

Before the Independent Hearings Panels

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

And

In the matter of Hearing Stream 6 (Indigenous Biodiversity)

Legal submissions on behalf of Wellington Regional Council – Hearing Stream 6

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MAY IT PLEASE THE PANELS:

Introduction

- 1 These legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 6 (Indigenous Biodiversity) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**). The hearing is scheduled to commence on 20 February 2024.
- 2 The legal framework and plan change tests that apply to Change 1 were set out in our submissions of 8 June 2023, for Hearing Stream 1. That framework and those tests apply equally to this hearing stream.
- 3 These submissions address a single legal issue arising in response to issues raised by submitters and also raised in discussion at other hearing streams. That is, what are the legal obligations and key considerations for the Panels resulting from a change in national direction - here the commencement of the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**) - in making recommendations on Change 1?
- 4 GWRC's legal submissions in reply for Hearing Stream 2 (dated 7 July 2023) addressed the general issue in the context of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**). Effectively, the submissions concluded that any amendments that the Panels can make to give effect to the NPS-HPL are still limited by scope constraints (as relevant – that is, that freshwater provisions are only limited by scope of Change 1 itself, and not further limited by the relief sought through submissions). These submissions expand on that proposition and address the most recent case law on the issue.

Refer to paragraphs 7 – 18.

General position on changes in national direction

- 5 As set out in our earlier submissions, it is submitted that when considering amendments to Change 1 to respond to changes in national direction the Panels are limited by scope, regardless of the requirement in the RMA to give effect to an NPS. This is consistent with the High Court's decision in *Horticulture NZ v Manawatu-Wanganui Regional Council* [2013] NZHC 2492. [2013] NZHC 2492,
- 6 Winstone Aggregates legal submissions for Hearing Stream 5 referred to the following decisions to support its proposition that, in the context of recent changes to the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), the Panels are required to apply the changed national direction, regardless of the date on which the higher order policy statement was gazetted, but that the application of the changed national direction is limited by the scope of Change 1: 3 November 2023, at paras 7.10, 7.17 and 7.18
- 6.1 *Balmoral Developments Outram Ltd v Dunedin City Council* [2023] NZEnvC 59 at [92];
- 6.2 *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 at [83]-[86]; and
- 6.3 *Re Otago Regional Council* [2021] NZEnvC 164.
- 7 It is submitted that this proposition is generally consistent with GWRC's legal submissions in reply for Hearing Stream 2. However, each NPS has its own implementation requirements and transitional provisions which also need to be considered. The specific
- We note here that this was in the context of freshwater provisions, and not standard schedule 1 provisions with additional scope of submissions constraints.

requirements for the NPS-IB are set out in the next section of these submissions.

Obligation to give effect to the NPS-IB

- 8 Change 1 was notified on 19 August 2022. The NPS-IB was gazetted on 7 July 2023 and came into force on 4 August 2023. Clause 1.2(1) of the NPS-IB.
- 9 The obligations on GWRC under the RMA in relation the NPS-IB are:
- 9.1 Section 61(1)(da) of the RMA states that a regional policy statement must be changed 'in accordance' with a NPS.
 - 9.2 Section 62(3) of the RMA requires that a regional policy statement 'must give effect to' (i.e., implement) a NPS.
 - 9.3 Section 55 of the RMA sets out how a 'document' (which includes Change 1) should be amended to recognise a NPS. It sets out a process for Schedule 1 and non-Schedule 1 changes.
 - 9.4 The process for non-Schedule 1 changes is not relevant here, as there are no provisions in the NPS-IB which allow changes without a Schedule 1 process.
 - 9.5 Sections 55(2B) and (2C) of the RMA require that GWRC must make all other amendments that are required to give effect to any provision in the NPS-IB by way of a Schedule 1 process.

- 9.6 Section 55(2D) of the RMA then requires that amendments to give effect to the NPS-IB need to be made 'as soon as practicable' or within the time period specified in the NPS.
- 9.7 The NPS-IB sets out that GWRC must give effect to the NPS-IB 'as soon as reasonably practicable' and publicly notify changes to the RPS that are necessary to give effect to the NPS-IB by 4 August 2031 (and by 4 August 2028 in respect of giving effect to the provisions for significant natural areas).
 Clause 4.1(1) and (2) of the NPS-IB.
 Clause 4.2 of the NPS-IB.
- 9.8 Part 3 of the NPS-IB sets out the implementation requirements. Clause 3.1(1) and (2) are clear that Part 3 sets out a non-exhaustive list of things that must be done to give effect to the Objective and Policies in part 2 of the NPS-IB, but that it does not limit the general obligation under the RMA to give effect to the NPS-IB, or limit GWRC's functions and duties under the RMA in relation to indigenous biodiversity.
 The directiveness of Part 3 of the NPS-IB is addressed in further detail below.
- 10 GWRC's rebuttal legal submissions from 22 August 2023 in respect of Hearing Stream 3 (Climate Change) set out the meaning of 'practicable'. Consistent with those submissions, whether a measure is or is not 'reasonably practicable' is an assessment which requires a value judgment in light of all the facts. Three general propositions from the case law are as follows:
- 10.1 Reasonably practicable means something narrower than physically possible or feasible.
Slivak v Lurgj (Australia) Pty Ltd (2001) 177 ALS 585 at [53].

- 10.2 What is reasonably practicable is to be judged on the basis of what was known at the relevant time. Ibid, at [53].
- 10.3 To determine what is reasonably practicable it is necessary to balance the likelihood of the risk occurring against the cost, time, and trouble necessary to prevent that risk. Ibid, at [53]
- 11 There is no 'bright line' test and what is, and what is not, considered to be 'reasonably practicable' will depend on a case-by-case analysis. Based on the above, it is submitted that it is something less than 'impracticable' and incorporates an element of reasonableness.

Application to Change 1 and the NPS-IB

- 12 While there is no doubt there is an obligation on GWRC to give effect to the NPS-IB, this obligation is to make changes as soon as reasonably practicable, and this obligation is still limited by scope, which is addressed further below.
- 13 It is submitted that it is only where amendments are within the scope of Change 1 and (for Schedule 1 provisions within Change 1) within scope of submissions on Change 1, that they can be made by the Panels in this process.
- 14 This means a further change process will be required for GWRC to give full effect to the NPS-IB, unless there is scope within Change 1 to fully give effect to the wide ranging NPS-IB provisions now.
- 15 As set out in the section 42A report, while broad scope is provided by Change 1, parts of the NPS-IB

implementation (being those that require engagement and additional technical work to identify and support such changes) will still need to be subject to a subsequent Schedule 1 process. However, where there is scope to amend Change 1, to give effect to parts, or in part, the NPS-IB and where the relevant information is available in order for the Panels to be satisfied that making those changes now is the most appropriate then doing so now would comply with the direction in the NPS-IB to give effect to it as soon as reasonably practicable. The section 42A report has undertaken analysis as to what can and/or should be done through Change 1 and sets out the policy reasons for making changes now .

16 In summary, Mr Wyeth, in making recommendations as to which parts of the NPS-IB can and/or should be addressed through Change 1 now, has applied a set of guiding principles. They are:

Section 42A report, Issue 2.2 from paragraph 95 and Appendix 3.

- 16.1 NPS-IB provisions should be given effect to where reasonably practicable and within scope.
- 16.2 The NPS-IB provisions that specifically require changes to RPSs with limited discretion in how these are implemented should be given effect to as a priority.
- 16.3 Where the NPS-IB provisions need to be given effect to following partnering with mana whenua/tangata whenua, engaging with communities and landowners, and/or require further technical work (eg identifying highly

mobile fauna areas), these need to be given effect to through a future RPS change.

16.4 The scope to give effect to the NPS-IB is generally limited to indigenous biodiversity in the terrestrial environment.

17 These factors all, in our submission, go to the question of whether or not now is the 'reasonably practicable' time to make the changes, or whether they need to be addressed through a subsequent plan change. Where there is scope and there is little discretion on how the NPS-IB is to be implemented, it is submitted that it is appropriate and reasonably practicable to make those changes now. Where there is no scope, and/or where additional work (be it technical, or in terms of engagement or partnership processes) is required, it is submitted that it not reasonably practicable to make those changes now.

18 Many of the implementation clauses in the NPS-IB contain highly directive language as to what local authorities must do or consider when implementing the NPS-IB. These directives are addressed in the section 42A report and the NPS-IB leaves little discretion for GWRC when making implementation decisions. For example, in respect to managing adverse effects on significant indigenous biodiversity clauses 3.10 and 3.11 work together to effectively require inclusion of an avoidance policy direction in the RPS, with express exceptions, along with the required management of effects (other than those avoided) through an effects management hierarchy.

- 19 In response to this clear direction, the section 42A report recommends that policy 24 of the RPS is amended so that it expressly refers to managing effects on significant biodiversity values in the terrestrial environments by applying clauses 3.10 and 3.11. While repeating the material from clause 3.10 and 3.11 into the RPS would be of the same effect, for the reasons set out in the section 42A report, a cross reference to the clauses is considered by the section 42A authors to be the most effective and efficient here.
- 20 GWRC considers it appropriate to take the steps it can now to implement certain NPS-IB provisions through Change 1 and it is submitted that this is consistent with the legal position on giving effect to national direction. It is also consistent with GWRC's functions, including in respect of maintaining indigenous biological diversity (section 30(1)(ga)), and the requirement to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, and the requirement to have particular regard to the intrinsic values of ecosystems contained in section 6(c) and 7(d) of the RMA.
- 21 While it is acknowledged that there is some speculation as to future changes to the NPS-IB that may or are to be made by the new government, until such time as those changes are made and in effect, the Panels must continue to apply the NPS-IB as it is at the time of their recommendation.

Refer to the analysis on issue 3.13.2 in the section 42A report.

Scope

- 22 GWRC's legal submissions on Hearing Stream 1 (dated 8 June 2023) set out the legal tests for scope. Generally, when considering whether a submission is

within scope of the plan change requires consideration of the following:

22.1 does the relief address the proposed change itself? That is, it must address the extent of the alteration to the status quo which the change entails; and

Palmerston North City Council v Motor Machinists Ltd [2013] NZHC 1290.

22.2 whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

23 In respect of the NPS-IB, the scope to implement it through Change 1 is broad. Change 1 is a change to the RPS that clearly addresses the issue of indigenous biodiversity. It is one of the issues addressed listed on the first page of the Change 1 document and it is referenced throughout Change 1 and its provisions.

24 In section 3.0 of the section 32 report for Change 1, the scope of Change 1 is clearly set out. It includes the following:

At paras 46-47

Change 1 updates the RPS to respond to updated information, current Greater Wellington Regional Council policy, new national direction, or other relevant changes since the development of the operative RPS, for the following:

- Lack of urban development capacity
- Degradation of fresh water
- Loss and degradation of indigenous biodiversity
- The impacts of climate change.

These four issues are the focus of Change 1 because the RPS must be changed to give effect to NPS's for urban development and freshwater management, and taking an integrated approach to issues and responses (see following section), it is necessary to incorporate biodiversity and climate change issues in the scope of this change. There is also national direction, or draft national direction for indigenous biodiversity and climate change (refer Section 5.0) but this is not in the form of an operative NPS.

25 Unlike other changes in national direction that have occurred during the Change 1 process, the anticipated change in respect of the NPS-IB coming in to force and being implemented was clearly addressed in the section 32 report:

Section 32 report at 182 and 183, page 39.

An exposure draft of the National Policy Statement for Indigenous Biodiversity (NPS-IB) was released for consultation by the government in June 2022. The purpose of the NPS-IB is to set out an objective and policies in relation to maintaining indigenous biodiversity, and to specify what local authorities must do to achieve that objective. It is therefore directly relevant to the Indigenous Ecosystems chapter of the RPS. The intent is that the NPS-IB will be gazetted in December 2022 taking into account feedback through the exposure draft process. Local authorities must publicly notify any changes to their policy statements necessary to give effect to the NPS-IB within 8 years after the commencement date although plan changes relating to the identification and protection of 'significant natural areas' must be notified within 5 years of commencement date (this primarily relates to district plans). However, to the extent that policy statements already give effect to the NPS-IB, local authorities are not obliged to make changes to wording or terminology merely for consistency with it. The NPS-IB applies to the terrestrial environment only with limited exceptions⁶⁰.

Change 1 is an important opportunity to align the RPS with the imminent NPS-IB. While this is at exposure draft stage now (so not gazetted), the direction is clear and if the NPS-IB is gazetted later this

year as intended by the government, Council can address any matters of misalignment through the Schedule 1 process.

- 26 It is therefore submitted that the position on scope in respect of the NPS-IB is different to the change in national direction to the NPS-FM or the gazettal of the NPS-HPL that is being addressed through other hearing streams. That is because indigenous biodiversity is clearly topic addressed by Change 1 and the gazettal of the NPS-IB was expressly considered by the section 32 report.
- 27 Accordingly, the scope of Change 1 in relation to indigenous biodiversity and implementing the NPS-IB is broad. As set out in the section 42A report, Change 1 included a range of provisions relating to indigenous biodiversity and it was clear the intention was to implement the NPS-IB if gazetted prior to decisions on submissions (as has turned out to be the case) and the evidence from the section 42A report is that there have been no significant changes in the policy intent between the NPS-IB exposure draft and the gazetted NPS-IB.
- 28 The status quo on this issue was clearly being altered by Change 1 and a new regime was proposed for indigenous biodiversity. The public had the opportunity to submit on that regime and the change in status quo. These are the key scope determinants.
- 29 If the provisions contained within this topic are progressed as standard Schedule 1 provisions and not freshwater provisions (as is the recommendation from the section 42A report) then the Panels will also need to be satisfied that there is scope within the submissions before making changes to the provisions of Change 1.

This issue is addressed in the section 42A report as part of assessing the submissions.

- 30 The section 42A report states that there are a number of submissions requesting a review and amendment of Change 1, should the NPS-IB be gazetted prior to decisions being made on Change 1 and those submissions provide scope to consider the gazetted version. For example, as set out at paragraph 79 of the section 42A report, the Director General of Conservation requested that if the NPS-IB is gazetted prior to Change 1 hearings, that the indigenous ecosystem provisions be reviewed for compliance with the final NPS-IB.

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