

15 September 2009

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For: Andrew Bashford

Dear Andrew

### **Proposed One Plan - water quality**

1. We refer to your 4 September 2009 request for advice about the status of the water quality "standards" in Schedule D (Table D 16) of the Horizons Regional Council Proposed One Plan (**Plan**). You have asked us whether these provisions are water quality standards under section 69 of the RMA.

### **Executive Summary**

2. The numerical values in Schedule D (Tables 16 and 17) are described in the Plan as water quality standards, but there is a degree of confusion in the proposed Plan and in the officers' report as to how they are intended to work. Horizons officers have indicated to you that the water quality standards included in the Plan are not water quality standards within the context of section 69 of the RMA, and that this was a deliberate decision by Horizons when drafting the Plan.
3. From the manner in which the Plan's rules implement the standards, it appears that they are intended to be in the nature of standards in relation to permitted and restricted discretionary activities, but guidelines or assessment criteria in relation to discretionary activities. However, the Plan itself does not make that intention clear so there is a significant risk that the Plan may be interpreted as bringing section 69 into play.
4. If section 69 applies, the Plan must require compliance with the standards in RMA Schedule 3 and/or in the Plan, and existing discharge permits could potentially be reviewed under section 128(1)(b) to require them to meet the standards.
5. We recommend that you seek clarification of these issues from Horizons. If Horizons does not want the standards to be section 69 water quality standards, they will need to amend the Plan to reflect that intention.

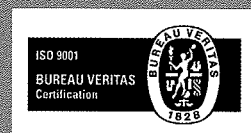
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## Background – the law

6. Under section 69 of the RMA, if a regional council incorporates water quality standards in its plan, the plan's rules must require the observance of those standards:

*"(1) Where a regional council—*

*(a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and*

*(b) includes rules in the plan about the quality of water in those waters,—*

*the rules shall require the observance of the standards specified in that Schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.*

*(2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters."*

7. The classes specified in Schedule 3 of the RMA are:

- (a) Class AE Water (being water managed for aquatic ecosystem purposes);
- (b) Class F Water (being water managed for fishery purposes);
- (c) Class FS Water (being water managed for fish spawning purposes);
- (d) Class SG Water (being water managed for the gathering or cultivating of shellfish for human consumption);
- (e) Class CR Water (being water managed for contact recreation purposes);
- (f) Class WS Water (being water managed for water supply purposes);
- (g) Class I Water (being water managed for irrigation purposes);
- (h) Class IA Water (being water managed for industrial abstraction);
- (i) Class NS Water (being water managed in its natural state);
- (j) Class A Water (being water managed for aesthetic purposes); and
- (k) Class C Water (being water managed for cultural purposes).

8. In summary, if the Plan states that particular water bodies are to be managed for one of the above purposes, **and** includes rules about water quality in those water bodies, the rules must impose the relevant standards set out in Schedule 3 (or stricter standards). Horizons may state new classes and standards if it considers that to be necessary. In addition section 69 requires such rules to require the observance of the

standards. In other words there is effectively a prohibition on activities which do not meet the standards.

## Background – the Plan

9. It is not clear from the Plan's text whether Horizons intends to utilise section 69 or not. As notified, the Plan:

- (a) Sets out a list of "water management zones", "values" and "management objectives" (as opposed to calling these classes, purposes or standards) – RPS Objective 6-1, Policy 6-1 and Table 6.2; Plan Schedule D Table D.1. Some of those values (eg NS, CR, SG, Ae, WS, IA and I) correspond to water quality classes in RMA Schedule 3, but others (eg LSC, SOS-A, SOS-R, Am, MAU, SW, CAP, FC, D) do not. An extract from Schedule D is set out below:

Table D.1: List of values, management objectives, and indication as to where they apply

Value Group	Individual values	Management Objective	Where it applies
Ecosystem Values	NS	Natural State	The waterbody is maintained in its natural state
	LSC	Life-Supporting capacity	The waterbody supports healthy aquatic life / ecosystems
	SOS-A	Sites of Significance - Aquatic	Sites of significance for native aquatic biodiversity are maintained or improved
	SOS-R	Sites of Significance - Riparian	Sites of significance for native riparian biodiversity are maintained or improved
	NFS	Native Fish Spawning	The waterbody sustains healthy native fish spawning and fry development
	CR	Contact recreation	The waterbody is suitable for contact recreation
	Am	Amenity	The amenity values of the waterbodies and their margins are maintained or improved
			Conservation Land Refer to Map D:9 Page 19 and Table D.3 Page 20
			All natural waterbodies (10 classes) Refer to Map D:10 Page 21 and Table D.4 Page 22
			Specified sites / reaches Refer to Map D:11 Page 27 and Table D.5 Page 28
			Specified sites / reaches Refer to Map D:12 Page 36 and Table D.6 Page 37
			Specified sites / reaches Refer to Map D:13 Page 40 and Table D.7 Page 41
			All natural waterbodies
			Coastal Marine Area + Specified sites / reaches Refer to Map D:14 Page 43 and Table D.8 Page 44

- (b) States that "water quality standards" relating to the identified values have been developed for each water management zone – RPS Policy 6-2, 6-3, 6-4 and 6-5, and includes tables of numerical water quality standards later in Schedule D. An extract is set out below:

Table D.17: Water quality standards for rivers and streams in each Water Management Sub-zone (Note: refer to and for water quality standards applying to rivers and streams flowing into natural lakes)

Management Zone	Sub zone	pH		Temp (°C)		DO (%SAT)	BOD <sub>5</sub> (g/m <sup>3</sup> )	POM (g/m <sup>3</sup> )	Periphyton		DRP (mg/m <sup>3</sup> )	SIN (mg/m <sup>3</sup> )	QMCI	Ammonia (mg/m <sup>3</sup> )	Tox.	Turbidity (NTU)			Clarity (m)	
		Range	Δ	<	Δ	>	<	<	Chla (mg/m <sup>2</sup> )	% cover	<	<		<		<1/2 m	< m	< 3 xm	Δ	Δ
Upper Manawatu (Mana_1)	Upper Manawatu (Mana_1a)	7 to 8.5	0.5	19	3	80	1	2.5	120	30	10	167	6	400	99	1	15	20	20	
	Mangalewainui (Mana_1b)	7 to 8.5	0.5	19	3	80	1	2.5	120	30	10	167	6	400	99	1	15	20	20	
	Mangatoro (Mana_1c)	7 to 8.5	0.5	19	3	80	1	2.5	120	30	10	110	6	400	99	1	20	20	20	
Weber-Tamaki (Mana_2)	Weber-Tamaki (Mana_2a)	7 to 8.5	0.5	19	2	80	1	2.5	120	30	10	444	6	400	99	1	15	20	20	
	Mangatera (Mana_2b)	7 to 8.5	0.5	22	3	70	2	5	120	30	10	444	5	400	99		15	30	30	
Upper Tamaki (Mana_3)	Upper Tamaki	7 to 8.2	0.5	19	2	80	1	2.5	50	30	6	70	6	320	99		5	20	20	
Upper Kumeū (Mana_4)	Upper Kumeū	7 to 8.2	0.5	19	2	80	1	2.5	50	30	6	70	6	320	99		5	20	20	

- (c) Includes rules that refer to the water quality standards in Schedule D. For example:

- (i) Permitted activity Rule 13-9 (i) includes a condition stating that "The discharge shall not, after reasonable mixing, change the natural temperature of the receiving water by more than the maximum temperature or temperature change specified by the water quality standards for the water management zone listed in Schedule D".

- (ii) Permitted activity Rule 13-24 includes a condition stating that "*The discharges shall not, after reasonable mixing, cause the receiving waterbody to breach the water quality standards for that waterbody set out in Schedule D, either from the discharge itself or in combination with any other discharges*".
  - (iii) Restricted Discretionary activity Rule 13-17 reserves discretion over "*measures required to comply with the water quality standards for the relevant water management zone(s)*".
  - (iv) Restricted Discretionary activity Rule 13-21 reserves discretion over "*measures to manage effects on surface waterbodies, including maintaining the values and water quality standards set out in Schedule D*".
10. Rules 13-9 and 13-24 refer to the water quality standards in Schedule D, and require activities to comply with these as required by section 69. Activities that do not comply with these permitted activity rules require discretionary activity consent under Rule 13-27, which does not mention the water quality objectives or standards.
11. Rule 13-17 refers to water quality standards but does not state where these are found. The rule does not expressly require compliance with the standards but the inclusion of the standards as a matter of discretion is consistent with the standards being assessment criteria or guidelines.
12. Rule 13-21 refers both to the values and the water quality standards in Schedule D, but does not require compliance with them.
13. In your discussions with Horizons you have asked for clarification about these provisions. David Murphy's evidence on the overall One Plan hearing noted that:
- "... Horizons officers and its legal advisor John Maassen, have now confirmed that the water quality standards included in the One Plan are not water quality standards within the context of section 69 of the RMA. It was also confirmed by John Maassen at the 26 May pre-hearing meeting that this was a deliberate decision by Horizons when drafting the One Plan. An indication was also given that the standards may be better defined as water quality guidelines or goals."*
14. Horizons officers have since told you that they consider the "standards" to be objectives and do not like the term "guidelines". Accordingly it seems the intention is that the standards are not intended to be standards for the purpose of section 69, however the Plan and the officers' recommendations do not make this clear.
15. The 31 August 2009 officers' report recommends the following amendments to the provisions noted above:
- (a) Amend RPS Objective 6-1 by adding a target date of 2030 for meeting the values in Schedule Ba.

- (b) Rename RPS Policy 6-1 "Water management framework" instead of "Water management zones and values".
- (c) Add the following text to that RPS framework:
- "(iii) Surface water<sup>^</sup> quality shall be managed according to the standards set in Schedule D, which provide for the values defined for each Water Management Sub-zone\*;"
- (d) Amend the numerical water quality standards in Schedule D, apparently to make those standards stricter. Indicative extracts from Schedule D are set out below:

**Table D.1a Region-wide Water<sup>^</sup> Quality Standards that apply to all natural streams and rivers<sup>^,2</sup>**

Management Zone	Sub-Zone	E.coli / 100 ml		Periphyton Cover	Diatom or Cyanobacterial Cover	OMCI % <sup>3</sup>
		< 50 <sup>th</sup> %ile	< 20 <sup>th</sup> %ile			
All Water Management Zones <sup>*</sup>	All Water Management Sub-Zones	260	550	30%	50%	20

**Table D.2a: Water Quality Standards for Rivers and Streams in each Water Management Sub-zone (Note: refer to Table D.4a for the water quality standards that apply to natural lakes):**

Management Zone	Sub-zone	pH		Temp (°C)		DO (%SAT)	scBOD <sub>5</sub> (g/m <sup>3</sup> )	POM (g/m <sup>3</sup> )	Periphyton		DRP (mg/m <sup>3</sup> )	SIN (mg/m <sup>3</sup> )	OMCI <sup>4</sup>	Ammoniacal Nitrogen (mg/m <sup>3</sup> )	Tox.	Turbidity (NTU)			Clarity (m)		
		Range	Δ	<	Δ <sup>5</sup>	>	<	<	Chla Chl a (mg/m <sup>3</sup> )	% cover	<	<	≥	<	%	<1/2 m	<m	<3 km	Δ	< 50 <sup>th</sup> %ile	%Δ
		Upper Manawatu (Mana_1)	Upper Manawatu (Mana_1a)	7 to 8.5	0.5	19	3	80	4 1.5	2.5 5	120	30	10 0.010	167 0.167	6 120	400 0.400	99	1		15	20
Mangatewainui (Mana_1b)	7 to 8.5		0.5	19	3	80	4 1.5	2.5 5	120	30	10 0.010	167 0.167	6 120	400 0.400	99	1		15	20	3	20
Mangatoro (Mana_1c)	7 to 8.5		0.5	19	3	80	4 1.5	2.5 5	120	30	10 0.010	167 0.167	6 120	400 0.400	99	1		20	20	3	20
Weber-Tamaki (Mana_2)	Weber-Tamaki (Mana_2a)	7 to 8.5	0.5	19	2	80	4 1.5	2.5 5	120	30	10 0.010	444 0.444	6 120	400 0.400	99	1		15	20	3	20
	Mangatera (Mana_2b)	7 to 8.5	0.5	22	3	70	2	5	120	30	10 0.010	444 0.444	6 100	400 0.400	99			15	30	2.5	30



- (e) Replace references to "Schedule D" in Rules 13-9 and 13-21 with references to "Schedule Ba", which now contains an expanded version of the more general "*Water Management Zones and Associated Values*" previously contained in Schedule D. An extract from Schedule Ba is set out below:

B) **WATER MANAGEMENT VALUES KEY:** showing the management objectives, where they apply in the region, and where to find them in Schedule B.

Value Group	Individual values	Management Objective	Where it applies	Location in Schedule Ba	
Ecosystem Values	NS	Natural State	The <i>water_body</i> is maintained in its natural state	Conservation Land Refer to Map D:9 Page 16 and Table D:3 Page 20	Map Ba:11 page Ba-53 and Table Ba:11 Pages Ba-54 – Ba-55
	LSC	Life-Supporting Capacity	The <i>water_body</i> supports healthy aquatic life / ecosystems	All natural waterbodies* (40 classes) Refer to Map D:10 Page 21 and Table D:4 Page 22	Map Ba:10 page Ba-46 and Table Ba:10 pages Ba-30 – Ba-43
	SOS-A	Sites of Significance – Aquatic	Sites of significance for native aquatic biodiversity are maintained or improved	Specified sites / reaches Refer to Map D:14 Page 27 and Table D:5 Page 28	Map Ba:12 page Ba-57 and Table Ba:12 pages Ba-58 – Ba-67
	SOS-R	Sites of Significance – Riparian	Sites of significance for native riparian biodiversity are maintained or improved	Specified sites / reaches Refer to Map D:12 Page 26 and Table D:6 Page 27	Map Ba:13 page Ba-69 and Table Ba:13 pages Ba-70 – Ba-72
	NFS IS	Native Fish Spawning – Inanga Spawning	The <i>water_body</i> sustains healthy native fish Inanga spawning and fry egg development	Specified sites / reaches Refer to Map D:13 Page 40 and Table D:7 Page 41	Map Ba:15 page Ba-79 and Table Ba:15 pages Ba-80 – Ba-81
	WM	Whitebait Migration	The <i>water body</i> is maintained or improved to provide safe passage of inwardly migrating juvenile native fish known collectively as whitebait	Specified sites / reaches Refer to Map D:15 Page 47 and Table D:9 Page 48	Map Ba:17 page Ba-88 and Table Ba:17 pages Ba-89 – Ba-90
	Recreational and Cultural Values	CR	Contact recreation	The <i>water_body</i> is suitable for contact recreation	All natural waterbodies*
Am		Amenity	The amenity values of the <i>water_bodies</i> and their margins are maintained or improved	Coastal Marine Area – Specified sites / reaches Refer to Map D:14 Page 43 and Table D:8 Page 44	Map Ba:16 page Ba-93 and Table Ba:16 pages Ba-94 – Ba-96
NE		Native Fishery	The <i>water_body</i> sustains populations of native fish that can be harvested in a sustainable manner	Specified sites / reaches Refer to Map D:15 Page 47 and Table D:9 Page 48	
MAU		Mauri*	The Mauri* of the <i>water_body</i> is maintained or improved	All natural waterbodies*	
SG		Shellfish Gathering	The <i>waterbody</i> is suitable for shellfish harvesting	Coastal waters (CMA)	
SOS-C		Sites of Significance – Cultural	Sites of significance for cultural values are maintained	To be defined	
TF		Trout Fishery	The <i>water_body</i> sustains healthy rainbow and / or brown trout fisheries.	Specified zones / reaches (3 categories) Refer to Map D:16 Page 50 and Table D:10 Page 51	Map Ba:18 page Ba-92 and Table Ba:18 pages Ba-93 – Ba-99
TS		Trout Spawning	The <i>water_body</i> meets the requirements of rainbow and brown trout spawning and larval and fry development	Specified sites / reaches Refer to Map D:17 Page 57 and Table D:11 Page 58	Map Ba:19 page Ba-101 and Table Ba:19 pages Ba-102 – Ba-112
Ae		Aesthetics	The aesthetic values of the <i>water_body</i> and its margins are maintained or improved	Specified sites / reaches Refer to Map D:18 Page 66 and Table D:12 Page 67	Map Ba:14 page Ba-74 and Table Ba:14 page Ba-75 – Ba-77

## Discussion

16. Section 69 of the RMA has effect whether or not Horizons intends to utilise it unless the Plan makes it clear that section 69 does not apply. In the absence of that, if the tests in section 69 are met, then either the standards in RMA Schedule 3 apply, or more stringent or specific standards in the Plan apply and must be enforced. The difficulty with this is that section 69 does not allow for any discretion. The rules must require the observance of the standards.
17. The key questions under section 69 are: has the regional council:
  - (a) provided in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and
  - (b) included rules in the plan about the quality of water in those waters?
18. If the answers to both those questions are yes, the Plan's rules must require the observance of the standards specified in RMA Schedule 3 in respect of the appropriate class or classes (or alternatively the Plan may specify more stringent standards).
19. The fact that the Plan uses some classes or standards that are different to those in RMA Schedule 3 does not stop section 69 from applying, because section 69(2) envisages this. Nor does the use of the word "values" rather than "classes", although

the wording used introduces a potential ambiguity. Horizons should resolve that ambiguity by clearly stating in the Plan that the "values" either are or are not "classes" for the purpose of section 69.

20. *Question 17(a)*: In the One Plan as notified, the only express statements that certain waters are to be managed in accordance with the Schedule D values are contained in the RPS (Objective 6-1 and Policy 6-1) rather than in the Plan itself. These RPS objectives and policies are in turn referred to in Plan Policy 13-1 as being matters to which Horizons will have particular regard. Because section 60 refers to plans rather than policy statements there is a reasonable argument that the Plan does not require the waters to be managed for the listed purposes. However, this argument may not necessarily succeed since the document is identified as a plan even though parts of it are an RPS. In our view if Horizons does not intend section 69 to apply it needs to be explicit about this. The risk is that others will argue that the Plan as a whole clearly signals that certain waters are to be managed for specified purposes.
21. *Question 17(b)*: The Plan includes rules about the quality of the specified water bodies, so the answer to this question is "yes".
22. On the basis of these answers, in our opinion there is a significant risk that the Plan may be interpreted as bringing section 69 into play, and must therefore comply with that section by requiring compliance with the standards in RMA Schedule 3 and/or in the Plan. If, as seems the case, Horizons does not intend that outcome it should amend the Plan to make that intention unequivocal.
23. Even if section 69 is not triggered, there is still a question about whether the numerical values and narrative management objectives in Schedule Ba and Schedule D in fact contain standards as opposed to guidelines or something else.
24. Schedule D contains numerical water quality standards that are labelled as such, and the rules refer to these as standards. If that version is adopted the Plan will contain standards for the specified water bodies. Accordingly even if section 69 does not apply, if a proposal breaches a standard referred to in a rule it will become a fully discretionary activity. We also note that the discretionary activity rule does not mention the standards.

25. It is less clear whether the narrative "management objectives" in notified Schedule D (now Schedule Ba) are standards or guidelines or something else. For the purposes of comparison, we have set out a selection of the values and management objectives from Schedule Ba along side the classes and standards in RMA Schedule 3:

One Plan Value/ RMA Class	One Plan Management Objective	RMA Standard
CR (Contact Recreation)	The water body is suitable for contact recreation.	(1) The visual clarity of the water shall not be so low as to be unsuitable for bathing.  (2) The water shall not be rendered unsuitable for bathing by the presence of contaminants.  (3) There shall be no undesirable biological growths as a result of any discharge of a contaminant into the water.
NS (Natural State)	The water body is maintained in its natural state.	The natural quality of the water shall not be altered
WS (Water Supply)	The water body is suitable as a raw drinking water source for human consumption.	(1) The pH of surface waters shall be within the range 6.0–9.0 units.  (2) The concentration of dissolved oxygen in surface waters shall exceed 5 grams per cubic metre.  (3) The water shall not be rendered unsuitable for treatment (equivalent to coagulation, filtration, and disinfection) for human consumption by the presence of contaminants.  (4) The water shall not be tainted or contaminated so as to make it unpalatable or unsuitable for consumption by humans after treatment (equivalent to coagulation, filtration, and disinfection), or unsuitable for irrigation.  (5) There shall be no undesirable biological growths as a result of any discharge of a contaminant into the water.

26. The above comparison indicates that for some values (eg CR and WS), the Plan's management objective is less specific (and arguably less stringent) than the corresponding standard in RMA Schedule 3. For others (eg NS), the corresponding wording is quite similar.
27. Standards can be numerical or narrative (eg RMA Schedule 3 and section 107 contain narrative standards). Numerical values are generally acceptable if they are guidelines,



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but the Plan clearly refers to the numerical values in Schedule D as standards. The key issues are as follows:

- (a) The Plan needs to make it clear whether the provisions are standards or guidelines; and
- (b) If they are standards, there needs to be a clear scientific basis for imposing the particular standards.

#### *Standards or guidelines*

- 28. The rules as currently worded provide that non-compliance with the standards elevates the activity classification from permitted or restricted discretionary to full discretionary. However the relevant full discretionary activity does not make reference to the standards. If section 69 applies then compliance with the standards would need to be required under the full discretionary rule as well. If section 69 does not apply then it would seem that it is intended that fully discretionary activities do not need to comply with the standards.
- 29. We also note that if the provisions are standards, and if this is reflected in rules, existing discharge permits could be reviewed under section 128(1)(b) to require them to meet the standards. This could have a potentially significant impact on the City Council's operations. However in order for the new water quality standards to apply to the exercise of existing consents, the rules would need to specifically provide for that (section 68(7)), and they do not. Existing consents with review conditions can still be reviewed but could not be required to meet the new standards as a result of such a review.
- 30. As the provisions currently stand, in our opinion the numerical standards in Schedule D are standards. The narrative management objectives now contained in Schedule Ba are referred to as standards in Rule 13-21 (although this may be an error<sup>1</sup>) and in our opinion they probably qualify as standards despite the Horizons officers' preference for the word "objectives".
- 31. It seems reasonably clear that Horizons did not envisage that section 69 would apply but, as discussed above, this has not been made clear enough in the Plan. It also seems that it is intended that the guidelines or objectives are in fact standards in relation to permitted and restricted discretionary activities but are intended to be guidelines in relation to discretionary activities. All of this should be made clearer.

#### *Scientific basis for numerical standards*

- 32. In light of the effect of standards, before Horizons introduces standards that contain numerical limits on particular substances (such as those in Schedule D), it should have a clear scientific basis for the limits that are chosen. That basis should be made available for review and comment by submitters. If the standards are more stringent

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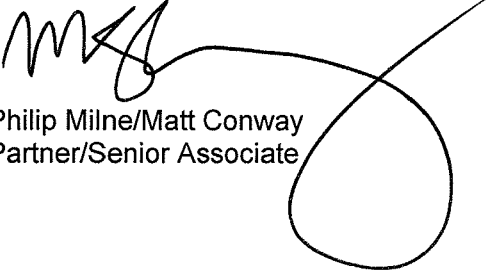
<sup>1</sup> The officers have recommended that the reference to Schedule D in Rules 13-9 and 13-21 be updated to now refer to Schedule Ba in line with their recommendation to move the values and management objectives to Schedule Ba. Rule 13-21 now refers to "*the values and water quality standards set out in Schedule Ba*". Given that the numerical water quality standards are still in Schedule D, we expect the officers intended Rule 13-21 to now refer to "*the values set out in Schedule Ba and the water quality standards set out in Schedule D*".

than the RMA Schedule 3 standards, Horizons should make it clear why it considers the Schedule 3 standards are not appropriate in its case.

### Conclusion and next steps

33. There is a degree of confusion in the proposed Plan and in the officers' report as to just how these standards or objectives are intended to work. In our view it needs to be made much clearer that section 69 is not intended to operate. In particular that the waters in question are not being managed for the purposes listed but rather that there are some management objectives that Horizons is aiming for. It also needs to be made clearer that the standards are standards for the purpose of some rules but are more in the nature of guidelines or assessment criteria in relation to fully discretionary activities (if that is what is intended). The justification for some of the numerical standards will also need to be explained. There is a grave danger with "one size fits all" numerical standards. For example for dissolved oxygen, nitrates etc.
34. We recommend that you raise these issues with Horizons. In light of Horizons' officers' statements that the Council deliberately chose not to include section 69 water quality standards, they will need to amend the Plan to reflect that intention. We can help with drafting specific amendments if you wish.

Yours faithfully  
SIMPSON GRIERSON



Philip Milne/Matt Conway  
Partner/Senior Associate