Before the Hearings Panel
At Wellington

Under the Resource Management Act 1991

In the matter of Proposed Natural Resources Plan for the Wellington Region

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Legal Submissions for Hearing Stream 5 - Right of Reply

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MAY IT PLEASE THE PANEL:

1 Hearing Stream 5 (**HS5**) dealt with issues of:

1.1 Discharges to Land (section 42A report provided by Mr Loe),

1.2 Wetlands and Biodiversity (section 42A report provided by Ms Guest), and

1.3 Beds of Lakes and Rivers (section 42A report provided by Ms Guest).

2 The following legal issues arose during the hearing which are addressed in these submissions:

2.1 Consenting pathway for Regionally Significant Infrastructure (**RSI**) in the proposed Natural Resource Plan (**proposed Plan**).

2.2 National Policy Statement for Freshwater Management (**NPS-FM**) and the National Policy Statement for Urban Development Capacity (**NPS-UDC**) and the relative weight to be given to each.

2.3 Identification of wetlands (spatially).

2.4 Mitigation hierarchy and how that relates to the RMA not being a 'no effects' regime.

2.5 Dams and any cross-over with the Building Act 2004 (**BA**).

CONSENTING PATHWAY FOR REGIONALLY SIGNIFICANT INFRASTRUCTURE

3 In Hearing Stream 5 and Hearing Stream 4 Right of Reply the Panel raised questions in relation to whether there is a consenting pathway for regionally significant infrastructure (**RSI**) in the proposed Plan and if not, should there be (or not) based on higher order documents and/or the objectives in the proposed Plan.

4 As we understand it, the concern raised by submitters is that the use of 'avoid' policies would mean that unless there is an exception in the policy or rule to allow for RSI, then RSI development would be stymied where it is a non-complying activity. That is, it cannot get through the 'gateway test' of not being contrary to the objectives and policies of the proposed Plan.

Section 104D(1)(b) RMA

The non-complying 'gateway' test

5 The 'gateway tests' are the hallmark feature for non-complying activities and are what makes the processing of them different from other activity classifications.

6 The RMA sets out two 'gateway' tests under section 104D. Those tests are that the consent authority is satisfied that:

6.1 the adverse effects of the activity on the environment will be minor, or

6.2 the activity will not be contrary to the objectives and policies.

7 These 'gateways' are alternatives. That is, only one gateway test needs to be met and if you pass through the minor effects test, there is no need to assess the objectives and policies test.

Equally, if neither of the gateways is satisfied, then the application fails. If an application passes through either 'gateway', then the applicant still has to satisfy the consent authority that the application should be granted in terms of the matters referred to in section 104(1) of the RMA.

8 The issue raised by submitters is that if an RSI project has effects that are more than minor, then for it to even be considered it has get through the 'not contrary to the objectives and policies' test.

9 Until relatively recently, the settled position in the Environment Court was that the objectives and policies threshold test was approached holistically. The assessment depended on the objectives and policies as a whole, and the importance of the relevant objective or policy within that framework. Although being contrary to one objective or policy could see an application fail, it was not necessarily a fail. The case of *Akaroa Civic Trust v Christchurch City Council* summarised that position:

> In all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game: at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. But the proposal may be so strong in terms of that policy that it outweighs all the others if that is the intent of the plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in a district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal before the consent authority, it may be open to the consent authority to find the proposal is contrary to the objectives and policies under section 104D. We add that it is rare for a consent authority, or the court, to base its decision either way, on a single objective or policy.
>
> [2010] NZEnvC 110, at [74]
>
> Emphasis added

> The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.

10 The decision of *Queenstown Central Limited v Queenstown Lakes District Council* changed that position. In that decision, the High Court held that the section 104D(1)(b) test: [2013] NZHC 817, at [37]

> … is not an overall judgment of some degree of the adverse effects of the proposal. The test is tougher. The activity must not be contrary to any of the objectives or policies. Emphasis added

11 In other words, if an application for a non-complying activity is contrary to one objective or policy it is likely to fail to pass through the gateway in section 104D(1)(b) of the RMA.

12 Since that decision of the High Court, the Environment Court has addressed the issue on several occasions and it has shown some reluctance to follow that approach, despite *Queenstown Central* being High Court authority.

Judge	**As a whole**	**Individually**
Smith	✓	
Jackson (original judge in QCL case whose decision overturned)	✓ ✓	
Dwyer	✓	✓
Hassan	✓	But acknowledges this approach
Thompson	✓ but acknowledges division of judicial opinion	
Kirkpatrick	Not contrary to any	
Newhook	✓	
Borthwick	✓	

The outcome

13 Given that the *Queenstown Central* decision has not been distinguished by another High Court decision or overruled by a higher Court, then legally it should be followed by the Panel and the Environment Court (because the Environment Court is bound by decisions of the High Court).

14 Accordingly, until such time as this is reconsidered, an activity is likely to fail the section 104D(1)(b) gateway test if it is contrary to any one objective or policy.

15 However, what constitutes being 'contrary to' an objective or policy is also important because it is submitted that applying that test does dilute the impact of the *Queenstown Central* case somewhat.

Meaning of 'contrary to'

16 Some of the relevant principles to date from caselaw are:

16.1 Non-complying status does not in and of itself make something 'contrary to' the objectives and policies of a plan.

16.2 A proposal which simply fails to satisfy or meet a policy is not necessarily 'contrary to' it. *Akaroa Civic Trust*, at [73]

16.3 A lack of recognition within the plan or a lack of support from the planning provisions for a particular activity is not enough for a proposal to be stopped at the section 104D(1)(b) gateway. In fact, a non-complying activity will rarely, if ever, find direct support in the objectives and policies of a plan. But that alone does not make the activity 'contrary to' the provisions of that plan. *Wilson v Whangarei District Council* NZEnvC W020/07, at [35]

16.4 The phrase 'contrary to' in the context of the section 104D(1)(b) gateway test means something more than just non-complying. It means 'opposed to in nature', 'different to', 'opposite', 'repugnant' or 'antagonistic'.

New Zealand Rail v Marlborough District Council [1994] NZRMA 70 at p80

17 As to what this means in practice, the Environment Court has found that:

> In terms of objectives and policies, the Court needs to form a judgment on where a proposal sits on the continuum that runs between (a) an activity implementing the provisions of a plan and (b) being inconsistent with it, but not so inconsistent as to be contrary to (or completely at odds with, or repugnant to) the objectives and policies.

Guilty As Ltd v Queenstown Lakes District Council [2010] NZEnvC 19, at [61]

18 Other phrases used by the Environment Court when determining what is 'contrary to' are whether the activity has 'any irreconcilable conflicts with the provisions' or whether the activity 'compromises any of the provisions'.

Berry v Gisborne District Council (2010) 16 ELRNZ 88 and *Queenstown Central* at [30]

19 These phrases set a high bar - ie, an activity needs to be completely at odds with the plan or create an irreconcilable conflict to be 'contrary to' an objective or policy.

'Avoid' policies

20 The Panel has already had extensive submissions on *King Salmon* and the meaning of 'avoid' and implications of policies using those words. In summary:

20.1 'Avoid' means do not allow or prevent the occurrence of. In isolation, 'avoid' sends a clear signal that activities which result in the effects to be avoided will not be allowed.

Hearing Stream 1 legal submissions, dated 20 April, paras 87-88.

20.2 However, the use of the word avoid must be considered in the context and framework in which

it is used, and does not always result in a blanket prohibition.

20.3 Although *King Salmon* considered that 'avoid' in the NZCPS meant 'do not allow' or 'prevent the occurrence of', it considered that it was possible for minor or transitory effects to be acceptable, even where the avoid language was used.

Hearing Stream 4 legal submissions, dated 12 January 2018, paras 14-16

21 It is submitted that it is very important to consider the context within which the word 'avoid' is used because it will not always result in a prohibition of a certain effect, because the objective or policy may contain provisos or exceptions (such as 'avoid significant adverse effects'). Each non-complying rule will have to be considered in light of the relevant policies and objectives in the propose Plan.

Issues to consider

22 The non-complying gateway contains two tests and RSI is not prevented from getting through the gateway if its adverse effects will be minor.

23 In other words, the issue only arises when the adverse effects will be more than minor and there is an issue with an objective or policy to the extent that the RSI proposed is 'contrary to' that objective or policy, which is a high test. That will need a case by case assessment, which is what would form part of the consenting process.

24 It is submitted that while there are a number of 'avoid' policies in the proposed Plan these are not generally unqualified 'avoid'.

25 In her Right of Reply Report Ms Guest has assessed the 'avoid' policies which relate to biodiversity and which are absolute. She identifies that the application of an avoid

policy is only absolute for P31, P34, P39 and P39(a). Ms Guest considers that given the value of the water bodies that these policies relate to, this level of protection is appropriate.

HS5 Right of Reply Wetlands and Biodiversity at [150]

26 Additional examples of policies which use the term 'avoid' are set out below:

26.1 Policy P10 requires that use and development shall avoid, remedy or mitigate any adverse effects on contact recreation and Maori customary use in fresh and coastal water.

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26.2 Policy P25 requires that use and development shall avoid significant adverse effects on natural character in the CMA, natural wetlands, lakes and rivers, and avoid, remedy or mitigate other effects.

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26.3 Policy P45 (sites with significant mana whenua values) requires that significant adverse effects be avoided, and other effects shall be managed as recommended in a cultural impact assessment.

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26.4 Policy P46 requires that more that minor adverse effects on significant historic heritage be avoided, remedied or mitigated.

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27 It is submitted that regionally significant infrastructure is not necessarily something that should be provided for in every location in the Region. In determining whether RSI gets to 'trump' other matters, such as sites of significance, the higher order documents will provide guidance on this and will have to be considered as part of the Panel's assessment of whether the proposed Plan is giving effect to those documents.

28 The wording of those higher order documents is very important to this issue. For example, the RPS does not

provide for RSI 'full stop', but rather:

28.1 Requires regional plans to include policies and/or methods to recognise the benefits of RSI. Policy 7 RPS

28.2 Requires regional plans to include policies and rules that protect RSI from incompatible uses occurring under, over or adjacent to the RSI. Policy 8 RPS

28.3 Sets an objective that the benefits of RSI are recognised and protected (with the explanation showing this is protection of existing RSI from incompatible uses). Objective 10 RPS

29 The proposed Plan objectives and policies reflect these in Objectives O12, O13, and Policies P12-P14.

30 The NZCPS does not use the phrase RSI, but does refer to 'infrastructure', which is defined the same as in the RMA. This arises in the following provisions:

30.1 Policy 1((i) recognises that the coastal environment includes infrastructure that has modified it.

30.2 Policy 6(1)(a)recognises that the provision of infrastructure in the coastal environment is an activity that is important to social, economic and cultural well-being.

30.3 Policy 6(1)(b) requires consideration of the rate at which public infrastructure should be enabled to provide for the reasonably foreseeable needs or population growth without compromising the other values of coastal environments.

30.4 Policy 10(3), when considering reclamations, requires that particular regard is given to the extent

to which the reclamation and intended purpose would provide for the efficient operation of infrastructure, including ports, airports, pipelines, ferry terminals, etc.

30.5 Policy 25(d), where areas are potentially affected by coastal hazards over the next 100 years, then it is encouraged that infrastructure should be located away from areas of risk where practicable.

31 The only place where significance of that infrastructure is mentioned is in Policy 27(c) where areas of significant existing development are likely to be affected by coastal hazards, then the range of options assessed for reducing coastal hazard risk should recognise that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance.

32 It is submitted that these higher order documents do not actually give RSI any special status that requires a consenting pathway to be provided for it. At most, the RPS requires an acknowledgement of the benefits of RSI and protection of it from incompatible uses. That is not the same as having to provide a consenting pathway for it in the proposed Plan.

Examples from the proposed Plan

33 Ms Guest has provided details of examples in her Right of Reply. In addition, we have included two examples in Appendix A where we examine the provisions of the proposed Plan.

HS5 Right of Reply Wetlands and Biodiversity at [149]

NATIONAL POLICY STATEMENT VERSUS NATIONAL POLICY STATEMENT

34 In her evidence on behalf of Wellington City Council (**WCC**), Ms Pascall identified a concern that the proposed

Plan does not adequately provide for future urban development and the NPS-UDC. She stated that:

> WCC is concerned about the lack of recognition in the PNRP of the realities of a growing region and Central Government requirements to provide sufficient development capacity for the next 3, 10, and 20 years under the National Policy Statement for Urban Development Capacity (NPS-UDC). — Evidence of Ms Pascall on behalf of Wellington City Council at [15]
>
> …
>
> WCC is concerned that the PNRP lacks sufficient acknowledgement of the need for future urban development. A key area of concern in this hearing stream is the overly restrictive way the PNRP addresses necessary earthworks for urban development (namely Policy P102 and Rule R127 relating to reclamation activities). — At [20]

35 She went on to acknowledge that the proposed Plan also has to give effect to the NPS-FM, but considered that a balance must be struck between the NPS-FM and the NPS-UDC. She appears to be concerned that too much weight has been given in the proposed Plan to the NPS-FM over the NPS-UDC. Ms Pascall stated in her evidence:

> It is acknowledged that the GWRC has particular obligations under the National Policy Statement for Freshwater Management. However, there are also particular requirements under the National Policy Statement for Urban Development Capacity, as I have outlined in the introduction to my evidence. Both NPSs sit side-by-side and thus a balance must be struck between the two in delivering on the overarching philosophy of the RMA. — At [99]
>
> WCC is concerned that the future development potential of urban growth areas may be compromised by a policy and rule framework that sets a high bar and potentially limits the ability to efficiently develop land within areas where growth has been anticipated and expected for some time. — At [100]

36 As set out in our submissions on Hearing Stream 1 a proposed Plan is required to give effect to <u>any</u> National Policy — Submissions on Hearing Stream 1 dated 20 April 2017 at [47]-[49].

Statement.

37 'Give effect to' simply means 'implement'. There is no requirement to give more weight to one or the other. However, as stated in *King Salmon,* and in our submissions on Hearing Stream 1, the implementation of any NPS will be affected by what the NPS objectives and policies relate to, that is, what must be given effect to. A requirement to give effect to a NPS which is framed in a specific and unqualified way (i.e. which creates an 'environmental bottom line') may, in a practical sense, be more prescriptive than a requirement to give effect to a NPS which is worded at a higher level of abstraction.

Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, at [77]

38 Accordingly, whilst neither the NPS-FM or the NPS-UDC takes precedence over the other, the phrasing of the specific objectives and policies within the NPS may mean that one is more directive than the other. The degree of specificity and directiveness may mean that some objectives and policies are more prescriptive than others are. This does not mean one has more weight than the other, but rather, it may mean that how they are implemented has less flexibility.

39 Each NPS needs to be considered on an individual level, as do the various parts of the proposed Plan to consider whether the proposed Plan gives effect to the NPS's. We do not propose to undertake this exercise here, but understand that section 42A report officers have already been completing this exercise.

40 There is also a timing issue in terms of giving effect to the NPS-UDC. The NPS-FM and NPS-UDC came into effect during the proposed Plan process. The NPS-FM came into effect one month before the draft Plan was available for public comment and the NPS-UDC came into effect on 1 December 2016 after the submissions on the proposed Plan

Submissions on Hearing Stream 1 dated 20 April 2017 at [69]

closed.

41 The proposed Plan is required to give effect to the NPS-UDC. However, the NPS-UDC is not directive as to amendments required to the proposed Plan, and therefore the Council must progress any amendments to the proposed Plan required to give effect to the NPS-UDC through the normal Schedule 1 process.

Section 55(2C), of the RMA

42 For the proposed Plan, this means that section 42A report authors will have considered whether the NPS-UDC is relevant to their provisions, and if so, whether the NPS-UDC has been given effect to by those provisions.

Submissions on Hearing Stream 1 dated 20 April 2017 at [72]

43 However, where the NPS-UDC has not been given effect to, and further amendments are required, it is only where those amendments are already within scope of a submission on the proposed Plan that they can be made by the Panel. This means a further plan change process may be required in order for the Council to give full effect to the NPS-UDC.

At [73]

44 Again, we have relied on the section 42A report writers to draw that Panel's attention to where this situation exists (if it does).

IDENTIFICATION OF WETLANDS

Lack of certainty

45 The proposed Plan does not include detailed boundary delineations for wetlands. The section 42A report states that:

> These are a matter for expert discussion where required for development of a wetland restoration management plan or a resource consent.
>
> …
>
> The boundaries of the wetlands detailed in Schedule A3 and shown on Map 1 are indicative only. And do not provide definitive wetland delineations that can be used for the purpose of resource consents.

Section 42A Report Wetlands and Biodiversity at [790] and [813]

46 Several submitters requested that the significant wetlands are illustrated on a plan. A large number of submitters are concerned at the potential for farmed pastureland to be captured by the definition of a natural wetland.

Section 42A Report Wetlands and Biodiversity at [130] and [98]

47 Mr Jeffries in his further submission emphasised the importance of being able to identify whether land is wetland or something else:

> … All the rules in these chapters are ambiguous because all rules impose conditions which relate to definable but as yet undefined spaces of land.

Alan Jefferies Hearing Stream 5 Further submissions, 7 Aril 2017

At [5]

48 The Panel has also raised the question of whether wetlands being undefined (in a spatial sense) is acceptable for a permitted activity (eg, Rules 104 and 105).

49 As we understand it, this issue only arises in relation to 'natural wetlands' and 'significant natural wetlands', as we understand from Ms Guest that all 14 'outstanding natural wetlands' are listed in Schedule A3 and shown on Map 1 and GIS Mapping, and have accurate boundary definitions.

Wetland provisions in the Proposed Plan

50 A summary of how the proposed Plan intends to deal with wetlands is explained in the Section 42A Report Wetlands and Biodiversity, and sets out the following:

> Given the rarity of wetlands in the Wellington Region and the sensitive nature

Section 42A Report: Wetlands

of these ecosystems, the proposed Plan takes a strong approach to manage activities within these systems.

There are eight rules that specifically manage activities within wetlands, and also rules R97 and R98 which manage stock access to surface water bodies (including wetlands[22]) (refer to Table 6). There are two permitted activity rules [R104 and R105] that provide for a very limited range of activities that are considered likely to have minor or less than minor adverse effects on biodiversity values and wetland function (e.g. planting of appropriate indigenous species and pest control). These rules are subject to a set of 'Wetlands general conditions', set out in Section 5.5.2 of the proposed Plan.

and Biodiversity at [587] and [588]

51 Also included in the proposed Plan are definitions for 'natural wetland' and 'significant natural wetland', which are set out below.

Natural wetland Is a permanently or intermittently wet area, shallow water and land water margin that supports a natural ecosystem of plants and animals that are adapted to wet conditions, including in the beds of lakes and rivers, the coastal marine area (e.g. saltmarsh), and groundwater-fed wetlands (e.g. springs).

Natural wetlands do not include:

(a) damp gully heads, or wetted pasture, or pasture with patches of rushes, or

(b) areas of wetland habitat in or around bodies of water specifically designed, installed and maintained for any of the following purposes:

(i) water storage ponds for
  a) public water supply, or
  b) hydroelectric power generation, or
  c) firefighting or
  d) irrigation, or
  e) stock watering or

(ii) water treatment ponds for
  f) wastewater, or
  g) stormwater, or
  h) nutrient attenuation, or
  i) sediment control, or
  j) animal effluent, or

(iii) beautification, landscaping, amenity, or

(iv) drainage.

See also significant natural wetland and outstanding natural wetland.

'Wetland' has the same meaning as in the

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RMA.

> **Significant natural wetland** A natural wetland that meetings one or more of criteria (a)-(d) listed in Policy 23 of the Regional Policy Statement 2013, being representativeness; rarity; diversity; ecological context.
>
> (Note – Schedule F3 lists significant natural wetlands for the purpose of managing livestock exclusion under Rule R97).

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52 The RMA defines a 'wetland' as including:

> … permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions

Section 2 of the RMA

53 In her section 42A Report, Ms Guest comments on the comparison between the proposed Plan definition for 'natural wetland' and the RMA definition for 'wetland', stating that:

> The definition for a Natural Wetland set out in the proposed Plan mirrors the RMA definition and includes two additional clauses with the aim of "providing practical guidance for identifying wetlands in the field" (Section 32 Report: Wetlands): sub clause (a) and (b). Sub-clause (a) makes it clear that the proposed Plan is concerned with natural wetlands in the beds of lakes and rivers, the coastal marine area, and groundwater-fed wetlands. It responds to a concern raised frequently by rural stakeholders during development of the proposed Plan, that areas which they consider to be wet or boggy paddocks with a few rushes may, and should not, be captured by the definition of wetland.

Section 42A Report: Wetlands and Biodiversity at [91]

54 Schedule F3 lists identifies significant natural wetlands, proving a wetland name, district and NZTM 2000 map reference. We understand that this list provides the general location of the wetland, but not the specific boundaries of the wetland. However, we also understand that property scale maps were provided to landowners, and there was engagement with landowners around the existence of any

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Section 42A Report: Wetlands and Biodiversity at [109] and [119]

boundaries to the wetlands.

55 The rules in the proposed Plan that are applicable to wetlands are Rules 97, 104 and 105 which deal with permitted activities and Rules R106 to R111, which require resource consent.

Requirements for Rules

56 The caselaw says that rules in a plan and the provisions of the plan in general must be clear and precise. If a rule is found to be vague or unclear, it may be void for lack of certainty:

Lovegrove v Waikato District Council [2010] NZEnvC 054 at [10].

> It is established that rules in a plan, and the provisions of the plan in general, must be clear and precise. If a rule is found to be vague or unclear, it may be void for lack of certainty. In *Sandstad* v *Cheyne Developments Limited* the Court commented:
>
> "It is desirable that those who administer or are affected by or have to advise on the restrictions prescribed by a town planning ordinance should be able to identify without difficulty the properties to which it relates."

57 In addition, a permitted activity must not reserve discretion to a decision maker to provide final approval to a permitted activity and it must be sufficiently certain to be understandable and functional, ie it should be clear on its face as to whether an activity is permitted by that rule or not.

Hearing stream 3 reply submissions, 8 December 2017 at [7] and [28]

Boanas v Oliver PT Christchurch C072/94, 28 July 1994 at page 5-6

58 In *AR and MC McLeod Holdings v Countdown Properties Limited* the High Court stated:

HC Wellington CP949/89, 19 September 1990 at page 27 - 28

> An expression need not always be considered invalid because it is general. Qualitative generalisations are common enough in district schemes, and are accepted planning mechanisms
>
> …
>
> The question must always be: is it sufficiently certain to be understandable and functional.

59 Ensuring that the definition and identification of wetlands is sufficiently certain is a challenge faced by all regional councils and government itself. The NES for Plantation Forestry contains restraints on activities in 'wetlands' and includes requirements relating to wetlands as permitted activity conditions (eg, earthworks are permitted if, among other things, they are not within 10m of a wetland larger than 0.25ha - Rule 29). The definition of wetland in the NES-PF is the same as in the RMA. The Draft National Planning Standards adopt the same definition. This definition does not allow the specific boundaries of the wetland to be identified either.

60 At a Council level, we have considered how other Councils have dealt with this issue, as has Ms Guest in her Right of Reply.

HS5 Right of Reply Wetlands and Biodiversity Appendix D

61 For the Canterbury Land and Water Regional Plan (**CLWRP**) the section 42A report authors commented (in the context of the definition of wetlands) that:

> The definition from the RMA is relatively descriptive, but open to interpretation and differing points of view, it also potentially requires some expertise and analysis to determine whether an area meets the criteria of a wetland. Some councils and organisations have attempted to more precisely define wetland, and several submitters have suggested alterations to the definition. Overall the RMA definition, despite its uncertainty, does not appear to be improved on by the various requests in the submissions. Retention of the RMA definition enables a single definition to be consistently applied across the Freshwater NPS and RPS 2013. It is also notable that the RPS 2013 clarifies in Policy 9.3.5 that in general grazed pasture will not be considered a wetland.

At page 386

62 In the decision the Panel commented that:

> A number of submitters also identified a lack of clarity and certainty in the stock exclusion provisions of the LWRP, including the

At [278] and [279]

definitions of wetlands and river beds.

…

In our view the amendments we are recommending to the definitions for 'wetland',' bed' and 'intensively farmed stock' assist with resolving the issues of clarity, certainty and instances of inconsistency. These, coupled with recommended re-ordering of the policies and rules into a cascade and logical sequence, would improve clarity.

63 The final version of the CLWRP defined 'wetland' as including:

1. wetlands which are part of river, stream and lake beds;
2. natural ponds, swamps, marshes, fens, bogs, seeps, brackish areas, mountain wetlands, and other naturally wet areas that support an indigenous ecosystem of plants and animals specifically adapted to living in wet conditions, and provide a habitat for wildlife;
3. coastal wetlands above mean high water springs;

but excludes:

(a) wet pasture or where water temporarily ponds after rainfall

(b) artificial wetlands used for wastewater or stormwater treatment except where they are listed in Sections 6 to 15 of this Plan;

(c) artificial farm dams, drainage canals and detention dams; and

(d) reservoirs for firefighting, domestic or community water supply.

64 The CWLRP also defines wetland boundary as:

Means the point in the transition from wetland to dryland where wetland plant species occur at more than four times their ungrazed height apart.

65 The Bay of Plenty Regional Natural Resources Plan defines 'wetlands' as:

> Wetlands
>
> Includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.
>
> For the avoidance of doubt, the term 'wetland' applies to water bodies, and intermittently wet areas. The term does not apply to dry land that does not support a natural ecosystem of plants and animals that are adapted to wet conditions, and that occurs within an area commonly referred to in its entirety as a wetland.
>
> For the purposes of this regional plan, 'wetland' excludes:
>
> (a) Wetted pasture and pasture with patches of rushes.
>
> (b) Oxidation ponds.
>
> (c) Artificial water bodies used for wastewater or stormwater treatment. This includes wetlands that have been developed primarily for effluent or stormwater treatment or disposal, but are managed to appear 'natural'.
>
> (d) Artificial Farm dams and detention dams.
>
> (e) Land drainage canals and drains.
>
> (f) Artificial reservoirs for firefighting, domestic or municipal water supply.
>
> (g) Temporary ponded rainfall over areas that would not otherwise be considered a wetland.
>
> (h) Artificial water bodies that are not in the bed of a stream, river or lake; and are not degraded natural wetlands that have been modified. This includes artificial water bodies that are managed to appear 'natural'.
>
> The edge of a wetland (ie where a wetland becomes land) should be determined by a person with appropriate expertise.

66 The Waikato Regional Plan, Hawke's Bay RRMP and Taranaki Regional Fresh Water Plan all adopt the same

definition for 'wetland' as under the RMA.

Section 32 Assessment

67 Ultimately, the Panel must reach a determination on which rules are the most appropriate way to meet the objectives of the proposed Plan, whilst also proving for rules that are sufficiently clear. As set out in our submissions on Hearing Stream 1, the Panel is required to:

> Examine whether the polices and rules are the most appropriate way to achieve the objectives by identifying other reasonably practicable options, assessing the efficiency and effectiveness of the provisions and summarising the reasons for deciding on the provisions.

Hearing Stream 1, legal submissions at [30]

68 Whilst there are challenges with identifying the boundaries of a wetland (ie, expert input will be required), there are also strong policy reasons for protecting wetlands, and restricting activities that take place in those wetlands. If the Panel is concerned about this uncertainty for permitted activities, then the alternative is simply not to have any permitted activities in wetlands, which is also not ideal from an efficiency and effectiveness perspective. It is submitted that this is simply the 'nature of the beast' and similar definition issues arise in relation to the precise location of a 'bed', where the 'coastal marine area' extends to on the landward side and what is a 'river'. This has not prevented permitted activities in those areas.

69 Ultimately, the Panel may find that in order to give effect to the objectives that relate to wetlands and higher order documents, then rules which are less than ideally certain are required.

MITIGATION HIERARCHY AND HOW THAT RELATES TO THE RMA NOT BEING A 'NO EFFECTS' REGIME

70 During the hearing a number of issues arose on this topic and we understand that it would assist the Panel if clarification was provided on the following:

70.1 Does the mitigation hierarchy apply to all effects, or only effects on biodiversity?

70.2 Is the proposed Plan's mitigation hierarchy related to 'avoid, remedy and mitigate' in the RMA?

70.3 Is the RMA a 'no effects' regime and how does this relate to the mitigation hierarchy in the proposed Plan?

70.4 How does the mitigation hierarchy relate to section 104, as amended by the Resource Legislation Management Amendment Act 2017?

71 Prior to providing our response on the above questions, we have first set out the Environment Court case law regarding use of a mitigation hierarchy.

72 The mitigation hierarchy in the proposed Plan is discussed in the section 42A report of Ms Guest. She stated that the hierarchy requires those wishing to carry out activities to avoid, minimise, remedy and then offset:

> First, and preferentially, <u>avoid</u> damaging biodiversity; "Prevention is better than cure". In the first instance, efforts must be taken to locate the project area away from sites of significant biodiversity value or to redesign the way in which the activity is carried out so that biodiversity is not adversely impacted.
>
> Then <u>minimise</u> any damage; When adverse impacts cannot be completely avoided, they can often be minimised by adjusting the

Section 42A Report: Wetlands and Biodiversity at [412]

Emphasis added

project design or operation.

Then remedy (restore) on-site any biodiversity damaged by the project; For example, certain sites or species can often be restored within the project area.

Only then, if residual adverse biodiversity impacts remain, make good on these through biodiversity offsets. An important distinction between mitigation and offsetting is that mitigation must occur at the point of impact.

73 The Environment Court has supported the use of the mitigation hierarchy. In *Day v Manawatu Regional Council* the Environment Court considered the following approach taken in its proposed Regional Plan: [2012] NZEnvC 182

> (i) Any more than minor adverse effects on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 12-6 are avoided. At [3-48] Emphasis added
>
> (ii) Where any more than minor adverse effects cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect occurs.
>
> (iii) Where any more than minor adverse effects cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity gain.

74 Ultimately the Environment Court accepted the approach of a hierarchy reflecting BBOP principles. At [3-92]

75 It was also argued before the Environment Court that if the term offsets is used in a plan, the term should be used consistently with the Business Biodiversity Offsets Programme principles (**BBOP**). The Court commented on the BBOP, stating that: At [3-49]

> … Notwithstanding that it has no statutory effect, and the number of submissions made on it, we consider the document is worthy of respect as a reflection of considered opinion, particularly as it reflects international best At [3-59]

practice.

76 In that case the Court concluded that the hierarchy approach:

> … has the benefit of setting down clear steps which a resource consent application, evidence and decision making have to address in a logical and robust manner. This is likely to result in improved analysis and evaluation of proposals, thereby reducing the risk of further biodiversity loss.

At [3-79]

77 An argument was also made to the Court that biodiversity offsetting is a subset of remediating and mitigation and should not be specifically referred to. The Court found that:

At [3-61]

> … we do not consider that offsetting is a response that should be subsumed under the terms *remediation* or *mitigation* [in the relevant Plan]. We agree with the Minister that in developing a planning framework, there is the opportunity to clarify that offsetting is a possible response following minimisation - or mitigation - at the point of impact.

At [3-63]

All effects or only effects on biodiversity

78 Policies P32 and P40-41 introduce the mitigation hierarchy. Policy P32 relates to adverse effects on biodiversity, aquatic ecosystem health and mahinga kai. It then says that proposals for mitigation and biodiversity offsetting will be assessed against the principles in Schedule G1 and G2.

Section 42A Report: Wetlands and Biodiversity at [83]

79 Policy P41 is limited to Schedule F1 sites (rivers and lakes with significant indigenous ecosystems), Schedule F2 (bird habitats), Schedule F3 (significant wetlands) and Schedule F4 (coastal sites) and F5 (coastal habitats). It also says that proposals for mitigation and biodiversity offsetting will be assessed against the principles in Schedule G1 and G2.

80 Schedule G1 clearly states that it 'details the principles that should be used to guide the development of biodiversity mitigation' and 'manage adverse effects on biodiversity' and

for G2 that it 'details the principles that should be used to guide the development of biodiversity offsets' to 'manage adverse effects on biodiversity'.

81 Accordingly, the mitigation hierarchy in the proposed Plan applies only to biodiversity effects, not all adverse effects.

Relationship between the proposed Plan's mitigation hierarchy and the requirement to 'avoid, remedy and mitigate' in the RMA

82 The phrase 'avoid, remedy or mitigate' adverse effects is principally referenced in the RMA at:

82.1 Section 5(2)(c), as a description of the meaning of sustainable management - ie including avoiding, remedying or mitigating any adverse effects on the environment.

82.2 Section 17, as a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of the person, whether or not it is carried out in accordance with a resource consent.

83 Aside from section 17 there is no specific requirement in the RMA when assessing effects of a resource consent application to follow the 'avoid, remedy or mitigate' approach, although it is certainly open to an applicant to do so and it may well be the approach the relevant planning documents direct.

84 There is similarity between the phrasing 'avoid, remedy and mitigate', and the mitigation hierarchy that requires 'avoid, minimise, remedy and offset'. However, the mitigation hierarchy in the proposed Plan only becomes relevant when a proposal triggers policies P32 and P40-41.

85 The Court has commented on the argument that the law does not allow the policy approach of a hierarchy as it requires that any proposal should be treated under the avoid, remedy or mitigate mantra. The Court found that it is:

> … acceptable and appropriate for the regional plan to state a preference for the way effects on biodiversity should be dealt with, including by instituting a hierarchy.

Day v Manawatu Regional Council [2012] NZEnvC 182 at [3-64]

No effects regime

86 We understand that three submitters, including NZTA, have raised concerns that the RMA is not a 'no effects' regime, and that the requirement for no net loss is excessive.

Section 42A Report Wetlands and Biodiversity at [463]

87 The Environment Court has stated that the RMA is not a 'no effects' regime. For example, in *Puke Coal Ltd v Waikato Regional Council* the Court stated:

[2014] NZEnvC 223

> … We acknowledge that the RMA is not a no- effects Act. Nevertheless, it is clear that the more significant the effect, the more the Court will be looking to the avoidance and remedial steps of the Act rather than mitigation.

At[109]

88 The 'no effects' regime of the RMA is relevant for a section 104(1)(a) assessment, where the consent authority must have regard to any actual and potential effects on the environment of allowing the activity. In contrast, the mitigation hierarchy is relevant when a proposal triggers policies P32 and P40-41. This means that the mitigation hierarchy is a 104(1)(b) matter, as it is considered when the consent authority has regard to the relevant provisions of the proposed Plan. The relevant planning documents can, and do, direct how the effects of an activity are considered and identify what effects might or might not be appropriate. That is exactly what objectives or policies that require certain effects to be 'avoided' are.

89 It is accepted that the RMA does not require 'no effects', but

the proposed Plan can include a more restrictive outcome, if the Panel determines that that outcome is the appropriate one, having regard to the requirements for a regional plan under the RMA. This has been accepted by the Environment Court, as noted in the quote at paragraph 85 above.

Amendment to section 104 to provide for offsetting

90 Under section 104(1)(ab) (which was introduced through the Resource Legislation Amendment Act 2017) the consent authority must have regard to:

> any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity.

Section 104(ab) of the RMA

91 This simply codifies and reinforces the law as it currently exists, which allows for offsetting to be taken into account as a positive effect, but not as mitigation. In *Royal Forest and Bird v Buller District Council* the Court commented that:

[2013] NZHC 1346

> The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

At [72]

92 It is submitted that this is guidance to the decision maker that offsets (or positive effects) should be taken into account when making a resource consent decision, if agreed to by the applicant. That is in addition to any requirements that might be in the statutory planning documents which are relevant under section 104(1)(b) of the RMA. This can include guidance on effects. For example, just because the level of effects are to be considered under section 104(1)(a) and (ab) of the RMA, this does not prevent the Regional Council from including a policy in its proposed Plan which requires certain effects to be addressed in certain ways (an example being

provisions which require certain effects to be 'avoided').

DAMS AND ANY CROSS-OVER WITH THE BUILDING ACT 2004

93 The proposed Plan specifically addresses small dams in Rule R116 (permitted activity) and the Panel has asked whether this creates any conflict or inconsistency with the BA. In short, the RMA and BA control different things and as long as the provision relates to controlling an effect of the activity, or an effect of the activity on the environment (eg, flooding effects and biodiversity effects) rather than the structural performance of the structure, then there is no issue with addressing that in the proposed Plan.

94 This reflects the fact that the purpose of the BA is different to that of the RMA. The focus of the BA is on the building/structure itself and the components required to make the building structurally sound and safe for those who use it and the environment around it. This distinction has been confirmed by *Christchurch International Airport v Christchurch City Council:*

> Reduced to the simplest level relevant to the present case, the Building Act [1991] allows a Council to control building work in the interests of ensuring *the safety and integrity of the structure*, whereas the Resource Management Act allows the Council to impose controls from the point of view of *the activity to be carried out within the structure* and *the effect of that activity on the environment* and of the environment on that activity.

(1996) 3 ELRNZ 96

95 This case has been cited and upheld in other cases, such as *Petone Planning Action Group Inc v Hutt City Council* where it was stated:

Decision W020/2008, at 212, upheld on appeal to the High Court

> [section 7(2) of the Building Act 1991] will only prevent the exercise of powers under the RMA if the consent authority is attempting to impose building controls in respect of the physical structure of the

> building which are not attributable to the legitimate exercise of powers under the RMA.

96 Section 7 referred to in that case is now section 18 of the BA and it provides:

> (1) A person who carries out any building work is not required by this Act to—
>
> (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
>
> (b) take any action in respect of that building work if it complies with the building code.
>
> (2) Subsection (1) is subject to any express provision to the contrary in any Act.

97 In other words, as long as the provision relates to controlling an effect of the activity on the environment rather than the performance of the building/structure, then there is no issue with including it in the proposed Plan.

Date: 19 July 2018

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

APPENDIX A

98 We have considered examples of the potential consenting pathways for RSI, and the policy background where no such pathway is provided. The examples are:

98.1 Discharge of water or contaminants into water to an outstanding water body (Schedule A site), a non-complying activity.

98.2 Reclamation of a bed of a river in a Schedule C site (mana whenua), where it is necessary to enable the operation or maintenance of RSI, a non-complying activity.

Discharge into an outstanding water body

99 As identified in the redline version of the proposed Plan, Rule R67 makes discharges of water or contaminants into water (or onto land where it may enter water) in a site identified in Schedule A (outstanding water bodies) a non-complying activity. Page 143 Redline version

100 Policy P39 provides that the adverse effects of use and development on outstanding water bodies and their significant values identified in Schedule A (outstanding water bodies) 'shall be avoided'. Page 64 Redline version

101 Objective O25 provides that outstanding water bodies and their 'significant values are protected and restored'. Page 40 Redline version

102 These provisions are strictly worded. It is submitted that these provisions can provide a consenting pathway for RSI (ie, it could get through a non-complying gateway), only if the activity is managed so that the adverse effects are no more than minor. It is submitted that for discharges into these sites

of significance, this is appropriate because:

102.1 Schedule A identifies water bodies with outstanding indigenous ecosystem values, including outstanding indigenous biodiversity values. — Section 42A Report: Wetlands and Biodiversity at [769] to [775]

102.2 Policy 24 of the RPS requires regional plans to include policies, rules and methods to protect indigenous ecosystems and habitats with significant indigenous biodiversity values from inappropriate use and development.

102.3 The NPS-FM contains an objective that requires the overall quality of freshwater to be maintained or improved, while protecting the significant values of outstanding freshwater bodies. — Objective A2(a)

102.4 The NPS-FM contains an objective that requires protection of significant values of outstanding freshwater bodies. — Objective B4

102.5 Section 6(c) of the RMA requires recognition and provision for protection of areas with significant habitats of indigenous fauna.

103 Accordingly, the question for the Panel is whether this is the most appropriate set of provisions.

Reclamation of a bed of a river in a mana whenua site

104 As identified in the redline version of the proposed Plan, Rule R127 makes the reclamation of a bed of a river in a Schedule C site (mana whenua), where it is necessary to enable the operation or maintenance of RSI, a non-complying activity. — Page 200 Redline version

105 Objective 14 requires that sites with significant mana whenua — Page 39 Redline

values are protected from use and development that will adversely affect their values and restored to a state where the characteristics and qualities of those sites sustain the identified values.

version

106 Policy P45 then states that in the first instance, activities in sites with significant mana whenua values identified in Schedule C (mana whenua) shall be avoided. If the site cannot be avoided then more than minor adverse effects must be evaluated through a cultural impact assessment. Significant adverse effects on the significant values of the site shall be avoided and other adverse effects managed in accordance with tikanga and kaupapa Māori. P45 also includes a bottom line so that where more than minor adverse effects cannot be avoided, remedied or mitigated then the activity is inappropriate.

Page 67 Redline version

107 It is submitted that these provisions can provide a consenting pathway for RSI (ie, it could get through a non-complying gateway), so long as the activity is managed so that the adverse effects are no more than minor. It is submitted that this is appropriate because of the requirements of the following RPS objectives and policies:

107.1 Objective 16: Indigenous ecosystems and habitats with significant biodiversity values are maintained and restored to a healthy functioning state.

Page 53 RPS

107.2 Objective 27: Mahinga kai and natural resources used for customary purposes, are maintained and enhanced, and these resources are healthy and accessible to tangata whenua.

Page 76 RPS

107.3 Objective 28: The cultural relationship of Mäori with their ancestral lands, water, sites, wähitapu and other taonga is maintained.

Page 76 RPS

107.4	Policy 18: Requires regional plans to include policies, rules and/or methods that discourage the reclamation of rivers.	Page 101 RPS
107.5	Policy 24: Requires protection of indigenous ecosystems and habitats with significant indigenous biodiversity.	Page 105 RPS