

## **Before the Independent Hearings Panels**

**In the matter** of the Resource Management Act 1991 (**RMA**)

**And**

**In the matter of** Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

**And**

**In the matter of** Hearing Stream 1 (General and Overarching General Matters)

---

**Legal submissions on behalf of Wellington Regional Council – legal framework and plan change tests**

**Date: 8 June 2023**

---



Solicitor on the Record  
Contact solicitor

Kerry Anderson  
Emma Manohar

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

+64 4 474 3255  
+64 4 918 3016

Level 4, 20 Customhouse Quay, Wellington 6011  
PO Box 2791, Wellington 6140  
Tel +64 4 472 6289

## **MAY IT PLEASE THE PANEL:**

### **INTRODUCTION**

- 1 These legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 1 of the hearings on Proposed Change 1 to the Regional Policy Statement (**Change 1**), scheduled to commence on 26 June 2023.
  
- 2 The purpose of these legal submissions is to set out the applicable legal framework for the two types of plan processes (freshwater planning process and the usual Schedule 1 process) and to identify and discuss a number of the legal issues arising from Change 1 relevant to this Hearing Stream (or across all Hearing Streams).
  
- 3 Change 1 is in part a freshwater planning instrument (**FPI**), using the Freshwater Planning Process (**FPP**), and in part, a standard change instrument, using the usual Schedule 1 process for changes. The differences in process and approach are outlined further below.

### **OUTLINE OF SUBMISSIONS AND EVIDENCE**

- 4 These submissions address:
  - 4.1 Change 1;
  - 4.2 an overview of the two applicable processes;
  - 4.3 the legal framework applying to Change 1; and
  - 4.4 the legal principles relating to scope of submissions on and relief that may be sought on Change 1.
  
- 5 Council has filed 2 section 42A reports – Overview Report, Kate Pascall and General Submissions Report, Sarah Jenkin.

## THE LEGAL FRAMEWORK FOR THE RPS

### Change 1 to the Regional Policy Statement

- 6 Ms Pascall addresses the purpose of Change 1, which is effectively amendments to the RPS to address the following key issues:
- 6.1 lack of urban development capacity;
  - 6.2 degradation of freshwater;
  - 6.3 loss and degradation of indigenous biodiversity; and
  - 6.4 the impacts of climate change.
- 7 In addition to these key changes, Change 1 makes minor updates to ensure ongoing implementation of the NZCPS and the Proposed Natural Resources Plan. These updates relate to natural character in the coastal environment and regionally significant infrastructure. These amendments do not relate to new resource management issues but are made to ensure consistency with national direction and in implementation of the Regional Policy Statement (**RPS**).
- 8 Change 1 was notified by the Council on 19 August 2022. 151 submissions and 31 further submissions were received.

### Statutory tests for changes

- 9 The legal framework for an RPS is set out in sections 59-62 of the Resource Management Act 1991 (**RMA**). Its purpose is to 'achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region'.

- 10 The Environment Court has given a comprehensive summary of the mandatory requirements for plan preparation in *Long Bay-Okura Great Park Society v North Shore City Council*.<sup>1</sup> Subsequent cases have updated the *Long Bay* summary, including in *Colonial Vineyard v Marlborough District Council*.<sup>2</sup> While these cases relate to district plans and district plan changes, it is submitted that the principles apply equally to changes to the RPS (with appropriate modifications).
- 11 Since these cases summarising the statutory tests, there have been various amendments to the RMA. An updated summary of the statutory tests that the Panels will need to consider is attached as **Appendix A** to these legal submissions (amended to be RPS specific rather than plan specific).
- 12 As a general summary:
- 12.1 the RPS must give effect to any national policy statement and New Zealand Coastal Policy Statement, or national planning standard,<sup>3</sup> and must also state the significant resource management issues for the region, its objectives and policies and the methods (excluding rules) to implement the policies, and other matters and must not be inconsistent with any water conservation order;<sup>4</sup>

---

<sup>1</sup> *Long Bay-Okura Great Park Society v North Shore City Council*, EnvC Auckland, 16/7/2008 A78/08 at [34].

<sup>2</sup> *Colonial Vineyard v Marlborough District Council* [2014] NZEnvC 55 at [17].

<sup>3</sup> RMA section 62(3).

<sup>4</sup> RMA, section 62(1).

12.2 Change 1:

12.2.1 should be designed in accordance with<sup>5</sup>  
GWRC's functions<sup>6</sup> and Part 2;<sup>7</sup> and

12.2.2 must also be prepared in accordance with the  
obligation (if any) to prepare an evaluation  
report under section 32,<sup>8</sup> and in accordance  
with any national policy statements, New  
Zealand Coastal Policy Statement, national  
planning standard<sup>9</sup> and any regulations;<sup>10</sup>

12.3 When preparing Change 1:

12.3.1 GWRC shall have particular regard to an  
evaluation report prepared in accordance with  
section 32;<sup>11</sup> and

12.3.2 GWRC must also:

- (a) have regard to any relevant  
management plans and strategies  
under other Acts<sup>12</sup> and to any  
relevant entry on the New Zealand  
Heritage List/Rārangi Kōrero  
required by the Heritage New  
Zealand Pouhere Taonga Act 2014,<sup>13</sup>  
and to various fisheries regulations<sup>14</sup>

---

<sup>5</sup> RMA, section 61(1)(a).

<sup>6</sup> As described in section 30 of the RMA.

<sup>7</sup> RMA, section 61(1)(b).

<sup>8</sup> RMA, section 61(1)(c).

<sup>9</sup> RMA, section 61(1)(da).

<sup>10</sup> RMA, section 61(1)(e).

<sup>11</sup> RMA, section 61(d).

<sup>12</sup> RMA, section 61(2)(a)(i).

<sup>13</sup> RMA, section 61(2)(a)(ia).

<sup>14</sup> RMA, section 61(2)(a)(iii).

to the extent that their content has a bearing on resource management issues of the region;<sup>15</sup> and the extent to which the regional policy statement needs to be consistent with plans and proposed plans of adjacent regional councils<sup>16</sup> and regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.<sup>17</sup>; and

- (b) take into account any relevant planning document recognised by an iwi authority, to the extent that its content has a bearing on resource management issues of the region.<sup>18</sup>

13 In addition, a further analysis prepared in accordance with section 32AA of the RMA is required where changes are proposed to the provisions of Change 1 following the completion of the original section 32 report.<sup>19</sup>

14 It is important to record that as Change 1 was notified on 19 August 2022, the version of the RMA that applies to the Change 1 process is that which was in place at the date of notification. That means that the amendments to the RMA which came into effect in November 2022 do not apply, given the transitional provision incorporated into the RMA at the same time. Clause 26 of Schedule 12 to the RMA states:

---

<sup>15</sup> RMA section 61(2)(a).

<sup>16</sup> RMA, section 61(2)(b).

<sup>17</sup> RMA, section 61(2)(c).

<sup>18</sup> RMA, section 61(2A)(a).

<sup>19</sup> RMA, section 32AA(1).

- (1) This clause applies to a proposed policy statement or plan, change, or variation that, immediately before the effective date,—
  - (a) has been publicly notified under clause 5 or 26(1)(b) of Schedule 1; but
  - (b) has not proceeded to the stage at which no further appeal is possible.
- ...
- (3) The proposed policy statement, plan, change, or variation, or resource consent must be determined as if the climate change amendments had not been enacted.

## **THE FRESHWATER PLANNING PROCESS**

15 In July 2020, the RMA was amended as a result of the Resource Management Amendment Act 2020, to incorporate a new planning process, being the FPP. Section 80A of the RMA sets out the FPP and the scope of its application. The most relevant parts of section 80A of the RMA for these submissions are (2) and (3):

- (2) A freshwater planning instrument means—
  - (a) a proposed...regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:
  - (b) a proposed... regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):
  - (c) a change or variation to a ... regional policy statement if the change or variation—
    - (i) is for the purpose described in paragraph (a); or
    - (ii) otherwise relates to freshwater.

- (3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—
  - (a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and
  - (b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.

...

16 The High Court in *Otago Regional Council v Royal Forest & Bird Protection Society of NZ Inc* has provided some guidance as to scope provided to the Council to utilise the FPP.<sup>20</sup>

17 Of specific relevance is the High Court's interpretation that section 80A of the RMA must be read as follows:<sup>21</sup>

[165] I have concluded that s 80A(2)(a) should be interpreted and applied as if it reads “a freshwater planning instrument means a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management, subject to s 80A(3)”.

[166] Section 80A(3) establishes a mandatory obligation for a regional council to prepare the parts of instruments that relate to freshwater through the freshwater planning process, and all other parts through the standard process in pt 1 of sch 1.

18 In terms of the section 80A tests, it is submitted that the High Court stated that for the 'giving effect to the NPS-FW' limb in section 80A of the RMA, it is necessary that the freshwater

---

<sup>20</sup> *Otago Regional Council v Royal Forest & Bird Protection Society of NZ Inc* [2022] NZHC 1777.

<sup>21</sup> *Ibid*, at [165] and [166].



planning provisions relate directly to the maintenance or enhancement of the quality or quantity of freshwater:<sup>22</sup>

The National Freshwater Policy is concerned with the quality of freshwater and the effects on the receiving environment of freshwater on a whole of catchment basis. This does not mean that any part of a regional policy statement concerned with the catchment for or receiving environment from freshwater will relate to freshwater for the purpose of s 80A. It will be only to the extent parts of the proposed regional statement regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater, that policies or objectives for the catchment or receiving environment will relate to freshwater for the purposes of s 80A.

- 19 For the second limb of 'relates to freshwater', it is not as clear, but the conclusion at paragraph 202 recognises this is a separate test and the Court has interpreted that to mean the Council must satisfy itself that freshwater planning provisions in the RPS '*relate directly to matters that will impact on the quality and quantity of freshwater*', including groundwater, lakes, rivers and wetlands (and excluding sea water):<sup>23</sup>

In accordance with s 80A(2)(b), there may potentially be other ways in which provisions in the proposed regional statement can qualify to be part of a freshwater planning instrument. For that to be so, the ORC will have to satisfy itself that those parts relate directly to matters that will impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands. The ORC will also have to satisfy itself that the parts are not concerned with sea water or are part of a proposed regional coastal plan or a change or variation to that plan

- 20 And finally, the High Court made it clear that it was not for the Court in that proceeding to decide what parts of the NPS-FW

---

<sup>22</sup> Ibid, at [200].

<sup>23</sup> Ibid, at [202].

relate to freshwater management in the manner required for section 80A(2) to be applied - that is for the Council:<sup>24</sup>

It is not for this Court, in the context of these proceedings, to decide which parts of the National Freshwater Policy relate to freshwater management in the manner required for the purposes of applying s 80(2). The ORC will however have to make that determination when considering whether any particular part of the proposed regional statement relates to freshwater through the way it gives effect to the National Freshwater Policy.

- 21 Part 4 of Schedule 1 then sets out the procedural requirements for a FPP. Although, in accordance with section 80A(6) of the RMA, selected parts of the standard Schedule 1 process continue to apply.

### **Legal principles**

- 22 As a standard Schedule 1 change, and in reliance on section 80A(6)(a) for the FPI components, clause 6(1) of Schedule 1 to the RMA applies to all submissions on Change 1 and provides:

#### **6 Making of submissions under clause 5**

- (1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

[Emphasis added]

- 23 A person may, in the prescribed form, make a submission seeking decisions 'on' Change 1. If the relief sought in the submission is not 'on' Change 1, there is no jurisdiction for relief to be granted by the Panels, as discussed further below.

---

<sup>24</sup> Ibid, at [201].

- 24 The legal principles relevant to determining whether a submission is 'on' a change, in accordance with clause 6 of Schedule 1, are well-settled.
- 25 In respect of clause 6 of Schedule 1, the High Court confirmed in *Palmerston North City Council v Motor Machinists Limited (Motor Machinists)* that for a submission to be 'on' a change, a two-limbed test must be satisfied:<sup>25</sup>
- 25.1 the submission must address the proposed change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and
- 25.2 the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.
- 26 In considering the first limb, the High Court held in *Motor Machinists* that whether the submission falls within the ambit of the change may be analysed by asking whether it raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular resource is altered by the change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the change. However, some extensions to a change are not excluded: incidental or consequential extensions are permissible if they require no substantial section 32 analysis.
- 27 In considering the second limb, the High Court in *Motor Machinists* identified the risk that the Council must guard against

---

<sup>25</sup> *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC1290 at [80]-[82].

is that the reasonable interests of others might be overridden by a 'submissional side-wind.' The concern identified was that a change could be so morphed by additional requests in submissions that people who were not affected by the change, as notified, became affected through a submission, which had not been directly notified to them.

28 *Motor Machinists* is still good law and was recently applied by the Environment Court in *Meridian Energy Ltd v Mackenzie District Council*, which concerned the District Council's scope to make a number of amendments to the decisions version provisions of Plan Change 18 to the proposed Mackenzie District Plan.<sup>26</sup>

29 In that case, the Environment Court noted the general principle that, once a territorial authority notifies a proposed plan change, it must notify a variation if it seeks to substantially change its ambit. Otherwise, any changes cannot substantially extend beyond submissions in terms of their scope.<sup>27</sup>

30 Accordingly, for both the FPI and standard Schedule 1 provisions that are not freshwater provisions, there is a potential issue of scope in terms of whether the submission is 'on' the change.

31 However, there is a difference in the scope of recommendation making for standard Schedule 1 provisions compared to the FPI provisions, in response to submissions:

31.1 For standard Schedule 1 provisions, clause 10 of Schedule 1 requires the Panel to provide recommendations on the provisions of the change and matters raised in submissions. For an amendment to be within the scope of clause 10(2) of Schedule 1, it must

---

<sup>26</sup> *Meridian Energy Ltd v Mackenzie District Council* [2022] NZEnvC 105. The *Motor Machinists* decision was also applied by the Environment Court in *Re Otago Regional Council* [2021] NZEnvC 164.

<sup>27</sup> *Ibid* at [25].

not go beyond what is 'reasonably and fairly raised' in submissions on the change.<sup>28</sup> In other words, the Panel is limited to making recommendations on the matters raised in submissions. For FPI provisions, the FHP is not limited to making recommendations in the same way. Clause 49(2) of Schedule 1 states:

(2) The freshwater hearings panel:

- (a) is not limited in making recommendations only within the scope of submissions made on the freshwater planning instrument; and
- (b) may make recommendations on any other matters relating to the freshwater planning instrument identified by the panel or any other person during the hearing

31.2 In other words, for the FPI provisions the FHP can make recommendations that go beyond the scope of submissions on those provisions, as long as the issue is raised during the hearing.

32 As set out in the section 32 analysis accompanying Change 1, approximately 66% of the provisions contained within Change 1 have been assessed as freshwater provisions. Those provisions are illustrated with the freshwater icon. Some hearing topics (hearing streams 2, 3, 5 and 6) deal only with freshwater provisions, and some deal with freshwater provisions and non-freshwater provisions (hearing streams 1, 4 and 7).

---

<sup>28</sup> *Countdown Properties (Northlands) v Dunedin DC* HC, Wellington AP 214/93 (7 March 1994) (1994) 1B ELRNZ 150 at p171, [1994] NZRMA 145. See also *Re Vivid Holdings* [1999] NZRMA 467 at [19].

33 Specific issues or concerns as to scope of the change and the scope of relief sought in submissions will be addressed in the relevant hearing streams.

**CONCLUSION**

34 Counsel for Wellington Regional Council will appear at the commencement of Hearing Stream 1 to speak to these submissions and are available to address any specific legal issues that arise in Hearing Stream 1 or other Hearing Streams.

**Date:** 8 June 2023



.....  
K M Anderson / E L Manohar / K H Rogers  
Counsel for Wellington Regional Council

## APPENDIX A – STATUTORY TESTS FOR A CHANGE TO AN RPS

### A. General requirements – RPS

1. A regional policy statement (change) should be designed **in accordance with**<sup>29</sup> the regional council's functions<sup>30</sup> and Part 2.<sup>31</sup>
2. The regional policy statement (change) must also be prepared **in accordance with** the obligation (if any) to prepare an evaluation report under section 32,<sup>32</sup> and **in accordance with** any national policy statements, New Zealand Coastal Policy Statement, national planning standard<sup>33</sup> and any regulations.<sup>34</sup>
3. When preparing its regional policy statement (change), the regional council shall **have particular regard** to an evaluation report prepared in accordance with section 32.<sup>35</sup>
4. When preparing its regional policy statement (change) the regional council must also:
  - **have regard to** any relevant management plans and strategies under other Acts<sup>36</sup> and to any relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014,<sup>37</sup> and to various fisheries regulations<sup>38</sup> to the extent that their content has a bearing on resource management issues of the region;<sup>39</sup> and the the extent to which the regional policy statement needs to consistent with plans and proposed plans of adjacent regional councils<sup>40</sup> and regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.<sup>41</sup>
  - **take into account** any relevant planning document recognised by an iwi authority, to the extent that its content has a bearing on resource management issues of the region.<sup>42</sup>

---

<sup>29</sup> RMA, section 61(1)(a).

<sup>30</sup> As described in section 30 of the RMA.

<sup>31</sup> RMA, section 61(1)(b).

<sup>32</sup> RMA, section 61(1)(c).

<sup>33</sup> RMA, section 61(1)(da).

<sup>34</sup> RMA, section 61(1)(e).

<sup>35</sup> RMA, section 61(d).

<sup>36</sup> RMA, section 61(2)(a)(i).

<sup>37</sup> RMA, section 61(2)(a)(ia).

<sup>38</sup> RMA, section 61(2)(a)(iii).

<sup>39</sup> RMA section 61(2)(a).

<sup>40</sup> RMA, section 61(2)(b).

<sup>41</sup> RMA, section 61(2)(c).

<sup>42</sup> RMA, section 61(2A)(a).

- **not have regard** to trade competition or the effects of trade competition.<sup>43</sup>
5. A regional policy statement must **give effect to** any national policy statement and New Zealand Coastal Policy Statement, or national planning standard.<sup>44</sup>
  6. The formal requirement that a regional policy statement (change) must also state the significant resource management issues for the region, its objectives and policies and the methods (excluding rules) to implement the policies, and other matters and must not be inconsistent with any water conservation order.<sup>45</sup>

B. Objectives [the section 32 test for objectives]

8. **Examine** the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act.<sup>46</sup>

C. Policies and methods [the section 32 test for policies and methods]

9. The policies are to implement the objectives;<sup>47</sup>
10. Whether the provisions (the policies and methods) are the most appropriate way to achieve the purpose of the regional policy statement change and the objectives of the RPS by:<sup>48</sup>
  - (a) identifying other reasonably practicable options for achieving the objectives;<sup>49</sup> and
  - (b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:<sup>50</sup>
    - i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:
      - economic growth that are anticipated to be provided or reduced;<sup>51</sup> and

---

<sup>43</sup> RMA, section 61(3).

<sup>44</sup> RMA section 62(3).

<sup>45</sup> RMA, section 62(1).

<sup>46</sup> RMA, sections 61(1) and 32(1)(a).

<sup>47</sup> RMA, section 62(1)(c) and (d).

<sup>48</sup> See summary of tests under section 32 of the RMA for 'provisions' in *Middle Hill Limited v Auckland Council* Decision [2022] NZEnvC 162 at [30].

<sup>49</sup> RMA, section 32(1)(b)(i).

<sup>50</sup> RMA, section 32(1)(b)(ii).

<sup>51</sup> RMA, section 32(2)(a)(i).



- employment that are anticipated to be provided or reduced;<sup>52</sup>
- ii. if practicable, quantifying the benefits and costs;<sup>53</sup> and
- iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.<sup>54</sup>

---

<sup>52</sup> RMA, section 32(2)(a)(ii).

<sup>53</sup> RMA, section 32(2)(b).

<sup>54</sup> RMA, section 32(2)(c).