

## **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 7 (Small topics, wrap up and Variation 1)

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**Legal submissions in reply on behalf of Wellington Regional Council**

**Hearing Stream 7**

**Date:** 30 May 2024

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## MAY IT PLEASE THE PANELS:

### Introduction

1 These legal submissions in reply on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 7 (Small topics, wrap up and Variation 1) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**).

2 These legal submissions respond to a single matter, being the request from the Panels contained at paragraph 10j. of Minute 27. Specifically:

Can Counsel for the Council please advise whether the panels are able to recommend deleting the words 'see also' from all the tables subject to Change 1, or whether this could raise issues of scope or other legal issues. Council's recommendation to delete the words 'see also' is set out in paragraph 12 of Ms Pascall's comments of 8 April 2024 (Response to Request for Information in Minute 23 – Paragraphs 6(d) and 6(f)) uploaded to the HS7 webpage.

3 Simply put, in order for the Panels to make changes to the provisions of Change 1 there must be scope within Change 1 for that relief (noting that consequential amendments are permissible), and

3.1 for those provisions in the Freshwater Planning Process (**FPP**) process, in accordance with Schedule 1, clause 49(2) the Freshwater Hearing Panel (**FHP**) is not limited to making recommendations only within scope of submissions made on the Freshwater Planning Instrument (**FPI**). The FHP can make recommendations on any matter relating

to the FPI identified by the FHP or another person during the hearing.

3.2 for those provisions following the Part 1 Schedule 1 (**P1S1**) process, in reliance on clause 6, the amendment must be within scope of the relief sought in submissions.

4 In addition, where there is no scope for the relief, if the Panels have the appropriate delegations, they could recommend amendments under clause 16 of the First Schedule 1 to the RMA.

5 We address these pathways below, after addressing the nature of the change sought.

#### **The amendment proposed**

6 Table 1A is a new table inserted through Change 1. It sets out the climate change objectives and titles of policies and methods to achieve the objectives. For each policy, it contains a blank cell with the text 'Also see –' and 'and consider –'. Those lists are not included and remain blank.

7 Table 1A mirrors the format from the existing RPS. This is seen in Tables 1-6(a), 7, 8(a), 9-11 and Table 14. In each of those tables, for each policy, there is a grey 'Also consider / Also see' cell. That cell then contains a list of provisions to also see / also consider. As Ms Pascall explains those are cross-references to the regulatory and consideration policies respectively.

8 Other than Table 1A, the tables subject to Change 1 are all part of the operative RPS. Tables 3, 4, 6(a), 8(a), and 9) have all been amended through Change 1. The

existing 'Also see / Also consider' cells have not been amended,<sup>1</sup> but new cells have been inserted into the Tables where some new policies have been inserted, but not for all of the new policies proposed through Change 1. Those new cells contain the heading text but are otherwise blank. Where policies have been deleted, the cells have been deleted.

9 Change 1 and the section 32 report are silent on what the intention of those cells were, or when the additional text was to be added.

10 At page 15 of the Operative RPS, the following text provides and explanation:

Each section in this chapter addresses a topic then introduces the issues. All the issues are issues of regional significance or have been identified as issues of significance to the Wellington region's iwi authorities. Each section includes a summary table showing all the objectives that relate to that topic and the titles of the policies and methods that will achieve those objectives. The table also includes a reference to other policies that need to be considered alongside to gain a complete view of the issue across the full scope of the Regional Policy Statement.

11 As set out in Ms Pascall's memorandum of 8 April 2024, at [11]:

...in the opinion of the reporting officers, the inclusion of the 'Also see' and 'Consider' lists is unnecessary and may in fact create confusion and inefficiencies in the implementation of the RPS. In listing out all potentially relevant policies, there is a risk that those that are not included are seen as less important or a relevant policy(ies) is omitted from the list. In any

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<sup>1</sup> Other than where those cells that refer to Freshwater Policy 43 which has been deleted through Change 1 as notified.

case, those engaging with the RPS must read the document as a whole to determine the relevant objectives, policies and methods that apply to the particular proposal

- 12 We agree with this statement from a legal perspective. The text is not directive itself (ie, it is not an objective or a policy that must be considered going forward). It is intended as interpretative guidance only, and signals that consistent with the case law, all relevant objectives and policies within the RPS must be considered by decision makers.
- 13 However, we also note that alongside the policies in the various chapters, there are notations in the margin of the Operative RPS which mirror the 'also see and consider' content from the tables (eg, Policy 7 page 95 of the Operative RPS). These have not been added to or amended through Change 1 and will remain as part of the Operative RPS unless removed by the Council in future.

### **The amendment process**

- 14 As set out above, should the Panels wish to delete the 'Also consider / Also see' cells from the tables subject to Change 1, the mechanism through which that can be achieved needs to be considered.
- 15 For provisions going through either the P1S1 or FPP process, the starting point for relief is that it must be within scope of Change 1.
- 16 GWRC's legal submissions on Hearing Stream 1 (dated 8 June 2023) set out the legal tests for scope. Generally, when considering whether a submission is

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

within scope of the plan change requires consideration of:

16.1 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

16.2 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.

17 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 are permissible if they require no substantial section 32 analysis.

### **Scope analysis**

18 Based on the applicable case law regarding scope of the Change, we consider where Change 1 sought to introduce new 'Also see / also consider' cells, it is within scope of Change 1 to remove those cells from Change 1. Accordingly, it is submitted that:

- 18.1 all the cells from Table 1A can therefore be deleted in reliance on the scope of Change 1; and
- 18.2 all the new cells added to Tables 3, 4, 6(a), 8(a), and 9 can be deleted in reliance on the scope of Change 1.
- 19 It is submitted that amendments to other cells within Tables 3, 4, 6(a), 8(a) and 9 would also be within scope where those changes relate to other provisions amended by Change 1. For example, where Change 1 has amended an existing policy from the Operative RPS, amending the related cell, including its deletion, would also be within scope of Change 1 in our submission.
- 20 This means that even though the Tables are included in Change 1, our submission is that there is unlikely to be scope within Change 1 to delete the also see / also consider cells where they are attached to objectives, policies or methods that have not been amended through Change 1.
- 21 That is the first scope issue. The second scope issue is whether there are submissions that provide scope for the relief. That is, even where the change is within scope of Change 1, to be a valid amendment, where it is a P1S1 provision that is being amended, that relief must be within scope of a submission on Change 1. Generally, to be within scope of a relief, the relief must have been fairly and reasonably raised within a valid submission.
- 22 Given there is uncertainty as to which process the Tables are proceeding through, we have not undertaken

that submissions analysis, as it may be unnecessary (although we do note there are submissions seeking deletion of all of the Tables subject to Change 1, other than Table 9 – see submissions by Anders Crofoot and Wairarapa Federated Farmers). However, once the Panels have determined which process they are recommending the Tables are proceeding through, for any that are progressing through the P1S1 process, an assessment of scope of those submissions will be required.

### **Clause 16, First Schedule to the RMA**

23 If there is no scope (either within Change 1 itself, or submissions in respect of any P1S1 provisions), clause 16 may enable the Panels to recommend those changes regardless.

24 Under clause 16 of the First Schedule to the RMA, an amendment can be made at any time to a proposed policy statement where such an alteration is of minor effect, or where it corrects a minor error. This is a power that is independent of scope.

25 Section 80A(6) of the RMA provides that clause 16 also applies to the FPP process.

26 The test for 'minor effect' is whether the amendment affects the rights of some members of the public, and therefore might have drawn a submission, or whether it is merely neutral. Only if it is neutral, and therefore would not have drawn a submission, may such an amendment be made.

*Re an Application  
by Christchurch  
City Council  
(1996) 2 ELRNZ  
431, at p440.*

27 A minor correction includes slips in spelling, punctuation, cross referencing and the like, to correct a

*Ibid.*



mistake or inaccuracy which has crept into the policy statement. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt what number is intended. A correction only seeks to clarify what is clearly intended by the document and does not make a change which alters its meaning.

- 28 We do not consider removal of the 'Also see / also consider' cells is correcting an error. Therefore, in order for those cells to be removed they would need to be of 'minor effect'.
- 29 On the basis of the tests set out above, the deletion of the 'also see / also consider' cells does not in our submission change the application of the provisions within Change 1. It is submitted that it is interpretive guidance only and therefore, the deletion can be considered to be neutral and of minor effect.
- 30 Provided the Panels have appropriate delegations, the Panels could recommend that GWRC exercises its clause 16 powers to amend Change 1.
- 31 Finally, it is important to note that clause 16 only applies to the provisions of Change 1, but as the question asked was only in relation to Tables that were amended by Change 1 we have not addressed the Tables in the operative Regional Policy Statement.

### **Conclusion**

- 32 The Panels can consider deleting the cells where there is scope within the change and for the P1S1 provisions, scope within submissions to do so. An alternative

option that can be considered, subject to delegations, is  
clause 16 of the First Schedule to the RMA.

**Date:** 30 May 2024

Two handwritten signatures in blue ink, one on the left and one on the right, both appearing to be stylized and illegible.

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K M Anderson / E L Manohar / K H Rogers  
Counsel for Wellington Regional Council