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 in reply on behalf of Wellington Regional Council
Hearing Stream 1 – General and Overarching matters

Date: 7 July 2023

DLA PIPER

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

Solicitor on the Record	Kerry Anderson	kerry.anderson@dlapiper.com	+64 4 474 3255
Contact solicitor	Emma Manohar	emma.manohar@dlapiper.com	+64 4 918 3016

MAY IT PLEASE THE PANELS:

Introduction

1 These legal submissions in reply on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 1 on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**). The hearings were held on 26-30 June 2023.

2 These submissions address:

2.1 Minute 5 regarding the categorisation of provisions between the FPP and the usual Schedule 1 process.

2.2 The caselaw on the meaning of 'relates to' as a phrase, which is used in section 80A of the RMA.

3 GWRC filed 2 section 42A reports – Overview Report, Kate Pascall and General Submissions Report, Sarah Jenkin. It also filed rebuttal evidence from Ms Zöllner and Ms Jenkin. Initial legal submissions were filed on 8 June 2023 and reply legal submissions were filed on 21 June 2023.

4 These legal submissions respond to legal issues raised by submitters or the Panel during the hearing and respond to the categorisation of provisions process set out in Minute 5.

Categorisation of provisions to FPP and First schedule processes

5 This issue attracted a wide range of legal submissions across a number of submitters, who raised issues with the process followed by GWRC in notifying Change 1 and with the process suggested in the GWRC legal submissions in reply for how the issue can be addressed by the Panels.

6 The process set out in GWRC's legal submissions in reply (21 June 2023) was effectively that the Panels sit together for all Hearing Streams and hear evidence in each Hearing Stream on:

6.1 What provisions submitters are concerned with and why, and

6.2 GWRC's rationale for why those provisions are freshwater provisions (or not, as the case may be).

7 As with any other matter that is subject to submissions, the Panels will then ultimately make recommendations in their final reports on what provisions need re-categorising to First Schedule provisions, if any[1]. The Council will then need to consider the recommendations from the Panels in accordance with the provisions of clauses 10 and 52 of Schedule 1 and GWRC will ultimately decide whether it accepts the recommendations or not.

8 Since these submissions, the Panels have issued Minute 5, which sets out how the Panels intend to address this issue and the proposed approach is consistent with what GWRC proposed.

9 It is submitted that this is an appropriate approach because it fits with the legislative regime, is fair to all participants, is efficient, has the least practical issues and avoids a number of issues that would arise with alternative approaches suggested by submitters.

10 By way of example, two other approaches were suggested to the Panels:

10.1 The hearing process is adjourned, GWRC reconsiders the matter of which provisions are freshwater provisions and renotifies a new FPP post that reconsideration.

10.2 The Panels make a recommendation now to GWRC on which provisions it considers need re-categorisation and GWRC makes a decision on those recommendations and then hearings recommence.

---

[1] Counsel is not aware of any requests that First Schedule provisions should be freshwater provisions, so the focus is on freshwater provisions, which the Panels ultimately want to recommend as First Schedule provisions.

11 It is submitted that both of these approaches have significant issues. These include:

11.1 They are unlikely to resolve the categorisation issue as submitters will potentially still want to raise the issue that the provisions are categorised incorrectly even after GWRC has reconsidered the issue. Nothing in the RMA would prevent submitters making such a submission. The Panels will potentially be in the same position in many months' time, of having to decide the best process for any re-categorisation.

11.2 Both processes would take significant time and will effectively result in abandoning the balance of the hearing streams on Change 1 (which will have implications for Panel member availability). There are no Council meetings scheduled until late August 2023 and even if a report could be prepared and put to GWRC at that meeting, there will not be a decision until then at the earliest. If the first approach of then renotifying was adopted, then public notice and submissions will need to follow and as with Change 1, this means hearings could not be held until well into 2024.

11.3 It is submitted the Panels need to hear evidence on why provisions are freshwater provisions, or not, before making any recommendation on this issue. This means it is likely that there would need to be a 'mini process' for categorisation so that the Panels have enough evidence before them from GWRC and the parties as to what provisions are in what category and why, which would allow them to issue recommendations on the issue. This would create significant delay and result in the balance of the hearings being adjourned.

11.4 Both processes are inefficient. Hearings have commenced and significant time and costs have been

incurred by a number of parties already. Section 18A of the RMA requires all practicable steps to be taken to 'use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised'.

11.5 Where 'two decisions' arise (one on categorisation and one on the substance of the provisions), this creates issues as to when appeal rights run from as potentially there is a decision from GWRC that has a right of appeal, once it decides on the re-categorisation. This raises an issue of how that will work when appeals on the substance of the provisions will not be possible until much later, when decisions on the substance of the provisions are issued by GWRC.

11.6 Requests to the Minister are likely to be required to extend the timeframe specified for the FPP under clause 47 of the First Schedule to the RMA and a request under clause 10A of the First Schedule to the RMA to extend the timeframe for the First Schedule part of Change 1.

12 It is submitted that these issues do not arise with the approach proposed by the Panels and in fact, it has a number of benefits, including:

12.1 The hearing process remains on time and in accordance with current hearings schedule.

12.2 There is no need for applications to the Minister to extend timeframes to allow a re-categorisation process to occur.

12.3 All submissions, whether about categorisation or substance, are dealt with in the same way with one set of recommendations and ultimately, one set of decisions (and one set of appeal rights). There is no need for a

separate 'mini process' to determine categorisation issues.

12.4 It is unclear at this point how many other submitters may wish to raise the issue of categorisation (if any). While a number of submitters have been involved in Hearing Stream 1 and have made legal submissions on the issue, there may be other submitters who have waited until the relevant hearing stream to raise their issues with categorisation and they can do this with the process proposed by the Panels.

12.5 Rights of appeal to the Environment Court are preserved, which was a concern raised by submitters. That is:

12.5.1 If GWRC accepts the recommendation of the FHP to move a provision to First Schedule. This would make the provision a First Schedule provision and rights of appeal to the Environment Court arise under clause 14 of the First Schedule.

12.5.2 If GWRC rejects the recommendation of the FHP to move a provision to First Schedule and decides an alternative solution. This would result in rights of appeal to the Environment Court under clause 55 of the First Schedule.

13 In addition, while potential issues have been raised by submitters regarding the proposed approach, it is submitted that these can be addressed, or are not an issue at law. For example:

13.1 Uncertainty about what process applies to what hearings and what provisions. It is submitted that this is not really an issue as all parties and the Panels can proceed on the basis of the provisions as notified and parties can raise whatever issues they submitted on.

The main process differences between the two is the ability to seek leave to cross-examine in the FPP, which is not available in the First Schedule process and the issue of scope of submissions for the First Schedule process, which is not an issue for the FPP process. These are issues for the Panels rather than submitters, but can be dealt with:

13.1.1 Evidence obtained via cross-examination on a FPP provision when that provision is recommended by the Panels to be moved to First Schedule. As the Panels note at paragraph 5(f) of Minute 5, if in its deliberations, the FHP concludes that a matter in respect of which cross examination has occurred was not properly part of the FPI, then it will disregard any evidence heard during cross examination. The same rationale will apply to the Council when it ultimately makes its decisions.

13.1.2 For scope, this requires careful management by the Panels and is acknowledged in paragraph 5(e) of Minute 5. One way of addressing may be that if the FHP is recommending a provision is re-categorised to a First Schedule provision, then the First Schedule Panel will need to address scope as part of making any recommendations on the substance of the provisions. Again, GWRC will have to consider this also when making its decisions.

13.2 Issues about whether the correct Panel is making a recommendation on the correct provision (raised by Wairarapa Federated Farmers at the hearing). While not clearly articulated, counsel understood the issue to be where the FHP makes a recommendation to GWRC

that a freshwater provision is reallocated and that is accepted by GWRC, should the recommendation have been made by the First Schedule Panel? It is submitted that at the time the FHP is making its recommendation on a provision it is still part of the FPI. It doesn't stop being part of the FPI until GWRC makes a decision accepting the recommendation. Accordingly, the FHP is entitled to make a recommendation on it. In any event, if considered an issue, this could be resolved by the Panels coordinating on recommendations (ie, ensuring for the provisions in question that 'for avoidance of doubt' the First Schedule Panel also includes a recommendation on the provision and ultimately GWRC decides which recommendation to accept once it decides on whether to accept any re-categorisation recommendation). Potentially, issuing one set of recommendations from the Panels together may also address this and other issues raised.

13.3 The suggestion that renotification of the FPI would be required as a consequence of any re-categorisation of freshwater provisions as First Schedule provisions. It is submitted that this is not an issue (as set out in paragraph 13 of the Legal Submissions in Reply for GWRC (21 June 2023)) because:

13.3.1 The Change 1 process can be distinguished from the *Otago Regional Council* case because Change 1 is not an entire RPS as it was in Otago and the Panels are not in the same situation as the Court. The Court ultimately issued a declaration that there was no notification of a FPI and therefore, once the Otago Regional Council reconsidered the matter the new FPI would need to be notified. In this situation, there are clearly provisions in Change 1 that are freshwater provisions and have been categorised as

such. Therefore, a valid FPI has been notified.

13.3.2 The only request from submitters is that some of those provisions should not be freshwater ones but should instead be First Schedule provisions. No-one is suggesting none of the provisions should be freshwater ones.

13.3.3 The Court in the *Otago Regional Council* case had no issue with provisions that were notified as freshwater provisions which were not freshwater provisions continuing as First Schedule provisions without any further notification:[2]

> ...Those parts of the proposed regional policy statement that will not be part of a freshwater planning instrument have been publicly notified, and do not need to be re-notified.

13.3.4 There are no fairness issues because all potential submitters had the opportunity to submit on any of the provisions in Change 1, regardless of whether they were categorised as freshwater provisions or First Schedule provisions.

13.4 Finally, the issue raised that only Council can make the decision on what forms part of the FPI. As noted in response to a question from Chair Nightingale, it is submitted that this is not what section 80A of the RMA states. It states that the Regional Council 'must prepare' a FPI. This means the Regional Council has to decide what is a freshwater provision and what is not in order to

[2] *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777, at [230] and [231].

notify its FPI (which it did do), but that does not make its decision unchallengeable. In any event, the approach proposed by the Panels results in GWRC making the decision on what is a freshwater provision and what is not, so even if this was a valid issue, it is addressed.

14 Accordingly, for the reasons set out above, GWRC fully supports the approach proposed by the Panels in Minute 5.

The caselaw on the meaning of 'relates to'

15 In response to a question from Commissioner Wratt, counsel made reference to caselaw on what 'relates to' means on 26 June 2023 and set out below is the relevant caselaw.

16 This is relevant because one of the two tests for whether a provision (ie, part of an instrument) can be a freshwater provision under section 80A of the RMA uses this wording. The two alternative tests set out in section 80A(2)(a) and (c) of the RMA are:

> a change [to the RPS]... for the purpose of [giving effect to any national policy statement for freshwater management]: OR
>
> a change [to the RPS that] otherwise **relates to freshwater.**

17 The cases that have some relevance to the meaning of 'relates to' are:

17.1 *General Distributors v Foodstuffs Properties* [2012] NZRMA 215. This looked at section 308B of the RMA and the phrase 'does not relate to trade competition or effects of trade competition'. It stated at paragraph [19]:

> 'Relates to' means 'has a connection with'.

17.2 *Husband v Napier City Council* 1 [1979] NZLR 317. In this case, the Court was looking at whether an offence

'relates to road safety' under the Transport Act 1962. It stated at page 319:

> …there must be a clear relation between the conduct itself and road safety in the sense that the one can be or is affected by the other.

17.3 *SCA Hygiene Australasia Ltd v The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc* (2008) 5 NZELR 813. This considered the phrase 'relates to bargaining for a collective agreement' in the Employment Relations Act 2000. It stated at paragraph [36] (agreeing with a quote from another case):

> The distillation of the several pages devoted to the definition in the *Fletcher* case, I think, causes the phrase "relates" to mean "significantly referable to". The task of the Court is to examine whether there is a real relationship between the two items or event.

17.4 And at paragraph [39]:

> Where there are two matters to which the action may relate I conclude that the approaches taken in *Hancock* and in the *NZ PSA* case amount to a workable test that reflects the words of the statute. To establish whether the industrial action relates to collective bargaining, the question is whether there is a real causal relationship between the action and the bargaining.

17.5 And finally, *Mercury NZ v The Waitangi Tribunal* [2021] 2 NZLR 142, which looked at the phrase in the Waitangi Tribunal Act 1975 of 'relates to land'. The Court found at paragraph [72]:

> I do not agree that the words "relates to" mean something substantially different from "in respect of" as the Tribunal held, and as the Muriwhenua Land Tribunal said. There are various verbal formulations that could have been used:

> "relates to", "in respect of", "concerning," "over" or even just "about". All these phrases have somewhat elastic meanings that depend on the circumstances of their use to gain any more precise content. It is the circumstances of their use in these provisions in light of the other words of the sections and the purpose of the provisions as a whole that is decisive in my view.

18 In other words, the caselaw supports a liberal interpretation of 'relates to freshwater' and uses phrases like 'has a connection with', 'one can be or is affected by the other', 'a real relationship between the two', 'in respect of', 'concerning' and 'about'.

19 As mentioned at the hearing, the *Otago Regional Council v Royal Forest & Bird Protection Society of NZ Inc* [2022] NZHC 1777 case used the phrase 'directly relates to', despite section 80A of the RMA not using that wording. The only relevant caselaw we have found on the meaning of 'directly' is:

> *Foodstuffs (Auckland) Ltd v Planning Tribunal (Number One Division)* [1982] 2 NZLR 315, which related to the phrase 'directly affected' in the Town and Country Planning Act 1977 in relation to trade competition. It states at page 322:
>
> I have heard considerable argument as to the meaning of "directly affected" in the subsection. It is clear from a general examination of the provisions of the Act and the decision in *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295, that town planning is concerned not only with the amenities of the district but also the welfare of the people of the district including their economic welfare. The use of the adverb "directly" qualifies a general description of persons affected. The Shorter Oxford English Dictionary gives the following definitions of "directly":
>
> > "1. In a direct manner; in a straight line of motion; straight … 2… 3… 4. Without the intervention of a medium; immediately; by a direct process or mode… 5. Immediately (in time); straightaway..."

20 It is submitted that this really just supports a plain meaning of the word and suggests that it means there is nothing in between or intervening or put another way, that the relationship to freshwater should be clearly connected, rather than more obliquely (ie, having to go through a number of steps to show the connection).

Conclusion

21 It is submitted that:

21.1 The process proposed by the Panels in Minute 5 to address any re-categorisation of freshwater provisions to First Schedule provisions is appropriate, efficient and aligns with the legislative regime.

21.2 The caselaw on 'relates to' and 'directly' suggests that 'relates to freshwater' means there is a clear connection between the matter in question and freshwater or, one is affected by the other.

Date: 7 July 2023

. . . . . .

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