retrieval and mooring areas identified as Te Huruhi Point Landing Area on Map 4 of the Motiti island Environmental Management Plan Operative May 2016.

(b) All policies in Part 3 - Iwi Resource management

(specific references to be added)

Policy MNEMA 1 Incorporate matauranga Maori for the Motiti Natural Environment Management Area by:

(a) identifying a Rahui /Conservation Management Area incorporating Otaiti and the waters associated with Otaiti for protection of natural heritage, cultural values and taonga species, for restoration and enhancement of natural character.

(b) Give effect to a customary rahui preventing removal, damage or destruction of any indigenous flora or fauna including taonga species within the Rahui/Conservation Management Area and preventing occupation of space for that purpose, unless for the purpose of scientific, state of the environment or resource consent monitoring.

Policy MNEMA 2 Achieve integrated management of the Motiti Natural Environment Management Area by regular mauri monitoring in collaboration with tangata whenua of Motiti.

12.2 Rules

Rule MNEMA 1 Controlled

Motiti marae based aquaculture that is not located within the Rahui/Conservation Management Area and is subject to Rule AQ 2.

Rule MNEMA 2 Prohibited

Breach of the Rahui by:

a. Removal, damage or destruction of any indigenous flora or fauna including taonga species, unless for the purpose of scientific or resource consent monitoring; or

b. Structures or Occupation (whether temporary or permanent) of the Rahui /Conservation Management Area for the purpose of removal, damage or destruction of any indigenous flora or fauna including taonga species, unless for the purpose of scientific or resource consent monitoring.

Part Five Methods

Add Consequential Amendments

Part Six

Update Schedule 6 ASCV.

Add a new Schedule 6A to identify the attributes values and tangata whenua aspirations to include the following:

A. The cultural landscape extends from the sea floor to the ocean surface and is integrated with land within the Motiti Natural Environment Area.

C4

B. Taonga species include [taken from the RPS Appendix J]:

- Hapuku;
- Tamure (snapper);
- Kahawai;
- Maomao
- Tarakihi;
- Moki
- Araara (trevally)
- Parore;
- Haku (yellow-tail Kingfish)
- Aturere (tuna)
- Kuparu (John Dory)
- Kumukumu (gurnard)
- Patikirori (sole)
- Mango (sharks)
- Wheke (octopus)
- Koura (crayfish)
- Paua (abalone)
- Kuku (mussels)
- Tipa (scallops)
- Tio (oysters)
- Kina (urchins)
- Rori (sea cucumbers)
- Karengo (seaweeds).

C. Schedule 2 – Indigenous Biological Diversity Area:

- IBDA A75 Motiti Island
- IBDA A76 Astrolabe Reef
- IBDA A77 Motunau (land)
- IBDA A78 Motunau (marine area)
- IBDA A79 Motuputa Island
- IBDA B132 Motiti Islets

C. Schedule 3 – Outstanding Natural Features and Landscapes

- ONFL 44 Motiti Island margin and associated islands, reefs and shoals

D. Schedule 5 – Regionally Significant Surf Breaks

- 12 Motiti Island (east side)

E Schedule 6 – Areas of Significant Cultural Value

- ASCV 25 Motiti Island and associated islands, reefs and shoals

C5

The Natural Heritage (NH), Iwi Resource Management (IW) and Recreation, public access and open space (RA) polices contained in Part 3 contain additional policy direction on managing effects on A- E above

Tangata whenua aspirations

Motiti Natural Environment Area

- Marae based aquaculture.
- Restoration of natural heritage and cultural values.
- Protection of biodiversity, particularly indigenous flora and fauna, in order to establish, maintain and enhance the habitat of taonga species.
- Protection and restoration of the mauri and mana
- Use and development of coastal environment of Motiti Island supports the values and attributes of identified natural and cultural heritage values.
- Maori customary activities, public access, educative and experiential opportunities are able to be undertaken.

Otaiti Rahui Conservation Area

- Protection of natural heritage, cultural values and taonga species
- Restoration and enhancement of natural character
- Avoid taking, removal, damage or destruction of any indigenous flora or fauna including taonga species unless for the purpose of scientific or resource consent monitoring

Amend Schedule 15 to remove reference to Te Huruhi Point Landing Area on Map 4 of the Motiti Island Environmental Management Plan Operative May 2016.

Part Seven

Provide additional maps and amendments to the existing suite of maps 43 and 44:

- to identify and provide for the Motiti Natural Environment Management Area based on the RPS Appendix I Map 21a and
- to show the Rahui Conservation Management Area identified in MNEM Policy 1
- to incorporate Motunau Island Rocks and Reefs including Tokeroa within MNEMA
- providing for Motiti Island within MNEMA

AMENDED RELIEF TO APPEAL - ENV-2015-AKL-134

Part One Purpose, content, planning framework

The parts of the Plan relating to the spatial planning approach to the Motiti Natural Environment Management Area and any amendments made to other parts of the Plan as a result of appeal ENV-2015-AKL-000134 (including **[to specify]** [5.2] [spatial planning approach for the Motiti Natural Environment Management Area], Issues 53 – 55, Objectives 50 – 52, Policies MNEMA 1 and 2, and Rules MNEMA 1 and 2) shall not come into effect or become operative until a date after final resolution of the appeals and other challenges (if any) against the grant of consents to The Astrolabe Community Trust relating to the remains of the MV Rena on Otaiti, with the intent that these provisions shall have no effect on the resolution of those resource consents.

Amend 5.Plan Mechanisms at 5.2 to provide for "Management Areas" as a plan mechanism by amending the heading and adding a new paragraph follows:

"5.2 Zoning, ~~and~~ Overlays and Management Areas

The Motiti Management Area adopts a spatial planning approach to the Motiti Natural Environment Management Area, identified in the Regional Policy Statement. The Management Area has multiple values and requires an integrated approach to protect and enhance these values.

Part Two Issues and objectives for the coastal environment

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area as follows:

12. Motiti Natural Environment Management Area (MNEMA)

Under 1. Issues

Add a new set of issues to address an additional discrete spatial area within the coastal environment, namely the Motiti Natural Environment Area, following on from 1.10 Harbour Zone and 1.11 Port Zone, by inserting a new 1.12 Motiti Natural Environment Management Area and two issues as follows:

1.12 Motiti Natural Environment Management Area

Issue 53 Motiti Island is the only continuously occupied offshore island in the region. It is the most developed of all offshore islands. Tangata whenua have a lengthy history of traditional and continuing cultural relationships with the coastal environment of the Motiti Natural Environment Management Area where tangata whenua have lived and fished for generations. Motiti is physically and spiritually linked to Otaiti as well as toka, reefs and other features identified in the Motiti Natural Environment Management Area. Otaiti is both anchor (haika) and umbilical cord (pito) for Motiti Island (Topito o te Ao).

Issue 54 For tangata whenua of Motiti, Te Moutere o Motiti is a taonga. Te Tau o Taiti (Astrolabe reef) is a taonga, and so too are identified features and named toka

(rocks) including Te Porotiti, Te Papa, Okarapu, Motukau, Motunau, Tokeroa and the coastal waters in which they are located.

Issue 55 ~~*He Aitua*~~

~~The *MV Rena* grounding on Te Tau o Taiti (Otaiti) Astrolabe reef on 5 October 2011 was a significant maritime incident with profound impacts on the marine environment and customary fisheries of the Motiti Rohemoana.~~

Rahui

Tangata whenua of Motiti issued a rahui under customary authority, kaitiakitanga and tikanga to manage, maintain and protect Otaiti ~~for the duration that the MV Rena wreck remains in situ~~. The rahui seeks to restore the mauri of Otaiti as a taonga. For restoration to occur, an integrated approach is required to address tangible and intangible values including natural heritage, natural character, biodiversity, cultural and taonga species. The rahui expresses the matauranga Maori of Motiti tangata whenua for protection of Otaiti and management of the Motiti Natural Environment Management Area.

Under 2 Objectives

Add new objectives for the Motiti Natural Environment Management Area under a new Section 2.11 as follows:

2.11 Motiti Natural Environment Area (see Part Seven Map Series 43 and 44)

Objective 50 Protect, restore and rehabilitate the natural and cultural heritage characteristics that are of special value to the tangata whenua of Motiti including:

(a) Mauri o te wai; and

(b) Kaimoana resources; and

(c) Landforms and features; and

(d) Taonga including Otaiti.

Objective 51 Recognise the ongoing and enduring relationship of the tangata whenua of Motiti with the coastal environment of MNEMA. Recognise and implement the rahui for Otaiti in order to sustainably manage the multiple values that exist within the Rahui Conservation management area.

Objective 52 In taking into account the principles of the Treaty of Waitangi and kaitiakitanga, protect and enhance the Motiti Natural Environment Management Area as taonga.

Part Four Activity Based policies and rules

Add a new item 12 to the list of topic headings to provide for the Motiti Natural environment Management Area activities as follows:

12. Motiti Natural Environment Management Area activities (MNEMA)

Add a new Policies & Rules Section 12 as follows:

D2

12. Motiti Natural Envrionment Management Area (MNEMA)

12.1. Policies

12.1.1 General Policies for the Motiti Natural Environment Management Area

1. Also refer to the following policies in other sections of this Plan where relevant to a proposed activity.

(a) All policies in Part 3 –Natural heritage

~~With the exception that the reference in NH5(a) (ii) to activities in Schedule 15 being appropriate in certain circumstances does not include activities and structures associated with boat launching, retrieval and mooring areas identified as Te Huruhi Point Landing Area on Map 4 of the Motiti island Environmental Management Plan Operative May 2016.~~

Deleted

(b) All policies in Part 3 - Iwi Resource management

(specific references to be added)

Policy MNEMA 1 Incorporate matauranga Maori for the Motiti Natural Environment Management Area by:

(a) identifying a Rahui /Conservation Management Area incorporating Otaiti and the waters associated with Otaiti for protection of natural heritage, cultural values and taonga species, for and enhancement of natural character.

(b) Give effect to a customary rahui preventing removal, damage or destruction of any indigenous flora or fauna including taonga species within the Rahui/Conservation Management Area and preventing occupation of space for that purpose, unless for the purpose of scientific, state of the environment or resource consent monitoring.

Policy MNEMA 2 Achieve integrated management of the Motiti Natural Environment Management Area by regular mauri monitoring in collaboration with tangata whenua of Motiti.

12.2 Rules

Rule MNEMA 1 Controlled

Motiti marae based aquaculture that is not located within the Rahui/Conservation Management Area and is subject to Rule AQ 2.

Rule MNEMA 2 Prohibited

Breach of the Rahui by:

a. Removal, damage or destruction of any indigenous flora or fauna including taonga species, unless for the purpose of scientific or resource consent monitoring; or

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2012-454-764
[2013] NZHC 1290

UNDER	the Resource Management Act 1991
BETWEEN	PALMERSTON NORTH CITY COUNCIL Appellant
AND	MOTOR MACHINISTS LIMITED Respondent

Hearing: 13 & 20 March 2013

Counsel: J W Maassen for Appellant
B Ax in person for Respondent

Judgment: 31 May 2013

JUDGMENT OF THE HON JUSTICE KÓS

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[1] From time to time councils notify proposed changes to their district plans. The public may then make submissions "on" the plan change. By law, if a submission is not "on" the change, the council has no business considering it.

[2] But when is a submission actually "on" a proposed plan change?

[3] In this case the Council notified a proposed plan change. Included was the rezoning of some land along a ring road. Four lots at the bottom of the respondent's street, which runs off the ring road, were among properties to be rezoned. The respondent's land is ten lots away from the ring road. The respondent filed a submission that its land too should be rezoned.

[4] The Council says this submission is not "on" the plan change, because the plan change did not directly affect the respondent's land. An Environment Court Judge disagreed. The Council appeals that decision.

Background

[5] Northwest of the central square in the city of Palmerston North is an area of land of mixed usage. Much is commercial, including pockets of what the public at least would call light industrial use. The further from the Square one travels, the greater the proportion of residential use.

[6] Running west-east, and parallel like the runners of a ladder, are two major streets: Walding and Featherston Streets. Walding Street is part of a ring road around the Square.[1] Then, running at right angles between Walding and Featherston Streets, like the rungs of that ladder, are three other relevant streets:

(a) *Taonui Street:* the most easterly of the three. It is wholly commercial in nature. I do not think there is a house to be seen on it.

(b) *Campbell Street:* the most westerly. It is almost wholly residential. There is some commercial and small shop activity at the ends of the street where it joins Walding and Featherston Streets. It is a pleasant leafy street with old villas, a park and angled traffic islands, called "traffic calmers", to slow motorists down.

(c) *Lombard Street:* the rung of the ladder between Taonui and Campbell Streets, and the street with which we are most concerned in this appeal. Messrs Maassen and Ax both asked me to detour, and to drive down Lombard Street on my way back to Wellington. I did so. It has a real mixture of uses. Mr Ax suggested that 40 per cent of the street, despite its largely residential zoning, is industrial or light industrial. That is not my impression. Residential use appeared to me considerably greater than 60 per cent. Many of the houses are in a poor state of repair. There are a number of commercial premises dotted about within it. Not just at the ends of the street, as in Campbell Street.

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[1] Between one and three blocks distant from it. The ring road comprises Walding, Grey, Princess, Ferguson, Pitt and Bourke Streets. See the plan excerpt at [11].

MML's site

[7] The respondent (MML) owns a parcel of land of some 3,326 m^2. It has street frontages to both Lombard Street and Taonui Street. It is contained in a single title, incorporating five separate allotments. Three are on Taonui Street. Those three lots, like all of Taonui Street, are in the outer business zone (OBZ). They have had that zoning for some years.

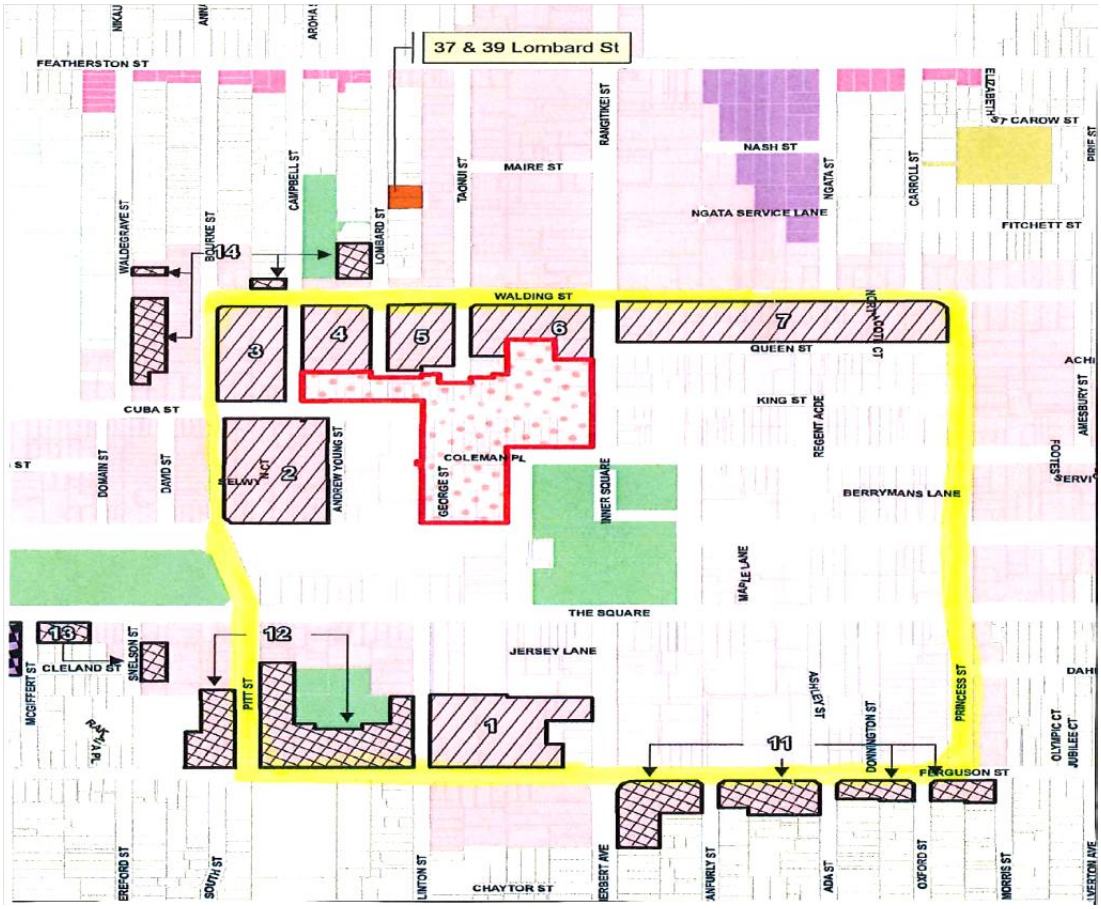
[8] The two lots on Lombard Street, numbers 37 and 39 Lombard Street, are presently zoned in the residential zone. Prior to 1991, that land was in the mixed use zone. In 1991 it was rezoned residential as part of a scheme variation. MML did not make submissions on that variation. A new proposed district plan was released for public comment in May 1995. It continued to show most or all of Lombard Street as in the residential zone, including numbers 37 and 39. No submissions were made by MML on that plan either.

[9] MML operates the five lots as a single site. It uses it for mechanical repairs and the supply of automotive parts. The main entry to the business is on Taonui Street. The Taonui Street factory building stretches back into the Lombard Street lots. The remainder of the Lombard Street lots are occupied by two old houses. The Lombard Street lots are ten lots away from the Walding Street ring road frontage.

Plan change

[10] PPC1 was notified on 23 December 2010. It is an extensive review of the inner business zone (IBZ) and OBZ provisions of the District Plan. It proposes substantial changes to the way in which the two business zones manage the distribution, scale and form of activities. PPC1 provides for a less concentrated form of development in the OBZ, but does not materially alter the objectives and policies applying to that zone. It also proposes to rezone 7.63 hectares of currently residentially zoned land to OBZ. Most of this land is along the ring road.

[11] Shown below is part of the Council's decision document on PPC1, showing some of the areas rezoned in the area adjacent to Lombard Street.



[12] As will be apparent[2] the most substantial changes in the vicinity of Lombard Street are the rezoning of land along Walding Street (part of the ring road) from IBZ to OBZ. But at the bottom of Lombard Street, adjacent to Walding Street, four lots are rezoned from residential to OBZ. That change reflects long standing existing use of those four lots. They form part of an enterprise called Stewart Electrical Limited. Part is a large showroom. The balance is its car park.

MML's submission

[13] On 14 February 2011 MML filed a submission on PPC1. The thrust of the submission was that the two Lombard Street lots should be zoned OBZ as part of PPC1.

[14] The submission referred to the history of the change from mixed use to residential zoning for the Lombard Street lots. It noted that the current zoning did

[2] In the plan excerpt above, salmon pink is OBZ; buff is residential; single hatching is proposed transition from IBZ to OBZ; double hatching is proposed transition from residential to OBZ.

not reflect existing use of the law, and submitted that the entire site should be rezoned to OBZ "to reflect the dominant use of the site". It was said that the requested rezoning "will allow for greater certainty for expansion of the existing use of the site, and will further protect the exiting commercial use of the site". The submission noted that there were "other remnant industrial and commercial uses in Lombard Street" and that the zoning change will be in keeping with what already occurs on the site and on other sites within the vicinity.

[15] No detailed environmental evaluation of the implications of the change for other properties in the vicinity was provided with the submission.

Council's decision

[16] There were meetings between the Council and MML in April 2011. A number of alternative proposals were considered. Some came from MML, and some from the Council. The Council was prepared to contemplate the back half of the Lombard Street properties (where the factory building is) eventually being rezoned OBZ. But its primary position was there was no jurisdiction to rezone any part of the two Lombard Street properties to OBZ under PPC1.

[17] Ultimately commissioners made a decision rejecting MML's submission. MML then appealed to the Environment Court.

Decision appealed from

[18] A decision on the appeal was given by the Environment Court Judge sitting alone, under s 279 of the Resource Management Act 1991 (Act). Having set out the background, the Judge described the issue as follows:

> The issue before the Court is whether the submission ... was on [PPC1], when [PPC1] itself did not propose any change to the zoning of the residential land.

[19] The issue arises in that way because the right to make a submission on a plan change is conferred by Schedule 1, clause 6(1): persons described in the clause "may make a submission on it". If the submission is not "on" the plan change, the council has no jurisdiction to consider it.

[20] The Judge set out the leading authority, the High Court decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council.*[3] He also had regard to what might be termed a gloss placed on that decision by the Environment Court in *Natural Best New Zealand Ltd v Queenstown Lakes District Council.*[4] As a result of these decisions the Judge considered he had to address two matters:

(a) the extent to which MML's submission addressed the subject matter of PPC1; and

(b) issues of procedural fairness.

[21] As to the first of those, the Judge noted that PPC1 was "quite wide in scope". The areas to be rezoned were "spread over a comparatively wide area". The land being rezoned was "either contiguous with, or in close proximity to, [OBZ] land". The Council had said that PPC1 was in part directed at the question of what residential pockets either (1) adjacent to the OBZ, or (2) by virtue of existing use, or (3) as a result of changes to the transportation network, warranted rezoning to OBZ.

[22] On that basis, the Judge noted, the Lombard Street lots met two of those conditions: adjacency and existing use. The Judge considered that a submission seeking the addition of 1619m^2 to the 7.63 hectares proposed to be rezoned was not out of scale with the plan change proposal and would not make PPC1 "something distinctly different" to what it was intended to be. It followed that those considerations, in combination with adjacency and existing use, meant that the MML submission "must be *on* the plan change".

[23] The Judge then turned to the question of procedural fairness. The Judge noted that the process contained in schedule 1 for notification of submissions on plan changes is considerably restricted in extent. A submitter was not required to serve a copy of the submission on persons who might be affected. Instead it simply lodged a copy with the local authority. Nor did clause 7 of Schedule 1 require the local authority to notify persons who might be affected by submissions. Instead just a

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3 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

4 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

public notice had to be given advising the availability of a summary of submissions, the place where that summary could be inspected, and the requirement that within 10 working days after public notice, certain persons might make further submissions. As the Judge then noted:

> Accordingly, unless people take particular interest in the public notices contained in the newspapers, there is a real possibility they may not be aware of plan changes or of submissions on those plan changes which potentially affect them.

[24] The Judge noted that it was against that background that William Young J made the observations he did in the *Clearwater* decision. Because there is limited scope for public participation, "it is necessary to adopt a cautious approach in determining whether or not a submission is on a plan change". William Young J had used the expression "coming out of left field" in *Clearwater*. The Judge below in this case saw that as indicating a submission seeking a remedy or change:

> ... which is not readily foreseeable, is unusual in character or potentially leads to the plan change being something different than what was intended.

[25] But the Judge did not consider that the relief sought by MML in this case could be regarded as falling within any of those descriptions. Rather, the Judge found it "entirely predictable" that MML might seek relief of the sort identified in its submission. The Judge considered that Schedule 1 "requires a proactive approach on the part of those persons who might be affected by submissions to a plan change". They must make inquiry "on their own account" once public notice is given. There was no procedural unfairness in considering MML's submission.

[26] The Judge therefore found that MML had filed a submission that was "on" PPC1. Accordingly there was a valid appeal before the Court.

[27] From that conclusion the Council appeals.

Appeal

The Council's argument

[28] The Council's essential argument is that the Judge failed to consider that PPC1 did not change any provisions of the District Plan *as it applied to the site* (or indeed any surrounding land) at all, thereby leaving the status quo unchanged. That is said to be a pre-eminent, if not decisive, consideration. The subject matter of the plan change was to be found within the four corners of the plan change and the plan provisions it changes, including objectives, policies, rules and methods such as zoning. The Council did not, under the plan change, change any plan provisions relating to MML's property. The land (representing a natural resource) was therefore not a resource that could sensibly be described as part of the subject matter of the plan change. MML's submission was not "on" PPC1, because PPC1 did not alter the status quo in the plan as it applied to the site. That is said to be the only legitimate result applying the High Court decision in *Clearwater.*

[29] The decision appealed from was said also by the Council to inadequately assess the potential prejudice to other landowners and affected persons. For the Council, Mr Maassen submitted that it was inconceivable, given that public participation and procedural fairness are essential dimensions of environmental justice and the Act, that land not the subject of the plan change could be rezoned to facilitate an entirely different land use by submission using Form 5. Moreover, the Judge appeared to assume that an affected person (such as a neighbour) could make a further submission under Schedule 1, clause 8, responding to MML's submission. But that was not correct.

MML's argument

[30] In response, Mr Ax (who appeared in person, and is an engineer rather than a lawyer) argued that I should adopt the reasoning of the Environment Court Judge. He submitted that the policy behind PPC1 and its purpose were both relevant, and the question was one of scale and degree. Mr Ax submitted that extending the OBZ to incorporate MML's property would be in keeping with the intention of PPC1 and the assessment of whether existing residential land would be better incorporated in

that OBZ. His property was said to warrant consideration having regard to its proximity to the existing OBZ, and the existing use of a large portion of the Lombard Street lots. Given the character and use of the properties adjacent to MML's land on Lombard Street (old houses used as rental properties, a plumber's warehouse and an industrial site across the road used by an electronic company) and the rest of Lombard Street being a mixture of industrial and low quality residential use, there was limited prejudice and the submission could not be seen as "coming out of left field". As Mr Ax put it:

> Given the nature of the surrounding land uses I would have ... been surprised if there were parties that were either (a) caught unawares or (b) upset at what I see as a natural extension of the existing use of my property.

Statutory framework

[31] Plan changes are amendments to a district plan. Changes to district plans are governed by s 73 of the Act. Changes must, by s 73(1A), be effected in accordance with Schedule 1.

[32] Section 74 sets out the matters to be considered by a territorial authority in the preparation of any district plan change. Section 74(1) provides:

> A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

[33] Seven critical components in the plan change process now deserve attention.

[34] First, there is the s 32 report referred to indirectly in s 74(1). To the extent changes to rules or methods in a plan are proposed, that report must evaluate comparative efficiency and effectiveness, and whether what is proposed is the most appropriate option.[5] The evaluation must take into account the benefits and costs of available options, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[6] This introduces a precautionary

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5 Resource Management Act 1991, s 32(3)(b). All statutory references are to the Act unless stated otherwise.

6 Section 32(4).

approach to the analysis. The s 32 report must then be available for public inspection at the same time as the proposed plan change is publicly notified.[7]

[35] Secondly, there is the consultation required by Schedule 1, clause 3. Consultation with affected landowners is not required, but it is permitted.[8]

[36] Thirdly, there is notification of the plan change. Here the council must comply with Schedule 1, clause 5. Clause 5(1A) provides:

> A territorial authority shall, not earlier than 60 working days before public notification or later than 10 working days after public notification was planned, either –
>
> (a) send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the proposed plan, to every ratepayer for the area where that person, in the territorial authority's opinion, is likely to be directly affected by the proposed plan; or
>
> (b) include the public notice, and such further information as the territorial authority thinks fit relating to the proposed plan, and any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area – and shall send a copy of the public notice to any other person who in the territorial authority's opinion, is directed affected by the plan.

Clause 5 is intended to provide assurance that a person is notified of any change to a district plan zoning on land adjacent to them. Typically territorial authorities bring such a significant change directly to the attention of the adjoining land owner. The reference to notification to persons "directly affected" should be noted.

[37] Fourthly, there is the right of submission. That is found in Schedule 1, clause 6. Any person, whether or not notified, may submit. That is subject to an exception in the case of trade competitors, a response to difficulties in days gone by with new service station and supermarket developments. But even trade competitors may submit if, again, "directly affected". At least 20 working days after public notification is given for submission.[9] Clause 6 provides:

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7 Section 32(6).
8 Schedule 1, clause 3(2).
9 Schedule 1, clause 5(3)(b).

Making of submissions

(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

(2) The local authority in its own area may make a submission.

(3) Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).

(4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that –

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

(5) A submission must be in the prescribed form.

[38] The expression "proposed plan" includes a proposed plan change.[10] The "prescribed form" is Form 5. Significantly, and so far as relevant, it requires the submitter to complete the following details:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include* –
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish (*or* do not wish) to be heard in support of my submission.

It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[39] Fifthly, there is notification of a summary of submissions. This is in far narrower terms – as to scope, content and timing – than notification of the original plan change itself. Importantly, there is no requirement that the territorial authority

[10] Section 43AAC(1)(a).

notify individual landowners directly affected by a change sought in a submission. Clause 7 provides:

> **Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.

[40] Sixthly, there is a limited right (in clause 8) to make further submissions. Clause 8 was amended in 2009 and now reads:

> **Certain persons may make further submissions**
>
> (1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
>
> (a) any person representing a relevant aspect of the public interest; and
>
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
>
> (c) the local authority itself.
>
> (2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6.

[41] Before 2009 any person could make a further submission, although only in support of or opposition to existing submissions. After 2009 standing to make a

further submission was restricted in the way we see above. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 sought to restrict the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

[42] In this case the Judge contemplated that persons affected by a submission proposing a significant rezoning not provided for in the notified proposed plan change might have an effective opportunity to respond.[11] It is not altogether clear that that is so. An affected neighbour would not fall within clause 8(1)(a). For a person to fall within the qualifying class in clause 8(1)(b), an interest "in the proposed policy statement or plan" (including the plan change) greater than that of the general public is required. Mr Maassen submitted that a neighbour affected by an additional zoning change proposed in a submission rather than the plan change itself would not have such an interest. His or her concern might be elevated by the radical subject matter of the submission, but that is not what clause 8(1)(b) provides for. On the face of the provision, that might be so. But I agree here with the Judge below that that was not Parliament's intention. That is clear from the select committee report proposing the amended wording which now forms clause 8. It is worth setting out the relevant part of that report in full:

> Clause 148(8) would replace this process by allowing councils discretion to seek the views of potentially affected parties.
>
> Many submitters opposed the proposal on the grounds that it would breach the principle of natural justice. They argued that people have a right to respond to points raised in submissions when they relate to their land or may have implications for them. They also regard the further submission process as important for raising new issues arising from submissions, and providing an opportunity to participate in any subsequent hearing or appeal proceedings. We noted a common concern that submitters could request changes that were subsequently incorporated into the final plan provisions without being subject to a further submissions process, and that such changes could significantly affect people without providing them an opportunity to respond.
>
> Some submitters were concerned that the onus would now lie with council staff to identify potentially affected parties. Some local government submitters were also concerned that the discretionary process might incur a risk of liability and expose councils to more litigation. A number of organisations and iwi expressed concern that groups with limited resources

[11] See at [25] above.

> would be excluded from participation if they missed the first round of submissions.
>
> We consider that the issues of natural justice and fairness to parties who might be adversely affected by proposed plan provisions, together with the potential increase in local authorities' workloads as a result of these provisions, warrant the development of an alternative to the current proposal.
>
> We recommend amending clause 148(8) to require local authorities to prepare, and advertise the availability of, a summary of outcomes sought by submitters, and to allow anyone with an interest that is greater than that of the public generally, or representing a relevant aspect of the public interest, or the local authority itself, to lodge a further submission within 10 working days.

[43] It is, I think, perfectly clear from that passage that what was intended by clause 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of clause 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10 day timeframe provided for in clause 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first. It is perhaps unfortunate that Parliament did not see fit to provide for a clause 5(1A) equivalent in clause 8. The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.

[44] Seventhly, finally and for completeness, I record that the Act also enables a private plan change to be sought. Schedule 1, Part 2, clause 22, states:

> **Form of request**
>
> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or

plan [and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed].

(2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

So a s 32 evaluation and report must be undertaken in such a case.

Issues

[45] The issues for consideration in this case are:

(a) Issue 1: When, generally, is a submission "on" a plan change?

(b) Issue 2: Was MML's submission "on" PPC1?

Issue 1: When, generally, is a submission "on" a plan change?

[46] The leading authority on this question is a decision of William Young J in the High Court in *Clearwater Resort Ltd v Christchurch City Council.*[12] A second High Court authority, the decision of Ronald Young J in *Option 5 Inc v Marlborough District Council*,[13] follows *Clearwater.* *Clearwater* drew directly upon an earlier Environment Court decision, *Halswater Holdings Ltd v Selwyn District Council.*[14] A subsequent Environment Court decision, *Naturally Best New Zealand Ltd v Queenstown Lakes District Council*[15] purported to gloss *Clearwater.* That gloss was disregarded in *Option 5.* I have considerable reservations about the authority for, and efficacy of, the *Naturally Best* gloss.

[47] Before reviewing these four authorities, I note that they all predated the amendments made in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. As we have seen, that had the effect of restricting the persons

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12 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

13 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

14 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

15 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch 49/2004, 23 April 2004.

who could respond (by further submission) to submissions on a plan change, although not so far as to exclude persons directly affected by a submission. But it then did little to alleviate the risk that such persons would be unaware of that development.

Clearwater

[48] In *Clearwater* the Christchurch City Council had set out rules restricting development in the airport area by reference to a series of noise contours. The council then notified variation 52. That variation did not alter the noise contours in the proposed plan. Nor did it change the rules relating to subdivisions and dwellings in the rural zone. But it did introduce a policy discouraging urban residential development within the 50 dBA Ldn noise contour around the airport. *Clearwater's* submission sought to vary the physical location of the noise boundary. It sought to challenge the accuracy of the lines drawn on the planning maps identifying three of the relevant noise contours. Both the council and the airport company demurred. They did not wish to engage in a "lengthy and technical hearing as to whether the contour lines are accurately depicted on the planning maps". The result was an invitation to the Environment Court to determine, as a preliminary issue, whether *Clearwater* could raise its contention that the contour lines were inaccurately drawn. The Environment Court determined that *Clearwater* could raise, to a limited extent, a challenge to the accuracy of the planning maps. The airport company and the regional council appealed.

[49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".[16] He identified three possible general approaches:[17]

(a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";

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16 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].

17 At [59].

(b) an approach in which "on" is treated as meaning "in connection with"; and

(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

[51] The first, literal construction had been favoured by the commissioner (from whom the Environment Court appeal had been brought). The commissioner had thought that a submission might be made in respect of "anything included in the text as notified", even if the submission relates to something that the variation does not propose to alter. But it would not be open to submit to seek alterations of parts of the plan not forming part of the variation notified. William Young J however thought that left too much to the idiosyncrasies of the draftsman of the variation. Such an approach might unduly expand the scope of challenge, or it might be too restrictive, depending on the specific wording.

[52] The second construction represented so broad an approach that "it would be difficult for a local authority to introduce a variation of a proposed plan without necessarily opening up for relitigation aspects of the plan which had previously been [past] the point of challenge".[18] The second approach was, thus, rejected also.

[53] In adopting the third approach William Young J applied a bipartite test.

[54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".

[55] Secondly, "if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real

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[18] At [65].

opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate".[19] If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.

[56] In the result in *Clearwater* the appellant accepted that the contour lines served the same function under the variation as they did in the pre-variation proposed plan. It followed that the challenge to their location was not "on" variation 52.[20]

[57] Mr Maassen submitted that the *Clearwater* test was not difficult to apply. For the reasons that follow I am inclined to agree. But it helps to look at other authorities consistent with *Clearwater*, involving those which William Young J drew upon.

Halswater

[58] William Young J drew directly upon an earlier Environment Court decision in *Halswater Holdings Ltd v Selwyn District Council*.[21] In that case the council had notified a plan change lowering minimum lot sizes in a "green belt" sub-zone, and changing the rules as to activity status depending on lot size. Submissions on that plan change were then notified by the appellants which sought:

(a) To further lower the minimum sub-division lot size; and

(b) seeking "spot zoning" to be applied to their properties, changes from one zoning status to another.

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19 At [69].
20 At [81]–[82].
21 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).

[59] The plan change had not sought to change any zonings at all. It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or the "green belt" part of the zone).

[60] The Environment Court decision contains a careful and compelling analysis of the then more concessionary statutory scheme at [26] to [44]. Much of what is said there remains relevant today. It noted amongst other things the abbreviated time for filing of submissions on plan changes, indicating that they were contemplated as "shorter and easier to digest and respond to than a full policy statement or plan".[22]

[61] The Court noted that the statutory scheme suggested that: [23]

> ... if a person wanted a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be "on" the plan change, then they may have to go about changing the plan in another way.

Either a private plan change, or by encouraging the council itself to promote a further variation to the plan change. As the Court noted, those procedures then had the advantage that the notification process "goes back to the beginning". The Court also noted that if relief sought by a submission went too far beyond the four corners of a plan change, the council may not have turned its mind to the effectiveness and efficiency of what was sought in the submission, as required by s 32(1)(c)(ii) of the Act. The Court went on to say:[24]

> It follows that a crucial question for a Council to decide, when there is a very wide submission suggesting something radically different from a proposed plan as notified, is whether it should promote a variation so there is time to have a s 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

[62] The Court noted in *Halswater* the risk of persons affected not apprehending the significance of submissions on a plan change (as opposed to the original plan change itself). As the Court noted, there are three layers of protection under clause 5

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22 At [38].
23 At [41].
24 At [42].

notification of a plan change that do not exist in relation to notification of a summary of submissions:[25]

> These are first that notice of the plan change is specifically given to every person who is, in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

[63] Ultimately, the Environment Court in *Halswater* said:[26]

> A submissions on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.

[64] In *Halswater* there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects. As a result, they might not have checked the summary of submissions or gone to the council to check the summary of submissions. Further, the rezoning proposal sought by the appellants had no s 32 analysis.

[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own.

Option 5

[66] *Clearwater* was followed in a further High Court decision, *Option 5 Inc v Marlborough District Council*.[27] In that case the council had proposed a variation (variation 42) defining the scope of a central business zone (CBZ). Variation 42 as notified had not rezoned any land, apart from some council-owned vacant land. Some people called McKendry made a submission to the council seeking addition of further land to the CBZ. The council agreed with that submission and variation 42

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25 At [44].
26 At [51].
27 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

was amended. A challenge to that decision was taken to the Environment Court. A jurisdictional issue arose as to whether the McKendry submission had ever been "on" variation 42. The Environment Court said that it had not. It should not have been considered by the council.

[67] On appeal Ronald Young J did not accept the appellants' submission that because variation 42 involved some CBZ rezoning, any submission advocating further extension of the CBZ would be "on" that variation. That he regarded as "too crude". As he put it:[28]

> Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being "on".

[68] In that case the amended variation 42 would change at least 50 residential properties to CBZ zoning. That would occur "without any direct notification to the property owners and therefore without any real chance to participate in the process by which their zoning will be changed". The only notification to those property owners was through public notification in the media that they could obtain summaries of submissions. Nothing in that indicated to those 50 house owners that the zoning of their property might change.

Naturally Best

[69] Against the background of those three decisions, which are consistent in principle and outcome, I come to consider the later decision of the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council.*[29]

[70] That decision purports to depart from the principles laid down by William Young J in *Clearwater*. It does so by reference to another High Court decision in

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[28] At [34].

[29] *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.

Countdown Properties Ltd v Dunedin City Council.[30] However that decision does not deal with the jurisdictional question of whether a submission falls within Schedule 1, clause 6(1). The Court in *Naturally Best* itself noted that the question in that case was a different one.[31] *Countdown* is not authority for the proposition advanced by the Environment Court in *Naturally Best* that a submission "may seek fair and reasonable extensions to a notified variation or plan change". Such an approach was not warranted by the decision in *Clearwater*, let alone by that in *Countdown*.

[71] The effect of the decision in *Naturally Best* is to depart from the approach approved by William Young J towards the second of the three constructions considered by him, but which he expressly disapproved. In other words, the *Naturally Best* approach is to treat "on" as meaning "in connection with", but subject to vague and unhelpful limitations based on "fairness", "reasonableness" and "proportion". That approach is not satisfactory.

[72] Although in *Naturally Best* the Environment Court suggests that the test in *Clearwater* is "rather passive and limited", whatever that might mean, and that it "conflates two points,"[32] I find no warrant for that assessment in either *Clearwater* or *Naturally Best* itself.

[73] It follows that the approach taken by the Environment Court in *Naturally Best* of endorsing "fair and reasonable extensions" to a plan change is not correct. The correct position remains as stated by this Court in *Clearwater*, confirmed by this Court in *Option 5*.

Discussion

[74] It is a truth almost universally appreciated that the purpose of the Act is to promote the sustainable management of natural and physical resources.[33] Resources may be used in diverse ways, but that should occur at a rate and in a manner that enables people and communities to provide for their social, economic and cultural

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30 *Countdown Properties Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
31 At [17].
32 At [15].
33 Section 5(1).

wellbeing while meeting the requirements of s 5(2). These include avoiding, remedying or mitigating the adverse effects of activities on the environment. The Act is an attempt to provide an integrated system of environmental regulation.[34] That integration is apparent in s 75, for instance, setting out the hierarchy of elements of a district plan and its relationship with national and regional policy statements.

[75] Inherent in such sustainable management of natural and physical resources are two fundamentals.

[76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater.*

[77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributors Ltd v Waipa District Council*:[35]

> The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might

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[34] Nolan (ed) *Environmental and Resource Management Law* (4th ed, Lexis Nexis, Wellington 2011) at 96.

[35] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [54].

so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

[78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under Schedule 1, Part 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[79] In contrast, the Schedule 1 submission process lacks those procedural and substantial safeguards. Form 5 is a very limited document. I agree with Mr Maassen that it is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change. That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the *Clearwater* test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in clause 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about

by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the *Halswater* decision. Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to Schedule 1, clause 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of clause 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed

in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

Issue 2: Was MML's submissions "on" PPC1?

[84] In light of the foregoing discussion I can be brief on Issue 2.

[85] In terms of the first limb of the *Clearwater* test, the submission made by MML is not in my view addressed to PPC1. PPC1 proposes limited zoning changes. All but a handful are located on the ring road, as the plan excerpt in [11] demonstrates. The handful that are not are to be found on main roads: Broadway, Main and Church Streets. More significantly, PPC1 was the subject of an extensive s 32 report. It is over 650 pages in length. It includes site-specific analysis of the proposed rezoning, urban design, traffic effects, heritage values and valuation impacts. The principal report includes the following:

> 2.50 PPC1 proposes to rezone a substantial area of residentially zoned land fronting the Ring Road to OBZ. Characteristics of the area such as its close proximity to the city centre; site frontage to key arterial roads; the relatively old age of residential building stock and the on-going transition to commercial use suggest there is merit in rezoning these sites.
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> ...
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> 5.8 **Summary Block Analysis** – Blocks 9 to 14 are characterised by sites that have good frontage to arterial roads, exhibit little pedestrian traffic and have OBZ sites surrounding the block. These blocks are predominately made up of older residential dwellings (with a scattering of good quality residences) and on going transition to commercial use. Existing commercial use includes; motor lodges; large format retail; automotive sales and service; light industrial; office; professional and community services. In many instances, the rezoning of blocks 9 to 14 represents a squaring off of the surrounding OBZ. Blocks 10, 11, 12 and 13 are transitioning in use from residential to commercial activity. Some blocks to a large degree than others. In many instances, the market has already anticipated a change in zoning within these blocks. The positioning of developer and long term investor interests has already resulted in higher residential land values within these blocks. Modern commercial premises have already been developed in blocks 10, 11, 12 and 13.
>
> 5.9 Rezoning Residential Zone sites fronting the Ring Road will rationalise the number of access crossings and will enhance the function of the adjacent road network, while the visual exposure for sites fronting key arterial roads is a substantial commercial benefit

> for market operators. The location of these blocks in close proximity to the Inner and Outer Business Zones; frontage to key arterial roads; the relatively old age of the existing residential building stock; the ongoing transition to commercial use; the squaring off of existing OBZ blocks; and the anticipation of the market are all attributes that suggest there is merit in rezoning blocks 9 to 14 to OBZ.

[86] The extension of the OBZ on a spot-zoning basis into an isolated enclave within Lombard Street would reasonably require like analysis to meet the expectations engendered by s 5. Such an enclave is not within the ambit of the existing plan change. It involves more than an incidental or consequential extension of the rezoning proposed in PPC1. Any decision to commence rezoning of the middle parts of Lombard Street, thereby potentially initiating the gradual transition of Lombard Street by instalment towards similar land use to that found in Taonui Street, requires coherent long term analysis, rather than opportunistic insertion by submission.

[87] There is, as I say, no hardship in approaching the matter in this way. Nothing in this precludes the landowner for adopting one of the three options identified in [78]. But in that event, the community has the benefit of proper analysis, and proper notification.

[88] In terms of the second limb of *Clearwater*, I note Mr Ax's confident expression of views set out at [30] above. However I note also the disconnection from the primary focus of PPC1 in the proposed addition of two lots in the middle of Lombard Street. And I note the lack of formal notification of adjacent landowners. Their participatory rights are then dependent on seeing the summary of submissions, apprehending the significance for their land of the summary of MML's submission, and lodging a further submission within the 10 day time frame prescribed.

[89] That leaves me with a real concern that persons affected by this proposed additional rezoning would have been left out in the cold. Given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field".

Conclusion

[90] MML's submission was not "on" PPC1. In reaching a different view from the experienced Environment Court Judge, I express no criticism. The decision below applied the *Naturally Best* gloss, which I have held to be an erroneous relaxation of principles correctly stated in *Clearwater*.

Summary

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council*[36] in analysing whether a submission made under Schedule 1, clause 6(1) of the Act is "on" a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

(b) This judgment rejects the more liberal gloss placed on that decision by the Environment Court in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council,*[37] inconsistent with the earlier approach of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*[38] and inconsistent with the decisions of this Court in *Clearwater* and *Option 5 Inc v Marlborough District Council.*[39]

(c) A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a

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36 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
37 *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004.
38 *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC).
39 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009.

notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.

(d) The first limb of the *Clearwater* test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(f) Neither limb of the *Clearwater* test was passed by the MML submission.

(g) Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change under Schedule 1, Part 2.

Result

[92] The appeal is allowed.

[93] The Council lacked jurisdiction to consider the submission lodged by MML, which is not one "on" PPC1.

[94] If costs are in issue, parties may file brief memoranda.

Stephen Kós J

Solicitors:
Cooper Rapley, Palmerston North for Appellant

ORIGINAL

DOUBLE SIDED

Decision No: C86 /99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under section 311 for a declaration by **VIVID HOLDINGS LTD**

ENF : 8/99

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson – (Sitting alone pursuant to section 279 of the Act)

HEARING at QUEENSTOWN on 12 and 13 April 1999

APPEARANCES

Mr G M Todd and Ms J E Macdonald for Vivid Holdings Ltd, D W Andrew, and R W Pringle
Mr W P Goldsmith for Carlin Enterprises, Carolina Developments Ltd, Pisidia Holdings Ltd, Stalker Family Trust, Crosshill Farm Ltd, Allanby Farms Ltd, M L McLellan, J & N Turnbull, R & M Cox – all under section 274
Mr N T McDonald for Design 4 Ltd, Quail Point Properties Ltd, J F Investments Ltd, D Speight, M Clear, M W Pittaway, J Stewart, C Umber, A Jardine, Shotover Properties, G Stalker, K Stalker, W Stalker, Clark Fortune McDonald & Associates, M Hamer, R & P Chilman, R Drayton, C & F Rule, N Beer – all under section 274
Mr N S Marquet for Queenstown Lakes District Council
Mr S Stamers-Smith for Wakatipu Environmental Protection Society Inc

DECISION

Introduction

1. This proceeding is about the validity of a reference by the Wakatipu Environment Protection Society ("the Society") to this Court. The issue is of significance to many rural landowners in the Queenstown Lakes District. The Queenstown Lakes District Council ("the Council") publicly

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

notified its proposed district plan ("the proposed plan") under the Resource Management Act 1991 ("the Act") on 10 October 1995. Part 6 of the proposed plan dealt with urban growth. The explanation for the objective of sustainable growth management stated that a growth management strategy ("GMS") was "seen as essential to the sustainable management of the District's resources and amenities ..."[1]. Part 8 of the proposed plan, called "Rural-Residential Areas", provided for low-density lifestyle residential opportunities in certain rural locations throughout the District. A rural-residential zoning enabled subdivision[2] of the relevant land to a minimum lot size of around 4,000 m^2.

2. The Society lodged a submission ("the Society's submission") relating to part 8 of the proposed plan . The submission states (relevantly):

> *Our submission is that we oppose any new RR zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. The areas in the plan do not appear to be designed in a sustainable pattern as there is no provision for co-ordinated landscape treatment. This will lead to piecemeal development.*
>
> *We seek the following decision from the Council:*
>
> *Refer RR zones for more study as part of the Growth Management Survey/Strategy.*

3. The Council's summary[3] of submissions states in respect of the Society's submission that the Society:

1 Proposed plan p.6/9
2 Under Part 15 of the proposed plan
3 Under Clause 7 of the First Schedule to the Act

opposes any new Rural Residential zones until the Growth Management Survey/Strategy has shown that there is a need for them and the preferred area(s) for them. There is no provision for co-ordinated landscape treatment in the Rural Residential areas in the plan and this will lead to peicemeal [sic] *development.*

It will be seen that this is nearly a copy of the submission. Under the heading 'Decision Requested', the Council summary simply copies the decision sought as stated in the Society's submission (quoted above).

4. The issue of rural subdivision and development attracted many submissions. After months of hearings the Council issued its decision ("the revised plan"). The revised plan:

(1) deletes part 6 of the proposed plan and thus all reference to the GMS; and

(2) retains as Rural Residential the zoning of some of the land zoned Rural Residential in the proposed plan; and

(3) zones as Rural Residential certain other land that had a different zone in the proposed plan; and

(4) introduces a new zone, called the "Rural Lifestyle" zone, applying to:

  (a) some of the land previously zoned Rural Residential in the proposed plan; and

  (b) certain other land previously zoned Rural Downlands;

(5) contains a completely new part 8 called "Rural Living Areas" which contains mainly new objectives, policies and rules in respect of Rural Residential and Rural Lifestyle land.

5. In effect the Council has completely rejected the Society's submission and has gone in the opposite direction. Instead of having no rural-residential

subdivision until a growth management strategy is completed it has, in the revised plan, dropped the idea of a growth management strategy completely and immediately increased the rural living areas. The decision *Issue 6 – Urban Growth* states:

> ... *it was inappropriate for* [the Council] *to make any decision with respect to whether a growth management strategy should be conducted* [and] ... *the Council has not budgeted for such a strategy and ... there are presently no plans for it to be implemented.*

6. The rules for both the Rural Residential and Rural Lifestyle zones are contained in a single chapter (Part 8 – Rural Living Areas) of the revised plan. The provisions for each zone are almost identical. The only significant difference is in the minimum lot sizes:

   (a) the minimum lot size in the Rural Residential zone is 4,000 m^2;
   (b) the minimum lot size in the Rural Lifestyle zone is 1 hectare provided that the lots to be created by subdivision (including the balance lot) do not average less than 2 hectares.[4]

7. The Society lodged a reference[5] with the Environment Court in respect of the relevant Council decision[6]. Under the heading "Relief Sought" in the reference the Society requests that:

> *The Court make an interim decision referring the entire plan back to council for it to reconsider its decisions to give better effect to the purpose of the Act*

---

4 See the table of minimum lot sizes in the revised plan in para 15.2.6.3 [p.15/16]
5 RMA 1394/98.
6 Decision 8/1.1.7.

Alternatively ...

5. Decision 8/1.1.7

5.1 Either reinstate the rural residential zone provisions of the Proposed District Plan (Oct 1995) or

5.2 Delete all rural living zones of the Proposed District Plan (July 1998) and replace with rural general zoning.

The Society's reference also seeks other relief, but that is not challenged in this proceeding.

8. Vivid Holdings Ltd ("Vivid") owns a property near Arrowtown. Vivid lodged a submission on the proposed plan seeking that the Rural Downlands zoning of its property be changed to Rural Residential. This submission was accepted in part by the Council which rezoned the property Rural Lifestyle, and the land therefore falls into one of the categories described above[7].

9. Vivid has now applied to the Court under section 311 of the Resource Management Act 1991 ("the Act") for a declaration that the Court has no jurisdiction to grant some of the relief requested by the Society[8]. Vivid is supported by all other persons who appeared except the Society.

10. None of the parties questioned whether an application for a declaration is the appropriate mechanism in this case. The usual procedure would be an application under section 279(4) for an order striking out all or part of the

7 In paragraph 4(4)(b).
8 Quoted above in para 7

Society's reference. However, I am satisfied that the Court has jurisdiction because section 310 of the Act gives power to declare:

> *(a) The existence or extent of any function, power, right, or duty under the Act.* [my emphasis]

The question in this case involves the extent of the Society's right to refer the Council's decision to this Court.

The Arguments

11. For Vivid, Mr Todd's first submission was that the Society's first relief sought – that the Court refer the entire plan back to the Council for reconsideration – fails to meet the requirement of Form 4 of the Resource Management (Forms) Regulations 1991 ("the regulations") to state the relief sought. A similar issue arose in ***Leith v Auckland City Council***[9]. The appellant there sought *"withdrawal of and/or substantial modification of the plan"*. The Court stated that such a failure could lead the Court to decline jurisdiction. The reasons were that:

> *The present references fail to identify relief that could be granted other than a direction for withdrawal of the proposed district plan. No modification to the plan that would meet the appellants' cases has been specified with any particularity at all. The result is that the respondent had nothing specific to focus its evidence on, and the Tribunal is consequently not able to give adequate consideration to amendments to the proposed district plan that it might direct the respondent to make if any of the appellants' challenges is found to be justified.*

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9 [1995] NZRMA 400, 411.

12. Mr Todd's second argument was that the Society's reference fails to meet what he called the accepted test which is:

> *Whether the relief goes beyond what is reasonably and fairly raised in submissions.*[10]

He submitted:

(a) *That the relief sought in the original submission was clearly tied to reconsidering the Rural Residential issue as part of a Growth Management Strategy.*

(b) *That the Wakatipu Environmental Society had clearly filed a submission in relation to the Growth Management issue.*

(c) *That the Queenstown Lakes District Council in releasing its decisions decided to delete all reference to Growth Management and provision for the adoption of a Growth Management Strategy.*

(d) *That the Wakatipu Environmental Society did not appeal the Council's decision deleting all reference to Growth Management and the provision to adopt a Growth Management Strategy.*

(e) *That its failure to file a Reference in respect to such decision is fatal to it now seeking to rely on an original submission where the relief sought in that submission was clearly tied to the provision for a Growth Management Strategy being retained as part of the Plan.*

10 *Atkinson v Wellington Regional Council* Decision No: W13/99

13. A third and alternative argument was that the reference filed by the Society now seeks something different to what was sought in the original submission. In particular, relief 5.1 sought by the Society's reference was inconsistent with the original submission which sought no more subdivision in the rural residential zone. Finally in respect of relief 5.2, he noted that the Society did not generally file further submissions in respect of submissions which sought zoning for rural-residential purposes. It only made three such cross-submissions, whereas many specific submissions (about 85) were made to the Council seeking rural-residential zoning for particular pieces of land. A significant number of those submitters are represented in this proceeding and are seeking to have the Society's reference declared invalid.

14. For other parties Mr Goldsmith submitted first that because the Society has not requested reinstatement of the growth management strategy, the relief sought cannot be granted. Alternatively he said that the Society's submission could only refer:

(a) to rural residential land referred to in the proposed plan, not to land which has subsequently been zoned as 'rural living'; or

(b) to land which was covered by a cross-submission by the Society (and there were only 3 such cross-submissions).

15. Mr McDonald adopted the submissions of Messrs Todd and Goldsmith. For the Council Mr Marquet submitted that:

(a) the first relief sought is void for uncertainty;

(b) *... the relief sought in paragraph 5 of the Society's reference is not mandated by the original submission by the Society.*

The role of references in the preparation of district plans

16. The First Schedule to the RMA contains a code for the process of notifying a proposed plan and the making of submissions on it[11]. The relevant clauses for present purposes are those which give power to make submissions, to make a cross-submission on a submission, and to refer a decision to the Environment Court. Clause 6 gives the power to make a primary submission on a proposed plan and the Society's submission was made under Clause 6. The power to make a further or cross submission is contained in clause 8. Vivid and others lodged cross-submissions under this clause against the Society's submission.

17. The primary rule as to the scope of references is clause 14 of the First Schedule to the Act. Rather strangely, almost none of the decisions[12] on the scope of references discuss the wording of clause 14. The submissions of counsel in this case did not even refer to clause 14. That states:

> ***14. Reference of decision on submissions and requirements to the Environment Court***
>
> *(1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court*
>
> *(a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or*

---

11 Recent decisions on this issue include ***Re An Application by Christchurch City Council*** (Montgomery Spur) C71/99 and ***Christchurch International Airport Ltd et anor v Christchurch City Council*** C77/99 (the Templeton Hospital case)

12 e.g. ***Atkinson v Wellington Regional Council*** (Decision W13/99); ***Telecom NZ Ltd v Manawatu-Regional Council*** Decision W66/97; ***Telecom New Zealand Ltd v Waikato District Council*** Decision A74/97 and ***Hilder v Otago Regional Council*** Decision C122/97 although this decision refers to clause 14. An exception is ***CBD Development Group v Timaru District Council*** Decision C43/99. The leading cases in the High Court ***Countdown Properties (Northlands) Ltd v Dunedin City Council*** [1994] NZRMA 145; ***Royal Forest and Bird Protection Society Inc v Southland District Council*** [1997] NZRMA 408 are of course on the scope of a local authority's decision making powers under clause 10 rather than on clause 14.

(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan,

if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

18. Clause 14(1) requires an answer to three questions to establish whether a reference is lawful:

(1) Did the appellant make a submission?

(2) Does the reference relate to either:

(i) a provision included in the proposed plan; or

(ii) a provision the local authority's decision proposes to include; or

(iii) a matter excluded from the proposed plan; or

(iv) a provision which the local authority's decision proposes to exclude?

(3) If the answer to any of (2) is 'yes', then did the appellant refer to that provision or matter in their submission (bearing in mind this can be a primary submission[13] or a cross-submission[14])?

19. It is difficult to see how a submitter can refer[15] directly in their submission to provisions or matters which a decision proposes to include or exclude unless their submission has been accepted by the local authority in which it is unlikely the submitter will be referring the matter to the Court. No one

13 Under clause 6 of the First Schedule
14 Under clause 8 of the First Schedule
15 ***CBD Development Group v Timaru District Council*** Decision C43/99

can reliably anticipate the collective mind of the local authority. I consider that in order to start to establish jurisdiction a submitter must raise a relevant 'resource management issue'[16] in its submission in a general way. Then any decision of the Council, or requested of the Environment Court in a reference, must be:

(a) fairly and reasonably within the general scope of:
  (i) an original submission[17]; or
  (ii) the proposed plan as notified[18]; or
  (iii) somewhere in between[19]

provided that:

(b) the summary of the relevant submissions was fair and accurate and not misleading[20].

20. The leading authorities on the scope of local authority decisions are ***Countdown***[21] and ***Royal Forest & Bird Protection Society Inc v Southland District Council***[22]. In the latter case Panckhurst J adopted ***Countdown*** and stated:

> *... [T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

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16 As the term is used in section 75(1)(a) of the Act

17 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408; *Atkinson v Wellington Regional Council* W13/99 is a recent example referred to by Mr Todd

18 *Telecom NZ Ltd v Waikato District Council* A74/97 at p.4

19 *CBD Development Group v Timaru District Council* C43/99

20 *Re An Application by Christchurch City Council* (Montgomery Spur) C71/99 and *Christchurch International Airport Ltd et anor v Christchurch City Council* C77/99

21 [1994] NZRMA 145

22 [1997] NZRMA 408 at 413

I hold that the same interpretative principle applies to the assessment of the scope of references and whether they raise sufficient matters under clause 14 of the First Schedule to establish jurisdiction.

The requirements of clause 14 in this case

21. The Society filed a submission and it does relate to provisions included in Part 8 of the proposed plan – the objectives, policies and rules for rural-residential activities. In addition, the Council's decision proposes to exclude the growth management strategy and consequent objectives and policies from the proposed plan so the Society could have referred that excluded provision to the Court. The Society has chosen not to do that. In fact the Society has in its reference (paragraphs 5.1 and 5.2) sought different relief which focuses on what the Council decision proposes to include, that is further rural-residential zoning and the creation of a rural lifestyle zone, together grouped in a new Part 8 called "Rural Lifestyle".

22. The Society's primary submission clearly raised the issue of rural-residential subdivision. It opposed any new rural-residential zones. Admittedly that was only until a growth management "survey/strategy" was completed, but that is no longer going to occur. I cannot think it is reasonable to hold (as Vivid and others have requested) that the Council's decision not to proceed with a growth management survey and/or strategy knocks out the Society's submission or right to refer the Council's decision. To the contrary, I consider that, in the absence of such a survey/strategy being completed, the Society has made it clear that it opposes new rural-residential development throughout the district. When the Society's reference seeks as alternative relief, not the deletion of all rural-residential zones, but the deletion of those which were not included in the proposed plan, that relief can be seen as a subset of what it referred to in its submission. The relief is within the scope of the Society's original

submission because the Society referred to *"no more rural-residential zoning"*. That phrase can fairly and reasonably be seen as relating to both provisions included in the proposed plan and to provisions the decision proposes to include (i.e. in the revised plan). Since this is *"a question of degree to be judged by the terms of the proposed [plan] and of the contents of the submission"*[23] I now consider the relevant factors.

23. In ***Westmark Investments Ltd v Auckland City Council***[24] Barker J was considering "so-called grounds for submission ... being a statement against planning controls generally" and whether these were sufficient to establish a valid reference to the Planning Tribunal. He compared the primary submission with those in ***Countdown*** and said:

> *I acknowledge, as was done in the* ***Countdown*** *case at 167, that persons making submissions are unlikely to fill in the forms exactly as required by the First Schedule, even when the forms are provided to them by a local authority. The Full Court noted that the Act encourages public participation in the resource management process; that the ways whereby citizens participate in that process should not be bound by formality.*
>
> *The comments were made in the context of assertions to the Court that the wider public had been disadvantaged. In that case, there was no doubt that all parties before the council and before the Tribunal, knew exactly what the issues were; there was no question of a broad general attempt to torpedo a whole plan by a submitter who did not even to* [sic] *attempt to follow the form and made broad assertions unsupported by any substance.*

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23 *Countdown* [1994] NZRMA 145 at 166

24 [1995] NZRMA 570 at 572

> *I note that in the* ***Countdown*** *case, there were discussions about possible amendments to the plan presented at the hearing of submissions. That possibility, as discussed by the Tribunal and by the Court in* ***Countdown****, cannot diminish the duty of somebody making a submission to attempt to say exactly what it is in the plan that is objected to and what result is sought. Latitude about the lack of formality surely must be directed to the wording of the relief sought or to the specificity of the parts of the plan to which objection is taken. For example, if the submitter said that he or she did not like the height restrictions in a particular zone or height restrictions in general and asked that these all be removed that would be sufficient probably.*[25]

24. Without elevating Barker J's words into an independent test or checklist for compliance with the First Schedule, it is useful to consider how the Society's submission might measure against the considerations Barker J identified. In this case, I find that:

(1) all persons who read the Council's summary of submissions, and all parties to this case, knew exactly what the Society's issue was – whether or not there should be more rural residential subdivision;

(2) there is no question of an attempt by the Society in its reference to torpedo the whole revised plan;

(3) the Society has generally followed the forms in the regulations in both its submission and in its reference;

(4) the opposition to rural-residential zoning is supported by at least one matter of substance – especially in the Queenstown-Lakes district – and that is the reference in the primary submission to landscape values.

---

25 *Westmark* at p.575

I also note that by analogy with Barker J's example with respect to height restrictions, it is probably sufficient if the Society's submission (and thus by extension its reference) stated it did not like rural-residential zonings in general. In fact the Society has gone further, and has now cut down the relief it is seeking.

25. I therefore hold that in this case the Society's reference is jurisdictionally sufficient when it seeks no further rural-residential subdivision or activity beyond what was in the proposed plan. That is so even if the issue is inextricably involved in fact with individuals' submissions and the Council's decision on them. My decision on that point may be conclusive on the jurisdictional issue but the following aspects of the policy and scheme of the Act are also relevant.

The Society's failure to lodge further submissions on rural-residential issues

26. First, I do not overlook that a local authority's decision can neither propose to include a provision nor exclude a matter unless there is a submission to that effect (or it is a consequential alteration)[26]. In this context, a provision is a form of words describing an issue, objective, policy, rule or other method, or reason etc[27]. Thus in this case the Council could only propose to rezone other areas as rural-residential if there were submissions seeking that. If there were such submissions then they had to be summarised and notified. The Society therefore had an opportunity to lodge cross-submission on any such primary submissions. The issue is whether this leads to the conclusion that in general the Society's reference cannot relate to further rural-residential subdivision beyond what was in the proposed plan? In other words: is the failure to lodge cross-submissions on individuals' submissions seeking rural-residential zoning fatal?

[26] Under clause 10(2)
[27] See section 75 (for district plans) and section 67 (for regional plans)

27. Secondly, it is the policy of the RMA to encourage public participation[28]. If I hold that the Society's reference is invalid, then that policy is not being carried out. Of course, in this case, many people will be affected by the Society's reference, and may have to appear and call evidence when they did not expect to because there were no cross-submissions on their primary submissions. Those matters are partly a consequence of the scheme and policy of the RMA, and partly a matter which can be dealt with in the hearing procedure by this Court. For example, the Society can be directed to give particulars as to which specific pieces of land it opposes rural-residential zonings for.

28. Thirdly, as to the scheme of the RMA, the Court has the wide power in section 293 of the Act to change any provision of a plan when hearing a reference to the Court. Certainly this power is exercised cautiously and sparingly,[29] but its existence suggests that if the Court is concerned that other interested persons should be heard then it can remedy that by directing notification under section 293(2). I consider that one of the reasons Parliament has given the Environment Court the powers in section 293, especially in section 293(2) is to cover the situation where the relief the referrer is seeking is not spelt out in adequate detail in the submission and/or the reference. Obviously it is good practice to spell out precisely the relief sought[30], but it is not essential to do so. If it is not and the Court considers a reasonable case for a particular change to a proposed plan is made out but that interested persons have not had adequate notice -

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28 See *Murray v Whakatane District Council* [1997] NZRMA 433 (HC) and ***Bayley v Manukau City Council*** [1998] NZRMA 513; (1998) 4 ELRNZ 461

29 See ***Kaitiaki Tarawera Inc v Rotorua District Council***(1998) 4 ELRNZ 181 at 188; also ***Romily Properties Ltd v Auckland City Council*** A95/96 at p.6

30 ***Leith v Auckland City Council***[1995] NZRMA 400.

because the relief was not stated, or not clearly - then the Court can exercise its powers under section 293(2).

29. That section covers the situation which came before the High Court under the Town and Country Planning Act 1977 ("the TCPA") in ***Nelson Pine Forests Ltd v Waimea County Council.***[31] In that case the Maruia Society had made a submission to the local authority seeking that the activity of clearing native forest and scrub be a conditional use in the district scheme. The Council despite opposition from NPF in an objection, introduced conditional use status for land clearance. Ordinances (rules) concerning conditions to be attached to the activity if consented to, were proposed by the Council to the Planning Tribunal on appeal. Holland J stated:

> *The Court considers that an informed and reasonable owner of land on which there was native forest should have appreciated that, if NFAC's objection was allowed and the logging or clearing of any areas of native forest became a conditional use, then either conditions would need to be introduced into the ordinance relating to conditional use applications, or at some stage or other the council would adopt a practice of requiring certain information to be supplied prior to considering such applications. Had the council adopted the conditions to the ordinances that it presented to the Tribunal at the time of the hearing of the objection, I am quite satisfied that no one could reasonably have been heard to complain that they had been prejudiced by lack of notice. Such a decision would accordingly have been lawful.*[32]

30. Thus, there was the possibility under the TCPA that the Planning Tribunal's decision could go beyond the local authority's decision by way

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31 (1988) 13 NZTPA 69
32 (1988) 13 NZTPA 69 at 73

of amending a plan[33], but it is certain that the Environment Court may do so under the RMA because of its powers under section 293 of the Act. Thus in unusual cases, and at this stage I do not think this case is one, people may be involved at a late stage even though they had not previously been involved in the new plan process or at the reference level. But my point here is that there is a safeguard for them, to ensure they can be given a chance to be heard.

31. In the circumstances I consider the second and third aspects of the scheme and policy of the Act which I have identified outweigh the first. An aim of the Act is to assist and encourage public participation in the plan process. It does not impose two sets of procedural hurdles in front of interested persons which they must jump, or if they fail, be excluded from the process. If, as I have held, the Society's general reference opposing rural-residential zoning beyond that proposed in the proposed plan is valid as fairly and reasonably within the scope of the original submission, then the omissions of the Society:

(a) to oppose many submissions seeking further rural living zones by filing further submissions on those issues;

(b) to refer the proposed exclusion of a growth management strategy from the plan to the Environment Court

- are not fatal to the Society's reference (paragraphs 5.1 and 5.2).

Outcome

32. In the circumstances I hold that the Court does have jurisdiction to grant the relief sought by the Society in paragraphs 5.1 and 5.2 of its reference. The Court is likely however to decline jurisdiction in respect of the first

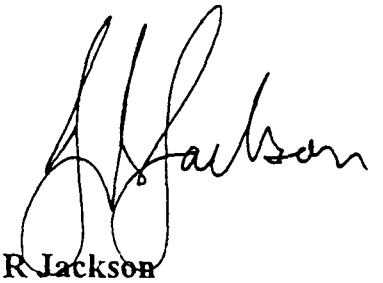
[33] See the ***Nelson Pine Forest Ltd*** case at p.74

relief sought in the Society's reference. In the meantime, because the Court has jurisdiction, Vivid's application for a declaration is refused.

33. Costs are reserved, although my initial view is that they should lie where they fall for two reasons: first the Society is the author of all the difficulties because its original submission and reference are both unclear; secondly, while Vivid and the supporting parties have been unsuccessful, there was genuine doubt about the true legal status of parts of the reference.

34. The Society's reference will now be set down for a pre-hearing conference. It may be possible at that time to refine the issues further. The persons who appeared in this proceeding and those who filed submissions seeking rural-residential zoning for their land should consider whether they wish to appear under section 274. In the meantime I prefigure my intention (subject to any submissions on the issue) to direct the Society to serve its reference (minus any attachments) on the persons who made submissions seeking rural-residential zoning of their land.

DATED at CHRISTCHURCH this 17th day of May 1999.



J R Jackson
Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-683
[2013] NZHC 1346

IN THE MATTER OF	an appeal under s 299 Resource Management Act 1991
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	BULLER DISTRICT COUNCIL AND WEST COAST REGIONAL COUNCIL First Respondents
	BULLER COAL LIMITED Second Respondent
AND	WEST COAST ENVIRONMENTAL NETWORK INCORPORATED Interested Party

Hearing: 27, 28 and 30 May 2013

Appearances: P D Anderson and S R Gepp for the Appellant
J O M Appleyard, B G Williams and T A Lowe for Respondents
Q A M Davies for Interested Party

Judgment: 7 June 2013

JUDGMENT OF FOGARTY J

Contents

Introduction

[1] This is an appeal against an interim decision of the Environment Court, delivered on 27 March 2013.[1] In that decision the Environment Court was considering an application by Buller Coal Ltd (BCL) for consents to establish an open cast coal mine (the escarpment mine proposal or EMP) on the Denniston Plateau. The decision did not grant the consents. However, it advised that it considered that consents to the EMP could be achieved, but invited the parties to consider, discuss and negotiate changes to the proffered conditions. Notwithstanding its interim character, the Environment Court made findings which it intends to apply when considering the conditions to be imposed. So there is a decision which can be appealed, see s 299.

[2] This is the second decision by the Environment Court on this application. The first was another interim decision, delivered on 21 March,[2] on a preliminary point as to whether Solid Energy's possible open cast Sullivan Mine adjoining the EMP was part of the "existing environment" that would otherwise trigger a need for assessment of cumulative effects. The Environment Court answered no, and that decision was the subject of a separate appeal. The appeal was dismissed.[3]

[3] The decision on that appeal precedes this decision. The two decisions can be regarded as companion decisions, for the purpose of assimilating and understanding the facts. While there is some overlap in the descriptions of the facts, to enable this decision to be read standing alone, most readers of this decision will also have occasion to read the decision on the Sullivan Mine point. For this reason, this decision assumes a degree of familiarity with the Denniston Plateau setting of the mine and the escarpment mine proposal.

[4] The Denniston Plateau is in the Buller. It has been the subject of coal mining activity in the past. It contains a valuable resource, "coking" coal, which is very suitable for the manufacture of cement and steel. The parent of BCL, Bathurst,

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1 *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

2 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 42.

3 *Royal Forest and Bird Society of New Zealand Inc v Buller District Council and West Coast Regional Council & Anor* [2013] NZHC 1324.

has exploration licences over most of the Denniston Plateau, except for the possible Sullivan Mine, where a coal mining licence has been granted for 40 years, now held by Solid Energy. The Minister has just altered Solid Energy's licence to allow open cast mining. BCL is seeking consents to operate the escarpment mine to the south of the Denniston Plateau. The intention is that this will be mined as an open cast mine 24 hours/7 days for 5 or 6 years.

[5] BCL's primary mitigation programme is to remove fauna: lizards, snails, etc, before mining, and rehabilitate the site at the end of mining, to create an environment compatible with the natural landscape from which a stable indigenous ecosystem will develop long term. Bathurst will, it is likely, at some stage after that, move on to further mining on the plateau.

[6] BCL accepts its primary mitigation and remediation programme will not completely avoid or mitigate the adverse effects of the mining. So, in addition, BCL offered to carry out a programme of biodiversity enhancement, mainly by predator control, in two different areas:

(a) On an area of the Denniston Plateau and surrounds, termed the Denniston Biodiversity Enhancement Area (DBEA), for 50 years; and

(b) Within the Kahurangi National Park (some 100 kilometres north of the EMP site), termed the Heaphy Biodiversity Enhancement Area (HBEA), for 35 years.

[7] Within the course of the hearing, the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) raised concerns about Bathurst's longer term intention to open cast mine a large part of the DBEA. Recognising this, the Environment Court issued a minute in which it suggested there would need to be a lasting environment enhancement in compensation for unremediated effects. As a result BCL filed a proposal to establish a Denniston Permanent Protection Area (DPPA), an area within the DBEA. BCL proposed a condition that:

> The consent holder shall ensure a form of permanent legal protection from land disturbance of any type within the DPPA.

[8] Because Bathurst does not own the land, which is owned by the Crown, there are unresolved issues as to how Bathurst can make the DPPA promise. The DPPA falls within the DBEA, so will also be part of the biodiversity enhancement programme.

[9] BCL describes the DBEA, the DPPA and the HBEA as a "comprehensive offset mitigation and compensation" package. Overall, together with the primary rehabilitation programme, BCL contends it will provide a "net conservation gain for the escarpment mine proposal, EMP."

[10] The questions of law dividing the parties in this appeal centre on the BCL description of the DBEA, DPPA and HBEA as "offset mitigation".

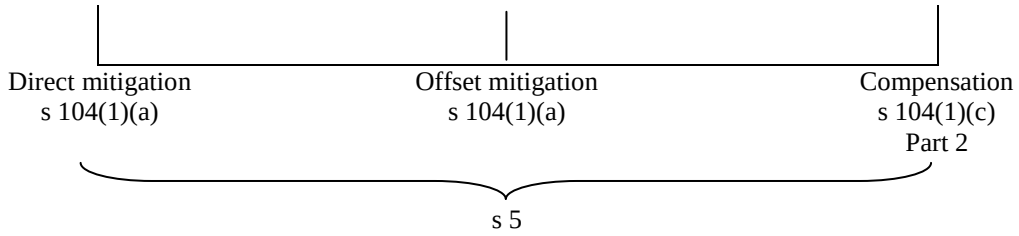
[11] The Environment Court's key conclusions are:

(a) measures within the mine site connected with the manner of mining are direct mitigation;

(b) measures to enhance places on the Denniston Plateau outside the mine site, and species that are displaced from the mine site, may properly be regarded as (offset) mitigation of the adverse effects of the mine, at [212], [227] and [325];

(c) the Court refers to the HBEA as compensation on a number of occasions (rather than a form of hybrid offset/compensation contended by BCL). The Court does however accept that species benefitted by the proposal, which would suffer adverse effects on Denniston, could be compensation in kind (ie, an offset), and necessary, since there is uncertainty about the extent to which Denniston populations will be benefitted by the predator control there, at [213]-[215], and [234]-[235].

[12] BCL submitted that there is a continuum which can be visually represented as:



[13] BCL relies on a distinction, drawn by a Board of Inquiry in the *Transmission Gully* decision:[4]

> What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term *"offsetting"* encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
>
> Offsetting relating to **the values affected by an activity** was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> (Emphasis added)

[14] Forest and Bird argue that the DPPA offer adds nothing. For it is over a site which does not have valuable coal, so that it is never going to be mined. Alternatively, that as there is no resource consent to mine in the DPPA, there is no credible mining threat to protect against; applying [84] of *Queenstown Lakes District Council v Hawthorn Estate Ltd*.[5] Third, in the alternative, that the offer to have a predator control programme over the Denniston Biodiversity Enhancement Area (DBEA) is qualified by the fact that large parts of that area are going to be mined over the course of the biodiversity programme so the benefits are not significant. This argument assumes a mining threat in the future.

[15] Forest and Bird argues there were errors when the Environment Court examined and weighed these offers. That the Court confused "mitigation" of adverse effects with "offset" benefits. It says that these confusions are material because

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4 Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072) at [210].

5 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

mitigation is directly addressed in s 5 (2) of the Resource Management Act 1991 (RMA), and thereby considered when applying s 104. Forest and Bird agree with BCL, that offsets can be offered by applicants and taken into account; but only as a relevant consideration in either s 5(2) or in s 104(1)(a). Forest and Bird argue that as a matter of law offsets are a materially lesser value under the RMA than mitigation. Thereby a confusion between mitigation and offsets is a legal error and can lead to error in weighing the pros and cons of a proposal. Forest and Bird says these errors are material in this decision, for the Environment Court found the case "quite finely balanced".[6]

[16] The proposed open cast mine will produce a lot of surplus material which has to be disposed of on the plateau. There is an area known as Barren Valley, located towards the eastern end of the proposed escarpment mine footprint. It is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge, due to the presence there of the nationally critical umbrella fern *Sticherus tener*. During the hearing, the Environment Court asked for evidence on whether the mine could be developed in such a way to avoid the Barren Valley and the Sticherus Ridge. Otherwise, if the valley was going to be used as an overburden dump, the volumes of overburden were sufficient to overtop the valley and cover the ridge, to the detriment of the umbrella fern habitat. BCL argued that there would be significant economic consequences to avoid the Barren Valley; there being impacts on logistics, including a greater distance for fill to be hauled, and double handling of material. The Court accepted that argument, and allowed the Barren Valley and Sticherus Ridge to be used, citing the logistics and consequent cost as a reason for not protecting that area. Forest and Bird argue that as a matter of law it was an error for the Environment Court to take into account the cost of the condition, and the impact of that cost on the commercial viability of the mine.

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6 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [335].

The issues

[17] In the notice of motion of appeal, Forest and Bird pleaded eight errors of law. In the course of the hearing, three were abandoned. They were numbers one, four and five; leaving two, three, six, seven and eight.

[18] The remaining pleadings are:

Second error of law – Biodiversity offset and compensation as mitigation

[19] The proposed biodiversity offset and compensation would not mitigate the adverse effects of the activity on the environment in terms of s 104(1), and the Environment Court applied the wrong legal test in finding to the contrary.

Third error of law – proposal to increase protection status of land

[20] Increasing the protection status of land, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1).

Sixth error of law – security of benefits of offsets

[21] The benefits of a biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration under s 104(1).

Seventh error of law – offset of significant habitats of indigenous fauna

[22] When recognising and providing for the protection of significant indigenous vegetation and significant habitats of indigenous fauna, as required by s 6(c), the Environment Court applied a wrong legal test, by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvement to other habitats of these species.

Eighth error of law - mining the Barren Valley and Sticherus Ridge

[23] Forest and Bird sought that, even if consent was granted, conditions be imposed to protect the Barren Valley and Sticherus Ridge. The Barren Valley is

located towards the eastern end of the proposed escarpment mine footprint, and is so named because it has no coal under it. On the eastern side of the Barren Valley is a ridge, known as the Sticherus Ridge due to the presence of the nationally critical umbrella fern *Sticherus tener*.

[24] In the course of its submissions, particularly in its closing submissions on materiality, Forest and Bird usefully made these intentions as to error of law more concrete.

[25] As to the second error, it is submitted that the Court erred in finding the DBEA (and aspects of the HBEA) constitute mitigation.

[26] In respect of the third error, Forest and Bird submitted that increasing the protection status of the DPPA, without any relevant environmental effect resulting from the change in protection status, is an irrelevant consideration under s 104(1)(a).

[27] In respect of the sixth error, Forest and Bird submitted that the benefits of the DBEA predator control are dependent on the habitat of the DBEA persisting. The Court accepted that there are proposals afoot to mine parts of the DBEA, but held it could not have regard to those proposals (or impose conditions protecting against the effects of those proposals on the habitat of the DBEA), because that is a matter for future consent authorities. It therefore considered the benefits of the DBEA as if those proposals did not exist. Forest and Bird submits that the Court took into account an irrelevant consideration when it considered the benefits of the DBEA in circumstances where those benefits could not be secured through conditions of consent.

[28] In respect of the seventh error, Forest and Bird submitted that it was an error for the Environment Court to include the HBEA in its consideration of whether granting consent would achieve protection of significant indigenous vegetation and significant habitats of indigenous fauna as required by s 6(c). That it included the HBEA in what it described as "offset mitigation". Given the Court's finding, which was inevitable, that the HBEA constitutes a different habitat to the EMP site (Heaphy

is 100 kilometres north), the HBEA proposal is only relevant to protecting by compensating/offsetting for significant fauna, not the significant habitat.

Second error of law – biodiversity offset and compensation as mitigation

[29] The DBEA covers the whole of the Denniston Plateau and surrounds. The part of the DBEA that is on the plateau mostly covers the same vegetation, habitat and types of species that will be adversely affected by the EMP.

[30] The HBEA covers vegetation, habitat types and (mostly) species that are different to those that will be adversely affected by the EMP.

[31] The Environment Court found that the DBEA would largely (but not completely) mitigate adverse effects on fauna:

> [226] In short, there would be some species that would be lost to the mine site, and there could be some local extinctions.
>
> [227] **The principal offset** offered for these effects on the mine site is a predator and weed control programme over a 4,500 ha area on the Denniston Plateau. It is clear to us that there would be some benefits from this control to a number of threatened or at risk species on the plateau. That is because there is evidence of rats at moderate density in forested areas of the plateau in years when far fewer might reasonably have been expected. And we are satisfied that there were even more rats in areas just off the plateau proper, but at comparatively high altitudes. The evidence is that both riflemen and kiwi use the forested area on and adjacent to the plateau and mine site. We also recall that while no study has been made of fernbird's use of coal measures habitat, they spend much of the time on the ground in thick, but lower, vegetation. Dr Parkes's evidence is that ship rats are major predators of small birds, and take eggs and chicks of both arboreal and ground-nesting species. We have no evidence that this general proposition would not apply in respect of the specific species on the Denniston. Introduced predators also take snails, even if a smaller percentage of *patrickensis* on Denniston than of other species in other habitats.
>
> (Emphasis added)

[32] Naturally enough, the Court did not make similar findings as to flora. Later in the judgment, it repeated its findings as to fauna, and made an observation as to flora:

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation

> in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)
>
> [326] That is not the situation with areas of significant indigenous vegetation.
>
> [327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[33] With respect to the HBEA, the Environment Court found that the Heaphy package offered protection for important fauna in the Heaphy as compensation for loss of significant flora on Denniston:

> [234] Dr Ussher, restoration ecologist called by BCL, opined that the benefits to fauna in the Heaphy Biodiversity Enhancement Area were not needed to offset or compensate for adverse effects on fauna and their habitat on the mine site. That, in his view, was achieved by the predator protection programme on Denniston Plateau. We do not believe the evidence is certain enough to accept that assertion. Dr Ussher added:
>
> > Benefits to plant communities in the Heaphy BEA are the most relevant benefits for comparing against residual losses of plant communities in the EMP footprint; however an exchange ratio would be needed to account for differences between vegetation types at Denniston and the Heaphy.
> >
> > Ultimately broader considerations around sustainable, landscape level management of broad eco-systems and the benefits that this brings beyond a reductionist approach may outweigh the need to engage in biodiversity accounting practices as described here.
>
> We suspect Dr Ussher was offering this justification for the Heaphy package, which he acknowledged was in large measure a "like for unlike" form of compensation. The Heaphy package in our view offers protection for important fauna in the Heaphy as compensation for the loss of significant

> flora on Denniston. That may be important since the extent of benefits to fauna on Denniston from the predator control package is, on the evidence of Dr Parkes, not known.
>
> ...
>
> [237] On the surface, the "desiderata" in ***JFI Limited*** would suggest that we give limited significance to the compensation package in the Heaphy. To the extent that species are benefitted which would suffer adverse effects on Denniston, we consider that to be compensation in kind, and necessary, since there is uncertainty about the extent to which the Denniston populations will be benefitted by the predator control there. But in terms of the Denniston flora, the compensation would be what Dr Ussher acknowledged to be "unlike for like." That could be given weight only on the basis of the much broader approach to the management of eco-systems to which Dr Ussher referred in his initial evidence. We consider the different types of effects at issue in ***JFI Limited*** and this case give us scope to accept as **offset mitigation** benefits to those same species that are adversely affected by the EMP proposal.
>
> (Emphasis added)

[34] The Court had earlier found that the DBEA (and aspects of the HBEA) constituted mitigation of the adverse effects of the EMP on the wider environment.

> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, **as a mitigation of the adverse effects** of the mine on the wider environment.
>
> (Emphasis added)

[35] It then later found that the DBEA proposal was supported by plan provisions favouring mitigation:

> [307] For the reasons we have given, we hold that the proposal is somewhat inconsistent with, rather than contrary to the provisions on wetlands, significant indigenous fauna and significant habitats of indigenous fauna to which Mr Purves referred. But these are provisions of considerable significance to this case. We accept that provisions which enable mining and encourage these types of **mitigation/offsetting** proposed pull in the opposite direction. Overall we find that the provisions of the plans are evenly balanced with respect to the proposal rather than consistent.
>
> (Emphasis added)

[36] Section 104, considered as a whole, confers a discretion on consent authorities (which include the Environment Court) to grant resource consents.

Section 104 gives a number of directions. It is sufficient for this case to focus on s 104(1), which provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[37] Part 2 of the Act contains four sections (ss 5, 6, 7 and 8). The argument of the parties in this Court focussed only on some of these provisions. First on the application of s 5(2)(a) and (c), which provides:

> **5 Purpose**
>
> ...
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> ...
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment

And on s 6(c), which provides

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[38] It is only necessary to consider part of s 104 and these parts of ss 5 and 6, because it is a core characteristic of law that it is the context which makes considerations relevant. This is particularly a characteristic of the RMA, which provides for numerous considerations, not all of which are made relevant in a particular context.

[39] It is common ground in this case that the open cast mining proposal, the EMP, cannot be undertaken avoiding any adverse effects of activities on the environment, or completely protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[40] "Effect" is widely defined. Section 3 of the Act provides:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

[41] It will be seen that the definition includes any positive effect, and enables a forward-looking examination of future effects, whether temporary or permanent.

[42] "Mitigating" is not defined.

[43] "Offset" is used only once in the Act. It appears in s 108(10), which is the section addressing conditions of resource consents. Section 108(9) defines "financial contribution" as meaning a contribution of money or land, or a combination. Subsection 10 then provides:

108 Conditions of resource consents

...

(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—

(a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) the level of contribution is determined in the manner described in the plan or proposed plan.

[44] The consequence of subsection 10 is that financial contributions can only be made in accordance with purposes specified in the plan or proposed plan. No such purposes are specified in the plans before this authority.

[45] There is competing jurisprudence on how regulatory statutes should be interpreted and applied. One school is that, where the terms of the statute allow, Judges can develop policy within the boundaries allowed by the language of the statute. The other school argues that Judges should take the text in regulatory statutes and apply it to the facts without adding new criteria, or elaborating on the language in the statute.

[46] In New Zealand, I think the law is that additional criteria can only be taken into account in the application of regulatory statutes when the text of the statute, read

in the light of its purpose, applying to a particular context, implicitly makes relevant a consideration. The authority for this proposition is the decision of the Privy Council in *Mercury Energy Ltd v ECNZ*.[7] This was a judicial review application, but it was concerned, as I am in this case, to identify whether or not an authority has contravened the law. The Privy Council re-endorsed the relevance of Lord Green MR's judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[8] That judgment includes this proposition:[9]

> If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters...

[47] The use of the term "compensation" dates back to the decision of the Environment Court in *J F Investments Ltd v Queenstown Lakes District Council*.[10] In that judgment, J F Investments Ltd applied to the council for a subdivision consent to make a boundary adjustment, and for a land use consent to identify a building platform/build a house on its land. As part of the package, the applicant offered to spend up to $100,000 removing wilding pines which marred the outstanding natural landscape. The Court was considering the application of s 6(a), which provides:

> (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

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7 *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 (PC). See also *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HL), which also applies the *Wednesbury* case, and *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).

8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (The *Wednesbury* case).

9 See *Mercury* at 389.

10 *J F Investments Ltd v Queenstown Lakes District Council* EnvC Christchurch C48/2006, 27 April 2006.

[48] The Court recognised that s 6 does not function to ensure the preservation of matters of national importance, citing *New Zealand Rail Ltd v Marlborough District Council*.[11] The Court reasoned:[12]

> [27] We conclude that, since activities which meet other agendas of national importance are allowable under the RMA even though they create permanent adverse effects on nationally important natural resources, it is inconsistent to suggest that environmental compensation is outside the scope of the Act. If adverse effects on the environment can be justified as providing a net benefit because they are in the national interest, then adverse effects offset by a net *conservation* benefit allowed by enhancement or the remedying of other adverse effects on the relevant environment, landscape or area must logically be justifiable also. They are certainly relevant under both s 5(2)(c) and s 7 of the RMA.

[49] To my mind, that paragraph would read the same if, instead of the phrase "environmental compensation" one replaced it with the phrase "environmental offset". "Offset" is used in the next sentence. Both in that paragraph and in this case, I have noticed that counsel and the Court seem to use the term "offset" and "compensation" as synonyms.

[50] Offsets also fit into the formulation expressed in the House of Lords in *Newbury District Council v Secretary of State for the Environment*, endorsed by the Court of Appeal in *Housing New Zealand Ltd v Waitakere City Council*,[13] being:[14]

(a) For a resource management purpose.

(b) Fairly and reasonably related to the proposal.

[51] I think it is particularly important when applying the RMA, to exercise a discretion, to conform with that principle. This is because the history of the enactment of this Act reveals that it has borrowed some international concepts, particularly sustainable management. Secondly, it has selected numerous criteria, all contained in Part 2, giving them different scales of importance. These criteria reflect the New Zealand-ness of the RMA. For example, s 6 starts with the preservation of the natural character of the coastal environment. New Zealand is an island nation.

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11 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at [86], Greig J.
12 *J F Investments Ltd v Queenstown Lakes District Council* at [27].
13 *Housing New Zealand Ltd v Waitakere City Council* [2001] NZRMA 202 (CA).
14 *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 at 739.

Section 7(a) requires particular regard to kaitiakitanga. Section 6(e) provides for the recognition of and provision for the relationship with Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. In

short, at a glance, it can be seen that Parliament has given particular and careful attention to the values and goals that should be pursued in the application of the RMA.

[52] It is clear that Parliament did not intend the RMA to be a zero sum game, in the sense that all adverse effects which were unavoidable had to be mitigated or compensated. Section 17 contains a duty to avoid, remedy or mitigate adverse effects, gives power to the Environment Court to grant enforcement orders, but is qualified in s 319 so that the Environment Court cannot make an enforcement order against a person if the person is acting in accordance with a rule in a plan, a resource consent or a designation, the adverse effects of which were recognised at the time of the granting of the consent, unless the Court considers it is appropriate to do so because of an elapse of time and change of circumstances.[15]

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

[54] As already noted, the RMA does refer to the concept of offset. Furthermore, it uses the concept of offset where there may be a financial contribution of land, clearly being land other than the site upon which the activity is sought to be pursued. Nor is there any qualification in s 108(10) confining offset to situations where it operates as mitigation of the adverse effect. The term "offset" naturally has a different normal usage from the term "mitigate". The term "offset" carries within it the assumption that what it is offsetting remains. So, for example, if there is an adverse effect that continues, but those adverse effects can be seen as being offset by some positive effects.

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15 Sections 17(4), 319(2) and (3).

[55] For these reasons, I am satisfied that, where an applicant offers an offset providing positive effects, depending on the nature of the offset and the context, the consent authority can by implication decide it ought to have regard to them, in an appropriate context, made relevant by s 5(2).

[56] There was no contest between counsel before me that the Environment Court ought to have had regard to the DBEA and the HBEA. The argument of Forest and Bird was not as to the relevance of consideration, but to the classification of the consideration. This was because implicitly Forest and Bird was arguing that mitigation deserves a greater weighting in the scheme of the Act than an offset.

[57] Both BCL and Forest and Bird used compensation as a synonym for offset. So does the Environment Court in a number of authorities, starting with *J F Investments*, as already noted above. I have not heard full argument as to the justification for using the term "compensation". In principle, High Court Judges should confine themselves to resolving disputes that are brought to the Court. However, I do not find it possible to use the word "compensation".

[58] The RMA has numerous provisions which use the word compensation. But no provisions which provide for compensation if adverse effects are not completely avoided, remedied or mitigated. The compensation provisions are directed, as one would expect for constitutional reasons, to addressing the extent of compensation payable if property rights are taken.[16] To compensate can be limited to counterbalancing, but it frequently is used in a way which carries the value that there ought to be the making of amends. That value has been addressed in the RMA but given limited functionality in the provisions that have just been footnoted. It is not deployed in Part 2 or in s 104.

[59] However, I am satisfied that it is sufficient in this case to resolve whether or not offsets can be regarded as a form of mitigation, sometimes called "offset mitigation".

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[16] Sections 85, 86, 116A, 150F, 185, 186, 198, 237E, 237F, 237G, 237H, 331, 414, 416 and 429.

[60] There was general agreement between counsel, and the Court, that s 104(1)(a) allows the taking into account of positive effects on the environment proffered by the applicant in consideration for allowing the activity. In short, offsets can be had regard to when exercising the discretion in s 104.

[61] The core problem set for resolution in these proceedings is whether or not the concept of "offset mitigation" is relevant, or whether the two concepts should be kept apart. BCL argues for the utilisation of offset mitigation. Forest and Bird opposes it. Forest and Bird's point is that mitigating adverse activity warrants greater weighting in deliberations than offsetting.

[62] I agree that that offset is not "mitigation" as the word is used in s 5(2)(c). There is no reason to go beyond the normal meaning of the term mitigate, particularly as it occurs in a phrase, "avoiding, remedying or mitigating".

[63] Counsel for Forest and Bird's main submission was that two other decisions overlook the distinction between actions that address effects of the activity for which consent is sought (which can be mitigation), and actions that address the effects of other activities (offsets), and so are not correct. These are the Board of Inquiry's decision in *Transmission Gully*[17] and *Mainpower NZ Ltd v Hurunui District Council*.[18]

[64] In *Transmission Gully*, the Board of Inquiry found that:

> ...offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[65] In *Mainpower*, the Environment Court noted that the terminology associated with offsets was becoming loosely employed and confusing. The Court in *Mainpower* applied the *Transmission Gully* approach to offsetting. It found that:[19]

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17 Final decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request (5 October 2011, EPA 0072).

18 *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384.

19 *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at 463.

> The offsetting for Mt Cass clearly relates to the values being affected, and secondly, it is being undertaken on the same site. Therefore we consider it to be a "form of remedy or mitigation of adverse effects" rather than environmental compensation.

[66] The decision of the Environment Court in *Day v Manawatu-Wanganui Regional Council*[20] is in contrast. That case was concerned with the appropriate wording in the policy framework for considering the resource consents in the proposed One Plan. The Court was specifically considering whether offsetting should be required by the plan for residual adverse effects following appropriate avoidance, remedy and mitigation. The decision states:

> [3-61] An argument was made that a biodiversity offset is a subset of remediation or mitigation (and even, potentially, avoidance) and should not be specifically referred to or required.
>
> [3-62] Meridian submitted that the Final Decision and Report of the Board of Inquiry into New Zealand Transport Agency Transmission Gully Plan Change Request has close parallels with the matter considered by the Court and that it had taken this approach. The appeal to the High Court against this decision did not deal with this particular matter.
>
> [3-63] With respect to the Board of Inquiry, we do not consider that offsetting is a response that should be subsumed under the terms remediation or mitigation in the POP in such a way. We agree with the Minister that in developing a planning framework, **there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation – at the point of impact.**

[67] Counsel for BCL supported the *Transmission Gully* reasoning. Although it modified the reasoning by saying there was a continuum. Counsel submitted:

> At one end of the continuum are offsets. They are regarded as actions which are most directly related to avoiding, remedying or mitigating an adverse effect, in this case works on Denniston Plateau; and
>
> At the other end of the continuum is compensation – ie, positive effects which although they might be less to do with actual mitigating, remedying or avoiding a particular adverse effect arising from a proposal – ie, involve an unlike trade, are nevertheless positive effects that should be incorporated into the wider balancing process under s 5.

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[20] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

[68] Counsel for BCL argued that the Environment Court in this case was taking a similar approach as that in *Transmission Gully*. Counsel particularly referred to [211] and [212], which provide:[21]

> [211] These desiderata were applied and developed in ***Director-General of Conservation v Wairoa District Council***, and ***Royal Forest and Bird Protection Society Inc v The Gisborne District Council***. Particularly in more recent cases, the Court and Boards of Inquiry (presided over by Environment Judges) have tended to draw a distinction between various types of offsetting, some of which they tend to include in the category of remedy and mitigation, and some to be regarded as compensation. The Board of Inquiry into the proposed Transmission Gully Plan Change expressed it like this:
>
> > What ultimately emerged from the evidence, representations, and submissions of the parties, was an acknowledgement that the term "offsetting" encompasses a range of measures which might be proposed to counterbalance adverse effects of an activity, but generally falls into two broad categories.
> >
> > Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.
>
> [212] We agree with the distinction drawn by the Transmission Gully Board of Inquiry. We find that although the mine site is within the landscape and environment of the Denniston Plateau, measures to enhance other places on the plateau and species that are displaced from the mine site, may properly be regarded, to the extent that they are likely to be successful, as a mitigation of the adverse effects of the mine on the wider environment.

[69] I agree that the Environment Court in this case was directly applying *Transmission Gully* and adopting the proposition, cited above, that:

> Offsetting relating to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects, and should be regarded as such. Offsetting which did not relate to the values affected by an activity could more properly be described as environmental compensation.

[70] That explains why the Environment Court in this case did refer to offset mitigation.

[71] There is obviously an attraction to give greater weight to offsetting, where the offsetting relates to the values adversely affected by an activity for which resource

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[21] *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47.

consent is being granted. That can be done without calling the offset "mitigation" or "offset mitigation".

[72] I am of the view that counsel for Forest and Bird are correct, that such offsets do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, for example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was on the environment that is being destroyed was lifted and placed in the new environment. Merely to say that the positive benefit offered relates to the values affected by an adverse effect is, in my view, applying mitigating outside the normal usage of that term. And the normal usage would appear to apply when reading s 5(2). The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.

[73] This reasoning is supported by the helpful submissions I received from Mr Davies, counsel for West Coast Environmental Network Inc. He submitted that "mitigation" by definition must be at the point of impact. He invited this Court to follow the Environment Court in *Day v Manawatu-Wanganui Regional Council*.[22]

[74] Like the other counsel, Mr Davies agreed that offsetting is a positive benefit and may be taken into account, he said, under s 104(1)(a). He submitted that in order for an adverse effect on the environment to be mitigated, that effect must be mitigated both at an ecosystem level and at the level of their constituent parts. That submission was drawing upon the definition of intrinsic values which appears in the statute. Intrinsic values is defined:

> **2 Interpretation**
>
> ...
>
> **intrinsic values,** in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—

[22] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182.

(a) their biological and genetic diversity; and

(b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience:

...

I agree. I accept his submissions, that offsets best operate at the ecosystem level. (This is not to say they cannot be wider.) They are not mitigating, in that they do not address effects at the point of impact, they are better viewed as a positive environmental effect to be taken into account, pursuant to s 104(1)(a) and (c), and s 5(2).

[75] Coming back to the context, I am referring here to the DBEA, which is improving other parts of the same ecosystem, part of which is lost by the open cast mining. That can be distinguished from the ecosystem in the Heaphy, 100 kilometres away. Then again, perhaps if one wants to, one can refer to the ecosystem of the Buller. It is, in one natural use of the term, the same environment.

[76] But overall, I think there was an error of law in the Environment Court, in its interim decision, treating the DBEA, and possibly the HBEA, as offset mitigation. Neither mitigate the adverse effects of the loss of the flora and the habitat and fauna caused by the open cast mining and associated activities in the EMP.

[77] The next question is whether or not this is a material error of law warranting any reconsideration of the reasoning so far by the Environment Court. I deal with materiality of error at the end of this judgment.

[78] This analysis resolves the first error of law. The proposed biodiversity offsets in the DBEA and the HBEA do not mitigate the adverse effects of the activity on the environment. They cannot also be characterised as offset mitigation. They are offsets and are relevant considerations to be weighed in favour of the application by reason of s 104(1)(a) and (c), and s 5(2).

Third error of law – proposal to increase protection status of DPPA

[79] The Environment Court discussed the DPPA:

[247] The appellants' objections relate not only to the legality of condition 145, but to its merits. They rely on a statement in the evidence of Dr Ussher **that land offered as an offset must have a credible threat against it**, and contend that the condition as proposed by BCL does not require the DPPA to contain coal and be under such threat.

[248] After its closing submissions were written, BCL defined more precisely the area for which it proposed to suggest further legal protection. In the last two days of the hearing it produced a map which purported to show that the area does contain coal. It accepted that the vast majority of the DPPA, as mapped in coal values, shows very low values, and if there is coal of any value in it the vast majority of it is of low value. **Mr Welsh could not tell us whether or not mining it was a practical proposition. This is all rather speculative, and might not advance matters greatly.**

[249] We remind ourselves however that the purpose of additional protection is not to deny potential miners coal, but to provide the best possible conditions for indigenous eco-systems with indigenous flora and fauna to flourish. We are not persuaded by BCL's submission that only open-cast mining could damage the ecosystems of the DPPA. We accept that the phrase "land disturbance" could capture minor activities. **But the purpose of an offset is to mitigate adverse effects on one site by enabling improved environmental values on, in this case, another site in the vicinity.**

[250] We have not reached the point of forming fixed views about the precise form of protection that would be desirable. We consider it desirable that mechanisms be explored and active steps taken to bring the separate but parallel consenting processes to greater consistency if at all possible. We stress that the Court has no part to play in the processes that are not before it, but would hope that all concerned would be assisted if a co-operative approach were to be taken. As we have said, we do not as yet have fixed views about mechanisms, but we urge BCL to think carefully about the purpose of the DPPA, and what is necessary to secure the achievement of that, rather than simply concerning the effects of open-cast mining. **As we indicate later, it is at least possible that the question of whether consent is able to be granted could turn on this issue.**

...

[312] We have read carefully the thorough decision of the commissioners at the first instance hearing. However, we do not interpret the Buller District Plan in quite the same way as them with respect to its approach to mining. Further, there have been a number of quite significant changes to the proposal since the first instance hearing. The area over which weed and predator control is proposed has increased, and there is a proposal to establish a DPPA**, presumably with greater security against open-cast mining than presently** exists. Moreover, both applicants and appellants have carried out significant research between the two hearings, so that the Court has before it much better evidence than did the original commissioners, along with the benefits of cross-examination. As we have indicated, the commissioners' decision is very considered, and we have had quite considerable regard to it, but ultimately it is the evidence before us that is more important.

...

> [325] **Offset mitigation** for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.
>
> (Emphasis added)

[80] Forest and Bird argued that the DPPA was a legally irrelevant consideration. Counsel relied upon an expert witness, Dr Ussher, who argued that to be a valid averted loss offset, the proposal must avert a "credible threat" – which he considered could only be achieved in this case if *"BCL ...[identified] land with coal under it that is currently economically recoverable and set aside that land such that vegetation is protected from the effects of mining."* Forest and Bird submitted that there was no valid threat for the offset to qualify as a positive effect. There needed to be an unimplemented resource consent to mine in the DPPA, otherwise mining is not part of the existing environment. This reasoning relies upon [84] of *Hawthorn*, discussed in the first decision.

[81] In reply, BCL pointed out that the DPPA is proposed to be a minimum of 745 hectares. That it will have a 500 hectare offset mitigation area, 30% by land area of pakihi, 30% by land area of manuka shrubland, 30% by land area of forest, and 10% by land area of sandstone pavement, of which at least 200 hectares will be within the known current distribution range of the snail *Powelliphanta patrickensis*. That within the DBEA, of which the DPPA is part, BCL will be required to have a biodiversity enhancement programme, with a goal of achieving and sustaining improvements and key biodiversity attributes. That it is intended to offset the residual effects on biodiversity values from the EMP to achieve and sustain statistically significant improvements and abundance for certain named species, including the great spotted kiwi, *Powelliphanta patrickensis*, the South Island fern bird, rifleman, forest gecko and West Coast green gecko. BCL argue that the DPPA offer is of permanent protection of at least 500 hectares of land.

[82] The fact that the DPPA comes with an offer of permanent protection invites consideration of the long term implications of the offer. There is no suggestion that this area at present is under threat of mining, because of the low quality of the coal reserves under that land. The Denniston Plateau, however, has been mined before. The mining history goes back for a long time. Permanent protection of the DPPA land protects it not only against mining but, as the Environment Court noted, any use for ancillary operations of mining.

[83] As noted, it was argued that, when considering the benefits of a condition like this, [84] of *Hawthorn* again applies, and one cannot take into account anything other than the environment as it exists, permitted uses and existing resource consents. In this context, I disagree. It is a fact that Bathurst holds an exploration permit over the DPPA. The subject of environment protection by way of conditions was not before the Court in *Hawthorn*, and [84] of *Hawthorn* should not be read out of context. I will not burden this judgment with my past reasoning in *Queenstown Central Ltd v Queenstown Lakes District Council*,[23] which argues that the Court of Appeal in *Hawthorn* held environment is the future environment, and that [84] is a summary that should not be read out of context, let alone be applied like a statutory provision to any context. I do not repeat my reasoning in the first and companion judgment, but it applies here.

[84] Section 104(1) is expressed to be subject to Part 2. Part 2 includes the all important s 5, particularly s 5(2):

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

[23] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[85] "Sustainable management" requires long term thinking. It is usually reflected in the plans, which are themselves applications of s 5. Section 104 is expressly subject to Part 2. Long term thinking must be intended to be carried over in s 104 analysis, as to apply short term thinking would be inconsistent with s 5.

[86] Here the relevant plans provide for mining, and as restricted discretionary or discretionary activities, over the whole of the Denniston Plateau. Because of the scale of the plateau, and the need for copious quantities of water to be taken and discharged, it is of the nature of things that mining of the valuable coking coal on the plateau will be staged over time. Bathurst and Solid Energy have an understanding. The terms are confidential. But before me, counsel agreed it is about staging exploration of the Denniston Plateau resource.

[87] In order to take into account intrinsic ecosystem values of the Denniston Plateau, s 5(2)(b), the values have to be examined against a long timeframe. This must include the uncertainty of the commercial value, in the future, of the coal under the DPPA.

[88] I think there is no doubt that a condition providing for the DPPA can be taken into account as a relevant consideration by the Environment Court, in s 104 analysis, as a Part 2, s 5(2) consideration. The weight that it gives to that consideration is for the Environment Court.

[89] For reasons I develop further in analysis of the next issue, the proposed DPPA does not mitigate any actual or potential effects on the environment of allowing the Buller Coal escarpment proposal. It does not fall directly within s 5(2)(c). Forest and Bird submitted that s 104(1)(a) makes relevant offers of environmental compensation, which will be an actual and potential positive effect on the environment of allowing the activity. I agree, if that proposition is read as

"offset" rather than compensation. It is accordingly a relevant condition under s 104(1), and sustainable management in s 5(2)..

Sixth error of law – security of benefits of offset

[90] This contention, arguing that the benefits of biodiversity offset or compensation which cannot be secured through conditions of consent are an irrelevant consideration, addresses the efficacy of the promise of permanently setting aside the area in the DPPA, and the prospect of further mining elsewhere in the DBEA.

[91] The Environment Court is currently seeking conditions designed to lock in place the DPPA. It needs to be understood that the land is Crown land. I think that Forest and Bird, wittingly or unwittingly, are trying to draw this Court into a merit judgment, which is the responsibility of the Environment Court. The Environment Court may well be faced with a set of terms relating to the DPPA which fall short of legally binding locking up of the DPPA. That may have to be done by statute. But there is nothing to stop the Environment Court forming a judgment on the merits as to the utility of the DPPA.

[92] The DBEA covers all of the Denniston Plateau except the Sullivan Mine licence area, and some areas adjacent to the plateau. The DBEA is a proposal to enhance the habitat for fauna by reducing pest numbers across the whole area.

[93] The Environment Court found, applying [84] of *Hawthorn*, that it could not consider the possibility of future applications for mining that might be undertaken within the DBEA.[24] The primary submission of Forest and Bird is that the Sullivan coal mining licence forms part of the existing environment in the *Hawthorn* sense, in [84]. That submission has been rejected. It will be recalled that the Environment Court called for the setting aside of some land because of the prospect of further mines. Forest and Bird submit there is no logical basis for the Environment Court excluding consideration of prospective mines in Whareatea West and Coalbrookdale in the Denniston Plateau because they do not have consent, but giving weight to the

[24] *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [230].

proffering of the DPPA. Mining in the DBEA is more likely to occur on those other sites than within the DPPA. Forest and Bird submit the same test should apply to each of these circumstances. I agree.

[94] For the reasoning already given, it follows that this Court is of the view that it is open to the Environment Court to find as a matter of fact that Bathurst is likely to achieve the resource consents for mining elsewhere in the DBEA, and indeed in the DPPA.

[95] It is a matter of fact for the Environment Court to judge whether the prospect of future mining in the DBEA affects the weight that it gives to the benefits of the DBEA.

[96] Forest and Bird then submitted that in that case the purported benefits of the DBEA are not able to be secured through consent conditions, because those conditions cannot prevent destruction of the habitat that is to be enhanced. Therefore, it is submitted that the benefits of the DBEA were an irrelevant consideration.

[97] I do not agree. The DBEA is a very large area. Future open cast mining on the plateau is likely to follow the same mode of operation as the EMP, namely opening up a particular part of the Denniston Plateau, taking out the coal, then rehabilitating the site. It does not follow that there is not continued efficacy in the continuation of the biodiversity programme elsewhere on the plateau. It is a fanciful criterion that the whole of the huge area of the Denniston Plateau is going to be one open cast coal mine.

While Forest and Bird may have identified an error of law in the Environment Court's reasoning, by applying [84] in a completely different context to that in which it was set in *Hawthorn*, it is another question as to whether the error is material and/or cannot be re-addressed in the upcoming resumed hearing of the Environment Court on 12 June 2013. That is a hearing to examine the conditions being proposed. It is also a hearing to make the final decision as to whether or not to grant consent.

Seventh error of law – offset of significant habitat of indigenous fauna

[98] Forest and Bird alleges that the Court applied the wrong legal test by considering that the adverse effects on significant habitats of species of indigenous fauna could be addressed by improvements to other habitats of the same species for the purpose of s 6(c).

[99] Section 6(c) of the RMA provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> ...
>
> (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> ...

[100] The Heaphy predator control area (the HBEA) contains a few species in common with the EMP footprint, but it consists of a very different habitat. The Court found that the HBEA "comprises some 24,000 ha of forest and other vegetation types that differ from those on the Denniston Plateau".[25]

[101] In terms of s 6(c), the Court found that where there was an adverse effect on the significant habitat of indigenous species, it could take into account improvements to other habitats of that species.[26]

[102] Forest and Bird were submitting that in considering whether s 6(c) was met, the Court had regard to the HBEA. Forest and Bird particularly focussed on [325]. I think, however, it is important to read [325]-[335].

> [325] Offset mitigation for these effects is offered in the form of a predator control programme, which BCL intends to fund for at least fifty years on the Denniston Plateau, and additional environmental compensation in the form

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25 *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [232].

26 At [214].

of a similar programme in the Heaphy River area for 35 years. We have found that predator control is likely to provide benefits for important indigenous species in these areas, though the extent of these benefits is more speculative. While we do not consider there is sufficient evidence to sustain the claim of net gain for fauna, particularly on Denniston, on the balance of probabilities we think the gains elsewhere on the plateau will largely mitigate the adverse effects of the proposal on fauna on the mine site.

[326] That is not the situation with areas of significant indigenous vegetation.

[327] A number of rare species, notably two *Sticherus* species, *Euphrasia wettsteiniana* and *Peraxilla tetrapetala* are likely to be lost. In the case of pink pine, even if a proportion of the species survive VDT, specimens hundreds of years old would be substantially cut back to achieve their translocation. Some species, on the applicant's own evidence, would take centuries to regain their present condition. These are significant effects. We reiterate the evidence of a witness called by the applicant, Dr Glenny amongst others, that the "Sticherus Ridge" is outstanding. We return to that matter in our final assessment under s 5. But we indicate here that we do not consider such effects offset, or compensated for. Significant areas of indigenous vegetation are not protected. And we add that the relevant subsection of the Act, s 6(c) does not include the qualifier *"from inappropriate subdivision, use and development*."

[328] That qualifier is included in s 6(a) which requires us to recognise and provide for the preservation of the natural character of (inter alia) wetlands and lakes and rivers and their margins. As we have indicated, there will be adverse effects on pakihi wetlands, seepages and a small area of *Chionochloa rubra* wetland which would be removed entirely during the mining operation. Likewise, 6.7km of streams would be removed during mining, to be replaced by 4km of streams on the ELF. It is acknowledged that the natural character of the reinstated streams would for some time be less than that now existing. Recolonisation by bryophytes is expected to be slow, and Dr Stark, while confident that invertebrates would re-establish, does not have the evidence to suggest a likely timeframe.

[329] For the sake of completeness we add that some of the affected tributaries of the Whareatea River are ephemeral, and it is unlikely that the loss of stream length would have any effect on water quality and quantity further downstream. Further, the take proposed from the Waimangaroa would in our view leave the natural character of that river intact.

[330] We return to the question of whether the adverse effects on wetlands result in the development of the mine being "inappropriate." The adjective calls for a value judgement. Ms Bodmin's evidence that both pakihi and seepages would remain well represented on the plateau and the efforts BCL has taken to reduce the extent of *chionochloa rubra* fenland affected, considerably reduce the degree to which the proposal constitutes development from which wetlands require preservation.

[331] Overall, in terms of s 6, we find that the requirement to protect areas of significant indigenous vegetation tells against the proposal. The requirement to recognise and provide for the preservation of wetlands from inappropriate development also does so, but not as strongly.

[332] Buller Coal properly referred us to the judgement of the High Court in ***NZ Rail v Marlborough District Council*** citing the following passages:

> The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose ... It is certainly not the case that the preservation of natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs must all play their part within the overall consideration and discussion.

The same considerations apply when considering wetlands under s 6(a) and significant indigenous vegetation under s 6(c).

[333] In turning to s 5 of the Act, we remind ourselves from that decision that:

> ... the application of s 5 involves an overall broad judgement of whether a proposal will promote the sustainable management of natural and physical resources., that approach recognises that the RMA has a single purpose, and such a judgement allows for comparison of conflicting considerations, and the scale and degree of them and their relative significance or proportion in the final outcome.

In this case we find the task more than usually complex. The proposal provides significant enablement in the form of high quality employment in the Buller District. It provides enablement to the New Zealand economy by stimulating a "shuffling upwards" in the labour market. These benefits are not to be underestimated.

[334] Alongside this enablement, the proposal, if implemented, will have adverse effects of some proportion on areas of significant indigenous vegetation, including locally and nationally endangered plant species and ecosystem. Together with these effects there are effects on wetlands, perhaps of lesser significance because of what will remain on the plateau, and a considerable reduction for some time in the amenity of the mine site and its surrounds. In addition to these adverse effects which are not avoided, remedied or mitigated, the life that the rehabilitated ecosystems support on the mine site will be less fit, rich and diverse than those presently existing. We hold that to be a relevant matter under s 5(2)(b).

[335] Overall this case is quite finely balanced, rather as was found by the first instance hearing commissioners. So finely balanced indeed that while our present inclination is to grant consent, much will ultimately turn on whether appropriate conditions can be worked out and whether some others can be offered by the applicant on an *Augier* (volunteered) basis. These matters have been discussed extensively throughout this decision. Our preliminary view as just said is that with such conditions appropriately framed, consent is likely. But we share the view of the respondent that the conditions presently offered to the Court would not alone satisfactorily underpin consent to the application. For the guidance of the parties, we set out our concerns.

[103] Forest and Bird submitted that in [326] the Court found that s 6(c) was not met for significant indigenous vegetation. Forest and Bird then submitted that the implication of singling out that part of s 6(c) is that the Court must have concluded that a decision to grant consent would recognise and provide for the remainder of s 6(c), the protection of significant habitats of indigenous fauna, and that this appears to be its conclusion in [325].

[104] I do not agree. Reading all the paragraphs, and in the context of the whole case, it is clear that the open cast mining entailed in the EMP would remove some of the significant habitat of indigenous fauna. Second, I do not read these paragraphs as intending to provide for the protection of significant habitats which were inevitably going to be partly removed.

[105] Rather the Environment Court recognised, when citing *New Zealand Rail and Marlborough District Council*, that notwithstanding the strong language of s 6(c), the preservation of significant indigenous flora and significant habitats of fauna might have to bow to the promotion of the mine as part of the promotion of sustainable management of natural and physical resources, applying s 5(2).

[106] Having recognised that, the Environment Court then turned not to protecting what was going to be lost, s 6(c), but intending addressing the issue of the partial loss of the ecosystem, in the conditions, [335]. They were not just confined to addressing plant species, they refer to the ecosystem. I am not persuaded that the Environment Court lost sight of the terms of s 6(c). More pertinently, they recognised that s 6(c) may have to bow to sustainable management under s 5(2), in this case. That is a decision on the merits, yet to be completed by the Environment Court.

[107] Forest and Bird submitted that the HBEA is not relevant to s 6(c), as it does not contain a common habitat with the EMP footprint. This is not a proposition of law. It is, at best, a merit argument. Once it is acknowledged that it is not possible to maintain protection of habitat within the EMP footprint, then it is not possible to apply s 6(c) as requiring protection of the habitat, let alone of significant fauna. They will go, habitat and fauna.

[108] It is, however, a relevant consideration for the Environment Court to consider the positive effects of the HBEA when considering the implications of not being able to protect habitat and fauna in the EMP footprint.

[109] For these reasons, I do not think there is an error of law in these paragraphs of the decision.

Eighth error of law – Barren Valley – relevance of cost and viability of the mine

[110] The Environment Court found that the mine footprint was significant indigenous vegetation in terms of s 6(c) and the applicable plan criteria, and that Sticherus Ridge was outstanding, following agreed evidence from witnesses from both parties. This was due to the presence of a number of threatened and at risk plants. The mining proposal will result in the destruction of the Barren Valley and the Sticherus Ridge, as it is to be used as an overburden dump, with the volumes of overburden sufficient to overtop the valley and cover Sticherus Ridge.

[111] During the course of the hearing, the Court asked for evidence on whether the mine could be developed in such a way as to avoid the Barren Valley and Sticherus Ridge. Mr McCracken prepared a brief of evidence on behalf of BCL, in which he advised that the Barren Valley could be avoided, but this would have impacts on logistics, including greater distance for fill to be hauled and double-handling of material. Mr McCracken concluded there would be a number of consequences of avoiding the Barren Valley, including in relation to costs and minable coal and rehabilitation, which would have an overall impact on project economics.

[112] The Environment Court refused to impose conditions protecting the Barren Valley and the Sticherus Ridge:

> [339] We have come to the conclusion that the logistics and likely consequent cost of endeavouring to preserve these features, which are essentially just off centre in the mine footprint, would on balance be too great.

[113] Included in that analysis was a judgment that the likelihood of successful transplantation is low, so that in the event of a consent the most probable outcome is that these rare plants would be lost.[27]

[114] Forest and Bird submitted that it was long established in a number of Environment Court decisions that cost and economic viability, or profitability of a project, are not matters for the Environment Court. Rather, they are decisions for the promoter of the project. Otherwise the Environment Court would be drawn into making, or at least second guessing, business decisions.[28]

[115] All of these decisions are addressing the big question as to whether or not a project will be economically viable. The leading decision is that of the High Court in *NZ Rail Ltd v Marlborough District Council*, Greig J. It concerned the proposals and plans of Port Marlborough to develop and expand the port of Picton into the neighbouring Shakespeare Bay, and to construct and establish there a port facility to service the export of bulk products, including timber and coal. The local authorities concerned gave approval to the development, so far as it related to the expansion of the port for the purpose of export of timber, and refusal to approve the extension/expansion of the port as a coal export service. There were appeals and cross-appeals to the Planning Tribunal.

[116] One of the planks of NZ Rail's challenge of the proposed development was a claim that the cost of the whole development was likely to be significantly greater than had been estimated. The result of this would mean that, in order to service the cost, port fees would have to be increased, but because, for competitive reasons, it would be necessary to hold costs to the users of the timber and the coal berths, the costs would therefore fall on other port users, and in particular on NZ Rail as the predominant principal user of the port. Counsel for NZ Rail, Mr Cavanagh submitted that financial viability was a relevant consideration under Part 2 of the RMA.

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27 At [340]-[341].

28 See *NZ Rail v Marlborough District Council* [1994] NZRMA 70 (HC); *Re Queenstown Airport Ltd* [2012] NZEnvC 206 at [211]; *Friends of Community of Nhawha Inc v Minister of Corrections* High Court Wellington AP 110/02, 20 June 2002 at [20]; *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC).

[117] Greig J found:[29]

> Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic wellbeing is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual or potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

[118] The scope of the remarks of Greig J, which are appropriate to that context, have no application to the discrete issue being examined by the Environment Court in this case: the proposal to shift the place for the overburden to be placed in order to protect some rare plants. This latter issue is a mitigation of one adverse effect in a complex project. There is nothing in the Act which prevents a consent authority from making a proportionate decision assessing the cost of a particular proposed condition. This is quite a different exercise from embarking on judging the merit of an application against the financial viability of the project. The Environment Court's treatment of this issue does not disclose any error of law.

Materiality of error

[119] The High Court sitting on appeal on questions of law will only intervene in the decision making of the Environment Court if an error of law has been identified and, as a matter of judgment, the Court considers the error is of materiality to the decisions being made by the Court.[30]

[120] In this case, the appeal is against an interim decision. The Environment Court is sitting again on 12 June 2013 to consider the efficacy of submissions. The Environment Court has not yet made a decision whether or not to grant the application.

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[29] At 88.

[30] *Manos v Waitakere City Council* [1996] NZRMA 145 (CA).

[121] Had this been an appeal against the final determination of the Environment Court to grant a decision, then a real issue of whether the errors identified are of sufficient materiality would confront the Court. This is not the case, because of the interim character of the Environment Court decision.

[122] The most important aspect of this judgment is the view of this Court that the RMA keeps separate the relevant consideration of mitigation of adverse effects caused by the activity for which resource consent is being sought, from the relevant consideration of the positive effects offered by the applicant as offsets to adverse effects caused by the proposed activity.

[123] Forest and Bird wanted also a clear finding that mitigation considerations should get a greater weighting than offset considerations. I have not made that finding. This is because it all depends on the context, including the degree of mitigation and the scale and qualities of the offset.

[124] While I have disagreed with the Environment Court's use of the concept of "offset mitigation", and of using "offset" and "compensation" interchangeably, I have no basis to judge whether refining the use of these terms, on the basis of this judgment, will materially affect the deliberations of the Environment Court.

Conclusion

[125] That said, given that the Environment Court has not yet finally decided the case, I think it is appropriate that I do refer this decision back to be considered by the Environment Court, who, as a result, are required to keep mitigation considerations separate from offset considerations.

[126] I do not make a formal finding against the use of the term "compensation" or "environmental compensation", because it was not directly put in issue.

[127] Costs are reserved. Forest and Bird has been partially successful.

Solicitors:
Royal Forest and Bird Protection Society of New Zealand, Christchurch
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Gascoigne Wicks, Blenheim

BOARD OF INQUIRY
Transmission Gully Plan Change

Final Decision and Report of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request

Produced under Section 149R of the Resource Management Act 1991

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October 2011

BEFORE THE BOARD OF INQUIRY CONCERNING THE TRANSMISSION GULLY PLAN CHANGE REQUEST

IN THE MATTER	of the Resource Management Act 1991 and the deliberations of a Board of Inquiry appointed under Section 149J of the Act to consider applications by New Zealand Transport Agency for changes to the Regional Freshwater Plan for the Greater Wellington Region
HEARING AT:	Wellington on the following dates: 6, 7, 8, 11, 12 and 13 July 2011
APPEARANCES:	J Hassan and N McIndoe for the New Zealand Transport Agency
	S Bradley and A Camaivuna for the Director General of Conservation
	T Bennion for Rational Transport Society Incorporated and P Warren
	M Conway for Kapiti Coast District Council
	P Milne – Legal advisor to the Board
REPRESENTATIONS:	J Horne
	K Brown
	H Wooding for Kapiti Coast District Council
	M J Mellor for Public Transport Voice

P Bruce for Appropriate Technology for Living Association

R Jessup and G Thompson for the Coastal Highway Group

R Norman

M O'Sullivan for Alliance for Sustainable Kapiti Inc

Board: Environment Judge Brian Dwyer (Chairperson)
Environment Commissioner Russell Howie (Member)
David McMahon (Member)
David Mitchell (Member)
Glenice Paine (Member)

FINAL DECISION AND REPORT OF BOARD OF INQUIRY UNDER SECTION 149R OF THE ACT

TABLE OF CONTENTS

1 INTRODUCTION AND BACKGROUND

1.1 THE PLAN CHANGE REQUEST AND THE MINISTER'S DIRECTION

[1] On 6 September 2010, the New Zealand Transport Agency (NZTA) lodged a request (Request) for changes to the Regional Freshwater Plan for the Wellington Region (the Freshwater Plan) with the Environmental Protection Authority (EPA).

[2] The Request sought changes to existing policies, the insertion of a new policy and two new definitions into the Freshwater Plan. NZTA indicated in the accompanying documentation that the changes were intended to better enable the consideration of future resource consents under the Freshwater Plan for NZTA's Transmission Gully Project (TGP).

[3] When such a Request is lodged with EPA, s146 of the Resource Management Act 1991 (the Act)[1] requires EPA to seek a direction from the Minister for the Environment (the Minister) under s147.

[4] Upon receipt of EPA's recommendation on 10 September 2010, the Minister determined that this Request was a matter of national significance because it is part of a proposal of national significance and directed that it be referred to a Board of Inquiry (the Board) for a decision.

[5] Section 142(3) identifies the matters to which the Minister may have regard in determining whether or not a matter is or is part of a proposal of national significance. In accordance with s142(3) the Minister determined that:

- TGP has a long history of media and public attention, part of which relates to the potential environmental effects of the proposal;
- TGP involves the construction of a highway 27km in length. Construction will require earthworks, stream diversions, culverts and dams associated with construction activities. Multiple areas of land will need to be acquired by NZTA. The project is estimated to cost more than $1 billion dollars;
- TGP is a part of the *Roads of National Significance* identified in the Government Policy Statement on Land Transport Funding. State Highway 1 is a structure of national significance;
- The 27km highway which will result from TGP could result in some irreversible changes to the environment;

[1] For the balance of this decision, where we refer to or quote sections of the Act we will simply use the section number with no reference to the Act. Where we refer to or quote sections of other Acts we will identify the Act in question.

- TGP is expected to provide an alternative route into and out of Wellington City. This is intended to improve route security, reduce existing congestion problems on State Highway 1(SH1), improve access to key regional and inter regional destinations, and improve safety. Thus the project can be seen as assisting the Crown in fulfilling its public health, welfare, security, or safety obligations or functions;

- TGP traverses the jurisdictions of four territorial authorities (Wellington City Council, Porirua City Council, Upper Hutt City Council, Kapiti Coast District Council) and is within the jurisdiction of Greater Wellington Regional Council (Greater Wellington);

- The network utility operation to which TGP relates extends to four territorial authorities. Also it is noted that TGP includes some local roads for which Porirua City Council will be the network utility operator.

1.2 THE ROLE OF THE BOARD AND PROCESSING HISTORY

[6] The Board is tasked with considering the Request in accordance with the provisions of s149P(6). The Board must consider all matters relevant to the Request, including the Request itself and its associated documentation, submissions and further submissions, as well as evidence, other reports and further information presented at the hearing.

[7] The decision of the Board must be made independently of EPA and the Minister. EPA has provided administrative support to the Board during the process of considering the adequacy of the information initially provided by the NZTA, notifying the plan change request, commissioning reports in terms of s42A and arranging and administering the hearing.

[8] The Board has also been supported by legal counsel to the Board (Mr P Milne) whose role was to provide advice to the Board. In addition, Mr J Kyle of Mitchell Partnerships Limited (Mitchell Partnerships) was appointed as an independent planner and has prepared s42A reports for the Board.

[9] In terms of s145(9), if the matter lodged with the EPA is a request for a change to a plan, clause 22 of Schedule 1 applies, except that every reference in that clause to a local authority must be read as a reference to EPA.

[10] On 23 September 2010, Greater Wellington provided the Board with initial comments on the Request.

[11] On 24 September 2010, the Board received a report from Mitchell Partnerships under s149(2)(b) on the adequacy of the information lodged with EPA by NZTA in support of its Request. On 6 October 2010, the Board asked for further information from NZTA. This information was received by the Board on 1 November 2010.

[12] One of the first tasks of the Board was to determine whether to accept or reject the Request, pursuant to s149M. Prior to making this particular decision, the Board consulted further with Greater Wellington as to its views on the Request.

[13] On 29 October 2010, Greater Wellington provided the Board with further information to assist the Board in understanding:

- The values that are ascribed to the water bodies in Appendix 2B of the Freshwater Plan (being water bodies potentially affected by TGP), including its decision to include these water bodies and Policy 4.2.10 and Appendix 2 in the Freshwater Plan;
- The appropriateness of the Stream Ecological Valuation (SEV) as a tool to offset adverse effects on stream values in the Wellington Region. (A key feature of the Request was a proposal to include provision for offsetting adverse effects of TGP in the Freshwater Plan, including provision for application of SEV as part of that process.)

[14] Greater Wellington was also commissioned by EPA, pursuant to s149G(3), to prepare a *key issues* report. The key issues report was provided to EPA on 17 November 2010 and dealt with:

- The non-complying activity status of reclamation activities in specified streams;
- Relevant provisions of the various Greater Wellington regional plans, including the Freshwater Plan;
- Relevant provisions of Greater Wellington's operative and proposed Regional Policy Statements;
- Offsetting as an environmental management tool;
- A detailed summation and timeline of the discussions between NZTA and Greater Wellington in relation to the Request.

[15] On 19 November 2010, the Board received a report from Mitchell Partnerships which addressed the adequacy of the further information provided, taking into account the key issues report prepared by Greater Wellington.

[16] On 2 December 2010, NZTA provided amendments to the Request. This amended documentation included refinements to the Request which were deemed by NZTA to be appropriate in the light of the various reports received by the Board.

[17] On 3 December 2010, the Board modified the Request pursuant to clause 24 of Schedule 1 in the manner shown in the amended information provided by NZTA on 2 December 2010. The Board then accepted NZTA's modified Request in accordance with clause 25(2)(b) of Schedule 1.

[18] On 7 December 2010, the Board served notice of its decision to accept the modified Request on NZTA and Greater Wellington, pursuant to s149M(4).

[19] As required by s149M(4)(b), Greater Wellington prepared the plan change in accordance with the Request. The merits of NZTA's proposed plan change were not considered by Greater Wellington during this process. In preparing the plan change, the matters addressed by Greater Wellington included:

- If the plan change *fits* into the wider context of the Freshwater Plan;
- If the plan change is workable;
- If the plan change is *intra vires*;
- If any consequential changes are needed to the Freshwater Plan.

[20] Greater Wellington determined that no amendments were needed to the wording of the Request as accepted by the Board on 3rd December 2010. The Request was served on EPA by Greater Wellington on 24th December 2010. EPA gave public notice of the proposed plan change on 12 February 2011 with submissions to be lodged by 11 March 2011. Further submissions on the initial submissions were to be made by 26 April 2011.

1.3 THE REQUEST AS NOTIFIED

[21] The public notice was inserted into four major daily newspapers, being the New Zealand Herald, the Dominion Post, The Press, and the Otago Daily Times. In addition, a copy of the notice was published in two local weekly newspapers, the Kapi-Mana News (on Tuesday 15 February 2011) and the Kapiti Observer Horowhenua Mail (on Thursday 17 February 2011). EPA was required to serve notice of the Request directly on owners and occupiers of the land to which the matter relates, and the land adjoining the land to which the matter relates. EPA considered that the land to which the matter relates was that land within and adjacent to the catchments of the Appendix 2B streams mentioned in the Request (the Horokiri, Ration and Pauatahanui streams).

[22] The Request sought to modify the policy framework of the Freshwater Plan to enable what NZTA contends to be a *more balanced* consideration of the management of the effects of TGP at the time resource consents are applied for. The Request did not seek to modify any of the objectives, rules or standards in the Freshwater Plan.

[23] The Request (at notification) proposed the following amendments to Policy 4.2.10 of the Freshwater Plan. (The proposed changes are shown in underlined text.)

> ***Regional Freshwater Plan Chapter 4 - General Objectives and Policies***
>
> *4.2.10 To avoid adverse effects on wetlands, and lakes and rivers and their margins, identified in Appendix 2 (Parts A and B), (<u>with the exception of the Transmission Gully Project and its effects on the Horokiri, Ration and lower Pauatahanui Streams where Policy 4.2.33A applies</u>), when considering the protection of their natural character from the adverse effects of subdivision, use, and development. <u>For the avoidance of doubt Rule 50 applies to the Transmission Gully Project.</u>*
>
> ***Explanation:*** *Wetlands, and lakes and rivers and their margins, are identified in Appendix 2 as having a high degree of natural character when assessed against the characteristics outlined in Policy 4.2.9.*

The preservation of natural character in this policy is achieved by avoiding adverse effects. In this policy "to avoid adverse effects" means that when "avoiding, remedying or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "To avoid adverse effects" means that only activities with effects that are no more than minor will be allowed in the water bodies identified unless Policy 4.2.33A applies. Further elaboration of the meaning of "minor" is contained in Policy 4.2.33 (Policy 4.2.33A provides the approach to be considered in relation to the Transmission Gully Project that includes avoidance, remediation, mitigation or offsetting adverse effects). Activities can occur in the water bodies listed in Appendix 2 but the emphasis in this policy is on preserving the natural character of these water bodies.

In this context "To avoid…when considering" relates to consideration during the preparation of, variation to, or change to, district and regional plans, or the consideration of any relevant resource consent application.

The wetlands, rivers and lakes which are identified in Part A of Appendix 2 are to have their water quality managed in its natural state according to Policy 5.2.1. The wetlands, rivers and lakes that are identified in Part B of Appendix 2 are to have their water quality managed for aquatic ecosystem purposes according to Policy 5.2.6.

[24] The Request also proposed insertion of the following new Policy into the Freshwater Plan:

4.2.33A To allow adverse effects of the development of the Transmission Gully Project, which are more than minor, provided:

(1) Adverse effects are avoided to the extent practicable;

(2) Adverse effects which cannot be avoided are remedied to the extent practicable;

(3) Adverse effects which cannot be avoided or remedied are mitigated to the extent practicable;

(4) Adverse effects which cannot practicably be avoided, remedied or mitigated are offset.

***Explanation:** This policy recognises that the Transmission Gully Project is particularly important for enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety. Accordingly, the adverse effects of aspects of the Project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated. The policy creates a cascading hierarchy for the avoidance, remedying, or mitigation of adverse effects. However, the policy also provides that where none of these options are practicable, it may be appropriate to offset such effects.*

In this context "offset" in clause (4) means taking action that will offset any adverse effects such as enhancing amenity, ecological, or recreational values on-site or elsewhere. Tools such as the "Stream Ecological Valuation" method

may assist in evaluating the ecological offset ratio, which, based on measured values, sets the amount of offset required. Other ways of offsetting adverse effects are indicated in the second, third and fourth bullet points of Policy 4.2.36.

[25] The Request also proposed the following amendments to Policies 7.2.1 and 7.2.2 of the Freshwater Plan to exempt activities and structures associated with TGP from consideration under these policies. (The proposed changes are shown below in underlined text.)

Regional Freshwater Plan Chapter 7 - Use of the Beds of Rivers and Lakes and Development on the Floodplain

7.2.1 To allow the following uses within river and lake beds:

- *structures or activities for flood mitigation or erosion protection purposes;*
- *structures for transportation and network utility purposes; or*
- *structures for activities which need to be located in, on, under, or over the beds of rivers and lakes; or*
- *structures for cultural harvest (e.g., pa tuna); or*
- *the maintenance of any lawful structure; or*
- *the removal of aquatic weeds from farm drains and urban drains for drainage purposes; or*
- *the extraction of sand, gravel, or rock; or*
- *the diversion of water associated with activities that are otherwise authorised; or*
- *the enhancement of the natural character of any wetland, lake or river and its margins;*

provided that any adverse effects are avoided, remedied or mitigated and that the significant adverse effects identified in Policy 7.2.2 are avoided (unless the effects are of activities for the Transmission Gully Project and are addressed in accordance with Policy 4.2.33A).

Explanation: *Policy 7.2.1 lists criteria for appropriate uses within the beds of rivers and lakes. "Uses" refers to those activities identified in subsections 13(1)(a), 3(1)(b), 13(1)(c), 13(1)(d) and 13(1)(e) of the Act. Structures or activities that do not meet the criteria listed in the policy are inappropriate. For example, any structure associated with a use that does not have to be located in or on the bed of a river or lake is considered inappropriate.*

While a particular use of a river or lake bed may meet the criteria listed in the policy, it may need to comply with environmental controls, and is subject to

Policy 7.2.2. <u>The policy recognises that adverse effects of activities for the Transmission Gully Project can be considered according to Policy 4.2.33A.</u>

7.2.2 To not allow the use of river and lake beds for structures or activities that have significant adverse effects on:

- *the values held by Tangata whenua; and/or*
- *natural or amenity values; and/or*
- *lawful public access along a river or lake bed; and/or*
- *the flood hazard; and/or*
- *river or lake bed or bank stability; and/or*
- *water quality; and/or*
- *water quantity and hydraulic processes (such as river flows and sediment transport); and/or*
- *the safety of canoeists or rafters;*

<u>unless the structures or activities are for the Transmission Gully Project and addressed in accordance with Policy 4.2.33A.</u>

Explanation: *This policy lists characteristics of rivers and lakes that should not be significantly affected by uses of river and lake beds which are identified as "appropriate" in the previous policy. "Uses" has the same meaning as in Policy 7.2.1.*

When a new use of any river or lake bed is considered, due regard must be had to avoiding, remedying, or mitigating adverse effects on these characteristics.

In the context of this policy deciding on what are "significant adverse effects" is in part a value judgement which will be determined by the decision makers on resource consents, i.e., Regional Councillors or Hearing Commissioners. When deciding whether an adverse effect is significant or not, decision makers will have regard to:

- *the significance of any values identified; and*
- *the scale/magnitude of any adverse effects on the values identified; and*
- *the reversibility of any adverse effects on the values identified; and*
- *any other relevant provisions in the Plan.*

<u>Reference in the policy to "the Transmission Gully Project and adverse effects that would otherwise be significant" recognises that these potential effects shall be addressed through Policy 4.2.33A.</u>

[26] The Request also proposed to insert the following two new definitions into the Freshwater Plan:

> *"Transmission Gully Project" is a strategic transport route running from MacKays Crossing to Linden and the term includes works associated with the implementation of that project.*
>
> *"Stream Ecological Valuation" (SEV) is a tool to assist in evaluating the ecological offset ratio, which, based on measured values, sets the amount of offset required.*

1.4 RELATIONSHIP OF THE REQUEST TO THE TRANSMISSION GULLY PROJECT

[27] NZTA has indicated that this Request will be followed at a later date by applications for regional resource consent(s) and Notices of Requirement (NoR) to designate the TGP route in terms of relevant district plans, which are necessary to consent TGP under the Act. The consents required will include land use consents under s13 to carry out activities within waterways and consents to dam and divert and discharge to water. There are also likely to be applications for regional land use consents for earthworks.

[28] Reclamation activities which involve the water bodies of significance listed in Appendix 2 to the Freshwater Plan are non-complying activities. Pursuant to s104D, consent may only be granted for a non-complying activity where either the effects of the activity are likely to be no more than minor or the activity will not be contrary to the objectives and policies of the relevant plan. NZTA is concerned that some policies in the Freshwater Plan require adverse effects to be *avoided*. It contends that this may provide a potential barrier to the grant of consents for reclamation activities associated with TGP which are likely to have more than minor adverse effects on the environment and which may also be considered contrary to the objectives and policies of the Freshwater Plan.

[29] Accordingly, a key aspect of the Request was the proposal by NZTA to change the requirement for simple avoidance of adverse effects presently provided for in Policy 4.2.10 of the Freshwater Plan to provide for remedy, mitigation and offsetting of such effects where avoidance is impracticable or where it would impose significant costs to TGP. The *centrepiece* of the Request in that regard was the insertion of proposed Policy 4.2.33A[2] which sought to establish a cascading regime of measures to allow adverse effects of TGP on water bodies which were more than minor. The cascade proposed in Policy 4.2.33A was that:

- Adverse effects are to be avoided to the extent practicable;
- Adverse effects which cannot be avoided are to be remedied to the extent practicable;

[2] Para [24] above.

- Adverse effects which cannot be avoided or remedied are to be mitigated to the extent practicable;
- Adverse effects which cannot practicably be avoided, remedied or mitigated are to be *offset*.

[30] We will address the cascading management regime and the concept of offsetting in detail in this decision.

1.5 THE HEARING PROCESS

[31] On 8 February 2011, the Board issued details of hearing procedures, which outlined the way the hearing was to be conducted. This included information on the timetable for reports and evidence exchange, evidence requirements, and the proposed hearing order and time limits and protocols. This note of procedures was available to the public on EPA's website.

[32] A summary of the process is as follows:

- NZTA evidence was lodged on 5 May 2011 and was made available to the public on the EPA website;
- Submitter evidence was lodged with EPA on 24 May 2011 and was made available to the public on the EPA website;
- Expert witness conferencing was undertaken by the various expert planning witnesses involved in the hearing on 15 June 2011. A joint statement by the witnesses issued from that caucus and was circulated to parties;
- A site visit was undertaken by the Board on 28 June 2011;
- Further witness conferencing was undertaken by the expert ecological witnesses involved in the hearing on 1 July 2011. A joint statement by the witnesses issued from that caucus and was circulated to parties;
- The Board pre-read all evidence, reports and supplementary comments that were presented at the hearing;
- The hearing commenced on 6 July 2011 and ran for 6 days closing on 13 July.

2 STATUTORY REQUIREMENTS AND CONTEXT

2.1 THE RESOURCE MANAGEMENT ACT 1991

[33] Plan change requests to a regional plan are prepared and considered under a framework provided by the Act. We briefly describe that framework.

[34] Pursuant to s149P(6), in considering this change to the Freshwater Plan, the Board must apply clause 10(1) and (3) of Schedule 1 as if it were a local authority, may exercise the powers under s293 as if it were the Environment Court and must apply

sections 66 to 70B and 77A to 77D as if it were a regional council. We will address those requirements to the extent they are applicable in the Evaluation section of this Decision and Report.

[35] Section 30 identifies the functions of regional councils under the Act[3] and again we will address the relevant provisions in the Evaluation section of this Decision and Report.

[36] Section 32 requires that before adopting any objective, policy, rule or other method, both the local authority[4] and the person requesting a plan change must carry out evaluations considering alternatives, benefits and costs. Again we will address the relevant provisions in the Evaluation section of this Decision and Report.

[37] We are required to consider the Request in terms of Part 2. Part 2 sets out the purpose and principles of the Act in sections 5, 6, 7 and 8.

[38] Section 5 requires us to make an overall broad judgement, which allows for the comparison of conflicting considerations, the scale of them and their relative significance or proportion in the final outcome.

[39] Sections 6, 7 and 8 of the Act set out principles to be applied in achieving the purpose of the Act. The principles contained in sections 6, 7 and 8 of the Act are subordinate to the overall purpose of the Act. Each plays a part in the overall consideration of whether the purpose of the Act has been achieved in a particular situation.

[40] Once again, we will address all of the relevant provisions in the Evaluation section of this Decision and Report.

2.2 NATIONAL POLICY STATEMENTS

[41] In achieving the purpose of the Act and in accordance with s67(3) the Freshwater Plan must give effect to any relevant national policy statements (NPS) and any New Zealand coastal policy statement. There are three NPS that have been gazetted to date and one coastal policy statement as listed below:

- National Policy Statement on Electricity Transmission (NPS(ET));
- National Policy Statement for Renewable Electricity Generation (NPS(REG));
- New Zealand Coastal Policy Statement (NZCPS);
- National Policy Statement for Freshwater Management (NPS(FM)).

[42] Our consideration as to whether the Request gives effect to any relevant NPS or NZCPS is undertaken in the Evaluation section of this Decision and Report.

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[3] Which apply to the Board in this instance.

[4] Or in this case the Board.

[43] A Proposed National Policy Statement on Indigenous Biodiversity (NPS(IB)) was released in January 2011, with submissions closing on 2 May 2011. The relevance of this proposed NPS is also addressed in the Evaluation section of this Decision and Report.

2.3 REGIONAL POLICY STATEMENTS

[44] There are operative and proposed regional policy statements for the Wellington Region. The operative Regional Policy Statement (RPS) was made operative in May 1995. A proposed RPS was notified in March 2009, with a revised version following Greater Wellington's decisions on submissions released in May 2010. A total of nine appeals, covering a broad range of matters, have been lodged with the Environment Court on the proposed RPS.

[45] When determining the Request, the Board is required to consider if it gives effect to the operative RPS pursuant to s67(3)(c), and to have regard to the proposed RPS pursuant Section 66(2)(a). An analysis of these issues is included in the Evaluation section of this Decision and Report.

2.4 OTHER MATTERS

[46] Section 66(2)(c)(i) requires that when preparing or changing a regional plan a board must have regard to any management plans or strategies prepared under any other Act.

[47] The Wellington Regional Land Transport Strategy (WRLTS) 2010 – 2040 is a statutory document that guides the development of the region's transport system including public transport, roads, walking, cycling and freight for the next ten years and beyond. The WRLTS is addressed in the Evaluation section of this Decision and Report.

[48] The Department of Conservation has prepared a Conservation Management Strategy (CMS) for the Wellington Region which contains a section on the Pauatahanui Inlet. The relevance of the CMS is addressed in the Evaluation section of this Decision and Report.

[49] Section 66(2A) requires us to take into account any planning document recognised by an iwi authority that has been lodged with the Council. Greater Wellington has advised that there are no planning documents recognised by iwi authorities that have been lodged with it relating to the area traversed by TGP.

[50] Section 67(4) provides that a regional plan must not be inconsistent with any other identified instruments including (inter alia) any other regional plans. We will address that matter in the Evaluation section of this Decision and Report.

3 OVERVIEW AND PRE HEARING INFORMATION

3.1 OVERVIEW OF THE TRANSMISSION GULLY PROJECT

[51] TGP will provide an inland alternative road link to the coastal route of the existing SH1 between MacKays Crossing and Linden. It is approximately 27 km long and passes mostly through farmland, regional parks and rural residential areas, with some areas of scrub and forest towards the southern end of the route.

[52] TGP is part of the Wellington Northern Corridor between Levin and Wellington which is recognised as nationally and regionally important in the Government Policy Statement on Land Transport Funding 2009/10 – 2018/19 (GPS), issued by the Minister of Transport pursuant to s84 of the Land Transport Management Act 2003. The GPS details the Government's desired outcomes and funding priorities for the use of the National Land Transport Fund to support activities in the land transport sector.

[53] In the GPS the Government has listed seven Roads of National Significance (RoNS) as a statement of national road development priorities. Identified as a RoNS within the Wellington Region is:

Wellington Northern Corridor (Levin to Wellington) – SH1

[54] TGP comprises one section of the Wellington Northern Corridor.

3.2 NZTA'S REASONS FOR THE PLAN CHANGE REQUEST

[55] NZTA prepared a document titled *Reasons for the Request* (December 2010) which accompanied the Request.

[56] NZTA advised that if it ultimately constructs TGP, it will seek to avoid adverse effects on waterways wherever practicable. Where this is not practicable, measures to remedy, mitigate or offset any potential or actual adverse effects will be employed with a priority of remedying then mitigating. Offsetting of adverse effects would be undertaken only where avoiding, remedying or mitigating of such effects are impracticable.

[57] Given that Policy 4.2.10 seeks to avoid adverse effects on natural character values of these waterways (with no provision for remedy or mitigation of adverse effects) there is concern held by NZTA that TGP may be unable to meet this policy of avoidance or that the policy may necessitate uneconomic engineering responses to providing crossings for the Appendix 2B waterways.

[58] By way of example, Rule 50 of the Freshwater Plan (as it relates to reclamation activities) could trigger a requirement for non-complying activity resource consents to be obtained for TGP. NZTA is concerned that any reclamation activity necessitated by TGP might (through the decision making process on the resource consents) be deemed to be contrary to the policies within the Freshwater Plan, in particular Policy 4.2.10. If such activity was also found to have more than minor

effects on the environment then s104D of the Act would preclude the grant of consent to TGP.

[59] NZTA relevantly outlined in its Reasons for Request document that:

> *The NZTA's objective for the Plan Change is to allow greater flexibility for implementation of the Transmission Gully Project in a manner that is environmentally appropriate in the circumstances. The Plan Change does not propose a fundamental review of the Objectives, Policies and Rules of the Freshwater Plan. The proposed Plan Change ...would not alter the objectives or rules of the Freshwater Plan, but rather would modify the policy framework to give the NZTA more options for implementing the Transmission Gully Project in a way which is consistent with the objectives of the Freshwater Plan and the purposes and principles of the RMA*[5]*.*

[60] NZTA suggests in the Reasons document that some of the policies in the Freshwater Plan currently allow little flexibility in the development of resource management solutions to environmental effects and this lack of flexibility could add significantly to the cost and uncertainty of TGP.

[61] The Reasons document also notes that the Request is a response to the current tension between:

- *The avoidance or protectionist approach to adverse effects of some of the policies of the Freshwater Plan;*
- *Recognition within the Proposed Regional Policy Statement (Proposed RPS) of the importance of regionally significant infrastructure which is defined in a way which would include the Transmission Gully Project.*

3.3 NZTA□S SECTION 32 ANALYSIS

[62] NZTA advised that the:

> *…resource management issue which the Plan Change seeks to address is to set a mechanism in place whereby, if avoidance of adverse effects cannot practicably be achieved, there is the option to remedy, mitigate or offset effects*[6]*.*

[63] NZTA identified in its s32 analysis five options[7] to address the perceived lack of flexibility in the Freshwater Plan, being:

- Option 1 - Relying on the existing policy framework □ i.e. the do nothing option;

[5] NZTA Reasons for Request, December 2010, pg 1.

[6] NZTA section 32 Report, December 2010, pg 13.

[7] NZTA section 32 Report, December 2010, pg 16.

- Option 2 - Changing the activity status of matters covered in Rule 50 to discretionary;
- Option 3 - Inserting a definition of reclamation which would exclude culverts;
- Option 4 - Create a new policy for avoiding, remedying, mitigating or offsetting effects relating to TGP;
- Option 5 – Create a new policy for Pauatahanui and Horokiri Ration Streams.

[64] NZTA provided an evaluation of the above options against the requirements of section 32 and concluded that Option 4 (creation of a new policy for avoiding, remedying, mitigating or offsetting effects relating to TGP):

- *Is the most appropriate for achieving the objectives in the Freshwater Plan, in relation to the other options.*
- *Is a method of clearly managing the policy tension between support for the Transmission Gully Project in the RPS and the RLTS, and the "avoidance" required by Policy 4.2.10.*
- *Is issue specific – it does not widen the issue to activities other than the Transmission Gully Project itself and it therefore 'ring fences' the change to the three streams that the Transmission Gully Project traverses. Policy 4.2.10 relates to all water bodies included in Appendix 2 of the Freshwater Plan and for those water bodies unaffected by the Transmission Gully Project the policy remains unaffected.*
- *There is no change to Rule 50. A "for the avoidance of doubt" qualification has been added to the policy to explicitly state that the rule still applies to the Transmission Gully Project in relation to the three streams affected.*
- *Can be relatively easily inserted with limited impact on other plan provisions.*
- *Can proceed in 2010. Waiting until a full scale review of the Regional Plans means that there will be delay and uncertainty to implementing the Transmission Gully Project.*
- *Will realise the socio-economic benefits to the wider community earlier (if all consents are granted) from the Transmission Gully Project component of the Strategic Transport Network*[8]*.*

3.4 THE VALUES OF THE APPENDIX 2 WATERWAYS

[65] Appendix 2 of the Freshwater Plan identifies that a number of water bodies throughout the Wellington Region have a high degree of natural character. In addition to the protection of natural character, Appendix 2B identifies water bodies which are to be managed for aquatic ecosystem purposes.

[8] NZTA section 32 Report, December 2010, pg 35.

[66] In its Reasons for the Request, NZTA has provided information to quantify and assess the significance of the values that exist within the Appendix 2B water bodies that will be affected by TGP. This information is in the form of a technical report prepared by Boffa Miskell Limited (the Boffa Miskell report) that is attached as Appendix F to the Reasons for the Request. Appendix F is referred to and summarised on page 15 of the Reasons for the Request.

[67] The Boffa Miskell report provides a description of the ecosystem values in the relevant waterways listed in Appendix 2B. It also evaluates the ecological value and significance of those streams including an assessment of the ecological aspects of their natural character, and sets out a brief summary of the potential adverse effects of TGP on these features.

[68] The Boffa Miskell report observes that the Horokiri catchment exhibits high ecological values and is of regional significance. The upper and middle portion of the Pauatahanui catchment is assessed as being more modified and therefore has a reduced degree of natural character insofar as this is derived from its ecological values. The lower Pauatahanui catchment is assessed as retaining a relatively high degree of regionally significant ecological and biodiversity value. The lower catchments of the Ration Stream are also considered to be of high value given the presence of important fauna species.

3.5 GREATER WELLINGTON REGIONAL COUNCIL OFFICERS REPORT

[69] On 8 February 2011, the Board requested that officers of Greater Wellington prepare a report pursuant to s42A. This was provided to the Board in April 2011 and responded to 11 questions posed by the Board.

[70] On 11 May 2011, the Board requested Greater Wellington address two further questions in an additional s42A report. These questions were:

- *Are the values of the waterways to which the plan change relates, such that there could be situations where avoidance is the only appropriate method of managing effects to ensure the purpose of the Act is achieved? If so, which waterways contain such values?*
- *Does the proposed wording of the policies within the plan change allow the consent authority to determine that, due to the value of a body of water, avoidance is the only appropriate method of managing effects to ensure the purpose of the Act is achieved?*

[71] In response to the first question, the report concluded:

> *Given the nature of the identified values of the Horokiri, Ration (Little Waitangi), and Pauatahanui Streams and Duck Creek and current information, it is unlikely that there will be an occurrence where the avoidance of adverse effects is the only appropriate action. It is, however, conceivable that in the light of more detailed information it could be the case that at particular sites within*

these streams avoidance of adverse effects may indeed be the only appropriate option.

[72] In response to the second question the report stated that:

It appears that policy 4.2.33A would not provide for avoidance exclusively in all circumstances or based solely on the values of a water body, as it incorporates the concept of practicability as a matter for consideration.

3.6 MITCHELL PARTNERSHIPS S 42A REPORT

[73] The Board requested Mitchell Partnerships to prepare a report pursuant to s42A. The report was prepared on the basis of information available prior to the hearing, including submissions made at that time but prior to further submissions being available. The report was posted on the EPA website.

[74] This report included a description of the background to the Request, the statutory requirements and context, a summary of the information provided in the Request, details of consultation with Greater Wellington, a summary of and response to issues raised by submitters and an evaluation of the Request against the relevant statutory tests. This evaluation resulted in the authors of that report suggesting some changes to the wording of the proposed plan change. In particular the authors suggested changing the approach in proposed Policy 4.2.33A from one that *allows* adverse effects to one that *manages* adverse effects. The authors also suggested limiting the provisions of proposed Policy 4.2.33A to the three Appendix 2B streams that will be affected by TGP and ensuring that the consequential amendments to policies 7.2.1 and 7.2.2 are limited to those same three Appendix 2B streams identified in proposed Policy 4.2.33A.

[75] Following the exchange of applicant and submitter evidence, Mitchell Partnerships prepared a supplementary s42A report, taking into account the further submissions, evidence and other information that has been lodged with the Board since completion of the initial report. This report was lodged with the Board and posted on the EPA website on 30 June 2011.

3.7 LEGAL ADVICE TO THE BOARD REGARDING ENVIRONMENTAL OFFSETS

[76] The Board sought comment from Mr Milne, as to issues relating to environmental offsetting under the Act. Mr Milne provided a memorandum addressing this issue on 11 May 2011. A Board minute dated 12 May 2011, including Mr Milne's advice, was issued to all submitters and further submitters on the Request.

[77] We have factored this advice and the case law discussed in it, into our discussion of environmental offsets in the Evaluation section of this Decision and Report.

4 SUMMARY OF SUBMISSIONS

4.1 SUBMITTERS

[78] The Request documentation was able to be viewed from the EPA website, EPA Head Office, the Christchurch and Auckland offices of the Ministry for the Environment, the Greater Wellington Regional Council, the Kapiti Coast District Council and the Porirua, Hutt, Upper Hutt and Wellington City Councils. Submissions closed on Friday 11 March 2011.

[79] In total, 39 submissions were received. Of these submissions, 24 opposed the Request and nine supported it. Remaining submissions were either neutral, or in partial support and/or opposition. Two late submissions were received by email on 13 and 15 March 2011. The Board agreed to accept these late submissions[9].

[80] A summary of submissions was prepared by Mitchell Partnerships and made available on EPA's website on 2 April 2011. Any person representing a relevant aspect of public interest or who had an interest in the Request greater than the general public and the local authority had the opportunity to make a further submission. Further submissions closed on 26 April 2011. Four further submissions were received in response to issues raised in the original submissions.

4.2 MATTERS RAISED IN SUBMISSIONS

[81] The primary matters raised by submitters can be summarised as follows:

- **Environmental Effects on Important Streams**
  A concern frequently raised in the submissions and further submissions was that the Request, if accepted, would result in significant adverse environmental effects on the streams which are affected by the Request specifically the Horokiri, Ration and Pauatahanui Streams. Some submitters were concerned that acceptance of the Request would allow adverse environmental effects to occur, including habitat loss and decline of threatened species. Submitters suggested that a number of endangered species would be adversely affected by the Request including native freshwater fish (specifically the Shortjawed Kokopu and Giant Kokopu), native birds which use the corridor from Kapiti Island to the Tararuas and endangered frog species (including the Tree Frog). A number of submitters stated that the streams have been identified and listed in Appendix 2 and 3 of the Freshwater Plan for good reasons and the existing protection afforded to them is both appropriate and necessary.

- **The Justification for Exceptions to the Existing Provisions of the Freshwater Plan is Inappropriate or Inaccurate**
  Another common issue raised in submissions was a claim that the Request had not been adequately justified by NZTA. A number of submitters suggested that TGP is unlikely to improve the well-being of communities and that the

[9] Documented in the Board minute titled *Late Submissions* and dated 23 March 2011.

protection of the important streams is more important than TGP. Many submitters expressed their belief that rail is a preferred option to provide the transportation benefits NZTA suggest accrue from the constructed TGP.

- **Impacts Extend Beyond Instream Values**
  Another issue submitters commonly raised was a suggestion that the impacts of changing the Freshwater Plan provisions as proposed will affect more than just the three streams specifically identified (being the Horokiri, Ration and Pauatahanui Streams).

  Some submitters contended that there are likely to be impacts on drinking water, recreation, shallow aquifers, water flow, flooding and on the ecosystems and endangered flora and fauna surrounding and depending on the life supporting capacity of these streams, including values at Pauatahanui Inlet. Two submitters also noted that the local community has been undertaking works to restore/improve the values of the Pauatahanui Inlet and suggest that allowing the Request would provide for activities that would undermine these efforts.

- **Impacts of the Transmission Gully Project**
  A number of submitters raised concerns relating to the construction and implementation of TGP. These include altering the rural landscape and the amenity of the local environment, including Queen Elizabeth Park, Battle Hill Farm Forest and Belmont Regional Park. Other potential impacts identified within submissions also arise from the implementation of TGP and relate to the encouragement of dispersed development and increased traffic movements.

- **The Protection Afforded by the Freshwater Plan is Appropriate**
  Generally, those submitting on this topic raised the issue that if the construction of TGP is to cause adverse effects on the environment, then the obstacles to this should not be removed from the Freshwater Plan. Some submitters noted that if anything is to change, the protection afforded by the Freshwater Plan should be increased. A number supported their submission with alternative plan provisions to help achieve increased protection of the values associated with the water bodies in question.

- **Offsetting**
  It was contended by a number of submitters that offsetting is an inappropriate way of managing the values of Appendix 2B streams. It was suggested by these submitters that adequate offsetting could not be undertaken within the region. They therefore suggest that offsetting has the potential to degrade important values in the region.

  Two submitters also questioned the use of SEV as a tool for assisting offsetting including concern that the application of this tool has the potential to be inconsistently applied and confusing to those applying it.

  One submitter suggested that offsetting should not be limited to TGP and should be applied in other circumstances within the region. Another submitter

supported the hierarchy within proposed Policy 4.2.33A which lists offsetting as the last management option.

One submitter was not opposed to offsetting provided it adopted a robust methodology for calculating biodiversity losses and gains and a no net loss outcome was achieved.

- **The Plan Change may set a Precedent**
  Some submitters contended that, if accepted, the Request could potentially create a precedent for other infrastructure projects by government agencies or departments. The concern expressed was that environmental protection requirements will be able to be *sidestepped* by those pursuing projects which are deemed to be of regional or national significance. It was suggested by some submitters that this is an adverse outcome as environmental degradation can be avoided through appropriate and environmentally sensitive development.

- **Relevant Planning Documents**
  A number of submitters suggested that the proposal is contrary to Part 2 of the Act, the operative and proposed RPS, the Freshwater Plan and the NZCPS and/or that NZTA has not properly considered the CMS.

  It was submitted that the Request is inconsistent with the operative RPS, specifically Policies 2 and 3 in Chapter 14. In this regard it has been suggested that the Request and the project proper do not align with the operative RPS views on transport fuels, renewable energy, sustainable transport and dispersed development.

  A number of submitters also suggest that the Request is contrary to NZCPS, including but not limited to Policies 11, 22 and 23 and that necessary regard has not been given to the CMS particularly with respect to the values of the Pauatahanui Inlet.

- **Part 2 of the Act**
  Some submitters expressed concerns that the proposal does not protect the natural character of the coastal environment or the streams and wetlands that TGP will affect as required by Part 2 of the Act. They suggest that TGP will adversely affect significant habitats of indigenous fauna. In addition they argue that TGP does not represent an efficient use of natural and physical resources because it will encourage a project that will generate additional traffic which is not an efficient use of energy, will generate further greenhouse gas emissions and runs counter to facilitating the increased use of renewable energy.

- **Importance of the Project**
  Submitters in support of the Request generally contended that the changes will remove barriers to the benefits arising from implementation of TGP. On the whole, they supported amendments to the Freshwater Plan if the amendments will assist in ensuring that TGP proceeds.

[82] In addition to the issues raised above, a number of submitters raised issues such as:

- Seismic Concerns;
- Oil Consumption Climate Change Global Warming;
- Alternative Transport;
- Alternative Routes;
- Project Economics;
- Project Details;
- Coastal Matters;
- The Appointment of the Board.

[83] Although some of these matters may possibly be relevant to future resource consent and NoR applications, it is not necessary for us to make findings on these matters to determine this Request which is driven by a perceived requirement for there to be greater policy flexibility in considering a specific project. We will address all of the relevant issues in this decision.

5 NZTA S CASE

5.1 EVIDENCE SUBMISSIONS

[84] NZTA (represented by Mr J Hassan and Ms N McIndoe) circulated its evidence in support of the Request on 5 May 2011. Evidence for NZTA was given by:

- Mr C Nicholson traffic engineer employed by NZTA as Principal Project Manager for TGP;
- Dr V Keesing an ecologist;
- Mr L Daysh a planner.

[85] Mr Nicholson provided an overview of NZTA and its statutory role and functions throughout New Zealand. He confirmed the importance of TGP as a route of national and regional significance and provided some detail about the project, the likely construction works and the consents likely to be required. Mr Nicholson discussed the benefits that would be derived from the implementation of the project and provided an overview of the consenting strategy for TGP. He explained the reasoning behind the Request and responded to a number of the matters raised in submissions and the s42A reports.

[86] Dr Keesing provided a description and assessment of the ecological significance of the streams that will be affected by works associated with TGP. He explained that the project will cross water bodies within the catchments of Te Puka Stream, Wainui Stream, Horokiri Stream, Ration Stream, Pauatahanui Stream, Duck Creek, Cannons Creek and a small tributary of Porirua Stream. He noted that three of these streams are listed in Appendix 2B of the Freshwater Plan as having high

natural character. He concluded that while the Ration Stream (other than in its coastal reach) does not warrant its identification as being of significance under the Freshwater Plan, the Horokiri and the lower Pauatahanui Streams do have significant ecological values which warrant their protection under the Freshwater Plan. With regard to the other streams that will be crossed by TGP, Dr Keesing concluded that both Duck Creek and Te Puka Stream also have high ecological and natural character values and noted that these streams are currently not provided any special protection under the Freshwater Plan.

[87] Dr Keesing also provided a description of the anticipated effects of TGP construction and operation on all of the streams and concluded that some 10,000m of stream length would be adversely affected by construction activities. He observed that this would lead to potentially significant and unavoidable impacts on freshwater habitats and fauna. There would also be an unavoidable increase in sediment transported from the construction activities through to the Porirua Harbour. Dr Keesing also considered the severity of the likely effects against the mitigation and□or offsetting measures that could be imposed via the management regime proposed by the Request. He concluded that there would be a neutral or positive outcome on natural character and habitat quantity for all of the aquatic ecosystems affected by TGP.

[88] Dr Keesing provided a detailed commentary around the concept and use of offsetting and the methodology that is employed through the use of the SEV method. He explained the purpose and use of SEV as well as identifying its potential shortcomings. He then provided an assessment of the efficacy of SEV for TGP using a test case scenario. The SEV system established that enhancement of 26,504m of stream length is required to offset the changes and losses to some 10,000m of stream length. Dr Keesing concluded that the use of offsetting has the potential to lead to better management of those waterways impacted by TGP.

[89] Dr Keesing responded to issues raised by submitters and the s42A reports. He concluded that the concept of *no net loss* which had been raised by some witnesses as part of any offsetting process does not need to be included in the Request. He stated that this is too complicated for inclusion in the Freshwater Plan, particularly in the field of ecological values. He also noted that the Act does not require a no net loss approach to be adopted to environmental compensation. In response to changes suggested in the initial Mitchell Partnerships s42A report (to Policies 4.2.33A, 7.2.1 and 7.2.2 in particular), Dr Keesing did not agree that the Request should be limited to the three streams listed in Appendix 2B. He stated that the management cascade of avoid, remedy, mitigate, offset is appropriate for all of the water bodies that would be potentially affected by TGP, and that cascade of measures proposed in the Request is a system that is more likely to result in ecological benefit than simple avoidance, as all of the streams along the route have current water and habitat quality issues related to catchment land use.

[90] Dr Keesing assessed the interaction of the streams with the coastal marine area. He stated that all of the streams affected by the project discharge into the Porirua Harbour, with the exception of the Te Puka Stream and Wainui Stream. These streams discharge into the coastal marine area north of Paekakariki. Dr Keesing said that the key effect in this regard is potential sedimentation of Porirua Harbour.

He stated that sedimentation effects are being considered by NZTA and will be addressed when applications are lodged for TGP's substantive consents.

[91] Mr Daysh provided a detailed description of the Request. He discussed the relevant statutory criteria, including a description and assessment of the relevant planning and policy instruments and other relevant matters (e.g. the WRTLS). He concluded that the Request would better enable Greater Wellington to carry out its responsibilities relating to the strategic integration of infrastructure with land use. Mr Daysh considered that the Request is consistent with the relevant regional policy documents including the operative and proposed RPS. He contended that the Request is entirely consistent with the WRTLS. He considered that the Request would implement the relevant objectives in the Freshwater Plan and is the most appropriate in s32 terms.

[92] Mr Daysh responded to issues raised by submitters and to the matters raised in the s42A reports. In summary, he disagreed with those submitters who opposed the concept of the Request, or considered it to be unnecessary. He also disagreed that the Request will create a precedent for other large scale or national projects. Mr Daysh discussed what is meant by the phrase *to the extent practicable* as it appears in the Request and compared it to the phrase *best practicable option* which is used in the Act.

[93] Mr Daysh agreed in part with the initial Mitchell Partnerships s42A report relating to recommended changes to Policy 4.2.33A and the definition of TGP. He supported the change from *allow* to *manage* in Policy 4.2.33A recommended by Mitchell Partnerships.[10] He advised that it is NZTA's intention to create a resource management framework to address adverse effects arising from the construction and implementation of TGP, rather than to create a presumption that effects should always be allowed. Mr Daysh also agreed that the definition of TGP would benefit from the addition of a map to the Freshwater Plan. In addition, he recommended amending the definition to include recognition that activities associated with TGP will occur in proximity to the alignment indicated in that map.

[94] Mr Daysh did not agree that application of Policy 4.2.33A should be limited to the Appendix 2B waterways affected by TGP, as suggested in the Mitchell Partnership's report. His view was that it is appropriate that this policy applies to all streams within the footprint of the project. Mr Daysh referred to the evidence of Dr Keesing which provided an assessment of the values within the streams affected by TGP. Mr Daysh considered that it is appropriate to apply a consistent management regime to the effects on all streams potentially affected by TGP. He noted that Dr Keesing supported this in his evidence.

[10] Para [74] above.

[95] Counsel commenced their case[11] by advising that NZTA has the objective set out in the Land Transport Management Act 2003 namely, to undertake its functions in a way that contributes to an affordable, integrated, safe, responsive and sustainable transport system.

[96] Counsel submitted that TGP is a critical section of the SH1 RoNS for the Wellington Northern Corridor. It is a part of the programme to upgrade this essential route and is identified in the GPS. At a regional level it is part of the Western Corridor Plan that is included in the WRLTS. It links to the motorway to the south at Linden and to the upgraded SH1 MacKays Crossing to the north. It has been recognised as a proposal of national significance by the Minister.

[97] Benefits of the project were identified by Counsel as improved route security and safety, reduced journey times, increased reliability of journey travel times and enhanced amenity values for coastal communities along the existing SH1 corridor.

[98] Counsel advised that some of the resource consents required for TGP will be non-complying under the Freshwater Plan. They contended that because Policy 4.2.10 requires the avoidance of any adverse effects that are more than minor on certain water bodies there is a risk that consideration of the merits of anticipated TGP resource consent applications could be precluded under s104D. Some effects of TGP will inevitably be more than minor and TGP could arguably be said to be contrary to the restrictive policy in the Freshwater Plan thereby failing the test of s104D RMA. If that was the case resource consents for TGP could not be granted. A plan change to avoid this possibility and allow consideration of TGP is requested accordingly.

[99] The plan change initially requested by NZTA was to provide for a preferentially cascading framework that managed any adverse effects of TGP by, firstly avoiding, then remedying, then mitigating and finally offsetting those effects. It was to stand in the Freshwater Plan as a separate policy applying only to TGP as Policy 4.2.33A. Consequential changes to Policies 4.2.10, 7.2.3 and 7.2.3 were also proposed so that they would not remain contradictory to the new policy.

[100] In closing submissions, Counsel suggested a remodelled form of the plan change that revisited the concept of cascading management of effects and the separate identification of offsetting of effects. Because steps to offset effects of the project could be said to mitigate or remedy those effects it would be more appropriate to prefer avoidance of the effects where practicable and then to remedy or mitigate them, accepting that offsetting of effects is a recognised form of remedy or mitigation. They said that new policy should apply to all streams affected by the project and should address all effects; minor ones, significant ones and those less than minor. We will address the specifics of the remodelled plan change in the Evaluation section of this Decision and Report.

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[11] NZTA was jointly represented by Mr Hassan and Ms McIndoe, both of whom presented various parts of their submissions at different times. For the sake of convenience we refer to counsel jointly in summarising their submissions.

[101] Consequential amendments and explanations for Policies 4.2.10, 7.2.1 and 7.2.2 were also submitted. Counsel said the changes would not alter any objectives or rules of the Freshwater Plan.

[102] A definition of TGP was provided with reference to a map of the project. Initially a definition of SEV was also suggested but that was not pursued because that process was still evolving and other methodologies are available.

[103] Counsel addressed the topic of whether there should be some *stop* mechanism in the Freshwater Plan to protect vulnerable or irreplaceable natural values. They submitted that Greater Wellington had identified that it is unlikely there will be an occurrence where the avoidance of adverse effects is the only appropriate action, although on a detailed examination that might be the appropriate response at particular sites. They contended that none of the water bodies affected by TGP require avoidance of adverse effects to maintain their current values. They said therefore there was no need for a *stop* provision.

[104] Consultations with Te Runanga O Toa Rangatira (Ngati Toa) had been undertaken and were ongoing. Counsel submitted there were no issues that could not be resolved that were evident at this stage and that it is not unusual for a Memorandum of Understanding to take some time to finalise.

[105] Counsel canvassed the statutory criteria and framework for the plan change and the Board's functions, duties and powers. They referred us to the relevant policy and planning documents and tested the proposal against the requirements of s32. They submitted that the plan change, as amended, was the most appropriate method for meeting the provisions of the Act. They said that there was no issue as to scope in the Board accepting the revised version of the plan change.

[106] After reading the evidence and hearing opening submissions for NZTA, the Board had issued a minute identifying three issues it considered were important as well as four questions for parties' consideration. We will address those issues and questions elsewhere in this decision however we record Counsels' pertinent comments on those matters, as follows:

- They agreed that offsetting was a means of remedying or mitigating effects. They also submitted that the proposed plan change as amended recognised the normal step of seeking to avoid effects before remedying or mitigating them without the inflexibility of a cascade regime. It retained the scheme of the Act. They submitted the definition of TGP with reference to a plan would be adequate.

- They submitted there was a need to change the Freshwater Plan and that the amended plan change was appropriate. They said that with the plan change all options, including avoidance, are available to deal with effects of TGP. A consideration of alternatives has been undertaken and the amendments now proposed are a result of that continuing process. They submitted that the Request is consistent with the NPS(FM), does not detract from the ability for the Freshwater Plan to give effect to the NZCPS and implements the objectives of

the Regional Plan. They submitted that the amended form of the Request is the appropriate form of the changes proposed..

- In reference to Section 10 of the Freshwater Plan, Counsel submitted that Para 10.4(1) which anticipates that the natural character of the water bodies listed in Appendix 2B will be preserved, could be achieved by the plan change. In any event they said that provision is not a policy to be delivered.

[107] Counsel reiterated that a specific stop provision on the effects management regime is not required because the amended plan change allows for all options to manage effects. If particular natural values are very important then a consent authority can require adverse effects to be avoided. Similar reasoning was used to oppose a provision in the policy advocated by the Director General of Conservation, requiring avoidance of effects where vulnerable or irreplaceable indigenous biodiversity is present.

[108] Counsel submitted that overall the effectiveness, efficiency, benefits and costs of the Request had been thoroughly debated during the hearing. They detailed the sequence of arguments that support this view and sought that the Request as now amended, be approved.

6 SUBMITTERS IN OPPOSITION

6.1 ISSUES RAISED BY SUBMITTERS PRESENTATIONS

[109] A variety of issues had been raised by submitters in opposition to the Request who appeared before us. These issues were summarised earlier[12]. In addition the following issues were raised or developed during the hearing:

- The approach to offsetting proposed in the Request is inappropriate;
- There has been an inadequate assessment of the implications of the Request in regards to the requirements of statutory documents;
- Waterway and estuarine values have not been given enough weight in the Request;
- The planning assessment undertaken by NZTA was inadequate;
- There are numerous freshwater values to be identified and managed;
- Peak oil diminishes the viability of TGP; and
- The cost-benefit analysis process is challenging.

[12] Para [81] above.

6.2 EVIDENCE AND SUBMISSIONS OF OTHER PARTIES

[110] The following parties presented evidence and submissions:.

- The Director General of Conservation (Director General) (represented by Ms S Bradley and Ms A Camaivuna) provided evidence from:
  - Dr G Ussher - an ecologist who gave evidence regarding biodiversity;
  - Mr S Ericksen - a planner;
  - Ms H Kettles - an ecologist who gave evidence regarding estuarine ecology;
  - Ms N Bott - an ecologist who gave evidence about the ecological values of catchments likely to be affected by TGP.
- Kapiti Coast District Council (KCDC) (represented by Mr M Conway) provided evidence from:
  - Ms E Thomson - a planner.
- Appropriate Technology for Living, Public Transport Voice; Rational Transport Society and Paula Warren (represented by Mr T Bennion) presented a joint case and provided evidence from:
  - Ms P Warren- a policy analyst with botanical, ecological and resource management expertise or experience;
  - Mr T Jones - who addressed matters of sustainable energy;
  - Dr M Pickford - an economic researcher;
  - Mr K Wood - a retired engineer.
- Royal Forest and Bird Protection Society of NZ Inc (Forest and Bird) provided evidence from:
  - Dr R Bellingham - a planner and ecologist.

We briefly summarise the evidence given by these witnesses and the submissions presented by the parties who called evidence.

The Director General of Conservation

[111] Dr Ussher is experienced in the application of biodiversity offsetting in New Zealand. He considered that the way NZTA intends to use offsetting is not in accordance with best practice and recommended amendments to the proposed approach including the removal of reference to the SEV method from the Request. Dr Ussher addressed the following topics:

- The international and New Zealand context for biodiversity offsetting;
- The application of biodiversity offsetting in New Zealand;

- Internationally accepted principles governing biodiversity offsetting;
- The mitigation hierarchy and limits to offsetting;
- Key points to consider for the application of biodiversity offsetting to ecological values that may be impacted by TGP and arising from the Request;
- The appropriateness of the use of the SEV tool as a means of determining the quantum and type of biodiversity required to be offset to achieve no-net-loss of ecological values;
- A memorandum dated 5 May 2011 prepared by Mr Milne for the Board; and
- Suggested amendments to the wording of the proposed plan change.

[112] In summary, Dr Ussher contended that the application of proposed Policy 4.2.33A would underestimate the biodiversity loss arising from construction activities associated with TGP and would not result in a no-net-loss outcome. He considered that further amendments should be made to the Request, to ensure that both in stream values and downstream effects of TGP are appropriately managed.

[113] Ms Kettle's evidence was directed at:

- Values of estuaries and in particular the Pauatahanui Inlet;
- Potential impacts of TGP on estuary values (especially Pauatahanui Inlet), particularly sedimentation, contamination and eutrophication.
- Restoration of estuary values;
- The NZCPS;
- NZTA evidence relating to estuary values;
- Managing potential effects.

[114] In summary, Ms Kettles deposed that estuaries are highly productive ecosystems and that estuarine values are high and worthy of protection. She discussed biodiversity values specific to the Pauatahanui Inlet and said that the Pauatahanui Inlet comprises 65 of the entire Porirua Harbour estuary, which is the largest of the 52 estuaries in the lower North Island. Ms Kettles stated that estuaries act as sinks for sediments, contaminants and nutrients flowing in from streams leading from the surrounding catchments. She noted that the Pauatahanui Inlet has already been significantly adversely affected by sediment and that contaminants associated with roading are a threat to the Inlet estuary. She also noted that TGP may increase nitrogen levels in the Inlet, facilitating the eutrophication process.

[115] Ms Kettles considered that the Request is contrary to a number of specific policies in NZCPS. She addressed the evidence of Dr Keesing. It was Ms Kettles evidence that effects on estuarine values should not be facilitated or condoned but that estuarine values should be enhanced. Accordingly, she contended that the proposed method of managing adverse effects contained in the Request needs to be revised as, in its proposed form, the Request would enable significant adverse

effects including through sedimentation. Ms Kettles noted that given the linkages between effects on freshwater and the coastal environment, an integrated approach is the only sensible way to manage the effects of TGP. She expressed the opinion that assessing and addressing adverse effects under the Freshwater Plan requires an assessment of the effects of TGP on the coastal environment including Pauatahanui Inlet.

[116] Ms Bott noted that all of the streams that would be affected by TGP are listed as significant indigenous ecosystems and habitats with significant indigenous biodiversity values in Appendix 1, Table 16, of the Proposed Regional Policy Statement . She detailed the ecological values of the Porirua Harbour and Wainui Stream catchments and discussed the importance and vulnerability of these ecological values. Ms Bott considered that enabling adverse effects to be remedied, mitigated or offset instead of avoided, reduced the protection provided to these values, which is inconsistent with the intention of including them in the Freshwater Plan in the first place. Ms Bott explained why she considered that a precautionary approach should be adopted to management of these values.

[117] Ms Bott also undertook an assessment of the ecological significance of the eight water bodies to identify the potential effects of TGP. She commented on the appropriateness of the cascading hierarchy contained in the Request as a way to manage these potential effects.

[118] In summary, Ms Bott expressed a preference for protecting ecological values through avoidance. She indicated that if off-setting is to be used, it should be based on the principle of *no-net-loss* or *like for like*. She discussed appropriate management approaches for each of the water bodies, dependent on their ecological values and noted that this may require additional investment and more innovative construction practices to ensure only minor effects result from TGP.

[119] Mr Ericksen addressed various issues, summarised as follows:

- The Request does not take into account the downstream effects of TGP. Regional councils are required to achieve the integrated management of natural and physical resources. An approach that accounts for downstream effects is required by the guiding national policy documents. Accordingly an inappropriately limited approach has been taken in assessing the implications of the plan change.

- The NZCPS should be considered now and considerable weight attributed to it in assessing the Request, rather than deferring this consideration to the resource consent phase as is proposed by Mr Daysh. Furthermore, the WRLTS should not be given more weight than the NZCPS.

- Mr Ericksen considered that the Request includes errors and omissions in the interpretation of the applicable statutory documents.

- To accept the Request would set a precedent in regard to project specific provisions within regional plans, which in Mr Ericksen s view is undesirable.

- Mr Ericksen had concerns as to the adequacy and appropriateness of the revised policy. He considers that Mr Daysh's explanation of how the policy would be applied does not match what is required by the text of the proposed policy.

- It is common practice that loss of ecological values must be offset by gains in ecological values (not amenity or recreation values). Furthermore, Mr Ericksen expressed the opinion that there should be *no net loss* of such values and preferably a net ecological gain. The proposed plan provisions should be amended to better achieve this outcome.

- Mr Ericksen considered that there is confusion in the use of the term *to the extent practicable* in the Request. He held the view that use of this term would lead to uncertainty in administering the Freshwater Plan.

- Mr Ericksen had concerns regarding the appropriateness of proposed Policy 4.2.33A and consequently proposed a new Policy 4.2.10A to replace proposed Policy 4.2.33A.

[120] Ms Bradley submitted that the Director General supported a plan change to allow full consideration of TGP under the Freshwater Plan using a cascading regime (which is international best practice) but sought amendments to ensure that after avoiding, remedying, mitigating and offsetting effects there would be no significant remaining adverse effects.

[121] Ms Bradley sought the avoidance of adverse effects on vulnerable or irreplaceable indigenous biodiversity as a mandatory first step in the cascading management regime. Then the policy should require avoidance to the extent practicable, remedying to the extent practicable, mitigating to the extent practicable and finally offsetting of the remaining effects. She submitted that offsetting should apply only to residual effects.

[122] Ms Bradley agreed that offsetting properly defined can mitigate effects and is an available technique under the Act. She submitted that offsetting does not include *environmental compensation* which, although not lessening effects, can be considered as a positive aspect of a development. Ms Bradley provided several case references on the topic of offsetting and environmental compensation and suggested including in the explanation to Policy 4.2.33A a definition of offset, agreed by the ecologists, as follows:

> *Offsets are measurable outcomes resulting from, and directly linked to, actions designed to compensate for residual adverse impacts arising from project development after appropriate avoidance, remedying and mitigation measures have been taken.*

[123] Ms Bradley submitted that offsetting is a means to achieve remedying or mitigation of residual effects but is somehow distinct from *avoid, remedy, mitigate* because it is to apply only to residual effects. She accepted the definition of TGP now proposed by NZTA.

[124] Ms Bradley accepted that the Freshwater Plan could potentially preclude the grant of consent to TGP and that amendments to Policies 4.2.10, 7.2.1 and 7.2.2 would remove that risk. However, her interpretation of the current Policy 4.2.10 was that it is only more than minor effects (after mitigation) which need to be avoided and that could be managed under the current wording of the policy. If the policy framework is to be expanded to remove the risk as requested by NZTA, she identified the following requirements:

- Define offset, linking it to TGP effects, and include it in the Policy with a no net loss requirement;
- Include bottom lines (vulnerability and irreplaceability);
- Provide guidance on the place and time for offset works and on the meaning of the term, *to the extent practicable*;
- Avoid specifying a technique for ecological stream evaluation.

[125] Ms Bradley acknowledged that total avoidance of significant adverse effects on the water bodies in question is not required but noted that care is needed to assess their tolerance to change. She agreed that the Board will need to have regard to the significance of TGP pursuant to s149P(1)(a) and that the Board will need to examine alternatives pursuant to s32(3)(b).

[126] Ms Bradley advised that the Director General is mainly concerned with sedimentation effects downstream of TGP in the Pauatahanui Inlet, an Area of Significant Conservation Value in the Wellington Regional Coastal Plan. She then canvassed the range of relevant statutory instruments including the NPS(FM) and the NZCPS. In the NZCPS Objectives 1 and 2, and Policies 4, 11, 13, 14, 21 and 22 were submitted to be relevant. She submitted that including the bottom line effects (vulnerability and irreplaceability) would give effect to the NPS(FM) and the NZCPS. She identified that the CMS is also relevant to our considerations, particularly in respect of the values in the Pauatahanui Inlet.

[127] Ms Bradley provided draft changes to the Freshwater Plan in her submissions which would meet the Director General's concerns. She submitted that these amendments were necessary to achieve the objective of the Freshwater plan, were appropriate in terms of the Act and met the purpose of the Act.

[128] In summary, the Director General supported the concept of the Request but had concerns as to its form.

Kapiti Coast District Council

[129] Ms Thomson testified that while KCDC is generally supportive of TGP, she was concerned that the Request seems to envisage redesigning the affected water bodies to fit the preferred road design. She made reference to the NPS(FM) and said that our decision needed to take account of this.

[130] Ms Thomson considered the operative and proposed RPS documents and concluded that while the Freshwater Plan could be amended and still give effect to

both documents, the Request is not a better or more appropriate method than the existing policies. She contended that the WRLTS should not be given more weight than Part 2, the NPS(FM), RPS or existing Freshwater Plan objectives in our considerations.

[131] Ms Thomson was unconvinced that the Request is necessary to enable TGP and generally did not agree with Mr Daysh's assessment under ss 67 and 32(3)(b) nor with some of the assessments provided in the Mitchell Partnerships s42A report. She considered that the Request is not adequately justified in terms of s32. Ms Thomson was not comfortable with the environmental compensation approach to offsetting which she considered the Request proposed and instead favoured a mitigation based approach. She suggested amendments to the Request which in her view would be necessary to ensure that the Request is consistent with Part 2 of the Act.

[132] Mr Conway advised on behalf of KCDC that it wanted the Request declined because it prefers adverse effects on the Appendix 2B streams to be avoided. Nevertheless, KCDC supports TGP. In response to a query from the Board, he advised that there had been no formal Council resolution to determine a position for KCDC on the Request. The Board expressed a concern about KCDC stating a formal position to it without that position being approved by resolution.

[133] Mr Conway submitted that the Request, even with improved wording, was not the most appropriate way of achieving the objectives of the Freshwater Plan. Mitigation of adverse effects for some significant resources would not be an adequate response to objectives that used the words protect, preserve and safeguard. Offsetting or compensation is further removed. Offsetting of effects should not be included.

[134] Mr Conway submitted that once the provisions of Policy 4.1.10 and Appendix 2 are applied, the most effective policy to implement Objectives 4.1.4, 4.1.5, 4.1.6, 4.1.11, 4.1.12, 4.1.13, and 7.1.1 is one that provides a greater degree of assurance that the outcomes sought by these objectives will actually occur. All these objectives are relevant because the proposed plan change is to apply to all streams affected by TGP. He submitted that the Request would not implement the objectives as well as the current policies and would not be as effective or efficient.

[135] Mr Conway submitted that if, contrary to KCDC's submission, offsetting was contemplated by the Board then it should be strictly specified and controlled using the material in Schedule 2 of the proposed NPS(FM) and the policy itself should include that specification. He submitted that deleting all reference to offsetting in the plan change so that it simply referred to avoid, remedy and mitigate would be preferable. He contended that both offsetting and environmental compensation can be considered in the resource consenting phase without there being reference to them in the policies.

[136] KCDC supported a more detailed definition of TGP. Mr Conway submitted that whether or not s104D might prevent consideration of TGP, is not a test relevant to s32. He contended that the significance of TGP should not over-ride the unchallenged objectives of the Freshwater Plan.

[137] In summary, KCDC opposed the Request. It had a secondary position that if the Request was approved it ought to be amended as suggested by Ms Thomson.

Appropriate Technology for Living, Public Transport Voice, Rational Transport Society, and Paula Warren

[138] Ms Warren gave evidence on offsetting, the effects which TGP may have on fresh water and the coastal marine area, statutory requirements relating to the Request, the costs and benefits of TGP and their relevance in the statutory context. She undertook a theoretical analysis of the offsetting concept and expressed the view that it appears NZTA intends offsetting as something other than mitigation given that the term is added to a list that includes the term mitigation. She considered offsetting as protection, mitigation and avoidance and discussed its appropriateness and the relevance of offsetting for the Appendix 2B streams.

[139] Ms Warren provided information as to natural values in the area of TGP. She identified and discussed what she considered to be relevant policies, plans and other statutory matters regarding likely impacts on the natural resources of the area. Ms Warren endeavoured to refute a number of the claimed benefits of TGP focusing on anticipated route security, reduction in journey times, safety benefits, health effects, social wellbeing, and the implications of changes in fuel prices.

[140] Mr Jones gave evidence on the world oil supply, his key point being that world oil supply has peaked and peak oil presents a problem for New Zealand which is very vulnerable to oil supply constraints. He said that the need to reduce greenhouse gas emissions from transport is widely accepted and that alternative sources of transport fuels will not be sufficient to meet the shortfall in oil production. Projections of increasing transport activity no longer reflect a credible model of future transport activity and this calls into question the need for motorway projects such as TGP. Mr Jones contended that transport alternatives which make better use of scarce resources, and which enhance resilience when faced with a future of declining transport fuel availability and high transport fuel prices are preferable.

[141] Mr Pickford discussed the process involved in calculating benefit-cost ratios (BCR) and stated that the BCR must be larger than one for a project to be viable. He said that in his experience, agencies typically set a minimum BCR for their projects. The former Transit New Zealand required the BCR of a given project to be greater than 4. According to a letter sent from NZTA to Councillor Paul Bruce (dated 16 March 2011), the Wellington Northern Corridor RoNS has a BCR of 1.1 excluding agglomeration benefits and 1.2 including agglomeration benefits. TGP itself has a BCR of only 0.6. Mr Pickford concluded that on the basis of the estimated BCR provided by NZTA it would be economically irrational to proceed with TGP.

[142] Mr Wood discussed the updated NZTA Economic Evaluation Manual and defined the purpose of TGP as being to support traffic growth. The majority of his evidence focused on the difficulties in identifying the BCR for TGP, including issues associated with hourly rates being applied to time savings, values of time, estimating and using time savings and incorporating wider economic benefits and agglomeration effects. Mr Wood contended that a weakness of TGP is that it is

being developed in isolation of other transport links and that there is a need to consider other approaches towards transportation.

[143] Mr Bennion formally adopted the position of KCDC in a number of respects. Additionally he submitted that benefits and environmental effects of TGP have not been proven sufficiently in terms of s32 and that the change would not conform to the objectives of the Freshwater Plan, the RPS, the NPS(FM), the NZCPS or s67(1).

[144] Mr Bennion argued that the Request does not meet the requirements of s145(9)or s66(1). He submitted that TGP has not been assessed in a detailed enough manner to allow consideration of the Request under Part 2 of the Act and that reductions in stream protection are sought to allow the unproven benefits of TGP. He submitted that Objectives 4.1.4, 4.1.5 4.1.6, 4.1.12 and 4.1.13 of the Freshwater Plan would not be implemented by the plan change particularly in respect to the concept of offsetting.

[145] Mr Bennion considered provisions of the operative and proposed RPS, the Regional Coastal Plan, the NPS(FM) and submitted that any plan change must accord with those provisions. He argued that any policy allowing offsetting (assuming it was appropriately defined) must envisage residual effects and he submitted that is contrary to objectives of protection or preservation.

[146] After considering evidence and submissions during the hearing, Mr Bennion suggested some changes to the proposed Policy 4.2.33A so that the practicability criterion was removed, the term waterway was replaced by waterbody, reference to the coastal marine area was included and effects on threatened species or ecosystems were avoided.

[147] In summary, the parties represented by Mr Bennion opposed the Request. They also had a secondary position that if the Request was approved changes ought to be made to it, as suggested above.

Royal Forest and Bird Protection Society of NZ Inc

[148] Forest and Bird had provided a brief of evidence from Dr Bellingham. His evidence (which was pre-circulated, but not presented in person to the Board) addressed four primary issues:

- The appropriateness of offsetting;
- Whether offsetting is appropriate for TGP;
- Whether SEV is a suitable tool for the proposed offsetting;
- The affect of the NZCPS in assessing offsets for TGP.

[149] Dr Bellingham stated that Forest and Bird does not support offsetting for TGP nor as a general concept for all consent applications. He suggested that it would be premature to formally introduce offsetting into plan provisions while the Department of Conservation is yet to conclude its CRDTP Biodiversity Offset Programme. The effects of TGP should be assessed at the time the resource consent application is

considered as a whole. Allowing the Request would not only allow serious adverse effects on the relevant streams, but would also cause damage to Pauatahanui Inlet and streams affected by TGP. Dr Bellingham suggested that these waterways and water bodies should be subject to progressive restoration rather than permanently degraded.

[150] Dr Bellingham noted that the Freshwater Plan already contains some limited provisions for offsetting. His primary concern was that with no guidance in the Freshwater Plan, the natural environment will be significantly undervalued and inadequate mitigation and compensation will be derived to address the significant adverse effects of TGP. Dr Bellingham provided examples from his experience that the natural environment generally loses in big development projects. To help overcome this, he stated that a better definition of offset is needed to guide the decision and he proposed such an alternative.

[151] Dr Bellingham viewed the offsetting proposal as an opportunity to redress the ecological losses that are likely to come from TGP, but noted that the proposed approach needs amendment. He said that there should be no reference to SEV in the Request. Mitigation should be required to apply to all affected streams not just Appendix 2 streams and the adverse effects footprint of TGP provides a good guide to where NZTA should apply offsets. Furthermore, as TGP extends beyond the motorway itself the Board may need to take into account the NZCPS (in particular Policy 4: Integration).

[152] In summary, Forest and Bird's evidence was directed specifically at the concept of offsetting, its definition and its inclusion in the Freshwater Plan. The evidence was somewhat more restricted in scope than Forest and Bird's original submission.

7 EXPERT WITNESS CONFERENCING

[153] Prior to the hearing the Board required expert witnesses in the fields of ecology and planning to participate in conferences where they considered various issues identified by the Board. The witnesses did that and at the conclusion of each conference provided a joint statement identifying matters where they were in agreement, matters where they disagreed and the reasons for their disagreement.

[154] The expert witness joint statements were circulated to all parties and made available on the EPA website.

8 SUMMARY OF REPRESENTATIONS

[155] In addition to those parties who presented evidence and submissions, a number of submitters appeared before the Board and made formal representations which did not constitute evidence but were statements of the parties' views on the Request. We have given consideration to those representations in reaching this decision. We summarise the representations as follows:

- Mr J Horne raised concerns with the effects of human activity on the rate of sedimentation in the Pauatahanui Inlet. He noted that the Horokiri Stream, Ration Creek, Duck Creek and Pauatahanui Stream flow into the Inlet. Mr Horne requested the Board decline the Request on the basis that if TGP was granted consent it could affect the amenity, biodiversity and wider ecological values of the streams.

- Mr P Morgan (on behalf of Cycle Aware Wellington and Living Streets Aotearoa) expressed a concern that TGP would not deliver benefits to people who travel or live along the existing SH1 coastal route. He also contended that the benefits of TGP were untested, concluding that ...*we should not be trading away unique biodiversity*[13]*.*

- Ms K Brown argued that this hearing was an appropriate avenue for testing the merits of TGP. She identified to the Board what she believes are the wider environmental and social effects generated by transport infrastructure including climate change. Ms Brown concluded by stating that she believed the costs outweighed the benefits of TGP.

- Councillor H Wooding spoke as a representative of KCDC (but we note, without the authority of a Council resolution) in support of the Council's submission. She stated that KCDC does not support the Request as it considers that it undermines environmental bottom lines agreed by the local and regional community and further that it undermines the intent of such documents as the proposed NPS(FM). Clr Wooding advised that KCDC is not convinced that the plan change is necessary to enable TGP to be developed.

- Mr M Mellor (on behalf of Public Transport Voice) questioned whether TGP is consistent with the RPS. In discussing the reason for the group's submission Mr Mellor stated:

  > *NZTA acknowledges the change will adversely affect regionally important streams and justifies this because it believes the project to be of overriding regional significance, and we submit that, far from being a benefit to the region, the project is likely to have significant long term adverse effects on the region and its transport network.*[14]

  Mr Mellor identified reasons why his group did not believe that TGP is regionally important infrastructure and that the social, economic and environmental effects of TGP are such that it is contrary to the RPS. He concluded that there is [no] *valid reason for lowering the standards of the Regional Freshwater Plan for the project and the plan change request should, therefore be declined*[15]*.*

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[13] Notes of Evidence (NoE), pg 201.

[14] NoE, pg 256.

[15] NoE, pg 258.

- Mr P Bruce (on behalf of Appropriate Technology for Living) stated that he and his group believe that TGP is not a regionally important project and therefore it does not warrant an exemption from the Freshwater Plan. Mr Bruce cited research into the effects of peak oil and the impact of climate change and questioned assumptions in the cost benefit analysis undertaken by NZTA stating that:

  > *So the project will provide no economic benefit and the negative cost benefit ratio, in fact, means that the Project could not be funded under government under normal rules. It is not a good project from an environmental perspective*[16]*.*

  Mr Bruce said that he would like to see protection for the streams increased rather than decreased and proposed his own plan changes to do so.

- Mr R Jessup (representing the Coastal Highway Group) outlined his group's belief that ...*social, economic and cultural well-being and their safety...would be much better dealt with by developing the Coastal Highway at considerably less expense than Transmission Gully*[17]*.*

- Mr G Thompson (also representing the Coastal Highway Group) questioned NZTA's decision to proceed with TGP. He expressed the view that ...*there is no reason for a plan change before the major application and the water issues should be considered in the total context*[18]*.*

  Mr Thompson requested that the Board adjourn sine die until the anticipated resource consent applications are made.

- Dr R Norman stated that freshwater ecosystems are in crisis in New Zealand and that the decline in freshwater ecosystems is due to intensive agricultural use in pastoral catchments. He believed that environmental bottom lines were required, noting that:

  > *...this year we'll trade off a bit of environmental degradation, next year we'll trade off a bit more environmental degradation and further and further down the track until we have nothing left, that's why we need inflexibility in environmental plans to provide some bottom line protection to natural environments particularly freshwater ecosystems which are in crisis at the moment because they are being degraded year after year after year*[19]*.*

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[16] NoE, pg 266.

[17] NoE, pg 274.

[18] NoE, pg 278.

[19] NoE, pgs 340 – 341.

Dr Norman concluded that if NZTA wishes to proceed with TGP, it should do so within the existing environmental protections provided by the operative and proposed RPS.

- Mr N Fisher did not appear but provided a written representation to the Board outlining his belief that the assumed benefits to the community from TGP are unsupported by evidence. Mr Fisher questioned the concept of offsetting adverse effects and concluded that:

  New Zealand is at a crisis point with the management and quality of our waterways and lagoons. This application, if approved, will only serve to ensure the further deterioration of our environment[20].

9 UNDERPINNING ISSUES

[156] In reaching our decision on the Request, the Board has considered the Request and all of its supporting material, the s42A reports received, the submissions and further submissions lodged, the evidence, legal submissions, representations and further information presented by NZTA, submitters and/or their representatives at the hearing.

[157] Given that no new objectives have been proposed by the Request, the Board is not required to determine whether the proposed change is the most appropriate way to achieve the purpose of the Act. Rather, the evaluative focus is narrower and requires determination of whether the proposed changes:

- Are appropriate to achieve the objectives of the Freshwater Plan;
- Will assist Greater Wellington in carrying out its functions to achieve the purpose of the Act;
- Will satisfy the relevant requirements of ss 66 and 67; and
- Are in accordance with Part 2.

[158] In *Eldamos Investments Ltd v Gisborne District Council*[21] (adopted in *Geotherm Group Ltd v Waikato Regional Council* [22]), the Environment Court identified the following measures for evaluating proposed plan objectives and for evaluating proposed plan policies, rules and other methods:

A. An objective in a district plan is to be evaluated by the extent to which:

1 it is the most appropriate way to achieve the purpose of the Act (s32(3)(a));

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[20] Written representation, Monday 11 July 2011, pg 2.

[21] Decision W047/2005.

[22] Decision A047/2006.

2 *it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72); and*

3 *it is in accordance with the provisions of Part 2 (s 74(1)).*

B. A policy, rule, or other method in a district plan is to be evaluated by whether:

1 *it is the most appropriate way to achieve the objectives of the plan (s 32(3)(b)); and*

2 *it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72);*

3 *it is in accordance with the provisions of Part 2 (s 74(1)); and*

4 *(if a rule) it achieves the objectives and policies of the plan (s 76(1)(b)).*

[159] We have adopted the *Eldamos* approach to the assessment of the Request. In the present case it is only the matters under B (1-3) (above) which are relevant because we are only considering changes to policies, not objectives and not rules. (*Eldamos* involved a district plan but we believe is equally applicable to evaluation of proposed policies of a regional plan, subject to amendment of the various section references)*.* The Environment Court decision in *Long Bay-Okura Great Park Society v North Shore City Council* (*Long Bay*)[23] has extended the tests outlined in *Eldamos* to include the *"higher order directions" of sections 72, 74 and 76 (in relation to district plans).* We were also advised that the *Long Bay* decision outlines a more comprehensive set of relevant considerations for plan changes.

[160] As required by s32, a mandatory consideration for the Board when considering the Request is whether the proposed changes (and in particular the cascade of avoiding, remedying, mitigating or offsetting) is the most appropriate means for achieving the objectives of the Freshwater Plan ...*having regard to their efficiency and effectiveness*.

[161] Before we consider the merits of the Request, we make findings in respect of four matters which inform and underpin our considerations. In some cases these are matters of fact and in some cases matters of fact and law. They are:

- Firstly, whether or not the Freshwater Plan in its present form does preclude or potentially preclude the grant of regional consents to TGP having regard to the provisions of s104D as contended by NZTA;
- Secondly, a finding as to the condition of Horokiri, Ration and Pauatahanui Streams (and the other streams potentially affected by TGP) and whether or not the avoidance of adverse effects is the only appropriate mechanism under RMA to enable their sustainable management;
- Thirdly, the significance of TGP; and

[23] Decision A078/2008.

- Fourthly, a determination as to what constitutes *offsetting*.

We consider those matters in the order above.

Does the Freshwater Plan in its present form preclude or potentially preclude the grant of regional consents to TGP having regard to the provisions of s104D RMA?

[162] We have previously identified the reasons why NZTA made its Request in paras [55]-[61] above, but for the purposes of this discussion summarise them as follows:

- Rule 50 of the Freshwater Plan provides that the reclamation of the beds of lakes or rivers (excluding Lake Wairarapa) is a non-complying activity.
- Although the word reclamation is not defined in the RMA or the Freshwater Plan, no party to these proceedings disputed that works in water bodies affected by TGP may fall within the commonly accepted meaning of that word. Accordingly, non-complying activity consent under the Freshwater Plan will be required for at least some of these works.
- Non complying activity applications are subject to the provisions of s104D which require (in summary) that a resource consent for a non-complying activity may only be granted if a consent authority is satisfied that either:
  - the adverse effects of the activity on the environment will be minor; or
  - the application is for an activity that will not be contrary to the objectives and policies of (in this case) the Freshwater Plan.
- These two criteria are commonly referred to as the gateway tests. Unless a non-complying activity application passes through one of the gateways it cannot be considered for consent on its merits pursuant to s104.
- NZTA accepts that the magnitude of TGP is such that some adverse effects which it might have on the physical environment will be more than minor. TGP is accordingly unable to pass through the first (minor effects) gateway of s104D.
- NZTA has concluded that (arguably) TGP may be contrary to identified policies of the Freshwater Plan namely Policies 4.2.10, 7.2.1 and 7.2.2 which (individually and collectively) require the avoidance of adverse effects. If that was found to be the case by the consent authority considering any resource consent application for TGP, the application might not pass through the second (objectives and policies) gateway of s104D.
- Having failed to pass through either gateway of s104D, the application would consequently be declined without having been subject to a full appraisal having regard to its beneficial, as well as its adverse, effects. Such an appraisal is undertaken pursuant to s104 but would be precluded if the application had not passed the s104D gateway tests.

- NZTA contends that to the extent that the policies in question seek avoidance of adverse effects, they are unnecessarily restrictive in nature. It seeks to amend the policies to allow consideration of remedy, mitigation and offsetting of adverse effects as well as avoidance. NZTA contends that amending the Freshwater Plan in that manner will enable a full consideration of any resource consent applications for TGP.

[163] There was some debate between the parties before us as to whether or not the policies in question would have the constraining consequences claimed by NZTA. A brief summary of the other parties positions on that issue is as follows:

- KCDC did not directly address NZTA s propositions as to the consequences of the policies. However in the planning evidence which she gave on behalf of KCDC, Ms Thomson expressed the opinion that *...it is not a foregone conclusion that the TG Project will necessarily be contrary to the objectives and policies as a whole (in their current form) particularly if the project is designed in a way that is sympathetic to the waterways as indicated in Dr Keesing's evidence*. *On that basis the plan change may not be necessary*[24]. Accordingly, the position of KCDC as to whether or not the identified policies in their present form preclude a grant of consent to Transmission Gully could probably be described as *ambivalent*.

- Mr Bennion s submissions seem to have been predicated on the assumption that even if the policies have the consequences contended by NZTA, they are the appropriate policies to which TGP should be subject.

- In her submissions for the Director General, Ms Bradley identified two situations[25] where Policies 4.2.10, 7.2.1 and 7.2.2 in their present from could potentially preclude the grant of consent to TGP. However, the planning evidence of Mr Ericksen was largely directed at the appropriateness of the Request rather than its perceived necessity. Mr Ericksen went so far as to suggest that there may be other potentially significant policy barriers to the grant of consent to TGP in the Freshwater Plan which are not addressed by the Request.

- In his s42A report Mr Kyle expressed the following view:

> *....A broad judgement as to applicability and weighting in this regard is required. Section 104D does not allow for a deconstructionist approach whereby the proposal is assessed against each individual objective and policy, on the basis that if the proposal is contrary to any one of those it will fail the gateway test that applies.*
>
> *While we understand the NZTA's concerns and the reasoning for the plan change request, it may be that NZTA has adopted an overly cautious*

[24] Thomson, Evidence in Chief (EiC), para 4.24.

[25] Para 41.

approach to the likely assessment of the Transmission Gully Project against the relevant plan provisions[26].

- The officers of Greater Wellington (Messrs M McLea and J Streat) who prepared a s42A report for the Board, accepted that Policy 4.2.10 limited NZTA's options to offset reclamation activities in the named streams and *on balance* accepted the concerns of NZTA as to the possible effects of the policy provisions on TGP.[27]

- Mr Milne expressed reservations as to whether the policies would provide the hurdle to TGP which NZTA considered, but accepted that on at least some interpretations the policies could have that effect. On balance he considered that it was best for any uncertainties to be resolved.

[164] We concur with the view that on at least some interpretations the policies in question could operate to close the objectives and policies gateway of s104D RMA so as to preclude consideration of TGP on its merits pursuant to s104. Consideration of whether any particular proposal is contrary to the objectives and policies of any given regional or district plan is frequently a difficult and disputed exercise involving a broad consideration of objectives and policies overall. However in a situation where there are objectives or policies directed at specific outcomes (as in Policy 4.2.10), a proposal which is found to directly offend such objectives or policies may be found to be contrary to the objectives and policies of the plan overall.

[165] We appreciate that there are contrary arguments (such as those advanced by Ms Thomson for KCDC) but do not think that it is necessary for us to determine who is right or wrong in that regard. In the context of these proceedings, we consider that it is sufficient if we find that there is uncertainty as to the consequences of the policies insofar as any application for non-complying activity consent for TGP is concerned so that they potentially preclude the grant of consent to TGP. We find that to be the case.

[166] Accordingly, we conclude that the underlying rationale for the Request is well founded. That finding of itself does not lead us to the conclusion that the Request ought be approved but does mean that there is a *live issue* to be determined as to whether or not there should be an alteration to the policy framework of the Freshwater Plan to accommodate TGP as sought by NZTA and if so what form it might take.

Condition of streams

[167] TGP will affect, in some way or other, eight water bodies which lie within its route. Three of those water bodies (Horokiri, Ration and Pauatahanui streams) are identified in Appendix 2B of the Freshwater Plan as being water bodies which are to

[26] Mitchell Partnerships s42A Report, April 2011, paras 7.66 - 7.67

[27] Wellington Regional Council s42A Report, April 2011, para 18.

be managed for aquatic ecosystem purposes. Policy 4.2.10 seeks to avoid adverse effects of developments on the natural character of Appendix 2B waterways.

[168] Policy 7.2.2 applies to all eight of the water bodies in the TGP route and seeks ...*to not allow...* the use of the beds of water bodies for activities that have significant adverse effects on various values and qualities including (inter alia) the values held by tangata whenua and natural or amenity values. This policy can be described as requiring total avoidance of significant adverse effects on all of the water bodies concerned.

[169] Put in its simplest terms, what the Request seeks to do is to widen the policies in question to enable consideration of a range of responses to any adverse effects on the water bodies caused by TGP, other than simply avoidance of those effects. The amended policies proposed by NZTA seek to allow avoidance, remedy, mitigation or offsetting of adverse effects (including significant adverse effects) of TGP on the water bodies to be considered rather than just avoidance.

[170] That raises the question as to whether or not the condition and values of the water bodies which might be affected by TGP are such that avoidance of any adverse effects on them is the only appropriate resource management method to be used in their sustainable management. The Board heard evidence on this topic from the four expert ecological witnesses previously identified and whose evidence we have also previously summarised, namely:

- Dr Keesing for NZTA;
- Dr Ussher for the Director General;
- Ms Kettles for the Director General;
- Ms Bott for the Director General.

[171] We have noted that the Board required these witnesses to participate in an expert witness conference prior to our hearing with a view to resolving any disputed issues between them. Additionally, Ms Warren is a qualified ecologist and gave evidence on ecological matters. At the Board's direction she did not participate in the ecological witnesses' conference due to her stated interest in the proceedings as a submitter opposing the Request. She was however, given the opportunity to comment on the report from the expert witness conference.

[172] In his rebuttal evidence, Dr Keesing described the values of the water bodies which will be affected by TGP in these terms:

> *12. The water bodies affected by the TG Project are hill country water bodies in a fully ruralised area with catchments all having experienced catchment forest clearance, farming, riparian degradation, water quality changes, sedimentation and large changes in species composition. None are pristine or even high in terms of representing a pre-1840 condition or even a particularly natural condition.*
>
> *13. As my EIC states, these water bodies are not without value, but the value is relative. While in generally highly modified states, they nevertheless contain*

species of value and systems that at least mimic their natural state. Furthermore, these water bodies hold greater value because of the paucity of examples in even a reasonable state in rural and urbanized landscapes. They are, however, still very modified when compared to water bodies that are in "pristine" or good condition and are quite tolerant of changes to quality and quantity of water.

14. None of the water bodies affected by the TG Project are of sufficient quality, composition or sensitivity to require avoidance in order to maintain their current values.

[173] The expert witness conference was asked by the Board to comment specifically on the conclusion reached by Dr Keesing in his para 14 (above). The response contained in the witnesses' joint report was as follows:

Resolved

6. Agreed on the following with respect to:

(a) no streams affected by the Project are of such condition to require total avoidance (i.e. in the normal sense of the word rather than the policy meaning) but it is not known how tolerant they are to change. There are tipping points in condition beyond which degradation can occur rapidly. We are unsure of where the tipping points are in relation to these streams.

[174] In her comments on the joint report, Ms Warren said[28]:

I do not have sufficient knowledge of the particular streams to be able to agree or disagree with the assessment of their current state.

I agree that ecological systems will generally have a tipping point, and that this is difficult to predict. I would add that reversing deterioration after degradation can be very difficult, and in some cases will not be possible.

I would also note that any evaluation of the effect on the "current values" of a stream must clarify what those values are. The ecological condition overall of a stream could be maintained, while a particular value was adversely affected.

[175] We accept the evidence given by Dr Keesing and summarised in his paragraph 14. His opinion was not upset in cross-examination, nor was it challenged by any other contrary probative evidence. It was consistent with the advice given by the officers of Greater Wellington in their s42A report. It was confirmed at the conference of ecological witnesses, subject to the reservation that it was not known how tolerant the water bodies were to change and where the *tipping points* might be in relation to those streams. (We understood the term tipping point to describe the point at which there might be a precipitous decline in particular values.)

[28] Paula Warren's written comments on Ecological Conferencing, dated 4 July 2011.

[176] Accordingly, we find that the values of the water bodies to which the Request relates are not such that avoidance of adverse effects is the only appropriate method of sustainably managing the effects of the TGP on those water bodies. We consider that any consent authority considering resource consent applications for TGP should have available to it the full range of mechanisms contemplated in the Act, namely avoidance, remedy and mitigation, to manage any adverse effects occasioned by TGP.

[177] In making that finding, we are not suggesting that if and when a resource consent application for TGP is made, the relevant consent authority may not determine in light of the evidence before it, that avoidance of adverse effects on certain values is the appropriate response in any given instance. That would be for the consent authority to determine. However, the evidence satisfied us that avoidance is not the only method of managing adverse effects on the affected water bodies which should be available to the consent authority.

The significance of TGP

[178] NZTA contends that TGP is a project of such significance as to warrant making specific provision for it in the Freshwater Plan. NZTA identified a number of matters in support of that proposition which we have considered.

[179] Firstly, we have had regard to the fact that the Minister has determined to refer the matter to this Board pursuant to the provisions of s142(2)(a) which relevantly provides:

> *(2) If the Minister considers that a matter is or is part of a proposal of national significance, the Minister may call in the matter by making a direction to -*
> *(a) refer the matter to a board of inquiry for decision;*

[180] In determining that TGP is a proposal of national significance which ought be referred to this Board, the Minister was guided by the provisions of s142(3), which provides:

> *(3) In deciding whether a matter is or is part of a proposal of national significance, the Minister may have regard to:*
>
> *(a) any relevant factor, including whether the matter-*
>
> *(i) has aroused widespread public concern or interest regarding its actual or likely effect on the environment (including the global environment); or*
>
> *(ii) involves or is likely to involve significant use of natural and physical resources; or*
>
> *(iii) affects or is likely to affect a structure, feature, place or area of national significance; or*
>
> *(iv) affects or is likely to affect or is relevant to New Zealand's international obligations to the global environment; or*

(v) *results or is likely to result in or contribute to significant or irreversible changes to the environment (including the global environment); or*

(vi) *involves or is likely to involve technology, processes, or methods that are new to New Zealand and that may affect its environment; or*

(vii) *is or is likely to be significant in terms of section 8; or*

(viii) *will assist the Crown in fulfilling its public health, welfare, security or safety obligations or functions; or*

(ix) *affects or is likely to affect more than 1 region or district; or*

(x) *relates to a network utility operation that extends or is proposed to extend to more than 1 district or region.*

[181] The Minister clearly had regard to a number of the above factors in determining to refer the Request to this Board. The factors which lead to the Minister so deciding are set out in full in para [5] of this decision and it is not proposed to repeat them here.

[182] Secondly, we have had regard to the GPS issued by the Minister of Transport pursuant to the Land Transport Management Act 2003. The GPS identified seven RoNS including the road described as ...*Wellington Northern Corridor (Levin to Wellington) - State highway 1.* TGP is part of this road.

[183] The GPS describes the RoNS in these terms:

22. These are seven of New Zealand's most essential routes that require significant development to reduce congestion, improve safety and support economic growth. The purpose of listing roads as nationally significant is to ensure these priority roading developments are taken fully into account when the NZTA develops the National Land Transport Programme.

[184] Thirdly, in addition to its identification as a RoNS in the GPS, the Wellington Northern Corridor has been identified as being an appropriate project for funding in NZTA's National Land Transport Programme (NLTP). The importance and priority of the Northern Corridor is outlined in the Wellington Regional Summary to the NLTP[29] in these terms:

In Wellington, the entire length of SH1 between Levin and Wellington Airport has been identified as a RoNS because of the need to provide a quality link to service Wellington, the Kapiti Coast, Levin, Palmerston North and the wider lower North Island. Currently this route is regularly congested and has a relatively poor safety record, which inhibits the flows of people and freight and restricts economic growth.

[29] NLTP Wellington Regional Summary, pg 7.

[185] The WRLTS (2010-2040) is a statutory document prepared by the Regional Council. Policy 8.1 r of WRLTS is to:

> *Ensure the proposed Transmission Gully project is developed as the long term solution to address access reliability for State Highway 1 between MacKays and Linden.*

[186] In his evidence for NZTA, Mr Nicholson identified a number of benefits which would arise from TGP[30]. They include:

- Improved route security for the national and regional road network. SH1, SH2 and the North Island main trunk rail networks are presently vulnerable to damage and likely to be closed for many weeks in the event of large earthquake or storm events. TGP will provide a safer, more secure and efficient highway connection between Wellington and the lower North Island with greater resilience to earthquakes and flooding and greater route security in the event of a major incident or natural event.

- A reduction in journey times between Wellington and the lower North Island as TGP will provide a higher standard route with greater capacity and fewer intersections than the existing SH1. Currently SH1 between Levin and Wellington International Airport is regularly and severely congested at some times and in some locations.

- The existing SH1 presently has a poor safety record with one of the highest rates of fatal serious crashes per kilometre in the country. These safety risks often serve to exacerbate congestion problems. TGP will substantially improve the safety of the route for its users.

- The last benefit identified by Mr Nicholson was that diverting through traffic to TGP would reduce the community severance and amenity impact experienced by the coastal communities along the present SH1, which would become a local road.

Mr Nicholson was cross-examined by Mr Bennion as to calculation of the BCR which formed part of NZTA s assessment of the project economics. Other than that, his evidence as to the benefits of TGP was unchallenged in cross examination or in the evidence which we heard.

[187] We have no hesitation in finding that TGP is an important roading project at both a national and regional level. In reaching that conclusion we have had regard to the Minister s assessment that TGP is a proposal of national significance, the identification of TGP as part of a RoNS, the reference to TGP in the WRLTS and Mr Nicholson s direct evidence on the point.

[188] In considering this Request, we are obliged to have regard to the Minister s reasons for directing the Request to the Board[31] and to management plans and strategies

[30] EiC, paras 51-59.

[31] Section 149P(1)(a).

prepared under legislation other than the Act[32]. The determination of the Minister and provisions of other management plans and strategies are not binding on us but they are something which we must consider and give appropriate weight in our determination.

[189] Our assessment of the significance of TGP is undertaken in a limited context in these current proceedings. The issue for our determination is whether or not the significance of TGP is such that it is appropriate to consider changing the Freshwater Plan as sought by the Request.

[190] We find that TGP is of sufficient significance to warrant that consideration. That conclusion is based on our finding that TGP is a nationally and regionally important roading project, in conjunction with our earlier finding that the condition of the water bodies likely to be affected by TGP is not such that total avoidance of adverse effects on those water bodies is required.

[191] Making that finding does not require us to determine that TGP may or may not have adverse effects on water bodies which ought to be avoided irrespective of the significance of TGP. Nor does it require us to determine whether or not remedy or mitigation of adverse effects in the water bodies is the appropriate response to their management rather than avoidance in any given instance. Those are matters which will be determined by the relevant consent authority when and if resource consent applications are made to carry out TGP works in the water bodies concerned.

[192] It will be apparent from our earlier summary of the submissions made to us[33] that a number of parties to these proceedings challenged the concept that it was appropriate to make provision for roading projects such as TGP at all. We have made no determination on those issues which do not seem relevant to our considerations in this case. We are deciding the comparatively restricted issue of whether or not TGP is of such significance (whatever the views on its merits might be) that the policies of the Freshwater Plan ought to be changed in the manner requested by NZTA.

[193] It is also relevant to record that in the Request as originally proposed, NZTA proposed that the *Explanation* to Policy 4.2.33A contained the following statement:

> *This policy recognises that the Transmission Gully Project is particularly important for enabling people and communities to provide for their social, economic and cultural wellbeing and for their health and safety.*

[194] The Board suggested during the course of the hearing, that this statement could not be justified by the evidence before us. We understood NZTA to concur with that proposition. In the amended version of Policy 4.2.33A which NZTA advanced in closing, the *Explanation* recognised that the basis of the Policy was the significance

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[32] Section 66(2)(c)(i).

[33] Para [81] above.

attributed to TGP by the various national and regional policy documents we have identified rather than the wider benefits which were originally claimed. Again, our finding is consistent with that more limited recognition.

Offset/Offsetting

[195] We have previously referred[34] to the cascading management regime which NZTA seeks to insert in the Freshwater Plan through Policy 4.2.33A, providing that adverse effects of TGP are to be managed:

- By avoidance to the extent practicable;
- By being remedied to the extent practicable, if they cannot be practicably avoided;
- By being mitigated to the extent practicable if they cannot practicably be avoided or remedied;
- Finally, any adverse effects which cannot practicably be avoided, remedied or mitigated are to be offset.

[196] There was some confusion on the part those participating in the Request process as to just what NZTA meant by the term offset. That confusion arose for a number of reasons:

- Its identification as a separate final step in the cascading management regime indicated that NZTA considered that offset (or offsetting) was something different to avoidance, remedy or mitigation of adverse effects;
- The Explanation to Proposed Policy 4.2.33A defined offset as meaning *...taking action that will offset any adverse effects such as enhancing amenity, ecological, or recreational values on-site or elsewhere.* Inclusion of the word offset in the definition of offset is not particularly helpful (although it was a feature of a number of definitions which came before the Board during the course of the hearing). Further, the definition was very loosely phrased. Use of the words *...such as enhancing amenity, ecological, or recreational values on-site or elsewhere…* indicates that the specific means identified are examples only and appears to give NZTA an *open book* as to the nature of the offsets it would offer as part of any resource consent application;
- Because the proceedings before the Board were a plan change rather than a resource consent application, the specific proposals which NZTA might have to offset adverse effects of TGP were not put before the Board, so that those interested in these proceedings simply did not know what means NZTA proposed to offset any adverse effects of TGP;
- In their opening submissions, counsel for NZTA submitted that *...the concept of offsetting (which is sometimes referred to as environmental compensation) has*

[34] Para [29] above.

been well recognised through case law[35]. In fact, we understood (and we think ultimately that all parties agreed) that offsetting is something different to the concept commonly known as environmental compensation.

[197] These uncertainties gave rise to a concern that the Board was being asked to write into the Freshwater Plan as a policy, an open-ended provision enabling NZTA to offer a (presently) unidentified and unconfined range of compensatory measures to address adverse effects on water bodies, brought about by TGP.

[198] Both the Director General and KCDC sought that, if the Request was approved, a definition of offset offsetting should be included in the Freshwater Plan to give certainty as to what may come under that description. Mr Kyle raised concerns on this issue in his initial s42A Report and the Board had similar concerns. One of the matters which we will discuss in the succeeding section of this decision is whether or not reference to offsetting should be included in proposed Policy 4.2.33A at all, however the Board concurs with the view of those parties who advanced the proposition that if there is to be any reference to that concept in the Freshwater Plan it ought be properly defined.

[199] An appropriate starting point is the dictionary definition of the word. The New Shorter Oxford English Dictionary defines offset as meaning ...*A counterbalance to or compensation for something else; a consideration or amount diminishing or neutralizing the effect of a contrary one.* The Cambridge (Online) Dictionary defines offset as meaning ...*to balance one influence against an opposing influence, so that there is no great difference as a result.* Put in its simplest general terms, the concept of offset requires that an adverse effect is counterbalanced by a beneficial effect.

[200] The Act has not defined what constitutes offsetting or environmental compensation. In practice the terms have sometimes been used interchangeably (as they were by counsel for NZTA in their opening submissions). These concepts have largely developed as a matter of practice through applicants for resource consents offering various remedial, mitigatory or compensatory works to counter balance adverse effects caused by development proposals and have been the subject of a number of decisions of the Environment Court.

[201] In the Environment Court decision *J F Investments Ltd v Queenstown Lakes District Council*[36], Judge Jackson described the concept of environmental compensation in these terms:

> *The concept arises in this way: an applicant for a resource consent may choose or be required to avoid or mitigate or, occasionally, to remedy the adverse effects of a proposal. Or the applicant may volunteer to remedy or mitigate adverse effects of other activities. The offer may be fungible, that is of the same kind as the values or resources being lost, or different; it may be to*

[35] NZTA Opening Submissions, para 63.

[36] Decision C48 2006.

remedy or mitigate adverse effects on-site or off-site. We define as 'environmental compensation' any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought[37]*.*

And further:
In the context of these proceedings, the enabling concept suggests that land owners should be allowed to volunteer environmental compensation as a set-off for creating some adverse effects[38]*.* (We have assumed that the term set-off means the same as offset)

[202] In *J F Investments*, the Court recognised that there was a continuum of remedial or mitigating actions which might be offered by an applicant for resource consent. In considering the question of how to assess the value of those actions, the Court observed:

The practical answer is usually that if the proposed remedial or mitigatory action is the repair of damage of the same kind as the adverse effects of the activity, it is easier to accept as not only relevant, but reasonably necessary as well. Similarly, if the proposed remedy is also in the same area, landscape, or environment then its benefits, compared with the costs of the proposed activity, are more easily seen. Conversely, if the offered environmental compensation is too far in distance, kind or quality from the adverse effects caused by the proposed activity then it may be no longer reasonably necessary, but merely expedient for the developer to offer[39]*.*

[203] Accordingly, the Court in *J F Investments* appeared to use the terms set-off (offsetting) and environmental compensation interchangeably but identified the significance of proximity (in terms of distance, kind or quality) of the counter balancing action in assessing the value of that action. There comes a point at which the action being offered ceases to remedy or mitigate the adverse effect which has been created and is rather offered as an indirect but compensatory benefit for allowing that adverse effect. An example of the latter type of action would be an offer to make a cash payment to an environmental cause as a response to damaging a water body.

[204] That distinction was recognised by the Environment Court in its decision in *Haka International NZ Ltd v Auckland Regional Council*[40] where the Court was

[37] Decision C48 2006, para 8.

[38] Decision C48 2006, para 19.

[39] Decision C48 2006, para 37.

[40] Decision A097 2007.

considering the inclusion of provision allowing environmental compensation in a regional plan. The Court made the following observation:

> *We do observe however that in the future drafters of similar provisions might find increased clarity in differentiating between mitigation, in the traditional sense of lessening or making less intense, and compensation. Compensation does not carry a sense of the lessening of the adverse effect in question, but rather of offering recompense for the loss or impairment of whatever advantage or amenity has been affected*[41]*.*

[205] The distinction between counter balancing measures which remedy or mitigate adverse effects and those which compensate for them was significant in these proceedings in light of the failure of the Request to adequately identify what was meant by the term offset in proposed Policy 4.2.33A. If the term offset (or offsetting) could be interpreted as extending to include offers of recompense for any adverse effects on water bodies caused by TGP, which had no direct connection with those effects, then the ambit of Policy 4.2.33A was very wide indeed.

[206] It became apparent that NZTA did not seek to define offset as widely as suggested above. Mr Daysh explained his understanding of the word offset in these terms:

> *In my view offset for the Project would include carrying out related works to the overall stream environment but including in areas of the catchment they may be unaffected by the proposed works*[42]*.*
>
> And further:
> *I consider that offset is a form of mitigation with the primary distinction between the two terms being that mitigation can be carried out at the direct location of the effect. Offset can be utilised to compensate for these adverse effects away from the actual site where such an effect occurs*[43]*.*

It is apparent from those statements that Mr Daysh regarded offsetting as a form of mitigation undertaken away from the actual site where an effect had occurred.

[207] In his evidence for NZTA, Dr Keesing explained his understanding of the concept of offsetting in these terms:

> *Firstly, however, it is useful to step back and consider the appropriateness of any type of offsetting or environmental compensation. In my view the concept is sound where the evidence produces an assessment that does not require avoidance due to such high existing values and where mitigation or remedial action cannot sufficiently minimise or balance the adverse effect (often due the entire loss of a feature). An offset (a form of mitigation) should create a balance in ecological values before and after the effect as close as possible to*

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[41] Decision A097 2007, para 11.

[42] EIC, para 83.

[43] EIC, para 84.

the effect area, but ideally at least within the same Ecological District (the same scale ecological "significance" is usually assessed at). Offsetting does not always need to mean a spatial balance, but can mean the security of threatened values or to create the opportunity for an increase in values commensurate with the values loss[44]*.*

In these statements, Dr Keesing also uses the terms offsetting and environmental compensation interchangeably but recognises offset as *(a form of mitigation).*

[208] Similarly, in response to questions from Ms McIndoe, Dr Keesing used the terms interchangeably when he said:

Offsetting, which is a funny term is a little bit newer and to my mind, it is a form of compensation or it is a form of mitigation that you do when you have done

everything you can onsite or thereabouts, for the direct affect and you are trying to look for values you can add, to bring the thing to neutrality...To me offsetting has a special component to mitigation and it's away from the area of direct affect and it is to supplement mitigation going on. I don't like the term offset but I prefer compensation. It is sort of something that is above and beyond the current sites, remedial mitigation actions that you might do and it is often special, hopefully that helps someone.

Accordingly, Dr Keesing's view was that offsetting was something over and above remedial mitigation actions on the affected site and he preferred to call this concept compensation.

[209] In his evidence for the Director General, Dr Ussher referred to a widely used international definition of biodiversity offsets provided by the Business and Biodiversity Offsets Programme (an international collaboration of scientists, policy makers, industry and non-governmental organisations). We do not repeat that definition here as it was provided by Dr Ussher in the specific context of biodiversity offsetting. However, Dr Ussher participated in the caucus of ecological witnesses which, in response to questions from the Board, provided a wider definition of offsetting in these terms:

Offsets are measurable outcomes resulting from, and directly linked to, actions designed to compensate for residual adverse impacts arising from project development after appropriate avoidance, remedying and mitigation measures have been taken.

Again, as with Policy 4.2.33A, the definition appears to treat offsetting as something different to avoidance, remedying and mitigation, being something that deals with residual adverse effects after avoidance, remedy and mitigation have been undertaken.

[44] EIC, para 116.

However, in response to questions, Dr Ussher expressed the view that offsets ...*sit firmly and squarely within the realm of mitigation and not compensation*[45].

[210] What ultimately emerged from the evidence, representations and submissions of the parties was an acknowledgement that the term offsetting encompasses a range of measures which might be proposed to counter balance adverse effects of an activity, but generally fell into two broad categories. Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.

[211] That categorisation is consistent with the distinction recognised by the Environment Court in *Haka International*. NZTA made it clear in its closing submissions that it was not seeking to amend the Freshwater Plan to include provision for environmental compensation in the policies of the Freshwater Plan (although it observed that there was nothing to prevent NZTA from offering environmental compensation in the resource consent applications for TGP for consideration as an *other matter* under s104(1)(c)). NZTA acknowledged that the offsetting which it sought to have provided for in the Freshwater Plan was a form of remedy or mitigation of adverse effects on water bodies caused by TGP.

[212] During the course of the hearing a number of definitions of offsetting were tendered to the Board and were the subject of evidence and submission. This iterative process lead to NZTA offering a definition of the term offsetting in its closing submissions which made it clear that for the purposes of this Request, the concept of offsetting is a subset of remedy and□or mitigation (and possibly avoidance) of adverse effects. We will consider the specifics of NZTA□s amended definition later in this decision.

Summary of conclusions

[213] We summarise our conclusions in terms of the underpinning issues which we have identified as follows:

- The policies of the Freshwater Plan in their present form potentially preclude consideration of any resource consent application for TGP under s104 RMA due to the restrictions on grant of consent to applications for non-complying activities contained in s104D RMA;
- The values of the water bodies likely to be affected are not such that avoidance is the only appropriate method of managing adverse effects which should be available to any consent authority determining resource consent applications for TGP;
- TGP is a roading proposal of national and regional significance;

[45] NoE, pg 390.

- The definition and commentary which NZTA proposes be inserted in the *Explanation* to proposed Policy 4.2.33A adequately explain and define the concept of offsetting as a subset of remedy and mitigation for the purposes of consideration of this Request.

[214] We now turn to address the merits of the Request in light of these findings.

10 EVALUATION

10.1 KEY ISSUES FOR DETERMINATION

[215] As outlined previously, and as captured in our Minute and Direction[46] issued on the first day of the hearing, it appeared to us that answering four questions lies at the heart of our considerations in this inquiry. Those four questions are:

i) Does the regional plan in its present form preclude, or potentially preclude, the grant of the consent to the TGP, having regard to provisions of s104D?

ii) If the answer to the first question is yes, then is it appropriate to expand the policy framework of the regional plan as proposed by NZTA to enable consideration of the range of responses to TGP other than simply the avoidance of adverse effects? In answering that question the Board considers that regard should be had to the following issues:

a) Whether the condition of the streams affected by TGP is such that total avoidance of adverse effects is required?

b) The significance of TGP.

c) Consideration of alternatives to the plan change.

d) Consistency of the proposed plan change with the range of statutory provisions and instruments to which the Board needs to have regard.

e) Whether or not the proposed amendments achieve the objectives of the Regional Plan.

iii) If the answer to the second question is yes, then what is the appropriate form of the plan change, having regard to:

a) The objectives of the Regional Plan

b) The reservations previously expressed by the Board as to the meaning and inclusions of the term "offset" in the plan change.

[46] Minute and Direction of the Board, *Further Key Issues raised after NZTA opening submissions,* dated 7 July 2011.

iv) Does the plan change (in whatever form it might ultimately take) achieve the purposes of the Act?

[216] We address Questions 1 and 2 only briefly.

[217] We refer to our earlier findings summarised in para [213] (first bullet point) above which answer Question 1.

[218] Simply put, Question 2 asks whether it is appropriate to expand the policy framework of the Freshwater Plan as proposed by NZTA to enable consideration of the range of responses to TGP other than simply the avoidance of adverse effects? Originally we posed five sub-questions on this issue but the two key issues are those relating to:

- The condition of the streams affected by TGP, and
- The significance of TGP itself.

The remaining sub questions identify statutory tests which we are obliged to (and will) apply later in this decision.

[219] Insofar as the condition of the streams affected by TGP and the significance of TGP are concerned, we again refer to our earlier findings summarised in para [213] above. In the light of those findings we are satisfied that it is appropriate to give consideration to expanding the policy framework of the Freshwater Plan to enable any adverse effects of TGP on water bodies to be managed by a range of methods other than solely the avoidance of adverse effects.

[220] In that context, we briefly address the contention advanced by some submitters opposed to the Request that changing the Freshwater Plan to accommodate TGP creates an undesirable precedent. We do not accept that is the case. There are two reasons for that:

- Firstly, provision for private plan changes[47] has been a feature of the Act since its inception. In our experience such plan changes are commonly undertaken to advance specific projects;
- Secondly, and more relevantly for this Request, Part 6AA makes specific provision for the consideration of requests for plan changes by any person for proposals of national significance, as the Minister has found TGP to be. The Request accords with the process contemplated by the Act.

[221] Having determined that it is appropriate to consider expansion of the policy framework as requested by NZTA, the remaining questions which we have identified somewhat overlap as they encompass the various statutory tests that we are obliged to apply. We now consider those tests and in doing so answer the remaining questions.

[47] Schedule 1, Part 2.

10.2 RELEVANT RMA TESTS - SECTION 32 ASSESSMENT

[222] Section 67(1) provides that:

> *(1) A regional plan must state—*
>
> *(a) the objectives for the region; and*
>
> *(b) the policies to implement the objectives;* (our emphasis)*and*
>
> *(c) the rules (if any) to implement the policies.*

[223] The requirement in s67(1) is reflected in the requirement in s32 for the person proposing a plan change,[48] and the Board,[49] to evaluate whether the policies, rules or other methods proposed, are the most appropriate for achieving the objectives of the plan. Section 32 relevantly requires:

> *(3) An evaluation must examine-*
>
> *(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
>
> *(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*
>
> *(4) For the purposes of the examinations referred to in sub sections (3) and (3A), an evaluation must take into account-*
>
> *(a) the benefits and costs of policies, rules, or other methods; and*
>
> *(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.*

[224] In determining whether the proposed policy is the most appropriate way to achieve the objectives of the Plan, we have considered the following matters:

- What are the relevant objectives of the Freshwater Plan, in particular what is the predominant *focus and flavour* of the Plan's objectives that the proposed policies seek to achieve?;
- Does the new policy framework achieve those objectives having regard to efficiency and effectiveness and alternatives (options) including the status quo;
- What is the most appropriate form of the policy;
- How does the preferred policy framework *stack up* against the relevant statutory documents;

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[48] Sections 32(1)(d) and 145(9) and clause 22 of Schedule 1.

[49] Sections 32(2)(a) and 149P(6)(c).

- Finally, in overall terms, is the proposed policy framework in accordance with Part 2.

[225] These five matters form the structure for the remainder of this determination.

[226] Prior to our evaluation we briefly note a criticism of counsel for KCDC in respect to the NZTA s32 report[50] and Mr Daysh's evidence[51]. Mr Conway contended that the NZTA Daysh material appears to have included achievement or implementation of TGP as one of their criteria for assessing whether the Request satisfies the requirements of s32.

[227] We concur with Mr Conway that meeting the objectives of the person requesting the plan change is not one of the tests in s32. The relevant s32 inquiry is whether the policies are the most appropriate for achieving the objectives of the Freshwater Plan[52]. Notwithstanding this, we understood that Mr Conway acknowledged that any error on the part of NZTA in this regard, is not fatal to the s32 analysis given that this is an on-going process which continues into our assessment and determination. We record that whilst we have carefully examined NZTA s objectives in implementing TGP, we have done so, not in terms of a s32 assessment but rather, in terms of a contextual description of the reasons for and necessity of the Request.

10.3 THE RELEVANT OBJECTIVES OF THE FRESHWATER PLAN

[228] Before identifying the relevant objectives of the Freshwater Plan we record that:

- The objectives in question are *settled,* being part of the operative Freshwater Plan;
- The Request does not seek to change those objectives.

[229] We note that the *Long Bay* decision addresses the situation where the operative plan contains settled objectives which the plan change does not seek to alter. In summary, where the objectives of a plan are not themselves in question, they may be taken to represent sustainable management under section 5:[53]

> *Where there are higher level settled objectives then we agree with Suburban Estates Limited v Christchurch City Council that Part 2 RMA considerations are largely subsumed in those settled objectives and policies of the district plan.*

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[50] Page 33, part 4.4.

[51] EiC para 325.1.

[52] Section 32(3)(b); Long Bay requirement 10.

[53] Decision A078 2008, para 39.

[230] Consequently, we have assumed that the objectives of the Freshwater Plan achieve the purpose of the Act. We have focused on the relationship between the relevant existing objectives and the proposed policies and in particular on whether the proposed policies achieve the objectives and specifically which option for dealing with the Request most appropriately achieves those objectives.

[231] We consider that the relevant objectives of the Freshwater Plan in terms of the Request, are Objectives 4.1.4-6 (which relate to Policy 4.2.10) and Objective 7.1.1 (which relates to Policies 7.2.1 and 7.2.2). These objectives provide as follows:

> *4.1.4 The natural character of wetlands, and lakes and rivers and their margins, is preserved and protected from inappropriate subdivision, use and development.*
>
> *4.1.5 The life-supporting capacity of water and aquatic ecosystems is safeguarded from the adverse effects of any subdivision, use and development.*
>
> *4.1.6 Significant indigenous aquatic vegetation and significant habitats of fresh water fauna in water bodies are protected.*
>
> *7.1.1 Appropriate uses of the beds of rivers and lakes are allowed while avoiding, remedying, or mitigating any adverse effects.*

[232] These objectives are concerned with preserving, safeguarding and protecting identified values (in the case of Objectives 4.1.4-6) or avoiding, remedying or mitigating adverse effects (in the case of Objective 7.1.1). None of the objectives of themselves require outright avoidance of adverse effects as Policies 4.2.10 and 7.2.2 require. Arguably, the policies which seek absolute avoidance go further than the relevant objectives require. In any event s32(3)(b) requires us to assess whether or not the policies now promoted by NZTA are the most appropriate for achieving the identified objectives.

10.4 ALTERNATIVES/OPTIONS

[233] As part of its preparation of the Request, NZTA undertook a s32 assessment as it is required to do. We refer to that in paragraphs [62] to [64] above. We are obliged to undertake our own s32 assessment based upon the evidence and other material before us. Our s32 assessment is slightly different to that undertaken by NZTA and reflects the iterative process which the Request has undergone.

[234] In his advice to the Board in respect of s32 matters, Mr Milne identified five options for dealing with the Request being:

- Option 1 – The Board could reject the Request which would leave avoidance of significant adverse effects as mandatory in relation to all streams affected by the project. This could be described as the *status quo option*;
- Option 2 – The Board could retain avoidance as a mandatory requirement in respect of the Appendix 2B streams (which is the current Policy 4.2.10) and remove it from Policies 7.2.1 and 7.2.2;

- Option 3 – The Board could remove avoidance as a mandatory requirement for all streams affected by TGP but still provide for avoidance where practicable (effectively the current NZTA proposal);

- Option 4 – The Board could conclude that the *where practicable* requirement should only apply to the Appendix 2B streams and provide for avoidance, remedy or mitigation in relation to other streams (this appears to go further than requested by NZTA or sought by any party);

- Option 5 – The Board could simply provide for avoidance, remedy or mitigation with no preference for avoidance in relation to all streams. (This would be much less restrictive than the Request proposed and may be beyond the scope of the current request).

[235] We concur with Mr Milne's assessment. We do not consider that any party to the proceedings identified any other option that we need to address.

[236] It appears to us that in the first instance the choice as to which option is the most appropriate comes down to a choice between Option 1 (the status quo) and any of the remaining four options, all of which propose a change of some form or other.

[237] Those opposed to the Request in its totality effectively sought retention of the status quo. We do not consider that retaining the status quo is the most appropriate way of achieving the objectives. There are two reasons for that:

- Firstly, we do not consider that the identified objectives require that avoidance of adverse effects is the only or most appropriate way of achieving them, as the present policies provide;

- Secondly, we refer to our finding that the qualities of the water bodies potentially affected by TGP are not such that avoidance of adverse effects is the only way of sustainably managing effects which TGP may have on them. It is accordingly appropriate for the Freshwater Plan to provide for a wider range of options for management of adverse effects on those water bodies than just avoidance of those effects.

[238] We consider that the most appropriate way to achieve the objectives is through the inclusion of new policies in the Freshwater Plan which enable consideration of TGP in accordance with the widest range of management methods contemplated in the Act for the promotion of sustainable management namely avoidance, remedy and mitigation of adverse effects. We therefore reject the status quo option.

[239] In terms of the remaining options, we reject options 2 and 4 which contemplate the inclusion of specific policy provisions applicable only to the Appendix 2B water bodies. Underlying that rejection is the finding that none of the water bodies have qualities such that avoidance is the only appropriate means of their management. That being so, it appears to us that a consistent management regime ought to apply to them all. We also consider that efficiency and effectiveness require consistent management. We note Mr Milne's reservations about the vires of option 4 in any event.

[240] We similarly reject option 5. The Request proposed that avoidance of adverse effects where practicable was NZTA's preferred option, even if avoidance was not necessary. We think that Drs Keesing and Ussher agreed that as a general principle, avoidance of adverse effects should always be the first consideration where that was practicable. Again, we note Mr Milne's reservations as to the vires of option 5.

[241] That brings us to the conclusion that option 3, removing avoidance as a mandatory requirement, but still providing for avoidance as the preferred management mechanism for all of the water bodies which may be affected by TGP, is the most appropriate means for achieving the objectives of the Freshwater Plan having regard to its efficiency and effectiveness. That conclusion in turn leads us to consider the appropriate form of the change which we have determined should be made to the Freshwater Plan.

10.5 FORM AND WORDING OF NEW POLICIES

[242] In their closing submissions, counsel for NZTA submitted that in light of the evidence before the Board, Policy 4.2.33A ought be in the following form:

> *4.2.33A To manage adverse effects of the development of the Transmission Gully Project in accordance with the following management regime:*
>
> *a. Adverse effects are avoided to the extent practicable;*
>
> *b. Adverse effects which cannot be avoided are remedied or mitigated (including by offsetting).*
>
> ***Explanation:*** *this policy recognises that the Transmission Gully Project is identified in relevant policy documents as having both national and regional significance. Accordingly, the adverse effects of aspects of the project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated. The policy creates a management regime for the avoidance, remedying, or mitigation of adverse effects.*
>
> *In this policy "offsetting" means the provision of a positive effect in one location to offset adverse effects of the same or similar type caused by the Transmission Gully Project at another location with the result that the overall adverse effects on the values of the water bodies are avoided, remedied or mitigated.*
>
> *Where offsetting is to be applied, there should be a clear connection with the effect and the offsetting measure. The offsetting measure should preferably be applied as close as possible to the site incurring the effects (with a principle of benefit diminishing with distance). Hence there should be a focus on offsetting occurring along the Transmission Gully route and to specifically address the effects at issue.*
>
> *Offsetting should, as far as can be achieved maintain and enhance the particular values affected by the Project when assessed overall.*

The adequacy of a proposed offsetting measure should be transparent in that it is assessed against a recognised methodology.

[243] In summary, NZTA proposed to amend proposed Policy 4.2.33A from its form as notified to;

- *Flatten* the cascading hierarchy so that avoidance of adverse effects where practicable is the preferred option, but there is no expressed preference as between remediation and mitigation. This is consistent with Option 3 above and does not raise any scope issues in terms of the initial application;
- Incorporate clarification that offsetting can be used to remedy or mitigate adverse effects;
- Amend the first sentence of the Explanation to recognise that the significance of TGP is founded on its inclusion in various national and regional documents;
- Incorporate an amended definition of offsetting;
- Remove reference to SEV.

It was NZTA's position that the amended proposed policy is the most appropriate to achieve the relevant objectives of the Freshwater Plan.

10.6 THE HIERACHY AND OFFSETTING

[244] In considering NZTA's amended proposal it was necessary for us to address firstly, the cascading hierarchy and secondly, the place of offsetting in the Policy.

[245] Dealing firstly with the cascading hierarchy, we support a change to the policy framework for the following reasons:

- The cascading concept promoted by NZTA in the Request was supported by the Director General, KCDC, and several submitters. The ecological evidence presented by Dr Keesing in particular (which was supported by Dr Ussher) was that in a practical sense avoidance of adverse effects was the natural and preferred outcome in any situation, followed by remediation/mitigation, without any preference between those two methods. The lack of preference between remediation and mitigation reflected the desire to have all options available (following avoidance) to achieve the best environmental outcomes;
- Although the Act does not provide a preference between avoidance, remedy or mitigation, the Freshwater Plan seeks to preserve, safeguard and protect natural values. Although those concepts do not require absolute avoidance of adverse effects, we consider that they support a preference for avoidance as a starting point before consideration of the other alternatives (including offsetting). This view was supported by the ecologists' evidence that avoidance of adverse effects was a natural first step and preferred as an outcome. That preference is reflected in the revised policy wording proposed by the Board. We consider that promotion of avoidance as a preferred option is an appropriate first step in managing adverse effects of TGP.

[246] Secondly, and in terms of offsetting we record:

- We agree with the end position of NZTA that offsetting is a subset of remedying or mitigating effects. Ultimately there was general agreement that compensation did not constitute offsetting but if it was advanced as part of any application for TGP, could be considered pursuant to s104(1)(c);

- We are aware that offsetting is a concept already identified in the Freshwater plan under Policies 4.2.14, 4.2.15, 6.2.15 and 10.4. We think that it is generally apparent from those policies that offsetting is regarded as an aspect of avoidance remedy or mitigation although that is not always clear.

[247] We have concluded that for the purposes of TGP the concept of offsetting is intended to encompass management methods which fall into the categories of remedying or mitigating (or possibly even avoiding) adverse effects. That being so there is no need to include reference to offsetting in the policy hierarchy proposed by NZTA even though NZTA continued to seek its inclusion in its closing submissions.

[248] However, we accept that in light of NZTA's stated intention to provide for offsetting as a means to remedy or mitigate any adverse effects of TGP when resource consent applications are made, Policy 4.2.33A ought include a clear definition of offsetting. The place to do that is in the Explanation to the Policy rather than in the cascade established by the Policy itself.

10.7 SPECIFIC WORDING

[249] There were several versions of proposed Policy 4.2.33A advanced by the parties during the course of our hearing. This included suggestions from Counsel for NZTA, the Director General, KCDC and Ms Warren and also from Mr Kyle and from Mr Milne. Some of these were amended or abandoned as the hearing progressed. The form of the Policy suggested in NZTA's closing reflects that iterative process.

[250] In selecting the appropriate wording of the Policy, we wished to ensure that the wording of the new Policy 4.2.33A (and consequential changes to existing Policies) is clear and easily understood. To this end, there was a deliberate focus not only on the Policy itself but also on the attendant Explanation. There was also consideration given to the need for additional definitions to aid with interpretation of the Policy. We considered that the flattening of the cascading hierarchy in itself assisted in clarifying the Policy.

[251] The resultant policy framework adopted by the Board is set out in Appendices 1 and 2. Appendix 1 is a tracked changes version of the notified Request. The extent and type of changes that have been decided by the Board are readily apparent. Appendix 2 is simply a *clean* version of Appendix 1. The reasons for these changes are set out below:

Policy 4.2.10

- The last sentence of the Policy has been altered to include the reference ...*in relation to its effects on the Horokiri, Ration and lower Pauatahanui Streams.*

We considered that while this reference may not be necessary in terms of the Policy itself, its inclusion removed any doubt over the application of Rule 50 in terms of TGP.

- Reference to *offsetting* in the Explanation has been removed. For the purposes of this Policy reference to avoidance, remedy and mitigation are all that is required. The concept of offsetting is adequately dealt with in the Explanation to Policy 4.2.33A.

- The remainder of the changes to this Policy and Explanation as notified in the Request were considered appropriate by the Board.

Policy 4.2.33A

- The Policy is altered to remove any separation between remedy and mitigation as suggested by NZTA in closing. Reference to offset is also removed from the cascading hierarchy contained in the Policy. The Board considered that reference to offsetting was not necessary for the reasons previously stated[54]. In light of the stated intention of NZTA to propose offsetting as part of the remediation and mitigation package for TGP, we agree that it is appropriate to include a reference to and definition of offsetting in the Explanation to the Policy.

- For the reasons previously stated[55], we considered that maintaining provision for avoidance to the extent practicable as a preferred first category, indicates that in all cases the initial objective should be to avoid effects on the natural character of the water bodies affected by TGP. If adverse effects cannot practicably be avoided then the ability to remedy and mitigate (including by offsetting) would provide any future consent authority with the ability to consider all possible methods of management of adverse effects in order to achieve the best overall environmental outcome.

- We considered that the inclusion in the Explanation to Policy 4.2.33A of a definition of the term ...*to the extent practicable,* was appropriate. We agree with the submission of Director General that there ought to be such a definition and we also agree with the definition suggested by the Director General. We have adopted that definition in our Appendices 1 and 2.

- We have not included in the Policy a requirement for avoidance of adverse effects on vulnerable or irreplaceable indigenous biodiversity as sought by the Director General. Mr Bennion also requested a reference to threatened indigenous species or rare or threatened ecosystems. We agree with counsel for NZTA that there is no need to do so. If in any instance, avoidance of adverse effects on particular values is required to achieve sustainable

[54] Paras [195]-[212].

[55] Paras [195]-[212].

management, that response is available to a consent authority under the Policy as we have drafted it.

Policies 7.2.1 □ 7.2.2

- Policy 7.2.2 appeared to the Board to be inconsistent with the new proposed Policies 4.2.10 and 4.2.33A and amendments as we have drafted are needed to provide a specific reference to TGP.
- Changes to Policy 7.2.1 were not strictly necessary, but were included for completeness and clarity.

Definitions

- We noted the agreement amongst all parties for need to have a clear and yet flexible definition of TGP. The definition promoted by NZTA included a plan of the TGP route (which we have included as Appendix 3). In our view this adequately defined TGP and would give the consent authority the ability to identify activities relating to TGP.
- The definition proposed by NZTA uses the term *works in proximity* in defining works which are part of TGP. Mr Daysh advised that these words were added to the pre-lodgement version of the definition which had previously just referred to *works associated with implementation of the project*. We agree that further refinement was necessary to provide a spatial component to what those works might be. We considered providing a defined physical dimension to what *in proximity* means but decided that whatever figure might be used would be arbitrary. Ultimately we agreed that the words *in proximity* would suffice.

[252] For the above reasons, the amended provisions set out in Appendices 1, 2 and 3 are considered to represent the most appropriate form and wording of the plan change requested by NZTA.

10.8 CONSIDERATION OF RELEVANT STATUTORY INSTRUMENTS

[253] There is a range of statutory instruments that the Board must consider when assessing the Request. The Board has considered these in the three categories set out below, which are then discussed in the following sub-sections:

- National policy statements (previously referred to as NPS);
- Regional documents; and
- Other statutory plans.

[254] Section 67(3)(a) and (b) require that the Freshwater Plan, being a regional plan, must *give effect to* any NPS or any New Zealand coastal policy statement. We have previously identified the relevant statutory instruments in paragraphs [41] and [44] above.

[255] Before considering those instruments in detail, it is useful to briefly consider what the term *give effect to* means in relation to the Request specifically, as opposed to the Freshwater Plan as a whole. It was argued by NZTA that there is no requirement for the Request itself to *give effect* to a NPS, but rather that it is the Freshwater Plan as a whole that must give effect to a NPS[56].

[256] It was submitted by Ms Bradley that *...there is no reason that it would not be practicable for the plan change to be required to give effect to the provisions of the NPS [on Freshwater Management] or [the] NZCPS in as far as they are relevant to the implementation of the plan change.*[57]

[257] Mr Bennion accepted that it is not the Board's role to review the Freshwater Plan to fully give effect to (in this instance) the NPS(FM), but submitted that the amendments proposed should give effect to that instrument within the scope of the amendments[58]. He argued that a Request that is inconsistent with a provision of a NPS would clearly not give effect to it. He went further to say that a plan change that was not inconsistent with a NPS, but that would be altered, within its scope, to address matters in the NPS, would also not give effect to the NPS[59].

[258] We consider that the position is as follows:

- Section 67(3)(a) and (b) impose positive obligations on regional plans to give effect to NPS. This obligation appears to be different to that contained in s67(4) which requires that regional plans may not be inconsistent with various identified instruments. However, we accept that regional plans which are inconsistent with NPS cannot be said to give effect to them.

- The Request seeks to change only limited provisions in the Freshwater Plan relevant to TGP. We do not consider that the Request needs to give effect to wider provisions of any NPS that are beyond the limited scope of the Request.

- The Act provides that it is only operative regional plans[60] and operative changes to such plans (as opposed to proposed regional plans or proposed changes to such plans) which must give effect to NPS. This particular proposed change to the Freshwater Plan does not set out to give effect to any NPS, nor is it required to do so. We accept that once they are incorporated into

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[56] This was discussed by counsel, in their Opening Submissions, para 131, in relation to the NPS(FM), but is equally applicable to other NPS.

[57] Director General, Submissions, para 57.

[58] Rational Transport Society etc, Opening Submissions, para 4.24.

[59] Rational Transport Society etc, Opening Submissions, para 4.25-4.26.

[60] Under s43AA a regional plan is defined as being an operative regional plan or operative change to a regional plan (as opposed to a proposed regional plan or proposed change to a regional plan).

the operative Freshwater Plan the plan changes requested cannot be such that they preclude the Freshwater Plan from giving effect to any NPS.

[259] Accordingly, we have asked ourselves, is there is anything in the Request that precludes the Freshwater Plan (when taken as a whole) from giving effect to the relevant NPS?

[260] The Freshwater Plan became operative on 17 December 1999. Section 79(1) requires that any provisions in a regional plan be reviewed within 10 years. As part of such a review, the Freshwater Plan will need to be considered in its entirety, including how it gives effect, overall, to the relevant NPS.

Proposed National Policy Statement on Indigenous Biodiversity

[261] The Board notes that the NPS(IB), is proposed only and has not as yet been approved. As such, we do not consider that it is at a stage where the Act requires that the Freshwater Plan gives effect to it.

[262] We acknowledge that the NPS(IB) includes a cascading management hierarchy which is similar to that proposed in this Request. However, as this NPS is proposed only, we do not give any weight to that as a precedent.

[263] The Board accepts the submission of Mr Hassan & Ms McIndoe that the Act does not require the Board to consider this document[61].

National Policy Statement on Electricity Transmission

[264] The NPS(ET) came into effect in 2008. It addresses the need to operate, maintain, develop and upgrade electricity transmission networks. Its policies recognise the national benefits of electricity transmission, manage the environmental effects of electricity transmission, manage the adverse effects of third parties on the transmission network, require territorial authorities to map the electricity transmission network and require decision makers to provide for the longer term strategic planning for transmission sites.

[265] The Board accepts the evidence of all planners who gave evidence that the NPS(ET) is not relevant to the matters being considered under this Request[62].

National Policy Statement for Renewable Electricity Generation

[266] The NPS(REG) came into effect on 13 May 2011. It seeks to ensure that a consistent approach is undertaken to planning for renewable electricity generation in New Zealand. It gives clear government direction on the benefits of renewable electricity generation and requires all councils to make provision for it in their plans. Again, the Board accepts the planning evidence that the NPS (REG) is not directly

[61] NZTA, Closing Submissions, para 58.

[62] Daysh, EiC, para 137; Kyle, Mitchell Partnerships s42A Report, April 2011, para 3.2.3.

applicable to the Request, although, as noted by My Daysh, it does include reference to the term offset[63].

New Zealand Coastal Policy Statement

[267] The NZCPS came into effect on 3 December 2010. While TGP will not be within any part of the coastal marine area, some of the streams that may be affected by TGP eventually discharge into the coastal marine area at the Pauatahanui inlet. We therefore consider that the NZCPS 2010 is a relevant consideration for the Board.

[268] NZCPS contains 7 objectives and 29 policies. In summary, the relevant objectives relate to:

- Safeguarding and sustaining the coastal environment;
- Preserving natural character and protecting natural features and landscapes;
- Taking account of the Treaty of Waitangi and recognising Tangata whenua as kaitiaki;
- Maintaining and enhancing public open space and recreation opportunities;
- Managing coastal hazard risks;
- Enabling people and communities to provide for their social, economic, and cultural wellbeing through subdivision, use, and development in the coastal environment; and
- Ensuring compliance with New Zealand's international obligations.

[269] Potentially relevant policies of NZCPS include:

- A policy requiring the application of the precautionary approach in certain circumstances;
- A policy requiring policy statements and plans to identify areas where subdivision, use and development are or may be *inappropriate*;
- Policies emphasising the importance of the coastal environment from a use and development perspective, including in relation to matters such as energy generation and transmission, aquaculture and ports;
- Policies requiring significant levels of protection for indigenous biodiversity, natural character, natural features and landscapes; and
- Policies requiring the management of natural and physical resources to improve water quality, particularly where it is degraded and manage the effects of sedimentation and coastal contamination.

[63] Daysh, EiC, para 138.

- A policy requiring the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment.

[270] The planning witnesses agreed that Policies 6 (Activities in the Coastal Environment), 13 (Preservation of Natural Character) and 22 (Sedimentation) of the NZCPS are of primary relevance, but were of the view that the NZCPS will be more relevant to the merits consideration associated with the subsequent consenting applications for TGP[64]. We agree with those comments. We note that Mr Ericksen was of the opinion that Policy 4 was also a relevant consideration.

[271] Mr Ericksen suggested that the Request was inconsistent with the NZCPS, and considered that the Board should require the Freshwater Plan to give effect to the NZCPS at this opportunity[65].

[272] For the reasons we have outlined earlier, we do not consider it necessary for the Request to give effect to the NZCPS. Mr Daysh concluded that there is nothing in the Request which would detract from the ability of the Freshwater Plan to give effect to the NZCPS. His opinion was consistent with those of Ms Thomson and Mr Kyle[66] and we accept their evidence.

National Policy Statement for Freshwater Management

[273] The NPS(FM) came into effect on 1 July 2011. The Board accepts that it is of direct relevance to this inquiry. That was agreed at the planning witness conference.[67]

[274] The NPS(FM) contains 8 objectives and 13 policies. In summary the objectives relate to:

- Safeguarding the life-supporting capacity of fresh water;
- Maintaining or improving the overall quality of freshwater;
- Sustainably managing the taking, using, damning, or diverting of fresh water;
- Avoiding further over allocation of freshwater;
- Maximising the efficient allocation and use of freshwater;
- Protecting significant values of wetlands;

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[64] Expert Conferencing Joint Report to the Board of Inquiry Planning, 15 June 2011, para 19.

[65] Ericksen, EiC, para 59.

[66] NZTA, Closing Submissions, para 59.

[67] Expert Conferencing Joint Report to the Board of Inquiry Planning, 15 June 2011, para 21.

- Integrated management of freshwater and the use and development of land;
- Ensuring that the values and interests of Tangata whenua are identified and reflected in the management of fresh water.

[275] In approaching the NPS(FM), the Board considered two matters.

- Firstly, the issue of giving effect to the NPS(FM) as canvassed earlier;
- Secondly, the substantive issue of compatibility between the policy framework being proposed by the Request and the framework of the NPS(FM).

[276] Without repeating the substance of our earlier discussion, the Board accepts that the Freshwater Plan, as a regional plan, must give effect to the NPS(FM), but we have considered whether the Request precludes the ability for the Freshwater Plan to do this, rather than considering if the Request in itself gives effect to this document.

[277] NZTA submitted, it is the responsibility of Greater Wellington, consistent with Policy E1 of the NPS(FM), to achieve this. Mr Erickson[68], suggested that the Board may wish to attempt to modify the Request to give effect to the NPS(FM) through the current proceedings. We respond as follows:

- In our view that is not appropriate. Any attempts to retrofit this Request so as to give effect to the NPS(FM) would be outside the scope of the Request.
- The Act requires regional councils to carry out a Schedule 1 response to the NPS(FM) in its entirety via the normal plan preparation, notification, submission and appeal process. To attempt to undertake this in microcosm through the current Request would not, in our view, represent best practice. In this respect, we refer to the limited nature of the Request, being a specific policy response to a specific project. In addition, the NPS(FM) directs regional councils to make changes to their regional plans outside the Schedule 1 process. Again, we consider that is outside the scope of the Request.

[278] Having determined that it is not necessary for the Request to give effect to the NPS(FM), we have nevertheless considered whether or not it is consistent with that document or precludes the Freshwater Plan from giving effect to it.

[279] All of the planners who appeared before us made an assessment of the Request against the relevant provisions of the NPS(FM). We also heard from the s42A writers on this topic.

[280] From the evidence presented, it was clear that provisions in the NPS(FM) relating to Water Quality (Part A) are the most relevant to the Board's decision here. Objective A1 is:

[68] Ericksen, EiC, paras 6 and 44.

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.

[281] Objective A2 seeks to ensure that:

The overall quality of fresh water within a region is maintained or improved while:

a) protecting the quality of outstanding freshwater bodies

b) protecting the significant values of wetlands and

c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

[282] In our assessment, the proposed (revised) Request framework does not run counter to these objectives nor the policies that follow them for the following reasons:

- Our suggested refinements to Policy 4.2.33A (and its attendant Explanation) would ensure that the safeguarding of life supporting capacity, ecosystem processes and indigenous species will be adequately achieved;
- Avoidance of adverse effects is the first preference under the proposed (revised) policy framework;
- When considering resource consent applications for TGP, the consent authority retains an overall discretion to determine whether adverse effects have been adequately addressed by NZTA. Nothing in the proposed policies precludes a consent authority from determining that the concepts of safeguarding or protecting provided for in Objectives A1 and A2, require the avoidance of adverse effects in any given case.

[283] Aside from Water Quality issues, we note that Part C of the NPS(FM) is a section titled Integrated Management. Objective C1 is:

To improve integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land, associated ecosystems and the coastal environment.

[284] Proposed Policy 4.2.33A (as refined) is consistent with achieving integrated management of fresh water and the development of land. It provides the opportunity to manage the effects of the use and development of land in a way that has particular regard to fresh water values through management methods which contemplate avoidance, remedy or mitigation of adverse effects.

[285] Part D relates to Tangata whenua roles and interests. Objective D1 is:

To provide for the involvement of iwi and hapu, and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water including associated ecosystems, and decision-making regarding

freshwater planning, including on how all other objectives of this national policy statement are given effect to.

[286] We were advised by Mr Nicholson[69] that NZTA was undertaking consultation with iwi and was in the process of preparing a MoU. We record that this was also discussed in Mr Daysh's evidence[70] and in the Reasons for Request Report.[71] Mr Daysh referred to this again in his rebuttal statement. In those references, Mr Daysh stressed that NZTA has consulted with tangata whenua over many years including in relation to this Request. He stated that he is aware that the draft MoU between NZTA and Ngati Toa includes provision for involvement of iwi in stream diversions and reclamation activity, including the design of streams, checking new stream channels before waters are diverted and involvement, if necessary, when waters are diverted.

[287] In his supplementary s42A Report, Mr Kyle raised concerns about NZTA's consultation with Ngati Toa, as follows:

- He noted that Objective D1 provides for the involvement of iwi in all elements of the decision making process including where it is proposed to make a change to a plan, as is the case here; and
- He observed that it appeared to him that much of the consultation that has occurred with Ngati Toa has essentially related to the future consenting process and there has been nothing specific produced with respect to the Ngati Toa views about the Request.

[288] Mr Kyle initially concluded that there is a potential shortcoming in the information provided by the NZTA with respect to the views of Ngati Toa in particular, regarding this particular Request. He did acknowledge however that this may be something that would be best addressed further at this hearing.

[289] In response, NZTA counsel referred to an email from Mr G Hastilow of Ngati Toa which was contained in Appendix E to the Reasons for Request Report. We agree with NZTA that this email clearly relates to the Request, rather than TGP more generally. Mr Kyle acknowledged this at the hearing and under cross-examination said that he had indicated that clarification might be provided at the hearing on this issue and agreed that it had been so in this instance.

[290] Finally on this issue, we acknowledge the point made in closing by counsel for NZTA that the development of memoranda of understanding can be a long process, and the resulting documents are not always publicly released. We accept the submission by that Counsel that Ngati Toa (or any other person) was able to lodge a submission on the Request if it was concerned that Tangata whenua roles and

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[69] NoE, pg 56.

[70] EiC, para 222-223; Rebuttal Evidence, para 15.

[71] Section 5.

interests had not been appropriately taken into account. We record that no such submission was lodged.

[291] For the above reasons, and following our review of the evidence on the relevant objectives and policies, we conclude that the proposed (revised) Request is not inconsistent with the NPS(FM) and will not preclude the Freshwater Plan from giving effect to that document.

Board's findings with respect to national policy statements and national instruments overall

[292] Accordingly, the Board finds that:

- There are no issues of inconsistency between the Request and any relevant NPS or the NZCPS;
- Inclusion of the changes sought by the Request in the Freshwater Plan will not preclude Greater Wellington from ensuring that the Freshwater Plan gives effect to relevant and operative national policy statements; and
- Matters relating to Tangata whenua roles and interests have been adequately canvassed insofar as they relate to the national instruments.

10.9 REGIONAL DOCUMENTS

Operative Regional Policy Statement

[293] Section 67(3)(c) requires that the Freshwater Plan gives effect to the operative Regional Policy Statement (RPS).

[294] The operative RPS has been in place since 1995. We note NZTA's contention that it should be given less weight now, as it is under review with decisions on submissions on the proposed RPS made in May 2010. We also note the comments of Mr Daysh that the operative RPS pre-dates the 2005 Amendments to the Act which added a new regional council function, for *...the strategic integration of infrastructure with land use through objectives, policies and methods (s30(1)(gb))*[72]. We agree with Mr Kyle that until such time as the appeals on the proposed RPS are resolved, the operative RPS remains relevant to this Request[73].

[295] The operative RPS contains a number of objectives and policies that are relevant to the Request. These include:

- The iwi environmental management system (Chapter 4);

[72] EiC, para 153.

[73] Mitchell Partnerships s42A Report, para 7.10.3.

- Fresh water (Chapter 5);
- Ecosystems (Chapter 9); and
- The built environment and transportation (Chapter 14).

[296] We consider that the Request is consistent with the operative RPS, and accept the evidence of Mr Daysh that the Request will not detract from the ability of the Freshwater Plan to give effect to the RPS[74]. We generally accept the comments of My Kyle in his supplementary s42A report[75], in that we agree that:

- TGP is recognised as being of regional and national significance;
- TGP seeks to provide a solution to the region's existing transportation and accessibility needs. Meeting those needs is important in providing for the social and economic wellbeing of communities; and
- NZTA recognises that adverse effects of TGP will need to be appropriately managed. The Request seeks to broaden the range of options to best manage the effects that would ultimately occur in those water bodies that are directly impacted by TGP.

[297] On the above basis, whilst it not possible to conclude that the Request will give effect to the operative RPS due to the restricted nature of the Request, it is not, in our view, inconsistent with the RPS and does not preclude the Freshwater Plan from giving effect to it.

[74] EiC, para 151.

[75] Mitchell Partnerships s42A Report, para 7.10.7.

Proposed Regional Policy Statement

[298] In considering the Request, Section 66(2)(a) requires us to have regard to the proposed RPS which contains sections dealing with:

- Energy, infrastructure and waste (section 3.3);
- Fresh water (section 3.4);
- Regional form, design and function (section 3.9); and
- Resource management with tangata whenua (section 3.10).

[299] In Mr Daysh's view, the Request appropriately recognises the proposed RPS because it seeks to implement the policies in the proposed RPS on Regionally Significant Infrastructure and also considers the proposed RPS provisions relating to natural and ecosystem values[76].

[300] Mr Kyle's initial view was that the proposed RPS favours a cautious approach to the waterways identified in its Appendix 1[77], particularly the policy protection that is to be provided by regional plans. It was his view that to allow adverse effects on these waterways could be inconsistent with these policies, and he suggested amendments to achieve this[78]. During the course of the hearing, Mr Kyle acknowledged that both the NZTA revised version of Policy 4.2.33A and a version suggested by Mr Milne addressed his initial reservations regarding the consistency of the proposed Policy with the relevant provisions of the proposed RPS. He added that he was ambivalent about which version might be ultimately selected should the Board decide to approve the Request. We understand this to indicate that he accepted that either version would be consistent with the proposed RPS.

[301] The Board considers that the proposed (revised) policy framework which we have set out in Appendices 1 and 2 is consistent with the proposed RPS.

Regional Plans

[302] Section 67(4)(b) requires that the Freshwater Plan is *not inconsistent with* the other regional plans for the region. The other operative regional plans for the Wellington region are the:

- Regional Coastal Plan;
- Regional Air Quality Management Plan;

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[76] EiC, para 163.

[77] Table 16, of Appendix 1 of the proposed RPS lists the Horokiri and Pauatahanui Streams as having significant indigenous ecosystems. Greater Wellington has identified in its key issues report that Ration Stream which is referred to as Little Waitangi in the proposed RPS is also listed in Appendix 1.

[78] Mitchell Partnerships s42A Report, para 7.10.17.

- Regional Soil Plan; and
- Regional Discharges to Land Plan.

[303] These plans by their very nature deal with matters unrelated to those covered in the Freshwater Plan, and we were not advised of there being any inconsistencies between these regional plans and the Request.

[304] With respect to the Freshwater Plan itself, we have assessed the Request against the Plan's objectives in a preceding section of this report. The Board is of the opinion that the Request is not inconsistent with the general approach of the Freshwater Plan. That was also the advice given to us by the officers of Greater Wellington Regional Council who undertook the s42A assessment.

10.10 OTHER STATUTORY PLANS

District Plans

[305] The following district plans are applicable to land affected by TGP:

- The Kapiti Coast District Plan;
- The Upper Hutt City Council District Plan;
- The Porirua City District Plan; and
- The Wellington City District Plan.

[306] The Board notes that under s75(4)(b), any of these district plans must not be inconsistent with the Freshwater Plan. However, we do not understand there to be a reverse requirement for the Freshwater Plan not to be inconsistent with the district plans. We have therefore concluded that while the provisions of these district plans will be relevant to TGP when resource consent applications are made, we do not need to consider them further in our decision on this Request.

Regional Land Transport Strategy

[307] Section 66(2)(c)(i) requires the Board, in considering the Request, to *...have regard to any management plans and strategies prepared under other Acts...to the extent that their content has a bearing on resource management issues of the region*.

[308] The WRLTS guides the development of the region's transport system and provides a context for investment in the regional transport network and supports both the Wellington Northern Corridor RoNS package and TGP. A relevant policy[79] of the WRLTS is to:

[79] WRLTS, pg 42.

Ensure the proposed Transmission Gully project is developed as the long term solution to address access reliability for State Highway 1 between MacKays and Linden.

[309] While we must have regard to the provisions of the WRLTS, we accept the view of Ms Thomson, that the WRLTS should not be given more weight in our considerations than Part 2 of the Act, the NPS(FM), the RPS or the Objectives of the Freshwater Plan itself[80].

[310] We do find that the Request is consistent with the policies of the WRLTS and that A*s currently drafted, the Freshwater Plan could be seen as a statutory bar to delivering on the intentions of the WRLTS*[81]. We accept that the Request is more consistent with the WRLTS than the current Freshwater Plan provisions. These are appropriate matters for us to take into account in our deliberations.

Conservation Management Strategy

[311] The CMS shows the location of a number of wildlife refuges and reserves, acknowledges the location of water bodies within these areas, and describes the values of Pauatahanui Inlet including the estuarine wetlands, and the management objectives for the area[82].

[312] There was some debate about the relevance of this document, with counsel for NZTA arguing that it is not relevant to the Request[83]. The CMS identifies the importance of the Pauatahanui Inlet primarily for its ecological values which was a matter raised by several submitters. We agree with the comments of Mr Kyle that it is apparent in the CMS that the Inlet has significant values, and that the actual effects on the streams and values within the Inlet is something to be carefully assessed during the consenting phase of TGP[84].

Iwi Management Plans

[313] There are no iwi management plans that the Board is required to consider in the context of this Request.

Greater Wellington Parks Network Plan

[314] After the conclusion of our hearing, but before the issue of this decision, Mr Horne forwarded to EPA a copy of the Greater Wellington Parks Network Plan dated July 2011 and requested that it be circulated to the Board. This document includes a

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[80] EiC, para 4.16.

[81] NZTA Opening Submissions, para 154.

[82] Director General Opening Submissions, para 62.

[83] NZTA Opening Submissions, para 156.

[84] Mitchell Partnerships s42A Report, 7.12.3.

section on Battle Hill Farm Forest Park. We have considered this document in our decision however it appears to be of limited relevance to our considerations on the Request. We accept that the document may possibly be of relevance at the time of consideration of any resource consent applications.

10.11 DOES THE REQUEST ASSIST GREATER WELLINGTON TO CARRY OUT ITS FUNCTIONS AND IS IT IN ACCORDANCE WITH THE PROVISIONS OF PART 2 OF THE ACT

[315] We consider these two matters together.

[316] The functions of Greater Wellington relevant to our consideration are those contained in s30, which provides:

30 Functions of regional councils under this Act

(1) *Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*

(a) *The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:*

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

(c) The control of the use of land for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:

(iii) The maintenance of the quantity of water in water bodies and coastal water:

(iiia) The maintenance and enhancement of ecosystems in water bodies and coastal water:

(iv) The avoidance or mitigation of natural hazards:

(v) The avoidance or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances:

(ca) The investigation of land for the purposes of identifying and monitoring contaminated land:

(d) In respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of -

(i) Land and associated natural and physical resources:

(ii) the occupation of space in, and the extraction of sand, shingle, shell or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:

(iii) The taking, use, damming, and diversion of water:

(iv) Discharges of contaminants into or onto land, air, or water and discharges of water into water:

(iva) The dumping and incineration of waste or other matter and the dumping of ships, aircraft, and offshore installations:

(v) Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

(vi) The emission of noise and the mitigation of the effects of noise:

(vii) Activities in relation to the surface of water:

(e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) The setting of any maximum or minimum levels or flows of water:

(ii) The control of the range, or rate of change, of levels or flows of water:

(iii) The control of the taking or use of geothermal energy:

(f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

(fa) If appropriate, the establishment of rules in a regional plan to allocate any of the following:

(i) The taking or use of water (other than open coastal water):

(ii) The taking or use of heat or energy from water (other than open coastal water):

(iii) The taking or use of heat or energy from the material surrounding geothermal water:

(iv) The capacity of air or water to assimilate a discharge of a contaminant:

(fb) If appropriate, and in conjunction with the Minister of Conservation, -

(i) The establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water:

(ii) The establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:

(g) In relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in that water body:

(iii) The maintenance of the quantity of water in that water body:

(iv) The avoidance or mitigation of natural hazards:

(ga) The establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

(gb) The strategic integration of infrastructure with land use through objectives, policies, and methods

(h) Any other functions specified in this Act.

(2) A regional council and the Minister of Conservation may perform the functions specified in the subsection (1)(d) to control the harvesting or enhancement of aquatic organisms to avoid, remedy, or mitigate -

(a) The effects on fishing and fisheries resources of occupying a coastal marine area for the purpose of aquaculture activities:

(b) The effects on fishing and fisheries resources of aquaculture activities:

(3) However, a regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii) or (vii) to control the harvesting or enhancement of aquatic organisms for the purpose of conserving, using, enhancing, or developing any fisheries resources controlled under the Fisheries Act 1996.

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) The rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) Nothing in paragraph (a) affects section 68(7); and

(c) The rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) In allocating the resource in anticipation of the expiry of existing consents, the rule may -

(i) Allocate all of the resource used for an activity to the same type of activity; or

(ii) Allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and

(e) The rule may allocate the resource among competing types of activities; and

(f) The rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

[317] We find that the Request will assist Greater Wellington in carrying out its relevant functions above. The present policy framework in the Freshwater Plan requires the avoidance of adverse effects but we are satisfied that it is appropriate for Greater Wellington to be able to manage the adverse effects of TGP on water bodies by their remedy or mitigation if avoidance is not practicable. Providing a more flexible policy framework enables Greater Wellington to reconcile potentially conflicting requirements of development and protection in an integrated fashion.

[318] Part 2 describes the purpose of the Act in these terms.

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

*(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while -*

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[319] Natural and physical resources are defined in s2 in these terms:

> ***Natural and physical resources*** *includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.*

Section 2 relevantly defines structures as meaning:

> ***Structure*** *means any building, equipment, device, or other facility made by people and which is fixed to land;*

[320] The water bodies potentially affected by TGP are natural and physical resources as are the roads which make up New Zealand's infrastructure. Section 5 requires that both are managed in a way which promotes sustainable management.

[321] NZTA seeks to enable people and communities to provide for their social and economic well-being and their health and safety through the promotion of an improved roading system. Other parties to these proceedings seek to provide for the cultural well-being of people and communities, to sustain the potential of water bodies to meet the foreseeable needs of future generations and to safeguard the life supporting capacity of those water bodies. Sustainable management involves the resolution of the tensions between the two.

[322] In our judgement, changing the Freshwater Plan to enable any consent authority to consider resource consent applications for TGP in accordance with a management regime which seeks to avoid adverse effects on those water bodies as a first preference but otherwise to remedy or mitigate any adverse effects is in accordance with Part 2 and will assist Greater Wellington in carrying out its functions to achieve the purpose of the Act.

[323] At present the policies of the Freshwater Plan which NZTA seeks to change, require avoidance of adverse effects on the water bodies in question. Such policies restrict the manner in which Greater Wellington may carry out its functions under the Act in respect of water bodies where we are satisfied that avoidance of adverse effects is not the only appropriate management method.

[324] Changing the provisions of the Freshwater Plan as requested by NZTA will enable any resource consent applications for TGP to be considered in the light of a policy framework which allows for the avoidance, remedy or mitigation of any adverse effects of TGP. We return to the point which we have made previously, that if avoidance of adverse effects is the appropriate response to effects of TGP in any given instance, that response is available to the consent authority under proposed Policy 4.2.33A. Similarly if remedy or mitigation of adverse effects is the appropriate response, those responses are available. Nothing in the Policy precludes the consent authority from determining that any proposed remedy or mitigation by way of offsetting is inadequate to such an extent that consent ought be

declined. We consider that such a policy framework is in accordance with the provisions of s5(2)(c) and best assists Greater Wellington in carrying out its functions to achieve the purpose of the Act.

[325] In reaching that conclusion we have been informed by the remaining provisions of Part 2 (more particularly, the provisions of sections 6, 7 and 8).

[326] Section 6 provides:

> ***6 Matters of national importance***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development:*
>
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
>
> *(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*
>
> *(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*
>
> *(f) The protection of historic heritage from inappropriate subdivision, use, and development.*
>
> *(g) The protection of protected customary rights.*

[327] In this case the relevant provisions appear to be s6(a) and (c). We comment as follows regarding those provisions:

- It is recognised that TGP may potentially have *downstream* effects on the coastal environment by way of sediment discharge to Pauatahanui Inlet. The consent authority determining resource consent applications for TGP will be required to consider the preservation of the natural character of the Inlet and whether or not TGP is an appropriate development. The changes to the Freshwater Plan proposed by NZTA do not preclude the consent authority from avoiding adverse effects of TGP on the coastal environment should it determine to do so. We do not consider that the Request is inconsistent with s6(a);

- Section 6(c) seeks protection of significant habitats of indigenous fauna. The evidence which we heard established that the water bodies within the TGP route were a habitat of indigenous fauna. However, we are satisfied that the significance of that habitat is not such that avoidance of adverse effects is the

only appropriate means of achieving sustainable management of the water bodies.

[328] Section 7 provides:

> ***7 Other matters***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to -*
> *(a) Kaitiakitanga:*
>
> *(aa) The ethic of stewardship:*
>
> *(b) The efficient use and development of natural and physical resources:*
>
> *(ba) the efficiency of the end use of energy:*
>
> *(c) The maintenance and enhancement of amenity values:*
>
> *(d) Intrinsic values of ecosystems:*
>
> *(e) [Repealed].*
>
> *(f) Maintenance and enhancement of the quality of the environment:*
>
> *(g) Any finite characteristics of natural and physical resources:*
>
> *(h) The protection of the habitat of trout and salmon:*
>
> *(i) The effects of climate change:*
>
> *(j) The benefits to be derived from the use and development of renewable energy.*

[329] It appears to us that subsections (a), (aa), (b), (d), (f), (g) are all relevant to our considerations:

- Section 7(a) requires us to have particular regard to Kaitiakitanga. In this instance we are advised that Ngati Toa has chosen to exercise its rights of Kaitiakitanga by way of direct negotiation with NZTA and entering into an MOU;
- The ethic of stewardship seeks to ensure the responsible use of resources. We are satisfied that the Request is consistent with that responsible use;
- Section 7(b) seeks that natural and physical resources are used and developed efficiently. The Request seeks to promote the efficient development of New Zealand s roading infrastructure. It is not inconsistent with s7(b);
- Section 7(d) requires us to have particular regard to the intrinsic values of the ecosystems within the water bodies likely to be effected by TGP. We are conscious of the fact that three of the water bodies in question have been included in Appendix 2B of the Freshwater Plan as water bodies to be managed for aquatic ecosystem purposes. Again, we refer to our finding that the

avoidance of adverse effects is not the only appropriate method of management of those water bodies;

- Appendix 2 water bodies have been identified in the Freshwater Plan as having a high degree of natural character. Section 7(f) requires us to have regard to the maintenance and enhancement of that natural character to the extent that it contributes to the quality of the environment. Nothing in the evidence which we heard leads us to the conclusion that avoidance of adverse effects is the only means of achieving maintenance and enhancement of that natural character;

- Finally we considered the finite characteristics of the water bodies in question. They are small water bodies confined to a distinct geographical area which have already been subjected to considerable degradation. The Request seeks that management of the water bodies may be undertaken by means of avoidance, remedial and mitigation measures (including offsetting) which may lead to better outcomes than current management of those water bodies. Again we are satisfied that nothing in the Request is inconsistent with s7(g).

[330] Section 8 provides:

> ***8 Treaty of Waitangi***
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

[331] We refer to the contents of para [329] (first bullet point) above. Again we are satisfied that any issues pertaining to the Treaty of Waitangi have been addressed through direct negotiation between NZTA and Ngati Toa.

11 OUTCOME

[332] We summarise our determinative findings and the reasons for them in these terms:

- TGP is a roading project which has been identified as nationally and regionally significant[85].

- TGP is likely to have adverse effects which are more than minor on water bodies on its route[86];

- The relevant policies of the Freshwater Plan require the avoidance of adverse effects on those water bodies, notwithstanding that avoidance of adverse

[85] Para [178] - [190] above.

[86] Para [98] above.

effects is not the only appropriate method of achieving their sustainable management provided for by the Act[87];

- The Freshwater Plan in its present form potentially precludes consideration of the merits of any resource consent applications for TGP in accordance with s104 as a consequence of the operation of s104D due the lack of flexibility in the relevant policies[88];
- Changing the Freshwater Plan to include provision for a wider range of management methods than just avoidance of adverse effects is the appropriate option to achieve sustainable management of the water bodies and allow consideration of resource consent applications for TGP *on their merits*[89];
- The appropriate form of the Request having regard to alternatives and to its efficiency and effectiveness in enabling the Freshwater Plan to achieve its Objectives, is that set out in Appendices 1 and 2[90];
- The changes to the Freshwater Plan contained in Appendices 1 and 2 do not of themselves give effect to any national or regional policy statements as they are limited in scope. The changes are not inconsistent with the relevant national and regional policy instruments and will not preclude the Freshwater Plan from giving effect to such instruments if they are incorporated into the Freshwater Plan[91];
- The changes to the Freshwater Plan contained in Appendices 1 and 2 will enable Greater Wellington to carry out its functions[92]; and
- The changes to the Freshwater Plan contained in Appendices 1 and 2 are in accordance with Part 2[93] and meet the purpose of the Act.

[333] Having regard to all of our findings above, we are satisfied that it is appropriate to approve the Request subject to the plan changes requested being in the form contained in Appendices 1 and 2. Changes should be made to the Freshwater Plan accordingly.

[334] Appendix 3 contains the map referred to in the definition of Transmission Gully Project.

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[87] Para [237] above.

[88] Para [162] – [166] above.

[89] Para [233] – [241] above.

[90] Para [242] – [252] above.

[91] Para [253] – [304] above.

[92] Para [316] – [317] above.

[93] Para [318]-[331] above.

[335] Appendices 4 and 5 contain summaries of reasons why we have accepted or rejected submissions on the issues identified in para [81] and (for the sake of completeness) on the individual submissions and cross submissions themselves.

[336] Prior to the issue of this Final Decision Report the Board had regard to comments received pursuant to S 149Q(5) from:

- Greater Wellington;
- Rational Transport Society Inc & P Warren;
- NZTA;
- The Director General.

A table of the comments received and the outcome of the Board's consideration of those comments is available from the EPA.

[337] This Decision and Report represents the unanimous opinion of the Board.

Dated this 5th day of October 2011

Signed: Environment Judge Brian Dwyer

Signed: Environment Commissioner Russell Howie

Signed: David McMahon

Signed: David Mitchell

Signed: Glenice Paine

12 APPENDICES

APPENDIX 1

PLAN CHANGE WITH TRACKED CHANGE REVISIONS

Key

Xxxxx – Additional text highlighted in the "As notified" Request by NZTA

~~Xxxxx~~ – Text to be removed, as identified by the Board.

Xxxxx – Text to be inserted, as identified by the Board.

Regional Freshwater Plan Chapter 4 - General Objectives and Policies

4.2.10 *To avoid adverse effects on wetlands, and lakes and rivers and their margins, identified in Appendix 2 (Parts A and B), (with the exception of the Transmission Gully Project and its effects on the Horokiri, Ration and lower Pauatahanui Streams where Policy 4.2.33A applies), when considering the protection of their natural character from the adverse effects of subdivision, use, and development. For the avoidance of doubt Rule 50 applies to the Transmission Gully Project, in relation to its effects on the Horokiri, Ration and lower Pauatahanui Streams.*

Explanation. *Wetlands, and lakes and rivers and their margins, are identified in Appendix 2 as having a high degree of natural character when assessed against the characteristics outlined in Policy 4.2.9.*

The preservation of natural character in this policy is achieved by avoiding adverse effects. In this policy "to avoid adverse effects" means that when "avoiding, remedying or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "To avoid adverse effects" means that only activities with effects that are no more than minor will be allowed in the water bodies identified unless Policy 4.2.33A applies. Further elaboration of the meaning of "minor" is contained in Policy 4.2.33 (Policy 4.2.33A provides the approach to be considered in relation to the Transmission Gully Project that includes avoidance, remediation, or mitigation of ~~or offsetting~~ adverse effects). Activities can occur in the water bodies listed in Appendix 2 but the emphasis in this policy is on preserving the natural character of these water bodies.

In this context "To avoid … when considering" relates to consideration during the preparation of, variation to, or change to, district and regional plans, or the consideration of any relevant resource consent application.

The wetlands, rivers and lakes which are identified in Part A of Appendix 2 are to have their water quality managed in its natural state according to Policy 5.2.1. The wetlands, rivers and lakes that are identified in Part B of Appendix 2 are to have their water quality managed for aquatic ecosystem purposes according to Policy 5.2.6.

The characteristics of a water body that are commonly perceived to contribute to its natural character are identified in the previous policy.

4.2.33A *To ~~allow~~ manage adverse effects of the development of the Transmission Gully Project, ~~which are more than minor, provided~~ in accordance with the following management regime:*

(1) Adverse effects are avoided to the extent practicable;

(2) Adverse effects which cannot be avoided are remedied or mitigated. ~~to the extent practicable;~~

~~(3) Adverse effects which cannot be avoided or remedied are mitigated to the extent practicable;~~

~~(4) Adverse effects which cannot practicably be avoided, remedied or mitigated are offset.~~

Explanation: *This policy recognises that the Transmission Gully Project is identified in various statutory and policy documents as having both national and regional significance. In achieving the sustainable management objectives of the Act, resource managers and decision makers have the option of applying avoidance, remediation and mitigation in managing adverse effects.* ~~*particularly important for enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.*~~ *Accordingly, the adverse effects of aspects of the Project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated.*

Remedying or mitigating can include the concept of offsetting. ~~*The policy creates a cascading hierarchy for the avoidance, remedying, or mitigation of adverse effects. However, the policy also provides that where none of these options are practicable, it may be appropriate to offset such effects.*~~ *"Offsetting" means the provision of a positive effect in one location to offset adverse effects of the same or similar type caused by the Transmission Gully Project at another location with the result that the overall adverse effects on the values of the waterbodies are remedied or mitigated.*

Where offsetting is to be applied, there should be a clear connection with the effect and the offsetting measure. The offsetting measure should preferably be applied as close as possible to the site incurring the effects. Hence, there should be a focus on offsetting occurring within the affected catchments along the Transmission Gully route and to specifically address the effects at issue.

Offsetting should, as far as can be achieved maintain and enhance the particular natural values affected by the Project when assessed overall.

The adequacy of a proposed offsetting measure should be transparent in that it is assessed against a recognised methodology.

In this policy "to the extent practicable" requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, the financial implications and adverse effects of the measure considered compared with other alternative measures, the current state of technical knowledge and the likelihood that effects can be successfully avoided, remedied or mitigated.

~~*In this context "offset" in clause (4) means taking action that will offset any adverse effects such as enhancing amenity, ecological, or recreational values on-site or elsewhere. Tools such as the "Stream Ecological Valuation" method may assist in evaluating the ecological offset ratio, which, based on measured values, sets the amount of offset required. Other ways of offsetting adverse effects are indicated in the second, third and fourth bullet points of Policy 4.2.36.*~~

Regional Freshwater Plan Chapter 7 - Use of the Beds of Rivers and Lakes and Development on the Floodplain

7.2.1 *To allow the following uses within river and lake beds:*

- *structures or activities for flood mitigation or erosion protection purposes;*
- *structures for transportation and network utility purposes; or*
- *structures for activities which need to be located in, on, under, or over the beds of rivers and lakes; or*
- *structures for cultural harvest (e.g., pa tuna); or*
- *the maintenance of any lawful structure; or*
- *the removal of aquatic weeds from farm drains and urban drains for drainage purposes; or*
- *the extraction of sand, gravel, or rock; or*
- *the diversion of water associated with activities that are otherwise authorised; or*
- *the enhancement of the natural character of any wetland, lake or river and its margins;*

provided that any adverse effects are avoided, remedied or mitigated and that the significant adverse effects identified in Policy 7.2.2 are avoided (unless the effects are of activities for the Transmission Gully Project and are addressed in accordance with Policy 4.2.33A).

Explanation. *Policy 7.2.1 lists criteria for appropriate uses within the beds of rivers and lakes. "Uses" refers to those activities identified in subsections 13(1)(a), 13(1)(b), 13(1)(c), 13(1)(d) and 13(1)(e) of the Act. Structures or activities that do not meet the criteria listed in the policy are inappropriate. For example, any structure associated with a use that does not have to be located in or on the bed of a river or lake is considered inappropriate.*

While a particular use of a river or lake bed may meet the criteria listed in the policy, it may need to comply with environmental controls, and is subject to Policy 7.2.2. The policy recognises that adverse effects of activities for the Transmission Gully Project can be considered according to Policy 4.2.33A.

7.2.2 *To not allow the use of river and lake beds for structures or activities that have significant adverse effects on:*

- *the values held by tangata whenua; and/or*
- *natural or amenity values; and/or*
- *lawful public access along a river or lake bed; and/or*
- *the flood hazard; and/or*
- *river or lake bed or bank stability; and/or*
- *water quality; and/or*
- *water quantity and hydraulic processes (such as river flows and sediment transport); and/or*
- *the safety of canoeists or rafters;*

unless the structures or activities are for the Transmission Gully Project and addressed in accordance with Policy 4.2.33A.

Explanation. *This policy lists characteristics of rivers and lakes that should not be significantly affected by uses of river and lake beds which are identified as "appropriate" in the previous policy. "Uses" has the same meaning as in Policy 7.2.1.*

When a new use of any river or lake bed is considered, due regard must be had to avoiding, remedying, or mitigating adverse effects on these characteristics.

In the context of this policy deciding on what are "significant adverse effects" is in part a value judgement which will be determined by the decision makers on resource consents, i.e., Regional Councillors or Hearing Commissioners. When deciding whether an adverse effect is significant or not, decision makers will have regard to:

- *the significance of any values identified; and*
- *the scale/magnitude of any adverse effects on the values identified; and*
- *the reversibility of any adverse effects on the values identified; and*
- *any other relevant provisions in the Plan.*

Reference in the policy to "the Transmission Gully Project and adverse effects that would otherwise be significant" recognises that these potential effects shall be addressed through Policy 4.2.33A.[1]

"Transmission Gully Project" is a strategic transport route as shown on the plan attached to this report as Appendix 3 and running from MacKays Crossing to Linden and the term includes works in proximity that are associated with the implementation of that project.

~~*"Transmission Gully Project" is a strategic transport route running from MacKays Crossing to Linden and the term includes works associated with the implementation of that project.*~~

~~*"Stream Ecological Valuation" (SEV) is a tool to assist in evaluating the ecological offset ratio, which, based on measured values, sets the amount of offset required".*~~

[1] We have included the original wording as requested by NZTA, but have reservations about the accuracy and relevance of this addition. The parties may make submissions on this matter in their comments on the Draft Report.

APPENDIX 2

PLAN CHANGE FINAL FORM WITH REVISIONS ACCEPTED

Regional Freshwater Plan Chapter 4 - General Objectives and Policies

4.2.10 To avoid adverse effects on wetlands, and lakes and rivers and their margins, identified in Appendix 2 (Parts A and B), (with the exception of the Transmission Gully Project and its effects on the Horokiri, Ration and lower Pauatahanui Streams where Policy 4.2.33A applies), when considering the protection of their natural character from the adverse effects of subdivision, use, and development. For the avoidance of doubt Rule 50 applies to the Transmission Gully Project, in relation to the Horokiri, Ration and lower Pauatahanui Streams.

Explanation. *Wetlands, and lakes and rivers and their margins, are identified in Appendix 2 as having a high degree of natural character when assessed against the characteristics outlined in Policy 4.2.9.*

The preservation of natural character in this policy is achieved by avoiding adverse effects. In this policy "to avoid adverse effects" means that when "avoiding, remedying or mitigating adverse effects", as identified in subsection 5(2)(c) of the Act, the emphasis is to be placed on avoiding adverse effects. "To avoid adverse effects" means that only activities with effects that are no more than minor will be allowed in the water bodies identified unless Policy 4.2.33A applies. Further elaboration of the meaning of "minor" is contained in Policy 4.2.33 (Policy 4.2.33A provides the approach to be considered in relation to the Transmission Gully Project that includes avoidance, remediation, or mitigation of adverse effects). Activities can occur in the water bodies listed in Appendix 2 but the emphasis in this policy is on preserving the natural character of these water bodies.

In this context "To avoid … when considering" relates to consideration during the preparation of, variation to, or change to, district and regional plans, or the consideration of any relevant resource consent application.

The wetlands, rivers and lakes which are identified in Part A of Appendix 2 are to have their water quality managed in its natural state according to Policy 5.2.1. The wetlands, rivers and lakes that are identified in Part B of Appendix 2 are to have their water quality managed for aquatic ecosystem purposes according to Policy 5.2.6.

The characteristics of a water body that are commonly perceived to contribute to its natural character are identified in the previous policy.

4.2.33A To manage adverse effects of the development of the Transmission Gully Project, in accordance with the following management regime:

(1) Adverse effects are avoided to the extent practicable;

(2) Adverse effects which cannot be avoided are remedied or mitigated.

Explanation: *This policy recognises that the Transmission Gully Project is identified in various statutory and policy documents as having both national and regional significance. In achieving the sustainable management objectives of the Act, resource managers and decision makers have the option of applying avoidance, remediation and mitigation in managing adverse effects. Accordingly, the adverse effects of aspects of*

the Project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated.

Remedying or mitigating can include the concept of offsetting. "Offsetting" means the provision of a positive effect in one location to offset adverse effects of the same or similar type caused by the Transmission Gully Project at another location with the result that the overall adverse effects on the values of the waterbodies are remedied or mitigated.

Where offsetting is to be applied, there should be a clear connection with the effect and the offsetting measure. The offsetting measure should preferably be applied as close as possible to the site incurring the effects. Hence, there should be a focus on offsetting occurring within the affected catchments along the Transmission Gully route and to specifically address the effects at issue.

Offsetting should, as far as can be achieved maintain and enhance the particular natural values affected by the Project when assessed overall.

The adequacy of a proposed offsetting measure should be transparent in that it is assessed against a recognised methodology.

In this policy "to the extent practicable" requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, the financial implications and adverse effects of the measure considered compared with other alternative measures, the current state of technical knowledge and the likelihood that effects can be successfully avoided, remedied or mitigated.

Regional Freshwater Plan Chapter 7 - Use of the Beds of Rivers and Lakes and Development on the Floodplain

7.2.1 To allow the following uses within river and lake beds:

- *structures or activities for flood mitigation or erosion protection purposes;*
- *structures for transportation and network utility purposes; or*
- *structures for activities which need to be located in, on, under, or over the beds of rivers and lakes; or*
- *structures for cultural harvest (e.g., pa tuna); or*
- *the maintenance of any lawful structure; or*
- *the removal of aquatic weeds from farm drains and urban drains for drainage purposes; or*
- *the extraction of sand, gravel, or rock; or*
- *the diversion of water associated with activities that are otherwise authorised; or*
- *the enhancement of the natural character of any wetland, lake or river and its margins;*

provided that any adverse effects are avoided, remedied or mitigated and that the significant adverse effects identified in Policy 7.2.2 are avoided (unless the effects are of activities for the Transmission Gully Project and are addressed in accordance with Policy 4.2.33A).

***Explanation.** Policy 7.2.1 lists criteria for appropriate uses within the beds of rivers and lakes. "Uses" refers to those activities identified in*

subsections 13(1)(a), 13(1)(b), 13(1)(c), 13(1)(d) and 13(1)(e) of the Act. Structures or activities that do not meet the criteria listed in the policy are inappropriate. For example, any structure associated with a use that does not have to be located in or on the bed of a river or lake is considered inappropriate.

While a particular use of a river or lake bed may meet the criteria listed in the policy, it may need to comply with environmental controls, and is subject to Policy 7.2.2. The policy recognises that adverse effects of activities for the Transmission Gully Project can be considered according to Policy 4.2.33A.

7.2.2 *To not allow the use of river and lake beds for structures or activities that have significant adverse effects on:*

- *the values held by tangata whenua; and/or*
- *natural or amenity values; and/or*
- *lawful public access along a river or lake bed; and/or*
- *the flood hazard; and/or*
- *river or lake bed or bank stability; and/or*
- *water quality; and/or*
- *water quantity and hydraulic processes (such as river flows and sediment transport); and/or*
- *the safety of canoeists or rafters;*

unless the structures or activities are for the Transmission Gully Project and addressed in accordance with Policy 4.2.33A.

Explanation. *This policy lists characteristics of rivers and lakes that should not be significantly affected by uses of river and lake beds which are identified as "appropriate" in the previous policy. "Uses" has the same meaning as in Policy 7.2.1.*

When a new use of any river or lake bed is considered, due regard must be had to avoiding, remedying, or mitigating adverse effects on these characteristics.

In the context of this policy deciding on what are “significant adverse effects” is in part a value judgement which will be determined by the decision makers on resource consents, i.e., Regional Councillors or Hearing Commissioners. When deciding whether an adverse effect is significant or not, decision makers will have regard to:

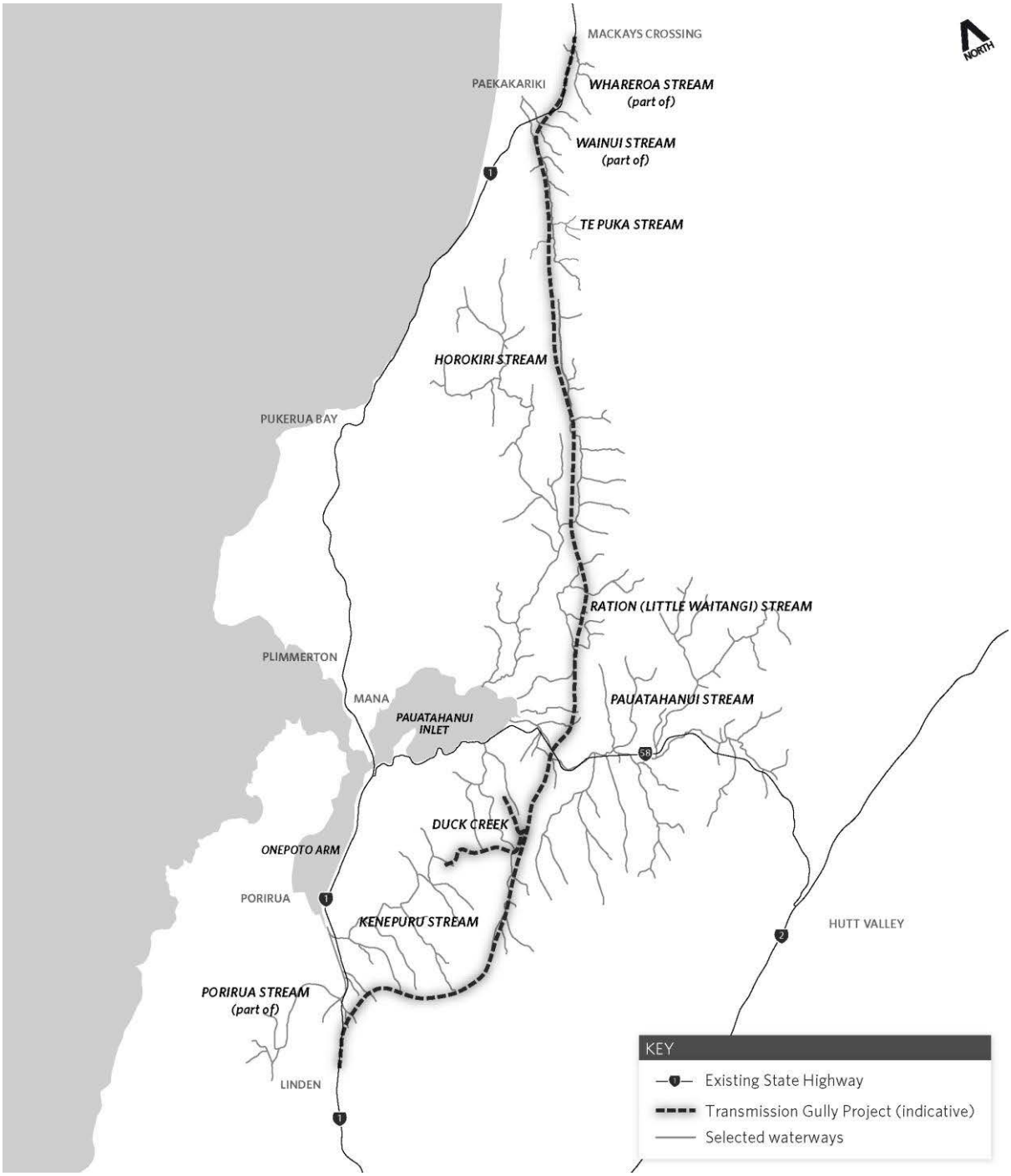
- *the significance of any values identified; and*
- *the scale/magnitude of any adverse effects on the values identified; and*
- *the reversibility of any adverse effects on the values identified; and*
- *any other relevant provisions in the Plan.*

Reference in the policy to “the Transmission Gully Project and adverse effects that would otherwise be significant” recognises that these potential effects shall be addressed through Policy 4.2.33A.

"Transmission Gully Project" is a strategic transport route as shown on the plan attached to this report as Appendix 3 and running from MacKays Crossing to Linden and the term includes works in proximity that are associated with the implementation of that project.

APPENDIX 3

MAP SHOWING INDICATIVE TRANSMISSION GULLY ROUTE


MACKAYS CROSSING
NORTH
PAEKAKARIKI
WHAREROA STREAM
(part of)
WAINUI STREAM
(part of)
TE PUKA STREAM
HOROKIRI STREAM
PUKERUA BAY
RATION (LITTLE WAITANGI) STREAM
PLIMMERTON
MANA
PAUATAHANUI INLET
PAUATAHANUI STREAM
DUCK CREEK
ONEPOTO ARM
PORIRUA
KENEPURU STREAM
HUTT VALLEY
PORIRUA STREAM
(part of)
LINDEN
KEY
Existing State Highway
Transmission Gully Project (indicative)
Selected waterways

APPENDIX 4

DECISIONS ON MATTERS RAISED IN SUBMISSIONS

In accordance with clause 10(2)(a)(ii) of Schedule 1 we address the issues raised in submissions identified in para [81] of this Report:

Environmental Effects on Important Streams

We have rejected those submissions which opposed the Request on the basis that allowing it would result in significant adverse effects on the streams affected by TGP. Our reason for doing so is our finding that the values of these streams potentially affected by TGP are not such that the avoidance of adverse effects is the only appropriate method of achieving their sustainable management.

The Justification for Exceptions to the Existing Provisions of the Freshwater Plan is Inappropriate or Inaccurate

We have rejected the submissions which contend that the justification for exceptions to the Freshwater Plan is inappropriate or inaccurate. Our reasons for doing so are that:

- We are satisfied that TGP is a nationally significant roading project;
- We find that the values of the streams potentially affected by TGP are not such that the avoidance of adverse effects is the only appropriate method of achieving their sustainable management;
- It is accordingly appropriate to allow consideration of resource consent applications for TGP under a more flexible policy framework than presently exists in the Freshwater Plan.

Impacts Extend Beyond Instream Values

We have rejected those submissions which raised this issue. Although we have accepted that water bodies other than Horokiri, Ration and Pauatahanui streams will be affected by TGP there was no evidence before us to support the submissions as to wider affects of drinking water, recreation, shallow aquifers etc. Insofar as the other matters raised under this head are concerned we find that:

- The values of the streams (other than Horokiri, Ration and Pauatahanui) that may potentially be affected by TGP are not such that the avoidance of adverse effects is the only appropriate method of achieving their sustainable management;
- Insofar as potential affects of TGP on Pauatahanui Inlet are concerned we refer to our findings that if any consent authority determines that avoidance of adverse effects of TGP on Pauatahanui Inlet is the appropriate response to resource consent applications, then that response remains available to it notwithstanding the inclusion of Policy 4.2.33A in the Freshwater Plan;
- There is nothing in the request which would detract from the ability of the Freshwater Plan to give effect to the NZCPS.

Impacts of the Transmission Gully Project

We have rejected those submissions which raise concerns relating to construction and implementation of TGP. We do so for two reasons:

- The submissions were unsupported by relevant evidence;
- We refer to our findings in a number of instances that matters relevant to TGP can be properly assessed and considered as part of any application for resource consents. Nothing in the request as approved by us precludes a full assessment of adverse effects of TGP.

The Protection Afforded by the Freshwater Plan is Appropriate

We have rejected those submissions which contended that if construction of TGP is to cause adverse effects on the environment, then the obstacles to this should not be removed from the Freshwater Plan. Our reason for doing so is our finding that the values of the streams potentially affected by TGP are not such that the avoidance of adverse effects is the only appropriate method of achieving their sustainable management.

Offsetting

We have rejected those submissions which contended that offsetting was an inappropriate way of managing the values of water bodies potentially affected by TGP. We have done so because the evidence of the ecologists led us to the view that offsetting is a technique commonly used for ecological management. Whether or not offsetting is the appropriate method for dealing with all (or any) adverse effects of TGP is something to be determined by the consent authority determining resource consent applications for TGP. Policy 4.2.33A does not require the application of offsetting in any given instance, it simply makes that method available (as a subset of mitigation or remedy) if it is appropriate.

We have accepted those submissions which have questioned the use of SEV as a method for assessing offsetting by deleting reference to SEV from Policy 4.2.33A. Whether or not SEV is in fact an appropriate method in any given instance is again something that will be determined by the consent authority. We have accepted in part the submission seeking a cascading hierarchy in Policy 4.2.33A by accepting the preference for avoidance where practicable.

The Plan Change may set a Precedent

We have rejected those submissions which raised precedent issues pertaining to the Request. The reason for doing so is that private plan changes are a mechanism provided for the Act and because Part 6AA specifically contemplates and provides for plan changes for proposals of national significance as we have found TGP to be.

Relevant Planning Documents

We have rejected those submissions which contended that the Request is contrary to various relevant planning instruments and inconsistent with others. We have found that the changes proposed in the Request are not inconsistent with any of the relevant national and regional policy statements and documents and will not preclude the Freshwater Plan from giving effect to such instruments. We have found that the changes proposed in the request are in accordance with Part 2.

Part 2 of the Act

We have rejected those submissions which expressed concerns about protection of the natural character of the coastal environment, effects of TGP on significant habitats of indigenous fauna and who argue that TGP does not represent an efficient use of natural and physical resources. None of the submissions to that effect were supported by relevant probative evidence. We refer to our earlier findings as to potential effects on Pauatahanui Inlet and our findings that the values of the streams potentially affected by TGP are not such that avoidance of adverse effects is the only appropriate method of achieving their sustainable management. We do not consider it necessary to address matters such as generation of traffic and the like as these were not relevant to the limited consideration of changes to the Freshwater Plan.

Importance of the Project

We have accepted those submissions which supported the Request, to the extent that it would remove barriers to the benefits arising from implementation of TGP. We have found that the Policies of the Freshwater plan in their present form do potentially preclude the grant of consents under that Plan to TGP.

We have rejected the submissions to the extent that the changes to the proposed Policies which we have required do not ensure that TGP will proceed (as the submissions sought), but rather that any resource consent applications to be made in respect of TGP may be considered in the context of policies which permit consideration of the fullest appropriate range of methods to manage adverse effects.

APPENDIX 5

DECISIONS ON SUBMISSIONS

Reference	Submitter	Position	Decision requested	Board Decision on Submission
0032	Alliance for Sustainable Kapiti, Inc (contact Marie O Sullivan)	Oppose in full	Reject. The submitter also seeks that Kapiti waterways are given protection in the Freshwater Plan.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0034	Appropriate Technology for Living Association (contact Paul Bruce)	Oppose in full	Reject. The submitter also proposes a new set of rules for permitted, discretionary and prohibited activities in the Freshwater Plan.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0041[1]	Richard Barber	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0024	Bronwyn Bell	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0009	Allan Bloomfield	Support in full	Accept.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. Request has been amended to reflect the Board s findings.
0001	Stephen Brouwer	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0038	Katy Brown	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0010	Benjamin Burkhart	Oppose in full	Not stated.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.

[1] This late submission was accepted by the Board of Inquiry on 23 03 2011.

0036	Director General of Conservation	Support in part Oppose in part	Accept the plan change subject to the amendments set out by the submitter.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings.
0003	Richard and Susan Finlay	Support in full	Not stated.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings.
0018	Nick Fisher	Oppose in full and in particular policy 4.2.33A	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0015	Lesley Frederikson	Oppose in part and are neutral in part.	Accept the plan change subject to addressing the concerns raised by the submitter.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings.
0031	Stacey Gasson	Oppose in full	Not stated.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0005	Corona Griffiths	Oppose in part	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0002	Marc Hastings Griffiths	Oppose in full	Not stated.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0023	Guardians of Pauatahanui Inlet (Anthony Shaw contact person)	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.

0039	John Horne	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0020	Kapiti Coast District Council	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0028	Jan Logie	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0021	Wayne Mackenzie	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0017	Patrick Morgan	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0013	Michael Nicholson	Oppose in part	Accept the plan change subject to addressing the concerns raised by the submitter.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board s findings.
0008	Russel Norman	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0022	Paremata Residents Association Inc.	Support in full	Accept.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board s findings.
0035	Pauatahanui Inlet Community Trust (PICT)	Support in full	Accept the plan change subject to addressing the concerns raised by the submitter.	Submission is rejected in part and accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings.

				The form of the plan change contained in the Request has been amended to reflect the Board□s findings.
0037	Karen Phillips	Support in full	Accept.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board□s findings.
0007	Mr Roger, Mrs Jennifer and Ms Karen Phillips	Support in full	Accept.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board□s findings.
0030	Porirua City Council (PCC) (contact Gary Simpson)	Support in full	Accept.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board□s findings.
0027	Public Transport Voice (Mike Mellor □ contact)	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0019	Rational Transport Society Incorporated (contact Paula Warren)	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0026	Royal Forest and Bird, Wellington Branch	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0014	Alison Smith	Oppose in full	Not stated.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.

0016	Tiffany Stewart	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0004	Michael and Kathleen Sudfeldt	Support in full	Not stated.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board s findings.
0033	Alice Taylor	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0025	The Coastal Highway Group	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0006	R & C Vasta Family Trust (contact Carol Vasta)	Support in full	Not stated.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board s findings.
0012	Paula Warren	Oppose in full	Reject. The submitter also suggests amendments to the Freshwater Plan to provide protection for all important water bodies and coastal areas from the effects of land use activities.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
0040[2]	Beverley Wakem and Nicky Chapman	Oppose in full	Reject.	Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.

[2] This late submission was accepted by the Board of Inquiry on 23 03 2011.

0011	Whitby Coastal Estates Ltd (contact David Bradford)	Support in part	Accept the plan change subject to addressing the concerns raised by the submitter.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings.
029	Winstone Aggregates, a division of Fletcher Concrete and Infrastructure Limited	Support in part Oppose in part	Accept the plan change subject to addressing the concerns raised by the submitter.	Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings.

FURTHER SUBMISSIONS

Reference	Submitter	Position	Decision requested	Board Decision on Submission
01	Living Streets Wellington and Cycle Aware Wellington	Oppose submission No. 13 - Michael Nicholson	Reject	Further Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.
02	Royal Forest & Bird, National Office	Oppose submission No.11 - Whitby Coastal Estates Ltd Support submission No.12 - Paula Warren Support submission No.20 - Kapiti Coast District Council Support submission No.26 - Royal Forest &	Disallow part of the submission that seeks to extend the offsetting principle to all projects. Allow submission reject plan change in full. Allow submission reject plan change in full Allow submission reject plan change in full	Further Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board's findings

		Bird, Wellington Branch Support submission No.23 - Guardians of Pauatahanui Inlet Support in part submission No.36 □ Director General of Conservation. Support submission No.8 - Russel Norman	 Allow submission reject plan change in full. Seek that the plan change is rejected in full. However, if the Board decides to grant the plan change, we seek greater certainty in several aspects of the plan change, as outlined by DOC at paragraph 5 of its submissions. Allow submission reject plan change in full.	
03	John Horne	Support submission No.34 - Appropriate Technology for Living Association Support submission No.12 - Paula Warren	Allow the whole of the original submission by adopting the plan change proposed, or an equally effective set of rules to manage the impacts of land uses on freshwater and coastal ecosystems and values Allow whole of submission	Further Submission is rejected because of the findings summarised in Para [332] and the identified reasons for each of those findings.

04	Director General of Conservation	Support submission No.29 - Winstone Aggregates Support in part submission No.40 □ Beverley Wakem & Nicky Chapman Support in part submission No.23 - Guardians of Pauatahanui Inlet	Allow in whole Allow in part Allow in part	Further Submission is accepted in part because of the findings summarised in Para [332] and the identified reasons for each of those findings. The form of the plan change contained in the Request has been amended to reflect the Board□s findings