

MEMORANDUM

Date: 20 December 2023
To: Briar Belgrave
From: Lucy de Latour | Tegan Wadworth

Proposed Te Tai o Poutini Plan – Designations Chapter advice

1. We understand that as part of the hearing on the designations chapter of the proposed Te Tai o Poutini Plan (TTPP), you have been asked to obtain legal advice regarding the relevant Resource Management Act 1991 (RMA) processes that apply to including alterations/modifications to existing designations and new requirements for designations in a proposed plan. In particular, we understand that the independent hearings panel is interested in understanding how the provisions that apply to requiring authorities giving the territorial authority notice of a requirement prior to the district plan being notified, apply to the TTPP.
2. We understand that this opinion will be provided to the independent hearing panel as part of the designations hearing stream. We have not addressed the obligations of the independent hearings panel in relation to the process for making any recommendations in respect of designations included in the TTPP as notified (as a result of any submissions on those).

Executive summary

3. There are a number of different processes under the RMA that provide for the inclusion of alterations to existing designations or new designations in a proposed district plan. For the purposes of the hearings on the TTPP submissions, there are two processes under clause 4 of Schedule 1 of the RMA:
 - (a) With one process applying to existing designations (which a requiring authority can request be included, with or without modification, prior to the notification of the proposed plan); or
 - (b) A separate process, whereby a territorial authority must include in its proposed plan provision for any notice of requirement for a designation (or alteration) to which section 170 applies (i.e. new designations).
4. In particular, the TTPP committee has been transferred powers under Schedule 1 of the RMA which includes a requirement under clause 4 to give notice to requiring authorities of a new district plan, prior to the proposed plan being notified. Subsequently, requiring authorities may give notice of any modifications to existing designations which then must be included in a proposed plan (or alternatively, a requiring authority can request an existing designation be included without modification).
5. Additionally, if a territorial authority is given notice of a requirement (**NOR**) for a new designation (or NOR for an alteration), the territorial authority may include that requirement in a proposed plan under section 170 of the RMA, if the territorial authority proposes to notify that proposed district plan within 40 working days of receipt of that NOR. Clause 4(5) of Schedule 1 of the RMA provides that territorial authorities must include, in its proposed plan, provision for any requirements for designations to which section 170 applies.
6. The Order in Council transferring powers to the West Coast Regional Council, which have been delegated to the TTPP Committee, does not explicitly refer to section 170. However, the purpose of the transfer of powers does more broadly refer to the preparation and notification of a district plan.¹ In the context of the preparation and notification of district plans, we consider this includes any NORs for designations prior to the TTPP being notified, particularly given clause 4(5) of Schedule 1 refers to designations to which section 170 applies.

¹ Local Government Reorganisation Scheme (West Coast Region) Order 2019, clauses 6(1) and 8(4)(a).

7. There are other processes where new designations (or alterations) can be included in a proposed plan. However, we do not consider that the powers and obligations transferred to the TTPP committee extend to these other processes. These include the processes for making alterations to existing designations under section 181 and the inclusion of new designations under section 175. We have further outlined these processes below.
8. Under the RMA, there is no process that provides for the inclusion of NORs for designations in a proposed plan through relief sought in submissions. Therefore, any requests for new designations received via submissions cannot be included in the TTPP.
9. Our detailed advice follows.

Process for inclusion of new, or alterations to, designations in a proposed plan

10. There are different ways in which modifications to existing designations, or new designations, can be included in a proposed district plan. For the purposes of the hearings on the TTPP submissions, in summary, these include:
 - (a) Under clause 4 of Schedule 1 of the RMA: when a territorial authority is preparing a new district plan and gives notice to requiring authorities of the new district plan, a requiring authority can notify the territorial authority of a modification to an existing designation (or alternatively, an existing designation can be included without modification). Clause 4 also includes a process for a territorial authority to seek the inclusion of an existing designation; or
 - (b) Under clause 4 of Schedule 1 of the RMA: a territorial authority must include in its proposed plan provision for any NORs for designation to which section 170 applies.
11. It is also important to note that, under the RMA, there is no process that provides for the inclusion of NORs for designations in a proposed plan through relief sought in submissions. Therefore, any requests for new designations received via submissions cannot be included in the TTPP. For new designations to be included in the TTPP, such a request by a requiring authority (including territorial authorities) must have occurred prior to the TTPP being notified on 14 July 2022. Otherwise, any new designations would have to be considered through the standard NOR process, and subsequently included in the TTPP, once decided under section 175 of the RMA. However, submissions can request changes to a designation that was included in the notified version of the TTPP (i.e. a third party can submit on the designation).

Clause 4, Schedule 1 – territorial authority gives notice of proposed plan and requiring authority gives notice of modification

12. Clause 4 of Schedule 1 requires territorial authorities to give written notice, prior to the notification of a proposed plan, to any requiring authority that has a designation (which has not lapsed) in the district plan.² In this case, the TTPP committee has been designated functions under Schedule 1 which includes giving this notice to requiring authorities.
13. The purpose of the notice is to invite requiring authorities to give written notice to the territorial authority stating whether the requiring authority requires the designation to be included, with or without modification, in the proposed plan.³ The requiring authorities must have at least 30 working days to respond.⁴
14. If a requiring authority states that a designation is to be included in the proposed plan, with modifications, the requiring authority must notify the territorial authority of the nature of the modifications and the reasons.⁵

² RMA, sch 1, cl 4(1A) and (1C).

³ RMA, sch 1, cl 4(1B).

⁴ RMA, sch 1, cl 1D.

⁵ RMA, sch 1, cl 4(3).

15. Under clause 4(5), a territorial authority must include, in its proposed plan, provision for any designation it receives notice of under clause 4, including any modifications.⁶
16. If a requiring authority does not notify the territorial authority of any designation required, or modification, no provision for the designation shall be included in the proposed plan.⁷
17. Under clause 4(6), there is also an equivalent process for territorial authorities to seek the inclusion of an existing designation (with or without modification), or a new designation, for which the territorial authority has responsibility.
18. We are unsure how the TTPP Committee notified requiring authorities (including territorial authorities) and under which part of clause 4 of Schedule 1, designations held by the territorial authorities have been included in the TTPP but provided the relevant territorial authorities themselves sought the inclusion of a designation for which it has responsibility, we see no issue with the inclusion of such designations in the TTPP as notified.

Clause 4, Schedule 1 – territorial authority must include any requirement for designation to which section 170 applies

19. Under section 170 of the RMA, if a territorial authority receives a NOR for a designation (under section 168) or to alter a designation (under section 181), and the territorial authority proposes to notify a proposed plan within 40 working days of receipt of that NOR, the territorial authority may, with the consent of the requiring authority, include the NOR in its proposed plan.⁸
20. As noted above, the power under section 170 has not explicitly been transferred to the TTPP committee, but the TTPP committee has been transferred powers under Schedule 1. Clause 4(5) of Schedule 1 requires a territorial authority to include in its proposed plan provision for any requirements for designation to which section 170 applies. Therefore, we consider if there were any NORs to which section 170 applied, the TTPP committee was required to provide for those NORs in the TTPP when it was notified.
21. We understand that three new notices of requirement for designation with the Ministry of Education as the requiring authority were included in the notified version of the TTPP. To the extent these were new notices for designation, we assume the process in section 170 and clause 4(5) of Schedule 1 applied, but we have not considered this in detail.

Other processes not delegated to the TTPP Committee

Section 175 – territorial authority must include decision on designation in proposed plan without using the Schedule 1 process

22. For completeness, a new designation (or any alteration) must also be included in a proposed district plan in accordance with section 175, if there has been a decision on a NOR for designation under section 172 (i.e., a NOR has been considered under the standard process).
23. The power under section 175 has not been delegated to the TTPP Committee. However, it is a requirement that must occur once a decision has been made on a designation. If this scenario arises, a further transfer of powers, or delegation to the TTPP Committee may be necessary to facilitate the obligation under section 175 to include the designation in the TTPP. However, we have not considered this in detail as we are not aware of any proposals for new NORs being considered under the standard RMA processes, and this is not a matter before the independent hearings panel.

Section 181 – territorial authority may at any time alter an existing designation

24. Section 181 of the RMA provides that a territorial authority may, at any time, alter a designation in its district plan or requirement in its proposed district plan, without following the standard process, if one the specified exceptions in section 181(3) apply.

⁶ RMA, sch 1, cl 4(5).

⁷ RMA, sch 1, cl 4(4).

⁸ RMA, s 170(1).

25. The Buller, Grey and Westland District Council's powers under section 181 of the RMA have not been transferred to the West Coast Regional Council or delegated to the TTPP Committee. Only the district council's plan making powers under section 73 and Schedule 1 were transferred to the TTPP Committee.⁹ Accordingly, we do not consider the TTPP Committee has powers under section 181 of the RMA.

Conclusion

26. We trust that our advice assists. Please let us know if you wish to discuss, or have any further questions.

Wynn Williams

⁹ Local Government Commission "2019: West Coast reorganisation" (date unknown) Local Government Commission www.lgc.govt.nz and "Local Government Reorganisation (West Coast Region) Final Proposal Order 2018" (5 November 2018) (Final Proposal Order). <https://gazette.govt.nz/notice/id/2018-go5585>.