

BEFORE THE INDEPENDENT HEARING PANELS

UNDER the Resource Management Act
1991

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

Submitter **WINSTONE AGGREGATES**
(Submitter 162)

STATEMENT OF EVIDENCE OF CATHERINE CLARKE

ON BEHALF OF WINSTONE AGGREGATES

Dated: 30 January 2024

Hearing Stream 6 – Indigenous Biodiversity

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1.0 Qualifications and Expertise

- 1.1 My name is Catherine Mary Clarke. I am a Partner and Planner at Boffa Miskell Limited, a national firm of consulting planners, ecologists, and landscape architects.
- 1.2 I hold the qualification of Bachelor of Regional Planning (1st Class Honours) from Massey University. I am a full member of the New Zealand Planning Institute and a past president of the Auckland branch. I have accreditation under the “Making Good Decisions” programme for RMA decision makers.
- 1.3 My professional experience includes approximately twelve years as a local authority planner and over twenty five years in consultancy. As a planning consultant, I have had a range of experience in the development and implementation of planning documents under the Resource Management Act 1991 (**RMA**). I have been engaged by local authorities to assist in the drafting and development of regional and district plans. I have also been engaged by infrastructure providers and various industry groups including Winstone Aggregates to provide planning advice and present expert evidence on a range of regional and district planning documents that affect their activities.
- 1.4 Most recently I have assisted Winstone Aggregates in the preparation of the submissions and further submissions on the Greater Wellington Regional Council (**GWRC**), Proposed Change 1 to the Regional Policy Statement (**PC1**).

2.0 Code of Conduct

- 2.1 I have read the Code of Conduct for expert witnesses in the Environment Court Practice Note. I agree to comply with this Code. The evidence in my statement is within my area of expertise, except where I state that I am relying on the evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions I express.

3.0 Scope of Evidence

- 3.1 My statement of evidence is principally focused on the relevant submission points made by Winstone Aggregates (**Winstone**) addressed in the Section 42A Hearing Report, Hearing Stream 6: Indigenous Biodiversity (**HS6**) of PC1.
- 3.2 I have outlined in the sections that follow my response to several matters raised in the Section 42A report that relate to Winstone's submission. Where I have not made specific comment on a matter addressed in the Section 42A report on a Winstone submission point, it can be taken that I have no further comment at this time.
- 3.3 Throughout my evidence, I have provided discussion, and where appropriate suggestions, on how the provisions addressed in my evidence might be amended in line with the relief sought by Winstone.

4.0 Allocation of Provisions to Part 1 Schedule 1

- 4.1 The Section 42A author (Ms Guest) has discussed the allocation of provisions that are subject to the Freshwater Planning Instrument (**FPI**) process in Section 3.4 of the Section 42A report. Based on her evaluation, Ms Guest has recommended the Indigenous Biodiversity provisions are subject to the Part 1 Schedule 1.
- 4.2 I note that Winstone's legal counsel provided a summary of the High Court in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc.*¹ in legal submissions for Hearing Stream 1 and Hearing Stream 5. I adopt the findings of this summary to inform my assessment of the correct allocation of these provisions to the FPI or Part 1 Schedule 1 (**P1S1**) process.
- 4.3 Ms Guest has appropriately reviewed the indigenous biodiversity consistently with the above observations and has revised their allocation accordingly. I agree with Ms Guest's assessment and fully

¹ *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc* [2022] NZHC 1777, [2022] NZRMA 565.

support the recommendation for the re-allocation of provisions to the Part 1 Schedule 1 process.

5.0 Amendments to give effect to the NPS-IB

- 5.1 The Section 42A report has recommended several changes to the provisions of the Indigenous Biodiversity chapter in order to align with the provisions with the National Policy Statement for Indigenous Biodiversity (**NPS-IB**) which was gazetted following the notification of PC1.
- 5.2 In broad terms, I share similar concerns to those raised by other submitters, whereby I consider the Hearings Panel should consider delaying or putting on hold the determination of the Indigenous Biodiversity provisions in PC1 of the RPS at this time.
- 5.3 Firstly, the NPS-IB does not require Councils to make immediate changes to an RPS. I could understand making immediate changes to provisions in the operative RPS where they are directly contrary with the higher order directives in the NPS-IB. However, the S42A report does not appear to note that any of the operative provisions in the RPS require change for this reason.
- 5.4 I also share similar concerns to those raised by Porirua City Council in their response to the prehearing discussions². Careful consideration must be given to all the requirements of the NPS-IB when proposing provisions to give effect to it.
- 5.5 In that regard, I question whether it is appropriate to make many of the proposed changes in the S.42A report through the current plan change process.

² Provided in Paragraph 1 of Minute 17

Incorporation of new provisions in NPS-IB

5.6 The NPS-IB as gazetted does include much of the direction of the draft version (for which PC1 relied on), but also includes new concepts and policy directives. .

5.7 For example, the directive to give effect to the “decision making principles” in making any decisions affecting indigenous biodiversity, as required by Policy 1 of the NPS-IB. Policy 1 states (emphasis added):

Policy 1: Indigenous biodiversity is managed in a way that gives effect to the decision-making principles and takes into account the principles of the Treaty of Waitangi.

Clause 3.2 of the NPS-IB states the role of the decision-making principles (emphasis added):

Local authorities must engage with tangata whenua, people and communities (including landowners) to ensure that the decision-making principles inform, and are given effect to, when implementing this National Policy Statement in their regions and districts.

~~5.8~~ I understand that the direct engagement undertaken for PC1 was very limited, including limited engagement with landowners (including Winstone), iwi and the wider community. I also concerned that changes recommended by Ms Guest now introduce a range of new policies, of note, Policy 24A and Policy IE.2A, which are have not been made available for full and meaningful community engagement and rather only those who had previously made a submission to Change 1.

Restating the NPS-IB

5.9 I also note that many of the changes recommended Section 42A report effectively restate the direction of the NPS-IB. This is

inconsistent with good planning practise and leading case law³ where RPS policy should not simply parrot higher order direction. Rather RPS policy should provide direction for interpreting in a local context or provide direct that seeks to reconcile conflicting higher order direction.

Direct cross reference

5.10 The S.42A report has also recommended various amendments to align with the NPS-IB by way of direct cross reference, including the following:

- Policy 23(1) cross references Appendix 1 and Clause 3.8 of the NPS-IB,
- Policy 24(a) cross references Clause 3.10 and 3.11 of the NPS-IB, and
- Policy 24A(a)(i) cross references Appendix 3 and 4 of the NPS-IB⁴.

5.11 In addition to those references to the NPS-IB, there is also direct cross reference to the New Zealand Threat Classification System Manual⁵ in the proposed new definition of 'threatened or at-risk species'.

5.12 Notwithstanding my comments in relation to giving effect to the NPS-IB generally, I generally support direct cross referencing which avoids potential 'parroting' of higher order direction.

5.13 However,-I do question whether due process has been followed with relation to Clause 34 of Schedule 1 of the RMA and the duty to consult on material incorporated by reference prior to notification.

³ *Wairoa River Canal Partnership v Auckland RC* [2010] NZEnvC 309, (2010) 16 ELRNZ 152; and *Port Otago Ltd v Environmental Defence Soc Inc* [2023] NZSC 112⁴ There is also direct cross reference to Appendix 6 and 7 of the National Policy Statement for Freshwater Management 2020.

⁴ There is also direct cross reference to Appendix 6 and 7 of the National Policy Statement for Freshwater Management 2020.

⁵ Andrew J Townsend, Peter J de Lange, Clinton A J Duffy, Colin Miskelly, Janice Molloy and David A Norton, 2008. Science & Technical Publishing, Department of Conservation, Wellington

This is a prescribed process that must be undertaken prior to the notification of a proposed change and must provide reasonable opportunity for persons to make comment. It appears some material (such as the New Zealand Threat Classification Manual) is proposed to be incorporated by reference following notification, and that this process has not been followed.

- 5.14 For the above reasons, I consider that many of the proposed changes to give 'interim' effect to the NPS-IB are not appropriate and fail to account for the process intended by the NPS-IB (as gazetted), or in the case of the principles, would benefit from full and meaningful community engagement including with landowners to determine those regionally important values, before seeking to implement them in the plan. Delaying changes to the Indigenous Biodiversity chapter will ensure that an appropriate planning process can be undertaken, and any additional statutory requirements are met.

6.0 Policy 23

- 6.1 The S.42A report recommends changes to Policy 23 to align with the timeframes specified in the NPS-IB.
- 6.2 While I accept that the changes seek to ensure that the proposed policy is not inconsistent with the NPS-IB, I question whether any change to the existing Operative Policy 23 is necessary.
- 6.3 As I understand, changes proposed to Policy 23 through Change 1 was primarily to specify a date for when significant natural areas are to be identified. This in response to the resource management issue that there has not been a defined date for the policy to be implemented by. This is further explained in the following excerpt from the Section 32 report which confirms the intent of the policy package⁶:

Amendments to policies 23 and 24 to specify a completion date for the identification of sites with significant biodiversity values,

⁶ Paragraph 4 of the "Indigenous ecosystems evaluation – efficiency and effectiveness of provisions" table on Page 191 of the Section 32 evaluation report.

directing regional and district councils to have plan provisions in place to protect these sites by June 2025. While this has been a requirement in the RPS since 2013, and the RPS has provided a set of criteria to underpin this work since 1995, less than half of the district plans include schedules of significant sites and plan provisions. Method 21 is amended to ensure that each territorial authority has a plan for completion in place to meet these timeframes.

6.4 Following the notification of Change 1, the NPS-IB has been gazetted which specifies a timeframe for which local authorities must identify Significant Natural Areas. This requirement remains regardless of the direction specified in the Regional Policy Statement. It would seem that the resource management issue is now being appropriately managed by the NPS-IB. I accept that immediate changes to Policy 23 may be required where it conflicts with the higher order direction. However, I do not consider that there is any conflict between the operative Policy 23 and the NPS-IB. There is no prescribed timeframe in the operative policy and the criteria for identifying indigenous ecosystems and habitats with significant indigenous biodiversity values reflecting at a high level the criteria specified in Appendix 1 of the NPS-IB.

6.5 In my opinion, the proposed changes to Policy 23 are inefficient and have not provided any benefit. I consider the Operative Policy 23 should be retained in accordance with the relief sought in the Winstone submission.⁷

7.0 Policy 24

7.1 The S.42A report author (Jerome Wyeth) has recommended various changes to Policy 24 which provide direction to district and regional plans to provide policies, rules, and methods to protect significant indigenous biodiversity. The policy includes minimum

⁷ Submission point [S162.008]

requirements that cross reference existing national direction and other proposed policies of PC1.

- 7.2 I fully support the intent of this direction and the recognition of existing pathways provided for certain activities. Of particular interest to Winstone is the recognition of Clause 3.10 and 3.11 of the NPS-IB which provides a clear pathway for aggregate extraction and clean filling, and Policy 18A and 18B as recommended by the Section 42A author of Hearing Stream 5 which provide for the similar pathway from the National Policy Statement for Freshwater Management (**NPS-FM**).
- 7.3 I note that Mr Wyeth considered three options for providing for this direction⁸ and the proposed changes reflect his preferred option being 'Option 1'. While I understand Mr Wyeth's assessment that this is the most efficient option, I note that this is a different approach to the similar direction recommended by Ms Pascall in Hearing Stream 5. In addition, I note that proposed Policy 24 only directs district and regional councils undertaking a plan review, and not resource consent decision makers. This is inconsistent with the approach taken for Hearing Stream 5 where Ms Pascall recommended Policies 40A and 40B account for the similar direction through 'consideration' policies which applies to all decision making (including resource consents). For the same reasons that I raised for Hearing Stream 5⁹, I consider that the consenting pathways (including for aggregate extraction and cleanfilling) must be appropriately reflected in the Regional Policy Statement, including through the 'consideration' policy direction.
- 7.4 I consider a more appropriate approach would be to adopt a similar approach to that adopted by Ms Pascal, including a separate 'consideration' policy that relates to all decision makers. I acknowledge that further work may be required for the drafting of

⁸ Paragraphs 305 – 308

⁹ Paragraphs 8.7 – 8.10 and 9.4 of the Statement of Evidence for Catherine Clarke in Hearing Stream 5

the policies which could be integrated with the existing Policies 18A, 18B, 40A and 40B.

Policy 24A and Appendix 1A

- 7.5 A new Policy 24A has been proposed in the Section 42A report which incorporates a similar direction to Policy 24 as notified. Clauses (b) and (c) of Policy 24A in conjunction with proposed Appendix 1A prescribe what is 'appropriate' biodiversity offsetting and compensation. It is understood this policy direction is provided to assist in implementing the direction provided through Appendix 3 and 4 of the NPS-IB. The applicable direction in the NPS-IB is provided below:

When **biodiversity offsetting** is not appropriate: Biodiversity offsets are not appropriate in situations where indigenous biodiversity values cannot be offset to achieve a net gain. Examples of an offset not being appropriate include where:

(a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected:

(b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible:

(c) there are no technically feasible options by which to secure gains within an acceptable timeframe.

When **biodiversity compensation** is not appropriate: Biodiversity compensation is not appropriate where indigenous biodiversity values are not able to be compensated for. Examples of biodiversity compensation not being appropriate include where:

(a) the indigenous biodiversity affected is irreplaceable or vulnerable;

(b) effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse or irreversible;

(c) there are no technically feasible options by which to secure a proposed net gain within acceptable timeframes

7.6 Winstone raised significant concern over the former direction in Policy 24 and proposed Appendix 1A in their submission¹⁰ and through further submissions¹¹. The main concerns raised by Winstone were:

- Taking a 'species based' blanket approach is inappropriate.
- The approach of does not allow for site specific assessment.
- There is no national direction that requires this direction in an RPS.
- There is a limited evidence base to support the identification of the habitats and taxa identified in Appendix 1A.
- Species and habitats identified are extensive and effectively prohibits activities where the species or habitats exist, despite the actual effects.

7.7 While there have been some changes proposed in the Section 42A report in proposed Policy 24A, many of the concerns raised have not been resolved. Overall, I consider the policy direction in Policy 24A continues to significantly restrict the ability to offset and/or compensate. Furthermore there has been no further evidence provided to justify this direction in the Section 42A report other than the NPS-IB being gazetted which includes the direction noted above. I also note that there does not seem to be any evidence (or examples) provided to date that demonstrate that there is a regional 'issue' which requires inconsistent or more restrictive

¹⁰ Submission point [S162.009]

¹¹ Further submissions to submission points [100.016], [S134.11], and [S148.041].

implementation of the biodiversity offsetting and compensation principles.

- 7.8 In my view, the NPS-IB already provides clear direction on instances where offsetting or compensation is not appropriate, including importantly still enabling consideration of the local context, the proposal, and the actual effects.
- 7.9 To further limit when offsetting and compensation may be applied without sufficient evidence appears inappropriate. Furthermore, Policy 24A will also likely inhibit opportunities for innovation and seeking the best environmental outcomes for the region's biodiversity. Identifying specific species and habitats (as set out in Appendix 1A) also fails to account for further research and the evolving understanding of conservation statuses of species over the duration of the RPS.
- 7.10 I consider that Policy 24A and Appendix 1A should be deleted in their entirety in a manner consistent with the relief sought in the Winstone submission.

8.0 Definitions

- 8.1 There are various defined terms proposed through Change 1 relating to Indigenous Biodiversity. The Section 42A report has recommended various amendments to those definitions and has recommended additional definitions.
- 8.2 I question the value or necessity of many of the proposed new definitions proposed. A definition within the Regional Policy Statement should only be introduced where policy direction introduces a unique term, or where there is need for regional consistency for the meaning of a term. I also note the following in relation to the proposed definitions:
- 8.2.1 There are various definitions that are proposed that differs the National Policy Statement for Indigenous Biodiversity.

These definitions include: “biodiversity compensation”, “biodiversity offsetting” and “buffer/buffering”.

- 8.2.2 Terms such as “maintain”, “protect” and “enhance” are well understood in planning by their ordinary meaning. The case law definition’s of these terms were discussed in my planning evidence on Chapter 5-Freshwater and in Winstone’s legal submissions on that chapter.¹² There is no supporting evidence provided that the ordinary meaning as confirmed by caselaw should differ for indigenous biodiversity chapter of the RPS.
- 8.2.3 Definitions proposed are inconsistent with other definitions within Proposed Change 1. For instance, the definition of “biodiversity compensation” and “biodiversity offsetting” overlap and with “aquatic compensation” and “aquatic offsetting” by incorporating rivers and natural wetlands. There would also seem to be three definitions that have the same meaning: “ecological integrity”, “ecological health” and “resilience (in relation to an ecosystem)”. This does not assist plan users and rather hinders.
- 8.2.4 The proposed definitions for “naturally uncommon ecosystems” and “threatened or at-risk species” directly cross reference publications. This effectively ‘grandparents’ the threat status and uncommon ecosystems identified within those publications. It can be anticipated that updated publications will be released that accounts for updated data and understanding – the definition would not allow for consideration of this.
- 8.3 Should definitions be introduced, I suggest that they adopt the same meaning as the NPS-IB. I do however note that this should only be limited to the definitions section of the NPS-IB, and not inserting interpretation clauses from the NPS-IB such as has been

¹² <https://www.gw.govt.nz/assets/Documents/2023/11/HS5-S162-Winstone-Aggregates-Legal-Submission-031123.pdf> para 8.0 -8.7

proposed for the definition of “maintain” and “decision making principles”.

9.0 Conclusion

9.1 It is apparent that the section 42 authors have invested considerable time and energy in the preparation of the s.42A reports for this Hearing Stream 6 – Indigenous Biodiversity.

9.2 However, I consider that due to the timing and nature of the direction in the NPS-IB that serious consideration needs to be given to delaying the decision making of the Biodiversity chapter, and undertaking further work and community engagement as a separate process to Change 1.



Catherine Clarke

Dated 30 January 2024