

**Before an Independent Hearings Panel of Wellington District 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

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

**Hearing Stream 11 – Indigenous Biodiversity**

**5 September 2024**

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## 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. In summary, WIAL’s relevant submission points sought:
  - (a) amendments to or the deletion of INF ECO P33 and P34;
  - (b) the deletion of proposed SNAs Moa Point Gravel Dunes (**WC175**) and Lyall Bay Dunes (**WC176**).
3. WIAL has filed evidence from:
  - (a) Jo Lester, Planning Manager, WIAL;
  - (b) Dr Michael Anderson, Senior Ecologist, Bioresearches; and
  - (c) Kirsty O’Sullivan, Partner, Mitchell Daysh Limited.
4. Ms Lester’s evidence provides a historical overview of the original coastline and subsequent reclamation developments in the area which include part of each identified SNA. Ms Lester also refers to the latest understanding of the construction methodology for the Seawall Renewal Project which makes it clear that an area to the east of the existing southern seawall will be required for the duration of the construction period which upon completion will be remediated and enhanced.
5. Dr Anderson has undertaken a detailed analysis of each proposed SNA including a site visit and has recommended that each SNA area be reduced in area. He draws attention to some errors in the proposed Schedule 8 descriptions and recommends amendments to accurately reflect the NPS-IB criteria and current threat status. Dr Anderson also points out mapping errors which have erroneously included areas within the CMA in the proposed SNAs.
6. Ms O’Sullivan’s sets out the statutory context in particular the relevant policy provisions of the Greater Wellington Regional Policy Statement (**GW RPS**) and Greater Wellington Natural Resources Plan (**GW NRP**) to explain why:

- (a) her suggested amendments to INF ECO P33 better reflect the higher order documents;
  - (b) the s42A Report's INF ECO P34 references to ECO policies creates a potentially insurmountable consenting barrier for specified infrastructure; and
  - (c) the inclusion of a new clause 3 reference in INF ECO P34 is inconsistent with the GW NRP and may not give effect to the GW RPS.
7. Ms O'Sullivan adopts Dr Anderson's evidence as to the delineation of each SNA and his recommended amendments to accurately reflect the species present and their current classification.

#### **WIAL POSITION *vis a vis* SECTION 42A REPORT AND REBUTTAL**

8. The remaining differences as between the s42A report (including as amended by the rebuttal evidence) and the WIAL evidence are:
- (a) The S42A Report recommends further amendments to INF ECO P34 (para 99 of Mr McCutcheon's rebuttal evidence and not included in his Appendix 5) which are not fully supported by Ms O'Sullivan;
  - (b) The S42A Report continues to recommend the spatial extent of both proposed SNA's apart from excluding the CMA portions of each.
9. Dr Anderson and Ms O'Sullivan will provide summaries of their evidence and respond to the S42 Report evidence at the hearing.

#### **LEGAL FRAMEWORK**

10. I understand the Council's legal advisor will be filing legal submissions in relation to this topic. I anticipate these will set the legal scene including the Panel's legal obligations and key considerations as a result of the National Policy Statement for Indigenous Biodiversity (**NPS-IB**) coming into force after the PDP was publicly notified.
11. Accordingly, I will not provide general legal submissions but note in particular:

- (a) The Council is required to give effect to the NPS-IB;
  - (b) The NPS- IB does not affect the Council’s other functions and duties in relation to indigenous biodiversity under the Act;
  - (c) The Implementation provisions of the NPS-IB require this to be achieved “as soon as practicable” or within the time period specified which in relation to the SNA provisions is by August 2028;
  - (d) However, for the purposes of the PDP process, this obligation is still limited by issues of scope of submissions;
  - (e) Where there is a conflict between the NPS- IB and the New Zealand Coastal Policy Statement (**NZCPS**), the NZCPS will prevail.
12. The recent Supreme Court’s decision in *Royal Forest and Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 (**East West Link Decision**) clearly demonstrates the legal/planning labyrinth created by complex plan provisions quite apart from considering a project’s factual matrix and context, when endeavouring to resolve tensions between the various policy provisions.
13. The Decision also highlights and reinforces the particular care required when drafting “avoid policies” with plan provisions being central to any analysis as well as higher order documents (in the case of the East West Link decision, the NZCPS). It is abundantly clear that avoid policies will take priority over “recognise and provide for” provisions and relying on other policies to balance out clear directions within an avoid policy framework will simply not work.
14. Importantly the East West Link decision demonstrates there will inevitably be a very narrow pathway if at all for infrastructure proposals (including most specified infrastructure) to be granted where there are strong avoid provisions from the “*top to bottom in the RMA hierarchy of objectives and policies*”<sup>1</sup>.
15. As such it is critical that the PDP provisions are carefully drafted to ensure that the very narrow pathway for specified infrastructure is not undermined

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<sup>1</sup> East West Link Decision at [169].

and the identification of SNA's, including their extent is fully justified in accordance with the NPS-IB and the NZCPS for those in the coastal environment.

16. WIAL's seawall is a real-life example of an infrastructure project that is about to run the statutory gauntlet where the stakes are high. With the sea walls no longer fit for purpose and at the end of their design life, they must be replaced and in doing so account for climate change and more intensive storm surge activity.
17. The social and economic consequences of not being able to do so are obvious<sup>2</sup> - an airport without a functional runway would be a social and economic disaster especially considering the lifeline utility role the airport plays in terms of the Civil Defence Emergency Management Act 2002. The seawalls also protect key 3 Waters infrastructure and Moa Point Road itself which is important to bear in mind.

#### **Amendments to INF ECO P34**

18. The S42A Report recommends some additional amendments to INF ECO P34 (para 99 Mr McCutcheon's rebuttal evidence) in response to Ms O'Sullivan's concerns. While the amendments are a step in the right direction, they are not fully supported by Ms O'Sullivan.
19. I have asked Ms O'Sullivan to give some further thought as to how the policy can be further amended to more appropriately align with the GW RPS and GW NRP policy provisions.

#### **Spatial Extent of the SNAs**

20. In my submission Dr Anderson has undertaken a more thorough analysis of the proposed SNA's than the Section 42A Report particularly in terms of the spatial extent of the SNA's.
21. Mr Goldwater's evidence includes a number of statements where he makes assumptions that a particular listed fauna species will be present, or he refers to sightings that are in fact some distance from the proposed SNA in

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<sup>2</sup> I refer to Jenna Rayburn'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.

question.<sup>3</sup>

22. While I acknowledge that some assumptions are necessary in this context, care needs to be taken to be as accurate as possible and take a systematic approach and a sensible analysis to justify imposing SNA status including the extent of the SNA.
23. Importantly in these circumstances, under the Rarity and Distinctiveness criterion of the NPS-IB it is necessary for the particular area to provide habitat for the listed species before it can qualify as an SNA.
24. Accordingly, there must be cogent evidence of the species using the area as habitat before SNA status and the extent of the SNA is justified.
25. In my submission Mr Goldwater has downplayed the nature of the areas where Dr Anderson has recommended removal.
26. This is a critical issue given the NPS-IB definition of habitat:<sup>4</sup>

***habitat** means the area or environment where an organism or ecological community lives or occurs naturally for some or all of its life cycle, or as part of its seasonal feeding or breeding pattern; but does not include built structures or an area or environment where an organism is present only fleetingly.*

[my emphasis]

27. The term “built structures” is not defined in the NPS-IB, RMA or National Planning Standards. The term “structure” is not defined in the NPS-IB or NZCPS however it is defined in the RMA (and adopted in the National Planning Standard) as:

*means any building, equipment, device, or other facility, made by people, and which is fixed to land; and includes any raft.*

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<sup>3</sup> See for example Goldwater rebuttal para 18 where the nest referred to some considerable distance away and para 21 where he considers copper skinks are likely because they were found 500 m away on a completely site in terms of location and characteristics.

<sup>4</sup> I note the GW RPS definition of habitat is different – in this instance the higher order document prevails. There is no definition of habitat in the NZCPS.

28. The term “built” in the context of a structure as defined does not add much to the meaning given the definition of structure itself.
29. In my submission taking into account these broad definitions areas that have been subject to reclamation and associated seawalls, or other built elements are “built structures” for the purpose of the NPS-IB<sup>5</sup> in that they are a device or other facility made by people which is fixed to land. Therefore, these areas cannot form part of any habitat and do not meet the NPS-IB SNA criteria. This is perhaps reinforced in clause 5 of the Representativeness Criterion which states that when considering the typical character of an ecological district, any highly developed land or built-up areas should be excluded.
30. Ms Lester’s evidence sets out the history of the coastline through a series of historic photos highlighting the significant reclamation activities over time in the areas proposed to be part of the SNAs. In relation to the Moa Point SNA the historical photos do not show any dunes in this location and the contemporary photos and site visits show this area to be reclamation hard fill.
31. The Panel also needs to consider the exclusion in the habitat definition in relation to the reference to areas where species are present only fleetingly.
32. This is important in relation to sightings of red and black billed gulls, which is also discussed in Dr Anderson’s evidence. In my submission care needs to be taken to set a high standard for SNAs in line with the NPS-IB criteria otherwise there would be a need to classify the entire coastline and many parts of urban Wellington as SNAs.
33. Obvious examples would be areas outside fish and chip shops/cafés with outdoor eating areas, sports fields as well as the waterfront area in downtown Wellington and even Wellington’s land fill facilities. The entire Airport itself could be included as many birds perch at times on the roof of the airport buildings and runway and despite the necessary measures undertaken by the airport to discourage this as it is obviously required to do so for aircraft safety reasons and its statutory obligations as an airport

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<sup>5</sup> There is no conflict with the NZCPS here.

authority.

## **CONCLUSION**

34. In my submission, for the reasons outlined above, the spatial extent of the SNA's should be reduced in line with Dr Anderson's evidence.
35. In relation to Section 42A suggested amendments to INF ECO P34, Ms O'Sullivan will provide further comment at the hearing which will more appropriately align with the GW RPS and GW NRP policy provisions.

**Amanda Dewar**

Counsel for Wellington International Airport Ltd