

Before an Independent Hearings Panel of Wellington City Council

Under the Resource Management Act 1991

In the matter of the hearing of submissions and further submissions on the
Proposed Wellington City District Plan (**PDP**)

And

In the matter of Hearing Stream 11

**SUPPLEMENTARY SUBMISSIONS ON BEHALF OF
WELLINGTON INTERNATIONAL AIRPORT LIMITED**

Hearing Stream 11 – Indigenous Biodiversity

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Amanda Dewar | Barrister

Phone: 021 2429175

Email: amanda@amandadewar.com

PO Box 7

Christchurch 8140

INTRODUCTION

1. These legal submissions are filed on behalf of Wellington International Airport Limited (**WIAL**), a submitter on the Wellington City Council (**WCC**) Proposed District Plan (**PDP**) in relation to Hearing Stream 11– Indigenous Biodiversity.
2. The submissions are supplementary to those filed on 5 September 2024, and respond to the Panel's minute 58 recording the leave granted to WIAL to provide information on the following issues:

- "(i) General leave to reply to Forest and Bird's legal submissions;*
- (ii) We requested that Ms O'Sullivan consider the potential for ECO-P33 to provide for temporary activities, and provide wording and Section 32AA evaluation if she recommends such a provision be added;*
- (iii) We requested that Ms O'Sullivan provide a discussion of Policy 24CC arrived at through joint witnessing conferencing in the GWRC RPS Change 1 process, with specific reference to the consistency of that policy with the NZCPS, having regard to the directions in the Supreme Court's majority decision in Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency [2024] NZSC 26 (East/West);*
- (iv) We requested that Dr Anderson provide us with a map of the revised Lyall Bay SNA boundary he described verbally;*
- (v) We requested that Dr Anderson provide us with copies of the iNaturalist and eBird maps showing the locations of threatened bird sightings within and in the vicinity of the Lyall Bay and Moa Point SNAs that he discussed in his evidence;*
- (vi) We requested that WIAL provide us with a legal analysis of what it means when built structures are described as being 'fixed', and in particular whether the Moa Point seawalls and reclaimed Moa Point Beach qualify in that regard."*

3. These matters are addressed in turn below.

RESPONSE TO FOREST AND BIRD'S LEGAL SUBMISSIONS

4. Regarding the legal submissions filed on behalf of Royal Forest & Bird

Protection Society of New Zealand Incorporated (**Forest and Bird**), the only point to which WIAL wishes to respond (in addition to the submissions and evidence it has already filed) relates to the proposed relief described at [57] of Mr Anderson's submissions, namely:

Forest & Bird seeks an amendment that provides that, every time SNAs are mentioned in objectives, policies and rules, the words 'or an area meeting the criteria for significance in Policy 23 of the Wellington Regional Policy Statement' [RPS] are added. This is required to ensure that the intent of the NPS-IB is met and is not inconsistent with the intent of the NPS-IB to protect SNAs.

5. It would be inefficient for the District Plan to include those additional words in every provision that mentions Significant Natural Areas (**SNAs**). To do so would:
 - (a) be inconsistent with the National Policy Statement in Indigenous Biodiversity (**NPS-IB**), as well as unnecessary given the requirements on local authorities to implement the NPS-IB;
 - (b) circumvent the district planning processes and associated public participation clearly envisaged by the NPS-IB to apply to the identification of SNAs; and
 - (c) create uncertainty for users of the District Plan.
6. These points are addressed briefly in turn below.
7. Firstly, the NPS-IB specifies the relevant criteria for identifying SNAs and provides clear direction on how territorial authorities are to implement its provisions regarding SNAs. Clause 3.9, for example, requires that:
 - (1) *A territorial authority must notify a plan or plan change to include as an SNA each area in its district that is identified as qualifying as an SNA.*
 - (2) *The notified plan or plan change must include:*
 - (a) *the location of the SNA and a description of its attributes; and*
 - (b) *a map of the area; and*
 - (c) *specify whether the SNA is a geothermal SNA*
8. Where additional SNAs are subsequently identified, clause 3.8(6) provides that those SNAs are to be included in the next appropriate plan or plan change.
9. The NPS-IB therefore establishes a deliberate scheme for SNAs to be identified (and mapped) by territorial authorities based on an evaluation carried out by specialists with the relevant expertise, then included in notified plan changes,

and then confirmed following a statutory planning process (such as the present), in which landowners and other interested persons can participate, involving rigorous testing of the relevant evidence.

10. The relief proposed by Forest and Bird is contrary to the scheme and clear direction established by the NPS-IB, which is for the NPS-IB protections to apply to SNAs properly identified through such a district planning process.
11. Second, and relatedly, the relief sought by Forest and Bird would lead to the District Plan protections for SNAs potentially applying to areas that have not been identified by the Council as potential SNAs and subject to the rigorous scrutiny of a planning process, in which landowners and other potentially affected persons can participate.¹ Forest and Bird's proposed relief would provide an unnecessary and unwarranted side-step of this process.
12. Third, the relief proposed by Forest and Bird would also create considerable uncertainty for readers of the District Plan about which areas in fact qualify for the protections afforded to SNAs. Given the potentially significant implications for landowners and other interested persons of SNAs being identified, certainty in this regard is important (including as to the accuracy and availability of mapping and data). This uncertainty is one of the key justifications identified by the Ministry for the Environment for the NPS-IB to impose clear requirements on territorial authorities to identify SNAs through a deliberate, robust, participatory process.²
13. As such, the relief sought by Forest and Bird is unnecessary, inefficient, and risks undermining the PDP process to date.

INF-ECO-P33 – TEMPORARY ACTIVITIES

14. Ms O'Sullivan's evidence dated 17 September 2024 is filed together with these legal submissions. As the evidence records, minute 58 was not available to Ms O'Sullivan at the time she prepared her evidence (and she has since departed to travel overseas). Nonetheless, her evidence effectively answers the question posed in minute 58; Ms O'Sullivan does not recommend adding a reference to temporary activities to this provision.

¹ *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at [60].

² [NPSIB-Evaluation-report-under-Section-32-of-the-RMA.pdf \(environment.govt.nz\)](#), pages 42-43.

POLICY 24CC RPS AGREED WORDING – CONSISTENCY WITH *EAST WEST LINK*

Introduction

15. Ms O'Sullivan was not able to address the Panel's question regarding Policy 24CC of the conferenced version of Proposed Change 1 to the Regional Policy Statement (**RPS**) for the Wellington Region prior to her departure (noting that minute 58 contains a somewhat refined version of the question put to Ms O'Sullivan by the Panel at the hearing). Counsel is nonetheless able to assist the Panel with its query, which turns on legal analysis of the Supreme Court's decision in *East West Link*³ (and other relevant jurisprudence).
16. As Ms O'Sullivan explained in her evidence of 28 August 2024:

"2.12 Policy 24CC of the conferenced version of the [RPS] provisions directs district plans to include policies, rules and methods to consider providing for the operation, maintenance, upgrade and extension of existing regionally significant infrastructure where it may have certain adverse effects (akin to those described in Policy 11(a) and 11(b) of the NZCPS) where:

2.12.1 There is a functional or operational need for the regionally significant infrastructure to be in that area;

2.12.2 There is no practicable alternative on land or elsewhere within the coastal environment;

2.12.3 The activity provides for the maintenance and where practicable, enhance or restoration of the effects on significant indigenous biodiversity values and attributes."

17. The Panel has queried the consistency of that outcome with the New Zealand Coastal Policy Statement (**NZCPS**), having regard to the Supreme Court's analysis of the relevant legal principles in *East West Link*.
18. Legal analysis relevant to that question is set out below. Counsel acknowledges at the outset that the Panel's question is rooted in key planning principles discussed by the higher Courts, including that:
- (a) When considering provisions in a lower-order planning document, the decision-maker must give careful attention to the higher-order planning documents to ensure that the former document 'gives effect to' the latter. It should not confine its attention to unchallenged parts of the planning document in issue or to the planning document immediately above the document under consideration, and ignore or gloss over higher order planning documents.⁴

³ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 (*East West Link*).

⁴ *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* (2017) 20 ELRNZ 564 at [84].

- (b) However, lower-level planning documents are required to 'give effect to' the higher-order planning documents. It can therefore be expected that policies of higher-order documents will be reflected in the more place- and subject-specific provisions of the lower-level document.⁵
19. The Panel will also understand that there are a number of relevant higher-order instruments relevant to RPS Policy 24CC, including the NPS-IB and NZCPS; and that both the national level and regional level policy and planning documents are relevant to the Panel's ultimate task of recommending PDP provisions (including INF-ECO-P34, as relevant to this discussion). In other words, in recommending PDP provisions, the Panel will need to give careful attention to a number of higher-order instruments, including the NZCPS, NPS-IB, RPS and the Natural Resources Plan (**NRP**). In the event of any conflict between the NZCPS and NPS-IB, the NZCPS prevails.
20. To summarise the submission for WIAL, the wording of RPS Policy 24CC agreed by the relevant planners does give effect to the relevant policies of the NZCPS and represents a faithful application of the NZCPS direction in the specific context of the Wellington region.

Relevant case law

21. The Panel's question refers to *East West Link*, which, as the Panel will be aware, concerned decisions under ss 104 and 171 of the RMA in relation to whether resource consents should be granted and notices of requirement confirmed. The Supreme Court's decision in *Port Otago Ltd v Environmental Defence Society Inc*⁶ (**Port Otago**) and other decisions considering the form of planning provisions are also directly relevant to the Panel's task here; nonetheless *East West Link* includes helpful discussion and guidance on matters such as the meaning of 'avoid' and how to reconcile policies 6 and 11 of the NZCPS.
22. The key principles of the relevant decisions as they relate to the present issues are as follows:

Avoid policies

- (a) In interpreting 'avoid' policies, the word 'avoid' should be given its ordinary meaning of 'not allowing' or 'preventing the occurrence of', and it should carry significant weight when read alongside less strongly-

⁵ *East West Link* at [40].

⁶ *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 (**Port Otago**).

worded provisions.⁷

- (b) The meaning of 'avoid' as used in the NZCPS avoidance policies must be:

*"interpreted in light of what is sought to be protected including the relevant values and areas, and when considering any development, whether measures can be put in place to avoid material harm to those values and areas."*⁸

- (c) Avoidance policies (such as policy 11 of the NZCPS) can form *"something in the nature of a bottom line"*, but it would likely not be necessary to avoid minor or transitory effects under those policies.⁹

- (d) Avoidance can either be achieved at the outset or after mitigation has been applied to reduce the harm so it is no longer material.¹⁰

Enabling policies

- (e) Depending on how they are worded, 'enabling' policies can also be directive.¹¹ The specific language of directive policies is important.¹²

Reconciling conflicts and providing for 'deserving exceptions'

- (f) Where there is conflict between directive policies of similar strength, decision-makers must consider whether absolute avoidance is required or whether there is a degree of flexibility as to how effects are to be avoided, and to what degree. This requires an *"appropriate balance"* between the policies via a *"structured analysis"*, considering the wording of the provisions, and the wider context.¹³ Part 2 of the RMA can assist in determining the appropriate balance.

- (g) There remains a residual discretion for *"deserving exceptions"* to prevent outcomes plainly inconsistent with the purpose of the RMA:

- (i) policies that relate to a subject matter *"set at a high level of generality"* may leave broader room for deserving exceptions; and
- (ii) the more precise and sharp-edged the policy, the less room

⁷ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 (**King Salmon**), at [96].

⁸ *Port Otago* at [68].

⁹ *King Salmon* at [132] and [145] (also cited in *Port Otago* and *East West Link*).

¹⁰ *Port Otago* at [65].

¹¹ *Port Otago* at [69].

¹² *East West Link* at [77]. See also *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 at [119].

¹³ *Port Otago* at [78].

there will be for outcomes that can fairly be considered so anomalous or unintended that an exception is justified.¹⁴

Specific comments on policies 6 and 11 of the NZCPS

- (h) In respect of policy 11 of the NZCPS, this policy is designed to avoid adverse effects but *"it is not intended to produce perverse outcomes in pursuit of that high level purpose. Rather (...) [it leaves] room for deserving exceptions (...) These exceptions are necessary for the broad language of the policy to work (...) and without producing outcomes plainly at odds with Part 2."*¹⁵
- (i) In respect of policy 6 of the NZCPS, this policy expressly supports infrastructure in the coastal environment and encourages future planning around it.¹⁶
- (j) While policy 6 refers to 'functional need', lower-level planning documents may take a more expansive approach by accepting that 'operational need' may also suffice.¹⁷ Policy 6 is not hard-edged in this respect; infrastructure generally should not be located in the CMA for operational reasons, but there may be *"deserving exceptions"*.¹⁸

Application

- 23. In deciding the provisions of the PDP, the Panel will need to consider the relevant provisions of the NZCPS, NPS-IB, RPS and NRP and ensure its decision 'gives effect' to those higher order documents.
- 24. Given that decisions on the RPS are imminent, it would be sensible to defer decisions on INF-ECO-P34 until the RPS provisions are settled.
- 25. Because the RPS has been developed to 'give effect to' the NZCPS, once its provisions are settled, it can be expected that those provisions reflect the policies of the NZCPS, albeit with more place- and subject-specificity. This does not mean the Panel does not need to consider the NZCPS. However, it does

¹⁴ *East West Link* at [109].

¹⁵ *East West Link* at [105]. See also at [110]: *"That is why the broad subject matter of Policy 11 admits of exceptions. A certain level of flexibility will assist in achieving its purpose and avoiding unintended outcomes at the margin that are inconsistent with Part 2 and the terms of Policy 11 itself. To put it another way, Policy 11 has a powerful shaping effect on all lower order decision-making, but "avoid" does not exclude a margin for necessary exceptions where, in the factual context, relevant policies are not subverted and sustainable management clearly demands it.*

¹⁶ *East West Link* at [44].

¹⁷ *East West Link* at [44]. See also at [112].

¹⁸ *East West Link* at [112].

mean the Panel should be cautious before including provisions in the district plan that undo or are inconsistent with the RPS provisions.

26. When considering how to give effect to the NZCPS, the following approach is appropriate and consistent with the reasoning of the Supreme Court in *East West Link*:

(a) The Panel needs to give effect to policy 11 in the NZCPS and acknowledge that this is a strongly worded 'avoid' policy. However, avoidance can be achieved at the outset or after mitigation has been applied so that there is no 'material harm' on relevant values.

(b) The Panel also needs to give effect to the policies in the NZCPS relevant to infrastructure, in particular:

(i) Policy 1: *"Recognise that the coastal environment includes (...) physical resources and built facilities, including infrastructure, that have modified the coastal environment";*

(ii) Policy 6:

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure (...) [is] important to the social, economic and cultural well-being of people and communities;

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment; (...)

(2) Additionally, in relation to the coastal marine area: (...)

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; (...)

(iii) Policy 27:

"In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes ... recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations".

(c) While these policies may initially appear to be not as directive as policy 11, they do provide support for a 'deserving exception' for regionally significant infrastructure, such as the Airport, particularly

bearing in mind the Supreme Court's comments on policy 6, noted above. It is therefore appropriate to resolve any apparent conflict between these policies through a "*structured analysis*", and Part 2 can assist in determining the "*appropriate balance*".

(d) Stepping through policies 1, 6 and 27 in relation to the Airport, the Panel should consider that:

- (i) The Airport exists and its seawall and associated structures have already significantly modified the coastal environment.
- (ii) The Airport is of considerable importance to the well-being of this district, region and nation.¹⁹
- (iii) The ongoing maintenance and upgrade of the seawall should be enabled to provide for the reasonably foreseeable needs of the region, provided that other values are not compromised.
- (iv) The Airport has at least an operational need, if not a functional need to remain where it is. It is simply impractical to suggest that the airport should be relocated to some other location. 'Functional need' means "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment*".²⁰ 'Operational need' means "*the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints*."²¹
- (v) Provisions in the RPS that provide for the upgrading of infrastructure or new infrastructure in the coastal environment that have an operational need to be there can be consistent with policy 6. Policy 6 is not 'hard-edged' and allows for 'deserving exceptions'. By giving effect to those RPS provisions, the Panel will also be giving effect to the NZCPS.
- (vi) There are limited options to secure the ongoing protection of

¹⁹ I refer to Jenna Raeburn's evidence at Hearing Stream 1 which refers to the important role the airport plays in the social and economic wellbeing of the district, region and nation.

²⁰ *East West Link* at [44], citing from the National Planning Standards.

²¹ *East West Link* at [44], citing from the National Planning Standards.

the airport's seawall from coastal hazard risk. Maintaining and upgrading the existing seawall is the only practical means of doing so and it is appropriate to provide a policy framework that enables this to occur. This include the edges/ends of the seawall where integration and protection is required as well as the associated construction activities necessary to undertake the project.

27. In summary, a policy framework that enables essential maintenance and upgrade of the seawall to occur, but which also ensures adverse effects on biodiversity are appropriately addressed gives effect to the relevant provisions of the NZCPS. This is what the agreed wording for Policy 24CC in the RPS intends to achieve in the Wellington context, and the Panel can draw comfort from the approach supported by experts in that process as an appropriate way of 'giving effect to' the NZCPS.

LYALL BAY SNA – MAP OF DR ANDERSON'S RECOMMENDED SNA AREA

28. Dr Anderson has prepared maps, which accompany these legal submissions, showing the extent of the Lyall Bay SNA as he recommends it (as well as the Moa Point SNA).

MAPS SHOWING LOCATIONS OF THREATENED BIRD SIGHTINGS

29. The same set of maps prepared by Dr Anderson also show the locations of threatened bird sightings within and near the proposed Lyall Bay and Moa Point SNAs.

MEANING OF 'FIXED' BUILT STRUCTURES AND WHETHER SEAWALLS AND RECLAMATION QUALIFY

30. Built structures are "*fixed*" if they are held in place by gravity or stable and unmoving for a duration which is not temporary.
31. The Environment Court has considered the land law concept of "*degree of annexation*" in interpreting the meaning of "*fixed to land*".²² Whether something has become part and parcel of the land (being fixed to land) is a matter of the degree and purpose of annexation.²³

²² *Hauraki District Council v Moulton* EnvC Auckland C38/97, 15 May 1997 at 10 and *Antoun v Hutt City Council* [2020] NZEnvC 6 at [53].

²³ *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL) at 692–693.

32. The Environment Court has also considered the dictionary definition of 'fixed' and found that things held permanently in place by gravity are fixed. For instance, concrete blocks placed on land with the intention that they remain permanently in position as a seawall are fixed to the land.²⁴
33. Further, an object does not need to be tethered to the ground to be "*fixed to land*". For example, a tiny house was found to be fixed to the land such that it was a structure, despite not having foundations or piles and instead sitting firmly on the land in a stable position.²⁵
34. The Moa Point seawalls are 'fixed' as the rocks and akmons have been placed firmly and stably on the ground, with the intention that they will be permanent. The reclaimed Moa Point beach is 'fixed' as the area of construction fill has been placed firmly and stably on the ground, with the intention that it will be permanent.²⁶
35. As an aside, counsel's notes from the hearing record a related question from the Panel as to whether the NPS-IB definition of 'habitat' excludes all built structures, or only those where "*an organism is present only fleetingly*".
36. The former is the correct interpretation. If the latter were the intended meaning, 'habitat' ought to have been defined to exclude "*a built structure, area or environment where an organism is present only fleetingly*".
37. This follows from the plain and ordinary meaning of the definition. Moreover, if it was intended that built structures were only excluded from the definition where organisms are only fleetingly present, it would not have been necessary to include specific reference to them (since, a built structure constitutes 'an area' or 'an environment').
38. Stepping back, WIAL's position remains that the Moa Point seawalls and reclaimed Moa Point beach:
- (a) are not SNAs as they are man-made, non-natural areas that do not meet the requisite threshold to justify listing as a SNA, for all the reasons explained in Dr Anderson's evidence;
 - (b) are excluded from the definition of habitat in the NPS-IB because:

²⁴ *Antoun v Hutt City Council* [2020] NZEnvC 6 at [57]; *Ohawini Bay Ltd v Whangarei District Council* EnvC Auckland A068/06, 31 May 2006 at [24].

²⁵ *Antoun v Hutt City Council* [2020] NZEnvC 6 at [54] and [58].

²⁶ See the evidence of Jo Lester at paragraph 5.2.

- (i) they are devices or other facilities;²⁷ and
- (ii) they are fixed to land; and
- (iii) additionally, they may fall within the RMA definition of 'structure' as a 'building';²⁸ support for this interpretation is that, if built today, on the face of the Building Act 2004 a building consent would arguably be required for those works.²⁹

Amanda Dewar

Counsel for Wellington International Airport Ltd

²⁷ Both terms are of very broad compass. See *Ohawini Bay Ltd v Whangarei District Council* EnvC Auckland A068/06, 31 May 2006 at [23].

²⁸ Albeit that for certain RMA purposes (unrelated to the NPS-IB definition of 'habitat') the reclaimed Moa Point beach may be more appropriately classified as a reclamation than a 'built structure'.

²⁹ See sections 7–8 and 40 of the Building Act 2004. The seawalls and reclaimed beach would involve construction of a "*permanent immovable structure*". Unless an exemption applies, building works must not be carried out except in accordance with a building consent; and none of the exemptions would be applicable.