

Before the Hearing Panels

Under the Resource Management Act 1991 (**RMA**)

And

In the matter of Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region

And

In the matter of Hearing Stream 2 (Objectives and Ecosystem Health Policies)

Rebuttal legal submissions on behalf of Greater Wellington Regional Council

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MAY IT PLEASE THE PANELS

Introduction

- 1 These rebuttal legal submissions are made on behalf of the Greater Wellington Regional Council (**Council**) in relation to Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region (**NRP**), Hearing Stream 2 (Objectives and Ecosystem Health Policies).
- 2 These submissions address the legal issues raised through legal submissions filed by Wellington City Council (**WCC**) and Porirua City Council (**PCC**).¹ While the outcomes sought by PCC and WCC are different, as explained by Ms O'Callahan in her rebuttal evidence, the legal issues raised are similar.

The National Policy Statement for Freshwater Management 2020

- 3 Before addressing the specific issues with PC1 raised by PCC and WCC legal submissions it is submitted that it is important to keep in mind the directions in the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), which the Council must 'give effect to'² as part of this plan change. While the NPS-FM is not the only matter that needs to be considered as part of a plan change³, it is a key document for this plan change. It provides the context and direction for what has been proposed by the Council in PC1 and in some cases, means there is limited discretion available for the content of certain provisions.
- 4 These submissions start by stepping through the relevant direction contained within the NPS-FM as to the National Objectives Framework (**NOF**) as a large focus of the legal submissions (and evidence) in this Hearing Stream is on the

¹ Being the legal submissions on behalf of Wellington City Council (dated 14 March 2025) and Porirua City Council (dated 21 March 2025).

² Section 67(3)(a) of the RMA.

³ The plan change tests were set out in the Hearing Stream 1 legal submissions, 3 October 2024, at paragraphs 21-23 and Appendix A.

target attribute states (**TAS**), their achievability/affordability and the evidence base to support them.

5 In our submission, it is important to understand a number of key requirements in the NPS-FM relating to the NOF, because those have informed the approach taken by the Council in PC1 (those listed below are specifically relevant to this Hearing Stream). It is submitted that these requirements also provide a 'lens' through which the PC1 provisions need to be considered (because PC1 needs to 'give effect to' them):

5.1 Engagement with, and involvement of, mana whenua⁴ and communities in the process is key to the process and content of the provisions:

5.1.1 When determining how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region the Council must engage with mana whenua and communities.⁵

5.1.2 In giving effect to Te Mana o te Wai, the Council must actively involve mana whenua in freshwater management and engage with communities and mana whenua to identify long-term visions, environmental outcomes, and other elements of the NOF.⁶

5.1.3 At every step of the NOF process (including setting environmental outcomes and TAS), the Council is required to engage with communities and mana whenua.⁷

⁴ Note: Mana whenua is used in these submissions to be consistent with PC1 wording, but the NPS-FM uses tangata whenua.

⁵ Clause 3.2(1) of the NPS-FM.

⁶ Clauses 3.2(2) and 3.3(3) and policy 2 of the NPS-FM.

⁷ Clause 3.7(1) of the NPS-FM

- 5.1.4 In making PC1 and implementing the NOF, the Council is required to actively involve mana whenua (to the extent they wish to be involved) in decision-making processes.⁸
- 5.1.5 Freshwater is managed (including through a NOF) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.⁹
- 5.2 The best available information must be used:¹⁰
 - 5.2.1 This means, if practicable, using complete and scientifically robust data.
 - 5.2.2 In the absence of complete and scientifically robust data, the best information may include information obtained from modelling, as well as partial data, local knowledge, and information obtained from other sources, but Council must prefer sources with the greatest certainty and take all practicable steps to reduce uncertainty.
 - 5.2.3 Importantly, Council must not delay making decisions solely because of uncertainty about quality or quantity of information.¹¹

⁸ Clause 3.4(1) of the NPS-FM

⁹ Policy 5 of the NPS-FM.

¹⁰ Clause 1.6 of the NPS-FM.

¹¹ Clause 1.6 of the NPS-FM.

5.3 Freshwater is managed so degraded water bodies are improved and those that are not degraded are (at least) maintained.¹²

5.3.1 The condition of water bodies and freshwater ecosystems is to be monitored over time, and action taken where freshwater is degraded, and to reverse deteriorating trends.¹³

5.3.2 If Council detects that an FMU (or part-FMU) is degraded or degrading, it must, as soon as practicable, take action to halt or reverse the degradation (for example, by making or changing a regional plan, or preparing an action plan).¹⁴

5.3.3 The national target (as set out in Appendix 3 to the NPS-FM) for water quality improvement is achieved.¹⁵ This is directive in that 80% of 'specified lakes and rivers'¹⁶ in the region are to be suitable for primary contact by 2030 and 90% no later than 2040.

5.4 TAS must be set, they must be at or above baseline state, or at or above national bottom line and they must specify a timeframe (details are set out at paragraph 7.4 below).¹⁷

Implementing the NPS-FM

6 The NOF is the NPS-FM's framework for managing freshwater. As noted above, it requires engagement with communities and

¹² Policy 5 of the NPS-FM.

¹³ Policy 13 of the NPS-FM.

¹⁴ Clause 3.20 of the NPS-FM

¹⁵ Policy 12 and Appendix 3 of the NPS-FM.

¹⁶ Defined to mean rivers that are fourth order or greater and lakes with a perimeter of 1.5km or more.

¹⁷ Clause 3.11(2)-(5)(a) of the NPS-FM. Note, there are some exceptions in clause 3.31 and 3.32 of the NPS-FM.

mana whenua and application of Te Mana o te Wai at every step of the process.¹⁸

- 7 The NPS-FM sets out a series of prescribed steps that must be followed by regional councils in implementing the NPS-FM. (These steps are the parts of the process that relate to this Hearing Stream):¹⁹
- 7.1 Identify **Freshwater Management Units (FMUs)** in the region.²⁰ This includes identifying sites used for monitoring, primary contacts sites, habitats of threatened species and natural inland wetlands.
- 7.2 Identify **values** for each FMU:²¹
- 7.2.1 Appendix 1A are compulsory values that apply to every FMU.
- 7.2.2 The Council may identify other values that apply to an FMU and must consider whether the values in Appendix 1B apply.
- 7.3 Set **environmental outcomes** for every value and include them as objectives in regional plans.²² Identify **attributes** for each value and identify baseline states for those attributes. The Council:²³
- 7.3.1 Must use all attributes in Appendix 2A and 2B for the compulsory values listed (except where specifically provided otherwise).

¹⁸ Clause 3.7.

¹⁹ Refer clause 3.7(2) of the NPS-FM for a summary of those steps.

²⁰ Clause 3.8 of the NPS-FM.

²¹ Clause 3.9(1)-(2) of the NPS-FM.

²² Clause 3.9(3)-(5) of the NPS-FM.

²³ Clause 3.10 of the NPS-FM.

- 7.3.2 May identify other attributes for any compulsory values.
 - 7.3.3 Must identify, where practicable attributes for all other applicable values.
 - 7.3.4 If attributes cannot be identified for a value, or if attributes are insufficient to assess a value, must identify alternative criteria to assess whether the environmental outcome of the value is being achieved.
 - 7.3.5 Must identify the 'baseline state' of each attribute.²⁴).
- 7.4 Set **target attribute states** to support the achievement of environmental outcomes:²⁵
- 7.4.1 The Council must set a TAS for every attribute identified for a value and the site to which it applies and each must be set in such a way that they will achieve the environmental outcomes for the relevant values.²⁶
 - 7.4.2 The TAS for every value with attributes (except the human contact value) **must be set at or above the baseline state** of that attribute and for the human contact value, it must be set **above the baseline state of that attribute (unless the baseline state is already within the A band** of Tables 9 or 10 in Appendix 2A).²⁷

²⁴ Defined in clause 1.4 of the NPS-FM as the state the attribute is at on the date it is first identified by Council under 3.10, or the state on the date Council set a freshwater objective for it under the NPS-FM or the state on 7 September 2017.

²⁵ Clauses 3.11, 3.13 and 3.16 of the NPS-FM.

²⁶ Clause 3.11(1) and 3.11(7) of the NPS-FM.

²⁷ Clause 3.11(2) and (3) of the NPS-FM.

7.4.3 If the baseline state of an attribute is below any national bottom line for that attribute, the TAS must be set at or above the national bottom line.²⁸

7.4.4 Every TAS must:

- (a) Specify a timeframe for achieving the TAS, or if already achieved, state it will be maintained from a specified date. Timeframes may be of any length or period, but if long term, they must include an interim TAS (up to 10 years).²⁹
- (b) For attributes in Appendix 2A or 2B, be set in the terms specified in those Appendices and for any other attributes, in a way appropriate to the attribute.³⁰

Expression of the NOF through PC1

8 The whitua implementation programme was the Council's mechanism for collaborative catchment-based decision making for the purpose of implementing the NPS-FM.³¹ The documents produced through the two whitua processes relevant to PC1 were the starting point for the development of PC1. Those documents are the voice of mana whenua and the community. They express the values, desired outcomes, specific numeric objectives for attributes and go on to recommend various regulatory and non-regulatory actions to achieve these outcomes.

²⁸ Clause 3.11(4) of the NPS-FM.

²⁹ Clause 3.11(5) and 3.11(6) of the NPS-FM.

³⁰ Clause 3.11(5) of the NPS-FM.

³¹ Addressed in detail in the evidence of Tim Sharp and Part B of the section 32 report.

The relevant territorial authorities were also involved in both of these processes.

9 This aligns with the directive nature of the NPS-FM as to the engagement with both mana whenua and communities (as set out above) and the recognition in Policy 5 of the community involvement (and choice) in the process. That is, Policy 5 is specific that freshwater is managed to ensure the health and well-being of degraded water bodies and freshwater ecosystems is improved, but that communities have the ability to choose improvement in relation to the health and well-being of all other water bodies.³²

10 As explained by Ms O'Callahan in her section 42A report on Objectives,³³ the expression (and implementation) of the components of the NOF through PC1 are as follows:³⁴

10.1 The **FMUs** and **part FMUs** to which PC1 relates are illustrated in Maps 78, 79 and 80 and set out in the relevant tables. The NOF in PC1 is limited to the two whitua.

10.2 The **values** for each FMU or part FMU are set out in the documents produced by the Whitua Committees and these informed the environmental outcomes of PC1.

10.3 The **environmental outcomes** for each of those FMUs and part FMUs are set out in the Objectives (specifically Objectives WH.O1/P.O1, WH.O2/P.O2, WH.O4/P.O4 and WH.O5). The environmental outcomes seek to achieve the long-term visions and the sole objective of the NPS-FM.

³² Noting that the NPS-FM directs that the health and wellbeing of degraded water bodies must be improved.

³³ Section 42A Hearing Report: Objectives, section 2.1.

³⁴ Coastal objectives and TAS are not referred to here.

- 10.4 The **attributes** for each value and their baseline state are set out in the relevant TAS tables (Tables 8.2 (lakes), 8.3 (primary contact sites), 8.4 (rivers) and 9.2 (rivers)). These align with the requirements of clause 3.10 of the NPS-FM.
- 10.5 The **TAS** for each of those attributes is then set through Tables 8.2 (lakes), 8.3 (primary contact sites), 8.4 (rivers) and 9.2 (rivers). The TAS have been set to achieve the environmental outcomes.
- 11 It is submitted that the correct process has been followed by the Council in undertaking the NOF process and proposing the above through provisions in PC1. As such, the Council is implementing the NPS-FM, as it is required to do.

Issues raised in legal submissions by WCC and PCC³⁵

Achievability

- 12 The main issue raised by WCC and PCC in their legal submissions is that the TAS, and as a consequence the environmental outcomes, are set at a level that they say is not achievable for them.
- 13 Paragraph 2.13 of the WCC legal submissions, states that:
- Importantly, a regional council must ensure that TASs are set in such a way that they *will achieve* the environmental outcomes for the relevant values. Achievability is therefore a mandatory constraint on the setting of TASs in the plan.

³⁵ The issues other than the prohibited activity status raised by PCC are addressed in these submissions. The submissions relating to a prohibited activity status will be responded to during the hearing stream that addresses that rule framework – Hearing Stream 4.

14 WCC's proposal in paragraph 5.1 of its legal submissions is that any achievability and affordability issues can be addressed by adopting a 2060 timeframe for the TAS and suitable interim TAS.

15 PCC's legal submissions at paragraphs 4.11 and 4.26 state that:

The TAS set in tables 9.1 and 9.2, especially those relating to E.coli, do not provide for sustainable management, as they are neither achievable nor affordable in the current proposed timeframe.

...the current TAS and 2040 timeframe included in Change 1 do not amount to an affordable framework that can be realistically achieved. In section 32 terms, it is simply not possible to reach the view – on the evidence – that the provisions are the most appropriate way to achieve the purpose of the Act.

16 PCC's proposed alternative is set out at paragraphs 4.36 and 4.39 of its legal submissions – that 'the use of the MRI with a 2060 timeframe is the most appropriate option before the Panel' and that this would mean there is a role for interim TAS.

17 In terms of the WCC legal submission that achievability is a mandatory constraint. It is submitted that this is incorrect based on the provision referred to. Whether WCC can achieve a TAS is not what is required by the referenced provision. Clause 3.11(7) of the NPS-FM states:

Every regional council must ensure that target attribute states are set in such a way that they will achieve the environmental outcomes for the relevant values, and the relevant long-term vision.

18 In the context of the NOF and the NPS-FM, achievability is relevant in the following ways:

18.1 TAS are to be set in such a way that they will *achieve the environmental outcomes* for the relevant values and the *relevant long-term vision*.³⁶

³⁶ 3.11(7) of the NPS-FM.

- 18.2 Environmental outcomes for a value are to be described in a way that enables an assessment of the effectiveness of the RPS and plans in *achieving the environmental outcome*.³⁷
- 18.3 When *achieved*, the environmental outcomes must fulfil the relevant *long-term visions and objective of the NPS-FM*.³⁸
- 19 Accordingly, achievability under the NPS-FM is not about cost or resourcing – it is ultimately about whether the TAS have been set at the required level to *achieve* the environmental outcomes, which themselves need to be set in a way that *achieves* the long-term visions and the objective of the NPS-FM. It is in this way that achievability is a requirement of implementing the NPS-FM.
- 20 Accordingly, care is needed when referring to achievability so it is clear what it means and how it is being used. There also seems to be some inconsistency in language where affordability is often used interchangeably with achievability or the two ideas are being combined together as the same concept, ie with statements made as to affordability and achievability.³⁹
- 21 In our submission, the correct test is whether the PC1 provisions are the most appropriate. This involves the application of the plan change tests, set out in our Hearing Stream 1 legal submissions, dated 3 October 2024. In terms of TAS (which are objectives) the specific test is that they are 'the most appropriate way to achieve the purpose of the Act'.
- 22 Finally, there is also significant direction within the NPS-FM as to the levels at which TAS can be set (minimum requirements are set out) so it is not entirely at the Council's discretion.⁴⁰ The NPS-

³⁷ Clause 3.9(5)(a) of the NPS-FM.

³⁸ Clause 3.9(5)(b) of the NPS-FM.

³⁹ Refer for example to Ms Rogers, Statement of Evidence, at 7.31, Mr Mendonça at [6.6].

⁴⁰ Clause 3.11(2)-(4) of the NPS-FM.

FM provides no ability to not set TAS or to set them below certain levels. While there is some discretion around timing, it is not open ended and it is submitted that the NPS-FM does not anticipate that the process of achieving TAS will be simple or cheap.

- 23 If you look at the primary contact target as an example of scale anticipated by the NPS-FM, it is set to effectively require an approximate 10% improvement in the proportion of rivers and lakes suitable for contact recreation each decade from 2017, 2030 to 2040. This also provides an indication of what is considered appropriate in terms of timeframes for this particular value.

Section 32 issues and evidence base

- 24 There are issues raised with the section 32 assessment in both sets of legal submissions. WCC's legal submissions (Part 4) are that 'section 32 requires an identification of the reasonably practicable options for achieving the objectives of the plan change' and PCC's legal submissions at paragraph 4.27 state that in setting the TAS the Council has failed to meaningfully assess viable alternatives. These submissions conflate the different requirements in section 32 of the RMA between assessing objectives and assessing the other provisions.
- 25 The TAS are set in the objectives of PC1 and therefore, the requirement under section 32(1)(a) of the RMA is for the objectives to be the most appropriate way to achieve the purpose of the RMA. The other provisions (defined to mean policies, rules or other methods) are not assessed in the same way as objectives - they are assessed against section 32(1)(b) of the RMA. It is this part of section 32 that requires assessment of reasonably practicable options and efficiency/effectiveness.

26 These tests were recently confirmed in *Save the Maitai v Nelson City Council*.⁴¹

- (a) proposed objectives are to be evaluated as to whether they are the most appropriate way to achieve the purpose of the RMA.[section 32(1)(a)] Policies are to implement objectives. The proposed rules are to implement the policies;
- (b) each proposed policy, rule and method is to be examined as to whether it is the most appropriate method of achieving the objective, having regard to efficiency and effectiveness [section 32(1)(b)];

27 Accordingly, the objectives (and specifically the TAS objectives for the purposes of this hearing) are assessed against the purpose of the RMA itself, which in the case of PC1 is largely assessment of whether they give effect to the RPS, the NPS-FM and NZCPS,⁴² as they are the relevant expression of Part 2 for PC1 (as well as comply with the other requirements for regional plans as set out in section 67 of the RMA). The criticism that the Council should have assessed alternative options for the TAS is therefore unfounded.

28 In addition, it is submitted that focusing on the achievability requirements of section 32 (as proposed by WCC) overlooks the specific requirements contained within the NPS-FM. The Panels cannot put the NPS-FM to one side and assess the provisions of

⁴¹ [2024] NZEnvC 155, at [14].

⁴²Refer to *Environmental Defence Society v NZ King Salmon Co* [2014] NZSC 38. Para 33 states – 'Because the purpose of the NZCPS is "to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand" and any plan change must give effect to it, the NZCPS must be the immediate focus of consideration. Given the central role played by the NZCPS in the statutory framework, and because no party has challenged it, we will proceed on the basis that the NZCPS conforms with the RMA's requirements, and with pt 2 in particular...' and at para 85 – 'while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) pt 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to pt 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however...' (validity, a gap in coverage and uncertainty).

PC1 solely against section 32 of the RMA (albeit for the TAS that section 32 requirement is assessing whether they are the most appropriate to way to achieve the purpose of the RMA). Even for the wider section 32 assessment for the non objective provisions, it is submitted that the assessment must occur through the lens of the NPS-FM. This must include consideration of the significant emphasis placed by the NPS-FM on community and mana whenua engagement and the other key requirements set out in paragraph 5 above.

- 29 An example of this is that (contrary to the submission from WCC at paragraph 2.9 of its submissions) is that the NPS-FM provides express direction as to the evidence base requirements – ie the Council must use the best information available at the time, and must not delay decision-making on because of uncertainty and if there is uncertainty, it must be interpreted in a way that will give best effect to the NPS-FM. This lens needs to be applied to the section 32 assessments.
- 30 Finally, it is submitted that criticisms of the section 32 assessment are not particularly helpful at this point in the plan change process and it does not help the Panels understanding or making decisions on the key matters of contention for this hearing stream, which, as noted in Ms O'Callahan's rebuttal evidence, are the *E.coli* and metal TAS settings and the timeframes for meeting them.
- 31 In any event, the territorial authorities all appear to now consider they have enough information to put forward what they seek and all seek a 2060 timeframe, with some seeking the notified TAS (HCC and unclear for UHCC) and others the reduced TAS in Ms O'Callahan's section 42A report (WCC, PCC and unclear for UHCC) - see Ms O'Callahan's summary of the positions in Row 2, Table 8 of her rebuttal evidence.
- 32 As can be seen from the rebuttal evidence from the Council, it has considered the issues that have been raised in the evidence and it has made some suggested amendments to the 2040

timeframe, but not for all part FMU's (see Row 2 of Table 8 of Ms O'Callahan's rebuttal evidence).

Conclusion

33 Accordingly, it is submitted that the Council has carefully followed the NPS-FM requirements and the process it dictates. It is not a simple process, the issues are complex and there will be significant cost involved in implementation.

34 It is submitted that this is the reality of solving complex environmental issues and implementing the current national direction in the NPS-FM. The test that needs to be applied to the PC1 provisions is whether they are the most appropriate provisions and that is determined by working through the plan change tests set out in our Hearing Stream 1 legal submissions.

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