

Before the Independent Hearings Panels

Under the Resource Management Act 1991

In the matter of submissions on proposed Plan Change 1 to the Regional Policy Statement for the Wellington Region

LEGAL SUBMISSIONS ON BEHALF OF PORIRUA CITY COUNCIL (S30)

Hearing Stream 6 (Indigenous biodiversity)

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May it please the Panels

1. Introduction

- 1.1** These submissions are filed on behalf of Porirua City Council (**PCC**), in advance of hearing stream 6 (**HS6**) on proposed Change 1 (**Change 1**) to the Regional Policy Statement for the Wellington Region (**RPS**).
- 1.2** As advised previously, PCC has recently completed a full review of its district plan and notified a Proposed District Plan on 28 August 2020 (**PDP**). PCC has now made its decisions on the PDP with the decisions version publicly notified on 7 December 2023.
- 1.3** Relevant to HS6, as part of its district plan review, PCC undertook a comprehensive process of reviewing and identifying significant natural areas (**SNA**) and their values within Porirua City. A full list of the SNAs is set out in Schedule 7 of the PDP, and the provisions that apply to the SNAs are set out in the Ecology and Indigenous Biodiversity chapter.¹ This identification of SNAs and their values was a significant exercise involving expert ecology assistance (the methodology is set out in a report prepared by Wildland Consultants Ltd).² The methodology was designed to give effect to Policy 23 of the RPS.
- 1.4** Given the comprehensiveness of this exercise, PCC is motivated to ensure that any new requirements introduced by Change 1 do not impose unnecessary inefficiencies. In particular, as the National Policy Statement for Indigenous Biodiversity (**NPSIB**) introduces procedural requirements that need to be followed, PCC considers that an additional change to the RPS will likely be required to fully give effect to the NPSIB.
- 1.5** While PCC is generally supportive of amendments to Change 1 that give effect to the NPSIB, it is concerned that by seeking to give effect to the NPSIB through this

¹ Ecology and Indigenous Biodiveristy Chapter: <https://eplan.porirua.govt.nz/districtplan/rules/0/42/0/0/0/152>
Schedule 7: <https://eplan.porirua.govt.nz/districtplan/rules/0/132/0/12567/0/152>

² https://storage.googleapis.com/pcc-wagtail-media/documents/Wildlands_2018_Methodology_for_the_Assessment_of_Ecological_Site_Significance.pdf

process (in the way suggested in the section 42A report, by making additional amendments to the RPS) natural justice issues will arise, which primarily derive from a lack of scope for the changes now proposed (and absence of any public notification of these amendments, and opportunity for submissions).

- 1.6** PCC is also concerned that the flow on effect of these amendments will be to require PCC to revisit the approach it has taken to identification and protection of SNAs, and other indigenous biodiversity, through its PDP process and more than once (particularly if a future change is proposed to the RPS giving further direction). In the interests of best utilising rate payer funds, PCC supports the initiation of a further Schedule 1 process to fully give effect to all of the NPSIB requirements in the RPS (including procedural matters).

2. Scope of permissible amendments

- 2.1** As the Panels will be aware, Greater Wellington Regional Council (**GWRC**) had the benefit of reviewing the Ministry for Environment’s proposed National Policy Statement on Indigenous Biodiversity (**draft NPSIB**) at the time it prepared Change 1. However, Change 1 was not prepared in accordance with the final NPSIB as it was gazetted on 7 July 2023. Similarly, the submission and further submission periods for Change 1 closed before 7 July 2023. Therefore, at the time Change 1 was drafted, and when submitters were preparing submissions, the final content of the NPSIB was unknown.

Scope – legal principles

- 2.2** We respectfully agree with the following principles on scope that are set out in GWRC’s legal submissions for HS6:³
- (a) Amendments to Change 1 provisions allocated to the standard Schedule 1 process are limited by the scope of submissions on Change 1;

³ Dated 19 December 2023 at [13].

(b) Amendments to Change 1 provisions allocated to the freshwater planning process (FPP) are not so limited; the Panel may make any recommendations “relating to the FPI” that are identified by the Panel or any other person during the hearing.⁴

2.3 We also agree that the permissible scope of submissions on Change 1 (and, accordingly any amendments to Change 1 that the Schedule 1 Panel will make) requires consideration of the two factors identified by the High Court in *Palmerston North City Council v Motor Machinists Limited*:⁵

(a) The submission must be “on” Change 1 and therefore address the plan change itself. It must therefore address the alteration to the status quo brought about by Change 1.

(b) This above requirement is subject to whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.

2.4 In *Motor Machinists* the High Court emphasises that the scope of a plan change is informed by the section 32 evaluation which provides “a comparative evaluation of efficiency, effective and appropriateness of options”.⁶

2.5 The difficulty in these circumstances is that, due to the timing of the notification of Change 1 and the gazettal of the NPSIB, the section 32 report could not be, and was not, informed by the final provisions of the NPSIB. On this point we note that the final NPSIB departed in numerous respects from the draft NPSIB, and so there can be no certainty that the existing section 32 report is sufficient in addressing the NPSIB. There is therefore no guarantee that potential submitters would have the benefit of being able to review a comparative evaluation to understand the extent to which they may be affected by the Change 1 provisions.

4 RMA, sch 1 cl 49(2).

5 GWRC Legal submissions at [22] citing *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

6 *Motor Machinists* at [76].

Application of scope principles

- 2.6** For most amendments that the section 42A report recommends, we agree that the amendments are sufficiently similar to the Change 1 provisions to be considered “on” the plan change, and within scope of the submissions made.
- 2.7** Although the section 32 report identifies an intention for Change 1 to be amended through the Schedule 1 process to “address any matters of misalignment” between the draft NPSIB and the gazetted NPSIB, in our submission this approach has the potential to create natural justice concerns.⁷ In particular, any amendments made through the process would not have been evaluated through the section 32 report, therefore depriving submitters of that analysis. In effect, this approach appears to attempt to leave it open for the Change 1 provisions to be varied at a later date, once the final NPSIB is confirmed. That should instead be addressed by a variation under Schedule 1, so that a formal submissions process is engaged (and natural justice issues are resolved by way of the public participation opportunities available through that process).
- 2.8** PCC does not accept that the scope to now amend the Change 1 provisions to align with the NPSIB is automatically “broad”, as counsel for GWRC submits.⁸ Including a statement in the section 32 report that alludes to future changes is not sufficient to overcome natural justice principles. Of relevance to PCC, the section 42A report recommends inclusion of a new Policy IE.2A, which imposes obligations on local authorities when considering an application for resource consent, notice of requirement, or a plan change. This policy, which would apply to decisions concerning indigenous biodiversity that does not have significant biodiversity values and is not on Māori land, was not included in Change 1 as notified.
- 2.9** This Policy has not been informed by a section 32 evaluation and has not been the subject of submissions, with potential submitters given no opportunity to make a submission on the provision (and therefore create jurisdictional scope for changes). The issue is particularly acute, given the breadth of land that could be

⁷ Section 32 report, page 183.

⁸ GWRC legal submissions at [27].

affected by Policy IE.2A (a matter which also has not been assessed in the section 32 report). This policy is also directive to PCC, potentially requiring a district plan change in advance of a full review of the RPS being undertaken to give effect to the NPSIB. PCC therefore considers that this could result in multiple requirements for it to update its district plan to ensure that it fully gives effect to the RPS and the NPSIB.

Timing to give effect to the NPSIB

2.10 Because Change 1 was notified and submissions closed before the NPSIB came into force, Change 1 does not fully give effect to the NPSIB, and it could not have been intended to. The NPSIB does not provide a transitional regime for plan or policy statement changes notified prior 7 July 2023, and nor is there a transitional regime in the RMA that applies to this situation.

2.11 Clause 4.1(1) NPSIB requires councils to implement it "as soon as reasonably practicable".⁹ However, clause 4.1(2) requires that councils must notify any change to policy statements or plans to give effect to the NPSIB "*within eight years after the commencement date.*" GWRC is therefore not required to give full effect to the NPSIB through the Change 1 process. Nor would this be possible, due to the scope of Change 1 and submissions made on it. This point is supported by the section 42A officers who state:

I recommend that certain NPS-IB provisions are given effect to in full or part through Change 1, with the NPS-IB given effect to in full through a future RPS change.

2.12 This statement acknowledges that certain requirements of the NPSIB require time to be worked through (for example the requirement to increase indigenous vegetation cover as required by clause 3.22).

⁹ Part 4 of the NPSIB sets out a number of timeframes, including a five year timeframe work inclusion of planning provisions for SNAs (clause 4.2), and a ten year timeframe for preparation or updating regional biodiversity strategies (clause 4.3).

2.13 Given that a further review to give full effect to the NPSIB will be required in the future, PCC considers it appropriate for a more fulsome review of the RPS to be undertaken at a later date, to include the additional provisions recommended in the section 42 report (that were not notified). This would remove the potential for multiple changes being made to the RPS and by extension to District Plans, and avoid potential natural justice issues arising through the Change 1 process.

Uncertainty of scope to make or recommend amendments

2.14 For completeness, the exact scope that the Panels have to either amend the HS6 provisions (for non-FPI provisions) or recommend that they be amended (for FPI provisions) is currently uncertain.

2.15 This is due to the fact that although all provisions were notified as part of GWRC's FPI, the s 42A reporting officer recommends that they now be categorised as non-FPI provisions, and should undergo the normal Schedule 1 process. As set out at paragraph 2.3 above, the Panels' scope to amend Change 1 differs depending on whether a provision is allocated to the standard Schedule 1 process or the FPP.

3. Requirements of the NPSIB

3.1 The NPSIB includes the following objective:

(1) The objective of this National Policy Statement is:

(a) to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and

(b) to achieve this:

(i) through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and

(ii) by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and

(iii) by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and

*(iv) **while** providing for the social, economic, and cultural wellbeing of people and communities now and in the future.*

3.2 Of particular relevance, the NPSIB sets a requirement to also provide for the “social economic, and cultural wellbeing of people and communities now and in the future” while also maintaining indigenous biodiversity across Aotearoa. PCC is unclear of the analysis of how this is being achieved by the amendments proposed to Change 1 which are intended to give effect to the NPSIB. This highlights the potential natural justice issue PCC is concerned about, as provisions need to be given effect to in their broader context considering all of the provisions of the NPSIB (and the requirements of the RMA more broadly). Undertaking an ad hoc approach to implementation creates more of a risk that decisions made in one process will need to be revisited later.

3.3 The NPSIB also sets out certain procedural requirements for GWRC when making changes to the RPS, that did not previously exist in the draft NPSIB. This includes clause 3.2 which provides:

Local authorities must engage with tangata whenua, people and communities (including landowners) to ensure that the decision-making principles inform, and are given effect to, when implementing this National Policy Statement in their regions and districts.

3.4 The “decision-making principles” concerned are set out at clause 1.5(3) of the NPSIB, and provide for seven principles that must “inform the implementation of [the NPSIB]”, including through Change 1.

3.5 The need for engagement with the groups identified in clause 3.2 to inform implementation of the NPSIB, emphasises the need for the Panels to tread carefully on the extent to which Change 1 is now amended to give effect to the NPSIB. In PCC’s submission, the proposed new Policy IE.2A is such an example, where engagement has not occurred.

3.6 Further and more specific requirements for engaging with tangata whenua are set out in clause 3.3, however, PCC is not in a position to comment on the extent to which these requirements have been complied with.

4. Relief sought by PCC

- 4.1** PCC requests that the Panels ensure that any decisions it makes that are to give effect to the NPSIB are done so in accordance with the scope of matters raised in submissions. This will then enable GWRC to undertake a more comprehensive review of the RPS provisions and to fully give effect to the NPSIB after consulting with the appropriate parties (including PCC as a territorial authority) in accordance with the procedural requirements of the NPSIB. This is of particular importance to PCC where there may be flow-on implications for the obligations placed on PCC as directed by the NPSIB. As the Panels will appreciate, PCC is keen to reduce any potential for duplication of work being required to comply with any direction relating to, in this context, indigenous biodiversity.
- 4.2** PCC made submissions on a number of the provisions that have been allocated to HS6. Notwithstanding the substantive procedural concerns raised in these submissions, PCC is still seeking to pursue the points it raised in its submission:
- (a) Clarification of the outcomes sought by Objectives 16, 16A, 16B and 16C – the section 42A officer recommends rejection of these submission points. PCC continues to seek amendments to clarify the outcomes those objectives are seeking to achieve;
 - (b) PCC has set out its opposition to the inclusion of dates by which territorial authorities are required to give effect to RPS provisions (refer to [4.2] – [4.16] Opening Legal Submissions on behalf of PCC, Hearing Stream 1, dated 13 June 2023). In relation to Policies 23 and 24, PCC has already mapped and included provisions for SNAs in accordance with the requirements of the RPS. However, it considers that any further identification and mapping of SNAs (to the extent required for PCC), and inclusion of new or amended provisions should occur within the timeframes specified by the NPSIB, including under clause 4.1 and clause 4.2 of the NPSIB. Related to this, clause 3.8(5) enables recognition of a methodology used to identify SNA that existed at the time of the

commencement of the NPSIB. PCC will likely work through this approach to determine whether the methodology used to identify SNA through its PDP process meets the requirements of the NPSIB (and therefore that it will not need to undertake a further district wide assessment to comply with the requirements of the NPSIB). Clause 3.8(5) gives PCC four years to have its methodology recognised. Overall PCC considers that the implementation timeframes in the NPSIB should not be undercut, or further complicated, by the RPS provisions;

- (c) PCC maintains its position that Policy IE.1 is not required. It considers that the requirement for local authorities to partner with tangata whenua in relation to management of indigenous biodiversity is a requirement of the RMA (section 8), and is a requirement of clause 3.33 of the NPSIB;
- (d) Policy 47 and IE.2 are “consideration policies”. PCC’s position on these policies is set out in the Legal Submissions on behalf of PCC, Hearing Stream 3, dated 14 August 2023. As discussed in those submissions, PCC is concerned about how those policies will continue to apply where the RPS has been given effect to by a relevant district plan. This is particularly relevant in as it is not clear how Policy 47 will be applied when Policies 23 and 24 have been given effect to, and how Policy IE.2 will apply where Policy IE.1 has been given effect to. Although the amendment to Policy 47(i) goes some way to addressing PCC’s concerns, it does not provide sufficient clarity, as that provision only references biodiversity offsetting and compensation (i.e. rather than acknowledging that the policy will not apply more broadly when policies 23, 24 and 24A are given effect to);
- (e) Policies IE.3 and IE.4 are “non-regulatory” policies that require regulatory responses. The amendments proposed to Policy IE.3 by the section 42A officer do not resolve PCC’s position that, although the policy is labelled “non-regulatory” it requires a regulatory response. The amendments to this policy require further regulatory response. PCC considers that these policies would be better framed as methods;

- (f) As above, PCC does not support the inclusion of a date for compliance as set out in Method 21. If a date is to be included, it should be aligned with the requirements of the NPSIB; and
- (g) PCC supports the amendments proposed by the section 42A officer in response to its submissions on Policy 61, and Methods 32 and 54.

Dated: 30 January 2024



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