

## MEMORANDUM

**Date:** 11 July 2024  
**To:** Briar Belgrave  
**From:** Lucy de Latour | Molly McDouall

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### Permissibility of overlap between regional and district plans

1. You have asked us to provide advice in relation to industrial zone rules of the proposed Te Tai o Poutini Plan (**TTPP**). This is in relation to questions raised by the Hearing Panel at the hearing, regarding the lawfulness of the stormwater treatment provisions in the industrial zone chapters of the TTPP.
2. We understand that the question concerns whether certain stormwater provisions as currently drafted go beyond the functions of a territorial authority, and instead address regional council functions under the Resource Management Act 1991 (**RMA**). As such, there are concerns about the legality of these provisions.<sup>1</sup>
3. We understand that this memorandum will be provided as part of your s42A reply in relation to the Industrial Zone provisions.

### Executive Summary

4. In short, it is permissible for there to be overlaps between regional and district plans where each is consistent with the respective council's functions.<sup>2</sup>
5. In this case, it would be *ultra vires* for the relevant provisions to regulate stormwater *discharges* per se - as that is a regional council function which must sit with West Coast Regional Council (**WCRC**). However, provisions within the Industrial zones that are aimed at managing the *effects of land use* on water quality are in our opinion lawful. Therefore, there is scope for these rules to be retained in some form. There are recent examples of this overlap in function, including Environment Court decisions.<sup>3</sup>
6. This position can be reinforced and supported by clause 3.5 in particular of the NPS-FM 2020 – which encourages integrated management between local authorities, but also places direct obligations on territorial authorities in respect of the management of land use to achieve water quality outcomes.<sup>4</sup> Further, the WCRC's Regional Policy Statement (**RPS**), which also must be given effect to, also supports managing the effects of land use on water quality within the TTPP.<sup>5</sup>

### Overlapping functions of regional councils and territorial authorities

7. Overall, it is permissible for there to be overlaps between regional and district plans where each is consistent with the respective council's functions.<sup>6</sup>
8. It is recognised that the management of effects on water quality (and the regulation of discharges of contaminants to land and water) is a function that primarily rests with regional councils under section 30 of the RMA.

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<sup>1</sup> INZ-Policy 11, GIZ-R1(7), GIZ-R1 Advice Notes (2 and 3), LIZ-R1(7) and LIZ-R1 Advice Notes (2 and 3).

<sup>2</sup> *Re Otago Regional Council* [2022] NZEnvC 101.

<sup>3</sup> *Re Otago Regional Council* [2022] NZEnvC 101.

<sup>4</sup> National Policy Statement for Freshwater Management 2020, clause 3.5.

<sup>5</sup> For example, Policies 1, 7 and 8 of Chapter 8 of the RPS; Resource Management Act 1991, section 75(3)(c).

<sup>6</sup> *Telecom New Zealand Ltd v Environmental Protection for Children Trust* Environment Court, Christchurch, C36/2003, 28 March 2003 at [15].

9. However, case law has confirmed that there may be circumstances where the functions of regional and territorial authorities overlap.<sup>7</sup> For example, regional and district councils have overlapping land use and natural hazard functions under section 30 and 31 of the RMA.
10. Section 30 and 31 of the RMA set out the respective functions of regional councils and territorial authorities. The Court of Appeal in *Canterbury Regional Council v Banks Peninsula District Council* explained that neither a regional council, nor a territorial authority has power to make rules for *purposes* falling within the functions of the other, except to the extent that they fall within its own functions and are for the purposes of carrying out its own functions. What is limited is not so much what can be controlled, but the *purpose* for which it can be controlled.<sup>8</sup> For territorial authorities, in this case, this relevantly includes:
- (a) Integrated management of the natural and physical resources of the district; and
  - (b) Effects of the use of land and associated natural and physical resources.
11. The Environment Court in *Telecom New Zealand Ltd v Environmental Protection for Children Trust*, has previously considered the matter of overlapping functions between regional and district councils, finding that:<sup>9</sup>
- Subsequent to the decision of the Court of Appeal in *Canterbury Regional Council v Banks Peninsula District Council* it is clear that there **might be an overlapping of the functions of a district and regional council** provided each authority is acting within the terms of its respective legal functions under sections 30 and 31.
- From this we must conclude that provided the City Council is controlling the effects or potential effects of a land use activity, then it may include controls in its plan.** This is irrespective of whether the Regional Council may have the power to control [radio frequency] on the basis that it is a contaminant....
- [emphasis added]
12. Thus, the Court's overall finding was that as long as the Council in that case was controlling the effects or potential effects of a land use activity, then it may include controls in its plan relating to radio frequency. The Court went on to recognise that there is at least potential in that case, for the regional and district councils to have overlapping jurisdiction regarding radio frequency. The Court explained that:<sup>10</sup>
- (a) the regional council is focused upon the potential of radio frequency to change the physical, chemical, or biological condition of the land or air (if radio frequency can be shown to be a contaminant);
  - (b) in contrast, the district council is focused upon the adverse effects of the land use activity.
13. A further example of this overlap of functions occurring is in *Re Otago Regional Council*.<sup>11</sup> By way of background, Queenstown Lakes District Council (**QLDC**) had included in its proposed district plan (**PDP**) earthworks rules relating to the adverse effects associated with earthworks which included managing the effects of sedimentation on waterbodies (resulting from earthworks).

<sup>7</sup> *Telecom New Zealand Ltd v Environmental Protection for Children Trust* Environment Court, Christchurch, C36/2003, 28 March 2003; *Re Otago Regional Council* [2022] NZEnvC 101.

<sup>8</sup> *Canterbury Regional Council v Banks Peninsula District Council* (1995) 1B ELRNZ 415 at 422.

<sup>9</sup> *Telecom New Zealand Ltd v Environmental Protection for Children Trust* Environment Court, Christchurch, C36/2003, 28 March 2003 at [15] – [16].

<sup>10</sup> *Telecom New Zealand Ltd v Environmental Protection for Children Trust* Environment Court, Christchurch, C36/2003, 28 March 2003 at [18].

<sup>11</sup> *Re Otago Regional Council* [2022] NZEnvC 101.

14. These provisions were designed to provide for district-wide regulation in circumstances where the effect of earthworks was not adequately addressed in the Regional Plan: Water for Otago (**RPW**) - to bridge the gap in the RPW.<sup>12</sup>
15. QLDC further explained that the Council's approach to managing the effects of earthworks on water quality was to employ the PDP to do all it can to control the land uses that might lead to discharges through implementation of the earthworks rules.
16. QLDC accepted that its PDP cannot *authorise* discharge of contaminants under section 15, but explained that the earthworks rules were appropriate as they gave effect to clause 3.5 of the NPS-FM 2020, as well as the proposed Otago Regional Policy Statement which required cooperation between councils in the integrated management of the effects of land use and development on freshwater.
17. In this case, there was no question over the legality of QLDC's approach in the PDP, albeit, that this did not consequently prevent ORC from itself regulating the discharges and land use within its regional plan (recognising the overlapping functions).

### **Role of NPS-FM 2020 and the RPS**

18. As is noted above, in *Re Otago Regional Council*, clause 3.5 of the NPS-FM 2020 was a reason for the earthworks provisions being appropriate in QLDC's PDP, as they gave effect to the clause 3.5 (as well as the proposed Regional Policy Statement for Otago).<sup>13</sup> Clause 3.5 encourages integrated management between local authorities - but - also places direct obligations on territorial authorities in respect of the management of land use to achieve water quality outcomes.<sup>14</sup>
19. While the NPS-FM 2020 does not require / direct provisions to be included in district plans to give effect to it, section 75 of the RMA requires district plans to give effect to national policy statements, and the NPS-FM 2020 is therefore a relevant consideration for land use provisions included to manage the effects of stormwater on waterbodies.
20. Further, the WCRC's Regional Policy Statement (**RPS**), which must be given effect to, also lends support for managing the effects of land use on water quality.<sup>15</sup> For example:
  - (a) Policy 1 of Chapter 8 of the RPS states that the adverse effects on fresh and coastal water quality and aquatic ecosystems arising from subdivision, use or development of land must be 'avoided, remedied or mitigated' to ensure that water quality and aquatic ecosystems are maintained or improved.
  - (b) Policy 7 of the RPS encourages coordination of urban growth, land use, and development to achieve integrated management of effects on fresh and coastal water.
  - (c) Policy 8 requires that social, economic, and cultural wellbeing derived from the use and development of land is provided for, while maintaining or improving water quality and aquatic ecosystems. The RPS both informs and supports the position that land use controls can be used to address water quality effects.
21. The explanation to the policies in Chapter 8 also state that:
 

"Policy 1 gives effect to the NPSFM and Objective 1 above by requiring that subdivision, use and development activities on land, discharges of contaminants, water takes and uses, and activities in, or on, water are managed in a way that reduces the adverse effects of those activities. Explicit detail on how this will be achieved will be set out in the Regional Land and Water Plan, as well as provisions in the district plans and through conditions on individual resource consents ... The regional and district councils need to have regard to the downstream effects of land and water use on coastal mahinga kai areas."

<sup>12</sup> *Re Otago Regional Council* [2022] NZEnvC 101 at [117].

<sup>13</sup> *Re Otago Regional Council* [2022] NZEnvC 101 at [143].

<sup>14</sup> National Policy Statement for Freshwater Management 2020, clause 3.5.

<sup>15</sup> Resource Management Act 1991, section 75(3)(c).

22. This is also supported by the methods which state:
- “Include in district plans, policies, rules, guidelines or other information to avoid, remedy or mitigate the adverse effects of land use activities and management practices on water quality.... and regional and district plans are integrated across statutory functions to manage the effects of urban growth, development, and infrastructure on fresh and coastal water.”
23. Collectively, the RPS therefore directs and supports the position that land use controls within district plan provisions can address water quality effects.

**Conclusion**

24. Overall, we consider that if the provisions can be sufficiently aimed at focusing on the effects of land use – rather than regulating the discharge itself, then they are not ultra vires. We have not sought to comment specifically on the proposed drafting at this stage, but please let us know if that is required.
25. We trust this advice assists. Please let us know if we can provide any further information.

**Wynn Williams**