15 April 2026

Fast-track Approvals Act wildlife approval report

Section 51(2)(c) wildlife approval report for –
FTAA-2512-1163 Stella Passage Development

Department of Conservation
Te Papa Atawhai

Te Kāwanatanga o Aotearoa
New Zealand Government

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1.0 Introduction

1.1 Port of Tauranga Limited (POTL / the Applicant) is seeking wildlife approval under the Fast-track Approvals Act 2024 (FTAA / the Act) for the capture, handling and relocation of kororā / little blue penguin that are absolutely protected under the Wildlife Act 1953 (the Approval). Kororā are classified as At-Risk – Declining by the New Zealand Threat Classification System.

1.2 On 3 March 2026, in accordance with section 51(2)(c) of the Act, the Panel Convener directed the EPA to obtain a report prepared by the Director-General of Conservation in accordance with clause 3 of Schedule 7.

1.3 The Panel Convener has also requested that the Director-General file a report pursuant to s 51(1) of the Act advising how the weighting of matters set out in Schedule 7, clause 3 of the Act should be approached, having regard to relevant senior court decisions. This report is attached at **Appendix C**.

2.0 Purpose of the report

2.1 This report has been prepared by the Department of Conservation (DOC) on behalf of the Director-General of Conservation. It provides commentary on information provided by the applicant to support the Panel's assessment of the application for a wildlife approval and has been informed by the Department of Conservation's ("DOC") technical experts and information from our Treaty partners, where available.

2.2 In accordance with clause 3 of schedule 7, this report must address the following matters:

- The purpose of the Wildlife Act 1953 and the effects of the Project on the protected wildlife that is to be covered by the Approval.
- Information and requirements relating to the protected wildlife that is to be covered by the Approval (including, as the case may be, in the New Zealand Threat Classification System or any relevant international conservation agreement).
- Any conditions that should be imposed to manage the effects of the activity on protected wildlife.
- Any conditions that should be imposed to recognise or protect a relevant Treaty settlement and any obligations arising under the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

3.0 Overview of DOC's report

3.1 DOC's assessment concludes that, subject to recommended conditions, the proposed activities are broadly consistent with the purpose of the Wildlife Act. The Avifauna Management Plan (AMP) includes appropriate methodologies for salvage and relocation, identifies a suitable release site, and proposes habitat enhancement measures. However, DOC notes the following:

- **Authorised Personnel:** DOC notes that POTL have not nominated a suitably qualified and experienced person (SQEP) that will handle the wildlife and has suggested a condition to ensure one is named before works start.
- **Marking:** POTL did not apply for marking, however, refers to it in section 6.4 of the AMP as part of their monitoring. DOC supports the proposed marking as a monitoring method and recommends the Panel consider this activity when making a decision. Marking protected wildlife without authorisation is an offence under the Wildlife Act.
- **Conditions:** As POTL have not provided any conditions with their application, DOC has suggested a condition set aligned with best-practice standards for a wildlife approval of this type.
- **Term:** As POTL have not provided a term with their application, DOC has suggested a term of 10 years, in line with a standard wildlife approval of this type.

4.0 Sources

4.1 This report draws on information from the substantive application. Application documents specifically referenced in this report include:

- Substantive Application Report
- Avifauna Management Plan

4.2 The assessment in this report is informed by expert advice from DOC Technical Advisor, Dave Houston. Dave's credentials are provided in **Appendix B**.

5.0 Context and background

5.1 Project overview

5.1.1 \The Stella Passage Development Project (the Project) is a proposal to extend the existing Mount Maunganui and Sulphur Point wharves in stages. The Project is located in the coastal marine area within the Tauranga Harbour.

5.1.2 POTL is applying for resource consents and a wildlife approval under the FTAA.

5.2 Summary of wildlife approval sought

5.2.1 The Applicant seeks a wildlife approval (under s 42(4)(h) of the Act) to handle and relocate kororā that may be otherwise adversely affected by works associated with the Project. The substantive application report states that the Approval is sought "to capture and relocate live kororā/blue penguins, as a precautionary measure in case individual birds do not relocate of their own accord".

5.2.2 Details of the Applicant's proposed kororā management is provided in an AMP and was prepared by W.B. Shaw of Wildlands Consultants Limited, the most recent version of which was completed on 8 April 2025 and has been published on the Fast-track website.

5.2.3 The AMP details the methods proposed for kororā salvage and relocation should species be discovered at the site prior to or during development works. The effects and kororā management actions as described in the AMP are outlined at section 6.2 of this report alongside DOC's commentary.

5.3 The role of species management plans

5.3.1 Wildlife Act approvals for wildlife salvage typically include approval of a species management plan as part of the process. That is, an applicant provides a species management plan with their application, detailing proposed actions. The detail in the species management plan informs the assessment against the purpose of the Wildlife Act and, if the application is approved, the Wildlife Act authorisation is conditional on compliance with the approved plan.

6.0 Matters considered in relation to the criteria for a wildlife approval

6.1 Statutory context

6.1.1 Clause 1 of Schedule 7 of the Act defines "wildlife approval" as "a lawful authority for an act or omission that would otherwise be an offence under any of sections 56(1), 58(1), 63(1), 63A, 64, 65(1)(f), 70G(1), 70P, and 70T(2) of the Wildlife Act 1953".

6.1.2 Capture, killing, marking and liberating and marking native kororā without lawful authority are all offences under the Wildlife Act:

- Sections 63(1) and 70G(1) make it an offence to "hunt or kill" (the definition of which includes related activities such as "taking", "capturing" and "disturbing") protected wildlife without lawful authority. This also includes killing that is incidental, which is that which is not directly intended but is unavoidable and foreseeable as a consequence of carrying out an otherwise lawful activity (s 53A).
- Sections 65(1)(f) and s 70P provide that it is an offence to do anything for which an authority is required under the Wildlife Act or any regulations under that Act.
- Section 56 establishes that no person may liberate; or capture or attempt to capture or have in their possession for the purpose of liberating, wildlife without the prior written authority of the Director-General.
- Section 38 of the Wildlife Regulations 1955 establishes that no person, Fish or Game Council, or organisation may mark any wildlife without prior written authority from the Director-General.

6.1.3 The activities proposed (capturing, releasing, marking and killing wildlife) can be considered for wildlife approval under the FTAA. A wildlife approval granted under the Act is treated as if it were granted under the Wildlife Act (Schedule 7, clause 7(1)). DOC notes that while the Applicant hasn't explicitly sought approval for marking, it is proposed in the AMP and requires approval under the Wildlife Act.

6.2 DOC Assessment

6.2.1 The relevant purpose of the Wildlife Act is to protect wildlife.

6.2.2 The AMP sets out actions that are intended to protect kororā populations inhabiting the site via salvage and habitat enhancement.

6.2.3 In assessing the Application against the purpose of the Wildlife Act, it is relevant to consider protection at both the individual level (e.g. minimising impacts, safe capture and handling) and population level (e.g. benefits offered by habitat enhancement).

6.2.4 Key points relevant to this application are discussed below, and a recommended condition set for an approval of this type are provided at **Appendix A**.

General Assessment of the Management Plan

6.2.5 DOC considers that overall the plan seeks to minimise adverse effects on kororā during construction activities by ensuring kororā are kept safe during construction and providing new, safe habitat for kororā.

6.2.6 In order to achieve these objectives, the plan:

- Provides maps and descriptions of kororā habitat affected;
- Outlines procedures for kororā surveys undertaken to date and those planned;
- Describes methods for handling and relocating kororā;
- Describes methods to exclude kororā from construction work areas;
- Describes the creation of new kororā habitat;
- Sets out procedures to be implemented if kororā are encountered in construction areas during works;
- Provides timing for actions and protocols set out in the kororā management plan; and
- Describes procedures for monitoring and reporting.

6.2.7 However, DOC notes that the plan does **not** identify a named suitably qualified and experienced person (SQEP) who will be responsible for the extraction and relocation of kororā. DOC has provided a condition at Appendix A to ensure that an SQEP is approved by DOC.

Kororā Surveys

6.2.8 Surveys have been completed using human observers and a conservation dog. DOC considers that this methodology is likely to detect most sites where kororā are present.

6.2.9 DOC notes that the estimate of up to 50 kororā requiring relocation is based on 16 burrows identified to date. DOC considers this estimate to be reasonable; however, DOC notes that

more than five years have elapsed since the last survey, and kororā numbers and distribution may have changed in that time.

Techniques and Best Practice

6.2.10 DOC considers that the methods described for work timing, kororā exclusion, nest buffers, rock removal, kororā extraction and relocation, and daily site checks are consistent with methods used in similar projects and are acceptable.

6.2.11 DOC notes that these measures will reduce, but not eliminate, the risk of injury or mortality to kororā.

6.2.12 Overall, DOC considers the proposed techniques to be comprehensive.

Release Site

6.2.13 The proposed release site is located close to the works area, meaning displaced kororā are likely to locate it.

6.2.14 DOC considers the site to be suitable in most respects, although it is relatively small. DOC expects that kororā released at this location may initially attempt to return to their former nesting sites, and once access to those burrows is destroyed or prevented, seek nesting opportunities nearby. DOC notes that this may include uptake of the newly proposed concrete burrows.

Mitigation Measures

6.2.15 The primary mitigation measure is the creation of a new kororā colony comprising 13 nest boxes and 20 concrete pipe burrows.

6.2.16 DOC considers that the provision of replacement habitat through artificial nest sites is sufficient to offset the loss of kororā habitat resulting from the works.

Monitoring

6.2.17 DOC considers that the monitoring and reporting framework proposed in the plan is adequate.

Marking

6.2.18 POTL has proposed marking kororā with PIT tags as part of their post-release monitoring. DOC supports that marking be included in the Approval.

Personnel

6.2.19 DOC wishes to note that the qualifications and experience of personnel responsible for the extraction and relocation of kororā cannot be fully assessed, as no specific individuals are named. However, DOC notes that the plan identifies the following groups as undertaking this work:

- Port of Tauranga staff holding a permit allowing them to handle and move kororā / blue penguins within the Port environment;

- POTL's consulting specialist bird handler;
- Additional assistance and support from penguin permit-holding members of Western Bay Wildlife Trust.

6.2.20 To the best of DOC's knowledge, no POTL staff currently hold authorisation to relocate kororā. DOC further wishes to note that while Western Bay Wildlife Trust members may be experienced in penguin handling, they are not authorised to carry out kororā extractions and relocations of this nature.

Term

6.2.21 In the absence of a term provided by the Applicant, DOC suggests that a 10-year term be granted by the Panel, which is standard for wildlife approvals of this type.

6.3 Conditions to manage effects on protected wildlife

6.3.1 As the Applicant has not provided a set of conditions for the wildlife approval with its application, DOC has provided a set of conditions for the Panel at Appendix A. The conditions are standard for a wildlife approval of this type.

6.3.2 Critically, DOC recommends that a condition be imposed requiring the naming of suitably qualified and experienced individuals to carry out kororā salvage before it commences. These individuals are to be approved by the relevant DOC Operations Manager, supported by technical advice.

7.0 Consultation

7.1 Pre-lodgement

7.1.1 POTL engaged with DOC in the development of the application and took DOC's feedback on board in the final wildlife approval application that was subsequently lodged.

7.2 Post-lodgement

7.2.1 On commencement of the Panel on 16 March 2026, POTL made contact with DOC with an offer to meet to engage over any outstanding matters.

7.2.2 There are no outstanding matters from DOC's point of view on the application for the wildlife approval, and therefore no further engagement resulted. The one minor exception to this was DOC enquiring whether an SQEP for kororā handling could be identified; to which POTL commented that this was not feasible given construction could be some time away. This is sensible and DOC has instead proposed a condition to manage this in the future.

8.0 Additional information

8.1 International Conservation Agreements

8.1.1 The following international agreements are relevant to the Panel's consideration of the approval sought:

The United Nations Convention on Biological Diversity (CBD)

8.1.2 New Zealand became a signatory to the United Nations Convention on Biological Diversity (CBD) in 1992. The CBD is an international agreement that promotes the development of global targets, national strategies and action plans by countries for the protection, restoration and sustainable use of biodiversity.

8.1.3 As a party to the CBD, New Zealand is required to have a national biodiversity strategy and action plan. Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020 sets out New Zealand's contribution to reversing the loss of biodiversity worldwide.

8.1.4 Key objectives of the strategy that are relevant to this application include:

- Biodiversity protection is at the heart of economic activity.
    - Natural resources are managed sustainably.
    - Management ensures that biological threats and pressures are reduced through management.
    - Ecosystems and species are protected, restored, resilient, and connected from mountain tops to ocean depths.

8.1.5 The application from POTL seeks to develop land and to salvage and relocate resident kororā. The proposal to salvage kororā and enhance habitats at the relocation sites will contribute to protection of biodiversity.

International Union for Conservation of Nature (IUCN)

8.1.6 The IUCN is a globally recognised conservation body and New Zealand's membership (since 1948) reflects its commitment to biodiversity and ecosystem protection. While the IUCN is not a treaty-level agreement, New Zealand's contributions to the IUCN's Contributions for Nature platform and its alignment with global biodiversity targets (e.g. the Kunming-Montreal Global Biodiversity Framework) reflect a strong public commitment to species recovery and habitat protection.

8.1.7 The IUCN red List status of species named in the application is provided in Table 1.

Common Name	Scientific Name	IUCN Red List Status
Little blue penguin / kororā	*Eudyptula minor*	Least Concern - Stable

8.2 Consistency with statutory planning documents and policy

8.2.1 The following statutory planning documents and associated policies are relevant to the consideration of the wildlife approval sought for this Project.

Conservation General Policy 2005

8.2.2 The Conservation General Policy 2005 (CGP), approved by the Minister of Conservation, provides guidance for the administration and management of lands and waters and natural and historic resources managed under conservation legislation including the Wildlife Act.

8.2.3 The CGP does not contain policies specific to the proposed wildlife activities. However, the following provisions are relevant:

- 11.1(a) Any application for a concession or other authorisation will comply with, or be consistent with, the objectives of the relevant Act, the statutory purposes for which the place is held, and any conservation management strategy or plan.
- 11.1(c) The Department and all concession and other authorisation holders should monitor the effects of authorised activities on natural resources, historical and cultural heritage, and the benefit and enjoyment of the public, including public access, to inform future management decisions.

8.2.4 The application is not inconsistent with these provisions.

Bay of Plenty Conservation Management Strategy 1997 - 2007

8.2.5 The Bay of Plenty Conservation Management Strategy 1997–2007 (CMS), approved by the New Zealand Conservation Authority, sets out objectives for the integrated management of natural and historic resources within the Bay of Plenty region. It provides strategic direction for the Department of Conservation's activities under conservation legislation, including the Conservation Act and the Wildlife Act.

8.2.6 The CMS does not contain policies specific to the proposed wildlife activities. While the strategy includes general provisions relating to the management of threatened species, including protection within natural ecosystems and the use of techniques such as pest control, species transfers, and captive breeding, these provisions are not relevant in this instance, as no threatened species are involved.

9.0 Treaty of Waitangi settlement considerations and obligations

9.1 Treaty of Waitangi settlement obligations

9.1.1 Under section 7 of the Act the Panel must act in a manner that is consistent with obligations arising under existing Treaty settlements.

9.1.2 This includes obligations arising under a Treaty settlement Act or a Treaty settlement deed. The relevant Treaty settlement Acts which relate to the proposed project area include the

Waitaha Claims Settlement Act 2013, Ngāti Pūkenga Claims Settlement Act 2017, and Ngā Hapū o Ngāti Ranginui Claims Settlement Act. The relevant Treaty settlement deeds which relate to the proposed project area include the Ngāi Te Rangi and Ngā Potiki Deed of Settlement and the Tauranga Moana Iwi Collective Deed of Settlement.

9.1.3 Ministry for the Environment (MFE) provided a report which sets out the section 18 matters it considered relevant to the application. DOC was not consulted by MFE on this report.

9.1.4 DOC has reviewed the section 18 report and notes MFE's conclusion that the primary matter for consideration by the Panel, as relevant to the Wildlife Act approval, is the conservation protocol provided for under the Waitaha Claims Settlement Act 2013. This agreement applies to the project area and sets out procedures for consultation on statutory authorisations, including Wildlife Act approvals. DOC also notes that while the Tauranga Moana Iwi Collective deed includes provisions for a conservation relationship agreement, these have not yet been enacted.

9.1.5 Kororā are not identified as taonga species in any relevant Treaty settlement schedules, although they may still hold cultural significance for iwi and hapū in the project area.

9.2 Treaty of Waitangi principles

9.2.1 DOC's work in preparing this report has been carried out in a manner that, as far as possible, gives effect to the principles of the Treaty of Waitangi (arising from the obligation on DOC from section 4 of the Conservation Act). The principles most applicable to DOC's role are:

- **Partnership** – mutual good faith and reasonableness.
- **Informed decision-making** - Both the Crown and Māori need to be well informed of the other's interests and views. Consultation is a means to achieve informed decision-making.
- **Active protection** - requires informed decision-making and judgement as to what is reasonable in the circumstances.
- **Redress –** requires recognition of existing rights and interests.

9.2.2 For this application, this has included:

- **Notifying** Treaty partners of the application. We note this has occurred within the context of the fast-track process with prescribed timeframes, and where the applicant has an obligation to consult and Treaty partners have a right to be invited to comment. The scope of engagement also recognised DOC's role to provide reports and comments on the application, and not in its usual role as decision-maker.
- **Identifying** for the Panel any relevant information from protocols or relationship agreements prepared in accordance with settlements (e.g. taonga species)
- **Ensuring** that the information in this report is fully informed by any information from Treaty partners and the impact the activity would have on their interests.

9.2.3 DOC have kept Treaty partners informed by email during the iterations of this project, and most recently they were emailed in regards this 'Second Substantive Application' that is the subject of this report when the application was lodged with the EPA, and again when it had been deemed complete and to have no competing applications.

Appendix A: Conditions

General

WA 1 The approved activity must be carried out in accordance with the AMP appended to the Approval and in the application to the extent it relates to the Approval.

WA 2 Capture, handling, marking and release methods must involve only techniques that minimise the risk of infection or injury to the animal and shall follow those described in the AMP.

WA 3 The approval holder is permitted to incidentally kill or harm wildlife if the harm or death is not directly intended but is unavoidable and foreseeable and all reasonable effort has been made to meet the terms and conditions in this Approval.

Term

WA 4 The wildlife approval shall expire 10 years after the date the Approval is granted.

Capture and handling of kororā

WA 5 Penguins must only be handled by authorised personnel that have been approved by the relevant DOC Operations Manager prior to exercising the Approval.

WA 6 Penguins can only be captured, handled, and relocated if they are not at a nest containing eggs or chicks. Any penguin that is at a nest containing eggs or chicks must not be captured, handled, or relocated until the nest no longer contains viable eggs or live chicks, or the breeding attempt has been abandoned. If a penguin is located during construction at a nest containing eggs or chicks, a 10 m setback around the penguin's nest must be established and no construction activities may occur in this area. Temporary signs must also be established providing information that a penguin is present and not to be disturbed.

Injury and/or death of penguins associated with Approved Activities

WA 7 If any penguins are injured as part of the approved activity, the approval holder shall contact the authorised personnel approved by the DOC Operations Manager to get advice on the management of the penguin.

WA 8 The approval holder is authorised to euthanise any injured penguin on recommendation of the authorised personnel and/or a veterinarian.

WA 9 If any penguin should die during the approved activities of catch, handle, mark or release, the approval holder must:

a. inform the Tauranga DOC Operations Manager (tauranga@doc.govt.nz) within 48 hours, chill the body if it can be delivered within 72 hours, or freeze the body if delivery will take longer than 72 hours; and

b. send the body to Massey University Wildlife Postmortem Service for necropsy OR as otherwise advised by the Tauranga DOC Operations Manager, along with details of the animal's history; and

c. pay for any costs incurred in investigation of the death of any kororā; and

d. if required by the Tauranga DOC Operations Manager, cease the approved activity for a specified period.

Reporting

WA 10 The approval holder must keep a record of all kororā encountered, captured and /or relocated before or during construction. These records are to be provided to the Tauranga DOC Operations Manager (tauranga@doc.govt.nz) and permissionshamilton@doc.govt.nz by 30 June each year for the life of the Approval.

Records must include:

(a) The Project name;

(b) The species and number of any animals collected and released;

(c) The GPS location (or a detailed map) of the collection point(s) and release point(s);

(d) The results of all surveys, monitoring or research; and

(e) Any difficulties encountered with capture and handling.

All reporting must be undertaken in accordance with the AMP.

Ownership of protected wildlife

WA 11 All wildlife remains the property of the Crown. This includes any dead wildlife, live wildlife, any parts thereof, any eggs or progeny of the wildlife, genetic material and any replicated genetic material.

WA 12 Unless expressly authorised by the Director-General in writing, the approval holder must not donate, sell or otherwise transfer to any third party any wildlife collected or otherwise obtained under this approval.

Variations

WA 13 The approval holder may apply to the Director-General for variations to this Approval in accordance with clause 7(2) of Schedule 7 of the Fast-track Approvals Act 2024.

Costs

WA 14 The approval holder must pay the Department of Conservation's standard charge-out rates for any staff time and mileage required to monitor compliance with this Approval and to investigate any alleged breaches of the terms and conditions of it.

Liabilities

WA 15 The approval holder agrees to exercise the Approval at their own risk and releases, to the full extent permitted by law, the Director-General and the Director-General's employees and agents from all claims and demands of any kind and from all liability which may arise in respect of any accident, damage, or injury occurring to any person or property arising from the approval holder's exercise of the Approval.

Revocation

WA 16 The Director-General may revoke this Approval at any time in respect of the whole or any part of the approved activity (pursuant to clause 7(4) of Schedule 7 of the Fast-track Approvals Act 2024) if the approval holder breaches any of the conditions of this Approval.

WA 17 If the Director-General intends to revoke this Approval in whole or in part, the Director General must give the approval holder such prior notice as is reasonable and necessary in the circumstances.

Compliance with Legislation and Director-General's Notices and Directions

WA 18 The approval holder must comply with all statutes, bylaws, and regulations, and all notices, directions, and requisitions of the Director-General and any competent authority relating to the exercise of the Approval.

Appendix B: Expert Credentials

Dave Houston

I am a Technical Advisor for the Department of Conservation, a role I have held since 2012. I have held other technical and field roles with the Department since 1987.

I hold a Diploma of Parks and Recreation Management from Lincoln University. I am a member of Birds New Zealand (The Ornithological Society of New Zealand Incorporated).

I have more than 35 years of experience in the research and management of New Zealand penguins, including yellow-eyed, Fiordland crested, Snares crested, erect-crested and little blue penguins (kororā).

I gained 16 years of experience monitoring, managing and researching kororā at Oamaru. I was instrumental in the creation of the Oamaru Blue Penguin Colony and set up the long-term monitoring of the penguin population there to monitor the potential impacts of site development and tourism. I have co-authored publications in peer-reviewed journals reporting on monitoring results. I also developed the nest box widely used around New Zealand to provide supplementary or replacement nest sites.

I have experience in the identification of kororā nests in structures such as rock walls, and in the rescue and rehoming of kororā when construction activities or natural events have threatened or destroyed nest sites.

I am one of the founders of, and regular contributors to, the biennial Oamaru Penguin Symposium, a forum developed to discuss the research and management of kororā.

Appendix C: Weighting of relevant matters to be taken into account

Introduction

1. This report responds to the Panel Convener's Minute dated 3 March 2026, directing the EPA to obtain advice from DOC on "How the weighting of matters set out in the relevant schedules should be approached, having regard to relevant senior court decisions".

2. The Minute refers to the matters set out in Schedule 7, clause 3 of the FTAA (wildlife approval) which the FTAA directs must be addressed by the Director-General's s 51(2) reports.[1]

Weighting generally

3. Generally, the weighting to be accorded to relevant considerations by a statutory decision maker is for that decision maker to determine,[2] however where a statute directs the weight to be given to a matter, that direction must be given effect to.[3]

4. The senior courts have recognised that apparently disproportionate, inadequate or undue weight attached to a relevant factor can lead to judicial consideration of whether the weighting applied was within the limits of reason, and hence, whether the ultimate decision was unreasonable in an administrative law sense. A court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or which has given excessive weight to a relevant factor of no great importance.[4]

5. Accordingly, mandatory relevant considerations must be given genuine consideration and weighting by statutory decision makers.

Weighting under the Fast-track Approvals Act 2024

6. The Schedules to the FTAA list mandatory considerations that decision-making Panels must take into account, when determining applications for the various approvals that can be granted under the Act.[5]

7. The only directive regarding weighting contained in the FTAA, is that the "greatest weight" is to be given to the purpose of the FTAA.[6]

8. While described in the FTAA as "criteria",[7] the mandatory matters to be taken into account can be described as "factors", in the sense that they are matters to be assessed on the basis of their qualities, rather than quantities. They establish the foundation for assessment rather than the outcome

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1 The schedule clauses referenced in the Minutes exclude consideration of the purpose of the FTAA from the ambit of the request. However, in order to respond to the Panel Convener's request in relation to consideration of weighting, it is necessary to refer to the purpose of the FTAA given the statutory directive that this consideration be given "the greatest weight" relative to other mandatory considerations (i.e. relative to the matters that must be addressed by the Director General's s 51 reports). This advice has therefore been prepared on that basis.

2 See, for example *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR (HC) 188 at 223: The weight to be given to the evidence in the balancing exercise … is a matter for the primary tribunal and the Planning Tribunal on appeal.

3 Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd [1994] NZRMA 529 (HC) at 540: "Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine."

4 See, for example *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] LGHNZ 17 (CA).

5 See Schedule 7, clause 5 (wildlife approval).

6 This directive occurs multiple times in the FTAA, including at Schedule 7, clause 5 (wildlife approval).

7 This is the terminology used in the titles for each of the relevant clauses listed in fn 5.

of it.[8] Accordingly, the criteria, or factors, are not tick-boxes to be crossed off a list but are matters that must be qualitatively assessed.

9. The FTAA does not direct how much relative weight should be given to, or between, relevant matters other than the purpose of the FTAA. Nor does the FTAA specify how much greater weight should be accorded to its purpose relative to other mandatory considerations. It may be the case that some of the factors listed in the relevant clauses may be found to have no relevance. Consequently, that factor will have no weight accorded to it in the balancing exercise.

10. While the purpose of the FTAA is to be given the greatest weight, the purpose of the FTAA does not automatically outweigh all other considerations. By listing other considerations besides the purpose of the FTAA, it is implicit that weight be attached to them, and that they should receive genuine consideration where relevant.[9]

11. Accordingly, while the greatest weight is to be accorded to the purpose of the FTAA, it does not follow that when qualitatively assessed, the regional or national benefits of a project must necessarily outweigh other considerations, in combination or in isolation, such as the adverse environmental effects of a project. The extent of regional or national benefits will vary between projects. Also, adverse effects will vary between projects in nature and severity. Each factor must be qualitatively assessed and those assessments weighed. Where they pull in different directions, they must be weighed against each other.

12. The issue of legislatively directed weighting was considered by the Court of Appeal in *Enterprise Miramar Peninsula Inc v Wellington City Council*,[10] when considering the application of s 34 the Housing Accords and Special Housing Areas Act 2013 (HASHAA). Section 34 provides:

> **34 Consideration of applications**
>
> (1) An authorised agency, when considering an application for a resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater to lesser) in the order listed:
>
> (a) the purpose of this Act:
>
> (b) the matters in Part 2 of the Resource Management Act 1991:
>
> (c) any relevant proposed plan:
>
> (d) the other matters that would arise for consideration under—
>
> (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
>
> (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):

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[8] *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147, at [117]-[118].

[9] See also s 85(3)(b)of the FTAA which provides for the decline of a FTAA application if the adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the Panel has considered

[10] *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541.

(e) the key urban design qualities expressed in the Ministry for the Environment's *New Zealand Urban Design Protocol (2005)* and any subsequent editions of that document.

13. The Court held that all the listed matters must first be individually assessed prior to the exercise of weighing them in accordance with the prescribed hierarchy (in that case, the listed matters in subsection (1)(b)–(e) could not properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)–(e)).[11]

14. Applying that approach to the FTAA, the relevant matters should first be individually assessed, uninfluenced by the purpose of the FTAA, "before standing back and conducting an overall balancing" where the purpose of the FTAA is to be given greatest weight.[12] It would be an error of law to use the purpose of the FTAA to eliminate or reduce individual assessment of the other specified mandatory relevant considerations.[13]

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[11] *Enterprise Miramar Peninsula Inc*, at [53].

[12] *Enterprise Miramar Peninsula Inc*, at [52]. Note that the FTTA does not take the same cascading hierarchy of "greater to lesser" weight, but only that the "greatest weight" be given to the purpose.

[13] *Enterprise Miramar Peninsula Inc*, at [55]-[59]