

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 2 (Integrated Management)

Legal submissions in reply on behalf of Wellington Regional Council

Hearing Stream 2 – Integrated Management

Date: 7 July 2023



Solicitor on the Record
Contact solicitor

Kerry Anderson
Emma Manohar

kerry.anderson@dlapiper.com
emma.manohar@dlapiper.com

+64 4 474 3255
+64 4 918 3016

Level 4, 20 Customhouse Quay, Wellington 6011
PO Box 2791, Wellington 6140
Tel +64 4 472 6289

MAY IT PLEASE THE PANELS:

Introduction

- 1 These legal submissions in reply on behalf of the Wellington Regional Council (**GWRC**) respond to matters raised in legal submissions (and/or evidence) filed by submitters in Hearing Stream 2 on Proposed Change 1 (**Change 1**) to the Operative Regional Policy Statement (**RPS**).
- 2 GWRC filed one section 42A report from Mr Jerome Wyeth, dated 16 June 2023. It also filed rebuttal evidence from Mr Jerome Wyeth dated 7 July 2023. Initial legal submissions were filed on 23 June 2023.
- 3 These submissions address the legal issue raised by Horticulture New Zealand (**HortNZ**), in relation to the requirement to 'give effect' to the National Policy Statement for Highly Productive Land (**NPS-HPL**).

HortNZ Amendments re the NPS-HPL

- 4 HortNZ has sought amendments to Change 1 to recognise the NPS-HPL (set out in Appendix 1 to the 'Industry Statement' of Ms Levenson). Effectively, they seek an addition to Overarching RM Issue 1 and the definition of 'highly productive agricultural land'.
- 5 HortNZ sets out a range of reasons why those amendments should be made, including:

As outlined in the legal advice provided in Appendix 3, HortNZ submits that under section 55(2D) of the RMA, Council has a statutory obligation to give effect to the NPSHPL as soon as practicable. It is our view it is more appropriate to start the implementation of the NPSHPL in this process rather than to wait.

At [22]

- 6 These submissions respond to the suggested obligation of Council under section 55(2D) of the RMA.

Obligation to give effect to the NPS-HPL

- 7 Change 1 was notified on 19 August 2022. The NPS-HPL came into force on 17 October 2022. Clause 1.2(1) of the NPS-HPL
- 8 The obligations on GWRC in relation the NPS-HPL are:
- 8.1 Section 61(1)(da) of the RMA states that a regional policy statement must be changed 'in accordance' with a national policy statement.
 - 8.2 Section 55 of the RMA sets out how a 'document' (which includes Change 1) should be amended to recognise a national policy statement. It sets out a process for Schedule 1 and non-Schedule 1 changes.
 - 8.3 The process for non-Schedule 1 changes is not relevant here as the only provisions in the NPS-HPL which allows changes without a Schedule 1 process is clause 3.5(4) of the NPS-HPL. This relates to changes to District Plans to incorporate maps of highly productive land, once the Regional Council has undertaken the required mapping exercise in its RPS (which has a 3 year timeframe on it).
 - 8.4 Section 55(2B) and (2C) of the RMA require that GWRC must make all other amendments that are required to give effect to any provision in the NPS-HPL by way of a Schedule 1 process.
 - 8.5 Section 55(2D) of the RMA then requires that amendments to give effect to the NPS-HPL need to be made 'as soon as practicable' (aside from the mapping of HPL in the RPS, which is required 'as soon as practicable and not later than 3 years after commencement). There are no other specified timeframes directed in the NPS-HPL for any amendments that relate to GWRC functions.

Application in the case of Change 1

- 9 While there is no doubt there is an obligation on GWRC to give effect to the NPS-HPL, this obligation does not require the changes to be made immediately and put in Change 1 and this obligation does not override the fact that there is no jurisdiction for amendments to be made to Change 1 where there is no scope to do so.
- 10 It is submitted that it is only where amendments are within the scope of Change 1 and (for Schedule 1 provisions within Change 1) within scope of submissions on Change 1 that they can be made by the Panels, as the NPS-HPL requires a Schedule 1 process for essentially all amendments required for GWRC to give effect to it.
- 11 This means a further change process will be required for GWRC to give full effect to the NPS-HPL, particularly the RPS mapping. It is submitted that this is the appropriate place for the full implementation of the NPS-HPL to be addressed.
- 12 From a practical perspective, it is also worthy of note that if no amendments are made to Change 1 to reflect the NPS-HPL, it is not a situation where there is a gap and there are no constraints on the use of highly productive land as defined by the NPS-HPL. The NPS itself sets out an interim regime that applies to highly productive land (and which has applied since October last year), regardless of what the RPS says.
- 13 It is submitted that the approach that the Panels are limited by scope regardless of the requirement to give effect to an NPS is consistent with the High Court's decision in *Horticulture NZ v Manawatu-Wanganui Regional Council* [2013] NZHC 2492. In that case an issue arose as to whether a proposed plan notified prior to the gazettal of the National Policy Statement on Freshwater Management (**NPS-FM**) needed to give effect to it. On appeal, the High Court considered whether it was an error of law for the Environment Court on appeal to fail to

consider the extent to which the relevant proposed plan gave effect to the NPS-FM and observed (footnotes omitted):

[99] It is also important to bear in mind that the Environment Court's jurisdiction is functionally limited. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions. I agree with Mr Maassen's submission that the Environment Court does not sit in an executive plan-making and plan-changing role. That is the local authority's role.

Horticulture NZ v Manawatu-Wanganui Regional Council [2013] NZHC 2492, (2013) 17 ELRNZ 652 at [99]-[101].

[100] In this case the NPSFM was gazetted only after appeals and s 274 notices had been filed. I consider that the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step".

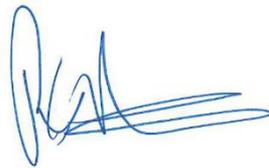
[101] Policy E1 of the NPSFM anticipates decisions being made by regional councils. Implementation must be undertaken using the process in sch 1. Notification and consultation is a key part of that process. There is no justification for that to be short-circuited through a hurried implementation exercise in the course of a party-confined, and jurisdictionally confined, appellate process that commenced before the NPSFM was gazetted.

- 14 Accordingly, it is submitted that where the Court is referring to it being is 'confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions' (para 99 above), the Panels and GWRC are similarly confined. This is not by the scope of appeals, but by

scope of the Change itself and (for the First Schedule provisions) the scope of submissions.

- 15 The legal submissions that Ms Levenson attached to her 'industry statement', which relate to a change to the Waikato RPS, claim that the *Horticulture NZ v Manawatu-Wanganui Regional Council* case was distinguishable from the Waikato case. This was because the Waikato RPS Change was 'open for submissions and consultation after the NPS-HPL was gazetted and in effect'. At para 16
- 16 That is clearly not the same situation as here, where Change 1 was notified before the NPS-HPL took effect. That is, GWRC's Change 1 is analogous to the *Horticulture NZ v Manawatu-Wanganui Regional Council* situation, not the Waikato situation.
- 17 This does not make the NPS-HPL irrelevant, but it does mean that any amendments the Panels and GWRC can make to give effect to the NPS-HPL are still limited by scope constraints (as relevant).
- 18 The legal submissions on Hearing Stream 1 (dated 8 June 2023) set out the legal tests for scope.

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