

## Before the Hearings Panel

In the Matter of                      the Resource Management Act 1991

And

In the Matter of                      the Proposed Waikato Regional Plan Change 1 – Waikato  
and Waipā River Catchments

And

In the Matter of                      Hearing Block 2 (Topic C6: Urban/Point Source  
Discharges)

# Legal Submissions for **BT Mining Limited** (Submitter 72453)

Dated: 2 July 2019

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## Table of Contents

<b>INTRODUCTION .....</b>	<b>3</b>
BT Mining Limited .....	3
Coal Mining in the Waikato.....	4
Overview of Submissions and Relief Sought .....	5
<b>STATUTORY CONSIDERATIONS.....</b>	<b>6</b>
Council's functions .....	6
Part 2 of the RMA.....	7
National Policy Statement for Freshwater Management .....	8
<b>KEY ISSUES – URBAN/POINT SOURCE DISCHARGES .....</b>	<b>14</b>
Summary of Relief sought .....	14
Definition - Regionally Significant Industry .....	15
Policy 10 - Development of Regionally Significant Industry .....	17
Policy 11 – BPO and Offsetting .....	24
<b>CONCLUSION .....</b>	<b>28</b>

## INTRODUCTION

1. BT Mining Limited (**BT**) lodged a submission on the Proposed Waikato Regional Plan Change 1 (**Plan Change**) in March 2017 (Submitter Number 72453) (**Submission**).
2. The Submission addresses Topic C6: Urban/Point Source Discharges, which is the subject of this hearing.
3. These legal submissions are presented on behalf of BT to address the matters raised in the Submission.

### BT Mining Limited

4. The shareholders of BT are Bathurst Resources Limited (**Bathurst**)<sup>1</sup> and Talleys Energy Limited<sup>2</sup>. BT was incorporated to acquire and run the business and assets of the Stockton, Rotowaro and Maramarua mines (**Mines**).
5. In 2015 state-owned enterprise Solid Energy New Zealand Limited (**Solid Energy**) was placed into administration following financial difficulties and was subsequently put into liquidation. On 31 August 2017, BT purchased the Mines from Solid Energy.
6. As part of the purchase, BT ensured that the expertise of employees was not lost by offering employment to the majority of Solid Energy's staff. BT also received access to the Crown indemnity fund covering rehabilitation.
7. BT is the permit holder and permit operator of the Mines. BT has appointed Bathurst as the mine operator. Bathurst is a publicly listed New Zealand resources company and is New Zealand's leading coal producer. Bathurst provides the necessary technical and managerial skills required for the operation of the Rotowaro and Maramarua mines.
8. BT is guided by a commitment to shareholders, employees, local communities, and the environment. The commitment is backed by significant investment of time and money to ensure social and environmental impacts are managed from design and planning through to production and eventually rehabilitation of mining sites. The ultimate aim

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<sup>1</sup> 65% shareholder.

<sup>2</sup> 35% shareholder.

is to ensure that the operations enable society to meet its present needs without compromising the ability of future generations to meet their needs.

### **Coal Mining in the Waikato**

9. There has been a long history of coal mining in the Waikato. Commercial mining commenced in Huntly in 1876 with the Taupiri Coal Mining Company.
10. Rotowaro was a coal mining settlement from 1915. The current opencast mine was opened in 1958 and produces low ash and low sulphur thermal coal. Current production at Rotowaro is around 600,000 tonnes of coal per annum. Coal is supplied to Huntly Power Station and Glenbrook Steel Mill among others.
11. The Maramarua mine developed an opencast mine in 1948. The mine was modest until Solid Energy invested infrastructure and increased production during the period between 2010 and 2015. Current product is now around 220,000 tonnes of coal per annum which is expected to increase to around 240,000 tonnes this financial year. Coal is supplied to local dairy plants, and the Glenbrook Steel Mill.
12. BT's major customers, Genesis Energy Limited for the Huntly Power Station, New Zealand Steel Limited for Glenbrook Steel Mill and Fonterra Limited for its Waikato-based dairy factories, significantly contribute to the Waikato Region and the nation more broadly. Specifically:
  - (a) Huntly Power Station was commissioned in 1983 and is New Zealand's largest thermal power station. It has four operational generating units, two of which are 250MW coal and gas fired steam turbine units. Huntly Power Station plays an important role in providing secure voltage support for Northland, Auckland and the Waikato.
  - (b) The use of coal at Glenbrook Steel Mill commenced in 1968, when New Zealand Steel Limited pioneered the direct reduction process for reducing iron oxide (heavy and dark ironsands sourced locally) into metallic iron. The coal is used to dry the ironsands, an essential ingredient in ironmaking and therefore steelmaking.

- (c) BT coal provides the heat source for Fonterra's Waikato-based dairy factories. Dairy products were exported from New Zealand as early as the 1880's and dairy exports continue to be a fundamental aspect of the New Zealand economy. The dairy industry provides approximately 38,000 jobs in New Zealand, in the year to June 2018 New Zealand dairy exports were valued at \$16.667 billion.
13. Until there is a transition from coal to another economic energy source, the coal demands of nationally significant industries (like those above) will be met by local or imported coal. The preference should be for local coal, which has a smaller transportation footprint.
  14. In addition, local coal provides significant employment to the Waikato Region and contributes to the local, regional and national economy through wages, taxes and procurement. Rotowaro Mine employs approximately 130 staff and various contractors. Maramarua mine employs approximately 60 staff. This equates to wages of over \$20 million per annum. In addition, BT spends approximately \$17 million on procurement, \$4 million on leasing and \$2.5 million on royalties and energy resources levies annually.
  15. In the next 5 – 10 years BT will have depleted the economically recoverable coal resource within the current pits. BT will be required to look to develop adjacent areas, which will enable it to sustain the business (and maintain continuity of employment where possible) as well as utilising existing infrastructure and avoiding the need to duplicate facilities.
  16. In my submission, there is a need for the Plan Change to recognise Regionally Significant Industry (**RSI**), and in particular that mineral extraction is recognised as RSI. It is also essential that opportunity for development of existing and new RSI is enabled in the Plan Change. This will ensure BT, as a mineral extractor (RSI), can continue to support the social and economic well-being of the Region and the nationally significant industries referred to above.

### **Overview of Submissions and Relief Sought**

17. The Submission seeks to ensure recognition of the critical role coal plays in the economy of the Waikato Region. In summary, the relief sought by BT seeks to:

- (a) ensure RSI are appropriately defined to include mineral extraction;
- (b) enable development of existing and new RSI;
- (c) support the use of Best Practicable Option (**BPO**) while recognising it is a high threshold; and
- (d) ensure the effects hierarchy enables offsetting and compensation as non-compulsory measures.

## STATUTORY CONSIDERATIONS

18. The purpose of a regional plan is to assist a regional council to carry out its functions in a way that achieves the purpose of the Resource Management Act 1991 (**RMA**).<sup>3</sup> The purpose of the RMA is to promote the sustainable management of natural and physical resources.<sup>4</sup>
19. The Panel's decision on the Plan Change must (relevantly) be in accordance with the following provisions of the RMA:<sup>5</sup>
- (a) the Council's functions under section 30;
  - (b) the provisions of Part 2;
  - (c) a national policy statement or a New Zealand coastal policy statement; and
  - (d) any regulations.
20. A regional plan must also give effect to a regional policy statement. If the regional plan does not give effect to a regional policy statement it must be amended.<sup>6</sup>

### Council's functions

21. A regional council's functions are set out in section 30 of the RMA.
22. Of particular relevance to the Plan Change, a regional council is responsible for:

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<sup>3</sup> Section 63(1), RMA.

<sup>4</sup> Section 5(1), RMA.

<sup>5</sup> Section 66(1), RMA.

<sup>6</sup> Section 65(6), RMA.

- (a) achieving integrated management of natural and physical resources;<sup>7</sup>
- (b) controlling land for the maintenance and enhancement of water in water bodies;<sup>8</sup>
- (c) the control of taking, use, damming and diversion of water and the control of water quantity, level and flow in any water body;<sup>9</sup>
- (d) the control of discharges of contaminants and water into water;<sup>10</sup>
- (e) the establishment of rules surrounding the capacity of water to assimilate a discharge of a contaminant;<sup>11</sup> and
- (f) the strategic integration of infrastructure with land use (including discharges) through objective, policies and methods.<sup>12</sup>

23. The above functions demonstrate that a regional council's water quality functions are not limited to objectives, policies and methods in a regional plan. It is important to note that a regional council's functions with regard to the maintenance and enhancement of water quality extend beyond the regional plans.

## **Part 2 of the RMA**

24. As the Panel will be aware, it must exercise its role in the preparation of the Plan Change in accordance with the provisions of Part 2 of the RMA.<sup>13</sup> This includes, in achieving the purpose of the RMA:

- (a) Enabling people and communities to provide for their social, economic and cultural well-being while:
  - (i) *sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;*
  - (ii) *safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

<sup>7</sup> Section 30(1)(a), RMA.

<sup>8</sup> Section 30(1)(c), RMA.

<sup>9</sup> Section 30(1)(e), RMA.

<sup>10</sup> Section 30(1)(f), RMA.

<sup>11</sup> Section 30(1)(fa), RMA.

<sup>12</sup> Section 30(1)(gb), RMA.

<sup>13</sup> Section 66(1) of the RMA.

- (iii) *avoiding, remedying, or mitigating any adverse effects of activities on the environment.*<sup>14</sup>
- (b) Recognising and providing for the matters of national importance listed in section 6, including the preservation of the natural character of lakes, rivers and their margins and the protection of them from inappropriate subdivision, use and development.<sup>15</sup>
- (c) Having particular regard to the other matters in section 7 specifically, the efficient use and development of natural and physical resources.<sup>16</sup>
25. Part 2 of the RMA, and the Courts' interpretation of it, confirms that the RMA is not a "no effects" statute.<sup>17</sup> In *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2) (Buller)* Justice Fogarty stated:

*It is clear that Parliament did not intend the RMA to be a zero sum game, in the sense that all adverse effects which were unavoidable had to be mitigated or compensated. ...*

*Sections 17 and 319 reinforce the natural inference that s 5(2) envisages that sustainable management will, from time to time, make choices which may prefer the development of natural and physical resources over their protection, including the special protection "required" in s 6.*

26. Buller Coal Limited, which is also a subsidiary of Bathurst, was a party to the *Buller* case.

### **National Policy Statement for Freshwater Management**

27. The NPSFM sets out the national directives on the management of freshwater in terms of quality and quantity. The Plan Change must be carried out in accordance with the NPSFM.<sup>18</sup> Accordingly, the Plan Change must give effect to the NPSFM.

<sup>14</sup> Section 5(2), RMA.

<sup>15</sup> Section 6(a) of the RMA.

<sup>16</sup> Section 7(b) of the RMA.

<sup>17</sup> *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346 at [52] – [53], see also *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 at [116].

<sup>18</sup> Evidence of Ms Stevens dated 26 February 2018 at [20] – [24] and Evidence of Ms Stevens dated 19 September 2018 at [15] – [24].



28. The NPSFM requires that regional councils relevantly:
- (a) identify regional targets to improve the quality of freshwater;<sup>19</sup>
  - (b) identify freshwater management units (**FMUs**);<sup>20</sup>
  - (c) identify values for FMUs;<sup>21</sup>
  - (d) identify freshwater objectives;<sup>22</sup>
  - (e) create monitoring plans;<sup>23</sup> and
  - (f) create freshwater quality accounting systems.<sup>24</sup>
29. Values and objectives, in particular, are to be assessed against several matters which include, relevantly:
- (a) *how to enable communities to provide for their economic well-being, including productive economic opportunities, while managing within limits;*<sup>25</sup> and
  - (b) *any implications for resource users, people and communities arising from the freshwater objectives and associated limits including implications for actions, investments, ongoing management changes and any social, cultural or economic implications.*<sup>26</sup>
30. The values and objectives for each FMU are vital in the maintenance or improvement of water quality pursuant to Part A: Water Quality. Part A also requires communities be able to provide for their economic well-being, including productive economic opportunities, in sustainably managing freshwater quality, within limits.<sup>27</sup>
31. Finally, Part A specifically addresses discharges, specifically it:

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<sup>19</sup> Policy A6, NPSFM.

<sup>20</sup> Policy CA1, NPSFM.

<sup>21</sup> Policy CA2(c), NPSFM.

<sup>22</sup> Policy CA2(e), NPSFM.

<sup>23</sup> Objective CB1, NPSFM.

<sup>24</sup> Policy CC1, NPSFM.

<sup>25</sup> Policy CA2(f)(iab), NPSFM.

<sup>26</sup> Policy CA2(f)(v), NPSFM.

<sup>27</sup> Objective A4, NPSFM.

- (a) requires the imposition of conditions on discharge permits to ensure the limits and targets can be met;<sup>28</sup>
  - (b) requires, where permissible, the adoption of BPO;<sup>29</sup> and
  - (c) expressly envisages new discharges pursuant to Policy A4(3).
32. The NPSFM also provides for commercial and industrial use as an optional national value. In particular, the NPSFM states:<sup>30</sup>

*The freshwater management unit provides economic opportunities to people, businesses and industries*

*Water quality and quantity can provide for commercial and industrial activities. Attributes will need to be specific to commercial or industrial requirements.*

33. In accordance with the requirements of the NPSFM, the Waikato Regional Council (**WRC**) implemented the Waikato Regional Policy Statement<sup>31</sup> and updated the Waikato Regional Plan.<sup>32</sup> The Plan Change is also in response to the NPSFM.

### **Regional Policy Statement**

34. A regional plan must give effect to a regional policy statement.<sup>33</sup> The Plan Change must therefore give effect to Te Tauākī Kaupapahere O Te Rohe O Waikato - The Waikato Regional Policy Statement (**WRPS**).
35. Various provisions of the WRPS have direct relevance to policies 10 and 11 of the Plan Change, these provisions are outlined below.

#### *Health and Well-being of the Waikato River Catchment*

36. One of the issues in the WRPS is the health and well-being of the Waikato River catchment (which includes the area covered by the Plan Change).<sup>34</sup> The ability of the Waikato and Waipa Rivers to sustainably and safely

<sup>28</sup> Policy A3(a), NPSFM.

<sup>29</sup> Policy A3(b), NPSFM.

<sup>30</sup> Appendix 1: National values and uses for fresh water, Other National Values, page 28, NPSFM.

<sup>31</sup> WRPS became operative in April 2016.

<sup>32</sup> Variations in July 2011, April 2012, December 2015 and an update may be required for the NPSFM 2017 amendments.

<sup>33</sup> Section 65(6), RMA.

<sup>34</sup> Issue 1.6, WRPS.

provide economic opportunities is recognised as an area of concern under this issue.<sup>35</sup>

37. The explanation of this issue acknowledges that the Waikato River is at the heart of the social and economic development of the Waikato Region.<sup>36</sup>
38. Policy 8.4 requires that the existence of regionally significant industry,<sup>37</sup> and the social and economic benefits to the community,<sup>38</sup> are considered in the identification and undertaking of catchment-based intervention.
39. It is an objective of the WRPS that the Waikato River is restored and protected, and that the objectives put forward in Te Ture Whaimana o Te Awa o Waikato – The Vision and Strategy for the Waikato River (**Vision and Strategy**) are to be achieved.<sup>39</sup> The Vision and Strategy can be classified as catchment-based intervention.
40. The Vision and Strategy was developed as part of the Waikato River Settlement between the Crown and Waikato-Tainui. Pursuant to Chapter 2 of the WRPS, the Vision and Strategy is deemed to be part of the WRPS.<sup>40</sup> Further, if there is any inconsistency between the WRPS and the Vision and Strategy, the Vision and Strategy prevails.<sup>41</sup>
41. In accordance with Policy 8.5 of the WRPS, and consistent with Chapter 2, the Vision and Strategy is the *primary direction-setting document for the Waikato River*.
42. The Vision and Strategy does not address regionally significant industry or social and economic benefits to the community as required by Policy 8.4. It is therefore necessary to consider the other policies in the WRPS.

#### *Integrated Management*

43. The WRPS requires natural and physical resources to be managed in a way that recognises, relevantly:
  - (a) the needs of current and future generations;<sup>42</sup>

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<sup>35</sup> Issue 1.6(b), WRPS.

<sup>36</sup> Page 1-8, WRPS.

<sup>37</sup> Policy 8.4(h), WRPS.

<sup>38</sup> Policy 8.4(l), WRPS.

<sup>39</sup> Policy 8.1 – 8.2, WRPS.

<sup>40</sup> Chapter 2.4, WRPS.

<sup>41</sup> Above.

<sup>42</sup> Objective 3.1 (d), WRPS.

- (b) the relationship between environmental, social, economic and cultural well-being; and<sup>43</sup>
- (c) the need to work with agencies, landowners, resource users and communities.<sup>44</sup>

#### *Resource Use and Development*

44. the WRPS also requires resource use and development to be maintained and where appropriate enhanced, including:
- (a) access to natural and physical resources to provide for regionally significant industry,<sup>45</sup> and
  - (b) access to the significant mineral resources of the region.<sup>46</sup>
45. Policy 4.4 of the WRPS states that the management of natural and physical resources is to provide for the continued operation and development of regionally significant industry. The policy requires recognition of, among others, *“the benefits of enabling the co-location of regionally significant industry to support efficient use of infrastructure, and minimise transportation requirements.”*<sup>47</sup>
46. The explanation to Policy 4.4 also notes that *“Some regionally significant industries also provide an anchor to support other industries and communities within rural and urban settings”*.<sup>48</sup>
47. Policy 6.8 recognised the value of mineral resources. The policy requires recognition of the need to access mineral resources during development of the built environment.<sup>49</sup> Accordingly, the WRC is required to identify significant mineral resources<sup>50</sup> and to provide appropriate protections for those resources.<sup>51</sup>
48. The explanation to Policy 6.8 explains that whilst recognition does not imply minerals should or will be extracted, their extraction should not be

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<sup>43</sup> Objective 3.1(e), WRPS.

<sup>44</sup> Objective 3.1(f), WRPS.

<sup>45</sup> Object 3.2(a), WRPS.

<sup>46</sup> Objective 3.2(d), WRPS.

<sup>47</sup> Implementation Method 4.4.1(f), WRPS.

<sup>48</sup> Page 4-11, WRPS.

<sup>49</sup> Policy 6.8, WRPS.

<sup>50</sup> Policy 6.8.1, WRPS.

<sup>51</sup> Policy 6.8.2, WRPS.

hampered by development of the built environment.<sup>52</sup> The explanation to policy 6.8 also confirms that the sustainability of mineral extraction will be determined by considering the other relevant provisions of the WRPS.<sup>53</sup>

#### *Point Source Discharges*

49. Point source discharges are addressed by Policy 8.3 of the WRPS. In particular, Implementation Method 8.3.1 requires that regional plans control discharges in a way that, among others, provides for mitigation or offsetting of adverse effects where effects cannot be avoided or remedied.<sup>54</sup>
50. The express acknowledgement that not all effects can be avoided or remedied is also made in the explanation to the policy which states:

*Method 8.3.1d) requires the regional plan to provide a policy framework for those instances where it is impossible for effects to be avoided or remediated. In these instances the provision for mitigation and offsetting are an effective means to reduce the impact of unavoidable adverse effects, and to enable a degree of counterbalancing or compensation in order to manage effects of activities in an integrated manner.*

#### *Energy*

51. I have outlined how that Rotowaro provides essential support to Huntly Power Station through coal supply. The provisions relating to energy are therefore of some relevance.
52. Energy is another one of the key issues identified in the WRPS.<sup>55</sup> There is a focus on renewable energy moving forward, however the ability to meet future demand<sup>56</sup> and the security of supply<sup>57</sup> are both particular areas of concern under the WRPS.

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<sup>52</sup> Explanation to Policy 6.8, page 6-14, WRPS.

<sup>53</sup> Above.

<sup>54</sup> Implementation Method 8.3.1(d), WRPS.

<sup>55</sup> Issue 1.3, WRPS.

<sup>56</sup> In accordance with Issue 1.3(a) and Objective 3.5(i), WRPS.

<sup>57</sup> In accordance with Issue 1.3(f) and Objective 3.5(i), WRPS.

## KEY ISSUES – URBAN/POINT SOURCE DISCHARGES

### Summary of Relief sought

53. BT supports the protection of the Waikato and Waipa river catchments (**Rivers**) for future generations, and the use of the Rivers to protect the social and economic well-being of future generations. In particular, the relief sought by BT in relation to Urban/Point Source Discharges:
- (a) recognises that the Rivers are a source of social and economic well-being;
  - (b) recognises that mineral extraction is RSI due to:
    - (i) its contribution to the social and economic well-being of the region; and
    - (ii) its position as an ‘anchor’ supporting other regionally significant industry such as the dairy and steel making industries;
  - (c) recognises that RSI are essential in the continuing and future development of social and economic well-being in the region; and
  - (d) balances the need to protect the Rivers with the need to maintain and grow RSI in the region for social and economic well-being.
54. In summary, the relief sought in the Submissions (and subsequent amendments arising out of the evidence) seeks to protect social and economic well-being by ensuring that:
- (a) RSI is appropriately defined to include mineral extraction;
  - (b) Policy 10 includes provision of the development of existing and new RSI; and
  - (c) Policy 11 adequately protects the Rivers while ensuring provision for offsetting and compensation.
55. In my submission, the amendments are necessary and the most appropriate way to give effect to the provisions of the RMA and to give effect to the WRPS (including the Vision and Strategy).

56. These legal submissions focus on the following key aspects of BT's submissions:
- (a) the definition of RSI;
  - (b) development of existing and new RSI under Policy 10; and
  - (c) the best practicable option, offsetting and compensation under Policy 11.

### **Definition - Regionally Significant Industry**

57. BT seeks the inclusion of a definition for RSI in order to provide context to Policy 10. The definition sought in the Submissions is as follows:

***“Regionally Significant Industry:** means an economic activity based on the use of natural or physical resources in the region which have benefits that are significant at a regional and/or national scale. These may include social, economic or cultural benefits. Regionally significant industry includes:*

- Dairy manufacturing;
- Meat processing;
- Pulp and paper processing;
- Mineral extraction.”

#### **(Submission Definition)**

### *Officers' Report*

58. The Officers' Report agrees that the inclusion of definitions for RSI would provide clarity.<sup>58</sup>
59. With regard to RSI, the Officers consider that the WRPS Definition should be used. The WRPS definition is as follows:

*Regionally significant industry - means an economic activity based on the use of natural and physical resources in the region and is identified in regional or district plans, which has been shown to have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits.*

#### **(WRPS Definition)**

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<sup>58</sup> Section 42A Report – PC1 Block 2, at [1070].

60. The definition in the Officers' Report is as follows:

**Regionally significant industry:** means an economic activity based on the use of natural and physical resources in the region, which is demonstrated to have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits.

**(Officers' Definition)**

61. The Officers acknowledge that the WRPS Definition anticipates identification of regionally significant industries in regional and district plans.<sup>59</sup> Despite this, the Officers do not propose to list specific industries that are considered regionally significant.
62. The Officers are of the view that the definition should not list specific industries because there is no justification, at this stage, that the four industries proposed by BT (and several other submitters) meet the definition. The Officers rely on the part of the definition that states "*which has been shown to have benefits*" to support their view that justification is required.<sup>60</sup> The Officers also do not provide any indication as to when, if not during the Plan Change process, it is appropriate for that justification to be assessed.

*Assessment*

63. BT supports the intent of the definition as proposed by the Officers. With the exception of the words "is demonstrated to", and the exclusion of the four industries, it is the same definition as proposed by BT.
64. BT does not consider that the words "is demonstrated to" in any way limits the ability of mineral extraction to be specified as RSI.
65. BT maintains that specification of some classes of RSI will provide certainty to industry participants and efficiency in the consenting process. In particular, consistent with submitter's evidence,<sup>61</sup> BT seeks that Dairy Manufacturing, Meat Processing, Pulp and Paper Processing and Mineral Extraction be added to the Officers' Definition.

<sup>59</sup> Section 42A Report – PC1 Block 2, at [1072].

<sup>60</sup> Above.

<sup>61</sup> In particular EIC of Ariell King for J Swap Limited and EIC of Sharon Dines for Winstone Aggregates and Fulton Hogan.



66. BT agrees with the evidence of Ms Dines that failure to specify the commonly recognised industries would require the provision of economic justification for every resource consent application for a point source discharge.<sup>62</sup> This is an inefficient use of applicant's and council officer's time during the resource consenting process.
67. The classification of RSI would then also be left to the council officer processing the resource consent which, in my submission, could result in inconsistencies.
68. The use of the word "includes" means that the proposed list is not exclusive. Those industries falling outside of the list are not excluded, but simply require economic justification. We agree with the evidence of Ms Dines that the first part of the definition is sufficiently wide to capture new industries that become regionally or nationally significant.<sup>63</sup>
69. Importantly, the inclusion as a RSI gives policy recognition but does not give those industries unfettered ability to operate or expand.<sup>64</sup> RSI will still be required to address environmental impacts, including water quality. The inclusion of the four industries as regionally significant simply adds an efficiency to the process for those industries.
70. I submit that the express provision for mineral extraction at Policy 6.8 of the WRPS supports the proposition that mineral extraction is a RSI. In addition, BT specifically plays a critical role in the social and economic well-being of the region. BT is a local employer, procurer and taxpayer. BT is also an anchor for the dairy, energy and steel manufacturing industries.

### **Policy 10 - Development of Regionally Significant Industry**

71. BT seeks amendment of Policy 10 to explicitly provide for development of existing and new RSI. Several other submitters have also sought this relief.<sup>65</sup>
72. Specifically, BT seeks that Policy 10 read as follows:

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<sup>62</sup> EIC of Sharon Dines for Winstone Aggregates and Fulton Hogan Limited dated 3 May 2019, at [3.29].

<sup>63</sup> Above at [3.30].

<sup>64</sup> Part 2 and section 104 of the RMA, Policy 6.8 of the WRPS, Policy 11 of the Plan Change.

<sup>65</sup> For instance, Fulton Hogan (74048), GBC Winstone (73992), J Swap Limited (71618) and Stevenson Resources Limited (73732).

*“When deciding resource consent applications for point source discharges of nitrogen, phosphorus, sediment and microbial pathogens to water or onto or into land, provide for the:*

- a. Continued operation of regionally significant infrastructure and regionally significant industry;*
- b. The growth of regionally significant infrastructure and regionally significant industry;*
- c. The establishment of new regionally significant infrastructure and regionally significant industry.”*

73. This relief is sought on the basis that as the Waikato Region continues to grow RSI will need to grow with it to provide for the social and economic well-being of the population. The social and economic well-being of the region is a crucial aspect of Part 2 of the RMA, reiterated in the WRPS.

#### *Officers' Report*

74. The Officers' Report provides that it would be inappropriate to have explicit policy support for development of existing and new RSI in the Plan Change.<sup>66</sup> This decision was made on the basis that the Vision and Strategy provides that additional adverse effects on the Waikato River are unacceptable (**Statement**).<sup>67</sup>

#### *Vision and Strategy*

75. BT acknowledges that the Vision and Strategy plays a fundamental role in shaping the Plan Change. However, the Vision and Strategy does not cover growth and development of RSI, or RSI generally or point source discharges. As such, in the absence of any conflict with the Vision and Strategy, the WRPS applies.
76. Objective h. of the Vision and Strategy provides that the Waikato River is already degraded and should not be required to absorb further degradation as a result of human activities. BT acknowledges that the objective for no further degradation should be adhered to in the Plan Change.

<sup>66</sup> Section 42A Report – PC1 Block 2, at [1065].

<sup>67</sup> Above.

77. However, the Statement is not an appropriate reason to not enable development of existing and new RSI. The implication of the Statement is that development of existing and new RSI results in adverse effects and adverse effects result in degradation. That implication is not supported for two reasons:
- (a) development of existing and new RSI does not automatically equate to adverse effects; and
  - (b) adverse effects do not automatically equate to degradation.
78. Development of existing or new RSI will not necessarily result in adverse effects. In this regard, we refer to and adopt the evidence of Ms Dines,<sup>68</sup> Mr Ryan<sup>69</sup> and Ms King<sup>70</sup>. In particular I note following case studies outlined in Ms Dines' evidence:
- (a) Fonterra Lichfield: the site doubled while maintaining the pre-development nutrient footprint. In addition, it was a condition of the resource consent that the pre-development nutrient footprint would be reduced by 10% within 7 years of the consent being granted.<sup>71</sup>
  - (b) Waikeria Prison: the prison capacity doubled but the nutrient, pathogen and sediment footprint of the development reduced. Reduction requirements were secured by resource consent condition/s.<sup>72</sup>
79. Further, in my submission, "adverse effects" do not automatically equate to degradation. Rather, degradation is a possible outcome stemming from a failure to appropriately address adverse effects. However, under the Plan Change adverse effects should be able to be avoided, remedied, mitigated, offset or compensated in accordance with the provisions of the RMA.<sup>73</sup>
80. On that basis, it is my submission that the Vision and Strategy does not (as suggested by the Statement) state that all adverse effects on the Waikato

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<sup>68</sup> EIC of Sharon Dines for Winstone Aggregates and Fulton Hogan Limited dated 3 May 2019, at, [3.10] – [3.19].

<sup>69</sup> EIC of Paul Stanley Ryan for Hamilton City Council dated 30 April 2019, at [47] – [63].

<sup>70</sup> EIC of Ariell Leanne King for J Swap Limited, at [4.9].

<sup>71</sup> EIC of Sharon Dines for Winstone Aggregates and Fulton Hogan Limited dated 3 May 2019, at [3.14].

<sup>72</sup> Above.

<sup>73</sup> Sustainable management under section 5 of the RMA refers to avoiding, remedying and mitigating adverse effects while section 104 of the RMA refers to the offset of compensation of adverse effects.

River are unacceptable. Rather, the general theme is that failure to appropriately address adverse effects is unacceptable.

81. In any case, proposed point source discharges (for existing or new RSI) will still be assessed through the consenting process.

*Status of Policy 10*

82. The Officers' Report confirms that Policy 10 does not "trump" the other policies.<sup>74</sup> Specifically, RSI are still subject to the requirement to adopt BPO under Policy 11.<sup>75</sup> The Officers' Report reiterates that provision for RSI "does not preclude adverse effects being avoided, remedied or mitigated."<sup>76</sup>
83. Further, and more importantly, any point source discharge for RSI will still be required to comply with the other objectives, policies and rules relating to water quality under the Waikato Regional Plan. Any point source discharge will also be subject to any other instrument regulating water quality, such as the targets required under the NPSFM.
84. Ms O'Callahan<sup>77</sup> and Mr Ryan<sup>78</sup> in their evidence make the valid point that the same argument can apply to the development of existing or new RSI. Inclusion of existing and new development of RSI will not mean that such development is not subject to the consenting process.
85. In my submission the inclusion of development into Policy 10 does not give development of RSI a "free pass". Any applications for a point source discharge, whether for existing or new RSI:
- (a) will be required to adhere to the process in Policy 11;
  - (b) will be required to adhere to other relevant policies and objectives of the Plan Change;
  - (c) will be required to address water quality in the consenting process; and

<sup>74</sup> Section 42A Report – PC1 Block 2, at [1058].

<sup>75</sup> Above.

<sup>76</sup> Section 42A Report – PC1 Block 2, at [1064].

<sup>77</sup> EIC of Mary Elizabeth O'Callahan for Waikato Region Territorial Local Authorities comprising the WARTA Group dated 3 May 2019, at [5.4] – [5.6].

<sup>78</sup> EIC of Paul Stanley Ryan for Hamilton City Council dated 30 April 2019, at [50] – [51].

(d) can be subject to consent conditions ensuring water quality is maintained, or where possible increased - as was the case with Fonterra Lichfield and Waikeria Prison.

86. Failure to include development to existing and new RSI will mean that RSI will be unable to meet growth in the region. Enabling provisions need to be provided for.

### *Technology*

87. The Officers' Report also fails to take into consideration the development of technology, bearing in mind that the Plan Change (once operative) will remain operative for 10 years.

88. Technology is often developed to deal with greater environmental expectations<sup>79</sup> or provide greater resilience to existing infrastructure.<sup>80</sup> For example, Council's are undertaking projects to identify innovative infrastructure solutions. For instance, the sub-regional three waters investigation that is being undertaken in relation to the Hamilton to Auckland Corridor Plan.<sup>81</sup>

89. It is likely that existing and new RSI will be developed to further address environmental outcomes.

90. Failure to provide for development of RSI has aptly been described by Mr Ryan as short-sighted and counter-productive.<sup>82</sup> Failure to provide for development of RSI will mean that any technological advancement for RSI's will not have policy recognition. Failure to provide for development of RSI could therefore stifle environmental outcomes developed with new technology.

### *Regional Policy Statement*

91. The Plan Change must give effect to the WRPS because, as previously discussed, a regional plan must give effect to a regional policy statement.<sup>83</sup>

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<sup>79</sup> EIC of Mary Elizabeth O'Callahan for Waikato Region Territorial Local Authorities comprising the WARTA Group dated 3 May 2019, at [5.6].

<sup>80</sup> EIC of Paul Stanley Ryan for Hamilton City Council dated 30 April 2019, at [58].

<sup>81</sup> EIC of Paul Stanley Ryan for Hamilton City Council dated 30 April 2019, at [56] – [57].

<sup>82</sup> Above, at [55].

<sup>83</sup> Section 65(6), RMA.

92. The Officers' Report relies solely on the Statement as the reason to deny provision for development of RSI in the policy.<sup>84</sup> This fails to consider the various WRPS provisions which support (and in some cases require) development of RSI.
93. WRPS Policy 8.4 requires consideration of RSI, and the social and economic benefit to the community, when undertaking catchment-based intervention like that proposed in the Plan Change.
94. BT significantly contributes to the social and economic benefit to the community. For that contribution to continue provision should be made for development of new and existing resource areas.
95. In addition, WRPS Policy 4.4 specifically requires recognition of development of new RSI. Policy 4.4 provides that "the management of natural and physical resources provide for the *continued operation and development* of regionally significant industry ..." including by "maintaining and where appropriate enhancing access to natural and physical resources, while balancing the competing demand for these resources."<sup>85</sup>
96. We refer to and adopt the evidence of Ms Dines<sup>86</sup>, Mr Ryan<sup>87</sup>, Ms O'Callahan<sup>88</sup> and Ms King<sup>89</sup> in this regard, in particular the reference to WRPS Policy 4.4.
97. Failure to provide for the continued operation and development of RSI is a failure to give effect to the WRPS.

#### *Overall assessment*

98. The RMA requires sustainable management. Sustainable management provides for development while ensuring that any adverse effects of that development are avoided, remedied or mitigated. That is the fundamental concept of the RMA.
99. Enabling development of existing and new RSI in Policy 10 does not conflict with purpose of the RMA; development would be provided for in

<sup>84</sup> Section 42A Report – PC1 Block 2, at [1065].

<sup>85</sup> Policy 4.4 (f), The Waikato Regional Policy Statement.

<sup>86</sup> EIC of Sharon Dines for Winstone Aggregates and Fulton Hogan Limited dated 3 May 2019, at [3.15] – [3.16].

<sup>87</sup> EIC of Paul Stanley Ryan for Hamilton City Council dated 30 April 2019, at [59] – [60].

<sup>88</sup> EIC of Mary Elizabeth O'Callahan for Waikato Region Territorial Local Authorities comprising the WARTA Group dated 3 May 2019, at [5.6] – [5.8].

<sup>89</sup> EIC of Ariell Leanne King for J Swap Limited, at [4.8].

Policy 10 and management of the effects of that development is provided for in Policy 11. As I have submitted, development of existing or new RSI does not conflict with the Vision and Strategy either, provision for development on new RSI is required under the WRPS.

100. Failure to enable development of existing or new RSI, particularly mineral extraction, could result in:
- (a) non-compliance with the WRPS;
  - (b) stifling of new technologies which would provide better environmental outcomes;
  - (c) a shortage in the supply of coal which would have the following flow on effects;
    - (i) supply issues for the steel industry;
    - (ii) supply issues for the dairy manufacturing industry;
    - (iii) failure to secure supply of energy;
    - (iv) importation of coal not subject to the environmental standards that local coal is;
    - (v) increased transportation footprint for coal supply and therefore increased global CO<sub>2</sub> emissions;
    - (vi) loss of local employment;
    - (vii) reduction in local procurement;
    - (viii) reduction in social and economic well-being of the region;  
and
  - (d) overall unsustainable management.
101. Development of existing and new RSI's should be provided for in Policy 10 because:
- (a) development of existing and new RSI will still be subject to the consenting process, particularly BPO under Policy 11, to obtain point source discharge consents;

- (b) technological developments available to existing and new RSI are likely to improve environmental outcomes; and
  - (c) the policies in the WRPS provide for development of new and existing RS&I.
102. Sustainable management requires development of existing and new RSI is enabled, particularly where there are appropriate environmental controls elsewhere in the Regional Plan and other planning documents.

### **Policy 11 – BPO and Offsetting**

103. As identified in BT's submission, Policy 11 as notified is unclear as to the relationship between BPO and offsetting. The language of Policy 11 appears to be absolute, requiring that BPO is undertaken and then offsetting is required on *all* adverse effects which cannot be avoided or mitigated.
104. Such an approach would create an inappropriately and impractically high threshold.
105. BT sought amendment to Policy 11 to ensure that offsetting is not required in addition to BPO. BT instead considered that an offsetting proposal should be optional.

### *Officers' Report*

106. The Officers acknowledge the difficulty of the wording of the policy as notified.
107. The Officers propose to replace the phrase *all adverse effects* with *any adverse effects* so that *any adverse effects* that are not reasonably avoided or mitigated can be offset.
108. The Officers preferred the "hierarchy approach" proposed by DOC and Fish and Game. This approach requires that the adverse effects are avoided and/or mitigated in the first instance and where they cannot reasonably be avoided and/or mitigated then offsetting is encouraged. It is noted that 'remedying' is not an option under the policy for some reason.
109. In order to avoid confusion between BPO and offsetting the Officers propose splitting the policy into two paragraphs. The first paragraph



addresses the requirement for BPO and the second paragraph addresses the option to use offsetting where BPO effects are not avoided or mitigated.

### *Assessment*

110. The changes made by the Officers are supported by BT Mining to clarify the intention of Policy 11. However, the submissions and the evidence with regard to Policy 11 vary significantly in their interpretation of the concept of offsetting.
111. In my submission, before the construction of this policy is formalised, there must be some submissions (or ruling) on what offsetting is and where it fits in the proposed effects management hierarchy. This will also involve consideration of compensation, which does not form part of Policy 11 but in my submission should form part of the policy.
112. As such, my submissions with regard to Policy 11 start by outlining the concepts that I submit should be incorporated within the hierarchy before turning to the construction of the policy itself.

### *Hierarchy*

113. The effects hierarchy generally is as follows:
- (a) Effects are firstly avoided, remedied or mitigated. We note that previously there was authority to suggest that offsetting was a form of mitigation but this has been overruled, at least by the High Court.<sup>90</sup>
  - (b) *Residual* effects can then be offset.
  - (c) Compensation can then be proposed to address remaining residual effects.
  - (d) Finally, any remaining residual effects are assessed pursuant to section 104. This is subject to any “bottom lines” that a planning document may provide for.
114. The effects hierarchy, which is summarised generally above, has been upheld in *Oceana Gold (New Zealand) Limited & Others v Otago Regional*

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<sup>90</sup> *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346.

*Council*<sup>91</sup> (*Oceana*). While parts of that decision are under appeal, I note that in this case the parties were already in agreement that a hierarchy approach would apply.

115. There is no requirement under the RMA that adverse effects must be avoided, remedied or mitigated prior to offsetting/compensation. However, the effects hierarchy appears to be gaining judicial momentum. It appears most frequently in guidelines<sup>92</sup> relating to biodiversity offsetting and is now commonly being proposed in policy statements and plans.
116. An offset provides a benefit to balance a loss. This is compared to mitigation which addressed the specific effects at the point of impact. Originally there was some debate as to whether an offset was a subset of mitigation.<sup>93</sup> This was resolved by *Buller*<sup>94</sup> where the High Court found that offsetting was not mitigation. That is, mitigation reduces the scale of an effect of the activity to which the resource consent application relates, offsetting provides a positive new effect.<sup>95</sup>
117. Under *Oceana* the current law is that an ‘offset’ provides a like-for-like benefit to balance a loss and this is separated from ‘compensation’ which also provides a benefit to balance a loss, but an unrelated or like-for-unlike benefit. This position is different to that of *Buller* which indicated that the RMA has no provision for compensation relating to adverse effects and that offsetting was the correct term.
118. The introduction of “compensate” to section 104 of the RMA in the 2017 amendments<sup>96</sup> addresses the comments in *Buller* relating to compensation for adverse effects. Specifically, a measure “ensuring positive effects on the environment to offset or compensate for any adverse effects” is now to be considered in an application for resource consent.<sup>97</sup> This will affect resource consent applications from the date of effect, October 2017. It is

<sup>91</sup> [2019] NZEnvC 41.

<sup>92</sup> For example *Biodiversity Offsetting under the Resource Management Act* published by Local Government New Zealand.

<sup>93</sup> Various cases considered that offsetting was a form of mitigation: *New Zealand Transport Agency’s Transmission Gully Plan Change Request* (5 October 2011, EPA 0072) (Board of Inquiry, *Mainpower New Zealand Limited v Hurunui District Council* [2011] NZEnvC 384 and *West Coast Environmental Network Incorporated v West Coast Regional Council* [2013] NZEnvC 47.

<sup>94</sup> *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346

<sup>95</sup> Above, at [72].

<sup>96</sup> Resource Legislation Amendment Act 2017 (2017 No 15).

<sup>97</sup> Section 104(ab), RMA.

important to note however that this amendment did not apply in *Oceana*, the previous version of the section did.

119. The amendment provides statutory authority for compensation of effects as a separate tool in the RMA tool box compared to mitigation and offsetting. It also provides clarity for subordinate planning documents. Given the statutory authority for compensation, the ‘splitting’ of offsets and compensation is a distinction that is likely to apply going forward.
120. Policy 11, in its current form, does not address compensation. In accordance with section 104 of the RMA, provision should be made for compensation in addition to offsetting.

#### *Policy Construction*

121. BT supports the ‘hierarchy approach’ on the basis that it is as defined above. That is, where there is sufficient room for offsetting proposals following the BPO assessment and compensation proposals following offsetting measures.
122. The RMA is not a “no effects” statute.<sup>98</sup> To require that all effects be avoided, remedied or mitigated, or even that all effects be offset, is a higher standard than what is required by the RMA. It is also impractical for many industries, particularly the mining industry.
123. In some circumstances mineral extractors will be unable to avoid, remedy or mitigate a residual adverse effect. This is acknowledged by the WRPS.<sup>99</sup> Offsetting, given its requirement for like-for-like positive effects, will also not be possible in some cases. If compensation is not enabled, miners may not be capable of operating and supporting other RSI. As I have already outlined, BT’s mineral extraction plays a vital role in the energy, dairy and steel industries as well as in the social and economic well-being of the region.
124. While some submitters may be seeking policies that aim to stifle mining, that is not sustainable management, does not conform with Part 2 of the RMA and does not promote the social and economic well-being of the region.

<sup>98</sup> *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller District Council (No. 2)* [2013] NZHC 1346 at [52] – [53], see also *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 at [116].

<sup>99</sup> Policy 6.8, WRPS.

125. BT therefore seeks additions to Policy 11 enabling a decision maker to consider compensation as well as offsetting. BT proposes the following additional wording off Policy 11 following subparagraph d):

*Where an offset measure proposed in accordance with the above results in more than minor residual adverse effects, compensation can be considered in relation to those effects.*

## **CONCLUSION**

126. The amendments made by the Officers in their section 42A report have come a long way from the notified version. The inclusion of a definition for RSI is helpful, as is the clear split between BPO and offsetting in Policy 11.

127. However, the following further amendments are required:

- (a) the specific inclusion of mineral extraction, and any other necessary industry, in the definition for RSI;
- (b) amendment to Policy 10 to enable development of existing and new RSI; and
- (c) provision for compensation to residual effects of offsetting in Policy 11.

128. In my submission, the amendments sought above will:

- (a) assist with the implementation of the Plan Change;
- (b) comply with Part 2 of the RMA, the NPSFM and the WRPS;
- (c) protect the quality of the Rivers and promote the objectives of the Vision and Strategy;
- (d) maintain and enhance social and economic well-being;
- (e) promote sustainable development in the region; and
- (f) ultimately be the most appropriate way to achieve the purpose of the RMA.

129. In my submission the relief proposed by BT, or similar relief proposed by the expert evidence referred to, should be accepted.

Dated: 2 July 2019

A handwritten signature in blue ink, appearing to read 'Joshua Leckie'.

Joshua Leckie / Kelsey Barry  
**Counsel for BT Mining Limited**