

**In the Matter**

of the Resource Management Act 1991 ("RMA")  
as amended by the Local Government (Auckland  
Transitional Provisions) Amendment Act 2010

**And**

**In the Matter**

of submissions lodged by Yachting New Zealand  
(Inc) (6699) on the Proposed Auckland Unitary  
Plan

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**Written Legal Submissions for Yachting New Zealand (Inc) and the  
Auckland Yachting and Boating Association (Inc)**

**Topic 033/034**

**31 March 2015**

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## Summary

1. The discharge of sewage from ships<sup>1</sup> is controlled by the Resource Management (Marine Pollution) Regulations 1998<sup>2</sup> which provide for specific and limited variations through Coastal Plan provisions to the regulatory provisions controlling these discharges.<sup>3</sup>
2. The notified provisions, purporting to introduce a blanket extension of the distance offshore from the 500m in the regulations to 2kms are unlawful, as they are outside the scope of what the Regulations permit.
3. There are separate international Regulations controlling the discharge of sewage from ships through Annex IV of Marpol 73/78<sup>4</sup> but by definition these apply generally to registered ships exceeding 200 tons gross tonnage and to certified passenger carrying ships, so separate provision to deal with the discharge of harmful substances, garbage, waste and sewage within the CMA was needed under the RMA. A policy decision to control these discharges by a universal national control was made by the Ministry of Environment (“MfE”), supported by Yachting New Zealand (“YNZ”), and the 1998 Regulations supplanted the various rules that had been introduced by the first Coastal Plans notified under the RMA.
4. 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>5</sup>
5. There is no plausible evidence that the current controls are ineffective or insufficient to prevent adverse effects on marine farms or reserves, or

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<sup>1</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>2</sup> Amended in 2002 and 2014, and reprinted 28 August 2014

<sup>3</sup> Refer regulation 11(3), 12(2), and 12A(2).

<sup>4</sup> Derived from the International Convention for the Prevention of Pollution from Ships, 1973, published by the International Maritime Organization

<sup>5</sup> This was recognised by the Board of Inquiry Report on the NZCPS - Volume 2 Working Papers page 300, 2008

inshore harbours bays and estuaries and their environmental or recreational values. However, YNZ proposed in its original submission that the effect of the regulatory control should be extended to include the Waitemata Harbour, the Mahurangi Harbour, and Port Fitzroy at Great Barrier Island.

## **Introduction**

6. YNZ is the national sports body for competitive and recreational sailing, and represents the needs and interests of over 250 member yacht clubs class associations, and regional associations. The Auckland Yacht and Boating Association (“AYBA”) is an affiliated Regional Association, and many yacht and boating clubs in Auckland are affiliated to AYBA and also to YNZ.
7. 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>6</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.
8. Representing New Zealand's recreational boating interests, YNZ joined with the MfE in developing the Resource Management (Marine Pollution) Regulations. I represented YNZ in this initiative, and was involved with Ministry staff in the drafting of the regulations.
9. For its size, New Zealand has an extensive coastline, and a multitude of attractive cruising grounds outside of the principal coastal towns and

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<sup>6</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.

cities. Although over time, sewage pump out facilities have been incorporated into new marina developments<sup>7</sup>, unlike the US and Europe our popular cruising grounds<sup>8</sup> are remote from any pump out locations and given the need for these to have a connection to sophisticated treatment systems, these are unlikely to be available in the foreseeable future, if ever. 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.

10. 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. It is not unusual to see even published scientific reports, such as that relied upon by the Auckland Regional Public Health Service (“ARPHS”) witness, 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, as in the incidents quoted in the Simmons/Greening/Gao/Campbell 2001 article and other reports produced by Dr Sinclair.

11. The Council’s tracked change version of rule 6.2.1.5.2 (f) now proposes (lawfully) specific harbours or embayments which should have separate protection additional to the 500m distance/5m depth regulation, including

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<sup>7</sup> Reference Policy 23(5) NZCPS

<sup>8</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

those proposed by YNZ in its submission, namely the Inner Waitemata Harbour, the Mahurangi Harbour, and Port Fitzroy. Of the others referred to in that sub-paragraph, Islington Bay Rangitoto, Huruhi Bay Waiheke Island, and Bon Accord Harbour Kawau Island are all protected by the existing regulatory control (a combination of distance and depth, not just the 500m distance measurement). YNZ does not oppose Bostaquet Bay Kawau Island, and Nagle Cove and Tryphena Harbour at Great Barrier Island being added. YNZ also supports the revised sub-paragraph (e) providing for an exemption to the control during rough weather conditions.

### **Proposed Auckland Unitary Plan**

12. The Proposed Auckland Unitary Plan (“PAUP”) as notified purports to increase the distance beyond which untreated waste must be discharged.<sup>9</sup> Under proposed Rule 6.2.1.5.2 the discharge of untreated human sewage from a vessel must occur more than **2km** from MHWS along the entire region’s coastline.
13. The section 32 report prepared by the Council on this issue states that the regulations fail to provide restrictions for some “*critical anchorage areas*” and that the discharge of sewage should be prohibited in these “*sensitive*” areas, a statement which did not support the notified rule. This “blanket restriction” continues to be supported by number of submitters. Aside from the lack of probative evidence to justify such a change, as the Council have now recognised such a provision is unlawful. 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)).
14. The regulation was drafted to ensure that any departures from the regulatory 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

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<sup>9</sup> Notified 30 September 2013.

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.

15. 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.

### **The New Zealand Coastal Policy Statement**

16. 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. The Council's s 32 report states that an increase seaward of 2km is necessary to comply with s 67(3)(b) of the RMA.<sup>10</sup> I understand the Council now accept that is incorrect, because 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**

17. In New Zealand an Act of Parliament is the highest source of law. The doctrine of Parliamentary supremacy ensures that Acts passed by

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<sup>10</sup> At page 3.

Parliament cannot be overturned or invalidated by the judiciary.<sup>11</sup>  
Although Acts are the highest source of law, they are not the only source.

18. The authority to create subordinate legislation can be delegated to the Executive branch of Government to make law in the form of regulations.<sup>12</sup>  
This authority must be explicitly contained within a provision of an Act of Parliament.

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

19. 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.
20. 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>13</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 sources, or in relation to any area of land, air, or water specified in the regulations”.

### **The Effect of the Regulations**

21. 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>14</sup>

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<sup>11</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.

<sup>12</sup> Cabinet Office *Cabinet Manual 2008* at [7.77].

<sup>13</sup> The section which controls the discharge of contaminants to the CMA

<sup>14</sup> Section 15(1)(d).

22. 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 s15 if the discharge of untreated sewage (or other contaminant)<sup>15</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 PAUP must be within the scope of that discretion.

### **Is there a need for stricter control?**

23. The evidence of Dr Sinclair for the ARPHS raises the issue of adequate public health protection and refers to the risk of norovirus contamination and accumulation in shellfish. He refers to several norovirus outbreaks caused by contaminated commercially grown shellfish documented in New Zealand in the last 20 years; and says "*some likely caused by discharge of untreated sewage from vessels, others from failure of land-based sewage reticulation and treatment systems.*"<sup>16</sup> In paragraph 18 he suggests a 500m distance from shellfish farms "*would appear minimal and likely inadequate to prevent contamination*", but has no evidence to support this contention.

24. The 2001 paper upon which the ARPHS relies suggests sewage effluent from recreational boats was the likely source of faecal contamination of growing waters in one site, referring to a sanitary survey of the Awaawaroa Bay at Waiheke Island. The report states that "at the time of the survey there were 14 boats anchored in the Bay in which the growing beds were situated". The report does not acknowledge that a discharge of sewage from any of those vessels anchored in that bay would have been in breach of the Regulations. Despite recognition by Dr Sinclair that land-based sewage systems can cause contamination of these relatively shallow coastal bays where oysters are grown, no reference is made to the possibility that the contamination came from septic tank systems servicing houses or baches on the waters edge of this bay.

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<sup>15</sup> Another important provision is the exemption for "normal ship operations".

<sup>16</sup> Paragraph 15 Sinclair evidence



25. The report Dr Sinclair relied upon also refers to contamination of oyster farms in the Waikare Inlet in the Bay of Islands, and states "*the mouth of the Waikare Inlet is a busy area for marine craft and from time to time boats are moored in proximity to the inlet*". As with Awaawaroa Bay, the moored boats referred to are prohibited from discharging sewage at the location of the moorings by the Regulations, and in any event moored boats are usually unoccupied. Moreover, subsequent litigation issued by the owners of the oyster farms in question targeted the Far North District Council, alleging contamination from the Council's Kawakawa treatment plant.
26. The lengthy report produced as part of the Bio Marine evidence is generic, non-specific and the case studies do not even identify locations. Like the other document produced by the ARPHS, this report produced by aquaculture interests fails to establish any connection between discharge of sewage from boats and any contamination problems in marine farms. In addition, the documented investigations seem to all refer to oysters – oyster farms are located in shallow and often upper estuarine locations that are not favoured anchorages.
27. The non-expert evidence of Richard Wekekind suggesting sewage discharges from vessels is responsible for pollution in the Waiheke Channel has no credible basis. His photograph (Figure 2) showing yachts and launches in Oranga Bay, Ponui Island is of a popular cruising anchorage where the existing regulations prevent any discharge of sewage through the application of the regulatory 500m distance/5m depth control.
28. Under a heading "Sewage in the Waiheke Channel" he refers to "*pale orange foam coating the beaches and headlands around Orapiu Bay*". His statement "*the foam is reasoned to be the observable manifestation of pollution (sewage discharge)*" is nothing short of fanciful, and is unsupported by any expert evidence – even a laboratory tested sample of the material. Even if this happened to be indicative of pollution by sewage discharge, as he acknowledges he resides in a residential community at Orapiu, and residential baches and houses are located all

along that eastern coast, all reliant on on-site septic tank or other treatment systems. Ponui Island is intensively farmed and stock have ready access to the water's edge. Nonetheless passing recreational vessels or those anchored nearby are the ready target for his complaints.

29. The Chairman of the Waiheke Local Board made a submission to you supporting the proposed 2km limit, and was not apparently aware as to why the Council abandoned that proposal- after mediation at which the problem with the notified version was pointed out and discussed. In fact his further requests for plan changes requiring the installation of pump out facilities<sup>17</sup>, adding further extensions to the no discharge distance when there is no probative evidence to support doing so<sup>18</sup> and that sewage treatment and performance standards should be included in the Plan show he has no understanding of the lawful powers of any Regional Council to amend the Marine Pollution Regulations. It would have been wise to get a briefing from Council legal and planning advisors before presenting his submission.
30. Other concerns raised seem to be focussed on larger commercial ships and ferries. As already noted, these can be separately governed by Annex IV of the Marpol Convention, as well as being subject to the Marine Pollution Regulations. If any of the commercial vessels he is referring to 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.
31. As for his assertion that there is a lack of science or data to support the regulatory controls, the evidence of Richard Brown for the AYBA contains survey results of bathing water quality at popular beaches<sup>19</sup>, and he has particularly identified those that are also popular anchorages. The results

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<sup>17</sup> Waiheke has no boat or ferry sewage pump out facility, and no treatment facility to accept sewage from a pump out facility. Ironically Mr Walden and his Board are opposing a new marina at Matiatia which would, if approved, establish a pump out facility which would be available to the public as well as marina berth occupants. The marina would be responsible for trucking the waste off island for treatment and disposal.

<sup>18</sup> An unlawful application of the "precautionary approach"

<sup>19</sup> Including on Waiheke Island

from this water quality testing indicate the opposite to that implied by Dr Sinclair and alleged by Mr Wedekind.

## **Conclusion**

32. While 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, YNZ sees the merit to identifying specific harbours or other locations where it is prudent to prevent any discharge of sewage from boats.
33. It is not appropriate to introduce additional control over and above that provided by the Marine Pollution Regulations where the existing 500m distance/5m depth already provides that protection.
34. There is no scientific basis for changing the current regulatory controls in relation to marine farms. The report provided on request by the ARPHS alleges one contamination event was *likely* a result of sewage effluent discharge from recreational boats when for that to occur would have required the law to be breached. The likelihood of defective septic tank systems serving coastal buildings being responsible is not acknowledged, despite testing in other instances having established that defective land-based disposal systems were at fault. Other allegations of pollution by sewage discharge from boats is lacking in credibility.
35. Yachting New Zealand support the amended provisions produced as part of the Council case (in the latest tracked change version), but with the removal of Islington and Huruhi Bays and Bon Accord Harbour from the list in subparagraph (f).

**Dated** at Auckland this 31<sup>st</sup> day of March 2015



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