

**Before the Proposed Marlborough Environment Plan Hearing Panel**

**In the Matter** of Schedule 1 of the Resource Management Act 1991

**And**

**In the Matter** of the Proposed Marlborough Environment Plan

---

**Legal Submissions on behalf of Yachting New Zealand Inc (Submitter 503)  
Topic 11: Use of Coastal Environment**

**Dated 3 April 2018**

---

Jeremy Brabant  
Barrister  
Level 4, Vulcan Building Chambers  
PO Box 1502, Shortland St  
Auckland City  
021 494 506

Email: [jeremy@brabant.co.nz](mailto:jeremy@brabant.co.nz)

## **Introduction**

1. I represent Yachting New Zealand (**YNZ**).
2. As described in paragraph 6 of its submission, YNZ is New Zealand's National sports body for competitive and recreational sailing and boating.
3. The section 42A report for Topic 11 identifies 14 matters which will be addressed as part of this topic. YNZ submissions are referenced in the context of:
  - a. Matter 6 – Shipping;
  - b. Matter 12 – Discharge from land-based activities into Coastal Waters; and
  - c. Matter 13 – Discharge of Sewage from ships into Coastal Waters.
4. I note YNZ's submission with respect to Policy 13.9.6 (a)<sup>1</sup> does not appear to be referenced at all in the section 42A report. It is unclear why this is the case. YNZ maintains its position as set out in paragraph 8 of its submission.

## **Matter 6 – Shipping**

5. YNZ's submission addressed Navigational Safety.<sup>2</sup> The wording of Policy 13.15.2 (c) and (e) as proposed is supported by YNZ.
6. The issue raised by YNZ is that the proposed wording of 13.15.2 (a) – (b) does not capture all relevant water transportation matters. As a result, the matters for you to consider are:
  - a. Should the policy address more than significant commercial shipping routes?
  - b. If yes, what should be identified as requiring protection?

---

<sup>1</sup> Which presumably should be addressed in the context of **Matter 5 – Anchoring and Moorings**.

<sup>2</sup> Submission with respect to Policy 13.15.2 and consequential amendment to Chapter 25 Definitions.

- c. What is the most appropriate wording to give effect to the policy intention?

*More than significant commercial shipping routes?*

7. Commencing with the first question above, there is agreement between the reporting planner, the Harbourmaster and YNZ that the policy should address more than “significant commercial shipping routes”. The YNZ position reflects findings of the Environment Court in the context of a plan change in Northland (Plan Change 4 Proceedings),<sup>3</sup> which in turn reflects earlier case law.

*What should be identified as requiring protection?*

8. Turning to the second question identified above, the wording of Policy 13.15.2 as proposed sought to protect “navigational routes around headlands”,<sup>4</sup> and “significant commercial shipping routes”.<sup>5</sup>
9. As proposed, routes around headlands were to be maintained unimpeded, while activities or locating structures within significant commercial shipping routes were to be avoided. In addition, the safety of navigation and use of or access to various identified locations or areas (including “areas that provide shelter from adverse weather”) was to be “not affected” by activities or structures.<sup>6</sup>
10. YNZ says that the above provisions do not go far enough:
  - a. Protection of navigational routes around headlands is supported, however;
  - b. The policy should not be limited to significant commercial shipping routes, but instead should refer to recognised navigational routes (covering both commercial and recreational), along with recognised anchorages of refuge and port or harbour approaches.

---

<sup>3</sup> *Moturoa Island Limited & Ors v Northland Regional Council* [2013] NZEnvC 227. An extract of this case is attached to these legal submissions – a complete copy of the case can be provided if required.

<sup>4</sup> 13.15.2 (a).

<sup>5</sup> 13.15.2 (b).

<sup>6</sup> 13.15.2 (d).

11. In addition, the proposed wording is not clear in its application, and does not use terminology recognised by the Courts. What constitutes a “significant” commercial shipping route is not identified.<sup>7</sup> Further there are other navigational routes of sufficient importance to justify protection in the Plan. From the perspective of managing potential effects on water transportation, anchorages of refuge also have a very important role to play and should be addressed in Plan provisions.

*Most appropriate wording*

12. As indicated above the YNZ submission adopts wording imposed by the Environment Court in the context of a plan change in Northland. That wording is appropriate because:

- a. The terms have specific, known and constrained meaning; and
- b. It ensures consistency of approach.

13. Commencing with the headlands issue, the section 42A report addresses Policy 13.15.2 (a) at paragraphs [477] – [481]. It suggests that navigation around a headland should be kept “as a separate criteria (as opposed to combining it within (b) as submitted by Yachting New Zealand) to clearly acknowledge the significance of headlands to navigation”.

14. As already indicated the need to protect navigation around headlands is agreed. However, in my submission the section 42A report recommendation is flawed because:

- a. The relief sought by YNZ does not propose headlands being addressed in (b), but rather in (a); and
- b. The proposed wording addressing headlands in a standalone

---

<sup>7</sup> I note the Environment Court's observation as to the use of “significant”: “Absent an explanation, councils “significant” begs the question as “determined by whom and on what basis”? Without supporting explanatory material the term creates... potential interpretation difficulties... We were not assisted by submissions or evidence on how this difficulty, which we view as inimical to efficient implementation, would be avoided” see *Moturoa Island Ltd v NRC*, at [55].

subparagraph, instead of addressing headlands in the context of an integrated subparagraph as suggested by YNZ, does not provide any elevated policy protection for headlands.

15. Ultimately with respect to headlands, a standalone provision could be adopted. YNZ remains of the view that it would be better incorporated into a consolidated set of provisions as proposed by YNZ.
16. Turning to those matters requiring protection, the YNZ wording<sup>8</sup> proposes subparagraphs which address:
  - a. Recognised Navigational Routes and port or harbour approaches (which would encompass routes around headlands); and
  - b. Recognised Anchorages of Refuge and Mooring Management Areas.

17. The YNZ wording of (a) and (b) is:

Avoid, remedy or mitigate adverse effects on water transportation by:

- (a) avoiding activities and/or locating structures within Recognised Navigational Routes (both commercial and recreational) and/or port or harbour approaches (including navigation routes around headlands, and shipping routes from the Port of Picton, Havelock Harbour and from Waikawa Marina);
  - (b) avoiding activities and/or locating structures within Recognised Anchorages of Refuge and Mooring Management Areas;
18. The term Recognised Navigational Route is adopted from the terminology used in the Maritime New Zealand Guidelines for Aquaculture Management Areas and Marine Farms 2005. The use of this terminology was adopted by the Environment Court in the Northland Plan Change 4 process.<sup>9</sup> I understand by reference to the section 42A report that the Marlborough Harbourmaster also supports this term. A consequential change should be made to the

---

<sup>8</sup> Refer YNZ submission, paragraph 32.

<sup>9</sup> *Moturoa Island Ltd v NRC*, at [55] – [56].

definition section of the plan in order that there is clarity as to what the term means.

19. Turning to Recognised Anchorages of Refuge and Mooring Management Areas, the section 42A report supports protection of MMAs, which is logical given the policy support for their use to provide for and manage long-term secure storage of vessels. That policy intent should not be undermined through compromise of their function caused by other activities or structures.
20. That leaves the issue of areas that, in a colloquial sense, provide for shelter from adverse weather. The section 42A report makes clear that an intention to protect areas which provide shelter from adverse weather is appropriate, but the Harbourmaster has raised concerns that the phrase adopted in the proposed plan to identify geographic location (“provide shelter from adverse weather”) is too broad in potential interpretation.<sup>10</sup>
21. The Harbourmasters proposition, adopted by the reporting planner, is to insert the word “significantly” to qualify the level of adverse effect, whilst retaining the reference to areas which “provide shelter from adverse weather”. That is an odd approach as it does not address the acknowledged shortcoming in the geographic location descriptor. YNZ submit that a more appropriate approach is to define Recognised Anchorages of Refuge and avoid adverse effects on those.
22. The YNZ approach should be preferred because:
  - a. It provides certainty and clarity;
  - b. It accords with terminology adopted by the Environment Court in the Northland Plan Change 4 process;<sup>11</sup>
  - c. The YNZ wording results in a lesser number of clearly defined areas being subject to a clear level of protection. In contrast, the section 42A suggestion results in a lack of clarity as to what areas are

---

<sup>10</sup> Section 42 A report, at paragraphs [500] – [502].

<sup>11</sup> *Moturoa Island Ltd v NRC*, at [55] – [56].

intended to be caught with the potential for arguments to be made in favour of very large areas (given that, as noted in the section 42A report, the lee of any landmass can provide shelter in adverse weather), and further uncertainty as to what level of effect “not significantly affected” is intended to capture.

### **Matter 12 - Discharge from land-based activities into Coastal Waters**

23. The section 42A report identifies that the Council agrees an amendment to Policy 15.1.19 is required.<sup>12</sup> That Council submission, although proposing wording slightly different than that suggested by YNZ, nonetheless aligns with YNZ’s submission seeking an amendment to policy 15.1.19.
24. YNZ submit that the wording it proposes be preferred, both because it identifies that the intent of the policy is to address discharges from land to coastal waters, and further it identifies clearly the aspiration to work towards elimination of such discharges.
25. The section 42A report supports the wording of Policy 15.1.19 as notified. However, this recommendation is flawed because the reporting planner fails to acknowledge that it is appropriate the policy is clearly limited to discharges from land, because there is a separate set of provisions addressing the discharge of sewage from ships within coastal waters.
26. I note YNZ also proposed an amendment to Policy 15.1.18. The reason for the proposed amendment is essentially the same as identified above with respect to Policy 15.1.19 – namely that there is a separate set of provisions addressing the discharge of sewage from ships in coastal waters. It appears that the section 42A report completely fails to comment on YNZ’s suggested amendment to Policy 15.1.18.
27. Absent the amendment to Policy 15.1.18 proposed by YNZ, there will be a conflict between Policy 15.1.18 and policies and provisions in the Plan which provide for controlled discharge of untreated human sewage from ships.

---

<sup>12</sup> Section 42A report, at [1191] – [1192].

### **Matter 13 - Discharge of Sewage from ships into Coastal Waters**

28. YNZ has a long history of involvement throughout the country in RMA processes, starting with submissions to virtually all of the first regional coastal plans promulgated under the RMA. As a result, it became apparent that there were a range of different approaches or methodologies being proposed in these Coastal Plans in relation to controlling the discharge of sewage from boats.<sup>13</sup> Because many boat owners will travel in their vessels outside the coastal waters of the region in which their boat is based, it became evident that the preferred approach was a national regulation controlling boat discharges, so that boat owners could become familiar with and conform to the same requirements anywhere on New Zealand's coastline.
29. Representing New Zealand's recreational boating interests, YNZ joined with the MfE in developing the *Resource Management (Marine Pollution) Regulations*.
30. For its size, New Zealand has an extensive coastline, and a multitude of attractive cruising grounds outside of the principal coastal towns and cities. Although over time, sewage pump out facilities have been incorporated into new marina developments,<sup>14</sup> unlike the US and Europe much of our popular cruising grounds<sup>15</sup> are relatively remote from any pump out locations and where such locations are available they are extremely limited in number and daily capacity (i.e. the number of vessels which can be serviced by that pump out location per day). In addition, given the need for pump out locations to have a connection to sophisticated treatment systems, these are unlikely to be available in remote locations in the foreseeable future, if ever.

---

<sup>13</sup> There was also the need to control the disposal of other contaminants, and certain "contaminant" discharges such as engine cooling water which are part of the normal operations of a ship needed to be provided for.

<sup>14</sup> Reference Policy 23(5) NZCPS.

<sup>15</sup> Examples are the outer Hauraki Gulf, the Bay of Islands and Northland's coastline from Bream Head to Doubtless Bay, and the Marlborough Sounds. I note in the context of the Sounds that remoteness is not simply physical distance but also has a relationship to travel times to access facilities. In that regard refer to calculations undertaken by other submitters referenced in the section 42A report – for example Jonathan Duffy's calculation of travel times to a lawful discharge point from Whakenui Bay, being in excess of three hours return. Similar calculations would apply to reach existing discharge points. See paragraph [1237].



31. The regulatory controls establish a set of distance and depth parameters beyond which any discharge of treated and untreated sewage from a boat must occur. It is no accident that the distance from shore is expressed in the regulations in nautical miles as well as metres, as this is the distance measurement used on marine charts. The depth limitation can be readily ascertained from a depth sounder, which is the most basic form of recreational boat instrumentation after a compass.
32. In my submission there is no plausible evidence that the application of these straightforward controls since 1998 have not achieved the intended outcome, which was to afford protection of inshore water quality and thus (inter alia) recreational values (including for swimming) and to protect marine farms and marine reserves.
33. It is not unusual to see allegations suggesting boat discharges of sewage as the cause of coastal water pollution or shellfish contamination, but on examination these contentions cannot be verified, and often the culprit has been confirmed as a land based source. The mere presence of boats in a bay or harbour often seems to be sufficient reason to some to justify the allegation, without consideration of whether such a discharge would be contrary to the Marine Pollution Regulations (thus assuming unlawful behaviour), or the likelihood of contamination coming from another source.

*Proposed Plan Provisions*

34. In summary the provisions proposed make significant changes to the restrictions on discharge of sewage currently in place.
35. The changes will have enormous effects upon those boating, in particular in the context of potential health and safety implications. Maps prepared by submitters (which do not include further restrictions imposed by proximity to marine farms) show how constrained available disposal areas will be within the Sounds.<sup>16</sup>
36. As identified in YNZ's primary submission, the only objective which specifically

---

<sup>16</sup> See section 42A report, at [1237].

addresses coastal waters is 15.1a.

37. Objective 15.1a seeks to maintain and where necessary enhance water quality including in coastal waters. However, the objective does not recognise:
  - a. Recognition on a national scale by way of Regulation that management of discharge of untreated and treated sewage from vessels requires specific provision; and
  - b. Health and safety risks to vessels if they are required to discharge sewage significant distances from Mean High Water Springs.
38. The discharge of sewage from ships<sup>17</sup> is controlled by the Resource Management (Marine Pollution) Regulations 1998 which provide for specific and limited variations through Coastal Plan provisions to the regulatory provisions controlling these discharges.
39. The regulations were made under s360 of the RMA, and legally are an exemption to s15. The regulatory controls on contaminant discharges from ships are not subject to the policy provisions of the New Zealand Coastal Policy Statement (**NZCPS**).<sup>18</sup>
40. As a result, specific objective, policy and rule treatment of discharge of sewage from ships is appropriate, and further making specific provision for such discharge is not contrary to the policy provisions of the NZCPS, and in particular Policy 23.
41. An objective should be introduced which makes specific reference to these health and safety matters.
42. Consequently, the proposed rules reflect the above shortcoming. Requiring ships, and in particular smaller recreational vessels, to travel a minimum of 12 nautical miles offshore to discharge untreated sewage, is not supported by or

---

<sup>17</sup> The RMA s2 definition references the definition in s2(1) of the Maritime Transport Act 1994. It covers the entire range of vessels from ocean-going ships to small recreational craft including dinghies and small yachts. However for practical purposes it is the larger yachts (generally keelers) and launches equipped with accommodation and marine toilets that the regulations are aimed at.

<sup>18</sup> This was recognised by the Board of Inquiry Report on the NZCPS - Volume 2 Working Papers page 300, 2008.

justified by any established regionwide adverse effects resulting from the discharge and introduces significant potential health and safety risks particularly in more challenging weather conditions.

43. The section 32 reports prepared by the Council lack probative evidence to justify such rules. There is a lack of science or data to support the proposed rules. The section 32 reports also fail to properly address the costs and benefits of the proposed objectives, policies and rules with respect to the discharge of sewage from ships.
44. The section 42A report does not rectify the shortcomings in the section 32 assessment. Indeed, there is explicit acknowledgement in the section 42A report that the Council "...has not provided any specific evidence relating to the proposed environmental effects in the Marlborough Sounds specific [sic] the discharge of sewage from ships". The reporting planner makes the bold assertion "I am satisfied that there is sufficient general knowledge of the effects of sewage on water quality, to provide justification for the Council wishing to control the discharge of sewage in coastal waters".
45. In law, the general assertions referenced above are inappropriate in the context of the task before Commissioners. They do not provide information or reasoned analysis which would enable the Commissioners to undertake an effects-based section 32 analysis to resolve whether the provisions put forward are the most appropriate way to achieve the purpose of the Act.
46. Comments in the section 42A report also indicate that the reporting planner does not properly understand the effect of the Marine Pollution Regulations and in addition has not properly understood the interface between those regulations and the NZCPS.

*The New Zealand Coastal Policy Statement*

47. Under Policy 23, the NZCPS requires that authorities "do not allow" the discharge of untreated human sewage directly into water. The wording "do not allow" indicates a mandatory prohibition against the discharge of untreated sewage. However, the Marine Pollution Regulations take

precedence over the NZCPS. This was recognised by the Board of Inquiry into the NZCPS and is the reason why the issue of sewage discharges from boats is only dealt with in Policy 23(5). The Board recognised the regulations control the discharge of certain contaminants (including garbage and other waste) from ships, and that any departure from the regulatory controls by way of rules in a coastal plan derives from the regulations, not from policy direction found in the NZCPS.

*The Status of Regulations in New Zealand and the Process for Making Regulations*

48. In New Zealand an Act of Parliament is the highest source of law. The doctrine of Parliamentary supremacy ensures that Acts passed by Parliament cannot be overturned or invalidated by the judiciary.<sup>19</sup> Although Acts are the highest source of law, they are not the only source.
49. The authority to create subordinate legislation can be delegated to the Executive branch of Government to make law in the form of regulations. This authority must be explicitly contained within a provision of an Act of Parliament.

*Application to the Resource Management (Marine Pollution) Regulations 1998*

50. The power to make regulations under the RMA is contained within s 360(1), under which the Governor-General may from time to time, by Order in Council, make regulations for any of the listed purposes.
51. The Governor-General promulgated the Resource Management (Marine Pollution) Regulations 1998 by this process, pursuant to s 360(1)(h) of the RMA. This section provides that the Governor-General may at any time make regulations “prescribing exemptions from any provision of section 15,<sup>20</sup> either absolutely or subject to any prescribed conditions, and either generally or specifically or in relation to particular descriptions of contaminants or to the discharge of contaminants in particular circumstances or from particular

---

<sup>19</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.

<sup>20</sup> The section which controls the discharge of contaminants to the CMA.

sources, or in relation to any area of land, air, or water specified in the regulations”.

*The Effect of the Regulations*

52. Because these regulations have been made pursuant to section 360(1)(h) of the RMA, they are part of the statute law. Under section 15 of the RMA no person may discharge any contaminant into water unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan (as well as a rule in a proposed regional plan), or a resource consent.<sup>21</sup>
53. The Marine Pollution Regulations create an exemption to the general prohibition of discharges under s 15 of the RMA. It follows that a person will not be in breach of s 15 if the discharge of untreated sewage (or other contaminant)<sup>22</sup> complies with the Marine Pollution Regulations requirements. The regulations limit the powers of a Regional Council to implement controls on the discharge of sewage from ships different from the regulation. Any rule proposed in the Plan must be within the scope of that discretion.
54. Any change to the depth or distance dimensions stated in the Marine Pollution Regulations is restricted to what the regulations permit – reference regulation 11(3), (and in respect of the discharge of treated sewage, regulation 12 (2) and 12 A (2)).
55. The section 42A report effectively appears to suggest that a proposed rule which prohibits discharge of untreated human sewage into the coastal marine area in its totality<sup>23</sup> is acceptable by reference to the regulations because it increases the discharge distance. In fact, the proposed rule is a “blanket restriction” applying to the entirety of the coastal marine area. Aside from the lack of probative evidence to justify such a change, in my submission such a provision is unlawful.
56. The regulation was drafted to ensure that any departures from the regulatory

---

<sup>21</sup> Section 15(1)(d).

<sup>22</sup> Another important provision is the exemption for “normal ship operations”.

<sup>23</sup> Rule 13.6.6.

control would be by reference to discrete, identified harbours, estuaries, embayments or other parts of a region (or an increase in distance from a (specific) marine farm, marine reserve or mataitai reserve), because the boat owner or skipper of a vessel could identify these specific locations on the Marine Chart of the area (or now, in the modern age, on the chart plotter), and similarly increased distances off the chart or plotter, or increased depth using the vessel's depth sounder. The regulations do not support a blanket increase with the outcome that the provisions in the regulation are undermined entirely, and hence are of no practical effect.

57. There needs to be a sound basis for a departure from the regulatory control, as adding additional restrictions in a coastal plan creates difficulties especially for visiting boats who are unlikely to be familiar with the coastal plan of another region, let alone particular exemptions. By contrast, the straightforward controls on discharge in the regulations have become well known and understood over time and are easily applied across the wide range of recreational anchorages on NZ's coast.

*Is there a need for stricter control?*

58. The Council, as already mentioned above, has not provided any meaningful evidence in support of stricter controls. References in the section 42A report to flushing times do not address the resource management issue in question – namely whether discharge of sewage in accordance with the Marine Pollution Regulations results in unacceptable or inappropriate adverse effects on the marine environment.
59. To properly address the issue the Council would need to provide evidence as to the effects of discharge of sewage from vessels in accordance with Regulations.
60. The experience of YNZ in other plan change processes in New Zealand is that it is common for recreational boats to be targeted as the cause of contamination (when it exists) without acknowledging coastal residential communities, and residential baches and houses along the coast, all reliant on on-site septic tanks or other treatment systems as potential culprits.

61. Any concerns focussed on larger commercial ships and ferries can be separately governed by Annex IV of the Marpol Convention, as well as being subject to the Marine Pollution Regulations. If commercial vessels are bound to comply with the Marpol control, then because greater quantities of sewage are involved than with smaller recreational craft, the distances offshore are 4 nm for treated sewage, and 12nm for untreated sewage.
62. There is also a complete failure in the section 42A report to engage with the potential environmental implications of complying discharges being concentrated in a small number of geographically discrete areas of the CMA. Nor, in the context of reliance on pump out stations as a solution and the required cost benefit analysis, is there any assessment of:
- a. the capacity of existing stations (say calculation of the average number of vessels able to be serviced in a day by a station taking all relevant factors into account<sup>24</sup>);
  - b. the number of new stations based on capacity and vessel numbers in the Sounds that would be required;
  - c. the feasibility of finding suitable sites for those new stations, including accessible and protected sites from a water based perspective, the need for associated land based infrastructure, consenting them and financing them.

#### *Health and Safety*

63. Health and safety risks if vessels are required to travel significant distances to discharge are a real concern, in particular if they are required to proceed to open areas of the Sounds, or even exit the Sounds altogether. The section 42A report refers to a significant volume of evidence addressing these issues. However, the report offers no meaningful response to those concerns and does not explain how those concerns are addressed through the Plan

---

<sup>24</sup> Which would include (in addition to the average time taken to moor, connect, pump out, disconnect, and depart) serviceability issues, and weather or tide related restrictions

provisions proposed.

*Conclusion re discharge from ships*

64. There is no scientific or other basis for a departure from the regulatory control which has stood the test of time since its introduction in 1998.
65. While YNZ does support introduction of additional pumpout locations, their ability to successfully provide a solution for untreated sewage has not been demonstrated.



---

**Jeremy Brabant**

Counsel for Yachting New Zealand

3 April 2018



**Attachment 1**

**Extract from:**

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

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2013] NZEnvC 227

**IN THE MATTER** of appeals under Clause 14 of the First Schedule  
of the Resource Management Act 1991 (**the Act**)

**BETWEEN**

MOTUROA ISLAND LIMITED  
(ENV-2008-AKL-000145)

JH DOWELL  
(ENV-2008-AKL-000148)

YACHTING NEW ZEALAND  
(ENV-2008-AKL-000167)

AUCKLAND YACHTING AND BOATING  
ASSOCIATION & OTHERS  
(ENV-2008-AKL-000168)

PAROA BAY STATION LIMITED  
(ENV-2008-AKL-000170)

WILLIAMS CAPITAL HOLDINGS NO. 1, E & K  
WILLIAMS AND WJ FALCONER  
(ENV-2008-AKL-000171)

ROBINIA INVESTMENTS LIMITED  
(ENV-2008-AKL-000172)

MINISTER OF CONSERVATION  
(ENV-2008-AKL-000176)

Appellants

**AND**

NORTHLAND REGIONAL COUNCIL

Respondent



AND

NGATI WAI TRUST BOARD

WHANGAREI HARBOUR WATCHDOG INC

BOI COASTAL WATCHDOC INC

BREAM BAY ACTION GROUP INC

FEDERATED FARMERS OF NZ

D KEYS

MOUNTAIN LANDING PROPERTIES LTD

Section 274 parties

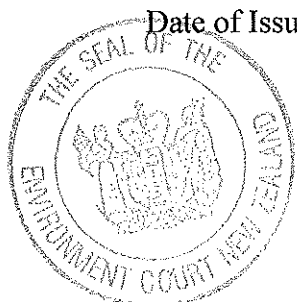
Hearing at: Paihia 12 and 13 March 2013. Final materials received 29 May 2013.

Court: Acting Principal Environment Judge LJ Newhook  
Environment Commissioner RM Dunlop  
Environment Commissioner I M Buchanan

Appearances: Mr J Burns for Northland Regional Council  
Mr J Brabant for Yachting New Zealand, Auckland Yachting and Boating Association & Northland Yachting Association  
Mr R Brabant for Moturoa Island Ltd and JH Dowell  
Ms V Morrison-Shaw for Robinia Investments Ltd, Paroa Bay Station Ltd, Williams Capital Holdings No 1 & others (Mountain Landing Properties Ltd, K & E Williams and FK Falconer)  
Mr K Volkerling for Ngati Wai Trust Board  
Mr T Grove for Whangarei Harbour Watchdog Incorporated  
Ms K Bellingham for Minister for Conservation  
Mr D Keys for himself  
Mrs M Hicks for Bream Bay Action Group

Date of Decision: 24 September 2013

Date of Issue: 24 September 2013



---

**INTERIM REPORT AND RECOMMENDATIONS OF THE ENVIRONMENT  
COURT TO THE MINISTER OF CONSERVATION ON AN INQUIRY INTO  
APPEALS AGAINST NORTHLAND REGIONAL COASTAL PLAN CHANGE 4:  
AQUACULTURE, AND DIRECTIONS ON SAME TO THE NORTHLAND  
REGIONAL COUNCIL**

---

- A. Policy 27.4.9 and its Advice Note are amended subject to submissions by the parties on their final form, in the areas and to the extent indicated.**
- B. Leave is granted for the parties to make submissions on an appropriate order for sequencing Policies 27.4.6 - 9.**
- C. The Regional Coastal Plan definitions are to be amended by adding new terms “recognised navigational routes” and “recognised anchorages of refuge”.**
- D. The locations where the parties agreed aquaculture should be a prohibited activity are endorsed.**
- E. Prohibited activity status is extended in the upper Te Puna Inlet only to the extent necessary to include the recognised anchorage of refuge on the west side of Kauri Point.**
- F. Aquaculture is to be a prohibited activity at the entrance to Whangaruru Harbour in the locations supported by the council and boating parties.**
- G. Aquaculture is to be a prohibited activity in the described central portion of Bream Bay subject to refinement through a process of further submissions but not in a four kilometre band inshore.**
- H. Costs are reserved.**

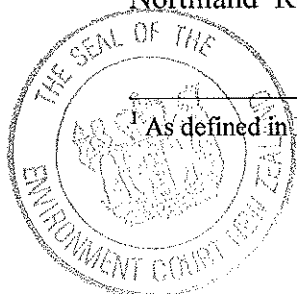
**REASONS FOR REPORT, RECOMMENDATIONS AND DIRECTIONS**

**Introduction**

[1] These appeals concern the provisions of Proposed Plan Change 4 (PC4) to the Northland Regional Coastal Plan (NRCP) for aquaculture.<sup>1</sup> PC4 sets out how existing

---

<sup>1</sup> As defined in PC 4 Definitions.



qualities or is an ONL and have that assessment tested through the First Schedule process. Finally, we find that the council's criterion would more appropriately read "outstanding natural landscapes (including seascapes)" to better reflect NZCPS Policy 15.

[54] Before leaving this criterion we note that there is an apparent overlap between Policy 27.4.7(e) and an undisputed aspect of P27.4.9. The former provides that aquaculture should have no more than minor adverse effects on "outstanding landscapes". For current purposes we assume the latter to be short hand for ONL. Both the council and YNZ are agreed that in Policy 27.4.9 where adverse effects are unavoidable on ONL aquaculture should be prohibited. In this instance we have found that ONC and ONL are matters properly included in Policy 27.4.9. Without prejudging any aspect of Topic 2, which may involve further and different parties we ask whether Policy 27.4.7(e) requires attention.

*Are the criteria concerned with vessel routes, anchorages and harbour approaches framed suitably?*

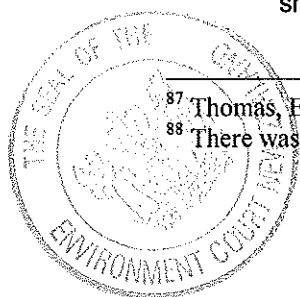
[55] There was no in-principle dispute about the relevance of this matter or its component parts. No party proposed that "port or harbour approaches" be qualified. The principal difference between the council and YNZ cases was the use of "significant" and "recognised" as qualifying terms for the other components. In one instance the council proposes that both terms be deployed, namely "significant recognised vessel routes". YNZ generally preferred "recognised". Absent an explanation, council's "significant" begs the questions "determined by whom and on what basis"? Without supporting explanatory material the term creates the same potential interpretation difficulties as council's c(i) and (ii). We were not assisted by submissions or evidence on how this difficulty, which we view as inimical to efficient implementation, would be avoided. The same questions arise in respect of "recognised". Counsel for YNZ, relying on the evidence of Mr Thatcher, a deputy harbourmaster (northern area) for the Auckland Council, experienced boat operator and Northland boating guide author, and Mr Thomas,<sup>87</sup> submitted that it would be appropriate to adopt the terminology used in the MSA Aquaculture Management Area and Marine Farming Guidelines (2005), which include the following definitions:

**Recognised navigational route**<sup>88</sup> is a safe sea passage and commonly used by vessels navigating within that area. The recognised navigational route may be one used by commercial vessels to and from ports, and may also include pleasure craft routes which are normally used to navigate between popular destinations.

**Recognised anchorages** means an anchorage which is referred to in cruising guides, pilot books and similar publications as being suitable shelter for small/larger craft in adverse weather.

<sup>87</sup> Thomas, EIC [40] and Thatcher EIC [21]ff

<sup>88</sup> There was no dispute about the merits of "vessel" vis-a-vis "navigational" routes.



[56] We accept that these terms are better for the reasons Mr J Brabant submitted<sup>89</sup> than council's alternatives, including that "recognised navigation route" has been considered and applied by the Court in the *MacLab* decision.<sup>90</sup> We respectfully adopt the finding in *MacLab* that a navigational route may be a body of water in which a vessel navigates, as opposed to a distinct track, which we find apt in the circumstances of P27.4.9. The cruising guides and other publications referred to in the definition of "recognised anchorages" are known to be publicly available. Some were produced in part during the hearing. For the avoidance of doubt we find that "anchorages of refuge" in the YNZ wording should be prefixed by "recognised". We also find PC 4 should add the two terms from the MSA Guidelines set out above to the RCP's Definitions and direct accordingly.

*Is the Minister's Biodiversity criterion suitably worded?*

[57] It has occurred to the Court since the hearing that there are potential problems with Mr Riddell's wording. He considered that s.6(c) and NZCPS Policy 11 support his wording. However Policy 11(a), which is the "avoid adverse effects" provision that parallels PC 4 Policy 27.4.9, is concerned to protect threatened, at risk and rare resources. We are concerned that these resources may be less common than those likely to be caught by Mr Riddell's "high" threshold.<sup>91</sup> Notably, the criteria in NZCPS Policy 11(a) provide greater certainty than Mr Riddell's wording. We also find that adopting "high" as the threshold would not be the most appropriate provision for achieving NZCPS Objective 6, NZCPS Policy 8 and PC 4 Objectives 1 and 2. For these reasons we have included an amended criterion in our revised version of Policy 27.4.9 below. Leave is granted the parties to make submissions on the detailed wording of the amendment, but not our principal finding.

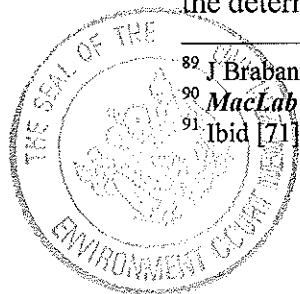
## Two General Matters

[58] We come now to two more general matters. First there is the sequence in which the cascade of Policies 27.4.6 - .9 is ordered. It occurs to the Court that the sequence might better have 27.4.6 and .9 juxtaposed as both deal with circumstances in which aquaculture is to have no adverse effects. Our preliminary view is that it is probably not critical whether the cascade proceeds from no adverse effects including where aquaculture is prohibited, to avoiding significant adverse effects, or vice versa. Adopting DV5 numbering, the order might then be 27.4.9, 27.4.6, 27.4.7 and 27.4.8. Leave is granted the parties to file and serve submissions on the sequence. Failing receipt of submissions, the sequence is to be re-ordered as indicated. We anticipate that there could be benefits in having this aspect settled ahead of the determination of Topic 2 matters.

<sup>89</sup> J Brabant, Opening submissions [35]ff

<sup>90</sup> *MacLab (New Zealand) Limited v Marlborough DC*, EnvC Wellington W16/2005

<sup>91</sup> Ibid [71]



request as the subject areas were not in dispute before us and potentially relevant evidence was not contested.

### Summary of Findings and Directions

[101] We summarise our preceding findings and directions in the following terms. In the event of any inconsistency directions in the main body of the Interim Report prevail.

- (a) Policy 27.4.9 is to be amended in the manner indicated with leave granted the council in consultation with the parties, and parties separately in the absence of consensus, to provide an Explanation to support criteria c(i) and c(ii). Submissions are not to re-litigate our principal findings.
- (b) Leave is granted the council and parties on the same basis to lodge submissions on a final wording for Policy 27.4.9(c)(v).
- (c) Leave is granted the council and parties, again on the same basis, to lodge submissions on the wording of the Advice Note to support Policy 27.4.9.
- (d) Leave is granted the council and parties to lodge submissions on the appropriate order for Policies 27.4.6 - .9. Absent submissions, the policies are to be re-ordered as indicated in the Interim Report.
- (e) The RCP Definitions are to be amended by adding the “recognised navigational routes” and “recognised anchorages of refuge” definitions contained in the MSA Aquaculture Management Area and Marine Farming Guidelines (2005).
- (f) If necessary, the aquaculture-prohibited area in the upper Te Puna Inlet is to be extended to include the recognised anchorage of refuge on the west side of Kauri Point. Otherwise the area is to remain unaltered.
- (g) The aquaculture-prohibited area around Henry Island at the entrance to Whangaruru Harbour is to be as supported by the council and YNZ and supporting parties. The aquaculture-prohibited area off Bream Head is to be as agreed between the parties. The aquaculture-prohibited area in the main body of Bream Bay is to be as shown on Exhibit 4 enlarged by adoption of the “in the alternative areas” at Bream Tail. If it does not already do so, the area is to extend seaward of McGregor Rock a suitable distance for recreational navigation determined by the council in consultation with YNZ and supporting parties. The prohibited area around ships’ Anchorage B may also be reviewed and adjusted by the council in consultation with the parties, should greater ships’ manoeuvrability be required inshore of the anchorage and to secure an



obstacle-free Marsden Point – Bream Tail rhumb line for recreational boats.  
Aquaculture is not to be prohibited inshore in the balance of the Bay.

[102] The council is to consult with the parties as directed, report, and file and serve submissions within 20 working days of the date of this Interim Report. Any submissions by other parties if required are to follow within a further 10 working days.

[103] Costs are reserved.

DATED at AUCKLAND this 24<sup>th</sup> day of September 2013.

*For the Court*



L J Newhook  
Acting Principal Environment Judge

