

**BEFORE**

A Hearing Panel of Commissioners appointed  
by Palmerston North City Council, Manawatū  
District Council and Tararua District Council

**IN THE MATTER OF**

The Resource Management Act 1991

**AND**

**IN THE MATTER OF**

Notices of requirement for designations under  
section 168 of the Act, in relation to Te Ahu a  
Turanga; Manawatū Tararua Highway Project

**BY**

**NEW ZEALAND TRANSPORT AGENCY**  
Requiring Authority

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**OPENING LEGAL SUBMISSIONS ON BEHALF OF  
THE NEW ZEALAND TRANSPORT AGENCY**

**20 March 2019**

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## **MAY IT PLEASE THE HEARING PANEL:**

### **PART A PRELIMINARY MATTERS**

#### **INTRODUCTION**

1. The New Zealand Transport Agency (“**Transport Agency**”) has given notice to Palmerston North City Council, Manawatū District Council and Tararua District Council (“**Councils**”) of its requirement for designations (“**NoRs**”) for the Te Ahu a Turanga; Manawatū Tararua Highway Project (“**Project**”).
2. The hearing of the NoRs marks a significant milestone in the development of the Project, as the Transport Agency continues to work with urgency to open a new road to replace the severed State Highway 3 (“**SH3**”) connection through the Manawatū Gorge.
3. Ending the severe disruption that has been caused by that broken link is an important task, and restoring the connection will make a real difference to the social, economic, and cultural wellbeing of people living on either side of the Ruahine and Tararua Ranges.
4. The Transport Agency is grateful for the opportunity to put its case to the Hearing Panel (the “**Panel**”) and looks forward to the upcoming hearing, and to receiving the Panel’s recommendations.

#### **STRUCTURE OF SUBMISSIONS**

5. These legal submissions for the Transport Agency:
  - (a) explain how this document is structured, and summarise the Transport Agency’s case in an overarching principal submission (**Part A**);
  - (b) set out the background and context to the Project (**Part B**), including:
    - (i) the serious problems that the Project is intended to fix, arising from the closure of SH3 through the Manawatū Gorge;
    - (ii) the Transport Agency’s statutory role and the objectives it has set for the Project;
    - (iii) the collaborative way in which the Transport Agency is trying to deliver this Project for the benefit of all, and key outcomes of that approach; and
    - (iv) the matters before the Panel, ie the NoRs;

- (c) describe the statutory framework for the Panel's consideration of the NoRs and highlight key legal issues arising in this case (**Part C**), including:
  - (i) the purpose and function of designations;
  - (ii) section 171 of the Resource Management Act 1991 ("**RMA**"), which is the key provision for the Panel in evaluating the NoRs;
  - (iii) the purpose and function of outline plans;
  - (iv) issues relating to the Panel's task of considering the effects on the environment of allowing the requirements, including:
    - (1) how to assess effects in the absence of a detailed design;
    - (2) the relevance of the future resource consenting process to considering the NoRs;
    - (3) the 'existing environment' in this case; and
    - (4) whether the current or future condition of the road through the Gorge is relevant to considering effects;
  - (v) the law relating to the consideration of alternatives;
  - (vi) the law relating to the reasonable necessity of the work and designation for achieving the Project objectives;
  - (vii) the Panel's ability to recommend modifications to the requirements, and limitations on that power; and
  - (viii) in light of the statutory context, whether the Panel can recommend that the Transport Agency add elements to the Project such as a dedicated walking and cycling path;
- (d) summarise the key 'environmental effects' issues, on the evidence, for determination by the Panel (**Part D**);
- (e) identify the key planning provisions relevant to the matters in dispute (**Part E**);
- (f) address other matters relevant to the Panel's decision, including the Transport Agency's consideration of alternatives and why the Project and designations are reasonably necessary for achieving the Transport Agency's objectives (**Part F**);
- (g) address the conditions proposed to attach to the designations, if confirmed (**Part G**);

- (h) address the application of Part 2 of the RMA to the proposal (**Part H**);  
and
- (i) provide some concluding remarks and introduce the witnesses for the applicants (**Part I**), a list of whom is annexed as **Appendix A**.

## **PRINCIPAL SUBMISSION**

6. The Transport Agency is seeking to designate land within which a new, high-quality road will be developed to reconnect the Manawatū and Tararua districts and enhance travel around the region and beyond. The Project is a necessary response to a serious set of problems arising from the closure of SH3 through the Manawatū Gorge.
7. The Project represents a significant investment in the region, and the Transport Agency and others are working hard to deliver the Project in the right way. The Transport Agency has set objectives responding to the problems at hand and undertaken a wide-ranging assessment of alternative routes for a new road. It has adopted a strong ethos of collaboration with iwi, local government, and the affected communities as it has devised the Project NoRs, and in the lead-up to this hearing.
8. Many issues have been resolved as a result, thus simplifying the Panel's task in evaluating the NoRs and submissions.
9. There are a number of legal issues to consider, though, some of which stem from the RMA framework that is particular to designations. The Transport Agency has been mindful of those issues as it has developed the NoRs and, again, has sought to resolve potential areas of dispute through conditions that take a fulsome and responsible approach to addressing adverse environmental effects.
10. A particular issue that arises in this case relates to requests that the Project incorporate a shared path along its length. The Project provides new infrastructure for active modes and is future-proofed for a possible recreational path (or paths) for cyclists and pedestrians across the ranges or around the Manawatū Gorge. Ongoing planning for these initiatives needs to be carried out, and in the meantime potentially complicated iwi, environmental, and/or landowner issues could risk delaying the Project's delivery.
11. In a legal sense, a desire for a proposal to realise additional 'opportunities' does not sit comfortably in an RMA framework, where the focus is on avoiding, remedying, or mitigating adverse effects. The Project's benefits are

already compelling, for all transport modes, and extensive measures are proposed to address adverse effects, such that the Project is strongly aligned with the relevant plans and the RMA more generally.

12. As such, the Panel is respectfully requested to confirm the requirements sought, on the conditions proposed by the Transport Agency.

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

### **THE PROBLEMS THAT THE TRANSPORT AGENCY IS SEEKING TO ADDRESS**

13. The background to the Project will be well known to the Panel.<sup>1</sup> It is nonetheless important not to gloss over:
  - (a) the importance of the connection that the Gorge road provided; and
  - (b) the seriousness of the issues that the loss of that route has caused for travellers, the residents of Ashhurst, and many other people and businesses.
14. In simple terms, the closure of SH3 through the Manawatū Gorge has diverted 7,600 vehicles per day (and rising) to alternative routes that are not fit-for-purpose; Saddle Road (in particular) and Pahiatua Track are steep, narrow, and winding roads that are inappropriate for a permanent SH3 connection, in terms of safety, resilience, and efficiency of travel.<sup>2</sup>
15. Unsurprisingly, this diversion has had serious social, economic and environmental impacts on nearby residents and the wider region, including in terms of crashes on the alternative routes.
16. Almost all modes of travel have been affected:
  - (a) Costs to **freight operators** are contributing significantly to estimated direct travel costs (of approximately \$60,000 per day), effects on Gross Domestic Product (\$7 million per annum), lost outputs due to increased freight costs (\$9 million per annum) and lost agglomeration efficiencies (\$5 million per annum).<sup>3</sup>
  - (b) Costs to **other motor vehicle users** make up much of the balance of those estimated costs, and impacts are being felt by regular commuters

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<sup>1</sup> See for example part A of the AEE and the executive summary, the evidence of Sarah Downs (paragraphs 27-37) and David Dunlop (paragraphs 11-16), and Technical Assessment 1 – Transport (see for example paragraphs 54-68).

<sup>2</sup> Technical Assessment 1 – Transport; see for example paragraphs 54-111.

<sup>3</sup> Technical Assessment 1 – Transport; paragraphs 65 and 66.

across the ranges, other people travelling for work or recreation, tourists, and others.

- (c) **Cyclists** have been impacted by the influx of motor vehicles onto the alternative routes they have traditionally used to cross the ranges, and increased safety concerns regarding the Pahiatua Track have led the administrators of Ngā Haerenga / the New Zealand Cycle Trail to warn cyclists off using it.
  - (d) The environment for **pedestrians** using and crossing local roads in Ashhurst has worsened as a result of the Project diverting over 6,000 vehicles daily (more than 10% of them heavy vehicles) through that community and onto Saddle Road.
17. The Transport Agency is currently doing what it can to improve safety in Ashhurst, on Saddle Road, and near Woodville, but these can only be temporary fixes – the Project is needed urgently to provide a lasting solution.

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

18. Fixing the problems arising from the closure of the Gorge road is a very high priority for the Transport Agency.<sup>4</sup> This prioritisation reflects the seriousness of the problems at hand and the Project's strong alignment with the statutory role and objectives of the Transport Agency.
19. As Ms Downs has explained, the Transport Agency's statutory objective under the Land Transport Management Act 2003 ("**LTMA**") is to "*undertake its function in a way that contributes to an effective, efficient, and safe land transport system in the public interest.*"<sup>5</sup> Its functions include constructing and operating the State highway network and investing in public transport and local road networks on behalf of the Crown.<sup>6</sup>
20. In meeting its objective and undertaking its functions, the Transport Agency must exhibit a sense of social and environmental responsibility. This includes avoiding, to the extent reasonable in the circumstances, adverse effects on the environment.<sup>7</sup>
21. The Transport Agency must also use its revenue in a manner that seeks value for money, which is relevant to submissions seeking that other features

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<sup>4</sup> Evidence of Sarah Downs, paragraph 26.

<sup>5</sup> Section 94.

<sup>6</sup> See the Transport Agency's 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 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*".

<sup>7</sup> LTMA, section 96.

be added to the Project (including a separated walking and cycling path along the route).<sup>8</sup>

22. The Transport Agency has been delivering on its responsibilities by:
  - (a) devising Project objectives that stem from the pressing problems occasioned by the closure of the Gorge, relating to improving **resilience, efficiency, and safety**;
  - (b) identifying and evaluating numerous options for the route of a new connection, and selecting a route; and
  - (c) working urgently to progress the Project, with the goal of opening the new road by 2024.
23. An important aspect of these processes has been defining the nature of the Project and the breadth of transport issues that it will address. The Transport Agency's functions and responsibilities extend beyond this Project to the wider land transport network in these regions and elsewhere. Obviously it is not incumbent on the Transport Agency to address all existing transport issues through any one development.
24. Rather, the focus has been on urgently reinstating the severed SH3 connection (and indeed creating a higher-quality connection than was provided by the Gorge road) in a way that does not preclude other improvements to the network in future.<sup>9</sup>
25. Indeed, as discussed further below, the Project is expressly future-proofed for potential recreational walking or cycling paths in or around the Manawatū Gorge Scenic Reserve ("**MGSR**"), and can integrate with a regional ring road around Palmerston North, a potential future bypass of Woodville, and other possible network developments (to the extent that these works align with community plans and priorities in the future).
26. The Project will comprehensively deliver on the Transport Agency's objectives and realise significant social and economic benefits for Manawatū, Tararua, and beyond (a point to which we return later in these submissions).

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<sup>8</sup> LTMA, section 96. The Transport Agency also has a statutory responsibility as a lifeline utility provider under the Civil Defence Emergency Management Act 2002. Its duties include ensuring that lifeline utilities within its control are "able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency" (section 60(1)(a)).

<sup>9</sup> Evidence of Sarah Downs, paragraphs 38-40 and 45-52.



## THE TRANSPORT AGENCY'S APPROACH OF PARTNERSHIP AND COLLABORATION

27. The Transport Agency recognises that working in partnership with iwi and stakeholder organisations, and generally adopting a collaborative approach to developing the Project, appropriately respects the mana and leadership role of its partners, and the wealth of knowledge and information that they and others hold.
28. In practical terms, it will also maximise the prospects of designing and implementing a high-quality piece of new infrastructure in the fastest possible time.
29. The concerted drive by the Transport Agency to foster transparency and teamwork is described in the AEE and in Lonnie Dalzell's evidence.<sup>10</sup>
30. The Transport Agency's witnesses have expressed their gratitude for the leadership shown by iwi and the time and effort invested by iwi representatives, Council officers, submitters, other landowners, technical specialists, and many other people in guiding the Project's development to this point.<sup>11</sup> Considerably more effort and input will be required to bring the Project to fruition, and the Transport Agency expresses its thanks in advance for the support and goodwill of its partners and the people of Manawatū and Tararua.
31. Points to highlight, as relevant to these legal submissions, are as follows:
  - (a) The practices adopted by the Transport Agency for the Project, despite the time pressures, comfortably surpass the normal expectations (and even accepted best practice) for 'consultation' under the RMA.
  - (b) There of course remain a number of legal issues and evidentiary disputes for the Panel to evaluate, identified below. Nonetheless, the approach of partnering and collaboration has directly led to numerous positive outcomes, in terms of narrowing issues and streamlining the hearing process, including the following:
    - (i) Iwi are appropriately central in the Project's development and in the presentation of the Transport Agency's case.
    - (ii) There is a notable absence of submissions expressing concern about issues that are otherwise important considerations for the

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<sup>10</sup> See part F of the AEE and the evidence of Lonnie Dalzell, paragraphs 48 and following.

<sup>11</sup> Evidence of Lonnie Dalzell, paragraphs 48-60; evidence of Sarah Downs, paragraphs 93 and 94.

Panel, including in respect of cultural effects and effects on landscape and natural character.

- (iii) An early 'visioning' process and subsequent hui and workshops have helped develop a Cultural and Environmental Design Framework ("**CEDF**") to guide the Project's design.
- (iv) Proposed conditions (and condition amendments) have been agreed with various submitters or would-be submitters, either partially or fully addressing matters of concern to them. This has allowed various submitters to withdraw from or take a more limited role in the hearing, including Transpower, PowerCo, KiwiRail, and Heritage New Zealand Pouhere Taonga.
- (v) Other aspects of the Project and conditions have been enhanced to respond to submitters' concerns, including in respect of:
  - (1) a new walking and cycling path attached or near to the existing Ashhurst Bridge;
  - (2) a dedicated walking and cycling path from the existing Ashhurst Bridge to the MGSR carpark;
  - (3) a pedestrian facility on the new Manawatū River Bridge (in some form, with the details to be worked through);
  - (4) a walking and cycling connection in Woodville (facilitating part of the future Lindauer Arts Trail);
  - (5) managing effects on the MGSR carpark;
  - (6) managing ecological effects, including protecting ramarama within the designation corridor,<sup>12</sup> revising offset planting environmental compensation ratios ("**ECRs**") to align better with the views of experts for the Department of Conservation ("**DOC**"), and making explicit the precautions relating to nesting dotterels;
  - (7) mitigation of effects on the Te Āpiti Wind Farm and the operations of Meridian Energy Limited ("**Meridian**");
  - (8) mitigation of effects on the field trial site owned by AgResearch Limited ("**AgResearch**"), including as a result of a meeting involving submitters and experts at the field

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<sup>12</sup> The threat classification of ramarama was recently changed as a precautionary measure due to myrtle rust.

trial site itself (and a follow-up meeting regarding mitigation measures in Palmerston North) on 1 March 2019; updated conditions are to be presented by Ainsley McLeod;

- (9) mitigation of noise effects for various specific properties and submitters (including John and Wendy Napier, Murray Ramage, Nick Rogers and Tiffany Wendland, and Barbara Cooke and Nicholas Shoebridge); and
- (10) minimising effects on the open space values of the areas subject to Queen Elizabeth II (“**QEII**”) covenants.<sup>13</sup>

(vi) Transport Agency witnesses were proactive in seeking comment on their survey and assessment methodologies, particularly in respect of landscape, natural character, and ecological matters, leading to a high degree of accord between the experts on these matters (with some exceptions, discussed below) and the assessments undertaken.

(vii) Early conferencing between noise experts identified no fundamental areas or points of disagreement between them,<sup>14</sup> and led to proposed amendments to the relevant designation conditions.<sup>15</sup>

(viii) An ecology mitigation workshop attended by iwi, Councils, and various submitters brought to light additional potential measures that could form part of a package through which the Project will achieve a net biodiversity gain.

(ix) Early conferencing between ecological experts flushed out specific concerns and led to the proposed condition enhancements noted above.

32. These outcomes are a testament to the approach and processes adopted by the Transport Agency, and to the commitment of its partners, submitters, and other entities to those processes, for which the Transport Agency is very grateful.

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<sup>13</sup> Ms McLeod will update the Panel on this matter at the hearing.

<sup>14</sup> Joint witness statement of Dr Stephen Chiles and Nigel Lloyd dated 13 February (Attachment B to the pre-hearing meetings report of 1 March 2019).

<sup>15</sup> The amended conditions were presented through the evidence of Ainsley McLeod.

## THE MATTERS BEFORE THE PANEL

33. The Transport Agency has issued three NoRs for designations to be included in the Councils' respective district plans.
34. The Transport Agency has not sought that the requirement to provide outline plans be waived, and nor has it applied for the regional resource consents that will be required by the Manawatū-Whanganui Regional Council's ("Horizons") One Plan, including for discharges to land and water and the removal of indigenous biodiversity (among other statutory authorisations<sup>16</sup>). These further authorisations will be sought after the detailed design of the Project has been undertaken.
35. The evidence of Lonnie Dalzell for the Transport Agency explains that a desire to open a new road as quickly as possible has underpinned the consenting pathway chosen for the Project.<sup>17</sup>
36. The Transport Agency has long signalled to stakeholders that it would be seeking a designation as a first step to implementing the Project, and this is an entirely lawful and rational consenting path to take.
37. While some participants perceive there to be insufficient certainty in the process, we explain below, by reference to the legal framework and issues arising for determination, how the Panel is perfectly able to evaluate the NoRs and discharge its functions.

## PART C STATUTORY FRAMEWORK AND KEY LEGAL ISSUES

### INTRODUCTION

38. Below we outline the statutory framework for the Panel's consideration of the NoRs and a number of key legal issues to be determined.

### THE PURPOSE AND EFFECT OF DESIGNATIONS

#### Introduction

39. Network utility operators that are "*requiring authorities*" have the power to issue notices of requirement for designations to be included in the relevant

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<sup>16</sup> Other authorisations that are likely to be required include consents under the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011; consents under the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009; requiring authority consents under section 177 of the RMA for works that may prevent or hinder an existing designated project or public work, including from KiwiRail (for crossing the rail corridor designation on the northern bank of the Manawatū River) and Tararua District Council (for works within the designation for the closed Woodville Landfill); and authorisations from the Director-General of Conservation under section 53 of the Wildlife Act 1953 in relation to any protected wildlife. An archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014 is to be sought shortly.

<sup>17</sup> Evidence of Lonnie Dalzell, from paragraph 26.

district plan(s). The Transport Agency is a requiring authority under section 167 of the RMA,<sup>18</sup> and has issued three NoRs to enable the Project.

40. Designations are a standard tool for enabling operation of the State highway network but are less well understood than, for example, more common RMA permissions and processes such as resource consents and plan changes. In case it may assist the Panel and other hearing participants, we discuss briefly below:
- (a) the purpose and legal effect of designations; and
  - (b) some common misconceptions about designations.

### **Purpose and legal effect of designations**

41. Part 8 of the RMA sets out:
- (a) the process for a requiring authority to give notice of its requirement for a designation over private and other land;
  - (b) the process for the requirement to be evaluated;
  - (c) the effect of designations; and
  - (d) associated matters.
42. Designations perform two key functions. First, once confirmed, a council must include a designation in its district plan as if it were a rule,<sup>19</sup> and the designated work is exempted from restrictions that would otherwise apply to the use of land under section 9(3) of the RMA.<sup>20</sup>
43. In simpler terms, a designation means that the requiring authority does not have to obtain the land use consent(s) that it would otherwise need under the relevant district plan(s).
44. In this sense, a designation is similar to 'spot-zoning' in a district plan, which enables particular activities on the relevant land.
45. The other key function of a designation is to 'protect' the land from any other development that would be incompatible with the work enabled by the designation. That is, no person may, without the prior written consent of the requiring authority, do anything in relation to the land that would prevent or hinder the project to which the designation relates.<sup>21</sup>

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<sup>18</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 can be provided to the Panel if necessary.

<sup>19</sup> Section 175(2).

<sup>20</sup> Section 176(1)(a).

<sup>21</sup> Section 176(1)(b).

46. This protection applies, on an interim basis, as soon as notice has been given for a requirement.<sup>22</sup>
47. The ability to constrain private landowners' use of their land in this way, and to circumvent normal consenting or planning processes, are powers reserved to government bodies and others who provide critical infrastructure for the public good.
48. The privileged position of requiring authorities is also reflected in the statutory processes of:
  - (a) the relevant council(s) considering a requirement and making a recommendation back to the requiring authority, which then decides whether or not to accept the recommendation; and
  - (b) the outline plan process, discussed below, where councils can request changes and the requiring authority makes the decision (subject to appeal rights).
49. The RMA provides checks and balances to this power, including in relation to considering alternatives and the reasonable necessity of designating land (discussed further below). There are also safeguards for the owners of designated land who are unable to sell their land as a result, in which case the requiring authority can be ordered to buy the affected land.<sup>23</sup>
50. The wider statutory scheme includes additional safeguards for landowners, most notably the full compensation payable under the Public Works Act 1981 ("PWA").

### **Relationship between designations and land acquisition**

51. Misconceptions as to the effect of designations sometimes arise, given their relative rarity.
52. These include that land must be designated in order for it to be acquired for the Project. This is not the case; the PWA empowers the Crown to acquire land for public works, either compulsorily or by agreement, irrespective of whether a designation is in place.<sup>24</sup>
53. Conversely, putting in place a designation does not **acquire** the designated land for the Crown, or make the Crown's acquisition of that land under the

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<sup>22</sup> Section 178.

<sup>23</sup> Section 185.

<sup>24</sup> Section 186 enables 'non-Crown' requiring authorities to request that the Crown acquire designated land compulsorily, on their behalf.

PWA inevitable. While there are some linkages between the RMA and PWA regimes, the acquisition of land under the PWA is a separate process.

54. It follows that issuing a NoR over particular land, or even confirming a designation over it, does not provide certainty that the relevant land will be acquired and the works enabled by the designation implemented. Nor does it mean that all Project works must take place within the boundaries of the designation.
55. Rather, a designation acts as a spot-zoning to enable a public work, provided that the conditions are met.
56. In this case, for example, the Transport Agency is likely to acquire additional land interests outside the proposed designation boundaries, to plant and maintain native trees and implement other ecological offset measures. That the Transport Agency has chosen not to designate specific areas of land for that purpose does not mean that acquiring the land interests needed to undertake planting is any less certain than acquiring the land for the new road.<sup>25</sup>
57. Put simply, at this stage no aspect of the Project can be said to be absolutely 'certain' – it is not certain that the designated land where the significant trees are found will be affected (because the Transport Agency has not yet acquired that land), and nor is it certain that any such effects will be offset by planting **in a specific location**. Nor is it certain what the scale of the mitigation planting required will be, because that will relate back to the scale of the adverse effect, and at this stage a 'realistic worst case' effect is assumed.
58. What is certain is that any adverse effect will be offset to achieve a net gain, because that is the effect of the proposed condition.<sup>26</sup>
59. This is simply a function of the designation process, whereby a requiring authority can seek RMA permissions for a public work over land which it does not yet own (but for which the PWA empowers the Crown to acquire land).
60. In the meantime, the Panel is perfectly able to exercise its functions under the RMA and evaluate the Project on the basis that the necessary land rights

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<sup>25</sup> As such, the "critical issue" perceived by Nicholas Goldwater in his evidence for the Department of Conservation, of "whether or not there is scope for stream offsetting within the designation", is overstated (at paragraph 6.2 of his evidence). Likewise, the concern of Gregor McLean, one of the Section 42A experts, that the Transport Agency will not be able to implement best practice erosion and sediment control beyond the designation is unfounded.

<sup>26</sup> Condition 17.

will be secured to implement the Project (including the necessary mitigation and offset measures); if not, the Project will not proceed.

61. The Panel can also impose conditions that account for these uncertainties. Examples include the proposed conditions that provide for offset planting to be carried out at certain ECRs, as a substantial part of a package of offset measures that is legally required to meet a certain outcome (namely net biodiversity gain).

## **SECTION 171 OF THE RMA**

62. Sections 171(1) and (1B) of the RMA frame the Panel's consideration and recommendation to the Transport Agency in respect of the NoRs. Section 171(1) provides that, when considering the NoRs and any submissions, the Panel must, subject to Part 2 of the RMA, consider the effects on the environment of allowing the requirements, having particular regard to:
- (a) any relevant provisions of a national policy statement,<sup>27</sup> regional policy statement, or plan (discussed later in these submissions);
  - (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 Panel considers reasonably necessary in order to make a recommendation on the requirements.
63. In terms of the Panel's task of assessing effects, both "*effect*" and "*environment*" are defined widely under the RMA;<sup>28</sup> importantly, the Panel must consider both the positive and adverse effects of the Project on the environment. This is underscored by the relatively recent enactment of section 171(1B) which makes explicit that the positive effects considered may include the effects of any measures offered by the Transport Agency to offset or compensate for adverse effects.
64. Section 171(2) provides that the Panel may recommend to the Transport Agency that it:
- (a) confirm the requirements;

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<sup>27</sup> Including the New Zealand Coastal Policy Statement, which is not relevant to the Project.

<sup>28</sup> Sections 3 and 2 of the RMA, respectively.



- (b) modify the requirements (a power discussed further below);
  - (c) impose conditions (also discussed below); or
  - (d) withdraw the requirements.
65. If the requirements are confirmed by the Transport Agency, the Councils will then include the new designations in their respective district plans.<sup>29</sup>

### **THE PURPOSE AND FUNCTIONS OF OUTLINE PLANS**

66. Section 176A provides that the Transport Agency must submit an outline plan of the Project to the Councils before construction commences. Outline plans describe the works that the requiring authority intends to carry out on the designated site.
67. Outline plans often contain details that were not available when the site was first designated in the district plan. The details required include:
- (a) the height, shape, and bulk of the works;
  - (b) the location on the site of the works;
  - (c) the likely finished contour of the site;
  - (d) the vehicular access, circulation, and provision for parking;
  - (e) the landscaping proposed; and
  - (f) any other matters to avoid, remedy, or mitigate any adverse effects on the environment.
68. The Transport Agency intends to submit outline plans, once the detailed design of the Project has been undertaken (but prior to the commencement of construction works), detailing all relevant aspects of the Project and including various management plans.
69. The RMA provides the Councils with the ability to request changes to the outline plans and, if the Transport Agency does not make those requested changes, the ability to appeal that decision to the Environment Court. The Court's role at that point is to determine whether the changes requested by the Councils will give effect to the purpose of the RMA.<sup>30</sup>

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<sup>29</sup> Subject to any appeals.

<sup>30</sup> Section 176A(5) and (6).

## **ASSESSING THE EFFECTS OF ALLOWING A REQUIREMENT (SECTION 171(1))**

### **Introduction**

70. A designation is thus a planning tool that enables land to be safeguarded for a future public purpose, with the details (including the height, shape, and bulk of the works, landscaping, and other mitigation) to be provided later through a separate statutory process. A designation can also be sought separately from (and in this case, prior to) any resource consents required to implement the work.
71. The Panel is tasked, however, with assessing the effects of allowing the requirements.
72. This statutory scheme immediately raises two issues relevant to the Panel's determination, namely:
- (a) how the Panel can evaluate the effects of allowing the requirements in the absence of a detailed design; and
  - (b) the relevance, at this NoR stage, of the later resource consenting process that the Transport Agency must navigate to implement the Project.
73. These matters are addressed below, together with two other 'effects assessment issues' that are particular to this Project:
- (a) the unusual 'existing environment' in this case; and
  - (b) whether the current or future condition of the road through the Gorge is relevant to considering effects.

### **Assessing effects in the absence of a detailed design**

#### *Introduction*

74. The Panel has asked:

*“Given our role is to consider the effects on the environment of allowing the requirement, how can we adequately do so when much of the detail for this requirement is yet to be developed within and during an outline plan process?”<sup>31</sup>*

75. As an initial point, it is common for the Transport Agency to rely on the outline plan process to finalise the design of major projects such as this.

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<sup>31</sup> Third Minute of the Panel, 27 February 2019, p 6, Part D "Statutory Context".

Examples of recent projects where the Transport Agency did not seek an outline plan waiver include Ara Tūhono (Pūhoi to Warkworth), Northern Corridor Improvements, East-West Link, and Transmission Gully; this was an approach accepted as appropriate by the Boards of Inquiry in each case. Likewise, the Southern Links Project in the Waikato, in 2014, involved designations for route protection that were approved by a Council hearings panel.<sup>32</sup>

76. In the Ara Tūhono project, the Board commented:<sup>33</sup>

*"(...) a NoR for a designation essentially secures the route or site for the future intended use and specifies the purpose for which the site will be used. Designations are therefore deliberately broader in scope and purpose than resource consents and it is common practice for NoRs to be issued over an indicative alignment for a motorway, with details of the work to be undertaken to be provided to the territorial authority later via an [outline plan] under section 176A of the Act."*

77. The Panel has asked whether there are limits on outline plans.<sup>34</sup> In terms of assessing effects, the fact of a future outline plan process certainly does not obviate the need for the Panel to consider the full range of likely effects of allowing the NoRs. Rather, it is clear that the Panel must have sufficient information to assess adequately the effects on the environment of allowing the requirement.

78. The Environment Court in *Sustainable Matatā* discussed the issue as follows:<sup>35</sup>

*[45] A fundamental issue which arises in this case is a desire on the part of the Applicant for maximum flexibility. This is not uncommon; many cases before the Court are prepared on the basis that the final design is not known. In this case there is a desire to use a design-build-operate system, and thus retain maximum flexibility for the successful tenderer.*

*[46] In many cases there are other contingencies that may lead to variations in the design. The designation process itself recognises this need for flexibility, and utilises the concept of Outline Plans.*

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<sup>32</sup> The decision is here: <https://www.nzta.govt.nz/assets/projects/southern-links/docs/Sthn-Lnx-Decn-Vol-1-Hearings-Report.pdf>.

<sup>33</sup> *Final Report and Decision of the Board of Inquiry into the Ara Tūhono – Pūhoi to Wellsford Road of National Significance: Pūhoi to Warkworth Section* at [267].

<sup>34</sup> Third Minute of the Panel, 27 February 2019, p 6, Part D "Statutory Context".

<sup>35</sup> *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90.

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

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

79. The Transport Agency's NoRs and its case before the Panel have been developed with this concern in mind.
80. We return below to the proposed conditions and the surety they provide, in terms of specifying key outcomes and necessary components of the suite of measures to avoid, remedy, mitigate, offset, and/or compensate for adverse effects.
81. In terms of the basis on which the effects of allowing the requirements have been evaluated, the evidence and technical assessments of the Transport Agency's experts clearly explain and justify the approach in each case. Those approaches have varied slightly, depending on the subject-matter of the assessment, but in each case provides a robust basis for the Panel to consider effects and make recommendations accordingly.
82. This is discussed further below.

*Assessing most categories of effect is uncomplicated*

83. In broad terms, assessing effects entails considering an indicative design and factoring in the potential for a different design outcome to arise as a result of any flexibility inherent in the approvals sought.
84. Assessing effects in this way is orthodox RMA practice for large infrastructure proposals (as noted by the Court in *Sustainable Matatā*), which are typically consented before detailed design has been undertaken and invariably allow for some flexibility. Te Āpiti Wind Farm, where turbine locations were consented  $\pm 100\text{m}$ , is another case in point.

85. For most disciplines, this process is relatively straightforward; transport effects is one such area. Considering effects turns on the fact that a new connection will be created within the identified corridor, the indicative construction methodology, the road design criteria, and the indicative design (as well as conditions, including in respect of the tie-ins with existing transport networks).
86. For noise and vibration effects, the assessment has considered the relative locations of noise-sensitive receivers and the new road, by reference to its indicative alignment and factoring in the potential alignment changes within the proposed designation boundaries.
87. Social effects are assessed in a similar way to transport and noise.
88. Other types of effects arise from the presence or otherwise of particular values within or near to the proposed designation corridor, or otherwise stem from the creation of infrastructure within that corridor. Such effects can be evaluated on a 'realistic worst-case' basis, taking into account the general ability sought by the Transport Agency to carry out earthworks and other activities in the corridor (subject to any specifically identified constraints).
89. That is the case for:
  - (a) archaeological sites – no known sites are within the proposed designation but, if they had been, an effect would be assumed unless a condition were imposed requiring avoidance;
  - (b) specific sites of importance to iwi, on the same basis (acknowledging that effects on broader cultural values inherent in the environment fall into a somewhat different category, discussed below);
  - (c) effects on the owners of designated land and their farming or business operations – the designated parts of the Te Āpiti Wind Farm, the AgResearch field trial site, and the relevant farms can be assumed to be affected, subject to the proposed constraints (which are discussed below); and
  - (d) effects on terrestrial ecological values (and related aspects of natural character) – the Transport Agency's experts have evaluated the values within the corridor, recommended specific constraints, and otherwise assumed that habitats will be affected.
90. On this last point, counsel for DOC has queried, in a memorandum dated 15 March 2019, whether or not indigenous biodiversity effects are to be

considered as effects of allowing the requirements sought, and asserts that the Transport Agency's approach of first seeking designations means that effects have been considered at a high level only.<sup>36</sup>

91. It will hopefully be clear to the Panel from the Transport Agency's evidence that the effects of allowing the requirements on terrestrial indigenous biodiversity values have been evaluated in considerable detail.
92. In respect of freshwater ecological values (and effects on air quality), however, the designations do not enable works in watercourses or discharges to them (or discharges to air), so the effects of those activities are more properly considered when consent is sought for them; we discuss this point further below.

*Assessing visual effects and effects on inherent values in the landscape*

93. Assessing the visual effects of allowing a requirement, in the absence of a final design, is a more nuanced exercise, as is assessing effects on cultural and other intrinsic values in the landscape (including natural character). This is because the RMA clearly envisages details that will be central to those assessments – the height, shape, and bulk of the works, the finished contouring of the landform, and the landscaping proposed – being unavailable when the effects of allowing a requirement are considered.
94. The important matter, as observed by the Court in *Sustainable Matatā*, is to have sufficient information to assess adequately the effects on the environment of allowing the requirement.
95. In terms of landscape, natural character, and visual effects, a large amount of information has been factored into the experts' assessment, including:
  - (a) geometric design standards and other criteria for the new road, dictating its appearance and the width of the finished Project footprint;
  - (b) detailed topographical data and other information about the natural environment, supported by numerous site visits, surveys of ecological values, and photo-simulations from various viewpoints;
  - (c) an indicative design modelled into the topography, demonstrating an alignment within the designations that is feasible and relatively efficient (in terms of seeking to balance earthwork volumes of cut and fill);
  - (d) consideration of the effect of the flexibility sought to build the road along other alignments within the proposed designations; in particularly

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<sup>36</sup> At paragraph 6.

sensitive areas, this has entailed multiple indicative designs being modelled to allow detailed consideration of the potential effects of those alternative alignments;<sup>37</sup>

- (e) proposed conditions specifying 'envelopes' of effect – ie the maximum possible extent of effects on specific significant vegetation or lengths of stream; and
  - (f) other conditions promoting good cultural and environmental design practices, incentivising the further avoidance of effects on aspects of particular value (such as significant vegetation, outstanding natural landscapes, streams with high natural character, and so on).
96. With that information, a clear picture is built up of the Project's effects on the landscape it traverses, and little reliance is placed on the outline plan process to assess the predicted future effects.<sup>38</sup>
97. Rather, the Transport Agency's experts have highlighted the future outline plan process because it gives added assurance that the Transport Agency must demonstrate, **after** the detailed design has been undertaken, how effects have been appropriately managed through design.
98. Assessing effects on cultural values in the landscape and wider environment is conceptually similar. As discussed further below, tangata whenua have been involved throughout the process of defining the proposed designation boundaries, and have brought to bear their sophisticated, long-standing knowledge of their whenua as the Project has taken shape.
99. To conclude on this point, concerns expressed by the Section 42A reporting officers and some submitters that the Panel does not have sufficient information to assess the effects of allowing the requirements are unfounded. Again, we return below to the important role of conditions in requiring effects to be addressed appropriately.

### **The relevance of the later resource consenting process to assessing effects**

100. In a similar vein, in considering the NoRs the Panel does not need to evaluate in any detail the effects of other activities **not enabled** by the NoRs – ie activities for which resource consents must be sought from Horizons.

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<sup>37</sup> In this context, considering a 'realistic worst-case' scenario allows fanciful outcomes that would not be feasible in engineering terms to be disregarded, such as an alignment entirely in cut.

<sup>38</sup> The experts are understood to agree, though, that the outline plan process has some relevance to assessing visual effects, in particular.

101. Section 171(1) obliges the Panel to consider “*effects on the environment of allowing the requirement*” (emphasis added). It does not fall to the Panel, at this time, to consider effects on the environment of activities for which consent will be sought from Horizons. Adverse effects of those activities (and the measures to address those effects) cannot be said to be “*effects of allowing the requirement*”, because the requirement will not allow the Transport Agency to carry out those activities.
102. The Section 42A report authors nonetheless contend, by reference to the future regional consenting process, that:
- (a) the Panel must consider “*the likelihood of a road being accommodated within the proposed corridor*”;<sup>39</sup>
  - (b) the Panel must “*reach a high degree of certainty that there is a pathway through the Regional Policy Statement / One Plan which will not frustrate the utilisation of the designation*”;<sup>40</sup> and
  - (c) “*As part of the NOR process, NZTA should be able to demonstrate that the designation reasonably provides for the actual and potential effects on aquatic ecology to be avoided, remedied or mitigated.*”<sup>41</sup>
103. With respect, the scheme of the RMA does not support those assertions, and counsel are not aware of any judicial authority to that effect.
104. For one, the RMA does not oblige requiring authorities to apply for any necessary resource consents at the same time as it gives notice of its requirement for a designation.
105. Further, while section 91 of the RMA specifically authorises councils to defer the processing of a resource consent application where it considers other resource consents will also be required in respect of the proposal, there is no equivalent provision in respect of notices of requirement.<sup>42</sup>
106. This makes sense given that designations function differently to resource consents, as outlined above, including that:
- (a) designations serve to protect land for a future development; and

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<sup>39</sup> Answers to Panel questions, 14 March 2019.

<sup>40</sup> Answers to Panel questions, 14 March 2019.

<sup>41</sup> Section 42A report, paragraph 456.

<sup>42</sup> This answers a question of the Panel: “*Given that relevant resource consents for this project are yet to be obtained, does a section 91 issue arise, and if so, how should that issue be dealt with?*”; Third Minute of the Panel, 27 February 2019, p 6, Part D “Statutory Context”.



- (b) the outline plan process contemplates design details (such as one might expect to support an application for resource consent) being provided after the designation is in place.
107. Moreover, it is not clear what the Section 42A authors understand to be the distinction between the exercise of “[reaching] a high degree of certainty that there is a pathway through the [regional planning instruments]”, and the task of the future decision-maker in evaluating consent applications for the regional activities. The Panel does not need to (and cannot) usurp the function of the future decision-maker, nor understand whether the later consent applications for those activities are likely to be granted (if that is a materially different exercise to assessing the applications themselves).
108. If the Panel were obliged to consider the effects of activities for which consent will be sought, this would undermine the RMA scheme that treats designations and resource consents separately, and affords certain powers to requiring authorities for the ‘public good’ reasons summarised above.
109. In any case, the Transport Agency has of course had firmly in mind the future consentability of a new road within the proposed designations, and is confident that there are ‘effects’ and ‘planning’ pathways to the future grant of regional consents.
110. This is even so on the current ‘realistic worst-case’ effects basis, leaving aside the high likelihood that adverse effects will be reduced through the design process (as incentivised by the proposed conditions and CEDF).

### **The existing environment**

111. The existing environment is the basis against which the actual and potential effects of the Project are to be considered. The nature of the existing environment is detailed in the NoR materials.<sup>43</sup>
112. An unusual aspect of the existing environment for this Project is that it encompasses the current, post-Gorge road closure situation, and all the problems that has created in transport, social/cultural, and amenity terms. That is, the Project’s effects must largely be assessed against a situation where traffic has been diverted over the Saddle Road and Pahiatua Track (meaning significantly more traffic through Ashhurst, and reduced flows through the Woodville town centre). The Transport Agency and the reporting officers agree on this point.

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<sup>43</sup> Part B of Volume 2 of the AEE.

113. While the current situation is problematic for the community as a whole, and for many individual residents and business owners, there are some properties that have benefited (at least in a sense) from the alteration to the main flows of traffic. The Project's effects have been assessed on the basis that those benefits form part of the existing environment, including (for example) the Project's noise effects and proposed mitigation measures described in the evidence of Dr Stephen Chiles.
114. That does not mean, however, that the pre-Gorge closure situation is irrelevant to the Panel's evaluation. The 'existing environment' includes people whose personal experiences and memories include the pre-existing traffic environment, and who have (and have always had) expectations that the current problems will be fixed.
115. Little turns on this point, given the high degree of accord between the relevant experts (discussed below), but the Panel is able to undertake a 'reality check' in this regard if necessary.

#### **The relevance of the current or future condition of the Gorge road to assessing effects**

116. Ms Downs explains that the future of the Gorge road remains uncertain, noting that the risk of slips continues to be at an 'extreme' level. Decisions on the future of the road, both in terms of function and legal status, will be made in consultation with key stakeholders. Ultimately the main options to be considered are retaining the road for a different purpose, revoking the State highway status of the Gorge road under section 103 of the LTMA (potentially in stages), or seeking to stop the road under section 116 of the PWA.<sup>44</sup>
117. DOC and Forest and Bird raise concerns about the Transport Agency abandoning the Gorge road and the potential for the subsequent spread of pests. As Ms Downs explains, the Transport Agency has no intention of simply abandoning the Gorge road.<sup>45</sup>
118. The future of the Gorge road, and the relevant statutory processes that would need to be followed, are entirely separate from the Project. The Project will not result in the bypassing of an otherwise fully functional State highway; as noted above, the existing environment is an indefinitely closed Gorge road, and the Project will not change that situation. In the meantime, the Gorge road remains the responsibility of the Transport Agency, including in respect

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<sup>44</sup> Evidence of Sarah Downs, paragraph 89.

<sup>45</sup> Evidence of Sarah Downs, paragraph 100.

of biosecurity matters. The Transport Agency has provided its regional pest management plan to DOC, and sought confirmation of whether this addresses its concerns, but has not yet received a response.

119. Given that context, any conditions relating to the future of the Gorge road are likely to be both unwarranted and unlawful.<sup>46</sup>

### **CONSIDERATION OF ALTERNATIVES – SECTION 171(1)(b)**

120. In considering the NoRs, the Panel must have particular regard 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".*

121. This entails an enquiry into whether the Transport Agency has gone through a properly informed process of considering alternative options for the Project before making a decision as to the form the Project will take. For roading projects, that process tends to focus primarily on alternative routes.

122. The Panel's focus under section 171(1)(b) must be on the **process** followed by the Transport Agency in considering alternatives. Focusing too much on the merits of the option put forward would risk a decision-maker attempting to 'redesign' the Project, which is not its role.

123. The High Court has summarised the decision-maker's duty under section 171(1)(b) as follows:<sup>47</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."*

124. What constitutes "*adequate consideration*" is a broad issue involving questions largely of fact rather than law.<sup>48</sup>

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<sup>46</sup> Even if the Gorge road was currently an operational State highway, it would by no means follow that the imposition of conditions that might duplicate or cut across the anticipated separate statutory processes for dealing with the future use of the road would be appropriate.

<sup>47</sup> *Waikanae Christian Holiday Park v Kapiti Coast DC* (CIV-2003-485-1764, HC, Wellington, 27/10/04, McKenzie J), at paragraph 129.

<sup>48</sup> *Nelson Intermediate School v Transit NZ* (2004) 10 ELRNZ 369 ("**Nelson Intermediate**").

125. The Courts' interpretation of that term, however, has evolved. Earlier RMA case law often approached it as not setting a particularly high standard.<sup>49</sup> More recent High Court authority has established that demonstrating adequate consideration of alternatives will be "*very much circumstances dependent*".<sup>50</sup> In particular, the extent of the effects a proposal will have on the environment<sup>51</sup> and private property<sup>52</sup> are key factors.
126. Accordingly, in this case the Transport Agency has carried out a particularly detailed evaluation of options in key areas of sensitivity, such as at the northern abutment of the new Manawatū River Bridge, the areas subject to QEII open space covenants, and in respect of the Meridian and AgResearch land.
127. Having said that, it is again 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' alternative.<sup>53</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>54</sup> and
  - (b) in making its choice, the Transport Agency was required to consider the information obtained regarding alternatives, but was not obliged to choose the 'best' option.<sup>55</sup>
128. We discuss further below the robustness of the assessment undertaken by the Transport Agency.

#### **REASONABLE NECESSITY OF THE WORK AND DESIGNATION FOR ACHIEVING THE PROJECT OBJECTIVES – SECTION 171(1)(c)**

129. The Panel is also required to have particular regard to "*whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought.*" Section 171(1)(c)

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<sup>49</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 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>50</sup> *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 ("**Basin decision**"), [142].

<sup>51</sup> *Basin decision* at [142].

<sup>52</sup> *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 at [121] and [122].

<sup>53</sup> *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZRMA 477 (HC), at [81].

<sup>54</sup> *Basin decision*, at [178], [125] and [185].

<sup>55</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].

thus requires an assessment of whether the Project and designations are “reasonably necessary” for achieving the Transport Agency's objectives for the Project, which are set out in Ms Downs’ evidence and relate to safety, resilience, and efficiency.

130. The framing of objectives is a policy function of the requiring authority; it is not for an RMA decision-maker to assess the appropriateness or otherwise of the objectives.<sup>56</sup>
131. The term “reasonably necessary” has often been applied as falling between expedient or desirable on the one hand, and essential on the other.<sup>57</sup>
132. 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>58</sup>

*“to elevate the threshold test to [the] “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 (as it has done in relation to s 16 and the duty to use the “best” practicable option for noise mitigation).”*

133. 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 Limited* 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>59</sup>

#### **THE PANEL MAY RECOMMEND MODIFICATIONS – SECTION 171(2)(b)**

134. The Panel is entitled under section 171(2)(b) of the RMA to recommend that the Transport Agency “modify” the NoRs.
135. The Panel has asked whether the power to modify allows for a ‘wider corridor’ or for the ‘designation boundaries’ to be amended, or whether that would require renotification of an amended NoR and associated AEE.<sup>60</sup>

<sup>56</sup> *Babington v Invercargill City Council* (1993) 2 NZRMA 480.

<sup>57</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>58</sup> *Queenstown Airport Corp Ltd v Queenstown Lakes DC* [2013] NZHC 2347 at 96.

<sup>59</sup> [2017] NZEnvC 46 at [27].

<sup>60</sup> The question was asked of the Section 42A report authors in the Fourth Minute of the Panel.

136. Case law indicates that the ability to enlarge a designation without further notification is highly constrained, as discussed below, by the risk of increased effects and potential prejudice to affected landowners (and other interested parties). The Panel would need to satisfy itself as to these matters before such a recommendation could validly be made.
137. To explain, case law establishes that a permissible ‘modification’ amounts to “*an act of making changes to something without altering its essential character.*”<sup>61</sup> So, for example, the Board of Inquiry into the MacKays to Peka Peka Expressway Proposal determined that an altered arrangement at the Te Moana interchange (including a low-level bridge to provide for Te Moana Road to go over the expressway) sought by a submitter could not be put in place as a ‘modification’ on the basis that it would “*alter the essential nature and character of this portion of the designation*”.<sup>62</sup>
138. In addition, the Board of Inquiry into the Hauāuru mā Raki Wind Farm Proposal concluded that it would not make modifications to an NoR (such as were sought by some landowners in that case) that would have significantly greater impacts on other landowners, particularly if they had not submitted in the process so would be disadvantaged in a procedural sense.<sup>63</sup>
139. That reasoning naturally extends to broader environmental effects. Any discretionary power (such as the power to recommend and make modifications to a NoR) must be exercised in accordance with the purpose of the RMA.<sup>64</sup> That, and the wording of section 171(1), require all potential environmental effects to be considered.
140. It follows that the Courts have been more willing to accept modifications that would **reduce** the physical footprint or likely adverse effects of allowing a requirement. In *Queenstown Airport*,<sup>65</sup> the High Court held that reducing the area covered by the airport’s NoR was a lawful modification. In doing so, the Court noted the broad framing of the ‘modify’ power, but added that in the case of the airport designation:<sup>66</sup>

*“(…) no legitimate question of procedural unfairness arises in this case  
– the scope of works and envelope of effects is substantially reduced*

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<sup>61</sup> *Quay Property Management Limited v Transit New Zealand* W028/00 Judge Kenderdine, 29 May 2000; *Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [40].

<sup>62</sup> Final Report of the Board of Inquiry at [1442] – [1443], available at: <https://www.epa.govt.nz/assets/FileAPI/proposal/NSP000005/Boards-decision/Mackays-Final-decision-volume-1-Report-and-appendices.pdf>.

<sup>63</sup> Final Report of the Board of Inquiry at [1188], available at: [http://www.mfe.govt.nz/sites/default/files/media/hmr-final-report-vol-1\\_0.pdf](http://www.mfe.govt.nz/sites/default/files/media/hmr-final-report-vol-1_0.pdf).

<sup>64</sup> *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [54].

<sup>65</sup> *Queenstown Airport Corporation v QLDC* [2013] NZHC 2347

<sup>66</sup> At [87].

*as a consequence of the modification. The prospect of affected parties not having submitted because a much larger proposal was notified is, in my view, highly unlikely."*

141. The Court also observed that<sup>67</sup> "(...) *the revised designation falls entirely within the envelope of the notified proposal.*"

#### **THE PANEL'S ABILITY TO IMPOSE CONDITIONS – SECTION 171(2)(c)**

142. The Panel may recommend the imposition of conditions under section 171(2)(c). Doing so is of course standard practice, and the Transport Agency's updated proposed set of conditions has been filed with Ms McLeod's evidence.

143. The ability to recommend conditions is subject to common law principles on their validity, including the *Newbury* principles relating to relevance and reasonableness.<sup>68</sup> The *Newbury* principles have been applied to the RMA context by the Supreme Court in *Estate Homes*,<sup>69</sup> and specifically confirmed by the Courts to apply to designation conditions. The Environment Court in *Handley* recently confirmed that designation conditions must:<sup>70</sup>

- (a) serve a resource management purpose, not an ulterior one;
- (b) fairly and reasonably relate to the project authorised by the designation (as per *Estate Homes*, there must be a logical connection – although query whether the connection must now be more direct, in light of the enactment of section 108AA of the RMA); and
- (c) not be unreasonable.

144. The Panel also needs to be particularly mindful of the need to avoid conditions that would have the effect of nullifying the designation.

145. Of course, the fact of a potential condition being lawful does not automatically mean it is appropriate or necessary.

146. We return in later sections of these submissions to the effectiveness of the conditions proposed by Ms McLeod, and issues with some of the conditions sought by other participants.

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<sup>67</sup> At [88].

<sup>68</sup> Set out in the English decision of *Newbury DC v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731.

<sup>69</sup> *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).

<sup>70</sup> *Handley v South Taranaki District Council* [2018] NZEnvC 107.

## **CAN THE PANEL LAWFULLY RECOMMEND THAT THE TRANSPORT AGENCY ADD FEATURES TO THE PROJECT?**

147. A striking aspect of this case is the overwhelming focus of the submissions lodged in respect of the NoRs, and of the Section 42A materials, on the Transport Agency's decision to promote a Project that does not include a separated walking and cycling path alongside the new road.
148. Ms Downs has acknowledged, on the Transport Agency's behalf, that it is understandable that people see the Project as an opportunity for other potential improvements to the transport network to be made.
149. In a legal sense, however, a case focusing on 'lost opportunities' is unusual, and somewhat difficult to place in an orthodox RMA frame.
150. The case is about 'lost opportunities' because, as we highlight in the next section of these submissions, the Project will clearly provide significant benefits for cyclists and pedestrians. It is not in dispute, for example, that the Project will:
- (a) remove around 96% of motorised vehicles from Saddle Road, thus making Saddle Road a significantly more attractive route for cyclists;
  - (b) create a new route with consistent shoulders at least 2 metres wide, available for use by cyclists, which are not present on the alternative routes (or on the old Gorge road); and
  - (c) have other benefits in terms of connectivity for active modes.
151. As such, despite efforts to categorise such a path as necessary to address adverse safety effects of the Project, the real focus is on what many submitters consider to be the loss of a "*once in a lifetime opportunity*" (to coin a phrase used by Mr Baker, the recreation expert informing the Section 42A report, and in the submission of the Manawatū Gorge Governance Group).
152. The Project clearly creates opportunities, rather than stifles them, and will be future-proofed so as not to preclude initiatives in future (as discussed further below). In any event, this situation raises the issue of whether the Panel can lawfully recommend that the Transport Agency develop a proposal that is different to the Project, by requiring elements to be added to it.
153. In short, based on the law and the available evidence, it cannot.
154. Again, it is somewhat difficult to approach this issue in an orthodox manner, because RMA cases tend to focus on measures required to avoid, remedy, mitigate the adverse effects of a proposal. However, it is possible to make



some observations by reference to the legal context for the Panel's evaluation, summarised above:

(a) **The power of a requiring authority to designate land for a work:**

Devising and developing the Project is at the Transport Agency's discretion, reflecting its statutory function and powers, including as a Crown entity tasked with developing and maintaining infrastructure for the public good, and achieving 'value for money' with public funds. As a requiring authority, its powers include restricting private landowners' use of land. It is not possible, in an RMA or other legal sense, to compel a requiring authority to invoke those powers.

(b) **Assessing environmental effects (section 171(1)):**

The Project does not incorporate a separated path along the route of the new proposed road, and the adverse environmental effects of such a path have not been assessed.<sup>71</sup> The evidence filed on behalf of Rangitāne o Manawatū<sup>72</sup> and Meridian<sup>73</sup> indicates that there is considerable work to be done to assess those effects, and Ms Downs has explained that the risk of overcomplication and delay is one reason why the Project does not incorporate a path.

In terms of positive effects, arguments that the Project represents an 'opportunity lost' can be understood as a request that the Project create **additional** benefits. Submitters and the Section 42A report authors are not understood to be arguing, however, that the Project's benefits are insufficient to allow the designations to be approved.

Again, devising the Project is a policy decision of the Transport Agency, not a matter in which the Panel or the Courts can interfere (subject to the discussion below regarding modifications and conditions).

(c) **Assessment of alternatives (section 171(1)(b)):**

As noted above, the task for the Panel is to evaluate the merits of the proposal put before it, rather than weigh up the merits of potential alternatives. To the extent that accommodating a path would give rise to additional effects on the environment or private land (such as indicated by Rangitāne o Manawatū and Meridian), an obvious

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<sup>71</sup> For example, the evidence of Boyden Evans (at paragraph 84) notes that the landscape effects of a path have not been assessed, but that a wider Project footprint would pose additional challenges in terms of minimising effects on landscape values.

<sup>72</sup> See for example the evidence of Siobhan Karaitiana-Lynch at paragraphs 19 and 20, and the evidence of Dr Jonathan Procter at paragraph 42.

<sup>73</sup> Evidence of Lindsay Daysh at paragraph 112.

question arises as to whether the Transport Agency can establish that it has carried out an assessment sufficient to justify that.

David Murphy, for Palmerston North City Council (“**PNCC**”), suggests in his evidence that insufficient consideration has been given to alternative methods for providing for cyclists. PNCC’s submission argues that that inadequacy can be cured by imposing a condition requiring a path. This is not how section 171(1)(b) operates, however; as discussed above, it is a ‘check and balance’ on the power of a requiring authority to designate private land. As such, assessing alternatives is a process to be undertaken before NoRs are lodged.<sup>74</sup>

(d) **Reasonable necessity of the work and designation for achieving the objectives (section 171(1)(c)):**

While safety concerns underpin arguments in favour of a path, it cannot credibly be argued that the Project (as framed) does not achieve the safety-related objective. The expert evidence for PNCC accepts that a State highway with 2m+ shoulders represents a lesser safety risk for cyclists than other roads in the network,<sup>75</sup> which may be a significant underestimation of the safety factor provided by such shoulders.<sup>76</sup>

Ms Downs has explained why the Transport Agency set the objectives for the Project, which was a policy decision that cannot now be questioned.

Again, it is far from certain whether the Transport Agency (or any other requiring authority, such as the Councils) would be able to establish the reasonable necessity of designating any further private land necessary to build a path, if it were minded to do so. Meridian has signalled its strong opposition to its land being used for such a purpose.

(e) **Modifying a requirement:**

Given that no separated shared path has been designed for consideration, and that adding to the transport corridor’s footprint may increase adverse effects on other values in the environment, it is unclear whether the addition of a shared path would be a permissible modification to the NoRs in terms of section 171(2)(b). The Section 42A

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<sup>74</sup> *Nelson Intermediate* at paragraphs 167, 175, and 176.

<sup>75</sup> Shane Vuletich applies an assumption that the risk of a cyclist being injured or dying on a State highway with a 2m shoulder is 92% of the risk across all road types; see the Appendix to his evidence. It is not clear how this figure was derived.

<sup>76</sup> Refer to the responses to the Panel’s questions of David Dunlop and Jonathan Kennett dated 20 March 2019.

Report authors provide no analysis of this, and again the evidence of Rangitāne o Manawatū and Meridian casts doubt on the issue.

(f) **Conditions:**

A shared path is not necessary to address the adverse effects of the Project, and as such conditions requiring the provision of a shared path would risk offending against the *Newbury* principles.

155. In conclusion on this point, the Transport Agency certainly understands that people see the Project as an opportunity to have central government funding used to promote recreational outcomes. Part of the Transport Agency's function is assessing potential such projects around New Zealand and prioritising available funding accordingly.
156. The Transport Agency witnesses have explained that the focus of the Project is on urgently reinstating and improving on the connection that has been lost, in a way that creates benefits for all road users and is future-proofed so that other potential recreational opportunities are not precluded from being realised.

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

### **INTRODUCTION**

157. The effects on the environment – both positive and adverse – of allowing the requirements are central to the Panel's evaluation under section 171, in a direct sense and in assessing the Project's alignment with the relevant planning provisions and Part 2 of the RMA.
158. Ms McLeod's evidence synthesises the available information regarding the Project's positive and adverse effects, and the conditions proposed to address the latter, and summarises the Project's effects according to different categories.<sup>77</sup> The information analysed by Ms McLeod includes the NoRs and the evidence of Transport Agency witnesses, the submissions, and the Section 42A report and associated materials.
159. The Panel has since received the expert evidence of submitters, and now has before it a voluminous suite of information regarding effects.
160. Evidence is still being received by the day and, in particular, not all expert conferencing has been completed by the date the Panel has requested to

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<sup>77</sup> From paragraph 103. The effects are also summarised in Part G of the AEE; volume 2 of the NoRs.

receive these legal submissions. Counsel and witnesses will be able to update the Panel at the hearing.

161. That being the case, below we highlight what are likely to be key 'effects issues' requiring determination by the Panel, by reference to the key categories of effects.

## **TANGATA WHENUA VALUES AND CULTURAL HERITAGE**

162. The Transport Agency is privileged to enjoy a partnership relationship with four iwi who have identified an interest in the Project area, and as legal counsel for the Transport Agency we are grateful for the opportunity to call witnesses on behalf of Rangitāne o Manawatū, Rangitāne o Tamaki Nui-ā-Rua, Ngāti Kahungunu ki Tāmaki Nui-ā-Rua, and Ngāti Raukawa.
163. The partnerships have developed in a positive and collaborative manner, thanks to the generosity of time and experience shown by the iwi, and a respectful and genuine partnership approach on the part of the Transport Agency.
164. Underpinning iwi support for the Project is the fact that fixing the transport issues arising from the closure of the Manawatū Gorge will bring considerable cultural benefits, in the sense of improving the wellbeing of iwi members and their whānau who live locally and travel across the ranges.<sup>78</sup>
165. The Project traverses a deeply significant cultural landscape, though, and it is clear that a large new piece of infrastructure across the Ruahine Range will adversely affect intrinsic cultural values in the environment. It is therefore vital that the Project is developed in a way that respects those values, minimises adverse effects on them, enhances the relationships of iwi with their taonga resources, and strongly promotes kaitiakitanga, among many other matters.
166. The Transport Agency and iwi are working hard towards that end. As will be clear to the Panel from the evidence that has been filed, further complexities and challenges have to be worked through to achieve those outcomes. Nonetheless, all iwi witnesses express their confidence in the Project and support for the NoRs being confirmed, to allow the parties to continue to progress the design, develop further details of mitigation packages, and implement the Project. That is an achievement to be celebrated and built upon.

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<sup>78</sup> See for example the evidence of Jessica Kereama at paragraph 4.1 and Morry Black at paragraph 7.1.

167. The evidence of iwi witnesses is wide-ranging, but some key points are that the Project avoids known wāhi tapu<sup>79</sup> and specific sites of cultural significance and, where impacts have been unavoidable (such as the alteration of the landscape on the eastern and western slopes), the Transport Agency has worked with iwi on plans to address those effects.<sup>80</sup>
168. Further, iwi acknowledge that adverse effects on the mauri of waterways will be addressed in subsequent planning phases, with the understanding that the dynamic partnership (such as between Rangitāne o Manawatū and the Transport Agency<sup>81</sup>) will ensure that effects are addressed.
169. Further, the evidence of Rangitāne o Manawatū explicitly recognises significant positive cultural effects of the Project; Siobhan Lynch-Karaitiana observes that:<sup>82</sup>

*“Contemporary ability to practice culture in this landscape will be enhanced as a result of the Project. Rangitāne generally have limited access to most of Te Āpiti except for a few walks and reserves on the fringes that are maintained by local Councils. This Project has offered an opportunity for Rangitāne to build upon their relationship with Te Āpiti, the Ruahine ranges and their taonga. The opportunity to harvest resources from the ngāhere and pākihi, host wānanga for our rangatahi, share cultural narratives, and just be in their amazing spiritual area is a benefit that cannot be summed. Te Ahu a Turanga Highway Project has the potential to restore a missing piece of culture for Rangitāne. TMI and NZTA are committed to seeing this happen.”*

170. The partnerships between the Transport Agency and iwi put the Project in a somewhat different paradigm from a standard development, where conditions are crucial to ensuring that works will proceed in a culturally respectful and appropriately inclusive way.
171. Nonetheless, the Transport Agency recognises that the Panel may take additional comfort in express conditions to this end, including providing for a wide range of expressions of kaitiakitanga. Such conditions are proposed in relation to:
- (a) the CEDF (noting that there is some enthusiasm for it to be developed further);

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<sup>79</sup> See for example the evidence of Siobhan Lynch-Karaitiana at paragraph 7.

<sup>80</sup> Evidence of Dr Jonathan Procter at paragraph 15 and 17.

<sup>81</sup> Evidence of Siobhan Lynch-Karaitiana at paragraphs 4 and 29 and evidence of Dr Jonathan Procter at paragraph 18.

<sup>82</sup> Evidence of Siobhan Lynch-Karaitiana at paragraph 5.

- (b) on-going participation in the design of the Project, particularly in relation to management plan development regarding landscape and ecology matters;
- (c) further consultation with the Te Āpiti Ahu Whenua Trust regarding design of the new Manawatū River Bridge;
- (d) a Tangata Whenua Values Monitoring and Management Plan (“**TWVMMP**”); and
- (e) an accidental discovery protocol.

172. The Transport Agency again thanks its iwi partners for their guidance, leadership, and support.

### **TRANSPORT AND TRAFFIC**

173. It is clear that the Project is urgently needed, from a transport perspective. The Project’s compelling transport benefits, and other transport-related effects, are central to the Panel’s consideration of the NoRs.

174. David Dunlop’s evidence describes the Project’s positive transport and traffic effects, including key benefits relating to:

- (a) traffic safety, through the creation of a high-quality new connection between the regions;
- (b) redistribution of traffic demand from existing routes, which will result in positive effects for the residents, pedestrians and cyclists on the local road network, particularly in Ashhurst, on Saddle Road and on the Pahiatua Track;
- (c) the reliability and resilience of the transport network, through the development of a new, more resilient road, and a new high-quality bridge over the Manawatū River; and
- (d) approximately halving travel times between Palmerston North and Woodville, and Aokautere and SH2 to the north of Woodville.

175. There is no real dispute about these matters.

176. Nor can there be any dispute about the benefits to cyclists from new dedicated infrastructure on or beside the Ashhurst Bridge,<sup>83</sup> from that Bridge to the MGSR carpark, and in Woodville, or the benefits to recreational

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<sup>83</sup> See Condition 26, which is expressed to be subject to obtaining the necessary resource consents.

walkers arising from new facilities on the Ashhurst Bridge, the Manawatū River Bridge, and elsewhere.

177. The key issue raised by the Section 42A report authors and submitters appears to be whether the Project is creating a safety risk for cyclists that does not presently exist. The Project is not created with a dedicated cycling facility, because the Transport Agency does not consider it to be warranted for this rural highway. Cyclists may nonetheless choose to use the road shoulders, though; on PNCC's own evidence, cycling on 2m-wide shoulders will be safer than elsewhere in the roading network.
178. The Project will also go through several more Road Safety Audits before it opens.<sup>84</sup>
179. Other issues to consider include:
  - (a) whether worsening performance of the roading network in Woodville is due to the Project (noting again that improvements for active modes are proposed in Woodville); and
  - (b) temporary construction-related effects, to be managed through the development of a Construction Traffic Management Plan ("CTMP") and other conditions.<sup>85</sup>

## **SOCIAL EFFECTS**

180. Amelia Linzey's evidence is that the Project will have a range of positive social effects, many of them permanent. These social benefits generally arise from the positive transport and traffic effects discussed above, including the new connection and the redistribution of traffic away from Ashhurst.<sup>86</sup>
181. Again, it is important not to gloss over these fundamental benefits, which are the reason that the Transport Agency is investing so heavily in this Project.
182. Among other things, the Project will facilitate:
  - (a) improved social cohesion due to greater connectivity between communities;
  - (b) improved 'way of life' through reduced travelling times, and less time wasted due to travel unreliability;

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<sup>84</sup> Evidence of Andrew Whaley at paragraph 20.

<sup>85</sup> As required under condition 22.

<sup>86</sup> Evidence of Amelia Linzey at paragraphs 21-22.

- (c) opportunities to provide for social and economic wellbeing by enabling economic activities between the east and west of the Ranges and increased economic activity and employment during construction; and
  - (d) better access to social services and facilities, education, healthcare, recreation, and employment.
183. Improved cycling and walking connectivity created by the Project is also beneficial in a social sense, as it provides for greater recreation activity and connectivity for residents, and opportunities for tourism activities.
184. Around 10 residences near the Project will experience ongoing adverse effects, which is a relatively small number for a Project of this scale, and others will see the return of passing traffic that stopped when the Gorge road was closed. Various noise mitigation measures are proposed, as well as opportunities for affected landowners to participate in detailed design discussions about landscape and noise mitigation through the Landscape Management Plan.<sup>87</sup>
185. Construction of the Project will result in potential economic and social benefits to people and businesses, but adverse effects during that period will need to be managed carefully; conditions are proposed to this end.

## **NOISE AND VIBRATION**

186. The Project will have significant positive noise effects associated with the reduction of road traffic noise levels through Ashhurst and around the outskirts of Woodville.<sup>88</sup>
187. The Project also has the potential to cause significant adverse noise effects due to increased traffic on Napier Road in Ashhurst and Vogel Street in Woodville, as well as at the two roundabouts and on the lower eastern slope, and construction noise associated with the Project.
188. Various mitigation measures are proposed, and there does not appear to be much in the way of material disagreement between Dr Chiles and Mr Lloyd on these matters; indeed, no technical areas of disagreement were recorded in the Joint Statement of Acoustic Experts.<sup>89</sup>

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<sup>87</sup> Condition 12(e).

<sup>88</sup> Evidence of Dr Stephen Chiles at paragraph 21.

<sup>89</sup> Dated 13 February 2019, and attached to the Pre-Hearing Meetings Report, also attached to the Section 42A Report of Nigel Lloyd.



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

189. Inevitably, the introduction of large-scale earthworks and a new road across the Ruahine Range will result in significant changes to the landscape, have visual effects, and will adversely affect the natural character of watercourses and their margins.<sup>90</sup> The extent of those effects varies along the Project's length.
190. Visual effects do not appear to be at issue; the key area of sensitivity relates to the new Manawatū River Bridge, where effects can be managed through good design.<sup>91</sup>
191. In terms of adverse biophysical and landscape character effects, including on areas identified as outstanding natural landscapes, landscape experts have been involved throughout the route selection process and design work to date, with the aim of minimising effects and devising a strategy to mitigate residual effects. Boyden Evans, the Transport Agency's expert, considers that conditions imposed on the designations and measures described in the CEDF will provide effective mitigation,<sup>92</sup> and again these effects do not appear to be highly contentious.
192. There are issues in contention regarding the Project's effects on the natural character of streams and their margins.
193. Effects on the streams themselves will be considered in detail when resource consents are sought for works in streams, and for discharges to them. Nonetheless, the Project designations do contain streams assessed to have high natural character (partly because downstream of Project they flow through the relatively pristine MGSR). As a result, the Transport Agency's experts have assumed effects and created 'envelopes' through proposed conditions with a view to ensuring that the Project will meet Objective 6-2(b) of the One Plan (discussed further below), on a strict, literal interpretation.
194. While some criticism has been levelled at the methodology and outcome of that assessment, it is not clear whether there is a fundamental difference in opinion about the level of effects (or indeed whether anyone other than the Transport Agency experts has sought to assess them); the joint witness statements of the relevant experts is inconclusive. These issues will no doubt be explored further at the hearing.

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<sup>90</sup> Evidence of Boyden Evans at paragraph 32.

<sup>91</sup> Evidence of Boyden Evans at paragraph 44.

<sup>92</sup> Evidence of Boyden Evans at paragraph 20.

## ECOLOGY

195. A new road across the Ruahine Range will inevitably affect indigenous vegetation, and information provided by ecologists was central to assessing potential route options for the Project. Despite that, some sensitive areas (including the two QEII areas) have not been able to be avoided by the Project. As a result, understanding how adverse ecological effects can be minimised and appropriately offset and/or compensated for has been a priority for the Transport Agency in developing the NoRs.
196. The Project's adverse effects on terrestrial ecology have been assessed in detail; freshwater ecology effects have been considered in the assessment of effects on natural character, discussed above, and will be a focus of the regional consenting process.
197. The Transport Agency has sought to put forward a compelling case in relation to the ecological effects of allowing the requirements, to give assurance to interested parties that they will be involved in further developing and implementing a package of mitigation and offset measures that will achieve a net gain in indigenous biological diversity.
198. Dr Forbes has recommended such a suite of measures that assumes a 'worst case' effects scenario, which can be scaled down to incentivise further avoidance through design. Offset planting at specified ECRs forms a substantial part of that package, as do pest control measures and legal and physical protection in perpetuity of planted and restored areas – likely to be considerably larger than the QEII areas affected. Beyond that, the conditions provide for a collaborative, multi-party process to determine whether additional measures are required to achieve net gain and, if so, what they should be.
199. There appears to be a good degree of comfort from the Section 42A report authors regarding the quality of the assessment that has been undertaken, and the component parts of the offset package proposed; expert conferencing between Mr Lambie, for the Councils, and Dr Forbes and Mr Blayney, for the Transport Agency, recorded no areas of disagreement. Early conferencing between Dr Forbes and Dr Martin, representing DOC, highlighted some suggested changes to the ECRs, which have largely been implemented.<sup>93</sup>

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<sup>93</sup> Evidence of Dr Adam Forbes from paragraph 71.

200. The key outstanding issue regarding ecology appears to be a lack of confidence in the Transport Agency's ability to deliver offset planting – such as in the areas identified by Dr Forbes as being of high value for potential planting – or the other measures necessary to achieve a net gain in indigenous biological diversity.
201. In relation to this issue, the Transport Agency is well aware that it must acquire the necessary land interests to implement the Project, including for offset planting, and Mr Dalzell has explained that there has been a good level of enthusiasm from landowners about the availability of land.<sup>94</sup> We have also noted above the Crown's powers to acquire land under the PWA, and sought to explain why designating land for offsetting purposes would be largely illusory, in terms of providing an assurance that that particular land would be acquired.
202. In the meantime, the conditions proposed by the Transport Agency can give the Panel assurance that net gain will be achieved, with the expert guidance of iwi and DOC.
203. In relation to DOC, the Transport Agency has sought its guidance in devising the Project and will continue to seek to work constructively with DOC, given its important governmental role and expertise in the conservation of natural resources. The feedback that DOC and its experts have given the Transport Agency to date has been gratefully received and fed into the process.
204. As highlighted in the memorandum of DOC's counsel dated 15 March 2019, though, it appears that DOC feels unable to participate meaningfully in this NoR process because of conceptual concerns regarding the ability of requiring authorities to designate land through ecological areas. As a result, DOC's ecologists did not participate in the expert conferencing that took place on 18 and 19 March 2019, despite the Panel's direction that conferencing take place.
205. Again, however, this is not a barrier to the Panel evaluating the NoRs, nor to DOC continuing to engage with the development of the Project, the suite of measures by which ecological effects are addressed, and the later resource consenting process; the Transport Agency looks forward to continuing to work constructively with DOC and its experts on those matters.

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<sup>94</sup> See the answers to the Panel's questions of Mr Dalzell dated 20 March 2019.

## **HISTORIC HERITAGE AND ARCHAEOLOGY**

206. The Project avoids heritage sites and known archaeological sites, including the Parahaki kāinga site on Moutere Island,<sup>95</sup> but may encounter unrecorded archaeological sites. The Transport Agency is seeking an archaeological authority under the Heritage New Zealand Pouhere Taonga Act 2014,<sup>96</sup> and will develop an Accidental Discovery Protocol in consultation with tangata whenua and Heritage New Zealand Pouhere Taonga.<sup>97</sup>
207. Proposed condition 24 (as amended) has been agreed with Heritage New Zealand Pouhere Taonga in the context of its submission.

## **EFFECTS ON PROPERTY, NETWORK UTILITIES AND INFRASTRUCTURE**

208. The Project will directly affect a number of properties and infrastructure assets. Property acquisition (whether temporary, for construction purposes, or on a permanent basis) and compensation will be dealt with in the normal way under the PWA scheme.
209. The PWA sets out the framework through which the Crown may acquire land for public works. Under the PWA regime, full compensation is paid to landowners for the value of any property acquired (and for various other matters) at market rates. The Crown intends to purchase and fully compensate for the land required for the Project in accordance with the PWA.
210. The PWA regime also provides for compensation to be paid to landowners who have part of their land acquired and suffer 'injurious affection' to any retained land;<sup>98</sup> this arises where adverse effects of the Project cause depreciation in the value of that retained land.
211. More broadly, potential effects on property values are not a relevant matter for consideration under the RMA.<sup>99</sup>
212. Submissions have been lodged by landowners within and in proximity to the designation corridor, raising concerns about the potential effects of the Project. Mr Dalzell explains the fulsome effort that has gone into meeting with these submitters. The submissions are addressed in the evidence of the relevant subject-matter experts (including Dr Chiles and Ms Linzey in particular) and, as those experts and Ms McLeod explain, in some cases specific conditions have been proposed to address concerns.

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<sup>95</sup> Evidence of Dr Rodney Clough at paragraph 14.

<sup>96</sup> Evidence of Dr Rodney Clough at paragraph 16.

<sup>97</sup> Condition 24.

<sup>98</sup> Public Works Act 1981, ss60, 62, and 64.

<sup>99</sup> *Tram Lease v Auckland Council* [2015] NZEnvC 137.

213. The effects of the Project on network utilities, and measures and conditions to manage those effects, are set out in Table 33 in the AEE. KiwiRail has submitted in support of the Project, as explained in the evidence of Rebecca Beals for KiwiRail. Transpower New Zealand Limited and Powerco Limited both lodged submissions seeking conditions that would protect their assets, and their concerns have been addressed through agreed conditions, as explained by Ms McLeod.
214. Two directly affected landowners with particular issues are Meridian, which owns Te Āpiti Wind Farm, and AgResearch, which owns the Ballantrae Hill Country Research Station (“**Ballantrae Station**”).

### **Te Āpiti Wind Farm**

215. Mr Dalzell outlines the discussions that have been occurring, and which are ongoing, between the Transport Agency and Meridian to further understanding of the Project’s potential effects on the Te Āpiti Wind Farm, and to discuss measures to minimise and mitigate them. Meridian’s submission does not indicate overall opposition to the Project, but instead is (understandably) focused on minimising effects on its operations.
216. The potential effects on the Wind Farm bring into play the provisions of the National Policy Statement on Renewable Electricity Generation 2011 (“**NPSREG**”). Ms McLeod notes that Objective B Policy B is particularly relevant; it requires the Panel to have particular regard to “*maintenance of the generation output of existing renewable electricity generation activities*”, and the possibility that “*even minor reductions in the generation output of existing renewable electricity generation activities can cumulatively have significant adverse effects on national, regional and local renewable electricity generation output.*”
217. Mr Whaley explains that the alignment has been positioned so as to minimise direct impacts that would necessitate the removal of wind turbines, and that the design process in that respect is ongoing. One (or possibly two) turbines would need to be removed based on the current indicative alignment.<sup>100</sup>
218. The Project will also impact on the way that Meridian accesses the turbines, both during and after construction; clearly, the NPSREG supports measures to enable continued access to 16 turbines and two wind masts on the south side of the proposed new road.

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<sup>100</sup> Nine turbines in total are within the designation corridor, primarily to enable reinstatement of access tracks.

219. Ms McLeod summarises the proposed conditions intended to address Meridian's concerns about the Project. Of particular note, those include:
- (a) any outline plan describing the works within the Wind Farm site, being prepared in consultation with Meridian, and including appropriate engineering advice where construction activities are within 60 metres of a turbine that is to be retained;
  - (b) measures to ensure ongoing access to the Wind Farm site during and after construction of the Project; and
  - (c) restricting the planting that can be located within the Wind Farm site, to address Meridian's concerns about effects on wind flows.
220. Meridian seeks a 160m buffer between existing turbines and highway development, but has explained that that is an 'engineering alert'-type measure rather than a 'no-go' zone.<sup>101</sup>
221. These matters are to be worked through at the hearing, and in the planners' conferencing; the Transport Agency is open to further discussion about ways in which the Project's adverse effects on the Te Āpiti Wind Farm can be minimised. In the meantime, the Panel is able to take into account that another matter for ongoing discussion between Meridian and the Transport Agency is how effects will be compensated for through the PWA process.
222. Following the refinement of the Project design, and in light of the conditions proposed to minimise other effects, the effects of the Project on the productivity of the Wind Farm are likely to be marginal.<sup>102</sup> In the meantime, the Transport Agency will continue working with Meridian to minimise effects and enable a development that appropriately reconciles and provides for the benefits of both renewable energy and the Project.
223. Otherwise, the Transport Agency's response to Meridian's concerns appropriately addresses the relevant NPSREG matters.

### **Ballantrae Station**

224. The Project traverses the southern part of the long-term fertiliser trial site that forms part of Ballantrae Station. The Transport Agency has, since the time it was evaluating alternative route corridors for the Project, been cognisant that the Project would affect the trial site. It therefore looked for ways to avoid the

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<sup>101</sup> Evidence of Lindsay Daysh at paragraph 58.

<sup>102</sup> It is also worth noting Meridian's indication, in its submission, that it intends to re-power or replace turbines in the coming years. With that in mind, it may be that any relatively small losses in power output as a result of the Project are short-lived.

site, and has since explored means to minimise effects on the site and ways in which residual effects can be addressed.

225. Discussions have been ongoing between the Transport Agency, AgResearch and other relevant submitters in relation to activities at the trial site, and measures to address the potential effects of the Project on the site.
226. Mr Whaley explains that the designation corridor has been refined in an effort to minimise the impact of the Project on the trial site. He also explains, including in response to questions from the Panel, why the trial site has not been avoided. The indicative construction footprint would, if confirmed, further reduce the direct impact on the trial site.
227. AgResearch and other submitters<sup>103</sup> contend that the construction of the Project will result in the loss of the trial site and cessation of the trial.
228. Dr Dave Horne has carried out a LiDAR-based assessment of the direct impact of the Project on the trial site and its four individual farmlets, in terms of total area that would be removed from the trial site, and the important slope, aspect and soil class parameters. Dr Horne's analysis shows that while part of the trial site (approximately 15%) will be lost to the Project footprint,<sup>104</sup> the balances of the slope, aspect and soil class parameters will be more or less preserved.<sup>105</sup>
229. Both Dr Horne and Jeff Morton are of the opinion that there is no clear reason why the existing trial should not be able to continue in those circumstances. Dr Horne comments that if the trial was to be discontinued, the trial site *"would potentially make an excellent resource for future hill country research, should funding be available"*.<sup>106</sup>
230. The trial has been ongoing since 1975. However, Mr Morton refers to the greatly reduced level of research effort at the trial site over the last 30 years. Mr Dalzell explains that AgResearch came close to selling Ballantrae Station in 2013 / 2014, and that there is no apparent long-term strategic plan for the current trial or the trial site. The large corporate submitters nevertheless emphasise the economic and financial value of the trial site.
231. AgResearch will be compensated for the loss of part of the Ballantrae trial site, as well as for business interruption impacts, through the PWA regime.

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<sup>103</sup> Including Beef and Lamb New Zealand, the Fertiliser Association of New Zealand, Balance Agri-Nutrients, Dr Cory Matthew, and Dr Louis Schipper.

<sup>104</sup> Dr Horne and Mr Morton have assumed that the small parts of the Ballantrae trial site to the south of the Project footprint will effectively be lost.

<sup>105</sup> Dr Horne explains that the most notable impact is the loss of most of the southerly facing aspects on the LFLF farmlet.

<sup>106</sup> At paragraph 26.

To the extent that the trial site is of economic and financial value, that should be reflected in the level of PWA compensation payable.

232. Mr Morton recommends a package of measures to address the potential effects on the trial site, in terms of its operations and scientific value. In doing so he has not considered the potential overlap between PWA compensation and measures to address those effects.
233. The measures Mr Morton recommends include practical steps (during construction and beyond, as appropriate) to address potential operational impacts, and additional measures to address the potential impact on the long-term viability of the trial and research use of the site. The second category includes:
- (a) funding for a pre-construction programme to fill the gap in research and measurements over the last 30 years and capture the results of the trial to date;
  - (b) monitoring of the effects of the Project on the trial site for a 3-5 year period following construction; and
  - (c) presuming the trial site remains suitable for research use, funding for ongoing research.
234. The updated draft conditions (described in response to the Panel's questions, provided separately), require the Transport Agency to confirm a construction footprint that is consistent with the level of direct impact on the Ballantrae trial site as assessed by Dr Horne. A Ballantrae Station Management Plan is proposed to address the measures recommended by Mr Morton (and will have to take into account the compensation payable under the PWA). These updated conditions can be further explained by Ms McLeod.
235. The Transport Agency's position is that the PWA regime, supplemented as needed by specific measures set out in the Ballantrae Trial Site Management Plan, will appropriately address the direct and potential impacts of the Project on the trial site.

## **CONCLUSION ON EFFECTS**

236. Overall, the Project has very significant benefits, and considerable work has gone into identifying potential adverse effects, designing the corridor and imposing constraints to minimise them, and devising a broad package of measures to address them. The measures will be developed further, in



conjunction with the detailed design of the Project, and implemented as the Project progresses.

## **PART E RELEVANT PLANNING PROVISIONS (SECTION 171(1)(A)) AND OTHER MATTERS (SECTION 171(1)(D))**

237. There is generally little dispute about the planning provisions that are relevant to the Panel's consideration of the NoRs, but there are certainly questions of weight for the Panel to determine, and some disputes about how policy wording should be interpreted.
238. The relevant provisions are listed in Appendix One to the AEE.<sup>107</sup> The evaluation of the Project against the provisions is summarised in Part I of the AEE, and updated in Ms McLeod's evidence.
239. The areas of dispute between the planners (who are yet to conference, as at the date of these submissions) about the meaning and effect of the provisions appear to be relatively few. Areas of focus have included:
- (a) the meaning and effect of walking- and cycling-related provisions in the district plans;<sup>108</sup>
  - (b) the relative weight to be given to One Plan Policy 3-3, which seeks to enable significant infrastructure, and Policy 13-4, which guides decisions on regional resource consent applications for activities in rare, threatened, and at-risk habitats<sup>109</sup> (although this dispute may be largely academic, given that the proposed conditions deliberately build in an outcome by reference to Policy 13-4, so any tension between the policies may be more perceived than real); and
  - (c) the meaning of words in Objective 6-2(b)(ii) of the One Plan, to the effect that adverse effects on natural character be avoided "*where they would significantly diminish the attributes and qualities of areas that have high natural character*".
240. On this last point, the Section 42A report authors are understood to be of the view that the diminishment of **any one** attribute or quality of natural character in such areas would offend against the objective, which does not accord with a plain reading of the relevant words.
241. In terms of 'other matters' potentially relevant to the Panel's determination, one apparent issue is the weight to be given to the draft Te Āpiti / Manawatū

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<sup>107</sup> The Section 42A report authors agree that this is a complete list; see paragraph 116 of their report.

<sup>108</sup> Evidence of Ainsley McLeod, at paragraph 49.

<sup>109</sup> Evidence of Ainsley McLeod, at paragraphs 55 and 56.

Gorge Governance Group's Master Plan. That document is relied on heavily by the Section 42A report authors to justify the addition of a separated path to the Project,<sup>110</sup> but appears to be in a very early, conceptual stage of development (and apparently has not been discussed with the Transport Agency, whose name appears on the front of the document,<sup>111</sup> or with iwi including Rangitāne, whose name does not).

242. These are matters for the Panel to work through with the expert planners at the hearing, in light of the outcomes of expert conferencing.

## **PART F ALTERNATIVES AND REASONABLE NECESSITY**

### **ALTERNATIVES**

243. As explained above, in considering the NoRs, the Panel is required to have particular regard to whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work.
244. The nature of the Panel's task under section 171(1)(b) is summarised above.
245. The Transport Agency followed a detailed and intensive process for considering alternative options for the Project, as a key part of its Detailed Business Case ("**DBC**") evaluation.
246. This approach recognises the fact that the Project will have significant adverse effects on the environment (before mitigation and offsetting), and that the Project requires a reasonably large area of private land. 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.
247. Andrew Whaley explains the process for developing options for consideration, while Scott Wickman describes in his evidence the two-stage (long-list and short-list) Multi-Criteria Analysis ("**MCA**") processes. Mr Wickman explains that a specific sub-option assessment was carried out in respect of the connection of SH3 at or near Ashhurst, as part of the overall short-list MCA assessment.
248. The MCA process allowed for a wide range of route options to be assessed against a set of criteria relevant to the Transport Agency's objectives and the

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<sup>110</sup> See for example the Section 42A Technical Evidence: Planning of Mr Percy and Ms Copplestone, at [121], [139], [140], [281], [293], [296], [302], [325], and [669]. See in particular paragraphs [139], [293], [296], and [325], where the report authors appear to give weight to the aspirations of the Master Plan to provide recreation opportunities. See also the Section 42A: Technical Evidence: Tourism and Recreation of Mr Baker at [11], [17], [18], [23], [24], [45], [59], [60], [61], [63], [65], [66], [67], [118], [126], [143], and Appendix 2. See in particular, "*Opportunities to enhance recreational and tourism opportunities in Te Āpiti*" (paragraphs [45] and [59] – [70]) where Mr Baker discusses at length the relevance of the Master Plan to the Project, and key recreational opportunities identified in the Master Plan.

<sup>111</sup> Evidence of Sarah Downs at paragraph 61.

potential environmental effects of the Project. The input of subject-matter experts as well as stakeholders was a feature of the process.

249. The information gathered through the MCA process then fed into the Transport Agency's decision to select 'Shortlist Option 3' as the Project route corridor. Subsequent to that decision, a further process of refining the broad Project route corridor down to the route and shape of the designation corridor as set out in the NoRs was followed.
250. That process, summarised in Mr Whaley's evidence, involved the consideration of various options for addressing particular issues. It has been iterative and responsive to the advice received from experts and stakeholders. The benefits of that process can be illustrated by reference to the effects envelopes specified in respect of the highly sensitive areas from the northern abutment of the new bridge across the Manawatū River, to the QEII areas to the north-east.
251. Other areas of particular focus were the 'eastern rise', where a significant length of stream habitat has been avoided, the Ballantrae Station field trial site, and the Te Āpiti Wind Farm.
252. These processes were robust and informative, and certainly "*adequate*" in terms of section 171(1)(b) of the RMA.

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

253. Under section 171(1)(c) the Panel is required to have particular regard to:

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

254. More detail on the appropriate application of section 171(1)(c) is provided above.
255. The proposed works (ie the Project) are reasonably necessary to meet the Transport Agency's Project objectives, being to reconnect the currently closed section of SH3 with a connection that is more resilient; and which is safer and more efficient than the Saddle Road and Pahiatua Track. It would of course be very difficult to meet these three objectives without this Project to provide an alternative SH3 connection across the Ruahine Range.
256. The Section 42A report appears to contend that the lack of a separate path for cyclists and pedestrian means that the Project is "*deficient*" in terms of

how it meets the Project objectives.<sup>112</sup> The Report also flags a concern as to whether the Project provides an efficient connection with the existing network at Woodville.

257. Ms McLeod addresses these issues in her evidence. As noted above, the Project objectives stem from the pressing problems occasioned by the closure of the Gorge, and should be read in that light. In reference to each objective:
- (a) the Project route will clearly be more resilient than the previous Gorge route (a point with which the Section 42A report authors agree);<sup>113</sup>
  - (b) as Ms McLeod notes, the second objective refers to efficiency in the sense of faster travel times, more reliability of (that is, less variability in) travel times, and fuel saving, and is clearly met by the Project; and
  - (c) any reasonable analysis would conclude that the Project route will be safer than Saddle Road and Pahiatua Track (in their current form).
258. Further, the use of a designation as a planning tool for the Project is reasonably necessary to achieve the Transport Agency's objectives. Ms McLeod outlines in her evidence why the designation tool is appropriate for the Project.
259. 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), and in this case span multiple districts;
  - (b) are shown in the district plans, and therefore alert the public to the Project's existence;<sup>114</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>115</sup>

## **PART G CONDITIONS**

260. Section 171(2)(c) provides that the Panel may recommend to the Transport Agency that it impose conditions on the NoRs. Conditions are an important

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<sup>112</sup> At paragraphs [745] – [747]. Note that the subsequent comment that all the shortlisted options would have achieved the objectives is irrelevant to the consideration required under section 171(1)(c).

<sup>113</sup> At paragraph 745(a).

<sup>114</sup> Section 175 of the RMA.

<sup>115</sup> Section 176(1)(b) RMA.

means for ensuring that effects are able to be managed appropriately through the construction and operational phases of the Project.

261. The Transport Agency has proposed an extensive set of conditions to be imposed should the Panel be minded to recommend that the requirements be confirmed. Draft conditions were included in the AEE, have been updated as a result of engagement with submitters and early conferencing (as described in the evidence of Ms McLeod) and are being refined further through the conferencing process.
262. The conditions set out a series of binding, legal obligations with which the Transport Agency will comply in implementing the Project.
263. Many of the conditions guide and constrain the design of the Project, including the effects 'envelopes' that set 'bottom lines' relating to terrestrial ecology and streams, the conditions relating to the AgResearch and Meridian land, conditions requiring noise and other mitigation measures to be implemented, and the CEDF condition, among others.
264. Some of the conditioned obligations are 'outcome-based', such as the requirement to implement measures to achieve a net gain in indigenous biological diversity, in accordance with Policy 13-4 of the One Plan. To be clear, this is proposed to be a binding obligation that the Transport Agency must meet in developing the Project.
265. In addition, the Transport Agency's evidence demonstrates how the net gain outcome is proposed to be achieved, such as by the substantial building blocks of ECRs, legal and physical protection of planting and restoration areas in perpetuity, and other measures, with the overall effectiveness of the package to be confirmed through a collaborative process involving iwi and DOC.
266. A number of conditions are intended to dovetail into the outline plan process, with details to be put forward as part of the outline plans demonstrating matters of detail and reporting on how the design achieves certain outcomes.
267. The proposed conditions provide a sound basis for the Panel to recommend confirmation of the NoRs.

## **PART H PART 2 RMA ASSESSMENT**

268. The Panel's consideration under section 171 is expressed to be "*subject to Part 2*". The High Court's decision in *Basin Bridge* confirmed that recourse

could be had directly to Part 2 in evaluating an NoR, notwithstanding the provisions of the relevant planning instruments.<sup>116</sup>

269. As the Panel will be aware, the higher Courts have been revisiting the meaning of “*subject to Part 2*” in the context of resource consent applications, in light of the *King Salmon* decision (which related to a decision on a plan). In short, in *Davidson* the Court of Appeal determined that:

- (a) notwithstanding *King Salmon*, RMA decision-makers should usually consider Part 2 when making decisions on resource consents (that is the implication of the words “*subject to Part 2*” in section 104);
- (b) however, where the relevant plan provisions have clearly given effect to Part 2, there may be no need to do so as it “*would not add anything to the evaluative exercise*”. It would be inconsistent with the scheme of the RMA to override those plan provisions through recourse to Part 2. In other words, “*genuine consideration and application of relevant plan considerations may leave little room for Part 2 to influence the outcome*”.

270. While the Court of Appeal in *Davidson* did not directly address the use and meaning of the term “*subject to Part 2*” in section 171, the Court’s decision is consistent with *Basin Bridge* in this regard.

271. The Project has been developed in a way to ensure strong alignment with the One Plan and relevant district plans. However, to the extent that it would add to the Panel’s evaluative exercise to consider directly the provisions in Part 2, Ms McLeod has explained why the Project accords with sections 6, 7, and 8, and gains strong support from section 5; the Project will make a significant contribution to people’s economic, social, and cultural wellbeing, while minimising and addressing any adverse effects.<sup>117</sup>

## **PART I CONCLUSION AND WITNESSES**

272. There are clearly a number of matters for the Panel to work through and consider carefully through this hearing process. In doing so, it will hopefully be apparent that the Transport Agency has put in considerable effort, and will continue to do so, to deliver a high-quality Project where:

- (a) good design is incentivised and will be achieved in close collaboration with iwi and others;

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<sup>116</sup> *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, (2015) 19 ELRNZ 163 at [118].

<sup>117</sup> Evidence of Ms McLeod at paragraphs 214 to 220.

- (b) adverse effects are appropriately addressed; and
- (c) substantial, meaningful, and positive change is delivered for the people of Manawatū and Tararua, and travellers through the region.

273. **Appendix A** to these submissions identifies the Transport Agency's expert and other witnesses (in the order they are intended to be called).

**DATED** this 20th day of March 2019



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**David Randal / Thaddeus Ryan / Annie O'Connor**  
**Counsel for the New Zealand Transport Agency**

## APPENDIX A – LIST OF WITNESSES

	Witness
1	<b>Sarah Downs</b> (Portfolio Manager System Design: Developing Regions)
2	<b>Andrew Whaley</b> (Project Design)
3	<b>Scott Wickman</b> (Alternatives)
4	<b>Lonnie Dalzell</b> (Project Management)
5	<b>Jonathan Kennett</b> (Walking and Cycling)
6	<b>David Dunlop</b> (Transport)
7	<b>Amelia Linzey</b> (Social)
8	<b>Dr Stephen Chiles</b> (Noise and Vibration)
9	<b>Chris Bentley</b> (Cultural and Environmental Design Framework)
10	<b>Boyden Evans</b> (Landscape, Natural Character and Visual)
11	<b>Dr Adam Forbes</b> (Terrestrial Ecology)
12	<b>Andrew Blayney</b> (Terrestrial Fauna)
13	<b>Kieran Miller</b> (Freshwater Ecology)
14	<b>Dr Rod Clough</b> (Archaeology)
15	<b>Dr David Horne</b> (Effects on Ballantrae Farm)
16	<b>Jeff Morton</b> (Effects on Ballantrae Farm)
17	<b>Ainsley McLeod</b> (Planning and Conditions)

In addition, representatives of Rangitāne o Manawatū, Rangitāne o Tamaki Nui-ā-Rua, Ngāti Kahungunu ki Tāmaki Nui-ā-Rua, and Ngāti Raukawa will give evidence on behalf of their respective iwi, but under the umbrella of the Transport Agency's case. In no particular order, written evidence has been filed by **Manahi Paewai, Dr Jonathan Procter, Siobhan Lynch-Karaitiana, Chris Whaiapu, Greg Carlyon, James Kendrick, Jessica Kereama, Justin Tamihana, and Morry Black.**

Subject to the views of iwi and the Panel, counsel intend to ask that iwi representatives address the Panel in turn after the presentation by Lonnie Dalzell.