BEFORE A BOARD OF INQUIRY
TRANSMISSION GULLY PLAN CHANGE

UNDER
the Resource
Management Act 1991

IN THE MATTER OF
a request for a plan
change to the Regional
Freshwater Plan for the
Wellington Region

BY
New Zealand Transport
Agency

LEGAL SUBMISSIONS
ON BEHALF OF KAPITI COAST DISTRICT COUNCIL

DATE: 7 July 2011

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MAY IT PLEASE THE BOARD

1. INTRODUCTION

1.1 These legal submissions are made on behalf of Kapiti Coast District Council (Council), a submitter on this proposed plan change.

1.2 The Council's submission seeks that the plan change proposal be declined, and that remains its preferred outcome. In the alternative, in case the Board considers that the plan should be amended, the Council's evidence also puts forward recommended wording amendments to assist the Board in its consideration of the specific wording of the plan change.

1.3 The representation on behalf of the Council will be in two parts: these legal submissions, and then a statement from Councillor Hilary Wooding on behalf of herself and the other councillors. Mayor Jenny Rowan had planned to deliver that statement but she was unable to attend today.

1.4 In essence, the Council's position is that the existing policy wording will be more effective and efficient at achieving the Regional Freshwater Plan's objectives relating to the protection of water bodies and their values, because policy wording that envisages allowing adverse effects on those water bodies cannot protect those resources to the same extent as policy wording that directs avoidance of effects.

1.5 The Council accepts that projects involving Roads of National Significance are important for the economy. But the impending arrival of a consent application for a major project does not decrease the need for the existing protections in the Regional Freshwater Plan (Plan); if anything it makes those protections more important.

2. OUTLINE OF LEGAL SUBMISSIONS

2.1 These legal submissions address the following core questions:

(a) Is the proposed policy wording the most appropriate for achieving the Plan's objectives? (In my submission, the answer is no.)
(b) If not, can it be amended so that it is more appropriate than the current policy wording? (In my submission, it could be improved significantly, but that would not make it more appropriate than the current wording.)

2.2 Within the discussion of these questions, I will also address the following matters:

(a) Summary of existing and proposed policy approaches.

(b) What is meant by offsetting, including a discussion of the distinction between mitigation offsets and environmental compensation offsets.

(c) Relevant RMA tests.

(d) Existing Regional Freshwater Plan objectives.

(e) Relative appropriateness of "avoid" and "avoid, remedy, mitigate or offset".

(f) Principles from case law and the proposed Biodiversity NPS.

(g) Possible amendments to the proposed policy wording.

(h) Would amendments to the plan change make it more appropriate than the current policies?

3. EXISTING AND PROPOSED POLICY APPROACHES

3.1 The existing and proposed policies are set out in the Mitchell Partnerships section 42A report, and will not be reproduced here. In summary, the Plan's existing policies:

(a) require avoidance of adverse effects on relating to the streams with high natural character as identified in Appendix 2 of the Plan (Policy 4.2.10);

(b) require avoidance of significant adverse effects on the water body values listed in Policy 7.2.2; and

1 Paragraphs 4.4.6-4.4.9. NB the proposed provisions have subsequently been amended as set out in Mr Daysh's evidence and in the Expert Caucusing Joint Report – Planning.
(c) enable activities that avoid, remedy or mitigate adverse effects and avoid the significant adverse effects identified in Policy 7.2.2 (Policy 7.2.1).

3.2 The policy approach contained in the proposed plan change removes Transmission Gully from the above policies, and inserts a new policy stating:²

"4.2.33A To manage adverse effects of the development of the Transmission Gully Project, which are more than minor, in accordance with the following cascading management regime:

(1) Adverse effects are avoided to the extent practicable;

(2) Adverse effects which cannot be avoided are remedied to the extent practicable;

(3) Adverse effects which cannot be avoided or remedied are mitigated to the extent practicable;

(4) Adverse effects which cannot practicably be avoided, remedied or mitigated are offset."

4. WHAT IS MEANT BY OFFSETTING?

4.1 Offset is a general term for a spectrum of responses, from mitigation at one end to environmental compensation at the other. The explanation to Policy 4.2.33A in the proposed plan change states that in the context of the proposed cascading management regime, offset means:

"... taking action that will offset any adverse effects such as enhancing amenity, ecological, or recreational values on-site or elsewhere."

4.2 Environmental compensation was defined by the Court in JF Investments Ltd v Queenstown Lakes District Council³ (JF Investments) as:

"any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoidable and unmitigated adverse effects of the activity for which consent is being sought."

4.3 Environmental compensation does not lessen the adverse effect in question, but rather offers up recompense for the loss or impairment of whatever advantage or

² This version of Policy 4.2.33A is taken from the Expert Caucusing Joint Report – Planning.
³ C48/06.
amenity has been affected. In other words it tends to involve the offering of a positive effect elsewhere, in respect of the same or a similar type of resource, to compensate for effects of an activity.

4.4 In contrast, mitigation means to "make less severe, serious, or painful". In terms of mitigation of effects, the implication is that the effects themselves are being made less severe. As Mr Milne has pointed out, whether an offset is mitigation or compensation will depend on "the scale at which one views the adverse effects in question and the location and form of offset".

4.5 NZTA's proposed wording leaves it open for it to obtain resource consents for the Transmission Gully project based on environmental compensation. In my submission this outcome would not reflect the Plan's objectives. The additions to the explanation to Policy 4.2.33A as set out in the Expert Caucusing Joint Report – Planning are an improvement, because in effect these additions indicate that offsets should take the form of mitigation rather than environmental compensation. However, in my submission they do not go far enough to resolve the uncertainty about what the plan change means by offsetting, and in any event the Council's position is that a policy approach allowing offsets would not be able to implement the Plan's objectives as effectively as the existing policies do.

4.6 As discussed later in these submissions, the objectives of the Plan require strong protection of freshwater resources and values. The use of the words preserved, protected and safeguarded in the objectives will be likely to mean that for some resources, mitigation is not an adequate response, and environmental compensation may be a step further removed. To implement the Plan's objectives, the policies should reflect the wording that is used in the objectives.

4.7 The Council is not suggesting that environmental compensation is never an option under the RMA. What it is saying is that this Plan's objectives are sufficiently directive to require that the most a policy could allow is a mitigation offset (ie not environmental compensation). In effect this means that if the policies are to allow offsets, the policies should provide appropriate and clear limits about what types of offsets will be acceptable. However, the Council's submission is that the policies should not refer to offsets.

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5 Philip Milne, 11 May 2011 memorandum, paragraph 31.
5. IS THE PROPOSED POLICY WORDING THE MOST APPROPRIATE?

Relevant RMA tests

5.1 Section 67(1) of the RMA makes it clear that the purpose of policies in a regional plan is to implement the objectives of the plan for the region:

"A regional plan must state—
(a) the objectives for the region; and
(b) the policies to implement the objectives; and
(c) the rules (if any) to implement the policies." (my emphasis)

5.2 The section 67(1) requirement is aligned with the requirement in section 32 for the person proposing a plan change, and the Board, to examine whether the policies, rules or other methods are the most appropriate for achieving the objectives of the Plan. The relevant parts of section 32 are set out below:

"(3) An evaluation must examine-
(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(4) For the purposes of the examinations referred to in sub sections (3) and (3A), an evaluation must take into account-
(a) the benefits and costs of policies, rules, or other methods; and
(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods."

5.3 The Environment Court's decision in Long Bay-Okura Great Park Society Incorporated & Others v North Shore City Council (A078/08) (Long Bay) has extended the tests outlined in Eldamos Investments Limited v Gisborne District Council (W047/05) to include the "higher order directions" of sections 72, 74 and

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8 Objectives 4.1.4, 4.1.5 and 4.1.6.
9 Sections 32(1)(d) and 145(9) of the RMA and clause 22 of Schedule 1 of the RMA.
10 Sections 32(2)(a) and 149P(6)(a) of the RMA.
76 (in relation to district plans). The Long Bay decision outlines a more comprehensive set of relevant considerations for plan changes. In Appendix A I have set out those considerations, updated to reflect subsequent RMA amendments and amended to include reference to the RMA provisions relating to regional plans.

5.4 Ms Thomson's evidence discusses the interaction of the proposed plan change with other planning and policy documents. My submissions will focus on the following Long Bay requirements:

(a) The policies are to implement the objectives (of the plan, not of the person proposing the plan change).

(b) Each proposed policy or method is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the plan taking into account:

   (i) the benefits and costs of the proposed policies and methods; and

   (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

5.5 In these submissions, I will discuss the section 32 and section 67 matters together, because in order for a policy to be the most appropriate method for achieving the Plan's objectives, it must implement those objectives.

5.6 The section 32 report and Mr Daysh's evidence appear to have included achievement or implementation of the Transmission Gully project as one of their criteria for assessing whether the proposed plan change meets the section 32 tests. However, the objective of the person requesting the plan change is not one

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11 Long Bay was decided in the context of only district plan provisions, but the discussion is equally applicable to regional plan provisions.
12 Paragraphs 4.3-4.16.
13 Section 75(1)(b) in the context of district plans, section 67(1)(b) in the context of regional plans.
14 Section 32(3)(b) of the Act.
15 Section 32(4) of the Act.
16 Page 33, part 4.4.
17 EIC paragraph 325.1.
of the tests in section 32 itself. The relevant section 32 inquiry is whether the policies are the most appropriate for achieving the objectives of the plan.\(^\text{18}\)

5.7 The Long Bay decision also addresses the situation where the operative plan contains settled objectives which the plan change does not seek to alter. In summary, where the objectives of a plan are not themselves in question, they may be taken to represent sustainable management under section 5.\(^\text{19}\)

"Where there are higher level settled objectives then we agree with Suburban Estates Limited v Christchurch City Council that Part 2 RMA considerations are largely subsumed in those settled objectives and policies of the district plan".

5.8 As a result, these submissions will focus on the relationship between the relevant existing objectives and the proposed policies.

**Existing Freshwater Plan objectives**

5.9 Below I set out and comment briefly on the relevant objectives in the Plan.

**Objective 4.1.4:** The natural character of wetlands, and lakes and rivers and their margins, is preserved and protected from inappropriate subdivision, use and development.

5.10 Objective 4.1.4 reflects section 6(a) of the RMA and focuses on preserving and protecting the natural character of water bodies. It is particularly relevant to those water bodies identified in Appendix 2 as having high natural character.

5.11 The objective requires protection from inappropriate development rather than from all development. A key question for policies about natural character to answer is therefore "what types of development are appropriate, and what types of development are inappropriate?" One means of doing so is for policies to identify particular resources that warrant increased protection from adverse effects, as has been done in Policy 4.2.10 and Appendix 2. Once those resources have been identified, in order for the policies to implement Objective 4.1.4 they will need to reflect that objective of preservation and protection. In my submission, the most effective policy for achieving this objective will be the policy that provides the greatest assurance that that preservation and protection will actually occur.

\(^\text{18}\) RMA section 32(3)(b); Long Bay requirement 10 on page 30.
\(^\text{19}\) Long Bay, at paragraph 39.
Objective 4.1.5: The life-supporting capacity of water and aquatic ecosystems is safeguarded from the adverse effects of any subdivision, use and development.

5.12 Objective 4.1.5 reflects section 5(2)(b) of the RMA and focuses on safeguarding the specified values from adverse effects of any development (not just inappropriate development). The objective requires a high level of protection of the life supporting capacity of water and aquatic ecosystems, and a policy implementing this objective will also need a correspondingly strong protection emphasis. In my submission, the most effective policy for achieving this objective will be the policy that provides the greatest assurance that the values listed in the objective will actually be safeguarded.

Objective 4.1.6: Significant indigenous aquatic vegetation and significant habitats of fresh water fauna in water bodies are protected.

5.13 Objective 4.1.6 reflects section 6(c) of the RMA. As with Objective 4.1.5, it provides strong protection, regardless of whether a particular use or development is appropriate or inappropriate.

5.14 In terms of offsets, it is significant that Objective 4.1.6 protects particular vegetation and habitats (ie significant vegetation and habitats). For a policy to implement Objective 4.1.6, the policy must protect the particular vegetation and habitats that have been identified as significant. An offset relating to vegetation or a habitat elsewhere arguably would not actually implement the objective and therefore a policy allowing such an offset could not be the most effective method for achieving this objective.

Objective 4.1.11: People and communities are able to use and develop freshwater resources to provide for their social, economic, and cultural well being and for their health and safety.

5.15 Objective 4.1.11 reflects section 5 of the RMA, and focuses on use and development of freshwater resources. This objective’s enabling approach is likely to be in tension with some of the other protection-centred objectives noted above and below. However, in my submission this tension can be resolved by reading the objectives together and by requiring any use of the freshwater resources to be consistent with the other objectives. In other words, the policies can enable use and development of freshwater resources so long as that use and development also protects the particular values identified in the other objectives.
Objective 4.1.12: The adverse effects of the use and development of freshwater resources are avoided, remedied, or mitigated.

5.16 Objective 4.1.12 is also relevant. Adverse effects of activities using and developing freshwater resources must be avoided, remedied or mitigated. Policies relating to activities such as disturbance of or discharges to water should therefore focus on avoidance, remediation or mitigation, depending on the significance of the freshwater resource in question.

Objective 4.1.13: Activities that enhance freshwater resources are promoted.

5.17 Objective 4.1.13 confirms that in addition to protecting and safeguarding water resources, enhancement should be encouraged. This raises the question, "should an activity enhance the water resources that are directly affected by an activity, or water resources at some other location?"

5.18 An offset proposing to enhance a water resource either within the same catchment as the core activity or elsewhere would appear to have the support of Objective 4.1.13. However, if the cost of that enhancement is degradation of water resources at the site of the consented activity, the overall outcome could still be degradation rather than enhancement.

Objective 7.1.1: Appropriate uses of the beds of rivers and lakes are allowed while avoiding, remedying, or mitigating any adverse effects.

5.19 Objective 7.1.1 bears some resemblance to Objective 4.1.12, but with a focus on uses of the beds of rivers and lakes. It is an enabling objective, while still requiring that adverse effects of activities to be avoided, remedied or mitigated. Policies relating to activities such as disturbance of or discharges to water should therefore focus on avoidance, remediation or mitigation, depending on the significance of the freshwater resource in question.

5.20 In summary, there is a consistent focus in the above objectives on safeguarding, protecting and enhancing natural character values and habitats of aquatic flora and fauna, while contemplating use where it is appropriate in the context of that protection. The Freshwater NPS and the proposed RPS also require strong protection of fresh water resources, as described in Ms Thomson's evidence.20

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20 Thomson evidence, paragraphs 4.6-4.8 (NPS Freshwater) and paragraphs 4.14-4.15 (proposed RPS).
5.21 In my submission, a policy that provides a greater degree of assurance that the outcomes sought by these objectives will actually occur, will be a more effective, efficient and appropriate method for achieving these objectives.

5.22 In *NZ Rail v Marlborough District Council*,\(^{21}\) the Planning Tribunal discussed how to deal with multiple objectives and policies in the context of what is now section 104D(1)(b) of the RMA. The Tribunal noted that "the objectives and policies referred to are the relevant objectives and policies to which regard is to be had in terms of section 104(4) [now section 104(1)(b)(iv)]". The Tribunal also noted that "where there are relevant general objectives and policies that might be thought to be in conflict with more specific relevant objectives and policies … it is the latter that should be regarded as being applicable".

5.23 In *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110, the Environment Court stated, "it is conceivable that a resource consent proposal may achieve only one policy in a district plan and be contrary to many others. But the proposal may be so strong in terms of that one policy that it outweighs all the others if that is the intent of the plan as a whole".

5.24 Both these decisions were made in the context of resource consent applications. However, it follows that where multiple objectives in a plan have relevance to a proposal to change the plan's policies, more weight should be placed on the most relevant and specific objectives (provided this accords with the intent of the plan when read as a whole).

5.25 In the present case, the objective that is most relevant to the natural character of the Appendix 2 water bodies is Objective 4.1.4, because natural character is the basis on which the Appendix 2 water bodies were identified in the Plan. However, given that the proposed plan change wording would apply to all effects of the Transmission Gully project rather than effects on natural character only, in my submission the plan change should seek to implement all of the objectives identified above in a holistic manner.

\(^{21}\) (1993) 2 NZRMA 449, at page 460.
Relative appropriateness of "avoid" and "avoid, remedy, mitigate or offset"

5.26 For the reasons discussed below and in Ms Thomson's evidence, in my submission, NZTA's proposed policies:

(a) Will not implement the relevant objectives as well as the current policies will; and

(b) Will not be as effective and efficient as the current policies in achieving the objectives, and therefore are not the most appropriate way to achieve those objectives in terms of section 32(3)(b).

5.27 In my submission, the avoidance approach in the current policies implements the current objectives, because the strength of its wording reflects the strength of the protection sought by the Plan's objectives, and it provides meaningful guidance to plan users about how the objectives are to be achieved. This approach also reflects the strong protection wording in the Freshwater NPS and the proposed RPS.

5.28 The policy approach contained in the proposed plan change removes the requirement to avoid significant adverse effects of Transmission Gully on all water bodies, and introduces the ability to remedy, mitigate or offset adverse effects on the water bodies in Appendix 2. In particular, where it is not practicable to avoid, remedy or mitigate adverse effects on a water body, the consent applicant can propose to offset those effects somewhere else.

5.29 Allowing a consent applicant to offset adverse effects implicitly signals that it is acceptable not to safeguard, protect and preserve the resources directly affected by the activity. In particular, the plan change would mean that the policies contemplate a situation where, because of the proposed enhancement of another resource elsewhere:

(a) the natural character of the wetlands, lakes and rivers and their margins directly affected by the proposal, might not be preserved and protected (Objective 4.1.4);
(b) the life-supporting capacity of water and aquatic ecosystems directly affected by the proposal might not be safeguarded from adverse effects (Objective 4.1.5); 

(c) significant indigenous aquatic vegetation and significant habitats of freshwater fauna in water bodies directly affected by the proposal might not be protected (Objective 4.1.6); and 

(d) (in the case of environmental compensation offsets) the adverse effects of the use and development of the freshwater resources directly affected by the proposal might not be avoided, remedied, or mitigated (Objective 4.1.12).

5.30 In terms of section 32(4)(a), the results of NZTA’s proposed policy approach would include the benefit to NZTA of more flexible consenting requirements for the Transmission Gully project, as well as any localised benefits of the particular offsets employed by NZTA. The costs would include decreased protection of the natural character, vegetation and habitats at the sites of the primary works, and the likely increase in adverse effects on those values. Non-Appendix 2 streams, which Policies 7.2.1 and 7.2.2 currently protect against significant adverse effects, would lose that protection.

5.31 In my submission, allowing offsets would not implement the objectives set out above as well as the current policies do, and in some circumstances it might lead to outcomes that do not implement those objectives at all. The strong wording in the existing policies in the Plan will be more effective at providing the protection that the objectives require, and nothing in the existing policy framework prevents a consent applicant from proposing enhancement works as part of its consent application. As a result, I submit that the proposed policy wording is not the most appropriate in terms of section 32 of the RMA.

6. WHAT LIMITS ON OFFSETTING WOULD BE APPROPRIATE IF OFFSETTING IS TO BE ALLOWED?

Principles from case law and the proposed Biodiversity NPS

6.1 Appropriate limits for offsets have been developed by case law, and in my submission these limits should be incorporated into the policies if the Board
decides to allow offsetting under the plan change. (The Council opposes the inclusion of offsetting.) I submit that the limits developed by case law also indicate that acceptable offsets will almost always be mitigation offsets rather than environmental compensation offsets.

6.2 In JF Investments, the Court held that an offset should be limited by the following constraints. It stated:\textsuperscript{22}:

"(1) it should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;

(2) it should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;

(3) it must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;

(4) there should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;

(5) it should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document."

6.3 These factors were affirmed by the Environment Court in Royal Forest and Bird Protection Society v Gisborne District Council (W026/2009), where the Court also noted that the following principles developed by Dr David Norton in relation to biodiversity offsets can be considered to build on the JF Investments principles:\textsuperscript{23}

"Biodiversity offsets should only be used as part of a hierarchy of actions in which a development project must first seek to avoid impacts and then minimise the impacts that do occur.

Some form of guarantee must be provided that the offset proposed will occur.

Biodiversity offsets are inappropriate for certain ecosystem (or habitat) types because their rarity or the presence of particular species within them makes the clearance of these ecosystems inappropriate under any circumstances.

Biodiversity offsets can involve protection of existing habitat but most often involve the creation of new habitat, especially when existing habitat already enjoys a degree of protection.

\textsuperscript{22} Paragraph 42.
\textsuperscript{23} Paragraph 72.
A clear currency is required that allows transparent quantification of values to be lost and values to be gained in order to ensure ecological equivalency between cleared and offset areas.

Determination of what is an appropriate offset must take into account both the uncertainty involved in obtaining the desired outcome for the offset area and the time-lag that is often involved in reaching this point."

6.4 The Proposed NPS on Biodiversity offers yet more detailed principles, which appear to reflect the current trend in planning practice as signalled in the above cases. This NPS is not yet operative but it does provide some additional guidance about how limits on offsetting could be expressed.

6.5 As with the Royal Forest and Bird case noted above, the NPS Biodiversity guidance relates to offsets in the context of biodiversity, but the principles offer helpful guidance about the types of limits that would be appropriate in other settings as well. These principles are contained in Schedule 2 of the proposed NPS and are set out in Appendix B to these submissions. For ease of reference I summarise them below:

(a) the offset should causes no net loss, and preferably a net gain – including the development of an appropriate method of calculating an offset;

(b) the offset should cause additional positive conservation outcomes;

(c) the offset only addresses the residual effects of the activity, namely those effects left after all the appropriate avoidance, minimisation and rehabilitation actions have been taken;

(d) no offsetting is allowed if the adverse effect would affect vulnerable or irreplaceable biodiversity;

(e) the appropriateness of offsetting is to be looked at in the context of a whole landscape or ecosystem;

(f) an offset should have the legal and monitoring foundation to continue effectively and be revised if need be; and
(g) the design of and reporting on an offset should be transparent and timely.

6.6 The principles in the two cases above related to consideration of the merits of particular offsetting proposals in resource consent appeals, so some elements might need adjusting if they were to be incorporated into a policy guiding the use of offsets. However, the key themes arising from both cases and from the proposed NPS are consistent. In particular, they each contain a requirement for transparency, as encapsulated in JF Investments as follows:24

"an offset should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document."

6.7 Other key themes are that offsets should be as close as possible to the site, they should be "in kind", they should aim for a net benefit or at least no net loss and, importantly, offsets will not always be appropriate.25 In terms of the last point, if proposed Policy 4.2.33A is to be inserted into the Plan, the Council supports the addition of an express limit within the policy stating that effects on rare or vulnerable resources, such as that proposed in paragraph 6.7 of the Mitchell Partnerships Supplementary Section 42A report (24 June 2011).

6.8 Based on the cases noted above, I also submit that offsets are an inappropriate method to address adverse effects on streams that have been identified as having a high degree of natural character, such as those listed in Appendix 2 of the Plan. The current Policy 4.2.10 is deliberately strong in focusing on avoidance of adverse effects in these streams. To accept the currently proposed wording would create a risk that the natural character of these streams will be degraded.

Possible amendments to the proposed policy wording

6.9 There is a lack of certainty about the way offsetting is used within the proposed plan change wording, and this lack of certainty highlights a misalignment between the Plan's objectives and the proposed policy approach. This issue goes to whether the proposed plan change actually implements the objectives, and is also

24 JF Investments, paragraph 42.
25 For example in relation to certain ecosystem (or habitat) types because of their rarity or the presence of particular species within them: Royal Forest and Bird, paragraph 72. See also principle 4 of Schedule 2 of the proposed Biodiversity NPS, as paraphrased above in paragraph 6.5(d) of these submissions.
relevant to the question of what changes would need to be made in order to improve the plan change’s appropriateness if an approach involving offsetting is to be allowed.

6.10 Although an assessment of whether a proposal ultimately requires an offset to be imposed would need to be made at the time of consenting, in my submission if the policies are to allow offsetting, it would be more efficient and effective to offer guidance in the form of more detailed and refined policy wording now. This wording would guide both the preparation and consideration of the consent application that is to come, and would help to avoid unnecessary uncertainty about what types of offsets are appropriate.

6.11 In particular, if the Board decided to approve policy wording that envisages offsetting, I submit that more detailed guidance would be required in the policy wording about the meaning of offset, in what circumstances it will be available, and what form it must take. At present, the only information about the possible types and extent of offsets that might be put forward as part of the consent applications for the project are the summarised indications in evidence about what NZTA currently intends to do. In my submission those indications do not provide a sufficient basis on which to include an open-ended provision allowing offsetting.

6.12 The amendments proposed in the Expert Caucusing Joint Report – Planning are a step in the right direction. However, they do not address all of the aspects noted above, and in any event they are in the policy explanation only, and so they would carry little weight.

6.13 Ms Thomson’s evidence sets out and explains a number of wording amendments that would improve the certainty of the plan change. In particular, the limits on offsetting that are reflected in the cases above and in the proposed Biodiversity NPS could be incorporated into the relevant policies.
6.14 If those changes were made, the policies would provide greater guidance about what is expected of an applicant, and would arguably provide greater protection to the water bodies along the intended Transmission Gully route than the plan change as currently proposed would provide. On that basis, the changes would improve the appropriateness of the plan change for achieving the objectives. In particular, if offsetting was to be allowed in the policies:

(a) Objective 4.1.6 would support a requirement that the offset is confined to very close proximity to the vegetation or habitat being lost or damaged. Even then it would be debatable whether a policy approach that envisaged loss of or damage to significant vegetation or habitats would actually implement the protection required by Objective 4.1.6.

(b) Objective 4.1.12 would support discouraging anything falling outside the avoid, remedy or mitigate directives (eg environmental compensation). In my submission it would be inconsistent with this objective to include a policy that either explicitly or implicitly authorised environmental compensation, because that is a non-mitigation type of offset.

(c) Objective 4.1.13 would support the inclusion of a requirement for a net benefit (or at least no net loss) for any offsets, because that requirement would promote activities that enhance freshwater resources.

Would amendments to the plan change make it more appropriate than the current policies?

6.15 Overall however, the above changes would not alter the fact that, if amended, the Plan would contemplate allowing adverse effects on water bodies on the Transmission Gully route. This approach cannot, in my submission, be more effective or more efficient than the current Plan wording at implementing or achieving objectives requiring the protection of those water bodies. On that basis, the Council maintains its submission that the current policies are more appropriate for achieving the Plan’s objectives.

7. CONCLUSION

7.1 The objectives of the Plan have not changed, and NZTA is not proposing to change them. Instead the argument seems to be that the existing policies will
impede NZTA's objectives. However, in my submission, the arrival of the Transmission Gully project on the horizon does not mean that Policy 4.2.10 is no longer the most appropriate, efficient or effective means of implementing and achieving the objectives of the Plan (sections 67(1) and 32(3)(b)).

7.2 Despite the importance of the Roads of National Significance to the economy, the key question under the plan change proposal is whether the proposed policy changes are the most appropriate for achieving the objectives of the Regional Freshwater Plan. In my submission they are not.

7.3 The Council respectfully requests that the Board decline the plan change.

7.4 In the alternative, if the Board is of a mind to change the plan, the Council seeks that the plan change be amended to reflect the matters raised in Ms Thomson's evidence.

7.5 As a further alternative, deleting all references to offsetting in the plan change wording (so that it contemplated avoidance, remediation and mitigation) would be preferable to proceeding with the plan change in its present form. If that outcome was to be chosen, I submit that the plan change should not exclude Policies 7.2.1 and 7.2.2 from applying to the Transmission Gully project, because the existing protection those policies provide to all streams remains an appropriate and effective means of achieving the Plan's objectives.

Matt Conway
Counsel for Kapiti Coast District Council
7 July 2011
Appendix A – updated Long Bay considerations for plan changes

(a) A plan (change) should be designed to accord with, and assist the Council to carry out, its functions so as to achieve the purpose of the Act.

(b) When preparing a plan (change) the Council must give effect to any national policy statement or New Zealand Coastal Policy Statement.

(c) When preparing a plan (change) the Council shall:

(i) have regard to any proposed regional policy statement,

(ii) give effect to and operative regional policy statements.

(d) District plans’ relationship to regional plans:

(i) a district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) [or a water conservation order], and

(ii) a territorial authority must have regard to any proposed regional plan on any matter of regional significance.

(e) When preparing a plan (change) the Council must also:

(i) have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations; and (for territorial authorities) the extent to which the plan needs to be consistent with plans and proposed plans of adjacent territorial authorities or (for regional councils) the extent to which the plan needs to be consistent with regional policy.

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26 Section 74(1) in the context of district plans, section 66(1) in the context of regional plans.
27 As described in section 31 in relation to territorial authorities, and section 30 in relation to regional councils.
28 Sections 72 and 74(1) in the context of district plans, sections 63 and 66(1) in the context of regional plans.
29 Section 75(3)(a) and (b) in the context of district plans, section 67(3)(a) and (b) in the context of regional plans.
30 Section 74(2)(a)(i) in the context of district plans, section 66(2)(a) in the context of regional plans.
31 Note: Prior to changes introduced by the Resource Management Amendment Act 2005, sections 75(3)(c) (in a district plan) and 67(3)(c) (in a regional plan) required Councils to ensure the plan was not inconsistent with an operative regional policy statement (and, as such, this was the wording used in Long Bay).
32 75(3)(c) in the context of district plans, section 67(3)(c) in the context of regional plans.
33 Section 75(4) in the context of district plans, section 67(4) in the context of regional plans.
34 Section 74(2)(a)(ii).
35 Section 74(2)(a)(ii).
36 Section 74(2)(b) in the context of district plans, section 66(2)(c) in the context of regional plans.
statements and plans, or proposed regional policy statements and proposed plans, of adjacent regional councils;\(^\text{37}\)

(ii) take into account any relevant planning document recognised by an iwi authority; and

(iii) not have regard to trade competition.\(^\text{38}\)

(f) The policies are to implement the objectives.\(^\text{39}\)

(g) Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives\(^\text{40}\) of the plan taking into account:

(i) the benefits and costs of the proposed policies and methods (including rules); and

(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.\(^\text{41}\)

(h) The plan (change) must be prepared in accordance with any regulations\(^\text{42}\) (there are none at present).

(i) The formal requirement that a plan (change) must\(^\text{43}\) also state its objectives, policies and the rules (if any) and may\(^\text{44}\) state other matters.

(j) The Council may also be required to comply with other statutes.\(^\text{45}\)

\(^{37}\) Section 66(2)(d).
\(^{38}\) Section 74(3) in the context of district plans, section 66(3) in the context of regional plans.
\(^{39}\) Section 75(1)(b) in the context of district plans, section 67(1)(b) in the context of regional plans.
\(^{40}\) Section 32(3)(a).
\(^{41}\) Section 32(4).
\(^{42}\) Section 74(1) in the context of district plans, section 66(1) in the context of regional plans.
\(^{43}\) Section 75(1) in the context of district plans, section 67(1) in the context of regional plans.
\(^{44}\) Section 75(2) in the context of district plans, section 67(2) in the context of regional plans.
\(^{45}\) In Long Bay the examples given were the Hauraki Gulf Maritime Park Act 2000 and the Local Government (Auckland) Amendment Act 2004.
Appendix B – Schedule 2 of the Proposed National Policy Statement on Indigenous Biodiversity: Principles to be applied when considering a biodiversity offset

1. **No net loss**: A biodiversity offset should be designed and implemented to achieve in situ, measurable conservation outcomes which can reasonably be expected to result in no net loss and preferably a net gain of biodiversity.

   The offset design will demonstrate that:
   
   a. the key biodiversity components affected by the activity are identified, and an explanation provided as to how this was done, the basis for doing so, and how the key biodiversity components have been included in the offset design
   
   b. the anticipated losses of biodiversity at the site of the activity and the anticipated gains at the offset site have been calculated to determine "no net loss" and preferably "net gain" and documented
   
   c. appropriate measures/metrics that address the quality and quantity of biodiversity have been identified and used in the loss-gain calculations
   
   d. a suitable basis for assessing a 'like-for-like-or-better' approach to equivalence has been identified and used for the offset design
   
   e. any temporal loss of biodiversity between the time of the project's impact and the time the offset will mature has been considered and addressed
   
   f. intended conservation outcomes for biodiversity components within the offset are explicitly described
   
   g. uncertainty and risk is explicitly built into the loss-gain calculations.

2. **Additional conservation outcomes**: A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.

   The offset design will demonstrate that:
   
   a. conservation gains have been predicted without the offset project ("without-offset") and with the offset, and on this basis, evidence is provided to show that the anticipated conservation outcomes would not have occurred without the offset.

3. **Adherence to the mitigation hierarchy**: A biodiversity offset is a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance, minimisation and on-site rehabilitation measures have been taken according to the mitigation hierarchy.

   The offset design must demonstrate:
   
   a. how the activity addresses direct and indirect effects on specific components of biodiversity by:
      
      i. habitat for indigenous species
      
      ii. seasonal food sources for indigenous species
iii. ecological linkage between areas and habitats identified in accordance with Policy 4

iv. a buffer to indigenous vegetation for areas and habitats identified in accordance with Policy 4

b. that the biodiversity offset only addresses the residual effects of the activity, namely those effects left after all the appropriate avoidance, minimisation and rehabilitation actions have been taken.

4. **Limits to what can be offset**: There are situations where residual effects cannot be fully compensated for by a biodiversity offset because the biodiversity affected is vulnerable or irreplaceable.

These situations will be demonstrated when:

a. a comprehensive assessment has been undertaken to determine whether, and if so which, highly vulnerable and irreplaceable biodiversity components are present and are affected by the activity. In determining when offsetting is not appropriate local authorities should have regard to whether the vegetation or habitat:
   i. represents a non-negligible proportion of what remains of its type
   ii. is now so rare or reduced that there are few options or opportunities for delivering the offset
   iii. is securely protected and in good condition so there is little opportunity to offset the biodiversity components in a reciprocal manner
   iv. is threatened by factors that cannot be addressed by the available expertise.

If there are residual effects on biodiversity that are not, or seem likely not, to be capable of being offset, any measures taken to address them, by way of environmental compensation or otherwise, should not be considered to be a biodiversity offset for the purposes of Policy 3.

5. **Landscape context**: A biodiversity offset should be designed and implemented in a landscape context to achieve the expected measurable conservation outcomes taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.

The offset design will demonstrate that:

a. it contributes to and complements biodiversity conservation priorities/goals at the landscape and national level.

6. **Long-term outcomes**: The design and implementation of a biodiversity offset should be based on an adaptive management approach, incorporating monitoring and evaluation, with the objective of securing outcomes that last at least as long as the project’s impacts and preferably in perpetuity.
The offset design will demonstrate that:

a. management arrangements, legal arrangements (eg, covenants) and financial arrangements (eg, bonds) are in place that allow the offset to endure as long as the effects of the activity, and preferably in perpetuity

b. a biodiversity offset management plan is prepared and implemented which:

i. contains specific, measurable and time-bound targets for the biodiversity offset

ii. predicts when no net loss/net gain will be achieved

iii. provides mechanisms for adaptive management of the offset, using the results of periodic monitoring and evaluation against identified milestones to determine whether the offset is on track and rectify if necessary

iv. establishes roles and responsibilities for managing, governing, monitoring and enforcing the offset

c. where milestones are not achieved, an analysis is undertaken to identify the causes of non-achievement and to revise the offset management plan to avoid similar occurrences a decision-making process has been established to correct problems that arise and enable adaptive management of the biodiversity offset for the timeframe over which the offset's measurable conservation outcomes will be achieved and maintained.

7. **Transparency:** The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.