

## 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 10B: Ecosystems and  
Indigenous Biodiversity

# Legal Submissions for Bathurst Resources Limited and BT Mining Limited

Dated: 12 August 2024

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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 10B – Ecosystems and Indigenous Biodiversity of the proposed Te Tai o Poutini Plan (**TTPP**).
2. We have previously filed legal submissions and appeared before the TTPP Panel.<sup>1</sup> Bathurst's relief relating to Natural Features and Landscapes matters was considered by the Panel in March 2024. Our legal submissions do not repeat these matters and address Bathurst's relief relating to Ecosystems and Indigenous Biodiversity for your determination in this hearing.
3. There are similar themes to the relief allocated to the Ecosystems and Indigenous Biodiversity (**ECO**) Chapter (**Topic 10B**) that Bathurst and BT have sought across the TTPP, to ensure:
  - (a) that the mineral extraction activities expressly anticipated to be provided for and carried out in the Mineral Extraction Zone (**MINZ**) and Buller Coal Field Zone (**BCZ**) are able to be carried out;
  - (b) to ensure there is adequate provision for existing and lawfully established activities in the ECO provisions;
  - (c) that both the functional need and operational need of mineral extraction activities are recognised and provided for; and
  - (d) the ability for resource consent applications to apply the full effects management hierarchy is provided for through policy.
4. Overall, it is our case that:
  - (a) The fluid state of the amendments to the National Policy Statement for Indigenous Biodiversity 2023 (**NPS-IB**) puts the Panel and submitters in a challenging position and risks outcomes that do not give effect to any amendments that are to be made to the NPS-IB. The Panel needs to be cautious about that if the NPS-IB is changed between the hearing and the Panel's decision.
  - (b) If the Panel proceeds to issue decisions prior to those changes, the NPS-IB must be given effect to in the TTPP to the extent that there is scope within the submissions to do so.

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<sup>1</sup> Hearing Topics 1, 2, 3, 4,7,9,10,13 and 15.

- (c) The West Coast Regional Policy Statement 2020 (**RPS**) predates the NPS-IB and does not give effect to it. Where there is conflict (regarding bottom lines in particular), the TTPP should give effect to the NPS-IB rather than the RPS.
- (d) For the reasons outlined in these submissions, the relief sought by Bathurst gives effect to the NPS-IB better than the Section 42A Report recommendations by:
  - (i) focusing on ensuring no overall loss of indigenous biodiversity using the effects management hierarchy;
  - (ii) recognising that there is a need to provide for the social and economic wellbeing of people and communities; and
  - (iii) recognising the specific consenting pathways provided for minerals extraction activities in the NPS-IB.
- (e) The policy framework in the ECO Chapter must work alongside with, and not effectively trump, the enablement of mineral extraction that the BCZ and MINZ anticipates. Achieving this balance will ensure that the significant economic benefits mineral extraction provides for the West Coast continue to be enabled.

## **CONTEXT FOR THE PANEL'S DECISION MAKING – THE SIGNIFICANCE OF MINING**

5. The uncontested evidence in Topics 1, 2 and 13 of the TTPP hearings is that the mining of mineral resources plays a critical role in enabling the West Coast people and communities to provide for their economic and social wellbeing.
6. The objective and policy framework of the RPS recognises the role of resource use and development on the West Coast and its contribution to enabling people and communities to provide for their social, economic and cultural wellbeing.
7. The Section 32 evaluation for the MINZ and BCZ recognises that the West Coast contains mineral deposits that are of considerable social and economic importance to the districts, region and the nation.<sup>2</sup> As such enabling the smooth transition of the Coal Mining Licence (**CML**) sites in the TTPP process was identified as a high priority to support social and economic wellbeing on the West Coast.<sup>3</sup>

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<sup>2</sup> Section 32 Evaluation, Report Fourteen Mineral Extraction at [2.1].

<sup>3</sup> Section 32 Evaluation, Report Fourteen Mineral Extraction at [2.1].

8. In order to explicitly recognise the significance of mineral resources, existing mineral extraction operations, their contribution to the district and wider regional/national economies, give clear effect to the RPS and appropriately manage associated effects, the MINZ and BCZ were recommended for inclusion in the TTPP.<sup>4</sup>
9. The Strategic Objectives recognise the importance of mineral extraction to the West Coast.
10. Despite the TTPP anticipating and providing for mineral extraction activities to be enabled within the MINZ and BCZ, Bathurst is concerned that the protection and maintenance provisions in the Ecosystems and Indigenous Biodiversity Chapter effectively 'trump' the enabling intent of the MINZ and BCZ.
11. It is within the context of this policy tension within the TTPP that the Panel are to make decisions on the Ecosystems and Indigenous Biodiversity chapter. We acknowledge the balancing act of ensuring the protection provided in the Ecosystems and Indigenous Biodiversity Chapter works alongside with, and does not trump, the enablement that the BCZ and MINZ. Achieving this balance will ensure that the significant economic benefits mineral extraction has for the West Coast continues to be enabled. In recommending more stringent provisions within the TTPP than the NPS-IB requires, this balance is not achieved. This is particularly problematic in the key zones where mineral extraction activities are existing and enabled. The relief recommended by Ms Hunter appropriately navigates that balance.

## ECOLOGICAL CONTEXT OF BATHURST'S WEST COAST OPERATIONS

12. Dr Bramley's evidence outlines the ecological context of Bathurst's West Coast operations.<sup>5</sup> Bathurst's largest operation is Stockton Mine located on the Stockton Plateau. Bathurst also holds licences, permits and resource consents on the Denniston Plateau.
13. Dr Bramley's evidence demonstrates that the Stockton and Denniston Plateaux (**Buller Coal Plateau**) which lie within the Ngakawau Ecological District, are geographically large and ecologically complex areas. The extent of Buller Coal Plateau is shown in Figures 1 – 5 attached to Dr Bramley's evidence.
14. Weeds and pests (including weeds given access via historic mining) are widespread across the Buller Coal Plateau and beyond.<sup>6</sup> Dr Bramley considers that if ecosystem

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<sup>4</sup> Section 32 Evaluation, Report Fourteen Mineral Extraction at [4.2.2] and [4.3.3].

<sup>5</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [23] – [36].

<sup>6</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [54].

management at the Buller Coal Plateaux were to cease these weeds and pests would increase, expand their influence and native species would decline.<sup>7</sup>

15. There is evidence of historic (pre-European) fire across the Buller Coal Plateaux which have likely resulted in shallow soils being eroded/blown away resulting in substantial areas of exposed sandstone pavement.<sup>8</sup>
16. As Dr Bramley has identified in his evidence, coal extraction from the Buller Coal Plateau will often have to occur in places where it will conflict with indigenous biodiversity (or other ecological values) because that is where the coal is.<sup>9</sup>
17. It is within this ecological context that Bathurst carries out its operations and rehabilitation programmes. The conditions of the Stockton CML require that Bathurst implements a research programme to continually refine best practice for rehabilitation work that is ongoing.<sup>10</sup> Ecological management methods at Stockton have steadily improved over time as knowledge about the functioning of ecosystems has improved and management practices have been refined.<sup>11</sup>

## **NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY**

### **Giving Effect to the National Policy Statement for Indigenous Biodiversity**

18. The TTPP is required to give effect to any National Policy Statements.<sup>12</sup>
19. However, the NPS-IB came into effect after the TTPP was publicly notified on 14 July 2022.<sup>13</sup> The question of how the TTPP is to give effect to the NPS-IB is therefore relevant to the Panel's consideration.
20. The NPS-IB requires every local authority to *give effect* to the NPS-IB as soon as reasonably practicable<sup>14</sup> and any changes that are necessary to give effect to the NPS-IB must be notified within eight years after the commencement date.<sup>15</sup>
21. We agree with the position taken in the initial legal submissions filed by Wynn Williams for the TTPP Committee in the Strategic Directions topic, that to the extent that there is scope to do so, the Panel should strive to give effect to the NPS-IB.<sup>16</sup> We agree with the TTPP Committees' opening legal submissions that the approach taken by the High Court in *Hawkes's Bay and Eastern Fish and Game Council v*

<sup>7</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [54].

<sup>8</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [31].

<sup>9</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [19].

<sup>10</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [74].

<sup>11</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [72].

<sup>12</sup> Resource Management Act 1991, Section 75(3)(a).

<sup>13</sup> Gazetted on 7 July 2023 and came into force on 4 August 2023.

<sup>14</sup> National Policy Statement for Indigenous Biodiversity, Clause 4.1(1).

<sup>15</sup> National Policy Statement for Indigenous Biodiversity, Clause 4.1(2).

<sup>16</sup> Opening Legal Submissions on behalf of Te Tai o Poutini Plan Committee, 13 October 2023 at [45].

*Hawke's Bay Regional Council*<sup>17</sup> and the Environment Court in *Wakatipu Equities Limited v Queenstown Lakes District Council*<sup>18</sup> should be followed. This is also the approach taken through the Environment Court mediations on the Marlborough Environmental Plan in relation to giving effect to the National Policy Statement for Freshwater 2020.

22. Relying on those authorities, the TTPP should give effect to the NPS-IB to the extent that there is scope within the submissions and the provisions themselves to do so.
23. Separately, the NPS-IB requires discrete implementation steps such as mapping of Significant Natural Areas (**SNAs**) using a Schedule 1 process and until such time as this has occurred the NPS-IB cannot be fully given effect to. The NPS-IB currently requires local authorities to identify and include new SNAs in district plans by 4 August 2028. However, the Select Committee is currently considering reform proposed by the Resource Management (Freshwater and Other Matters) Amendment Bill that has proposed to suspend this obligation for 3 years until 31 December 2030.<sup>19</sup>

### **Overall Policy Context of National Policy Statement for Indigenous Biodiversity**

24. We submit that the amended NPS-IB (soon to be amended again) focuses on maintaining indigenous biodiversity across New Zealand so that there is no overall loss and ensuring that this protection contributes. The NPS-IB also specifically provides for the social, economic and cultural wellbeing of people and communities. To ensure that the social and economic wellbeing of people and communities is provided for, the NPS-IB enables specific activities and provides consenting pathways for these activities. In enabling specific activities and taking a New Zealand wide approach to the test of overall loss, the NPS-IB anticipates that the importance of some activities justifies certain biodiversity loss above others.
25. Objective 2.1 relevantly states: (our emphasis added):<sup>20</sup>
  - (a) *Maintain indigenous biodiversity across Aotearoa New Zealand **so that there is at least no overall loss in indigenous biodiversity** after the commence date; and*
  - (b) *To achieve this:*
    - (i) *through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and*

<sup>17</sup> *Hawkes's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* [2014] NZHC 3191, 19 ELRNZ 348 at [183] and [184].

<sup>18</sup> *Wakatipu Equities Ltd v Queenstown Lakes District Council* [2023] NZEnvC 188 at [5] and [6].

<sup>19</sup> Resource Management (Freshwater and Other Matters) Amendment Bill.

<sup>20</sup> National Policy Statement for Indigenous Biodiversity, Objective 2.1.

- (ii) *by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and*
  - (iii) *by protecting and restoring indigenous biodiversity **as necessary to achieve the overall maintenance** of indigenous biodiversity; and*
  - (iv) ***while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.***
26. When giving effect to the overarching objective of the NPS-IB Clause 3.5 of the NPS-IB relevantly requires local authorities to consider the following:<sup>21</sup>
- (a) that the protection, maintenance, and restoration of indigenous biodiversity contributes to the social, economic, and cultural wellbeing of people and communities; and
  - (b) that the protection, maintenance, and restoration of indigenous biodiversity does not preclude subdivision, use and development in appropriate places and forms.
27. The objective and policy framework of the NPS-IB does not require the removal of indigenous biodiversity to be completely 'avoided'. Of key relevance to the Panel's determinations the objective and policy framework of the NPS-IB focuses on:
- (a) **maintaining** indigenous biodiversity **across New Zealand** so there is **no overall loss**;<sup>22</sup>
  - (b) protecting SNAs by avoiding **or managing** adverse effects;<sup>23</sup>
  - (c) recognising the importance of maintaining indigenous biodiversity outside SNAs;<sup>24</sup> and
  - (d) recognising and **providing for the activities that contribute to New Zealand's social, economic** and cultural wellbeing through identifying these activities in the NPS-IB.<sup>25</sup>

### **Mineral Extraction Exemption**

28. The NPS-IB requires that identified adverse effects on a SNA of any new subdivision, use or development must be avoided unless the activity is specifically

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<sup>21</sup> National Policy Statement for Indigenous Biodiversity 2023 at Clause 3.5.

<sup>22</sup> National Policy Statement for Indigenous Biodiversity, Objective 2.1.

<sup>23</sup> National Policy Statement for Indigenous Biodiversity, Policy 7.

<sup>24</sup> National Policy Statement for Indigenous Biodiversity, Policy 8.

<sup>25</sup> National Policy Statement for Indigenous Biodiversity, Policy 10.

exempt.<sup>26</sup> Any other effect that is not identified must be managed by applying the effects management hierarchy.

29. The NPS-IB provides an exemption for the **operation** or **expansion** of any coal mine in a SNA that was **lawfully established** as of 4 August 2023. After 31 December 2030 this exemption applies only to coal mines that extract coking coal, and this pathway will not be available to thermal mines.<sup>27</sup> This differentiation between coking and thermal coal in the NPS-IB is unlikely to impact Bathurst's West Coast operations which extract coking coal exclusively.<sup>28</sup>
30. For this exemption to apply it must be demonstrated:
- (a) that there is a functional or operational need for the proposal in that location;<sup>29</sup>
  - (b) that there are no practicable alternative locations;<sup>30</sup>
  - (c) how each step of the effects management hierarchy will be applied; and
  - (d) how offsetting and compensation complies with Appendix 3 and 4 of the NPS-IB as required.<sup>31</sup>
31. The exemption for coal mines provides a bespoke set of "*bottom lines*" for coal mining activities different to than those set out for other activities in Clause 3.10(2). Clause 3.10(2), which *doesn't* apply to Bathurst's activities, requires the following adverse effects on a SNA to be avoided:
- (a) loss of ecosystem representation and extent;
  - (b) disruption to sequences, mosaics, or ecosystem function;
  - (c) fragmentation of SNAs or the loss of buffers or connections within an SNA;
  - (d) a reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems; and
  - (e) a reduction in the population size or occupancy of Threatened or At Risk (declining) species that use an SNA for any part of their life cycle.

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<sup>26</sup> National Policy Statement for Indigenous Biodiversity, Clause 3.10(2).

<sup>27</sup> National Policy Statement for Indigenous Biodiversity, Clause 3.11(1)(iv).

<sup>28</sup> Statement of Evidence of Richard Tacon, 29 September 2023.

<sup>29</sup> National Policy Statement for Indigenous Biodiversity, Clause 3.11(1)(b).

<sup>30</sup> National Policy Statement for Indigenous Biodiversity, Clause 3.11(1)(c).

<sup>31</sup> National Policy Statement for Indigenous Biodiversity, Clause 3.10(3) and (4).



32. For coal mining and other specified activities these adverse effects are not required to be avoided and adverse effects must instead be managed by applying the effects management hierarchy.
33. In providing an exemption for the operation or expansion of existing coal mines in SNAs, the NPS-IB recognises that coal mining contributes to New Zealand's economic and social wellbeing.
34. Relevant to the Panel's determination, the NPS-IB exemption for coal mines is proposed to be amended through the Resource Management (Freshwater and Other Matters) Amendment Bill (**Bill**) that is currently before a Select Committee.
35. The Bill proposes to align the provisions for coal mining with other mineral extraction activities under the NPS-IB, National Policy Statement for Freshwater Management 2020 (**NPS-FM**) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**).<sup>32</sup> These instruments contain strong protections for wetlands and SNAs but also provide specific consent pathways for mineral extraction activities that have adverse effects on wetlands or SNAs. The current pathway for coal mining has additional controls compared to other mineral extraction activities despite the localised environmental effects being similar. The Bill extends the consenting pathway for coal mines to new coal mines and removes the sunset clause on consent pathways for thermal coal.<sup>33</sup>
36. To summarise the above, we submit that the below factors form the context for the Panel's decision making on the ECO Chapter:
  - (a) The NPS-IB should be given effect to in the TTPP to the extent that there is scope within the submissions to do so.
  - (b) While decisions on the ECO Chapter should give effect to the NPS-IB to the extent possible, timing of the NPS-IB amendments may necessitate the provisions and evidence to be revisited prior to a decision being issued on the Topic.
  - (c) Ensuring the protection provided in the ECO Chapter functions alongside with, and does not effectively trump, the enablement that the BCZ and MINZ expressly provides for. Achieving this balance will ensure that the significant economic benefits mineral extraction has for the West Coast continues to be enabled.

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<sup>32</sup> Resource Management (Freshwater and Other Matters) Amendment Bill, Schedule 2.

<sup>33</sup> Resource Management (Freshwater and Other Matters) Amendment Bill, Schedule 2.

## WEST COAST REGIONAL POLICY STATEMENT

37. The RPS became operative on 24 July 2020 and predates the NPS-IB. The RPS therefore does not give effect to the NPS-IB as it is required to do by Section 62(3) of the RMA.
38. We agree with the Section 42A Report that it is not appropriate to automatically import the RPS framework into the TTPP.<sup>34</sup> The TTPP should reflect the current regulatory framework not just that which was in place when the RPS was adopted.
39. In our submission the provisions of the RPS that conflict with the NPS-IB, especially in relation to setting bottom lines, should not be given effect to in the TTPP.
40. The RMA establishes a hierarchy of planning documents at the national, regional and district levels.
41. Relevantly a National Policy Statement must state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA set out in Part 2.<sup>35</sup> The objectives and policies stated in a National Policy Statement must be given effect to in subordinate planning documents.<sup>36</sup>
42. The RPS predates the NPS-IB and does not give effect to it. As the NPS-IB sits above the RPS in the hierarchy of planning documents and contains objectives and policies that have been prepared in accordance with, and give effect to Part 2, the TTPP is required to give effect to the NPS-IB to the extent there is scope. Where this is in conflict with the predated RPS, the RPS provisions should not be given effect to in the TTPP.

### Statutory Role

43. The Buller, Grey and Westland District Councils must prepare a district plan for the districts.<sup>37</sup>
44. The purpose of the TTPP will be to assist the Councils in carrying out their functions in order to achieve the sustainable management purpose of the RMA.<sup>38</sup> When preparing the TTPP the Councils, and the Panel acting on the delegated authority of the Council, must prepare it in accordance with the provisions of Part 2.<sup>39</sup>

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<sup>34</sup> Section 42A Report, Ecosystems and Indigenous Biodiversity at [208].

<sup>35</sup> Resource Management Act 1991, Section 45.

<sup>36</sup> Resource Management Act 1991, sections 62(3), 67(3) and 75(3).

<sup>37</sup> Resource Management Act 1991, Section 73.

<sup>38</sup> Resource Management Act 1991, Section 72.

<sup>39</sup> Resource Management Act 1991, Section 72(1)(b).

45. The RMA establishes a hierarchy of planning documents that each are intended to give effect to the sustainable management purpose of the RMA and ultimately Part 2.<sup>40</sup> Each document within the hierarchy must give effect to those above it with the intention that as one moves down the hierarchy of documents they move from the general to the specific.<sup>41</sup>
46. In line with the hierarchy of planning documents the TTPP must give effect to:<sup>42</sup>
- (a) National Policy Statements;
  - (b) the New Zealand Coastal Policy Statement;
  - (c) National Planning Standards; and
  - (d) Regional Policy Statements.
47. The Supreme Court has held that to “*give effect to*” means to implement and is strong directive that creates a firm obligation on the part of those subject to it.<sup>43</sup>
48. Following the Supreme Court’s decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* if a higher order planning document that must be given effect to in a plan review or change, properly reflects and gives effect to Part 2, a decision maker does not need to have regard to Part 2.<sup>44</sup> Resort back to Part 2 of the RMA and the application of an overall broad judgement approach is only required if caveats identified by the Supreme Court are present.<sup>45</sup>
49. In *King Salmon* the Supreme Court stated in the context of the New Zealand Coastal Policy Statement:<sup>46</sup>

*“As we have said the purpose of the NZCPS is to state policies in order to achieve the RMA’s purpose in relation to New Zealand’s coastal environment. That is, the NZCPS gives substance to Part 2s provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting “in accordance” with Part 2 and there is no need to refer back to the part when determining a plan change.”*

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<sup>40</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [30].

<sup>41</sup> Above at [14].

<sup>42</sup> Resource Management Act 1991, Section 75(3).

<sup>43</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

<sup>44</sup> Above at [85].

<sup>45</sup> Above at [88].

<sup>46</sup> Above at [85].

50. While the NPS-IB is primed for amendment we agree with the Section 42A Report that the proposed amendments cannot be given weight at this time and the NPS-IB must be considered by the Panel as it is currently drafted.
51. Following the Supreme Court's decision in *King Salmon* we submit that:
- (a) The Councils are required to prepare the TTPP in accordance with the functions under Section 31 and Part 2 of the RMA.
  - (b) As the RPS predates the NPS-IB and does not give effect to the NPS-IB (which sits above it only the planning hierarchy) the RPS does not properly reflect and higher order planning documents (the NPS-IB).
  - (c) As such if provisions of the RPS conflict with the NPS-IB the Panel must give priority to the NPS-IB in order for the TTPP to achieve the Councils' functions under Section 31 and the sustainable management purpose of the RMA.
  - (d) In giving priority and effect to the NPS-IB (and where there is conflict not giving effect to the RPS), the Panel will be acting in accordance with Part 2.

### **Bathurst's Relief and the National Policy Statement for Indigenous Biodiversity**

52. The relief sought by Bathurst on the ECO Chapter better achieves the sustainable management purpose of the RMA than the Section 42A recommendations.
53. For the reasons discussed below we submit that the following provisions of the ECO Chapter require careful testing against Part 2 and the NPS-IB:
- (a) Policy ECO-P6 which mirrors the wording of the RPS; and
  - (b) Policy ECO-P7.
54. As outlined earlier in our submissions, as the RPS predates the NPS-IB it does not give effect to the NPS-IB. There are significant conflicts between provisions relating to bottom lines and the distinction between mitigation and offsetting/compensation that need to be treated with caution.
55. As discussed in paragraph 24 the NPS-IB adopts an increasingly balanced approach to protecting indigenous biodiversity by seeking that there is no overall loss across New Zealand and ensuring that this protection provides for the social, economic and cultural wellbeing of people and communities. To achieve this the NPS-IB enables specific activities.

56. In the case of coal mining, the NPS-IB provides a bespoke set of bottom lines for coal mining activities in that it does not require the avoidance of identified effects and provides for these to be managed by applying the effects management hierarchy. The NPS-IB provides definitions of the effects management hierarchy, including what constitutes offsetting and compensation, and provides clear principles for offsetting and compensation. This is in contrast to the RPS which does not provide guidance on when a measure would qualify as mitigation, remediation, offsetting or compensation.
57. In enabling specific activities and adopting a New Zealand wide approach to the test of overall loss, the NPS-IB anticipates the importance of some activities justifies certain biodiversity losses above others.
58. The NPS-IB direction conflicts with the RPS, particularly Chapter 7 which sets the objectives and policies to identify SNAs, achieve the protection of SNAs and maintain indigenous biodiversity. The policy suite in Chapter 7 of the RPS contains an internal effects management hierarchy with what the Environment Court considers a gateway controlling entrance to the offsetting and compensation policies.<sup>47</sup>
59. As such, Policy 7.2 of the RPS sets a significantly more stringent bar than the NPS-IB in requiring that activities do not (relevantly):
- (a) prevent an indigenous species or community's ability to persist in their habitats within their natural range in the Ecological District;<sup>48</sup> and
  - (b) result in measurable reductions in the local population of indigenous cover or threatened taxa.<sup>49</sup>
60. The Environment Court has held that offsetting and compensation measures cannot be considered under Policy 7.2 of the RPS<sup>50</sup> and if the provisions in Policy 7.2 are not able to be met, the effects management hierarchy set out in subsequent policies are unable to be reached.<sup>51</sup> This conflicts with the NPS-IB direction which provides for the adverse effects of specified activities to be managed by applying the effects management hierarchy as opposed to being avoided.<sup>52</sup>

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<sup>47</sup> *Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council* [2023] NZEnvC 68 at [84].

<sup>48</sup> West Coast Regional Policy Statement 2020 at Policy 7.2(a).

<sup>49</sup> West Coast Regional Policy Statement 2020 at Policy 7.2(c) and (d).

<sup>50</sup> *Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council* [2023] NZEnvC 68 at [131].

<sup>51</sup> *Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council* [2023] NZEnvC 68 at [214].

<sup>52</sup> National Policy Statement for Indigenous Biodiversity Clause 3.10(2), (3), (d) and Clause 3.11.

61. Policy 7.2 also directs more separation of mitigation, offsetting and compensation than that now included in the NPS-IB.
62. Tested against the NPS-IB, the Bathurst relief will more appropriately achieve the balance between enablement and protection to achieve sustainable management in its more enabling provision of the effects management hierarchy.
63. As demonstrated in the evidence of Dr Bramley and Ms Hunter to ensure that the best ecological outcomes are achieved post mineral extraction it is critical that a fit for purpose policy framework is included in the TTPP that recognises:
- (a) that mineral extraction activities have a functional and operational need to locate where the resources are found;
  - (b) this results in mineral extraction activities often needing to take place within areas of significant indigenous vegetation or significant habitats of indigenous fauna; and
  - (c) given the above it is critical that the TTPP provides the ability to apply the fulfil effects management hierarchy.
64. We submit that ultimately when Bathurst's relief is tested against Section 6(c) it is demonstrated that it achieves the relevant Section 6 matters of national importance, the overall purpose of the RMA and ultimately Part 2.

## **BATHURST'S RELIEF ON THE ECOSYSTEMS CHAPTER**

65. The evidence of Dr Bramley and Ms Hunter has provided robust assessment of the appropriateness of Bathurst's relief. Our submissions address key themes arising from the relief for the Panel's consideration.

### **Objective ECO-O2 and Policy ECO-P2**

66. Bathurst seeks amendments to Objective ECO-O2 and Policy ECO-P2 to:
- (a) ensure the intent of the MINZ and BCZ are recognised and provided for;
  - (b) ensure that established and operating mineral extraction activities are recognised and provided for;
  - (c) ensure the ability to apply the full effects management hierarchy including offsetting and compensation is provided for consistent with the NPS-IB;

- (d) recognise both the functional and/or operational need of activities of activities located within areas of significant indigenous vegetation or significant habitats of indigenous fauna; and
- (e) ensure consistency with the NPS-IB by referencing the test of no overall net loss and clarifying that Policy ECO-P2 applies to scheduled SNAs consistent with the NPS-IB and not all areas of indigenous biodiversity.

### **Intent of the Mineral Extraction Zone and Buller Coal Field Zone**

- 67. We submit that it is appropriate for Objective ECO-O2 and Policy ECO-P2 to recognise the intent of the MINZ and BCZ.
- 68. As outlined in our submissions at [9], the TTPP recognises that mineral extraction activities that are enabled in these zones are economically essential to the West Coast. It is important that these activities are not unintentionally restrained or trumped by other chapters of the TTPP to ensure the ongoing recognition of economic, employment and social benefits.
- 69. Should the TTPP apply a more restricted approach it would likely result in the loss of social and economic benefits which would need to be considered in a Section 32 sense.

### **Effects Management Hierarchy**

- 70. As outlined in detail above, it is important that the TTPP provides the ability for the full effects management hierarchy to be applied as the location of minerals is fixed.<sup>53</sup> Extraction will therefore often have to occur in places where it will conflict with indigenous biodiversity (or other ecological values) because that is where the coal is.<sup>54</sup>
- 71. In light of the significant economic benefits mineral extraction provides to the West Coast it is important a consenting pathway is retained in the TTPP.
- 72. This will have significant benefits for the rehabilitation, and offsetting and compensation in relation to mining projects. Dr Bramley's evidence details the current offsetting and remediation activities being undertaken by Bathurst on the West Coast and identifies that ecological management methods continue to improve as knowledge about the functioning of ecosystems is gained, and management practices refined.<sup>55</sup> Dr Bramley concludes that provided better ecological outcomes are achieved via the implementation of the effects management hierarchy, enabling

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<sup>53</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [47].

<sup>54</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [51].

<sup>55</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [20].

of mineral extraction on the Buller Plateau is not inconsistent with the relevant National Policy Statements.<sup>56</sup>

73. As Dr Bramley has outlined in his evidence the ability for Bathurst to be able to access and apply the effects management hierarchy is critical because the location of minerals is fixed. Additionally, as some management actions contribute to, or achieve, both mitigation and offsetting, it is important from an overall maintenance of biodiversity perspective that opportunities are not lost due to incorrect, inappropriate or misunderstood bottom lines being applied that limit ecological outcomes.<sup>57</sup>
74. Offsets must conform to generally agreed principles which recognise that some ecological values are so vulnerable or irreplaceable that they cannot be offset. This particular situation as it applies to a project and the affected biodiversity will vary between projects and across time (e.g., as knowledge improves and technology advances), and will require a substantial amount of complex data and a technical assessment undertaken at the time a specific application is made.<sup>58</sup>
75. For these reasons the TTPP needs to provide for the technical assessments supporting offsetting and compensation to be carefully tested during the consenting process, and not apply constraints or limits before these knowledge gaps can be filled.<sup>59</sup> Inclusion of a “*technical knock-out*” in the TTPP policies as to when offsetting and compensation are not available without allowing robust consideration of the proposals specific context and technical assessment will likely result in lost opportunities to achieve the overall objective of the NPS-IB and maintain indigenous biodiversity.<sup>60</sup>
76. Providing access to the full effects management hierarchy in the TTPP as sought by Bathurst does not mean that proposals will automatically be granted approval where biodiversity can or will be compromised. Full access however does enable proposals to be evaluated on their merits including an assessment of the validity and appropriateness of any offsetting and compensation proposal.<sup>61</sup>
77. Dr Bramley’s evidence discusses the current application of aspects of the effects management hierarchy at Stockton, Cypress and Escarpment.<sup>62</sup> Broadly this has involved:

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<sup>56</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [53].

<sup>57</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [41].

<sup>58</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [55].

<sup>59</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [44].

<sup>60</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [39].

<sup>61</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [58].

<sup>62</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [61] – [69].



- (a) Search and salvage of lizards and snails. In the case of *Powelliphanta augusta* resulting in the release of 7,500 snails and 2,800 eggs back into habitats at Stockton and Denniston covering approximately 70ha.
  - (b) Weed management.
  - (c) Planting and vegetation direct transfer.
  - (d) Ecosystem management.
78. 94% of the Buller Coal Plateaux is being managed and the opportunities for additional ecosystem management in the form of offsetting within the Buller Coal Plateau itself are therefore limited as there are few areas that contain like for like biodiversity values that are not already being managed. Future management is likely to occur in different adjoining habitats and would be unlikely to qualify with the principles of offsetting but instead qualify as compensation. This compensation would have the ability to contribute positively to maintaining biodiversity values because of the intact and functional ecological connection. Without the ability to consider compensation in the TTPP the best ecological outcome for any particularly future mining proposal is unlikely to be achieved.<sup>63</sup>
79. Given the above, Bathurst conceptually agrees with the Section 42A Report recommendation to enable access to the effects management hierarchy in Policy ECO-P2 for specified activities that are located in a SNA.
80. However, the Section 42A recommendation to include “*where the activity has more than minor adverse effects*” is not consistent with the NPS-IB. The NPS-IB provides for offsetting and compensation to redress more than minor residual adverse effects. Offsetting and compensation are only to be contemplated after steps to avoid, minimise and remedy adverse effects are demonstrated to have been exhausted.<sup>64</sup> For this reason this reference is not appropriate to be included in Policy ECO-P2.
81. For the reasons discussed above and to give effect to the NPS-IB, we submit it is appropriate for Objective ECO-O2 to also provide for the ability to apply the full effects management hierarchy.
82. As discussed in the evidence of Ms Hunter, with respect to Policy ECO-P6 consideration is required as to whether this provision relates to activities in SNAs or any area of indigenous biodiversity.<sup>65</sup> We agree with Ms Hunter that as Policy ECO-P2 is intended to give effect to the directions in Clauses 3.10 and 3.11 of the NPS-IB (subject to the amendments sought in Bathurst’s evidence to address

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<sup>63</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [68].

<sup>64</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [95].

<sup>65</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [44].

inconsistencies), Policy ECO-P6 should be amended to give effect to Clause 3.16. Clause 3.16 relevantly enables the application of the effects management hierarchy outside of SNAs.

83. As currently drafted Policy ECO-P6 closely mirrors the wording of the RPS. As we have discussed above, the TTPP must give effect to the NPS-IB to the extent that it can within the scope of the submissions. As currently drafted Policy ECO-P6 acts as a bottom line, requires a localised assessment of loss and if triggered the opportunity for offsetting or compensation will not be provided for.
84. We submit that Policy ECO-P6 does not give effect to the NPS-IB which enables specified activities to apply the effects management hierarchy and adopts a New Zealand wide approach to the test of overall loss.
85. Policy ECO-P6 should enable an outcome that allows a resource consent applicant the full availability of planning tools to achieve the most appropriate biodiversity outcome. We submit that:
- (a) if the provision is intended to apply to SNAs, consistent with the NPS-IB pathway for coal extraction activities, the ability to apply the effects management hierarchy must be provided for; and
  - (b) if the provision is intended to apply to areas of indigenous biodiversity outside of SNAs, consistent with Clause 3.16 of the NPS-IB, effects of activities should be managed by applying the effects management hierarchy.
86. As Policy ECO-P2 is intended to give effect to the direction in the NPS-IB relating to SNAs, Bathurst's position is that Policy ECO-P6 should be amended to enable the application of the effects management hierarchy outside of SNAs.<sup>66</sup> While as it is currently drafted Policy ECO-P2 gives effect to the RPS, this is not the most appropriate outcome as the RPS predates and does not give effect to the NPS-IB. As such careful testing of the relief against the NPS-IB is necessary. As outlined above at paragraph 62 when Bathurst's relief is tested against the NPS-IB it demonstrates that the relief gives effect to the NPS-IB which is a more appropriate outcome than the Section 42A Recommendations which do not.

### **Recognition of established and operating mineral extraction activities**

87. Bathurst sought amendments to the TTPP to acknowledge and provide for mineral extraction activities that are established and operating. If the term "*lawfully*

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<sup>66</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [45].

*established activities*” is to be included in the TTPP Bathurst supports the definition of “*lawfully established*” as set out in Ms Hunter’s mineral extraction evidence.<sup>67</sup>

88. As discussed in Ms Hunter’s evidence these amendments are consistent with the direction set out in the NPS-IB requiring local authorities to include provisions to enable the continuation of specified established activities.<sup>68</sup>
89. The amendments are also consistent with the intent of broader TTPP framework as set out in the Section 32 evaluation. As set out in paragraph 7 the Section 32 evaluation recognises the economic importance of mineral extraction to districts and identified enabling the smooth transition of CML sites into the TTPP as a high priority to support social and economic wellbeing on the West Coast.<sup>69</sup>
90. As the MINZ and BCZ appear to have been founded on the premise of mirroring existing licences, permits and/or resource consents these zones aim to specify “*established activities*” for the purposes of Clause 3.15(4) of the NPS-IB.<sup>70</sup>
91. As outlined in Ms Hunter’s evidence Bathurst supports the inclusion of reference to “*established activities*” in Policy ECO-P2 that clearly links that effects are linked to what has already been authorised to occur in existing licences, permits and/or resource consents.<sup>71</sup>
92. In relation to Rule ECO-R1 Bathurst seeks amendments to ensure that established and operating mineral extraction activities are not undermined by conflicting chapters in the TTPP. As currently drafted, there is no clear provision for disturbing indigenous vegetations or SNAs in Rule ECO-R1 when it is associated with an existing mineral operation.<sup>72</sup> This has the potential to conflict with the permitted activity status in the BCZ which is intended to provide for existing operations to continue.
93. As Ms Hunter has outlined in her evidence this conflict can be resolved by adopting the definition of “*lawfully established*” proposed in Ms Hunter’s mineral extraction evidence.<sup>73</sup>
94. As submitted in previous hearings a more effective approach to ensuring established and operating activities enabled and provided for in the MINZ and BCZ are not undermined by other chapters to add a standalone rule to either the BCZ or ECO provisions. A potential approach is set out in Ms Hunter’s evidence and would

<sup>67</sup> Statement of Evidence of Claire Hunter, Topic 13, 29 April 2024 at [30].

<sup>68</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [32].

<sup>69</sup> Section 32 Evaluation, Report Fourteen Mineral Extraction at [2.1].

<sup>70</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [35].

<sup>71</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [36].

<sup>72</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [53].

<sup>73</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [53].

anticipate potential conflicts with indigenous biodiversity in the area and establish a consenting pathway that directly aligns with the intent of the TTPP and NPS-IB.<sup>74</sup>

### **Functional Need**

95. Bathurst sought amendments to Policy ECO-P2 to recognise both the functional and/or operational need of activities of activities located within areas of significant indigenous vegetation or significant habitats of indigenous fauna.
96. As set out in Dr Bramley's evidence coal extraction from the Buller Plateau and elsewhere, as well as necessary ancillary activities often have to occur in areas where it will conflict with indigenous biodiversity as it must be carried out where the coal resource is located.<sup>75</sup>
97. Bathurst supports the Section 42A Report recommendation to redraft Policy ECO-P2 to include reference to functional and/or operational need on the basis that it is consistent with and gives effect to:
- (a) higher order policy documents such as the NPS-IB and NPS-IB; and
  - (b) the RPS which expressly recognises that some activities (the important activities listed, including mineral extraction) can only occur in certain places because of the functional and/or operational needs of the activity.<sup>76</sup>

### **Consistency with the National Policy Statement for Indigenous Biodiversity**

98. Ms Hunter's evidence proposes amendments to Policy ECO-P2 and Objective ECO-O2 to ensure consistency with the NPS-IB. These amendments:
- (a) clarify in Objective ECO-O2 that the relevant test as set out in the NPS-IB is to achieve no overall loss across New Zealand; and
  - (b) clarify that Policy ECO-P2 applies to SNAs scheduled in Schedule 4 and not all areas of indigenous biodiversity.
99. The amendments proposed by Ms Hunter to Policy ECO-P2 have been added to the recommended version in the Section 42A Report which Bathurst broadly supports subject to the amendments in Ms Hunter's evidence.
100. These amendments are necessary to ensure that the TTPP gives effect to the NPS-IB direction which has been discussed in detail in these legal submissions.

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<sup>74</sup> Statement of Evidence of Claire Hunter, Topic 10B, 30 July 2024 at [55].

<sup>75</sup> Statement of Evidence of Gary Bramley, 30 July 2024 at [51].

<sup>76</sup> West Coast Regional Policy Statement, explanation to Policy 5.2.

101. Overall, we submit that the drafting of Policy ECO-P2 and Objective ECO-O2 outlined in Ms Hunter's evidence is consistent with the current direction in the NPS-IB which:
- (a) focuses on maintaining indigenous biodiversity across New Zealand so that there is no overall loss and ensuring that this protection contributes and provides to the social, economic and cultural wellbeing of people and communities;
  - (b) recognises that coal mining is a functionally and operationally constrained activity that contributes to New Zealand's economic and social wellbeing;
  - (c) that there may be inherent conflicts between functionally and operationally constrained activities and areas of significant indigenous biodiversity; and
  - (d) expressly provides a pathway for such activities provided the effects are managed in accordance with the effects management hierarchy.

## CONCLUSION

102. Bathurst supports the recognition of the economic importance of mineral extraction to the West Coast in the TTPP and the enablement of mineral extraction activities in the MINZ and BCZ.
103. The relief sought on the ECO Chapter seeks to ensure that the protection provided in the ECO Chapter works alongside with, and does not trump, the enablement provisions of the BCZ and MINZ. Achieving this balance will ensure that the significant economic benefits mineral extraction has for the West Coast continues to be enabled. The relief sought by Bathurst achieves this balance as supported by the evidence of Dr Bramley and Ms Hunter.



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