IN THE MATTER OF the Resource Management Act 1991 (**the RMA**)

AND

IN THE MATTER OF of resource consent applications by Gisborne District Council – Community Lifelines (**the application**) for construction and upgrading of approximately 4.2 kilometres of stopbanks, associated earthworks, road raising, drainage and stormwater infrastructure, works within and adjacent to the Waipaoa River, temporary water take and discharge activities during construction, vegetation clearance, temporary access works, service relocations, and landscape planting and site reinstatement (**the Protection Scheme**).

STATEMENT OF EVIDENCE OF ROSS MUIR

1.0 INTRODUCTION

1.1 My full name is Ross McPhail Muir.

1.2 I am an independent planning consultant and Director of Insight (2022) Limited which operates in Gisborne and Wanaka.

1.3 I hold a Bachelor of Regional Planning (Hons) degree from Massey University and have 43 years experience in the field of resource management and planning in New Zealand. I was formerly employed by the Gisborne City Council and more recently, the Gisborne District Council from 1983 to 2002 in senior roles in the policy development and plan implementation sections. I have acted as an Accredited Independent Commissioner.

1.4 My consultancy work primarily involves providing resource management advice and preparing resource consent applications on behalf of public and private clients, including large scale infrastructure projects.

1.5 I have a good understanding of the Gisborne District, the local planning environment and the Council's Tairawhiti Resource Management Plan (**TRMP**) which incorporates the Council's former district and regional plans. I am familiar with the Te Karaka locality, most recently submitting an application for a comprehensive residential development for kaumatua flats within the Te Karaka Township, on behalf of Te Runanga o Turanganui a Kiwa.

1.6 For over 32 years I owned and managed a farm comprising 36 hectares located on the Poverty Bay Flats at Patutahi. Farm production included cropping, beef breeding, and a 5.5 hectare citrus orchard. I experienced first-hand, the 1985 Ngatapa and 1988 Cyclone Bola floods, and the associated debilitating effects on farm production.

1.7 I therefore have broad experience of local rural production regimes, resource sustainability and capacity matters in the context of a working rural environment and the benefits and constraints associated with the use of the elite and versatile soils that make up the Poverty Bay Flats.

1.8 I am authorised to provide evidence on behalf of the M & W Burgess Family Trust (**the Trust**)

2.0 CODE OF CONDUCT FOR EXPERT WITNESSES

2.1 I confirm that I have read the Environment Court's Code of Conduct for Expert Witnesses, as contained in section 9 of the Environment Court's Practice Note 2023, and I agree to comply with it.

2.2 The data, information, facts and assumptions that I have considered in forming my opinions are set out in my evidence that follows. The reasons for the opinions expressed are also set out.

2.3 I confirm that the matters addressed in this brief of evidence are within my area of expertise, with the exception of where I confirm that I am relying on the evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from my opinions expressed in this brief of evidence. I have specified where my opinion is based on limited or partial information and I have identified any assumptions I have made in forming my opinions.

3.0 SCOPE OF EVIDENCE

3.1 My evidence will cover:

(a) The matters generally addressed in the Trust's submission to the Application, matters arising from requests for further information and the evidence statements of others;

(b) My interpretation of the relevant statutory planning instruments that are relevant to the Application with particular emphasis on the RMA, the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES:FW**) the National Policy Statements on Natural Hazards (**NPS-NH**) and Highly Productive Land (**NPS-HPL**), and the TRMP.

(c) My evidence is structured around the following headings:

- Increased flood effects;
- Effects on Highly Productive Land;
- Mitigation of adverse effects via external agreements;
- Adequacy of information;
- Condition certainty;
- Proposed conditions assessment;
- Resource consents bundling.

4.0 RELATED EVIDENCE STATEMENTS & S42A RMA REPORT

4.1 I have read and am familiar with the Officer's s42ARMA report (**the s42A report**).

4.2 My evidence is informed by the expert evidence presented by Mr. Wilson on behalf of the Trust where he describes how the application will adversely affect the productive capacity of the Trust's site at 2416 Matawai Road (**the property**). I agree with the evidence and in some instances make specific reference to the views expressed therein. I note Mr. Wilson's evidence is consistent with matters raised in the Trust's submission.

4.3 My assessment is further informed by the Applicant's statements of evidence, particularly the evidence of Messrs (Sven) Exeter, Ruifrok, Foote and Hooker. Mr Exeter's evidence is particularly helpful in providing a considered and reasoned assessment of the concerns of the Trust. In some respects, he presents professional planning views that are materially different from those in the application and associated responses to requests for further information, which I discuss throughout my evidence.

5.0 EXECUTIVE SUMMARY

5.1 At section 6 of my evidence I discuss the consequential increase in flood effects on the Trust's property, with particular reference to the additional information supplied following the late amendment to the eastern Protection Scheme. The Applicant confirms these changes will lead to a material increase in flood hazard risk at the property.

5.2 I compare that outcome in terms of the assessments in the Application and the s42A report that these effects are neither new nor unacceptable. I discuss inconsistencies in the methods adopted in these documents relating to properties beyond the lands the Scheme is designed to protect.

5.3 Section 7 is a discussion on the implication of the NPS-HPL. I note the discussion on this matter in the Application is too narrowly focussed. I give reasons why the NPS-HPL, particularly in the way it defines "productive capacity" requires a more rounded assessment.

5.4 I outline my assessment of how the proposal does not sit comfortably with the NPS's direction. I rely on the expert evidence of Mr Wilson to summarise the significant consequential adverse flooding effects on the soil resource within the property and the flow-on effects in terms of horticultural production. My view is particularly informed by Mr Wilson's considered opinion that the Protection Scheme will result in a significant downgrading of the farming regime for the property[1] and which will have a material negative impact on the productive capacity of its soils. This effect will not be transitory, nor can it be remedied. It will be permanent.

5.5 Section 8 of my evidence centres around a discussion on the reliance of separate independent processes to address RMA-related environmental effects. This is one of the central issues raised in the Application and has been a focal point of some submissions, to the extent that the Hearings Panel has found it necessary to issue Direction #1 on the matter.

5.6 Adopting the approach in the Application, the s42A report poses conditions 69 and 70 to require that agreements (prepared outside the statutory RMA processes) are in place before the Scheme can be implemented. I give my reasons why this approach is not conscionable in terms of an RMA effects assessment process.

5.7 I then discuss Mr Exeter's approach to effects and note my view that a combination of RMA mitigations and community-good weighting does not identify or address the adverse effects on the Trust.

5.8 Section 9 discusses the adequacy of the information presented in the application and the late change to the eastern part of the Scheme which has impacted on the Trust's property.

5.9 At section 10, I critique the s42A external mitigation conditions 69 and 70 in terms of the commonly accepted criteria established by caselaw, and I discuss matters where I believe inconsistent interpretations could arise.

5.10 At section 11, I evaluate some of the conditions directly affecting the Trust and provide comments.

5.11 Section 12 is a discussion on the consents bundling issue with reference to the provision of flood flaps on twin culverts serving a tributary stream within the protected area. I describe my view that all of the consents required for the Scheme have material overlap or flow-on effects and are sufficiently interconnected that they should be assessed under a non-complying consent categorisation.

[1] Paragraph 43

5.12 I provide an evaluation of the gateway tests under s104D and agree with Mr Exeter's statement of evidence where he concludes the environmental effects are more than minor and therefore the first gateway test is not met.

5.13 In terms of the second gateway under s 104D (objectives and policies) I conclude that the application as it exists presently does not meet this test.

6.0 Increased Flood Effects.

6.1 The Trust's submission notes that the Protection Scheme will result in increased flood effects on its property. It considers these effects have not been properly assessed in the Application.

6.2 In response, the Applicant provided a further site-specific assessment[2] addressing the consequential effects of the amended Protection Scheme. The information describes the expected changes to flood risk including matters such as flood frequency, duration, flow velocities and consequential effects on productive land. The information confirms the earlier predicted adverse effects on the Trust's property and therefore does not assuage its concerns.

6.3 The proposal has undergone several amendments, one which will have a material impact on the property. The evidence of Mr Foote explains the timing, whereby the proposal was amended before the application was notified, however, the detail of that amendment was not carried through in the public notification documents, including the associated technical assessments.

6.4 Consequently, the assessments of increased flood effects on the Trust's property are only now being addressed. The process is ongoing as the Applicant has agreed to supply additional flood modelling information determined for all locations within the property. I have prepared my evidence without the benefit of this information and therefore reserve my position in this regard.

6.5 The dynamic and changing nature of the flood risk at Te Karaka is starkly illustrated in Mr Foote's evidence where he confirms that in all modelled events, the recently raised dwelling on the Trust's property will flood regardless of the Protection Scheme. While this raises a separate but important broader question regarding the veracity of advice provided through the FOSAL process, there is no dispute that the property floods.

6.6 The evidence of Mr Exeter and Mr Hooker acknowledge that the Protection Scheme will lead to a material increase in flood velocities over the Trust's property for the Design Event[3] and for a less intensive rain event similar to Cyclone Gabrielle. Mr Exeter's evidence suggests that the Trust's submission inferred a corresponding increase in flood depths over the property,

2 s42A report (pdf) page 77
3 Year 2090 1% AEP event

however the summary of the Trust's concerns at paragraph 8.6 of Mr Foote's evidence is more correct where the reference is made to flood velocity effects only.

6.7 The Hearings Panel is invited to consider these outcomes against the "no more than minor" adverse effects assessments peppered throughout the Application and the s42A report. For example, at (pdf) page 75 of the s42A report:

> *"….For locations beyond the protected area and other third party assets (aside from the bridges) the localised nature of the geomorphic changes means that any additional risk is considered minor. Because these changes fall within the river's existing baseline of dynamic variability, they are not expected to generate significant new or unacceptable risks to surrounding properties."*

6.8 The Applicant's own subsequent modelling of the effects on the Trust's property disproves this generalised assertion. To his credit, Mr. Exeter's evidence acknowledges the need for a more informed effects assessment.

6.9 Further in this regard, there is an inconsistency in the s42A report discussion which addresses a possible change in the alignment of the stopbank as it may or may not affect the Wi Pere Trust lands. The report expresses the view that a change of alignment of the stopbank may expose the subject properties to greater flooding than the current proposal. The response in this instance is to seek further information before a decision is made.

6.10 The same consideration has not been extended to the Trust, notwithstanding the Applicant confirms the flood risk increase and the consequential changes in flood characteristics will therefore materially worsen the effects on the property.

6.11 To justify its position, the s42A report relies on Tables 9 & 10 of the Application[4]. Most of these properties have residences on smaller sites. The report opines that no other persons who own properties currently deemed to be subject to consequential flooding have submitted, however this is to disregard the concerns raised in the Trust's submission. The information confirms these concerns are legitimate and should be addressed.

6.12 S106A of the RMA applies because the proposal is not "infrastructure" as defined in the Act, nor is it a network utility. The land use consent aspect of the proposal cannot be granted if it would accelerate, worsen or result in material damage to land or structures.

6.13 In assessing this matter, the Applicant and the s42A report rely on the proposed conditions of consent to mitigate such effects. I consider this confidence is misplaced for the reasons I now discuss.

[4] "Design event flood levels and hazard for dwellings with worsened flooding & RMA effects" and "Adverse consequential flood effects on residential properties and potential mitigation options"

7.0 Effects on Highly Productive Land

7.1 I agree with Mr Exeter where he acknowledges the discussion in the Application on the effects of the Protection Scheme on production land was narrowly focused and that the effects on orcharding operations requires "*substantive consideration*". He accepts the professional advice that the proposal will make permanent horticulture production on the Trust's property unviable. In terms of an RMA assessment he acknowledges these adverse effects but considers a broad judgement should also take into account the wider project benefits.

7.2 Mr Hooker acknowledges that he is unable to confirm the effects of the increased flood hazards on the productive capacity of the Trust's property because he does not have expertise in this area. I further note that there is no discussion in his evidence of detailed flood modelling data explaining the flood effects on different crops at different locations.

7.3 I therefore rely on the evidence of Mr Wilson, who does have such expertise. The increased flooding effects on the Trust's property, and particularly its orchards, resulting from the Protection Scheme are summarised in his evidence and include:

- The new stopbank alignment will result in a 66% increase in floodwater velocity, or an increase of 0.43 m/s, in a flood event similar to Cyclone Gabrielle. Accordingly, for similar (below Design Event) floods, the risk hazard classification moves from risk categories H3 to H4 (Unsafe for people & vehicles).

- For the Design Event, water velocity over the Trust's property will increase by 68%. The Flood Hazard Risk rating remains at H5, thereby creating flood hazard risks that are:

  - Unsafe for vehicles and people; and,
  - Will expose all buildings to structural damage with some less robust buildings vulnerable to failure;

  Whilst the hazard classification remains unchanged, water velocities are significantly higher and therefore likely to be more damaging. Mr Wilson notes at paragraph 32 of his evidence that if water velocity doubles, the energy generated increases by a factor of four.

- It is unclear whether the flood modelling includes the effects of raising Matawai Road;

- The amended stopbank alignment will expose a significantly larger area of the Trust's property to larger volumes of water moving at higher velocities causing increased:

  - Physical damage (uprooting, toppling and breakage of citrus trees, failure of infrastructure such as orchard fencing, shelter belts, roads, culverts and drains);
  - Greater debris and soil scouring and loss of productive topsoil;
  - Siltation and root suffocation in orchard areas further from the river course;

- Longer periods of anaerobic soil conditions leading to root disease, poor tree health, loss of productivity and tree death;
- Increased adverse effects relating to chemical deficiencies and bacterial contamination which may result in increased harvest withholding periods or the consequential disposal of fruit unfit for human consumption;
- Creation of business uncertainty acting as a disincentive to future investment in tree stock and production improvement systems;
- Increased tree losses delaying production break even times, increased “gapping up” resulting in the need for different management inputs, thereby increasing production costs.

7.4 Mr Wilson’s conclusion is the Protection Scheme will increase the risk and cost of horticulture redevelopment on the property to such an extent that the future land use will need to change over time to less intensive farming regimes such as arable cropping or stock grazing. In my view, this is a significant adverse effect on the Trust’s social and economic wellbeing and is a matter that goes to the heart of a Part 2 assessment under the RMA.

7.5 The application and s42A report discuss the implications of the NPS-HPL in terms of the beneficial effect of releasing the footprint soils following the decommissioning of the former stopbank system. In my view, the effect is neutral as current production land will instead be occupied by the relocated stopbanks.

7.6 Otherwise, the only focus for an NPS-HPL assessment is the loss of productive soils through mobilisation by floodwaters. Whilst this is a legitimate concern[5], the NPS-HPL deserves a broader consideration.

7.7 Mr Exeter similarly arrives at this conclusion at paragraph 16.44 of his evidence. However, in his analysis of the effects on the Trust’s production land, he draws on the evidence of Mr Foote relating to flood frequency. That is not the only concern outlined in the Trusts submission which also focusses on flood velocity effects.

7.8 Having regard to flood effects, my understanding is that the information so far provided is concerned with mean flood values . It does not address changes to specific flood levels in a more comprehensive manner, particularly the actual levels and flows on specific crop blocks[6]. Mr Wilson’s evidence[7] notes how flood characteristics can affect crops differently depending on a range of matters. Furthermore, it is not clear if the changes to flood levels account for the raised road adjacent to the Trust’s property.

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5 And one noted in Mr Wilson’s evidence where he discusses scour effects on the Trust’s property caused by increased flood velocities

6 Paragraph 26 of Mr Wilson’s evidence citing the evidence of Mr Hooker

7 Paragraph 28 of Mr Wilson’s evidence

7.9 The application is for a "specified infrastructure activity" as defined in the NPS-HPL, and therefore in a general sense is an appropriate use . However, the proviso is that the proposal minimises or mitigates any actual loss or potential cumulative loss of the availability of productive land and its <u>productive capacity.</u>

7.10 In my opinion, "Productive Capacity" is defined in a way that includes broader matters than solely soil loss, and could include the critical physical characteristics that are referred to in Mr Wilson's evidence where he describes the consequential flooding effects on the Trust's soil resource.

7.11 The NPS-HPL is a relevant matter for the Hearing Panel to consider in terms of s104(1)(b)(iii) and to weigh as necessary in terms of a Part 2 RMA evaluation. My view is that neither the Application, the s42A report nor the Applicant's evidence provide a sufficient assessment in this regard.

8.0 Mitigation of adverse effects under external agreements

8.1 The proposal was conceived and notified on the basis that a Public Works Act (**PWA**) process did not apply to the Trust's property[8]. That positioned changed when a decision was made to relocate part of the eastern stopbank.

8.2 The applicant has now commenced negotiations to purchase 1,601.2m^2 or 1.34% of the property. The matters to be compensated are set out in the Trust's submission and are very limited. Having regard to the wider flood effects on the property that arise as a consequence of the Protection Scheme, my position is that the PWA process does not adequately mitigate the adverse environmental effects.

8.3 The Application and the s42A report support an independent compensation or civil agreement process to address the adverse environmental effects discussed above. The s42A report proposes a condition accordingly which specifically references some properties. The Trust's property is not included. Even were it referenced, my view is that this approach is flawed.

8.4 Direction #1 notes that matters relating to land acquisition and compensation are addressed through independent statutory processes. It further explains the hearing process is confined to an assessment and determination solely under the RMA.

8.5 Accordingly, the Panel cannot determine compensation matters either through a separate process or through its decision on the application. I agree with these statements which reflect the concerns raised in the Trust's submission. I note that had this approach been followed in

[8] A position that extended to the resource management process where the evidence of Wendy Burgess notes the Applicant's advice that because the property is located on a flood plain, the Trust was considered neither advantaged nor disadvantaged by the proposal and therefore was not consulted directly.

the first instance, the Trust would not be placed in a position of contesting this aspect, nor would the Hearings Panel have the need to issue its Directive in this regard.

8.6 These matters arise directly as a consequence of the position taken in the Application, as endorsed in the s42A report, where increased flood effects for properties beyond the Protection Scheme will be neither avoided nor remedied, but mitigated through unrelated statutory mechanisms where the outcomes are presently unknown.

8.7 The Application and s42A report justify this approach in terms of a wider community good. The rationale is that these (some quite significant) adverse effects can be authorised by financial compensation or side agreement. Three scenarios are proposed as set out below. Implicit in the wording is the effects to be addressed are limited to dwellings:

- Raising floor levels (of dwellings);
- Relocation and compensation;
- No mitigation (if preferred by landowners/residents) and compensation.

8.8 The Application concedes these tandem processes would "ideally" be concluded prior to lodging the resource consent application.

8.9 It is understandable that there may be circumstances where RMA and compensation processes are run in parallel. However, in my opinion it is not appropriate to transfer an assessment of the environmental effects to a separate legislative regime, or civil agreement process in the manner suggested.

8.10 The PWA is concerned with processes for acquiring land and compensating for its loss whether by agreement or compulsory acquisition. Unlike the RMA, it is not an environmental statute. Therefore, the proposed mitigation package does not reduce the environmental or land-use effects of upgrading the Te Karaka stopbanks. Rather, it compensates the owner for the legal consequences of the land being taken. In effect, the Applicant's approach is to bypass the RMA environmental assessment through a form of hybrid side agreement. Expressed another way, the intent is that a separate and non-environmental process somehow makes the flooding effects acceptable.

8.11 Furthermore, there are other environmental matters that cannot be addressed in the manner suggested. For example, land acquisition/compensation might make the flooding acceptable between GDC and the Trust, but there are wider issues such as the loss of productive capacity under NPS-HPL.

8.12 As I note, the mitigation response endorsed in the Application and the s42A report is limited to affected properties with dwellings outside the proposal protection area. A condition of consent is proposed in the s42A report, but is referenced to specific land parcels which do not include the Trust's property. On that basis, the recommendation before the Hearings Panel is to approve the proposal without addressing several more than minor adverse effects on the Trust's property.

8.13 The proposed condition is[9]:

Prior to commissioning of the works, the consent holder shall obtain all necessary land interests, easements, covenants, or other legal arrangements required to authorise the consequential flooding effects on the affected properties. For the avoidance of doubt these properties are: …….[abridged]

8.14 It qualifies the requirement on the basis that the flooding effects are "authorised" notwithstanding the effects are an RMA concern rather than a requirement to access or purchase land to construct works, or money to compensate a financial loss.

8.15 Understandably, the proposed condition has been worded so not to require the agreement of the owners of the nominated properties, but rather to require the necessary agreements are first in place before the Protection Scheme is commissioned.

8.16 In certain circumstances this approach may be acceptable, however I am aware of one case[10] where the Environment Court has paused a final decision on a combined resource consents/notice of requirement process involving (non-compulsory) land acquisition because the land/mitigation agreements integral to the environmental mitigations relied upon had not been finalised.

8.17 Considering the particular circumstances of the proposal, in my opinion there are two substantive issues that neither the Application nor the s42A report address:

(a) The Applicant has indicated the agreement will be via a PWA process. The scope of the process may not necessarily address the full range or extent of adverse effects in a manner required under the RMA. Certainly to date, the indication from the Applicant is that the extent of effects considerations under a PWA process is far more limited than the catchment of effects on the Trust's property that are required to be assessed under the RMA;

(b) The process will not necessarily conclude with respective agreements. The PWA enables a compulsory acquisition pathway which may override the appropriate mitigation of some or all adverse effects arising from the proposal with compensation discussions happening months or years after the works have been completed. The s42A report references terms such as "fair, equitable and transparent" in terms of appropriate mitigation outcomes, but it acknowledges these outcomes in terms of PWA assessment criteria, not the assessment criteria set out in the RMA. For example at section 1.3.12:

> *"The PWA provides a clear framework for land acquisition, either by agreement or compulsorily, with the objective of placing affected owners in a "no better and no worse" position as a result of the Project."*

9 Condition 69 s42A report Appendix 1

10 [Mt Messenger/Te Ara o Te Ata Bypass] Director-General of Conservation v Taranaki Regional Council [2019] NZEnvC 203

8.18 In deferring an assessment of flood effects to a separate statutory or legal process, the s42A report relies on the Hearings Panel Directive #1, but it fails to address the part of the Directive to "*consider evidence relating to flooding and other environmental effects to the extent that such matters are relevant under the RMA*" (my emphasis). At the conclusion statement, the s42A report concedes that these effects are not addressed under the RMA, where it restates the Application position that compensation will address residual adverse effects that cannot be mitigated.

8.19 In my view this does not equate to an adequate assessment in terms of an RMA process, because the determinative matters of "no better no worse" do not necessarily address environmental issues. A PWA/legal process may compensate some or all of the financial and social consequences for the Trust, but it does not address the environment effects directly.

8.20 To further illustrate this matter, I refer to the discussion at section 6.11.2 of the Application which is repeated below:

> *"In this context, while social effects associated with relocation may be significant for affected individuals, they are addressed primarily through the PWA process rather than through RMA consent mechanisms. Accordingly, once acquisition and compensation are taken into account, the residual social effects associated with property relocation are not considered more than minor in an RMA weighting sense, notwithstanding that they are understandably significant for those directly affected."*

8.21 I do not agree with the assessment that "residual impact" is no more than minor when the outcome of an acquisition/compensation process is not known, or where a process is implemented without mutual consent. The decisionmakers in this regard will not be the Hearings Panel and the assessment parameters will not be those set out in the RMA.

8.22 In his evidence, Mr Exeter recants the position in the Application that financial compensation is the primary approach to manage worsened flood effects. In so doing, he instead undertakes a s104(1)(a)RMA assessment and describes a mitigation package that he concludes sufficiently reduce the effects to minor or less.

8.23 In relation to consequential flooding effects, at paragraph 15.9 of his evidence, he suggests a proportionate management response as follows:

- Retreated alignment [of the stopbank];
- Refinement of the alignment and construction footprint where practicable;
- Property specific responses including floor raising, relocation or acquisition[11]; and,
- Emergency management measures;

[11] Paragraph 14.6 also includes maintenance or reinstatement of access and services, construction management and emergency response measures

8.24 In one sense, the amended approach appears to still endorse a compensatory approach as further evidenced where he observes at paragraphs 15.4(c) and (d):

> *(c) where a part of a property is to be acquired, the acquisition may be relevant to the receiving environment and the identity and exposure of receptors, but it does not remove the need to assess the effect;*
>
> *(d) where a whole property will be acquired, any environmental effects will effectively be internalised and accepted by GDC, in which case they can be disregarded.*

8.25 Conversely, at paragraph 16.42 he appears to abandon any reliance on a PWA process where he observes conditions define mitigation outcomes to the extent an "*RMA response does not depend on the PWA outcome*".

8.26 For this reason he recommends the Hearings Panel remove the proposed conditions for a PWA/civil agreement solution entirely, notwithstanding the mitigation outcomes recommended do not address the consequential flood impacts on the Trust's property.

8.27 The exception is the suggested possibility to refine the alignment of the stopbank and therefore to bring the Trust's property into the protected area, a point made in the Trust's submission. However, the absence of any specific discussion in this regard in the Application, RFI responses or the Applicant's evidence statements suggest this is an option the Applicant chooses not to consider.

8.28 In my view, the approaches recommended have created a confused, ineffective approach to an RMA assessment of flood effects on the Trust's property.

8.29 Put simply, the s104 mitigation responses proffered are incapable of addressing the consequential increased flood risk on the Trust. I consider this matter is implicitly acknowledged in the various circular assessment processes, where references are ultimately made to an external compensatory solution.

8.30 Mr Exeter's evidence at paragraph 1.6 succinctly observes:

> *"…..the RMA does not require a proposal to produce no adverse effects. The relevant question is whether, having regard to the positive and adverse effects, the applicable policy direction, the alternatives considered and the mitigation available, the proposal represents sustainable management and whether the residual effects are acceptable.*

8.31 For the reasons I note above, in my opinion the residual effects have not been properly addressed to the extent that the sustainable management objectives of the RMA have been satisfied.

8.32 In my view the resource consent process has exposed the flawed alternative approaches to addressing the consequential flood effects of the Trust's property by:

(a) Conditioning for the transference of an RMA mitigation requirement to non-related statutory or legal mechanisms that may be implemented without mutual consent; or

(b) Reliance on specified s104(1) measures that will not mitigate such effects.

8.33 I agree with the evidence statement by Wendy Burgess that the design of the Protection Scheme should be amended to protect the Trust's property.

9.0 Adequacy of information

9.1 In my opinion, the contradictory approaches described above can be partly explained by the 11th hour decision to amend the proposal to incorporate the Trust's property. The explanation given is that this has resulted in less disruption to the adjoining Pine Hollows Trust site and particularly the substantial accessory buildings and operational assets associated with an equestrian activity it operates. The amendment may have partly achieved the objective, but in doing so it has transferred some effects and created additional effects that have still not been properly assessed.

9.2 This is perhaps most apparent where the s42A report focuses on the material provided in the Application without any apparent reference to the amendment to the proposal which directly affects the Trust's property. The amended plans are not tied to the recommended approved plans referenced in Appendix 13 or the approved plans schedule at proposed General Condition 1. In fact, the s42A report appears to rely on the outdated application information where its Appendix 2.1 (subject property plans) omit the Trust's property, notwithstanding part of the Upgrade Scheme will be constructed on it (refer Appendix 1 to my evidence).

9.3 Moreover, the increased flood effects as described in the material provided to the Trustees by Property Group Letter dated 18 June 2026 are not referenced in the s42A report, nor the attachments to it.

9.4 The above information gaps are compounded by the statements in the Application and the s42A report which both note that some hydrological aspects of the proposal are still uncertain. This lack of clarity in this relatively late stage of proceedings is concerning and makes it difficult for the Trust and its advisers to properly understand the implications.

9.5 Section 104(6)RMA empowers the Hearings Panel to decline a resource consent application on the grounds that there is insufficient information to enable a determination. The Applicant has gone to considerable lengths to research and evaluate the proposal and in this regard my view is that the information gaps described above should be resolved through the Hearings process rather than declining the proposal.

9.6 As noted in its submission, the Trustees are long term Te Karaka residents and have had an enduring association with the Te Karaka Volunteer Fire Brigade. They are committed members of that community and therefore support in principle the wider benefits the Protection Scheme will provide. Conversely, for the same reasons, the disbenefits that will result for the Trust as an affected party requires a transparent and proportionate consideration.

9.7 Mr Exeter at paragraph 14.2 of his evidence opines that the proposal provides mechanisms for property specific mitigation, design refinement, acquisition or compensation and emergency response. For the reasons I outline above, I do not share that view.

10.0 Condition certainty: proposed (s42A report) conditions 69 & 70

10.1 RMA s108AA expands on s108, and enables the grant of a resource consent subject to appropriate conditions directly connected with an adverse effect of the activity. The increased flood effects on the Trust's property is an adverse effect. Previously, I give reasons why I consider these conditions are not appropriate. In the event that the Hearings Panel determines otherwise, I offer the following comments on the effectiveness of the conditions.

10.2 In terms of the commonly accepted tests[12] for resource consent conditions, I consider proposed conditions 69 and 70 relate to a resource management purpose and therefore the activity. However, in my view they are neither reasonable nor certain.

10.3 Any increased flooding effects precipitated by the proposal (including the increase effects on the Trust's property) that have been or will be quantified through technical assessments, should be referenced in proposed condition 69. Instead, the condition is open-ended as it references "consequential flood effects" and could be interpreted to allow greater effects (including those beyond the "effects envelope" identified in the Application material). For example:

- Where proposed condition 69 refers to *"consequential flooding effects on the affected properties",* is this referencing the Design Flood, a lesser flood or the over Design Flood? In terms of consequential effects, does this include the Trust's dwelling, the crops, and farm infrastructure, noting that some of these matters have been separately conditioned? Is it intended to include social impacts such as stress and anxiety as legitimate consequential effects as referenced in the Application, the associated supplementary reports and the s42A report itself?

- A management plan approach may partly address some, but not all these matters. I agree with the evidence of Mr Exeter where he recommends important considerations such as these should be subject to specific conditions of consent, rather than left to a management plan process.

12 For example the Newbury Test (Newbury District Council v Secretary of State for the Environment [1981] AC 578 (HL)

- Post consent phase, how will GDC in exercising its resource consent monitoring functions, review compliance matters in deciding what “flooding effects” have been authorised by separate arrangement?

11.0 Other conditions assessment

11.1 The Trust accepts that it will inevitably experience some adverse effects on its amenity and routine farming operations associated with the construction of the Protection Scheme. The objective is to develop a suite of practical, enforceable conditions that respond to the operational needs of the Applicant but which set reasonable constraints in consideration of affected land owners and occupiers.

11.2 The Trust’s submission notes a concern relating to earlier iterations of the proposed conditions, particularly where an adaptive approach appeared to be taken to management plans intended to regulate actual or potential adverse effects associated with the construction phases of the project.

11.3 Further iterations of the conditions have better clarified the intent and therefore the subsequent certification processes for the associated management plans. Broadly, I consider the conditions proposed in Mr Exeter’s evidence are appropriate subject to the specific comments discussed below.

11.4 However, I remain concerned that draft management plans have not been submitted with the Application, particularly given the scale of the proposal and the associated actual or potential adverse environmental effects.

11.5 The following review is limited to the conditions having relevance to the Trust’s submission and adopts the numbering system set out in Mr Exeter’s evidence.

<u>General Conditions 1</u>

The extent of the stopbank changes are referenced in the plans schedule as Appendix 7. The main body of drawings are covered off in the February-April plans set described in the first row of the associated table. For the sake of clarity, the amended section of the stopbank should be referenced with the main plans set.

<u>General Conditions 2</u>

A reference is made to “buildings” as a guide to assess whether there will be consequential increase in flood hazard risk classification to other properties. The assessment criteria should be broadened to include other structures and capital improvements that may be adversely affected.

Condition 8: Construction Season & Hours of Operation

The proposed construction is well beyond the accepted season of October to April. The Trust's submission notes the concern of construction traffic creating soil compaction issues, which is an effect that intensifies during wetter periods. The Trust questions the extent of the construction season sought when the standard requirement is not routinely extended in earthworks consent approvals. My view is that standard works season should be imposed, retaining the option for the Applicant to apply for reason-specific extensions.

Condition 9: Minor works

Minor works are not defined. In my view they should be to give clarity to receivers and for the purpose of consent condition monitoring.

Condition 10:   Construction activities

The present iteration would permit 24 hour operation for "quiet construction activities and meetings subject to the imposition of night time noise standards. My view is that this is a very loose condition which has the potential to create unacceptable adverse effects to receivers. It is noted that the TRMP standard requires a 20 metre notional boundary envelope from a rural dwelling whereas the consent conditions propose to reduce this to 1 metre.

Furthermore, while the permitted noise standards account for the fact that rural activities can generate night time noise particularly during crop planting and harvest seasons, the extent of these activities will not be routinely experienced to the possible extent proposed.

"Quiet construction activities" are not defined and therefore are open to different interpretations. Furthermore, the condition does not reference sensitive receptors and therefore appears to apply generally, noting that mitigation of adjacent road raising activities by noise barriers is unavailable[13].

Whilst Figure 3 of Mr (Jamie) Exeter's evidence shows mitigated and unmitigated setbacks for the eastern section of proposed stopbank, no consideration is given to the Trust's residence which is only 90 metres distant. Instead, the CEMP discussed below is relied on.

Condition 11:   Construction Environmental Management Plan (CEMP)

Given the importance of this document in regulating construction activities and therefore the mitigation of construction effects on others, it is very disappointing that a draft of this Plan was not made available for review.

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13 Paragraph 5.1 J Exeter evidence

The s42A report notes that no submitter raised safety concerns about construction traffic, however this is a matter that is specifically discussed in the Trust's submission, given the proposal is to construct the stopbank over the alignment of the main farm access and to operate a haul route during the construction phase.

Nor is there any detail of the extent and location of alternative vehicle access arrangements during the construction period or how this may impact on established orchard blocks or long term soil compaction issues.

While the application is silent on the matter, the changed alignment will necessitate the removal of an important live shelter, and removal of some roadside live shelter trees to enable a temporary access.

Mr Exeter proposes a new subclause (m) to address specific effects on the dwelling at 29 Morris Road. The Trust's submission requested a similar consideration for its dwelling and wider farming operation that has not been actioned.

<u>Condition 13: CEMP certification</u>

There are some incorrect condition references.

<u>Condition 22: Communications Plan</u>

Without limiting the catchment of persons benefitting, it would be helpful if the "surrounding landowners and occupiers" are identified (including the Trust).

<u>Condition 33(c): Construction Noise & Vibration Plan</u>

There is a typographical error in the condition reference.

<u>Condition 35: Construction noise limits</u>

The condition wording is interesting because it purports to set maximum construction noise limits (higher than the TRMP standard) where "an activity cannot practicably comply." These higher limits apply 1 metre from the façade of a building within which a noise sensitive activity is undertaken. In each instance the CNVP must be adjusted. They apply to any occupied dwelling outside the "subject site". I am not sure if this is a reference to the Protection Area.

Mr (Jamie) Exeter's evidence describes how this concession is intended to apply to works elevated above dwellings where noise barriers are unable to be installed (for example where the State Highway adjacent to the Trust's property is to be raised). He further notes at paragraph 5.5:

> *"I consider overall that construction noise and vibration from the proposed works will not cause unreasonable disruption if the best practicable options to mitigate the effects are adopted through the provisions of a CNVMP that is certified by Council, and there is effective communication with the*

nearest receivers. This approach and the proposed limits are common for construction projects in New Zealand."

In my view this highlights the concerns raised in the Trust's submission that the management plan approach in the application does not enable affected receivers the opportunity to better understand the effects and what may be considered "unreasonable disruption."

As noted, for a project of the nature and scale of the Protection Scheme, Council's regulatory division should have required the Applicant to submit draft management plans to better inform affected parties' understanding.

<u>Condition 56: Construction noise limits</u>

There is a typographical error in the condition reference.

<u>Condition 78: Trust-specific condition</u>

The first point I note is that the Access & Orchard Operations Management Plan is to be prepared in consultation only with the Trust. It should provide for information to be provided to the Certifier where there are areas of disagreement.

While the Plan provides for the possible shared use of the existing access, the reality is that this will not be practicable. The Plan then address the construction of an alternative access but gives no direction relating to the reinstatement of affected parts of the Trust's orchard should it need to be removed post construction phase.

The amended construction plans show the alignment of the reinstated permanent access will be over the raised stopbank. Subclause (e) does not define what a "no less serviceable standard" might be. The evidence of Wendy Burgess describes how no provision is made for dual vehicle access over the raised section.

Furthermore, the condition does not address measures to protect against wandering stock, interference with GrowSafe spraying operations, and the health and safety of workers undertaking orchard activities in the vicinity.

The evidence of Mrs Burgess describes other matters which are not addressed in the condition.

12. Consents Bundling

12.1 This issue has relevance because one resource consent application is for passive flood flaps fitted to twin culverts draining a tributary to the Waipaoa River. It is therefore part of the Protection Scheme effects envelope. The status of that consent is for a non-complying activity which imposes more stringent assessment tests.

12.2 Caselaw establishes that where a proposal requires several, sufficiently interconnected resource consents, they should be "bundled" for joint assessment. Interconnectedness means there should be material overlap, including consequential or flow-on effects[14]. Only where the applications result in environmental effects which are genuinely distinct, (particularly where the matters reserved for control or restricted discretion are narrowly confined), a separate assessment may be appropriate.

12.3 The Applicant argues the flood flaps should be assessed separately because:

(a) They have a different activity status under the NES-FW; and,
(b) Are not integral to the proposal.

<u>Different activity status</u>

12.4 One reason advanced in the application to decouple the non-complying consent is because it is triggered under the NES-FW. Section 87A(5) of the RMA expressly provides that where an activity is described in a national environmental standard as a non-complying activity, then the requirements of s104D of the Act apply.

12.5 Regulation 74 of the NES-FW refers to the imposition of conditions relating to the passage of fish through the provisions of reg65 and reg62 (information on structures and information about flood flaps). In this regard, I agree that the consent categorisation is effects-specific to the extent that the decoupling of the consent application is appropriate.

12.6 However, caselaw on consents bundling has noted a holistic approach is required to an effects assessment which may broaden the scope, even requiring the effects of permitted activities are considered[15]. In terms of a holistic approach, I consider the following considerations are also relevant.

<u>Not integral to the wider stopbank project</u>

12.7 The Applicant's stance vacillates between a functional need for the flood flaps to a position where they are a minor structure that is not necessarily required. The Application describes the flood flaps "*as necessary for flood control"*. In the response to a request for information the importance diminishes, being "*a minor and discrete element that is not integral to the overall stopbank function"* and "the culvert *does not rely on it to achieve the primary flood protection outcomes of the project*."[16] What is meant by primary protection outcomes is not clarified.

14 Body Corporate 97010 v Auckland City Council [2000] 3 NZLR 513 (CA) and Bayley v Manukau City Council [1999] 1 NZLR 568 (CA)
15 Marlborough District Council v Zindia Ltd [2019] NZHC 2765, [2020] NZRMA 216
16 Stradegy RFI response letter dated 10 June 2026

12.8 More recently in response to a further clarification request, the advice now is that in the absence of the flood flaps, the stopbank would still function, "*albeit less effectively*". The s42A report has taken that advice at face value without further seeking detail on what a "less effective function" means. Of concern is that there is no enquiry of the actual or potential effects arising from the proposal in the event that its function is impaired without the flood flaps. In my view, such an enquiry is critical to a proper analysis of the matter.

12.9 Putting aside the fact that the operational and regulatory approaches have been to bundle the remaining consents as a Discretionary activity (where all assessment matters are not fettered) my understanding is that a holistic assessment[17] is required and the principal matter is the degree of overlap between consent activities.

12.10 To understand the rationale of decoupling the flood flaps consent, further guidance is provided at section 1.4 of the s42A report where the flood flaps are described as a "*discrete structure with distinct ecological and hydrological effects relating to fish passage, habitat and residual flows*". Support for this position is provided by an assessment of TRMP policy C6.3.12(5).

12.11 In my view this assessment fails to acknowledge there are much broader policy considerations such as the guidance in sub policy 2 where the proposal should be allowed only where other criteria are met including:

a) It is reasonably necessary to provide for the benefits outlined in Policy C6.3.12.1;
b) There is a functional need to do so;
c) There is no practical alternative;
d) <u>Significant effects are avoided or other adverse effects are avoided, remedied or mitigated </u>[my emphasis].

12.12 Sub policy 1 includes flood control and in this regard the policy is met. Presumably, there is no practical alternative because the applicant persists in seeking consent for the structures. However, in my view the information so far presented does not enable an appropriate assessment of sub policies (b) and (d), particularly whether the structure would avoid or mitigate broader effects on the aquatic values of the tributary.

12.13 Furthermore, the Applicant focuses on the need for the structure in terms of maintaining the integrity of the Protection Scheme, whereas the s42A report focuses only on a very narrow consideration of the aquatic values of a tributary. In my view, neither of these approaches are sufficiently robust to enable a determination that a consent bundling issue does not apply. The result is to compartmentalise the proposal to obscure the overall effects, to disregard the extent of overlap effects and therefore to fail to consider the activity "in the round"[18]

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17 For example, Marlborough District Council v Zindia Ltd [2019] NZHC 2765, [2020] NZRMA 216
18 Bayley v Manukau City Council [1999] 1 NZLR 568 (CA)

12.14 The policy framework requires a broader assessment of the degree of overlap between the matters and effects requiring consideration. There is simply not sufficient information to enable an assessment that the flood flaps consent is such a genuinely distinct component that there no consequential or flow-on effects between the areas of consideration.

12.15 Therefore, in terms of the effects gateway, the adverse effects of the whole bundled proposal should be considered, not merely those generated by the particular non-complying component.

12.16 Drawing together the rules of practice developed by various judicial decisions on resource consent bundling, my assessment in this regard is as follows:

(a) The Applicant has persisted with the flood flaps application, and based on its Application statements, suggests that the proposal cannot sensibly proceed without it. In that sense it is an integrated activity rather than a case of an independent activity simply occurring at the same time or place;

(b) All other associated resource consent applications have been bundled, some of which are quite specific (for example the consent to undertake minor works in the margin of an isolated wetland). The fact that the flood flaps consent has been decoupled when a similar argument could be made for some other consents, is because of the non-complying status. The applicant concedes this is deliberate[19];

(c) The most important consideration is whether the effects of the flood flaps (or more relevantly, the effects without them), overlap. Case law confirms that an overlap occurs where the effects of one consent will compound, enable or have consequential effects of other consents. The application detail, RFI responses and s42A report analyses are conspicuously absent in detail in this regard.

(d) Mr Foote's evidence[20] confirms the reason for the flood flaps is to prevent backwatering, that is, the backflow of floodwaters overtopping the banks of the tributary and then "*flowing along the State Highway towards the Cliff Road intersection and the township.*" He explains how the flaps are necessary to accommodate events more frequently experienced than the Design Event and relevantly he confirms that without the flood flaps:

> *"there would remain a pathway for surface flooding through the culvert system towards the township during a sufficiently large flood event".*

In my view there is a sufficient overlap of flooding effects to confirm the flood flaps are an integral component of the Protection Scheme;

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19 Ibid[10]

20 Paragraph 7.1

(e) Therefore a critical question is whether the flooding and hydraulic effects of the proposal with or without the flood flaps are capable of being allocated squarely to individual consent components. In my opinion, the Applicant's evidence establishes a sufficient interdependence and therefore a bundled, whole-of-project assessment is more appropriate;

(f) The consequential or flow on effects, not only in terms of aquatic values within the tributary, but a wider area, is a relevant policy consideration but is one which is not addressed in either the application or the s42A report[21]. To separate the decision process runs the risk that the environmental effects produced by the project as a whole are not addressed.

12.17 In my opinion neither the application nor the s42A report have established a case for the decoupling of the flood flaps consent. As a result, the s104D gateway tests have been incorrectly applied to a very small component of the activity rather than the overall project.

12.18 Having further regard to the gateway tests, I agree with Mr Exeter where he concedes at paragraph 15.21 that the actual or potential adverse effects are more than minor and therefore the requirements of s104D(1)(a) are not met.

12.19 However, I am unable to agree with his comment that the proposal is not contrary to the relevant planning framework when considered as a whole for the reasons discussed previously. There are numerous examples of objective and policy requirements that require appropriate mitigation of adverse effects, not only to the broader ecological values of the tributary, but the gamut of other environmental considerations.

12.20 For the reasons I have discussed, there are aspects of the application that do not establish appropriate means to avoid, remedy or mitigate the consequential adverse effects of the Protection Scheme. Accordingly, without further mitigation, in my opinion the proposal fails to meet the objectives and policies gateway in s104D(1)(b).

Ross Muir
22 September 2026

[21] For example, at the policy discussion of freshes in the s42ARMA report, the assessment is limited to the discharges from the tributary, not the effect of the backwatering effects as described in Mr Foote's evidence

APPENDIX 1

Map Prepared	Te Karaka Eastern Side	DISCLAIMER: This map/plan is illustrative only and all information should be independently verified on site before taking any action. Whilst due care has been taken, Grip gives no warranty as to the accuracy and plan completeness of any information on this map/plan and accepts no liability for any error, omission or use of the information. SOURCES: Property & Imagery: LINZ CC BY 4.0 Copyright © Grip Limited
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