In the Hearing Panel
At Wellington

Under	the Resource Management Act 1991
In the matter of	Proposed Natural Resources Plan for the Wellington Region (Hearing Stream 3)

Wellington Regional Council legal submissions for Hearing Stream 3: Water Allocation & Natural Form and Function

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MAY IT PLEASE THE PANEL:

Introduction

1 These submissions address the legal framework relevant to the subject matter of Hearing Stream 3. Hearing Stream 3 covers two main topics:

1.1 Water allocation - addressed in the section 42A report prepared by Paula Hammond and the following technical evidence:

1.1.1 Dr Mark Gyopari (Consultant to Greater Wellington Regional Council) – Modelling and investigations used to develop the conjunctive management framework

1.1.2 Mr Brydon Hughes (Consultant to Wellington Regional Council) – Conjunctive management framework

1.1.3 Dr Doug Mzila (Council Senior Environmental Scientist – Groundwater) – Bores, aquifer integrity and dewatering, and

1.1.4 Mr Mike Thompson (Council Senior Environmental Scientist – Hydrology) – Minimum flows and allocation

1.2 Natural form and function - addressed in the section 42A report prepared by Yvonne Legarth.

2 As with other legal submissions presented at the start of a hearing stream, these submissions provide an overview of the main legal issues. It is anticipated that the Panel will have specific questions arising throughout the hearing which will then either be answered orally, or through written legal submissions in reply.

3 The legal framework for preparing and assessing a regional plan, including a regional coastal plan have previously been set out.[1] Those requirements are not repeated here, but are relevant to the Panel's consideration of, and decisions on the provisions addressed in this hearing stream.

WATER ALLOCATION

Section 14 of the RMA - restrictions relating to water

4 Section 14 of the Resource Management Act 1991 (**RMA**) is relevant to the water allocation topic to the extent it addresses the take and use of water. Discharges to water, or land where it may enter water, will be covered by other hearing topics. Section 14 is set out in full below.

> **14 Restrictions relating to water**
>
> (1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental

[1] Refer legal submissions in respect of Hearing Stream 1.

standard, 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; or

(b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—

(i) an individual's reasonable domestic needs; or

(ii) the reasonable needs of a person's animals for drinking water,—

and the taking or use does not, or is not likely to, have an adverse effect on the environment; or

(c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

5 As previously discussed with the Panel in Hearing One, section 14(3)(b)(ii) of the RMA has been amended by section 8 of the Resource Legislation Amendment Act 2017 (**Amendment Act**).[2] In addition, section 14(3)(e) of the RMA has now been amended by section 197 of the Fire and Emergency New Zealand Act 2017.

[2] The Amendment Act will be covered in more detail in the legal submissions in reply for Hearing Stream One to be filed on 11 August 2017.

6 The change in section 14(3)(b)(ii) relates to the activities authorised by section 14 of the RMA without the need for a resource consent (ie, it effectively makes them a permitted activity). It has changed the provision by replacing the words 'an individual's' with 'a person's'. This change came into effect on 19 April 2017:

> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of ~~an individual's~~ a person's animals for drinking water,—
>
> and the taking does not, or is not likely to, have an adverse effect on the environment;

7 This changes the focus of the permitted activity from an individual's animals, to a person's animals. While this potentially broadens the permitted activity significantly (as person is defined in section 2 of the RMA to include the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate) it is important to remember that the activity is still qualified by the statement that *the taking does not, or is not likely to, have an adverse effect on the environment*.

8 The change in section 14(3)(e) of the RMA was to replace the phrase 'firefighting purposes' with emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017 from 1 July 2017, as follows:

> the water is required to be taken or used for ~~firefighting purposes~~ emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

9 This removes the previous ambiguity in section 14(3)(e) of the RMA as to the scope of 'firefighting purposes' and whether this related solely to emergency response, or whether it included training purposes as well. The section is now clear that emergency and training purposes are now both covered, as section 48 of the Fire and Emergency New Zealand Act states:

48 Power to use water for any emergency and training purposes

(1) All FENZ personnel may, free of charge,—

(a) use all hydrants and control valves installed in any water mains and any water in the water mains for—

(i) the purposes of performing or exercising FENZ's functions, duties, or powers; or

(ii) training for the purposes of performing or exercising FENZ's functions, duties, or powers; and

(b) use water from any water supply or any source of water for—

(i) the purposes of performing or exercising FENZ's functions, duties, or powers; or

(ii) training for the purposes of performing or exercising FENZ's functions, duties, or powers.

(2) The provisions of this section apply in relation to defence fire brigades and industry brigades with all necessary modifications.

(3) The exercise of powers under this section is subject to the overall requirements of the National Controller under the Civil Defence Emergency Management Act 2002 if a state of emergency exists under that Act.

10 In terms of consequences for the water allocation hearing topic, this has implications on the use of water from April and July 2017. Both amendments result in specific water takes and uses being allowed as of right. There is no need for the proposed Plan or a resource consent to expressly allow such takes.

11 The legal effect of these changes are addressed in more detail in the reply submissions on Hearing One.

Necessary, reasonable and efficient

12 Fish and Game New Zealand's submission seeks that all water takes must be shown to be first necessary, then reasonable and then efficient. The submitter seeks that the proposed Plan reflect this.

13 Prior to the submitter's presentation/circulation of evidence, it is unclear what the submitter is relying on as justification for that submission point, but it may arise from the wording of section 14(3)(b) of the RMA.

14 Section 14(3)(b) of the RMA addresses water uses that are not prohibited by section 14(2). That is, they are uses that do not require a resource consent to occur. The requirements of section 14(3)(b) of the RMA are that the take is *required* for the *reasonable* needs (either domestic needs or for animals drinking water) and that the take does not, or is not likely to have an adverse effect on the environment.

15 The reference to 'required' in this section may be what the submitter is referring to in its submission. To be allowed under section 14(3)(b) of the RMA all the relevant criteria of that provision need to be met and there is no hierarchy (in terms of required and reasonable) in that sense.

16 However, the criteria in section 14(3)(b) of the RMA are only a requirement for activities that do not require resource consent. Where section 14(3) of the RMA is not complied with and the permitted activity rules R136 and R137 are not complied with, resource consent is required. Where not permitted, rules R141 (controlled activity), R142 (discretionary activity) and rules in the Whaitua chapters (R.R1, WH.R1 and K.R1 (restricted discretionary) and P.R1 and WC.R1 (discretionary) would apply. The requirements in section 14(3)(b) of the RMA are no longer relevant as that resource consent is then assessed against the relevant provisions of the proposed Plan.

17 In our submission section 14(3)(b) of the RMA does not limit the Council's ability to make rules or policy direction as to what water takes and uses are appropriate (it simply limits what will not need a resource consent). If a take is allowed by section 14(3) no consent is required

and therefore no consideration of the proposed Plan's objectives and policies is required. The objectives and policies therefore do not need to be consistent with the section 14(3)(b) RMA criteria.

18 Objectives and policies of the proposed Plan will only be relevant where a resource consent is required. From the legal perspective there is no requirement for a water take to be necessary before resource consent can be granted. It is then simply whether from the policy perspective, whether the Panel considers that it is necessary to have such a requirement. This matter is addressed from a policy perspective by Ms Hammond in her section 42A report.

Definition of water

19 As the water allocation topic considers the allocation of the region's water resources, it is important to understand what is meant by 'water' in the RMA.

20 Section 2 of the RMA defines water as:

> water—
>
> (a) means water in all its physical forms whether flowing or not and whether over or under the ground:
>
> (b) includes fresh water, coastal water, and geothermal water:
>
> (c) does not include water in any form while in any pipe, tank, or cistern
>
> [Emphasis added]

21 It is important to keep this definition in mind when considering the provisions of the proposed Plan, particularly for this topic.

22 'Fresh water', 'geothermal water' and 'coastal water' are also all defined in section 2 of the RMA.

Existing use rights

23 As addressed in Ms Hammond's section 42A report, an issue has been raised in submissions in respect of rules in the proposed Plan that reduce

the permitted level of water takes. Specifically the issue has arisen where the rules in the proposed Plan have reduced the amount of water that can be taken as a permitted activity. See for example, rule R141 which results in a reduction of permitted takes as the Regional Freshwater Plan allowed as a permitted take up to $20m^3$/day, but now that would be limited to $10m^3$/day on properties smaller than 20ha.

24 Section 20A of the RMA sets out the legal framework. Section 20A effectively provides 'existing use rights' to allow some activities to continue where regional plan rules now require resource consent for that activity.

25 First, where the relevant rule has taken legal effect, but prior to that rule becoming operative, the activity may continue under section 20A(1) of the RMA until that rule becomes operative. Provided that:

25.1 the activity was a permitted activity or otherwise could have been lawfully carried out and was lawfully established prior to the rule taking effect (section 20A(1)(a)),

25.2 the effects of the activity are the same or similar in character, intensity and scale to the effects that existed prior to the rule taking effect (section 20A(1)(b)), and

25.3 the activity has not been discontinued for a continuous period of more than 6 months (section 20A(1)(c)).

26 Second, where the relevant rule has become operative, the activity may continue under section 20A(2) of the RMA provided that:

26.1 It was a permitted activity or allowed to continue under section 20A(1) or otherwise could have been lawfully carried out without a resource consent and was lawfully established prior to the rule becoming operative (section 20A(2)(a)),

26.2 the effects of the activity are the same or similar in character, intensity and scale to the effects that existed prior to the rule becoming operative (section 20A(2)(b)), and

26.3 the person carrying out the activity has applied for a resource consent within 6 months after the date the rule became operative and the application has not yet been decided or any appeals have not yet been determined (section 20A(2)(c)).

27 Applying section 20A(1), in the context of Rule 141, where the Regional Freshwater Plan allowed as a permitted take up to $20m^3$/day, but now that person would be limited to $10m^3$/day on properties smaller than 20ha – a person may continue to take up to $20m^3$/day until the rule becomes operative, assuming section 20A(1)(a) to (c) are satisfied (and for a short time afterwards under section 20A(2) of the RMA if the requirements of that section are satisfied). After that 6 month period (from the plan becoming operative) a resource consent will be required to be able to continue that activity.

NATURAL FORM AND FUNCTION

Introduction to the topic

28 The natural form and function topic addresses the provisions in the proposed Plan aimed at managing effects on natural form and function. This includes natural character, natural processes, outstanding natural features and landscapes, significant geological features, significant surf breaks and special amenity landscapes.

29 The provisions in the proposed Plan that address this issue are largely driven by higher order provisions, in particular sections 6(a) and 6(b) of the RMA, and the New Zealand Coastal Policy Statement (**NZCPS**) (and in particular policies 13 (preservation of natural character), 14 (restoration of natural character), 15 (natural features and natural landscapes) and 16 (surf breaks of national significance). There are also many Regional Policy Statement (**RPS**) provisions that address these topics, which are addressed in Ms Legarth's section 42A report.

30 The higher order provisions are directive and the Council's options in implementing them in the proposed Plan are therefore limited.

Council's jurisdiction

31 The Council's jurisdiction in respect of regulating land use, is largely confined to the coastal marine area (**CMA**) but also extends to the use of the beds of lakes and rivers and wetlands. In Hearing Stream 2 Mr Loe addressed the Panel on the definitions of lake and river bed and the various types of lakes and rivers that exist in the Wellington region. We do not repeat that here, other than to note that the terms are defined in section 2 of the RMA.

32 The CMA is defined in section 2 of the RMA as:

> **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—
>
> (a) of which the seaward boundary is the outer limits of the territorial sea:
>
> (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
>
> (i) 1 kilometre upstream from the mouth of the river; or
>
> (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

33 The higher order instruments, including the RMA and both the RPS and the NZCPS refer to the 'coastal environment'. In addition, section 64(2) of the RMA states:

> A regional coastal plan may form part of a regional plan where it is considered appropriate in order to promote the integrated management of a coastal marine area and <u>any related part of the coastal environment</u>
>
> [Emphasis added]

34 The coastal environment is something different to the CMA. It is not defined in legislation, but it is commonplace that the coastal environment extends beyond the CMA and often to the nearest ridgeline (although not always) and into the territorial local authority's jurisdiction. It was judicially defined under the Town and Country Planning Act as an environment in which the coast is a significant part of element:[3]

> What constitutes the coastal environment will vary from place to place and according to the position from which a place is viewed. Where there are hills behind the coast, it will generally extend up the dominant ridge behind the coast.

35 This definition has been endorsed through caselaw since, when the extent of the coastal environment has been at issue.[4]

36 Forest and Bird has requested that provisions in the proposed Plan that refer to the CMA are amended to refer to the 'coastal environment' instead (for example O17 and P24) to be consistent with the RMA and NZCPS.

37 While there are directions as to the preservation of natural landscapes, character and amenity in both the RPS and NZCPS, it is not the Regional Council's sole responsibility to give effect to those provisions. Under section 30(1)(d) of the RMA the Council is only responsible, and able to, control land use in the coastal marine area, and not the broader coastal environment, territorial authorities will need to give effect to those provisions in that part of the coastal environment that is outside the Council's jurisdiction.

38 This is consistent with section 63(1) of the RMA which is quite clear that the purpose of the regional coastal plan is to achieve the purpose of the RMA 'in relation to the CMA' and the Minister only approves the parts that relate to the CMA (section 64(3)). Accordingly, the regional

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[3] Refer *Northland Regional Planning Authority v Whangarei County Council* (1977) A4828.

[4] Refer, for example, *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384.

coastal plan can only address matters in the CMA. Both O17 and P24 are regional coastal plan provisions and should therefore refer to the CMA, not the wider coastal environment.

39 However, the Council's consideration of a development in the CMA cannot be made in isolation from its surrounding context. Its location adjacent to (say) an outstanding natural feature, that is outside of the CMA, but within the coastal environment, will still be a relevant consideration. Policy 49 is an example of a provision that addresses this. It addresses use and development in the CMA, but requires consideration of how that impacts on outstanding natural landscapes, outstanding natural features and significant amenity landscapes.

Outstanding Natural Landscapes

40 Finally, the proposed Plan does not yet contain a list of outstanding natural features and landscapes or areas with outstanding/high natural character. As Ms Legarth sets out in her section 42A report, this is a 'work in progress' being undertaken by the Council in conjunction with the territorial local authorities (see M24). Inclusions into the list will be assessed on a case by case basis. There is significant case law on what is, and the assessment criteria for an outstanding natural landscape or feature. We do not repeat that case law here.[5] The RPS also contains directive policies and criteria to be used to identify them.

41 While inclusion in the list will provide certainty as to what is considered to be an ONL or ONF, that list will never be exhaustive. Whether or not a landscape or feature is outstanding will be assessed at the time a resource consent application is considered. This is clear from the caselaw, where the Courts have considered whether a landscape is an

[5] Refer for example to *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC); *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* EnvC C074/00; *Lakes District Rural Landowners Society Inc v Wakatipu Environmental Society Inc* EnvC C075/01.

ONL based on the expert assessment before it, not necessarily on its listing or otherwise in the relevant planning document.[6]

42 On that basis, what is, and is not, and ONL or ONF will always be a moving-feast and require consideration each time a resource consent application is being assessed.

Date: 7 August 2017

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[6] Refer *Unison Networks Ltd v Hastings District Council* HC Wellington CIV-2007-485-896, 11 December 2007 and *Rangitikei Guardians Society Inc v Manawatu-Wanganui Regional Council* [2010] NZENvC 14.