

**BEFORE THE INDEPENDENT HEARINGS PANEL
FOR THE HAWKE'S BAY REGIONAL COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER of proposed Plan Change 9 to the Hawke's Bay Regional Council
Regional Resource Management Plan, publicly notified under clause 5,
Schedule 1 of the RMA

LEGAL SUBMISSIONS FOR HAWKE'S BAY REGIONAL COUNCIL

21 May 2021

 **Simpson Grierson**
Barristers & Solicitors

M G Conway / O L Rego
Telephone: +64-4-499 4599
Email: matt.conway@simpsongrierson.com
PO Box 2402
Wellington

1. INTRODUCTION

1.1 These legal submissions are filed on behalf of the Hawke's Bay Regional Council (**HBRC**), in support of the Proposed Tūtaekurī, Ahuriri, Ngaruroro and Karamū (**TANK**) Proposed Plan Change 9 (**PPC9**) to the Hawke's Bay Regional Council Regional Resource Management Plan (**RRMP**).

1.2 These submissions complement the section 42A report and the statements of evidence prepared on behalf of HBRC by the following experts:

- (a) Ceri Edmonds (planning and policy);
- (b) Anna Louise Madarasz-Smith (estuarine ecology);
- (c) Pawel Rakowski (groundwater modelling);
- (d) Alexandra Haidekker (freshwater ecology);
- (e) Barry Lynch (soil and sediment science);
- (f) Daniel Fake (ecohydrology);
- (g) Robert Waldron (hydrology and water modelling);
- (h) Kathleen Kozyniak (rainfall and climate science); and
- (i) Channa Rajanayaka (groundwater modelling).

1.3 These legal submissions address:

- (a) The legislative framework for regional plan changes;
- (b) Scope limitations;
- (c) The relevance of the National Policy Statement for Freshwater Management 2020 (**NPS-FM 2020**); and
- (d) Addressing potentially competing considerations under multiple national policy statements.

2. The legislative framework for regional plan changes

2.1 PPC9 proposes changes to the RRMP. The RRMP is a combined regional policy statement (**RPS**) and regional plan that became operative in 2006. PPC9 only alters the regional plan portion of the RRMP.

2.2 The legal framework for regional plans and changes to them is set out in sections 63-70 of the RMA. For ease of reference, those provisions (excluding those in relation to regional coastal plans) are reproduced in **Appendix A** to these submissions.

2.3 A summary of the matters that need to be addressed in relation to *district* plans was set out by the Court in *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55, and has subsequently been adopted in the context of the Auckland Unitary Plan¹ and the Bay of Plenty Regional Coastal Plan². While these decisions relate to contexts other than the present one, their characterisation of the key elements of the statutory framework may still be of some assistance and the key aspects are reproduced in **Appendix B** to these submissions for ease of reference.

3. Scope limitations

3.1 The scope of PPC9 is limited both spatially (i.e. it only relates to the TANK catchments) and in terms of the aspects of the RRMP to which it relates (it excludes the RPS, for example).

3.2 The scope of submissions is limited to the relief sought in those submissions. Evidence filed in support of a submission cannot create scope if a provision addressed in the evidence is beyond the scope of the submission itself.

3.3 The Council can make changes to PPC9 that are sought by submissions, including further submissions.³ However, there are limits to the changes that can be made in reliance on submissions. For example, relief in a submission can only be granted to the extent that it is "on" PPC9. For a submission to be "on" PPC9:⁴

- (a) it would need to address the change to the pre-existing status quo advanced by PPC9; and
- (b) there must not be a real risk that people affected by PPC9 (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

3.4 The High Court has stated that, to meet the first limb of the above test, a submission on a plan change must address an alteration entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change.

1 *Adams v Auckland Council* [2018] NZEnvC 8.

2 *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67.

3 RMA, Schedule 1, clause 10.

4 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 at [80] to [82]; citing *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

The Court suggested the following ways of analysing whether a submission falls within the ambit of a plan change:⁵

One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change.

4. The relevance of the NPS-FM 2020

- 4.1** Under section 67(3)(a) of the RMA, regional plans must give effect to any national policy statement.
- 4.2** PPC9 was prepared and publicly notified while the National Policy Statement for Freshwater Management 2014 (as amended in 2017) (**NPS-FM 2017**) was in force. After the close of the submission period but before the close of the further submission period, the NPS-FM 2020 came into effect on 3 September 2020. From that date, it replaced the NPS-FM 2017 as the operative freshwater NPS to which the RRMP must give effect.
- 4.3** The NPS-FM 2020 does not provide a transitional regime for plan changes notified prior to 3 September 2020, and nor is there a transitional regime in the RMA that applies to this situation.
- 4.4** The NPS-FM 2020 requires councils to implement it "as soon as reasonably practicable".⁶ However, regional councils have until 31 December 2024 to notify planning instruments to give effect to the NPS-FM 2020,⁷ and HBRC is not required to give full effect to the NPS-FM 2020 through PPC9.
- 4.5** Nor would this be possible in full, because the NPS-FM 2020 will require HBRC to review the RMA policy and planning framework applying to freshwater throughout the region. The RPS, and the regional plan's provisions applying to catchments other than the TANK catchments, are outside the scope of PPC9 and will require a further planning process. It would be appropriate for HBRC to undertake its review

5 *Motor Machinists* at [81].

6 National Policy Statement for Freshwater Management 2020, at [4.1].

7 RMA, section 80A(4).

in a comprehensive way and to propose changes that apply across the region, in order to ensure a consistent approach is taken (i.e. rather than only considering the PPC9 catchments). As noted in the section 42A report,⁸ doing so will also require further community engagement, technical work, and development of long-term vision statements.

4.6 In terms of what *can* be done in reliance on the NPS-FM 2020 through decisions on PPC9, the Council's decisions on submissions that are within the scope of PPC9 must give effect to the NPS-FM 2020.⁹ In practice, this leads to two key limits: the scope of PPC9 and the scope of submissions on it. The principles relating to scope have been addressed above.

4.7 Applying those principles to PPC9, due to the timing of the NPS-FM 2020 being released, it was not possible for the PPC9 section 32 report to consider or address the application of the NPS-FM 2020. In addition, care should be taken not to make changes to PPC9 if those changes could not reasonably have been contemplated when reading the original plan change or the submission, as that could deny people affected by the changes an effective opportunity to participate in the statutory process. While there is an ability to make further submissions, the classes of people who are eligible to make further submissions under clause 8 of Schedule 1 are limited.

4.8 In summary, where scope exists in PPC9 and in submissions for changes that would help PPC9 to give effect to the NPS-FM 2020, those changes can be made. The principles addressed in part 3 of these legal submissions will be relevant to the consideration of questions of scope, and any changes that are outside scope are able to be considered as part of the Kotahi plan review that will follow in due course to complete the implementation of the NPS-FM 2020 in the region.

5. Addressing potentially competing considerations under multiple national policy statements

5.1 The RMA requires effect to be given to “any national policy statement”. Where multiple national policy statements are relevant to a regional plan, the Panel may need to consider how to balance any competing considerations contained in the relevant statements. For example, the submissions by Hastings District Council

⁸ Paragraphs 59-60.

⁹ RMA, section 67(3)(a); and *Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2015] NZRMA 131 at [183] and [184].

and Napier City Council raise matters under the National Policy Statement on Urban Development 2020 (**NPS-UD**).

- 5.2** The scheme of the RMA gives councils a degree of flexibility in how they implement national direction in their regional and district plans. However, decision-makers are ultimately constrained by the requirement to "give effect to" any national policy statement.¹⁰
- 5.3** An issue could arise if the objectives and policies in a national policy statement conflict with the objectives and policies of another national policy statement, but both must be given effect to. The Supreme Court's decision in *King Salmon* may provide some guidance about how to resolve such a conflict.
- 5.4** When comparing the wording of the NZCPS policies, the Court in *King Salmon* found it clear that Policies 13, 15, 23, and 29 use directive wording.¹¹ The wording used in other policies such as "take into account", "consider" and "recognise" was considered to provide elements of discretion. Policies with directive wording carry more weight and in some instances, such as in the *King Salmon* case, directive terms mean the decision maker has no choice but to implement the policy.¹² Although the Court recognised that sometimes policies within the NZCPS would pull in different directions, the varying language in the policies means that this can usually be resolved via a natural hierarchy appearing on close inspection of the wording in each of the policies.¹³
- 5.5** The Board of Inquiry in the *King Salmon* case had found a conflict between Policy 8 on one hand and Policies 13(1)(a) and 15(a) on the other. The Board held that if a conflict remains despite the analysis of the policy wording, then there would be justification for one policy prevailing over another altogether, but this type of result should rarely occur.¹⁴ Although the Board found a conflict, the Supreme Court did not, stating that Policy 8:

recognises the need for sufficient provision for salmon farming in areas suitable for salmon farming, but this is against the background that salmon farming cannot occur in one of the outstanding areas if it will have an adverse effect on the outstanding qualities of the area¹⁵.

10 *King Salmon* at paragraph [91], RMA sections 55 and 75(3)(b).
11 At [127].
12 At [129].
13 At [129].
14 At [130].
15 At [131].

5.6 Therefore, all three policies could co-exist and the NZCPS could be given effect to. The Court was clear that the directive wording in policies 13 and 15 provided an "environmental bottom line" that the Board was required to give effect to (under section 67).¹⁶

5.7 Although the potential conflict in *King Salmon* was internal (i.e. within the NZCPS) rather than between two different national policy statements, the High Court has subsequently indicated that the King Salmon approach could apply to conflicts between different national policy statements.¹⁷



M G Conway / O L Rego
Counsel for Hawke's Bay Regional Council

¹⁶ At [132].

¹⁷ *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZRMA 1 at [75-76]

APPENDIX A – sections 63-70 of the RMA

63 Purpose of regional plans

- (1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.
- (2) Without limiting subsection (1), the purpose of the preparation, implementation, and administration of regional coastal plans is to assist a regional council, in conjunction with the Minister of Conservation, to achieve the purpose of this Act in relation to the coastal marine area of that region.

65 Preparation and change of other regional plans

- (1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga).
- (1A) A regional council given a direction under section 25A(1) must—
 - (a) prepare a regional plan that implements the direction; or
 - (b) prepare a change to its regional plan in a way that implements the direction; or
 - (c) prepare a variation to its regional plan in a way that implements the direction.
- (2) A plan must be prepared in accordance with Schedule 1.
- (3) Without limiting the power of a regional council to prepare a regional plan at any time, a regional council shall consider the desirability of preparing a regional plan whenever any of the following circumstances or considerations arise or are likely to arise:
 - (a) any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict:
 - (b) any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance:
 - (c) any risks from natural hazards:
 - (d) any foreseeable demand for or on natural and physical resources:
 - (e) any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources:
 - (f) the restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration:
 - (g) the implementation of a national policy statement or New Zealand coastal policy statement:

- (h) any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality:
 - (i) any other significant issue relating to any function of the regional council under this Act.
- (4) Any person may request a regional council to prepare or change a regional plan in the manner set out in Part 2 of Schedule 1.
- (4A) A request for a plan change may be made jointly with an application to exchange recreation reserve land under section 15AA of the Reserves Act 1977 if the regional council—
- (a) is also the administering body in which the recreation reserve land is vested; and
 - (b) agrees that the request and application may be made jointly.
- (5) A regional plan may be changed in the manner set out in the relevant Part of Schedule 1.
- (6) A regional council must amend a proposed regional plan or regional plan to give effect to a regional policy statement, if—
- (a) the statement contains a provision to which the plan does not give effect; and
 - (b) one of the following occurs:
 - (i) the statement is reviewed under section 79 and not changed or replaced; or
 - (ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or
 - (iii) the statement is changed or varied and becomes operative.
- (7) A regional council must comply with subsection (6)—
- (a) within the time specified in the statement, if a time is specified; or
 - (b) as soon as reasonably practicable, in any other case.

66 Matters to be considered by regional council (plans)

- (1) A regional council must prepare and change any regional plan in accordance with—
- (a) its functions under section 30; and
 - (b) the provisions of Part 2; and
 - (c) a direction given under section 25A(1); and
 - (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
 - (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

- (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
 - (f) any regulations.
- (2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to—
- (a) any proposed regional policy statement in respect of the region; and
 - (b) the Crown’s interests in the coastal marine area; and
 - (c) any—
 - (i) management plans and strategies prepared under other Acts; and
 - (ii) [Repealed]
 - (iia) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and
 - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and
 - (iv) [Repealed]
 - (v) relevant project area and project objectives (as those terms are defined in section 9 of the Urban Development Act 2020), if section 98 of that Act applies,—
 - to the extent that their content has a bearing on resource management issues of the region; and
 - (d) the extent to which the regional plan needs to be consistent with the regional policy statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils; and
 - (e) to the extent to which the regional plan needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and
- (2A) When a regional council is preparing or changing a regional plan, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:
- (a) the council must take into account any relevant planning document recognised by an iwi authority; and

- (b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—
 - (i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and
 - (ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.
- (3) In preparing or changing any regional plan, a regional council must not have regard to trade competition or the effects of trade competition.

67 Contents of regional plans

- (1) A regional plan must state—
 - (a) the objectives for the region; and
 - (b) the policies to implement the objectives; and
 - (c) the rules (if any) to implement the policies.
- (2) A regional plan may state—
 - (a) the issues that the plan seeks to address; and
 - (b) the methods, other than rules, for implementing the policies for the region; and
 - (c) the principal reasons for adopting the policies and methods; and
 - (d) the environmental results expected from the policies and methods; and
 - (e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and
 - (f) the processes for dealing with issues—
 - (i) that cross local authority boundaries; or
 - (ii) that arise between territorial authorities; or
 - (iii) that arise between regions; and
 - (g) the information to be included with an application for a resource consent; and any other information required for the purpose of the regional council's functions, powers, and duties under this Act.
- (3) A regional plan must give effect to—
 - (a) any national policy statement; and
 - (b) any New Zealand coastal policy statement; and
 - (ba) a national planning standard; and
 - (c) any regional policy statement.
- (4) A regional plan must not be inconsistent with—

- (a) a water conservation order; or
 - (b) any other regional plan for the region; or
 - (c) [Repealed]
- (5) A regional plan must record how a regional council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if the council has done so.
- (6) A regional plan may incorporate material by reference under Part 3 of Schedule 1.

68 Regional rules

- (1) A regional council may, for the purpose of—
- (a) carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and
 - (b) achieving the objectives and policies of the plan,—
- include rules in a regional plan.
- (2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.
- (2A) Rules may be made under this section for the protection of other property (as defined in section 7 of the Building Act 2004) from the effects of surface water, which require persons undertaking building work to achieve performance criteria additional to, or more restrictive than, those specified in the building code as defined in section 7 of the Building Act 2004.
- (3) In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.
- (3A)[Repealed]
- (3B)[Repealed]
- (4) A rule may specify an activity as a restricted coastal activity only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on the grounds that the activity—
- (a) has or is likely to have significant or irreversible adverse effects on a coastal marine area; or
 - (b) occurs or is likely to occur in an area having significant conservation value.
- (5) A rule may—
- (a) apply throughout the region or a part of the region:
 - (b) make different provision for—
 - (i) different parts of the region; or
 - (ii) different classes of effects arising from an activity:
 - (c) apply all the time or for stated periods or seasons:

- (d) be specific or general in its application:
 - (e) require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.
- (6) [Repealed]
- (7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—
- (a) whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
 - (b) that the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.
- (8) Where regulations have been made under section 360(1)(ha) deeming rules to be included in a regional coastal plan or proposed regional coastal plan, the relevant regional council shall, as soon as reasonably practicable after the date on which the regulations are made, revoked, or cease to apply to its region,—
- (a) give public notice of the fact that such regulations have been made or revoked or have ceased to apply, as the case may be, and in such detail as the council considers appropriate, generally describe the nature of any rules deemed to be included in the plan or proposed plan by those regulations; and
 - (b) ensure that a copy of any regulations deeming rules to be included in the plan or proposed plan is annexed to, and appropriate annotations are made in, every copy of that plan or proposed plan that is under the regional council's control.
- (9) Notwithstanding anything to the contrary in this section, no rule of a regional coastal plan shall authorise as a permitted activity any of the following activities to which section 15A applies:
- (a) the dumping in the coastal marine area of any waste or other matter from any ship, aircraft, or offshore installation:
 - (b) the dumping in the coastal marine area of any ship, aircraft, or offshore installation:
 - (c) the incineration in the coastal marine area of any waste or other matter in any marine incineration facility.
- (10) Subject to subsection (9), sections 69 and 70(2) shall, with all necessary modifications, apply to the inclusion of rules in regional coastal plans about the dumping of waste or other matter as if every reference in those provisions to a discharge of a contaminant included a reference to a dumping of waste or other matter.

- (11) A rule may exempt from its coverage an area or class of contaminated land if the rule—
- (a) provides how the significant adverse effects on the environment that the hazardous substance has are to be remedied or mitigated; or
 - (b) provides how the significant adverse effects on the environment that the hazardous substance is reasonably likely to have are to be avoided; or
 - (c) treats the land as not contaminated for purposes stated in the rule.

69 Rules relating to water quality

- (1) Where a regional council—
- (a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and
 - (b) includes rules in the plan about the quality of water in those waters,—
- the rules shall require the observance of the standards specified in that schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.
- (2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.
- (3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.
- (4) On and from the commencement of this subsection, Schedule 3 ceases to be applicable to fresh water.

70 Rules about discharges

- (1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—
- (a) a discharge of a contaminant or water into water; or
 - (b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—
- the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the

discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

- (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
- (d) any conspicuous change in the colour or visual clarity:
- (e) any emission of objectionable odour:
- (f) the rendering of fresh water unsuitable for consumption by farm animals:
- (g) any significant adverse effects on aquatic life.

(2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—

- (a) the nature of the discharge and the receiving environment; and
- (b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

APPENDIX B – Principles from case law about legislative framework for plan changes

1. The following are extracts from two cases regarding the statutory framework for plans by territorial authorities and the relevant considerations under such frameworks. While neither directly correlate to the context of PPC9 (a regional plan change), they demonstrate the approach taken in similar situations and therefore provide guidance on the approach that may apply in the current context.
2. The first extract from the *Motiti Rohe Moana Trust v Bay of Plenty Regional Council [2018] NZEnvC 67* is in the context of a regional coastal environmental plan but with emphasis on the coastal plan portion. The Court in this case endorsed the approach in the *Colonial Vineyard Ltd v Marlborough District Council [2014] NZEnvC 55* case (the second extract) and used it as the basis for developing this approach to regional coastal plans.
3. The second extract from the *Colonial Vineyard* case demonstrates the considerations relevant to changes to district plans. It was endorsed by the Court in the *Motiti Rohe Moana Trust* case as a reliable basis for considering the frameworks for other plans.

EXTRACT 1

***Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67 at [159]**

[159] To assess what is the most appropriate response we now undertake a general assessment under s 32. Relying on the guidance from *Colonial Vineyard v Marlborough District Council*,¹⁸ we see the issues as follows:

- (a) the council carrying out its function and purpose of the Act in this case under section 66 - 68 of the RMA;
- (b) in accordance with the principles of Part 2 under s 66(1)(b);
- (c) give effect to the National Policy Statement, the New Zealand Coastal Policy Statement under s 66(1)(ea) and s 67(3)(b);
- (d) give effect to the Regional Policy Statement under s 67(3)(c);
- (e) have regard to MPI's interest in the coastal marine area under s 66(2)(b);
- (f) have regard to the actual or potential effect on the environment of the activities, in particular any adverse effects under s 68(3);
- (g) the most appropriate method for achieving the objectives and policies of the Regional Coastal Plan, having regard to efficiency and effectiveness and benefits and costs under s 30(1)(b) and (2)(a) and (b); and
- (h) the risk of acting or not acting under s 32(2)(c).

18 [2014] NZEnvC 55.

EXTRACT 2

Colonial Vineyard Ltd v Marlborough District Council [2014] NZEnvC 55 at [17] (bold emphasis in original)

A. General requirements

1. A district plan (change) should be designed to **accord with**¹⁹ – and assist the territorial authority to **carry out** – its functions²⁰ so as to achieve the purpose of the Act²¹.
2. The district plan (change) must also be prepared **in accordance with** any regulation²² (there are none at present) and any direction given by the Minister for the Environment²³.
3. When preparing its district plan (change) the territorial authority **must give effect to**²⁴ any national policy statement or New Zealand Coastal Policy Statement²⁵.
4. When preparing its district plan (change) the territorial authority shall:
 - (a) have regard to any proposed regional policy statement²⁶;
 - (b) give effect to any operative regional policy statement²⁷.
5. In relation to regional plans:
 - (a) a district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order²⁸; and
 - (b) **must have regard to** any proposed regional plan on any matter of regional significance etc²⁹.
6. When preparing its district plan (change) the territorial authority must also:
 - (a) **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and

19 Section 74(1) of the Act.

20 As described in section 31 of the Act.

21 Sections 72 and 74(1) of the Act.

22 Section 74(1) of the Act.

23 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

24 Section 75(3) RMA.

25 The reference to "any regional policy statement" in the Rosehip list here has been deleted since it is included in (3) below which is a more logical place for it.

26 Section 74(2)(a)(i) of the RMA.

27 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

28 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

29 Section 74(2)(a)(ii) of the Act.

to various fisheries regulations³⁰ to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities³¹;

(b) **take in account** any relevant planning document recognised by an iwi authority³²; and

(c) not have regard to trade competition³³ or the effects of trade competition;

7. The formal requirement that a district plan (change) must³⁴ also state its objectives, policies and the rules (if any) and may³⁵ state other matters.

B. Objectives [section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act³⁶.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies³⁷;

10. Each proposed policy or method (including each rule) is to be examined, having **regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives³⁸ of the district plan **taking into account**:

(a) the benefits and costs of the proposed policies and methods (including rules); and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods³⁹; and

30 Section 74(2)(b) of the Act.

31 Section 74(2)(c) of the Act.

32 Section 74(2A) of the Act.

33 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.

34 Section 75(1) of the Act.

35 Section 75(2) of the Act.

36 Section 74(1) and section 32(3)(a) of the Act.

37 Section 75(1)(b) and (c) of the Act (also section 76(1)).

38 Section 32(3)(b) of the Act.

39 Section 32(4) of the RMA.

- (c) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances⁴⁰.

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment⁴¹.
12. Rules have the force of regulations⁴².
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive⁴³ than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land⁴⁴.
15. There must be no blanket rules about felling trees⁴⁵ in any urban environment⁴⁶.

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal⁴⁷ the Environment Court must have regard to one additional matter – the decision of the territorial authority⁴⁸.

40 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.

41 Section 76(3) of the Act.

42 Section 76(2) RMA.

43 Section 76(2A) RMA.

44 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.

45 Section 76(4A) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.

46 Section 76(4B) RMA – this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

47 Under section 290 and Clause 14 of the First Schedule to the Act.

48 Section 290A RMA as added by the Resource Management Amendment Act 2005.