

Summary

Hearing Stream Three: Natural Form and Function

1.0 Introduction

1. My name is Yvonne Legarth. I prepared the RMA s.42A Report on the Natural Form and Function topic for the Wellington Regional Council. I have the qualifications and experience set out in that report.
2. This summary outlines the provisions in the proposed Plan that deal with natural character, natural processes, significant geological features, significant surf breaks; and areas that have special amenity landscape values.
3. This summary outlines:
 - the approach I have taken to grouping the submissions
 - a general summary of the relevant RMA and higher order planning instruments
 - the approach in the proposed plan to managing natural character, natural processes, and outstanding natural features
 - the key issues that I have identified from the submissions and
 - recommendations that I have reconsidered after reading the evidence pre-circulated by submitters.

2.0 Background

4. The RMA section 42A Natural Form and Function report covers a number of separate but related matters. I have organised the submissions into three main groups based on the plan provisions; and then into sub-issues on matters raised in submissions.

5. Group 1 – deals with Natural Character: with submissions seeking a definition of natural character; and submissions on Objective O17; Policy P24; and Policy P251
6. Group 2 – deals with the effects of activities in the Coastal Marine Area (CMA) on natural processes: with submissions on the definition of natural processes; and on Objective O19 and Policy P26
7. Group 3 – deals with Sites of Significance and special amenity values; with submissions on:
 - Outstanding natural features and landscapes; Objective O32; Policy P48 and Policy P49 (and also implemented by Method M24)
 - Significant geological features: Objective O36; Policy P50 and Schedule J: Significant Geological Features
 - Significant surf breaks: Objective O37; Policy P51 and Schedule K: Significant Surf Breaks
 - Special amenity landscape values: Objective O38 and Method M242.

2.1 The Resource Management Act 1991 (RMA)

8. Since 1991, the RMA has required that persons exercising functions
 - under s.6(a) of the Act to recognise and provide for the preservation of the natural character of the coastal environment, rivers, lakes, wetlands and their margins from inappropriate subdivision, use and development; and
 - under s.6(b) to protect outstanding natural features and landscapes from inappropriate subdivision, use, and development; and
 - under RMA s.7 (c) to have particular regard to the maintenance and enhancement of amenity values and

¹ Related provision Policy P26 effects on natural processes

² Related provision Policy P49 use and development in the CMA adjacent to an outstanding natural feature or landscape or special amenity landscape.

- under s.7(f) the maintenance and enhancement of the quality of the environment; and
- under s.7(g) any finite characteristics of natural and physical resources.

2.2 Protection from inappropriate activities in RMA s6(a) and s6(b)

9. Consideration of what is inappropriate use and development will occur on a case by case basis when consents are required by rules in the plan. What is ‘inappropriate’ is to be assessed by reference to what is being ‘protected’. The RPS Policy 36 and RPS Policy 50 provide decision makers with direction when considering whether an activity may affect natural character or an outstanding natural feature or landscape; and particular regard is to be given to the criteria in those RPS policies to determine whether an activity is inappropriate.

2.3 Higher order planning instruments

10. In this summary I only identify the main themes from the higher order planning instruments. The relevant higher order planning documents are the NZCPS, NPS-FM and the RPS. A full analysis of the relevant provisions can be found in detail in Section 5 of my RMA section 42A report.
11. As a very short and generalised overview; the NZCPS, NPS-FM and the RPS afford a high level of protection to the natural resources that are addressed in the Natural Form and Function topic. The NZCPS provisions that deal with natural character and outstanding natural features and landscapes set in place a policy hierarchy that applies in the coastal environment.
12. The RPS Policy 35 and 36 (natural character) and RPS Policy 50 (outstanding natural features and landscapes) includes the matters to be considered when assessing natural character or outstanding natural features and landscape values; and provide decision support in the form of provisions that assist decision makers in determining whether high or outstanding values are present; and if present criteria for making decisions on resource consent applications and to determine whether an activity is ‘inappropriate’. Those two RPS policies are particularly important where

the proposed plan has not included schedules that specify areas of high or outstanding natural character; and outstanding natural features and landscapes.

13. Appendix D of my RMA section 42A report includes a table that identifies the higher order planning documents that relate to the natural form and function objectives (in response to Minute #3). These are also discussed in Section 5 of that report.

2.4 Proposed Natural Resources Plan

14. **Natural character** is dealt with in Objective O17. The plan does not specify areas with high or outstanding natural character in a schedule. The RPS is relied on for criteria that identifies and to guide decisions on consent applications in areas of high or outstanding natural character. Natural character is not a new term, and the management of natural character has historically been of interest to managers of natural resources. Case law has interpreted natural character to be “a product of nature and does not include features constructed by man³; and as including only the indigenous or original elements and processes of the environment”.
15. The long-standing case law “that natural character is a product of nature and does not include features constructed by man⁴; and includes only the indigenous or original elements and processes of the environment; and that natural character exists regardless of the extent of modification or the condition of that environment”.
16. The degree to which the character of an environment is natural varies along a continuum, from indigenous and pristine at one end to a built-up environment at the other.⁵
17. While the case law has developed in the context of the coastal environment and the NZCPS, the approach appears to me to be relevant to all of the RMA section 6(a) environments; and the same thinking about natural character from the early court cases can be applied to the natural character of wetlands, rivers, lakes and their margins.

³ Harrison vs Tasman District Council 1993

⁴ Harrison vs Tasman District Council 1993

⁵ referenced in RPS page 92

18. More recently, the debate in plans and policies has been less about what the term ‘natural character’ means and what the extent of the ‘coastal environment’ is, but has been more about the degree of natural character that might be present in an area.
19. Natural character almost always exists to some degree. Unmodified coastal environments (free from built elements) have the highest degree of natural character and therefore have the highest priority for protection and preservation.
20. **Natural processes** are dealt with in Objective O19, and the proposed plan includes a definition of Natural processes. It describes natural processes, not just physical ones.
21. As I understand it, the Court has considered what is meant by ‘natural’ as part of its consideration of natural character and the extent of the coastal environment. The Court found that ‘natural’ includes the indigenous or original elements and processes of the environment and not the man-made elements. The Court considered that *“Natural” may include things such as pasture and exotic trees and wildlife, both wild and domestic. It does not include human-made structures, roads or machinery. This means that areas where indigenous vegetation has been replaced with pasture may still have high natural character so long as built structures do not dominate the environment.”*
22. An example of the interrelationship between natural processes and how ecological relationships or processes are part of what is ‘natural’ includes migratory patterns such as fish spawning, and movements upstream and downstream as part of their life cycle. The effects on the natural processes (and ecological relationships) would be managed in the plan by ensuring the effects of structures on the flow regime and fish passage is addressed.
23. **Outstanding natural features and landscapes** are dealt with in Objective O32. A regional plan can either include criteria to be applied when assessing the significance of a receiving environment when consents are applied for; or it may specify sites and areas of significance in a schedule and/or on a map.
24. The proposed plan does not specify all outstanding natural features and landscapes in a schedule. The approach in the proposed plan relies on the criteria in the RPS

being applied when consents are required that may impact upon an area of outstanding natural features and landscapes. The proposed plan does specify significant geological sites, and significant surf breaks.

25. **Significant geological features** are dealt with in Objective O32; **significant surf breaks** are dealt with in Objective O36; and **special amenity landscapes** are dealt with in Objective O38. The proposed plan specifies significant geological features that are outstanding and surf breaks of regional significance in Schedules J and K respectively.
26. Specifying particular sites and areas as significant in a schedule of the proposed plan should be based on an assessment of the values present against appropriate criteria. In the case of geological sites, the ‘significant’ equates with ‘outstanding’. The geological sites were identified using the criteria in the RPS for an outstanding natural feature or landscape: being those that are exceptional or out of the ordinary; and where natural components dominate over the influence of human activity.
27. There are two technical reports that were prepared that deal with significant geological sites and significant surf breaks:

“Assessment of sites of Regional Geological Significance” prepared by Dr Dawe (dated June 2014) which is relevant to Schedule J Significance Geological Features in the Coastal Marine Area; and

“Regionally Significant Surf breaks in the Greater Wellington Region” prepared by eCoast Marine Consulting and Research (dated May 2015) which is relevant to Schedule K Significant Surf Breaks.

3.0 Key Issues addressed in the s42A report

28. The key issues raised in submissions on the objective and policies dealing with natural character - Objectives O17, and Policies P24 and P25 are:
 - that all of the RMA section 6(a) requirements are not included
 - lack of consistency with the NZCPS and NPS-FM

- effects of activities on the natural character of freshwater, especially flood management activities are not addressed
- timeframes should be added to implement the objective
- restrict management of natural character to ‘the beds’ of lakes and rivers and ‘significant’ wetlands
- replace ‘coastal marine area’ with ‘coastal environment’
- areas of outstanding natural character should be specified in the plan
- use of ‘avoid, without ‘remedy or mitigate’
- that Policy P25 duplicates Policy P24 (outstanding natural character).

29. The key issues raised in submissions on the objective and policies dealing with natural processes are:

- ‘Interference’ as used in Objective O19 is unclear
- use "avoid, remedy or mitigate" rather than “minimise” (similar concerns are raised in respect of Policy P26)
- to combine proposed Objective O19 (natural processes) and Objective O17 (natural character)
- add ‘where appropriate’ at the end of Objective O19
- that Policy P26 is too general to be useful.
- Objective O19 and Policy P26.

30. The key issues raised in submissions on the objectives and policies dealing with outstanding natural features and landscapes are:

- undertake an assessment of outstanding natural features and landscapes, and include provisions to manage them

- only protect identified ‘outstanding’ natural features and landscapes identified in accordance with Method M7
- amend Objective O32 to focus on rivers, lakes, wetlands and the coastal marine area (CMA)
- specify areas of outstanding natural features and landscapes in the plan and apply a policy hierarchy
- add ‘inappropriate use and development’ to Policy P49
- enable Regionally Significant Infrastructure.

31. The key issues raised in submissions on the objective and policies dealing with significant geological features are:

- that Objective O32 is onerous
- that Objective O32 should only apply to identified geological features
- add ‘inappropriate use and development’ into Objective O36
- delete ‘significant’ geological features and replace with ‘avoid, remedy or mitigate’ effects on geological features
- strengthen the policy to avoid adverse effects, rather than just significant adverse effects
- amend to manage effects using a mitigation hierarchy (including offsetting).

32. The key issues raised in submissions in the objective and policies dealing with significant surf breaks:

- delete Objective O37, Policy P51 and Schedule K
- clearly identify the relevant surf breaks and clarify how Policy P51 will be applied
- limit Objective O37 to Scheduled and identified surf breaks

- clarify the nature of potential adverse effects and measurement of these, and how the policy would be applied in practice
 - replace ‘minimise’ with ‘avoid, remedy or mitigate’, and
 - add Makara Point break to Schedule K.
33. The key issues raised in submissions on the objective and policies dealing with special amenity landscapes:
- that the location and reasons for identifying special amenity landscapes should be specified in the plan
 - to include a schedule of the special amenity landscapes and to only protect those identified areas.

4.0 Recommendations in my s42A report

34. In response to submissions I have recommended an alternative Objective O17, O19, P25, and P49.

Objective O17

35. I have recommended an alternative Objectives O17 to relocate ‘natural wetlands’ in the objective, in a manner that reflects the approach in the RMA section 6(a).

Objective O19

36. I have recommended an alternative Objective O19 because the objective as notified is problematic, using ‘minimise’ which relies on an interpretation that sits in Policy P4 in the proposed plan. The proposed and the caucused versions of Policy P4 both contain a degree of discretion to determine what is ‘reasonably practicable’. Retaining subjective judgements in an objective makes monitoring of the environmental outcomes difficult. The use of ‘minimise’ in an objective calls into question whether or not Policy P4 applies (Policy P4 only applies when ‘minimise is used in a policy in the plan).

37. The joint statement signed by the experts that attended the caucusing on Policy P4 put forward an alternative definition and an alternative Policy P4. The detail of this is set out in my Right of Reply which addresses documents prepared since submitters presented their submissions and evidence in Hearing Stream 1.

Policy P25

38. Policy P25 in the proposed plan deals with the natural character of both the CMA and freshwater bodies; and Policy P25(d) in the proposed plan deals with the relationship between functional need and natural character in a manner that is inconsistent with that in the NZCPS⁶.
39. I recommend a revised alternative Policy P25, which together with other provisions implements Objectives O17 and O19. The alternative Policy P25 adds in a sub-clause to specifically deal with natural character associated with freshwater, and amends the sub-clauses that are intended to address functional need to be more consistent with the NZCPS; and to include 'operational need'.

Policy P49(b)

40. I have recommended an alternative Policy P49(b) to refer to characteristics and qualities to align the proposed plan with the language used in the NZCPS and the RPS that describe natural features, cultural and landscape values. I am amending that recommendation to retain the reference to 'values'; alongside that 'characteristics and qualities', because 'values' is the term most commonly used in association with landscapes.

RMA section 32AA report and table

41. An evaluation of the alternative Objectives O17 and O19; and Policies P25 and P49(b) is provided in the RMA s.32AA Report included as Appendix A and s.32AA Table included as Appendix B and attached to my RMA s.42A report.

5.0 Recommendations I have reconsidered

⁶ NZCPS Objective 6 and Policy 6(c) and (d) deal with functional need; NZCPS Objective 2, and Policies 13 and 14 deal with natural character.

42. In response to the evidence of submitters, I am now recommending a revised alternative Objective O19.
43. The evidence of Ms Claire Kelly for Fertiliser Association of New Zealand⁷ suggests a simpler approach for Objective O19. I have no major concerns with the redrafted Objective O19 put forward by Ms Kelly, however if the Panel are of a mind to accept the approach, I recommend a drafting change to ensure the objective more clearly meets the outcome test and to focus on ‘natural processes’ and the reference to ‘forms’ should be deleted.
44. Drawing from Ms Kelly’s evidence, I recommend an amended alternative Objective O19 as follows: ~~To ensure that~~ Use and development does not adversely impact on the integrity and functioning of natural processes ~~and forms~~.
45. I agree with the evidence of Mr Lindsay Daysh on behalf of Kiwirail at paragraph 38, to include ‘and operational requirement’ into my alternative Policy P25(e); however I do have a concern that there may not be scope in the submission made by Centreport Properties Limited submission. The inclusion of ‘operational need’ in Policy P25 is however also suggested in the evidence of Mr David le Marquand for Powerco.
46. I recommend an amended alternative Policy P25(e) as follows:
- Amended alternative Policy P25(e)** the extent to which the activity has a functional need and operational requirement to be located in the coastal marine area that limits location and development options.
47. I recommend an alternative Policy P49(b) to refer to characteristics and qualities as well as ‘values’ to align the proposed plan with the language used in the NZCPS and the RPS that describe natural features, cultural and landscape values.
48. The NZCPS uses ‘characteristics and qualities’ when addressing natural character and refers to ‘values’ when addressing natural features and landscapes⁸ and tangata whenua values⁹. In my recommended alternative Policy P49(b) I deleted the word

⁷ Ms Kelly EIC paragraph 22

⁸ NZCPS Objective 2

⁹ NZCPS Objective 3

‘values’ from Policy P49(b); however I now consider ‘values’ should be retained alongside that ‘characteristics and qualities’, because ‘values’ is the term most commonly used in association with landscapes.

5.0 Correction

Response to Fish and Game’s submission s308/147

49. The response to Fish and Game’s submission s308/147 to amend the Objective O31 and associated policies and rules to ensure that outstanding waterbodies are identified based on a full assessment of their values has been included in the Table in error. Objective O31 is to be discussed in the RMA section 42A report in Hearing Stream 5.

6.0 Conclusion

50. In conclusion, the Panel should carefully consider the RMA section 32 test of the risk of not acting. The proposed plan deals with RMA section 6(a) and section 6(b) matters. The operative plans were assessed in the RMA section 32 reports as needing some amendments. I have recommended alternative provisions where I consider that there are provisions in the operative plan that are both necessary and missing in the proposed plan.
51. I would also like to draw the Panel’s attention to the relief sought in the evidence of Ms Kelly, Mr Daysh, and Ms Cooper and Mr Percy.
52. In response to the evidence provided by Ms Kelly and by Mr Daysh I now recommend a revised alternative Objective O19 and Policy P25(e).
53. I am concerned that the revised policy in the relief sought in Ms Cooper’s evidence only focuses on freshwater values, and this raises a question about how the relief sought in that submission will deal with the protection of the natural character in the CMA.
54. As I understand it, Mr Percy’s evidence is not seeking the withdrawal of the proposed plan on the grounds that it fails to give effect to the NZCPS and the RPS because areas of high and outstanding natural character and outstanding natural

features and landscapes have not been identified. I understand Mr Percy's position to be that a variation may be required. I observe that Method M24 envisages an approach that is very similar in practice. Once the work of identifying areas has been completed; Method M24 is to undertake a plan change that would follow the same RMA Schedule 1 process.

55. Having read Mr Percy's evidence, I conclude that the Panel should turn its mind to the RMA section 32 test that requires an assessment of the risk of not acting. Given the significance of the natural values associated with sites that are managed through Objectives O17, O19, and O32 and their associated policies, the risks of not acting and the plan being silent on natural character and outstanding natural features and landscapes could include the risk of use and development resulting in diminishing or the loss of the values that are present.
56. In my opinion not scheduling significant sites is not fatal to the provisions in the proposed plan. I have been involved in a case about the management of significant wetlands through a regional plan, and in that case the Court determined that it is appropriate to include sites that had been assessed in a schedule, and also to apply significance criteria from the RPS where the sites had not yet been assessed. This approach addressed the risk of not acting resulting in the loss of wetlands that had not been assessed at the time the regional plan was notified.
57. The proposed plan might usefully refer to the RPS provisions that include criteria for identifying high natural character and outstanding natural features and landscapes to support decisions when sites that have high, significant or outstanding values have not yet been assessed and included in a schedule in the plan.

Reconsidered recommendations

Revised recommendation

58. The alternative Objective O19 in my RMA section 42A report is: “*Natural processes, including natural elements, patterns and ecological processes continue to occur and the integrity and functioning of natural processes ~~and forms~~ are retained*”.

Amended alternative Objective O19

~~Objective O19: The interference from use and development on natural processes is minimised~~

Objective O19: Use and development does not adversely impact on the integrity and functioning of natural processes.

Amended alternative Policy P25

59. Amended alternative Policy P25(e): the extent to which the activity has a functional need and operational requirement to be located in the coastal marine area that limits location and development options.

Amended alternative Policy P49

60. **Amended alternative Policy P49:** Use and development in the coastal marine area on sites adjacent to an outstanding natural feature or landscape or special amenity landscape identified in a district plan shall be managed by:
- (a) protecting visual and biophysical linkages between the site and the outstanding natural feature or landscape, and
 - (b) avoiding adverse cumulative effects on the values, characteristics and qualities¹⁰ of an outstanding natural feature or landscape.

¹⁰ RMA section S42A: Natural form and function – Issue 10

