

**BEFORE THE HEARING PANEL AND FRESHWATER PLANNING PROCESS  
HEARING PANEL**

**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

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

**13 JUNE 2023**

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## INTRODUCTION

1. Wairarapa Federated Farmers (**Federated Farmers**) made a submission on Proposed Change 1 (**PC1**) to the Wellington Regional Council's (**GWRC**) Region Policy Statement. Relevant to Hearing Stream 1 (**HS1**), Federated Farmers submitted:
  - (a) that certain provisions identified as part of the freshwater planning instrument (**FPI**) to be heard by as part of the freshwater planning process (**FPP**) before the freshwater hearings panel (**FWP**), be instead heard as part of the Part 1, Schedule 1 process (**P1S1**);
  - (b) the scope of PC;
  - (c) providing for mana whenua; and
  - (d) whether engagement was sufficient.
2. Mr Matich's evidence and Ms McGruddy's hearing statement address matters (b) through (d) above, and they will speak to these at the HS1 hearing. The focus of these legal submissions will be on (a).
3. Federated Farmers sought for all provisions identified as "freshwater provisions" in PC1's amendments to the following chapters to be heard as part of the P1S1 process through the removal of the "FW icon":<sup>1</sup>
  - (a) Chapter 3 (resource management issues, objectives);
  - (b) Chapter 3.1A (Climate Change);
  - (c) Chapter 3.6 (Indigenous Ecosystems);
  - (d) Chapter 3.8 (Natural Hazards);
  - (e) Chapter 3.9 (Regional form, design and function);
  - (f) parts of Chapters 4.1 and 4.2 (Regulatory policies);
  - (g) parts of Chapter 4.4 (Non-regulatory policies);

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<sup>1</sup> Federated Farmers' submission (Submitter 163) at 1.3, 2.2, 5.2, 6.2, 7.2, 8.6, 8.7, 8.17, 8.18, 8.19, 9.2, 9.3, 9.6, 9.13, 9.14, 9.15, 9.16, 9.17, 9.18, 10.2, 10.4, 10.6, 10.7, 10.8, 11.2, 11.5, 11.6, 11.7, 11.9, 11.11, 11.12, 11.13, 11.15, 11.16 (x2), 11.17, 12.2, 12.13, 12.4, 12.5, 12.6, 12.7, and 12.9.

- (h) parts of Chapter 4.5 (Methods to implement policies); and
  - (i) parts of Appendix 3: Definitions.
4. While this formed part of Federated Farmers' submission on PC1, its concerns are more procedural in nature than on substance. Federated Farmers' concern is that utilisation of the FPP for provisions that relate primarily to matters other than freshwater (such as climate change, biodiversity and urban development) is procedurally unsound for the following reasons.

#### WHAT CONSTITUTES A FRESHWATER PLANNING INSTRUMENT

5. On 1 July 2020, the Resource Management Amendment Act 2020 (the **Amendment Act**) introduced s 80A and Part 4 of Schedule 1 into the Resource Management Act 1991 (**RMA**). These provisions established the FPP to “assist regional and unitary councils to meet the 2025 deadline for implementing the requirements of the National Policy Statement for Freshwater Management”.<sup>2</sup> The Amendment Act was aimed at addressing the continuing decline in freshwater quality and that the current regulatory system was not producing outcomes fast enough.<sup>3</sup>
6. Section 80A of the RMA establishes, among other things:
- (a) what constitutes a FPI;
  - (b) that FPIs must go through the FPP set out in Part 4 of Schedule 1 to the RMA;
  - (c) only the aspects of an FPI that relate to freshwater are to go through the FPP, with the remainder to go through the P1S1 process.
7. Sections 80A(2) and (3) read:
- (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)):

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<sup>2</sup> Resource Management Amendment Bill 2019 (180-2), Commentary.

<sup>3</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 at [124].

(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.

8. There is a tension between ss 80A(2) and (3). Section 80A(2) defines a FPI to include a plan change that “gives effect to any national policy statement for freshwater management” or “relates to freshwater”.<sup>4</sup> Section 80A(3) requires a regional council to “prepare the parts that do not relate to freshwater” in accordance with the P1S1 process.<sup>5</sup> It is therefore unclear how, if an FPI has to either relate to freshwater or give effect to a national policy statement for freshwater, there could be any parts of a FPI that “do not relate to freshwater”.
9. This tension was addressed by the High Court in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand*.<sup>6</sup> In that case the Court provided guidance on the interpretation of s 80A and how the words “relates to freshwater” are to be interpreted and applied. In doing so, the Court noted that:<sup>7</sup>

...the background, wording and references to freshwater in s 80A were all consistent with *Parliament contemplating that issues relating to freshwater could be identified as discrete matters and only such matters would be subject to the freshwater planning process*. The possibility of widening the scope of matters that might be considered through the freshwater planning process was brought to the attention of Cabinet and Parliament through the Ministry’s initial Policy Document and to Parliament through the Report after the Environment Committee process. That option was expressly rejected primarily because it would

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<sup>4</sup> Resource Management Act 1991, s 80A(2).

<sup>5</sup> Resource Management Act 1991, s 80A(3).

<sup>6</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777.

<sup>7</sup> At [149].

delay progress in improving the quality of freshwater management which the Government was committed to. [emphasis added]

10. The Court found that:<sup>8</sup>

...the Amendment Act contemplated that the focus of freshwater hearings panels would be on protecting and improving the quality of freshwater in New Zealand and, in particular, giving effect to national policy statements on freshwater management by 2025.

11. The Court went on to state:<sup>9</sup>

[191] The words “relates to freshwater” must be interpreted having regard to the purpose for which s 80A was enacted. That purpose was to address the decline in freshwater quality in New Zealand.

[192] Section 80A(3) drives the interpretation of s 80A. Because of this, parts of a regional policy statement will qualify to be part of a freshwater planning instrument pursuant to either s 80A(2)(a) or (b) if they directly relate to the maintenance or enhancement of the quality or quantity of freshwater.

12. In its concluding remarks, the Court stated that:<sup>10</sup>

Parts of a proposed regional statement cannot be treated as parts of a freshwater planning instrument simply because there is some connection to freshwater through the concepts of Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources.

13. Federated Farmers submits that the High Court’s decision should not be read as if it were a statute and individual passages should not be read in isolation when extracting the *ratio decidendi* of the case. This applies to the Court’s dicta at [192], which needs to be read in the context of the judgement as a whole, in particular:

- (a) Parliament’s intent was for issues identified as discrete matters to be subject to the FPP;
- (b) the focus of the FWP, which exclusively makes recommendations on a FPI, would be on protecting and improving the quality of freshwater in New Zealand or giving effect to the NPSFM 2020;

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<sup>8</sup> At [155].

<sup>9</sup> At [191]-[192].

<sup>10</sup> At [206].

- (c) the purpose of s 80A being to address the decline in freshwater quality in New Zealand; and
  - (d) that a provision does not qualify as part of an FPI “simply because there is some connection to freshwater through the concepts of Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources”.
14. Federated Farmers therefore submits that the *ratio* of the High Court’s decision is that for a provision to “relate to freshwater” and qualify as part of the FPI, it must directly and discretely relate to the maintenance, protection, improvement or enhancement of freshwater. The provision at issue needs to focus on how it will achieve those goals. It is insufficient for a provision to qualify as part of an FPI simply by dint of being applicable to freshwater.
15. Such an interpretation of s 80A accords with the RMA’s general scheme of public participation. The FPP erodes public participation by curtailing rights of appeal to the Environment Court. Therefore, to best uphold the RMA’s general scheme of public participation, only those directly and discretely relate to the maintenance, protection, improvement or enhancement of freshwater ought to be considered as part of the FPP.

#### **WHO DECIDES WHAT IS PART OF A FRESHWATER PLANNING INSTRUMENT**

16. Section 80A(3) of the RMA states that “if the council is satisfied that only part of the instrument relates to freshwater” only those parts that relate to freshwater are to be prepared in accordance with the FPP. The High Court in *Otago Regional Council* made it clear that it is for the regional council (here GWRC) to make the decision as to which parts of a plan change relate to freshwater “on a correct interpretation of s 80A”.<sup>11</sup>
17. Federated Farmers submits that, while a degree of latitude should be afforded to a regional council in deciding what parts of a plan change constitute an FPI, where a regional council has erred in its interpretation of s 80A its decision to include provisions as part of a FPI can be the subject of further scrutiny.
18. Additionally, while it is not for the FWP to second guess the provisions identified by GWRC as part of the FPI, the FWP needs to be satisfied that it

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<sup>11</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 at [169] and [179].

has jurisdiction to make recommendations on the provisions identified as part of the FPI, as it can only make recommendations in respect of a FPI.<sup>12</sup>

#### THE TEST WELLINGTON REGIONAL COUNCIL APPLIED

19. GWRC's interpretation of s 80A, which relied on the High Court decision of *Otago Regional Council*, was that for a provision to form part of a FPI it needed to either:<sup>13</sup>

- (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 or quantity of freshwater.

20. Relevantly, the Section 32 Report goes on to state:<sup>14</sup>

Consideration of relationship to freshwater has been undertaken at a provision level without splitting provisions. *If a provision contains a matter deemed to impact on freshwater quality or quantity, that whole provision has been included in the freshwater planning instrument even if it also relates to other matters.* This is because it can no longer be argued that the provision does not directly relate to freshwater, and regional councils must put freshwater-related provisions through the FPP. Breaking provisions up and putting them through different Schedule 1 processes would lead to unworkable outcomes whereby different parts of provisions could become disconnected. [emphasis added]

21. Federated Farmers submits such an approach is at odds with *Otago Regional Council*. As set out above, a provision will "relate to freshwater" and qualify as part of a FPI where it directly and discretely relates to the maintenance, protection, improvement or enhancement of freshwater. A provision that "relates to other matters" cannot be said to discretely provide for those outcomes. Further, a provision that "relates to other matters" takes an integrated management approach and therefore cannot be treated as a FPI simply by dint of that fact.<sup>15</sup>

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<sup>12</sup> Resource Management Act 1991, Schedule 1, cl 49(1) and (2).

<sup>13</sup> Section 32 report (Evaluation of provisions) for Proposed Change 1 to the Regional Policy Statement for the Wellington Region, August 2022, Appendix E at [9].

<sup>14</sup> At [11].

<sup>15</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Incorporated* [2022] NZHC 1777 at [206].

22. To allow provisions that relate to other matters to be dealt with as part of the FPP represents a curtailing of public participation. Federated Farmers acknowledges that parts of the challenged provisions relate to freshwater and are relevant to managing freshwater in New Zealand. However, these provisions are also relevant to situations other than freshwater, and therefore ought to be subject to the usual scrutiny of the P1S1 process. Federated Farmers agrees that “[b]reaking provisions up and putting them through different Schedule 1 processes would lead to unworkable outcomes whereby different parts of provisions could become disconnected”, therefore, provisions that relate to matters other than freshwater quality or quantity should be put through the P1S1 process.

23. Such an approach accords with the direction provided in *Otago Regional Council*, where the High Court stated:<sup>16</sup>

Consistent with the purpose of the Amendment Act and participatory rights under the RMA, in applying s 80A, the starting point must be that all of the proposed regional statement will be subject to the normal planning process set out in pt 1 of sch 1 of the RMA. It will be only those parts of the proposed regional statement that directly relate to freshwater management, in the manner just discussed, that can be parts of a freshwater planning instrument and so subject to the freshwater planning process.

24. On this basis, Federated Farmers considers GWRC erred in its interpretation of section 80A and further scrutiny of the provisions included in the FPI is warranted.

*Example: Provisions Relate to Indigenous Biodiversity/Ecosystems*

25. The issue with GWRC’s interpretation of s 80A, and therefore what can be included as part of an FPI, can be demonstrated through their approach taken to including provisions related to biodiversity in the FPI. There are provisions included in the FPI because they relate to ecosystem health, which includes freshwater ecosystems.<sup>17</sup>

26. As acknowledged by the Section 42A Report, “[t]he Council’s objectives and policies do not differentiate between different types of ecosystems” and “apply

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<sup>16</sup> At [203].

<sup>17</sup> See, for example, the reasons given for Objectives 16, 16A and 16B in the Section 32 report (Evaluation of provisions) for Proposed Change 1 to the Regional Policy Statement for the Wellington Region, August 2022, Appendix E at Table E-3.



equally to freshwater and coastal marine areas”.<sup>18</sup> Coastal marine areas do not concern freshwater by definition,<sup>19</sup> therefore, the provisions included for these reasons have a wider ambit than simply freshwater and cannot be said to discretely address freshwater issues.

27. Federated Farmers submits that a provision cannot be included as part of the FPI where it addresses freshwater through dealing another, broader, issue such as ecosystem health. As stated in the evidence of Mr Matich:<sup>20</sup>

In my opinion, many of the 174 provisions identified for the FPP address more than simply the maintenance and enhancement of water quality and quantity. In several instances, provisions address a range of concerns relating to indigenous biodiversity, urban development and climate change (alongside freshwater management). The range of provisions include aspects that are more directive and plainly fit within the ambit of the NPSFM and the FPP, and other aspects that are somewhat aspirational and are not imperative for maintenance and enhancement of water quality or quantity. This range of provisions stem from multiple legislative requirements and planning instruments that include, but are not solely based upon, the NPSFM (for example, the NPSUD). Many of these provisions are therefore applicable beyond the freshwater context.

28. For a specific example, PC1 is set to amend Objective 16 as follows:

Indigenous ecosystems and habitats with significant ecosystem functions and services and/or biodiversity values are ~~maintained protected, enhanced,~~ and restored to a healthy functioning state.

29. This amendment has been identified as part of the FPI. The reasons given by the Section 32 Reporting Officer were:<sup>21</sup>

Indigenous ecosystem health includes freshwater ecosystem health, which is intrinsically and directly linked to protecting and enhancing freshwater quality and quantity.

30. Federated Farmers does not dispute that indigenous ecosystems include freshwater ecosystem health. However, indigenous ecosystems extend beyond freshwater ecosystems to terrestrial and coastal ecosystems. While it is difficult to draw a bright line between ecosystems, it is clear that the amendments to Objective 16 will have application outside of freshwater,

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<sup>18</sup> Section 42A Report – Hearing Stream 1, 26 May 2023, at [105].

<sup>19</sup> Resource Management Act 1991, s 2.

<sup>20</sup> Statement of Evidence of Peter Matich on behalf of Wairarapa Federated Farmers, 12 June 2023, at [4.17].

<sup>21</sup> Section 32 report (Evaluation of provisions) for Proposed Change 1 to the Regional Policy Statement for the Wellington Region, August 2022, Appendix E at Table E-3.

cannot be considered to directly and discretely relate to freshwater, and therefore cannot constitute part of the FPI.

**RELIEF**

31. Federated Farmers respectfully submits:
- (a) GWRC failed to correctly interpret s 80A of the RMA by applying the wrong legal test for including provisions in part of the FPI; therefore
  - (b) the FWP cannot be satisfied it has jurisdiction to make recommendations in respect of the provisions included as part of the FPI.
32. Federated Farmers requests that the FWP, pursuant to the FWP's ability to regulate its own proceedings,<sup>22</sup> refer the chapters set out at paragraph [3] above back to GWRC for reconsideration as to what provisions should be part of the FPI, and therefore subject to the FPP, and what provisions should be subject to the P1S1 process.
33. Federated Farmers requests this be done at the FWP's earliest convenience to allow enough time for GWRC to reconsider the provisions and remit them to either the FWP or the PS1S hearing panel ahead of Hearing Stream 2.

**DATED** 13 June 2023



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<sup>22</sup> Resource Management Act 1991, Schedule 1, cl 48(1)(a).