

**Before the Hearing Panel
At Wellington**

Under the Resource Management Act 1991 (**RMA**)

In the matter of Proposed Natural Resources Plan for the Wellington Region
(hearing stream 1)

**Legal submissions on behalf of Wellington Regional Council:
Hearing stream 1**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
GENERAL REGIONAL COUNCIL JURISDICTION	2
PREPARING A REGIONAL PLAN	3
REQUIREMENTS OF SECTION 32 REPORTS	7
General requirements of section 32	7
Section 32 reports for the proposed Plan	8
Submissions on the section 32 reports	8
Panel's consideration of section 32	9
PRE-HEARING MEETINGS	10
NATIONAL POLICY STATEMENTS	11
National Policy Statement for Freshwater Management	11
National Policy Statement on Urban Development Capacity	15
Other National Policy Statements	16
RESOURCE LEGISLATION AMENDMENT ACT 2017	16
TERMINOLOGY AND APPROACH OF THE PLAN.....	16
Definitions used	16
Terminology used	18
Mapping approach	20
SCOPE TO RECOMMEND AMENDMENTS	21
Scope of amendments sought in submissions	21
Scope to amend minor errors	24
CONCLUSION	26
APPENDIX A - SUMMARY OF LEGISLATIVE REQUIREMENTS	27
APPENDIX B - THE PLAN CHANGE TEST	29
APPENDIX C - DEFINED TERMS	33

EXECUTIVE SUMMARY

- 1 The purpose of these legal submissions is to address the Panel on the relevant legal tests for considering plan changes under the Resource Management Act 1991 (**RMA**) and the key legal issues that have been raised in submissions in relation to Hearing Stream 1. Given the general nature of these submissions, the matters covered will be relevant throughout consideration of the proposed Plan and most, if not all, of the later hearings on the proposed Plan.

- 2 These submissions cover the following primary issues:
 - 2.1 the Council's functions and jurisdiction;
 - 2.2 the statutory requirements for the preparation of the proposed Plan;
 - 2.3 the requirements of section 32 assessments;
 - 2.4 the pre-hearing process undertaken;
 - 2.5 the implementation of the National Policy Statement on Freshwater Management 2014;
 - 2.6 the relevance of the National Policy Statement on Urban Development Capacity 2016;
 - 2.7 the relevance of the Resource Legislation Amendment Act 2017 to the proposed Plan;
 - 2.8 terminology and approach of the proposed Plan;
and
 - 2.9 scope of recommended amendments to the

proposed Plan.

- 3 These submissions are not intended to be a point by point response to all the potential legal issues raised in submissions relevant to Hearing Stream 1. It is considered more appropriate to respond to any specific legal issues if, and when, they are raised by submitters through the hearing process.

GENERAL REGIONAL COUNCIL JURISDICTION

- 4 The Wellington Regional Council (**Council**) is responsible for the greater Wellington Region, which covers an area of 7,860km². It is bordered by the Tasman Sea, the Pacific Ocean and Cook Strait, and extends north to Ōtaki in the west and almost to Eketahuna in the east.

- 5 The Council has particular control over the coastal marine area (**CMA**), the beds of lakes and rivers, the taking, using, damming or diverting any water, and the discharge of contaminants into the environment.

Sections 12-15, of the RMA.

- 6 One function of the Council is to establish a regional coastal plan for the purpose of achieving the purpose of the RMA in the CMA. The Council may also establish a regional plan or plans to assist it in carrying out its functions set out in section 30 of the RMA in order to achieve the purpose of the RMA. A regional plan assists Council in achieving the integrated management of the natural and physical resources of the region.

Sections 63, 64 and 65, of the RMA.

- 7 The Council is in the process of reviewing its operative Regional Plans, including its Regional Coastal Plan. As a result of the review, the proposed Natural Resources Plan for the Wellington Region (**proposed Plan**) was developed.

- 8 The proposed Plan sets out objectives, policies, rules and methods to manage land use, development and protection, air, soil, discharges, water allocation, water quality and coastal management in the Wellington Region. It addresses matters such as biodiversity, natural hazards, historic heritage and Māori relationships with the environment.
- 9 In terms of control of genetically modified organisms (GMOs), it is open to the Council to control GMOs through the proposed Plan, and other Councils, such as Bay of Plenty and Northland have done so. As there is no mandatory obligation to address GMOs, the Council has a discretion whether to include provisions relating to GMOs within the proposed Plan or not. *Federated Farmers v Northland Regional Council* [2015] NZEnvC 89, at [60].
- 10 The proposed Plan was publicly notified on 31 July 2015. Submissions closed on 25 September 2015. Further submissions were received until 29 March 2016. Submissions and further submissions cover all aspects of the proposed Plan.
- 11 Subsequently, section 42A Reports have been, or will be, prepared and pre-circulated prior to the hearings on a topic-by-topic basis.
- 12 The rules in the proposed Plan have all had immediate legal effect from public notification, as they deal with matters such as water, air, soil, significant indigenous vegetation and fauna. Section 86B(3) and (5) of the RMA.

PREPARING A REGIONAL PLAN

- 13 Sections 66 and 67 of the RMA set out the requirements for the Council in preparing the proposed Plan. A full summary of these provisions is set out in **Appendix A**.

- 14 Briefly, the proposed Plan should be designed to accord with the Council's functions under section 30 of the RMA and the provisions of Part 2. Section 66(1), of the RMA.
- 15 In addition, the proposed Plan must give effect to any national policy statement, New Zealand Coastal Policy Statement and the Regional Policy Statement. Section 67(3), of the RMA.
- 16 Under the RMA, the proposed Plan must state its objectives for the Wellington Region, the policies to implement the objectives and the rules (if any) to implement the policies. The proposed Plan may state other matters, including issues, methods, reasons, expected environmental results, maintaining procedures and processes for dealing with cross boundary issues. Section 67(1), RMA
- 17 The proposed Plan states objectives, policies, rules and methods, but unlike the operative Regional Plans, the proposed Plan does not include issues or expected environmental results.
- 18 Turning to the requirements of objectives, policies and rules in the proposed Plan, the Courts have listed a 'relatively comprehensive summary of the mandatory requirements' under the RMA for a plan change in *Long Bay-Okura Park Society Incorporated v North South City Council*, updated by the Court in *High Country Rosehip Orchards Ltd v Mackenzie District Council (High Country Rosehip)*.¹ **Appendix B** contains an excerpt from *Colonial Vineyard Ltd v Marlborough District Council (Colonial Vineyard)* which
- EnvC Auckland A078/08 16 July 2008, at [34]
[2011] NZEnvC 387, at [19].
[2014] NZEnvC 55, at [17].

¹ Whilst the general requirements set out by the Courts relate to a district plan change rather than a regional plan change, the requirements for objectives, policies and rules apply equally for a regional plan.

summarises the current position.

- 19 The Environment Court has commented on the meaning of an objective:
- The Concise Oxford is simple and direct: — an objective is ... a goal or aim. That simplicity sits perfectly well here — an objective in a planning document sets out an end state of affairs to which the drafters of the document aspire, and is the overarching purpose that the policies and rules of the document ought to serve.
- Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [42].
- 20 Objectives are to be the 'most appropriate' way to achieve the purpose of the RMA. The 'most appropriate' method does not need to be the superior method.
- Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC), at [45].
- 21 The Court has held that 'appropriate' means suitable. There is no need to place a gloss upon the word by requiring that it be superior.
- Ibid.
- 22 Whilst each objective must be examined, it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the RMA. This is because objectives may interrelate and have overlapping ways of achieving sustainable management of natural and physical resources. It is about the objectives as a whole being the most appropriate.
- Ibid, at [46].
- 23 In *Art Deco Soc (Auckland) Inc v Auckland Council*, the Court held that an 'holistic' approach should be taken rather than a more focused, vertical or 'silo' approach to objectives, policies and methods.
- [2012] NZRMA 451, at [108].
- 24 Policies are to implement the objectives, and the rules are to implement the policies. Each proposed policy, rule and method is to be examined as to whether it is the most appropriate method for achieving the objectives, having
- High Country Rosehip*, at [19].

regard to their efficiency and effectiveness.

- 25 The Council may categorise activities as permitted, controlled, restricted or fully discretionary, non-complying, or prohibited. The Council may then make rules for each class of activity and specify conditions for those activities. Section 77A of the RMA.
- 26 There is no need to cross reference back to which section of the RMA the rules relate to (such as land use (section 9), activities in the CMA (section 12), activities in lakes and rivers (section 13), water (section 14) or discharges (section 15)).
- 27 Unlike district plans, which have as a general presumption that a land use activity is permitted unless otherwise specified in the Plan, the proposed Plan addresses section 12 to 15 matters. Generally this means that unless an activity is expressly permitted by the proposed Plan it will require resource consent. This is potentially why the proposed Plan has quite a number of permitted activities. Sections 12, 13, 14 and 15 of the RMA.
- 28 In terms of permitted activities, the rules need to be clear on their face as to whether an activity is permitted by that rule or not. Discretion should not be required to determine if an activity is permitted. It is up to the person undertaking the activity to demonstrate compliance with the required conditions of the rules. *Boanas v Oliver* PT Christchurch C072/94 28 July 1994.
Wawatai v Hamilton City Council PT Wellington W017/96 26 February 1996.
- 29 While the provisions of the proposed Plan relate to the Wellington Region as a whole, where the rules are part of the regional coastal plan, a coastal icon has been used to illustrate that fact. This icon identifies the parts of the proposed Plan that the Minister of Conservation is required to approve under section 64(3) of the RMA.

REQUIREMENTS OF SECTION 32 REPORTS

General requirements of section 32

- 30 A section 32 report is required to ensure that the proposed objectives are the most appropriate way to meet the purpose of the RMA, and the policies, rules and methods are the most appropriate way to achieve the objectives.
- 31 Any section 32 report must:
- 31.1 Examine the extent to which the objectives of the proposed Plan are the most appropriate way to achieve the purpose of the RMA. Section 32(1)(a).
 - 31.2 Examine whether the policies and rules are the most appropriate way to achieve the objectives by identifying other reasonably practicable options, assessing the efficiency and effectiveness of the provisions and summarising the reasons for deciding on the provisions. Section 32(1)(b).
 - 31.3 In assessing the efficiency and effectiveness of the policies and rules, identify and assess the costs and benefits of the effects which are anticipated from the implementation of the provisions, quantifying the costs and benefits if practicable. Section 32(2).
 - 31.4 Contain a level of detail that corresponds to the scale and significance of the effects anticipated from the implementation of the proposal. Section 32(1)(c).

32 The Environment Court has stated that the following needs to be considered when assessing which provision is better under section 32:

Auckland Memorial Park Ltd v Auckland Council [2014] NZEnvC 9 at [26].

- [i] whether it assists the [territorial authority] to carry out its functions in order to achieve the purposes of the Act,
- [ii] whether it is in accordance with Part 2 of the Act,
- [iii] if a rule achieves the objectives and policies of the Plan,
- [iv] the efficiency and effectiveness of the provision, and
- [v] the benefits and costs of that provision.

Section 32 reports for the proposed Plan

33 All objectives, policies, rules and methods of the proposed Plan have been evaluated in the manner set out in section 32, to ensure that the objectives of the proposed Plan are the most appropriate way to meet the purpose of the RMA, and the policies, rules and methods are the most appropriate way to achieve the objectives.

34 Section 32 reports were prepared prior to notification of the proposed Plan and have been available on the Council's website since.

Submissions on the section 32 reports

35 There has been some concern from submitters around the adequacy and sufficiency of the section 32 reports completed by the Council.

36 While those concerns have been raised in submissions, they have not all been individually coded as 'submission points' in the Summary of Decisions Requested report prepared by the Council. The concerns generally have been addressed in the

relevant section 42A officers reports, however, where those submissions do not seek amendments to the provisions of the proposed Plan, they are not the subject of specific recommendations in terms of amendments to the proposed Plan.

Panel's consideration of section 32

37 While there is no specific case law on the sufficiency of a section 32 report, under the most recent version of that provision, there is helpful comment around the requirements on the Courts to provide reasoning when issuing a decision. This can assist in assessing the adequacy of a section 32 report, in terms of the scope and adequacy of those reports.

38 In *Contact Energy v Waikato Regional Council*, the High Court considered the decision of the Environment Court on a plan change, and held that:

(2007) 14 ELRNZ 128 (HC), at [92].

There is no error of law by failing to articulate all of the reasoning provided it is clear that the Court turned its mind to the relevant statutory provisions, and had evidence to justify a conclusion ... The depth of reasoning that must be expressed will vary depending on the subject matter... there was no error of law by the Environment Court's not setting out in its decision a detailed analysis, as might be undertaken by an economist, carefully recording and weighing costs and benefits of a rule.

39 The Court of Appeal has commented that giving reasons for a decision serves two purposes. To provide public confidence in the system of justice through allowing members of the public to understand why a decision was made, and to ensure that the lawfulness of what was done can be assessed.²

Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546 (CA), at [79].

² While these comments were made in a criminal case they have equal relevance to non-criminal cases.

- 40 The Court comments that 'reasons may be abbreviated', and in some cases 'will be evident without express reference'. What is required is that a decision maker should: Ibid, at [81].
- outline reasons sufficient to show to what they were directing their mind and thereby showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful.
- 41 Finally, the decision of the Panel must include a further evaluation of the proposed Plan in accordance with section 32AA of the RMA for any changes to the proposed Plan since the completion of the original section 32 reports. Schedule 1, clause 10(2)(ab), of the RMA.
- 42 This evaluation must meet the same requirements as the original section 32 report. Section 32AA, of the RMA.
- 43 Where amendments are being recommended by Council officers through section 42A reports, those reports contain a section 32AA analysis.

PRE-HEARING MEETINGS

- 44 Pre-hearing meetings for plan changes are authorised under the RMA. While not a mandatory requirement, pre-hearing meetings have been held for the proposed Plan. Schedule 1, clause 8AA of the RMA.
- 45 The RMA requires that the Chairperson of a pre-hearing meeting must prepare a report that identifies the matters agreed and not agreed. A pre-hearing report may also identify the evidence to be called by submitters. This report must be provided to the Panel and pre-hearing meeting attendees 5 days prior to the hearing. This requirement will be met for all pre-hearing meetings for all relevant topics and addressed in the relevant section 42A officers reports.
- 46 The Panel must have regard to the reports in making its Schedule 1, clause 8AA(7) of the

decision.

RMA.

NATIONAL POLICY STATEMENTS

- 47 A proposed Plan is required to give effect to any National Policy Statement. The current National Policy Statements address: Urban Development Capacity, Freshwater Management, Renewable Electricity Generation, Electricity Transmission, and the NZ Coastal Policy Statement. Section 67(3), of the RMA.
- 48 The National Policy Statement for Freshwater Management 2014 (NPS-FM) and the National Policy Statement on Urban Development Capacity 2016 (NPS-UDC) are the most recent NPSs. They will need particular consideration by the Panel due to the NPS-FM and NPS-UDC coming into effect during the proposed Plan process (i.e. the NPS-FM came into effect one month before the draft Plan was available for public comment and the NPS-UDC came into effect after the proposed Plan was notified).
- 49 'Give effect to' simply means 'implement'. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. However, the implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a NPS which is framed in a specific and unqualified way (i.e. which creates an 'environmental bottom line') may, in a practical sense, be more prescriptive than a requirement to give effect to a NPS which is worded at a higher level of abstraction. *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [77] (**King Salmon**).

National Policy Statement for Freshwater Management

- 50 A concern raised by a number of submitters is whether the approach taken in the proposed Plan properly gives effect to

the NPS-FM.

- 51 Policy E1 of the NPS-FM requires that: Policy E1 (ba).
- Every Regional Council is to implement the policy as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2025. Policy E1(b).
- 52 There is an ability to extend that date to December 2030 if 2025 is impracticable or meeting the 2025 date would result in lower quality planning. The Council has not done that, but instead has set a programme of defined stages that will ensure implementation by December 2025. Refer to the evidence of Alastair Smaill for Hearing Stream 1.
- 53 The proposed Plan will implement the Council's programme to progressively implement the requirements of the NPS-FM by 2025.
- 54 The key feature of this programme is the whitua process, the catchment-based, collaborative community approach. Whitua committees will work with their catchment communities to develop recommendations for freshwater objectives, values for fresh water management units and limits related to water quality and quantity, by applying the process directed by Policy CA2 of the NPS-FM. Notified version of the proposed Plan at page 8.
- 55 Recommendations made by the Whitua committees will be considered by the Council for inclusion in the Plan by way of plan changes. The Council plans to have all five whitua processes complete by 2024, ultimately giving full effect to the NPS-FM before 2025.
- 56 This approach was used in Auckland, in the Auckland Unitary Plan (**PAUP**) and in Canterbury, in the proposed Land and Water Regional Plan (**PLWRP**).
- 57 The PAUP provided a plan framework necessary for the full

implementation of the NPS-FM. It contained interim freshwater quality guidelines and water quantity allocation guidelines.

- 58 It was noted in the PAUP process that the interim provisions deliberately did not seek to implement the NPS-FM in full on the basis that the necessary consultation and catchment level research had not been undertaken.
- 59 The intention was that the interim provisions in the PAUP would be replaced. To develop replacement provisions for the PAUP, the Auckland Council intended to engage with communities, stakeholders and mana whenua to identify values, and set objectives, water quality limits and establish an allocation regime. The policies, objectives and methods that were developed from the engagement process would be subsequently incorporated into the PAUP by way of variation or plan change.
- 60 The issue of whether this staged approach gave effect to the NPS-FM was considered by the Council in the evidence presented to the Panel. The Hearing Panel noted in its Report to Auckland Council that:
- [t]he Panel accepts that the Plan will only give interim effect to the NPS-FM as set out in the Council's evidence.
- 61 In Canterbury, the PLWRP was structured to leave to sub-regions the development of additional targets, limits, timeframes and methods suitable for the circumstances of each sub-region. Those proposed are to be developed within the overall structure of the objectives and policies of the PLWRP.
- 62 The intention was that the sub-regional catchment provisions would be included in the PLWRP in a staged manner through

Report to Auckland Council: Hearing topics 046, 047, 048 and 049: Water quality and quantity; lakes, rivers and streams, aquifers and groundwater; and discharges of stormwater and wastewater at section 1.3.1.

Report and recommendations of the hearing commissioners adopted by Council as its decision on 5 December 2013, at paragraph 420.

Legal submissions at paragraph 69 and 77.

future plan change processes.

63 The Hearings Panel considered that approach, and assessed the PLWRP as:

... substantially giving effect to the NPS-FM by the provisions it currently contains (amended as we recommend), and by sub-regional sections it provides for, which the CRC (Canterbury Regional Council) has committed to proceed with in terms of its long term plan.

Report and recommendations of the hearing commissioners adopted by Council as its decision on 5 December 2013 at paragraph 420.

64 The approach taken by the Council in this case to implement the NPS-FM in a staged manner is consistent with the approach taken in both Auckland and Canterbury.

65 While both Panels endorsed the approach taken, there is limited legal comment on how Council is to give effect to the NPS-FM.

66 Evidence presented by Mr Smaill on behalf of the Council is that the Council has a programme of work in place leading to plan changes and/or variations which will give effect to the NPS-FM by 2024.

Evidence of Alastair Smaill.

67 In addition to the haitua process, the proposed Plan includes the specific policies required by Policy PA4 and Policy PB7 of the NPS-FM.

68 It is submitted that the proposed Plan gives effect to the NPS-FM to the extent it is required to now, and will fully implement the NPS-FM prior to the required date in 2025.

National Policy Statement on Urban Development Capacity

- 69 The NPS-UDC presents a different issue to consider than the NPS-FM. While the NPS-FM was in place prior to the notification of the proposed Plan, the NPS-UDC only came into effect on 1 December 2016, which was after the close of submissions.
- 70 The proposed Plan is required to give effect to the NPS-UDC. As Wellington is classified as a medium-growth area, all the objectives, as well as policies PA1-PA4, PC1-PC4 and PD1-2 must be given effect to as soon as practicable by the Council. Further, Policies PB6, PB7 and PB1-5 must also be given effect to, but the NPS-UDC specifies a later timeframe for that to happen.
- 71 As none of the relevant objectives or policies are directive as to the amendments required to the proposed Plan, the Council must progress any amendments to the proposed Plan required to give effect to the NPS-UDC through the normal Schedule 1 process. Section 55(2C), of the RMA.
- 72 Each section 42A report author has (or will) also consider whether the NPS-UDC is relevant to the provisions covered by that report, and if so, whether the NPS-UDC has been given effect to by the proposed provisions. Where the NPS-UDC has not been given effect to, and further amendments are required, it is only where those amendments are already within scope of a submission on the proposed Plan that they can be made by the Panel.
- 73 A further plan change process may be required in order for the Council to give full effect to the NPS-UDC.

Other National Policy Statements

- 74 In terms of the other NPSs, each officer's report addresses the NPS(s) relevant to their topic.

RESOURCE LEGISLATION AMENDMENT ACT 2017

- 75 The Resource Legislation Amendment Act 2017 (**RLAA**) received Royal Assent on 18 April 2017.
- 76 The amendments contained within the RLAA will not need to be considered by the Panel. Under Schedule 2, clause 13 of the RLAA the transitional provisions provide that where a proposed Plan has been publicly notified but has not proceeded to the stage at which no further appeal is possible prior to the RLAA commencing, the proposed Plan must be determined as if the RLAA had not been enacted.
- 77 This position is clear and we do not address it further.

TERMINOLOGY AND APPROACH OF THE PLAN

Definitions used

- 78 There are definitions in the proposed Plan which differ in varying ways to definitions in other statutory documents, including the RPS, NPSs, and the RMA.
- 79 Examples of these differences are included in **Appendix C**, and include 'wetland' (in the sense that as well as the definition of 'wetland' the proposed Plan includes a definition for 'natural wetland', 'significant natural wetland' and 'outstanding natural wetland'), 'regionally significant infrastructure' and 'renewable energy generation activity'.
- 80 In terms of differences in definitions between the RMA and

Section 34 of the Interpretation Act

the proposed Plan, the Interpretation Act 1999 states that a word or expression used in a regulation (such as the proposed Plan) made under an enactment (such as the RMA) has the same meaning as it has in the enactment under which it is made. However, this is a rebuttable presumption. It is the default position, in that it applies unless it is determined that a different meaning for the word or expression applies. 1999.

81 This means that where the proposed Plan does not specifically define a term that is defined in the RMA, that term will be interpreted as having the same meaning as it does in the RMA. However, where the proposed Plan defines a term itself, and that definition is different to the RMA definition, then the definition in the proposed Plan would apply.

Section 2.2 of the proposed Plan is clear that definitions in the RMA apply but are not repeated in the proposed Plan.

82 However, the proposed Plan must be 'in accordance with' Part 2 of the RMA. That does not mean that definitions cannot be different to the terms as defined in the RMA, but any definition must be in agreement with, or in conformity with Part 2 of the RMA and definition in a subordinate document should not be contrary to any definition in the RMA.

83 In terms of differences in definitions between the RPS or NPS and the proposed Plan, the issue is slightly different. The proposed Plan must 'give effect' to any RPS or NPS. Therefore, it is possible for there to be differences in definitions between the RPS and NPS, and the proposed Plan, provided the proposed Plan still gives effect to the RPS and the NPS, and the differences in the definitions do not limit that.

Section 67(3) of the RMA.

84 While it is best practice to be as consistent as possible across planning documents within the Wellington Region, there are sometimes reasons that justify differences, such as geographical differences, time (in the sense that newer documents may update an older, less relevant version) or

inaccuracies that in hindsight need correcting.

85 The differences and reasons for the differences are explained in the relevant section 42A reports.

Terminology used

86 A number of words and phrases have significance in the proposed Plan, including 'avoid', 'reasonably practicable', 'minimise', 'mitigate', 'recognise and provide for' and 'protect'. These words have been used by the Council to convey a particular meaning. Set out below is the legal meaning of these terms and how they have been treated in drafting the proposed Plan. This may be helpful to the Panel when considering the consequence of the proposed provisions.

87 **Avoid:** means do not allow or prevent the occurrence of. In isolation, 'avoid' sends a clear signal that activities which result in the effects to be avoided will not be allowed. *King Salmon*, at [62].

88 However, the use of the word avoid must be considered in the context and framework in which it is used, and does not necessarily always result in a blanket prohibition.

89 **Reasonably practicable:** Whether a measure is or is not reasonably practicable is one which requires a value judgment in light of all the facts. Three general propositions from case law are as follows:

89.1 Reasonably practicable means something narrower than physically possible or feasible. *Slivak v Lurgi (Australia) Pty Ltd* (2001) 177 ALS 585 at [53].

89.2 What is reasonably practicable is to be judged on the basis of what was known at the relevant time. *Ibid*, at [53].

89.3 To determine what is reasonably practicable it is *Ibid*, at [53].

necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to prevent that risk.

90 There is no 'bright line' test and what is, and what is not, considered to be reasonably practicable will depend on a case by case analysis. It is something less than 'impracticable' and incorporates an element of reasonableness.

91 **Minimise:** to minimise is to reduce (something, especially something undesirable) to the smallest possible amount or degree.

New Zealand Oxford Dictionary, p716.

92 There is no relevant case law on the definition of 'minimise'. However, the term is frequently used in the RMA context with no adverse comment by the Environment Court.

93 It is worth noting that the difference between minimise and mitigate is that minimise is to make (something) as small or as insignificant as possible while mitigate is to reduce, lessen, or decrease.

94 **Mitigate:** to mitigate is to make something milder or less intense or severe.

New Zealand Oxford Dictionary, p720.

95 Regarding mitigation, the Environment Court has stated that:

The idea of 'mitigation' is to lessen the rigour or the severity of effects.

Refer *Trio Holdings v Marlborough District Council* [1997] NZRMA 97, p36.

96 **Recognise and provide for:** This phrase has been used within the proposed Plan as a strong policy direction to highlight the importance of the matters that are to be recognised and provided for. To recognise and provide for something requires the decision maker to both recognise a factor, and then make provision for the factor. Some action

King Salmon, at [26].

is required, as one does not 'provide for' a factor by considering and then discarding it.

97 This phrase can be contrasted against the lesser 'take into account', which only requires the decision maker to consider a factor, and weigh it up with other factors whilst retaining the ability to give it considerable, moderate, little, or no weight at all as deemed appropriate.

98 **Protect:** Protect has been used in the proposed Plan to require something stronger than recognising and providing for a matter. It has been used in the sense of its dictionary definition which is 'to keep safe, defend, guard' etc. This interpretation has been supported by the Environment Court in *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council*.

New Zealand
Oxford Dictionary,
p903.

[2015] NZEnvC
2019, at [63]

Mapping approach

99 The proposed Plan has taken the approach that the detailed planning maps are found in the Council GIS system, accessed electronically. The hardcopy or paper versions of the planning maps are less detailed, although they do provide all relevant information (such as scheduled areas).

100 The hard copy maps in the notified version of the proposed Plan include a notation which states:

This version of the map is not complete. The version of this map available online shows the complete, detailed, map as it includes the GIS overlay that is not shown on this hard copy. The online version is available on the Council's website at <http://mapping.gw.govt.nz/gwrc/> and can be accessed from the Council offices or public library where you are viewing this hard copy.

- 101 In addition, at paragraph 2.1.6 of the proposed Plan there is a general notation which states: Notified version of the proposed Plan.

The maps (chapter 13) are included for indicative purposes only. For a complete version of the planning maps the online version of the relevant map needs to be consulted. The hard copy versions of the maps are not complete as they do not include the GIS overlay. The GIS overlay may include additional detailed information which may have implications on activities in the area concerned and as such, the hard copy map should not be relied on independently. The online version is available on the Council's website at <http://mapping.gw.govt.nz/gwrc/> and can be accessed from the Council offices or public library.

- 102 The requirement in the RMA is for the Council to have available a copy of its proposed Plan at all public libraries and its principal office. The requirement is not for a 'hard copy' - it can also be an electronic copy. It is clear from the hard copy where to look for more detail. Schedule 1, clause 5(5) and section 35, of the RMA.
- 103 The proposed Plan complies with the requirements of the RMA, and the GIS maps being the official version of the maps is appropriate.

SCOPE TO RECOMMEND AMENDMENTS

Scope of amendments sought in submissions

- 104 Council officers have recommended a range of amendments to the proposed Plan through the officers' s42A reports.
- 105 The scope for amendments generally lies between the provisions of the notified version of the proposed Plan, and the relief sought in submissions on the proposed Plan.

- 106 Any recommended amendment directly raised within a submission is clearly within scope of the Panel's ability to make changes. Many submissions seek broad and extensive relief, meaning that the scope for changes to the proposed Plan is very wide.
- 107 It is important to note that the scope of a submission extends beyond the express words of the submission. The Court has held that:
- [t]o take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.
- General Distributors Ltd v Waipa District Council* HC Auckland, CIV 2008-404-4857, 19 December 2008 at [56].
- 108 Decision-makers need scope to deal with the realities of the situation where it faces multiple submissions, which are often conflicting, and often prepared by persons without professional help. Ibid, at [55].
- 109 The limitation for decision makers is that planning instruments cannot be appreciably amended without real opportunity for participation by those potentially affected by the amendment. *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch, AP34/02 14 March 2003 at [66].
- 110 Accordingly, for an amendment to be within scope, typically there would be a relationship between a submission and an amendment, such that the amendment 'can fairly be said to be a foreseeable consequence of any change directly proposed in the reference.' *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at [73] and [74].

- 111 In the case of *Countdown Properties*, although there was no submission that could have justified the relevant insertion, the Court did not see this as fatal, as no one seemed to be disadvantaged by the amendment. The Court noted:
- Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, at p 44].
- Even where the relationship to the submissions was somewhat tenuous, it seems quite clear that at the extensive hearing before the Council, most of the matters were discussed. If they were not discussed before the Council, they were certainly discussed before the Tribunal at great length.
- 112 Ultimately it is a question of procedural fairness. Adequate notice and opportunity must be given to those who might seek to take an active part in the hearing if the proposed changes would not have been within the reasonable contemplation of the original reference.
- Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at [74].
- 113 The issue of scope was recently tested before the High Court on the PAUP. The Panel in preparing their recommendations on the PAUP considered the appropriate test for scope to be:
- Whether the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point.
- 114 On appeal, the High Court held that:
- The reasonably foreseen logical consequence test also largely conforms to the orthodox 'reasonably and fairly raised' test laid down by the High Court in *Countdown*.
- Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].
- 115 The Court went on to summarise the previous case law as follows:
- A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions
- Ibid, at [115].

should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The 'workable' approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

Scope to amend minor errors

116 A number of minor amendments are proposed in the section 42A officers reports to address a range of minor matters. For example, recommendations include:

116.1 The inconsistent use of 'Council' and 'Wellington Regional Council' is to be addressed.

116.2 In Section 2.2 the title reference to the RPS needs to be amended to remove to the date of the RPS and 'region' needs to be capitalised.

116.3 The titles of rules are currently hard to distinguish so they are to be bolded or changed to a dark green colour so they stand out.

116.4 In Schedule C5, table 'Sites of significance to Ngāti Kahungunu ki Wairarapa and Rangitāne o Wairarapa':

116.4.1 In the entry for Makakaweka Stream, the value wahi whakawatea is repeated and the duplication needs to be removed; and

116.4.2 In the entry for Parakuiti, Ruamāhanga River, the value taniwha is repeated and the duplication needs to be removed.

- 116.5 The reference to Paraparumu Airport needs to be corrected to be a reference to Kapiti Coast Airport.
- 117 Under the RMA, an amendment can be made at any time to the proposed Plan where such an alteration is of minor effect, or where it corrects a minor error. This is a power that is independent of scope. Schedule 1, clause 16A RMA.
- 118 The provision is recognition of the fact that from time to time minor errors will creep into the most carefully drafted documents. The provision also recognises that it would be a waste of public money to go through a full public participation process to correct these errors or matters with minor effect.
- 119 The test for 'minor effect' is whether the amendment affects the rights of some members of the public, and therefore might have drawn a submission, or whether it is merely neutral. Only if it is neutral, and therefore would not have drawn a submission, may such an amendment be made. *Re an Application by Christchurch City Council (1996)* 2 ELRNZ 431, at p440.
- 120 A minor correction includes slips in spelling, punctuation, cross referencing and the like, to correct a mistake or inaccuracy which has crept into the Plan. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt what number is intended. A correction only seeks to clarify what is clearly intended by the document and does not make a change which alters its meaning. Ibid.
- 121 Where Council has recommended changes to the proposed Plan to correct a minor error or a correction that is of minor effect, this is identified in the relevant s42A officer's report, for consideration by the Panel.

CONCLUSION

- 122 These submissions provide an overview of legal requirements for the proposed Plan and other issues relevant to this hearing topic in terms of jurisdiction, process and scope.
- 123 The matters addressed will be relevant throughout the hearing process.
- 124 Any additional legal issues that arise during the hearing can be addressed at any point requested by the Panel.

Date: 20 April 2017



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Kerry Anderson/Emma Manohar
Counsel for Wellington Regional Council

APPENDIX A - SUMMARY OF LEGISLATIVE REQUIREMENTS

- | | | |
|---|---|-------------------|
| 1 | A regional plan must not be inconsistent with: | Section 67(4) |
| | 1.1 a water conservation order, or | |
| | 1.2 any other regional plan for the region, or | |
| | 1.3 a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996. | |
| 2 | A regional plan must record how a regional council has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if the council has done so. | Section 67(5) |
| 3 | When preparing its regional plan the regional council must also: | |
| | 3.1 have regard to any relevant management plans and strategies prepared under other Acts, any relevant entry in the Historic Places Register and to various fisheries regulations; and | Section 66(2)(c) |
| | 3.2 have regard to consistency with regional policy statements, plans and proposed regional policy statements and plans of adjacent regional councils; and | Section 66(2)(d) |
| | 3.3 take into account any relevant planning document recognised by an iwi authority; and | Section 66(2A)(a) |
| | 3.4 recognise and provide for any matters related to the coastal area, so far as they are included within a planning documents prepared by a | Section 66(2A)(b) |

customary marine title group; and

3.5 not have regard to trade competition, or the effects of trade competition. Section 66(3)

4 The regional plan must be prepared in accordance with any regulation and any direction given by the Minister for the Environment. Section 66(1)

APPENDIX B - THE PLAN CHANGE TEST

Extract from *Colonial Vineyard Ltd v Marlborough District Council* [2014]
NZEnvC 55³

A. General requirements

1. A district plan (change) should be designed to **accord with**— and assist the territorial authority to **carry out** — its functions so as to achieve the purpose of the Act.
2. The district plan (change) must also be prepared **in accordance with** any regulation (there are none at present) and any direction given by the Minister for the Environment.
3. When preparing its district plan (change) the territorial authority **must give effect** to any national policy statement or New Zealand Coastal Policy Statement.
4. When preparing its district plan (change) the territorial authority shall:
 - (a) have regard to any proposed regional policy statement;
 - (b) give effect to any operative regional policy statement.
5. In relation to regional plans:
 - (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter

³ Paragraph 17, citations removed.

specified in section 30(1) or a water conservation order; and

- (b) **must have regard to** any proposed regional plan on any matter of regional significance etc.

6. When preparing its district plan (change) the territorial authority must also:

- **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;
- **take into account** any relevant planning document recognised by an iwi authority; and
- not have regard to trade competition or the effects of trade competition;

7. The formal requirement is that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies;
10. Each proposed policy or method (including each rule) is to be examined, having **regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives of the district plan **taking into account**:
 - (i) the benefits and costs of the proposed policies and methods (including rules); and
 - (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and
 - (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.
12. Rules have the force of regulations.
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land.

15. There must be no blanket rules about felling of trees in any urban environment.

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal the Environment Court must have regard to one additional matter — the decision of the territorial authority.

APPENDIX C - DEFINED TERMS

DEFINED TERMS IN THE PROPOSED PLAN WITH DIFFERENCES FROM DEFINED TERMS IN HIGHER ORDER DOCUMENTS

Defined term	Proposed Plan (as notified)	Other Documents
<p>Wetland</p>	<p>In the proposed Plan, there are three related and relevant definitions: 'Natural wetland', 'outstanding natural wetland' and 'significant natural wetland'.</p> <p><u>Natural Wetland:</u></p> <p>Is a permanently or intermittently wet area, shallow water and land water margin that supports a natural ecosystem of plants and animals that are adapted to wet conditions, including in the beds of lakes and rivers, the coastal marine area (e.g. saltmarsh), and groundwater-fed wetlands (e.g. springs). Natural wetlands do not include:</p> <ul style="list-style-type: none"> (a) damp gully heads, or wetted pasture, or pasture with patches of rushes, or (b) areas of wetland habitat in or around bodies of water specifically designed, installed and maintained for any of the following purposes: <ul style="list-style-type: none"> (i) water storage ponds for <ul style="list-style-type: none"> a) public water supply, or 	<p>Resource Management Act 1991, section 2:</p> <p>wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions</p>

Defined term	Proposed Plan (as notified)	Other Documents
	<p>b) hydroelectric power generation, or c) firefighting or d) irrigation, or e) stock watering or (ii) water treatment ponds for a) wastewater, or b) stormwater, or c) nutrient attenuation, or d) sediment control, or e) animal effluent, or (iii) beautification, landscaping, amenity, or (iv) drainage.</p> <p>See also significant natural wetland and outstanding natural wetland</p> <p>'Wetland' has the same meaning as in the RMA</p> <p><u>Outstanding natural wetland:</u> Outstanding natural wetlands are identified in Schedule A3 (outstanding wetlands).</p> <p><u>Significant Natural Wetland:</u> A natural wetland that meets one or more of criteria (a) to (d) listed in Policy 23 of the Regional Policy Statement 2013 being: representativeness; rarity; diversity; ecological context. Identified significant natural wetlands</p>	

Defined term	Proposed Plan (as notified)	Other Documents
	greater than 0.1ha from which livestock should be excluded under Rule R98 are listed in Schedule F3 (significant wetlands).	
Renewable energy generation activities	<p>The proposed Plan defines Renewable energy generation activities as:</p> <p>The construction, operation and maintenance of structures associated with renewable energy generation, including small and community-scale distributed renewable generation activities and the system of electricity conveyance required to convey electricity to the distribution network and/or the national grid and electricity storage technologies associated with renewable electricity.</p>	<p>The National Policy Statement on Renewable Electricity Generation 2011 uses a similar term and definition:</p> <p>Renewable electricity generation activities means the construction, operation and maintenance of structures associated with renewable electricity generation. This includes small and community-scale distributed renewable generation activities and the system of electricity conveyance required to convey electricity to the distribution network and/or the national grid and electricity storage technologies associated with renewable electricity.</p>
National Electricity Grid	<p>The proposed Plan defines the National electricity grid as:</p> <p>National electricity grid means the assets used or owned by Transpower New Zealand Limited, including:</p> <p>(a) transmission lines, and (b) electricity substations.</p>	<p>The National Policy Statement on Electricity Transmission 2008 uses the following:</p> <p>National grid means the assets used or owned by Transpower NZ Limited.</p> <p>Whereas, the National Policy Statement on Renewable Electricity Generation 2011 uses the following:</p> <p>National grid means the lines and associated equipment used or owned by Transpower to convey electrify</p>

Defined term	Proposed Plan (as notified)	Other Documents
<p>Regionally significant infrastructure</p>	<p>Regionally significant infrastructure is defined in the proposed Plan as:</p> <p>Regionally significant infrastructure includes:</p> <ul style="list-style-type: none"> • pipelines for the distribution or transmission of natural or manufactured gas or petroleum • strategic facilities to the telecommunication network, as defined in section 5 of the Telecommunications Act 2001 • strategic facilities to the radio communications network, as defined in section 2(1) of the Radio Communications Act 1989 • the national electricity grid • facilities for the generation and transmission of electricity where it is supplied to the electricity distribution network, including the national grid • the local authority water supply network and water treatments plants • the local authority wastewater and stormwater networks, systems and wastewater treatment plants • the Strategic Transport Network • Wellington City bus terminal and Wellington Railway Station terminus • Wellington International Airport • Masterton Hood Aerodrome • Paraparaumu Airport • Commercial Port Area within Wellington Harbour (Port Nicholson) and adjacent land used in association with the movement of cargo and passengers and including bulk fuel supply infrastructure, and storage tanks for bulk liquids, and associated wharflines. 	<p>The Regional Policy Statement defines the same term as:</p> <p>Regionally significant infrastructure includes:</p> <ul style="list-style-type: none"> • pipelines for the distribution or transmission of natural or manufactured gas or petroleum • strategic telecommunications facilities, as defined in section 5 of the Telecommunications Act 2001 • strategic radio communications facilities, as defined in section 2(1) of the Radio Communications Act 1989 • the national electricity grid, as defined by the Electricity Governance Rules 2003 • facilities for the generation and transmission of electricity where it is supplied to the network, as defined by the Electricity Governance Rules 2003 • the local authority water supply network and water treatment plants • the local authority wastewater and stormwater networks, systems and wastewater treatment plants • the Strategic Transport Network, as defined in the Wellington Regional Land Transport Strategy 2007-2016 • Wellington City bus terminal and Wellington Railway Station terminus • Wellington International Airport • Masterton Hood Aerodrome • Paraparaumu Airport • Commercial Port Areas within Wellington Harbour and adjacent land used in association with the movement of cargo and passengers and including bulk fuel supply infrastructure, and storage tanks for bulk liquids, and associated wharflines.