Marine and Coastal Area (Takutai Moana) Bill: submission from Greater Wellington Regional Council

Thank you for the opportunity to comment on the opportunity to make a submission on the Marine and Coastal Area (Takutai Moana) Bill (the Bill**).** Greater Wellington generally supports the intent of the Bill to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed. The determination and recognition of Maori customary rights are considered by Greater Wellington as primarily questions for resolution between the Crown and Maori.

For that reason, this submission does not address that substantive policy issue, but is focused on the issues of direct consequence to Greater Wellington in the exercise of its responsibilities under key legislation such as the Local Government Act 2002 (LGA) and the Resource Management Act 1991 (RMA).

The first part of this submission contains some general comments about the Bill, followed by a table containing more detailed comments and suggested amendments to specific clauses contained within the Bill.

1. General comments

Workability and interface with the RMA

Having a good interface between the Bill and the RMA is critical to the overall success in achieving integrated management of coastal areas in New Zealand.

Given the integrated nature of issues being considered, it is critical that the legal framework provided by the Bill provides for workable implementation and ensures agreements and processes are enduring for local government, iwi, central government, and communities.

In terms of workability, there are several areas in the Bill that require clarification or rewording to ensure the Bill delivers the Crowns position and intent. The parts of the Bill relating to protected customary rights and marine title are particularly important in this regard, as these have the greatest potential to impact on existing regional council functions, particularly as:

- current RMA policies, plans and resource consents will not apply to the exercise of customary rights; and
- the development of a separate planning document may effectively create a separate set of laws governing resource use and development in customary marine title areas.

Interface with the RMA – jurisdiction

Regional councils have the function, for the purposes of sustainable management, of controlling the coastal marine area under section 30(1)(d) of the RMA. This includes jurisdiction over structures and occupation of space.

Schedule 3 of the Bill provides that section 30(1)(d)(ii) of the RMA is to be repealed and the following substituted:

"The occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is not within the common marine and coastal area."

The effect of this is to change the jurisdiction for occupation of the common marine and coastal area (CMCA) to the Minister of Conservation. We understand that the intention is not to change the current jurisdictional arrangement and that the amendment in Schedule 3 contains a drafting error with the "not" being an error.

We support retaining the current jurisdictional arrangement with consistent jurisdiction over the entire CMCA, and the same agency having jurisdiction for both occupation and all the activities that may be related to that occupation.

Interface between the RMA and new planning documents

The provisions relating to planning documents require clarification to ensure a workable interface with the RMA.

Clause 84 enables a customary marine title group to develop a "planning document" to set out the objectives and policies of the group for the area, or for a wider part of the marine and coastal area where the group exercises "customary authority". As "customary authority" is not defined, or discussed in any other part of the Bill, this introduces significant uncertainty of application for local authority plan making. Deleting clause 84(3)(b) would remove this uncertainty.

Clarification is also required under clause 91 to provide certainty about the extent to which local authorities are required to recognise and provide for matters in iwi planning documents. Officials have clarified that the intention of s91(6) was for regional councils to retain a level of discretion and to recognise and provide for only those matters in an iwi planning document that align with the promotion of sustainable management under the RMA. Currently s91(6) fails to deliver any discretion. The choices appear to be about are to recognise and provide for the whole planning document – or not. Clarification is required to ensure changes to regional planning documents relate to the promotion of sustainable management under the RMA.

Greater Wellington considers it would also be useful to all parties for regional councils to be involved in some way during the development of planning documents. This will ensure planning documents are effective, meaningful and include matters that would assist regional councils give effect to such documents.

Reclamations and certainty for port operations

Greater Wellington is aware that the provisions relating to reclamations (sections 32 to 43) have had significant input from port companies, including CentrePort of which Greater Wellington is a major shareholder. These provisions (including changing the responsibility for the issuing of title for reclamations to the Minister of Lands) are considered to be a significant improvement to the current Foreshore and Seabed Act 2004. Furthermore, the specific presumption that ports and the Wellington Airport will be granted a freehold interest in reclaimed land is supported as this will ensure greater certainty for CentrePort to carry out its business.

2. Detailed Comments - Greater Wellington Regional Council submission to the Marine and Coastal Area (Takutai Moana) Bill

	Topic	Submission	Suggested change
7	Definitions	**contact details** We support this definition as such details are important to the workability of the Bill for local authorities. Contact details of any transferee of a customary title group or customary right group should also be recorded and sent to local authorities on transfer. Clarification is required on the process for transfer of customary title (clause 62). **marine and coastal area** The definition of *marine and coastal area* differs from the RMA definition of *coastal marine area*, however the words are so close that they are likely to lead to confusion. The key difference identified relates to the exclusion of water in the definition of marine and coastal area. We support certain reserve and protected land being excluded from the definition. For the same reasons, land with reserve status owned by local authorities should also be excluded. We also query whether esplanade strips created under RMA should be excluded.	*Ensure record of all transfers kept on database and notification made to local authorities.* *Clarify the reasons for the differences. Clarify that if water is excluded, then customary rights also exclude any matters related to the water. This would be consistent with land titles not providing rights over rivers within titles.* *Amend to clarify local authority vested reserves also excluded.* *Include esplanade strips under RMA as excluded protected land*
8	Meaning of "accommodated activity"	Greater Wellington supports the inclusion in clause 8(1) of permitted activities as accommodated activities. We suggest this clause be extended to include controlled activities under the RMA - where there is an absolute expectation the activity is allowed, but a consent process enables assessment of matters of detail. These should be accommodated as per other	*Add to 8(1) "an activity that is a controlled activity under the RMA" or alternatively, amend the RMA so that controlled activities are able to be declined.*

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		listed activities in (1). Section 8(1) (b) and (c) should reference the activity that stems from the application – not the application itself. This is consistent with the intent of Section 8(1) (d) of the Bill. Otherwise a challenge may be able to be sustained where the "application" is accommodated but the "subsequent activity" is not. Greater Wellington agrees it is appropriate to include infrastructure and structures (and associated operations) that are nationally or regionally significant as accommodated activities. This is supported as it provides for certainty and efficiency of port operations and provides for upgrading and maintenance of regional infrastructure.	*Amend section 8(1)(b & (c) to ensure the activity (not just the application itself) is clearly identified within the definition of accommodated activities.*
13	Boundary changes of marine and coastal area	Clause 13 (3) provides that any land that ceases to be part of the CMCA through natural processes such as accretion is vested in the Crown. Situations where adjacent land is owned by a local authority should be vested with the local authority	*Land that ceases to be part of the C&M area should vest in the local authority if it has previously been divested from the local authority or if a local authority owns adjacent land.*
16	Road ownership	Clause 16 provides that a formed road owned by the Crown, local authority or other person continues to be owned by them. This is supported. A road formed after this Bill is enacted is owned by the person, local authority or Crown that commissioned the formation. While clause 16(2) could be helpful in some situations, it would be better if local authorities could gain title or at least provisional title before commencing construction. Otherwise, the local authority would presumably have to obtain a coastal permit for the occupation of space to	*Amend to provide ownership protection in advance of construction.*

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		authorise the initial construction. Clause 16(3) states that Crown or local authority owned structures such as bridges and culverts that form part of a road are owned as separate property under clause 19 (previously 213). This could be difficult for local authority owned infrastructure. Clarification is also required where "unformed roads" fit in as the wording of clause 16 means that unformed roads, by default, would become part of the CMCA and would no longer be vested in the Crown or a local authority. There are many pieces of land within the CMCA that are classified as (and used as) "roads", but which have not been constructed in any physical sense due to their location. In particular, it is important to note that under transport legislation, every beach is a road. However, it is clearly not a formed road.	*Delete the word "formed" from clause 16(1) and that clause 16(2) is amended to clarify that ownership can be acquired for land (formed or unformed) in the common marine and coastal area.*
18	Addition to common marine and coastal area	We support clause 18(2), which protects land with specified status under other enactments. We assume this would include reserve or other protected land. Clause 18(3) could deprive local authorities of the ability to construct roads which are already planned or consented.	*Clarify which land acquired will not be included in common marine and coastal area.* *Clarify that planned but not yet commenced roads do not become part of the common marine and coastal area.*
20	Abandoned structures	The Crown is deemed to be the owner of abandoned structures, following inquiry by regional councils. While this is supported, there should be ability for regional councils to recover costs for the inquiry process.	*Amend to provide the ability for regional councils to recover costs from the Crown for the inquiry process.*
21	Existing resource	Existing resource consents are not affected by the Bill. This is	*Supported*

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	consents	clear and appropriate.	
22	Proprietary interests to continue	The extent of Clause 22 needs to be clarified to understand the potential implications for local authorities. For example, the regional council issues licences for large numbers of moorings in the marine and coastal area – is it intended that the Minister of Conservation would take over responsibility for managing and administrating such systems? Clause 22 uses the term "in respect of any land". Consideration should be given to what this includes. For example, does it cover the leasing of airspace above the land? It is also assumed that functions such as the issuing of building permits and liquor licences are not covered by the application of the Bill. If they are by way of the terminology used then consideration of what this section is meant to be limited to, is essential.	*Clarify the types of leases, licences, and permits that are covered by Section 22.* *Ensure that the current functions of regional councils are not inadvertently altered by clause 22.*
35-37	Reclamations – title process	These sections of the Bill are supported as they provide improved certainty for ports about the process for undertaking reclamations. In particular, the transfer of the vesting role to the Minister of Lands and LINZ is particularly supported as having more appropriate expertise in the land title process.	*Supported*
40	Reclamation for ports and airports – presumption of freehold interest	Clause 40 provides a presumption that port and airport reclamations be granted a freehold interest (as opposed to under the Foreshore and Seabed Act, which provided for long term leases instead). This option is supported as it provides much greater certainty for port and airport business.	*Supported*
54	Scope and effect of customary rights	Greater Wellington notes that these provisions provide generous exercise of customary rights to the extent that they could override provisions in regional plans, including the	*Amend the clause to ensure the effects of customary rights are unable to evolve to the extent that they cause significant*

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		regional coastal plan. While we are comfortable with customary activities continuing without further restriction, we would be concerned if a customary activity "evolves over time" (cl 53) to the extent that it created significant adverse effects on the environment. Clarification of the meaning of "evolves over time" or the deletion of these terms would be useful to ensure such activities do not expand or change to create a significant impact on the environment.	*effect on the environment.*
57	Effect of protected customary rights on resource consent applications	Clause 57(2) of the Bill is inconsistent with Section 104A of the RMA. This sub-section has a significant legal problem in relation to controlled activities – which regional council must grant, subject to conditions. The specifications of any controlled rule may not necessarily include the matters of concern in a customary rights area, and therefore council may not consider those concerns.	*Consider amending clause 57(2) to specifically exclude controlled activities. Alternatively make consequential amendments to the RMA section 87A(2)(a) and 104A to ensure that the requirements are consistent between the two pieces of legislation.*
58 and Schedule 2	Controls on protected customary rights	Regional councils (in conjunction with the Minister of Conservation) should be involved in setting terms and conditions during the agreement process in situations where adverse effects are likely to have a significant effect. It is also more efficient and effective to set relevant controls at the time of developing an agreement, rather than rely on Section 58(2) to retrospectively address adverse effects. Such a process also allows a 'check and balance' on the effects of the activities, and to check the relevance of regional rules (e.g. if an activity is allowed as a customary right, should it be permitted for the remainder of the region?).	*Clause 58 and Schedule 2 should be amended to involve regional councils, achieve sustainable management of the coastal area, and avoid significant adverse effects on the environment. The review process for protected customary rights controls should be retained, as it already involves regional councils.*

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		We also seek clarification on who will be monitoring the effects of customary right activities. As these agreements are not under the RMA we consider it should be the Ministry of Conservation who has responsibility for monitoring.	*Clarify that the Minister of Conservation has responsibility for monitoring effects of customary rights*
64	Customary marine title rights	As applications for rights/title have implications for processing resource consents, local authorities need to be certain they have the most up-to–date, correct information at any given time. Access to, and notification of applications on, a public register would assist.	*Consider setting up of a public register to ensure up to date information is available for local authorities and the public.*
65	RMA permission right	RMA permission rights do not preclude the grant of resource consent, but the exercise of that consent. This will need to be made clear in the RMA. Permission cannot prevent an accommodated activity (which includes permitted activities). For a controlled activity resource consent, however, a local authority could not decline the consent application, but a customary title group could prevent it being implemented. This lead to confusion – we consider it to be appropriate for controlled activities to be included in the scope of accommodated activities. Alternatively, amend the RMA to clarify that a controlled activity may not be approved in some circumstances (s87).	*Ensure this is included in Schedule 3 for amendments to RMA.* *Amend 65(1) so it does not include controlled activities. Or amend s87 RMA.*
66	Procedure for permission right	Providing a procedure and timeframes for the group giving (or not) the permission right is supported. However, local authorities must have the ability to stop the clock (20 working days under the RMA) on the RMA process if there is to be no requirement to obtain the permission right first. It would be unreasonable to require full resource consent process first if the permission right is not going to be forthcoming. These technical details are critical now the precise timeframes of the	*Include amendments in Schedule 3.* *Amend RMA so this is a valid reason to stop the clock and/or reject an application.*

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		RMA are subject to the RMA discount regulations. We also suggest the Bill requires the group to provide a copy of their decision on the permission right to the council once made.	*Amend the Bill to require a copy of the decision on the permission right to be provided by the group to the council.*
67(1)a	Effect of permission right	Change 'customary marine title group' to 'or delegate, or natural person who holds the title'. This is to ensure a defined entity or person is identified, and their contact details are available, to applicants.	*Amend clause 67(1)(a) to "… the relevant customary marine title group or delegate, or natural person who holds the title under …"*
77(4)	Protection of waahi tapu	It is unclear who the 'responsible Minister' is in this situation.	*Ensure that the legal drafting in the Bill clarifies which Minister is responsible for protection of waahi tapu sites.*
Section 78	Waahi tapu conditions	There is the potential for conflict between the provisions of this clause where access can be limited and those of section 27 where navigation rights are protected. Clarification is needed so that any enforcement and compliance can be certain in its application.	*Clarify within the Bill how access rights (and therefore consequent limitations for waahi tapu) are different from navigation rights.*
Section 80(1)	Implementation and enforcement – waahi tapu	Regional councils do not have a statutory function for operational protection of waahi tapu other than the one created by the Foreshore and Seabed Act – and proposed to be continued in this Bill. Regional Councils have very limited bylaw making powers under the Local Government Act 1974 and 2002. For example, fishing is not something that regional councils can control but this is anticipated by 78(2). We consider that regional councils should not be involved with implementing and enforcing restrictions where they are not involved in the process that creates them. The Minister has	*We request that you delete 'local authority' and replace with 'the responsible Minister'.*

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		the responsibility for making restrictions around protection of waahi tapu sites and should be responsible for implementing protection and restriction mechanisms. If responsibility is given to regional councils, there should be a mechanism for cost recovery.	*Include a mechanism for cost recovery, if responsibility is retained with regional councils*
84	Planning documents – scope	It would be clearer and much less complicated if planning documents were limited to the area of customary title only. In terms of applying wider under 84(3), is it unclear what "customary authority" means?	*We consider that Section 84(3)(b) should be deleted.*
91	Application of the RMA framework	Officials have clarified that the intention of Clause91(6) was for regional councils to retain a level of discretion and to recognise and provide for only those matters in an iwi planning document that align with the promotion of sustainable management under the RMA. Currently s91(6) fails to deliver any discretion. The choices are recognise and provide for the whole planning document – or do not. Clarification is required to ensure changes to regional planning documents relate to the promotion of sustainable management under the RMA.	*Remove the dislocation between clause 91(3) which provides for consideration of the purpose of the RMA and clause 91(6) which does not.* *Ensure that the framework described in 91(3) applies to 91(6).*
91	Process to develop planning documents	Greater Wellington considers it would also be useful to all parties for regional councils to be involved in some way during the development of planning documents. Our intention here is to ensure planning documents are as useful and meaningful as possible, and include matters that would assist regional councils give effect to such documents. This could be achieved by requiring customary marine title groups to consult with regional councils prior to finalising	*Amend to require customary marine title groups to consult with regional councils prior to finalising planning documents.*

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		documents.	
93	Recognition by agreement	We consider it would be useful for regional councils to be notified of any applications for customary rights and customary marine title if this affects resource consent processes. Public notification (akin to 102) could also be considered.	*Clause 101 should apply to applications for agreement and applications should be included on the public register.*
101(a) and (b)	Service of application	We support the inclusion of local authorities in clause 101.	*Supported*
110(1)(b)(i) and (ii)	Notification of recognition orders and appeals	We support the inclusion of local authorities in clause 110.	*Supported*
114	Register	We support the idea of a Marine and Coastal register, but would add 'contact details' as these are important to the workability of the Bill. Also consider the links to the Te Puni Kokori database and whether this agency could be responsible for the Marine and Coastal Register. As noted above, also include details of applications on the register. Maps should be part of the information on the register as these will be critical for councils and others to understand the scope and extent of applications or rights.	*Amend clause 114 so the register also includes all applications, all contact details, and maps.*
119 & 120	Regulations and by-laws	Clauses 119 and 120 overlap with regional council functions under the RMA (regional plans) Local Government Act (LGA) (bylaws), and powers under maritime legislation such as the Marine Safety Act. We question what benefit will result from these clauses as they duplicate and overlap with regional council responsibilities. It is also not appropriate to have the regulatory role with the	*We ask that overlaps with regional council functions are reduced by deleting clauses 119 and 120.* *If clauses 119 and 120 are retained, then we seek that they be amended to achieve the following:* • *Change the Minister responsible*

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		Minister of Conservation, who has an advocacy role, and as such, a protective approach may result, rather than one that is consistent either the approach of the RMA or the balance of the LGA. It is necessary to clarify how regulations under clauses 119 and 120 will affect existing regional plans and bylaws. Will such regulations override the existing provisions, or will there be a process to directly include regulations in regional plans and/or bylaws. The process by which regulations under clauses 119 and 120 are made is also not clear. Will there be any public involvement through processes such as the LGA special consultative procedure, or RMA planning processes? Under the RMA, the Minister of Conservation can direct regional council to review their regional coastal plans. The Minister also signs off all regional coastal plans before these become operative. Existing processes should be used in clauses 119 and 120 whenever possible.	*to the Minister of the Environment* • *Clarify how provisions under clauses 119 and 120 will affect existing regional plans and bylaws.* • *Clarify the process which provisions under clauses 119 and 120 are developed.*
Schedule 3 Part 1 – Resource Management Act 1991, Section 30(1)(d)(ii)	RMA interface and jurisdiction	Schedule 3 of the Bill provides that section 30(1)(d)(ii) of the RMA is to be repealed and the following substituted: "The occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is not within the common marine and coastal area." The effect of this is to change the jurisdiction for occupation of the CMCA to the Minister of Conservation. We understand that the intention is not to change the current jurisdictional arrangement and that the amendment in Schedule 3 contains a	*Clarify the intent of the Bill for the management responsibilities for the occupation of space, and extraction of minerals in the common marine and coastal area under the RMA.* *We consider that jurisdiction over occupation and activities within the coastal marine area under the RMA should remain with regional councils.*

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		drafting error with the "not" being an error. It should be noted that the removal of the word "not" still leaves a jurisdictional issue for regional councils in that the reverse situation would still be inappropriate because non-CMACA land would not be subject to regional council jurisdiction.	*Amendments to the Bill to achieve this intent should be undertaken.*