

**BEFORE THE INDEPENDENT HEARING PANELS**

**UNDER** the Resource Management Act  
1991.

**IN THE MATTER** of hearing submissions and further  
submissions on Greater Wellington  
Regional Councils Proposed Change  
1 to the Regional Policy Statement.

**Submitter** **WINSTONE AGGREGATES**  
**(Submitter 162)**

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**LEGAL SUBMISSIONS ON BEHALF OF WINSTONE AGGREGATES  
(SUBMITTER 162) OVERVIEW AND GENERAL SUBMISSIONS**

**Dated: 13 June 2023**

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## **MAY IT PLEASE THE PANEL:**

### **Introduction.**

1. I appear on behalf of Winstone Aggregates, a Division of Fletcher Building Ltd (“**Winstone**”). Winstone has made a submission (Submitter 162) and a further submission on GWRC RPS Proposed Plan Change 1 (**PPC1**). Winstone is the largest quarry operator in the Region.
2. More detail about Winstone’s operations in the Wellington Region is set out in the evidence of Mr Heffernan, Winstone’s Planning expert.
3. Winstone is supportive of many of the proposed changes to the PPC1 including introduction of Ki uta kai tai – integrated management, introduction of the regional policies for climate change, the National Policy Statement – Urban Development (**NPS-UD**) and Freshwater – Te Mana o Te Wai as part of the National Policy Statement on Freshwater (**NPS-FW**). Winstone shares the concerns expressed by other submitters that GWRC may have not taken the correct legal approach. They are also disappointed by the approach GWRC has taken to aggregate extraction and seek changes to better provide for aggregate extraction and related activities as part of their submission on PPC1.
4. The relief sought by Winstone’s is essential to ensure a continued supply of aggregate to the Region, (particularly in Wellington City where demand is highest). Aggregate extraction already faces incredibly restrictive consenting pathways in the Natural Resources Plan. Wellington Region is facing some very hard and difficult choices in the future as to where aggregate will be sourced (and the resulting cost of doing so).
  - a. Locally sourced quarries have been in rapid decline. Fifty years ago, there were 30+ quarries across the Wellington region, (today there are only a handful);
  - b. There is no alternative to aggregate, it is a finite mineral which is consumed in huge quantities to build, maintain and support our communities;
  - c. It’s a heavy, bulky product best utilised as close to where it is sourced as possible to reduce both transport and emissions costs (on average the economic cost per tonne for transport doubles for every addition 30km it is transported); and

- d. Quarries can only be established where accessible and quality aggregate resource lie and where the resource is near the surface. The vast majority of land across the region is already 'sterilised' via incompatible land uses.
5. Winstone seeks to maximise the life of its existing quarry operations at already established quarries rather than seeking to establish new greenfield quarries further afield. This is the most sustainable way to continue to support access to aggregate in an economically efficient way, and in turn seek to contain aggregate extraction activities (and their effects) to specific Regionally significant sites.
6. Land that has been set aside for aggregate extraction, is undeveloped and often contains streams, gullies, tributaries, wetlands and indigenous vegetation high in natural value. Winstone is concerned that PPC-1 introduces a combination of unworkable Policy direction that introduces "avoid" policies for indigenous ecosystems, freshwater (wetlands and tributaries and streams) with no recognised Policy exceptions at all. This will very quickly prevent access to remaining deposits of aggregate within its existing quarries, in terms of both aggregate extraction (and ability to consent clean fill of associated overburden deposits, to access aggregate resource).
7. A reliable source of locally sourced aggregate is necessary to achieve the development and infrastructure outcomes of the NPS-UD and provide for increased housing supply. The Government recognised in the NPS-FW (February 2023 Update) both the national and regional benefits of quarrying and clean filling activities, and sets out particular pathways for these activities, that navigate a pathway to consent activities as an exception to the avoid policy in instances where they conflict with protection of natural inland wetlands.<sup>1</sup> This is set out at **Appendix A**.
8. The NPS-FW gives national direction to Councils as to how to manage what can be a problematic interaction. The Ministry for the Environment described the rationale for Clause 3.22 in the following manner:

'The rationale for providing a consent pathway for quarrying is to recognise:

- aggregate resources are required for the construction of specified infrastructure, which already has a consent pathway in the regulations.
- the need to provide for increased housing supply.

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<sup>1</sup> National Policy Statement on Fresh Water – Clause 3.22(1)(d).

- Aggregate is locationally constrained – it can only be sourced from sites where the resource is naturally present.

The proposed amendment gives a discretionary activity status to activities necessary for expanding an existing, or developing a new, quarry for the extraction of aggregate. The discretionary activity status will enable councils to assess a range of matters on application for consent. Controls on the scale of activity will apply through the tests for 'national and/or regional benefit' and 'functional need'.<sup>2</sup>

9. The Ministry also elaborated on the rationale for amending the NPS-FW to provide for clean filling of overburden:<sup>3</sup>

'With a growing population and rising demand for aggregate materials to facilitate urban development and infrastructure, we can expect that the need for clean and managed fill sites will continue and may grow. We agree that where possible, fill sites should be outside natural inland wetland areas. However, because of the prevalence of natural wetlands in areas where fills tend to be located (i.e., depressions in the landscape), this may not always be feasible.'

10. Winstone seeks to ensure that the National Policy direction for aggregate extraction and the associated clean filling of overburden is recognised as an important (and relevant component) of PPC-1 implementation of the NPS-FW provisions. The aggregate industry has faced considerable difficulty since the introduction of the NPS-FW in 2020 (which did not contain an exception for aggregate extraction where natural inland wetlands could not be avoided). Viable Aggregate resource was sterilised over this period, where that resource was in proximity to or affected natural inland wetlands, (due to unavailability of a consenting pathway). It is important for the industry that the FPP provide Policy recognition of the pathway provided in the NPS-FW February 2022 update as a priority.
11. Winstone's submit that it is vital that the GWRC and freshwater planning process (FPP) do not shy away from addressing "difficult questions" as to how to consider sometimes conflicting and competing values of protection and use. Winstone comes to this process fully acknowledging those difficulties, and respects that others hold differing views. Tackling those "hard resource management issues" at a Regional Policy level helps to better achieve integrated management for the Region, and is a key role of the Regional Policy Statement. Strong Policy guidance provides local authorities with the tools to make decisions further down the planning hierarchy.<sup>4</sup> GWRC's selective focus in PPC-1 on "protective" aspects of the NPS-FW ignores "use." This will render it incredibly difficult to continue mineral extraction in some locations. It also

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<sup>2</sup> <https://environment.govt.nz/assets/publications/managing-our-wetlands-policy-rationale-exposure-draft-amendments-31May2022.pdf>

<sup>3</sup> <https://environment.govt.nz/assets/publications/managing-our-wetlands-policy-rationale-exposure-draft-amendments-31May2022.pdf>

<sup>4</sup> Officers Report [141]

creates a “policy gap” as to how land use for aggregate extraction – quarrying and associated clean filling, should interact with freshwater and biodiversity including offsetting with net positive benefits.

12. The Officer’s approach to aggregate extraction is also inconsistent with the Councils’ treatment of other interconnecting resource management issues in PPC-1.
13. Winstone strongly disagree with the Officer’s<sup>5</sup> suggestion that the only place for extraction of aggregates to be mentioned in the PPC1 is in the *“Minerals and Soil Chapter of the RPS.”* Seeking to have Policy recognition for aggregate extraction or quarrying and clean filling (as a land use) in other relevant Chapters of the RPS, where these interact does not mean it is out of scope.
14. The table included by the Officer<sup>6</sup> of narrow upcoming amendments to the District and Regional plans and proposed updates to the RPS for other NPS, does not provide any of the **Policy recognition** Winstone’s seek for Aggregate extraction in the Chapters being considered as part of NPS-FW in RPS-PC1.

#### **Evidence to be presented**

15. Winstone intends to present detailed evidence in support of its submission points on various chapters throughout the hearing process. The purpose of these introductory submissions is to familiarise the Panel with Winstone’s role in the Region, its interest in the PPC1 and to provide preliminary comments in response to the Officer’s Report for the HS1 General Submissions Chapter. Many of these points are best decided in conjunction with specific submission points, once the Panels have had the benefit of evidence.
16. Counsel also seeks to alert the Panel to “live” issues that in Winstone’s submission, ought to be dealt with as preliminary issues.

#### **Allocation of provisions between the FPP and P1S1 processes**

17. The Plan Change combines two statutory plan changes: a freshwater planning instrument (FPI) that is being prepared in accordance with the Freshwater Planning Process (FPP) in Part 4 of Schedule 1; and a regular plan change process being prepared in accordance with Part 1 of Schedule 1 (P1S1). Legally there are two distinct plan changes that are being processed together.

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<sup>5</sup> Officers Report at para [140].

<sup>6</sup> Officers Report at para [141].

18. It follows from this that two panels have been constituted to hear the Plan Change: a freshwater hearings panel and a P1S1 panel. The two panels have some common membership.
19. The freshwater hearings panel can make recommendations on the FPI, and the P1S1 panel can make recommendations on the P1S1 instrument.
20. A number of submitters, including Winstone, submit that the Plan Change has incorrectly allocated provisions to the FPI where those provisions ought to have been allocated to the P1S1 process. The allocation of a provision has significant consequences including the procedure and appeal pathways.
21. The scope of what can lawfully be included in a FPI was addressed by the High Court in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc.*<sup>7</sup> The Court made the following observations as to what amounts to an FPI and is able to proceed through the FPP:
  - a. Parts of a regional policy statement will qualify to be part of a FPI if they directly relate to the maintenance or enhancement of the quality or quantity of freshwater.<sup>8</sup>
  - b. Part of a regional policy statement may relate to freshwater through giving effect to the NPS-FM, or by otherwise relating to freshwater.
  - c. The scope of a FPI is narrower than what is included in the NPS-FM. Not all parts of the NPS-FM relate directly to freshwater quality or quantity, and therefore assessment is needed as to whether provisions in a regional policy statement relate to freshwater through the way they give effect to the NPS-FM.<sup>9</sup>
  - d. Other provisions that do not give effect to the NPS-FM may relate to freshwater in the required manner to qualify for inclusion in the FPI, by relating directly to matters that impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands.<sup>10</sup>
  - e. Parts of a regional policy statement cannot be included within a FPI simply because of a connection to freshwater through the concepts of

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<sup>7</sup> *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc* [2022] NZHC 1777, [2022] NZRMA 565.

<sup>8</sup> At [192].

<sup>9</sup> At [201].

<sup>10</sup> At [202].

Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources.<sup>11</sup>

- f. A provision that is concerned with sea water cannot be considered as related to freshwater or included in a FPI.<sup>12</sup>
  - g. The starting point is that all provisions in a proposed RPS should be subject to the normal P1S1 process.<sup>13</sup>
22. It is clear from this summary of the High Court’s decision that the issue of whether part of a regional policy statement is lawfully able to be prepared using the FPI is a complex issue that requires a detailed understanding of the nature and effect of the provisions.
23. GWRC had less than one month between delivery of the *Otago Regional Council* decision (on 22 July 2022) and notification of the Plan Change (on 19 August 2022) to undertake that assessment. It is disappointing GWRC has not revisited that assessment.
24. There are serious doubts as to whether that allocation process was undertaken correctly in light of the *Otago* decision.
25. An obvious example noted in the section 42A report concerns Policy FW.3, which has been identified as an FPI provision because it refers to considering the effects on freshwater of subdivision, use and development, but also includes the coastal marine area. This provision cannot be properly included in the FPI to the extent that it relates to seawater.<sup>14</sup>
26. Another example, which Winstone has submitted on, is Policy 24. This policy is directed at protecting indigenous ecosystems and biodiversity values. It has been allocated to the FPI. However, it is unclear how protecting indigenous ecosystems and biodiversity values has any degree of direct relationship with freshwater quality and quantity. The section 32 evaluation simply asserts that freshwater ecosystems are “intrinsically linked” to freshwater quality.<sup>15</sup> This is an assertion, rather than an explanation that there is a relationship between

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<sup>11</sup> At [206].

<sup>12</sup> At [202].

<sup>13</sup> At [203].

<sup>14</sup> At [202].

<sup>15</sup> Section 32 evaluation report at page 390 and 395.

the provision and freshwater quality and quantity and seems to fall foul of the criteria in *Otago Regional Council*.<sup>16</sup>

27. Winstone shares and supports the concerns expressed by other submitters<sup>17</sup> that the entire Indigenous Ecosystem Chapter has been allocated solely to the FPP. The s32 Report identifies the main driver for this Chapter being implementation of the Draft NPS-Indigenous Biodiversity (NPS-IB) (that deals predominantly with terrestrial provisions).<sup>18</sup> It is wrong to use the streamlined planning process for freshwater, for provisions implementing an entirely different (and not yet operative) NPS. If this Chapter is advanced, it should (in the very least) be assigned to P1S1 to allow those provisions to be tested in the usual way (including on appeal).
28. The plan change should not proceed further before these jurisdictional issues are resolved. There is otherwise going to be a significant risk that the Freshwater Hearings Panel will conclude it is unable to make recommendations on provisions before it, because those provisions are not directly related to freshwater and within the lawful scope of an FPI – to do so would be ultra vires. Section 80A (3) of the RMA makes it quite clear that only the parts of the freshwater instruments that relate to freshwater can go through the freshwater planning process.
29. There is no lawful mechanism for provisions to be removed from the FPI and added into the P1S1 instrument (or vice versa), other than by way of renotification or notifying a variation to the plan change.<sup>19</sup> To proceed further while these legal issues are unresolved is not a fair burden on submitters' time and resources.
30. Winstone submits that the Panels need to give directions for the Council to review and resolve the allocation issues at this preliminary stage, and that should include better articulation of the reason for inclusion of the provisions in the FPP. Affected parties should be consulted with prior to any renotification by Council. The Council may need to seek declarations from the High Court or Environment Court to ensure that there is clarity that the notified provisions have been correctly allocated.

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<sup>16</sup> At [206].

<sup>17</sup> For example, Forrest & Bird, Waka Kotahi and Wellington International Airport Limited

<sup>18</sup> Section 32 Report – process for indigenous ecosystem chapter page 390 and 395.

<sup>19</sup> This was the outcome of orders made by Nation J in *Otago Regional Council*.



**Expand the scope of Plan Change 1 to give effect to mineral and aggregate quarrying provisions in national policy statements**

31. Winstone has submitted that the Plan Change should give effect to aggregate extraction provisions (including those for quarrying and clean fill) in the applicable national policy statements.
32. The section 42A report recommends that this submission point is rejected because the amendment sought is out of scope.
33. Winstone accepts that changes to the Natural Resource Plan (Regional Plan) and the District Plans are out of scope of this process. By way of clarification, Winstone's "general comments" on this point were intended simply to emphasise the need to amend the RPS so that it was in line with National Policy Statement Direction, so that the lower order documents can follow suit (s55 RMA).
34. However, Winstone has submitted that there are changes required to the RPS to give effect to national policy direction. The Officer's suggestion that this category of changes are out of scope raises the legal issue of whether the relief that Winstone is seeking through its submission is "on" the plan change. Winstone's position is it clearly is. It is unclear how a submission requesting that the notified RPS provisions on a FPP (a process designed to implement the NPS-FW) be amended to reflect a National Policy Statement, can be out of scope.
35. The leading authority on the scope of a plan change is the High Court decision in *Palmerston North City Council v Motor Machinists Ltd*.<sup>20</sup> Whether a submission is within scope requires consideration of two limbs:
  - a. Does the submission address the change to the status quo advanced by the proposed plan change?
  - b. Is there a real risk that persons potentially affected by the relief sought have been denied an effective opportunity to participate in the plan change process?
36. The first limb involves two aspects: the breadth of the alteration to the status quo by the proposed plan change, and whether the submission addresses that alteration. This can be addressed by considering whether the submission

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<sup>20</sup> *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519

raises matters that should have been addressed in the section 32 evaluation report, or whether the management regime for a particular resource is altered by the plan change.

37. As part of the second limb, it will be relevant whether the relief sought by the submission is incidental or consequential to the changes in the notified document, or whether it is something “completely novel”, or that has “come out of left field”.
38. Winstone’s position is that its submission point is clearly within scope for the following reasons:
  - a. The Plan Change is seeking to make significant and broad changes to the management regime for a variety of resources. Winstone’s submission addresses and responds to this proposed alteration to the management regimes in a manner aligned with the NPS-FM and consistent with an integrated management approach. It has not “come out of left field.”
  - b. The Plan Change is seeking to give effect to the NPS-FM. The need to implement the NPS-FM was addressed in the section 32 evaluation report.<sup>21</sup> The changes Winstone seeks are incidental or consequential upon implementing the NPS-FM.<sup>22</sup>
  - c. The section 42A report is not correct to assume that Winstone is seeking changes to the Soil and Minerals chapter of the RPS, or the Natural Resource Plan. The changes Winstone seeks in this process – for example a provision that reflects the approach to aggregate extraction in clause 3.22 of the NPS-FM, would more naturally be included within the wetlands and indigenous ecosystem provisions that are within the scope of this plan change. For completeness, both the Exposure Draft NPS-IB and NPS-Highly Productive Soils contain similar National Policy recognition in terms of exceptions to allow for aggregate extraction.
39. The Freshwater Hearing Panel also has a wider discretion as to the scope in recommendations it can make. Schedule 1, Clause 49, Part 4(2)(a) of the RMA confirms that the Panel is not limited to making recommendations with the scope of submissions made on the freshwater planning instrument and may

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<sup>21</sup> Section 32 evaluation report at [159]–[168].

<sup>22</sup> While Winstone disagrees with GWRC implementing the Exposure Draft NPS-IB, the same point applies, GWRC seek to give effect to the Draft NPS-IB recognition of quarrying and clean filling is provided for in that document.

make recommendations “on” any other matters relating to the FPI. The freshwater panel will be invited to consider this power in the unlikely event that it finds Winstone’s submission point is technically out of scope.

40. Winstone will make further detailed legal submissions on scope, as is relevant to later hearing streams. The issue of scope cannot be finally resolved as part of the general overview hearing stream, because the panel(s) will need to understand the scope of the change that is proposed to the relevant management regimes by the plan change. and how Winstone’s submission interacts with the proposed change.

### **Outcome in Otago Regional Council**

41. In *Otago Regional Council*, the High Court ordered that the ORC reconsider the Court’s directions and allocation between the FPI and P1S1 instrument.<sup>23</sup>
42. The Otago Regional Council’s re-notified FPP provisions are remarkably narrow in comparison to PPC-1. While each RPS will be different, the *Otago* judgment is helpful guidance as to the reasons for excluding Urban Form and Development,<sup>24</sup> Integrated Management,<sup>25</sup> and Indigenous Ecosystems/Biodiversity.<sup>26</sup> These topics have all been removed from the Otago FPP process in the re-notified plan change and are being advanced via the usual P1S1 planning process. Given they stem from the same National Direction as to what a FPI should include, there should be some expectation as to consistency in terms of what is covered.
43. An important feature of the *Otago* case was that there was unanimous agreement that the “Land and Freshwater” chapter should predominantly be in the FPP.<sup>27, 28, 29</sup> The judgment states:

[204] ...there may be a Chapter which to a significant extent, relates to Freshwater. That is likely to be true as to the Chapter on land and freshwater. Nevertheless, there may be policies, objectives or rules in a land

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<sup>23</sup> *Otago Regional Council v Royal Forest and Bird Protection Society and others* [2022] NZHC 1777, orders of Justice Nason at para [213(a)-(d)]

<sup>24</sup> Ibid at [205] ‘in that chapter there may be objectives or policies or rules that are directly for the purpose of managing freshwater. It will only be those parts of a topic chapter on urban form and development that relate directly to freshwater management that can be part of a freshwater planning instrument.’

<sup>25</sup> Ibid para [206],[207],[208].

<sup>26</sup> Ibid at para [78]-[79] and [107(h)].

<sup>27</sup> Reasons for this cited in the judgment [para 143] are the wording of s30(1) as to what should be included in an RPS, noting, ‘Controlling the use of land for the purpose of maintenance and enhancement of quality or quantities of water[...].’

<sup>28</sup> Ibid at para [125] Policy Documents supporting the Resource Management Amendment Bill, expressing the intent ‘... to control the use of land for the purpose of maintenance **and enhancement of water quality**, recognising the impact that control and use of land can have on freshwater management...’

<sup>29</sup> Ibid at para. [143] citing the Randerson Report, which confirmed the scope of the FPP would include: ‘The phrase “giving effect to the NPS-FM, captures all requirements that arise from the NPS-FM.”

and water chapter that do not relate to freshwater. Such parts of that Chapter in terms of s80A, could not be treated as part of a Freshwater planning instrument.’

44. The re-notified Otago PRPS contains a very narrow set of FPP provisions focused primarily on freshwater and land use. The rest of the Otago RPS has been assigned to the P1S1 planning process.
45. It contains a Policy that provides Policy recognition to Clause 3.22 by recognising narrow exceptions to protection of natural inland wetlands in the NPS-FW and NES (as it stood at the date of renotification – prior to the February 2023 update).<sup>30</sup>
46. The Policy recognition of the interaction between land use and freshwater, and the inclusion of Policy recognition for Clause 3.22 in the ORPS- (FPP), is further support for Winstone’s view that the relationship between land use and freshwater and Policy recognition of the NPS-FW/NES Cl.3.22 can be said to fall squarely and properly within the ambit of the NPS-FW and should be considered as part of the FPP process.

## **Issue 2: Other National Policy Statements**

47. Winstone does not agree with the extent to which the Officer’s Report seeks to avoid consideration of other National Policy Statements as part of PPC1.<sup>31</sup> It is accepted that the FPP is focused on NPS-FW, but there is no direction in the FPP process that an FPI should entirely ignore other National Policy Statements (where they are applicable).
48. The RMA directs that decisionmakers when changing a regional policy statement must prepare and change its Regional Policy Statement in accordance with ‘a *National Policy Statement to give effect to National Policy Statements and National Environmental Standards*.’<sup>32</sup> Section 62(3) reiterates that ‘a *Regional Policy Statement must give effect to National Policy Statement*.’ Where relevant to proposed provisions, it is not possible to disregard other NPS, as being irrelevant to RPS-PC1. Both Panels should be “alive” to requirements of other NPS, such as NPS-HPL, NPS-REG, NPS-UD when and where they arise.

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<sup>30</sup> See page 131 renotified version of the Otago Regional Policy Statement FPP provisions policy LT-FW-F9 (protection of natural inland wetlands) & LF-LS-P21 (land use and freshwater). Note this is dated 21 June 2022, so this provision does not include the quarrying and clean fill amendments to Clause 3.22 that were introduced in the NPS-FW (February 2023 Update).

<sup>31</sup> Officers Report para [31]-[42] uses an unusual turn of phrase “is relevant to the extent that submitters seek...” There doesn’t seem to be a wider acknowledgement of the need for decisionmakers to consider the relevant NPS and NES as applicable to the proposed provisions of PPC-1.

<sup>32</sup> Section 62 RMA.

## Draft - National Policy Statement on Indigenous Biodiversity

49. GWRC's decision to overhaul of its Indigenous Ecosystem chapter to "give effect to" the exposure draft NPS-Indigenous Biodiversity (NPS-IB),<sup>33</sup> as part of PPC-1 is of serious concern to Winstone.<sup>34</sup> The s32 Report provides the following explanation at [181]:

"An exposure draft of the National Policy Statement for Indigenous Biodiversity (NPS-IB) was released for consultation by the government in June 2022. The purpose of the NPS-IB is to set out an objective and policies in relation to maintaining indigenous biodiversity, and to specify what local authorities must do to achieve that objective. It is therefore directly relevant to the Indigenous Ecosystems chapter of the RPS. The intent is that the NPS-IB will be gazetted in December 2022 taking into account feedback through the exposure draft process."

50. This is a significant policy shift in how the RPS approaches Indigenous Biodiversity/Ecosystems – in an already technical area. It imposes new obligations on local authorities, (that they say they are ill-equipped to handle)<sup>35</sup> and in turn will result in compliance costs on private property owners. The text of the Draft NPS-IB will inevitably change as a result of consultation before coming into force sometime in the future. The timeframe for finalising this the draft NPS-IB is uncertain, with MfE's website currently anticipating gazettal this year (but there is very limited time for this to occur before the General Election in October).
51. The RMA does not direct Regional Policy Statements to give effect to draft National Policy Statements. The Courts have been reluctant to place weight of Draft NPS for good reason,<sup>36</sup> noting that Drafts 'have no statutory significance',<sup>37</sup> and decision makers have generally declined to implement these.<sup>38</sup>
52. Winstone is not opposed to provisions that better protect biodiversity and ecosystems, but does question the timing of the changes being introduced.

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<sup>33</sup> Officer Report – Table page 8, Section 32 Report para [183].

<sup>34</sup> Officers Report para [134].

<sup>35</sup> S32 Report at [181]

<sup>36</sup> *Lindis Catchment Group Inc v Otago Regional Council* [2019] EnvC 166 (upheld on appeal) the Environment Court declined to implement a draft NPs/NES and associated Draft Guidelines. The Court was asked to consider the extent to which the proposed National Environmental Standard on ecological flows and water levels (the draft NES) were relevant to a proposed Regional Plan Change. Opting to eschew any reliance on the proposed NES it noted that 'there is no obligation to consider the draft NES so it could be considered as irrelevant.'

<sup>37</sup> *P & E Limited v Canterbury Regional Council* [2016] NZEnvC 252 at [195]. *Canterbury Regional Council* when asked to apply draft Guidelines developed for the Draft NPS-FW on maximum water location limits for low flow, the Court decided not to place 'too much weight on a [draft] document that has no statutory significance,' noting a lack of consensus in that other ecologist, 'did not agree with it.'

<sup>38</sup> *Mainpower New Zealand Limited v Hirinui District Council* [2011] NZ EnvC 384 at [27] 'EECA also referred to a number of other draft national policy statements. We have considered these in the context of the matters for which they were raised but have not placed any weight on them as they may yet change.'

Changes to the indigenous Ecosystem Chapter should be done once, done properly, and done efficiently) to implement the National direction and content of the NPS-IB once gazetted. There is little to be gained and plenty to be lost by GWRC seeking to prematurely implement the Draft NPS-IB into its RPS which will subsequently be adopted into Regional and District plans adding unnecessary cost and confusion.

### **Concluding remarks**

53. Counsel has sought to respond to issues raised in the s42A Report and signpost issues for the Panel in terms of themes which it intends to elaborate on in further detail in evidence during the relevant hearing on substantive issues.
  
54. Subject to proper policy recognition for aggregate extraction, being provided and issues as to jurisdiction being resolved, Winstone support the general direction of PPC-1 to introduce changes required by the NPS-UD, NPS-FW including introduction of Te Mana o te Wai (Freshwater), ki uta kia tai (integrated management of natural and physical resources). It also widely supports the Regional Policy response to Climate Change. The current RPS became operative in 2013 and is much in need of renewal to better reflect the regions current issues.



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**Pherne Tancock/ Duncan Ballinger**

Counsel for Winstone Aggregates.

# Appendix A

Extract from the National Policy Statement on Freshwater (February 2023 update).

## Subpart 3 Specific requirements

### 3.21 Definitions relating to wetlands and rivers

(1) In clauses 3.21 to 3.24, and 3.34:

**biosecurity** means activities to eliminate or manage pests and unwanted organisms (as those terms are defined in the Biosecurity Act 1993)

**effects management hierarchy**, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:

- (a) adverse effects are avoided where practicable; then
- (b) where adverse effects cannot be avoided, they are minimised where practicable; then
- (c) where adverse effects cannot be minimised, they are remedied where practicable; then
- (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; then
- (e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; then
- (f) if aquatic compensation is not appropriate, the activity itself is avoided

**functional need** means 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

**loss of value**, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:

- (a) any value identified for it under the NOF process
- (b) any of the following values, whether or not they are identified under the NOF process:
  - (i) ecosystem health
  - (ii) indigenous biodiversity
  - (iii) hydrological functioning
  - (iv) Māori freshwater values
  - (v) amenity values

**natural inland wetland** means a wetland (as defined in the Act) that is not:

- (a) in the coastal marine area; or
- (b) a deliberately constructed wetland, other than a wetland constructed to offset impacts on, or to restore, an existing or former natural inland wetland; or
- (c) a wetland that has developed in or around a deliberately constructed water body, since the construction of the water body; or
- (d) a geothermal wetland; or
- (e) a wetland that:
  - (i) is within an area of pasture used for grazing; and
  - (ii) has vegetation cover comprising more than 50% exotic pasture species (as identified in the *National List of Exotic Pasture Species* using the *Pasture Exclusion Assessment Methodology* (see clause 1.8)); unless
  - (iii) the wetland is a location of a habitat of a threatened species identified under clause 3.8 of this National Policy Statement, in which case the exclusion in (e) does not apply

**restoration**, in relation to a natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning

**ski area infrastructure** means infrastructure necessary for the operation of a ski area and includes: transport mechanisms (such as aerial and surface lifts, roads, and tracks); facilities for the loading or unloading of passengers or goods; facilities or systems for water, sewerage, electricity, and gas; communications networks; and snowmaking and snow safety systems

**specified infrastructure** means any of the following:

- (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002)
- (b) regionally significant infrastructure identified as such in a regional policy statement or regional plan
- (c) any water storage infrastructure
- (d) any public flood control, flood protection, or drainage works carried out:
  - (i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or
  - (ii) for the purpose of drainage by drainage districts under the Land Drainage Act 1908
- (e) defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990



(f) ski area infrastructure

**wetland maintenance** means activities (such as weed control) which prevent the deterioration, or preserve the existing state, of a wetland's ecosystem health, indigenous biodiversity or hydrological functioning

(2) For the purpose of the definition of **effects management hierarchy**:

**aquatic compensation** means a conservation outcome resulting from actions that are intended to compensate for any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, remediation, and aquatic offset measures have been sequentially applied

**aquatic offset** means a measurable conservation outcome resulting from actions that are

intended to: (a)

(b) redress any more than minor residual adverse effects on a wetland or river after all appropriate avoidance, minimisation, and remediation, measures have been sequentially applied; and

achieve no net loss, and preferably a net gain, in the extent and values of the wetland or river, where:

(i) **no net loss** means that the measurable positive effects of actions match any loss of extent or values over space and time, taking into account the type and location of the wetland or river; and

(ii) **net gain** means that the measurable positive effects of actions exceed the point of no net loss.

### 3.22 Natural inland wetlands

(1) Every regional council must include the following policy (or words to the same effect) in its regional plan:

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

(a) the loss of extent or values arises from any of the following:

(i) the customary harvest of food or resources undertaken in accordance with tikanga Māori

(ii) wetland maintenance, restoration, or biosecurity (as defined in the National Policy Statement for Freshwater Management)

(iii) scientific research

(iv) the sustainable harvest of sphagnum moss

(v) the construction or maintenance of wetland utility structures (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020)

(vi) the maintenance or operation of specified infrastructure, or other infrastructure (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020

(vii) natural hazard works (as defined in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020); or

(b) the regional council is satisfied that:

(i) the activity is necessary for the purpose of the construction or upgrade of specified infrastructure; and

(ii) the specified infrastructure will provide significant national or regional benefits; and

(iii) there is a functional need for the specified infrastructure in that location; and

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

(c) the regional council is satisfied that:

(i) the activity is necessary for the purpose of urban development that contributes to a well-functioning urban environment (as defined in the National Policy Statement on Urban Development); and

(ii) the urban development will provide significant national, regional or district benefits; and

(iii) the activity occurs on land identified for urban development in operative provisions of a regional or district plan; and

(iv) the activity does not occur on land that is zoned in a district plan as general rural, rural production, or rural lifestyle; and

(v) there is either no practicable alternative location for the activity within the area of the development, or every other practicable location in the area of the development would have equal or greater adverse effects on a natural inland wetland; and

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

**(d) the regional council is satisfied that:**

**(i) the activity is necessary for the purpose of quarrying activities; and**

**(ii) the extraction of the aggregate 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**

**(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**

**(f) the regional council is satisfied that:**

**(i) the activity is necessary for the purpose of constructing or operating a new or existing landfill or cleanfill area; and**

**(ii) the landfill or cleanfill area:**

**(A) will provide significant national or regional benefits; or**

**(B) is required to support urban development as referred to in paragraph (c); or**

**(C) is required to support the extraction of aggregates as referred to in paragraph (d); or**

**(D) is required to support the extraction of minerals as referred to in paragraph (e); and**

**(iii) there is either 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 natural inland wetland; and**

**(iv) the effects of the activity will be managed through applying the effects management hierarchy.”**

**(2) Subclause (3) applies to an application for a consent for an activity that:**

- 1. (a) is for a purpose referred to in subclause (1)(a) to (f), other than the purpose referred to in paragraph (1)(a)(i); and**
- 2. (b) would result (directly or indirectly) in the loss of extent or values of a natural inland wetland.**

**(3) Every regional council must make or change its regional plan to ensure that an application referred to in subclause (2) is not granted unless:**

**(a) the council is satisfied that:**

**(i) the applicant has demonstrated how each step of the effects management hierarchy will be applied to any loss of extent or values of the wetland (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values; and**

**(ii) if aquatic offsetting or aquatic compensation is applied, the applicant has complied with principles 1 to 6 in Appendix 6 and 7, and has had regard to the remaining principles in Appendix 6 and 7, as appropriate, and**

**(iii) there are methods or measures that will ensure that the offsetting or compensation will be maintained and managed over time to achieve the conservation outcomes; and**

(b) any consent granted is subject to:

(i) conditions that apply the effects management hierarchy; and

(ii) a condition requiring monitoring of the wetland at a scale commensurate with the risk of the loss of extent or values of the wetland; and

(iii) conditions that specify how the requirements in (a)(iii) will be achieved.

(4) Every regional council must make or change its regional plan to include objectives, policies, and methods that provide for and promote the restoration of natural inland wetlands in its region, with a particular focus on restoring the values of ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity values.