Before Greater Wellington Regional Council

Under	the Resource Management Act 1991
In the matter of	the Proposed Natural Resources Plan for the Wellington Region
And	
In the matter of	Submissions (S135) and Further Submissions (FS25) by **Wellington Water Limited**

LEGAL SUBMISSIONS FOR WELLINGTON WATER LIMITED

HEARING STREAM 3

11 September 2017

M J Slyfield
Barrister
Stout Street Chambers
Wellington

Telephone: (04) 915 9277
Facsimile: (04) 472 9029
PO Box: 117, Wellington 6140
Email: morgan.slyfield@stoutstreet.co.nz

mjs444.docx

Introduction

1. Wellington Water Limited is a submitter (S135) and further submitter (FS25) on the Proposed Natural Resources Plan (**the Proposed Plan**).

2. As has been covered previously, Wellington Water is responsible for maintaining, operating, renewing and upgrading the 3 waters networks, comprising water supply, wastewater and stormwater assets and services.

3. The submissions Wellington Water will address today are those relevant to the subject matter of Hearing Stream 3, namely water allocation and natural form and function.

4. There are two witnesses to give evidence for Wellington Water:

   (a) Robert Blakemore, who is the Chief Advisor, Service Planning at Wellington Water. Much of his evidence is factual, describing the water supply network, characteristics of demand and supply, the water efficiency programme and modelling for the future. He also offers some assessment on aspects of the Proposed Plan provisions, and to that extent his evidence is offered in an expert capacity. His statement acknowledges that he has sought and relied on input from Geoff Williams on some matters; and Mr Williams is in attendance today and able to respond to any questions arising in respect of his input.

   (b) Carolyn Wratt, a Principal Policy Planner with Stantec. Ms Wratt was not involved in the preparation of Wellington Water's submission or further submission, and has been contracted to provide independent expert planning advice.

5. There are three legal topics that I will address: the approach towards giving effect to higher order planning instruments; the scope of Wellington Water's submission; and the setting of water allocation amounts.

Giving effect to higher order planning instruments

6. There are a number of higher order planning instruments relevant to water allocation. In particular, these include the National Policy Statement for Freshwater Management 2017 (**NPS-FM**) the National Policy Statement for Urban Development Capacity 2016 (**NPS-UDC**) and the Regional Policy Statement for the Wellington Region (**RPS**).

7. The Proposed Plan is required to "give effect" to the National Policy Statements and the RPS.[1] The RPS is also required to give effect to the National Policy Statements.[2]

8. As you know, "give effect to" simply means "implement". The Supreme Court in the *King Salmon* case said:[3]

> "On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it."
>
> "The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction."

9. Further, the Supreme Court's decision directs that higher order instruments are to be taken as the expression of the Part 2 principles of the Resource Management Act 1991; and in the absence of invalidity, uncertainty or incomplete coverage in those higher order instruments, there should be no need to have recourse to Part 2. Rather, the provisions of the higher order instruments should provide the requisite guidance.

10. Relevant to this, it should be noted that the RPS was promulgated and became operative in a pre-*King Salmon* environment.[4] This timing means that the authors and shapers of the RPS did not

---

[1] Resource Management Act 1991, s 67(3).

[2] Resource Management Act 1991, s 62(3).

[3] *Environmental Defence Society v New Zealand King Salmon Company Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195 at [77] and [80].

[4] That is, an environment in which RMA practitioners were accustomed to treating policy directives to "avoid" or "protect" specific things, as something less than a bottom line.

necessarily foresee that Part 2 of the Act might be supplanted by the RPS. In particular, the RPS may not have "covered the field"[5] in respect of the 'enabling' aspects of Part 2.

11. The very recent changes to the NPS-FM invite comparison. The 2014 update of this NPS began prior to the *King Salmon* decision, but the recent 2017 update—which took effect 4 days ago—shows some signs of 'completing' the coverage of Part 2 considerations. In particular, the 2017 changes introduce new objectives, both on water quality and water quantity, "to enable communities to provide for their economic well-being, including productive economic opportunities, in sustatinably managing freshwater".[6]

12. The 2017 amendments apply, subject to a significant limitation: the NPS-FM 2014 and 2017 versions both provide for 'progressive implementation', under which Councils are to formally adopt a programme for implementation. Such programmes are, for the most part, required to achieve full implementation by the end of 2025.

13. Under its current implementation programme, GWRC expects the Whaitua Implementation Programme for the Wellington/Hutt Whaitua (being the Whaitua of greatest relevance to Wellington Water's water takes) to be completed in 2020, and consequent regional plan changes to be notified in 2021.

14. This is significant, as will be addressed in Ms Wratt's evidence, because of the degree of reliance being placed on the Whaitua Implementation Programme to refine the provisions that are presently being proposed. I comment on this further below.

15. Finally, I observe that NPS-UDC came into force *after* the Proposed Plan had been notified. Among those parts of it having immediate effect are policies that require development capacity to be serviced with development infrastructure, which includes water supply. Relevant to this, Mr Blakemore's evidence will cover the

---

[5] Incomplete coverage being one of the 3 recognised exceptions that allow for recourse to be had to Part 2. See *King Salmon* above n 3 at [88]; and subsequently confirmed in a consenting context in *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76].

[6] Objective A4 and B5. See also, the related Policies A7 and B8.

growth forecasts in the Wellington Region and what they mean for the future of the water supply network.

Scope

16. In her Statement of Evidence Ms Wratt proposes changes to the definition of "core allocation",[7] Policy P107,[8] Rule WH.R1,[9] and Rule WH.R4[10]. These are all related, in that they address how the plan recognises existing allocations, and how the plan will approach future allocations above the existing consented amounts. They are not the only provisions that are relevant to those topics, but I single them out specifically because the changes Ms Wratt proposes on these provisions differ from the specific changes that were sought in Wellington Water's original submission. Therefore it may be useful to make some observations about the scope of Wellington Water's submission.

17. First, for completeness I confirm that Wellington Water fully supports the changes that Ms Wratt has proposed.

18. Second, I submit that although Wellington Water's submission did not formulate and seek the specific changes now proposed by Ms Wratt, its submission did directly raise the issues that Ms Wratt's changes are seeking to address. Those issues are:

    (a) that the allocation provisions do not properly reflect the consented allocations that Wellington Water holds; and

    (b) that future increases should be consentable subject to appropriate evaluation.

19. Wellington Water sought specifically to change the allocations listed the Tables in Chapter 8, "to reflect the water takes already granted"; and proposed to add text beneath the Tables stating that "the effects of any applications for new consents or consent renewals should be carefully evaluated". I submit this discloses an

[7] At [59] – [61].

[8] At [67] – [70].

[9] At [155] – [157].

[10] At [165] – [182].

intent that there should be provision made for increases in the volume of take (otherwise the proposed text could simply have referred to "renewals" and omitted to mention "new consents"). Wellington Water also sought "such other amendments as may be appropriate to address the issues" its submission raised.

20. For these reasons, I submit all of the changes proposed by Ms Wratt specified above are within the scope of Wellington Water's submission. They address the issues raised by the submission, albeit in ways that Wellington Water did not expressly envisage at the time its submission was prepared.

Allocation Amounts

21. The Proposed Plan in effect promotes two very different allocation figures: on the one hand it promotes the "allocation amounts" such as those in Tables 8.2 and 8.3, which are said to be focussed on maintenenance of ecological values, and on the other hand it provides for the consented allocations that Wellington Water already holds. Yet, there is no dispute that Wellington Water's consented allocations are several times the "allocation amounts". Further, there is no new science here. Rather, GWRC has simply applied a 'default' formula for calculating allocation amounts on the basis of uniformity across the region. No specific assessment of environmental effects of the consented allocations has been undertaken.[11]

22. It is said for GWRC that Wellington Water's concerns about the setting of 'default' allocation amounts that bear no resemblance to Wellington Water's actual consents is "essentially addressed by the policy that protects existing use rights".[12]

23. As an aside, and to avoid mis-use of the terminology, Wellington Water's consents do not create an "existing use right" in a legal sense. Wellington Water's authority comes from the consents it holds, and that will remain the position when the Proposed Plan becomes operative. These are not "existing use rights".

---

[11] Statement of Primary Evidence of Mike Thompson , 7 August 2017 at [6.46].

[12] Statement of Primary Evidence of Mike Thompson, 7 August 2017 at [6.47].

24. More importantly, I submit the view expressed for GWRC that Wellington Water's concerns are addressed by the policy, is overly narrow, and, with respect, misses the concern.

25. Wellington Water's concern is not that its existing consents will be affected, but that in the longer term, the application of "allocation amounts" many times smaller than the current consented take, will affect the setting of freshwater objectives as required by the NPS-FM. In particular, setting a 'default', 'interim' threshold that bears no relationship to the actual takes, and doing so on the basis that this provides confidence that there are "appropriate ecological safe guards",[13] seems to dangerously under-state that these 'default' 'interim' thresholds are based on *no assessment whatsoever*. Mr Thompson observes:

> It may well be that the allocation amounts... are determined through the forthcoming whatiua process to be overly conservative. In the meantime, it is my opinion that setting of the default amounts provides a yardstick of hydrological alteration that is consistent with other rivers in the region.

26. A number of responses are warranted. First, given the GWRC implementation programme places the relevant Whaitua process between now and 2020, and given Wellington Water can plainly take many times the "allocation amount" in the meantime, what is the actual value of setting the "allocation amount" now, rather than leaving it for the Whaitua? It does not remotely resemble the actual amount that can be taken, and it has a lifespan of only two more years. It can hardly be considered 'effective' in terms of section 32(1)(b)(ii) of the Act.

27. Second, if Mr Thompson were right that the mere setting of the amount creates a "yardstick", then Wellington Water's concern is the Whaitua process may be influenced by that — the Whaitua may be drawn to an assessment why the level should be changed, not the more appropriate question of "what is the right level to set"?

28. Third, despite the stated intention that the Whaitua process will lead to refinement of the Plan's provisions, I submit you should be

[13] Statement of Primary Evidence of Mike Thompson, 7 August 2017 at [6.46].

cautious to rely heavily on that. It is effectively being used as a justification for interim provisions that appear to have no proper assessment foundation. The detail in part CA of the NPS-FM, and its associated Appendix 2, clearly demonstrates the level of consideration that is expected to go into the formulation of freshwater objectives; and in my submission the manner in which the 'default' allocation amounts have been set does not bear any comparison with those standards.

29. Wellington Water calls:

- Robert Blakemore, and
- Carolyn Wratt.

M J Slyfield
11 September 2017