

## **Hearing Presentation notes on legal submissions on behalf of Winstone Aggregates, (Hearing Stream 5) – Freshwater and Te Mana o te Wai.**

### **1.0 Introduction**

- 1.1 My name is Pherne Tancock, and I appear as counsel on behalf of Winstone Aggregates. I appear here today with Mr Heffernan and Ms Clarke.
- 1.2 This presentation provides an overview of the detailed legal submissions filed by Winstone and sets out Winstone's position following the Officers response and amendments now proposed on HS5 which has resolved many of those concerns.
- 1.3 Winstone filed expert evidence from Mr. Heffernan (corporate), Dr. Keesing (ecology) and Ms. Clarke (planning) and

### **Allocation between FPP and P1S1 (paragraph 4.1 - 4.5 legal submissions)**

- 1.4 Winstone agrees with the recommended removal of the provisions identified by the Officer, from the FPP process to the Schedule 1 process.

### **The role of the RPS in the RMA context (paragraph 6.1 - 6.9 of legal submissions)**

- 1.5 Quarrying activities and clean filling of overburden inevitably result in removal of vegetation and impacts on water. The aggregate industry operates in an increasingly difficult regulatory environment. Winstone's consider that the RPS strikes the wrong balance by focusing on protection (and ignoring use). Chapter 5 is a primary example of that. The provisions do little to reconcile the need for a secure and quality local aggregate supply with the need to protect freshwater values.
- 1.6 My legal submissions on Chapter 5 (paragraphs 6.1 - 6.9) provide further basis for the role of a RPS as providing policy recognition and clear direction to the way in which corresponding resource management issues, (for example protection) is reconciled with use, and how these are to be addressed, with reference to the recent Supreme Court decision in *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112. The Supreme Court confirmed that any conflict between NPS policies should be dealt with at the RPS and Regional Plan level (as far as possible) so as to provide as much information as possible for people to determine whether it's worth applying for a resource consent for a particular project and how a resource consent application would be approached.

### **2.0 Remaining issues in dispute**

- 2.1 The remaining issues in dispute for Winstone, and the focus of Winstone's presentation to the Panel are:

- (a) Amendment of Policies 18 and 40 to provide recognition of the consent pathways for quarrying and clean filling provided for in Clause 3.22 and 3.24(1) of the NPS-FM;
- (b) Objection to the narrowed scope in Policy 18 (n) and Policy 40 (o) which provides that the effects management hierarchy is only available to piping, straightening or concrete lining of rivers. This does not give effect to NPS-FM-3.24 Rivers.
- (c) Officer's view that the relief sought by Winstone is out of scope.

### 3.0 Policy 18

3.1 Policy 18 provides policy direction on the policies, rules and/or methods that shall be included in Regional Plans for the Wellington Region. The current wording of Policy 18(c) restates Policy 6 of the NPS-FM.<sup>1</sup> (*There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted*), but in Winstone's submission it does not give effect to the qualifier in Clause 3.22(1) of the NPSFM, which provides a mandatory direction that:

(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...**

.....goes on to list the exceptions in Cl.3.22(1)(a)-(3)(b)(iii)]

3.2 Policy 18 is silent on the exceptions set out in Clause 3.22 that Regional Plans *must* include specific wording that allows for the potential loss of extent or values of natural inland wetlands where certain circumstances are met. As Policy 18 RPS seeks to dictate the content of Regional and District plans, it follows that it must also refer to the matters set out in Cl.3.22. Failure to do so would make it expressly contrary to the NPS-FM.

3.3 In a similar vein, '*Policy 40 provides that when considering an application for resource consent, the Regional Council must give effect to te Mana o te Wai and have particular regard to,*' again is inconsistent with the direction in Cl. 3.22(2) and (3) which provides resource consent requirements for activities provided as exceptions to Cl.3.22(1)(a)(f). These are missing from Policy 40.

### 4.0 The loss of river extent and values

4.1 Winstone remains concerned about how NPS Rivers - cl3.24 is given effect to in Policy 18 and 40 – with current proposed wording of Policy 18(n):'*avoiding the reclamation, piping straightening or concrete lining of rivers unless, there (i) there is a functional need for the activity in that location; and (ii)the effects of the activity are managed by applying the effects management hierarchy.*'

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<sup>1</sup> NPS-FM **Policy 6:** There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

- 4.2 This is narrower than cl.3.24 of the NPS-FM<sup>2</sup> which allows use of the effects management hierarchy where there is a functional need in situations where there is a 'loss of river extent and values,' Winstone do not consider that there is evidential basis to justify this narrower application. Dr Keesing discusses the difficulties associated with doing so at para 4.8, 4.11 - 4.13 of his evidence. Dr Keesing highlights the difficulties this would cause using Belmont Quarry's current operations as a case. Winstone seek that Policy 18 be reworded to refer to a range of activities that may potentially result in the loss of river extent and value which is consistent with Cl.3.24 of the NPS. Similar relief is sought for Policy 40(o) for the same reason.

## 5.0 Recognition in the NPS-FM (February 2023 Update)

- 5.1 The 2023 NPS-FM update provided a vital pathway through a protect and no net loss of inland natural wetland policy, for the use of land for quarrying activities and clean filling where there would be damage to natural inland wetlands, and management of the effects through the effects management hierarchy.
- 5.2 The RPS does not currently include these pathways - meaning that the protection provided is absolute. The relief sought by Winstone is necessary to ensure that an appropriate balance is struck between protection of freshwater and natural inland wetlands and the use of that land where valid exceptions apply. Wording options were included in Ms Clarke's evidence.

## 6.0 Officer's Response

- 6.1 The Officer's Report was silent on the relief sought by Winstone, leaving counsel to guess at the reasons for that. The Officer has now acknowledged that there is a lack of consent pathways for quarrying **activities but** has rejected the relief (referring to the Hearing Stream 1 Officer's response) where the author considered Winstone's submission to be out of scope. The Officer's Response (at para 196):

'I acknowledge the concerns raised by Ms Clarke in relation to the lack of consenting pathway for quarrying activities in natural inland wetlands and rivers in clauses 3.22 and 3.24(1) of the NPS-FM. **This matters was raised through hearing stream 1 in response to Winstone Aggregates general submission points seeking amendments to the RPS to give effect to the relevant provisions of the NPS-FM and other national directions that provide a consenting pathway for aggregate and mineral extraction. The Reporting Officer recommended rejecting the relief sought on the basis that the request is "out of scope" of Proposed Plan Change 1 because:**

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<sup>2</sup> NPS-FM 3.24 Rivers – Every Regional Council **must include** the following Policy (or words to the same effect) in **its Regional Plan**. 'The loss of river extent and values is avoided unless the Council is satisfied that: (a) there is a functional need for the activity in that location; and (b) the effects of the activity are managed by applying the effects management hierarchy.' **Subclause 3.24(2) and (3) provides further rules for resource** consent applications falling within (a), with (3) says 'every regional council must make or change its regional plan to ensure that an application referred to is not granted unless...'

***‘the Council did not consider access to mineral aggregate resources as an issue to be addressed in Change 1. The operative RPS already includes explicit recognition of minerals, including Objective 31 “Demand for mineral resources is met from resources located in close proximity to the areas of demand,” and consider how the regions mineral resources are utilised. As Change 1 proposed no changes to these provisions amending the existing Soils and Minerals chapter is out of scope in my view.’***

**On this basis I do not agree with the suggested amendments put forward by Ms Clarke.’**

(emphasis added)

6.2 Winstone disagrees. The Officer’s reliance on the HS1 conclusion is misguided. Winstone’s original submission points and the relief it seeks by amendments to Policy 18 and Policy 40, are clearly appropriate and within scope of PC1<sup>3</sup> and the wording proposed by Ms Clarke should be adopted for the following reasons:

- (a) The Plan Change is seeking to make significant and broad changes to the management regime for a variety to resources. Policy 18 and 40, as notified in Plan Change 1, are essentially to be rewritten in a manner responsive to the NPS-FM, with specific wording to protect natural inland wetlands and river extent and values. This is consistent with the mandatory direction in s61(da) RMA that a Regional Council must prepare and change its RPS in accordance with a national policy statement.
- (b) The relief sought by Winstone in its written submission addresses and responds to this proposed alteration to the management regimes, in a manner aligned with the expected NPS-FM update and is consistent with an integrated management approach. This relief was clearly articulated and sought in Winstone’s written submission. It sought a pathway to be included in line with the exposure draft NPS-FM for quarrying and clean filling – *“it has not come out of left field.”*<sup>4</sup>
- (c) The Plan Change is seeking to give effect to the NPS-FM. The need to implement the NPS-FM was addressed by the s32 evaluation report. The changes Winstone seek are incidental or consequential upon implementing the NPS-FM and to ensure that Policy 18 and Policy 40 do “give effect” (i.e. to implement) the mandatory directions in the NPS-FM as required in s55(1)(a) and 55(2)(a-c)<sup>5</sup> RMA.

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<sup>3</sup> **Winstone’s written submission sought** ‘request that RPS via PPC1 contains an updated policy framework and clear policy directives that provide and support an appropriate enabling consenting pathway for aggregate extraction and associated quarrying activities such as overburden placement [...] this approach would better give effect to recognition and management of aggregate extraction activities as set out in the NPS-FM (including anticipated 2022 update).’ Relief sought: *‘Amend the RPS to provide recognition and protection for significant mineral resources in a way that is consistent with the Policy framework in the NRP and is consistent with the NPS-FM update when those documents are confirmed.’* In particular it appears that the RPS does not implement sections 3.22 of the NPS-FM which relates to natural inland wetlands. It also sought specific relief in respect of Policy 18 and 40.

<sup>4</sup> Winstone submission.

<sup>5</sup> Section 55(2) RMA directs that, ‘A local authority must amend a document, if a national policy statement directs so,—(a)to include specific objectives and policies set out in the statement; or

- (d) Winstone remain of the firm view that the most appropriate location in the RPS to make provision for these consenting pathways, is in the Policies 18 and 40 of the Freshwater Chapter that introduce provisions to protect natural inland wetlands: they do not belong in the soil and minerals chapter. This is to some extent confirmed by the wording of Cl.3.22 NPS-FM.
  - (e) Lastly, it is acknowledged that if the FPP do have residual concerns about scope then Sch. 1, clause 49 Part 4(2)(a) may assist, as the FPP is not bound by scope.
- 6.3 Winstone do not support GWRC’s alternative approach which is to wait for the Council to notify a further change to give effect to the NPS-FW (February 2023 update) provisions. It doubts this would eventuate. The aggregate industry has suffered considerably due the lack of pathway in the NPSFM 2020 – there is no benefit in deferring this even further.
- 6.4 In recent case law, the Environment Court decision in *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC and the High Court Decision in *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 (and the Panel) both confirm that the Council, Court (and in this case the Panel) all have an obligation to consider the NPS-FM (February 2023 Update) and where there is scope ‘to give effect to it’ now as part of this current process.
- 6.5 I submit that there are three key takeaways from the recently issued High Court Decision in *Southern Cross Healthcare Ltd v Auckland Council* that support Winstone’s position:
- (a) Cl.4.1 of the NPS-FM<sup>6</sup> imposes an obligation on Councils to implement an NPS as part of a plan change to the extent practicable. The Court found it is “reasonably practicable” in relation to its counterpart in the NPS-UD that when hearing appeals on a plan change for the Court to give effect to the NPS-FM. In my submission the same applies to the Panel.
  - (b) The non-exhaustive list of matters that Councils “must do” to give effect to objectives and policies in in cl.3.1 NPS-FM<sup>7</sup> *does not limit* the Council (or in this case the Panel’s obligation) ‘to give effect to the objectives and policies’ of an NPS as part of a plan change.’
  - (c) The High Court said *it was irrelevant* that the Council was engaged in separate and broader plan changes to give effect to in that case the NPS-UD, because those other processes, ‘*do not limit the obligation to give effect to the NPS as part of this process.*’

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(b)so that objectives and policies specified in the document give effect to objectives and policies specified in the statement; or(c)if it is necessary to make the document consistent with any constraint or limit set out in the statement.’

<sup>6</sup> NPS-FM Part 4.1(1) Timing ‘Every local authority must give effect to this National Policy Statement as soon as reasonably practicable.’

<sup>7</sup> Cl 3.1 (1) NPS-FM This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies in Part 2 of this National Policy Statement, but **nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of this National Policy Statement.**

6.6 While it is accepted that in some instances, the obligation to give effect to a NPS would be limited by the scope of a plan change, in Winstone's submission giving effect to the NPS-FM via RPS-PC-1 is not one of them.

6.7 The RPS should not be left "out of step" with higher documents for longer than it needs to be. There is a risk that such an approach over-emphasises protection is adopted into lower order planning documents and applied to resource consents and has potential to create mischief alluded to by counsel for Wellington Water view the NRP- PC1 process. This causes entirely unnecessary corresponding uncertainty, risk and cost to the aggregate industry (and other beneficial users recognised in cl3.22 of the NPS-FM), and the community who rely on and benefit from those products and uses in the interim.

## **7.0 Inconsistent treatment**

7.1 The Council has also chosen to include aspects of the NPS-FM (including the February 2023 update) to implement via the RPS now, while ignoring and refusing to give effect to others. It is not appropriate for Councils to pick winners or to pick and mix what parts of the NPS-FM it would like to implement. That is not the point of an National Policy Statement.

7.2 An example of this is the Officer's approach (para [94 - 96]) to submissions seeking that Policy 14(m) be amended to be consistent with and provide a consent pathway for urban development activities within natural inland wetlands arising from the pathway included in cl. 3.22(c) NPS-FM (February 2023 update).

7.3 The Officer '*agrees clause (m) should be amended to reflect this recognition of urban development activity through national direction.*' The supporting reasons provided by the Officer for the s32AA evaluation at (para 98) state:

- 'The amendments are effective as they ensure consenting pathways provided for urban development activities in the NPS-FM are sufficiently provided for in the RPS.
- As this change implements national direction, I consider the costs and benefits of this approach have already been assessed through development of that national direction and I do not repeat them here.
- The amendments ... are also effective as they remove a potentially high regulatory burden for urban development. This amendment will have social and economic benefits in terms of removing unnecessary barriers for urban development, while continuing to have moderate environmental benefits by requiring the minimisation of contaminants in stormwater (rather than the avoidance of adverse effects)
- The amendments provide clarity about what the regional plan must manage in relation to urban development, relative to territorial authorities. This reduces costs associated with duplicated effort and interpretation issues.'

7.4 With respect, the reasons given could equally be said to apply to Winstone's request that GWRC "give effect to" the National Direction contained in the NPS-FW quarrying and clean filling in Clause 3.22 and 3.34(1) NPS-FM in Policies 18 and 40.

7.5 It is unclear why it is accepted that Policy 14 requires amendment to give effect to the NPS and to provide a consenting pathway for urban development, but Council is unwilling to consider the corresponding NPS-FM pathways for clean filling and quarrying activities – these have the same status and recognition in the NPS-FW and are part of the same suite of exceptions and mandatory direction in cl3.22. The Officer has also refused similar relief for pathways for beneficial uses sought by Meridian and Wellington Water but their concerns do not appear to have been dismissed on scope grounds.

## **8.0 Relief sought by Winstone**

8.1 Ms Clarke sets out amendments in her evidence to Policies 18 and 40 to provide a pathway for aggregate extraction and clean filling, (and other beneficial uses recognised in Cl3.22) and properly address cl.3.24. The Freshwater Chapter, in Policy 18 (or via a new Policy 18A) and Policy 40 is the most appropriate place to recognise this pathway/use (not the Soils and Mineral Chapter). The Amendments proposed by Ms Clarke will ensure these policies give effect to the NPS-FM.

### **Pherne Tancock**

Counsel on behalf of Winstone Aggregates

22 November 2023