Before the Hearing Panels

Under	the Resource Management Act 1991 (**RMA**)
And	
In the matter of	Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region
And	
In the matter of	Hearing Stream 1 (Overarching matters and region-wide changes)

Legal submissions in reply on behalf of Greater Wellington Regional Council – matters arising from Hearing Stream 1

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MAY IT PLEASE THE PANELS

INTRODUCTION

1 These legal submissions in reply are made on behalf of the Greater Wellington Regional Council (**Council**) in relation to Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region (**NRP**), Hearing Stream 1 (Overarching and Region-wide Matters).

2 These submissions address the legal issues raised by the Panels during the hearing (4 – 6 November 2024) and the subsequent Minute 3. Those issues are:

2.1 The legal position on scope for each scope issue raised by Mr O'Brien in his section 42A reports.

2.2 The relevance of changes to section 70 and section 107 of the Resource Management Act 1991 (**RMA**) to PC1.

2.3 The relevance of the decisions cited in the submissions from the Upper Hutt Rural Communities to PC1.

2.4 The legality of rules limiting notification in PC1.

2.5 Offsetting versus compensation terminology for financial contribution rules.

2.6 The relationship between the National Environmental Standards for Plantation Forestry (**NES-PF**) and the National Environmental Standards for Commercial Forestry (**NES-CF**).

Scope – Air Quality and Schedules and Threatened Species topics

3 The issue of scope of PC1 (as distinct from scope of submissions) was raised by Mr O'Brien in the following places:

3.1 Section 42A Report – Air Quality:

3.1.1 At paragraph [70] regarding relief sought by Taumata Arowai regarding what constitutes 'drinking water supply'; and

3.1.2 At paragraph [82] regarding relief sought by Yvonne Weeber and Guardians of the Bay Inc to include interim measurable milestones to phase out the activities regulated by Rules R7, R8 and R11.

3.2 Section 42A Report – Schedules and Threatened Species Objectives:

3.2.1 At paragraph [56] regarding the relief sought by the Environmental Defence Society (**EDS**) and Forest and Bird to include indigenous fish diversity as a listed value of Lake Wairarapa in Schedule A2.

4 The Panels asked that legal submissions are provided on these scope issues. The legal tests as to scope of PC1 are set out in paragraphs 10-20 of the Council's opening legal submissions, dated 3 October 2024. While we do not repeat that detail here, the summary is that the question that needs to be asked is "whether a submission is within scope of PC1". Two tests need to be satisfied for a submission to be within scope of PC1:[1]

[1] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [80]-[82].

4.1 The submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

4.2 The Panels must consider 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.

5 We address each of the above in turn below.

Scope of Air Quality changes

6 The changes to the Air Quality provisions of the NRP proposed by PC1 are narrow. This is reflected in the section 32 report, where at paragraph [12] in respect of air quality, it states the following (when discussing the broader, non-National Policy Statement for Freshwater Management related changes proposed by PC1):

> amendment to NRP air quality rules (Chapter 5.1) to remove the coastal icon from selected permitted activity rules, and other minor amendments for recent updates to national standards and improvements and to improve rule uncertainties.

7 Part E of the Section 32 report then states the following in terms of the Air Quality amendments:[2]

> Proposal No. 1 – Amend air quality permitted activity rules to give effect to the NZCPS for discharges of contaminants into the CMA.
>
> Proposal No. 2 – Remove the coastal icon from air quality permitted activity Rules R7, R8, R9, R10, R11, R12, R14, R15, R16, R17, R18, R19, R20, R21, R25, R26, R27, R29, R30, R31, R34, R35, R36, R37, R38, and R40.

[2] Section 32 Report, Part E, section 1 'Miscellaneous region-plan changes, paragraph 1, page 1.

> Proposal No. 3 – Update Standards New Zealand references in air quality permitted activity Rules R14, R18, R38, and R39.

Analysis of Taumata Arowai's relief

8 Through its submission, at paragraphs 44-47, Taumata Aworai has sought that various provisions, including Rule 5.1.13 are amended to reflect legislative changes to what constitutes a 'drinking water supply'. Rule 5.1.13, which sets out the general conditions applying to discharges of agrichemicals, was addressed by Mr O'Brien in his Air Quality section 42A report and he raised scope of PC1 as a potential issue[3]

9 In respect of Rule 5.1.13, the changes proposed through PC1 were to include reference to the coastal marine area in (a) as follows (addition in underline):

> the discharge shall not cause noxious, dangerous, offensive or objectionable odour, dust, particulate, smoke, vapours, droplets or ash beyond the boundary of the **property** or in the coastal marine area, and

10 As relevant to Taumata Arowai's submission, Rule 5.1.13(c) references the defined terms of 'community drinking water supply protection area' and 'group drinking water supply'. Those are defined terms that are used throughout the NRP. The current definitions are:

> **Community drinking water supply protection area:** The area surrounding a community drinking water supply as shown on Map 39 and Map 40, Map 41, Map 42 and Map 43. The community drinking water supply abstraction points are also identified in Schedule M1 (surface water supplies) and Schedule M2 (groundwater supplies).
>
> **Group drinking water supply**: A registered drinking water supply that is recorded in the drinking water register maintained by the Ministry of Health (the Director-General) under section 69J of the Health Act 1956 that provides more than 25 people

[3] We note that Taumata Arowai's submission on this point was much broader and the other points will also be addressed in other hearing streams.

with drinking water for not less than 60 days each calendar year.

11 No changes are proposed to those definitions, related maps or to Rule 5.1.13(c) by PC1.

12 While it is not clear what specific relief is sought by Taumata Arowai, from the general wording of its submission, it is submitted that amending Rule 5.1.13(c), in a way that is not related to the change proposed in (a) or related to any amendment to an objective or policy implemented by Rule 5.1.13, is outside scope of PC1. Amendments regarding the drinking water supply definitions are not within scope of proposal 1, 2, or 3 above as set out in the section 32 report. In our submission, such a change would fail both of the scope tests set out above.

13 If a change is sought to the defined terms, it is submitted that making such a change has the potential to impact the provisions of the NRP more broadly than the amendments sought through PC1. That is, amending a broad ranging definition, that would apply to all NRP provisions that use that term, is beyond scope. It is submitted that such a change would also fail both of the scope tests set out above.

Analysis of Yvonne Weeber and Guardians of the Bay Inc relief

14 Through their submissions, Yvonne Weeber and Guardians of the Bay Inc have sought to add interim measurable milestones to phase out the following activities:

14.1 Rule R7 - Natural gas and liquefied petroleum gas,

14.2 Rule R8 - Diesel or kerosene blends, and

14.3 Rule R11 - Coal, light fuel oil, and petroleum distillates of higher viscosity given their climate impacts.

15 The only change proposed by PC1 to the above rules is the deletion of the coastal icon. The wording of the provisions is not

subject to change, but the removal of the coastal icon will mean they are no longer classified as part of the regional coastal plan and the activity status for these activities in the coastal marine area will change from permitted under Rules R7, R8 and R11 to discretionary under Rule R42[4].

16 It is submitted that how these Rules apply outside the coastal marine is not subject to change in PC1 and therefore, adding milestones to these Rules to phase out the activities is not within scope of PC1. Such a change would fail both of the scope tests set out above.

17 In terms of these activities within the coastal marine area, the change is that they will require resource consent under Rule R42. The proposed change did not suggest a phasing out of the activities and what the submission seeks goes outside the alteration to the status quo proposed by PC1. Because of that, it also raises the issue of whether anyone affected by the submission seeking phasing out was denied the opportunity to respond to what is sought in the submissions. In our view, making the changes sought by these submitters would fail both limbs of the scope test identified above.

Scope of the Schedules and threatened species changes

18 Schedule A2 of the NRP sets out the lakes within the Wellington Region that have been identified as having outstanding indigenous ecosystem values. Three lakes are listed in Schedule A2 in the NRP – Lake Kohangapiripiri, Lake Kohangatera and Lake Wairaprapa. Through PC1, a new column has been proposed for Schedule A2, which has been populated for 2 of the 3 identified lakes, as they are within the two whaitua addressed by PC1. The changes are as follows (insertions in underline):

[4] See page 341 of the section 32 report.

Schedule A2: Lakes with outstanding indigenous ecosystem values		
Lakes	**Values**	**Nationally Threatened Freshwater Species and their critical habitat attributes** (for **Whaitua** Te Whanganui-a-Tara and Te Awarua-o-Porirua **Whaitua**)
Lake Kohangapiripiri	Aquatic plants Indigenous fish diversity Threatened fish species	Aquatic herb (Plant) *Althenia bilocularis*: Shallow freshwater close to coast, habitat free of exotic aquatic pest plants.
Lake Kohangatera	Aquatic plants Indigenous fish diversity Threatened fish species	Aquatic herb (Plant) *Althenia bilocularis*: Shallow freshwater close to coast, habitat free of exotic aquatic pest plants.
Lake Wairarapa	Wildlife habitat	

19 The new column is headed "Nationally Threatened Freshwater Species and their critical habitat attributes (for Whaitua Te Whanganui-a-Tara and Te Awarua-o-Porirua Whaitua)." Species and habitats have been identified in that column for Lake Kohangapiripiri and Lake Kohangatera as they are both within Whaitua Te Whanganui-a-Tara.

20 Lake Wairarapa has not had species and habitats identified in that column, as it is within the Ruamāhanga Whaitua.

21 It is clear from the section 32 report, that this proposal, of adding provisions to manage nationally threatened freshwater species as required by the NPS-FM, is limited to the two identified whaitua.[5]

Analysis of EDS and Forest and Bird relief

22 EDS and Forest and Bird have sought the inclusion of indigenous fish diversity as a listed value of Lake Wairarapa in Schedule A2. This is not a change in respect of the proposed new column, but in respect of the values listed in an existing column, which was not subject to change.

[5] See for example, section 32 report part C, page 5-6, paragraph 15 and section 9.3, section 32 Report Part D, p 197.

23 It is submitted that this relief is outside the scope of PC1 for two reasons:

23.1 the changes to Schedule A2 in PC1 relate solely to the addition of a new column to list nationally threatened freshwater species and their critical habitat attributes in 2 whaitua, they do not extend to changes to existing columns or the Schedule more generally; and

23.2 the changes to Schedule A2 relate solely to those waterbodies within the Whaitua Te Whanganui-a-Tara and Te Awarua-o-Porirua Whaitua. They do not extend to waterbodies in the table outside those whaitua, which is what Lake Wairarapa is.

24 It is submitted that the change sought by these submitters fail both limbs of the scope test.

Legislative changes

25 During the hearing, the Panels asked questions as to the relevance of the recent amendments to sections 107 and 70 of the RMA to the PC1 process.

26 The Resource Management (Freshwater and Other Matters) Amendment Act 2024, commenced on, and had effect from 25 October 2024. Among other changes to the RMA, it amended section 107 in the following way (changes in underline):

> (1) Except as provided in subsection (2) <u>or (2A)</u>, a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—
>
> (a) the discharge of a contaminant or water into water; or
>
> (b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

(ba) the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,—

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

(c) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) any conspicuous change in the colour or visual clarity:

(e) any emission of objectionable odour:

(f) the rendering of fresh water unsuitable for consumption by farm animals:

(g) any significant adverse effects on aquatic life.

(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

(a) that exceptional circumstances justify the granting of the permit; or

(b) that the discharge is of a temporary nature; or

(c) that the discharge is associated with necessary maintenance work—

and that it is consistent with the purpose of this Act to do so.

(2A) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15A that may allow the effects described in subsection (1)(g) if the consent authority—

(a) is satisfied that, at the time of granting, there are already effects described in subsection (1)(g) in the receiving waters; and

(b) imposes conditions on the permit; and

(c) is satisfied that those conditions will contribute to a reduction of the effects described in subsection (1)(g) over the duration of the permit.

(3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

27 This is a change that relates directly to the Council's decision making on discharge consents. On its face, it is a change that may enable a Council to grant a discharge consent that it was previously prevented from granting based on the requirements of section 107(1) of the RMA.

28 The changes to section 107 are not a change to the plan making provisions of the RMA. Although, it is submitted that it could have relevance to the Panels' consideration of whether or not particular rules (including activity status) or amendments to rules proposed through PC1 are the most appropriate provisions. This is something that will need to be expressly considered by reporting officers in the hearing stream/s that address provisions relevant to discharge consents and the applicable framework.

29 There has been no change made yet to section 70 of the RMA, although that is an upcoming change that has been signalled by the Government. The Government has signalled that it will make amendments to section 70 of the RMA to safeguard permitted activities and restore certainty for councils and the primary sector around diffuse discharges. Counsel will provide updates on any relevant legislative reform if, and when, that happens and how

that might impact on decision-making for the Panels, including in respect of any issues with scope to make changes that may arise.

Caselaw cited in submissions

30 At the hearing, the Panels asked for legal comment on the decision cited by the Upper Hutt Rural Communities group of submissions and how it is relevant to PC1. Those submissions reference "GWRC v Adams & Others together with GWRC v UHCC" which the submissions refer to as relating to a roadside drainage ditch and whether it was a natural waterway. Counsel understands that the first reference to be to the case of *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25, of which UHCC was also a respondent. The second refence does not appear to relate to a formal proceeding.

31 The *Adams* case related to an enforcement order sought by the Council against a number of parties in respect of a subdivision consent granted by UHCC. The focus of the dispute in that case, was whether or not, the sites in question contained natural wetlands (as per the then proposed NRP definition and the definition of inland natural wetlands in the National Policy Statement for Freshwater Management).

32 There was an evidential dispute, focused on the 'pasture exclusion' in the definitions. In that context, where the Court was considering contested evidence as to whether or not the exclusion applied, and how to apply the exclusion, it made the following statement, that has been paraphrased by the submitters in PC1:

> [57] There is an obvious legal issue in the Regional Council purporting to import a binding "pasture" test into pNRP by fiat without undertaking Schedule 1 processes. Setting that issue to one side, in reaching her conclusions as to whether or not areas 1, 2 and 3 identified in the November report constituted natural wetlands as defined in pNRP Dr van Meeuwen-Dijkgraaf applied the pasture exclusion test which the Regional Council advised her was appropriate, namely exceedance of 50% relative cover. We observe that as a matter of certainty the

> 50% relative cover test has obvious attractions and some similarities with the bright line improved pasture exclusion provision contained in the NPS-FM.

33 Given the case's focus on wetlands, the fact that the definition of 'natural wetland' was changed through the NRP appeals process (such that the part of the definition expressly considered by the Court has been replaced) and given PC1 does not alter any of the 'wetland' provisions in the NRP, it is submitted that this case is of little relevance to the Panels when they make their recommendations on PC1. Even if it was relevant, the quote above specifically recognises the fact the Council can choose to change its plan through a First Schedule process. It is not bound, as suggested by the submitter, to not propose changes to its plan when a Court has ruled on the meaning of provisions.

Rules limiting notification

34 During the hearing, the Panels questioned the legality of rules precluding or requiring notification. Section 77D of the RMA allows a local authority to make a rule specifying the activities for which the authority:

> (a) must give public notification of an application for a resource consent:
>
> (b) is precluded from giving public notification of an application for a resource consent:
>
> (c) is precluded from giving limited notification of an application for a resource consent.

35 Accordingly, it is legally valid for the Council to have rules requiring public notification, or precluding public or limited notification (as it does in PC1, see for example Rule WH.R6, WH.R7 and WH.R14). Before making any such rule, it must however be assessed on its merits against the plan change tests.

Counsel has been unable to find any relevant case law citing section 77D.[6]

Offsetting v compensation terminology for financial contribution rules

36 Counsel notes that the use of offsetting language compared with compensation language in the financial contribution rules was the subject of question from the Panels of Ms O'Callahan.

37 This is an issue that will be addressed in Hearing Stream 4, where the relevant provisions will be considered. Accordingly, we do not address the issue at this point in time.

The relationship between the NES-PF and NES-CF

38 In Minute 3, at paragraph 13, the Panels have made the following request:

> We request that the Council's legal team please provide more information on the relationship between the NES-PF and NES-CF, in light of submissions from NZ Carbon Farming Group (S263) and China Forest Group Company NZ Ltd (S288). In particular, are the transitional provisions in the NES-CF sufficient to read all references in PC1 to the NES-PF as the 'NES-CF'? Does this raise any issues where activities were not regulated under the NES-PF? For example, R128 excludes from the list of permitted activities, those activities regulated by the NES-PF. Are there any issues with reading this now as a reference to the NES-CF if the scope of the activities regulated by the NES-CF is different from those regulated by the NES-PF?

39 The NES-PF was promulgated in July 2017. On 3 November 2023, its name was amended to NES-CF by regulation 4 of the Resource Management (National Environmental Standards for Commercial Forestry) Amendment Regulations 2023. Other substantive amendments were also made at that time. In addition, in respect of the name change, the following provision was

[6] The decision of *Pacific Farms Ltd v Palmerston North City Council* HC Palmerston North CIV02008-454-791, 5 February 2010, references section 77D, but focuses on the appropriate activity status in that case, not on the notification rule.

inserted as clause 1, Schedule 1, Part 2 of the NES-CF (emphasis added):

> Every reference in any enactment and in any document to the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 must, unless the context otherwise provides, be read as a reference to the Resource Management (National Environmental Standards for Commercial Forestry) Regulations 2017.

40 As a starting point in answering this question, it is important to set out the legislative framework as it applies to the relationship between the NRP (and provisions of PC1) and the NES-CF more generally. In summary, the relevant statutory requirements are:

40.1 Section 43B of the RMA sets out the relationship between NESs and rules in the NRP.

40.2 Section 43B(1) and (2) provide that a rule can be more stringent, or more lenient, than a NES, only if the NES expressly says that a rule can be more stringent, or more lenient, than it.

40.3 Section 43B(2) sets out that a rule is more stringent than a NES if it prohibits or restricts and activity that the standard permits or authorises.

40.4 Section 43B(4) sets out that a rule is more lenient than a NES if it permits or authorises an activity that the standard prohibits or restricts.

40.5 Regulation 6 of the NES-CF sets out the situations when a rule in the NRP may be more stringent than the NES-CF (see regulations 6(1), 6(2), 6(3) and 6(4A)).[7]

[7] Noting that regulation 6(4A) was inserted by the Resource Management (National Environmental Standards for Commercial Forestry) Amendment Regulations 2023.

40.6 Regulation 6(4A) sets out the limited situations where the NRP can be more lenient than the NES-CF. Prior to inclusion of regulation 6(4A) in November 2023, there were no situations where the NES enabled the NRP to be more lenient than it.

40.7 Section 44A of the RMA provides the requirements for local authority recognition of a NES.

40.8 Section 44A(3) to 44A(5) of the RMA apply where there is conflict (ie a rule is more stringent or more lenient when the NES does not allow that) or duplication of the NES in the NRP. They specify that the conflict is to be removed without using a Schedule 1 process, and that the timeframe for that to occur, depending on the wording of the NES, is either as specified in the NES or as soon as practicable.[8]

41 Accordingly, when the NRP was prepared,[9] and when changes are being considered through PC1, the Council needs to ensure that:

41.1 Rules of the NRP (including as amended by PC1) do not duplicate the NES-CF. If so, that duplication needs to be removed (and can be removed without using a Schedule 1 process).

41.2 Rules of the NRP are not more stringent than the NES-CF, unless that is expressly allowed by Regulation 6 of the NES. Any conflict must be removed (and can be removed without using a Schedule 1 process).

41.3 Rules of the NRP are not more lenient than the NES-CF, unless that is expressly allowed by Regulation 6 of

[8] No timeframes for resolution of conflict and duplication are included in the NES-CF.
[9] Noting that the NES-PF was only promulgated part way through the pNRP process – post notification, but prior to the Council's decision on it.

the NES. Any conflict must be removed (and can be removed without using a Schedule 1 process).

42 That exercise was undertaken by the Council, when making the NRP. Following the amendments to the NES-CF in November 2023, the Council needs to undertake an exercise to determine whether any new duplication or conflict has been created between the NES-CF and the NRP. If new conflict or duplication is identified, it needs to remove that duplication or conflict.

43 Further, the Council needs to determine if there are any new instances of the NRP being more stringent or any instances of the NRP being more lenient than the NES-CF, where it is allowed such differences (ie, they are not a conflict) and whether, from a policy perspective, it wishes to retain those differences. If it does not wish to retain those differences, it would need to go through a plan change process to remove those differences. It would need to use a Schedule 1 process to do that. The current PC1 process may provide scope for such changes to be made.

44 In response to the specific question from the Panels, the NRP is a document that currently references the NES-PF. Given this, it is submitted that based on the transitional clause set out at paragraph 40 above, the references within the NRP and PC1 to the NES-PF, need to be read as references to the NES-CF. Accordingly, regardless of whether or not the provisions are changed by the Council through PC1 to expressly say 'NES-CF' in place of 'NES-PF', they need to be read that way based on the transitional clause.

45 Accordingly, we consider that the references in the NRP and PC1 can, and should, now be read as references to the NES-CF.

46 However, the Council still needs to undertake the steps above to ensure there are no unintended consequences or conflict or duplication that arise from the changes to the NES in the provisions of PC1, and the section 42A authors will address that in the relevant hearing streams. Mr O'Brien has done so in

respect of Rules R128 and R132 in his Beds of Lakes and Rivers section 42A report.[10]

Date: 29 November 2024

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[10] Refer to paragraphs [74] and [82] respectively.