

**BEFORE THE INDEPENDENT HEARINGS PANELS APPOINTED TO HEAR AND MAKE
RECOMMENDATIONS ON SUBMISSIONS AND FURTHER SUBMISSIONS ON PROPOSED CHANGE 1
TO THE REGIONAL POLICY STATEMENT FOR THE WELLINGTON REGION**

UNDER Schedule 1 of the Resource Management
Act 1991 (the Act)

IN THE MATTER OF Hearing Submissions and Further
Submissions on Proposed Change 1 to the
Regional Policy Statement for the
Wellington Region

STATEMENT OF REBUTTAL EVIDENCE OF MIKA HELENA ZÖLLNER

ON BEHALF OF WELLINGTON REGIONAL COUNCIL

HEARING STREAM 1 – Topic: General Submissions

21 June 2023

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INTRODUCTION

1 My full name is Mika Helena Zöllner. I am a Senior Policy Advisor at Greater Wellington Regional Council.

2 With respect to the freshwater planning process allocation, I have read the legal submissions and statements of evidence from the following parties:

2.1 Wellington International Airport Limited

2.2 Wairarapa Federated Farmers

2.3 Winstone Aggregates

2.4 Forest and Bird.

3 A common issue raised by these submitters is whether certain provisions in Change 1 have been correctly allocated to the Freshwater Planning Process (as against the usual First Schedule process). As I was involved in this allocation process, including briefing Council and writing Appendix E of the Section 32 report, I am replying to the issues raised in respect of allocation. I am also the reporting officer for Hearing Stream 4 on urban development and regional form.

QUALIFICATIONS AND EXPERIENCE

4 I hold a Bachelor of Environments from the University of Melbourne and a Master of Environmental Science from Victoria University of Wellington Te Herenga Waka.

5 I have 2 years experience in resource management and 2 years experience in environmental science, with particular experience in hydrology and urban water quality.

6 I am a Senior Policy Advisor at Greater Wellington Regional Council. In this role I have provided policy advice on a range of resource management planning issues including in relation to the Regional Policy Statement.

CODE OF CONDUCT

7 I have read the Code of Conduct for Expert Witnesses set out in the Environment Court's Practice Note 2023 and I have complied with the Code of Conduct in preparing this evidence. My experience and qualifications are set out above. Except where I state I rely on the evidence of another person, I confirm that the issues addressed in this evidence are

within my area of expertise, and I have not omitted to consider material facts known to me that might alter or detract from my expressed opinions.

RESPONSES TO ISSUES RAISED BY SUBMITTERS REGARDING ALLOCATION OF PROVISIONS TO THE FRESHWATER PLANNING PROCESS

- 8 Change 1 is in part a freshwater planning instrument (FPI), using the Freshwater Planning Process (FPP), and in part, a standard change instrument, using the Part 1 Schedule 1 process. My evidence outlines the process undertaken by Council officers (including me) to prepare Council to make a decision on how to notify part of the Proposed RPS Change 1 as a FPI according to Section 80A of the Resource Management Act 1991 (RMA).
- 9 Officers began work on determining the scope of the FPI for Change 1 in April 2022. At this stage officers were aware of the Otago Regional Policy Statement High Court proceedings, however it was not known when the decision on the proceedings would be released or what the outcome would be. Therefore, officers proceeded initially on the basis that the decision would not be released prior to notification of Change 1. An analysis was undertaken to interpret Section 80A of the RMA and identify options for how to notify Change 1.
- 10 The basis for allocation was that in Section 80A(1), 80A(2) and 80A(3) of the RMA:

80A Freshwater Planning Process

(1) The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.

(2) A freshwater planning instrument means—

(a) a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management:

(b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a)):

(c) a change or variation to a proposed regional plan or regional policy statement if the change or variation—

(i) is for the purpose described in paragraph (a); or

(ii) otherwise relates to freshwater.

(3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and [Part 4](#) of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—

(a) prepare that part in accordance with this subpart and [Part 4](#) of Schedule 1; and

(b) prepare the parts that do not relate to freshwater in accordance with [Part 1](#) of Schedule 1 or, if applicable, [subpart 5](#) of this Part.

- 11 There was no precedent for how to apply the test in Section 80A to a change to an operative Regional Policy Statement that officers were aware of. It was clear that a provision-by-provision assessment to determine whether each provision met one of the criteria in Section 80A(2)(c) would be necessary to allocate provisions to the FPI. This allocation would need to ensure any provisions that met the test were accurately identified in order to meet the requirements in Section 80A of the RMA.
- 12 After internal discussions and input from our legal providers, the key factors we decided on (prior to the High Court decision on the Otago Regional Policy Statement) were:
- 12.1 Each new or amended provision in Change 1 needed to be assessed independently for inclusion in the FPI.
- 12.2 A whole provision, rather than just the amendment, would need to be assessed for inclusion in the FPI.
- 12.3 Case law (prior to the release of the Otago Regional Policy Statement decision) supported a liberal interpretation of ‘relates to freshwater’.
- 12.4 If reasonable justification and articulation of the connection to freshwater could be made, a provision would be captured by the definition of an FPI.
- 12.5 The relationship between objectives, policies and methods could not alone be used to determine inclusion in the FPI, and all provisions would need to be checked, i.e. if an objective was in the FPI it could not be assumed all policies and methods giving effect to it were also in the FPI.
- 12.6 If a new or amended definition of a term was mentioned in an objective, policy or method that was in the FPI, that definition would also need to be in the FPI for the provision to stand up.
- 12.7 ‘Part’ in Section 80A(3) could apply either:

12.7.1 At the provision level, where if any *part* of a provision met the criteria in Section 80A(2)(c) the whole provision would be in the FPI and go through the FPP.

12.7.2 At the sub-provision level, where provisions would be split according to their relationship to freshwater or the NPS-FM, and put through different processes.

13 It was considered by officers that splitting provisions and putting some parts of a provision through the FPP, and other parts through the Standard Part 1 Schedule 1 process, would lead to absurd or unworkable outcomes. For example, one part of an objective in Change 1 could be in a different process to another part of the same objective. Considering the difference in timeframes and the need for two hearing panels (one for the FPP and one for the P1S1 process). Officers took the approach of considering parts of the 'instrument' and not parts of provisions. This meant that if any provision or part of a provision met the test for the FPI, the whole provision would be in the FPI.

14 An initial internal workshop was held with Councillors on 16 June 2022, where they expressed an interest in maintaining an integrated, holistic approach to recognise the inherent connections between freshwater and indigenous biodiversity, climate change, urban development and mana whenua / tangata whenua and their relationship to their culture, land, water, sites, wāhi tapu and other taonga.

15 The purpose of this approach was also to recognise that Change 1 took an integrated approach to the first stage of NPS-FM implementation, and many provisions were drafted to collectively protect and enhance freshwater quality and quantity. An initial preference to notifying all of Change 1 as an FPI, subject to a detailed assessment of provisions, was provided by Council at this stage.

16 On July 22 2022 the High Court released a decision regarding the Proposed Regional Policy Statement for the Otago Region - *Otago Regional Council v Royal Forest & Bird Protection Society of NZ Inc [2022] NZHC 1777* (the Decision). It stated that the relationship between the provision and the maintenance and enhancement of, or impacts on, freshwater quality and quantity must be direct. It did not suggest that breaking down provisions into 'parts' of provisions was necessary and therefore this was consistent with the approach taken by officers to assess 'part' at the provision level. The Decision stated that the fundamental

concepts of ki uta ki tai and Te Mana o Te Wai could not form justification to treat the whole of a regional policy statement as an FPI.

- 17 There was no precedent for how this decision should be applied, and there remained considerable uncertainty around the implications. Officers needed to understand and apply the decision quickly, given the timeframe for notifying Change 1. I also note that the Decision was in response to a situation and allocation process that was notably different to Change 1 and the allocation process outlined in this statement, as well as a different regional policy statement.
- 18 An internal process was undertaken following the decision, to determine its implications on the work done to date and to prepare Council to make a decision on the scope of the FPI. This process involved:
- 18.1 An assessment process of different scenarios for how the provisions in Change 1 could be split between the two processes, with internal input and further legal advice. This included looking at a range of options. These options were intended to prepare Council to make an informed decision; balancing the intent for integrated provisions with the implications of the Decision and remaining uncertainty around its application. For example, whether the protection and enhancement of freshwater ecosystem health, including habitat, was directly related to matters impacting water quality or quantity was tested in two different scenarios.
- 18.2 Four options were presented to Council at a workshop on 2 August 2022. The options were as follows:
- 18.2.1 Option 1 - All provisions in RPS Change 1 are within the FPI
- 18.2.2 Option 2 – Most provisions in RPS Change 1 are within the FPI
- 18.2.3 Option 3 – Apply the High Court decision holistically, recognising the integrated way in which Change 1 partially implements the NPS-FM
- 18.2.4 Option 4 – Apply the High Court decision with a narrow lens.
- 18.3 The topics or terms that would be considered in scope of the FPI for each option are as summarised in Figure 1, attached as Appendix A, noting that some amendments to provisions were still expected so the final assessment had not

yet been completed. The proposed approach to 'part' being at the provision level (outlined in paragraph 13 of this statement) was also presented to Council at this workshop.

- 18.4 Council provided direction at the workshop to proceed with Option 3 - to apply the High Court decision while taking a holistic approach where possible and recognising the integrated approach to partial implementation of the NPS-FM in Change 1. This approach was intended to allow those provisions in Change 1 contributing to the implementation of the NPS-FM to be considered together in the most integrated way possible, given that it was clear two processes needed to be followed. Council provided direction to mitigate the loss of integration between provisions through the hearings process where possible, through the use of parallel hearings processes and providing clarity to submitters on which provision is in which process.
- 18.5 Officers applied the direction from Council to undertake a final assessment of provisions. The specific topics and their relationship to freshwater or the NPS-FM are discussed and justified for all provisions in Change 1 in Appendix E of the Section 32 report. The test for whether a provision in Change 1 would be included in the FPI was:
- 18.5.1 Gave effect to parts of the NPS-FM that regulate activities because of their effect on the quality or quantity of freshwater, or
 - 18.5.2 Related directly to matters that will impact on the quality or quantity of freshwater.
- 18.6 As mentioned in paragraph 15 of this statement, Change 1 was drafted in an integrated way, and many provisions therefore contribute to the purpose for which Section 80A was enacted; to address the decline of freshwater quality. If any part of a provision related to a topic that met the tests in 18.5.1 and 18.5.2 (for example, provisions relating to well-functioning urban environments or indigenous ecosystems, that provision was included in the FPI). Each provision was assessed independently and its relationships to other provisions could not form the basis for including or not including it in the FPI.
- 18.7 Some situations came up where a provision needed to be put through both the FPP and Part 1 Schedule 1, for example Table 1A and Table 8A of Change 1

which contain objectives in both processes. With definitions, where a term was used in both freshwater and non-freshwater provisions, they were included in the FPI to accompany the freshwater provisions so that they could be adequately interpreted and assessed.

- 18.8 Where there was uncertainty around a specific provision and whether it met the criteria, a workshop approach between officers was used to test the consistency of judgement. For example, comparing natural hazards provisions to test whether their purpose was to protect people and businesses (Part 1 Schedule 1) or to manage impacts of hazard mitigation measures on Te Mana o Te Wai (FPP).
- 18.9 At the Council meeting on 18 August 2022, Councillors were provided with the detailed scope of the FPI in the form of the Change 1 notification document, and the justification for each provision in Change 1 as provided in Appendix E of the Section 32 report.
- 18.10 Council approved public notification of those provisions identified in the notification of the Regional Policy Statement Change 1 with a freshwater symbol as a FPI, with remaining provisions proceeding through the standard Part 1 Schedule 1 process¹.

CONCLUSION

- 19 The process outlined in my evidence resulted in the scope of the FPI as notified. I acknowledge that this was a challenging, fast-paced process. The allocation process was complicated by the integrated nature of provisions in the regional policy statement and the need to genuinely recognise the interconnections between freshwater quality and quantity and other activities and ecosystems in giving effect to the NPS-FM.
- 20 I consider that the Council applied a structured approach to this process and officers applied the relevant sections of the RMA to allocate the provisions, balancing both the implications of the Decision and the need for a holistic approach to implementation of the NPS-FM in Change 1.

¹ Confirmed public minutes of the Council meeting on 18 August 2022 - <https://www.gw.govt.nz/assets/Documents/2022/08/Confirmed-Public-minutes-of-Council-meeting-on-18-August-2022.pdf>

DATE:

21 June 2023

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Senior Policy Advisor, Greater Wellington Regional Council

Appendix A

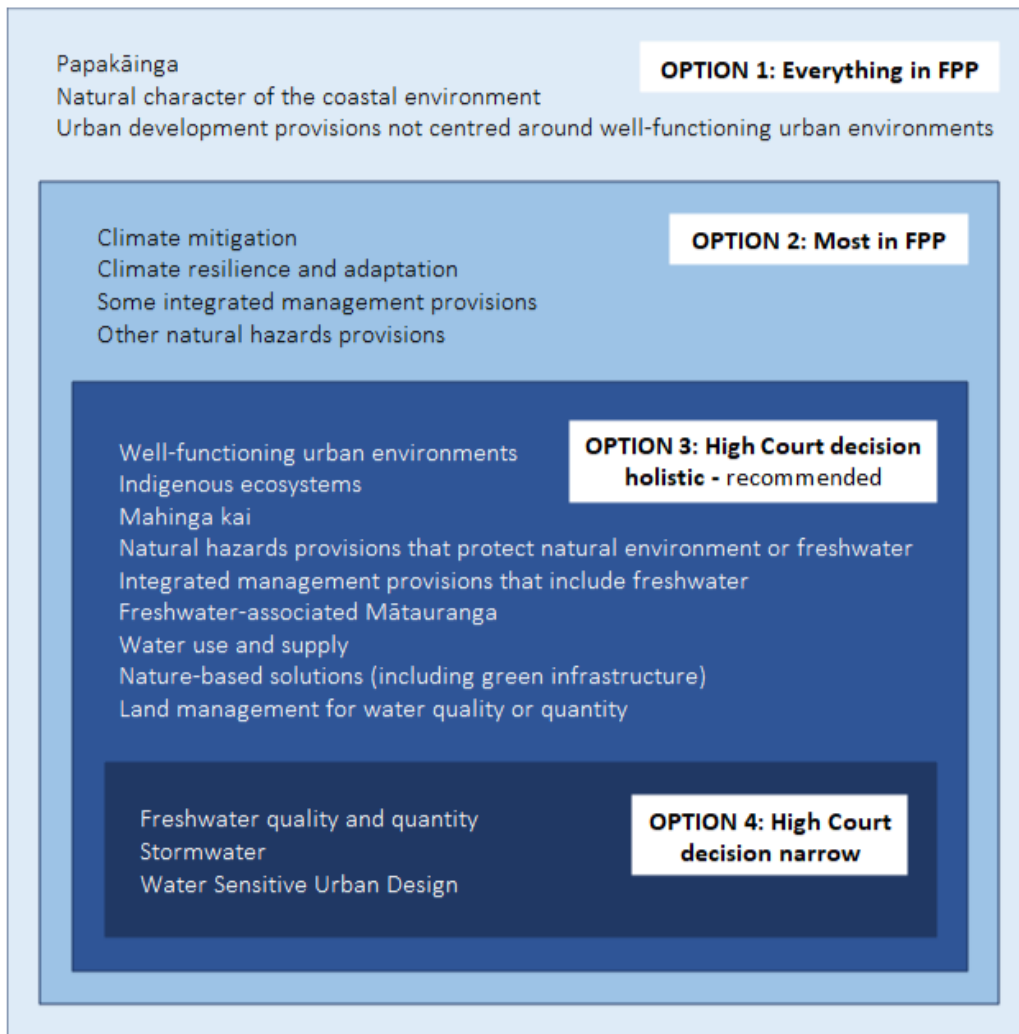


Figure 1: Depiction of the four options for the scope of the FPI. The largest box (Option 1) includes all topics in Change 1, and the scope narrows progressively.