

Bay of Plenty Regional Council

Decision in relation to applications for resource consent from

The New Zealand Transport Agency, for:

The construction and operational activities associated with a 6.8 km relocation of the State Highway between (Tauranga Northern Link (TNL)).

The resource consents are **GRANTED**. The reasons are set out below.

Application number:	RM17-0579
'Site' location	
Applicant:	The New Zealand Transport Agency
Hearing:	6 and 7 March 2018
Independent Hearing Panel:	Greg Hill (Chairman) Gina Mohi Nigel Mark-Brown
Appearances:	<p><u>For the Applicant:</u></p> <ul style="list-style-type: none"> • Nicola De Wit – Legal Counsel • Angela Crean – NZTA, Project Manager • Steve Bigwood – Planner • Gerardus Kessels – Ecologist • Eugene Vodjansky – Water Resources Engineer • David Morton – Geotechnical Engineer <p><u>For the Submitters</u></p> <ul style="list-style-type: none"> • <u>NZ Kiwifruit Growers Incorporated</u> - Nikki Johnstone, Chief Executive Officer and Katy McGinity, Policy Analyst. • <u>Tauranga City Council</u> – Jon Fields and Peter Askey (Engineering Consultant) • <u>Sandra Hopping</u> – represented by Richard Coles (Planning Consultant) • <u>The Hapū Advisory Group</u> – Ngāi Tamarawaho, Ngāti Hangarau, Wairo Hapū (Ngāti Kahu, Ngāti Pango, Ngāti Rangi) and Pirirakau - Julie Shepherd and Lou TeKeeti. <p><u>For the Council:</u></p> <ul style="list-style-type: none"> • Eleanor Christensen - Reporting Officer • Daniel Smith - Consents Team Leader • Alistair Suren – Freshwater Ecologist • Shay Dean – Environmental Scientist • Emma Joss – Senior Regulatory Project Officer,

	contaminated land and waste <ul style="list-style-type: none">• Susan Southerwood – Engineer• Blair Thornburrow – Water resources - technical audit
Hearing adjourned	7 March 2018
Commissioners' site visit	5 March 2018 ¹
Hearing Closed:	16 April 2018

Introduction

- 1 This decision is made on behalf of the Bay of Plenty Regional Council (“the Council” or “BOPRC”) by Independent Hearing Commissioners Greg Hill, Gina Mohi and Nigel Mark-Brown, appointed and acting under delegated authority under section 34A of the Resource Management Act 1991 (“the RMA”).
- 2 This decision contains the findings from our deliberations on the applications for resource consent, and has been prepared in accordance with section 113 of the RMA.
- 3 The applications were publicly notified in the Bay of Plenty Times on the 4 December 2017. It was also served on a number of parties². At the close of the submission period 13 submissions had been received. Of the submissions, three were in support, six were in opposition and four were neutral.

Summary of the Proposal

- 4 The New Zealand Transport Agency (NZTA or the Applicant) is seeking resource consents for a range of activities associated with the construction and operation of the Tauranga Northern Link (TNL); the relocation of part of the state highway network. Resource consents are being sought for the following:
 - Undertake earthworks;
 - Vegetation clearance;
 - Disturbance and remediation of contaminated sites;
 - Install intake structures in, on, under or over the bed of streams or rivers;
 - Excavate, drill, tunnel or otherwise disturb the bed of a river associated with drilling within the bed of a stream or river;
 - Place use and maintain culverts in, on, under or over the bed of a stream or river;

¹ Due to access issues, the Hearing Panel was accompanied by the Applicant's representative Mr Stephen Bigwood and the Hearing Committee Secretary Ms Shari Kameta. The merits of the proposal were not discussed with Mr Bigwood on the site visit

² Set out at section 6.3 - Notification of the section 42A report

- Place, use and maintain discharge structures and associated erosion protection in, on, under or over the bed of a stream or river;
 - Erect and place, use and maintain bridges over Minden Gully (Hakao Stream) and the Wairoa River;
 - Use, erect and place and excavate the bed and banks of the Wairoa River and the Hakao Stream associated with the installation of temporary bridges, structures and associated works;
 - Undertake drilling below the water table associated with the placement of abutment piles and installation of soil strengthening structures;
 - Temporarily discharge sediment contaminated stormwater to land where it may enter water;
 - Temporarily discharge sediment contaminated water to land where it may enter water associated with the discharge of water from groundwater dewatering;
 - Discharge contaminants to land in circumstances where it may enter water as a result of the remediation or disturbance of contaminated sites;
 - Permanently discharge stormwater to land, to land where it may enter water, and to water;
 - Discharge contaminants to land where it may enter water associated with the use of flocculants and dust suppression chemicals;
 - Modification of wetlands through vegetation removal and earthworks within wetlands;
 - Permanent damming and diversion of ground and surface water;
 - Temporary damming and diversion of ground and surface water associated with construction works;
 - Permanent damming and diversion of flood waters;
 - Take and use groundwater; and
 - Take and use surface water.
- 5 This decision report addresses all of the consents sought, and all have been granted.
- 6 A full description of the proposal was set out in the application (and Assessment of Environment Effects (AEE)). It was also fully described in the officer's section 42A report at section 5 – Description of the Proposal.

Background

- 7 The NZTA has applied for resource consent for the construction and operational activities associated with the Tauranga Northern Link (TNL).
- 8 We were advised by the NZTA that the current section of SH2 between Te Puna and Tauranga is at or near capacity during peak periods. We were also

told that there is growing concern about the safety of SH2 and the current route's ability to meet future growth and transport demands.

- 9 As set out in the application and evidence, the population served by SH2 is growing, and by 2031 traffic numbers are predicted to increase to over 30,000 vehicles per day. This growth is expected to exacerbate safety and congestion issues, as well as increase costs for freight operators.
- 10 SH2 between Tauranga and Te Puna has a poor safety record, due in part to the multiple different users of the road. This is expected to worsen as traffic numbers increase on SH2. Other factors contributing to the poor safety record and high crash rate on SH2 include the large number of intersections, an "unforgiving" roadside environment, inconsistent speeds and poor road geometry.
- 11 Figure 1 below sets out the proposed route:



- 12 The designated route is shown in the Tauranga City and Western Bay of Plenty District Plans as NZTA15 and D180 respectively. The designated TNL further ties into Designation D181 (Road Purposes – SH2 Four-laning) at Loop Road and will give effect to the designation once built.
- 13 In addition to the designated TNL, the transport network includes a designated connection from Fifteenth Avenue to Takitimu Drive, providing westbound access to Takitimu Drive and the TNL.

Locality and Existing Environment

- 14 The TNL is shown in Figure 1 above and extends from Takitimu Drive Toll Road to Loop Road, Te Puna. The current land uses vary across the designation area and include a combination of open farmland, avocado and kiwifruit orchards and small pockets of residential development and lifestyle blocks.
- 15 The TNL is situated within the Tauranga Ecological District (ED) (New Zealand Biological Resources Centre 1987). The ED contains several Special Ecological Areas that have been identified by the BOPRC, including the Wairoa River. The alignment crosses 11 identified streams as well as several additional modified and artificial water bodies / water courses.
- 16 There is 5.17 hectares of ecologically significant vegetation within the TNL alignment; with wet grasslands, rushes and raupo-reed land being significant

- components. The ponds and streams within the alignment are also considered an "ecologically significant land cover class".
- 17 Areas of wetlands are located across the alignment. These include the Richards Way Wetland and the Takitimu Drive/Kopurererua Wetland. Both of these wetlands have been heavily altered or modified by human activity.
- 18 A total of 34 recorded archaeological sites are located within or immediately adjacent to the designation corridor. We understand there is a high probability that unrecorded archaeological sites will be discovered within the TNL alignment during construction works.
- 19 Contaminated land and structures listed in the Hazardous Activities and Industries List have been identified across the alignment, through the Preliminary Site Investigation. These include kiwifruit orchards where pesticides have been applied and stored, and structures that are potentially contaminated through asbestos or the use of methamphetamine.

Procedural Matters

- 20 There were two procedural matters arising from this hearing. They related to: a request to keep certain information confidential under section 42 of the RMA; and the seeking of further information under section 41C of the RMA. We address these below.

Confidentially

- 21 The Hapū Advisory Group lodged a neutral submission, stating that they wanted to be involved in the hearing process and that the Group had worked closely with the NZTA. At the hearing Mr Te Keeti (of the Wairoa Hapū) sought to provide some information to the Hearing Panel on a confidential basis³.
- 22 Section 42(1) - Protection of sensitive information enables -
- A local authority may, on its own motion or on the application of any party to any proceedings or class of proceedings, make an order described in subsection (2) where it is satisfied that the order is necessary—*
- (a) to avoid serious offence to tikanga Māori.*
- 23 Subsection 2 enables the Council to make an order for the purpose of subsection (1)
- prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to any proposal, application, or requirement.*
- 24 The Council and the Applicant did not oppose the request.
- 25 The Hearing Panel granted Mr Te Keeti's request pursuant to section 42(1) and that the information he presented be kept confidential pursuant to section 42 (2)(b); - that the order have effect from the commencement of the hearing and for an indefinite period pursuant to section 42(3) of the RMA.

³ This related to the negotiations the hapū was having with the NZTA in terms of cultural mitigation.

Further Information Sought

- 26 After the hearing was adjourned the Hearing Panel was informed by the Council that some additional information/modelling for the Kopurererua Stream Catchment had been provided by the Applicant⁴. This information identified an increased flooding effect on a number of properties and potentially on a Tauranga City Council Stormwater Pond (Pond 11A adjacent to State highway 29A). The flooding was expected to be greater than the 15mm specified in the Hydrological and Hydraulic Guidelines (pre and post development flood levels).
- 27 In response to that information the Hearing Panel issued Directions to the Applicant seeking further information in relation to potential flooding. This was also provided to all submitters. As all parties were provided with the Direction, we have not set it out in any detail in this decision.
- 28 The NZTA responded to that request by a written memorandum dated 26 March 2018. Again the details of the reply were provided to all parties. In response to the NZTA memorandum, the Council responded to the Hearing Panel (28 March 2018) stating:
- BOPRC have had input into the proposed conditions from our technical experts and are satisfied that the potential flooding effects can be mitigated through the conditions. We will work with NZTA on the final wording before their right of reply submission.*
- 29 The Hearing Panel agreed with the responses, and requested that the NZTA file its written Reply and its recommended conditions. Following this, the hearing was subsequently closed on the 16 April 2018.

Relevant statutory provisions considered

- 30 In accordance with section 104 of the RMA, we have had regard to the relevant statutory provisions including sections 105 and 107 relating to discharge permits where the proposal would otherwise contravene s15 (or ss15A or 15B) and the relevant sections of Part 2.
- 31 Despite all section 104 considerations being “subject to part 2”, the High Court in RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52 has held that recourse to Part 2 is only required, or relevant, where certain circumstances exist. Those circumstances include where there is “conflict between provisions” or where there is “invalidity, incomplete coverage, or uncertainty of meaning” in the relevant planning documents, which requires that Part 2 is considered to resolve the matter. Where there is an absence of those circumstances, there should be no need for the consent authority to have recourse to Part 2.
- 32 We find that the relevant regional plan; the Regional Natural Resources Plan (previously the Regional; Water and land Plan) and Proposed Plan Change 9 – Water Quality to that Plan, have addressed the relevant Part 2 matters and those in the relevant national policy statements. We find there is no conflict between provisions, invalidity, incomplete coverage, or uncertainty of meaning in the planning documents. We also note that there was no disagreement about this between the Applicant's and the Council's planners.

⁴ It had been agreed at the hearing that this would occur

- 33 The application at section 6 – "The Application", sets out all of the consents required; being a combination of controlled, restricted discretionary and discretionary activities. Given that the proposal is to enable the realignment of the state highway, and requires multiple consents, it is appropriate to 'bundle' all of the consent applications together. In doing so, the most onerous is the Discretionary Activity status.
- 34 We have determined the application is a Discretionary Activity. There was no disagreement amongst the parties about this.

Relevant standards, policy statements and plan provisions and other matters considered

- 35 In accordance with section 104(1)(b)(i)-(vi) of the RMA, we have had regard to the following documents:
- The National Policy Statement for Freshwater Management 2014;
 - The Resource Management (Measuring and Reporting of Water Takes) Regulations 2010;
 - National Environmental Standard (NES) for Sources of Human Drinking Water 2008;
 - The Bay of Plenty Regional Policy Statement; and
 - Regional Natural Resources Plan (previously the Regional; Water and land Plan) and Proposed Plan change 9 – Water Quality to that plan.
- 36 Pursuant to section 104(1)(c) , we also had regard to the list of "other matters" set out in the section 42A report at section 9.7 – 104(1)(c) – Other Relevant Matters.

Summary of evidence heard

- 37 Ms Christensen had prepared the section 42A report, with expert technical input from:
- Alistair Suren – Freshwater Ecologist;
 - Shay Dean – Environmental Scientist;
 - Emma Joss – Senior Regulatory Project Officer – contaminated land and waste;
 - Susan Southerwood – Engineer; and
 - Blair Thornburrow – Water resources - technical audit⁵.
- 38 At the hearing Ms Christensen identified what she and the other Council experts considered were the key outstanding issues:
- Limited assessment of cultural effects;
 - Disagreement over the sampling methodology – fish monitoring and invertebrate monitoring;
 - Limited/lack of information on existing bores and possible drawdown effects;

⁵ Each of the technical witnesses had prepared statements of evidence and these were provided as part of the section 42A reporting process

- Limited/lack of detail provided in regards to the flooding effects/modelling undertaken for the Kopurererua Stream Catchment;
- No reticulated stormwater network design details have been provided;
- Limited information on the Richard's Way wetland;
- Limited information on the offsetting / compensation of the loss of wetland area or condition at the Takitimu Drive wetland; and
- Lack of detail in the Dust Management Plan – in particular in relation to water available and exposed areas open at any one time.

39 The Applicant presented opening legal submissions as well as corporate and expert evidence. In summary:

- The legal submissions addressed the Hearing Panel's jurisdiction in terms of the regional consents vis-à-vis those addressed by the designation (with which we agree), certification of management plans and of the TNL design, the review conditions and the term of consents.
- Ms Crean addressed the role of the NZTA, the strategic and policy context, the TNL and its wider context, an overview of the project, the process to deliver the TNL, property acquisition, the funding and anticipated timeline, consultation and some comment on the officer's report.
- Mr Vodjansky addressed the results of the Wairoa River flood modelling at the proposed new bridge crossing, culvert hydraulic modelling and design methodology, hydrologic and hydraulic modelling of the proposed stormwater management and treatment system near Richard's Way, Kopurererua Valley flood mitigation system, and issues raised by submitters.
- Mr Kessels addressed the ecological aspect of the proposal and included: a summary of the actual and potential ecological effects, responded to the Council evidence (Dean and Suren) and submitters concerns, and set out the avoidance, remediation, mitigation and monitoring measures proposed, as well as responding to the draft conditions of consent recommended by the Council officers.
- Mr Morton addressed all of the geotechnical issues related to the proposal, as well as potential groundwater and dust effects.
- Mr Bigwood provided planning evidence-in-chief and a supplementary statement. He provided a summary of the applications sought and a project description, the context of the existing environment, set out the actual and potential effects of the proposal, the relevant planning documents and their provisions, addressed the submissions, provided an assessment of the proposal against the relevant plan provisions, and a response to the section 42A report and the recommended conditions of consent. Mr Bigwood's supplementary statement provided (with reasons) an updated set of proposed consent conditions that he considered appropriate in relation to the proposal.

40 Ms Johnstone of the NZ Kiwifruit Growers Incorporated (NZKGI) verbally spoke to the submission. She was generally satisfied with the proposed conditions; the only outstanding issue was whether the 200 metre distance proposed would be sufficient in relation to extreme weather events.

- 41 Tauranga City Council (TCC) was represented by Mr Jon Fields and Mr Askey. TCC focused on the effects of the TNL on the landfill leachate ponds and wetlands at Takitimu Drive. Mr Askey's evidence was that raising the bunds isolating leachate ponds 1 and 2 from the wetland will ensure the status quo is maintained.
- 42 Mrs Hopping was presented by Mr Coles, a planning consultant. Mrs Hopping's only outstanding issue was the potential flooding effects of the TNL on the Hopping property in the 500 year ARI.
- 43 TNL Hapū Advisory Group presented evidence from Ms Shepherd and Mr Te Keeti. Ms Shepherd set out who was part of the Hapū Advisory Group, the role and engagement it had had with the NZTA. She confirmed the "genuine and constructive" approach that the NZTA had adopted in relation to its engagement with the Advisory Group.
- 44 Ms Shepherd explained that the NZTA had been engaging with the hapū affected by the TNL since 1999, and that input from hapū had helped shape the current alignment for the TNL and avoiding significant sites and culturally important resources.
- 45 Mr Te Keeti tabled documents (subject to the confidentiality order) which related to discussions and agreement between the NZTA the Wairoa Hapū. Mr Te Keeti's concern was that he wanted the NZTA to honour its commitments made to the Wairoa Hapū. He acknowledged this was about "dotting I's and crossing T's" rather than any fundamental concern that the NZTA would not honour those commitments.

Tabled Statements

- 46 Mr Rodney Sands tabled an email regarding his submission. He raised the issue of noise (which is not a matter we are able to address, and has been addressed in the NZTA Designation). He also addressed drains entering culvert CU4. He stated in his email that "*The solution outlined when executed should resolve this problem*".
- 47 Mr Graeme Clark tabled an email in which is said "*We are happy with what they had to say [NZTA staff and consultants - Ms Crean, Mr Averill and Mr Bigwood] and as long as they stick to that re Dust, Noise and Times of work I don't feel I need to attend the hearing*".
- 48 Powerco tabled a letter with respect to its submission. It stated that it sought several conditions, and that these had been agreed to by the NZTA.

Reply Submissions

- 49 The NZTA filed Reply submissions along with a set of recommended conditions. The Reply submission addressed the environmental effects of the proposal; both positive and adverse, and how the adverse effects had been appropriately avoided, remedied or mitigated. It also addressed: the planning documents; submitters' concerns and how they had been addressed, the term of the operational consents (seeking 35 year consent); and addressed the conditions proposed by the NZTA.

Principal issues in contention

- 50 There were a number of issues in contention, none of which fundamentally challenged the applications or the granting of consents (other than the Wairoa Hapū which we address below). The issues were about whether the effects could be appropriately avoided, remedied or mitigated by the proposal and by the conditions of consent.
- 51 The issues in contention (key outstanding issues) were:
- Modelling and flooding effects for the Kopurererua Stream catchment;
 - Flooding effects – Kopurererua Stream / Wairoa River;
 - Dust effects – impacts on kiwifruit;
 - Cultural effects; and
 - Term of consent – a 25 year term was proposed by the Council officer for the permanent activities whereas the NZTA sought a 35 year consent.

Reasons and the findings on the issues in contention

Section 104 (1) (b) and (c) - Relevant standards, policy statements and plan provisions and other matters considered:

- 52 The relevant objectives, policies of the statutory planning documents and other provisions (set out in the section above - **Relevant standards, policy statements and plan provisions and other matters considered**), were fully addressed in the AEE, and the reporting officer's section 42A report.
- 53 The Council's planner, Ms Christensen, and NZTA's planner, Mr Bigwood, agreed that, subject to appropriate conditions of consent, the TNL proposal would be consistent with those relevant objectives and policies of the relevant planning documents and the "other matters" considered.
- 54 Having considered all of the material and evidence provided to us, we agree with the expert planners, and agree that the issues in contention can be 'resolved', including by conditions of consent (which we address below). In this regard we have pursuant to section 113 (3) of the RMA adopted that material as part of this decision. That section states:

A decision prepared under subsection (1) may,—

- (a) instead of repeating material, cross-refer to all or a part of —*
- (i) the assessment of environmental effects provided by the applicant concerned;*
 - (ii) any report prepared under section 41C, 42A, or 92; or*

(b) adopt all or a part of the assessment or report, and cross-refer to the material accordingly.

Section 104 (1) (a) and (ab) - Any actual and potential effects on the environment.

Positive Effects

- 55 We accept there will be a range of positive effects arising from the proposal as set out my Ms Crean⁶. These include improving road safety, addressing traffic congestion between Omokoroa and Bethlehem by providing increased 'throughput' as well as travel time reliability. It will also provide an alternative route in the event of a state highway road closure.
- 56 The TNL will also remove state highway traffic from Te Puna and Bethlehem and improve local access for those communities.

Freshwater ecology

- 57 The ecology experts (Mr Kessels and Dr Suren) agreed the potential freshwater ecology effects of the TNL and agreed the appropriate mitigation including in relation to the monitoring of aquatic insects. At the hearing, both Mr Kessels and Dr Suren confirmed that the monitoring would be for information purposes only with the results to inform future consenting processes.
- 58 It was Dr Suren's view that the restoration of farm drains proposed as part of the TNL in the Kopurererua Stream catchment would have a significant beneficial effect. Appropriate, and agreed, consent conditions were proposed by the NZTA.

Terrestrial ecology (including wetlands)

- 59 Mr Kessels and Ms Dean (the terrestrial ecologist for the Council) were largely in agreement about the potential terrestrial ecological effects of the TNL and appropriate mitigation. In particular, Mr Kessels' evidence noted that additional surveys of wetlands had been carried out by Kessels Ecology in response to Ms Dean's concerns. The additional surveys identified that indigenous vegetation at the Richards Way wetland had regenerated vigorously since the original survey⁷.
- 60 The key outstanding issues at the hearing relating to terrestrial ecology were:
- The measures to address the effects of the TNL on the Richards Way wetland;
 - The significance of ecological effects of additional flooding of the Takitimu wetland resulting from the TNL; and
 - The level of indigenous cover to be achieved before the proposed ecological maintenance period ends.
- 61 The NZTA agreed to additional amendments to the Ecological Management Plan conditions, and these were agreed by the Council, and which we find appropriate. These included:
- All planting overseen by a suitably qualified ecologist;

⁶ Paragraphs 6.8 – 6.9 of Ms Crean's EIC
⁷ Paragraph 4.6 of Mr Kessels' EIC and Appendix 2

- A producer statement provided on completion;
- All plants being eco-sourced indigenous species appropriate to the locality; and
- monitoring of all planting to be undertaken.

62 In relation to Richards Way wetland Mr Kessels and Ms Dean had agreed in principle on a condition to address the effects of the TNL on this wetland. That condition requires and accepts that the parts of the wetland that will be restored will provide improved habitat for wetland fauna and that is not a 'loss'. On the other hand, where parts of the wetland are used for stormwater infrastructure, the effects of the TNL on that area will need to be mitigated.

63 Additional amendments to the conditions were agreed to address the effects of the TNL on the Richards Way wetland. These include a condition that specifies a 2:1 mitigation effect ratio for Richards Way wetland; and a condition specifying that Richards Way wetland cannot be used to mitigate effects at other sites. We agree that these are appropriate.

64 In relation to the Takitimu wetland (in the Kopurererua floodplain) Mr Vodjansky advised that the potential flooding effects of the TNL on the Takitimu wetland in the 100 year ARI 24-hour event will be an increase of 50 – 100 mm for a period of up to 12 hours. It was Mr Kessels' view, which we accept, that any occasional and short term flooding would have negligible adverse effects on the ecological values and functionality of the Takitimu wetland.

Stormwater

65 At the hearing, Mr Vodjansky and Ms Southerwood (the engineer for the Council), were essentially in agreement about the TNL project's potential impacts on stormwater. The outstanding issues, raised by Ms Southerwood, related to:

- The potential flooding effects of the TNL on the Kopurererua Stream catchment; and
- The lack of a Flood Management Plan requirement.

Kopurererua Stream

66 The potential flooding effects of the TNL on the Kopurererua Stream catchment were addressed in the NZTA memorandum dated 26 March 2018. NZTA's proposed condition (G36), which we have imposed, addressed this point.

67 The Hapū Advisory Group provided some comments on the potential flooding effects of the TNL on the Kopurererua Stream catchment (on 11 April 2018). Condition G64 requires the NZTA to consult with the Hapū Advisory Group to inform the preparation of the Management Plans required by the consents.

68 Conditions offered, and imposed by us, also require the NZTA to maintain the plantings for a minimum of 5 years or until the performance standards are met. As set out in the Reply Submissions⁸, the NZTA's standard maintenance obligations will continue to apply beyond that. We find that the issues raised

⁸ Paragraph 19 of the Reply Submissions

by the Hapū Advisory Group have been appropriately addressed by the conditions. We address the other concerns of the Hapū Advisory Group in more detail later in this decision.

69 In addition to the above the NZTA proposed conditions SW6 – SW9, which we have imposed, have been agreed with TCC to address the potential effects of the TNL on TCC's landfill treatment ponds and Takitimu wetland.

70 TCC focused on the effects of the TNL on the landfill leachate ponds and wetlands at Takitimu Drive. We understand the NZTA and TCC have worked together to identify a practical solution to this issue. The evidence of Mr Askey stated that raising the bunds isolating leachate ponds 1 and 2 from the wetland would ensure the status quo is maintained⁹.

71 On this basis the NZTA offered proposed conditions of consent, which we accept and have imposed, requiring the NZTA to:

- Consult with TCC to confirm the design of stormwater infrastructure for the Kopurererua Valley;
- Raise the bunds isolating leachate ponds 1 and 2 from the wetland;
- Provide a culvert between Smiths Stream and the Takitimu wetland (proposed condition SW9); and
- Not directly discharge untreated runoff into the Takitimu wetland.

72 The NZTA acknowledged that proposed condition SW8 requires works to be conducted on TCC land. The NZTA confirmed these works are within the scope of the application as the TCC land is within the designation boundary, the consents applied for include all of the types of activities required for bund works (earthworks, damming and diversion, and modification or disturbance of wetlands), and the bund works are required to mitigate an effect of the TNL identified through the submissions process. Moreover the NZTA acknowledged that this condition requires the cooperation of a third party (TCC) and offered it on an Augier basis.

73 We were advised that the proposed conditions were provided to TCC, and that TCC had advised it was satisfied with those conditions. We accept this.

Flood Management Plan

74 Ms Southerwood suggested that a Flood Management Plan should be required. In relation to this matter, the NZTA offered a new condition to ensure the Construction Management Plan includes flood contingency measures for the Wairoa River flood plain. In addition, it noted that flood management is addressed as part of normal erosion and sediment control procedures.

Geotechnical and groundwater

75 At the hearing the geotechnical and groundwater NZTA and Council experts (Mr Morton and Mr Thornburrow respectively) agreed about the TNL's potential groundwater effects. In particular, Mr Thornburrow confirmed that the groundwater draw down consent conditions were sufficient to address any remaining uncertainty as to the extent of those effects. Conditions (DA18 and DA19) address this point.

⁹ Section 4 of Mr Askey's EIC.

The outstanding differences on conditions between the NZTA and the Council

- 76 The Reply submissions set out the outstanding difference with the conditions¹⁰. We address these below, but record that given the significance of the proposal and its scale, we agree with the NZTA for the reasons set out in the Reply.
- 77 The Council sought that the ecological restoration and enhancement be completed as soon as possible and within two years of the impact occurring. The NZTA considered the requirement for planting “to be completed progressively and as soon as practically possible following completion of works”¹¹ is appropriate given the relatively low value of the impacted habitat (in particular, there is no critically threatened species habitat) and the relatively low level of impact caused by the TNL. In addition, the restoration and enhancement sites will require five years of maintenance to meet the performance standard specified (90% native canopy cover and less than 5% weed cover). We agree with NZTA’s position, which is reflected in Condition G38(4).
- 78 In relation to the permanent stormwater discharge¹², the Council sought continuous data loggers be installed in appropriate places to record total suspended solids, pH, and dissolved oxygen in real time. NZTA argued that continuous data loggers were unnecessary.
- 79 The NZTA’s experts’ view was that the potential effects will be adequately addressed by ensuring the treatment devices are designed, built and maintained to best practice standards (which are based on a large amount of prior scientific and engineering research). We agree with the NZTA that the cost of obtaining and maintaining the data loggers and interpreting the data is unwarranted.

Hapū Advisory Group

- 80 As has been set out earlier, the Hapū Advisory Group lodged a neutral submission, stating that they wanted to be involved in the hearing process; and the Group had worked closely with the NZTA. However at the hearing Mr Te Keeti (of the Wairoa Hapū) opposed the proposal. He tabled documents (which are the subject of the confidentially order) related to discussions and agreement between the NZTA the Wairoa Hapū.
- 81 The NZTA and the Hapū Advisory Group have agreed an extensive mitigation package to address the potential cultural effects of the TNL¹³. The main concern of the Hapū Advisory Group (and particularly the Wairoa Hapū) at the hearing was the enforceability of the agreed mitigation package. Mr Te Keeti explained that the Wairoa Hapū would support the TNL on the basis of the agreed mitigation package if a legal agreement is entered into.
- 82 Ms Crean confirmed that the NZTA had always intended to enter into a Memorandum of Understanding (MoU) with the Hapū Advisory Group in relation to the TNL mitigation package. She explained that it was not possible to finalise a draft MoU to send to the Hapū Advisory Group prior to the hearing as some parts of the mitigation package (non-RMA matters) continued to be discussed. Nevertheless, the NZTA has recorded the cultural mitigation it has offered by way of a letter to the Hapū Advisory Group and the Wairoa Hapū.

10 Paragraph 68 of the Reply Submissions
11 NZTA’s proposed condition G38(4)
12 NZTA proposed conditions SW10 - 17
13 Section 6 of Ms Shepherd’s EIC

- 83 In terms of our decision, we need to be satisfied that the potential cultural effects of the TNL will be appropriately avoided, remedied or mitigated in accordance with the RMA. We find that both the design of the TNL and the conditions that we have imposed (those discussed and agreed between the Hapū Advisory Group and NZTA) will ensure that outcome is achieved.
- 84 Moreover, we do not have the power to require the parties to enter into a MoU, and this was explained at the hearing. Furthermore, as set out at the hearing (and part of the reasons for the confidentially order) non-RMA matters are outside the scope of this process and need to be negotiated between the parties. We understand this has and continues to occur.
- 85 In response to the matters raised by the Hapū Advisory Group, a number of conditions were proposed and presented at the hearing and require:
- The Hapū Advisory Group to be invited to undertake cultural monitoring of the works;
 - Ongoing engagement with the Hapū Advisory Group in relation to the Management Plans;
 - Maximum of 2 piers to be constructed within the Wairoa River; and
 - A bridge, with no piers in the Hakao Stream, to be constructed over the Minden Gully.
- 86 Following the hearing, we understand further discussions between the Hapū Advisory Group and NZTA has occurred. From this the NZTA has offered additional conditions to require it to:
- Continue to facilitate the existence and operation of the Hapū Advisory Group, which has clear parameters set out in the condition. The NZTA is also required to take minutes of each Hapū Advisory Group meeting and circulate those to the members for confirmation of accuracy; and
 - Offer to undertake certain actions to mitigate the potential cultural effects of the TNL. The actions include (among other things) a Kaiarahi to manage any cultural monitors and to coordinate with the Hapū Advisory Group, commissioning cultural commemorative features, and ecologically sensitive restoration of the diverted Moffat Road stream with local eco-sourced plants to be planted in conjunction with Hapū members. This condition requires the NZTA to 'offer' the listed actions, and the actions are to be implemented if 'accepted' as many of the actions require Hapū participation.
- 87 As set out in the Reply submissions¹⁴, the NZTA "*provided the updated set of conditions to the Hapū Advisory Group, and the Hapū Advisory Group has advised that it supports the amendments proposed. This position was confirmed by the Group in writing on 11 April 2018.*"
- 88 Given the above, we find that the offered (and imposed) conditions will ensure that the potential cultural effects of the TNL will be appropriately avoided, remedied or mitigated in accordance with the RMA. As already noted above, non-RMA matters are outside the scope of this process and our decision, and will need to be negotiated between the parties. We encourage this to occur.

14 Paragraph 54 of the Reply Submissions

NZ Kiwifruit Growers Incorporated (NZKGI)

- 89 The NZKGI acknowledged at the hearing the constructive approach that the NZTA had taken to consulting with both it and the two kiwifruit growers that submitted on the application for the consents (Clark and Taylor).
- 90 As a result of that consultation, the NZTA proposed a condition that requires it to consult with kiwifruit orchards within 200 metres of the TNL designation boundary when preparing the Dust Management Plan. The NZKGI was generally satisfied with this proposed condition.
- 91 The only outstanding issue raised by NZKGI at the hearing was whether the 200 metre distance proposed would be sufficient in relation to extreme weather events. The NZTA considered the proposed condition to be appropriate as:
- 200 metres is a standard distance used for dust management;
 - In extreme weather events, dust may be carried from any location, and it may therefore be difficult to determine the source of any dust effects; and
 - To the best of the NZTA's knowledge, all existing kiwifruit orchards would be captured by the 200 metre distance proposed.
- 92 However, since the hearing, the NZTA amended the proposed condition to clarify that it applies to kiwifruit orchards existing at the commencement of these consents in order to provide certainty to the consent holder.

Mrs Hopping

- 93 Mr Richard Coles appeared at the hearing on behalf of Mrs Hopping. Mrs Hopping's only outstanding issue was the potential flooding effects of the TNL on the Hopping property in the 500 year ARI event.
- 94 Since the hearing was adjourned, the NZTA has received modelling results that confirm the extent of those potential flooding effects, and that were provided to Mr Coles. The modelling confirmed that any additional flooding effects of the TNL on the Hopping property will be 67 mm in the 500 year ARI event. The NZTA's experts consider that effect is insignificant. For the reasons we have addressed above in relation to flooding, we agree with the NZTA.

Overall finding on the effects of the proposal

- 95 Given the reasons set out above, we find that that the proposal will have some significant positive effects on the wider environment. Moreover the adverse effects of the proposal will be appropriately avoided, remedied or mitigated by the design of the proposal, the amendments made to the design and construction of the project following discussions with the Council and the submitters, and the conditions of consent which, amongst other things, 'lock in' the agreements made with the various parties.

Term of the operational consents

- 96 The NZTA sought a 35 year term for its operational consents. The Council officer's recommendation was to grant them for 25 years. The basis on which the Council officer recommended the shorter time frame related to uncertainty

regarding the effects of the TNL, particularly in relation to cultural effects and flooding effects on the Kopurererua Stream catchment.

97 The matters the Council officer was concerned about have been addressed earlier in this decision. We find that the uncertainty regarding those effects have been adequately addressed through:

- the Hapū Advisory Group's submission and the proposed conditions; and
- the TCC submission, discussions with Council and the proposed conditions.

98 The NZTA legal counsel set out the case law in relation to terms of consent and the role of review conditions. We accept and agree with those submissions. On this basis we find that:

- The effects of the TNL have been appropriately assessed and are understood to an appropriate degree of certainty, and that these effects are unlikely to change substantially in the future;
- Where the effects of the TNL are not fully known at this time due to the stage of the design, the NZTA has proposed an effective management plan approach to manage such effects to achieve clear outcomes; and
- The review condition is the appropriate mechanism for ensuring the conditions can respond to unforeseen effects as they arise. Accordingly a shorter consent term is not necessary to address such a risk.

99 Having regards to all of the relevant factors above, the significant positive effects, the substantial significant long term public investment (including mitigation) along with the review condition, it is our view that a 35 year consent term is appropriate, whereas a 25 year term would create unnecessary uncertainty for the NZTA.

Section 104 and 104B and 105 and 107

100 The proposal is, overall, consistent with the relevant statutory planning documents including the:

- National Policy Statement for Freshwater Management 2014;
- The Resource Management (Measuring and Reporting of Water Takes) Regulations 2010;
- National Environmental Standard (NES) for Sources of Human Drinking Water 2008;
- The Bay of Plenty Regional Policy Statement; and
- The Regional Natural Resources Plan (previously the Regional Water and Land Plan) and Proposed Plan Change 9 – Water Quality to that plan.

101 There was no contention between any party that the proposal was not consistent with the relevant planning documents.

- 102 The adverse effects of the proposal have been fully addressed and are either minor in their effect, or will be appropriately avoided, remedied or mitigated (section 5 (2) of the RMA) by the inherent nature, scale and location of the proposal, its operation and/or by the comprehensive suite of conditions imposed.
- 103 The conditions offered on an Augier basis further ensure the proposal is appropriate in this location.

Part 2 of the Resource Management Act

- 104 As we set out earlier, despite all section 104 considerations being “subject to part 2”, the High Court in *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 has held that recourse to Part 2 is only required, or relevant, where there is “conflict between provisions” or where there is “invalidity, incomplete coverage, or uncertainty of meaning” in the relevant planning documents, which requires that Part 2 is considered to resolve the matter.
- 105 We do not find that any of those circumstances apply to this proposal. That is - the relevant planning documents have addressed all of the relevant Part 2 matters in section 5 to 8 of the RMA. Checked against Part 2 of the RMA, granting consent to the application would achieve the purpose and principles of the RMA.

Decision

- 106 In exercising our delegation under sections 34A of the RMA and in terms of section 104B and Part 2 of the RMA, we determine that the resource consents for the proposal to realign the State Highway be granted for the reasons set out in this decision and subject to the conditions of consent.

Conditions

- 107 The conditions of consent are attached as Appendix 1 to this decision.



Mr Greg Hill - Chairman of the Hearings Panel.

Date: 25 April 2018
