Before the Board of Inquiry

Under the Resource Management Act 1991 (the "Act")

In the matter of hearings on a request by NZ Transport Authority ("NZTA") for changes to the Regional Freshwater Plan for the Wellington Region in relation to the Transmission Gully Project

Outline of Legal Submissions on behalf of the Director-General of Conservation

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OUTLINE OF LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION

May it please the Board

INTRODUCTION

1 These submissions are presented on behalf of the Director-General of Conservation (DOC). They address the key issues and questions raised by the Board before and during the course of the hearing, and respond to issues raised in Mr Milne’s two legal opinions to the Board, the opening submissions on behalf of the NZTA, and the evidence of various witnesses. We have set the submissions out in the order of questions put by the Board, first to Mr Milne as set out in his 11 May 2011 advice, and secondly as posed in its 7 July Minute and Directions to the parties.

2 In summary, DOC supports the proposed cascade approach leading to offsetting of residual (i.e. unavowed, unremedied and unmitigated) environmental effects, as proposed by the NZTA. DOC however considers that the new and amended policies in the plan change as currently proposed¹:

2.1 Would not achieve the objectives of the Regional Freshwater Plan for the Wellington Region (the “FW Plan”);

2.2 Would not assist the Council to undertake its integrated management or maintenance of biodiversity functions; and

2.3 Are inconsistent with the relevant provisions of the New Zealand Coastal Policy Statement 2010 (“NZCPS”) and the National Policy Statement for Freshwater Management (the “Freshwater NPS”).

3 DOC however considers that these shortcomings are able to be addressed by the inclusion of:

3.1 “Bottom lines” or “stop” provisions to ensure that important biodiversity values are protected;

¹ The revised 6 July version attached to the NZTA opening submissions.
3.2 Clear definitions for “vulnerable”, “irreplaceable” and “to the extent practicable” either within the policy explanations or the Glossary to the FW Plan;  
3.3 Assurance that adverse effects on the coastal environment are able to be considered;  
3.4 The inclusion of measurable outcomes;  
3.5 Provision for offsets to be in perpetuity;  
3.6 A built-in requirement for “no net loss” of biodiversity values; and  
3.7 Deletion of the current reference to the “Stream Ecological Valuation” tool.  

4 Suggested amendments to the two alternative versions of new Policy 4.2.33A (i.e. as proposed by NZTA in its opening and by Mr Milne in his 8 July opinion) are attached as Attachments 1 and 2.  

KEY ISSUES AND QUESTIONS RAISED BY THE BOARD  

A. Questions raised with the Board’s legal adviser Mr Milne about offsetting, and Mr Milne’s response at paragraph 77 of his legal advice  

(1) Is there jurisdiction to include specific provision for offsetting adverse effects when s5(2)(c) RMA requires avoiding, remediying or mitigating of adverse effects?  

5 Mr Milne’s advice is that there is no jurisdictional barrier to making provision for offsetting. We agree. As we explain later, “offsetting” as correctly defined and referred to, can be considered as a form of mitigation under the Act.  

(2) Is there anything in RMA relating to the functions/powers of local authorities and/or the contents of their plans which precludes making provision for offsetting in their plans?  

6 Mr Milne’s advice is “No”. We agree. Although the concept of offsets is a relatively new one, the appropriateness of offsets has been recognised in a  

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2 We note that the reference in the NZTA’s opening submissions (paragraph 89) to a quoted section from the Proposed Biodiversity NPS as stated in Dr Keesing’s evidence is incorrect. The correct reference from the Proposed NPS is “There are situations where residual effects cannot be fully compensated for by a biodiversity offset because the biodiversity affected is vulnerable or irreplaceable. (Clause 4, Schedule 2 to the NPS)
number of plans, including the FW Plan, particularly in respect of effects on trout habitat.

(3) **Is offsetting simply a subset of remedying or mitigating?**
7 Mr Milne’s conclusion is that offsetting may be a subset of avoiding, remedying or mitigating. We agree, as offsets can be regarded as a form of mitigation. However, we would make the distinction within “mitigation” between mitigation of adverse effects as a form of “minimisation” and the mitigation of residual effects through offsetting, as set out under the next question.

(4) **Is offsetting simply another term for environmental compensation?**
8 Mr Milne considers that offsetting may be in the form of environmental compensation. We do not agree. As Mr Milne notes, “compensation” as opposed to “mitigation” can be regarded as a positive effect on the environment which may count in favour of a proposal. Compensation does not of itself avoid, remedy or mitigate specific adverse effects.

9 We consider that the relevant terms can be described or simplified as follows:

- The RMA requires adverse effects to be avoided, remedied or mitigated. For simplicity, we can refer to this as “minimisation” of adverse effects (i.e. Step 1). If adverse effects are not completely avoided or remedied, the activity will result in “residual” adverse effects;

- Offsets relates to addressing residual effects only (i.e. Step 2);

- Offsets can be treated as “mitigation” as they reduce overall adverse effects. However, this relates to residual effects that aren’t avoided, remedied or mitigated in terms of minimising above;

- “Environmental compensation is where a positive benefit is provided in respect of a different resource or value from that adversely affected. It does not “offset” an adverse effect with a positive effect of the same kind, and therefore is not an “offset”. Environmental compensation is also not mitigation, as it does not reduce adverse effects.
10 In simple diagrammatic form, it looks like this:

![Diagram](image)

(5) **Is there any authority to assist in determination of these questions?**

11 Ins’s 11 May 2001 advice, he discussed the Environment Court decisions in *Transwaste Canterbury Ltd v Canterbury Regional Council* (C29/200), *Royal Forest & Bird Protection Society v Manawatu Regional Council, Director-General of Conservation v Wairoa District Council* (W081/2007) (“Bayly Trust”); and the final decision in *JF Investments Ltd v Queenstown Lakes District Council* (C48/2006). We agree with Mr Milne’s analysis of those pertinent decisions, and the final *JF Investments* decision is confusing in its use of terminology³. We do not agree with the opinion expressed by counsel for the NZTA in opening, that the concept of “offsetting” is readily understood by decision makers.⁴ Rather, we find the concept technically complicated and the application of it under the RMA inconsistent.

12 In respect of the *Bayly Trust* case and the relevance of the offset offered there (setting aside and covenanting a substantially larger area than that proposed for clearance), the Court said:

> [42] We have no doubt that we should, under s104(1)(c), regard the offered offset as an issue that is highly relevant, and reasonably necessary, to determine the application. Its relevance is self-evident. In regarding it as reasonably necessary, we respectfully adopt the reasoning of the Court in the *JF Investments Ltd* decision at para [32]. That of course is not to be taken as a view that the offered offset carries the day – it must take its place among all of the other s104 and Part 2 issues in coming to the ultimate decision.

13 There does not appear to be any discussion as to whether it amounted to “mitigation”, however had there been argument about whether the proposal would meet either of the s104D thresholds, we suspect that issue may have

³ Mr Milne’s 1st legal opinion to the Board dated 1 May 2011, paragraph 47.
⁴ NZTA opening submissions, paragraph 73.
become relevant. However, on our reading, counsel having acknowledged that one of the s104D thresholds was met, this does not appear to have been raised as a live issue.

14 In respect of *JF Investments*, we note counsel for the NZTA’s comment that the decision states that environmental compensation or biodiversity offsets will often be relevant under s104(1)(i). However, we also think it is clear from the decision that the Court saw such actions as remedial under s5(2)(c). At paragraph [23] the Court put it this way:

> [23] The final part of section 5(2)(c) should also be read in a broad way. First, the remedying of adverse effects of “activities on the environment” in section 5(2)(c) does not only refer to effects caused by the activity for which a resource consent is sought. We hold that the phrase refers also to adverse effects of other, including past, activities on the site and offsite on neighbouring parts of the relevant environment, area or landscape. Secondly, and more importantly “environment” is very widely defined in the Act. Most human activities involving natural and physical resources could be said to have some positive effects on the “environment”. In every decision under the Act a choice or compromise is almost always made between limiting the economic and social conditions of people by avoiding the adverse effects of their activities or enabling individual’s wellbeing by allowing some adverse environmental effects to occur, duly remedied or mitigated to the appropriate extent. Environmental compensation is one type of choice or compromise.

15 Therefore, the Court appeared firmly of the view that “environmental compensation” - which we would describe as “offsetting” – should indeed be considered as relevant under s5(2)(c) in terms assessing the extent to which adverse effects are avoided, remedied or mitigated.

16 We also say that the interim decision in the *JF Investments* appeal (C 132/2004), decided some 18 months ahead of the final decision (C 48/2006) is instructive as to whether the Court considered the offset proposal to be relevant under s5(2)(c). At paragraph [28] of the interim decision the Court recorded the following:

> “[28] In *Remarkables Park Limited and Ors v Queenstown Lakes District Council*, the Environment Court addressed the question of environmental compensation. Building on a line of cases including *Baker Boys Limited v*

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5 Counsel for the NZTA opening submissions, paragraph 66.
Christchurch City Council, and Rutherford Family Trust v Christchurch City Council, the Court said:

Indeed one of the useful tests for sustainability under the RMA, applying the appropriate standards in the hierarchy of section 5(2)(a) to (c) and sections 6 to 8 is whether development and use would lead to a net conservation benefit.

In terms of protection of outstanding landscapes, the compensation offered by way of wilding pine control does much to balance the loss caused by the imposition of a dwelling on this outstanding landscape. Combined with the other conditions offered we find that it reduces the effects on the outstanding natural landscape to an acceptable level."

Counsel for the Kapiti Coast District Council also set out in his submissions the principles adopted by the Court in Royal Forest & Bird Protection Society Gisborne District Council (W026/2009)\textsuperscript{6}, which affirmed and built upon the "desiderata" in \textit{JF Investments} as to what is required for an appropriate biodiversity offset. In that case, the application for sustainable logging of indigenous timber was predicated on biodiversity offsets arising from proposed pest control, pests representing a threat to the long-term sustainability of the forest. Whilst we would say that the pest control would rightfully be considered as (offset) mitigation, the benefits of the pest control offered was considered by the Court as a positive effect (adopting the reasoning in \textit{JF Investments}) under s104(1)(c).\textsuperscript{7} We consider it worthwhile to set out the principles adopted by the Court in full, given the heavy reliance on the biodiversity offset. They are these:

- Biodiversity offsets should only be used as part of a hierarchy of actions in which a development project must first seek to avoid impact 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 a new habitat, especially when existing habitat already enjoys a degree of protection.
- A clear currency is required that allows transparent quantification of values to be lost and values to be gained in order to ensure ecological equivalence between cleared and offset areas.

\textsuperscript{6} 7 April 2009, (Environment Court, Judge Thompson presiding), paragraph [72].
\textsuperscript{7} Paragraph [68].
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.

There are is number of further cases which the Board might find instructive, and we now discuss these.

**Haka International NZ Ltd v Auckland Regional Council (A097/07)** is a decision of the Environment Court (Judge Thompson presiding) in relation to the plan provisions for “Environmental Compensation”. In that case, the Court appears to have dealt with offsets as a form of mitigation. The Court distinguished between “mitigation” and “compensation” in this way:

- **[10]** As it stands, the intent and thrust of 2.1.4.10 is, we think, clear and workable enough. We certainly do not share Dr Johnston’s concern that a reader might be lead to think that only off-site or offset mitigation will be considered, with direct or on-site mitigation relegated to irrelevance. That is certainly not the law; nor do we think it a sensible conclusion to draw from the drafting of these provisions.

- **[11]** We do observe however that in the future drafters of similar provisions might find increased clarity in differentiating between mitigation, in the traditional sense of lessening or making less intense, and compensation. Compensation does not carry a sense of the lessening of the adverse effect in question, but rather of offering recompense for the loss or impairment of whatever advantage or amenity has been affected. It does not seem to be necessary to strain to fit compensation into the rubric of …avoid, remedy or mitigate… to make it a valid issue in deciding whether a resource consent might issue. It can, for instance, be considered as a relevant …other matter… under s104(1)(c) in coming to an overall decision under s5 as to whether a particular proposal will promote the sustainable management of resources.

The plan provisions in that case were confirmed using the term “offset mitigation”, with the policy at issue supporting offsets only where adverse effects on areas of high natural character are avoided “to the fullest extent practicable in the first instance” with offsets implemented where adverse effect on those resources are unavoidable. The policies confirmed (Polices 2.1.4.10 to 2.1.4.12) are set out at pages 2-1-7 and 2-1-8 of the plan provisions appended to that decision (which is included in our case-folder).

**Transit New Zealand v Auckland Regional Council (A100/200)** was a decision of the Environment Court (Judge Sheppard presiding) concerning appeals against the grant of regional consents for the realignment of SH1 between Orewa and Puhoi. The Court treated positive enhancement measures under the broad head of “mitigation”, referring to it as “off-setting mitigation”, and

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*Paragraphs [141] to [147], [166] and [167].*
the conditions of consent were confirmed under that heading. A relevant extract from the Court’ discussion is as follows:

“Mitigation measures

[141] Mr Brown listed a number of measures proposed in mitigation of environmental effects of the project. A bridge is to be constricted to carry the highway across the Otanerua stream. The bridge is not necessary from an engineering viewpoint, or to protect stream ecology, its purpose is to allow an ecological corridor (some 173 metres wide) for the benefit of terrestrial fauna.

[142] In addition Transit will purchase and vest in the Department of Conservation land having an area of 50.6 hectares having a total value of $2.7 million that would be severed by the highway. The severance land would be enhanced by further planting and fencing as appropriate. Transit would also use its best endeavours to have bush on additional land protected by conservation covenants and fencing, and would facilitate public access to it.

[143] Further, Transit has agreed to carry out revegetation of riparian strips adjacent to the Otanerua Stream and buffer strip east of the highway, within the former Willis block; and (in order to protect Straka’s Pond) to acquire a 50-metre wide buffer area, and a severance area on the western side of the pond, and carry out enhancement planting. Transit has also agreed to carry out extensive landscape and stability planting on batter slopes and areas exposed during construction.”

22 The Court considered the extensive measures proposed as mitigation of adverse effects under s5(2).9

23 Finally, we refer to the recent decision of the Board of Inquiry into the Hauāuru mā Raki Wind Farm and Infrastructure Connection to Grid, which was released in May this year. This inquiry related to a proposal by Contact Energy Limited and Contact Wind Limited (“Contact”) to construct a 169 turbine wind farm on the North Island’s west coast between Raglan and Port Waikato. A major issue for the Board was that that wind farm would be located on a migration route for (inter alia) internally migrant shorebirds, the consequent risk of mortality from turbine strike, and how this could be addressed. As part of a package of offset and mitigation measures, Contact proposed “offsetting” mortality through undertaking predator control on the breeding grounds of the shorebirds in and around the Upper Rangitata riverbed, so as to increase breeding success of the birds and thus “offset” the birds lost due to the wind farm. Contact agreed to a standard of “no net loss” in respect of this offsetting. However, built into this was provision for some allowance of loss from statistical uncertainty. The Board imposed stricter conditions than those agreed to by Contact (as well as DOC), setting higher

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9 Paragraphs [166] and [167].
offsetting requirements, requiring Contact to “aim higher” in terms of its offsetting results, for the reasons for which it explained as follows:10

“[523] Although the Board accepts that there may be variabilities in mortality from year to year, we do not accept the proposition that seven SIPO deaths is acceptable on an ongoing annual basis. We would have thought that such statistical anomalies should average out over three years and therefore, have concluded that if there is more than no-net-loss over a rolling three-year period, this should trigger a review. There is no magic to the selection of three years beyond our clear view that we should be cautious where the no-net-loss objective is being exceeded. Such a provision would encourage Contact Wind to over-provide for the species and, therefore, hopefully obtain a positive net benefit.”

24 It is also instructive that the Board clearly treated offsetting as mitigation under s5(2) of the Act. The Board referred to the above and additional offsetting forming Contact’s “Biodiversity Remediation and Enhancement Scheme” (or “BRES”) throughout the decision as “offset mitigation” or simply “mitigation”11, in most places distinguishing between “direct mitigation” and “offset mitigation”12 as discussed at paragraph [1038]:

38 MITIGATION WORKS AND THE BRES

[1038] We have already discussed the various ways in which adverse effects may be avoided, remedied or mitigated directly. Nevertheless, the applicant acknowledges that there are adverse effects that cannot be completely avoided or remedied, and that the direct mitigation may not be sufficient. The applicant has proposed to address these by way of a more general proposal of mitigation and restoration works. This is somewhat grandly referred to as a Bio-diversity Remediation and Enhancement Scheme (BRES) and is intended to provide offset mitigation for ecological effects.

25 As to the Board’s conclusion on effects on migrant shorebirds, the Board made the following comments:

[1108] The most significant impact upon fauna and habitat would be the potential for collisions of the turbine blades with migratory shore birds. For current purposes we are prepared to accept that the flight path of those birds is a significant habitat and, accordingly, that protection of that habitat is provided for in Section 6(c) of the Act. It is clear that the parties have recognised this issue, and have made explicit provision for it through the mitigation steps proposed. Does this adequately protect the habitat [flight path] of the migratory shore birds? We are satisfied that, in the end, it does for the following reasons:

10 Final Report and Decision of the Board of Inquiry into the Hauåuru må Raki Wind Farm and Infrastructure Connection to Grid, May 2001 (Volume 1).
11 See for example paragraphs [506], [520], [522] to [527], [536], [572], [787], [943], [1038] and [1108].
12 See for example paragraphs [496], [546], [978] and [1038].
Only part of the flight path would be affected by the turbines as there is a broad dispersion of bird flight paths, both to sea along the coast and inland in this area.

The agreement to enhance other habitat areas, particularly the upper Rangitata River nesting area, and the extensive conditions in relation to bird strike satisfy us (just) that the habitat for migratory shore birds would in a broad sense, be protected.

Thus, the Board’s approach to offsetting, notwithstanding its extreme importance for ensuring there would be no net loss to the shorebirds at issue, was in this case

B. Further key issues raised by the Board after NZTA’s opening submissions and Mr Milne’s response

Issue 1 - What constitutes offsetting?

In the context of “biodiversity” offsets, as Dr Ussher explains in his evidence\(^{13}\), the most widely used international definition of biodiversity offsets is provided by the Business and Biodiversity Offsets Programme (BBOP)\(^{14}\), an international collaboration of scientists, policy makers, industry and non-governmental organisations (including representatives from DOC, NZ extractive industries and environmental consultancies). That definition states that:

> “Biodiversity offsets are measurable conservation outcomes resulting from action designed to compensate for significant residual adverse effects arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve a no net loss or preferably a net gain of biodiversity on the ground with respect to species composition, habitat structure, ecosystem function and people’s use and cultural values associated with biodiversity.”

As noted by counsel for the Kapiti Coast District Council, this definition has been reflected by the Government in the Proposed National Policy Statement on Indigenous Biodiversity (Proposed Biodiversity NPS).\(^{15}\) We also note that the Proposed Biodiversity NPS adopts an avoid – remedy - mitigate cascading approach for offsets, such as is proposed under the TGP plan change.

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\(^{13}\) Dr G Ussher, evidence in chief paragraph 22.

\(^{14}\) [http://bbop.forest-trends.org/](http://bbop.forest-trends.org/)

The definition agreed by the ecological experts for “offsets” in their caucus report is:\textsuperscript{16}

“Offsets are measurable outcomes resulting from, and directly linked to, actions designed to compensate for residual adverse impacts arising from project development after appropriate avoidance, remedying and mitigation measures have been taken.”\textsuperscript{17}

In our submission the above definition should be included in the Explanation to Policy 4.3.22A. We consider that this would be more appropriate than including it as a definition in the FW Plan Glossary, as the term “offset” is defined differently in other provisions of the Plan (e.g. Policies 4.2.14 and 4.2.15), and a definition for “offset” as far as it will relate to Policy 4.2.33A is specific to this policy.

\textit{Issue 2 - Reservations about the cascade approach proposed and its form}

\textit{Is the Board being asked to provide an approval in principle for some unidentified environmental compensation?} (para 5.a)

As currently proposed, we submit it is. This is because the current wording proposed by the NZTA does not require a direct link between the effects of the TGP and the “offset” to be provided. The suggested amendments in \textbf{Attachments 1 and 2} address this problem.

\textit{Is offsetting distinct and should it be an end in itself?} (para 5.b)

As noted above, we agree that offsetting is a means to achieve remedying or mitigation of residual adverse effects. As offsets serve to reduce overall adverse effects of a development, offsets can be considered as “mitigation” for the purposes of s5(2)(c) and 104D(1) of the Act. It is however, distinct from “avoid, remedy, mitigate” in the sense that offsetting is intended to apply to residual effects only, and it is unlikely that offsetting would result in complete avoidance of adverse effects.

In the context of this plan change, we do not consider that “offsets” should not be provided for as an end in itself, and should be a last resort. This is

\textsuperscript{16} Expert Caucusing Joint Report to the Board of Inquiry, 1 July 2011, paragraph 8(b).
\textsuperscript{17} Note - Ms Warren disagrees with the use of the word “appropriate” as being necessary in the definition, as her opinion is that what is an appropriate level of residual effect is not part of the offsetting process, but rather part of another decision undertaken before offset (Response of Paula Warren, 4 July 2011, page 1.)
because the streams contain significant ecological and natural character values worthy of protection in their own right, and the outcome of an offsetting approach is inherently uncertain. However, if a stream had nil or negligible ecological values likely to be affected by the proposed development, then it would be considered that effects on ecological values would be nil or negligible, and the need for considering offsets under Policy 4.2.33A would not arise. We note that the policy as proposed by NZTA relates only to the management of adverse effects of the development of the TGP "which are more than minor". We assume that this is on the basis of the starting point for this plan change being that the current Policy 4.2.10 only requires effects that are more than minor to be avoided.

The proposed avoid, remedy, mitigate, offset hierarchy – does the enforced hierarchy unnecessarily constrain the consent authority as a “last resort”? (para 6)

34 In the context of this plan change, we do not consider that “offsets” should be provided for as an end in itself, and should be a last resort.\(^{18}\) This is because the streams contain significant ecological and natural character values worthy of protection in their own right, and the outcome of an offsetting approach is inherently uncertain. However, if a stream had nil or negligible ecological values likely to be affected by the project, then it would be considered that effects on ecological values would be nil or negligible, and the need for considering offsets under Policy 4.2.33A would not arise. We note that the policy as proposed by NZTA relates only to the management of adverse effects of the development of the TGP "which are more than minor". We agree to such an approach, as the starting point for this plan change is that the current Policy 4.2.10 only requires effects that are more than minor to be avoided.

35 The proposed hierarchy of avoid, remedy, mitigate, offset is supported by international best practice\(^ {19}\), and the Environment Court in the Forest & Bird decision referred to above, as being consistent with the views expressed in JF Investments and building on them.\(^ {20}\) The principle adopted in Forest & Bird was framed as this:

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18 Note – it would not be a last resort, environmental compensation would be a last resort.
19 Dr Graham Ussher evidence in chief, paragraph 46.
20 Forest & Bird, paragraph [72].
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.

36 This hierarchy ensures that in taking an offsetting approach, adverse effects are minimised, and that only the residual effects are required to be offset. We consider that is a responsible approach, consistent with sustainable management.

37 In some circumstances going straight to requiring an offset which delivers a clear net benefit could be regarded as being better than avoiding an effect. However, that offset would need to pass the offsetting principle gateways regarding offset-ability (i.e. the limits to offsetting) and provide assurance that the positive effects promised could and would be delivered. Provided clear bottom lines are included in Policy 4.2.33A (e.g. vulnerability and irreplaceability as sought by DOC), such an approach would not be precluded under the policy framework of the plan change, as these matters would be addressed through the decision-making on the extent to which the measures proposed to avoid, remedy or mitigate are appropriate, in light of the offset proposed.

38 We note that the inclusion of “offset-ability” measures is supported by the adoption of the third principle in Forest & Bird (paragraph [72]):

“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.”

39 We submit that the inclusion of criteria such as irreplaceability and vulnerability in Policy 4.2.33A would be consistent with that principle, and is necessary.

**Issue 3 - The definition of Transmission Gully Project**

40 Although we consider that a better and clearer map of the TGP route should be provided, we consider the wording in the proposed definition of the TGP is sufficient to tie back the provisions of the plan change to the actual works associated with the project and which are subject to control under the FW Plan.
The four questions that need to be answered

(i) *Does the regional plan in its present form preclude, or potentially preclude, the grant of the consent to the TGP, having regard to provisions of s104D?*

41 We submit that there are two occasions where the FW Plan in its current form could potentially preclude the grant of consent to the TGP.

42 The first would be:

42.1 If what NZTA proposes to undertake by way of “offsets” was considered by the decision-maker on the substantive resource consents as “environmental compensation” (or something else) which it did not treat as mitigation or remedying, and therefore would not “count” to reduce the scale of adverse effects; and

42.2 As a result, the TGP would result in “more than minor” effects and/or “significant” effects for the purposes of Policies 4.2.10 and 7.2.1 and 7.2.2 respectively; and

42.3 Considering the project against the objectives and policies of the FW Plan as a whole, the scale of adverse effects on the values sought to be protected by these policies led the decision-maker to conclude that the TGP was repugnant to those objectives and policies.

43 The second occasion would be if:

43.1 The offsets offered were treated as measures to “avoid, remedy or mitigate” but are not sufficient to reduce the scale of effects to below the “significant” threshold in Policies 7.2.1 and 7.2.2 and the “no more than minor” threshold in Policy 4.2.10; and

43.2 Considering the project against the objectives and policies of the FW Plan as a whole, the TGP was considered to be repugnant to those objectives and policies.

44 Removing the “more than minor” and “significant” effects thresholds in Policies 7.2.1 and 7.2.2 and the “no more than minor” threshold in Policy 4.2.10 would remove that potential consenting risk for the TGP.
(ii) If the answer to the first question is yes, then is it appropriate to expand the policy framework of the regional plan as proposed by NZTA to enable consideration of the range of responses to TGP other than simply the avoidance of adverse effects?

45 Our interpretation of Policy 4.2.10 is that the avoidance of more than minor effects is required under the policy, rather than all adverse effects. So, our interpretation is that what is required by the policy is mitigation, rather than complete avoidance of all adverse effects. As noted above, that is also the basis of the proposed new policy 4.2.33A – it does not first seek avoidance of all adverse effects, but rather or “more than minor” adverse effects. We consider this starting point significantly lower than complete avoidance.

46 DOC does not consider that it would be appropriate to expand the framework of the policies without the following changes:

46.1 The inclusion of a reference to offsets in the policy;

46.2 A clear definition of “offset”;

46.3 The inclusion of clear bottom lines as to values that are not appropriate to be compensated for by way of offsetting – such as where irreplaceability and vulnerability issues arise, and clear definitions for these included;

46.4 A clear direct link between offsets and adverse effects of the TGP;

46.5 Spatial and temporal guidance within the policy in relation to offsets;

46.6 A requirement of a “no net loss” of biodiversity values from offsetting;

46.7 Removal of the reference in the proposed new Policy 4.2.33A to “SEV” for the reasons explained by Dr Ussher and acknowledged by Dr Keesing; and

46.8 If the words “to the extent practicable” are to be used in the policy, clear guidance as to the criteria to be considered by the decision-maker to determine whether adverse effects are avoided, remedied and mitigated to the extent practicable before the scope of necessary offsetting actions is determined. This is particularly necessary given the current guidance in the FW Plan in Policy Rule 7.2.15
(reclamations) that whether a particular option is "practicable" can simply depend on financial considerations.

47 DOC also considers that the changes outlines above are required in order for the proposed policy framework to be consistent with the relevant provisions of the Freshwater NPS and the NZCPS, as set out below.

**Issues that need to be considered**

a) Whether the condition of the streams affected by TCP is such that total avoidance of adverse effects is required?

48 Related to this question is the additional "key" question put by Your Honour to a number of counsel and witnesses during the course of the hearing:

"Para 14 of Dr Keesing's rebuttal evidence states:

"None of the water bodies affected by the TG Project are of sufficient quality, composition or sensitivity to require avoidance in order to maintain their current values."

If the Board finds that that's correct, why should there be a policy in the Freshwater Plan requiring avoidance of effects on those streams? Why should the consent authority be precluded from considering whether mitigation or remediation is appropriate?"

49 The ecologists agree with Dr Keesing's statement that total avoidance is not required. However, we think it is important to be clear as to what they say in their joint caucus report. The ecologists are not saying that the streams do not have values worthy of protection, and they do not say that they consider more than minor effects (or significant effects) should be allowed under the revised policy framework. What they say is this:\textsuperscript{21}:

"No streams affected by the Project are of such condition to require total avoidance (i.e. in the normal sense of the word rather than the policy meaning) but it is not known how tolerant they are to change. There are tipping points in condition beyond which degradation can occur rapidly. We are unsure of where the tipping points are in relation to these streams."

50 A reflection of the tipping points, and the importance of ensuring that adequate protection for the important values in the Appendix 2 streams in particular continues, can be gleaned from what Dr Keesing appears to be saying regarding the Ration Stream now (some 12 years since the Plan

\textsuperscript{21} Expert Caucusing Joint Report to the Board of Inquiry, paragraph 6.
became operative) as having become degraded in some parts to the point where he does not consider it regionally significant.22

51 We also note the comments in the Greater Wellington June 2010 supplementary report on this issue, which signals caution:23

“Given the nature of the identified values of the Horokiri, Ration (Little Waitangi), and Pauatahanui Streams and Duck Creek and current information, it is unlikely that there will be an occurrence where the avoidance of adverse effects is the only appropriate action. It is, however, conceivable that in the light of more detailed information it could be the case that at particular sites within these streams avoidance of adverse effects may indeed be the only appropriate option.”

b) The significance of TGP.

52 We agree that the Board will need to “have regard” to the “significance of the project, as required by s149P(1)(a).

c) Consideration of alternatives to the plan change.

53 We also agree that the Board will need to examine the alternatives to the plan change under s32(3)(b), in order to determine as a first step whether or not, and as a second step (depending on the first), what form the plan change should be in.

d) Consistency of the proposed plan change with the range of statutory provisions and instruments to which the Board needs to have regard.

54 Mr Ericksen discusses the relevant objectives and policies of the Freshwater NPS and the NZCPS 2010 in his brief of evidence. A key theme in both documents is the integrated management of resources, which in terms of the NZCPS, requires the:

“particular consideration of situations where land use activities effect, or are likely to affect, water quality in the coastal environment and marine ecosystems through increasing sedimentation.”24

55 Of particular relevance are Objectives 1 and 2, and Policies 4, 11, 13, 14, 21 and 22. We note that the Environment Court has interpreted the requirement

22 Dr Keesing evidence in chief, paragraphs 14 and 67.
23 Paragraph 11.
24 NZCPS, Policy 4(c)(iv)
In terms of Policy 11 of the NZCPS to “avoid” adverse effects, as tolerating only “less than minor” adverse effects.

As the Board will have gathered, the adverse effects of the TGP associated with sediment loading of the affected water bodies from in-stream works in particular, is of great concern to DOC. As Mr Ericksen and Ms Kettles explain in their evidence, the Pauatahanui Inlet is an Area of Significant Conservation Value under the Wellington Regional Coastal Plan, and pulses of large amounts of sediment down a stream to the estuary can result in smothering and death of marine life. It is therefore critical that downstream effects of activities in streams as controlled by the FW Plan are properly taken into consideration in the assessment of this proposed plan change, and in any plan change provisions confirmed by the Board. There is paucity of information on predicted effects on the Pauatahanui Inlet from the TGP, and absent such information, our submission is that a precautionary approach is appropriate. Such an approach would build in robust bottom lines or “stops” to protect important in-stream as well as downstream values potentially affected by the project. In our submission this level of protection is necessary in order to achieve the relevant objectives of the FW Plan, for the Council to satisfy its duty to recognise and provide for the natural and ecological values set out in ss 6(a) and (c) of the Act, to achieve its integration management function under s30(1)(a) and to ensure it achieves the maintenance of indigenous biodiversity under s30(1)(ga).

In DOC’s submission there is no reason that it would not be practicable for the plan change to be required to give effect to the provisions of the NPS or NZCPS in as far as they are relevant to the implementation of the plan change. In our submission this would be achieved by ensuring that effects on the coastal environment are considered and addressed, and by including the bottom line protections suggested by DOC in Attachment 1.

e) **Whether or not the proposed amendments achieve the objectives of the Regional Plan.**

The relevant objectives of the FW Plan seek the protection of natural and ecological values overall. For the reasons we have explained above in the in

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26 Kris Ericksen evidence in chief, paragraph 42.
27 Helen Kettles evidence in chief, paragraph 43.
the evidence on behalf of DOC, we consider that as currently proposed, the plan change will neither ensure that those objectives are achieved or are the “most appropriate” to achieve those objectives as required to be demonstrated by s32(3). In our submission, the suggested amendments are necessary to ensure that the policy framework continues to achieve these objectives.

(iii) What is the appropriate form of the plan change?

59 In our submission, the amendment to Policy 4.2.10 sought by NZTA, together with a new Policy 4.2.33A revised to reflect the suggested amendments in Attachment 1, would be an appropriate form of the plan change. As noted above, we do not consider that the proposed amendments to policies 7.2.1 and 7.2.2 are necessary or that they would, together with the other policies, achieve the objectives in the FW Plan.

(iv) Does the plan change (in whatever form it might ultimately take) achieve the purposes of the Act?

60 Provided the policy framework in the FW as amended by the TGP plan change continues to achieve the relevant objectives in the FW Plan, then we consider it would continue to achieve the purpose of the Act.

RESPONSE TO OTHER ISSUES RAISED IN NZTA’S OPENING

Reference to the “Stream Ecological Valuation” tool

61 Throughout the hearing the NZTA and its witnesses have promoted the inclusion of a reference to “SEV” as an appropriate offset evaluation tool. Given the shortcomings of the SEV as explained in Dr Ussher’s evidence, and those acknowledged by Dr Keesing in his evidence and in cross examination, it would appear that the only logical reason for retaining a reference to SEV in the plan change is to be to reflect that the NZTA is undertaken its assessments for the TGP using that tool28. We say that that is not an appropriate reason for including a reference to SEV in the new policy, and reference to SEV should be deleted.

28 Mr Daysh, 7 July 2011, Transcript page 100, line 25.
Conservation Management Strategy (CMS)

Contrary to statements in the NZTA’s opening submissions and the evidence of Mr Daysh\(^\text{29}\), the CMS for the Wellington Region is still in force, and is relevant\(^\text{30}\). The CMS shows the location of the Pauatahanui Wildlife Refuge, the Horokiri Wildlife Reserves, the Pauatahanui Wildlife Management Reserve and the Duck Creek Scenic Reserve, the location of the Horokiri Stream and Duck Creek, and notes that Pauatahanui Stream and Ration Creek flow through the southern and central areas of the Pauatahanui Wildlife Management Reserve respectively. It also describes the values of the Inlet including the estuarine wetlands, and the management objectives for the area. and various highlights a number of relevant streams, and makes specific mention to

COMMENTS ON MR MILNE’S SECOND LEGAL OPINION

We agree with much of Mr Milne’s 8 July 2011 legal advice. However, we make the following comments:

63.1 Paragraph 9 – we do not agree that the current Policy 4.2.10 is inconsistent with Part 2 of the Act. Part 2 does not prevent policies which require adverse effects to be no more than minor or from seeking to protect the significant values of waterways. We say that Policy 4.2.10 reflects the requirement for councils to recognise and provide for section s6(a) matters, and is consistent with Part 2.

63.2 Paragraph 13 – we agree entirely with the summary in this paragraph.

63.3 Paragraph 16 – we query Mr Milne’s rationale for changing the in focus in Policy 4.2.10 on avoiding more than minor adverse effects to avoiding significant adverse effects.

63.4 Paragraph 25 – we do not consider that the description in the second bullet point of paragraph 25 of “mitigation is suitable. Rather, this situation should be treated as positive effects, not mitigation.

\(^{29}\) NZTA opening submissions paras 156 and 157, Mr Daysh evidence in chief, pars 210 and 211.

\(^{30}\) Mr Ericksen evidence in chief, paragraph 99.
63.5 Paragraphs 32 and 69 - we do not agree that offsetting should be provided for other than in relation to residual adverse effects, as is explained above. While technically an offset is mitigation, it relates to residual effects, following minimisation or “direct” mitigation.

63.6 Paragraph 35 – we disagree that it is inconsistent with s5 of the Act to include a hierarchy of avoid-remedy-mitigate in a policy. Although it is not required by s5, this is not necessarily inconsistent with it. We also do not consider that mitigation by way of offsets could create a better result than avoidance in the context of the policies at issue with this plan change.

63.7 Paragraph 36 – the Appendix 2B stream relate to s6(a) rather than s6(c). The s6(c) streams are in Appendix 3 to the FW Plan.

63.8 Paragraph 39 – we consider that the proposed policy in paragraph 39 is generally suitable, provided definitions were included as set out in Attachment 2.

63.9 Paragraph 42 – we disagree with the conceptual description of offsets here. As explained earlier, offsets are intended to address residual adverse effects following minimisation through avoidance, remediation and/or (direct) mitigation.

63.10 Paragraph 49 – we agree entirely with Mr Milne’s conclusions regarding policies 7.2.1 and 7.2.2.

63.11 Paragraph 67 – we disagree that a no net loss objective for offsets would constrain the concept. Scientific best practice prescribes a no net loss approach, as explained in Dr Ussher’s evidence.

63.12 Paragraph 71 – as noted above, we propose that criteria be included to clarify what is considered in determining what is “practicable”. Without that, simply financial considerations may be all that is considered in light of other provisions in the FW Plan.

63.13 Paragraph 78 – we do not agree that this is the key issue. The key issue is whether these particular policies should seek the avoidance of significant adverse effects in respect of all the s13 activities (Policies 7.2.1 and 7.2.2) and more than minor adverse effects in respect of the
named streams in Appendix 2B (Policy 4.2.10), including ones associated with projects of national significance. The policies do not in themselves require the effects of the TGP to below a certain level.

EVIDENCE

64 The following witnesses will be called in support of DOC’s case:

64.1 Ms Nadine Bott (freshwater ecology);

64.2 Ms Helen Kettles (coastal ecology);

64.3 Dr Graham Ussher (biodiversity offsets); and

64.4 Kris Ericksen (planning).

CONCLUSIONS

65 DOC supports the cascading offsets approach proposed by the NZTA. However, there are a number of shortcomings in the changes to the policy framework as currently proposed. It is also unclear whether the plan change is in fact necessary in respect of the proposed changes to Policies 7.2.1 and 7.2.2 if a true “offsetting” approach is intended by the NZTA, given that if offsets are treated as reducing adverse effects, it would appear unnecessary on the evidence before the Board to exempt the NZTA from the requirement to avoid significant effects – that is, significant effects taking into account mitigation actions.

66 We respectfully request that, should the Board be minded to approve the plan change, it makes the changes as set out in Attachment 1 to these submissions. However, if the Board is minded to approve the approach to new Policy 4.2.33A as proposed by Mr Milne, DOC requests that the changes be made to reflect the suggested amendments in Attachment 2.

Shona Bradley & Alice Camaivuna
Counsel for the Director-General of Conservation
11 July 2011
ATTACHMENT 1
DOC SUGGESTED AMENDMENTS TO NZTA'S REVISED PLAN CHANGE PROVISIONS

Policy 4.2.33A

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:

(1A) Adverse effects on natural resources that support indigenous biodiversity which are vulnerable or irreplaceable shall be avoided:

(1) Other 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.

Explanation: This policy recognises that the Transmission Gully Project is particularly important for enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety. Accordingly, the adverse effects of aspects of the Project may be acceptable, even though they cannot be completely avoided, remedied, or mitigated. The policy creates a cascading management regime which provides for the outright avoidance of adverse effects on natural resources that are vulnerable or irreplaceable, and for the avoidance, remedying, or mitigation of other adverse effects. However, the policy also provides that where none of these options are practicable, it may be appropriate to offset such effects.

In this context “offsets” in clause (4) are measureable outcomes resulting from, and directly linked to, actions designed to compensate for residual adverse impacts arising from project development after appropriate avoidance, remedying and mitigation measures have been taken means taking action that will offset any adverse effects such as enhancing amenity, ecological, or recreational values on-site or elsewhere.

Where offsetting is to be applied, there should be a clear connection with the effect of the Transmission Gully Project and the offsetting measure required to compensate for that effect. The offsetting measure should preferably be applied as close as possible to the site incurring the effect (with a principle of benefit diminishing with distance). There should be a focus on offsetting occurring within the
affected catchments along the Transmission Gully route and to specifically address the effect at issue.

Offsetting should, as far as can be achieved secure long term outcomes that last at least as long as the project’s impacts but preferably in perpetuity and maintain and enhance the particular values affected by the project when assessed overall, so that there is no net loss to those values.

The adequacy of a proposed offsetting measure should be transparent in that it is assessed against a recognised methodology (such as the “Stream Ecological Valuation” method).

Definitions

“Vulnerable” means the likelihood or imminence of biodiversity loss to current or impending threatening processes,

“Irreplaceable” means the degree by which the loss of values of an ecosystem (whether functioning together or alone) at a site containing threatened or at risk species or communities diminishes the ability to achieve conservation of that species or community

“To the extent practicable” requires consideration of the nature of the activity, the sensitivity of the receiving environment to adverse effects, the financial implications and adverse effects of the measure considered compared with other alternative measures, the current state of technical knowledge and the likelihood that effects can be successfully avoided, remedied or mitigated.

“Transmission Gully Project” is a strategic transport route shown on Plan [x] running from MacKays Crossing to Linden and the term includes works in proximity that are associated with the implementation of that project

“Stream Ecological Valuation” (SEV) is a tool to assist in evaluating the ecological offset ratio, which, based on measured values, sets the amount of offset required.
ATTACHMENT 2
DOC SUGGESTED AMENDMENTS TO NEW POLICY 4.2.33A AS PROPOSED 
BY MR MILNE

To avoid, remedy or mitigate any adverse effects of the Transmission Gully Project, so as to ensure that so far as is practicable, the effects of the Project on the overall natural character and ecological values of any particular waterway and its upstream and downstream catchments, are no more than minor.

Explanation

(Note: Offsets as defined in ?? below may be utilised as a means of avoiding, remedying or mitigating the adverse effects of the project, provided that all practicable efforts are taken to minimise adverse effects through avoidance, remedying and/or mitigation first in that preference, and offsetting is limited to the residual adverse effects of the project.)

In this context “offsets” in clause (4) are measureable outcomes resulting from, and directly linked to, actions designed to compensate for residual adverse impacts arising from project development after appropriate avoidance, remedying and mitigation measures have been taken.

Effects on natural resources that are vulnerable or irreplaceable should be avoided.

Where offsetting is to be applied, there should be a clear connection with the effect of the Transmission Gully Project and the offsetting measure required to compensate for that effect. The offsetting measure should preferably be applied as close as possible to the site incurring the effect (with a principle of benefit diminishing with distance). There should be a focus on offsetting occurring within the affected catchments along the Transmission Gully route and to specifically address the effect at issue.

Offsetting should, as far as can be achieved secure long term outcomes that last at least as long as the project’s impacts but preferably in perpetuity and maintain and enhance the particular values affected by the project when assessed overall, so that there is no net loss to those values.

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“Transmission Gully Project” is a strategic transport route shown on Plan [x] running from MacKays Crossing to Linden and the term includes works in proximity that are associated with the implementation of that project.