BEFORE THE FAST-TRACK EXPERT CONSENTING PANEL

IN THE MATTER	of an application for approvals under section 42 of the Fast-track Approvals Act 2024 ("FTAA")
AND	
IN THE MATTER	the substantive application by New Zealand Transport Waka Kotahi ("Waka Kotahi") for the Brynderwyns alternative project

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SUBMISSIONS OF COUNSEL FOR TE PATUHARAKEKE TE IWI TRUST BOARD

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MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These submissions are filed on behalf of Patuharakeke Te Iwi Trust Board ("Patuharakeke") as part of their s 53 comments on the substantive application by Waka Kotahi ("Application") for approvals for an alternative route across Piroa (the Brynderwyn Hills) ("Project" or "Proposal"). They are accompanied by 2 documents:

a. Expert statement from Siobhan Karaitiana, Kaupapa Taiao specialist with Kāhu Environmental. Attached to this statement are the following documents:

- Attachment A: A 'traffic-light' condition analysis document prepared by Patuharakeke and Waka Kotahi and developed further by Patuharakeke with environmental consultancy Kahu Environmental.
- Attachment B: Waka Kotahi's 13 July 2026 conditions with Patuharakeke's proposed amendments shown in track-changes.
- Attachment C: Otaki to Levin Waka Kotahi conditions.

b. An ecology report prepared by independent ecological consultancy Rural Design Limited ("RDL Report").

1.2 These documents should be read in conjunction with the CIA previously prepared by Patuharakeke and lodged with the Application. The CIA was prepared by Patuharakeke before it had access to several of the technical reports, assessment of environmental effects, and conditions lodged with the Application.[1] The documents referred to above have been prepared after the Application was lodged and build on the CIA, aligning Patuharakeke's commentary and recommendations with the Application material.

1.3 These submissions should be read in conjunction with the abovementioned documents and the CIA and address the significant legal issues raised by the Application under 9 headings in addition to this introduction:

c. Section 2: cultural evidence before the panel

d. Section 3: statutory framework

e. Section 4: Te Tiriti o Waitangi and tikanga

f. Section 5: significant physical and cultural adverse impacts

g. Section 6: significant adverse policy impacts

h. Section 7: section 85 assessment and why the Application must be declined in current form

i. Section 8: amended conditions

j. Section 9: conclusion and process

1.4 The essential points of argument for Patuharakeke are:

[1] CIA, section 2.4 for limitations, pdf pg 51 CIA.

a. The considered, consistent, and genuine view from hapū is that in its current form the Application will have numerous, significant, irreversible adverse impacts on an area of immense cultural significance to them and on the taonga within that area. Patuharakeke's position is that these impacts are a result of the scale and general location of the Proposal, and they are exacerbated by Waka Kotahi's 'envelope approach'[2] which means the actual extent of adverse impacts cannot be determined.

b. Te Tiriti o Waitangi and tikanga are directly relevant to the panel's decision. In its current form the Application would breach Treaty principles, tikanga, and the obligation in s 6(e) of the Resource Management Act 1991 ("RMA") through harming numerous taonga (including taonga absolutely protected under the Wildlife Act 1953 ("Wildlife Act"), undermining Patuharakeke's tino rangatiratanga and Mana Motuhake, and preventing exercise of kaitiakitanga. These are significant adverse impacts.

c. Adverse physical, cultural, and spiritual impacts also result in adverse policy impacts. Their occurrence is contrary to promoting sustainable management and protecting Aotearoa's wildlife, fails to recognise and provide for the matters of national importance in s 6(a), (c) and (e) RMA, and conflicts with directive provisions in the National Policy Statement for Freshwater Management ("NPSFM") the National Policy Statement for Indigenous Biodiversity ("NPSIB").

d. Each of the Project's adverse impacts must be considered and weighed separately by the panel to ensure the true extent of adverse impacts is taken into account. The hara (offence) suffered by different taonga must, for example, be considered separately; a narrow focus on harm to indigenous biodiversity would fail to properly delimit the Application's adverse impacts for s 85 purposes. When assessed in this way it is clear that without change, the adverse impacts of the Application are sufficiently significant to outweigh the benefits of an alternative route through the Brynderwyn Hills to connect Te Tai Tokerau with the rest of Te Ika-a-Māui, and require a decision to decline the Application. The FTAA does not envisage that the alternative route will be delivered at any cost.

e. Adverse impacts can be ameliorated to a point where the Application may be granted if the proposed conditions are amended as set out in Karaitiana Attachment B to (in summary):

    i. provide for on-going hapū involvement in a manner that is consistent with tikanga, upholding and restoring tino rangatiratanga and Mana Motuhake, and enabling exercise of kaitiakitanga.

    ii. adequately identify stream and wetland habitat and taonga species that will be affected by the Project.

    iii. identify specific areas or impacts that the final road alignment and any disposal areas must avoid.

[2] Summarised in Waka Kotahi's opening submissions at para 8 and referred to there as an 'effects envelope'.

iv. identify the maximum area of different taonga ecosystems that can be cleared to enable the final road alignment and any disposal areas.

v. require scientifically determined, best practice offsets for the areas of taonga ecosystem that are destroyed and/or degraded, and monitoring of those offsets.

vi. secure fish passage through design, construction and over the life of the Project.

vii. undertake stormwater treatment adequate to protect (keep safe from harm) receiving environments.

viii. minimise and monitor construction discharges to protect (keep safe from harm) receiving environments.

f. A Cultural Values Management Plan ("CVMP") is a critical tool for properly providing for hapū rights and interests. With regard to Waka Kotahi's proposed designation conditions DX-DX Cultural Values Management Plan, ngā hapū agree they should draft the CVMP for Waka Kotahi's input not the other way around. Ngā hapū are committed to drafting such a plan and intend to have a draft prepared by 10 November 2026 '(being the date planned for a collective hui with Waka Kotahi). Outcomes will be shared with the panel. At a high-level the CVMP will include shared/key principles, joint components and individual hapū components (some to be fleshed out in more detail post consenting but the intention is to cover key expectations, bottom lines etc).

2. CULTURAL EVIDENCE BEFORE THE PANEL

2.1 Piroa is a landscape of immense cultural significance to Patuharakeke, and part of a wider cultural landscape referred to as "nga tapuwae o nga tūpuna" (the footprints of our ancestors). Its northern half forms the southern boundary of the Patuharakeke rohe, acting as the 'gunwale of its Waka Houra and marking the point where Patuharakeke's rohe meets the rohe of Te Uri o Hau. It is connected to Patuharakeke through whakapapa. Piroa's significance derives not only from its location but from the interwoven network of features and values of historical and spiritual importance within it including wāhiwāhi tapu like Pā and urupa, tūtohu whenua, and taonga o te Taiao including awa, repo, manu, rākau rangatira, taonga tuku iho, rongoā me ika.[3]

2.2 These taonga have already been significantly adversely impacted because of activities to date, as has Patuharakeke's access to them because of historical colonist grievances. This has, and is having, significant adverse effects on Patuharakeke's ability to exercise tino rangatiratanga, Mana Motuhake, and kaitiakitanga within Piroa, and so on their mana and wairua. In its current form, the Proposal would cause significant, further (cumulative), numerous hara to Patuharakeke's relationship with their ancestral lands, water, sites, wāhi tapu, and to other taonga and to their cultural relationships and traditions.[4] A fundamental

[3] CIA, see for example Table 0.1, section 5.
[4] CIA, section 5.

change in approach is required to ameliorate these adverse impacts to the point where the Proposal's adverse impacts do not outweigh its benefits.

2.3 The evidence before the panel from both Te Uri o Hau and Te Parawhau is the same. The CIA's prepared by all hapū say that in its current form, the Proposal will have significant cultural effects, particularly where these interrelate with ecological issues. All agree there are substantive flaws in relation to ecological assessments and significant amendments are required to all sets of conditions and approvals.[5]

2.4 The panel is therefore faced with "a considered, consistent, and genuine view" from hapū that the Application would have significant adverse impacts on a landscape of immense cultural significance to them and on the taonga within that landscape. Patuharakeke submits it is therefore not open to the panel to decide the Application would not have these adverse impacts.[6] As the High Court in *Tauranga Environmental Protection Society v Tauranga City Council*[7] explained:

> [66] Deciding otherwise is inconsistent with Ngāti Hē's [Patuharakeke's] rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA.

3. STATUTORY FRAMEWORK

3.1 The starting point for the panel's decision is s 81(1) FTAA:

> (1) A panel must, for each approval sought in a substantive application, decide whether to:
> a. grant the approval and set any conditions to be imposed on the approval; or
> b. decline the approval.

3.2 Section 81(2) then sets out what the panel is required to do for the purpose of making that decision:

> (2) For the purpose of making the decision, the panel—
> (aaa) must, if the substantive application relates to an unlisted project, consider the Minister's reasons for accepting the referral application that are stated in the notice given by the responsible agency under section 28(1):
> (aab) must consider a relevant Government policy statement:
> (a) must consider the substantive application and any advice, report, comment, or other information received by the panel under section 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90:
> (b) must apply the applicable clauses set out in subsection (3) (see those clauses in relation to the weight to be given to the purpose of this Act when making the decision):
> (c) must comply with section 82, if applicable:
> (d) must comply with section 83 in setting conditions:
> (e) may impose conditions under section 84:
> (ea) may impose conditions under section 84A:

[5] Te Parawhau CIA, see for example executive summary; Te Uri o Hau CIA, see for example pdf pg 42-48.
[6] *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201 at [65].
[7] Ibid.

(f) may decline the approval only in accordance with section 85.

3.3 In this case the applicable clauses that the panel must apply under s 81(2)(b) are those applying to resource consents, designations, archaeological authorities, and wildlife permits.

3.4 For resource consents (ordinarily sought under the RMA) the "applicable clauses" are clauses 17-22 of Schedule 5, with clause 17 being the clause central to the panel's decision:

> the panel must take into account, giving the greatest weight to paragraph (a),-
> (a) the purpose of this Act; and
> (b) the provisions of Parts 2, 3, 6, 8 to 10 of the Resource Management Act that direct decision making on an application for resource consent, (but excluding s 104D of that Act); and
> (c) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

3.5 For designations (also ordinarily sought under the RMA) the "applicable clauses" are clauses 24 and 25 of Schedule 5, with clause 24 being the clause central to the panel's decision:

> the panel must, giving the greatest weight to paragraph (a)(i),-
> (a) take into account -
> (i) the purpose of this Act; and
> (ii) the provisions of Part 8 of the Resource Management Act that direct decision making on an application for a designation (except section 170); and
> (iii) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991; and
> (b) consider any Mana Whakahono ā Rohe or joint management agreement that is relevant to the approval.

3.6 For wildlife permits (ordinarily sought under the Wildlife Act) the "applicable clauses" are clause 5 and 7 of Schedule 7, with clause 5 being central to the panel's decision:

> the panel must take into account, giving the greatest weight to paragraph (a)(i)-
> (a) the purpose of this Act; and
> (b) 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; and
> (c) 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).

3.7 For archaeological authorities (ordinarily sought under the Heritage New Zealand Pouhere Taonga Act 2014) the "applicable clauses" are in Schedule 8 FTAA, with clause 4 being central to the panel's decision:

> (1) For the purposes of section 81, when considering an application for an archaeological authority, including conditions in accordance with clause 5, the panel must take into account, giving the greatest weight to paragraph (a),—
> (a) the purpose of this Act; and
> (b) the matters set out in section 59(1)(a) of the HNZPT Act; and
> (c) the matters set out in section 47(1)(a)(ii) and (5) of the HNZPT Act; and
> (d) a relevant statement of general policy confirmed or adopted under the HNZPT Act.

(2) For the purposes of subclause (1), the provisions of the HNZPT Act referred to in that subclause must be read with all necessary modifications, including that a reference to Heritage New Zealand Pouhere Taonga must be read as a reference to the panel.

3.8 When taking into account the matters listed in each of these clauses the panel is required to first consider each matter individually, uninfluenced by the purpose of the FTAA, before secondly weighing those factors in accordance with the prescribed hierarchy. That approach is supported by the Court of Appeal's decision in Enterprise *Miramar Peninsula Incorporated v Wellington City Council*.[8] It has been applied in most other FTAA panel decisions to date.[9]

3.9 When taking the purpose of the FTAA into account under each clause, the panel "must consider the extent of the project's regional or national benefits".[10] This is a factual question based on evidence and informed by judgement.[11] The extent of regional benefits is context-dependent: what constitutes a significant benefit may differ from one region to the next.

3.10 For the purpose of both resource consents and designations when taking into account the RMA provisions that direct decision-making,[12] the panel must undertake an assessment of the application under those provisions in the same way it would under the RMA, but with the modifications made by the FTAA in place (e.g. no s 104D assessment;[13] provisions that would require decline under the RMA do not have that effect under the FTAA;[14] s 8 RMA does not apply[15]). In respect of applicable planning instruments, this requires "a fair appraisal of the objectives and policies [of applicable planning instruments] read as a whole" in accordance with the guidance provided by the Supreme Court in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency*.[16]

3.11 For decisions on resource consents and designations, Mana Whakahono a Rohe are expressly required to be considered by the panel.[17]

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[8] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 [52]-[53], [59]. In *Enterprise Miramar* the Court of Appeal considered the correct interpretation and application of the decision-making criteria in the Housing Accords and Special Housing Area Act 2013. Although the weighting hierarchy was different in that statute, the decision-making provision was the same in that it required decision-makers to take into account a list of matters and then weigh them in accordance with statutory direction about how the weighting exercise should be undertaken.

[9] See for example Bledisloe Wharf decision, Waihi Gold decision, Taranaki VTM draft decision.

[10] FTAA, s 81(4).

[11] The FTAA does not define what constitutes a significant regional or national benefit, nor does it define the terms "significant" or "benefit(s)".

[12] Under s 104 RMA for resource consents and s 171 for designations, applicable by virtue of Sch 5 cl 17(1)(b) and cl 24(1)(a)(ii) respectively.

[13] Applicable to resource consents, Sch 5 cl 17(1)(b).

[14] Applicable to resource consents, Sch 5 cl 17(4).

[15] Applicable to resource consents and designations, Sch 5 cl 17(2)(a) and cl 24(2)(a).

[16] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC [2024] NZSC 26 at [79]-[80].

[17] FTAA, Sch 5 cl 17(2)(c), cl 24(1)(b).

3.12 The panel must decline an approval sought in the Application if any of the mandatory decline factors in s 85(1) or (2) apply. There is no requirement for mandatory decline in this case.

3.13 The panel may decline an approval if, in complying with s 81(3), it forms the view that there are 1 or more adverse impacts in relation to the approvals sought, and those adverse impacts are "sufficiently significant to be out of proportion to the project's regional or national benefits", even after taking into account any modifications made by Waka Kotahi or conditions that the panel may set to address to those adverse impacts.[18] Adverse impacts are broadly defined "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval."[19]

3.14 The panel may not form the view that adverse impacts meets that threshold "solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2)".[20] The word "solely" (common meaning "only; completely"[21]) and the reference to "*a* provision" are important. The panel may form the view that adverse impacts are sufficiently significant to be out of proportion due to a combination of inconsistencies with provisions or documents, or due to a combination of those inconsistencies with other adverse impacts.

3.15 In Patuharakeke's submission each adverse impact must be identified, considered and weighed separately by the panel to ensure the true extent of adverse impacts is taken into account. For example, the hara suffered by different taonga species must be considered separately and the hara to different wāhi tapu and to tino rangatiratanga must be considered separately; a narrow focus on harm to 'indigenous biodiversity' or to 'cultural values and relationships' as a collective would fail to properly delimit the Application's adverse impacts for s 85 purposes.

3.16 Ultimately s 85 requires the panel to look at the benefits and adverse impacts it has identified on the information before it and make a judgement about whether adverse impacts are sufficiently significant (which can also be understood to mean "noteworthy"[22]) that they are much bigger than the benefits[23], even when benefits are given more inherent weight.[24]

3.17 As further explained below, Patuharakeke submits that in this case, absent the amendments to the conditions in Karaitiana Attachment B, the Project's adverse impacts are so extensive that the only reasonable conclusion is that they outweigh its benefits.

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[18] FTAA, s 85(3).
[19] FTAA, s 85(5).
[20] FTAA, s 85(4).
[21] Collins New Zealand Dictionary, First Ed 2017.
[22] Definition applied to the term significant in context of benefits by several panels. See for example Maitahi decision, Waihi Gold decision.
[23] Reflecting the common meaning of the concept "out of proportion", which is defined in the Cambridge online dictionary as: "If something is out of proportion, it is much bigger or smaller than it should be when compared to other things".
[24] As required by FTAA, clause 17 of Schedule 5.

4. TE TIRITI O WAITANGI AND TIKANGA

Te Tiriti o Waitangi

4.1 The FTAA itself does not contain a general Treaty clause or refer to Te Tiriti o Waitangi or its principles, beyond references to Treaty settlements. However, it is well-established that Te Tiriti and its principles are relevant to the interpretation and application of statutory provisions even when not referred to in legislation. This is because "the Treaty is part of the fabric of New Zealand society"[25] and "has an elevated status owing to its constitutionally foundational significance".[26] As a full court of the High Court said in *Barton-Prescott v Director-General of Social Welfare*[27]:

> We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute.

4.2 The presumption of consistency with Te Tiriti is a powerful one. In *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* the Supreme Court said:[28]

> The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the questions … An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

4.3 In this case the way in which the Te Tiriti is brought to bear on the panel's decision is different as between the RMA approvals sought and the Wildlife Act approvals sought:

RMA approvals

a. Although s 8 RMA is excluded, there is no provision saying that the Te Tiriti o Waitangi is not relevant to the panel's assessment or excluding tikanga-based rights and interests from the purview of "adverse impacts". None of the Supplementary Analysis Report: Fast-track Approvals Bill 29/2/202, the Legislative Statement for Fast-Track Approvals Bill 7/3/2024, the Select Committee Report, and the First and Third Readings on the Bill, express a policy intent to exclude the ability of panels to respect the social contract enshrined in Te Tiriti and consider the principles of Te Tiriti where, as is the case here, they are directly relevant to the adverse impacts of a project. Treaty principles are also expressly relevant to analysis of applicable planning instruments. For example, the decision-making principles informing implementation of the NPSIB and NPSIB policy 1 include taking into account the principles of Te Tiriti.[29] Those implementing the National Policy Statement for Infrastructure 2025 ("NPS Infrastructure") are expressly reminded to "be aware of their obligations with regarding to other legislation, including…the Treaty of Waitangi."[30]

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[25] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.
[26] *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [35].
[27] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.
[28] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].
[29] NPSIB, cl 1.5(3)(b) and cl 2.2.
[30] NPS Infrastructure, explanatory note.

Wildlife permits

b. The panel must take into account "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".[31] The Wildlife Act does not have a specific purpose provision, however its purpose was articulated by the Supreme Court in *Shark Experience Ltd v PauaMAC5 Inc*[32] and it is that interpretation of purpose this panel must apply. According to the Supreme Court (**emphasis** added):[33]

> [44] This is not an Act concerned only with the regulation of hunting activities. As we have noted**, one of the principal purposes of the Act is the protection of wild animals.** That is apparent from its long title, but also from the scheme of the legislation itself, including as it does, provision for the creation of wildlife sanctuaries, refuges and management reserves.
>
> [45] It is also relevant that **the Act is the principal means by which wildlife in New Zealand, including many of its most endangered species, are protected**….
>
> [46]: The Wildlife Act, then, is the **"mainstay of statutory protection of animals in the environment"**.

For the wildlife harmed by this Application requiring approval under the Wildlife Act – mokomoko, pepeketua, indigenous snails, and Patuharakeke say also at least pekapeka and kiwi[34] - the purpose is absolute protection.[35] As an enactment which is (ordinarily) administered by DOC, the Wildlife Act must "be interpreted and administered as to give effect to the principles of the Treaty of Waitangi" in accordance with s 4 Conservation Act 1987.[36] That strong obligation applies to panels under the FTAA as the entity tasked, in DOC's place, with considering applications for approvals ordinarily sought under the Wildlife Act. The FTAA does not exclude application of s 4 Conservation Act.

4.4 The present case is one where breach of Te Tiriti and Treaty principles is directly at issue and constitutes a significant adverse impact as discussed in these submissions.

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[31] FTAA, Sch 7 cl 5(b).
[32] *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111.
[33] Footnotes omitted.
[34] RDL report, [84], [118]-[127], [181], [202], [236], [273 (b) and (d)], [293]. Rural Design Ltd's advice is that wildlife permits should also be being sought for pekapeka and kiwi.
[35] Wildlife Act, s 3. These species fall into the first tier of the Act's tiered system of protection described by the Supreme Court at [9]-[11] of *Shark Experience Ltd v PauaMAC5 Inc*.
[36] Relying on the findings of the Supreme Court in *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122. In that case the Supreme Court was tasked with considering an appeal related to the *vires* of concessions issued under the Reserves Act. At [33] of the judgement the Supreme Court reproduced s 4 Conservation. It went on to say at:

> [34] Section 4 applies in the present case because the concessions relate to reserves under the Reserves Act. Under s 6 of the Conservation Act, DoC is responsible for the administration of the enactments in sch 1 to the Conservation Act. The Reserves Act is one of the enactments specified in sch 1 and the obligation under s 4 extends to those enactments.

The Wildlife Act is similarly referred to in Sch 1 of the Conservation Act and so the same approach must apply.

4.5 The principle of partnership represents the agreement between the Crown and Māori signatories that the Crown would exercise kawanatanga (governorship or law-making) while Māori would retain tino rangatiratanga (chiefly authority and control).

4.6 The principle of good faith stems from the overarching partnership principle and requires both Treaty partners to act reasonably and honourably towards each other.[37]

4.7 The principle of active protection means that "the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable."[38] The Privy Council has explained that where:[39]

> …a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.

4.8 In this case, by granting the Application without the amendments to the conditions sought by Patuharakeke, the panel would be enabling a failure by the Crown (noting Waka Kotahi is a crown agent[40]) to meets in its obligation to take steps to enable Patuharakeke to exercise their tino rangatiratanga and meet their kaitiaki responsibilities in their rohe. This would compound the Crown's history of failing to recognise and protect their tino rangatiratanga and kaitiaki responsibilities through land confiscation and delay in recognising grievances and rangatiratanga through the settlement process.[41] [42]

4.9 The panel would also be enabling a failure by the Crown to actively protect numerous, vulnerable taonga, both cultural and physical, across an extensive landscape that is itself of immense cultural significance and a taonga in its own right.[43]

4.10 These breaches of Te Tiriti are significant adverse impacts and are, on their own, sufficiently significant to outweigh any benefits. They have not been acknowledged or addressed by Waka Kotahi in the Application. The constitutional significance of Te Tiriti means that adverse impacts deriving from breach of Te Tiriti or its principles must have significant weight in assessing an application under the FTAA. In this case a decision to grant the Application in its current form would put a single road above the integrity of Aotearoa's founding document.

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[37] Ko Aotearoa Tenei, Waitangi Tribunal, Volume 2 pg 94.
[38] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) *(Lands case)* at 664 per Cooke P.
[39] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) *(Broadcasting Assets case)* at 517.
[40] Crown Entities Act 2004, Schedule 1 part 1.
[41] CIA, at Table 5.2, 5.3.2, Table 6.1.
[42] The principles of Te Tiriti also include the express terms of Te Tiriti, as the Privy Council stated in the Broadcasting Assets case (at 517), so a breach of the Article 2 rights of iwi to tino rangatiratanga over their taonga will also breach the principles of Te Tiriti.
[43] See for example CIA, at section 5.3. Noting that all values addressed by the CIA are located within Piroa underscoring its overall significance.

Tikanga

4.11 Tikanga is the first law of Aotearoa.[44] It "was not displaced or extinguished by the arrival of the English common law…"[45] It "is a part of the common law of Aotearoa/New Zealand."[46] As part of the fabric of New Zealand law, it is relevant context for the interpretation of legislation under s 10(1) of the Legislation Act 2019. Tikanga must therefore also colour the interpretation and application of the FTAA in circumstances where it is raised as relevant by Māori.

4.12 In this case, tikanga is directly engaged by the statutory framework and relevant to the panel's decision.

4.13 In respect of the resource consents and designation, s 6(e) RMA[47] requires decision-makers to "recognise and provide for … the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" as a matter of national importance. In respect of the wildlife permits, the panel must interpret the purpose of the Wildlife Act in accordance with the obligation to give effect to the principles of Te Tiriti o Waitangi.

4.14 As the CIA for Patuharakeke explains (and those prepared by Te Uri o Hau and Te Parawhau), their relationship with their ancestral lands, waters, wāhi tapu and taonga is underpinned by whakapapa and ahi kā, which according to tikanga, leads to the holding of rangatiratanga and exercise of the related obligation of kaitiakatanga. It is the tikanga of those holding rangatiratanga that applies to an area or place, and which determines what actions and behaviours are required in relation to te Taiao to meet kaitiaki and whakapapa obligations. Tikanga is therefore a central component of the relationship of Patuharakeke with its ancestral lands, water, sites, wāhi tapu, and other taonga, and determines their status as rangatira over the northern part of Piroa.

4.15 Consequently, tikanga must sit squarely at the forefront of the panel's decision. Protecting relationships and giving effect to the principles of Te Tiriti of Waitangi includes protecting and upholding applicable tikanga. In this case, the information before the panel demonstrates that the Proposal is contrary to tikanga. By way of example, according to Patuharakeke tikanga:

a. As ahi kā Patuharakeke hold tino rangatiratanga and Mana Motuhake and thus decision-making control over the northern part of Piroa.[48] The Proposal does not reflect or adequately provide for Patuharakeke determination of what happens to its rohe or tūpuna whenua. Conditions providing for Waka Kotahi to prepare cultural values management plans reflect a complete lack of understanding of tikanga and further intrusion on Patuharakeke's Mana Motuhake; it is for Patuharakeke to

[44] *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [110] per Glazebrook J, at [172] per Winkelmann CJ.
[45] Ibid.
[46] *Ellis* at [116] per Glazebrook J.
[47] Which is a matter the panel must take into account as part of its RMA assessment in relation to the resource consents and designation sought by NZTA.
[48] See for example CIA, pdf pg 113ff.

identify their cultural values and how they are to be protected, managed, and restored, not the Crown.[49]

b. As rangatira Patuharakeke must fulfil the corresponding obligation of kaitiakitanga to te taiao. The Proposal results in immense physical harm to te taiao at levels contrary to the tikanga of kaitiakitanga and provides no opportunity for Patuharakeke to exercise kaitiakitanga through Patuharakeke designed and led restoration and monitoring work. [50]

c. Certain species and ecosystems are taonga and must be left undisturbed because of, for example, their role in maintaining ki uta ki tai or their spiritual significance as taonga tupuna.[51] The Proposal does not provide for this outcome. It identifies no 'no go'/avoidance areas apart from Pā and does not specify the maximum level of effect the Project can have on te taiao.

d. A number of ecosystems have been grossly undervalued and overlooked.[52]

e. Impacts of this scale require karakia and a process of giving back and extending thanks to te taiao and nga Atua for allowing the activity to take place.[53] The proposed conditions do not provide for this to occur.

f. Where people take from or harm taonga they must restore te taiao to make good on that harm.[54] The Proposal represents an abject failure in this regard, with work undertaken to understand the extent of harm being inadequate, management measures being unproven and ineffective (e.g. relocation of pepeketua being ineffective) and offsets being of such low ratios they will still result in overall loss.[55]

4.16 The Proposal is therefore contrary to tikanga and consequently in breach of the statutory obligations in s 6(e) RMA, s 4 Conservation Act, and the principles of Te Tiriti. These are significant adverse impacts.

5. SIGNIFICANT PHYSICAL AND CULTURAL ADVERSE IMPACTS

5.1 Waka Kotahi's 'envelope approach' means that the true and ultimate extent of the Proposal's adverse impacts cannot be identified. However, what the evidence before the panel is sufficient to demonstrate, is that irrespective of final alignment the Proposal's adverse cultural and environmental impacts will be numerous and significant; they will cause material harm to Patuharakeke, te taiao and taonga as discussed further below. Those impacts are not addressed by Waka Kotahi's proposed conditions.

5.2 For a description of the significant adverse effects on Patuharakeke's rangatiratanga, Mana Motuhake, and ability to exercise kaitiakitanga for their wāhi tapu, wāhi tupuna, taonga

[49] See Karaitiana Attachment A traffic light table.
[50] See for example CIA, pdf pg 119ff.
[51] See for example CIA, pdf pg 124.
[52] See for example RDL report, [9] regarding intermittent and ephemeral streams section, [44], [148]-[149] regarding excluded watercourses, section 14.2 regarding surveys,
[53] Karaitiana Attachment A, traffic light table.
[54] See for example CIA, pdf pg 128, 130, 132.
[55] See generally RDL report.

tuku iho, taonga tuku iho, and their cultural values and practices the panel should refer to the CIA and to the traffic light document in Karaitiana Attachment A.

5.3 For a description of the significant adverse ecological impacts on Piroa's ngahere, its awa and repo, and its taonga tuku iho, the panel should refer to the RDL report.

6. SIGNIFICANT ADVERSE POLICY IMPACTS

Resource consents and designation

6.1 The critical "provisions of the RMA that direct decision-making" for resource consents and designations are ss 104 and 171 RMA and Part 2 (ss 5, 6, 7).

Section 104 and 171 considerations

6.2 Section 104 RMA requires a consent authority to have, respectively, regard and particular regard, to: (a) any actual and potential effects on the environment of allowing the activity, (ab) positive effects to offset or compensate for adverse effects, (b) any relevant provision of a national, regional or district planning instrument, and (c) any other matter that the consent authority considers relevant and reasonably necessary to determine the application. Under s 104(2EA), a consent authority may have regard to any previous or current abatement notices, enforcement orders, infringement notices, or convictions under the RMA received by the applicant. Under s 104(6), a consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

6.3 Similarly, s 171 RMA requires those deciding a notice of requirement for a designation to consider the effects on the environment and have particular regard to any relevant provision of a national, regional or district planning instrument.[56]

Project has significant adverse effects

6.4 The information provided by Patuharakeke identifying actual and potential adverse effects on the environment is described in section 5 above, and adverse impacts on tikanga are summarised in section 4. As already stated, those effects are significant and adverse.

6.5 In many instances the information provided by Patuharakeke identifies that the Application materials are incomplete or uncertain, or that effects are understated. Under the RMA, inadequacy of information is a ground for declining an application. While not a standalone ground for declining under the FTAA, inadequacy of information is a matter that weighs against approval and so should be treated as an adverse impact in the s 85(3) proportionality assessment.

[56] In *East West Link* the Supreme Court did not treat the have regard to directive in s 104 and have particular regarding to directive s 171 as being substantially different, applying the same approach to interpretating applicable provisions in both contexts. These submissions have adopted that approach.

Project is contrary to relevant planning instruments

6.6 Interpretation and application of planning provisions under ss 104 and 171 RMA have been addressed by the Supreme Court in the *King Salmon, Port Otago*, and *East West Link* decisions.[57] Together, those decisions are authority for the following propositions:

a. Directive plan provisions have greater potency and leave decision-makers with less flexibility for choice as to the outcome of a particular decision than less directive plan provisions.[58]

b. The term "avoid" means "not allow" or "prevent the occurrence of".[59] It is a strong directive. The standard of protection is material harm; an effect is adverse if it will materially harm the thing sought to be protected.[60]

c. When having regard to relevant provisions of applicable planning instruments the decision-maker must undertake a fair appraisal of the objectives and policies read as a whole. Isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent for the drafters must be avoided. Attention must be paid to the words used in the relevant provisions. The words used matter.[61]

National Policy Statement Indigenous Biodiversity

6.7 The objective of the NPSIB is to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date (5 August 2023).[62] [63] Maintaining indigenous biodiversity requires no overall loss of all of the following:[64]

a. the size of populations of indigenous species.

b. indigenous species occupancy across their natural range.

c. the properties and functions of ecosystems and habitats used o occupied by indigenous biodiversity.

d. the full range and extent of ecosystems and habitats used or occupied by indigenous biodiversity.

e. connectivity between, and buffering around, ecosystems used or occupied by indigenous biodiversity.

f. the resilience and adaptability of ecosystems.

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[57] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38; *Port Otago Limited v Environmental Defence Society Inc* [2023] ELHNZ 245; *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.
[58] *East-West Link* at [72]; *King Salmon* at [129] and [152].
[59] *King Salmon* at [93].
[60] *Port Otago* at [65]-[66].
[61] *East-West Link* at [72], [79], [80], [167], [169].
[62] The NPSIB was notified in the New Zealand Gazette on 7 July 2023 (Notice Number 2023-go2999). It came into force 28 days after notification.
[63] NPSIB, cl 2.1(1).
[64] NPSIB, cl 1.7(1).

6.8 Where necessary it involves restoration and enhancement of ecosystems.

6.9 Whether these outcomes are achieved is a technical, ecological question, and it appears to be common ground between Waka Kotahi's ecological advisors and Rural Design Limited, that the Project will not maintain indigenous biodiversity.[65]

6.10 Maintenance of indigenous biodiversity is to be achieved through recognising the mana of tangata whenua as kaitiaki and managing indigenous biodiversity in a way that takes into account the principles of Te Tiriti.[66] It is clear from the CIA that in its current form the Proposal does not recognise the mana of Patuharakeke as kaitiaki, and it impairs and undermines Patuharakeke's ability to meet its kaitiaki obligations. These same impacts also result in breach of Treaty principles as set out in section 4 above.

6.11 For areas like Piroa which are identified as significant ecological areas, the starting point is that they will be protected and that this will be achieved by avoiding loss of ecosystem representation and extent; disruption to sequences, mosaics, or ecosystem function; fragmentation; reduction in function; reduction in the population size or occupancy of Threatened or At Risk (declining) species that use the SEA for part of their life cycle.[67] The Project will have these impacts.

6.12 For proposals like the Project this is acceptable if "there is a functional need or operational need for" the road "to be in that particular location" and "there are no practicable alternative locations" for the new road.[68] If those tests are met then proposals like the Project are able to manage adverse effects by avoiding where practicable, minimising where avoidance is not practicable, remedying where minimisation is not practicable, and then offsetting or compensating for more than minor residual adverse effects. However, where biodiversity compensation is found not to be appropriate because the limits to compensation are at play, then "the activity itself is avoided." [69]

6.13 Patuharakeke submits that Waka Kotahi's 'envelope approach' means it is not possible to determine if the Project meets these requirements. Because the final alignment is unknown it is not possible to determine whether the Project does, in fact, avoid adverse effects to the extent practicable, or to determine whether proposed mitigation, offset, and compensation actions will be sufficient to adequately address effects.[70]

6.14 It is clear from the RDL report that the minimisation/remediation measures and offsets proposed cover only a portion of the Project's adverse effects, and the offsets that are proposed are inadequate to actually achieve overall maintenance of indigenous biodiversity.[71] These physical effects are all sitting on top of the loss of taonga species protected by the NPSIB also constituting a breach of the principle of active protection, which the panel must take into account.

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[65] RDL report, at [271]-[272].
[66] NPSIB, cl 2.1(b)(ii) and cl 2.2 policy 1 and policy 2 and cl 3.5(1)(c).
[67] NPSIB, cl 2.2 policy 7 and cl 3.10(2).
[68] NPSIB, cl 3.11 (1)(b) and (c).
[69] NPSIB, cl 3.11(4) and definition effects management hierarchy cl 1.6(1).
[70] Ibid fn 3.
[71] Ibid fn 67.

6.15 The upshot is that in its current form the Project is inconsistent with the NPSIB's decision-making principles, objective, polices, and applicable effects management framework. These inconsistencies constitute adverse impacts for s 85 purposes and collectively represent an adverse impact of significant weight; the NPSIB provides infrastructure proposals like this with a special, more lenient approach and Waka Kotahi has simply not done what is necessary to comply with that approach.

6.16 The conditions proposed by Patuharakeke are intended to remedy these defects and bring the Project into alignment with both the cultural and ecological aspects of the NPSIB (see section 8 below).

National Policy Statement Freshwater Management

6.17 The objective of the NPSFM is to ensure that natural and physical resources are managed in a way that prioritises first, the health and well-being of water bodies and freshwater ecosystems; second, the health needs of people (such as drinking water); third, the ability for people and communities to provide for their social, economic, and cultural well-being now and in the future.[72]

6.18 The Application will result in significant loss of and adverse impacts on the landscapes awa, repo, and inhabitant species. In Patuharakeke's submission the 'envelope approach' means it is not possible to determine if Waka Kotahi is putting the health of Piroa's waterbodies and freshwater ecosystems first because there is no certainty about the final alignment and the functional or operational need of that alignment. The conditions proposed by Patuharakeke are intended to change this putting the health of Piroa's awa and repo first while giving Waka Kotahi the design flexibility it desires.

6.19 The policies for achieving the NPSFM's objective include:[73]

a. adopting an integrated, catchment-scale approach, consistent with Patuharakeke tikanga ki uta ki tai, recognising the interconnectedness of the whole environment.

b. no further loss of extent of natural inland wetlands and the protection of their values.

c. the loss of river extent and values is avoided to the extent practicable.

d. habitats of indigenous freshwater species are protected.

e. communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with the NPSFM.

6.20 Like the NPSIB, the NPSFM provides exceptions to the requirements to avoid loss of natural wetlands and rivers for infrastructure proposals that have a functional need to be in the proposed location. Infrastructure projects that demonstrate functional need are required to manage effects in accordance with the effects management hierarchy.[74] The Application fails to demonstrate compliance with both those requirements:

a. The failure to commit to a specific alignment or, in the alternative, to limits on the extent of loss the final alignment can cause, mean it is not possible to demonstrate

[72] NPSFM, cl 2.1.
[73] NPSFM, cl 2.2 policies 3, 6, 7, 9, 15 and cl 3.5.
[74] NPSFM cl 3.22 and cl 3.24.

functional need beyond the general need to traverse the Brynderwins; it is not possible to determine that a particular alignment is required for the road to operate without knowing what that alignment is. This failure is significant because certain alignments will have significantly greater effects on freshwater ecosystems and thus on Patuharakeke than others. For example, according to tikanga realignment of the Waihoihoi, which has been a place of spiritual practice for generations because of its natural values, will unacceptably harm its wairua.[75] Thus, an alignment that realigns Waihoihoi will have significantly greater effects than one that does not. There is no functional or operational impediment Patuharakeke can see preventing bridging of Waihoihoi so in its submission a design and alignment utulising a bridge should be adopted.

b. Rural Design Ltd explains the suite of management and offset measures put forward by Waka Kotahi do not meet the requirements of the effects management hierarchy.[76]

6.21 The Project will also result in significant loss of sensitive indigenous freshwater species habitat, and indigenous freshwater species themselves including pepeketua (discussed further below in context of the wildlife approvals sought).

6.22 Loss of waterways and culverting also puts fish passage at risk, and the Application materials are inadequate to confirm that fish passage will be maintained or improved in accordance with cl 3.26 NSPFM.[77]

6.23 All of the abovementioned adverse impacts fail to enable Patuharakeke to provide for its cultural well-being.

6.24 In Patuharakeke's submission these impacts are not a necessary evil of allowing a new Brynderwyn's connection. Conditions can be put in place that will enable the road while simultaneously enabling Patuharakeke to provide for its cultural well-being and managing effects on the environment in a way that is consistent with the tikanga of ki uta ki tai and as expected by the NPSFM. Its proposed amendments to the conditions are intended to achieve this outcome. Absent those changes, the Project is plainly inconsistent with the NPSFM objective, polices, and applicable effects management framework.

National Policy Statement Infrastructure

6.25 Waka Kotahi has relied heavily on the NPS Infrastructure for its proposed approach, with a particular emphasis on Policies 4 and 9(1) which state that "Decision-makers must enable new infrastructure or major upgrades of existing infrastructure activities in all environments."[78]

6.26 In Patuharakeke's submission the panel must interpret and apply that policy direction within the wider context of the NPS Infrastructure and the wider context still of other applicable national instruments. Indeed, doing otherwise, and placing primacy on that

[75] CIA, pg 82.
[76] RDL Report, [272].
[77] RDL Report, [55], [144], [150-[153d].
[78] Waka Kotahi opening submissions, [53].

singular directive in a vacuum, would be contrary to the Supreme Court's findings in *East West Link* and unlawful.

6.27 As set out above, the wider national policy context includes equally directive provisions relating to protection of specific environments, to recognising and providing for kaitiakitanga, and to providing for cultural well-being, as set out above. Those provisions give specificity to matters of national importance in ss 6(a), (c) and (e) RMA which require protection of areas of significant indigenous vegetation and habitat like Piroa, preserving natural character of waterways like the network spanning Piroa, and recognising and providing for Patuharakeke's relationship with its cultural lands, waters, and taonga.

6.28 The wider national policy context also includes highly specific frameworks for managing the effects of infrastructure where it is to be enabled in environments where these values are at play which again, as set out above, the Project does not comply with.

6.29 In circumstances like this where these s 6 RMA values are at play, the NPS Infrastructure expressly states (also in Policy 9) that:

> (2) Where infrastructure activities are proposed to locate in or are likely to have adverse effects on environments and values provided for in section 6 of the Act, the provisions of this policy must be read alongside other relevant national direction, regional policy statements and regional and district plans.

6.30 Read correctly in that context, the "enable" directive in Policy 9(1) is clearly not a direction to decision-makers that they must grant applications for approvals for infrastructure no matter the circumstances, or where they have significant adverse impacts on s 6 RMA values. Rather, Policy 9(1) means infrastructure is given the *opportunity* to be located in (enabled) all environments – which here it has been - and allowed if it meets the policy expectations of all applicable provisions when read together, according to their terms – which here, in its current form, Patuharakeke says it does not.

Project is contrary to Part 2 RMA

6.31 The Part 2 RMA provisions relevant under the FTAA are ss 5, 6, 7. Section 5(1) states the RMA's purpose "is to provide the sustainable management of natural and physical resources".

6.32 Sustainable Management is then defined as:

> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6.33 The term "environment is broadly defined and includes not only "natural and physical resources"[79] but also "ecosystems and their constituent parts, including people and communities", "amenity values" [80] which include "cultural attributes", and "the social, economic, aesthetic, and cultural conditions which affect" the those matters or which are affected by them.[81]

6.34 Sustainable management is therefore about much more than protecting the natural world - its ecosystems, flora, and fauna – although that is of course a critical component. It is also protecting cultural well-being, people and their culture, and cultural values and attributes, both now and also for future generations.

6.35 Section 5 "states a guiding principle which is intended to be applied by those performing functions under the RMA". The word "avoid" in (c) has its ordinary meaning of "not allowing" or "preventing the occurrence of". The word "while" means the definition should be read as an integrated whole: sub-paras (a), (b) and (c) must be observed in the course of the management referred to in the opening part of the definition (so "while" means "at the same time as"). The use of the words "protection" and "avoiding" contemplate that particular environments (places) may need to be protected from adverse effects to implement the policy of sustainable management. Sustainable management involves protection of the environment as well as its use and development.[82]

6.36 As the CIA explains the well-being of Patuharakeke is intrinsically intertwined with the well-being of Piroa through whakapapa. The clear, considered, and consistent view of all affected hapū is that the Proposal will result in significant, irreversible harm to Piroa and its taonga. Harm to the mauri and wairua of Piroa and its taonga also harms Patuharakeke. That harm is intensified because it reflects a breach of their kaitiaki obligation to protect Piroa, its sites of cultural significance, its ngahere and awa, and its taonga tuku iho, both now and for the foreseeable future, and also represents an erosion of tino rangatiratanga. These outcomes constitute significant adverse impacts on the cultural well-being of Patuharakeke. These adverse effects cannot be reversed or completely addressed. They can, however, be ameliorated through changes to the conditions. Without those changes in place Patuharakeke says the Proposal is inconsistent with sustainable management.

6.37 Section 5 is elaborated on by ss 6 and 7 RMA.[83] Section 6 requires decision-makers to recognise and provide for identified matters of national importance. Where s 6 refers to protection from inappropriate development, "inappropriateness" is assessed by reference to what it is that is sought to be protected.[84] Of particular relevance in this case:

a. *Section 6(c): the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*

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[79] Defined in RMA, s 2 as "includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".
[80] Defined in RMA, s 2 as "means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".
[81] RMA, s 2.
[82] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [158].
[83] *King Salmon* at [25].
[84] *King Salmon* at [101].

As both the CIA and the RDL report explain, and indeed Waka Kotahi's Application recognises, Piroa is an area of significant indigenous vegetation, covered in ngahere comprising kauri, and other ecologically and culturally important species. It also provides significant habitat for numerous culturally important and ecologically threatened taonga tuku iho. The information before the panel demonstrates that the Proposal will not keep those habitats safe from harm, injury, or damage.[85] Rather they will be subject to immense physical impact, which Waka Kotahi's proposed management and offset measures go only a fraction of the way to ameliorating.

b. *Section 6(e): the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga*

Only tangata whenua can identify and explain the nature of their relationship with their ancestral lands and waters.[86] Patuharakeke's CIA has outlined their relationship in detail; it is based on whakapapa and consists of intertwined rights and obligations of tino rangatiratanga and kaitiakitanga. The value they place on Piroa for cultural uses and practices and as home to numerous taonga has been long established and continues to this day. Patuharakeke's view (which aligns with other hapū) is that the Proposal would significant adversely impact on those rights, obligations, uses, and values, and that those impacts can only be adequately addressed through adopting the amendments to Waka Kotahi's proposed conditions set out in Karaitiana Attachment B.

6.38 Section 7 identifies matters that the panel must have particular regard to. Relevantly:

a. *Section 7(a): kaitiakitanga*

Patuharakeke's CIA shows that they have, and continue to, undertake extensive activities to fulfil their kaitiaki obligations, and that the Application would severely undermine their ability to do so on the future.

b. *Section 7(d): intrinsic values of ecosystems*

Intrinsic values, in relation to ecosystem, means:[87]

> those aspects of ecosystems and their constituent parts which have value in their own right, including—
> (a) their biological and genetic diversity; and
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience

An ecosystem is generally understood to be an inter-related group of living things in an area. The ecosystem within Piroa comprises numerous fauna and flora species, many of which are taonga. Some of those species appear to rely particularly on the Piroa ecosystem. For example, pepeketua are reliant on highly specific ecosystem conditions, and are present in areas across Piroa in some of the highest ever recorded numbers.[88] For Patuharakeke, all of the plants and creatures residing

[85] Being the meaning of protect as set out in *Royal Forest and Bird Protection Soc of NZ Inc v New Plymouth DC* [2015] NZEnvC 219.
[86] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.
[87] RMA, s 2.
[88] RDL Report, sections 3.2, 10, 11, 12.

across Piroa's landscape have intrinsic value, and a right to being able to continue to thrive. It is this view that underpins kaitiakitanga.

c. *Section 7(f): the maintenance and enhancement of amenity values*

Amenity values include the cultural attributes of an area.[89] The evidence from Patuharakeke demonstrates that cultural attributes of Piroa will not be maintained if the Application is granted in its current form; they will be degraded or lost.

d. *Section 7(g): any finite characteristics of natural and physical resources*

Piroa's landscape is an entirely unique combination of cultural and natural environmental features, with intertwined values. The Proposal would result in loss or degradation to many of these features, with a corresponding loss of the overall significance of the landscape. The evidence demonstrates that many of these features cannot be replaced, or confidently replaced, and the approach adopted by Patuharakeke in its proposed amendments to the conditions reflects the importance of protection and clearly delimiting the extent of loss when faced with those circumstances.

Wildlife Act purpose

6.39 As set out in section 4 above, in this context the purpose of the Wildlife Act is the absolute protection of the wildlife that is likely to be disturbed and incidentally killed because of the Project. That purpose must be interpreted and applied by the panel in a way that gives effect to the principles of Te Tiriti o Waitangi.

6.40 The scheme of the Wildlife Act does not envisage that absolute protection means no risk of disturbance or incidental death. But the directive nature of the Act's purpose, its role as the primary statutory tool for protecting Aotearoa's unique wildlife, and influence of Te Tiriti, place a very high bar for how potential disturbance and killing is minimised and managed.

6.41 For the reasons set out in the CIA and by Rural Design Ltd, and already covered in this submission, the measures proposed by Waka Kotahi are insufficient to meet the requirements of the Act. In summary, baseline surveys are so undercooked that they provide no certainty regarding the extent of wildlife potentially impacted and indeed have resulted in a failure to apply for permits in respect of some species. Habitat strongholds have not been identified and set aside as 'no go' zones. Proposed minimisation and management areas are not realistic and provide no certainty that species at risk of disturbance and death will be found, moved, and protected.[90]

6.42 Waka Kotahi's approach to pepeketua provides a particularly egregious example. Rural Design Ltd's assessment is that there will be "approximately 21,900 frogs affected" which "represents an unprecedented scale of impact for this species, let alone the Northland population."[91] In response the Application puts forward management methods that are less than what was proposed in relation to the Dome Valley landfill in relation impacts on approximately 2000 frogs, and relies almost entirely on salvage and relocation without first demonstrating that effects have been avoided and minimised as far as practicable, and with

[89] RMA, s 2.
[90] See generally RDL Report.
[91] RDL Report, [10].

no offsetting or compensation proposed despite significant residual effects that even the Waka Kotahi's assessment characterises as High.[92] That is an entirely inadequate approach to managing potential killing and disturbance of a species classified as At Risk-declining and which are taonga.[93]

6.43 Further underscoring the inadequacy of Waka Kotahi's approach is that all species subjected to harm, and in respect of which Waka Kotahi requires a wildlife permit, are taonga species that are part of an interconnected ecosystem in a landscape of immense cultural significance. This unique circumstance means the wildlife potentially harmed by the Project are subject not only to a statutory goal of absolute protection, but also to a commitment of active protection in accordance with Treaty obligations. Those obligations are not met by the Project in its current form and constitute significant adverse impacts.

Summary

6.44 Without the changes to the conditions proposed by Patuharakeke, the Application is contrary to ss 5, 6, and 7 RMA, applicable national planning instruments, and to the purpose of the Wildlife Act, and fails to give effect to the principles of Te Tiriti of Waitangi. The approvals sought would inevitably be declined if sought under the standard RMA and Wildlife Act processes. These adverse impacts must be weighed heavily in the panel's proportionality assessment.

7. SECTION 85 ASSESSMENT AND WHY THE APPLICATION MUST BE DECLINED IN ITS CURRENT FORM

7.1 As explained in section 3 above the panel may decline an approval if 1 or more adverse impacts are sufficiently significant to be out of proportion to a project's regional or national benefits.

7.2 Patuharakeke's proportionality assessment of the Project's benefits and adverse impacts, based on the information provided to the panel, is set out below.

Benefits	
Economic benefit (from providing new, improved road connection between Te Tai Tokerau and Tamaki Makaurau),	Significant
Natural hazard (from improving resilience to road disruptions from natural hazards)	Very significant
Adverse impacts	
Te Tiriti	Very significant
Rangatiratanga and kaitiakitanga	Very significant
Cultural sites of significance	Very significant
Cultural associations, values, and practices	Very significant
Ngahere and flora	Very significant
Awa	Very significant
Repo	Very significant
Pepeketua	Very significant

[92] RDL Report, at [80].
[93] RDL Report, [114]-[117].

Mokomoko	Very significant
Snail	Very significant
Manu	Very significant
Pekapeka	Very significant
Inconsistency with directive RMA policy	Very significant
Inconsistency with Part 2 RMA including recognising and providing for matters of national importance under s 6 and promoting sustainable management under s 5	Very significant
Inconsistency with purpose of absolute protection	Very significant

7.3 Based on this assessment, Patuharakeke agrees with Waka Kotahi that the balancing exercise in this case is straight forward, but not that the outcome of that exercise is to grant the Application.[94] Rather, it says that the only and obvious conclusion to be drawn from the balancing exercise is that without significant amendments to the proposed conditions the adverse impacts of the Project are sufficiently significant to be out of proportion to its benefits and require a decision by the panel to decline the application.

8. PATUHARAKEKE'S AMENDED CONDITIONS

8.1 Patuharakeke has prepared a set of amended conditions it considers are needed to tip the s 85 FTAA balancing exercise to tip in favour of granting the Application. These are included in Karaitiana Attachment B to this submission. Patuharakeke has prepared its proposed conditions as track changes to Waka Kotahi's conditions and provided pdf and word versions to enable the panel to easily use them as a base document.

8.2 There are several overarching points to note in respect of Patuharakeke's proposed conditions.

8.3 First, they have been prepared by Patuharakeke with an eye to the statutory direction in s 83 FTAA that the panel "…must not set a condition that is more onerous than necessary to address the reason for which it is set…". In Patuharaeke's submission its proposed conditions are not more onerous than necessary, they are precisely what is necessary to address significant adverse cultural and ecological impacts in a way that enables a decision to grant the Application. They achieve this by:

a. setting clear limits that the final alignment needs to meet, with Waka Kotahi then free to pursue the alignment it wants within those limits.

b. setting clear expectations regarding how residual adverse ecological impacts are to be offset but enabling the detail of these to be determined by Waka Kotahi later.

c. setting clear requirements regarding hapū on-going involvement with the Project but then providing Waka Kotahi with time and flexibility to work through and confirm the detail of those arrangements with hapū (not for hapū) after grant of consent. As set

[94] Waka Kotahi opening submissions, [44].

out at paragraph 1.4f above, with regard to Waka Kotahi's proposed designation conditions DX-DX Cultural Values Management Plan, ngā hapū agree they should draft the CVMP for Waka Kotahi's input not the other way around. Ngā hapū are committed to drafting such a plan and intended to have a draft prepared by 10 November 2026 '(being the date planned for a collective hui with Waka Kotahi). Outcomes will be shared with the panel.

8.4 In short, Patuharakeke's proposed conditions provide hapū, te taiao, and the panel with certainty about the extent and nature of the Project's adverse impacts and that they will be appropriately addressed, while giving Waka Kotahi flexibility to confirm its final alignment later.

8.5 Second, Patuharakeke's proposed conditions have also been prepared with an eye to other fast-track decisions on Waka Kotahi projects and to the Ōtaki to Levin Link decision. Like the panels that approved the North West Rapid Transit application and Takitimu North Link – Stage 2, Patuharakeke consider that a suite of conditions can be crafted such that a "general accordance" condition is not required. Patuharakeke's proposed conditions reflect this by providing certainty regarding extent and nature of effects through limits-based conditions instead.

8.6 Third, the updated conditions provided by Waka Kotahi on 13 July 2026 marked the cultural conditions as *Augier* conditions with no explanation. Patuharakeke takes no issue with the notation to the extent it is intended to indicate a formal undertaking by Waka Kotahi given in the course of proceedings, and their understanding is that this is the case. However, for completeness, if the *Augier* notation were intended to indicate that but for Waka Kotahi's offering those conditions, they could not be lawfully imposed by the panel,[95] the notation, and that suggestion, are opposed. The cultural conditions are directly connected to the Proposal's adverse cultural effects which are multi-faceted and range from impacts on taonga species, to impacts on sites of cultural and spiritual significance, to impacts on rangatiratanga and kaitiakitanga.[96] They are reasonable, reflecting what is needed to properly respond to those impacts while providing Waka Kotahi with time and flexibility to confirm the detail with hapū after the Application is granted. Cultural conditions could, and Patuharakeke submits, should, be lawfully imposed by the panel.

9. CONCLUSION AND PROCESS

9.1 In Patuharakeke's submission, without significant amendments to the proposed conditions, analogous to those Patuharakeke has proposed, the adverse impacts of the Project are sufficiently significant to be out of proportion to its benefits and require a decision by the panel to decline the Application.

[95] A use of *Augier* conditions discussed by the High Court in *Frasers Papamoa Ltd v Tauranga City Council* HC Tauranga CIV-2008-470-465, 30 September 2009
[96] RMA, s 108AA.

9.2 Patuharakeke thanks the panel for its commitment to hui.



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For Patuharakeke Te Iwi Trust Board