

Before the Hearings Panels

Under the Resource Management Act 1991 (RMA)

In the matter Proposed Plan Change 1 (PC1) to the Natural Resources Plan for the Wellington Region

And

In the matter Hearing Stream 2 (Objectives and Ecosystem Health and Water Quality Policies)

Legal submissions in reply on behalf of Greater Wellington Regional Council

Date: 14 May 2025



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 are made on behalf of the Greater Wellington Regional Council (**Council**) in relation to Proposed Plan Change 1 (**PC1**) to the Natural Resources Plan for the Wellington Region (**NRP**), Hearing Stream 2 (Objectives and Ecosystem Health Policies).
- 2 The purpose of these legal submissions is to address two issues identified in Minute 7 and one issue that arose during the course of the hearing.
- 3 In summary, those issues are:
 - 3.1 The vires of the notes proposed to be included on Objectives, in particular Objective WH.O1 and P.O1;
 - 3.2 The status of the target attribute state (**TAS**) tables as Objectives;¹ and
 - 3.3 Whether the note in Objective WH.O1 should also include a reference to notices of requirement.²
- 4 Each of these issues is addressed in turn below.

VIRES OF NOTES

Issue at hearing

- 5 The current provision set supported by the Council's section 42A reporting officer for this topic, Ms O'Callahan, recommends the

¹ In response to paragraph 5 of Minute 7.

² In response to paragraph 8 of Minute 7.

inclusion of the following note on Objectives WH.O1 and P.O1 (respectively):

Note: Objectives WH.O2 to WH.O9 set out what is needed to achieve progressive implementation of this long-term objective up to 2040. Therefore, resource consent applicants do not need to demonstrate their proposed activities align with this objective.

Note: Objectives P.O2 to P.O6 set out what is needed to achieve progressive implementation of this long-term objective. Therefore, resource consent applicants do not need to demonstrate their proposed activities align with this objective.

6 The vires of this approach was questioned by Hutt City Council through its evidence. That evidence stated:³

...Regardless, I do not see how the RMA requirements relating to considering plan objectives in decision-making on consents under Section 104 can be overridden by an advice note. As such, it is ultra vires and I recommend that it be deleted.

7 This was the subject of discussion between the Panels and counsel for the Council at the hearing on 7 April 2025.

Council position

8 The Council's position is that the inclusion of the note on the objectives does provide useful guidance to plan users.

9 In *Powell v Dunedin City Council*, the Court of Appeal identified the proper approach to the interpretation of a district plan, noting that that the orthodox approach to statutory interpretation applies:⁴

In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity,

³ Statement of Evidence of Torrey McDonnell, dated 14 March 2025, at [19].

⁴ *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [35].

interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Ratray*, regard must be had to the immediate context ... and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in *Ratray* or with the requirements of the Interpretation Act.

- 10 Accordingly, being clear with the language used in PC1 and the NRP is important, and the context of a provision itself will be relevant to its interpretation.
- 11 When considering a resource consent application, the decision maker is directed by section 104(1)(b) of the RMA to have regard to '*any relevant provisions*' of a plan or a proposed plan. It is submitted that this is not the same as a requirement to have regard to *every* plan provision, as recorded in *Pierau v Auckland Council*.⁵
- ...for the assessment under s 104(1)(b), it is only the provisions that are relevant to the site itself which are to be considered, namely the zone provisions, and any higher level provisions of relevance.
- 12 Accordingly, it is common in any resource consent assessment that judgment needs to be applied to determine which provisions are *relevant* and those which are not. If they are relevant, where the relevant plan intends for a provision not to apply, it can express as to that.
- 13 In the context of rules and the relationship between rules found in the applicable zone and the rules found in overlays within the Auckland Unitary Plan, and which would apply, or trump the other in respect of a particular site, the Environment Court has found

⁵ *Pierau v Auckland Council* [2017] EnvC 90, at [23].

that in the absence of a directive in the plan, both sets of rules would need to be applied.⁶ Effectively, the Court's conclusion was that unless there was express direction to the contrary in the plan, both set of provisions would apply.

- 14 In the case of PC1, the note in the objectives is providing both the plan user and the decision maker the specific direction that the objective in question is not a *relevant provision* to have regard to when making a decision on a resource consent application. It is submitted that it is appropriate for Plan Change 1 to do so and within the Council's powers (ie, it is vires).

ENVIRONMENTAL OUTCOMES AND TARGET ATTRIBUTE STATES

- 15 Paragraph 5 of Minute 7 sets out the following:

In our view, an environmental outcome is a statement of the desired outcome for a particular value. Environmental outcomes can be stated as 'narrative outcomes' such as for mahinga kai (e.g. Objective WH.O5(e)) and benthic cyanobacteria (WH.O8(b)); or they can be stated as numeric outcomes (e.g. Target Attribute States (TAS) for rivers Tables 8.4 and 9.2). Policies and rules then state how the outcomes are to be achieved.

Question for Reporting Officer (the Officer): Please consider whether a definition of 'environmental outcomes' would be helpful to include in the NRP; and if a definition is supported, please provide recommended wording. The definition could draw on the definition of 'environmental outcome' in the NPS-FM, but could also specifically capture the narrative and numeric outcomes sought in PC1. We note that 'environmental outcomes' is proposed to be included in Objective P.O2(i) in bold (indicating a defined term).

- 16 Ms O'Callahan addresses this specific question in her evidence in reply for Hearing Stream 2. However, it is considered important that the response is supplemented by legal submissions as to the

⁶ *Auckland Council v Budden* [2017] NZEnvC 209, [75]-[78]. The subsequent cases in this line of decisions are also relevant: *Auckland Council v Budden (No 2)* [2018] NZEnvC 3; and *Auckland Council v Budden (No 3)* [2018] NZEnvC 30.

ability for TAS to be an objective. This is in response to the submissions from Porirua City Council that TAS are not objectives.

Council position

17 While the NPS-FM does not direct that TAS are to be included in the NRP as objectives, in contrast to other directive parts of the NPS-FM around long-term visions (that are required to be included as objectives) and environmental outcomes (that are required to be included as objectives in the NRP)⁷ that does not mean the Council cannot choose to include them as objectives.

18 The Environment Court has described an objective as follows⁸:

The Concise Oxford is simple and direct: — an objective is ... a goal or aim. That simplicity sits perfectly well here — an objective in a planning document sets out an end state of affairs to which the drafters of the document aspire, and is the overarching purpose that the policies and rules of the document ought to serve.

19 It is submitted that as drafted the TAS tables clearly form part of the objectives. They set the outcomes to be achieved through implementation of the policies and rule framework. That is the definition of what objectives do.

20 Although the NPS-FM is clear that TAS must be set in a way that achieves the environmental outcomes (and relevant long-term vision), that is not the same as a directive that TAS must be included as a policy or other mechanism.⁹ There is no direction in the NPS-FM that means TAS cannot form part of the relevant objectives.

⁷ NPS-FM clause 3.9(4).

⁸ *Ngāti Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50 at [42]

⁹ NPS-FM clause 3.11.

- 21 It is submitted that this the appropriate place for TAS. The Council has not done this to sidestep its obligations under section 32 of the RMA. It has in fact spent significant time and resource in assessing the various options for setting the TAS (including the work through the whaitua committee processes) and is the only party that has put forward any economic assessment of the cost implications of those options.
- 22 Section 32(1)(a) of the RMA still applies to objectives, and requires evaluation of whether the objectives are the most appropriate, which naturally requires consideration of options. However, the express direction in section 32(2) of the RMA as to undertaking a cost benefit analysis is not part of that required analysis of the objectives. That only applies to assessment of the other provisions required under section 32(1)(b) of the RMA.
- 23 To be clear, the commentary in the Council's rebuttal legal submissions for this hearing stream as to the usefulness of challenging the section 32 analysis, was not that parties are unable to challenge that analysis or its robustness. However, the concern was that should such a challenge be made by simply by pointing out perceived gaps or errors without producing evidence to counter that assessment it is not useful at this stage in the process. It is submitted that the Panels' indication of requiring further information through Minute 7 highlights this concern with the evidence base provided by submitters.

NOTICES OF REQUIREMENT

The issue

- 24 At paragraph 8 of Minute 7, the following question is asked:¹⁰

¹⁰ Purple text illustrates WIAL's proposed amendments.

Can the Officer please advise whether she supports the amendments proposed by Wellington International Airport Limited (WIAL) to the Note:

“Note: Objectives WH.O2 to WH.O9 set out what is needed to achieve progressive implementation of this long-term objective up to 2040. Therefore, resource consent ~~applicants applications and Notices of Requirement~~ **do not need to demonstrate their proposed activities alignment with this objective.**”

Council position

- 25 This issue is addressed by Ms O'Callahan in her statement of reply evidence from a planning perspective.
- 26 It is submitted that it is not necessary (or appropriate) to reference a notice of requirement in this note. While it is acknowledged that technically, the provisions of a the NRP could be considered under section 171(1)(iv) of the RMA when a notice of requirement is being assessed, in practice that does not occur. As set out above, the direction is to have particular regard to *relevant provisions* in a plan or proposed plan. The reference to 'plan' incorporates both district and regional plans (as opposed to the district plan alone).¹¹ However, the provisions of the NRP are unlikely to be relevant to a notice of requirement for the reasons that follow.
- 27 A notice of requirement is a notice given by a requiring authority of its requirement for a designation. The effect of a designation is that section 9(3) of the RMA does not apply to a public work or project or work undertaken by a requiring authority under the designation.¹² In other words, it does not need land use consents under section 9(3) of the RMA, which only relates to district

¹¹ RMA, section 43AA defines 'plan' as a regional plan or a district plan.

¹² RMA, section 176.

plans.¹³ Should a regional land use consent be required under the NRP, it would still be required regardless of the designation.¹⁴

28 Accordingly, any land use activities authorised by a designation are not regulated by the NRP and the provisions of the NRP will not be relevant to decision making on the NOR. If there are discharges resulting from the NOR activities that are not permitted, they will need a separate regional consent, which will then consider these objectives in the NRP. Adding in reference to "notices of requirement" in Objective WH.O1 is unnecessary, and may lead to unintended consequences. For example, by being express that these objectives do not apply to notices of requirement, it could result in an interpretation that all other objectives in the NRP are relevant to decision making for notices of requirement. It is submitted that is unlikely to be WIAL's intention.

29 Accordingly, the Council does not support the amendment sought by WIAL to the note on Objective WH.O1.

Date: 14 May 2025



.....
Kerry M Anderson / Emma L Manohar
Counsel for Wellington Regional Council

¹³ RMA, section 9(3).

¹⁴ RMA, section 9(2).