

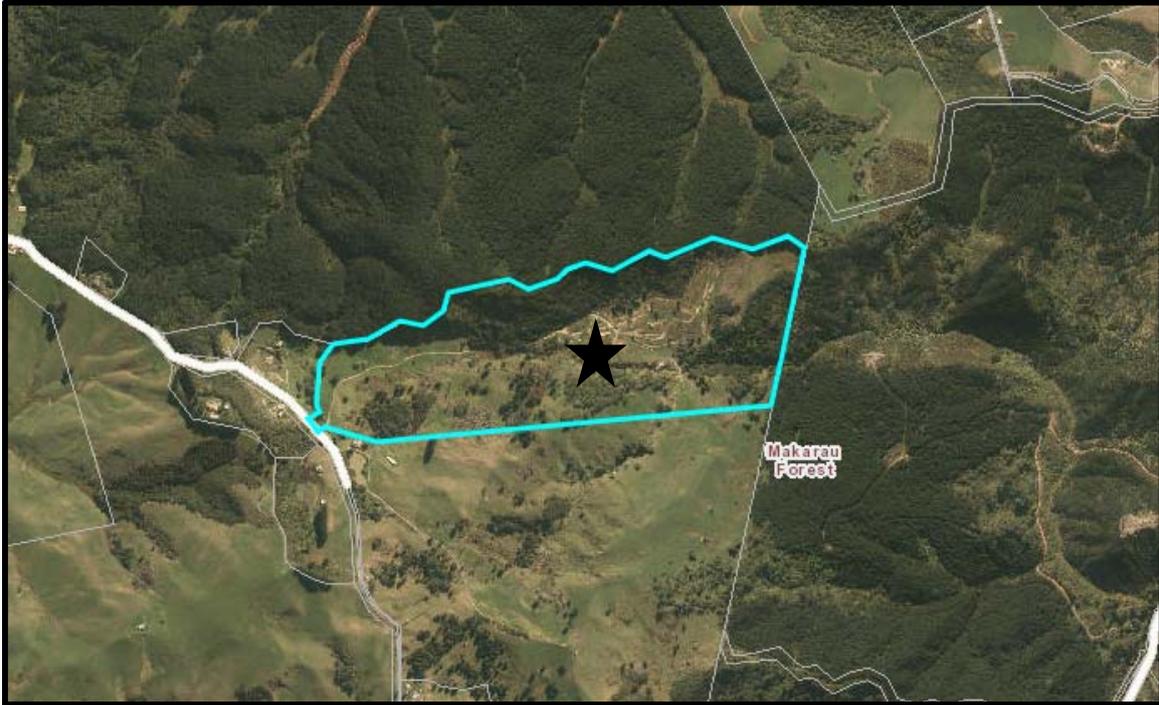
# Report related to a certificate of compliance ref L67783 issued under section 139 of the Resource Management Act 1991 (RMA)- Directions from the High Court



## 1. Application description

<b>Application number(s):</b>	CER70001889 (L67783)
<b>Applicant's name:</b>	Raymond O'Brien and Victoria Pichler
<b>Site address:</b>	287 Tuhirangi Road, Kakanui
<b>Legal description:</b>	Lot 2, DP 365701
<b>Site area:</b>	37.91ha
<b>Operative plan(s) as at 18/8/16:</b>	Auckland Council District Plan (Rodney Section)
<b>Zoning as at 18/8/16:</b>	General Rural
<b>Special features, overlays etc as at 18/8/16:</b>	Floodplain, Overland Flowpaths
<b>Proposed Auckland Unitary Plan ("PAUP") Zoning &amp; Precinct as at 18/8/16:</b>	Rural Production
<b>Special features, overlays etc as at 18/8/16:</b>	Natural Resource: Indicative Streams [i]

## Locality Plan



**Figure 1: Application Site and Surrounds**

### Application documents (plans and reference documents)

The following information was provided as part of the certificate of compliance application L67783 and has been reviewed:

- Application Form, and analysis prepared by Raymond O'Brien, dated 20<sup>th</sup> June 2016.
- Correspondence between Raymond O'Brien and Rebecca Harris dated between the 24<sup>th</sup> of June 2016 and the 18<sup>th</sup> of August 2016 and held on Council application file ref L67783.

Plan title and reference	Author	Rev	Dated
Site Plan indicating estimated location of activity – Auckland Council GIS viewer screenshot.	Raymond O'Brien	-	No date provided
Report title and reference	Author	Rev	Dated
273 Tuhirangi Road Pistol Club- Acoustic Assessment	Marshall Day Acoustics	-	8 August 2016

In addition, the following information has also been reviewed:

- E-mail from Michael Savage dated 4/8/17, including a Sharepoint link which included the following attachments:
  - o Cover letter from Terra Consultants dated 20/7/17.
  - o Assessment of Environmental Effects from Terra Consultants dated July 2017.
  - o Appendices A- K.
- High Court decision CIV-2016-404-3290 [2017] NZHC 1457 dated 28 June 2017 and the subsequent High Court decision CIV-2016-404-3290 [2017] NZHC 1492 dated 30/ June 2017, both these documents are attached as Appendix 2.
- Supplementary submissions for Auckland Council from Meredith Connell, CIV-2016-404- 3290, dated 23 June 2017.
- Submissions for Auckland Council from Meredith Connell, CIV-2016-404-3290, dated 9 June 2017.
- Council planners s139 RMA report dated 18 August 2016 related to Certificate of Compliance application reference L67783.

I confirm that I have also visited the site on 24/8/17. Earthworks have been undertaken on the site, although the extent (volume and area) and timing of these is unclear. In August 2016 when the CoC was issued, the applicant had provided confirmation that permitted activity rules and applicable standards, would be met. I have not explored this issue further.

## 2. Background

This assessment is the result of judicial review proceedings related to Certificate of Compliance (CoC) reference L67783. These proceedings are between Vipassana Foundation Charitable Trust Board (plaintiff), Auckland Council, the applicants Raymond Myles O'Brien and Victoria Mei Sien Pichler and Auckland Shooting Club Inc.

In its decision dated 28 June 2017 [2017] NZHC 1457, the High Court has outlined that the above CoC was flawed in two respects. These are that the CoC failed to record the existence of a building on the site and the application contained no information about discharges of contaminants (lead) to the environment. In this decision, the CoC was referred back to the Council to reconsider these matters.

This assessment deals with these two issues only. These are assessed in turn below. I have not assessed other aspects of the proposal against relevant regional and district rules in general, and rely on the CoC reference L67783 dated 18/8/16 in this regard.

### Relevant Planning Documents

This proposal is assessed on the basis of the regional and district plans which applied at the time the CoC was considered under s139 RMA. The decision on the CoC was made on 18/8/16. The relevant plans are:

1. The Auckland Council Regional Plan (Air, Land and Water) ("ACRP(ALW)"),
2. The Auckland Council District Plan (Rodney Section) ("ACDP(RS)"),
3. The Proposed Auckland Unitary Plan ("PAUP").

For completeness, it is noted that the AEE by Terra Consultants dated 20/7/17 and the associated Preliminary Site Investigation (PSI) by ENGEO dated April 2017 confirms that

investigations undertaken did not reveal any HAIL activities that have, or are more likely than not to have, occurred on the site.

### 3. The proposed permitted activity

#### Proposal

The background to this current assessment is set out above. The proposed activity remains the same as when originally assessed by the Council in August 2016. This is described in the Council Planners report for L67783 as follows:

*The applicant proposes to create an outdoor shooting range involving firearms (pistols) in the General Rural zone of the Auckland Council District Plan (Rodney Section). There will be two separate groups of ranges, an Eastern Range which will operate for a maximum of 8 hours per day between the hours of 6am and 6pm, Monday to Sunday and the Western Range which will operate for a maximum of 8 hours per day between the hours of 6am and 6pm, Monday to Saturday. The Western Range will not operate on Sundays. When both the Western and Eastern Ranges are in operation (Monday to Saturday) a maximum of 6 bays in total will be in use at any one time.*

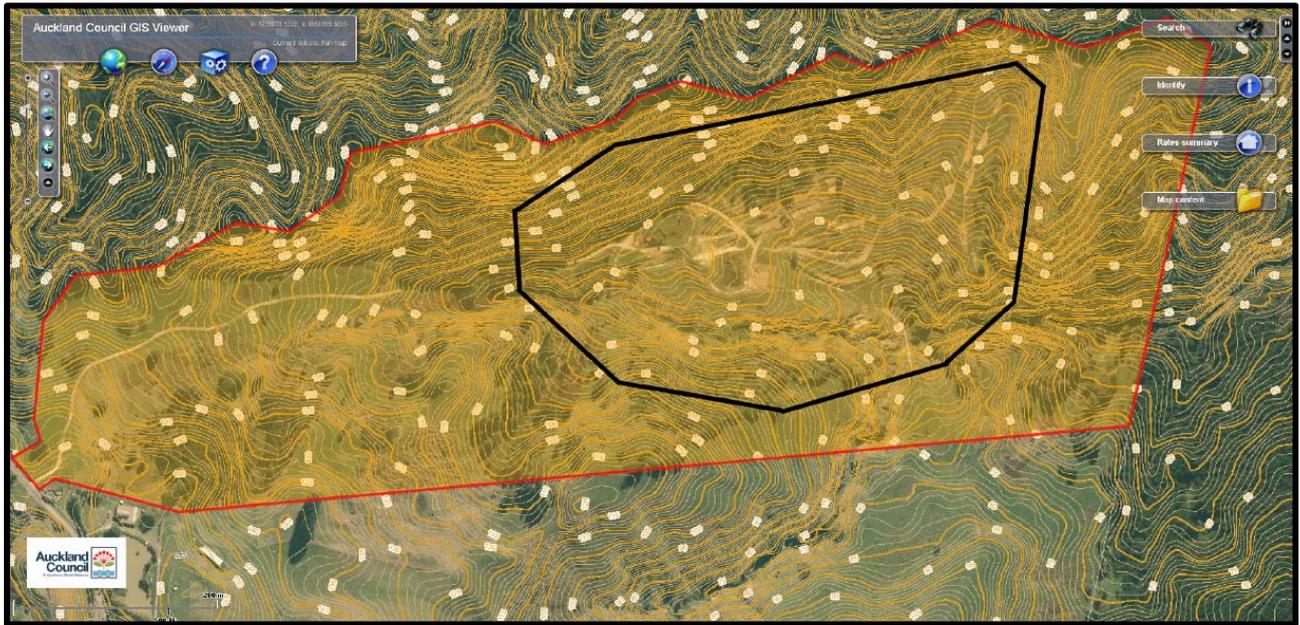
*A Club will be created in affiliation with Pistol New Zealand. Targets (approximately 1.5m in height) will be constructed in compliance with the safety regulations of Pistol New Zealand and the New Zealand Police.*

*A toilet and storage area for targets and target holders will also be constructed with a total gross floor area of less than 25m<sup>2</sup>. A septic system will be installed for the toilets and this will not discharge more than 2m<sup>3</sup> of wastewater to land per day. Drinking water will be provided via a mix of rain water and delivered water, with a quality filter system installed.*

*The noise performance standards for the General Rural Zone state that the noise level measured inside the notional boundary shall not exceed 50 dB L<sub>Aeq</sub> between the hours of 6am to 6pm Monday to Saturday and 45 dB L<sub>Aeq</sub> between the hours of 6am to 6pm on Sundays and Public Holidays. The applicant has engaged Marshall Day Acoustics who have prepared an assessment of compliance for the proposed pistol club. The report, dated 8 August 2016 concludes that the Rating levels for the proposed pistol club comply with the noise performance standards of the District Plan at all receivers for both ranges (Eastern and Western), Monday to Saturday. The Eastern Range complies at all receivers for the more restrictive Sunday limit.*

*The proposed ranges (both Eastern and Western) will be separated by a mixture of trapezoid shaped earth berms and fences that will be constructed to meet the safety criteria set out by the NZ Police. The finalised dimensions and amount of earth berms has not been confirmed, and is currently being designed by an engineering consultant. The height of the berms and width are subject to New Zealand Police requirements; however they will vary in size from approximately 15-20 metres in length, with a base width of 3.5m and a top dimension of 0.8m. A range certifier for the NZ Police has inspected the site, and is involved in the drafting of the design of the ranges. The amount of earthworks undertaken to construct these ranges will not exceed 1000m<sup>3</sup> as confirmed by the applicant.*

*Vegetation removal will be kept to a minimum and will not exceed 1 hectare in area.*



**Figure 2: Proposed area of development.**



**Figure 3: Proposed Pistol Range Configuration**

Since August 2016, the applicant has provided further information, including how the activity will operate, confirmation regarding use of an existing building on the site and photographs of the constructed ranges. These are outlined below.

The building on site is not proposed to be used in association with the gun activity.

Photographs of the ranges are included in the AEE by Terra Consultants dated 20/7/17, submitted as part of resource consent application reference LUC60305006. As noted above,

this AEE has been forwarded by Mr Michael Savage, Barrister acting for the applicants in the legal proceedings, and as such it is relevant to review.



*Figure 5: Looking south-west at ranges 1-3 constructed under COC L67783*



*Figure 6: Looking south at ranges 2-3 constructed under COC L67783*

**Figures 5 and 6 from the Terra Consultants AEE dated 20/7/17**

As can be seen the ranges are enclosed on three sides by earth bunds, with shooters entering at the open end. The targets will be located within the space surrounded by the earth bunds.

Projectiles are primarily proposed to be captured by bullet catchers (plastic barrels filled with rubber chips) in each bay, or when other targets are used or the bullet catchers are “missed” by the shooter the earthbunds will capture the projectiles (section 3.1 AEE and discussed on site). The AEE notes that there is the possibility of the activity discharging trace amounts of lead from the bullets. ENGEO (report dated 18/7/17, section 5.1) identifies that lead can be introduced into the environment in three ways:

- Lead oxidising when exposed to air and dissolving when exposed to acidic water or soil;
- Lead bullets, bullet particles or dissolved lead migration in stormwater runoff and
- Dissolved lead migration through soil to underlying groundwater.

In this case, to try to reduce the potential for lead to be discharged Site Specific Environmental Management is proposed. This is set out in section 7 of the ENGEO Adaptive Management Plan (dated 18/7/17).

**Table 5: Four-Step Approach to Lead Management**

Characteristics	Considerations
Step 1. Control and Contain	<ul style="list-style-type: none"> <li>• Bullet containment via earthen backstops, sand traps, steel traps, lamella or rubber granule traps or shock absorbing concrete</li> </ul>
Step 2. Prevent Migration	<ul style="list-style-type: none"> <li>• Monitor and adjust soil pH (e.g. lime spreading)</li> <li>• Immobilise lead (e.g. phosphate spreading)</li> <li>• Control runoff via planting vegetation, utilising organic ground cover and/or implementing engineered runoff controls</li> </ul>
Step 3. Remove and Recycle	<ul style="list-style-type: none"> <li>• Removing spent bullets via hand raking and sifting, screening, vacuuming, soil washing, working with a reclaimer</li> <li>• Recycle removed spent bullets</li> </ul>
Step 4. Documenting Activities and Record Keeping	<ul style="list-style-type: none"> <li>• Document number of rounds fired and bullet size</li> <li>• Document BMPs used</li> <li>• Document date and provider of BMP-related services</li> <li>• Evaluate the effectiveness of BMPs used</li> <li>• Keep records for the life of the range and at least 10 years after closing</li> </ul>

**Table 5 from ENGEO report dated 18/7/17**

## Consideration of the applications

### 4. Statutory considerations

Section 139 of the Resource Management Act 1991 (RMA) sets out the circumstances under which a consent authority may issue a certificate of compliance.

A certificate must be issued if the activity referred to in the application can be done lawfully in a particular location without a resource consent, and the applicant pays the appropriate administrative charge.

Any certificate which is issued must describe the activity and the location, and state that the activity can be done lawfully in the particular location without a resource consent, as at the date on which the consent authority received the request (section 139(7)).

Under section 139(8), a consent authority must not issue a certificate if the request has been made after a proposed plan has been notified, and the activity referred to in the application could not be done lawfully in a particular location without a resource consent, under the proposed plan.

## 5. Analysis of plan provisions

As noted above, the High Court has requested in its decision dated 30/6/17 that two matters be reconsidered in relation to CoC reference L67783. These relate to the use of a building on the site and discharge associated with the activity. These are considered separately below.

### **5.1 Building**

The relevant plans in this regard are the ACDP(RS) and the PAUP. These are discussed separately below.

#### Auckland Council District Plan (Rodney Section)

Outdoor recreation is defined in this plan as:

*any use of land for public and/or private leisure, sporting and recreational activities and excludes motorsports.*

The proposal has been described above, and is consistent with this definition.

The use of any buildings on the site in association with the gun club activity is relevant due to rule 7.9.2 (Activity Table 1) of the ACDP(RS). This rule states that outdoor recreation *not involving buildings* except for goal posts, seating, fencing and ancillary buildings (eg. toilets, ticket offices, storage) up to a combined total floor area of 25m<sup>2</sup> per site and excluding horse riding schools or horse riding facilities and horse training facilities is a permitted activity in the General Rural Zone (emphasis added).

Outdoor recreation involving buildings other than that set out above is a discretionary activity.

A building is present on the site, in addition to the toilets and the storage area noted in the application documents. This is located in the central part of the site, adjacent to a car park and in close proximity to the gun ranges. It consists of a double garage type structure (with roller doors) and an attached room which at present contains a kitchen, desk, table/ chairs and refrigerator. A covered concrete area is located adjacent to this.



**Figure 4: Existing building**

The applicant has confirmed, via their barrister Mr Michael Savage, in an e-mail dated 11/7/17 that the building will not be used in conjunction with the gun club activity authorised by the CoC. This confirmation is relied upon. The e-mail from Mr Savage is attached as Appendix 1. The activity therefore can be considered a permitted activity under rule 7.9.2 (Activity Table 1).

Proposed Auckland Unitary Plan

The activity would fall within the definition of “Organised Sport and Recreation” in this plan, being defined as:

*Activities that require physical effort and skills, are competitive, occur on a regular basis, have formal rules, referees and officials, and are organised within formal structures.*

*The activity typically involves the following:*

- use of sport and recreation structures*
- exclusive use of public open space during the course of the activity*
- participants and spectators*
- use of clubrooms, changing facilities*
- training and practice sessions*
- payment of money to conduct activity*
- organised by a club, sporting body or group*
- booking and recording system of scheduled hours per week of each sports filed by the owner or administrator of the sports field.*

*Includes, but is not limited to:*

- team sports*

- competitive sports.*

This definition is located within the “Community Nesting Table” within the PAUP. Rule 3.13.1 (Activity Table) contains the relevant rules related to activities within the Rural Production Zone. On 18/8/17 these rules did not have legal effect. The presence of the building and its use do not have any impact on the activity status under the PAUP.

## **5.2 Discharge**

Determining the activity status in this regard is a stepped process, beginning with the RMA and moving on to the relevant regional planning documents where required. These are assessed in turn below.

### **5.2.1 RMA Provisions**

In terms of addressing the relevant RMA provisions, it is important to first understand the relevant definitions. Discharge and contaminant are defined by the RMA as follows:

***discharge*** includes emit, deposit, and allow to escape.

***contaminant*** includes any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat—

- (a) *when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or*
- (b) *when discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged*

The activity has been described above. It includes both a discharge (due to the projectiles breaking down), and a contaminant (lead). I acknowledge that this conclusion takes a cautious approach, as the applicant intends to undertake management to reduce the potential for lead to enter the environment. This management will however not prevent the discharge of contaminants, but will reduce the likelihood of it occurring and the quantum of the discharge, when it does occur, to a very low level.

Discharges of contaminants into the environment are controlled initially by section 15 RMA. This states:

- (1) *No person may discharge any—*
  - (a) *contaminant or water into water; or*
  - (b) *contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*
  - (c) *contaminant from any industrial or trade premises into air; or*
  - (d) *contaminant from any industrial or trade premises onto or into land—*

*unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.*

*(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge—*

- (a) is expressly allowed by other regulations; or*
- (b) is expressly allowed by a resource consent; or*
- (c) is an activity allowed by section 20A.*

*(2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge—*

- (a) is expressly allowed by a national environmental standard or other regulations;  
or*
- (b) is expressly allowed by a resource consent; or*
- (c) is an activity allowed by section 20A.*

*(2) This section shall not apply to anything to which section 15A or section 15B applies.*

In terms of the above:

- Section 15(1)(b)- It is understood the projectiles are proposed to primarily be captured via the use of bullet catchers and the earth bunds themselves. The bullet catchers are to be inspected monthly and replaced as required. The principal pathway for lead to enter the environment is via the earth bunds, if the lead in the bullets dissolves or oxidises. The lead could then move into water, including groundwater and surface water (such as stormwater). In this regard ENGeo (18/7/17) note that the water table is relatively shallow and the soil is likely to be highly permeable. It is noted that management is proposed (see Table 5 above) to reduce the likelihood of lead migration.

ENGeo (18/7/17) states that the direction of groundwater beneath the site is not known, but that shallow groundwater may be hydraulically connected to surface water on or near the site, and therefore flow to the east within on-site gullies or south (toward the Makarau River which is approximately 1.8km from the site). These are factors to consider in relation to the potential for lead to enter water.

ENGeo (18/7/17) also outline monitoring and maintenance to be undertaken to reduce the potential for contamination. This includes draining surface water in shooting bay drains to raingardens, biannually monitoring concentrations of lead and other metals discharging in water from the raingarden and in annual monitoring of the same metals in groundwater (down-slope from the shooting range. While

this may be an appropriate way to manage potential effects, section 15(1)(b) does not contain a base level for contamination and refers only to discharging a contaminant onto or into land in circumstances which may result in that contaminant entering water. In my opinion the firearm activity may result in a person discharging a contaminant, in this case lead, into or onto land where as a result it could enter water.

The discharge must therefore be expressly permitted by a national environmental standard (NES) or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent. There are no known NES, other regulations or resource consents which permit the discharge for this activity. The proposal is therefore assessed in the context of the relevant regional plans, being the ACRP(ALW) and the PAUP.

### 5.2.2- Auckland Council Regional Plan (Air, Land and Water)

Part 3, Chapter 5 relates to discharges to land and water. There are two parts of this chapter that are of particular relevance, those relating to discharges from contaminated land and those relating to discharges to land and water.

#### 5.2.2.1- Contaminated Land

Turning firstly to discharges *from* contaminated land, the relevant permitted activity rules being 5.5.40- 5.5.42. These rules relate to “contaminated land” and “land containing elevated levels of contaminants” and discharges *from* this land (as opposed to discharges to this land or water). These terms are defined by the plan as:

“Contaminated land” adopts the definition in the RMA, being:

*land that has a hazardous substance in or on it that—*

*(a) has significant adverse effects on the environment; or*

*(b) is reasonably likely to have significant adverse effects on the environment*

“Land containing elevated levels of contaminants” is defined in the ACRP(ALW) as:

*Means land that contains contaminants which occur at levels exceeding those permitted by Rule 5.5.41.*

From discussions with Councils Senior Consents and Compliance Advisor – Contaminated Land, Mr Andrew Kalbarczyk, it is understood that the proposed development of the site (namely, land disturbance activity) complies with rule 5.5.41 (based on the contamination status of the site and not the proposed firing-range shooting activity, which Rule 5.5.41 does not apply to). ENGEO (report dated 18/7/17) have undertaken baseline condition testing and show the results of the soil metal concentrations in Table 2. This testing indicates that the site does not fall under the definition of either “land containing elevated levels of contaminants” or “contaminated land”. At present, the subject site does not require consent under rules 5.5.40-5.5.43, but potentially could in the future, if the activity was not managed appropriately and the site became contaminated (and was classified as

either “land containing elevated levels of contaminants” or “contaminated land”). In those circumstances, the discharges *from* this land would require assessment under the above rules, or those operative at the relevant time.

#### 5.2.2.2- Other Discharges of Contaminants to Land or Water

I conclude that the firing-range shooting activity has the potential to result in discharges of contaminants to land and subsequently discharges of contaminants from land to land and water. This means that the discharge must be provided for in the ACRP(ALW) to be considered a permitted activity. The permitted activity rules relevant to “discharges of contaminants to land or water” are 5.5.54- 5.5.62. These rules provide for a variety of discharge types and sources (including similar discharges by the New Zealand Defence Force, rule 5.5.61), but none relate to the discharge proposed by this activity. To this end it is noted that the discharge does not meet the definitions related to wastewater, washwater, is not one of the activity types noted in rule 5.5.57 and is not geothermal water. I therefore conclude that the discharge **is not a permitted activity** under the ACRP(ALW). I conclude that the discharge is a **discretionary activity** under rule 5.5.68, being a discharge that is not otherwise provided for.

#### 5.2.3 Proposed Auckland Unitary Plan

At the time the decision on application L67783 was made, the Proposed Auckland Unitary Plan (PAUP) was also relevant. The Council publicly notified its decisions on the PAUP on 19/8/16 but the decision on L67783 was made 18/8/16. The PAUP is the relevant document for the purposes of this assessment. This has been viewed via the Council’s website, which is understood to be an accurate copy of the PAUP as it existed prior to 19/8/16.

The definitions in Part 4 do not contain definitions of contaminant, contamination, contaminated land or discharge. The RMA definitions, where present, remain relevant in this regard. The proposal does not meet the definitions of wastewater or washwater in the PAUP.

##### 5.2.3.1- Contaminated Land

Section H.4.5 relates to contaminated land. The introduction refers to managing land use and development on land containing elevated levels of contaminants. It goes on to state that the Council is required to manage both the use of land containing elevated levels of contaminants and the discharge of contaminants from land containing elevated levels of contaminants. As set out above, at present the land is not contaminated and does not contain elevated levels of contaminants. Table 1 (H.4.5) is therefore not relevant to this activity.

##### 5.2.3.2- Other Discharges of Contaminants

Section H4.18 “Other Discharges of Contaminants” relates to discharges of contaminants onto or into land or water that are not otherwise covered by the plan, and that are identified as occurring or needing to occur for recognised purposes (refer section 4.18, Introduction). An Activity Table forms rule 1. The table is grey shaded, indicating that the rules had

immediate legal effect from the date the PAUP was notified (30 September 2013). Having reviewed Table 1, there is no entry in this table which specifically permits the discharge. I therefore conclude that the discharge **is not a permitted activity** under the PAUP. I conclude that the discharge is a **discretionary activity** under Activity Table 1 (rule H4.18.1), being a discharge that is not otherwise authorised by a rule in the Unitary Plan.

## 2. Conclusion

Overall I conclude:

- I accept that the building on site is not being used by in association with the activities outlined in the CoC application and so this aspect meets the relevant permitted activity rule of the ACDP(RS).
- The activity proposes methods to manage discharges and contaminants, however, while those methods will reduce the likelihood, and quantum, of the discharge occurring they will not prevent it. The activity is therefore assessed on the basis of including a discharge and that the discharge will contain contaminants (lead),
- The discharge is not expressly permitted by the ACRP(ALW),
- The discharge is not expressly permitted by the PAUP.

On this basis it is my opinion that the proposal described cannot be undertaken lawfully without a resource consent as of 18/8/16, and the CoC should not be granted.

### This report and recommendation prepared by:

**Name:** Hannah Thomson

**Title:** Consultant Planner, Resource Consents

**Signed:** 

**Date:** 29/8/17

**Reviewed by:**

**Name:** Dan Rodie

**Title:** Team Leader, Resource Consents

**Signed:**   
pp

**Date:** 29/8/17

**Appendix 1:** E-mail from Mr Michael Savage regarding use of building.

**Appendix 2:** Copy of ACDP(RS) rules regarding use of the building.

**Appendix 3:** High Court decisions: [2017] NZHC 1457 and [2017] NZHC 1492.

**Appendix 4:** Information submitted by Mr Savage, 4 August 2017.

**Appendix 5:** Council Planners and Assessment and Council decision on CoC dated 18/8/16.