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Angela Bell
Planning Policy Manager
Upper Hutt City Council
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UPPER HUTT
By email

Dear Angela

DISTRICT PLAN REGULATION OF EARTHWORKS IN A WATERCOURSE

- 1 You have asked us whether a district plan can control earthworks within the bed of a river or stream, given these activities are controlled under section 13 of the Resource Management Act 1991 (**RMA**) by regional councils?

Summary

- 2 A district plan can potentially control earthworks within the bed of a river or stream because a river or stream bed falls within the definition of 'land'. However, you need to carefully identify what function under section 31 of the RMA that you are relying on in imposing this control and what effect you are addressing (so a distinction can be made between the regional and district rules, if necessary). Any such provisions must also be consistent with any relevant regional plan provisions.
- 3 Our advice is set out in detail below.

Can a district plan provide for earthworks within the bed of a river or stream given these are controlled under section 13 of the RMA by regional councils?

- 4 The functions of a district council are set out in section 31 RMA. Those functions include provisions for the use, development and protection of land. Specifically, section 31 includes:

- 1 Every territorial authority should have the following functions for the purpose of giving effect to this Act in its district:

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(a) The establishment, implementation and review of objectives, policies and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

...

(b) The control of any actual or potential effects of the use, development or protection of land, including for the purpose of:

(1) the avoidance of mitigation or mitigation of natural hazards and

(2) the prevention and mitigation of any adverse effects of the development, subdivision or use of contaminated land

(3) the maintenance of indigenous biological diversity.

5 'Land' is defined in the RMA to include the bed of a stream or river:

Land:

(a) includes land covered by water and the airspace above land; and

(b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule does not include the bed of a lake or river; and

(c) in an national environmental standard dealing with a territorial function under section 31 or a district rule, includes the surface of water in a lake or river.

6 Practically, this means is that any district plan rules that relate to 'land' will include riverbeds, as the proposed definition in the proposed plan is the same as the one in the RMA. However, the definition of 'earthworks' in the proposed plan does not refer to disturbance of 'land' so to include riverbeds you would have to specifically refer to them, as you have in 23.1 with reference to 'stream corridor' (albeit, what that covers is not overly clear).

7 There has been some caselaw on this issue. In *Canterbury Regional Council v Banks Peninsula District Council* CA99/95 the Court of Appeal stated:

A regional council may, to the extent allowed under section 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 30(1)(c) to (h). A territorial authority may, to the extent allowed under section 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under section 31. Neither a regional council nor a territorial authority has power to make rules for purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority are also subject to section 75(2).

8 Accordingly, you will need to carefully assess whether the reason for the control on earthworks in riverbeds is within one of your functions, most likely:

- 8.1 To achieve integrated management of the effects of the use, development, or protection of land and associated physical resources, or
- 8.2 To control any actual or potential effects of the use, development or protection of land (including to prevent or mitigate adverse effects of development).
- 9 If so, you can validly make a district rule in relation to it, assuming it passes through the section 32 criteria. The other issue to consider is whether the rule/s you are proposing 'cut across' how the relevant regional plan deals with earthworks in riverbeds because section 75(4) of the RMA requires that the district plan must not be inconsistent with a regional plan, for any matter specified in section 30(1) of the RMA. Part of this exercise will require consideration of whether the purpose of the control is different to any similar controls in the regional plan (eg, yours is to protect structures in floods and regional councils is to ensure water quality is maintained or enhanced).
- 10 There was also some useful commentary by the Court of Appeal, from an enforcement perspective, in *Woolley v R* [2014] NZCA 178. That case looked at whether activities occurring in the bed of a river contrary to section 13 of the RMA, could also amount to a breach of section 9(3) of the RMA. It said that charges under both sections were possible where there was an overlap of functions assigned to territorial and regional authorities:
- Because land includes land covered by water, on this definition land includes a riverbed, except in a national standard, which is not relevant here. Therefore, on the face of it, s 9(3) can apply to the use of a riverbed. The question is whether s 13 (or some other provision in the Act) overrides that in some way.
- Section 13 restricts certain uses of beds of lakes and rivers. Relevantly, s 13(1) restricts excavation or other disturbance of the bed of a river or the depositing of any substance in, on, or under the bed of a river. Section 13(3) provides that the section does not apply to any use of land in the coastal marine area. Section 13(4) provides that "[n]othing in this section limits section 9." Again on the face of it, section 13 does not purport to restrict the application of section 9(3) to riverbeds.
- 11 However, the Court went on to comment that it was duplicitous to charge Mr Woolley under both sections 9 and 13 of the RMA in circumstances where the non-complying activities did not engage different effects, relating to a differing type of authority function under sections 30 and 31.¹ In those circumstances, charges could only be brought under either section 9 or section 13 of the RMA. This simply reinforces the need to be very clear about what function you are relying on in imposing this control and what effect you are addressing (so a distinction can be made between the regional and district rules, if necessary). If there is no distinction, then there will be an issue as to whether you want to (or it is necessary to) duplicate this and address it in the district plan.
- 12 A summary of our advice is provided at paragraph 2.

¹ *Woolley v R* [2014] NZCA 178 [41] and [42]



Yours sincerely

A handwritten signature in black ink, appearing to read 'Kerry Anderson'.

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