

**Before the Hearing Panel
At Wellington**

Under the Resource Management Act 1991 (**RMA**)

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

**Legal submissions in Reply
Hearing Stream 3 - natural form and function**

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MAY IT PLEASE THE PANEL

- 1 These legal submissions reply to the main legal matters raised by the Hearing Panel and submitters during Hearing Stream 3, as it relates to natural form and function. They do not address every legal issue addressed or question asked throughout the hearing time, but have addressed common themes or recurring issues.

- 2 These submissions should be read in conjunction with the other submissions previously filed by counsel in respect of this Hearing Stream.¹

- 3 These submissions do not address water allocation issues, as these have been deferred to a later date. Separate reply submissions will be filed on that topic.

- 4 In summary, the main legal themes or issues that arose the relevant part of Hearing Stream 3 relating to natural form and function are:
 - 4.1 Section 32 flowchart.

 - 4.2 The need to schedule Outstanding Natural Features and Landscapes in the proposed Plan.

Section 32 Flow Chart

- 5 Attached to the Hearing Stream 1 reply submissions was an Appendix that set out a flowchart of questions to ask when ascertaining whether an objective is the most appropriate. The Panel asked for a similar diagram to be provided in relation to policies. That diagram is attached as Appendix 1.

¹ Dated 7 August 2017

The need to schedule natural character areas and outstanding natural features/landscapes in the proposed Plan

- 6 There have been legal submissions on the need to identify outstanding natural features/landscapes and natural character areas in the proposed Plan:
- 6.1 WIAL seeks that provisions are amended to refer to a Schedule that does not exist and has not formed part of the proposed Plan process.
- 6.2 Rangitane O Wairarapa Inc Soc and Rangitane Tu Mai Ra Trust states that areas of natural character and outstanding natural features and landscapes have not been identified and that lack of assessment and identification does not give full effect to certain higher order planning documents.
- 7 Effectively, the submission is that these areas/features/landscapes are not identified in a schedule to the proposed Plan and they should be. The submitters consider that a schedule identifying these is required for the proposed Plan to give effect to the NZCPS and the RPS.
- 8 It is clear that apart from significant geological sites, the proposed Plan does not currently provide a schedule identifying outstanding natural features and landscapes or natural character areas. It is the Council's position that it is not required to as it has commenced the substantial task of preparing that list and work on the list is ongoing (which is what is required by the RPS).
- 9 The RMA requires that the proposed Plan to 'give effect' to the RPS. The RMA also requires that the proposed Plan 'give effect' to any NPS² and the NZCPS. Accordingly, we start by looking at what the NZCPS requires.

² Section 67(3) of the RMA

10 Policy 13 of the NZCPS states:

Policy 13 Preservation of natural character

(1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:

...

including by:

- (c) assessing the natural character of the coastal environment of the region or district, by mapping or otherwise identifying at least areas of high natural character; and
- (d) ensuring that regional policy statements, and plans, identify areas where preserving natural character requires objectives, policies and rules, and include those provisions.

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

...

including by:

- (c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

...
- (d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(Emphasis added)

11 In other words, the NZCPS requires that:

11.1 Areas of high natural character (at least) be mapped or *otherwise identified* and that Regional Plans identify areas where preserving natural character requires objectives, policies and rules and includes those.

11.2 Regional Plans map or *otherwise identify* areas where the protection of natural features and landscapes requires objectives, policies and rules and includes those.

12 Section 57 of the RMA states that section 55 applies to the NZCPS, as if it were a national policy statement. Section 55 of the RMA sets out how local authorities are to give effect to the NZCPS and directs that a local authority must give effect to the NZCPS in its documents (in this case, the RPS and proposed regional coastal plan) 'as soon as practicable' where no timeframe is provided in the NZCPS.

13 The RPS then gives effect to the NZCPS as it sets out how these areas, features and landscapes are to be identified by defining a list of criteria to apply. It is submitted that the NZCPS only identifies mapping as one way of identifying the relevant areas. That is exactly why it states '*or otherwise identifies*' because it is not limiting the identification to mapping only. There may be other ways to identify these areas, such as applying listed, consistent, criteria to determine what falls in that category.

14 Of relevance, the RPS states:

Policy 3: Protecting high natural character in the coastal environment – district and regional plans

District and regional plans shall include policies, rules and/or methods to protect high natural character in the coastal environment from inappropriate subdivision, development and/or use. Natural character should be assessed considering the following matters, with a site determined as having high natural character when the landscape is slightly modified or unmodified, the land-cover is dominated by indigenous vegetation and/or the vegetation cover is natural and there are no apparent buildings, structures or infrastructure:...

...

Policy 25: Identifying outstanding natural features and landscapes – district and regional plans

District and regional plans shall identify outstanding natural features and landscapes having determined that the natural feature or landscape is:

- (a) Exceptional or out of the ordinary; and
- (b) That its natural components dominate over the influence of human activity,

after undertaking a landscape evaluation process, taking into account the factors listed below.

Policy 26: Protecting outstanding natural features and landscape values - district and regional plans

Where outstanding natural features and landscapes have been identified in accordance with policy 25, district and regional plans shall include policies, rules and/or methods that protect outstanding natural features and landscape values from inappropriate subdivision, use or development.

15 It is important to note the different treatment of high natural character areas and outstanding natural features and landscapes in the RPS. That is:

15.1 For high natural character areas, the Regional Plan needs to include policies, rules or methods to protect those from inappropriate subdivision, development or use. (It is submitted that the proposed Plan does this via Objectives 17 and 19, Policies 25 and 26 and Method 24).

15.2 For outstanding natural features and landscapes, the Regional Plan needs to *identify* those and once that is done, policies, rules and/or methods will be included to protect these from inappropriate subdivision, use and development.

16 Section 4.1 of the RPS contains the 'lead in' paragraphs to the 'regulatory policies' (ie, the policies which include a direction to amend district or regional plans - policies 1-34) and states that:

The policies are to be implemented in accordance with methods 1, 2 or 3. The methods require that the process to amend district or regional plans to implement the policies shall 'commence' on or before the date in which a relevant council commences the review of a provision in a district or regional plan in accordance with section 79 of the Resource Management Act 1991. This recognises substantial work may be required for councils to give effect to these policies

17 Method 2 is the appropriate method for these Policies. It states:

The process to amend regional plans to implement policies 2, 3, 5, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 29 will commence on, or before, the date on which Wellington Regional Council commences the ten year review of its regional plans, or provisions in a regional plan, pursuant to section 79 of the Resource Management Act 1991.

18 In other words Method 2 simply requires that the process to implement these policies commences on or prior to the 10 year review of the regional

plan, not that the process is complete and included in the 10 year review. The process to undertake landscape evaluations and create of a list of natural character areas and outstanding natural features and landscapes was commenced prior to the commencement of the review of the regional plan and accordingly, the method is being implemented.

- 19 The key question is when you need to give effect to the NZCPS and RPS in the Regional Plan. The short answer is 'as soon as reasonably practicable' for the RPS³.
- 20 In our submission, the RPS defines what is 'reasonably practicable' in the circumstances (via Method 2). It requires the work to have started when the Regional Council commenced its 10 year review and that has been complied with. Clearly there is substantial work required to identify all outstanding natural features and landscapes in the region (which the RPS acknowledges) and time is required to fully given effect to the RPS.
- 21 In the Hearing 1 submissions (dated 20 April 2017), we addressed the caselaw on 'reasonably practicable' and noted that whether a measure is or is not reasonably practicable is one which requires a value judgment in light of all the facts. Three general propositions from case law are as follows:
- 21.1 Reasonably practicable means something narrower than physically possible or feasible.
- 21.2 What is reasonably practicable is to be judged on the basis of what was known at the relevant time.
- 21.3 To determine what is reasonably practicable it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to prevent that risk⁴.

³ See sections 55 and 65(7) of the RMA

⁴ *Slivak v Lurgi (Australia) Pty Ltd* (2001) 177 ALS 585 at [53].

22 In our submission, it is reasonable to rely on what the RPS provides (in Method 2) as a reasonably practicable timeframe.

23 In the interim, Policy 50 of the RPS provides the framework for addressing outstanding landscapes and natural features. Policy 50 clearly recognises this. The explanation to Policy 50 states:

Policy 50 provides an interim assessment framework for councils and resource consent applicants prior to the identification of outstanding *natural features* and *landscapes*, in accordance with policy 25, and the adoption of plan provisions for protection in accordance with policy 26. This policy is to be used where an outstanding natural feature or landscape has already been identified in a district or regional plan prior to policy 25 being given effect to, or where an assessment has not yet been undertaken, but such a landscape or natural feature is present. Policy 50 shall cease to have effect once policies 25 and 26 are in place in the relevant district or regional plans.

(Emphasis added)

24 Policies 35 and 36 then set out the matters that need to be considered in relation to preserving natural character and managing effects on natural character.

25 In our submission, it is open to the Panel to determine:

25.1 The RPS gives effect to the NZCPS because it sets out how these areas of natural character and outstanding natural features and landscapes are to be identified by defining the list of criteria to apply. It is submitted that the NZCPS only identifies mapping as one way of identifying the relevant areas. That is exactly why it states '*or otherwise identifies*' - because it is not limiting the identification to mapping only.

25.2 The proposed Plan gives effect to the RPS because:

25.2.1 For high natural character areas, the Regional Plan needs to include policies, rules or methods to protect those from inappropriate subdivision, development or

use. The proposed Plan does this via Objectives 17 and 19, Policies 25 and 26 and Method 24.

25.2.2 For natural character areas and outstanding natural features and landscapes, the RPS is able to specify when the Regional Plan must give effect to it. The RPS requires the work on the list to have started when the Regional Council commenced its 10 year review. That has been complied with.

25.2.3 When the list is complete, the Regional Plan will need to be amended to incorporate it and a First Schedule process will be followed. There is no ability to include a list in the proposed Plan at this time because there is not one available and it would be a fundamental change to the proposed Plan (with no scope in submissions for such a change - ie, no-one has suggested a list).

25.2.4 There is no point including provisions that refer to a Schedule that doesn't exist (as suggested by WIAL). When the list is final and in a form that can be included in the Regional Plan, the Plan Change that incorporates that list can include amendments to provisions where reference to the list is required. Now is not the time to do that reference as it has no effect and is meaningless (ie, it is difficult to meet the test of being the 'most appropriate' provision).

25.3 In the interim, the RPS provides a framework for addressing natural character areas and outstanding natural features and landscapes, which provides the guide for the proposed Plan provisions (Objective 32, Policies 48 and 49 and Method 24).

26 Finally, touching on a question by Commissioner McMahon - that is, why has it has been possible for some territorial authorities to create such lists, but not the Regional Council. Quite simply, that is not a determining factor

(and potentially not even a relevant one) in terms of the tests to be applied by the Panel to the provisions in the proposed Plan (as set out in Hearing One legal submissions). However, at a practical level, the Regional Council simply has a much larger area to cover and it has been trying to coordinate the assessments with the relevant territorial authorities, who are all at different stages of their assessments. It wants to produce the list as a complete regional list, not various lists in some 'ad hoc' or 'partial list' fashion across the region.

27 In our submission, there is no requirement to put 'on hold' the decisions relating to the proposed Plan provisions on natural character and outstanding natural features and landscapes. There is a framework in place that manages the impacts on these section 6 matters and while there is not a list of high natural character areas and outstanding natural features and landscapes in the proposed Plan, those 'areas' can be identified by applying the RPS criteria. The proposed Plan then guides decision making if an activity is affecting such an area (by way of Objectives 17, 19 and 32, Policies 25, 26, 48 and 49 and Method 24).

Date: 13 October 2017



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APPENDIX 1 - DIAGRAM - IS THE POLICY THE MOST APPROPRIATE?

