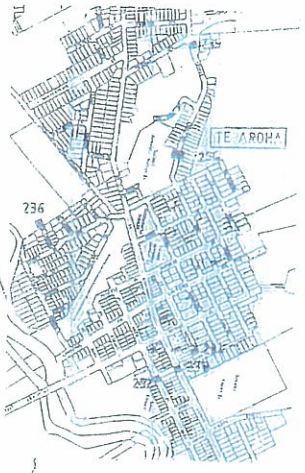
HAURAKI PLAINS DISTRICT COUNCIL

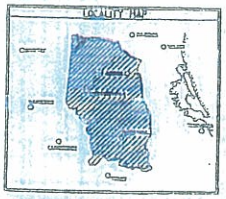
MAP OF THE

MATAMATA PIAKO DISTRICT COUNCIL

AREAS PRONE TO FLOODING

POSSIBLE PROBLEM ROADS DURING HEAVY RAIN





APPENDIX XII

Appendix

The following notes are reproduced from information made available by Horizons Regional Council in connection with work at time of emergency events. While this information indicates activity and processes with Horizon's, it is the belief of the investigating team that the disposal problem investigated equally applies to other Regional Councils.

Guidelines for the clearance of slip debris from road above watercourses and sensitive areas

In order to get a road open that has been blocked by a slip:

Material may be pushed of the road in order to obtain basic single lane access only if there is no practical alternative and there is an urgent need to re-establish access

A practical alternative would include establishing a spoil disposal site on a nearby area of flat ground that is not environmentally sensitive.

Identification criteria for appropriate spoil disposal sites would be:

- *The spoil disposal site is at least 20 meters from any lake, watercourse or wetland;*
- *The site is above flood level;*
- *Landowner approval has been obtained;*
- *The site is not culturally significant.*

Appropriate spoil disposal site preparation needs to be undertaken, this would include:

- *Vegetation clearance and benching is required before material is dumped;*
- *Subsurface drainage is necessary;*
- *Storm water diversion around the spoil disposal site;*
- *Compaction of spoil to ensure stability; and*
- *Re-vegetation upon completion of the spoil dumping.*

Once basic single lane access is obtained, all remaining material should be placed in a suitably prepared soil disposal site (see above).

Only in exceptional circumstances should material continue to be pushed of the road. In these situations Horizons Regional Council staff must be notified before this occurs so an assessment can be made. Contact can be made via the pollution hotline to ensure a prompt response.

Keep a record of work undertaken and forward to Horizons Regional Council. Details to include:

- *Approximate volume disposed of;*
- *Nature of material;*
- *Location extracted from;*
- *Preparation of dump site;*
- *Location of dump site;*
- *Compaction undertaken or proposed;*
- *Vegetation remediation proposed.*

Background: The 'natural' process of slips occurring is not always a desirable one and we all have a duty to mitigate the damage where we have a liability and this is appropriate. The perceived urgency of getting a road open does not justify damage to the environment. A specific environmental impact issue is that simply pushing material over the bank will often load up the bank and lead to further slipping in future – with a resultant damage to the road among the concerns.

Although the emphasis of the guideline is on works close to water courses it is also important to recognise the disposal of spoil on to private land, or long- term effects of pushing spoil over the side of the road where it may fail and cause damage to private property.

It is also important that the 'Authority' responsible for the road complete an s330 (Emergency Works) declaration within 7 days of the works being undertaken. This process effectively allows work to occur without the need to first obtain resource consent. The s330 declaration does require that resource consent be obtained after the works have been completed, if there is an ongoing environmental effect.

The details of s330 are as follows:

Emergency Works

330 Emergency works and power to take preventative or remedial action

(1) Where-

(a) Any public work for which any person has financial responsibility; or

(b) Any natural and physical resource or area for which a local authority or consent authority has jurisdiction under this Act; or

(c) Any project or work [for network utility operation] for which any network utility operator is approved as a requiring authority under section 167- is, in the opinion of the person the authority or the network utility operator, affected by or likely to be affected by-

(d) An adverse effect on the environment which requires immediate preventive measures; or

(e) An adverse effect on the environment which requires immediate remedial measures; or

(f) Any sudden [event] causing or likely to cause loss of life, injury, or serious damage to property-

the provisions of sections 9, 12, 13, 14 and 15 shall not apply to any activity undertaken by or on behalf of the person, authority, or network utility operator to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

(2) Where a local authority or consent authority-

(a) Has financial responsibility for any public work; or

(b) Has jurisdiction under this act in respect of any natural and physical resource or area-

which is, in the reasonable opinion of the local authority or consent authority ,likely to be affected by any of the conditions described in paragraphs (d) to (f) of subsection (1), the local authority or consent authority by its employees or agents may, without

prior notice, enter any place (including a dwellinghouse when accompanied by a constable) and may take such action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, mitigate any actual or likely adverse effect of, the emergency.

(3) *As soon as practicable after entering any place under this section, every person must identify himself or herself and inform the occupier of the place of the entry and the reasons for it.*

(4) *Nothing in this section shall authorize any person to do anything in relation to an emergency involving marine oil spill or suspected marine oil spill within the meaning of section 281 of the Maritime Transport Act 1994.]*

330A *Resource consents for emergency works*

(1) *Where and activity is undertaken under section 330(1), the person, authority, or network utility operator who or which undertook the activity shall advise the appropriate consent authority, with 7 days, that the activity has been undertaken.*

(2) *Where such an activity, but for section 330(1), contravenes any of sections 9, 12, 13, 14 and 15 and the adverse effects to the activity continue, then the person, authority, or network utility operator who or which undertook the activity shall apply in writing to the appropriate consent authority for any necessary resource consent required in respect of the activity within 20 working days of the notification under subsection (1).*

(3) *If the application is made within the time stated in subsection (2), the activity may continue until the application for a resource consent and any appeals have been finally determined.]*

330B *Emergency works under Civil Defence Emergency Management Act 2002*

(1) *If any activity is undertaken by any person exercising emergency powers during a state of emergency declared under the Civil Defence Emergency Management Act 2002, the provisions of sections 9, 12, 13, 14, and 15 of this Act do not apply to any activity undertaken by or on behalf of that person to remove the cause of, or mitigate any actual or adverse effect of, the emergency.*

(2) *If an activity is undertaken to which subsection (1) applies, the person who authorized the activity must advise the appropriate consent authority, within 7 days that the activity has been undertaken.*

(3) *If such an activity, but for this section, would contravene any of sections 9, 12, 13, 14,and 15 of this Act and the adverse effects of the activity continue, the person who authorised the activity must apply in writing to the appropriate consent authority for any necessary resource consents required in respect of the activity, within 20 working days of the notification under subsection (2).*

(4) *If the application is made within the time stated in subsection (3), the activity may continue until the application for a resource consent and any appeals have been finally determined.*

(5) *A person does not commit and offence under section 338(1)(a) of this Act by acting in accordance with this section.]*

Resource Management Act 1991

330 Emergency works and power to take preventive or remedial action

(1) Where—

(a) Any public work for which any person has financial responsibility; or

(b) Any natural and physical resource or area for which a local authority or consent authority has jurisdiction under this Act; or

(c) Any project or work [or network utility operation] for which any network utility operator is approved as a requiring authority under section 167—

is, in the opinion of the person or the authority or the network utility operator, affected by or likely to be affected by—

(d) An adverse effect on the environment which requires immediate preventive measures; or

(e) An adverse effect on the environment which requires immediate remedial measures; or

(f) Any sudden [event] causing or likely to cause loss of life, injury, or serious damage to property—

the provisions of sections 9, 12, 13, 14, and 15 shall not apply to any activity undertaken by or on behalf of that person, authority, or network utility operator to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

[(1A) Subsection (1) applies whether or not the adverse effect or sudden event was foreseeable.]

(2) Where a local authority or consent authority—

(a) Has financial responsibility for any public work; or

(b) Has jurisdiction under this Act in respect of any natural and physical resource or area—

which is, in the reasonable opinion of that local authority or consent authority, likely to be affected by any of the conditions described in paragraphs (d) to (f) of subsection (1), the local authority or consent authority by its employees or agents may, without prior notice, enter any place (including a dwellinghouse when accompanied by a constable) and may take such action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

[(2A) Sections 9, 12, 13, 14, and 15 do not apply to any action taken under subsection (2).]

(3) As soon as practicable after entering any place under this section, every person must identify himself or herself and inform the occupier of the place of the entry and the reasons for it.

Nothing in this section shall authorise any person to do anything in relation to an emergency involving a marine oil spill or suspected marine oil spill within the meaning of section 281 of the Maritime Transport Act 1994.]

Editorial Note - Statutes of New Zealand

Section 234 Public Works Act 1981 empowers emergency entry upon land where there is imminent danger to life or property or a likelihood of serious interference with or damage to any public work arising from any cause and which requires immediate remedial measures. Section 708A(3) Local Government Act 1974 conferred powers of entry upon any local authority in any sudden emergency or in the case of danger to any works.

History Note - Statutes of New Zealand

Subsection (1)(c) was amended, as from 7 July 1993, by s 150(1) Resource Management Amendment Act 1993 (1993 No 65) by inserting the words "or network utility operation". Subsection (1)(f) was amended, as from 7 July 1993, by s 150(2) of the same amending Act by substituting the word "event" for the word "emergency".

Subsection (1A) was inserted, as from 10 August 2005, by s 120(1) Resource Management Amendment Act 2005 (2005 No 87). See ss 131 to 135 of that Act as to the transitional provisions.

Subsection (2A) was inserted, as from 10 August 2005, by s 120(2) Resource Management Amendment Act 2005 (2005 No 87). See ss 131 to 135 of that Act as to the transitional provisions.

Subsection (4) was inserted, as from 20 August 1998, by s 18 Resource Management Amendment Act 1994 (1994 No 105). See cl 2 Resource Management Amendment Act 1994 Commencement Order 1998 (SR 1998/209).

Commentary - Resource Management

Cross references

s 2 "consent authority", "constable", "dwellinghouse", "environment", "local authority", "natural and physical resources", "network utility operator", "occupier", "person", "public work", "requiring authority"
s 3 "effect"
s 6 matters of national importance
s 7 other matters
s 8 Treaty of Waitangi
s 9 restrictions on use of land
s 12 restrictions on use of coastal marine area
s 13 restrictions on certain uses of beds of lakes and rivers
s 14 restrictions relating to water
s 15 discharge of contaminants into environment
s 18(2) possible defence in cases of unforeseen emergencies
s 166 meaning of "designation", "network utility operator" and "requiring authority"
s 167 application to become requiring authority
s 330A resource consents for emergency works
s 331 reimbursement or compensation for emergency works
Public Works Act 1981 (1981 No 35)
s 2 "public work"
s 234 emergency entry on land

A330.01 Scope of application of subs (1)

On the relevant principles, see *Auckland CC v Minister for the Environment* (1998) 5 ELRNZ 1; [1999] NZRMA 49 (EnvC).

"Likely"

The word "likely" imports an element of probability as opposed to mere possibility or potential.

(2) "Adverse effects"

The type of adverse effects are extremely diverse given the wide definition of "environment" in s 2.

(3) Judgment required under subs (1)

Three judgments are required:

(a) Whether and which of paras (d), (e), or (f) apply;

(b) The effect or likely effect upon the public work, natural and physical resource or area, or project or work or network utility operation; and

(c) Whether there is a case for the limitations of ss 9, 12, 13, 14, or 15 not to apply.

(4) Immediacy

The measures to be taken under subs (1)(d) and (e), and the action permitted under subs (2) contemplate a situation requiring immediacy of action, whether preventive or remedial, or by way of emergency action, provided the relevant situation requires an immediate response.

However, s 330 is not a general "fall back" provision to be automatically relied upon in any perceived emergency because of its specifically defined circumstances of applicability.

A330.02 Sudden events or emergencies — subs (1)(c)

(1) "Sudden emergency" test

In *Gisborne DC v Falkner* A082/94 (PT), the pre-RMAmA93 "sudden emergency" test was held not to apply, as damage from storms was not unexpected. The factors of suddenness and emergency in s 330 are limited to a state of danger that is unexpected (cf *Huakina Development Trust v Auckland Regional Water Board* (1985) 11 NZTPA 123 (PT)).

If a council fails to act for several years to address the issue of sewage disposal, it cannot then rely on the emergency powers of ss 330 or 330A since the factors of immediacy and urgency are not present: *Waiheke Island Country Club Ltd v Auckland CC* EnvC W005/98, citing *Fugle v Cowie* [1998] 1 NZLR 104; [1997] NZRMA 395; (1997) 3 ELRNZ 261 (HC).

(2) Foreseeability -- subs (1A)

Foreseeability does not prevent an "emergency" from arising if the relevant elements or qualifying aspects are satisfied: *Auckland CC v Minister for the Environment* (1998) 5 ELRNZ 1; [1999] NZRMA 49 (EnvC).

A330.03 Immunity from prosecution in relation to emergency works -- subss (2) and (2A)

Section 18(2) provides that: "[n]o person may be prosecuted for acting in accordance with section 330". This was applied in the case of persons charged with statutory functions in respect of works which cause environmental harm in *Southland RC v Invercargill CC* 23/12/96, Judge Treadwell, DC Invercargill CRN6025006200, 855. The onus is on the defendants to establish that immunity is available: *Canterbury RC v Doug Hood Ltd* (1998) 4 ELRNZ 395 (DC), following *Bay of Plenty RC v Bay Milk Products Ltd* [1996] 3 NZLR 120; [1996] NZRMA 279; (1996) 2 ELRNZ 187 (HC). See also *Auckland CC v Minister for the Environment* (1998) 5 ELRNZ 1; [1999] NZRMA 49 (EnvC), where the Court considered in some detail the application of s 18(1) and 18(2) in relation to emergencies under s 330. Subsection (2A) clarifies that the restrictions of ss 9 and 12-15 do not apply to emergency actions.

A330.04 Defence under s 341 if s 330 of no avail

Where a person or body is charged with an offence, in circumstances where that body or person has purported to rely on s 330 but is subsequently unable to maintain that stance, it is still possible to raise a defence under s 341 as contemplated by s 18(1).

Application of s 27(1) New Zealand Bill of Rights Act

A decision under s 330 is not a determination for the purpose of s 27(1) New Zealand Bill of Rights Act 1990. A determination needs to be of an adjudicative character rather than having some indirect impact on another person's rights: *Chisholm v Auckland CC* [2005] NZAR 661 (CA).

Resource Management Act 1991

[330A Resource consents for emergency works

(1) Where an activity is undertaken under section [[330]], the person [[(other than the occupier)]], authority, or network utility operator who or which undertook the activity shall advise the appropriate consent authority, within 7 days, that the activity has been undertaken.

(2) Where such an activity, but for section [[330]], contravenes any of sections 9, 12, 13, 14, and 15 and the adverse effects of the activity continue, then the person [[(other than the occupier)]], authority, or network utility operator who or which undertook the activity shall apply in writing to the appropriate consent authority for any necessary resource consents required in respect of the activity within 20 working days of the notification under subsection (1).

(3) If the application is made within the time stated in subsection (2), the activity may continue until the application for a resource consent and any appeals have been finally determined.]

History Note - Statutes of New Zealand

Section 330A was inserted, as from 7 July 1993, by s 151 Resource Management Amendment Act 1993 (1993 No 65).

Subsection (1) was amended, as from 10 August 2005, by s 121(1)(a) Resource Management Amendment Act 2005 (2005 No 87) by substituting the expression "330" for the expression "330(1)". See ss 131 to 135 of that Act as to the transitional provisions.

Subsection (1) was amended, as from 10 August 2005, by s 121(1)(b) Resource Management Amendment Act 2005 (2005 No 87) by inserting the words "(other than the occupier)" after the word "person". See ss 131 to 135 of that Act as to the transitional provisions.

Subsection (2) was amended, as from 10 August 2005, by s 121(2)(a) Resource Management Amendment Act 2005 (2005 No 87) by substituting the expression "330" for the expression "330(1)". See ss 131 to 135 of that Act as to the transitional provisions.

Subsection (2) was amended, as from 10 August 2005, by s 121(2)(b) Resource Management Amendment Act 2005 (2005 No 87) by inserting the words "(other than the occupier)" after the word "person". See ss 131 to 135 of that Act as to the transitional provisions.

Show the historical text (7 July 1993 to 9 August 2005)

Commentary - Resource Management

Cross references

s 2 "consent authority", "person"

s 3A person acting under resource consent with permission
s 9 restrictions on use of land
s 12 restrictions on use of coastal marine area
s 13 restrictions on certain uses of beds of lakes and rivers
s 14 restrictions relating to water
s 15 discharge of contaminants into environment
s 330 emergency works and power to take preventive or remedial action

Resource Management Act 1991

9 Restrictions on use of land

(1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or

(b) An existing use allowed by **[**section 10 or section 10A].

> Editorial Note - Statutes of New Zealand
>
> See s 4(3) of this Act as to this subsection not applying in specified circumstances.

(2) No person may contravene **[**section 176 or section 178 or section 193 or section 194 (which relate to designations and heritage orders)**]** unless the prior written consent of the requiring authority concerned is obtained.

(3) No person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is—

(a) Expressly allowed by a resource consent granted by the regional council responsible for the plan; or

(b) Allowed by section [20A] (certain existing lawful uses allowed).

(4) In this section, the word **use** in relation to any land means—

(a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or

(b) Any excavation, drilling, tunnelling, or other disturbance of the land; or

(c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or

(d) Any deposit of any substance in, on, or under the land; or

[(da) Any entry on to, or passing across, the surface of water in any lake or river; or**]**

(e) Any other use of land—

and **may use** has a corresponding meaning.

(5) In subsection (1), **land** includes the surface of water in any lake or river.

(6) Subsection (3) does not apply to the bed of any lake or river.

(7) This section does not apply to any use of the coastal marine area.

[(8) The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by a territorial authority in relation to the use of airports.]

Editorial Note - Statutes of New Zealand

In structure this was a new omnibus provision. But for subs (1), see ss 92 and 93 Town and Country Planning Act 1977; for subsection (2), see s 120 Town and Country Planning Act 1977.

History Note - Statutes of New Zealand

Subsection (1)(b) was amended, as from 7 July 1993, by s 6(1) Resource Management Amendment Act 1993 (1993 No 65) by substituting the words "section 10 or section 10A" for the words "section 10 (certain existing uses protected)".

Subsection (2) was amended, as from 7 July 1993, by s 6(2) Resource Management Amendment Act 1993 (1993 No 65) by substituting the words "section 176 or section 178 or section 193 or section 194 (which relate to designations and heritage orders)" for the words "section 178 or section 194 (which relate to requirements for designations and heritage orders and prohibit the doing of certain things)".

Subsection (3)(b) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Show the historical text (7 July 1993 to 31 July 2003)
Subsection (4)(da) was inserted, as from 7 July 1993, by s 6(3) Resource Management Amendment Act 1993 (1993 No 65) .

Subsection (8) was inserted, as from 7 July 1993, by s 6(4) Resource Management Amendment Act 1993 (1993 No 65).

Commentary - Resource Management

Cross references

s 2 "bed", "coastal marine area", "contravene", "designation", "district", "district plan", "heritage order", "lake", "land", "local authority", "person", "plan", "proposed plan", "regional plan", "requiring authority", "resource consent", "river", "rule", "structure"
s 3A person acting under resource consent with permission
s 10 certain existing uses in relation to land protected
s 10A certain existing activities allowed
s 20 certain rules in proposed plans not to have effect
s 76(4)(e) district rules
s 85 compensation not payable in respect of controls on land
s 134 land use and subdivision consents attach to land
s 176 effect of designation
s 178 interim effect of requirement
s 193 effect of heritage order
s 194 interim effect of requirement
s 338 offences against this Act

s 341 strict liability
s 373 existing district and maritime schemes to become district plans
Interpretation Act 1999 (1999 No 85)
s 30 definitions in enactments passed or made before commencement of this Act

A9.01 Definitions of "land"

In relation to district plans, "land" includes the surface of water in any lake or river: subs (5). In relation to regional plans, "land" does not apply to the bed of any lake or river: subs (6).

"Land" is non-exclusively defined in s 30 Interpretation Act 1999 and is deliberately not precisely defined in the RMA because it is meant to encompass most of the general senses in which the word is used, and includes minerals as part of the land: *Gebbie v Banks Peninsula DC* (1999) 5 ELRNZ 362 (EnvC), confirmed in *Gebbie v Banks Peninsula DC* [2000] NZRMA 553 (HC).

In *Gargiulo v Christchurch CC* EnvC C137/00, it was suggested that s 9 operates on the presumption that existing property rights should apply to land use unless the exercise of those rights is shown to be less efficient and effective and require control through district or regional plans.

Property rights such as easements and the incorporated powers under the Schedule 9 to the Property Law Act 1952 do not conflict with the RMA. The exercise of such property rights is subject to compliance with the RMA. See *Coleman v Kingston* 3/4/01, Hammond J, HC Auckland AP103-SW00.

A9.02 Permissive presumption

The net effect of s 9(1) is essentially permissive, ie it allows any use that is not prohibited or regulated in a plan or proposed plan. Note, however, that this does not apply to transitional district plans: s 373(3). Also, rules may require a resource consent to be obtained for every activity not specifically referred to in a district plan: s 76(4)(e).

A9.03 Offence

Under s 338 it is an offence to contravene or permit the contravention of s 9, and s 341 makes it a strict liability offence.

Where the use began before the plan became operative, the prosecutor has the onus of proving that the use is not authorised by s 10, and that may involve proving that the use was not lawfully established: *C G Rowland Ltd v Ngaruawahia Borough* (1984) 10 NZTPA 112 (HC). See also *Smith v Auckland CC* [1996] 1 NZLR 634; [1996] NZRMA 27 (HC), and note at A338.03, followed by *Bay of Plenty RC v Carter* 27/3/02, Judge Thompson, DC Whakatane.

A9.04 Use of "expressly" — ancillary uses and activities

Subsections (1)(a) and (3)(a) require that an activity be "expressly allowed". Case law under the TCPA77 established that what was ancillary to the principal purpose for which a consent was granted was also authorised. Mere association with a permitted activity cannot make the subsidiary activity permitted if that activity requires consent: *Mount Field Ltd v Queenstown Lakes DC* EnvC W101/07.

In *Queenstown Lakes DC v McAulay* [1997] NZRMA 178 (HC), the High Court confirmed that a land use (in this case, a dwelling-house) authorised by a resource consent carried with it a right for the land owner/occupier to undertake an ancillary use (in this case the landing and taking off of aircraft for private transportation to and from work). The Court recognised that this right to undertake ancillary uses as part of an approved land use could be removed through the imposition of specific restrictions on the ancillary use by rules of the district plan or proposed plan.

This "ancillary use" principle qualifies the harshness of the words "expressly allowed" in s 9(1)(a), and would seem equally applicable to permitted activity rules. See also A10.04.

An activity is not expressly allowed under s 9(1) if it is outside the true scope of a resource consent, including its conditions: *Gillies Waiheke Ltd v Auckland CC* 20/12/02, Randerson J, HC Auckland A131/02. The test is an objective one, determined by reference to the information contained in the application and its supporting documents, including plans, and the district plan.

In *O'Brien v Dunedin CC* EnvC C037/02, the Environment Court looked at the meaning of "storage" in

making a decision as to whether a building was a permitted activity in a port zone. In concluding that the building was part and parcel of the activity of storage, the Environment Court noted the definition of "activity" and "ancillary", and considered that the construction of a structure associated with storage was part and parcel of the activity rather than subservient to it.

In *Iniatus Ltd v Palmerston North CC* EnvC W103/07, the Court considered that a stand-alone accommodation complex, close to the main campus of Massey University and in proximity to other science, research and teaching establishments, was not "ancillary" to the primary activities provided for in the Institutional Zone (the term was not defined in the plan). The Court noted that "ancillary" in the context of the relevant rule in the plan required that the activity not be an end in itself, but be subservient or secondary to the wider educational and related activities being undertaken in the zone. The Court held that if a condition was imposed so that the use of the complex was restricted primarily to students and others attending or working at institutions in the zone, the outcome would be similar to a permitted ancillary use.

An activity authorised by a consent may develop over time, as conditions and society change, but will cease to be authorised by a consent if it changes to such a degree that it is fundamentally different from what was first agreed to: *Parnell Residents' Soc Inc v Edinburgh Institute Ltd* EnvC A019/05.

A9.05 Meaning of "activity"

"Activity" is not defined in the Act. However, in s 9 the word refers to a particular activity which is the subject of consideration: *Auckland Heritage Trust v Auckland CC* (1991) 1 NZRMA 69 (PT).

While "activity" and "use" appear to be interchangeable in s 9, it is arguable that "activity" is narrower in meaning than "use". Put another way, one can have several activities all forming part of the same class of use (obiter): *Shell Oil NZ Ltd v Rodney DC* (1993) 2 NZRMA 545 (PT).

A9.06 Meaning of "rule"

The reference to a "rule" means a rule which is currently in force (or one which is proposed), not past rules: *Rodney DC v Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA).

A9.07 "Use" of land — subs (4)

(1) Broad interpretation

A broad interpretation of "use" accords with the general purposes of the RMA: *Smith v Auckland CC* (1995) 2 ELRNZ 185; [1996] NZRMA 276 (CA). The definition of "use" is wide enough to encompass the activities within a building, as well as the construction of the building. A resource consent is needed if a change of use involves contravening the district plan: see *Donkin v Board of Trustees of The Sunnybrae Normal School* [1997] NZRMA 342 (EnvC), partially reported at (1997) 3 ELRNZ 126, followed in *Sandbrook v Hutt CC* EnvC W049/01. See also *Rodney DC v Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA), regarding change of use and existing use rights, and the note at A10.07(1).

"Use" essentially encompasses dynamic activities on land and does not relate to consents. If a proposed activity would alter the status of adjoining land, such as by vesting recreation reserve as road reserve, the future circumstances applicable to the site should be examined: *Re Anzani Investments Ltd* EnvC A076/00, applying *Mobil Oil NZ v Auckland CC* 29/9/93, Heron J, HC Wellington AP200/91.

The words in s 9(4) are not in the alternative, but rather are "and/or" conjunctives that can be used interchangeably: *McKinlay v Timaru DC* (2001) 7 ELRNZ 116; [2001] NZRMA 569 (EnvC).

(2) Removing trees

Removing trees is a use of land since it involves destruction or disturbance of, or damage to, the habitats of plants or animals: *Burton v Auckland CC* [1994] NZRMA 544 (HC), followed in *Smith v Auckland CC* (above). The destruction of vegetation by stock grazing is also a use of land: *Rodney DC v Eyres Eco-Park Ltd* (2007) 13 ELRNZ 157; [2007] NZRMA 320 (CA).

(3) Mining

"Use" includes any disturbance of land; and, as minerals are a part of the land, the restrictions in s 9 in relation to land can include restrictions on mining and quarrying: *Gebbie v Banks Peninsula DC* (1999) 5

ELRNZ 362 (EnvC).

The High Court accepted this approach on appeal. Despite the absence of minerals from the definition of "land" in s 2, and the exclusion of minerals from one aspect of the purpose of the Act (s 5(2)(a)), the inclusion of minerals in the definition of "natural and physical resources" is determinative. Section 9 Crown Minerals Act 1991 confirms that those with permits to mine Crown-owned minerals are bound by the RMA: *Gebbie v Banks Peninsula DC* [2000] NZRMA 553 (HC).

A9.08 Planning unit

Activities carried on at different properties can in some circumstances be regarded as a single planning unit, although no rule of general application has been established: *Ashburton DC v Colville* W046/95 (PT), referring to *Keating v Canterbury RC* C029/91 (PT) and *Adamson v Wanganui CC* (1971) 4 NZTPA 259 (SC). A decision to treat two sites as one planning unit should be explicit to the point that there was no doubt that the two sites were to be used together, with a requirement that the owner of the sites would not be able to sell one site as long as the use on the other site continued: *Westmark Investments Ltd v Auckland CC* A073/95 (PT). An example could be where a consent authority grants a land use consent subject to carparking being provided on an adjoining site, or on a site in the immediate vicinity.

A9.09 Subsection (8)

In *Glentanner Park (Mt Cook) Ltd v MacKenzie DC* W050/94 (PT), the Tribunal considered subs (8). It noted that the word "airport" as defined in the RMA is used in this subsection as opposed to the wider expression "aerodrome" as defined in the Civil Aviation Act 1990. Furthermore, the RMA does not clearly differentiate between aircraft overflying and aircraft landing or departing.

Subsection (8) limits the consideration of the effects of a gliding club to the ground related activities and any noise that may be controlled by a plan in relation to airports: *Hororata Concerned Citizens v Canterbury Gliding Club Inc* [2005] NZRMA 393 (EnvC). This exclusion is potentially relevant to the assessment of the receiving environment of aircraft activity, but that activity would not form part of the permitted baseline: *Maclean v Marlborough DC* EnvC C081/08.

Following the High Court in *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335; [1997] NZRMA 513 (HC), the Environment Court held in *Dome Valley District Residents Soc Inc v Rodney DC* EnvC A099/07 that a decision-maker under the RMA may require a higher degree of public safety in an aviation operation than is required by the Civil Aviation Administration. It also held that, in the absence of district plan rules relating to noise from airports, the effect of s 9(8) was that the effects of noise from helicopters or other aircraft while airborne were not relevant effects under s 104(1).

The High Court has now considered subs (8) in *Dome Valley District Residents Soc Inc v Rodney DC* 1/8/08, Priestley J, HC Auckland CIV-2008-404-587, an appeal from the Environment Court's decision in *Dome Valley* (above). Subsection (8) limits the power of a territorial authority to regulate aircraft other than to impose noise controls on airport use. Flying aircraft is not a land use within subs (1). Regulation of an aircraft in flight between two points is excluded and in any case would be a nonsense, just as landowners cannot control the intrusion of aircraft into their airspace. The ambit of "airspace" as defined for RMA purposes, does not extend to airspace into which aircraft intrude. Regulation and control of noise from flying aircraft is the subject of the Civil Aviation Act 1990 and regulations and rules made under it. *Glentanner* (above) and *Aviation Activities Ltd v Mackenzie DC* EnvC C072/00 are among a number of Environment Court decisions, though not binding on the High Court, accepting that subs (8) excludes flying aircraft from the controls under the RMA.

Resource Management Act 1991

12 Restrictions on use of coastal marine area

(1) No person may[, in the coastal marine area,]—

(a) Reclaim or drain any foreshore or seabed; or

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or

(c) Disturb any foreshore or seabed (including by excavating, drilling, or tunnelling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal); or

(d) Deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed; or

(e) Destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or animals or their habitat; or

(f) Introduce or plant any exotic or introduced plant in, on, or under the foreshore or seabed[; or]

[(g) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on historic heritage—]

unless expressly allowed [by a rule in a regional coastal plan and in any relevant proposed regional coastal plan] or a resource consent.

[(2) No person may, in relation to land of the Crown in the coastal marine area, or land in the coastal marine area vested in the regional council,—

[[(a) Occupy any part of the coastal marine area; or]]

(b) Remove any sand, shingle, shell, or other natural material from the land—

unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent.]

(3) Without limiting subsection (1), no person may carry out any activity—

(a) In, on, under, or over any coastal marine area; or

(b) In relation to any natural and physical resources contained within any coastal marine area,—

in a manner that contravenes a rule in a regional coastal plan or a proposed regional coastal plan unless the activity is expressly allowed by a resource consent or allowed by section [20A] (certain existing lawful activities allowed).

(4) [In this Act] ...,—

[(a) *Repealed.*]

(b)

Remove any sand, shingle, [shell,] or other natural material means to take any of that material in such quantities or in such circumstances that, but for the rule in the regional coastal plan or the holding of a resource consent, a licence or profit à prendre to do so would be necessary.

[(5)

The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by a regional council in relation to the use of airports within the coastal marine area.]

[(6) This section shall not apply to anything to which section 15A [[or 15B]] applies.]

Editorial Note - Statutes of New Zealand

Section 12 was new in its form, but its substance was derived from repealed legislation. See ss 242, 244, and 244A Harbours Act 1950, the land use controls of the Town and Country Planning Act 1977 (in particular Part 5), and the Soil Conservation and Rivers Control Act 1941.

History Note - Statutes of New Zealand

Subsection (1) was amended, as from 7 July 1993, by s 10(1) Resource Management Amendment Act 1993 (1993 No 65) by inserting the words ", in the coastal marine area," and by substituting the words "by a rule in a regional coastal plan and in any relevant proposed regional coastal plan" for the words "to do so by a rule in a regional coastal plan".

Subsection (1)(f) was amended, as from 1 August 2003, by s 6 Resource Management Amendment Act 2003 (2003 No 23) by inserting the expression "; or". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Subsection (1)(g) was inserted, as from 1 August 2003, by s 6 Resource Management Amendment Act 2003 (2003 No 23). See ss 109 to 113 of that Act as to the transitional and savings provisions.

Subsection (2) was substituted, as from 7 July 1993, by s 10(2) Resource Management Amendment Act 1993 (1993 No 65).

Show the historical text (1 October 1991 to 6 July 1993)
Subsection (2)(a) was substituted, as from 17 December 1997, by s 4(1) Resource Management Amendment Act 1997 (1997 No 104). See s 78 of that Act as to the transitional provisions.

Subsection (3) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Show the historical text (20 August 1998 to 31 July 2003)
Subsection (4) was amended, as from 7 July 1993, by s 10(3) Resource Management Amendment Act 1993 (1993 No 65) by omitting the words "and in section 13(1),". Subsection (4)(a) was substituted, as from 7 July 1993, by s 10(4) Resource Management Amendment Act 1993 (1993 No 65) and para (b) was amended, as from 7 July 1993, by s 10(5) of the same amending Act by inserting the word "shell,".

Subsection (4) was amended, as from 17 December 1997, by s 4(2) Resource Management Amendment Act 1997 (1997 No 104) by substituting the words "In this Act" for the words "In this section". See s 78 of

Resource Management Act 1991

13 Restriction on certain uses of beds of lakes and rivers

[(1) No person may, in relation to the bed of any lake or river,—

(a) Use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) Excavate, drill, tunnel, or otherwise disturb the bed; or

(c) Introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) Deposit any substance in, on, or under the bed; or

(e) Reclaim or drain the bed—

unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent.]

(2) No person may—

(a) Enter or pass across the bed of any river or lake; or

(b) Disturb, remove, damage, or destroy any plant or part of any plant (whether exotic or indigenous) or the habitats of any such plants or of animals in, on, or under the bed of any lake or river—

in a manner that contravenes a rule in a regional plan or proposed regional plan unless that activity is—

(c) Expressly allowed by a resource consent granted by the regional council responsible for the plan; or

(d) Allowed by section [20A] (certain existing lawful uses allowed).

(3) This section does not apply to any use of land in the coastal marine area.

(4) Nothing in this section limits section 9.

Editorial Note - Statutes of New Zealand

There was no equivalent to this section in previous legislation. See, however, ss 34, 149, 150 Soil Conservation and Rivers Control Act 1941.

History Note - Statutes of New Zealand

Subsection (1) was substituted, as from 7 July 1993, by s 11 Resource Management Amendment Act 1993 (1993 No 65).

Show the historical text (1 October 1991 to 6 July 1993)
Subsection (2)(d) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Show the historical text (7 July 1993 to 31 July 2003)

Commentary - Resource Management

Cross references

s 2 "bed", "contravene", "lake", "land", "person", "proposed plan", "regional council", "regional plan", "resource consent", "river", "rule", "structure"
s 9(6) restrictions on use of land
s 14 restrictions relating to water
s 20 certain rules in proposed plans not to have effect
s 354 Crown's existing rights to resources to continue

A13.01 Ownership and use

Section 354 continues the Crown's existing rights of ownership of the beds of navigable rivers, effected by s 261 Coal Mines Act 1979.

For non-navigable, non-tidal rivers, the registered proprietor of adjacent land owns the bed of the river to the middle line of the stream. See *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA), at p 609.

Amendments to s 354(2) by the RMAmA93 make it clear that compliance with the Act does not remove any obligation to obtain authority from the Crown, as owner of a river bed or lake bed, to use or occupy that bed. By contrast with the coastal marine area, the RMA does not override the Land Act 1948 in relation to the beds of lakes and rivers.

Due to ownership issues relating to consents for the extraction of gravel from a riverbed, the issue of priority of competing applications is not necessarily determined on usual first come, first served priority principles, but is instead likely to be determined by the owner of the land: *Brooklands Properties 2000 Ltd v Road Metals Co Ltd* EnvC C164/07.

A13.02 Vessels tied to land

In *Hauraki DC v Moulton* EnvC C038/97, it was held that the question whether a vessel is fixed to land depends on the degree of annexation. This involves considering: method and duration of mooring, and the possibility of whether the vessel can move under its own steam or sail. Vessels which are temporarily moored are not fixed to land; but it can be inferred from the duration of mooring that a vessel is fixed.

A13.03 Subsection (1)

The "and" in "unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan" is a true conjunctive. This interpretation achieves the general purpose of s 13, which is to protect river and lake beds, and restrain the type of activities that can be conducted in relation to them: *Southland RC v NZ Deer Farms Ltd* 24/6/04, Judge Smith, DC Invercargill CRN3025010005.

A13.04 Meaning of "deposit"

In *Re an Application by Contact Energy Ltd* EnvC C116/04, the Court considered whether a dam which slowed the flow of water causing sediment to settle on a lake bed, meant that the dam operator was depositing a substance onto the lake bed within the meaning of s 13(1)(d). The Court considered that ss 13 and 15 were designed to complement each other and held that the term "deposit" was a subset of "discharge", and excluded more general discharges and passive lack of interference, such as allowing

something to escape. The Court concluded that to "deposit" in s 13 (and probably also in s 12) means "reasonably directly and actively to place or empty a substance (not being a contaminant) onto a lake or river bed or into the water above the bed". The question of how direct and active the action must be is a question of fact and degree. The Court found that a resource consent was not required for the settling of alluvium in the lakes because the activity was too indirect and passive. It was, however, permissible for conditions to be imposed on the water permits for damming, and to avoid, remedy or mitigate adverse effects of the deposition of alluvium as a result of the damming (see *Re an Application by Contact Energy Ltd* EnvC C127/04, for the final form of the declaration). The Court also held that the regional plan could not, through its rules, impose more rigorous obligations than s 13(1)(d) itself.

A13.05 Meaning of "disturb"

In *Re an Application by Contact Energy Ltd* EnvC C116/04, the Court found there were two differences between the uses of the word "disturb" in s 13 of the Act. Section 13(1)(b) introduced connotations of a mechanical and direct activity with direct physical interference of the substrate of the bed, rock or other material beneath. Section 13(2)(b) also used the term as an active verb and the Court considered that it probably included the senses of "disturb" used in s 13(1)(b). The Court found that the most important difference was that the subsections have different objects: the former being concerned with the inorganic environment and the latter with ecosystems. The Court held that the erosion of the shores and banks of the hydro lakes which resulted from the damming, did not fall within the category of direct physical interference to the inorganic material of the river or lake beds and, therefore, no consent was needed under s 13(1)(b). While the erosion of the shores of the lake by wave action at high lake levels was in one sense caused by the control gates at the outlet, the Court considered that this cause was much less direct than in *Marlborough DC v NZ Rail Ltd* [1995] NZRMA 357 (PT), where there was a reasonably direct causal link between the cause and the disturbance. In the case of the hydro lake, the waves were caused by wind blowing across the fetch of the lake. The Court held that while erosion was not disturbance within the meaning of s 13(1)(b), it may be disturbance to habitats within the meaning of s 13(2)(b). It concluded that the council may, therefore, have been entitled to promote a rule to manage the erosion of habitats.

A13.06 Subsection (4) and relationship to s 9

Subsection (4) means that consent under s 13 does not remove any need for consent under s 9. The fact that each consent authority can take into account effects primarily controlled by the other does not make any difference: *Thompson v Queenstown Lakes DC* EnvC C103/97.

A13.07 Interrelationship with other Acts

The effects of impediments to freshwater fish passage can be considered by consent authorities under s 13 or s 14, as the jurisdiction of the Director-General of Conservation under the Conservation Act 1987 and the Freshwater Fisheries Regulations 1983 is exercised for a different and narrower purpose from that of a consent authority under the RMA. There is no inconsistency between the two powers, and both can be given effect: *Re Auckland RC* (2002) NZRMA 241 (EnvC).

A13.08 Nature of s 13 consents

In *Brooklands Properties 2000 Ltd v Road Metals Co Ltd* EnvC C164/07, the Environment Court noted that an application under s 13 is defined as a "land use consent", and accordingly, is concerned with the use of land rather than resource allocation or property rights. Consents to excavate and disturb a river bed do not allocate the gravel resource or authorise the taking of it. The permission of the land owner (usually the Crown) may also be required to take the resource. See A14.04 and A122.04.

Resource Management Act 1991

14 Restrictions relating to water

(1) No person may take, use, dam, or divert any—

(a) Water (other than open coastal water); or

(b) Heat or energy from water (other than open coastal water); or

(c) Heat or energy from the material surrounding any geothermal water—

unless the taking, use, damming, or diversion is allowed by subsection (3).

(2) No person may—

(a) Take, use, dam, or divert any open coastal water; or

(b) Take or use any heat or energy from any open coastal water,—

in a manner that contravenes a rule in a regional plan or a proposed regional plan unless expressly allowed by a resource consent or allowed by section [20A] (certain existing lawful activities allowed).

(3) A person is not prohibited by subsection (1) from taking, using, damming, or diverting any water, heat, or energy if—

(a) The taking, use, damming, or diversion is expressly allowed by a rule in a regional plan **[**and in any relevant proposed regional plan**]** or a resource consent; or

(b) In the case of fresh water, the water, heat, or energy is required to be taken or used for—

(i) An individual's reasonable domestic needs; or

(ii) The reasonable needs of an individual's animals for drinking water,—

and the taking or use does not, or is not likely to, have an adverse effect on the environment; or

(c) In the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) In the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) The water is required to be taken or used for fire-fighting purposes.

Editorial Note - Statutes of New Zealand

Section 14 was based on ss 21 and 34 Water and Soil Conservation Act 1967.

History Note - Statutes of New Zealand

Subsection (2) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Show the historical text (7 July 1993 to 31 July 2003)
Subsection (3)(a) was amended, as from 7 July 1993, by s 12 Resource Management Amendment Act 1993 (1993 No 65) by inserting the words "and in any relevant proposed regional plan".

Commentary - Resource Management

Cross references

s 2 "coastal water", "environment", "fresh water", "geothermal water", "open coastal water", "person", "proposed plan", "regional plan", "resource consent", "rule", "tikanga Maori", "water"
s 3 meaning of "effect"
s 20 certain rules in proposed plans not to have effect
s 354 Crown's existing rights to resources to continue

A14.01 Scope

Section 354 continues the vesting in the Crown of the sole right to take, use, dam, divert, or discharge into, water effected by s 21 Water and Soil Conservation Act 1967, but the provisions of this section are wider. This section specifically restricts the taking of heat or energy from water or from the material surrounding geothermal water, and the taking, use, damming, or diverting of coastal water, including open coastal water. See also s 34 of that Act.

A14.02 Water provision off site to subdivided lots

It was argued, in *Wheeler Forrest Assocs Ltd v Farquhar* [2001] 2 NZLR 417 (HC), that an easement to convey water was insufficient to supply domestic water for a subdivision, in the absence of a transfer to each lot owner of part of a consent obtained by the original subdivider to take water. Section 14(2)(b) would not require a partial transfer of a water permit, because "an individual's reasonable domestic needs" is not confined to the owner or occupier of the servient tenement. The Court declined to determine whether the exemption conferred by s 14(3)(b) extends to off-site use for domestic purposes, but noted obiter that it had concerns with the concept of the exemption extending that far.

A14.03 Water

In *Alexander v Wellington RC* (2005) 11 ELRNZ 39 (EnvC), the Court considered a submission that water-supply water was, at common law, "artificial water" which did not therefore fall within the scope of s 14. The Court held that the definition of water under the Act was broader than the definition under common law and therefore did encompass water taken from the water race of an irrigation scheme.

In *Opiki Water Action Group Inc v Manawatu-Wanganui RC* EnvC W064/04, the Court considered an artesian water supply where the water naturally flowed to the surface. The Court did not consider that the right to water, whether as a permitted activity or by means of a resource consent, carried with it a right to access or gain it by any particular means. The right was simply to take up to a certain amount of water from a given resource. The Court held, in applying *Auckland Acclimatisation Soc v Sutton Holdings Ltd* [1985] 2 NZLR 94; (1984) 10 NZTPA 225 (HC), that the existing lawful users had privileges rather than rights under the Act, either under s 14 or as permitted activities. Even if water levels or well pressures fell, the ability to access water had not been removed although the means of its extraction may be more expensive or less convenient. There was no right to the pressure which gave rise to free flowing artesian water. The effects on pressure and resultant effects on farmers and other affected landowners were,

however, relevant to the discretion as to whether or not to grant consent. See also *Napier CC v Hawke's Bay Catchment Board* (1978) 6 NZTPA 426.

A14.04 Rights or permits

The full Court in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268; (2005) 11 ELRNZ 207; [2005] NZRMA 251 (HC), declined to make a declaration that existing water permits did not limit a regional council's powers and discretions under ss 104-104D to grant water permits to others in respect of a specified (and over-allocated) water resource. The RMA's comprehensive statutory management regime for water allocation and use effectively prescribes a licensing system. The first in time to obtain a resource consent enjoys an exclusive right to the resource, having priority in terms of rights to use the resource. A number of provisions in Part 6 of the Act elevate the status of a water permit from a bare licence to a licence plus a right to use the resource.

The principle of non-derogation of grant applies to all legal relationships which confer a right in a property. The grantor may not frustrate the purpose which the parties shared when they entered the relationship, unless expressly authorised by the relevant instrument to interfere with, diminish or derogate from the other's entitlement, or act inconsistently with the grant.

Thus, where a water resource is fully allocated in a physical sense to a permit holder a consent authority cannot lawfully grant another party a permit to use the same resource, unless specifically empowered by the RMA. The Court found that this express power exists in s 68(7) to include in a regional plan a rule relating to maximum or minimum levels of flows or rates of use of water; s 128(1)(b) to review consent conditions once a regional rule under s 68(7) becomes operative; s 314(1)(f) to change or cancel a resource consent if information made available to the consent authority by the applicant contained inaccuracies, which materially influenced the decision to grant consent; and s 329(1) to apportion water where a regional council considers there is a serious temporary shortage in part or in the whole of its region. None of these powers allow a council to grant a consent to another party, which may have the effect of reducing the original consent. Each covers a specific situation where limitations may need to be imposed on the original consent for reasons other than granting water to another party.

See A122.04.

A14.05 Diversion

"Diversion" is not defined in the RMA or in the former Water and Soil Conservation Act 1967. *Chatham Islands Seafoods Ltd v Wellington RC* EnvC A018/04, applied *Stewart v Kanieri Gold Dredging Ltd* [1982] 1 NZLR 329, which held that diversion of water could include rechannelling, without altering the course of the main water body. *Chatham* held that non-flowing water (here groundwater) can be diverted by turning it aside or deflecting it so that it takes a different position. The exception in s 14(3)(b) does not apply to diverting water: *Chatham* (above). In addition, the evidence did not establish the water was required to be taken for stock needs, and the diversion had an adverse effect on the environment.

In *Save Happy Valley Coalition Inc v Solid Energy NZ Ltd* EnvC C170/06, the Court held that there is no diversion of rainwater until the point that it hits the ground.

Resource Management Act 1991

15 Discharge of contaminants into environment

(1) No person may discharge any—

(a) Contaminant or water into water; or

(b) 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; or

(c) Contaminant from any industrial or trade premises into air; or

(d) Contaminant from any industrial or trade premises onto or into land—

unless the discharge is expressly allowed by a rule **[**in a regional plan and in any relevant proposed regional plan**]**, a resource consent, or regulations.

(2) No person may discharge any contaminant into the air, or into or onto land, from—

(a) Any place; or

(b) Any other source, whether moveable or not,—

in a manner that contravenes a rule in a regional plan or proposed regional plan unless the discharge is expressly allowed by a resource consent**[**, or regulations,**]** or allowed by section [20A] (certain existing lawful activities allowed).

[(3) This section shall not apply to anything to which section 15A or section 15B applies.**]**

Editorial Note - Statutes of New Zealand

Parts of s 15 had their roots in s 21 Water and Soil Conservation Act 1967, and the Clean Air Act 1972.

History Note - Statutes of New Zealand

Subsection (1) was amended, as from 7 July 1993, by s 13 Resource Management Amendment Act 1993 (1993 No 65) by substituting the words "in a regional plan and in any relevant proposed regional plan" for the words "of a regional plan".

Subsection (2) was amended, as from 17 December 1997, by s 5 Resource Management Amendment Act 1997 (1997 No 104) by inserting the words ", or regulations,". See s 78 of that Act as to the transitional provisions.

Subsection (2) was amended, as from 1 August 2003, by s 95 Resource Management Amendment Act 2003 (2003 No 23) by substituting the expression "20A" for the expression "20". See ss 109 to 113 of that Act as to the transitional and savings provisions.

Show the historical text (20 August 1998 to 31 July 2003)
Subsection (3) was inserted, as from 20 August 1998, by s 5 Resource Management Amendment Act 1994 (1994 No 105). See cl 2 Resource Management Amendment Act 1994 Commencement Order 1998 (SR 1998/209).

Commentary - Resource Management

Cross references

s 2 "contaminant", "discharge", "industrial or trade premises", "land", "person", "proposed plan", "regional plan", "regulations", "resource consent", "rule", "water"
s 15A restrictions on dumping and incineration of waste or other matter in coastal marine area
s 15B discharge of harmful substances from ships or offshore installations
s 20 certain rules in proposed plans not to have effect
s 107 restriction on grant of certain discharge permits
Summary Proceedings Act 1957 (1957 No 87)
s 67(8) conduct of hearing

A15.01 "Contaminant"

(1) Minor impacts on water quality

This definition is sufficiently broad to include substances which may have only a minor impact on water quality. See also *Roydhouse v Hawke's Bay RC* 6/5/94, Gallen J, HC Napier CP15/94, where the Court accepted that 1080 poison bait was a contaminant for the purposes of s 15 and *Doug Hood Ltd v Canterbury RC* [2000] 1 NZLR 490; [2000] NZRMA 166 (HC), where dam materials washed into a river were a contaminant (as evidenced by downstream changes in the river's colour).

Contrast *Te Runanga O Taumarere v Northland RC* A108/95 (PT), partially reported at (1995) 2 ELRNZ 41; [1996] NZRMA 77, where the Tribunal held that treated sewage effluent would not be a contaminant because it would be indistinguishable from the receiving waters in physical terms.

It is immaterial whether the change in the land is very localised or widespread. It is the fact of the change, and not its extent or effect that matters. Equally there is no warrant for applying the permitted baseline test in these circumstances: *Works Infrastructure Ltd v Taranaki RC* (2002) 8 ELRNZ 84; [2002] NZRMA 517 (HC). The Court went on to conclude that the de minimis principle was unavailable to a defendant in a prosecution under the RMA.

(2) Offal and blood

Offal and blood are contaminants because they are likely to change the physical, chemical, and biological condition of land onto or into which they are discharged: *Bay of Plenty RC v Pro Pacific Ltd* [1993] DCR 289.

(3) Air contaminants

Soda ash (similar to commercially available washing soda) was held to be a contaminant as it was likely to change the physical condition of the air: *Wellington RC v Unilever NZ* 3/7/97, Judge Kenderdine, DC Wellington CRN7032004016-21.

For telecommunication signals as a potential contaminant see A15.04.

(4) Energy

For a discussion of energy being considered as a contaminant see *NZ Shipping Federation v Marlborough DC* EnvC W038/06.

A15.02 Subsection (1)

(1) Discharge

As the definition of "discharge" in s 2 includes "emit" and "allow to escape", it is to be construed as

extending to "cause to discharge". The natural and ordinary meaning of "discharge" involves engaging in an activity that results in the emission or discharge of a contaminant. This is consistent with the policy of preventing contamination in waterways and with *Union Steam Ship Co of NZ Ltd v Northland Harbour Board* [1980] 1 NZLR 273 (CA).

(2) Causation

The causal link between a person and the discharge will be an issue of fact in each case, and causation must be given a commonsense meaning. Further, "discharge" in the context of s 15 also extends to activities to which the statutory defences can apply, including events giving rise to a discharge that is beyond the control of a person, such as natural disaster, mechanical failure, or sabotage, and that could not reasonably have been foreseen or provided against. See *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664; [1994] NZRMA 258 (CA).

In *Doug Hood Ltd v Canterbury RC* [2000] 1 NZLR 490; [2000] NZRMA 166 (HC), the High Court found there was ample evidence establishing that the appellants were in control of construction of a dam. It confirmed that the District Court was entitled to infer that if appropriate precautionary steps were not taken, a flood situation could result in overtopping. The District Court was dealing with a strict liability offence, and the necessary causal link between the loss of the dam and the appellants' actions was established.

In *Northland RC v Tranz Rail Ltd* 15/5/96, Judge Bollard, DC Whangarei CRN6088003518, the Court held that the prosecution had established a sufficient causal link between it and the discharge. Tranz Rail was in a position of control, and had failed to properly control the operation that resulted in the discharge. It was aware of the possibility that a discharge could occur but had failed to institute the precautions it should have to prevent such discharges.

(3) "May result in" — para (b)

In *Bay of Plenty RC v Pro Pacific Ltd* [1993] DCR 289, the Court considered that the words "may result in" may pose a lesser test than "likely to result in" or "liable to result in".

(4) Onus of proof

In *Juken Nissho Ltd v Northland RC* [2000] 2 NZLR 556; [2000] NZRMA 410 (CA), the Court of Appeal upheld a High Court decision concerning the onus of proof under s 15(1) (see *Juken Nissho Ltd v Northland RC* (2000) 6 ELRNZ 250 (HC)). The burden of proof lies on a defendant to show that on a balance of probabilities a discharge occurred lawfully in accordance with the defendant's resource consent. The exception in s 15(1) ("unless the discharge is expressly allowed by ...") is not part of the description of the offence, but is truly an exception provision within s 67(8) Summary Proceedings Act 1957, which states that an exception need not be proved by the informant.

(5) Section 15(1)(c)

In *Queenspark Residents Assn Inc v Canterbury RC* EnvC C033/04, the Environment Court considered whether a discharge to air of landfill gases, resulting from decomposition, fell within s 15(1)(c). The Court did not need to decide the point, but tended to the view that the indirect contaminants (different from those deposited at the landfill) were not caught by s 15(1)(c).

A15.03 Point of discharge

In *Minister of Conservation v South Taranaki DC* W061/93 (PT), the Minister applied for a declaration as to whether a sewage discharge was into the coastal marine area, onto land, or into water. The sole issue was as to the point of discharge. The Tribunal accepted the principle stated in *Kerikeri Properties Ltd v Northland Catchment Commission and RWB* (1977) 6 NZTPA 344 (TCPAB), at p 348, that the point of discharge is the point at which the waste leaves the effective control of the discharger. The subsequent course of that discharge is relevant to the effects of the discharge. In that case it was held that the discharge in question fell to be regulated under s 15 at the point it reached land or water which was not within the coastal marine area. Accordingly, a discharge permit, rather than a coastal permit, was required.

See also *Manawatu-Wanganui RC v Genet* 1/11/95, Judge Treadwell, DC Palmerston North CRN5010003779, and *Auckland RC v Bitumix Ltd* 16/6/93, Judge Willy, DC Otahuhu CRN3048009825/93,

for examples of findings as to the point of discharge.

The Court in *Canterbury RC v Doug Hood Ltd* (1998) 4 ELRNZ 395 (DC), distinguished the decision in *Minister of Conservation v South Taranaki DC* (above), holding that it was not necessary to establish loss of control to prove that a discharge had occurred.

The distinguishing feature was that the charges related not to a discharge of water but to discharge of contaminants, that is, of the dam wall itself.

A15.04 Telecommunication signals

In *World Services NZ Ltd v Wellington CC* (1993) 1B ELRNZ 32 (PT), it was submitted that radio signals were a contaminant requiring a discharge permit. The Tribunal considered that grant of a resource consent for transmission of radio signals would necessarily include a discharge consent — whether or not expressed in the consent granted. The Tribunal stated (obiter) that the transmission of radio waves was an activity coming within the RMA.

The Court declined jurisdiction on a reference seeking to determine whether radio frequency issues were a contaminant, leaving the question open: *Telecom NZ Ltd v Christchurch CC* EnvC C036/03.

A15.05 Application of "de minimis" principle to discharges to air

In *AFFCO NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224 (PT), the Tribunal accepted that some discharges to air are so insignificant that they could be ignored under the principle de minimis non curat lex. However, it rejected the proposition that because the discharges were not discernible beyond the boundaries of the site the principle applied. Unlike discharges to water, the RMA does not provide for mixing zones for discharges to air: s 107(1).

A15.06 Discharges from industrial or trade premises

In *Taranaki RC v Works Infrastructure Ltd* (2002) 8 ELRNZ 75; [2002] DCR 814 (DC), the Court concluded that the premises from which the contaminant originates and the land on to which it is deposited need not be contiguous or directly connected. The contaminant originated at industrial premises, and there was a direct causal nexus between its leaving those premises and its being subsequently deposited onto farm land, which was sufficient to satisfy s 15(1)(d).

An appeal from District Court was dismissed — see *Works Infrastructure Ltd v Taranaki RC* (2002) 8 ELRNZ 84; [2002] NZRMA 517 (HC). However, the High Court did comment that the District Court may have erred in describing the relationship between the party undertaking the discharge and the origin of the contaminant in terms of sufficiency of causal nexus. The Court considered that causation is irrelevant in this context. Rather it is the relationship between the entity and the operation which matters. For a critique of the District Court and High Court decisions, see *Queenspark Residents Assn Inc v Canterbury RC* EnvC C033/04.

A15.07 Existing use rights — subs (2)

Roydhouse v Hawke's Bay RC 6/5/94, Gallen J, HC Napier CP15/94, was an application for an injunction to stop the dropping of 1080 poison. The High Court considered resource consents issued for an activity which contravened a rule in a proposed regional plan. Gallen J indicated that the fact that such operations had been undertaken nationwide by a range of statutory bodies for a number of years may be insufficient to enjoy existing use rights under s 20 for the purposes of subs (2). The Court preferred the view that the activity was lawfully established if it had been carried out under previous legislation.

Public Works Act 1981

234 Emergency entry on land

(1) Where there is imminent danger to life or property or a likelihood of serious interference with or damage to any public work arising from any cause whatever and which requires immediate remedial measures, [any Minister of the Crown] or other authority having control of the public work may, on giving to the occupier or, if there is no occupier, to the owner of any land, such oral notice as may be practicable in the circumstances, enter on that land and do such work as is necessary and sufficient to remove the danger or the cause of the likelihood of serious interference.

(2) If, under subsection (1) of this section, entry is made on any land without notice, advice that entry has been so made shall be given to the occupier or, as the case may require, the owner of the land as soon thereafter as is practicable, and if the occupier or owner cannot be found, the notice shall be displayed in a prominent place on the land.

(3) Where the work done under this section includes work that could have been done under section 133 of this Act, all costs and expenses incurred by [any Minister of the Crown] or other authority in respect of the latter work may be recovered as a debt due to [that Minister] or other authority from the person who would have been liable to pay if the work had been done under that section.

(4) No action or proceedings shall be brought against the Crown, [any Minister of the Crown], or any local authority, or any officer or servant of any of them, or any member of a local authority, or against any other person whatever, to recover damages for any damage to property occasioned by any person in the exercise or performance in good faith of his powers, duties, or obligations under this section.

Compare: 1928 No 21 s 10(3); 1955 No 59 s 2

History Note - Statutes of New Zealand

Subsection (1) was amended, as from 1 April 1988, by s 78(1) Public Works Amendment Act 1988 (1988 No 43) by omitting the words "any Minister of the Crown".

Subsection (3) was amended, as from 1 April 1988, by s 78(2)(a) Public Works Amendment Act 1988 (1988 No 43) by substituting the words "any Minister of the Crown" for the words "the Minister".

Subsection (3) was amended, as from 1 April 1988, by s 78(2)(b) Public Works Amendment Act 1988 (1988 No 43) by substituting the words "that Minister" for the words "the Minister" where they secondly occur.

Subsection (4) was amended, as from 1 April 1988, by s 78(3) Public Works Amendment Act 1988 (1988 No 43) by substituting the words "any Minister of the Crown" for the words "the Minister".