

**BEFORE THE HEARING COMMISSIONERS**

**IN THE MATTER OF** the Resource Management Act 1991

**AND**

**IN THAT MATTER OF** The Proposed Natural Resources  
Plan for the Wellington Region

**BETWEEN** Greater Wellington Regional Council

**AND** Minister of Conservation (Submitter)

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**Hearing 1: Plan framework, Beneficial Use and Development & Significant sites and  
areas for mana whenua**

Legal submissions on behalf of the Minister of Conservation (submitter no 75)

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Dated: 13 June 2017

May it please the panel

## **INTRODUCTION**

1. These legal submissions will traverse:
  - (a) the role of the Department and the Minister of Conservation;
  - (b) RMA requirements for regional plan making;
  - (c) New Zealand Coastal Policy Statement;
  - (d) National Policy Statement Freshwater Management;
  - (e) Section 42A report recommendations:
    - i. Outstanding issues from the Minister's perspective;
    - ii. Areas of alignment with the Minister's submissions.

## **ROLE OF THE DEPARTMENT OF CONSERVATION AND MINISTER OF CONSERVATION**

2. As outlined in Ms Kissick's evidence, the Department of Conservation has a number of functions under section 6 of the Conservation Act.<sup>1</sup>
3. The Minister of Conservation, rather than the Director-General of Conservation, is the submitter for the purposes of this plan process. This is because the Minister has the function of approving regional coastal plans in accordance with Schedule 1 of the RMA.<sup>2</sup>

## **RMA REQUIREMENTS FOR REGIONAL PLAN MAKING**

4. The RMA sets out requirements for making a regional plan. The plan must be made by the regional council consistently with sections 30, 66 and 67, and its contents can be informed by part 2 (sections 5, 6, 7 and 8) of the RMA.

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<sup>1</sup> Evidence in Chief of Ms Kissick, paragraph [15].

<sup>2</sup> RMA, section 28(b).

5. The Supreme Court has described section 5 as a “carefully formulated statement of principle intended to guide those who make decisions under the RMA”<sup>3</sup>, which is given “further elaboration” by the remaining parts of Part 2.<sup>4</sup> Section 5 sets out the “core purpose” of the RMA, which is “supplemented” by Sections 6, 7 and 8 that state “the particular obligations of those administering the RMA in relation to the various matters identified”.<sup>5</sup>
6. Under section 6, decision makers must recognise and provide for a range of matters of national importance, including (most relevant to the Minister’s submissions on this proposed plan):
  - (a) the preservation of natural character in the coastal environment, wetlands, lakes, rivers and their margins, and the protection of them from inappropriate subdivision, used, and development;<sup>6</sup> and
  - (b) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.<sup>7</sup>
7. Section 7 requires decision makers to “have particular regard to” matters specified such as, the intrinsic value of ecosystems and the maintenance and enhancement of the quality of the environment.
8. The Supreme Court has commented that the RMA envisages the formulation of a “cascade of planning documents”, each of which is intended to give effect to Section 5 of the Act and Part 2 more generally.<sup>8</sup> Section 66 of the RMA specifies that a regional council must prepare and change any regional plan in accordance with its functions under section 30 and the provisions of Part 2.
9. Section 66 and 67 of the RMA specify the content in a regional plan. A regional plan:
  - must give effect to any national policy statement, and any New Zealand coastal policy statement; and any regional policy statement;<sup>9</sup> and

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<sup>3</sup> Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited [2014] NZSC 38[17 April 2014] Paragraph[25]

<sup>4</sup> EDS v KS [25].

<sup>5</sup> EDS v KS [26].

<sup>6</sup> RMA, s 6(a).

<sup>7</sup> RMA, s 6(c).

<sup>8</sup> EDS v KS [30].

<sup>9</sup> RMA, section 67(3).

- must be in accordance with any regulations;<sup>10</sup>
- must not be inconsistent with a water conservation order or any other regional plan for the region;<sup>11</sup> and
- shall have regard to the Crown's interest in the CMA<sup>12</sup> and other plans, strategies or regulations that relate to sustainability, conservation or management in the CMA.<sup>13</sup>

## **NEW ZEALAND COASTAL POLICY STATEMENT**

10. The purpose of the NZCPS is to state objectives and policies to achieve the purpose of the RMA to promote the sustainable management of natural and physical resources in the coastal environment.<sup>14</sup> The Minister of Conservation holds the function of preparing and recommending the NZCPS under the RMA, and thus has an interest in its correct implementation.<sup>15</sup>

11. Relevant objectives and policies of the NZCPS for the purposes of this hearing are:

- (a) Objective 1: in particular the requirement to safeguard various values;
- (b) Objective 4: maintaining and enhancing public walking access to and along the coastal marine area;
- (c) Policy 3: to adopt a precautionary approach where effects on the environment are unknown, uncertain or little understood;
- (d) Policy 4: to provide for the integrated management of natural and physical resources in the coastal environment;
- (e) Policy 19: in particular, identifying opportunities to enhance or restore public walking access, for instance where subdivision use or development of land

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<sup>10</sup> RMA, section 66(1)(f).

<sup>11</sup> RMA, section 67(4).

<sup>12</sup> RMA, section 66(2)(b).

<sup>13</sup> RMA, section 66(2)(c).

<sup>14</sup> RMA, s 56.

<sup>15</sup> RMA, section 28(a).

adjacent to the coastal marine area has reduced public access or has the potential to do so.

## **NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2014**

12. Section 67(3)(a) of the RMA requires the plan to give effect to the NPSFM. The Supreme Court has found that to “give effect to” means to “implement” the planning documents in this section.<sup>16</sup> Under the RMA the purpose of policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purposes of the RMA.<sup>17</sup>
13. Relevant policies of the NPSFM for the purposes of this hearing are:
- (a) Objective A1: in particular that the values listed must be *safeguarded*;
  - (b) Objective B1: again, in particular that the listed values must be *safeguarded*;
  - (c) Objective C1: integrated management of freshwater and the use and development of land in whole catchments in particular; and
  - (d) Objective B: that any further over-allocation of water is avoided, and current over allocation is phased out;
  - (e) Policy A1: in particular the requirement that the plan establishes methods to avoid over-allocation;
  - (f) Policy E: the requirement that the NPSFM be fully implemented by 31 December 2025.
14. Council is implementing the NPSFM in a staged way; through providing interim limits in the current proposed plan, and for final limits to be set in future plan changes, as decided by “whaitua” committees. The Minister considers the current proposed plan therefore is a step on the way to implementing the NPSFM, but that the NPSFM will not be fully given effect to until the whaitua chapters have been completed and come into force.

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<sup>16</sup> EDS v KS [77].

<sup>17</sup> RMA, s 45(1).

## THE SECTION 42A REPORTS – OUTSTANDING ISSUES FROM THE MINISTER’S PERSPECTIVE

15. There is substantial alignment between the Minister’s submissions and the recommendations and reasoning in the s 42A reports.
16. The body of Ms Kissick’s evidence outlines where differences remain. This part of these legal submissions addresses those differences.

*Objective 7 – “Fresh water is available in quantities and is of a suitable quality for the reasonable needs of livestock”.*

17. The Minister supports the submission from Fish and Game which seeks to ensure that the provision of water for livestock is not contrary to s 14(3)(b) of the RMA. S 14(3)(b) qualifies the taking and use of water for reasonable domestic needs and drinking water for animals where “the taking or use does not, or is not likely to, have an adverse effect on the environment”.
18. Section 14(3)(b) is amended by the Resource Legislation Amendment Act 2017. That amendment replaces the word “individual” with “person” so it refers to the reasonable needs of a *person’s* animals for drinking water. The effect of this is that the statutory exemption from the prohibition applies to a legal person, including a company, whose stock requires drinking water. As such, this statutory right to take can be of significant scale for commercial farming. It is submitted that this amendment highlights the s 14(3)(b) exemption may not just be used for small scale takes. Therefore, in my submission, it is all the more important to include the statutory qualifier alongside the objective – the taking or use of that water does not, or is not likely to have an adverse effect on the environment.
19. The authorisation to take pursuant to s 14(3)(b) is not unlimited. The take or use must be required, the needs must be reasonable, and the taking or use must not, or must not be likely to, have an adverse effect on the environment. It is permissible for regional plans to define the point at which a take has, or is likely to have, an adverse effect on the environment and is therefore not authorised by s 14(3)(b) (*Carter Holt Harvey Ltd v Waikato RC* [2011] NZEnvC 380). To that end, s 14(3)(b) takes can and should be managed within a plan in order to effectively manage allocable flows and define a point at which adverse effects may begin to occur.
20. For the purposes of objective 7, however, it is submitted that for the full parameters of s 14(3)(b) to flow down into rules, and to give effect to the requirements of the NPS-FM and

avoid over-allocation of water resources, this objective must be qualified with the requirement that the take or use does not, or is not likely to, have an adverse effect on the environment.

## **SECTION 42A REPORTS – AREAS OF ALIGNMENT WITH THE MINISTER’S SUBMISSION**

21. Appendix 1 to Ms Kissick’s evidence and appendix 1 to these submissions set out areas of alignment between the s 42A reports and the Minister’s submission or further submission points. Ms Kissick will traverse those areas in summary form.

22. Where there is agreement on the recommendations in those reports, the Minister also supports the reasoning as set out by the reporting officers. In these submissions I will emphasise some areas of agreement where, in a legal sense, I would support the reasoning in the reports.

### *Objective O4*

23. The Reporting Officer has recommended amending Objective O4 as follows:

The intrinsic values of aquatic fresh water and marine ecosystems are recognised and the life-supporting capacity of water and aquatic ecosystems are safeguarded are recognised

24. The Minister sought that the objective be amended so that “recognised” is replaced with “safeguarded”, as this latter term gives effect to Objectives A1 and B1 of the NPSFM. In her section 42A report the Reporting officer recommended that this amendment be accepted to achieve the purpose of the RMA and to give effect to the RPS.<sup>18</sup>

25. The Minister is pleased with the recommendation, as the amendment aligns with the direction of section 5(2)(b) of the RMA, and gives effect to the NPSFM (Objective A1 and B1).

### *Policy P13: Existing regionally significant infrastructure and renewable electricity generation facilities*

26. Proposed Policy P13 states:

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<sup>18</sup> s42A report, Overall framework Part B, [310].

The use, operation, maintenance, and **upgrade** of existing **regionally significant infrastructure** and **renewable energy generation activities** are beneficial and generally appropriate.

27. The Minister, in her further submissions, supported the submission from Powerco, to retain the Policy as notified.
28. She opposed submissions from the New Zealand Transport Agency which sought amendment to the Policy, or a new Policy, directing that new regionally significant infrastructure be “generally appropriate”, as new regionally significant infrastructure may have significant adverse effects on environmental values. The Minister also opposed a submission from Kapiti Coast Airport Holdings Limited, to remove the term “generally”, because this would remove discretion and not recognise situations where these activities may be inappropriate.
29. The Reporting Officer has recommended the Policy be retained as notified, in line with the Minister’s submission. This is because the policy is non-specific and refers to all regionally significant infrastructure and renewable energy generation activities as defined in the proposed Plan; the word ‘generally’ applies a presumption of sorts in favour of the activities, but construes that not all activities are beneficial and each situation would be treated on a case-by-case basis.<sup>19</sup>

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Counsel for the Minister of Conservation

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<sup>19</sup> s42A report, Beneficial use and Development, [345].

**APPENDIX 1 –S 42A REPORT RECOMMENDATIONS ALIGNED WITH MINISTER OF CONSERVATION’S SUBMISSION / POSITION**

**KI UTA KI TAI: MOUNTAINS TO THE SEA**

<b>Objective / Policy</b>	<b>S 42A recommendation or recommended amendment</b>	<b>Comment</b>
<b>O1</b>	<p><u>Air, land, fresh water bodies and the coastal environment</u> the coast are managed as integrated and connected resources; ki uta ki tai – mountains to the sea.</p>	<p>More clearly reflects section 5 RMA and NZCPS</p>
<b>P1</b>	<p><u>Air, land and water resources, fresh water bodies and the coastal environment</u> will be managed recognising ki uta ki tai by using the principles of integrated catchment management. These principles include:...</p> <p>(c) coordinated management, with decisions based on best available information <u>and improvements in technology and science</u>, and...</p>	<p>The Minister agrees with these recommendations which provide a clearer representation of the requirements under section 5 of the RMA, the NZCPS and the NPSFM.</p>
<b>O4</b>	<p>The intrinsic values of <del>aquatic</del> fresh water and marine ecosystems <u>are recognised</u> and the life-supporting capacity of water and <u>aquatic ecosystems are safeguarded</u> <del>are recognised</del>.</p>	<p>Recommended changes gives effect to NPSFM (Objectives A1 and B1) and s 5(2)(b) of the RMA. Minister concurs with the comprehensive reasoning in the s 42A report for the recommendation.</p>

<b>P3</b>	Use and development shall be managed with a precautionary approach where there is limited information regarding the <del>receiving environment and the effects and any adverse effects are potentially significant effects</del> the activity may have on the environment.	The Minister supports this recommended amendment, as it better reflects the direction of Policy 3 of the NZCPS.
<b>O5</b>	Fresh water bodies and the coastal marine area, as a minimum, are managed to:  (a) safeguard aquatic ecosystem health and mahinga kai, and  (b) provide for contact recreation and Māori customary use, and  (c) in the case of fresh water, provide for the health needs of people.	Retain as notified

## BENEFICIAL USE AND DEVELOPMENT

<b>Objective / Policy</b>	<b>S 42A recommendation</b>	<b>Comment</b>
<b>O2</b>	The importance and contribution of land and water to the social, economic and cultural well-being of the community are recognised.	Minister agrees with recommendation to not add 'and provided for' to the end of this objective.
<b>P7</b>	Uses of land and water	Minister agrees with recommendation to not change this policy as notified

<b>O8</b>	The social, economic, cultural and environmental benefits of taking and using water are recognised and provided for within the Plan's allocation framework	Minister agrees with recommendation to not change this policy as notified
<b>P8</b>	Beneficial activities – add reference to the “removal of animal pests”	Minister agrees
<b>O10</b>	Public access to and along the coastal marine area and rivers and lakes is maintained and enhanced.	The Minister supported this Objective because it is consistent with section 6(d) of the RMA. However this submission point was not given a reference number in the submission database. The Reporting Officer recommended the Objective be retained without amendment.
<b>P9</b>	Public access to and along the coastal marine area and the beds of lakes and rivers – recommendation policy be amended to provide for maintenance and enhancement of public access	Minister supports the change. Planning evidence of Ms Kissick notes though that P9 doesn't differentiate between walking access and vehicle access, as required by policies 19 and 20 in NZCPS
<b>O12</b>	No change recommended to O12: The social, economic, cultural and environmental benefits of regionally significant infrastructure and renewable energy generation activities are recognised.	Minister supports the recommendation for no change and concurs with the reasoning in the s 42A report.
<b>P12</b>	Benefits of regionally significant infrastructure and renewable electricity generation facilities. Reporting officer recommended no change despite submission points of various agencies	Minister supports the recommendation and reasons given in s 42A report for no change.

<b>P13</b>	The use, operation, maintenance, and <b>upgrade</b> of existing <b>regionally significant infrastructure</b> and <b>renewable energy generation activities</b> are beneficial and generally appropriate.	The Reporting Officer has recommended the Policy be retained as notified, in line with the Minister's submission. This is because the policy is non-specific and refers to all regionally significant infrastructure and renewable energy generation activities as defined in the proposed Plan; the word 'generally' applies a presumption of sorts in favour of the activities, but construes that not all activities are beneficial and each situation would be treated on a case-by-case basis.
<b>Definition</b>	"regionally significant infrastructure" – recommendation to retain as notified	Minister agrees.