SUMMARY OF OPENING SUBMISSIONS FOR WINSTONE AGGREGATES HEARING STREAM 1 (SUBMITTER 162)

MAY IT PLEASE THE PANEL:

1. I appear on behalf of Winstone Aggregates, a Division of Fletcher Building Ltd ("**Winstone**") along with Mr Heffernan Winstones expert planner. Winstone filed legal submissions and planning evidence on the Introductory Chapter.

2. These opening submissions will:

    a. introduce Winstones and its interests in the hearing to the Panel,

    b. signpost key issues of concern that will be developed in the coming hearings;

    c. and to raise concerns about what it sees as wrongful allocation of some provisions to the FPP process and comment on the proposed fix up.

Treatment of Aggregates

3. Winstone has sought relief in it submission to provide better policy recognition for aggregate extraction activities in PC1.

4. This is essential to ensure a continued supply of aggregate to the Region, (particularly in Wellington City where demand is highest).

    a. There are few remaining quarries in the region.

    b. there is no alternative to aggregate.

    c. Huge quantities are required to build, support and maintain communities.

    d. It needs to be sourced locally to keep transport costs and emissions to a minimum.

    e. Quarries can only be established where there is accessible quality aggregate resource.

5. Winstone preference is to maximise the life of its existing quarries rather than seeking to establish new greenfield ones. This is the most sustainable and economically efficient way to provide aggregate. It has the benefit of restricting the effects of quarrying to existing regionally significant sites.

6. Land that has been set aside for aggregate extraction, is usually undeveloped and often contains streams, gullies, tributaries, wetlands and indigenous vegetation high in natural value.

7. PC-1 introduces a combination of unworkable Policy direction focused on "avoid" policies for indigenous ecosystems, freshwater (wetlands and tributaries and streams) with no recognised Policy exceptions for quarrying activities at all. If this approach is adopted into Regional and District plans it will prevent Winstone quarrying remaining deposits of aggregate within its existing quarries in the Region.

NPS-FW Clause 3.22

8. A reliable source of locally sourced aggregate is necessary to achieve the development and infrastructure outcomes of the NPS-UD and provide for increased housing supply and resilient communities.

9. The difficult position of aggregate extraction and clean filling was recognised by Government in the NPS-FW (February 2023 Update) Clause 3.22. This sets out a pathway for these activities, (applying an effects management hierarchy and offsetting where the necessary threshold tests are met). This provides a pathway to consent activities as an exception to the avoid policy in instances, where extraction and clean filling conflict with protection of natural inland wetlands.[1] A similar provision is proposed in the Draft NPS-IB.

10. This gives National direction to Council's as to how to manage competing values of protection and use in what can be a problematic interaction. This National direction, should in Winstone's view be given Policy Recognition in the RPS via PC1.

11. Strong guidance in the RPS is vital. An RPS should provide guidance as to who decisionmakers should attempt to reconcile competing values.

12. The RPS occupies an important place in the planning hierarchy and directly influences the content and sets the tone of regional and district plans. Ignoring the inevitable interaction of these activities (or confining any reference at all to aggregates or minerals in the RPS to the "Mineral and Soil Chapter" as suggested by the Officer) in my submission does not help to tackle these

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1 National Policy Statement on Fresh Water – Clause 3.22(1)(d).

issues. GWRC's insistence that PC1 focuses only on 'protection,' elements of the NPs-FW wrongly ignores use.

Draft - National Policy Statement on Indigenous Biodiversity

13. GWRC's decision to introduce provisions in its indigenous ecosystem chapter "give effect to" the exposure draft NPS-Indigenous Biodiversity (NPS-IB),[2] as part of PPC-1 is of concern to Winstone.[3] Winstone is not opposed to provisions that better protect biodiversity and ecosystems, but consider the timing of introducing these is premature. The text of the Draft NPS-IB will inevitably change as a result of consultation before coming into force sometime in the future, has the potential to create confusion and "lock in" provisions at that differ from National direction.

14. The RMA does not, direct an RPS to give effect to draft National Policy Statements. Caselaw demonstrates the Courts have been reluctant to place weight of Draft NPS, refused to implement these on the basis they have no statutory significance.[4][5][6] Changes to the indigenous Ecosystem Chapter should be done properly in one go, in order to implement the National direction and content of the NPS-IB once it is gazetted.

Scope

15. The Officers were of the view that Winstones submission was outside the scope of PC1. The relief sought by Winstone seeks to provide Policy Recognition in the RPS that it is consistent with recognised pathway provided for aggregate extraction and clean filling in the NPS-FW (and draft NPS-IB), it is hard to see how this is out of scope of either process. Detailed submissions were filed on this and will be considered further in respect of individual provisions (if necessary). As this was not addressed by GWRC in reply, it is unclear whether this has been accepted or remains in issue.

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2 Officer Report – Table page 8, Section 32 Report para [183].

3 Officers Report para [134].

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

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

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

Allocation of provisions between the FPP and Schedule 1 process

16. Winstone share the jurisdictional concerns of Forrest & Bird and Wellington Airport as to the extent that provisions have been wrongly allocated to the FPP. Winstone supports the detailed submissions (and accompanying analysis) filed by those parties, and oral submissions made by counsel yesterday.

17. Winstone is opposed to the entire indigenous ecosystem Chapter being allocated to FPI/FPP. It is wrong to use the FPP (designed for the NPS-FW) to implement an entirely different (Draft) NPS-IB. This is a significant policy shift in a technical and complicated area. Assigning it to the FPP removes appeal rights. If this Chapter is advanced, it should (in the very least) be assigned to the Schedule 1 process to allow those provisions to tested in the usual way. Forrest & Bird legal submissions have provided a useful and detailed analysis of that Chapter which Winstone supports.

18. Similar questions arise around the Council reasoning for inclusion of Urban Development and Climate Change and Integrated Management of natural and physical resources. Winstone supports the analysis of Wellington Airport in its submission.

19. The Officer in reply describes GWRC approach as a "holistic: High Court approach. That misinterprets the High Court decision in *Otago*– which is binding precedent, that Court confirms a very narrow approach is necessary and gives very detailed direction as to can be seen as within scope of an IPI in that it gives effect to the NPS-FW or '*relates to freshwater'* under s80A. s80A(3) that RPS may relate to more than just freshwater and directs that only parts of the RPS that relate to Freshwater can use the FPP process –the rest must proceed via schedule 1.

20. There is no justified basis for distinguishing that decision from the current circumstances. It makes no difference that *Otago* was a full plan review – Justice Nations principles on the scope of an IPI are equally applicable here.

GWRC proposed fix up

21. Winstones do not support GWRC proposed solution to the jurisdiction issue of having all members from both Panels sit on all chapters, and make allocation decisions as part of their final recommendations, (having heard the evidence).

22. While the FPP may regulate its own proceedings it must do so in a manner '*that is appropriate and fair in the circumstances*.' This solution is procedurally unfair for submitters:

    a. It creates uncertainty and confusion. Submitters should know in advance what legal process they are participating in, and understand the parameters of that process.

    b. They should not have to wait to receive the Panel recommendation at the end of the hearing to find that out.

    c. Submitters will incur greater costs in terms of expert witnesses and cross-examination (than they otherwise might have done) if they have to proceed on the assumption they are in a FPP.

    d. Loss of appeal rights also results in the loss of the opportunity to mediate which is a valuable tool in plan development and ability to have issues determined by the Court – is an important aspect of environmental law and should not be removed lightly.

23. Not reaching a decision on allocation until the very end of the process, adds further confusion to an already difficult area and puts the entire hearing process at risk of being challenged.

24. Winstone respectfully requests, that the Chair(s) provide detailed direction to the Officers to reconsider the allocation decisions now, carefully applying the *Otago* decision, these have been covered in Winstones opening submissions and WIAL opening submissions at para [2.6] provide a good summary of the relevant parts of the judgement [para's 191-208]. It is also requested that a more detailed explanation as to reasons why particular provisions have been allocated that process is provided to submitters.

25. GWRC are reluctant to do this without hearing the evidence first. I note, the Panel does have the ability to commission its own report (Sch.1 Cl. 45(1)) Otago Regional Council, did manage to successfully complete this exercise *in advance* of hearing the Chapters (following the Court direction) and there is no reason why GWRC should not do the same.

26. Following the decision in *Otago* [para 230][7] the Council should re-do its assessment in light of the principles of that case and then renotify any changes to the FPP provisions accordingly. Re-notification is a common remedy to rectify procedural errors or flaws, this is quite a complicated area, and it may be more appropriate to consider the issues of re-notification issues, once the Panels have the benefit of that re- assessment. The Panel does have the ability to recommend that a variation be made to the FPI, (Sch.1 cl40(4)) and Schedule 1, cl53, does seem to provide a possible solution where a variation is required to a FPI after the documents have been referred to the FPP.

27. Notably, when Otago Regional Council undertook that re-assessment, they ended up with very narrow FPP provisions related solely to water and land use – and reallocated indigenous ecosystems, urban development and climate change provisions, integrated management and much of *Te Mana o te Wai* to the schedule 1 process.

28. While all RPS are different, there should be some consistency in terms of application of the *Otago* judgement as to what can be included in an IPI.

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[7] '[230] There has been no valid determination as to which parts of the proposed regional plan statement are parts of a freshwater planning instrument so there has been no notification of a freshwater planning instrument to begin the freshwater planning process set out in Part 4,sch 1. Those parts of the proposed regional policy statement that will not be part of a freshwater planning instrument have been publicly notified, and do not need to be publicly notified. They have not been processed in accordance with the normal part 1, schedule 1 process because of ORC decision to treat the whole of the proposed regional statement as a freshwater planning instrument, and because of uncertainty associated with these proceedings. '