

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 (Topic: General and Overarching General Matters)

**Legal submissions in reply on behalf of Wellington Regional Council
– allocation of provisions between freshwater and non-freshwater
processes**

Date: 21 June 2023



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MAY IT PLEASE THE PANEL:

- 1 These legal submissions in reply on behalf of the Wellington Regional Council (**Council**) respond to matters raised in legal submissions (and evidence) filed by a number of submitters in Hearing Stream 1 for Proposed Change 1 to the Regional Policy Statement (**Change 1**).

- 2 The issue addressed is the way in which the submitters concerns with the allocation of the provisions of Change 1 across the Freshwater Planning Instrument and the standard Schedule 1 plan change process can be addressed by the Panels. The legal framework as to what forms part of a Freshwater Planning Instrument (**FPI**), and the case law on this was set out in our primary submissions and is not repeated here. These submissions instead address the procedural issues raised.

- 3 The issue is how, if required, the relevant Panel or Panels address provisions that have been identified as a freshwater provision, if the Panel/s consider that it is not a freshwater provision. The submitters raise the issue that this impacts on appeal rights.

- 4 This issue is squarely raised by submitters (in evidence and legal submissions) involved in Hearing Stream 1 and both Panels are tasked (under the RMA and by way of their Terms of Reference) with hearing and making recommendations on submissions.

- 5 Firstly, it is submitted that the substantive issue of whether a provision has been appropriately categorised can only be considered following the hearing of submissions and evidence in each hearing stream because there is a need to understand the details of each of the provisions, what they address and how they work together, which provisions submitters are concerned with and why, and it enables the parties to be able to have their say on this issue in the relevant hearing streams when the details of provisions are being considered (rather in the Hearing Stream 1,

which is really general overview matters). However, the framework or issues arising in respect of any re-categorisation can usefully be discussed now in Hearing Stream 1, so that all parties are clear on how the Panels intend to address this issue and can plan their involvement in future Hearing Streams accordingly.

6 In summary, the Council's position is that this issue could be addressed by both Panels hearing all the submissions¹ and then simply addressing the issue as part of their assessment of submissions and ultimately, their recommendations to the Council under clause 49 and clause 9 respectively (noting the FHP recommendations are due to Council before the First Schedule recommendations). This would mean:

6.1 The FHP:

6.1.1 makes recommendations on the provisions of Change 1 that it considers to be freshwater provisions;² and

6.1.2 makes recommendations that any provisions that were notified as freshwater provisions, but it considers are not freshwater provisions, be addressed by the P1S1 Panel.³

¹ Noting that this would require a change to the current procedural arrangements, where the P1S1 Panel was only scheduled to hear the submissions on HS1, HS4 and HS7. This is not entirely necessary as the P1S1 Panel can make recommendations with 2 members, but it caters for a scenario where one of those members is unwell.

² As the Council has undertaken that initial categorisation exercise, and identified those provisions it considers to be freshwater provisions in accordance with section 80A(2) and (3) of the RMA, re-notification of those provisions is not required, which is a contrast to the process followed by Otago Regional Council where that provision by provision analysis and identification was not initially undertaken as the whole RPS was notified as an FPI.

³ Consistent with the Court's decision in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777, those parts of Change 1 that were notified as part of an FPI but are no longer considered to be a FPI do not need to be re-notified and can continue to be progressed through the standard Schedule 1 process.

- 6.2 The P1S1 Panel makes recommendations on the provisions of Change 1 that are non-freshwater provisions (regardless of how they were categorised at the time of notification). That is, because they were either notified as such or the FHP recommends they are First Schedule provisions.
- 7 This will require coordination between the Panels. This type of integration and coordination was a driver for the Council undertaking the dual Panel and hearing approach for Change 1.
- 8 The Council will then need to consider the recommendations from the Panels in accordance with the provisions of clause 10 and clause 52 of Schedule 1 and it will ultimately decide whether it accepts the recommendations.
- 9 Taking the scenario where the FHP has recommended that 'Provision X' is a First Schedule provision and then the First Schedule Panel recommends (say) changes to that provision, then the Council has two options:
- 9.1 It accepts the recommendation. 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.
- 9.2 It rejects the recommendation and decides an alternative solution. This would result in rights of appeal to the Environment Court under clause 55 of the First Schedule.
- 10 It is submitted that as this categorisation issue is a matter raised in submissions, there must be a mechanism available to the Council and the Panels to address the issue. It is submitted that the approach above is the most efficient and effective approach to proceed with the hearing of Change 1 in an integrated manner.

- 11 While it is acknowledged, as set out in our opening submissions, and raised in legal submissions filed by other parties, that the High Court in the *Otago Regional Council* case made it clear that it was not for the Court in that proceeding to decide what parts of the NPS-FW relate to freshwater management in the manner required for section 80A(2) of the RMA to be applied (and therefore which parts of the regional policy statement were freshwater provisions),⁴ that was in the context of a declaration proceeding.
- 12 The High Court in that declaration proceeding was considering the question of whether there was an error of law in the Otago Regional Council deciding that the whole of its proposed regional policy statement was a FPI. The Panel can make recommendations as to the categorisation on the basis of the submissions received, and the Council can make a decision to accept or reject those recommendations as set out above. It is submitted that this is consistent with the High Court's position.
- 13 The issue of renotification of freshwater planning provisions has been raised, if a recommendation for recategorisation occurs (for example, see paragraphs 5.6-5.9 of the legal submissions on behalf of Wellington International Airport). It is submitted that:
- 13.1 The substance of the proposed provisions are clear and have been from the date of notification.
- 13.2 Whether the provision was a freshwater one or a First Schedule provision made no difference to the rights of the public to make submissions on the provisions.

⁴ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777, at [201].

- 13.3 The Panels hearing those submissions will need to be mindful of the differences between the two processes (most notably the discretion to allow cross-examination in relation to freshwater provisions and the fact that scope of submissions does not limit the FHP's recommendations for freshwater provisions). These matters will need to be addressed in any recommendations by the Panels (eg, if a freshwater provision is recommended for recategorisation to a First Schedule provision, then the First Schedule Panel could 'put to one side' any evidence arising from cross-examination on that provision and ensure that any changes recommended are within scope of submissions).
- 13.4 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. That is, 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. The only request from submitters is that some of those provisions should not be freshwater ones, but should instead be First Schedule provisions.
- 13.5 In any event, 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.⁵

Date: 21 June 2023

A handwritten signature in blue ink, consisting of a large, stylized initial 'R' followed by several horizontal strokes.

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

⁵ Ibid, at [230].