

Before the Independent Hearing Panel

TOPIC: Proposed Plan Change 92 Enabling housing supply to the Western Bay of Plenty District Plan

UNDER the Resource Management Act 1991

IN THE MATTER of submissions and further submissions

BETWEEN **BAY OF PLENTY REGIONAL COUNCIL**

Submitter

A N D **WESTERN BAY OF PLENTY REGIONAL COUNCIL**

Respondent

Legal submissions on behalf of the Bay of Plenty Regional Council

6 September 2023

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Introduction

1. Bay of Plenty Regional Council (**Regional Council**) recognises that via Plan Change 92 (**PC 92**) Western Bay of Plenty District Council (**WBOPDC**) is responding to a Central Government initiative requiring the introduction of the new Medium Density Residential Standards (**MDRS**) through the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (EHAA).¹ PC 92 applies the MDRS to all the existing residential areas of Ōmokoroa and Te Puke, and adds in new residential areas to those towns, along with associated provisions, including in particular the incorporation of the Ōmokoroa Structure Plan² that continues to guide the development of the Ōmokoroa peninsula, and the Te Puke Structure Plan.
2. Overall the Regional Council strongly **supports** Plan Change 92 and WBOPDC. It does seek some minor changes to the proposed version as recommended in the s42A reports.³ Regional Council acknowledges the work it has undertaken to bring in long-intended urbanisation provisions, as well as the history of that process to date, and the focussed pre-hearing discussion process it has undertaken to enable a full understanding of submission points and aims.
3. The two Councils have independently⁴ reached more or less the same point regarding the interpretation of the respective higher order documents and requirements of this new process, including proposed provisions⁵ aimed at ensuring that the incorporation of the new density provisions occurs in a manner that augments the directions in the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), the RPS and regional plan to manage effects of land use and development on water bodies⁶ and the environment, while still providing for a well-functioning urban environment⁷.

¹ The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act passed into law on 20 December 2021.

² As described in the s42A reports Introduction: “Ōmokoroa has been recognised as one of the main growth areas in the western Bay of Plenty sub-region, and has been recognised as suitable for urban development since the 1970s. The Section 32 Report sets out the history of growth and development in Ōmokoroa. A large part of Ōmokoroa was zoned Future Urban in 2012. Since that time Council, in consultation with the community, had been developing and had well progressed with structure planning for the new growth area (existing Future Urban Zone) and related provisions to provide the framework for the urbanisation of this area.”

³ These amendments are shown in Appendix 1 to the planning evidence of Mr Nathan Te Pairi.

⁴ With their own experts advising them.

⁵ As recommended through the s42A reports.

⁶ Notably freshwater management as required under the NPS FM 2020, including integrated management.

⁷ The NPS-UD does not provide an exhaustive list of factors that contribute to well-functioning urban environments. See MfE NPS-UD Fact Sheet.

4. It is my submission that the Plan Change as recommended through the s42A process, and subject to the minor amendments requested via the evidence of the Regional Council, reflects the requirements of the NPS-FM 2020 and provides an appropriate interim response to its full incorporation while still providing for the mandated density requirements and more. In doing so it appropriately gives effect to national policy direction relating to both the built and natural environment.

5. Numerous aspects of the Regional Council's submission have been able to be agreed as between the Councils as shown in the s42A report recommendations⁸ and there are few areas where differences remain. The Regional Council addresses both of those areas in its expert's evidence, as well as via these submissions.

6. Given the discussions in the section 42A report and refinement via pre-hearing discussions, the Regional Council now wishes to **withdraw** the following submissions:

- 25.28 – Risk offsite at Seddon Street
- 25.23 – Outstanding Natural Features and Landscapes
- 25.40 and 25.41 – Safe Evacuation Routes.

7. These submissions are in three parts, plus an Annexure:

Part One provides a brief outline of Regional Council's involvement in this plan change.

Part Two sets out the legal framework supporting your assessment of Regional Council's relief.

Part Three addresses some relief where legal issues requiring a specific response may arise.

Annexure A provides further detail on giving effect to the NPS-FM, for completeness.

Part One - Regional Council involvement

8. Regional Council recognises that the MDRS is a new process that is intended to effectively speed up the provision of residential land and increase density. Within its role and functions under section 30 of the RMA, including as a Smart Growth partner, and pursuant to clause 3.5 of the NPS-FM, Regional Council seeks to **assist** WBOPDC and this panel in ensuring that:

- a. The effects, including cumulative downstream effects of land use change and the density as proposed (and accompanying provisions for urbanisation) are recognised and managed⁹ as required by the various higher order documents;
- b. PC 92 is robust in considering and achieving integrated management between Councils¹⁰, including ensuring structure planning covers necessary areas; and
- c. Interim planning incorporating and enabling MDRS does not foreclose options for upcoming detailed new planning to give effect to National Policy Statements. This particularly applies to the protection of freshwater in recognition of Te Mana o Te Wai, while incorporating the required density standards and related provisions of the MDRS.

9. Staff have met with WBOPDC in a collaborative process seeking to explain and resolve the Regional Council's concerns and questions as set out in its submission and further submissions, and it is appreciative of these efforts and process, as well as the work that has been undertaken prior to notifying PC 92. Brief details of those meetings are noted in the relevant evidence.

10. The following changes to the proposed plan change recommended in the s42A report are considered **particularly** appropriate, and accepted as a means of addressing the Regional Council's submission points. I note that further recommended changes have been made in response to the Regional Council's evidence, via the rebuttal process, which brings the position of the Councils even closer. The presentation of the planning evidence will highlight the remaining areas where further amendment is required.

- a. Objectives and Policies¹¹ - changes to objective 12.2.1.6 and 12.2.2.7, as part of the response to changes that have been recommended for Rule 12.4.5.17, and "reflecting the directives of the NPS-FM to include objectives, policies and methods within the District Plan to promote positive effects, and avoid, remedy or mitigate adverse effects (including cumulative adverse effects), of urban development on the health and well-being of waterbodies, freshwater ecosystems, and receiving

⁹ Including enforceable provisions that will ensure higher order consents such as the CSC are given effect to on the ground as development occurs.

¹⁰ 3.5 NPS FM , including 3.5(i)(c) structure planning.

¹¹ Section 12 s42A at Topic 1 pp37 and 38. Submission points 24.14 and 24.15.

environments”¹², with Policy 12.2.2.7 articulating the expectations “around outcomes of stormwater management in current practice, ... expressed through Catchment Management Plans¹³ and CSCs”¹⁴ – *subject to* minor amendments recommended¹⁵ to Policy 12.2.2.7 to make the difference express between ‘increases in risk’ and ‘flooding effects’, as well as including a reference to considering risk to infrastructure (in line with RPS Objective 31).

- b. New recommended Rule 12.4.5.17 (*as amended* via the evidence of Mr Nathan Te Pairi – planning) providing for Stormwater Management Plans that:
- i. ensure new subdivision and development meets appropriate attenuation standards¹⁶,
 - ii. provide at source controls of inert contaminants¹⁷;
 - iii. takes into account up to date national guidance for climate change;
 - iv. are consistent with the objectives, methods and options of relevant Catchment Management Plans;
 - v. improve the linkages¹⁸ between the cascade of requirements and what occurs at the district plan subdivision and development stage; and
 - vi. give effect¹⁹ to higher order planning²⁰ and national documents; via integrated management.
- c. Incorporating the best practicable options for water sensitive design to manage hydrology and water quality [25.11]²¹ and correcting the reference of “net site area” from the impervious surfaces rule²².

¹² See S42A report Section 12, page 6.

¹³ The s42A report notes that the reference to Catchment Management Plans is important because these are “instrumental in Council’s response to the directives of the NPS-FM.” The policy also responds to the Regional Council’s submission point 25.43.

¹⁴ Ibid.

¹⁵ In the planning evidence of Mr Nathan Te Pairi at p7.

¹⁶ Ibid, p10.

¹⁷ Section 11, Topic 11, p31 s42A

¹⁸ Section 12 Topic 3 s42A NS Changes to 12.4.5.17 detailed in Topic 11.

¹⁹ Including interim effect to the NPS FM 2020

²⁰ Including Method 18 Regional Policy Statement requiring structure planning, NPS FM clause 3.5 and 3.1 and Objective 21, s31, s74 and s75 RMA – see Section 12 Topic 19 at page 61 s42A.

²¹ See evidence of Ms Susan Ira explaining the necessity for WSD.

²² Explained in the evidence of Ms Susan Ira at p16.

- d. Clarification in the application of the Natural Open Space zone to reflect the purpose of the Zone, and mapping amendments (with some further minor amendments as set out in the evidence of Mr Keith Hamill (ecologist) and described in the planning evidence²³).

11. Areas where the evidence suggests there may be a need for further consideration are noted below for completeness. At this stage the Regional Council cannot take these points further but seeks to draw them to the Panel's attention:

- a. **Potentially** - New provisions to address the risk to regionally significant infrastructure²⁴ (Kiwirail track) regarding sub-catchment N1 in Ōmokoroa Stage 3. Submission point 25.18 was rejected in the s42A recommendations – Section 12, Topic 20. The Regional Council remains concerned that the requirements of the RPS to protect this infrastructure are not being given effect to by providing a method that will manage cumulative flows should assessment show this to be required. Potential for incremental adverse effects on the infrastructure is raised in the engineering evidence of Ms Kathleen Thiel-Lardon. Mr Nathan Te Pairi notes these are matters requiring consideration under the Regional Policy Statement. At the point of writing these submissions it remains an unresolved issue, but is raised as a matter that needs to be considered before development occurs in the sub-catchment. It is recommended that this process begins by undertaking an assessment of the sub-catchment as set out in the evidence of Ms Thiel-Lardon²⁵.
- b. Te Puke Flood Maps: Submission 25.32. The s42A report²⁶ recommends the withdrawal of the proposed maps and reliance upon a mixture of statutory methods and the operative maps for now until a more comprehensive approach (via the Te Puke Spatial Plan work) is complete. The Regional Council submission and further

²³ At p15 onwards.

²⁴ IR5B(j) (give regard to the cumulative effects of the proposed activity in contributing to effects on the function, efficiency and safety of infrastructure) and **UG(1)(a)** (protecting the national and regional strategic network).

²⁵ At page 3:

“A catchment-wide analysis prior to subdivision and development is recommended to avoid potential piecemeal outcomes and to assess and, if required, manage cumulative flooding effects that may result in increased flooding risk to the railway infrastructure in sub-catchment N1 over time.”

²⁶ Section 8, at p25.

submission was therefore rejected in the recommendation. (FS 67.46, and 47). While this recommendation on 25.32 is **accepted** by the Regional Council, there remains a further issue as explained in submission 25.30 – i.e. it is still unclear what the extent is of the increase in water levels that is being driven by climate change compared to the increase driven by higher density stemming from intensification.

- c. At this stage the Regional Council does not know from the modelling or reports whether there will be intensification effects on the assets, or whether the various mitigations proposed by WBOPDC will prevent such effects on the drainage scheme directly downstream from Te Puke managed by the Regional Council's Rivers and Drainage team (see **Memorandum** of Coral-Lee Ertel, Asset and Capital Works Manager re Te Puke Intensification Infrastructure Report 13 July 2022, included at page 132/209 of Appendix 4 to the s32 analysis). To this extent the submission point remains a matter of concern. As a minimum, the engineering evidence²⁷ supports all of the methods outlined in Ms Ertel's Memorandum, including (a minimum of) the 50% impervious standard for Te Puke, but seeks some surety that there will not be impacts on its asset that arise from the MDRS plan change. To reiterate, the Regional Council does not oppose the 50% impervious standard, and supports it subject to the above concerns.

Part Two Legal issues introductory context

12. The Regional Council notes the regional importance of Ōmokoroa and Te Puke as planned urban areas.

13. [*Without labouring the point*] recent events have underscored the need to address effects management and risk early and comprehensively, integrating the focus and forward planning of regional and territorial authorities (as provided for in the higher order documents) and not leaving such matters to be considered in an *ad hoc* manner as development occurs, or at too late a stage to be effective. Timely consideration and integrated management in order to support intensification and provide an appropriate interim response to the requirements of the

²⁷ Evidence of Mr Mark Townsend at [10].

NPS-FM 2020 is at the heart of the Regional Council's submission on this Plan Change. In my submission, the recommended changes to PC92 evidenced in the s42A reports now address those requirements, subject to the minor amendments noted above, and the Regional Council has filed expert evidence that reflects the independent professional opinions in accord with this.

Integrated Management:

14. Although some may suggest that integrated management is a matter that requires only to ensure the District Plan has sufficient objectives, policies and methods, to manage the effects of development (including effects on freshwater) as a standalone document, in my submission the directions for integrated management in clause 3.5 of the NPS-FM provide a stronger focus. While s91 of the RMA provides some ability to consider joint consent application processing/hearings, and subclause 4 of 3.5 of the NPS-FM gives direction on what a district plan must contain in order to avoid, remedy or mitigate adverse effects of urban development (including cumulative effects)²⁸, in my submission subclauses 1²⁹ and 3 of the NPS-FM give a wider and more specific direction to the councils to work together in giving effect to Te Mana o Te Wai.

15. The direction in subclause 3 is particularly relevant: the two councils sharing jurisdiction over the catchment **must co-ordinate** in the integrated management of the effects of land use and development. The Regional Council has made its submissions in fulfilment of that requirement and many of the provisions now proposed reflect it. The addition of an explanatory note³⁰ ensuring that the statutory discretion³¹ is considered is an appropriate part of that co-ordination, supporting Rule 12.4.5.17 (as amended). This note as proposed does not

²⁸ (4) Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

²⁹ (1) Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai, requires that local authorities must: (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wahapū (estuaries) and to the sea; and (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and (d) encourage the co-ordination and sequencing of regional or urban growth.

³⁰ Nathan Te Pairi page 10.

³¹ S91 RMA.

cut across the exercise of that discretion or predetermine the outcome of a decision to exercise it.

16. The explanatory note is also consistent, in my submission, with the requirements of s31 RMA upon WBOPDC as a territorial authority, particularly around its function in s31(1)(a) requiring the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district, and s31(b) requiring (inter alia) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

- (i) the avoidance or mitigation of natural hazards; and
- (ii) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

17. Structure planning, such as that undertaken and proposed by WBOPDC here, is also a vital part of that approach, and is mandated by Method 18 of the RPS³². The Ōmokoroa and Te Puke structure plans have their genesis in this requirement, and are now considered to reflect the expectations of the RPS via that Method, subject to the changes set out in the evidence of the Regional Council as further recommendations.

18. The Regional Council's submission and evidence³³ addresses the District Plan response and suggests additions or refinements including:

- a. Mapping and protecting wetlands and rivers including the setbacks and buffer requirements³⁴;*
- b. Linking attenuation to Comprehensive Stormwater Consents³⁵*
- c. Linking water quality to Comprehensive Stormwater Consents and adding a new Appendix A to guide subdivision depending on land use³⁶*

³² See evidence of Nathan Te Pairi at [42] and [51].

³³ A list of witnesses is set out at the end of these submissions.

³⁴ NPSFM.

³⁵ Implementation.

³⁶ Implementation.

- d. *Seeking new provisions to require specific contents in Stormwater Management Plans that are created prior to subdivision and development occurring³⁷; and*
- e. *Addressing risk issues in the N1 catchment³⁸.*
- f. *Raising modelling issue and link to s80E to achieve stormwater management and achieve hydraulic neutrality*
- g. *Clarifying plan terminology, timing, linkages and information requirements.*
- h. *Addressing climate change requirements*
- i. *Applying the proposed Natural Open Space zone to protect wetlands and streams³⁹*

19. For the *most part* the s42A report recommendations have addressed those concerns, even where the exact relief sought has not been agreed. Remaining matters of detail are dealt with in the evidence, and are minor requested amendments for clarity or efficacy, other than the matters noted in the section above.

20. The next part of these submissions addresses the legal framework that guides consideration of the plan change.

Part Two – legal framework – general submissions

21. The main legal issue underpinning BOPRC’s submissions is:

How should PC92 best give effect to statutory, national, and regional directions while remaining workable and reflecting a best practice approach? This needs to be approached in light of the following legal principles:

- (a) the meaning of a statutory provision is to be ascertained from text in light of purpose and context⁴⁰; and
- (b) Parliament is presumed to legislate in a manner that produces a practical, workable and sensible result⁴¹.

22. These submissions address the legislative pathway to ensuring that result.

³⁷ Implementation and integrated management.

³⁸ RPS NH4B

³⁹ See the evidence of Mr Keith Hamill re the protection of some stream gullies and wetland areas, and the evidence of Mr Nathan Te Pairi.

⁴⁰ Legislation Act 2019, s 10.

⁴¹ R v Salmond [1992] 3 NZLR 8 (CA) at 13, per Cooke P.

23. WBOPDC has elected to undertake PC92 as a partial planning response⁴², acknowledging the pressures of the timeframe to incorporate the MDRS requirements, and is intending to bring in further comprehensive planning responses as part of an upcoming District Plan Review⁴³. The Regional Council supports that approach as reflected in the s42A reports and recommendations, subject to some minor amendments for clarity and certainty.

24. The Regional Council acknowledges there are some areas where there are shades of difference in legal interpretation, but considers overall that the Councils have the same understanding of how the various pieces of legislation and higher order documents are intended to work together to give the most appropriate outcome.

25. The primary context is the statutory requirements of the MDRS in mandating incorporation of the density standards, objectives and policies in enabling housing supply⁴⁴, and the use of the ISPP to expedite⁴⁵ that purpose.

26. There is statutory direction in how a specified territorial authority must prepare, notify, and progress an IPI by following the relevant processes described in subclause (2) of Schedule 1 Part 6 clause 95 RMA⁴⁶, which specifies applicable parts of Schedule 1 for this process.

27. The EHAA does not address the applicability of the other parts of the RMA that direct the district council on how to go about the plan change preparation, and are therefore still relevant. Only s 80G gives particular (although limited) direction re the RPS. [see below]

28. The established stages of deciding the contents of the plan change remain relevant i.e. that the starting place is ensuring identification of the facts, significant issues for the plan change arising from those facts, and then the other contents including on the ground matters that require a planning response⁴⁷, although the factual issue of housing undersupply and the

⁴² WBOPDC has included green site urban rezoning as well as applying the MDRS to residential areas as required.

⁴³ WBOPDC S32 at p20: "The full District Plan review process to be completed within the next 2 to 3 years will consider all other matters that fall outside the confines of this ISPP."

⁴⁴ S80E(1)(a) RMA; S80F(1) and (3).

⁴⁵ SS80D RMA.

⁴⁶ See S80F(3)(b).

⁴⁷ Wakatipu Environmental Soc Inc v Queenstown Lakes DC [2000] NZRMA 59(EnvC)

permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A⁴⁸ have been established via the EHAA.

29. Section 74 RMA requirements for consideration in changing a district plan continue to apply, including s74(1)(a)⁴⁹ and the requirement for accordance with: the territorial authority's functions in s31, including integrated management and development capacity⁵⁰ and any national policy statement and the national coastal policy statement⁵¹.

30. Section 75(3)(a) continues to require that district plan must give effect to any national policy statement.

31. There are two key⁵² NPS for the purposes of these submissions – the NPS-FM⁵³, and the National Policy Statement on Urban Development (NPS-UD). The National Policy Statement on Indigenous Biodiversity was gazetted in June 2023 and takes effect as of August, and also has some relevance⁵⁴. A detailed consideration of the implementation requirements of the NPS-FM is set out in the Appendix to these submissions. In summary, the submission is that the recommended changes to PC92 evidenced in the s42A reports will address the interim implementation of the⁵⁵ National Policy Statements (subject to the minor amendments recommended through the Regional Council's evidence).

32. How the NPS-FM overarching **Te Mana o Te Wai** is addressed in PC 92 including methods for managing effects, including cumulative downstream effects, that originate from the new density⁵⁶ and intended (i.e. enabled) level of development is a relevant consideration for the Panel, as is the focus on integrated management of the catchment and planning,⁵⁷ (as

⁴⁸ Waikanae at [31]

⁴⁹ S74 (1)A territorial authority must prepare and change its district plan in accordance with—

(a) its functions under section 31

⁵⁰ S31(1)(a), s31(1)(aa).

⁵¹ S74(1)(ea).

⁵² See s42A discussion on the National Policy Statement for Highly Productive Land, and the conclusion that the timing of PC92 means that this NPS does not apply : S42A Report, Introduction at page 14, citing the transitional definition of highly productive land at clause 3.5.(7).

⁵³ As amended.

⁵⁴ The NPS-IB 2023 is referred to briefly in the end of these submissions, with regards to the NOS zone.

⁵⁵ Noting that the MDRS is only a part of implementing the NPS-UD. The implementation of the NPS-IB is dealt with in WBOPDC's s42A introduction section.

⁵⁶ Noting that "density standard" is only a part of the necessary resource management requirements for achieving the desired level of development: S1 RMA: density standard means a standard setting out requirements relating to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to streets, or landscaped area for the construction of a building.

⁵⁷ NPS-FM 2020 cl 3.5

are the RPS methods and regional plan provisions when undertaking planning – including of new plan provisions intended to incorporate the MDRS). For this reason, the Regional Council supports the position of WBOPDC in its proposed management of those linkages via the proposed new Objective and Policy and Rule suite.

33. The application of the NPS-UD is explained in the s42A report at Introduction, page 10 and this generally accords with my view, although further details and analysis are provided via these submissions where relevant to the submissions of the Regional Council.

Regional Policy Statement

34. Section 75(3)(c) RMA requires that a district plan must give effect to any Regional Policy Statement.

“Section 75 addresses the contents of district plans. By s 75(3), a district plan must “give effect to”, among other things, any national policy statement and any regional policy statement. “Give effect to” means implement. It is a strong directive, creating a firm obligation on the territorial authority”⁵⁸.

35. This *firm obligation* relevantly includes the requirement to give effect to **Method 18 RPS**⁵⁹ requiring structure planning that includes the integrated management of related environmental effects and the co-ordinated pattern of infrastructure. For these reasons the Regional Council supports the proposed amendments to the Structure Plans for Te Puke and Ōmokoroa as set out in the s42A report which it considers reflects that requirement.

Other statutory direction re RPS – s77G(1) and (8)

36. Section 77G(1) provides a clear duty upon the territorial authority to **incorporate** the MDRS into relevant residential zones and give effect to Policy 3 or 5 in that zone, but also is required to incorporate the objectives and policies in clause 6 of Schedule 3A⁶⁰. These are much wider, including the number one Objective of achieving a well-functioning urban environment and all that this entails⁶¹.

⁵⁸ Southern Cross Healthcare v Eden Epsom Residential Protection Society Inc [2023] NZHC 948 at [27], referring to Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

⁵⁹ See evidence of Nathan Te Pairi at 25 and 42.

⁶⁰ Subclause (5).

⁶¹ Objective 1

37. Section 77G(8) provides that the above “requirement to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.”

38. The purpose of the RPS is relevant in understanding this relationship – which is to achieve the purpose of the RMA by providing an overview of the resource management issues of the region and polices and methods to achieve integrated management of the natural and physical resources of the whole region⁶².

“[30] The purpose of a regional policy statement includes achieving integration across policies so that, for example, policy or decisions on water issues should be made in conjunction with policy on land matters that affect water or links that might need to be made to the policy on natural hazards⁶³.”

39. Given this, s77G (8) has a specific meaning that does not oust the application of the RPS other than in very narrow circumstances. Rather the **requirement for incorporation** of the MDRS cannot be overridden by, *for example*, an RPS objective or policy relating to development yield, or timing of urbanisation, (which may potentially be inconsistent with the MDRS). Arguments [if any] for a wider reading of subsection [8] overlook the continued applicability of the RPS and need to give effect to it. Reconciliation of the statutory directions requires giving primacy to the clear direction of the Supreme Court regarding the legal requirement to “give effect to” higher order direction such as an RPS and NPS: “ “Give effect to” means implement. It is a strong directive, creating a firm obligation on the territorial authority”⁶⁴.

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- (a) a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future:

⁶² S59 RMA.

⁶³ “fn25: As discussed in *Derek Nolan Environmental and Resource Management Law*, (7th ed, LexisNexis, Wellington, 2020) at [2.5]; and as illustrated by the decision of the Environment Court in Clutha District Council v Otago Regional Council [2020] NZEnvC 194; upheld by the High Court in Clutha District Council v Otago Regional Council [2022] NZHC 510.” Otago Regional Council v Forest and Bird Protection Society of New Zealand 2022 NZHC 1777.

⁶⁴ Southern Cross Healthcare v Eden Epsom Residential Protection Society Inc [2023] NZHC 948 at [27], referring to Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

Regional Plan

38. Section 75(4) requires that a district plan must not be inconsistent with a regional plan for any matter specified in s30(1), which would therefore include IMP1A (the protection of streams) and WLP13A (protection of wetlands).

Other directions – s80E matters – decision in *Waikanae Land Company*

39. S80E(1)(b)(iii) provides discretionary jurisdiction for related provisions that “support or are consequential” on the MDRS⁶⁵. A recent Environment Court decision (on a direct referral for a resource consent) *Waikanae Land Company Ltd v Heritage New Zealand*⁶⁶ declared as a preliminary legal issue that s80E(1)(b)(iii) is a gateway to the use of s80E(2), and stated its view that the purpose of the IPI process was relatively narrow:

“[31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A.”⁶⁷

40. I draw the Panel’s attention to the recently decided IPI for Kapiti, and in particular, to the accepted recommendations of the IHP⁶⁸ there⁶⁹, including a careful analysis of the Environment Court decision in *Waikanae*. The Kapiti IHP noted that the Environment Court decision in *Waikanae* was **not** binding upon it, and respectfully **disagreed** with the Court’s

⁶⁵ See s32 report WBOPDC at p8:

Council is also including related supporting and/or consequential provisions including objectives and policies which support or are consequential to the MDRS. Related provisions for this plan change include district-wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management and subdivision. Within the Western Bay of Plenty District Council area, the implementation of the MDRS is limited to the Ōmokoroa and Te Puke towns as these have a projected population of 10,000 or more residents and are therefore defined as being an “urban environment” under the Amendment Act.

⁶⁶ [2023] EnvC 056

⁶⁷ *Waikanae Land Company Limited v Heritage New Zealand* [2023] NZEnvC

⁶⁸ THE INDEPENDENT HEARING PANEL’S REPORT TO THE COUNCILLORS OF THE KĀPITI COAST DISTRICT COUNCIL ON PLAN CHANGE 2 UNDER RMA SCHEDULE 1, PART 6, CLAUSE 100 dated 20 June 2023.

⁶⁹ <https://www.kapiticoast.govt.nz/media/jrmofuz1/ihp-report-to-kapiti-coast-district-council-on-pc2.pdf>

analysis of the meaning and intent of the IPI regime (noting that the Court did not have the benefit of full argument before it)-

“There is no evidence that Parliament intended the interpretation of the legitimate scope of an IPI to be construed narrowly or introduce ‘inherent’ limitations manifestly against Part 2 and Objective 1. Indeed, the term “supporting or consequential on” is terminology that suggests an element of appropriate judgment. Hence the openness of the language in RMA, s 80E(1)(b) and (2).” [198]

41. The IHP went on to say that: [199] ...

“Respectfully, we cannot understand how a territorial authority could sensibly implement the MDRS except in a way that ensures other or further requirements than in the existing Plan for earthworks, fencing, infrastructure, and stormwater management would be applied in the face of the enabled intensification. These potential new restrictions will then operate on any development, even if individual development does not take full advantage of the MDRS. The management regime operates across a new urban landscape of greater development potential, not just the site under construction.”

42. 80E(2) says related provisions “also includes” “without limitation” the matters listed in s80E(2), so other matters can also be related matters, subject to s80E(1). The listing of stormwater management including permeability and hydraulic neutrality in this s80(2)(f) subsection confirms that these consequential provisions *may* be included. Whether to do so is therefore a matter that Council should consider – and has. Regional Council’s evidence addresses some refinements to those proposals intended to provide greater workability.

43. The inclusion of the Natural Open Space⁷⁰ zone as part of the IPI is a related matter pursuant to s80E because it is necessary to support the MDRS zoning, being consequential upon it to ensure that stormwater and ecology are managed in an integrated manner, while giving (interim) effect to the NPS-FM as required under section 75(3)(a) and s55 RMA.

44. The well-known tests in section 32 still apply to your consideration, and WBOPDC has provided the panel and parties with a relatively comprehensive section 32 document, updated

⁷⁰ See below regarding further points on the ability to bring in the NOS zone.

with an addendum setting out the qualifying matters identified by WBOPDC, and a further report under s42A, providing s32AA analysis, as well as making submissions on its own accord. The Regional Council adopts those considerations, subject to amendments via the evidence filed and these submissions.

45. The next section of these submissions addresses legal issues that may arise with specific parts of the relief sought.

Part Three – legal dimensions of some relief

46. There are three aspects of the relief that require mention in this section.

The relationship between designations and zoning –

47. In my submission, the analysis on this point in the s42A correctly states the law, in that the application of the underlying zoning to reflect the context of the landform and environment as if the designation were not in place best gives effect to the requirements in the RMA for designations. Section 176(2) of the RMA states that:

“The provisions of a district plan or proposed district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.”

48. The zoning does not apply to the designation, and therefore cannot hinder it.

49. Mr Hextall’s rebuttal evidence⁷¹ (for WBOPDC) when addressing the additional areas sought for inclusion in the NOS⁷² refers to regional council controls and matters affected by or controlled by the NPS FM and says that “the related National Environmental Standards for Freshwater (NESF) that will apply to any sites that meet the criteria for assessment. There is no need for a duplication within the District Plan.” There are two points relevant to that statement:

⁷¹ At 45.

⁷² Evidence of Mr Hamill, Mr Te Pairi

firstly – it is unlikely that the NESF will apply to any of the sites that are covered by the designations, especially the stormwater designation, because **section 43D RMA** covers the relationship between national environmental standards and designations. That section says that the designation **prevails** over the NES if the designation existed when the NES was made. So there may be no protection from that avenue;

secondly – the requirements of structure planning are to include all of the important constraints and features at the planning stage in the district plan and not to leave it to later – for example, Method 18 RPS requires identification of “significant cultural, natural and historic heritage features and values and show how they are to be protected;”⁷³. Mr Hamill’s evidence is clear that the proposed additional sites require that protection.

50. Mr Hextall is also concerned that the NOS zone (as proposed to be amended) should not apply to the area with existing industrial zoning⁷⁴ and that this may “undermine previous planning decisions”. Those previous planning decisions were made at a time that the NOS zoning did not exist in the Western Bay of Plenty District Plan because the NOS is a new zone brought in under this plan change. It is therefore the first chance to consider the application of the NOS to this area of land. In my respectful submission it is appropriate to undertake that consideration in light of the evidence supporting that application.

The ability to impose the NOS in Ōmokoroa as part of the IPI.

51. The evidence of Mr Aaron Collier (planner)⁷⁵ raises his concern with the ability of WBOPDC to include a Rural Residential zone over part of the Bruning land along with the inclusion of “an Open Space Zone” over part of their land. Given that the evidence of the Regional Council supports the inclusion of the Natural Open Space over part of the subject land (supporting the s42A recommendations and recommending a slight increase) these submissions briefly address that issue⁷⁶.

52. Firstly, the statutory scheme is wider than those aspects considered in Mr Collier’s planning evidence.

⁷³ At Method 18(i) RPS.

⁷⁴ At [44] of his rebuttal.

⁷⁵ On behalf of N & M Brunning (Submitter 31).

⁷⁶ Noting it is primarily expected to be an issue addressed in the submissions of the WBOPDC counsel.

- a. Section 77N relates to urban non-residential zones, for example. These zones include Industrial zoning within the meaning of business zoning – which is an urban non-residential zone under the planning standards framework. The NPS-UG includes industrial land in the definition of business land. A power to impose an industrial zone must also include the power to amend its imposition – including by alternative zoning as the case requires.
- b. The RMA is express about the ability to impose **any** zone if s77F Interpretation is referred to, because this explains the meaning of relevant words used in s77F, s77G-77T and Schedule 3A. Simply put, “**urban non-residential zone** means **any** zone in an urban environment that is **not** a residential zone”. **Urban environment** “means any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that—
- (a) is, or is intended by the specified territorial authority to be, predominantly urban in character; and
- (b) is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people.
- c. “Qualifying matters are easier to remove than introduce”⁷⁷ and I submit that it is clear that the interim planning response should not foreclose on options for protecting freshwater as part of the ongoing urbanisation of the Ōmokoroa Peninsula in advance of giving full effect to the NPS-FM via a plan review in due course.
- d. The Natural Open Space zone is also a method to give interim effect to the requirements of the newly introduced NPS-IB. This is acknowledged in the Introductory section of the s42A report⁷⁸, and the analysis is supported: “Plan Change 92 also proposes a new Natural Open Space Zone, which along with stormwater management also provides for the ecological, cultural, recreational and amenity values of the Tauranga Harbour coastal margins and inland gully systems. While this area is not yet required to be assessed against the criteria for SNAs, it could in the future provide for improved indigenous biodiversity outcomes in the area.”

⁷⁷ Kapiti IHP at [120] re principles for planning consideration for MDRS.

⁷⁸ S42A Introduction at p15.

- e. “Many landowners have had restrictions on the use of their land imposed for values recognised by contemporary legislation that didn’t apply previously...”⁷⁹ and it is not uncommon for landowners to argue for a narrow interpretation against such recognition.
- f. Objective 1⁸⁰ is a core objective and should not be read down. As is the requirement to give effect to the NPS-FM.
- g. The Kapiti IHP firmly rejected⁸¹ the “narrow” approach in *Waikanae* that Mr Collier appears to reflect at 5.9 of his evidence, specifically refuting the idea that an IPI should be of narrow scope just because there are no appeal rights to the Environment Court.

[198] The Panel does not take a hostile view about the scope of an IPI just because the usual procedures for appeal to the Environment Court do not apply. Increasingly, streamlined planning processes are becoming a feature of the RMA. There is no evidence that Parliament intended the interpretation of the legitimate scope of an IPI to be construed narrowly or introduce ‘inherent’ limitations manifestly against Part 2 and Objective 1. Indeed, the term “supporting or consequential on” is terminology that suggests an element of appropriate judgment. Hence the openness of the language in RMA, s 80E(1)(b) and (2).

53. I respectfully submit that the above statement is correct in law, being the most consistent with the statutory scheme as explained via these submissions, and encompassing the elements that are needed to make the MDRS work in context, as well as reflecting the plain words of the statute.

Scope:

54. The s42A report discusses whether there is scope for the changes recommended by the Regional Council to insert new Objective and Policy changes to objective 12.2.1.6 and 12.2.2.7– . The s42A report discusses whether there is scope for the changes recommended, noting:

“In response, Bay of Plenty Regional Council indicated that submission points 25.14 and 25.15 provide scope. While those submission points related to Rules 12.3.8 and 12.4.11, the submission does seek to require that

⁷⁹ Kapiti IHP [168].

⁸⁰ Above, fn 61.

⁸¹ Kapiti IHP at [198].

subdivision within the Stage 3 area demonstrates consistency with the relevant stormwater management approach:

"Further provision(s) are sought to require that subdivision within Stage 3 of the Ōmokoroa Structure Plan demonstrates consistency with the stormwater management approach in the relevant catchment management documents and the 'Stormwater Management Concept: Ōmokoroa Stage 3', in Appendix 7 (Structure Plans) with regards to water quantity, volume reduction and water quality".

55. The point above about adequate scope being contained in the intent of the submission itself is repeated, noting the additional relief sought in the final paragraph to submission point 25.14 and 15:

"Any alternative, similar or consequential amendments, including to other provisions, that would give effect to the relief sought or address the matter raised".

56. In my submission, the IHP's powers within clause 99(2)(b) of Schedule 1 of the Act are relevant, because this expressly does **not** limit the IHP "to being within the scope of the submissions made on the IPI", only that its recommendations must be related to a matter identified by the Panel or any other person during the hearing. The amendments to the above Objective and Policy have been identified as required.

57. A final question is raised by WBOPDC about the scope of a small part of the recommended extension sought to the NOS zone being potentially outside of the boundaries of the plan change. I submit that the 'boundaries of the plan change' are not finely drawn in the case of Plan Change 92, bringing in as it does the MDRS and supporting provisions that apply to the urban environment, including intended urban environment. The NOS is related to a physical feature, and the recognition of that feature is within the scope of the plan change.

58. I refer to the rebuttal evidence of Mr Jeff Hextall on behalf of WBOPDC at [39] onwards regarding the evidence of Mr Keith Hamill recommending amendment to the NOS zone. Mr Hextall states at [43] that "In regard to Lot 3 DP 28670 and 467E Ōmokoroa Road, Mr Hamill has recommended areas be added to the Natural Open Space Zone further to those that have been recommended in the review by Council staff. It is noted that these include areas that were not part of the original Regional Council submission, and it appears that one area is actually outside the plan change area." Regional Council submission 25.2 is very widely phrased, and is **not** limited on its face to only the listed properties. The areas covered by the submission *includes* specific addresses but *also* "waterbodies and freshwater ecosystems that require

management and protection under the NPSFM including....”. The clear intent of the submission is to include waterbodies and freshwater ecosystems that require management and protection under the NPSFM, of which the listed areas is only a subset. I have already addressed the wider issue of the boundary of the plan change above. I note that Mr Hextall himself sees the area of the Plan Change as being very wide (in other contexts): “however in the case of Ōmokoroa as a peninsula it is part and parcel⁸².”

Conclusion

59. Ultimately, in my respectful submission, what is required is to do the best possible to address these disparate aspects together as a cohesive whole – recognising that the MDRS provisions are a part of the RMA - so that whilst the MDRS is aimed at enabling housing and there is a duty to incorporate the MDRS to the district plan in relevant residential zones, this is not intended to be at the expense of good planning practice and the other requirements of the Act – the legislature has not intended the MDRS to be incorporated in a vacuum, or to create future problems in or from those new urban densities and zones.

60. Careful consideration of the current planning regime is required, but there are also the future requirements to address effects of urbanisation which should not be foregone or compromised by the immediacy of new density provisions⁸³, and practicable alternatives⁸⁴ need to be identified and understood.

61. This includes methods requiring adequate forward planning around the integrated management documents in place or being created. The timing of these methods and the provision of information including identification and mapping are part of this necessity⁸⁵.

62. The MDRS provisions are intended to be enabling of housing and are a part of ongoing planning requirements that continue to present an evolving response to the various higher level documents. PC92 as recommended in the s42A reports, subject to the minor amendments

⁸² Rebuttal evidence of Jeff Hextall at [33].

⁸³ Including a new and updated CSC and its requirements, and consenting requirements that cross Council responsibilities – including the earthworks and discharge requirements at a Regional level for land use change and intensification at District Plan level.

⁸⁴ See clause 3.34 NPSFM, Section 32.

⁸⁵ Method 18 RPS. See evidence of Keith Hamill at [11] page 3.

recommended in the planning evidence of Mr Nathan Te Pairi, reflects that aim and is supported accordingly.

63. The following witnesses have filed statements of evidence in support of the Regional Council's relief:

- a. Mark Townsend (Engineering)
- b. Kathleen Thiel-Lardon (Stormwater and Flooding)
- c. Mark Ivamy (Natural Hazards)
- d. Susan Ira (Water Quality)
- e. Keith Hamill (Ecological)
- f. Marlene Bosch (Consenting)
- g. Nathan Te Pairi (Planning).

64. Please let us know if the Panel does not have any questions for any of the above witnesses.

In which case leave for that witness not to attend the hearing is sought.



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Counsel for Bay of Plenty Regional Council Toi Moana

Appendix A

National Policy Statement Freshwater Management 2020 – implementation

1. The NPSFM 2020 provides an overarching and fundamental approach that expressly transcends the bounds of the NPSFM in clause 1.3(2) and brings a paradigm shift via clause 1.3(1):

“Fundamental concept – Te Mana o te Wai”

(1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

(2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

2. Notwithstanding ongoing planning work to fully implement the NPSFM 2020⁸⁶ by 31 December 2024 at Regional plan level, each plan change in this interim period is still required

⁸⁶ See subpart 4 of Part 5 RMA re freshwater planning instrument.

to be in accordance⁸⁷ with it including the hierarchy of Objective and Policies⁸⁸, and to give effect to it in the district plan⁸⁹.

3. In addition, the local authority is also under a duty described in s55 RMA 'Local Authority Recognition of National Policy Statements' that requires it to do all of the things that the NPS requires it to do. [c/f timeframes in s55 below at [7(iv)]]].

Horticulture New Zealand v Manawatu-Wanganui Regional Council.

4. The High Court in 2013 considered the timeframe for the application of the much earlier version of the NPSFM 2011⁹⁰ where Kós J held the Environment Court was not bound to

⁸⁷ S74(1)(ea).

⁸⁸ 2.1 Objective

(1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

(a) first, the health and well-being of water bodies and freshwater ecosystems

(b) second, the health needs of people (such as drinking water)

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

2.2 Policies

Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.

Policy 2: Tangata whenua are actively involved in freshwater management (including decision making processes), and Māori freshwater values are identified and provided for.

Policy 3: Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.

Policy 4: Freshwater is managed as part of New Zealand's integrated response to climate change.

Policy 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.

Policy 6: There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

Policy 7: The loss of river extent and values is avoided to the extent practicable.

Policy 8: The significant values of outstanding water bodies are protected.

Policy 9: The habitats of indigenous freshwater species are protected.

Policy 10: The habitat of trout and salmon is protected, insofar as this is consistent with Policy 9.

Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.

Policy 12: The national target (as set out in Appendix 3) for water quality improvement is achieved.

Policy 13: The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends. National Policy Statement for Freshwater Management 2020 11

Policy 14: Information (including monitoring data) about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published.

Policy 15: Communities are enabled to provide for their social, economic, and cultural wellbeing in a way that is consistent with this National Policy Statement.

⁸⁹ S75(3)(a).

⁹⁰ Horticulture New Zealand v Manawatu-Wanganui Regional Council. [2013] NZHC 2492

give effect to the recently gazetted (after appeals had been filed) NPSFM 2011 in the course of the appeal⁹¹.

Southern Cross Healthcare v Eden Epsom Residential Protection Society Inc⁹²

5. The Horticulture New Zealand decision on implementing the NPSFM 2011 was recently distinguished from a finding that the Council had an obligation to amend its district plan as soon as practicable to give effect to the NPS-UG, and that the time frames given for specific implementation of **that** NPS were outer limits that did not defer or detract from that obligation, (although without considering whether the Horticulture New Zealand decision had any continuing relevance to the current NPSFM 2020.)⁹³

6. It is clear on the face of the Southern Cross decision that the High Court was not asked to consider differences between the NPS FM 2011 and NPSFM 2020 or whether the reasoning in the Horticulture New Zealand decision had any application to the situation under the very different NPSFM 2020, nor did it address the NPSFM 2020 in any way⁹⁴. This is largely because the decision was specific to the implementation of the NPS-UG and the reference to the approach in the Horticulture New Zealand decision was intended to explain why that reasoning would not apply to the NPS-UG.

7. In my submission, that aspect of decision in Horticulture New Zealand v Manawatu-Wanganui Regional Council on implementation requirements is limited to the NPSFM 2011⁹⁵, and **cannot** be applied to the current 2020 NPSFM for the following reasons:

- Unlike the NPSFM 2011, the NPSFM 2020 is reformative and extensive in its application and express in the need to put Te Mana o Te Wai as the fundamental concept. [detailed below]
- The temporal scope of implementation of NPSFM 2020 refers via clause 1.2 (2) 'Commencement' to Part 4 of the NPS – "See Part 4 for provisions about the timing of the implementation of this National Policy Statement".

⁹¹ On the basis that the NPSFM 2011 had its own implementation timetable and anticipated decisions being made by the Regional Council.

⁹² Op cit. fn 57.

⁹³ Southern Cross – at [82] to [85].

⁹⁴ [87]

⁹⁵ Which had very specific steps and timeframes for implementation as set out in Policy E1 that also covered the situation where a Regional Council could not complete implementation in due time and the steps to take for a late implementation.

- Part 4 provides:

Part 4: Timing and transitionals

4.1 Timing

(1) Every local authority must give effect to this National Policy Statement as soon as reasonably practicable.

(2) Local authorities must publicly notify any changes to their regional policy statements, regional plans, and **district plans** that are necessary to give effect to this National Policy Statement **as required under the Act**. (emphasis added)

- When considering the implementation meaning of “as required under the Act”, there are a variety of directions for the timing to notify changes to the planning instruments (including district plans) listed in in Part 4 above. For example:

- i. the Freshwater Planning Process set out in Subpart 4 RMA provides a specific process and timing for a Regional Council , where the purpose of the freshwater planning instrument is to give effect to the National Policy Statement for Freshwater Management 2020,[to] publicly notify the freshwater planning instrument by 31 December 2024 (s80A(4)) and to use that specific process. That process does not apply to the District Council’s obligations under the NPSFM 2020;
- ii. the RMA sets out “requirements under the Act” for District Councils to give effect to the NPS via sections 74 and 75 when changing a plan;
- iii. the NPSFM 2020 has “specific requirements” that relate primarily to things that the Regional Council needs to do (see subpart 3) that for the most part might occur under a freshwater planning instrument, or which have immediate requirements (such as insertion of policies in the regional plan under clause 3.22 and 3.34), but also contains processes and obligations that apply to district councils and regional councils in a wider sense that also need to be given effect to;
- iv. section 55(2B) ⁹⁶ requires a local authority to make amendments to a document (including a district plan) “to give effect to **any provision in a national policy statement that affects the document**” (ie inter alia the district plan) using the Schedule 1 process (2C) and in all cases **must** make the amendments as soon as practicable, (2D(a)) or within the time specified in the national policy statement (if any)⁹⁷ or before the occurrence of an event specified in the national policy statement (if any) (N/A here).

⁹⁶ RMA.

⁹⁷ See above – the time specified in the NPSFM is as per the RMA.

a. Provisions in the NPSFM 2020 that “affect the document” are set out in Subpart 1 of the NPS⁹⁸ which sets out how local authorities are to implement the NPSFM “particularly in giving effect to Te Mana o te Wai”.

b. Subpart 3 at clause 3.2 makes it clear that the list of things that a council has to do to give effect is **non-exhaustive** and so obviously is not limited to only specific requirements or timelines.⁹⁹

c. Subpart 1 NPSFM 2020 at cl 3.2(4) is express that Te Mana o te Wai must inform the interpretation of that NPS, and the provisions that are required by this National Policy Statement to be included in regional policy statements and regional and district plans.

d. The NPSFM 2020 also has specific requirements for local authorities/territorial authorities that include the following:

At 3.5:

(3) In order to give effect to this National Policy Statement, local authorities that share jurisdiction over a catchment must co-operate in the integrated management of the effects of land use and development on freshwater.

(4) Every territorial authority must include objectives, policies, and methods in its **district plan** to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments. (emphasis added).

8. For the reasons above, the NPSFM 2020 situation is much more closely aligned to that of the NPS UG which the Court in Southern Cross found required that the Council give immediate effect to it¹⁰⁰, and should be approached in the same way.

Annexure A to Appendix A: Implementation text NPS Freshwater Management 2011

E. Progressive implementation programme

Policy E1

⁹⁸ Clause 3.1(3)(a): “subpart 1 sets out how local authorities must implement this National Policy Statement, particularly in relation to giving effect to Te Mana o te Wai”.

⁹⁹ Cl 3.1(1) “This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.”

¹⁰⁰ [88]

- a) This policy applies to the implementation by a regional council of a policy of this national policy statement.
- b) Every regional council is to implement the policy as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2030.
- c) Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030.
- d) Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of this national policy statement, and publicly notified.
- e) Where a regional council has adopted a programme of staged implementation, it is to publicly report, in every year, on the extent to which the programme has been implemented.

https://environment.govt.nz/assets/Publications/Files/nps-freshwater-mgmt-2011_0.pdf

Annexure B to Appendix A Implementation NPSFM 2020 (as amended February 2023)

1.2 Commencement

- (1) This National Policy Statement comes into force on 3 September 2020.
- (2) See Part 4 for provisions about the timing of the implementation of this National Policy Statement.

Part 4: Timing and transitionals

4.1 Timing ¹⁰¹

¹⁰¹ This application section is far wider than just the Subpart 4-Freshwater Planning Process that is shown below as it applies to all local authorities, and to RPS, RP and DP requirements to give effect to the NPS.

Therefore: The way in which the district council gives way to the NPSFM is not via the Freshwater planning process, but by the other requirements in the RMA - such as s74 and 75.

(1) Every local authority must give effect to this National Policy Statement as soon as reasonably practicable.

(2) Local authorities must publicly notify any changes to their regional policy statements, regional plans, and district plans that are necessary to give effect to this National Policy Statement as required under the Act.

<https://environment.govt.nz/assets/publications/National-Policy-Statement-for-Freshwater-Management-2020.pdf>

RMA 1991

Subpart 4—Freshwater planning process

Subpart 4: replaced, on 1 July 2020, by section 22 of the Resource Management Amendment Act 2020 (2020 No 30).

80A Freshwater planning process

(1) The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.

(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)):

(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.

(4) A regional council must—

(a) publicly notify the freshwater planning instrument; and

(b) if the purpose of the freshwater planning instrument is to give effect to the National Policy Statement for Freshwater Management 2020, publicly notify the freshwater planning instrument by 31 December 2024; and

(c) no later than 6 months after it has publicly notified the freshwater planning instrument, submit the documents required by **clause 37(1)** of Schedule 1 (the **required documents**) to the Chief Freshwater Commissioner; and

(d) at least 20 working days before submitting the required documents, provide to the Chief Freshwater Commissioner in writing—

(i) its notice of intention to submit those documents; and
(ii) the regional council and local tangata whenua nominations for appointment to the freshwater hearings panel required by **clause 59(1)(b) and (c)** of Schedule 1.

(5) The following is an outline of the rest of the freshwater planning process set out in Part 4 of Schedule 1:

(a) the Chief Freshwater Commissioner must convene a freshwater hearings panel to conduct the public hearing of submissions on the freshwater planning instrument:

(b) the freshwater hearings panel must conduct the public hearing of submissions in accordance with its powers and the procedures set out in **Part 4** of Schedule 1:

(c) after the public hearing of submissions is concluded, the freshwater hearings panel must make recommendations to the regional council on the freshwater planning instrument:

(d) the regional council may accept or reject any recommendation. However,—

(i) the regional council must provide reasons for rejecting a recommendation; and

(ii) a person who made a submission on the freshwater planning instrument may make an appeal in accordance with subpart 2 of Part 4 of Schedule 1.

(6) For the purpose of this subpart the following provisions of Schedule 1 apply:

(a) **clauses 1(3), 1A, 1B, 2(1), 3 to 3C, 4A, 5, 6, 7(1) and (2), 8, 8A, and 8D**; and

(b) **clauses 16, 16A, 16B, 17, 20, and 20A**; and

(c) if a request is made by a person under **clause 21(1)** in relation to a freshwater planning instrument, **Part 2** of Schedule 1 applies to the request.

(7) This section does not affect the Minister's ability to call in a matter that the Minister considers is or is part of a proposal of national significance under section 142.

(8) In subsection (2), a proposed regional plan does not include a proposed regional coastal plan or a change or variation to that plan.

(9) Section 37(1)(a) does not apply to any time period specified in this subpart or Part 4 of Schedule 1.

(10) In subsection (4), publicly notify, in relation to a freshwater planning instrument, means to publicly notify the instrument in accordance with clause 5 of Schedule 1.

(11) Subsection (5) is by way of explanation only and does not limit or affect the other provisions of this Act.

Section 80A: replaced, on 1 July 2020, by section 22 of the Resource Management Amendment Act 2020 (2020 No 30).