

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 5 (Freshwater and Te Mana o te Wai)

**Legal submissions in reply on behalf of Wellington Regional Council
– Hearing Stream 5**

Date: 20 December 2023



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MAY IT PLEASE THE PANELS:

Introduction

- 1 These legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of responding to Minute 18 as part of GWRC's reply for Hearing Stream 5 (Freshwater and Te Mana o te Wai) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**).

- 2 These submissions address the single legal issue arising in response to that Minute. That is, the scope of Change 1 and the ability to make amendments in respect of quarrying activities, in response to the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) clause 3.22 changes. Minute 18 states:

Minute 18, 29
November 2023.

n. Are the NPS-FM 'natural inland wetland' and 'rivers' consenting pathways in clauses 3.22 and 3.24 of the NPS-FM given appropriate effect to in Policies 18 and 40? Should the pathways be recognised in a consistent way, for instance functional need and the effects management hierarchy is recognised for some activities, but others refer to 'to the extent practicable'. Mr Slyfield, Counsel for Wellington Water and others presenting at the hearing talked about the 'absolute' language in provisions such as Policy 18(c) which do not reflect the nuances in the NPS-FM.

Can you please review the HS5 provisions and recommend any amendments you consider are needed to give appropriate effect to the NPS-FM. Please consider, among other things, the comments in para 4.2 of Ms Tancock's hearing presentation notes on this issue and Mr Slyfield's submissions (from para 17).

o. Related to the question above, can Counsel for the Council please advise whether the recognition Winstone Aggregates seek for quarrying activities is

within the scope of Proposed Change 1 and whether we are required or permitted to grant the relief sought on the basis of caselaw including *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 and *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC referred to in Ms Tancock's hearing presentation notes.

- 3 We note that after Minute 18 was released, but prior to these legal submissions being filed, GWRC has filed legal submissions in respect of Hearing Stream 6 which set out a more fulsome analysis in respect of the requirements around a change in national direction after Change 1 was notified. That material is not repeated here, other than to reiterate that any amendments that the Panels can make to give effect to the NPS-FM changes are still limited by scope constraints (as relevant).

19 December 2023.

Obligation to give effect to the NPS-FM

- 4 Change 1 was notified on 19 August 2022. The changes to clause 3.22 of the NPS-FM relevant to Minute 18 were gazetted on 8 December 2022 and came into force on 5 January 2023.

- 5 Clause 3.22(1) states:

Every regional council must include the following policy (or words to the same effect) in its regional plan:

- 6 The amendments added activities for new purposes to the list of activities with consent pathways under the mandatory policy specified in clause 3.22 of the NPS-FM. As relevant to Minute 18, that included insertion of the new clause (d):

The loss of extent of natural inland wetlands is avoided, their values are

protected, and their restoration is promoted, except where...

(d) the regional council is satisfied that:

(i) the activity is necessary for the purpose of quarrying activities; and

(ii) the extraction of the aggregate will provide significant national or regional benefits; and

(iii) there is a functional need for the activity to be done in that location; and

(iv) the effects of the activity will be managed through applying the effects management hierarchy; or

- 7 The obligations on GWRC in relation the NPS-FM clause 3.22 are set out clause 1.7(1) of the NPS-FM. Clause 1.7(1) and section 55(2) and (2A) require GWRC to make amendments to its regional plan without using a Schedule 1 process.
- 8 The Natural Resources Plan (**NRP**) contains Policy P110 which along with policies P31, P36, P38 and P48 incorporates the direction contained in clause 3.22 prior to the January 2023 amendments (along with the clause 3.24 direction). It is acknowledged that these provisions, or others, will need to be amended in light of the changes to clause 3.22 of the NPS-FM and those changes have not yet occurred.
- 9 Accordingly, the direction as to implementation of the updated clauses of the NPS-FM are in respect of changes to the regional plan and not the regional policy statement. It is however acknowledged by GWRC that

changes to the RPS may be appropriate to support the policy direction in clause 3.22.

The question of scope

10 It is therefore submitted that while the existence of the new paragraph (d) in the clause 3.22 policy may assist Winstone Aggregates in its policy arguments for why the changes it has sought through its submission should be accepted by the Panels, changes to the RPS are not *required* by clause 3.22 of the NPS-FM, but can be made if the Panels consider it necessary to give effect to this part of the NPS-FM and if there is scope to do so.

11 It is submitted that what is relevant to the scope of Change 1 is what is and what was not addressed through Change 1. Once scope is determined, there is still the policy question of whether the relief should be granted and that is determined by applying the plan change tests. At that point, when the plan change tests are applied, the changes to clause 3.22 will become relevant.

12 Our legal submissions on Hearing Stream 1 (dated 8 June 2023) set out the legal tests for scope. Generally, when considering whether a submission is within scope of the plan change requires consideration of:

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

12.1 whether the relief addresses the proposed change itself? That is, it must address the extent of the alteration to the status quo which the change entails; and

12.2 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.

- 13 In summary, Winstone Aggregates is seeking amendments to Policy 18 and Policy 40 of the RPS to add new clauses to provide specific exemptions for some activities. We note here that given policies 18 and 40 are freshwater provisions, we have not assessed whether the relief now being sought by Winstone Aggregates is within scope of its submission, as the Freshwater Hearing Panel is not limited to making recommendations within scope of submissions received. The scope limitation is in respect of the scope of Change 1 itself and that the matter is raised during the course of the hearing process.

RMA, Schedule 1, clause 49(2).

- 14 The matter of the degradation freshwater is clearly within the ambit of Change 1. It is listed as one of the four issues that are the focus of Change 1. Under the heading of 'Degradation of fresh water' the section 32 report records the following:

Section 32 report, page 15, at [46].

66. Historic decision-making has prioritised the use of water for short term economic needs over the health and long term well-being of the waterbodies. As a result, the use of water for economic benefit and our quality of life has come at the expense of protecting the mauri of the wai and led to degraded quality, depleted quantity and highly modified aquatic ecosystems.²⁰

67. Over time, changes in land use, in both urban and rural settings has led to degradation of our waterbodies. This degradation includes declining water quality, the loss of habitat and the degradation of ecosystem health. The state of our waterbodies, and the shift to restore them is outlined in Whaitua Implementation Programmes. The causes of this degradation are complex and many, as are the solutions. In very simple terms there has been inadequate control of land use activities and change and on discharge of contaminants. This is highlighted in the urban sector where stormwater quality controls have been inadequate, wastewater overflows are

common, as is stream loss to urban subdivision. These issues are highlighted, because the focus of this RPS change is on the interface between urban development and fresh water.

68. In order to achieve our objectives for Te Mana o te Wai as directed by the NPS-FM, a much more directive regulatory approach along with identifying of a range of non-regulatory methods will be required in the RPS (and subsequent RMA plans). In particular, the updated RPS will need to:

- Reflect Te Mahere Wai and the Whaitua Implementation Programmes (WIPs)
- Provide greater clarity on what is needed to protect human health and how this might be prioritised in relation to other uses
- Clarify where activities/land uses will need to be constrained to achieve Te Mana o te Wai (regulatory) as well as identifying opportunities to do things differently.

15 Both Policy 18 and Policy 40 are amended through Change 1. Significant amendments to Policy 18 are proposed through Change 1 which include, as per the notified version, the following additions to the policy:

(c) there is no further loss of extent of natural inland wetlands and coastal wetlands, their values are protected, and their restoration is promoted;

(e) avoiding the loss of river extent and values;

16 Significant amendments were also made to Policy 40 by Change 1.

17 Accordingly, policy amendments to address degradation of freshwater has clearly put the issue of how far the limitations or protection should go 'on the table' as part of Change 1 (ie, it is altering the status quo).

18 It is submitted that as the Winstone Aggregates relief is seeking to introduce a carve out into the new avoidance policy direction in Policy 18 and in Policy 40, that was introduced through Change 1, that is within scope of what can be granted in this Change 1 process. That is, the policy direction contained within policies 18 and 40 has been changed through Change 1 and the relief sought by Winstone Aggregates is seeking to limit that change in respect of a particular set of activities. In our submission, the first limb of the *Motor Machinists* scope test is met.

19 As to 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, we do not consider this concern arises. In addition to the matter of degradation and implementation of the NPS-FM being within scope of Change 1, Winstone's submission clearly raised the issue of a consenting pathway (with express reference to the anticipated 2022 update) and recognition and protection of its resources through Change 1 provisions. Those interested in the issue, and changes to Policies 18 and 40 have had an opportunity to be involved through the submission and further submission process.

Refer for example to page 4 of its submission.

Conclusion

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.

Date: 20 December 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