

Comment on the Te Ara Tupua – Ngauranga to Petone shared path Fast Track Application

1. Contact Details

Please ensure that you have authority to comment on the application on behalf of those named on this form.

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All sections of this form with an asterisk (*) are mandatory

1. We will email you draft conditions of consent/notices of requirement for your comment.*

Yes	<input checked="" type="checkbox"/> I can receive emails and my email address is correct	<input type="checkbox"/> I cannot receive emails and my postal address is correct.
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1. Please provide your comments on the Te Ara Tupua – Ngauranga to Petone shared path Application

If you need more space, please attach additional pages. Please include your name, page numbers and Te Ara Tupua Application on the additional pages

Please see attached comments

**COMMENTS FROM THE ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INC
ON TE ARA TUPUA - NGĀ ŪRANGA KI PITO-ONE PATH**

To: Environmental Protection Authority
tearatupuafasttrack@epa.govt.nz

Date: 11 December 2020

Organisation: Forest and Bird
Contact: Jennifer Miller

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INTRODUCTION

1. Forest & Bird is New Zealand's largest and longest-serving independent conservation organisation, with many members and supporters. Its mission is to be a voice for nature, on land, in fresh water, and at sea, on behalf of its members and supporters. Volunteers in 50 branches carry out community conservation projects around New Zealand. It has nine branches in the Auckland region alone.
2. In support of the society's objectives, it has been involved in resource management processes around New Zealand for many years, at the national, regional, and district level. It routinely submits on regional and district plan provisions, and advocates in the Environment Court in relation to plan provisions relating to biodiversity, landscape and natural character and some resource consents. It is particularly interested to ensure that the environmental bottom lines established in national policy statements in order to give substance to the "protective" element of Part 2 of the RMA are given effect to in regional and district plans and achieved through decisions on resource consents.
3. Forest & Bird provided a submission on the COVID19 Bill and is recognised as a party that must be consulted with for listed projects.

4. Forest & Bird participated in several stakeholder consultation meetings with the NZTA on the proposal prior to it being listed as a referred project. There are a number of aspects to the proposal which Forest & Bird is supportive of, including:
 - a. Providing a viable option for alternative transport modes reducing carbon emissions and responding to climate change objectives; and
 - b. The aspects of the proposal which provide enhancement and protection to indigenous biodiversity.
5. However Forest & Bird still has a number of outstanding concerns regarding the adverse environmental impacts of this proposal that we consider must be satisfactorily resolved before the project can progress. Forest & Bird considers that the NZTA can do better to reduce environmental impacts from this proposal. We also consider that significantly stronger offsetting/compensation measures are required in order for this project to result in 'no net loss'. Better environmental outcomes are necessary in our view to avoid inconsistency with the New Zealand Coastal Policy Statement (NZCPS).
6. A decision to grant the project as currently proposed would result in adverse effects that are inconsistent with the directive provisions of the NZCPS.
7. Forest & Bird is therefore particularly interested in how or whether a decision under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the Act) will ensure that matters of national importance are protected.
8. Forest & Bird's comments relate to both the resource consent and NOR applications.

BACKGROUND

9. Forest & Bird has been engaged with this project since May 2019, as part of NZTA's stakeholder engagement consultation process. During this time, we received a number of briefings and updates on the project, as well as opportunities to raise concerns or offer suggestions as this proposal was being developed. We would like to recognise NZTA's proactive engagement and responsiveness throughout these early stages of the project and acknowledge those who enabled this open dialogue and consultation.
10. However, those discussions were cut short by the inclusion of the project under the Fast-track Consenting Act. Forest & Bird has some reservations about the appropriateness of including the project under Act given the projects permanent and significant environmental effects, including the loss of nationally important indigenous biodiversity values, and the consultation limitations in this process.
11. The fast-track process and timeframes excludes potentially valuable input through public submissions, and limits the scope for submitters to influence and improve outcomes]. As a consequence, it's likely that opportunities to better avoid, remediate and mitigate adverse effects will be lost, and that the measures required to offset and compensate for the

project's environmental damage may be weaker than they would have been under a more rigorous process.

IMPACT OF THE PROPOSED PROJECT

12. Forest & Bird initially held concerns about the impact of this project on penguin nesting sites, as well as displacement and disturbance to a range of seabird species that frequent valuable roosting and foraging sites along this coastal edge. However these concerns have largely been addressed through changes to the features of the design and mitigation measures (e.g. creation of nest sites within new riprap edges, creation of offshore islands and installation of visual screens). Forest & Bird is satisfied that the ongoing involvement with DOC in the development of a management plan recognised in the consent conditions will address these concerns.
13. However, on multiple occasions during the consultation process, Forest & Bird raised concerns about the lack of information about the distinctiveness or uniqueness of the ecosystem types and indigenous biodiversity that would be lost or adversely affected if this project proceeds as currently designed. Information about the ecological values present around the coastline elsewhere in the Wellington Harbour (or the wider Wellington region) is necessary to fully understand the significance of the values that would be lost and to identify opportunities for enhancement or offsetting. However, despite requests for the ecological values in the surrounding areas to be assessed (or existing information located), this this important contextual information is still lacking.
14. Forest & Bird still has concerns with the loss of unique and significant indigenous biodiversity in particular the loss of:
 - a. A 3,300m² area of shingle beach under the project footprint. Shingle beaches are an endangered (threatened) ecosystem type in New Zealand¹.
 - b. 11,200m² of intertidal habitats (including rocky reef) and 36,800m² of subtidal habitat (including rocky reef) under the project footprint. These habitats are listed as having significant indigenous biodiversity values under in Schedules F4 and F5 of the proposed Natural Resource Plan for the Wellington Region (PNRP). The applicant acknowledges that this total loss of 48,000m² of marine habitat constitutes a 'very high' level of adverse effect. Intertidal zones and rocky reef systems are vulnerable ecosystem and habitats (as stated in Policy 11(b) of the NZCPS).
15. Forest & Bird also has concerns with the offset and compensation package proposed by the applicant, including the basis on which an offset is applied rather than avoidance and lack of qualified and quantifiable outcomes to be achieved through proposed conditions.
16. **Forest & Bird do not currently support the proposal.** If the design was modified to avoid adverse effects on important habitat, and offsetting and compensation measures were sufficiently improved then Forest & Bird could support the proposal.

¹ Section 9.2.2 Technical Report 9 Ecological Assessment

17. Forest & Bird considers that it would be possible to avoid the most significant environmental harms that this proposal would cause by altering the pathway design in certain places. Swapping the proposed reclamation design for a cantilevered structure in the areas where the proposed design would otherwise destroy the endangered shingle beach ecosystem and rocky reef habitats would enable this project to proceed with a more acceptable level of environmental impact. We acknowledge that this solution would compromise on the resilience that the current design confers. However, the project's location means one compromise or another is inevitable. We contend that in this instance it is more important that the project avoids contravening the directions of the New Zealand Coastal Policy Statement, and for the government to uphold its own environmental standards (which it - legitimately - expects everyone else to uphold).
18. Our other key area of concern regarding this proposal is that the measures to offset and compensate for the residual adverse effects on the environment are inadequate. This aspect of the proposal requires significant improvement. The measures proposed are unacceptable in both scale and substance given the extent and significance of the anticipated losses. It would be highly undesirable for a government agency to fail to adequately offset or compensate for adverse effects of the nature envisaged by this project.
19. It is estimated that the sole biodiversity offset proposed by the applicant (installation of living seawalls, subject to landowner consent) would only offset a tiny fraction of the residual adverse effects of this proposal (although the applicant has failed to provide a calculation of the loss and gain as required under the PNRP). Installation of a small area of living seawall alone is clearly insufficient to achieve a no net loss outcome.
20. Offsetting is preferable to compensation, and we consider that other potentially valuable offsetting options exist that have not been sufficiently explored to date. For example, marine pest control could assist in restoring marine habitat and improving the state of biodiversity in Wellington's marine environment to help balance the unavoidable biodiversity impacts within the project site. We disagree with the applicant's assessment that there would be little benefit from such activity. The applicant's rationale that government has an established process for dealing with invasive marine organisms also appears out of step with terrestrial practices, whereby applicants frequently propose to undertake predator control activities irrespective of the existence of established government predator control processes – every bit helps. The possibility of exploring measures to reduce sedimentation and contamination entering the Harbour from the nearby Hutt river were also raised during the stakeholder engagement process but do not appear to have been pursued.
21. We also consider that the two proposed compensation measures are inadequate in scale to provide proportionate compensation for the losses that this project would cause. We note the applicant has provided no calculation to show how these measures could compensate for those losses.
22. We also consider that both compensation activities proposed by the applicant are likely to occur anyway so lack sufficient additionality, particularly in the context of the significant

losses they aim to redress. Forest & Bird continues to strongly support incorporating work to reduce contaminated run-off from the state highway entering Wellington harbour into the construction of the Project. However, we understand that improved stormwater treatment from the state highway will become a regulatory requirement in the next few years anyway (likely triggered by relevant provisions of the PNRP coming into force). While undertaking these upgrades in conjunction with construction of the pathway would presumably be preferable to retrofitting them in future (cheaper, more design options, less disruptive), we now consider it inappropriate to count this work as compensation for permanent environmental losses if it will be undertaken in the near future regardless.

23. The proposal to restore an area of dune ecosystem on the Petone foreshore also lacks meaningful additionality as this area has already been restored to a significant extent by various community groups. Furthermore, there is insufficient guarantee that gains would be sustained beyond the short-term as after 5 years maintenance responsibility would revert to Hutt City Council, for whom this does not appear to be a priority. A short-term small-scale restoration measure is inadequate to compensate for the permanent loss of shingle beach.
24. Approval of the project should be contingent on the proposal achieving no net loss for indigenous biodiversity, and preferably a net gain. This would be consistent with the sustainable management of natural resources expected under the COVID-19 Recovery Act. Additional offsetting and compensation measures must be considered to achieve this goal. We suggest that an independent expert assessment would be appropriate to consider and recommend an appropriate package of offsetting, restoration and enhancement activities in order to achieve (preferably) a net gain outcome.

ABILITY TO DECLINE THE PROPOSAL

25. The Act requires that applications assess activities against relevant provisions of specified documents², of relevance to Forest & Birds comments this includes the NZCPS.
26. The Act is designed to be enabling to listed projects. However it allows for a project to be refused on the basis of the application being inconsistent with an NPS including the NZCPS.
27. The applicant's legal analysis³ is that the use of the words "not inconsistent with" are equivalent to "would not align to a relatively high degree".
28. In applying this interpretation the applicant has considered adverse effects of the proposal in terms of an overall alignment with provisions of the NZCPS. Balancing outcomes rather than paying attention to the directive wording of provisions.
29. Forest & Bird considers that to determine whether granting consent would be inconsistent or not, with the NZCPS requires consideration of the relevant policies and of the directive wording within them. This means that a proposal would be inconsistent with a directive policy to avoid an adverse effect where such an effect is not avoided by the proposal.,

² Schedule 6, s9(1)(h) COVID19 Recovery Fasttrack Consenting Act 2020

³ Paragraph 52, Volume 5, Analysis of Legal Framework, NZ Transport Agency 12 October 2020

Applying this approach, in such circumstances, the conclusions must be that the proposal would be inconsistent with the NZCPS, regardless of alignment with other provisions.

30. We agree with the applicant that a proposal may be granted under the Act even if it is inconsistent with the NZCPS. We set out considerations in this respect later in these comments.

CONSISTENCY WITH THE NZCPS

31. The assessment of ecological effects for the proposal has identified adverse effects which will not be avoided if the proposal goes ahead. These adverse effects are stated as adverse effects which relate to permanent occupation and habitat loss⁴.
32. The assessment of the scale of effects seems to have resulted in conclusions that many adverse effects do not require mitigation, offsetting or compensation. While the consideration of scale is important and useful to considering how adverse effects can be managed, it is not an appropriate basis to determine whether an adverse effect has been avoided. The conclusions that adverse effects on marine ecology⁵ do or do not require mitigation, offsetting or compensation is unhelpful in determining consistency with the directive avoid provisions of the NZCPS.
33. Similarly the overall summary of ecological effects⁶ cannot be used to determine consistency with the avoid provisions of the NZCPS. As effects have been considered after applying measures to avoid, minimise, remedy and mitigate
34. While not stated it appears that the Table 33⁷ summary of potential ecological effects is also after offsetting and compensation measures are applied given the positive and net gain level of effects attributed to indigenous vegetation.
35. There is one area where the level of adverse effects remains very high, even after measures to address effects have been applied; the permanent habitat loss at the scale of the Project footprint⁸. However the table does not identify whether the habitat lost includes values where adverse effects are to be avoided under Policy 11 of the NZCPS.
36. The effects management hierarchy measures set out in Table 38⁹ is also unhelpful and potentially misleading in terms of consistency with Policy 11 of the NZCPS. This is because where an avoid measure is identified the extent to which avoid is achieved is uncertain given the subjective wording of “as much as possible”. The creation of offshore habitats, may

⁴ 8.5.1.1 Technical Report 9 Ecological Assessment

⁵ 8.5.1 Potential construction effects and 8.5.2 Potential Operational Effects, Technical Report 9 Ecological Assessment

⁶ 8.6 Overall summary of ecological effects, Technical Report 9 Ecological Assessment

⁷ 8.6 Technical Report 9 Ecological Assessment

⁸ Table 33, Technical Report 9 Ecological Assessment

⁹ Table 38: Summary of the implementation of the effects management hierarchy for the recommended ecological features for the Project,

avoid some effects on birds.¹⁰ However, it does not avoid adverse effects on the habitat of those birds which will be lost.¹¹ It is not clear why the creation of habitats, which as part of the proposal, is not identified as an offset.

37. The applicant's ecological assessment of adverse effects is not clear with respect to the directive avoid provisions of Policy 11 as conclusions are made on the basis of:
- a. A determination of the significance of the biodiversity value being affected;
 - b. The magnitude of the effects at a spatial and temporal scale¹² ;
 - c. Consideration at the scale of wellington harbour¹³ being appropriate as the scale does not change the effect of the proposal on the values which are directly affected;
 - d. The scale of adverse effects in an overall context of indigenous biodiversity in the Wellington harbour; and
 - e. Effects being considered after remediation, mitigation, offsetting and compensation.
38. Both the AEE and Legal Framework summary appears to have adopted the technical reports approach.
39. This approach is not appropriate for an assessment of inconsistency with the NZCPS. The "King Salmon decision" made it clear that it was necessary to pay careful attention to the way in which provisions were worded. There is no reason not to apply that same consideration here.
40. Policy 11 of the NZCPS sets out direction for the protection of indigenous biodiversity and is particularly relevant to the proposal given permanent impacts and loss of ecological values as a result of the proposal¹⁴. Policy 11 reads as follows:

Policy 11 Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa⁴ that are listed as threatened⁵ or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

¹⁰ 8.4.3.1 of the Technical Report 9 Ecological Assessment sets out that the proposal "involves additional reclamation and permanent occupation of areas which provide foraging, roosting and nesting habitat for a number of Threatened and At Risk coastal birds."

¹¹ NZCPS Policy 11(a)(iv) and (b)(ii) identify adverse effects to be avoided on specified habitats within the coastal environment.

¹² Bottom of page 106 continues on page 107, Technical Report 9 Ecological Assessment

¹³ Top of page 108 Technical Report 9 Ecological Assessment

¹⁴ As described in the applicants Technical Report 9 Ecological Assessment

- (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;*
 - (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;*
 - (v) areas containing nationally significant examples of indigenous community types; and*
 - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and*
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:*
- (i) areas of predominantly indigenous vegetation in the coastal environment;*
 - (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;*
 - (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;*
 - (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;*
 - (v) habitats, including areas and routes, important to migratory species; and*
 - (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.*

41. Policy 11(a) and (b) both use the word “avoid” with respect to adverse effects on specified indigenous biodiversity. This wording is directive. There is little if any flexibility in implementing the requirement to avoid when giving effect to Policy 11 of the NZCPS in plans or when having regard to the NZCPS in decision making under the RMA.

42. Under the Act a decision maker must have regard to the NZCPS, however this is subject to both the purpose of the RMA and the purpose of the Act. This is a different decision making process to that under the RMA, and as stated above a decision to grant consent and NOR can be made even where a proposal is inconsistent with the NZCPS.

43. However in our view this different decision making process does not change the approach to determining an inconsistency with the NZCPS which must be considered on the adverse effects of a proposal and the wording of relevant provisions.

ADVERSE EFFECTS OF THE PROPOSAL AND POLICY 11 OF THE NZCPS

44. Chapter 26 of the AEE considered indigenous biological diversity in terms of Policy 11 states that:

The Project has been specifically designed to avoid adverse effects on the indigenous biodiversity listed in Policy 11(a) and to avoid significant effects and avoid, remedy, or mitigate other potential effects on indigenous biodiversity listed in Policy 11(b).

45. That conclusion is not consistent with the substance of Chapter 26¹⁵ which records that:
- a. the assessment of effects identifies the following indigenous biodiversity within the Project area:
 - i. in respect of Policy 11(a):
 1. Shingle beaches (which are threatened ecosystems);
 2. Caspian tern and reef heron (threatened); and
 3. Black shag, pied shag, little black shag, little penguin, white-fronted tern, variable oystercatcher and the red-billed gull (at risk); and
 - ii. in respect of Policy 11(b):
 1. Macroalgae/cobble/reef habitat;
 2. Backshore nesting habitat, which occurs above MHWS on the beach adjacent to the Switching Station at Karanga Point (used by variable oystercatcher, black-backed gull (not threatened) and little penguins) and crevices in loose riprap above MWHS also provide potential nesting habitat for little penguins; and
 3. The Korokoro Stream catchment, which contains several areas suitable for inanga spawning habitat at the Korokoro Stream mouth. The migratory species identified in Korokoro Stream include shortfin eel (not threatened), longfin eel (at risk), giant kokopu (at risk), koaro (at risk), banded kokopu (not threatened), inanga (at risk), common bully (not threatened), bluegill bully (at risk), redfin bully (not threatened), and common smelt (not threatened).
 - b. measures to avoid adverse effects are not all inclusive , as recognised in the terminology used, for example:
 - i. substantially avoids shingle beaches¹⁶ - which recognises that not all adverse effects have been avoided on shingle beaches
 - ii. new offshore habitat to avoid compromising the ability of birds to roost – which does not avoid adverse effects on the current roosting habitat.
 - iii. Using best endeavours – which suggest an uncertainty to implementing the measure to minimise disturbance from dogs

¹⁵ Chapter 26 Statutory assessment

¹⁶ Chapter 26: Statutory assessment | Page 298

- iv. Minimise – which is uncertain in terms of the remaining adverse effects which are not avoided through that measure.
46. Nor does the AEE conclusion align with matters identified in Table 20 of the ecological assessment where a loss will occur as a result of the proposal.
47. The conclusion in the Legal Framework summary when considering the NZCPS that adverse effects are avoided seems to have been derived from the AEE. These conclusions cannot be relied on in our view for the reasons stated above.
48. Such a determination for consistency with the NZCPS is far from clear in the conclusions as to adverse effects provided by the applicant.
49. Forest & Bird is concerned that proposal does not adequately recognise this loss in terms of the avoid direction of Policy 11 of the NZCPS. Of particular concern to Forest & Bird is the loss¹⁷ of:
- a. Shingle beach 0.33 ha
 - b. Intertidal and nearshore foraging 4.22 ha (including rock reefs)
50. As a threatened and naturally rare ecosystem type adverse effects on the shingle beach are to be avoided under Policy 11(a)(iii).
51. Both of these areas include vulnerable to ecosystem and habitats where significant adverse effects are also to be avoided under Policy 11(b)(iii).
52. The applicant's conclusion to the assessment of effects is not consistent with the directive wording of Policy 11 for values where adverse effect and significant adverse effects are to be avoided. Offsetting or compensation may be appropriate measures to address residual adverse effects on Policy 11(b) values where significant adverse effects have been avoided and for other indigenous biodiversity values which are not addressed in Policy 11. Even then an assessment should be clear when measures to avoid, remedy or mitigate will not address the adverse effects that are to be avoided under Policy 11. This is necessary for decision makers to make an informed decision of the adverse effects of the proposal and whether it aligns with the NZCPS.
53. It is clear that adverse effects will not be avoided by the proposal in this case. In our view this is not consistent with Policy 11 of the NZCPS and the proposal is therefore not consistent with the NZCPS in this regard.
54. The assessment has determined that the overall effects on lizards with mitigation measure in place is low. However it is not clear whether this approach is consistent with the NZCPS where adverse effects have to be avoided in the matters under 11(a) or where significant adverse effects have to be avoided on the matters under 11(b).

¹⁷ Table 20, Technical Report 9 Ecological Assessment

55. Forest & Bird is concerned that the offset and compensation approach, rather than avoidance, will result in a loss of threatened and vulnerable indigenous biodiversity values.
56. In any event Forest & Bird considers that the applicant needs to put greater effort into offsetting on a like for like and no net loss basis as opposed to the dissimilar compensation measures being considered.

OFFSET AND COMPENSATION PACKAGE

57. Forest & Bird has a number of concerns with the offset and compensation package.
58. Waka Kotahi has stated that there are limited options for offsetting. However our understanding is that they have not undertaken a full and thorough investigation for opportunities to offset in the wider harbour area or for opportunities to offset through restoration by decommissioning of hard protection structures elsewhere in the harbour.
59. Compensation has greater implications in terms of loss and the maintenance of indigenous biodiversity as there is no replacement of equivalent values; like for like. Compensation allows for provision of different values than those lost to be provided as reparation.
60. Because these approaches are both provided as a reparation for adverse effects that cannot be considered as benefits of a proposal.
61. It is important to distinguish between biodiversity offset and biodiversity compensation to understand the extent to which indigenous biodiversity values will be maintained overall and whether the loss that is compensated for is acceptable.
62. The consideration of limits¹⁸ to what can be offset does not clearly identify the matters where limits are recognised and for which an offset cannot, or has not been applied.
63. Forest & Bird are also concerned that the offset measures identified in Table 38 for stormwater treatment are not recognised in terms of additionality for compensation measures as it is likely in our view that they do not meet this principle. It is our understanding that improved treatment of stormwater from the state highway corridor (along the lines of what the applicant has proposed here) will likely be required in the next few years anyway due to anticipated regulatory changes. Therefore, while we are supportive of the proposed upgrade of infrastructure to treat contaminated run-off from the state highway, this measure lacks additionality as compensation for the anticipated losses.
64. The applicants legal report records that de-reclamation was looked at as a potential offset measure. However in our correspondence with NZTA we could never ascertain the extent of wellington harbour which they investigated. Nor were we able to ascertain whether enhancement and protection of beach areas in the wider wellington harbour were investigated as these may have provided a like for like offset opportunity.

¹⁸ Table 26 Technical Report 9 Ecological Assessment

65. Forest & Bird accepts that it may not be possible to achieve like for like offset within the same ecological district, however NZTA holds large areas of designation in the coastal environment within the Wellington Region and with the powers of a requiring authority has functions and responsibilities to provide sustainable transport solutions that do not result in the loss of nationally important indigenous biodiversity.
66. Forest & Bird also considers that greater certainty of achieving offsets is required and that this is carried into the conditions if the consent and NOR are granted.
67. In setting conditions on the proposal, the matters to which decision makers are to have regard and particular regard to are also relevant. These are set out in Schedule 6 of the Act and include direction for decision makers considering:
 - a. the resource consent application¹⁹ to have regard to effects of the proposal, relevant documents (including the NZCPS); and
 - b. the NOR²⁰ to have particular regard to relevant provisions of listed documents (including the NZCPS).
68. Forest & Bird is concerned that NZTA does not have sufficient interest in the land at some sites where offsets are proposed. This is recognised in the wording of proposed conditions where an alternative of compensation provided for if NZTA is unable to undertake the works for offsetting due to landowner constraints.
69. This approach is concerning for two key reasons:
 - a. Firstly offsets provide a better reparation to adverse effects that cannot be avoided than compensation, where the principles²¹ including like for like and no net loss are applied.
 - b. Secondly because the alternative for compensation in the conditions has no outcomes or specification set out that would ensure appropriate measure are undertaken.
70. In having regard to the effects of the proposal and particular regard relevant provisions justifies a focus on offsetting over compensation. If offsetting is not available then the compensation must relate as closely as possible to the matters which are adversely effected and the outcomes to be achieved must be set out in consent and NOR conditions.
71. Forest & Bird is concerned that the offsetting that is proposed is uncertain in terms comparability with the adverse effects it is indented to offset and of success where land is held in other ownership. Further detail on the outcomes to be achieved, time frames within which the offset will provide equivalent benefits (no net loss and preferably a net gain) and

¹⁹ Schedule 6 clause 29 of the Act

²⁰ Schedule 6 clause 33 of the Act

²¹ Guidance on Good Practice Biodiversity Offsetting in New Zealand, New Zealand Government 2014.

long term protection of offset areas is needed within the conditions of the NOR and resource consents.

72. Both offsets and compensation (if used) need to be provided for in perpetuity. Where land under other ownership is relied on the offset must only be accepted where a covenant or other legal protection is register on the title.

PROPOSED CONDITIONS

73. Forest & Bird has the following comments on the proposed ecological management conditions:

74. The process for certification of the EMP under condition PC.5 is not comprehensive or certain in terms on the outcomes to be achieved thorough the implementation of the management plans. In particular the following points need to be clarified:

- a. It is not clear how certification occurs or what the certification requirements are.
- b. The “Manager” role needs clarification in the meaning of terms that an authorised delegate is a delegate of the relevant councils.
- c. The amendments provided for under (d) on the basis of consistency with the purpose of the management plan is insufficient to ensure that outcomes anticipated in the technical supporting documents are achieved.
- d. Under (c) the need for agreement to alter the timeframe for the manager to respond is concerning as there may be an appropriate reason for which the manager has not certified the EMP. Allowing for the manager to provide written notice of an alteration to timeframe may be more appropriate.

75. The purpose of the EMP is uncertain in terms of achieving the specific conditions and outcomes.

76. It is concerning that a draft EMP setting out objectives to achieve the outcomes and implement the measures set out in the ecological report has not been provided. For this reason greater detail and certainty is needed in the consent conditions.

77. The scope for changes and flexibility of measures which can be undertaken through management plans is concerning as this is tied only to a very broad purpose which does not recognise specific objectives or outcomes to be achieved. Condition EM.1 (b) needs to include that the purpose is to achieve the conditions of consent and the objectives set out in the draft EMP provided

78. Condition EM.3 does not provide for an offset of lizard habitat despite providing for the salvage of lizards where lizard habitat is not avoided. In this circumstance measures to avoid, remedy and mitigate adverse effects on resident native lizard populations needs to include offsetting measures to replace lost habitat.

79. EM.4 allows for agreement with the Manager. This is ultra-viridis as it allows for decision making after the grant of consent. In addition there is no condition to require the loss of river values associated with the extension of the culverts to be remedied, mitigated or offset in line with the NPSFM 2020 mitigation hierarchy.
80. EM.5 this condition is uncertain and unlike to be enforceable. (a) is also uncertain in terms of what is the intended outcome for avifauna. In (b) the extent of efforts to minimise is uncertain. Reference to a plan showing the locations for screens would provide a measureable outcome. The objective fails to protect bird breeding as there is no general requirement to avoid works during nesting and breeding periods at key locations or timeframes for the placement of screens.
81. EM.6B condition (a) to avoid potential effects of works on penguin and (b) on variable oystercatcher is supported.
82. EM.7 the restrictions on dogs is supported however this should be clarified to require dogs to be on lead at all times as well as confined to the formed path. Best endeavours is uncertain. The condition should require legal mechanisms and measures to be set out in the EMP, including the option of banning dogs from the path (at least temporarily to encourage behaviour change) should non-compliance with restrictions be an ongoing issue.
83. EM.8 the coastal clean up condition is supported. Plastic is becoming a significant issue for marine life including coastal avifauna. A condition for regular coastal clean ups to remove accumulated plastics including those that may not be directly associated with the use of the path would be an appropriate additional compensation measure given the permanent effects of the path on the coastal environment.
84. EM.9 the predator control programme is supported. This should be an ongoing requirement to last as long as the path. This condition should be set out on the designation and worded in the consent conditions such that it is clearly intended to be extended beyond 35 years.
85. EM.14 this condition should set out the outcomes to be achieved if offshore habitat design is varied.
86. EM.16 this conditions is of concern to Forest & Bird as it is put forward as providing for an offsetting of adverse effects however does not appear to provide a like for like replacement. Secondly is the living seawalls can't be established the condition includes provision for compensation however there is no specific outcome stated or measure as to the appropriate level of compensation to be achieved. Thirdly the condition does not provide clear outcomes a situation where seawalls are unsuccessful in achieving the intended offset.
87. EM.19 Forest & Bird is supportive of coastal dune vegetation establishment and restoration as a condition of consent but not as a compensation for the loss of threatened and rare ecosystems. In addition a five year maintenance period does not seem sufficient given the permanence of the pathway proposal. Of particular concern is the uncertainty of landowner approval. It is preferable that landowner approval is confirmed prior to grant of NOR and Consent. If this cannot be confirmed prior then more detail on alternative compensation

must be provided and supported with measureable and enforceable conditions. In addition to be an appropriate offset or compensation protection of the area needs to be provided for in perpetuity.

88. EM.21 the determination of the area of coastal dune vegetation to be restored needs to be calculated with respect to the adverse effects of the proposal. Also currently written there is no certainty that this objective will provide for a no net loss or for a net gain in indigenous biodiversity. Again a five year maintenance period does not seem sufficient given the permanence of the pathway proposal and protection of the area needs to be provided for in perpetuity.
89. Forest & Bird thanks you for considering its comments on this proposal and looks forward to your decision in due course.