

Before the Hearing Commissioners  
appointed by the Grey District Council  
and the West Coast Regional Council

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

In the matter of Resource consent applications by TiGa Minerals and Metals  
Ltd to establish and operate a mineral sands mine at State  
Highway 6, Barrytown (RC-2023-0046; LUN3154/23)

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**Legal submissions on behalf of TiGa Minerals and Metals Limited**

5 February 2024

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## **Naia te mihi kit e manawhenua, Te Rūnanga o Ngāti Waewae**

### **Naia te mihi ki a koutou**

### **Tēnā tatou**

#### **May it please the Commissioners**

- 1 TiGa Minerals and Metals Limited (**TiGa**) seeks all resource consents necessary to establish and operate a mineral sands mine at State Highway 6, Barrytown (**Proposal** and the **Site**).
- 2 The targeted minerals are fixed in location within strandline deposits formed by tidal and wave action over many thousands of years along the Barrytown Flats<sup>1</sup> The deposit is considered world class with a unique mineral suite that produces two core product streams, ilmenite and garnet, and two by product streams, zircon and gold<sup>2</sup>. These minerals have rising international demand as countries move to a low emission carbon economy and produce more renewable energy<sup>3</sup>.
- 3 The proposal before the Panel is to mine heavy mineral concentrate to export. There may be opportunities for secondary processing (i.e. high-value mineral separation) at a local industrial site in the future. This would not occur on the Site, nor does it form part of this Application. Why do I raise this? Because it provides some insight into the potential the mineral sand industry has for Tai Poutini/West Coast and Aotearoa.
- 4 Establishing mineral sand operations to extract a heavy mineral concentrate is the first step in this developing industry, and will be complementary to the opening of Greymouth and Westport Ports<sup>4</sup>, and advancing local research programmes focused on opportunities to add high value end products<sup>5</sup>.
- 5 Promoting a domestic mineral industry falls squarely within:
  - (a) the Government's Minerals and Petroleum Resources Strategy for Aotearoa New Zealand 2019-2029 ("Responsibly Delivering Value"<sup>6</sup>) where the

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<sup>1</sup> SoE R Brand, at [11].

<sup>2</sup> SoE R Brand, at [12].

<sup>3</sup> SoE R Brand, at [18].

<sup>4</sup> SoE J Berry at [18].

<sup>5</sup> SoE R Brand at [45].

<sup>6</sup><https://www.mbie.govt.nz/dmsdocument/7148-responsibly-delivering-value-a-minerals-and-petroleum-strategy-for-aotearoa-new-zealand-2019-2029>

minerals sector is identified for a significant role to provide necessary raw materials for clean-technology; and

- (b) Te Whanaketanga Te Tai Poutini West Coast 2050 Strategy (a collective community commitment supported by all local authorities and mana whenua) which identifies the competitive advantage the region has in the mining sector and in natural resources which can be utilised to support the regenerative economic future, while protecting the environment for future generations<sup>7</sup>; and
- (c) The West Coast Regional Policy Statement (WCRPS), a second generation statement, which:
  - (i) identifies that the West Coast is rich in its level of remaining indigenous biological diversity – having 84% of its land under the control of the Department of Conservation (**DoC**). In a national context, this is one quarter of all protected land in Aotearoa. In addition, there is roughly 40,647 km of streams and rivers in the region, of which 33,094 km (81%) are in DoC managed lands. This is 10% of the total length of rivers in Aotearoa<sup>8</sup>.
  - (ii) seeks to protect the coastal environment and indigenous biological diversity, *and* provide for appropriate development to enable people and communities to maintain or enhance their economic, social and cultural wellbeing<sup>9</sup>. The WCRPS states that minerals like ilmenite and garnet will be used in future to provide for people's economic wellbeing and development.<sup>10</sup> New activities near land with "significant mineral resources" are sought to be managed<sup>11</sup> to preserve the ability to use these resources.

6 So, will this proposal promote sustainable management? This is the ultimate test for the mineral sand mining at Barrytown flats.

7 TiGa, under their previous name of Barrytown JV Limited, had applied for resource consent for a larger disturbance area and deeper mining operation at the Application Site two years ago. That application was declined, primarily due to insufficient baseline data. TiGa elected not to appeal the decision, and has

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<sup>7</sup> Te Whanaketanga Te Tai Poutini West Coast 2050 Strategy, page 14.

<sup>8</sup> WCRPS, page 25.

<sup>9</sup> Objective 9.1 and 9.2, Chapter 9 Coastal Environment RPS.

<sup>10</sup> Background to the issues, Chapter 9 Coastal Environment RPS.

<sup>11</sup> WCRPS, p56 - **Significant mineral resource**, for the purpose of Chapter 5 Use and Development of Resources Policy 2(b)(i), means the monetary value of the mineral resource is significant to the local community, and employment is created in extracting the resource, based on the latest information available about the resource at the time.

subsequently spent an additional two years refining mineral resource definition, mine planning, gathering baseline data, and confirming local hydrology. This has resulted in a significantly different application before you today.

- 8 The approach taken to this application is also different. Upfront community engagement<sup>12</sup>, partnerships with mana whenua<sup>13</sup> and discussions with willing participants has occurred. TiGa has worked with the fifth-generation farming landowner to ensure positive environmental outcomes for rehabilitation, which do not compromise the long-term productivity of farming<sup>14</sup>. TiGa is working with a developer to ensure staff housing is available<sup>15</sup>.
- 9 TiGa requested the Application be publicly notified for the community to be heard. Meaningful consideration of the submissions has occurred, with numerous amendments being made to the Proposal, which is detailed in the pre-circulated evidence – the most significant being no mining or trucking outside daylight hours. Mr Brand has expressed that TiGa intends to be a good neighbour, and a constructive and public-spirited part of the Barrytown and wider West Coast community<sup>16</sup>.
- 10 You'll hear from the experts today that this Proposal before you has been designed to ensure a feasible and sustainable mining operation, but one with protection of the environment and matters of national importance at the forefront of their considerations:
  - (a) The natural character of the coastal environment (including the Coastal Marine Area (**CMA**)), wetlands, and rivers and their margins will be preserved.
    - (i) The Site is in the coastal environment but is not an area of outstanding or high natural character<sup>17</sup> It does not contain any outstanding natural features or landscapes, and adverse effects on these areas beyond the Site are agreed by the landscape experts to be less than minor<sup>18</sup>. Four hectares of new riparian wetland, coastal and boundary planting will be implemented within the first 1.5 years of mining and maintained

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<sup>12</sup> SoE R Brand, at [46]-[47].

<sup>13</sup> SoE R Brand, at [44]-[45].

<sup>14</sup> SoE R Brand, from [49].

<sup>15</sup> SoE R Brand, at [48].

<sup>16</sup> SoE R Brand, at [55].

<sup>17</sup> JWS, Landscape at [6]-[9].

<sup>18</sup> JWS, Landscape at [7].

throughout the consent period (98.5% of this will be retained on exit from the Site)<sup>19</sup>.

- (ii) Beyond the Site, there is higher natural character (i.e. Canoe Creek Lagoon and Canoe Creek). The landscape experts agree the Proposal will not have significant natural character effects while operating, and will have positive effects upon project completion<sup>20</sup>.
  - (iii) Hydrological function of the freshwater creeks, ponds, wetlands, springs and underlying groundwater systems will be preserved during the proposed activities as essentially the same flow patterns would be sustained throughout with careful water management and monitoring<sup>21</sup>.
  - (iv) Water quality parameters will protect aquatic species and not change visual clarity<sup>22</sup>.
  - (v) The mining operation is set back and will safeguard the integrity, form and function of the coastal processes, beach and natural defences in the short-term and over the long-term<sup>23</sup>.
- (b) There is no significant indigenous vegetation or habitats within the Site and the mine disturbance area itself has been assessed as having low ecological values.
- (c) Ecologically high value sites are present outside the area to be mined. These habitats are regionally significant, or in the case of the tāiko colony, nationally significant. Necessary mitigation and management actions have been proposed to provide certainty that the level of adverse effects on ecological values due to noise, disturbance, lighting and changes to hydrology beyond the boundary is minor or less than minor<sup>24</sup>. Adverse effects on the proposed SNA can be avoided<sup>25</sup>. A wetland area will be constructed at the completion of mining, which is expected in time to

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<sup>19</sup> SS N Crawford, at [18].

<sup>20</sup> JWS - Landscape, 29 January 2024 at [14].

<sup>21</sup> SoE J Rekker at [53].

<sup>22</sup> SoE M Fitzpatrick at [44] and [45].

<sup>23</sup> SoE G Teear, at [16].

<sup>24</sup> SoE G Bramley at [168].

<sup>25</sup> SoE G Bramley at [175].

contribute to the adjoining and local significant habitats of indigenous fauna<sup>26</sup>.

- (d) The Site and beyond contain at 'At Risk' (Declining) fish species within the freshwater waterbodies<sup>27</sup>, and water quality conditions are proposed which will protect aquatic habitats, including the coastal lagoon to which Collins Creek and the Northern Drain both contribute. It is considered adverse effects on fish and aquatic macroinvertebrates will be avoided<sup>28</sup>.
- (e) The mining footprint is within highly modified humped and hollowed farmland. There are no known archaeological or heritage sites. The relationship of mana whenua, Te Runanga o Ngāti Waewae has been meaningfully considered through engaging with mana whenua, and their technical experts, for a period of some four years now<sup>29</sup>. Ngāti Waewae's relationship with te taiao (the environment) and their role as Kaitiaki is acknowledged<sup>30</sup>. The current set of consent conditions reflects the Environmental Outcomes which were agreed with Ngāti Waewae relating to site water management and contaminants<sup>31</sup>. Ngāti Waewae submitted in support of the Proposal.
- (f) Public access to coastal areas will not change. The public are limited in their access to the coastal lagoons due to the legal boundaries of the Application Site and neighbouring land, which includes most of the raised beach area and coastal lagoons.<sup>32</sup>
- (g) Mining is not located in a coastal hazard risk area, and is beyond the area that will be affected by sea level rise or coastal erosion within the next 100 years<sup>33</sup>. The western end of the Site will be reinstated to at or above the existing level as part of rehabilitation<sup>34</sup>. The reinstated land and created wetland will not be more prone to coastal natural hazards, nor will the change to ground levels exacerbate any potential inundation of adjacent properties<sup>35</sup>. Stability modelling based on current understanding of the

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<sup>26</sup> SoE G Bramley at [175].

<sup>27</sup> SoE M Roper at [84].

<sup>28</sup> SoE M Roper at [18].

<sup>29</sup> SoE R Brand at [43].

<sup>30</sup> WCRPS, Chapter 3.

<sup>31</sup> SoE K McKenzie at [72].

<sup>32</sup> Refer Section 26 of the Marine and Coastal Area (Takutai Moana) Act 2011; and associated definitions: Marine and Coastal Area; Common Marine and Coastal Area; and Specified Freehold Land.

<sup>33</sup> SoE G Tear, at [76].

<sup>34</sup> SoE S Miller, attaching the Rehabilitation Plan.

<sup>35</sup> SoE G Teear, at [80].

ground model confirms the suitability of the excavation with any potential damage due to instability being contained within the 20m setback<sup>36</sup>. The risk of an extreme earthquake (M8) and coastal inundation have been assessed as low with moderate consequential damage with no specific mitigation required<sup>37</sup>. The short term use of the land for mining (5-7 years, but up to 12 years for contingencies and rehabilitation), and transient nature of the mining operation is a relevant consideration to assessments of risk.

- 11 The Application has been assessed by experienced objective technical experts, peer reviews completed (including internally) and additional evidence provided at the request of the West Coast Regional Council (**WCRC**) and the Grey District Council (**GDC**) (collectively, the **Councils**). Where better outcomes for the environment can be feasibly be achieved, mitigation and other effects management measures have been proffered by TiGa.
- 12 Overall, the Proposal, with the conditions proffered, has been assessed as having no more than minor effects on the environment, and consistent with the most directive policies relevant to the application. These policies within the NZCPS, NPSIB, NPSFM, and WCRPS seek avoidance of effects on threatened and at risk indigenous species and avoidance of hydrological effects on wetlands (which could give rise to adverse effects on wetland ecosystems)<sup>38</sup>.
- 13 TiGa has its roots in a joint venture between New Zealand investors and intends to work collaboratively with, and deliver economic benefits and employment opportunities to the West Coast community with minimised environmental impact. The economic benefits are assessed as regionally significant by two independent economic experts.
- 14 It is submitted that the sustainable management purpose of the Resource Management Act 1991 (**RMA**) will be met, and the Proposal is deserving of consent.

#### **Matters addressed in submissions**

- 15 My submissions address:
  - (a) Scope - amendments to the Application and requirements for consent;
  - (b) Existing environment and permitted baseline;

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<sup>36</sup> SoE C Wylie, at [63].

<sup>37</sup> SoE C Wylie, at [65].

<sup>38</sup> SoE K McKenzie at [14].

- (c) Legal tests:
  - (i) NES-F Regulation 45D - Gateway Test;
  - (ii) Sections 104, 105 and 107, Part 2 RMA.
  - (iii) RMA reforms not to apply
- (d) Supporting submissions;
- (e) Plan and policy statement provisions:
  - (i) Avoiding adverse effects;
  - (ii) Precautionary approach;
  - (iii) NPS-IB.
- (f) Key matters arising:
  - (i) Greenhouse gas emissions;
  - (ii) Emissions Reduction Plan and National Adaptation Plan;
  - (iii) Radiation Act
  - (iv) Wildlife Act
  - (v) Other matters – visual amenity, SH6, property values, social impacts, stock fencing, finite resources, and EIANZ guidelines.

### **Amendments to the Application**

16 Amendments to design and other details of an application may be made up until the close of a hearing, provided they are within scope defined by the original application<sup>39</sup>. An amendment to an application must not be (a) of a significantly different scale and intensity and (b) have significantly different effects.<sup>40</sup> The amendments seek to further minimise potential adverse effects through additional environmental controls and are within scope.

17 Mr Durand, the consultant planner to WCRC, considers discharge permits are required for ionizing radiation and greenhouse gas emissions<sup>41</sup>. Mr Geddes, the

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<sup>39</sup> *Shell New Zealand Limited v Porirua City Council* CA 57/05, 19 May 2005 at [7].

<sup>40</sup> *Atkins v Napier City Council* (2008) 15 ELRNZ 84 at [32]. See also *H.I.L.Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45 for a general overview of the case law on amendment.

<sup>41</sup> WCRC Section 42A



consultant planner to GDC, considers consent is required under a rule which he considers should have immediate legal effect under the proposed Te Tai o Poutini Plan (TTPP) (despite this rule not being publicly notified as having immediate legal effect)<sup>42</sup>. Ms McKenzie does not consider consent is required for these matters. All planners agree that should these consents be required, the overall the proposal remains a discretionary activity<sup>43</sup>. If these consents are required they are squarely within the scope of the application<sup>44</sup>.

### Existing environment and permitted baseline

- 18 It is important to determine the environment against which the proposal should be assessed. The environment includes not only the environment as it currently exists, but also the environment as it would exist with permitted activities and/or unimplemented resource consents.<sup>45</sup> These factors provide context for assessing the appropriateness of the Proposal that is before you.
- 19 The landowner of the Application Site holds a Certificate of Compliance for two sheds on the Application Site measuring 600m<sup>2</sup> and 700m<sup>2</sup> respectively and each 9.5m high (the **Sheds CoC**).<sup>46</sup> The Landowner has since agreed with TiGa that on completion of mining one shed will remain that can be used for farming purposes. From a legal perspective, due to these circumstances the Shed CoC is not likely to be implemented alongside the new consents sought.<sup>47</sup> But as Mr Geddes records the Shed CoC is relevant as it provides an example of the visual effects that could occur on the Site<sup>48</sup>.
- 20 While the technical assessments prepared for TiGa do not rely on the permitted baseline, section 104(2) RMA provides the Panel with discretion to disregard any adverse effect of the Application arising from a 'permitted baseline', being an activity with the relevant effect that is permitted in a national environmental standard or a plan.
- 21 There is no requirement that a permitted activity be of the same type as the proposed activity in order to apply the permitted baseline – the permitted baseline calls for a comparison of effects. Whether or not the permitted activity is 'fanciful'

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<sup>42</sup> GDC Section 42A at [52](a).

<sup>43</sup> GDC Section 42A, at [56], WCRC Section 42A, at [88].

<sup>44</sup> This is acknowledged by WCRC Section 42A at [34].

<sup>45</sup> *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] 12 ELRNZ 299, at [84].

<sup>46</sup> See *Attachment D – Certificate of Compliance* in the original application documents.

<sup>47</sup> *Keir v Auckland Council* [2023] NZHC 1658 at [50]-[52].

<sup>48</sup> GDC Officer's Report at [100].

may have a bearing on your decision of whether or not you exercise your discretion.<sup>49</sup>

- 22 The permitted matters in the rural zone (which includes some mining activity) are discussed by Ms McKenzie<sup>50</sup> and Mr Geddes<sup>51</sup>.
- 23 In addition, the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) provides for types of short-term and temporary activities which result in water level range or hydrological function changes for natural inland wetlands to be permitted when compliance with conditions is achieved<sup>52</sup>, including:
- (a) Water quality – discharges must, after reasonable mixing, not cause a change in colour or visual clarity, contaminate freshwater to the extent it is not suitable for farm animals to drink or have adverse effects on aquatic life that are more than minor. Debris and sediment must not be placed within 10m of the wetland or anywhere it may enter the wetland<sup>53</sup>.
  - (b) Natural movement of water (into, within and from) can be altered for temporary taking, use, damming and diversions for a period up to 14 days (after which the bed profile and hydrological regime must be returned to their original condition). This period extends to 30 days (or a restricted discretionary activity. If damming, the dam must be no higher than 600mm, and a diversion using a pump is required to have a fish screen<sup>54</sup>.
  - (c) Earthworks, land disturbance and vegetation clearance conditions require implementation of erosion and sediment control measures to minimise effects of sediment on wetlands, stabilise and contain exposed soil/disturbance until vegetation covers more than 80% of the Site and earth cannot remain bare for longer than 3 months<sup>55</sup>.
  - (d) Vegetation and birds and fish habitats – the activity must not smother indigenous vegetation by debris and sediment, disturb roosting or nesting birds during their breeding season, disturb an area listed in a regional plan

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<sup>49</sup> *Rodney DC v Eyres Eco-Park Ltd* [2007] NZRMA 1 (HC), at [37].

<sup>50</sup> SoE K McKenzie discussing earthworks, mining and other non-rural activities, buildings, light, noise and traffic at [59], [82-83].

<sup>51</sup> GDC Section 42A discussing building, noise, light and traffic effects at [99], [102], [154], [250].

<sup>52</sup> For example – NPS-F Regulations 38(3)(c) and (d); 40(3)(c) and(d); 42(3)(c) and (d).

<sup>53</sup> NPS-F, Regulation 55(3).

<sup>54</sup> NPS-F, Regulation 55(3) and 55(5).

<sup>55</sup> NPS-F, Regulation 55(8).

as a habitat for threatened indigenous fish or as a fish spawning area (during spawning season)<sup>56</sup>.

- 24 The National Policy Statement for Greenhouse Gas Emissions from Industrial Process Heat 2023 and the associated National Environmental Standards apply to "heat devices" (**NES-GHG**). Heat devices produces industrial process heat (for example, a boiler, furnace, engine, or other combustion device, excluding generators) and doesn't apply to the proposal. Under the NES-GHG, resource consent for low and medium temperature heat devices is not required for less than 500 tonnes of CO<sub>2</sub> emitted per year.

## Legal Tests

### NES- F "Gateway Tests"

#### *Regulation 45D*

- 25 A National Policy Statement for Freshwater was first introduced in 2011. It has since been amended six times<sup>57</sup>. Amendments to the National Policy Statement for Freshwater Management 2020 (**NPS-FW 2020**) most relevant to this Proposal took effect on 5 January 2023. The definition of natural inland wetland was refined, and additional consent pathways, including for the purposes of extraction of minerals and ancillary activities was provided. These have not yet been included in the regional planning documents.
- 26 To trigger the need for consent under these provisions, potential drainage or change to the water level range or hydrological function of a natural inland wetland is required. Gateway tests need to be passed for the activity to retain a discretionary activity status and proceed to be assessed under section 104 RMA.
- 27 Resource consent is required when the extraction of minerals and ancillary activities are within 100m of a natural inland wetland (as defined) and:
- (a) earthworks or land disturbance which is likely to result in the complete or partial drainage of all or part of the natural inland wetland is carried out;
  - (b) if water is taken, used, dammed or diverted which will change or is likely change the water level range or hydrological function of the wetland;

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<sup>56</sup> NPS-F, Regulation 55(9).

<sup>57</sup> 2014, 2017, 2020, February 2023, and December 2023 (quashing of clause 3.33 by CA).

- (c) if water is discharged into water where the discharge will enter the wetland and will change or is likely change the water level range or hydrological function of the wetland.

28 The evidence provided by the Applicant is:

- (a) the hydrological function of wetlands will be preserved during the proposed mining activities as essentially the same flow patterns would be sustained throughout<sup>58</sup>.
- (b) waterbody water levels and water course flows will be maintained such that the median is not reduced on pre-mining median levels or flows (i.e the water level range would not change)<sup>59</sup>.
- (c) water management measures will be deployed that avoid and minimise water-related effects are proposed (such as infiltration trench, injection wells, or augmentation) to ensure these outcomes<sup>60</sup>.
- (d) there are requirements to monitor groundwater level at specified piezometers on the mine periphery, along with groundwater levels in the Northern Boundary drain, flow monitoring of Collins Creek, and Water level monitoring of Canoe Creek Lagoon will trigger early awareness of any reducing effect and focused mitigation as it is required.

29 Notwithstanding this, resource consent is sought pursuant to regulation 45D NES-F *should* the activity be within 100m of a natural inland wetland, and *should* it result in a temporary partial reduction in the water level range of that wetland.

#### *Natural Inland Wetlands*

30 The NPS-FW 2020 defines natural inland wetlands. It excludes (most relevantly) wetlands which:

- (a) are in the CMA<sup>61</sup>;

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<sup>58</sup> SoE J Rekker, at [53].

<sup>59</sup> SoE J Rekker, at [240].

<sup>60</sup> Condition 26.

<sup>61</sup> By way of background, in 2021, the Environment Court declared the NES-F did not apply to coastal wetlands, estuaries, bays, and other areas in the CMA (*Bay of Islands Maritime Park Incorporated v Northland Regional Council* [2021] NZEnvC 6). This decision was over turned by an appeal to the High Court on appeal, such that natural wetlands in the CMA were also to be subject to the NES-F (*Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113.) The CMA was then explicitly excluded through legislative amendment. Resource Management (National Environmental Standards for Freshwater) Amendment Regulations (No 2) 2022 – came into force on 5 January 2023. The improved pasture and natural wetland definition was revoked. The reference to "Natural Wetland" was replaced with "natural inland wetland" throughout the regulations. Every reference in the NES-F is now to "natural inland wetland".

- (b) are deliberately constructed;
- (c) have developed in or around a deliberately constructed water body, since the construction of the water body.

- 31 Dr Bramley assessed no natural inland wetland within the Application Site<sup>62</sup>.
- 32 As Ms McKenzie has identified, both the operative and proposed Regional Coastal Plans has delineated the CMA at the entrances to Deverys Creek and Collins Creek, with the downstream Canoe Creek and Deverys Lagoons logically being part of the CMA<sup>63</sup>. The CMA in the Regional Coastal Plan was agreed with the Minister of Conservation, Regional Council and Grey District Council<sup>64</sup>.
- 33 Dr Bramley has also assessed these lagoons and their adjoining vegetation from an ecological perspective as coastal wetlands. He considers Rusty Pond to be inland<sup>65</sup> but acknowledges it was constructed as a result of previous mining operations<sup>66</sup>. Dr Bramley considers there may be or may not be natural inland wetlands on the adjoining property to north and south, despite still being grazed<sup>67</sup>. He refers to expert evidence of Mr Nichol previously provided on behalf of the neighbouring Langridge family<sup>68</sup> and agrees it is highly likely there are wetland areas, but he can't determine whether they are natural inland wetlands based on his knowledge of the area, and the information before him.
- 34 Notwithstanding this evidence, natural inland wetlands have been assumed as being within 100m of the proposed mining area<sup>69</sup>. In my submission, this approach is appropriately precautionary, given the nature of the adjoining environment, it's private ownership and the lack of access to comprehensively assess it.
- 35 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*<sup>70</sup> concerned an appeal point to the High Court on whether the Environment Court was wrong in its application of the NPS-FW 2020 because it failed to determine whether a wetland was a natural inland wetland. With respect to whether part or all of the valley concerned was a natural inland wetland, the Environment Court was unable to

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<sup>62</sup>SoE Dr Bramley at [55].

<sup>63</sup> SS Ms McKenzie at [25-27].

<sup>64</sup> SS Ms McKenzie at [24].

<sup>65</sup> SoE Dr Bramley at [151].

<sup>66</sup> SoE Dr Bramley at [33], [151].

<sup>67</sup> SoE Dr Bramley at [57].

<sup>68</sup> For completeness it is recorded the definition of natural inland wetland has changed since Mr Nichols assessment in the previous hearing. Permission was not granted to review the detail of the previous work completed by Mr Nichol for the Langridge family.

<sup>69</sup>SS Dr Bramley at [10].

<sup>70</sup> *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 at [36] ([Link](#))

reach a firm conclusion (struggling with the imprecise definition in the NPS-FW, and lack of evidence), but it ultimately concluded it could constitute a wetland, and the specific infrastructure exception (in cl 3.22 NPS-FW) could be relied on. The High Court found no error in this approach, stating "*whether the lower Managapekeke constitutes a natural inland wetland is immaterial if the specified infrastructure exception in clause 3.22(1)(b) would apply anyway*".

#### *Consenting pathway - Gateway tests*

- 36 The Panel must be satisfied the extraction of minerals will provide significant national benefits, that there is a functional need for the activity, and that the effects mitigation hierarchy has been applied (avoided, minimised and remedied, then offset or compensated (in that order) <sup>71</sup>.
- 37 Once passed through the gateway test, the NPS-FM that require councils to impose conditions on resource consents to apply the effects management hierarchy and require monitoring of a natural inland wetland at a scale commensurate with the risk of the loss of extent or values of the wetland.
- 38 The Applicant evidence and WCRC peer review considers the activity to be a regionally significant activity<sup>72</sup>. It is submitted, the first limb of the gateway is passed.
- 39 With respect to the "functional need" limb of the gateway tests:
- (a) The Panel must be satisfied there is "*a functional need for the extraction of minerals and ancillary activities in that location*".
  - (b) A functional need is defined as: "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.*"<sup>73</sup>
  - (c) The evidence demonstrates the minerals sought to be extracted are location specific<sup>74</sup> and the proposed ancillary activities are necessary to achieve that extraction<sup>75</sup>.
  - (d) It is submitted, the functional need limb of the gateway test is met.

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<sup>71</sup> Regulation 45D(6) NES-F.

<sup>72</sup> SoE J Ballingall, WCRC Section 42A at [118], [149].

<sup>73</sup> NPS-FM Clause 3.21

<sup>74</sup> SoE S Miller at [27] – [29], Figure 2 [50].

<sup>75</sup> SoE S Miller at [20]-[21] describes the limits to the activities in his design principles and factors when selecting an appropriate mining method, and [39]

- 40 The extent and design (such as extraction methodologies and processes selected) for the Proposal are relevant to application of the effects management hierarchy. This is the third limb of the gateway test. In this respect, effects have been avoided, where practicable, or minimised, on any inland natural wetland including through:
- (a) Considering alternative methods of extraction. The current extraction method was selected as it would have the least impact on water management and wetlands<sup>76</sup>. Other extraction methods were rejected, including due to water quality management and local water table impacts and delayed rehabilitation<sup>77</sup>.
  - (b) Limiting activities in proximity to wetlands to those immediately required for the mining extraction such as topsoil and overburden removal and mining void rehabilitation, infiltration trenches and reinjection wells for water management. All other ancillary activities such as the processing plant, access road, mine water facilities are set back<sup>78</sup>.
- 41 The experts also confirm that the effects management hierarchy has been applied to managing these effects<sup>79</sup>.
- 42 Mr Durand at the time of writing his recommendation considered that some 13 questions<sup>80</sup> need to be asked and answered to show *the activity of mineral mining cannot reasonably occur elsewhere*<sup>81</sup>. I disagree. A functional need in one location does not take away from a functional need elsewhere in an environment.
- 43 The High Court has considered the words "*can only occur*" within the *functional* need definition for specified infrastructure in the NPS-FM<sup>82</sup>. The Court did not interpret the focus to be on the need for *a proposal* to locate in a particular location. To interpret the "location" as the natural inland wetland overlooks the broader focus in the definition of "functional need". The focus is not on a particular location, but on the need for an activity to locate in a particular environment. And the term environment as defined is a much broader concept than a "location".<sup>83</sup> The Court considered the Environment Court, in its context and fact specific enquiry, was

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<sup>76</sup> SoE S Miller at [51].

<sup>77</sup> SoE S Miller at [33]-[37].

<sup>78</sup> SoE S Miller at [51], SoE J Rekker at [32].

<sup>79</sup> SoE K McKenzie at [14].

<sup>80</sup> WCRC Section 42A Report, at [163].

<sup>81</sup> WCRC Section 42A Report, at [164].

<sup>82</sup> *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629, at [47], [48]-[49], [53]-[55]. The High Court considered the appeal point: "that the Environment Court wrongly concluded that there is a "functional need" for the project in terms of clause 3.22(1)(b)(iii) of the NPS-FW. Clause 3.22(1)(b)(iii) requires a regional council to be satisfied that "*there is a functional need for the specified infrastructure in that location*".

<sup>83</sup> *Poutama Kaitiaki Charitable Trust*, at [53]-[55].

correct to find the Mt Messenger Road project *can only* occur in the relevant *environment*, namely a valley environment. Targeted minerals are fixed in location. However, a similar interpretation of environment to the broader coastal environment of Barrytown Flats could also apply.

44 For context, it is also noted that:

- (a) The WCRPS specifically seeks to manage new activities near land with "significant mineral resources"<sup>84</sup> (and land likely to be needed for regionally significant infrastructure) because "*some activities can only occur in certain places because of the functional needs of that activity*". The extraction of minerals such as ilmenite and garnets are acknowledged as an industry based on natural resources in the coastal environment, and provision is made for activities that have a technical, functional or operational locational requirement<sup>85</sup>.
- (b) The NZCPS recognises that functionally some uses and developments can only be located in the coastal environment (Objective 6) and specifically recognises the extraction of minerals as one such activity (Policy 6).
- (c) The Ministry recommendation report for the consenting pathway changes (*Essential Freshwater Amendment Report May 2022*) stated as "*in cases where mineral deposits are situated in natural inland wetlands there is a clear functional need for extractive mining activities to be undertaken there*".<sup>86</sup> and "*we consider that there is a functional need for mining activities to occur where the mineral is located, and in some situations, this may be within a natural inland wetland. We consider that the test for national and/or regional significance is sufficient to ensure that only necessary mining activities can occur in a natural inland wetland and that this will mitigate concern that consents for mining would be issued for purely economic reasons.*" There is no reference to alternative assessments in the recommendations.

45 The Environment Court recently noted the difficulties it has with the NES-F consenting pathway amendment for landfills insofar as its requirement for alternatives to be satisfied is so expansive as to be impossible to meet<sup>87</sup>. Unlike mineral extraction and ancillary activities, the gateway tests for landfills (and urban development) *do expressly require* consideration of alternatives outside the

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<sup>84</sup> Chapter 5 Use and Development of Resources Policy 2(b)(i)

<sup>85</sup> WCRPS Chapter 9 (Coastal Environment), Policy 4.

<sup>86</sup> Essential Freshwater Amendment Report, at pages 47-48:  
<https://environment.govt.nz/assets/publications/essential-freshwater-amendments-report-recommendations-summary-submissions-may2022.pdf>

<sup>87</sup> *Te Runanga o Ngati Whatua v Auckland Council* [2023] NZEnvC 277 at [239].



application area and surrounding environment (i.e. no practicable alternative location in the region; or every other practicable alternative location in the region would have equal or greater adverse effects on a wetland).

#### *Section 104 RMA*

- 46 The Application has an overall discretionary activity status. Pursuant to section 104(1) RMA, the Panel must have regard to the actual and potential effects of allowing the activity, including positive effects, the relevant provisions of plans, policy statements and national environmental standards or regulations, and any other matter considered relevant and reasonably necessary to determine the application. This statutory framework is well known to this Panel, and is addressed in Ms McKenzie's planning evidence and the Officer's Reports.
- 47 The Panel's evaluation requires giving 'genuine thought and attention' to the various matters set out in section 104 RMA.<sup>88</sup> To "have regard to" does not require you to "give effect to". The matters of consideration under section 104 are on equal footing, so that none of the subsections are to be elevated to a primary status.<sup>89</sup> All matters are to be considered and given such weight as you see fit.<sup>90</sup>
- 48 There is an evidential burden on all parties to produce evidence tending to support an allegation.<sup>91</sup> It is not enough to speculate, to simply entertain a possibility, pose questions, or to assert that something "may be" an outcome of this proposal. That is not the threshold. There must be evidence to support a particular conclusion. Caution should be exercised where witnesses are opposed to the project, while also providing expert evidence.
- 49 The Panel's finding of effects is directly relevant to the imposition of conditions of consent, should resource consent be granted. Section 108AA RMA requires that conditions must be directly connected to an adverse effect of the activity on the environment or an applicable district or regional rule, or a national environmental standard (unless the Applicant agrees to the condition).

#### *Sections 105 and 107 RMA*

- 50 Section 105 RMA requires the Panel to have regard to certain matters for discharge permits and pursuant to section 107(1) RMA, unless one of the section 107(2) exceptions exist (exceptional circumstances, temporary discharges or

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<sup>88</sup> *Foodstuffs South Island Limited v Christchurch City Council* (1999) 5 ELRNZ 308 (HC), at p 309.

<sup>89</sup> *Norwood Lodge v Upper Hutt City Council* HC Wellington CIV-2004-485-2068; *Henderson v Papakura District Council* A019/03 at [34].

<sup>90</sup> *Kennett v Dunedin City Council* (1992) 1A ELRNZ 168 at 182. *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25].

<sup>91</sup> *West Coast Abattoir v Westland District Council* M126/82 and *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, as confirmed more recently in *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75 at p 7-8.

maintenance works), the Panel cannot grant consent allowing any discharge into a receiving environment which would, after reasonable mixing, likely give rise to the listed effects.

## *Part 2*

- 51 The obligation to refer to Part 2 remains unless the Panel is assured that it would not add to the evaluative exercise under s104 RMA to do so.<sup>92</sup> If a fair appraisal of the objectives and policies means the appropriate response to a particular application is obvious, it effectively presents itself. Genuine consideration and application of relevant provisions should leave little room for Part 2 to influence the outcome.

## *Application of resource management reforms*

- 52 The Natural and Built Environment Act 2023 (**NBEA**) and the Spatial Planning Act 2023 (**SPA**, collectively, the **Reform Acts**) became law on 23 August 2023. The Reform Acts were repealed in 23 December 2023, with the RMA effectively returning to the status quo as it was prior to the Reform Acts. The Application was lodged on 27 April 2023. The Reform Acts have come and gone and are not a relevant consideration for the Panel under the Application.

## **Supporting submissions**

- 53 There is significant support for the Application. Support was provided in generic submissions identifying economic benefits and supporting the activity of mining in the district and region. I also note the following comments from supporting submitters who will not appear at this hearing:

- (a) L Mathieson (97) - "*we need all the jobs we can get. Tourism is not the only means of employment, we need balance.*"
- (b) Sandra Van Leeuwen (129) and Scott Van Leeuwen (312) – "*As a regular visitor to the Barrytown flats over the last 20 years I support the application. It is an opportunity for the area to grow economically with resident families potentially earning better wages, more families moving to the area, the school roll increasing, and other businesses establishing locally to support the increased demand for goods and services. The increased number of residents will host more visitors that will spend money in the area. It is an innovative use of pasture in the current climate of potentially expensive changes to rules around the traditional farming of livestock. The habitat after the rehabilitation is likely to support a more diverse range of species than*

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<sup>92</sup> *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [47]; in resource consent decisions it is not limited to the exceptions in *King Salmon* (uncertainty, invalidity or incomplete coverage).

*the current pasture. The minerals mined are going to be mined somewhere in the world – it is better that they are mined from an area that will be subject to rules and regulations for the duration of the project, and that will be restored after the mining is finished."*

- (c) Westpower Limited (205) – *"Westpower supports developments that are sustainable, make use of the natural resources in a environmentally friendly way, and provides economic benefits to the local West Coast economy. Westpower believe that TIGA's proposal to mine mineral sands meets these."*
- (d) P Schramm (343) – *"I believe that there is sufficient wider community and global long term benefits to offset any perceived negatives that some people feel they may incur. The perceived negatives are for a much shorter period than the benefits would provide for. In my view the perceived negatives some people are stating are not that onerous compared to the benefits that the sands will provide."*
- (e) D Skelton (346) – *"The land in question is privately owned farmland. The site has, in the past, obviously been extensively contoured with heavy machinery to aid drainage. It is not virgin land and does not contain any significant native flora or fauna as per the expert reports included in the TiGa Minerals Ltd application...The proposed activity has progressive rehabilitation which will restore the land back to productive farmland which will be more easily farmed due to enhanced drainage."*

### **Plan and policy statement provisions**

54 It is for the Panel to have regard to relevant statutory instruments and place different weight on their objectives and policies. The correct weight to be given to plan provisions flows from the provisions themselves, both their terms and their context. It is submitted:

- (a) Generally an assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole"<sup>93</sup>.
- (b) While it is appropriate to seek the plain meaning from a provision, it is not appropriate to undertake that exercise in a vacuum. Regard must be had to the immediate context, and where any obscurity or ambiguity arises it may be necessary to refer to other sections of a plan<sup>94</sup>.

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<sup>93</sup> *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25]; Referred to with approval in *Davidson R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

<sup>94</sup> *Powell v Dunedin City Council* [2004] 3 NZLR 721, at [35] (CA).

- (c) More specific or directive provisions may warrant greater weight, noting that enabling provisions can have directive character. Provisions which are qualified and seek to enable activities while controlling effects do not set environmental bottom lines<sup>95</sup>.
- (d) The addition of new national policy statements is part of the context in which the Panel must assess the Application. They inform rather than dictate the outcome of an assessment. All objectives and policies must be considered comprehensively and, where possible, appropriately reconciled.<sup>96</sup>

55 Mr Durand states that only where necessary did he regard the documents higher in the cascade than the regional plans under s104 (for example, whether the regional plans give effect to regional or national policy statements)<sup>97</sup>. I agree such an approach may be appropriate. However, having set out this position Mr Durand:

- (a) omits to make any further reference to the relevant regional provisions in his recommendation; and
- (b) proceeds to only refer to NPS-IB and NPS-FM policies in his recommendation report<sup>98</sup>.

*Avoid material harm*

56 Mr Geddes has interpreted the reference to "avoid" in Policy 11 NZCPS as an absolute reference to mean there are "no adverse effects".<sup>99</sup> This has resulted in material inaccuracies in his recommendations – any policies enabling of development activities and mineral extraction within environments containing coastal processes and indigenous biodiversity (including where activities have minor or transitory effects, or effects are to be managed according to the effects mitigation hierarchy) are stated as to be in conflict with the NZCPS<sup>100</sup>, and less weight is recommended to be given to the local documents, even where they have already incorporated the NZCPS (such as the RPS<sup>101</sup>) and more weight given to the generic national document due to this conflict<sup>102</sup>.

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<sup>95</sup> *Te Runanga o Ngati Whatua v Auckland Council* [2023] NZEnvC 277, at [243].

<sup>96</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 at [30] (in rejecting a suggestion that "environmental bottom lines" stood in the way of a proposal).

<sup>97</sup> WCRS Section 42A, at [84].

<sup>98</sup> For example, NPS-IB at [133] and NPSFM, at [178].

<sup>99</sup> Grey District Council, Officer's Report at [321].

<sup>100</sup> See for example, Officer's Report at [336], [337], [343], [396], [388], [386].

<sup>101</sup> Particularly WCRPS Chapter 7 (Ecosystems and Indigenous Biodiversity diversity), Policies 2 and 3; Chapter 9 (Coastal Environment), Policies 1 and 3.

<sup>102</sup> Grey District Council, Officer's Report at [396].

57 The WCRPS policies give effect to the NZCPS, including Policy 11, and are consistent with the position at law.

(a) WCRPS Policy 9.1 specifies that protecting the coastal environment from inappropriate development requires "*avoiding adverse effects on significant indigenous biological diversity*" and "*avoiding significant adverse effects and avoiding, remedying and mitigating other adverse effects on indigenous biological diversity*"<sup>103</sup>.

(b) Policy 9.3 seeks to provide for development in the coastal environment which maintains or enhances the social, economic and cultural wellbeing in the community and which requires the use of the natural and physical resources in the coastal environment (as is the case here), and specifically recognises that minor or transitory effects associated with development may not be an adverse effect on significant indigenous biological diversity.

(c) Policy 9.3 also allows for minor effects on indigenous biological diversity.

58 In *King Salmon*<sup>104</sup> the Supreme Court found that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of". While directive, Policy 11(a) is qualified in that it serves to "protect indigenous biodiversity in the coastal environment".<sup>105</sup> The Supreme Court commented on the interpretative relevance of such opening words in the context of Policy 13 (emphasis added):<sup>106</sup>

"Taking policy 13 by way of example, its opening words are: "To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development". Policy 13(1)(a) ("avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character") relates back to the overall policy stated in the opening words. **It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.**"

59 More recently in *Port Otago Ltd v Environmental Defence Society Inc (Port Otago)* the Supreme Court imported the term *material harm* from the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 to assist with evaluating this term "avoid"<sup>107</sup>, and confirmed adaptive management (in accordance with *Sustain our Sounds* – discussed below) may also have a role to

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<sup>103</sup> Significant indigenous biological diversity" for the purposes of Chapter 9, Coastal Environment is defined as meaning the biodiversity described in Policy 11 of the NZCPS.

<sup>104</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38, at [96].

<sup>105</sup> *Wilson v Waikato Regional Council* [2021] NZEnvC 131 at [152].

<sup>106</sup> At [145].

<sup>107</sup> *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 at [64]-[66].

play, if the effect is to avoid material harm<sup>108</sup>. In a resource consent context, and in an interim decision which considers the NPS-IB and NPS-FW, Judge Smith's division of the Environment Court has applied the word "avoid" to mean "*avoid material harm*" viewed through the lens of the Supreme Court decision in *Port Otago*<sup>109</sup>.

### Precautionary approach

- 60 Policy 3 of the NZCPS requires the adoption of a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown or little understood, but potentially significantly adverse. Clause 3.7 of the National Policy Statement for Indigenous Biodiversity (**NPS-IB**) requires the adoption of a precautionary approach when there are similar uncertainties, but the effects could cause significant or irreversible damage to indigenous biodiversity.
- 61 The Supreme Court case of *Sustain our Sounds*<sup>110</sup> is the leading authority on adaptive management, risk and precaution. It sets a gateway test of sorts for determining when adaptive management may be an appropriate response in conditions of consent, managing risk and uncertainty. The threshold of this gateway test is to 'sufficiently reduce' uncertainty, and 'adequately manage' remaining risk. Such an approach can only be adopted where there is an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve these goals.
- 62 The Supreme Court set out factors to consider, with the most important being focused on the sufficient diminishment of risk and uncertainty (factor 'd'):

[129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:

- (a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);
- (b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
- (c) the degree of uncertainty; and

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<sup>108</sup> *Port Otago*, at [67].

<sup>109</sup> *Te Runanga o Ngati Whatua v Auckland Council* [2023] NZEnvC 277, at [39]-[41]. Noting that Forest & Bird have stated publicly they intend to appeal this case.

<sup>110</sup> *Sustain our Sounds Inc v NZ King Salmon Company* [2014] NZSC 40 (*Sustain our Sounds*).

- (d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistently with a precautionary approach.

63 *Sustain our Sounds* provides further guidance on the key factors of an adaptive management framework. These include adequacy of baseline information, effective monitoring and reporting indicators, quantifiable trigger thresholds for remedial action, the ability to remedy effects before they become irreversible, and enforceable environmental objectives:

[133] The vital part of the test is contained within [129](d) above. This part of the test deals with the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty. We accept that, at least in this case, the factors identified by the Board are appropriate to assess this issue. For convenience, we repeat these here:

- (a) there will be good baseline information about the receiving environment;
- (b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;
- (c) thresholds are set to trigger remedial action before the effects become overly damaging; and
- (d) effects that might arise can be remedied before they become irreversible.

64 Judge Hassan's division of the Environment Court in *Wilson v Waikato*<sup>111</sup> determined a precautionary approach was triggered where the scale of potential effect was a population-level consequence (i.e. serious harm for a threatened mammal) but the likelihood of such was 'very low'<sup>112</sup>. The Court found that the second dimension of risk (likelihood)<sup>113</sup> was the determining factor when assessing whether there should be decline of consent or whether the risk could be addressed through conditions. The risk in that case was addressed in conditions.

65 Uncertainty in baseline information has been accepted by the Courts as an inherent part of resource allocation; as illustrated in the *Sustain our Sounds* confirmation of the Board's approach to determining whether there 'will be' adequate baseline information.

66 The key question is whether uncertainties can be sufficiently reduced, and whether remaining risk can be adequately managed, going forwards. That is not a 'no

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<sup>111</sup> *Wilson v Waikato Regional Council* [2021] NZEnvC 131.

<sup>112</sup> *Ibid*, at [105] - [106], [150].

<sup>113</sup> *Ibid*, at [108]

uncertainty' / 'no risk' approach<sup>114</sup>. The RMA is not a no risk statute, but it clearly recognises that the greater the potential effect the more stringent the assessment of risk will be.

- 67 In the absence of appropriate management actions, the mining would have the potential to cause adverse hydrology, ecology and water quality impacts. The evidence comprehensively addresses baseline data collected, effective monitoring and reporting indicators, and how the proposed conditions of consent supported by management plans will be implemented in a precautionary manner such that any effects will be mitigated before they become adverse. Mining operations will commence setback from the lagoon and wetland areas enabling adequate time for monitoring and confirming mitigation and management measures (such as for pit stability and water management).

#### *NPS-IB*

- 68 The NPS-IB came into force 4 August 2023. The objective of the NPS-IB is to achieve at least no overall loss in indigenous biodiversity across Aotearoa. The key policy provisions, clauses 3.10-3.15, apply to Significant Natural Areas (**SNA**). The NPS-IB definition of SNA includes any area of significant indigenous vegetation or significant habitat of indigenous fauna identified in a policy statement or plan at the commencement date.<sup>115</sup> 'Policy statements and plans' have an explicit definition in the NPS-IB as including any proposed plans.<sup>116</sup> PUN-W034 was notified in the TTPP. Additionally, clause 3.16 applies to new subdivision, use and development that affects indigenous biodiversity outside of SNAs.
- 69 Somewhat confusingly for this Proposal, the NPS-IB applies to land (terrestrial) ecosystems. It excludes land covered by water and waterbodies, and the CMA, but can include wetlands (if a natural inland wetland is contained within an SNA) and specified highly mobile fauna if they use the CMA<sup>117</sup>. As I have addressed earlier, natural inland wetlands exclude wetlands in the CMA.
- 70 Putting aside the jurisdictional issue of whether the district councils can include a proposed SNA in the TTPP which is within the CMA, it is unclear what parts of PUN-W034 are required to be assessed against the NPS-IB, once you exclude the CMA and the constructed Rusty Pond.

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<sup>114</sup> See also *Aubade NZ Ltd v Marlborough District Council* [2015] NZEnvC 154, at [35].

<sup>115</sup> NPS-IB, cl. 1.6.

<sup>116</sup> NPS-IB, cl. 1.6.

<sup>117</sup> NPS-IB, Clause 1.3.



71 Notwithstanding this, Dr Bramley has assessed the effects on the SNA against the relevant policies of the NPS-IB<sup>118</sup>. Dr Bramley has assessed specified highly mobile fauna within the application area (including the SNA)<sup>119</sup>.

### **Key matters arising**

#### *Greenhouse gas emissions (GHG)*

72 Section 104E RMA has been repealed and GHG emissions are no longer barred from considerations<sup>120</sup>.

73 This statutory bar commenced on 2 March 2004<sup>121</sup>, some three years *after* the Regional Air Quality Plan became operative<sup>122</sup>. While a review of the Air Quality Plan started in 2010, this was put on hold pending changes to the National Environmental Standard for Air Quality.

74 As a result, the operative Regional Air Quality Plan remains legally applicable and specifically addresses greenhouse gases in Chapter 9. It sets out:

- (a) an objective to reduce and minimise adverse effects from the discharge of greenhouse gases (Objective 9.3.1), and
- (b) a policy to promote the reduction of greenhouse gas emissions (Policy 9.4.2).

75 The Plan notes that discharge issues of global significance are best assessed and managed at a national level and regulation at the regional level is not appropriate<sup>123</sup>. The methods proposed in the Plan promote the reduction of greenhouse gas emissions, but focus only on what the regional council can do to reduce GHG emissions. For example, Method 9.4.2 states that "*The Council will advocate that central government investigate vehicle emissions, the use of alternatives fuels, and the retention of public transport subsidies. National guidelines or initiatives to limit emissions from motor vehicle exhausts will be supported.*"

76 The Plan therefore takes a permissive approach to greenhouse gas emissions. That permissive approach is reflected in Rules 3 and 5 and explanatory

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<sup>118</sup> SoE G Bramley, at [73].

<sup>119</sup> SoE G Bramley, at [170].

<sup>120</sup> Section 104E (the section in the RMA which barred the consideration of climate change effects) was repealed by section 35 of the RMA Amendment Act 2020. Section 35 came into force on 30 November 2022. As the Application was lodged after November 2022, the statutory bar does not apply.

<sup>121</sup> Section 7 Resource Management (Energy and Climate Change) Amendment Act 2004.

<sup>122</sup> 11 December 2001.

<sup>123</sup> Principal Reasons section pg 50-51.

comments<sup>124</sup>. Ms McKenzie has assessed the Proposal as complying with the permitted activity rules<sup>125</sup>.

- 77 As proposal meets the permitted activity rules for GHG emissions in the Air Quality Plan, resource consent is not required nor can it be granted by the Panel<sup>126</sup>.

*Emission reduction plan and national adaptation plan*

- 78 The November 2022 reforms of the RMA also now require local authorities to "have regard to" emission reduction plans and national adaptation plans published under the Climate Change Response Act 2002, but only when preparing regional policy statements, regional plans, and district plans.<sup>127</sup> The TTPP in process is exempt from this requirement under transitional provisions.<sup>128</sup>.

- 79 Aotearoa New Zealand's first emission reduction plan (**ERP**) (for the next 15 years) was published May 2022<sup>129</sup>. The purpose of the ERP is to set out how New Zealand will meet the staged emissions budgets, which in turn set goals for how New Zealand will meet the 2050 emissions target.<sup>130</sup>

- 80 The ERP covers the period 2022-2035 and includes sector-specific policies to reduce emissions as well as a multi-sector strategy to meet the emissions budgets. The second major part is the sectors and industries action plan, which involves private companies, but is led by central government. Key actions relevantly include providing funding to transition the freight sector to low or zero emissions trucks, reducing reliance on fossil fuels and improving energy efficiency. Mineral extraction is not identified specifically as a target for reductions. An equitable transition over the next 30 years is identified as important in the ERP<sup>131</sup>, with local government will requiring support and guidance from central government, particularly in the first two emission budget periods.

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<sup>124</sup> Comments about emissions from motor vehicles are also made in Chapter 8 (Products of Combustion) where it is noted "*motor vehicles, while a major cause of air pollution in cities are unlikely to add significantly to pollution levels on the West Coast due to its low and scattered population. Central government initiatives to limit emissions from motor vehicles, such as the introduction of emission standards, will be supported*".

<sup>125</sup> SoE K McKenzie at [24]-[31].

<sup>126</sup> *Cable Bay Wine Ltd v Auckland Council* [2022] NZCA 189.

<sup>127</sup> RMA Sections 61(2)(d)-(e); 66(2)(f)-(g), and 74(2)(d)-(e).

<sup>128</sup> RMA, Schedule 12, Part 2.

<sup>129</sup> <https://environment.govt.nz/assets/publications/Aotearoa-New-Zealands-first-emissions-reduction-plan.pdf>

<sup>130</sup> Climate Change Response Act 2002, Part 1B.

<sup>131</sup> Page 57.

- 81 The *First National Adaptation Plan*<sup>132</sup> is aimed at improving resilience of activities to climate change caused sea-level rise and hazards (such as flooding, heatwaves). It is not directed at activities producing GHG emissions.
- 82 Fuel emissions produced by machinery and trucks are captured as part of the Emissions Trading Scheme (**ETS**). The ETS operates a scheme where certain GHG emitting industries must purchase New Zealand Units equivalent to their GHG emissions. For example, fuel used for the freight trucks will have been 'paid for' under the ETS by the fuel importer and no further involvement in the ETS is required as the cost is anticipated to be spread through the supply chain. The Government's Minerals and Petroleum Resources Strategy for Aotearoa New Zealand 2019-2029 (the **Minerals Strategy**) identifies "*Emissions are priced and managed in New Zealand through the ETS, which is the Government's main tool for meeting domestic and international climate change targets*"<sup>133</sup>.
- 83 Climate change is a very important issue, and the evidence of Mr Brand and Mr Miller demonstrates reducing emissions has, and will continue to be, at the forefront of mine planning, operations and business sustainability. TiGa are doing what they can in the absence of feasible alternatives for fuel-based machinery and heavy vehicles.
- 84 However, the Government has clearly indicated how it intends to address climate change and the tools and mechanisms which it intends to use to ensure New Zealand meets its target of 'net zero' greenhouse gas emissions by 2050. For this short-term Proposal, and at this time, the ETS (where emitters already face an emission price) is an effective and appropriate mitigation.
- 85 At a national scale, the Minerals Strategy sees a transition to a clean, green and carbon neutral NZ as complementary to Government policies such as a just transition to a low emissions carbon economy (with specific reference to the Climate Change Response (zero carbon) Amendment Act.<sup>134</sup>

## **Radiation**

- 86 The Radiation Safety Act 2016 (**RSA**) came into force on 7 March 2017, repealing and replacing the previous Radiation Protection Act 1965 (**RPA**) and its regulations. The RSA establishes a framework to protect the health and safety of people and protect the environment from the harmful effects of ionising radiation while allowing for its safe and beneficial use. The RSA also enables New Zealand

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<sup>132</sup> <https://environment.govt.nz/assets/publications/climate-change/MFE-AoG-20664-GF-National-Adaptation-Plan-2022-WEB.pdf>

<sup>133</sup> Page 20.

<sup>134</sup> Page 24.

to meet its international obligations on radiation protection, safety, security and nuclear non-proliferation.

- 87 There is clear statutory language with respect to what constitutes a radioactive material under the RSA. Section 4 of the RSA clearly states that the act only applies if the radioactive material exceeds limits provided in the act. There is no need, or authority, to seek any further scientific advice as to what the effects on the environment are. Parliament has set clear thresholds dictating what is radioactive material and what level of radioactive material will cause an effect that requires regulation.
- 88 The applicability of the repealed RPA has been considered in the context of a marine consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 where the Decision Making Panel applied the clear statutory language of what constituted radioactive material in the RPA.<sup>135</sup> It is submitted, the same approach should apply here. The evidence demonstrates that radioactivity is not at a level where the RSA will apply. As such a resource consent is not required for discharging radiation.
- 89 If a law change was to occur in relation to Radiation as suggested may possibly occur by submitters, the Applicant is required to comply with that law.

#### **Wildlife Act**

- 90 Section 63 of the Wildlife Act 1953 (the **WA**) makes it an offence to hunt or kill any absolutely protected or partially protected wildlife without lawful authority. This could include the accidental or unintentional disturbance of protected wildlife in circumstance such as if there is a real risk of significant harm<sup>136</sup>. Recently, the Environment Court considered the interaction of the RMA with the WA. The Court agreed with the Director-General that the RMA and the Wildlife Act involve separate processes, stating<sup>137</sup> "*We agree we do not have Jurisdiction under the Wildlife Act 1953. It is sufficient to note that if consent is granted, a separate consenting process may be employed under that Act*".

#### **Other matters**

- 91 Some of the matters raised by submitters constitute fears that there is no evidential basis for. There is an evidential burden on all parties to produce evidence tending

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<sup>135</sup><https://www.epa.govt.nz/assets/Uploads/Documents/Marine-Activities-EEZ/Activities/990a6509eb/CRP-Decision-EEZ000006.pdf>; paragraph 74-76

<sup>136</sup> *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111.

<sup>137</sup> *Te Runanga o Ngati Whatua v Auckland Council* [2023] NZEnvC 277 at [357].

to support an allegation.<sup>138</sup> The Court has stated that a decision should not be made based on people's fears that might never be realised.<sup>139</sup>

### *Amenity*

92 An assessment of amenity values must start with an understanding of the subjective, based on articulation by those who enjoy the values, but it must be able to be tested objectively with reference to the relevant plans.

93 In *Schofield v Auckland Council*<sup>140</sup> the Environment Court stated:

"The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activity they undertake there, and the emotion they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively."

94 The genuinely held views of submitters are acknowledged, but it is submitted that the law must properly be applied on the evidence that is before you. Relevant RMA issues raised by submitters have been given due consideration and are addressed in evidence.

### *State Highway 6*

95 The trucks will directly access SH6. SH6 is lawfully established and forms part of the receiving environment, it is a recognised strategic route of the highest order and is regionally significant infrastructure which efficient operation should not be compromised:

(a) the District Plan recognises SH6 as a strategic transport route at the top of a transport hierarchy. Strategic routes are stated to be a significant element

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<sup>138</sup> *West Coast Abattoir v Westland District Council* M126/82 and *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, as confirmed more recently in *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75 at p 7-8.

<sup>139</sup> *City Rail Link Ltd v Auckland Council* [2017] NZEnvC 204 at [64]

<sup>140</sup> *Schofield v Auckland Council* [2012] NZEnvC 68 at [51]

in the national economy, require high level of user service to be provided at all times and are a significant element in the regional economy"<sup>141</sup>, with a function of carrying the largest volume of traffic at the highest level of efficiency.<sup>142</sup> Noise is anticipated as an adverse effect from a road once it is established.<sup>143</sup>

- (b) Rules in the District Plan focus on protecting established infrastructure such as SH6. Objectives relating to use of transport infrastructure prioritise safe and efficient use with no controls on amenities once it is located and designed.
  - (c) The RPS includes SH6 as regionally significant infrastructure (**RSI**)<sup>144</sup>, and dedicates an entire chapter in the RPS to recognising the social, economic, and environmental benefits that accrued from the establishment and continued operation of RSI. The safe, efficient and integrated development, operation, maintenance and upgrading of RSI is enabled, and protected from activities which would compromise this. New land use generated by growth and development should be strategically integrated with local, regional and national infrastructure, particularly transport, so as to avoid an unsustainable approach to infrastructure provision and funding;
  - (d) The West Coast Regional Land and Transport Plan 2021-2031 references the critical connection role roads play from businesses to freight hubs, rail links and the state highway network. These links feed into the ports for exporting highlighting the importance of an intermodal transport network for the extractive industry<sup>145</sup>. State highways are recognised as critical for the rural-based economy, moving goods to production centres and onto domestic and international markets.
- 96 Mining requires truck movements, and the efficient use of SH6 is an appropriate road for those movements. Waka Kotahi is the relevant authority which provides infrastructure for use by vehicles. Slips that have occurred on SH6 that are either in the process of being repaired, or are subject to temporary traffic management whilst repairs are investigated are a matter for Waka Kotahi to resolve and not an effect associated with the proposed mine activity.

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<sup>141</sup> 24.3.5 Roading Hierarchy GDP

<sup>142</sup> 24.5.3 Grey District Plan

<sup>143</sup> Grey District Plan, Chapter 12, Transport 12.2 Issues; 24.3.5 Roading Hierarchy.

<sup>144</sup> RPS, Chapter 6

<sup>145</sup> WCRLTP 2021-2031, at p3.

### *Property values*

- 97 The question of adverse effects on property values has been addressed by the Courts on several occasions. Effects on property values are not a relevant consideration *per se* in determining whether resource consent should be granted. If it occurs at all, diminution of property values is simply another measure of adverse effects on amenity values.<sup>146</sup>

### *Social impacts*

- 98 Various social effects have been raised by submitters, and the GDC Officer Report records while there are likely to be positive social effects it is outside his expertise to comment any adverse social effects, given the absence of evidence from the submitters and applicant<sup>147</sup>. The proposal will result in change but it is for an activity which has been planned for, and expressly anticipated in this environment, subject to appropriate management of environmental effect.
- 99 The susceptibility to fluctuating cycles and global commodity prices in West Coast communities which affect wellbeing of communities is acknowledged as an issue in the WCRPS. Chapter 4 specifically addresses resilient and sustainable communities - identifying the West Coast is at risk of population decline, and to address this risk, resource use and economic growth and employment should be enabled, while sustainable management is promoted. The WCRPS seeks that councils promote diversity, innovation, and encourage businesses to invest in the region and grow, including by making regional and district plans as 'business friendly' as possible (while still maintaining environmental standards). Promotion of sustainable management includes communities retaining heritage and amenity values.
- 100 TiGa has engaged with the community and mana whenua and has considered concerns raised in a meaningful way. Concerns were raised by the community regarding a shortage of housing and responded to by Mr Brand, and requests about the types of jobs have been provided to the community and discussed at a public consultation event.

### *Stock fencing*

- 101 Stock fencing is required by the Resource Management (Stock Exclusion) Regulations 2020 from 1 July 2025 for farming the Application Site (low slope land) so must not be considered separately as a positive effect.

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<sup>146</sup> *City Rail Link Limited (CRRL) (Successor to Auckland Transport) & Ors v Auckland Council*, [2017] NZEnvC 204; See also *Wilson v Dunedin City Council* [2011] NZEnvC 164 at [28].

<sup>147</sup> GDC s42A Report, at [125].

*Finite characteristics of natural and physical resources*

- 102 The GDC Officer's Report, when considering Part 2, RMA assesses the mineral resources as finite. For completeness, it is noted the reference in Section 5(2) RMA to sustaining the potential of natural and physical resources to meet the needs of future generations excludes minerals.

*EIANZ guidelines*

- 103 Dr Bramley has applied the Environment Institute of Australia and New Zealand (**EIANZ**) guidelines for assessing the significance of ecology on and around the Application Site. The EIANZ guidelines have been referred to and applied a number of times in the Courts<sup>148</sup>, and I am not aware of any case law criticising or questioning of these guidelines.

**Conclusion**

- 104 The Proposal has been many years in the making – with drilling and testing initiated by kiwi entrepreneurs and investors over a decade years ago. There is no doubt the proposal will contribute significantly to the economic wellbeing of the community and region, and is consistent with the future regional and national strategies for resources.
- 105 The Panel has before them a well-considered and comprehensively assessed project which prioritises the maintenance and enhancement of the environment and is deserving of consent. There has been considerable attention given by the company, mine planner, hydrologists and ecologists on how to appropriately avoid adverse effects and preserve the health of freshwater, wetland areas and their associated ecology. Several changes have occurred to the mining concepts and methodology on this journey. The company feels a strong sense of responsibility to protect and avoid adverse effects on threatened birds if they were to present on the Application Site and adjoining areas, particularly the tāiko.
- 106 Finally, the Applicant wishes to acknowledge the genuine concerns held by submitters and to thank them, as well as the parties who have been actively engaged seeking to resolve concerns, for their involvement in this process.

**Witnesses**

- 107 The Applicant has produced the following evidence in support of its case:

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<sup>148</sup> For example, *Waka Kotahi NZ Transport Agency v Manawatū-Whanganui Regional Council* [2020] NZEnvC 192, at [141]-[142].



- (a) Mr Robert Brand, company representative;
- (b) Mr Stephen Miller, mine engineering;
- (c) Mr Thomas Lawson, plant and water filtration design;
- (d) Mr John Berry, company representative (operations);
- (e) Mr Cameron Wylie, geotechnical;
- (f) Mr Mitchell Ryan, metallurgy;
- (g) Dr Gary Bramley, ecology;
- (h) Dr Mike Fitzpatrick, freshwater ecology;
- (i) Mr Nicholas Fuller, transport;
- (j) Mr Jon Farren, noise;
- (k) Mr Jens Rekker, hydrology;
- (l) Mr Graeme Ridley, erosion and sediment control;
- (m) Mr Gary Teear, coastal;
- (n) Ms Naomi Crawford, landscape and visual assessment;
- (o) Mr John Ballingall, economics; and
- (p) Ms Katherine McKenzie, planning.



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Counsel for TiGa

5 February 2024