JEPS

Judgeford Environmental Protection Society

**Submission by Professor Catherine Iorns to Porirua City Council in support of the Judgeford Environmental Protection Society Incorporated in relation to their oral submission on the Proposed Porirua District Plan.**

1. I am a Law Professor at Victoria University of Wellington, teaching and practising in the area of resource management law.[1] I was asked to assist the Judgeford Environmental Protection Society (JEPS) in their oral submission on the proposed Porirua District Plan. I have seen their written and oral submissions to the Panel and merely offer some comments on those and a few additional points. I offer these submissions in a pro bono capacity. I confirm that I rely on my professional expertise and judgement. I am more than happy to answer any questions, especially given the limited time to prepare this.

2. **Specific topics addressed are:**

   A Background to the submission

   B Rules and restrictions for quarrying in the Plan

   C The requirement to prioritise the protection of the Pauatahanui wildlife refuge of national significance and the need to apply precaution

   D Spatial planning and the requirement to prioritise housing

3. There are 3 **Appendices**:
   - App 1 contains some of the JEPS submissions on the resource consents for the Willowbank Quarry (at p 16);
   - App 2 contains some background on the precautionary principle (at p 23);
   - App 3 contains an email from JEPS to Wendy Walker, PCC, about JEPS' concerns, including re insurance and a PCC mining policy (at p 29).

[1] BA, LLB(Hons), *Well*, LLM *Yale*. VUW webpage: https://www.wgtn.ac.nz/law/research/publications/research-papers-of-individual-scholars/catherine-j-iorns-magallanes

**A. Background to the submission:**

4. As the Panel and Council have heard, the JEPS submission on the proposed plan is significantly influenced by the residents' current, lived experience of having suffered more than minor adverse effects from the Willowbank quarry operations. The blasting itself caused damage that was unpredicted when the consent was approved or when the blasting was undertaken, the noise has been louder than was predicted, the quarry haulage/access road was allowed to be moved closer to residential houses than was initially approved such that noise, dust and lights from trucks have significantly adversely affected residents lives more than initially forecast – they have been not even close to minor effects but significant adverse effects on amenity. There has been damage to concrete foundations of at least one nearby home, cracking within walls and loosening of weatherboards, and large amounts of dust that didn't used to exist are falling on properties who collect their own rainwater to drink.

5. As is well known throughout New Zealand, councils' resources for monitoring and enforcement are stretched and self-monitoring of consent conditions is frequently utilised, especially for large-scale projects with multiple conditions and monitoring requirements. This has been the case in the current situation and residents have been very clear about the inadequacies of the self-monitoring to prevent breaches of conditions or adverse effects on amenity. They have presented a damning case for what living too close to a quarry looks like, and have not even included some of the worst examples (as at least one of which is involving civil action).

6. Yet the residents have also experienced some effective good practices, such as they note in relation to truck type and weight and the resulting beneficial effect on noise levels. They have also experienced changes to blasting methods and levels which resulted in improvements and reduced the negative effects suffered.

7. This experience gives an insight as to the adequacy of quarry 'best practices' in Aotearoa, and the kinds of provisions that are needed, at least in respect to avoiding adverse effects on residents. It also gives an insight into the kinds of precaution that might be needed to ensure adverse effects are avoided in the current, permissive CME environment.

8. The residents' submissions did not address in detail effects on the flora and fauna, although did note the lack of compliance with a significant condition for the benefit of fauna which was the operation of the fish ladder. This is again consistent with findings about a general lack of compliance with consent conditions throughout the country, largely due to the lack of resourcing to monitor but also because of a preference of councils to work with a consent holder rather than take action against them for such breaches. (Eg, I understand that there have been whole groups – and significant numbers – of pukeko displaced from their habitat by the quarry and its

access road – and then run over on the roads – but these effects were not predicted and not the subject of consent conditions nor monitoring; I understand that they have been both disputed and ignored.)

9. The residents have noted that the response to many of the allegations about damage has been that they need to prove it, and provide evidence from before and after the alleged damage, such as through professional assessments – whether that be damage to their houses or to wildlife in the area. While in many areas of law that is a proper response, when dealing with some of these matters where that is simply not possible, it may not be reasonable to assume that there has been no damage until proven. Moreover, in matters where a precautionary approach is required, a different response and result is required.

10. I understand that the response from some insurers to the dwelling damage is variable. But the quarry operator maintains they cannot be liable as it has arisen from a lawful, consented activity; instead proof of breaches of consent conditions would be required. I submit that this places the residents in an unacceptable position: in addition to the difficulties of proof, the consent conditions may have been inadequate in the first place.

11. Overall, the experience of the residents needs to be taken into account to inform what kinds of requirements need to be made in the Plan, including for broader measures such as zoning, as well as detailed matters such as the content of Rules in the Plan. I submit that a less trusting approach and a more precautionary as well as a more certain regulatory approach needs to be applied, to ensure that adequate standards are actually defined and upheld in relation to quarrying in the Plan.

12. Another reason that these considerations are relevant is because it is only as a result of the recent Willowbank Quarry operation and its current consent applications that we are even considering this current Plan change. I understand that the current proposals have arisen from submissions made by the current quarry applicants that the zoning needs to be changed to more easily enable quarrying activities in the Porirua district.

13. I attach as an appendix some relevant submissions made by JEPS on the current resource consent applications for the Willowbank quarry. They detail more of the effects that have been suffered from the existing quarry, and they make suggestions for monitoring and controls.

**B- Rules and restrictions for quarrying in the Plan**

14. As a general rule, there need to be more detailed Rules and restrictions for quarrying in the Plan than are currently provided. The PCC has previous stated that the place for such Rules and restrictions are in the Plan, and not in a separate Policy on

extractive activities, for example. See this PCC reply to an inquiry from JEPS on this issue:[2]

> The Resource Management Act 1991 (RMA) provides the framework for managing land use activities, including quarrying and mining. This is implemented through the District Plan which is a policy document that deals with mining and quarrying activities on an effects basis. The District Plan must include objectives, policies and rules. The rules set out whether activities require resource consent, and if required these are assessed against the objectives and policies of the plan. The Proposed Porirua District Plan (PDP) contains rules, policies and objectives relating to quarrying and mining activities, and is therefore the policy document that guides decision making on resource consents for quarrying and mining activities once it becomes operative. The PDP determines mining and quarrying within the General Rural Zone to be a restricted discretionary activity and therefore would require resource consent, and would be assessed against the relevant policies. As such, there is no requirement or need for a separate policy document addressing quarrying and mining activities.

15. I agree that there need to be detailed Rules and restrictions for quarrying in this Plan. Some Councils have a separate, detailed policy document (eg Auckland), but these need to be in addition to Rules in the Plan. There are a wide range of matters that need to be covered, and bland statements about avoiding or mitigating effects are not specific enough for such extractive activities with such potentially major adverse nuisance effects. Unintended consequences and thus disputes will arise; it is unacceptable for residents to have to take court action, for example, in order to get them settled. This will also provide certainty for operators/applicants in what to expect by way of conditions on their activities. I do not propose to cover all such needed Rules and restrictions, but I will address some of the ones that have arisen that illustrate the inadequacy of the ones currently proposed for the Plan.

16. To be honest, I am surprised at the statement above that all matters relevant to extractive industry need to be in the Plan, given the technical documents other councils have by way of guidelines. But this certainly suggests erring on the side of more detail in the plan rather than less, if Council do not plan to pursue the creation of such additional guideline material.

17. I support the suggestion that there be a distance requirement between the quarry activities and residential housing. I also support a distance requirement between larger-scale quarry activities and the *boundary lines* of neighbouring properties, not just from existing dwellings. For example, if the restriction is made only in relation to existing houses, that prevents any residential land-owner from adding a second (or other) dwelling, when this is precisely one of the government's suggested requirements for the provision of more future housing. The evidence presented to the Panel noted how there was an identified building site on a neighbouring property

[2] Letter 4 Dec 2020, from Wendy Walker (PCC) to JEPS (Tracey Davies, via email). See App 3. This was repeated in an email on 9 April 2021.

which was near the boundary of the Willowbank quarry's property but now this would never be able to be built on.

18. **Distance limits** are commonly recommended to be 500 m from the quarrying to a dwelling, including in Australia. This is most commonly said to be for dust reasons, but also for general amenity. But residents have said in the current case that this was not enough for noise and vibration under some blasting regimes – see, e.g., Jenny and Andy Blake's evidence; their two dwellings are 720-760m away. It seems that 750 m is a better distance, at least for noise and vibration effects.

19. Of course, this also depends on the type and scale of the quarry and the blasting. But notably, the effects felt by the residents were greater than were anticipated, so it makes sense to provide that precautionary buffer and provide for new quarrying activities to be 500 m away from a property *boundary* and 750 m away from a dwelling, at least for larger-scale quarrying activities.

20. In Queensland, reverse sensitivity set-backs can be 200m or 1000m, depending on the resource.

21. Other plans in NZ have a range of provisions. Eg, Waipa has adopted the '500m from dwelling' rule;[3] Northland defines minerals zones and has a reverse rule about not erecting a dwelling closer than 100m to a mineral *zone boundary*.

22. Some plans provide for distances in order to reduce dust nuisance from quarrying. Others provide it in their resource consent conditions. For example, Canterbury requires quarries to monitor for dust at their boundaries, where that boundary is within 500m to the household dwelling.[4] This distance is based on the data: [5]
"The 500m was based on the transect data, which indicated that at 500m there were no exceedances of PM10. The results showed one exceedance at 250m from the nearest quarry. “This approach is designed to provide an evidence base for quarries to assure the community that their operations are not producing nuisance dust beyond their boundaries, and that they are taking all practicable measures to avoid and mitigate dust nuisance.” ".

23. Given the comments made earlier about consent conditions, it seems prudent to adopt this as a rule in the Plan for any quarry activities. It also indicates a scientific basis for a distance from a quarry from a dwelling. But where a quarry is a new activity, this makes sense to not enable them to occur within 500m of a residential property *boundary*, so as not to restrict housing on suitable land.

24. The suggested 500m distance from a quarry activity to a dwelling might not address **dust** nuisance completely in the Porirua District, because even the properties that

[3] See, eg, rule 2.4.6(g) of the Waipa District Plan;
[4] See, eg, https://www.minex.org.nz/assets/Uploads/ECan-explains-crack-down-on-quarries-Inside-Resources.pdf
[5] Ibid.

were 1 km away have reportedly got a lot of dust on their roofs (i.e. the roofs that collect water for their tanks). And in some rural areas that are not on piped water, water is collected not just on residential dwelling roofs but other farm buildings as well. It seems prudent to adopt the Christchurch approach and at least monitor dust at any existing quarry property boundary where it is 500m from a dwelling; but where it is a new activity then that 500m could be used to prohibit it from occurring 500m either from the quarry boundary to a dwelling, or a residential boundary to a quarry. This is something that could be provided for in plan rules.

25. It would also be prudent to provide for the testing of water for properties on tank rainwater supply where the rainwater is collected within a certain distance from a quarry. Given that dust nuisance has already been documented from residences approximately 1 km from the current quarry site, it would suggest that rainwater supply testing needs to occur for all residences up to 1 km away. I.e. the burden of testing should be on those who are profiting from the activity that is producing the effects rather than on those who have to suffer those effects.

26. I also note that some residents have a groundwater bore instead of rainwater collection. It would be prudent to test all water, to ensure that there is no other source of contaminants such as silica or the heavy metal flocculants entering their waters. If it is tested from the beginning of operations, it will provide data for comparison, eg in 10 or 20 years' time.

27. A restriction on a dwelling being near a quarry activity will not necessarily address the **traffic** issue. Some residents have found the majority of ongoing adverse effects have been through hundreds of very large, heavy and noisy truck movements per day, rumbling past their house and shining headlights at night. While topographical differences and difficulties make it hard to provide for all circumstances, there could also be a distance limit to boundary lines as an avoidance method, and/or stated requirements for appropriate barriers as a mitigation method. In the Wellington Region the Kiwi Point quarry requires foliage buffers at least 70 m from the edge of the quarry to the nearest residential boundary. However, this admittedly is a very different situation from Judgeford's wide open spaces, with Kiwi Point being next door to an urban suburb and an historical legacy rather thana new quarry.

28. In terms of **zoning**, it is noted that mining and quarrying generally are proposed to be noncomplying activities in the rural lifestyle zone but restricted discretionary activities in the general rural zone.

29. Given the size of blocks in the rural lifestyle zone, I query whether noncomplying is appropriate for all quarrying. It might be better to make a distinction between large and small scale activities, where larger scale ones would be prohibited and smaller scale ones noncomplying.

30. But the status given for the quarrying and mining in the rural zone is of more concern. Restricted discretionary is at the permissive end of activity status options. Conditions can only be imposed on a consent if they have already been identified and listed in the Plan. If practices change – or a type of situation arises that was not foreseen today and not provided for in the condition topics – then it can't be restricted within the consent. I recommend that a more restrictive status should be adopted, particularly in light of the current experience of quarrying on other residents in the rural zone, and that was consented under a Discretionary status where any conditions could have been imposed. At the very least it should be Discretionary status in the rural zone, and certainly no more permissive, unless there are significantly more restrictive rules imposed such as in relation to distance and nuisance levels and monitoring.

31. Again, a distinction in activity status could be made between large and small scale operations. I understand that such distinctions are usually made in terms of tonnage of rock, but they could equally be made in terms of their effects – which is consistent with the aim of the RMA, being an effects-based regime. For example, there could be a distinction made based on the number (and size) of truck movements per day, hours of operation, noise levels, distance from residential boundaries, and other aspects that the Panel thinks are most important in order to avoid the more serious effects that the Judgeford residents have had to put up with from the Willowbank Quarry.

32. Please note that I have more restrictive suggestions below in relation to protection of flora and fauna in the area.

**Traffic**

33. I have not examined the proposed traffic policies or rules but I assume they are similar to those contained in the current Plan on the efficiency and safety of the transportation network. I note that JEPS is particularly concerned about the traffic if large-scale quarrying is allowed with high numbers of large trucks per day utilising the current access road off SH58.

34. I note that in relation to the current Willowbank Quarry resource consent applications, the likely traffic effects were found to be *more* than minor. This was determined by the Consultant Planner who disagreed with the applicant's assessment.[6]

35. I also note that Transit New Zealand is arguably conflicted in its assessment of road safety at this site, with it being a beneficiary of the quarry outputs.

36. I also note that adverse traffic effects (including dangers to pedestrians and other road users) has been a predominant factor in the Environment Court denying significant resource consents – e.g. that for the Hilton hotel on the Queens Wharf T.[7]

[6] See Appendix 1.
[7] *Waterfront Watch v WCC [2012] NZEnv Court 74.*

37. In this light, I would submit that including a restriction in the Plan on effects from traffic is entirely appropriate. The Plan could perhaps prohibit large-scale effects (or make them non-complying) and allow small-scale mining and quarrying activities as discretionary or RD (with the right Rules as controls).

**C Protection of the nationally significant Pauatahanui Stream and Inlet**

38. The Pauatahanui Stream and inlet have high ecological values; the Stream is listed as significant in Schedule F1 of the GWRC PNRP, and the inlet contains a wetland of the highest significance to the region: as well as an identified significant natural wetland (Sched F3), it is a significant habitat for indigenous birds (Sched F2c), and site with significant indigenous biodiversity values (Sched F4). The Inlet is also a Government Reserve under the Reserves Act. "The reserve contains the most significant saltmarsh in the lower North Island, rare plants and wildlife, and fragile habitats. A large variety of estuarine birds use the reserve for feeding and nesting." (Sched F4.)

39. From Schedule F2c: "At least eleven threatened or at risk indigenous bird species are known to be resident or regular visitors to this habitat: SI pied oystercatcher, variable oystercatcher, bar-tailed godwit, pied stilt, banded dotterel, red-billed gull, black shag, pied shag, royal spoonbill, little black shag & caspian tern. Pauatahanui Arm is one of only a handful of relatively large estuaries in the Wellington Region and is therefore a regionally important stop-over for several migrant shorebird species such as NZ pied oystercatcher and bar-tailed godwit."

40. This habitat is listed as being valuable "All year round": It is an "Important summer habitat for Arctic-breeding shorebirds" and an "important winter habitat for NZ-breeding shorebirds".

41. The Stream and Inlet need to be given the highest protection in a precautionary manner. It is hard to predict thresholds and tipping points for damage to such wetland systems, and we need to avoid finding out the hard way where the limits are. Controls need to be clearly established in advance, as conditions precedent, in order to ensure protection of this habitat of regional and national significance. The Plan is exactly the place to do this, and do it in a way that protection cannot be whittled away by individual consents, whether deliberately or by accident.

42. In this day and age of changing climate and dwindling biodiversity, with many species and ecosystems already under stress, they must be subject to protections at very high confidence levels. And protections here refer to habitat and feeding grounds for these migratory species, especially when they are diminishing worldwide and we cannot guarantee that this is not the best last refuge, for example. This means being precautionary, and – for example - not relying on 1-in-100-year AELs for flood protection but going beyond, so as to ensure almost zero risk. The climate is changing

so fast that we may need double the protection within 20 years that we think we need now. Such factors must be considered for this. Nature will throw its own curveballs at the Inlet and the species that inhabit it – witness the recent wetland fires in Northland and Southland. We must impose restrictions in the Plan on activities – including quarrying - that reduce all possibility for human-induced errors that might generate negative effects on the inlet and its threatened ecosystem and species.

43. In respect of quarrying, I submit that current 'best practice' for many activities in NZ isn't enough and we need to go further, in order to future-proof the inlet and its species. It can't be left to individual consents and predictions of what conditions will be enough; it needs to have clear rules and strong precautionary restrictions in a plan. If more research is needed, then prohibit risky activities until it is done, rather than the other way around. For example, an adaptive management approach is not appropriate for preventing damage from disaster events – whether induced by nature or human error. Only a future-focused precautionary approach can future-proof the inlet and its species from such unintended damage.

*Natural Hazards*

44. The catchment for the Pauatahanui Stream and inlet is affected by a FLOOD HAZARD and FAULT RUPTURE ZONE, as per the District Planning Maps. This is extremely relevant to activities involving the creation of sediment and other ponds within the catchment. Given the sensitivity of the downstream environment, and particularly the Pauatahanui Inlet, such ponds need to be designed to withstand events that might seem of very low probability but are of high adverse effect if they eventuate. The need to be highly precautionary here could even suggest simply not building such structures here, and placing them in a less sensitive catchment. With good spatial planning, having toxic flocculant storage upstream of the Pauatahanui Inlet could be avoided.

45. In terms of zoning, mining and quarrying are proposed to be *non-complying* for the rural lifestyle zone and for the Pauatahanui settlement zone.[8] While that seems restrictive, it also means a resource consent can be obtained for mining and quarrying activities in these zones if effects are found to 'be minor'. Unfortunately, with long-term risks and/or uncertainty, such as for climate change and earthquakes, we know that it can be hard to establish what counts as minor, especially after biodiversity offsets and sediment ponds (etc) are argued to be designed to minimise such effects.

⇨ I submit that the protection of the wildlife reserve of national significance is of such importance that stronger measures than usual are required to prevent even what might be the equivalent of the 'one-in-100-year' event for breach of a flocculant sedimentation pond – whether that was due to flooding or seismic event. I would go

[8] See pp 24 and 37 of App 1 to the s 42A report.

so far as to recommend that they actually be prohibited in the Pauatahanui catchment because of this.

46. I understand that there is a high threshold to overcome in order to justify Prohibited status for an activity type. I suggest that it has been met with the combination of potential significant damage should a risk occur – even if it is a low and uncertain risk – because of the unique and treasured wildlife refuge.

47. I submit that the current situation warrants application of the precautionary principle (or approach) as outlined by the Supreme Court and, moreover, that it warrants a stronger obligation of caution than a weaker one.[9] The factors that contribute to this are:

    a. a nationally significant wildlife habitat;

    d. particularly vulnerable species or ecosystems are concerned;

    c. there is considerable uncertainty as to risks of climate changed flooding and seismic rupture, but if they eventuated then any poisoning of the Pauatahanui Inlet ecosystem could be catastrophic;

    e. the requirement to avoid such adverse effects, especially in the coastal environment (and the need for land use controls in order to achieve that).

48. Using the precautionary response spectrum for resource consent applications (endorsed by the Supreme Court), it justifies the strongest response of "deny the activity"[10], which would be Prohibited status here. If in the future better technology is adopted for minimising that risk, then the plan could be changed.

49. This is not a situation appropriate for adaptive management; it is one where the risk of flocculant release – whether gradually or in an event – needs to be avoided and all measures must be taken in order to achieve that.

50. If it is thought that Prohibited is too draconian a status and not sufficiently justified by evidence, then Noncomplying activity status could be maintained but more controls and restrictions included in the Plan. This recognises that there are a range of different scales, types of and methods for mining activities that might occur.

51. As an example of such a control or restriction, I would recommend that use of flocculants and their sedimentation ponds be prohibited within the catchment for the Inlet. This does not prohibit all quarrying, just the more dangerous activities. The wildlife refuge is too precious and significant to allow even one breach, and this is not even considering streams in the catchment before they reach the wildlife refuge. Even if there might not be particular evidence available on this point, the precautionary principle or approach can justify making a decision in favour of environmental

[9] I have attached as Appendix, a summary of the precautionary principle under the RMA that I have used for another RMA context.

[10] *Sustain Our Sounds v King Salmon* [2014] NZSC 40 at [111].

protection even in the face of scientific uncertainty, particularly when there is insufficient evidence.

52. I realise that the Council planners have not had a chance to consider this kind of restriction and issue a response as part of their report, but it is exactly the kind of measure that could be utilised to give greater protection and certainty about not just what needs to be protected but ways in which that should be achieved.

53. I have not elaborated on the planning layers and how such measures can be legally justified; but I certainly could if that was required.

**Relevant principles for consideration of inclusion in the Plan:**

54. I apologise if there are already statements in the plan relevant to my proposals below – I have not had time to examine all the proposed plan. Despite this, I thought it relevant to mention them, given the significant and outstanding environmental features in the District, particularly that of the Pauatahanui inlet and wildlife refuge.

*Statement of the precautionary principle in the Plan*

55. In discussion of application of a precautionary approach (or principle), different parties invariably suggest that their proposed actions or conditions are already or inherently precautionary. Some such statements use precaution in the ordinary language sense of the word rather than as a principle of environmental law. As noted above, the precautionary principle not just about being cautious – although that is clearly its objective. The intent of the principle, in making it part of environmental law, is so as to give guidance to decision-makers on what that means to apply caution.

56. Hence a precautionary principle statement might explicitly say that a decision-maker is justified in taking a protective measure even without the evidence that would normally be required by a court in another situation looking at damage, cause and effects (such as in nuisance or negligence law). There may be different thresholds to get over before it can be applied (such as a risk of serious or irreversible harm), but the point of it is to give decision-makers guidance on what to do with the risk and uncertainty before them.

57. Stronger versions of the principle will mandate action on the part of a decisionmaker – i.e. not merely enable them to make a decision to take an environmentally protective measure, but require them to do so.

58. Other versions might lie in between, such as ones where a level of risk and uncertainty trigger a reversal of the burden of proof before an activity goes ahead.

59. None of these versions are mere wishes that people take care – most people think they are being careful in fact. This is a method of decision-making in law that makes decision-makers think about how to be careful as a *method*, not just an outcome.

60. For example, in science, there may be set thresholds for permissive, even-handed and precautionary decision-making for a discipline or type of decision in that discipline. This defines a method that produces a precautionary result for that purpose.

61. I submit that, given the debate over the meaning and effect of precaution in law and practice, a statement of the precautionary principle could be included in the Plan. Inclusion of an express statement would be an important way to clarify for decision-makers how precaution should be applied as a method in future decisions such as in applications for resource consents.

62. There are different possible formulations of such a principle. One commonly-used – although fairly weak - version would be:[11]

    - The absence of, or any uncertainty in, any scientific information should not be used as a reason for postponing or failing to take any measure to achieve the protection of the significant or outstanding environmental characteristics and values in the District.

63. A more protective version would be more appropriate for the special nature of the Pauatanahui inlet and Wildlife reserve, such as:[12]

    - Decision-makers must take into account any uncertainty or inadequacy in the information available. Where the information available is uncertain or inadequate, a decision-maker must favour caution and protection of the Pauatanahui inlet and wildlife reserve.

64. It is also submitted that provisions could be inserted in the Plan addressing the second element of the principle: monitoring and reducing uncertainty. A requirement to undertake monitoring, for example, is in line with the precautionary approach (or principle) and is exactly what can be included in a Plan at this level.

*2 - Non-regression*

65. A second principle of environment law that is becoming increasingly relevant to Plans and Policies is the principle of non-regression. The simplest definition is that offered by World Commission on Environmental Law of the International Union for Conservation of Nature (IUCN): "States . . . shall not allow or pursue actions that have the net effect of diminishing the legal protection of the environment or of access to environmental justice."[13]

66. This principle requires no backsliding on environmental protection in two ways. The first focuses on environmental laws themselves: that future laws should not offer less protection than they currently do. The second aspect focuses on the results in the

[11] This version is based on that in the Fisheries Act, s 10.
[12] This version is based on that in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 61.
[13] *IUCN World Declaration on the Environmental Rule of Law* (2017), Principle 12; available at https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf

environment itself: requiring no more damage, protection of what we have retained – both to 'hold the line', and preferably also restore what has been lost.[14]

67. The principle "does not exist in a vacuum, but rather coexists with other considerations, requiring proper and proportionate justification before walking back norms or laws that affect the public's interest in the environment".[15]

68. While the principle does not have a high profile in Aotearoa, its use is common in international agreements, both bilateral and multilateral. For example, free trade and investment treaties commonly contain non-regression provisions where parties agree not to roll back environmental regulations.[16] For example, the Paris Agreement is based on non-regression and even progression in parties efforts to combat climate change, and there are several references to this in the Agreement. There are examples in domestic law – at constitutional, legislative and administrative levels, as well as in judicial decisions.[17]

69. Some procedural environmental rights such as the Escazú Agreement refer to both non-regression and progressive realisation as flip sides of the same concept.[18] The focus on progressive realisation is based on human rights law and the progressive realisation of human rights.

70. I submit that the principle of non-regression – perhaps incorporating progressive realisation as its flipside – is highly relevant to this WCO. This principle could be expressly referred to in the Plan itself, as a guiding principle for decision-makers under the Plan, in a similar way to that suggested for the precautionary principle.

71. The principle of non-regression suggests that, at the minimum, you would choose the option that best protected the existing state of the environment, one that didn't let the state worsen in any way. The flip side of progressive realisation suggests you could progressively encourage its improvement. This would suggest enabling the choice of options that allowed for improvement, given the current context of declining state.

72. In terms of inclusion in the Plan, it could be as short and simple as that offered by the World Declaration on the Environmental Rule of Law:[19]

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[14] For a fuller explanation, see, eg, Nicholas S Bryner, "NEVER LOOK BACK: NON-REGRESSION IN ENVIRONMENTAL LAW" 43 U. PA. J. INT'L L. (forthcoming 2022); available at <ssrn.com>.
[15] Bryner, above n 53, at p5.
[16] As Bryner notes, "Andrew Mitchell and James Munro's study in 2019 found 130 countries in the world with at least one investment treaty that contained a non-regression provision with regard to environmental protection". Bryner, above n 53, at 10, citing Andrew D. Mitchell & James Munro, *No Retreat: An Emerging Principle of Non-Regression From Environmental Protections in International Investment Law*, 50 GEO J. INT'L L. 625 (2019).
[17] See Bryner, above n 53, at 17-20.
[18] Art 3(c), Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean [Escazú Agreement], Mar. 4, 2018, *available at* https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf
[19] Above n 52.

1- Decision-makers must not allow or pursue actions that have the net effect of diminishing the protection of the significant and outstanding environmental characteristics and values in the Porirua District.

**D Spatial planning and the requirement to prioritise housing**

73. I agree that a better zoning for the Judgeford area, particularly the Hills and Murphy's Road would be Rural Lifestyle Zone. The properties are already subdivided more in line with a Lifestyle Zone and it has been known since 2012 that the Council intention was to develop this for future housing. This is demonstrated in the JEPS submission where the map shows the smaller lots than your normal Rural zone. (Slide 19 of the presentation)

74. Note has to be taken of the flooding issues on the flats in terms of encouraging further development. This will get worse with climate change, and I suggest that a responsible council should deny intensification here. Lifestyle zoning is compatible with the right housing design and restrictions, even though switching to fully Urban might not be.

75. I was surprised to read in the s 42A Report that one reason for not allowing further development along Murphy's Road was that the road itself needed upgrading for this. It is very common around the country to require a developer to upgrade the road before a development is approved. It's not usually a reason to change the zoning. In rural areas one lane bridges have been required to be upgraded to 2 lanes in order to safely carry additional traffic from residential development.

76. Changing from Rural to Rural Lifestyle Zone will not significantly affect the road use, even though switching to fully Urban would.

77. Housing is more consistent with the existing neighbours – rural lifestyle blocks – and with the National Policy Statement on Urban Development. The proposal makes much of the need for aggregate in the region. However, housing is needed even more. It would be much more in keeping with the existing activities in the area to place housing on this land than a quarry. Aggregate should be sourced further from existing houses. Moreover, housing would entail lower environmental effects.

78. It is exactly the role of this Plan to enable better spatial planning for the future. In that sense, it seems incongruous to be deciding to put quarries and mining activities in an area simply because it has been asked for by one particular landowner. These provisions will apply throughout the District, and what is the best uses of the land should be considered. Failing to consider such 'big picture' matters, such as by deciding on a 'squeaky wheel' principle, has been shown to lead to ad hoc and mismatched land uses. (The development of housing on prime growing land south of Auckland is probably the best example of this.) We definitely need to protect our food

growing land and provide for infrastructure and industry, as well as for housing, all in their own zones so they can peacefully coexist.

79. In this case, I suggest that housing needs to be prioritised in the Judgeford hills (in line with the NPS-UD and the recent urban housing legislation). I also suggest that, for all the other reasons outlined above, a major quarry storing large amounts of flocculants in an earthquake zone upstream of nationally significant wildlife refuge needs to be avoided, and that adds to reasons to prioritise housing in this area.

80. I submit that this is consistent with the hierarchy of planning documents involved. I'm happy to address this in more detail if required, but I assume that you know the planning documents at least as well as I do.

**Appendix 1: Submissions made by JEPS on the current resource consent applications for the Willowbank quarry**

82. The quarry was setup to help with building the Transmission Gully Highway. Porirua City Council granted consent for this specific purpose for a finite timeframe (to end December 2020 at the latest).

83. The application was determined by Porirua City Council to be of limited impact and thus able to be consented; but it was expressly stated more than once that this was because of the short-term duration of the activity, solely for the construction of Transmission Gully. Moreover, the notification status granted was "not-notified": a limited number of nearby residents agreed on the basis that the operation – for Transmission Gully - would be for the greater good of the region, plus it was only for the short-term ending 31 December 2020.

84. The proposed negative effects are *more than minor*, and they are *not outweighed by the limited positive effects*.

**85. The key adverse effects of the existing operation and the proposal to expand and continue it are as follows:**

- Operational noise
- Truck noise and vibration
- Dust
- Vibration
- Road safety: Increased truck movements and risks to road users
- Increased operational hours, with reserved right to cater for additional hours as required
- Increased visual impact from the quarry operation and dust plumes from trucks
- Visual effects of operational vehicles on the site
- Direct effects on property (physical damage)
- Direct effects on the environment, including to freshwater quality, downstream wetlands, potential native flora and fauna losses including of some threatened species
- Specific considerations of the sensitivity and importance of the Pauatahanui Inlet
- General detraction from the amenity values of the area

86. Society members, mainly made up of members of Murphys Road residents have already experienced these effects and believe they will continue to do so if consent is granted.

87. We also note that there is a strong need for more housing in this area, and much stronger than there is for a quarry. There are increased risks from working in a flood and earthquake hazard zone. We argue for better spatial planning in the region.

**Failure by Council to adequately monitor and enforce non-compliance by the operator:**

88. Under the consent, the operator proposes any adverse impacts will be "*appropriately managed through best practice quarry operations, management plans, monitoring and reporting and standard conditions of consent."* Residents have reported numerous breaches of the previous consent to Council and the previous operator. The Council has not responded in a timely manner to complaints about breaches of consent conditions nor undertaken any enforcement in relation to them. It is not appropriate to rely on self-monitoring, and we have previously advised that monitoring always coincides with more peaceful and compliant operations (temporarily). Failure to comply with conditions established in RC7695-LU0123/18 is evidenced in the AEE report provided with the current consent request. Consequently, JEPS has no confidence that the situation will be any different with a new operator. The negative effects on residents are so great that any breaches cannot be tolerated. It is not appropriate to grant such a consent under the conditions proposed without more stringent measures for non-compliance built in. It would be helpful if some enforcement measures could be designed and imposed as conditions, especially ones that were initiated by the public. Eg, it should include allowing evidence from monitoring undertaken by residents that was not reliant on PCC employees nor on notice given to the quarry.

*Rebuttal of the Rationale for continuation*

89. Discussion of the Porirua region supplying aggregate for other neighbouring regions (Wellington, Kapiti etc), fails to account for the closure of extractive industries in those other areas: relevant councils have considered the environmental impacts and health and social impacts upon neighbouring properties too great to justify the limited positive benefits of the supply of aggregate. PCC needs to do the same and prioritise the health and wellbeing of their residents, not just the financial benefits of the quarry.

90. The effects of the temporary quarry to date have been intolerable for many residents and were only endured for 2 reasons: because it was promised to be temporary – finished by Dec 2020 – and for the public good of Transmission Gully.

91. We note that a previous landowner of the site in question had his original, small quarry 'discontinued' due to the more-than-minor adverse effects, both on the natural environment and on amenity values. (*PCC Wharfe Quarry decision*, RC 1586, RC 2221, 27 Nov 2000.) It is unfortunate that the exception that was recently made for Transmission Gully is now being thought of as a precedent for general regional needs for aggregate, none of which are deemed to be of the National Significance that Transmission Gully was.

92. Most importantly, there are other sources of aggregate which are readily available near this new quarry site. This includes a quarry at the Eastern end of SH58. This

negates the argument that this quarry being applied for now has source proximity as a benefit. This new application is simply a case of a landowner trying to profit from externalising the negative effects onto neighbouring landowners and onto the natural environment.

*Issues related to the Rural Zone and Porirua City operative/proposed District Plan*

*Character and amenity values of the General Rural Zone*

93. The Society disagrees that the quarry activity is in keeping with the predominant character and amenity values of the General Rural Zone or of this particular rural lifestyle area. The proposed setback of the activity between the boundary with neighbours is insufficient for a rural lifestyle environment.

94. The neighbours have already suffered disruptive and stressful levels of noise, vibration, dust, and dangerous truck traffic. These levels are inconsistent with any residential use, let alone rural lifestyles. Quarrying is not an agricultural activity but more an industrial one. In some other regions and districts, special zoning and/or quarry rules have been devised. Yet this quarry proposes to increase the amount quarried and thus the negative effects.

95. Many residential suburbs in the PCC area have neighbouring farms. This quarry would not be allowed to be situated in such close proximity to other residential suburbs. There is even less reason to allow it next to rural lifestyle properties that – before the most recent consent – enjoyed less noise, traffic and other pollution than suburbs. There needs to be a much greater set-back from residential areas than is currently proposed.

*Future Urban Zone*

96. The Society notes that the property is zoned Future Urban Zone under the PCC DP. Housing is more consistent with the existing neighbours – rural lifestyle blocks – and with the National Policy Statement on Urban Development. The proposal makes much of the need for aggregate in the region. However, housing is needed even more. It would be much more in keeping with the existing activities in the area to place housing on this land than a quarry. Aggregate should be sourced further from existing houses. Moreover, housing would entail lower environmental effects.

97. It is unfortunate that a consent hearing can only allow or decline this particular activity rather than assist in spatial planning for a site or an area. We suggest that the best way to enable better spatial planning for the future is to deny this consent and encourage more suitable uses for this land to be developed.

98. The proposal fails to recognise Porirua City Council Rural Zone objective 4.2 policy to avoid or reduce the adverse effects of activities on ecosystems and the character of the rural zone

99. The Society disagrees with comments from the applicant in "Response to further information request - Willowbank Quarry resource consent application WGN210381" and in Table 4: Assessment of relevant objectives and policies in the ODP of the Resource Consent application, that this extractive activity will sustain the natural and physical resources either at the quarry site itself or within the surrounding Belmont Regional Park or neighbouring Significant Natural Area, SAL005 Belmont Hills or QEII Trust covenanted bush.

100. Diverting streams, discharge of sediment into the receiving environment, and failure to adequately protect the Lower Pauatahanui Stream is not consistent with:
"(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."

**Deposited Dust**

**101.** "*The area around the quarry is not densely populated, or likely to be especially sensitive to dust except for the nearby dwellings***."**

102. The Society disagrees strongly with this comment. Dust nuisance has already been documented to Porirua City Council, and to the Greater Wellington Regional Council, from residences approx. 1km from the current quarry site. Dust is regularly found over roofs and on windows. While the area is rural and borders many metalled driveways, the amount of material now found on roofs is significant. To date no testing of this material has been undertaken on any property by any authorities, despite the potential impact of harmful chemicals in the dust entering roof and spring water catchments.

103. Dust is likely to become an even greater nuisance given the significant amount of material to be removed prior to creation of bunds from the quarry overburden.

104. If consent is granted, Fulton Hogan should be required to wash external surfaces of all neighbouring properties yearly and regularly test water supplies for safety (some of which are direct from the spring fed near the quarry and others are self-contained roof top tank supply).

105. Fails to implement: C9 Landscape and Ecology 9.1 and 9.1.5 To protect the visual and ecological character of the Rural Zone and to manage in a sustainable manner the
landscape and ecological systems within Porirua City.

**Visual Catchment and Viewing Audiences**

106. The Society does not accept that the proposed quarry site has a low visual catchment. Of concern is the detrimental effect on key locations, including residential properties and vehicles travelling along SH58, The Judgeford Golf Club, and residential properties and vehicles or pedestrians travelling along Harris Road and Murphys Road. The impact of the site on aspects of the Belmont Regional Park has not been subject to photographic evidence so it is unclear whether some, most or any of the walking track will now view an operating quarry.

**Perceptual/Sensory Effects from the Increase in Daytime Truck Movements**

107. The Society is concerned with the proposed frequency and timing of the quarry traffic (one movement every 80 seconds) and the interruption to the low light rural night-time environment – the combination of which will detrimentally alter the character of this rural area. The noise and vibration from the truck movements have been intolerable for the residents near to the road, and inconsistent with rural character for those away from the road. Truck movements like that are not like normal farm or rural operations, where - for example - stock, milk or produce trucks come only intermittently or seasonally; what is proposed is more like an industrial freight yard of continual traffic.

*108.* Fails to implement: C11 Noise Policy - to minimise the adverse effect of noise on the environment.

**Noise and Vibration Effects**

*109. "Noise effects generated from the proposal will be able to comply with recognised standards and therefore will be minor and manageable"*

110. The Society disagrees that the proposal, including the modelling of proposed mitigations, will ensure that noise nuisance will meet the District Plan limits for the rural zone for residents who are the closest sensitive receivers. The Society's response to RC7695 - LU0055/20 should be read in conjunction with this. It is attached for your reference.

111. The expected noise and movement from the proposed activities are simply inconsistent with the residential life that is nearby and that was there before the quarry. Previous quarry noise levels interfered with dinner times and forced some residents to stay indoors at the side of their house that is furthest from the quarry simply to minimise the noise suffered. This is unacceptable and shouldn't have to be endured; great care needs to be made to ensure that activities are not approved that will make residents suffer, even if unexpected and not forecast by the modelling. If the applicant's modelling is wrong, it should not be the residents who suffer. But if an application is approved and investment is made, it is very hard to change an operation to fix and breaches; it is much easier and safer to be precautionary at the beginning and ensure that such breaches are not made in the first place.

112. *If consent is granted*, it is essential that braking and vehicle specifications which have previously been required from HEB CPB must be met and further that the crushing, blasting and loading activities which affects the most sensitive receivers closest to the quarry should be protected by limiting this activity to before 5pm at night (on any day of the week) to ensure residents' protection from excessive noise exposure and consequent stressors on mental and emotional health. Further we request that given the long-term duration of the consent request, that the operational hours of the quarry be clearly limited to five days per week and that the applicant should not receive any expectation that activity would be permissible after 6pm to "cater for the needs of local projects".

**Vibration and consequent property damage**

113. The Society's response to RC7695 - LU0055/20 should be read in conjunction with this. We disagree with the stated vibration levels, including the process by which this information has been gathered by the previous operator, and the stated potential impact upon properties. These concerns have previously been reported to insurers, Porirua City Council and the Greater Wellington Regional Council. All to no avail.

**Traffic**

114. Fails to ensure C07: Transport objectives are met: To ensure that the adverse effects of land use and development on the efficiency and safety of the transportation network are taken into account, and any intersection or frontage conflicts are avoided or minimised or remedied as appropriate.

115. The Society's response to RC7695 - LU0055/20 should be read in conjunction with this. Granting the request would appear to breach Transport Policy C7.1.2.

116. In summary, we agree with the Council's s95 Notification Decision Report (by Karen Williams, Consultant Planner) that the likely traffic effects will be more than minor – and we say that they will be *much* more than minor. While this report was commissioned in respect of the 5-year consent, the 35-year application is no better.

117. We disagree with the report commissioned by the applicant from Mr Tim Kelly which concludes that the intersection with SH58 will continue to operate safely, with minimal impacts upon the safe and efficient operation of this section of SH58. We have particular concerns for the safety of the travelling public should SH58 be returned to 80kph speed limit. We note that the consultant planner also disagreed with Mr Kelly's assessment. It is stated:

118. " This level of uncertainty [about road design and adding a deceleration lane] leads Mr Rowe to conclude that effects on public safety have not been demonstrated as being adequately mitigated, remedied, or avoided. I accept the advice of Mr Rowe."

*119.* If consent is granted it is essential that acceleration and deceleration lanes are installed. It is also essential to ensure the SH58 speed limits are maintained at 50km/h until all safety improvements required for safe entry/exit of all vehicles onto SH58 in the area can be assured. Given the high level of non-compliance of vehicles travelling at the temporary speed of 50km/h, the effects will be considerably more than minor, such that *this activity should not be approved.*

120. This consent needs to be declined as public safety cannot be guaranteed.

## Appendix 2: The Precautionary principle or approach

In the submission I mention the need for precaution a few times, so I thought it helpful to provide this background information that has been helpful in other contexts. Please disregard it if this is not helpful to your tasks.

*What is a precautionary approach (or principle)*

1 The traditional approach to environmental regulation provides that action to protect the environment from the adverse effects of an activity is only justified when those opposing the activity prove that the activity *will* cause damage (typically on the balance of probabilities). It has been based on three beliefs about our world and decision-making:

a. views of assimilative capacity or resilience of the receiving environment;

b. a belief in sufficiency of scientific information to prevent humans overstepping environmental limits; and

c. that regulators can utilise a. and b. to permit the right activities to operate within ecosystemic limits.

2 A precautionary approach addresses those three traditional assumptions:

a. information about the existence or the extent of a risk to the environment may not exist; notably, proof of cause-and-effect relationships between activities and environmental damage may not exist;

b. ecosystems may be more vulnerable than we thought; and

c. decision-makers may still need to take decisions early to prevent such risks eventuating.

> "Put simply, the principle can be understood as the expression of a philosophy of anticipated action, not requiring that the entire corpus of scientific proof be collated in order for a public authority to be able to adopt a preventive measure."[20]

3 This basic element been noted by the NZ Supreme Court:[21]

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[20] A Jordan & T O'Riordan "The precautionary principle: a legal and policy history" in Marco Martuzzi and Joel Tickner (eds) *The Precautionary Principle: Protecting Public Health, the Environment and the Future of our Children* (World Health Organisation Europe, ISBN 92 890 1098 3, 2004), at 42. D Freestone and E Hey, "Origins and Development of the Precautionary Principle" in D Freestone and E Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer International, Hague, 1996) at 13.

[21] *Sustain Our Sounds v King Salmon* [2014] NZSC 40 at note 208, citing the IUCN Guidelines: International Union for Conservation of Nature "Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management" (as approved by the 67th meeting of the IUCN Council 14-16 May 2007).

"[a]n element common to the various formulations of the Precautionary Principle is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat".

4 Further:[22]

> As has been said in the commentary, "At its most basic, environmental precaution involves the idea that it is better to be safe than sorry when the effects of activities are uncertain."

5 Notably:[23]

> "rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment".

6 The strength of the precautionary principle varies depending on its wording and context, including the subject matter that it is being applied to. The different elements include:

a. The threshold of threat of harm – whether significant and/or irreversible adverse effects might result;

b. The amount of evidence needed to show that there is a risk: it is less – ie more cautious – for activities in more sensitive environments;

c. The type of action that must be taken to address the risk and to favour caution;

d. The more uncertain the threat is, the more cautious we must be in our action taken. Eg, in the consenting context:

(i) *at the strong end of the response spectrum*, where the potential harm may be high and/or the lack of knowledge about the nature and potential of the risk is also high, a decision-maker should decline an activity;[24]

(ii) *at the mid-point of the response spectrum*, where there is moderate harm and uncertainty, and even where there is high harm and moderate uncertainty, conditions could be imposed that require certain effects to be avoided (and if they cannot be avoided then the activity is not allowed);

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[22] *Trans-Tasman Resources Ltd* [2021] NZSC 127, at [107], citing C Iorns and G Severinsen, "Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone" (2015) 13 NZJPIL 201, at 201.

[23] *Trans-Tasman Resources Ltd*, at [109], citing *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [109], n 208.

[24] See, e,g, *Sustain Our Sounds v King Salmon* [2014] NZSC 40 at [111]:

> "It is recognised that the precautionary principle may require prohibition of activities. This may be the case, for example, where urgent measures are needed to avert imminent potential threats, where the potential damage is likely to be irreversible and where particularly vulnerable species or ecosystems are concerned."

(iii) *at the low end*, where the potential harm is low to medium and the associated uncertainty is low but still persistent, then conditions to avoid and/or mitigate (if avoidance is not possible), and measures capable of overcoming lover levels of uncertainty, such as adaptive management, may be appropriate.[25]

e. Harm minimisation: all harm must be minimised as much as possible rather than seeking to identify levels of tolerable environmental insult.

7 In the current context of protecting the Wildlife refuge and the Inlet, the scientific information is low; there is even insufficient information about effects of changes of climate change to the reserve and its flora and fauna. But if toxin-lade sediment or waters found their wat into the reserve, damage would be certain. It is a 'textbook' situation for application of a strong precautionary approach to decision-making over such significant damage to the reserve and its contributing waters.

*The second part: reducing scientific uncertainty*

8 The second part of the precautionary principle is that attempts must be undertaken to resolve the scientific uncertainty. Precaution is only necessary because of uncertainty. In at least in the context of potentially approving activities with an uncertain environmental effect, the ultimate goal is to reduce the uncertainty so that we better understand the cause and effect of the activity on its receiving environment. The goal is that the need for application of a precautionary approach (or principle) is only temporary, while the uncertainty is reduced and hopefully eventually removed. Thus any decisions taken using the precautionary principle should be constantly revised in line with the best available environmental science.[26]

9 This is where adaptive management fits in as part of the precautionary principle: an activity may be partially approved while information is gathered about its effects.

10 But it doesn't only apply to adaptive management. An activity might be refused (at the strong end of the response spectrum, discussed above) and monitoring ordered instead, in order to gather more information about the receiving environment, for example. A good illustration in the RMA context is a proposal for marine farming structures in King Shag habitat in Admiralty Bay. The application was effectively put on hold for a few years while the applicant gathered more environmental information.[27]

11 Monitoring is the most common precautionary requirement imposed in situations of uncertainty.

*Precaution and the RMA*

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[25] See, e,g *Sustain Our Sounds v King Salmon* [2014] NZSC 40 at [110], citing the IUCN Guidelines: International Union for Conservation of Nature "Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management" (as approved by the 67th meeting of the IUCN Council 14-16 May 2007).
[26] A Gillespie, "Precautionary New Zealand", 24 NZULR 364 (2011), at 366.
[27] *Friends of Nelson Haven and Tasman Bay v Marlborough DC* [2016] NZEnvC 151.

12 There is no explicit statement of the precautionary approach in the RMA because "the RMA was enacted before the principle came to the fore in New Zealand's environmental thinking ".[28] However, courts have been prepared to read in a precautionary approach as inherent in the mechanics of the RMA: for example, in the definition of a potential effect in s 3(f), in the ability to place weight on policies emphasising the avoidance of effects, and by having regard to policies (such as the NZCPS) that themselves refer to the need for precaution.[29]

13 In the consenting context, it has been applied in three key ways:[30]

a. Lowering the standard of proof when proving or disproving the existence of future effects;[31]

b. Switching the evidential burden of proof to prove or disprove the existence of potential effects;[32]

c. Accepting a separate precautionary principle as a valid matter that can be considered in a decision-maker's discretion.[33]

14 Some courts have seen precaution as inherent in the RMA itself, such that it is not necessary – and even unhelpful – to refer to a separate, non-statutory formulation of a precautionary principle.[34] Others have recognised that it is possible to refer to a separate precautionary principle derived from general environmental law, by treating it as "any other matter … relevant and reasonably necessary to determine the application".[35]

15 However, whichever legal basis is taken, precaution has been able to be exercised in RMA decision-making to date.

16 It is noted that some national planning instruments made pursuant to the RMA contain statements of the precautionary principle. Most notable is the NZCPS: Policy 3 of the

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[28] C Iorns and G Severinsen, "Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone" (2015) 13 NZJPIL 201, at 210. Available at: https://ssrn.com/abstract=2724883

[29] See, eg, *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [223]; *Friends of Nelson Haven and Tasman Bay v Marlborough DC* (W36/2006), at [18]. Some have also chosen to see a precautionary principle in the planning context in s 32 RMA.

[30] See, eg, Greg Severinsen 'To Prove or not to Prove? Precaution, the Burden of Proof and Discretionary Judgment under the *Resource Management Act*' (2014) 13 *Otago Law Review* 351.

[31] See, eg, Greg Severinsen 'Letting our Standards Slip? Precaution and the Standard of Proof under the *Resource Management Act 1991*' (2014) 18 *New Zealand Journal of Environmental Law* 173.

[32] See, eg, Greg Severinsen 'Bearing the Weight of the World: Precaution and the Burden of Proof under the *Resource Management Act*' (2014) 26 *New Zealand Universities Law Review* 375.

[33] *See, eg, McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, 104; *Aquamarine Ltd v Southland Regional Council* [1997] EnvC Christchurch C126/97 (15 December 1997) 147; *JW Paterson & Sons Ltd v Bay of Plenty Regional Council* [2000] EnvC Auckland A135/2000 (27 November 2000) [84]–[85]; *Rotorua Bore Users Assoc Inc v Bay of Plenty Regional Council* [1998] EnvC Auckland A138/98 (27 November 1998) 51; *Golden Bay Marine Farmers v Tasman District Council* [2001] EnvC Christchurch W42/2001 (27 April 2001) [418].

[34] See, eg, *Shirley*, above n 10, at [134]–[135]; and *Re Meridian Energy* [2013] NZEnvC 59 at [57]–[58]. *Pierau v Auckland Council* [2017] NZEnvC 090 at [240].

[35] S 104. See, eg, the cases above n 14 (following *McIntyre*).

Coastal Policy Statement requires a precautionary approach to managing activities in the coastal environment when the effects of those activities are uncertain but potentially significantly adverse.[36] Moreover, some planning documents contain such statements. Courts have thus considered and applied the precaution principle to many situations.

17 In relation to the second element of the principle - of monitoring and reducing uncertainty - adaptive management addresses this and is a well-developed aspect of the precautionary approach under the RMA.[37]

*Precautionary Approach vs Principle*

18 NZ courts have differed over whether it should be called a precautionary approach or a principle, and whether there is any significant difference between them.

19 As the NZCPS refers to the precautionary approach, the courts most commonly simply refer to the "approach". But they differ on whether the principle is different and whether that refers to the general environmental law version. For example, the Environment Court in *Pierau v Auckland Council* said: "The taking of a precautionary approach in RMA application cases is not to be confused with a general precautionary principle found in environmental law."[38] In contrast, the Environment Court in *Friends of Nelson Haven and Tasman Bay v Marlborough DC* considered that the *approach* referred to the international law "as per the Rio Declaration of 1992"; this was "not helpful in the New Zealand context".[39] Instead, "The *precautionary principle*, as developed in New Zealand case law, has a different emphasis" and is applicable as such.[40]

20 Both cases adopted the same attitude toward the application of precaution in the RMA - that precaution was inherent and there was no need for additional consideration of the general environmental law version; but they both gave different names for each version.

21 Other cases use the terms interchangeably: in *Sustain Our Sounds* the Supreme Court used 'approach' and 'principle' interchangeably. This is notable both for being the highest court and as it was a case that discussed the concept in detail.[41]

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[36] NZCPS Policy 3:

(1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

(2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:

(a) avoidable social and economic loss and harm to communities does not occur;

(b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and

(c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

[37] The best authority on adaptive management is the Supreme Court's decision in *Sustain Our Sounds v King Salmon* [2014] NZSC 40.

[38] [2017] NZEnvC 090 at [240].

[39] [2016] NZEnvC 151, at [21].

[40] At [22]. Emphasis in original.

[41] See, eg, the NZ Supreme Court in *Sustain Our Sounds*, above n 2, at [107]-[112].

22 It is noted that the use of the two terms – 'approach' and 'principle' – arose for political reasons in the development of international environmental law. Some state parties negotiating international environmental instruments considered that referring to precaution as a principle made it sound too prescriptive, and they preferred a softer 'approach'. This difference reflects the Dworkin approach distinguishing between principles and rules, where there is a continuum of obligation. On this continuum, approach is seen as less prescriptive, a principle more so, and a rule mandatorily "applicable in all-or-nothing fashion".[42]

23 In these non-RMA contexts, 'approach' is thus used to indicate the adoption of a weaker and less environmentally protective precautionary approach, whereas 'principle' is used to indicate the adoption of a stronger and more environmentally protective one.

24 It is for this reason that Principle 15 of the 1992 Rio Declaration on Environment and Development - which is the most frequently-cited statement of the precautionary principle - itself refers to the approach:

> "In order to protect the Environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

25 In other words, in order to get agreement between states, the most political acceptable option - lowest common denominator - was chosen, which referred 'only' to an approach rather than a principle or rule. But the content of Principle 15 is what many refer to - and some courts apply when referring to – as 'the precautionary principle'.

26 It is submitted that there is not enough of a difference in the content to matter whether we talk about the precautionary principle or approach, and that NZ courts can apply (and have applied) the same content whatever its label.

27 It is submitted that the biggest difference in application arises because of the different facts of the situations it is applied to; this difference is thus driven by the context, not its label.

[42] Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25-26 (1967).

APPENDIX 3: Letter from JEPS to Wendy Walker, PCC (1 Feb 2021, via email)

JEPS

Judgeford Environmental Protection Society

233B Murphys Road
Judgeford
PORIRUA 5318
information@jeps.org.nz

Wendy Walker
Wendy.Walker@poriruacity.govt.nz

1 February 2021

Dear Wendy

As you are aware, the Society (and other concerned members of the community) have previously raised concerns about the Willowbank Quarry operation with the Porirua City Council, including directly with you, through various mechanisms.[1]

Our concerns relate to Council (planning and consenting departments) decisions to grant a resource consent to recommission Willowbank Quarry (for the completion of Transmission Gully), as well as concerns about the new application currently sitting with Council (since 29 June 2020).

Broadly, the concerns fall in four areas:

1. The decisions and omissions of the planning and consenting departments in considering whether to grant the initial (temporary) resource consent to Willowbank Trustee Limited;
2. The subsequent decisions and omissions of the planning and consenting departments in considering the variation to that consent (in 1 above) to allow for night-works operations;
3. The failure to process the new application made by Fulton Hogan and Willowbank Trustee Limited and received by the Porirua City Council on 29 June 2020 in a timely manner;
4. The proposal outlined in the proposed district plan to rezone land in Judgeford (to future industrial) and enable mining in the district plan without any mining / extraction policy in place or due consideration as to the impacts on the residents.

[1] Including at public meetings that you have attended, meetings with Council representatives at Council premises, emails, phone calls and legal correspondence.

**Issue 1 - The decisions and omissions of the planning and consenting departments of PCC in considering whether to grant a resource consent to Willowbank Trustee Limited**

We note the resource consent ref: RC7695-LU0123/18, was granted 28 November 2018. This consent was to expire 31 December 2020 (or upon the opening of Transmission Gully, whichever is earlier).

The trustee of Willowbank has made a new application (29 June 2020), essentially by lodging the same information as in the first application submitted and approved in 2018, and because of timeframes met in lodging the second application, can continue operations post the 31 December 2020 expiry date (due to section 124 RMA).

Specific concerns with the decisions and omissions pertaining to the original consent granted by the planning and consenting departments include:

*The AEE provided by the applicant did not accurately identify affects, was inadequate and incomplete*

The Society has noted previously that the Quarry operation has accumulative adverse effects which residents consider are more than minor. In particular, residents have experienced significant effects including blast and noise.

In terms of blasting effects, Council and the operator are aware of the property damage that has resulted from blast events. The Council (and operator) have previously advised residents (for example at a residents meeting at Judgeford Golf Course that we arranged, and you attended), that residents must go to their insurers in relation to this damage.

We note that Council is aware that in the second half of 2020 the Quarry operator has made changes to its blasting practices, as well as staff management changes (concerning explosives). Since this change in practice the operator has carried out more frequent blasting, as this has been necessary to obtain the rock (as blasts have been reduced).

This change to blasting practice does not change the fact that property has already been damaged and residents are still waiting to have property damage remedied. We are aware that at least one "hold liable" letter has been issued to the operators by an insurer, and the current operator is noting it is not liable as it is operating within Council consented perimeters. Residents with property damage are in a "no man's land" with current damage and future insurance cover is unclear. This is entirely unacceptable.

*Specific questions we have include:*

- What remedies will be available to residents for past and future blast damage to property caused by a Council consented activity?
- Will Council become an insurer of last resort for residents living within the Quarry buffer zone who are unable to obtain coverage for blast damage?

In terms of noise, the standards applied by the Council are discretionary (consistent with the District Plan). However, the Council is aware that residents have found the noise unacceptable and it has created undue stress. Particularly daytime noise from the crusher and trucking noise.

The Society submits that the decision to recommission the quarry appears to be based on claims in the AEE provided by the applicant operator that are counter intuitive and contrary to the history of the operation and are not correct. Specifically, it was incorrect to state in the AEE that the main effects of the operation are visual and that effects in relation to affected properties are less than minor, and effects on the environment are less than minor. We assert that these claims should have been challenged by the Council.

*Specific questions we have include:*

- What did the Council (consenting team) do to ensure that the affects were appropriately identified and tested?
- Given the history of the quarry why did the Council accept the claim that the effects were mainly visual, and that effects in relation to affected properties are less than minor and effects on the environment are less than minor?
- What actions did Council take to confirm that the effects were mainly visual?

*The consenting department did not ensure that the applicant correctly identified and consulted with all affected parties*

There are a number of established properties in the immediate vicinity of the Quarry, including those that border the Quarry. Council is aware these people are now living in what is considered (by those in the aggregates and quarry industry), to be a buffer zone (less than 500 m from a rock Quarry).

Yet, a number of residents were not identified as affected parties (re the 2018 consent). One example is 233B Murphys road, but there are other properties, including those that were being consented by Council (for building) at the time the Quarry was being recommissioned (for example 303 Murphys road). We note properties that had previously given evidence in Court in respect of the Quarry were not considered affected by the Council in this consent process.

The Society notes that it is a fact that only a select few residents were identified as affected (such as an employee of the Quarry operator). Some affected parties received undisclosed compensation for their signatures, while other residents were not even consulted. This demonstrates a lack of duty of care.

*Specific questions we have include:*

- Given the history of the Quarry operation, why was the 2018 consent not publicly notified?
- What actions did the Council take to ensure all affected parties were identified and consulted?
- Why were some properties - bordering the Quarry and track - missed from the list of affected properties specifically 303 and 233B Murphys road?

*Failure to publicly notify the consent application*

The consenting department should have publicly notified the 2018 application because the effects on the environment from granting the consent applied for were more than minor.

Further the Council was aware at the time of making a decision to not notify, that the Trustee was intending to operate beyond the “temporary” consent period stated in the application, and this was never disclosed to residents, including the few who were consulted and provided consent.

Those that provided consent were informed that the Quarry was time-bound and would cease at the completion of Transmission Gully or 31 December 2020, whichever is earliest.

The Society has previously requested that the Council publicly notify the new application.

*Questions*

- Will the Council publicly notify the application? If not, why?

*Failure to disclose longer term intention to recommission the Quarry operation*

The Trustee of the Quarry owner has publicly stated at a meeting in late 2020, attended by Council, that it was known to the Council at the time of the application being made, that the intention was to recommission the Quarry longer term, beyond Transmission Gully. This statement has recently also been published and this has not been disputed by Council.

Based on this longer-term intention alone, the application should have been publicly notified.

The consenting department had a duty of care to ensure that the residents of the area were adequately consulted and were fully aware of all material information – including that the operation was intended to be long-term.

*Specific questions we have include:*

- When did the Council become aware that there was an intention to recommission the Quarry longer term, beyond Transmission Gully? Specifically, whether Council had been advised by the applicant (as they have subsequently stated in the media) or they were aware from publicly available documents that there was a likelihood of continuation of the quarry activity when they permitted a not notified status on the current resource consent on the basis that it would be a temporary activity?

*Failure to adequately monitor and enforce non-compliance by the operator*

Under the consent, the operator is required to self-monitor. Residents have reported numerous breaches. The Council has not responded appropriately to numerous complaints about breaches of consent conditions. It is not appropriate to rely on self-monitoring and we have previously advised that monitoring always coincides with more peaceful operations.

*Specific questions we have include:*

- How many consent breaches has Council been notified of since the 2018 consent was issued?
- How many penalties have been imposed since the consent was issued?

**Issue 2 - Specific concerns with decisions and omissions pertaining to the amended consent to include night works include:**

As you know, a trial of night works was carried out in early 2020, this trial led to complaints to both Council and the operator from residents of sleep disruption. The effects of the night trial, reported to the Council and operator, indicated affects were significant and extended beyond those identified as initially affected (by the mainly visual effects noted in the AEE).

In approving the new night works consent (8pm – 6am six days a week), the consent department did not consider new affects or new affected parties. These people were advised by the quarry operator (not Council) that night works would commence and be ongoing until 31 December 2020.

As with the day operations, Council has failed to adequately monitor and enforce activities of the operator adequately for night works. The night work operation was a completely inappropriate activity and incompatible with the expectation of living in a rural zone.

*Specific questions we have include:*

- Why actions did the Council take to identify who might be impacted by the night operations?

- What factors did Council consider in deciding to vary the consent / what consideration did the Council give to the operative district plan in agreeing to vary the consent and allow for night works?

**Issue 3 - Undue delays in processing the new application made by Fulton Hogan and Willowbank Trustee Limited, specific concerns include:**

On 29 June 2020 Council received a new consent application (from Willowbank and Fulton Hogan). The consenting department has failed to process this new application in a timely way and has instead waived the time limits pursuant to sections 37 and 37A of the RMA.

The Society has noted previously to the Council (via legal advice) that Council must consider its duty to avoid unreasonable delay and must take into account the interests of any person who, in its opinion, maybe directly affected by the extension or waiver.

In this instance the Society, its members and other affected persons will be directly and adversely affected by any substantial delays in the processing of the application.

That is because any processing delays will necessarily delay the decision and extend the period of time within which the Applicant can continue to operate the quarry under its section 124 rights.

If consent is declined, then every month of delay will mean another month of the operation of the quarry beyond the expiry date of the current consents.

If consent is granted, any delay in decision making would extend the commencement date and therefore the expiry date of the consent.

This delay is clearly to the applicants advantage and the local community's disadvantage.

It is now 6 months since the further information request (from Council to applicant) was made. Only information which is required prior to notification is information which is necessary for the notification decision. Other information can be requested post notification.

We note Council has advised it has given the applicant until 26 Feb 2021 to complete the application. It is excessive and inappropriate that the Council has afforded the applicant such as substantive period of time to complete their application.

The Society submits the Council should be required to appoint independent commissioners at any future environment court hearing given its interest in securing quarry materials for roading and other work and the contentious nature of this proposal.

*Specific questions we have include:*

- Why has Council agreed to such as significant timeframe for the applicant to complete their application?

**Issue 4 - Decisions of the Porirua City Council pertaining to including in the proposed District plan including provision for:**

Noting the above interest that the Council has in securing quarry material, the Society is concerned that the planning department has proposed to include in the updated district plan:

- SUB-O4 FUZ-01 Purpose of the Future Urban Zone - The Judgeford Flats area of the Future Urban Zone will help meet the City's identified medium to long-term industrial land use needs.

- CEI-O8 Future Industrial Zone - Recognise that the intended use of the Northern Growth Area and Judgeford Hills is primarily for residential purposes, while Judgeford Flats is primarily for industrial purposes.
- GRUZ -P5 Quarrying activities and mining activity

In terms of the proposed rezoning, it would seem the only reasonable rationale is to provide for industrial use is to support the Willowbank Farm quarry becoming a more permanent fixture, there would appear to be no other reasonable reason for providing for industrial zoning as proposed. This suggests that, despite requesting further information from Fulton Hogan (for the proposed consent), the Council has pre-determined approving their consent to extend the life of Willowbank Farm quarry for potentially 35 years (that Fulton Hogan has publicly stated it will apply for, at a meeting attended by Council), this would be entirely inappropriate.

As noted above, the plan also proposes enabling new mining activities in the general rural zone. It is unclear from the consultation documentation how the planning department envisages the proposed new mining activity is consistent with the objectives of the District Plan.

As stated in our submission, the consultation documentation did not provide sufficient information to enable submitters to understand the expected impacts e.g. environmental, social or financial impacts of the proposal on the community. Therefore, we do not see how people, other than those who have existing knowledge or experience of the current mining activity, could be expected to make an informed submission.

From the document it is not possible to understand how the Council has arrived at the proposals for mining activities to be categorised as restricted discretionary and not categorised in some other way, such as prohibited.

In summary, the Council has failed to:

- Provide protective measures in the operative District Plan so that large scale quarry activities are not able to be carried out so close to established dwellings
- Ensure that the revised District Plan contains objectives, policies, and methods to control the effects of quarrying

*Council has failed to ensure that there is a mining and extraction policy that will provide transparency and accountability in Council decision making in future*

As we stated in our submission on the proposed District Plan and in our 18 November 2020 letter to you, most if not all Councils around New Zealand have a policy on mining that helps those affected understand how the activity fits within the Plan.

The approach proposed in the proposed District Plan to amend the plan to explicitly enable new mining activities in the general rural zone sees the activity drive the objectives of the Plan rather than the objectives of the plan driving the types of activities that are allowed and how they should be conducted.

In our letter of 18 November 2020 the Society asked you to urgently develop a mining and extraction policy, a halt on proposed amendments to the district plan to allow mining in the general rural zone until a clear mining and extraction policy is developed and offering to work with the Council on the development of a policy.

We note the Society received a response from you on 4 December essentially stating that this is not necessary. You said:

*The Resource Management Act 1991 (RMA) provides the framework for managing land use activities, including quarrying and mining. This is implemented through the District Plan which is a policy document that deals with mining and quarrying activities on an effects basis. The District Plan must include objectives, policies and rules. The rules set out whether activities require resource consent, and if required these are assessed against the objectives and policies of the plan.*

*The Proposed Porirua District Plan (PDP) contains rules, policies and objectives relating to quarrying and mining activities, and is therefore the policy document that guides decision making on resource consents for quarrying and mining activities once it becomes operative. The PDP determines mining and quarrying within the General Rural Zone to be a restricted discretionary activity and therefore would require resource consent, and would be assessed against the relevant policies. As such, there is no requirement or need for a separate policy document addressing quarrying and mining activities.*

As noted above Fulton Hogan are considering a 35-year application, in their words: **limited only by the timeframes in the district plan – that is operating hours Monday – Sunday, 6am – 10 pm of 60 trucks an hour.** Residents raised concerns about this with you and Council staff at a meeting at Judgeford Golf Course in 2020.

Given the property damage and noise impacts residents have been living with raised with you and discussed above, the Society urges you to reconsider this position that Mining should be a discretionary activity. This activity should be prohibited where people are residing

The fact that we have property damage (confirmed by engineers to most likely be caused from quarry blasting) should cause you to reconsider your position. Neither the operative nor proposed plan provide sufficient protection to Porirua residents from such activities.

The failure to have a specific policy on mining, or further protection in the proposed plan (as indicated in the reply the Society has received), indicates a lack of duty of care to ratepayers by a Council that has a conflict of interest in obtaining rock material.

*Specific questions we have include:*

- Given the significant concerns and impacts raised by residents, such as property damage from blasting, noted in (1) above, why will the Council not prohibit largescale mining in Judgeford or within 500m of dwellings?
- Why will the Council not take the opportunity to work with residents on a mining and extraction policy?
- What reassurance will Council give to ensure that residents are protected / adequately mitigated from property damage and amenity impacts from future Council consented Quarry operations? For example, will pre operation dilapidation reports be done?

Please note that we have copied Stewart McKenzie as you have asked us to direct further questions to him.

Yours sincerely

**Judgeford Environmental Protection Society**

Cc: Stewart McKenzie Stewart.McKenzie@poriruacity.govt.nz