

Before the Independent Commissioners  
Appointed by the Westland, Buller and  
Grey District Councils

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Under the Resource Management Act 1991

In the matter of a hearing on submissions on the proposed Te Tai o Poutini Plan

Hearing Topics 1 and 2: Introduction / Whole Plan and Strategic Directions

**Birchfields Ross Mining Limited (S604 and FS150)**

**Birchfield Coal Mines Limited (S601 and FS232)**

**Papahaua Resources Limited (S500)**

**Phoenix Minerals Ltd (S606 and FS215)**

**Rocky Mining Limited (S474)**

**TiGa Minerals and Metals Limited (S493 and FS104)**

**Whyte Gold Limited (S607)**

**WMS Group (HQ) Limited and WMS Land Co. Limited (S599 and FS231)**

**(the Submitters)**

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**Legal submissions on behalf of the Submitters**

13 October 2023

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**anderson  
lloyd.**

## May it please the Commissioners

- 1 These legal submissions are provided on behalf of:
  - (a) Birchfields Ross Mining Limited (S604 and FS150; **BRM**)
  - (b) Birchfield Coal Mines Limited (S601 and FS232; **BCML**)
  - (c) Papahaua Resources Limited (S500; **PRL**)
  - (d) Phoenix Minerals Ltd (S606 and FS215; **PML**)
  - (e) Rocky Mining Limited (S474; **RML**)
  - (f) TiGa Minerals and Metals Limited (S493 and FS104; **TiGa**)
  - (g) Whyte Gold Limited (S607; **WGL**)
  - (h) WMS Group (HQ) Limited and WMS Land Co. Limited (S599 and FS231; **WMS**)

(referred to collectively as **the Submitters**), on the proposed Te Tai o Poutini Plan (**TTPP**).
- 2 The Submitters engage in a range of mineral extraction and associated activities across the West Coast/ Te Tai o Poutini region. Broadly speaking, the Submitters' support the notified provisions of the TTPP, and particularly those which:
  - (a) recognise the strategic importance of the mineral extraction industry to the West Coast economy and communities in the TTPP;
  - (b) acknowledge that mineral resources are widespread and fixed in location throughout the West Coast/Te Tai Poutini; and
  - (c) enable mineral extraction and ancillary activities while ensuring the appropriate management of environmental effects.
- 3 Some amendments are sought to MIN-O3, MIN-O6, NENV-O1, NENV-O3 and CR-O2 as set out in the evidence of Ms McKenzie.
- 4 TTPP introductory chapters<sup>1</sup> highlight the proud history of mining and abundance of minerals located on the West Coast.
- 5 Evidence provided by the Submitters demonstrates the importance of mineral extraction and its ancillary activities to the West Coast economy, communities and

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<sup>1</sup> Description of the Districts – Te Whakamāramatanga o ngā Rohe.

environment. Not only does mineral extraction bring well-paying jobs and spending to the economy, but communities are supported through sponsorship of clubs, re-development of facilities and development of new cycle trails. Benefits to the economy and community are also found in improvement of infrastructure as a result of mineral extraction which, in turn, improves the region's resilience.

- 6 The obligation to mine in an environmentally responsible manner is acknowledged, and evidence demonstrates that mineral extraction activities can result in a net benefit for the environment through rehabilitation of farmland to native vegetation, pest control, wetland rehabilitation and stock fencing.
- 7 It is submitted that, based on the evidence provided, recognising the strategic importance of mineral extraction in the way sought by the Submitters is consistent with the higher order planning documents.

### **Legal matters**

#### *Preliminary legal issue - NBEA*

- 8 The Natural and Built Environment Act 2023 (**NBEA**) and the Spatial Planning Act 2023 (**SPA**) came into law in August 2023. However, the Resource Management Act 1991 (**RMA**) continues to apply to resource management matters while the NBEA and SPA are introduced in a staged manner. Pursuant to Schedule 1, Part 1, clause 5 of the NBEA, Parts 3 and 5 of the RMA will continue to apply to the West Coast region until the first natural and built environment plan for the West Coast is treated as operative. Given the timeframes, the RMA continues to apply to the TTPP process and the NBEA and SPA do not apply.
- 9 The first National Planning Framework (**NPF**) is planned for release in 2024 during the TTPP hearings. Should this occur, it is clear that the NPF must not be considered by the Panel<sup>2</sup>.

#### *Strategic Directions chapter – National Planning Standards*

- 10 The Strategic Directions chapter is an important chapter in setting the tone for the rest of the plan provisions. It sets out the overarching direction for the TTPP, and the subsequent chapters need to give effect to Strategic Direction provisions.
- 11 Strategic Directions must be included in all district plans as a mandatory requirement of the National Planning Standards, and address<sup>3</sup>:

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<sup>2</sup> NBEA Schedule 1, Part 1, clause 4.

<sup>3</sup> National Planning Standards, Sections 4(1) and 7.

- (a) key strategic or significant resource management matters for the district;
- (b) objectives that address key strategic or significant matters for the district and guide decision making at a strategic level;
- (c) policies that address these matters (unless better located in other more specific chapters);
- (d) resource management issues of significance to iwi authorities.

12 The TTPP states:

*For the avoidance of doubt, for resource consent applications, the Strategic Objectives may require specific consideration and application to proposals, as a relevant consideration under section 104(1)(b)(vi) of the RMA.*

13 It is submitted, that this reference is appropriate and should be retained.

#### *RMA Statutory tests*

14 The statutory tests when preparing and changing a district plan are as set out in *Colonial Vineyard Ltd v Marlborough District Council*,<sup>4</sup> applied and summarised in subsequent decisions.<sup>5</sup> In summary, these require that the TTPP:

- (a) Accord with and assist councils in carrying out their functions, including:
  - (i) Achieving integrated management of effects of the use, development and protection of land and associated natural and physical resources;
  - (ii) Ensuring that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district; and
  - (iii) Controlling any actual or potential effects of the use, development, or protection of land, including for the purposes of the avoidance of natural hazards;
- (b) Have regard to the actual and potential effects on the environment, including in particular any adverse effect;
- (c) Accord with Part 2 of the Act;

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<sup>4</sup> *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17] onwards.

<sup>5</sup> See also *Adams and Others v Auckland Council* [2018] NZEnvC8 at [53]; and more recently in *Trojan Holdings Limited and Skyline Enterprises Limited v Queenstown Lakes District Council* [2020] NZEnvC 79 at [23]; *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 at [10].

- (d) In respect of the existing statutory documents:
- (i) Give effect to any national policy statement or operative regional policy statement;
  - (ii) Have regard to any proposed regional policy statement, and management plans and strategies prepared under any other Acts;
  - (iii) Have regard to the extent to which the plan is consistent with the plans of adjacent territorial authorities; and
  - (iv) Establish the most appropriate method for achieving the objectives and policies of the District Plan, undertaking the assessment detailed in section 32.

15 I would also add to this list that a district plan must give effect to a national planning standard.<sup>6</sup>

### **Higher order documents**

#### *The hierarchy of planning documents*

- 16 The Supreme Court has stated that the RMA "envisages the formulation and promulgation of a cascade of planning documents".<sup>7</sup> This creates a hierarchy of planning documents, with each document intended to be consistent with the document above it.
- 17 At the top of this hierarchy (excluding the RMA) are the national direction documents. These include the New Zealand Coastal Policy Statement (**NZCPS**), National Policy Statement for Indigenous Biodiversity (**NPS-IB**) and the National Policy Statement for Freshwater Management (**NPS-FM**).
- 18 Section s75(3) RMA requires district plans to give effect to national policy statements, the NZCPS, the national planning standards and a regional policy statement.
- 19 'To give effect to' a higher document is a "strong directive, creating a firm obligation on the part of those subject to it".<sup>8</sup> This requires the higher order document to be implemented in the lower order document.<sup>9</sup>

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<sup>6</sup> Section 75(3)(ba) RMA.

<sup>7</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [30].

<sup>8</sup> *King Salmon*, at [77].

<sup>9</sup> *King Salmon*, at [77].

- 20 Applied to the TTPP, the document must give effect to the NZCPS, NPS-FM, NPS-IB and the RPS.
- 21 For completeness it is noted that a proposed National Policy Statement for Natural Hazard Decision-making is currently out for consultation (from 18 September to 20 November 2023). No regard needs to be had to this statement but should it progress, an updated legal position can be provided. Relevant to mineral extraction, this statement applies to planning decisions that result in or enable new development, and provides for new development with a functional or operational need to be located in areas of high natural risk in certain circumstances.

*Conflicting objectives and policies*

- 22 Given the range of documents that the TTPP must give effect to there may be instances of tensions between objectives and policies when considering subsequent chapters. Objectives and policies must be read consistently where possible and where conflicts are found, they should be kept as narrow as possible.<sup>10</sup>
- 23 The recent Supreme Court decision in *Port Otago Ltd v Environmental Defence Society*<sup>11</sup> provides direction as to how to treat unavoidable conflicts in policies. Although the decision deals with conflicts between policies of the NZCPS, it is submitted that it has broader relevance to how national direction should be given effect to. The NZCPS and other national direction sit on the same level in the planning documents hierarchy.
- 24 The Court held that any conflicts should be reconciled at the regional policy statement and plan level as far as possible.<sup>12</sup> There can be no presumption that one directive policy will always prevail over another.<sup>13</sup> Whether avoidance policies will be breached, it must be considered in light of what is meant by avoidance.<sup>14</sup> Where full reconciliation is not possible, the planning documents should provide as much guidance as possible to resolve these conflicts at the consenting stage through a "structured analysis" in the particular factual circumstances.<sup>15</sup>

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<sup>10</sup> *King Salmon*, at [130].

<sup>11</sup> [2023] NZSC 112.

<sup>12</sup> *Port Otago*, at [72].

<sup>13</sup> *Port of Otago* at [77].

<sup>14</sup> At [68] – 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 (including adaptive management measures).

<sup>15</sup> *Port Otago*, at [78]-[79].

### *Consistency of the TTPP*

- 25 Ms McKenzie analyses the higher order documents relevant to the Mineral Extraction (**MIN**), Natural Environment (**NENV**), Connections and Resilience (**CR**) and Climate Change (**CC**) strategic directions. Ms McKenzie makes the following key conclusions on higher order documents:
- (a) The NPS-IB requires the effects management hierarchy (**EMH**) to be utilised in certain prescribed circumstances;<sup>16</sup>
  - (b) The NZCPS is both protecting of the coastal environment and enabling of infrastructure and other activities that occur in the coastal environment;<sup>17</sup>
  - (c) The RPS contains objectives and policies focused on enabling economic activity (Objective 4.1, Policy 4.1) and identifies minerals as a resource important to the West Coast economy (Policy 5.2);<sup>18</sup> and
  - (d) The National Planning Standards require key strategic or significant matters for the district to be addressed in the Strategic Directions chapter.<sup>19</sup>
- 26 In summary, there are both 'avoid' and enabling objectives and policies which the TTPP must give effect to. It is submitted, the RPS already seeks to reconcile some conflicts between the higher national direction documents in a way appropriate for the West Coast region specifically. The RPS recognises the importance of mineral extraction and the fact that the coastal environment is often a working environment by being enabling of economic development. Effects on the natural environment must still be managed, but in a way that is proportional to the importance of the activity to the West Coast. For completeness, it is noted that the RPS has not considered the NPS-IB (including, the specific requirement for the implementation of an effects management hierarchy in particular circumstances), or the NPS-FM (except for the inclusion of mandatory provisions).

### **Section 42A Officer Report**

- 27 The section 42A report makes a number of recommendations on the proposed MIN, NENV, CR and CC objectives of the Strategic Directions chapter. Ms McKenzie has addressed the specific objectives in her evidence.

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<sup>16</sup> Statement of Evidence of Ms McKenzie, at [16].

<sup>17</sup> Ms McKenzie, at [18].

<sup>18</sup> Ms McKenzie, at [19].

<sup>19</sup> Ms McKenzie, at [20].

28 Ms McKenzie has identified a number of provisions proposed in the notified version of the TTPP or the Officer's Report that are inconsistent, inefficient or inappropriate as well as provisions she supports. I address the following legal issues upon which these conclusions are based.

*Consenting pathway for mineral and aggregate extraction activities*

29 The RPS was notified in 2015 and decisions were released in 2018 (with appeals being resolved in 2020). The exposure draft of the NPS-IB was first released in June 2022 and was gazetted in July 2023. As a result, the RPS has been prepared without giving effect to the NPS-IB, due to no NPS-IB existing at the time of the RPS being prepared.

30 The NPS-FM came into effect 3 September 2020. Those mandatory provisions required to be implemented<sup>20</sup> without the Schedule 1 process have been included in the RPS.

31 Clause 3.11 of the NPS-IB, provides a consenting pathway through the clause 3.10(2) policy to avoid certain effects on Significant Natural Areas (**SNAs**) if the activity is mineral extraction providing significant national benefit or aggregate extraction providing a significant regional or national benefit. This consenting pathway allows the EMH (including offsetting and compensation) to be applied to effects of these activities on SNAs instead.

32 The NPS-FM similarly applies consenting pathways for mineral and aggregate extraction activities. It is significant that a second national direction document provides exceptions for mineral and aggregate extraction by applying the EMH.<sup>21</sup>

33 These pathways were introduced after it was recognised that many extractive activities have a locational, functional or operational need to locate in certain areas and that, without the pathways, such industries might not exist.<sup>22</sup> The need to provide for mineral extraction stems from its benefits not only for employment and spending, but also for creating products necessary for New Zealand and its future. The evidence provided by the Submitters demonstrates how mineral and aggregate extractions provides products for construction, sea-level rise protection, high-value technology products (such as EV batteries) and food production. It is also noted that the Section 32 Report for the NPS-FM and NES-F amendments acknowledges the need for coal in the medium term.<sup>23</sup>

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<sup>20</sup> Section 55 RMA.

<sup>21</sup> NPS-FM, clause 3.22.

<sup>22</sup> Amendments to NES-F and NPS-FM: Section 32 report, at 35 (for quarrying) and 46 (for mining).

<sup>23</sup> Amendments to NES-F and NPS-FM: Section 32 report, at 46.



- 34 Consequently, the RPS is consistent with this national direction and its intent, in that mineral and aggregate extraction activities are identified in Chapter 4 of the RPS as important economic activities for the West Coast. More specifically, Policy 4.2 of the RPS directs that use and development must be enabled to give effect to relevant regional and national policy direction. The explanation to Policy 4.2 in the RPS states that the policy "aims to provide a regulatory framework that promotes diversity, innovation, and encourages businesses to invest in the region and grow."
- 35 It is submitted that it is consistent with national direction that mineral extraction activities are given specific objectives in the Strategic Directions chapter to recognise the need to enable these activities to occur.

#### *Use of the EMH*

- 36 Clause 3.16(1) NPS-IB, requires the EMH to be applied to activities with a *significant* adverse effect on indigenous biodiversity outside of SNAs (my emphasis). Any other adverse effect on indigenous biodiversity is not required to apply the EMH (clause 3.16(2)).
- 37 On this basis, the EMH is not a tool to be applied plan-wide. It should be carefully applied in the Strategic Directions chapter, a chapter that applies across the entire TPP. On that basis, Ms McKenzie supports the use of the EMH in MIN-O6 where it applies to significant habitats, not to all habitats.

#### *Other matters*

- 38 A number of recommended amendments in the s42A Officer's Report will result in repetition between objectives in the Strategic Directions.<sup>24</sup> The procedural principles of the RMA, found in s18A, require that plans are worded in a way that is clear and concise. This is particularly important for Strategic Directions, which are intended to guide decision-making across all matters. Adding the EMH to multiple objectives means a repetition of the EMH assessment may be required, when the NENV and MIN objectives will apply together.
- 39 On the proposed amendment to add ports to CR-O2 (if not considered 'critical infrastructure'), this would ensure consistency with national direction. Policy 9 of the NZCPS recognises the importance of ports to a sustainable national transport system. Policy 9 was recently determined by the Supreme Court to have a highly directive value, level with the avoid policies of the NZCPS.<sup>25</sup> Recognising a diverse transport network to provide resilience would also be consistent with proposed

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<sup>24</sup> Statement of Evidence of Kate McKenzie, at [41] and [47].

<sup>25</sup> *Port Otago*, at [71].

Policy 2(b) of the proposed National Policy Statement for Natural Hazard Decision Making.

- 40 Finally, I note the recommendation in the Officer's Report: Introduction to include additional text as submitted by Forest and Bird in submission point S560.409 in the Relationships between Spatial Layers section. The Officer recommends text that would state that the resource consenting process will be used to identify SNAs, with the potential implication that the resource consent process could 'create' SNAs. It is not clear how a resource consent process could even insert a SNA into the TTPP and to make the relevant TTPP and NPS-IB provisions apply. Regardless, this would be in opposition to clause 3.8(6) of the NPS-IB, which requires potential SNAs identified, for example, through a resource consent application to be assessed further to determine whether a new SNA should be inserted into the district plan. Clause 3.8(6) does not allow the Schedule 1 process of inserting this SNA to be circumvented and the Relationships between Spatial Layers should not imply as much.

## **Conclusion**

- 41 It is submitted the Strategic Directions provisions, with the amendments as sought by the Submitters, will ensure that a well-guided structured analysis of issues can take place when assessing the appropriateness of mineral and aggregate extraction development on the West Coast and will meet the legal tests for a district plan.
- 42 The Strategic Direction provisions as supported by the Submitters will:
- (a) assist the West Coast district councils in carrying out their functions by:
    - (i) Integrating the management of effects of developing mineral and aggregate extraction effects with other Strategic Directions; and
    - (ii) Controlling, as appropriate, the effects of mineral and aggregate extraction, while still enabling these activities to occur.
  - (b) Properly give effect to the NPS-IB and the RPS.

43 For these reasons it is submitted that the Strategic Directions, with the amendments proposed, are appropriate and will promote the purpose of the Act.

Dated this 13<sup>th</sup> October 2023

A handwritten signature in black ink that reads "A Booker". The signature is written in a cursive style with a large, prominent initial 'A'.

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Alex Booker / Alex Hansby  
Counsel for the Submitters