

**Before the Hearings Panel
At Wellington**

Under the Resource Management Act 1991

In the matter of Proposed Natural Resources Plan for the Wellington Region
(Hearing Stream 4)

**Legal Submissions on behalf of Wellington Regional Council
Hearing Stream 4: Right of Reply**

Date: 4 May 2018



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MAY IT PLEASE THE PANEL:

Introduction

1 Hearing Stream 4 dealt with the issues of water quality. The following section 42A authors have provided a reply:

1.1 Gerard Willis.

1.2 Yvonne Legarth.

1.3 Michelle Conland

1.4 Barry Loe.

1.5 Amber Carter.

1.6 Tim Blackman.

1.7 Rachel Pawson.

2 These legal submissions cover matters that arose during Hearing Stream 4 and address the following:

2.1 Amendments proposed by Fish and Game

2.2 Hierarchy of planning documents

2.3 Diffuse discharges

2.4 Incorporation by reference

2.5 Risk of acting or not acting

2.6 Meaning of 'provide for'

2.7 Good management practices and best practicable options.

3 We addressed the Panel on scope in our submissions on Hearing Stream 1¹ and on subsequent occasions.² To assist, we set out below a summary of the legal position on the scope to make changes to the notified version of the Proposed Natural Resources Plan for the Wellington Region (**proposed Plan**).

4 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. In other words, submissions provide scope for decision-making on a spectrum, with the notified provisions at one end and the relief sought in a submission at the other.³

2 It is important to note that the scope of a submission extends beyond the express words of the submission. The Court has held that:⁴

[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.

5 The paramount test is whether any amendment made to the proposed Plan as notified goes beyond what is fairly and reasonably raised in submissions.⁵ 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

¹ 20 April 2017 at [105]-[115].

² Hearing Stream 4 submissions, 8 December 2017 at [41]-[42]; and the Memorandum of Counsel regarding scope, 22 December 2017 at [5]-[8].

³ *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEvC 187 at [94].

⁴ *General Distributors Ltd v Waipa District Council* HC Auckland, CIV 2008-404-4857, 19 December 2008 at [56].

⁵ *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171

foreseeable consequence of any change directly proposed in the reference'.⁶

- 6 The issue of scope was tested in the High Court on the Proposed Unitary Plan. The High Court summarised the position on scope as follows:⁷

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 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.

- 7 Put simply, all provisions in the proposed Plan need to be filtered through the lens of relief sought in submissions. Where a provision is not the subject of a submission, or there is only a submission in support of the provision (with no changes sought), the Panel cannot make an amendment to that provision.⁸

- 8 The only exceptions are where a National Policy Statement (**NPS**) requires the inclusion of certain provisions (eg, the National Policy Statement for Freshwater Management (**NPS-FM**) contains 2 compulsory policies for inclusion), or where it is a minor amendment allowed by clause 16 of the First Schedule to the Resource Management Act 1991 (**RMA**). This allows an amendment to the proposed Plan to be made at any time where such an alteration is of minor effect, or where it corrects a minor error. This is a power that is independent of scope.

⁶ *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (*Westfield*) at [73] and [74].

⁷ *Westfield* at [115].

⁸ See Supplementary responses from legal advisers and section 42A authors addressing questions arising during Council's opening session on 22/23 May 2017 for the response to the Panel's question of how the Panel addresses provisions where there are no submissions at [41]-[44].

9 The provision recognises 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.

10 The test for 'minor effect' was addressed in the Hearing Stream 1 submissions,⁹ and 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. Such an amendment can only be made if it is neutral, and therefore would not have drawn a submission.¹⁰

11 A minor correction might be made to correct a mistake or inaccuracy which has crept into the Plan, such as a spelling, punctuation or cross-referencing error. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt which 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.

Scope for amendments requested by Fish and Game , Rangitane O Wairarapa Inc and the Minister of Conservation

12 Three submitters are seeking a similar outcome in the proposed Plan. These submitters are Fish and Game, Rangitane O Wairarapa Inc and the Minister of Conservation (**submitters**). The submitters seek two major changes:

12.1 Amendments to Tables 3.1 to 3.8 in Objectives O24 and O25 (**the Tables**), and

12.2 insertion of a new set of Polices, P##1 to P##5.

⁹ 20 April 2017 at [117]-[121].

¹⁰ *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 at 440.

Tables 3.1 to 3.8

- 13 The submitters seek amendments to the Tables, as set out in their legal submissions:¹¹
- At Hearing 4 Fish and Game and the Minister have sought amended and new numeric (as well as narrative) limits for various water quality attributes and Tables 3.1 to 3.8 of the PRNP.
- 14 These Tables are referenced in the notified version of O24 and O25, and in P63, P70 and P107. The Tables set out various objectives for water quality, aquatic ecosystem health and mahinga kai.
- 15 The amended Tables sought by the submitters are included in Appendix 3 of the joint planning evidence of Mr Percy and Miss Cooper at page 42 onwards. The changes sought can be categorised as:
- 15.1 Changes to limits of measurement criteria from the notified version of the proposed Plan, ie from narrative to numeric, and
- 15.2 Addition of new measurement criteria to the notified version of the proposed Plan, with limits included.
- 16 In our submission, where a particular measurement criteria was included in the Tables as notified (either with a narrative or numeric limit) and the submitters seek to change the limit (either through a change to the numeric limit, or through a change from a narrative to a numeric limit), it is considered that this change would be within scope of the submissions.
- 17 The submissions are clear that additional limits or targets are sought for the proposed Plan and in particular, that a change from narrative to numeric is sought. Therefore, even when a new numeric limit was not

¹¹ Supplementary submissions on behalf of the Wellington Fish & Game Council and the Minister of Conversation Hearing Stream 4 by Catherine Anton and Sarah Ongley dated 7 March 2018 at [4].

proposed in the original submission, but is now sought in evidence, our view is that the change is a foreseeable outcome of the submission. This would include the situation where a new numeric limit was sought in a submission, and a changed numeric limit is sought in the evidence. This is because where a submission was made on the limit, it indicates that a change was sought. It is considered that it is foreseeable that the change may be different to the specific numbers listed in the submission.

18 Where a new measurement criteria is proposed, however, it is submitted that this new measurement criteria should have been referenced in some way in the submission. It is submitted that it is pushing the foreseeable outcome of the submission too far to include a criteria that has never previously been raised.

19 We have reviewed the proposed changes sought to the Tables in the evidence of Mr Percy and Miss Cooper, and consider that all changes are within scope of the submission, except for the changes to Table 3.8. This is set out in more detail in **Appendix 1**.

20 Ms Pawson will address the substantive issue of whether she considers the submission should be accepted or not in her right of reply.

Policies ##1 to ##5

21 In the evidence of Mr Percy and Miss Cooper,¹² Fish and Game have set out five new policies it seeks, policy ##1 to policy ##5.

22 The new policies set out a framework for limiting or reducing current discharges to ensure that they fall within what Fish and Game submit is the allowable contribution to nitrate-nitrogen load in each catchment.

23 The key issue is whether there is scope for these changes. Ms Pawson and Mr Willis will address the substantive issue of whether they

¹² 2 February 2018 at 69 of their proposed amendments to the Plan.

consider that the submission should be accepted or not in her right of reply.

24 The key distinction between the Fish and Game submission and what it is seeking through evidence is the method of managing nitrogen allocation and limits.

25 In its submission, Fish and Game sought that farming activities should comply with sustainable nitrogen leaching rates. These were to be based on allocating the total allowable load of nitrogen for the sub-catchment on the basis of a flat leaching rate of kilograms of nitrogen per hectare per year, or a leaching rate that differs across the land use classes. Page 46 of the submission sets out the numeric limits/targets for nitrogen that it sought.

26 In its original submission, Fish and Game sought that:¹³

The impact of land use on a fresh water habitat are recognised and that land use is managed in the manner consistent with achieving the fresh water objectives set out in table 3.1 to 4.5 and what is consistent with section 70 of the RMA and the NZPSSWM and NZCPS, including the establishment of nitrogen and where appropriate phosphorous leaching standard/limit/target (N or P/per hectare/year).

That nitrogen leaching rights are allocated within catchments in such a way that there is an equitable allocation of a total catchment nitrogen limit to all users/activities who may wish to use the available resource.

[emphasis added].

3 In the original submission Fish and Game sought:¹⁴

The allocation status of fresh water management unit is defined and included in a schedule to the plan along with lines of appendix 9 to the submission.

Farming activities comply with the sustainable nitrogen leaching rate which is based on allocating the total allowable load of nitrogen for the subcatchment, water management zone or catchment to the land on the basis of either a "flat" per hectare allocation of nitrogen leaching, or a nitrogen leaching allowance per hectare based on an allocation on a land use capability class basis, or some other

¹³ At 34 to 37.

¹⁴ At 45 to 46.

methodology which achieves the efficient use of natural resources.

[emphasis added].

- 27 Fish and Game also provided evidence from Dr Death through maps,¹⁵ albeit these are low quality and resolution copies. The maps set out the allocation status of nitrogen in the Wairarapa. Dr Death also sets out the nitrate concentration for eco-system health based on a regression of MCI against nitrate.¹⁶
- 28 There is a clear change in the method that Fish and Game seeks to be implemented to manage discharges in catchments, which it says are over allocated from its submission to its evidence.
- 29 It is finally balanced whether there is scope for this proposed change. Taking a broad view of the submission, it Fish and Game sought to manage discharges against nitrogen allocation and nitrogen capacity in its submission. Given that, the changes sought by Fish and Game are arguably a foreseeable outcome of its submission, in the sense that this is a different method for achieving the same outcome - control of discharges against the current nitrogen allocation in the surrounding area.
- 30 However, we understand that the allocation method proposed in submissions is a very different allocation method to that proposed in evidence, and will affect landowners in a different way. The submission proposed a flat (or LUC -based) leaching rate for sites, whereas the evidence proposes a catchment wide approach, with the requirement for a proportionate reduction across a catchment where necessary to achieve a catchment load. We understand that landowners may have considered the original submission, and noted that they could comply with the flat or LUC-based leaching rate. In comparison, the outcome proposed in evidence requires every farm to reduce proportionally to achieve the load limit reduction now calculated to be required. For

¹⁵ See Appendix 6 of the Fish and Game submission.

¹⁶ See Appendix 9 of the Fish and Game submission.

some landowners that will require a significant change in their leaching rate, whereas the submission outcome would have resulted in no change. We consider that this change is unlikely to have been reasonably contemplated by potential submitters on the proposed Plan

- 31 On balance, we consider that proposed Policy ##1 to ##5 are not within scope of the Fish and Game submission, as it was not a reasonably foreseeable outcome of the submission.

Variation

- 32 Fish and Game requested that the Panel notify a variation setting out how the desired loads for nitrate-nitrogen in Dr Canning's 'over-allocated' zones are to be allocated amongst resource users.¹⁷ In its supplementary legal submissions, Fish and Game commented that:¹⁸

... although Fish and Game also sought an LUC allocation table in its original submission, it is that matter that Fish and Game has conceded *may* be outside scope, and which for broader reasons should proceed by way of variation.

- 33 Presumably this relates to proposed policy P##5, which states:

When determining how the sub-catchment load limits in Table XXX are to be allocated among resource users, the Regional Council must apply the following principles:

- (a) Equity/fairness, including intergenerational equity;
- (b) Iwi land ownership and its status including any Crown obligation;
- (c) Cultural values;
- (d) Extent of the immediate impact;
- (e) Public and private benefits and costs;
- (f) Resource use efficiency;
- (g) Existing land use;
- (h) Existing on farm capital investment; and
- (i) Ease of transfer of the allocation.

¹⁷ Outline of submissions on behalf of Fish and Game, 19 February 2017.

¹⁸ Supplementary legal submissions of Fish and Game, 7 March 2018 at [22].

34 We understand that the intention is that P##5 is within scope and would take effect through the proposed Plan, but the future method of allocation is outside scope, and needs to be addressed through a variation.

35 Fish and Game proposed an ambitious timetable for the variation, requesting that a decision on the Water Quality provisions be issued after Hearing Stream 5, and that the variation should be notified before the end of June 2018.¹⁹

36 Fish and Game did not provide further information as to why it considers that the Panel has the power to notify a variation.

37 The Panel does hold wide powers. It has been delegated all 'necessary powers' to hear and decide submissions on the proposed Plan. This is set out below:

The Proposed Natural Resources Plan Hearing Panel is delegated all necessary powers under the Resource Management Act 1991 to hear and decide on submissions on the Proposed Natural Resources Plan for the Wellington Region.²⁰

38 However, the Panel's powers are confined to hearing and deciding submissions on the proposed Plan. We understand that Fish and Game is seeking a variation because the changes that the variation would include are outside of the scope of submissions. As the Panel only has the power to address matters raised in submissions, it is considered that it is outside of the Panel's power to request a variation for out of scope matters.

39 In any event, the Panel has not been given powers under clause 16A of the RMA and cannot itself initiate a variation. The decision of whether to do that is a decision for the Council. From a practical perspective, it

¹⁹ Supplementary legal submissions of Fish and Game, 7 March 2018 at [3].

²⁰ The minutes of September 2015 in the document titled 'Establishment of a hearing panel for Proposed Natural Resource Plan'.

is also submitted that it would be impractical to issue a 'part decision' in June on one aspect of an integrated Regional Plan.

40 The NPS-FM was raised again during Hearing Stream 4. To assist the Panel, we set out below the requirements of the NPS-FM and the RMA. These were addressed in detail in our submissions on Hearing Stream 1.²¹

41 Under section 67(3) of the RMA, the proposed Plan is required to 'give effect' to the NPS-FM. That is the test. 'Give effect to' simply means to 'implement'. In our submission however, that is not a requirement to implement it at a rate more quickly than required by the NPS-FM itself.

42 Section 55 of the RMA sets out how local authorities must recognise national policy statements. Section 55(2D) of the RMA states:

In all cases, the local authority must make the amendments-
As soon as practicable, or
Within the time specified in the national policy statement
(if any), or
...

43 Policy E1(ba) of the NPS-FM requires that:

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.

44 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 2025²² through its progressive implementation framework. There is no requirement in the RMA or NPS-FM to provide an interim framework.²³

²¹ 20 April 2017 at [50]-[68].

²² Evidence of Mr Smaill - Hearing Stream 1.

²³ Responses from legal advisers and Emily Greenberg addressing question arising in the Panel's Minute No. 4, 8 June 2017 at [23]-[25].

- 45 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.
- 46 Recommendations made by the Whitua committees will be considered by the Council for inclusion in the Plan by way of plan changes. Wellington Regional Council (**the Council**) plans to have all five whitua processes complete by 2024, ultimately giving full effect to the NPS-FM before 2025.

Does Part E of the NPS-FM apply only to policies and not objectives?

- 47 Policy E1(b) states:
- 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.
- 48 Again, this makes no reference to the objectives. It does however, refer to 'the policy', which could be a reference to 'the national policy statement' or some specific policy in the NPS-FM.
- 49 While not determinative, there is no suggestion in any of the central government guidance that objectives were to be implemented at a different time from the policies in the NPS-FM.
- 50 It is also submitted that for E1(b) to make grammatical sense, 'the policy' needs to be read as a reference to the NPS-FM otherwise it does not make sense. This also aligns with section 55 of the RMA, which requires amendments to the proposed Plan or plan to give effect to the 'objectives and policies' in the statement' (section 55(2)) either 'as soon as practicable', or 'within the time specified within the national policy statement' (section 55(2D)). That aligns with the wording in E1(b) above, and in our submission, supports reading 'the policy' as 'the policy statement'.

NPS-FM 14 and NPS-FM 17

51 Changes were made to the NPS-FM in 2017. These changes took effect on 7 September 2017. At the time our original submissions were made on the NPS-FM (April 2017), the NPS-FM 2017 was not in effect. In our Introduction and legal overview on behalf of Wellington Regional Council: Right of reply: Hearing Stream ,1 we specifically addressed the 2017 NPS-FM.²⁴ In summary:

51.1 The amended NPS-FM contains no new directions that must be included in the proposed Plan under section 55(2) of the RMA. It does, however, amend Policy A4 of the NPS-FM by removing reference to 'secondary' in 2(a) and (b). The RMA directs that the Council must make those changes without using the Schedule 1 process, and must give public notice of the changes within 5 working days of making them. The Council will need to assess what other amendments are necessary to give effect to the amended NPS-FM provisions, and those will be addressed through a Schedule 1 process within the timeframes specified in Policy E1 of the NPS-FM. Policy E1(f) requires the Council to do that and, if necessary, to revise its formally adopted implementation plan (Attachment B of Alastair Smaill evidence for Hearing One) by 31 December 2018 and publicly notify it.

Relationship with section 32 assessment

52 The Council has made reference on several occasions to the fact that the proposed Plan does not give 'full effect' to the NPS-FM, but that it is 'consistent' with the policy direction of the NPS-FM.²⁵ Being consistent with the NPS-FM is not the statutory test. The question is whether the provisions proposed (ie, without full implementation of the NPS-FM)

²⁴ 4 September 2017, paragraphs 4.1-43.

²⁵ For example, paragraph [8] of Ms Pawson's summary of her s42A report dated 12 February 2018.

meet the appropriateness test which was set out in full in the Hearing 1 submissions.²⁶

53 As we understand it, the reference to consistency with the general policy direction of the NPS-FM was to give the Panel some comfort that when the time came for the full implementation of the NPS-FM (post the whitua processes), a suitable framework would already be in place that would accommodate the new provisions. Regardless, it is not a relevant consideration for this proposed Plan process.

Hierarchy of planning documents

54 Mr Percy, on behalf of Fish and Game, provided evidence that indicated there was a 'gap' in the proposed Plan. Mr Percy summarises the key 'gaps' in the proposed Plan as being:²⁷

- 54.1 Lack of a comprehensive water quality management framework.
- 54.2 Lack of a water quality management framework that describes how multiple contributors to water quality impacts will be collectively managed.
- 54.3 Lack of effective management of non-point source discharge of nutrients.
- 54.4 Reliance on the future Whitua Committee processes.
- 54.5 Lack of a water quality framework that will be effective in achieving improvement in the water quality of degraded water bodies.

²⁶ 20 April 2017, paragraph [18]; Appendix B and Overview of Legal Submissions for Hearing Stream 1, 22 May 2017 at [7].

²⁷ At [17].

55 Mr Percy considered that the above 'gap' means that the Council must manage water quality in accordance with sections 5 and 30 of the RMA:²⁸

I have established in previous evidence that there is no requirement for the Council to give full effect to the NPSFM at the present time. The s42A Report on Water Quality makes the same observation. However, as stated in my evidence for HS1, the ability to implement the NPS-FM over time “does not negate the Council’s duties to effectively and efficiently manage the region’s freshwater resources in a manner that is in accordance with s.5 of the RMA”. The statutory obligations set out in the Act are not set aside where a national policy statement must be given effect to over time.

...

One function of a regional council is the “maintenance and enhancement of the quality of water in water bodies and coastal water” for the purpose of giving effect to the RMA. Irrespective of whether the Council gives full effect to the NPS-FM, the regional plan still needs to be effective in supporting the Council’s water quality function under S.30(1)(c)(ii).

56 Mr Percy considered that this 'gap' in the proposed Plan:²⁹

...compromises the Council’s ability to deliver its functions under s30 of the RMA, and result in the Plan as proposed not giving effect to the RPS, the NPSFM, the NZCPS and the RMA. The omissions are such that the PNRP will also not be able to achieve many of its own objectives relating to freshwater quality.

57 We understand that this evolved into a discussion with the Panel as to whether:

57.1 There is a 'gap' in the proposed Plan as it fails to appropriately manage the region's freshwater resources, or

57.2 There is a gap in the NPS-FM, in that it does not completely manage water quality until it is required to be fully given effect to.

²⁸ At [73].

²⁹ Joint Planning Evidence of Mr Percy and Ms Cooper dated 2 February 2018 at [15].

58 In discussion with the Panel (although not in his written evidence), Mr Percy appeared to consider that if there was a 'gap' either in the proposed Plan or in the NPS-FM, *King Salmon* would require that we look further up the planning hierarchy to find the appropriate document to 'give effect' to.

59 The relevant planning document hierarchy for freshwater is:

59.1 Part 2 of the RMA,

59.2 NPS-FM,

59.3 RPS, and

59.4 Proposed Plan.

60 The argument put forward is difficult to follow. In terms of the proposed Plan, the question for the Panel is as per the flow diagram provided in the Hearing Stream 1 legal submissions in reply, although subsequent to that table, the High Court released updated commentary in the *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council*³⁰ case. Effectively, that case said you cannot simply look at just the one document above. You need to 'look up the line', even when the document that is lowest in the planning hierarchy appears to give effect to the higher order documents. The High Court stated that:³¹

There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.

...

Secondly, and perhaps more importantly, in my view there is a distinct risk that the intent and effect of higher order plans can be diluted, or even lost, in the provisions of plans

³¹ At [84] and [88].

lower in the planning hierarchy. Put colloquially, the story can be lost in the re-telling. Indeed, a similar point was noted in *Appealing Wanaka*, where the Court sounded a warning in the following terms:

...While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon*.

In my judgment, there are dangers in the truncated approach taken in *Appealing Wanaka* and by the Environment Court in this case.

61 In other words, the Panel *does* need to consider the document one above the one it is looking at (the RPS), and then look up the line to each of the higher order planning documents to make sure it is giving effect to all of them. It cannot only look at the document one above the document in question. . If there are tensions between provisions within a higher order document or between them, the Panel can turn to higher order documents to resolve that tension.

62 Finally, if there are options as to how to give effect to the RPS or any other higher order document, or if the *King Salmon* exceptions apply (incomplete coverage, uncertainty/ambiguity or invalidity), then the Panel can look to Part 2 to help to resolve this.

63 Fish and Game also references the need for the Council to deliver on its functions under section 30 of the RMA. In terms of water quality, section 30 sets out the following functions:

30 Functions of regional councils under this Act

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region
 - a. ..
 - b. ..
 - c. the control of the use of land for the purpose of—
 - i. ...
 - ii. the maintenance and enhancement of the quality of water in water bodies and coastal water:
 - iii. the maintenance of the quantity of water in water bodies and coastal water:

iiia. the maintenance and enhancement of ecosystems in water bodies and coastal water:

64 As set out in our submissions on Hearing Stream 1, under section 66 of the RMA, the proposed Plan must be designed to 'accord with and assist' the Regional Council 'to carry out its function so as to achieve the purpose of the Act'.³² Section 30, however, does not form part of the planning hierarchy.

65 We understand that the concern raised by Fish and Game is not that the proposed Plan fails to give effect to the NPS-FM, albeit partial effect. Rather the concern is that in the interim, prior to full implementation of the NPS-FM, the proposed Plan should give effect to Part 2 and section 30 of the RMA, and it currently does not.

66 Mr Willis addresses what 'gaps' exist in the interim in his evidence dated 14 May 2018. He states that under the NPS-FM:

... in the interim period a plan is not required to specify *any* freshwater objectives, regardless of whether they relate to compulsory values or other values, or whether they may coincide with attribute states expressed in Appendix 2 of the NPSFM.

67 Mr Willis is also of the view that:³³

... in my opinion there certainly are obligations that arise from the Act itself that are not extinguished by the NPSFM. Before the NPSFM we had 20 years of managing water quality under the Act. Those obligations are set out in Part 2 of the Act as well as sections 30, 70 and section 107.

Despite that, in my opinion nothing in any of those sections requires councils to include provisions of the type proposed by Mr Percy or Ms Cooper at this time (although I agree that those sections enable councils to adopt such provisions – subject to meeting other statutory tests).

68 Ms Conland addresses section 70 of the RMA at section 5 of her evidence dated 4 May 2018.

³² In addition, under section 63 of the RMA the purpose of a regional plan is to 'assist a regional council to carry out any of its functions in order to achieve the purpose of the Act'. Under section 65, a regional council may prepare a regional plan for any function specified in section 30(1)(c) (among others). Appendix B of Hearing Stream 1 legal submissions contains the Plan Change test.

³³ At [5.18] and [5.19]

Diffuse discharges

- 69 In her legal submissions on behalf of Fish and Game, Ms Ongley referred to the Council Officers' position on whether the discharges of effluent from stock animals are covered by the presumptions in section 15(1) of the RMA³⁴. Fish and Games position is that the approach for diffuse discharges in the proposed Plan does not give effect to the NZCPS, the RPS or the RMA, and is not in accordance with the NPS-FM. Fish and Game submitted that a table of limits was necessary to give effect to/be in accordance with the higher order documents.³⁵
- 70 The Council addressed this issue on in 'Response from Legal Advisors and Emily Greenberg'. We summarise the advice we provided at that time below, and include some additional information which has come to our attention.
- 71 The key question is whether the discharge of uncollected animal effluent meets the requirements of section 15 of the RMA. That is, is it a 'discharge' of a contaminant into water or onto land in circumstances where it may result in that contaminant entering water?
- 72 'Discharge' is defined under the RMA as:
- Discharge includes emit, deposit, and allow to escape.
- 73 We note that this issue was partially considered by the Court in *Carter Holt Harvey v Environmental Defence Society*.³⁶ The issue arose due to concern that 'non-point source discharges from animal emissions and nitrogen fixing plants may well be unlawful under section 15(1)(b) of the RMA.³⁷ However, the Court declined to make a determination, stating:

³⁴ Submissions of Ms Ongley on behalf of Fish and Game at [27]

³⁵ At [5(f)]

³⁶ A123/08.

³⁷ At [167].

[175] ... While the arguments were interesting, we have formed the clear view that this is not the appropriate occasion to make such a ruling. We say so for the following reasons:

- (i) This is an issue that could affect every pastoral farmer in New Zealand and every Regional Council. Perhaps due in part to earlier scientific understanding, pastoral farming in New Zealand has traditionally been regulated on a permissive basis as a land use activity, rather than a discharge activity (albeit that a farmer may also carry out specific activities that require discharge permits, such as dairy shed discharges). A finding in this case that non-point source discharges arising from pastoral farming are discharges under section 15(1)(b) would have significant implications for farmers and Regional Councils throughout New Zealand. Given the significance of any such finding, it should more properly have been sought by way of an application for a declaration with supporting affidavit evidence.

74 While it appears that Forest and Bird lodged an application for declarations with the High Court on this issue,³⁸ the application for declaration does not appear to have progressed.

75 In *McKnight v NZ Biogas Industries Ltd* the Court held that:³⁹

Section 15(1) contemplates discharge by a person. The definition extends the meaning to include emit and allow to escape. The former suggests that it therefore encompasses the consequence of activities carried out by a person - it would be absurd to suggest that it is confined to such contaminants as are personally emitted. Moreover the extension to allowing escape suggests something broader than direct action by the person.

76 Clearly, a person has not directly discharged uncollected effluent. Rather, a person has brought stock of some type onto land, and consequently there has been a discharge from that stock to land. This

³⁸ <https://duncancotterill.com/publications/dairy-matters>.

³⁹ [1994] 2 NZLR 664; [1994] NZRMA 258, at 6.

could be described as 'allowing to escape', but there will be arguments around the level of 'control' or connection an owner has over this:⁴⁰

Plainly however a person could not be said to discharge the contaminant unless there is a causal connection between the person and the discharge.

...

This means that because of its context the word discharge is to be construed as extending to cause to discharge. That accords with the natural and ordinary meaning of discharge as engaging in an activity which results in the emission or discharge of contaminant. It is consistent with the policy of the provisions to prevent contamination of waterways.

- 77 In this case, the activity that results in the discharge is the locating of stock on land. The foreseeable result of that activity is that stock then discharges effluent directly to land.
- 78 In the absence of clear judicial guidance, it is a difficult matter to determine in this forum. There is certainly an argument that the discharge of uncollected animal effluent to land is likely to be caught by the requirements of section 15 of the RMA because on its face:
- 3.1 Allowing animals onto your land will result in you allowing effluent to be 'emitted' or 'deposited'.
 - 3.2 Effluent is a 'contaminant'.
 - 3.3 If that is the case, the activity must be either permitted under the proposed Plan (and operative Regional Plan), NES, Regulations or resource consent.
- 79 This is supported by the fact that the NPS-FM does include 'diffuse discharges by any person or animal' in A4 (Policy 66 in the proposed Plan). As that policy requires the consent authority to have regard to various matters 'when considering any application for a discharge', this suggests it anticipates discharges by animals to be caught by section 15 of the RMA.

⁴⁰Ibid, at 8.

80 If subsequent case law establishes that a non-point source discharge is a discharge under section 15 of the RMA, a plan change may be required. In the interim, the proposed Plan would still provide rules which would apply to the 'discharge'.

81 We understand that the Fish and Game position on this issue is that reliance on rules 46 and 69 would not address a range of issues (cumulative effects, certainty, administrative burden and a first in first served approach). In addition, Fish and Game consider that Rule 42 would be contrary to section 70. However, Fish and Game do not appear to provide any discussion on why it holds that view. Ms Conland addresses this issue in her evidence dated 4 May 2018 at section 5. We also provide some comment below.

82 Rule 42 is a catch all rule for discharges of contaminants into water or onto or into land where it may enter water, where the discharge is not already given an activity status by another rule in the proposed Plan. Rule 42 allows for that discharge as a permitted activity, provided a range of conditions are met.

83 Section 70 of the RMA states that before a regional council includes in its regional plan a rule that allows for a discharge of a contaminant into water or onto or into land in circumstances that may result in that contaminant entering water the regional council shall be satisfied that a range of effects are not likely to arise. These effects are:

83.1 Production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials

83.2 Any conspicuous change in the colour or visual clarity

83.3 Any emission of objectionable odour:

83.4 The rendering of fresh water unsuitable for consumption by farm animals

83.5 Any significant adverse effects on aquatic life.

84 We do not understand that there is any evidence that these effects will result. It is the evidence of Mr Willis and Ms Conland on behalf of the Council that there is not any breach of section 70, because Rule 42 is conditional on the effects specified in section 70 not occurring.

85 Mr Willis has recommended changes to Rule 42, to ensure that Rule 42 permits animal to pasture discharges (subject to conditions), in anticipation of such discharges being found to be a discharge for the purposes of the RMA. Ms Conland supports this amendment in paragraph 74 of her evidence dated 4 May 2018.

Incorporation by reference

86 The issues of incorporation by reference was raised by Ms Wratt at paragraph 157 of her evidence filed on behalf of Wellington Water Ltd. She raised concerns with the manner in which Good Management Practice guidelines and documents were incorporated into the proposed Plan. Incorporation by reference is the practice of referring to an external document within a proposed plan. This reference could be included in any part of the plan, including objectives, policies or rules.

87 Clauses 30-34 of the First Schedule to the RMA set out the requirements around incorporating a document by reference. Clause 30(1) sets out that the following written material may be incorporated by reference in Proposed Plans:

- (a) standards, requirements, or recommended practices of international or national organisations;
- (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction;
- (c) any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.

88 It is well settled law that incorporation by reference can only apply to the version of the external document referenced in the relevant plan. Clause 31 sets out this requirement. Clause 31 states:

An amendment to, or replacement of, material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan only if—

- (a) a variation that has merged in and become part of the proposed plan under Part 1, 4, or 5 states that the amendment or replacement has that effect; or
- (b) an approved change made to the plan under Part 1, 4, or 5 states that the amendment or replacement has that effect.

89 This means that if a document is incorporated in the proposed Plan and an updated version is released, that updated version can only be incorporated through a plan change process. Put another way, there is no mechanism for automatic updates of documents referenced in the proposed Plan. The document referenced is fixed at the point in time it is inserted into the proposed Plan.

90 In addition, clause 30, which enables the incorporation of written material by reference, must be read as limited to the incorporation of written material that actually exists at the time of incorporation. There is no jurisdiction to incorporate future versions of a document, as those future versions do not yet exist as ‘written material’.

91 The Panel needs to be careful about which version of an external document it has scope to include in the proposed Plan. The scope is provided by the submissions made on the proposed Plan. We consider that the version of an external document which could be incorporated in the proposed Plan is the version which existed at the time the submissions were made. This is because the submissions cannot ask for something that did not exist at the time the submissions were made.

92 The other issue is whether the Panel can amend the proposed Plan to refer to external documents by way of incorporation by reference if they are requested by submitters, but were not in the notified version of the proposed Plan (ie, they didn't follow the consultation requirements in clause 34 of the First Schedule to the RMA). In our submission, provided that:

92.1 There is scope to make the amendment to refer to external documents, and

92.2 It is the type of written material referred to in clause 30(1), then the amendment can be made by the Panel.

93 Clause 30(1) reads:

(1) The following written material may be incorporated by reference in a plan or proposed plan:

(a) standards, requirements, or recommended practices of international or national organisations:

(b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:

(c) any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.

94 This is supported by clause 34(5) of the First Schedule to the RMA, which states:

A failure to comply with this clause does not invalidate a plan or proposed plan that incorporates material by reference.

95 We understand that the Panel is particularly interested in the prospect of incorporating by reference the "Technical Guidance Document: Aquatic Ecosystem Health and Contact Recreational Outcomes in the Proposed Natural Resources Plan" by Greenfield et al, dated July 2015. The proposed Plan was notified on 31 July 2015, so presumably the Technical Guidance Document either pre-dates or was released simultaneously with the proposed Plan.

96 We also consider that the Technical Guidance Document deals with technical matters. The Technical Guidance Document is 33 pages long, and in the context of the proposed Plan, we consider that this meets the requirement of being too large or impractical to include in the proposed Plan.

Risk of acting or not acting

97 In legal submissions, Fish and Game referenced the risk of acting or not acting, in the context of a submission that there is a low risk that acting to create additional water quality controls would result in a regime that is overly restrictive. The risk of acting or not acting arises in the context of a section 32 assessment which requires the following:

- (1) An evaluation report required under this Act must—
 - a. ...
 - b. examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
 - i. ...
 - ii. assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - iii. ...
- (2) An assessment under subsection (1)(b)(ii) must—
 - a. ..
 - b. ...
 - c. assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

98 Section 32(2) is also clear that an assessment of the risk of acting or not acting only needs to be completed where there is 'uncertain or insufficient information' about the subject. Therefore, where the Panel considers that there is certain and sufficient information, it does not need to complete an assessment of the risk of acting or not acting.

99 From our review of the case law, it does not appear that there is a blanket definition or meaning of what qualifies as 'uncertain or insufficient information'. However, in 2017 the Ministry for the Environment (**MfE**) released *A guide to section 32 of the Resource Management Act 1991: Incorporating changes a result of the Resource*

Legislation Amendment Act 2017 (Section 32 Guidance), which provides guidance on section 32(2)(c) issues.⁴¹

100 As to deciding on the level of information certainty and/or sufficiency, the Section 32 Guidance states:⁴²

Planning processes do not need to ascertain with certainty all future effects of all future activities, just enough to understand if the option will form a robust framework, and to avoid significant unforeseen circumstances and high unexpected negative impacts.

101 The Section 32 Guidance includes a table of the types of uncertainty that may occur, categorising them into data- and science-related uncertainty, value- and behaviour-related uncertainty, and regulatory uncertainty.⁴³ It suggests one way of assessing the level of uncertainty could be to use a ranking system of high, medium or low uncertainty.⁴⁴

102 'Provisions' is defined in section 32(6) of the RMA to mean the 'policies, rule or other methods that implement, or give effect to, the objectives of the proposed plan'. Accordingly, the assessment applies to those provisions where there is uncertain or insufficient information about the subject matter they address.

103 In *Sustain our Sounds Inc v New Zealand King Salmon Company*⁴⁵ the Supreme Court stated:⁴⁶

⁴¹ Ministry for the Environment *A guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Legislation Amendment Act 2017* (Ministry for the Environment, Wellington, 2017).

⁴² Ministry for the Environment *A guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Legislation Amendment Act 2017* (Ministry for the Environment, Wellington, 2017) at 44.

⁴³ Ministry for the Environment *A guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Legislation Amendment Act 2017* (Ministry for the Environment, Wellington, 2017) at 45, Table 7: Types of uncertainty.

⁴⁴ Ministry for the Environment *A guide to section 32 of the Resource Management Act 1991: Incorporating changes as a result of the Resource Legislation Amendment Act 2017* (Ministry for the Environment, Wellington, 2017) at 45.

⁴⁵ [2014] NZSC 40, (2014) 17 ELRNZ 520.

⁴⁶ [2014] NZSC 40, (2014) 17 ELRNZ 520 at [16].

The evaluation must also take into account ... 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.^[31]

[emphasis added]

104 In *New Zealand Aviation Museum Trust v Marlborough District Council*,⁴⁷ the High Court characterised the test as:⁴⁸

Section 32(2)(c) of the RMA provides that an assessment of the efficiency and effectiveness of a proposed plan change must involve an assessment of “the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions”.

105 The High Court went on to say that it was:⁴⁹

... satisfied that the decision of the Court relating to the efficiency and effectiveness of PC59 was properly based upon the evidence before the Court and that the decision to proceed despite the risk of acting on insufficient or incomplete information was reasonable.

106 It commented that the Environment Court had carefully noted that it was required to take into account the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the Plan Change and quoted the decision of the Environment Court, where the Environment Court stated:⁵⁰

The second test in section 32 is to consider the risks of acting (approving PC59) or not acting (declining PC59) if there is insufficient certainty or information. We bear in mind that when considering the future, there is almost always some practical uncertainty about possible future environments beyond a year or two. A local authority or, on appeal, the Environment Court has to make probabilistic assessments of the ‘risk’.”

107 The High Court concluded that the Environment Court, after identifying the risks of acting and not acting, carefully considered the relevant matters.

⁴⁷ [2014] NZHC 3350

⁴⁸ At [73]

⁴⁹ At [78]

⁵⁰ At [75]

Provide For

- 108 During the Council presentation at the beginning of Hearing Stream 4 the Panel asked for caselaw on the meaning of the term 'provide for'.
- 109 The meaning of 'provide for' has not been directly addressed by the Courts. In *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 the High Court looked at the meaning of 'recognise and provide for' in the context of considering section 5 of the Hazardous Substances and New Organisms Act 1996, which reads:
- ‘all persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this act, recognise and provide for the following principles...’.
- 110 The High Court considered the difference between the requirement to ‘take into account’ compared with the requirement to ‘recognise and provide for’, holding:⁵¹
- There is a deliberate legislative contrast between s5 ‘recognise and provide for’ and s6 ‘take into account’. When Parliament intended that actual provision be made for a factor, Parliament said so. One does not ‘provide for’ a factor by considering and then discarding it
- 111 Provide for is defined in the Concise Oxford English Dictionary as:
- Make adequate preparations or arrangements for
- 112 We consider that to ‘provide for’ matters, actual provision needs to be made for them. This is more onerous than the requirement to take certain matters ‘into account’, which is merely an obligation to consider and give as much weight as is appropriate to those matters in light of all relevant circumstances.
- 113 Mr Willis addresses the uncertainty that arises from the outcomes sought by Fish and Game.

Good Management Practice and Best Practicable Option

⁵¹ At [72]

114 The issue of whether there is a difference in meaning between 'good management practice' and 'best practicable option' arose during the hearing

115 'Good management practice' is not defined in the RMA. However, it is defined at page 23 of the Plan (as notified) as follows:

Practices, procedures or tools (including rules) that are effective at achieving the desired performance while providing for desired environmental outcomes. Good management practice evolves through time and results in continuous improvement as new information, technology and awareness of particular issues are developed and disseminated. Good management practice guidelines can be found on the Wellington Regional Council's website

<http://www.gw.govt.nz/good-management-practice/>.

116 'Best practicable option' is given the following definition in section 2(1) of the RMA, but is limited in its application to the discharge of a contaminant or an emission of noise:

best practicable option, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—

(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and

(b) the financial implications, and the effects on the environment, of that option when compared with other options; and

(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.

117 There is no useful case law on the meaning of 'good management practice', and we have been unable to find any case in which a Court has accepted that the concept can include the 'best practicable (or best possible) option'.

118 Similarly, there is little to no useful case law on the meaning of 'best practicable option' and how it relates to good management practice.

Date: 4 May 2018

A handwritten signature in black ink, consisting of a large, stylized initial 'K' followed by a horizontal line and a few additional strokes.

.....
Kerry Anderson/Kate Rogers
Counsel for Wellington Regional
Council

APPENDIX 1

- 1 The following assesses whether there is scope within the submissions of Fish and Game, Rangitane O Wairarapa Inc and the Minister of Conservation for the changes to tables 3.1 to 3.8 sought in Appendix 3 of the joint planning evidence of Mr Percy and Miss Cooper at page 42 onwards.
- 2 The Minister of Conservation (S75) had two aspects of their submission that may provide scope. Under the Table titled 'Attachment A - submissions on the Greater Wellington Natural Resources Plan' in the row 'Objective O25 all Tables', the Minister of Conservation seeks that all Tables be amended. The reasons for this submission are:

More specificity is required within the Tables when narrative objectives are used. Some of the terms used (such as 'balanced') have no clear ecological meaning or context. The use of 'unacceptable' / 'acceptable' is also unclear.
- 3 The following decision is sought from the Regional Council in the submission:

Numeric objectives should be used in preference to narrative objective, where possible, and words such as 'balanced' and 'unacceptable' replaced with clear, meaningful terms that support the objective".

For example, for the indigenous fish objective a measure of state to describe the indigenous community condition (such as a minimum fish index of biotic integrity (IBL)).
- 4 The next row in the submission deals with the specific provision Objective O25 Table 3.4. The submitter seeks that Table 3.4 be amended with the reason for the submission being that:

Additional objectives should be added to Table 3.4 relating to channel water surface area cover by non-indigenous macrophytes and deposited sediment, as these are important for achieving the objective of safeguarding aquatic ecosystem's health.
- 5 The following decision is sought from the Regional Council:

Include an objective relating to channel water surface area covered by non-indigenous macrophytes: less than 50 macrophyte cover of cross sectional area or volume, or less than 50% macrophyte cover of channel water surface area.

Include a deposited sediment percent cover objective for all outstanding water bodies (Schedule A), river and lakes for significant indigenous ecosystems (Schedule F1): less than 20% cover of the bed by fine silt or sand less than 2mm diameter (or within 10% cover of reference condition).
- 6 The Rangitane O Wairarapa submission does not contain any information that provides scope for amending the Tables to provide numeric rather than narrative limits.

7 The Fish & Game submission (S308) contains a range of references to Tables 3.1 to 3.8. These are set out below.

8 Within the preliminary section under the heading 'Reasons for the submissions' the following reasons are provided:

The plan in its current form does not adequately provide for / or give effect to:

...

24.15. Set numeric water quality and quantity standards, freshwater objective, or limit or target protect freshwater values, including safeguarding life supporting capacity and ecosystem health and processes, and give effect to the MPF freshwater management and Fish & Game game bird management plan.⁵²

...

28. Numeric water quality and quantity standards, objectives, outcomes, and limits or targets should be inserted into the plan to protect these values including aquatic ecosystem values and trout fishery values. The rules in the plan will then need to be amended / incorporated to ensure compliance with the standards set out in Schedule 3 of the RMA, and as shown in Appendix 2 and Appendix 3 to this submission.⁵³

9 Moving to the relief sought by Fish & Game at paragraph 35. Fish & Game seek:

35.1. That the relief outlined under the specific submission points, and as appended, is accepted; and in general terms;...

35.5 Inclusion of further objectives and numerical and narrative parameters are required in section 3 Tables to provide for the life supporting capacity, ecosystem health and processes, recreational, amenity and aesthetic values, mahinga kai, Maori, and the natural character freshwater objectives and values. Parameters that should be included are e-coli, temperature, water clarity, pH, deposited sediment, dissolved oxygen, nutrients, cyanobacteria, the weighted composite cover (WCC) of filamentous and mat material [PeriWCC], periphyton, flow requirements, toxicants, ammonia, and a narrative and numerical requirement for natural character.

35.6. Amend Table 3.1 so that all rivers and streams in the region are being managed for primary contact recreation as shown in Appendix 4.

35.7. Delete Table 3.2 in its entirety.

35.8. Amend Table 3.4 as shown in Appendix 3.

⁵² Submission of Fish & Game at paragraph 24.14.

⁵³ As above, paragraph 28.

35.9. Include new Table 3.4A, as set out in Appendix 2, which establishes Freshwater Objectives which recognise and provide for the region trout fishery and fauna values.⁵⁴

10 The Fish & Game submission then lists a range of specific submission points within a Table. At the beginning of the Table, the submission notes that:

The outcomes sought and the wording uses is a suggestion only, where a suggestion is proposed it is with the intention of 'or words to that effect'. The outcome sought may require consequential restructuring of the plan, or parts thereof, arising from the material amendment sought.

11 With regard to O24, an amendment is sought, and an amendment to Table 3.6 is also sought as follows:

Amend Table 3.6 to delete the narrative in relation to nitrate levels and replace with numerical states for acceptable groundwater drinking concentrations, and insert requirements to maintain water quality and quantity, and where degraded such that the ecosystem health of connected surface water bodies is impacted, groundwater quality and quantity is improved.⁵⁵

12 With regard to Tables 3.1, 3.2, 3.3, 3.4, and 3.5, Fish & Game support those Tables with amendments. The reason for this is:

As proposed Table 3.1, to 3.5 fail to provide sufficient attributes and states to ensure that freshwater resources are sustainably managed to safeguard life supporting capacity and ecosystem health and processes of freshwater, provide for the habitat of trout and indigenous fish. Provide for primary contact recreation and cultural values including mahinga kai, and recognise and protect the natural character of rivers, lakes, natural wetlands, and coastal water bodies.⁵⁶

13 In particular, the relief sought is:

Amend Table 3.1 to 3.4 as shown in Appendix 4 and 3.

Include new Table 3.4A as shown in Appendix 2.

Amend Table 3.5 to include a topic level index (TLA) for the lake type... include nitrogen phosphorous instream concentrations to achieve TLI

...

Amend the objectives policies and rules so that the numeric water quality and quantity limits and standards are included which ensure that the life supporting capacity and ecosystem health and processes...

⁵⁴ At paragraphs 35.5 to 35.9.

⁵⁵ At page 28

⁵⁶ At page 28

Amend the objectives policies and rules so that numeric water quality and quantity limits and standards are included which ensure that the life...

14 At Appendix 2 of the submission, Fish and Game set out a new Table 3.4a. This Table sets out standards for MCI, in stream plants (Chlor and PeriWCC), Temp, PH, DO, Dissolved inorganic Nitrogen, Dissolved reactive phosphorus, Ammonia, sediment cover, narrative measures of form and functions, and Natural Character Index.

15 At Appendix 3 of the submission Fish & Game set out their recommended amendments to Table 3.4. Within these recommended amendments, they include numeric limits around nutrients, particularly dissolved and organic nitrogen and dissolved reactive phosphorous, along with toxicants, flows and sediment cover.

16 At Appendix 4 Fish & Game set out their recommended amendments to Table 3.1. They include specific limits for e-coli, benthic cyanobacteria, toxicants, macrophyte cover, mat algae cover, filamentous algae cover, water clarity, and sediment cover. There are also narrative limits for tanagata whenua use, and sewage fungus.

17 The Forest and Bird submission also may provide scope. The submission seeks the following changes:

18 Tables 3.4-3.8 are supported in part and opposed in part. The specific change sought is:

Remove subjective references in Tables and replace with objective measures.

19 The reason given for this is:

Tables 3.4-3.8 are generally supported. However, there is an overreliance on narrative in some instances. The issue that arises is that this includes subjective words such as "balanced: and "appropriate". These should be avoided where possible in favour of objective measures or numerical limits.

20 The submission seeks that Table 3.4:

Identify Mahingai kai species

Add objectives relating to:

Soluble inorganic nitrogen ...

Dissolved reactive phosphorus ...

Deposited sediment ...

Non indigenous macrophytes ...

21 The submission seeks that Table 3.5 add limits around:

Soluble inorganic nitrogen ...

Dissolved reactive phosphorus ...

NOF lake attributes and

Additional parameters for macrophytes ...

Mahinga Kai

- 22 Amend Table 3.6 to include provision for groundwater nitrate to not exceed surface water nitrate objectives, and include numeric limits for unacceptable effects on stygofauna communities
- 23 Amend Table 3.7 so it includes measurable objectives for plants and fish and identifies mahinga kai species.
- 24 Amend Table 3.8 to:
- Include provisions that defines 'low frequency' of algae blooms
 - Include measurable objectives for 'sea grass and saltmarsh' and 'invertebrates'
 - Identify mahinga kai species
 - Develop specific objectives for Pauatahanui Inlet and Poirirua Harbour

Assessment of whether there is scope for the changes sought by the submitters to Tables 3.1-3.8

Table 3.1

- 25 An amended Table 3.1 was included in the Fish and Game submission. An amended Table 3.1 is included in the evidence of Mr Percy and Ms Cooper. I assess the scope of the evidence version of Table 3.1 below.
- 25.1 The changes sought to Table 3.1 (set out in the evidence of Mr Percy and Ms Cooper) seeks changes to benthic cyanobacteria limits. This change is the same as sought in submission, and is within scope.
- 25.2 Additional measurement criteria that were also sought in submissions: Macrophyte cover, with the same limits, water clarity (with different limits) sediment cover (with different limits). These changes are all within scope.
- 25.3 New measurement criteria of: Nuisance algae cover, and heterotrophic growth. However, the submission sought new measurement criteria of 'mat algae cover; and 'filamentous algae cover'. The category 'nuisance algae cover' appears to incorporate both of these proposed measurement criteria. Heterotrophic growth appears to mirror the measurement criteria 'Sewage Fungus' proposed in the submission. Given this, these changes are within scope of the submission.

26 All of Table 3.1 proposed in evidence is within scope of the submission.

Table 3.2

27 There is no amended version of Table 3.2 in the submission. In the submission there a submission point seeking that Table 3.2 be deleted. Given this, any changes to Table 3.2 would have to be within scope of the general parts of the Minister of Conservation and Fish and Game submission which is set out below:

More specificity is required within the Tables when narrative objectives are used. Some of the terms used (such as 'balanced') have no clear ecological meaning or context. The use of 'unaccepTable' / 'accepTable' is also unclear

Numeric objectives should be used in preference to narrative objective, where possible, and words such as 'balanced' and 'unaccepTable' replaced with clear, meaningful terms that support the objective".

35.5 Inclusion of further objectives and numerical and narrative parameters are required in section 3 Tables to provide for the life supporting capacity, ecosystem health and processes, recreational, amenity and aesthetic values, mahinga kai, Maori, and the natural character freshwater objectives and values. Parameters that should be included are e-coli, temperature, water clarity, pH, deposited sediment, dissolved oxygen, nutrients, cyanobacteria, the weighted composite cover (WCC) of filamentous and mat material [PeriWCC], periphyton, flow requirements, toxicants, ammonia, and a narrative and numerical requirement for natural character.

Amend the objectives policies and rules so that the numeric water quality and quantity limits and standards are included which ensure that the life supporting capacity and ecosystem health and processes...

Amend the objectives policies and rules so that numeric water quality and quantity limits and standards are included which ensure that the life...

28 The scope for the evidence version of Table 3.2 is assessed below.

28.1 The changes sought to Table 3.2 seeks changes to benthic cyanobacteria limits. Benthic cyanobacteria limits were included in the plan as notified. As set out above, I consider changes to limits to measurement criteria set out in the plan as notified to be within the general scope of the submission.

28.2 New measurement criteria for macrophyte cover, nuisance algae cover, water clarity, sediment cover, and heterotropic growth is sought.

28.3 Water clarity is specifically referenced in the submission above and is within scope. The other criteria are not specifically referenced, but may be technical terms which are

very similar to the terms raised in the submission. A more technical assessment will be required to determine scope.

Table 3.3

29 No changes appear to be proposed to Table 3.3 in the evidence of Mr Percy.

Table 3.4

30 An amended Table 3.4 was proposed through the submission. The evidence of Mr Percy proposes an updated Table 3.4.

31 The scope of the evidence version of Table 3.4 is assessed below.

31.1 The following measurement criteria are retained, with different limits: Periphyton, MCI, Macrophytes, Fish and Mahinga Kai. I consider that all new limits under these categories are within scope.

31.2 The following measurement criteria are additional to the notified version, but included within the version in the submission: Nitrate-Nitrogen concentrations (referred to as dissolved inorganic nitrogen in submission), Dissolved reactive phosphorus, temperature, fine deposited sediment, toxicants, dissolved oxygen. In the submission limits were proposed. All limits are now split in evidence, between all rivers, and significant rivers.

31.3 There are no new measurement criteria proposed.

32 All changes proposed are within scope of the submission.

Table 3.5

33 An amended Table 3.5 is proposed in evidence. No amended Table 3.5 was proposed in submission. Given this, the amendments to Table 3.5 must be within scope of the following:

35.5 ... Parameters that should be included are e-coli, temperature, water clarity, pH, deposited sediment, dissolved oxygen, nutrients, cyanobacteria, the weighted composite cover (WCC) of filamentous and mat material [PeriWCC], periphyton, flow requirements, toxicants, ammonia, and a narrative and numerical requirement for natural character

Amend Table 3.5 to include a topic level index (TLA) for the lake type... include nitrogen phosphorous instream concentrations to achieve TLI

- 34 In the evidence version, new measurement criteria are proposed for total nitrogen, total phosphorus and chlorophyll. The nitrogen and phosphorus are nutrients and are within scope. Chlorophyll is referenced in Table 3.4a (which was in the submission) as 'Chlor'.

Table 3.6

- 35 An amended Table 3.6 is proposed in evidence. No amended Table 3.6 was proposed in submission, although there was a specific reference to Table 3.6 in the submission, set out below.

Amend Table 3.6 to delete the narrative in relation to nitrate levels and replace with numerical states for acceptable groundwater drinking concentrations, and insert requirements to maintain water quality and quantity, and where degraded such that the ecosystem health of connected surface water bodies is impacted, groundwater quality and quantity is improved.⁵⁷

- 36 The only change to Table 3.6 is to include a numeric limit for nitrate. Nitrate was already included as a measurement criteria in the notified version of the plan, and is specifically referenced in the submission. Given this, the change is within scope.

Table 3.7

- 37 An amended Table 3.7 is proposed in evidence. No amended Table 3.7 was proposed in submission, therefore any changes must be within scope of the general submission set out below:

More specificity is required within the Tables when narrative objectives are used. Some of the terms used (such as 'balanced') have no clear ecological meaning or context. The use of 'unacceptable' / 'acceptable' is also unclear

Numeric objectives should be used in preference to narrative objective, where possible, and words such as 'balanced' and 'unacceptable' replaced with clear, meaningful terms that support the objective".

35.5 Inclusion of further objectives and numerical and narrative parameters are required in section 3 Tables to provide for the life supporting capacity, ecosystem health and processes, recreational, amenity and aesthetic values, mahinga kai, Maori, and the natural character freshwater objectives and values. Parameters that should be included are e-coli, temperature, water clarity, pH, deposited sediment, dissolved oxygen, nutrients, cyanobacteria, the weighted composite cover (WCC) of filamentous and mat material [PeriWCC], periphyton, flow requirements, toxicants, ammonia, and a narrative and numerical requirement for natural character.

⁵⁷ At page 28

Amend the objectives policies and rules so that the numeric water quality and quantity limits and standards are included which ensure that the life supporting capacity and eco system health and processes...

Amend the objectives policies and rules so that numeric water quality and quantity limits and standards are included which ensure that the life...

38 The changes to Table 3.7 are to change titles from 'plant' to 'flora' and 'fish' to 'fauna', and change the narrative limits to add additional information rather than to change to numeric limits.

39 These changes are within scope, as they fit within the submission to provide more specificity.

Table 3.8

40 An amended Table 3.8 is proposed in evidence. No amended Table 3.8 was proposed in submission, therefore any changes must be within scope of the general submission set out above.

41 The only change to Table 3.8 is to set limits for fish in the open coast, as well as within estuaries and harbours. Previously Table 3.8 listed those limits as 'NA'. This change is not within scope, as there is no reference in the submissions for criteria in the open coast for seagrass and saltmarsh, fish, sedimentation rate and mud content