

MEMORANDUM

Date: 30 September 2016
To: Hearing Panel
From: Philip Maw, Kirstie Wyss

PROPOSED FIORDLAND PATHWAY MANAGEMENT PLAN - CLEAN VESSEL PASS

1. During the course of the hearings on the proposed Fiordland Pathway Management Plan (**pFPMP**) an issue has arisen as to the legality of a request by a submitter that a proposed rule should require a "clean vessel pass" under the provisions of the Biosecurity Act 1993 (**Act**).
2. You have asked us to consider whether a rule in the pFPMP can require people who are entering the Fiordland Marine Area (**FMA**) to have a clean vessel pass.
3. We have specifically considered a draft clean vessel pass rule set out in the Proposal for a Fiordland Pathway Management Plan, prepared by the Fiordland Marine Pathway Management Plan Steering Group, dated December 2015 (**Proposal**).

Executive Summary

4. We consider a rule in the pFPMP requiring people who are entering the FMA to have a clean vessel pass could be drafted to fall within one of the purposes specified in section 93 of the Act. In particular, pursuant to section 93(5)(g) of the Act, which provides that a plan may include rules for all or any of the following purposes:
*"requiring the owner or person in charge of goods or craft to carry out specified treatments or **procedures** to assist in preventing the spread of organisms that could be spread through the pathway"*
[Our emphasis]
5. We consider that the process of obtaining and holding a clean vessel pass would be a *procedure* to assist in preventing the spread of organisms, and fall within the ambit of section 93(5)(g).
6. However, we consider that the draft rule in the Proposal would benefit from some amendments to provide greater certainty. We also consider that the procedure to obtain a clean vessel pass should be sufficiently detailed in the rules (which could be set out in an appendix) for example (amendments from Proposal marked up):
Owners/operators of vessels entering or located within the Fiordland Marine Area must ~~be in possession of~~ hold a current Fiordland Clean Vessel Pass that applies to that vessel, obtained in accordance with the procedure set out in Appendix A.
7. Our full analysis follows.

Biosecurity Act 1993

8. The pFPMP must be prepared in accordance with the Act.
9. Section 93 of the Act provides for the approval of the preparation of a regional pathway management plan. Section 93 also contains a list of the matters to be specified in the plan, and the requirements for rules contained in a regional pathway management plan. Section 93 relevantly provides as follows:

"(3) *A plan must specify the following matters:*

...

(h) *the rules, if any*

...

(5) *A plan may include rules for all or any of the following purposes:*

(a) *requiring a person to keep records of actions taken under the rules and to send to the management agency specified information based on the records:*

...

(g) *requiring the owner or person in charge of goods or craft to carry out specified treatments or procedures to assist in preventing the spread of organisms that could be spread through the pathway:*

...

(6) *A rule may—*

(a) *apply generally or to different classes or descriptions of persons, places, goods, or other things:*

(b) *apply all the time or at 1 or more specified times of the year:*

(c) *apply throughout the region or in a specified part or parts of the region, with, if necessary, another rule on the same subject matter applying to another specified part of the region:*

..."

10. The relevant provisions of the Act are set out in full in **Appendix A**.
11. The rules in the pFPMP must comply with the requirements of section 93 (particularly subsections (5) and (6)). These requirements include that any rules are for all or any of the purposes listed in section 93(5) of the Act.
12. We consider below whether the draft rule in the Proposal falls within any of the purposes set out in section 93(5).

Analysis of the draft Clean Vessel Pass rule

13. The pFPMP contains standards that vessels (and gear) must meet when entering or located in the FMA. The pFPMP also contains a rule that seeks to ensure that clean vessel standards are met before craft enter the FMA. Proposed Rule 2 of the pFPMP provides as follows:

"The owner or person in charge of a craft¹ in the Fiordland Marine Area must keep records of the actions taken to meet the clean vessel, clean gear and residual water standards in rule 1 of this plan, and must provide those records to an authorised person on request.

Contravention of this rule creates an offence under section 154N(19) of the Biosecurity Act."

14. The pFPMP states that compliance with proposed Rule 2 could be demonstrated by the owner or person in charge of the craft having a current Fiordland Clean Vessel Pass. The requirements and procedure for obtaining a clean vessel pass are also set out in the pFPMP. However, the pFPMP does not make it a mandatory requirement to obtain a clean vessel pass.

15. We now turn to consider whether a rule in the pFPMP can require people who are entering the Fiordland Marine Area (FMA) to have a clean vessel pass (as a mandatory requirement).

16. We have specifically considered a draft version of a clean vessel pass rule set out in the Proposal. The relevant draft rule in the Proposal provides as follows:

"Proposed Rule 2: Owners/operators of vessels entering or located within the Fiordland Marine Area must be in possession of a current Fiordland Clean Vessel Pass that applies to that vessel."

17. At first glance, the draft rule appears to fall within the ambit of section 93(5)(g) of the Act, which provides:

"(g) requiring the owner or person in charge of goods or craft to carry out specified treatments or procedures to assist in preventing the spread of organisms that could be spread through the pathway"

18. Our analysis of the draft rule against section 93(5)(g) is set out in the table below.

Draft clean vessel rule	Section 93(5)(g)	Analysis
<i>Owners/operators</i>	<i>owner or person in charge</i>	Complies with section 93(5)(g).
<i>of vessels</i>	<i>of craft</i>	Vessel falls within the definition of "craft" set out in section 2 of the Act. Therefore, complies with section 93(5)(g).
<i>entering or located within the Fiordland Marine Area</i>	<i>through the pathway</i>	In section 2, the definition of "pathway" includes the movement that is craft out of, into, or through a particular place in New Zealand. The definition of "place" includes the waters of the sea (i.e. the FMA). Further, section 93(6)(a) provides that a rule can apply to different persons/ places and (c) provides that a rule may apply throughout the region or in a specified part or

¹ We note that the definition of "craft" set out in section 2 of the Act includes aircraft. Therefore, aircraft (e.g. sea planes) in the FMA will also need to comply with the rule in the pFPMP.

		parts of the region. Complies with section 93(5)(g).
<i>must be</i>	<i>requiring</i>	As a mandatory obligation the draft rule complies with section 93(5)(g).
<i>in possession of a current Fiordland Clean Vessel Pass that applies to that vessel.</i>	<i>to carry out specified treatments or procedures to assist in preventing the spread of organisms that could be spread through the pathway</i>	The analysis on this aspect of the rule is set out below.

19. As set out in the table above, the majority of the draft clean vessel rule clearly falls within the scope of the purpose specified in section 93(5)(g) of the Act.
20. One aspect of the rule that requires more detailed assessment is whether the requirement to be in possession of a Fiordland Clean Vessel Pass is a procedure to assist in preventing the spread of organisms. This raises two issues:
- a. whether the possession of a Fiordland Clean Vessel pass is a procedure; and
 - b. whether the procedure assists in preventing the spread of organisms that could be spread through the pathway.
21. These issues are addressed below.

Is the requirement to be in possession of a Fiordland Clean Vessel Pass a procedure?

22. "Procedure" is not defined in the Act and we are unaware of any caselaw considering the interpretation of "procedure" under section 93 of the Act. Given that "procedure" is not defined in the ACT, principles of statutory interpretation must be applied to the interpretation of section 93. As the High Court held in *Christchurch City Council v Emma Jane Limited*:²

"It is well established that when interpreting the provisions in a Plan, the words are to be given their plain ordinary meaning unless this is clearly contrary to their statutory purpose, or the social policy, behind the Plan and Rules, or otherwise produces some injustice, absurdity, anomaly or contradiction. The test is 'what would an ordinary reasonable member of the public examining the plan have taken from the document'. (Powell v Dunedin City Council [2005] NZRMA 174 (CA))."

23. The Oxford English Online Dictionary definition of "procedure" is as follows:³

"1a The fact or manner of proceeding with any action, or in any circumstance or situation; the performance of particular actions, esp. considered in regard to method; practice, conduct. Also: the established or prescribed way of doing something.

...

2a A particular course or mode of action; an established or prescribed way of doing something; (also) an instance of this; a process, a proceeding."

² *Christchurch City Council v Emma Jane Limited*, Christchurch CIV-2008-485-000280, 27 August 2008 (HC).

³ Oxford English Dictionary (online) 2016 Oxford University Press.

24. The Concise Oxford English Dictionary definition of "procedure" is:⁴
- "An established or official way of doing something. A series of actions conducted in a certain order or manner"*
25. The Collins Concise Dictionary similarly defines "procedure" as:⁵
- "a way of acting or progressing, esp. an established method"*
26. It is arguable whether or not the requirement to *possess* a clean vessel pass can be considered as a procedure. However, we consider that the process of obtaining and holding a clean vessel pass would be a procedure and fall within the ambit of section 93(5)(g). Accordingly, we suggest amending the draft rule to require owner/operators to obtain a clean vessel pass e.g. "*Owners/operators of vessels ... must hold ~~be in possession of~~ a current Fiordland Clean Vessel Pass...*" to provide greater certainty that the draft rule is covered by section 93(5)(g).
27. We also consider that the procedure to obtain a clean vessel pass should be sufficiently detailed in the rules. We do not consider that the rule as drafted specifies the procedure with sufficient certainty so that owners/operators know what they are required to do. This could be achieved by the draft rule referring to an appendix that sets out the procedure to obtain a clean vessel pass, for example:
- Owners/operators of vessels entering or located within the Fiordland Marine Area must hold a current Fiordland Clean Vessel Pass that applies to that vessel, obtained in accordance with the procedure set out in Appendix A.
28. We note that many of the details of the clean vessel pass process are already set out in the Proposal and the pFPMP. These details could form the basis of the appendix.
29. We also note that some aspects of the procedure will also fall within the ambit of section 93(5)(a), which provides that a rule may be for the purpose of requiring a person to keep records of actions taken under the rules and to send to the management agency specified information based on the records.
30. Accordingly, we consider that the process to obtain a clean vessel pass is a procedure within the ambit of section 93(5). We now turn to consider whether the procedure assists in preventing the spread of organisms throughout the pathway.

Does the requirement to obtain a clean vessel pass assist in preventing the spread of organisms that could be spread through the pathway?

31. As set out in the Proposal (and the pFPMP), the intent of the draft clean vessel pass rule is to draw attention to the risks of biofouled vessels and promote the uptake of the clean vessel standards. The process of obtaining a clean vessel pass will ensure that owners/operators are familiar with the standards set out in the pFPMP. It will also ensure that the Council obtains information about vessels in the FMA, which may be used for monitoring and enforcement purposes. All of these matters will assist in preventing the spread of organisms throughout the FMA.
32. Therefore, we consider that the clean vessel pass procedure could assist in preventing the spread of organisms that could be spread through the FMA.

⁴ Concise Oxford English Dictionary (12th Ed) 2011 Oxford University Press.

⁵ Collins Concise Dictionary Fifth Edition 2001 Harper Collins Publishers.

Conclusion

33. We consider that a rule requiring a clean vessel pass could be drafted to fall within the ambit of section 93(5) of the Act.
34. Please contact us if you wish to discuss or have any further questions.

Appendix A

Relevant provisions of the Biosecurity Act 1993

s 2 Interpretation

(1) In this Act, unless the context otherwise requires,—

craft—

- (a) means an aircraft, ship, boat, or other machine or vessel used or able to be used for the transport of people or goods, or both, by air or sea; and
- (b) includes—
 - (i) an oil rig; and
 - (ii) a structure or installation that is imported by being towed through the sea

occupier,—

- (a) In relation to any place physically occupied by any person, means that person; and
- (b) In relation to any other place, means the owner of the place; and
- (c) In relation to any place, includes any agent, employee, or other person, acting or apparently acting in the general management or control of the place:

pathway means movement that—

- (a) is of goods or craft out of, into, or through—
 - (i) a particular place in New Zealand; or
 - (ii) a particular kind of place in New Zealand; and
- (b) has the potential to spread harmful organisms

pathway management plan means a plan to which the following apply:

- (a) it is for the prevention or management of the spread of harmful organisms:
- (b) it is made under Part 5:
- (c) it is a national pathway management plan or a regional pathway management plan

place includes any building, conveyance, craft, land, or structure, and the bed and waters of the sea and any canal, lake, pond, river, or stream

s 88 For the purposes of sections 89 to 98,—

plan means a regional pathway management plan

proposal means a proposal for a regional pathway management plan

rule means a rule in a regional pathway management plan

s 93 Fourth step: approval of preparation of plan and decision on management agency

- (1) If the council is satisfied as required by section 92(1) and is satisfied that the issues raised in all the consultation undertaken on the proposal have been considered, the council may take the fourth step in the making of a plan, which is to approve the preparation of a plan.
- (2) If the council approves the preparation of a plan, the council must apply section 100 to decide which body is to be the management agency.

Matters to be specified

- (3) A plan must specify the following matters:
 - (a) the pathway or pathways to be managed:
 - (b) the plan's objectives:
 - (c) the principal measures to be taken to achieve the objectives:
 - (d) the means by which the achievement of the plan's objectives will be monitored or measured:
 - (e) the sources of funding for the implementation of the plan:
 - (f) the limitations, if any, on how the funds collected from those sources may be used to implement the plan:
 - (g) the powers in Part 6 to be used to implement the plan:
 - (h) the rules, if any:
 - (i) the management agency:
 - (j) the actions that local authorities, local authorities of a specified class or description, or specified local authorities may take to implement the plan, including contributing towards the costs of implementation:
 - (k) the portions of road, if any, adjoining land covered by the plan and, as authorised by section 6, also covered by the plan:
 - (l) the plan's commencement date and, if there is one, its termination date:
 - (m) any matters required by the national policy direction.

Compensation

- (4) A plan—
 - (a) may provide for the payment of compensation for losses incurred as a direct result of the implementation of the plan:
 - (b) must not provide for the payment of compensation for the following losses:
 - (i) loss suffered because a person's income derived from feral or wild organisms is adversely affected by the implementation of the plan:
 - (ii) loss suffered by a person who fails to comply with the plan.

Rules

- (5) A plan may include rules for all or any of the following purposes:

- (a) requiring a person to keep records of actions taken under the rules and to send to the management agency specified information based on the records:
 - (b) requiring the identification of specified goods:
 - (c) prohibiting or regulating specified methods that may be used in managing the pathway:
 - (d) prohibiting or regulating activities that may affect measures taken to implement the plan:
 - (e) requiring audits or inspections of specified actions:
 - (f) requiring the occupier of a place to carry out specified treatments or procedures to assist in preventing the spread of organisms that could be spread through the pathway:
 - (g) requiring the owner or person in charge of goods or craft to carry out specified treatments or procedures to assist in preventing the spread of organisms that could be spread through the pathway:
 - (h) requiring the destruction of goods in circumstances in which the goods pose a risk of spreading organisms that could be spread through the pathway:
 - (i) prohibiting or regulating specified uses or movement of goods that may promote the spread of organisms through the pathway:
 - (j) prohibiting or regulating the use or disposal of organic material on the pathway:
 - (k) prohibiting or regulating the use of specified practices in the management of organisms that may promote the spread of organisms through the pathway.
- (6) A rule may—
- (a) apply generally or to different classes or descriptions of persons, places, goods, or other things:
 - (b) apply all the time or at 1 or more specified times of the year:
 - (c) apply throughout the region or in a specified part or parts of the region, with, if necessary, another rule on the same subject matter applying to another specified part of the region:
 - (d) specify that a contravention of the rule creates an offence under section 154N(19).