

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

**MT MESSENGER BYPASS PROJECT**

In the matter of the Resource Management Act 1991

and

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

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

31 July 2018

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## PART A INTRODUCTION AND SUMMARY

1. On 14 December 2017 the NZ Transport Agency lodged a notice of requirement ("**NoR**") and resource consent applications to enable the construction of the Mt Messenger Bypass Project (the "**Project**").
2. The Project will deliver a new section of State Highway 3 ("**SH3**"), generally between Uruti and Ahititi to the north of New Plymouth. This new section of SH3 will be a 6km long, two-lane section of highway to the east of the existing Mt Messenger alignment. It will provide for a significant upgrade over the existing Mt Messenger alignment, which is not fit for its purpose as an important section of a major State highway.

### High-level Project description

3. The Project will provide for a modern highway alignment, with 3.5m minimum lane widths in each direction and shoulders of 1.5m (except in the tunnel where they are 1.2m). Travelling north to south, the Project alignment:
  - (a) commences north of the driveway on the existing SH3 to the Pascoe property, via a T-intersection 'tie-in' to the existing SH3;
  - (b) runs to the east of, and broadly parallel to, the existing SH3, following the Mangapepeke Valley along the Pascoe farm and then Ngāti Tama land;
  - (c) increases in gradient beyond the Valley flats, through to the crest of the Project alignment at the entrance to the tunnel through the ridge connecting the Mangapepeke and Mimi Valleys;
  - (d) incorporates a tunnel that is approximately 235m long, and 95m below the crest of the ridge;
  - (e) descends down from the southern entrance to the tunnel through the Mimi Valley across Ngāti Tama land, again to the east of the existing SH3;
  - (f) crosses an approximately 120m-long bridge across the Mimi Valley upstream of the kahikatea wetland (referred to in these submissions as the "**Mimi Wetland**");
  - (g) decreases in gradient as it reaches the Mimi Valley floor;
  - (h) 'ties in' to the existing SH3 via a T intersection near the property at 2528 Mokau Road, Urenui; and
  - (i) incorporates (and improves) the existing SH3 to the bend near the property at 2454 Mokau Road.
4. In addition to the main tunnel and bridge, the Project incorporates:

- (a) a second, approximately 25m-long bridge across a tributary valley of the Mangapepeke Stream on the north side of the tunnel;
  - (b) a main construction yard (on the Pascoes' property) and smaller yards and haul roads;
  - (c) a total of 17 temporary and 19 permanent culverts as the alignment and earthworks cross streams;<sup>1</sup>
  - (d) at least 10 cuttings up to 60m in height (and up to 400m long), and 15 embankments ranging between 1.5m and 40m in height (and up to 450m long);
  - (e) Stormwater swales and two constructed stormwater wetlands to the north of the tunnel, and one to the south; and
  - (f) fill disposal sites in both construction regions (ie both valleys).<sup>2</sup>
5. The Project has a total earthworks footprint of up to 36ha. Of this area, approximately 18ha is the "Additional Works Area" ("**AWA**"), a buffer around the Project where it has been conservatively assumed that full vegetation clearance (and earthworks) will be required. The Project's earthworks volume is approximately 960,000m<sup>3</sup> and its bulk fill volume is approximately 890,000m<sup>3</sup>.
  6. The Project will remove up to 31.676ha of predominantly native vegetation,<sup>3</sup> and will require the diversion of a total of approximately 3.7km of stream length. A comprehensive and detailed package of measures to address the effects of the Project on ecological values (the "**Restoration Package**") has been developed and is a core part of the Project design.
  7. Mr Boam's evidence provides a more detailed description of the Project.<sup>4</sup> Mr Hugh Milliken (the Alliance manager for the Project) will present a run through of the Project alignment via the 'Humphrey' 3D modelling software.<sup>5</sup>
  8. Finally, the Project includes a robust set of proposed conditions (for the NoR and the resource consents) as well as a detailed set of proposed management plans. While addressed in more detail below, somewhat unusually the Transport Agency seeks that the management plans (apart from the Specific Construction Water Management Plans ("**SCWMPs**") be approved by the Commissioner and not subject to certification by the Councils. Having used an Alliance model the constructor has been involved in the design of the

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<sup>1</sup> Two previously proposed permanent culverts have been removed from the Project since the Transport Agency's EIC was filed. See the evidence of Mr McEwan (filed with supplementary evidence). Mr McEwan and Mr Hamill address the provision of fish passage through the culverts.

<sup>2</sup> Refer to the EIC of Mr Milliken at paragraph 62.

<sup>3</sup> Again, this is assuming that the entire AWA will be cleared.

<sup>4</sup> Noting that there have been some updates to the Project design since Mr Boam's evidence was filed on 25 May 2018. Those updates are addressed by Mr Roan and Mr McEwan in their evidence filed on 17 July 2018.

<sup>5</sup> The intention is that Mr Milliken will present the Humphrey run-through at this point.

Project and the management plans; the Transport Agency seeks the flexibility to be able to move without delay in constructing the Project.

### **Resource consents and the NoR**

9. The NoR was lodged with New Plymouth District Council ("**NPDC**"), and is for an alteration of the existing SH3 designation in the New Plymouth Operative District Plan, to add the area of land needed for the construction and ongoing operation of the Project, and key mitigation and offsetting activities.
10. A range of resource consents to authorise earthworks, works in watercourses, the taking and use of water, and discharges to air, land and water that are necessary for the construction and operation of the Project were lodged with Taranaki Regional Council ("**TRC**"). An application for resource consent to disturb contaminated land was lodged with NPDC.

### **Notification, submissions and hearing**

11. The NoR and consent applications were publicly notified by NPDC and TRC on 27 January 2018. 1,195 submissions on the Project were lodged. Of those, 1,172 were in support,<sup>6</sup> three were neutral,<sup>7</sup> and 20 were in opposition.
12. NPDC and TRC have jointly appointed the Commissioner to consider, hear and determine the resource consent applications, and to make a recommendation on the NoR to the Transport Agency as the requiring authority.

### **STRUCTURE OF SUBMISSIONS**

13. These submissions have the following overall parts:
  - (a) Part A: Introduction and summary;
  - (b) Part B: Background and context to the Project;
  - (c) Part C: The statutory framework for the Commissioner's consideration (at an outline level, with the remaining parts going into the key components in more detail);
  - (d) Part D: The effects on this environment (summarising the evidence filed in relation to the Project's environmental effects, and highlighting key issues for the Commissioner);
  - (e) Part E: Regulations, policy and planning documents, and "other matters";

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<sup>6</sup> Including 18 late submissions in support. We understand the Commissioner is considering whether to allow these submissions to be considered under section 37 of the RMA. The Transport Agency's view is that it would be appropriate to include these submissions in the total.

<sup>7</sup> One of those three submissions, from Powerco, has since been withdrawn.

- (f) Part F: Consideration of alternatives and whether the designation is reasonably necessary for achieving the Transport Agency's objectives;
- (g) Part G: Conditions;
- (h) Part H: Part 2 Assessment; and
- (i) Part I: Evidence to be presented (for the Transport Agency).

## **SUMMARY**

14. These submissions address the matters that are relevant to the Commissioner's consideration of the Project in detail. Counsel set out a brief, high level summary of the Transport Agency's position below.
15. The Project will deliver a much needed upgrade to the Mt Messenger section of SH3. Replacing the current inadequate section with the modern and carefully designed Project alignment will deliver significant transport benefits, including in terms of:
  - (a) Safety;
  - (b) Travel time reliability;
  - (c) Resilience to traffic incidents, as well as natural hazards; and
  - (d) Travel time savings.
16. These transport benefits will in turn have significant benefits for the economy of New Plymouth District and the Taranaki Region, and significant social benefits for the people who live and work here. Both Councils accept and ascribe significant weight to the benefits of the Project.
17. The location of this section of SH3 means that, in order to deliver these significant benefits, the Project traverses a sensitive environment, particularly in cultural, ecological and landscape terms. This has long been recognised and accepted by the Transport Agency, and the design of the Project has endeavoured to respond to these primary issues.
18. Project selection and refinement have been able to reduce the potential effects. However, significant potential cultural, ecological and landscape effects remained. These effects have been addressed through a carefully designed package of measures to mitigate, offset and compensate effects. In particular:
  - (a) Ngāti Tama have played a role in the design of the Project, and will continue to have the opportunity to give effect to their kaitiaki role during and after construction. Negotiations over a range of measures to address the fact that the Project requires Ngāti Tama Treaty Settlement

land have been ongoing since 2016 and is well progressed. The Transport Agency has committed not to compulsorily acquire Ngāti Tama's land for the Project, meaning that in effect the Project will not go ahead until Ngāti Tama are satisfied that cultural effects have been fully addressed.

- (b) In addition to a range of mitigation measures, a comprehensive "Restoration Package" to address the Project's ecological effects has been developed. Key features of this package include a 3,650ha pest management area, managed in perpetuity; a range of mitigation and restoration planting; and the restoration of 8,455m of stream.
  - (c) Landscape and visual matters are addressed through a detailed Landscape and Environmental Design Framework, in accordance with which final design and construction will proceed.
19. The Transport Agency and its witnesses are satisfied that these measures appropriately address the primary adverse effects of the Project.
20. Other adverse effects (including potential effects) that are normally associated with highway projects have been carefully dealt with through Project design and conditions. For example:
- (a) A fulsome construction water management regime is proposed.
  - (b) Effects on the (relatively small) number of local residents have been addressed and are being dealt with.
21. A comprehensive condition and management plan framework (mostly fully developed) is proposed to address the potential adverse effects on the Project, and to detail the responses to those effects.
22. With all these measures in place to address potential adverse effects, the Project is in keeping with the statutory planning framework. Bearing in mind the significant benefits the Project will deliver, the Project is consistent with the key Part 2 matters, and meets the sustainable management purpose of the RMA.

## **THE TRANSPORT AGENCY'S STATUTORY ROLE**

23. The Project should be seen in the context of the Transport Agency's statutory role. The Transport Agency is a Crown entity whose focus is on providing one integrated land transport system that helps people get the most out of life and supports business. This includes investing investing in public transport and local road networks, as well as the construction and operation of the State highway network on behalf of the government.<sup>8</sup>

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<sup>8</sup> Refer to the Transport Agency Statement of Intent for 2017 – 2021. Section 61 of the Government Roadway Powers Act 1989 provides the Transport Agency with the sole power of control for all purposes, including construction and maintenance, of all State highways, and the power to do all things necessary to construct and

24. The Transport Agency's statutory objective under the Land Transport Management Act 2003 ("**LTMA**") is:<sup>9</sup>

*"To undertake its function in a way that contributes to an effective, efficient, and safe land transport system in the public interest."*

25. The functions of the Transport Agency under the LTMA include (most relevantly):<sup>10</sup>

*(a) to contribute to an effective, efficient, and safe land transport system in the public interest...*

*(c) to manage the State highway system, including planning, funding, design, supervision, construction, and maintenance and operations, in accordance with this Act and the Government Roding Powers Act 1989...*

26. In meeting its objective and undertaking its functions under the LTMA, the Transport Agency must exhibit a sense of social and environmental responsibility.<sup>11</sup> This includes avoiding, to the extent reasonable in the circumstances, adverse effects on the environment. The Transport Agency must also use its revenue in a manner that seeks value for money.<sup>12</sup>
27. The Transport Agency has a statutory responsibility as a lifeline utility provider under the Civil Defence Emergency Management Act 2002 ("**CDEMA**"). Its duties include ensuring *"it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency"*.<sup>13</sup>

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maintain in good repair any State highway. Land transport system is broadly defined in section 5 of the LTMA as including *"transport on land by any means"* and *"coastal shipping and associated infrastructure"*.

<sup>9</sup> Section 94.

<sup>10</sup> Section 95.

<sup>11</sup> LTMA, section 96.

<sup>12</sup> LTMA, section 96.

<sup>13</sup> CDEMA, s 60(1)(a).



## **PART B BACKGROUND AND CONTEXT TO THE PROJECT**

### **THE CURRENT SITUATION**

#### **The importance of this section of SH3**

28. SH3 is a strategically important route, both at a regional and national level. It connects the Taranaki region through to the Waikato region, and provides connectivity to key economic and transportation hubs in Hamilton, Tauranga and Auckland.
29. As Taranaki's only arterial connection directly to and from the north, SH3 is of particular importance to the economic well-being and wider future of Taranaki. The route connects Taranaki's oil and gas, agricultural, forestry and engineering products and expertise through to their markets.
30. SH3 also provides the main route north for the people of Taranaki, for employment as well as for social purposes, and to access services including Waikato Hospital.
31. Accordingly, the route is essential to enabling people and communities of Taranaki to provide for their social, economic, and cultural wellbeing.<sup>14</sup>
32. In the Transport Agency's One Network Road Classification, SH3 through to Taranaki is a Regional Road, being a road that:
  - (a) makes a significant contribution to the social and economic wellbeing of a region;
  - (b) is a major connector between regions, in particular significant places, industries, ports and airports; and
  - (c) provides a critical alternative route to SH1 and SH4 (when closed due to extreme weather).
33. SH3 is critical to connectivity between Taranaki and Waikato in emergencies, particularly given the poor quality of the alternative options when SH3 is closed.<sup>15</sup> This means SH3 is important in the context of the Transport Agency's obligations under CDEMA.

#### **The current state of this section of SH3**

34. The current section of SH3 over Mt Messenger, and more broadly the Awakino Gorge to Mt Messenger section, is inadequate and not in keeping with its strategic importance.
35. The highway over Mt Messenger has its origins in the late 19<sup>th</sup> century.<sup>16</sup> While there have been various improvements to the route carried out over the

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<sup>14</sup> As explained in the EIC of Mr Peter McCombs, Mr Michael Copeland, and Ms Wendy Turvey.

<sup>15</sup> See Mr McCombs' EIC on this issue.

<sup>16</sup> See Dr Rod Clough's EIC at paragraph 28.

last century, those improvements have not addressed the fundamental issues of this section of SH3. The current route has significant constraints and deficiencies that affect its safety, reliability and resilience, including:<sup>17</sup>

- (a) steep grades;
- (b) a tortuous, winding alignment;
- (c) restricted forward visibility;
- (d) a narrow tunnel at the summit; and
- (e) vulnerability to interrupted service because of natural and traffic related incidents such as breakdowns, crashes, landslips, and rockfalls.

36. The poor quality of the existing SH3 has led to investigations and improvements of the corridor over Mt Messenger since the 1970s. In 2014, funding was announced to accelerate a package of regionally important State Highway projects through to Accelerated Regional Roothing Programme ("**ARRP**"). Taranaki was eligible for funding to finalise investigation and consenting work for SH3 Awakino Tunnel and Mt Messenger bypasses, and general improvements along this corridor of SH3.
37. In early 2016, the Minister of Transport announced that the Mt Messenger Project would be funded by the Crown as part of the ARRP and signalled a potential construction start date (assuming the NoR and consents were granted) of late 2018 / early 2019.
38. The intention is that the Project will address the issues with the Mt Messenger section of SH3 identified above, in order to provide an appropriate level of service for this vital piece of regional and national infrastructure. The current tortuous route approaching and going over Mt Messenger will be bypassed, replaced with a modern, fit-for-purpose, safe and resilient road.

#### **THE AWAKINO GORGE TO MT MESSENGER PROGRAMME**

39. The Project is part of a broader Awakino Gorge to Mt Messenger Programme ("**AG2MM**"), which will provide a safe, fit for purpose transport link between the Taranaki region and the north.
40. In addition to the Project, AG2MM comprises:
- (a) The Awakino Gorge Project which will bypass the existing one-lane Awakino tunnel with two bridges across the Awakino River. The Transport Agency has lodged resource consent applications and a NoR for an alteration to the existing SH3 designation to enable this project.<sup>18</sup>

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<sup>17</sup> See the EIC of Mr McCombs.

<sup>18</sup> The consent applications and NoR are being considered by TRC and Waitomo District Council.

- (b) Numerous safety upgrades being undertaken within the existing SH3 corridor, between the Awakino Gorge Project and the Mt Messenger Bypass Project.

## **THE PURPOSE AND KEY BENEFITS OF THE PROJECT**

- 41. As noted above, the overarching purpose of the Project is to provide an upgraded section of SH3 that is in keeping with its strategic importance and function.
- 42. The Transport Agency's Project objectives (for the purposes of the NoR and section 171(1) of the RMA) provide more detail. The objectives are:
  - (a) to enhance the safety of travel on SH3;
  - (b) to enhance the resilience and journey time reliability of the State highway network;
  - (c) to contribute to enhanced local and regional economic growth and productivity for people and freight by improving connectivity and reducing journey times between the Taranaki and Waikato Regions; and
  - (d) to manage the immediate and long term cultural, social, land use and other environmental impacts of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.
- 43. The first three Project objectives relate to the identified issues with the existing Mt Messenger section of SH3, and the strategic importance of this route. In effect, they explain why the Transport Agency is pursuing the Project.
- 44. The main benefits the Project will deliver in turn respond to these three objectives:<sup>19</sup>
  - (a) the Project's modern and fit-for-purpose highway design will provide for a significant improvement in the safety environment of this section of SH3, and will greatly improve connectivity across this section of SH3;
  - (b) the Project will provide for greatly improved reliability for this section of SH3, with fewer closures from slips or crashes, and reduced maintenance requirements. It will also significantly increase the resilience of the route to natural hazards. This will in turn provide for greater journey time reliability for people and freight;
  - (c) the Project will deliver average one-way journey time savings of 4:05 minutes for light vehicles and 6:28 minutes for heavy vehicles. In conjunction with the other AG2MM improvements, the Project will also provide for significantly reduced journey times for over-dimension loads

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<sup>19</sup> EIC of Mr Napier at paragraphs 36 – 47. Mr Napier relies on Mr McCombs' EIC in particular.

by enabling those loads to use SH3 as opposed to a significantly longer (3hr 45 min longer) journey via Whanganui; and

- (d) the improved connectivity, better journey time reliability and reduced journey times in turn will contribute to enhanced local and regional economic growth and productivity for people and freight.
- 45. The benefits the Project will deliver are addressed in more detail later in these submissions.
- 46. The fourth Project objective reflects the Transport Agency's focus on managing the potential environmental effects of the Project. It is not a reason for carrying out the Project as such, but frames the Transport Agency's approach to the Project including its design and the Restoration Package.
- 47. Extensive efforts have been made to address the actual and potential environmental effects of the Project, throughout the Project development and design process. These efforts have been in keeping with the Alliance motto for the Project, "*to tread lightly on the land*".

## **NGĀTI TAMA**

- 48. Ngāti Tama have a unique position in respect of the Project. The Project area traverses Ngāti Tama's rohe. In addition, a large block of land to either side of the existing SH3 through Mt Messenger was returned to Ngāti Tama as cultural redress in its historical Treaty of Waitangi settlement.<sup>20</sup> This land was previously part of the Mt Messenger Scenic Reserve and Mt Messenger Conservation Area, and was returned in recognition of Ngāti Tama's deep traditional, historical and cultural associations with this land.<sup>21</sup>
- 49. The Project footprint (and most of the options that were considered) run through this land; it would be very difficult to provide for the Project without affecting Ngāti Tama's land.
- 50. The Transport Agency recognised at an early stage that the Project would very likely require land that had been returned to Ngāti Tama to be re-acquired. It was recognised that it would be critical for the Transport Agency to enter into an intense engagement and negotiation process with Ngāti Tama from the very start of Project planning and development, to explore whether Ngāti Tama's consent could be obtained for the use of that Ngāti Tama land. Respect for Ngāti Tama and the unique Treaty settlement context was a primary and critical driver for the Transport Agency from the outset.

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<sup>20</sup> Provided for in the 2001 Deed of Settlement between Ngāti Tama and the Crown, and enshrined in the Ngāti Tama Claims Settlement Act 2003.

<sup>21</sup> Mr Dreaver's EIC outlines the Treaty Settlement background.

51. The Transport Agency has made a commitment not to seek to compulsorily acquire the Treaty settlement land from Ngāti Tama. In effect, the Project will only proceed with Ngāti Tama's support and blessing.
52. The approach to engagement with Ngāti Tama, dating back to early 2016, has very much been one of intense engagement, collaboration and negotiation in arriving at a final Project that Ngāti Tama is comfortable with (whilst still delivering a Project that the Transport Agency considers is appropriate).
53. The Transport Agency has engaged with Ngāti Tama primarily through Te Runanga o Ngāti Tama, which is the mandated iwi organisation under the RMA and the Treaty settlement framework.<sup>22</sup> Negotiation meetings between the Transport Agency team and representatives from Te Runanga have occurred on an almost weekly basis for the last two years. There have been a range of other engagements between the Transport Agency and Ngāti Tama as well.<sup>23</sup>
54. This engagement has allowed the Transport Agency to benefit from Ngāti Tama's vast knowledge of the Project area, including the conservation efforts over the Parininihi land to the west of the existing SH3 that they have been leading over the last fifteen years. Ngāti Tama have been influential in the design of the Project.
55. By way of example, Ngāti Tama played a central role in the 2017 multi-criteria analysis ("**MCA**") process for considering alternative route options for the Project. Te Runanga representatives attended both 2017 MCA workshops, and provided detailed analysis (including scoring under the MCA system) of each of the longlisted and shortlisted options, in terms of cultural values and effects. More broadly, their intimate knowledge of the Project area and its ecological and other values meant they provided valuable input to the general discussions at the workshops.<sup>24</sup>

## **THE LOCAL ENVIRONMENT**

56. The existing Mt Messenger section of SH3, and the Project, is in a rural environment. The existing and proposed alignments follow the Mangapepeke Valley in the north and the upper Mimi Valley in the south, separated by steep hill country. Pastoral farming is the predominant land use along the valley flats (noting in particular the Pascoe property in the Mangapepeke Valley), while the steep hill country is generally covered in indigenous vegetation.
57. This is a relatively high-value environment in ecological and landscape (as well as cultural) terms. As with direct impacts on Ngāti Tama's land, it would

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<sup>22</sup> Noting in particular that the Project traverses land returned to Ngati Tama through its historical Treaty Settlement, and that Te Runanga is the mandated 'Post-Governance Settlement Entity' in respect of Ngati Tama's Treaty Settlement assets.

<sup>23</sup> The EIC of Mr Napier and Mr Dreaver set out the engagement with Ngati Tama.

<sup>24</sup> Mr Conrad O'Carroll of Te Runanga also played a key role in developing one of the options considered at the shortlist MCA workshop. Refer to EIC of Mr Napier at paragraph 61 and EIC of Mr Roan at paragraph 61.

be very difficult to provide for the Project without having significant effects on ecological and landscape values.<sup>25</sup>

58. The Project avoids the Waipingao Valley and Parininihi land to the west of the existing SH3, which are considered to be of a generally higher value than the Project route in ecology and landscape terms (including because Parininihi has been subject to intensive pest management led by Ngāti Tama for the past 15 years). The Department of Conservation ("**DOC**") supported the choice of the Project route over other options that were considered, particularly because the Project route avoids the Waipingao Valley and Parininihi.<sup>26</sup>
59. Considerable work has gone into avoiding and minimising ecological effects through Project design. Notwithstanding those efforts, the Project will have significant ecological effects, including in particular the loss of up to 31.676ha of predominantly indigenous vegetation and up to 17 significant trees; and the loss or alteration of 3,705m (3,376m<sup>2</sup>) of stream. These habitat effects in turn have effects for native birds, bats, lizards, invertebrates and freshwater species.
60. The Project team, the Alliance and the Transport Agency have not shied away from these effects. Significant effort has been put in to designing and proposing a comprehensive package of measures to avoid, mitigate and offset/compensate these effects, in particular through the Restoration Package. The Restoration Package is a central and fundamental part of the Project itself and, while discussed in detail below, in addition to 'standard' mitigation measures, the Restoration Package includes:
  - (a) Intensive pest management over an area of 3,650 ha surrounding the Project area;
  - (b) A range of mitigation and offset planting for various types of habitat;
  - (c) Fencing 8.455km of stream length from livestock and planting 16.91 ha of riparian margin with indigenous species;
  - (d) Planting 200 seedlings of the same species for every significant tree removed; and
  - (e) Establishing a fenced predator free enclosure of at least 1ha in size for vulnerable lizards.
61. The ecological effects of the Project are addressed in more detail later in these submissions.<sup>27</sup>

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<sup>25</sup> This was confirmed through the MCA process.

<sup>26</sup> Refer to the DOC submission.

<sup>27</sup> Including by reference to the Transport Agency witnesses that address the effects and the responses to the effects.

62. The nature of the environment means that there are relatively few people who live in the vicinity of the Project, or whose land is required for the Project. This means that the Project will have lesser social and amenity effects than might normally be expected for a State highway realignment. By way of illustration, there are only four relevant houses that have been subject to formal construction and operational noise assessments.<sup>28</sup>
63. In addition to the Ngāti Tama land, the Project traverses the farm owned by Mr and Mrs Pascoe in the Mangapepeke Valley (and runs within close proximity of their existing house), as well as farm land owned by a small number of other landowners. Numerous conditions are proposed to address the effects of the Project on landowners, and property acquisition discussions are ongoing.
64. There is a large amount of DOC land in the general vicinity of the Project (but not within the Project footprint itself).

## **ENGAGEMENT AND CONSULTATION**

65. In addition to its consultation with Ngāti Tama, the Transport Agency has carried out extensive and detailed engagement and consultation with key stakeholders and the general public, dating back to early 2016.<sup>29</sup>
66. Key stakeholders that have been a specific focus of engagement include:
- (a) The eight directly affected landowners (other than Ngāti Tama) whose land is required permanently or temporarily for the construction and operation of the Project;
  - (b) Ngāti Mutunga and Ngāti Maniapoto, being the iwi to the immediate south and north of Ngāti Tama, respectively;
  - (c) DOC, bearing in mind the environment the Project traverses, the intention to locate much of the Restoration Package on DOC administered land, and DOC's ongoing role in terms of the Ngāti Tama land;
  - (d) NPDC and TRC as regulatory authorities and representatives of the local communities; and
  - (e) The SH3 Working Party as representatives of the users of and those responsible for policing SH3.
67. In addition the Transport Agency has engaged with:<sup>30</sup>

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<sup>28</sup> Refer to the EIC of Mr Ellerton.

<sup>29</sup> The EIC of Mr Napier (from page 14) describes the engagement carried out by the Transport Agency.

<sup>30</sup> See in particular the EIC, Supplementary Evidence and Rebuttal Evidence of Mr Dreaver in respect of engagement with Poutama and Te Korowai.

- (a) Nga Hapū o Poutama ("**Poutama**"), who claim mana whenua status over the Project footprint and wider area; and
- (b) More recently, Te Korowai Tiaki o te Hauāuru Inc ("**Te Korowai**"), an incorporated society formed on 26 February 2018 and whose members are Ngāti Tama iwi members.

68. Detailed public consultation rounds took place from November 2016 to January 2017 and again in June 2017. The public feedback highlighted the importance of safety, travel time and resilience for the general public, with a secondary focus on environmental issues. Mr Napier explains that the overriding theme of the public feedback was that the Transport Agency should simply get on and build this much needed improvement to SH3.<sup>31</sup> This is reflected in the large number of submissions in support of the Project (and very few submissions in opposition).

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<sup>31</sup> EIC of Mr Napier at paragraph 94.



## **PART C STATUTORY FRAMEWORK FOR THE COMMISSIONER'S CONSIDERATION OF THE PROJECT**

69. This section outlines the statutory framework for the Commissioner's consideration of the NoR and resource consent applications.
70. In particular, this section sets out what must be considered in making a recommendation to the Transport Agency on the NoR, and in deciding on the resource consents. The considerations are similar, but not identical. The following sections then go through the key considerations and the relevant issues under each consideration in more detail.

### **THE NOTICE OF REQUIREMENT FOR AN ALTERATION TO THE SH3 DESIGNATION**

71. The Transport Agency is a requiring authority under section 167 of the RMA.<sup>32</sup> It has given notice to NPDC (through the NoR) of its requirement to alter the existing designation in place for SH3 in the District Plan (Designation N36).
72. The alteration sought is to add to the existing designation to allow for the construction of the Project, and the operation of the new section of SH3. The alteration would be subject to the conditions proposed by the Transport Agency. Many (but not all) of the conditions will apply only during the construction period, rather than to the ongoing operation of this section of SH3.
73. Section 168 to 179 set out the process for a requiring authority giving notice of its requirement for a designation, and for the consideration of that notice including through hearing processes. By virtue of section 181(2), those provisions apply to a notice of requirement to alter an existing designation, with necessary modifications, as if it were a requirement for a new designation.
74. In particular, section 171(1) of the RMA frames the Commissioner's consideration and recommendation to the Transport Agency in respect of the NoR. It provides that, when considering the NoR and any submissions, the Commissioner must, subject to Part 2 of the RMA, consider the effects on the environment of allowing the (alteration to the) requirement, having particular regard to:
- (a) any relevant provisions of a national policy statement, the New Zealand Coastal Policy Statement ("**NZCPS**"), a regional policy statement or proposed regional policy statement, and a plan or proposed plan;

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<sup>32</sup> Requiring Authority status was granted via an Order in Council dated 7 December 1992; with subsequent Gazette Notices on 10 December 1992, 3 March 1994 (GO1500) and 19 November 2015 (GO6742). Copies of these gazette notices are attached to the NoR documentation.

- (b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work;
  - (c) whether the work and designation are reasonably necessary for achieving the objectives of the Transport Agency for which the designation is sought; and
  - (d) any other matter the Commissioner considers reasonably necessary in order to make his recommendation on the requirement.
75. Section 171(1B) specifies that the "effects on the environment" to be considered:
- "...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."*
76. Section 171(2) provides that the Commissioner may recommend that the Transport Agency:
- (a) confirm the requirement;
  - (b) modify the requirement;
  - (c) impose conditions; or
  - (d) withdraw the requirement.
77. If the requirement is confirmed by the Transport Agency, NPDC will then alter Designation N36 in the District Plan.

### **Outline plan**

78. Section 176A provides that the Transport Agency must submit an outline plan of the Project before construction commences, to allow NPDC to request changes. The requirement to submit an outline plan does not apply where:
- (a) the proposed public work, project, or work has been otherwise approved under the RMA;
  - (b) the details of the proposed public work, project, or work are incorporated into the designation; or
  - (c) the territorial authority waives the requirement for an outline plan.
79. In this case, the details of the Project are "*incorporated into the designation*", through the drawing set, proposed conditions, and fulsome suite of management plans, to a much greater extent than is usual for a major infrastructure project.

80. The Transport Agency's proposed conditions provide for an outline plan to be provided for key elements of the Project where decisions on final design details are yet to be made, namely:
- (a) The tunnel control building and emergency water supply tanks;
  - (b) The two bridges (over the tributary to the Mimi Wetland, and on the north side of the route at Chainage 2400); and
  - (c) The car parking arrangements for access to the Kiwi Road and Mt Messenger walking tracks.
81. For the rest of the Project, the combination of the detailed drawing set, conditions, and management plan processes (including the certification of SCWMPs prior to construction) provides sufficient detail that section 176A(2)(b) is satisfied, or alternatively that it is appropriate for a waiver to be granted.

### **Removal of redundant parts of the existing designation and revocation of State highway status**

82. The Project alignment will become part of SH3 once construction is complete, and the bypassed Mt Messenger section of SH3 will no longer be required as a State highway.
83. The alteration to the designation will not remove the bypassed section of SH3 from the existing designation. The Transport Agency will, once construction is complete, consider what land no longer needs to be included in the SH3 designation, and can be removed through the process set out in section 182 of the RMA.
84. Similarly, the Transport Agency has initiated a process with NPDC to establish what will happen to the bypassed section of SH3, including consultation as to the potential revocation of State highway status under the LTMA. This process will address ongoing access requirements for existing landowners with access off this section of highway, as well as exploring options to allow for the adaptive reuse of the existing Mt Messenger tunnel.<sup>33</sup>
85. This process, and in particular the potential revocation of State highway status, is not a matter for the Commissioner to address in these proceedings. It is governed by separate statutory requirements under the LTMA.

### **RESOURCE CONSENTS SOUGHT BY THE TRANSPORT AGENCY**

86. The Transport Agency is seeking a total of 58 resource consents from TRC. These are to authorise:
- (a) Discharges of stormwater and sediment to water and/or land;

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<sup>33</sup> Mr Napier EIC at paragraph 95.

- (b) Discharges to air;
- (c) Nine stream diversions;
- (d) 17 temporary culverts;
- (e) 21 permanent culverts;
- (f) Groundwater take for cuts;
- (g) Groundwater take for the tunnel;
- (h) Two takes and use of surface water;
- (i) Two dams;
- (j) Vegetation removal (landuse consent); and
- (k) Restoration planting.

87. The Transport Agency is also seeking one resource consent from NPDC, under the National Environmental Standards for Assessing and Managing Contaminants in Soil to Protect Human Health ("**NES Soil**"), for the potential disturbance of contaminated soils.

#### **Bundling and activity status**

88. A conservative approach has been taken for the Project; all consents are being assessed as a single bundle, with the most stringent activity status applying to all consents. This means the Project has an overall activity status of discretionary.

89. Because the consents are bundled as discretionary activities, section 104B applies. The Commissioner may after considering the applications:

- (a) grant or refuse the applications; and
- (b) impose conditions under section 108 (the proposed conditions are addressed later in these submissions).

#### **Section 104 assessment**

90. Section 104(1) provides that when considering the applications for resource consent and any submissions, the Commissioner must, subject to Part 2 of the RMA, have regard to:

- (a) any actual and potential effects on the environment of allowing the activity; and
- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for

any adverse effects on the environment that will or may result from allowing the activity;

- (b) any relevant provisions of a national environmental standard or other regulations, national policy statements including the NZCPS, a regional policy statement or proposed regional policy statement, and a (regional or district) plan or proposed (regional or district) plan; and<sup>34</sup>
- (c) any other matter the Commissioner considers relevant and reasonably necessary to determine the applications.

### **Section 105 and 107 considerations for discharge permits**

91. In relation to the discharge permits sought for the Project, section 105 requires the Commissioner to have regard to:
- (a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects;
  - (b) the applicant's reasons for the discharge; and
  - (c) any possible alternative methods of discharge, including discharge into any other receiving environment.
92. The discharges in question will occur during the construction period, and are of stormwater and sediment, as well as of dust. The nature of the discharges, and the sensitivity of the receiving environment, are set out in detail in the AEE and (in terms of the stormwater and sediment discharges) in the evidence of Mr Ridley. The Transport Agency has carefully considered alternative options for the Project (refer to later in these submissions); there are no real alternative receiving environments for the discharges associated with the chosen Project route. The TRC Section 42A Officer's Report records that alternative methods for the discharge of construction water and sediment have received considerable attention.<sup>35</sup>
93. Section 107 restricts the grant of certain discharge permits that would contravene sections 15 or 15A of the RMA.<sup>36</sup> The Transport Agency does not understand TRC or any party to contend that the discharges associated with the Project will trigger the effects set out in section 107. This means that the Commissioner does not need to consider section 107 in detail.
94. The Transport Agency's position is that the discharges in question are of a relatively standard nature for a highway construction project.<sup>37</sup> They will be carefully managed through the proposed conditions of consent and the

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<sup>34</sup> The definition of "plan" in sections 2 and 43AA is "*a regional plan or a district plan*".

<sup>35</sup> At paragraphs 233 – 235.

<sup>36</sup> These sections relate to the discharge of contaminants into the environment.

<sup>37</sup> Refer in particular to Mr Ridley's rebuttal evidence in respect of the discharge of stormwater and sediment.

management plan framework (including through a detailed construction monitoring regime).

## **PART 2 OF THE RMA**

95. The Commissioner's consideration of both the NoR under section 171 and the resource consents under section 104 are "*subject to Part 2*". The current legal position in respect of what that means is addressed later in these submissions.
96. The purpose of the RMA is to "*promote the sustainable management of natural and physical resources*", as set out in section 5.
97. Sections 6 to 8 set out the relevant matters that the Commissioner must consider, including:
  - (a) The "matters of national importance" in section 6;
  - (b) The "other matters" in section 7; and
  - (c) The principles of the Treaty of Waitangi (section 8).
98. For this Project, most (but not all) of the matters listed in sections 6 to 8 are relevant, and are addressed later in these submissions.

## **PART D EFFECTS ON THE ENVIRONMENT**

### **INTRODUCTION**

99. The effects on the environment of confirming the NoR are central to the Commissioner's consideration under section 171 and section 104.<sup>38</sup>
100. Both "effect" and "environment" are broadly defined in the RMA.<sup>39</sup> Importantly, the Commissioner must consider both the positive and adverse effects of the Project.
101. The recent additions of sections 104(1)(ab) and 171(1B) reiterate that the Commissioner is specifically entitled to consider the positive effects on the environment (particularly in terms of ecology) that are being offered by the Transport Agency to offset / compensate adverse effects.
102. The key effects of the Project are addressed below.

### **POSITIVE EFFECTS: TRAFFIC AND TRANSPORT, ECONOMIC AND SOCIAL**

103. The significant traffic and transport, economic and social effects of the Project are central to the Commissioner's consideration of the NoR and resource consents. These positive effects are largely unchallenged.<sup>40</sup> In the NPDC Section 42A Report, Ms McBeth states:<sup>41</sup>

*"I acknowledge and attribute significant weighting to these effects."*

104. The 1,172 submissions in support of the Project, from local residents, businesses and transport organisations and associations reflect the desire on the part of the community to see these benefits realised. In Mr Napier's words, the community feedback has been that the Transport Agency needs to get on and build this Project.<sup>42</sup>

#### **Traffic and transport**

105. The Project will bring significant traffic and transport benefits arising from the replacement of the outdated and inadequate Mt Messenger section of SH3 with a modern, fit for purpose highway (with a 100km/h design speed).
106. These positive effects are set out in detail in the evidence of Mr McCombs, and include:<sup>43</sup>
- (a) Fundamental improvements in road geometry (including wider lanes and shoulders, eased curves, and flatter grades), forward visibility and sight distances, which provide for an increase in safety rating from '2 Star' to

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<sup>38</sup> The Project's effects are also relevant in that section 5(2)(c) refers to "avoiding, remedying, or mitigating any adverse effects of activities on the environment" as part of the sustainable management purpose of the RMA.

<sup>39</sup> "Environment" is defined in section 2; "effect" is defined in section 3.

<sup>40</sup> In particular, they are emphasised in the NPDC and TRC Section 42A Reports.

<sup>41</sup> At paragraph 114. See paragraphs 114 – 117 for the NPDC commentary on positive effects.

<sup>42</sup> Mr Napier EIC at paragraph 94.

<sup>43</sup> Mr McCombs EIC at paragraphs 117 – 144.

'3 Star'. The Project alignment will reduce driver frustration and be significantly safer than the existing alignment.

- (b) Improved resilience of this section of SH3, both in terms of susceptibility to closures arising from breakdowns and crashes, and susceptibility to natural hazards including in particular slips and landslides. Mr Symmans explains in his evidence that the Project alignment avoids the major landslide feature that is crossed by the current highway (and the potential options that utilised the existing corridor).
- (c) As a result of the improvements in road geometry and resilience, journey-time reliability for users of SH3 will greatly improve, with fewer road closures and reduced maintenance improvements. The importance of this benefit is emphasised by the lack of convenient and suitable alternative routes to SH3.
- (d) Journey times will also be reduced as a result of the reduced length of this section of highway and the improvements in road geometry and gradient. There will be an average one-way journey time saving of 4.1 minutes for light vehicles, and 6.5 minutes for heavy vehicles. Over-dimension loads will be able to use the new route, and along SH3, as opposed to the significantly longer journey via Whanganui, saving 3 hours 45 minutes.<sup>44</sup>
- (e) Improved safety and quality of conditions for cyclists and any pedestrians.

107. These traffic and transport effects will in turn bring significant economic and social benefits.

### **Economic benefits**

108. Mr Copeland explains SH3's critical role in supporting the Taranaki economy and enabling its growth.<sup>45</sup> SH3 provides access for Taranaki businesses, including those in the key agricultural, oil and gas, heavy engineering, and forestry sectors, to points north including Hamilton, Tauranga and Auckland. The Project will deliver direct travel time, cost and reliability related savings to these businesses (as well as to individual road users).<sup>46</sup>

109. More broadly, the Project will improve the competitiveness of Taranaki businesses. It will also increase the attractiveness of the New Plymouth District and the Taranaki Region for businesses, residents and visitors. As such, the Project is likely to generate economic growth in the District and the Region.

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<sup>44</sup> This benefit will accrue once the Project and the Awakino Gorge Project are completed.

<sup>45</sup> Mr Copeland EIC at paragraphs 43 – 53.

<sup>46</sup> Mr Copeland EIC, see in particular paragraph 53.



110. The construction of the Project itself will bring significant increased economic activity to the District and Region: Project construction will generate an estimated 74 additional jobs, \$5.5 million in wages and salaries per year and \$33 million per year in additional expenditure with Taranaki businesses for the direct supply of goods and services to the Project. Indirect economic activity (for example, the supply of goods and services to Project staff) will be additional to these direct benefits.<sup>47</sup>

### **Social benefits**

111. Ms Turvey explains that the traffic and transport and economic benefits of the Project will bring significant social benefits at both the regional and local level. Just as SH3 is critical to the economy of Taranaki, it is central to the daily lives of local residents.<sup>48</sup> The sense of vulnerability and discomfort (and very real safety and reliability issues) that residents experience when using the Mt Messenger section of SH3 will be addressed through the Project.<sup>49</sup>
112. The NPDC Section 42A Report particularly highlights *the social benefits of the Project for those who need to access essential facilities in Waikato, particularly Waikato Hospital (which is the nearest tertiary hospital)*.<sup>50</sup>
113. Social benefits that will be delivered by the improved connectivity the Project will bring include enhanced employment opportunities; and retained and increasing population levels, with flow on benefits for the quality of social infrastructure and liveability.<sup>51</sup>

### **Other positive effects**

114. The Project will have other positive effects, particularly in terms of ecology (as a result of the Restoration Package), visual and scenic values for highway users, cultural expression and improved recreational opportunities. These benefits are discussed in the context of the relevant overall categories of effects below.

### **CULTURAL EFFECTS**

115. As set out above, the Transport Agency recognises the unique role of Ngāti Tama in this Project. The Project traverses Ngāti Tama's rohe, and land returned to Ngāti Tama through the Treaty Settlement process as cultural redress for historic breaches by the Crown of the Treaty of Waitangi.
116. The Transport Agency understood the potential for the Project to have significant cultural effects at an early stage, and have engaged in sustained and intensive engagement process with Ngāti Tama, through Te Runanga, for

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<sup>47</sup> Mr Copeland EIC at paragraphs 55 – 56.

<sup>48</sup> EIC of Ms Turvey at paragraph 25.

<sup>49</sup> This sense of discomfort and vulnerability was a theme of interviews with local residents carried out for the Social Impact Assessment and referred to by Ms Turvey in her EIC (paragraph 35 in particular).

<sup>50</sup> Paragraph 238.

<sup>51</sup> See the summary at paragraph 5 of Ms Turvey's EIC.

the last two years. Te Runanga is complimentary about the Transport Agency's level of engagement, with its submission stating:<sup>52</sup>

*"There is no issue with the level and nature of consultation with NZTA in relation to this project. The consultation process that the Runanga has experienced has been very positive and the Runanga has been fully supported through the consultation process."*

117. It is of course for the tangata whenua to set out what the effects of the Project on their cultural values will be. The Transport Agency relies on the assessment of Te Runanga as set out in the CIA prepared on their behalf, and in the evidence of Mr White for Te Runanga.
118. The Transport Agency has been working closely with Ngāti Tama (via Te Runanga) over the last two years to seek to avoid, minimise, mitigate and otherwise manage the cultural effects of the Project, as well as to seek the benefit of Ngāti Tama's intimate knowledge of the Project area. In terms of Project development and design, key steps in this regard have included:
- (a) Asking Ngāti Tama to play a direct role in the MCA process, as described by Mr Roan in his evidence on alternatives (and by Mr White in his evidence for Te Runanga). Ngāti Tama representatives provided the cultural effects assessment at both the long-list and short-list MCA stage, and more generally provided invaluable information about the Project area.<sup>53</sup>
  - (b) Seeking Ngāti Tama's comment on and input into the ecological Restoration Package and the ELMP, bearing in mind their kaitiaki status and lengthy experience with pest control on the Parininihi land. The evidence of Dr Shapiro on behalf of Te Runanga follows discussion between the Transport Agency, Ngāti Tama and their respective ecological advisors about the details of the Restoration Package.
  - (c) Seeking Ngāti Tama's input into the design of the Project, to date and into the construction and post-construction period. The LEDF provides for Ngāti Tama input into detailed design (including for example the 'jaws of Ngāti Tama' concept in respect of the tunnel approaches). Mr Roan explains the proposed establishment of a Kaitiaki Forum Group ("**KFG**"), which provides for Ngāti Tama to exercise kaitiakitanga through:<sup>54</sup>
    - (i) The incorporation of cultural values in detailed Project designs;
    - (ii) Ongoing input into the ELMP (in particular through the Pest Management Plan ("**PMP**") and the ecological review panel);

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<sup>52</sup> This position is supported through the CIA and also in the evidence of Mr White, paragraph 60.

<sup>53</sup> Refer to EIC of Mr Napier at paragraph 61 and EIC of Mr Roan at paragraph 61.

<sup>54</sup> EIC of Mr Roan at paragraphs 81 -82.

- (iii) The development and implementation of cultural indicators and monitoring; and
- (iv) Ensuring tikanga and cultural practices are appropriately incorporated into Project activities.

119. The NPDC Section 42A Report encouraged the development of KFG, and other conditions to provide for appropriate stewardship opportunities for tangata whenua.<sup>55</sup> The updated proposed conditions, ELMP and LEDF now address those matters in more detail.

120. In his evidence, Mr Dreaver explains that negotiations between Te Runanga and the Transport Agency over a potential mitigation and compensation package have been ongoing since 2016. These negotiations overlap with, but extend beyond, the Project design and development matters outlined above. In particular, those negotiations have focussed on the need for Ngāti Tama land to be acquired for the Project. Mr Dreaver records that in December 2017 the Transport Agency and Te Runanga confirmed an ongoing commitment to reaching a final agreement involving:<sup>56</sup>

- (a) recognition by the Transport Agency of the cultural association of Ngāti Tama with the Project Area;
- (b) the potential exchange of the Ngāti Tama land required for the Project for a 120 hectare property in Gilbert Road that was purchased by the Transport Agency in 2017 for that purpose. The Gilbert Rd property is close to Pukearuhe marae and would provide access to the Ngāti Tama Treaty settlement land at Paraninihi.
- (c) a cash payment to help address the cultural impact of the Project on Ngāti Tama interests;
- (d) an environmental mitigation package that provides for Ngāti Tama to control and manage the mitigation, offsetting and compensation work to be carried out on their ancestral lands;
- (e) a process to help enhance the relationship between Ngāti Tama and DOC;
- (f) commitments to maximise training, work, and business opportunities for Ngāti Tama members arising from the Project;
- (g) cultural input by Ngāti Tama into the design and implementation of the project; and
- (h) cultural monitoring by Ngāti Tama of works associated with the Project.

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<sup>55</sup> At paragraph 141.

<sup>56</sup> EIC of Mr Dreaver at paragraph 78.

121. Negotiations to finalise the precise nature of this package are continuing in good faith. Mr Dreaver records that agreements in principle have been reached in respect of most components of the package.<sup>57</sup>
122. There are therefore positive cultural benefits for Ngāti Tama should the RMA authorisations be granted, and a final agreement reached between Ngāti Tama and the Transport Agency.
123. Importantly, the Transport Agency has consistently stated that it will not seek to compulsorily acquire Ngāti Tama's land for the purposes of the Project.<sup>58</sup> This effectively means that the Project cannot go ahead without Ngāti Tama's ultimate approval (through its willingness to transfer the necessary land to the Transport Agency).
124. In his evidence for Te Runanga, Mr White records:<sup>59</sup>

*"... This is a momentous agreement and provides the assurance that we can participate in this process in good faith, knowing that even if the RMA approvals are granted, Ngāti Tama retains the ultimate right to say no to the project under the PWA. This allows us to maintain our mana intact while exploring what should be put in place to mitigate the cultural effects in accordance with the RMA and Treaty. ..."*

125. As Mr White explains, discussions about the final nature of the package that will mitigate cultural effects on Ngāti Tama are ongoing. However, with the Transport Agency's commitment not to compulsorily acquire Ngāti Tama land in mind, Mr White then sets out that:<sup>60</sup>

*"[Te Runanga] has resolved that it can support the grant of the RMA approvals, subject to it still being able to seek conditions and other matters with NZTA, and [Te Runanga] retains its ability to say no under the PWA."*

126. At the time the original NPDC Section 42A Report was written, Te Runanga's position in respect of the confirmation of the NoR and granting of consents was neutral, as per its original submission. Mr White's evidence makes it clear that Te Runanga is now in support.
127. The safeguard in terms of the acquisition of the Ngāti Tama land, and Mr White's comments about its implications, should give the Commissioner considerable comfort in respect of the cultural effects of the Project. It is a powerful recognition of the relationships of Ngāti Tama with their ancestral lands.

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<sup>57</sup> EIC of Mr Dreaver at paragraph 80.

<sup>58</sup> EIC of Mr Napier at paragraph 59.

<sup>59</sup> At paragraph 39.

<sup>60</sup> Evidence of Mr White, paragraph 40.

128. Ngāti Tama will no doubt raise any issues in terms of the proposed conditions with the Commissioner, including those in respect of pest management methodology discussed by Dr Shapiro in his evidence on behalf of Te Runanga. To adopt Mr White's words,<sup>61</sup> the Transport Agency and Te Runanga will continue to work through the outstanding matters until Ngāti Tama (though Te Runanga) is comfortable that the necessary land can be transferred to the Transport Agency.

### **Te Korowai and mandate**

129. The Transport Agency has been clear that its engagement with Ngāti Tama has primarily been through Te Runanga. Te Runanga is the statutory mandated representative body for Ngāti Tama under the Treaty Settlement legislation (particularly relevant given the Ngāti Tama land the Project traverses is Treaty Settlement land, and Te Runanga is the mandated Post Governance Settlement Entity under the Ngāti Tama Claims Settlement Act 2003) and under the RMA.

130. RMA decision-makers usually avoid seeking to resolve mandate disputes through RMA proceedings, noting that is a matter that can be dealt with by the Maori Land Court under section 30 of Te Ture Whenua Maori Act 1993. However, the Courts have accepted that it is appropriate for engagement with iwi to focus on mandated or formally recognised iwi authorities.<sup>62</sup>

131. The submission lodged by Te Korowai seeks to cast doubt on the ability of Te Runanga to address cultural matters on behalf of Ngāti Tama. The Transport Agency recognises that the members of Te Korowai, as members of Ngāti Tama, are tangata whenua, and Te Korowai and its individual members are of course entitled to provide their own views in terms of cultural effects.<sup>63</sup>

132. The Te Korowai submission, and more recently the evidence of Mr Carlyon on behalf of Te Korowai, criticises the level of engagement between the Transport Agency and Te Korowai. In response, as noted by Mr Dreaver in his rebuttal evidence:<sup>64</sup>

(a) Throughout 2016 three now-suspended Te Runanga trustees, and now Te Korowai members, attended meetings with the Transport Agency in their capacity as Te Runanga trustees, and through 2017 Te Runanga continued to update those suspended trustees on its engagement with the Transport Agency.

(b) Te Korowai did not exist as an entity until 26 February 2018. It was incorporated on that date (the day before public submissions on this Project closed) as West Coast North Island Coastal Protection Society Incorporated, and subsequently renamed in March 2018. It was of

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<sup>61</sup> Evidence of Mr White, paragraph 61.

<sup>62</sup> See for example *Cammack v Kapiti Coast District Council* NZEnvC W96/2009 at [203] – [205].

<sup>63</sup> See for example *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93.

<sup>64</sup> Paragraphs 24 – 29.

course not possible for the Transport Agency to engage with Te Korowai before that date (although members of Te Korowai have attended previous hui and been informed of the project during its development).

- (c) Since the Te Korowai submission was lodged, the Transport Agency has made clear its willingness to meet and discuss the Project with Te Korowai members. Members were specifically invited to (and did) attend the hui-a-iwi organised by Te Runanga on 2 June 2018, where the Transport Agency presented the Project and addressed questions from Ngāti Tama members. Offers were subsequently made to meet specifically with Te Korowai, and indeed a meeting occurred on 24 July 2018.

133. Again, the fact that Ngāti Tama must agree before the Project can proceed should provide significant comfort to the Commissioner. In mechanical terms that decision will be made by Te Runanga, which is the properly mandated entity, and the legal owner of the land. Te Runanga of course has its own clear framework in terms of how it represents Ngāti Tama members. All Ngāti Tama members have had the opportunity to influence Te Runanga's position to date on the Project (noting at least six hui-a-iwi have been held to canvas the views of Ngāti Tama members, including members of Te Korowai).<sup>65</sup>

134. As recorded in the NPDC Section 42A Report,<sup>66</sup> Te Korowai members include three currently suspended trustees of Te Runanga. Any dispute in that respect is well beyond the scope of this hearing. Of course, if the suspended trustees were to be reinstated, they would then play a direct role in determining whether or not the Ngāti Tama land would be transferred to the Transport Agency (allowing the Project to go ahead). In any event, Te Runanga can be expected to ascertain the views of Ngāti Tama members before determining that land can be transferred to the Transport Agency to allow the Project to proceed.

## **Poutama**

135. As explained by Mr Dreaver, the Transport Agency does not take a view on the status of Poutama as an entity.<sup>67</sup> The Transport Agency has engaged in good faith with Poutama.<sup>68</sup> Poutama has been kept updated as to the Project and have been invited by the Transport Agency to prepare and speak to a Cultural Impact Assessment in respect of the Project. Following the Commissioner's minute of 27 June 2018, Poutama are due to present their Cultural Impact Assessment during the second week of the hearing and the Transport Agency will respond as necessary.

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<sup>65</sup> As per the evidence of Mr White for Te Runanga at paragraph 38.

<sup>66</sup> At paragraph 129.

<sup>67</sup> EIC of Mr Dreaver at paragraph 90.

<sup>68</sup> Refer NPDC Section 42A Report at paragraph 136.

## EFFECTS ON ECOLOGICAL VALUES

### Introduction

136. A key issue for the Project is its potential adverse effects on ecological values in the Project footprint and wider Project area. As mentioned above, the Transport Agency has been aware from the start of the Project that due to the existing environment in the Mt Messenger area (see below) any alternative roading alignment to address the existing roading issues at Mt Messenger would raise significant ecological issues. For that reason the Restoration Package has been an integral part of the Project's development and design.
137. The Transport Agency factored in ecological considerations from the start of the Project. Potential adverse ecological effects were avoided through the assessment of alternatives process, noting in particular:<sup>69</sup>
- (a) The Project alignment is to the east of the existing SH3, and therefore avoids effects on Parininihi (to the west of the existing SH3);
  - (b) The Project alignment is a 'structures' rather than 'earthworks' option in terms of the options considered during the MCA process. It includes a bridge to avoid the Mimi Wetland and a tunnel under the ridgeline (to enable continuity and avoid further vegetation clearance);
  - (c) Before the shortlist MCA process occurred, the Project option was shifted uphill and further bridge design work was undertaken to avoid effects on the Mimi Wetland.
138. A key factor in the ecological considerations for the Commissioner under the RMA is that the mitigation/offset/compensation must relate to the effects of the Project. The Transport Agency is not required to provide additional benefits beyond the effects of the Project (though in this case the Transport Agency's ecology witnesses consider this will be the effect of the Restoration Package). For example, in relation to bats, Mr Chapman's opinion is that the Project is likely to halt, and potentially reverse, the existing likely decline of the local long-tailed bat population. However, he also emphasises that it is not necessary for the Project to do so to address residual effects of the Project after the Vegetation Removal Protocols ("**VRPs**") have been implemented.
139. These submissions do not refer to the Section 42A Reports in terms of ecological matters. These reports were outdated but they have been updated and provided late on 30 July 2018. There has not been time to review, consider and respond to those matters, but they will be addressed by the experts during the hearing and further evidence will be filed in response if required.

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<sup>69</sup> Refer to Mr Roan's EIC on the assessment of alternatives.

## Existing ecological environment

140. The existing ecological environment and its values are set out in the AEE<sup>70</sup>, the EIC of Mr MacGibbon<sup>71</sup> and in section 2 of the ELMP<sup>72</sup>. In summary:

- (a) The Project is in the North Taranaki Ecological District, an area of 255,852ha with 51% indigenous forest.<sup>73</sup>
- (b) The wider Project area (of some 4,430ha):
  - (i) Straddles an ecological boundary between two broad forest classes with podocarp, broadleaf forest largely in the Mimi catchment and upper Mangapepeke Valley and podocarp, broadleaf, beech forest within the lower Mangapepeke catchment and northwards.
  - (ii) Includes the Parininihi area (1332 ha – previously Whitecliffs Conservation Area) to the west of SH3 owned by Ngāti Tama. Following pest management by Ngāti Tama, and earlier by DoC (since the early 1990s), this is an area of particularly high ecological value (noting the recent release of kokako).
  - (iii) Includes the eastern Ngāti Tama forest block of contiguous forest of approximately 3,098ha immediately adjacent to, and to the east of, Mt Messenger over land owned by Ngāti Tama, DoC (the majority of the land) and private landowners. Pest management within these areas has been sporadic, if it has occurred at all. The upper Mangapepeke Valley, in particular, has been affected by long-term grazing, fire and logging such that while the forest retains indigenous plant and animal communities of high ecological value, the full ecological potential has been significantly diminished (in particular the significant reduction or loss of palatable understory species and in places the loss of all regeneration).
  - (iv) The most ecologically significant part of the wider project area is the Mimi Wetland, a hydrologically intact swamp forest and non-forest wetland areas in the upper Mimi catchment.
- (c) The following observations can be made regarding the 36ha Project footprint:<sup>74</sup>
  - (i) As with the wider Project area the Project footprint straddles an ecological boundary.

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<sup>70</sup> Section 8.3.4.

<sup>71</sup> Paragraphs 27-45. See also paragraphs 30-46 of Mr Singers' EIC.

<sup>72</sup> Section 2.

<sup>73</sup> EIC of Mr Singers, paragraph 31.

<sup>74</sup> Noting again that this includes the AWA.



- (ii) It is dominated by the Mimi catchment (to the south) and the Mangapepeke Stream catchment to the north.
- (iii) The Mimi catchment forest is dominated by tawa, rkamahi, rewarewa and occasional podocarp trees.
- (iv) In the Mangapepeke catchment much of the lower hillsides are secondary forest and the valley floor is kamahi, tawa, rewarewa and occasional podocarp trees, pole kahikatea forest and treeland and, at the northern end, farmland dominated by exotic rush, grass and herbaceous species.
- (v) These areas have not had the benefits of pest control.

### **Potential adverse ecological effects**

141. The potential ecological effects of the Project relate to effects on vegetation, bats, birds, herpetofauna, invertebrates, and freshwater ecology.<sup>75</sup> These are addressed in turn below but arise from:

- (a) The removal of, or potential damage of up to 31.676ha of predominantly indigenous vegetation and the loss of this habitat to fauna;<sup>76</sup>
- (b) The removal of up to 17 significant trees from along the Project footprint;
- (c) The loss or alteration of 3,705 metres of stream length;
- (d) Increased fragmentation (and edge effects); and
- (e) Risk of injury or mortality from vehicle strike.

### **Restoration Package**

142. As mentioned above, efforts to avoid, remedy, mitigate, offset and compensate the potential ecological effects of the Project have been extensive and the Restoration Package was developed alongside the Project's design.

143. Ways in which the Project has avoided ecological effects include, in summary:<sup>77</sup>

- (a) The choice of the Project alignment avoiding the more ecologically significant Parininihi area;
- (b) The use of a 235m tunnel through the ridge dividing the Mimi and Mangapepeke catchments;

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<sup>75</sup> In the evidence of Mr Inger DoC also raises potential marine ecology effects. DoC calls no specific evidence on these effects. The NPDC Section 42A Report concludes that overall the Project is expected to have little or no effect on marine ecology (see paragraph 288). In relation to marine ecology effects, Mr Inger seeks a review condition on the TRC consents. Such a review condition is already included in the proposed conditions (see Condition Gen.4 attached to the supplementary evidence of Mr Roan).

<sup>76</sup> Much of this figure is made up of the AWA, which it is conservatively assumed will be cleared.

<sup>77</sup> EIC of Mr MacGibbon, paragraph 69, EIC of Mr Singers, paragraph 111, and Supplementary Evidence of Mr Hamill, paragraph 8.

- (c) Use of a 120m bridge across a tributary valley to the Mimi Wetland;
  - (d) Refinement of the road corridor to:
    - (i) shift the road further east (uphill) away from the Mimi Wetland;
    - (ii) position the road through the Mangapepeke Valley to the valley sides (largely avoiding the stream and valley bottom); and
    - (iii) avoid areas of kahikatea forest in the Mangapepeke Valley and several significant trees (number reduced from up to 22 to up to 17);
  - (e) Removal of Fill 10 (and Culvert 12), and its associated culvert of a tributary to the Mangapepeke Stream by designing a 25m bridge; and
  - (f) Removal of Fill Disposal Area 3 and therefore Culvert 19.
144. In addition to these avoidance measures ecological effects of the Project have been mitigated/minimised, including by:<sup>78</sup>
- (a) Use of construction techniques to reduce ecological effects (for example the method to construct the bridge of the tributary to the Mimi Wetland);
  - (b) Location of laydown and spoil areas etc away from sensitive areas;
  - (c) Restricting the width of the AWA to 5m through ecologically sensitive areas (as opposed to 20m elsewhere);
  - (d) Implementation of the VRPs and sediment management practices and protocol;
  - (e) Managing construction (and operational) lighting;
  - (f) Requiring suitably qualified ecologists to be onsite and actively involved in processes, for the various vegetation removal (including for various plant species, peripatus, bats and lizards) and construction stages (for example kiwi monitoring through radio tagging and kiwi dog tracking);
  - (g) Various requirements relating to kiwi including nest protection, fences and use of culverts as underpasses (recognising too the tunnel and bridges provide unrestricted passage across the Project alignment);
  - (h) Extensive erosion and sediment control measures and monitoring of their appropriateness to enable responses if required;

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<sup>78</sup> EIC of Mr MacGibbon , paragraphs 70 and 71, EIC of Mr Singers, paragraphs 111 and 115, Mr Hamill EIC and Supplementary Evidence and Dr Neale EIC.

- (i) Avoidance of mulch entering streams, restrictions on water take flows, and measures (such as fish capture and relocation) to reduce effects of stream diversions;
- (j) Refining culvert design to provide wider culverts, more embedded culverts and lower gradients to further enhance fish passage (noting three culverts will not have fish passage), and the use of stormwater swales and treatment wetlands; and
- (k) The proposed use of large wood generated by vegetation removal for in-stream habitat enhancement.

145. Potential residual effects have been offset or compensated through the Restoration Package, which includes:<sup>79</sup>

- (a) Intensive pest management, in perpetuity, for rats, mustelids, possums, feral cats, goats, and pigs, as well as the exclusion of all farm livestock over an area of 3,650ha;
- (b) 6ha of kahikatea swamp forest planting;
- (c) 9ha of mitigation planting;
- (d) The application of the SEV model for stream habitat loss (3,705m/3,376m<sup>2</sup>) requiring the fencing, retirement (from stock) and planting 8.455km of stream for on average 10m on each bank (equating to 16.91ha of planting);
- (e) 200 seedlings of the same species for each significant tree felled (presently 3,400 seedlings for the 17 trees);
- (f) Establishment of a minimum 1ha predator free lizard enclosure (for striped skink and arboreal geckos); and
- (g) Establishment of a pest management review panel (to review and provide guidance on the pest management programme).

## **Freshwater**

146. The technical reports and evidence of Mr Hamill describe the freshwater environment of the Mimi River and Mangapepeke Stream affected by the Project.<sup>80</sup> The Mangapepeke Stream catchment is primarily indigenous forest (with typically excellent MCI scores) although the valley floor is mainly pasture and grazed wetland (with good to fair MCI scores). In the Mimi River catchment MCI scores within bush areas were excellent (except at one site) and in the farm drains were poor. The substrate reflects the soft papa mudstone geology of the area with fine sediment present as substrate at all

<sup>79</sup> Supplementary evidence of Mr MacGibbon, paragraph 8.

<sup>80</sup> Mr Hamill EIC, paragraphs 8, 20-30, 51-61.

sites. Slips are a common feature and cattle pugging reflects the presence of stock in the area.

147. Mr Hamill identifies the potential effects of the Project on freshwater ecology (and explains the mitigation proposed for each), the key issues being sedimentation, restricting fish passage and loss of stream habitat and function.<sup>81</sup>
148. In relation to sedimentation, the papa mudstone geology means the streams are accustomed to naturally high sediment loads.<sup>82</sup> The area most sensitive to sediment deposition is the Mimi Wetland but it is naturally buffered from project works by a raupo swamp.<sup>83</sup> Mr Hamill's opinion is that the proposed erosion and sediment control measures (as addressed in the evidence of Mr Ridley) and ecological and sediment deposition sampling will be appropriate to assess and manage the effects of sediment loss from the site.<sup>84</sup> In his Supplementary Evidence he explains additional monitoring sites added to the revised ELMP and remains of the opinion that the monitoring proposed provides an appropriate way to detect and manage effects of the project on streams.<sup>85</sup> Mr Hamill again reiterates this opinion in his Rebuttal Evidence.<sup>86</sup>
149. In relation to fish passage, Mr Hamill's Supplementary Evidence explains the refinements to the design of culverts in light of the April 2018 NZ Fish Passage Guidelines for Structures. In general this process involved making the culverts wider, the gradients less steep, and the culverts more embedded. It also resulted in the removal of two culverts (one being replaced with a bridge).<sup>87</sup>
150. Both Mr Hamill<sup>88</sup> and Dr Neale<sup>89</sup> consider that these interventions reduce the effects of the Project compared to that in Mr Hamill's EIC. There remain three culverts without fish passage (culverts 2, 10 and 13). These culverts are located within road cuts with vertical cut slopes, are all ephemeral and the effect will be small.<sup>90</sup> Mr Hamill responds to the evidence of Dr Drinan for DOC on fish passage in his rebuttal evidence, reiterating the views he set out in his EIC.<sup>91</sup>
151. Finally, in relation to stream loss and modification, Mr Hamill applied the Stream Ecological Valuation (SEV) method.<sup>92</sup> Mr Hamill refined his SEV calculations in his Supplementary Evidence (which resulted in very minor adjustments) which based on his assessment of stream affected by the Project (3,705m/3376m<sup>2</sup>) provides that the amount of stream restoration to

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<sup>81</sup> Mr Hamill EIC, paragraph 9.

<sup>82</sup> Mr Hamill EIC, paragraph 73. The high sediment loads have been supported by baseline sampling, paragraph 77.

<sup>83</sup> Mr Hamill EIC, paragraphs 74 and 75.

<sup>84</sup> Mr Hamill EIC, paragraph 83.

<sup>85</sup> Mr Hamill Supplementary Evidence, paragraphs 28-32.

<sup>86</sup> Mr Hamill Rebuttal Evidence, paragraph 26.

<sup>87</sup> Mr Hamill Supplementary Evidence, paragraph 8.

<sup>88</sup> Mr Hamill Supplementary Evidence, paragraph 27.

<sup>89</sup> Dr Neale EIC, paragraph 27.

<sup>90</sup> Mr Hamill Supplementary Evidence, paragraph 20.

<sup>91</sup> Mr Hamill Rebuttal Evidence, paragraphs 20-25.

<sup>92</sup> Mr Hamill EIC, paragraphs 32-4962-65.

offset the effects of the Project to be 8,455m<sup>3</sup>/8,153m<sup>2</sup>.<sup>93</sup> Dr Neale<sup>94</sup> reviewed Mr Hamill's SEV approach and his comments were assessed by Mr Hamill in his Supplementary Evidence<sup>95</sup> and, as above, as a result of this and other matters his SEV calculations were re-run. In his Rebuttal Evidence, Mr Hamill includes a point-by-point response to the issues Dr Drinan raises in respect of the application of SEV to the Project (he remains of the view that it is appropriate).<sup>96</sup>

152. Overall, Mr Hamill assesses the effects of the Project after mitigation and offset as "*low or less*"<sup>97</sup>. He considers that most potential effects can be appropriately minimised apart from stream loss, which is offset via the SEV method and as a minimum will achieve no net loss and may achieve a net gain.<sup>98</sup> As mentioned above, both Mr Hamill and Dr Neale consider the refinements to the Project design that have occurred since Mr Hamill's EIC further reduce freshwater ecology effects.
153. Dr Neale also emphasises that due to the location of the offset areas benefits are far more certain to accrue than with many restoration projects.<sup>99</sup> He adds that the benefits of the restoration (and other proposed mitigation) are not fully captured in the SEV framework. Dr Neale considers that additional benefits are likely, such that he has "*confidence that the freshwater offset package should provide a net improvement in ecological functioning in the medium to long term*".<sup>100</sup>

## Vegetation

154. The technical reports and evidence of Mr Singers set out the vegetation values and potential effects of the Project on them. Mr Singers' EIC identifies the vegetation communities within the Project footprint<sup>101</sup> which, classified structurally, include 23.867ha of forest, 1.36ha of treeland, and 6.445ha of secondary scrub.<sup>102</sup> The areas of highest value affected by the Project are dominated by kahikatea in the Mimi and Mangapepeke catchments and tawa, rewarewa and kamahi forest in the Mimi catchment.<sup>103</sup>
155. As already mentioned, in much of the Mangapepeke Valley the vegetation is of comparatively lower quality (and ecological value) due to clearance and browsing by introduced livestock, pests and weeds.<sup>104</sup> For example, in the largest stand of kahikatea the understory and groundcover tiers have been heavily browsed, with vegetation in these tiers mostly less than 30cm high and

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<sup>93</sup> Mr Hamill Supplementary Evidence, paragraph 25.

<sup>94</sup> Dr Neale EIC, paragraphs 18-24.

<sup>95</sup> Mr Hamill Supplementary Evidence, paragraph 23.

<sup>96</sup> Mr Hamill Rebuttal Evidence, paragraph 16. Dr Neal supports Mr Hamill's position in his Rebuttal Evidence.

<sup>97</sup> Mr Hamill EIC, paragraph 68.

<sup>98</sup> Mr Hamill EIC, paragraph 120.

<sup>99</sup> Dr Neale EIC, paragraph 32.

<sup>100</sup> Dr Neale EIC, paragraphs 32-35.

<sup>101</sup> Mr Singers EIC, Table 1.

<sup>102</sup> Mr Singers EIC, paragraph 14.

<sup>103</sup> Mr Singers EIC, paragraph 15.

<sup>104</sup> EIC of Mr Singers, paragraphs 16, 40, 45, 73, 78, 84-86, 95, 101, Figures 12 and 13.

dominated by African clubmoss (an invasive weed).<sup>105</sup> In the Mimi valley floor domestic stock are having significant localised effects.<sup>106</sup>

156. Mr Singers concludes in his EIC that with the mitigation and offset proposed (at that time 1085ha) "*the Project will provide medium and long-term benefits to vegetation. Overall, the effects of the Project on vegetation are acceptable.*"<sup>107</sup> In his Supplementary Evidence Mr Singers concludes that:<sup>108</sup>

- (a) The 903.5ha "core" area (this is the area of very low pest abundance within the 3,650ha PMA):
  - (i) is itself just under four times the size of the total offset area determined by the NZ Government Biodiversity Model to be necessary to achieve no net loss by year 10 (230ha with no buffer);
  - (ii) using the Biodiversity Model the Net Present Benefit at year 10 is +39.36 (greater than the modelled 230ha core area would deliver in 35 years);
  - (iii) is over 28 times the area of habitat lost to the Project; and
- (b) the Restoration Package will result in significant positive benefits for vegetation and flora within the wider Mt Messenger – Parininihi area, within a 10 year timeframe.

157. DOC has not presented evidence on vegetation effects. Dr Barea, a technical advisor at DOC, agrees the proposed pest management would be expected to significantly improve forest condition (though in his view this outcome should be regarded as environmental compensation rather than offset).<sup>109</sup>

### **Invertebrates**

158. The technical reports and evidence of Dr Watts explain a diverse invertebrate fauna within the Project footprint, dominated by native taxa and that the invertebrate fauna is generally typical of those inhabiting native forests of the southern North Island and northern South Island.<sup>110</sup>

159. With the range of avoidance and mitigation measures proposed (for example through the Peripatus Management Plan,<sup>111</sup> a range of pest (for example wasps<sup>112</sup>) and biosecurity controls (for example Argentine ants<sup>113</sup>), the Biosecurity Management Plan and the Restoration Package, Dr Watts concludes that "*any effects of the project on invertebrates are likely to be*

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<sup>105</sup> EIC of Mr Singers, paragraph 73.

<sup>106</sup> Supplementary evidence of Mr Singers, paragraph 23.

<sup>107</sup> EIC of Mr Singers, paragraph 20.

<sup>108</sup> Supplementary evidence of Mr Singers, paragraphs 30-40..

<sup>109</sup> Evidence of Dr Barea, paragraph 4.40.

<sup>110</sup> Dr Watts EIC, paragraphs 52 and 54.

<sup>111</sup> Dr Watts EIC, paragraphs 67-72.

<sup>112</sup> Dr Watts EIC, paragraphs 110-113.

<sup>113</sup> Dr Watts EIC, paragraph 65.

*negligible (and may be positive) in the medium term*",<sup>114</sup> with her opinion as to benefits increasing with the enlarged PMA now proposed.<sup>115</sup>

160. Mr Edwards, a science advisor at DOC, considers that the PMA now proposed would, if the targets are met, adequately compensate for effects on invertebrates.<sup>116</sup> In relation to Mr Edward's comments on biosecurity matters the Rebuttal Evidence of Mr MacGibbon<sup>117</sup> accepts his recommendations and the ELMP will be updated accordingly.

### **Avifauna**

161. The technical reports and evidence of Dr McLennan explain that the bird environment comprises a mix of native and introduced species typical of those in mixed habitats in northern Taranaki and the lower North Island in places where pest control is sporadic or non-existent.<sup>118</sup> Of particular interest are North Island Brown Kiwi and North Island Robin. Dr McLennan describes the measures to avoid<sup>119</sup> and mitigate<sup>120</sup> potential adverse effects on birds, in particular in relation to kiwi through extensive monitoring provisions (including radio tracking and kiwi dogs), relocation and fencing where necessary.
162. In his supplementary evidence in relation to the 3,650ha PMA, Dr McLennan states that the PMA:
- (a) is in the top 20% by area of sanctuaries in the North Island (and one of the largest "pest free" areas of the North Island) with the proposed pest management being unusual as it involves both aerial and ground based controls;<sup>121</sup>
  - (b) with no reduction in pest management, makes the attainment of key threshold pest densities much more certain (a shift from high to very high);<sup>122</sup>
  - (c) will benefit three times as many forest birds than the PMA reviewed in his EIC (simply because it is three times larger)<sup>123</sup> and "*profoundly increases the extent to which avifauna will be enhanced in the project area*";<sup>124</sup>
  - (d) will provide a net benefit of the Project for kiwi of 1198 adults over 30 years (or a gain of 55:1 for each theoretical loss (and due to in perpetuity control this will not be eroded));<sup>125</sup>

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<sup>114</sup> Dr Watts EIC, paragraph 15.

<sup>115</sup> Dr Watts Supplementary Evidence, paragraph 15.

<sup>116</sup> Evidence of Mr Edwards, paragraph 2.1.1

<sup>117</sup> Mr MacGibbon Rebuttal Evidence, paragraphs 45-49.

<sup>118</sup> Dr McLennan EIC, paragraphs 12 and 13.

<sup>119</sup> Dr McLennan EIC, paragraph 54.

<sup>120</sup> Dr McLennan EIC, paragraphs 55 to 66.

<sup>121</sup> Dr McLennan Supplementary Evidence, paragraphs 12 and 13.

<sup>122</sup> Dr McLennan Supplementary Evidence, paragraph 12.

<sup>123</sup> Dr McLennan Supplementary Evidence, paragraph 16.

<sup>124</sup> Dr McLennan Supplementary Evidence, paragraph 26.

<sup>125</sup> Dr McLennan Supplementary Evidence, paragraphs 27 and 28.

- (e) that the net benefit ratio for kiwi of 55 is high, and with limited opportunities for comparison is possibly unprecedented;<sup>126</sup> and
- (f) there is no doubt that the Project will have a net benefit for avifauna, and the enlarged PMA will substantially increase that benefit.<sup>127</sup>

163. Dr Burns, a technical advisor at DOC, considers that the 3,650 ha PMA is sufficient to compensate for effects generally on forest birds and wetland birds, with the possible exceptions of kiwi and bittern. Dr Burns notes in his evidence that the western brown kiwi population in Taranaki has substantially contracted since the 1980s, most likely due the combined effects of habitat loss and predation.<sup>128</sup>

164. In his rebuttal evidence Dr McLennan explains his reasons for rejecting the view that he has overestimated the potential benefits of the PMA for kiwi,<sup>129</sup> and states his opinion that his benefit:loss (theoretical) ratio estimate of the Project for kiwi of 55:1 is correct.<sup>130</sup> In relation to the potential presence of bittern, Dr McLennan states the use of song detectors will help to clarify the presence (if any) of bittern in the Project area.<sup>131</sup>

### **Herpetofauna**

165. The technical reports and evidence of Mr Chapman describe the potential herpetofauna in the Project footprint (despite extensive effort,<sup>132</sup> none have been found to-date but that is not unexpected). Mr Chapman therefore included in his assessment all 11 species identified in literature as being potentially present in the Project area (recordings within 50km).<sup>133</sup> The most significant potential species present in Taranaki (and therefore potentially in the Project area) is the striped skink.<sup>134</sup>

166. Mr Chapman describes the measures applied to avoid and mitigate potential effects on herpetofauna (including the Herpetofauna Management Plan). Mr Chapman's Supplementary evidence explains how during discussions with Ms Adams, a technical adviser at DOC, it was agreed that due to the difficulty in finding lizards, the lizard discovery protocol be reduced<sup>135</sup> and the focus moved to identifying and predator-proof fencing a lizard (in particular striped skink and arboreal gecko) enclosure of a minimum of 1ha.<sup>136</sup> Mr Chapman concludes that the mitigation and the Restoration Package will be more than adequate to address the potential effects of the Project on lizards, and that the

<sup>126</sup> Dr McLennan Supplementary Evidence, paragraph 29.

<sup>127</sup> Ibid.

<sup>128</sup> Evidence of Dr Burns, paragraph 6.10.

<sup>129</sup> Dr McLennan Rebuttal Evidence, paragraph 19.

<sup>130</sup> Dr McLennan Rebuttal Evidence, paragraph 20.

<sup>131</sup> Dr McLennan Rebuttal Evidence, paragraph 27.

<sup>132</sup> Mr Chapman EIC, paragraphs 32 and 38.

<sup>133</sup> Mr Chapman EIC, paragraphs 8, 31, 37 and 64.

<sup>134</sup> A species known from widely scattered locations across the North Island, but fewer than 150 individuals ever recorded.

<sup>135</sup> Mr Chapman Supplementary Evidence, paragraph 35.

<sup>136</sup> Mr Chapman Supplementary Evidence, paragraph 37.



enclosure represents a substantial contribution to a poorly know "at risk" lizard species.

167. In her evidence on behalf of DOC Ms Adams, considers that a predator proof area provides the only option for recovery of lizards in forests and agrees with Mr Chapman as to the provision of such an area,<sup>137</sup> with some additional criteria. If all or most of her criteria are addressed, Ms Adams supports a predator-proof fence as proposed by Mr Chapman.<sup>138</sup> In his Rebuttal Evidence, Mr Chapman agrees with the criteria Ms Adams raises<sup>139</sup> and the ELMP will be amended accordingly.

## **Bats**

168. The technical reports and evidence of Mr Chapman describe the existing bat environment in the wider Project area (including the studies undertaken),<sup>140</sup> the potential effects of the Project on bats<sup>141</sup> and the proposed measures to avoid, mitigate and offset/compensate effects on bats.<sup>142</sup> Mr Chapman cautions against undertaking post construction acoustic monitoring of bats as, while of academic interest, it provides little meaningful material.<sup>143</sup> Mr Chapman concludes in his EIC (relating to the previously proposed 1085ha PMA) that through avoiding the higher quality habitats, the mitigation measures proposed (VRPs) and the Restoration Package, the Project's effects on bats will be appropriate, and that the Project will result in no net loss, and possible net benefit for bats.<sup>144</sup>

169. In his Supplementary Evidence Mr Chapman explains how the 3,650ha PMA:

- (a) exceeds the upper area shown to successfully recover long-tailed bat populations;<sup>145</sup>
- (b) goes substantially beyond mitigating/offsetting/compensating the effects of the Project on long-tailed bats,<sup>146</sup> and
- (c) will deliver a fantastic sustainable long-term outcome for North Taranaki's long-tailed bat population.<sup>147</sup>

170. Mr Chapman also explains that:

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<sup>137</sup> Evidence of Ms Adams, paragraphs 3.10 and 7.1.

<sup>138</sup> Evidence of Ms Adams, paragraph 7.1.

<sup>139</sup> Mr Chapman Rebuttal Evidence, paragraph 38.

<sup>140</sup> Mr Chapman EIC, paragraphs 26-30, 33 and 42.

<sup>141</sup> Mr Chapman EIC, paragraph 42.

<sup>142</sup> Mr Chapman EIC, paragraphs 44-63.

<sup>143</sup> Mr Chapman EIC, paragraphs 61 and 62 and his Supplementary Evidence, paragraph 23.

<sup>144</sup> Mr Chapman EIC, paragraphs 15 and 63.

<sup>145</sup> Mr Chapman Supplementary Evidence, paragraph 18.

<sup>146</sup> Mr Chapman Supplementary Evidence, paragraph 13.

<sup>147</sup> Mr Chapman Supplementary Evidence, paragraphs 13 and 24.

- (a) without the Project the likely current decline of the North Taranaki long-tailed bat population will continue<sup>148</sup> (this is undisputed by Dr O'Donnell for DOC); and
- (b) the revised VRP will make a valuable contribution towards minimising/mitigating the direct adverse effects of vegetation clearance of the project on long-tailed bats.<sup>149</sup>

171. Dr O'Donnell, a principal science advisor at DOC, raises a number of issues in relation to bats, his primary concern being certainty of effects (and hence area of pest management required). Dr O'Donnell accepts that bat populations in New Zealand are declining<sup>150</sup> and does not dispute Mr Chapman's opinion that without the Project the current likely decline in the North Taranaki long-tailed bat population will continue. He also does not dispute that the PMA is of an area likely to reduce the adverse effects of the Project on bats (with a greater than 80% desired survival level<sup>151</sup>), but only if certain conditions are met.<sup>152</sup> Those conditions are:

- (a) Radio-tracking to locate roosting areas to "*confirm*" presence and numbers within the PMA to "*ensure*" benefits to the population.<sup>153</sup> As these matters have not in his opinion occurred, certainly the presence of bats within the PMA is known but roosting tree locations are not, he considers a minimum of 5,000ha to be required. However, Dr O'Donnell presents no science to justify this additional area – rather he considers it a "*pragmatic minimum*"<sup>154</sup> when breeding trees have not been identified. Further, Mr Chapman in his Rebuttal Evidence notes that it can take years of study to provide a degree of certainty (and even then such certainty may not be achieved).<sup>155</sup>
- (b) Use of a buffer. As explained in Mr Chapman's Rebuttal Evidence, Dr O'Donnell's position on this matter is somewhat confused.<sup>156</sup> He refers to studies in which buffers are included, as for the PMA, but then ignores the buffers in the PMA, stating that the effective area of the PMA is smaller.<sup>157</sup> Further, while Dr O'Donnell focuses on the buffer area he fails to consider the pest target rates proposed – that is the actual pest densities themselves.
- (c) Vegetation Removal Protocols. Dr O'Donnell has a number of concerns in this area. In particular:

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<sup>148</sup> Mr Chapman Supplementary Evidence, paragraph 24.

<sup>149</sup> Mr Chapman Supplementary Evidence, paragraph 33.

<sup>150</sup> Evidence of Dr O'Donnell, paragraph 4.5.

<sup>151</sup> Evidence of Dr O'Donnell, paragraph 9.16.

<sup>152</sup> Evidence of Dr O'Donnell, paragraph 9.6.

<sup>153</sup> Evidence of Dr O'Donnell, paragraph 9.7.

<sup>154</sup> At paragraph 9.18

<sup>155</sup> Mr Chapman, Rebuttal Evidence, paragraph 9.

<sup>156</sup> Mr Chapman, Rebuttal Evidence, paragraphs 14-18.

<sup>157</sup> Evidence of Dr O'Donnell, paragraph 3.14(b).

- (i) He considers VRPs to be a last resort (in his opinion in the mitigation hierarchy they come after compensate), and that they do not "*guarantee the survival of the Mt Messenger bat population.*"<sup>158</sup> Dr O'Donnell goes on to say that tree felling protocols "*attempt to minimise harm to bats, but do not guarantee this, as some bats will always remain undetected.*"<sup>159</sup> In response, counsel note that mitigation, as applied under the RMA, relates to minimising harm at the location in which the effects occur. That is precisely what the VRPs do. Further, guarantees as to outcomes are not required under the RMA (it is not a no risk or no effects statute).
- (ii) Dr O'Donnell does not agree that the VRPs should apply only to trees greater than 80cm dbh. Mr Chapman in his Rebuttal Evidence<sup>160</sup> recommends that trees between 50-80 DBH be included at the discretion of the supervising bat ecologist (he considers 15 DBH to be unnecessarily low).
- (iii) Mr Chapman in his Rebuttal Evidence<sup>161</sup> accepts some of Dr O'Donnell's wording change suggestions in the ELMP, but not in relation to felling of high-risk trees during summer months only (especially in light of the above revised VRPs).
- (iv) In relation to lighting, Mr Chapman's Rebuttal Evidence<sup>162</sup> agrees that lighting should be designed so as not to attract bats to the road and refers to the CEMP that requires the involvement of the Project Ecologist in lighting design.

172. Irrespective of all the above, Dr O'Donnell accepts that the intended PMA "*may*" sustain the local long-tailed bat population, but only if implemented with long-term certainty, alongside local pest control efforts, such as at the adjacent Parininihi.<sup>163</sup>

173. Mr Chapman's EIC<sup>164</sup> and Supplementary Evidence<sup>165</sup> comments on the additional benefits provided by the adjacent Parininihi block as well as other surrounding pest control efforts. Having considered Dr O'Donnell's evidence, and made some changes (in particular to the VRPs), Mr Chapman concludes that his opinion remains that the Project goes substantially beyond mitigating/offsetting/compensating the effects of the Project on long-tailed bats, and will secure the long-term future of bats in north Taranaki (the population of which is presently likely declining).<sup>166</sup>

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<sup>158</sup> Evidence of Dr O'Donnell, paragraph 9.3.

<sup>159</sup> Mr Chapman agrees that the intention of the VRPs is to minimise harm: his supplementary evidence at paragraph 33.

<sup>160</sup> Mr Chapman, Rebuttal Evidence, paragraph 30.

<sup>161</sup> Mr Chapman, Rebuttal Evidence, paragraph 31.

<sup>162</sup> Mr Chapman, Rebuttal Evidence, paragraph 32.

<sup>163</sup> Evidence of Dr O'Donnell, paragraph 9.21.

<sup>164</sup> Paragraphs 54 and 58.

<sup>165</sup> Paragraphs 21 and 22.

<sup>166</sup> Mr Chapman, Rebuttal Evidence, paragraph 33.

## Restoration Package

174. The Restoration Package PMA and the pest management programme is explained in the technical reports and evidence of Mr MacGibbon. Mr MacGibbon explains the effects management hierarchy, and that only significant (as in more than minor) residual ecological effects are required to be offset under the NZ Government Biodiversity Offsetting Guidance.<sup>167</sup> Mr MacGibbon explains that intensive and enduring pest management is expected to result in considerably more rapid and more ecologically diverse recovery of forest biodiversity than could be achieved by planting alone.<sup>168</sup>
175. In relation to the pest management programme, Mr MacGibbon explains the methodologies and performance monitoring in his EIC,<sup>169</sup> sets out the pest management performance targets,<sup>170</sup> and concludes that a no net loss of biodiversity is likely to be achieved 10 years following construction and a net gain in biodiversity 15 years after construction.<sup>171</sup>
176. In his Supplementary Evidence Mr MacGibbon notes that the PMA is larger than 3 of the 6 DOC Mainland Island sites where pests are intensively managed for multiple biodiversity benefits.<sup>172</sup> Mr MacGibbon concludes that a "*PMA of 3650ha can be expected to create substantial biodiversity gains by year 15, well in excess of the effects caused ...*".<sup>173</sup>
177. Dr Barea, a technical advisor at DOC, provides evidence on the Restoration Package. While he purports to comply with the Environment Court Code of Conduct, his evidence that he does not support "*the issuing of the resource consent for the Application*"<sup>174</sup> seeks to address the ultimate question before the Commissioner, and is well outside the area of his expertise. Given the importance of independence of expert evidence,<sup>175</sup> Dr Barea's evidence should be given little, if any, weight.
178. Irrespective, Mr MacGibbon responds to Dr Barea's comments, many of which focus on terminology rather than ecological outcomes.<sup>176</sup> Mr MacGibbon comments (noting he calls the Restoration Package one of offset and compensation in his EIC and Supplementary Evidence) in his Rebuttal Evidence that:

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<sup>167</sup> MacGibbon EIC, paragraphs 49 and 51.

<sup>168</sup> MacGibbon EIC, paragraph 76.

<sup>169</sup> MacGibbon EIC, paragraphs 112-118 and 140-152. Some aspects of these are updated in his Supplementary and Rebuttal Evidence.

<sup>170</sup> MacGibbon EIC, paragraph 138.

<sup>171</sup> MacGibbon EIC, paragraph 17.

<sup>172</sup> MacGibbon Supplementary Evidence, paragraph 34.

<sup>173</sup> MacGibbon Supplementary Evidence, paragraph 45.

<sup>174</sup> Evidence of Dr Barea, paragraph 5.3.

<sup>175</sup> See for example the Environment Court's decisions of *Tram Lease Limited v Auckland Council* [2015] NZEnvC 133 and 137.

<sup>176</sup> While Dr Barea spends pages addressing offsetting and compensation it focuses on terminology rather than effects, especially since he comments at para 3.18 that environmental compensation as well as an offset can create positive environmental effects.

*"Most of this package may be more accurately termed compensation but the objective (ecological benefit) remains the same."*<sup>177</sup>

179. In relation to the expanded PMA of 3,650ha, Dr Barea states that *"on an area basis alone effective management of pests will result in biodiversity gain significantly greater than previously proposed."*<sup>178</sup>
180. While Dr Barea seems to accept there is a biodiversity gain, he has concerns over ungulate control and buffers (in which he falls into the same double counting error as Dr O'Donnell).<sup>179</sup> Mr MacGibbon explains the intended increased pest management at the edges of the PMA (and how the ELMP will be amended to better reflect this). He also explains how the buffers within the PMA will work (for example, while pest densities can be expected to be above the performance targets on occasions, they will not rise to densities found in unmanaged areas and as a consequence there will still be considerable benefits to biodiversity in these buffer areas).<sup>180</sup>
181. Finally, Dr Barea comments on some refinements which Mr MacGibbon responds to in his Rebuttal Evidence. In particular, due to an unintended error (related to the inclusion of the Pest Management Panel) reference to the Ecological Review Panel was lost from the conditions and ELMP. Mr MacGibbon agrees that there should be an Ecological Review Panel providing independent review of monitoring and performance data as required, and reporting their findings and recommendations to the consent authorities and to the stakeholder representatives (the ELMP provisions will be amended accordingly).<sup>181</sup> Mr MacGibbon also responds to steps taken to identifying riparian planting, with all but 2.3km agreed and discussions continuing with landowners on the remainder.<sup>182</sup>
182. Dr Shapiro raises a number of technical matters in relation to the pest management programme. Mr MacGibbon responds to all of these matters in his Rebuttal Evidence,<sup>183</sup> and in particular recognises the importance of Ngāti Tama's local experience and expertise in pest management and explains how it has been, and will continue to be, important, for example in the implementing the Pest Management Plan through the Ecological Review Panel. In terms of adding Parininihi to the PMA, Mr MacGibbon is open to that should DOC, as its evidence has indicated may be the case, stop or reduce its support for pest management on the Parininihi land (in this case the amount of DOC land in the PMA would be reduced).

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<sup>177</sup> Mr MacGibbon Rebuttal Evidence, paragraph 14.

<sup>178</sup> Evidence of Dr Barea, paragraph 2.9.

<sup>179</sup> Ibid.

<sup>180</sup> Mr MacGibbon Rebuttal Evidence, paragraphs 19 and 20.

<sup>181</sup> Mr MacGibbon Rebuttal Evidence, paragraphs 36 and 37.

<sup>182</sup> Mr MacGibbon Rebuttal Evidence, paragraph 26.

<sup>183</sup> Paragraphs 50-63.

## Overall conclusion on ecological effects

183. The aim in developing the Restoration Package was to achieve no net loss of biodiversity by year 10 (following construction) and a net gain in biodiversity from year 15.<sup>184</sup> All the Project ecologists consider that this has been achieved such that the ecological effects of the Project are acceptable, and largely positive over the long-term given the pest management proposed in perpetuity. In particular:

- (a) In relation to freshwater, there is confidence that the freshwater offset package (including the restoration of 8.455km of stream length) should provide a net improvement in ecological functioning in the medium to long term;<sup>185</sup>
- (b) In relation to vegetation, the Restoration Package will result in significant positive benefits for vegetation and flora within the wider Mt Messenger – Parininihi area, within a 10 year timeframe;<sup>186</sup>
- (c) In relation to birds, the Project:
  - (i) will have a net benefit for avifauna, and the enlarged PMA will substantially increase that benefit;<sup>187</sup>
  - (ii) will benefit three times as many forest birds than the 1,085 ha PMA proposed earlier,<sup>188</sup> which in turn "*profoundly increases the extent to which avifauna will be enhanced in the project area*";<sup>189</sup> and
  - (iii) will provide a net benefit of the Project for kiwi of 1198 adults over 30 years (or a gain of 55:1 for each theoretical loss (and due to in perpetuity control will not be eroded)<sup>190</sup> (which is possibly unprecedented);<sup>191</sup>
- (d) In relation to invertebrates the experts agree that the PMA now proposed would, if the targets are met, adequately compensate for effects on invertebrates;<sup>192</sup>
- (e) In relation to herpetofauna the experts agree in relation to the provision of a predator-proof and free fenced area;<sup>193</sup>
- (f) In relation to bats Mr Chapman concludes that the Project goes substantially beyond mitigating/offsetting/compensating the effects of the

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<sup>184</sup> Mr MacGibbon EIC, paragraph 87.

<sup>185</sup> Dr Neale EIC, paragraph 35.

<sup>186</sup> Mr Singers, Supplementary Evidence, paragraph 45.

<sup>187</sup> Dr McLennan Supplementary Evidence, paragraph 29.

<sup>188</sup> Dr McLennan Supplementary Evidence, paragraph 16.

<sup>189</sup> Dr McLennan Supplementary Evidence, paragraph 26.

<sup>190</sup> Dr McLennan Supplementary Evidence, paragraphs 27 and 28.

<sup>191</sup> Dr McLennan Supplementary Evidence, paragraph 29.

<sup>192</sup> Evidence of Mr Edwards, paragraph 2.1.1

<sup>193</sup> Evidence of Ms Adams, paragraphs 3.10 and 7.1 and Mr Chapman Rebuttal Evidence, paragraph 38.

Project on long-tailed bats and will secure the long-term future of bats in north Taranaki (the population of which is presently likely declining);<sup>194</sup> and

- (g) Overall, the PMA of 3,650ha can be expected to create substantial biodiversity gains by year 15, well in excess of the effects caused by the Project.<sup>195</sup>

184. The Project therefore appropriately avoids, remedies, mitigates, offsets and compensates its ecological effects.

## **LANDSCAPE, VISUAL AND NATURAL CHARACTER EFFECTS**

185. As with any major highway development, the Project will have adverse landscape, visual and natural character effects. The potential for adverse effects is increased by the nature of the landscape around the Project footprint.

186. Mr Lister's evidence explains the detailed methodology employed in assessing those effects (setting out the nature of the effects in both the Mangapepeke and Mimi Valleys) and the extensive efforts that have been put into avoiding, minimising and mitigating those effects. Mr Lister considers that the effects will be localised in nature, and addressed through measures including:<sup>196</sup>

- (a) the choice of route, and in particular a route away from the Waipingao Valley to the west of the current alignment;
- (b) the location of the Project, where it will be primarily experienced by road users and only visible to a small number of local residents;
- (c) the alignment of the route and use of the tunnel so that the route follows the topography, linking the two valleys via the bridge and keeping low in the landscape; and
- (d) the mitigation and other measures set out in the Landscape and Environmental Design Framework ("**LEDF**") that has been prepared and will be implemented by the Transport Agency / Alliance, as well as in the ELMP. Key measures include:
  - (i) Mitigation, restoration and offset planting (as described in respect of ecological effects above – these measures also address landscape, visual and natural character effects);
  - (ii) Minimising encroachment on significant trees and vegetation;

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<sup>194</sup> Mr Chapman Rebuttal Evidence, paragraph 33.

<sup>195</sup> MacGibbon Supplementary Evidence, paragraph 45.

<sup>196</sup> Summarised by Mr Lister at paragraph 12 of his EIC, with more detail in paragraphs 59 – 72 in particular.

- (iii) The appropriate profile and treatment of cut and fill batters and fill disposal sites, including encouraging revegetation;
- (iv) Reducing visual clutter in terms of highway furniture;
- (v) Restoring access to the DOC estate (through the access to the realigned Kiwi Road track via the existing SH3 alignment); and
- (vi) Providing for Ngāti Tama influence, including in detailed highway design which will in particular retain the 'jaws of Ngāti Tama' concept of a border between Taranaki and Waikato.

187. Mr Lister's conclusion is that with these measures in place, the adverse landscape and visual effects of the Project will be 'moderate-low', and the adverse natural character effects will be 'moderate'. Mr Lister notes there will also be some positive landscape effects associated with the Project.<sup>197</sup>

188. Mr Bain on behalf of NPDC agrees with Mr Lister that landscape and visual effects have been appropriately addressed through the measures described above.<sup>198</sup> Mr Bain is also supportive of the LEDF. Both Mr Bain and Ms McBeth raised issues in the NPDC Section 42A Report about the interaction between the conditions, the LEDF and the ELMP. These have at least to some extent been addressed in later iterations of these documents, as discussed by Mr Roan in his evidence.

## **SOCIAL EFFECTS**

189. As set out above, the Project will deliver significant social benefits at a regional and local level.

190. The evidence of Ms Turvey for the Transport Agency records that there will also be adverse social effects on the small number of people who live in the immediate vicinity of the Project, especially during construction. These will be appropriately addressed through measures in the CEMP, particularly in terms of ensuring good communication between local residents and the Transport Agency and Alliance.<sup>199</sup>

191. Ms McBeth focusses in the NPDC Section 42A Report (as do a number of submitters) on the social effects of the Project on Mr and Mrs Pascoe,<sup>200</sup> who are the most affected local residents. Ms Turvey (and the Transport Agency, as reflected in Mr Napier's evidence) accept that there will be social effects on Mr and Mrs Pascoe, particularly during construction.<sup>201</sup> It is important to bear in mind that the PWA includes a comprehensive compensation regime through the acquisition processes, and that Mr and Ms Pascoe will (at the very least)

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<sup>197</sup> EIC of Mr Lister at paragraph 72.

<sup>198</sup> NPDC Section 42A Report at paragraph 264. There are no other landscape experts involved in this hearing process.

<sup>199</sup> EIC of Ms Turvey at paragraph 74.

<sup>200</sup> Refer to paragraphs 242 – 245 of the NPDC Section 42A Report.

<sup>201</sup> EIC of Ms Turvey at paragraph 81.



be rehoused by, and at the cost of, the Transport Agency for the duration of the construction period.

## RECREATION EFFECTS

192. The Mt Messenger and Kiwi Road tracks are in the direct vicinity of the Project alignment (and can be accessed from the existing SH3). During parts of the construction period there may be some minor impact on the use of the Kiwi Road track, as the Project route crosses the track. The Transport Agency is committed to maintaining access to both tracks as far as is reasonably practicable during construction.<sup>202</sup>
193. Following construction, access to both tracks will be significantly improved through the provision of a dedicated parking area (with details to be developed as part of detailed design, and proposed by the Transport Agency to be subject to the outline plan process).<sup>203</sup> The Transport Agency will also consider, in conjunction with Ngāti Tama and other landowners, the possible provision of:
- (a) walking and cycling trails in the vicinity of the Project alignment (particularly along planting areas and construction haul roads);<sup>204</sup> and
  - (b) a rest area along the Project route, noting that there are existing rest areas to the north and south.<sup>205</sup>
194. It is not anticipated that Project will affect publicly accessible fishing or other stream-based recreational activities.<sup>206</sup>

## HERITAGE EFFECTS

195. Dr Rod Clough presents evidence for the Transport Agency on archaeology and historic heritage effects. His key conclusions include:<sup>207</sup>
- (a) Construction of the Project may affect the remains of part of a historic pack track on the saddle ridgeline above the Mangapepeke and Mimi Valleys, and a section of an earlier Mt Messenger Road alignment. These potential archaeological sites are of limited to moderate value.
  - (b) No known archaeological sites associated with Maori settlement will be affected by the Project. It is possible that unknown sites might be discovered during construction, but the nature of the terrain means the potential to encounter such sites is low.

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<sup>202</sup> This is endorsed in the NPDC Section 42A Report at paragraph 274.

<sup>203</sup> Refer to Mr Boam's EIC at paragraph 226, Mr Roan's evidence at paragraph 267 and the NPDC Section 42A Report at 275.

<sup>204</sup> Refer to Mr Boam's EIC at paragraph 227 and the NPDC Section 42A Report at paragraphs 276 – 277.

<sup>205</sup> Refer to Mr Napier's EIC at paragraph 103, Mr Roan's evidence at paragraph 279, and the NPDC Section 42A Report at paragraph 279.

<sup>206</sup> Refer to NPDC Section 42A Report at paragraphs 280 – 282.

<sup>207</sup> EIC of Dr Clough, in particular paragraphs 52 – 56.

196. Dr Clough considers the pack track and section of the earlier road alignment would ideally be avoided by the proposed construction of the Project, but if not any effects can be appropriately mitigated through archaeological recording under the provisions of the Heritage New Zealand Pouhere Taonga Act 2014 ("**HNZPTA**").<sup>208</sup>
197. As recommended by Dr Clough, designation conditions are proposed to address any accidental discover of heritage remains or koiwi tangata.<sup>209</sup> The Transport Agency has also applied for a Project-wide archaeological authority (to cover the possible disturbance of the pack track and earlier road, as well as any accidental discovery) under section 44 of the HNZPTA as a precautionary measure.
198. Mr Daniel McCurdy peer reviewed Dr Clough's assessment on behalf of NPDC, and appears generally to agree with Dr Clough's assessment. The NPDC Section 42A Report records Ms McBeth's agreement with the proposed approach to dealing with any potential disturbance of heritage remains or koiwi tangata.<sup>210</sup>

## **CONSTRUCTION WATER**

199. The Transport Agency recognises the importance of properly addressing and managing erosion and sedimentation risks associated with the Project, and is of course particularly experienced in doing so. Mr Ridley explains in his evidence that, while earthworks will be carried out over a 36 hectare area during the construction of the Project, this is in fact a relatively small-scale earthworks Project in State highway terms. The earthworks to be carried out are also relatively small-scale in the context of the size of the Mimi and Tongaporutu catchments, being the two receiving environments.
200. For the Project, the Transport Agency guideline on erosion and sediment control has been adopted. This represents industry best practice.<sup>211</sup> A detailed Construction Water Management Plan ("**CWMP**") has been developed in detail to set out the overall approach and guidance for construction water management. This will be a live document to allow for continuous improvement during the construction period. SCWMPs will be developed to provide more detail in respect of each area of work.<sup>212</sup>
201. Monitoring during construction is also crucial to the overall construction water management approach. A detailed Construction Water Discharges Monitoring Programme ("**CWDMP**") has been developed to that end.

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<sup>208</sup> EIC of Dr Clough at paragraphs 60 – 61.

<sup>209</sup> In accordance with the Transport Agency's Accidental Archaeological Discovery Specification (P45), to be reviewed by the Kaitiaki Forum Group.

<sup>210</sup> Refer paragraphs 146 – 159 of the NPDC Section 42A Report.

<sup>211</sup> Erosion and Sediment Control Guidelines for State Highway Infrastructure (September 2014)

<sup>212</sup> Three have been developed already for approval through the hearing process, and are "construction ready".

202. In his evidence for the Transport Agency Mr Ridley has consistently reiterated his view that with the CWMP and CWDMP framework in place, the erosion and sedimentation effects of the Project will be negligible.
203. In his supplementary evidence Mr Ridley outlines the discussions he had with TRC following the filing of the Transport Agency EIC (and the date of the TRC Section 42A Report); it appears that there are now only relatively minor differences between the Transport Agency and TRC in respect of construction water management. In his Rebuttal Evidence, Mr Ridley reiterates the conclusions he reached previously. In particular, he states that he considers Mr Duirs is overstating the erosion and sedimentation risks associated with the Project; that risks associated with the Project have been clearly recognised and accounted for, and that the erosion and sedimentation effects of the Project will be negligible.<sup>213</sup>

### **CONSTRUCTION TRAFFIC**

204. There will be temporary adverse effects on SH3 users during construction of the Project due to the interaction between SH3 and the site access points, works on SH3 (primarily at the tie in points), and the number of construction vehicles on the highway (an average of about 80 movements per day). Most construction will occur away from the existing alignment, which minimises construction traffic effects. Construction traffic and interaction between construction and the existing SH3 will be managed through the Construction Traffic Management Plan ("**CTMP**").<sup>214</sup>
205. Ms McBeth records that 'on-line' options would have significantly increased construction traffic related challenges, that the CTMP contains appropriate controls, and that the Transport Agency are "*experts in managing interruptions to the State highway*".<sup>215</sup>

### **NOISE AND VIBRATION**

206. The remote location of the Project means there are only a small number of residents that are potentially susceptible to noise and vibration effects during construction, and once the Project is operational as part of SH3.<sup>216</sup>
207. Mr Damian Ellerton identifies in his evidence for the Transport Agency that:<sup>217</sup>
- (a) Construction noise levels at the small number of nearby dwellings will generally comply with the criteria in New Zealand Standard NZS6803:1999,<sup>218</sup> with two possible exceptions:

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<sup>213</sup> Mr Ridley Rebuttal Evidence, paragraphs 8-10.

<sup>214</sup> Mr McCombs EIC, paragraphs 174-179.

<sup>215</sup> NPDC Section 42A Report at paragraph 196.

<sup>216</sup> Mr Ellerton has assessed potential construction and / or operational noise effects on four residential dwellings.

<sup>217</sup> EIC of Mr Ellerton at paragraphs 40 – 52.

<sup>218</sup> NPDC agrees this is the appropriate standard for assessing the Project construction noise against – see paragraph 183 of the NPDC Section 42A Report.

- (i) At 2397 Mokau Road (the Gordon property), which is in close proximity to a spoil disposal site; and
  - (ii) Where night works occur in close proximity to dwellings.
- (b) Traffic noise levels will comply with New Zealand Standard NZS6806:2010;
- (c) Construction vibration levels will comply with the relevant Transport Agency guidelines (and will be acceptable),<sup>219</sup> and operational vibration effects will be negligible.
208. It has been assumed that 3072 Mokau Road (the Pascoes' house) will be vacant during construction.<sup>220</sup>
209. A Construction Noise Management Plan ("**CNMP**") has been prepared to manage the potential construction noise effects identified above, and generally to manage noise and vibration generating activities during construction. The Transport Agency's proposed conditions require compliance with the construction noise criteria set out in NZS6803:1999, subject to the exceptions specified in the CNMP. As sought in the NPDC Section 42A Report, the proposed conditions also specifically address the potential effects during construction on any occupants of 2397 Mokau Road.

#### **AIR QUALITY AND DUST**

210. The potential air quality and in particular dust effects of Project construction are also limited by the small number of residents in the immediate Project area, and TRC agrees that any dust effects will be minor.<sup>221</sup>
211. A Construction Dust Management Plan ("**CDMP**") has been prepared and will be implemented in order to manage potential effects on the nearby residential receptors. As sought by TRC in its Section 42A Report, the Transport Agency also proposes a specific condition prohibiting the generation of any noxious, dangerous, offensive or objectionable dust beyond the site boundary.<sup>222</sup>

#### **LIGHTING**

212. Temporary lighting will be employed during construction. Potential amenity effects on the small number of local residents will be managed in accordance with the CEMP.
213. Lighting will be provided in the tunnel and at the tunnel approaches once the Project alignment is operational (and ecological effects of lighting on bats are addressed above). The current intention is to provide lighting at the

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<sup>219</sup> The NPDC Section 42A Report raises no issue with this assessment (see paragraph 189).

<sup>220</sup> The Transport Agency's intention is to purchase the land the Pascoes' house sits on prior to construction commencing, or at least to relocate the Pascoes for the duration of construction.

<sup>221</sup> TRC Section 42A Report at paragraph 218.

<sup>222</sup> Condition AIR.3.

intersections with the bypassed section of SH3. Noting the NPDC Section 42A Report comment about potential (minor) rural character effects of intersection lighting, the Transport Agency will re-evaluate this intention at the final design stage. State highway safety will be a main priority in that re-evaluation.<sup>223</sup>

## **NATURAL HAZARDS**

214. As set out above, the improvement in the resilience of this section of SH3 to natural hazards in the form of landslides and earthquakes is a key positive effect of the Project.<sup>224</sup> The NPDC Section 42A Report records that the current Mt Messenger section is prone to natural hazards.<sup>225</sup> Mr Symmans' evidence is that the Project can be constructed to provide a resilient section of State highway.<sup>226</sup>
215. Several submitters raise concerns about possible fog, black ice and flooding related issues as the Project alignment crosses the Mangapepeke Valley. Mr Boam addresses those points in his evidence,<sup>227</sup> recording that:
- (a) neither black ice and fog are expected to be particular issues for the Project alignment, as the NPDC Section 42A Report notes these are primarily operational issues for the Transport Agency to address;<sup>228</sup> and
  - (b) the Project alignment will not be susceptible to flooding, or effect the existing flood susceptibility of the Mangapepeke Valley in any significant way,<sup>229</sup> and the NPDC Section 42A Report raises no issue in this respect.<sup>230</sup>
216. More broadly, the Project design (including bridges and culverts as well as vegetation removal and planting) will not increase the risk of flooding.<sup>231</sup>

## **SOIL CONTAMINATION AND HAZARDOUS SUBSTANCES**

217. The Transport Agency has, in line with the process envisaged in the NESCS, carried out preliminary and detailed site investigations in respect of ground contamination along the Project alignment. No major issues have been identified by these investigations. To ensure any contaminated soil

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<sup>223</sup> In response to the comments at paragraph 297 of the NPDC Section 42A Report, the potential effects of lighting on bats are addressed by My Chapman in his EIC, and in the CEMP and the updated conditions proposed by Mr Roan.

<sup>224</sup> Section 2 of the RMA includes a broad definition of the term "natural hazards". Geotechnical issues, and resilience of the new road to natural hazards, is address in the evidence of Mr Symmans, paragraphs 81-178.

<sup>225</sup> At paragraph 197.

<sup>226</sup> Mr Symmans EIC, paragraph 12.

<sup>227</sup> At paragraphs 185 – 204 of Mr Boam's EIC. Mr Boam relies in respect of black ice and fog on advice received from Dr Mike Revell of NIWA, attached as Appendix 3 to Mr Boam's EIC.

<sup>228</sup> Paragraph 210 of the NPDC Section 42A Report.

<sup>229</sup> In response to Dawn Bendall's submission, at paragraphs 208 – 211 of his EIC Mr Boam also explains that the Project is design and will be constructed to appropriately address the underlying "swampy" conditions in the Mangapepeke Valley.

<sup>230</sup> See paragraph 208.

<sup>231</sup> See proposed conditions TCV.10, PCV.3, VEG.3 and PLN.5.

encountered during construction is handled appropriately, a Contaminated Land Management Plan has been prepared and will be adhered to.

218. The detailed site investigation was carried out subsequent to the NPDC Section 42A Report being prepared, and (together with the updated version of the CLMP) addresses the issues raised by Ms Knowles on behalf of NPDC.<sup>232</sup> While the NPDC Section 42A Report suggested that the CLMP should be "approved" by NPDC prior to construction, the CLMP is now effectively complete, and can be approved through this hearing process (without the need for any delegation to NPDC officers).
219. Hazardous substances necessary for the construction of the Project will be managed in accordance with the Hazardous Substances and New Organisms Act 1996 ("HSNO") regime, and as set out in the CEMP and CWMP. To that end, the minor suggestions made by Ms Knowles and recorded in the NPDC Section 42A Report have been addressed in the updated version of the CEMP.<sup>233</sup>

## **LAND ACQUISITION AND PROPERTY ACCESS**

220. The PWA sets out the framework through which the Crown may acquire land for public works. Under the PWA regime, compensation is paid to landowners for the value of any property acquired (and in relation to various other matters) at market rates. The Crown intends to purchase and provide compensation for the land required for the Project in accordance with the PWA.
221. The PWA regime also provides for compensation to be paid to landowners who have part of their land acquired and also suffer 'injurious affection' (i.e. depreciation in value) to any retained land.<sup>234</sup> For example, landowners may be eligible for compensation where part of their land is acquired for the Project and where certain adverse effects of the Project causes depreciation in the value of any retained land. Potential effects on property values are not a relevant matter for consideration under the RMA.<sup>235</sup>
222. The CTMP and the Transport Agency's proposed conditions require disruptions in property access during the construction period to be minimised.<sup>236</sup> The Transport Agency will ensure that all property owners – including those few landowners who rely on the section of SH3 being bypassed – retain reasonable access to the State highway following the completion of the Project. This will be a key consideration in the State highway revocation process discussed above. NPDC has indicated it is comfortable with this approach to property access.<sup>237</sup>

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<sup>232</sup> Refer 216 – 221 of the NPDC Section 42A Report.

<sup>233</sup> Refer paragraph 227 of the NPDC Section 42A Report, and more broadly paragraphs 222 – 227 which record that NPDC is comfortable with the Transport Agency's approach to managing hazardous substances.

<sup>234</sup> Public Works Act 1981, ss60, 62, and 64.

<sup>235</sup> *Tram Lease v Auckland Council* [2015] NZEnvC 137.

<sup>236</sup> See proposed designation conditions 22 and 37.

<sup>237</sup> NPDC Section 42A Report at paragraph 251.

## **PART E REGULATIONS, POLICY AND PLANNING DOCUMENTS AND "OTHER MATTERS"**

223. The Commissioner is directed by sections 104 and 171 to have regard to / have particular regard to the relevant regulations and provisions of the statutory policy and planning documents, as well as any other matter the Commissioner considers relevant and reasonably necessary.

### **REGULATIONS, POLICY AND PLANNING DOCUMENTS**

224. The key relevant regulations, policy and planning documents are identified in the AEE. These are:

- (a) National Environmental Standards and other regulations:
  - (i) NES Soil.
  - (ii) Resource Management (Measuring and Reporting Water Take) Regulations 2010 ("**Water Take Regulations**").
- (b) National Policy Statements:
  - (i) National Policy Statement for Freshwater Management 2014.
  - (ii) New Zealand Coastal Policy Statement 2010.<sup>238</sup>
- (c) Regional Policy Statements:
  - (i) Regional Policy Statement for Taranaki.
- (d) Regional Plans:
  - (i) Regional Freshwater Plan for Taranaki ("**Freshwater Plan**").
  - (ii) Regional Soil Plan for Taranaki ("**Soil Plan**").
  - (iii) Regional Air Quality Plan for Taranaki ("**Air Quality Plan**").
- (e) District Plans:
  - (i) New Plymouth Operative District Plan ("**District Plan**").

225. The AEE includes a detailed analysis of the Project against the relevant provisions of each of these documents.

226. In terms of the regulations:

- (a) NES Soil: As discussed above, the Transport Agency has carried out an initial site investigation, and subsequently a detailed site investigation. A

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<sup>238</sup> Noting the Project area is 9.2km upstream of the Tongaporutu estuary and 21.5km upstream of the Mimi estuary (NPDC S42A Report, paragraph 288). The AEE (page 203) states that the Project is not expected to have a measurable effect on marine ecosystems. The NPDC S42A Report concludes that overall the Project would be expected to have little or no effects on the values identified (para 288).

global application for resource consent under the NES Soil for the disturbance and handling of contaminated soil has been lodged and is to be considered by the Commissioner. The proposed conditions and CLMP set out how the Transport Agency / Alliance will manage any uncovering of contaminated soil.

- (b) Water Take Regulations: The proposed conditions of consent provide for water take records to be kept and provided to TRC in accordance with the Water Take Regulations.

227. Mr Dixon provides an integrated thematic assessment of the relevant policy and planning provisions in his EIC.<sup>239</sup> A full objective and policy statutory assessment is included as Appendix A to the AEE. Combining the two, by way of summary:

- (a) Growth and development in Taranaki: The Project is an important catalyst for the growth and development of the Taranaki region, and aligns with the RPS strategic intent of supporting the growth and development of the region.
- (b) Regionally significant infrastructure: The Project aligns with the RPS imperative to provide for regionally significant infrastructure, and improve the existing route security and resilience issues associated with SH3,<sup>240</sup> as well as the District Plan imperative to ensure the road network operates safely and efficiently.<sup>241</sup> The adverse effects of the Project are being mitigated as sought by the planning documents, especially in light of the Restoration Package to address residual ecological effects.
- (c) Public health and safety: The Project delivers on the health and safety objectives of the relevant planning documents (see above). It will deliver an improved safety environment and outcomes for users of SH3. Project construction appropriately manage health and safety risks.
- (d) Natural hazards – avoiding and mitigating effects: In improving the resilience of this section of SH3 to natural hazards, the Project delivers on the RPS<sup>242</sup> and District Plan objectives and policies<sup>243</sup> that relate to mitigating the effects of natural hazards on people, property, infrastructure and the environment. The effects of climate change have also been factored into the design of the Project<sup>244</sup>, and there will be a

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<sup>239</sup> Paragraphs 70 – 112.

<sup>240</sup> INF Objective 1 – the Project will "provide" for the continued safe and operation of SH3 and, in line with INF Policy 1, adverse effects will be avoided, remedied or mitigated "as far as practicable".

<sup>241</sup> Objective 20 – the Project will "ensure" that the road network will be able to operate safely and efficiently.

<sup>242</sup> HAZ Objective 1 and HAZ Policy 6 in terms of avoiding or mitigating effects of natural hazards to people, property and the environment and the use of SH3 for essential services (in particular through to Waikato Hospital).

<sup>243</sup> Objective 12 and Policy 12.1 whereby the Project will "ensure" enhanced resilience and reduce the effects of natural hazards on SH3, a strategic roading corridor and connection.

<sup>244</sup> Consistent with CCH Objective 1 the Project will avoid, remedy or mitigate adverse effects arising from climate change through its resilient nature.



reduction in CO<sub>2</sub> emissions from vehicles travelling the route as compared to the existing route.

- (e) Tangata whenua values and cultural heritage: the Transport Agency's engagement with Ngāti Tama has been consistent with the statutory planning provisions that address tangata whenua values.<sup>245</sup> Through agreeing not to use its PWA powers the Transport Agency has recognised and provided for the relationship of Ngāti Tama with its land and supported the protection of iwi land.<sup>246</sup> In particular, the Transport Agency has taken into account the principles of the Treaty of Waitangi, including recognition of Ngāti Tama tikanga, the spiritual relationship that tangata whenua have with the environment and acknowledgement of Ngāti Tama's rangātiratanga and kaitiaki responsibilities in relation to the Project.<sup>247</sup> Finally, in relation to freshwater, cultural and spiritual values have been recognised, and mitigation measure provided (in particular improved fish passage provisions and removal of 2 permanent culverts).<sup>248</sup>
- (f) Biodiversity and water quality: The Restoration Package has been developed to appropriately address the significant unmitigated effects of the Project on biodiversity values. Mr Inger, in his evidence on behalf of DOC lists the consistent themes of the relevant planning provisions in relation to ecology and all his list have "*maintaining and enhancing*" as the objective and policy intention.<sup>249</sup> The implementation of the Restoration Package, and its no net loss / net gain outcomes, is consistent with the biodiversity objectives and policies in the RPS,<sup>250</sup> Regional Plan and NPDP.<sup>251</sup> In relation to freshwater the Project will "*maintain and enhance*" surface water quality,<sup>252</sup> and the life supporting capacity of freshwater will be safeguarded,<sup>253</sup> especially in light of the high existing sediment loads reflecting the underlying papa mudstone geology. Fish passage will be provided through suitable, for the

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<sup>245</sup> RPS KTA Objectives 1 and Policy 1 in relation to "*having particular regard to*" kaitiakitanga and how it can be (and has been) integrated into the Project.

<sup>246</sup> In accordance with RPS REL Objective 1 and REL Policy 1 (noting too consistency with REL Policies 3, 5 and 7).

<sup>247</sup> In accordance with RPS CSV Objective 1 and Policy 1 (see also the Regional Freshwater Plan, Policy 4.1.5).

This is also consistent with TOW Objective 1 and its Policies 1-2. The Project is also in this way consistent with Objective 19 of the NPDP as it "recognises and provides for" cultural and spiritual values in a manner that respect and accommodates tikanga Māori.

<sup>248</sup> The Project achieves the as "*far as is practicable*" requirement of Regional Freshwater Plan, Policy 4.1.1. See also Policy 4.1.2 in relation to mahinga kai. In relation to incorporating customary knowledge the whole Project design has been, and will continue to be shaped by Ngāti Tama and they have been influential in assisting with the development of the restoration Package in line with Policy 4.1.5.

<sup>249</sup> Evidence of Mr Inger, paragraph 6.32.

<sup>250</sup> See for example RPS BIO Objective 1, and of fundamental importance BIO Policy 2 that requires adverse effects on indigenous biodiversity to be avoided, remedied or mitigated "as far as is practicable" and BIO Policy 7 which requires in the maintenance and enhancement of indigenous biodiversity consideration will be given to the social and economic benefits of appropriate use and development of resources. Further, the Project will use local genetic stock for re-planting, consistent with BIO Policy 8.

<sup>251</sup> Objective 16, to sustainably manage, and enhance where practicable, indigenous vegetation and habitats.

<sup>252</sup> Consistent with RPS WQU Objective 1 and Regional Freshwater Plan, Policy 3.1.4 (and adverse effects will be avoided "as far as practicable", remedied or mitigated in line with this policy).

<sup>253</sup> Consistent with the Regional Freshwater Plan, Policy 3.1.3. The Project is also consistent with Policy 5A.1.1 and 5A1.2.

catchment affected, provision of fish passage.<sup>254</sup> Further, the proposed riparian planting will, in addition to improving stream habitat, create effective buffer zones and reduce contaminants entering water.<sup>255</sup>

- (g) Natural features, landscapes and amenity: The Project has avoided outstanding natural features and landscapes. There will be landscape effects, but those effects will be mitigated, and the Project has appropriate regard to the relevant landscape, natural feature and amenity objectives and policies in the statutory planning instruments.<sup>256</sup>

228. Mr Dixon's overall conclusion, and the Transport Agency's position, is that the Project is consistent with the outcomes sought by the statutory planning instruments. This conclusion is consistent with the NPDC Section 42A Report which states:<sup>257</sup>

*"Overall, I conclude that Mt Messenger Bypass is not in conflict with or opposed to the outcomes sought by the instruments to which we are required to have particular regard to, such that confirmation of the NoR should be precluded. The application of the mitigation hierarchy by the RA, and the measures proposed within the application documents, has resulted in a proposal that is largely consistent with many of the instruments in question."*

229. Mr Dixon's conclusion is also consistent with the TRC Section 42A Report that states:<sup>258</sup>

*"In summary, with appropriate and effective offsetting, granting these applications as recommended is consistent with the RPS, and Regional Plans. The offsetting of effects enables activities to occur in a manner which promotes sustainable management."*

## **OTHER MATTERS**

### **National, regional and local policy documents that support the Project**

230. There are a number of national, regional and local level policy documents that lend support to the improvement to this section of SH3 that the Project will deliver.<sup>259</sup>

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<sup>254</sup> Consistent with Regional Freshwater Plan, Policy 6.6.2. In relation to structures in waterways the Project is consistent with the requirements of Policy 6.6.9 which the Commissioner has to consider.

<sup>255</sup> Consistent with RPS WQU Policies 1-3. It is also consistent with BIO Objective 1, and its policies (see footnote above).

<sup>256</sup> Consistent with RPS NFL Policies 2 and 3 (there are no outstanding natural features or landscapes affected). The Project is also consistent with NPDP Policy 4.5, Objective 14 and Policy 14.2.

<sup>257</sup> Paragraph 346.

<sup>258</sup> Paragraph 313.

<sup>259</sup> See Section 11 (Table 11.2) of the AEE. See also paragraphs 349 – 353 of the NPDC Section 42A Report.

231. Mr McCombs includes in his evidence an analysis of the Project against the draft (2018) Government Policy Statement on Land Transport, as well as the Regional Land Transport Plan for Taranaki 2015/16 - 2020/21.<sup>260</sup>

232. Mr Dixon refers in particular to:

- (a) "Tapuae Roa: Make Way for Taranaki": Taranaki Regional Economic Development Strategy (August 2017), which identifies improvement of Taranaki's northern gateway as a "*one-off regional game-changer*";
- (b) The Taranaki Regional Council Long Term Plan 2015-2025;
- (c) Regional Land Transport Plan for Taranaki 2015-2021;
- (d) New Plymouth District Council Long Term Plan 2015-2025; and
- (e) New Plymouth District Council Economic Development Strategy 2014-2024.

233. The NPDC Section 42A Report records that the strategic importance of the Project route is identified in the TRC Long Term Plan 2015-2025 and the NPDC Long Term Plan 2015-2025.<sup>261</sup>

234. Mr Dixon also refers to the key directions in the NPDC Long Term Plan 2015 - 2025 that are relevant to the Project.

### **2018 Fish Passage Guidelines**

235. The "*New Zealand Fish Passage Guidelines for Structures up to 4 Metres*" ("**Fish Passage Guidelines**"), were published in April 2018. Mr McEwan explains that a process of considering and refining the design of a number of freshwater structures was followed after the Transport Agency's evidence in chief was filed on 25 May, primarily in response to the Fish Passage Guidelines and to improve fish passage.

236. Mr McEwan's evidence, and the Supplementary Evidence of Mr Hamill, make it clear that careful attention has been given to the Fish Passage Guidelines. However, counsel note that the Fish Passage Guidelines do not set requirements that must be strictly 'complied with' in an RMA process. They do not have the weight of regulations, and are not part of the planning policy framework.

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<sup>260</sup> See paragraphs 145 – 154 of Mr McCombs' EIC.

<sup>261</sup> At paragraph 353.

## PART F CONSIDERATION OF ALTERNATIVES AND WHETHER THE ALTERATION TO THE DESIGNATION IS REASONABLY NECESSARY FOR ACHIEVING THE TRANSPORT AGENCY'S OBJECTIVES

237. In considering the NoR, the Commissioner is required to have particular regard under section 171(1)(b) to:

*"whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work, if:*

*(i) the requiring authority does not have an interest in land sufficient for undertaking the work; or*

*(ii) it is likely that the work will have a significant adverse effect on the environment".*

238. Under section 171(1)(c) the Commissioner is required to have particular regard *"whether the work and [alteration to the] designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought."*

### CONSIDERATION OF ALTERNATIVES

239. The Transport Agency as requiring authority is required under section 171(1)(b) to go through a properly informed process of considering alternative options for the Project before making a decision as to what form the Project will take. For highway projects that process tends to focus primarily on alternative routes (with methods also being relevant),

240. The Commissioner's role under section 171(1)(b) is to enquire into the process followed by the Transport Agency in considering alternatives. The High Court has summarised the decision-maker's duty under section 171(1)(b) as follows:<sup>262</sup>

*"[It] is essentially an examination of the processes and consideration adopted by the requiring authority, and the exercise of a judgment by the territorial authority or the Court as to whether that consideration has been, in its view, adequate."*

241. Overall, what constitutes *"adequate consideration"* is a broad issue involving questions largely of fact rather than law.<sup>263</sup> Earlier RMA case law often set out that the term *"adequate consideration"* does not set a particularly high standard.<sup>264</sup>

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<sup>262</sup> *Waikanae Christian Holiday Park v Kapiti Coast DC* (CIV-2003-485-1764, HC, Wellington, 27/10/04, McKenzie J), at paragraph 129.

<sup>263</sup> *Nelson Intermediate School v Transit NZ* (2004) 10 ELRNZ 369 ("**Nelson Intermediate**").

<sup>264</sup> For example, in *Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at paragraph 153, the Court held that: *"adequate" does not mean "meticulous". It does not mean "exhaustive". It means "sufficient" or "satisfactory". Indeed one of its definitions in the Oxford English Reference Dictionary (1996) is "barely sufficient" – a definition we do not intend to follow because it does not accord with the*

242. More recent High Court case law has established that what is required to demonstrate that there has been adequate consideration of alternatives will be "very much circumstances dependent".<sup>265</sup> In particular, the extent of the effects the proposal will have on the environment,<sup>266</sup> and the effects on private property,<sup>267</sup> are key factors.
243. Having said that, it is important to note that the "adequate consideration" standard does not require the Transport Agency to demonstrate that it has considered all possible alternatives, or that it has selected the 'best' of all the available alternatives.<sup>268</sup> Importantly:
- (a) the choice of site, route, or method of the work remains the Transport Agency's to make, and that decision is not subject to challenge under the RMA;<sup>269</sup> and
  - (b) in making its choice, the Transport Agency was required to have particular regard to the information obtained through its alternatives assessment, but was not obligated to choose the 'best' option.<sup>270</sup>
244. The Transport Agency's process of considering alternative options for the Project has been meticulous and thorough. This approach recognises the fact that the Project will have significant (before mitigation, offsetting and compensation) effects on the environment, and that the Project requires a reasonably large area of private land, including land returned to Ngāti Tama via the Treaty settlement process. In other words, this is a situation where the case law suggests that a careful assessment of alternative options was required by the Transport Agency.
245. That alternatives process was centred on (but not determined solely by) a two-stage MCA process carried out in 2017, led by Mr Roan.<sup>271</sup> Key features of that MCA process included:
- (a) It being a two-stage process, with a long-list of options evaluated, which then led to a short-list of options being developed and assessed;
  - (b) A range of assessment criteria were applied, having been developed to take into account key RMA matters and the Project objectives;

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*general thrust of judicial authority. It does, however, support the concept that a District Council is not required to go to unreasonable lengths to support a chosen route or site for a particular public work."*

<sup>265</sup> *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 ("**Basin decision**"), [142].

<sup>266</sup> *Basin decision* at [142].

<sup>267</sup> *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [121] and [122].

<sup>268</sup> *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZRMA 477 (HC), at [81].

<sup>269</sup> *Basin decision*, at [178], [125] and [185].

<sup>270</sup> *Basin decision*, at [207]; *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477, at [81]; *Quay Property Management Pty v Transit NZ* (EnvC, W028/00); *Beda Family Trust v Transit New Zealand* (A139/2004, 10 November 2004) at [57].

<sup>271</sup> Refer to the EIC of Mr Roan on Assessment of Alternative options for the details.

- (c) The options were assessed by subject-matter experts, including at two-day MCA workshops for both the long-list and short-list stage and through the preparation of reports;
- (d) The options were scored against a specific and consistent scoring matrix to allow for comparison and analysis; and
- (e) Mr Roan analysed the total 'raw' scores for each option, applied weighting systems, and set out an overall analysis in longlist and shortlist MCA reports.

246. Following the shortlist MCA process, further refinement of the shortlisted options was considered and cost estimates were prepared. The Transport Agency then received and considered all of this information, and determined that it would take forward shortlist 'Option E' as the Project option.

247. The Transport Agency's position is that its consideration of alternatives was robust (and certainly "*adequate*"), and that the choice of Option E was a reasonable one. The NPDC reporting officer records that she is "*satisfied with respect to what*" section 171(1)(b) requires, having (correctly) noted that "*it is not the Council's role to state whether we agree with the option selected, rather to consider whether adequate consideration has been given to alternatives*".<sup>272</sup>

#### **REASONABLE NECESSITY FOR ACHIEVING THE PROJECT OBJECTIVES**

248. Section 171(1)(c) requires an assessment of whether the Project and alteration to the designation are "reasonably necessary" for achieving the Transport Agency's objectives for the Project. The Transport Agency's Project objectives are set out above.

249. The term "*reasonably necessary*" has often been applied as falling between expedient or desirable on the one hand, and essential on the other.<sup>273</sup>

250. However, section 171(1)(c) does not require, or allow for, an assessment of whether the selected form of the Project is the "best" way of achieving the objectives. The High Court has held that:<sup>274</sup>

*"to elevate the threshold test to "best" site would depart from the everyday usage of the phrase "reasonably necessary" and significantly limit the capacity of requiring authorities to achieve the sustainable management purpose [of the RMA]. If that was the intention of Parliament then I would have expected express language to that effect*

<sup>272</sup> This conclusion is restated in the supplementary NPDC Section 42A Report at paragraph 4.

<sup>273</sup> *Gavin Wallace v Auckland Council* [2012] NZEnvC 120; *Re Queenstown Airport Corp Ltd* [2012] NZEnvC 206. Referred to as the "*orthodox approach*" in *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2013] NZHC 2347 at 94.

<sup>274</sup> *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2013] NZHC 2347 at 96

*(as it has done in relation to s 16 and the duty to use the "best" practicable option for noise mitigation).*"

251. In particular, section 171(1)(c) is not an opportunity to re-examine the Transport Agency's analysis of alternative options for the Project; the enquiries under sections 171(1)(b) and 171(1)(c) are separate. To that end, the Environment Court in *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46 was critical of an opponent of an NoR who sought to "[enlarge] upon the examination of the alternative sites through the vehicle of s171(1)(c)...".<sup>275</sup>
252. The NPDC Section 42A Report appears to conflate the section 171(1)(b) and (c) enquiries. Ms McBeth sets out her view that the Transport Agency has not clearly demonstrated why it did not select an 'online' route (Option Z in the short-list MCA process), and states that she therefore has "*reservations over whether section 171(1)(c) has been satisfied.*"
253. In any event, the issue flagged by Ms McBeth now appears to have been resolved. Following the lodgement of the Transport Agency's evidence in chief (which provides further detail in response to the Section 42A Report), Ms McBeth confirmed to Mr Roan that she accepts the basis for the Transport Agency's selection of Option E as its preferred option; that conclusion is now formally recorded in the supplementary NPDC Section 42A Report.<sup>276</sup>

#### **Proposed works reasonably necessary to meet the Project objectives**

254. The proposed works (ie the Project) are reasonably necessary to achieve the objectives of the Transport Agency, and to deliver the key benefits outlined above in terms of:
- (a) enhanced safety of travel on this section of SH3;
  - (b) enhanced resilience of this section of SH3;
  - (c) greater journey time reliability, including through avoiding reliance on alternative, much longer routes in the event of a disruption;
  - (d) reduced overall journey times;
  - (e) enhanced connectivity of people and freight; and
  - (f) enhanced local and regional economic growth and productivity for people and freight.
255. It would be very difficult to deliver these benefits, and therefore to achieve the Project objectives, without this Project to upgrade the Mt Messenger section of SH3.

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<sup>275</sup> [2017] NZEnvC 46 at [27].

<sup>276</sup> At paragraph 2.

### **Designation reasonably necessary to meet the Project objectives**

256. The use of a designation (or, in this case, an alteration to a designation) as a planning tool for the Project is reasonably necessary to achieve the Transport Agency's objectives. Designations are preferable to (land use) resource consents as a means of authorising the construction, operation and maintenance of the Project, because designations:

- (a) are more appropriate for large infrastructure projects that extend across a wide area (such as roads or transmission lines);
- (b) are shown in the district plan, and therefore alert the public to the Project's existence;<sup>277</sup> and
- (c) prevent others from doing anything in relation to land subject to the (altered) designation that would prevent or hinder the Project.<sup>278</sup>

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<sup>277</sup> Section 175 RMA.

<sup>278</sup> Section 176(1)(b) RMA.



## **PART G CONDITIONS**

258. Section 108 provides that the Commissioner may impose conditions on the resource consents; section 171(2)(c) provides that the Commissioner may recommend that the Transport Agency impose conditions on the altered designation. Conditions are an important means for ensuring that effects are managed appropriately through the construction and operational phases of the Project.
259. The Transport Agency has proposed a robust set of conditions for the altered designation and for the resource consents, as explained and presented in the evidence of Mr Roan. Central to the Transport Agency's proposed set of conditions is the detailed suite of management plans, most of which have been developed in full for consideration by the Commissioner through the hearing process. As is normal, the conditions will be refined during the hearing and an updated set of conditions will be provided with written closing submissions.

### **GENERAL PRINCIPLES**

260. Section 108 enables conditions to be imposed on the NoR and consents but 108AA states (as is relevant):

*" (1) A consent authority must not include a condition in a resource consent for an activity unless—*

*(a) the applicant for the resource consent agrees to the condition; or*

*(b) the condition is directly connected to 1 or both of the following:*

*(i) an adverse effect of the activity on the environment;*

*(ii) an applicable district or regional rule, or a national environmental standard; or*

*(c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent."*

### **MANAGEMENT PLANS**

261. Management plans commonly form part of the conditions framework for designations and resource consents for large projects, as they provide a means for appropriately managing construction effects through the subsequent construction and operational phases of a project.
262. The 'standard' approach to management plans is that draft management plans – often quite skeletal – are developed in advance of the hearing. Conditions are then imposed that:

- (a) Specify in detail what the fully developed management plans must address, and the environmental outcomes that must be achieved;
- (b) Require the requiring authority or consent holder to develop the draft management plan so as to meet the parameters set out in the conditions; and
- (c) Provide for the relevant local authority to 'certify' that the fully developed draft management plans meet the parameters set out in the conditions.

263. When management plans are utilised (as occurs in nearly every larger project) conditions are important to ensure the management plan regime is to operate properly. Conditions should contain quantifiable standards and performance criteria against which proposed management plans can be assessed and subsequent operation of the management plans can be measured.<sup>279</sup>

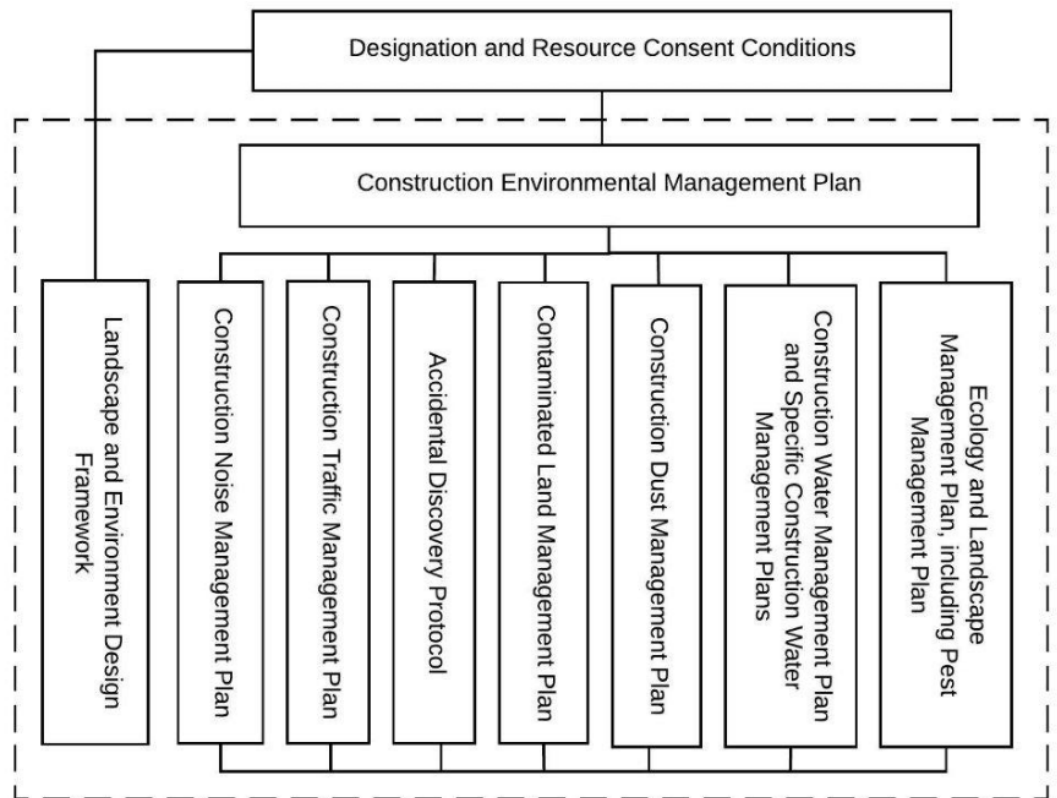
264. However, in this case, the management plan process has advanced well beyond the detail normally available at this stage. As mentioned above, this is due to the Alliance model involving the construction team in consenting design development meaning far greater detail can be provided.<sup>280</sup> This is of benefit as it provides submitters, the Councils and the Commissioner with greater certainty as to the overarching principles, methodologies and procedures for managing and mitigating/offsetting/compensating the effects of constructing the Project to achieve the environmental outcomes and performance standards required by the proposed conditions.

265. As set out in the evidence of Mr Roan, the management plan structure is below.

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<sup>279</sup> *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal*, at paragraphs [186 – 187].

<sup>280</sup> Mr Roan EIC, paragraphs 191 and 192.



266. As the management plans, except for some of the SCWMPs, have been prepared the Transport Agency seeks that they are finalised and confirmed by the Commissioner. Therefore, for those plans approved by the Commissioner, the Councils do not have a certifier role (unless later changes occur to the plans). NPDC in its Section 42A Report sought to retain this certifier role, however this appeared to be more related to the detail of the plans at that time as opposed to the approach sought by the Transport Agency.<sup>281</sup> However, NPDC's updated report dated 30 July makes it clear this concern is no longer held (though the Council Officer considers the current plans are not ready to be approved as final).<sup>282</sup>

## UPDATED CONDITIONS

267. To assist the Board, the Transport Agency has prepared an updated set of conditions which are proposed to be attached to the NoRs and consents. The latest iteration of the proposed conditions is attached to Ms Roan's rebuttal evidence. Like with the management plans the conditions will be revised during the hearing and a final set will be provided with closing submissions.

268. Mr Roan's evidence-in-chief and rebuttal evidence explain the approach to conditions and the various iterations which have been developed, in response to submissions, submitter evidence, consultation and engagement since submissions and the Section 42A Reports.

<sup>281</sup> Paragraphs 318 and 320.

<sup>282</sup> Paragraphs 26 and 27.

269. The structure of the conditions is discussed in Mr Roan's EIC. For the resource consents, general conditions are placed at the front, followed by more specific matters. For the NoR conditions a similar structure is followed but all in the one condition set.
270. As always conditions (and management plans) are critical and the Transport Agency's experts have put considerable effort into them. The Section 42A Reports (and their updated Reports) contain numerous comments on matters that could be addressed through conditions. The suggests proposed in the original Section 32A Reports have been either incorporated into the proposed conditions (for example the inclusion of a Kaitiaki Forum Group<sup>283</sup>) or have been responded to through the Transport Agency's experts' evidence.
271. As set out in the updated s42A Reports, there remain matters for which the Councils seek additional conditions (and changes to what is proposed). As these reports were received less than 24 hours before these legal submissions were due a full assessment of them has yet to occur. However, the Transport Agency's witnesses will orally address matters relevant to their expertise and, if necessary, further evidence will be provided. To the degree the Transport Agency accepts any proposed conditions they will be included in a finalised condition set as proposed by the Transport Agency and attached to the written closing submissions.
272. However, overall, with what the Councils consider to be appropriate provisions addressing their key concerns through conditions, the designations<sup>284</sup> and consents<sup>285</sup> can be granted. This illustrates the usual important role of conditions (and management plans).
273. In his Rebuttal Evidence<sup>286</sup> Mr Roan repeats his opinion that the conditions clearly articulate the key performance targets required to lock in and ensure delivery of the outcomes central to avoiding, remedying, mitigating, offsetting and compensating for the effects of the Project. In particular Mr Roan considers that the conditions set the key parameters and the management plans set out the methods to be used to achieve those parameters. In his Rebuttal Evidence<sup>287</sup> Mr Roan also addresses the dispute process conditions for the management plans and maintains his position that the process proposed is common place (he provides examples) and appropriate.

## **LAPSE AND TERM**

274. The term sought for the regional council consents is 35 years which TRC supports. Given the extensive steps to avoid, remedy, mitigate, offset and compensate the various adverse effects, and the significant positive effects of the Project, a full 35 year term is appropriate (and no party seeks a shorter

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<sup>283</sup> Designation conditions 4 and 4(a) and consent conditions

<sup>284</sup> NPDC Section 42A Report, paragraph 384.

<sup>285</sup> TRC Updated Section 42A Report, 30 July 2018, paragraph 19.

<sup>286</sup> Paragraph 8.

<sup>287</sup> Paragraph 23. This issue has also been raised by TRC in its Updated s42A Report.

term), As noted in the TRC Section 42A Report, regional land use consents can be granted in perpetuity. The Transport Agency considers that would be appropriate in this case.

275. In relation to lapse period TRC considers the default lapse period of 5 years to be appropriate. The Transport Agency sought a lapse date of 10 years.<sup>288</sup> It is submitted that given the scale of the Project, its cost, and its significance to the region utilising the standard 5 year lapse period fails to achieve sustainable management. While it is intended to get on and construct the Project, the funding for the Project could be delayed given the competing demands on the Land Transport Fund. It makes sense given the Projects significance that when the funding starts align the Project is ready to be constructed. Further, as far as Council is aware, no submitter has sought a shorter lapse period.
276. In terms of the 10 year lapse for the alteration to the existing designation in the AEE, as the NoR is to vary an existing designation there is no statutory ability to impose a lapse period.<sup>289</sup> This makes sense as the designation is already in existence. Therefore, no lapse period can be imposed on the NoR.

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<sup>288</sup> Mr Roan EIC, paragraph 285.

<sup>289</sup> This issue is raised at paragraph 254 of Mr Roan's EIC. Section 181(2) does not incorporate s184 which sets the lapse period for a designation.

## PART H PART 2 RMA ASSESSMENT

277. The Transport Agency's case as it relates to Part 2 is set out below.

278. The overriding purpose of the RMA is to "*promote the sustainable management of natural and physical resources*". Sustainable management is defined in section 5(2) of the RMA and is discussed in more detail below.

### "SUBJECT TO PART 2"

#### Traditional approach

279. Until recently, the Courts have taken an "overall broad judgement" approach in considering applications for resource consent as well as notices of requirement, assessing the application against the relevant planning instruments, and then stepping back to consider the application against the matters in Part 2.

280. This conventional approach was described by the Environment Court in *North Shore City Council v Auckland Regional Council*.<sup>290</sup>

*"The method of applying section 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome."*

281. However, in a number of recent cases, the Courts have re-considered how Part 2 should be applied in decision-making processes under the RMA. These cases have arisen following the Supreme Court's reasoning in *King Salmon*, as to how decision-makers should apply Part 2 of the RMA in a plan change context.

#### Post King Salmon case law

282. The High Court in *New Zealand Transport Agency v Architectural Centre Inc*<sup>291</sup> ("**Basin Bridge**") considered the implications of *King Salmon* in the context of a notice of requirement application. The High Court distinguished *King Salmon* on the basis that section 171 of the RMA requires a different approach to that taken in a plan change context. The Court cited with approval the following passage from the Board of Inquiry's findings:<sup>292</sup>

*"Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being subject to Part 2. We accordingly have a specific statutory*

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<sup>290</sup> [1997] NZRMA 59 (EnvC) at page 46. Derived from the often-cited High Court decision in *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 about the open nature of the language of Part 2.

<sup>291</sup> [2015] NZHC 1991.

<sup>292</sup> *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [118]. This approach has been applied by the Environment Court to designations, see for example *Queenstown Airport Corporation Limited* [2017] NZEnvC 46, at [68].

*direction to appropriately consider and apply that part of the Act in making our determination."*

283. In the context of resource consents, the findings in *King Salmon* and *Basin Bridge* were considered by the Environment Court and the High Court in *RJ Davidson Family Trust v Marlborough District Council* ("**Davidson**").<sup>293</sup>
284. In its decision the Environment Court questioned the accuracy of the findings in *Basin Bridge* as to the role of Part 2 in decision-making processes.<sup>294</sup> The Environment Court instead considered that the phrase "subject to Part 2" does not give a specific direction to apply Part 2 in all cases, but only in certain circumstances (as set out in *King Salmon*).<sup>295</sup>
285. On appeal, the High Court agreed with the findings of the Environment Court, stating that the reasoning in *King Salmon* applies to section 104(1) because the relevant provisions of the planning documents have already given substance to the principles in Part 2. Referring to *King Salmon*, the Court agreed that reference should only be made to Part 2 where there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents.<sup>296</sup>

#### **Application of the case law to this Project**

286. Following the High Court decisions in *Basin Bridge* and *Davidson*, the current position is that:
- (a) the Commissioner is required to apply the traditional 'overall broad judgment' approach in respect of the NoR; but
  - (b) the Commissioner should only refer back to Part 2 if there is invalidity, incomplete coverage or uncertainty of meaning in the planning documents in respect of the resource consents.<sup>297</sup>
287. Given the nature of the Project, including the range of effects and relevant plan provisions that are engaged, the assessment of the NoR will in practice be very similar to the assessment of the resource consents. The Commissioner will in our submission need to carry out a weighting of relevant factors, with proper regard to any directive policies and nuances of policy. However, as set out above, the Project is consistent with the relevant objectives and policies in the relevant policy and planning documents. Therefore, the outcome of the two processes are, it is submitted (the Part 2

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<sup>293</sup> [2016] NZEnvC 81 and [2017] NZHC 52. The application was initially heard by the Environment Court, which declined the application. That decision was appealed to the High Court and was further appealed to the Court of Appeal whose decision is awaited.

<sup>294</sup> As well as *KPF Investments Ltd v Marlborough District Council* [2014] NZEnvC 152, an earlier decision regarding resource consent applications.

<sup>295</sup> [2016] NZEnvC 81 at [259].

<sup>296</sup> [2017] NZHC 52 at [76].

<sup>297</sup> It might be argued that this distinction is difficult to reconcile with the similarity in wording between sections 104 and 171 of the RMA; counsel note that the decision of the High Court in *Davidson* is currently under appeal to the Court of Appeal.

reasons being set out below) both that the NoR can be confirmed and the consents can be granted (subject to conditions) irrespective of which process is adopted to get there.

## **SECTION 6            MATTERS OF NATIONAL IMPORTANCE**

288. Section 6 provides that the Commissioner shall, in achieving the sustainable management purpose under section 5, recognise and provide for the matters of national importance set out in that section. The matters relevant to the Project are addressed below.

### **Section 6(a)**

*"the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins"*

289. The Project appropriately reflects and preserves the natural character of the coastal environment, wetlands, lakes, rivers and their margins as set out in the evidence of Mr Ridley, Mr Hammill, Dr Neale and Mr MacGibbon. In particular the Project has been designed to avoid Parininihi (through option selection) and the Mimi Wetland (both by the use of a bridge and shifting its alignment uphill) and through the Mangapepeke Valley effects on the natural character of the stream have been reduced by the road hugging the valley side away from the stream. Mitigation measures, including fish passage provisions, swamp forest replanting and extensive riparian planting, will further reduce effects on natural character (and enhance it long-term<sup>298</sup>).

290. Mr Lister's EIC is that adverse natural character effects will be 'moderate' but there will also be some positive natural character effects.<sup>299</sup> Mr Dixon's opinion is that the Project mitigates effects on natural character but that residual effects are unavoidable<sup>300</sup> and it is submitted, and addressed in TRC's Section 42A Report,<sup>301</sup> that offsets/compensation through the Restoration Package will appropriately address that. Mr Inger's evidence appears to be that because the project will have unavoidable effects on natural character preservation will not be possible. However, the requirement is not an absolute no effects one and Dr Neale's evidence is clear as to the suitability of the riparian planting offsetting (and its additional benefits). Further, it has to be assessed against the values being protected and the appropriateness of the Project against those values. It is submitted that overall, with the mitigations and Restoration Package proposed, it is submitted that the Project recognises and provides for this provision.

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<sup>298</sup> NPDC's Section 42A Report states at paragraph 357 that over time adverse effects on natural character will be "somewhat remedied."

<sup>299</sup> Mr Lister EIC, paragraph 72.

<sup>300</sup> Mr Dixon EIC, paragraph 58.

<sup>301</sup> Paragraphs 247 and 250.



### **Section 6(b)**

*"the protection of outstanding natural features and landscapes"*

291. The Project does not affect any outstanding natural features or landscapes.<sup>302</sup>

### **Section 6(c)**

*"the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna"*

292. As set out in the ecology effects section above, the Project area contains high quality indigenous biodiversity although diminished from its potential by pests and livestock. The Project, through site section avoids the more ecologically significant Parininihi area and the Mimi Wetland. Without mitigation the Project has significant adverse ecological effects

293. Mr Inger's evidence appears to be that because the Project will have unavoidable effects on significant vegetation and habitats preservation will not be possible (he fails to mention the present likely declining state of indigenous biodiversity (especially kiwi and bats)). Again, the requirement is not an absolute no effects one and has to be assessed against the values being protected (here though high of lesser quality and no SNAs are affected) and the appropriateness of the Project against those values.

294. . However, as set out above, with the extensive mitigation and Restoration Package<sup>303</sup> proposed as a core part of the Project, the Transport Agency's expert ecologists consider that effects have been appropriately mitigated and will provide a long-term net biodiversity benefit. On this basis it is submitted that the Project appropriately recognises and provides for this provision.

### **Section 6(d)**

*"the maintenance and enhancement of public access to and along rivers"*

295. The Project will not alter existing public access to waterways but through the provision of access ways, and car parking, for local tracks (such as Kiwi Track) will ensure safer access to such areas.<sup>304</sup>

### **Section 6(e)**

*"the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga"*

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<sup>302</sup> AEE Section 9.9 and NPDC Section 42A Report, paragraph 357.

<sup>303</sup> TRC's Section 42A Report addressees offsetting in relation to s6(c) at paragraph 255. NPDC's Section 42A Report also relates its assessment against the suitability of the offset mitigation package at paragraph 357.

<sup>304</sup> Mr Dixon EIC, paragraph 58 and TRC Section 42A Report, paragraph 256. NPDC's Section 42A Report talks about potential enhancement through a walkway etc. The Project will enhance safe access to existing walkways.

296. This provision is covered in detail in the cultural effects section above. Significant engagement has occurred with Ngāti Tama. Through that engagement and its CIA the relationships with section 6(e) matters are well understood. As also explained above, significant effort has been put into avoiding, mitigating and compensating for adverse cultural effects. Mr Carlyon raises issues on behalf of Te Korowai in relation to this provision which are, it is submitted, fully addressed above.<sup>305</sup> In this case, the Transport Agency's position that it will not use the PWA to attempt to compulsorily acquire Ngāti Tama's land is specific recognition and protection of section 6(e) values. The significance of this is outlined in Mr White's evidence on behalf of Te Runanga as is the Runanga's support for the Project's RMA approvals being granted. Overall, it is submitted that the project appropriately recognises and provides for this provision.

### **Section 6(f)**

#### *"the protection of historic heritage"*

297. No known historic heritage will be affected by the Project. In terms of any potential archaeological sites out of an abundance of caution an archaeological authority is being obtained and accidental discovery protocol are proposed.<sup>306</sup> Overall, it is submitted that the Project appropriately recognises and provides for this provision.

### **Section 6(h)**

#### *"the management of significant risks from natural hazards"*

298. This is one of the objectives of the Project. As set out in the evidence of Mr McCombs the current road is vulnerable to closures due to slips etc. As set out in the AEE<sup>307</sup> and the evidence of Mr Symmans, the Project will significantly improve resilience of the route by providing a modern resilient route for SH3 through the Mt Messenger area (with the significant benefits that provides). It will also avoid the significant landslide feature identified along the existing corridor.<sup>308</sup> Overall, it is submitted that the project appropriately recognises and provides for this provision.<sup>309</sup>

## **SECTION 7 OTHER MATTERS**

299. Section 7 provides that the Commissioner shall, in achieving the sustainable management purpose under section 5 of the RMA, have particular regard to the matters set out in that section. The matters relevant to the Project are addressed below.

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<sup>305</sup> He appears to consider that on this basis consent should be declined but no section 6 matter, including 6(e) creates a "veto".

<sup>306</sup> Evidence of Dr Clough and NPDC Section 42A Report, paragraph 357.

<sup>307</sup> Technical Report 3.

<sup>308</sup> Mr Symmans EIC.

<sup>309</sup> This appears consistent with NPDC Section 42A Report, paragraph 357.

### **Section 7(a)**

#### *"kaitiakitanga"*

300. How the Project has had particular regard to kaitiakitanga is set out above (critically, Ngāti Tama have been involved in shaping the Project from the start). In particular through the LEDF (for project design), the ELMP (for the Restoration package) and the KFG, the Project provides active roles for Ngāti Tama throughout the project (and into the future through the Ecological Review Panel).

### **Section 7(aa)**

#### *"the ethic of stewardship"*

301. As mentioned above, the Alliance's motto is to "*tread lightly on the land*" and the LEDF sets out the landscape design principles which reflect that and Mr Boam's evidence explains how the design has also reflected that. The route selection, away from Parininihi and methods to avoid effects (the tunnel and bridges) also reflect the approach to stewardship. Finally, the Restoration Package has been developed through engagement with DOC<sup>310</sup> (and Ngāti Tama) and provides a meaningful, long-term commitment to stewardship of the indigenous biodiversity and its habitats.

### **Section 7(b)**

#### *"the efficient use and development of natural and physical resources"*

302. The Project will provide for the efficient use and development of natural and physical resources by providing capacity to support growth in Taranaki region and improve resilience.<sup>311</sup> The evidence of Mr McCombs is that the Project will significantly improve the existing transport connection through the Mt Messenger area (and with the wider Awakino project and safety improvements the wider SH3 route north). The evidence of Mr Copeland is that the project will provide significant economic benefits<sup>312</sup> with the BCR calculated at a national level (whereby the majority of the benefits are regional and local) with no certainty that if the Project does not proceed any of the money will be spent on SH3, or in the region.

### **Section 7(c)**

#### *"the maintenance and enhancement of amenity values"*

303. For the reasons set out above, and the evidence of Mr Lister on landscape and visual effects, Mr Ellerton on noise, the Dust Management Plan (and other

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<sup>310</sup> Although of course while the approach is accepted the outcomes are not agreed.

<sup>311</sup> AEE page 260. This is supported by the NPDC Section 42A Report but the officer queries whether an online route would be more efficient with reduced effects (however this is not the requirement of the provision). This is addressed through the evidence of Mr Symmans and Mr Roan.

<sup>312</sup> Mr Copeland EIC, paragraph 17.

management plans), Ms Turvey's evidence on social effects and the recreational sections of the AEE<sup>313</sup> it is submitted that particular regard has been had to amenity values and their maintenance and enhancement.<sup>314</sup>

#### **Section 7(d)**

*"intrinsic values of ecosystems"*

304. As already mentioned, this matter has been a key one for the Project since its inception. The ecological effects section above addresses this in detail. While arguments will occur as to whether the Restoration Package is sufficient (based on the Transport Agency's experts it is submitted that it is), it is submitted that the Project has had particular regard to this matter.<sup>315</sup>

#### **Section 7(f)**

*"maintenance and enhancement of the quality of the environment"*

305. The Project will maintain and enhance the quality of the environment for the reasons listed under the other section 6 and 7 headings above. Where there are residual adverse effects on the environment, these are proposed to be offset or compensated through the restoration Package. Again, while arguments will occur as to whether the Restoration Package is sufficient, it is submitted that the Project has had particular regard to this matter.

#### **Section 7(g)**

*"any finite characteristics of natural and physical resources"*

306. Again the Project has had particular regard to this matter through the route selection process (avoiding Parininihi), the bridge over the tributary to the Mimi Wetland, the tunnel and the project design (keeping it low in the landscape). The residual effects of the Project on ecological matters have been appropriately addressed through the Restoration Package. Overall, it is submitted that the Project has had particular regard to this matter.

#### **Section 7(h)**

*"the protection of the habitat of trout and salmon"*

307. The evidence of Mr Hamill sets out fully the efforts proposed to have particular regard to all fish species and their habitats, including trout or salmon should they be present (they are not included on Mr Hamill's species list<sup>316</sup>). Mr Ridley's evidence sets out the extensive erosion and sediment controls in place to appropriately provide for the protection of freshwater habitats from

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<sup>313</sup> Section 9.6.

<sup>314</sup> The NPDC Section 42A Report at paragraph 357 consider that effects on amenity would be appropriately managed in accordance with the management plans.

<sup>315</sup> As accepted in the NPDC Section 42A Report at paragraph 357.

<sup>316</sup> Mr Hamill EIC, paragraph 57.

sedimentation effects. Overall, it is submitted that the Project has had particular regard to this matter.

### **Section 7(i)**

*"the effects of climate change"*

308. As set out above (and see the evidence of Mr Boam and Mr Symmans) the Project is designed to incorporate, and provide increased resilience to, the effects of climate change. (Further, while not relevant to this point, the Project will decrease CO2 emissions.) Overall, it is submitted that it is the Project has had particular regard to this matter.

### **SECTION 8 TREATY OF WAITANGI**

309. Section 8 provides that the Commissioner shall, in achieving the sustainable management purpose under section 5 of the RMA, take into account the principles of the Treaty of Waitangi.

310. As set out above, the Transport Agency has carefully taken Treaty principles into account; they have been at the forefront of the Project with Ngāti Tama involved in a robust and meaningful way as partners from the start.<sup>317</sup> The Transport Agency commitment not to attempt to use the PWA to acquire Ngāti Tama land means Ngāti Tama has the ultimate say as to whether the Project, and its effects (positive and negative) align with its tikanga of mana whenua, kaitaki and Treaty principles. The evidence of Mr White is that retaining the ability to say no recognises and gives supremacy to this tikanga and on that basis Te Runanga resolved to support the RMA approvals being granted.<sup>318</sup>

### **SECTION 5 SUSTAINABLE MANAGEMENT PURPOSE OF THE RMA**

311. It is submitted that the Project will achieve the sustainable management purpose of the RMA.<sup>319</sup> In particular:

- (a) the Project will significantly improve the existing SH3 route over Mt Messenger, making it safer, more efficient and resilient. thereby enabling people and communities to provide for their social, cultural, and economic wellbeing, and for their health and safety;
- (b) the Project will sustain the potential of natural and physical resources to meet the needs of future generations, including the need for an effective SH3 transport route through this area;
- (c) the Project will ensure recognition of, and provision for the tikanga, mana whenua and cultural values of Ngāti Tama;

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<sup>317</sup> See the evidence of Mr Napier and Mr Dreaver.

<sup>318</sup> Evidence of Mr White, paragraphs 37-40. Mr Carlyon in his evidence appears to adopt a different position.

<sup>319</sup> Mr Dixon EIC, paragraph 56.

- (d) the Project will, with the proposed conditions, management plans and Restoration Package safeguard, and in many cases enhance, the life-supporting capacity of air, water, soil, and ecosystems in the Project area;
  - (e) while inevitably there will be residual adverse effects, the Transport Agency has gone to significant lengths to ensure that adverse effects on the are avoided, remedied, mitigated, offset or compensated to an acceptable level (and in a number of cases, for example biodiversity, to achieve a net benefit after 15 years and achieve benefits well in excess of the Project's effects), and the scale and degree of such effects do not outweigh the significant benefits identified; and
312. Mr Inger, in considering Part 2 is of the opinion consent should be declined unless a larger PMA is provided. However, Mr Inger gives scant regard to positive effects,<sup>320</sup> and critically provides no assessment of the relevant positive objectives and policies, nor a full overall statutory assessment (he only assesses selected parts of section 5). It is submitted that Mr Inger's approach to cherry picking provisions, and failing to assess all relevant matters, is inconsistent with the Code of Conduct and his evidence should be given little, if any, weight. Mr Carlyon adopts a similar approach, focusing solely on cultural matters, not mentioning or considering the positive effects, and not undertaking a full planning or statutory provisions assessment. Again, it is submitted that this fails to comply with the Code of Conduct and for the same reasons his evidence should also be given little, if any, weight.
313. The NPDC Section 42A Report concludes that if the Transport Agency can satisfactorily address the key areas of concern then the NoR (and NESCS consent) can be granted.<sup>321</sup> The TRC section 42A Report adopts a similar outcome.<sup>322</sup>
314. Ultimately, the Project presents an opportunity to address the longstanding problem of the transport route through the Mt Messenger section of SH3. The Project as presented addresses that problem in a responsible manner from an environmental, cultural, social and economic perspective. The Transport Agency's efforts to avoid, remedy, mitigate, offset and compensate for the Projects effects have been extensive and unprecedented (scale of the PMA, agreement not to use the PWA). The Transport Agency's experts are all of the opinion that the Projects' effects have been appropriately addressed (and the Project is consistent with the relevant objectives and policies). The Project will achieve the sustainable management purpose of the RMA and, for that reason, the notices of requirement should be confirmed and the resource consent applications granted.

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<sup>320</sup> 3 references in 35 pages

<sup>321</sup> Paragraph 384.

<sup>322</sup> Paragraphs 242 and 313. TRC's Updated Section 42A Report, paragraph 19.

## **PART I EVIDENCE TO BE PRESENTED**

315. The **Appendix** to these submissions identifies the Transport Agency's expert and other witnesses (in the order they are intended to be called, noting what written evidence they have provided).