

BEFORE THE P1S1 AND FRESHWATER HEARING PANELS

UNDER THE Resource Management Act 1991 (**Act**)
IN THE MATTER OF Proposed Change 1 to the Wellington Regional
Council's Regional Policy Statement (**PC1**)
BETWEEN **WELLINGTON REGIONAL COUNCIL**
Local Authority
AND **WAIRARAPA FEDERATED FARMERS**
Submitter 163 to PC1

**FURTHER LEGAL SUBMISSIONS ON BEHALF OF
WAIRARAPA FEDERATED FARMERS FOR HEARING STREAM 1**

12 JULY 2023

Counsel:
M T N Campbell
P +64 21 627 936
PO Box 715
Wellington 6140

MAY IN PLEASE THE PANELS:

1. Several submitters,¹ including Wairarapa Federated Farmers (**WFF**), have raised issues regarding the allocation of provisions in Proposed Change 1 (**PC1**) to the Wellington Regional Council's (**GW**) Region Policy Statement between the Freshwater Planning Process (**FPP**) and the Part 1, Schedule 1 (**P1S1**) process. WFF and the other submitters spoke to these issues at Hearing Stream 1 (**HS1**).
2. In response to these issues, the P1S1 and Freshwater Panels (together the **Panels**) issued Minute #5 on 4 July 2023, which:
 - (a) proposes an approach the Panels will take to the allocation of provisions between the P1S1 process and FPP; and
 - (b) invites any party that has concerns with this approach to provide comment.
3. The purpose of these further legal submissions is to highlight WFF's concerns with the Panels' proposed approach to the allocation of provisions between the P1S1 process and the FPP. In particular, counsel:
 - (a) submits Mr Winchester's advice of 8 March 2023 can be materially distinguished from the current PC1 process, and therefore should not form the basis of the Panels' decision on how to address the issue of the allocation of provisions between the P1S1 process and the FPP; and
 - (b) wishes to address two issues with the approach proposed by the Panels in Minute #5.
4. WFF maintains that the Freshwater Hearings Panel (**FHP**) should refer the entire freshwater planning instrument (**FPI**) back to GW, alongside what the FHP considers is the correct legal test for what can form a FPI, for reallocation of provisions between the FPP and P1S1 processes pursuant to the FHP's general ability to regulate its own proceedings.² The reasons for this are set out in the Legal Submissions on behalf of WFF for HS1 (13 June 2023) and expanded on in oral submissions of counsel at HS1, and are not repeated here.

¹ Wellington International Airport Ltd (S148), Winstone Aggregates (S162), Royal Forest and Bird Protection Society (S165).

² Resource Management Act 1991, Schedule 1, cl 48(1)(a).

5. WFF acknowledges there may be a desire to progress PC1, however, counsel submits that desire to make progress should not be made paramount to the need to ensure a robust process. The allocation of provisions between the FPP and the P1S1 process is ripe for consideration by the High Court on appeal, and not addressing such an issue at the early stages of the hearing process could ultimately result in delays in addressing New Zealand's water issues through protracted litigation.

Mr Winchester's advice

6. Counsel respectfully submits that Mr Winchester's advice, dated 8 March 2023, should not form the basis of the Panels' decision on how to address the issue of the allocation of provisions between the P1S1 process and the FPP.
7. The situation Mr Winchester was advising on is materially different from the present situation because there was only one Independent Hearings Panel (**IHP**) hearing both the intensification planning instrument (**IPI**) and the residual Proposed District Plan (**PDP**). This can be contrast with the current PC1 process which involves two hearing panels, one conducting the FPP and the other conducting the P1S1 process.³ This distinction is material because, if Mr Winchester's advice was to be applied to the PC1 process and the approach proposed by the Panels in Minute #5 is adopted, both the FHP and the P1S1 panel would need the legal ability to direct the other hearing panel to consider provisions not before it. Counsel respectfully submits this would amount to an unlawful delegation/sub-delegation of each of the Panels' powers and therefore materially distinguishes Mr Winchester's advice.
8. Mr Winchester's advice was given in the context of a single hearing panel conducting both the ISPP and the usual Schedule 1 process. This means that both the IPI and the PDP, and all the matters raised in submissions on the two, were before the IHP for consideration. Mr Winchester's advice therefore never needed to engage with the source of authority for a panel to refer provisions and submissions to another panel.
9. This can be contrast with the current PC1 process, which involves the P1S1 Panel and the FHP. The P1S1 Panel is established by GW and "is delegated all necessary powers under the Resource Management Act 1991 to consider and hear submissions on the Proposed Regional Policy Statement Change 1 and to make recommendations to Council on the Proposed Change 1 to the

³ Counsel acknowledges that the panels in the PC1 process has overlapping membership, however, legally the FHP and P1S1 panel are distinct.

Regional Policy Statement”.⁴ The FHP is convened by the Chief Freshwater Commissioner after receiving a FPI (and other relevant documents) from a regional council,⁵ and has the functions and powers prescribed in statute.⁶

10. Counsel submits that, for the P1S1 panel to have “jurisdiction to issue recommendations on the merits and context of any [provision reallocated by the FHP]”,⁷ the FHP must have the power to direct the P1S1 panel to consider, and make recommendations on, provisions and/or submissions currently before the FHP. To do so would amount to a delegation of functions by the FHP that would require express statutory authority. However, counsel respectfully submits that the FHP does not have power to do so nor does the P1S1 panel have the authority to accept such a direction.
11. The FHP’s powers and functions are prescribed in the RMA. Counsel submits there is no power in the RMA for the FHP to refer a provision before it to be considered by the P1S1 panel. The FHP simply does not have the ability to delegate its function in respect of a provision of the FPI.
12. Additionally, the P1S1 panel is established by GW, who has delegated its powers, alongside referring non-freshwater provisions, to the P1S1 panel in the Terms of Reference dated March 2023. Counsel submits there is no express ability for the FHP to widen GW’s delegation to the P1S1 panel to consider provisions not currently before it.
13. For these reasons, counsel respectfully submits the existence of the two Panels forms a material basis for distinguishing Mr Winchester’s advice and therefore should not form the basis of the Panels’ proposed approach to resolving the issue of the allocation of provisions between the FPP and P1S1 process.

The proposed way forward

14. Counsel is conscious that addressing the complexities of the issues surrounding the allocation of provisions between the FPP and P1S1 process in oral submissions during HS1 may have resulted in a miscommunication on counsel’s part. With the Panels’ proposed approach in mind, counsel wishes to reiterate two of the salient points he may not have articulated clearly at HS1.

⁴ Terms of Reference for the Proposed Regional Policy Statement Change 1: Part 1, Schedule 1 Hearing Panel, March 2023, at [4].

⁵ Resource Management Act 1991, Schedule 1, cl 38.

⁶ Resource Management Act 1991, Schedule 1, Part 4, particularly cl 39, 40, 48 and 49.

⁷ Minute 5, 4 July 2023, at [5e].

15. Minute 5 records that:⁸

In its recommendation report, the FHP may recommend that particular provisions do not relate directly to freshwater or otherwise meet the *Otago Regional Council* High Court tests, so they should be removed from the FPI. We consider that the FHP has the jurisdiction to make any such recommendations.

16. With respect, counsel submits that this conclusion is not supported by statute. If a provision does not relate directly to freshwater or otherwise meet the *ORC* High Court test, it cannot be considered to be part of the FPI. If a provision cannot be considered to be part of the FPI, the FHP cannot make a recommendation on it, given the FHP may only make recommendations “on the freshwater planning instrument” or “relating to the freshwater planning instrument”.⁹

17. Minute 5 also records that:¹⁰

The FHP will hear any application for cross-examination on its merits and in accordance with the directions issued in Minute 1. If in its deliberations, the FHP concludes that a matter in respect of which cross examination has occurred was not properly part of the FPI, then it will disregard any evidence heard during cross examination. The P1S1 panel will disregard all evidence heard through cross examination even if that evidence is relevant to provisions that have moved into the scope of its process.

18. With respect, an approach where cross examination is permitted and then disregarded is counter to the RMA’s requirement to “take all practicable steps to ... use timely, efficient, consistent, and cost-effective processes” and the Act’s purpose of sustainable management.¹¹ Additionally, the FPP also provides for other mechanisms not present in the P1S1 process (such as expert conferencing and alternative dispute resolution) that, if utilised, would also need to be disregarded if the ultimate decision is for a provision to be reallocated to the P1S1 process. This would also run counter to the RMA.

Concluding remarks

19. As stated above, the desire to make progress in the PC1 process should not be made paramount to the need to ensure a robust process is followed. With

⁸ Minute 5, 4 July 2023, at [5d].

⁹ Resource Management Act 1991, Schedule 1, cl 49(1) and (2).

¹⁰ Minute 5, 4 July 2023, at [5f].

¹¹ Resource Management Act 1991, ss 5 and 18A(a).

respect, the approach proposed by the Panels in Minute 5 risks prolonging the PC1 process through appeals on an issue that could be resolved now. While resolving this issue now may result in delays and wasted resources in the immediate future, counsel submits this will result in a more robust and therefore efficient PC1 process in the longer term.

20. Neither WFF nor counsel seek to be heard further on this issue at HS2, however, counsel will make himself available in the event the Panels have questions arising from these submissions.

DATED 12 July 2023



M T N Campbell

Counsel for Wairarapa Federated Farmers