

**BEFORE THE INDEPENDENT HEARING PANELS**

<b>UNDER</b>	the Resource Management Act 1991
<b>IN THE MATTER</b>	of hearing submissions and further submissions on Greater Wellington Regional Councils Proposed Change 1 to the Regional Policy Statement
<b>Submitter</b>	<b>WINSTONE AGGREGATES (Submitter 162)</b>

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**MEMORANDUM OF COUNSEL FOR WINSTONE AGGREGATES  
HEARING STREAM 4 – URBAN DEVELOPMENT  
ALLOCATION OF PROVISIONS**

**29 September 2023**

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## MAY IT PLEASE THE PANEL

1. Counsel for Winstone Aggregates lodges this memorandum to respond to a legal issue raised by the planning evidence of Catherine Clarke (dated 19 September 2023) and Mika Zollner (dated 26 September 2023). The legal issue concerns the allocation of provisions to the Freshwater Planning Instrument (FPI) or the Part 1 Schedule 1 (P1S1) instrument.
2. The approach taken by Greater Wellington Regional Council, which Ms Zollner adopts, is that provisions (i.e., objectives and policies) should not be split between the FPI and P1S1 process. Therefore, a provision should be allocated to the FPI if any part of it either:
  - (i) Gives effect to parts of the NPS-FM that regulates activities because of their effect on the quality or quantity of freshwater; or
  - (ii) Relates directly to matters that will impact on the quality or quantity of freshwater.
3. In short, Ms Zollner says that if any part of a provision relates to freshwater quality/quantity, then it should be in the FPI, regardless of the content of the balance of the provisions.<sup>1</sup>
4. Ms Clarke, by contrast, has undertaken a holistic assessment of the provisions she comments on, to consider whether they are directly related to quality and quantity of freshwater. Taking Policy 55 as an example, she does not consider that it directly relates to freshwater quality or quantity by reason of only one sub-paragraph referencing Te Mana o Te Wai, in circumstances where the other sub-paragraphs and sub-subparagraphs do not relate to freshwater quality or quantity.<sup>2</sup>
5. The approach taken by Ms Clarke is, in counsel's submission, a correct application of the High Court's guidance in *Otago Regional Council v Royal Forest & Bird Protection Society Inc*. In particular, the High Court said that:

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<sup>1</sup> Statement of Rebuttal of Mika Zollner (26 September 2023) at paragraph 14.

<sup>2</sup> Statement of evidence of Catherine Clarke (19 September 2023) at paragraph 4.17.

6. The starting point is that all provisions should be subject to the normal P1S1 process;<sup>3</sup>
7. Provisions must relate “directly” to matters that impact on quality and quantity of freshwater in order to be included in the FPI.<sup>4</sup> The High Court Judge summarised his findings as follows: “I have held it is only those parts of the proposed regional statement that *relate directly* to the maintenance or enhancement of freshwater quality or quantity that can be treated as parts of a freshwater planning instrument.”<sup>5</sup>
8. Ms Zollner’s approach does not assess whether each provision as a whole can be considered to “directly” relate to freshwater quality/quantity matters. Rather, she seems to consider that any relationship to freshwater, even if only partial or indirect, is sufficient for allocation to the FPI.
9. The approach taken by Otago Regional Council in response to the High Court decision is instructive. A narrow approach was taken to the allocation of provisions to the FPI. A relatively small number of provisions are in the Otago Regional Council’s FPI instrument, where such provisions in their entirety have a direct relationship with freshwater quality/quantity.
10. For example, Policy LF-FW-P15 – “Stormwater and wastewater discharges” has been allocated to the Otago Regional Council’s FPI. This provision from the Land and Freshwater chapter’s Freshwater sub-chapter, states:

**“LF-FW-P15 – Stormwater and wastewater discharges**

Minimise the adverse *effects* of direct and indirect *discharges* of *stormwater and wastewater* to *fresh water* by:

- (1) except as required by LF-VM-02 and LF-VM-04, preferring *discharges of wastewater to land* over *discharges to water*, unless adverse *effects* associated with a *discharge to land* are greater than a *discharge to water*, and
- (2) requiring:

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<sup>3</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc* [2022] NZHC 1777, [2022] NZRMA 565 at [203].

<sup>4</sup> At [201] and [202].

<sup>5</sup> At [236] (emphasis added).

- (a) all sewage, industrial or trade waste to be *discharged* into a reticulated *wastewater* system, where one is available,
  - (b) all *stormwater* to be *discharged* into a reticulated system, where one is available,
  - (c) implementation of methods to progressively reduce the frequency and volume of wet weather overflows and minimise the likelihood of dry weather overflows occurring for reticulated *stormwater* and *wastewater* systems,
  - (d) on-site *wastewater* systems to be designed and operated in accordance with best practice standards,
  - (e) *stormwater* and *wastewater discharges* to meet any applicable water quality standards set for *FMUs* and/or *rohe*, and
  - (f) the use of water sensitive urban design techniques to avoid or mitigate the potential adverse *effects* of *contaminants* on receiving *water bodies* from the *subdivision*, use or development of *land*, wherever practicable, and
- (3) promoting the reticulation of *stormwater* and *wastewater* in urban areas.”

11. By contrast, the Urban Form and Development chapter contains Policy UFD-P4 “Urban expansion”. This has been allocated to the P1S1 process. The provision states as follows:

**“UDF-P4 – Urban expansion**

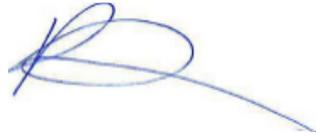
Expansion of *existing urban areas* is facilitated where the expansion:

- (1) contributes to establishing or maintaining the qualities of a *well-functioning urban environment*,
- (2) will not result in inefficient or sporadic patterns of settlement and residential growth,
- (3) is integrated efficiently and effectively with *development infrastructure* and *additional infrastructure* in a strategic, timely and co-ordinated way,
- (4) addresses issues of concern to *iwi* and *hapū*, including those identified in any relevant *iwi* planning documents,
- (5) manages adverse *effects* on other values or resources identified by this RPS that require specific management or protection,

- (6) avoids, as the first priority, highly productive land identified in accordance with LF-LS-P19,
  - (7) locates the new urban/rural zone boundary interface by considering:
    - (a) adverse *effects*, particularly reverse sensitivity, on *rural areas* and existing or potential productive rural activities beyond the new boundary, and
    - (b) key natural or built barriers or physical features, significant values or features identified in this RPS, or cadastral boundaries that will result in a permanent, logical and defensible long-term limit beyond which further urban expansion is demonstrably inappropriate and unlikely, such that provision for future development infrastructure expansion and connectivity beyond the new boundary does not need to be provided for, or
    - (c) reflects a short or medium term, intermediate or temporary zoning or infrastructure servicing boundary where provision for future development *infrastructure* expansion and connectivity should not be foreclosed, even if further expansion is not currently anticipated.”
12. This policy, Policy UFD-P4, has some level of relationship with freshwater quality and quantity. This is because sub-paragraph (5) refers to managing “adverse effects on other values or resources identified by this RPS that require specific management or protection”. Freshwater quality and quantity are other values or resources that are identified in other parts of the RPS. However, the relationship to freshwater is indirect because the relationship to freshwater only arises through other values/resources identified in other provisions of the RPS.
13. The Otago Regional Council has therefore correctly allocated this provision to the P1S1 process. The relationship between the provision and freshwater quality/quantity is at best indirect.
14. Precisely the same analysis should be applied to GWRC’s RPS PC1. For example, Policy 55 of PC1 is headed “Providing for appropriate urban development”. The only relationship with freshwater comes from the words “Integrates *Te Mana o Te Wai* consistent with Policy 42”, which is one sub-subparagraph within a list of matters to which particular regard shall be given. The relationship with freshwater

quality and quantity is not direct, because only it arises through reference to being “consistent with Policy 42”.

15. For these reasons, counsel submits that the approach proposed by Ms Clarke to the allocation of provisions is correct and ought to be applied by the Panel.



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**PHERNNE TANCOCK**

**Dated** the 29<sup>th</sup> day of September 2023