

BEFORE THE EXPERT PANEL UNDER THE FAST-TRACK APPROVALS ACT 2024

IN THE MATTER of a substantive application by Port of Tauranga Limited for resource consents and a wildlife approval for the Stella Passage Development project (the **Project**), being a listed project in Schedule 2 of the Fast-track Approvals Act 2024

**MEMORANDUM ON BEHALF OF THE APPLICANT IN RESPONSE TO MINUTE 11 OF THE
STELLA PASSAGE DEVELOPMENT EXPERT PANEL
[FTAA-2512-1163]
24 JULY 2026**


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Introduction

1. This memorandum is filed on behalf of Port of Tauranga Limited (**POTL**) in response to Minute 11 (**Minute**) of the Stella Passage Development Expert Panel (**Panel**). In the Minute the Panel has requested further information from the Applicant on two matters and we address these below.

Augier conditions

2. The Panel has requested the Applicant provide submissions as to whether any of its *Augier* conditions may instead fall within the scope of s 108AA(1)(b) RMA.¹
3. POTL has considered the participants' responses to Minute 7 concerning the *Augier* conditions.² POTL maintains the position as set out in its response to the Panel's Minute 5.³ Accordingly, no amendments to the condition sets are proposed.
4. By way of further background, counsel note:
 - (a) Prior to the Resource Legislation Amendment Act 2017 (as noted by the Environment Court in *Oceana Gold (New Zealand) Ltd v Otago Regional Council*⁴) the role of offsets and environmental compensation under the Resource Management Act 1991 (**RMA**) was unclear.
 - (b) An early decision of the Planning Tribunal, in relation to a retrospective consent for a townhouse, had noted that it was doubtful that it had jurisdiction to impose a compensation condition which effectively would force a neighbour into a consent situation. It would have been receptive to such a condition if it had the power to impose it, but the Planning Tribunal considered that the RMA

¹ Minute at [2](a).

² Minute 7 of the Expert Panel – Stella Passage Development [FTAA-2512-1163] dated 29 June 2026.

³ Memorandum of behalf of the Applicant in Response to Minute 5 of the Stella Passage Development Expert Panel [FTAA-2512-1163] dated 8 June 2026 at [44] – [52] and Appendix 2.

⁴ [2019] NZEnvC 41, at [80].

was not designed to place the Planning Tribunal in the role of assessing compensation but rather to prevent adverse effects for the purpose of advancing the concept of sustainable management.⁵

- (c) In 2006, the Environment Court discussed offsetting and compensation in *J F Investments Limited v Queenstown Lakes District Council*⁶, confirming that an applicant can offer environmental compensation to add to the positive benefits of their proposed activity and that it could be considered under (then) s 104(1)(i) of the RMA, being any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (d) The Resource Legislation Amendment Act 2017, effectively codified the *Augier* principle in s 108AA(1)(a) of the RMA, and placed statutory limits on the imposition of conditions under s 108AA(1)(b) (these limits previously having been derived from the *Newbury* and *Estate Homes*⁷ cases).
- (e) Importantly, the Resource Legislation Amendment Act 2017 also introduced s 104(1)(ab) of the RMA that when considering resource consent applications, a consent authority must have regard to:

any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity
- (f) These amendments had the effect of clarifying that a consent authority could take into account compensation offered by an applicant, without having to consider it as 'another relevant matter'. Furthermore, we submit that they reinforce the position that monetary compensation which goes beyond the ambit of a financial contribution under s 108(10) of the RMA, amounts to

⁵ *Colonial Homes Ltd v Queenstown-Lakes District Council* Decision W104/95, Judge Treadwell.

⁶ Decision C48/2006, Judge Jackson.

⁷ *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112.

compensation which must be offered by an applicant rather than imposed by a consent authority.

5. In light of the above, it is our submission that there is not jurisdiction to impose the conditions recommended by Dr Richard Meade and Vanessa Wilkinson, but which are not volunteered by the Applicant on an *Augier* basis, as suggested by Ngāti Kuku Hapū and Whareroa Marae (**Ngāti Kuku**).⁸

Inability of mitigation to operate without funding

6. Ngā Tai ki Mauao (**NTKM**) and the Ngāti Ranginui parties have submitted that without funding much of POTL's proposed mitigation would fail to achieve desired outcomes.⁹
7. In our submission, those concerns are misplaced. POTL's express inclusion of funding commitments as *Augier* conditions provides certainty that funding would be available for those activities and what the quantum of that funding would be.¹⁰
8. It does not follow, that if the Panel considers itself unable to impose the funding commitments under s 108AA(1)(b) RMA that the proposed mitigation is rendered ineffective. Rather, POTL has volunteered funding commitments which the Panel must have regard to when it undertakes its decision-making powers.

⁸ Ngāti Kuku Hapū and Whareroa Marae Response to Minute 7 dated 16 July 2026 at [31].

⁹ Ngā Tai ki Mauao Response to Minute 7 dated 14 July 2026 at [38] and Joint Memorandum of Counsel on Behalf of Ngāi Ranginui Iwi Society, Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngāti Ranginui Fisheries Trust in Response to Expert Panel's Minute 7 dated 14 July 2026 at [15].

¹⁰ Memorandum on behalf of the Applicant in response to Minute 5 of the Stella Passage Development Expert Panel [FTAA-2512-1163] dated 8 June 2026 at [49] and [50].

Ngāti Kuku Hapū and Whareroa Marae

9. Ngāti Kuku submit that s 84 of the FTAA provides a further basis to impose conditions that involve a payment or compensatory element to address adverse impacts related to the subject proposal (including adverse cumulative impacts).¹¹
10. In our submission, that is not correct. Section 84 confers a discretion to impose conditions for a particular purpose, being to *recognise or protect a relevant Treaty settlement* – it is not authorisation for a general compensation provision. Section 83 still applies, so any condition must be no more onerous than necessary to address the reason for which it is set in accordance with the provision of the FTAA that confers the discretion. In practice, we submit that any condition imposed under s 84 of the FTAA is more likely to be operative in nature (rather than purely compensatory) with any monetary amount simply reflecting the funds available to fulfil the substantive condition.
11. That distinction is reflected in POTL's approach to the proposed *Augier* conditions as set out in its response to Minute 5. We do not repeat those submissions here and direct the Panel to that response.

Response to RFI #3 responses

12. The Panel has requested:¹²

As requested in the Applicant's memorandum of counsel dated 22 July 2026, a response from **the Applicant** to the "new, discrete submissions" in the participants' responses referenced in its paragraph 2.

¹¹ Ngāti Kuku Hapū and Whareroa Marae Response to Minute 7 dated 16 July 2026 at [30].

¹² Minute at [2](c).

13. A number of new, discrete submissions were made in the responses of NTKM, Ngāti Kuku, and Pirirākau Tribal Authority Incorporated (**PTAI**) to Minute 7 of the Panel that counsel wishes to respond to.¹³ We set out the relevant submissions made by those participants and address each in turn.

‘Enjoyment’ of treaty settlement obligations

14. NTKM relies on the approach in the draft Trans-Tasman Resources (**TTR**) decision, that Treaty settlement consistency turns on whether approval would materially undermine the practical operation and integrity of settlement obligations in practice.¹⁴ As set out in our previous submissions¹⁵, the process adopted by the TTR Panel provides a useful way for the Panel to approach its assessment of consistency with Treaty settlement obligations:¹⁶

- (a) Firstly, are there any potentially relevant existing Treaty settlements?
- (b) Secondly, if so, are they engaged by the project?
- (c) Thirdly, would granting the approvals materially undermine the intended practical operation and integrity of obligations under those engaged Treaty settlements?

15. However, NTKM submit that the TTR Panel’s approach should include the *enjoyment* of settlement benefits, purporting that that is tangata whenua’s expectation.¹⁷ It is our submission that is incorrect, and that the Panel is to not assess inconsistency on this basis. We submit that this is because:

¹³ Minute 7 of the Stella Passage Development Expert Panel [FTAA-2512-1163] dated 29 June 2026.

¹⁴ Record of Draft Decision of the Expert Consenting Panel under Section 87 of the Fast-track Approvals Act 2024 dated 4 February 2025 at [1827].

¹⁵ Legal Submissions for the Applicant in Response to Comments [FTAA-2512-1163] dated 7 May 2026 at [74].

¹⁶ Record of Draft Decision of the Expert Consenting Panel under Section 87 of the Fast-track Approvals Act 2024 dated 4 February 2025 at [1827] and [1828].

¹⁷ Ngā Tai ki Mauao Response to Minute 7 dated 14 July 2026 at [15].

- (a) The concept of *enjoyment* does not appear in the FTAA, the relevant settlement instruments¹⁸, or the Taranaki VTR draft decision.¹⁹
 - (b) Enjoyment is inherently a subjective concept and it should not influence the analytical task the Panel is required to undertake.
 - (c) Section 7 requires consistency with Treaty settlement obligations and not satisfaction with outcomes, or an absence of effects on matters that are of significance to the beneficiaries of those settlements. Those are fundamentally different questions.
 - (d) If consistency requires preservation of the groups' enjoyment of settlement benefits, then almost any adverse cultural effect associated with any project could potentially amount to inconsistency, irrespective of whether the settlement obligations remained fully capable of operating. This would incorrectly create an effects-based test to inconsistency that does not draw on the terms of the relevant Treaty settlements.
16. The relevant analysis to undertake for the third limb of the TTR Panel's approach is whether the Project would prevent the practical operation of, or materially undermine, obligations in the relevant Treaty settlements. There is no basis on which to extend that analysis to include a group's enjoyment of settlement benefits.

¹⁸ Ngāi Te Rangi, Ngā Pōtiki, Ngāi Te Rangi Settlement Trust, Ngā Pōtiki a Tamapahore Trust, and the Crown, Deed of Settlement of Historical Claims dated 14 December 2013. NB: enjoyment is used in the settlement deed, but is used to refer to a lessee's quiet enjoyment of land without interruption and is not relevant to NTKM's submission.

¹⁹ NB: enjoyment is used in the draft decision but only to refer to reduced enjoyment due to reduced visibility (at [943] and [1543]) and in relation to recreation effects of reduced enjoyment of beaches (at [1529]). Neither paragraphs are relevant to the Treaty settlement analysis.

Baseline environment – Tauranga Moana Iwi Collective Settlement

17. NTKM submit that the granting of consent would undermine the practical operation and integrity of the Tauranga Moana Iwi Collective Settlement, specifically the Tauranga Moana Framework (**TMF**) and the Tauranga Moana Governance Group (**TMGG**).
18. The thrust of its submission is that approval would entrench the Project within the future baseline for Te Awanui, requiring future actions contemplated by the settlement to operate within that, materially altered, context.²⁰ As a result the TMF and TMGG would be practically impaired and that amounts to inconsistency.
19. Such inconsistency does not arise merely because of a change in the baseline environment in which the settlement obligations would operate. In our submission:
 - (a) NTKM does not identify any obligation that requires the Panel, or other parties, to preserve the current baseline, or defer development, until the TMF and TMGG are operational. Rather, NTKM's submission conflates the effects of the Project on that baseline with inconsistency with settlement obligations.
 - (b) The parties, at the time the settlement was signed, could not have expected that the baseline environment of Te Awanui would remain in the same condition until the TMF and TMGG were operational. Moreover, the fact that the baseline can change are all ordinary consequences of the resource management system, which would have been anticipated at the time the settlement was signed.²¹
 - (c) None of the issues identified in NTKM's submissions demonstrate that the settlement instruments themselves would be unable to operate or fulfil their intended function.

²⁰ Ngā Tai ki Mauao Response to Minute 7 dated 14 July 2026 at [24](h) and (i).

²¹ Noting that the biophysical effects of the Project are assessed as very low to low.

- (d) A logical consequence of NTKM's position would be that any significant development approved before the exercise of the TMF and TMGG would be characterised as being 'inconsistent', purely as a result of it changing the baseline within which those obligations would operate. That interpretation substantially expands the scope of s 7 beyond the protection of settlement obligations to conferring on settlements a degree of control over future resource consent decisions. That is not reflected in settlements, nor the FTAA.

20. NTKM's submissions do not demonstrate that obligations would become practically inoperable or be void of practical integrity as a result of the Project being granted. It is our submission that the Project is consistent with the Tauranga Moana Iwi Collective Settlement.

Who can say that there is settlement inconsistency?

21. To the extent that settlements reference tikanga-based concepts, Ngāti Kuku submit that is only for ahi kā parties to determine, by way of evidence, what is or is not consistent with Treaty settlement obligations.²²
22. There is an important distinction between evidence as to any cultural effects resulting from the Project and the question of whether granting approval is inconsistent with settlement obligations. The former is informed by the views of those tangata whenua groups who hold the relevant relationships and responsibilities. The latter requires interpretation of deeds and legislation which is a task that falls to the decision-maker. We submit that:

- (a) It cannot be true that only one party to settlements can speak to its meaning and effect. Treaty settlements are the product of negotiations between iwi and / or hapū, and the Crown. While subsequently recorded in deeds, and

²² Ngāti Kuku Hapū and Whareroa Marae Response to Minute 7 (16 July 2026) at [20].

then legislation²³, they are, in substance, bilateral agreements that settle historical claims.

- (b) There is no basis for treating one party's interpretation as determinative. Rather, the Panel must determine the meaning and effect of the settlement obligations objectively.
- (c) The authorities relied upon by NTKM²⁴ support the proposition that a decision maker cannot substitute its own view with that of the relevant Māori group as to whether **cultural effects** are appropriately avoided, remedied, or mitigated as cultural effects flow from impacted tikanga. Those authorities do not state that tangata whenua possess exclusive authority to determine whether there is inconsistency with settlement obligations, and in our submission settlement obligations and cultural effects are not comparable.

23. While the views of ahi kā can provide important evidence regarding the practical operation and integrity of settlement obligations and the effects of the Project upon them, the question of Treaty settlement obligation inconsistency is not one that can be answered exclusively by any single participant. It is a matter for the Panel to determine having regard to the settlement instruments, and the submissions and evidence before it.

²³ Noting that the Ngāi Te Rangi and Ngā Pōtiki settlement is yet to be incorporated into legislation.

²⁴ *Te Rūnanga o Ngāti Whātua v Auckland Council* [2024] NZHC 3794 and *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

Consultation with PTAI

24. PTAI contend that inconsistency with the Ngāti Ranginui Treaty settlement has arisen as a result of the absence of *genuine, project-specific engagement with the currently mandated PTAI leadership on conditions or mitigation* and that this results in a procedural inconsistency with the hapū-centric settlement.²⁵
25. We submit that PTAI's assertion that treaty settlement inconsistency arises in these circumstances is misconceived. The Ngāti Ranginui Treaty settlement framework does not require agreement or consultation, or co-design of conditions, with any particular entity as a prerequisite to approval. Dissatisfaction with the Applicant's engagement process does not of itself amount to inconsistency with the settlement.

Proportionality test

26. In its concluding submissions on the *Augier* conditions, NTKM submit that:²⁶
- ... if this Panel were to decide it could not impose appropriate conditions itself, it must evaluate any *Augier* or s108AA(1)(a) conditions proffered by POTL. If they do not outweigh the Project's residual impacts then consent cannot be granted for the project.
27. In our submission, that is an incorrect summation of the required assessment. The requirement in s 85(3) of the FTAA is for the Panel to consider the Project's *regional and national benefits* against any adverse impacts, taking into account conditions imposed by the Panel or proposed by the Applicant. Only if the adverse impacts are sufficiently significant to be out of proportion to those benefits can the Panel decline the application.

²⁵ Submission on behalf of Pirirākau Tribal Authority Incorporated (PTAI) in Response to Minute 7 of the Expert Panel dated 1 July 2026 at 2.2.1(iii)(d).

²⁶ Ngā Tai ki Mauao Response to Minute 7 dated 14 July 2026 at [65].

DATED at Tauranga this 24th day of July 2026

Three blue ink signatures are displayed side-by-side. The first signature is 'Vanessa Hamm', the second is 'Laura Murphy', and the third is 'Cory Lipinski'. Each signature is written in a cursive, flowing style.

Vanessa Hamm / Laura Murphy / Cory Lipinski
Counsel for Port of Tauranga Limited