

GWRC REGIONAL POLICY STATEMENT: PROPOSED CHANGE #1

HEARING STREAM 6: INDIGENOUS BIODIVERSITY

SUPPLEMENTARY SPEAKING NOTES OF CHRISTINE FOSTER (22.02.24)

(CALLED BY MERIDIAN ENERGY LIMITED)

1. Introduction

1.1 This supplementary statement should be read together with the speaking notes that were supplied to the Council by email on 19 February 2024. As explained in the covering email, and in the speaking notes, the 19.02.24 speaking notes were provided at the Council's request prior to the commencement of the hearing and without the benefit of hearing the officers' presentations and the hearing discourse. Having heard most (not all) of the discussion during the first two days of the hearing, I wish to raise some additional matters to the Hearing Panel's attention:

- a) Additional overarching issues;
- b) Provision for regionally significant infrastructure including REG in the coastal environment;
- c) Scope for the amendments now proposed;
- d) Process.

2. Overarching issues

2.1 The six overarching issues I identified in my 19.02.24 speaking notes remain valid in my opinion.

2.2 I am concerned about the extent and complexity of amendments being proposed through rebuttal. I am also concerned that further substantive and equally complex amendments may be invited or proffered through further post-hearing supplementary or rebuttal evidence from officers, without opportunity for input from submitters.

2.3 There has been no comprehensive s. 32AA evaluation of the amendments proposed by the officers and no opportunity to critique (or agree with) any s. 32AA evaluation. It will be plain to the Hearing Panel that the amendments are not minor matters of editorial refinement. The subject matter is complex and the changes involve substantive policy matters that warrant a careful analysis of all relevant s. 32 matters.

3. Provision for Regionally Significant Infrastructure Including REG in the Coastal Environment

3.1 Having heard the discussion during the opening morning of the hearing on Tuesday this week and some of the exchanges since then (observing by AVL) I am concerned that there is something missing from the narrative around two aspects of the amendments proposed to Policy 24:

- a) whether and how biodiversity offsetting can be provided for in the RPS in the coastal environment; and
- b) provision for infrastructure, and particularly REG and ET, in coastal environments where NZCPS Policy 11 (a) and 11 (b) ecosystems or species are present.

3.2 The legal submissions for RFBPS (paragraph 11) oppose any 'carve-outs' for REG and ET. RFBPS requests that any policy gaps created by the NPS part 1.3 (3) exception for REG and ET should be subject to the relevant effects management hierarchies. I agree that all relevant considerations should be applied. However, I am concerned that the focus of the discussion at the hearing has been narrow and does not reflect all relevant matters.

3.3 My comments are made in the context of the practical reality of one REG generator's (Meridian's) assets and activities in this region. Mine is not a theoretical view, or based on a desire to achieve national consistency on theoretical concepts. Rather it is an attempt to assist the RPS for the Wellington region to reconcile and provide meaningful guidance on competing national imperatives for the actual physical resources of this region.

3.4 Policy 24 has been settled in the Wellington RPS since it was made operative in 2013. It is a simple direction to district and regional plans to include policies, rules and methods to protect indigenous ecosystems and habitats with significant indigenous biodiversity values from inappropriate subdivision, use and development. It may not be apparent to the Hearing Panel that the relevant regional plan (the operative Natural Resources Plan - **NRP**) has completed the exercise it was directed by Policy 24 to undertake. The NRP was publicly notified in 2015 and became fully operative in July 2023 (after mediation of appeals during 2021). The operative NRP already explicitly addresses the protection of indigenous ecosystems and habitats with significant indigenous biodiversity values within the environments for which the NRP has jurisdiction. That

includes the coastal marine area, lake and river beds and freshwater environments, including where these environments occur in the coastal environment.

3.5 These distinctions in environments (and jurisdictions) are important in the context of the amendments Mr Wyeth proposes in his:

- Policy 24B (for the terrestrial environment, which includes the terrestrial part of the coastal environment);
- Policy 24C (for the coastal environment, which applies to marine, terrestrial and aquatic environments in the coastal environment); and
- Policy 24D (for REG and ET not limited to any particular environment).

3.6 The NRP provisions were settled through mediation, by consent, after reconciling the competing imperatives in relevant provisions including Part 2, the NZCPS and the NPS-REG. For the coastal environment, the NRP includes Policy 38 which directly addresses NZCPS Policies 11 (a) and (b). Policy 38 is in three parts. In clause (a) Policy 38 requires complete avoidance of all adverse effects on NZCPS Policy 11 (a) sites and species. The avoidance directive of Policy 11 (a) was accepted by the parties, including Meridian, at the time and that position has not changed since, as I understand it.

3.7 Clause (b) of Policy 38 reflects NZCPS Policy 11 (b) in requiring avoidance of *significant* adverse effects on 11 (b) sites and species. Clause (c) of Policy 38 provides for the management of *non-significant* adverse effects on NZCPS Policy 11 (b) sites through an effects management hierarchy that includes the option of biodiversity offsetting and, for regionally significant infrastructure only, the option of biodiversity compensation.

3.8 Clause (d) provides for the management of significant adverse effects on indigenous biodiversity values elsewhere in the coastal environment by applying an effects management hierarchy that includes the options of biodiversity offsetting and biodiversity compensation.

3.9 I have attached to this statement copies of NRP Policy P38 and related policies for your convenience. These provisions were settled by consent between GWRC and appellant parties (including Meridian, WIAL, Forest and Bird) and, in respect of the coastal marine area, were signed off by the Minister of Conservation (the NRP being in part a regional coastal plan). These policies must be presumed to give effect to the NZCPS. Nothing has changed in the NZCPS since these NRP

provisions were settled. The NRP provisions were settled following careful analysis of all of the competing higher order imperatives relevant for the coastal environment at that time and can be considered to be settled and complete. There is no basis for the view that the biodiversity offsetting and biodiversity compensation provisions in NRP Policy P38 (for NZCPS Policy 11 (b) sites and species) are somehow not allowed by or contravene the NZCPS.

3.10 It is reasonable to expect that a regional plan made operative as recently as July 2023 would continue to be operative for some years yet, without unsettling fundamental policy frameworks. That must be particularly so where (for the coastal environment) there has been no change in higher order policy instruments to suggest the approach taken in the NRP has become invalid. The approaches being proposed to you by some parties would create a direction in Policy 24 that would unsettle the now settled NRP approach, based on consideration of only part of the higher order policy framework (i.e. only NZCPS Policies 11 (a) and 11 (b)).

3.11 There seems to be agreement that the NZCPS prevails over the NPS-IB where there is conflict between the NZCPS and the NPS-IB (part 1.4 (2) of the NPS-IB). However, the NPS-IB and the NZCPS are not the only considerations to be analysed in formulating plan provisions for managing indigenous biodiversity values (including in the coastal environment).

3.12 While it is correct to say that the NZCPS prevails over the NPS-IB where there is conflict between those two instruments, it is not correct that the NZCPS prevails over all other considerations. There are also other National Policy Statement considerations, including:

a) NZCPS Objective 6 and Policy 6 - recognising that:

- i. some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities; and
- ii. some uses and developments can only be located on the coast or in the coastal marine area; and
- iii. the coastal environment contains renewable energy resources of significant value; and

b) NZCPS Policy 6:

- i. recognising that the provision of infrastructure, the generation and transmission of electricity and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities; and

- ii. taking into account the potential of renewable resources in the coastal environment (such as energy from wind, waves, currents and tides) to meet the reasonably foreseeable needs of future generations; and
 - iii. recognising that there are activities that have a functional need to be located in the coastal marine area, and providing for those activities in appropriate places; and
- c) the NPS-FM;
 - d) the NPS-REG and NPS-ET); and
 - e) other Part 2 RMA considerations (including those set out in s. 7).

3.13 Settling plan provisions for the management of indigenous biodiversity will not be (cannot be) a contest of values between only the NPS-IB and NZCPS. As directed by the 'Port Otago' decision, a comprehensive analysis of all the relevant higher order policy imperatives is required.

3.14 Perhaps inadvertently, Mr Wyeth's proposed Policy 24C, gives the impression that NZCPS Policies 11 (a) and 11 (b) are the only considerations and, indeed, the sole purpose for managing adverse effects on indigenous biodiversity in the coastal environment. In the framework Mr Wyeth proposes however, consent pathways are provided in Policies 24B and 24D for regionally significant infrastructure (including REG and ET). Effects management hierarchies are also provided for and these include biodiversity offsetting and biodiversity compensation. But these are only available outside NZCPS Policy 11 (a) sites and species and for non-significant adverse effects on Policy 11 (b) sites and species. This is entirely consistent with the NZCPS in my view, as demonstrated by the operative NRP Policy P38 having been recently authorised by the Minister of Conservation.

3.15 I do not read the NZCPS as explicitly preventing a Council from including an effects management hierarchy in a district plan or in the Natural Resources Plan, for the management of non-significant adverse effects on NZCPS Policy 11 (b) sites and species. The NZCPS is a product of its time (2010) and reflects the language of s. 5 (c) of the RMA in describing an effects management framework. The effects management framework of the RMA has moved on since then and now also contemplates offsetting and compensation.

3.16 Through amendments to the RMA made in 2017, s. 104 (1) (ab) and s. 171 (1B) require decision makers on applications for consent and designations to have regard and particular regard (respectively) to any measure proposed by an application for the purpose of ensuring positive effects to offset or compensate for any adverse effects. That has been achieved in spite of s. 5 (c)

not explicitly referring to offsetting or compensation. Similarly, the NPS-IB contemplates biodiversity offsetting and biodiversity compensation, also in spite of the narrow wording of s. 5 (c).

3.17 The exposure drafts of the replacement NPS-REG and NPS-ET also reflect the movement in thinking about what constitutes an effects management framework, by explicitly providing for bespoke effects management hierarchies (that include offsetting and compensation). This is intended to be more enabling of REG and ET activities in responding to today's challenges associated with the effects of climate change and commitments to transition from non-renewable to renewable energy sources.

3.18 Limiting the ability to respond to these (today's) challenges by a narrow reading of a 2010 policy instrument is counter-productive in my view.

3.19 It is a stretch, in my opinion, to read Policy 11 (b) of the NZCPS as meaning the NZCPS explicitly prevents the use biodiversity offsetting and biodiversity compensation in the management of non-significant adverse effects in specified coastal situations. Especially where there is no case law supporting that assertion. GWRC's rebuttal legal submissions (paragraphs 31 and 32) noted that there is no case law that is determinative on whether offsetting is available for NZCPS Policy 11 sites other than Policy 11 (a) sites (however also noted that there is no caselaw suggesting it is not available).

4. Scope

4.1 The discussion and officers' answers to questions at the Hearing to date have not answered the question I raised in my 30 January 2024 evidence about scope for insertion of Policy IE.2A. Also, it remains unclear to me exactly which submission point(s) provide the scope for the insertion of Policy 24C. They appear to be being introduced under the very broad umbrella of being a subset of 'indigenous biodiversity'.

4.2 The amended provisions as now proposed look completely different from those in the publicly notified PC1 and there is not a clear line of sight to the relief requested in submission points for all of them, in my opinion. I have been clear, in my evidence, about which submission points of Meridian's my suggested amendments relate to. However, with the complexity of amendments now proposed through rebuttal evidence, it is becoming a little unclear exactly which proposed

submission points are relied on for the amendments proposed. It is difficult to conclude that the scope and complexity of some of the amendments now proposed could have been anticipated by reading PC1, the s. 32 report or the submissions. It would be useful if the reporting officers could identify the specific submission point number(s) they rely on for introducing the Policy 24 and Policy IE.2A amendments in particular (and for the other extensive proposed amendments).

5. Process

5.1 In the spirit of contributing constructively to these proceedings, I have responded to the extensive amendments proposed by the officers in their s. 42A report and in their rebuttal statements. However, given the short time available and the complexity of the proposed amendments, I cannot claim that my suggested amendments set out in my 19.02.24 speaking notes will be completely 'bullet-proof'. I fully expect they could be improved.

5.2 It is not clear how the Hearing Panel intends to proceed with the proposed amendments and the variants now being proposed by submitters and officers. I reiterate the suggestion made in my 19.02.24 speaking notes that it may assist if there is an opportunity for parties and/or their experts to examine, with Council officer, the detail of the proposed wording. That may require a direction to parties to confer on draft provisions or to make planning experts available for conferencing on the drafting. However, in my experience, those processes are more likely to be fruitful if the Hearing Panel provides an indication of preliminary findings on key matters in dispute.

Christine Foster
22 February 2024