

Before the Proposed Te Tai o Poutini Plan Hearings Panel

In the Matter of

the Resource Management Act
1991 (**Act**)

And

In the Matter of

a submission (S491) and further
submission (FS89) on the Proposed
Te Tai o Poutini Plan by Bathurst
Resources Limited and BT Mining
Limited

And

In the Matter of

Topic 3: General District Wide
Matters

Legal Submissions for Bathurst Resources Limited and BT Mining Limited

Dated: 31 October 2023

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INTRODUCTION

1. These legal submissions are presented on behalf of Bathurst Resources Limited (**Bathurst**) and BT Mining Limited (**BT**) in relation to Topic 3 – General District Wide Matters of the proposed Te Tai o Poutini Plan (**TTPP**). We have previously presented legal submissions on behalf of Bathurst for Topics 1 and 2 which provide background to Bathurst’s involvement in the TTPP.
2. Broadly speaking Bathurst supports the recognition in the TTPP of the significance of mining and mineral resources on the West Coast and the Buller Plateau to the local, regional and national economies. The evidence provided on behalf of Bathurst in the Topic 1 and Topic 2 hearing demonstrates the importance of mineral extraction to the West Coast economy and communities.
3. In particular, Bathurst supports the Mineral Extraction (**MINZ**) and Buller Coalfield Zones (**BCZ**). Bathurst wishes to ensure that the remainder of the TTPP:
 - (a) is consistent with the intended objectives and provisions of the MINZ and BCZ; and
 - (b) does not restrict anticipated activities from occurring within the MINZ and BCZ.
4. In terms of the relief allocated to Topic 3, Bathurst has sought amendments to the Earthworks Chapter provisions to ensure that:
 - (a) the mineral extraction activities intended to be carried out within the MINZ and BCZ are appropriately enabled; and
 - (b) the MINZ and BCZ provisions are not unintentionally undermined or restricted by the Earthworks provisions.
5. In our submission, the Section 42A Report amendments are supported but do not go far enough to explicitly make it clear which rules take precedence across the wider TTPP, and conflict may arise as a result of interpretation issues. We submit that the amendments sought through the Bathurst submission to the Earthworks Chapter provisions will:
 - (a) ensure inconsistency and interpretation conflicts do not arise when implementing the TTPP; and
 - (b) ensure the activities intended by the MINZ and BCZ are appropriately enabled and not unintentionally undermined.

SCOPE OF SUBMISSIONS

6. Bathurst's submission addresses matters covering multiple chapters of the TTPP. The purpose of our legal submissions today is to address the matters for your determination in this hearing (though noting our earlier submission that no final decisions should be made until all hearings are completed).. Our earlier submissions for Bathurst on Topic 1 and 2 address Bathurst's relief allocated to these topics and outline Bathurst and BT's interests in the West Coast and overall position on the TTPP.

LEGAL FRAMEWORK

7. The high level framework for the Hearing Panel's decision making has been addressed in our Topic 1 and 2 submissions¹ and is set out in detail in the General District Wide Matters Section 32 Report.² We do not propose to repeat this framework here.

BATHURST SUBMISSION ON THE EARTHWORKS CHAPTER

Submission on EW-R1

8. Rule EW-R1 prescribes the general standards that earthworks must comply with to be a permitted activity. Clause 2 of EW-R1 requires that to qualify as a permitted activity (in addition to other standards):

EW-R1(2)

All fill must consist of cleanfill material.

9. To ensure that the Earthworks provisions are both consistent with the intended objectives and provisions of the BCZ and MINZ, and do not restrict anticipated activities from occurring in these zones, Bathurst seeks that the following advice note is added to EW-R1 to clarify that if a Mineral Extraction Plan has been prepared, EW-R1(2) does not apply to mining activities:

Clause 2 does not apply to mining activities in the BCZ, MINZ, General Rural Zones or Open Space Zone where a Mineral Extraction Plan is prepared in accordance with Appendix Seven.

10. The Section 42 Report recommends that Bathurst's submission seeking this clarification in EW-R1 is rejected as the Earthworks Chapter Overview provides

¹ Bathurst Topic 1 and Topic 2 Legal Submissions, 16 October 2023 at [8] – [9].

² General District Wide Matters Section 32 Report at [6.2], [15.2] and [21.2].

clear cross referencing to the MINZ and BCZ provisions and will therefore apply to those zones.³

11. Further amendments to EW-R1(2) are recommended in the Section 42A Report in response to submissions of other parties which clarify that EW-R1(2) applies to *imported fill* and EW-R1(2) therefore does not apply to all material moved internally on a mine-site. While these amendments have partially addressed Bathurst's concerns with the Rule, the cross referencing in the Earthworks Chapter Overview means that interpretation conflicts remain as:
- (a) the definition of earthworks does not explicitly exclude earthworks associated with mineral extraction activities; and
 - (b) the Earthworks Chapter Overview includes the following text that indicate the MINZ and BCZ rules apply in addition to the Earthworks rules, making it unclear which rules take precedence:

In addition to the provisions in this chapter, earthworks and land disturbance are also subject to additional provisions in some zone chapters and a number of Part 2: District-Wide Matters chapters.

12. Given that remaining ambiguity, we propose further relief to the Earthworks Chapter Overview to provide clarity on which rules are intended to apply to mineral extraction activities as set out in paragraphs 16 - 23 below.

Submission on EW-R3

13. Bathurst seek that EW-R3 be amended as follows to allow for earthworks associated with a lawfully established activity to be a permitted activity:

EW-R3

1. All standards in Rule EW-R1 are complied with; and

2. The activity is associated with a lawfully established activity.

14. The Section 42A Report recommends that the submission to amend EW-R3 to permit earthworks where they are associated with a lawfully established activity that is outside the MINZ or BCZ be rejected.⁴ The Section 42A Report provides the reasoning that earthworks associated with any activity may have adverse environmental effects which need to be managed.

³ Section 42A Report, 6 October 2023 at [98].

⁴ Section 42A Report, 6 October 2023 at [136].

15. We submit that the inclusion of lawfully established activities in EW-R3 is appropriate as if a land use activity is lawfully established it should not need to trigger retrospective consent as it is already lawful. Regardless, the inclusion of lawfully established activities in EW-R3 will not result in unmanaged environmental effects as EW-R3 requires compliance with the general standards in EW-R1 for an activity to be permitted, ensuring that any adverse effects are managed.

Earthworks Chapter Overview Cross Referencing

16. Bathurst's submission highlighted the following overarching concern with the TTPP:

We wish to ensure that the rest of the Plan is not only consistent with the objectives and provisions of those zones (MINZ and BCZ) but also does not restrict anticipated activities from occurring within those zones.

17. The submission subsequently sought:

To the extent that we have not specifically captured any inconsistencies below in our more specific submissions we make an overall submission for all necessary changes to the Plan to ensure that the permissions and rights intended to be granted by the MINZ and BCZ are able to be fully implemented at least for the life of the Plan.

18. The Court has confirmed that the scope to change a plan is not limited by the words of the submission.⁵ We submit that the amendments that are necessary to this Chapter are incidental to, consequential upon, or directly connected to the submission and are in scope.⁶
19. On this point, Bathurst is supportive of the amendments recommended in the Section 42A Report to the Earthworks Chapter Overview to clarify that the Earthworks provisions do not include mineral extraction activities.⁷ However in our submission the amendments do not go far enough to clarify which provisions take precedence for mineral extraction activities in the BCZ or MINZ and do not resolve all potential interpretative conflicts.
20. As set out in Ms Hunter's Topic 1 and Topic 2 evidence, as the TTPP is currently drafted, it is not clear which rules take precedence between the BCZ, MINZ and Earthworks Chapters. We submit that the drafting of the TTPP needs to be explicit as to which rules take precedence for mineral extraction activities.⁸ Ms Hunter's Topic 1 and Topic 2 evidence proposed amendments to the introductory text of the TTPP to make it clear which rules need to be considered when an activity falls within

⁵ *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556 at [574] – [576].

⁶ *Well Smart Holdings (NZQN) Limited v Queenstown Lakes District Council* [2015] NZEnvC at [16].

⁷ Section 42A Report, 6 October 2023 at [68].

⁸ Statement of Evidence of Claire Hunter, 29 September 2023 at [20].

a Special Purpose Zone and is anticipated or provided for by the Special Purpose Zone.⁹ Ms Hunter's Topic 1 and 2 evidence notes further changes to individual chapters will be required to make this relationship clear.¹⁰

21. Specifically in relation to the Earthworks Chapter, Bathurst supports the evidence of Ms McKenzie for *Birchfield Coal Mines Limited*¹¹ that the Earthworks Overview text contradicts the amendments recommended in the Section 42A Report and supports the following wording proposed by Ms McKenzie for the Earthworks Chapter Overview:¹²

Earthworks Associated with Mineral Extraction – the Zone and Overlay Chapters have provisions ~~in relation to which manage~~ mineral extraction and its ancillary activities. The Earthworks rules within this section do not apply to mineral extraction, mineral prospecting or mineral exploration. Including earthworks.

22. As the definition of earthworks in the TTPP does not explicitly exclude earthworks associated with mineral extraction activities, despite the Earthworks Chapter Overview indicating that the provisions do not capture mineral extraction activities, we submit that unless the Earthworks rules specifically exclude mineral extraction it is possible for an interpretive conflict to arise.
23. In our submission this amendment would be consistent with Section 18A of the Resource Management Act 1991 (**Act**) which requires plans to be worded in a way that is clear and concise. We submit that as currently drafted the Earthworks provisions do not achieve this as there is the potential for interpretation inconsistencies to arise.

Further Submission Points

24. In addition to the above, Bathurst's further submissions that have been allocated to Topic 3:
- (a) support the submissions of Buller District Council to retain objectives and policies as notified;¹³ and
 - (b) oppose the submissions of Forest and Bird to amend EW-R1 and EW-R7 to add that vegetation clearance associated with earthworks must comply with the on the basis that the amendments sought changes the intent of the rules.¹⁴

⁹ Statement of Evidence of Claire Hunter, Topic 1 and 2, 29 September 2023 at Annexure B page 2.

¹⁰ Above at Annexure B page 3.

¹¹ *Birchfield Coal Mines Limited, Papahaua Resources Limited, Rocky Mining Limited, TiGA Minerals and Metals Limited and WMS Group (HQ) Limited and WMS Land Co. Limited.*

¹² Statement of Evidence of Katherine McKenzie, 16 October 2023 at [16].

¹³ FS89.0010 and FS89.009 relating to Objective EW-O1, EW-P1, EW-P2, EW-P3 and EW-P4.

¹⁴ FS89.079 relating to EW-R7 and FS89.078 relating to EW-R1.

25. The Section 42A Report recommends accepting Bathurst's further submission points. Bathurst is supportive of this recommendation.

CONCLUSION

26. Bathurst supports the higher order strategic directions of the TTPP which provide for mineral extraction activities as a matter of strategic importance. In our submission and as discussed above the amendments sought by Bathurst to the Earthworks Chapter will ensure inconsistency and interpretation conflicts do not arise when implementing the TTPP and ensure the activities (often already enabled by existing permissions and rights) and provided for in the MINZ and can be fully exercised.
27. The clarification of the relationship between the MINZ, BCZ and Earthworks provisions will remove complexity, uncertainty and associated increases in costs from the consenting process for applicants, and better and more clearly achieve the outcomes that the Section 42A Report seeks.



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