BEFORE THE PALMERSTON NORTH CITY, MANAWATŪ DISTRICT (MDC) AND TARARUA DISTRICT COUNCILS

IN THE MATTER	of the Resource Management Act 1991 ("the Act")
AND	
IN THE MATTER	NOTICES OF REQUIREMENT by NZTA under s168 RMA for the construction, operation, maintenance and improvement of approximately 11.5km of new State Highway between Ashhurst and Woodville to replace the closed section of SH3 through the Manawatū Gorge and associated works, know as the Te Ahu a Turanga, Manawatū Tararua Highway Project ("the Project")

LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION

Dated: 1 April 2019

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MAY IT PLEASE THE PANEL

Director-General of Conservation functions

1. The Director-General of Conservation is the administrative head of the Department of Conservation (DOC).[1] He has all powers as are reasonably necessary and expedient to enable DOC to perform its functions set out in section 6 Conservation Act 1987. Under section 6, the Department's functions include "*to advocate the conservation of natural resources generally*" and "*to preserve so far as is practicable all indigenous freshwater fisheries*".[2]

2. "Conservation" is defined in section 2 of the Conservation Act as:

> *"The preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations."*

3. "Natural resources" for the purposes of the Conservation Act means:

> *"Plants and animals of all kinds, and the air, water and soil in or on which any plant or animal lives."*

Legal framework

4. These legal submissions should be read alongside Memorandum of Counsel on behalf of the Director-General of Conservation dated 15 March 2019 (and attachments).

5. The Act recognises the difficulties involved with, and the importance of, large infrastructure projects and allows the Crown/network utility operators approved as requiring authorities,[3] certain privileges. Without traversing all the provisions of the Act relating to designations[4], the Director-General agrees with NZTA's Counsel that the Act provides for a NOR to be made separately to resource consent applications.

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[1] Section 52 Conservation Act 1987.
[2] Refer s6(a) and (c) Conservation Act.
[3] Under section 168.
[4] Usefully summarised by the Environment Court in *D M Handley v South Taranaki District Council* [2018] NZEnvC 97 at page 15.

6. The Director-General has listened carefully to the NZTA's desire to take a more innovative approach to this Project, bearing in mind that in some other projects many changes can follow the granting/confirming of resource consents and designation due to alterations in detailed design. There will, no doubt, be efficiencies for NZTA in the approach it has taken.

7. The Director-General agrees that section 91 does not apply. Parliament has intended a different avenue for requiring authorities, a 'privileged' position given that some of the provisions governing designations are relatively draconian. This may recognise the difficulties in getting these projects 'off the ground', particularly linear infrastructure projects traversing territorial authority boundaries.

8. Counsel understands that a similar approach was taken in the NOR's and regional consents sought for the Puhoi to Warkworth roading project, that is, applying 'worst case' scenarios and essential bottom lines.[5] But that case focussed on whether the standard format of 'condition 1' should be dispensed with ("*the work is to be undertaken in general accordance with…*").

9. The Director-General takes on board Counsel for NZTA's suggestion not to get hung-up on 'the why'. The question for this Panel is whether there is sufficient information to adequately assess the effects on the environment of allowing the requirement[6], taking into account constraints imposed by conditions.

10. This question is not only about deliverability of the compensation/offset areas, in a legal sense. Rather, the issues for the Director-General relate to the ability to understand the nature of potential adverse effects on ecological values (terrestrial and freshwater), and how those effects will be addressed.

11. Although the Director-General understands the urgency in securing a safe link between Ashhurst and Woodville, he continues to submit that in this context best practice does require resource consent applications be sought at the same time as the designation, or more information be outlined at this NOR stage.

[5] BOI decision at [271].
[6] NZTA Opening Legal Submissions at [77]-[78] citing *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [45]-[47].

Territorial authority and regional council functions

12. Under ss 30 and 31 of the Act:

    12.1. the functions of regional councils include "*the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity*"; and

    12.2. the functions of district councils include "*control of any actual or potential effects of the use, development, or protection of land, including for the purpose of … the maintenance of indigenous biological diversity*."

13. For the purposes of integrated management, and as required by s62(1)(i) of the Act, the RPS for the Manawatu-Whanganui Region apportions the function of controlling land use activities for the purpose of managing indigenous biodiversity through Policy 6-1 of the One Plan. This provides:

    a. The Regional Council must be responsible for:
        i. developing objectives, policies and methods for the purpose of establishing a Region-wide approach for maintaining indigenous *biological* diversity, including enhancement where appropriate
        ii. developing rules controlling the use of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna and to maintain indigenous biological diversity, including enhancement where appropriate.

        …

    c. Both the Regional Council and Territorial Authorities must be responsible for:

        recognising and providing for matters described in s6(c) and having particular regard to matters identified in s7(d) RMA when exercising functions and powers under the RMA, outside the specific responsibilities allocated above, including when making decisions on resource consent applications."

        (Emphasis added)

14. So, although the Manawatu-Whanganui Regional Council is responsible for rule making, territorial authorities retain the function under ss 6(c) and 7(d) when making decisions on resource consent applications and (although not

expressly mentioned) under notices of requirement. This is because consideration of a NOR involves "exercising functions and powers under the RMA".

15. There is no issue here with "usurping" the functions of a future decision-maker.[7] The Regional Council has reserved the indigenous biodiversity function in relation to the making of objectives, policies, rules and methods, but not in relation to considering particular applications. This Panel is charged with recognising and providing for the matter in section 6(c) of the Act.

'Stand alone' application

16. NZTA's approach leaves detailed matters in relation to both indigenous biodiversity and natural character to be considered at a later stage. The focus of the Director-General's case is on the former (indigenous biodiversity).

17. As I set out in these submissions, this leaves to another stage potentially significant adverse effects that 'trigger' Part 2, consideration of which is informed by strong and directive language in the regional planning document.

18. As in *Basin Bridge*, where the High Court recorded that a fuller understanding of the project would be gleaned from another project (Mt Victoria Tunnel duplication project in particular):[8]

    18.1. you are required to determine the matter on the application before you;

    18.2. you must determine whether the project before you meets the Act's sustainable management purpose as a stand-alone Project.

19. This includes considering the extent to which the Project and its effects can be properly understood and assessed.[9]

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[7] NZTA Opening Submissions at [107].
[8] *NZ Transport Agency v Architectural Centre Inc & Ors* [2015] NZHC 1991 at [247] – [248].
[9] Refer also *Graham v Dunedin City Council* EnvC 43/01 – expansion of a poultry farm (application before territorial authority) with odour effects at [45]-[46]: "We have concluded the principles of integrated management and sustainable development mean that the Court should properly consider land use issues as they affect discharge issues where these overlap. In those cases where they inter-relate then good resource management will require that these applications should be considered together."
"We have concluded that to consider them separately this case would introduce a level of artificiality"
And at [40] "We do not believe that we can properly ignore a range of potential effects which appear to have some evidentiary basis for the purpose of considering the land use activity. A holistic treatment of the Mainland application requires us to be satisfied that the development as a whole is sustainable. We accept that we do not have the jurisdiction at present nor proper evidence before us to reach a conclusion in respect of Regional Council Discharge consent relating to this application." (In this case there is jurisdiction to consider effects on indigenous biodiversity values).

20. NZTA states that it acknowledges the risk that regional resource consents may not be granted, and is prepared to accept that risk. However approval is sought by NZTA to commence preliminary works.

Part 2

21. Section 171 retains the need to "have particular regard to"[10] objectives and policies of *regional* planning documents, and the words "subject to Part 2".

22. The Director-General submits that the direction to "have particular regard" to regional planning documents recognises that the planning landscape is wider than the district(s). Regional planning documents may contain important provisions that are highly relevant to a project or work. Following recent caselaw, such provisions may also articulate for the Region what is required under Part 2 of the Act.

23. The following extract from *City Rail Link Limited v Auckland Council*[11] provides a summary of the relevance of Part 2 to designations:

> "[98] All consideration under s171(1) is, as noted, subject to Part 2.
>
> [99] The long-standing judicial approach to an 'overall broad judgment' approach to assessing applications for resource consent against Part 2, was, as it is well known, rejected for at least some purposes by the

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[10] On the interpretation of this phrase, refer *New Zealand Transport Agency v Architectural Centre Incorporated & Ors* [2015] NZHC 1991 (Brown J):
"[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".
[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*. Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said: […]
[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight. On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion."

(The above quote excludes footnotes).

[11] [2017] NZEnvC 204 (Principal Environment Judge Newhook presiding).

decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited*.

[100] There have been subsequent decisions exhibiting some uncertainty about the application of that finding, particularly in relation to notices of requirement. (Also in relation to resource consenting).

[101] The Board of Inquiry concerning the Puhoi to Warkworth Road of national significance held that there remains a need to carry out an overall balancing test and questions the widespread applicability of the 'environmental bottom lines' approach to the New Zealand Coastal Policy Statement [Final Report and Decision of the Board of Inquiry into Ara Tuhono-Puhoi to Wellsford Road of national significance: Puhoi to Warkworth section, 2 September 2014 at [133]-[134]].

[102] The High Court in what is colloquially known as the Basin Bridge decision also distinguished *King Salmon* on the basis that s171(1) RMA provides for specific statutory authority to consider Part 2, which is different from the statutory wording in the Plan Change context. The High Court held:

> King Salmon did not change the import of Part 2 for the consideration under s171(1) of the effects on the environment of a requirement.

…

[104] Question marks remain however because of the decision of the Environment Court, upheld in the High Court in *RJ Davidson Family Trust v Marlborough District Council*. (The latter decision concerned a resource consent application measured against s104 RMA).

[105] We are aware that the *Davidson* decision has recently been the subject of a hearing in the Court of Appeal, and reserve decision is awaited.

…

[107] We hold that the debate is (perhaps fortunately) academic in the present case. We consider that a Part 2 analysis would be satisfied in this case on the evidence before us…".

24. The reference to the Puhoi to Warkworth decision, is to the following paragraphs in that Final Report and Decision of the Board of Inquiry:

"[133] It is well settled law that, in making its determination, the Board is to apply an 'overall broad judgement' to be made having regard to various competing considerations which might arise in any given set of circumstances. The classic enunciation of that proposition is contained in *North Shore City Council v Auckland Regional Council*, which was affirmed on appeal to the High Court in *Green & McCahill Properties Limited v Auckland Regional Council*:

> "The method of applying section 5 … involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. This recognises that the Act has a single purpose. Such an

> approach allows for the comparison of conflicting considerations and the scale and degree of them, and also their relative importance or proportion in the final outcome.
>
> [134] Dealing, in a s 5 context, with NZCPS and the *King Salmon* judgment, there is still a need to carry out an overall balancing test. The Board accepts the submissions made by counsel in their closing submissions on the application of the *King Salmon* decision. The judgment remains, along with all other matters relevant under ss 104 and 171, a salutary reminder from New Zealand's superior appellate court on the importance of 'environmental bottom lines' set out in NZCPS24."
>
> (The above quote excludes footnotes).

25. The Court of Appeal has now released its decision in *R J Davidson Family Trust v Marlborough District Council.*[12] That decision, applying to resource consent applications, held that there may be other circumstances where planning documents do not fully implement Part 2 (beyond those of invalidity, incomplete coverage or uncertainty). The following passage from *King Salmon* was cited by the Court of Appeal with approval (and as binding):

> "[151] Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA's overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to context and location. It is these documents that provide a basis for decision-making, even though pt 2 remains relevant."
> (Emphasis)

26. The Director-General submits the Horizons One Plan "fleshes out" the principles of Part 2 for the purpose of the application before you. There are no inconsistencies between Part 2 and the provisions of the Horizons One Plan as they relate to biodiversity.

27. The background to the development of the provisions of the One Plan is usefully set out in *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC

[12] [2018] NZCA 316.

182, where the Environment Court itself said the policy for indigenous biodiversity is strong:[13]

> "While the policy is strong, there is the opportunity for applicants to step-down or work through the hierarchy and pass the gateway test for objectives and policies even where it is not possible to avoid all rare and threatened habitats."

28. Even if the overall balancing approach referred to in Puhoi to Warkworth is to be applied, it would need to be informed by the Supreme Court's decision in *King Salmon*. That decision provides direct authority on meaning of the following provisions of Part 2:

28.1. The Supreme Court said in relation to section 5:[14]

> "… the use of the word 'protection' in the phrase 'use, development and protection of natural and physical resources' and the use of the word 'avoiding' in subpara (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management: that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effect of development on particular areas is consistent with sustainable management."

28.2. In relation to section 6:[15]

> "It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from 'inappropriate' subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words 'protection' and 'avoiding' in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development. In this way, s6 underscores the point made earlier that

[13] At [3-116]
[14] At [24(d)].
[15] At [28].

> protection of the environment is a core element of sustainable management."
>
> and:[16]
>
> "We see this language as underscoring the point that preservation and protection of the environment is an element of sustainable management of natural and physical resources. Sections 6(a) and 6(b) are intended to make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management."

29. So, even if a 'balancing' approach is to be taken, these important directions must be given due weight. It is the protection element in section 6(c) that the Director-General considers is front and centre in this application.

30. Also important, is the need to examine what is sought to be protected or preserved.[17] What values of the SNA's make them significant? What are the effects on those particular values? Are these effects appropriately addressed (or, to use the wording in *King Salmon,* they are transitory or minor)? Currently there is insufficient information to undertake this analysis.

Director-General's position

31. If it were possible to have some *framework* conditions that would provide a degree of certainty that adverse effects on significant indigenous biodiversity values would be adequately addressed *later*, according to the mitigation hierarchy set out in the One Plan, it is likely that the Director-General would take a different position. That is not the case.

32. Ecological experts for the Director-General give evidence that this is neither possible nor appropriate.

33. The complexity of effects on biodiversity does not invite rudimentary approaches, such as that proposed by NZTA for ECR's. Counsel for NZTA

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[16] At [148].
[17] In *King Salmon* in relation to the word "inappropriate" in section 6(a): at [47], [101] and at [105] *"We consider that 'inappropriate' should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved. That is, in our view, the natural meaning."* (Although noting that section 6(c) does not include the word "inappropriate", it refers to protection *per se*).

invites you to accept that under the designation regime there are *many* uncertainties. There is uncertainty the Project will proceed. There is uncertainty resource consents will be granted for effects on both indigenous biodiversity and freshwater. There is also uncertainty as to the location of offset or compensation sites, or whether they will be secured.

34. Where the Director-General differs, is in relation to the proposition that the same degree of uncertainty applies across the board. The Director-General considers that a higher degree of uncertainty falls on the manner for addressing adverse effects on significant biodiversity values. There is uncertainty as to the condition and composition of the habitats that are to be offset, the fauna values present, the extent of potential wetland loss, the location and nature of the mitigation/offset/compensation sites and for wetlands, whether there are any offset or compensation sites available[18].

35. These uncertainties are further complicated by the legal position that:

    35.1. offsets or compensation must to be *offered* by the requiring authority[19] - they have not yet been offered.

    35.2. there is uncertainty as to whether any offset or compensation site would need to be acquired under the Public Works Act 1981 (Counsel understands this approach has not been tested, although it may well be a "public work" within the relevant definition.[20] Offsetting principles would need to be considered in relation to such an approach including that of stakeholder participation and equity).

Horizons One Plan

36. The Director-General rejects the suggestion that Policy 3-3, as it relates to infrastructure, takes precedence over the Objectives and Policies in Chapters 6 and 13 specifically relating to indigenous biological diversity.[21]

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[18] For potential wetland restoration sites, the inadequacy of the sites mentioned is set out in Martin EIC at [10.13].

[19] Section 171(1B) states*: "The effects to be considered under subsection (1) may include any positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from the activity enabled by the designation, as long as those effects result from measures proposed or agreed to by the requiring authority."*

[20] Public Works Act 1981 section 2: "*Public work and work mean—*
(a*) Every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such Government work or local work or use."* (Emphasis)

[21] McLeod EIC at [56(a)] "*It could equally be argued that the biodiversity management approach is the more generic policy on the basis that it applies to all activities, whereas Policy 3-3 is a policy specific to important infrastructure, with a particular approach or pathway being offered because such infrastructure has special importance (when compared to other activities).*"

37. The One Plan treats all "threatened" or "rare" habitats as significant without further analysis. These are listed in Appendix E. These are defined according to habitat descriptions and, as recorded by the Environment Court in the *Day* decision:[22]

> "The Plan has a focus on habitats, rather than individual species or genetic diversity, as the mechanism to most effectively sustain regional indigenous biodiversity into the future. It categorises habitats into rare, threatened or at-risk habitats. The description in the s42A report of Ms Fleur Maseyk, an ecologist, broadly explains the framework:
>
> > … the proposed framework for protection of indigenous biodiversity is based on habitat types rather than individual species. Habitat types were largely identified using predictive modelling. Comparisons between former and current extent of habitat types was conducted to determine degree of loss. Original and current extent of indigenous vegetation cover was primarily projected using robust national spatial data sets and predictive models. The use of these national spatial data sets and predictive models is common practice for analysis of this sort, and for determining the need for priorities for protection of indigenous biodiversity. …"

38. For "at risk" habitats the One Plan requires the significance criteria in Policy 13-5 to be applied before they can be identified as significant under s6(c).

39. The 'mitigation hierarchy' as it applies to significant habitats or areas, is set out in Policy 13-4(b).[23] In the *Day* decision, under the heading *"Should offsetting be required?"*, the Environment Court said:[24]

> [3-63] With respect to the Board of Inquiry [in Transmission Gully], we do not consider that offsetting is a response that should be subsumed under the terms remediation or mitigation in the POP in such a way. We agree with the Minister that in developing a planning framework, there is the opportunity to clarify that offsetting is a possible response following minimisation – or mitigation – at the point of impact.
>
> [3-64] A related argument was that the law does not allow the policy approach of a hierachy, but requires that any proposal should be treated in the round

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[22] At [3-8].

[23] Policy 13-4(b) "Consent must generally not be granted for resource use activities in a rare habitat*, threatened habitat* or at-risk habitat* assessed to be an area of significant indigenous vegetation or a significant habitat of indigenous fauna under Policy 13-5, unless:

i. any more than minor adverse effects^ on that habitat's representativeness, rarity and distinctiveness, or ecological context assessed under Policy 13-5 are avoided.
ii. where any more than minor adverse effects^ cannot reasonably be avoided, they are remedied or mitigated at the point where the adverse effect^ occurs.
iii. where any more than minor adverse effects^ cannot reasonably be avoided, remedied or mitigated in accordance with (b)(i) and (ii), they are offset to result in a net indigenous biological diversity^ gain."

[24] At [3-63].

> under the avoid, remedy or mitigate mantra. We have already dealt with that argument in Part 2 of the decision dealing with Landscape. We find it acceptable and appropriate for the regional plan to state a preference for the way effects on biodiversity should be dealt with, including by instituting a hierachy.
>
> Should avoidance be the first response?
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> [3-65] We had understood from the planners' conferencing record that the planners agreed that avoiding significant adverse effects should be pursued before moving to the lower level of remedying or mitigating such effects. There were some questions about this in the course of the hearing. However, avoidance is the first response in the BBOP principles and we accept the reasons given to us by various ecology and planning witnesses for that."

40. In the recent case *Oceana Gold NZ Limited v RFBPS* [2019] NZEnvC 41 these aspects of the *Day* decision, in particular the difference between mitigation and offset, were cited with approval. The Environment Court said: [25]

> "We consider that the *Day* approach to offsets comes closest to the principles of Part 2 of the RMA (and - as we shall show - international practice) in relation to offsets… ."

41. Although the Court in *Oceana Gold* also discussed the use of "compensation", the One Plan does not expressly provide for compensation in Policy 3-4.

42. The principles in the One Plan, Policy 3-4, in relation to offsets, are consistent with the evidence of Dr Lloyd at this hearing.[26]

43. DOC's evidence is that, the following provision in Policy 13-4(d)(ii) has not been met (emphasis):

> "An offset assessed in accordance with b(iii) … must:
> (ii) reasonably demonstrate that a net indigenous biological diversity gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect".

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[25] At [85].

[26] Policy 13-4(d) states "An offset assessed in accordance with b(iii) or (c)(iv), must:

- i. provide for a net indigenous biological diversity^ gain within the same habitat type, or where that habitat is not an area of significant indigenous vegetation or a significant habitat of indigenous fauna, provide for that gain in a rare habitat* or threatened habitat* type, and
- ii. reasonably demonstrate that a net indigenous biological diversity^ gain has been achieved using methodology that is appropriate and commensurate to the scale and intensity of the residual adverse effect^, and
- iii. generally be in the same ecologically relevant locality as the affected habitat, and
- iv. not be allowed where inappropriate for the ecosystem or habitat type by reason of its rarity, vulnerability or irreplaceability, and
- v. have a significant likelihood of being achieved and maintained in the long term and preferably in perpetuity, and
- vi. achieve conservation outcomes above and beyond that which would have been achieved if the offset had not taken place."

44. Dr Lloyd's refers to the definition of "biodiversity offset" in the BBOP[27] and says:

> *"The first word in this definition is a key one as measurability separates offsetting from more subjective assessments of mitigation sufficiency".*

45. Ms McLeod states in relation to Policy 13-4:

> *"In the case of the NoRs, I do not consider that the Policy should be applied the same directive way and effectively akin to a rule pathway, rather it is my opinion that the Policy is a tool to inform the consideration of the effects of allowing the requirements."*
> (Emphasis)

46. While it may not be a 'rule pathway' for this hearing, the Director-General considers the pathway provided in Policy 13-4 is highly relevant. Even if you accept that this pathway should not apply until the resource consenting stage, a recommendation that the NOR be confirmed may close off options for the pathway at that stage. Meridian has referred to the Officers' Report comment that a wider corridor may be required in order to allow for a precautionary approach, and insufficient certainty to satisfy the high burden of proof around offsetability on areas with high conservation values.[28]

47. The Director-General's primary position is that this pathway must be applied at this NOR stage. To leave it to another stage would fail to address a primary function of the current consent authorities.

Expert evidence: ecology

48. Dr Martin conferenced with Dr Forbes on 22 February 2019 on limited ecological matters, including terminology. Following this conferencing, Dr Forbes states that the package of positive effects would not need to be described as either offset or compensation, but recommends using the terminology "*positive effects package*" as in revised Table 6.A.1 (Appendix B of his EIC). [29]

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[27] Lloyd EIC at [3.3]: A biodiversity offset is "Measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been undertaken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground."
[28] Submissions of Counsel for Meridian at [57] referring to the Officer's Report at [152] and [471].
[29] Addendum at [10].

49. Dr Forbes states that if the package of positive effects is referred to as compensation that does not automatically mean more uncertainty and more positive effects are required as:[30]

> *"I was conservative in developing the package of positive effects in the first place and have since amended the ECR component of the package in an attempt to respond to comments received from Dr Martin.*"

50. Dr Lloyd and Dr Martin disagree with this explanation. Their evidence is that if, contrary to the mitigation hierarchy, the 'package of positive effects' is accepted, a decision-maker would need to accept there is greater risk that adverse effects are not addressed and there is likely to be some 'net loss'.

51. Even if ECR's are accepted on their face, concealed losses may involve matters not the subject of ECR's (examples include significant old trees, invertebrates, currently unknown fauna values, habitat complexity such as canopy epiphytes and tree cavities). Some of these may involve potentially irreplaceable values (e.g. old growth forest and rare seepage wetland).

52. In addition to ECR's, which are proposed on the basis of area to be removed, the Applicant's positive effects package includes an area of 32 hectares of "retirement, protection, and canopy gap planting" to address the following:[31]

    a. Permanent edge effects where road design prevents the planting of forest buffers.
    b. Permanent fragmentation and isolation where forested gullies are severed by the road being constructed on an embankment.
    c. Loss of habitats where restoration plantings will take centuries to reach an equivalent state to the habitats to be lost.

53. Dr Martin states that using a compensation (rather than offset) approach, this quantum would likely be an order of magnitude greater than the 32 hectares proposed.[32]

54. Dr Forbes has conferenced with Mr Lambie. The resulting JWS records that Mr Lambie has requested further description of the rationale underpinning the ECR development.[33] That is not surprising. The Director-General's experts

[30] Addendum at [30].
[31] Martin EIC [10.9].
[32] Martin EIC at [10.11].
[33] Joint Statement of Ecology Experts (terrestrial ecology) 18 March 2019 at page 7.

do not consider Dr Forbes has provided sufficient rationale (including in his Addendum).

55. Dr Forbes has stated that Dr Martin's participation in witness conferencing on 22 February 2019, and Dr Martin's comments on ECRs, suffer from the same subjectivity problem as do ECRs themselves.[34] The willingness of the Director-General to make his witnesses available to conference early, including on the ECR's, should not be held against him. The difficulty for the Director-General is that his experts are being requested to comment on ECR's with insufficient information. That is why the Director-General recently indicated its experts would not attend further conferencing without further information.[35]

56. Dr Lloyd's evidence states that Dr Forbes has excluded a scientifically robust offsetting framework from consideration, when such an approach "*could easily have been used for younger stands of indigenous forest, scrub, and shrub land*".[36]

57. Despite Dr Forbes' comments in his Addendum that a Microsoft XL-based calculator would not have been preferable, and would also have required subjective expert judgment, the paper tabled authored by Dr Maseyk on behalf of Kahungunu Ki Tāmaki Nui-a-Rua Trust and Ngāti Raukawa (11 March 2019) voices the very same concerns as Dr Lloyd, including (emphasis):

    - "*In addition to the incomplete identification of values and impact assessment, the proposed mitigation and offset package <u>does not align with key principles of offsetting, uses area alone as a currency of exchange which does not adequately account for losses and gains in condition, and lacks rigor and transparency</u> in its evaluation*." (page 3)

    - "*It is my view that the proposed effects management package is more accurately described as in an embryonic stage of design, and that <u>it is premature and inaccurate to conclude that a "net-gain position" will result</u>.*" (page 3)

    - *"<u>A decision was made not to use an objective, numerical offset model</u> to evaluate the adequacy of the proposed offset exchange, relying instead on expert judgment. <u>This decision requires greater justification and a further explanation of the assumptions that have informed this judgment</u>*." (page 4)

[34] Addendum Forbes at [47].
[35] In Counsel's Memorandum dated 15 March 2019.
[36] Lloyd EIC at [4.28].

- "*The complexity of the model should be commensurate with the complexity and value of the biodiversity impacted and the scale of impacts."* (page 8)[37]

- *"Conducting this evaluation outside of an objective, transparent, accounting framework is effectively taking a 'best guess'. The stakes of getting an offset requirement wrong are high; overestimating puts undue accountability, risk, and cost onto the applicant, while underestimating entrenches permanent biodiversity losses with subsequent consequences for cultural, environmental, social, and economic wellbeing and for intergenerational equity*." (page 8)

Inadequate assessment of potentially affected *values*

58. Dr Martin's evidence on the history of consultation DOC/NZTA has been taken out of context by Dr Forbes in his Addendum.[38] Dr Martin clearly acknowledges in his evidence where matters have since been addressed.

59. The purpose of Dr Martin setting out the history of interaction was intended to show:

    59.1. The substantial changes that have been made following the Director-General's involvement.

    59.2. That some important ecological matters were not addressed prior in the NOR. These include identification of the Ramarama trees (Threatened – Nationally Critical) within the Project footprint, the wetlands dominated by exotic plant species not included, extent of effects from spoil sites, potentially significant effects on At Risk terrestrial invertebrates previously recorded at the site (Meterana exquisita and Meterena grandis).

60. As explained by Dr Martin, following his input, including his high level review of December 2018, and subsequent interactions with NZTA, these matters have now been partially addressed. Uncertainty around the exact quantum of

[37] Dr Lloyd also states that complexity is better captured in an offsetting model EIC [4.3] *"I am unsure why Dr Forbes has rejected a qualitative approach on the basis of its inability to capture complexity. In my opinion a well-structured offsetting currency, with detailed attributes and limited aggregation of attributes, can do a much better job of capturing the complexity of biodiversity than the approach Dr Forbes has used."*
[38] Forbes Addendum at [13]-[15].

wetland loss remains. The potential for the loss of 89% of divaricating Coprosma shrubland within the designation in an indicated spoil site remains.[39]

61. A difference remains as to whether all habitats (all 12 habitat types according to DOC's assessment) meet the significance criteria under the One Plan. Dr Forbes still considers 3 habitat types are not significant for the purpose of section 6(c), including divaricating shrublands even though the Applicant ranks these as "high" value. Dr Forbes states he is comfortable with his rankings assigned regarding "ecological context" in the absence of finer-scaled assessment of individual ecosystem areas.[40] Dr Martin says the failure of the buffer/connectivity criterion to be triggered is clearly an error given the connectivity of many of the habitats to forest within the Manawatu Gorge Scenic Reserve.[41] Dr Forbes states that ECRs would not alter by virtue of differences Dr Martin has pointed out with the section 6(c) significance assessment under the criteria of the One Plan. I suggest that this issue does require a decision. It may not affect Dr Forbes' ECR ratios[42], but it identifies which habitats fall to be considered under section 6(c).

62. NZTA has consistently advised that freshwater ecology effects are a matter for another day.[43] However the Director-General also provides expert evidence on freshwater ecology, from Dr Goldwater. Dr Goldwater's evidence is that it is possible c. 7000 metres of stream loss may occur as a result of the proposed works, which includes spoil sites and lay down areas. Although there has been reference to opportunities being discussed for identifying and securing land beyond the designation corridor for ecological restoration processes, he cannot find any information that specifically addresses offsetting of stream loss outside the designation.[44] Similar uncertainties arise as for effects on terrestrial biodiversity, and proposed consent conditions would allow QEII Trust west and east streams to be permanently disturbed by diversion or other physical modifications.[45]

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[39] Dr Martin pointed out that Coprosma shrubland are a distinctly separate vegetation type within the designation with their own set of ecological values but were previously mapped as the border vegetation type called manuka – kanuka and divaricating shrublands.
[40] Forbes Addendum at [19].
[41] Martin EIC at [8.9].
[42] As outlined in Forbes Addendum at [18] – the experts referred to by Dr Forbes as having discussed this matter at expert witness conferencing in March, do not include the Director-General's experts.
[43] Including in Counsel for NZTA's Opening submissions at [92].
[44] Goldwater EIC at [6.1].
[45] Currently condition #5(e).

Conditions

63. Further comment on the proposed conditions will be made at the Director-General's presentation (including in Addenda to expert evidence) in relation to:
    63.1. Potential adverse effects on indigenous biodiversity.
    63.2. PN2 (carparking) which is currently the subject of discussion with NZTA.
    63.3. Management of pest plants in the existing SH 3 should it be closed.

64. By way of preliminary comment, a condition that includes the proposition that any offset (or compensation) will be designed to achieve a 'net gain', is not sufficiently certain.[46] Neither are 'process' conditions.[47]

65. Although legal certainty of offset sites is not the only issue for the Director-General, the Mt Messenger bypass application[48] was granted at first instance and the following condition is currently before the Environment Court (the Director-General's appeal is seeking further certainty):

> Condition 29A "(a) Works shall not commence until the Requiring Authority provides the Planning Lead (or Nominee) with written confirmation that it has in place the legal agreements and/or other authorisations necessary to allow the Requiring Authority to enter onto land outside the boundaries of the designation to carry out, continue and maintain all the measures set out in the ELMP, including the restoration planting, riparian planting and pest management measures. This shall also include appropriate access to such sites, for the purposes of undertaking those measures.
> …"

66. Although a management plan can provide information as to how the parameters or controls in the consent can be achieved, it is inappropriate for those parameters to be left to the management plan: for example as in *Wood v West Coast Regional Council*:[49]

> "In the end counsel were agreed on a submission by Ms Robinson that a management plan can be required to be prepared pursuant to section 108(3) of the Act, but its purpose should be to provide the consent authority and anyone else who might be interested, with information about the way

[46] Currently condition # 17.
[47] Currently condition #17b.
[48] NZTA application for NOR and resource consents.
[49] C127/99 pages 6-7 (Judge Skelton presiding).

in which the consent holder intends to comply with the more specific controls or parameters laid down by the other conditions of a consent. So, for example, in the case of noise, specific noise control limits can be laid down but the way in which these are to be complied with is for the consent holder who can be required to provide a management plan containing information about the method of compliance. However because technology might change over time the consent holder should have the ability to change the management plan without having to go through the process of seeking a change to the conditions of consent."

67. For the management of pest plants, Dr Martin discusses the potential adverse effects on pest plant proliferation, including for the DOC land beside the existing SH3, should the existing SH be closed.[50] The Director-General says that a condition may be imposed on the NOR even though the matter is also covered by section 103 of the Land Transport Management Act 2003. This was recognised by the Board of Inquiry considering the Transmission Gully NOR.[51] The Board said in the Transmission Gully case that it would be pointless to impose a RMA condition that simply duplicates what is required under other legislation[52] but the condition ultimately required consultation with identified parties that went beyond who would be consulted under the land transport legislation.[53] That the environmental effects of abandoned piece of road can

[50] Martin EIC [9.9] – [9.12]
[51] Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal, Volume 1 at [147].
[52] Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal, Volume 1 at [148] bullet point 3.
[53] The Transmission Gully condition required consultation with the Paremata Residents association on the future of the Paremata bridge. The full condition is set out as follows:
"No earlier than six months after the commencement of the Project and no later than 12 months from that date the Requiring Authority shall: Consult with PCC, WRC, Paremata Residents Association Inc, Plimmerton Residents Association Inc, and Ngāti Toa Rangitira in relation to its proposals for the Work Paremata Road, Mana Esplanade and St Andrews Road following the construction of the Transmission Gully Motorway Project, including the following matters: (a) Ownership and control of the Work Paremata Road, Mana Esplanade and St Andrews Road;
(b) Options relating to the future of the existing Paremata Bridge;
(c) The continuation of four laning of St Andrews Road between Acheron Road and James Street;
(d) Measures (to the extent that they are legally available) to restrict or discourage heavy vehicle movements through the Work Paremata Road, Mana Esplanade and St Andrews Road;
(e) Other measures required to ensure an adequate level of service for the traffic volumes and traffic type expected to use the Work Paremata Road, Mana Esplanade and St Andrews Road;
(f) Provision of arrangements for cyclists;
(g) Alteration of footpath widths;
(h) Removal of traffic lights;
(i) Changes to the operation of the clearways or High Occupancy Vehicle lanes;
(j) Alteration of arrangements in relation to capacity;
(k) Any changes to be sought to the any NZTA designation in relation to those matters; and
Report on the outcomes of that consultation to PCC and WRC for the purposes of ensuring that PCC and WRC are fully informed of the views of the public and those bodies, and of the Requiring Authority's intended response to that consultation."
(Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal, Volume 2: Conditions, at NZTA3.B).

be considered under a NOR, was also recognised in *Handley v South Taranaki District Council*.[54]

Conclusion

68. As a 'stand alone' Project, and having "particular regard to" the objectives and policies of the planning documents, including the objectives and policies of the One Plan (as they relate to significant indigenous biodiversity), the proposal is contrary to Part 2 of the Act. Without further information, the Director-General's position remains as stated in his written submission, that is, the consent authorities are requested to recommend to the requiring authority that the requirement be withdrawn.

DATED at New Plymouth this 1st day of April 2019

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Sarah Ongley
Counsel for the Director-General of Conservation

[54] [2008] NZEnv C 97 at [59] – [60] – the Court accepted that what would happen to an abandoned stretch of road (referred to in that case as the "dog leg") was a matter *within* the requirement for the designation. There is a matter of stewardship regarding the abandoned dog leg that must be considered under the RMA, and that is indeed relevant for any owner of land.