

**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**

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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:<sup>1</sup>

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.

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<sup>1</sup> 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



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K Anderson/K Rogers  
Counsel for Wellington Regional  
Council