

**BEFORE AN EXPERT CONSENTING PANEL UNDER THE COVID-19
RECOVERY (FAST-TRACK CONSENTING) ACT 2020**

IN THE MATTER OF an AEE for resource consents by Kāinga Ora for activities
associated with Bothamley Park Stage 1 Sewer Upgrade

**LEGAL CONSIDERATIONS ON BEHALF OF KĀINGA ORA FOR THE
BOTHAMLEY PARK STAGE 1 SEWER UPGRADE**

28 April 2022

BUDDLE FINDLAY

Barristers and Solicitors
Auckland

Solicitor Acting: Jennifer Caldwell / Mathew Gribben
Email: Jennifer.caldwell@buddlefindlay.com / mathew.gribben@buddlefindlay.com
Tel 64 9 358 2555 Fa2555 Fax3 2055 PO Box 1433 DX CP24024 Auckland 1010

CONTENTS

1. INTRODUCTION	1
2. THE APPLICANT AND PROJECT PARTNERS.....	3
3. THE PROJECT	5
4. LEGAL FRAMEWORK UNDER THE CRA.....	10
5. APPLICATION OF THESE CONSIDERATIONS TO THE PROJECT	17
6. POTENTIAL EFFECTS OF THE PROJECT	17
7. RELEVANT PLAN AND POLICY STATEMENT PROVISIONS.....	24
8. CONDITIONS	34
9. CONCLUSIONS	36

BUDDLE FINDLAY

Barristers and Solicitors
Auckland

Solicitor Acting: Jennifer Caldwell / Mathew Gribben
Email: Jennifer.caldwell@buddlefindlay.com / mathew.gribben@buddlefindlay.com
Tel 64 9 358 2555 Fa2555 Fax3 2055 PO Box 1433 DX CP24024 Auckland 1010

1. INTRODUCTION

- 1.1 This AEE has been lodged on behalf of Kāinga Ora – Homes and Communities (**Kāinga Ora** or **the Applicant**) under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**CRA**) and seeks resource consents for Stage 1 of the Bothamley Park trunk sewer main pipeline replacement works (the **Project**).
- 1.2 The existing sewer traverses Bothamley Park in Eastern Porirua and is located adjacent to the Kenepuru Stream.¹ Bothamley Park is the city's second largest reserve and is regarded as the 'green heart' of Porirua², with some high ecological and natural character values and well used walkways. The Kenepuru Stream is an integral feature of the Park and of significance for mana whenua Ngāti Toa Rangatira.
- 1.3 The key features of the Project are:
- (a) The upgrade of the sewer is the first of a series of bulk infrastructure upgrades associated with the Kāinga Ora Eastern Porirua Regeneration Project (**EPRP**) to service the eastern Porirua community.
 - (b) The Regeneration Programme will see the replacement of approximately 2,000 existing state homes with approximately 2,300 new state homes and 1,500 new market/affordable homes over a 20 – 25 year period. The Project enables these housing opportunities and is required before significant development can occur (along with other upgrades). In this way it will contribute to achieving a well-functioning urban environment in Eastern Porirua.
 - (c) The sewer currently experiences regular failures with wastewater discharges to Bothamley Park and Kenepuru Stream. These discharges affect water quality, mauri and ecosystem health of the Stream and Te Awarua-o-Porirua Harbour. They reduce the amenity values of Bothamley Park and limit the enjoyment of the Park by its users.

¹ Parts of the sewer traverse over and under the Stream.

² Technical Report 8, Bothamley Park Masterplan and Recreation Assessment, at 1.2.2(a).

- (d) The Project will prevent these regular failures in the future and so improve water quality in the Kenepuru Stream, improve the amenity of the Bothamley Park and enhance the relationship of mana whenua with the Stream and Te Awarua-o-Porirua Harbour;
 - (e) Ngāti Toa is a strategic partner for the Project and has been involved in route selection, design of the proposal and assessment of effects, including preparing a cultural impact assessment;
 - (f) There is strong community support for the Project and in particular for preventing future failures;
 - (g) Given the high ecological values of some parts of the Project area, particular attention has been given to the identification of ecological values, assessment of effects on those values and the steps required to avoid, remedy, mitigate and offset those effects. Overall, the Project will result in a net-benefit for ecological values; and
 - (h) Construction of the Project will result in some temporary effects, which can be fully addressed through construction management and proposed conditions.
- 1.4 A comprehensive assessment of effects on the environment has been prepared in support of the Project including a range of specialist reports (**AEE**). The AEE material satisfies all the relevant requirements under the CRA as outlined below and in sections 15 and 16 of the AEE.
- 1.5 Overall, the Project:
- (a) Will result in a number of direct positive effects, including economic benefits and employment through construction activities and improvements to water quality. The improvements to water quality can only be delivered through this Project as the source of the current wastewater contamination is the aging and undersized infrastructure.
 - (b) Creates the opportunity for additional economic and social benefits through new housing in Eastern Porirua;
 - (c) Can address all adverse construction effects through a combination of standard construction management techniques and bespoke conditions that avoid, remedy, mitigate and offset remaining effects;

- (d) Is consistent with the relevant planning documents, including in relation to water quality and urban development; and
- (e) Is consistent with Part 2 of the Resource Management Act 1991 (**RMA**) and the purpose of CRA.

1.6 These legal considerations address the following matters:

- (a) The applicant and project partners, including the statutory powers of Kāinga Ora;
- (b) Referral Order and project description;
- (c) Legal framework under the CRA;
- (d) Potential effects of the Project;
- (e) Assessment against planning documents; and
- (f) Conclusions.

1.7 The legal considerations complement and are intended to be read alongside the AEE and its supporting materials.

2. THE APPLICANT AND PROJECT PARTNERS

2.1 The applicant for resource consent is Kāinga Ora as it has financial responsibility for the works. As outlined in the AEE, Kāinga Ora intends to transfer the resource consents to Porirua City Council (**PCC**) to operate and maintain the sewer. The timing of the transfer will likely coincide with the completion of construction and will be undertaken in accordance with the relevant requirements of the RMA and planning documents.

Statutory powers of Kāinga Ora

2.2 Kāinga Ora was established by the Kāinga Ora-Homes and Communities Act 2019, which sets out the general purposes and powers of Kāinga Ora.

2.3 The statutory objective of Kāinga Ora is to contribute to sustainable, inclusive, and thriving communities that:³

- (a) Provide people with good quality, affordable housing choices;

³ Kāinga Ora-Homes and Communities Act 2019, s 12(1).

- (b) Support good access to jobs, amenities and services; and
 - (c) Sustain or enhance the economic, social, environmental and cultural well-being of current and future generations.
- 2.4 Kāinga Ora is empowered to undertake any urban development, on its own account or on behalf of others, including:⁴
 - (a) The development of housing;
 - (b) The development and renewal of urban environments; and
 - (c) The development of related amenities and infrastructure.
- 2.5 The Project does not involve the development of housing but it will enable subsequent development of housing by Kāinga Ora and others, and generally contribute to the renewal of the urban environment of Eastern Porirua. The Project involves the development of amenities (Bothamley Park) and infrastructure (wastewater network in Eastern Porirua) that are related to housing development and urban renewal.
- 2.6 Kāinga Ora must understand, support and enable the aspirations of communities and Māori in relation to urban development.⁵ The AEE, and in particular the Consultation Report, outlines the extensive consultation that Kāinga Ora and its project partners (PCC and Ngāti Toa) have undertaken in order to understand the aspirations of the community.
- 2.7 Kāinga Ora must act consistently with its objectives⁶ and follow a series of statutory operating principles.⁷ Relevant principles include:
 - (a) Ensuring urban development has infrastructure and amenities that support community needs;⁸
 - (b) Partnering with Māori for meaningful engagement and providing them with participation opportunities throughout the process;⁹ and

⁴ Section 13(1)(f).

⁵ Section 13(1)(h)-(i).

⁶ Crown Entities Act 2004, s 49.

⁷ Kāinga Ora-Home and Communities Act, s 11(1)(a).

⁸ Section 14(1)(g).

⁹ Section 14(1)(k).

- (c) Partnering with other people and organisations including having early and meaningful engagement with communities affected by urban development.¹⁰
- 2.8 Consenting and development of the Project is therefore clearly within the statutory powers of Kāinga Ora and consistent with its statutory operating principles.
- 2.9 Porirua City Council (**PCC**) is a partner with Kāinga Ora in the Eastern Porirua Regeneration Project and has jointly developed and prepared the application with Kāinga Ora. It has statutory responsibility for planning, consenting and operation of infrastructure in the project area and is the landowner of Bothamley Park.
- 2.10 Ngāti Toa is also part of the Regeneration Project and is a strategic partner in the development of the Project, and, if consent is granted, in the construction of the Project. A number of Ngāti Toa representatives have been embedded in the project team and within the project management.
- 2.11 The Project is being consented and delivered through the Te Aranga Alliance which comprises Kāinga Ora, PCC and technical representatives from Goodmans, Beca, Higgins, Harrison Grierson and Orogen referred to in parts of the AEE and in some supporting technical reports. Te Aranga is the agent for the proposal and acts as the project team preparing the design, applying for consent and then constructing the project. The legal entity applying for consent is Kāinga Ora, who will hold the consent (until transferred) and be responsible for ensuring compliance with the resource consent conditions.

3. THE PROJECT

Referral Order

- 3.1 Under Part 2 and Schedule 3 of the CRA the Project is a "referred project". A referral application under section 20 of the CRA was lodged with the Ministry for the Environment on 18 September 2020 and an Order in Council giving effect to the Minister's decision was Gazetted on 10 December 2020.

¹⁰ Section 14(1)(l).

- 3.2 As a result, the "Eastern Porirua Regeneration Project – Infrastructure Works" is described in Schedule 9 of the Covid-19 Recovery (Fast-track Consenting) Referred Projects Order 2020 lists as a referred project (**Referral Order**).
- 3.3 The scope of the regeneration project involves three infrastructure works projects being:¹¹
- (a) Bothamley Park Wastewater Main Replacement;
 - (b) A new water reservoir; and
 - (c) Cannons Creek Park wetland.
- 3.4 The Referral Order lists the activities involved in the regeneration project as follows:¹²

4 Description of activities involved in project:

- (1) The project involves the following:
- (a) earthworks (including bulk earthworks):
 - (b) discharges associated with earthworks:
 - (c) works to trim or remove vegetation:
 - (d) landscaping, including planting:
 - (e) dewatering and discharge of the water onto land or into freshwater
 - (f) works to construct stormwater infrastructure:
 - (g) works to discharge stormwater and wastewater onto land or into freshwater:
 - (h) works to construct pipes, culverts, and associated reticulation infrastructure:
 - (i) works to construct or disestablish crossings of the Kenepuru Stream:
 - (j) works to construct a water storage reservoir and associated reticulation infrastructure:
 - (k) any other works that are—
 - (i) associated with the works described in paragraphs (a) to (j); and
 - (ii) within the scope of the project as described in clause 3 of this schedule.

- 3.5 Since the Referral Order was issued the design of the Project has been developed further and the mitigation measures identified. As a result, some additional activities are now part of the Project but not listed in Clause 4 of the Referral Order. This includes the proposed boardwalk within a natural wetland and bank stabilisation works. These activities are within the scope

¹¹ Clause 3

¹² Clause 4.

of the Referral order pursuant to the "catch all" Clause (4)(k) as other works associated with the listed activities.¹³

3.6 The Referral Order states that Kāinga Ora and PCC are the applicants for these projects. There is no provision in the Referral Order or within the CRA requiring both Kāinga Ora and PCC to be joint applicants for resource consents. Instead, the Referral Order empowers either of those persons to be the applicant. As a result, there is no legal impediment to consents being sought by Kāinga Ora .

3.7 The Referral Order requires a number of standard technical reports and assessments to be submitted to the panel with any consent application.¹⁴ An additional and uncommon requirement is for the provision of:

- (l) a master plan of Bothamley Park and Cannons Creek Park, which must—
 - (i) show how the wastewater trunk main upgrade and the proposed wetland integrate with the wider improvements being considered for the parks; and
 - (ii) have regard to cycleways, recreation areas and facilities, crime prevention through environmental design, safety upgrades, and public access.

3.8 Kāinga Ora, PCC and Ngāti Toa are developing this master plan and a copy of the current concept draft is included with the AEE along with an assessment of how the Project integrates with the masterplan. The development of the masterplan is a separate workstream that is occurring in parallel with the Project.

3.9 Technical Report 8 by StudioPacific Architects describes the masterplan as follows:¹⁵

- a. The Parks Landscape Plan sets out a roadmap for the regeneration and enhancement of the reserves, including their recreational opportunities, and with a strong focus on ecology, biodiversity and the restoration of the Kenepuru Stream
- b. The Parks Landscape Plan will identify ways in which we can enhance the accessibility, safety and function of the parks to best meet the needs of the community and te taiao, the environment

¹³ Clause 4(k).

¹⁴ Referral Order, Clause 6.

¹⁵ Technical Report 8 at 2.1.2 Parks Landscape Plan Scope.

c. It's a plan that will define potential future projects for the three parks, from which Kāinga Ora, Ngāti Toa and Porirua City Council will then be able to identify project phasing, funding, governance, delivery, stakeholder and community engagement.

- 3.10 With one exception, identified below, the Project does not seek to authorise the activities related to the masterplan and instead adopts the approach of ensuring that opportunities in the masterplan are not precluded.¹⁶

Project Staging

- 3.11 This application only relates to the Bothamley Park Wastewater Main Replacement provided for in the Referral Order.¹⁷ For ease it is referred to as the Bothamley Park Sewer in the AEE, the technical reports and these legal considerations. The replacement works have been split into stages with this application encompassing Stage 1. The remaining stages (2 and 3) will be sought as part of separate applications.
- 3.12 For the purposes of assessment and construction, Stage 1 has been further divided into "sub-stages" of Stages 1A to 1H. Some of those sub-stages (Stage 1A and Stage 1C) are outside the boundaries of the Referral Order and are subject to separate processes. Stage 1A is being authorised through a separate resource consent application and certificates of compliance have been obtained for Stage 1C for works within the Champion Street Road Reserve.
- 3.13 In addition to works related to construction of the sewer, this application also seeks approval for pine removal and enhancement planting identified within the Bothamley Park Landscape Masterplan. Kāinga Ora and PCC have identified an opportunity to efficiently undertake that work at this point in time when there is other disruption and construction occurring within Bothamley Park. The AEE therefore assesses the potential effects of this activity and incorporates it into the relevant management plans and conditions.

Project background

- 3.14 As summarised earlier, the infrastructure works provided for in the Referral Order are part of a wider project, being the Regeneration Programme. The

¹⁶ AEE at 17.1.3.3.

¹⁷ Separate approvals will be sought for the Cannons Creek wetland and the new water reservoir. They are not part of this application.

Regeneration Programme is designed to deliver wellbeing outcomes for the people and places of Eastern Porirua. A key part of the Programme will be infrastructure and housing delivery, it also seeks to achieve improved health, education and employment opportunities as part of broader regeneration objectives.

- 3.15 The Regeneration Programme will see the replacement of approximately 2,000 existing state homes with approximately 2,300 new state homes and 1,500 new market/affordable homes over a 20 – 25 year period. However, to enable these works, infrastructure upgrade works are required. Infrastructure assessments have confirmed significant age and capacity-related issues within the existing infrastructure system in Eastern Porirua that will constrain future development unless upgraded.¹⁸ This includes:
- (a) Frequent wastewater discharges and other contamination to open waterways, causing public health and environmental impacts;
 - (b) Widespread flooding in high intensity rain events including water levels above the inhabited floor levels of some homes; and
 - (c) A large deficit in water reservoir storage.
- 3.16 In order to unlock the development potential of Eastern Porirua and future development upstream, a series of bulk infrastructure upgrades and interventions need to be completed. These infrastructure upgrades have been provided for in the Referral Order. Accelerating the delivery of these key development infrastructure works will enable development of the housing identified in wider Regeneration Programme, resulting in faster delivery of housing and creation of employment opportunities.

Local wastewater network

- 3.17 In the context of the Project specifically, Eastern Porirua's local wastewater network is made up of a number of individual wastewater catchments, that drain via gravity to a trunk network, primarily located within Bothamley Park. The existing network in Eastern Porirua has significant condition and performance issues and does not meet current or future aspirational level of service targets, with high existing inflow and infiltration.¹⁹ Much of the asset is at the end of its life, and the existing trunk main in Bothamley Park has

¹⁸ Referral AEE for Eastern Porirua Regeneration Project—Infrastructure Works, 18 September 2020, Part III Project details.

¹⁹ Ibid.

regular failures with wastewater contamination of Bothamley Park and Kenepuru Stream.

- 3.18 The objective of the works is to increase wastewater capacity and address the adverse effects created by the existing failing trunk sewer which crosses the Kenepuru Stream in 21 locations within the extent of the Stage 1 project area.²⁰ These effects include water quality pollution from raw sewage discharges into the stream, surges of diluted sewage during rainfall, and associated degradation of ecosystem health and mauri of the stream. The existing infrastructure is also causing scour holes and bank and channel erosion, with reactive hard engineering works altering natural hydrogeological processes.²¹ The wastewater trunk main in Bothamley Park therefore requires replacement, and resource consents are required to carry out these works.

4. LEGAL FRAMEWORK UNDER THE CRA

- 4.1 Fast-track consenting is enabled by the CRA. The CRA seeks to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand.²²
- 4.2 Schedule 6 of the CRA provides the specific form, manner and content requirements for consent application, with Clause 9 prescribing the relevant information required.²³ The AEE has been structured to align with the specific provisions of Clause 9. Schedule 9 of the Referral Order also includes specific information requirements which must be submitted with the AEE.²⁴ Section 17 of the AEE confirms that those requirements have been met.
- 4.3 Clause 9(1)(g)(iii) requires an assessment of the proposal against section 19 of the CRA. A referred project is one that is referred to a panel by an Order in Council after scrutiny by the responsible Ministers, considering the criteria and related matters at sections 18 and 19 of the CRA. As the

²⁰ There are 36 existing stream crossing points in total, but only 21 are within the Stage 1 project area.

²¹ Refer to Technical Report 1 Ecological Assessment.

²² COVID-19 Recovery (Fast-Track Consenting) Act 2020, s4.

²³ To avoid repetition, all "clause" references in this document are references to clauses contained in Schedule 6 of the CRA, unless otherwise indicated.

²⁴ Refer to Schedule 9, clause 6 of the COVID-19 Recovery (Fast-track Consenting) Referred Projects Order 2020. Under the COVID-19 Recovery (Fast-Track Consenting) Act 2020, clause 9(6)(c) requires consents AEEs for referred projects to include all the additional information required by the relevant referral order.

Project was referred to the Panel, the Minister was therefore satisfied that it would be consistent with the purpose of the CRA.

- 4.4 Despite that presumption, for completeness and in order to satisfy the requirements of Schedule 6 of the CRA, the AEE provides an analysis of the Project against the various considerations set out in section 19 of the CRA.²⁵ In summary:
- (a) The Project meets the purpose and intent of the CRA by providing infrastructure to promote employment and support New Zealand's recovery from the economic and social impacts of COVID-19, as well as supporting ongoing investment.²⁶ The Project will support 43 full-time equivalent jobs (FTE) across the Wellington Region, including 5 in Porirua. This will provide opportunities for people affected by COVID-19 to re-enter the labour market;²⁷
 - (b) The Project is one of three major infrastructure projects that together will unlock infrastructure constraints for Eastern Porirua, enabling Kāinga Ora to build an additional 1,500 – 2000 new dwellings.²⁸ Construction of these dwellings is expected to support 152 FTE jobs across the Wellington Region, including 26 FTE within Porirua over a 19-year period. The Project will also enable private sector housing development which will support further jobs;²⁹
 - (c) There are positive long-term social impacts from the operation of the sewer and the Project will improve the environmental quality of the Park;
 - (d) The Project will likely progress faster by using the CRA fast-track process given the processing times under that act are generally faster than the standard RMA times; and
 - (e) Overall, there is significant public benefit to the project including through the improvements to the public wastewater system and Bothamley Park.

²⁵ Section 16 of the AEE.

²⁶ COVID-19 Recovery (Fast-Track Consenting) Act 2020, s 19(d)(iv).

²⁷ Technical Report 10 - Economics Impact Assessment at 1.3.

²⁸ Technical Report 10 - Economics Impact Assessment at 1.4.

²⁹ Ibid.

Relevant considerations for the resource consents sought

- 4.5 In the case of referred projects, a panel's ability to decline a consent is not limited as it is for listed projects. Rather, the CRA identifies a range of matters which a panel must consider in determining whether to grant or decline a consent AEE.
- 4.6 More specifically, when considering a consent application for a referred project, clauses 31 and 32 of Schedule 6 of the CRA are relevant. Clause 31(1) sets out the matters to which a panel must have regard when considering consent AEEs for referred projects (or any comments received regarding the AEE). A panel must, subject to Part 2 of the RMA and the purpose of the CRA, have regard to:
- (a) Any actual and potential effects on the environment of allowing the activity;
 - (b) Any measure proposed (or agreed to) by the applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity;
 - (c) Any relevant provisions of any of the documents listed in clause 29(2), which include a National Environmental Standard (**NES**), National Policy Statement (**NPS**), New Zealand Coastal Policy Statement (**NZCPS**), regional policy statement (**RPS**) and planning documents (including a planning document recognised by a relevant iwi authority and lodged with a local authority); and
 - (d) Any other matter the panel considers relevant and reasonably necessary to determine the consent application(s).
- 4.7 Clause 31 also requires a panel to apply section 6 of the CRA (Treaty of Waitangi) instead of section 8 of the RMA,³⁰ and the panel must comply with any relevant obligations imposed in Treaty settlements, that apply to local authorities or other decision-makers when determining a consent AEE.³¹
- 4.8 Clause 32 sets out additional RMA matters that are relevant to a panel's consideration of a consent AEE. This includes sections 104A to 104D (matters relevant to determining consent activities), section 105 (matters

³⁰ COVID-19 Recovery (Fast-Track Consenting) Act 2020, sch 6, cl 31(2).

³¹ COVID-19 Recovery (Fast-Track Consenting) Act 2020, sch 6, cl 31(10).

relevant to certain AEEs) and section 107 (restrictions on grant of certain discharge permits).

- 4.9 For this Project, Kāinga Ora seeks resource consents under:³²
- (a) The Greater Wellington Regional Freshwater Plan;
 - (b) The Greater Wellington Regional Soil Plan;
 - (c) The Greater Wellington Regional Council Proposed Natural Resources Plan,
 - (d) The Operative Porirua City District Plan;
 - (e) The Proposed Porirua City District Plan;
 - (f) The NES for Freshwater Regulations 2020 (**NESFW**); and
 - (g) The NES for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011 (**NES Contaminated Soil**).

Activity Status

- 4.10 The activity status of each individual activity is outlined in the AEE. Kāinga Ora has adopted a conservative approach and bundled the application. The most restrictive activity status is non-complying and so overall, resource consent is sought from the Panel for a non-complying activity.
- 4.11 As the AEE records³³, the main works (stream works and upgrading of infrastructure) are discretionary activities and only certain aspects of the Project trigger non-complying activity status. Those are:
- (a) Potential discharge of sediment-laden water into an F1 Scheduled Area under the Proposed Natural Resources Plan; and
 - (b) Activities within a Significant Natural Area (SNA) under Rule ECO-R9 of the Proposed Porirua District Plan, not otherwise listed and not part of upgrade of infrastructure in an SNA. The AEE notes that bridge placement, compound areas and stream bank stabilisation might require resource consent under this rule.

³² As described in Section 5 of the AEE.

³³ AEE at 5.10.1.

- 4.12 In relation to sediment-laden water, while best practice erosion and sediment control methods will be used, the expert assessments cannot confirm that discharges will always be able to meet the relevant standards (e.g. in the event of a significant storm) and so consent has been applied for to cover this potential event.
- 4.13 In relation to those potential non-complying activities within an SNA there is uncertainty about whether the non-complying activity rule should apply for the following reasons:
- (a) The structure of the Proposed Plan means that infrastructure activities are regulated by specific rules in the Infrastructure Chapter. Arguably all activities related to the development of infrastructure are intended to be regulated by that chapter.
 - (b) Bank stabilisation and bridge piers will both be located within the stream bed or stream banks and are therefore activities in the beds of lakes and rivers and so regulated by the regional plan instead of the district plan;
 - (c) The work compound is arguably part of the upgrade of infrastructure, or at least an ancillary activity to the upgrade of infrastructure, and so regulated by the Infrastructure chapter and its rules and not the ECO rules.
 - (d) Rule ECO-R9 is a "catch-all" rule which states that any activity within an SNA not otherwise listed in the chapter is a non-complying activity.
 - (e) However, there are only a very limited number of activities listed in the ECO chapter (e.g. earthworks, removal of vegetation and construction of a residential unit on a vacant lot). A strict interpretation of Rule ECO-R9 would mean that every single other activity in an SNA would be a non-complying activity (unless specifically regulated by another chapter). This would apply to any structure or any land use. Such a rule would have very broad scope and severely restrict development, regardless of the underlying zoning.
 - (f) For Bothamley Park a strict interpretation of Rule ECO-R9 would essentially render the open space zoning nugatory as nearly all

activities would require resource consent as a non-complying activity. Given these disproportionate restrictions we consider that the scope of the rule should be interpreted narrowly and only applied when there are no other realistic alternatives. In our submission there are alternative activity statuses for bridge placement, compound areas and stream bank stabilisation and ECO-R9 does not apply to those activities.

- 4.14 In the event the Panel accept this submission, there will still be a very small component of the Project relating to the potential for discharges that requires a non-complying resource consent. As the application has been bundled it will still have an overall activity status of non-complying. However, the Panel should take into account that it is only a very small aspect of the Project that has that status, and the Project is generally a discretionary or restricted discretionary activity and is generally anticipated as such by the planning documents.
- 4.15 Even if a conservative approach is adopted, the main works for the Project are discretionary activities and are not unanticipated or discouraged as might be the case if the primary activity were identified as a non-complying activity.
- 4.16 Given the non-complying activity status, in accordance with clause 32 of the CRA, section 104D of the RMA applies to the panel's consideration of the Project.
- 4.17 Section 104D(1) of the RMA is often referred to as the "gateway test". A proposal must satisfy one of the two limbs or "gateways" of section 104D(1) before it can be considered under section 104. A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either –
- (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor (***known as the effects limb***); or
 - (b) the AEE is for an activity that will not be contrary to the objectives and policies of—
 - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

- (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity
(known as the policy limb).

- 4.18 In relation to the effects limb, a decision maker must only consider the adverse effects of the proposal and not the positive effects, but can consider any remediation and mitigation of those adverse effects and any proposed conditions of consent.³⁴
- 4.19 In relation to the policy limb:
- (a) In the leading case on the meaning of “contrary” the High Court defined it as “...opposed in nature, different to or opposite... repugnant and antagonistic.”³⁵ It is a finding that goes beyond mere inconsistency with a policy direction.³⁶
- (b) In making that assessment a decision maker must undertake a fair appraisal of the objectives and policies read as a whole.³⁷ This remains the relevant test for non-complying activities and was confirmed by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*.³⁸ Any suggestion that there are now “environmental bottom lines” in relation to resource consent decisions is inaccurate and not supported by the relevant Court of Appeal case authority.

The assessment is limited to operative and proposed regional and district plans. National policy statements and the RPS are irrelevant to an assessment under section 104D.

- (c) The Project engages a range of provisions in operative and proposed plans and the Panel is required to consider all relevant objectives and policies within each document.
- (d) The Panel must be satisfied that the Project is not contrary to the objectives and policies of each separate plan.³⁹ Under section 104D a weighting exercise between different plans is not permitted.

³⁴ *Auckland Regional Council (ARC) v Rodney District Council* [2009] NZRMA 453 particularly at [59]-[60].

³⁵ *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 (HC) at 11.

³⁶ *Lightning Ridge Partnership Limited v Hastings District Council* W041/2007 (EC) at [24]

³⁷ *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

³⁸ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [66] – [73]. As confirmed by the High Court in *Royal Forest and Bird Protection Society v New Zealand Transport Agency* [2018] NZHC 390.

³⁹ *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [82].

4.20 Once the panel is satisfied the proposal passes one of the gateways, under section 104B of the RMA it may grant or refuse the application, and if it grants the application, may impose any conditions under section 108 of the RMA.⁴⁰

5. APPLICATION OF THESE CONSIDERATIONS TO THE PROJECT

5.1 As set out in these legal considerations and in the AEE, and having regard to section 6 of the CRA and Part 2 of the RMA:

- (a) The Project will result in significant positive effects, and any potential adverse effects arising from construction or operation of the Projects can be adequately mitigated, remedied or offset;⁴¹
- (b) The Project is consistent with the relevant national policy statements, the RPS and the operative and proposed regional and district plans; and⁴²
- (c) The Project is consistent with Ngāti Toa Rangatira Claims Settlement Act 2014.⁴³

5.2 These matters are discussed in further detail below. In light of the conclusions reached regarding these matters, the Applicant respectfully requests that the Panel grant the resource consents sought, subject to any reasonable conditions that it finds appropriate.

5.3 The Applicant has developed a proposed set of comprehensive conditions that will appropriately and effectively manage the adverse effects of the Project on the environment. The proposed set of conditions is discussed further in section 8 below.

6. POTENTIAL EFFECTS OF THE PROJECT

6.1 The Project has been assessed by various technical specialists, with their assessments set out in the technical reports submitted as part of the AEE. The findings of these reports are summarised in the AEE, which describes

⁴⁰ Section 108 of the RMA remains relevant to the conditions of consents granted under the CRA, by virtue of clause 35(3) of the CRA which provides that sections 108, 108A to 112 and 220 of the RMA apply to conditions imposed on consents, subject to all necessary modifications.

⁴¹ Section 12 of the AEE which describes the potential effects of the Project.

⁴² Section 14 of the AEE which assesses the AEE against the relevant statutory matters.

⁴³ AEE at 15.4.4.

the actual and potential effects of the construction, operation and maintenance of the Project.⁴⁴

6.2 While this document does not discuss the conclusions reached in relation to all of the topics considered as part of the effects assessment, we set out some of the key findings reached by the experts.

6.3 In designing the Bothamley Park Sewer upgrade, the project team has sought to avoid adverse effects in the first instance. In particular:⁴⁵

- (a) The route for the upgraded sewer is partly located in Champion Street, in order to avoid additional stream crossings and temporary bridges and reduce flood risk; and
- (b) Horizontal Direction Drilling will be used in order to shorten construction lengths and allow the sewer to traverse through rather than around bluffs, which would have involved more excavation adjacent to the watercourse and longer pipes.

6.4 Where avoidance has not been possible, measures to remedy or mitigate adverse effects have been proposed. Two key measures are:

- (a) Minimising the number of stream crossings⁴⁶; and
- (b) Remediation and replanting of some vegetation that needs to be removed for construction of the upgrades to the sewer.

6.5 These measures are detailed within the AEE and reflected in the proposed consent conditions.⁴⁷ By way of summary as to some of the conclusions reached regarding effects, we note the following:

Economic, employment and housing

6.6 As outlined above, the construction of the Project will directly result in 43 FTE jobs for the construction period and economic benefits associated with that employment.

6.7 The Project will help unlock infrastructure constraints for eastern Porirua, enabling Kāinga Ora to build an additional 1,500 to 2,000 new dwellings. Construction of those dwellings will support a further 152 FTE jobs across

⁴⁴ AEE at 12.

⁴⁵ AEE at 9.3.3.

⁴⁶ AEE at 9.4.2.

⁴⁷ AEE at 13.

the Wellington Region, including 26 FTE jobs within Porirua and results in \$518m of construction activity.⁴⁸

- 6.8 The Urban Growth Demand Report prepared by Beca (Technical Report 5) assesses the likely level and timing of urban development and renewal in the catchment of the sewer and confirms that the proposed upgrades provide sufficient capacity to service that likely level of development.⁴⁹

Water quality

- 6.9 Potential effects on water quality by construction activities will be controlled through standard erosion and sedimentation control measures. Overall, the construction phase effects on water quality are considered to be less than minor with proposed mitigation measures.⁵⁰
- 6.10 Once the sewer upgrade is operational, the water quality on the Kenepuru Stream and downstream in the Te Awarua-o-Porirua Harbour will be improved through the prevention of further sewage discharges.⁵¹

Mana Whenua effects

- 6.11 A cultural impact assessment and supporting documents have been prepared by Te Rūnanga o Toa Rangatira, including a Cultural Values Assessment. However, Ngāti Toa's involvement is more extensive than a standard cultural impact assessment. The project was undertaken through a co-design process between Kāinga Ora, PCC and Ngāti Toa. Ngāti Toa representatives were embedded in the Te Aranga Alliance and have been engaged in design meetings.
- 6.12 The design features and management methods proposed, and overall project outcomes are consistent with the relevant cultural values identified in the Cultural Values Assessment.
- 6.13 There is an overall position of support from Te Rūnanga o Toa Rangatira due to the improvements to water quality and the mauri of the water anticipated and the Project has positive cultural effects.⁵²

Landscape, natural character and visual effects

⁴⁸ AEE at 12.2.3.

⁴⁹ Technical Report 5, Executive Summary at paragraph 8.

⁵⁰ AEE at 12.5.2.

⁵¹ AEE at 12.4.2.

⁵² AEE at 12.2.1.1.

- 6.14 The majority of Bothamley Park is identified in the Operative Porirua District Plan as a Landscape Protection Area. The Landscape and Visual Report from Isthmus identifies areas of High-Moderate natural character in parts of the upper reaches of the Kenepuru Stream.
- 6.15 Construction activities will result in short-term adverse effects on natural character due to large-scale pine removal and views of construction activity, but there are long-term positive landscape effects. The proposed sewer pipe alignment minimises new crossings and removes existing highly visible sewer pipe crossings. Although there will be new built structures introduced on some natural streambanks, they will reduce construction impacts to natural character and on-going stream-bank erosion problems.
- 6.16 The removed pine will be replaced with indigenous plants to increase indigenous natural character, and earthworks will be rehabilitated and replanted where possible. There are also associated visual improvements with better views from within Bothamley Park and some adjacent dwellings.⁵³
- 6.17 There are a number of recommendations made in the Landscape and Visual Assessment (**LVA**) technical report to minimise and manage adverse effects. The LVA assumes that these recommendations will be implemented in the detailed design and bases its conclusions about the level of effects on this assumption. The recommendations have largely been incorporated into the Planting Strategy and the recommended consent conditions proposed a process where:
- (a) A suitably qualified landscape and visual expert will be involved in the detailed design; and
 - (b) A report will be prepared and lodged with Council outlining if the recommendations have been included in the detailed design and confirming the level of effects if they are not.
- 6.18 Overall, the Project will have significant positive impact on natural character and visual amenity.⁵⁴

⁵³ AEE at 12.3.1.1-12.3.1.5.

⁵⁴ AEE at 12.3.1.6-12.3.1.9.

Ecological effects

- 6.19 Bothamley Park is identified in the Proposed Porirua District Plan as an SNA with high ecological values. Morphum has prepared a comprehensive Ecological Impact Assessment (EclA) of the Project assessing potential impacts on terrestrial and freshwater ecology.
- 6.20 The Project will result in temporary adverse effects related to the construction such as sedimentation, loss of ecological function and habitat, and habitat disturbance.
- 6.21 There is a potential high magnitude adverse effect on the coastal marine area due to sedimentation and earthworks which could exacerbate habitat degradation. However, the use of best-practice measures will reduce this risk to negligible.
- 6.22 There are no adverse effects associated with the operation of the pipeline.⁵⁵
- 6.23 Vegetation clearance will result in adverse effects and those effects will be significant in areas where rehabilitation and replanting are not possible. Off-setting will be undertaken in order to address those effects and to ensure no-net-loss of habitat. Removal of pine will have short-term adverse effects but long-term benefits for the understory currently suppressed by the pine canopy. All effects are addressed with mitigation and offset measures in the Planting Strategy and the Vegetation Offset Enhancement Plan.⁵⁶
- 6.24 There are potential adverse effects on fauna due to short-term loss of stream habitat and ecological function, but cofferdams will be used to preserve fish passage and the removal of above stream pipe structures further remove existing partial barriers to fish passage. Native fish will be relocated prior to streamworks to avoid adverse effects. Overall, the short-term effects combined with mitigation have been assessed as low to net-positive.
- 6.25 There are potential impacts on birds and lizards which can be addressed through conditions of consent, including working outside of nesting season or undertaking pre-clearance nesting bird surveys, and through

⁵⁵ AEE at 12.4.2.5-12.4.2.7.

⁵⁶ AEE at 12.4.3.

implementation of a standard Lizard Management Plan. Overall effects are assessed as low.⁵⁷

- 6.26 The EclA shows that the Stream Ecological Valuation of the Kenepuru Stream will improve due to improvement in connectivity for species migration, growth of riparian vegetation, maturation of regenerating indigenous forest buffer, and no overall reduction in stream habitat due to offset measures.⁵⁸
- 6.27 Removal of the existing above-stream crossings of the sewer pipeline will have further positive impacts such as restoring the natural channel form, hydraulic regime in the affected reaches, reduced erosion, and reduced wastewater discharges. The risk to the stream-bank will be managed with stream edge protection and bridges for temporary access during construction.⁵⁹
- 6.28 Overall, there will be a net positive impact on ecological values from the Project.

Social impact

- 6.29 There will be short term adverse effects during construction due to loss of access to parts of the recreational space and proximity to construction activities and associated noise, with some potential impact on safety from construction traffic. Some of this is mitigated through a staged construction process to maintain some park access throughout the project construction phase.
- 6.30 Once completed the long-term effects of the Project will be an improvement in amenity and enjoyment of the area from a significant reduction in overflow of wastewater into Bothamley Park and Kenepuru Stream.⁶⁰ There are also associated recreational improvements (path widening, new

⁵⁷ AEE at 12.4.4.1-12.4.4.4.

⁵⁸ AEE at 12.4.4.5-12.4.4.7.

⁵⁹ AEE at 12.4.2.1-12.4.2.4.

⁶⁰ AEE at 12.2.2.

pathway connections, improved access) which will further increase visitor enjoyment of the park.⁶¹

Construction traffic

- 6.31 The Project will result in construction traffic which has the potential to cause adverse effects in the local network but will not impact the wider transport network.
- 6.32 There will be some access disruption resulting from temporary traffic management, but residential access to adjacent properties will be maintained with most of the construction work being done within the Park itself. To mitigate potential safety issues arising, a number of measures will be put in place including:
- (a) Restriction of pedestrian access with physical barriers;
 - (b) Traffic Management Plans (TMPs) with defined construction vehicle routes;
 - (c) Construction vehicle drivers will be briefed on high-risk areas, and
 - (d) Movement during peak traffic hours (i.e., school and rush hour) will be avoided where possible.
- 6.33 Overall, the adverse effects of construction traffic can be suitably addressed through a range of mitigation measures described and implemented via TMPs that will be developed prior to the relevant construction stage.⁶²

Construction noise

- 6.34 Noise from construction activities is predicted to exceed prescribed limits and likely to be distinguishable from ambient noise in a limited number of adjacent dwellings.
- 6.35 Potential adverse effects can be managed through a range of standard construction techniques such as limitations on construction hours, adoption of best practicable options, the use of temporary noise barriers, and communication with affected landowners. With these measures the

⁶¹ Ibid.

⁶² AEE at 12.2.6.

construction noise effects can be managed to be less than minor and overall are reasonable.⁶³

Effects on natural wetland

- 6.36 The Project involves minor earthworks works within a natural wetland. The works are the installation of a boardwalk across the wetland to replace the existing unformed track that runs through the wetland. The boardwalk is part of the alternative pedestrian access through Bothamley Park which will be provided during the construction phase. There is no drainage or partial drainage of the wetland.
- 6.37 Morphem has concluded that the wetland has moderate value and the proposed works will have a positive effect on the wetland values by reducing future damage caused by an at grade walking path.⁶⁴

Other effects

- 6.38 The AEE contains further detail regarding the actual and potential effects of the Project in terms of archaeology, hydrology, dewatering and contaminated land.

Conclusion

- 6.39 Overall, the AEE concludes that the Project will result in a number of significant positive effects, and while some potential adverse effects have been identified as a result of the construction or operation of the Project, these will be adequately remedied, mitigated and offset through the measures that have been proposed and reflected in the conditions sought.

7. RELEVANT PLAN AND POLICY STATEMENT PROVISIONS

- 7.1 Clause 29(2) of the CRA lists a wide range of plan and policy statements that compromise the planning framework.
- 7.2 Section 14 of the AEE assesses the Project against each relevant document and identifies common themes within each document. Similar themes arise across many of the documents and so the assessment of the Project against one planning document (such as a national policy document) is likely to be relevant to another document (such as the regional

⁶³ AEE at 12.7.2.

⁶⁴ AEE at 12.5.3.

policy statement or regional plan), subject to any specific wording in each topic.

Weighting of plans

- 7.3 Neither the regional or district plans applicable to the Project are settled at the moment as there are both operative and proposed regional and district plans. The Panel will need to consider the provisions of all operative and proposed plans until such time as the proposed plans are operative or can be treated as operative. The AEE therefore assesses the Project against both operative and proposed plans.
- 7.4 Counsel understands that appeals on the Proposed Greater Wellington Natural Resources Plan have been the subject of mediation and negotiation and that some appeals are being resolved by consent. As a result, some provisions of the Proposed Plan may be amended and become operative during the period in which the Panel is considering the application. Updated assessments against those amended provisions can be provided if necessary.
- 7.5 The legal principles relating to the weighting of different plans are outlined in the decision of *Keystone Watch Group v Auckland City Council* where the Court consolidates multiple principles into a list of relevant factors:⁶⁵
- (a) The importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.
 - (b) The extent to which the provisions of a proposed plan are relevant will be a fact-specific exercise influenced by:
 - (i) The extent to which the proposed measure has been exposed to testing and independent decision-making;
 - (ii) Circumstances of injustice; and
 - (iii) The extent to which a new measure, or the absence of one might implement a coherent pattern of objectives and policies in a plan.

⁶⁵ *Keystone Watch Group v Auckland City Council* A007/01 at [45].

- (c) Where there is a significant shift in Council policy and the new provisions are in accord with Part 2 of the RMA, the Court may give more weight to the proposed plan.

7.6 Those principles were recently endorsed by the High Court in the *Knowles v Queenstown Lakes District Council*.⁶⁶

7.7 The AEE shows that the Project is consistent with (and not contrary to) all the relevant planning documents and so no weighting exercise is required if the Panel reaches the same conclusion. But in the event that the Panel concludes otherwise in relation to one (or several) as planning document(s) then it will need to undertake a weighting exercise between the different plans as part of its substantive consideration of the Project under section 104.

Regional and District Plans

7.8 The AEE assesses the Project against the following plans:⁶⁷

- (a) The Operative Regional Freshwater Plan;
- (b) The Operative Regional Soil Plan;
- (c) The Regional Plan for Discharges to Land;
- (d) The Greater Wellington Regional Council Proposed Natural Resource Plan (Appeals Version);
- (e) The Operative Porirua District Plan; and
- (f) The Proposed Porirua District Plan.

7.9 In general, the assessment is that the Project is consistent with these documents, given that the Project:

- (a) Is a key piece of infrastructure to support the Eastern Porirua Regeneration Project and will result in significant economic and social benefits;
- (b) Improves freshwater and coastal water quality, and temporary effects on water quality from construction can be managed;

⁶⁶ *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227 at [24].

⁶⁷ AEE at 14.3 and 14.4.

- (c) Improves the mauri of the Kenepuru Stream and, in a small way, the Te Awarua-o-Porirua Harbour while enhancing the relationship between mana whenua and natural resources;
- (d) Improves natural character and landscape values;
- (e) Once all mitigation and offset measures are implemented, improves biodiversity and ecological values;
- (f) In the long term, improves the use of public open spaces in Bothamley Park; and
- (g) Avoids, remedies, mitigates and offsets the temporary adverse effects related to construction.

7.10 Although it is still at an early stage of development and not subject to a council decision the Proposed Porirua District Plan has a number of provisions that directly relate to one of the primary activities of Project which is the upgrade of existing infrastructure in an SNA. These provisions relate to rules that have immediate legal effect.

7.11 The relevant provisions are outlined in the AEE⁶⁸ and include:

- (a) INF03, INF05 and INFP3 which recognise the benefits of infrastructure and enable infrastructure to provide sufficient capacity;
- (b) INFP20, which allows for the upgrade of existing infrastructure and new infrastructure in SNA that can demonstrate that:
 - (i) There is an operational or functional need such that the infrastructure's location cannot be avoided; and
 - (ii) Any adverse effects on indigenous biodiversity values are addressed in accordance with ECO-P2 and the matters in ECO-P4, ECO-P11 and ECO-P12;
- (c) ECO-P2, which directs that biodiversity values are protected by requiring development to adhere to the effects management hierarchy;
- (d) ECO-P4 and P11 that require, amongst other matters, that an assessment of potential effects be undertaken by a suitably qualified

⁶⁸ AEE at 14.4.2.6 – 14.4.2.8 and 14.4.2.10-15.

expert and any biodiversity offsetting is in accordance with the relevant guidance.

7.12 The Project meets these provisions as follows:

- (a) It provides capacity to service future development of Eastern Porirua and will deliver significant benefits;
- (b) There is a functional need for the Project to locate generally within Bothamley Park due to the need to replace the existing sewer and to connect to other existing trunk and branch sewer lines;
- (c) Upgrade of the existing sewer in its current location will likely have less adverse effects on the SNA than a new route that traverses the SNA;
- (d) The Project has been assessed by Morphem Ecologists, highly experienced ecologists;
- (e) The project design has avoided effects where possible, including through locating part of the route outside the SNA entirely, in Champion Street, and using horizontal directional drilling to reduce the vegetation removal and the number of stream crossings;
- (f) Residual effects are mitigated and remedied, including through the replanting of vegetation in some areas that are cleared for construction;
- (g) Some effects, especially in relation to areas of high value terrestrial vegetation and stream, cannot be adequately mitigated or remedied and so offsets for those effects are required; and
- (h) Vegetation and stream offsets have been prepared by Morphem in accordance with relevant guidelines and included within the draft conditions. The aim of those offsets is to ensure no-net-loss.

National Policy Statements

7.13 The Project has been considered against each of the relevant national policy statements, being:

- (a) The National Policy Statement for Urban Development 2020 (**NPS-UD**);

(b) The National Policy Statement for Freshwater Management 2020 (**NPSFM**); and

(c) The New Zealand Coastal Policy Statement 2010 (**NZCPS**).

7.14 The two remaining national policy statements are not relevant to the Project.⁶⁹

NPS-UD

7.15 The NPS-UD came into effect on 20 August 2020, replacing the National Policy Statement on Urban Development Capacity 2016. The objectives and policies of the NPS-UD aim to ensure that New Zealand's towns and cities are well-functioning urban environments that meet the shifting needs of the wider community. The Project has been considered against the relevant objectives and policies of the NPS-UD.⁷⁰

7.16 As described in the AEE, the Project is consistent with a number of aspects of the NPS-UD:

(a) It provides development infrastructure to service urban development in Eastern Porirua and ensures that urban development is integrated with infrastructure (Objective 6);

(b) Additional urban development in Eastern Porirua will assist PCC to provide sufficient capacity to meet its short, medium and long-term demand (Policy 2);

(c) The improvements to the amenity and recreational use of Bothamley Park will help improve accessibility to open spaces (Policy 1(c)); and

(d) Overall, the Project will contribute to making Eastern Porirua a well-functioning urban environment (Objective 1 and Policy 1).

NPSFM

7.17 The NPSFM came into force on 3 September 2020 and provides local authorities with direction as to how to manage freshwater under the RMA. The following NPSFM policies are relevant to the Project.⁷¹

⁶⁹ National Policy Statement for Renewable Electricity Generation and National Statement on Electricity Transmission.

⁷⁰ AEE at 14.1.1

⁷¹ AEE at 14.1.2.

- (a) Freshwater is managed in a way that gives effect to Te Mana o te Wai;⁷²
- (b) Tangata whenua are actively involved in freshwater management and Māori freshwater values are provided for;⁷³
- (c) Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis;⁷⁴
- (d) There is no further loss of extent of natural inland wetlands, their values are protected and their restoration is promoted;⁷⁵
- (e) The loss of river extent and values is avoided to the extent practicable;⁷⁶ and
- (f) The habitats of indigenous freshwater species are protected.⁷⁷

7.18 The objectives and policies of the NPSFM that are relevant to the Project have been assessed in the AEE, with some of the key findings of that assessment summarised below:

- (a) The project provides a direct, significant and tangible benefit through the development of more resilient wastewater infrastructure. This will improve water quality and assist to restore ecosystem health and the mauri of the Kenepuru Stream (Policy 2 and Policy 9);
- (b) The project will assist to rekindle the relationship of Ngāta Toa with freshwater and coastal waters including through the physical improvements and involvement in project design and implementation (Policy 2);
- (c) Overall, the Project will give effect to Te Mana o te Wai (Policy 1);
- (d) There will be no loss of river extent or values as the Project will mitigate and offset temporary construction effects on stream values and result in a long-term improvement in those values (Policy 7);⁷⁸

⁷² NPSFM, Policy 1.

⁷³ NPSFM, Policy 2.

⁷⁴ NPSFM, Policy 3.

⁷⁵ NPSFM, Policy 6.

⁷⁶ NPSFM, Policy 7.

⁷⁷ NPSFM, Policy 9.

⁷⁸ AEE – Appendix 4 NPSFM Policy 7 Assessment.

- (e) Those temporary effects are also appropriate since there is a functional need for the sewer upgrade to occur adjacent to the stream as that is the current location of the sewer and trunk and branch sewer connections. The Project has applied the effects management hierarchy to the temporary effects (implementation method 3.24);
- (f) A small aspect of the Project involves works within a natural wetland with the installation of a boardwalk to replace the existing unformed path. There will be no loss of extent of the wetland and the boardwalk will have a positive effect on the values of the wetland by removing ongoing disturbance of the wetland resulting from pedestrians and vehicles using the path through it.

NZCPS

- 7.19 The Project is not located within the coastal environment but will improve water quality in the Kenepuru Stream which flows into the Te Awarua-o-Porirua Harbour. This will improve, in a small way, the degraded water quality in the Te Awarua-o-Porirua Harbour and so is consistent with Policy 21 of the NZCPS.

National Environmental Standards

- 7.20 As set out in the AEE, the AEE has been considered against the assessment criteria for each rule triggered under the relevant NES documents, namely the NESFW and NES Contaminated Soil. The seven remaining NES are not considered relevant to this AEE.⁷⁹

NESFW

- 7.21 The NESFW came into force on 3 September 2020 and contains standards to regulate activities that pose risks to the health of freshwater and freshwater ecosystems. Resource consent under the NESFW is required for the Project under Regulation 42 for construction of a wetland utility

⁷⁹ Being the NES for Plantation Forestry 2017, NES for Air Quality 2004, NES for Sources of Drinking Water 2007, NES for Telecommunications Facilities 2016, NES for Electricity Transmission Activities 2009, NES for Marine Aquaculture 2020 and the NES for Storing Tyres Outdoors 2021.

structure being a boardwalk and earthworks within a natural wetland. Consent is sought for a restricted discretionary activity.

- 7.22 As a restricted discretionary consent activity, specific assessment criteria are identified in the NESFW, but as the activity has been bundled and assessed as a non-complying activity no specific assessment against those criteria has been undertaken.

NES Contaminated Soil

- 7.23 The NES Contaminated Soil came into force on 1 January 2012 and contains a nationally consistent set of planning controls and soil contaminant values. For the Project, controlled activity consents are required under Regulation 9(1) of the NES Contaminated Soil in relation to soil disturbance.⁸⁰
- 7.24 The AEE provides a detailed assessment of potential contaminated land effects associated with the construction and operation of the Project. Based on that assessment, any effects related to contaminated land are likely to be minimal and can be appropriately managed via development and implementation of a Contaminated Land Management Plan, proposed as part of the consent conditions.⁸¹

Consideration of Part 2 matters

- 7.25 Clause 31 requires a panel to have regard to various matters (discussed in the preceding sections of this document), "*subject to Part 2 of the RMA*".⁸² Nearly all of the relevant Part 2 matters are reflected in the relevant planning documents and are assessed in that context. But for completeness, the Project has been assessed against the relevant Part 2 matters:
- (a) In accordance with section 5 of the RMA, the Project supports the social, economic and cultural wellbeing of the Porirua community while improving water quality with subsequent positive ecological and cultural effects.⁸³ The health and safety of people will be improved due to increased recreational opportunities and the removal of wastewater discharges in Bothamley Park;

⁸⁰ AEE at 5.8.2.

⁸¹ AEE at 14.2.9 and 5.3.

⁸² Clause 9(1)(g)(i) of the CRA also requires an assessment of the Project against Part 2 of the RMA.

⁸³ AEE at 15.1.2.

- (b) In accordance with section 6 of the RMA, the Project will enhance natural character, protect areas of significant indigenous vegetation and enhance the relationship of Māori with their ancestral lands, water and taonga;⁸⁴
- (c) In accordance with section 7 of the RMA, the Project has had particular regard and appropriately allows for kaitiakitanga, provides for the efficient use and development of resources (including the existing sewer and wastewater network), maintains and enhances the amenity values of Bothamley Park and will overall enhance the quality of the environment;⁸⁵ and
- (d) With regard to section 8 of the RMA, clauses 31(2) and 33(6) of the CRA, state that a panel must apply section 6 of the CRA instead of section 8 of the RMA, which is discussed further below.⁸⁶

7.26 Overall, the Project is in accordance with the purpose and principles of the RMA.⁸⁷

Te Tiriti o Waitangi principles and applicable Treaty settlements

7.27 Section 6 of the CRA provides that in achieving the purpose of the CRA, all persons performing functions and exercising powers under it must act in a manner that is consistent with the principles of the Treaty of Waitangi and with any applicable Treaty settlements.⁸⁸

7.28 As noted by the Panel in the decision on the *Matawii* application, the CRA does not contain a list of Treaty principles. However, these principles have been developed through case law, which indicates that the principles likely include active protection, good faith consultation and communication, and a spirit of partnership.⁸⁹

7.29 Ngāti Toa has been a strategic partner in the Project (and the wider Regeneration Programme) and the Project has involved a co-design process with Ngāti Toa.⁹⁰ The Project achieves active protection of mana

⁸⁴ AEE at 15.2.2.

⁸⁵ AEE at 15.3.2.

⁸⁶ AEE at 15.4.1.

⁸⁷ AEE at 15.5.

⁸⁸ COVID-19 Recovery (Fast-Track Consenting) Act 2020, section 6.

⁸⁹ Decision of the Expert Consenting Panel concerning the Matawii Water Storage Reservoir, issued 27 October 2020 at [109].

⁹⁰ AEE at 15.4.3.3.

whenua interests and taonga through the improvements to water quality and natural character of the Kenepuru Stream.

- 7.30 The Ngāti Toa Rangatira Claims Settlement Act 2014 is the only relevant Treaty settlement relating to the Project.⁹¹ The statutory areas are listed in Schedule 1 of the Ngāti Toa Rangatira Claims Settlement Act 2014 and recognises Te Awarua-o-Porirua Harbour. The Project incorporates methods to protect Te Awarua-o-Porirua Harbour, including sediment and erosion control methods. The harbour and associated cultural practice will benefit from the improvement to water quality associated with the Project.⁹²
- 7.31 Te Rūnanga o Toa Rangatira (Te Rūnanga), the mandated iwi authority for Ngāti Toa Rangatira has provided a cultural impact assessment which identifies values and areas of significance and seeks the applicant's input into mechanisms to enhance those values. The AEE confirms that the Project is consistent with the identified values and recommendations of that cultural impact assessment.⁹³ In addition, Ngāti Toa representatives will continue to be closely involved in the implementation of the consents and construction of the Project.

8. CONDITIONS

- 8.1 The CRA sets out that a panel may grant a resource consent subject to the conditions it considers appropriate.⁹⁴ The CRA requirements are that a panel must:
- (a) Have regard to all comments received via the CRA process on the draft conditions;⁹⁵ and
 - (b) Not have regard to trade competition or the effect of trade competition.⁹⁶
- 8.2 Section 108 of the RMA remains relevant to the conditions of consents granted under the CRA, by virtue of clause 35(3) of the CRA. When imposing conditions under section 108, the *Newbury* principles⁹⁷ are a key

⁹¹ AEE at 15.4.5.

⁹² *Ibid.*

⁹³ AEE at 11 and 15.4.3.3.

⁹⁴ COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6, cl 35(2).

⁹⁵ COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6, cl 36(5).

⁹⁶ COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6, cl 31(5) and cl 33(1).

⁹⁷ *Newbury DC v Secretary of State for the Environment* [1981] AC 578. The *Newbury* tests are that the condition must be for a resource management purpose, not for an ulterior one; the condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached; the condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

consideration for decision-makers, and conditions cannot be imposed that frustrate or effectively nullify the grant of a consent.⁹⁸

- 8.3 The intent of the CRA is to urgently kick-start New Zealand's economic and social recovery from the COVID-19 pandemic. It follows that any conditions imposed should be appropriate, practical and actionable to allow the construction of approved CRA projects to begin promptly following grant of consent or confirmation of the requirement.
- 8.4 The Applicant has prepared an extensive set of draft conditions, as set out in Appendix 7 to the AEE. These conditions have been drafted and developed with input and engagement from PCC and Ngāti Toa Rangatira and other key stakeholders such as the PCC Regulatory team and Greater Wellington Regional Council. These conditions are appropriate and will adequately avoid, remedy, mitigate and offset the adverse effects of the Project on the environment so that they are effectively managed.

Management Plans

- 8.5 The conditions employ the use of management plans to ensure that effects are appropriately managed throughout the duration of the Project.
- 8.6 Some aspects of the Project have only been designed to a conceptual design stage (for example some bank stabilisation and stream works), which is sufficient to identify and assess the effects of the Project but not adequate for construction. These aspects will be subject to further detailed design and management plans are particularly appropriate to allow that additional design but ensure environmental outcomes are met.
- 8.7 The use of management plans is specifically contemplated within the CRA, which provides that the information submitted with an AEE must be provided in sufficient detail to correspond to the scale and significance of the effects of the activity.⁹⁹ A management plan comprehensively fulfils this obligation.
- 8.8 The management plans proposed for inclusion in the conditions have been prepared in light of the decision in *Te Ara Tupua*. Through that decision,

⁹⁸ *Richmond v Kapiti Coast DC* [2016] NZEnvC 1.

⁹⁹ COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6. cl 14(1).

the Panel identified that the key tenets of a "fit for purpose" management plan condition are:¹⁰⁰

- (a) a requirement to prepare it by suitably qualified personnel;
- (b) a clear objective, a stated scope and performance management requirements;
- (c) specification of a process for council certification;
- (d) specification of process for amending a certified plan; and
- (e) a requirement to comply with the management plan once certified.

8.9 The conditions proposed by the Applicant meet these key tenets. The conditions contain objectives and performance management requirements to ensure these objectives are met.¹⁰¹

9. CONCLUSIONS

9.1 The Project provides for the upgrade of the existing sewer within Bothamley Park and improvements to recreational opportunities in the Park itself. The Project is part of wider suite of infrastructure upgrades needed to service urban development and renewal in Eastern Porirua. In addition to servicing this growth, the Projects represent an opportunity to support New Zealand's recovery from the economic and social effects of COVID-19.

9.2 The Project will have a number of positive effects and the potential adverse effects arising from construction or operation of the Project can be appropriately mitigated. The Project is consistent with the relevant national policy statements, national environmental standards, the regional policy statement, regional and district plans, Treaty principles and Treaty settlements. Kāinga Ora has proposed a suite of appropriate and reasonable conditions which promotes Part 2 of the RMA and the purpose of the CRA, while appropriately avoiding, remedying and mitigating adverse effects.

DATED 28 April 2022

¹⁰⁰ Decision of the Expert Consenting Panel concerning the Te Ara Tupua - Ngā Ūranga Ki Pito–One - Shared Path, issued 5 February 2021 at [265].

¹⁰¹ For example, see Appendix 7 to the AEE, proposed conditions 5 and 46 of regional council consents.