

**BEFORE THE HEARING COMMISSIONERS
AT WHANGAREI**

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

AND

IN THE MATTER of Proposed Plan Change 87 – Coastal
Areas to the Whangarei District Plan

EVIDENCE 16
TOPIC PC85A-D, 86A-B, 87, 102, 114
SUB# Rural Plan Changes
DATE 05-07-2017

**LEGAL SUBMISSIONS ON BEHALF OF THE NATIONAL INSTITUTE OF
WATER AND ATMOSPHERIC RESEARCH LIMITED**

5 JULY 2017

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INTRODUCTION AND OVERVIEW

1. Coastal areas are important. They provide the interface between New Zealand's land and marine resources. They are a significant contributor to wellbeing – not only in an environmental, social and cultural sense but also, economically. It is therefore vitally important that coastal area plan provisions get the balance between protection, use and development, *right*.
2. Plan Change 87 – Coastal Areas (PC87), as notified, fails to do this. PC87 applies blanket controls across coastal areas without recognising the considerable differences in the existing environment within those areas, or the regional and national significance of activities located in those areas.
3. The changes recommended by the reporting planner go some way to redressing these issues – but they do not go far enough. Further change is required, to ensure that key activities, such as those undertaken by the National Institute of Atmospheric Research Limited (NIWA) at its Bream Bay aquaculture facility, are appropriately provided for.
4. The purpose of these submissions is to provide the context and legal basis to support the additional changes to PC87 sought by NIWA.

Evidence

5. NIWA is calling evidence from two witnesses in support of its position:
 - (a) Dr Michael Bruce, Assistant Regional Manager – Auckland, NIWA. Dr Bruce sets out the history of the Bream Bay facility, outlines its current operations, the significance of the existing Bream Bay facility, the value to be added from planned development, and the concerns he has with PC87; and
 - (b) Dr Philip Mitchell, a very experienced expert planner and director of Mitchell Daysh. Dr Mitchell addresses the planning issues, sets out the changes he considers are required to PC87 and the planning support for those changes.

Outline

6. These submissions are organised as follows:

recognition of the highly modified nature of the land within this zone;

- (c) the four existing seawater take and discharge pipelines and associated consents; and
 - (d) the coastal location of the site given the facility has a functional need to be located in the coastal environment.
11. Over the last 15 years, NIWA has established and built its marine science and aquaculture activities to the point that they are now recognised as being of both national and regional significance. Aquaculture is a key contributor to the region's economy and has been earmarked as a future growth area for Northland.
12. NIWA has significantly advanced and commenced implementing plans for further development of the Bream Bay facility. The importance of this planned development was recognised in the Tai Tokerau Northland Economic Action Plan 2016.¹ This planned development requires an appropriately enabling planning framework that recognises the zoning and existing environment of the site.

Submissions made by NIWA

13. NIWA is a submitter and further submitter on proposed Plan Change 87 – Coastal Areas (**PC87**).²
14. NIWA's original submission was filed some 30 days late³ but well before the summary of submissions - which included NIWA's submission - was notified.⁴ NIWA applied for a waiver at the time the submission was lodged (refer **Appendix 1**). It is understood Council has no issue with the waiver being granted and that the Commissioners are empowered to make a decision on the waiver as part of this hearing. Accordingly, NIWA respectfully requests that the

¹ Section 3.2, page 5 and section 5.2 page 16 of the Economic Action Plan. Available from: <http://s3-ap-southeast-2.amazonaws.com/nnzlibrary/documents/Tai-Tokerau-Northland-Prosperty-Roadmap-February-2016.-Web.pdf?mtime=20160203141217>.

² Submission numbers 542/1 and 542/2 and further submissions X372, X502 – X512.

³ The submission period closed on 4 October 2017 and NIWA filed its submissions on 3 November 2017.

⁴ The summary of submissions was notified on 23 November 2016.

20. As PC87 was notified in August 2016, this means that the recent amendments made by the Resource Legislation Amendment Act 2017 and the Resource Management Amendment Act 2016 do not apply.
21. Instead, the applicable version of the Act is that resulting from the Resource Management Amendment Act 2013 (which made significant changes to section 32), along with the minor changes resulting from various other legislative amendments prior to October 2016.⁶

Scope for changes

22. In my submission, there is ample scope for the changes NIWA is seeking to PC87. While no scope issues have been raised to date, in case the issue arises, I set out the legal basis for my submission.
23. The Council has the power to make amendments that:⁷
- (a) reflect changes sought in written submissions;
 - (b) respond to groups of written submissions;
 - (c) address cases presented at the hearing; as well as
 - (d) make other changes which do not alter the meaning or effect of provisions.
24. Council also has the power to make consequential amendments.⁸
25. NIWA's original submission was broad and sought changes to more appropriately reflect the existing environment and the regional and national significance of the Bream Bay facility. NIWA's further submission supported or opposed changes sought by other submitters and suggested consequential amendments which gave substance to its remaining concerns.
26. NIWA's amendments were "reasonably and fairly raised" in its submissions.⁹

⁶ For a full list of amending acts refer to: <http://www.legislation.govt.nz/act/public/1991/0069/latest/versions.aspx>.

⁷ *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497 (PT), (affirmed on appeal).

⁸ Schedule 1, clause 10 of the Act.

statutory objective is clear". The Court explained that "[s]ection 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA..."

30. The High Court distinguished *King Salmon* on the basis that the circumstances were "far removed" from the situation before them, there was no constraint in a higher order planning document to which the Council was required to give effect, and the express wording of section 74 requires consideration be given to section 31 and Part 2.¹⁴ In particular, the Court noted that where the decision makers have choice, (such as in determining the most appropriate provisions for a district plan change), reference to Part 2 remains relevant.
31. PC87 is a district plan change where the Council has choice (in terms of what provisions are the most appropriate) but also constraints – in that it must give effect to both the RPS and the NZCPS.
32. While the *Turners & Growers* case makes it clear that section 31 and Part 2 are relevant considerations in terms of section 74, it does not expressly address the requirement in section 75(3) for a district plan to give effect to the RPS and/or NZCPS. These issues were not before the Court on appeal. However, the principles expressed in respect of section 74 appear to apply equally to section 75.
33. In the present case, as the RPS came into force after the district plan became operative, that document would need to be considered on either approach. However, the law is not completely settled on whether the NZCPS must also be considered separately or whether the RPS can be deemed to have given effect to it. In my submission, the Council is able to, and should consider both. This is the approach adopted by both the section 32 evaluation report for PC87 (s 32 Evaluation Report) and the s 42A Report.

New Zealand Coastal Policy Statement

34. The s 32 Evaluation Report addresses the policy intent of the NZCPS:

¹⁴ *Supra* note 12, at paragraph [46].

where natural character has been compromised by development.¹⁷

38. It is noted that Policy 14 of the NZCPS is to promote restoration or rehabilitation of the natural character of the coastal environment. This policy is to be achieved (inter alia) by identifying areas and opportunities for restoration or rehabilitation. In my submission, the Business 4 zone is not an appropriate area to attempt to restore natural character – given the highly modified nature and long standing heavy industrial uses of the land.
39. In light of these policies, it is not necessary to further regulate activities on land zoned and used for business purposes, (outside outstanding natural character areas) to properly give effect to the NZCPS.

Regional Policy Statement

40. The provisions of the NZCPS addressed above are given effect to in the following provisions of the RPS:

"Policy 3.15 - Maintain and/or improve the natural character of the coastal environment;

Policy 3.14 - Protect the qualities and characteristics that make up the natural character of the coastal environment from inappropriate subdivision use and development;

Policy 5.1.2 - Enable people and communities to provide for their wellbeing through appropriate subdivision, use, and development that:

(a) Consolidates urban development¹⁸ within or adjacent to existing coastal settlements and avoids sprawling or sporadic patterns of development;

...

¹⁷ S 32 Evaluation Report, at paragraph [48].

¹⁸ Refer Footnote 12 on page 91 of the RPS which states:

"For the purpose of Policy 5.1.2 'urban development' means subdivision, land use or development intended for mixed-use, commercial, industrial activities and all development where the primary purpose is residential use, except where it is ancillary to a lawfully established rural activity."

- (b) the Business 4 zone is a discrete zone containing highly modified environments within the coastal area (located in Ruakaka, Marsden Point and in Whangarei City); and
 - (c) the Business 4 zone contains regionally significant activities which should be supported.
46. The s 42A Report recommends the following amendments to PC87 to provide a more nuanced approach to such land and activities:

"CA.1.1 Descriptions and Expectations

...

Over the years, the Coastal Area has been substantially modified, with coastal forests, dune vegetation and indigenous wetlands being largely replaced by productive land, ~~and~~ residential development and industrial developments that rely on their proximity to the coast for their ongoing operations.²¹

CA.1.2 Objectives

11. Recognise and provide for existing development and regionally significant infrastructure which has a functional or operational need to be located in the Coastal Area

CA.1.3 Policies

23. To recognise that there can be a functional need to locate, operate and maintain infrastructure, commercial and industrial activities in certain locations in the CA proximate to existing infrastructure, commercial and industrial activities.

CA.2.3 Discretionary Activities

2. Earthworks within the CA but outside a Business 4 Environment or Strategic Rural Industry Environment, where...

47. In terms of giving effect to the RPS and NZCPS, it is submitted these amendments:
- (a) encourage the consolidation of existing coastal settlements and urban areas, contributing to the

²¹ S 42A Report at paragraph [52].

seeks to manage the effects of such development and subdivisions on the coastal environment, and the submission of Radio NZ (supported in NIWA's further submission) specifically sought an additional objective and assessment criterion regarding reverse sensitivity.

51. While the s 42A Report recognises the need to avoid reverse sensitivity and conflicts between land uses, the Report concludes that addressing this issue specifically in the coastal area will create "unnecessary duplication" within the district plan.²²
52. I disagree. As Dr Mitchell explains in his evidence it is both necessary and appropriate for PC87 to address reverse sensitivity. Such an approach is consistent with the directions in both the operative district plan and the RPS.²³ In this regard, Dr Mitchell recommends the inclusion of one additional objective and criterion as follows:
- (a) CA1.2 Objectives – insert new objective as follows:
- "13. To protect existing commercial and industrial developments and facilities, infrastructure and network utilities from adverse reverse sensitivity effects."
- (b) An additional 'Criterion' be added to Rule CA.2.3.1:
- "Construction or external alteration of a residential unit within both the Coastal Area and the Rural Production Environment but outside a High or Outstanding Natural Character Area:
- ...
- d. Proximity of the residential unit to existing commercial or industrial development, facilities, infrastructure or network utilities and the risk of adverse reverse sensitivity effects."
53. In my submission, including one additional objective and criterion does not amount to "unnecessary duplication". Instead, it provides clarity as to how reverse sensitivity is to be addressed in the coastal area.

²² S42A Report, Paragraphs 100 – 104, 207 and 212

²³ Statement of Evidence of Dr Philip Hunter Mitchell on behalf of the National Institute of Water and Atmospheric Research Limited, dated 23 June 2017, at paragraphs [40] to [48].

supporting aquaculture and marine farming activities.²⁵ The strip of coastal land through which the four underground pipelines pass, is identified as an area of high natural character.²⁶ PC87, as notified, requires resource consent for any land disturbance associated with works on these pipelines.

57. To give effect to the RPS, NZCPS, and the direction identified in the Te Tai Tokerau Northland Economic Development Plan, PC 87 needs to provide for appropriate recognition and protection of lawfully established activities and infrastructure which have a functional need to be within the coastal area.²⁷ The evidence of Dr Mitchell identifies the following amendments as being appropriate to achieve this outcome:

- (c) addition to the list of the exemptions in Rule CA.2.3.3:

"Earthworks within sand dune, with the exception of earthworks associated with:

...

f. Maintenance, minor upgrading or replacement of existing lawfully established pipeline infrastructure."

- (d) amendment to Rule CA.3.1.2:

"Earthworks within a High Natural Character Area where:

...

c. The earthworks are not associated with:

i. The repair and maintenance of fences, utility connections, existing underground pipelines, driveways, parking areas ..."

- (e) amendments to Rule CA.4.1.1:

²⁵ Statement of Evidence Dr Michael Bruce on behalf of the National Institute of Water and Atmospheric Research Limited, dated 23 June 2017, at paragraph [14].

²⁶ Statement of Evidence of Dr Philip Hunter Mitchell on behalf of the National Institute of Water and Atmospheric Research Limited, dated 23 June 2017, at paragraph [28].

²⁷ Statement of Evidence of Dr Philip Hunter Mitchell on behalf of the National Institute of Water and Atmospheric Research Limited, dated 23 June 2017, at paragraph [62].

any relief granted under NIWA's PC87 submission being rendered illusory - NIWA requests that the Council, (where it has scope to do so), apply similar wording changes to the relevant PC114 provisions.

CHANGES SOUGHT BY OTHER PARTIES

62. The pre-circulated evidence from other parties seeks relief relating to six provisions which either directly conflict with relief sought by NIWA or which if adopted, have the potential to adversely affect NIWA's Bream Bay operation.
63. The relevant provisions, the relief sought and the concerns NIWA has are set out below.

CA1.3.1 – delete the word “residential” so that the policy applies to all buildings

64. This change was recommended in the s 42A Report and supported by the Department of Conservation (DOC). NIWA's concern is that it broadens the policy to include commercial and industrial buildings in the Business 4 zoning. As noted earlier, this zoning is applied to land which is already heavily modified, is occupied by regionally significant industries, and has little to no “natural character” to protect. Should such a change be adopted, NIWA considers that a specific exemption should be made for commercial and industrial buildings in the Business 4 zone.

CA1.3.4 – delete the word “residential” so that the policy applies to all buildings

65. This change was requested by DOC as a corollary to the above change to CA1.3.1. NIWA's position is therefore the same – if that relief is granted, a specific exemption should be provided for commercial and industrial buildings in the Business 4 zone.

CA2.2.4 – insertion of permitted activity standards for coastal areas

66. DOC has requested the insertion of permitted activity standards for both residential and other buildings. The “other building” standards would make any building over 200m² in size, greater than 10m tall, or which do not comply with specific reflectivity controls, a discretionary activity. This is a considerable departure from the position under the operative plan where there are no such constraints in the

driveways, parking areas and the relief NIWA seeks (being maintenance and repair of its pipelines in this area). NIWA opposes DOC's relief on the bases that:

- (a) it is impractical;
- (b) fails to recognise the existing activities in these areas;
- (c) fails to recognise the functional need that some of these activities (like NIWA's pipelines) have to locate in these areas; and
- (d) would inappropriately constrain rather than recognise and provide for regional significant activities – like the Bream Bay aquaculture facility.

71. The NRC relief, while unlikely to be an issue for NIWA (given earthworks on the pipelines in these areas are likely to be less than the limit proposed), appears inconsistent with the nature of the activities occurring in the Business 4 zone. NIWA considers, it may be more appropriate to exempt the Business 4 zone from this rule.

CA4.2.1 – exemptions applying to earthworks in outstanding natural character areas

72. While NIWA's activities and its pipelines do not fall within any outstanding natural character areas,³¹ for consistency (with the position taken above), NIWA opposes the DOC relief to remove all exemptions (other than marine mammals), and considers the NRC relief should be refined so it does not apply to the Business 4 zone.

CONCLUSION

73. NIWA's primary concerns are to ensure that PC87:
- (a) recognises the national and regional significance of the Bream Bay facility and appropriately provides for its development, operation, maintenance and upgrade;
 - (b) recognises that the Bream Bay facility has a functional need to locate in the coastal area;

³¹ The Bream Bay facilities are located in the coastal area, with the pipelines crossing high natural character areas, as well as areas identified as outstanding natural landscape areas under PC114.

APPENDIX 1 – WAIVER APPLICATION

7. Accordingly, on behalf of NIWA, we respectfully request that the Council exercise its discretion under section 37 of the Resource Management Act 1991 to grant a waiver and accept a late submission from NIWA.

Yours faithfully

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