

**Before the Hearing Panel
At Wellington**

Under the Resource Management Act 1991

In the Matter of the Proposed Natural Resources Plan for the Wellington
Region (Hearing Stream 3)

**Memorandum of counsel regarding scope to amend P117 and Rule 1 of the
Whaitua Chapters and a recent High Court decision**

Date: 22 December 2017



50-64 Customhouse Quay, Wellington 6011
PO Box 2791, Wellington 6140
DX SP20002, Wellington
Tel +64 4 472 6289
Fax +64 4 472 7429

Solicitor on the record
Contact solicitor

Kerry Anderson
Emma Manohar

kerry.anderson@dlapiper.com
emma.manohar@dlapiper.com

Tel +64 4 474 3255
Tel +64 4 918 3016

MAY IT PLEASE THE PANEL:

Introduction

- 1 During the presentation of the Council's legal submissions in reply and officer reports in reply on Thursday 14 December 2017, the Panel sought clarification as to scope.

- 2 Specifically, the Panel sought clarification on the basis for the amendments proposed by Ms Paula Hammond to Policy P117, Rules RR1, WHR1, KR1 and the related proposed new schedule and tables.

- 3 This memorandum of counsel addresses those matters. These submissions do not address the law on whether a submission is or is not 'on' the proposed Plan and therefore valid as given the scope of the proposed Plan, it is not likely to be of concern to the Panel. Instead, the focus of these submissions is on the scope of decision-making available to the Panel in terms of amendments to the proposed Plan (as notified) based on submissions.

- 4 This memorandum also addresses a recent High Court case on the *King Salmon* line of decisions.

SCOPE

The legal framework

- 5 In terms of scope, the legal submissions for Hearing One, dated 20 April, addressed the scope caselaw in detail (paragraphs 105-115). The most recent case at that time was a High Court one on the Unitary Plan. It stated:¹

...A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To

¹ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The 'workable' approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

6 More recent cases have been discussed with the Panel as they arise. However, they have been consistent with, and have not changed, the principles as to the scope of decision making.²

7 This passage summarises what has long been understood to be the law in this area. In our view, in applying the established law, the Panel should consider the following framework when making its decision:

7.1 The paramount test is whether any amendment made to the proposed Plan as notified goes beyond what is fairly and reasonably raised in submissions.³

7.2 That assessment should be approached in a realistic and workable fashion.⁴

7.3 A submission must first raise a relevant resource management issue, and then any decision must fairly and reasonably fall

² For example, *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEvC 187; *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764.

³ *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC), 171.

⁴ *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408, 413.

within the general scope of the original submission, or the proposed Plan as notified, or somewhere in between.⁵

- 7.4 Submissions provide scope for decision-making on a spectrum - with the notified provisions at one end and the relief sought in a submission at the other.⁶
- 7.5 Scope is not necessarily restricted by the express words of a submission.⁷
- 7.6 The whole relief package detailed in submissions needs to be considered.⁸
- 7.7 Consequential changes which logically arise from the grant of relief requested and submissions lodged are permissible, provided they are reasonably foreseeable.⁹
- 7.8 There is an implied jurisdiction to make consequential amendments to rules following changes to objectives and policies on the principle that regional plans have an internal hierarchical structure, provided the changes are reasonably foreseeable.¹⁰

- 8 This framework can be applied by the Panel in making its decision on the proposed Plan. Council officers have had this framework in mind when considering their recommendations to the Panel.

⁵ *Re an application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264; [1999] NZRMA 467 at [19].

⁶ *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187, at [94].

⁷ *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254 (HC) at [73].

⁸ *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [44].

⁹ As n 7, at [73] - [77].

¹⁰ *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166, at [20].

Specific provisions

- 9 We have set out in **Appendix 1**, the specific provisions you have asked to be assessed. This has been prepared in conjunction with Ms Hammond. Appendix 1 sets out the provisions as notified, Ms Hammond's recommended amendments (as per her right of reply on Water Allocation dated 8 December 2017) and the submission/s relied on to provide scope for the recommendation. We trust this will be of assistance to the Panel.

THE KING SALMON LINE OF DECISIONS

The issue

- 10 At the hearing on 14 December 2017 the Panel requested a copy of a recent High Court decision. That decision, addressed the principles in the *King Salmon* case.¹¹ *King Salmon* has previously been discussed with the Panel, and relied on through legal submissions.

The case requested

- 11 The case requested by the Panel is *Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZHC 3080. It is a decision from 12 December 2017. A copy is *attached* to this memorandum as Appendix 2. Without purporting to provide a thorough analysis of the case, the following is considered to be relevant to the matters that the Panel is required to consider in this proposed Plan process.
- 12 The decision arises from an appeal to the High Court against a decision of the Environment Court regarding the wording of various policies in the Bay of Plenty's proposed Regional Coastal Environment Plan (**RCEP**). The appeal was brought on the basis that the Environment Court erred in its application of *King Salmon*. In particular, that it erred

¹¹ *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38.

in its interpretation and implementation of, and failed to give effect to the higher order planning documents, being the NZCPS, the Regional Policy Statement (**RPS**) and the RCEP objectives. In addition, it erred in its interpretation of section 87A, 104 and 104D of the RMA.

13 The High Court provides some helpful commentary on how *King Salmon* should be applied by a decision maker in a resource management context, and (of most relevance to this situation) confirmed:

13.1 There is a requirement to consider higher order planning documents, even when the document that is lowest in the planning hierarchy appears to give effect to the higher order documents.

13.2 The meaning of 'avoid' is as discussed in *King Salmon* (ie, 'not allow', or 'prevent the occurrence of') and is not contextual.

13.3 Where there is tension between planning documents, or within them, there is an obligation under *King Salmon* to articulate and analyse those tensions, and to make a thorough attempt to reconcile those tensions.

13.4 *King Salmon* does not allow for the proportionate or contextual approach taken by the Environment Court in the prior decision.

13.5 The persuasiveness of *King Salmon* is significant, as although it has a relatively narrow ratio, it contains observations made by our highest Court and cannot be ignored or glossed over.

14 We expand on each of these matters below.

15 For the Panel, in making its decision on the proposed Plan, it should consider relevant direction provided by the Courts. However, we do not consider that this most recent case requires that the Panel make any major changes to its decision making process so far.

Requirement to consider higher order planning documents

- 16 The Environment Court confined its consideration of the higher order documents primarily to the unchallenged objectives in the RCEP, which was the document lowest in the planning hierarchy. It referred briefly to some provisions in the RPS, and even more briefly to the NZCPS. The Environment Court appeared to take this approach in reliance on what it termed a concession by Forest and Bird, that the provisions of the RPS and the settled objectives of the RCEP reflected the NZCPS and other national policy statements.
- 17 The High Court held that the Environment Court was not entitled to take the approach it took, stating that:¹²

In my judgment, the Environment Court erred when it proceeded primarily by reference to the RCEP's objectives, with only limited reference to the RPS and the NZCPS. Its approach in effect ignored the statutory directive contained in s 67(3). That subsection is clear in its terms. It requires that decision-makers promulgating regional plans must "give effect to", inter alia, National Policy Statements and Regional Policy Statements. The Environment Court failed to have regard to the majority of the Supreme Court's finding that the words "give effect to" mean to implement, and that this is a strong directive, creating a firm obligation on the part of those subject to it.

...

The Environment Court also appears to have assumed that it was unnecessary for it to consider the NZCPS in any detail, because there was no evidence to suggest that the RCEP's objectives were not "entirely in keeping with the superior documents, including the NZCPS, the NPSET, or, if relevant, Part 2". With respect, this was not an issue of evidence. Interpretation of the relevant planning documents and their interrelationship was for the Environment Court, and it does not matter whether or not there was evidence on the issue.

¹² At [89] and [93].

18 In terms of whether the Environment Court's approach was consistent with *King Salmon*, the High Court observed:¹³

There is nothing in the majority's observation in *King Salmon* which suggests that a decision-maker can confine his, her or its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.

...

Secondly, and perhaps more importantly, in my view there is a distinct risk that the intent and effect of higher order plans can be diluted, or even lost, in the provisions of plans lower in the planning hierarchy. Put colloquially, the story can be lost in the re-telling. Indeed, a similar point was noted in *Appealing Wanaka*, where the Court sounded a warning in the following terms:

...While the simplicity of that process may sometimes be more theoretical than real, since in practice plans may be uncertain, incomplete or even partly invalid, it is easier than the exhaustive and repetitive process followed before the Supreme Court decided *EDS v NZ King Salmon*.

In my judgment, there are dangers in the truncated approach taken in *Appealing Wanaka* and by the Environment Court in this case.

Meaning of avoid

19 The Environment Court considered that 'avoid' was contextual, commenting that:¹⁴

Of critical importance in this regard is whether or not the word "must be avoided" used in RCEP Policy NH 4 requires a simple binary calculation as to whether or not all effects are avoided or not. It is clear that the Supreme Court, in interpreting the word "appropriate", acknowledged that its meaning varied by context. We have concluded that even for words such as avoid, the context must go further than simply the wording of the

¹³ At [84] and [88].

¹⁴ *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council*, [2017] NZEnvC 045, at [43].

plan, but the context of the individual case or application.

20 The High Court disagreed, stating:¹⁵

By finding that the word “avoid” is contextual, and that it is necessary to go further than simply the wording of the plan, the Environment Court has, in my judgment, failed to properly apply the directive provisions contained in the NZCPS and the majority’s observations in *King Salmon*.

The Environment Court’s proportionate response is also inconsistent with the approach taken by the Supreme Court in *King Salmon*. The majority roundly rejected the broad overall judgment taken by the Board of Inquiry in that case, and the proportionate response adopted by the Environment Court in this case is an overall judgment approach – albeit by a different name. The more restrictive regime flowing from the Supreme Court’s decision in *King Salmon* does not permit the proportionate, or contextual, response taken by the Environment Court.

Tension in and between planning documents

21 The Environment Court identified various tensions raised in the RCEP objectives between various elements. Given the Environment Court considered that the RCEP was intended to reflect the RPS, it would seem to follow that the Environment Court also considered there was also some tension in the RPS. The Environment Court also considered that the NZCPS recognises the tension between various elements in the coastal environment. However, the Environment Court used these tensions to justify the proportionate response it considered appropriate, and did not seek to analyse the tensions.

22 The High Court considered that this failure to analyse the tensions, and also to make an attempt to reconcile the various provisions was in conflict with *King Salmon*. The High Court stated:¹⁶

The Environment Court’s approach was, in my judgment, in conflict with the various observations of the Supreme Court in *King Salmon*. As noted above in [50]-[52], the majority discussed the correct approach to

¹⁵ At [102] to [103].

¹⁶ At [98].

be taken to the interpretation of the, at first glance, disparate policies in the NZCPS. It set out the obligations of decision-makers considering those policies, and what they should do if they consider that particular provisions pull in different directions. These observations were made in relation to the NZCPS. This was one of the documents the Environment Court was called upon to consider in this case. Further, and as I have already noted, the majority's observations in *King Salmon* are equally applicable to documents lower in the planning hierarchy which seek to implement higher order documents. The Environment Court did not follow the approach the majority in the Supreme Court considered appropriate. It made no attempt to resolve the tensions and it failed to make "a thoroughgoing attempt to find a way to reconcile" the provisions it considered to be in tension.

Limited nature of *King Salmon*?

23 The Environment Court appears to have considered that *King Salmon* was of limited assistance, because, unlike the Supreme Court, the Environment Court was required to deal with multiple national policy statements, the RPS and the unchallenged parts of the RCEP.¹⁷

24 The High Court did not agree with this approach, commenting that:¹⁸

I accept that the ratio of *King Salmon* is relatively narrow. I have endeavoured to summarise what I understand it to be in [47] above. While strictly obiter, all of the majority's observations which led to the conclusions I have set out are highly persuasive. They are observations made by our highest Court, discussing some of the provisions and issues which are directly at issue in the present case. They cannot, in my judgment, be ignored or glossed over.

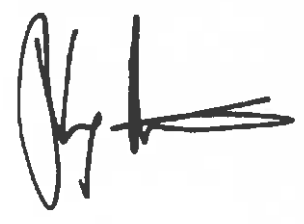
I do not consider that *King Salmon* can be distinguished, or that it is of limited assistance only.

¹⁷ At [75].

¹⁸ At [80] - [81].

25 This case can be discussed with the Panel at the outset of Hearing Stream 4.

Date: 22 December 2017

A handwritten signature in black ink, consisting of a large, stylized initial 'K' followed by a horizontal line and a vertical stroke.

.....
Kerry Anderson / Emma Manohar
Counsel for Wellington Regional Council

Appendix 1: Scope summary for proposed amendments to Policy P117, Rules RRI, WIIRI, KRI and new schedule

Provision	Provision as notified	Recommended amendment in Right of Reply - Water Allocation (Section 7.11), dated 8 December 2017	Relevant Issue in section 42A Report	Submission/s relied on	Content of submission	Conclusion on scope for proposed amendment
P117	<p>Policy P117 Supplementary allocation amounts at flows above the median flow</p> <p>In addition to core allocation, water is available from rivers at flows above the median flow provided flushing flows and a portion of flow above the median flow remains in the river to meet Objective O25</p>	<p>Policy P117 Supplementary allocation amounts at flows above the median flow</p> <p>In addition to core allocation, supplementary allocation water is available from rivers at flows above the median flow in the following amounts:</p> <p>(a) For rivers (and their tributaries) listed in Table 1 of Schedule V, up to 50% of the portion of flow in the river above the median flow at the point of abstraction, or</p> <p>(b) For rivers (and their tributaries) listed in Table 2 of Schedule V, up to 10% of the total amount of flow in the river at the point of abstraction, or</p> <p>(c) For rivers and their tributaries not listed in either Table 1 or 2 of Schedule V, up to 10% of the total amount of flow in the river at the point of abstraction</p> <p>provided flushing flows and a portion of flow above the median flow remains in the river to meet Objective O25</p>	<p>Issue 2.5, paragraph 387</p>	<p>Fish and Game (S308/082)</p> <p>Rangitane o Wairarapa, Inc (S27/148)</p> <p>Minister of Conservation (S75/105)</p>	<p>Both Fish and Game and Rangitane sought amendments to Policy P117 to include a supplementary take regime. Fish and Game proposed specific wording and Rangitane proposed the concept</p> <p>The Minister of Conservation sought the inclusion of a percentage limit on supplementary flow</p>	<p>The wording recommended provides for a supplementary take regime within the policy</p> <p>The wording proposed differs from that proposed by Fish and Game due to the structure of proposed amendments to the proposed Plan but the intent and outcome is considered to be the same</p> <p>Percentage limits are included consistent with the Minister of Conservation's submission</p> <p>There is scope to make this amendment to Policy P117 based on the listed submissions.</p> <p>The tables in Schedule V referred to in the policy do not change the policy's intent. They simply enable users of the Plan to refer to the tables to determine the percentage of water available for a particular river or stream, as opposed to having to obtain the same information from other sources. It is therefore a change to form as opposed to substance and within scope. The other information contained in Schedule V provides information on how the supplementary allocation policies and rules will be implemented, including management points, median flow trigger values and how the supplementary allocation amount for an individual take will be calculated. It improves the workability without amending the</p>

	policy or rule requirements					
RR1	<p>Rule R R1. Take and use of water in the Ruamāhanga Whaitua – restricted discretionary activity</p> <p>The take and use of water from any river (including tributaries), Lake Wairarapa (including tributaries), and groundwater in the Ruamāhanga River catchment above the Lake Wairarapa outflow, and in the Lake Wairarapa catchment, is a restricted discretionary activity provided the following conditions are met</p> <p>(a) the take and use shall not occur below the minimum flows or water levels in Table 7.1 or 7.2, except that this condition does not apply to:</p> <p>(i) water for the health needs of people as part of a group drinking water supply or community drinking water supply or water for rootstock protection, and</p> <p>(ii) water used by industry from a community drinking water supply for a period of seven years from the date of public notification of the Proposed Natural Resources Plan (31/07/2015), and</p> <p>(iii) taking groundwater, and</p> <p>(iv) <u>water takes for the purpose of supplying water for the health needs of people and animal drinking water, and</u></p> <p>(b) in any catchment management unit and catchment management sub-unit in Tables 7.3-7.5, the amount of water taken and used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum amount allocated by resource consents at the date the consent application is lodged, or</p> <p>(ii) the allocation amounts in Tables 7.3-7.5.</p>	<p>Refer paragraph 422 of the Section 42A Report Water allocation for list of submitters. S81/076, S127/081, S93/106, S142/014, 016, 016, 017, 018, S152/023, S316/137, S85/071 and S104/011</p>	<p>Issue 2.6, paragraph 423</p>	<p>Rule R R1. Take and use of water in the Ruamāhanga Whaitua – restricted discretionary activity</p> <p>The take and use of water from any river (including tributaries), Lake Wairarapa (including tributaries), and groundwater in the Ruamāhanga River catchment above the Lake Wairarapa outflow, and in the Lake Wairarapa catchment, that is not provided for in Rules R136, R137, R138, R139, R140, R140A or R141 is a restricted discretionary activity provided the following conditions are met</p> <p>(a) the take and use shall not occur below the minimum flows or water levels in Table 7.1 or 7.2, except that this condition does not apply to:</p> <p>(i) water for the health needs of people as part of a group drinking water supply or community drinking water supply or water for rootstock protection, and</p> <p>(ii) water used by industry from a community drinking water supply for a period of seven years from the date of public notification of the Proposed Natural Resources Plan (31/07/2015), and</p> <p>(iii) taking groundwater, and</p> <p>(iv) <u>water takes for the purpose of supplying water for the health needs of people and animal drinking water, and</u></p> <p>(b) in any catchment management unit and catchment management sub-unit in Tables 7.3-7.5, the amount of water taken and used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum amount allocated by resource consents at the date the consent application is lodged, or</p> <p>(ii) the allocation amounts in Tables 7.3-7.5.</p>	<p>Submitters sought that the whatua chapters need to provide for small water takes such as those permitted by Rules R136 to R140</p> <p>In addition, S81/076 raises concern with the workability of the Whaitua Chapters and their integration into the proposed Plan and needs reconciliation across the provisions</p>	<p>Amendment provides this relief sought in respect of the inclusion of R136 - R140 in the rule. Scope is provided by the listed submissions.</p> <p>R140A has been included in the list as it is a new proposed permitted activity rule and should be treated the same as the rest. It is a consequential amendment to the inclusion of the new rule and scope is provided in that way. If the Panel does not include the new rule, then it does not need to be included in this list</p> <p>R141 is a controlled activity and should be treated in the same way as the permitted activity rules. Scope is provided by S81/076</p> <p>The proposed Plan, R138 provides for the take of water for identified and consented water races as a permitted activity, the default status under Rule R142. Rule R R3 provides any takes not meeting conditions (a) and (b) of R R1 are prohibited in the Ruamāhanga Whaitua. Submitters have sought a permitted and non-complying activity status. The amendment provides for certain water races to be a restricted discretionary activity. This is within scope of the submissions as it is relief that is on the spectrum between the notified provisions (prohibited) and the relief sought in submissions (permitted).</p>
	<p>SWDC and MDC seek that the ongoing use of the water race network within the Wairarapa be provided for as a permitted activity until such time as the outcomes of the water race working group are confirmed and a plan change process initiated</p> <p>Federated Farmers requests that Rule R R3 be amended so it is a non-complying rather than a prohibited activity</p>	<p>South Wairarapa District Council (S366/107) and Masterton District Council (S367/107)</p> <p>Federated Farmers (S352/261)</p>	<p>Issue 2.3, paragraph 288</p>			

	<p>except that this condition does not apply to the take and use of water at river flows above the median flow and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river</p>	<p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river <u>50% of the river flow above the median flow remains in the river (and their tributaries) listed in Table 1 of Schedule V no more than 50% of the portion of flow in the river above the median flow is taken at the point of abstraction, or</u></p> <p>(iii) <u>For rivers (and their tributaries) not listed in either Table 1 or 2 of Schedule V no more than 10% of the total amount of flow in the river at the point of abstraction</u></p>	<p>Issue 2.5, consequential change</p> <p>Same submissions as for P117 above</p> <p>As per P117 above</p>	<p>Scope provided due to this being a consequential amendment to a rule to implement change to Policy P117 sought in submissions.</p>
	<p>except that this condition does not apply to the take and use of water at river flows above the median flow and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river</p>	<p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river <u>50% of the river flow above the median flow remains in the river (and their tributaries) listed in Table 1 of Schedule V no more than 50% of the portion of flow in the river above the median flow is taken at the point of abstraction, or</u></p> <p>(iii) <u>For rivers (and their tributaries) not listed in either Table 1 or 2 of Schedule V no more than 10% of the total amount of flow in the river at the point of abstraction</u></p>	<p>Issue 2.3, paragraph 227</p> <p>Issue 2.3, Paragraph 226 and 227</p>	<p>Consequential amendment due to change in terminology for classification types Within scope of that change</p> <p>Minor amendment under clause 16(2)</p>
<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Effects due to local flow or water level depletion on wetlands, springs, or downstream river reaches</p>
<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking of water, including instantaneous (L/sec), daily (m3/day), and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface <u>water direct connection (Category A) groundwater and high connection (Category B) groundwater</u> at times of low flow and restrictions when rivers approach or fall below the minimum flows, including the guideline for stepdown allocation and flows in Schedule R (stepdown guideline)</p>	<p>Effects due to local flow or water level depletion on wetlands, springs, or downstream river reaches</p>

	<p>on wetlands, springs, or downstream river reaches in the same catchment management sub-unit</p> <p>6 Interference effects on existing lawful water takes</p> <p>7 Prevention of salt water intrusion into the aquifer, or landward movement of the salt water/fresh water interface</p> <p>8 For a take and use in category B groundwater (directly connected) or category B groundwater (not directly connected)</p> <p>9 Preventing fish from entering water intakes</p> <p>10 Measuring and reporting, including the guideline in Schedule S (measuring takes)</p>	<p>in the same catchment management sub-unit</p> <p>6 Interference effects on existing lawful water takes</p> <p>7 Prevention of salt water intrusion into the aquifer, or landward movement of the salt water/fresh water interface</p> <p>8 For a take and use from groundwater, the degree of connectivity and category according to Table 4.1 in category B groundwater (directly connected) or category B groundwater (not directly connected)</p> <p>9 Preventing fish from entering water intakes</p> <p>10 Measuring and reporting, including the guideline in Schedule S (measuring takes)</p>	<p>Issue 2.4, paragraph 3.54</p>	<p>Consequential amendment due to change in terminology for classification types. Within scope of that change</p>
<p>WHRI</p>	<p>Rule WHRI. Take and use of water in the Wellington Harbour and Hutt Valley Whaitua – restricted discretionary activity</p> <p>The take and use of water from any river (including tributaries) and groundwater in the Te Awa Kairangi/Hutt River, Waiuotonga River and Orongorongo River catchments, is a restricted discretionary activity provided the following conditions are met:</p> <p>(a) the take and use shall not occur below the minimum flows in Table 8.1, except that this condition does not apply to:</p> <p>(i) water for the health needs of people as part of a group drinking water supply or a community drinking water supply, and</p> <p>(ii) taking groundwater, and</p> <p>(b) in any catchment management unit in Tables 8.2 and 8.3, the amount of water taken and used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum amount allocated by resource consents at the date the consent application is lodged, or</p>	<p>Rule WHRI. Take and use of water in the Wellington Harbour and Hutt Valley Whaitua – restricted discretionary activity</p> <p>The take and use of water from any river (including tributaries) and groundwater in the Te Awa Kairangi/Hutt River, Waiuotonga River and Orongorongo River catchments, that is not provided for in Rules R136, R137, R138, R139, R140, R140A or R141 is a restricted discretionary activity provided the following conditions are met</p> <p>(a) the take and use shall not occur below the minimum flows in Table 8.1, except that this condition does not apply to:</p> <p>(i) water for the health needs of people as part of a group drinking water supply or a community drinking water supply, and</p> <p>(ii) taking groundwater, and</p> <p>(b) in any catchment management unit in Tables 8.2 and 8.3, the amount of water taken and used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum amount allocated by resource consents at the date the consent application is lodged, or</p>	<p>Refer paragraph 4.22 of the Section 42A Report Water allocation for list of submitters S81/036, S127/081, S93/106, S142/014, 016, 016, 017, 018, S152/023, S316/137, S85/071 and S104/011</p> <p>Issue 2.6, paragraph 4.23</p>	<p>Submitters sought that the whaitua chapters need to provide for small water takes such as those permitted by Rules R136 to R140</p> <p>Amendment provides this relief sought in respect of the inclusion of R136 - R140 in the rule. Scope is provided by the listed submissions</p> <p>R140A has been included in the list as it is a new proposed permitted activity rule and should be treated the same as the rest. It is a consequential amendment to the inclusion of the new rule and scope is provided in that way. If the Panel does not include the new rule, then it does not need to be included in this list</p> <p>R141 is a controlled activity and should be treated in the same way as the permitted activity rules. Scope is provided by S81/036</p> <p>In addition, S81/036 raises concern with the workability of the Whaitua Chapters and their integration into the proposed Plan and needs reconciliation across the provisions</p>

<p>(i) the allocation amounts in Tables 8.2 and 8.3</p> <p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>at flows above median flow</p> <p>(c)</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river, and</p>	<p>(ii) the allocation amounts in Tables 8.2 and 8.3</p> <p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river, and For rivers (and their tributaries) listed in Table 1 of Schedule V no more than 50% of the portion of flow in the river above the median flow is taken at the point of abstraction, or</p> <p>(iii) For rivers (and their tributaries) listed in Table 2 of Schedule V no more than 10% of the total amount of flow in the river is taken at the point of abstraction, or</p> <p>(iv) For rivers (and their tributaries) not listed in either Table 1 or 2 of Schedule V no more than 10% of the total amount of flow in the river at the point of abstraction, and</p> <p>(d) the take and use is not from a river identified as outstanding in Schedule A1 (outstanding rivers)</p>	<p>Issue 2.5, consequential change</p>	<p>Same submissions as for P117 above</p>	<p>As per P117 above</p>	<p>Scope provided due to this being a consequential amendment to a rule to implement change to Policy P117 sought in submissions.</p>
<p>(d) the take and use is not from a river identified as outstanding in Schedule A1 (outstanding rivers)</p> <p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of take of water, including instantaneous (L/sec), daily (m³/day) and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface</p>	<p>(d) the take and use is not from a river identified as outstanding in Schedule A1 (outstanding rivers)</p> <p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of take of water, including instantaneous (L/sec), daily (m³/day) and seasonal requirements and duration and timing of peak daily take rate</p> <p>3 For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people</p> <p>4 Reduction in the rate of take from surface water and groundwater directly connected to surface</p>				

	<p>water at times of low flow and restrictions when rivers approach or fall below the minimum flows</p>	<p>4 Reduction in the rate of take from surface water and groundwater directly-connected-to-surface water direct connection (Category A) groundwater and high connection (Category B) at times of low flow and restrictions when rivers approach or fall below the minimum flows <u>or water level</u></p>	<p>Issue 2.3, paragraph 227 Issue 2.3, Paragraph 226 and 227</p>		<p>Consequential amendment due to change in terminology for classification types. Within scope of that change Minor amendment under clause 16(2).</p>
5	Effects due to local flow or water level depletion on wetlands, springs, or the downstream river reach in the same catchment management unit	5 Effects due to local flow or water level depletion on wetlands, springs, or the downstream river reach in the same catchment management unit			
6	Interference effects on existing lawful water takes	6 Interference effects on existing lawful water takes			
7	Prevention of salt water intrusion into the aquifer, or landward movement of the salt water-fresh water interface	7 Prevention of salt water intrusion into the aquifer, or landward movement of the salt water-fresh water interface			
8	For a take and use in category B groundwater (directly connected) or category B groundwater (not directly connected)	8 For a take and use in from groundwater the device of connectivity and category according to Table 4.1 category B groundwater (directly connected) or category B groundwater (not directly connected)	Issue 2.4, paragraph 354		<p>Consequential amendment due to change in terminology for classification types. Within scope of that change</p>
9	Preventing fish from entering water intakes	9 Preventing fish from entering water intakes			
10	Measuring and reporting, including the guideline in Schedule 5 (measuring takes)	10 Measuring and reporting, including the guideline in Schedule 5 (measuring takes)			
NRT	Rule K.1: Take and use of water in the Kāpiti Coast Whaitua – restricted discretionary activity The take and use of water from any river (including tributaries) or groundwater in the Kāpiti Coast Whaitua in Tables 10.2 and 10.3 is a restricted discretionary activity provided the following conditions are met	Rule K.1: Take and use of water in the Kāpiti Coast Whaitua – restricted discretionary activity The take and use of water from any river (including tributaries) or groundwater in the Kāpiti Coast Whaitua in Tables 10.2 and 10.3 is not provided for in Rules R.136, R.137, R.138, R.139, R.140, R.140A, or R.141 is a restricted discretionary activity provided the following conditions are met	Refer paragraph 422 of the Section 42A Report Water allocation for list of submitters S81/036, S127/081, S93/106, S142/014, 016, 016, 017, 018, S152/023, S316/137, S85/071 and S104/011		<p>Amendment provides this relief sought in respect of the inclusion of R.136 – R.140 in the rule. Scope is provided by the listed submissions</p> <p>R.140A has been included in the list as it is a new proposed permitted activity rule and should be treated the same as the rest. It is a consequential amendment to the inclusion of the new rule and scope is provided in that way. If the Panel does not include the new rule then it does not need to be included in this list</p> <p>R.141 is a controlled activity and should be treated in the same way as the permitted activity rules. Scope is provided by S81/036.</p>
(a)	the take and use shall not occur below the minimum flows in Table 10.1, except that this condition does not apply to:	(a) the take and use shall not occur below the minimum flows in Table 10.1, except that this condition does not apply to:			<p>Submitters sought that the whatua chapters need to provide for small water takes such as those permitted by Rules R.136 to R.140</p>
(b)	water for the health needs of people as part of a group drinking water supply or community drinking water supply or water for rootstock protection, and	(i) water for the health needs of people as part of a group drinking water supply or community drinking water supply or water for rootstock protection, and (ii) taking groundwater, and			<p>In addition, S81/036 raises concern with the workability of the Whaitua Chapters and their integration into the proposed Plan and needs reconciliation across the provisions</p>
(b)	in any catchment management unit in Tables 10.2 and 10.3, the amount of water taken and	(b) in any catchment management unit in Tables 10.2 and 10.3, the amount of water taken and			

<p>used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum allocated by resource consents at the date the consent application is lodged, or</p> <p>(ii) the allocation amounts in Tables 10.2 and 10.3</p> <p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river, and</p>	<p>used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum allocated by resource consents at the date the consent application is lodged, or</p> <p>(ii) the allocation amounts in Tables 10.2 and 10.3</p> <p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river, and For rivers (and their tributaries) listed in Table 1 of Schedule V no more than 50% of the portion of flow in the river above the median flow is taken at the point of abstraction, or</p> <p>(iii) For rivers (and their tributaries) listed in Table 2 of Schedule V no more than 10% of the total amount of flow in the river is taken at the point of abstraction, or</p> <p>(iv) For rivers (and their tributaries) not listed in either Table 1 or 2 of Schedule V no more than 10% of the total amount of flow in the river is taken at the point of abstraction, and</p> <p>(d) the take and use is not in part of a river identified as an outstanding river in Schedule A1 (outstanding rivers)</p> <p>Matters for discretion</p> <p>1 The reasonable and efficient use of water, including the criteria in Schedule Q (efficient use)</p> <p>2 The timing, amount, and rate of taking and using</p>	<p>Issue 2.5. consequential change</p> <p>Same submissions as for P117 above</p> <p>As per P117 above</p> <p>Scope provided due to this being a consequential amendment to a rule to implement change to Policy P117 sought in submissions.</p>	<p>used, in addition to all existing resource consents, does not exceed whichever is the greater of</p> <p>(i) the maximum allocated by resource consents at the date the consent application is lodged, or</p> <p>(ii) the allocation amounts in Tables 10.2 and 10.3</p> <p>except that this condition does not apply to the take and use of water at river flows above the median flow, and</p> <p>(c) at flows above median flow</p> <p>(i) the frequency of flushing flows that exceed three times the median flow of the river is not changed, and</p> <p>(ii) 50% of the river flow above the median flow remains in the river, and</p>
--	--	---	--

Schedule V	3	water including instantaneous (L/s), daily (m3/day) and seasonal requirements and duration and timing of peak daily take rate For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people	3	water including instantaneous (L/s), daily (m3/day) and seasonal requirements and duration and timing of peak daily take rate For group drinking water supplies or community drinking water supplies, the amount and rate of water taken and used for the health needs of people	Issue 2.3, paragraph 227 Issue 2.3, Paragraph 226 and 227	Consequential amendment due to change in terminology for classification types. Within scope of that change Minor amendment under clause 16(2).
	4	Reduction in the rate of take from surface water and groundwater directly connected to surface water at times of low flow and restrictions when rivers approach or fall below the minimum flow, including the guideline for stepdown allocations and flows in Schedule R (stepdown guideline)	4	Reduction in the rate of take from surface water and groundwater directly connected to surface water direct connection (Category A) groundwater at times of low flow and restrictions when rivers approach or fall below the minimum flows or water level including the guideline for stepdown allocations and flows in Schedule R (stepdown guideline)		
	5	Effects due to local flow or water level depletion on wetlands, springs or the downstream river reach in the same catchment management unit	5	Effects due to local flow or water level depletion on wetlands, springs or the downstream river reach in the same catchment management unit		
	6	Interference effects on existing lawful water takes	6	Interference effects on existing lawful water takes		
	7	Prevention of salt water intrusion into the aquifer, or landward movement of the salt water/fresh water interface	7	Prevention of salt water intrusion into the aquifer, or landward movement of the salt water/fresh water interface		
	8	For a take and use in category B groundwater (directly connected) or category B groundwater (not directly connected)	8	For a take and use from groundwater, the degree of connectivity and category according to Table 4.1 in category B groundwater (directly connected) or category B groundwater (not directly connected)	Issue 2.4, paragraph 354	Consequential amendment due to change in terminology for classification types. Within scope of that change
	9	Preventing fish from entering water intakes	9	Preventing fish from entering water intakes		
	10.	Measuring and reporting, including the guideline in Schedule S (measuring takes)	10.	Measuring and reporting, including the guideline in Schedule S (measuring takes)		
Schedule V	N/A		Not inserted due to length		Issue 2.5, paragraph 387, consequential change	Consequential amendment due to change to Policy P117. Scope provided through same submissions/reasoning as scope for that change

Appendix 2

Royal Forest and Bird Protection Society of NZ Inc v Bay of Plenty Regional Council
[2017] NZHC 3080