

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision No. [2021] NZEnvC 27

IN THE MATTER of six appeals under s 120 and/or s 174 of
the Resource Management Act 1991 for
Mount Messenger Bypass proposed State
Highway 3 between Uruti and Ahititi, North
Taranaki

BETWEEN DIRECTOR-GENERAL OF
CONSERVATION
(ENV-2019-WLG-000003)
(ENV-2019-WLG-000004)

AND TE RŪNANGA O NGĀTI TAMA
TRUST
(ENV-2019-WLG-000005)

AND POUTAMA KAITIAKI CHARITABLE
TRUST AND D & T PASCOE
(ENV-2019-WLG-000006)
(ENV-2019-WLG-000010)

AND TE KOROWAI TIAKI O TE HAUĀURU
INCORPORATED
(ENV-2019-WLG-000009)

Appellants

AND TARANAKI REGIONAL COUNCIL
Respondent/Regional Authority

AND NEW PLYMOUTH DISTRICT
COUNCIL
Respondent/Section 274 party



Director General of Conservation & Ors v Taranaki Regional Council & Ors

AND

NEW ZEALAND TRANSPORT
AGENCY

Respondent/Applicant

Court: Environment Judge BP Dwyer
Māori Land Court Judge M Doogan
Environment Judge MJL Dickey
Environment Commissioner DJ Bunting
Environment Commissioner RM Bartlett

Hearing: 15-19, 23 and 24 July 2019

Interim Decision: 18 December 2019

Appearances: D Allan and A Brenstrum for New Zealand Transport Agency
SJ Ongley for Director-General of Conservation
V Morrison-Shaw for Te Rūnanga o Ngāti Tama
R Enright and RG Haazen for Te Korowai Tiaki o Te Hauāuru
Incorporated
D & T Pascoe for themselves through R Gibbs and M Gibbs
R Gibbs and M Gibbs for Poutama Kaitiaki Charitable Trust
HP Harwood for New Plymouth District Council and Taranaki
Regional Council

Date of Decision: 10 March 2021

Date of Issue: 10 March 2021

SECOND INTERIM DECISION OF THE ENVIRONMENT COURT

- A: (1) The appeals by the Director-General of Conservation and Te Rūnanga o Ngāti Tama are allowed.
- (2) The appeals from Poutama Kaitiaki Charitable Trust and D & T Pascoe are dismissed.
- B: Conditions are to be finalised in accordance with the Court's direction in paragraph [75] of this decision.

REASONS

Introduction

[1] In our interim decision dated 18 December 2019 we determined:¹

Result

1. This is an interim decision of the Court because there is no certainty as to whether or not the Agency can acquire from Te Rūnanga the land necessary to implement the Project and finalise an Agreement for Further Mitigation.
2. In light of the Agency's assurance that it will not compulsorily acquire the Ngāti Tama land, the Court is not prepared to complete its consideration of the NOR and resource consents, absent advice from Te Rūnanga that it has agreed to the acquisition and further mitigation.
3. That is because we cannot determine that the effects of the Project will be appropriately addressed until we receive advice on that acquisition and further mitigation.
4. This proceeding is adjourned until 31 March 2020.
5. On that date we direct that the Agency is to file a memorandum advising the Court of the state of its negotiations with Te Rūnanga.

[2] Since our interim decision, we have been advised that Te Rūnanga have resolved to support the Project, and that the project agreements have been approved by an 81.6% majority of Ngāti Tama members who voted. Turnout for the vote was over 60%.² The Agency has asked that we finalise our decision.

[3] The Agency seeks a minor amendment to the Notice of Requirement (NOR) to alter the designation and the resource consents to accommodate an additional construction yard at the southern end of the Project area.

[4] We record that by memorandum dated 27 October 2020 Te Korowai Tiaki o Te Hauāuru Incorporated withdrew its appeal. Finally, we note that the High Court has dismissed the appeal against our Interim Decision.³

¹ Mount Messenger Interim Decision [2019] NZEnvC 203 at page 5.

² Transport Agency memorandum dated 16 July 2020, at paragraph 4. We record that the New Zealand Transport Agency is now known as Waka Kotahi NZ Transport Agency. For convenience we will continue to refer to it as the Agency as per the Interim Decision.

³ *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council & Ors* [2020] NZHC 3159.

[5] It therefore remains for us to make a final assessment of the matters we did not determine in our interim decision, address the request to amend the NOR, and finalise conditions.

Matters raised in interim decision

[6] Our summary of findings on the core central issues was outlined in our interim decision at paragraphs [458]-[470]. They were as follows:

Alternatives

[458] We have determined that the Agency's consideration of alternative sites, routes or methods of undertaking the Project was adequate.

[459] We observe that the online option (staying within the existing SH3 alignment) was considered and not chosen, primarily for reasons of cost, constructability and cultural values.

Consultation

[460] The Agency's consultation was detailed and extensive.

Cultural effects

[461] There are significant adverse cultural effects from the Project on Ngāti Tama which are yet to be resolved.

[462] We have found that Ngāti Tama has mana whenua over the Project area and it is appropriate that it be the only body referred to in conditions addressing cultural matters.

[463] Mrs Pascoe and her family have not established on the evidence that they have and are able to maintain the whanaungatanga relationships or exercise the associated tikanga that would require recognition under Part 2 of the Act.

[464] We have found that Mrs Pascoe is not kaitiaki in the sense the term 'kaitiakitanga' is used in the Act. The relationship the Pascoes have with their land is one of stewardship.

Te Korowai

[465] We do not consider it is appropriate for Te Korowai to be included in the Kaitiaki Forum Group.

[466] As we have already observed, the primary difference between Te Rūnanga and Te Korowai is whether the cultural effects can be appropriately mitigated. Te Korowai is not satisfied that the terms of the agreement being negotiated between Te Rūnanga and the Agency, together with the proposed conditions, will result in cultural effects being appropriately avoided. We will not determine that issue until we receive advice from Te Rūnanga as to what has been decided with

regard to its land.

Poutama

[467] We have found that Poutama are not tangata whenua exercising mana whenua over the Project area. It follows, therefore, that it is not appropriate that it be recognised in any consent conditions addressing kaitiakitanga that may issue.

Mr and Mrs Pascoe

[468] There is no doubt that the Project will have significant adverse effects on the Pascoes and their land. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

Ecology

[469] We consider that the Project will have significant adverse effects on the area that it affects, but that those effects will be appropriately addressed through the proposed conditions in the event that Te Rūnanga agree to transfer the Ngāti Tama Land to the Agency.

Conditions

[470] Except for those proposed conditions we have addressed in this decision, we are presently unable to find that the proposed conditions, on their own, appropriately avoid, remedy or mitigate the effects of the Project. It may be that those effects can only be adequately addressed through the proposed conditions, the acquisition of the Ngāti Tama Land, and the Agreement for Further Mitigation. Until we know whether or not the acquisition has been agreed, the related agreement entered into (and whether any further amendments to conditions are required as a consequence of such agreements) we cannot finally determine these appeals.

[7] The matters left open until further information was received as to Te Rūnanga's acceptance of the Project are outlined at various parts of the interim decision. We can now complete our assessment.

Retention in Ngāti Tama ownership of subsoil of the highway

[8] At paragraph [390] of our decision we put the issue of retention of the subsoil of the highway by Ngāti Tama to one side pending Te Rūnanga's decision on acquisition of its property. Counsel for the Agency submitted that the position of Ngāti Tama's members in support of acquisition of their land is now clear, and that we can proceed relying on the proposed mitigation package accepted by Ngāti Tama. We agree and record that no issue was raised by Ngāti Tama as to ownership of the subsoil. It was an

issue raised only by Te Korowai and was not supported by Ngāti Tama.

The Agency's objectives – reasonable necessity

[9] The fourth project objective is:

To manage the immediate and long term cultural, social, land use and other environmental effects of the Project by so far as practicable avoiding, remedying or mitigating any such effects through route and alignment selection, highway design and conditions.

[10] In our interim decision we observed that a significant part of the Agency's ability to avoid, remedy and mitigate the effects of the Project rests on compliance with the proposed conditions addressing cultural and ecological effects. We determined that until the Ngāti Tama land needed for the Project had been acquired and agreement reached, the Project is, to all intents and purposes, 'incomplete'. We noted that the Agency could not proceed with the Project without agreement of Te Rūnanga and that, at that time, we could not be certain that the Agency's final objective could be fulfilled.

[11] Counsel for the Agency submitted that the Project's fourth objective in relation to cultural effects has been fulfilled by the acceptance of the Project by Ngāti Tama members. Further, the agreement to the other key elements referred to in Ngāti Tama's opening submissions have now been resolved. As there is now agreement for the Agency to acquire the Ngāti Tama land (and related agreements) we consider, having regard to those matters and our other assessments of the effects of the Project, that the Agency's final objective can be fulfilled.

Cultural effects

[12] At paragraphs [466], [472] and [483]-[484] of the interim decision we did not finally determine whether the cultural effects of the Project could be appropriately mitigated. Having regard to the advice now received about Ngāti Tama's acceptance of the Project and the acquisition of its land and the related agreements, together with our assessment of the wider cultural effects of the Project, we consider that the effects of the NOR and the Project will be appropriately addressed.

Southern construction yard

[13] The Agency seeks to alter the NOR to accommodate an additional yard at the southern end of the Project area.⁴ Certain of the designation conditions and regional resource consent conditions would also need to be amended if the change were made. The amendments proposed were to Condition 1 of the designation conditions and condition Gen.1 of the regional resource consent conditions, to refer to the drawing set dated 3 July 2020 rather than the set provided in evidence. The Agency advised that no other changes to conditions were necessary

[14] In our Minute of 2 September 2020, we invited any party opposing that amendment to advise the Court. We have received no advice of opposition save from Poutama and the Pascoes. However, apart from referring to it as a significant issue,⁵ they provide no details of their opposition.

[15] In support of its proposal, the Agency has advised that there are efficiencies for the Project's construction in having north and south construction yards. In particular, the proposed southern construction yard is closer to the labour-intensive activities of Bridge 1 and the tunnel, and it will also significantly reduce the amount of construction related traffic using SH3 over Mt Messenger.

[16] The Agency stated:⁶

12. The proposed southern construction yard is entirely located on land owned by Mr Thomson. The NoR, and the resource consents, already cover Mr Thomson's land.
13. Mr Thomson has provided his written approval to the alterations and the southern construction yard being located on his land ...
14. The proposed new southern construction yard requires a slight alteration of the NoR and consent boundaries by approximately 131m long and up to 54m wide and will result in approximately an additional 0.4ha (or approximately an additional 0.4% in the entire area to be designated) as shown in **Table 1**.

⁴ Transport Agency memorandum dated 16 July 2020.

⁵ Poutama/Pascoe memorandum dated 15 November 2020.

⁶ Transport Agency memorandum dated 16 July 2020, at paragraphs 12-15.

Table 1 – Southern construction yard approximate area and earthwork volumes

Item	Total		Outside designation	
	Area	Earthworks volume	Area	Earthworks volume
South construction yard	8866m ² (0.9h)	11057m ³	4103m ² (0.4ha)	5456m ³

15. Overall the southern construction yard:

- (a) has the written approval of Mr Thomson;
- (b) will not result in additional adverse environmental effects;
- (c) is supported by Te Rūnunga, has been discussed with the Regional and District Councils (and a draft of this memorandum provided to them) and a draft of this memorandum was provided to the Department of Conservation; and
- (d) will provide efficiencies to the Project being:
 - (i) a north and south construction yard enabling better management of two work fronts;
 - (ii) positioning a construction yard closer to the labour-intensive activities of bridge 1 and the tunnel; and
 - (iii) will significantly reduce the amount of construction related traffic using SH3 over Mt Messenger.

(footnotes and appendix omitted)

[17] The Agency supported its application with an ecological assessment of the location, a memorandum confirming the efficiencies of the proposed southern construction yard, a “South Yard – Earthworks and Flood Assessment” and a specific Construction Water Management Plan to determine how erosion and sediment controls can be arranged.

[18] Having reviewed that information, we consider that the proposal to amend the designation and related resource consent boundaries is appropriate. However, before finalising our decision on this proposal we consider the jurisdictional basis for making the amendments.

Amendment to NOR

[19] In terms of s 174(4) of the RMA, the Court can modify a notice of requirement or impose conditions as it thinks fit. The discretion to modify the NOR is broad.⁷ It includes the ability to modify the boundaries of the NOR,⁸ however a modification must not alter the essential nature or character of the project which is a question of fact in any given instance.⁹

[20] Counsel for the Agency submitted that significant considerations when assessing this matter include that the Environment Court may make modifications where they are minor, reduce the environmental effects and the affected landowners remain unchanged;¹⁰ and that the Court will be constrained by the principles of fairness.¹¹ The plausibility of additional submitters is a factor to consider in determining whether it would be fair to modify a notice of requirement in the way proposed.¹²

[21] Counsel for the Agency submitted:¹³

23 Applying the legal principles to the proposed southern construction yard modification to the designation amendment:

- (a) The modification is minor in scale (0.4ha).
- (b) The modification will not result in any additional environmental effects to those already assessed (it utilises an area of pasture between SH3 and the Mimi stream).
- (c) No person who did not submit, nor party, is prejudiced by the modification:
 - (i) no additional land parcels (beyond those already listed in the NoR documents and designation property plans) are affected;

⁷ *Director-General of Conservation v New Zealand Transport Agency* [2020] NZEnvC 19 at [16] and [26].

⁸ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347 at [86].

⁹ *Director-General of Conservation v New Zealand Transport Agency*, see above n 7 at [26]; *Quay Property Management Limited v Transit New Zealand* NZEnvC Wellington W28/2000, 29 May 2000 at [167].

¹⁰ *Alan Hope T/A Victoria Lodge v Rotorua District Council* [2010] NZEnvC 7 at [38]-[41].

¹¹ *Handley v South Taranaki District Council* [2018] NZEnvC 97 at [45].

¹² *Final report and decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, Ministry for the Environment, Board of Inquiry, 18 September 2009 at [175].

¹³ Transport Agency memorandum dated 16 July 2020, at paragraph 23.

- (ii) the only affected land owner, Mr Thomson, while not a party to the proceedings already has the same parcel of land affected by the NoR (and resource consents) and he has provided written approval to the proposed southern construction yard; and
 - (iii) no additional person would have submitted due to the modification.
- (d) The modification:
- (i) does not alter the material (or essential) nature or character of the Project; and
 - (ii) is not at odds with the original NoR for the amended designation.

Amendment to the resource consents

[22] We acknowledge that it is common for changes to be proposed to a project after consent applications have been lodged. Amendments may be made provided they are within scope of the original application. An amendment is likely to be within scope if it is fairly and reasonably within the ambit and scope of the original consent application and does not result in what is, in substance, a different application; it does not result in a significant difference to the scale, intensity and character of a proposed activity; or the effects of the proposed activity; and it does not prejudice any person.¹⁴

[23] Counsel for the Agency submitted:¹⁵

27. Applying these legal principles to the proposed southern construction yard:

- (a) The proposed southern construction yard will not increase effects of the project on the environment, or any person (Mr Thomson has provided his written approval).
- (b) The proposed location of the southern construction yard is on land (owned by Mr Thomson) which is already affected by the resource consent package (no new land parcels are affected) and listed in the Schedule of Properties attached to the AEE.
- (c) The proposed southern construction yard does not alter the substance of the application in any way, nor materially alter its scale, intensity or character.

¹⁴ *Atkins v Napier City Council* [2009] NZRMA 429 (HC) at [20]-[21], *Car Distribution Group Ltd v Christchurch City Council* [2018] NZEnvC 235 at [23], *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29], *HIL Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45, (2014) 18 ELRNZ 29 at [42], *Shell New Zealand Ltd v Porirua City Council* CA 57/05, 19 May 2005 at [7]. See also *Re Horowhenua District Council* [2014] NZEnvC 184 at [13].

¹⁵ Transport Agency memorandum dated 16 July 2020, at paragraph 27.

- (d) No person who did not submit would have submitted due to the proposed southern construction yard and no party is prejudiced by this change.

[24] We consider that there is a jurisdictional basis to both modify the NOR and amend the Plan to which reference is made in the resource consent conditions because it is clear to us that the amendment enables the efficient construction of the Project, comprises land already included in the NOR documents and does not prejudice or affect any person save Mr Thomson, who has provided written approval to the proposed construction yard.

National Policy Statement for Freshwater Management 2020 (NPSFM 2020) and Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES Freshwater)

[25] Both these documents came into force on 3 September 2020.¹⁶ In a memorandum dated 29 September 2020, the Agency addressed the NPSFM 2020 and NES Freshwater as they relate to the Project. Although both came into force well after the conclusion of the hearing, we are obliged to have particular regard to the NPSFM 2020 in considering the NOR and the application for regional resource consents under the relevant provisions of ss 104 and 171 of the Act. Further, we are obliged to consider the provisions of the NES Freshwater as its provisions must be complied with pursuant to Part 3 of the Act.

[26] In its memorandum, the Agency addressed new conditions that are proposed regarding management plan certification, amendment and review, and also made other amendments to the conditions. Of particular concern to this assessment is the amendment made to the conditions “to incorporate the requirements of the NES Freshwater”.¹⁷

NPSFM 2020

[27] As discussed, the NPSFM 2020 is a relevant national policy statement. In addition, under s 55(2) of the Act, Taranaki Regional Council must amend its regional

¹⁶ The parts of the NES Freshwater relevant to this decision came into effect on 3 September 2020. There are further provisions concerning: intensive winter grazing; stockholding areas other than feedlots; and application of synthetic nitrogen fertiliser to pastoral land which will come into force later in 2021.

¹⁷ Transport Agency memorandum dated 29 September 2020, at paragraph 5(a).

plan, without using a Schedule 1 process, to make the changes set out in Part 1.7 of the NPSFM 2020. These are the changes required to:

- Clause 3.22(1) – Natural inland wetlands
- Clause 3.24(1) – Rivers
- Clause 3.26(1) – Fish passage.

[28] Part 4.1(1) of the NPSFM 2020 provides that every local authority must give effect to the NPSFM 2020 as soon as reasonably practicable. The Agency noted that it is therefore possible that Taranaki Regional Council will update its regional plan to provide for these changes before the Court delivers its decision. Irrespective, the Agency addressed these matters.

Objective and policies of the NPSFM 2020

[29] Counsel submitted that the Project is consistent with the objective and policy framework of the NPSFM 2020. For reasons of efficiency, we set out the relevant portions of counsel’s submission addressing the objective and policies:

13. The objective of the NPSFM 2020 is as follows:

The objective of this [NPSFM 2020] is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems*
- (b) second, the health needs of people (such as drinking water)*
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

14. The NPSFM 2020 includes 15 policies which relate to:

- (a) Te Mana o te Wai and involving tangata whenua in freshwater management (policies 1 and 2);
- (b) Integrated whole-of-catchment management (policy 3);
- (c) Integration with New Zealand’s response to climate change (policy 4);
- (d) Implementation of a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems

is improved, and for all others is either maintained or improved (policy 5);

- (e) Protection of wetlands and their values (policy 6);
- (f) Avoidance of the loss of river extent and values to the extent practicable (policy 7);
- (g) Protection of significant values of outstanding water bodies (policy 8);
- (h) Protection of the habitats of indigenous freshwater species (policy 9);
- (i) Protection of the habitat of trout and salmon (policy 10);
- (j) Efficient use and allocation of freshwater (policy 11);
- (k) Achievement of the national target (as set out in Appendix 3) for primary contact (policy 12);
- (l) Monitoring and reporting (policies 13 and 14); and
- (m) Enabling communities to provide for their social, economic, and cultural well-being (policy 15).

15. The Project is consistent with this objective and policy framework for the following reasons:

In terms of the NPSFM 2020 objective:

- (a) The Project has been developed to prioritise the health and well-being of water bodies and freshwater ecosystems. While the Project involves activities that will affect water bodies and freshwater ecosystems, the response to those effects has been thorough and comprehensive, as described in the evidence of Mr MacGibbon. Mr Hamill and Dr Neale (in respect of streams and freshwater ecology) and Mr Singers (in respect of wetlands) prepared the technical reports attached to the AEE, supplementary reports and evidence at the council hearing. In particular, a suite of mitigation measures is proposed to avoid, minimise and mitigate effects on water bodies and freshwater values. Offset measures are also proposed as follows:
 - (i) The stream areas lost or disturbed as a result of the Project will be offset to achieve no net loss. Restoration (fencing and planting margins of an average 10m width on each bank) of 8455m of existing stream, equating to 10,738m² of stream channel offset will be carried out. In addition, Waka Kotahi will restore the 798m² of stream channel that is being diverted for the Project.
 - (ii) The planting restoration package includes 6ha of kahikatea - swamp forest restoration planting. The purpose of this planting is to transform grass, rush and sedgeland dominated areas to kahikatea, pukatea and swamp maire forest, with small areas of rimu and matai where ground conditions are not as saturated.
- (b) The Project prioritises the health needs of people, appropriately manages flood risk and provides for a lifeline utility.

- (c) The Project will create significant national and regional benefits as explained in the evidence of Mr Napier, Mr McCombs, Mr MacGibbon, Mr Copeland and Mr Hickman, and is supported by Te Rūnanga. The Project therefore provides for the social, economic and cultural well-being of people and communities.

In terms of the NPSFM 2020 policy framework:

- (a) Te Rūnanga o Ngāti Tama has been involved in the development of the Project, as explained in the evidence of Mr Dreaver and the evidence provided by Te Rūnanga (policies 1 and 2). As the Court is aware from Te Rūnanga's memorandum of 27 August 2020 the agreement between Ngāti Tama and Waka Kotahi has now been signed and Te Rūnanga support the proposed conditions. Further, in terms of Policy 1, the comments above in relation to the objective apply.
- (b) The stormwater design has appropriately considered the integrated management of fresh water and use of land, as described in the evidence of Mr Symmans (policy 3). Further, the 2018 Fish Passage Guidelines were adopted and the Councils and the Department of Conservation have agreed with the proposed conditions and Ecology and Landscape Management Plan (which have been the subject of expert conferencing).
- (c) The effects of climate change have been considered as part of stormwater design and in assessing the hydrological effects of the Project, as described by Mr Symmans and at the council level by Mr Kenneth Boam (policy 4).
- (d) The Project will maintain existing water quality. Therefore, the primary contact requirements in Appendix 3 of the NPSFM 2020 will not be affected (policy 12).
- (e) The Project has avoided the loss of natural inland wetlands, has protected their values and promoted their restoration. In particular, the Project has been carefully designed to avoid effects on the ecologically significant Mimi wetland (policy 6).
- (f) While the Project does involve the permanent loss of sections of streams, a thorough assessment was undertaken to avoid the loss of river extent as far as practicable. In addition, the freshwater offset package (summarised above at sub-paragraph (a(i))) will offset the effects of this loss of streams and protect the habitats of indigenous freshwater species (policies 7 and 9).
- (g) The Project does not affect any outstanding water bodies (policy 8).
- (h) The Project does not affect the habitat of trout or salmon (policy 10).
- (i) The Project involves the temporary allocation of water to provide for construction/dust management. The level of take has been carefully identified to be a maximum of 150m³ per day from the Mimi River and 300 m³ from the Mangapepeke River, at a rate of 5L/s. The proposed conditions and mitigation measures have been designed to ensure that the effects of the water take will be appropriately minimised and mitigated. This is an efficient allocation of water to enable this significant

infrastructure project (policy 11).

- (j) Policies 13 and 14 (which relate to monitoring and information sharing) are not relevant to the Project but the conditions require monitoring and reporting on water quality.
- (k) The significant benefits of the Project will enable communities to provide for their social, economic and cultural well-being (policy 15).
(footnotes excluded)

[30] We agree with counsel's submission that the Project is consistent with the objective and policy framework for the reasons specified in the preceding submissions. with the possible exception of 15 (e) above, in relation to natural inland wetlands which we explore further below.

Clause 3.22(1) – Natural inland wetlands

[31] This provision requires that every regional council must include the following policy (or words to the same effect) in its regional plan:

- 16. Subpart 3.22(1) provides that every regional council must include the following policy (or words to the same effect) in its regional plan:

"The loss of extent of natural inland wetlands is avoided, their values are protected, and their restoration is promoted, except where:

- (a) *the loss of extent or values arises from any of the following:*
 - (i) *the customary harvest of food or resources undertaken in accordance with tikanga Māori*
 - (ii) *restoration activities*
 - (iii) *scientific research*
 - (iv) *the sustainable harvest of sphagnum moss*
 - (v) *the construction or maintenance of wetland utility structures*
 - (vi) *the maintenance or operation of specified infrastructure, or other infrastructure*
 - (vii) *natural hazard works; or*

- (b) *the regional council is satisfied that:*
- (i) *the activity is necessary for the construction or upgrade of specified infrastructure; and*
 - (ii) *the specified infrastructure will provide significant national or regional benefits; and*
 - (iii) *there is a functional need for the specified infrastructure in that location; and*
 - (iv) *the effects of the activity are managed through applying the effects management hierarchy.*

[32] The Agency primarily relies on the *specified infrastructure* exception in (b) above. However, in its memorandum it does discuss the wetlands affected by the Project. Again, it is convenient and efficient to set out counsel's submissions in full:

18. The design philosophy adopted by the Project in relation to ecological values focused strongly on avoiding the ecologically significant Mimi wetland, which is described in the evidence of Mr MacGibbon as "*the area of greatest ecological significance in the wider Project area*". The Project has avoided direct adverse effects on the Mimi wetland through careful design (the use of Bridge 1 and shifting the road alignment away from the wetland) and selection of construction methodology for the bridge over the tributary to the Mimi wetland. The construction methodology chosen, which is set out in detail in the evidence of Mr Symmans, Mr Milliken and the AEE, is more expensive but eliminates the need for works in the valley floor leading to better ecological outcomes.

Exotic rushland

19. Beyond the high-value Mimi wetland, the Project affects 5.83 ha of exotic rushland in the Mangapepeke Valley, assessed as low value (not significant) by Mr Singers. The exotic rushland is shown in Figures A1 and A2 of Appendix 2 to the evidence of Mr MacGibbon (taken from Mr Singer's February 2018 Supplementary Technical Report). The exotic rushland is predominantly located on Mr and Mrs Pascoe's property.
20. The definition of 'natural wetland' in the NPSFM specifically excludes "*any area of improved pasture that ... is dominated by (i.e. more than 50%) exotic pasture species and is subject to temporary rain-derived water pooling.*"
21. 'Improved pasture' is defined to mean "*an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.*"
22. The Mangapepeke valley floor where the exotic rushland occurs was cleared and has been maintained since for the purposes of pasture production over many decades. Its growth and composition has been modified, and is managed, by Mr and Mrs Pascoe for stock grazing.
23. In his Supplementary Technical Report Mr Singers assessed the 'exotic rushland' community as "*dominated by exotic rush and pasture species*" with native species occupying "*<3% cover*". This assessment reflects that the valley floor

was cleared, is dominated by poor quality pasture species and has been grazed for many decades. Indeed, as the hillsides are bush covered, the valley floor provides the key grazing for Mr and Mrs Pascoe's stock.

24. Therefore, the 'exotic rushland' community within the lower Mangapepeke valley is not a natural wetland under the NPSFM.

Upper Mangapepeke valley

25. The Project will impact areas of Pukatea treefern treeland (0.722ha) in the upper Mangapepeke valley. Parts of these areas, despite their significant modification, degraded state and a high component of exotic pasture species throughout, are likely qualify as a 'natural wetland' under the NPSFM. The likely area of affected 'Pukatea treefern treeland' inland wetland has been reduced by the inclusion of Bridge 1.

(footnotes excluded)

- [33] With regard to these matters, DOC has recorded¹⁸ that it:

...

(b) agrees with Waka Kotahi that parts of the Mimi Valley and Upper Mangapepeke Valley fall within the definition of 'natural wetland' under the NPSFM, and does not wish to comment whether the lower Mangapepeke Valley fits the definition or not as that relies upon an evidential foundation to which DOC has not led evidence and given the agreements DoC has reached with Waka Kotahi to provide for positive ecological outcomes; and

(c) has relied on the expert evidence of Mr Robert MacGibbon and Mr Peter Roan for Waka Kotahi in support of the Project.

(footnotes excluded)

- [34] Mr and Mrs Pascoe and Poutama have an issue with the Transport Agency's claim that the 'exotic rushland' community within the lower Mangapepeke Valley is not a natural wetland under the NPSFM 2020. Referring to the statement by counsel for the Agency that "this [Singers] assessment reflects that the valley floor... is dominated by poor quality pasture species...".¹⁹ Poutama/Pascoes assert that that statement is simply untrue. They assert that Mr Singers assessed the rushland as dominated (60-70%) by rush species in his supplementary report. They claim that it is self-evident that the rushland community in the Mangapepeke Wetland is not maintained or managed for the purposes of pasture production. If it were so maintained, it would not be a rushland. They maintain in summary that the rushland is not improved pasture. It is not maintained and

¹⁸ Memorandum of counsel for Waka Kotahi NZ Transport Agency, Te Rūnanga o Ngāti Tama Trust, the Director-General of Conservation, Taranaki Regional Council, and New Plymouth District Council dated 27 October 2020, at paragraph 9.

¹⁹ Referring to paragraph 23 of the Transport Agency memorandum dated 29 September 2020.

modified and managed for the purpose of pastoral production.²⁰

[35] For its part, the Agency maintains that the exotic rushland is not a “natural inland wetland” under the NPSFM. However, it observes that in respect of any natural wetland affected by the Project (including the exotic rushland, were that area to be classified as natural wetland) the Agency primarily relies on the “specified infrastructure” limb of clause 3.22(1) of the NPSFM.²¹

[36] In considering this matter we find the definition of “natural inland wetland” (point 20 in paragraph 32 above) to be imprecise – it raises more questions than it answers, particularly in relation to the meaning of “improved pasture”. For example:

- The definition of improved pasture in the NPSFM²² is “*an area of land where exotic species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.*” In the current situation in the lower part of the Mangapepeke valley exotic species (grasses in particular) appear to have been deliberately sown – possibly in the past, the Pascoes having been in residence there for several decades, thus species composition and growth has been modified, and the very fact of grazing means that the pasture is being thus “maintained”. Does that mean it qualifies as improved pasture or would other management techniques have to have been applied?
- Are “exotic pasture species” only those species that are most commonly sown specifically for grazing (grasses), which the “improved pasture” definition implies, or do they include common exotic herbaceous and rush species that also occur in pasture? Some farming practices encourage diversity of herbaceous species within pasture for stock health reasons – are these “exotic pasture species” or does their presence above a certain percentage assist in qualifying the area as a “natural inland wetland”?

²⁰ Poutama/Pascoes memorandum, paragraphs 33-45.

²¹ Transport Agency memorandum dated 18 November 2020, at paragraph 3(b).

²² NPSFM 2020 at page 23

[37] Policy 6 of the NPSFM 2020 is “There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.” This policy and the definition of natural inland wetland (however imprecise) lead us to think that the intention of the NPSFM is to ensure that even where a wetland has been substantially modified and may have a large component of exotic species, if it retains elements of natural hydrological function, then restoration should be promoted. Restoration is itself defined in the NPSFM 2020: “restoration, in relation to a natural inland wetland, means active intervention and management, appropriate to the type and location of the wetland, aimed at restoring its ecosystem health, indigenous biodiversity, or hydrological functioning.”

[38] We can also rely on the RMA definition: “wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals, that are adapted to wet conditions”.

[39] The reference material referred to in clause 3.23 (3) and clause 1.8 of NPSFM 2020, which is said to assist “in case of uncertainty or dispute about the existence or extent of a natural inland wetland”, does not on closer examination assist in more than determining whether or not an area is a wetland, and does not go to the questions we have about “natural inland wetland” or “improved pasture”. There was no opportunity for the ecological experts to present evidence as to whether part or all of Mangapepeke valley is a natural inland wetland as the NPSFM 2020, with its definitions, was promulgated only in September 2020, well after the hearing. Thus we are unable to reach a firm conclusion as to the status of the wetland. Rather than concern ourselves further with the matter here we concur with the Agency that they are able to rely on the specified infrastructure limb of clause 3.22(1).

[40] Finally, with regard to the NPSFM, Poutama/Pascoes refer to the Objective of the NPSFM asserting that it ensures that the Project should prioritise the health and wellbeing of the waterbodies in the Mangapepeke Valley, the health needs of Poutama (including Pascoe whānau drinking water, the Mangapepeke puna waiora and mahinga kai) and the ability of Poutama, including the Pascoe whānau, to provide for their social, economic and cultural wellbeing. We find that the conditions to be applied during

construction to protect water quality and hydrology will be sufficient to enable a successful hydrological rehabilitation of the valley floor and that the attention being paid to the ecological restoration there is likely to result in an improvement to the biodiversity of the valley, given the currently low ecological value ascribed to it by the Agency's ecologists.

Specified Infrastructure

[41] We agree with the submissions of counsel that the Project fits within sub-clause (1)(b) of the policy in clause 3.22. We consider it is both a lifeline utility, as defined in the Civil Defence Emergency Management Act 2002, and specified infrastructure providing significant national and regional benefits. There is a functional need for the Project to occur in the identified location, identified after consideration of options in the route designation process. Further, we are satisfied that the adverse effects of the Project can be managed through the effects management hierarchy as we had previously identified in our interim decision. We accept the reasoning outlined in the Agency's 29 September memorandum, as set out below.

[42] Counsel submitted:²³

26. Irrespective of whether natural inland wetlands are affected or not, the Court can be satisfied that the Projects fits within limb (b) of the policy in Subpart 3.22, for the reasons summarised below.
27. The Project is necessary for the construction of "specified infrastructure", which the NPSFM 2020 defines as including either:
 - (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002 ("CDEMA");
 - OR
 - (b) regionally significant infrastructure identified as such in a regional policy statement or regional plan.
28. The Project clearly falls within this definition. Waka Kotahi is defined as a lifeline utility in the CDEMA, and the Project is of course infrastructure that delivers a service operated by Waka Kotahi. In addition, the Taranaki Regional Policy Statement acknowledges the importance of "*providing for regionally significant infrastructure*" and identifies the importance of transport route security

²³ Transport Agency memorandum dated 29 September 2020, at paragraphs 26-32.

and reliability to Taranaki's growth and development, particularly in relation to SH3, along with network efficiency, capacity and safety.

- 29 As explained in evidence (see above), and acknowledged by the Court in its decision, the Project will provide significant national and regional benefits through the construction of a modern, fit for purpose road, which is significantly safer, more reliable and connective compared to the current SH3. The Project will create significant economic benefits to the region, as well as ecological benefits through the Project's ecological restoration package.
30. There is a functional need for the Project to occur in this location. "Functional need" is defined in the NPSFM as meaning "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.*" This is the case for this Project, for the following reasons:
- (a) The Project comprises large-scale, linear infrastructure. There cannot be gaps in the road – the whole route must fit together safely and efficiently.
 - (b) The constraints on the design of the Project included reducing cultural, ecological, and landscape (by keeping the road low in the landscape) effects while ensuring the road could be appropriately designed and constructed and its geometric design will deliver a safe fit for purpose modern section of state highway.
 - (c) The Project route was the subject of a "*detailed*" alternatives process; Waka Kotahi carefully selected the route as explained in the evidence of Mr Roan. As the Court noted "*the Agency as the requiring authority undertook a thorough and detailed evaluation of the route options before deciding on the preferred route along the Mangapepeke valley.*"
 - (d) The route design was refined at several points to avoid impacts on the ecologically significant Mimi wetland. These refinements included the addition of a bridge to the route across a tributary valley to the Mimi Wetland area, and shifting the southern end of the route further west away from the Mimi Wetland.
 - (e) As explained in the evidence of Mr Roan and Mr MacGibbon, and noted by the Court in its decision, the alignment through the Mangapepeke valley was shifted off the valley floor and moved to the eastern valley flanks, avoiding poorer soil conditions on the valley floor and an area that is a potential restoration target (for kahikatea swamp forest planting).
31. Further, the adverse effects of the Project are managed through applying the effects management hierarchy, which is also defined by the NPSFM 2020. The Project has applied this hierarchy as it has:
- (a) Avoided adverse effects where practicable as set out in Mr MacGibbon's evidence in relation to ecology.
 - (b) Where adverse effects cannot be avoided, the Project has minimised (including remedied) them where practicable as set out in Mr MacGibbon's evidence in relation to ecology.
 - (c) Where more than minor residual adverse effects cannot be avoided,

minimised or remedied, provided for aquatic offsetting / compensation, as those terms are defined by the NPSFM 2020. In particular, the Restoration Package includes the re-establishment of kahikatea – swamp forest and wetland habitat in areas that were once swamp forest and wetland and which retain the environmental conditions suitable for re-establishment. Following restoration, the upper Mangapepeke valley will be transformed into a diverse, high value swamp/wetland ecosystem.

- (d) The Restoration Package also includes the Pest Management Programme which provides for comprehensive, measurable, pest management in perpetuity over 3,650ha. Mr MacGibbon’s evidence is that the ecological package is the largest and most comprehensive for a new road project in New Zealand and that “*the ecological gains will be substantial and permanent.*” The Court also recorded in its interim decision that:

“[208] We are satisfied that the Restoration Package includes a range of mitigation, offset and compensation that together are sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole PMA (and potentially beyond it) in the longer term.”

32. Therefore, the Court can be satisfied that the Project complies with this policy.

(footnotes omitted)

[43] We record DOC’s position on the issue of ‘functional need’ as follows:

9. In respect of the 29 September memorandum, DOC wishes to record that it:

- (a) Does not comment on whether there is a functional need for the Project matter since as stated at the Council-level hearing DOC “*has not closely scrutinised or challenged Waka Kotahi’s evidential basis [for alternatives assessment] as it does not have the requisite engineering expertise to do so. DOC has relied upon the expert evidence of NZTA’s engineers in the opinions that they provided to inform the Multi-Criteria Analysis (MCA) process. DOC has focused on the effects of the alignment now proposed*”;

...

Clause 3.24(1) – Rivers

[44] This provision requires that every regional council must include the following policy (or words to the same effect) in its Regional Plan:

The loss of river extent and values is avoided, unless the council is satisfied:

- (a) that there is a functional need for the activity in that location; and
 (b) the effects of the activity are managed by applying the effects management hierarchy.

[45] The Project is consistent with this Policy as there is a functional need for it to occur in this location, identified after consideration of options in the route designation process. Adverse effects of the Project have been managed through the effects management hierarchy as we have previously identified.

Clause 3.26(1) – Fish passage

[46] This provision requires every regional council to include the following fish passage objective (or words to the same effect) in its Regional Plan:

The passage of fish is maintained, or is improved, by instream structures, except where it is desirable to prevent the passage of some fish species in order to protect desired fish species, their life stages, or their habitats.

[47] We consider the Project is consistent with this objective as it provides for fish passage in all culverts where fish passage is likely to be impeded, with all culverts providing fish passage being designed in accordance with the April 2018 Fish Passage Guidelines.

[48] Having regard to our earlier findings, the contents of the AEE, and the evidence we heard, we accept the submissions made by counsel for the Transport Agency. We find that, for the purposes of s 171(1)(a)(i) and s 104(1)(b)(iii) there is no aspect of the Project that will be inconsistent with any objective and policies of the NPSFM 2020 itself nor with any objective and policies which must be incorporated into the Regional Plan pursuant to s 55(2) of the Act.

NES Freshwater

[49] We have also considered the relevant provisions of the NES Freshwater, which came into force on 3 September 2020.²⁴ We are obliged to have regard to them pursuant to s 104(1)(b)(ii) of the Act. The regulations do not contain any transitional savings or related provisions addressing applications in the course of consideration at the time of their coming into force.

²⁴ See paragraph 25 above, and note 16.

[50] In its memorandum of 29 September, the Agency identified a number of regulations which it contended were of relevance to the Project. It submitted as follows:

42. The NES Freshwater includes the following regulations of relevance to the Project:

(a) "Specified infrastructure" within or affecting "natural wetlands" is provided for in regulations 45 to 47 as follows:

(i) Construction of specified infrastructure within or within a specified distance from a natural wetland is a discretionary activity (including vegetation clearance, earthworks or land disturbance, or the taking, use, damming or discharge of water).

(ii) Maintenance and operation of specified infrastructure within or within a specified distance from a natural wetland (including vegetation clearance, earthworks or land disturbance, or the taking, use, damming or discharge of water) is a permitted activity subject to certain conditions provided for in regulations 46 and 55. If those conditions are not complied with, maintenance and operation becomes a restricted discretionary activity.

(b) "Reclamation" of the bed of any river is a discretionary activity (regulation 57). "Reclamation" is defined with reference to the National Planning Standards as the manmade formation of permanent dry land by the positioning of material into or onto any part of a river (with certain exclusions). Project activities that involve the loss of streams require a resource consent under this regulation.

(c) The placement and use of culverts or weirs are permitted activities, subject to compliance with conditions (regulations 70 or 72). Culverts or weirs that do not comply with those conditions have a discretionary activity status (regulations 71 or 73). In addition, regulations 62, 63, 64 and 69 create additional requirements that must be provided for by the conditions of consent for culverts or weirs as follows:

(i) Regulations 62, 63 and 64 require certain information to be provided to the relevant regional council within 20 working days after any culvert or weir has been constructed as a condition of consent.

(ii) Regulation 69 requires a resource consent granted for the construction of any culvert or weir to impose conditions that require monitoring, and maintenance of the structure in the manner set out in the Regulation.

43. The application before this Court is for all resource consents required for the Project under the regional rules noted therein, and any other rules which may apply to the Project, even if not specifically noted. The resource consents specifically applied for are for such activities as earthworks, works in watercourses, the taking and use of water, discharges to air, land and water, and disturbing contaminated land. The resource consents were bundled with an overall activity status of discretionary.

44. All the relevant activities within the NES Freshwater have been incorporated within the consents for the Project sought to date and before the Court. The AEE, supplementary reports and evidence on behalf of Waka Kotahi has comprehensively addressed these matters. In particular, agreement has been reached with the Councils and the Department of Conservation as to the conditions and the application of the mitigation hierarchy in this case.
45. The Project complies with the provisions of the NES Freshwater and the Court can grant any resource consents required under the NES Freshwater. None of the regulations that impose a non-complying activity status apply to the Project. The applicable regulations impose, at most, a discretionary activity status; the same activity status that the bundled resource consents were assessed under by the Court during the hearing and in its interim decision.
46. Therefore, on the basis of the extensive evidence and material before the Court, Waka Kotahi seeks that the Court confirm that, to the extent necessary, resource consent is granted under the following regulations of the NES Freshwater:
- (a) Regulation 45: Construction of specified infrastructure.
 - (b) Regulation 57: Reclamation of the bed of rivers.
 - (c) Regulation 71: Placement and use of culverts.
 - (d) Regulation 73: Placement and use of weirs.
47. As noted above, regulations 62, 63, 64 and 69 create additional requirements that must be provided for by the conditions of consent for culverts or weirs.
48. The amended conditions in Appendix 1 include provision for these requirements as follows:
- (a) **GEN.24(b)(iii), DAM.7, TCV.9 and PCV.10** have been amended to require monitoring and maintenance of culverts and weirs to be carried out in a way that meets the requirements of regulation 69. This requirement is also reflected in Schedule 1 to the conditions in relation to the Freshwater Management Plan.
 - (b) **TCV.9A and PCV.11A** have been added to ensure the information requirements in respect of culverts under regulation 62(3) and 63(3) are complied with.
 - (c) **DAM.8** has been added to ensure the information requirements in respect of weirs under regulation 62(3) and 64(3) are complied with.

[51] For the purposes of this decision, we have accepted that the Transport Agency's identification of the provisions of the NES that are relevant to the Project is correct. There is nothing obviously to the contrary that stands out in our perusal of the regulations. We accept the proposition advanced in the *Westfield NZ Limited v Upper Hutt City Council* case that it is for the consent authority to classify activities by reference to

relevant rules, and we have had regard to the provisions of s 88A.²⁵ We note the provisions of s 88A of the Act to the extent that they are relevant, and note that under the Regional Plan the Transport Agency's applications have been treated as discretionary activities.

[52] We are concerned by the proposition contained in the Transport Agency's memorandum that, as the Project complies with the provisions of the NES Freshwater, the Court can grant any resource consents required under that document. Counsel submitted that none of the regulations imposing a non-complying activity status apply to the Project. They impose at most a discretionary activity status; the same status under which the bundled resource consents were assessed during the hearing and in our interim decision. It sought, therefore, that resource consents be granted under the following regulations: Regulations 45, 57, 71 and 73.

[53] We do not consider that it is possible in a jurisdictional sense to grant consent for an activity for which no consent was required as at the date the resource consent application was filed, notwithstanding the reference in the AEE to the application being for all resource consents required for the Project under the regional rules noted and any other rules which may apply to the Project even if not specifically noted.

[54] We conclude that, for there to have been a valid application for the consents required in the NES Freshwater (being other regulations), the application documents must have assessed the proposal against the relevant provisions of those regulations. It has not done so in this case as the NES Freshwater was not in existence at the time the application was filed. For these reasons we do not consider that the Court has jurisdiction to grant any further consent (assuming that further consents are, in fact, needed – we have not undertaken an independent assessment of that) required under the NES Freshwater. Further, we do not consider that it is appropriate to amend the conditions to address NES Regulations – the Regulations require compliance with certain matters not explored with the Court during the hearing.

²⁵ *Westfield NZ Limited v Upper Hutt City Council* (2000) 6 ELRNZ 335 (EnvC).

Conditions

[55] We received a final set of proposed conditions from the Transport Agency. We were initially concerned at the way in which management plans were proposed to be dealt with in the conditions, and asked that the Agency address those concerns. That has now occurred, with a final set of NOR conditions having been filed on 29 September 2020 and a final set of Regional Council consent conditions filed on 27 October 2020.

[56] The parties were given an opportunity to comment on those final conditions.

[57] In a memorandum dated 27 October 2020 from the Transport Agency, Te Rūnanga, Director-General of Conservation, Taranaki Regional Council and New Plymouth District Council, those parties indicated their support for a final set of Taranaki Regional Council conditions (with some minor amendments) and for the designations conditions. The only parties who have issues with the conditions are the Poutama / Pascoe parties. Royal Forest & Bird Protection Society of New Zealand Incorporated did not raise any issues.

[58] Poutama / Pascoes are concerned about:

- (a) the removal of condition 5A (relating to the Pascoe land) from the Taranaki Regional Council conditions;
- (b) geotechnical matters;
- (c) the removal of the lapse date from the conditions.

Condition 5A

[59] The Pascoes are concerned that the substance of Condition 5A, which had been included also as part of the regional consents as GEN.6A, has been removed from the regional consent conditions. It is clear to us that the condition has been removed from the regional consents because the condition requires attention to land use matters only. It sets out a process by which the Pascoes may relocate from their home either temporarily or permanently. It seems to us that it is not appropriate that such condition be replicated in the regional consents, as compliance with it is a matter for the New

Plymouth District Council. The Pascoes have not lost anything as a result of its removal.

Geotechnical

[60] In their memorandum dated 15 November 2020, Poutama/Pascoes advised that they have asked Taranaki Regional Council for “further information regarding damage to the Mangapepeke wetland by NZTA earthworks carried out during geotechnical investigation entries. We have yet to receive a response”.²⁶ In its memorandum dated 18 November 2020, the Agency responded. It said:²⁷

(a) The memorandum contends that drains present on the Mangapepeke Valley floor are the result of “probably unconsented” drainage work carried out by Waka Kotahi as part of geotechnical investigations. That is incorrect: the geotechnical investigations carried out for the Project have not involved the digging of drains, and the drains present on the valley floor were not created by Waka Kotahi or its contractors.

[61] We accept that explanation, but note in any event that this matter is not relevant to our assessment of the NOR and application for regional resource consents.

Drinking water supplies

[62] An assertion is made by the Poutama/Pascoe appellants to the effect that the Project will destroy the Pascoe whānau drinking water supplies, including the Mangapepeke puna waiora.²⁸

[63] The Agency responded.²⁹

The memorandum states that the Project will destroy the Pascoe’s drinking supplies. However, counsel note that Mr Symmans addressed the impact of the Project on groundwater (including springs) in Mangapepeke Valley in detail in his evidence, concluding that “the Project will have [a] negligible effect on the groundwater system”.

We accept that evidence.

²⁶ 21st Memorandum for Poutama Kaitiaki Charitable Trust & D & T Pascoe in response to the Minute of the Environment Court dated 9 November 2020, 15 November 2020, at paragraph 16.

²⁷ Transport Agency memorandum dated 18 November 2020, at paragraph 4(a).

²⁸ Poutama/Pascoe Memorandum dated 15 November 2020.

²⁹ Transport Agency memorandum dated 18 November 2020, at paragraph 4(b).

Lapse date

[64] There is no lapse date for the NOR specified in the NOR conditions. In their memorandum, Poutama/Pascoes refer to a lapse period for the designation of 10 years proposed by the Commissioner in his decision on the NOR. They note that the Agency appears to have removed that requirement and in the absence of a proposed lapse period propose a standard five year lapse period.³⁰ In their opening submissions to the Court, Poutama/ Pascoes had argued that no lapse period would impose unreasonable uncertainty on the Pascoe whānau for an indefinite amount of time.³¹

[65] In its opening submission to the Court, the Transport Agency submitted that as the NOR is to vary an existing designation there is no statutory ability to impose a lapse period. It argued that s 181(2) (which relates to alterations to existing designations) does not incorporate s 184 which sets the lapse period for a designation.³²

[66] The Court did not hear full argument on the matter of the lapse of the designation and is therefore reluctant to determine the matter. We will not impose a lapse date on the amended designation but in so doing are not endorsing the position of either party. We note however that the project has a de facto lapse period given that a lapse date of 10 years has been imposed on the resource consents.

Conditions generally

[67] Poutama/Pascoes assert that the conditions and Project do not provide for the cultural values, rights, responsibilities and interests, including kaitiakitanga and stewardship, of Poutama, including the Pascoe whanau. They assert that the conditions actually seek to impose adverse cultural, including social effects, on Poutama including the Pascoe whanau.

[68] We have addressed the cultural effects of the Project and the effects of the Project on the Pascoes and others in our Interim Decision and propose to say no more about them here.

³⁰ Poutama/Pascoe memorandum dated 15 November 2020, at paragraphs 48-49.

³¹ Poutama/Pascoe opening submissions dated 22 July 2019, at paragraph 57.

³² Transport Agency opening submissions dated 16 July 2020, at paragraph 251.

[69] Finally, Poutama/Pascoes maintain that any management plans, resource consent and designation conditions need to be consistent with any potential Public Works Act land agreement conditions. We consider that the conditions proposed to address the effects of the proposal on landowners, including the Pascoes, are appropriate.

Outcome and Conditions

[70] We are obliged to consider the relevant matters contained in ss 171 and 104 of the Act. We identified those matters in our Interim Decision. At the beginning of this decision we set out our findings on the core central issues (at paragraph [6]).

[71] For completeness, we record that we identified and considered the relevant provisions of the various instruments set out in s 171(1)(a)(i)-(iv) in paragraphs [391] – [422] of our Interim Decision. Since our Interim Decision, the NES Freshwater and the NPSFM 2020 have been promulgated and we have considered them in this decision. In the Interim Decision we noted that the effect of the Project on cultural values was a significant issue in the hearing, and also that Te Rūnanga had not yet consented to the Agency's use and acquisition of its land for this Project. We have discussed developments since then regarding cultural matters in this decision.

[72] The determinative issue before the Court arises pursuant to s 171(1)(b)(ii), namely the effects of the designation and whether, here, there has been adequate consideration of alternatives. In paragraphs [115] – [390] we addressed the effects of the designation (and the resource consent applications) and determined that, save for Cultural effects, the effects of the proposal will be appropriately addressed through conditions.


[73] Cultural effects have now been addressed to our satisfaction as outlined in paragraph [12] of this Decision.

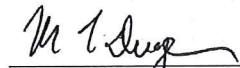
[74] Finally, we had been concerned about whether the Agency's fourth Project Objective could be fulfilled. We are now satisfied that it can be fulfilled, given the agreements reached between the Agency and Ngāti Tama, and in light of our findings on the other effects of the Proposal.

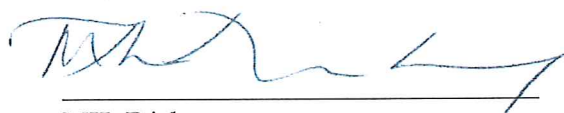
[75] The Agency is directed to delete the amendments to conditions made to address the NES Freshwater (in accordance with our finding in paragraph [54] above). The Court has identified some minor additional issues. The Agency is directed to address those issues, set out in the attached Schedule. The Agency is to lodge an amended complete set of NOR conditions, regional resource consent conditions and a full set of the latest plans within 15 working days of the date of this decision. Upon receipt of same we will formally issue approval to the resource consents and confirm the application in respect of the NOR.

[76] The appeals from Poutama Kaitiaki Charitable Trust and D & T Pascoe are dismissed. Costs are reserved against Poutama Kaitiaki Charitable Trust. Any costs applications to be made and responded to in accordance with clause 6.6 of the Environment Court Practice Note 2014. Time limits to run from the date of issue of the final decision.

For the Court:


 BP Dwyer
 Environment Judge


 M Doogan
 Māori Land Court Judge


 MJL Dickey
 Environment Judge


 RM Bartlett
 Environment Commissioner


 DJ Bunting
 Environment Commissioner



Schedule

Designation Conditions:

- i. Table of contents – Construction Environmental Management Plan – should this row refer to conditions “16 – 18B” (rather than “16 – 18”)?
- ii. Table of contents – Schedule 5 – should the reference to GEN.6A(e)(iv)(3) instead be to Condition 5A of the designation conditions?
- iii. Glossary – the “CTMP” definition is repeated.
- iv. Condition 1 – should “Ecological and Landscape Management Plan” be “Ecology and Landscape Management Plan ” (see Glossary and other conditions, e.g. condition 8).
- v. Condition 5A – advice note – the equivalent condition is no longer in the project resource consents conditions. The advice note will need amendment.
- vi. Condition 6(b)(ii) – should “level of urgency is” instead be “level of urgency in”?
- vii. Heading above Condition 25. Should “Landscape and Environmental Design Framework” instead read “Landscape and Environment Design Framework” (see Glossary)?
- viii. Condition 28A(b) – delete the second sentence as this repeats the first.
- ix. Condition 29A(e) – includes the wording “with any amendments deemed necessary to Conditions 30(a) to (f)”. Is it intended that Conditions 30(a) to (f) themselves could be amended using the process set out in conditions? Should this refer to PMA locations in Condition 29A(d) are amended, not the conditions?
- x. Condition 30(dd) – refers to “bat peer reviewer” but this person has already been identified (in Condition 30(d)) as the “independent peer reviewer”.
- xi. Condition 33(a)(ii)(2) – should the reference here to Condition 29(d)(i) instead be to Condition 29(d)(ii)?
- xii. Condition 43 – the last paragraph starts with the words “Upon receipt of the notice of under...”. Should this instead be “Upon receipt of the notice under ...”?

- xiii. Schedule 1 – paragraph 2(n) begins “Provision to undertaken post-construction ...”. Should this instead read “Provision to undertake post-construction ...”?
- xiv. Schedule 1 – paragraph 3(b)(ii) begins “all other trees that are ≥ 80 cm ...”. Condition 29(c)(i)(1) refers to “trees greater than 80cm”. Is there an inconsistency between Condition 29 and Schedule 1?
- xv. Schedule 1 – paragraph 8(b) – should “relocated it at predetermined release sites” instead be “relocate it at predetermined release sites”?
- xvi. Schedule 1 – paragraph 9(d) refers to non-detection in the “planting” areas of pest plants and pest animals. Paragraph 7 in Schedule 1 contains non-zero levels of pest animal detection. What is the relationship between the “planting area” referred to in paragraph 9(d) and the PMA in paragraph 7?
- xvii. There is an attachment to conditions, inserted after Schedule 5, relating to the CLMP. In paragraph 1B –should “Consent Holders’s” be “Consent Holder’s”?

Regional Resource Consent Conditions:

- i. Table of contents – should the row referring to the Construction Environmental Management Plan refer to “GEN.19 – 21B” instead of “GEN.19 – 21”?
- ii. Table of contents – should the row for the “Ecology and Landscape Management Plan” refer to “GEN.22 – 26” and new rows be created for Conditions GEN.27 and GEN.28 (as they have separate headings)?
- iii. Glossary – “Construction Traffic Management Plan” is listed twice.
- iv. Glossary – the definition of PMA should probably make it clear that the conditions referred in that definition are the Designation Conditions.
- v. Condition GEN.1 – should “Ecological and Landscape Management Plan” be “Ecology and Landscape Management Plan” (see Glossary)?
- vi. New Condition GEN.5(a) – should this be numbered “GEN.5A”? Numbering it GEN.5(a) and then inserting a paragraph (a) into Condition 5(a) could lead to

confusion.

- vii. Condition GEN.14(g) refers to Condition 17. Is this a reference to Condition 17 in the Designation conditions, or a reference to Condition GEN.17?
- viii. Condition GEN.18 – refers (after para (g)) to Condition 18B. Is this the correct reference?
- ix. Condition GEN.23A(e) – the phrase “shall not commence” is repeated.
- x. Condition GEN.24(a)(ii)(4) –refers to Condition 24(a)(ii)(2) and (3). Should this be a reference to Condition GEN.24(a)(ii)(2) and (3)?
- xi. Condition SED.7, after paragraph (h), refers to Condition GEN.12. Condition GEN.12 is a blank condition.
- xii. Condition SED.11, after paragraph (e) refers to “Conditions (b)”. Should this be “Condition (b)”?
- xiii. Condition SED.11 (g) begins “Any exceedance on ...”. Should this be “Any exceedance of ...”?
- xiv. Condition TCV.3 – should “details on the location” be “details of the location”?
- xv. Conditions BRG.1 – 5 (Mimi River) and BRG.1, 2, 3A and 5 (Mangapepeke Stream). The Mangapepeke Stream conditions appear to be repeats of Conditions BRG.1, 2, 3, and 5 of the Mimi River conditions. Should the Mangapepeke Stream conditions be renumbered (BRG.6 – 9), or alternatively refer to the Mimi River conditions and simply say that Mimi River Conditions BRG.1, 2, 3 and 5 apply to the Mangapepeke Stream bridge (rather than repeating the Mimi River conditions with different numbers)?
- xvi. Schedule 1 - see the suggestions regarding Schedule 1 to the Designation Conditions.
- xvii. Delete Schedule 2 (the Pascoe Farm plan). As Condition GEN.6A is deleted, there seems no need to retain Schedule 2 in these conditions.