

**BEFORE THE TARANAKI REGIONAL COUNCIL AND NEW PLYMOUTH
DISTRICT COUNCIL**

MT MESSENGER BYPASS PROJECT

In the matter of the Resource Management Act 1991

and

In the matter of applications for resource consents, and a notice of requirement by the NZ Transport Agency for an alteration to the State Highway 3 designation in the New Plymouth District Plan, to carry out the Mt Messenger Bypass Project

**CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE NZ TRANSPORT
AGENCY**

30 October 2018

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PART A INTRODUCTION

1. The Transport Agency acknowledges Ngāti Tama, across whose lands the Project traverses. Ngāti Tama has provided guidance to the Project team since the start of the Project, and their ongoing support is key to the delivery and ongoing success of the Project.
2. On 14 December 2017 the NZ Transport Agency lodged a notice of requirement ("**NoR**") to vary and existing designation and resource consent applications to enable the construction of the Mt Messenger Bypass Project (the "**Project**").
3. A high level Project description is set out in opening submissions dated 31 July 2018. The opening submissions also set out in detail the Transport Agency's position on the applications. To the extent possible, these closing submissions rely on and refer back to (rather than repeat) those opening submissions and update them in light of the hearing.
4. The Commissioner has now had the opportunity to hear and consider the legal submissions from the parties, expert and other evidence, and representations. The Transport Agency again acknowledges the issues raised by those persons who have made submissions and representations.
5. The key questions for the Commissioner to consider are:
 - (a) What are the benefits of the Project and how significant are they?
 - (b) What are the adverse effects of the project and have they been appropriately avoided, remedied, mitigated, offset and compensated?
 - (c) Given (a) and (b) above, is the Project consistent with the relevant planning documents and Part 2 of the RMA such that the requirement can be confirmed and resource consents granted?
6. These submissions address the following matters:
 - (a) Part A: Introduction;
 - (b) Part B: The significant transport and related benefits that would be realised through the Project;
 - (c) Part C: Effects on the environment;
 - (d) Part D: Other outstanding legal and statutory matters;
 - (e) Part E: Conditions and management plans; and
 - (f) Part F: Planning framework, Part 2 of the RMA and overall conclusions.

PART B PROJECT BENEFITS

7. The Project has a range of significant benefits listed in opening submissions, the evidence presented on behalf of the Transport Agency, and the submissions below.

Transport

8. SH3 is a strategically important route, both at a regional and national level. It connects the Taranaki region through to the Waikato region, and provides connectivity to key social, economic and transportation hubs in Hamilton, Tauranga and Auckland.
9. Accordingly, the route is essential to enabling people and communities of Taranaki to provide for their social, economic, and cultural wellbeing.¹
10. The current section of SH3 over Mt Messenger, and more broadly the Awakino Gorge to Mt Messenger section (as summarised in opening submissions), is inadequate and not in keeping with its strategic importance.
11. The highway over Mt Messenger has its origins in the late 19th century.² While there have been various improvements to the route carried out over the last century, those improvements have not addressed the fundamental issues of this section of SH3. The current route has significant constraints and deficiencies that affect its safety, reliability and resilience, including:³
- (a) steep grades;
 - (b) a tortuous, winding alignment;
 - (c) restricted forward visibility;
 - (d) a narrow tunnel at the summit; and
 - (e) vulnerability to interrupted service because of natural and traffic related incidents such as breakdowns, crashes, landslips, and rockfalls.
12. The poor quality of the existing SH3 has led to investigations and improvements of the corridor over Mt Messenger since the 1970s.
13. The Project will address the issues with the Mt Messenger section of SH3 identified above, in order to provide a modern, fit for purpose highway (with a 100km/h design speed).
14. The positive transport effects are set out in detail in the evidence of Mr McCombs, and include:⁴

¹ As explained in the EIC of Mr Peter McCombs, Mr Michael Copeland, and Ms Wendy Turvey.

² See Dr Rod Clough's EIC at paragraph 28.

³ See the EIC of Mr McCombs.

⁴ Mr McCombs EIC at paragraphs 117 – 144.

- (a) **Safety:** Fundamental improvements in road geometry forward visibility and sight distances, providing an increased safety rating from '2 Star' to '3 Star'. The Project alignment will reduce driver frustration and be significantly safer than the existing alignment.
 - (b) **Resilience:** The Project will improve along the route, both in terms of susceptibility to closures arising from breakdowns and crashes, and susceptibility to natural hazards including in particular slips and landslides.
 - (c) **Journey-time reliability:** with no other appropriate routes without significant detours, the Project will greatly improve journey-time reliability for users of SH3.
 - (d) **Journey times⁵:** The Project will reduce the average one-way journey time, saving of 4.1 minutes for light vehicles, and 6.5 minutes for heavy vehicles. Over-dimension loads will be able to use the new route, and along SH3, as opposed to the significantly longer journey via Whanganui, saving 3 hours 45 minutes.⁵
 - (e) **Alternative modes:** The Project improves safety and quality of conditions for cyclists and any pedestrians.
 - (f) **Environmental:** The Project reduces CO2 emissions and vehicle operating costs (due to the improved geometry, shorter distance, reduced gradients and a lower climb).
15. These benefits were emphasised in the submissions in support of the Project and especially through the representations during the hearing by Mr Cloke, Mr Hickman and Mr Rogers.⁶

Other benefits

16. These traffic and transport effects will in turn bring significant:
- (a) economic benefits as explained in the evidence of Mr Copeland, including:
 - (i) the connection SH3 provides for Taranaki businesses, including those in the key agricultural, oil and gas, heavy engineering, and forestry sectors, to points north including Hamilton, Tauranga and Auckland;
 - (ii) the improved competitiveness the better connection provides for Taranaki businesses, increasing the District's and Region's attractiveness for business, residents and visitors, thereby generating economic growth in the District and the Region; and
 - (iii) the construction of the Project itself will bring significant increased economic activity to the District and Region (an estimated 74

⁵ This benefit will accrue once the Project and the Awakino Gorge Project are completed.

⁶ On behalf of the National Road Carriers Association, Western Central District Road Carriers, JD Hickman and TIL. See too the Transcript for Day 4 of the hearing.

additional jobs, \$5.5 million in wages and salaries per year and \$33 million per year in additional expenditure with Taranaki businesses). Indirect economic activity (for example, the supply of goods and services to Project staff and contractors) will be additional to these direct benefits.

(b) social benefits:

(i) are explained in the evidence of Ms Turvey, including that SH3 is critical to the daily lives of local residents and residents within the district and region; and

(ii) the NPDC Section 42A Report highlights the social benefits of the Project for those who need to access essential facilities in Waikato, particularly Waikato Hospital (which is the nearest tertiary hospital); and

(c) other positive effects, particularly in terms of ecology (as a result of the Restoration Package), visual and scenic values for highway users, cultural expression and kaitiaki, and improved recreational opportunities.

17. The s42A report on behalf of NPDC acknowledged and attributed significant weight to the positive effects of the Project.⁷ The Project provides the opportunity to address long-standing issues with the Mt Messenger section of SH3 (which have been investigated since the 1970s), thereby unlocking multiple benefits for the District and the Region. Overall, the Project will provide significant benefits.

⁷ At paragraph 115.

PART C EFFECTS ON THE ENVIRONMENT

INTRODUCTION

18. This part of the submissions addresses the Project's actual and potential adverse effects on communities and the environment, and explains briefly how these will be managed effectively. For ease of reference, each category of adverse effect covered in Part D of the opening legal submissions for the Transport Agency is addressed here (and in the same order). This section should be read in conjunction with Part D of the opening legal submissions.
19. Cultural and ecological effects are the main focus of this section, noting that they are the issues that occupied most of the hearing.

CULTURAL EFFECTS

20. In opening legal submissions for the Transport Agency, counsel emphasised the unique and central role of Ngāti Tama in the Project, and the sustained and intensive engagement process between the Transport Agency and Ngāti Tama (through Te Runanga) that has been occurring since mid-2016.⁸ Te Runanga and both Councils have been complimentary of the Transport Agency's engagement with Ngāti Tama.
21. A package of measures to address the cultural effects of the Project, and gain the benefit of Ngāti Tama's knowledge, have already been implemented or are proposed.⁹ Those measures include, for example, the Kaitiaki Forum Group ("KFG"),¹⁰ whose role has been evolving as the hearing has progressed. In particular, the proposed conditions now provide for the input of the KFG in finalising the location of the PMA following the bat monitoring and tracking programme.¹¹
22. In opening submissions counsel also explained, referring to Mr Dreaver's evidence, that negotiations between Te Runanga and the Transport Agency are ongoing in respect of a potential mitigation and compensation package for the acquisition of Ngāti Tama's land and to address the cultural impacts of the Project.¹² By way of update, those negotiations are ongoing. The Transport Agency's commitment not to compulsorily acquire Ngāti Tama's land for the purposes of the Project is very important to both Ngāti Tama and the Transport Agency, and that commitment remains in place. In other words, the Project will only proceed once the negotiations between the Transport Agency and Ngāti Tama (through Te Runanga) are successfully concluded.

⁸ At paragraphs 115 – 116.

⁹ Opening legal submissions for the Transport Agency, paragraphs 118 and 119.

¹⁰ Designation conditions 4 and 4(a); consent conditions GEN.5 and GEN.5(a).

¹¹ Designation condition 30(h), (i) and (l).

¹² Opening legal submissions for the Transport Agency, paragraphs 120 and 121.

23. At the hearing, Te Runanga reiterated the cultural significance of this commitment, and that Te Runanga support the grant of consents and confirmation of the NoR, subject to appropriate conditions.¹³ Counsel understand Te Runanga do not have any outstanding concerns or issues in respect of the conditions proposed by the Transport Agency.
24. As set out in opening legal submissions, the commitment not to compulsorily acquire Ngāti Tama's land is a powerful recognition of Ngāti Tama's relationships with their ancestral lands, and should give the Commissioner considerable comfort in respect of the cultural effects of the Project.
25. Counsel for Te Korowai suggested that the commitment not to acquire Ngāti Tama land by compulsion, and any reliance on that commitment by the Commissioner, is "*arguably unlawful*".¹⁴ No statutory or case-law basis for was provided for that suggestion.
26. Counsel submit that there is no legal impediment to the Transport Agency's commitment not to compulsorily acquire Ngāti Tama's land. Compulsory acquisition of land does not automatically follow the confirmation of a designation, but is an avenue open to the requiring authority (and more broadly, the Crown) if considered necessary and appropriate to secure the relevant land.
27. It would also be perfectly appropriate for the Commissioner to take the commitment not to compulsorily acquire Ngāti Tama's land as a strong safeguard in terms of ensuring the cultural effects of the Project on Ngāti Tama are appropriately addressed.¹⁵

Te Korowai

28. As set out in opening legal submissions, the Transport Agency has (correctly, it is submitted) engaged with Ngāti Tama primarily through Te Runanga. However, the Transport Agency has since Te Korowai was formed in February 2018 made clear its willingness to meet and discuss the Project with Te Korowai members. The Transport Agency entirely refutes the assertion by Te Korowai that consultation with members of Te Korowai has been inadequate. Counsel note Ms McBeth's comments on behalf of NPDC in her Hearing Statement in this respect, in particular Ms McBeth states:¹⁶

"... in my view, the [Transport] Agency has recognised and provided for members of [Ngāti Tama] beyond the Ngāti Tama Runanga members who were the main points of contact. I do not consider that Te Korowai have been marginalised."

¹³ Including through the legal submissions of Mr Hovell. The opening legal submissions for the Transport Agency (paragraphs 124 and 125) refer to Mr Greg White's Evidence in Chief on this matter.

¹⁴ Legal submissions for Te Korowai at paragraphs 17 and 18.

¹⁵ Particularly in light of the weight placed on that commitment by Te Runanga.

¹⁶ Ms McBeth Hearing Statement at paragraphs 10 - 12; the quote is from paragraph 12.

29. Again, the commitment by the Transport Agency not to compulsorily acquire Ngāti Tama's land is important in respect of the cultural values of Te Korowai members. All members of Ngāti Tama have had, and will continue to have, the opportunity to be involved in Ngāti Tama decision-making processes; Mr Hovell also confirmed that Te Runanga is now operating with the full complement of seven trustees, including the trustees who are (or were) members of Te Korowai.

Poutama and Mr and Mrs Pascoe

30. The *Transport Agency* reiterates, as set out in opening legal submissions and in the evidence of Mr Dreaver,¹⁷ that it does not take a view on the status of Poutama as an entity. Clearly there is a dispute in that respect between Poutama and Te Runanga, as made apparent by the relevant statements of evidence.
31. Counsel agree with Ms McBeth's advice that it is open to the Commissioner to consider the Poutama Iwi Plan as an "other matter" in terms of section 171(1)(d) (and section 104(1)(c)) of the RMA. Counsel also note the helpful advice provided by Simpson Grierson to the Commissioner dated 26 October 2018 in respect of Poutama's 'other iwi authority' notation on the Te Puni Kokiri website. Counsel have nothing to add to that advice, and note the comment that "*at this point, the Council has not recognised Poutama as an iwi authority for the purposes of the RMA.*"¹⁸
32. In any event, and as noted in opening legal submissions, the Transport Agency has engaged in good faith with Poutama, including through funding of a Cultural Impact Assessment (which in practice was delivered in the form of evidence by Mr Stirling). Again, Ms McBeth for NPDC sets out her view that:¹⁹
- "I am also satisfied that NZTA has meaningfully sought to engage with Poutama, having met with them on numerous occasions, provided information in a timely manner, and having contributed financially towards the preparation of the report prepared by Bruce Stirling."*
33. At the hearing, Mr and Mrs Pascoe stated that they had an affiliation with Poutama. Mr and Mrs Pascoe are of course entitled to express their views on the effects the Project will have on them, including in terms of any cultural values. In response to a question raised by the Commissioner, counsel simply record that there is no indication on the title documentation that the Pascoe land is held as Maori land in terms of Te Ture Whenua Maori Act 1993.

¹⁷ Refer opening legal submissions for the Transport Agency at paragraph 135.

¹⁸ At paragraph 33.

¹⁹ At paragraph 14.

The make-up of the KFG

34. There was some discussion during the hearing about the make-up of the KFG, and in particular whether representatives from Poutama and / or Te Korowai should specifically be included as members of the KFG.
35. In his Second Supplementary Statement of Evidence, Mr Roan explains that the KFG conditions have a deliberate focus on Ngāti Tama, and sets out that in his view it is appropriate for Te Runanga to determine who will have the opportunity to participate in the KFG.²⁰ The Transport Agency's position is that this approach is appropriate, given the special importance of Ngāti Tama in relation to this land and Project (including the Treaty Settlement context).
36. The KFG conditions are agreed by both Councils, and in her Hearing Statement Ms McBeth confirms her view that it is appropriate that Te Runanga be central to the KFG.²¹

Conclusion on cultural effects

37. The Transport Agency recognises that the Project will have cultural effects on Ngāti Tama, and recognises the right of members of Te Korowai, and of Poutama, to explain what they consider to be the cultural effects of the Project on them.
38. Counsel submit that the measures set out in the conditions and management plans (agreed between the Transport Agency and both Councils), together with the commitment not to acquire Ngāti Tama's land, will appropriately address the cultural effects of the Project, and provide for an appropriate framework in terms of sections 6(e), 7(a) and 8 of the RMA.

ECOLOGICAL EFFECTS

Introduction

39. As stated in opening submissions, from the start of the Project the Transport Agency has been focused on establishing appropriate outcomes to ensure a medium to long-term net ecological benefit. That reflects the fact that removing nearly 32ha of mature native vegetation (albeit degraded by pest and livestock browsing) will have significant adverse ecological effects.
40. Those effects have been robustly covered by extensive evidence and reports on behalf of the Transport Agency, DOC and the Councils relating to vegetation, aquatic ecology, avifauna, invertebrates, herpetofauna and bats.

²⁰ At paragraphs 52 – 54.

²¹ At paragraph 23.

41. The JWS – Ecology dated 15 October identified 4 issues²² remaining in dispute among the experts. This section summarises the Transport Agency's position:
- (a) on the ecological effects of the Project; and
 - (b) on the 4 ecological matters remaining in dispute from the JWS-Ecology dated 15 October 2018.
42. The Transport Agency first sought to avoid adverse ecological effects through Project route selection and design (including adjusting the alignment to be above and outside the Mimi wetland and the use of bridges and a tunnel²³).
43. The Transport Agency also developed numerous approaches to mitigate and minimise the effects of the Project, including construction techniques, location of laydown areas and site works, use of vegetation removal protocols and refining the design of culverts to further enhance fish passage and align (as much as practicable) with the April 2018 Fish Passage Guidelines.²⁴
44. The Transport Agency proposes that residual ecological effects be offset and compensated for through the Restoration Package that includes:²⁵
- (a) Intensive pest management, in perpetuity, for rats, mustelids, possums, feral cats, goats, and pigs, as well as the exclusion of all farm livestock over an area of 3,650ha;
 - (b) 6ha of kahikatea swamp forest planting;
 - (c) 9ha of mitigation planting;
 - (d) The application of the SEV model for stream habitat loss of 3,376m². That loss requires the fencing, retirement (from stock) and planting 10,738m² of stream area which, with 798m² of restoration associated with remediating stream diversions, provides a total of 11,536m²;²⁶
 - (e) The planting of 200 seedlings of the same species for each significant tree felled (presently 3,400 seedlings for the 17 trees);
 - (f) Provision of \$200,000 (plus GST if any) as a contribution towards lizard research that would benefit herpetofauna in the North Taranaki Ecological District; and
 - (g) Establishment of an Ecological Review Panel.

²² At paragraph 11.

²³ Further avoidance steps are set out in paragraph 143 of the Opening Submissions on behalf of the Transport Agency.

²⁴ Further mitigation and minimisation steps are set out in paragraph 144 of the Opening Submissions on behalf of the Transport Agency.

²⁵ Supplementary evidence of Mr MacGibbon, paragraph 8, updated to reflect the evidence presented during the hearing.

²⁶ Second Supplementary Evidence of Mr Hamill, paragraph 7.

Context

45. The existing ecological environment and its values are set out in the AEE²⁷, the EIC of Mr MacGibbon²⁸ and in section 2 of the ELMP²⁹ and were summarised at paragraph 140 of the opening submissions. In summary:
- (a) The Project is in the North Taranaki Ecological District, an area of 255,852ha with 51% indigenous forest.³⁰
 - (b) The wider Project area of some 4,430ha includes:
 - (i) the Parininihi area (1332 ha – previously Whitecliffs Conservation Area) to the west of SH3 owned by Ngāti Tama; and
 - (ii) the eastern forest block of contiguous forest of approximately 3,098ha immediately adjacent to, and to the east of, Mt Messenger over land owned by Ngāti Tama, DoC (the majority of the land) and private landowners.

Vegetation

46. The technical reports and evidence of Mr Singers set out the vegetation values and potential effects of the Project on them. Mr Singers' EIC identifies the vegetation communities within the Project footprint³¹ which, classified structurally, include 23.867ha of forest, 1.36ha of treeland, and 6.445ha of secondary scrub.³²
47. As explained in Mr Singers EIC, the Project footprint "*straddles a major ecological boundary for hill country forest types*"³³ (this is an issue in relation to the potential PMA at Waitaanga which is discussed in the Restoration Package section below) with:
- (a) the Mimi catchment forest being dominated by tawa, kamahi, rewarewa and occasional podocarp trees;³⁴
 - (b) in the Mangapepeke catchment much of the lower hillsides are secondary forest and the valley floor is kamahi, tawa, rewarewa and occasional podocarp trees, pole kahikatea forest and treeland and, at the northern end, farmland dominated by exotic rush, grass and herbaceous species;³⁵ and

²⁷ Section 8.3.4.

²⁸ Paragraphs 27-45 of Mr MacGibbon's EIC. See also paragraphs 30-46 of Mr Singers' EIC.

²⁹ Section 2.

³⁰ EIC of Mr Singers, paragraph 31.

³¹ Mr Singers EIC, Table 1.

³² Mr Singers EIC, paragraph 14.

³³ EIC of Mr Singers, paragraph 43.

³⁴ EIC of Mr Singers, paragraph 43.

³⁵ EIC of Mr Singers, paragraphs 44 and 45.

- (c) neither area having benefited from pest control with the Mangapepeke catchment in particular affected by long term pest browsing and livestock.³⁶
48. In terms of vegetation types affected the evidence of Mr Singers (which was not challenged) was:
- (a) for forest type WF8 (High value): Kaihikatea, pukatea forest the Project will affect 0.59% of this vegetation type in the Ecological District;³⁷
 - (b) for forest type WF13 (Moderate-high value): Tawa, kohekohe, rewarewa, hinau, podocarp forest the Project will affect 0.1% of this vegetation type in the Taranaki Region;³⁸
 - (c) for forest type WF14 (Moderate value): Kamahi, tawa podocarp, hard beech forest vegetation communities the Project will affect approximately 0.008% of the total primary forest in the region;
 - (d) for forest type CL6 (Moderate value): hebe, wharariki flaxland/rockland vegetation communities the Project will affect 0.399 ha of a naturally uncommon ecosystem. While no ecological district area comparisons are given, cliffs are common in the area.³⁹
49. To develop an offset for vegetation effects Mr Singers applied the NZ Government Guidance as explained in Part B of his EIC. All aspects of the model were applied in a precautionary or conservative manner.⁴⁰ The output of those calculations was the protection of 230ha through pest management in perpetuity (as well as additional restoration planting).⁴¹ Mr Singers surveyed and identified such an area of vegetation ("*the core*"), and concludes in his EIC that with the mitigation and offset proposed (at that time 1085ha) "*the Project will provide medium and long-term benefits to vegetation. Overall, the effects of the Project on vegetation are acceptable.*"⁴²
50. In his Supplementary Evidence Mr Singers concludes that the Restoration Package will result in significant positive benefits for vegetation and flora within the wider Mt Messenger – Parininihi area, within a 10 year timeframe.⁴³
51. DOC did not present expert evidence on vegetation effects.⁴⁴
52. While NPDC's experts raised some questions in relation to Mr Singer's assessment,⁴⁵ during the expert conferencing these matters were resolved as

³⁶ EIC of Mr Singers, paragraphs 16, 40, 45, 73, 78, 84-86, 95, 101, Figures 12 and 13.

³⁷ EIC of Mr Singers, paragraph 68.

³⁸ EIC of Mr Singers, paragraph 81.

³⁹ EIC of Mr Singers, paragraphs 93 and 94.

⁴⁰ Mr Singe's Summary of Evidence, paragraph 23.

⁴¹ EIC of Mr Singers, paragraph 220.

⁴² EIC of Mr Singers, paragraph 20.

⁴³ Mr Singers Supplementary Evidence, paragraph 45.

⁴⁴ Dr Barea did comment that the proposed pest management would be expected to significantly improve forest condition at paragraph 4.40 of his evidence.

⁴⁵ Statement of Evidence of Mr Shaw and Dr Martin, 8 October 2018, paragraph 2, 1st bullet point and paragraphs 14-15.

per the JWS-Ecology dated 15 October (where these issues were no longer listed in dispute) and the JWS-Ecology dated 23 October which attached an agreed (apart from the 4 issues in dispute) ELMP.

53. Overall, it is submitted that the Project's residual effects on vegetation have been offset and compensated to a degree that, within 10 years, the Project will have significant ecological benefits.

Freshwater

54. The technical reports and evidence of Mr Hamill describe the freshwater environment of the Mimi River and Mangapepeke Stream affected by the Project⁴⁶ as summarised at paragraphs 146-148 of opening submissions.
55. Freshwater ecology issues have been resolved, and the proposed conditions and management plan framework agreed, as between the Transport Agency and the Councils.⁴⁷
56. Mr Hamill identifies the potential effects of the Project on freshwater ecology (and explains the mitigation proposed for each), the key issues being sedimentation, restricting fish passage and loss of stream habitat and function.⁴⁸
57. The two issues remaining in dispute between the Transport Agency and DOC relate to fish recovery, and monitoring for macroinvertebrates and fish in response to elevated turbidity.⁴⁹
58. In relation to fish recovery Mr Hamill's rebuttal evidence explains that Dr Drinan proposes a prescriptive, one-size-fits-all approach that takes little account of stream conditions.⁵⁰ Mr Hamill's opinion is that the extra effort sought by Dr Drinan "*results in considerably more effort for, at best, negligible benefit, but will probably result in more fish injury and death.*"⁵¹
59. In relation to monitoring for macroinvertebrates and fish in response to elevated turbidity issues raised by Dr Drinan and Mr Duris, Mr Hamill revised the provisions in the ELMP, and the conditions, through his rebuttal evidence.⁵² He attached as his Appendix 1 a flow diagram of the intended responses that will occur following monitoring described in the ELMP. This diagram shows the monitoring phases, the triggers and the responses (as well as feedback loops). Mr Ridley also explained in his evidence how these mechanisms fit within the broader erosion and sediment control measures proposed. Mr Hamill considers that the monitoring described in the ELMP

⁴⁶ Mr Hamill EIC, paragraphs 8, 20-30, 51-61.

⁴⁷ Statement of Ms McBeth, 9 October 2018, at paragraph 41.

⁴⁸ Mr Hamill EIC, paragraph 9.

⁴⁹ The changes to the conditions sought by Dr Drian are attached to Mr Inger's Statement dated 24 October 2018.

⁵⁰ Mr Hamill rebuttal evidence, paragraph 41.

⁵¹ Mr Hamill rebuttal evidence, paragraph 35.

⁵² Mr Hamill rebuttal evidence, paragraph 44 and 60.

(and now agreed between the Transport Agency and the Councils) "*will provide robust information to assess any ecological effects on streams*".⁵³

60. Dr Drinan agreed that Mr Hamill's changes "*were an improvement*"⁵⁴ but still sought further mitigation works and additional "offsets" should his proposed triggers be exceeded. Mr Hamill's supplementary evidence explained:
- (a) how additional monitoring sites had been added to better assess the effects of earthworks and address the concerns of DoC;⁵⁵
 - (b) how the monitoring takes a risk-based approach;⁵⁶
 - (c) how the ecological monitoring will occur alongside the water quality monitoring in the CWDMP (see below) to assess and manage construction effects on streams;⁵⁷ and
 - (d) how the CWDMP has been updated to include initial continuous turbidity sampling at both upstream and downstream locations.⁵⁸
61. It is important the robust relationship between the ecology monitoring and the erosion and sediment control monitoring, and the responses and feedback loops between them, are recognised. These processes are explained in the schematics in Mr Hamill's Appendix 1 (above) and Mr Ridley's Appendix 1 to his supplementary evidence. In Mr Hamill's opinion "*the water quality monitoring and the ecological monitoring in the ELMP together provide an appropriate way of detecting and managing effects of the Project on streams*".⁵⁹
62. It is submitted that the provisions provide a robust and inter-linked monitoring, triggers and response process between ecology and erosion and sediment control matters that will appropriately monitor and ensure the necessary responses to any exceedances. The provisions also include prompt exceedance notification and follow-up reporting to TRC of exceedance response actions undertaken.
63. While not listed in the JWS – Ecology as matters still in dispute, in Mr Inger's Statement of 24 October 2018 some condition wording amendments are sought. The Transport Agency opposes the inclusion of those changes and, relying on the expert evidence of Mr Hamill, Dr Neale and Mr Ridley, considers that the conditions proposed by the Transport Agency are robust and appropriately reflect the nature of, and protect, the affected streams.⁶⁰

⁵³ Mr Hamill rebuttal evidence, paragraph 43.

⁵⁴ Summary of Evidence for Dr Drinan, paragraph 17.

⁵⁵ Mr Hamill supplementary evidence, paragraph 29.

⁵⁶ Mr Hamill supplementary evidence, paragraph 30.

⁵⁷ Mr Hamill supplementary evidence, paragraph 31.

⁵⁸ Mr Hamill supplementary evidence, paragraph 32.

⁵⁹ Ibid.

⁶⁰ See for example paragraph 17 of Dr Watt's Rebuttal Evidence where she states that "*the proposed regime for addressing possible sedimentation events is appropriate in terms of invertebrate values and effects*."

64. During the last day of the hearing the Commissioner gave Dr Drinan the opportunity to respond to the Transport Agency's quantum of proposed riparian planting and protection. By email to the hearings administrator dated 29 October 2018 counsel for DOC stated:

"Dr Drinan is comfortable with the total area of riparian planting (and exclusion from livestock) now proposed, of at least 11,536 m² of existing streams within the Mimi and Mangapepeke catchments. Dr Drinan understands that this is comprised of 10,738 m² and 798 m² for culverts and diversions respectively. It is important that this figure is expressed in metres squared."

65. Overall, Mr Hamill assesses the effects of the Project after mitigation and offset on freshwater ecology as "low or less"⁶¹. He considers that most potential effects can be appropriately minimised apart from stream loss, which is offset via the SEV method and as a minimum will achieve no net loss and may achieve a net gain.⁶² As mentioned above, both Mr Hamill and Dr Neale consider the refinements to the Project design that have occurred since Mr Hamill's EIC further reduce freshwater ecology effects. Dr Neale has "confidence that the freshwater offset package should provide a net improvement in ecological functioning in the medium to long term".⁶³

Invertebrates

66. The evidence of Dr Watts was that "any effects of the project on invertebrates are likely to be negligible (and may be positive) in the medium term",⁶⁴ with her opinion as to benefits increasing with the enlarged PMA now proposed.⁶⁵
67. During the hearing there was discussion on biosecurity matters relating to plantings and nursery management. Mr MacGibbon amended the ELMP and conditions and those matters are now resolved among the experts.⁶⁶
68. The sole remaining issue relating to invertebrates is pest management of *Vespula* wasps. The experts for the Council sought in perpetuity⁶⁷ wasp pest management but during the last day of the hearing Dr Martin stated that 10 years would be sufficient.⁶⁸ A 10 year period was more in line with Dr Martin's evidence and the JWS-Ecology dated 15 October 2018.⁶⁹
69. The Transport Agency's proposed conditions,⁷⁰ and the agreed ELMP, both require wasp monitoring and control during construction (estimated to take 4 years) and "through to the conclusion of a 6 year plant maintenance period."

⁶¹ Mr Hamill EIC, paragraph 68.

⁶² Mr Hamill EIC, paragraph 120.

⁶³ Dr Neale EIC, paragraphs 32-35.

⁶⁴ Dr Watts EIC, paragraph 15.

⁶⁵ Dr Watts Supplementary Evidence, paragraph 15.

⁶⁶ Invertebrates are not one of the 4 issues remaining in dispute in the 15 October JWS-Ecology.

⁶⁷ See for example the comment in the JWS-Planning dated 23 October 2018.

⁶⁸ Though counsel has not had the benefit of the transcript to confirm that.

⁶⁹ Paragraph 18 of Dr Martin's evidence and paragraph 11 of the JWS-Ecology.

⁷⁰ Condition 29(h)(ii)(4).

That provides an appropriate mechanism that reflects the effect relating to the new edge and the closure of that edge over time. It also reflects counsel's understanding of Dr Martin's position as expressed during the last day of the hearing. On that basis counsel are uncertain as to whether any dispute as to *Vespula* wasp control remains. If it does, it is submitted that the Transport Agency's proposal reflects, and appropriately addresses, the effect based on the evidence before the Commissioner.

Avifauna

70. Dr McLeann's evidence was that the increase in the size of the PMA to 3,650ha "*profoundly increases the extent to which avifauna will be enhanced in the project area*".⁷¹
71. The key issues relating to avifauna during the hearing involved North Island Brown Kiwi, kōkako and bittern.
72. Kōkako and bittern issues have been resolved.⁷²
73. In relation to kiwi Dr McLennan describes the measures to avoid⁷³ and mitigate⁷⁴ potential adverse effects on birds, in particular in relation to kiwi through extensive monitoring provisions (including radio tracking and kiwi dogs), relocation and fencing where necessary.
74. Counsel had thought the Councils no longer had any issues in relation to kiwi effects.⁷⁵ However, in the JWS-Planning dated 23 October 2018 it is recorded that Wildlands agree with DoC in relation to kiwi fencing.
75. Dr Burns for DoC did not dispute that the kiwi population in the Project area was declining (in line with national trends).⁷⁶ Dr Burns also did not dispute that kiwi would benefit from the proposed PMA (though he applied a lower growth rate, so disputed Dr McLennan's opinion that the benefit would be 1198 adults over 30 years).⁷⁷
76. The sole issue remaining in dispute is the provision of kiwi fencing.⁷⁸ Dr McLennan proposed that such fences be provided along parts of the route where radio-tracking informed they may be at risk.⁷⁹ Dr Burns for DoC initially sought kiwi fencing along "*the entire length of the road on both sides*."⁸⁰ In the JWS-Ecology dated 15 October 2018, DoC sought fencing "*at all locations*

⁷¹ Dr McLennan Supplementary Evidence, paragraph 26.

⁷² JWS-Ecology 23 October 2018, the agreed ELMP resolves these issues.

⁷³ Dr McLennan EIC, paragraph 54.

⁷⁴ Dr McLennan EIC, paragraphs 55 to 66.

⁷⁵ JWS-Ecology 23 October 2018, paragraph 11, and such issues were not raised in the Evidence of Mr Shaw and Dr Martin dated 8 October 2018.

⁷⁶ Evidence of Dr Burns, paragraph 6.10.

⁷⁷ Summary of Evidence of Dr Burns, paragraph 11.

⁷⁸ It is understood this is to keep the away from the road rather than Dr Burns' earlier concern of kiwi falling off embankments. However, if that is not correct the Transport Agency opposes such fencing for the reasons set out in paragraph 29 of Dr McLennan's rebuttal evidence.

⁷⁹ Dr McLennan EIC paragraphs 64-66, Summary of Evidence of Dr McLennan, paragraph 11 and Rebuttal Evidence of Dr McLennan at paragraph 28.

⁸⁰ Evidence of Dr Burns, paragraph 18.

where kiwi may be able to access the road corridor." In the Planning JWS dated 23 October DoC continued this approach.

77. As mentioned during the hearing the wording "*where kiwi may be able to access the road corridor*" is uncertain, and so broadly worded that it is in effect a Clayton's 'compromise' as the entire route would have to be fenced. It also ignored the Transport Agency's approach of using the radio-tagging to determine areas to be fenced.
78. During the last day of the hearing it was mentioned that the areas of fencing in the conditions could be better linked to the kiwi tracking and monitoring. This has occurred in the revised conditions attached to these submissions and greater clarity has been provided.

Herpetofauna

79. As no herpetofauna were identified within the Project footprint during investigations,⁸¹ Mr Chapman took a conservative assessment by including all 11 species identified in literature as being potentially present in the Project area (recordings within 50km).⁸² The most significant potential species present in Taranaki (and therefore potentially in the Project area) is the striped skink.⁸³
80. Through evidence and during the adjournment period considerable discussions on herpetofauna have occurred with all issues now resolved.⁸⁴ The focus was on striped skink and any captured during vegetation clearance will be relocated to a lizard sanctuary at Rotokare Scenic Reserve. In addition, the Transport Agency will provide \$200,000 (plus GST if any) to contribute to research benefiting herpetofauna in the North Taranaki Ecological District.

Bats

81. The most contested ecological issue during the hearing related to potential adverse effects on bats and how such effects should be avoided, remedied, mitigated, offset or compensated.
82. These issues were extensively canvassed during the hearing. They were a key reason for the Transport Agency requesting the final adjournment until October and were addressed further during the resumed hearing. However, during further conferencing, they were resolved, in particular through a summer season of bat tracking and monitoring effort (see the JWS-Ecology 15 October 2018 and the JWS-Ecology 23 October 2018 (which attached the agreed ELMP wording)).

⁸¹ Mr Chapman EIC, paragraphs 32 and 38.

⁸² Mr Chapman EIC, paragraphs 8, 31, 37 and 64.

⁸³ A species known from widely scattered locations across the North Island, but fewer than 150 individuals ever recorded.

⁸⁴ Herpetofauna was not one of the 4 issues in dispute in paragraph 11 of the JWS-Ecology 15 October 2018.

83. It is submitted that with the wording of the conditions and the ELMP now agreed that the potential effects of the Project on bats will be appropriately avoided, remedied, mitigated, offset and compensated. In particular this is through the use of vegetation removal protocols (revised now down to 15cm dbh at the discretion of the bat ecologist), a 3,650ha PMA (discussed below) and a season of bat tracking monitoring (presently underway). Overall, with these provisions in place it is submitted that the Project will provide long-term benefits to long tailed bats in northern Taranaki (the population of which is presently declining towards local extinction in line with the national trend).

Restoration Package and the PMA

84. The Restoration Package, including the PMA, explained in the technical reports and evidence of Mr MacGibbon and summarised above.
85. Again, while the Restoration Package was subject to extensive evidence and discussion during the hearing, almost all aspects of it have been agreed through the JWS-Ecology 15 October 2018 and the JWS-Ecology 23 October 2018 (which attached the agreed ELMP wording). The planners, in their JWS dated 23 October 2018, agreed the relevant condition wording.
86. The outstanding issues in respect of freshwater matters, *Vespula* wasps, and kiwi fencing are addressed above. The other outstanding matter is the appropriateness of the 'alternative PMA' (at Waitaanga Valley). More specifically, whether, if that alternative (fall-back) PMA is required, should an additional PMA area to address vegetation values be required.
87. Of course, the Transport Agency is hopeful that the Waitaanga PMA will not be required, and that the current Intended PMA (or the area immediately surrounding it) can be used as the final PMA. The use of the Waitaanga PMA will only be required if the PMA cannot be finalised through the application of scenarios 1 – 3 in designation condition 30.
88. If Waitaanga is required, the remaining issues relate to the following questions:
- (a) is Waitaanga sufficiently similar to the Project footprint such that its use as a PMA appropriately compensates for the effects of the Project?
 - (b) is such a consideration determinative at any rate?
 - (c) does a PMA at Waitaanga provide sufficient benefits to appropriately address the residual ecological effects of the Project?
 - (d) should there be multiple PMAs (and if so should the area be greater than 3,650ha)?

89. NPDC's (or at least, Wildlands') concern about Waitaanga as expressed in Ms McBeth's Statement of 9 October is:⁸⁵

"... we view it as considerably less desirable than the land within the Study Area, particularly from the perspective of 'like-for-like' and 'proximity' principles for bio-diversity offsetting and compensation."

90. The position of the Council's experts is that, due to a lack of similarity, "additional PMA site(s) should be found and managed".⁸⁶
91. As discussed during the hearing the PMA is provided by way of offset and compensation. Accordingly, the Commissioner does not have an ability to impose it but where offered must have regard to it.⁸⁷ As mentioned in oral closing submissions, and contained in the conditions attached, the Transport Agency does not propose either:
- (a) a PMA (in whatever form) greater than 3,650ha; or
 - (b) multiple PMAs scattered around North Taranaki.
92. Therefore, the last question, although addressed below, is a moot point as neither option is offered by the Transport Agency.
93. For the reasons set out below the Transport Agency's position is that the proposed Waitaanga PMA (should it be required) provides significant biodiversity benefits that more than compensate for the ecological effects of the Project, including on vegetation.

Similarity

94. Mr Singer's evidence (as quoted above) is that the Project footprint "straddles a major ecological boundary for hill country forest types."⁸⁸ No expert or party challenged that categorisation. In his technical report Mr Singers commented:⁸⁹

"Mt Messenger is situated in the North Taranaki Ecological District, an area which is characterised by a warm and humid climate supporting broadleaved dominant indigenous forest over most hill country land, and kahikatea (Dacrycarpus dacrydioides), pukatea (Laurelia novae-zelandiae) forest and associated wetlands in valley floor areas. Parininihi which encompasses the Waipingao Valley to the west of the Project area and is unaffected by the Project, has a rare example of coastal to lowland vegetation sequences and, especially due to the pest control efforts of Ngāti Tama, very high vegetation values."

⁸⁵ Paragraph 18.

⁸⁶ JWS-Ecology dated 15 October 2018, paragraph 11.

⁸⁷ Section 104(1)(ab).

⁸⁸ EIC of Mr Singers, paragraph 43.

⁸⁹ Vegetation Technical Report 7a, Executive Summary.

95. Mr MacGibbon's evidence on Waitaanga is that "*The forest is at a higher altitude than the Intended PMA or Wider PMA and has less coastal vegetation as a result.*"⁹⁰
96. Dr Barea's evidence is that:
- (a) "*There are large areas of primary alluvial kahikatea, rimu and tawa forest along the streams and rivers*";⁹¹ and
 - (b) "*Although there are some differences in vegetation associations ... there are many similarities in vegetation and fauna*";⁹² and
 - (c) "*I am comfortable that the level of dissimilarity between the impact area and the Waitaanga Conservation Area is not substantially high so as to override other considerations.*"⁹³
97. Despite this similarity of vegetation, an issue for Mr Shaw and Dr Martin seems to be their opinion that Waitaanga does not have coastal vegetation.⁹⁴ That may be correct (Mr Singers was overseas during the expert conferencing and the end of the hearing so could not comment), but to the degree it may question the use of vegetation at Waitaanga to compensate effects:
- (a) it fails to reflect that the vegetation type at the Project footprint is hill-country (recognising it has limited coastal vegetation which neither Mr Shaw nor Dr Martin have quantified or described);
 - (b) it fails to reflect that:
 - (i) for the highest value vegetation type affected by the Project, WF8 (High value): Kaihikatea, pukatea forest the kaihikatea element (at least) is represented at Waitaanga;
 - (ii) the next highest vegetation type WF13 (Moderate-high value): Tawa, kohekohe, rewarewa, hinau, podocarp forest the tawa element (at least) is represented at Waitaanga;
 - (iii) the next highest value vegetation type (and part from cliff habitat the only type left) WF14 (Moderate value): Kamahi, tawa podocarp, hard beech forest vegetation communities the tawa and beech⁹⁵ communities (at least) are represented at Waitaanga;
 - (c) as per the evidence of Mr MacGibbon and Dr Barea the vegetation type, while not identical, is sufficiently and appropriately similar; and

⁹⁰ Mr MacGibbon Second Supplementary Statement, paragraph 62.

⁹¹ Dr Barea Supplementary Evidence, paragraph 2.33.

⁹² Dr Barea Supplementary Evidence, paragraph 2.34.

⁹³ Dr Barea Supplementary Evidence, paragraph 2.34.

⁹⁴ Statement of Evidence of Mr Shaw and Dr Martin, 8 October 2018, paragraph 8.

⁹⁵ Dr Barea Supplementary Evidence, paragraph 2.33.

- (d) it fail's to reflect that the use of Waitaanga is a fall-back only if the first 3 PMA scenarios are not suitable – it provides certainty of outcome at the end of a cascading selection process.

98. No issue as to similarity and the use of Waitaanga has been raised for any other matter apart from vegetation.

Is similarity determinative?

99. The short answer is not for compensation, for the reasons set out below.

100. NPDC's position is that the PMA should ideally provide like-for-like and proximate outcomes. The Transport Agency disagrees with this position in relation to the use of compensation which, unlike offsetting as explained in Mr Barea's evidence, has greater flexibility to deliver broader benefits.

101. Dr Barea's supplementary evidence:

(a) in relation to proximity stated that:

- (i) *in NZ it is common for offsets and compensation to be implemented at the local scale of an ecological district*,⁹⁶ and
- (ii) *"I am comfortable that the Waitaanga Conservation Area is an appropriate option with respect to proximity"*,⁹⁷

(b) in relation to like-for-like, is that:

- (i) *"in my opinion when environmental compensation is being proposed, as it is here, a degree of departure from strict like for like exchanges does not need to prevent well designed solutions that compensate for residual adverse effects"*,⁹⁸

102. As discussed above, under the RMA it is up to the Applicant to offer compensation. There are no statutory parameters around what compensation may include. Unlike offsetting there is also no developed or widely applied methodology for compensation, nor it is submitted should there be as otherwise flexibility is lost and arguments focus on language and not the benefits being proposed. Such restrictions limit the broad provisions provided for in the RMA.

103. While general parameters have been applied to the development of the PMA,⁹⁹ these have not be applied to the Restoration Package in an absolute manner but rather as appropriate. As above, the key way they have been applied is to start with local PMA options which better align to those principles, and only if those options are shown not to be suitable does the use of

⁹⁶ Dr Barea Supplementary Evidence, paragraph 2.26.

⁹⁷ Dr Barea Supplementary Evidence, paragraph 2.29.

⁹⁸ Dr Barea Supplementary Evidence, paragraph 2.30.

⁹⁹ Mr MacGibbon EIC, paragraph 59.

Waitaanga arise. Whether the compensation is appropriate must be assessed on a case by case basis taking a broader approach to the benefits achievable through the compensation proposed.

Is Waitaanga an appropriate PMA?

104. The key question is, should it be required, does the Waitaanga PMA provide ecological benefits that appropriately address the ecological effects of the Project? It is submitted that no expert contests that substantial benefits would be created by the Waitaanga PMA. Rather, the issue for NPDC is that the Waitaanga would not provide 'like for like' vegetation benefits to the same extent as the Intended PMA (in respect of coastal vegetation in particular).

105. The Transport Agency's position is that the Waitaanga PMA, if required, clearly is an appropriate PMA. In particular:

- (a) three other PMA scenarios will have already been tested and discarded (based on uncertainty of benefits for bats) before Waitaanga is utilised;
- (b) although there was criticism, in particular from Ngāti Tama, as to the focus on bats, a key emphasis of the expert evidence was that given the national critical status of bats it was appropriate that they were a key focus for the location of the PMA and there was no dispute that Waitaanga is appropriate compensation for effects on bats;
- (c) the vegetation (the sole issue as to its suitability) is sufficiently similar to the hill-country forest types within the Project footprint;
- (d) at 3,650ha, a Waitaanga PMA would be orders of magnitude larger than the 230ha required to offset the effects of the Project on vegetation such that it significantly benefits vegetation (noting that the Waitaanga PMA would be compensation, rather than offsetting);
- (e) direct vegetation effects within the Project footprint are still offset through the restoration and mitigation plantings (as explained in the Restoration Package summary above);
- (f) a Waitaanga PMA would also protect other rare vegetation, such as the only known locations in the district for yellow and red mistletoe;¹⁰⁰
- (g) the evidence of Mr MacGibbon¹⁰¹ and Dr Barea¹⁰² is that similar avifauna are present and in addition Dr Barea's evidence is that Waitaanga supports kaka, yellow eyed kakariki, whio and NZ Falcon all of which are locally extinct at Mt Messenger;¹⁰³

¹⁰⁰ Dr Barea Supplementary Evidence, paragraph 2.33.

¹⁰¹ Mr MacGibbon, Second Supplementary Statement, paragraph 62.

¹⁰² Dr Barea Supplementary Evidence, paragraph 2.33.

¹⁰³ See paragraphs 33-37 of Dr McLennan's EIC.

- (h) the evidence of Dr O'Donnell is that it has known bat roosts, provides comparable bat habitat and "*potentially, the bats being recorded at Mt Messenger ... could be the same population;*"¹⁰⁴ and
- (i) it is entirely on DOC land so can be delivered through agreement with DOC.

Multiple PMAs

106. During the 'hot-tubbing' Mr MacGibbon explained his opinions as to why two PMAs (for example a separate PMA to protect coastal vegetation) were not necessary. These reasons,¹⁰⁵ included:

- (a) edge effects and constant reinvasion which decreases effectiveness (associated too with cost whereby money could be spent elsewhere with greater benefits);
- (b) administration and access issues with having multiple PMAs making long-term management and administration harder and beneficial outcomes more at risk;
- (c) that, as above, the Project footprint contains limited coastal vegetation such that the in perpetuity protection of 3,650ha of vegetation 16km away and in the same ecological district is a significant vegetation benefit for the loss of 31.6ha which, using the 2014 NZ Government calculator requires 230ha to provide a no net loss offset for vegetation;
- (d) that the proposal is compensation and not offsetting; and
- (e) that, as well as vegetation, all other ecological effects are provided for at Waitaanga with significant net ecological benefits.

107. At the end of the ecology 'hot-tubbing' Mr MacGibbon commented that in his opinion the Waitaanga PMA provided significant ecological benefit beyond the effects of the Project and further PMAs were not necessary. The Transport Agency supports that position and, as above, is not preferring more than one PMA.

Overall conclusion on ecological effects

108. Through all of the reports, evidence, conferencing and discussions during the adjournment the Project as now proposed has resolved nearly all of the myriad of ecological concerns raised by DoC and the Councils. The remaining issues, which relate to conditions rather than the designation being approved and consents being granted, have been addressed above.

109. Overall, it is submitted that the Project will provide significant ecological benefits in perpetuity such that it appropriately avoids, remedies, mitigates,

¹⁰⁴ Dr O'Donnell Supplementary Evidence, paragraphs

¹⁰⁵ Again, counsel has not had the benefit of the transcript of the final day of the hearing.

offsets and compensates its effects (to the point where they will be ecological enhancement). Two species, bats and kiwi, on which much time has been spent, are both currently declining towards local extinction unless intervention occurs.

110. As Dr McLennan stated, the proposed PMA is in the top 20% in terms of size of the 40 North island sanctuaries and is unusual as it has a mix of aerial 1080 and year round ground-based controls.¹⁰⁶ Mr MacGibbon's overall conclusion is that the PMA "*can be expected to create substantial biodiversity gains by year 15, well in excess of the effects caused and of a magnitude that is unprecedented as mitigation/offset for a road construction project in New Zealand.*"¹⁰⁷

LANDSCAPE, VISUAL AND NATURAL CHARACTER EFFECTS

111. When appearing at the hearing, Mr Lister reiterated his position that the Project, the conditions proposed by the Transport Agency, and the Landscape and Environmental Design Framework ("**LEDF**") appropriately address landscape, visual and natural character issues.
112. Mr Bain on behalf of NPDC agrees with Mr Lister – there is no dispute between the experts,¹⁰⁸ and there was (beyond Mr Lister's evidence), little if any discussion of landscape issues at the hearing. The conditions that are relevant to landscape matters are agreed between the Transport Agency and both councils, and the Councils are comfortable that the commissioner can approve the LEDF in its current form.¹⁰⁹

SOCIAL EFFECTS

113. Ms Turvey confirmed at the hearing that all her recommended measures to address the adverse social effects of the Project on the small number of local residents have been incorporated in the conditions, and in the Construction Environment Management Plan ("**CEMP**"). The relevant conditions, and measures in the CEMP, are agreed between the Transport Agency and both councils.
114. As acknowledged in Ms Turvey's evidence and in the opening legal submissions, the Project will have social effects on Mr and Mrs Pascoe, particularly during construction. The Project team, led primarily by Mr Napier, have put considerable effort into engaging with the Pascoes about the Project. The Transport Agency acknowledge the representations made to the commissioner by Mr and Mrs Pascoe, but entirely refutes their comments about "bullying" behaviour.

¹⁰⁶ Dr McLennan Supplementary Evidence, paragraph 12.

¹⁰⁷ Mr MacGibbon Supplementary Evidence, paragraph 45. See also his Second Supplementary Evidence, paragraph 69.

¹⁰⁸ NPDC Supplementary Section 42A Report, paragraph 13.

¹⁰⁹ As per the agreed conditions. See also the NPDC Supplementary Section 42A Report at paragraph 27; and Ms McBeth's Hearing Statement at paragraphs 46 – 48.

RECREATION EFFECTS

115. NPDC is supportive of the Transport Agency's approach to maintaining access to both the Mt Messenger and Kiwi Road tracks as far as is reasonably practicable during the hearing.
116. Mr Milliken's supplementary evidence clarifies and provides a detailed plan of the proposal to convert the current informal pull-off areas at the entrance to the Kiwi Road track into a formal, marked car parking area. The conditions require that car-parking area to be provided,¹¹⁰ meaning that (as Mr Roan notes), there is therefore no need for the car-parking provision for the tracks to be subject to an outline plan of works process.
117. Mr Milliken also explains that ultimately there may be an alternative or additional arrangement for access to the two tracks through the revocation process for the existing section of SH3. That is best addressed through the revocation process.
118. The Transport Agency is considering the possible provision of walking and cycling trails in the vicinity of the alignment, and a possible rest area along the Project route.

HERITAGE EFFECTS

119. The Transport Agency proposes conditions to address the accidental discovery of unknown heritage remains or koiwi tangata. As per Dr Clough's recommendation, the Transport Agency will endeavour to avoid the remains of the early pack track and road alignment (noting that Dr Clough does not consider avoidance to be essential).
120. Dr Clough explained that an application for a Project wide archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014 had been made. That archaeological authority was granted on 28 August 2018.¹¹¹ As per the proposed conditions, the terms of the archaeological authority will therefore supersede the standard Transport Agency Accidental Discovery Protocol. For completeness, the conditions referring to the standard Transport Agency Accidental Discovery Protocol ("**ADP**") have been retained, but as per those conditions (and the advice note to designation condition 35), the terms of the archaeological authority will supersede the ADP.
121. NPDC (acting on the advice of Mr McCurdy) is comfortable with the Transport Agency's approach to heritage matters.¹¹² The proposed conditions relating to heritage and archaeology are agreed between the Transport Agency and NPDC.

¹¹⁰ Designation condition 44. Following discussion at the last day of the hearing, the relevant plan is now attach to the proposed designation conditions, to ensure ease of reference in future.

¹¹¹ Authority number 2019/057.

¹¹² NPDC Section 42A Report, paragraphs 146 – 159.

CONSTRUCTION WATER EFFECTS

122. The Transport Agency proposes a comprehensive approach to construction water management, through conditions of consent, the Construction Water Management Plan ("**CWMP**") (including the appended Construction Water Discharges Monitoring Programme ("**CWDMP**")), and the suite of Specific Construction Water Management Plans ("**SCWMPs**"). Three of the SCWMPs have been prepared and are ready for approval, the consent conditions provide for the others to be prepared and certified by TRC in advance of the relevant stage of the Project works.
123. Following updates made during the hearing adjournment, the relevant consent conditions are agreed between the Transport Agency and TRC. TRC is also comfortable that the CWMP (including the CWDMP) and the three SCWMPs that have been prepared can be approved by the commissioner in their current form.
124. As explained by Mr Roan in his Second Supplementary Statement of Evidence,¹¹³ this follows amendments to the sediment discharge consents agreed between the Transport Agency and TRC during the hearing adjournment. Mr Roan explains that the more substantive changes are to Conditions SED.7, where the Transport Agency has largely accepted the amendments sought by TRC, and to Condition SED.11, which relate to monitoring and to the Construction Water Discharges Monitoring Plan.¹¹⁴
125. Mr Duirs on behalf of DOC has confirmed that he generally considers "*the Applicant's proposed erosion and sediment control methods to be reflective of best practice methods typically implemented for large scale earthworks projects in New Zealand.*"¹¹⁵ However, Mr Duirs remains concerned about the challenges of implementing those measures.
126. Mr Duirs (in addition to Dr Drinan) seeks a number of amendments to the CWDMP.¹¹⁶ On the advice of Mr Ridley, that additional wording has largely been rejected by the Transport Agency. Mr Inger's 24 October 2018 Statement, along with his notes on Condition SED.11 in the planners' joint witness statement version, sets out the additional wording in the consent conditions relating to construction water issues that are sought by DOC.
127. The points of disagreement between Mr Ridley and Mr Duirs (and noting the overlap with Dr Drinan's views), in terms of the conditions and management plan framework, are relatively narrow. Mr Ridley, who has wide experience in

¹¹³ At paragraph 39(h).

¹¹⁴ Mr Ridley's expert view was that those changes were not necessary to address the potential effects of the Project. Mr Ridley's view has not changed from this original expert opinion, however the Transport Agency was content to agree those amendments in order to satisfy TRC.

¹¹⁵ Mr Duirs' summary of evidence, paragraph 11.

¹¹⁶ See the versions attached to Mr Inger's Supplementary Evidence.

construction water effects management for large-scale infrastructure, considers that:¹¹⁷

- (a) the erosion and sedimentation risks of the Project are clearly identified and accounted for and can be managed throughout the construction period;
- (b) the Project is not a particularly 'risky' one in construction water terms, noting it is relatively small scale in comparison to a number of other successfully implemented State highway projects; and
- (c) the erosion and sedimentation effects of the Project will be negligible.

128. In light of those overarching comments, the Transport Agency's position is that the Commissioner should approve the version of the CWMP (including the CWDMP) and conditions related to construction water management that are proposed by the Transport Agency, without the additional wording / amendments sought by DOC. Counsel submit that Mr Ridley's wide experience, together with the fact that TRC have considered construction water management issues in detail and are satisfied with the Transport Agency's proposed approach, should be persuasive.

CONSTRUCTION TRAFFIC EFFECTS

129. Construction traffic effects will be managed through the proposed conditions and in particular the Construction Traffic Management Plan ("**CTMP**"). NPDC is comfortable with the Transport Agency's approach, and is comfortable that the CTMP can be approved in its current form.¹¹⁸ The relevant conditions are again agreed between the Transport Agency and NPDC.

130. As discussed in the hearing, the likely effects of the Project on construction traffic are significantly less than the likely effects had an "online" option been pursued.

NOISE AND VIBRATION EFFECTS

131. At the hearing, there was no dispute about the appropriateness of the Transport Agency's proposed conditions, and the Construction Noise Management Plan ("**CNMP**"), for addressing noise and vibration effects on the small number of potentially effected residents.

132. In response to a question from the Commissioner, Ms Turvey reiterated that the Pascoes' home would be an unpleasant living environment during construction.¹¹⁹ That point has been made clear by the Transport Agency (including to the Pascoes) for some time.

¹¹⁷ Mr Ridley's Rebuttal Evidence, paragraph 10.

¹¹⁸ NPDC Section 42A Report, paragraph 215.

¹¹⁹ Due in large part, but not only, to noise effects.

133. As explained in opening legal submissions, counsel explained that the Transport Agency is seeking to purchase the land the Pascoes' house sits on prior to construction. If the Pascoes do not agree to sell that land, the Transport Agency has offered to rehouse the Pascoes (at the Transport Agency's expense) for the duration of construction.
134. To provide absolute certainty to the Commissioner, the Transport Agency is now proffering a condition requiring it to reiterate its (longstanding) offer to provide the Pascoes with alternative accommodation for the duration of the construction period. The condition is as follows:¹²⁰

"The Requiring Authority shall prior to the commencement of Works write to the occupiers of the dwelling at 3072 Mokau Road to offer to provide alternative housing from the commencement of Works until the Completion of Construction Works. If that offer is accepted, the Requiring Authority will provide that alternative housing in a form that is as similar as is reasonably practicable to the dwelling at 3072 Mokau Road. The obligation to provide alternative housing under this condition will not apply (or will cease to apply) if the Requiring Authority acquires the dwelling at 3072 Mokau Road."

135. The Transport Agency understands that the Pascoes intend to accept this offer, but of course cannot speak for the Pascoes.¹²¹ The Pascoes did not specifically address possible noise and vibration effects in their presentations at the hearing.

AIR QUALITY AND DUST EFFECTS

136. As with noise and vibration, counsel do not understand there to be any dispute about the appropriateness of the Transport Agency's proposed conditions, and the Construction Dust Management Plan ("**CDMP**"), for addressing noise and vibration effects on the small number of potentially effected residents. At the request of TRC (as per its Supplementary Section 42A Report), further detail has been added to the CDMP in respect of liaison during construction with the three sensitive dust receptors.
137. The conditions that relate to air quality and dust effects are agreed between the Transport Agency and TRC, and counsel understand that TRC is comfortable that the commissioner can approve the CDMP in its current form.

LIGHTING EFFECTS

138. The conditions and the relevant measures in the CEMP that address construction and operation lighting effects are agreed between the Transport

¹²⁰ New proposed designation condition 19(b).

¹²¹ Noting that discussions for the permanent acquisition of the Pascoes' property are continuing, in the context of the Public Works Act scheme.

Agency and NPDC.¹²² The final operational lighting provision (including whether there will be any operational lighting at the intersections with the existing SH3) will be confirmed through detailed design.

NATURAL HAZARDS

139. The expert evidence of Mr Symmans is that the Project will be a resilient section of State highway, and significantly more resilient to natural hazards than the existing highway.¹²³ NPDC are comfortable that this is indeed the case.
140. Concerns raised by submitters about fog, black ice and flooding associated with the alignment crossing the Mangapepeke Valley were addressed by Mr Boam in his evidence.¹²⁴ NPDC is satisfied with the Transport Agency's responses to those concerns.¹²⁵
141. Only the Pascoes addressed any of these issues at the hearing, producing material about previous flooding in the Mangapepeke. That notwithstanding, the expert evidence is that the Project alignment will not be especially susceptible to flooding, or exacerbate the existing situation.

SOIL CONTAMINATION AND HAZARDOUS SUBSTANCES EFFECTS

142. In response to comments in the NPDC Supplementary Section 42A Report, minor updates have been made to the Detailed Site Investigation, CEMP and Contaminated Land Management Plan ("**CLMP**") in terms of the management of potential contaminated land and hazardous substances related effects. Ms McBeth confirmed she is satisfied with the updates, and that the CLMP and CEMP can now be approved.¹²⁶ The conditions that relate to soil contamination and hazardous substances effects are agreed between the Transport Agency and NPDC; no other party raised any issues at the hearing.

LAND ACQUISITION AND PROPERTY ACCESS

143. Land acquisition discussions are continuing to progress, as flagged in the opening legal submissions and the evidence of Mr Napier.
144. Of particular note is that there is not yet an agreement in place with the Pascoes. As explained by Mr MacGibbon,¹²⁷ the location of the 'Intended PMA' now includes provision for the possibility that the Transport Agency will not be able to acquire the Pascoes' land (beyond the road corridor and land

¹²² In particular, Ms McBeth confirmed on the final day of the hearing that she is not pursuing the alternative words in designation condition 40 linking the decision on operational lighting at the intersections to the existing SH3 with the State highway revocation process. On that basis, Mr Roan's version of that condition is an agreed condition.

¹²³ See in particular paragraph 12 of Mr Symman's EIC.

¹²⁴ Mr Boam's EIC, paragraphs 185 – 204.

¹²⁵ NPDC Section 42A Report, paragraphs 208 – 210.

¹²⁶ Ms McBeth's Hearing Statement, paragraph 46.

¹²⁷ In his Second Supplementary Statement of Evidence, paragraphs 50 – 52.

required for temporary occupation during construction of the road, which will if necessary be acquired compulsorily).

145. Access for property owners served by the existing SH3 will be maintained during construction in accordance with designation condition 37 (agreed between the Transport Agency and NPDC). Access for those property owners on a longer-term basis will be addressed through the State highway revocation process (as discussed below).

PART D OTHER OUTSTANDING LEGAL AND STATUTORY MATTERS

146. This section addresses the small number of additional outstanding statutory and legal issues (including in respect of conditions remaining in contention) not covered in the previous sections. Counsel's opening legal submissions set out the overall statutory framework for the Commissioner's consideration; that material is not repeated here. More broadly, this section should be read in conjunction with the opening legal submissions for the Transport Agency in respect of legal and statutory matters.
147. This section addresses:
- (a) Whether conditions should prescribe minimum terms for which the Transport Agency must secure the use of the PMA and planting areas;
 - (b) The State highway revocation process and whether that should be addressed in conditions;¹²⁸
 - (c) Lapse periods, and in particular whether a lapse period can be imposed on the alteration to the designation;¹²⁹ and
 - (d) Sections 171(1)(b) and (c).¹³⁰

CONDITIONS PRESCRIBING MINIMUM TERMS FOR ACCESS TO PMA AND PLANTED AREAS

148. The Transport Agency has always accepted that it must carry out pest management within the PMA in perpetuity, and ensure that all planted areas are protected on an ongoing basis. As such, the Transport Agency also accepts that if for any reason it ever loses access to any of the PMA or planting land, it must secure replacement areas. The enduring nature of the ecological mitigation, offset and compensation measures are fundamental to the overall package.
149. Following discussions with DOC over the last two weeks, designation condition 29A and consent condition GEN.24A have been expanded. Those conditions now specify:
- (a) The Transport Agency must not commence Works until it gives the Councils written notice that it has in place the necessary agreements / authorisations to carry out all aspects of the ELMP (including pest management and planting). This is a condition precedent, offered by the Transport Agency, obliging it to secure the land necessary for pest management and planting before the Project begins (with an exception

¹²⁸ See also paragraphs 82 - 85 of counsel's opening legal submissions.

¹²⁹ See also paragraphs 274 - 276 of counsel's opening legal submissions.

¹³⁰ See also Part F of counsel's opening legal submissions.

where the PMA location is confirmed through 'scenario 4' in condition 30);

- (b) The Transport Agency must carry out pest management within the PMA in perpetuity, and ensure that the restoration and riparian planting is protected on an ongoing basis;
 - (c) If the agreements / authorisations necessary to secure the PMA and planting land are term-limited, the Transport Agency must notify the Councils two years before the relevant term expires, and then either ensure the term is renewed, or else go through a process to secure replacement land, and have the subsequent material amendment to the ELMP (resulting from the changed location of the PMA and / or planted areas) certified.
150. The Councils are both satisfied that this condition provides for the necessary safeguards to ensure the PMA and planted areas will be enduring.
151. There is a remaining disagreement with DOC about the wording of these conditions, though that disagreement has been substantially narrowed over the last two weeks. The wording as summarised above is agreed between the Transport Agency and DOC. However, DOC seek additional wording in Conditions 29A and G.24A to specify that the relevant legal agreements / authorisations must secure the relevant (third party) land in perpetuity, or for a minimum 35 year term for the PMA.
152. The Transport Agency's position is that there is no need for those additional words, given the clear and firm obligations to secure and deliver pest management in perpetuity, and to ensure the ongoing protection of the planted areas. There is no real issue as to the certainty of the longevity of the PMA and planted areas, given the Transport Agency's proposed condition framework.
153. Of course, the Transport Agency is motivated to secure access to the relevant third party land for terms that are as long as possible, and to avoid any future process of moving the PMA or planted areas. Any such process would likely be an expensive and time consuming one for the Transport Agency, and as per the agreed conditions the councils would be kept informed well before the expiry of any term.
154. However, specifying a required term for the relevant property agreements / authorisations is not necessary to secure the ecological restoration package, and would needlessly constrain the Transport Agency's property discussions with DOC, Ngāti Tama, and other relevant landowners. Flexibility in securing the land is important, especially given that most of the land is either Ngāti Tama Treaty Settlement land, or land administered by DOC under the Conservation Act.

155. Legal submissions were filed by DOC, broadly in relation to these conditions. To some extent, those submissions discuss the general need for a condition precedent requiring the PMA and planting land to be secured before construction, and to require the PMA and planted areas to be enduring (issues that are not in dispute). In terms of the cases referred to by counsel for DOC, counsel respond briefly as follows:
- (a) *Handley v South Taranaki District Council [2018] NZEnvC 97*: The Transport Agency accepts that a condition precedent is appropriate (as discussed above);
 - (b) *McGuinness v Longview Estuary Estate and Whangarei District Council [2011] NZEnvC 382*: It is not apparent that this case is of direct application here;
 - (c) *Ruataniwha decision (Board of Inquiry decision, June 2015)*: The Transport Agency's proposed condition 29A is aligned with condition 7 from Ruataniwha cited by DOC;
 - (d) *Buller Coal [2013] NZEnvC 253*: The conditions cited by counsel for DOC provide for the consent holder to use its "best endeavours" to secure the protection of the offset / compensation site (the DPPA). Counsel note that the Environment Court accepted the "best endeavours" proviso after fulsome debate on that point between the parties. This is a less stringent condition than the more certain condition framework proposed by the Transport Agency here, where there is no "best endeavours" proviso;
 - (e) *JF Investments Limited v QLDC (C48/2006)*: Again, the Transport Agency is proposing a condition precedent here;
 - (f) *Transmission Gully (Board of Inquiry decision, June 2012)*: The conditions required the Transport Agency to use its "best endeavours" to secure the land retirement and planting areas in perpetuity. As with the *Buller Coal* decision, the "best endeavours" proviso means there is in fact no strict obligation in that respect. The subsequent obligation not to open the main alignment until title instruments have been registered should be read in that light.
156. Both Councils agree with the Transport Agency that the additional words sought by DOC are not necessary. Counsel respectfully submit that the views of the Councils as regulators should be an important consideration for the Commissioner in this instance. The Commissioner can also, it is submitted, take significant comfort from the fact that the Transport Agency's proposed conditions provide a greater level of certainty in terms than the *Buller Coal* conditions, which were imposed by the Environment Court after fulsome debate on that point by the parties.

157. For completeness, counsel note that, should the Commissioner favour DOC's approach, the additional words sought by DOC in condition 29A(a) and 24A(a) would need to be amended to read (for both conditions):

"The legal agreements and/or other authorisations shall provide for the rights to carry out, continue and maintain the measures in perpetuity, or for a term of not less than 35 years."

158. This would ensure the planted land could also be secured for 35 year terms. There is no reason to treat the planted areas differently to the PMA, and there is planting proposed to be carried out on Ngāti Tama and DOC land. The same cultural issues noted at the hearing (including by Ms McBeth and by counsel for DOC) in respect of perpetuity over Ngāti Tama land apply as much to the planted areas as to the PMA.

REVOCAION OF STATE HIGHWAY STATUS

159. The Transport Agency remains of the view that there is no need for a designation condition that addresses the State highway revocation process. Section 103 of the Land Transport Management Act 2003 ("**LTMA**") provides a standalone statutory framework for that revocation process, which should not be disturbed or duplicated without compelling reasons.
160. In particular, the LTMA requires that the Transport Agency must consult any regional council or territorial authority that may be affected.¹³¹ The Transport Agency has produced a detailed Policy and Guidance document on the process which sets out the timeframes, funding and a number of other elements including that if the Transport Agency recommends revocation it must ensure that the relevant section of State highway will (at the time of handover), be fit for purpose in relation to its transport functions.¹³² As set out in the evidence of Mr Napier, the Transport Agency has committed to consultation with the Councils over the future of the section of SH3 that will be bypassed by the Project.
161. NPDC nevertheless continues to seek a condition relating to the revocation process. In doing so, Ms McBeth in her Hearing Statement referred to the Board of Inquiry into the Transmission Gully project. It is worth setting out the condition that was ultimately imposed by the Board of Inquiry in full:¹³³

"No earlier than six months after the commencement of the Project and no later than 12 months from that date the Requiring Authority shall: Consult with PCC, WRC, Paremata Residents Association Inc, Plimmerton Residents Association Inc, and Ngāti Toa Rangitira in relation to its proposals for the Work Paremata Road, Mana Esplanade

¹³¹ Land Transport Management Act 2003, section 103(8).

¹³² State Highway Revocation: Policy Guidance (NZ Transport Agency). Available at: <https://www.nzta.govt.nz/assets/planning-and-investment/docs/state-highway-revocation-policy.pdf>

¹³³ Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal, Volume 2: Conditions, at NZTA3.B.

and St Andrews Road following the construction of the Transmission Gully Motorway Project, including the following matters:

- (a) Ownership and control of the Work Paremata Road, Mana Esplanade and St Andrews Road;
- (b) Options relating to the future of the existing Paremata Bridge;
- (c) The continuation of four laning of St Andrews Road between Acheron Road and James Street;
- (d) Measures (to the extent that they are legally available) to restrict or discourage heavy vehicle movements through the Work Paremata Road, Mana Esplanade and St Andrews Road;
- (e) Other measures required to ensure an adequate level of service for the traffic volumes and traffic type expected to use the Work Paremata Road, Mana Esplanade and St Andrews Road;
- (f) Provision of arrangements for cyclists;
- (g) Alteration of footpath widths;
- (h) Removal of traffic lights;
- (i) Changes to the operation of the clearways or High Occupancy Vehicle lanes;
- (j) Alteration of arrangements in relation to capacity;
- (k) Any changes to be sought to the any NZTA designation in relation to those matters; and

Report on the outcomes of that consultation to PCC and WRC for the purposes of ensuring that PCC and WRC are fully informed of the views of the public and those bodies, and of the Requiring Authority's intended response to that consultation."

162. The Board of Inquiry did find that the effects of revoking State highway status can be a matter for designation conditions (which in that case warranted a condition requiring consultation, and reporting to the relevant councils as to the outcomes of consultation). However, the Board declined to impose a different form of condition proposed by Kapiti Coast District Council, on the basis that the Council was "seeking to set up a parallel process to that contained in s103(8) under the conditions of NoRs that appears neither necessary or desirable".¹³⁴

163. The condition sought by NPDC is as follows:

¹³⁴ Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal, Volume 1, at [148].

Status of existing road no longer needed as State highway

(a) Prior to any decision being made on the future status of the existing road over Mt Messenger, the Requiring Authority shall:

(i) consult with New Plymouth District Council's Manager Transportation and all owners and occupiers of land adjoining the bypassed road, and other parties with access rights or other interests in the affected area, about options to ensure that access is provided to the affected properties, assets and interests and that such access is suitable for its future use; and

ii) provide a report on the outcomes of the consultation to NPDC for the purpose of ensuring that NPDC is fully informed of the views of the affected persons and interests, and of the Requiring Authority's intended response to that consultation.

(b) Before any part or parts of the existing road's State highway status is revoked and any parts of the bypassed route are vested in any person or the Council, the Requiring Authority shall carry out the necessary works to ensure the existing road is (and any alternative new accessways are) fit for its future use.

(c) The Requiring Authority shall have particular regard to the likely the ongoing maintenance costs of the existing road and any alternative new accessways before making a decision as to what type of surface treatment will be fit for its future use.

(d) The Requiring Authority shall maintain the bypassed route (and any alternative new accessways) for five years following revocation of its State highway status, to a standard consistent with its decisions in (b) and (c) above.

164. In broad terms, part (a) of the NPDC proposed condition is aligned with the Transmission Gully condition. Even so, counsel note that the context here is different from Transmission Gully, which related to the replacement of a significant stretch of State Highway 1 through Porirua and the Kapiti Coast, where that replaced road was to remain an important local road. By contrast, there is no suggestion that the bypassed section of SH3 will serve anywhere near that type of function. Again, the Transport Agency position is that there is little reason to require consultation and reporting in a designation condition, given the existing LTMA framework.
165. The remainder of the NPDC condition goes well beyond what was imposed by the Transmission Gully Board of Inquiry, and is significantly more problematic. In particular, parts (b), (c) and (d) of the NPDC condition would presuppose the outcome of the LTMA process, thereby actively impinging on that statutory process. NPDC has not pointed to any precedent for a condition encompassing those elements.

166. As Ms McBeth records in her Hearing Statement, any condition relating to the revocation process must be reasonable and appropriate.¹³⁵ In simple terms, the condition sought by NPDC (particularly parts (b), (c) and (d)) is not reasonable or appropriate.

LAPSE PERIODS

Resource consents

167. As per the agreed conditions, the Transport Agency and TRC are aligned in respect of:
- (a) the appropriate term for all the regional resource consents, other than the land use consents, being 35 years (condition GEN.3);
 - (b) the appropriate term for the regional land use consents, being the default unlimited term under section 123(b) of the RMA; and
 - (c) the appropriate lapse period for all the regional resource consents, being 10 years (condition GEN.2).
168. No term or lapse period is specified in the agreed conditions for the resource consent under the NES Soil. Under section 123(b) of the RMA, the default term is (as with most other land use consents) unlimited. Counsel submit there is no need to provide for any specific term of this consent, and that the default unlimited term (as per section 123(b)) is appropriate).
169. The default lapse period for the NES Soil consent is 5 years (as per section 125(1)). However, counsel submit it would be appropriate to specify a 10 year lapse period for the NES Soil consent, to align with the lapse period for the regional consent.¹³⁶ Counsel understand from Mr Roan that there was no deliberate decision by the planners in conferencing to leave the default 5 year lapse period in place.

Alteration to the designation

170. There is disagreement between the Transport Agency and NPDC in respect of the legality of including a lapse period for the alteration to the designation. This is to some extent a moot point, given the Transport Agency intends to construct the Project as soon as possible, and NPDC seeks a 10 year lapse period. However, the issue of lapse periods for alterations to designations has wider application for the Transport Agency in respect of designations around the country.
171. Counsel understands that lapse periods have been applied to alterations to designations for Transport Agency projects including the East West Link, Ara Tūhono - Pūhoi to Wellsford (Pūhoi to Warkworth Section), and Christchurch

¹³⁵ Paragraph 67.

¹³⁶ The updated draft conditions for the NES Soil consent include a new condition to that effect.

Southern Motorway projects. However, as counsel understands it, the legality of lapse periods for alternations to designations was not argued in those cases. The Transport Agency's current approach is that as point of law and of planning principle, lapse periods should not apply to alterations of designations.

172. As set out in opening legal submissions,¹³⁷ the Transport Agency's position is that no lapse period may be included on an alteration to a designation. That position is based on a straightforward application of section 181 of the RMA, which provides for alterations to designations. In particular, section 181(2) provides:

“Subject to subsection (3), sections 168 to 179 and 198AA to 198AD shall, with all necessary modifications, apply to a requirement referred to in subsection (1) as if it were a requirement for a new designation.”

173. Section 184 provides for lapse periods for “*designations that have not been given effect to*”. In simple terms, section 184 is not applied to alterations to designations by section 181(2), and therefore there is no ability to impose a lapse period on an alteration to an existing designation. Of course, the designation itself (for SH3 in the vicinity of Mt Messenger) was “*given effect to*” long ago.
174. With respect, NPDC's response that section 181(2) “*requires a change to a designation to be processed in the same way as a new NoR unless the change is sufficiently minor that it can be approved under s181(3)*”¹³⁸ omits the crucial reference to the sections that apply to modifications (ie, not section 184). Nor is NPDC's reference to section 168 particularly relevant – that section simply provides for the lodgement of an NoR by a requiring authority.
175. Counsel accept that NPDC's reference to the designation rollover process has merit. However, if the Transport Agency were ultimately to decide not to construct the Project, it could be expected (like any responsible requiring authority) to go through the process set out in section 182 of the RMA to have the relevant part of the designation removed. Counsel also note that under section 185 of the RMA, landowners (or owners of another interest in land) affected by a designation have an ability to apply to the Environment Court for an order to compel a requiring authority to acquire their interest in the land. In other words, landowners affected by an alteration to a designation are not without recourse simply because there is no lapse period.

SECTIONS 171(1)(B) AND (C)

176. In opening legal submissions, counsel traversed the legal principles and case law applicable to section 171(1)(b) of the RMA (whether adequate consideration has been given to alternatives) and section 171(1)(c) (whether

¹³⁷ At paragraph 276.

¹³⁸ Ms McBeth's Hearing Statement, paragraph 69.

the work and [alteration to the] designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought).

177. There is no need to restate that material here, other than to reiterate two overall points (which will be well known to the Commissioner) in respect of section 171(b):
- (a) the choice of site, route, or method of the work remains the Transport Agency's to make, and that decision is not subject to challenge under the RMA; and
 - (b) in making its choice, the Transport Agency was required to have particular regard to the information obtained through its alternatives assessment, but was not obligated to choose the 'best' option.
178. Ms McBeth sought further information in her original Section 42A Report, including in relation to the shortlisted 'online' Option Z. In light of the additional information provided in the Transport Agency's evidence (including in particular the evidence of Mr Symmans and Mr Milliken), Ms McBeth confirmed in her Updated Section 42A Report that she is comfortable that adequate consideration was given to alternatives in terms of section 171(1)(b), and that the landslide feature associated with the Option Z alignment (and significant costs of addressing that issue) was "*a strong basis for the NZTA's selection of an offline option*".¹³⁹
179. In her Hearing Statement, Ms McBeth added that she is "*satisfied that the route selected is appropriate in terms of S171(1)(c)*".¹⁴⁰
180. As acknowledged in Ms McBeth's reporting, the Transport Agency has endeavoured to address all the questions posed by NPDC and its advisors in respect of the alternatives process, through meetings and in evidence. Mr Doherty continued to raise questions in the 14 August 2018 letter attached to Ms McBeth's Hearing Statement. [FN: unfortunately the Transport Agency did not see and was not able to address that letter until 10 October 2018.] Ms McBeth had the opportunity to consider Mr Doherty's letter, and confirmed that notwithstanding that letter she is comfortable that sections 171(1)(b) and 171(1)(c) are satisfied.
181. At the direction of the Commissioner, Mr Doherty filed a statement of evidence on 19 October 2018, and then on 26 October 2018 provided a response to written questions from the Commissioner. In that latter response, Mr Doherty stated:

¹³⁹ Paragraph 2.

¹⁴⁰ Paragraph 7. Given this conclusion there is no real need to address Ms McBeth's comments on the application of section 171(1)(c), other than to reiterate the point from opening legal submissions that section 171(1)(c) is not a second opportunity to analyse option selection (including in terms of the choice of an online vs an offline option).

"I accept the cost difference of \$183M between Option Z and Option E as presented by Mr Symmans on 1 August 2018."

182. He then explained that in his view *"the additional effects generated by Option E to those considered in the original MCA that have not been addressed through written and verbal expert evidence"* are the cost of implementing and maintaining the mitigation, offset and compensation measures now proposed for the Project. Mr Doherty states that *"Mr Symmans confirmed to me on 16 October 2018 that ongoing pest management costs were not included, and these are still to be confirmed"*.

183. Putting aside the question of whether those costs are in fact an RMA effect (given they will be internalised to the Transport Agency), counsel note that Mr Doherty has not referred to a letter sent by Mr Symmans to Mr Doherty dated 17 October 2018, where Mr Symmans explained that the Project budget of just under \$200m:

*"...does not include ongoing pest management costs, which are still to be confirmed. **However the net present value of such costs will be unlikely to increase the overall project estimate by more than a few percent.**"*

[emphasis added]

184. The Transport Agency and Ms McBeth for NPDC (in her role as expert planner) agree that the Transport Agency has satisfied both sections 171(1)(b) and 171(1)(c). By way of brief overall summary, counsel note:

- (a) The AEE, associated reports (including the Longlist MCA Report and Shortlist MCA Report) and the evidence of the Transport Agency's witnesses (including in particular Mr Roan, Mr Napier, Mr Symmans and Mr Milliken) demonstrate that the Transport Agency followed a detailed and robust process for assessing alternative options for the Project, centred on but not determined solely by a two-stage MCA process;
- (b) In light of all the information it received, including the MCA results and the \$185m difference in cost between Options E and Z, the Transport Agency's decision to progress Option E was perfectly reasonable. There is no dispute about that significant cost difference;
- (c) The shortlisted options in particular (including the 'online' Option Z) were all developed to a reasonable level of detail for the MCA assessment and further developed prior to the Transport Agency decision to select Option E. It is standard and responsible practice to continue refining the chosen Project option through to the consenting stage (including refining the mitigation / offset / compensation required to address environmental effects); and

- (d) In referring to the costs of the ecological restoration package, Mr Doherty seems to infer that there would have been no significant ongoing and expensive mitigation and offset / compensation requirements for an 'online' Option Z. That is by no means a safe inference. In fact, in his MCA assessment of the shortlisted options, Mr Singers gave Options E and Z the same overall score in terms of effects on indigenous vegetation. Mr Singers also concluded that in relative terms Option E had lesser such adverse effects than Option Z (and had relatively lesser effects than all shortlisted options).¹⁴¹ In any event, the costs associated with the ecological restoration package are dwarfed by the \$185m cost difference between Options E and Option Z.

¹⁴¹ Refer to the Terrestrial Ecology Report included as Appendix J to the overall Shortlist MCA Report (Volume 4B of the application / NoR materials). Refer in particular to Mr Singers' comments at pages 4 – 5 of his report.

PART E CONDITIONS AND MANAGEMENT PLANS

185. The conditions and management plans have been subject to extensive review and redrafting through the hearing process. The Transport Agency appreciates the effort of the Councils and DOC to get the conditions into the position which the Transport Agency now proposes.
186. The proposed conditions attached to these closing submissions are almost all agreed. Those that are not agreed are mentioned in the JWS-Planning dated 23 October 2018, set out in Mr Inger's final statement of evidence provided on 24 October 2018 and are addressed fully above.
187. Further, mostly minor changes to the conditions that are proposed by the Transport Agency following the conclusion of the hearing are highlighted in yellow in the attached version.
188. In relation to the management plans, which are also attached to these closing submissions:
- (a) a key technical issue as to whether they were ready to be certified by the Commissioner is no longer in dispute;
 - (b) the wording of the ELMP is agreed (subject to the 4 matters addressed above);
 - (c) there are some issues in respect of the CWDMP raised by DoC (and addressed above) but otherwise this management plan is agreed;
 - (d) three of the SCWMPs are ready to be approved by the Commissioner and the rest will be subject to certification by the Councils; and
 - (e) all the other management plans are agreed.
189. It is submitted, for the reasons set out above, that the proposed conditions and management plans are robust and will ensure outcomes such that the effects of the Project will be appropriately avoided, remedied, mitigated, offset and compensated.

PART F PLANNING FRAMEWORK, PART 2 OF THE RMA AND OVERALL CONCLUSIONS

190. Opening submissions on behalf of the Transport Agency address Part 2 of the RMA and planning matters in detail.¹⁴²

PLANNING FRAMEWORK

191. Initially, the planners for the Councils (through the Section 42A Reports which supported confirming the notices of requirement and granting the resource consents¹⁴³) and DOC raised concerns about ecological issues in relation to various policies (including those relating to SNAs – none of which are mapped):

- (a) the Transport Agency has never argued that the vegetation affected is not significant; and
- (b) by the end of the hearing, the planners for the Councils and DOC did not raise any further planning issues beyond those above related to conditions, and counsel are unaware of any such issues.

192. Mr Carlyon raised some planning issues in his evidence on behalf of Te Korowai but accepted during the hearing that he was on a limited retainer and had not assessed all relevant objectives and policies. For the reasons set out in the evidence of Mr Dixon and Mr Roan it is submitted that the Project aligns with the relevant cultural objectives and policies Mr Carlyon raised.¹⁴⁴

193. It is submitted, based on the evidence of Mr Dixon and Mr Roan, that the Project, as revised through the hearing and now proposed is consistent with the relevant objectives and policies of the relevant planning documents.¹⁴⁵

194. Paragraphs 230-236 of the opening submissions address the relevant 'other matters'. Particular focus was placed in supplementary evidence on the April 2018 Fish Passage Guidelines.

PART 2

195. In opening submissions and during the hearing counsel referred to the *Davidson* High Court decision and mentioned that the Court of Appeal decision was pending. That decision was released during the hearing.

196. In short, in *Davidson*¹⁴⁶ the Court of Appeal determined that:

¹⁴² In Parts E and H.

¹⁴³ See paragraphs 228 and 229 of the opening submissions.

¹⁴⁴ See also paragraph 227(e) of the opening submissions.

¹⁴⁵ It is submitted that this applies to each individual objective and policy, but the requirement is that consistency is to be assessed against "a fair appraisal of the objectives and policies read as a whole" - *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25] cited with support by the Court of Appeal in *Davidson* at [73].

¹⁴⁶ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

- (a) notwithstanding *King Salmon*, RMA decision makers should usually consider Part 2 when making decisions on resource consents (that is the implication of the words "subject to Part 2" in section 104);¹⁴⁷
- (b) however, where the relevant plan provisions have clearly given effect to Part 2, there may be no need to do so as it "*would not add anything to the evaluative exercise*".¹⁴⁸ It would be inconsistent with the scheme of the RMA to override those plan provisions through recourse to Part 2. In other words, "*genuine consideration and application of relevant plan considerations may leave little room for Part 2 to influence the outcome*".¹⁴⁹

197. It is submitted that the Court of Appeal's decision in *Davidson* does not materially alter the position and outcome set out in opening submissions.

198. Part 2 matters were assessed in detail in evidence and opening submissions for the Transport Agency and through the hearing the changes made to the Project, conditions and management plans have, it is submitted, made the Project even more aligned with Part 2 matters (as well as the planning framework).

OVERALL CONCLUSION

199. In relation to sections 104 and 171, based on all the evidence and submission presented above, it is submitted that:

- (a) the Project is consistent with Part 2 of the RMA;
- (b) the Project has significant positive effects;
- (c) adverse effects have been appropriately avoided, remedied, mitigated, offset and compensated;
- (d) the Project is consistent with the relevant objectives and policies of the relevant planning documents;
- (e) adequate consideration has been given to alternatives;
- (f) the alteration to the designation is reasonably necessary for achieving the objectives of the Transport Agency; and
- (g) the Project is consistent with other relevant matters to which the Commissioner may have regard.

200. The Project will promote the sustainable management purpose of the RMA in a manner that is consistent with the relevant objectives and policies of the relevant planning documents.

201. Overall, the Project provides an opportunity to resolve longstanding transport issues associated with the Mt Messenger section of SH3. The Project delivers

¹⁴⁷ Ibid, see paragraphs 66-70.

¹⁴⁸ Ibid, at paragraph 75.

¹⁴⁹ Ibid, at paragraph 82.

a modern road, suitable for its present and predicted future use, that is also safe and resilient.

202. The Project appropriately recognises and addresses adverse effects, and provides significant economic benefits for the district and region.