BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY THE WEST COAST REGIONAL COUNCIL AND THE GREY DISTRICT COUNCIL

Under	**the Resource Management Act 1991**
And **In the matter of**	an application by **TIGA Minerals and Metals Ltd** for resource consents to establish and operate a mineral sand mine on Barrytown Flats. Reference WCRC: RC-2023-0046 and GDC: LUN-315/23.

Legal Submissions from Counsel on behalf of
the Director-General of Conservation *Tumuaki Ahurei*
Dated: 26th February 2024

Department of Conservation | *Te Papa Atawhai*
Private Bag 4715
Christchurch Mail Centre
Christchurch 8140
Solicitor rōia: Ceri Warnock
Phone waea: 0273436890
Email īmera: cwarnock@doc.govt.nz

MAY IT PLEASE THE HEARING PANEL:

INTRODUCTION

1. These submissions are made on behalf of the Director-General of Conservation *Tumuaki Ahurei* (the Director-General) in respect of the application for resource consents by TIGa Minerals and Mining Ltd ('the applicant') for their proposal to construct and operate a mine at Barrytown Flats.[1]

2. The Director-General has a statutory duty to advocate for the conservation of nature.[2]

3. The Director-General lodged a submission opposing the application. She was particularly concerned about the potential for adverse effects on Westland petrel, other threatened and at-risk avifauna, and wetlands.

4. Since then, the applicant has amended the proposal, notably to remove the proposal for mining and trucking in the hours of darkness. However, other night-time activities will continue. These submissions address the Director-General's response to the amended proposal.

Overview of the Director-General's submissions

5. The Director-General's submission is that a real risk of harm remains to Westland petrel and other threatened and at-risk avifauna, which are factors that militate against the granting of consent.

6. The Director-General agrees with the s 42A report writer for the West Coast Regional Council ('WCRC') that there is not a functional need for minerals extraction and associated activities within 100 meters of the wetlands in this matter.

Scope of submissions

7. These legal submissions will address:
    a) Westland petrel;
    b) Other avifauna (and the proposal in the Avian Management Plan ('AMP') to deliberately disturb threatened and at-risk avifauna);
    c) Wetlands (and the functional need test);

[1] WCRC: RC-2023-0046 and GDC: LUN-315/23.
[2] s 6 Conservation Act 1987

d) The legal relevance of climate change; and
e) Conditions.

Evidence

8. The Director-General will call Kate Simister to address effects on Westland petrel and other avifauna.

WESTLAND PETREL

Section 104(1)(a) – 'any actual and potential effects on the environment of allowing the activity'[3]

9. All the Westland petrel experts (Dr Waugh, Kate Simister and Bruce Stuart-Menteath) agree with the following facts:

a) The Westland petrel, Procellaria westlandica or Tāiko, is a naturally rare, endangered seabird species, endemic to New Zealand.
b) The species is known to breed at only one location in the world - in the foothills behind Barrytown flats on the West Coast of the South Island of New Zealand. The colony is likely to have existed in this location for over 5,000 years.
c) The proposed mining site is 3.6km south of the breeding colony and directly adjacent to the Tasman Sea, which is an essential flight path for the birds as they travel to and from the colony.
d) The mine site lies in the flight path of birds moving between their feeding grounds and the colony.
e) Westland petrel are nocturnal on land, and do not fly between the sea and colony during daylight hours.
f) Westland petrel circle over the Barrytown flats as they make their way out to sea during darkness.
g) Artificial lights attract Westland petrel and can cause them to 'ground'. Once grounded, Westland petrel cannot take off again from flat land.
h) Approximately half of all grounded Westland petrel die.

[3] The definition of 'environment' in the RMA includes 'natural and physical resources', and the definition of 'natural and physical resources' includes 'all forms of ... animals' (s 2 RMA); see also *Pierau v Auckland Council* [2017] NZEnvC 90, [251] and *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81, [163] confirming effects on avifauna are relevant RMA considerations.

i) Westland petrel mortality is already above the threshold of population sustainability meaning that any additional loss from the mine proposal can be considered an adverse population level effect.
j) The Westland petrel is considered to have an unfavourable conservation status in international fora.

10. There is no contradictory evidence from the applicant. Accordingly, the Director-General invites the Panel to accept each of these facts as findings in the decision.

Lighting effects

11. From the evidence, it would appear that the artificial lighting from the activity will include the following:

a) Fixed external lights on site, necessary for health and safety;
b) Internal lighting in the WCP building (and note Dr Bramley's comment in oral evidence concerning lights accidentally being left on);[4]
c) Lighting fixed to the tailings pump that will be used in the event of pump failure and /or for necessary maintenance;
d) Transport / mobile lighting from people and vehicles going to address emergencies;
e) Transport lighting from workers vehicles and / or minibus for shift changes.

12. The following information is missing from the application:

A lighting plan for the site, prepared by an appropriate expert that would enable the experts and the Panel to better assess the risk to Westland petrel.

13. The following operational issues are uncertain:

a) Whether lighting that accords with the Australian Light Pollution Guidelines for Wildlife 2020 ('Lighting Guidelines') complies with relevant health and safety requirements for mines;
b) What time all lights on site will be turned off and all vehicles will have left in the evening, and what time cars will return and lights will be turned on in the morning;
c) Whether the WCP building will have windows or not (presumably, there will be doors for worker access in addition to the roller doors for loading);
d) Whether loading of trucks will take place in the hours of darkness;

[4] He stated, "someone may leave the toilet light on or something" in answer to questions from the Panel.

e) Any sense of how likely the pump is likely to fail / require maintenance at night and / or other aspects of the proposal may require maintenance during darkness;
f) Time of night-time shift changes for WCP workers and whether they will be required to use a mini-bus or whether this will be optional (and cars will be used);[5]
g) Whether the Lighting Guidelines can be 'retro-fitted' to mobile light sources (they are stated to be for fixed sources only).

14. The following ecological information is uncertain:

Whether the Australian Light Pollution Guidelines for Wildlife 2020 are adequate to protect Westland petrel.

15. The questions for the Panel (and the legal tests) are whether a *real risk* of harm remains to Westland petrel and if so, what weight to give to that risk.

16. The evidence from the Westland petrel experts is that: [6]

a) a *real* risk of grounding Westland petrel remains. That risk may have been mitigated to a lower probability by proposed conditions, but it remains, nonetheless;
b) grounding causes death in c. half of all cases; and
c) any induced loss constitutes a population-level effect, moving the species closer to extinction.

17. Counsel for the applicant states, 'the RMA is not a no risk statute', a phrase that has, with respect, become rather hackneyed in the abstract. It has its origins in *Aquamarine Ltd v Southland RC,*[7]a decision where the Environment Court *declined* consent for an activity in Doubtful Sound because of a low probability risk that had high potential impact. The reality is the statute, planning documents, and case law - taken together - constitute a nuanced risk assessment framework – and I set out the legal framework for that risk analysis in paragraphs [18]-[26] below. Context is always critical. Some risks are worth taking. Some risks are unacceptable, no matter how small the likelihood of that risk eventuating.

[5] SoE Dr Gary Bramley 19 January 2024, [126] (raises this question).
[6] SoE Kate Simister 26 January 2024 [10]; SoE Dr Susan Waugh 25 January [78]; SoE Bruce Stuart-Menteath 8 February 2024 [45]; see also SoE Mike Harding 12 December 2023 [96]-[99];
[7] *Aquamarine Ltd v Southland Regional Council* C126/97 (unrep) (NZEnvC), p 145, and referenced by Judge Jackson in *Shirley Primary School* (below), [106].

Potential effects, risk and uncertainty

18. The statutory test for potential effects includes 'any potential effect of high probability' (s 3(e)) and 'any potential effect of low probability which has a high potential impact' (s 3(f)).[8] Therefore, the test has two components: (1) probability of occurrence; and (2) severity of consequences.[9] This test is reflective of a risk analysis.

19. The standard of proof required to establish a risk is low. In *Shirley Primary School*, the Environment Court noted the balance of probabilities '… is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future.'[10]

20. What probability of occurrence should suffice in any given case will depend upon the ecological context. In Clifford *Bay Farms Ltd*, the NZEnvC stated that, 'there is no Procrustean – one size fits all – principle for risk assessment and the standard of proof of risks under the RMA': ecological context helps form the legal response. [11]

21. However, a 'scintilla'[12] of reliable evidence will suffice to meet the probability threshold where threatened or at-risk species and / or critically endangered environments are concerned.

22. For example, although the Court found there was a very small likelihood of an oil spill from container ship manoeuvring in Doubtful Sounds, consent was refused in *Aquamarine Ltd v Southland Regional Council* because of the distinct and special nature of the ecosystem.[13]

23. The combined effect of the degree of seriousness and irreversibility of the environmental threat (i.e., the ecological context), and the degree of uncertainty (i.e., the lack of scientific knowledge), impacts the legal approach taken to evaluating the evidence. The more significant and uncertain the threat, the greater the degree of precaution required.[14] In the present matter, the fact that the experts are uncertain as to whether the Australasian

---

[8] Properly understood, the risks from lighting are not *cumulative* effects they are *potential* effects. If a petrel is attracted to a light on site and is grounded and killed, that has nothing to do with any other light source, and the death of that petrel is a population level effect. In the alternative, the effects are *actual* cumulative effects – the effects from the proposal are combing with effects that *already exist* and are currently impacting the environment, i.e other pressures on Westland petrel (c.f. *Dye v Auckland Regional Council* [2002] 1 NZLR 337).
[9] *Clifford Bay Farms Ltd v Marlborough District Council* C131/2003 (unrep) (NZEnvC), [55].
[10] *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC), [117] quoting *Fernandez v Government of Singapore* [1971] 1 WLR 987 (PC).
[11] *Clifford Bay Farms Ltd v Marlborough District Council* C131/2003 (unrep) (NZEnvC), [68].
[12] *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC), [142].
[13] *Aquamarine Ltd v Southland Regional Council* C126/97 (unrep) (NZEnvC).
[14] *Aquamarine Ltd v Southland Regional Council* C126/97 (unrep) (NZEnvC).

Light Pollution Guidelines for Wildlife 2020 are adequate to protect Westland petrel supports the application of a precautionary approach.

24. The approach to risk set out above, has been approved by the High Court in *Davidson* and *Clearwater Mussels.*[15] *Davidson* and *Clearwater Mussels* were concerned with the risk to King Shags (a Nationally Endangered species). In both cases the Environment Court found that the habitat of the King Shag would be disturbed and / or altered, and while there was a low probability (very unlikely but still a realistic possibility) that the King Shag would become extinct as a result of the activities, consents were refused.[16]

25. Allegations that a proposed activity could harm the environment must be based on 'real evidence' (which may include expert opinion) and must be 'reliable'. [17]

26. General expert acceptance of a hypothesis can constitute reliable evidence, and expert opinions about a particular risk may be derived from hypotheses rather than experiential evidence.[18] However, expert opinion evidence as to hypotheses that have 'analogic evidential backing' is more persuasive.[19]

27. In the Director-General's submission, while the *likelihood* of petrels grounding has been reduced it has not been removed and the *consequences* of groundings would be significant. In particular, the proposed measures in the AMP for the mine workers to discover and adequately respond to grounded birds found on site are unlikely to improve the outcome for grounded birds.[20]

28. Accordingly, the Panel is invited to find that there is a *real risk* of the activity causing an adverse population level effect on Westland petrel. This finding must be taken into account by the Panel in the s 104 analysis and militates against consent.

29. The planning framework supports this submission.

---

[15] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZEnvC 81, (Environment Court); *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, High Court; Cull J.

[16] *Clearwater Mussels v Marlborough District Council* (EC) [2018] NZEnvC 88, at [114] (approach to risk approved on appeal, see *Clearwater Mussels Ltd v Marlborough District Council* [2019] NZHC 961); *Davidson* (EC) [2018] NZEnvC 81 at [297] (approach to risk approved on appeal, see *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, High Court; Cull J.). Note *Davidson* was also declined due to the adverse effects on natural character.

[17] *McIntyre v Christchurch City Council* [1997] NZRMA 289 (PT) , 104 citing *R v Mohan* [1994] SCR 9 and focusing on the need for scientific evidence to meet a basic threshold of 'reliability'.

[18] *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (NZEnvC), [147].

[19] *Clifford Bay Farms Ltd v Marlborough District Council* C131/2003 (unrep) (NZEnvC), [79].

[20] SoE Kate Simister 26th February 2024 [10]; SoE Bruce Stuart-Menteath 8 February 2024 [36-38].

Section 104 (1)(b) – the planning framework

30. A consent authority must have regard to the New Zealand Coastal Policy Statement 2010 ('NZCPS').[21] The West Coast Regional Policy Statements and plans, and the Grey District Plan must give effect to the NZCPS.[22]

31. Policy 11(a)(i) of the NZCPS requires that – to *protect* indigenous biological diversity in the coastal environment – adverse effects of activities on indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists, must be *avoided*. Under Policy 11(a)(ii), adverse effects of activities on taxa or species that are listed by the International Union for Conservation of Nature and Natural Resources as threatened must also be *avoided*.

32. Avoid means 'not allow' or 'prevent the occurrence of.'[23]

33. It is not possible to avoid material harm through the use of adaptive management in this matter. Adaptive management would not accord with the test set in *Sustain Our Sounds*, because it is not possible to set 'thresholds ... to trigger remedial action before the effects become overly damaging.' [24] This is because Westland petrel mortality is already above the threshold of population sustainability.[25]

34. The NZCPS 2010 Guidance Note states:

> when making decisions with regard to this policy, it is important that the presence of the following features is first identified: relevant threatened or at-risk taxa…. habitats where indigenous species are at the limits of their natural range… The second step is to then consider what the actual and potential relevant adverse effects are, which activities may cause those effects for that species, habitat or area, and how those effects could be avoided (not allowed). *The avoidance of adverse effects will be specific to each species and type of adverse effect* (emphasis added)[26]
>
> and
>
> where there is a risk of extinction or irreversible loss, any adverse effects will be significant. This reflects the precautionary approach.[27]

[21] RMA s 104(1)(b)(iv).
[22] RMA ss 61(da), 66(ea), 74(ea).
[23] *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [96].
[24] *Sustain Our Sounds Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 40, [133].
[25] *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [68].
[26] Department of Conservation, NZCPS 2010 Guidance Note Policy 11: Indigenous biological diversity, May 2019, p 19.
[27] Department of Conservation, NZCPS 2010 Guidance Note Policy 11: Indigenous biological diversity, May 2019, p 20.

35. The activity will not 'avoid' adverse effects. On the contrary, even with the proposed conditions, there is a *real risk* that it will create 'material harm'[28] to Westland petrel.

36. NZCPS Objective 7 is also relevant to the s 104 analysis as explained below:

> To ensure that management of the coastal environment recognises and provides for New Zealand's international obligations regarding the coastal environment, including the coastal marine area.

Section 104 (1)(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application

37. In determining the weight to be given to the risk to Westland petrel, the extensive measures undertaken by the New Zealand government and the New Zealand public to protect the species are relevant and reasonably necessary factors to consider.

38. Westland petrel require *protection* under international law:

    a) the species is listed in Appendix II of the Convention of Migratory Species 1979;[29]
    b) it is listed in Annex 1 of Agreement on the Conservation of Albatrosses and Petrels 2018;[30]
    c) its habitat is designated an Important Bird Area and Key Biodiversity Area under the Convention on Biological Diversity (CBD);[31]

---

[28] One couldn't for example set a threshold of one or two downed birds in a four-week period (as the applicant does in the AMP) because there is no guaranteed that a grounded bird would (a) survive the grounding or (b) be discovered and in a healthy enough state to rehabilitate.

[29] Species with 'unfavourable conservation status' are listed. The aim of the Convention is to 'restore the migratory species concerned to a favourable conservation status or to maintain it in such a status' (Art V(I)).

[30] Agreement on the Conservation of Albatrosses and Petrels 2018, Article II contains the Objective and Fundamental Principles:

1. The objective of this Agreement is to achieve and maintain a favourable conservation status for albatrosses and petrels.
2. The Parties shall take measures, both individually and together, to achieve this objective.
3. In implementing such measures the Parties shall widely apply the precautionary approach. In particular, where there are threats of serious or irreversible adverse impacts or damage, lack of full scientific certainty shall not be used as a reason for postponing measures to enhance the conservation status of albatrosses and petrels.

Annex 2 [2.1] of the Agreement requires '[s]o far as is appropriate and necessary, the Parties shall take such management action, and introduce such legislative and other controls, as will maintain populations of albatrosses and petrels at, or restore them to, favourable conservation status, and prevent the degradation of habitats.'

[31] SoE Dr Susan Waugh 25 January 2024 [55]. NB: Key Biodiversity Areas (KBAs) are "sites that contribute to the global persistence of biodiversity" and are identified through a set of established criteria, such as whether a

d) and it is listed as 'endangered' in the IUCN Red List (and note that 'a taxon is endangered when the best available evidence indicates that it is considered to be facing "a high level of extinction in the wild"').[32]

39. Consenting to a proposal that creates a *real risk* of harm to Westland petrel is inconsistent with New Zealand's international law duties.

40. The Westland petrel requires protection through national law:

a) it is absolutely protected under the Wildlife Act 1953;[33]
b) its habitat is a scientific reserve under the Reserves Act 1977, with the purpose of 'protecting and preserving in perpetuity';[34]
c) its habitat is no fly zone under the Civil Aviation Act 1990;[35]
d) there is Ministerial direction in the NZCPS to protect the species (as above);
e) Te Tiriti o Waitangi – it is a taonga species in the Ngāi Tahu Claims Settlement Act 1998;
f) Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020 (that gives effect to New Zealand's international law commitments under the CBD and in turn is given effect to via the NPSIB) is also relevant and has the 2025 goal of 'no known human-driven extinction of indigenous species', the 2030 goal of 'at-risk species populations are improving', and the 2050 goal of 'expanded range, abundance and increased resilience';[36]

41. The government has attempted to protect the Westland petrel in many practical ways:

a) by funding research programmes through the National Science Challenges and the New Zealand Conservation Services Programme;[37]
b) by funding dedicated DOC staff time;[38]
c) Waka Kotahi has turned off street-lights in Punakaiki;[39]
d) cables have been buried.[40]

---

site supports a significant proportion of the worldwide population of a globally threatened species. **KBAs are recognized as priorities for protection**", UNEP-WCMC, 2024. State of the World's Migratory Species. UNEP-WCMC, Cambridge, United Kingdom, p 38.

[32] IUCN. 2023. *The IUCN Red List of Threatened Species. Version 2023-1*. https://www.iucnredlist.org. NB: in the IUCN lexicon, the only higher threat classifications than 'Endangered' are 'Critically Endangered,' 'Extinct in the Wild', and 'Extinct'.

[33] s 3 Wildlife Act 1953

[34] s 21 Reserves Act 1977

[35] s 29A Civil Aviation Act 1990

[36] Department of Conservation *Te Mana o te Taiao Aotearoa New Zealand Biodiversity Strategy* 2020, p 53

[37] SoE Kate Simister 26 January 2024, [5], [17].

[38] In particular, the expertise of Kate Simister and other DOC rangers.

[39] SoE Kate Simister 26 January 2024, [16].

[40] Ibid. Also, oral evidence of Bruce Stuart-Menteath, 8th February 2024.

42. The community has taken extensive practical measures to protect the species including:

    a) running petrel patrols[41]
    b) running many educative events[42]

43. In timely fashion, the first ever United Nations State of the Worlds Migratory Species Report was launched on 12th February 2024 and makes for sobering reading.[43] The report finds that,

> the conservation status of migratory species overall is deteriorating. Species listed for protection under CMS, despite positive successes, reflect this broader trend. The conservation needs and threats to migratory species need to be addressed with greater effectiveness, at a broader scale, and with renewed determination. In particular, urgent action is needed to prevent the extinction of species that are categorised as Critically Endangered and Endangered [as Westland petrel are].[44]

44. In all the circumstances, the Panel is invited to place significant weight on the risk to Westland petrel.

OTHER AVIFAUNA

45. Twenty-nine threatened or at-risk bird species have been recorded within 10 kms of the site. Sixteen of those threatened species were confirmed as present within or near to the mine site including the wetlands by the applicant's ecologist following surveys. These species include Pacific Reef Heron (threatened - nationally endangered, c. 300 to 400 birds left), Caspian Tern (threatened – nationally vulnerable), Grey Duck (threatened – nationally vulnerable), and White Heron (threatened – nationally critical, c. 150 to 200 birds left).

46. An inherent component of the applicant's proposal is to deliberately disturb and displace other threatened and at-risk avifauna from the site.[45] The preponderance of expert evidence is that: such disturbance creates a real risk of harm; this form of management does not constitute good conservation practice; and it is contrary to Policy 11(a) of the NZCPS.[46] The species that are likely to be impacted are absolutely protected under the Wildlife Act 1953.

---

[41] Ibid; SoE Suzanne Hill for Coast Road Resilience Group Inc on Westland petrel 31 January 2024 [22]-[32].
[42] Ibid.
[43] UNEP-WCMC, 2024. State of the World's Migratory Species. UNEP-WCMC, Cambridge, United Kingdom.
[44] Ibid, p iv.
[45] Avian Management Plan ('AMP'), 3.2, 3.3.
[46] SoE Kate Simister 26 January 2024 [54]; SoE Mike Harding 12 December 2023 [127]; SoE Dr Susan Waugh 25 January 2024 [84]-[85].

WETLANDS

Habitat for threatened and at-risk species

47. The proposal is to mine for minerals and establish holding ponds within 100 meters of wetlands that the applicant's ecologist has assessed as having high ecological value.

48. Dr Susan Waugh notes that the area is classified as an Important Bird Area and so designated as a Key Biodiversity Area under the CBD.[47] In oral evidence, she described the environment surrounding the mine site as a "biodiversity hotspot".

49. To provide one example: the wetlands adjacent to the mine site have been described as constituting good habitat for Australian bittern (threatened - nationally critical – estimated population of 900 in the 1980s will steep population decline since then).[48] Deborah Langridge gave evidence that she had seen bittern in Canoe Creek Lagoon,[49] as did another submitter.[50] Mike Harding notes that "[t]here appears to be no dispute that matuku [bittern] are present".[51] Mike Harding suggests a precautionary approach requires a 100-meter set-back from the wetlands.[52]

50. Dr Waugh notes that the variety of threatened and at-risk avifauna present is unusual.[53] In her opinion, the wetlands should be considered as habitat for threatened and at-risk birds, as habitat includes a whole host of values including feeding.[54]

51. The Director-General invites the Panel to make a finding that the wetlands surrounding the mine site are habitat for threatened and at-risk species.[55] If an independent expert ecologist suggests a 100-meter buffer from those wetlands (as Mike Harding has done) the Director-General supports that recommendation. This approach is also supported by Policy 3 of the NZCPS, that requires a precautionary approach.

Hydrology

52. The applicant proposes a hydrology regime for managing water in the mine void and on-site to ensure that an adequate balance of water is maintained in the wetlands, i.e. to

[47] SoE Susan Waugh 25 January 2024, [55].
[48] SoE Mike Harding 12 December 2023, [104].
[49] Submiter 256, oral evidence to the Panel.
[50] Submitter 87.
[51] SoE Mike Harding 12 December 2023, [104].
[52] Ibid.
[53] SoE Dr Susan Waugh 25 January 2024, [16].
[54] Oral evidence of Dr Waugh.
[55] It would be contrary to the precautionary approach in the NZCPS (and not supported by the specific evidence) to find that there was only 'fleeting occupancy' of all threatened and at-risk species in the wetlands.

prevent de-watering, and / or water over-flow from the mine site and / or holding ponds going directly into wetlands. The applicant's case is that this regime will avoid adverse effects on the wetlands.

53. However, there is some uncertainty between the experts as to whether the plan is achievable.

54. Professor Brian McGlynn described the proposed hydrological management as incredibly challenging and stated there would be a need for 'infinite resources and knowledge' to make it work effectively.[56] He stated the regime would, 'be pretty much impossible' for the Council to monitor, provide certification for changes, and / or enforce.[57]

55. Brett Sinclair said that the proposal was achievable if the applicant 'keep an eye on the ball' and 'kept things under control'.[58] The conclusions in his written report are similarly framed: 'provided the proposed groundwater and surface water mitigation measures are implemented and effectively monitored and managed.'[59]

56. Dr Durand opined,

> in practice this may be too complex to achieve and show compliance ... **I note the applicant has not been able to arrange for access to the wetland, but ongoing access will be necessary if the resource consent is granted**.[60]

57. In the Director-General's submission, *if* the Panel finds that access to the wetlands is necessary to monitor and respond to water level depletion, inundation, turbidity and / or water quality, and to report on the success of that regime for the wetlands – and access is not allowed – this is a major flaw in the proposal, meaning that compliance will not be achievable.[61]

Functional need for mining within 100 meters of wetlands

58. The WCRC s 42A report writer, Dr Durand, concludes that there is not a functional need for mining within 100 meters of the wetlands. The Director-General agrees and therefore submits that the Panel cannot grant consent for minerals extraction and associated activities, as the activities do not pass through the gateway in Regulation 45D(6) of the

[56] In answer to questions put by the Panel.
[57] In answer to questions put by the Panel.
[58] In answer to questions put by the Panel.
[59] Hydrological Peer Review (Final) for the applicant, Brett Sinclair, 4 September 2023, p 10.
[60] s42A report WCRC [145].
[61] Note also New Zealand Civil Aviation Rules 101 which prevents drones from flying over private property without the consent of the owners.

Resource Management (National Environmental Standards for Freshwater) Regulations 2020 ('NES-F') . The following submissions address the legal tests in the NES-F. There are two contentious legal issues.

First, are the wetlands 'natural inland wetlands'?

59. Dr Bramley states, "[t]he location of the CMA boundary between these [cross river reference] points remains unknown".[62] I have checked whether DOC can supply information to assist in determining the delineated coastal marine area ('CMA'). As I understand it, there is not a clear map of the delineated CMA in existence.

60. DOC cannot confirm that the indicative lines drawn by Dr Bramley (see Figure 15 in his primary evidence) are correct. Accordingly, it is unclear whether the wetlands juxtaposed to the site are wholly within the CMA or not.

61. I agree with Counsel for the applicant: a precautionary approach would require the application to be considered on the basis that natural inland wetlands are impacted and therefore subject to the test in NES-F reg 45D. Regulation 45D sub regs (3), (4) and (5) are triggered by this application.

Second, how should the 'functional need' test in NES-F reg 45D be interpreted and applied?

Extraction of minerals and ancillary activities

45D Discretionary activities

(6) A resource consent for a discretionary activity under this regulation must not be granted unless the consent authority has first—

(a) satisfied itself that the extraction of the minerals will provide significant national or regional benefits; and

(b) satisfied itself that **there is a functional need for the extraction of minerals and ancillary activities in that location;** and

(c) applied the effects management hierarchy.

[62] Statement of Dr Gary Bramley dated 19th January 2024 [151].

62. The three limbs of reg 45D(6) are disjunctive. This test is described as a 'gateway' test, meaning once the test has been satisfied, the activity can be considered under s 104. Reg 45D(6)(b) requires the consent authority to satisfy itself that there is a functional need for the extraction of minerals and ancillary activities in that location. 'Satisfied itself' is indicative of a robust assessment or an adequate degree of certainty.

Functional need v operational need

63. 'Functional need' was first defined in the National Planning Standards to mean:

> the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment. [63]

That definition is also used in the NES-F and the NPS FM.

64. Functional need was described as setting 'a strict requirement' in the *Recommendations on Submissions Report for the first set of National Planning Standards* because of the 'limitation that an activity can only occur in that environment'.[64]

65. 'Functional need' is defined in opposition to 'operational need' in the Planning Standards:[65]

> Operational need means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.[66]

66. There is a clear distinction between functional and operational need, and it is important not to conflate the two concepts. [67]

67. Counsel for the applicant relies upon Stephen Miller's evidence to justify the functional need for mining within 100 meters of wetlands.[68] But Mr Miller's analysis falls squarely

---

[63] Ministry for the Environment, *National Planning Standards*, (Wellington: Ministry for the Environment, November 2019), p 58

[64] Ministry for the Environment, *2I Definitions Standard – Recommendations on Submissions Report for the first set of National Planning Standards* (Wellington: Ministry for the Environment, 2019), [3.34],p 95.

[65] Ministry for the Environment, *2I Definitions Standard – Recommendations on Submissions Report for the first set of National Planning Standards* (Wellington: Ministry for the Environment, 2019), [3.34], p 95.

[66] Ministry for the Environment, *National Planning Standards*, (Wellington: Ministry for the Environment, November 2019), p 62.

[67] They are used deliberately, and alternatively, in various NPS and NES. There is a logical reason for the differing application. It maintains a distinction between situations where public pool resources are concerned (such as freshwater) so requiring the higher test of functional need, but in situations where there is a large private land component the lesser test of operational need is relied upon (for example SNAs under the NPSIB).

[68] Legal Submissions for the Applicant, [39].

within the definition of operational need – i.e. premised on technical, logistical, or operational choices and in particular, profit maximisation.[69]

68. The Government deliberately chose the higher requirement of 'functional need' in the NES-F and NPS FW, despite submissions to the contrary from resource-users.[70]

69. A higher test accords with the objective of the NPS FW:

> The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
> (a) **first, the health and well-being of water bodies and freshwater ecosystems**
> (b) second, the health needs of people (such as drinking water)
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

and policy 6 of the NPS FW:

> There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

and is appropriate where public pool resources (such as freshwater) are involved.[71]

Relevant case law

70. There are no cases that I am aware of that specifically address the functional need for mineral extraction within 100 meters of wetlands.

71. *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* concerned specified infrastructure and cl 3.22(1)(b)(iii) of the NPS-FW. In that case, the proposal was for a road to traverse a valley that may have contained wetlands. In accepting there was a functional need for the route to cross the valley, the Court noted,

> the Project comprises large-scale, linear infrastructure. There cannot be gaps in the road – the whole route must fit together safely and efficiently[72] ... [i]t involves the creation of a new stretch of road approximately six kilometres in length which is required to join with two existing and fixed points on the highway. In order to connect

[69] SoE, Stephen Miller 19 January 2024 [29]-[30]
[70] Ministry for the Environment. 2022. *Essential Freshwater Amendments: Report recommendations and summary of submissions: Managing our wetlands: Proposed changes to the wetlands regulations*. Wellington: Ministry for the Environment; Ministry for the Environment. 2022. *Amendments to the NES-F and NPS-FM: Section 32 report.* Wellington: Ministry for the Environment.
[71] NPS FW 2.1, 2.2
[72] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2022] NZHC 629, [41].

> these two points, it is necessary for the road to traverse the environment(s) between them. In this case, one of the environments is the lower Mangapepeke Valley.[73]

The ratio of the case is that the word 'environment' in the functional need test means the broader concept as defined in RMA s 2, and the relevant environment was the particular environment impacted (c.f. a generalist or abstract conception about the environment – for example 'the coastal environment'). In this case, the particular environment was the Mangapepeke Valley. Due to the nature of linear infrastructure, the road had to cross that particular valley at some point. The specific location of the road was chosen to minimise environmental damage to that environment (amongst other considerations). Although it is difficult to draw an analogy between linear infrastructure and mining, the ratio in this case is helpful for present purposes as I explain below.

72. In *H P Doig v Marlborough DC,* the Environment Court addressed the functional need test in Policy 6(2)(c), (d) of the NZCPS. The Court accepted that a boatshed has a functional need to be located in the coastal marine environment but toilet and shower facilities inside the boatshed did not.[74] In like fashion, see the Commissioners' decision in Mangawhai Wharf.[75] These examples are concerned with interpreting the functional need test in the NZCPS where the 'particular environment' is specifically defined in the Policy i.e. 'the coastal environment'. What constitutes the 'particular environment' for the purposes of reg 45D is not legislatively constrained. Accordingly, the question arises as to how to conceptualise the 'particular environment' for the purposes of reg 45D (see below).

73. Other case law addresses the phrase 'functional need' as it is used in lower-level plans.[76] However, in those cases the Court is interpreting the phrase within the immediate textual context of the relevant planning instrument, which impacts the interpretation given and limits the application of those ratios to the present matter.[77]

What does 'operate in a particular environment because the activity can only occur in that environment' in reg 45D(6)(b) mean?

[73] Ibid, [55]-[56].
[74] *H P Doig v Marlborough DC* [2018] NZEnvC 55, [39].
[75] Independent Commissioners Decision, Mangawhai Historic Wharf Trust APP.040213.01.01, 18 November 2020, [149].
[76] See e.g. *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 ('Creswell'), intepreting "rural processing activity", upheld on appeal in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, and [115] and [151] in particular illustrating the very different textual context c.f. reg 45D(6)

74. Two possible interpretations are offered. The applicant's interpretation of functional need is summarised by Kate McKenzie in paragraph [52] of her statement, and described as a simple test:[78]

> Mineral extraction, by nature, has a functional need to locate where the targeted minerals are located, and demonstrating that the resource exists in the location proposed to be mined is sufficient to demonstrate a functional need in that location.

75. Dr Durand addresses the functional need test in paragraphs [147] to [160] of the WCRC s 42A Report. In contrast to Ms McKenzie's interpretation, he suggests the test is multi-layered. The question is:

> whether of all the instances of "this environment" (lowland coastal mineral sand deposits) this particular activity (quarrying for mineral ore extraction purposes) can only occur in this particular location (the Barrytown Flats adjacent to the Canoe Creek Lagoon).

76. The Director-General supports the interpretation of Dr Durand for the following reasons:

a) Kate McKenzie's proposition appears tautological. Reg 45D(6) is concerned with the *extraction of minerals*.[79] The *extraction* of minerals always takes place where the minerals are deposited because it is not possible to *extract* minerals unless they are there.[80] Mining permits under the CMA are *only* granted if the Minister is satisfied that, 'the permit applicant has identified and delineated at least an indicated mineable mineral resource or exploitable mineral deposit.'[81] If this interpretation was accepted, there would never be a proposal to mine crown minerals that failed reg 45D(6)(b) and the text would become redundant.

b) It is important to test the converse argument. Does the meaning adopted by Dr Durand inevitably frustrate a consenting pathway? This does not appear to be the case. Dr Durand has set out factual considerations that would result in a mining proposal satisfying the functional need test to mine within 100 meters of wetlands. Accordingly, if Dr Durand's interpretation was accepted there would be some mining proposals (albeit not this one)[82] that met the test.

---

[78] SoE, Kate McKenzie 19 January 2024, [51].
[79] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (NZSC): in interpreting ambiguous text, 'the Court must obviously have regard to both the immediate and the general legislative context', [22], see also s 10 of the Legislation Act 2019.
[80] 'Reg 45D(6) is concerned with 'the extraction of minerals'. 'Mining' means 'to take, win, or extract by whatever means,– (i) a mineral existing in its natural state in land', s 2(1) Crown Minerals Act 1991.
[81] NZPAM, *Minerals Programme for Minerals (Excluding Petroluem) 2013*, 10.1.
[82] s42A Report for WCRC, [157].

c) If there are two ways to interpret a legislative provision and one interpretation renders the provision meaningless, then the other interpretation is to be preferred.

d) Kate McKenzie's proposition does not accord with the drafting history set out above and the acknowledgement by MfE that 'functional need' sets a high test.

e) The ratio of *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council*[83] supports Dr Durand's analysis in paragraphs [153]-[154] of the s 42A Report. The High Court found that the particular or relevant (wider) environment also had to be considered, not just the chosen location.[84] So, there are two (spatial) considerations: if the *location* is near to wetlands, can this activity *only occur* in this particular (or relevant) *environment* that you are concerned with (i.e. the Barrytown Flats adjacent to the Canoe Creek wetlands)? And that requires a 'context and fact specific inquiry' ... [that considers] 'alternatives'.[85] If not, it needs to take place somewhere else that is not near to wetlands. This multi-layered approach aligns with Dr Durand's analysis but not with Kate McKensie's simple approach that focuses only on one aspect i.e. the location of minerals and ignores the wider environment.

f) None of the contextual matters suggested by Counsel for the applicant in [44] of her submissions are of assistance in interpreting 'functional need'.

   i. [44] (a) Draws on Policy 4 of the WCRPS to assist the argument on functional need, but that policy is concerned with REG and is giving effect to the NPS REG 2011 Policy C1, so it is not analogous or helpful in interpreting reg 45D(6). A more apt policy is Policy 6 of Chapter 8 'Identify the significant values of wetlands and outstanding freshwater bodies in regional plans and protect those values.' In relation to the s 32 Report, the evaluation report does *not* support Counsel's paraphrase but rather states, "[t]his will enable mining-specific assessments to ensure that no activities are being undertaken within, or within the setback of, a natural wetland unless necessary."

[83] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council,* [2022] NZHC 629, [52]-[58].
[84] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council,* ibid. The High Court appears to conflate 'location' with 'environment' in [53] whereas the concepts are used distinctively in cl 3.22 and reg 45D(6) which suggest they are not to be used interchangeably, but that does not detract from the main ratio in the case.
[85] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council,* [2022] NZHC 629, [58].

ii. [44] (b) In relation to the NZCPS, the point that some activities can *only* take place in certain environments is the very issue we are concerned with, so referencing the NZCPS does not take the analysis much further.

iii. [44] (c) The quotes are taken out of context. They are taken from the discussion of various options whether to expand the wording in the functional need test to 'mining activities' or keep the word 'mining' in the test.[86] The recommendation was for the later. It is important to note that a specific part of the Report *is* dedicated to functional need test, and the 'Analysis and Recommendations' from MfE do not support the applicant's contentions in this matter:

> *Functional need gateway test*
>
> Anecdotal evidence from councils reveals that the functional need gateway test is having the desired effect. Councils report consent applications for specified infrastructure have subsequently been modified to specifically avoid natural inland wetlands, whereas prior to this they would have been overlooked and/or in-filled.
>
> The functional need test is a critical aspect of balancing land use activity with the protection of natural inland wetlands. Without the test, we consider that the policy may no longer be consistent with section 5 or 6 of the RMA. Requiring an activity to be undertaken elsewhere, if it can be done so, is consistent with the RMA definition of sustainable management and ensures that natural inland wetlands are only disturbed where an activity must locate or operate in a natural inland wetland area.[87]

CLIMATE CHANGE

77. Climate change is likely to have a major impact on biodiversity and Westland petrel, as Kate Simister's evidence makes clear. The Director-General's submission on the application did not explicitly raise climate change concerns. However, counsel has a professional duty is to assist the Panel in identifying the correct legal framework within which to consider the application. The following submissions are in response to legal submissions for the applicant, which I do not accept as a correct summary of the law.

78. An inherent component of the project is the production of Scope 1 GHG emissions through trucking heavy metal concentrate from the site to a port for export. The applicant

[86] Ministry for the Environment. 2022. *Essential Freshwater Amendments: Report recommendations and summary of submissions: Managing our wetlands: Proposed changes to the wetlands regulations*. Wellington: Ministry for the Environment, p 33.
[87] Ministry for the Environment. 2022. *Essential Freshwater Amendments: Report recommendations and summary of submissions: Managing our wetlands: Proposed changes to the wetlands regulations*. Wellington: Ministry for the Environment, p 33.

proposes to truck 250,000 tonnes of heavy metal concentrate annually on SH6 to either Greymouth or Westport. There will be 50 truck movements, each day of the year, for 5 to 7 years.[88]

79. The applicant has not provided an estimate of the total (Scope 1 and 2) GHG emissions from the project or any assessment of the relevant significance of these emissions.[89] However, if the calculation undertaken by the Coast Road Resilience Group (4,398 tonnes pa) is a good approximation, the applicant's annual emissions would equate to c. 0.006% of New Zealand's total emissions from all sources.[90]

80. The climate change forcing effect of GHG emissions are a legally relevant effect for the Panel to consider in determining whether to grant or decline consent.

    a) The applicant's planner suggests that GHG emissions could be considered under s 104(1)(c).

    b) The s 42A report for the WCRC suggests that on-site emissions could be considered under s 104(1)(a) as they breach s 15(1)(c).

    c) However, it is likely that all of the emissions from tucking on-site and off-site from the mine to the port, can be considered under s 104(1)(a) as they breach both s 15(1)(c) and s 15(2A).

Relevant legal history

81. In 2004, the Resource Management (Energy and Climate Change) Amendment Act 2004, inserted definitions for 'climate change' and 'greenhouse gas' into the RMA for the first time, along with ss 7(ba,)(j) and (i), and ss 70A,B 104E and 104F. The Supreme Court addressed the meaning of s 104E in *Greenpeace NZ Inc v Genesis Power Ltd*[91] and in a majority decision (with Elias CJ dissenting) found that the climate change-forcing aspects of fossil fuel intensive projects could not be considered as a negative factor in consenting decisions.

[88] I am unclear as to whether trucking will cease on public holidays.
[89] In the context of, for example, the Emissions Budget, the Emissions Reduction Plan and / or New Zealand''s Nationally Determined Contribution.
[90] Based on the 2021 national figure of 77,638,000 tonnes of CO2 eq (Stats NZ)
[91] *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112

82. Part of the rationale for the majority decision focused on the policy at the time for a 'national mechanism' to address GHG emissions, in the form of a carbon tax or ETS.[92]

83. It is important to note that there was no economic rationale for a singular national policy approach.[93] Rather, this policy choice reflected a political decision that was unusual compared to other nations' pluralistic, multilayered approaches.[94] As the World Bank states,

> [c]arbon pricing by itself cannot address all of the complex drivers of climate change; some combination of regulations, standards, incentives, educational programs, and other measures will also be required.[95]

Over time, it became clear in New Zealand, that a singular focus on the ETS was not effective.[96]

Current law

84. Section 104E was repealed (along with ss 70A, 70B and 104F) by section 35 of the Resource Management Amendment Act 2020 and those amendments came into force on 30 November 2022. Subsections 61(2)(d), (e) were also added to the RMA. The transitional arrangements in clause 104 of the Amendment Act make clear that the amendments will apply to resource consent applications.[97]

85. The amendments reflected that a broader policy response is needed in addition to a price mechanism. As the Supreme Court stated, in *Smith v Fonterra Co-operative Group Ltd*,

> [99] ... as we have noted, the ETS neither authorises nor immunises GHG emissions. It merely facilitates state-introduced market signals via a trading scheme in emissions

---

[92] *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [59]. The initial proposal was for a carbon tax (see https://www.beehive.govt.nz/release/government-adds-detail-2002-carbon-tax-policy) but the chosen mechanism was the NZ ETS, launched in 2008.

[93] E.g. Robert N. Stavins, *Economics of Climate Change and Environmental Policy: Selected Papers of Robert N. Stavins, 2000–2011*, Edward Elgar, 2013 (Robert Stavins is the A. J. Meyer Professor of Energy and Economic Development, John F. Kennedy School of Government, Harvard University); Geoff Bertram and Simon Terry. *The Carbon Challenge: New Zealand's Emissions Trading Scheme*, Bridget Williams Books, 2010.

[94] C.f. for an overview of EU climate policies (including the EU ETS and the plethora of supporting regulations and policies), see Rayner, T (ed) *Handbook on European Union Climate Change Policies and Politics*, Edward Elgar, 2023.

[95] Evans, S, et al. *Emissions Trading in Practice: A Handbook on Design and Implementation* (2nd ed), World Bank Group, 2021, p 2.

[96] For comprehensive treatment, see Mark Bracey 'New Zealand's Emissions Trading Scheme: An In-depth Examination of Legislative History', NZJEL 21 [2017], 133.

[97] I.e. for resource consents lodged after the amendments come into force, as this application was. For applications lodged before the amendments see Resource Management Amendment Act 2020 cl 26 (2) This clause also applies to applications for resource consents that were lodged with a local authority immediately before the effective date; (3) The proposed policy statement, plan, change, or variation, or resource consent must be determined as if the climate change amendments had not been enacted.

> units. There is provision in the CCRA for fines and other sanctions for failing to register as a participant, for under reporting emissions or for holding insufficient emissions units, but there is no power in the EPA or any other CCRA agency to forbid an emitter from discharging GHGs for want of emissions units. In fact, as already discussed, **policing the actual environmental effects of the activities of individual emitters is primarily the province of the RMA, not the CCRA**.
>
> [100] The last point is important to grasp. **The CCRA does not purport to cover the entire field. It is a companion measure designed to operate alongside the RMA in relation to GHG emissions** (emphasis added).[98]

86. The Supreme Court noted that the repeal of ss 70A, 70B, 104E and 104F in 2022, 'restored the status quo ante'.[99]

RMA Analysis

87. GHGs fall under the definition of contaminants in s 2. The contribution to climate change caused by GHG is an effect (s 3) on the environment and must be considered under s 104(1)(a). 'Effects' under the RMA are not limited to on-site effects only.

88. Pursuant to s 15,

> (1) No person may discharge any— ...
> (c) contaminant from any industrial or trade premises into air
> and
> (2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge— ...
> (b) is expressly allowed by a resource consent

89. The applicant's planner considers Rule 5 of the West Coast Regional Air Quality Plan 2001 is relevant. Rule 5 states:

> Unless covered by another Rule in this Plan, the discharge of any contaminant into air arising from earthworks, quarrying operations, mining, or clean fill operations is a permitted activity provided that the following conditions are met:
>
> a) any discharge of smoke, dust, gas or odour **is not noxious, dangerous**, offensive or objectionable beyond the boundary of the subject property; or

[98] *Smith v Fonterra Co-operative Group Ltd*, [2024] NZSC 5, [99-100].
[99] *Smith v Fonterra Co-operative Group Ltd*, [2024] NZSC 5, [47], ft 88.

b) in the case of public amenity areas, any discharge of smoke, dust, gas or odour is not offensive or objectionable beyond the boundary or beyond 50 metres of the discharge, whichever is the lesser.

If an activity is unable to meet the conditions of this Rule, then it is a discretionary activity.

90. This rule is not permissive (as the applicant's planner suggests), it is a control. Further, it is not simply controlling discharges from mining. It is controlling discharges *arising from* (which means 'resulting from, because of or due to') mining *operations beyond the boundary of the property*.

91. 'Mining operations' is not defined in the RMA but in the CMA it is differentiated from 'mining' and defined in a wide manner to include all acts incidental or conducive to the operations, including transporting minerals.[100] Accordingly, the term 'mining operations' in the Plan is capable of encompassing activities beyond the discrete extraction of the minerals from the subsurface, and covering emissions from transporting the minerals concentrate within the region.

92. A quarter of a century ago, the framers of the West Coast Air Quality Plan had the foresight to future-proof the Plan. The Plan states that the terms noxious, dangerous, offensive and objectionable, 'are not defined in the Glossary to this Plan because of the need to take account of case law precedent as it develops.' [101]

93. Case law confirms that GHG emissions are dangerous. In *Smith v Fonterra*, the Supreme Court found,

> [13] The following points may be taken as common ground or indisputable.
>
> [14] Climate change threatens human well-being and planetary health...
>
> [20] The IPCC recently summarised the impact of continued warming in the near term:
>
> > Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*).

[100] In *Greymouth Petroleum v Todd* (2006) CIV2004 485 1651 (HC) the rhetorical question was asked (but not comprehensively answered): how near to the mine site does the activity need to be to still fall to be regulated under the CMA? Wild J stated: "I need not decide whether data analysis being undertaken for a New Zealand permit holder by a consultant in, say, Calgary in Canada, is "exploration". That is, literally, thousands of kilometres removed from the issue in this case. Its resolution can await the unlikely event of a Court ever having to rule on it." [86]. In the present case, the transport emissions to be considered are discharged within the region so the proximity issue does not arise.

[101] West Coast Regional Air Quality Plan, 2001, [10.2], p 54.

[21] Such future warming would have widespread impacts:

> In the near term, every region in the world is projected to face further increases in climate hazards (*medium* to *high confidence*, depending on region and hazard), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium* to *very high confidence*, depending on ecosystem), and a decrease in food production in some regions (*high confidence*). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people,infrastructure and the economy in most mountain regions (*high confidence*).The projected increase in frequency and intensity of heavy precipitation (*high confidence*) will increase rain-generated local flooding (*medium confidence*).

94. In all the circumstances, both s 15 (1)(c) and 15(2)A are triggered. There is no justifcation for reading down the plain provisions of the rule, particularly when the wider context is considered. In [3.5], the Plan states that,

> a number of rules do not make a distinction between discharges from industrial or trade premises because the effects of an activity are likely to be the same wherever the activity takes place.

And in [9.4.2] that,

> [a]s it is widely accepted that greenhouse gases are detrimental to the environment, it is desirable to reduce their emission wherever possible.

95. Accordingly, the Panel is required to have regard to the climate-change forcing effects of the project, including the emissions-intensive trucking off site within the region, under s 104 (1)(a).

96. There is no evidence that these adverse effects will be avoided, remedied, or mitigated.[102] The Panel may choose to apply the permitted baseline in s 104(3), which is discretionary. If the baseline was utilised three fifths of emissions would remain unacccounted for.[103] The Panel must also consider s 105.

---

[102] For example, by using electric trucks, choosing a shorter route, or offsetting emissions. The fact that the applicant will be using existing trucks is potentially more problematic. The Ministry of Transport has assessed the NZ fleet as dominated by old and inefficient trucks (see Ministry of Transport, *Green Freight Stategic Working Paper,* May 2020, p 14).

[103] The District Plan permits 20 truck emissions per day in the rural zone.

97. The weight given to the GHG emissions is a matter for the Panel. The following matters go to weight: [104]

a) The relative contribution that this project will make to New Zealand's national GHG inventory is calculable and significant (see above).

b) In the alternative, New Zealand case law is clear that *de minimis* arguments in relation to GHG emissions will fail.[105] In *Environmental Defence Society v Taranaki Regional Council,* the Environment Court stated,

> Because of the stable nature of carbon dioxide and the fact that each small contribution is spread around the globe to combine and create the greenhouse effect, we are satisfied that, while it cannot be measured scientifically, the effect of the proposed plant will nevertheless be more than "de minimus" or "vanishingly small". It is just this very situation that section 3(d), which relates to cumulative effects, is intended to cover.[106]

c) That approach is not an outlier and is reflected in case law from around the world.[107] As the Supreme Court of the Netherlands stated in *Urgenda*,

> Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere, and thus contributes to reaching the critical limits of 450 ppm and 430 ppm.[108]

d) The New Zealand Government has declared a climate emergency;[109]

e) Section 5ZN of the Climate Change Response Act 2002 permits public decision-makers to take into account the emissions target, budgets and reduction plans;

f) The New Zealand Emissions Budget sets a net zero GHG emissions (excluding biogenic methane) by 2050;

---

[104] And may be considered as part of the factual assessment, legal test and / or under s 104(1)(c).
[105] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EnvC), [222-226].
[106] *Environmental Defence Society Inc v Taranaki Regional*, Council EnvC Auckland A/184/2002, 6 September 2002, at [24].
[107] E.g. *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [525]-[527].
[108] *State of Netherlands v Stitching Urgenda*, Supreme Court of Netherlands, 20th December 2019, (English translation) ECLI: NL: HR: 2019:2007 at [4.6].
[109] New Zealand Parliamentary Debates (Hansard) *Motions – Climate Change – Declaration of Emergency*, 2nd December 2020.

g) The New Zealand Emissions Reduction Plan sets a target to "[r]educe emissions from freight transport by 35% by 2035", which is within the term of any consent.[110]

98. The high GHG emissions associated with the proposal militates against granting consent. Alternatively, in the event that consent is granted, conditions may be imposed to require all site operations to be electrified and to address transport emissions (for example, through the use of electric vehicles and / or minimising transport distances and / or offsetting).

CONDITIONS

99. During the hearing, witnesses for TIGa have responded in various ways to suggestions from the Panel about possible additional or amended conditions. Accordingly, there is not a final set of proposed conditions at the time of making these legal submissions.

100. In *Port of Tauranga Ltd v Bay of Plenty Regional Council* - a decision of the Chief Environment Court Judge and Commissioners Hodges, Leijnen and Paine - the Environment Court stated:

> We consider the time has passed when conditions of consent can be based on statements of intent as to what will be done at some time in the future. We will require greater certainty of what will occur, by when, what outcomes are to be achieved, who will be responsible and what enforcement mechanisms will be available.[111]

101. In that matter, the Court issued an interim decision and adjourned matters for the applicant to draft adequate conditions and for other parties' experts to comment on those conditions.

102. If the Panel is minded to grant consent in this matter, the Director-General submits that a similar process should be followed. A lighting plan should be prepared by an appropriate expert, amended conditions should be circulated, and the opportunity provided to submitters to make written submissions on the proposed conditions.

103. Conditions the Director-General submits are necessary include, amongst others:

a) A condition guaranteeing there will be 'no loss of Westland petrel'. One way of achieving this could be to include provision for an Immediate Review to be triggered, that suspends all nightime operations and artificial lights in the event

[110] Minister of Climate Change, Aotearoa New Zealand's First Emissions Reduction Plan, ME1639, Ministry for the Environment, June 2022, Chapter 10 Transport, Target 4, p 172.
[111] *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 270, [26].

that any Westland petrel is found grounded or killed by the activity, with referral to an independent expert ecological panel, funded by the applicant, to advise the Council as to next steps to ensure no loss;[112]

b) Specifying hours of work to ensure an appropriate buffer between lighting and bird flight;
c) Conditions in relation to shift changes and requiring the use of a minibus;
d) No windows in the WCP building;
e) An alternative to the deliberate 'disturbance' activities proposed in the AMP;
f) No mining and associated activities within 100 meters of wetlands. This requirement should be made clear on the face of the consent, not in a condition, to make it clear this is not a paramater that could be changed (i.e. reduced) through a change of conditions under s 127.

104. Finally, there has been some discussion in the hearing concerning 'deeming' conditions as a mechanism to amend management plans. Deeming provisions are unlawful because they amount to a delegation of the Council's functions under the RMA. Section 34A of the RMA restricts the power of delegations. The only way for the condition to become lawful would be for the elected members of Council to make a specific instrument of delegation that allowed the consent holder to approve the management plan proposed by the consent holder. Such a resolution is, in my respectful opinion, unlikely.

Ceri Warnock
Counsel for the Director-General
26th February 2024

[112] See for example, *Final Report and Decision of the Board of Inquiry into Hauāru mā Raki Wind Farm and Infrastructure Connection to the Grid*, Volume 2, May 2011, Condition 6.30E , p 38.