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)

Supplementary responses from legal advisers and section 42A authors addressing questions arising during Council's opening session on 22/23 May 2017

Date: 26 May 2017

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Introduction

1 During the presentation of the legal submissions and section 42A reports on 22/23 May 2017 the Panel asked several questions, some of which could not be responded to at the time as further consideration was required.

2 It was considered appropriate to file these supplementary responses now to respond to those questions, so the Panel has that information available as it continues to hear submissions on the Hearing One topics. This also means that any 'reply' filed by legal or the section 42A officers will truly be in reply to issues raised by submitters, rather than including responses to questions raised on the Council reports. All questions arising after Council completed its presentations on 23 May 2017 will be addressed in reply (due 10 working days after adjournment of Hearing Stream 1).

3 The matters have been addressed in the order they arose.

How should the Panel address the amendments to the Council's functions in section 30 of the RMA? (Commissioner McMahon 22 May 11.30am)

4 On 19 April 2017 the Resource Management Act 1991 (**RMA**) was amended by the Resource Legislation Amendment Act 2017 (**RLAA**). As set out in legal submissions dated 21 April 2017, the transitional provisions of the RLAA provide that the Panel must make its decision on the proposed Plan on the provisions of the RMA as if the RLAA had not been enacted.

5 While that is mostly straightforward where new requirements have been inserted, some issues arise where existing requirements have been deleted. The Panel has specifically raised the amendments to section 30 in terms of hazardous substances.

6 As at 19 April 2017 the Council's functions under section 30 of the RMA have been amended. A new function has been added, and two existing functions either repealed or amended:

> (ba) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region:
>
> ~~(c)(v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances~~
>
> (d)(v) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards~~ and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances~~

7 In accordance with the transitional provisions, the Panel has to effectively ignore these amendments. How the Council considers these changes to hazardous substances should be dealt with within the proposed Plan will be specifically addressed in Hearing Stream 5.

What is the most recent case law on the precautionary principle and how is it implemented through the proposed Plan? (Commissioner Burge 22 May 12.05pm)

8 The Panel requested the 'most recent case law' on the use of the precautionary approach in RMA cases.

9 *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council* [2016] NZEnvC 151 stated the principle quite clearly in the New Zealand context:

> [22] The *precautionary principle,* as developed in New Zealand case law, has a different emphasis. It comes into play where there is uncertainty about the likelihood, or possibility, of adverse effects arising from a given activity, and/or the significance of those adverse effects. Where that is so, the principle holds that commensurate caution should be applied to any necessary decision-making. So, applying that concept to the present debate, the question must be whether there is a foreseeable likelihood, or possibility, that extending the existing marine farms would, or might, so reduce the area of usable habitat for the dolphins that there would be an appreciable decline in the Bay's population. A similar issue arises about possible effects on the King Shag population.

[23] One possible tool for giving effect to the precautionary principle is that of *adaptive management*. That usually will involve a staged establishment and operation of the activity in question. At each stage, the adverse effects, if any, are to be measured against a known baseline. If the effects are both attributable to the activity, and adverse beyond a pre-set limit, then that stage of establishment and operation is to be reversed. It follows from that last point that it must be reliably predictable that the reversal will allow the affected environment to return to its undamaged state.

[24] So it follows that an adaptive management regime, to give effect to the precautionary principle must have, at the very least:

• A clear baseline against which future effects can be measured;

• A means of reliably measuring the nature and extent of future adverse effects;

• A means of knowing that a given adverse effect is the product of a known cause.

• Certainty that the identified cause can be stopped, and that any adverse effects attributable to it can be reversed.

[25] That prescription fits, we think, with the comments made by the Supreme Court in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40 [2014], 1 NZLR 673 (at para [133]) as to what is required of an effective and supportable adaptive management regime - ie:

> We accept that, at least in this case, the factors identified by the Board are appropriate to assess this issue. For convenience we repeat these here:
>
> [a] There will be good baseline information about the receiving environment;
>
> [b] The conditions provide for effective monitoring of adverse effects, using appropriate indicators;
>
> [c] Thresholds are set to trigger remedial action before the effects become overly damaging; and
>
> [d] Effects that might arise can be remedied before they become irreversible.
>
> The Court held that a threshold point had to be reached before an adaptive management regime could be considered appropriate - there must be an adequate evidential foundation to have a reasonable assurance that the regime would sufficiently reduce uncertainty, and adequately manage residual risk. Noting that the Court expressed the proviso ... *at least in this case* ...

> we have to say that we see no material difference between that case and this in assessing the requirements of an effective AMP.

10 The most recent case that considered the issue is In *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52,[1] which summarised what the *King Salmon* case said on the issue and it relied on that. The following excerpts from *Davidson* (which reference *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*) are particularly relevant:

> [51] In the course of the judgment, the Supreme Court had particular regard to the significance of the King Shag foraging habitat. In addition to citing with approval the 2007 IUCN Guidelines for the application of the precautionary principle, the Supreme Court concluded it should be applied to the threatened status of the King Shag:
>
> > "[66] The 'cumulative additions of nitrogen, increases in phytoplankton and consequential reduction in water clarity' were also potentially of significance for the King Shag foraging habitat. This merited a precautionary approach, given the threatened status and limited geographic range of the King Shag."
>
> [52] The Supreme Court also addressed the secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach. This, the Court said, will depend on an assessment of a combination of factors, including the extent of the environmental risk, the importance of the activity, the degree of uncertainty and the extent to which an adaptive management approach will sufficiently diminish the risk in the uncertainty.
>
> [53] The question the Court addressed was whether any adaptive management regime can be

[1] We note that the Court of Appeal has granted leave to appeal this decision (*R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194). However, that appeal does not relate to the use of the precautionary approach. Leave is limited to consideration of the questions of whether the High Court erred in holding the EnvC was not able or required to consider part 2 of the RMA directly and was bound by its expression in the relevant planning documents, and if so, should the High Court have remitted the case back to the EnvC for reconsideration.

considered consistent with a precautionary approach. The answer to the question of whether risk and uncertainty will be diminished sufficiently for an adaptive management regime to be consistent with a precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. The Court gave as an example the annihilation of an endangered species:

"For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach."

[54] The Supreme Court found that it was open to the *SOS* Board of Inquiry to consider the adaptive management regime as being consistent with a proper precautionary approach. The Court said:

"[140] In this case, while a change in trophic state would be grave, the experts were agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was thus entitled to consider that the four factors it had identified were met. In this case, given the uncertainty will largely be eliminated and the risk managed to the Board's satisfaction by the conditions imposed, it was open to the Board to consider that the adaptive management regime it had approved, in the plan and the consent conditions, was consistent with a proper precautionary approach."

11 In the Environment Court, the principles from previous cases were summarised and relied on by the Court in *Eyre Community Environmental Safety Society Inc v Christchurch Regional Council* [2016] NZEnvC 178:

[28] The Environment Court in *Aquamarine Ltd v Southland Regional Council*, offered discussion about the so-called precautionary principle in the context of effects of low probability but high potential impact. The Court held that the RMA was not a "no risk regime", as that would be incompatible with the definition of sustainable management in s 5(2) RMA. The Court held instead that where there was a suggested risk of

> serious or irreversible harm to the environment coupled with scientific uncertainty as to the extent of that risk, then decision-makers should be cautious but not inhibited to the extent of a no risk approach.

12 As to how the precautionary approach is incorporated into the proposed Plan, this is addressed by Ms Emily Greenberg's section below.

How are obligations contained within Settlement Acts incorporated into the proposed Plan? (Commissioner St Clair 22 May 1220pm)

13 There are two Settlement Acts that are relevant in the Wellington Region[2]:

13.1 Port Nicholson Block (Taranaki Whānui ki te Upoko o Te Ika) Claims Settlement Act 2009;

13.2 Ngāti Toa Rangatira Claims Settlement Act 2014; and

14 In addition, there is a Settlement Bill that is progressing through the Parliamentary process:

14.1 Rangitāne Tū Mai Rā (Wairarapa Tāmaki nui- ā-Rua) Claims Settlement Bill (currently awaiting its second reading in Parliament).

15 Each Settlement Act contains its own specific statutory acknowledgement, the purpose of the statutory acknowledgement and how regional councils are to consider that acknowledgement in consent decisions and through their regional plans. For example, section 28 of the Port Nicholson Block (Taranaki Whānui ki te Upoko o Te Ika) Claims Settlement Act 2009 states:

> **28 Recording statutory acknowledgement on statutory plans**
>
> (1) On and from the effective date, each relevant consent authority must attach information

[2] Section 42A report on Areas and Sites with Significant Mana Whenua Values (Pam Guest) at [35].

recording the statutory acknowledgement to all statutory plans that wholly or partly cover a statutory area.

(2) The information attached to a statutory plan must include the relevant provisions of sections 23 to 31 in full, the descriptions of the statutory areas, and the statements of association.

(3) The attachment of information to a statutory plan under this section is for the purpose of public information only, and the information is not—

(a) part of the statutory plan, unless adopted by the relevant consent authority; or

(b) subject to the provisions of Schedule 1 of the Resource Management Act 1991, unless adopted as part of the statutory plan.

16 Policy recognition of the Settlement Acts in the proposed Plan primarily occurs through Policy 21, which states:

> Policy P21: Statutory acknowledgements
>
> Wellington Regional Council will:
>
> (a) include any relevant statutory acknowledgments in Schedule D (statutory acknowledgements) for public information, and
>
> (b) have regard to any relevant statutory acknowledgment in Schedule D (statutory acknowledgements) when processing resource consent applications.

17 In accordance with Policy P21, the relevant statutory acknowledgements of the two current Settlement Acts are incorporated into Schedule D of the proposed Plan. As further Settlement Acts are given assent to, they will also be included within the Schedule D as required by those Acts.

18 As a current example, clause 33 of the Rangitāne Tū Mai Rā (Wairarapa Tāmaki nui- ā-Rua) Claims Settlement Bill currently states:

> **33 Recording statutory acknowledgement on statutory plans**
>
> (1) On and from the effective date, each relevant consent authority must attach information recording the statutory acknowledgement to all statutory plans that wholly or partly cover a statutory area.

(2) The information attached to a statutory plan must include—

(a) a copy of sections 28 to 32, 34, and 35; and

(b) descriptions of the statutory areas wholly or partly covered by the plan; and

(c) the statement of association for each statutory area.

(3) The attachment of information to a statutory plan under this section is for the purpose of public information only and, unless adopted by the relevant consent authority as part of the statutory plan, the information is not—

(a) part of the statutory plan; or

(b) subject to the provisions of Schedule 1 of the Resource Management Act 1991.

Case references in officers section 42A reports (Commissioner St Clair 22 May12.40pm)

19 The section 42A officers reports have been reviewed and all case references identified. A case book has been provided incorporating those. In future cases citied in legal submissions, and officers reports, will be combined into one bundle for the Panel.

Was the implementation programme developed through public consultation? (Commission McMahon 22 May 430pm)

20 The Progressive implementation programme as required by section E of the NPS-FM was formally adopted by the council and publicly notified (as required by policy E1 (d) of the NPS-FM). This is what is attached as Attachment B to Mr Smaill's evidence (appendix B to Ms Greenberg's section 42A Report Part A: Overall policy framework of the proposed plan)

21 No public consultation was undertaken as part of this council decision.

22 Separately, the Whaitua concept and proposed Plan structure was consulted on widely through consultation on the proposed Plan including on the

working document for discussion, the draft plan and consultation leading up to notification of the proposed Plan.

Is there a hierarchy among objectives within the proposed Plan, if so, which provisions have primacy? (Commissioner McMahon 23 May 9.10am)

23 We understand that this query around a hierarchy of objectives has been raised in part due to the recent case law of *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* which dealt with the objectives of the Canterbury Land and Water Regional Plan, which in the Introduction to Section 3, stated: [3]

> The Objectives of this Plan must be read in their entirety and considered together. In any particular case some Objectives may be more relevant than others, but in general no single Objective has more importance than any other.

24 The Court stated:

> It appears to us that ranking those Objectives (and all the others) equally fails to give effect to the CRPS which would, at first sight, appear to require that for example Objective 3.8 be achieved before Objective 3.10 is implemented. We received no argument on that so take it no further.

25 As noted in the extract above, this is a point which was not considered in any detail by the Court, or expanded any further in the decision. We understand the Panel's concern is that this case indicates that a hierarchy must be provided for in objectives. In our view, this decision does not indicate that a hierarchy is required, but rather, in that case the issue was that the objectives did not reflect the relevant RPS, which is a different issue.

26 As confirmed by Council officers, there is no express primacy or hierarchy within the proposed Plan objectives. They appear in the proposed Plan in order of first objectives that are region wide/activity wide with the later objectives being more activity specific. The region/activity wide objectives are likely to be relevant to all resource consent applications. The activity

[3] [2017] NZEnvC 36.

specific objectives will only be relevant to some resource consent applications.

27 As set out in the legal submissions filed on 20 April 2017, *Art Deco Soc (Auckland) Inc v Auckland Council* states that when considering plan provisions, there is a 'need for a holistic approach to the objectives, policies and methods being considered, as opposed to the vertical or silo approach'. [4]

28 In *Rational Transport Soc Inc v New Zealand Transport Agency* the Court stated that: [5]

> As to Mr Bennion's argument that s 32(3)(b) mandated that "each objective" had to be the "most appropriate way" to achieve the Act's purpose; i.e. it was an error to look at the combined objectives; I do not agree that the Board is to be constrained in that way. It is required to examine each, and every, objective in its process of evaluation — that may, depending on the circumstances result in more than one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships.

29 In addition, *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* (***King Salmon***), when examining the inter-relationship between policies in the NZCPS, stated: [6]

> When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, "avoid" is a stronger direction than "take account of". That said however, we accept that there may be instances where particular policies in the NZCPS "pull in different directions". But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent

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[4] [2012] NZRMA 451, at [108].

[5] [2012] NZRMA 298 (HC) at [46].

[6] [2014] NZSC 38 at [129]

> conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
>
> Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5

30 Accordingly, we do not consider that an express hierarchy of objectives is required. While recently (eg, Christchurch Replacement Plan and Queenstown's Proposed District Plan, with Strategic Directions Chapters) some Councils have chosen to do this, it is not a requirement of the RMA.

31 On that basis, unless there is anything in the proposed Plan that directs otherwise, we consider that there is no express hierarchy (or need for one) and the weight to be given to the various relevant objectives and policies will depend on the specific resource consent application where they are being considered. As set out in *King Salmon* where there are more directive provisions, these may effectively 'trump' less directive provisions. However, any party must be cautious before determining that one policy (or objective) has primacy over another.

What are the 'strategic facilitates' referred to in the definition of 'regionally significant infrastructure'? (Commissioner McMahon 23 May 9.35am)

32 We understand that the Panel would like further information on the meaning of 'strategic facility' as that term is used within the definition of 'regionally significant infrastructure' (in Chapter 2 of the proposed Plan and as already used within the RPS).

33 As we understand it, the RPS identified the benefits of infrastructure and the need to protect it from incompatible use and development adjacent to it as a regionally significant issue. It contains policies that direct regional plans to recognise the benefits of regionally significant infrastructure and protect them from incompatible use and development. A definition of *regionally significant infrastructures* is then included within the RPS. That definition

is effectively mirrored in the proposed Plan (see Appendix B of legal submissions dated 20 April 2017 for comparative table).

34 The starting point for the development of the definition in the RPS was the definition of infrastructure in the RMA:

> infrastructure means—
>
> (a) pipelines that distribute or transmit natural or manufactured gas, petroleum, biofuel, or geothermal energy:
>
> (b) a network for the purpose of telecommunication as defined in section 5 of the Telecommunications Act 2001:
>
> (c) a network for the purpose of radiocommunication as defined in section 2(1) of the Radiocommunications Act 1989:
>
> (d) facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person—
>
> (i) uses them in connection with the generation of electricity for the person's use; and
>
> (ii) does not use them to generate any electricity for supply to any other person:
>
> (e) a water supply distribution system, including a system for irrigation:
>
> (f) a drainage or sewerage system:
>
> (g) structures for transport on land by cycleways, rail, roads, walkways, or any other means:
>
> (h) facilities for the loading or unloading of cargo or passengers transported on land by any means:
>
> (i) an airport as defined in section 2 of the Airport Authorities Act 1966:
>
> (j) a navigation installation as defined in section 2 of the Civil Aviation Act 1990:
>
> (k) facilities for the loading or unloading of cargo or passengers carried by sea, including a port related commercial undertaking as defined in section 2(1) of the Port Companies Act 1988:
>
> (l) anything described as a network utility operation in regulations made for the purposes of the definition of network utility operator in section 166

35 An evaluative assessment was then undertaken to determine what infrastructure was considered to be regionally significant, with the definition ultimately reflecting this in an inclusive (but not exhaustive) list of examples.

36 Two of those examples, 'strategic facilitates to the telecommunications network' and 'strategic facilities to the radio communications network' use the qualifier of 'strategic facilities'. However, there is no definition of 'strategic facilities' in either planning document (or in the Radiocommunications Act 1989 or the Telecommunications Act 2001) nor is there any case law on what a *strategic facility* is under the RPS.

37 In contrast, Strategic Transport Network which is also included within the list of regionally significant infrastructure, is defined within the proposed Plan. This references infrastructure that forms part of the Regional Transport Plan.

38 In terms of other legislation, the Local Government Act 2002 uses the term *strategic asset* which is defined in section 5 of that Act as:

> strategic asset, in relation to the assets held by a local authority, means an asset or group of assets that the local authority needs to retain if the local authority is to maintain the local authority's capacity to achieve or promote any outcome that the local authority determines to be important to the current or future well-being of the community; and includes—
>
> (a) any asset or group of assets listed in accordance with section 76AA(3) by the local authority; and
>
> (b) any land or building owned by the local authority and required to maintain the local authority's capacity to provide affordable housing as part of its social policy; and
>
> (c) any equity securities held by the local authority in—
>
> (i) a port company within the meaning of the Port Companies Act 1988:

(ii) an airport company within the meaning of the Airport Authorities Act 1966

39 The use of the phrase strategic facilities within the proposed Plan must be considered to require a similar assessment in our view.

40 While it will be necessary to consider whether the assets are strategic or not on a case by case basis, the intention in the RPS was to clearly limit regionally significant infrastructure in some way, so to not include the entire networks within scope of that definition. Utility operators may be better to advise during their submissions whether they have any strategic plan or guidance as to what parts of their network are strategic (which is consistent with the Council using the Regional Transport Plan to identify the Strategic Transport Network), with the position to then be addressed by officers in reply.

How does the Panel address provisions where there are no submissions? (Commissioner McMahon 22 May 12.15pm)

41 All provisions in the proposed Plan need to be filtered through the lens of relief sought in submissions. The Panel's role is to make decisions on submissions (clause 10 of the First Schedule to the RMA) - it is not the Panel's role to prepare the plan from scratch.

42 Put simply, where a provision is not subject to a submission, or there is only a submission in support of the provision (with no changes sought), it cannot make an amendment to that provision.

43 Aside from the jurisdictional issue - ie, clause 10 only gives the power to make *'a decision on the provisions and matters raised in submissions'* there are also practical reasons for this limitation:

43.1 Where rules are concerned, they are deemed operative under section 86F of the RMA where no *'submissions in opposition*' have been made.

43.2 If the Panel did amend provisions where there were no submissions on them, it would result in a situation where there are provisions that cannot be appealed. Clause 14 of the First Schedule to the RMA is clear that a submitter can only appeal a plan change decision where its submission related to that provision, and its submission sought the relief they seek on appeal.

44 This reflects why the RMA plan making process is set up the way it is.

Are objectives that 'recognise' or 'recognise and provide for' really objectives or do they not state the goal or end state? (Commissioner McMahon 23 May 3.50pm)

45 As stated in our prior submissions, the Environment Court[7] 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.

46 We understand that the Panel is concerned that the phrase 'recognise and provide for' within an objective means that objective is not sufficiently focused on a goal or aim.

47 The Court in *King Salmon* notes the strong direction given by the phrase 'recognise and provide for', albeit in the context of Part 2:

> As between ss 6 and 7, the stronger direction is given by s 6 — decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national

[7] *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [42].

> importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).

48 In addition, the term 'recognise and provide for' is present within the RMA in a number of sections. This term has been considered to be a 'deliberate legislative contrast' to the term 'take into account'. In the context of this comparison, the High Court has indicated that where the term 'recognise and provide for' is used that Parliament requires actual provision to be made for a matter.[8]

49 In terms of a case which has endorsed the term 'recognise and provide for' within an objective, in *Friends of Shearer Swamp Inc and Ors v West Coast Regional Council*,[9] the Environment Court considered an appeal on Variation 1 of a Proposed Regional Land and Riverbed Management Plan.

50 Objective 5A2.1 was the sole objective of Variation 1. The variation was altered so that it read:

> 5A.2.1 To recognise and provide for the protection of the natural character, indigenous biodiversity and other values of wetlands in the region.

51 The Court stated that: [10]

> While not the most informative objective we approve it nonetheless as it (at least) picks up on matters of national importance if not much more than that.

52 The phrase has been implicitly considered and endorsed in the following two cases:

52.1 In *G & S Hoete & Ors v Minister of Local Government*,[11] a long-running appeal on an Environmental Management Plan for Motiti

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[8] *Bleakley v Environment Risk Management Authority* [2001] 3 NZLR 213 (HC).

[9] [2012] NZEnvC 006.

[10] At paragraph 64.

Island, the Court considered that the Minister could proceed to make the Plan operative. The iwi considered the plan to be unacceptable. The Plan included, when confirmed, a number of objectives that included the term 'to recognise and provide for'.

52.2 *Craddock Farms Ltd v Auckland Council* was in relation to a consent application as opposed to a plan change.[12] However, the District plan in question (Auckland Council District Plan: Franklin Section) had an objective under its Key Rural – Coastal Zone Objectives to 'recognise and provide for the sustainable management of natural resources'. No issue arose as to the objective.

53 In that light, while the objectives could be more goal orientated, the Environment Court has previously endorsed objectives that 'recognise and provide for' matters. This is, however, something the Council officers will consider further through their right of reply. Further, Ms Greenberg addresses this issue in her statement at page 27 below.

Is 'minimise' a term used in the RMA (Commissioner McMahon 22 May)?

54 In addition to the questions requiring further consideration, on 22 May during the officers presentations, Ms Anderson advised the Panel that the word 'minimise' is not generally a word used in the RMA, but it is used in the NZCPS and RPS. This is not quite correct. The word 'minimise' is not defined in the RMA, but is used in a variety of sections:

54.1 The definition of 'best practicable option'.

54.2 Sections 58N and 58O.

54.3 Section70.

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[11] [2015] NZEnvC007..

[12] [2016] NZENVC051

54.4 Section 108.

54.5 Section 149KA.

54.6 Sections 311 and 316.

54.7 Sections 341A and 341B.

Officers' responses

55 Response from the following Council officers' are provided in the following pages:

55.1 Ms Amber Carter - Section 42A Part A: introduction & Procedural Matters and Part A: Section 32 and consultation.

55.2 Ms Emily Greenberg - Section 42A: Overall policy framework of the proposed Plan.

55.3 Ms Pam Guest - Section 42A: Areas and Sites with significant mana whenua values.

55.4 Mr Paul Denton - Section 42A: Beneficial use and development

Date: 26 May 2017

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Kerry Anderson / Emma Manohar
Counsel for Wellington Regional Council

Supplementary responses to Panel questions arising on 22 May 2017 regarding Part A: Introduction & Procedural Matters and Part A: Section 32 and consultation

26 May 2017

Prepared by Amber Carter

1. Was any review done to show how the objectives and rules flow through and to check there were no orphaned provisions?

1. The relationship between objectives > policies > rules and other methods has been reviewed multiple times in the process for different purposes. I consider key reviews to be:

   i. Each of Council's s32 evaluation reports contains a table for each of that topic's objectives listing the related policies, rules and other methods that implement each objective. In the appendix to each report, how each objective relates to higher order statutory instruments is also assessed.
   ii. Gerald Willis from Enfocus was commissioned as an external reviewer for the proposed Plan before it was notified, and part of his brief was to assess if there were any gaps (see my answer to question 4 below for more detail on the parameters of his review).
   iii. As part of the process for preparing the s42A reports for the hearing, every provision in the proposed Plan was assigned a topic. Each topic's report author reviewed the list and agreed which report would be primarily responsible for overlapping provisions. This has influenced the hearing structure. For example, although the rules that relate to seawalls are part of the suite of provisions that implement the natural hazard objectives, the natural hazards s42A report will not make recommendations on these rules. Instead, rules that relate to seawalls will be considered as part of the coast s42A report. However, both these topics will be heard at the same hearing stream (Hearing Stream 6).
   iv. As all the rules in the proposed Plan have had legal effect for nearly two years since it was notified, there has also been feedback from the Environmental Regulation and Compliance

teams on how the provisions have been working 'in the field'. A log has been kept of issues as they arise and report authors have been asked to consider whether these issues can be addressed within the scope of submissions on the proposed Plan.

v. The Panel has received a table of provisions for each Hearing Stream showing which objectives>policies>rules and other methods are considered under each topic report.

2. What other s42A Officer's reports will be relevant to the NPS-UDC?

2. The NPS-UDC has reasonably minimal implications for the regional plan because:

   i. Council's jurisdiction is largely limited to the coastal marine area and the beds of lakes and rivers
   ii. The proposed Plan manages:
      a. Discharges
      b. Water allocation
      c. Activities & structures in the coastal marine area and the beds of lakes and rivers.

3. The greatest implication for the proposed Plan is likely to be for provisions around piping streams (which is an activity often associated with large roading and subdivision proposals). These provisions (such as Rule R127: Reclamation of the beds of rivers or lakes) will be considered in the s42A Officer's Report: Beds of Lakes and Rivers, to be prepared in advance of Hearing Stream Five.

3. Is Wellington 'high growth' for the purposes of the NPS-UDC? What is the process and implications for the proposed Plan if Wellington changes to 'high growth'? Would this be a separate process?

4. Wellington is classed as a medium-growth urban area based on the most recent Statistics NZ population projections. Statistics NZ is currently revising its urban area population projections with the intent to publish these by September 2017. The Ministry for the Environment has advised that local authorities newly defined as high or medium growth as a result of this revision will have later timeframes to meet the NPS-UDC requirements.

5. Although Statistics NZ has not yet formally published their revised projections, my understanding is that Wellington is likely to remain in the medium-growth category. Paragraph 22 of my Part A: Introduction & Procedural Matters report summarises the NPS-UDC's requirements for medium-growth areas.

6. If, in the future, any area within the Wellington Region is re-classified as a high-growth urban area, the following NPS-UDC policies would apply in addition to those that apply to medium-growth urban areas:

- PC5–11: Set minimum targets in statements and plans
- PC12 – PC14: Future development strategy

7. This would mainly affect the Regional Policy Statement (rather than the regional plan) but the need for any changes to the regional plan would be considered at that time. If necessary, a plan change would be progressed through the Schedule 1 process separately from the current process.

4. What does 'fit for purpose' mean at para 61 of the s42A Officer's Report Part A: Introduction and Procedural Matters in the context of the review that was done by Gerald Willis?

8. After the draft Natural Resources Plan was publicly released, Council reviewed the public's feedback and prepared a new document (the proposed Plan). Council then commissioned Enfocus to review this document ahead of public notification. In Enfocus's review they summarise Council's brief as a request to ensure the proposed Plan was 'fit for purpose' – which is what I quoted in my evidence – but the full wording of Council's brief for the review was as follows:

- '*Does the plan work?*
- *Does it give effect to higher level national instruments?*
- *Are there any areas of high risk of litigation?*
- *Does the plan make sense?*
- *Is it easy to use?*
- *Policy approach:*
  a. *Are the policies and approach well developed?*
  b. *Are any of the policy approaches overly/unduly complex?*

c. *Is there any inconsistency between policies/policy approaches for different resources?*

- *Rules:*
  a. *Is the activity status logical (is it what you would expect given the policy direction)?*
  b. *Are there any inconsistencies between rules and activity status for different resources?*
- *Where gaps are identified, provide an indication as to how this can be addressed either in the plan or in the Issues and Evaluation S32 Report*'.

9. This review then resulted in changes to the proposed Plan prior to notification to address identified issues.

5. Does the Council map the mean high water springs (MHWS)?

10. Council does not have a map showing MHWS for the region's coastline. However, the MHWS is defined at a number of river mouths around the region and these maps are in the proposed Plan (Maps 42–48). My understanding is that some preliminary work has been undertaken to develop a proposal and method for defining the MHWS for Kāpiti, with a view to rolling that out around the region. At this stage there is no timeline attached to that work as it is dependent on the coastal research programme that KCDC is implementing.

6. Update on the status of the Proposed National Environmental Standard for Plantation Forestry (NES-PF)

11. The Government first proposed the NES-PF in 2010 and consultation has been ongoing since then. Although a proposed NES-PF has no legal effect, it is my understanding that this regulation is likely to be finalised and come into force this year (2017). The s42A Officer's Report on Soil Conservation that will be prepared in advance of Hearing Stream 2 by Mr Denton will consider the implications of this NES-PF for the proposed Plan. However, note that if the NES-PF does come into effect, its provisions in conjunction with the provisions in the RMA will determine its impact on the proposed Plan (refer RMA s43A(5), s43B and s44A).

Supplementary responses to Panel questions arising during Hearing Week 1 (22 May 2017) regarding Section 42A: Overall policy framework of the proposed Plan

26 May 2017

Prepared by Emily Greenberg

Questions from 22 May

1. How is the precautionary principle addressed in the RMA, NPSs, operative plans, RPS and the proposed Plan?

RMA

1. The RMA does not refer specifically to the precautionary principle.

2. However as detailed at paragraph 337 of my s42A report, Overall policy framework of the proposed plan – Part B, section 3 of the RMA defines the 'meaning of effect' as including, *'(e) any potential effect of high probability; and (f) any potential effect of low probability which has a high potential impact.'*

3. In addition, s104(1)(a) of the RMA requires Council to consider *'any actual and potential effects on the environment'* when assessing applications for resource consent.

4. Furthermore section 32 of the RMA requires the assessment of the risk of acting or not acting if there is uncertain or insufficient information.

NZCPS

5. Policy 3 of the NZCPS is clear that a precautionary approach should be used for activities in the coastal environment where the information on potential effects is lacking but potentially significant. The policy

specifically directs the use of the precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse. Policy 3 of the NZCPS also directs a precautionary approach to use and management of coastal resources potentially vulnerable to the effects from climate change.

Operative plans

6. The precautionary principle is addressed in four (4) policies in the operative plans. These are Policy 4.2.5 in the Coastal Plan and Policies 4.2.22, 4.2.25 and 6.2.3 in the Freshwater Plan.

RPS

7. In the RPS, the precautionary approach is addressed in three policies – Policy 29, 47 and 51.

8. As noted at paragraph 339 of my s42A report, Policies 29 and 51 in the RPS specifically direct the use of the precautionary approach to development in areas at high risk from natural hazards.

9. Policy 47 directs the use of the precautionary approach when assessing the potential for adverse effects on indigenous ecosystems and habitats, where these ecosystems and habitats have not been fully addressed in regional and district plans.

Proposed Plan

10. The precautionary approach is addressed in one policy in the proposed Plan - Policy P3. There were several submissions on this policy. My recommendation is to slightly alter the policy to give better effect to the NZCPS and achieve the purpose of the RMA.

> Policy P3: Use and development shall be managed with a precautionary approach where there is limited information regarding the ~~receiving environment and the~~ effects and any

adverse effects are potentially significant ~~effects the activity may have on the environment.~~

2. Is there a hierarchy between the objectives?

11. The interpretation provided in the proposed Plan is clear that there is no hierarchy between the objectives. Guidance in Section 2.1.1 (Objectives) of Chapter 2 of the proposed Plan state that objectives 'should be read together' and are 'designed to work together'.

12. That said, during preliminary versions of the proposed Plan some objectives were recognised as more 'overarching' (or even region wide) rather than activity or topic-specific. In general, these objectives are located at the beginning of the list of objectives in the Section 3.1 Ki uta ki tai: mountains to the sea (proposed Objectives O1-O5), Section 3.2 Beneficial use and development (proposed Objectives O6-O13) and Section 3.3 Māori relationships (O14-O)16).

13. An example of this overarching nature is given in Appendix A of my s42A report, Overall policy framework of the proposed plan – Part B, for Objective O3 (Sustain and enhance mauri). This table indicates that Objective O3 is also implemented by four objectives that manage for shared values of water (Objectives O5, O24, O25 and O26) and by six objectives that recognise and provide for Māori relationships (Objectives O11, O14, O15, O16, O18 and O33).

14. It was a very deliberate decision to note separate out the two types objectives i.e. 'overarching' and 'activity or topic specific'. There is a very high risk that objectives which are grouped or titled 'overarching' or 'general' will be seen as not applicable and overlooked by plan users. Instead objectives were ordered from the more general to the more activity or resource use specific.

Supplementary responses to Panel questions arising Hearing Week 1 (22 May -23 May 2017) regarding Section 42A: Areas and Sites with significant mana whenua values

26 May 2017

Prepared by Pam Guest

Questions from 22 May

1. Clarify regional council jurisdiction. Do schedules B or C include areas or sites of significance for mana whenua on land?

1. Schedules B or C **do not** include areas or sites of significance for mana whenua on land. Schedules B and C only relate to areas and sites that lie within the CMA, wetlands and the beds of lakes and rivers, consistent with RPS Policy 61 which allocates responsibility for land use controls for indigenous biodiversity. City or district councils are responsible for the control of land use to protect significant sites outside of these areas.

2. The higher order planning documents that guide or direct Objectives O16 and O33 and Policies P18, P44 and P45 are set out in Section 5 of my S42A report: Areas and sites with significant mana whenua values. In particular, I draw the Panel's attention to:

> RPS Objective 15 Historic heritage is identified and protected from inappropriate modification, use and development.
>
> RPS Objective 28: The cultural relationship of Māori with their ancestral lands, water, sites, wāhi tapu and other taonga is maintained.

3. RPS Policies 21, 22 and 46 direct district and regional plans to identify, protect, and manage effects on places, sites and areas with significant historic heritage values.

4. RPS Policies 23, 24 and 47 direct regional plans to identify, protect and manage effects in ecosystems and habitats with significant indigenous biodiversity values, including those of significance to tangata whenua. Policy 23 states that ecosystems or habitats are significant where:

   (e) Tangata whenua values: the ecosystem or habitat contains characteristics of special spiritual, historical or cultural significance to tangata whenua identified in accordance with tikanga Māori.

5. RPS Policy 61 allocates responsibilities for land use controls for indigenous biodiversity, including:

   (b) The Wellington Regional Council shall be responsible for developing objectives, policies, rules and/or methods in regional plans for the control of the use of land to maintain and enhance ecosystems in water bodies and coastal water. This includes land within the CMA, wetlands and the beds of lakes and rivers.

   (c) city and district councils shall be responsible for developing objectives, policies, rules and/or methods in district plans for the control of the use of land for the maintenance of indigenous biological diversity. This excludes land within the coastal marine area and the beds of lakes and rivers.

2. Reword P45(d) & combine P44&P45 and O14&O16

6. Suggested amendments were provided to the Panel on 23 May 2017. Further redrafting of these objectives and policies will be provided as part of the Officer's Right of Reply, focusing on ensuring that the objectives clearly set out the outcomes sought and that the policies clearly differentiate between the management approach for Schedule B areas and Schedule C sites.

3. Clarify where responsibility lies for each sub-clause P18 a-c

7. Council: when, developing whaitua provisions, evaluating resource consent applications within Ngā Taonga Nui a Kiwa, implementing Other Methods (particularly M25 and M26), carrying out operational activities (such as flood protection works).

8. Resource consent applicants: when identifying the way in which they will carry out activities, and when evaluating the effects of these activities on the wider environment.

9. Landowners and others: in managing/carrying out activities involving land, water, air resources.

10. (a) Council (primarily) but in liaison with land owners and other interested parties.

(b) Council.

4. Can we determine wording to clarify what a suitably qualified person is for the purposes of a CIA?

11. I suggest edits to my recommended change to the definition of a CIA (para 168 in my s42A report), and to the amendments tabled on May 23, to clarify that 'mandate' is a matter to be determined by the relevant iwi authority or authorities. On reflection, the change I suggested to add the term 'suitably qualified' is unnecessary as it will be part of the determination by iwi.

> "A cultural impact assessment must be prepared by a ~~suitably qualified~~ person mandated by ~~mana whenua~~ the relevant iwi authority or iwi authorities."
>
> Add a note: "The Wellington Regional Council maintains a list of the contact details for iwi authorities within the Wellington Region."

12. I also note that Policy P45 already states that a CIA is to be undertaken by the relevant iwi authority or iwi authorities. The point of the amendment to the definition for a CIA is to highlight the importance of this requirement and to help ensure that it is noted by resource consent applicants.

5. Provide copies of the maps that were sent to Hammond Ltd and Kapiti Coast Holdings with respect to two Schedule C sites.

13. These maps were provided to the Panel on 24 May 2017, and included here again for completeness.

6. Provide a copy of Marr and Moore as referenced in my s42A report.

14. I note that the reference to Marr and Moore is actually incorrect and should instead refer to the Council's Section 32 report: Māori Values (p32).

Questions from 23 May

7. Is there anywhere in the plan that sets out the approach to written approvals and notification?

15. No, these are process matters which are provided for by internal consent procedures guidelines.

8. Does Lake Onoke meet the definition of a lake or estuary? (in response to S78)

16. Lake Onoke is an estuary when the entrance is open, but a lake when the entrance is blocked. Technically Lake Onoke is an ICOL – an intermittently closing and opening lagoon.

17. Lake Onoke lies wholly within the CMA.

18. The lake is outside the NPS-FM, except it is subject to the integrated management policies.

19. However, Mr Alistair Smaill advises that ICOL's are likely to be added to Appendix 2 (attribute tables) of the NPS-FM in the upcoming amendments.

20. Where an estuary is the limiting factor in catchment management it is good practice to set objectives (at a numeric level of detail) which would then drive catchment limits and management.

21. These objectives are equivalent to freshwater objectives as described in the NPS-FM.

22. The Ruamahanga Whaitua process will do this.

Para 224. Copy of map sent to Hammond Ltd (S132)

Para 225. Copy of map sent to Kapiti Coast Airport Holdings Ltd (S99)

Supplementary responses to Panel questions arising on 23 May 2017 regarding section 42A officer's report: Beneficial use and development

26 May 2017

Prepared by Paul Denton

1. What is the risk of not including the entire network with respect to telecommunications network?

1. In one sense, the risk of including the entire network is low, as the network mostly applies to land based activities, outside the jurisdiction of the pNRP. The pNRP only applies to the CMA and the beds of lakes and rivers.

2. However, the risk of including of including the entire network to the definition of regionally significant infrastructure is high in my view, as this definition only applies to significant aspects of infrastructure, not entire networks. I would consider there is a distinction between aspects of the network that are everyday activities and other activities that provide a larger benefit. For example, the rollout of the ultrafast broadband fibre optic cable (UFB) throughout New Zealand is a significant addition to this infrastructure. In my view there is a high risk of unintended consequences of providing for activities that in of themselves do not provide a significant benefit to the region.

2. How are objectives and policies for RSI given effect to in rules i.e. in the coast or beds of lakes and rivers? Is there a more permissive rule framework for RSI activities?

3. Yes, the objectives and policies for regionally significant infrastructure are given effect in two rules, Rule R197 (motor vehicles for certain purposes) – permitted activity, and Rule R214 (reclamation and drainage

for regionally significant infrastructure outside sites of significance) – discretionary activity.

4. Overall, I would not consider there is a permissive rule framework specifically for regionally significant infrastructure activities. This would be inappropriate given the potential significant adverse effects from large scale infrastructure projects[13].

5. The two rules mention in para 31 above, only one Rule R197 is a permitted activity, the other is discretionary.

6. By in large, the objectives and policies of the proposed Plan will be given effect through consideration in relevant resource consent applications. That is, decision makers will be guided in their Part II decision making to specifically recognise the social, economic, cultural and environmental benefits to the region of regionally significant infrastructure.

3. Should landfills be included as RSI - given the move to large/regional scale landfills and the closure of small ones

7. There is a possibility that large municipal landfills of the size of the Southern Landfill in Wellington City and Silverstream Landfill in Upper Hutt are actually large infrastructure that provide a regional benefit. However, these questions are for a plan change on the RPS to consider, and I do not think they are a question for the pNRP.

8. I consider this because the pNRP jurisdiction is the CMA and the beds of lakes and rivers. A large municipal landfill is not going to be located in either of these areas. However, this type of infrastructure does have discharges which are relevant to the pNRP and the subject of future hearings on the pNRP.

4. Why is Objective O10 on public access different to that in the RPS?

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[13] I note the evidence of Ms Christine Foster given on 24 May 2017 regarding the scale of effects of regionally significant infrastructure projects.

9. To summarise the discussion and question; Objective O10 in the pNRP includes the words maintain and enhance as:

Objective O10: Public access to and along the coastal marine area and the beds of lakes and rivers is maintained and enhanced.

10. However, RPS Objective 8 states: *Public access to and along the coastal marine area, lakes and rivers is enhanced*.

11. The difference between the two objectives is in reference to the word 'maintain'.

12. I note that the RMA requires that in s6 (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers.

13. RPS page 22 provides a context for Objective 8. The RPS states at para 3 of page 22 that "*where land is publicly owned, public access can be enhanced by providing walking tracks and recreational areas. Where land is privately owned, city and district councils can take esplanade reserves or strips as part of subdivisions. On private land that is not proposed to be subdivided, however, public access is at the discretion and with the permission of the landowner. To date, there has been no region-wide strategic planning in the region that has identified where public access should be enhanced. Where esplanade reserves and strips have been taken for public access, city and district councils sometimes struggle to maintain them. Even where there is legal access, it is not always aligned with access that is physically possible. There are circumstances where public access to the coastal marine area, lakes and rivers may not be desirable – such as to provide security for regional infrastructure, allow for farming activities and prevent harm to the public*."

14. It is apparent from this section of the RPS that enhancement is a feasible approach for public access and maintenance is more problematic,

especially for city and district councils. It is equally important to ensure existing public access is maintained, while identifying opportunities to also enhance this.

15. I note that RPS Objective 8 is implemented by RPS Policy 53, RPS Method 4 and RPS Method 51.

16. RPS Policy 53 is a consideration policy for city and district plans and does not apply to the regional plans.

17. RPS Method 4 is implemented by city and district councils. RPS Method 51 is implemented by city and district councils and the Wellington Regional Council.

18. Method 51 requires councils to "*Identify areas of the coast, lakes and rivers where public access should be improved*".

19. Therefore, RPS Objective 8 only applies to the pNRP in respect of Method 51. The pNRP gives effect to RPS Method 51 through pNRP Method 22: Integrated management of the coast.

20. Therefore the pNRP Objective O10 to 'maintain and enhance' public access gives effect to the RMA, and is appropriate.