regionalplan@gw.govt.nz

Proposed Change 1 to the Regional Policy Statement for the Wellington Region

Dr Sarah Kerkin

[redacted]

The following is my submission on the proposed change to the Regional Policy Statement (RPS).

I wish to be heard by speaking in support of my submission.

I would consider presenting a joint case at the hearing with others who make a similar submission.

I will not obtain any commercial advantage through the matters contained in my submission.

I confirm that I have permission to provide this information and that I have read and understood the privacy statement

[redacted]

Sarah Kerkin

13 October 2022

_ _

Some opening observations

Thank you for the opportunity to make a submission.

My husband and I are rural landowners and are living in Lower Hutt while we build our forever home on our land in Whitemans Valley.

All things being equal, we should have been living in our forever home by now, and would have been but for the ill-fated litigation brought by GWRC against the developer, the Upper Hutt City Council, us and our neighbours (*GWRC v Adams and ors*). The stress and cost of that completely unwarranted and meritless legal action continues to have a toll on our family – one that GWRC has never acknowledged, let alone apologised for.

The Environment Court made it clear that it expected we landowners would be left to the quiet enjoyment of our land.

Staggeringly, that appears not to be so. Less than a year after the hearing began, GWRC is mounting another attack on our land, this time in the name of climate change.

The proposed RPS appears to set up a regulatory taking by stealth

By referring specifically to peatland as a nature based solution it seems clear that GWRC is laying the groundwork for prescriptive rules that will effectively make all activity on the peatland unviable. We've some experience well-versed in living under those conditions – GWRC asserted its highly prescriptive wetland rules applied to our wetted pastures, creating a significant fire risk every summer because we weren't allowed to mow the waist-high grass.

The proposed RPS doesn't impose such rules itself. The RPS is, in places, so vague it could enable GWRC staff to make up the rules as they went along (the Environment Court called this ruling by fiat). The RPS would also empower the making of new (and we anticipate prescriptive) rules through the natural resources plan.

The inclusion of the peatland in the proposed RPS looks unnervingly like an attempt to stop all activity, be it farming or residential, on the peatland. That feels a lot like a regulatory taking by stealth and without any compensation. If GWRC wants the peatland it should be honest and say that. It should then be prepared to buy the land at market rates from the owners and be accountable to the region's ratepayers for doing so in the middle of a cost of living crisis.

The proposed RPS conceals some vital information in definitions at the end

I have 22 years' experience in central government, including 7 years on the Attorney-General appointed Legislation Design and Advisory Committee. This is a committee of senior public servants who advise departments on good drafting and legislative design to help them create better regulation. I bring that experience to bear in commenting on drafting clarity and quality.

I strongly recommend that GWRC consider moving the definitions to the start of the RPS. The definitions contain critical information that materially affects how the RPS will be applied. For instance, people will assume the natural and ordinary meaning of "restoration" will apply, unless they have seen the definition. If the definitions are hidden at the back of

the document, people may give up before they get there, particularly given the draft's length.

In legislation, the interpretation clause is usually at the start. That makes it more likely that people will read the key definitions before getting into the statute.

I make some specific drafting suggestions for some definitions further on in my submission.

Decision requested – amend the proposed RPS and, if necessary, the full RPS to put the definitions at the start, not the end.

The proposed RPS needs to be clearer as to where it sits in the hierarchy of resource management planning instruments

I understand that regional policy statements are subordinate to primary legislation and national policy statements, and are superior to regional and district plans. In other words, central government policy in the form of laws and national policy statements will drive the content of regional policy statements and district plans.

On that basis, I'm a little confused by GWRC councillors' decision on 18 August 2022 to adopt the RPS proposed change when clause 44 so clearly says that its intent is to wrap constraints around the central government's housing intensification direction by August 2022.

At a constitutional level, I am troubled by the idea that central government could issue an instrument with a clear policy direction, only to have councils look for ways to circumvent it. If there are practical difficulties with, or policy objections to, a particular NPS that seems to be a matter for ongoing dialogue between central and local government rather than a decision not to implement.

GWRC has also struck out on its own on climate change, ahead of decisions that central government may make. The council's concern is laudable, but the issue is best dealt with at a national level. Regional approaches to climate change are most likely to result in a patchwork of inconsistent requirements that will make things challenging, if not unfair, for businesses and residents. At worst, the regulatory incentives could lead to a race to the bottom. Regional approaches are unlikely to have much of a positive impact on their own, absent a consistent national approach.

Again, climate change might be a useful conversation for local and central government to have. In the meantime, however, the climate change targets and other provisions in the proposed RPS may do more harm than good.

Overall, I am troubled by the GWRC's apparent belief that it has the right, power, and mandate to regulate matters more properly the domain of central government, and to ignore limits imposed by central government where the council disagrees. Such behaviour exposes the community to the risk of uncertainty and inconsistent regulation by GWRC when compared to neighbouring regions.

That being the case, the most prudent approach seems to be to put the proposed RPS on hold pending further regulatory instruments from central government. If GWRC decides to pursue its current course, I strongly urge it to publish the documents on which it based its policy so the science can be tested by the community. Our experience with the environmental science team's "science" of wetlands in *GWRC v Adams and ors* has left me, my neighbours and the Mangaroa Peatland Focus Group with little confidence in GWRC's climate science. Heightened transparency would promote legitimacy of the final instrument.

Decision requested – amend the proposed RPS to remove any and all clauses that seek to "constrain" the intent and direction of NPS-UD.

Remove any and all clauses relating to climate change pending further regulatory instruments from central government.

Release the documents used to formulate the climate policy so the science can be tested by the community.

The proposed RPS shows some confusion as to what is linked to NPS-FM

The proposed RPS contains the Fresh Water indicator in numerous places and whilst in some cases there is a clear linkage to NPS-FM there are many where the linkage is tenuous at best.

The preamble specifies the criteria for determining the scope of a freshwater planning instrument - namely that there should be a direct relationship to freshwater quality or quantity. The court's decision maintains that it is up to regional councils to determine and justify a connection to freshwater for each provision.

GWRC has determined which parts of Change 1 meet at least one of the tests now required to form part of a freshwater planning instrument:

a - give effect to parts of the NPS-FM that regulate activities because of their effect on the quality or quantity of freshwater, or

b - relate directly to matters that will impact on the quality and quantity of freshwater.

This process and logic have not been applied in a consistent fashion.

Decision requested – GWRC should examine the document and remove the FW indicator from those parts of the document that don't meet the criteria specified in the preamble. Those parts should follow a Section 1 process.

Specific comments on provisions in the proposed RPS

In preparing my submission I have copied the relevant section from the proposed RPS change and shown it in **black**.

My observations are shown in Blue.

The decision that I am requesting is shown in green.

Page 13

Council is required by the Resource Management Act 1991 to prepare a Regional Policy Statement and to give effect to national direction, including the National Policy Statement on Urban Development 2020 and the National Policy Statement for Freshwater Management 2020

See page 10 of the draft RPS which states the intent to constrain NPS-UD. Refer to my comments above.

Decision requested – affirm that GWRC have a statutory obligation to give effect to NPS and not make up their own rules as they go along.

Page 15

The focus of RPS Change 1 is to implement and support the National Policy Statement on Urban Development 2020 (NPS-UD).

Given the stated intention to constrain, this statement seems somewhat disingenuous.

Decision requested – be straightforward about the intention towards NPS-UD and refer to it consistently. Doing otherwise can create an impression that GWRC is trying to *look* as though it is implementing NPS-UD whilst doing something else altogether.

3.1A Climate Change

While historical emissions mean that we are already locked into continued global warming until at least mid-century, and longer for sea-level rise, there is still opportunity to avoid the worst impacts of climate change if we act urgently across all sectors to make signification reductions in global greenhouse gas emissions.

The reality is that significantly reducing emissions in the Wellington region is not going to have any impact on the global situation. GWRC targets might have feel-good factor, but there's nothing to indicate whether any analysis or modelling was done to understand the

impacts on the regional economy and whether the economy and community could sustain the emission cuts needed.

For the region and the nation to cope with the results of climate change, we need to have the strongest economy that we can generate which will give us the resilience to mitigate the inevitable consequences of changing weather patterns and sea levels. We also need to act in a nationally consistent way to make the most effective and efficient interventions that impact fairly and equitably.

Decision requested – GWRC hold the proposed climate change provisions pending central government direction on climate change. remove the climate change provisions. Alternatively, the proposed RPS should recognise the need for a strong economy and put in place measures to promote commerce and sustainable agriculture as a key elements of this.

The key areas of action required to address climate change are

1. methane reductions offer a significant opportunity for global cooling in the short-term.

Opening statement says that we are already locked into continued global warming until at least mid-century. Action item 1 contradicts that statement. Which one of these contradictory positions is correct?

Decision requested – amend this statement so that the document makes sense. Release the documents on which the opening statement and action item 1 are based so the community can understand the science.

Increase greenhouse gas sinks through carbon sequestration, while recognising that this is only a short-term solution.

It's not clear why GWRC thinks this is only a short-term solution. If done properly through plantation forests that are sequentially harvested, it can both lock in carbon and produce an ongoing economic benefit.

Decision requested – delete the statement re short-term solution. Release the documents on which this statement is based so the community can understand the science.

Take adaptation action to increase the resilience of our communities, the natural and built environment to prepare for the changes that are already occurring and those that are coming down the line. Critical to this is the need to protect and restore natural ecosystems so they can continue to provide the important services that ensure clean water and air, support indigenous biodiversity and ultimately, people.

This clause introduces the concept of restoration, which is inadequately defined in the definitions section of the RPS. The definition is open-ended and requires restoration to an unspecified prior state.

GWRC ran into problems with this approach to restoration in *GWRC v Adams and ors.* The Environment Court was unimpressed by GWRC officials' inability to specify the state of the land at the material time (and therefore the standard to which the land need3d to be restored). The Court was also unimpressed with the open-ended nature of the orders sought, as they would have given the people subject to the orders no certainty over their legal obligations and when they would be met. The Environment Court rightly described GWRC's request for orders requiring this kind of restoration as "draconian".

In light of this experience, it seems extraordinary that GWRC would seek to regulate a similarly flawed approach. There is no difficulty with protecting that which currently exists but there is a real issue with the concept of returning something to a loosely defined prior state.

Decision requested – remove the words "and restore" from this clause.

The risks associated with natural hazards are exacerbated by climate change

our over-reliance on hard engineered protection works, which will inevitably become overwhelmed and uneconomic to sustain, will ultimately increase the risk to communities and the environment.

This statement is made from a pre-conceived point of view and does not appear to be based on evidential analysis. There are numerous examples of hard engineered protection works throughout the world that have given and continue to give the protection that they were designed to achieve. Thames Barrier (tidal surge), Rhine estuary at Maastricht (tidal surge and controlled river flow), Afsluitdijk (to create dry land from a 5 metre deep seawater bay). Closer to home the entire Hutt valley is protected from periodic flooding by the stop bank system and there will only be any increased risk if there is a failure to maintain them.

We have to work with the reality we have. That reality means engineered solutions will have to sit alongside nature based solutions, especially in the Hutt Valley, where the valley floor has been developed for more than a century, and people and communities are part of the environment too (per the Resource Management Act). This means that, however attractive the nature based solution of giving the rivers room to move, it will probably not be a feasible approach to manage Te Awakairangi without working in tandem with engineered solutions.

Decision requested – delete the above clause which does not appear to have any evidential basis. Hard engineered protection works that are well-designed, well-engineered and well-maintained do not increase risk. If GWRC wishes to continue to rely on this point of view, it

needs to release the factual, scientific and engineering-based information on which it has reached its conclusions.

The impacts of climate change will exacerbate existing inequities

The impacts and costs of responding to climate change will not be felt equitably, especially for Māori. Some communities have no, or only limited, resources to enable mitigation and adaptation and will therefore bear a greater burden than others, with future generations bearing the full impact.

It's laudable that GWRC is considering equity and fairness in its approach to managing climate change response.

I would also note that, in introducing the peatland as a nature based solution, GWRC appears to be expecting peatland landowners to bear the full cost of maintaining a carbon store for climate change purposes for the benefit of the wider community. The cost borne by the landowners is the reasonable use and enjoyment of their land. Without recompense, which doesn't seem particularly fair or equitable.

Decision requested – if the climate change provisions remain, GWRC needs to identify how it will mitigate the impacts of climate change restrictions on landowners whose land is substantially or wholly co-opted as part of a "nature based solution".

KkW Policy 10

For Kahungunu ki Wairarapa indigenous species and tangata whenua values come first: Management of Trout and Salmon shall be consistent with the values of tangata whenua. Indigenous species shall have the priority to be abundant, which may mean trout and salmon shall be removed

This policy appears to be inconsistent with national-level regulation, the Freshwater Fisheries Regulations. That inconsistency should be resolved before the RPS is promulgated to ensure that the RPS doesn't require people to do anything to do anything that will incur additional compliance costs or liability under the Regulations. If it has not already done so, GWRC should really consult with DOC as the government agency that administers the regulations and Fish and Game.

Decision requested – sort out the regulatory implications of adopting KkW Policy 10.

Policy CC.5: Avoid increases in agricultural greenhouse gas emissions – regional plan

Regional plans shall include objectives, policies, rules and/or methods to avoid changes to land use activities and/or management practices that result in an increase, in gross greenhouse gas emissions from agriculture.

There are many situations where a change in agricultural practice will result in both an increase and a decrease in emissions. The focus should be on the net change, not just on one side of the equation. That will give a false picture of what's happening in reality. Looking at gross emissions only suggests that GWRC doesn't have a strong grasp of basic mathematics. I'm sure that's not the impression GWRC wants to give.

Decision requested – Delete the word "gross" and insert the word "net".

Policy CC.6: Increasing regional forest cover and avoiding plantation forestry on highly erodible land – regional plans

Regional plans shall include objectives, policies, rules and/or methods that support an increase in the area of permanent forest in the region

(a) promoting and incentivising the planting or regeneration of permanent indigenous forest over exotic species,

offsetting through carbon sequestration is only a short-term solution

I'm intrigued by GWRC's apparent belief that indigenous forest is better at sequestering carbon than exotic forest. I'd really like to see the science underpinning that conclusion.

I'm also intrigued by the idea that permanent forest is better at carbon sequestration than, say, sustainably farmed timber forests (which could be native or exotic species). I understand that forest, comprised of any species, will only produce a net storage of carbon while it is in an active growing phase. Once the forest is mature it reaches a state of limbo where there is no longer a net absorption of carbon and as trees within the forest die and fall to the forest floor and rot, the forest becomes a net emitter of methane. The draft RPS notes that methane is a significant greenhouse gas.

Plantation forest can be sequentially planted, harvested and again planted. Erosion and slope stability issues should be able to be addressed and controlled. Research can focus on economic utilisation of slash and controls put in place to ensure that it is not left on site to clog waterways.

The emphasis on permanent indigenous forest seems to have little to do with whether it is the best way of sequestering carbon but is greatly influenced by other, unarticulated considerations.

Decision requested – GWRC review the calculations which have been used to support the concept that permanent indigenous forest gives the best overall outcome taking all factors into consideration. GWRC produce the scientific evidence for scrutiny and peer review.

Policy 18: Protecting and restoring aquatic ecological function health of water bodies – regional plans

(b) there is no further loss of extent of natural inland wetlands and coastal wetlands, their values are protected, and their restoration is promoted.

I agree with protecting Aotearoa's remaining natural wetlands.

As noted earlier the concept of restoration is inadequately defined in the definitions section of the RPS. The definition is open-ended and requires restoration to an unspecified prior state.

GWRC ran into problems with this approach to restoration in *GWRC v Adams and ors.* The Environment Court was unimpressed by GWRC officials' inability to specify the state of the land at the material time (and therefore the standard to which the land need3d to be restored). The Court was also unimpressed with the open-ended nature of the orders sought, as they would have given the people subject to the orders no certainty over their legal obligations and when they would be met. The Environment Court rightly described GWRC's request for orders requiring this kind of restoration as "draconian".

In light of this experience, it seems extraordinary that GWRC would seek to regulate a similarly flawed approach.

The ill-fated case has significantly weakened the Mangaroa Peatland community's trust in the GWRC. Given that loss of trust, it would be advisable to make restoration a non-regulatory provision. Too much harm is likely to result if the council and community "eco-warriors" can wield this provision like a weapon against their neighbours.

Decision requested – restoration of wetlands is made a non-regulatory provision. If it is to remain a regulatory provision, be clear that restoration applies only to natural wetlands and not to areas like the peatland that have been so degraded they have ceased to be natural wetlands.

Policy 23: Identifying indigenous ecosystems and habitats with significant indigenous biodiversity values – district and regional plans

By 30 June 2025, District and regional plans shall identify and evaluate indigenous ecosystems and habitats with significant indigenous biodiversity values

I suggest policy 23 is premature and needs to be withheld pending release of NPS-IB. As far as I'm aware the NPS-IB hasn't yet been released following consultation on the exposure draft. The exposure draft indicated that SNA area plans would need to be notified within 5 years from the commencement date (which we won't know until the NPS-IB is promulgated).

By introducing a date of June 2025 (a mere 2.5 years away), not only is GWRC jumping the gun on NPS-IB, it's also putting unnecessary pressure on already overloaded local authorities to produce SNA maps. That will likely impact on time for community consultation, and result in further erosion of public support for SNAs. Surely GWRC doesn't want that.

GWRC are also using assessment criteria that have not yet been confirmed following the consultation stage of the draft NPS-IB.

Decision requested – withhold the provision until the NPS-IB has been released so GWRC can be sure it is using the correct assessment criteria. Also delete "30 June 2025" and insert "within 5 years from the commencement date of NPS-IB.

Policy 30: Maintaining and enhancing the viability and vibrancy of regionally and locally significant centres – district plans

Policy 30 identifies the hierarchy of regional and locally significant centres within the Wellington Region

Hierarchy is defined as a system in which people or things are put at various levels or ranks according to their importance.

Policy 30 does not identify a hierarchy. If it did then it would be stating that Upper Hutt is more important than Lower Hutt. This is clumsy drafting and it would be better to remove the concept of hierarchy from the list altogether.

Decision requested – delete the words " the hierarchy of".

Policy 31: Identifying and enabling a range of building heights and density

Policy 31 is an unnecessary inclusion that has the potential to cause confusion. NPS-UD clearly specifies how Local Authority District Plans are to be amended to give effect to the NPS and Policy 31 just inserts another layer of bureaucracy in the process without really adding any value. It potentially adds confusion by creating a question as to whether the Regional Policy Statement or the National Policy Statement prevails.

The NPS contains all of the criteria needed for the Local Authority to make any adjustments to their District plan in order for it to comply with Government direction.

Decision requested – delete Policy 31 from the RPS.

Policy 32: Identifying and protecting key industrial-based employment locations – district plans

Policy 32 repeats clear direction that is contained in NPS-UD. It is unnecessary and should be removed.

Decision requested – delete Policy 32 from the RPS

Policy CC.11: Encouraging whole of life carbon emissions assessment – consideration

…a whole of life carbon emissions assessment is encouraged for all new or altered transport infrastructure

Perhaps it might be helpful for GWRC to provide an example to help people prepare this kind of assessment. The assessment that GWRC prepared for its EV bus fleet would be an excellent example I'm sure.

Decision requested – GWRC to publish alongside the regional policy statement the whole of life carbon emissions assessment calculation done for its EV bus fleet as an exemplar of what is required.

Policy CC.13: Managing agricultural gross greenhouse gas emissions – consideration

As agriculture is the second largest emitter of GHG in the region, contributing 34 percent of the region's GHG emissions,

As per Policy CC.5. In focussing on gross emissions GWRC is only looking at part of the picture. There are always two sides to any equation, so net emissions is the correct measure here.

Decision requested – Delete the word "gross" and insert the word "net".

Policy 47: Managing effects on indigenous ecosystems and habitats with significant indigenous biodiversity values

(b) providing adequate buffering around areas of significant indigenous ecosystems and habitats from other land uses

The concept of buffering has not been adequately defined and there has been no consultation with communities that would be impacted. There has been no definition as to

the dimensions of any buffer zone; no definition as to what constitutes 'adequate'; nor has there been any clear direction as to what activities within the buffer would be constrained.

Not only will there need to be effective consultation with the landowner where the SNA is situated but there would also need to be another layer of consultation for those landowners within the buffer zone.

To consult meaningfully, the community will need to understand matters like the dimensions of any buffer zone, the scientific basis on which those buffers are being drawn, what constitutes 'adequate' and the restrictions that are likely to be imposed on activities within the buffer.

Ideally, when it comes time to draft rules for buffer zones, GWRC will draft the rules in close collaboration with affected landowners to ensure the rules are workable in practice.

Decision requested – GWRC be required to clearly define the concept of buffering, including all relevant factors and rules that would apply to the buffer zone. GWRC be required to collaborate closely with the community in developing rules to ensure workability. It is not acceptable for GWRC to be left to make up detailed regulations on the fly.

Definition – nature-based solutions

Insert a new definition of nature-based solutions as follows: Nature-based solutions
Examples include:
Reducing greenhouse gas emissions (climate change mitigation):
- planting forests to sequester carbon
- protecting peatland to retain carbon stores

The inclusion of the reference to peatland within a definition constitutes an attempt to regulate by stealth, and flies in the face of the Environment Court's expectation that people on the peatland would be left to the quiet enjoyment of their land. It smacks of bad faith regulation.

The Mangaroa Peatland community is aware that GWRC officials have long sought to limit use of the peatland, first through wetland rules, then using SNA rules and now, it seems by citing it as a carbon sink.

For the avoidance of doubt, the RPS should also acknowledge that it respects and observes the Environment Court's finding in *GWRC v Adams and ors* that the land subject to that decision was not and is not a natural wetland.

Decision requested – GWRC remove the example of "protecting peatland to retain carbon stores" from the definition. The RPS should acknowledge that it respects and observes the Environment Court's decision in *GWRC v Adams and ors.*

Definition - protect

Protect (in relation to indigenous biodiversity) Looking after biodiversity and the ecosystem processes that create and maintain it in the long term. This involves managing all threats to secure species from extinction and ensuring that their populations are buffered from the impacts of the loss of genetic diversity and longer-term environmental events such as climate change. This includes, but is not restricted to, legal protection.

This is another definition that is worryingly broad and vague in that it can be read to cover everything everywhere if GWRC believes it to be appropriate. The rule of law requires that law be accessible and predictable. That means the law must be able to be easily discovered and understood, and applied predictably and consistently. This definition doesn't meet that basic requirement. The open-ended nature of the definition, including as it does legal protection, opens up the prospect of rule by fiat by GWRC officers, something which was of concern to the Environment Court in *GWRC v Adams and ors*. Ideally the definition would be made more specific.

Decision requested – specify the components of the definition so it can be meaningfully understood and consistently applied. Consult with the community on the redrafted definition to promote its legitimacy.

Definition - restoration

The active intervention and management of modified or degraded habitats, ecosystems, landforms and landscapes in order to reinstate indigenous natural character, ecological and physical processes, and cultural and visual qualities. The aim of restoration actions is to return the environment, either wholly or in part, to a desired former state, including reinstating the supporting ecological processes.

Again, the definition is broad and vague and doesn't meet rule of law requirements that law be predictable and understandable. Detailed rules should be developed in close collaboration with experts and affected landowners to ensure the rules are practicable and workable. To be legitimate, the rule-making process needs extensive community consultation and support.

Some key points that need to be sharpened up in the definition include the perspective – whose desired former state it is – and the time at which that former state existed. Some reference to expert opinion needs to be included. The assessment of what is needed to restore a habitat etc should not come down to the subjective opinion of a council official, given that GWRC has strongly stated environmental goals.

Balancing perspectives are needed from expert advisors and from people directly affected in the local community. The perspectives of people indirectly affected may also be relevant but should be given less weight than those directly affected.

Decision requested – specify the components of the definition so it can be meaningfully understood and consistently applied. Consult with the community on the redrafted definition to promote its legitimacy.

End of Submission