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 6 (Indigenous Biodiversity)

Rebuttal legal submissions on behalf of Wellington Regional Council – Hearing Stream 6

Date: 13 February 2024

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MAY IT PLEASE THE PANELS:

Introduction

1 These rebuttal legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 6 (Indigenous Biodiversity) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**). The hearing is scheduled to commence on 20 February 2024.

2 These legal submissions follow those filed by the Council on 19 December 2023 in respect of this topic and respond to matters raised by submitters through pre-filed legal submissions.

3 The topics addressed are:

3.1 scope of Change 1 in respect of the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**) and natural justice,

3.2 approach to cross referencing the mitigation hierarchy in the NPS-IB versus alternative drafting approaches,

3.3 the renewable electricity generation and transmission 'carve out' in the NPS-IB, and

3.4 the approach to offsetting for Policy 11 New Zealand Coastal Policy Statement 2010 (**NZCPS**) species, ecosystems and habitats in the coastal environment.

Scope of Change 1 and natural justice

4 The Council's legal submissions of 19 December 2023 address the legal framework in respect of the scope available to the Panels in making recommendations in

respect of changes in national direction, such as the NPS-IB. Those submissions are not repeated here.

5 In addition, the general legal framework for determining the scope of Change 1, which is the outer limit of what can and cannot be amended through either the Part 1, Schedule 1 or the freshwater planning process, is set out in our submissions of 8 June 2023. In summary, in respect of clause 6 of Schedule 1, the High Court confirmed in *Palmerston North City Council v Motor Machinists Limited* that for a submission to be 'on' a plan change, a two-limbed test must be satisfied:[1]

Motor Machinists at [80]-[82].

5.1 the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

5.2 the Council must consider 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.

6 In considering the first limb, the High Court held in *Motor Machinists* that whether the submission falls within the ambit of the plan 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 plan change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the plan change. However, some extensions to a plan change are not excluded: incidental or consequential extensions

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are permissible if they require no substantial section 32 analysis.

7 What is to be considered in respect of the first limb, was discussed in paragraphs [36]-[40] of the Environment Court decision in *Bluehaven*, including at [39], where it states:

Bluehaven Management Limited v Western Bay of Plenty District Council [2016] NZEnvC 191.

> Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

8 In considering the second limb, the High Court in *Motor Machinists* identified the risk that the Council must guard against is that the reasonable interests of others might be overridden by a 'submissional side-wind'. The concern identified was that a plan change could be so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission, which had not been directly notified to them. As we address further below, this is the RMA's safeguard for natural justice.

9 Porirua City Council's (**PCC**) legal submissions at [2.5] appear to state that as at the time the section 32 report was prepared the NPS-IB did not exist, that section 32 report could not assess Change 1 against that national direction, and therefore, the issues addressed in the

NPS-IB were not addressed in the section 32 report. That proposition then supports PCC's conclusion on scope of Change 1 in respect of implementing the NPS-IB.

10 While the Council acknowledges that the NPS-IB was gazetted post preparation of Change 1, the substance of the issues addressed by the NPS-IB were, in a large part, already addressed and considered through Change 1 and the section 32 report. This is due, in part, to Change 1 having been prepared at a time when a draft of the NPS-IB was available which Council deliberately sought to align with, but also, as set out below, due to indigenous biodiversity being part of the RMA requirements on the Council more generally.

11 The NPS-IB is not an entirely new piece of national direction, or an unexpected or unanticipated change in national direction that is now being considered at the hearing stage of Change 1. It is not national direction in a previously unregulated area. It is national direction that was foreshadowed for a number of years and of which the subject matter (ie the management regime for indigenous biodiversity) was carefully considered and addressed through the section 32 report for Change 1. Our legal submissions of 19 December 2023 step through the general scope of Change 1 in respect of indigenous biodiversity.

12 An analysis was undertaken by the Council reporting officers to determine firstly, the extent of the change between the draft (which was expressly addressed through Change 1 as notified) and the gazetted NPS-IB and then secondly, consideration of that change within the context of the scope of Change 1 to determine the scope to respond to such changes through Change 1.

An assessment of the substance of the matters addressed through Change 1 is what is required, not a focus on when the NPS-IB was gazetted. It is that careful analysis that has established that, in the Council's view, there is broad scope within Change 1 to make changes to respond to changes between the draft and gazetted versions of the NPS-IB.

13 It is submitted that the case law set out above, in respect of determining the scope of a Plan Change (as well as the law in respect of determining the scope of relief sought through a submission), is the RMA's framework in respect of safeguarding natural justice. With reference to the submissions made by PCC at [2.5] and [2.8], it is this established law on scope that needs to be considered when determining the appropriateness of relief and not a separate consideration of the principles of natural justice.

14 It is accepted that the Council will need to make further changes to give full effect to the NPS-IB. However, where there is scope to amend Change 1, to give effect to parts, or in part, the NPS-IB and where the relevant information is available in order for the Panels to be satisfied that making those changes now is the most appropriate, then doing so now would comply with the direction in the NPS-IB to give effect to it as soon as reasonably practicable. Not making those changes would be contrary to the requirement in clause 4.1(1) of the NPS-IB and section 55(2D) of the RMA to give effect to the NPS-IB through changes to the RPS as soon as 'reasonably practicable' and 'practicable' respectively. The specific timeframes contained in clauses 4.1(2), 4.2, and 4.3 do not override this more general direction.

Southern Cross Healthcare Ltd v Auckland Council [2023] NZHC 948, at [85].

15 Stepping back from the NPS-IB, it is important to acknowledge that, as set out in Forest & Bird's submissions and the Director General of Conversation's submissions, including provisions within Change 1 in respect of indigenous biodiversity is required independently of the NPS-IB and is consistent with the Council's functions, including in respect of maintaining indigenous biological diversity (section 30(1)(ga)). It is also consistent with the requirement to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, and the requirement to have particular regard to the intrinsic values of ecosystems contained in section 6(c) and 7(d) of the RMA, as well as promoting the safeguarding of life-supporting capacity of ecosystems in section 5(2)(b) of the RMA.

At [4].

Dated 29 January 2024, at [4].

16 In that regard, clause 3.1(2) of the NPS-IB is clear that nothing in the implementation part of the NPS-IB limits the Council's functions and duties under the RMA in relation to indigenous biodiversity.

Cross referencing to the NPS-IB

17 Concerns have been raised by several parties in relation to the approach taken by the Council in cross-referencing the effects management hierarchies set out in the NPS-IB. Albeit, other parties have indicated some support for this cross-referencing approach to avoid unnecessary duplication and repetition within the RPS.

18 It is submitted that the concerns regarding what happens when/if the NPS-IB is amended do not arise because if there is a specific reference to a provision of the NPS-IB in a provision of the RPS, then regardless of whether that NPS provision is amended (or repealed),

the reference in the RPS remains in effect until removed or amended by way of a First Schedule change. This means there is certainty while that RPS provision remains in force because there is a specific cross reference to an NPS provision as it was at a point in time.

19 This is due to the First Schedule process, which does not allow for changes to provisions of an operative RPS without a First Schedule process (unless it is a correction of a minor error or an amendment direction through an NPS to which section 55(2) and (2A) of the RMA). While a number of parties have referred to Part 3 of Schedule 1, it is submitted that it does not apply because it only relates to plans or proposed plans. However, the outcome is the same – the referenced part of the NPS-IB has legal effect until a change amends it, regardless of whether that NPS changes in the intervening period.

20 While that is the legal position, from a workability/plan user perspective, having all material in one place, without the need to move between documents is likely to be beneficial. Mr Wyeth has suggested an alternative drafting approach, which effectively includes the material from the relevant NPS provisions in to the RPS provisions and removes the need for cross-referencing those external documents. The efficiency of these different drafting approaches from a planning perspective are set out in Mr Wyeth's evidence, but from a legal perspective, it is submitted that both approaches are valid.

Renewable electricity generation and transmission 'carve out'

21 The legal submissions of Forest & Bird raise an issue at paragraphs [14] and [15] in respect of the approach to the 'carve out' contained in the NPS-IB for renewable electricity generation and transmission activities.

22 Clause 1.3(3) of the NPS-IB is express that:

> Nothing in this National Policy Statement applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities. For the avoidance of doubt, renewable electricity generation assets and activities, and electricity transmission network assets and activities, are not “specified infrastructure” for the purposes of this National Policy Statement

23 Due to this exclusion in clause 1.3(3) of the NPS-IB there is a 'gap' in the national direction as it relates to indigenous biodiversity in the terrestrial environment in relation to renewable electricity generation and transmission activities. It is submitted that the Council can, through its RPS, put in place a policy framework to fill that gap and how it does that is not limited by the NPS-IB. This approach is consistent with the obligations in section 6(c) of the RMA. Mr Wyeth does suggest a way of doing this in his rebuttal evidence.

The approach to offsetting for NZCPS Policy 11 species, ecosystems and habitats in the coastal environment

24 Forest and Bird and Wellington International Airport Limited (**WIAL**) have raised issues in relation to applying offsetting to NZCPS Policy 11(a) species, ecosystems and habitats in the coastal environment (**Policy 11 sites**). Forest and Bird have sought that

F&B submissions, para 22

WIAL submissions, para 1.3

Policy 24A of the RPS is amended to clarify it does not apply in the coastal marine area and where there is conflict in the coastal environment, the NZCPS prevails. WIAL have sought that there is flexibility provided for 'specified infrastructure' in the RPS provisions (particularly Appendix 1A and Table 17) so the effects management hierarchy is available to it.

25 Clause 3.11 of the NPS-IB provides an exception to the direction in clause 3.10 to avoid certain adverse effects listed in 3.10(2), where there is 'specified infrastructure' that provides significant national or regional benefit, and there is a functional or operational need to be in that particular location, as well as there being no practicable alternatives for it. Policy 11(a) of the NZCPS is directive in the requirement to 'protect indigenous biological diversity in the coastal environment' by 'avoid[ing] adverse effects of activities' on listed matters and Policy 11(b) requires 'avoid[ing] significant adverse effect and avoid, remedy or mitigate other adverse effects' of activities on listed matters.

26 The NZCPS applies to the coastal marine area and the coastal environment. The NPS-IB also applies in the terrestrial coastal environment. The NPS-IB is specific that if there is conflict between the provisions of the NPS-IB and the NZCPS then the NZCPS prevails.

27 'Avoid' means do not allow or prevent the occurrence of. In isolation, 'avoid' sends a clear signal that activities which result in the effects to be avoided will not be allowed. However, the use of the word 'avoid' must be considered in the context and framework in which it is used and does not necessarily always result in a blanket prohibition.

Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, at 62

28 Although *King Salmon* considered that 'avoid' in the NZCPS meant 'do not allow' or 'prevent the occurrence of', it considered that it was possible for minor and transitory effects to be acceptable, even where the avoid language was used.

Ibid, at 145

29 It is also worth noting that the NZCPS only focusses on avoiding 'adverse effects' or 'significant adverse effects' and does not appear to address offsetting (whether for Policy 11 sites or otherwise). It is submitted that offsetting does not avoid adverse effects, because by its very nature it involves offsetting an adverse effect that remains. This is how it was interpreted by the High Court in of *Royal Forest and Bird v Buller District Council* where the Court stated:

Royal Forest and Bird v Buller District Council [2013] NZHC 1346, at 54 and 72

> The term "offset" naturally has a different normal usage from the term "mitigate". The term "offset" carries within it the assumption that what it is offsetting remains. So, for example, if there is an adverse effect that continues, but those adverse effects can be seen as being offset by some positive effects.
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> …
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> The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

30 The High Court determined that offsets can be viewed as a positive environmental effect, but not as a reduction or mitigation of an adverse effect. The final view of the Court was that:

Ibid, at 74

> [T]he RMA keeps separate the relevant considerations of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.

31 This does suggest that if there is a conflict between the NZCPS and the NPS-IB and the NZCPS is to prevail, then the NZCPS does not anticipate offsetting being applied to Policy 11(a) sites. Counsel has been unable to locate any caselaw which is determinative on whether offsetting can be applied to Policy 11 sites, but there is a case where the provisions ultimately endorsed by the Court did allow for offsetting in relation to Policy 11 sites. However, there was no commentary on this issue or the basis for those provisions.

Motiti Rohe Moana Trust v Bay of Plenty Regional Council [2020] NZEnvC 73

32 Mr Wyeth's view in his rebuttal evidence is that there is a clear statutory basis to allow for offsetting when this would result in any of the adverse effects listed in Policy 11 of the NZCPS. Mr Wyeth also agrees with Forest and Bird that there are foreseeable conflicts in the terrestrial coastal environment between the pathways for specified infrastructure in clause 3.11(1) of the NPS-IB and Policy 11 of the NZCPS which cannot be resolved. Accordingly, the NZCPS needs to prevail. He suggests amendments to reflect that in Policies 24A and 24C of Change 1. It is submitted that without any caselaw suggesting otherwise, this is an appropriate response to the requirements of the NPS-IB and NZCPS.

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