

IN THE MATTER

of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER

of a notice of requirement ("**NoR**") for a designation by KiwiRail Holdings Limited ("**KiwiRail**") for the Palmerston North Regional Freight Hub ("**Freight Hub**") under section 168 of the RMA

**REPLY SUBMISSIONS ON BEHALF OF
KIWIRAIL HOLDINGS LIMITED**

13 OCTOBER 2021

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MAY IT PLEASE THE HEARING PANEL:**1. SUMMARY**

1.1 These reply submissions have been prepared on behalf of KiwiRail in response to matters that were raised by the Commissioners, the Palmerston North City Council's ("**PNCC**"), iwi, and submitters.

1.2 These submissions are focussed on addressing the key legal issues raised during the hearing and outstanding matters in contention. In particular, these submissions will address:

- (a) A designation as a planning tool;
- (b) KiwiRail's requiring authority powers;
- (c) Planning for the Freight Hub;
- (d) Benefits of the Freight Hub;
- (e) Scope of PNCC's jurisdiction;
- (f) Adverse effects;
- (g) Cultural values;
- (h) Planning provisions and Part 2; and
- (i) Conditions.

2. A DESIGNATION AS A PLANNING TOOL

2.1 A key theme in this hearing has been the nature of a designation and the level of information required to support a notice of requirement. Some submitters have asserted that KiwiRail has deliberately opted for a high level concept design, or high level assessments, in lieu of a more comprehensive approach, such that there is not enough information before the Panel to make a positive recommendation.¹ That suggestion is strongly rejected by KiwiRail.

2.2 Designations have been described as "notice to the world of the use to which the land subject to the designation may be put".² A designation serves the important function of notifying the public that the land is intended for a project

¹ See for example Legal submissions on behalf of Peter Gore and Dale O'Reilly, dated 18 August 2021, at [5] and [13].

² *Titirangi Protection Group Inc v Watercare Services Limited* [2018] NZHC 1026 at [34] referring to *Waimairi County Council v Hogan* [1978] 2 NZLR 587 (CA) at 590.

(or work) with the effect that no person can undertake any activities on the land that would prevent or hinder the project or work without the requiring authority's approval.³

2.3 The Environment Court has observed that there are two "key distinguishing features" of a designation, being:⁴

- (a) the final layout and design of the work can be detailed in a future outline plan of works ("**OPW**"); and
- (b) the effect of a designation is that it enables the requiring authority to use the land without having to comply with the District Plan controls.

2.4 The OPW process is a critical aspect of the legislative scheme of the designation.

2.5 In relation to the Freight Hub, and through this first stage of the NoR, KiwiRail seeks to set aside sufficient land to enable the construction and operation of the Freight Hub. It has indicated, through a well-advanced concept plan, where the key operational elements of the Freight Hub are intended to be located. Further details will be developed through the OPW process as well as through the management plan processes under the proposed conditions of the Designation, and subsequent consenting.

2.6 Some have asserted during the hearing that KiwiRail has taken the approach "too far"⁵ or is seeking to rely on the subsequent OPW process as a "complete solution" to address adverse effects.⁶ We disagree with that position:

- (a) While section 171 of the RMA requires an assessment of effects, any such assessment must be commensurate with the nature of the NoR sought and the process adopted by the requiring authority. KiwiRail has provided a comprehensive assessment of effects which appropriately corresponds to the nature of this NoR.
- (b) The purpose of an OPW is to provide details to the territorial authority of the proposed built form and construction for a project (or work). This is evident in the language of section 176A(1) of the RMA which

³ RMA, section 176.

⁴ *Re Queenstown Airport* [2017] NZEnvC 46 at [50] – [52].

⁵ Legal submissions on behalf of Peter Gore and Dale O'Reilly, dated 18 August 2021 at [4].

⁶ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [41].

provides that an OPW of the work "to be constructed" must be provided to the territorial authority.⁷ Section 176A(3) outlines the matters that must be included in an OPW, including the height, shape, and bulk of the project or work and the likely finished contour of the site, as well as "any other matters to avoid, remedy or mitigate any adverse effects".

- (c) This NoR has been prepared on the basis of a well-considered concept design. In evidence before the Panel, Mr Skelton described the layout of the key components of the Freight Hub which were developed and then tailored to this particular site. The site layout and sizing of elements have been determined based on projected demand and site constraints, and are fundamental to the successful operation of the Freight Hub on this site.
- (d) The degree of flexibility that the OPW process provides a requiring authority in terms of final design does not mean that a requiring authority can generate more adverse effects than what is approved under a designation.⁸
- (e) KiwiRail is not relying solely on the OPW phase to address the adverse effects of the NoR. There is a clear requirement, through proposed condition 1 of the Designation, for the Freight Hub to be developed in general accordance with the information that has already been provided, which includes extensive technical evidence and assessment. There is a comprehensive suite of conditions proposed by KiwiRail which provide further certainty as to the management of effects of the NoR.

2.7 This is not a case where there is inherent uncertainty as to what will ultimately be developed on the Site. It is simply not the case that the NoR has been developed to achieve "maximum flexibility".⁹ Of course, with a project of this scale, every design and operational detail cannot be known today. It would be naïve to think that or for KiwiRail to suggest that is the case. While details will be provided at the future OPW stage (as is lawful and common practice), there is a good degree of certainty about what the Freight Hub designation, if confirmed, will authorise in terms of the activities and their effects.

⁷ The meaning of this was considered in *Waitakere City Council v Minister of Defence* [2006] NZRMA 253 at [42] - [44].

⁸ *Minister of Corrections v Otorohanga District Council* [2018] NZEnvC 25 at [11].

⁹ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [56].

- 2.8 It is also trite to say that the Panel must have sufficient information before it to assess the effects of the NoR. You need to have a level of information in order to understand the scale and significance of the effects.¹⁰ In our submission, the level of information required must also reasonably correspond to the nature of the approvals sought (in this case, an NoR).
- 2.9 PNCC has submitted that there is a "trend" for requiring authorities to provide an increasing level of detail with NoRs.¹¹ We do not disagree that there has been a tendency, in recent years, for some requiring authorities to provide extensive information with NoRs, to the point that in some cases the NoRs effectively become de facto resource consents. This "trend" does not equate to a requirement under the RMA (nor does it, in all cases, result in better management of environmental effects).
- 2.10 In our submission, KiwiRail has provided sufficient information to support the NoR and to enable the Panel to properly assess the scale and significance of its effects. The NoR is supported by comprehensive technical assessments and evidence that are appropriate for the nature of this project.

3. KIWIRAIL'S REQUIRING AUTHORITY POWERS

- 3.1 Counsel for Dr Fox and Dr Whittle submitted that the scheme of section 167 is such that network utility operators approved as requiring authorities need separate approval to undertake particular projects or works.¹² In response to questions from the Chair, it became apparent that the proposition being advanced by Ms Tancock was not that there was a "scheme" that assists that interpretation question but rather that section 167 of the RMA provides "two pathways" in which an applicant can become a requiring authority (either for a particular project or work, or for a network utility operation). That is plain from the language of section 167 of the RMA and in our submission, does not assist the Panel in determining the scope of KiwiRail's requiring authority approval.
- 3.2 KiwiRail was approved as a network utility operator under section 167(3)(b). The fact that an alternative pathway exists for an applicant to seek approval for a project or work does not mean that a particular project cannot form part of a network utility operation, provided there is scope within that approval to do

¹⁰ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [47].

¹¹ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [45].

¹² Legal submissions on behalf of Dr Fox and Dr Whittle dated 14 September 2021, at [29].

the work. For the reasons set out below and in our opening submissions, KiwiRail's approval as a requiring authority clearly enables it to carry out the Freight Hub project as part of its network utility operation.

3.3 In determining the scope of KiwiRail's powers, Ms Tancock submitted that KiwiRail's application to become a requiring authority is irrelevant to the interpretation and should not be used as an aid for interpretation for a number of reasons, including that KiwiRail's application is:¹³

- (a) not a public facing document and the first time submitters would have been aware of it would have been when it was included in KiwiRail's bundle of authorities; and
- (b) in a different category to the use of *Hansard* and select committee reports.

3.4 We consider that KiwiRail's application is directly relevant. In determining meaning of "state housing purposes" in the context of a compulsory acquisition under the Public Works Act 1981 ("**PWA**"), for example, the background to the *Gazette* notice and communications with the landowner were relevant to the Court of Appeal's finding that a broader interpretation should be given to the meaning. The Court held that while the meaning must be found in the *Gazette* notice which declared the taking of land, "that declaration must be read in the factual and legal context in which it was written".¹⁴ The factual context in which KiwiRail's approval as a requiring authority was granted and subsequently written in the *Gazette* notice includes its application to become a requiring authority.

3.5 Without irony, Ms Tancock refers the Panel to a 2004 briefing paper to the Minister on New Zealand Railways Corporation's ("**NZRC**") application to become a requiring authority and says this confirms how KiwiRail's *Gazette* notice should be interpreted.¹⁵ The Minister's briefing paper is of the same nature and status as the application which Ms Tancock says KiwiRail cannot rely on as an aid to interpretation (ie not a public facing document nor *Hansard*).

¹³ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021 at [33].

¹⁴ *Attorney General v Hull* 3 NZLR 63 at [30].

¹⁵ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021, at [37] and [38].

- 3.6 In any case, it is our submission that the Minister's briefing paper on NZRC's 2004 application is not "conclusive evidence" that KiwiRail's approval should be read down as asserted by Ms Tancock because:¹⁶
- (a) That decision was related to an earlier application by KiwiRail's predecessor to become a requiring authority and is separate to KiwiRail's application for, and subsequent approval as, a requiring authority in 2013.
 - (b) In the context of that application, the Minister determined that approval should be given for its "railway line", rather than "railway system" as sought by NZRC, on the basis that:
 - (i) This language was consistent with the terminology in the RMA. In our submission, the Minister was simply saying that approval given should reflect the language in the RMA. The Minister also stated that the RMA does not include a definition of railway line and did not suggest that this term was limited to a particular definition in any other enactment (despite NZRC's application referring to the definition of railway line in the New Zealand Railways Corporation Act 1981).
 - (ii) The Ministry was not aware of any issues with the use of the term railway line which, in our submission, is evidence that it was considered that the approval was sufficient to enable NZRC (at that time) to carry out its network utility operation under the RMA and there was no need to take a different approach. The same briefing paper noted that NZRC's functions include "management and development of national rail network infrastructure" which suggests there was an understanding that the approval for a "railway line" was sufficient for NZRC to carry out its functions for its "infrastructure" across the national rail network.¹⁷

¹⁶ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021, at [38(c)].

¹⁷ Briefing Report to the Minister, dated 10 September 2004, at [8].

- 3.7 Ms Tancock appears to accept that "railway line" includes loading and unloading wagons as well as road vehicles, and marshalling freight to and from the tracks, and log handling.¹⁸
- 3.8 The crux of the issue for this submitter appears to be whether KiwiRail can designate for freight forwarding and distribution facilities associated with the operation of the railway corridor. In our submission, these activities clearly fall within KiwiRail's powers as a requiring authority:
- (a) Freight forwarding facilities are key component of the operation of the rail network in that they enable the direct transfer of freight from rail to road and vice versa. As KiwiRail's *Gazette* notice provides it with the power to designate land for the *operation* of its railway line, these activities necessarily fall within that function.
 - (b) The meaning of "railway line" is not static. It can, and appropriately should, change over time. The modern-day railway encompasses much more than simply rail tracks. It includes those activities that are commonly found at rail yards and are necessary for the operation of the railway corridor as a whole. This necessarily includes freight forwarding facilities, distribution facilities and warehousing which directly support the movement of freight on and off the railway tracks.¹⁹
 - (c) The evidence of KiwiRail's experts is that the freight forwarding facilities are an integral component of a modern railway operation. Mr Moyle explained that the way in freight is handled is changing and as such, the way that the facilities are designed has had to adapt. This has meant, for example, more inland ports with direct rail access to efficiently process freight.²⁰
 - (d) It is appropriate to have regard to the wider legislative framework governing KiwiRail's functions. The Court of Appeal previously held, in determining the meaning of "state housing purposes", a broad legislative statement of functions "provide a strong context" for a broad reading of that term.²¹ The Railways Act 2005 provides for a broad range of elements that make up the rail corridor including

¹⁸ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021, at [41].

¹⁹ *McElroy v Auckland International Airport* [2009] NZCA 621 at [47] – [74].

²⁰ Evidence of Todd Moyle, dated 9 July 2021, at [5.4].

²¹ *Attorney General v Hull* 3 NZLR 63 at [30].

railway lines, railway infrastructure and railway premises. In particular, "railway premises" as defined in the Railways Act 2005:²²

means the land, buildings, or structures that are located near a railway line; and used for the purposes of, in connection with, or obtaining access to, a railway.

- 3.9 Mr Thomas' planning evidence on behalf of PMB Landco, Brian Green Properties Ltd and Commbuild Property Ltd also asserted that the some of the components of the Freight Hub may be outside the scope of the Freight Hub. Ms Tancock sought to rely on that evidence to support her submissions.
- 3.10 In response to questions from the Panel, Mr Thomas confirmed that the scope of KiwiRail's designation was of interest to his clients (industrial developers with land interests in the north east of Palmerston North)²³ for "trade competition" reasons because KiwiRail will be a "competing landlord with other private developers in the area".²⁴ To the extent that Mr Thomas' evidence and his clients' submissions are motivated by trade competition or are concerned with the effects of trade competition, section 171(1A) of the RMA requires the Panel to disregard those effects.

4. PLANNING FOR THE FREIGHT HUB

Strategic planning

- 4.1 Some submitters have said they were taken by surprise by notice of the proposal. KiwiRail acknowledges that RMA processes can be unsettling and upsetting, particularly when people are directly affected by them. And as Mr Murphy for PNCC said, RMA processes can have the effect of focussing people's minds, in that notice of the project is given directly to affected parties.²⁵
- 4.2 Prior to notice of the NoR being given, there have been a range of public processes which have signalled a clear intent for the development of this area for industrial purposes. This dates back to the joint industrial land review in 2007 which was a precursor to the boundary adjustment change between the Manawatū District and Palmerston North City.²⁶ That adjustment brought

²² Railways Act 2005, section 4.

²³ Evidence of Paul Thomas, dated 15 July 2021, at [9].

²⁴ Oral evidence of Paul Thomas.

²⁵ Oral evidence of David Murphy.

²⁶ Memorandum of David Murphy, dated 23 September 2021, at [4].

Bunnythorpe and the rural land surrounding it within the Palmerston North City limits. While not the only reason, one of the key drivers for that change was industrial growth in this part of the region.²⁷

- 4.3 Since the boundary adjustment in 2012, an additional 126 hectares of land was zoned for North East Industrial Zone ("**NEIZ**") in 2015, signalling a clear intent for this land to be developed for industrial purposes. PNCC has also led a range of strategic planning initiatives which were brought together in a spatial plan in 2018 which specifically referenced multi-modal infrastructure to enable industrial growth in this area.²⁸
- 4.4 These processes indicate a clear desire, signalled for over ten years, of PNCC to develop the north eastern area of Palmerston North City for industrial purposes.

Funding and the business case

- 4.5 Some submitters raised concerns with KiwiRail's bid for funding from the Provincial Growth Funding ("**PGF**") in 2018, alleging this was tied to a particular site which impacted on the independence of the multi criteria analysis ("**MCA**") process initiated in 2019.
- 4.6 In our submission, this allegation is not supported by evidence. While it was clearly necessary (and prudent) for KiwiRail to obtain funding to advance a process to design and designate for a freight hub, that funding was not granted on the basis that a particular site had to be chosen.
- 4.7 In December 2017, the Office of the Minister for Regional Economic Development prepared a paper to Cabinet setting out the broad parameters of the PGF. A three-tiered approach to funding of projects under the PGF was developed, based on a project's size, scale and nature.²⁹ Over late 2018-2019, the Government considered feasibility studies and business cases for Tier Three projects to determine eligible projects for funding.³⁰ A robust business case was required in order to obtain funding.³¹

²⁷ Memorandum of David Murphy, dated 23 September 2021, at [6].

²⁸ Memorandum of David Murphy, dated 15 June 2021, at [8].

²⁹ Tier three funding was to enable infrastructure projects that would help regions to be well-connected (both internally and between regions) from an economic and social perspective, including rail, road and communications. Investments to increase regional and national resilience by improving critical infrastructure are also eligible for funding through this tier.

³⁰ Paper from the Office of the Minister for Regional Economic Development to Cabinet, dated February 2018, at [21].

³¹ At [62].

- 4.8 The Government asked KiwiRail to put forward network infrastructure proposals for consideration that would ensure intra and inter-regional rail connections supported the ongoing development of regions.³² As part of this process, KiwiRail prepared a Business Case for a freight hub in August 2018. The Business Case refers to the acquisition of land in the NEIZ.³³
- 4.9 A Funding Agreement was signed between Treasury and KiwiRail in May 2019. The key details of the Funding Agreement describes the "Project" as:³⁴
- (a) preparation of a master plan and concept design for a transport hub (including a rail enabled container transfer facility) in or near Palmerston North,
 - (b) site/options analysis and site selection for the new hub site
 - (c) securing a designation under s168 of the RMA prior to the potential purchase of land for a new site in or near Palmerston North.
 - (d) acquisition of sufficient land in the identified location to develop a future-proofed Regional Growth Hub. An indicative site size of 65 ha, has been identified, based on preliminary design for an intermodal, operational rail and road transport interchange and hub and associated services.
- 4.10 The Funding Agreement does not identify a specific site for the Freight Hub. It refers to the Freight Hub being "in or near Palmerston North" and makes no reference to the NEIZ. In response to questions from the Chair, counsel for Dr Fox and Dr Whittle accepted that the reference in subsection (d) to an "identified location" could be read as meaning "in or near Palmerston North" as per subsection (c). In our submission, the reference to identified location in (d) was intended to be that which the site selection process referenced in (b) would identify.
- 4.11 The Funding Agreement also lists Project Milestones, and identifies that site selection will follow completion of a MCA of options. KiwiRail was required to use all reasonable endeavours to achieve the Project Milestones by the completion dates, meaning the MCA was to occur before site selection.³⁵

³² At [50].

³³ Business Case, dated 23 August 2018, at page 5.

³⁴ Funding Agreement, Clause 5.

³⁵ Funding Agreement, Clause 3.4.

- 4.12 The fact that nine different areas in or near Palmerston North were considered as part of the MCA process clearly indicates that the scope of the Funding Agreement was not tied to a particular site.

Assessment of alternatives

- 4.13 KiwiRail has undertaken a robust assessment of alternatives. The process has been comprehensively summarised in the NoR documentation as well as KiwiRail's evidence.³⁶

Longburn

- 4.14 Some submitters expressed a preference for other sites considered through the MCA process, such as those in Longburn. As summarised in the evidence of Ms Poulsen and Ms Bell, a total of nine areas were initially considered as part of the long list of site options:³⁷

- (a) Option One – Bunnythorpe 1: West Side
- (b) Option Two – Bunnythorpe 2: East Side
- (c) Option Three – Bunnythorpe 3: West Side (Airport)
- (d) Option Four – Bunnythorpe 4: East Side
- (e) Option Five – Longburn 5: North Side
- (f) Option Six – Longburn 6: North West Side
- (g) Option Seven – Longburn 7: West Side (River)
- (h) Option Eight – Longburn 8: South East Side
- (i) Option Nine – Existing KiwiRail Freight Yard in Tremaine Avenue

- 4.15 Each of these areas were considered against a range of criteria, including engineering degree of difficulty, connectivity, resilience to hazards, and other environmental effects.³⁸ For each of the assessment criteria, areas were allocated an impact rating, one being low impact and five being high impact.

³⁶ NoR, Appendix F, MCA Summary report; Evidence of Karen Bell, dated 9 July 2021; Evidence of Olivia Poulsen, dated 9 July 2021.

³⁷ MCA Summary Report, dated 30 June 2020, page 20.

³⁸ MCA Summary Report, dated 30 June 2020, page 22.

Any options that were identified as having such adverse effects that they could not proceed were considered fatally flawed.³⁹

- 4.16 Of the four Longburn options, options five, seven, and eight were considered fatally flawed in terms of natural environment and noise and vibration impacts, resilience to natural hazards, and strategic fit.⁴⁰ In particular:
- (a) Option five contained a large remnant of mature low-lying indigenous forest, which would not be possible to avoid if the Freight Hub were located there. It was also located in close proximity to an extensive residential area, which would have significant noise impacts. Due to the location of the site in relation to the NIMT, it would not be possible to locate the noise generating aspects of the Freight Hub away from this residential area.
 - (b) Option seven was located in an area prone to flooding from the Manawatū River, in as little as a 1-year ARI event, with engineering solutions unlikely to mitigate this risk.
 - (c) Option eight also had flooding risks, but was also located in an area identified by PNCC for future greenfield residential development and had already been subject to two plan changes to rezone land to residential. A freight hub in this location would misalign with PNCC's growth strategy and result in significant reverse sensitivity effects. This is in contrast to the North East of Palmerston North, which has been earmarked (and part zoned) for industrial growth.
- 4.17 Option Six was the only Longburn area not fatally flawed following the assessment of the long list of options. It was, however, subject to some constraints, such as its proximity to the Longburn Community Hall. The site area for Option Six was altered to avoid the constraints and combined with the unconstrained portions of the Option Five site to create a revised Option Five, which was shortlisted for further assessment with the other Bunnythorpe sites, none of which were fatally flawed.⁴¹ This approach demonstrated KiwiRail's commitment to identifying realistic options.
- 4.18 Of the shortlisted options, the revised Option Five had high impacts in terms of landscape and visual amenity, natural environment, noise and vibration, and affected properties, and performed the worst overall of the five remaining

³⁹ MCA Summary Report, dated 30 June 2020, pages 36 and 37.

⁴⁰ MCA Summary Report, dated 30 June 2020, pages 36 and 37.

⁴¹ MCA Summary Report, dated 30 June 2020, page 45.

sites.⁴² As noted above, there was also a preference from Ngāti Kauwhata and Rangitāne o Manawatū for a site in the north east of Palmerston North (and iwi expressed a preference that Options Two, Three and Four be investigated further).⁴³ Overall, based on scoring, three Bunnythorpe locations (Options Two, Three and Four) were shortlisted as the final three sites for further investigation.⁴⁴

4.19 While some Bunnythorpe submitters may have a preference for a site away from Bunnythorpe (eg one of the Longburn sites), this not a relevant matter for the Panel to consider when determining whether the *process* undertaken by KiwiRail was adequate for the purposes of the RMA. One of the principles established by the Board of Inquiry in relation to the Upper North Island Grid Project, and adopted by the Environment Court, is that it is irrelevant that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable.⁴⁵ What is relevant is that there was a clear process that was followed by the requiring authority in assessing each of the options, which in our submission is clearly demonstrated.

4.20 That is not to say that the three shortlisted Bunnythorpe sites, or the site ultimately chosen, were perfect or would result in no adverse effects. For a project of this scale it is inevitable there will be adverse effects that must be managed for any site chosen.

Options assessed

4.21 Ms Tancock submitted that there were weaknesses in the assessment of alternatives because the areas assessed were too large (ranging from almost 500 ha to over 800ha) and should have focussed on more "realistic site sizes".⁴⁶

4.22 The focus of the inquiry under section 171 is on whether the process was adequate.⁴⁷ Adequate "does not mean meticulous; it does not mean exhaustive; it means sufficient or satisfactory".⁴⁸ The RMA does not require the requiring authority to consider *all* alternatives nor, as Commissioner

⁴² MCA Summary Report, dated 30 June 2020, page 59.

⁴³ MCA Summary Report, dated 30 June 2020, page 60.

⁴⁴ MCA Summary Report, dated 30 June 2020, page 59.

⁴⁵ *Pukekohe East Community Society Inc v Auckland Council* [2017] NZEnvC 027 at [21].

⁴⁶ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021, at [22].

⁴⁷ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [167].

⁴⁸ *North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73 at [62].

Makinson tested with Ms Tancock, does the Panel have to be satisfied that every feasible alternative was considered by KiwiRail.

4.23 The contention that the areas were assessed through "too big a lens" is not a legitimate basis to find that the process undertaken by KiwiRail was inadequate:

- (a) A requiring authority is not required to have a confirmed designation extent (and only look for sites of that size) before it embarks on an assessment of alternatives process. In many cases that may be inappropriate (or even impossible), given that the designation extent may need to be refined, expanded or adapted to respond to particular constraints and manage the effects in a particular location, once the site is selected. The fact that KiwiRail's business case was premised on an initial site area of 65ha and the final designation extent is 177.7ha suggests that it may be prudent in some cases to assess a much broader area with the ability to refine that as the analysis progresses.
- (b) The assessment of alternatives process is not rigid. In our submission, the process can (and often should) be refined and developed provided it is transparent and replicable. This is inherent in the iterative nature of resource management processes.
- (c) KiwiRail was transparent about the process it undertook and the basis on which it assessed the options throughout the process. The MCA Summary Report records that in selecting and assessing the long list of (nine) site options, a larger footprint was adopted because a concept plan for the Freight Hub was still under development.⁴⁹ Once the concept layout had been developed through the Master Plan, this was applied to a refined list of (five) areas for assessment.⁵⁰

4.24 In our submission, KiwiRail has clearly demonstrated that its assessment was adequate for the purposes of section 171(1)(c).

⁴⁹ MCA Summary Report, dated 30 June 2020, at page 20.

⁵⁰ MCA Summary Report, dated 30 June 2020, at page 44.

5. BENEFITS OF THE FREIGHT HUB

- 5.1 The Panel has heard that the Freight Hub will be a modern facility that will integrate freight handling facilities and infrastructure to support longer trains to create a more resilient and efficient transport system.⁵¹ It is a major infrastructure project of regional and national significance that will unlock a range of benefits for the region and New Zealand Inc.
- 5.2 Mr Paling's evidence is that \$1.3 billion in economic benefits are expected from the Freight Hub over the next 60 years.⁵² The Freight Hub will likely have a much longer lifespan and the total benefits could be greater than this. The estimated benefits are also conservative because they are based on rail's existing share of freight.⁵³ Any modal shift over that period (which the Freight Hub itself will encourage) will increase these benefits. Mr Moyle's evidence is that rail generates 70% less emissions than road.⁵⁴ If the prices of fuel and emissions increase, rail is more resilient to those increases than road and those benefits flow through into the economy through the price of goods.
- 5.3 The Freight Hub has been designed with a long-term horizon in mind to ensure that it can meet the projected demand and the needs of future generations. Mr Murphy, on behalf of PNCC, acknowledged the need to take the opportunity to learn from the existing Freight Yard on Tremaine Ave, which has been outgrown by Palmerston North over time. If KiwiRail builds only for what it needs now, the Freight Hub footprint would be smaller, but we would need to repeat this process again in 10 years' time, based on the expected demand growth.
- 5.4 The Panel also heard evidence from a range of submitters of the benefits that they consider the Freight Hub will bring to their community and the wider region. This includes evidence from:
- (a) CEDA, Central New Zealand Distribution Hub Stakeholders and Accelerate 25 who say this is a "1 in 100 year opportunity".⁵⁵ CEDA presented on the Lower North Island Distribution Strategy, which advocates alignment across key organisations in the investment of enabling infrastructure to support the Manawatū region as the distribution hub for the Lower North Island, including Taranaki,

⁵¹ Evidence of Todd Moyle, dated 9 July 2021, at [1.6].

⁵² Evidence of Richard Paling, dated 9 July 2021, at [7.12].

⁵³ Evidence of Richard Paling, dated 9 July 2021, at [8.7].

⁵⁴ Evidence of Todd Moyle, dated 9 July 2021, at [4.3].

⁵⁵ Submission of Accelerate 25 Manawatū-Whanganui dated 25 March 2021.

Hawkes Bay, and Wellington. The Freight Hub is recognised as a key project in delivery of the Lower North Island Distribution Strategy, strongly aligning with the Accelerate 25 regional and PNCC growth plans, with the opportunity to integrate with other broader freight transport projects planned for the region.⁵⁶

- (b) Members of the local Bunnythorpe community acknowledge the environmental benefits of rail in terms of reduction in carbon emissions and that there will be "improvement in amenity" due to the planting stormwater ponds and associated recreational trails.⁵⁷ A number of submitters, while concerned about the potential edge effects of the Freight Hub, also confirmed that they were not opposed to the Freight Hub in principle⁵⁸ and recognised the economic importance of the project to Palmerston North and the wider region.⁵⁹
- (c) The Manawatū District Council and Horizons Regional Council ("**Regional Council**") note the Freight Hub's strong alignment with strategic direction for the region, with opportunities to integrate with the Regional Ring Road ("**Ring Road**"), the NEIZ, and the Airport, which will assist in consolidating Palmerston North as a key logistics and distribution centre for the North Island. As Mr Murphy acknowledged on behalf of PNCC, the NoR is "just one part of a broader planning process" and this is about "how we can set up the NEIZ to work efficiently for 100 year plus".⁶⁰ There is a significant opportunity here in that this project has the potential to be a catalyst for strengthening Palmerston North's role as a strategic node.
- (d) Waka Kotahi supports the project and KiwiRail's approach. They are particularly supportive of the Road Networks Integration Plan.

5.5 KiwiRail's evidence is that there are strategic advantages of locating the Freight Hub in this location not only in terms of the important role that Palmerston North has to play in the supply chain network but also in terms of

⁵⁶ CEDA Distribution Hub Strategy dated August 2021.

⁵⁷ Zaneta Park, oral submission notes.

⁵⁸ Ian and Andrea Ritchie.

⁵⁹ David Odering, and Glen and Karen Woodfield.

⁶⁰ David Murphy, oral presentation.

its potential to integrate with future upgrades to the roading network, such as the Ring Road,⁶¹ which are earmarked in strategic documents.

- 5.6 Planning approvals have not yet been obtained for the Ring Road, and so in our submission, it does not form part of the reasonably foreseeable future environment against which the NoR must be assessed. The Council agrees with this approach.⁶² Accordingly, KiwiRail's experts have not directly assessed the effects of the NoR being delivered in conjunction with these future projects.
- 5.7 Appropriately, the economic benefits (and resultant positive effects) of the Freight Hub (as assessed by Mr Paling and Mr Colegrave) do not rely on the delivery of these future projects – their evidence is that the Freight Hub will provide a range of benefits to Palmerston North and the wider area without provision of the Ring Road. Provision of the Ring Road would likely provide improved connections from the Freight Hub to the roading network and would potentially result in even greater efficiencies in the movement of freight.
- 5.8 In her legal submissions, Ms Tancock refers to the statement in Ms Bell's evidence which notes that the "delivery of the PNITI works will be important to enable the benefits of the Freight Hub to be fully realised", in an attempt to support her assertion that the positive effects of the Freight Hub are heavily contingent on future roading projects.⁶³ KiwiRail has sought this NoR independent of that wider programme of roading works. While Ms Bell has acknowledged that the delivery of those works "will be important to" deliver the benefits of the Freight Hub, the benefits are not contingent on those works being delivered.
- 5.9 While integration with wider regional projects has not been counted in a strict sense as a positive effect of the Freight Hub, it is our submission that it is appropriate for the Panel to consider the benefits of this integration in a strategic sense. This arises in two ways under section 171(1) of the RMA:
- (a) Section 171(1)(c) - One of KiwiRail's objectives for the NoR is to enable rail to be integrated with, and connected to, other transport modes and networks. Inherent in this is objective is a strategic

⁶¹ Accessibility provided by strategic transport modes, including linkages to the Ring Road, was considered as part of the MCA process. See for example, NoR, Volume 2, Appendix F12, Economic Assessment.

⁶² Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [131].

⁶³ Evidence of Karen Bell, dated 9 July 2021 at [9.10].

component in that it seeks to "enable" integration with other transport modes which can, in our submission, include the wider planned strategic transport network. As the Chair pointed out during the hearing, where there is an element of strategic planning "intrinsic in the designation", it is open to the Panel to have an eye to the wider strategic transport planning when considering the effects of the NoR.

- (b) Section 171(1)(d) - the effects on the environment must be considered having particular regard to any other matter reasonably necessary to make a recommendation on the NoR. This can, and appropriately should in our submission, include relevant policy and strategic documents such as the Government Policy Statement on Land Transport 2021, the New Zealand Rail Plan, Regional Land Transport Plan and Accelerate 25 Regional Growth Economic Development Strategy.⁶⁴ In this way, the Panel must consider the effects of the NoR while giving genuine thought and attention to the objectives of these strategic documents. PNCC agrees with this approach.⁶⁵

6. SCOPE OF PNCC'S JURISDICTION

- 6.1 This issue has come into focus because the NoR has been sought prior to KiwiRail lodging regional resource consent applications. This approach seems to have troubled some Council experts and the reporting planner.
- 6.2 With respect, in our submission, the interface between regional and district issues has become unnecessarily fraught in this hearing. While PNCC clearly would have preferred regional approvals were lodged concurrently with the NoR, there is of course no requirement under the RMA to seek these approvals concurrently. The Council reluctantly accepts this.⁶⁶
- 6.3 In response to a question from Commissioner Pomare, Mr Arseneau said that what the Council is being asked is to "trust" the Regional Council. With respect, that is exactly what is required. It is the regional council's statutory mandate under the RMA to manage the matters that are within its function.

⁶⁴ For an assessment of these documents, refer to the Evidence of Karen Bell, dated 9 July 2021, at Appendix 3.

⁶⁵ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [136].

⁶⁶ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [60].

- 6.4 Below, we highlight two interrelated matters, being the scope of:
- (a) PNCC's jurisdiction as a territorial authority; and
 - (b) the Panel's consideration of the effects of the NoR.

Regional vs district jurisdictions

6.5 The functions of regional councils and territorial authorities are set out in sections 30 and 31 of the RMA, respectively. It is evident from those sections that both territorial authorities and regional councils have an express overlap in some of their functions - they can regulate the same activity but for different purposes as result of the effects that they generate.⁶⁷

6.6 There are three key areas of overlap that warrant consideration in this case.

Dust

6.7 Activities that generate dust, such as earthworks, can be regulated by both territorial authorities and regional councils but for different purposes. The Environment Court has previously held that a city council has jurisdiction to manage the effects of dust on amenity, including visual and nuisance effects, but is precluded from managing their impact on air quality as a contaminant.⁶⁸ This is because the control discharge of contaminants to air is expressly a regional council function.⁶⁹

6.8 The Freight Hub will give rise to dust which will have an effect on amenity for adjacent residents. It has proposed (for the NoR) conditions requiring:

- (a) investigations to be undertaken prior to construction to identify dwellings that rely on roof top rain-water supply systems and to offer a fast flush system as mitigation; and
- (b) an Operational Dust Management Plan to manage dust from the operation of the Freight Hub.

6.9 In our submission, these conditions are appropriate to address the amenity effects of dust that arise and are within PNCC's jurisdiction.

6.10 The Council also seeks conditions be imposed on the designation requiring a construction dust management plan and construction dust monitoring.

⁶⁷ *Canterbury Regional Council v Christchurch City Council* 1B ELRNZ 423, at page 8.

⁶⁸ *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2017] NZEnvC 165 at [219] to [228].

⁶⁹ RMA, section 30(1)(f).

Construction dust will arise from the earthworks undertaken on the site and the movement of heavy vehicles associated with those works.⁷⁰

- 6.11 Land disturbance activities are broadly separated by scale. As the Palmerston North City District Plan ("**District Plan**") includes provisions relating to earthworks, the designation (if confirmed) would authorise KiwiRail to undertake small scale earthworks that would otherwise contravene the rules in the District Plan.⁷¹ With a site of this size, the scale of those works would be unlikely to result in any material adverse effects on amenity. In any case, the rules in the Horizons One Plan mean that in practice KiwiRail could only undertake earthworks of up to 2,500m² without a regional consent.⁷²
- 6.12 The reality is that KiwiRail will be undertaking earthworks on a much greater scale than this and will require a bulk earthworks regional consent. That regional consent would include conditions to control construction dust, which would very likely include a comprehensive construction dust management plan and dust monitoring. In this regard, it is unnecessary to impose conditions of this nature on the designation.

Ecology

- 6.13 The function of territorial authorities in the context of freshwater is limited to the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes.⁷³ Regional councils, on the other hand, have a much broader role in relation to the management of freshwater.⁷⁴ PNCC acknowledges that the Regional Council has the primary responsibility in relation to the management of freshwater.⁷⁵
- 6.14 The jurisdictional overlap in relation to the management of indigenous biodiversity has been considered by the High Court in the context of the relevant provisions of the One Plan.
- 6.15 In *Property Rights in New Zealand Incorporated v Manawatū-Whanganui Regional Council*, the Court held that a regional council may make rules for the

⁷⁰ Evidence of Paul Heveldt, dated 9 July 2021, at [8.1] and [8.3].

⁷¹ RMA, section 176(1)(a).

⁷² Horizons One Plan, Chapter 13.3 Rules – Vegetation Clearance, Land Disturbance, Forestry and Cultivation and Indigenous Biological Diversity, Rule 13-1.

⁷³ RMA, section 31(1)(e).

⁷⁴ RMA, sections 31(c), (e), (f), (fa) and (g).

⁷⁵ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [11].

purposes of maintaining indigenous biodiversity.⁷⁶ While it also acknowledged that territorial authorities have a similar function, the Court said that the existence of this functional overlap was expressly anticipated by Parliament:⁷⁷

[...] by reasons of s 62(1)(i) it is specifically the regional council, through its regional policy statement, that is to decide which local authority (i.e the regional council or the relevant territorial authority) that is to be responsible for specifying the objectives, policies and methods (i.e. including rules) for the control of the use of land to avoid or mitigate natural hazards and hazardous substances – *and* to maintain indigenous biodiversity. Policy 7-1 is exactly the exercise of allocative responsibility intended by that provision. The regional policy statement may determine that a territorial authority has either some or no rule-making role in relation to control on land use to maintain indigenous biodiversity.

6.16 Policy 7-1 (now Policy 6-1(a)) in the One Plan divides the Regional Council and PNCC's functions as follows:

- (a) the Regional Council must be responsible for developing provisions to manage land use in a way that maintains indigenous biological diversity and protects areas of significant indigenous vegetation;⁷⁸ and
- (b) the territorial authority must be responsible for responsible for retaining schedules of notable trees.⁷⁹

6.17 The High Court noted that this policy seems to contemplate the Regional Council having "overarching responsibility" for indigenous biodiversity and that territorial authorities have a "subordinate role".⁸⁰ PNCC accepts it does not have the primarily role in relation to managing indigenous biodiversity.⁸¹

6.18 Despite PNCC asserting it is not attempting to claim consenting responsibilities for the management of freshwater and indigenous biodiversity from the Regional Council, it has proposed a condition which requires extensive ecological surveys to be carried on a raft of matters including stream

⁷⁶ *Property Rights in New Zealand Incorporated v Manawatū-Whanganui Regional Council* [2012] NZHC 1272 at [30].

⁷⁷ *Property Rights in New Zealand Incorporated v Manawatū-Whanganui Regional Council* [2012] NZHC 1272 at [33].

⁷⁸ Horizons One Plan, RPS, 6.4.1. Policy 6-1(a).

⁷⁹ Horizons One Plan, RPS, 6.4.1. Policy 6-1(b)(i).

⁸⁰ *Property Rights in New Zealand Incorporated v Manawatū-Whanganui Regional Council* [2012] NZHC 1272 at [18].

⁸¹ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [11].

classification, vegetation assessments and water quality matters. In our submission, this is an uncomfortable attempt to delve into regional consenting matters through a district planning tool.

Natural hazards

- 6.19 The control on the use of land to avoid or mitigate natural hazards is a function of both the Regional Council and PNCC.⁸² As noted above, section 62(1)(i) of the RMA provides that a Regional Policy Statement must outline the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land to avoid or mitigate natural hazards.
- 6.20 In the context of the One Plan, there is shared responsibility for these matters, with the territorial authority being responsible for developing provisions to control the use of land to avoid or mitigate natural hazards except for those activities within the regional council's responsibility (which includes provisions for the control of land use activities within the beds of rivers and lakes and the Coastal Marine Area).⁸³
- 6.21 These responsibilities have been outlined by Ms Coppleson in her planning summary.⁸⁴ We do not traverse them in any detail because ultimately PNCC's and KiwiRail's experts agree that:
- (a) The potential stormwater and flooding effects can be appropriately avoided or mitigated.⁸⁵ There is general agreement between the stormwater experts as to the assumptions and approach to sizing the stormwater definition pools and treatment wetlands.⁸⁶
 - (b) KiwiRail's proposed conditions on the NoR are appropriate to manage the stormwater and flooding effects. While the Council previously insisted on the imposition of the Stormwater Management Framework as a condition, Ms Coppleson is now comfortable with

⁸² RMA, sections 30(1)(c)(iv) and 31(1)(b)(i).

⁸³ Horizons One Plan, Regional Policy Statement, Policy 9-1.

⁸⁴ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [18] – [22].

⁸⁵ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [19].

⁸⁶ Section 42A Technical Evidence Summary: Stormwater, dated 24 September 2021 at [2]. In relation to the recent rain event in photos provided by submitters of flooding, Mr Leahy advised that this event was not extreme and supports the construction of the treatment and detention facilities outside of the flood plain.

KiwiRail's approach.⁸⁷ KiwiRail's conditions require the preparation and implementation of:

- (i) a stormwater management report to confirm the design of the stormwater detention ponds are sufficient to manage the flooding effects as a result of runoff from the Freight Hub; and
 - (ii) a stormwater management and monitoring plan to demonstrate the system and methods will be effective.
- (c) It is appropriate for a geotechnical report to be prepared which confirms that any risk of instability of the site can be mitigated.

6.22 In our submission, the approach taken by KiwiRail's experts in their assessments and the proposed conditions appropriately respects the jurisdictional distinctions of the City and Regional Council, and the Panel can have comfort that effects will be appropriately managed.

Consideration of regional effects under section 171

6.23 Section 171(1) provides, when the Panel is considering a "requirement", it must consider the effects on the environment of "allowing the requirement". The key question is whether that permits and/or requires, consideration of potential future effects that may arise as a result of activities that will be the subject of future regional consents.

6.24 Counsel for PNCC says that the Panel must consider these potential future effects because the Freight Hub cannot proceed in its current form without allowing the requirement under section 171 and allowing the activity under section 104.⁸⁸ However, PNCC also accepts that the nature of the enquiry into regional consenting effects is more limited because there is still a future process to go through.⁸⁹

6.25 In our submission, the assessment under section 171(1) of the RMA should be approached as follows:

⁸⁷ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [18].

⁸⁸ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [63] and [64].

⁸⁹ At [64].

- (a) The Panel's inquiry must first and foremost be on the "requirement" - the application before it and on which it must make a recommendation.
- (b) The Panel's inquiry must be focused on the effects that would be authorised through the designation if confirmed. As a designation is a district planning tool, these effects are centred on the land use component of the proposal. This is made clear in section 176(1)(a) of the RMA which provides that a NoR, if confirmed, has the effect of enabling the requiring authority to undertake works pursuant to the designation (and OPW and conditions) without a requirement to obtain a land use consent.
- (c) It is appropriate for the Panel to consider the potential regional consenting pathways available to the requiring authority. This arises by virtue of the requirement in section 171(1)(a) to have particular regard to any relevant provisions in the Regional Policy Statement and the One Plan.
- (d) The Panel does not, however, need to satisfy itself as to the nature and scale of those future potential effects arising from future regional consent applications or how those effects will be managed. This would require the Panel to embark on a speculative enquiry which risks undermining and / or pre-empting the separate process under section 104 of the RMA.

6.26 The Panel has heard evidence that:

- (a) The Freight Hub is specified infrastructure for the purposes of the NPS-FM and NES-F which provides a clear pathway for the construction of the Freight Hub in the event that any wetlands are found to be present on the Site.⁹⁰
- (b) In terms of potential stream loss there are opportunities to mitigate effects within the site.⁹¹ While some effects may need to be offset outside the site, contrary to PNCC's desire for more certainty about the requirements for any offsets, the Panel does not need to be satisfied with any degree of certainty that there are locations for those off-sets to occur.

⁹⁰ Supplementary Evidence of Jeremy Garrett-Walker, dated 13 August 2021, at [1.7]; S42A Report, dated 18 June 2021, at [514].

⁹¹ Evidence of Jeremy Garrett-Walker, dated 9 July 2021, at [10.10].

- (c) Adequate land has been set aside within the designation to manage stormwater discharge effects and not create additional flood risk effects.⁹²

6.27 There is clearly a pathway through. Representatives from the Regional Council advised the Panel that while they do not have all the detail yet, they do not have any real concerns. The Regional Council noted the site was a highly modified area, and they considered any effects could be mitigated. The Panel can be confident it can recommend the NoR be confirmed, having regard to the regional planning framework.

7. ADVERSE EFFECTS

Introduction

- 7.1 In considering the adverse effects of the NoR, the Panel must do so in the context of the site being in a highly modified environment. This is not a pristine site.
- 7.2 Mr Parker explains how this the area was cleared by European settlers for farming over 100 years ago.⁹³ Indigenous vegetation has been replaced with pasture and other exotic vegetation for farming.⁹⁴ A failure to exclude livestock from waterways and over 100 years of farming has resulted in highly modified waterways with no riparian buffers and soft-bottomed streams that provide little habitat for fish and eels, with some parts of the stream actually drying out in summer months.⁹⁵ Both the PNCC's and KiwiRail's ecologists agree that the Site is degraded.⁹⁶ Ms Rimmer's assessment is that natural character values are low.⁹⁷
- 7.3 This is also not a highly populated residential area. While there are existing residential properties both on and around the site, there is also industrial development, rural uses, warehousing, and local commercial businesses. There is an existing railway line and state highway and local roading network. The site is zoned for industrial and rural purposes. The NEIZ is (as a result of the zoning extension in 2015) located on, and immediately adjacent to, the Site.

⁹² Evidence of Allan Leahy, dated 9 July 2021, at [9.2]; Section 42A Technical Evidence Summary: Stormwater, at [2].

⁹³ Evidence of Daniel Parker, dated 9 July 2021, at [5.3]

⁹⁴ Evidence of Jeremy Garrett-Walker, dated 9 July 2021, at [4.2].

⁹⁵ At [6.19] and [6.20].

⁹⁶ At [4.2]; S42A Technical Evidence: Ecology, dated 9 August 2021, at [61] and [147].

⁹⁷ Evidence of Lisa Rimmer dated 9 July, at [6.12] and [6.13].

- 7.4 This is not to minimise the reality that families live here, and some have multi-generational connection to their land. No KiwiRail witness has sought to suggest the Freight Hub will not result in significant change for local residents, and particularly for those who will be directly affected by land acquisition or who will be immediate neighbours to the Freight Hub if the NoR is confirmed. Ms Austin recognised in her evidence that the character and feel of the community will change as a result of the Freight Hub development.⁹⁸
- 7.5 Much of the hearing has, properly, focussed on the "edge" effects of the Freight Hub, being those adverse effects that will transcend the boundaries of the Freight Hub, such as dust, noise, lighting and traffic, and impact on its neighbours. Many of these edge effects are rightly the primary concerns for submitters.
- 7.6 The reality is that large infrastructure projects like this will have edge effects - it is simply not possible to internalise all effects. That said, KiwiRail's approach has been to seek to internalise its effects as far as practicable to manage those effects on its neighbours. KiwiRail has been part of the Palmerston North community for a long time, and its intention is to continue to invest in this community over the next 100 years. Rail has, and will continue to be, a big part of Palmerston North and the surrounding area for a long time.
- 7.7 Two key areas of "edge" effects have been the focus of the submissions received and are the key areas in contention during this hearing. These are noise and vibration effects, and landscape and visual effects. We discuss these in detail below.

Noise and vibration

- 7.8 There will be noise and vibration effects from both the construction and operation of the Freight Hub. We heard from some submitters that they enjoy the peace and quiet of the area; we also heard from others that it is not a quiet environment. Dr Chiles' evidence acknowledges that while there is, at present, relatively quiet periods (particularly at locations further away from existing activities), this is not a remote rural area and many of the occupiers of dwellings are currently exposed to noise from the road, rail, airport and industrial activity.⁹⁹

⁹⁸ Evidence of Kirsty Austin, dated 9 July 2021, at [1.2].

⁹⁹ Evidence of Stephen Chiles, dated 9 July 2021, at [5.3] and [5.4]. For example, submitter, Mr Bradley noted from his own noise reading taken at his property of 50-60dB was fine.

- 7.9 Dr Chiles has recognised that there will be noise and vibration from construction but with good management practice (and conditions), he considers that those effects will be minor.¹⁰⁰ Where practicable, noise mitigation will be put in early, but due to a complex construction program there are constraints in some locations as to how early this can occur (such as on the eastern boundary where Railway Road needs to be closed and the NIMT realigned to enable these works). KiwiRail's proposed conditions require:
- (a) construction works to be undertaken to comply with the noise and vibration limits as far as practicable;
 - (b) the preparation of a comprehensive Construction Noise and Vibration Management plan to detail how construction activities will comply with those limits; and
 - (c) procedures to be followed to manage effects of noise and vibration, where compliance with the limits cannot be achieved. This includes a requirement to undertake pre-condition building surveys for affected dwellings, monitoring of vibration during construction, and repair of any damage to buildings caused by construction vibration.
- 7.10 Dr Chiles has undertaken modelling to determine the noise emissions that are likely to occur as a result of the operation of the Freight Hub. The modelling was undertaken based on the concept design.
- 7.11 Based on this modelling, Dr Chiles produced noise contours showing the future projected noise from the Freight Hub (both without and with mitigation included) once it is fully built out.¹⁰¹ Those contours show that with mitigation, the noise reduces substantially but there will still be properties that will experience adverse noise effects from the operation of the Freight Hub.
- 7.12 The sources of noise that were used inputs for the model were based on Dr Chiles observations from activities at other rail yards that are similar to those that will be undertaken on the Freight Hub site. Dr Chiles states:¹⁰²

The sources listed in Table 10 have been used to create a scenario that is likely to be representative of a busy hour during daytime operations of the fully developed Freight Hub. The Freight Hub will also include a wide range of other sound sources not included in the model and it would not be practical

¹⁰⁰ At [6.7].

¹⁰¹ First Section 92 Response dated 15 February 2021, Attachment 7.

¹⁰² NoR, Volume 3, Technical Report D: Acoustic Assessment, dated 23 October 2020, at page 26.

to explicitly model every potential sound source. The sources that have been modelled should represent the louder activities and they have been modelled at relatively frequent rates. This conservatism in the model in effect allows for minor contributions from other activities that are not explicitly modelled.

- 7.13 The inputs to the model are based on three trains continually moving throughout the Site. In response to the Chair's question regarding the modelling for the assessment, Dr Chiles has advised that based on his observations of other rail yards, there are no continual train movements so in this respect the modelling is conservative.
- 7.14 Mr Lloyd for PNCC considers that noise from the NIMT should be included in the modelling and controlled by the designation. As the Panel will be aware, the existing (operative and approved) NIMT runs adjacent to Railway Road. The NIMT is a linear piece of infrastructure of regional and national significance. KiwiRail's operations on the NIMT are authorised by an existing designation in the District Plan ("**NIMT Designation**"). There are no conditions on the NIMT Designation that control the emission of noise and vibration from the operative NIMT rail corridor. The District Plan provisions also excludes most rail activity from the noise limits in the Plan.¹⁰³
- 7.15 The NoR proposes to designate land that is currently occupied by the NIMT as this land is required for the construction of noise mitigation structures (the bund and noise barriers) on the eastern boundary of the Site. A consequence of the Freight Hub (if confirmed) is that the NIMT will need to be moved to the west of its current alignment and KiwiRail will need to alter the NIMT Designation to enable this realignment. KiwiRail will pursue this alteration separately from the Freight Hub NoR given that the realignment will only be necessary if this designation is confirmed.
- 7.16 As such, Dr Chiles has not modelled the noise and vibration effects from the operation of the NIMT as part of his assessment. The NIMT Designation is not reliant on a permitted baseline and KiwiRail is not asking the Panel to exercise its discretion to disregard those effects.¹⁰⁴ Rather, those effects have been excluded from assessment as they form part of a separate activity which does not (in its realigned location) form part the receiving environment.
- 7.17 In our submission, Dr Chiles has taken the correct approach:

¹⁰³ District Plan, R6.2.6.2.

¹⁰⁴ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [96].

- (a) The NIMT is a separate activity. Although the NIMT will run through the Freight Hub once realigned, it will remain distinct in that rail traffic may pass through on the NIMT but not necessarily stop at the Freight Hub. KiwiRail can, under the NIMT Designation, increase the rail traffic operating on the corridor.
- (b) To model the noise from the NIMT in its current location in conjunction with the noise from the Freight Hub would be artificial given that the NIMT (in its current alignment) cannot co-exist with the Freight Hub due to the noise mitigation works that will need to occur in the corridor.
- (c) The noise and vibration effects from the realigned NIMT will be assessed at the time KiwiRail applies to alter the NIMT Designation.
- (d) Including the NIMT activity in the current assessment as if it were part of the Freight Hub would result in one part of the operative line being inadvertently captured by controls, which could have implications for the whole line.

7.18 Dr Chiles' evidence is that there will be benefits associated with realigning the NIMT in the future in that it will shift that activity further away from the existing residential uses along the eastern boundary of the Site. Ms Tancock has submitted that KiwiRail should not be able to exclude the adverse effects of the NIMT from the assessment while including the positive effects.¹⁰⁵

7.19 We accept that the potential positive noise and vibration effects from the realignment of the NIMT are properly considered as contingent benefits in that they are intended to flow from the realignment of the NIMT but will only occur when that change is implemented through a separate RMA approval.¹⁰⁶ The realisation of those effects is not a matter that this Panel can consider as part of this NoR. However, the point that KiwiRail's experts properly make is there is an enabling element arising from the Hub proposal, in that those benefits can only be unlocked if this NoR is confirmed.

¹⁰⁵ Legal submissions on behalf of Dr Fox and Dr Whittle, dated 29 September 2021, at [69(c)].

¹⁰⁶ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [251].

- 7.20 KiwiRail has proposed a suite of comprehensive measures to mitigate the noise and vibration effects. These include:
- (a) The construction of substantial noise barriers on the northern and eastern boundaries of the Site and a more typical three metre high noise barrier on the west boundary.¹⁰⁷
 - (b) The development of both a Construction and an Operational Noise and Vibration Management Plan, which include requirements for monitoring the noise and vibration generated.
 - (c) A noise management boundary and a noise limit requiring that noise from the Freight Hub does not exceed 65 dB LAeq(1hr) within any site zoned Rural or Residential outside the Designation Extent.
 - (d) A requirement to offer and install at KiwiRail's cost noise insulation in affected dwellings (which as we explain below has been significantly revised).
- 7.21 The Panel has heard from some submitters that living next door to the Freight Hub and having to bear its effects is not their choice. There has been some suggestion that KiwiRail should purchase properties which might experience effects.
- 7.22 Mr Lloyd – who throughout the processing of this NoR has advocated for an expansion of the NoR footprint so that KiwiRail could acquire more houses - said that noise provisions need to "ensure people are saved from themselves". With respect, that approach is paternalistic and not supported by the legal framework. There needs to be a principled, transparent and lawful basis on which effects are managed (and properties acquired), and in our submission KiwiRail's evidence and proposed conditions do that.
- 7.23 An offer to acoustically insulate neighbouring properties, based on clear triggers and well understood noise mitigation packages for residential dwellings (as KiwiRail's conditions proposed to do) may not be desirable for all property owners. Some will decline the offer of mitigation if and when it is made. Some will choose to sell and move on. KiwiRail's approach is, in our submission, fair, transparent, and based on evidence.

¹⁰⁷ Evidence of Stephen Chiles, dated 9 July 2021, at [7.1].

7.24 KiwiRail has listened to submitters who have properties on the edge of the Site, and Dr Chiles has worked further with Mr Lloyd,¹⁰⁸ to significantly refine and strengthen the proposed conditions on noise insulation so that:

- (a) It is clear that treatment is at KiwiRail's cost.
- (b) The offer for noise insulation is forward looking in that it is triggered when the noise is anticipated to be generated in the following 12 months and best endeavours must be made to install the treatment before the noise is generated.
- (c) The appropriate noise insulation will be determined by a suitably qualified expert, which is appropriate to ensure that what is being installed is effective. The option is built in for KiwiRail to agree to alternative measures if that is the wish of the property owner.

7.25 Dr Chiles was also attracted to the Chair's observation on the last day of hearing regarding a "bifurcated" approach to noise from the NIMT whereby noise from the NIMT is not controlled by the designation but treatment offered takes into account noise from the Freight Hub and the NIMT. KiwiRail is not, in our submission, required to treat dwellings for the noise generated from the NIMT. However, KiwiRail has carefully considered this approach and is willing to offer conditions in response. The revised conditions proposed by KiwiRail:

- (a) exclude (appropriately and correctly) noise from the NIMT from the noise limits which control the day-to-day operations of the Freight Hub;
- (b) include a trigger for investigations to be undertaken at affected dwellings based on noise projections arising from the operation of the Freight Hub (excluding the separate NIMT activity);
- (c) where those investigations determine that treatment is required for noise from the Freight Hub, offer to install acoustic treatment; and
- (d) on an *Augier* basis, offer treatment measures that achieve an appropriate internal noise level based on the long term projected noise of the Freight Hub and a reasonable future projection of noise from the NIMT.

¹⁰⁸ Dr Chiles and Mr Lloyd produced a joint statement on 19 August 2021 which recorded that issues had been narrowed significantly and that there is agreement on many issues.

- 7.26 This approach appropriately respects the function of the NIMT as a separate piece of linear infrastructure while also ensuring, pragmatically, that those adversely affected by noise from the Freight Hub receive mitigation for the real-world effects that they will experience.
- 7.27 In terms of using the future noise contours as design criteria for the acoustic treatment, Mr Lloyd considers that these should be based on the current noise contours that Dr Chiles has modelled.¹⁰⁹ Dr Chiles disagrees. For the purposes of treatment, Dr Chiles' view is the annual and future noise modelling proposed is a more accurate and prudent basis on which to proceed.
- 7.28 Ultimately, the noise experts agree that the treatment should be based on future noise contours – it is a question only as to whether those future noise contours should be inserted now or later. In our submission, Dr Chiles' approach must be preferred. It is appropriate for the building treatment to be based on the projected noise level from the Freight Hub once detailed design has been undertaken to ensure that KiwiRail is treating on the basis of the most accurate and up to date information. It otherwise risks property owners being treated for noise to a greater or lesser degree than they otherwise should. Providing unnecessary mitigation is an unreasonable cost for KiwiRail to bear, as well as unnecessarily disruptive for property owners. Property owners should be confident they are being offered a package which will appropriately address the effects of noise on them.
- 7.29 In our submission, the mitigation measures that KiwiRail has proposed are comprehensive and appropriate. With these measures in place, the noise and vibration effects from the Freight Hub will be avoided, remedied or mitigated.

Landscape and visual effects

- 7.30 The impact of the Freight Hub from a visual amenity perspective has been a key concern for some submitters, and particularly (and reasonably) from neighbours whose properties border the Hub site.

¹⁰⁹ Section 42A Technical Evidence Summary: Noise, dated 30 September 2021, at [58]-[59]; Joint Witness Statement of Acoustics Experts, dated 19 August 2021, at [6.3].

- 7.31 The Environment Court has identified key principles for visual effects assessment:¹¹⁰
- (a) There is no right to a view. Although decision-makers must have particular regard to the maintenance and enhancement of amenity values, "this is not the same thing as saying there is a right to a view".
 - (b) A landowner can use their land as they see fit, provided it is lawful. As such, land use can sometimes lawfully change an existing view.
 - (c) The significance of a particular landscape to people who live near it may require decision-makers to carefully consider local input, as well as that provided by experts.
- 7.32 The Freight Hub will result in a change of outlook for landowners living near to the Site and there will be adverse visual amenity effects associated with that. This is recognised in Ms Rimmer's assessment where she identifies that there will be high adverse visual amenity effects for those residential properties with open views towards the Freight Hub and where noise mitigation structures are proposed.
- 7.33 Her evidence, which includes an advanced landscape concept plan and comprehensive effects assessment, is that these effects can be mitigated through a suite of measures, including the proposed Landscape and Design Plan, which provides opportunities for landowner and community input. The community will be able to work with KiwiRail and its experts in relation to how the edge effects of the Freight Hub are managed and integrated with the surrounding environment.
- 7.34 There are also real opportunities to thoughtfully and cohesively consider landscape edge effects given the size of the Site and that it will all be in the control of a single landowner. The ability to manage this interface across a large site is much more effective than would be possible if the Site was in fragmented ownership.

Design framework

- 7.35 PNCC has sought an overarching design framework to be developed early in the process and sit above all of the management plans, in addition to the landscape and design plan proposed by KiwiRail.

¹¹⁰ *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [112].

- 7.36 KiwiRail's evidence is that a design framework is unnecessary here.¹¹¹ A framework that sits above all other management is not appropriate and does not reflect the practical realities of the way in which the Freight Hub will be designed and developed. In the expert conferencing undertaken on the Landscape and Design Plan, KiwiRail's experts acknowledged that other management plans will need to be developed in parallel, to ensure an integrated approach to development.¹¹² For KiwiRail's experts, the requirement for an additional (standalone) document and additional separate process will only add to the complexity of the project for the community and for KiwiRail.¹¹³
- 7.37 When questioned by the Chair on the purpose of the Design Framework, Ms Whitby said that the Design Framework would require input from multiple experts rather than being prepared solely by a landscape architect and there would be greater opportunities for engagement on the design with the community. These matters will, in our submission, be addressed through the conditions proposed by KiwiRail.
- 7.38 Where the conditions require a plan to be prepared by a suitably qualified person (in this case a landscape architect), it does not mean that other experts are precluded from involvement. However, it would be cumbersome to suggest a need to write into conditions a requirement for consultation with relevant experts. For the avoidance of any doubt however, and to ease the Council's concerns in this regard, KiwiRail's proposed conditions require the Landscape and Design Plan to be prepared by a suitably qualified and experienced person in consultation with other relevant qualified persons, as required.
- 7.39 In relation to community involvement, it would be disingenuous for KiwiRail to suggest to the community that they can have a real influence on all aspects of the design of the Freight Hub. The reality is that some key aspects of the Landscape and Design Plan will be based on matters which the community will not be able to meaningfully influence, like operational requirements. This is made clear in KiwiRail's proposed conditions which separates these aspects out from the design principles and outcomes that the community can have a say on.

¹¹¹ Evidence of Lisa Rimmer, dated 9 July 2021, at [10.5].

¹¹² Joint Witness Statement of Landscape and Visual and Social Impact Experts, dated 27 September 2021, at [1.12] and [1.16].

¹¹³ Joint Witness Statement of Landscape and Visual and Social Impact Experts, at [1.16].

7.40 KiwiRail also has an obligation to make sure certain design measures are effective in mitigating the effects of the Freight Hub. The Landscape and Design Plan is not an opportunity to go back to square one. As already highlighted in these submissions, KiwiRail has a well-advanced concept plan and proposed landscape treatments which will be refined through the detailed design phase. PNCC's desire to see involvement of experts from various disciplines and the community and mana whenua can, and will, be achieved through KiwiRail's proposed Landscape and Design Plan.

Ecology

7.41 The Council's ecologist and reporting planner are of the view that an "incomplete assessment" has been undertaken of the ecological values of the site and has suggested that this results in an information "gap" in the NoR.¹¹⁴ In our submission, what there actually is, is a difference of opinion between the Council's and KiwiRail's expert ecologists as to the assessment approach and the conclusions reached by each on the ecological values and effects on the site.

7.42 Mr Garrett-Walker has undertaken a robust assessment of the ecological values of the Site which followed the EIANZ 2018 Guidelines for Ecological Impact Assessment.¹¹⁵ This assessment involved both desktop and site investigations from which he has assessed the ecological values and effects based on his expert opinion, again following good practice guidance.

7.43 Ms Quinn's opinion is that it is too soon to draw conclusions about the ecological values of the Site. She considers that further assessments and surveys are needed. Notwithstanding this, Ms Quinn "totally accept[s]" that her reservations about Mr Garrett-Walker's assessment may be addressed by a further detailed assessment and a regional consenting process.¹¹⁶ In our submission, the regional consenting phase is the appropriate place for a more detailed assessment to take place. Mr Garrett-Walker has always been clear that this is what would be required in his opinion.

7.44 While Ms Quinn has maintained her view that a condition requiring an ecological survey to be undertaken is necessary as part of this process, in response to questions from Commissioner Makinson she acknowledged this assessment would be required for regional consenting anyway. That is exactly

¹¹⁴ Section 42A Technical Evidence Summary: Planning, dated 30 September 2021, at [31(b)].

¹¹⁵ Evidence of Jeremy Garrett-Walker, dated 9 July 2021, at [5.1].

¹¹⁶ Section 42A Technical Evidence Summary: Ecology, dated 29 September 2021, at [5].

the point made earlier – this is required for a regional consent application and the imposition of such a condition is, in our submission, unnecessarily duplicating that process. It also confuses the role of the PNCC in regional matters.

- 7.45 Ms Quinn considers that some of the areas investigated by Mr Garrett-Walker meet the definition of a wetland. This conclusion is drawn despite that she has not investigated those areas herself. We appreciate Ms Quinn's role as a reporting officer is to review the assessment and not necessarily undertake her own assessment. However, based on her evidence, it appears that she has only visited part of the site on one occasion in November 2020 where she made visual assessments only.¹¹⁷ Mr Garrett-Walker on the other hand has undertaken four site visits (two of which occurred over two different days) where he directly accessed approximately 50% of the Site and has viewed a significantly greater portion of the Site from public vantage points. For these reasons, Mr Garrett-Walker's evidence should be preferred.
- 7.46 In any case, while Mr Garrett-Walker considers that it is unlikely that there will be wetlands on those areas of the Site he has not visited, in the event that any are present, he considers that those adverse effects will be able to be mitigated or offset. From a planning perspective, Ms Copplestone appears to be concerned that in respect of in-stream values there is (in her view) uncertainty as to the mitigation, compensation or offsetting measures that might be required and that there is a high bar to meet under the National Policy Statement for Freshwater Management 2020 ("**NPS-FM**").¹¹⁸
- 7.47 As outlined in our opening legal submissions, the NPS-FM directs that the effects management hierarchy is to be applied by the regional council through its regional plan in relation to applications for regional resource consents. In this regard, the detail as to the how these effects can be mitigated or offset cannot be considered an information "gap" in the context of a process that does not require this assessment to be undertaken.
- 7.48 Fundamentally Ms Quinn agrees that the Site is degraded and that it is not an inappropriate site for the Freight Hub development from an ecological perspective.¹¹⁹

¹¹⁷ Section 42A Technical Evidence Summary: Ecology, dated 29 September 2021, at [3.4].

¹¹⁸ Section 42A Technical Evidence Summary: Planning, dated 29 September 2021, at [7].

¹¹⁹ Section 42A Technical Evidence Summary: Ecology, dated 29 September 2021, at [3].

Air Quality

- 7.49 Ms Ryan for PNCC states that further information is needed to understand the nature and scale of the potential effects of the NoR on air quality.
- 7.50 Ms Ryan's position is partly informed by her expectations based on her experience and the level of assessment that Waka Kotahi "routinely provides".¹²⁰ She provides two recent examples of projects that she has been involved in, the Puhoi to Warkworth project and the Riverlink project. Both of those projects involved the concurrent application for notices of requirement and regional resource consents, including applications for discharges to air where a detailed air quality assessment would be necessary for the application for consent. These applications are not analogous to the present NoR and the approach taken by another requiring authority is not a sound basis to suggest that this NoR lacks information.
- 7.51 Notwithstanding Ms Ryan's assertion that more information is needed, Dr Heveldt and Ms Ryan are in agreement to a significant degree, particularly on the management responses. They agree that:
- (a) The risk of discharges of dust is high and that a construction dust management plan is needed.¹²¹
 - (b) Air quality monitoring for particulate matter during construction is appropriate (although they have different approach to that monitoring).¹²²
 - (c) A wider air quality management plan is appropriate to address air quality matters beyond those associated with dust.¹²³
- 7.52 The disagreement lies between Ms Bell and Ms Coplestone on where those management measures should sit - with PNCC or the Regional Council. Ms Bell's evidence is that these matters are most appropriately addressed at the regional consenting phase. Ms Coplestone has proposed a much more comprehensive set of conditions that she considers are necessary to address

¹²⁰ Section 42A Technical Evidence Summary: Air quality, dated 29 September 2021, at [17] – [19].

¹²¹ At [3].

¹²² At [3].

¹²³ At [8].

"the lack of clarity" around the discharges from the Freight Hub and the potential effects.¹²⁴

- 7.53 In our submission, the conditions proposed by Ms Coplestone stray into matters that sit within the Regional Council's jurisdiction. The fact that Ms Coplestone does not consider that "any overlap in this area would be burdensome to KiwiRail" is beside the point (and it unclear the basis on which Ms Coplestone might make that assertion).¹²⁵ What the conditions should achieve is a management response to the effects that are generated from the NoR and regulated by PNCC. In our submission, KiwiRail's approach and the proposed conditions do that.

8. CULTURAL VALUES

Approach

- 8.1 KiwiRail did not obtain formal cultural values assessment reports ("**CVA**") from iwi before coming to this hearing. It has been open about that.
- 8.2 Instead, its approach has been to invite iwi to the site selection process and development of the NoR, and identify how their values can be represented through the project, as it is developed over time. The approach has been about building relationships, trying to unlock opportunities for iwi, and exploring new ways of doing things. KiwiRail sees local iwi as partners in this project, not simply stakeholders or submitters. KiwiRail has heard and endorses Commissioner Pomare's challenge to find real and tangible economic and partnership opportunities for mana whenua.
- 8.3 The approach has also meant that, at times, KiwiRail has not been able to go as "fast" as the conventional RMA process demands. KiwiRail's acknowledgement about the process it has followed has led to a narrative emerging through the hearing that, there is a deficit of cultural information before the Panel. In our submission, that is not accurate. KiwiRail has endeavoured to take a broader view of the role of mana whenua in projects like this, rather than relegating their involvement to the production of an "RMA-ready report" which an applicant can then hand up, job done, box ticked and move on.

¹²⁴ Section 42A Technical Evidence Summary: Planning, dated 29 September 2021, at [17].

¹²⁵ At [17].

- 8.4 KiwiRail's approach hasn't been perfect or without challenge. It has, however, consistently been based on honesty, transparency and listening. It has been based on people doing their best, and letting iwi guide the conversation. It has resulted in KiwiRail proposing a set of mana whenua engagement conditions which are broad, empowering, and partnership-focused (and which would make many developers nervous). These are not conditions that are intended to languish in the requiring authority's bottom drawer.
- 8.5 In our submission, the Panel has good evidence from KiwiRail, from the application documents, from experts, iwi and submitters directly through this hearing process, in relation to cultural values and effects.
- 8.6 KiwiRail cannot compel iwi to provide CVAs and it remains KiwiRail's view that it is not appropriate for KiwiRail to assess the cultural values of the Site or to insist on CVA when iwi are not ready to provide them (or do not want to), or have other more pressing demands on their time, like Waitangi Tribunal processes, or managing COVID responses in their communities. KiwiRail has also been, throughout this process, respectful of the interplay between iwi in the region where, at times, some iwi have deferred to others, only to (later, and for a range of reasons) want to play a larger role. It has been important to KiwiRail to listen to iwi in relation to that interplay, and be guided by them.
- 8.7 KiwiRail is committed to the long-term development of this Site. It is committed to the Manawatū. KiwiRail is not going anywhere, and continuing to build and develop relationships with mana whenua is critical. This project, and the way it is designed, developed and operated, has the potential to be transformative.
- 8.8 The conditions proposed are, in KiwiRail's view, the best and most appropriate way to (within the confines of an RMA NoR) provide real and meaningful long term opportunities for mana whenua in the development of the Freight Hub. There are a range of other opportunities which sit outside the condition set, and which KiwiRail will continue to pursue and support. In our submission, this approach ensures that cultural effects can be appropriately avoided, remedied or mitigated, working with iwi through not just the development of the Freight Hub and the management of environmental effects on site, but in its operation moving forward – unlocking real opportunities for iwi.

Evidence

- 8.9 Since the MCA process, and throughout the NoR and hearing process, KiwiRail has engaged with Ngāti Kauwhata, Rangitāne o Manawatū, Ngāti Raukawa ki te Tonga, Aorangi Marae trustees, and Ngāti Turanga, to seek their advice on the cultural values within the area and the potential effects that

the Freight Hub may have on those values. KiwiRail's engagement with iwi up to the hearing was summarised in Ms Poulsen's evidence.¹²⁶

- 8.10 The site selection and MCA process was also directly informed by information provided by iwi (Ngāti Kauwhata, Rangitāne o Manawatū, and Ngāti Raukawa ki te Tonga) to KiwiRail. For example:
- (a) In September 2019, KiwiRail engaged Ngāti Kauwhata, Rangitāne o Manawatū, and Ngāti Raukawa ki te Tonga to undertake an assessment of each of the site options that were being investigated as part of the MCA process. Iwi were invited to assess the site locations and provide that feedback in a form of their choice. KiwiRail also invited iwi to attend the workshops, and representatives from Ngāti Kauwhata and Rangitāne attended workshops 2 and 3.¹²⁷
 - (b) Rangitāne provided KiwiRail with a report on each of the long list of site options that were being assessed as part of the site selection process. The report used a range of databases containing information on sites of significance to Rangitāne as well as the location of iwi members to assess the impact of each of the sites. The report identified that sites 3 and 4 were preferred, subject to a more detailed assessment on the sites of significance and waterways.¹²⁸ From an ecological perspective, this has occurred in part through the assessment prepared through the NoR and more detailed assessments will be undertaken as part of the detailed design and regional consenting phase. KiwiRail welcomes the input of mana whenua on the cultural values as part of those assessments, when they are ready to do so. The conditions enable that approach.
 - (c) Ngāti Kauwhata provided comments on the site options, noting that this would be an ongoing process of engagement. While Ngāti Kauwhata indicated a preference for site 4 based on a range of factors,¹²⁹ they have not advised that there are sites of such cultural significance to Ngāti Kauwhata within site 3 that would require the avoidance of this site altogether. If any sites of cultural significance are identified, KiwiRail and iwi will work through the solutions

¹²⁶ Evidence of Olivia Poulsen, dated 9 July 2021, at [6.4]-[6.8].

¹²⁷ MCA Summary Report, dated 30 June 2020, at page 82.

¹²⁸ MCA Summary Report, dated 30 June 2020, at pages 77 and 82.

¹²⁹ MCA Summary Report, dated 30 June 2020, at page 82.

together and the conditions provide mechanisms through which these discoveries can be addressed.

- (d) In determining the short list of options for further analysis, there was a preference from both Ngāti Kauwhata and Rangitāne for site locations to the North East of the City, as opposed to any southern sites in Longburn, or sites further north (near Aorangi Marae). For Rangitāne, this was "based on density of known and likely sites of significance to Rangitāne".¹³⁰ KiwiRail ultimately selected sites 3 and 4 as part of the final shortlisted sites.¹³¹
- (e) Aorangi Marae trustees were not directly involved through the MCA process, but through various hui with Marae representatives over the last couple of years, we understand do not have a strong preference for the location of the Freight Hub, subject to avoiding locations near the Marae and any associated adverse effects on the Marae.¹³² We understand sites preferred by Ngāti Kauwhata and Rangitāne were consistent with this position.

- 8.11 After site selection, iwi have continued to talk to KiwiRail about a range of matters, including local roading and safety issues, concerns regarding noise effects on the Marae, and economic opportunities for iwi. KiwiRail is grateful for this input, and has also benefited from the ability to hear the evidence that Ngāti Kauwhata have given as part of their current Waitangi Tribunal proceedings, which has deepened KiwiRail's understanding of their history and relationship with the area.
- 8.12 Representatives of Ngāti Kauwhata, Rangitāne o Manawatū, and trustees of Aorangi Marae also addressed the Panel through the hearing on their submissions.
- 8.13 While Te Runanga o Raukawa attended the reconvened hearing, they elected not to speak to their submission and KiwiRail understands that they are broadly in support of Ngāti Kauwhata's position.
- 8.14 By way of email correspondence, representatives on behalf of Ngāti Turanga noted that while the matters raised in their submission still stand, they are

¹³⁰ MCA Summary Report, dated 30 June 2020, at page 60.

¹³¹ MCA Summary Report, dated 30 June 2020, at page 60.

¹³² Evidence of Olivia Poulsen, dated 9 July 2021, Appendix 1.

"working with KiwiRail to look for common ground and resolution to issues raised in submissions".¹³³ They chose not to present at the hearing.

8.15 During the hearing, the Panel heard the following from iwi:

- (a) Concerns about roading infrastructure and traffic and noise impacts from road and rail on Aorangi Marae.
- (b) The need to acknowledge the significant impact of the project on the land – the proposed 177ha footprint means a huge amount of land would be disrupted by this project.
- (c) The need to see a partnership approach with KiwiRail and active participation by iwi in the Hub project, but an acknowledgement there is potential for that. As Commissioner Pomare noted after one presentation, "reasonable optimism".
- (d) No fundamental opposition to this site. Ngāti Kauwhata continues to prefer site 4 on the other side of Railway Road, but will work with KiwiRail on this Site.
- (e) Frustration from Rangitāne about KiwiRail's sometimes sluggish response in the lead up to the hearing.
- (f) A reminder that iwi should not be sidelined or used to tick a box.
- (g) Ngāti Kauwhata considers there are waahi tapu on the site.
- (h) Concerns about the impacts of the project on stream quality and the opportunities for improvements.

Update

8.16 Since the hearing was adjourned in August, KiwiRail has continued working with representatives from Ngāti Kauwhata, Rangitāne o Manawatū, Ngāti Raukawa and Ngāti Turanga. This has included numerous discussions and hui (online and in person) in relation to the proposed conditions, but more broadly as well – such as other ways to formalise the ongoing commitment to a partnership approach to this project and beyond. Some of those matters sit outside this process.

¹³³ Email correspondence from Greg Carylton to Kath Olliver dated 14 September 2021.

- 8.17 On the basis of ongoing consultation with and direct input from iwi, KiwiRail proposes revisions to the Mana Whenua engagement framework conditions.
- 8.18 Rangitāne o Manawatū supports these conditions as now proposed by KiwiRail.
- 8.19 KiwiRail has also discussed the draft conditions extensively with Ngāti Kauwhata. Ngāti Kauwhata considers that while the draft conditions are moving in the right direction, they are not yet happy with them, because they don't consider they appropriately reflect what they consider is their status as kaitiaki of this particular site, or ahi kaa. Ngāti Kauwhata are not however in opposition to the Freight Hub project and want to be at the table.
- 8.20 You heard that a key concern of Ngāti Kauwhata relates to Aorangi Marae and the papakāinga. KiwiRail acknowledges the evidence of Sir Mason Durie on behalf of the Marae Trustees and the concerns he and other trustees, as well as others from Ngāti Kauwhata, have raised in relation to the effects of the current transport network (road and rail) on that important place. In a strict sense, the ability for the Panel to consider those adverse effects is limited – the proposed effects of the Hub do not extend to adverse effects on the Marae, and arise predominantly from the use of the existing road network including the state highway, as well as the operative NIMT. As Mr Harris from the Manawatū District Council said, the concerns of Aorangi Marae have been known for a long time, and require a multi-user approach and a multi-party solution.
- 8.21 KiwiRail is genuinely committed to working with trustees and Ngāti Kauwhata to advance a multi-party solution to these issues. It is a matter that sits outside this process.
- 8.22 The amended conditions proposed by KiwiRail:
- (a) require KiwiRail to prepare a mana whenua engagement framework in partnership with mana whenua and in accordance with Te Tiriti o Waitangi;
 - (b) recognise kaupapa-based approaches such as Te Whare Tapa Whā;
 - (c) provide the mechanism not only for KiwiRail to understand the values in the area but to honour, recognise and provide for them in the design and operation of the Freight Hub;

- (d) provides for roles and responsibilities for mana whenua at governance and operational levels, which ensures that there is an express obligation and ongoing role for iwi in this project (and beyond);
- (e) ensures that mana whenua are involved in the preparation and implementation of management plans as part of the designation as well as any regional consenting processes, in that mana whenua will be able to co-develop these management plans with KiwiRail; and
- (f) requires opportunities for employment, training and scholarships to be provided as part of the development of the Freight Hub.

8.23 These conditions set up a broad and enduring framework which will recognise and provide for the relationship of mana whenua with this site. The conditions have particular regard to kaitiakitanga, and the principles of Te Tiriti o Waitangi. The intent is that the mana whenua engagement framework is prepared early in the piece, with KiwiRail and mana whenua preparing it within 12 months after the NoR is confirmed.

9. PLANNING PROVISIONS AND PART 2

National Policy Statements

- 9.1 The Chair raised a question regarding the degree to which the National Policy Statement on Urban Development 2020 ("**NPS-UD**") is relevant to the NoR and how the Panel ought to approach its assessment of the NPS-UD as against the NPS-FM.
- 9.2 It is firstly important to consider the relevance of national policy documents in the context of a NoR. Section 171 provides that the Panel must have particular regard to (not give effect to) the relevant provisions of all relevant policy statements.¹³⁴ This means giving genuine attention and thought to those documents but do not necessarily have to be accepted.
- 9.3 The Panel must give genuine thought and attention to the policies in those documents when considering the effects of the NoR on the environment under section 171 of the RMA. As to how the Panel should reconcile those documents, the Environment Court has previously held:¹³⁵

¹³⁴ *New Zealand Transport Agency v Architectural Centre Inc* [2015] 1991 at [60] and [64].

¹³⁵ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2020] NZEnvC 043 at [77].

There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as “trumping” the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

9.4 The High Court endorsed this approach on appeal and stated:¹³⁶

[...] I also agree with the Court that, in relation to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as “trumping” the other and neither should be given priority over or “give way” to the other. As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. [...]

9.5 In that case, the High Court found that to the extent that there was “room for differences” between the NZCPS and NPSET, both had been reconciled and given effect to by the regional coastal environment plan and the district plan.¹³⁷ In this instance, neither the District Plan nor the One Plan have been updated to give effect to the NPS-FM or the NPS-UD, so this approach cannot be relied upon to reconcile any tensions between the two national documents.

9.6 In light of the case law, it is our submission that the correct approach when considering the NPS-UD and NPS-FM in the context of the Freight Hub is to:

- (a) undertake a genuine attempt to interpret both documents in a consistent manner, where possible, including with any other relevant national policy statements, and if they cannot be interpreted consistently; then
- (b) consider the objectives and policies of both documents within the specific context of the Freight Hub and where any objectives or policies are more specific or directive they should be given more weight.

¹³⁶ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [125].

¹³⁷ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [128].

- 9.7 There is, in our submission, an inevitable tension between the NPS-FM and NPS-UD but the extent of that tension will vary depending on the circumstances of each case. In the context of the Freight Hub, we submit that these policy documents can be reconciled in the following way:
- (a) In managing freshwater resources and enabling urban development, there is clear policy direction in the NPS-FM and NPS-UD to provide for the social, economic, and cultural wellbeing of people and communities both now and into the future. The Freight Hub will support the development of Palmerston North City's urban environment, through its provision of land for the movement of freight which is a vital aspect of contributing to the creation of jobs within the region thereby supporting the social and economic well-being of communities.
 - (b) Both the NPS-FM and NPS-UD have a clear focus on managing our resources in way that responds to climate change. The NoR for the Freight Hub is a planning decision, in the context of the NPS-UD, that contributes to "well-functioning urban environments" by supporting reductions in greenhouse gas emissions through the provision of sustainable rail transport modes. That can be interpreted consistently with the policy direction in the NPS-FM to manage freshwater as part of an integrated response to climate change.
 - (c) The NPS-FM seeks to ensure that the loss of river extent and values is avoided "to the extent practicable". The NPS-FM appropriately acknowledges and provides a pathway to manage the effects of development on the Freight Hub, where that may for example be necessary to provide for well-functioning urban environments. While KiwiRail's evidence is that the presence of natural inland wetlands is unlikely, to the extent that there are any wetlands later found to be present the NPS-FM provides a pathway for specified infrastructure, like the Freight Hub, where there is a functional need for that infrastructure in this particular location (of which there is, in our submission).
 - (d) There is a clear need to recognise and provide for cultural values in managing our freshwater resources under the NPS-FM and for planning decisions relating to urban environments to take into account Te Tiriti o Waitangi.

Part 2

- 9.8 The Panel must consider Part 2 in addition to the matters under section 171 for a notice of requirement.¹³⁸ It is not a matter of considering each environmental effect under section 171 for consistency with Part 2,¹³⁹ and we agree with the PNCC's submission that a Part 2 assessment should not be a box-ticking exercise. That is not the approach Ms Bell has taken in her assessment. Rather, Ms Bell has undertaken a complete Part 2 assessment and concludes that the Freight Hub, as a whole, is consistent with Part 2.¹⁴⁰
- 9.9 Counsel for PNCC has raised issues with specific effects in relation to sections 6(a), 6(d), 7(d) and 7(g), but concludes its concerns with these specific matters are not "necessarily fatal".¹⁴¹ Counsel for PNCC says there is evidence that Part 2 could be met but the ability to reach that firm conclusion is impacted by the "informational issues".¹⁴²
- 9.10 In our submission, it is unhelpful for the Panel to consider Part 2 on this basis, but for completeness we respond to the matters raised by PNCC below. We also submit there are no information gaps of the kind alluded to by counsel for PNCC (as set out above) and the Freight Hub is consistent with the matters in Part 2.

Section 6(a)

- 9.11 Regarding the enhancement of natural character, we accept that the culverting of waterways, when considered in isolation, does not enhance natural character. This is a large, complex, regionally significant infrastructure project, and there will be adverse effects. The evidence of Mr Skelton and Mr Leahy for KiwiRail has explained why, from a design perspective, culverting is required in order to meet the operational requirements of the Freight Hub.
- 9.12 Ms Rimmer's evidence is that the Freight Hub has the potential to enhance natural character of the Mangaone Stream environs. That conclusion takes into account the existing degree of natural character which is relevant to what is being "preserved" for the purposes of section 6(a). Ms Rimmer's evidence is that the waterways on the Site have low natural character values. They

¹³⁸ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [112].

¹³⁹ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [118].

¹⁴⁰ Evidence of Karen Bell, dated 9 July 2021, at [7.27] – [7.38].

¹⁴¹ Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [149].

¹⁴² Legal Submissions on behalf of Palmerston North City Council, dated 29 September 2021, at [150].

already flow through culverts under Railway Road and the NIMT. Their paths have been heavily influenced by farming activities and access bridges, and their margins are dominated by exotic weeds.¹⁴³

- 9.13 Ms Rimmer's view is that there are a number of features of the Freight Hub, all of which need to be considered together, such as the indigenous planting (which include river plain and wetland species), the proposed naturalised channel and planted stormwater ponds. Taken together, her opinion is that these features will create "physical and perceptual connections with the stream environment and their setting within a significant area of naturalised planting that would be typical of the area historically".¹⁴⁴ Compared to the existing environment, Ms Rimmer's opinion is that these features will enhance perceptions of natural character.¹⁴⁵
- 9.14 In our submission this is a project of regional significance that meets the overarching purpose of sustainable management such that it does not require absolute protection or preservation of (already low) natural character of the Mangaone Stream.
- 9.15 In that context, it is our submission, that the Freight Hub is not an inappropriate development in the context of the existing natural character of the waterways on this Site.

Sections 6(d) and 7(d)

- 9.16 KiwiRail accepts that public access to stormwater ponds is not a substitute for public access to a stream, or a lake. But the reality is that there is currently no public access to any waterways through the Site. It is against this existing environment that Ms Rimmer's assessment has been made.
- 9.17 We also accept that the public will not be accessing the Mangaone Stream directly. However, the public cannot access the Stream currently as the adjacent land is within private ownership. So while the Freight Hub will not provide direct public access (and will not "maintain" public access given there is none now), Ms Rimmer's evidence is that walking through these naturalised areas of indigenous planting will be better than what is there now. Recreational loop tracks, with access to stormwater ponds in the west of the Site, will change perceptions of the Mangaone Stream for the area, particularly to the west of the Site, around the stormwater ponds and planting.

¹⁴³ Evidence of Lisa Rimmer, dated 9 July 2021, at [6.13].

¹⁴⁴ Evidence of Lisa Rimmer, dated 9 July 2021, at [7.4] and [7.5].

¹⁴⁵ At [7.5].

Section 7(g)

- 9.18 The site proposed for the Freight Hub is large. While it is not entirely clear from PNCC's legal submissions what the concern with section 7(g) is, PNCC's evidence is that there is sufficient land available within the city for projected residential growth and that the reduction in industrial zoned land as a result of the Freight Hub does not pose any issues from an industrial land supply perspective.¹⁴⁶ While the Freight Hub will result in the loss of some versatile soils, PNCC's evidence is that it hard to avoid city growth on these soils because of the nature of land within the City.¹⁴⁷

Sections 6(e), 7(a), and 8

- 9.19 Counsel for PNCC suggests that it is premature to draw a conclusion on whether the Freight Hub is consistent with sections 6(e), 7(a) and 8 of the RMA. As outlined above, KiwiRail's engagement with iwi has been extensive and ongoing and extends beyond this NoR process. In our submission, those matters in Part 2 can (and should) be provided through more than just an applicant's provision of a CVA.
- 9.20 In our submission, the proposed Mana Whenua Engagement Framework remains the most appropriate way to ensure that cultural values are recognised throughout the life of the Freight Hub. In our submission, KiwiRail can ensure, in partnership with iwi, that cultural effects are avoided, remedied and mitigated in manner that is consistent with Part 2.

10. CONDITIONS

Iterative approach

- 10.1 KiwiRail has listened carefully to the matters raised by submitters, iwi, PNCC and the Panel during the course of the hearing and has refined its conditions further. As well as amending its final set of conditions to respond to matters of substance, KiwiRail has also closely reviewed the drafting of its conditions. In particular, and having regard to Commissioner Sweetman's questions throughout the hearing, KiwiRail has been cognisant of the need for:
- (a) specificity and certainty of outcomes while also balancing the nature of this designation;

¹⁴⁶ Section 42A Report, dated 18 June 2021, at [818] and [822].
¹⁴⁷ At [829].

- (b) simplicity in drafting and use of plain language (such as "must" rather than "shall"), as well as the passive voice; and
- (c) conditions that have a clear resource management purpose and do not repeat obligations at law.

10.2 Appended to these submissions are:

- (a) a clean version of KiwiRail's proposed conditions as **Appendix A**; and
- (b) a table with KiwiRail's proposed conditions and the Council's final set of conditions with commentary on the areas of disagreement as **Appendix B**.

Hard limits and management plans

- 10.3 The Environment Court has acknowledged that, given the flexibility of designation, "careful attention" must be given to conditions, particularly those which constrain the activities within the boundaries of effects that the experts (and the Panel) considers acceptable.¹⁴⁸ However, the conditions of a designation also need to reflect the nature of the designation sought should not, in our submission, be so prescriptive so as to effectively negate the need for an OPW entirely. There is a balance to be struck.
- 10.4 KiwiRail has proposed stand-alone conditions that impose limits on the construction and operation of the Freight Hub where it is practicable and appropriate to do so, including in relation to noise and vibration. But in the context of a designation, hard limits are not always practicable or appropriate. KiwiRail's proposed conditions also include a suite of management plans to provide certainty that the adverse effects of the Freight Hub will be addressed. These include a range of construction management plans (for traffic, noise and vibration, and lighting) as well as management plans to manage the ongoing operation of the Freight Hub. The use of management plans is a common and accepted tool in the management of effects (in addition to OPWs), particularly in large-scale infrastructure projects.
- 10.5 In considering the East West Link Proposal, the Board of Inquiry ("**BOI**") observed that "reliance on management plans is not surprising for a Proposal of that scale and complexity".¹⁴⁹ The BOI went on to state that it had "no issue"

¹⁴⁸ *Minister of Corrections v Otorohanga District Council* [2018] NZEnvC 25 at [10].

¹⁴⁹ Final Report and Decision of the Board of inquiry into the East West Link Proposal (January 2018) at [1204].

with the following view expressed by Ms Hopkins (a planning witness in that case):¹⁵⁰

[...] management plans are an effective and widely used method to manage the effects from major construction projects. This is particularly so for large infrastructure projects such as this, where the design details will be finalised at a later date, meaning that not all the mechanisms for managing construction effects can be finalised at this time. I consider the management plan process to be an effective technique to provide certainty that adverse effects of the Project will be appropriately managed.

- 10.6 Management plans allow for detail (such as construction methodologies) to be developed at a future stage. Given this approach, it is generally accepted that management plans should be certified (rather than approved) by the territorial authority and the conditions should set out a process for certification.¹⁵¹ KiwiRail's proposed conditions set out a clear process for certification of relevant management plans.
- 10.7 As set out in our opening submission, there are a series of principles that have developed around what good management plan conditions look like. These include a requirement to be prepared by a suitably qualified person, have a clear objective and a requirement to implement the plan.
- 10.8 The Board of Inquiry on the Transmission Gully Proposal considered that the incorporation of relevant management plans (including the landscape and urban design plan as well as relevant construction management plans) into the OPW is authorised by section 176A(3)(f) of the RMA.¹⁵²
- 10.9 Consistent with this approach, KiwiRail's proposed conditions require relevant management plans that relate to the construction and built form of the project to be submitted to PNCC with any OPW that relates to relevant matters in the OPW.

Sequencing

- 10.10 At a high level, KiwiRail's proposed conditions work in this way:
- (a) Within 12 months of the NoR being confirmed, KiwiRail must engage with mana whenua to prepare a Mana Whenua Engagement

¹⁵⁰ Final Report and Decision of the Board of inquiry into the East West Link Proposal (January 2018) at [1205].

¹⁵¹ *Summerset Villages (Lower Hutt) Ltd v Hutt City Council* [2020] NZEnvC 114 at [13].

¹⁵² Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (June 2012) at [177].

Framework. They must also establish the Community Liaison Forum and appoint a Community Liaison Person.

- (b) At least 12 months prior to the first OPW, the Road Network Integration Plan must be prepared in consultation with relevant local authorities and road controlling authorities to ensure that as the design and construction of the Freight Hub progresses, it is done with an eye to the wider transport network.
 - (c) The Landscape and Design Plan must be submitted with the first OPW.
 - (d) Prior to construction works commencing, KiwiRail must prepare a range of construction management plans (including a Construction Traffic Management Plan and Construction Noise and Vibration Plan) which for the most part must be prepared at least six months prior to construction and will be submitted with relevant OPW.
 - (e) Prior to the first train operating on the Site, KiwiRail must prepare relevant operational management plans including lighting, dust, noise and vibration, and implement these plans during operation.
- 10.11 In a project of this scale and complexity much of the design work and many of the management plans will be prepared in parallel. This is appropriate to ensure that the design and construction of the Freight Hub is coordinated and developed in an integrated manner. Management plans will also be prepared for different stages of design and works, and there will be multiple iterations of these plans as the project develops over time which will be submitted with OPW that are relevant to the particular stage or aspect of the works.

PNCC outstanding issues

- 10.12 The issues in contention between KiwiRail and PNCC have been narrowed significantly. Outstanding issues relating to noise, air quality, landscape and design, and ecology have been addressed above. The remaining issues on conditions relate to:
- (a) road remediation;
 - (b) PNCC's infrastructure;
 - (c) train operations; and
 - (d) lapse period.

10.13 We address these below.

Traffic remediation condition

- 10.14 PNCC continues to seek the imposition of conditions that require KiwiRail to undertake pre-works and post-works condition surveys "on local roads affected by the Freight Hub" identified in the Construction Traffic Management Plan and remediate any damage caused.
- 10.15 KiwiRail does not accept the imposition of these conditions. In terms of the immediately adjacent road network which the construction traffic will be using to access the Freight Hub site, KiwiRail is already committed to undertaking (at its cost) a range of roading improvements including along Roberts Line. A new section of road will be constructed between Roberts Line and Railway Road as part of the Perimeter Road. These upgrades will be constructed to PNCC's roading standards and will be a significant improvement to what is there now.
- 10.16 Beyond that immediately adjacent network, and to the extent that PNCC wants KiwiRail to finance upgrades further afield, a condition of the nature that PNCC seeks is uncertain and difficult to enforce. While heavy vehicle traffic associated with construction can be an adverse effect for the purposes of the RMA, a condition can only be required where there is a direct causal link to the activity. Construction vehicles associated with the Freight Hub will not be the only vehicles using the local roads. As a result, there is an inherent difficulty in attributing the damage caused to the roads to KiwiRail's contractors and requiring KiwiRail to pay for upgrades to the roads.
- 10.17 As importantly, there are also other tools at PNCC's disposal for it to recover costs that it may be required to incur as a result of development on its roading network, such as development contributions, and rates.¹⁵³

¹⁵³ We agree with PNCC that KiwiRail could be charged development contributions. While development contributions will not be payable if the developer is the Crown, in this case KiwiRail Holdings Limited (as the developer) is a state-owned enterprise. Although the meaning of the "Crown" varies according to the context in which it is used, it does not normally include organisations having their own corporate identities, such as state-owned enterprises. Commissioner Makinson also suggested the imposition of a heavy vehicle impact fee which was a tool used Kaipaki Road Sand Quarry and Clean Fill Operation. This fee was imposed by way of a financial contribution condition on the resource consent.

Infrastructure assets

- 10.18 In relation to existing PNCC infrastructure on the Site, KiwiRail's proposed conditions appropriately address those effects by ensuring, for example, that KiwiRail maintains continuity of PNCC's existing three waters assets currently located in the Designation.
- 10.19 PNCC has sought to impose a condition on KiwiRail's designation that requires KiwiRail to ensure the designation does not "impede" PNCC's planned water bore facility. This is an unlawful condition. While it has been paired back from PNCC's earlier condition which sought that KiwiRail transfer land to PNCC, it cannot be imposed on this designation because that land is being designated, and is required, for railway purposes. KiwiRail does not accept the imposition of this condition.
- 10.20 Since the hearing in August, KiwiRail has also further considered the matters raised in PowerCo's submission and has been engaging with PowerCo to resolve its concerns. KiwiRail has proposed further amendments to the conditions to address these matters which are explained in **Appendix B**. While the parties are engaging in ongoing discussions (including on the mechanics of the relocation of any PowerCo's affected assets), it is our submission that the conditions proposed by KiwiRail give the Panel sufficient comfort that the adverse effects on PowerCo's assets will be addressed.

Train operations

- 10.21 PNCC has recommended that conditions be imposed on the designation requiring KiwiRail to undertake (and document) a safety in design process in accordance with its own standard and carry out simulations of train operations. With respect those conditions are unnecessary. It is KiwiRail's responsibility as the operator of the rail network to ensure that it is both designed and operated safely and that its design is feasible operationally. These conditions are not accepted.

Lapse period

- 10.22 The Chair asked whether it is the Panel's role to make a recommendation on the lapse period or whether that is a matter for the Council to determine when it includes the designation in its district plan under section 184(1)(c).
- 10.23 In our submission, the lapse period is a matter for the Panel to consider:
- (a) The Panel has a broad power under section 171(2) to make recommendation on the NoR, including to impose conditions. Where

a period other than the 5 year default period is being specified for a designation, the conventional approach is to include a different lapse period in the conditions.

- (b) The requiring authority determines the form and content of the designation to be incorporated into the District Plan,¹⁵⁴ once it has made a decision on the Panel's recommendation.¹⁵⁵ Where the conditions specify a different lapse period, that is then incorporated into the District Plan by the Council.¹⁵⁶
- (c) There is no mechanism where a Council can make a "decision" on a lapse period specified under section 184(1)(c). The right to objection under section 184(3) is only available in relation to decisions from the Council not to fix a longer period. That must relate to section 184(1)(b) where the territorial authority has the power to "determine" a longer lapse period on application from a requiring authority. If the Council could unilaterally determine the lapse period, it would undermine the opportunities for public participation through the Notice of Requirement process and would not provide any right of appeal against for submitters against the lapse period.

10.24 KiwiRail continues to seek a 15 year lapse period for the Freight Hub designation. The default lapse period is simply not practicable for a project of this nature and scale. Mr Skelton's evidence is that three and a half years are needed for construction, with an 18 month lead in period before that. Five years would allow no room for delay, which we all now understand in the current world can arise when they're not expected.

10.25 The question then becomes what is an appropriate extension to that default period. In our submission, 15 years is appropriate and reasonable. Mr Moyle and Mr Skelton gave evidence on the complexity of construction of a project of this scale.¹⁵⁷ It will be designed and built over a number of years in stages.¹⁵⁸ Before construction starts, there is detailed design to be undertaken, other statutory approvals to be obtained, and land acquisition to be completed. While KiwiRail is already underway with its acquisition process, this is a large site with many landowners, and that process this will take significant time.

¹⁵⁴ RMA, section 175.

¹⁵⁵ RMA, section 172.

¹⁵⁶ See for example Te Ahu a Turanga; Manawatū-Tararua Highway designation in the Palmerston North City District Plan, Section 24: Designations.

¹⁵⁷ Evidence of Michael Skelton, dated 9 July 2021, at section 6.

¹⁵⁸ Evidence of Todd Moyle, dated 9 July 2021, at [1.5].

- 10.26 The key opposition from PNCC and submitters for a 15 year lapse period comes down to certainty. This is not a blank box designation. It comes with a well-advanced concept design with carefully considered components. There is a high degree of certainty as to what is coming. KiwiRail requires an appropriate length of time to give effect to that vision.
- 10.27 There is a balance to be struck giving private property owners some certainty about when this project will be delivered, and KiwiRail confidence that it can give effect to the Hub properly. In our submission, 15 years strikes that balance for a project of this scale and significance.

11. CONCLUSION

- 11.1 This a major infrastructure project of regional and national significance that is deserving of approval. In our submission, the Freight Hub meets the statutory test in section 171 of the RMA and the Panel should recommend that it be confirmed subject to the conditions set out in **Appendix A**.

Dated: 13 October 2021

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