

Before the Hearing Commissioners
Appointed by the Buller District Council (**BDC**) and
West Coast Regional Council (**WCRC**)

Under the Resource Management Act 1991

In the matter of resource consent applications by Westland Mineral Sands
Co. Limited to establish and operate a mineral sand mine
operation at Okari/Nine Mile (RC-2021-0095)

Legal submissions on behalf of Westland Mineral Sands Co. Limited

21 March 2022

Applicant's solicitor:

Alex Booker
Anderson Lloyd
Level 3, 70 Gloucester Street, Christchurch 8013
PO Box 13831, Armagh, Christchurch 8141
DX Mail: WP20309
P + 64 3 379 0037 | f + 64 3 379 0039

**anderson
lloyd.**

Naia te mihi ki te manawhenua, Te Rūnanga o Ngāti Waewae

Naia te mihi ki a koutou

Tēnā tatou

May it please the Commissioners

- 1 Westland Mineral Sands Co. Limited (**Westland Minerals**) seek resource consents to establish and operate a mineral sand mine operation at Okari/Nine Mile (**Application** and **Application Site**).
- 2 The proposed mine will extract ilmenite, garnet and some rare earth elements (**REE**) (collectively Heavy Mineral Concentrate (**HMC**)) from a secondary dune inland from Nine Mile Beach. This dune is setback some distance from the coastline (approx. 700m east¹) and is within highly modified farmland used for dairy. As an activity to extract sand, it has a functional need to be located in the Coastal Environment. No indigenous vegetation is proposed to be removed.² Mining will be setback from significant indigenous vegetation, wetlands, other waterbodies and drains. Adverse effects on native bird and lizard species will be avoided – through avoidance of their habitats, and conditions requiring regular monitoring and management techniques³. No direct discharges to water or additional water takes are proposed. Discharges of tailings leachate to land and surface water quality has been assessed as acceptable and able to avoid adverse effects on freshwater species and birds⁴. Assessments have been precautionary, as are the conditions proposed which require regular monitoring through the life of the mine. There will be no adverse effects on previously recorded and scheduled archaeological sites.⁵
- 3 Historically, there has been a lot of interest in the Application Site for sand mining. It is likely to have been mined as early as 1876⁶, with drilling programmes commencing as early as 1930s. Various forms of exploration have been permitted in the area since that time⁷. Mining is also not an unanticipated or out of zone

¹ SoE of Mr Glasson, at [16].

² With the exception of one nīkau palm to be removed as a permitted activity.

³ Summary SoE of Dr Bramley, at [5].

⁴ Summary SoE of Dr Bramley, at [6].

⁵ SoE of Ms Lawrence, at [11].

⁶ SoE of Ms Lawrence, at [22].

⁷ SoE of Mr Hardie, at [29].

activity on the Application Site in the Buller District Plan (**BDP**). Consent has previously been granted for a small scale sand mining activity⁸. The non-complying activity status is triggered as a result of a non-compliance with dated permitted noise standards at the property boundary of adjacent dwellings on Saturday evenings and Sundays⁹, and due to a discharge of water (stormwater and water in tailings and slimes in the mine pit) being within 100m of a natural wetland (pursuant to the Regulation 54 of the National Environmental Standard for Freshwater 2020 (**NES-FM**)).

- 4 The Application has been comprehensively assessed by experienced and reputable technical experts, peer reviews completed and additional evidence provided at the request of the WCRC and BDC. Where better outcomes for the environment can be achieved without compromising necessary functional and operational requirements, mitigation has been offered by the Applicant. The Applicant has made substantial revisions¹⁰ to the Application in direct response to concerns raised in submissions, and through ongoing engagement with willing affected persons. This includes reducing the mining hours, reducing the mining area, not mining below the water table and further restrictions on trucking (hours, movements and speeds). Additional setbacks, fencing, bunding and planting is offered, and so is additional monitoring of water quality and associated ecology.
- 5 The proposal is an efficient and short term use of land. The Application Site will be rehabilitated to a similar albeit reduced land contour for farming again. To the north of the Application Site, the proposed planting will remain as an ecological corridor between the two adjacent wetlands.¹¹ The ecological corridor, along with proposed stock-fencing spanning the entire boundary of the wetlands and adjacent forest, will have positive biodiversity effects beyond the life of the mine. The Applicant has also agreed to contribute a substantial sum towards the section of the Kawatiri Cycle Trail traversing the stretch of coastline adjacent to the mine should the mine go ahead¹².
- 6 The Applicant is a proud West Coast company, and intends to work collaboratively with, and deliver positive economic benefits and employment opportunities to the West Coast community with minimum environmental impact¹³. The proposal represents an exciting opportunity to meet growing international demand for critical

⁸ RC130035, granted 8 May 2013 for a 15 year term, implemented in 2014.

⁹ When a "night-time" noise limit of 45 dB L_{A10} applies. Rule 7.9.1.2 of the Buller District Plan.

¹⁰ SoE of Ms McKenzie, at [12].

¹¹ As outlined in the Rehabilitation Plan attached to the Statement of Evidence of Karen Goh dated 4 March 2022.

¹² SoE of Mr Mudgway, at [11].

¹³ SoE of Duncan Hardie dated 4 March 2022, at [22] – [23].

minerals. The long term strategy and desire is to grow an inter-generational and sustainable mineral sands sector on the West Coast, consistent with the Government's national agenda to move toward clean-tech minerals. This will include the development of a sustainable shipping solution and re-establishing the West Coast ports.¹⁴ Te Rūnanga o Ngāti Waewae (**Ngāti Waewae**), Tainui Kawhia Incorporation (who share a whakapapa with Ngāti Waewae)¹⁵, and the Applicant are currently collaborating with the intent to create a shared shipping system for the West Coast of NZ. This project is a significant part (and the start) of this strategy. These broader benefits provide context, but have not been assessed by Ms McKenzie as direct benefits of the Application. The Panel is required to assess the effects of the Application before you, not future potential resource consent applications.

- 7 The operation will have no more than minor adverse environmental effects¹⁶ and is not contrary to, and broadly consistent with the planning framework applying to the Application Site.¹⁷ It is submitted that the sustainable management purpose of the RMA will be met. The Application provides for the West Coast's social, economic and cultural well-being while sustaining and safeguarding the wetlands and their ecosystems, and avoiding, remedying and mitigating adverse effects.¹⁸

Matters addressed in submissions

- 8 My submissions address:
- (a) Amendments to application;
 - (b) Legal tests:
 - (i) Section 104D RMA;
 - (ii) Section 104 RMA; and
 - (iii) Section 105 and 107 RMA;
 - (c) Existing environment;

¹⁴ Westland Minerals have already obtained a long-term lease of Westport Port.

¹⁵ Tainui Kawhia Incorporation have submitted in support of the Application.

¹⁶ SoE of Ms McKenzie, at [14].

¹⁷ SoE of Ms McKenzie, at [15].

¹⁸ Section 5(2) RMA... *while* (a) sustaining the potential of the natural and physical resources to meet the reasonably foreseeable needs of future generations, (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

- (d) Permitted baseline;
- (e) Submissions – supporting and changed positions;
- (f) Actual and potential effects (positive effects, adverse effects, radiation);
- (g) Risk and adaptive management;
- (h) Planning provisions (WCRPS provisions relating to ecology/natural character; and other relevant matters);
- (i) Matters raised in submissions (amenity, property values, climate change);
- (j) Part 2 RMA; and
- (k) Conditions of consent and management plans.

Amendments to application

- 9 The Applicant has responded to Council and submitter feedback, as well as expert peer reviews, by amending the Application throughout this process. The amendments are outlined in detail in the respective statements of evidence, and summarised in the evidence of Ms McKenzie.¹⁹
- 10 An amendment must be within the scope of an original application²⁰. Whether an amendment to an application is within scope is determined by how that amendment sits within the overall application in terms of:²¹
 - (a) being of a significantly different scale and intensity; and
 - (b) having significantly different effects.
- 11 The Applicant may make amendments to the Application up until the close of a hearing.²² It is submitted that the amendments made to the Application reduce the effects of the Application and are within scope.

¹⁹ SoE of Ms McKenzie, at [12].

²⁰ *Shell New Zealand Limited v Porirua City Council* CA 57/05, 19 May 2005 at [7].

²¹ *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.

²² *Darroch v Whangarei District Council* A18/93 at page 27, as confirmed more recently in *Simons Hill Station Ltd v Canterbury Regional Council* [2013] NZEnvC 62 at [20].

Legal tests

Section 104D RMA

- 12 As a non-complying activity, the Application must pass the section 104D RMA 'gateway' test. That is, the consents may only be granted if the decision maker is satisfied that either:
- (a) the adverse effects of the activity on the environment will be minor (s104D(1)(a)). Positive effects are not to be considered; or
 - (b) the Application is for an activity that will not be contrary to the objectives and policies of the district and regional plans (s104D(1)(b)). For completeness it is recorded that this assessment does not apply to the West Coast Regional Policy Statement (**WCRPS**), National Policy Statement for Freshwater Management 2020 (**NPS-FM**) and New Zealand Coastal Policy Statement 2010 (**NZCPS**).
- 13 There is no primacy given to either of the two limbs, so if one limb can be passed then the test is considered to be passed. If the Application passes either of the limbs, then it can move on to be considered under s104. Ms McKenzie considers the Proposal passes both of the gateway tests, subject to the imposition of the offered revised conditions of consent.²³

Section 104 RMA

- 14 Having passed the gateway tests, the Panel must (pursuant to section 104(1)) 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 will be well known to the Panel, and is addressed in Ms McKenzie's planning evidence²⁴ and the Officer's Reports.
- 15 Your evaluation requires giving 'genuine thought and attention' to the various matters set out in section 104 RMA.²⁵ To "have regard to" does not require you to "give effect to". The matters of consideration under section 104 are on equal

²³ Summary SoE Ms McKenzie, at [36].

²⁴ SoE of Ms McKenzie, at [21] – [34] and [81] – [107].

²⁵ *Foodstuffs South Island Limited v Christchurch City Council* (1999) 5 ELRNZ 308 (HC), at p 309.

footing, so that none of the subsections are to be elevated to a primary status.²⁶ All matters are to be considered and given such weight as you see fit.²⁷

16 It is for the Panel to:

- (a) Assess the relevant potential effects of the proposal, including in light of the objectives, policies and rules of the relevant plans. Your duty under section 104 is to consider all relevant effects, both positive and negative, otherwise the assessment may be incomplete and the balancing of conflicting considerations may be distorted.²⁸
- (b) 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. Generally an assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole".²⁹ However, following the judgment of the Supreme Court in *King Salmon*, it is now recognised that more specific or directive provisions, particular those which set "environmental bottom lines" may warrant greater weight.³⁰ Objectives and policies of recent instruments higher in the policy hierarchy may be given more weight but relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled.³¹
- (c) Consider Part 2 – more as a check to the interpretation of the planning framework, noting that Part 2 cannot be used to render planning provisions under a broad judgement ineffective.
- (d) Weigh these conclusions to determine whether the consent can be granted and the purpose of the RMA is achieved.

²⁶ *Norwood Lodge v Upper Hutt City Council* HC Wellington CIV-2004-485-2068; *Henderson v Papakura District Council* A019/03 at [34].

²⁷ *Kennett v Dunedin City Council* (1992) 1A ELRNZ 168 at 182. *Dye v Auckland Regional Council* (2001) 7 ELRNZ 209 at [25].

²⁸ *AFFCO v Far North District Council* A 6/94 at 233 (adopting what was said in *Te Aroha Air Quality Protection Group v Waikato Regional Council* (No 2) A 70/93; see also *Baker Boys Ltd v Christchurch City Council* (1998) 4 ELRNZ 297.

²⁹ *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].

³⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZLR 593 [King Salmon].

³¹ *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).

- 17 The Panel should be mindful that there is an evidential burden on all parties to produce evidence tending to support an allegation.³² 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 cogent evidence to support a particular conclusion. In other words, there needs to be material of probative value which tends to logically show the existence of facts consistent with the finding. The evidence must satisfy you of the fact that there will be such an effect on the balance of probabilities.

Sections 105 and 107 RMA

- 18 Section 105 RMA provides relevant considerations for a discharge application:

105 Matters relevant to certain applications

- (1) *If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*
- (a) *the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
 - (b) *the applicant's reasons for the proposed choice; and*
 - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment.*
- 19 The nature of the discharge, the sensitivity of the receiving environment and an assessment of alternatives is canvassed in the Application and accompanying (and subsequent) technical reports and evidence, particularly that of Mr Etheridge and Dr Bramley. The proposal to discharge to ground rather than water represents best practice methods for discharge, which is the reason for the Applicant's choice of method, and is considered the most appropriate alternative³³.
- 20 Pursuant to section 107(1), the consent authority cannot grant consent allowing any discharge into a receiving environment which would, after reasonable mixing, give rise to all or any of the following effects unless one of the three exceptions specified in section 107(2) exist (i.e. exceptional circumstances, temporary discharges, and/or maintenance works):³⁴

³² *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.

³³ SoE Ms McKenzie, at [33].

³⁴ S 107(1), RMA.

- (c) *The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended material:*
 - (d) *Any conspicuous change in the colour or visual clarity:*
 - (e) *Any emission of objectionable odour:*
 - (f) *The rendering of fresh water unsuitable for consumption by farm animals:*
 - (g) *Any significant adverse effects on aquatic life.*
- 21 The proposal does not involve any direct discharge to water, and the evidence of Mr Etheridge and Dr Steyl confirms that the proposal will meet section 107(1)(c-f), and Dr Bramley confirms that there will not be any adverse effects on aquatic life in Blind River. Conditions of consent are included to require compliance with regard to these matters. The Application meets the tests of section 107³⁵.

Existing environment

- 22 The environment against which the Application needs to be assessed is the 'existing' or 'receiving' environment – being the environment as it currently exists, but also the future environment as it would exist with permitted activities and/or unimplemented resource consents undertaken.³⁶
- 23 Permitted activities or an unimplemented resource consent do not however automatically form part of the existing environment – they are subject to the 'likelihood test' outlined in *Queenstown Lakes District Council v Hawthorn Estate Limited (Hawthorn)*.³⁷ Whether an unimplemented resource consent is considered part of the environment depends on the likelihood of that resource consent being implemented.³⁸ The Environment Court has since found that "likely" means "more likely than not".³⁹
- 24 If a determination is made that an unimplemented resource consent is likely to be implemented, the environment for consideration must include the activity of that consent. There is no discretion to ignore a factual finding as to the future state of the environment.⁴⁰

³⁵ SoE Ms McKenzie, at [34].

³⁶ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] 12 ELRNZ 299, at [84].

³⁷ *Ibid.*

³⁸ At [84].

³⁹ *Burgess v Selwyn District Council* [2014] NZEnvC 11, [74] and [79]; affirmed in *Otway Oasis Society Inc v Waikato Regional Council* [2020] NZEnvC 169 at [15].

⁴⁰ *Te Runanga-A-Iwi O Ngati Kahu v Far North District Council* [2010] NZEnvC 372, at [98]; affirmed in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221, at [95].

- 25 What constitutes the existing environment is relevant to:
- (a) the proposed dwelling of Mr Nicholson and Ms Wilson, who own the property directly to the north of the Application Site;
 - (b) consideration of the existing resource consent for sand mining over part of the Application Site (as part of the assessment of natural character); and
 - (c) the existing resource consent for a water take from Blind River.

Nicholson/Wilson proposed dwelling

- 26 Mr Nicholson and Ms Wilson have indicated it is their intention to build a dwelling on their property, in accordance with Certificate of Compliance RC210071 recently granted (on 18 November 2021). The BDC Officer's Report indicates that the dwelling forms part of the existing environment on the basis of the Certificate of Compliance (**CoC**). Ms McKenzie, in her evidence, considers implementation of the CoC is currently unlikely because additional approvals are required.⁴¹
- 27 To legally form part of the existing environment, the Panel needs to be satisfied that the CoC is "more likely than not" to be implemented. The CoC is premised on Mr Nicholson and Ms Wilson advising BDC that there is an existing vehicle access and crossing to the site. Evidence will need to be provided by these submitters to demonstrate physical access is able to be obtained to the proposed site.⁴² The difficulty of providing access to the proposed building platform is illustrated clearly in the image provided in Mr Nicholson and Ms Wilson's submission which visually shows the significant wetland completely covering the middle of the property. The owner has previously obtained resource consent to construct an access across the wetland which has now lapsed⁴³. The same access would now be a prohibited activity under the NES-FM.
- 28 In *Burgess v Selwyn District Council*⁴⁴ the Environment Court considered whether a certificate of compliance for a dwelling was likely to be implemented. The Environment Court was unable to conclude that the certificate would be implemented and the dwelling constructed on the basis that plans for the dwelling had not progressed to a stage to support that determination.⁴⁵ In fact, the

⁴¹ SoE of Ms McKenzie, at [38].

⁴² No evidence has been provided of an access agreement with the neighbouring properties, an arrangement would be subject to an approval pursuant to section 348 of the Local Government Act for a right of way certificate. BDC had not received an application of this nature as at 14 March 2022.

⁴³ SoE of Ms McKenzie, at [38].

⁴⁴ *Burgess v Selwyn District Council* [2014] NZEnvC 11.

⁴⁵ *Ibid*, at [78].

Environment Court considered that the certificate of compliance was being used as a means of future-proofing the land in question as a result of the application.⁴⁶

- 29 It is submitted, on the information provided, there is not enough evidence to confirm that the proposed Nicholson/Wilson dwelling forms part of the existing environment.

Existing small scale sand mining

- 30 There is an existing resource consent for sand mining over part of the Application Site that forms part of the existing environment as it has been implemented. Resource consent RC130035 (BDC) was issued 8 May 2013, implemented in 2014, and expires in 2028. RC13036/1 (WCRC) authorises earthworks associated with the extraction of mineral sands along the base of the sand dune down to 2-3 metres (8000m³ per annum, 120,000m³ total). It commenced on 22 February 2013 for a 15 year term.
- 31 The consents authorise land disturbance and sand removal activities along the entire length of the dune, with associated effects on natural character. The consented activity is smaller in scale - 0.5ha mine area disturbed at any one time to 2-3m⁴⁷. The use of an excavator and other mining equipment, and associated effects, would also form part of the existing environment as they would still be required for a mining operation on this smaller scale. Rehabilitation is to occur within 6 months.⁴⁸
- 32 The existing environment of the Application Site is therefore highly modified farmland, which includes mineral sand mining which modifies the base of the dune land form that is the subject of this Application. The current application, if granted will supersede these consents.
- 33 For completeness, it is noted that coastal permits have been granted for small scale sand mining on Tauranga Bay Beach (to disturb and take sand, and deposit sand/tailings). These were recently obtained by a submitter in opposition.⁴⁹

Water take

- 34 The farm holds water permits for taking and using groundwater and taking and using surface water from the Blind River for dairy farming, irrigation and mining

⁴⁶ Ibid.

⁴⁷ RC210051 and Annual Work Plan (2014) attached to BDC Officer's Report.

⁴⁸ RC210051 and Annual Work Plan (2014) attached to BDC Officer's Report.

⁴⁹ Coastal permits RC-2021-0102-01-04.

purposes to a combined volume of 74 L/s⁵⁰. The consent holder shall take no more than 40L/s from the Blind River (an identified take location south of the mining site). These consents expire 25 August 2036.

Permitted baseline

- 35 Section 104(2) RMA provides you 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.
- 36 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 the effects of the permitted and proposed activities. Whether or not the permitted activity is 'fanciful' may have a bearing on your decision of whether or not you exercise your discretion.⁵¹
- 37 It is not fanciful for the Application Site to contain permitted rural activities with large scale rural buildings. As demonstrated by the CoC obtained by the Applicant for a farm building and three associated silos⁵². These activities will have visual and amenity effects and should be appropriately discounted in its consideration of effects on the environment.
- 38 The Application's proposed Lighting Management Plan ensures that lighting will be limited to the BDC permitted level of 10 lux spill.
- 39 The West Coast Regional Air Quality Plan permits stockpiling, conveying and handling so long as dust does not discharge beyond the boundary of the subject property,⁵³ and permits earthworks, quarrying, mining and clean fill operations so long as any discharge beyond the boundary of the site is not noxious, dangerous, offensive or objectionable.⁵⁴
- 40 The Regional Land and Water Plan contains permitted activity provisions for land disturbance (humping, v-blading and earthworks), relevant to assessing the visual effects of the mine disturbance footprint, especially with regard to the short term effects on natural character.

⁵⁰ RC-2021-0090-01/02.

⁵¹ *Rodney DC v Eyres Eco-Park Ltd* [2007] NZRMA 1(HC), at [37].

⁵² The Farm building is 25m x 18m with a total area of 450m². The height of the building is approximately 9.4m at the apex of the roof gable. The three silos, which will be constructed adjacent to the shed, will be 2.74m in diameter and 6.74m in height, each with a building area of 5.9m².

⁵³ Rule 3.

⁵⁴ Rule 5.

- 41 Ms McKenzie details the permitted baselines in her evidence.⁵⁵ For completeness, it is confirmed that the Applicant's experts have not relied on the permitted baseline in undertaking their assessments. I submit this is important for context.

Submissions

Supporting submissions

- 42 There is substantial support for the Proposal (approximately 70 submissions) and due regard should be given to these submissions. Support was provided on the basis of generic submissions for:
- (a) Jobs (direct and indirect employment) and the intended use of local businesses;
 - (b) Other economic and community benefits to Buller and West Coast – including from associated developments such as reopening of Westport Port, which will add to the resilience of the region and would provide an alternative link for essential goods and services to be transported in and out of the region; and
 - (c) That the activity is small scale and appropriately located on rural land, and that WMSC appears to be committed to ensuring the activity is well planned and managed and any environmental effects are addressed.
- 43 Some comments of particular note from supporting submitters who will not appear:
- (a) Bradleys, 40 The Esplanade, Westport: *"We have lived on The Esplanade for 32 years. We lived with Holcim cement tankers passing our house on a more frequent cycle than the trucking movements proposed by WMS, and do not think we will have lifestyle impairment by the WMS trucking. In fact, we are building a new house on The Esplanade ... so would not be persisting with this spend up if we thought trucking was going to wreck our lifestyle. We support new enterprise in our district. As furniture retailers in business in Westport, we clearly understand the need for employment for Westport people, as work and prosperity for our citizens is the source of our turn over. We are fortunate to have people with foresight and enterprise by WMS, to provide new opportunities for prosperity in our district. We see little difference in the activities proposed by WMS, and activities associated with rock or gravel quarrying all over the West Coast. Trucking activities from such quarries and rivers are ongoing and new quarried and river pits are*

⁵⁵ SoE of Ms McKenzie, at [39] – [41].

opening up quite frequently, with little or no public outcry about such activities."

- (b) M Dellaca, Westport: *"I wish to see the Buller be a prosperous district, creating jobs so that people can live, work and play on the West Coast."*
- (c) R Hayman, Westport: *"For me, it's a lot about creating jobs in this region ... as a region we need to be forward planning for other mines to open ... We are a mining region! Embrace it, as this is what keeps our town humming. Mining activities are common here and effects of such activities are well known and can be managed via appropriate conditions and monitoring."*
- (d) L Scanlon, Homebuilders West Coast Trust, Westport (non-for profit community group): *"the proposed project will be an economic benefit to the district, while providing employment, increase the social environment and connection within the district. Families gaining employment, school rolls increasing, children growing and developing in a safe district where the community looks after the community is definitely a positive for the District."*
- (e) Westfleet Seafoods Ltd: *"as one of the largest employers on the West Coast, we fully support the mineral sands operation proposal and the potential economic and community benefits that it will bring to the region."*
- (f) Tainui Kawhia Minerals (owned 100% by TKI) Kawhia, West Coast North Island: *"A development will provide jobs and opportunities for investment. A future development stands to benefit our people for many generations. We share a whakapapa with Ngāti Waewae and support developments that benefit their people. ... Shipping is a major cost of a mineral's development, and we are pleased to advise of the relationship we are forming with Westland Mineral Sands Limited which includes a collaboration around shipping that will be of mutual benefit to both of us."*
- (g) West Coast Emergency Management Joint Committee: *"Of most interest is the possible alternate transport link to and from the West Coast region in the event of the region being cut off by road (in a large earthquake for example). Research announced earlier this year found that there is a 75% probability of a rupture on the central section of the Alpine Fault over the next 50 years (Howarth et al (2021)). Alpine fault rupture earthquake will be a significant and likely catastrophic event for the region, the impact of which will be felt across New Zealand to some degree. ... The region is susceptible to damaged transport routes due to severe weather events and other natural hazards. Every year the region experiences events that result intermittent loss of roading infrastructure. Re-establishing a port would significantly add to the resilience of the region and provide an alternative link for essential goods and services to be transported in and out of the region."*

Submitters change of position

- 44 Since the Officers' Reports were provided, opposing submissions from Ocean Views Okari and Utopia Horizons have been withdrawn.
- 45 The submission by Kerry and Mary Wallis (Tauranga Bay) has been changed from opposition to neutral on the basis that *"the Applicant has been very proactive during the past few months in arranging as many mitigating factors as possible for both the environment/wildlife, and for the local residents in and around the Cape/Carters Beach areas. We feel that almost everything we were opposed to has been well listened to, and many issues have been very well addressed"*.

Actual and potential effects

- 46 The mining activity has been carefully designed to minimise effects on the environment. The Applicant's evidence is that any potential adverse effects on the environment arising from the Application can be satisfactorily mitigated to the point where they are no more than minor. Once these effects are balanced with the significant positive benefits of the proposal, and the short term nature of the activity is considered, the only conclusion that can be drawn is that the effects will be entirely appropriate.
- 47 For completeness, it is noted that *King Salmon* does not preclude new activities in a coastal environment if that area has high natural character. Issues of existing modification to that environment, the appropriateness of development, the extent and duration of effects of the activity and the availability of methods to avoid those effects (such as adaptive management) are all relevant matters to assess. Proposed activity effects in context may be minor or transitory, or otherwise capable of being avoided.⁵⁶

Positive Effects

- 48 Positive effects of an Application are to be considered in accordance with section 104(1) RMA.
- 49 Positive effects of the Application are assessed in the evidence of Mr Hardie, Mr Mudgway, Ms McKenzie, Mr Glasson and Dr Bramley. A statement has also been provided from Mr Heath Milne, Chief Executive Officer of Development West Coast. Specifically, the Application directly or indirectly provides the following benefits:

⁵⁶ This approach was confirmed in *Port Otago Ltd v EDS* [2021] NZCA 638, at [85], [86].

- (a) 37 full time equivalent (**FTE**) jobs. These jobs will be well-paid providing economic and social wellbeing to the employees and their families.⁵⁷
- (b) For every direct job created 1.2 additional jobs are created in the community.⁵⁸ On that basis the Application is therefore expected to create a total 81 FTE in the community.
- (c) Local companies are contracted (pending resource consent approval) for the \$1.5million establishment of the processing plant.⁵⁹
- (d) The Applicant will use local transportation companies, for instance Johnson Bros. Transport (2006) Limited and Aratuna Freighters Limited.⁶⁰
- (e) An ecological corridor will be created between the two wetlands and along the northern boundary of the Application Site.⁶¹
- (f) Additional native vegetation planting will take place along the southern side of the entranceway and adjacent to the Diskin property.⁶²
- (g) The parts of the wetlands, and the part of forest to the east of the Application Site, that encroach onto the Application Site will be stock-fenced.⁶³
- (h) WMS have committed to contributing substantial funding to the Kawatiri Cycle Trail that runs past and beyond the mine site.⁶⁴

Potential Adverse Effects

- 50 Technical experts complying with the Code of Conduct for Expert Witnesses have comprehensively assessed the Application and adverse effects are considered no more than minor.⁶⁵ To summarise:

⁵⁷ SoE of Mr Mudgway, at [36].

⁵⁸ SoE of Heath Milne dated 11 March 2022, at [20].

⁵⁹ SoE of Mr Mudgway, at [41].

⁶⁰ SoE of Mr Mudgway, at [46] – [47].

⁶¹ SoE of Gary Bramley dated 4 March 2022, at [17] and SoE of Chris Glasson, at [29], [34], [37], [74] and Graphics 4.1 – 4.2 and 4.4.

⁶² SoE of Mr Glasson, as Figure 4.1, 4.3 – 4.5.

⁶³ SoE of Mr Bramley, at [17].

⁶⁴ SOE of Mr Mudgway, at [11].

⁶⁵ SoE of Ms McKenzie, at [44].

- (a) *Archaeology* - Ms Lawrence has found that there are no effects to previously recorded and scheduled sites.⁶⁶ An Archaeological Management Plan (**AMP**) has been prepared that provides mitigation and protection procedures for both recorded sites and the uncovering of sites not previously recorded. Ngāti Waewae support the application and the AMP.⁶⁷ The proposed works will operate under, and adhere to, the conditions in Archaeological Authority 2022/366 issued by Heritage New Zealand Pouhere Taonga.
- (b) *Landscape* - Mr Glasson has assessed the landscape as modified farmland that has been the subject of draining, vegetation removal, humping and hallowing and over-sowing for grazing purposes.⁶⁸ Despite these modifications, Mr Glasson assess the Application Site as still containing a high level of natural character, particularly given the vegetation removal has allowed for the extent of the subject sand dune to become more legible.⁶⁹ Mr Glasson has concluded that the adverse effects natural character would have a no more than minor effect due to the temporary nature of the disturbance, the limitation of land disturbance to 5ha and the rehabilitation proposed.⁷⁰ His assessment conservatively has not accounted for the existing sand mining consent.
- (c) *Visual amenity effects* - are assessed as no more than minor at directly adjacent properties.⁷¹ With regard to the visual amenity effect from public viewpoints, Mr Glasson notes that the site is generally not visible from Okari Road, but that truck movements will be visible and that there is therefore a low (less than minor) effect.⁷²
- (d) *Stability* - Mr Howard has assessed the geotechnical aspects of the Application and has concluded that slope stability risk can be managed to the point that effects will be less than minor.⁷³ Specifically, he considered the proposed slope configuration to be stable⁷⁴ and did not consider a slope failure large enough to encroach on the wetlands or Blind River to be

⁶⁶ SoE of Ms Lawrence dated, at [11].

⁶⁷ Submission of Ngati Waewae dated 27 October 2021.

⁶⁸ SoE of Mr Glasson, at [78].

⁶⁹ Ibid, at [15] and [78].

⁷⁰ SoE of Mr Glasson, at [79].

⁷¹ Summary Statement of Chris Glasson dated 17 March 2022, at [15].

⁷² SoE of Mr Glasson, at [20].

⁷³ SoE of Matt Howard dated 3 March 2022, at [17].

⁷⁴ Ibid, at [13](a).

credible.⁷⁵ Mr Howard considers that any risk of pit instability could be controlled through a process of adaptive mine management (use of trial benches to test stability),⁷⁶ which is achievable due to the south to north mining program.

- (e) *Noise* - Mr Farren has confirmed that noise effects of the Application will be no more than minor.⁷⁷ The Application will comply with the District Plan permitted activity standards at the property boundary of adjacent dwellings, with the exception of Saturday evenings and all day on Sundays, when the ‘night-time’ noise limit of 45 dB LA10 applies. Mr Farren has indicated that he considers a limit of 55 dB Laeq (15min) to be appropriate to provide residential amenity.⁷⁸ Mr Humpheson proposes a limit of 50 dB Laeq (15min). Both experts agree the same night time noise limit⁷⁹. Mr Farren has responded to the evidence of Mr Lang and no further changes are proposed.
- (f) *Transport* - Mr Fuller has assessed transport effects, and concludes that (with the adoption of the Transport Management Plan, the construction of the site access arrangement⁸⁰ and the provisions of the road safety recommendations⁸¹) the transport safety and efficiency effects of the Application are less than minor.⁸² The Applicant has increased mitigation measures in response to the WSP technical review and concerns raised by the submitters and the councils. In particular, the Applicant has agreed to:
 - (i) remove night-time trucking between the hours of 2000 and 0800;
 - (ii) reduce the maximum daily heavy vehicle movements from 40 to 30 (noting this results in an hourly increase from two to three movements per hour);
 - (iii) remove heavy vehicle movements during school bus pick-up and drop-off times, and 30 minutes either side of nautical dusk and nautical dawn;

⁷⁵ Ibid, at [13](b).

⁷⁶ Ibid, at [13](c).

⁷⁷ Summary and Rebuttal of Jon Farren, at [11].

⁷⁸ Ibid, at [7].

⁷⁹ JWS, at [15].

⁸⁰ SoE of Nick Fuller dated 4 March 2022, at [23] – [25].

⁸¹ Ibid, at [47].

⁸² Ibid, at [49].

- (iv) require truck drivers to use radio calling to ensure there is only one truck on Okari Road at any one time;
 - (v) restrict heavy vehicle and vehicle speeds in defined locations; and
 - (vi) pay for road safety improvements recommended by the WSP Transport Assessment peer-review, including for the painting of a centre-line between Tauranga Bay Road and the site access.
- (g) *Dust* - discharges have been raised as potential adverse effects by submitters and the potential for dust discharges (including silica dust) have been assessed by Mr Ritchie and Dr Paul Hoskin. Dr Hoskin, supported by geology analysis of Mr Ritchie, opines that dust creation during mining will be minimal.⁸³ The implementation of the Dust Management Plan will ensure compliance with permitted activity rules in the Regional Air Quality Plan⁸⁴.
- (h) *Ecology* - ecological assessment has been undertaken and confirmed the presence of several species of conservation concern in habitat adjacent to (not within) the Application Site.⁸⁵ Dr Bramley has assessed the Application Site and the adjacent habitat through site-based surveys and desktop analysis and has confirmed effects on these species can be avoided,⁸⁶ along with effects on the wetlands generally.⁸⁷ Effects are avoided by avoiding effects on the habitat in the first instance and monitoring to confirm their habitat use and implementation of suitable buffers or other management as mining proceeds (achieved through the use of the conditions and management plans). Dr Bramley has responded to the evidence of Mr Nichol and Ms Godfrey.⁸⁸
- (i) *Hydrology* - Mr Etheridge has confirmed that the effects on local hydrology (including the wetlands) will be less than minor.⁸⁹ Mr Etheridge has responded to the evidence of Ms Grant and Mr Nichol.⁹⁰

⁸³ SoE of Dr Paul Hoskin, at [30], see also SoE of Thomas Ritchie, at [34] – [36], for analysis on particle size.

⁸⁴ Summary and Rebuttal of Ms McKenzie, at [6(g)].

⁸⁵ Summary and Rebuttal of Dr Bramley, at [5] – [6].

⁸⁶ Ibid.

⁸⁷ Ibid, at [7].

⁸⁸ Ibid, at [9] – [32].

⁸⁹ Supplementary evidence and Rebuttal of Mr Etheridge, at [43].

⁹⁰ Ibid, at [34] – [42].

- (j) *Water quality* - Dr Steyl has undertaken an assessment of tailing leachates and that assessment shows that the concentrations of toxic metals and metalloids are expected to be less than the water quality limits proposed in the consent conditions.⁹¹ On that basis, Mr Etheridge considers that there is a high level of certainty that more than minor water quality effects from toxic metals and metalloids will be avoided.⁹² Dr Bramley considers this will be sufficient to avoid adverse effects on freshwater fish species in Blind River and bird species feeding in Okari Lagoon⁹³.

Radiation

- 51 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 to meet its international obligations on radiation protection, safety, security and nuclear non-proliferation.
- 52 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 level of radioactive material will cause an effect that requires regulation.
- 53 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 and the Decision Making Panel in that case applied the clear statutory language of what constituted radioactive material in the RPA.⁹⁴ It is submitted, the same approach should apply here.
- 54 There is no need, or authority, for the Panel to consider whether the HMC and tailings are radioactive because the evidence of Professor Hoskin is that radioactivity is not at a level where the RSA will apply. Mr Ritchie confirms the samples tested are appropriately representative.

⁹¹ Ibid, at [32].

⁹² Ibid, at [43].

⁹³ Summary SoE Dr Bramley, at [6].

⁹⁴<https://www.epa.govt.nz/assets/Uploads/Documents/Marine-Activities-EEZ/Activities/990a6509eb/CRP-Decision-EEZ000006.pdf>; paragraph 74-76

- 55 Dr Mudd, an expert appearing for the submitters, raises issues of radioactivity but in forming his evidential conclusions, he makes a number of assumptions about the New Zealand geological conditions and a cited article⁹⁵. Mr Ritchie, the senior project geologist for Westland Minerals, is closely involved in New Zealand geological work and familiar with the article Dr Mudd cites and considers assumptions made are wrong.⁹⁶
- 56 That said, to address submitters concerns, the Applicant offers conditions requiring quarterly testing of the HMC and the installation of radiation dosimeters (secured through the consent conditions).

Risk and Adaptive Management approach

- 57 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 adverse⁹⁷. It is submitted, the proposed conditions of consent supported by management plans reflect a precautionary approach particularly in relation to ecology and water quality.
- 58 The Supreme Court case *Sustain our Sounds*⁹⁸ 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.
- 59 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);*

⁹⁵ Tay et al. (2021) article.

⁹⁶ Summary and Rebuttal of Tom Ritchie, at [8] – [20] and Summary and Rebuttal of Dr Paul Hoskin, at [9] – [11].

⁹⁷ Policy 3, NZCPS.

⁹⁸ *Sustain our Sounds Inc v NZ King Salmon Company* [2014] NZSC 40 (*Sustain our Sounds*).

- (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*
- (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.

60 *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.*

(emphasis added)

61 Subsequent Court decisions applying *Sustain our Sounds* have adopted a precautionary approach where risk (according to scale of consequence and relative likelihood) results in a 'serious harm consequence'. That could include where likelihood is improbable or low, but consequences are significant (such as a population-level consequence). The application of a precautionary approach through consent conditions, as opposed to dictating decline of consent, will depend on assessing not only risk and remaining uncertainty, but also the importance of the activity being proposed and the benefits it will provide.

- 62 Judge Hassan's division of the Environment Court in recent case *Wilson v Waikato*⁹⁹ 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'¹⁰⁰. The Court found that the second dimension of risk (likelihood)¹⁰¹ was the determining factor when assessing whether there should be decline of consent or whether the risk could be addressed through conditions.
- 63 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. Addressing residual uncertainties in the baseline in an adaptive management approach has been achieved through establishment of an initial 'monitoring and investigation' phase; as a prerequisite to activity commencing, or commencing on a very limited scale.
- 64 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 uncertainty' / 'no risk' approach¹⁰².

Planning provisions

- 65 In the recent decision of *Tauranga Environmental Protection Society Inc v Tauranga City Council*, Palmer J in the High Court found that there is a proper order of analysis which begins with the most localised instrument.¹⁰³ According to that approach, the order of assessment here should be Buller District Plan, Land and Water Regional Plan, WCRPS, NPS-FM and NZCPS.
- 66 Ms McKenzie has undertaken a comprehensive analysis of the applicable planning framework and relies on the evidence of technical experts in formulating her opinion. She considers the Application to be consistent with planning provisions.

WCRPS - ecology/natural character provisions

- 67 The WCRPS was made operative on 24 July 2020 and gives effect to the NZCPS and Part 2.

⁹⁹ *Wilson v Waikato Regional Council* [2021] NZEnvC 131.

¹⁰⁰ *Ibid*, at [105] - [106], [150].

¹⁰¹ *Ibid*, at [108]

¹⁰² See also *Aubade NZ Ltd v Marlborough District Council* [2015] NZEnvC 154, at [35].

¹⁰³ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

68 For the assistance of the Commissioners, the most relevant directive policies relating to at risk and threatened bird and fish species, and natural character, is within Chapter 9 Coastal Environment of the WCRPS. Of relevance:

- (a) It is acknowledged that minerals like ilmenite and garnet found in the coastal environment will be used in future to provide for peoples economic wellbeing and development;¹⁰⁴
- (b) The significant relevant issue for management of the coastal environment for the West Coast region is identified as *"protecting the values of the coastal environment whilst enabling sustainable use and development, to provide for the region's economic, social and cultural wellbeing"*;
- (c) The relevant objectives seek to *"protect indigenous biological diversity"*; *"preserve natural character, and protect it from inappropriate subdivision, use and development"*; *"protect natural features and natural landscapes from inappropriate subdivision, use and development"* and provide for appropriate development to enable people and communities to maintain or enhance their economic, social and cultural wellbeing¹⁰⁵;
- (d) Policy 9.1 specifies that protecting the coastal environment from inappropriate development requires *"avoiding adverse effects on significant indigenous biological diversity, areas of outstanding natural character and outstanding natural landscapes and features"*¹⁰⁶ and *"avoiding significant adverse effects and avoiding, remedying and mitigating other adverse effects on indigenous biological diversity, natural character, natural features and natural landscapes"*;
- (e) 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.
- (f) Policy 9.3 also allows for minor effects on indigenous biological diversity, natural character, natural features and natural landscapes (which aren't outstanding).

¹⁰⁴ Background to the issues, Chapter 9 Coastal Environment RPS.

¹⁰⁵ Objective 9.1 and 9.2, Chapter 9 Coastal Environment RPS.

¹⁰⁶ 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 in the RPS>

(g) Policy 9.9 seeks to consider opportunities for the restoration or rehabilitation of natural character.

- 69 It is well established in case law that "avoid" means 'not allow' or 'prevent the occurrence of'. In the context of the provisions above, it is not unqualified. It serves to 'protect indigenous biodiversity in the coastal environment' and applies only to 'effects' determined as 'adverse' in the context of the specific factual situation and the existing environment.
- 70 The Application avoids adverse effects on significant indigenous biological diversity by avoiding their habitats in the first instance, combined with monitoring to confirm their habitat use and implementation of suitable buffers or other management as mining proceeds. Management Plans have been prepared for both lizards and the bird species which covers the specific management actions proposed¹⁰⁷.
- 71 In the RMA context "maintain" does not mean the same thing as the dictionary definition. The dictionary definition relates to the requirement to keep in an existing state but according to the High Court and Court of Appeal's determination in *Shell v Auckland City Council*¹⁰⁸: if the adverse effects are minor they can be treated as inconsequential and so, broadly speaking, the environment is "maintained".

Other relevant matters

- 72 A new strategy, Te Whanaketanga Te Tai Poutini West Coast 2050 Strategy, has been developed and Ms McKenzie's evidence directly addresses how the Application fits with the aspirations of that strategy.¹⁰⁹ At a national scale, promoting a domestic green minerals industry falls squarely within the Government's Minerals and Petroleum Resources Strategy for Aotearoa New Zealand 2019-2029.¹¹⁰ The Minerals Strategy specifically identifies West Coast REE as an important part of New Zealand's clean-tech mineral potential.

Matters raised in submissions

- 73 Some of the matters raised by submitters constitute fears that there is no evidential basis for. As previously submitted, there is an evidential burden on all parties to

¹⁰⁷ Summary SOE Dr Bramley, at [5].

¹⁰⁸ *Shell v Auckland City Council* [1995] 2 ELRNZ 175.

¹⁰⁹ SoE of Katherine McKenzie dated 4 March 2022, at [124] – [125].

¹¹⁰ Responsibility Delivery Value – A Minerals and Petroleum Strategy for Aotearoa New Zealand 2019 – 2029 (November 2019): <https://www.mbie.govt.nz/dmsdocument/7148-responsibly-delivering-value-a-minerals-and-petroleum-strategy-for-aotearoa-new-zealand-2019-2029>

produce evidence tending to support an allegation.¹¹¹ The Court has stated that a decision should not be made based on people's fears that might never be realised.¹¹²

- 74 The genuinely held views of submitters are acknowledged, but it is submitted that the law must properly be applied in this case based on the evidence that is before you.
- 75 Relevant RMA issues raised by submitters have been given due consideration and are addressed in evidence. It is submitted the Panel must review evidence from experts who have also made opposing submissions with caution, and within the context of their opposing submission.
- 76 I address some of the issues raised and the legal tests applying to consideration of those issues below.

Amenity

- 77 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.
- 78 In *Schofield v Auckland Council*¹¹³ 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 s7(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.

¹¹¹ *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.

¹¹² *City Rail Link Ltd v Auckland Council* [2017] NZEnvC 204 at [64]

¹¹³ *Schofield v Auckland Council* [2012] NZEnvC 68 at [51]

79 In *Yaldhurst Quarries Joint Action Group v Christchurch City Council*¹¹⁴ the Environment Court observed that a change to amenity values does not necessarily equate to a loss of rural character or an adverse effect on amenity values. To test the proposition that scale and intensity of effects will be adverse, experts need to first assess the baseline environment against which the effects are evaluated. The Court outlined its approach when assessing amenity values evidence as follows:¹¹⁵

- (a) *identify the values of people and communities. Based on the topics above this will include the attributes and characteristics of the existing landscape, soundscape and air quality that are valued by them. [We expect the experts will explain how they ascertained the values of people and communities];*
- (b) *ascertain whether the District Plan identifies any valued attributes or characteristics for the relevant zone, landscape or more broadly the receiving environment. These elements may also be identified from other documentation such as a Conservation Management Strategy;*
- (c) *determine whether the amenity values are reasonably held. In that regard we expect the experts to objectively test the basis of the values that are derived from the environment. This is necessary because the residents' views on their existing amenity is subjective and influenced by personal feelings or opinions, including the strength of their attachment to this place;*
- (d) *assess whether the proposal gives rise to adverse effect on the relevant attribute or characteristic;*
- (e) *if it does, then to consider whether, in this case, rural character is maintained and second, whether there are any consequential effects on the existing amenity values; and*
- (f) *finally, to assess those effects in light of the outcomes for the relevant resources and values under the District Plans.*

80 The key amenity effects that have been raised in submissions relate to visual amenity effects (addressed by Mr Glasson) and effects on amenity from heavy vehicle movements along the trucking route, in particular Okari Road and Tauranga Bay.

81 It is submitted the Buller District Plan is the means by which subjective amenity values can be considered objectively,¹¹⁶ and the explicit exclusion of road traffic

¹¹⁴ [2017] NZEnvC 165.

¹¹⁵ At [117].

¹¹⁶ *Schofield v Auckland Council* [2012] NZEnvC 68 at [51].

noise from the Buller District Plan indicates that (objectively) this is not a valid amenity concern. Road traffic noise is explicitly exempt under Rule 7.8.2 of the Buller District Plan.

- 82 Even if road traffic noise was an amenity effect to be considered as part of the Application, Mr Farren has assessed noise generation from trucks using public roads during the day and he considers the proposed number of heavy vehicle movements will result in acceptable noise effects at dwellings.¹¹⁷

Property values

- 83 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.¹¹⁸

Climate change

- 84 In *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd*,¹¹⁹ the High Court upheld a decision of the Environment Court¹²⁰ which held that the assessment of effects under s 104(1)(a) RMA does not include consideration of the effects on climate change of the discharge of greenhouse gases from the end use (of coal in this instance). The Resource Management Amendment Act 2020¹²¹ allows local authorities to consider greenhouse gas emissions in consenting decisions. These provisions were to commence either on 31 December or a date no later than 30 December 2022. They are not yet in effect.

Part 2

- 85 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.¹²² 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

¹¹⁷ Summary and Rebuttal of Mr Farren, at [10].

¹¹⁸ *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].

¹¹⁹ *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller Coal Ltd* [2012] NZRMA 552

¹²⁰ *Re Buller Coal Ltd* [2012] NZRMA 401

¹²¹ Which was given royal assent on 30 June 2020.

¹²² *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).

application of relevant plan provisions leave little room for Part 2 to influence the outcome. Where the proposed activity conflicts with an NZCPS policy, recourse to Part 2 of the RMA is likely unnecessary¹²³.

- 86 Ms McKenzie has assessed and considers the proposal will meet Part 2. With respect to Section 8 RMA, Ngāti Waewae have submitted in support of the Proposal.

Conditions of Consent and Management Plans

- 87 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).
- 88 Management plans are now commonplace, but must operate in a way that will serve the purpose of the RMA.¹²⁴ Conditions which provide for the use of management plans must include clear, reasonably certain and enforceable objectives. Conditions should also contain quantifiable standards and performance criteria against which management plans can be assessed.¹²⁵
- 89 Case law prescribes that a Management Plan should typically describe the methods and procedures to achieve the conditions of a consent:¹²⁶
- (a) consent conditions will usually provide they be developed by a suitably qualified expert;
 - (b) the consent authority is to certify that the methods in the plan will achieve the outcomes stated in the conditions;
 - (c) the consent authority must require the consent holder to conduct their activities in accordance with the management plan; and
 - (d) conditions may provide that the management plan will be periodically reviewed.

¹²³ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [71].

¹²⁴ *Crest Energy Kaipara Ltd v Northland Regional Council EnvC Auckland A132/09*, 22 December 2009 at [229]

¹²⁵ Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal Board of Inquiry, EPA 0175, June 2012 at [187].

¹²⁶ *Selwyn Quarries Limited v Canterbury Regional Council* [2019] NZEnvC 153, at [44].

- 90 The Application involves a number of management plans: Water Management Plan; Avian Management Plan; Lizard Management Plan; Lighting Management Plan; Traffic Management Plan; Dust Management Plan; Erosion and Sediment Control Plan; Archaeological Management Plan; and Rehabilitation Plan.
- 91 Ms McKenzie has reviewed and restructured the management plan conditions in response to the Commissioners Minute (Minute 3) to ensure these requirements are met.

Witnesses

- 92 The Applicant has produced the following evidence in support of its case:
- (a) Mr Duncan Hardie, company representative;
 - (b) Mr Ray Mudgway, company representative;
 - (c) Ms Karen Goh, mine engineering;
 - (d) Mr Nigel Slonker, operations;
 - (e) Mr Paul Butler, processing plant design;
 - (f) Mr Thomas Ritchie, geology and mineralogy;
 - (g) Mr Matthew Howard, geotechnical;
 - (h) Mr Nick Fuller, transport;
 - (i) Mr Jon Farren, acoustic;
 - (j) Mr Chris Glasson, landscape and visual effects;
 - (k) Ms Megan Lawrence, archaeology;
 - (l) Mr Zeb Etheridge, hydrological;
 - (m) Dr Gary Bramley, ecological;
 - (n) Dr Gideon Steyl, geochemistry;
 - (o) Prof Paul Hoskin, radiation;
 - (p) Ms Kate McKenzie, planning.



A S Booker
Counsel for Westland Mineral Sands Co. Limited
21 March 2022