BEFORE THE FRESHWATER HEARINGS PANEL AND THE PART 1, SCHEDULE 1 HEARINGS PANEL

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER OF	Proposed Change 1 to the Regional Policy Statement for the Wellington Region
HEARING STREAM	Stream 1 – Overview and General Submissions

WELLINGTON REGIONAL COUNCIL LEGAL SUBMISSIONS FOR HEARING STREAM 1: OVERVIEW AND GENERAL SUBMISSIONS

PROVIDING FOR TANGATA WHENUA / MANA WHENUA IN PROPOSED CHANGE 1

Dated: 8 June 2023

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MAY IT PLEASE THE PANELS:

1. These legal submissions solely address *Issue 2: Providing for mana whenua in the RPS* in the Section 42A report on Proposed Change 1 to the Regional Policy Statement for the Wellington Region (**RPS**) (**Change 1**).[1] As well as submissions on specific provisions in Change 1, Muaūpoko Tribal Authority (**the submitter**) is seeking:

    (a) acknowledgement throughout the RPS of the submitter's connection to Te Whanganui a Tara; and

    (b) consideration of a future plan change that includes formal recognition of the submitter as mana whenua, with connections in the Wellington region, including in the Tangata Whenua chapter.

2. These submissions provide guidance on whether the Freshwater Hearings Panel (**FHP Panel**) and/or Part 1, Schedule 1 Hearings Panel (**P1S1 Panel**) are required to make decisions on the submitter's submission points.

3. The suggested approach section of these submissions considers the submitter's submission points and the relief sought in the order they occur in the submitter's submission.

Limitations

4. These legal submissions have been filed prior to evidence and legal submissions from the parties. As such they set out the legal position and provide guidance for the FHP Panel and P1S1 Panel but go no further.

Legal position

Scope

5. It is not the role of Wellington Regional Council to confer, declare or affirm tikanga-based rights, powers or authority. Determination of those rights or mana whenua status is a matter for mana whenua themselves in accordance with tikanga Māori.[2] In respect of resource management decision making, the High Court in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* stated that:[3]

[1] Refer to the Section 42A report on general submissions at 21–23.
[2] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [101].
[3] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [67].

> … local authorities and the Environment Court are not engaged at Part 2 of the RMA in a process of conferring, declaring or affirming tikanga-based rights, powers or authority per se whether in State law or tikanga Māori. Similarly, Part 2 does not expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.

6. Nevertheless, where necessary and relevant to meet the statutory directions in sections 6(e), 7(a) and 8 (or other obligations to Māori) in the RMA, decision-makers must "*meaningfully respond*" to iwi claims that a particular outcome is required.[4] That may require making evidential findings about tikanga based rights, powers and/or authority insofar as that is relevant to discharge the RMA's obligations to Māori.[5] Evidence may show different layers of interests among iwi and hapū, with differing strengths on different issues.[6]

7. Relevant recent court decisions have been in the context of resource consent applications, instead of planning processes. However, the principles are, in our opinion, applicable to resource management decision making more broadly, including in relation to planning. In *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* the High Court concluded that:[7]

> ... when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions. But any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

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[4] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [68].
[5] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [68]–[69], [102] and [135(b)].
[6] *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council* [2019] NZEnvC 184, (2019) 21 ELRNZ 447at [73]–[74]. See also *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [38]–[87] and [92]–[93] where the evidence demonstrated that there were different layers of relationships, cultures and traditions with Ōtāiti (Astrolabe Reef) that required different forms of recognition and provision.
[7] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [133].

8. The RMA defines:

   (a) tangata whenua, in relation to a particular area, as "*the iwi, or hapu, that holds mana whenua over that area*"; and

   (b) mana whenua as "*customary authority exercised by an iwi or hapu in an identified area*".

9. Change 1 uses 'mana whenua / tangata whenua' as the predominant terminology. The determination of whether a group holds mana whenua (by exercising customary authority in an identified area) is a matter to be established through evidence.

Suggested approach

The submitter's connection to Te Whanganui a Tara[8]

10. The submitter's submission that Wellington Regional Council failed to consult with it as required by clause 3(1)(d) of Schedule 1 of the RMA is outside the scope of the FHP Panel and P1S1 Panel's consideration of Change 1. There is no specific relief sought in relation to the lack of consultation separate from the matters addressed below.

11. As identified in the Section 42A report, except for the introduction to Chapter 3.4, the provisions in Change 1 typically refer to 'mana whenua / tangata whenua', 'tangata whenua' or 'mana whenua' rather than naming specific iwi.[9] Consequently, it may not be necessary in this process to name specific iwi.

12. The FHP Panel and P1S1 Panel do not need to insert amendments to recognise the submitter's connection to Te Whanganui a Tara through Change 1 as:

   (a) The submission point is out of scope as Change 1 does not amend the Tangata Whenua chapter of the RPS. Submissions must address the proposed change itself and cannot raise matters unrelated to what is proposed.[10]

[8] Muaūpoko Tribal Authority submission at 4–5 and 10.
[9] Section 42A report on general submissions at [119].
[10] See generally *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

(b) Change 1 typically refers to 'mana whenua / tangata whenua', 'tangata whenua' or 'mana whenua' and does not specify any iwi by name when using these three broad concepts.[11]

(c) Any determination, to the degree it is necessary, can be made in the context of a resource consent application when greater information and specificity is available. For example, in the recent consideration under the COVID-19 Recovery (Fast-track Consenting) Act 2020 of KiwiRail's application for a ferry terminal redevelopment at Kaiwharawhara, an issue arose as to whether the submitter should be included in conditions requiring input from iwi. Advice was provided by Mr Ian Gordon which referred to the Wai 145 Report.[12] The Panel concluded as follows:[13]

> Therefore, drawing on the Wai 145 Report, and Mr Gordon's advice, the Panel proceeds on the basis that Muaūpoko certainly had a historical connection to the Project area up to (around) the 1820's. However, after that, and including the period immediately before 1840, Muaūpoko did not rekindle ahi ka to that same area. It necessarily follows that Muaūpoko are not Mana Whenua for that area, and they have lost tangata whenua rights in the sense of "ownership" rights that went with them.
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> Despite this, Muaūpoko still assert historical tangata whenua connections to the Project area and the Panel understands that such connections can last forever.

13. As the section 42A author notes, matters relating to a future change to the Tangata Whenua chapter are out of scope.[14] It is therefore not necessary for the FHP Panel and/or P1S1 Panel to make a determination on this submission point.[15]

14. If the FHP Panel and/or P1S1 Panel decides it does need to engage with this matter, as it is specific to Te Whanganui a Tara, the comments above from the Waitangi Tribunal will be relevant and need to be assessed.[16]

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[11] Ngāti Kahungunu ki Wairarapa and Rangitāne o Wairarapa are named in Change 1, but only in respect of their Te Mana o Te Wai statements of expression.
[12] See advice of Ian Gordon Re Kaiwharawhara Ferry Terminal Redevelopment (21 December 2022).
[13] See the Record of Decision of the Expert Consenting Panel (25 January 2023) at [62]–[63].
[14] Section 42A report on general submissions at [120].
[15] Change 1 does not amend the Tangata Whenua chapter and further submissions on Muaūpoko Tribal Authority's submissions were not provided by some iwi.
[16] See Waitangi Tribunal *Te Whanganui a Tara me ona Takiwā: Report on the Wellington District* (Wai 145, 2003).

Te Mana o Te Wai[17]

15. The introduction to *Chapter 3.4: Fresh water (including public access)* in Change 1 states:

> The *Te Mana o Te Wai* objective is required by the NPS-FM (3.2(3)). Each iwi of the region have expressed what *Te Mana o Te Wai* means to them in their own words. These expressions of *Te Mana o Te Wai* form part of this objective.
>
> The NPS-FM requires that freshwater is managed in a way that gives effect to *Te Mana o te Wai*. The regional council "must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to *Te Mana o te Wai*" (NPS-FM 3.2 (3)). The *Te Mana o Te Wai* objective in this RPS repeats the requirements of the NPS-FM, and then provides how each iwi of the region wishes to articulate their meaning of *Te Mana o Te Wai*.
>
> Note: There are six iwi wishing to express their meaning of Te *Mana o Te Wai* as part of this objective. There are two expressions of *Te Mana o Te Wai* in this RPS at this time from Rangitāne o Wairarapa and Kahungunu ki Wairarapa. Others will be added either through the Schedule 1 process or in future plan changes.
>
> All policies and methods in this RPS relating to freshwater must contribute to achieving this objective.
>
> (emphasis added)

16. The reference to "six iwi", seen in the context of the Section 32 report,[18] may require the FHP Panel to engage with the issue which would require an evidential assessment. The P1S1 Panel is not required to engage with the issue as the introduction to Chapter 3.4 is part of the freshwater planning instrument which is proceeding through the freshwater planning process and will be considered by the FHP Panel. As recognised in the Section 42A report, any determination would be a complex undertaking with diametrically opposed further submissions from Rangitāne o Wairarapa (supporting) and Ngāti Toa Rangātira and Te Ati Awa ki Whakarongotai (opposing), and no explicit submissions on the point from other iwi such as Taranaki Whānui ki te Upoko o te Ika a Maui.[19] Any determination would be limited to that

[17] Muaūpoko Tribal Authority's submission at 5–6 and 11–12.
[18] The Section 32 report, in respect of the six identified mana whenua / tangata whenua partners, stated at [112] that the Wellington Regional Council's priority was "*partnering on the Te Mana o te Wai / Freshwater mahi for the RPS as well as regional plans implementing the NPS-FM*."
[19] Section 42A report on general submissions at [121].

necessary for the purposes of the RMA and for the specific provision in the RPS.

17. It may be preferable to instead remove the specific reference to 'six iwi' and include drafting on a broader basis which would likely remove the need to engage with the issue for Change 1. Potential redrafting could include, for example (see strikethrough and underline):

> The *Te Mana o Te Wai* objective is required by the NPS-FM (3.2(3)). ~~Each~~ iwi of the region ~~have~~ can express~~ed~~ what *Te Mana o Te Wai* means to them in their own words. These expressions of *Te Mana o Te Wai* form part of this objective.
>
> The NPS-FM requires that freshwater is managed in a way that gives effect to *Te Mana o te Wai*. The regional council "must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to *Te Mana o te Wai*" (NPS-FM 3.2 (3)). The *Te Mana o Te Wai* objective in this RPS repeats the requirements of the NPS-FM, and then provides how ~~each~~ iwi of the region wish~~es~~ to articulate their meaning of *Te Mana o Te Wai*.
>
> Note: ~~There are six iwi wishing to express their meaning of *Te Mana o Te Wai* as part of this objective~~. There are two expressions of *Te Mana o Te Wai* in this RPS at this time from Rangitāne o Wairarapa and Kahungunu ki Wairarapa. Others will be added either through the Schedule 1 process or in future plan changes.
>
> All policies and methods in this RPS relating to freshwater must contribute to achieving this objective.

Indigenous biodiversity, climate change and urban development[20]

18. These proposed amendments do not specify iwi by name or a set number of iwi. It is outside scope and/or inappropriate to make any determination of mana whenua for the purposes of responding to these submission points. As stated in the Section 42A report, these submission points will be addressed in the relevant topic-specific Section 42A reports.[21]

[20] Muaūpoko Tribal Authority's submission at 7–8 and 13–15.
[21] Section 42A report on general submissions at [115].

Evidential requirements if the FHP Panel chooses to engage on the issue in Chapter 3.4

19. If the FHP Panel were to decide to engage in such a determination for the introduction to Chapter 3.4, it would need to assess the evidence before it and make evidential findings. The High Court has articulated that evidential requirement as follows:[22]

> … That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations. This may involve evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties. …
>
> …
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> … that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource [management] outcome.

20. In assessing the evidence, the FHP Panel may find the 'rule of reason' approach useful, which involves consideration of:[23]

    (a) whether the values correlate with physical features of the world (places, people);

    (b) people's explanations of their values and their traditions;

    (c) whether there is external evidence[24] (ie Māori Land Court Minutes) or corroborating information (ie waiata, or whakatauki) about the values;

    (d) the internal consistency of explanations (whether there are contradictions);

    (e) the coherence of those values with others; and

    (f) how widely the beliefs are expressed and held.

[22] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [68] and [102].
[23] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC) at [53]. The 'rule of reason' approach has been applied with approval by the High Court. See for example *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 at [106]; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 2, at [116]–[117].
[24] The Environment Court clarified that 'external' means before they became important for a particular issue and (potentially) changed by the value-holders.

21. In addition to the above list, other sources of knowledge and history can support oral evidence and cultural relationships. External evidence may also include kōrero tuku iho, pepeha (tribal sayings), tukutuku (woven panels), whakairo (carvings), maps, photos, drawings, Waitangi Tribunal reports[25] and statutory acknowledgements. In *Raikes v Hastings District Council* such external evidence was present:[26]

> The cultural evidence before the Court was through whakapapa (genealogy), kōrero tuku iho (the Hapū history), pepeha (tribal sayings), waiata (songs), whakatauākī (proverbs) and whakairo (carvings). The position was also supported by historical records, archaeological evidence, and statements of associations set out in the Maungaharuru Tangatu Hapū deed of settlement which indicate the association of the Hapū to identified areas. This was evidence which the Court was entitled to and did accept.

Reliance on Te Kāhui Māngai

22. If the FHP Panel were to decide to engage on this matter an issue may arise as to Te Kāhui Māngai which is referred to in the submitter's submission. The RMA imposes an obligation on the Crown to provide each local authority with information on the iwi authorities within the region or district and the areas over which one or more iwi exercise kaitiakitanga.[27] The Crown meets this obligation through the website Te Kāhui Māngai which is managed by Te Puni Kōkiri. In respect of the submitter, Te Kāhui Māngai includes a map and states: "*This rohe map represents the area over which Muaūpoko exercises kaitiakitanga for the purposes of the Resource Management Act 1991*."

23. In *Director-General of Conservation v Taranaki Regional Council* the Environment Court considered the weight that could be given to inclusion on Te Kāhui Māngai.[28] The Environment Court held that "*inclusion [on] the Te Kāhui Māngai registry is neutral, it neither confirms that a group is an iwi authority, nor does it disprove it*" and that inclusion "*does not and cannot*

[25] See for example Waitangi Tribunal *Te Whanganui a Tara me ona Takiwā: Report on the Wellington District* (Wai 145, 2003). Findings in relation to Te Whanganui a Tara from Wai 145 were applied in the recent COVID-19 Recovery (Fast-track Consenting) Act 2020 decision on KiwiRail's new Wellington ferry passenger terminal.
[26] *Raikes v Hastings District Council* [2022] NZHC 3075, (2022) 24 ELRNZ 598 at [117].
[27] Resource Management Act 1991, s 35A(2).
[28] *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203.

create iwi authority or mana whenua status where no such status otherwise exists".[29]

Dated: 8 June 2023

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[29] At [349]–[350]. On appeal, the High Court in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 23, held at [159] that the Environment Court had made no error on its analysis of section 35A of the RMA and the implications of inclusion on Te Kāhui Māngai.