BEFORE THE INDEPENDENT HEARING PANEL APPOINTED TO HEAR AND MAKE RECOMMENDATIONS ON SUBMISSIONS AND FURTHER SUBMISSIONS ON PROPOSED CHANGE 1 TO THE REGIONAL POLICY STATEMENT FOR THE WELLINGTON REGION

UNDER	Schedule 1 of the Resource Management Act 1991 (The Act)
IN THE MATTER OF	Proposed Change 1 to Greater Wellington Regional Council's Regional Policy Statement (PC1)
BETWEEN	**Greater Wellington Regional Council**
AND	**Dr Sarah Kerkin** Submitter 96 to PC1

HEARING STATEMENT OF SARAH KERKIN

28 AUGUST 2023

The quality of regulation is judged by how it works in the real world for real people

1. I am a career public servant with 24 years in government service. I have a doctorate in applying systems thinking in public policy. I have served for the last seven years on the Attorney-General's Legislation Design and Advisory Committee, which focuses on the quality of regulatory design and drafting. This expertise informs my submission to you.

2. In my submissions I will:
    a. Introduce my family's relationship with our land and our experience with regulation of the Mangaroa Peatland, which is why I am here today.
    b. Highlight some key issues with the scope and application of the RPS PC1, and its definitions, as regards climate change.
    c. Respond to some of the recommendations made in the s 42A reports, which respond to submissions made by me and other members of my community.
    d. Outline some proposals for you to consider, which expand on the points made in my written submission. These proposals would go a long way towards resolving the concerns of many of us living and working on the Peatland.

3. The Mangaroa Peatland (the Peatland) is an area of some 360 ha in Whitemans Valley. It was once a large swamp, although geological activity has tilted and drained the valley to the point that it no longer holds water. It is no longer a working peatland, in that there is no longer a bog that forms peat, which means there is no new carbon sequestration occurring. There is a layer of peat underlying the surface soil. The depth of the peat has not been mapped; it has only been estimated. The Peatland has been farmed and progressively drained since the 1850s. The entire area is now privately owned. There are working farms across the centre of the Peatland, with lifestyle blocks around its edge. The area has low intensity housing and lots of trees.

4. I would like to make it clear at the outset that I have no objection to nature-based solutions. We have a swale on our land that very effectively manages torrential rain, guiding and holding rainwater until it can soak into the ground and conveying what cannot easily soak in through to our farm drain. We are actively using mulch around our baby trees to lock in moisture and keep down weeds. Once we are living on the land, we intend to convert much of the grass to meadow, to promote a haven for pollinating insects, and because meadow needs less water and draws fewer nutrients from the soil than grass.

We own four hectares on the Mangaroa Peatland – it was to be our slice of rural paradise

5. My husband and I bought the land with the intention of planting trees to attract birds to our part of the valley, allowing our daughter to run free-range chickens, and building our multi-generational forever home. It would be our retirement haven, a base for our children to come back to when they grow up, and a place where we could care for my elderly parents.

6. Three years down the track, we still have the land and have started planting the trees. Everything else has been a nightmare.

7. Some officials within Greater Wellington consider that the Peatland should be protected from any development and use. Those officials and at least one councillor wanted to block the farm drains, flood the area and open it to the community as a park, despite the entire Peatland being in private ownership, and its long history of use for farming and families. Greater Wellington does not appear to understand or acknowledge the impact of its actions on the physical, financial, or emotional well-being of the families whose homes are at stake.

Greater Wellington has weaponised regulatory and legal procedure against us and other Peatland owners

8. We have copies of internal correspondence, obtained through LGOIMA requests and released in evidence discovery, where officials discuss their tactics: if they cannot regulate the land as a wetland, they will regulate it as a significant natural area (SNA). If that doesn't work, they have said they will use climate change.

9. On its first attempt, Greater Wellington held up development of our consented lifestyle subdivision by two years. It took the developer, Upper Hutt City Council (the consenting authority), and seven landowners to court, alleging that the subdivision was on a natural wetland and should never have been consented. They wanted our (bona fide) titles to be changed retrospectively and enforcement orders made requiring the wetland to be restored to some unspecified standard.

10. We won spectacularly in the Environment Court, after an eight-day hearing in which the Court bent over backwards to give Greater Wellington a fair hearing. Greater Wellington's scientific evidence was found to be overwhelmingly deficient.[1] The Court concluded the land was not natural wetland. It probably had not been so for the better part of a century. The Court also said the enforcement orders Greater Wellington wanted would have been draconian, even if the land had been natural wetland. The Court sent a clear message that the orders would not have been made, even had the land been natural wetland, given the context in which the land had been consented, subdivided, and sold. Greater Wellington did not appeal the case and paid the respondents' full legal costs and the Court's own costs (these are almost never imposed by the Court) without argument.

11. While the case was in development, Greater Wellington officials were telling the whaitua looking at water resources in the region that the Peatland had "significant values for climate change as well as biodiversity" and that it was worth around $600m in carbon storage benefits. I understand that the draft economic analysis was completed by an economist who does not specialise in environmental economics. The officials' advice to the whaitua stated that the Peatland should ideally be restored so it

[1] For instance, Greater Wellington's own expert witness, leading wetlands expert, Dr Beverley Clarkson, stated that Greater Wellington had not provided any hydrological evidence to support its claim, despite asserting that hydrological evidence is an essential part of determining the presence of a natural wetland. The first respondent did provide expert hydrologist evidence to the Court, and that evidence cast significant doubt on the foundations of Greater Wellington's claims.

could start to function and absorb carbon again, although that would involve restoring the water table as much as possible because peatland needs the water level to be near the surface. As a result of the officials' advice, the whaitua was left believing that the Peatland was a natural wetland, and that rewetting the peat (effectively flooding the Peatland) was a viable option.[2]

12. The hydrologist who appeared in the court case suggested that re-wetting the peat this would be very much more complex than Greater Wellington appeared to think, because of the geological forces that have tilted the valley. He described the idea of restoring the Peatland as "naïve at best, hubris at worst".

13. While the case was still being heard, Pam Guest for Greater Wellington wrote to the Upper Hutt City Council advising that the Mangaroa Peatland should be designated as an SNA. The rationale for this appears to be because of its character as a large ex-peatland, although it cannot be compared to functioning or remediable peatlands such as the one in Queen Elizabeth II (QEII) Park. The peat underlying the Mangaroa Peatland itself does not appear to support any special indigenous ecosystems. The land atop the peat looks like ordinary farm / lifestyle land, although it does include some stands of mānuka planted by a local farmer.

14. Greater Wellington's insistence that the entire Peatland is an SNA creates significant unresolved uncertainty for the Peatland community. The proposed Natural Resources Plan's (pNRP) highly prescriptive rules for SNAs mean that having an SNA on or near your land (and the extent of the buffer zones have not yet been defined) makes doing even basic land management almost impossible and prohibitively expensive once administrative red-tape costs are factored in. Given that buffer zones have not yet been defined (see paragraphs 85-92 infra), we cannot predict the extent of the impact of an SNA being declared over part or all of the Peatland.

15. Greater Wellington officials have since provided the Peatland community with messages released under LGOIMA that they do not plan to flood the Peatland. We find it hard to believe that message, given Greater Wellington's ongoing attempts to regulate the Peatland in ways that conflict with our quiet enjoyment of our land and their ongoing failures to communicate clearly, openly, and proactively with our community.

16. Greater Wellington's approach to the Peatland has caused the Peatland community some real concern. Some people in my community, including on my subdivision, have lived experience of being surveilled regularly by Greater Wellington's enforcement officers. We have lived experience of Greater Wellington's science, consenting and enforcement officers making up the law as they go. We therefore live in fear of being prosecuted for inadvertent transgressions of the law, as we have seen happen to others in our community.

[2] See for example, meeting notes of the whaitua dated 21 January 2021 https://www.gw.govt.nz/assets/Documents/2022/04/TWT-Committee-meeting-notes-20.1.2021.pdf and the whaitua's draft recommendations released in May 2021, which included a recommendation that Greater Wellington prioritise the rewetting of non-functional wetlands.

17. Greater Wellington's attitude towards the Peatland community is illustrated by an observation in paragraph 83 of the *Climate resilience* report. There, the report notes that the submissions from the Mangaroa Peatland community had not provided any evidence refuting the value of peat for carbon sequestration or storage. With respect, that is asking the wrong question, and puts the onus in the wrong place.

18. This is a regulation-making process and, as the regulator seeking to make new regulation, Greater Wellington is in a uniquely privileged position in terms of holding both the power to regulate and information about the need to regulate. Therefore:

    a. It is for Greater Wellington to justify the regulation it wishes to make. Requiring communities to justify why regulation is not needed entrenches power and information asymmetries and is simply perverse.

    b. Greater Wellington has not yet made a persuasive argument that peat – as a soil type underlying the surface – is in and of itself a nature-based solution within the commonly accepted meaning of that term. There is a distinction to be drawn between bog areas which could potentially be returned to peat-forming wetlands (e.g. QEII Park peat bog) and the Peatland, which is more correctly viewed as an area of drained land that has an unmapped and unknown quantity of peat underlying it with no realistic prospect of ever returning to a peat-forming area.

Peatland in RPS PC1 – why is it a concern to us?

19. The redraft proposed by the s 42A report *Climate resilience and nature-based solutions* (the *Climate resilience* report) weaves peatland into RPS PC1, as an example of a nature-based solution (now framed as an explanatory note) and in method CC.6. Each of the references to nature-based solutions need to be considered to assess how they would work in the context of the Peatland.

20. My concerns are threefold:

    a. RPS PC1's inclusion of peatland makes assumptions about peatland (i.e. that it is a working, functioning peatland that can be restored, per the QEII Park peat bog[3]) that do not work for the Mangaroa Peatland. The definition of peatland needs to be sufficiently nuanced to reflect this difference and, if it cannot, the references to peatland should be removed altogether.

    b. Based on our lived experience with the pNRP's wetland rules, I fear that the RPS policies, objectives, and methods will translate into rules in the pNRP that will be prescriptive, onerous, overly focused on compliance and enforcement, and will make living and working on the Peatland difficult, if not impossible.

[3] See, for instance, paragraph 83 of the s 42A *Climate resilience* report. The author is clearly familiar with that peat bog and the restoration project, and that has likely influenced the approach to drafting the peatland example.

c. Based on our experience with Greater Wellington to date, I have no confidence that I or my community will be engaged with in any meaningful way as policy or priorities are being developed. Instead, we are likely to be presented with a close to final policy or priority as a fait accompli and any concerns we raise will go unaddressed.

21. In this context, it is telling that the *Climate resilience* report misunderstands my submission that RPS PC1's inclusion of peatland as a nature-based solution runs contrary to the intention of the Environment Court's decision in *Greater Wellington Regional Council v Adams and Ors*.[4] Let me explain this submission more clearly. The Environment Court was plainly very unhappy that Greater Wellington was seeking to take what the Court described as draconian enforcement action against innocent third-party purchasers based on a case with no legal or scientific merit. The Court expected that, at the case's conclusion, the parties would be able to use and enjoy their land.

22. Greater Wellington's subsequent actions over the SNA and RPS PC1 give us little confidence that it has any intention of respecting the Court's decision and leaving us to the quiet enjoyment of our land.

23. The Environment Court critically noted Greater Wellington was not following the correct schedule 1 processes when it attempted to incorporate a test for pasture into the wetland definition in the pNRP. *GWRC v Adams and Ors* highlights the need to get definitions correct and not create ambiguities that could be used to push a particular agenda. I, and the 61 others in my community who made submissions to this process, worry that the protecting / maintaining peatlands example in the definition of nature-based solutions is too ambiguous. While the QEII Park peat bog may be an example of a nature-based solution, not all peatlands in the region are in that same condition. The vagueness of the example as drafted gives Greater Wellington scope to pressure landowners to carry the burden of changing 150 years of land use without following a proper process to designate protections or other requirements on the land.

24. While it is open to Greater Wellington to set new planning directions, it should do so mindful of the Court's expectation. It appears Greater Wellington has not really internalised one of the central points of the Court's decision, that there was no credible scientific reason to believe there was anything on the land that needed special protection. Nature-based solutions should not be used or given scope for Greater Wellington planners at consent stages to direct landowners to change the nature of general features on their land if those general features do not otherwise merit protection. My concern is that leaving the example of peatlands in the note implies that peatlands generally need protection even if they do not fall within the scope of Greater Wellington's protection for wetlands.

25. To resolve this issue, I have some drafting suggestions for the Panel to consider (discussed further at paragraphs 27-33 below). As an alternative, I suggest that the Panel might consider inserting a method for Greater Wellington to create guidance and details about more specific nature-based solutions. It may be preferable to including

[4] *Climate resilience* report, para 84.

vaguely worded examples as a note.

Issues to be canvassed in this hearing statement

26. I want to bring six points to the Panel's attention, grouped into four themes. These are issues I have identified relating to my submission from the s 42A reports and are:

Good regulation requires the removal of assumptions from drafting.

a. The approach to peatland in PRS PC1 has become clear through the s42A Climate resilience report. That report clearly has a model of peatland in mind, which is a functioning, carbon-sequestering peat bog (or a peat bog that could be made functional again), which would be a wetland under Greater Wellington's pNRP. My community and I interpret peatland through our lens of living and working on the Mangaroa Peatland, a fundamentally different prospect that has been found by the Environment Court to not be a natural wetland under the RMA. Given the presence of the Mangaroa Peatland in the region, a clarification might be needed to ensure that the presence of peat soil is not in and of itself a peatland / nature-based solution unless it is also a natural wetland.

The hierarchy of planning instruments under the RMA matters - s 42A Climate change general report.

b. The importance of an issue doesn't obviate the need to regulate consistently with the overarching regulatory framework, to be effective and efficient and avoid unintended consequences. Part 2 of the RMA and in the NPS-FM recognise that communities social and economic well-being is provided for in sustainable development. Nature-based solutions, if drafted into the RPS, also need to provide for communities' ability to use their land (including for rural residential purposes). Directions for nature-based solutions should not be drafted in ways that prevent development, but rather, focused on working with communities to achieve their social and economic well-being in a way that mitigates the effects of climate change and ensures their development is climate-resilient. The current proposed drafting and recommendations in the s 42A reports could cut across the balances struck in higher-order instruments in practice because Greater Wellington is given a wide scope for prioritising the use of nature-based solutions without directions on their integration with the RMA purpose to enable communities to provide for their social, economic, and cultural wellbeing.

The redrafting of nature-based solutions proposed in the Climate resilience report creates some new problems and does not resolve the issues identified in my submission.

c. Peatland is an "odd man out" in the explanatory note's list of examples, unless peatland is defined as being something like a functioning natural wetland that sequesters carbon.

d. The shift in drafting from 'protecting' to 'maintaining' is not an improvement, given that 'maintain' is generally interpreted to include 'protect' in resource management law.

e. The proposed redrafting of policies CC.4, CC.4A, CC.14 and CC.14A increases

the scope and application of nature-based solutions and effectively directs nature-based solutions to be used unless they are shown to be inappropriate. This approach creates new problems that were not apparent in the original draft and does not resolve the concerns underlying my initial submission.

Key definitions are unclear and create a risk of law-making by fiat (from my submission).

f. The thresholds for key concepts like "protect", "restoration", and "buffer zones" are not clear and create a risk of law-making by fiat (officers making up the law as they go).

Good quality regulation requires the removal of assumptions from drafting

27. It has become clear through reading the *Climate resilience* report that Greater Wellington clearly has a model of peatland in mind. Use of the QEII Park Peat bog as an example in paragraph 84 suggests this is the form of peatland the author has in mind when considering peatland as a nature-based solution.

28. Assumptions permeate drafting unless we are very careful to manage for them. There is a world of difference in terms of carbon sequestration between a functioning peat bog underpinned by a 30-metre layer of peat, and an area of ground that is dry year-round, except for rain-derived pooling, that happens to have a layer of peat soil in it.

29. Unless "peatland" is defined to be limited to a functioning, carbon sequestering peat bog (or a former peat bog that can feasibly be remediated and made functional again), the term will lead to confusion. My community and I (and I suspect Upper Hutt City Council) interpret "peatland" through our lens of living and working on the Mangaroa Peatland. That means we view the term as encompassing an area of land that includes peat soil, which was once a peat bog but is no longer functional and probably cannot realistically be made functional again, given the geological processes that have occurred.

30. Including peatland in this way therefore creates a cognitive dissonance with the definition. It risks setting up a precedent for treating other things that simply exist as nature-based solutions regardless of whether they meet the elements of the definition. While Greater Wellington may well have been considering the QEII Park peat, it is also important to bear in mind that the definition may well be applied to other peat, such as the Peatland, which is not a functioning peatland. The definition must be able to draw meaningful boundaries so that the RPS PC1 operative provisions (particularly policies CC.4, CC.4A, CC.14 and CC.14A) are not applied inappropriately.

31. For as long as the Peatland is called the Peatland, we will be vulnerable to Greater Wellington, lobby groups such as Forest and Bird, and the local self-described ecowarriors believing that the nature-based solution provisions will apply to it and will use them to seek to restrict what can be done on the Peatland, or even to try to direct landowners to restore it using the nature-based solution provisions in the RPS.

32. This problem is definitional in nature. It has not been resolved by the drafting changes

proposed in paragraphs 82, 84, and 202 of the *Climate resilience* report.

I suggest…

33. To resolve the issue, I suggest that the Panel consider:

    a. Either redrafting the peatland example as "protect natural wetlands with peat soils", or

    b. Adding a specific exclusion to make it clear that the Mangaroa Peatland is not a peatland for the purposes of the "nature-based solutions" provisions and Method CC.6

    c. Or removing all references to peatland from RPS PC1.

The hierarchy of policy and planning instruments matters

34. The Resource Management Act (RMA) was designed to promote sustainable development by creating an overarching framework for resource management. The principles and purposes in the Act are implemented through various planning instruments starting from national policy instruments through to local instruments. They are intended to get more and more specific as they descend from the national to the local level.

35. The goal of this cascade of instruments is vertical consistency in the rules. Within that framework, there is room for some regional variation as regions and districts develop more specific rules that address their communities' interests and concerns within a democratic framework. But there is always a degree of vertical alignment.

36. The regional policy statement is restricted to matters within part 2 and s 30 of the RMA. Generally, they set directions for the region, within the national framework set by the RMA and any national policy that has been set.

In straying out of its lane, Greater Wellington risks hurting people and businesses…

37. Greater Wellington is straying out of its lane in acting without the necessary RMA-based national level climate change guidance. In doing so, Greater Wellington is disrupting the regulatory framework established by the RMA. That will create real on-the-ground consequences for the people and businesses of the region which will not be experienced by people anywhere else in New Zealand.

38. While climate change is a pressing issue that needs to be dealt with and a future focus is often lost sight of in policy-making, I don't see any recognition in Greater Wellington's own analysis or in the *Climate change general* report of the fact that the RMA's definition of the environment includes people and communities. The RMA's definition means the policy approach needs to reflect the effects on people now, as well as in the future. The on-the-ground effects of RPS PC1 are likely to send some businesses and farmers to the wall or fleeing to other regions (thereby affecting Greater Wellington's own rating base) and will make getting around the region harder than it already is.

…and create an environment where coherent, national RMA-based climate policy is less likely to emerge

39. I encourage the Panel to think about the big picture. At a macro policy level, I think there are two, relatively unpalatable, likely outcomes if RPS PC1 proceeds with the climate change provisions intact.

40. First, central government may decide to leave climate change for local government to figure out. That might ultimately mean no national direction on climate change policy within the RMA regulatory framework. In such a scenario, regional approaches would become the norm, and New Zealand would become governed by a patchwork of (probably) inconsistently worded requirements as different councils put their own spin on things.

41. That would be highly undesirable. A patchwork of inconsistent requirements would make the law unclear and difficult to comply with for businesses and residents. They could create a race to the bottom: businesses will have strong incentives to move to the places with the easiest regulatory requirements, and councils will have a strong financial incentive to maximise their rating base, particularly in the current economic climate. I anticipate that an exodus of businesses and jobs from the region is unlikely to please the region's mayors or MPs and they would be quick to point the finger at Greater Wellington for creating the conditions leading to it.

42. A patchwork of regional approaches would also create spiraling transaction and compliance costs for businesses, without necessarily creating proportionately large reductions in greenhouse gas emissions. In short, doing business and farming (the backbone of New Zealand's wealth) would become unnecessarily difficult and expensive. New Zealand would likely become poorer and therefore less able to look after our people and communities, and our environment.

43. Second, central government might look at the approach in the Wellington region and decide that ambitious targets are all too hard in practice. That might result in national-level climate change regulation being quietly shelved, or it might see national policy guidance being developed to mitigate the problems MPs perceive as occurring in Wellington. I imagine that neither of those outcomes would be particularly palatable to Greater Wellington, given its obvious desire to do something meaningful to mitigate climate change.

Waiting for national direction before establishing a regional regulatory approach is good regulatory practice, not "kicking the can down the road"

44. I ask the Panel to consider the extent to which it is fair and legitimate that Wellingtonians are to be the guinea pigs, trialling a regulatory approach that may not ultimately be rolled out for the rest of New Zealand. Would it not be more prudent - and more consistent with the RMA's regulatory framework - to allow the national direction to emerge before establishing a regional regulatory approach?

45. From a regulatory perspective, Greater Wellington's approach is undesirable, and pausing now is not "kicking the can down the road". And the major question from a

regulatory perspective is whether the rules will really make a difference? A regional approach to climate change will not have any substantive impact on its own. At best, it is virtue-signaling. A consistent national approach is needed.

46. In any case, Greater Wellington will probably need to rewrite the climate change provisions once central government comes out with national guidance. If councillors want a successful initiative to sell to ratepayers, this just isn't it.

One final observation about vertical alignment – it creates national consistency in terminology

47. Ideally, the RMA's vertical alignment approach creates some nationwide consistency in concepts and terminology, so people in Westport, the Waikato, Northland, and Wellington region can all view peatland in the same way, for instance. Fundamental terms and concepts should not be defined differently across different regions. That creates a coherent regulatory environment for people and businesses, should their activities cross regional boundaries. It also creates fairness and consistency of treatment, and avoids the risk of a race to the bottom.

Nature-based solutions – the redraft creates some new problems, and doesn't quite do away with the old

First the good…

48. Given the RPS's location in the system of environmental regulation, I am very concerned about what will come next for rules governing the Mangaroa Peatland, particularly because peatland was initially cited as an example in the definition of "nature-based solutions".

49. The changes proposed to the definition of "nature-based solutions" by the *Climate resilience* report to seem to clarify that "nature-based solutions" are an activity rather than something that just exists. This seems to be somewhat closer the internationally accepted meaning of the term, although I would defer to the experts in the field on this question.

50. It is also good to see that the examples are now proposed to be a note, which I understand is an interpretative aid and does not form part of the definition. The expanded list of examples in the proposed note is also helpful. Most of those examples appear to either use natural ecosystems, or engineer systems that mimic natural processes as the definition suggests.

49. On a final note, I also suggest that the Panel consider making the definition explicitly prospective in application only. The definition is so broad that existing activities could be reframed as nature-based solutions at the whim of a consenting, planning or enforcement officer. That would create significant uncertainty for people seeking consents or even to do things on their land that don't currently require consents.

…but "maintaining" peatland is still not a good fit in the list of examples if the Mangaroa Peatland is top of mind…

50. However, for the reasons given above (paragraphs 27-33), "maintaining peatland to retain carbon stores" is the odd one out in this list of examples, especially if it is intended that the example apply to dormant peat underlying the surface. Peatland as a passive carbon store is not a nature-based solution in the true sense of the term: it is contrary to the intent of MfE's Nature-based Solution policy to create more-nature-based solutions, as these peatlands already exist.

51. Paragraph 84 of the *Climate resilience report* suggests that the Mangaroa Community's concerns may be allayed by replacing "protect" with "maintaining". With respect, I am not inclined to think this wording change will make any material difference.

52. I understand that, in resource management law, "maintain" is often used as a catch-all term inclusive of protection. Maintenance can extend to enhancing and restoring. Given our recent experience with Greater Wellington's attempt to impose an enforcement order requiring the restoration of a non-wetland to some standard of wetland that it couldn't specify, I view this drafting change as more of a threat than an improvement.

53. Given the other changes proposed in the *Climate resilience* report, particularly those that give nature-based solutions more priority within the regulatory framework, it seems that the change in drafting from "protect" to "maintaining" has more to do with drafting imperatives to bring the example into line with other drafting changes to policies.

…and the effective direction that nature-based solutions be used unless shown to be inappropriate will have negative unintended consequences for the Mangaroa Peatland community

54. Although the *Climate resilience* report notes that Policy CC.12 will become non-regulatory, the redrafting proposed for policies CC.4, CC.4A, CC.14 and CC.14A actually increases the scope and application of nature-based solutions and effectively directs nature-based solutions to be used unless they are shown to be inappropriate. Unless the Mangaroa Peatland is removed from the scope of these provisions, this approach will create more problems than the drafting of the notified version of PC1. The proposed redraft does not, therefore, resolve the concerns underlying my initial submission.

I agree with the amendments to Policy CC.7 and CC.12

55. Policy CC.7 directs plans to include objectives, policies, rules and methods to protect, restore and enhance ecosystems that provide nature-based solutions. In the proposed version of the RPS, policy 7 alongside policy 12 were the strongest direction for nature-based solutions.

56. The *Climate resilience* report recommends that policy 7 is transferred into a non-regulatory method, apparently on the assumption that my concerns around the

peatland related to the ecosystem aspect. Generally, I consider the non-regulatory footing of policy 7 is the right one. However, the changes proposed to policies CC.4, CC.4A, CC.14, and CC.14A give nature-based solutions a stronger, directive regulatory footing. That means the changes to policy CC.7 and CC.12 do not address my concerns.

I believe direction is needed about how Objective CC.4 is to be implemented

57. The recommended wording is:

> Nature-based solutions are an integral part of climate change mitigation and *climate change* adaptation, improving the health and resilience of people, *indigenous* biodiversity, and the natural and physical resources ~~environment~~.

58. The *Climate change resilience* report indicates that nature-based solutions could be an important tool that Greater Wellington would work with landowners to implement, and policy CC.7 is to be made non-regulatory in recognition of that. The tenor in relation to my submission was that nature-based solutions would be one way of achieving climate change adaptation and mitigation.

59. However, the wording in CC.4 also places nature-based solutions at the centre of the regional response to climate mitigation and climate change adaptation. Paragraph 116 of the report considers how this objective would be measured. The discussion of metrics is concerning, given the old adage "tell me how you will assess me, and I'll tell you how I will behave".

60. The third bullet point states that "development consents could be interrogated to identify the use of nature-based solutions such as the use of constructed wetlands to manage stormwater runoff". Greater Wellington seems to be looking for nature-based solutions in all development consents or, at least, demonstration that a nature-based solution is not appropriate for a particular context. The difficulty with this approach is that it effectively makes nature-based solutions a rebuttable presumption. In this context, it may be very costly in terms of time and money to rebut that presumption. Nature-based solutions will necessarily be site-specific. There should not be a one-size-fits-all approach to their use.

61. It is also unclear what is meant by "interrogate" other than implying that consents may be stalled or denied if they cannot establish that they use nature-based solutions. Further weight is given to this idea that nature-based solutions are intended to be used in developments by the recommendations to change Policy CC.7 to "prioritising" nature-based solutions.

62. This possibility is particularly worrying for my community, given that Greater Wellington appears to view the peat underlying our land as a nature-based solution in and of itself: it raises the spectre of resource and building consents being "interrogated" or, more probably, stalled and denied on the basis that they might pose a risk to the unknown quantity of peat lying an unknown distance below ground level.

63. Again, my community and I have lived experience of this, albeit in slightly different context. Our subdivision's resource consent (Upper Hutt City Council's statutory

responsibility) was stalled for months because Greater Wellington was "interrogating" the resource consent Upper Hutt City Council was processing for the subdivision's resource, because Greater Wellington thought the consent should not be issued. That "interrogation" significantly delayed settlement on property purchases and title being granted and was highly frustrating for all concerned.

64. I invite the Panel to consider introducing a method that requires Greater Wellington to develop its performance measures and indicators in consultation with the community and district councils. How this objective is measured will have a direct impact on how it is implemented.

I suggest Policy CC.14 and Policy CC.14A revert to the previous draft

65. While I did not initially submit on these policies, the redraft proposed by the *Climate resilience* report appears to broaden their scope beyond urban areas, and so they are now of interest to the Peatland community. I have also noted that the drafting of CC.14 and CC.14A takes a significantly different approach to nature-based solutions. Therefore, I now consider it necessary to comment.

66. This policy is critical for the regulatory role of nature-based solutions under the RPS. The *Climate resilience* report proposes that "when considering an application for a resource consent … or a change, variation or review of a district plan, seek that development and infrastructure is located, designed and constructed in ways that provide for climate-resilience, prioritising the use of nature-based solutions…" This proposal recommends fundamental changes to the policy that will likely impact on my community (particularly if CC.14 <u>is</u> intended to apply to rural communities, and not just to urban environments:

    a. The policy is no longer about <u>allowing</u> for nature-based solutions; it is <u>directing</u> that all resource consent applications and plan changes "seek… ways that provide" for climate resilience. It would <u>require</u> steps towards having nature-based solutions in developments.
    b. The priority given to nature-based solutions suggests that all developments would have to prove they are incorporating a nature-based solution. The burden is put on applicants and councils to show why a nature-based solution is not appropriate.

68. I suggest the Panel revert to the previous version of CC.14 and CC.14A.

I recommend Policy CC.4 and CC.4A revert to the previous draft

69. While I did not initially submit on these policies, the redraft proposed by the *Climate resilience* report appears to broaden their scope beyond urban areas, so they are now of interest to the Peatland community. The redraft also means these policies take a significantly different approach to nature-based solutions. Therefore, I now consider it necessary to comment. The *Climate resilience* report proposes to amend these policies Policy CC.4 and CC.4A to further require district councils to take steps to prioritise climate resilience and prioritise use of nature-based solutions.

70. This gives me and my community some concern, based on our lived experience of Greater Wellington's interactions with Upper Hutt City Council regarding the Mangaroa Peatland. Would it expect, for instance, Upper Hutt City Council to prohibit any building on the Mangaroa Peatland so it can "maintain peatland to protect carbon stores"? Given Greater Wellington's strong opposition to development of our subdivision at the southern end of the Peatland, it is easy to anticipate this expectation.

71. Greater Wellington has never demonstrated to our community that low-intensity farming or low-intensity land use is detrimental to the peat lying dormant underground. Given that, it is hard to see a justification for a regulatory narrowing of land use on the surface.

72. I suggest the Panel consider reverting to the previous version of CC.4 and CC.4A.

Method CC.6 raises some issues

73. Method CC.6 clearly suggests that Greater Wellington considers that peatland is an ecosystem, as CC.6(a) requires Greater Wellington in partnership with mana whenua/tangata whenua to identify ecosystems that should be prioritised for protection, enhancement and restoration, "including those that sequester and/or store carbon (e.g. peatland)".

74. This returns to the definitional issue canvassed earlier (paragraphs 27-33 above). While a functioning peatland that is creating peat would seem to be an ecosystem, I am not clear whether the same can be said for the peat underlying the Mangaroa Peatland. While there are plenty of ecosystems sitting above ground there, there are no apparent "peatland ecosystems" on my part of the Peatland. I suggest that if dormant peat such as that underlying the Mangaroa Peatland were to be included within the definition of ecosystem it would distort the concept. This usage of the term is unlikely to be understood by ordinary people.

75. The use of a definition to distort the areas protected by a concept is something with which we have lived experience. Greater Wellington used a definition in the pNRP to make all wetlands in the Wellington region "significant", because of their comparative scarcity. That triggered a higher level of protections in the pNRP, including a prohibition on using machinery in wetlands. That makes sense in wetlands with soft grounds, water and precious plants. It didn't make any sense for our 2-ha paddock that is firm underfoot and grows waist-high grass in summer. Our inability to take a tractor and mower onto the paddock while Greater Wellington thought the paddock was a wetland created a fire risk every summer. Peat fires are a serious threat on the Peatland, and we owe a duty to our neighbours to manage our land responsibly to minimise fire risk.

76. There is a need to be mindful of the on-the-ground consequences for the people living and working on the Peatland, should it be identified for "restoration". That concept has already been tested and rejected by the Environment Court in the context of restoration of disputed wetlands on the Peatland (see discussion at paragraphs 85-86 infra).

77. As a final note, I would note it seems odd that the identification and prioritisation of

ecosystems for protection, enhancement, and restoration does not seem to involve any involvement of the landowners whose land may be directly affected by Greater Wellington's decision. Given that protection, enhancement, and restoration may render land effectively unusable and may, effectively, result in a regulatory taking of land, I am surprised that Method CC.6 does not give at least something of a nod to consultation with affected landowners and compensatory processes.

78. Based on the foregoing, I suggest that CC.6(a) exclude the Mangaroa Peatland. That could be done by way of defining "peatland" or an explicit exclusion for the Mangaroa Peatland, or by removing 6(a) altogether.

Concluding thoughts on the redraft proposed by the Climate resilience report

79. In my experience with regulatory frameworks, one-size-fits-all policies are rarely effective. In most cases, there will need to be trade-offs made between the implementability, costs, and benefits of nature-based solutions. It will be important to consider who bears those costs and who experiences the benefits, and make sure they are apportioned somewhat fairly. Putting in place a regulatory expectation of prioritsation without any support for incentives places all the costs on consent holders and landowners, which does not seem wholly fair.

80. It would also be a more efficient and cost-effective regulatory approach to have Greater Wellington work with and help applicants in developing nature-based solutions rather than setting up an effective rebuttable presumption that nature-based solutions will be used. If you think about where the expertise and information resides, it is more likely to sit with Greater Wellington than with individual landowning consent applicants. Requiring people to commission expert reports, which can cost many tens of thousands of dollars creates an inaccessible regulatory system which risks being observed in the breach. That is not good for the rule of law. Better by far for Greater Wellington to put in place some regulatory carrots than to create a scheme that cannot be complied with and then over-rely on its regulatory sticks.

I recommend the Panel consider adding a new method for 'nature-based solutions'

81. I suggest that the Panel add a method directing Greater Wellington to develop guidance on nature-based solutions through engagement with the community. If Greater Wellington wants to develop climate change-based methods or rules relating to the Mangaroa Peatland, I suggest that they create an enabling framework co-designed with the people who live and work on the Peatland. The Mangaroa Peatland Focus Group's steering committee would be a good first point of contact to enable this.

82. The broad application of nature-based solutions policy is going to have a significant implementation cost for district councils and people affected by and using the RMA. I suggest that the Panel add a method directing Greater Wellington to narrow the information asymmetries between individuals and councils, bearing in mind that many resource and building consents are sought by private individuals with limited means at their disposal.

83. Resource consents are not all sought by commercial developers with significant resources behind them. Resource consents, particularly on rural land, are needed to undertake activities that would once have been seen as responsible land management. Most ordinary people cannot afford to commission expert reports from ecologists, hydrologists, and other specialists. The cost of expert reports alone may guarantee that resource consents for activities (including environmentally friendly activities) are not sought. Requiring these reports for land management activities sends a clear signal that Greater Wellington does not trust people to manage their land responsibly – or that it does not want land management to be undertaken.

Finally - unclear thresholds in critical definitions

84. Definitions like "protect", "restoration" and "buffer zones" create important thresholds for regulatory action. They are very important for day-to-day living on the land by those affected.

85. The *Climate change general* report states that "restoration is a well understood concept in the context of natural ecosystems and is supported by this clear national direction", referring to the then draft NPSIB. As a theoretical exercise and at an abstract policy level that may well be true. But when the planning rules are taken out onto the land and applied in the real world the "clear national direction" can become very much harder to apply in practice.

86. We have a clear object lesson in *GWRC v Adams and Ors*. One of the obstacles Greater Wellington faced to getting the enforcement orders to restore what it considered to be degraded wetlands was that it was unable to specify to the Environment Court's satisfaction:

    a. The condition of the "wetlands" at a material date relevant to the court action
    b. Whether and how the actions of the respondents had contributed to the degradation of the "wetlands"
    c. The specific actions that it wanted to be taken to restore the land to viable, functioning wetlands
    d. Whether any of those actions would successfully restore the land to that state
    e. Who should be responsible for carrying out the remedial work, and bearing the cost for it
    f. How any remediation work would impact on the landowners' property interests and whether any consideration should be given to the fact that they were bona fide purchasers in good faith.

87. The Environment Court considered that open-ended definitions in the pNRP gave Greater Wellington officers the power to both decide what the law meant and enforce that in a particular context, without any real accountability. The Court described this as "rule by fiat" and saw it as operating directly counter to the rule of law. Rule by fiat is a way of regulating that undermines legitimacy in the regulatory system and in the regulator.
88. Although that risk was identified in the context of a case about wetlands, it arose because of rules made by Greater Wellington in the pNRP. Greater Wellington is now

seeking to set policy that will guide the development of more rules in the pNRP. Given we have a known risk, identified by the Environment Court, it seems prudent to address it here and now.

89. The rule of law requires that law be accessible and predictable. The law must be able to be easily discovered and understood, and applied predictably and consistently. The concepts of “protect”, “restoration” and “buffer zone” are critical to understanding how communities may use their land under the RMA system, yet the proposed definitions don’t come close to meeting this basic requirement of good law-making.

90. I’m not a scientist, so I defer to those more qualified on the content of the definitions. Where the content is based on scientific understandings, the science must be clear and contestable, and published. We have lived experience of Greater Wellington’s taking enforcement action based on scientific opinions that were found not to be credible and to have misapplied the law. We really don’t want anyone else to go through what we had to. The costs are too significant.

91. As a member of the Mangaroa Peatland Focus Group’s steering committee, I can say that we would welcome the opportunity to work constructively with Greater Wellington on policy development and drafting.

Whakawhetai koutou mo te whakarongo. Thank you for listening to my submission

92. Given my role, I am more used to sitting at an officials table than in this chair. But I wanted to you to hear firsthand a perspective from the Peatland. You will be hearing from others from our focus group today and throughout this process. We’re thinking about what this is going to look like on the ground for us – your challenge is to do that too.

93. I am happy to answer any questions you may have for me.