BEFORE THE INDEPENDENT HEARING PANEL APPOINTED TO HEAR AND MAKE RECOMMENDATIONS ON SUBMISSIONS AND FURTHER SUBMISSIONS ON PROPOSED CHANGE 1 TO THE REGIONAL POLICY STATEMENT FOR THE WELLINGTON REGION

UNDER	Schedule 1 of the Resource Management Act 1991 (The Act)
IN THE MATTER OF	Proposed Change 1 to Greater Wellington Regional Council's Regional Policy Statement (PC1)
BETWEEN	**Greater Wellington Regional Council**
AND	**Dr Sarah Kerkin** Submitter 96 to PC1

HEARING STATEMENT OF SARAH KERKIN

26 JUNE 2023

Tēnā koutou, tēnā koutou, tēnā koutou kātoa
Ko Sarah Kerkin toku ingoa
Ka nui te mihi ki a koutou kua huihui nei

Thank you for allowing me to speak with you today

The quality of regulation is judged by how it works in the real world for real people

1. I am a career public servant with 24 years in government service. I have a doctorate in applying systems thinking in public policy. I have served for the last seven years on the Attorney-General's Legislation Design and Advisory Committee, which focuses on the quality of regulatory design and drafting. This expertise informs my submission to you.

2. In my submissions I will:
    a. Introduce my family's relationship with our land and our experience with regulation of the Mangaroa Peatland, which is why I am here today.
    b. Highlight some key issues with the scope and application of the RPS PC1 and its definitions.
    c. Outline some proposals for you to consider, which expand on the points made in my written submission. These proposals would go a long way towards resolving the concerns of many of us living and working on the Peatland.

3. The Mangaroa Peatland is an area of some 360 ha in Whitemans Valley. It was once a large swamp, although geological activity has tilted and drained the valley to the point that it no longer holds water. The Peatland has been farmed and progressively drained since the 1850s. The entire area is now privately owned. There are working farms across the centre of the peatland, with lifestyle blocks around its edge. The area has low intensity housing and lots of trees.

We own four hectares on the Mangaroa Peatland – it was to be our slice of rural paradise

4. My husband and I bought the land with the intention of planting trees, allowing our daughter to run free-range chickens, and building our multi-generational forever home. It would be our retirement haven, a base for our children to come back to when they grow up, and a place where we could care for my elderly parents.

5. Three years down the track, we have the land and have started planting the trees. Everything else has been a nightmare.

6. Some officials within Greater Wellington consider that the Peatland is special and should be protected from any development and use. Those officials and at least one councillor wanted to block the farm drains, flood the peatland and open it to the community as a park, despite its long history of use for farming and families.

Greater Wellington has weaponised regulatory and legal procedure against us and other Peatland owners

7. We have copies of their internal correspondence where officials discuss their tactics: if they can't regulate the land as a wetland, they'll regulate it as an SNA (significant natural area). If that doesn't work, they'll use climate change.

8. On their first attempt, Greater Wellington held up development of our consented lifestyle subdivision by two years. They took the developer, the territorial authority, and 7 landowners to court, alleging that the subdivision was on a natural wetland and should never have been consented. They wanted our (bona fide) titles to be retrospectively changed and enforcement orders made requiring the wetland to be restored to some unspecified standard.

9. We won spectacularly in the Environment Court. The Court found the land wasn't natural wetland. It probably hadn't been so for the better part of a century. The Court also said the enforcement orders Greater Wellington wanted would have been draconian, even if the land had been wetland.

10. While we were still in court, Greater Wellington told the Upper Hutt City Council that the Mangaroa Peatland should be designated as a Significant Natural Area (SNA) because of its character as a peatland, not because the peat supports any special ecosystems, or because there is anything special on top of the land. The proposed Natural Resources Plan's (pNRP) prescriptive rules for SNAs mean that having an SNA on or near your land makes doing even basic land management is almost impossible and prohibitively expensive once you factor in the administrative red-tape costs.

11. While we were still in court, Greater Wellington officials were telling the whaitua looking at water resources in the region that the Peatland had "significant values for climate change as well as biodiversity" and that it had around $600m carbon storage benefits. It should ideally be restored so it could start to function and absorb carbon again, although that would involve restoring the water table as much as possible because peatland needs the water level to be near the surface. I have been advised that the draft economic analysis was completed by an economist who does not specialise in environmental economics. Council officials have since told us they don't plan on flooding the Peatland, and it's really hard to know who to believe.

12. And now, here we are. Greater Wellington has dropped protecting peatland into the definition of nature-based solutions in the RPS PC1. From our experience with the wetland rules, we predict that the review of the pNRP will translate nature-based solutions for peat into prescriptive rules that will make living and working on the Peatland difficult, if not impossible.

13. I want to highlight three points today from my submission. They are:
    a. The hierarchy of planning instruments under the RMA matters
    b. The definition of "nature-based solutions" and examples distorts the concept. Together with Policy CC.12, it is likely to create an unreasonable regulatory burden
    c. The thresholds for key concepts like "protect", "restoration", and "buffer zones" are not clear and create a risk of law-making by fiat (officers making up the law as they go).

First - The hierarchy of policy and planning instruments matters

14. The RMA was designed to promote sustainable development by creating an overarching framework for resource management. The principles and purposes in the Act are implemented through various planning instruments starting from national policy instruments through to local instruments. They are intended to get more and more specific as they descend from the national to the local level.

15. The goal of this cascade of instruments is vertical consistency in the rules. Within that framework, there is room for some regional variation as regions and districts develop more specific rules that address their communities' interests and concerns within a democratic framework. But there is always a degree of vertical alignment.

16. The regional policy statement is restricted to matters within part 2 and s 30 of the RMA. Generally, they set directions for the region, within the national framework set by the RMA and any national policy that has been set.

17. Here, Greater Wellington and the s 42A reports seem to be arguing that:
    a. The RPS has the power to modify a national statement made under Part 5 subpart 1 of the RMA.
    b. Greater Wellington should regulate for the region a matter that needs to be regulated on a national basis.

18. Neither of these arguments make sense.

19. Greater Wellington's proposed changes to the NPS-UD disrupt the vertical alignment at the heart of the RMA's planning system. They seem to ignore Greater Wellington's obligation under s 30(ba) - to ensure there is sufficient development capacity in relation to housing and business land to meet the region's expected demand. If Greater Wellington disagrees with NPS-UD, there are better ways to discuss that with the government.

20. The approach to climate change seems premature, particularly given that central government appears to be developing regulation, slowly to be sure.

21. From a regulatory perspective, Greater Wellington's approach is undesirable, and pausing now is not "kicking the can down the road". Regional approaches to climate change will likely result in a patchwork of inconsistent requirements that make the law unclear and difficult to comply with for businesses and residents. They could create a race to the bottom: businesses will move to the places with the easiest regulatory requirements, and councils have a strong financial incentive to increase their rating base. An exodus of businesses and jobs from the region won't please the region's mayors or MPs and they will be quick to point the finger.

22. Burdensome regulation that people don't agree with will likely result in Greater Wellington relying overly on enforcement to compel compliance. That's expensive and damages relationships with the community. Not a great place for a regulator to be in.

23. And the major question from a regulatory perspective is whether the rules will really make a difference? A regional approach to climate change won't have any substantive impact on its own. It's just virtue-signalling. A consistent national approach is needed. And the rules will probably need to be rewritten once government comes out with its rules. If councillors want a successful initiative to sell to ratepayers, this just isn't it.

I recommend the Panel narrow the scope of RPS PC1

24. The provisions relating to NPS-UD need to be made consistent with it. I support the suggestions made by Upper Hutt City Council in this regard. The climate change provisions need to be deferred until the government has issued national-level policy.

Second – the definition of nature-based solutions and the examples given distort the concept. Taken together with Policy CC.12, they are likely to create an unreasonable regulatory burden

25. Given the RPS's location in the system of environmental regulation, I'm very concerned about what will come next for rules governing the Peatland, particularly because peatland is an example in the definition of "nature-based solutions".

26. The definition appears to misunderstand the basic features of nature-based solutions for climate mitigation and adaptation, as they are accepted internationally and by the Ministry for the Environment. I understand nature-based solutions to be deliberate solutions that are intentionally designed to work with nature to at least protect, but more often to enhance and even create a natural feature to achieve positive outcomes for climate adaptation or mitigation. This might be, for instance, planting forest to stabilise hilly ground at risk of erosion or restoring wetlands around rivers to help manage flooding.

27. The methods and vague wording in the RPS widen the concept of nature-based solutions to extend to simply protecting what we already have, such as "protecting peatland to retain carbon stores". This conceptual confusion will create unclear conditions for when an activity will have effects on a nature-based solution, which will create uncertainty in the law. That's an undesirable outcome from a regulatory perspective.

28. Coupled with problematic drafting in Policy CC.12 it's got far-reaching and likely unintended consequences. Policy CC.12 conflates accounting for effects of an activity on climate change and biodiversity protections with encouraging non-engineered solutions to achieve climate goals. It muddles these into a prescription for restricting any activities that might potentially have adverse effects on climate change mitigation or adaptation. It effectively distorts the precautionary approach into requiring people to prove a negative.

29. This approach places Greater Wellington and the district councils in a position with wide policy discretions to decide what activities are a nature-based solution. That opens the door to planning, consenting and enforcement officers making up the rules as they go, which compounds the uncertainty for people, and creates a risk of arbitrariness and unfairness, and unlawful decision-making.

30. This approach also burdens district councils and people applying for resource consents with proving how their activities will avoid adverse effects on those functions without the necessary support. That's effectively a recipe for no development, rather than sustainable development.

31. The use of a definition to distort the areas protected by a concept is something with which we have lived experience. And it didn't go well.

32. Greater Wellington used a definition to make all wetlands in the Wellington region "significant", because of their comparative scarcity. That triggered a higher level of protections in the proposed Natural Resources Plan, including a prohibition on using machinery in wetlands. That makes sense in wetlands with soft grounds, water and precious plants. It didn't make any sense for our 2 ha paddock that is firm underfoot and grows waist-high grass in summer. That created a fire risk every summer that we weren't allowed to mow it while Greater Wellington thought it was a wetland.

I recommend the Panel reframe the definition and remove the examples – and reconsider Policy CC.12

33. I want to take the definition of nature-based solutions and Policy CC.12 together, because they work in tandem to prescribe a feature for protection (and stopping

development), rather than promoting the use of nature in developments. First, I suggest that the definition needs to be amended:

a. To reflect that nature-based solutions are human solutions that use and work with nature and are distinct from the ecosystem services provided by nature, and distinct from the adaptation needs of species themselves.

b. The current examples in the definition should be removed and nature-based solutions should be determined on a case-by-case basis as new activities. The use of examples risks pre-determining or restricting officials' thinking come implementation.

34. If the Panel keeps examples, then peatland as a carbon store should be removed. It is not a nature-based solution in the true sense of the term: it is contrary to the intent of MfE's Nature-based Solution policy to create more-nature-based solutions, as these peatlands already exist. The inclusion of the peatland example leaves my community concerned about the prescriptive rules that will follow, and what they will mean for living and working on the peatland.

35. I suggest that the Panel consider making the definition prospective in application only. The current definition is so broad that existing activities – and existing states of being (e.g. the Peatland) – could be reframed as nature-based solutions at the whim of a consenting, planning or enforcement officer. That would create significant uncertainty for people seeking consents or even to do things on their land that don't currently require consents. The definition and Policy CC.12 taken together seem to require that nature-based solutions be identified already, which may give PC1 retrospective effect. Ideally that ambiguity would be removed, as retrospective law is undesirable and potentially outside the power of an RPS.

36. I also suggest that Policy CC.12 needs to be fundamentally reframed. I appreciate that Hearing stream 3 is to come, but Policy CC.12 is inextricably bound up with the definition of nature-based solutions, so I address it here.

37. Policy CC.12 needs to separate out the consideration of adverse effects from nature-based solutions. Consideration of adverse effects should be confined to resource consent applications. The rest of Policy CC.12 could be reframed as an enabling provision: encouraging or promoting nature-based solutions for resource consents and plans. An enabling framework would use more flexible regulation that tapped into people's incentives to comply, rather than relying on command and control-based prescription and enforcement. This would provide both a stick and a carrot, and it

would give everyone time to practise working with nature-based solutions in a quasi-regulatory environment.

38. I also suggest that the Panel add a method directing Greater Wellington to develop guidance on nature-based solutions through consultation with the community. If Greater Wellington wants to develop climate change-based methods or rules relating to the Mangaroa Peatland, I suggest that they create an enabling framework co-designed with the people who live and work on the Peatland. The Mangaroa Peatland Focus Group's steering committee would be a good first point of contact to enable this.

39. The broad application of nature-based solutions policy is going to have a significant implementation cost for district councils and people affected by and using the RMA. I suggest that the Panel add a method directing Greater Wellington to narrow the information asymmetries between individuals and councils, bearing in mind that many resource and building consents are sought by private individuals with limited means at their disposal.

40. Most ordinary people cannot afford to commission expert reports from ecologists, hydrologists, and other specialists. The cost of expert reports alone may guarantee that resource consents for activities (including environmentally friendly activities) are not sought. Requiring these reports for land management activities sends a clear signal that Greater Wellington does not trust people to manage their land responsibly – or that it does not want land management to be undertaken.

41. The added time Policy CC.12 may impose on a consent application should also be factored in, given that building consents in some districts already take nine months.

Finally - Unclear thresholds in critical definitions

42. Definitions like "protect", "restoration" and "buffer zones" create important thresholds for regulatory action. They are very important for day to day living on the land by those affected.

43. The Environment Court considered that open-ended definitions in the pNRP opened the prospect of rule by fiat by Greater Wellington officers, who would have the power to

both decide what the law meant and enforce that in a particular context, without any real accountability. Given the Court identified this risk, it seems prudent to address it here and now.

44. The rule of law requires that law be accessible and predictable. That means the law must be able to be easily discovered and understood, and applied predictably and consistently. The concepts of "protect", "restoration" and "buffer zone" are critical to understanding how communities use their land under the RMA system, yet the proposed definitions don't meet that basic requirement.

45. I'm not a scientist, so I defer to those more qualified on the content of the definitions. Where the content is based on scientific understandings, the science must be clear and contestable, and published. We have lived experience of Greater Wellington's taking enforcement action based on scientific opinions that were found not to be credible and to have misapplied the law. We really don't want anyone else to go through what we had to. The costs are too significant.

46. As a member of the Mangaroa Peatland Focus Group's steering committee, I can say that we would welcome the opportunity to work constructively with Greater Wellington on policy development and drafting.

Whakawhetai koutou mo te whakarongo. Thank you for listening to my submission

47. Given my role, I am more used to sitting at an officials table than in this chair. But I wanted to you to hear firsthand a perspective from the Peatland. I believe you will be hearing from others from our focus group throughout this process. We're thinking about what this is going to look like on the ground for us – your challenge is to do that too.

48. I am happy to answer any questions you may have for me.