

Proposed Southland Water and Land Plan

Response to Question of Chairperson Rob van Voorthuysen for s42A authors

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Question

Physiographic Zone maps

A number of submitters have stated that they consider the physiographic zone maps to be inaccurate at a farm scale. Suggestions to remedy this perceived problem include removing the maps from the pSWLP and having them reside outside the plan as an external reference document that can be more easily amended.

Legally:

1. Can pSWLP policies refer to physiographic zone maps that reside outside the plan?
2. Can pSWLP rules refer to physiographic zone maps that reside outside the plan?
3. If the answer to either of questions 1 or 2 is 'yes', would the policies and rules need to refer to a specific dated version of the maps or could the provisions refer to the 'latest version' of the maps?
4. If pSWLP policies and rules were to refer to physiographic zone maps that reside outside the plan, would those maps nevertheless be incorporated into the plan by reference, thereby triggering the obligations of RMA Schedule 1 Part 3?

Response – PM:

Background context

1. In order to provide context to the questions above, it is useful to describe how the physiographic zones are currently used in the pSWLP.
2. The physiographic zones within the pSWLP represent areas of the landscape with common attributes that influence water quality, such as climate, topography, geology and soil type. The zones differ in the way sediment, microbes, and nutrients such as nitrogen and phosphorus accumulate and are transferred through the soil, aquifers and into waterbodies.
3. The pSWLP utilises physiographic zones in the policy and rule framework. This planning framework seeks to respond to the key transport pathways for contaminants within each of the physiographic zones and to manage particular activities proportionate to the risk that those activities pose to water quality.
4. Specifically, the pSWLP uses physiographic zones within:
 - a. Policies - The physiographic zone policies provide clear guidance on the ways in which adverse effects on water quality are to be avoided, remedied or mitigated within each physiographic zone with regard to each zone's particular characteristics.

- b. Rules – The rules relating to the use of land for farming activities, intensive winter grazing and the discharge of effluent on to land, use physiographic zones to manage the risks that those activities pose to water quality. However, I note that the s42A report recommends changes to the notified version of the pSWLP that would limit the use of physiographic zones to determine the activity status of particular activities, rather than determining whether those particular activities require consent.
 - c. Farm Environmental Management Plans (**FEMPs**) – FEMPs are required to be prepared and implemented by particular farming activity rules and include physiographic zones to determine good management practices for the particular landholding.
5. The physiographic zone maps show, spatially, where each of the zones are located. The maps are included as Volume 2 to the pSWLP, and form part of the proposed plan.

Question 1 & 2 - Can pSWLP policies and rules refer to physiographic zone maps that reside outside the plan?

6. In light of the planning framework outlined above, I consider that the physiographic zone maps need to be included in the plan and cannot solely reside outside the pSWLP. It would create uncertainty if the physiographic zone maps resided outside the plan and could be updated from time to time, particularly if they could be amended on an ad hoc basis, with no clear direction as to how, when or who could update the maps. As such, based on the way in which the physiographic zones are currently used in the policy and rule framework, they cannot reside outside the plan. My reasoning follows.
7. Rules within a planning framework require certainty. Rules are required to be certain in order to be valid. The need for certainty in rules was expressly recognised by the Environment Court in *Morgan v Marlborough District Council*, where the Court stated that rules are required to have a status and certainty which allows them to form a basis for prosecutions.¹ The Environment Court has also noted that rules must be clearly defined because they have the force and effect of regulations (under ss 68(2) and 76(2) of the Resource Management Act 1991 (**RMA**)).²
8. Arguably, policies do not require the same level of certainty as rules. I am unaware of any case law authority that supports the proposition that a policy can be void for want of certainty. However, the RMA states the purpose of rules is to implement the relevant policies within a plan.³ In order for rules in the notified pSWLP to effectively implement the physiographic zone policies, I consider that the policies require the same level of certainty. This is particularly the case where some of the corresponding physiographic zone policies in the notified version of the pSWLP are directive. It is possible; however, that this argument would be less compelling if the policies were less directive.
9. Furthermore in this context, allowing the physiographic zone maps to reside outside the plan and be able to be amended without going through a Schedule 1 process, would be contrary to the underlying policy of the RMA to encourage public participation in planning review processes. By going through a Schedule 1 process, people can lodge submissions in relation to plan provisions which may directly affect their property or interests. As outlined above, the physiographic zone maps add certainty to the

¹ *Morgan v Marlborough District Council* EnvC Christchurch W62/20000, 4 October 2000.

² *Queenstown Lakes District Council v Marcam Grand Lakes Ltd* EnvC Christchurch C156/02, 22 November 2002, at [52].

³ Resource Management Act 1991, s67(1).

interpretation and application of the relevant pSWLP policies and rules. The ability to amend zone maps outside of the Schedule 1 process would remove the public's right to submit on any changes to the zone maps.

10. My response to question 1 and 2 does not preclude the physiographic zone maps from being replicated elsewhere (for example on Environment Southland's online GIS viewer, Beacon). However, an online GIS viewer can only replicate the physiographic zone maps in a plan that has undergone a Schedule 1 process.

Question 3 – If the answer to either of questions 1 or 2 is ‘yes’, would the policies and rules need to refer to a specific dated version of the maps or could the provisions refer to the ‘latest version’ of the maps?

11. Notwithstanding the response to questions 1 and 2 above, for completeness I have considered question 3. If my answer had been that the pSWLP policies and rules could refer to physiographic zone maps that solely resided outside the plan, I consider that they would need to refer to a specific dated version of the physiographic zone maps.
12. In order to comply with Part 3 of Schedule 1 of the RMA (Part 3 deals with material incorporated by reference in a plan), I consider the material referenced needs to refer to a specific version of the document. I discuss these provisions further below in response to question 4. Similar to the position above, a reference to a specific dated version of the physiographic zone maps would be required to ensure the pSWLP policies and rules are sufficiently certain.
13. A similar issue has been considered by the Courts, although within a different context. The High Court in the *Horizons One Plan* case⁴ considered whether it was open to the Manawatu-Wanganui Regional Council to have a generic reference to OVERSEER (a computer model that measures potential nitrogen leaching) in its One Plan, given the requirements regarding documents incorporated by reference in Part 3 of Schedule 1 of the RMA. The High Court upheld the Environment Court's decision not to reference a specific version number of OVERSEER.
14. However, I consider that this case can be distinguished from the present situation. The Court in that case referred to the fact that OVERSEER is a computer model and not necessarily the type of 'written material' caught by clause 30 to 35 of Schedule 1 of the RMA. The Court's finding on this point also turned on the particular planning framework in that case.⁵

Question 4 – If pSWLP policies and rules were to refer to physiographic zone maps that reside outside the plan, would those maps nevertheless be incorporated into the plan by reference, thereby triggering the obligations of RMA Schedule 1 Part 3?

15. Yes - even if the physiographic zone maps were to reside outside the plan, they would nevertheless be incorporated by reference into the plan pursuant to Part 3 of Schedule 1 of the RMA.
16. Part 3 of Schedule 1 of the RMA stipulates that the following material may be incorporated by reference in a plan or proposed plan:⁶

⁴ *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.

⁵ *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at [114].

⁶ Clause 30(1), Part 3 of Schedule 1, RMA.

- a. standards, requirements, or recommended practices of international or national organisations;
 - b. standards, requirements, or recommended practices prescribed in any country or jurisdiction; and
 - c. any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.
17. Notably, written material incorporated by reference in a plan has legal effect as part of the plan.⁷ Any amendments to, or replacement of, material incorporated by reference can only be incorporated in a plan by a full Schedule 1 process (either a variation to a proposed plan or an approved plan change to an existing plan).⁸ Therefore even if the physiographic zone maps resided outside the plan, they would nevertheless be incorporated by reference into the plan and could only be amended by going through a Schedule 1 process.
18. I consider that it is likely the physiographic zone maps fall under the type of material referred to in Part 3 of Schedule 1. The zone maps deal with technical matters and it could be considered impractical for them to be included in the printed plan.
19. The provisions in Part 3 of Schedule 1 clearly demonstrate the intention of the RMA to ensure any material necessary to interpret and apply plan provisions is included in the plan itself and cannot be amended on an ad hoc basis. This reinforces the underlying policy of the RMA to encourage public participation in planning review processes. Applying this underlying rationale to this particular context, it would be contrary to the central provisions of the RMA to allow parts of a plan to be amended without going through a Schedule 1 process.

⁷ Clause 30(3), Part 3 of Schedule 1, RMA.

⁸ Clause 31, Part 3 of Schedule 1, RMA.