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In the matter of the Resource Management Act 1991

and in the matter An inquiry pursuant to Schedule 1 RMA into the provisions of the proposed One Plan notified by Horizons Regional Council.

RESPONSE TO MISCELLANEOUS LEGAL QUESTIONS

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1. In a number of rules in Chapter 13 there is reference to section 15(2) and section 15(2A) in the activity description. The Hearing Panel has asked whether or not those references are correct. Section 15(1) contains the presumption of unlawfulness of a discharge. Section 15(1) is limited to discharges that fall within (1)(a)-(d). Reference to section 15(1) in the context of discharges in the activity description is appropriate whether or not the classification is permitted or otherwise. Section 15(2) precludes discharge to air or land from any place in a manner that contravenes a national environmental standard. The presumption is that discharges not caught by section 15(1) are permitted unless they contravene section 15(2) or section 15(2A). Section 15(2A) has a presumption of lawfulness of discharges from any place not caught by section 15(1) unless a regional rule provides otherwise. In summary:

    (a) Reference to section 15(1) is appropriate for all classes of activity.

    (b) Section 15(2) is not relevant to any class of activity as it relates to discharges caught by national environmental standards.

    (c) Reference to section 15(2A) in the activity list is appropriate for all classes of activity unless the activity is permitted without performance conditions and should also not be referred to if the intention is to limit the discharge to discharges caught by section 15(1)(a)-(d). Generally such a limitation is not intended by the rule as notified.[1] Where the activity is permitted subject to conditions the activity is not permitted unless the conditions are met and consequently it should be made plain the rule addresses an activity covered by Rule 15(2A).

2. The pink version of the POP now refers to the sections and subsections in part 3 RMA as amended by the Resource Management (Simplifying and Streamlining) Amendments Act 2009. An issue was raised as to the applicable law. Section 161 of the 2009 Amendment Act makes it plain that any policy statement or plan notified prior to the commencement of the Act (i.e. 1 October 2009) must be determined as if the 2009 Act amendments has not been made. In the context of activity descriptions, this means that any new sources of jurisdiction cannot be inserted in the activity descriptions to clarify the scope of the rule. However, where the substantive power existed but the subsection reference, for example has changed, then it is sensible and permissible to refer to the current reference. This would qualify as a minor alteration (see Clause 16(2) Schedule 1 RMA).

3. A question arose whether or not there should be a guide to interpretation in the glossary. A guide to interpretation is not supported. Rules have the status of regulation (see section 68(2)). Consequently they qualify as an enactment (see definition of regulations in the Interpretation Act 1999 (see sub paragraph (e)). In respect of rules therefore, the construction will be

[1] Section 15(2A) was introduced by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. POP is to be determined as if that Amendment Act had not been passes. Between 18/8/2003-1/10/2009 section 15(2A) as it presently is, was section 15(2) but without the reference to national environmental standard. Therefore the jurisdiction to impose the rule existed prior to the 2009 Amendment Act but the reference to section 15(2A) is now the correct one.

guided by the Interpretation Act 1999. Interestingly that means section 34 applies which states:

> "A word or expression used in regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant or other instrument made under an enactment has the same meaning as it has in the enactment under which it is made."

4. In the context of plural and singular, section 33 IA applies.

5. Objectives and policies however do not have the status of regulation. A provision in the glossary which provides that the objectives and policies are to be interpreted in the same manner as rules under the Interpretation Act 1999 may have some merit but there are also reasons why such an approach is not desirable. Objectives and policies often deal with broad subject matter and policy direction and are not of the same character and class as rules. Objectives and policies should be read as goals not rules.

6. In POP as notified, some rules have performance conditions that would not apply if third party approval was obtained. See for example rule 15-2. Third party consents have been deleted as qualifications to performance standards for permitted activities in chapters 13 and 15. Bollard ECJ in *Maclean v. Thames Coromandel District Council* commented on provisions that qualify performance conditions for permitted activities based on third party consents in the following passages:

> "(19) As Mr Brabant observed a reference to the provision of consent by a neighbour and other persons affected rather implies that a resource consent application is called for. Apart from the question of determining in a given instance whose consent is actually neede, then **that** person may effectively determine whether or not the activity is permitted. In effect, the rule leaves it to the decision of another (or others depending on the circumstances) to determine whether the activity can occur as of right, or otherwise be the subject of a restricted discretionary activity consent application according to the rule's footnote."
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> "(20) Normally one expects qualifying criteria for a permitted activity to be clearly specified and capable of objective attainment, without being dependent for classification purposes, as here, on the identification of a person or persons affected (presumably by the Council), and the subjective response of such person or persons. We note as well the possibility, recognised in the footnote, of a case arising where affected parties cannot be suitably identified. In that regard, one could at least imagine a situation of disagreement between a would-be developer and the Council as to whether some third person is in fact a person affected."

The deletion of these qualifications by Clare Barton is legally sound.

John Maassen