Before the Hearings Panel

In the Matter of	the Resource Management Act 1991
And	
In the Matter of	the Proposed Waikato District Council Plan – Stage 1

Legal Submissions on behalf of **Bathurst Resources Limited** and **BT Mining Limited** relating to Hearing 21A

Dated: 16 November 2020

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INTRODUCTION

1. Bathurst Resources Limited (**Bathurst**) and BT Mining Limited (**BT**) lodged a submission on the Proposed Waikato District Plan – Stage 1 (**Proposed Plan**) on 9 October 2018 (**Submission**) and further submissions on 12 July 2019.

2. These legal submissions are presented on behalf of Bathurst and BT in relation to their submissions points that have been allocated to Hearing 21A, Significant Natural Areas.

3. We have previously provided opening legal submissions on behalf of Bathurst and BT, and recently provided legal submissions in relation to Hearings 1 and 18. These prior legal submissions, along with the evidence of Craig Pilcher dated 16 September 2020 (**Rural Evidence**), addressed Bathurst and BT's relief relating to the rural provisions and a number of aspects which also relate to this hearing.

4. Of particular relevance, the prior legal submissions and Mr Pilcher's Rural Evidence outlined the role that Bathurst and BT play as mine operators and owners, the Waikato mines operated and owned by Bathurst and BT, the importance of coal mining in the Waikato (including the economic contribution coal mining makes to the Auckland and Waikato regions) and the future need for coal mining. These legal submission do not repeat that material, which was already presented to the panel, but where necessary (for instance in the context of the functional need to locate mining where coal deposits are found) these legal submissions draw on the prior legal submissions and Mr Pilcher's Rural Evidence.

KEY ISSUES AND SUMMARY OF RELIEF SOUGHT

5. As notified, the planning mechanisms applying to the proposed mapping of Significant Natural Areas (**SNA**) do not recognise the significant role that coal mining plays in the Waikato, nor the functional need for coal mining to locate where there are suitable coal deposits and, if possible, close to existing infrastructure (to avoid duplication).

6. As previously submitted in the Rural Hearing, the Waikato District has nationally significant coal deposits, making it unique.

7. In their original submission Bathurst and BT sought the removal of proposed SNA mapping where that mapping impinges upon the functional need of coal mining to locate where there are suitable coal deposits. Bathurst and BT listed examples of Coal Mining Licences, Coal Mining Permits and Exploration Permits in their original submission within which they seek the removal of the SNA overlays. Regardless, and more fundamentally, Bathurst and BT submit that the desktop analysis undertaken in order to determine the proposed mapping of SNAs was not appropriate as it resulted in inaccurate mapping – making that original relief somewhat moot.

8. Bathurst and BT generally support the SNA framework as modified in the Section 42A Report, and the opportunity for offsetting, but consider that further amendments are required in order to:

   (a) reflect the functional need of coal mining;

   (b) include 'environmental compensation' as an alternative to offsetting; and

   (c) achieve certainty around what is considered 'no net loss' in the context of offsetting.

9. These submissions therefore address the relief relating to:

   (a) the appropriate identification of SNAs; and

   (b) further changes sought to the SNA framework.

STATUTORY AND PLANNING CONTEXT

10. The Panel will be familiar with the statutory functions and obligations of a territorial authority and the relevant legal tests. These are also outlined in detail in **Annexure 1** to our legal submissions dated 25 September 2020.

11. On that basis, this section focuses on the higher order documents that are relevant in the context of indigenous biodiversity and SNAs.

Waikato Regional Policy Statement

12. Pursuant to section 75(3) of the Resource Management Act 1991 (**RMA**), the Proposed Plan is required to give effect to the Te Tauākī Kaupapahere O Te Rohe O Waikato - The Waikato Regional Policy

Statement (**WRPS**). This means that in the exercise of their functions the Waikato District Council (**Council**), and the Panel, are required to ensure that the provisions of the district plan give effect to the WRPS.

13. It is submitted that the Proposed Plan as notified does not give effect to the WRPS, particularly in the manner that it maps the proposed SNAs – ignoring coal mining's functional need to locate where there are suitable coal resources.

14. In terms of SNAs specifically, Policy 11.2 of the WRPS (and the associated implementation methods) provides for the protection of significant indigenous vegetation and significant habitats of indigenous fauna. Policy 11.1 (and the associated implementation methods, bar 11.1.3), relating to the maintenance and enhancement of indigenous biodiversity, also applies to SNAs. The offsetting aspect of these provisions seeks to achieve 'no net loss' of indigenous biodiversity but, as will be addressed below, the WRPS makes it explicitly clear that 'no net loss' does not mean 'no adverse effects'.

Waikato Regional Plan and Regional Coastal Plan

15. The Waikato Regional Plan does not address indigenous biodiversity, or significant natural areas. The Waikato Regional Plan is in the process of being reviewed, however community engagement is not expected until late 2020/early 2021.

16. The Waikato Regional Coastal Plan addresses Significant Vegetation and Habitat, but this is not relevant to Bathurst and BT's area of interest, being the Waikato nationally significant coal deposits and their mines: Rotowaro and Maramarua.

IDENTIFICATION OF SIGNIFICANT NATURAL AREAS

17. The Proposed Plan as notified maps areas considered to be SNAs. Bathurst and BT oppose this mapping and sought removal of the mapping within certain coal mining licences, coal mining permits and exploration permits.

18. The main basis for Bathurst and BT's proposed relief is that the SNA mapping has been undertaken through a desktop analysis, is inaccurate and has not been ground-truthed. In our submission, SNA mapping

based on poor evidence will have the effect of stifling activities without justification.

19. Mr Pilcher has provided evidence for Bathurst and BT outlining why the desktop analysis was inappropriate, and referring to an expert analysis by AECOM of one of the SNAs applying to BT's Exploration Permit. This evidence identifies the need for ground-truthing to be undertaken, and also outlines some issues with applying the criteria.

20. Bathurst and BT support the option Ms Chibnall has identified in her Section 42A Report to address the incorrect mapping, namely the removal of all mapped SNAs from the Proposed Plan that have not been ground-truthed. As identified in the Section 42A Report, this option has several parts to it:[1]

    (a) Retain SNA mapping of ground-truthed sites.

    (b) Delete all SNA mapping not ground-truthed.

    (c) Amend the SNA provisions to refer to an SNA as indigenous vegetation meeting the criteria of an SNA in Appendix 2.

    (d) Undertake, as a separate process, a series of plan changes specific to each geographical area to reintroduce mapping back into the Proposed Plan, and consequently removing the need to apply the Appendix 2 criteria.

21. On the basis that Bathurst and BT fully support the removal of SNA mapping not ground-truthed, Bathurst and BT adopt Ms Chibnall's reasoning for proposing the removal, and support her Section 32AA analysis. In particular, Bathurst and BT agree that the proposed deletion would (among others):

    (a) Ensure high integrity of the SNA layer that is mapped and included in the Proposed Plan.[2]

    (b) Prevent the unreasonable constraint of development and activities within an area that actually does not meet the criteria of an SNA.[3]

[1] Section 42A Report, at [66].
[2] Section 42A Report, at [72](c).
[3] Section 42A Report, at [72](d) and [75].

(c) Ensure the Proposed Plan comprehensively gives effect to the WRPS.[4]

22. In addition, where (after robust assessment) indigenous vegetation does meet the SNA criteria in Appendix 2 of the Proposed Plan, it will still be appropriately managed by the SNA Framework.

23. Bathurst and BT have reviewed the other submitter evidence in particular WRCs submission that the notified mapping of SNAs should be retained. WRC refers to the 'comprehensive consultation process' undertaken for the provisional mapping but in our submission:

(a) visiting 50 out of 698 sites as part of the consultation process is not comprehensive;

(b) regardless of the 'comprehensive consultation process':

(i) the WRPS acknowledges that further verification and validation of the Regional Council's SNA identification may be required before it is mapped into Regional or District Plans;[5]

(ii) the report detailing the SNAs also indicates that ground-truthing should be undertaken;[6] and

(iii) the mapping has been shown to be inaccurate and should not therefore been supported.

24. Further, WRC suggests that Ms Chibnall's section 42A Report is not adequately robust or comprehensive to make the decision removing the mapping. On the contrary, we submit that Ms Chibnall's assessment was thorough and well considered and it is the SNA mapping that is not sufficiently robust and therefore has the ability to unreasonably constrain development.

25. Bathurst and BT submit that Ms Chibnall's proposal to remove the mapped SNA areas not ground-truthed is the most appropriate means of achieving the purpose of the RMA, and giving effect to the WRPS.

[4] Section 42A Report, at [72](e).
[5] WRPS, Explanation to 11.2, at page 11-6 – 11-7.
[6] See Pilcher's SNA evidence at [10], citing Kessels Ecology, *Significant Natural Areas of the Waikato District: Terrestrial and Wetland Ecosystems*, November 2017, inside cover page.

FUNCTIONAL NEED RELATING TO COAL MINING LOCATION

26. The Section 42A Report for Hearing 5 – Definitions recommended the following definition for 'functional need':

> *means 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.*

27. This definition reflects the definition of 'functional need' in the National Planning Standards 2019, which is also recommended for inclusion in the proposed National Policy Statement on Indigenous Biodiversity.

28. Coal mining has a functional need to locate where there is a suitable coal deposit for mining purposes. That functional need fits within the proposed definition detailed above. Bathurst and BT seek that be recognised in the Propose Plan, consistent with the approach taken in other districts in New Zealand. For clarity, Bathurst and BT do not seek an 'exemption', or a permitted activity status, for extractive activities within SNAs – rather they seek sufficient recognition that coal mining has a functional need to locate where the appropriate resource lies.

29. Mr Pilcher's Rural Evidence details the scarcity of high quality coal deposits across New Zealand, and it also details the considerations in determining whether a particular coal deposit is in fact suitable for mining. Of particular relevance, there must be a suitable (as in size and quality) coal reserve in the ground, that coal reserve must be capable of being safely and economically mined, and all access arrangements and consenting requirements must also be capable of being met.[7] As such, not only is there a functional need for coal to locate where there is a suitable coal deposit, but there is unlikely to be any practical alternative locations.

30. In addition there are operational and environmental efficiencies in locating new mining in close proximity to existing infrastructure. As detailed in Mr Pilcher's Rural Evidence, the areas Bathurst and BT are proposing to expand into will be able to utilise existing infrastructure,[8]

[7] Pilcher Rural Evidence, at [56].
[8] Above, at [67].

meaning that additional land does not need to be developed for infrastructure and Bathurst and BT avoid the cost of new infrastructure.

31. The WRPS, specifically with regard to significant indigenous vegetation and significant habitats of indigenous fauna, provides for functional need more generally. Specifically, Implementation Method 11.2.2(g) requires that regional and district plans shall:[9]

> *have regard to the functional necessity of activities being located in or near areas of significant indigenous vegetation and significant habitats of indigenous fauna where no reasonably practicable alternative location exists.*

32. This Implementation Method relates specifically to significant indigenous vegetation and significant habitats of indigenous fauna (i.e. SNAs). The WRPS therefore specifically envisages activities that have a functional need to locate within an SNA. The WRPS notes, in the Explanation to Policy 11.2 (and associated implementation methods) that functional need is not an exemption, but another factor to be considered.[10]

33. In our submission, specific reference to the functional need of extractive activities does not act as an 'exemption' from the SNA framework, as suggested by Ms Chibnall[11], or result in a permitted activity status for extractive activities within an SNA. Rather, policy recognition of an extractive activities' functional need recognises that there is a need for extractive activities to locate where there is an appropriate resource, and that that is a consideration that should be taken into account.

34. The Proposed Plan is required to give effect to the WRPS and it is submitted that, without recognition of functional need for some activities to locate within an SNA, the Proposed Plan does not give effect to the WRPS. Bathurst and BT seek amendment to the SNA policy framework to give effect to the WRPS; the specific relief seeking this is detailed at paragraphs [58] and [70].

[9] WRPS, Implementation Method 11.2.2(g), at page 11-6.
[10] WRPS, Explanation to Policy 11.2, at page 11-7.
[11] Section 42A Report, at [170] and [186].

OFFSETTING AND ENVIRONMENTAL COMPENSATION

35. As notified, the Proposed Plan provides for significant residual adverse effects in SNAs to be offset pursuant to Policies 3.2.3 and 3.2.4 and Appendix 6. The Proposed Plan as notified does not provide for environmental compensation.

36. In our submission, the Proposed Plan needs to be clearer as to what constitutes offsetting, what constitutes environmental compensation and when it is appropriate (in terms of the management hierarchy) for those measures to be employed. In our submission the Proposed Plan as notified also fails to give sufficient certainty in terms of what constitutes 'no net loss'.

37. As such, Bathurst and BT seek provision for environmental compensation (as a concept broader than economic compensation) and a definition clarifying that 'no net loss' does not require nil effects.

Offsetting Measures versus Environmental Compensation Measures

38. An offset is a measure that provides a positive effect that can be used to offset an adverse effect on the environment. An offset is not a form of mitigation.[12]

39. Prior to the 2017 amendment to the RMA, there was no distinction between offsets and what is now commonly termed 'environmental compensation'. In particular, the High Court in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* (***Buller***) stated:[13]

> *The RMA has numerous provisions which use the word compensation. But no provisions which provide for compensation if adverse effects are not completely avoided, remedied or mitigated.*

40. However following the 2017 amendments, section 104(1)(ab) of the RMA (among others) refers to measures providing a positive effect to offset *or compensate* adverse effects on the environment. We refer to

[12] *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346
[13] Above, at [58].

'environmental compensation' to distinguish this form of compensation from other, purely monetary, compensation under the RMA.

41. In *Oceana Gold (New Zealand) Limited & Others v Otago Regional Council* [2019] NZEnvC 41 (***Oceana***) the undisputed ecology evidence was that an offset is a 'like-for-like' measure while compensation is a 'like-for-unlike' measure, which is not necessarily monetary compensation. It is worthwhile repeating part of Dr Lloyds evidence in *Oceana* because this is an important distinction which, we submit, has not been correctly applied in the Proposed Plan:

> *… the difference between offsetting and compensation is that offsetting must be on a like-for-like basis and undertaken close to where the adverse effects are experienced, whereas compensation can include like-for-unlike transactions and can be more remote from where the adverse effects are experienced.*
>
> *... Like-for-like transactions can, at least theoretically, be balanced, so that net maintenance or enhancement of biodiversity occurs. On the other hand, like-for-unlike transactions trade certain loss of one feature of biodiversity in exchange for improvement in a different feature of biodiversity. Thus there is a decline in the biodiversity of the first feature, compensated for by an enhancement in the biodiversity of the second feature. Overall biodiversity is not maintained, because one feature declines.*

42. The interpretation of offsetting and environmental compensation put forward in *Oceana* was not questioned by the Environment Court in that case, or on appeal in the High Court.

43. In our submission the *Oceana* interpretation of offsetting and environmental compensation is the most appropriate interpretation and demonstrates that environmental compensation:

    (a) has a valuable place in the management hierarchy; and

    (b) is wider than 'economic' compensation.

44. The Proposed Plan should provide for environmental compensation, particularly for activities that have a functional need to locate within SNAs. Bathurst and BT's proposed amendments to the Proposed Plan

to address environmental compensation are detailed below at paragraphs [58], [65] and [70].

'No Net Loss'

45. The Proposed Plan requires that offsetting measures result in 'no net loss', however provides no definition or explanation as to what constitutes 'no net loss'. Bathurst and BT therefore seek a definition of 'no net loss' similar to that of the WRPS, which clarifies that 'no net loss' does not equate to 'no adverse effects'.

46. The RMA is not a 'no effects' statute[14] and, in the submission of Bathurst and BT, 'no net loss' therefore cannot constitute no adverse effects.

47. When considering the meaning of 'no net loss', the definition in the WRPS is of particular relevance. In the WRPS, 'no net loss' means:[15]

> *… no reasonably measurable overall reduction in the type, extent, long-term viability and functioning of indigenous biodiversity. When the term is applied in a policy context it has regard to the overall contribution of regulatory and non-regulatory methods as contained in local indigenous biodiversity strategies. It does not create a no adverse effects regime.*

48. In the explanation of Policy 11.1 (and the accompanying methods), the WRPS reiterates that 'no net loss' does not create a no adverse effects regime, in particular:[16]

> *No net loss of indigenous biodiversity is to be achieved at a regional scale and does not create a no adverse effects regime. Some activities may result in a loss of indigenous biodiversity; however this will be countered by other regulatory and nonregulatory methods that result in positive indigenous biodiversity outcomes.*

49. In our submission, a definition for 'no net loss' is required to ensure that it is not interpreted to mean no adverse effects. Bathurst and BT

[14] *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346, at [52].
[15] WRPS, Definitions, at page G-8.
[16] WRPS, Explanation to Policy 11.1, at page 11-4.

propose a definition for 'no net loss' based off the WRPS definition at paragraph [65].

SIGNIFICANT NATURAL AREA FRAMEWORK

50. Bathurst and BT largely support the notified SNA framework, and the proposed amendments by Ms Chibnall, as detailed below. Bathurst and BT also support any consequential amendments to the deletion of the SNA mapping, such as the deletion of references to SNA mapped areas.

51. In their original submission, Bathurst and BT sought to ensure offsetting was available where there was a functional need for an activity to take place within a SNA, and the adverse effects of that activity could not be avoided. Bathurst and BT submit that amendment to some of the policies and rules is required in order to recognise functional need in accordance with the WRPS, and the ability to utilise offsetting/environment compensation measures.

Objective and Policy Framework

52. The objective and policy framework for SNAs is found in Chapter 3: Natural Environment; notified Objective 3.2.1 and Policies 3.2.2 – 3.2.8 relate specifically to SNAs.

53. As indicated above, Bathurst and BT sought broad relief to ensure the recognition of functional need and the enablement of offsetting. Bathurst and BT also further submitted on several policies that are central to their relief, in particular Policies 3.2.3 and 3.2.4.

Policy 3.2.3

54. Policy 3.2.3 sets the management hierarchy for effects in an SNA. As notified, this policy enables offsetting of significant residual adverse effects but does not enable environmental compensation. In addition, at (a)(i), this policy recognised the functional need of some activities to locate within an SNA. The relevant parts of Policy 3.2.3 are as follows:

> *(a) Recognise and protect indigenous biodiversity within Significant Natural Areas by:*
>
> *(i) avoiding the significant adverse effects of vegetation clearance and the disturbance of*

habitats unless specific activities need be enabled;

…

(iv) after remediation or mitigation has been undertaken, offset any significant residual adverse effects in accordance with Policy 3.2.4.

55. Ms Chibnall has, relevantly, recommended amendment to Policy 3.2.3 as follows:

(a) Recognise and protect indigenous biodiversity within Significant Natural Areas by:

(i) avoiding the ~~significant~~ adverse effects of vegetation clearance and the disturbance of habitats ~~unless specific activities need be enabled~~;

…

(v) If offsetting of any significant residual adverse effects in accordance with Policy 3.2.4 is not feasible then economic compensation may be considered.

56. Bathurst and BT support the changes proposed by Ms Chibnall to recognise environmental compensation, but consider that limiting environmental compensation to '*economic compensation'* misapplies the measure. It also creates a new term in addition to 'environmental compensation', essentially nullifying the need for the definition of environmental compensation recommended by Ms Chibnall in the Section 42A Report.[17] Environmental compensation is wider than economic compensation, which has a monetary focus, and it is submitted that it should be recognised as such in the Proposed Plan.

57. Implementation Method 11.2.2(g) specifically requires District Plans to *have regard to the functional necessity of activities being located in or near* SNAs. Ms Chibnall specifically acknowledges this in the Section 42A Report,[18] however her amendment to Policy 3.2.3(a)(i) effectively

[17] Section 42A Report, at [701].
[18] Above, at [193].

removes the notified recognition of functional need. We reiterate our submission that recognition of a functional need does not create an exemption to the SNA rules, but rather is a consideration to be weighed. It is further submitted that Implementation Method 11.2.2(g) is clear and directive, and the Proposed Plan must give effect to the WRPS – including Implementation Method 11.2.2(g).

58. Bathurst and BT therefore seek:

(a) Amendment to Policy 3.2.3(a) to reflect Implementation Method 11.2.2(g) as follows:

(a) Recognise and protect indigenous vegetation within Significant Natural Areas, <u>while having regard to the functional need of activities being located in or near Significant Natural Areas</u>, by:

…

(b) Ms Chibnall's new Policy 3.2.3(a)(v) be accepted, with replacement of the words '*economic compensation*' with 'environmental compensation'.

59. Bathurst and BT otherwise support Policy 3.2.3.

Policy 3.2.4

60. Policy 3.2.4 relates to biodiversity offsetting and how it should be applied. Bathurst and BT generally support the notified version of Policy 3.2.4, but seek reference to environmental compensation and certainty around what constitutes 'no net loss'.

61. It is our understanding, from the inclusion of a definition for environmental compensation and the amendment to Policy 3.2.3 that it is Ms Chibnall's intention for environmental compensation to be included as a measure in the management hierarchy, and this is supported by Bathurst and BT. However, it is submitted that in the instance environmental compensation is included it should be reflected in an amended Policy 3.2.4.

62. Further, Bathurst and BT submit that the Proposed Plan should provide certainty around what is considered 'no net loss' to ensure consistency in the application of the biodiversity offsetting provisions.

63. Bathurst and BT also generally support the amendments proposed by Ms Chibnall, with the exception of the deletion of the word *significant* when referring to the residual adverse effects to which offsetting can apply. Ms Chibnall has advised in the Section 42A Report that she has removed the word 'significant' to '*broaden the potential for offsetting to be considered as a mitigation measure, and not just when there are "significant" residual effects."*[19]

64. Removal of the word '*significant*', and the reasoning for doing so, is not appropriate because:

(a) Offsetting is not a mitigation measure and this has been confirmed by the Courts.[20]

(b) Even if offsetting were capable of being an mitigation measure this would conflict with Policy 3.2.3 of the Proposed Plan which establishes the management hierarchy that requires avoiding, remedying or mitigating of effects prior to offsetting.

(c) Appendix 6 of the Proposed Plan specifically states that offsetting cannot apply in situations where it is used to mitigate adverse effects.[21]

(d) Removal of the term significant would also conflict with Policy 3.2.3(iv) and (v) of the Proposed Plan which refer to offsetting of significant residual adverse effects.

(e) Without the term 'significant' the Policy implies that there is an obligation to consider offsetting for all residual adverse effects, which is not appropriate in the context of the RMA as it is not a no effects statute.

(f) The WRPS requires offsetting of 'more than minor' residual adverse effects in an SNA, not 'minor' as suggested by the Section 42A Report.[22]

65. Bathurst and BT therefore seek:

[19] Section 42A Report, at [214].
[20] *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346
[21] Plan, Appendix 6(2)(1).
[22] WRPS 11.2.2(d) and Section 42A Report, at [214](b).

(a) Amendment of Policy 3.2.4 to apply to both biodiversity offsetting and environmental compensation, by:

(i) Amending its heading as follows:

3.2.4 Policy – Biodiversity Offsetting <u>and Environmental Compensation</u>

(ii) Adding a clause relating to environmental compensation consistent with the equivalent wording for offsetting:

<u>Within a Significant Natural Area, environmental compensation may be considered appropriate where offsetting of any significant residual effects is not feasible in accordance with Policy 3.2.3(v).</u>

(b) The inclusion of a definition of '*no net loss*' in the Proposed Plan that demonstrates that the term is not a synonym for no adverse effects. Bathurst and BT consider the starting point would be an adaptation of the WRPS definition, relevantly:

> *… no reasonably measurable overall reduction in the type, extent, long-term viability and functioning of indigenous biodiversity. ... It does not create a no adverse effects regime*

(c) Rejection of Ms Chibnall's proposed deletion of '*significant*' residual adverse effects in (a) and, therefore, retention of the notified wording.

Rule Framework

66. The rule framework for SNAs is found in the zone chapters. The SNA rule framework contains a number of permitted activities within SNAs, and manages activities not permitted through the earthworks and vegetation clearance rules. For Bathurst and BT, the key rules in question are notified rule 22.2.3.3 relating to earthworks in SNAs, notified rule 22.2.7 relating to indigenous vegetation clearance inside SNAs and notified rule 22.2.8 relating to Indigenous vegetation clearance outside SNAs.

67. Ms Chibnall has sought consequential amendment to the rule framework for SNAs so that, pending the proposed plan changes reintroducing mapping, they apply to indigenous vegetation that meets

the SNA criteria in Appendix 2. These consequential amendments, and the continued application of these rules, are supported by Bathurst and BT.

68. Bathurst and BT did not specifically submit on Rules 22.2.3.3, 22.2.7 or 22.2.8. However, Bathurst and BT sought to ensure offsetting was available where there was a functional need for an activity to take place within a SNA, and the adverse effects of that activity could not be avoided. Bathurst and BT also sought any consequential amendments required to give effect to their submission.

69. Bathurst and BT support the overall intent of Rules 22.2.3.3, 22.2.7 and 22.2.8 and the activity statuses provided in those rules.

70. In terms of the detail of those rules, Bathurst and BT:

    (a) Support Ms Chibnall's proposal in the section 42A Report to:

        (i) Delete notified Rule 22.2.3.3, and replace notified Rule 22.2.3.3 RD1 with Rule 22.2.3.1 RD2. Bathurst and BT also support new matter of discretion (iii) relating to the functional and operational need for the earthworks.

        (ii) Extend Rules 22.2.7 and 22.2.8 to apply to all vegetation, not only indigenous vegetation, and support the related permitted activity statuses for clearance of non-indigenous species inside an SNA (Rule 22.2.7 P9) and outside an SNA (Rule 22.2.8 P5).

    (b) Seek to:

        (i) Retain notified Rule 22.2.7 D1 and reject Ms Chibnall's proposed Rules 22.2.7 D2 and D3 on the basis that they effectively duplicate catchall rule D1.

        (ii) Consequentially amend notified Rule 22.2.8 RD1 to apply in the instance P1 – P5 do not, and reject Ms Chibnall's proposed Rule 22.2.8 RD2 because it effectively duplicates catchall rule RD1.

        (iii) Include a functional and operational need matter of discretion in Rule 22.2.8 RD1 (and RD2 if retained), like that proposed by Ms Chibnall in 22.2.3.1 RD2.

(iv) Include an 'offsetting matter of discretion' in 22.2.3.1 RD2 like that proposed by Ms Chibnall at Rules 22.2.8 RD1(b)(vi) and RD2(b)(vi).

71. With regard to the 'offsetting matter of discretion' in Rules 22.2.8 RD1(b)(vi) and RD2(b)(vi), this matter of discretion effectively repeats the effects assessment required by s104 of the RMA. However, Bathurst and BT submit that if it is to be included in 22.2.8 RD1 and RD2 it should also be included in 22.2.3.1 RD2.

CONCLUSION

72. Bathurst and BT consider that the notified mapping of SNAs is inappropriate. Bathurst and BT therefore support the removal of any SNA overlays not ground-truthed.

73. Bathurst and BT generally support the SNA Framework proposed under the notified version, which seeks both to protect SNAs and allow subdivision, use and development where appropriate. However, Bathurst and BT seek minor amendments to ensure that the functional need of some activities to locate within SNAs is recognised, to ensure there is appropriate provision for offsetting and environmental compensation and to ensure that the 'no net loss' requirement for offsetting does not inadvertently result in a 'no adverse effects' application.

74. On that basis, Bathurst and BT submit that the relief proposed in their submission, and elaborated on in these legal submissions, is the most appropriate means of achieving the purposes of the Act in the Waikato District.

Dated: 16 November 2020

Joshua Leckie / Kelsey Barry
Counsel for Bathurst Resources Limited and BT Mining Limited