

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 – functional need**

16 February 2024

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**May it please the Commissioners:**

- 1 The Panel has requested legal submissions on the reference to functional need within Regulation 45D Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**).
- 2 I am firmly of the opinion there is a functional need for the proposed mining activities (extraction of minerals and ancillary activities), and that on the evidence Regulation 45D 6(b) NES-F would be met.
- 3 In providing the consenting pathway in Regulation 45D NES-F, and supporting policy in Clause 3.22 of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), the Minister for the Environment (**Minister**) has already determined that:
  - (a) mineral resources are locationally constrained; and
  - (b) there is a functional need for mineral extraction activities to occur where the mineral is located, including within, and within a 100m setback, of a natural inland wetland.
- 4 The Minister's determination is demonstrated in the significant volume of policy analysis that was undertaken to support the Minister's decision to amend the wetland provisions of the NES-F and NPS-FM, which is addressed in **Appendix A**. It is not for this Panel to revisit that decision.
- 5 The task of this Panel is to assess whether there is a functional need for the extraction and ancillary activities required to take the targeted minerals, where those activities are within a 100m setback of any natural inland wetland. This is a site-specific factual inquiry, based on the evidence before you. That inquiry involves ascertaining whether any proposed earthworks or land disturbance, or taking, use, damming or diversion of water needs to occur within the setback in order to win the minerals that exist in that location.
- 6 Whether there are mineral resources beyond a 100m setback from a natural inland wetland on the Application Site (or further afield) is not relevant to the Panel's assessment of the activities required to extract the resources that are fixed in location from within 100m of a natural inland wetland.

**Analysis**

- 7 Regulation 45D NES-F allows consent to be obtained for specific activities (i.e. earthworks, land disturbance and taking, use, damming or diversion of water) where the activity is for the purpose of the extraction of minerals and ancillary activities, and meets other conditions.

- 8 The consent authority cannot grant consent under Regulation 45D unless it has first satisfied itself:
- (a) that the extraction of the minerals will provide significant national or regional benefits; and
  - (b) there is a functional need for the extraction of minerals and ancillary activities in that location; and
  - (c) applied the effects management hierarchy.
- 9 NPS-FM Clause 3.22(1)(e), which provides for regional plans to establish a consent pathway for mineral extraction, is worded slightly differently. It requires the loss of extent of natural inland wetland to be avoided *except* where the regional council is satisfied that:
- (a) the *activity* is necessary for the purpose of the extraction of minerals (other than coal) and ancillary activities; and
  - (b) there is a functional need for the *activity* to be done in that location.
- 10 In other words, it is necessary to demonstrate that there is a functional need for the activities that are proposed to enable the winning of minerals from their fixed location (e.g. earthworks and land disturbance) – rather than a functional need for the extraction of the minerals itself.
- 11 It is submitted that regulation 45D(6)(b) should be interpreted in the same way, i.e. the panel is to determine whether there is a functional need for the activities that enable the extraction of minerals and ancillary activities (i.e., earthworks, land disturbance, etc) to be located within the setback. It is these activities that are the subject of the application.
- 12 This is intended to be a straightforward test. Those activities required to enable mineral extraction that cannot be located outside the setback have a functional need to locate within the setback. However, it is expected that other ancillary activities, e.g., supporting infrastructure such as office buildings, carparks, etc, that can occur elsewhere on the site will do so.
- 13 In some cases, there will be methods of extracting minerals that do not require earthworks or land disturbance within a natural inland wetland, e.g., where the mineral is located sufficiently below the surface that they can be accessed from underground; or where adopting a steeper slope to avoid a wetland is possible. In the case of this application, there are no available methods to extract the same

minerals which would have less impact on any possible natural inland wetland<sup>1</sup>. Only activities immediately required for the mining extraction such as topsoil and overburden removal and mining void rehabilitation, infiltration trenches and reinjection wells for water management are proposed within a 100m setback from any possible natural inland wetland. Activities that can occur elsewhere such as the processing plant, access road, mine water facilities have all been located out of this area.<sup>2</sup>

- 14 The NES-F and the NPS-FM is secondary legislation where its meaning must be ascertained from its text and in the light of its purpose and its context. It is submitted that the interpretation set out above is consistent with the numerous supporting documents, including the section 32 report and related recommendations from the Ministry for the Environment, that the Minister considered in deciding to introduce the consenting pathway for mining activities into the NES-F and NPS-FM.
- 15 Relevant extracts from these documents and related analysis are set out in **Appendix A**. It is submitted that it is clear from those documents that, the Minister understood that:
  - (a) there was a policy problem for mining activities where activities could not seek and/or obtain consents for mining operations that would be of significant national or regional benefit due to the NES-F, and NPS-FM;
  - (b) mining is locationally constrained and it can only be undertaken where the resource is located;
  - (c) there is a clear functional need for minerals to be extracted from within or near a wetland if deposits are located there;
  - (d) a consent pathway will be provided for mineral extraction and ancillary activities;
  - (e) the consent pathway was expanded from "mining" (i.e. to take or extract a mineral), to include " mineral extraction and ancillary activities" in response to concerns raised in submissions from the mineral sector that the pathway would otherwise be too narrow and not be viable;
  - (f) ancillary activities would only form part of the consent pathway where they could demonstrate a functional need to be in that location;
  - (g) the functional need test will be applied at a site scale;

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<sup>1</sup> SoE Mr Miller, at [51].

<sup>2</sup> SoE Mr Miller, at [51].

- (h) overall, the consent pathway reduces the uncertainties associated with identifying natural inland wetlands and enables key industries and activities to occur in or around a wetland while ensuring there is no net loss of wetland extent. It does this through offsetting requirements associated with effects management hierarchy and the consent process;
  - (i) that a consent pathway and policy support was being provided for mineral extraction and ancillary activities within natural inland wetlands and within a 100m setback from natural inland wetlands where no such consent pathway and policy support previously existed; and
  - (j) where consenting pathways could not be met, for activities outside (but within 100m of a natural inland wetland), resource consent could be sought as a non-complying activity under Regulation 52 or 54.
- 16 It is submitted that an interpretation of Regulation 45D(6) that there is no functional need to locate within 100m of the potential wetland because the mineral also exists outside the setback will result in unworkable legislation and frustrate the purpose of introducing the consenting pathway. The practical effect of such an interpretation is that a functional need only ever arises where minerals lie wholly within the 100m setback.
- 17 It is difficult to conceive a scenario when mineral extraction with significant national or regional benefits is to *only occur* within a natural inland wetland or 100m setback from a natural inland wetland<sup>3</sup>. To interpret the text in this way would result in an unanticipated narrowing of the consent pathway for mining activities to the point where Regulation 45D operates as an exclusion. The exclusion was the exact policy problem identified by the Minister, which resulted in including the consent pathway in the NES-F. This is particularly relevant to this Application Site, with Mr Miller considering that approximately 25 to 30% on the scheduled reserve could be sterilised, with the projected economic loss being greater due to the ore loss being higher than the average grade in the project<sup>4</sup>.
- 18 It is submitted that the relevant context in which to assess the appropriateness of undertaking the activity operating within the setback is under the effects management hierarchy limb of Regulation 45D(6) – i.e. has the Applicant, despite the functional need to be within this environment, avoided effects in the first

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<sup>3</sup> Ms Hills sought to give an example during the hearing, saying by not mining into the water table you could operate within the 100m setback from a natural inland wetland. Such an activity would not require consent under Regulation 45D (as there would not be a hydrological connection between the activity and a natural inland wetland or a change to the water level range or hydrological function).

<sup>4</sup> Supplementary evidence Stephen Miller, at [3].

instance, and if not, applied the cascading hierarchy. This hierarchy concludes with avoidance.

- 19 In this case, as a result of the evidence before the panel, if it ultimately determines that there is not a functional need for the activity in this location, which it is submitted is not supported on the evidence, then it is open for the Commissioners to still grant the proposal in its current form, either:
- (a) on the basis that the activity does not require consent under the NES-F on the basis of evidence that the activity is not likely to cause change to the water level range or hydrological function of the wetland and/or given the lack of any evidence of a natural inland wetland within 100m;
  - (b) as a non-complying activity pursuant to Regulation 54 NES-F.
- 20 It is noted for completeness, that legal advice referred to in the evidence of Mr Freeman<sup>5</sup> (provided to Environment Southland prior to the Amendments and for a different purpose) is not relevant.



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Alex Booker / Alex Hansby  
Counsel for TiGa

16 February 2024

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<sup>5</sup>SoE S Freeman, at 113-116.

## APPENDIX A – ANALYSIS OF MINISTER'S DECISION TO AMEND WETLAND PROVISIONS OF NES-F AND NPS-FM

### The Ministers functions with respect to the NES-F and NPS-FM

- 1 The Minister's functions under the RMA include:
  - (a) preparing, considering recommendations on, and recommending to the Governor General the approval of national policy statements. The NPS-FM is a national policy statement approved by the Governor General under s52(2) RMA, and is secondary legislation for the purposes of the Legislation Act 2019.
  - (b) preparing, considering recommendations on, and recommending to the Governor-General the making of regulations known as national environmental standards. The NES-F are regulations made by Order in Council under s 43 RMA, and is secondary legislation for the purposes of the Legislation Act 2019.
  - (c) The NPS-FM includes an objective and policies and the NES-F contains regulations relevant to natural inland wetlands. Relevant to the Application, amendments were made to the NPS-FM and NES-F provisions that relate to natural inland wetlands with effect from 5 January 2023 by the Minister under section 53(1) of the Act and notified in the New Zealand Gazette on 8 December 2022 as the National Policy Statement for Freshwater Management 2020 Amendment No 1<sup>6</sup>. The Gazette Notice stated that the Governor General was acting on the recommendation of the Minister for the Environment (having satisfied the requirements of the RMA) (**the Amendments**).
  - (d) To make the above Amendments to the NES-F and NPS-FM<sup>7</sup>, the Minister was required to give notice of the changes and reasons for the changes and an opportunity to make a submission to public and iwi authority. A report and recommendations was made to the Minister on the submissions and subject matter (i.e. Amendments to the NES-F and NPSFM: Report and Recommendations (**November 2022 Recommendations**)<sup>8</sup>. The Minister was also required to prepare an evaluation report (i.e. Amendments to NES-

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<sup>6</sup> <https://gazette.govt.nz/notice/id/2022-sl5286>

<sup>7</sup> Section 46A RMA.

<sup>8</sup>Ministry for the Environment. 2022. Amendments to the NES-F and NPS-FM: Report and recommendations (**November 2022 Recommendations**). [https://environment.govt.nz/assets/publications/Amendments-to-NES-F-and-NPS-FM\\_Report-and-recommendations.pdf](https://environment.govt.nz/assets/publications/Amendments-to-NES-F-and-NPS-FM_Report-and-recommendations.pdf)

F and NPS-FM: Section 32 report dated 8 December 2022<sup>9</sup> (**Section 32 Report**)).

- (e) Consultation on proposed changes to the wetland regulations occurred between 1 September and 27 October 2021. The Ministry then analysed submissions and prepared a report of advice and recommendations for the Minister (**June 2022 Recommendations**). Proposed amendments to the wetland regulations were then drafted, and exposure drafts of the NPS-FM and NES-F were publicly consulted on between 31 May and 10 July 2022 (**Exposure Draft of the NPS-FM<sup>10</sup> and NES-F<sup>11</sup>**) along with supporting policy rationale (**Policy Rationale for Exposure Draft Amendments 2022**)<sup>12</sup>. The Ministry then analysed submissions and prepared a report of advice and recommendations for the Minister (i.e. the November 2022 Recommendations).
- (f) The Section 32 Report is stated as being intended to be read alongside other reports, including the Regulatory Impact Statement dated 17 November 2022 (the **Regulatory Impact Statement**)<sup>13</sup>. The June 2022 Recommendations, Exposure drafts of the NPS-FM and NES-F, Policy Rationale for Exposure Draft Amendments 2022 are stated in the Section 32 Report as providing the rationale for the Amendments since the initial consultation<sup>14</sup>.
- (g) The Legislation Act 2019 directs the Panel as to how it should ascertain the meaning of legislation (which includes secondary legislation). It requires that "*[t]he meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*"<sup>15</sup>

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<sup>9</sup>Ministry for the Environment 2022. *Amendments to the NES-F and NPS-FM: Section 32 report (Section 32 Report)* <https://environment.govt.nz/assets/publications/Amendments-to-the-NES-F-and-NPS-FM-Section-32-report.pdf>

<sup>10</sup> **Exposure draft of the NPS-FM:** [https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user\\_uploads/exposure-draft-changes-to-npsfm-2020.pdf](https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user_uploads/exposure-draft-changes-to-npsfm-2020.pdf)

<sup>11</sup> **Exposure drafts of the NES-F:** [https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user\\_uploads/exposure-draft-changes-to-rm-nesf-regulations-2020.pdf](https://consult.environment.govt.nz/freshwater/npsfm-and-nesf-exposure-draft/user_uploads/exposure-draft-changes-to-rm-nesf-regulations-2020.pdf)

<sup>12</sup> Managing our wetlands: Policy rationale for exposure draft amendments 2022 (**Policy rationale for exposure draft amendments 2022**) <https://environment.govt.nz/assets/publications/managing-our-wetlands-policy-rationale-exposure-draft-amendments-31May2022.pdf> (p13, 18, 19).

<sup>13</sup>**Regulatory Impact Statement** – 17 November 2022. <https://www.treasury.govt.nz/sites/default/files/2023-02/ria-mfe-cwriw-nov22.pdf>

<sup>14</sup>Section 32 Report, at Page 11.

<sup>15</sup>Legislation Act 2019, Section 10(1).



- (h) The recommendations received by the Minister, and the accompanying section 32 analysis are RMA documents which were used to understand and justify the Amendments to the NPS-FM and NES-F by the Minister. They are directly and contextually relevant to the interpretation of Regulation 45D NES-F. The Section 32 Report expressly states it was prepared alongside the drafting of the national direction instruments and is consistent with the final drafting of the national direction instruments.<sup>16</sup>

2 The timeline of the preparation of these documents is as follows:

3 August 2020	NPS-FM 2020 and NES-F published
1 September – 27 October 2022	Consultation on Amendments to the NES-F and NPS-FM
June 2022	First report and recommendations to Minister
31 May – 10 July 2022	Publication of Exposure Draft of the NPS-FM and NES-F for consultation and policy rationale
November 2022	Second and final report and recommendations to Minister
17 November 2022	Publication of Regulatory Impact Statement
8 December 2022	Publication of s32 Report on Amendments
8 December 2022	Amendments gazetted

### The Amendments to the NES-F and NPS-FM

- 3 Prior to the Amendments, and most relevant to this Application, earthworks, or the taking, use, damming, or diversion of water outside but within a 100m setback from a natural inland wetland that would result in complete or partial drainage of a natural inland wetland was a non-complying activity (Regulation 52 NES-F). Within a wetland, such activities were prohibited (Regulation 53 NES-F).
- 4 The Regulatory Impact Statement stated the impact of the NES-F on the mining industry as the "*inability to seek and/or obtain consents for mining operations that will be of significant national benefit*", and it was expressly acknowledged that "*mining is 'locationally constrained' in that it can only be undertaken where the resource is located*"<sup>17</sup>. To address this policy problem the Regulatory Impact Statement sought to "*ensure regulation (consenting) of activities in inland wetlands and associated buffers is proportionate to potential environmental impacts and/or*

<sup>16</sup> Ministry for the Environment 2022. *Amendments to the NES-F and NPS-FM: Section 32 report* <https://environment.govt.nz/assets/publications/Amendments-to-the-NES-F-and-NPS-FM-Section-32-report.pdf>, Page 10.

<sup>17</sup> Table 1 - Impacts of prohibited and non-complying activity status on specific industries noting for "Mining". Regulatory Impact Statement – 17 November 2022. <https://www.treasury.govt.nz/sites/default/files/2023-02/ria-mfe-cwriw-nov22.pdf>

*scope to offset these impacts; including activities that are currently prohibited/ non-complying and discretionary"*<sup>18</sup>.

- 5 The overall effect of the Amendments was to provide a consent pathway and policy support for the extraction of mineral extraction and ancillary activities within natural inland wetlands and within a 100m setback from natural inland wetlands where no such consent pathway and policy support previously existed.
- 6 Regulations 53 and 54 no longer applied to mining activities provided for under Regulation 45D, with the effect that activities with the purpose of the extraction of minerals and ancillary activities could take place within, or within a 100m setback of, a natural inland wetland in circumstances where they would result in complete or partial drainage of natural inland wetlands, subject to the consent authority satisfying itself of significant benefits, functional need and the application of the effects management hierarchy (**EMH**) (described as "gateway tests" in the pathway).
- 7 Amendments to the NPS-FM added the activities for the purpose of extraction of minerals and ancillary activities to consent pathways under the mandatory policy specified in Clause 3.22.

"The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, **except where:** ...

(e) the regional council is satisfied that:

(i) the activity is necessary for the purpose of:

(A) the extraction of minerals (other than coal) and ancillary activities; or

(B) the extraction of coal and ancillary activities as part of the operation or extension of an existing coal mine; and

(ii) the extraction of the mineral will provide significant national or regional benefits; and

(iii) there is a functional need for the activity to be done in that location; and

(iv) the effects of the activity will be managed through applying the effects management hierarchy; or

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<sup>18</sup> Page 18.

- 8 Where an activity cannot meet the gateway tests in the pathway, the Section 32 Report states the activity is either non-complying (Regulation 52, 54) or prohibited (Regulation 53)<sup>19</sup>:

**Where an activity does not have a consent pathway (or cannot meet the gateway tests in the pathway), and would result in full or partial drainage of a natural inland wetland, it is either a non-complying activity (regulation 52 – for activities outside of, but within 100 metres of, the wetland) or prohibited (regulation 53 – for activities occurring within the wetland). A general non-complying catch-all rule (regulation 54) for the activities of vegetation clearance, earthworks or water take, use, damming, diversion or discharge covers all other activities.**

- 9 The Section 32 Report states the Amendments seek to provide for additional consent pathways, but the framework to ensure the overall objective (Te Mana o Te Wai) and policies of the NPS-FM remain unchanged<sup>20</sup>. The additional consent pathways are assessed as consistent with the framework, and it is specifically noted:

The intent of the NPS-FM objective is not that the first priority (clause 2.1(1)(a)) is to be read as a bottom line with the goal of achieving a pristine or 'pre-human' water quality state. Rather, it is to shift the way we think about managing freshwater and guide implementation of the NOF process prescribed in the NPS-FM.

The NPS-FM objective is clear in what it prioritises but is flexible in its approach, which is consistent with the RMA effects-based approach to sustainable management.

- 10 With respect to the Wetland Amendments, Option 3 (Provide consent pathways for additional activities and enable restoration, wetland maintenance and biosecurity) the Section 32 Report stated<sup>21</sup>:

**Option 3 is the preferred option. It reduces the uncertainties associated with identifying natural wetlands and enables key industries and activities to occur in or around a wetland while ensuring there is no net loss of wetland extent. It does this through offsetting requirements associated with effects management hierarchy and the consent process.** This is the package that the Government agreed to consult on in 2021. Option 3 creates consenting pathways for specific activities including quarrying activities, mining (the extraction of minerals and ancillary activities), fill sites (landfills and cleanfill areas) and urban development. These sectors are important to provide for needed infrastructure (as well as upgrades) and well-functioning urban environments, which are required under the National Policy Statement on Urban Development 2020.

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<sup>19</sup> Section 32 Report, page 34.

<sup>20</sup> Section 32 Report, page 26.

<sup>21</sup> Section 32 Report, section 4.3, page 28.

## Functional need for mining activities

- 11 In providing the consenting pathway for mining activities, the Minister confirmed that:
- (a) Minerals are locationally constrained;
  - (b) There is a clear functional need for extractive activities to occur where the mineral is located;
  - (c) Unnecessary and ancillary activities can be controlled by the functional need test;
  - (d) The functional need gateway test will be applied at the site scale.
- 12 Relevant extracts are set out below.
- 13 The Section 32 Report recognises the functional need test will be applied at a site scale:

The consent pathways for quarrying and mining recognise that these activities are constrained to the locations of the resource, and that these locations may be at times within, or within the 100-metre setback of (as set out in the NES-F), a natural inland wetland. The consent pathways require that applications demonstrate a functional need as a gateway test for the expansion of an existing, or for new, quarrying or mining activities. **The functional need gateway test will be applied at the site scale. The other gateway test of significant regional or national benefit will ensure that only appropriate activities are considered** and, may be granted on a case-by-case basis.

**The functional need test is considered to be fit for purpose for specified infrastructure (as currently required), and also for quarrying and mining (which by their nature, must locate where the resources are located). It also provides a check and balance against the ancillary activities associated with quarrying and mining.**

- 14 The June 2022 Recommendations made the following recommendations with respect to providing a consent pathway for mining:
- (a) At page 47:
    - Option 2: Provide a discretionary consent pathway for mining (recommended)
    - 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.

(b) At page 48:

We recommend this option because **in cases where mineral deposits are situated in a natural inland wetland there is a clear functional need for extractive mining activities to be undertaken there.**

15 Following the June 2022 Recommendations, the Exposure Draft of NES-F and the Exposure Draft of NPS-FM was notified on 31 May 2022 for public submission.

16 The Exposure Draft of Regulation 45D NES-F provided a consent pathway for "mining" as the activity. To secure a discretionary activity status, for vegetation clearance, earthworks and the taking, use, damming and diversion of water the activity had to be for the "purpose of mining". There was no reference to a functional need for mining in the Exposure Draft of Regulation 45D NES-F, presumably because (as recorded above) it was recognised where mineral deposits are situated in a natural inland wetland there is a clear functional need for extractive activities to be undertaken there.

17 The Exposure Draft of NPS-FM (at 3.22(1)(e)) stated the regional council needed to be satisfied that the activity is for the purpose of extracting any mineral in its natural state from the land; and the extraction of the mineral will provide significant national or regional benefits, and there is a functional need for the activity to be done in that location, and the effects of the activity are managed through applying the EMH.

18 The supporting Policy Rationale for Exposure Draft Amendments 2022:

(a) Referenced the Functional Need definition in the National Planning Standards and stated these tests mean activities can only be consented in natural inland wetlands when they are of national and/or regional benefit, and when the activity can only occur in that environment<sup>22</sup>.

(b) Under the heading "Amendment 5 – New consent pathway for mining (minerals)" stated<sup>23</sup>:

Mining (minerals) can only occur where the resource is located. New Zealand has many mineral deposits other than coal and gold (which were the main focus of submitters who opposed a consent pathway for mineral mining). Submissions emphasised that to function, New Zealand society requires many of these minerals.

There was strong opposition to a consent pathway for mining. However, as was highlighted in submissions, mined areas can be rehabilitated or used for other commercial or community

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<sup>22</sup> Policy Rationale for Exposure Draft Amendments 2022, at page 13.

<sup>23</sup> Policy Rationale for Exposure Draft Amendments 2022, at page 19.

activities. As per the other consent pathways, offsets of the lost wetland extent and values would be required under the effects management hierarchy.

**The Ministry has heard that**, as with quarrying:

- the effect of regulation 53 of the NES-F, and the lack of a consent pathway in the NPS-FM, is to prohibit mining

**- there is a clear 'functional need' to site mineral mines where the minerals are.**

We consider a discretionary consent pathway is appropriate for mining activities. Councils can assess consent applications on a case-by-case basis, and unnecessary activity will be controlled through the tests for 'national and/or regional benefit' and 'functional need'. The pathway would be for an activity necessary for the purpose of extracting any mineral, and as with the other consent pathways the NES-F lists the relevant activities.

As with quarries, there is a question about also providing for ancillary activities for mining (see the following definition section).

### **Background to "mineral extraction and ancillary activities"**

19 The reference to "mineral extraction and ancillary activities" within Regulation 45D NES-F and Clause 3.22 NPS-FM:

- (a) resulted from public submissions and this descriptor was tested with the sector;
- (b) was included to increase the scope of activities from the original reference to "mining activities" (to take or extract a mineral), to ensure it would also cover ancillary activities to ensure a viable consenting pathway within and near natural inland wetlands;
- (c) was considered more restrictive than "mining operations" which could include activities such as office, carparking, transport and processing which may be able to locate elsewhere;
- (d) the functional need test was incorporated into Regulation 45D to accompany the reference to ancillary activities.

20 Relevant extracts are set out below:

21 The June 2022 Recommendations made the following comments with respect to defining mining and the scope of the consent pathway:

We agree with submitters that if mining is provided with a consent pathway in the NES-F it should be defined in the regulations. To ensure alignment across legislation we agree with submitters that it would be appropriate to use the definitions currently prescribed in the Crown Minerals Act. As with quarrying there are two options for how mining could be defined, which will determine the scope of the proposed consent pathway.

The Crown Minerals Act currently differentiates between mining and mining operations as follows.

...

Option 1: Provide for 'mining' (defined above) as a discretionary activity, but not 'mining operations' (recommended)

Under this option, the split between mining and mining operations (as defined in the Crown Minerals Act), would be retained. **Only the extractive activities of mining would be defined in the NPS-FM/NES-F and provided with a discretionary consent pathway on the basis that the mineral resource itself is locationally constrained but operations are not.** Mining operations would be subject to non-complying/prohibited regulations as relevant.

**We recommend this option because in cases where mineral deposits are situated in a natural inland wetland there is a clear functional need for extractive mining activities to be undertaken there.** We consider however, that some mining operations (as defined in the Crown Minerals Act) are beyond the scope of the activities provided for under the NES-F consent pathway (ie, vegetation clearance, earthworks and land disturbance, taking, use damming and diversion of water). As such we do not consider the definition of mining operations should be incorporated into the NPS-FM/NES-F.

...

Option 2: Include both 'mining' and 'mining operations' and provide discretionary activity status for both

Under this option, both mining and mining operations (as defined in the Crown Minerals Act), would be considered mining activities in the NPS-FM/NES-F. A discretionary consent pathway would be provided not only for the extractive activities of mining, for which there is a clear functional need, but also to mining operations (eg, transport and processing), which may be able to be located elsewhere. If this option is progressed, consideration of these activities would be subject to the gateway tests and offsetting requirements.

The definition of mining operations includes "the removal of overburden by mechanical or other means, and the stacking, deposit, storage, and treatment of any substance considered to contain any mineral" (under (b)(iii)). However, we consider that this would be captured under the proposal for a clean/managed fill consent pathway.

## 22 In the Policy Rationale for Exposure Draft Amendments 2022:

The same question applies to mining as to quarrying: whether the proposed pathway should also provide for purposes ancillary to the location and extraction of the mineral.

In the report, recommendations and summary of submissions, we recommended defining the proposed consent pathway for 'mining' by reference to the definition in the Crown Minerals Act, but excluding 'mining operations' (also defined in the Crown Minerals Act.) As with quarrying, we do not consider it appropriate to include ancillary activities in the definition of mining, for the purposes of the NPS-FM and NES-F. The intent is to provide a pathway for minerals to be extracted. We expect

that ancillary infrastructure (eg, office buildings, carparks) will be situated to avoid natural inland wetlands.

As with quarries, over the course of drafting it became apparent that the scope of mining operations need not be constrained through a definition in the NPS-FM, as the 'functional need' test will achieve this.

As mining operations are not specifically covered by the consent pathway, this will likely affect the layout of a mine. In our view, however, the alternative is not justifiable. The impact is mitigated to an extent by the proposed consent pathways for cleanfill and managed fill. These allow for disposing of overburden near a mine (see Amendment 4).

23 The November 2022 Recommendations took into account the further submissions made on the exposure drafts, and made recommendations for drafting changes based on the most significant matters arising, including specific provision for ancillary activities associated with mining.

24 At paragraph 49<sup>24</sup>:

v. Wetlands – Provision for ancillary activities associated with quarries and mining

49. We previously provided advice that the consent pathways for both quarries and mining should apply only to the area of resource and not to the ancillary activities necessary for the extraction [BRF-1004 recs 17 and 30 respectively]. We are concerned, however, that this approach could result in consent pathways that are not viable.

25 At paragraph 55-59:

#### **Mining**

55. Many submitters remain opposed to a consent pathway for mining minerals – particularly for coal mining. NZPI, Environmental Law Initiative, Bioreserches NZ, and most industry submitters sought clarification of the scope of the consent pathway. They note that as with quarrying, inconsistent definitions and terms had been used between the NES-F and the NPS-FM. The NPS-FM, as drafted, refers to 'activities associated with the extraction of minerals' (undefined) and the NES-F, as drafted, refers to 'mining' as defined in the Crown Minerals Act (ie, to take or extract a mineral).

56. Industry noted that the exposure draft reliance on the Crown Minerals Act definition of 'mining' does not provide adequate scope for the activities required for the extraction of minerals, as it is missing the accompanying definition of 'mining operations' (ie extraction, processing transport etc) and this may make pathway unviable.

57. As with quarries above you previously agreed to provide a consent pathway only for the extraction of the mineral and not for the ancillary activities necessary for the extraction [BRF-1004 rec 30 refers]. In light of feedback on the exposure draft however,

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<sup>24</sup> November 2022 Recommendations, page 11 Briefing Note – BRF- 1889.



we consider ancillary activities should be part of the consent pathway for mining. The new consent pathways should be viable, otherwise the current problem will remain.

58. However, unlike 'quarrying activities' in the National Planning Standards there is no equivalent definition under the RMA for 'mining activities'. Reliance on the Crown Minerals Act definition of 'mining operations' is inappropriate as it applies only to minerals owned by the crown and is broader than required for the consent pathways (eg covers operations in connection with exploring and prospecting).

59. We therefore recommend using the phrase 'extraction of minerals and ancillary activities.' We do not wish to add another (untested) definition for this sector and therefore do not recommend defining 'ancillary activities' but to address this through guidance. As with quarrying, we consider that the existing gateway tests and offsetting requirements will ensure that ancillary activities will only be granted consent where functional need and the effects management hierarchy are met. We tested this descriptor with the sector and this approach is supported by them.

**Recommendation:** Proceed as proposed for providing a consent pathway for mining but include ancillary activities by using the phrase the extraction of minerals and ancillary activities' throughout

Do not define 'the extraction of minerals and ancillary activities' but address through guidance.

- 26 The Section 32 Report states with respect to Consent pathway C – Mining (minerals):

**Consent pathway C – Mining (minerals)**

Mining can only occur where the resource is located. The amendments to the regulations include a consenting pathway for the "extraction of minerals and ancillary activities" as a discretionary activity. This will enable councils to assess resource consent applications on a case-by-case basis and to apply controls and/or grant consent as appropriate. This is set out in the NPS-FM at proposed clause 3.22(1)(e), and in the NES-F at proposed new regulation 45D.

...

The same question applies to mining as it does to quarrying, being whether the proposed pathway should also provide for ancillary mining activities at the location and extraction of the mineral. As with quarrying, the intent of the policies is to provide a pathway for minerals to be extracted and that includes ancillary activities where they meet the functional need test.

There is no appropriate definition for mining activities as there is for quarrying activities – the definition of 'mining operations' in the Crown Minerals Act 1991 is inappropriate and too broad. The proposed amendment therefore uses the phrase 'extraction of minerals and ancillary activities'. This is intentionally undefined in the regulations and will be supported through guidance.

- 27 And with respect of the scope of mining:

Table 13: Assessment of effectiveness of the proposed consent pathway for mining – against the elements of the specific problem definition

Scope of mining

**The consenting pathway acknowledges that the mined material is locationally constrained and can be located in, or within the setback of, a natural inland wetland.** As with quarrying activities, some ancillary activities to mining face similar constraints in that they must be located near the mining operations. They have therefore been included in the consent pathway. Providing a consent pathway for ancillary activities is consistent with the intent of the policy, to provide a pathway for mining to be undertaken, recognising that the location of mineral resources are locationally constrained. Not providing for ancillary activities risks making the consent pathway unviable. The gateway tests and effects management hierarchy will apply to ancillary activities and provide the same checks and balances (as for mining) against those activities to ensure they are only consented where appropriate.