

8 February 2024

By email: dhilum.nightingale@kschambers.co.nz

Dhilum Nightingale
Chairperson of the P1S1/FHP Panels
WELLINGTON

PROCEDURAL ADVICE – PLAN CHANGE 1 TO THE REGIONAL POLICY STATEMENT FOR THE WELLINGTON REGION

1. We refer to our previous letter dated 7 February 2024 providing our advice on procedural matters relating to the Part 1, Schedule 1 (**P1S1**) Hearings Panel and Freshwater Hearings Panel, for Proposed Change 1 (**PC1**) by the Greater Wellington Regional Council (**GWRC**) to its Regional Policy Statement (**RPS**).
2. We do not repeat the matters of background set out in section 1 of our 7 February letter.
3. You have asked us to provide the Panels with advice on the extent to which the Panels are able to amend provisions to give effect to new national direction that is gazetted after PC1 is notified, namely:
 - a) Recent amendments to the National Policy Statement on Freshwater Management (**NPS-FM Update**);
 - b) The National Policy Statement on Highly Productive Land (**NPS-HPL**); and
 - c) The National Policy Statement on Indigenous Biodiversity (**NPS-IB**).
4. As addressed further below, the NPS-FM Update, NPS-IB and NPS-HPL post-date the notification of PC1 on 19 August 2022.
5. We understand that this issue has been the subject of legal submissions by several parties, including GWRC. You have sought a peer review of the views expressed in those legal submissions, and we have approached this advice accordingly. While we have focused on broad matters of principle in this advice, we have provided some high-level comments on

2582206 / 709063

the specific issues arising (as we understand them). We would be happy to provide more targeted and detailed advice on specific issues, if required.¹

6. We have seen the following legal submissions relevant to this issue. There may be other submissions germane to the matters traversed in this letter, which we have not seen, and please let us know if so:
 - a) Industry Statement by Emily Levenson for Horticulture New Zealand (**HortNZ**) dated 30 June 2023 addressing the NPS-HPL;
 - b) Legal submissions in reply on behalf of GWRC for Hearing Stream 2 dated 7 July 2023 addressing the NPS-HPL;
 - c) Legal submissions on behalf of Winstone Aggregates Ltd (**Winstone**) for Hearing Stream 5 dated 3 November 2023, and hearing presentation notes of counsel dated 22 November 2023, addressing the updated NPS-FM Update;
 - d) Legal submissions in reply on behalf of GWRC for Hearing Stream 6 dated 19 December 2023, addressing the NPS-IB;
 - e) Legal submissions in reply on behalf of GWRC for Hearing Stream 5 dated 20 December 2023, addressing the NPS-FM Update.

7. The parties' legal submissions capture several general propositions relevant to consideration of any amendments to PC1 to respond to changes in national direction:
 - a) Counsel for GWRC refer² to the requirements of sections 55 and 61(1)(da) of the RMA relating to local authority (including GWRC) recognition of NPSs generally, the former broadly requiring the following:
 - i. GWRC must amend the RPS, if a NPS so directs, without using the Schedule 1 process: section 55(2) and (2A);
 - ii. GWRC must make all other amendments that are required to give effect to any provision in a NPS by way of a Schedule 1 process: section 55(2B) and (2C);
 - iii. Amendments to give effect to a NPS need to be made "as soon as practicable", or within the time specified in the NPS (if any),³ or before the occurrence of an event specified in the NPS (if any): section 55(2D).

 - b) Counsel for GWRC note that, when considering amendments to PC1 to respond to any changes in national direction, the Panels are limited by scope, regardless of the requirement in the RMA to give effect to an NPS. This is said to be consistent

¹ This is likely to require more detailed analysis of PC1, the s 32 report, submissions, the s 42A report, relevant evidence etc.

² E.g. Legal submissions in reply for Hearing Stream 2, 7 July 2023, at [8].

³ Each NPS contains a clause or clauses dealing with timing. The NPS-HPL also contains a specific timeframe for implementing the mapping requirements.

with the High Court's decision in *Horticulture NZ v Manawatu-Wanganui Regional Council*.⁴

- c) Subject to d) below, the legal tests for scope emerge from cases such as *Palmerston North City Council v Motor Machinists Ltd*.⁵ Counsel for GWRC note that the question of whether a submission is within the scope of a plan change requires consideration of the following:⁶

- i. Whether the submission addresses the proposed change itself? That is, it must address the extent of the alteration to the *status quo* which the change entails.

In considering this 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; and

- ii. 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.

In considering this second limb, the High Court identified the risk that the Council must guard against is that the reasonable interests of others might be overridden by a 'submissional side-wind'.

- d) Counsel for GWRC draw attention to the fact that the freshwater provisions are not limited by the relief sought through submissions, as the Panel is expressly empowered to recommend changes that are out-of-scope.⁷
- e) Counsel for Winstone note that the obligation to give effect to a NPS would be limited by the scope of a plan change,⁸ citing the Environment Court's decision in *Re Otago Regional Council*.⁹

⁴ Submissions of counsel for GWRC for Hearing Stream 6, 19 December 2023, at [5]. *Horticulture NZ v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.

⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

⁶ The *Motor Machinists* tests are addressed in submissions by counsel for GWRC dated 8 June 2023 concerning the legal framework and plan change tests, at [24] onwards.

⁷ Submissions of counsel for GWRC for Hearing Stream 6, 19 December 2023, at [4].

⁸ Submissions of counsel for Winstone for Hearing Stream 5, 3 November 2023, at [7.18].

⁹ *Re Otago Regional Council* [2021] NZEnvC 164, Annexure 1, at [23].

- f) Counsel for Winstone have referred to two more recent cases – *Balmoral Developments*¹⁰ and *Southern Cross*¹¹ – submitting that these cases confirm that:¹²

... the Council, Court (and in this case the Panel) all have an obligation to consider the NPS-FM (February 2023 Update) and where there is scope ‘to give effect to it’ now as part of this current process.

- g) For clarity, we observe in passing that neither *Balmoral Developments* nor *Southern Cross* is in fact concerned specifically with the NPS-FM (the former relates to the NPS-HPL, while the latter concerns the NPS-UD). In any event, there does not appear to be any issue of contention with the broad proposition summarised above, with counsel for GWRC stating that the proposition is “generally consistent with GWRC’s legal submissions in reply for Hearing Stream 2”.¹³
- h) However, counsel for GWRC emphasise that each NPS has its own implementation and transitional arrangements, which also need to be considered.¹⁴ That submission is consistent with the Environment Court’s decision in *Balmoral Developments*.¹⁵
8. We broadly agree with the position that appears to have been reached through the respective submissions of GWRC and Winstone, namely that amendments can be made to give effect to a NPS (or any update to a NPS) post-dating notification of PC1:
- a) Where there is scope to do so;¹⁶ and
 - b) Subject to consideration of any specific implementation and transitional arrangements.

9. We address each planning instrument below in turn.

NPS-FM Update

10. Changes to the NPS-FM were gazetted on 8 December 2022. These changes introduced a pathway for quarrying activities into clause 3.22, which relates to natural inland wetlands. The relevant changes took effect on 5 January 2023.
11. We note in passing that the latest version of the NPS-FM is dated “January 2024”, following amendments to give effect to the Court of Appeal quashing clause 3.33 and Appendix 5 on

¹⁰ *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59.

¹¹ *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948.

¹² Hearing presentation notes of counsel for Winstone, 22 November 2023, at [6.4].

¹³ Submissions of counsel for GWRC for Hearing Stream 6, 19 December 2023, at [7].

¹⁴ Submissions of counsel for GWRC for Hearing Stream 6, 19 December 2023, at [7].

¹⁵ See *Balmoral Developments Outram Ltd v Dunedin City Council* [2023] NZEnvC 59, at [90].

¹⁶ I.e. where an amendment is within the scope of PC1 itself and (for the Schedule 1 provisions) within the scope of submissions.

13 December 2023, in *Muaūpoko Tribal Authority Incorporated v Minister for the Environment and Te Rūnanga o Raukawa Incorporated*.¹⁷

12. As matters stand, there appears to be a consensus between GWRC and Winstone that the Panel may (in scope terms) make amendments to provisions to address Winstone's submission. We have read, broadly agree with, and do not repeat the legal submissions by counsel for GWRC for Hearing Stream 5 dated 20 December 2023 as to:
 - a) The obligation to give effect to the NPS-FM Update (paragraphs 4 to 9); and
 - b) The question of scope (paragraphs 10 to 19).
13. We agree with counsel for GWRC that the direction as to implementation of the updated clauses of the NPS-FM relate to the regional plan, not the RPS, but that changes to the RPS may be appropriate to support the policy direction in clause 3.22. The appropriateness of those changes, or otherwise, is a matter for the Panel. We therefore agree with the following conclusions stated by counsel for GWRC:
 - 20 In summary, a change to the policy direction on the management of wetlands and rivers was clearly signalled through Change 1 and it is submitted that the relief sought by Winstone Aggregates is within what may have been anticipated in response to that Change.
 - 21 Accordingly, the question then becomes whether the Panels are satisfied that the relief sought is the most appropriate in accordance with the applicable plan change tests, which are set out in our submissions for Hearing Stream 1, dated 8 June 2023. In that respect, the section 42A report author for this topic has suggested alternative wording for the relief sought.

NPS-HPL

14. Aspects of the NPS-HPL are also at issue. The NPS-HPL was gazetted on 19 September 2022 and came into force on 17 October 2022.
15. Having reviewed the legal submissions of counsel for GWRC dated 7 July 2023 concerning the NPS-HPL, we comment as follows:
 - a) We broadly agree with the following submissions by GWRC as to the legal position:¹⁸
 - 9 While there is no doubt there is an obligation on GWRC to give effect to the NPS-HPL, this obligation does not require the changes to be made immediately and put in Change 1 and this obligation does not override the fact that there is no jurisdiction for amendments to be made to Change 1 where there is no scope to do so.

¹⁷ *Muaūpoko Tribal Authority Incorporated v Minister for the Environment and Te Rūnanga o Raukawa Incorporated* [2023] NZCA 641.

¹⁸ Legal submissions in reply for Hearing Stream 2, 7 July 2023.

10 It is submitted that it is only where amendments are within the scope of Change 1 and (for Schedule 1 provisions within Change 1) within scope of submissions on Change 1 that they can be made by the Panels, as the NPS-HPL requires a Schedule 1 process for essentially all amendments required for GWRC to give effect to it.

11 This means a further change process will be required for GWRC to give full effect to the NPS-HPL, particularly the RPS mapping. It is submitted that this is the appropriate place for the full implementation of the NPS-HPL to be addressed.

- b) In relation to paragraph 11 of the above quote concerning GWRC's mapping obligations under the NPS-HPL, we consider that the High Court's comments at [100] and [101] of the *Horticulture New Zealand* case are apposite. GWRC is required *inter alia* to undertake the mapping in collaboration with relevant territorial authorities and in consultation with tangata whenua.¹⁹
- c) We draw your attention to clause 3.1(1) in the NPS-HPL, concerning "Implementation", which provides that Part 3 sets out:

... a non-exhaustive list of things that local authorities must do to give effect to the objective and policies of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to that objective and those policies.

We highlight this clause given the emphasis placed by the High Court on the almost identical clause in the NPS-UD in *Southern Cross*. The High Court held that the equivalent clause in the NPS-UD "could not be clearer" and the fact that the "NPS-UD stipulates the subpt 6 process, and that the Council was engaged in that process, did not limit the Council's (or the Environment Court's) obligation to give effect to the objectives and policies of the NPS-UD".²⁰

- d) As counsel for GWRC note in the context of section 55,²¹ the GWRC is required to give effect to the mapping requirements of the HPL "as soon as practicable" but no later than 3 years after commencement. There are no other specified timeframes directed in the NPS-HPL for any amendments that relate to GWRC functions.
16. Consistent with GWRC's analysis²² (with which, as noted, we agree), we consider that it may be permissible to make amendments to PC1 to give effect to the NPS-HPL (other than the mapping requirements), for instance to remove any perceived inconsistencies between

¹⁹ NPS-HPL, clause 3.4(4).

²⁰ *Southern Cross*, at [86].

²¹ *Ibid*, at [8.4] and [8.5]. See clause 3.5(1) of the NPS-HPL.

²² As quoted at paragraph 15 a) above.

PC1 and the NPS-HPL. This is subject to you being satisfied as to scope²³ – and of course as to the appropriateness of those changes in terms of the applicable plan change tests.

17. We have had a high-level look at the specific changes at issue sought by HortNZ. There appear to be two changes sought in the evidence of Ms Levenson for HortNZ dated 30 June 2023, which remain in contention: the insertion of a new issue, and an amendment to the definition of “highly productive agricultural land”.

18. The GWRC’s witness, Mr Wyeth, agrees with Ms Levenson that:²⁴

... Change 1 should seek to give effect to the NPS-HPL to the extent available within the scope of Change 1 and that Chapter 3.11 (which does not form part of Change 1) does not adequately recognise the importance of protecting highly productive land for land-based primary production.

19. However, Mr Wyeth does not see any value in amending overarching resource management issue 1, as it “*would not be supported by a specific set of objectives, policies and methods to protect highly productive land until Council gives effect to the NPS-HPL in full*”.²⁵ He also does not support amending the definition of ‘Highly productive agricultural land (Class 1 and II land)’ to include LUC Class 3, as:

... this amendment would have wider implications for RPS provisions that refer to Highly productive agricultural land (Class 1 and II land) that did not form part of Change 1.

20. We would be happy to review the relevant submissions and evidence in more detail, if that would be helpful, but simply note at this stage, based on our high-level review, that:

- a) Mr Wyeth’s planning view in relation to HortNZ’s proposed amendment to issue 1 appears to relate more to the merits / appropriateness of the proposed amendment,²⁶ rather than a concern as to scope *per se*;
- b) We are not in a position to offer a view as to whether or not there is some basis for Mr Wyeth’s concern in relation to the wider implications of HortNZ’s proposed amendment to the definition, without undertaking a more detailed review;
- c) However, we note GWRC’s submission on PC1, which expressly seeks a new definition of “Highly Productive Land” to align with the NPS-HPL,²⁷ and to support other changes sought in GWRC’s submission to two policies;
- d) While certainly not definitive, GWRC’s submission – which, as noted, seeks alignment with the NPS-HPL – tends to suggest there may be some basis for HortNZ’s position that discrete amendments to PC1 to address matters of

²³ I.e. the scope of PC1 itself, and (for the Schedule 1 provisions) the scope of submissions.

²⁴ Rebuttal evidence of J Wyeth for Hearing Stream 2, 7 July 2023, at [90].

²⁵ Ibid, at [92.1].

²⁶ Given the absence of supporting objectives, policies and methods.

²⁷ GWRC submission, at page 6: https://www.gw.govt.nz/assets/Documents/2022/10/S137_Greater-Wellington-Regional-Council-GWRC.pdf

alignment (on an interim basis and pending a full Schedule 1 process to implement the NPS-HPL) could be seen as 'on' PC1 and within scope.

NPS-IB

21. The NPS-IB was gazetted on 7 July 2023. Its provisions came into force on 4 August 2023.
22. The legal submissions of counsel for GWRC for Hearing Stream 6 dated 19 December 2023 address the NPS-IB. We have read, broadly agree with, and do not repeat the following submissions by counsel for GWRC:
 - a) Paragraphs 8 to 11 concerning the obligation to give effect to the NPS-IB;
 - b) Paragraphs 12 to 21 concerning application to PC1 and NPS-IB;
 - c) Paragraphs 22 to 30 concerning scope.
23. In short, *prima facie* there appears to be fairly broad scope to implement the NPS-IB through PC1, given PC1 is a change that clearly addresses the issue of indigenous biodiversity, as traversed in some detail in the submissions of counsel for GWRC by reference to the section 32 report.
24. We would be happy to advise further on any specific issues concerning proposed amendments that arise during the hearings for Hearing Stream 6.

Yours faithfully
BROOKFIELDS



Matt Allan / Lisa Wansbrough
Partner / Special Counsel

Direct dial: +64 9 979 2128 / +64 27 530 4556
email: allan@brookfields.co.nz / wansbrough@brookfields.co.nz