Before the Proposed Northland Regional Plan Hearings Panel

In the Matter	of Schedule 1 of the Resource Management Act 1991 (**Act**)
And	
In the Matter	of the Proposed Northland Regional Plan
Hearing Reference	Hearing Block 4

Legal Submissions on behalf of Yachting New Zealand Incorporated

Dated 12 September 2018

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Introduction

1. I represent Yachting New Zealand (**YNZ**).

2. As described in paragraph 6 of its submission, YNZ is New Zealand's national sports body for competitive and recreational sailing and boating.

3. YNZ maintains the position set out in its submission. A statement of evidence from Max Nelson has been lodged by YNZ in support of aspects of its submission.

4. I do not propose to address the law applicable to the task before this Panel. I presume it will have been canvassed by Council and/or other submitters who have appeared before me.

5. As the panel is aware, the section 42A reports prepared by Council staff include one report addressing the "General approach", and 26 additional reports each addressing a specific subject matter. This legal submission addresses the following:

    a. Definitions;

    b. General approach;

    c. Aquaculture;

    d. Coastal structures;

    e. Marine pests;

    f. Moorings and Anchorage.

Definitions

6. YNZ submitted on three definitions.[1] Two relate to anchorages whilst the other relates vessel/ship.

[1] Paragraphs 7-9 of YNZ submission

Recognised Anchorage and Recognised Recreational Anchorage

7. The Proposed Regional Plan (**PRP**) for Northland as recommended by the staff[2] does not include in the Definitions section, any Anchorage definition. The PRP does refer to Regionally Significant Anchorages.[3] Regionally Significant Anchorages are mapped.[4]

8. YNZ proposes definitions for anchorages[5] by reference to recommended policies and the findings of the Environment Court through the Plan Change 4 (**PC 4**) process.

9. Recommended Policy D .5 .2 states (relevantly) that:

   Aquaculture activities must avoid adverse effects (after taking into account any remediation or mitigation) on:

   …significant tourism and/or recreation areas[6], and

   …anchorages referred to in cruising guides, pilot books and similar publications as being suitable for shelter in adverse weather.[7]

10. The wording of D .5 .2 above is essentially drawn from Policies approved through PC 4. However, the subsequent rules recommended in the PRP process do not properly give effect to the overarching policy, nor do they align with the findings of the Environment Court through PC 4.

11. Through the PC 4 proceeding the Court adopted the term Recognised Anchorages of Refuge, which were defined as being an anchorage which is referred to in cruising guides, pilot books and similar publications as being suitable shelter for small/large craft in adverse weather. It is this definition which is replicated in Policy D .5 .2.

12. In contrast, at paragraphs 19 – 21 of section 42 A Report – Moorings and

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[2] Proposed Regional Plan for Northland, section 42A recommendations, July 2018
[3] C .1 .2 .5, C.1 .2 .6, C .1 .2 .11, C .1 .3 .3, C .1 .3 .4, C .1 .3 .6, C .1 .3 .9, C .1 .3 .10, C .1 .3 .12, C .1 .3 .14, C .1 .6 .4
[4] refer section I Maps.
[5] YNZ Submission, paragraph 7 - 8
[6] D .5 .2 (3)
[7] D .5 .2 (5)

Anchorage, the report author suggests that the PRP has two classifications for anchorages. These are Regionally Significant Anchorages and Recognised Anchorages. As already noted, neither are defined.

13. Recommended Policy D .5 .11 refers to recognition of the value of Regionally Significant Anchorages "as anchorages that are critical refuges during bad weather".

14. Recognised Anchorages are referenced in recommended policy D .5 .12, which states:

    Recognise the value of anchorages commonly used by the boating community because of their shelter, holding and/or amenity values, as evidenced by their reference in cruising guides, pilot books or similar publication.

15. The recommended PRP provisions do not appear to refer to Recognised Anchorages in any other objective, policy or rule.

16. The absence of clear definitions, and the adoption of different wording to that approved by the Environment Court through the PC 4 process, create potential confusion.

17. YNZ supports a Recognised Anchorages definition which aligns with PC 4. If necessary, the words "of Refuge" could be added to the end of this definition as imposed by the Environment Court. The introduction of a defined term that aligns with Court approved wording is a more appropriate planning response than the suggested Regionally Significant Anchorages method recommended by Council.

18. YNZ also propose an alternative method to the proposed Recognised Anchorages reference in the PRP. Instead a definition for Recognised Recreational Anchorages should be introduced. These anchorages should be mapped.

19. The consequential changes proposed by YNZ to plan rules would require adverse effects to be avoided on both Recognised Anchorages [of Refuge] and Recognised Recreational Anchorages. The section 42 A Report – Moorings

and Anchorage criticises this submission at paragraph 29. The suggestion is that there is no basis for such an approach with respect to Recognised Recreational Anchorages.

20. To the contrary, there is a clear basis by reference to findings of the Environment Court in the context of PC 4.

21. Policy 27.4.6 in the Operative Plan states that aquaculture activities will not be appropriate in a number of identified areas, including "significant tourism and social recreation areas". As already canvassed above, that wording is replicated in proposed policy D .5 .2.

22. Policy 27.4 in the Operative Plan was followed by an "Explanation". The Explanation included the following text explicitly introduced by the Environment Court:

Significant tourism and/or recreation activities in the Northland CMA are generally found in locations **where one or more** of the following attributes or resources are present:

(a) Public reserves

(b) Outstanding natural character and/or outstanding natural landscapes (including seascapes)

(c) **Recognised recreational anchorages**

(d) Tourism facilities or services

(e) Outstanding natural features (for example Piercy Island)

(f) Concentrations of marine mammals, seabirds and fish (for example fishing grounds and dolphin watching locations)

(g) Recognised dive sites

(h) Popular beaches

(i) Popular surf breaks

(j) Coastal walkways

(k) Significant historic heritage

In most instances, the adverse effects of aquaculture on significant tourism and/or recreation activities would be unavoidable. Aquaculture generally occupies relatively large areas and includes structures that sit below, on and/or above the water surface or in intertidal areas. Where there is a concentration of tourism and/or recreation activity, these structures can significantly impede access and/or detract from the values that attract people to the area.

23. In my submission Recognised Recreational Anchorages have been recognised as significant tourism and/or recreation areas. Recognised Recreational Anchorages host significant tourism and/or recreation activities. Accordingly by reference to policy D .5 .2, aquaculture activities must avoid adverse effects upon them.

24. In the alternative, as a minimum this should be explicit provision in the PRP which requires significant adverse effects on Recognised Recreational Anchorages to be avoided.[8]

Vessel/Ship

25. The PRP wording uses a definition of "Vessel" which it appears is "based on" the "Ship" definition drawn from Section 2 of the Maritime Transport Act 1994, with some additions made by Council staff. These additions and the basis for them are addressed in the 42A report regarding Marine Pests.

26. The commentary in the 42 A report Marine Pests suggest that the additions are worthwhile because they provide some additional clarification and therefore the definition is not proposed to be amended.

27. Ship definition:

Ship means every description of boat or craft used in navigation, whether or not it has any means of propulsion; and includes—

(a) a barge, lighter, or other like vessel:

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[8] This alternative relief is accepted as appropriate in the section 42 A Report – Moorings and Anchorage – refer paragraph 30

(b) a hovercraft or other thing deriving full or partial support in the atmosphere from the reaction of air against the surface of the water over which it operates:

(c) a submarine or other submersible

28. In contrast Council proposed to define Vessel as:

Means every description of boat or craft, whether or not it has any means of propulsion, and includes but is not limited to:

1) a barge, lighter, raft, or other like vessel, and

2) personal watercraft (jet ski) or paddle craft, and

3) a sea plane, hovercraft or other thing deriving full or partial support in the atmosphere from the reaction of air against the surface of the water over which it operates, and

4) a submarine or other submersible.

29. As a matter of construction, I commence by observing the addition of the words "but is not limited to" in the Vessel definition after the word "includes" is superfluous.

30. The addition of "sea plane" is problematic for two reasons. First, it extends the definition to a completely different class of transport. The Maritime Transport Act 1994 includes in its definitions section, a definition of aircraft.[9] An aircraft is a different thing to a ship (and for that matter a vessel). Second, a seaplane does not derive full or partial support in the atmosphere from the reaction of air against the surface of the water over which it operates – when airborne it derives support in the atmosphere from the reactions of the air without reference to the surface of the earth/water. Therefore, the addition of seaplane prior to the reference to hovercraft is nonsensical.

31. Following on from the above, the explicit implication of the Council definition is that every reference to Vessel includes a jet ski, paddle craft and seaplane.

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[9] which has the same meaning as in the Civil Aviation Act 1990: *aircraft* means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth

The bulk of the rules in the plan which refer to Vessel may not be readily applicable in a practical sense to jet skis, paddle craft and seaplanes. In my submission the term “Ship” is more appropriate. If an expanded definition is to be adopted, then as a minimum the reference to sea plane should be deleted.

General Approach

32. Paragraphs 10 – 19 of YNZ’s submission address the structure of the PRP and objectives. Like a number of other submitters YNZ criticised the notified approach which adopted a single objective, and which was driven by a bottom-up approach.

33. I don’t propose to repeat those matters set out in the YNZ submission. The Council officers have effectively conceded in the section 42A report that the criticisms of the notified approach were justified.

34. The addition of meaningful and focused objectives is supported. However, YNZ maintain the position that there should be explicit recognition for discharge of untreated and treated sewage from vessels, and the need to manage associated health and safety risks to vessels in the context of any requirement to discharge sewage at nominated distances from Mean High Water Springs. The relevant recommended Objectives are F.0.3 and F.0.8.

35. The best fit would appear to be an amendment to recommended Objective F.0.3 water quality management, which should have an additional matter added as follows:

    Manage the use of land and discharges of contaminants so that:

    …

    The rules governing discharge of sewage from ships provide for the health and safety of ships and their occupants.

36. The recommended policies still fail to engage with wastewater discharge to coastal water of untreated and treated sewage from vessels. Policies need to be amended or added to address this issue. I provide detailed submissions

regarding sewage management below.

Aquaculture

37. YNZ's submission supports the prohibited areas established through the Plan Change 4 process. It follows that YNZ opposes the change in activity status sought by Westpac Mussels Distributors Limited. I agree with the observations in the section 42 A report – Aquaculture at paragraphs 28 – 29, that adopting a prohibited activity status is an available planning response and further that there is no substantive evidence to suggest that this position, which was held to be appropriate by the Environment Court, should change.

38. YNZ support for the PC 4 outcomes means that it acknowledges in the context of prohibiting aquaculture activities from certain areas that there is a balance to be struck. For that reason, despite YNZ stakeholders highly valuing the entirety of the Bay of Islands, YNZ does not go so far as to suggest that the balance of the Bay of Islands (i.e. those remaining non-prohibited areas) should be included as a prohibited area.

39. YNZ does not seek that the north western arm of the Kaipara Harbour (leading into the Wairoa River) be added as an additional prohibited area.[10]

40. Provisions providing for realignment and extensions need to be dealt with very carefully, to avoid opening the door to unanticipated outcomes. If extensions to authorised aquaculture (C .1 .3 .4) is to be provided for as a restricted discretionary activity, then the matters of discretion should encompass effects on recreational and amenity values. These values are valid and important from a resource management perspective and are not captured by any of the other proposed matters of discretion.

41. Rule C .1 .3 .9 should provide for noncomplying activity status, rather than discretionary. In certain circumstances aquaculture exists in areas within which it would not be appropriate for it to establish as a "new" activity. Whilst such aquaculture has a legal right to continue, that does not equate to an acknowledgement that such aquaculture would appropriately be consented

[10] refer section 42 A report – Aquaculture, paragraph 35

in the context of today's legislative environment. Given establishment of new aquaculture in such an area is prohibited, relevant objectives and policies are unlikely to support aquaculture in such a location. With that policy backdrop, logically any new aquaculture (irrespective of the fact that it may be an extension to something which exists) should face comprehensive assessment pursuant to section 104 D of the RMA.

42. YNZ supports introduction of a policy which addresses adverse effects associated with aquaculture. No explanation is provided in the 42 A report – Aquaculture which justifies why a policy listing benefits is appropriate, but a policy listing adverse effects is not. Listing benefits but not adverse effects is unbalanced. Pointing to other provisions which focus on managing adverse effects does not assist – the management of adverse effects is a different matter again.

Coastal structures

43. The YNZ submission at paragraphs 36 – 40 addresses rules considered in the Coastal Structures section 42A report.

44. Commencing with C.1.1.6, being a proposed rule that enables establishment of monitoring and sampling equipment in the CMA as a permitted activity, YNZ's position is that for Recognised Anchorages and Recognised Recreational Anchorages the installation of such equipment shall be non-complying.

45. The section 42A report states "[YNZ] has not provided any reasoning or justification for the request. I am therefore unable to assess this request". This assertion on the part of the reporting officer is incorrect. The reporting officer has failed to consider and respond to the matters of concern raised by YNZ.

46. The YNZ submission clearly states that the anchorage definitions proposed by YNZ identify the full range of anchorages where structures are not appropriate due to the values of those anchorages – those values being the shelter they offer and the significant amenity and recreational value they have. There is a clear basis for protection for these anchorages in comparison to other areas within the CMA.

47. The installation of monitoring and sampling equipment as a permitted activity as provided for in the rule does not effectively provide for avoidance or mitigation of adverse effects on these anchorages.

48. C .1.1.6 refers to the size of structures in square metres, but this measurement excludes anchors and anchor lines. Anchor lines running on an angle beneath the water pose a navigational risk to vessels, particularly where the placement and depth of those lines is unknown.[11] Further such lines effectively result in an area which not only cannot be traversed by vessels underway, but also must sit outside the swing arc of a vessel secured on a mooring or anchor, given the potential risk of conflict with that structure anchor line. The implication is that the area consequently "off-limits" to vessels is likely to be significantly larger than 3 m^2 or 10 m^2.

49. There is a cross-reference to general conditions in rule C .1 .8. Those general conditions do include a requirement that structures not cause a hazard to navigation. It is unclear what meaningful restriction this imposes upon the location of installation of such structures. C .1 .1 .6 (4) does require that the monitoring or sampling equipment not obstruct access by water to various structures, navigational channels or moorings. However, there is no requirement that the equipment avoid impinging upon the "swing arc" of a vessel secured to such a mooring (which is a different issue than as to whether access to the mooring as impeded in any way).

50. The rule structure and activity status do not expressly reserve to Council the ability to control and manage the size and location of the structures, nor is there any acknowledgement in the rule regarding potential for adverse effects upon the use of moorings, the availability of anchoring space or recreational or visual amenity values.

51. In addition, there would appear to be no time limit imposed at all for an installation of equipment not exceeding 3 m^2 in size. It appears such equipment could be in place indefinitely. Equipment 10 m^2 in size may be in

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[11] Which they will be, because the ability to place the structures as a permitted activity on an ad hoc basis will mean they are not shown on navigational charts or cruising guides.

place up to 365 days during a two-year period.

52. The proposed provisions to manage monitoring and sampling equipment in the CMA might be described as extremely generous. YNZ is prepared to accept such an approach for the CMA generally, but there are clear reasons why a more restrictive regime is required for Recognised Anchorages [of Refuge] or Recognised Recreational Anchorages. In my submission the appropriate response is that the activity should be noncomplying in such anchorages.

53. YNZ's criticisms of rule C .1 .1 .11 are in essence similar to those addressed above. It is acknowledged that rule C1 .1 .11 proposes as a matter of control consideration of effects on mapped Regionally Significant Anchorages. However, this proposed rule still fails to accurately identify the matters of concern which need to be managed by Council and maintains a consent approach which is too generous. In my submission the most appropriate response is that the activity status be noncomplying.

54. If the Panel were to disagree with YNZ's submission seeking noncomplying activity status, then in my view as a minimum position the activities should be restricted discretionary (with identified discretions added to capture those matters referred to in this submission) in order that Council give due consideration to all relevant matters, have proper control over the activity by reference to those matters, and have the ability to decline consent where those matters cannot be properly addressed.

55. The proposed amendments to C.1.1.16 and C1.1.22 are consequential changes related to the amendment sought by YNZ with respect to Anchorage definitions. I address those Anchorage definitions elsewhere in this submission.

Marine pests

56. The YNZ submission at paragraphs 57 – 59 addresses rules considered in the Marine Pests section 42A report.

57. YNZ 's relief sought with respect to rule C .1 .7 .1 (deletion of subsection 2) is

supported by the 42 A report.

58. In my view the proposed wording for subsection 1 (as amended in the 42A report) remains problematic, to the extent it refers to whether biofouling "is not likely" to contain any marine pest. The subsection is intended to be a standard, compliance with which results in the activity in question being permitted. Accordingly, it is important that compliance with the standard can be objectively ascertained both by members of the public subject to the rule, and by those responsible for enforcing it.

59. A likelihood test in this context is not appropriate. In my submission the rule is better worded on the basis that subsection 1 is amended only to state "the biofouling does not contain any marine pest". Beyond that, management of marine pest risk more appropriately sits with the Marine Pathway Management Plan.

60. YNZ have also identified an issue with the wording of C .1 .7 .1 and C .1 .7 .6, related to how passive release of biofouling is addressed. I comment on that further below.

61. Turning to C.1.7.2 which relates to in-water vessel hull and niche area cleaning, the proposed amendments to the rule set out in the 42A Report are accepted by YNZ with the exception of the proposed wording for subsection 7.

62. YNZ agrees that the appropriate applicable standard (in line with the now settled Marine Pathway Management Plan) is "light fouling". Under the Marine Pathway Management Plan, a vessel with light fouling is not subject to any limitations upon movement within Northland. That is because the Marine Pathway Management Plan acknowledges that light fouling does not pose a risk such that it justifies controls. It is important to also acknowledge that light fouling as defined does not include any allowance for the presence of marine pests.

63. Given the above, it is illogical to word subsection 7 in a manner which limits in-water cleaning of light fouling to the Commercial Coastal Zone, Marina

Zone, Mooring Zone or within 50 m of a Mooring Zone. There is no resource management basis for these restrictions. Vessels with light fouling only are free to traverse any zone within Northland, because they do not pose a risk (in the context of marine pests) which was determined to require control.

64. Accordingly, C.1.7.2(7) should be deleted with the effect that in-water cleaning can occur in any of the five zones within Northland's CMA. For the avoidance of doubt, YNZ does support retention of C.1.7.2(4) which prevents in water cleaning within a Significant Ecological Area.

65. YNZ also submitted with respect to C .1 .7 .6. YNZ simply wish to ensure that the passive release of biofouling from vessels was properly addressed, such that a vessel with ablative antifouling, or a vessel underway where water pressure may force biofouling to drop off, did not need to apply for resource consent so long as the biofouling in question did not contain any marine pest.

66. As proposed to be worded the rule conflates two issues. The heading of the rule appears to suggest it is intended to deal with passive release of biofouling only. Despite this the rule would also appear intended to identify a discretionary activity status for "navigation, mooring or anchoring of a vessel or the relocation or placement of a structure with biofouling on the hull and niche areas" where those activities are not undertaken in compliance with the provisions of rule C .1 .7 .1. That is presumably because no activity status is identified in rule C .1 .7 .1, where the permitted activity standards are not met.

67. The difficulty with the proposed wording is that the discharge of contaminants through passive release of biofouling from a vessel hull and niche area cannot be a permitted activity under rule C .1 .7 .1 because this activity is not addressed by that rule. The outcome as a result is that passive release of biofouling defaults to a discretionary activity pursuant to C .1 .7 .6, in circumstances where the intention is that such passive release if it occurs from a vessel complying with C .1 .7 .1 is a permitted activity.

68. YNZ is in agreement with Council as to the intended outcome, it is simply a question of amending the rules to ensure that outcome is accurately captured.

69. There are various alternatives from a wording perspective to achieve the outcome intended. In my submission the solution is as follows:

   a. Amend the wording of C .1 .7 .1 by adding reference to passive release of biofouling. As a result, that rule would commence as follows:

      The navigation, mooring or anchoring of a vessel or the relocation or placement of a structure with biofouling, <u>and any consequential discharge of contaminants through passive release of biofouling from a vessel hull and niche areas</u>, is a permitted activity, provided…

   b. C .1 .7 .6 could then be left as proposed to be worded.

70. The 42 A report addressing Marine Pests also addresses the relief sought by YNZ with respect to the definition of “Vessel”. It is not clear why that definition has been singled out for comment in the context of Marine Pests only. I have made submissions regarding definitions above.

Moorings and Anchorage

71. I have already addressed Anchorage definitions.

72. Paragraphs 28 – 30 of the YNZ Submission address D .5 .9. Subsection (2) should be deleted because the recommended policy imports a higher standard of assessment (in effect that the activity must have no more than minor adverse effects). That is inappropriate – the application should be addressed on its merits by reference to the provisions of the RMA. YNZ’s submission that subsection (3) should be deleted because the terminology proposed with respect to precedent is imprecise, legally inaccurate by reference to case law principles, uncertain and speculative is recommended to be accepted.[12]

73. Paragraphs 41 – 44 of the YNZ Submission address rules which impose anchoring restrictions. As the section 42 A report – Moorings and Anchorage makes clear, the rationale underpinning the proposed restrictions is the

[12] refer Council Errata report

proposition that it will aid achievement of compliance with sewage discharge regulations and rules.

74. To be frank, the restrictions on overnighting are poorly thought out. Compliance with sewage discharge regulations is required in law. The limitation on overnight stays in a certain location does not have any direct relationship to whether or not the vessel concerned complies with sewage discharge regulations.

75. The rule imposes limitations upon freedom of navigation, recreation and use of the CMA, without any definitive benefit by reference to sewage disposal which is the subject of completely separate regulations and an entirely different set of plan rules.

76. Furthermore, the rules as worded are uncertain, will be difficult to enforce and is likely to be ineffective. By way of example, there is essentially no realistic way for Council enforcement staff to establish whether a vessel has remained within an enclosed water for more than 14 consecutive days. Nor is there any realistic way for them to establish whether a vessel which has been within the enclosed water for more than 14 consecutive days does not return to that enclosed water within three calendar days after leaving it.

77. The proposed wording refers to "consecutive days or part days". There is no clarity as to how the reference to part days is properly interpreted. Presumably the intention is to avoid the "clock stopping" if a vessel were to briefly exit the enclosed waters and return. As worded the lack of clarity is likely to result in the rule being unenforceable.

78. In addition, the references in the rule to a "location" meaning any position within a thousand metre radius appear entirely random, and completely absent any resource management basis.

79. That the rule is not fit for purpose is clearly demonstrated by a hypothetical example where a vessel staying in one location or in enclosed water for more than 14 consecutive days periodically makes a brief trip to a location where sewage can be disposed of in accordance with applicable regulations and

rules. Despite undertaking lawful sewage disposal, that vessel would run afoul of these overnighting provisions which ostensibly are in place to assist in achieving lawful sewage disposal.

Discharge of Sewage from ships into Coastal Waters

80. YNZ opposes the proposed change to discharge of sewage rules (which in the Operative Plan align with relevant regulations). There is no probative evidence provided by Council to justify the change they suggest.

81. YNZ has a long history of involvement throughout the country in RMA processes, starting with submissions to virtually all of the first regional coastal plans promulgated under the RMA. As a result, it became apparent that there were a range of different approaches or methodologies being proposed in these Coastal Plans in relation to controlling the discharge of sewage from boats.[13] Because many boat owners will travel in their vessels outside the coastal waters of the region in which their boat is based, it became evident that the preferred approach was a national regulation controlling boat discharges, so that boat owners could become familiar with and conform to the same requirements anywhere on New Zealand's coastline.

82. Representing New Zealand's recreational boating interests, YNZ joined with the MfE in developing the Resource Management (Marine Pollution) Regulations.

83. For its size, New Zealand has an extensive coastline, and a multitude of attractive cruising grounds outside of the principal coastal towns and cities. Although over time sewage pump out facilities have been incorporated into new marina developments,[14] unlike the US and Europe much of our popular cruising grounds[15] are relatively remote from any pump out locations and where such locations are available they are extremely limited in number and

[13] There was also the need to control the disposal of other contaminants, and certain “contaminant” discharges such as engine cooling water which are part of the normal operations of a ship needed to be provided for.
[14] Reference Policy 23(5) NZCPS.
[15] Examples are the outer Hauraki Gulf, the Bay of Islands and Northland’s coastline from Bream Head to Doubtless Bay, and the Marlborough Sounds. Remoteness is not simply physical distance but also has a relationship to travel times to access facilities.

daily capacity (i.e. the number of vessels which can be serviced by that pump out location per day). In addition, given the need for pump out locations to have a connection to sophisticated treatment systems, these are unlikely to be available in remote locations in the foreseeable future, if ever.

84. The regulatory controls establish a set of distance and depth parameters beyond which any discharge of treated and untreated sewage from a boat must occur. It is no accident that the distance from shore is expressed in the regulations in nautical miles as well as metres, as this is the distance measurement used on marine charts. The depth limitation can be readily ascertained from a depth sounder, which is the most basic form of recreational boat instrumentation after a compass.

85. In my submission there is no plausible evidence that the application of these straightforward controls since 1998 have not achieved the intended outcome, which was to afford protection of inshore water quality and thus (inter alia) recreational values (including for swimming) and to protect marine farms and marine reserves.

86. It is not unusual to see allegations suggesting boat discharges of sewage as the cause of coastal water pollution or shellfish contamination, but on examination these contentions cannot be verified, and often the culprit has been confirmed as a land based source. The mere presence of boats in a bay or harbour often seems to be sufficient reason to some to justify the allegation, without consideration of whether such a discharge would be contrary to the Marine Pollution Regulations (thus assuming unlawful behaviour), or the likelihood of contamination coming from another source.

Proposed Plan Provisions

87. In summary the provisions proposed make significant changes to the restrictions on discharge of sewage currently in place.

88. A Marine pollution limit is identified in appendix I Maps. This limit is referenced in rules C .1 .2 .2, C .1 .2 .10, C .6 .9 .7.

89. The extensions to the default areas affect the Bay of Islands, Whangaroa

Harbour and Whangaruru Harbour.

90. The changes will have significant implications upon those boating. In particular, potential health and safety implications arise.[16]

91. As identified in YNZ's primary submission, and in these legal submissions, proposed objectives and policies fail to recognise:

    a. Recognition on a national scale by way of Regulation that management of discharge of untreated and treated sewage from vessels requires specific provision; and

    b. Health and safety risks to vessels if they are required to discharge sewage significant distances from Mean High Water Springs.

92. The discharge of sewage from ships[17] is controlled by the Resource Management (Marine Pollution) Regulations 1998 which provide for specific and limited variations through Coastal Plan provisions to the regulatory provisions controlling these discharges.

93. The regulations were made under s360 of the RMA, and legally are an exemption to s15. The regulatory controls on contaminant discharges from ships are not subject to the policy provisions of the New Zealand Coastal Policy Statement (NZCPS) – the regulations make specific provision for disposal of sewage to water notwithstanding Policy 23.[18]

94. As a result, specific objective, policy and rule treatment of discharge of sewage from ships is appropriate, and further making specific provision for such discharge is not contrary to the policy provisions of the NZCPS.

95. An objective should be introduced which makes specific reference to these

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[16] refer evidence of Max Nelson

[17] The RMA s2 definition references the definition in s2(1) of the Maritime Transport Act 1994. It covers the entire range of vessels from ocean-going ships to small recreational craft including dinghies and small yachts. However for practical purposes it is the larger yachts (generally keelers) and launches equipped with accommodation and marine toilets that the regulations are aimed at.

[18] This was recognised by the Board of Inquiry Report on the NZCPS - Volume 2 Working Papers page 300, 2008.

health and safety matters.

96. Consequently, the proposed rules reflect the above shortcoming. Requiring ships, and in particular smaller recreational vessels, to travel further offshore to discharge untreated sewage, is not supported by or justified by any established regionwide adverse effects resulting from the discharge and introduces significant potential health and safety risks particularly in more challenging weather conditions.

97. The section 32 reports prepared by the Council lack probative evidence to justify such rules. There is a lack of science or data to support the proposed rules. The section 32 reports also fail to properly address the costs and benefits of the proposed objectives, policies and rules with respect to the discharge of sewage from ships.

98. The section 42A report does not rectify the shortcomings in the section 32 assessment, and indeed acknowledges the absence of evidence.[19] The report refers in paragraph 49 – 54 to alleged reasons why the additional restrictions are appropriate.

99. The assertion that the Regulations "provide for untreated sewage to be discharged in or near areas that are heavily used for recreational swimming, diving and shellfish collection" is incorrect. Any such discharges are required to be 500 m seaward of mean high water springs, in water exceeding 5 m depth, more than 500 m from a marine farm, more than 200 m from a marine reserve, and more than 500 m from any mataitai reserve. These restrictions result in significant separation from sensitive areas.

100. The reporting planner acknowledges there is no monitoring data to support the position recommended.

101. Absent supporting data, the reporting planner refers to two examples of public comment. There is no evidence to establish these comments reflect public opinion, nor in any event is "public opinion" the metric by which this panel must make decisions. The comments do not include any data or science

[19] refer paragraph 47 of the section 42A report

supportive of an increase in discharge restrictions. Bald assertions that the discharge of untreated sewage into water is unacceptable directly conflict with nationwide Regulation which allows such discharge.

102. There is no empirical basis for the assertion that such discharge is "no longer accepted by the public", and in any event such discharges are lawful.

103. In law, the general assertions referenced above are inappropriate in the context of the task before Commissioners. They do not provide information or reasoned analysis which would enable the Commissioners to undertake an effects-based section 32 analysis to resolve whether the provisions put forward are the most appropriate way to achieve the purpose of the Act.

104. YNZ acknowledges that there is concern regarding management of sewage discharge into water. However, YNZ's position is that the regulations in force adequately manage potential adverse effects of such discharge.

The New Zealand Coastal Policy Statement

105. Under Policy 23, the NZCPS requires that authorities "do not allow" the discharge of untreated human sewage directly into water. The wording "do not allow" indicates a mandatory prohibition against the discharge of untreated sewage. However, the Marine Pollution Regulations take precedence over the NZCPS. This was recognised by the Board of Inquiry into the NZCPS and is the reason why the issue of sewage discharges from boats is only dealt with in Policy 23(5). The Board recognised the regulations control the discharge of certain contaminants (including garbage and other waste) from ships, and that any departure from the regulatory controls by way of rules in a coastal plan derives from the regulations, not from policy direction found in the NZCPS.

The Status of Regulations in New Zealand and the Process for Making Regulations

106. In New Zealand an Act of Parliament is the highest source of law. The doctrine of Parliamentary supremacy ensures that Acts passed by Parliament cannot

be overturned or invalidated by the judiciary.[20] Although Acts are the highest source of law, they are not the only source.

107. The authority to create subordinate legislation can be delegated to the Executive branch of Government to make law in the form of regulations. This authority must be explicitly contained within a provision of an Act of Parliament.

Application to the Resource Management (Marine Pollution) Regulations 1998

108. The power to make regulations under the RMA is contained within s 360(1), under which the Governor-General may from time to time, by Order in Council, make regulations for any of the listed purposes.

109. The Governor-General promulgated the Resource Management (Marine Pollution) Regulations 1998 by this process, pursuant to s 360(1)(h) of the RMA. This section provides that the Governor-General may at any time make regulations "prescribing exemptions from any provision of section 15,[21] either absolutely or subject to any prescribed conditions, and either generally or specifically or in relation to particular descriptions of contaminants or to the discharge of contaminants in particular circumstances or from particular sources, or in relation to any area of land, air, or water specified in the regulations".

The Effect of the Regulations

110. Because these regulations have been made pursuant to section 360(1)(h) of the RMA, they are part of the statute law. Under section 15 of the RMA no person may discharge any contaminant into water unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan (as well as a rule in a proposed regional plan), or a resource consent.[22]

111. The Marine Pollution Regulations create an exemption to the general prohibition of discharges under s 15 of the RMA. It follows that a person will

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[20] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.
[21] The section which controls the discharge of contaminants to the CMA.
[22] Section 15(1)(d).

not be in breach of s 15 if the discharge of untreated sewage (or other contaminant)[23] complies with the Marine Pollution Regulations requirements. The regulations limit the powers of a Regional Council to implement controls on the discharge of sewage from ships different from the regulation. Any rule proposed in the Plan must be within the scope of that discretion.

112. Any change to the depth or distance dimensions stated in the Marine Pollution Regulations is restricted to what the regulations permit – reference regulation 11(3), (and in respect of the discharge of treated sewage, regulation 12 (2) and 12 A (2)).

113. The regulation was drafted to ensure that any departures from the regulatory control would be by reference to discrete, identified harbours, estuaries, embayments or other parts of a region (or an increase in distance from a (specific) marine farm, marine reserve or mataitai reserve), because the boat owner or skipper of a vessel could identify these specific locations on the Marine Chart of the area (or now, in the modern age, on the chart plotter), and similarly increased distances off the chart or plotter, or increased depth using the vessel's depth sounder. YNZ acknowledge that the amendments proposed fit within these parameters.

114. However, there needs to be a sound basis for a departure from the regulatory control, as adding additional restrictions in a regional plan creates difficulties especially for visiting boats who are unlikely to be familiar with the regional plan of another region, let alone particular exemptions. By contrast, the straightforward controls on discharge in the regulations have become well known and understood over time and are easily applied across the wide range of recreational anchorages on NZ's coast.

115. In addition, potential health and safety risks must be taken account of.

Is there a need for stricter control?

116. The Council, as already mentioned above, has not provided any meaningful evidence in support of stricter controls. The resource management issue in

[23] Another important provision is the exemption for "normal ship operations".

question is whether discharge of sewage in accordance with the Marine Pollution Regulations results in unacceptable or inappropriate adverse effects on the marine environment.

117. To properly address the issue the Council would need to provide evidence as to the effects of discharge of sewage from vessels in accordance with Regulations.

118. The experience of YNZ in other plan change processes in New Zealand is that it is common for recreational boats to be targeted as the cause of contamination (when it exists) without acknowledging coastal residential communities, and residential baches and houses along the coast, all reliant on on-site septic tanks or other treatment systems as potential culprits.

119. Any concerns focussed on larger commercial ships and ferries can be separately governed by Annex IV of the Marpol Convention, as well as being subject to the Marine Pollution Regulations. If commercial vessels are bound to comply with the Marpol control, then because greater quantities of sewage are involved than with smaller recreational craft, the distances offshore are 4 nm for treated sewage, and 12nm for untreated sewage.

120. In the course of engagement by YNZ in planning processes in other regions in New Zealand regarding these issues, on several occasions submitters or Council staff have suggested that pumpout stations will offer a complete solution. For completeness I note this proposition is not supportable. To conclude that pumpout stations would address all needs for sewage disposal a cost benefit analysis would be required including assessment of:

   a. the capacity of existing stations (say calculation of the average number of vessels able to be serviced in a day by a station taking all relevant factors into account[24]);

   b. the number of new stations based on capacity and vessel numbers

[24] Which would include (in addition to the average time taken to moor, connect, pump out, disconnect, and depart) serviceability issues, and weather or tide related restrictions

in the region that would be required to service demand;

c. the feasibility of finding suitable sites for those new stations, including accessible and protected sites from a water based perspective, the need for associated land based infrastructure, consenting them and financing them.

Health and Safety

121. Health and safety risks if vessels are required to travel significant distances to discharge are a real concern, in particular if they are required to proceed to open water areas.

122. As the panel will appreciate the maritime environment is fluid with different combinations of wind strength, wind direction, depth and state of the tide, along with the unique characteristics of each vessel (size, design, method of propulsion, numbers of crew, experience of the crew) all contributing to the matrix that the skipper must assess prior to undertaking any trip.

123. As a result a proposed journey or a particular geographic location which may be safe on one day may not be on another or may be safe for a particular vessel but not for another.

124. Given the above whether a particular distance offshore is "safe" cannot be guaranteed. However, a distance of 500 m (as a generalisation) enables vessels to lawfully discharge without being forced to travel too far from shelter. The parameters also enable (relevant to the recommended provisions before the Panel) discharge in areas of the Bay of Islands and in the Whangaroa and Whangaruru Harbours which offer relatively sheltered waters in poor weather. The extensions recommended will require a ship wishing to lawfully discharge to travel into locations which in adverse conditions will significantly change potential health and safety risks.

125. The most significant example in this respect is commented on by Mr Nelson is Whangaroa Harbour. The entrance to this harbour is well-known to mariners for its challenges. The coastline to the north and south of the harbour for a significant distance is unforgiving and offers no real alternative shelter

particularly when wind and swell are onshore. Forcing ships to exit the harbour altogether to legally discharge sewage is not appropriate. Not only is there no data or scientific basis for this amendment, but the significant adverse potential health and safety implications have not been assessed.

Conclusion re discharge from ships

126. There is no scientific or other basis for a departure from the regulatory control which has stood the test of time since its introduction in 1998.

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Jeremy Brabant
Counsel for Yachting New Zealand

Dated: 12 September 2018