

IN THE MATTER OF The Resource Management Act 1991
AND
IN THE MATTER OF Notices of requirement for
designations under section 168 of the
Act, in relation to Te Ahu a Turanga;
Manawatū Tararua Highway Project
BY **NEW ZEALAND TRANSPORT AGENCY**
Requiring Authority

LEGAL SUBMISSIONS FOR THE JOINT COUNCILS (REPORTING OFFICERS)

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MAY IT PLEASE THE HEARING PANEL

DEFINITIONS

- [1] The following key terms are used within these legal submissions:
- (a) “NZTA” means the New Zealand Transport Agency;
 - (b) “NOR” means collectively the Notices of Requirement lodged with the joint councils, known as Te Ahu a Turanga; Manawatu Tararua Highway Project;
 - (c) “PNCC” means the Palmerston North City Council;
 - (d) “MDC” means the Manawatu District Council;
 - (e) “TDC” means the Tararua District Council;
 - (f) The “Joint Councils” means PNCC, MDC and TDC in their reporting function under s 42A;
 - (g) “Horizons” means the Manawatu-Whanganui Regional Council;
 - (h) “RMA” means the Resource Management Act 1991;
 - (i) “LTMA” means the Land Transport Management Act 2003;
 - (j) “GPS” means the Government Policy Statement on Land Transport 2018/19 – 2027/28;
 - (k) “RLTP” means the Horizons Regional Land Transport Plan (2018 Review);
 - (l) “Safer Journeys” means Safer Journeys 2020, New Zealand’s Road Safety Strategy 2010-2020.

INTRODUCTION

The Joint Councils' Approach

- [2] NZTA has lodged Notices of Requirement with the Joint Councils for work associated with the construction and operation of the NOR.
- [3] Under s 102 of the RMA the Joint Councils, through functions delegated to the Hearing Panel, are hearing the NOR jointly. Recommendations by the Hearing Panel under s 171 RMA will be in respect of all NORs.

Section 42A reporting function

- [4] The Joint Councils are reporting to the Hearing Panel by way of consultants and an officer of a local authority under s 42A RMA.
- [5] The team of reporting officers comprises experts in a variety of technical fields of expertise with relevance to key issues arising out of the NOR. The reporting officers have all undertaken thorough assessments within the confines of the hearing panel's function of *considering the requirement and any submissions received*.¹
- [6] The reporting officers have prepared high-quality reports for consideration. Where expert witness conferencing was appropriate, the reporting officers have engaged in attempts to resolve or clarify agreed or disputed matters in a short time frame. The reporting officers have also attended to responding to questions asked by the Hearing Panel, and have read and considered answers provided by NZTA on questions asked of them.
- [7] The reporting officers, when called upon, will present a summary of their views on key issues including any outstanding issues that remain in contention, including any further opinion or clarification that is required in relation to further evidence (including from submitters) that has been received over the course of the hearing. The reporting officers will also, of course, address the topic of the appropriateness of the consent conditions.

¹ Resource Management Act 1991, s 171(1).

- [8] It should not need to be stated that the s 42A reporting officers are not appearing as advocates. They are not driven by ulterior motives, with their opinions transparently given in expert evidence. There is plainly a legitimate issue, for example, as to the safety provision of the new road for all users. Further, exploration of “opportunity” is not a dirty word in the policy environment that the Project engages with.

These Legal Submissions

- [9] These legal submissions are to assist the Hearing Panel in relation to key legal issues relevant to the Hearing Panel’s consideration of the NOR and submissions received, including a review of the opening legal submissions on behalf of NZTA. The structure of these submissions will be to address discrete legal points to provide guidance to the Hearing Panel, followed by in-depth analysis of two major outstanding topics relevant to the NOR. The structure is:

- (a) Discrete legal issues, including:
 - (i) Section 91;
 - (ii) Approach to effects assessment;
 - (iii) Alternatives assessment;
 - (iv) Reasonable necessity;
 - (v) Recommendations to modify the requirement and/or impose conditions.
- (b) Issues concerning vulnerable users;
- (c) Issues relating to indigenous biological diversity and natural character. This topic includes issues regarding the interpretation and application of One Plan policies.

- [10] There are of course other issues which are important but are not addressed in any detail in these submissions. For example:

- (a) Issues concerning the effects of the Project on the AgResearch long term experiment;
- (b) Issues concerning the effects on Maori cultural values and relationships; and
- (c) Issues relating to vulnerable users in Ashhurst and Woodville.

[11] It seems that these issues are likely to be resolved on the evidence before the Hearing Panel. Work continues on the CEDF as discussed later in evidence. I will speak to issues concerning AgResearch.

[12] Ms Fraser will be reminding the Hearing Panel as to the Woodville issues.

PART A – LEGAL ISSUES

Section 91 RMA

- [13] The Panel has asked a question of NZTA as to whether a s 91 issue arises.² Counsel for NZTA answered questions on the issue in opening. At the time of writing these submissions, Counsel has not had an opportunity to review legal submissions from the Department of Conservation (“DOC”).
- [14] The Power under s 91 to make a determination “*not to proceed with a hearing*” in circumstances where other resource consents are required, does not apply when considering NOR’s under Part 8, because it is not one of the applicable Part 6 RMA sections referred to in s 169.
- [15] With s 91 unavailable, complexities in respect of assessment of s 171 matters must be addressed. The effects of the Project (of allowing the requirement) should still be considered in a holistic and integrated manner when having regard to the instruments identified in s 171(1)(a) and in the context of Part 2.
- [16] It is submitted that there will be an overlap in respect of the effects on the environment of allowing this requirement, and the effects that will need to be considered by Horizons at the appropriate time. It is not, as NZTA submits, a clear matter of “excluding” effects from assessment, or excluding the application of relevant policy, noting that such issues will be addressed in detail by the Regional Council decision makers. This would be an error of law.
- [17] Acknowledging that there is an overlap, the true challenge for the Hearing Panel lies in the inherent difficulties of effects assessment, consideration of policy, matters of weighting, and alternatives assessments.
- [18] In approaching its task, the Hearing Panel should be aware that there is no bright line distinguishing between matters that may be properly regarded as the “effects on the environment of allowing the requirement” under s 171 and the consenting process under s 104 which is to consider “actual and potential effects on the environment of allowing the activity”.³

² Third Minute of the Hearing Panel at page 6.

³ *Queenstown Airport Corporation Limited* [2017] NZEnvC 46.

[19] Instead what is important is that (for designations and resource consents) the Hearing Panel is able to understand “both the scale and significance of various effects” and the “nature and scale of the effects created”.⁴

[20] As noted in the *Sustainable Matata Inc* case:⁵

In recent years there has been a tendency of consultants to park significant issues utilising the devices of Management Plans and generalised conditions to address effects. The Court has repeatedly noted its concern that it must, in terms of both designations and resource consents, be able to understand both the scale and significance of the various effects. Generalised conditions and an outline Management Plan often do not achieve this outcome.

[21] What those effects are will be related to the designation purpose, and the nature and scale of the works as informed by the planning instruments identified in s 171. Relevant to that enquiry, will be whether the measures to avoid, remedy or mitigate adverse effects are sufficient. This enquiry must be made in the context of Part 2 and relevantly here, in light of s 6 and s 7 matters.⁶

[22] As addressed later in the submissions the s 42A Reporting Team consider that the effects on indigenous biological diversity and natural character are effects of the Project enabled by the designation (of “allowing the requirement”). The extent of those effects and any mitigation must be properly understood and assessed through the lens of the planning instruments set out in s 171, and in the context of Part 2. It is submitted that this enquiry is a necessary one.

[23] Equally, however, as it is agreed that certain provisions in the One Plan are relevant for assessment by the Hearing Panel and will also be relevant down the track at resource consent stage, care ought to be exercised in relation to how the decision maker reaches and then expresses its findings as to consistency or otherwise with those provisions.

⁴ *Sustainable Matata Inc v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [46] and [47].

⁵ [2015] NZEnvC 90 at [47].

⁶ *Auckland Volcanic Cone Society Inc v Transit NZ* [2003] NZRMA at [51].

Assessing the effects of the activity on the environment

[24] This section addresses:

- (a) The existing environment;
- (b) NZTA's method of assessment of effects on walking and cycling;
- (c) Assessment of positive effects in relation to walking and cycling;
- (d) Whether the Hearing Panel should assess the effects on indigenous biological diversity, noting that the Regional Council resource consent process is likely to assess such effects in greater detail in relation to a certain road alignment;
- (e) Whether the Hearing Panel should assess the effects on natural character.

The Existing Environment

[25] There is no dispute with NZTA that the environment against which effects are to be assessed is against a situation where the Old Gorge Road has been closed and traffic is diverted over the Pahiatua Track and Saddle Road routes. The expert witnesses agree on this.

[26] It is tempting given that the Old Gorge environment remains fresh in the minds of the community, to seek to compare the project against the situation of several years ago. Mr Kennett and Mr Dunlop for NZTA both fell into this trap, each contrasting the provision for vulnerable users on the new road against the lack of provision of the Old Gorge Road, presumably to illustrate the point that the cyclist provision on the new road is better than ever.⁷

⁷ Statement of Evidence of Jonathan Peter Kennett, at [47] – “However, the proposed shoulder width, in conjunction with ATP (rumble strips) between the shoulders and traffic lanes, and ‘shy space’ between the shoulder and the roadside barrier, will provide a considerably higher level of safety for cyclists than the old Manawatū Gorge road did.” Statement of Evidence of David James Dunlop at [59] – “This can be contrasted with the closed Gorge route, which did not include appropriate provision for cyclists and walkers, and the Project is therefore an improvement on the situation prior to closure of the Gorge route, as well as currently.”

- [27] To be clear, comparison of on-road safety for vulnerable users of the new road against the on-road safety (or lack thereof) of the Old Gorge Road is not relevant to the assessment of the project.
- [28] Despite agreeing as to the existing environment, NZTA's legal submissions invite the Panel to "*reality check*",⁸ presumably to open the door to such assessment in respect of the safety of the road for vulnerable users. This has no basis in the RMA case law known to Counsel.
- [29] For clarity, the existing environment does not include:
- (a) Predicted further improvements to the road quality of the Saddle Road; and
 - (b) A re-opened Old Gorge Road for any users.
- [30] Some focus has been placed on the suitability of the Saddle Road for cyclists, once the new road is open, particularly taking into account future improvements to make the road safe. There is evidence that the road is not safe as it stands, and there is no potential future development of sufficient certainty. The improvements may or may not proceed. As such, the environment cannot include a future Saddle Road with safety improvements as a way of demonstrating its suitability for cyclists.
- [31] Mr Kennett, and TDC as submitter, have both expressed interest in re-opening the Old Gorge road to create a recreational alternative use to the new road. There is considerable doubt based on NZTA's evidence⁹ that the closed road could be opened to the public. It is agreed that the existing environment is the situation as it stands, with the road closed. Whether or not there is an opportunity to one day reopen the road for recreational purposes, it is not an option now. Nor is that opportunity enabled by the Project such that its availability could influence assessment of this Project by the Hearings Panel.

NZTA's method of assessing effects on vulnerable users

⁸ NZTA Opening Legal Submissions dated 20 March 2019 at [114].

⁹ See Ms Downs' Statement of Evidence, pages 22-23.

- [32] NZTA mostly¹⁰ sidesteps assessment of whether the proposed road will generate an adverse safety effect for vulnerable users. NZTA prefers to focus on the improvements to safety for pedestrians and cyclists across the wider network because of the road, and its relative safety compared to those roads.¹¹ This is an assessment error which incorrectly frames the effect.
- [33] Despite this, it is agreed by Messrs Read and Dunlop and Ms Fraser that “*the design of the Project needs to be safe for all road users.*”¹² and, “*...the Project road needs to safely provide for cyclists.*”¹³ (underlines added). This is the correct approach. Various other submitters agree.
- [34] Although it is not necessary to take this discussion further given the agreement of the experts, the following additional submissions are made:
- (a) The assessment of effects under s 171(1) cannot be constrained by the terminology of the Project Objective as suggested by Ms McLeod for NZTA, who argues that “*the provision of safe pedestrian and walking¹⁴ facilities is not needed for the project to achieve its objective.*”¹⁵ The effects are what they are. Consideration of the Project Objective is a separate task under s 171(1)(c). This aligns with a submission made by Mr Conway for PNCC (as submitter).
 - (b) The problems with overly broad scale assessment of effects over the wider roading network risks the dilution or inappropriate discounting of adverse effects at the local scale (over the new road itself).¹⁶
 - (c) The word “safer” literally invites consideration of a scale of safety, and must logically include something which is itself “safe”. One must question whether, in light of all relevant policy in relation to safety,

¹⁰ The first and only time that the road is described as “safe” for cyclists is in Mr Dunlop’s answers to questions asked by the Panel, in the Memorandum of Counsel for NZTA dated 20 March 2019 at page 20.

¹¹ For example, Statement of Evidence of Brent Barrett and Rachel Keedwell on behalf of Build the Path (as Tabled at the Hearing) “*When it comes to cyclists — regardless of user numbers — they need to be safe. Not just less unsafe, but safe.*”

¹² Joint Witness Statement, Transport and Social, 21 March 2019 at page 19.

¹³ Ibid, at page 26.

¹⁴ Taken to mean pedestrian and cycling.

¹⁵ Statement of Evidence of Ainsley Jean McLeod at [73].

¹⁶ *Clearwater Mussels Limited v Marlborough District Council* [2018] NZEnvC 88 at [156].

NZTA is truly arguing that its Project Objective precludes assessment of whether vulnerable users are safe, which appears to be its case.

- [35] To summarise, “Safer” in a purely relative sense does not advance the assessment of the safety effects of this proposal. Society expects new infrastructure advanced by a statutory body with a core “safety” function to be independently safe and that is clear. Modern major infrastructure development is expected to be developed to a higher standard than decades old local roads, because the community generally has progressively higher standards and expectations of environmental performance that includes safety with consequentially higher costs.¹⁷ Industry accepted best practice guidelines, such as Austroads, reflect those higher expectations.

Assessment of effects related to recreation and tourism

- [36] NZTA is critical of submitters and evidence that comments negatively in respect of the *opportunity lost* by NZTA not making provision for a separated shared path such as to create *additional benefits*.

- [37] In terms of effects assessment, NZTA says:

It is somewhat difficult to approach this issue in an orthodox manner, because RMA cases tend to focus on measures required to avoid, remedy, mitigate the adverse effects of a proposal.

- [38] It may not be typical of day-to-day consenting issues to see an effect identified as a benefit criticised for not being *beneficial enough*. One does not, however, make decisions in the RMA based solely on avoiding remedying or mitigating adverse effects. That is not the scheme of the RMA or s 171, where decisions on effects are not made in a policy vacuum. Section 171 requires the Hearing Panel to evaluate the effects, whether positive or negative, through the lens of all relevant statutory and non-statutory policy and subject to the purpose and principles contained in Part 2 RMA.

¹⁷ *Orica Mining Services NZ Ltd v Franklin District Council* EnvC W032/09 at [53].

[39] This is clearly established in case law. Note the legal test set out by the Board of Inquiry in the Basin Bridge case, described by the High Court as “not susceptible to challenge”.

[199] We therefore propose to structure this part of our decision (appropriately applying the guidance from King Salmon, as just identified) as follows:

[a] To identify and set out the relevant provisions of the main RMA statutory instruments that we must have particular regard to under Section 171(1)(a), and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that we must have particular regard to under Section 171(1)(d);

[b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;

[c] To consider and evaluate the directions given in Section 171(1)(b) as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;

[d] To consider and evaluate the directions given in Section 171(1)(c) as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and

[e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA’s purpose of sustainability.

[40] The legal test articulated by the Board of Inquiry and cited with approval in the High Court decision, was drawn from the judgment of Whata J in *Queenstown Airport Corporation Ltd v Queenstown-Lakes District Council*¹⁸, where he assessed the approach to adverse effects assessment under s 171 as follows:

[68] *It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them. Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.*

69] *Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.*

[70] *The reference at s 171(1)(d) to “any other matter” is qualified by the words “reasonably necessary”. Given the Act’s overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.*

[41] The relevant policies and objectives which provide the lens for assessment of environmental effects concerning provision of walking and cycling are all those policies and objectives at a local, regional and national level that sit within the

¹⁸ *Queenstown Airport Corporation Ltd v Queenstown-Lakes District Council* [2013] NZHC 2347.

hierarchy of documents under the RMA and LMTA. This includes, notably, the strategic direction identified in the government policy statement relating to safety, access, and environment (see sections 2.2, 2.3, and 2.4 of the GPS), and the policies and objectives within the RLTP which is (as confirmed by the RLTC) concerned with “*maximising opportunities*”.¹⁹ All relevant policy is thoroughly considered by the s 42A reporting officers.

[42] Then of course, there is s 5 of the RMA which provides:

***sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

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

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

[43] All of which is directly relevant to the evaluation of effects relating to walking and cycling along the Project.

Whether the Hearing Panel should assess the effects on indigenous biological diversity and natural character, noting that the Regional Council resource consent process is likely to assess such effects in greater detail in relation to a certain road alignment.

[44] It is difficult to pinpoint NZTA’s position as to whether the Hearing Panel must assess the effects of the Project on indigenous biological diversity. NZTA notes that:

¹⁹ Philip Hindrup answer to question from the Chair of the Hearing Panel.

“In terms of assessing effects, the fact of a future outline plan process certainly does not obviate the need for the Panel to consider the full range of likely effects of allowing the NORs.”

- [45] NZTA then also cites *Sustainable Matatā Inc* and the passage (cited at [75] of NZTA’s legal submissions) including:

“...the Act recognises that effects which are identified can be dealt with as part of the designation process, and in general consents require sufficient details for the Court to accurately be able to understand the nature and scale of the effects created.

- [46] All of this is contradicted by the submission at paragraph [101] that:

It does not fall to the Panel, at this time, to consider effects on the environment of activities for which consent will be sought from Horizons. Adverse effects of those activities (and the measures to address those effects) cannot be said to be “effects of allowing the requirement”, because the requirement will not allow the Transport Agency to carry out those activities.

- [47] Section 171 requires the Hearing Panel to consider the effects on the environment of the Project. There is no bright line distinguishing between the effects on the environment of allowing the requirement and those that are to be considered under s 104.²⁰ The nature of effect will be informed by the purpose of the designation and nature of the works, the planning framework (and the recognised value and status of the effects), and Part 2 matters, particularly, ss 6 and 7 of the RMA.

- [48] The nature of the Project is described as the construction, operation, maintenance and improvement of approximately 11.5km of new State Highway, and associated works. Effects on ecological values, landscape, visual

²⁰ *Queenstown Airport Corporation Limited* [2017] NZEnvC 46 at [50].

amenity, and natural character values, are also identified as “actual and potential effects” of the Project by NZTA.²¹

[49] This approach to effects is evident in Ms McLeod’s answers to the Hearing Panel’s questions on the applicability of Policy 13-4 of the One Plan. Ms McLeod accepts that it is relevant in respect of the consideration of the NORs as set out in s 171(1) of the RMA, “particularly in respect of the acceptability of actual and potential adverse effects of the Project and approaches to managing these effects”.²²

[50] To apply a bright line test which removes them from the Hearing Panel’s consideration would create an artificiality not contemplated by the RMA, when having regard to the value placed on management of these effects under the district and regional plans, particularly through the Regional Policy Statement, but also under Part 2 (s 6 and 7) of the RMA.

[51] NZTA’s “bright line” test fails to have sufficient regard to:

- (a) The nature of the proposed Project enabled by the designation, and related effects;
- (b) Objective 6-1(c) which provides for the Hearing Panel to account for s 6(c) in exercising its powers and functions (outside of rule-making) under the RMA, and further, Objective 6-2(e) which enables the Hearing Panel in exercising those powers and functions to have regard to offsetting and Rule 13-4 of the One Plan. This issue, including background to the One Plan provisions, is traversed in further detail later in these submissions.
- (c) The objectives and policies that address natural character within the district plans and the absence of a specific rule at the regional consenting stage addressing natural character policy, although the

²¹ Form 18, Notice of Requirement by Minister, Local Authority, or Requiring Authority for Designation or Alteration of Designation at page 3.

²² NZTA Responses to Questions from the Hearing Panel, dated 20 March 2019, page 44, paragraph 6.

effects are nevertheless relevant to other rules that would be triggered.

- (d) The fact that NZTA seek to rely on the NOR in delivery of a restoration package which looks to minimise but also offset effects, including significant adverse ecological effects and effects on natural character. This includes conditions to this effect on the designation.
- (e) The need for a holistic approach to the consideration of effects, with a view to integrated and sustainable management of effects.

[52] It is therefore submitted that the significant adverse ecological effects and effects on natural character must form part of the Hearing Panel's consideration and recommendation under s 171 of the RMA.

Alternatives Assessment

[53] This section is a brief legal discussion of the requirement under s 171(1)(c)(b) to consider whether adequate consideration has been given by NZTA to alternative sites, routes, or methods of undertaking the work. Consideration of how the provision applies to the facts is discussed later.

[54] There is no serious dispute with NZTA as to the applicable legal principles regarding assessment of alternatives. Further points are made:

- (a) *New Zealand Transport Agency v Architectural Centre Incorporated & Ors*²³ is the leading authority (referred to as "*Basin Bridge*").
- (b) Section 171(1)(b) does require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement.²⁴
- (c) Alternatives assessment are to be described in an Assessment of Environmental Effects under Schedule 4 of the RMA upon lodgement of the NOR, not afterwards;

²³ [2015] NZHC 1991.

²⁴ At [136] - [144].

- (d) Despite (c), while shortcomings in respect of assessment of alternatives are often fatal to an NOR, decline is not a mandatory outcome. It is possible to cure shortcomings in assessment of alternatives in the context of hearing proceedings with further information;²⁵
- (e) It is agreed that the standard of adequate consideration does not require NZTA to demonstrate that it has considered all possible alternatives, or selected the best alternative. Per Basin Bridge, “Adequate” does not mean exhaustive, it means “sufficient or satisfactory”.²⁶

[55] Following evaluation of alternatives and all other mandatory considerations under s 171(1), the Hearing Panel is empowered to give recommendations at s 171(2). While it may be that recommending withdrawal would ordinarily be the consequence of a failure to adequately consider alternatives, it is not the only option available. *North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73 is good precedent for a Court adopting a pragmatic response to an inadequate alternatives assessment, holding that deficient assessment of alternatives can be “cured”, while also relying on powers to modify and impose conditions to ensure the designation meets the purpose of Part 2 RMA.

Reasonable Necessity

[56] Section 171(1)(s) requires the Hearings Panel to consider:

“whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought.”

[57] NZTA’s objectives are set out in various places in the NOR documentation, including Form 18 at page 3.

²⁵ *North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73 at [182].

²⁶ At [137].

[58] It is accepted that ‘necessary’ has a meaning to ‘expedient’ or ‘desirable’, rather than ‘essential’.²⁷ What is required is a threshold assessment that is proportionate to the circumstances of the particular case.

[59] The relevance of these objectives and how they are tested as part of the NOR process are addressed through the body of these submissions, including when considering the ability of NZTA to meet its objectives through the current designation.

Recommendations to modify the requirement and/ or recommendations to impose conditions

[60] This section of the submission addresses the power of the Hearing Panel to recommend modifications to the requirement (s 171(2)(b)) and to recommend conditions (s 171(2)(c)).

[61] There is no dispute that the Panel has the power to ‘modify’ a requirement.

[62] Exercise of the power is, however, governed by relevance, fairness and reasonableness.²⁸ A modification must not involve changes which alter its essential nature character²⁹ and will be subject to constraints, including the Newbury principles and potential prejudice to third parties. It is agreed with counsel for NZTA and PNCC (as submitter) that the Hearing Panel would need to satisfy itself of these matters before the boundaries of the NOR could be enlarged by way of modification.

[63] Equally, however, the power to “modify it or impose conditions on it as the Court thinks fit” “literally and logically includes the power to modify the scale of the NOR”.³⁰ There is no suggestion that a change in scale needs to be an increase or a reduction. In fact, a broad interpretation was favoured by the High Court in a decision involving the *Queenstown Airport Corporation*:³¹

²⁷ *Countdown Properties (Northlands) v Dunedin City Council* [1994] 1B ELR 150 (HC), at 185.

²⁸ *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [40].

²⁹ *Quay Property Management Limited v Transit New Zealand* 1028/00 29 May 2000 at [101].

³⁰ *Queenstown Airport Corporation v Queenstown Lakes District Council* [2013] NZHC 2347 at [86].

³¹ *Ibid*, at [86].

This interpretation better serves the overt scheme of the requiring provisions to enable necessary works with appropriate effects, having regard to the criteria expressed at s 171. Further, a flexible power to modify will, in my view, better enable decision makers to carry out their functions in a manner that is consistent with the broad purpose of sustainable management. Conversely, a narrow interpretation of the power may unduly inhibit the capacity of functionaries to achieve that purpose.

[64] Generally speaking it will be a question of fact and degree whether the modification changes the essential nature and character of the notified requirement. So long as material nature of the Project remains the same, some modification is contemplated by the RMA. A proposal is not 'ring fenced' by the NOR, nor does it set an impenetrable outer limit.³²

[65] In the same way, there is a judgment of fact and degree in deciding whether modifying a requirement to mitigate adverse effects is within the scope (statutory limit) of the requirement as notified.³³ See, for example, *Norwest Community Action Group v Transpower New Zealand Limited*.³⁴ In that case, a modification to the height/footprint to mitigate against visual effects was not inconsistent with the requirements purpose. Rather:³⁵

[W]e conclude that the modification to the building height associated with the additional footprint area embraced in the decision under appeal was not such as to alter the substance of the requirement. Transpower sought to modify the proposal to assist in reducing the visual impact. In responding as it did to submitters concerns over the height aspect, the modification included in its decision did not change the material nature of the proposal.

³² *Quay Property Management Limited v Transit New Zealand* 1028/00 29 May 2000 at [101].

³³ Final Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project, at [174].

³⁴ *Norwest Community Action Group v Transpower New Zealand Limited* EnvC Auckland A113/01, 29 October 2001. While it was an analogous provision, the same principles are said to apply.

³⁵ *Ibid* at [47].

[66] The Environment Court also considered it relevant to consider whether the increase in height was a measure to mitigate adverse effects. This assumes relevance in circumstances where an extension of the spatial area of the requirement has been put forward by Mr Percy as one of the options to address the significant effects on indigenous biological diversity and natural character. It is therefore open to the Panel to consider whether (subject to the limitations addressed above) an increase in the designation would enable more effective avoidance of some of the high to very high adverse ecological effects and adverse natural character effects.

[67] There are two further questions which require further attention:

- (a) Is the reporting officers' recommended condition requiring a separated shared path a modification of the requirement, and if so is it lawful modification?
- (b) Is the reporting officers' recommended condition requiring a separated shared path a lawful condition?

Is the reporting officers' recommended condition requiring a separated shared path a modification of the requirement, and if so is it a lawful modification?

[68] NZTA's argument against the condition is premised on it being an unlawful modification under s 171(2)(b). It is not clear that it is a modification at all, let alone one which is unlawful.

[69] First, there is a predominance of case authority that the terminology of "*modification*" is used to describe a change to the *boundary* of a requirement, rather than a simply a component of the designated works. *Hope t/a Victoria Lodge v Rotorua District Council*,³⁶ relied upon as authority in *Takamore*, concerned a modification to a designation boundary. *Quay Property* was in relation to "*an entirely new alignment which obliterates the motor camp*". The *Queenstown Airport* case addressed above was a discussion of modification in the context of a proposed reduction of the designated boundary. The Board of Inquiry decision on the *Hauāuru mā Raki Wind Farm Proposal* appears to

³⁶ [2010] NZEnvC 7 at [40].

concern requests to reroute infrastructure beyond the designated boundaries. The *Norwest Community Group* decision referred above, involved a larger footprint area to enable a reduced building height.

[70] The Palmerston North City Council (as submitter) has addressed the topic and appears to fall in line with Counsel's understanding that the *modification* power relates to modification of the designated boundary.³⁷

[71] Second, there now appears to be an increased focus on the principles of procedural fairness and more generally, the Newbury principles, when considering imposing a requirement and conditions as in *Handley v South Taranaki District Council*.³⁸ Although this approach is tempered by the Court's views that the "resource management purpose" under Newbury is to be considered by the purpose the designation would serve under the RMA³⁹; that is, the modification would need to be for the purpose the designation is to serve under the RMA, not any ulterior purpose. It is not clear whether this was intended to embody the "essential nature and character" test which has been so consistently applied by the Courts over recent times.

[72] In any event, even if the shared pathway was considered to be a 'modification', it would not be one that changed the essential nature and character of the Project because:

- (a) The required separated shared pathway has not been designed, but it is not apparent that the designation boundary would require modification to accommodate the path;
- (b) Counsel for NZTA has indicated that a pathway that is right beside the proposed road is *possibly a permissible modification*;
- (c) It is an expectation that detailed design of the shared path would be carried out by NZTA, occurring alongside design of the proposed road.

³⁷ Legal Submissions of the Palmerston North City Council (as Submitter) dated 28 March 2019 at [39].

³⁸ *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [40]

³⁹ *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [41]

In that circumstance it would be designed by NZTA in such a way that it is a permissible modification, according to NZTA's interpretation;

- (d) A shared pathway catering for vulnerable users across the balance of the route is entirely consistent with the project objectives which accommodates all road users.

[73] Finally, note that through evidence in this hearing, NZTA has already modified its Project in the following ways:

- (a) Proposed a condition for a separated shared pathway from the Ashhurst Bridge to the Manawatu Gorge Scenic Reserve Carpark; and
- (b) Modified the project by including a clip-on the Ashhurst Bridge.

[74] While the modifications advanced by NZTA are certainly welcome additions (they were recommended in conditions by the reporting officers), it must be noted that there is no design available in respect of the shared path, no information as to its effects, no specifics as to where precisely it will be located, how wide it will be (or any other criteria), and what property it will impact. That is not a problem, and those modifications do not require re-notification, because NZTA's overarching theory is accepted that specific issues will be dealt with through detailed design in an appropriate manner. A similar case is readily made for the shared pathway.

Is the reporting officers' recommended condition requiring a separated shared path a valid condition?

[75] Validity principles for conditions are reasonably well settled through case law under s 108. They equally apply in the case of designations. There is no concern as to validity here. Among other things, the condition addresses an adverse effect which fairly and reasonably relates to the designation (and the designated purpose), and has been recommended in a lawful manner by the s 42A report writers in a manner consistent with the Newbury principles.

PART B – OVERVIEW OF LEGAL AND FACTUAL ISSUES CONCERNING VULNERABLE USERS

Overview

What is recommended by the Officers?

- [76] The reporting officers' have recommended to the Hearing Panel that further provision ought to be made for vulnerable users. The officers' conditions to capture the recommendations are at 26B, 26C, 26D, and 26F of the Officers' set. It is worthwhile to briefly introduce those conditions.
- [77] Recommended condition 26B provides for separated facilities across the Ashhurst Bridge on State Highway 3. This condition is not contested as it was, around the time of the officers' report, advanced by NZTA as modification. According to Mr Dunlop the justification for bringing it into the Project was based on *effects* and to "*release suppressed demand*".⁴⁰
- [78] Recommended condition 26C would extend those facilities either side of the Ashhurst bridge up to Cambridge Avenue on the north, and along to the Manawatu Gorge Scenic Reserve car park. NZTA will provide the facility from the Ashhurst bridge to the car park (once again, because of effects and to release suppressed demand), but does not agree that it is required from the Ashhurst bridge up to Cambridge Avenue (this point remains disputed).
- [79] At the other end of the NOR, condition 26F makes further provision for vulnerable road users is recommended on State Highway 3 between McLean Street (State Highway 2) and Woodlands Road. There is deliberately greater flexibility in relation to this stretch of road considering the challenges identified by Ms Fraser in her evidence.
- [80] The recommendation that has generated the most focus in the hearing to date relates to condition 26D, the requirement for a sealed contraflow cycleway and walkway along the entire length of the new road. Note in relation to the condition that:

⁴⁰ Answering a question from Commissioner Mackinson. Hearing Day 2.

- (a) It imposes a minimum standard for the shared path with several elements captured within the condition, including that the path is sealed;
- (b) It is deliberately flexible in respect of where it is located. The minimum requirement is that it must be separated by a wire barrier. The path could be designed to be immediately adjacent to the road and it is expected that this would be the most efficient solution, or it could diverge in places if that is appropriate. It is expected that the shared path is designed and delivered in an integrated manner and subject to the same conditions that would otherwise apply to the detailed design of the road itself.
- (c) It does not require what is described as a “*recreational trail*” by Mr Kennett. The justification for the path is informed by the principles of delivering safety and access to road users, with evidence directed thereto. The facility that is required by the condition is the optimal solution to address safety concerns associated with the shoulder provision while promoting and encouraging usage. It is not intended to deliver on the *optimal* recreational aspirations for an *iconic trail*,⁴¹ because that is not the point of it. The reporting officers and submitters are under no illusions that a purpose built off-road recreational trail is a matter to be addressed another day.

Safety effects on vulnerable users informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents

[81] Safety of vulnerable users is a principal concern of the reporting officers and many submitters. NZTA unfairly dismisses⁴² the explicit *safety* concerns of 697 submitters,⁴³ expert witnesses, and a variety of policy and statutory guidance,

⁴¹ “*Bicycle lanes with some form of physical separation generally provide riders with comfort and safety and have been shown to promote increased patronage on cycling routes where they have been constructed.*” Austroads Guide to Road Design, Part 3 Geometric Design.

⁴² See for example NZTA’s Legal Submissions at [151] in which NZTA dismisses safety concerns and advises what it considers to be the “real focus”.

⁴³ For one example, Mr Watt, Hearing Day 5.

all capturing community and national priorities to ensure that vulnerable users, particularly cyclists, are provided for safely. NZTA boldly submits that all concerns regarding safety effects on vulnerable users are a *red herring quest for a broader play for an attractive path separated from the road*.⁴⁴ The evidence does not support that submission.

[82] The evidence is before the Hearing Panel in relation to safety concerns. Ultimately it comes to a question of whether the Panel prefers the opinions of Ms Fraser and Mr Read that the proposed shoulders are not safe for cyclists, or whether the evidence of Mr Dunlop that *safe enough* is adequate.

[83] On the expert evidence of Ms Fraser and Mr Read, the proposed 2 metre shoulder width along most of the proposed road will generate a discernible adverse safety effect for vulnerable users of the Road. Ms Fraser notes that risk of death or serious injury is very likely, and she concludes that there is a significant safety concern.⁴⁵

[84] NZTA has not attempted to make the road independently safe for cyclists, it has only tried to make it more safe (or as Ms Keedwell puts it, less unsafe⁴⁶) than the alternative routes. That is consistent, NZTA says, with the constraints of its Project Objective. The shoulders were not designed to be consistent (nor are they) with industry accepted best practice standards for sealed shoulder width (Austroads).⁴⁷

[85] Having particular regard to the various relevant provisions⁴⁸ of planning instruments developed under the framework of the RMA (s 171(1)(b)), it is apparent that the safety risks for vulnerable users generates inconsistency with Objectives and Policies of the Joint Councils. Further, the shoulder width advanced by NZTA does not deliver on the safe systems approach, government strategic priority of Safety, and RLTP safety objectives. Ms Fraser's assessment

⁴⁴ NZTA's Legal Counsel Opening Submissions, Hearing Day 1.

⁴⁵ Evidence of Harriet Fraser at [103(b)].

⁴⁶ Per Ms Keedwell and Mr Barrett.

⁴⁷ See Andrew Whaley's answers to questions of the Hearing Panel, Memorandum of Counsel for NZTA, at page 5.

⁴⁸ Identified and summarised in the Evidence of Harriet Fraser at [14] – [31].

of the NOR in relation to these documents is at paragraph 136 of her s 42A report.

- [86] Further to the input of the expert witnesses on this issue, it is appropriate to specifically acknowledge the quality and thoughtfulness of all submitters with an interest in this topic. From the perspective of the reporting officers, the presentations and various perspectives were incredibly enlightening and observed to be refreshingly consistent in terms of the outcome sought (albeit reflecting different degrees of pragmatism as to what should be achieved by the Project in response to concerns about potential cost and delay).

Reliance on technical documents/ strategy

- [87] All witnesses support their transportation assessments or peer reviews by reference to publications concerning road safety. Ms Fraser and Ms Read take guidance from *Austrroads, the Safer Journeys Strategy (including safe system principles)*, the *One Network Road* classification, and (for Mr Read) Transport Agency Technical Memorandum.⁴⁹ Ms Fraser and Mr Read are critical of Mr Dunlop's reliance on *draft Transport Agency guidance for on-road cycle facilities on rural State highways*, which Mr Dunlop says is more appropriate for the Project because of what he describes as its low projected use.⁵⁰
- [88] The suitability of the document as a guide to best practice is dubious, particularly as the design of the walking and cycling facilities were not in fact informed by this document and it is advanced *ex post facto* to justify NZTA's chosen design width. Mr Whaley did not rely on the publication in the Design Philosophy and it is not referred to in his evidence either. It is not a surprise that it did not inform Mr Whaley's design philosophy because the document is dated September 2018, one month before the NOR was lodged, thus providing justification for the shoulder width that NZTA had already settled on.

⁴⁹ TM-2503 Guidelines for Edge Protection and Medians on Dual Carriageway Roads, incorporating a Safe System Philosophy.

⁵⁰ Memorandum of Counsel for NZTA dated 20 March 2019 at page 20.

[89] This is contrasted with the reliability of Austroads, note the evidence of Ms Fraser at [112] and Mr Read at [6.4].

Recreational, social, and tourism effects, informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents

[90] There is no question that the NOR will provide benefits to the community in terms of social outcomes, including recreational benefit and tourism.

[91] There is an issue as to how the Hearing Panel should assess those aspects of the Project, considering criticisms by some reporting officers and various submitters regarding provision for walking and cycling. This is what is described as a “*missed opportunity*” or a failure to “*maximise*” the benefit.

[92] It is important to note that the task of the Hearing Panel is not exclusively limited to just avoiding, remedying or mitigating adverse effects. This would be an overly simplistic interpretation of ensuring that *sustainable management* is achieved.

[93] The recreational, social, and tourism benefits in this case is predominantly a matter of framing those effects in relation to policy. The comments of Whata J in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* (set out in full at paragraph [40] of these submissions) are relevant to this issue.

[94] The Hearing Panel is entitled to consider whether NZTA’s proposal to provide a 2 metre shoulder width adequately delivers on the policy direction set by the community through its district plans, in turn reflecting the core purpose of the RMA.

[95] The Hearing Panel is also entitled to consider whether the project advanced by NZTA delivers on its own statutory function under the LMTA, government direction through the GPS (which NZTA must give effect to when undertaking its functions), including the strategic priorities of “*Access*” and “*Environment*” (which “*recognises the public health benefits of reducing harmful transport*”

*emissions and increasing uptake of walking and cycling*⁵¹), the outcomes sought through the RLTP, and other relevant documents to provide the frame for assessment of this project.

[96] The reporting officers who have prepared evidence relevant to this topic are Ms Austin, Ms Fraser, Mr Baker, and Ms Copplestone/Mr Percy.

[97] Various submitters have also spoken critically of the lack of sufficient provision for cycling and walking. Note that none of these submitters are explicitly asking for “additional benefits” or “more positive effects.” The submissions are generally indicating disappointment and surprise at the shoulder provision in the face of a policy environment which they say should have been reflected by the NOR. The preoccupation with categorising their requests as merely seeking additional effects distorts the messages conveyed by submitters.

Encouraging or dissuading usage?

[98] One feature of the evidence advanced by NZTA are predictions as to desirability and ultimately usage of the road by vulnerable users. NZTA acknowledges that the road will be used by cyclists but presents evidence that it will be undesirable, and that cyclists will instead choose to use other routes. NZTA are comfortable promoting the alternative routes while indicating that it is considering actively dissuading users from the new road.

[99] This reflects a difference between NZTA and the community as to the outcomes sought in respect of the new road. The reporting officers and the submitters consider that the new road should, in fact, *encourage* walking and cycling activity, pursuant to policy directives.

[100] There has been some discussion, given the territorial boundaries, as to whether the various policy documents advanced by the Palmerston North City Council can speak for the outcomes sought in other jurisdictions, e.g. Taranaki District and Manawatu District. Note the following three policies from the respective District Plans:

⁵¹ GPS at page 10.

- (a) **PNCC:** 1.6 Encourage the development of safe and accessible pedestrian paths and cycleways, as well as convenient and accessible cycle parking, to support the opportunity for people to use active and non-vehicular modes of transport throughout the City.
- (b) **MDC:** 1.1 To ensure that the adverse effects of vehicle movements to and from roads are managed by: d. Providing appropriate facilities for pedestrians and cyclists, particularly in urban areas.
- (c) **TDC:** 2.8.3.2(g) To encourage the use of “environmentally friendly” forms of transportation through the provision and enhancement of safe cycling and pedestrian facilities, particularly in town centres.

[101] While NZTA indicates that usage by “target users”⁵² will be low, and that cyclists can or will (or should) instead choose to cycle alternatives, there is actual policy justification, even at the community level across the three Councils (not to mention regional and national), to actively encourage active modes of transport.

[102] In these circumstances, it is appropriate for the Hearing Panel to consider whether the provision of an option which will be used by cyclists achieves the policy outcome, notwithstanding that there is evidence it is unsafe.

[103] Mr Baker states that The Te Apiti area is intended to retain a breadth of appeal while *broadening* its user base.⁵³ However, the shoulder option will only appeal to what Mr Baker refers to as “*highly experienced strong and fearless cyclists*”⁵⁴ (Mr Kennett describes these as the “*target users*”).

[104] It is accepted that a lack of safety or perceived lack of safety can serve as a suppressant on usage, as noted by Mr Dunlop in answer to questions from the Hearing Panel, and as discussed by Ms Austin in her evidence.⁵⁵ It must also

⁵² Jonathan Kennett in answer to a question of the Hearing Panel.

⁵³ Ibid at [56].

⁵⁴ Evidence of Jeff Baker at [104].

⁵⁵ Evidence of Kirsty Austin at [116].

be accepted that provision of some sort of separation will increase patronage⁵⁶ addressing a broader potential user base.

- [105] There is a chain of logic that delivering a safer outcome will be more appealing, which will increase patronage of the road, which will provide social wellbeing and health benefits, all to achieve consistency with social, health, and economic elements of sustainable management and the GPS strategic directions.

Alternatives - Safety

Alternative methods to safely provide for vulnerable users

- [106] There is criticism by the reporting officers concerning the assessment by NZTA of alternative methods to resolve effects on vulnerable users.
- [107] There is no assessment within the NOR of any alternative method to the 2 metre shoulder provision, whether by a shared separated pathway or a wider shoulder. NZTA's NOR foreclosed any assessment of alternatives by stating the position that separated walking and cycling facilities are not specifically provided for.⁵⁷
- [108] NZTA subsequently tabled at the commencement of the hearing a copy of the concept design audit which identifies a "*significant*" level of concern with walking and cycling provision, dated April 2018. The recommended response was to "*consider providing a high quality/ high speed off-road path separated from the highway or widen the shoulders in accordance with best practice.*" Those are the two alternative methods which, for the purposes of s 171(1)(b), required "*adequate*" assessment.
- [109] As to the question of "*adequacy*":

⁵⁶ See Austroads Guide to Road Design Part 3: Geometric Design, at page 82.

⁵⁷ NOR, Volume 2 at page 34.

- (a) Note that the level of concern is described as “significant”, a description which Ms Fraser agrees with. This indicates a greater degree of robustness in the alternatives assessment per *Basin Bridge*;
- (b) Besides case law as to adequacy, NZTA has its own internal guidelines⁵⁸ specifying the formal process of responding to road safety audits to inform decisions as to the action that will be taken, including “*identify the costs and implications of each audit recommendation,*”⁵⁹ with a direction that “*the reasons for suggesting that a road safety audit recommendation is to be rejected should be more detailed than the reasons for accepting it.*”

[110] See also Ms Fraser’s criticisms of the alternatives assessment at paragraphs [78] – [79] of her evidence.

[111] Whether the assessment of alternatives was adequate is a question for the Hearing Panel which can be informed by the extent of the responses within the concept safety audit. There is certainly no further evidence preceding lodgement of the NOR of any consideration of a wider shoulder or separate shared pathway that attempts to grapple with any form of multi-disciplinary cost-benefit analysis.

Can assessment of alternatives be constrained by the Project Objective?

[112] NZTA’s case on walking and cycling provision is influenced by relative safety improvements as compared to the Pahiatua Track and Saddle Road. This is reflected in the second Project Objective and the questionable reliance on the word “safer”. The NZTA response in the concept safety audit reflect that approach, by reasoning that the recommendations do not need to be accepted because there would be *viable alternatives*.

⁵⁸ NZTA’s *Road Safety Audit Procedures for Projects Guidelines*, describes the key objectives of a road safety audit as “*to deliver completed projects that contribute towards a safe road system that is increasingly free of death and serious injury by identifying and ranking potential safety concerns for all users and others affected by a road project.*”

⁵⁹ Ibid at page 23.

[113] Ms Keedwell referred to case law when she addressed the Hearing Panel. The case and passage she referred to is in fact authority for the proposition that the framing of a Project Objective does not constrain the assessment of alternative methods to achieve the objective:⁶⁰

[28] In relation to objectives, this Court has no jurisdiction to amend the objectives of the requiring authority, but is entitled to consider alternative sites, routes or methods etc for achieving the stated objective. That is subject to the caveat that a requiring authority cannot couch its objectives in such terms as to exclude consideration of alternatives, but rather that the enquiry of this Court must be limited to considering alternatives etc against the objectives which the requiring authority has specified.

[114] Both alternatives, and the method now before the Hearing Panel (i.e. 2 metre shoulders) fall squarely for consideration against the project alternative, with different degrees of provision of safety with varying costs and benefits that have not been adequately assessed by NZTA.

Possible Responses

[115] If the Hearing Panel determines that the assessment of alternative methods was inadequate, then it may also wish to consider whether the deficiency is cured by information supplied in the context of the Hearing process.

[116] NZTA has not helped itself by insisting that the shared path is not part of the Project and by submitting that there is inadequate information in respect of it to allow for a condition. That is a dangerous submission for NZTA to make when the obligation to adequately assess the costs and benefits of a shared path was solely NZTA's responsibility.

[117] In the circumstances, despite inadequate assessment of the costs and benefits of the alternatives, it is submitted that it may well be appropriate to follow a pragmatic response such as that undertaken in *North Eastern Investments Ltd*

⁶⁰ *Wymondly Against the Motorway Action Group v Transit New Zealand A22/2003* Environment Court at [28].

v Auckland Transport,⁶¹ by simply imposing the mitigation that is ultimately considered appropriate.

Reasonable Necessity

[118] It is accepted that the Hearing Panel has no jurisdiction to *look behind* a Project Objective. There is, however, a question as to the proper interpretation of the Project Objective which may be appropriate to consider.

[119] NZTA has relied on the word “safer” as it is used in its second project objective,⁶² and places particular emphasis on the word “safer” in its assessment as a justification for not providing a road that is independently safe for vulnerable users. Such phrasing, if deliberate, would not align with the RLTP, GPS or NZTA’s core function, which one would expect to influence delivery of a major project. Nor would it align with the agreement reached in the Joint Witness Statement that “*the design of the Project needs to be safe for all road users.*” and, “*...the Project road needs to safely provide for cyclists.*”

[120] Palmerston North City Council (in its capacity as submitter) submits that NZTA’s intention cannot have been to deliver a project that remained unsafe, and asserts that “*safer*” ought to be interpreted as “*safe*”. Applying that interpretation, the Palmerston North City Council (in its capacity as submitter) asserts that the second Project Objective is not met unless a separated path is provided for as part of the Project.⁶³

[121] In any case, the evidence of Ms Fraser and Mr Read (if accepted) does indicate that the second project objective would not be achieved without mitigation of the safety effects to vulnerable users.

⁶¹ [2016] NZEnvC 73.

⁶² “To reconnect the currently closed Manawatu Gorge State Highway 3 connection with a safer connection than the Saddle Road and Pahiatua Track.”

⁶³ Legal Submissions of the Palmerston North City Council (as Submitter) dated 28 March 2019 at [31].

Conditions and Part 2 RMA

Validity of condition?

[122] The proposed shared pathway condition is valid. Counsel agrees with the assessment advanced by Palmerston North City Council (as submitter) which considers and endorses the proposed condition against the Newbury principles at paragraphs 42 to 45.

What factors are relevant in considering whether to impose conditions?

[123] The approach under s 108 RMA is that “a resource consent may be granted on any condition that the consent authority considers appropriate”.⁶⁴

[124] What is *appropriate* is determined having regard to Part 2 RMA. Pursuant to *Cookie Munchers Charitable Trust v Christchurch City Council*.⁶⁵

[31] Whether or not a condition is appropriate must accordingly be determined (inter alia) having regard to Part 2 RMA, more particularly whether or not imposition of the condition is appropriate in light of the purpose of the Act, namely promotion of - the sustainable management of natural and physical resources.

[125] Proportionality of the response in terms of cost is something which can be had regard to in determining the appropriateness of conditions.⁶⁶ It is not mandatory, but can be helpful.

Discussion of potential options

[126] It is apparent that if the Hearing Panel agrees there is a need for a condition, then the options on the table (as discussed during the hearing) include:

- (a) The proposed separated shared path as described above and advanced by the reporting officers with the support of some submitters;

⁶⁴ Resource Management Act, s 108.

⁶⁵ W 090/2008 Environment Court, 22 December 2008.

⁶⁶ *Donald Jones v Palmerston North City Council* [2014] NZEnvC 131 at [38].

- (b) Wider shoulders in accordance with best practice (Austroads);
- (c) The Hearing Panel could decide not to impose a condition (no change);
- (d) The Road could be closed to cyclists as indicated by Mr Randal in opening submissions for NZTA.

[127] The reporting officers, specifically Ms Fraser, Mr Baker, Ms Austin, Ms Copplestone/Mr Percy can address the Hearing Panel further in relation to the relative benefits and drawbacks of the options identified above from varying perspectives including:

- (a) Relative safety considerations and alignment with relevant statutory and non-statutory documents;
- (b) Relative social, recreational and tourism considerations and alignment with relevant statutory and non-statutory documents;
- (c) Any practical or other design or planning considerations.

[128] There are certainly many factors that have been addressed in evidence or raised by submitters during the hearing, such as;

- (a) Relative social, economic and health and well-being benefits between the options;⁶⁷
- (b) Relative alignment with relevant statutory and non-statutory documents;
- (c) Predictions as to relative popularity in usage terms including discussion as to who are the *target users*, potential enablement over time with e-bikes⁶⁸ and development of river linkages by Palmerston North City Council;⁶⁹

⁶⁷ Regional Land Transport Committee, Wellington Conservation Board and The Central Economic Development Agency.

⁶⁸ With Mr Kennett, Mr Castle and Cr Jefferies all predicting an effective flattening of terrain constraints through e-bike usage.

⁶⁹ Statement of Evidence of David Murphy.

- (d) Relative safety benefits.⁷⁰ It is agreed by the experts that a separated facility would be safer than the use of the shoulder for vulnerable users.⁷¹
- (e) The benefits of integrating development of facilities for vulnerable road users at the same time as the road;⁷²
- (f) Potential design issues of the options including where it could or should be in relation to the road;
- (g) Other relevant effects;
- (h) Proportionality;
- (i) Cost, delay, complexity.

[129] The question, considering all relevant factors, is what is the most appropriate response considering the purpose of the RMA?

Comment on proportionality

[130] Proportionality is the consideration of the costs of the mitigation of the effect in relation to the benefits that will be achieved. It is not a mandatory consideration by any means, but it can guide the Hearing Panel's decision. The problem with considering proportionality here is the generally insufficient evidence, and certainly as between the various options. However:

- (a) Mr Whaley indicates a \$20 million cost for a sealed separated cycleway (note that this *indicative* cost appears to be for a fully separated cycleway rather than a cycleway separated only by a wire barrier);
- (b) There is evidence from Ms Fraser that a separated facility will result in a significant reduction of death or serious injury from a crash between

⁷⁰ Ms Fraser, Mr Castle and Mr Watt;

⁷¹ Joint Witness Statement, Transport and Social, 21 March 2019 at page 26.

⁷² Regional Land Transport Committee and Wellington Conservation Board.

a cyclist and vehicle. Positive social outcomes associated with encouraging walking and cycling and avoiding death;

- (c) Mr Vuletich for PNCC (in its capacity as submitter) places the expected benefits under an “on Highway” scenario at \$4,617,089 over a 20 year period. Note the views of several submitters that this is a Project with a long intended lifespan and benefits will continue to accrue beyond 20 years.

[131] The evidence is that a separated shared path is a high up-front cost, with high benefit delivered over the life of the project. The indicated costs are not disproportionate to the benefits that will be delivered and not out of scale to the costs and significance of the Project.

[132] A related issue of proportionality is the relative benefits of a cycleway over a widened shoulder option. The only evidence as to the costs of widening the road shoulders is contained in the responses to the Concept Safety Audit identifying “minor” land implications and “minor to moderate”⁷³ cost implications. Relative proportionality between the two mitigations cannot be thoroughly compared. Ms Fraser is available to assist the Hearing Panel on this point by identifying approximate ‘width’ implications that would be necessary to achieve compliance with Austroads under each scenario.

What should be taken of NZTA’s assertions that a shared path will cause complexity and delay?

[133] There is an issue as to how much weight the Hearing Panel should place on NZTA’s concerns regarding delays, complexities, and costs⁷⁴ that will arise from a separated shared path. It is a relevant factor for consideration, particularly given the expressed views of some submitters such as the Tararua District Council, but one which should be approached with caution in this case.

[134] Fundamentally, there is a lack of specificity as to why a potential delay is likely as a consequence of a shared path condition. NZTA’s evidence is speculative

⁷³ Responses to Concept Road Safety Audit.

⁷⁴ Delays in realising the benefits of the road are estimated by NZTA to be \$22 million per annum additional direct travel costs. See NOR, Executive Summary at page 3.

and it is certainly not accepted that delays are the inevitable or probable consequence of this condition. It cannot truly be known whether there would be any additional delay or undue complexity arising from this until NZTA undertakes a design exercise and works through the processes required by the conditions on the NOR before advancing an outline plan.

[135] Ultimately, if the Hearing Panel determines that a shared path is the best option to advance the purpose of the RMA and accordingly makes a recommendation to impose a condition, then one would assume NZTA would spend some time on proper investigation and design before making a final decision in respect of the recommendation. If NZTA then determined, following proper investigation, that costs, or delays or complexities were of such significance that a separated shared path was simply untenable, then it is in a privileged position (as it notes) whereby it has 15 working days to give notice of its decision on the recommendation.

[136] There is also nothing to stop NZTA starting the process now, particularly given mitigations should have been subject to greater assessment as alternative methods well before now. Ms Downs for NZTA explains the potential delay by saying that issues concerning the separate cycling and walking path “*have only been raised recently and are yet to be properly investigated*”. While it is correct that NZTA has not properly investigated the issue, there has been plenty of time already for NZTA to investigate a separated shared path, and plenty of time remains for a suitable design to be incorporated:

- (a) The issue was on NZTA’s radar no later than April 2018 when the Road Safety Audit recommended a high quality / high-speed off-road path separated from the highway or wider shoulders in accordance with best practice;
- (b) At all times NZTA had access to the available and relevant policies (which shape community expectations), including strategy and best practice guidance in delivering its NOR design. The timing of the GPS with a focus on safety and access was such that NZTA had an opportunity to align delivery of its project against that strategy. NZTA

decided not to without adequately assessing the identified mitigation options;

- (c) The processes under Part 8 RMA post lodgement of the NOR are precisely the opportunity for the NOR to be tested by the community through submissions and the functions of the Hearing Panel. Costs and delays are sometimes a consequence of a thoroughly tested NOR;
- (d) It could be kept in mind that “...*the cost of changing a design are significantly less than the cost of remedial treatments after works have been constructed, or the social cost of road crashes.*”⁷⁵ Mr Wolfsbauer echoed the sentiment more bluntly: “*don’t waste my money playing catch up*”.

[137] NZTA had given the Mayor and Chief Executive of Palmerston North City Council a legitimate expectation that a shared path would be looked at in the next stage of development. Now NZTA says this will cause delay.⁷⁶

Part 2

[138] Insofar as the Hearing Panel has heard that this project provides a *once-in-a-lifetime opportunity*, it is relevant to note that s 5 of the RMA *enables people and communities to provide for their social, economic, cultural, and health and safety while sustaining the potential of ...physical resources ...to meet the reasonably foreseeable needs of future generations and... avoiding, remedying, or mitigating any adverse effects.*

[139] The question is whether the project is best meeting the reasonably foreseeable needs of future generations if the social, economic and health and safety benefits arising from a shared path are not taken up now.

Equestrian usage

[140] There has been discussion about whether suitable provision should be made for equestrian users (as requested by Mr Yeo), in context of submissions by

⁷⁵ Road Safety Audit Procedures for Projects, Guidelines, Interim Release May 2013, at page 3.

⁷⁶ Statement of Mayor Smith, Appendix B.

PNCC (as submitter) that the project objective is inclusive of all road users and should provide safely for all.

[141] While safety for all users would be ideal, there is a limit to what can be achieved in terms of safety for equestrians through the proposed shared path condition. The proposed condition is deliberately for a *sealed* separated pathway, which, if built, would likely be beside the highway and traffic. Mr Read indicated that equestrian usage in this environment is incompatible. Ms Fraser can also address this issue.

[142] Ultimately, it is submitted that the condition proposed achieves a dual purpose of mitigating an adverse effect, while achieving social outcomes through encouragement of walking and cycling.

[143] Equestrian usage specifically is not a target of the condition, and does not enjoy the same level of policy support in the various planning documents. Adaptation of the proposed condition to allow a more favourable surface for equestrians would affect the balance of the condition by reducing its effectiveness for cyclists.

What if the Road is closed for cyclists?

[144] Mr Randal explained that the most effective means of addressing the adverse safety effect on vulnerable users would be to close the road to vulnerable users. It is assumed that is not NZTA's position, as the prevention of vulnerable users from the Road would plainly be a failure by NZTA to meet its project objectives. This would also have significant impact in respect of the assessment of effects and policy as it relates to vulnerable users.

[145] If NZTA's response will be to close the road to cyclists if the Hearing Panel decides that the proposed shoulder widths are unsafe, then it would be appropriate for NZTA to formally declare its position so that the project can be evaluated by the Hearings Panel on a fully informed basis.

OVERVIEW OF LEGAL AND FACTUAL ISSUES CONCERNING INDIGENOUS BIOLOGICAL DIVERSITY AND NATURAL CHARACTER (INCLUDING EARTHWORKS)

Overview

[146] There is a level of consensus amongst the ecologists in terms of the identification of significant vegetation and/or significant habitat for fauna and application of the One Plan. The experts also agree that the Project will have significant adverse effects on areas of indigenous vegetation, including two QEII areas. In some areas there are High to Very High adverse ecological effects on High to Very High valued ecosystems.

[147] There are broadly four issues that have not been resolved through evidence and conferencing of the witnesses:

- (a) Whether further consideration should have been given to avoidance of the QEII areas given the significant effects on these areas of significant indigenous vegetation.
- (b) Certainty over the ECRs; with issues ranging from concerns of DOC witnesses over the low ratios and the need to account for ecological value and time lag, through to Mr Lambie's position (shared by the NZTA witnesses at conferencing) that there needs to be much greater analysis of the relative roles of the ECRs and the other positive effects.
- (c) The need for (absence of) surety over whether the offset is feasible.
- (d) Whether a net biological diversity gain will be achieved for the Project (with differing views as between the DOC witnesses, Mr Lambie and Dr Forbes as to when and how any net gain can be achieved) as required by proposed NOR condition, and its relevance at this stage of the process.⁷⁷

[148] Related to the effects on indigenous vegetation is the potential for the vegetation to be significant habitat for fauna and the effects on the fauna it supports. The evidence of Mr Blayney and subsequent conferencing has

⁷⁷ Condition 17(b)(i) of Proposed Designation Conditions, tabled at hearing on 25 March 2019.

resolved many of the concerns of Mr Lambie. For example, there is now an invertebrate management plan, and the parties have agreed an avoidance first approach in the event of the discovery of bats, lizards, and nesting birds. Given the high level of agreement, and the fact that the vegetation (which represents significant habitat) is being exhaustively addressed, these effects are not canvassed further in these submissions.

[149] Conferencing indicates that the landscape experts are largely in agreement over landscape and visual effects.

[150] It is acknowledged by Mr Hudson and Mr Evans that the visual effects of the Project can be appropriately assessed at the time of detailed design and through the outline plan process.

[151] Landscape effects are also largely agreed between the witnesses.⁷⁸ Mr Hudson remains concerned that there could have been further analysis against the One Plan provisions on landscape, particularly cumulative effects. Otherwise, Mr Hudson continues to seek that the recommendations of Mr Evans are carried over into conditions or failing that, as appropriate, captured through the CEDF. The Conditions remain a work in progress in this regard and it may be that further update is provided during the course of when submissions are presented.

[152] The Project also spans areas of high natural character. All experts agree that there are a number of streams affected by the Project which have high or very high natural character. The extent of impact on natural character is still in dispute between the experts; specifically, given differences in methodology, the extent of effects on attributes and qualities of the areas identified as having high natural character. Resolution of this issue is important in circumstances where the ecologists, and Mr Evans and Mr Hudson all agree that it is important to capture areas of high natural character values as part of the NOR process.⁷⁹

⁷⁸ There has also been agreement over the adverse impact on landscape character caused by the grain of the landscape running north-south where the corridor runs east-west, which was referenced in the evidence of Mr Hudson.

⁷⁹ JWS Freshwater Ecology and Natural Character dated 19 March 2019, at section [44.2].

[153] All these effects (on indigenous vegetation, habitat, natural character and landscape) must be considered having particular regard to the planning instruments identified in s 171(1)(a). At least in the case of indigenous vegetation and natural character, the policies are very directive. Mr Percy and Ms Coplestone address these policies in their s 42A report, and in response to questions from the Hearing Panel.⁸⁰ It is their position that the effects hierarchy reinforced by these policies should be given weight as part of the Panel's evaluative consideration of the Project. Those policies require the avoidance of effects as a starting point. Only then (at least in the case of indigenous biological diversity) can regard be had to remediation and mitigation, and failing that, offsetting, if deemed appropriate under Rule 13-4 of the One Plan.

[154] The issue for the Hearing Panel to determine therefore remains broad – in essence, whether or not the effects (positive and negative) of the Project on the above matters are acceptable when having particular regard to the planning documents set out in s 171(1)(a) of the RMA and Part 2.

Indigenous Biodiversity

Effects on Indigenous Biological Diversity informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents.

[155] The effects on indigenous biological diversity assume significance when having regard to s 6(c) of the RMA and the One Plan, and in particular policies 6-1, 6-2 and 13-4.⁸¹

[156] For reasons already identified, and contrary to the suggestion in NZTA's opening submissions, there is no debate over whether the effects on indigenous biological diversity can be assessed. See also the Addendum of Ms McLeod.⁸²

⁸⁰ Hearing Panel Questions and Responses, s 42A Reporting Team, 14 March 2019.

⁸¹ There are also some district plan objectives and policies as included in Part 1: Statutory Matters of NOR Documents.

⁸² Addendum to Statement of Evidence of Ainsley McLeod, page 19.

- [157] The impacts on significant vegetation and its habitats are effects of allowing the requirement for the purposes of an assessment s 171 of the RMA. Equally, there is an acceptance by Ms McLeod and other witnesses of the application of Policy 13-4 to the Project. The condition which has been offered up for effects on vegetation is further suggestive of relevance.
- [158] The Joint Councils are required to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance. The word 'protection' is not defined in the RMA. It has been held in the RMA context to have the ordinary meaning "to keep safe from harm, injury or damage. More recently, the Environment Court has stated that 'protection' is "...also a near synonym for "safeguard", the word used in section 5(2)(b) of the RMA.⁸³ It is considered more absolute than those s 6 matters qualified by "inappropriate subdivision, use and development".
- [159] Policy 6-1 of the One Plan divides up responsibilities as between the Regional Council (Horizons) and the territorial authorities when dealing with indigenous biological diversity in the context of their respective plans. The intention of the policy was to identify the areas of rule-making responsibility, with Horizons responsible for developing objectives and policies to establish a region wide approach for maintaining indigenous biological diversity and the development of rules to control the use of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna,⁸⁴ while the territorial authorities are responsible for measures to address intrinsic, amenity and cultural indigenous biological diversity values.
- [160] This division of responsibility is evident when considering Policy 6-1(1)(a) and 6-1(1)(b) of the One Plan. However, 6-1(c) also goes on to identify areas where both Horizons and the territorial authorities have responsibility, including "recognising and providing for matters described in s 6(c) RMA and having particular regard to matters identified in s 7(d) RMA when exercising functions

⁸³ *Oceania Gold (New Zealand) Limited & Ors v Otago Regional Council* [2019] NZEnvC 241.

⁸⁴ And to maintain, including enhance, where appropriate.

and powers under the RMA, outside the specific responsibilities allocated above, including when making decisions on resource consents applications”.

[161] It is submitted therefore that Policy 6-1(c) extends to the consideration of RMA 6(c) and 7(d) matters whenever the territorial authorities are exercising other “functions and powers” (outside of their rule making functions), including when assessing resource consent applications, and NORs.

[162] This approach to Policy 6-1 is confirmed through the planning evidence of Ms Helen Marr at the Biodiversity Hearing on the One Plan,⁸⁵ as well as through a caucusing statement of the planning witnesses associated with that hearing process. With respect to the latter,⁸⁶ there was agreement that the intended outcome of the policy was:

“a) That Horizons to take the primary role in writing rules and other methods to maintain significant habitat and vegetation covered under s 6c RMA.

b) That TA’s may write rules for protecting areas other than those covered in a) above.

c) That there be clear separation of biodiversity functions so there is no duplication between RC and TA rules.

d) That the policy recognise that both RC’s and TA’s are responsible for recognizing and providing for s 6(c) and having regard to s 7(d) in other functions and duties” (my emphasis).

[163] Specifically, Ms Marr, in her End of Hearing Statement stated:⁸⁷

Subclause (c) of the policy was included to reflect the intent of (d) above. While it may be argued that this states what is already required by the RMA, the subclause was included to remove doubt and add clarity. The concern was that without this

⁸⁵ End of Hearing Statement, Ms Helen Marr, at page 5 of 18.

⁸⁶ Memorandum, Caucusing of Experts on Biodiversity Hearing – Policy 7-1, dated 16 August 2008.

⁸⁷ End of Hearing Statement, Ms Helen Marr, at page 5 of 18.

statement, it could be argued by some that (a) may remove the TA's ability to consider s 6(c) at all. This is not the intent. Clarifying the intent in the way proposed does not in my opinion distract from the other subclauses, is consistent with the RMA, and could potentially save costly arguments over district plans in the future.

- [164] The Hearing Panel accepted the recommendations of the planning witnesses.⁸⁸
- [165] When exercising functions and powers described in Policy 6-1, the territorial authorities must under Policy 6-2 consider, among other things, indigenous biological diversity offsets in appropriate circumstances as defined in Policy 13-4.⁸⁹ The Panel is therefore able to consider offsets (and the other direction in the relevant policies) when assessing an effect of the NOR under s 171 as defined in Policy 13-4. In this regard the question of avoiding adverse effects and offsetting and its appropriateness is not simply a matter for another day (and the regional consent applications alone) but is a matter relevant to the territorial authority's function in evaluating the effects on indigenous biological diversity as a s 6 matter of national importance.
- [166] Policy 13-4 requires activities with more than minor adverse effects on rare, threatened or at-risk habitats representativeness, rarity and distinctiveness, or ecological context assessed under the One Plan⁹⁰ to be avoided. Where more than minor effects cannot reasonably be avoided, they must be remedied or mitigated at the point where the adverse effect occur. Alternatively, where any more than minor adverse effects cannot reasonably be avoided, remediated or mitigated, they must be offset to result in a "net indigenous biological diversity gain" ("net biological gain").⁹¹ In endorsing this approach, the Environment Court concluded, in terms of the way the particular policy was constructed, offsetting is better not to be subsumed

⁸⁸ Biodiversity and Heritage Hearing, Volume 1, Part 5, at 5-30 - 5-31.

⁸⁹ Policy 6-2(e)(ii).

⁹⁰ Policy 13-5.

⁹¹ This hierarchy of effects is consistent with the BBOP Principles.

within the term “remediation or mitigation” but should be referred to separately and should come last in the hierarchy.⁹²

More than minor adverse effects

[167] Therefore, the starting point is avoidance of more than minor adverse effects on rare habitat, threatened habitat, or at-risk habitat. Only where those effects cannot be reasonably avoided does an assessment of remediation or mitigation, and failing that offsetting take place.

[168] Mr Lambie is of the opinion that the significance of effects on the rare and threatened habitat (protected by QEII covenants) meant that further consideration should have been given to whether the effects could have first been avoided (through a more northern alignment option for the QEII areas, for example). This approach has been supported by the conferencing of the ecologists with their focus on avoidance as the preferential first step/outcome.⁹³ The greater the significance of effect (which include High to Very High ecological effects) the more robust the alternatives assessment must be. Care is not disputed by NZTA.

[169] Putting aside the question of alternatives, there is agreement between the ecology experts that the significant adverse effects on rare and threatened habitat are not able to be remedied or mitigated at the point where the adverse effect occurs, and therefore offsetting becomes the only other potentially available option in the mitigation hierarchy. The evidence establishes that the offset of assessed effects is a feasible worst case scenario, which (in terms of its parameters) becomes relevant when considering whether offsetting is appropriate.

Availability of offsetting

[170] Offsetting is not available in all circumstances. Policy 13-4, and in particular, 13-4(d) sets out a number of bottom lines which must be met by any offset.

⁹² Decision Part 3, paragraphs [3-63] to [3-64].

⁹³ JWS, Terrestrial Ecology, dated 18 March 2019; and JWS, Freshwater Ecology, dated 19 March 2019.

These matters require an assessment of whether offsetting is actually acceptable in all of the circumstances.

[171] Mr Lambie's evidence has examined NZTA's proposed offset package against the requirements of 13-4. While the offsets are to be the subject of further assessment at the time regional council consents are sought for the Project,⁹⁴ Mr Lambie is of the view that there needs to be some certainty that significant adverse effects can be offset in a manner which meets the One Plan, or "at the very least, that the NOR provide for avoidance of the Very High ecological effects on the irreplaceable and vulnerable significant habitat."⁹⁵

[172] A complicating factor when considering application of the policy in this case is that the values of some of the vegetation/habitat are regarded as "highly vulnerable or irreplaceable". Policy 13-4(d)(v) must be considered in those circumstances. It directs that offsetting must not be allowed where "inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability".⁹⁶

[173] There is no prima facie assumption that because an area is rare or vulnerable that an offset is impossible. Instead, the policy introduces an element of discretion to the decision maker over how much the Project will impact on the rare and threatened habitat. This was evident in *Manpower NZ Limited v Hurunui District Council*⁹⁷ where the small scale of the disturbance of the karst ecosystem, and limited disruption to ecotones across the ridge and minimal effects on the scarp face meant that the Court did not consider the "highly vulnerable and irreplaceable components of biodiversity" to be affected to such an extent that offsetting is out of the question. Overall the nature and

⁹⁴ Mr Lambie expressly notes that the review does not presuppose any position that may be reached on review of the final design as part of the resource consenting process.

⁹⁵ Evidence of James Lambie at paragraph 137. See also the Response to the Hearing Panel Questions at page 17, where Mr Lambie responds to a question of the Panel about surety and certainty.

⁹⁶ This reflects the "Limits to Offsets" policy and is expressed in the BBOP as: "Limits to what can be offset: There are situations where residual impacts cannot be fully compensated by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected".

⁹⁷ *Manpower NZ Limited v Hurunui District Council* [2011] NZ EnvC 384, at [232].

scale of effects and the availability of limestone pavement for delivering an offset meant that offsetting was both viable and appropriate.

- [174] The effects envelope proposed by Dr Forbes is therefore critical to the assessment of whether the effects on the irreplaceable and vulnerable habitat are capable of being offset.
- [175] The offsetting proposed as part of the Project must also have a “significant likelihood of being achieved and maintained in the long term and preferably in perpetuity”.⁹⁸ This is directly related to the question of certainty raised by Mr Lambie and many of the submitters on this topic (see 13-4(d)(vi)). Whether or not offsetting is available under Policy 13-4 therefore depends on the ability of NZTA to achieve and maintain the offset, preferably in perpetuity.
- [176] There is no guidance as to “significant likelihood” within Policy 13-4(d). Consistent with best practice Mr Lambie relies on the Pilgrim theory⁹⁹ when determining the level of certainty required for delivery of the offset¹⁰⁰. In short, the greater the conservation concern, the higher the standard a proposed offset must meet in terms of certainty of delivery and outcome. This does not appear to be disputed between the experts.
- [177] What is in dispute is the certainty of delivery. As it is understood on the evidence the issue as to certainty of delivery remains unresolved as between the experts.
- [178] The terrestrial ecology JWS is silent as to the question of delivery of outcome. NZTA is of the view that the condition regarding net biological gain is sufficient to provide the assurance that offsetting can be achieved. DOC witnesses are of the view that the uncertainty over restoration outcomes at this stage means that greater emphasis should be placed on the avoidance of irreplaceable or significant habitats.¹⁰¹ Further, DOC seek a higher degree of certainty regarding the type, extent, and values of the habitat to be lost, and the

⁹⁸ Policy 13-4(d)(v)

⁹⁹ Evidence of James Lambie, at paragraphs 37 and 126.

¹⁰⁰ Evidence of James Lambie, at paragraphs 73.

¹⁰¹ Evidence of Timothy Martin, at paragraph 10.5.

location, extent, and condition of the restoration site (the offset site).¹⁰² Mr Lambie is also of the view that there should be greater surety in outcome when considering, at least at this stage, whether 13-4(b) is available, or in the event of any concerns or reservations, that the NOR gives greater weight to, and provides for, avoidance of the significant ecological effects.

[179] Overall, it is accepted that further information will be required before any decision as to delivery of the net biodiversity gain can be made. However, to the extent that the Panel seeks to rely on offsetting to counter balance the significant adverse ecological effects on irreplaceable and vulnerable habitat (when considered against the planning framework), it is submitted that the requirements of 13-4(d) and the availability of offsetting should also be considered as part of the Hearing Panel's evaluation of the effects of the NOR.

Alternatives

[180] The level of effects on significant vegetation and habitat also assumes relevance under s 171(1)(b) when considering the question of alternatives under s 171 of the RMA and the question of adequacy discussed earlier in these submissions.

[181] The alternatives assessment in circumstances where there are High to Very High ecological effects must be rigorous.

[182] In the *Basin Bridge* decision, the High Court also found that [at 200]:

... in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

[183] The need for weighting assumes relevance in this case where the avoidance of effects on a s 6 matter appear to have been weighted against factors such as impacts on wind turbines, earthworks and spoil sites, and the like. Further, while these factors are mentioned in the evidence of NZTA witnesses, they have not been the subject of detailed scrutiny, at least on the face of the NOR documents and evidence.

¹⁰² Evidence of Timothy Martin, at paragraph 3.6.

- [184] Mr Lambie, along with some other submitters, is of the opinion that the assessment of alternatives, particularly at a localised level within the current corridor, should have been more detailed when considering the weight required to be given to avoidance of adverse effects on significant vegetation and habitat. In Mr Lambie's opinion a greater level of scrutiny is required in circumstances where there is a Very High level of effect on areas of significance notwithstanding the imposition of an effects envelope to limit adverse effects, and efforts at detailed design to minimise the level of effect on ecosystems. See also the 42A Reporting Team's response to the Hearing Panel's questions.¹⁰³
- [185] Mr Lambie has noted possible options with a northern alignment avoiding the QEII blocks. While evidence of NZTA witnesses suggests that these options have been considered for the Western QEII, there appears to be limited supporting analysis to show the extent of these investigations, including any detail on habitat being affected (with no indication of the habitats values, or the extent and nature of change) if the alignment is moved further north.
- [186] For example, other than a brief mention of further earthworks, Mr Whaley provides no evidential basis to support dismissal of a possible route north of the Western QEII covenant. It is also not clear whether the assessed alternatives were within the NOR footprint, with a set design grade and speed (when asked by the Panel whether alternative speed environments had been considered, Mr Dunlop mentioned only Option 2 (which was the Saddle Road option) where lower speed environments had been considered). If assumptions around design grade and speed were locked in when considering alternatives, there would have been limited flexibility to provide for avoidance of effects within the NOR corridor.
- [187] Mr Whaley has confirmed the availability of a northern alignment which affects only 40% of the Eastern QEII Block compared with the indicative alignment, without fragmentation of habitat. He confirmed that the designation boundary was specifically extended to provide for this alternative route. This option would therefore have less of an effect on the Eastern QEII

¹⁰³ Hearing Panel Questions and Responses, s 42A Reporting Team, at page 16.

block and its indigenous biological diversity components. Notwithstanding, the effects envelope relied on by NZTA has retained the worst case option (indicative design), rather than this northern alignment. Offsets proposed for conditions have also been derived from this worst-case scenario and therefore do not recognise the opportunity to avoid those effects through the northern alignment discussed by Mr Whaley.

[188] This is a little surprising given that NZTA were prepared to confine the proposed construction footprint to at least minimise adverse effects on the Ballantrae site; in effect confining the effects envelope in this location.

[189] Despite these two examples above, NZTA have been seemingly unprepared to comprehensively consider alternative routes and methods that could avoid some or all of the adverse effects on the Western QEII area and the significant sites at the base of the Western Rise.

[190] These are matters that the s 42A reporting team seek greater clarity on. One option may be for the effects envelope to be reduced to account for these and other options and/or amendments recommended to the NOR itself to enable such alternatives to be examined in more detail by NZTA at the detailed design stage.

Possible Responses

[191] The requirement to consider effects under s 171 extends to an obligation to consider the adequacy of mitigation measures.

[192] While a failure to comply with objectives, policies or rules will not necessarily be fatal to a notice of requirement, the relevant planning instruments and policies give important context to the enquiry under s 171 as to the effects on the environment of allowing the Project. This is particularly the case, as here, where objectives and policies in the One Plan indicate the importance of certain effects due to their recognised value and status.

[193] Not only are these effects carefully managed under the One Plan (including its RPS component), but they are also a matter of national importance under Part 2, and specifically s 6(a) and (c). Further, Policy 6-1(c) and Policy 6-2(e), in

combination, direct the Joint Councils to have regard to offsetting where appropriate in accordance with Policy 13-4.

[194] Should the Panel seek to counter balance the adverse effects on significant vegetation and habitat with reference to Policy 13-4, three questions are submitted to arise:

- (a) Has avoidance of the effects been considered in the first instance?
- (b) If the effects cannot be reasonably avoided, mitigated or remedied, is offsetting in the current case appropriate in the circumstances, bearing in mind the requirements of section 13-4(d), all of which must be achieved by any offset assessed under the policy.
- (c) Does the offsetting package result in a net indigenous biological diversity gain?

[195] It is submitted that (a) and (b) above are relevant to the Panel's recommendation. While there may be further detail or work needed to reach a conclusion on the third question (with it to be addressed by the Regional Council at a later date), in order for the Panel to address the significant ecological effects on the basis that offsetting will be utilised as part of the resource consent phase of the Project, it should have regard to whether offsetting is even available. Policy 13-4(d)(i) through (d)(vii) are submitted to assume relevance to that assessment.

[196] In considering these issues, the s 42A reporting team have turned their mind to whether NZTA can achieve its objectives for the NOR in light of addressing adverse effects (and other Part 2 matters) – in this case in light of the question marks over the appropriateness and availability of offsetting (with the outcome of net indigenous biological diversity gain). This in no way was intending to pre-empt the regional consenting outcome, rather it saw Mr Percy and Ms Copplestone considering the effects of the Project through the lens of the relevant objectives and policies.

[197] This assessment requires consideration of whether the objectives of NZTA can be achieved subject to any restrictions that may arise through application of

the One Plan at later date. There is otherwise a risk that the spatial extent of the land is not sufficient, or that weighty burdens are being placed on private land without sufficient justification or cause.¹⁰⁴

[198] Relevantly, and by way of non-exhaustive criteria, the Court in *Queenstown Airport Corporation Limited v Queenstown-Lakes District Council*¹⁰⁵ observed that the work in designation would be reasonably necessary for the purposes of s 171(1)(c) where:

- (a) There is a nexus between the works proposed and the achievement of the requiring authority's objectives that supports the designation as sought;
- (b) The spatial extent of land required is justified in relation to those works; and
- (c) The designated land is able to be used for the purpose of achieving the requiring authority's objective for which the designation is sought.

[199] All of these factors are relevant to the Hearing Panel's recommendation, with the elevation of certain effects under the policy framework of the One Plan and s 6 of the RMA, while not necessarily determinative, relevant to the assessment of whether and how the designation NZTA seeks can achieve its objectives.

Conditions

[200] Subject to on-going refinement the s 42A reporting team accepts, so long as avoidance has been adequately tested through careful consideration of alternatives, the conditions containing the indigenous biological diversity effects envelope (as may be adjusted in light of the northern western alignment) as being appropriate for the purpose of a designation.

¹⁰⁴ Hearing Panel Questions and Responses, s 42A Reporting Team.

¹⁰⁵ *Queenstown Airport Corporation Limited v Queenstown-Lakes District Council* [2013] HZHC 2347, at [39].

- [201] The s 42A Reporting Team do not accept the effects envelope proposed for natural character given the freshwater ecologists views in conferencing, as discussed later in the submissions.
- [202] A condition requiring net biological gain as an outcome of the designation is also accepted in principle. However, particular care must be taken not to usurp any functions of the Regional Council in considering the applicability of Rule 13-4 with the benefit of further information around the offsetting package at a later date. That is, the Regional Council must be left with the option to determine that offsetting may or may not be available, or may or may not have delivered net biological gain.
- [203] There has been discussion during the hearing about environmental compensation. Caution is recommended in this regard. Offsets are not the same as remedying or mitigating effects and also should be distinguished from environmental compensation.¹⁰⁶ An offset directly relates to the values adversely affected by an activity, while initiatives which provide a positive benefit in respect of a different resource or value from that adversely affected are more properly described as compensation. On either approach it is necessary to understand the effect that is being offset, or compensated, and its extent, which is not yet the case here.
- [204] Regardless, the decision as to the role compensation may or may not play in delivery of the net benefit gain is one for the Regional Council as part of the regional consenting phase. It is not for the Hearings Panel to pre-determine the views of the Regional Council as to the acceptability (or otherwise) of environmental compensation, particularly in circumstances where there are no detailed compensation proposals for review. It is also notable that the One Plan provides no direction as to when compensation is appropriate. This can be obviously compared with the level of direction found for offsetting within Rule 13-4.

¹⁰⁶ *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZHC 134.

Effects on Natural Character informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents

[205] As with effects on indigenous biological diversity, the effects of allowing the NOR on natural character is a relevant matter for the Panel under s 171 of the RMA. Not only is natural character protected under s 6 of the RMA and the One Plan (the RPS component), related effects are also addressed through a series of district plan objectives and policies for PNCC, MED and TDC.

[206] The landscape evidence before the Panel has referred to sections 6(a) of the RMA, and Objective 6-2, and policies 6-8 and 6-9 of the One Plan. It is accepted by the planning witnesses that the objective and supporting policies must be read together¹⁰⁷. Regard must also be had to the objectives and policies pertaining to natural character and landscape across the district plans. These include provisions relating to the protection, preservation, maintenance and enhancement of natural character,¹⁰⁸ including associated policies regarding protection and maintenance of the values of margins of rivers and streams.

[207] Not surprisingly the One Plan provisions seek to reflect the requirements of s 6 of the RMA, with a focus on preserving natural character of rivers and streams and protecting them from inappropriate development. Objective 6-2(a) explicitly requires the characteristics and values of the natural character of, among others, wetlands, rivers and lakes and their margins to be protected from inappropriate development. In addition to the need for protection from “inappropriate” development, Policy 6-8 requires preservation of natural character. Policy 6-9 then provides guidance as to what appropriate development may be, with a set of bottom lines that must be met in any given circumstance.

¹⁰⁷ JWS, Planning and Conditions, dated 21 March 2019.

¹⁰⁸ Volume 2, NOR documentation, section 44.2 of Part I: Statutory Matters; Evidence of Phil Percy and Anita Copplestone, at paragraphs [502] – [509].

- [208] The One Plan therefore focuses on both protection and preservation as part of the concept of sustainable management.¹⁰⁹ The standard against which inappropriateness is to be assessed is “*the backdrop of what is sought to be protected or preserved.*”¹¹⁰ What will be inappropriate is dependent on the natural character that is to be preserved or protected.¹¹¹
- [209] This approach is reflected in Objective 6-2 which requires avoidance where:
- (a) There is an area of outstanding natural character; and
 - (b) The adverse effects would “significantly diminish the attributes and qualities” of areas with high natural character.
- [210] It is not clear from Objective 6-2(b) what happens when there are adverse effects on areas of high natural character that do not “significantly diminish” the attributes and qualities of the area. However, when considering the appropriate response under the effects mitigation hierarchy, guidance can be taken from Objective 6-2, and policies 6-8 and 6-9, which, when read together, focus on preservation of natural character and protection of the values and characteristics of an area from inappropriate development. In this case, weight would also need to be had to the conferencing of the freshwater ecologists and their preference for avoidance.¹¹²
- [211] In all other areas (being areas that do not have outstanding or high natural character) adverse effects should be avoided, remedied or mitigated.
- [212] All experts agree that there are no outstanding areas of natural character.
- [213] What remains at issue is whether there are adverse effects which significantly diminish the attributes and qualities of areas that have high natural character. Mr Evans does not consider that the threshold within Objective 6-2(b) has

¹⁰⁹ There does not appear to be any primacy afforded to protection or preservation under the One Plan; consistent with the approach under section 6 of the RMA.

¹¹⁰ *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [98] – [105]

¹¹¹ Policy 6-9 also provides guidance.

¹¹² Avoidance is preferable for the ecologist; see the JWS Freshwater Ecology and Natural Character dated 19 March 2019, page [6].

been reached in the circumstances (i.e. the attributes and qualities have not been *significantly* diminished). Mr Hudson disagrees.

[214] Mr Hudson opines that there are flaws in the approach of NZTA which have resulted in dilution or discounting of effects when represented as an overall rating of natural character. The Panel will be aware that NZTA experts agreed as between them the meaning of “significantly diminish” as a reduction in natural character from High to Moderate or less.¹¹³

[215] The concerns of Mr Hudson (and other s 42A writers in some or all ways) are:

- (a) First, the five-point scale referenced in the methodology is “effectively a nine-point scale”.¹¹⁴ Notably, it is now accepted by all experts in the freshwater ecology and natural character conference that a “series of small rating changes on the nine-point scale” could result in a “significant diminishment” of natural character.
- (b) Second, the use of a median when determining an “overall” natural character value for the streams and stream crossings. This approach is considered inconsistent with the intent of 6-2(b) which is to consider the attributes and qualities of an area with high natural character and the impact the Project has on them, with a view to ensuring the effects are viewed in the context of the values and characteristics being protected. All experts agree that evaluation relying only on the median result would be inappropriate¹¹⁵. Reliance on a statistical approach risks overlooking or hiding the change to specific attributes and qualities of the areas, as well as impacts on weighting, as discussed below. While Mr Evans notes that there the median score was combined with expert judgment¹¹⁶, review of the technical information in the AEE does not indicate how or where this expert judgment was applied. The values prescribed in the tables, say tables

¹¹³ Technical Assessment 4, at [126]. The footnotes refers to H.

¹¹⁴ All agreed as part of the JWS, Freshwater Ecology and Natural Character, dated 19 March 2019, page 8.

¹¹⁵ JWS, Freshwater Ecology and Natural Character, page 7.

¹¹⁶ JWS, Freshwater Ecology and Natural Character, page 7.

9 and 11 for example¹¹⁷, do not reflect any adjustment outside of the median score. There remains some uncertainty over this methodology.

- (c) Thirdly, Mr Hudson, Mr Brown and Mr Lambie all raised concerns through their evidence about the absence of any weighting of the attributes and qualities of an area with high natural character. All experts accept that the NOR documentation provides no explanation or insight into the weighting exercise (including its occurrence)¹¹⁸, although NZTA consider that sufficient consideration was given to this matter during the NZTA expert groups workshops.¹¹⁹ That weighting is important, as is evident in the agreement of the experts that “not all the attributes are contributing equally to the natural character”.¹²⁰ Rather there will be attributes and qualities that have greater influence on the natural character of an area at any given time and location.
- (d) A related point is whether one or more or several attributes and qualities of an area with high natural character must be adversely affected in order for the natural character of an area to be “significantly diminished”.¹²¹ NZTA suggests that several should be affected due to the plural wording of the provision. The Joint Councils are of the view that one or more attributes and qualities may be adversely affected in order for those attributes and qualities to be significantly diminished. It has been suggested that the plural reference to “attributes and qualities” is determinative. However, this overlooks that (b) is referring to “areas that have high natural character”. This broader context suggests that the singular should not be excluded. As does drafting practice where it is common for the plural and singular to be used interchangeably. This particular issue

¹¹⁷ NOR, Volume 3: Technical Assessments – Table 9, page 50; and Table 11, page 52.

¹¹⁸ JWS Freshwater Ecology and Natural Character, page 7.

¹¹⁹ This point was recorded in the JWS Ecology and Natural Character, page 7, although not as an agreed point.

¹²⁰ JWS Freshwater Ecology and Natural Character, page 6.

¹²¹ Objective 6-2(b).

should not become a distraction, however. Given NZTA's own assessment of natural character, this issue is likely to be a moot point, and it is not in of itself a fatal flaw in the NZTA methodology.

- (e) Finally, there is concern that the qualitative attributes of sectors of the NOR corridor have been underestimated within the natural character assessment.

[216] These concerns were also addressed in summary form by Mr Brown in the Hearing Panel Questions and Responses for the s 42A reporting team.¹²²

[217] When having regard to these factors in combination, Mr Hudson concludes that there is a likelihood that the rating reductions for natural character may not have sufficiently reflected the impacts that the NOR corridor and associated road will have in certain areas.

[218] Even putting to one side Mr Hudson's concerns over methodology, NZTA's own assessment shows that the attributes and qualities of areas of high natural character have been significantly diminished. See for example, tables 9 and 11 of the Natural Character Technical Assessment.¹²³ This level of effect is evident whether or not the Panel assesses natural character at a whole stream or individual crossing level. For example, when the Whole Stream results for QEII West Viaduct are considered, two attributes reduce from High to Moderate. When the Whole Stream results for QEII East are considered, four attributes reduce from High to Moderate. Mr Hudson will expand on these points for the Panel.

[219] These matters assume importance when considering the directive nature of Objective 6-2(b). If, for example, the attributes and qualities of an area with high natural character are "significantly diminished" then the requirement in Objective 6-2(b) to avoid those areas applies. The objective in this sense contains a blunt "in or out" threshold test.

¹²² Hearing Panel Questions and Responses, s 42A Reporting Team.

¹²³ NOR, Volume 3: Technical Assessments – Table 9, page 50; and Table 11, page 52.

- [220] Of further importance in this context is the agreed position of the freshwater ecologists that the designation corridor does not allow for avoidance.¹²⁴
- [221] Even if avoidance is not required under Objective 6-2(b), as mentioned above, regard would need to be had to the need to preserve and protect these areas of high natural character through any recommendation under s 171. The approach will in that sense be informed by policies 6-8 and 6-9 but also arguably, section 6(a). Further, while it is accepted that there may be more opportunity to consider remediation, mitigation and possibly offsetting in that circumstance, avoidance must be, as agreed by the experts, the first step in the process. In those circumstances (where there is no significant diminishment of natural character) a condition as discussed between Mr Miller and the Panel which reflects avoidance as far as practicable may be more plausible, although Mr Brown will speak to this further.

Whether or not there are deficiencies in the assessment of alternatives?

- [222] There is acceptance between the experts that there will be a high level of ecological effect on the streams and their margins. Mr Brown also states that the Freshwater Technical Assessment identifies that some of the streams within the NOR corridor have high ecological values and that the Project will have a high level of ecological impact on those streams with these high values. See Table 6.C.9 as summarised by Mr Brown at paragraph 56:¹²⁵

However, even with the above caveats, the assessment provided in Table 6.C.9 shows that for those sites that have a high ecological value (5A, 5B, 6A, 6B, 6C, 7A, and 7B (4200-4400), even with a moderate magnitude effects (change), the level of ecological effect of the activity will still be high on these sites.

- [223] Again, careful assessment of alternatives is required in this case.¹²⁶ Notwithstanding, it does not appear that natural character was assessed as

¹²⁴ JWS Freshwater Ecology and Natural Character, page 6.

¹²⁵ Evidence of Logan Brown, at [56]. The caveats referred to are at [54] and [55].

¹²⁶ NZTA Opening Submissions, at [246].

part of the two stage (long-list and short-list) Multi-Criteria Analysis (MCA) process described in the evidence of NZTA.

- [224] This means that the preservation and protection of natural character of rivers, stream and their margins was not considered as one of the “multi-criteria” against which the route options were assessed at either the long-list or short-list stage. As a consequence, it would follow that the input of experts as well as stakeholders (as a feature of the MCA)¹²⁷ was not received in relation to natural character leading into selection of “Shortlist Option 3”.¹²⁸
- [225] This limitation was reported in the Manawatu Gorge Alternatives Detailed Business Case¹²⁹, where, at page 64, Table 17, “Adverse effects on Outstanding Natural Character” were noted. The Business Case goes on to record in the same table “Increased consenting risks with inflexible avoid policy. Importance placed on the assessment of alternatives process”. Notwithstanding, the results of the assessment of the recommended option as recorded in Table 16, at page 59, record: “Natural character has not been assessed by a specialist at this stage.” This is considered to be an important oversight by NZTA.
- [226] There is therefore a risk that the long-list and short-list option assessment may not have adequately assessed the effects on the natural character of the rivers, streams and their margins affected by the Project. This may have limited the opportunity for consideration of options to avoid the effects on the high natural character streams in accordance with advice of experts and stakeholders until (at least it seems) late in the process.
- [227] These limitations are of concern in circumstances where:
- (a) There is a level of effect on natural character, which, on any assessment, sees a reduction from high (and in some cases very high) levels of natural character to moderate high, moderate and moderate-

¹²⁷ NZTA Opening Submissions, at [248].

¹²⁸ NZTA Opening Submission, at [248].

¹²⁹ Detailed Business Case dated 31 May 2018, Table 17 at page 64.

low,¹³⁰ and the policy framework suggests that areas should be protected and preserved; and

- (b) The assessment does not appear to have had any regard to cumulative effects despite there being multiple streams impacted through the NOR corridor.¹³¹
- (c) The freshwater ecologists agree that the “best way to avoid effects of the proposed road alignment on QEII streams would be to move the alignment north to avoid direct modification of the perennial and intermittent waterways.”¹³²
- (d) NZTA appear to be offering up conditions as a consequence of discussions with Meridian which further restrict the ability to mitigate or remedy adverse effects on natural character through planting along streams within the Te Apiti Windfarm extent.

Possible Responses

[228] There remains the question of what Objectives 6-2(a) and 6-2(b) mean in the context of a notice of requirement, where regional council consent applications are still to be lodged.

[229] Consideration of the natural character effects must occur having particular regard to the planning instruments, including the RPS and the district plan objective and policy framework for natural character. While the weight to be given to effects on attributes and qualities of areas of high (and very high) natural character will be a matter for the Hearing Panel, it remains relevant to consider what the effects mean in terms of the ability of NZTA to deliver an alignment with acceptable effects (in light of the tolerances of the policies) within the spatial extent of the NOR corridor. It is relevant for the Hearing

¹³⁰ Refer John Hudson’s responses, Responses to Questions from the Hearing Panel, page 4.

¹³¹ Hearing Panel Questions and Responses, s 42A Reporting Team, page 21. See also Objective 6-2(b) “Adverse effects, including cumulative adverse effects...”

¹³² JWS Freshwater Ecology and Natural Character, page 6.

Panel to confirm that the designated land is able to be used for the purpose of achieving NZTA's objective.¹³³

[230] If, after having regard to Mr Hudson (and others) evidence, the Hearing Panel is concerned that there is insufficient information regarding the effects on attributes and qualities of areas with high natural character, it has the option to require the experts to conduct a further assessment with an agreed methodology. Alternatively, should the Hearing Panel feel it has sufficient information (in that it puts to one side the report of Mr Hudson), particular care should be taken not to fetter the later ability of Horizons and its experts to reach a different view on the Objective.

[231] On any approach, the Hearing Panel's evaluation should assess whether there is flexibility within the NOR to accommodate and respond to any restrictions imposed by the rigid nature of Objective 6-2(b). If there is not sufficient flexibility built into the NOR, the spatial extent of the corridor may be insufficient to ensure the objectives of NZTA can be met.

[232] The ability of the NOR corridor to provide for a road with acceptable effects (within the confines of the policies) is also a question related to the adequacy of the NOR in achieving the objectives of NZTA, and whether NZTA can justify the extent of land to be designated when having regard to its restrictive effect on landowners and the QE Trust.

Conditions

[233] The condition proposed by NZTA to manage effects on natural character (a – through restrictions on the extent of stream disturbance – is not considered appropriate by Mr Brown or Mr Lambie. They are concerned that the condition is premature given that there is still uncertainty as to the potential envelope of effects until final road design and construction methodology is established.¹³⁴ There was also agreement at conferencing between the ecologists that “from an ecology perspective, the wording of Condition 5e) in

¹³³ *Queenstown Airport Corporation Limited v Queenstown-Lakes District Council* [2013] HZHC 2347, at [19].

¹³⁴ Evidence of Logan Brown, at [57] and [58].

Ms McLeod's EIC implies a direct step to stream loss rather than going through the mitigation hierarchy."¹³⁵ This is condition 5e), which remains in the conditions as circulated by the NZTA in its current form. In its current form the condition does not appear to cater for the correct streams (refers to 7A, but not 7B or 7C).¹³⁶

- [234] Mr Percy and Ms Coplestone recommended that, rather than remove the condition, a more robustly derived 'effects envelope' relying on expert advice could be appropriate, and that such a condition should be applied to all streams affected. While such a condition may not strictly be necessary because stream and riparian margin disturbance will be controlled by regional council resource consents, the effects envelope approach for natural character at least mirrors the approach supported by NZTA for indigenous biological diversity effects
- [235] In answer to a question from the Panel, Mr Evans indicated that the whole of stream assessment was more relevant than the stream crossings to the Panel's recommendation at this time. However, this approach is not entirely consistent with statements of the ecologists in conferencing, where they concluded that it is important to capture areas of high natural character values during the current NOR assessment, with areas of lesser natural character able to be appropriately addressed at the subsequent regional council consenting stage.¹³⁷
- [236] While Mr Brown does not anticipate there being too much change in terms of the freshwater values ascribed to the areas through this process, as previously identified, care will need to be taken by the Hearing Panel in not taking steps or imposing conditions which impede the exercise of the consent authority's functions when consent applications are lodged with Horizons.

¹³⁵ JWS Freshwater Ecology and Natural Character, page 10.

¹³⁶ The JWS Freshwater Ecology and Natural Character confirms that the lower portion (below waterfall) of 7B has high natural character as well.

¹³⁷ JWS Freshwater Ecology and Natural Character, page 6.

Earthworks

Effects from construction (erosion and sedimentation) informed by the relevant provisions of Part 2, the relevant statutory instruments and other relevant matters, being the relevant conditions and the relevant non-statutory documents

[237] The Project has the potential for adverse effects associated with erosion and sediment run-off.

[238] These matters, considered by Mr McLean, have been assessed at only a high level as a result of not having the benefit of a detailed design.

[239] Mr McLean confirms that there is enough room within the NOR corridor to accommodate spoil sites for the extent of the construction earthworks proposed,¹³⁸ although the location of those sites will need to be assessed in greater detail later through the regional council consenting process.

[240] There is also a need to adopt best practice erosion and sediment controls. Mr McLean sets out what he considers to be best practice guidance in his response to the Hearing Panels questions.¹³⁹

[241] The Panel is asked to consider the spatial extent of the NOR corridor and whether best practice controls can be accounted for within the proposed designation boundary.¹⁴⁰ As it stands, Mr McLean concludes that in some places there is limited space between the indicative construction footprint and the boundaries of the designation to accommodate best practice erosion and sediment control structures. As the effectiveness of sediment removal generally correlates with the footprint of the management measure, the proximity of the works footprint to the designation boundary may result in NZTA adopting less effective practices within the confines of the NOR boundaries¹⁴¹. While NZTA have indicated that further land can be obtained

¹³⁸ Evidence of Gregor McLean at [34].

¹³⁹ Panel Questions to the s 42 Reporting Team, 14 March 2019, at page 24.

¹⁴⁰ As above.

¹⁴¹ Evidence of Gregor McLean at [41]. For example, a decanting earth bund 'may require up to 75 metres from the top of fill, whereas a silt fence would only require a small area of clearance.

outside the NOR corridor, Mr McLean considers there is risk that the effectiveness of sediment control could be compromised.¹⁴²

[242] Mr Brown has also raised the issue of temporary discharge of sediment, which has effects on water quality. It is noted that conferencing of the freshwater ecologists records the agreement of the experts that 'temporary sediment discharged to waterways could be of a duration up to 15-25 years'.¹⁴³ Those 'temporary' effects are long term and, particularly in catchments with high ecological or natural character values, could be significant. In those circumstances it is considered appropriate that the NOR be sufficiently wide to accommodate sediment controls of a very high standard.

[243] The Panel must consider earthwork effects due to its impacts on the outcomes to be achieved for landscape, natural character, biodiversity and ecology. As with other aspects of the Project, consideration needs to be given to whether the designation provides for the Project to be constructed in a manner that addresses any adverse effects, including through appropriate management of erosion and sediment around streams with high natural character.

Conditions

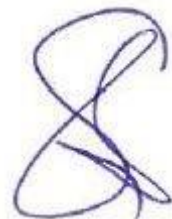
[244] The set of conditions recommended by the s 42A officers, particularly in relation to enabling works and construction works collectively, is intended to address the effects of earthworks.

[245] When considering the proposed suite of management plans, Mr McLean has identified the integrated management of enabling works and construction works due to the potential for cumulative effects resulting from the package of works. Mr McLean supports an outline plan being prepared for enabling works and for the Erosion and Sediment Control Plan to span both stages of works.¹⁴⁴

¹⁴² As above.

¹⁴³ JWS Freshwater Ecology and Natural Character, dated 19 March 2019, at page 10.

¹⁴⁴ Panel Questions to the s 42 Reporting Team, 14 March 2019, at page 24.



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