Before the Hearings Panel

In the matter	of the Resource Management Act 1991 (**RMA**)
And	
In the matter of	the Proposed Far North District Plan, a proposed plan under Part 1 of Schedule 1 to the RMA

MEMORANDUM OF COUNSEL FOR THE FAR NORTH DISTRICT COUNCIL IN RELATION TO THE NATIONAL POLICY STATEMENT ON INDIGENOUS BIODIVERSITY

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TO THE HEARINGS PANEL:

INTRODUCTION

1. The Proposed Far North District Plan (**PDP**) is currently proceeding through the process under Part 1 of Schedule 1 of the RMA. It was publicly notified on 27 July 2022 and primary submissions closed on 21 October 2022. Further submissions closed on 4 September 2023.

2. The National Policy Statement on Indigenous Biodiversity (**NPS-IB**) was gazetted on 7 July 2023 and came into force on 4 August 2023. It includes an objective, policies and implementation clauses seeking to maintain indigenous biodiversity across New Zealand.

3. The Schedule 1 process was therefore "mid-flight" when the NPS-IB came into force. This memorandum addresses the extent to which decision-makers on the PDP are required to give effect to the NPS-IB when making decisions on submissions.

4. This memorandum is filed in support of the overall approach to the NPS-IB in the Section 42A Report: Ecosystems and Indigenous Biodiversity, prepared by Mr Jerome Wyeth.

THE REQUIREMENT TO GIVE EFFECT TO THE NPS-IB

5. The statutory considerations when making a district plan are set out in ss 31, 32, 32AA and 72-76 of the RMA. Most relevantly, s 75(3)(a) provides that a district plan must give effect to any national policy statement.[1]

1 Under s 74(1)(ea) of the RMA, a territorial authority must also prepare and change its district plan in accordance with a national policy statement.

6. The Supreme Court in *Environmental Defence Society v New Zealand King Salmon*[2] found that:

> "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it.[3]

7. The Supreme Court went on to say:

> [91] We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans. Many of the policies are framed in terms that provide flexibility and, apart from that, the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.

8. The Supreme Court also found that the requirement to give effect to a policy that is framed in a specific and unqualified way may be more prescriptive than a requirement to give effect to a policy that is worded at a higher level of abstraction.[4] Where policies are expressed in clearly directive terms, such as use of the word "avoid", a decision-maker may have no option but to implement them.[5]

9. While some efforts were made to align the general direction of the notified PDP with the direction of the NPS-IB exposure draft (being mindful of uncertainties about if and when the NPS-IB would come into effect), the PDP does not fully give effect to the NPS-IB because it was publicly notified before the NPS-IB came into force.

10. The NPS-IB includes a number of highly directive provisions for the management of indigenous biodiversity which must be implemented. However, the question of timing arises as discussed below.

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2 [2014] NZSC 38, (2014) 17 ELRNZ 442.
3 *King Salmon,* n 2, at [77].
4 *King Salmon,* n 2, at [80] and [128]-[130].
5 *King Salmon*, n 2, at [129].

NPS-IB TIMING REQUIREMENTS

11. The timeframes for giving effect to the NPS-IB are set out in Part 4 of the NPS-IB.[6]

12. Clauses 4.1 requires that:

(a) Every local authority must give effect to the NPS-IB "as soon as reasonably practicable"; and

(b) Local authorities must publicly notify any changes to their plans that are necessary to give effect to the NPS-IB within eight years after the commencement date i.e. by 4 August 2031.

13. Clause 4.2 requires local authorities to publicly notify any plan or changes necessary to give effect to subpart 2 of Part 3 (significant natural areas) and clause 3.24 (information requirements) within five years after the commencement date i.e. by 4 August 2028.

PROPOSED AMENDMENTS TO THE NPS-IB TIMING REQUIREMENTS

14. The Resource Management (Freshwater and Other Matters) Amendment Bill (**Amendment Bill**) was introduced to Parliament on 23 May 2024 and had its first reading on 28 May 2024. It will implement the Government's announcement that requirements for identification of new significant natural areas (**SNAs**) will be suspended for a period of three years. Submissions on the Amendment Bill closed on 30 June 2024 and the Select Committee report is due on 30 September 2024. The Parliamentary process is likely to conclude in late 2024.

15. Although wider reform of the RMA and potentially the NPS-IB is on the Government agenda, the Amendment Bill proposes relatively discrete changes to disapply key NPS-IB requirements for the identification of SNAs in district plans (Policy 6, clause 3.8(1), (6), and (8), clause 3.9(1) and clause 3.9(3)) and to disapply the clause 4.1

6 Under s 55 of the RMA, a local authority must make all other amendments to a planning document that are required to give effect to any provision in a national policy statement that affects the document as soon as practicable or within some other specified time period.

requirement to give effect to the SNA provisions as soon as reasonably practicable.[7] These provisions are proposed to be disapplied for a 3-year period which commences when the Amendment Act comes into force.

16. The clause 4.2(1) requirement to implement the SNA provisions in subpart 2 of Part 3 within five years is proposed to be extended from 4 August 2028 to 31 December 2030 (but clause 3.16 (indigenous biodiversity outside SNAs) remains subject to the 5-year timeframe in clause 4.2).[8]

17. The Bill also provides that:

(a) Clause 4.1 (which requires local authorities to give effect to the NPS-IB as soon as reasonably practicable) continues to apply in relation to the other provisions of the NPS-IB;[9]

(b) The changes in the Bill do not affect any function or requirement under other provisions of the RMA relating to indigenous biological diversity, including in relation to areas of significant indigenous vegetation or significant habitats of indigenous fauna;[10] and

(c) An SNA included in a proposed plan after commencement of the Amendment Act is not to be treated as an SNA, regardless of how it is described in the plan (for 3 years from commencement of the Amendment Act).[11]

18. The proposed changes therefore do not remove the Council's obligations to give effect to NPS-IB provisions which are unrelated to identification of SNAs.

19. The proposed changes also do not relieve decision-makers of their function to maintain indigenous biodiversity under s 31(1)(b)(iii) of the RMA, their obligation to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national

7 Resource Management (Freshwater and Other Matters) Amendment Bill, cl 21.
8 Resource Management (Freshwater and Other Matters) Amendment Bill, Schedule 2.
9 Resource Management (Freshwater and Other Matters) Amendment Bill, cl 21, s 78(3)(b).
10 Resource Management (Freshwater and Other Matters) Amendment Bill, cl 21, s 78(4).
11 Resource Management (Freshwater and Other Matters) Amendment Bill, cl 21, s 78(5).

importance under s 6(c) of the RMA or their obligation to have particular regard to the intrinsic values of ecosystems under s 7(d) of the RMA.

20. If the Amendment Bill commences in its current form before the Council's decisions on submissions are publicly notified (that being the date the PDP is amended under clause 10(5) of Schedule 1), proposed s 78(5) would appear to effectively "cancel out" SNAs included through PDP decisions (if any) for a period of 3 years from the date of commencement of the Amendment Act.

21. At the time of writing these submissions, the Amendment Bill has not completed the Parliamentary process and received Royal Assent. It therefore does not currently have legal effect. However, the Hearings Panel must apply the law as it stands when it comes to make its recommendations. If the Amendment Bill has passed into law at the time of the Hearings Panel's recommendations, it should be applied by the Hearings Panel i.e. the requirements for identification of SNAs in district plans and to give effect to the SNA provisions as soon as reasonably practicable will not apply. This position applies unless there are transitional provisions that provide otherwise.

22. As foreshadowed above, while the changes in the Amendment Bill could be described as relatively discrete, the changes have been made to immediately fulfil an election commitment of the current Government. The Government has also signalled wider reform of the RMA, and a broader review of SNAs. For example, the Explanatory Notes to the Bill state that: "The 3-year suspension period for the implementation of new SNAs will allow time for a review of the operation of SNAs more broadly."

REQUIREMENT FOR COUNCIL DECISIONS TO GIVE EFFECT TO THE NPS-IB

23. The timing requirements which currently apply are set out in Part 4 of the NPS-IB.

24. In *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated*[12] the High Court considered similar provisions in the National Policy

12 [2023] NZHC 948.

Statement on Urban Development (**NPS-UD**) in determining whether that document needed to be given effect to at the time of a plan change, or whether that was not required due to the NPS-UD requirements for implementation by a later date.

25. In that case, the NPS-UD came into force on 20 August 2020 during the Environment Court appeals phase, after public notification of a proposed plan change in 2019 and after council decisions on the plan change in May 2020. Despite the NPS-UD coming into force when the Schedule 1 process was underway, the High Court found that the Environment Court was obliged to consider the extent to which the proposed plan change would give effect to all provisions of the NPS-UD when determining the appeals.

26. One of the issues before the High Court required consideration of the timeframes for implementation in the NPS-UD. The High Court found that clause 4.1(2) of the NPS-UD sets a two-year outer limit for complying with certain policies, but that does not defer or diminish the Council's obligation under clause 4.1(1) to give effect to the NPS-UD as soon as practicable.[13] The High Court also noted that clause 3.1 was clear that nothing in the NPS-UD limits the general obligation to give effect to the NPS-UD.

27. Because the NPS-IB implementation clauses are broadly similar to those considered by the High Court in that case, I consider that the NPS-IB should be interpreted in a similar way.

28. It follows that clause 4.1(2) sets an "outer limit" of eight years to publicly notify any plan changes necessary to give effect to the NPS-IB. Clause 4.2(1) sets an "outer limit" of five years to publicly notify any plan changes necessary to give effect to subpart 2 of Part 3 (significant natural areas) and clause 3.24 (information requirements). However, these outer limits do not defer or diminish the Council's obligation to give effect to the NPS-IB "as soon as reasonably practicable" under clause 4.1(1).

13 *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated* [2023] NZHC 948, at [82] – [83].

29. When considering amendments to the PDP to give effect to a national policy statement, decision-makers are bound by the normal principles of scope.[14] In summary:

(a) A council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is "reasonably and fairly raised" in submissions on the proposed plan or plan change. [15]

(b) The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[16]

(c) The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.[17]

(d) It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the submission.[18]

30. The extent to which the NPS-IB should be given effect to through Council decisions on the PDP therefore depends on the scope of submissions and whether it is a reasonably practicable time to do so.

31. As noted by Mr Wyeth, the scope of submissions on the Indigenous Biodiversity Chapter is broad, and includes several submissions generally seeking amendments to give effect to the NPS-IB. While that is the case, questions of fairness may arise if there are wide-ranging changes or changes that may affect people not involved in the process.

32. Determining whether a particular approach is "reasonably practicable" requires a case-by-case assessment. In *Wellington International Airport Limited v New*

14 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.
15 *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).
16 *Royal Forest and Bird Protection Society of New Zealand v Buller Coal Limited* [2012] NZHC 2156, [2012] NZRMA 552.
17 *Shaw v Selwyn District Council* [2001] 2 NZLR 277, at [31].
18 *Westfield (New Zealand) Limited v Hamilton City Council* [2004] NZRMA 556 (HC), at [73]-[74].

Zealand Air Line Pilots' Association Industrial Union of Workers Inc[19] the Supreme Court found:

> "Practicable" is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

33. As was succinctly stated in *Southern Cross Healthcare Limited*: "What is a practicable time will depend on the circumstances."[20] The element of reasonableness must also to be factored in.

THE SECTION 42A REPORT APPROACH

34. The question of whether it is reasonably practicable to give effect to the NPS-IB provisions through the PDP is addressed in paragraphs 46-50 of Mr Wyeth's s 42A report. Appendix 3 to Mr Wyeth's report includes a detailed assessment of the extent to which it is reasonably practicable to give effect to the relevant NPS-IB provisions. The Appendix also sets out the key principles that have guided Mr Wyeth's approach.

35. Mr Wyeth has considered the relevant circumstances and concludes that it is not reasonably practicable to give effect to the NPS-IB in full through the PDP process. His assessment identifies the following difficulties in giving full effect to the NPS-IB at this time:

(a) *Practical inability to follow procedural requirements as part of the PDP process* – for example, clause 3.8 sets out a process for assessing areas that qualify as SNAs. This includes a district-wide assessment, a partnership approach with tangata whenua and landowners and physical inspections.

19 [2017] NZSC 199 at [35].
20 *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Incorporated* [2023] NZHC 948, at [82].

(b) *Absence of technical work to support new plan provisions* – for example, clause 3.8 requires application of the SNA assessment criteria by a suitably qualified ecologist.

(c) *Pre-requisite procedural steps that have not yet been completed by the regional council* – for example, the requirement under clause 3.20 for regional councils to record areas outside SNAs that are highly mobile fauna areas, or the requirement under clause 3.22 for regional councils to assess the percentage of indigenous vegetation cover and set targets for indigenous vegetation cover.

(d) *The interrelated nature of NPS-IB provisions* – for example, many NPS-IB provisions refer to SNAs and are therefore contingent on SNAs being mapped.

36. The final point arises because SNA is defined in the NPS-IB as follows:

> **SNA**, or **significant natural area**, means:
>
> (a) any area that, after the commencement date, is notified or included in a district plan as an SNA following an assessment of the area in accordance with Appendix 1; and
>
> (b) any area that, on the commencement date, is already identified in a policy statement or plan as an area of significant indigenous vegetation or significant habitat of indigenous fauna (regardless of how it is described); in which case it remains as an SNA unless or until a suitably qualified ecologist engaged by the relevant local authority determines that it is not an area of significant indigenous vegetation or significant habitat of indigenous fauna.

37. SNAs are by definition areas that have been mapped in an operative or proposed district plan. Therefore, all NPS-IB provisions which use "SNA" or "significant natural area" engage that particular meaning. Provisions which refer to SNAs are premised on SNAs being mapped. If SNAs have not been mapped in the operative or proposed district plan, as is the case for the Far North District, the relevant NPS-IB provisions cannot be given effect to until SNAs are mapped. Given the many references to SNAs in the NPS-IB provisions, this issue makes it impractical to implement much of the NPS-IB.

38. The factors above all go to the question of whether it is "reasonably practicable" to give effect to the NPS-IB now. In my submission, they support Mr Wyeth's

conclusion that a future plan change will be required to fully give effect to the NPS-IB.

39. However, if there are no practical barriers to giving effect to particular NPS-IB provisions immediately, appropriate changes should be made through Council decisions. Accordingly, Mr Wyeth recommends the following interim approach in decisions on the PDP until the NPS-IB can be implemented in full through a future plan change:

(a) **Not give effect to** any NPS-IB provisions relating to SNAs.

(b) **Not give effect to** NPS-IB provisions that:

(i) Require further engagement (e.g. identifying taonga species in partnership with tangata whenua).

(ii) Require further technical assessments (e.g. indigenous vegetation cover).

(iii) Are primarily directed at regional councils or are subject to pre-requisite procedural steps that must be completed by the regional council (e.g. regional biodiversity strategies, highly mobile fauna areas, or assessing the percentage of indigenous vegetation cover and setting targets for indigenous vegetation cover within urban and non-urban environments).

(c) **Give effect to** NPS-IB provisions that are more general in nature and can be given effect to through specific policies in the Indigenous Biodiversity Chapter e.g. the precautionary approach, priorities for restoration, resilience to climate change and alignment with the general direction of the NPS-IB.

40. As stated above, whether it is reasonably practicable to give effect to the NPS-IB depends on the circumstances. Mr Wyeth has identified a range of factors which make it impracticable to give effect to many of the NPS-IB provisions now. In summary, Mr Wyeth has recommended changes to the PDP to give effect to the NPS-IB where reasonably practicable, but it is premature to try and give effect to

many provisions in the NPS-IB until the relevant procedural and technical requirements of the NPS-IB have been satisfied. This is consistent with the legal position above.

CONCLUSION

41. In conclusion, Mr Wyeth's reasons and recommended approach properly satisfy the requirement to give effect to the NPS-IB as soon as reasonably practicable. They are also in accordance with the other statutory considerations including the Council's functions under s 31(1)(b)(iii), the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna under s 6(c) of the RMA and the requirement to have regard to the intrinsic values of ecosystems under s 7(d) of the RMA.

DATED at Auckland this 2nd day of August 2024

T R Fischer