BUDDLE FINDLAY

Memo

17 September 2025

To: Jo Young, Consents Manager – Stevenson Aggregates Ltd

From: Natalie Summerfield; Bal Matheson (Richmond Chambers)

Legal response to Council further information queries

1. INTRODUCTION

1.1 Stevenson Aggregates Ltd has lodged a substantive application under the Fast-track Approvals Act 2024 for the Drury Quarry Sutton Block quarry pit expansion. Stevenson has been working closely with Auckland Council since lodgement to address further information requests.

1.2 A number of matters that have been raised by the Council's ecologist Mr Andrew Rossaak. This memorandum provides a legal response to Mr Rossak's comments in respect of:

(a) the presumption that consent conditions will be complied with;

(b) how obligations beyond the term of the consent can be assured;

(c) whether, legally, the National Policy Statement: Freshwater Management 2020 (NPS:FM) and the associated AUP policy require that the loss of stream extent and values to be offset separately; and

(d) any assessment of potential values for wetlands under the NPS:FM must be undertaken by appropriately qualified individuals, and the degree of assessment must be proportionate to its degree of adverse effects.

2. LEGAL PRESUMPTION THAT THE CONSENT CONDITIONS WILL BE COMPLIED WITH

2.1 Mr Rossaak suggests in Auckland Council responses #53, #54 and #56 that there should be limited reliance on the proposed consent conditions to mitigate the effects of the Sutton Block Project, as it should not be presumed that Stevenson will comply with these requirements.

2.2 That suggestion is legally incorrect.

2.3 In *Guardians of Paku Bay*, the High Court found that the applicant is 'entitled to be treated on the basis that it will comply with the consents it holds, and with the Act'.[1] The High Court cited *Barry*[2] where the Court of Appeal found that 'the appellant was entitled to have it assumed that he and his (sic) successors would act legally".[3]

2.4 Any assessment of effects, whether by the Expert Panel or any other participant in the process, must therefore be undertaken on the basis that any conditions of consent will be complied with.

[1] *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544, at [134].
[2] *Barry v Auckland City Corporation and Ors* [1975] 2 NZLR 646 (CA).
[3] Ibid, at page 652.

3. AUGMENTATION OBLIGATIONS WITHIN CONSENT CONDITIONS BEYOND 35 YEARS

3.1 In Auckland Council response #54, Mr Rossaak noted that it was unclear how augmentation of streams will be achieved and assured in perpetuity:

> *Flow augmentation appears to be required for at least the duration of the quarry works (50 years), and potentially in perpetuity. Given the maximum consent duration is 35 years, how will this stream augmentation pumping from the quarry bed (below the invert of the stream) be maintained for 50, 100 or 200 years? How would this be ensured and current and proposed offsets be maintained?*

3.2 Mr Rossaak is correct that it is proposed that proposed duration period for quarry activities at the Sutton Block (~50 years) will exceed the maximum consent duration (35 years) that enables the augmentation of NT1-8-Southern Tributary to occur. This is not an unusual situation for quarries – nearly all of which have a life of quarry longer than 35 years, and which will accordingly require all of their regional resource consents to be renewed at some point in their operational life.

3.3 The solution to Mr Rossaak's concern is to adopt one of the following two approaches:

(a) Include the flow augmentation requirement in the landuse consent (which has an unlimited duration). Given that the flow augmentation is to also ensure the success of terrestrial vegetation adjacent to NT1-8-Southern Tributary, this would be sufficiently linked to the land use activity. This condition would allow such augmentation to cease once dewatering had ceased and natural groundwater level had risen back to its current level; or

(b) Alternatively, impose that obligation relating to flow augmentation in a covenant that is registered on the applicable Sutton Block record of title. A covenant condition has been proposed in the consent conditions (see Conditions 159 to 162). This obligation is not in perpetuity because, once dewatering ceases and the groundwater level recovers, then the augmentation ceases to be necessary.

3.4 Either of these methods completely addresses Mr Rossaack's concerns.

4. DOES THE LOSS OF STREAM EXTENT AND VALUES NEED TO BE OFFSET SEPARATELY

4.1 In Auckland Council response #55, Mr Rossaak noted that the Ecological Impact Assessment did not address how the loss of stream extent is managed through the effects management hierarchy, and that stream values have been incorrectly accounted for through the use of the Stream Ecological Valuation (SEV) method. Further, Mr Rossaak states:

> *It is noted that the applicant's ecologist has provided for both value and extent as separate effects management actions in the current Fast Track Application for Kings Quarry. […]*
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> *Clause 3.24(1) of the NPS:F directs that loss of extent and values is avoided, unless the applicant can demonstrate the activity has a functional need and manages effects using the effects hierarchy – in essence we must consider effects on both aspects independently.*

4.2 We disagree with Mr Rossaak's interpretation of clause 3.24(1) of the NPS:FM, which has been included in the Auckland Unitary Plan (Operative in Part) at Policy E3.3(18), which states:

> *The loss of river extent **and** values is avoided, unless the council is satisfied that: […]*
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> (emphasis added).

4.3 The conjunction used in the policy is 'and' not 'or', so both the extent and values should be considered together.

4.4 The appropriate assessment methodology for the loss of stream extent and values was considered in the Waste Management Wayby Landfill Environment Court decision,[4] where the Environment Court found:

> *[744] We note that the SEV method and ECR methods have been in use since circa 2006. The Auckland Council's Technical Report 2001/009 (reprinted 2015) provides the methods used for assessing the ecological functions of Auckland streams. It has been used frequently in New Zealand, including before this Court, and the method has been published internationally. No other method of assessment has been suggested by the appellants' experts.*
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> *[747] We conclude that that the SEV and ECR parameters and modelling achieve a reasonable determination of stream length/area to offset the loss of the streams from the Landfill Valley. We acknowledge the limitations of using any model, and these need to be viewed in a pragmatic and proportionate way.*

4.5 The concept that the loss of rivers and values should be considered together as one concept has been supported by Auckland Council on other projects, including the Waste Management Wayby Landfill High Court appeal.[5]

4.6 We do not understand the legal basis for Mr Rossaak's interpretation, and we consider the assessment completed by Ms Barnett in relation to the loss of extent and values for the streams is therefore appropriate.

5. AN ASSESSMENT OF POTENTIAL WETLAND VALUES MUST BE PROPORTIONATE

5.1 In Auckland Council response #59, Mr Rossaak considers the assessment of potential wetland values does not meet the assessment of values required under the NPS:FM. He notes that the assessment does not provide 'a complete assessment' of the values listed in the NPS:FM definition 'loss of value' at clause 3.2 of the NPS:FM.

5.2 Clause 2(3)(c) of Schedule 4 to the RMA provides that assessments of activities' effects on the environment must include "*such detail as corresponds with the scale and significance of the effects that the activity may have on the environment*". This is a proportionality requirement, ensuring that potentially significant adverse effects will be assessed in sufficient detail, without placing an

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[4] *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277, dated 21 December 2023.
[5] See Auckland Council legal submissions dated15 July 2024, in relation to *Te Rūnanga o Ngāti Whātua and Anor v Auckland Council and Ors* [2024] NZHC 3794. We record that an application for leave to appeal to the Court of Appeal was filed on this point by the Royal Forest and Bird Society of New Zealand Inc in February 2025. A decision on that application is due in November 2025.

unreasonable burden on applicants to consider every effect theoretically possible, no matter how minor or transitory.

5.3 Whether an activity will cause an adverse effect depends on whether the "material harm" threshold is met, with the High Court in *Te Rūnanga o Ngāti Whātua v Auckland Council* accepting the Environment Court interpreting "avoid" as meaning "avoid material harm".[6] This is an application of the Supreme Court's position in *Port Otago*, where it stated:[7]

> *…the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas*.

5.4 The concept of "material harm" originated in the *Trans-Tasman Resources* decision,[8] where it was explained it in the following manner:[9]

> *There will be an acceptable extent of harm and an unacceptable extent… the assessment of whether there is material harm has qualitative, temporal, quantitative and spatial aspects that have to be weighed.*

5.5 To summarise the above:

(a) the extent of assessment required must be proportional to the effect that is sought to be avoided; and

(b) the extent of effect that must be avoided will depend on the values that are sought to be protected.

5.6 As the NPS:FM acknowledges, not all wetlands are created equal – each will have unique values, or combinations of values.

5.7 In the present case, the "wetland" in question is essentially a minor ditch that intermittently fills with rain. It is frequently traversed by cattle, within a site that has been a drystock farm for a significant period of time (over a century). With reference to the *Port Otago* test for material harm, it does not have values that are capable of being adversely effected in a qualitative, temporal or spatial sense, given it is:

(a) qualitatively inadequate (trampled by cattle);

(b) spatially insignificant (tiny); and

(c) temporally insignificant (intermittent).

5.8 The lack of values are immediately and clearly apparent, and to require any sort of substantive assessment would be contrary to the proportionality requirement set out in Schedule 4 to the RMA.

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[6] [2024] NZHC 3794, at [114].
[7] *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112, at [68].
[8] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board and ors* [2021] NZSC 127.
[9] At [255].

5.9 Finally any assessment that is done must be done by an appropriately qualified person. For example, an ecologist would generally not be able to advise on mana whenua values (unless they were also mana whenua), and an ecologist would not be able to advise on (human) recreational values. The extent of theoretical effects, and resulting costs associated with expert assessments of these theoretical effects, means that the concept of proportionality is even more important.