 2021) highlighted the concern and the Council's intention to seek that the Court utilise section 293 of the RMA to correct the PNRP through the inclusion of

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the paragraph. That memorandum gave the Court and all parties to the PNRP appeals process notice of the Council's intentions.

Section 32 analysis

38 The Section 32 evaluation for this application is below.

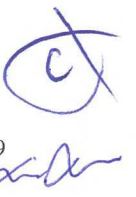
39 Section 32(1)(a) requires an evaluation of the whether the objective of the proposal is the most appropriate way to meet the purposes of the Act. The purpose of the proposal is to provide certainty to plan users and resource consent applicants as to the location of the MHWS boundary at river and stream mouths in the Region not otherwise provided in Maps 42 to 48. I consider that this proposal is the most appropriate way to achieve the purpose of the Act.

40 Section 32(1)(b)(i) requires identification of other reasonably practicable options for achieving the relevant objective.

40.1 There are four main options that could be employed to remedy this error. The first is to wait until the next plan change for the PNRP. This option however is not a reasonably practicable option, as plan users and the Council cannot make decisions about where the coastal marine area boundary is at river mouths in the Region, except where they are already identified in Maps 42 to 48.

40.2 The second option is to map the coastal marine area boundary for all rivers and streams that enter the coast. This option however would time consuming and expensive to undertake given the high number of rivers and streams that enter the coast.

40.3 The third option is to require landowners, councils and infrastructure providers to map or survey the mean high water springs every single time an activity or development is proposed in the vicinity of the river mouth. This would impose a high cost to applicants and result in lengthy delays




to allow time for a surveyor to undertake the work and present the results before any consenting could continue. Typical costs for a mean high water survey are in the order of several thousand dollars.

40.4 The fourth, and in my assessment, the most reasonably practicable option is to proceed with the declaration and section 293 application to insert the relevant paragraph into the PNRP.

41 Section 32(1)(b)(ii) requires an assessment of the effectiveness and efficiency of the proposal. I consider it is effective and efficient to implement this amendment in the PNRP to remove any confusion relating to the location of the coastal marine area boundary at river mouths not shown on Maps 42-48. This is the most efficient option to remedy this error as quickly as possibly through this s293 application, rather than the alternative of waiting for the next plan change.

42 Section 32(2)(a) requires an assessment of the costs of the environmental, social and cultural effects which are anticipated from the implementation of the amendment. I consider that the costs of making the amendment to the PNRP to identify the location of the coastal marine area boundary at river mouths not shown on Maps 42-48 is extremely limited. The amendment will not change the framework which will apply, instead it will remove uncertainty, and the costs which arise from that uncertainty.

43 Section 32(2)(b) requires an assessment of the benefits (environmental, economic, social and cultural) of the proposed application. The benefit to Council and plan users is in providing certainty regarding the position of the coastal marine area boundary at river mouths for resource consent applicants or in providing general advice to plan users. Further, there are benefits to ratepayers in the Region that do not have to pay for additional survey work that would be required for Council to establish the boundary of the coastal marine area at river mouths not already mapped by the PNRP (i.e., Maps 42 to 48). This is relevant for




- situations where the Council is the resource consent applicant i.e., for flood protection activities.
- 44 I consider the risk of 'acting' to be low for this application. There is potential for confusion and uncertainty if this application is not proceeded with in terms of providing a clear direction to plan users.
- 45 I consider the risk of 'not acting' (not including a means to identify the landward boundary of the coastal marine area where it crosses rivers) to be far greater. If this error is not addressed, there will be a high cost to individual resource consent applicants where they need to identify the boundary of the coastal marine area. This cost could be substantial and would be twofold in that it would require surveying the coastal marine area boundary at a river mouth in question and add to the resource consent processing time that is charged back to the applicant.
- 46 There is potentially a moderate-high cost to the environment if no action is taken. River mouths are typically sensitive and important ecosystems in the environment and commonly have high biodiversity values. The coastal rules in the PNRP have been developed to recognise the values these areas have, and it is important to ensure the correct rules are applied to ensure good kaitiakitanga/stewardship of these high value ecosystems.
- 47 I consider that the proposed amendment to insert new paragraphs into the PNRP is the most appropriate way to achieve the purpose of the RMA.
- 48 In conclusion, the proposed amendment is the most appropriate provision.

Affirmed

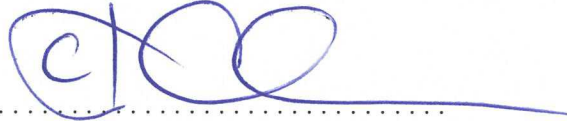
~~Sworn~~ at Wellington

on ~~1st~~ September 2021

before me: ~~October~~



Iain Nicholas Dawe



Solicitor of the High Court of New Zealand

Anita Kim Miller
Solicitor
Wellington

ATTACHMENT B: COURT'S DECISION UNDER s.310 of the RMA

**IN THE ENVIRONMENT COURT
AT WELLINGTON**

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

Decision No. [2022] NZEnvC 1

IN THE MATTER

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

BETWEEN

WELLINGTON REGIONAL
COUNCIL

(ENV-2021-WLG-000033)

Applicant

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

INTERIM DECISION OF THE ENVIRONMENT COURT

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

REASONS

Introduction

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



RE WELLINGTON REGIONAL COUNCIL

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

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

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

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

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

Discussion

Declaration

[13] Section 310(e) RMA provides:

310 Scope and effect of declaration

A declaration may declare—

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application under s 293

[22] Section 293 RMA relevantly provides:

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

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

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

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

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

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

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

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

to be heard by the local authority.⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ RMA, s 293(1).

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

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

Outcome

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

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

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


BP Dwyer
Environment Judge



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