IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Resource Consents and Notices of Requirement for the Central Interceptor main project works under the Auckland Council District Plan (Auckland City Isthmus and Manukau Sections), the Auckland Council Regional Plans: Air, Land and Water; Sediment Control; and Coastal, and the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health

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LEGAL SUBMISSIONS IN REPLY ON BEHALF OF WATERCARE SERVICES LIMITED

13 AUGUST 2013

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1. INTRODUCTION

1.1 The purpose of these submissions is to reply to certain matters raised during the course of the hearing where they have not already been covered by the supplementary statements of evidence already provided during the presentation of Watercare's case. We will not restate Watercare's case which is outlined in the opening submissions, as there is nothing in the evidence of the submitters which would cause us to change our conclusions about the appropriateness of the Project and our submission that you should recommend the Notices of Requirement ("**NOR**") be confirmed and grant the consents sought, subject to the "**Reply Set**" of proposed Consent and Designation Conditions tabled as part of this reply.

1.2 The reply submissions address matters raised:

(a) by members of the Panel during the presentation of Watercare's case;

(b) by submitters; and

(c) by Council staff and consultants.

1.3 In particular, these reply submissions will address the following:

Part 1

(a) Legal issues raised by Panel:

(i) bundling;

(ii) Best Practicable Option; and

(iii) the extent of the designation at the Mangere Wastewater Treatment Plant ("**Mangere WWTP**") and consents required for activities at that site.

(b) Conditions queried by Panel:

(i) commencement;

(ii) lapse date;

(iii) the term of Emergency Pressure Relief ("**EPR**") discharge;

(iv) approval of management plans;

(v) "as far as practicable";

(vi) timing of section 176 approvals; and

(vii) other amendments to the conditions.

Part 2

(c) Some issues raised by submitters, either by topic or site:

(i) "In general accordance with";

(ii) the relevance of the draft Unitary Plan;

(iii) Mount Albert War Memorial Reserve;

(iv) Lyon Avenue;

(v) Haverstock Road;

(vi) May Road;

(vii) Keith Hay Park;

(viii) Kiwi Esplanade; and

(ix) EPR structure.

Part 3

(d) Reply Set of Conditions; and

(e) Conditions in dispute with Council staff and consultants.

1.4 Brief statements of reply evidence will also be given by:

(a) Clint Cantrell;

(b) John Cooper;

(c) Belinda Petersen;

(d) Mathew Cottle;

(e) Leo Hills;

(f) Dave Slaven; and

(g) Peter Roan.

1.5 These witnesses will address various matters raised by submitters, or by the Council in respect of Conditions. That evidence expands on points we cover and deals with some other matters where nothing more needs to be added from a legal perspective. Watercare's Reply is therefore comprised of both these legal submissions and the reply evidence.

PART 1 - PANEL QUERIES OR ISSUES

2. BUNDLING

2.1 In our opening legal submissions, we set out Watercare's position on the bundling of the various consents involved in the Project. We explained that Watercare reluctantly agreed with the Council's request to bundle the activities requiring consent **within** each of the various regional and district plans (and National Environmental Standard), so that there was one overall activity status for each of the plans, but opposed any further bundling of activities **across** plans. Watercare remains of the view that the bundling of activities is not always appropriate *either* within plans, *or* across plans.

2.2 In response to this position, the Commissioners raised the following queries:

(a) Are there any practical consequences of the Council's approach to bundling?

(b) Where a project is interconnected, and it may not be possible to construct elements independent of the whole, does case law require it to be bundled?

2.3 We address each of these in turn.

Practical consequences

2.4 As we explained in response to this query at the hearing, there are a number of potentially significant practical consequences to the bundling approach proposed to be taken in the Council Pre-hearing Report.

2.5 The first is in relation to the intended activity status. Watercare, along with many other prospective resource consent applicants, expend great cost and, at times, years of litigation, in order to ensure that there is as supportive a planning framework as possible in place in relation to their likely future activities. For example, Watercare has been actively involved for approximately a decade in the Auckland Regional Plan: Air, Land and Water ("**ALWP**") process in order to ensure its likely future activities obtain an appropriate activity status under that plan, with related assessment criteria often of a limited or constrained nature.

The Council's proposed bundling approach would have the effect of entirely negating or disregarding the activity status determined through that planning process. Regardless of the level of effect, or the status of an activity under that plan, all of the activities involved in the entire project would go into the most unfavourable category of non-complying and, to put it bluntly, everything would be up for grabs. The constrained and focussed approach intended by the plan for the specific activities would be ignored. Instead, the entire project would need to be thoroughly and comprehensively assessed to be satisfied it passed the threshold tests in section 104D, and the extent of assessment required under section 104 would be similarly expanded. Under this reasoning, individual activity status classifications in plans would become largely irrelevant and redundant and large projects of this type would likely always default to a non-complying status. This begs the question - what is the point of the individual activity status under the plan?

2.6 By their very nature, large infrastructure projects sometimes struggle to meet the effects test in section 104D, leaving only the objectives and policies test. An approach which results in a large number of otherwise discretionary or even controlled activities that are unrelated and geographically isolated all being re-classified as non-complying means that the assessment required to demonstrate that a proposal taken as a whole can meet the objectives and policies test in section 104D(1)(b) is enormous and needs a vast range of objectives and policies under potentially a large number of plans to be considered.

2.7 This should be particularly concerning where almost all aspects of a proposal are controlled or restricted discretionary under the plans (and therefore considered to be generally appropriate subject to controls / conditions), but a small component, for example earthworks in one location, tips the entire application into non-complying status. There will be situations where, for example, a controlled activity under one plan may be contrary to an objective or policy under an entirely different plan. Would this preclude consent even if the activity were wholly consistent with the objectives and policies of the plan under which consent was needed for that activity? Hypothetically, is it appropriate that a proposal which is acceptable according to almost all of the rules in a regional plan, for example, needs to be assessed in its entirety as

non-complying, and potentially turned down, because consent is needed in a geographically separate part of Auckland for a completely different reason?

2.8 In our submission, there are potentially significant practical consequences of the Council's approach to bundling, despite the fact that the Project passes at least one of the gateway tests.

Does the case law require this Project to be bundled?

2.9 The Courts have found that the **degree** of overlap or interconnection between the various consents will be determinative of the bundling approach taken in the particular case. Where there is no overlap of effects, it is clear there is no need for a holistic approach to the entire application. Where there is some overlap, a factual evaluation is required. Matters relevant to this evaluation will include:

(a) the extent to which the consents can be carried out separately; and

(b) the extent to which the effects of each of the consents overlap.

2.10 The general approach of consent authorities is that the holistic approach is appropriate where there is a clear overlap between the activities that require consent. As such, a consent authority will not artificially split off consents that are part of a proposal, and which overlap, merely on the basis of different activity classifications. Conversely, in situations where consents do not impact on one another, they can be considered separately.[1]

2.11 The evidence for Watercare, particularly that of Mr Cantrell, is that the Central Interceptor, once constructed, would essentially operate and function as an overall interconnected system. We agree that the Central Interceptor itself will ultimately operate in an interrelated and cohesive way. However, the main project works themselves require a number of consents relating to construction activities at a number of distinct sites, and we do not consider these to be connected in the same manner. The reality is that the **effects** of many of these isolated activities will not impact on, be dependent on, inter-relate, or overlap

[1] *Body Corporate 97010 v Auckland City Council* (2000) 6 ELRNZ 303.

with, the effects of other activities at other sites located a considerable distance away and mostly above ground (the proposed main tunnel is 13 kilometres in length).

2.12 Mr Cantrell also explained earlier in the hearing that, with the intended phasing of construction, activities at the various sites will start and finish at different times. It is intended that construction of the main tunnel will occur as two drives, in different directions over a six year period. Above ground activity at the surface construction sites will similarly be staged, with some sites being constructed (and potentially completed) well in advance of others. Therefore, not only are the activities going to be geographically remote from one another, but also, in some instances, temporally remote.

2.13 While we acknowledge that Watercare agreed to the Council's approach to bundle within plans, albeit unhappily,[2] Watercare's starting point was that the consents for the Project should be grouped on a site by site basis to acknowledge the independence of both the sites and the effects of the activities undertaken at each of them. For example, this approach would have seen the consents for the Project being separated into groups based on location, including: each individual surface site; individual sectors between the sites; sectors covering activities within the Coastal Protection Yard and within the Coastal Marine Area ("**CMA**").

2.14 This approach would have more appropriately recognised that the Project covers a large geographical area (with works taking place over a long period of time) and that activities within a specific area are most likely to have effects that may overlap with other activities within that area, rather than activities carried out in another area under a different plan. However, grouping the consents by surface site (or project sector) would have resulted in the same (or largely similar) consents being granted for each surface site resulting in an unmanageable number of different consents. If the site by site approach had been pursued, it may have been sensible to bundle within each plan for each site, but the expectation was that there would be no bundling across the various construction sites, or between surface and at-depth activities.

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[2] This agreement to the bundling approach was largely to satisfy the Council, and also meant that the more efficient approach of applying for common consents across sites could be pursued.

2.15 In the end, a site by site approach was not adopted and Watercare instead applied for consents that applied Project-wide. The Council's approach to bundle **within** plans was accepted by Watercare, and Watercare was and is content to proceed on that basis (particularly given the approach put forward to apply for common consents applying to all sites rather than potentially hundreds of consents on a site by site basis). That being said, we do not consider that this compromise warrants the Council taking the further step of applying the approach **across** all plans, particularly without Watercare agreeing to that approach given the considerable prior discussions and the concessions made.

2.16 Where there is a very clear overlap of activities and effects, ie they are all on the one site, perhaps a different approach may be warranted. For example, we referred in our opening submissions to the *Newbury* case, which held that the Environment Court had not erred in bundling together activity consents from different council plans because of the overlap of the activities.[3] As set out in Watercare's opening legal submissions,[4] we submit that the Project is distinguishable from *Newbury* and other cases where an "across plan" approach has been accepted.[5] Those cases concerned the development of a single site where the effects of the development clearly overlapped and were interrelated. In comparison, and as discussed above, the effects of the Project can be realistically separated and therefore do not meet the criteria necessary for bundling across plans (that is, effects must overlap and be interrelated).

2.17 We maintain that the bundling of consents across a large number of different plans is inappropriate considering that all the plans have a distinct purpose - they are designed to contemplate and regulate different activities with different effects - that is why they are the subject of different plans. For example, the underlying approach to land and water / discharge activities under the Resource Management Act 1991 ("**RMA**") differs, with land use being permissive in nature, and coastal / water related activities being restrictive. This example highlights that

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3 *Newbury Holdings Limited v Auckland Council* [2013] NZHC 1172 at [62].

4 Refer to [6.7] to [6.10] of Watercare's opening legal submissions.

5 See for example *Tairua Marine Limited v Waikato Regional Council* ENC Auckland A108/05, 1 July 2005 at [181] - [182] (concerning the development of a marina at Paku Bay) and *Graham v Dunedin City Council* ENC Christchurch C43/2001, 9 April 2001 at [45] (concerning the construction and operation of significant additions to an egg poultry facility). *Newbury* concerned the development of a single site to accommodate the applicant's operations.

the effects considered by different plans, as a general rule, should be considered quite separately.

2.18 In addition, generally where consents are needed for a project under both a regional and a district plan, separate applications are made to the two consent authorities. Each application may bundle within the relevant district or regional plan and provide an over-arching activity status for the proposed activity under that plan. It would then be open to the consent authorities to hold a joint hearing if they considered it to be appropriate under section 102 of the RMA. Even if a joint hearing were held, the consents required under the different plans would remain distinct and it is possible, for example, that the consents under the district plan could be granted and the consents under the regional plan declined. There is no reason for the approach to be any different where a unitary consent authority is involved.

2.19 In summary, we submit that the case law does not require you to bundle all consents under all plans for this Project.

3. BEST PRACTICABLE OPTION

3.1 Various witnesses have used the term "best practicable option" (or "**BPO**") in their evidence and have stated that the Project is the BPO for achieving an integrated solution that meets the future needs of the wastewater network in Auckland. In particular, the main project works is considered to be the BPO because it is the only option that can address all three of the key drivers identified through the Three Waters Final 2008 Strategic Plan ("**Three Waters Plan**") process.

3.2 During the hearing the Commissioners queried whether the evidence is providing the justification for this conclusion or whether it is also partly based on background material, including the Three Waters Plan.

3.3 Watercare has relied on the Three Waters Plan as part of the context for the BPO justification for the Project and the wider Scheme.[6] Once the Central Interceptor Scheme is completed (that is the main project works and the CSO Collector Sewers), it will reduce the average

[6] Note that the Three Waters Plan, although presented as a standalone document, is supported by 34 separate background documents. At the commencement of the concept design phase for the Central Interceptor Project, Watercare's consultants reviewed the outcomes of the Three Waters Plan to ensure that the conclusions with regards to the Central Interceptor Project remained valid.

annual wastewater overflow volumes discharged from the network within the Central Interceptor catchment by approximately 80%.

3.4 As the Commissioners are aware, Watercare has separately applied for a Network Discharge Consent from the Council to authorise existing and future (albeit significantly reduced) overflow discharges from the public wastewater network within the Central Interceptor catchment area. The application for the Network Discharge Consent was provided to the Council on the same day as the application and NORs for the main project works.

3.5 The Network Discharge Consent is sought as a restricted discretionary activity in accordance with Rule 5.5.11 of the ALWP and Rule 20.5.11 of the Auckland Council Regional Plan: Coastal ("**Coastal Plan**"). After the Network Discharge Consent application was provided to the Council for lodgement, the Council advised Watercare that it was more appropriate that lodgement of that application be delayed until the Coastal Plan was made operative. This was due to an outdated cross-reference in Rule 20.5.11 of that plan to a rule in the ALWP which has since been updated.[7] The cross-referencing was being corrected through the resolution of outstanding appeals to the Coastal Plan and once operative, the corrected rule will apply.

3.6 Watercare had expected the Coastal Plan to be made operative more quickly than has eventuated, and always intended that the two applications would be progressed in the same timeframes. The Council and Watercare continue to share the same view that it is more appropriate to wait for the Coastal Plan to be made operative to remove any possible dispute over the correct version of the rule and resulting activity status. Watercare has continued to progress its "draft" application with the Council in a timely manner and will continue to do so.

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[7] Rule 20.5.11 of the Coastal Plan requires that direct discharges of sewage to the coastal marine area by a wastewater network utility operator within the urban area be assessed under Rule 5.5.11 of the ALWP. Rule 5.5.11 of the ALWP is restricted discretionary, hence the Coastal Permit application for network discharge under 20.5.11 of the Coastal Plan shall be assessed as a restricted discretionary activity. The reference to discretionary activity status in the Advice Note to rule 20.5.11 is out of date and is in the process of being updated through the resolution of outstanding appeals to the Coastal Plan.

3.7 A key component of the Network Discharge Consent application is to address the requirements of the Coastal Plan and the ALWP for the adoption of a BPO methodology for managing discharges from the wastewater network.

3.8 While the Central Interceptor Scheme as a whole (comprising of the three separate parts) is considered to be the overall BPO for the catchment, the BPO test is only relevant in respect of discharge applications and as such, will predominantly be addressed in the separate Network Discharge Consent application. This means that, as part of this hearing and package of works, you do not need to decide or determine whether the Project or the Scheme is the BPO.

3.9 It is, however, within your role to determine that:

(a) the EPR discharge is the BPO; and

(b) the conditions imposed on the Project in relation to noise and other discharges (including stormwater and air) are appropriate.

3.10 We address each of these below.

Role of BPO in the RMA

3.11 Section 16(1) of the RMA provides that:

> Every occupier of land (including any premises and any coastal marine area), and every person carrying out an activity in, on, or under a water body or the coastal marine area, shall **adopt the best practicable option** to ensure that the emission of noise from that land or water does not exceed a reasonable level.

3.12 Section 108(2)(e) of the RMA provides that:

> (2) A resource consent may include any one or more of the following conditions:
>
> (e) ....requiring the holder [of any discharge permit] to **adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment** of the discharge and other discharges (if any) made by the person from the same site or source.

3.13 The BPO, in relation to the discharge of a contaminant, is defined in section 2 of the RMA as being the best method for preventing or minimising the adverse effects on the environment, having regard to:

(a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and

(b) The financial implications, and the effects on the environment, of that option when compared with other options; and

(c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

3.14 In addition, before a BPO condition can be imposed, a consent authority must be satisfied the condition is the most efficient and effective means of preventing or minimising adverse effects, having regard to the nature of the discharge and receiving environment and other alternatives available, including requiring the observance of minimum standards of quality of the receiving environment. The Courts have held that the requirements of section 108(e) will be satisfied by *"ensuring that the contaminants discharged by the applicant are at a level which on the best scientific and technical information available constitutes the best practicable option of minimising adverse effects on the environment*".[8]

3.15 The adoption of a BPO, or ensuring discharges are managed within a BPO framework, is also required under the various objectives and policies of the Coastal Plan and ALWP. These objectives and policies require an applicant to adopt a BPO approach for the management of any diversion and discharge, having regard to the BPO statutory criteria in the RMA.[9] For example, Policy 20.4.3 of the Coastal Plan provides that any proposal to discharge contaminants or water into the "CMA" (unless the discharge is prohibited) shall be considered appropriate only if it can be demonstrated that it is the BPO in terms of preventing or minimising adverse effects on the environment.

3.16 It is clear that the aspects of the Project that need to adopt the BPO relate to the:

(a) EPR discharge;

(b) noise; and

(c) conditions imposed in relation to other discharges.

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8 *Medical Officer of Health v Canterbury Regional Council* (PT) Wellington W109/94 15 November 1994 at pages 25 and 26.

9 For example, Objective 20.3.2 and Policies 20.4.3 and 20.4.11 of the Coastal Plan and Objective 5.3.8 and Policy 5.4.4 of the ALWP.

Emergency Pressure Relief Structure

3.17 As you have read, and heard, the evidence of Mr Munro, Mr Cantrell and Mr Roan all provide technical information that places the discharge from the EPR in the context of a BPO framework, consistent with the requirements of Policy 20.4.11 of the Coastal Plan.[10] Mr Cantrell and Mr Roan provide further evidence on the EPR as part of the Reply.

3.18 We consider that the EPR discharge satisfies the BPO requirements for the following reasons:

(a) The Project design includes the construction of an EPR structure which will allow for safe and controlled discharge in the event of extreme inflows to the main tunnel **combined** with an emergency event (e.g. prolonged pump station failure), thereby providing flooding protection for the main tunnel and proposed Mangere Pump Station. Watercare has designed the Project (through various pre-emptive design measures) so that the likelihood of a discharge from the EPR structure is extremely low, at 1 every 50 years. As a result, a series of events would need to occur in combination for the discharge to occur.[11]

(b) Following an assessment of various locations for the EPR structure (including locations at Pump Station 25, Pump Station 23 and at Kiwi Esplanade), the proposed location is considered to be the only feasible option and has the least risk in terms of operational access, overflow response requirements and ecological effects.[12] The proposed location is also considered to be the best location as it is the most remote from residential areas, areas where there is potential water based contact recreation and it also enables the discharge to operate by gravity, rather than by mechanical or electrical system.[13]

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10 Evidence of Ms Russ at [6.90].

11 Evidence of Mr Cantrell at [2.10] and Mr Roan at [2.2] and reply evidence of Mr Cantrell at [5.3]. The reply evidence of Mr Roan at [4.1] to [4.4] provides further detail of the rate and volume of a discharge from the EPR if one occurred (taking into account the various pre-emptive measures Watercare has in place to mitigate the discharge).

12 Evidence of Mr Roan at section 5 and Mr Cantrell at [8.14] to [8.18].

13 Evidence of Mr Cantrell at [6.14], [6.15] and [8.14].

(c) If a discharge were to occur from the EPR, the effects on recreational or ecological values would be of a temporary nature, lasting only several weeks and reducing within that period through ongoing dilution.[14]

Noise

3.19 As noted above, section 16 of the RMA imposes a duty to ensure that the emission of noise does not exceed a reasonable level through the adoption of a BPO.

3.20 The BPO is the optimum combination of all methods available to limit the noise to residents to the greatest extent achievable,[15] taking into account the various considerations set out in the definition in section 2 of the RMA (set out in full above), including the nature of the emission and the sensitivity of the receiving environment to adverse effects.

3.21 Proposed Designation Condition CNV.2 provides that Watercare shall undertake the works to achieve, as far as practicable, compliance with the requirements of NZS6803:1999 Acoustics — Construction Noise. However, Watercare has acknowledged that there may be instances where the noise emitted from the works is unable to meet this standard. Proposed Designation Condition CNV.4(h) requires the adoption of the BPO where the noise standard cannot be complied with:

> where full compliance with NZS6803:1999 cannot be achieved, the CNVMP shall set out the methodology for handling non-compliances (including drafting site specific CNVMPs) so that the Best Practicable Option is adopted, including setting out the consultation undertaken with affected stakeholders in developing the Best Practicable Option;

3.22 In the Reply Set, Watercare proposes amendments to both CNV.2 and CNV.4 to ensure that, in the event of non-compliance with the standard, affected stakeholders will be consulted in the identification and development of the BPO. This will ensure that the BPO will adequately respond to the receiving environment and limit the noise effects on affected stakeholders to the greatest extent achievable.

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[14] Evidence of Mr Roan at [2.5] to [2.8] and his reply evidence at [4.2] - [4.4] and [5.1] - [5.6].

[15] *Auckland Kart Club Inc v Auckland City Council* (PT) Auckland A124/92 22 October 1992.

Conditions imposed in relation to other discharges

Air discharges

3.23 Similarly, in respect of air discharges, section 108(2)(e) provides that a consent authority may impose a condition requiring a consent holder to adopt the BPO to prevent or minimise the adverse effects of any discharge.

3.24 As explained in the evidence of both Mr Cantrell and Mr Kirkby, the adverse effects of discharges to air arising from the operation of the Central Interceptor will be no more than minor and, in some cases, will be reduced when compared to the existing situation.[16] In the event that unexpected odour issues arise, provision has been made for additional air extraction and air treatment facilities to be installed at other key points along the main tunnel.[17]

3.25 Watercare has also proposed conditions to ensure that odour discharges are kept to minimum levels (Consent Condition 7.2) and any odour operational discharges do not cause adverse effects at any private property (residential or otherwise) that are offensive or objectionable (Consent Condition 7.3). Any odour discharges will be no more than minor and there is provision for additional air treatment facilities to be provided in the unlikely event there is an odour issue. The best practicable option has therefore been adopted in respect of potential odour discharges.

Stormwater and construction-related discharges

3.26 As noted above, the Coastal Plan and ALWP both require an applicant to either adopt a BPO approach for any diversion and discharge of stormwater, or ensure discharges are managed within a BPO framework.

3.27 Watercare has applied for nine consents under the Coastal Plan and ALWP for construction-related and stormwater discharges to land and the CMA from construction and permanent works. These consents are set out in the primary evidence of Ms Russ at paragraphs 4.11(e) and (f) and Tab A of the opening legal submissions.

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16 Refer primary evidence of Mr Kirkby at [2.9] and [5.81] in particular.
17 Refer primary evidence of Mr Kirkby at [2.4].

3.28 The Central Interceptor Main Project Works Assessment of Effects of the Environment, submitted to the Council on August 2012, concludes that the effects of stormwater and construction-related discharges are considered to be minor in nature and necessary to undertake the proposed works.[18] In addition, the actual effects of the discharges are able to be managed and mitigated through the implementation of appropriate conditions. Watercare has proposed conditions that require the treatment of discharges prior to their release (Condition 3.3), measures to be installed to mitigate stormwater effects at particular sites (Condition 5.2 - which requires rain tanks to be installed at the Western Springs and May Road sites) and the preparation of various management plans to manage stormwater and construction discharges from both construction and permanent works (Conditions 3.3 to 3.5, 6.2 to 6.4 and 6.9 to 6.13). The BPO has therefore been adopted in respect of potential stormwater and construction-related discharges.

4. MANGERE WWTP DESIGNATION AND CONSENTS

4.1 Clarification was sought as to:

(a) the spatial extent of the designation at the Mangere WWTP and, in particular, how the location of the works related to the boundary of the designation; and

(b) which of the consents sought would apply to the primary construction site at Mangere WWTP.

4.2 A map has been prepared (**attached** at **Tab C** to these reply submissions) that shows the location of the primary construction site within the boundary of the existing designation. It is clear from this map that the entire site, including the EPR structure, is well within the boundary of the existing designation for the Mangere WWTP. We note, however, that the geographical extent of the designation has not been updated to reflect the reinstatement of the CMA since the former oxidation ponds were removed. Watercare is therefore only relying on the existing designation for the EPR structure for that part that is above mean high water springs (MHWS).

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[18] Part A of the Central Interceptor Main Project Works AEE, dated August 2012, at pages 125 - 126 and 137.

4.3 A number of the regional consents applied for cover the works at this site. By reference to the table attached at **Tab A** to our opening submissions, the regional consents required for works at this site are those numbered 4, 5, 6, 7, 12, 13, 14, 17, 18, 19 and 20. These are all noted as being either "Project-wide" or specific to the proposed Mangere Pump Station or EPR structure.

4.4 While not an issue raised by the Commissioners, it is appropriate to address here Mr Demler's concern about Watercare's ability to rely on the Mangere WWTP designation given that these new works were not included in the original Outline Plan of Works ("**OPW**") lodged in 2002.[19]

4.5 With respect, Mr Demler has misunderstood the nature of OPWs. During the term of a designation, multiple OPWs can be lodged to authorise *new* works on the designated land provided the works are within the scope of the designation.[20] Therefore, the fact that the original OPW lodged in 2002 did not include the Project works does not mean that the designation needs to be modified, nor that Watercare is precluded from undertaking the Project. Other OPWs have also been submitted since that time. The existing designation No.144A provides for "Wastewater treatment plant processes and ancillary activities" as a permitted activity. The proposed Mangere Pump Station is within the scope of the designation and a new OPW will be prepared in due course. Watercare has undertaken many works at the Mangere WWTP since 2002, continues to do so, and lodges OPWs as and when required. This is no different than many other major infrastructure facilities, where ongoing OPWs are sought to cover new buildings or major renovations (e.g. Auckland Airport).

5. COMMENCEMENT

5.1 Commissioner Hill raised a query in relation to what "construction completion" would actually mean in the context of Watercare's proposed lapse and commencement conditions. In this regard, Watercare has proposed that the consents which apply to the permanent or operational works should not commence until they are

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19 Refer to paragraphs [4.6] to [4.8] of Robert Demler's submission.
20 Section 176A of the Resource Management Act 1991.

needed, i.e. when the permanent works are in place and/or the Central Interceptor system is up and running.

5.2 In the Hearing Set of Consent Conditions Watercare proposed the following phrases as triggers for the commencement of the operational conditions (consents 40837, 40838, 40839, 40840, 40849, 40842 and 40850):

(a) "the date on which construction is completed at each site";

(b) "the date on which construction is completed at the first of the two construction sites"; and

(c) "the date on which the commissioning begins".

5.3 Further thought has been given to this, and new phrases are now included in the Reply Set of Consent Conditions, as discussed below.

"Construction is completed"

5.4 The conditions of the construction contracts will require the issue of a "practical completion certificate" and at that point the works will legally transfer from the contractor to Watercare. This is the best way to define the point at which the construction works can be considered to be complete. Watercare suggests that this should be the point in time when the permanent stormwater discharge consents commence.

"Commissioning begins"

5.5 Commissioning will be over a period of several months and may start earlier for some components, such as for gates and chambers, than others. However, the tunnel will not be able to accept wastewater until the proposed Mangere Pump Station is complete and ready to pump that wastewater. After that date the Project can accept wastewater, potentially cause discharges to air, and there will be the potential for a discharge through the EPR. Watercare therefore suggests that the date the practical completion certificate is issued for the proposed Mangere Pump Station should be the point in time when the air and EPR discharge consents commence.

5.6 We have amended the relevant conditions accordingly in the Reply Set of Conditions and will draw your attention to them when we address the Reply Set later in these submissions.

6. LAPSE DATE

6.1 Earlier in the hearing Commissioner Majurey queried the necessity of the 15 year lapse period given that construction is currently scheduled to begin in 2017 and finish in 2023 (i.e. potentially being complete within 10 years). He expressed concern about the estimated life of the Western Interceptor and a delayed start to the Project.

6.2 In our submission the 15 year lapse period is entirely appropriate given:

(a) The uncertainty in the case law as to what is required to "give effect" to a consent, with some judges concluding that completion is required.

(b) The expectation that construction is intended to start in 4 years and take a further 6 years to complete, making it:

(i) impossible to "give effect" to the consents within 5 years; and

(ii) only possible to "give effect" (under all interpretations) to the consents if there are absolutely no unexpected delays.

(c) To do otherwise would be likely to put Watercare in the position of having to seek an extension to establish "substantial progress or effort" has been made.

6.3 For completeness, we set out our reasoning below.

Statutory Framework

6.4 Under section 125 of the RMA a consent will lapse on the date specified in the consent unless:[21]

(a) the consent is given effect to; or

(b) an application is made under section 125(1A)(b) to extend the lapse period.

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[21] A similar regime also applies to designations under section 184 of the RMA.[21] Given the similarities, the case law on the lapse of resource consents is applicable to designations.

6.5 Whether a consent has been given effect to is a matter of degree and will vary from case to case depending on the specific facts involved and answers to questions such as:[22]

(a) What is the nature of work authorised by the consent?

(b) What in fact has been done?

(c) Why has it not been completed?

(d) Why has it been discontinued?

(e) Was the discontinuation voluntary and justified?

6.6 On the face of it, the words "given effect to" import the idea of "full compliance or completion of the thing envisaged, and it is clearly straining their ordinary meaning to say that they contemplate only the first physical step of the operation envisaged by the consent...".[23] Obviously, if **no** steps have been taken on the proposal for which the consents have been granted, the consents have not been given effect to.

6.7 However, in contrast, if a substantial amount of work has been done and the consent holder has done all things reasonably possible but the project has not been entirely completed, it is arguable the consent has been given effect to. The conclusions of the Courts in considering whether a consent has been given effect to have differed:

(a) It was plain in one case, for example, that where 90% of the dwellings in a subdivision had been built the consent had been given effect to and did not lapse.[24]

(b) In contrast, in *Gus Properties*,[25] Casey J had little difficulty in concluding that the consent had not been given effect to, despite a number of preparatory steps being taken on site pursuant to the consent, including preparation of final plans, removal of a dwelling and hedges, ordering of building

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22 *Goldfinch v Auckland City Council* (HC) Auckland HC101/96 10 September 1996 at pages 14 and 15.

23 *GUS Properties Ltd v Chairman, Councillors and Inhabitants of the Borough of Blenheim* (SC) Christchurch M394/75 24 May 1976 at page 4.

24 *Robinson Developments Ltd v Marlborough District Council* (EC) Wellington W29/2005 16 March 2005.

25 *GUS Properties Ltd v Chairman, Councillors and Inhabitants of the Borough of Blenheim* (SC) Christchurch M394/75 24 May 1976.

materials by an engaged contractor, advertising for building staff, and erection of a temporary shed with associated drainage.[26]

(c) In *Goldfinch*,[27] in which it was found the consents had been given effect to (distinguished from *Gus Properties*), the house had been fully enclosed; and while it was not habitable, all the work subject to controls in the plan and for which consent had been obtained was complete. The inability to progress further with the consent was due to legal obstacles.

6.8 It is clear from this case law that whether a consent has been "given effect to" involves a degree of discretion, but appears to require more than mere preparatory works at the very least, and being almost entirely finished at most.

6.9 It is clear from the scheme of section 125 of the RMA that "given effect to" must require more than "substantial progress or effort". This is because if a consent holder has not yet given effect to a consent, it can still apply for an extension under section 125(1A) of the RMA if it has at least made "substantial progress or effort". However, even the meaning of "substantial progress or effort" is a moving target capable of varying interpretations and applications. In summary:

(a) "Substantial progress" does not mean that the majority of the work enabled under the consent has to have been completed.[28]

(b) Whether progress is "substantial" in any given case depends on all the circumstances of the case.[29] While continuity of progress or effort is required, there may be reasonable interruptions which do not break the overall picture of continuing towards the end in view.[30]

(c) "Substantial...effort" has been interpreted to assist a consent holder who, while making substantial efforts towards giving

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26 As discussed in *Sandilands v Manawatu District Council* ENC Auckland A107/97, 10 September 1997 at page 12.

27 *Goldfinch v Auckland City Council* (HC) Auckland HC101/96 10 September 1996.

28 *GUS Properties Ltd v Chairman, Councillors and Inhabitants of the Borough of Blenheim* (SC) Christchurch M394/75 24 May 1976.

29 *Ashburton Borough v Clifford* [1969] NZLR 927 (CA).

30 *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183.

effect to the consent, has been unable to make substantial progress for some reason.[31]

(d) The Courts have accepted that substantial progress or effort can be made out despite little on-site activity, due to practical and economic realities of constructing and completing major developments, including fluctuations in market demand and the need to raise finance. However, there is some divergence as to the extent to which financial viability of a project or prevailing economic conditions can justify an extension.[32]

Application to the Project

6.10 The need to duplicate the at-risk sections of the Western Interceptor in the next 15 years is one of the key drivers for the Project. That being said, there are always risks of delay in a Project of this size. However the 15 year lapse period is not, and should not be seen as, a suggestion that the Project commencement will be delayed by 10 or 15 years. Instead, it is an acknowledgment of the uncertainty over what it may mean to "give effect to" the consents in the context of the Project.

6.11 The standard 5 year lapse period would simply not reflect the size and complexity of the Project. In the event that, for example, an unforeseen delay occurs and construction at one or more sites cannot commence until several years later than anticipated, even a 10 year lapse period would see the consents at risk of lapsing before construction was able to get sufficiently underway to "give effect to" the consents and designations to avoid them lapsing in accordance with section 125, and Watercare would need to seek and obtain an extension.

6.12 With respect, both "alternatives" being for Watercare to either take its chances that its consents have been sufficiently "given effect to" or to apply in advance for a lapse date extension, present serious risks for a project of this size, complexity, and economic value; risks that can be avoided by allowing for a longer lapse period at this stage of the process.

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31 *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183 at [123].

32 For example, in *Body Corporate 970101 v Auckland City Council* (2000) 6 ELRNZ 183 the council was entitled to take into account the practical and economic realities of constructing and completing a major development including fluctuations in market demand and a need to raise finance. However, matters such as the financial viability of a consented proposal and the applicant's particular financial circumstances were not considered relevant in *Akaroa Organics Ltd v Christchurch City Council* [2010] NZRMA 467.

6.13 Arguably, as Watercare has sought common consents across all construction sites, construction occurring at the majority of sites in the future could be considered to have "given effect to" the consents generally. It could also be suggested that the extent to which the Project as a whole has been progressed needs to be considered when determining whether a single consent has been given effect to. However, this is by no means a clear or risk free approach.

6.14 While we accept that the likelihood of not progressing within the timeframes signalled is very low, we maintain that the 15 year timeframe is appropriate and necessary in order to allow a level of flexibility commensurate with the scale and importance of the Project. The Council Pre-hearing Report acknowledges this:[33]

> This longer lapse period is considered to be an acceptable timeframe given the nature of the Project and the need to provide certainty and protection for the construction works.

6.15 We submit that it would be an unacceptable and unnecessary risk to the Project to require Watercare to demonstrate that it had in fact reached this uncertain threshold of "given effect to" in order to continue to exercise the consents should an unforeseen delay occur, and to otherwise be exposed to the risk of having its consents "re-litigated" through either a lapse date extension process or, at worst, an entirely new consent process.

6.16 A longer lapse date of 15 years would give Watercare an additional but appropriate "buffer" and ensure that this significant and beneficial Project is not exposed to such undue risk.

7. TERM OF EPR DISCHARGE CONSENT

7.1 Commissioner Majurey queried whether there may be any grounds for the EPR discharge consent expiring at the same time as the existing consents for the Mangere WWTP. We understand he was suggesting this could potentially allow for all of the consents for discharges from the Mangere WWTP to be considered together, and was questioning whether or not there would be any benefit in enabling this to occur.

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[33] Council Pre-hearing Report at page 227.

7.2 Watercare does not consider there would be any grounds for this approach.

7.3 First, the EPR and the Mangere WWTP, while operating as part of a wider wastewater network, are not linked together in terms of operations or effects such that they warrant being considered as a "package". The EPR provides necessary pressure relief in the event of failure at the proposed Mangere Pump Station. While the EPR discharge is located at the Mangere WWTP, this is only because that is where the proposed Mangere Pump Station (which it is protecting) is located. Any discharge from the EPR is not a discharge from the Mangere WWTP, but is instead a discharge from the Central Interceptor Scheme because the flow was unable to reach the Mangere WWTP due to a failure of the proposed Mangere Pump Station in combination with extreme flows.

7.4 Secondly, we do not consider that imposing a shorter period, out to 2032, i.e. approximately 19 years, would be at all appropriate or reasonable in these circumstances for the following reasons:

(a) The Central Interceptor has a design life of well in excess of 50 years. Having the ability to discharge at the EPR is a key (and necessary) aspect of the design of the main tunnel as it provides an essential safeguarding function to the operation of the wastewater system. The EPR discharge is part and parcel of, and therefore goes hand in hand with, the Central Interceptor Scheme. The ability to discharge in this location will be required during the life of the infrastructure.

(b) Given the significant investment being made by Watercare in the Central Interceptor main project works, it is entitled to the certainty of a 35 year consent. Such consent terms have been supported by the Courts on the basis of consent security:[34]

> Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term.

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[34] *PVL Proteins v Auckland Regional Council,* EC Auckland, A61/2001, 3 July 2001 at [30].

(c) Imposing a shorter consent term of 19 years from now (instead of 35 years from completion of construction as requested) would simply require Watercare to seek a new consent at that time, potentially having to go through a new public hearing process to authorise discharges from a structure that will have only been in place for 9 or so years.

(d) The Council Pre-hearing Report acknowledges that a 35-year term is appropriate because:[35]

(i) the frequency of the discharge is likely to have a longer return period than the consent; and

(ii) Watercare requires certainty that at the time the potential discharge occurs, the consent will provide for it.

(e) Lastly, once the Central Interceptor, including its EPR structure, is constructed, as you have heard, if a number of unlikely events coincide (including prolonged pump station failure and an extreme storm event) the EPR would discharge. Whether or not the term was shortened, and whether or not a new consent was granted, an EPR discharge would still have the potential to occur at any time, albeit with a very low probability (as it is dependent on a number of independent events occurring at the same time). While conditions could be reviewed and amended, particularly in relation to any response and / or monitoring or clean up required, limited conditions can be imposed on that discharge due to the lack of control and emergency nature involved.

7.5 For these reasons, we submit that in this situation there would be no grounds for providing for anything less than the 35 year consent term allowed for under the RMA.

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[35] Council Pre-hearing Report at pages 228 and 229.

8. APPROVAL OF MANAGEMENT PLANS

8.1 A number of the proposed Consent Conditions require the Consent Holder to submit various plans for the Project overall, or for the relevant stages of the Project, to the Manager (Resource Consents - Auckland Council) for approval, and that this approval is not to be "unreasonably withheld".[36] The use of management plans, and whether approval is required, has raised a number of queries from the Commissioners which we respond to below in the following order:

(a) Can an approval power be subject to reasonableness?

(b) Why is there an inconsistency between the proposed Designation and Consent conditions in respect of approvals?

Can an approval power be subject to reasonableness?

8.2 Watercare has proposed to include conditions requiring Council approval of various management plans. However, in order to ensure that Watercare has some certainty over the process for obtaining such approval, Watercare has also proposed that the Council cannot be *unreasonable* about withholding its approval. The Council itself included this proviso on some of the conditions but not all, and Watercare simply amended the Hearing Set to be consistent across the suite of conditions. The proviso is consistent with the approach taken for other consents held by Watercare and it would be very helpful to have consistency, both in decision making and also in the wording of conditions. It was intended to ensure that the Council could not unreasonably delay, or attempt to impose additional conditions on, its approval.

8.3 For example, in the Hobson tunnel project ("**Project Hobson**"), Conditions 21 and 31 of Permit 29010 provide that the Consent Holder shall ensure that groundwater monitoring and its Monitoring and Contingency Plan are approved by the Manager prior to construction works commencing and that this approval shall not be unreasonably withheld. As noted in the evidence, Project Hobson was a project that involved very similar issues to this Project.

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[36] For example, proposed Consent Condition 1.7 which relates to Construction Management Plans.

8.4 Other consents have provided the consent authority with limited approval rights. For example, for the Puketutu Biosolids consents, the consent conditions provided that if approval was not provided by the consent authority within 30 working days, consent would be deemed to have been provided.[37]

8.5 The High Court in *Omaha Beach Residents Society Incorporated v Ocean Management Limited*[38] held that the test of whether a party has unreasonably withheld its approval must be considered in the context within which it must make its decision and must be determined on an objective basis:[39]

> [59] I consider that the insertion of the word "unreasonably" in Clause 1(b) of the land covenant and Clause 15.5 of the Constitution answers this questions. If that word had not been inserted, the clauses would operate to prohibit the Society from delaying or withholding its consent in any case where the design complied with Plan Change 76 and the design guidelines. **The requirement that any delay or withholding of consent not be unreasonable confirms, in my view, that the Society has the power to delay or withhold its consent even where the design complies with Plan Change 76 and the design guidelines. If it elects to do so, however, the Society's decision must not be unreasonable. Whether or not that is the case must, of course, be determined on an objective basis.**
>
> [60] How, then, is the reasonableness of the Society's decision in any given case to be assessed? **The answer to this question must be determined by considering the context within which the Society is obliged to make its decision. That context is to be found in the framework that defines the manner in which the Society must make its decisions.**
>
> [Our emphasis]

8.6 In any event, even if the phrase "not to be unreasonably withheld" was deleted from the proposed Consent Conditions, the Council would still have a limited role in respect of the management plans under the Conditions. While Watercare has proposed that the Council will have approval powers in respect of the various management plans, the Courts have held that, where a condition requires the subsequent

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37 For example, Condition 8 of consents 34086, 36001 to 36007 provides that the Consent Holder shall submit an Environmental Monitoring Programme to the Manager for written approval at least 40 working days prior to the commencement of works authorised by the consents and if no response is received within 30 working days of the Plan being submitted, then approval is deemed to have been given.

38 *Omaha Beach Residents Society Incorporated v Ocean Management Limited* (HC) Auckland CIV-2007-404-2539 27 November 2007.

39 Ibid at [59] and [60].

preparation of a management plan, the Council's role is more properly one of "certification" rather than "approval":

> [18] It was generally accepted that it is not appropriate to provide for a management plan on the basis that it is to be approved by a consent authority or some delegated official at a later time, except to the extent that they may be regarded as certifiers in terms of the leading case on this subject, *Turner and Ors v Allison and Ors* [1971] NZLR 833; 4 NZTPA 104 (CA). However, what is or is not a valid certifier condition can itself create considerable difficulties, particular in regard to a management plan.[40]

8.7 In terms of what is meant by a "certifier", the Court of Appeal in *Turner v Allison*[41] outlined the "fundamental difference" between the duties conferred by conditions requiring approval by "a certifier" (that is, using one's technical skills and judgement) versus a condition requiring a judicial function (that is, acting as an arbiter to resolve some sort of dispute).[42]

8.8 Therefore, as the Council only has a role as a "certifier" of the management plans its role is already limited, and the phrase "not to be unreasonably withheld" was only included for the avoidance of doubt (i.e. the Council could not unreasonably delay the certification of the plans or attempt to impose additional conditions).

8.9 Overall, we consider that Watercare's proposed Consent Conditions are appropriate, provide both parties with sufficient certainty, and are consistent with conditions that have been imposed for other similar projects. For completeness, we also note that the Council staff have not sought to delete the phrase from the Consent Conditions.

Inconsistency between the Designation and Consent conditions

8.10 During the hearing, the Commissioners noted that approval of the management plans is required under the proposed Consent Conditions, but that Watercare has not sought that the same approval be obtained for the various plans required under the proposed Designation Conditions. The Commissioners queried whether this created an issue,

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40 *Wood and Others v West Coast Regional Council* [2000] NZRMA 193 at [17] - [20]. The Courts have also recognised that it is not appropriate for a Council to endeavour to reserve to itself the power to approve a management plan at a later date outside the formal resource consent procedures.(*Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [133], referring to *Wood v West Coast Regional Council* [2000] NZRMA 193 (EnvC).)

41 *Turner v Allison* [1971] NZLR 833 (CA).

42 Ibid at 856 - 857.

particularly where the same plan is required under both sets of conditions. For example, both proposed Designation Condition CM.1 and proposed Consent Condition 1.7 require a Construction Management Plan ("**CMP**") to be prepared by the Consent Holder; however, approval from the Council is only required for the CMP prepared under proposed Consent Condition 1.7.

8.11 The reason Watercare has not proposed similar wording in the proposed Designation Conditions is because the various plans listed in those conditions form part of the OPW, which is not subject to Council approval under the RMA. As the Commissioners will be aware, while a territorial authority does not have approval powers in respect of an OPW, it has the right to **request** the requiring authority make changes.[43] The requiring authority then has a discretion to decide whether to accept or reject the territorial authority's requested changes. Where requested changes are rejected, the RMA provides the territorial authority with the right to appeal the requiring authority's decision to the Environment Court. As such, there is a separate statutory process applying to OPWs, which Watercare is following in the Designation Conditions.

8.12 While this process applies to OPWs, management plans required under resource consent conditions, on the other hand, are generally subject to council approval, rather than just comment. Usually, the territorial authority (under the OPW process) and the regional council (for the management plan process) are separate entities. However, the situation in Auckland is unique, in that the Auckland Council is a unitary authority and therefore is involved in both processes under the proposed Designation and Resource Consent Conditions.

8.13 For this reason, Watercare considers that it is not necessary, nor appropriate, to provide approval powers to the Council under the proposed Designation Conditions. To do so would be to provide the Council with powers beyond those anticipated under the RMA and would derogate from a requiring authority's statutory power to have the final say as to what is or is not included in an OPW.

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[43] Section 176A(4) of the Resource Management Act 1991.

9. AS FAR AS PRACTICABLE

9.1 As the Commissioners will be aware, the phrase "as far as practicable" is commonly used in both resource management plans and resource consent conditions. A number of Watercare's Proposed Conditions for the Project, mainly the noise and vibration conditions, adopt the phrase, and the Commissioners have queried how in practice this wording would affect the ability to interpret compliance with those conditions.

9.2 While we agree with the Commissioners' observation that this can allow for some discretion to be applied and, by its very nature, introduces some level of ambiguity, we submit that it is necessary in some instances, especially where limits must be flexible enough to allow for minor technical breaches in order for works to continue and to ensure they can occur without unreasonable cost. It is for these reasons that the phrase is so commonly adopted in resource management.

9.3 The phrase allows for some level of discretion on the part of the consent holder and flexibility to account for unforeseen situations. It recognises that consent conditions cannot provide for or contemplate all future possibilities at the time of granting, and so it would be unfair and unnecessarily restrictive to require strict compliance in all, including unforeseen, circumstances. A slight exceedence, even momentarily, could therefore result, strictly speaking, in a non-compliance which could then result in enforcement action under the RMA. "As far as practicable" allows, for example, an enforcement officer, to take into account the particular circumstances when considering whether or not there has been a breach or non-compliance.

9.4 The phrase also recognises that in some circumstances possible mitigation will not be practicable, and in fact could potentially hinder the proposed works to the extent that the works are not able to be undertaken either from a technical or cost perspective.

9.5 Proposed Designation Condition CNV.2, which was specifically queried by the Commissioners, reads (emphasis added):

> The CNVMP shall include specific details relating to the control of noise and vibration associated with all Project works. The CNVMP shall be formulated and the works implemented to achieve, **as far as practicable**, compliance with the requirements of:

> (a) NZS6803:1999 Acoustics — Construction Noise, except as provided for in Condition CNV.5A below; and
>
> (b) German Standard DIN 4150-3:1999 Structural Vibration – Effects of Vibration on Structures, except as provided for in Conditions CNV.5B, 5C and 6 below.
>
> [emphasis added]

9.6 The word "practicable" is very important here. While it is important that the standards are not breached unnecessarily during construction, there must be an ability to exceed them in certain circumstances provided an appropriate process is in place and followed. Watercare has proposed such an alternative process (discussed below) to ensure that works are not unreasonably impeded to the point where they cannot continue but affected parties are involved in the process for the selection of mitigation. Flexibility in mitigation options needs to be retained.

9.7 For example, as Mr Cottle explains in his evidence, the contractors may decide to schedule the non-compliant work when the relevant landowner is not present, or in exceptional circumstances, for example where noisy night-time works are necessary, provide alternative accommodation. This may be a better outcome from an effects perspective than simply complying with the construction noise standard in that instance as in some cases it may be better to have short term noise non-compliance than days and days of noisy (but otherwise compliant) works. The structure of the conditions enables a more fine-tuned approach to be taken, in consultation with the affected parties.

9.8 Imposing a black and white rule is not appropriate as it will not always be possible to comply with the construction noise standard. An alternative would be to try to apply a higher limit at all times to ensure that this could be met in all circumstances - but, again, this is not preferable from an effects perspective.

9.9 As Mr Cottle explained in his evidence:[44]

> ...it is not possible or practicable for construction noise to comply with the district plan limits for normal everyday activities. Any attempt to achieve such compliance would stifle or potentially prevent much development.

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[44] Evidence of Mathew Cottle at [2.19].

9.10 Any exceedence of the relevant noise or vibration standards would be temporary and needs to be considered in light of the significant long term benefits for Auckland that the short term construction activities will enable. Mr Cottle discusses the use of this phrase in his reply evidence, and provides a list of recent projects in Auckland that have adopted a similar approach. There is no reason to take a more stringent approach for this Project.

9.11 However, in light of the concerns raised by the Commissioners, Watercare has reviewed the conditions and amendments are proposed in the Reply Set to address this concern:

(a) Designation Condition CNV.2 is proposed to be amended in the Reply Set so that it clearly requires consultation with the relevant landowners in the event of expected non-compliances with the standards. The new wording reads:

> Where compliance with the requirements of NZS6803:1999 or DIN 4150-3:1999 cannot be achieved, the CNVMP shall be prepared in consultation with affected stakeholders.

(b) Designation Condition CNV.4 has been amended so that the following is included in the Construction Noise and Vibration Management Plan ("**CNVMP**") (for noise):

> (g) the ~~measures~~ consultation ~~that will be~~ undertaken by the Requiring Authority with affected stakeholders to develop the proposed noise management measures and any feedback received from those stakeholders, along with the noise management measures that will be adopted based on this consultation~~to communicate and obtain feedback from affected stakeholders on noise management measures~~;
>
> (h) where full compliance with NZS6803:1999 cannot be achieved, the CNVMP shall set out the methodology for handling non-compliances (including drafting site specific CNVMPs) so that the Best Practicable Option is adopted, including setting out the consultation undertaken with affected stakeholders in developing the Best Practicable Option;

(c) Similarly in Designation Condition CNV.5 (for vibration):

> (e) identification of any particularly sensitive activities in the vicinity of the proposed works (e.g. commercial activity using sensitive equipment such as radiography or mass-spectrometry) including Plant and Food Research (at 118-120 Mt Albert Road, Mt Albert), the Institute of Environmental Science and Research (Hampstead Road, Sandringham) and

> Caltex Western Springs (at 778-802 Great North Road, Grey Lynn) along with the details of consultation with the land owners of the sites where the sensitive activities are located and any management measures that will be adopted based on this consultation;
>
> (f) alternative management and mitigation strategies where compliance with German Standard DIN4150-3:1999 cannot be achieved;
>
> (g) the ~~measures~~ consultation ~~that will be~~ undertaken by the Requiring Authority with affected stakeholders to develop the proposed vibration management measures and any feedback from those stakeholders, along with the vibration management measures that will be adopted based on this consultation ~~to communicate and obtain feedback from affected stakeholders on vibration management measures~~;

9.12 The requirement is still to comply, as far as practicable. However, where compliance cannot be achieved the process is now set out more clearly and persons subject to the higher levels of noise and vibration will be involved in the preparation of the site specific CNVMP that will be required.

10. TIMING OF SECTION 176 APPROVALS

10.1 Under proposed Designation Condition W.1, Watercare will not require Auckland Transport, or other network utility operators with existing infrastructure in the road reserve, to seek written consent under section 176 of the RMA to access, maintain, and operate their existing assets.

10.2 Commissioner Hill queried when proposed condition W.1 is intended to commence. The intention is that, as with all other conditions, it will commence when the designation is included in the district plan.

10.3 The Commissioners will be aware that an NOR has interim effect upon lodgement. Section 178 of the RMA provides that, during the period between the date the NOR is approved and its withdrawal, cancellation, or inclusion in a district plan:

> no person may do anything that would prevent or hinder the public work, project, or work to which the designation relates unless the person has the prior written consent of the requiring authority.

10.4 As a starting point, we do not consider that it can be said that section 178 gives interim effect to the entire NOR, including any proposed conditions. The NOR itself is not binding on lodgement, as it does not empower the requiring authority to exercise it. Rather, its interim effect is limited to a broad restriction on the acts of others - no person can do anything to prevent or hinder the work or project; which may or may not eventuate depending on the outcome of the NOR process.[45] In some ways it is a "placeholder" setting out the requiring authority's intentions while the NOR is progressed.

10.5 It is section 176, rather than section 178, that is referred to in the proposed Designation Condition. The relevant part of section 176 states that, if a designation is included in a district plan, then:

> b) no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including—
>
> (i) undertaking any use of the land; and
> (ii) subdividing the land; and
> (iii) changing the character, intensity, or scale of the use of the land.

10.6 Section 176 can only "come into effect" once a designation has been confirmed under the provisions of Part 8 or has been included in a district plan under clause 4 of Schedule 1. Provided the designation is confirmed, then the section 178 restriction on other use or subdivision of the designated land effectively *continues* under section 176(1)(b) - which is the clause referred to in proposed Designation Condition W.1. However, if the NOR is not confirmed, any restriction on other use or subdivision ceases on withdrawal of the NOR or its cancellation by the Environment Court on any appeal, and section 176 will have no relevance.

10.7 Proposed Designation Condition W.1 is restricted to excluding approvals under section 176. Accordingly, regardless of whether the conditions proposed with an NOR could be considered to also have interim effect (and we do not consider they can be), proposed Designation Condition W.1 would not apply to approvals under section

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[45] Refer to *Hastings v Auckland City Council,* ENC Auckland, A068/01, 6 August 2001 at [105]: "Requirements are different. Although they have interim effect, they are really proposals for designations, that may or may not survive the statutory process of submissions and appeals. While those processes are incomplete, it would not be appropriate to presume any particular outcome..."

178 due to this direct and explicit reference to approvals under section 176.

10.8 The requirement for written approvals under section 178 of the RMA will apply until such time as the NORs are confirmed, and section 176 and proposed Designation Condition W.1 come into effect. Finally, it also follows that the reference to "existing infrastructure" must therefore apply to that infrastructure that is "existing" at the time the NOR is confirmed, as this is the time at which the condition comes into effect.

10.9 For this reason we consider that it is clear that proposed Designation Condition W.1 is intended to commence on the date that the NOR is included in the district plan, and that existing infrastructure will also be determined at that date.

11. OTHER AMENDMENTS TO CONDITIONS

11.1 The Commissioners also questioned:

(a) the definitions of "Alert Level" and "Alarm Level" in Condition 4.30; and

(b) the relationship between the timing requirements in the groundwater conditions (part 4 of the proposed Consent Conditions).

11.2 These have both been refined, and are explained in **Part 3: Conditions** below.

PART 2: SUBMITTERS

12. ISSUES

12.1 You have heard from a number of submitters who oppose the Project, or at least the construction site associated with the Project near to their home or business. For a project of this scale, the extent of opposition has been relatively limited. In particular, there have been no submitters attend the hearing with issues at the following construction sites:

On the main tunnel alignment

(a) Western Springs;

(b) Walmsley Park;

(c) Pump Station 23;

(d) Proposed Mangere Pump Station (with the exception of the potential discharge from the associated EPR);

On the Link Sewers alignments

(e) Motions Road;

(f) Western Springs Depot;

(g) Rawalpindi Reserve;

(h) Norgrove Avenue;

(i) Pump Station 25;

(j) Miranda Reserve;

(k) Whitney Street;

(l) Dundale Avenue; or

(m) Haycock Avenue.

12.2 In addition, only one submitter is opposing the Car Park site at Mount Albert War Memorial Reserve ("**Car Park site**") - Mr Webb.

12.3 The contentious sites at this hearing have therefore been:

(a) Mount Albert War Memorial Reserve: Reserve Site ("**Reserve site**");

(b) Lyon Avenue;

(c) Haverstock Road;

(d) May Road;

(e) Keith Hay Park;

(f) Kiwi Esplanade; and

(g) the potential discharge from the EPR structure associated with the proposed Mangere Pump Station.

12.4 In terms of infrastructure providers:

(a) agreement was reached with Auckland Transport in advance of the hearing, and the conditions proposed in the Hearing Set addressed their concerns; and

(b) agreement has now been reached with Transpower, and a new condition is proposed in the Reply Set to reflect the agreed position.[46]

12.5 The majority of issues raised by submitters were addressed either in our opening submissions or primary evidence. Where that is the case, we have not responded again. Instead, this section of our reply focuses only on the issues raised that were not previously covered. The same goes for the evidence in reply which has been prepared by Mr Cantrell, Mr Cooper, Ms Petersen, Mr Cottle, Mr Hills, Mr Slaven and Mr Roan to address issues raised by submitters.

12.6 This section of our submissions addresses a couple of general issues raised by parties at more than one location, then responds to the remainder on a site-by-site approach.

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[46] Condition 9.2A of Watercare's proposed Consent Conditions states that Watercare shall provide a minimum horizontal separation distance of 10 metres between the outside edge of the Central Interceptor tunnel and the nearest foundation of Tower 36 of the Henderson to Otahuhu A (HEN-OTA A) 220 kV transmission line.

13. IN GENERAL ACCORDANCE WITH

13.1 Several submitters[47] have raised concerns at the hearing with the use of "in general accordance with" in the proposed Consent and Designation Conditions. This phrase appears in the "scope" conditions; being the conditions which detail all of the application and NOR associated documents. Respectively, proposed Designation Condition DC.1[48] and Consent Condition 1.1 state (emphasis added):

> DC.1 Except as modified by the conditions below and subject to final design, the works shall be undertaken **in general accordance with** the information provided by the Requiring Authority in the Notices of Requirement dated August 2012 and supporting documents being:...
>
> 1.1 Except as modified by the conditions below and subject to final design, the project shall be undertaken **in general accordance with** the plans and information submitted with the application...

13.2 It has been suggested that this is inappropriately uncertain, particularly when coupled with "and subject to final design".[49]

13.3 As Commissioner Bhana acknowledged during the hearing, there is a problem with suggesting works of the type involved in this case must be **in accordance with** the documentation and plans, because, in practice, that will not be always be possible. With a project of this size, there are going to be aspects of the works which simply cannot be determined with any degree of certainty at this stage. This is precisely why Watercare has proposed such a thorough suite of management plans to be submitted to the Council, either for approval or as part of the OPW process; management plans that will more accurately reflect the detailed design of the Project.

13.4 It is common practice to include this terminology in resource consent applications of this type so as to not unreasonably and unwaveringly restrict applicants to the information contained within the application documents "*when it is within the scope of what they have sought*".[50]

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47 Plant & Food Research, Environmental Science & Research, St Lukes Gardens Apartments and St Lukes Gardens Apartments Progressive Society Incorporated.

48 It is used in the same way in the Mount Albert War Memorial Reserve specific proposed Designation Condition DC.1A.

49 Refer to the legal submissions of Peter Fuller for St Lukes Gardens Apartments and St Lukes Gardens Apartments Progressive Society Incorporated in reference to the proposed Designation Condition DC.1 and proposed Consent Condition 1.1.

50 This phrase is used in a number of Watercare's existing consent conditions. See for example those applying to Puketutu Island Biosolids Project (eg condition 1 of the general conditions

That qualification is an important one. While "in general accordance with" gives consent holders some flexibility to undertake works, it certainly does not have the effect of allowing them to go outside the limits of, or to undertake works which were clearly not anticipated by, the application documents.

13.5 The Commissioners may be familiar with the recent case of *NZ Windfarms*,[51] where the phrase "*operated generally in accordance with the information accompanying the application*" was held by the High Court to be read as affirming the scope of the application as the outer limit of consent. The Court stated at paragraph 49 that:

> The starting point is that scope conditions such as condition 1 in this case are enforceable both because they lawfully and expressly bind the appellant to the parameter of its own application and because they simply express in words the general principle that no consent may grant more than what is asked for. A slightly different way of putting that proposition is that the applicant may not produce environmental effects that are materially greater than or different to the effects described in the application as its outer limits.

13.6 Therefore, we submit that the retention of the words "in general accordance with" in the relevant conditions will achieve an entirely appropriate balance between allowing flexibility for Watercare and its contractors in design and construction, and certainty for those affected by the works that the consent holder cannot justifiably go beyond the scope of the effects contemplated by the application documents set out in the relevant conditions. If the words are not included, this may constrain the opportunities to optimise the design so that the effects assessed to date are reduced.

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applying to consents 34086, 36001 to 36007) the Hunua 4 Pipeline Project (eg condition 2 of the general conditions applying to permits 34151, 37809, 37810, 37811, 37812, and 38161), and Project Hobson (condition 5 of permit number 29040; condition 2 of permits 29702, 29039 29042 etc).

51 *New Zealand Windfarms Limited v Palmerston North City Council* [2013] NZHC 1504. The issue for the High Court in this appeal was whether the appellant, New Zealand Windfarms Limited ("**NZWL**") was bound by *both* its own predictions about the sound levels generated by its wind turbines contained in its application for resource consent *and* the specific noise standards set out in the resource consent conditions, or whether NZWL was bound *only* by the specific conditions contained in its resource consent, which set standards in relation to allowable noise levels received at sensitive residential locations nearby.

14. RELEVANCE OF DRAFT UNITARY PLAN

14.1 A number of submitters suggested that the draft Unitary Plan was of some relevance.[52]

14.2 In particular, Mr Demler suggested in his evidence that:

(a) The Commissioners should take into account the draft Unitary Plan as an "other matter" under section 171(1)(d) of the RMA when making a decision on Watercare's NORs.[53]

(b) Watercare should await the outcome of the Unitary Plan process before obtaining the approvals or doing the works necessary to construct the Project.[54]

(c) There is a "major disconnect between what Watercare has planned for and what has been proposed in the Unitary Plan".[55]

14.3 As the Commissioners will be aware, the draft Unitary plan is still just that - a draft - and is likely to be notified in September or October this year. Given that the draft Unitary Plan is still to be notified and has only been subject to preliminary informal consultation, it is inappropriate for the Commissioners to take this plan into account.

14.4 Section 104(1)(d) of the RMA provides that, subject to Part 2 of the Act, when considering an application for a resource consent, the consent authority shall have regard to "any relevant objectives, policies, rules, or other provisions of a *plan or proposed plan*". The courts have held that the weight to be given to a proposed plan depends on what stage the relevant plan has reached, the weight generally being greater as a proposed plan moves through the notification and hearing process.[56]

14.5 The way proposed plans are treated under section 104(1)(b)(iv) is entirely relevant to the suggestion that you should consider the draft Unitary Plan under section 171 of the RMA. In this instance, the Unitary Plan has not even been notified yet, and it would be dangerous

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52 Including Robert Demler, Jim Jackson, Bronwen Turner, Denis Scott on behalf of SLGA and the Mangere Bridge Residents and Ratepayers Association.

53 Evidence of Robert Demler at [5.1] to [5.10].

54 Evidence of Robert Demler at [5.9] and [5.10].

55 Evidence of Robert Demler at [5.8].

56 *Hanton v Auckland City Council* (PT) Auckland A010/94 1 March 1994 and *Keystone Ridge Ltd v Auckland City Council* (HC) Auckland AP24/01 3 April 2001.

to assume that the content of the draft Unitary Plan does or could reflect what might be in the Unitary Plan when it is eventually notified, let alone what it might look like after it has progressed through the submission and hearing process.

14.6 In addition, to request Watercare to await the conclusion of the Unitary Plan process before beginning works or seeking approvals to commence works would in effect invite planning paralysis, with applicants and decision makers hesitant to proceed while there is any uncertainty still in the plan provisions. As mentioned in the questioning of Mr Demler by Commissioner Bhana, it could easily be five years, if not more, before the Unitary Plan is at a point where it can be (even partially) operative. By way of example, as noted above the Network Discharge Consent application is ready to be lodged as soon as the Coastal Plan is made operative. This plan was notified in 1995, and has been subject to appeal since 2004.

14.7 However, even if the Commissioners were minded to take into account the draft Unitary Plan, then Watercare concurs with the Council Pre-hearing Report's conclusion that "the proposed Central Interceptor Project is considered to align with the direction outlined within the draft Unitary Plan...".[57]

14.8 Mr Cantrell in his reply evidence will also respond to the issue raised by submitters of whether or not the Central Interceptor could accommodate the higher growth projections that the draft Unitary Plan was said to be based on.

15. MOUNT ALBERT WAR MEMORIAL RESERVE

15.1 A number of submitters either tabled[58] or presented evidence[59] in support of the Car Park site and expressed concerns at the fact that Watercare has not withdrawn the original NOR for the Reserve site and may not, in fact, confirm its intentions for some time.

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[57] Refer to page 225 of the Pre-hearing Report. The Pre-hearing Report sets out regional and local objectives and policies for Infrastructure (as set out in Part 3.1.1.1 (Network utilities, energy and transport) of the draft Unitary Plan) to illustrate the direction for infrastructure in the draft Unitary Plan and how this aligns with the Central Interceptor Project.

[58] Including Dorina Jotti, Gemma Henrys, Stephanie and Jeffrey Boyle, Sally Kedge and Peter Kerridge and Rosy X. Wei and family.

[59] Including Pip, Tony and Alexandra McAlwee; Anne and Robin Boyd; Louise Gordon and Kenneth Webb and Tracie Clarke.

15.2 Watercare has taken on board the concerns raised by the submitters and understands that the approach of retaining both designations could cause uncertainty for affected residents. As a result, Watercare has proposed several amendments to address this concern to the greatest extent possible. In particular:

(a) There is now a requirement for Watercare to withdraw the designation for the Reserve site once it is satisfied it can comply with Condition TM.3B. This is achieved by the amendments to DC.1B:

> DC.1B As soon as practicable following the Requiring Authority being satisfied that it can comply with condition TM.3B, the Requiring Authority shall confirm it will implement ~~If~~ the Car Park Site at the Mount Albert War Memorial Reserve, as described in the Notice of Requirement dated March 2013~~, is implemented,~~ and the designation area as set out in the Notice of Requirement dated August 2012 shall be removed from the Mount Albert War Memorial Reserve in accordance with Section 182 of the RMA.

(b) The condition to be satisfied of compliance with, TM.3B, has also been amended to remove any potential uncertainty over whether Watercare would be establishing alternative carparking and, more importantly, amended so that the condition is satisfied once the location of such parking has been confirmed and compliance is no longer linked to its actual establishment:

> TM.3B ~~In the event that construction activities reduce the number of carparks available to users of the Mt Albert War Memorial Reserve, t~~The Requiring Authority shall, in consultation with Auckland Council Parks, Sports and Recreation and the Albert-Eden Local Board, ~~identify~~ confirm the location of suitable alternative carparking to be established ~~and shall establish at its cost alternative carparks sufficient~~ to address the parking lost during construction activities within the Reserve.

(c) As a consequence, a new condition TM.3CA is needed to require the establishment of the carparking prior to commencement of works:

> TM.3CA The alternative carparking referred to in Condition TM.3B shall be established by the Requiring Authority at its cost prior to the commencement of works at the site.

15.3 The new wording makes it clear that, once Watercare is in a position to confirm the location of suitable alternative car parking, which would then allow for construction to later proceed at the Car Park site, it must confirm it will implement that designation and remove the Reserve site

designation. Watercare does not intend to leave both designations in place for a number of years. The proposed changes have been included to satisfy the residents that the decision will be made as soon as possible, and is only dependent on whether Watercare is able to address the car parking issue.

15.4 A number of submitters raised additional concerns, which are commented on below.

Mrs McAlwee

15.5 On pages 6 and 7 of her evidence, Mrs McAlwee questioned whether there was an inconsistency between the noise and vibration evidence of Mr Cottle and Mr Millar. Mr Cottle briefly comments on this issue in his reply evidence.

Mr & Mrs Boyd

15.6 The issues raised by Mrs Boyd relate to the Reserve Site and it is clear from her evidence that she and her husband support the use of the Car Park site. She did, however, seek a number of changes to the conditions proposed in the Hearing Set. A number of changes have now been made in the Reply Set that may address most of her concerns. These are explained in greater detail in the reply evidence and in summary:

(a) It was likely that a CNVMP would have been prepared for each site where compliance with the requirements of NZS6803:1999 or DIN 4150-3:1999 cannot be achieved. The ability to do a site-specific OPW, CNVMP or other plan was provided by, and recognised in, the definition of "Project stage" which now reads:

> Note: "Project stage" means a separable part of the Project, e.g. by Contract area or by geographical extent and may include one or more designated sites enabling the preparation of site-specific plans where appropriate.

However, in order to avoid any confusion or uncertainty, CNV.7(d) has now been amended to make it abundantly clear that site specific CNVMPs will be prepared for each construction site.

(b) Affected parties will be involved in the preparation of the CNVMP, as clarified by the amendments to CNV.2, CNV.4 and CNV.5.

(c) As a secondary construction site, the construction hours will generally be 7am to 6pm Monday to Friday and 8am to 6pm on Saturday.[60] Work may occur outside these hours only for the limited purposes listed in CH.2. As a general rule, therefore, there will not be night-time activities at this site so there is no need to prohibit the use of reverse alarms for night-time works.

(d) Her request to reinsert CH4 (controlling the route of heavy vehicles leaving the site) has been met, with the introduction of TM.3CB which is her exact wording.

(e) As explained above, Watercare will confirm its use of the Car Park site as soon as it has confirmed the location of suitable alternative car parking.

Ms Gordon and Mr Webb

15.7 The only submission in opposition to the Car Park site is that from Ms Gordon and Mr Webb. They did not lodge a submission on the Reserve site, and it is clear from their presentation to the hearing that they are opposed to any construction site being located down the access way adjacent to their property. That access way would be used for both the Reserve and Car Park sites.

15.8 Their specific requests are set out in Section 4 of their evidence. Their requests have been considered, and are responded to below:

(a) Councillors Drive is not an acceptable truck route, for the reasons explained in Mr Hills' reply evidence;

(b) as a secondary construction site, the construction hours will generally be 7am to 6pm Monday to Friday and 8am to 6pm on Saturday.[61] Work may occur outside these hours only for the limited purposes listed in CH.2. As a general rule, therefore, there will not be night-time activities at this site. As

[60] Proposed Designation Condition CH.1.
[61] Proposed Designation Condition CH.1.

a consequence, there is no need to impose an absolute prohibition on reversing alarms at night, and no need to impose a more restrictive noise level than that set out in the Construction Noise Standard;

(c) the operational noise limits are in ON.1;

(d) the height of the noise barrier will be finalised as part of the CNVMP. These residents will be consulted during this process, ensuring their input into the height, design and location of the noise barrier. Any effects on access to sunlight / shading can be considered at that point;

(e) it is not proposed to have artificial lighting installed at this site as no night-time works are proposed;

(f) the direction of the tunnel drive will not impact on the level of construction works required at this location;

(g) a liaison person will be available by telephone 24 hours per day seven days per week during the entire construction phase;[62] and

(h) with the changes to CNV.4 and CNV.5 proposed in the Reply Set, where any property is expected to receive noise or vibration in excess of the standards, those property owners will be involved in the preparation of the CNVMP.

15.9 No further amendments are therefore proposed in response to this submission.

16. LYON AVENUE

16.1 Mrs Walker gave a presentation on behalf of St Lukes Environmental Protection Society ("**STEPS**"), acknowledging and appreciating the reduction in overflows and adopting a constructive approach with suggested amendments to the conditions.

[62] Proposed Designation Condition DC.3.

16.2 Her requests for amendments have been considered, and a number of amendments are proposed in response. In particular:

(a) Condition RC.1 has been amended in response to STEPS' request that any enhancement works not be limited to the Roy Clements Treeway only as there could well be better opportunities for implementation of some equivalent mitigation works:

> RC.1 A Vegetation Enhancement Plan shall be prepared that sets out proposed works that the Requiring Authority will undertake within the Roy Clements Treeway or in another local area in the vicinity of Meola Creek to mitigate effects of vegetation removal at the Lyon Avenue construction site. The Plan shall be prepared by a suitably qualified person.

(b) Consequential amendments have been made in Condition RC.2:

> ... The objectives of the Plan shall be to enhance amenity and ecological values of either the Meola Creek riparian habitats and vegetation between Fergusson Reserve and Alberton Avenue, or other local areas in the vicinity of Meola Creek which would provide a similar area and level of vegetation enhancement to that which would be achieved between Fergusson Reserve and Alberton Avenue.

(c) Condition RC.2 has also been amended to ensure that any new planting is appropriate for the local habitats of the catchment, in response to STEPS' particular concerns with species selection in the rock forest:

> The mitigation works to be set out in the Plan may include planting and weed control, and shall be integrated with any other works planned in this area by the Council. New planting shall use eco-sourced native plants, appropriate to the local habitats of the Meola Creek catchment.

16.3 Mrs Walker also acknowledged that Watercare had assessed the alternative site that STEPS had asked it to consider in its submission, and appeared satisfied with the material and reasoning provided in response. However, she put forward (for the first time) an alternative not previously raised by STEPS with Watercare that she asked to be considered (the Phillips Car Park). This alternative was also put forward by Mount Albert Residents Association and St Lukes Gardens Apartments ("**SLGA**"). Mr Cantrell and Mr Hill will discuss this

alternative, together with the further alternative put forward by the SLGA, in their evidence in reply.

16.4 The other submitters[63] with issues at the Lyon Avenue site were represented by Mr Fuller. Instead of responding to the wide-ranging issues that he attempted to raise, we simply note that:

(a) His submissions included unnecessarily disparaging comments about Watercare, its consultants and advisors. Counsel's language, and indeed his demeanour as well, were at odds with the more objective and impartial evidence of his own client and consultant witnesses. To a large extent, his submissions detracted from the relevant issues of concern for his clients.

(b) He made a number of allegations that the assessment of effects undertaken by Watercare was marred by its view of the Deed. We indicated in opening that there was a dispute between the parties as to the interpretation of the Deed, that this was an issue likely to be raised by SLGA, that Watercare had not taken issue with the submissions filed by SLGA and that it had, in fact, assessed the effects (and considered the submissions) as if the Deed was not in existence. Mr Fuller's allegations to the contrary are all completely unfounded.

16.5 In contrast to the submissions of counsel, the evidence presented by and on behalf of SLGA raised some relevant points. In response, we note:

(a) Mr Cantrell responds on the alternatives now proposed, and explains why the proposed site is the preferred option;

(b) Mr Cooper addresses the issues raised with groundwater and surface settlement.

(c) Mr Hills comments on the evidence of Mr Hall, and also the traffic issues with the alternatives put forward.

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[63] The Body Corporate 346086 - St Lukes Gardens Apartments and St Lukes Gardens Apartments Progressive Society Incorporated.

16.6 Mr Goodwin has not responded to the evidence of Mr Scott as it was clear from Mr Scott's evidence that he agreed with the conclusions reached by Mr Goodwin on the level of effects to be experienced by the residents of the SLGA. Their difference of opinion was around whether those effects should be tolerated, or required an alternative site to be used. Mr Goodwin's primary evidence clearly sets out his opinion that the proposed site can be used for the necessary construction works. Mr Cantrell in his reply evidence also points out that the SLGA residents are the primary beneficiaries of the Lyon Avenue works proposed to occur next to them.

16.7 The only substantive legal issue raised by Mr Fuller was the allegation that the works would result in SLGA being in breach of their consent conditions. We address this issue below.

Parking

16.8 As set out in our opening legal submissions at paragraphs 7.29 to 7.35, Watercare considers that both the Deed of Agreement between the parties and SLGA's existing resource consent conditions clearly anticipate, provide for, and allow, the temporary reduction in visitor car parking over the Spillway during construction. While this reduction is "unfortunate" and may "greatly increase friction" between residents, guests and the Manager as suggested by Mr Milliken (the Committee Secretary) and Mr Lancaster (the Building Manager) of SLGA, as noted in our opening submissions, whether or not SLGA can operate without the car parks would have been considered when the conditions were imposed and it is clear the reduction was considered to be acceptable.

16.9 To assist the Commissioners, **attached** at **Tab D** is a marked up version of page 62 of the Hearing Drawing Set. This shows the proposed designation boundary in relation to Watercare's existing designation at the site. The small cross hatched area is the **only** part of the SLGA site which is proposed to be included in Watercare's proposed designation which is not already within its existing designation.

Pedestrian access

16.10 At the hearing SLGA also raised concerns that the layout of the proposed Lyon Avenue construction site would put it in breach of their consent conditions in relation to the provision of public access through SLGA and into the Roy Clements Treeway.

16.11 Their conditions require that "public access through the pedestrian walkway shall be provided" and that "should a gate be constructed at the access point to the Roy Clements Treeway, it shall only be an electronically controlled gate...permitted to be closed and locked between the hours of 10.30pm - 6am in summer and 10pm - 7am in winter". It is clear that there needs to be unimpeded pedestrian access from SLGA to the Roy Clements Treeway between 6am and 10.30pm in summer, and 7am and 10pm in winter.

16.12 Watercare has considered these conditions and incorporated possible temporary alternative pedestrian access ways into its proposed site layouts. Two possible temporary alternative pedestrian access ways are indicated on page 65 of the Hearing Drawing Set. Watercare has also ensured that (as shown on page 65) its site does not impact on the walkway through the Roy Clements Treeway and this will be available for pedestrian access throughout the full duration of works at this site.[64]

16.13 As the purpose of their conditions is to provide public access through the SLGA to the Roy Clements Treeway, we consider that so long as alternative access is provided, as proposed by Watercare, this would be in accordance with both the purpose and the actual requirements of the conditions.

16.14 Watercare has now agreed to an additional designation condition TM.3F(e) which more specifically states that public access is to be maintained between Morning Star Place and the Roy Clements Treeway. Other conditions have also been included relating to the use of Morning Star Place as this is a private road and not subject to Auckland Transport traffic management plan approval processes. We comment further on this in the Conditions section of these legal submissions.

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[64] Refer to proposed Designation Conditions TM.2(e) and PM.1.

17. HAVERSTOCK ROAD

17.1 It was disappointing that Mr Havill felt the need to attend and present evidence in opposition to the Haverstock Road site.

17.2 Watercare understands and acknowledges that the Mount Albert Research Centre is an important facility and its ongoing operational viability must not be restricted by the Project, nor its security jeopardised.

17.3 Section 4.4 of Mr Havill's evidence was clear on what he was seeking. As indicated by Ms Petersen in her primary statement of evidence,[65] Watercare has been consulting with Mr Havill's clients since 2011, and that consultation is on-going. Ms Petersen advised you that a draft access agreement was provided in May 2013, further information was provided in June 2013 and that discussions were continuing on the scope and detail of the agreement. Draft versions of the agreement have been going back and forth between the parties for the last few months, and it is currently with Watercare for review. Watercare remains confident that it can address Mr Havill's clients concerns outside of this process. In the unlikely event that does not occur, the amended Designation Conditions CNV.2, CNV.4, CNV.5 and Consent Condition 4.12 provide the requisite certainty that these issues will be addressed at detail design stage, as explained in paragraphs 3.21 to 3.22, 9.11, and 18.2(c)(ii) above.

18. MAY ROAD

18.1 As succinctly summarised by Mr Allan, Foodstuffs (Auckland) Limited's ("**Foodstuffs**") concerns are with the:[66]

(a) alleged effects on its operations from:

(i) the use of the Roma Road access;

(ii) settlement, exacerbated by blasting;

(iii) stormwater effects on the low lying parts of its land;

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65 Refer to [5.81] to [5.82] of Ms Petersen's primary evidence.

66 Legal submissions, presented by Douglas Allan on behalf of Foodstuffs, at [5].

(b) a suggested lack of certainty caused by:

(i) the uncertainty around the use of May Road as either a launch site, a retrieval site, both or neither;

(ii) the reliance on management plans where there is:

(aa) no opportunity for substantive input by Foodstuffs; and

(bb) no requirement for them to be "approved" by Council under the proposed Designation Conditions;

(c) flexibility sought by Watercare to exceed the noise and vibration standards; and

(d) the proposed 15 year lapse period.

18.2 With the exception of the concern listed in paragraph 18.1(b)(i), all of these are addressed in Watercare's reply:

(a) As explained in the reply evidence of Mr Hills:

(i) The uncertainty existing in Designation Condition TM.3D in the Hearing Set has now been removed so that:

(aa) all vehicles, rather than just heavy vehicles, will use the one way system;

(bb) the direction of the one-way system has been confirmed; and

(cc) the proviso that it was subject to the agreement of the landowner and Auckland Transport has been removed as requested.

(ii) There will be negligible traffic effects on the operation of the Roma Road access as the ingress for the construction site.

(b) Watercare fully expects that vehicles accessing the site from Roma Road in the one way manner proposed will meet the relevant standard in respect of the adjacent building at 58 Roma Road. The amendments to Designation Conditions CNV.2, CNV.4 and CNV.5 now provide Foodstuffs with the opportunity to be involved in the preparation of the CNVMP, if any standards cannot be met in relation to any construction effects.

(c) As explained in the reply evidence of Mr Cooper:

(i) the evidence of Mr Mullaly was consistent with the previous work completed by Mr Twose and did not raise any unexpected issues;

(ii) new Consent Condition 4.12 enables landowners to establish the presence of specific sensitive buildings and request they be included in the monitoring programme; and

(iii) any stormwater effects can be managed through detailed design, and new Consent Condition 6.3(fa) provides further comfort that the works will not increase flooding on Foodstuffs' land.

(d) Watercare has already confirmed to Foodstuffs that it is willing to commit to undertake pre-construction surveys on a number of its buildings. No mention was made of this prior offer in the material presented by Foodstuffs. Watercare intends to continue dialogue with Foodstuffs in respect of which buildings are to be surveyed.

(e) The approval process for the management plans is discussed in Section 8 above, and the 15 year lapse period is discussed in Section 6 above.

18.3 That leaves only the concern listed in paragraph 18.1(b)(i) above, about the uncertainty around the use of May Road as either a launch site, a retrieval site, or both. No further clarification or certainty can be provided at this point in time.

18.4 In our submission, and despite the contrary position taken by Ms Bull, Watercare has gone to significant efforts to address the concerns raised by Foodstuffs. The May Road site has, out of necessity as a result of Watercare's desire to retain flexibility over the construction sequencing, needed to be assessed on the worst case scenario. Even at this level of activity on the site, the expert independent advice to Watercare is that the site can operate with a satisfactory level of effects.

18.5 It is possible that the May Road site will not be used for a TBM launch site and the traffic effects and duration of works will, as a consequence, be significantly less than assessed. It is, however, accepted that the worst case scenario is needed to be assessed in order to justify the Project and Watercare's proposed Conditions. The extensive list of *site-specific* conditions requested by Foodstuffs are not required, and not justified, with most (if not all) being covered in some other way in the Project-wide conditions. The latest changes in the Reply Set will ensure that, regardless of the level of activity at May Road, the construction site can be managed in a way that should satisfy Foodstuff's concerns.

19. KEITH HAY PARK

19.1 The two submitters at Keith Hay Park live very close to the proposed construction site. Watercare is acutely aware of the proximity of their dwellings to the proposed construction site and the levels of noise and vibration they will experience during the construction period. As explained in the primary evidence of Ms Petersen:[67]

> The Whitehead property boundary is located only around 12 metres from the proposed access shaft at the Keith Hay Park site. This property is one of the closest to any of the shaft sites, and as it is two storied, mitigation of noise effects in particular will require special treatment. The potential effects on the Whitehead property are acknowledged by Watercare.
>
> The Puertollano property is located adjacent to the proposed construction access from Arundel Street.
>
> Since lodgement of the NOR in August 2012, Watercare has met on two occasions with Mr and Mrs Whitehead and met once with Mr and Mrs Puertollano. Further assessment is being undertaken of potential noise mitigation options for both the Whitehead and Puertollano properties and

[67] Evidence of Ms Petersen at [5.95] to [5.100].

discussions with them will continue during further development of the Project.

19.2 While Mr and Mrs Whitehead attended the hearing, they acknowledged that they are in consultation with Watercare and that possible internal noise controls have been discussed. Mr and Mrs Portallano did not attend the hearing, but in their tabled material also acknowledged that there has already been contact with Watercare regarding potential mitigation options.

19.3 While Watercare has commenced discussions with these two submitters, and remains optimistic that agreement can be reached with both in the near future, the amended Designation Conditions CNV.2, CNV.4 and CNV.5 in the Reply Set provide comfort that, in the event agreement cannot be reached now, or the land ownership changes between now and construction commencing, the effects on these properties will be considered and addressed at the time the CNVMP is prepared for the site.

20. KIWI ESPLANADE

20.1 A number of issues were raised by submitters[68] in relation to the Kiwi Esplanade Reserve site, including odour, effects on shore birds, alternative options, and the future operation of the Mangere WWTP. To the extent relevant, these general issues are addressed in the reply evidence to follow.

20.2 The reply evidence of Ms Petersen also specifically addresses the issues raised by the Dempseys, and provides further detail on the proximity of the tunnel alignment to their property and what the permanent features are likely to look like from their property.

21. EPR STRUCTURE

21.1 A number of submitters[69] have raised various concerns around the EPR structure. The various technical concerns raised in relation to the EPR are addressed in detail in the reply evidence of Mr Cantrell and Mr

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68 Including the Mangere Bridge Residents and Ratepayers Association, Sean Dempsey, Timothy Corbett, Mere Clifford Edward Kitching, Gillian Vaughan on behalf of the Miranda Naturalists' Trust and Robert Demler.

69 Including the Manukau Harbour Restoration Society, the Mangere Bridge Residents and Ratepayers Association, Jim Jackson, Timothy Corbett, Mere Clifford, John Skeates, Bronwen Turner, Edward Kitching, Gillian Vaughan on behalf of the Miranda Naturalists' Trust.

Roan. As emphasised in our opening legal submissions, the evaluation of the potential effects of any discharge from the EPR cannot occur in a vacuum and must be assessed in their context.

21.2 As you have heard (and read) there are three key drivers for the Project:

(a) replacement of failing infrastructure;

(b) provision for growth within an existing area; and

(c) reducing wet weather overflows of wastewater into the environment.

21.3 Often infrastructure projects address a single pressing issue, such as capacity on a road. This Project, however, has been designed to achieve three pressing infrastructure issues. It is a very good news story. The Project will not only replace aging and at-risk infrastructure, but will also cater for growth to occur and will reduce overflows into the environment.

21.4 As with all water-related infrastructure, and indeed most infrastructure, emergency measures **must** be incorporated into design to cover the "what if" scenarios, whether it be protocols for downed power cables or emergency exits from subway systems. Regardless of the likelihood or low probability of the emergency occurring, certain processes and infrastructure has to be in place "just in case". This is no different for the proposed EPR. While in a utopian world such structures and risks would not be required, in reality all wastewater interceptors constructed worldwide have built in emergency pressure relief structures. The need for the EPR discharge has been thoroughly assessed and justified in the application documents and evidence presented at this hearing and will be covered further by Mr Cantrell and Mr Roan as part of this reply.

PART 3: CONDITIONS

22. INTRODUCTION

22.1 As the Panel will have heard from Council staff, Watercare provided Council staff with an updated version of both the Designation Conditions and Consent Conditions on Wednesday 7 August (dated 9 August) to facilitate discussion on changes arising during the course of the hearing. The intention at that time was to close the hearing on either 8 or 9 August, and the draft "Reply Set" of conditions was provided in an effort to reduce duplication and provide an early indication of the likely changes to be proposed by us in reply.

22.2 No discussions occurred, but the Council staff have usefully used the draft "Reply Set" as the base document for their own reply. Unfortunately, however, the documents created by Council staff are not particularly helpful as instead of showing amendments to conditions in a number of places they have simply inserted alternatives. The document is difficult to follow and for this reason has not been developed further by Watercare.

22.3 Instead, what we have done is update Watercare's draft "Reply Set" to incorporate any further changes requested by Council staff that Watercare is willing to accept. The amendments originally shown in the draft "Reply Set" dated 9 August, the further amendments proposed by Council staff that are accepted by Watercare, and additional amendments now proposed are all shown in the "Reply Set" (as red, green and purple respectively). We have also prepared a "Clean Set" that shows the conditions in their final form (as proposed by Watercare) with all numbering and cross references updated and formatting corrected.[70] These four sets of Conditions are included in the "**Reply Conditions Bundle**" provided to you today.

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[70] Note that references to conditions in the reply submissions and evidence are to the marked up Reply Set of conditions rather than the Clean Set of conditions.

22.4 This part of the submissions:

(a) explains all of the changes proposed in the Reply Set, and where further detail can be found; and

(b) identifies the areas still in dispute and explains where these matters are addressed in the evidence.

23. REPLY SET

Designation Conditions

23.1 As explained in paragraph 15.2(a) above, DC.1B has been amended in response to concerns expressed by submitters at Mount Albert War Memorial Reserve and now requires Watercare to remove the Reserve site designation as soon as it is has confirmed the location of suitable alternative car parking.

23.2 The definition of "Project stage" below DC.5 has been amended to make it abundantly clear that there may be site specific OPWs and management plans. DC.7(b) and (d) have also been amended to specifically refer to site specific management plans for traffic, noise and vibration. Consequential amendments have been made in CM.2(l), CNV.1, CNV.3, CNV.4, CNV.5 and TM.1.

23.3 A Cultural and Archaeological Management Plan is now listed in DC.7 and is to form part of the OPW package. This amendment, together with the more substantive change with new condition AH.0, is in response to questioning from Commissioner Majurey and reflects Mr Maskill's discussions with iwi to date. The wording has been amended to reflect the request by Council staff on 9 August.

23.4 Mr Goodwin has been in discussions with Mr Lister regarding the amendments that Mr Lister indicated were required when he was asked for comment during the presentation of Watercare's case. New condition DC.7AA reflects those discussions, and a minor consequential amendment is also made to DC.7B. DC.7B(d) is also amended as sought by the Council staff on 9 August.

23.5 The edit to CM.2(m) requires no explanation and the small edit to (n) reflects the changes made to T.1 and T.2 below. CM.3 has been amended to require any updated CMP to be submitted to the Council.

23.6 As explained in paragraphs 9.1 to 9.12 above, the changes to CNV.2, CNV.4 and CNV.5 are in response to both concerns expressed by the Panel with the inclusion of the phrase "as far as practicable" in CNV.2 and concerns expressed by submitters about not being involved in the OPW process and the selection of methods to be adopted for managing noise and vibration. This is discussed further in the reply evidence of Mr Cottle.

23.7 There are three changes to CNV.5A:

(a) In response to questions from the Commissioners, "blast" has been replaced with "blast event" and a definition of the new term has been inserted. The original definition provided by Mr Millar has been updated to reflect the wording suggested by Council staff on 9 August.

(b) In response to a request from Mr Styles, the Australian Standard to be used for measuring and assessing the air overpressure has been specifically listed in the condition.

(c) As requested by Council staff on 9 August, any agreement reached with the affected owner(s) is to be recorded in writing. The same change has been made in CNV.6.

23.8 The wording of CNV.5B has also been reconsidered by Mr Millar and a small correction has been made.

23.9 Minor changes are proposed in ON.1 to reflect the request from Council staff on 9 August.

23.10 Minor changes are proposed in TM.2 in response to concerns expressed by Ms Crafar at the hearing that Western Springs Stadium may not be considered a park or reserve, and other further minor amendments she has recently suggested.

23.11 TM.3A has also been amended in the manner requested by Council staff on 9 August.

23.12 As explained in paragraph 15.2 above, TM.3B has been amended and a new TM.3CA proposed in response to the concerns expressed by the submitters at Mount Albert War Memorial Reserve about the potential length of time before Watercare confirms the use of the Car Park site and withdraws the Reserve site designation. The wording of TM3.B has been updated following receipt of the Council staffs' comments on 9 August.

23.13 The two primary construction sites of May Road and Western Springs were the only sites to have site specific traffic management conditions in the Hearing Set. Watercare has now agreed to a site-specific traffic management condition for the Mount Albert War Memorial Reserve site, and TM.3CB is the wording requested by Ms Crafar.

23.14 As explained in paragraph 18.2 above, TM.3D has been amended in response to concerns expressed by Foodstuffs and now commits Watercare to using the one-way system, for all vehicles, entering from Roma Road and exiting on to May Road. This arrangement is further discussed in the reply evidence of Mr Cottle and Mr Hill. The wording of the condition has been amended in the manner requested by Council staff on 9 August.

23.15 A new TM.3F is also now proposed for the Lyon Avenue site, introducing site specific traffic management / mitigation measures. Watercare remains of the view that site-specific measures do not need to be specifically listed in the conditions for individual sites. However, it does recognise that Morning Star Place is a private road (and not subject to Auckland Transport traffic management approval processes) and may therefore warrant special attention in the conditions. The wording of new TM.3F is based largely on that proposed by Council staff in a further version of the designation conditions provided yesterday afternoon.

23.16 CH.1 has been amended in the way sought by Council staff, with the deletion of "generally" from the preamble above the construction hours.

23.17 A new T.2 is proposed for the reasons explained in the reply evidence of Ms Petersen.

23.18 As noted in paragraph 23.2 above, new AH.0 is in response to questioning from Commissioner Majurey and reflects Mr Maskill's discussions with iwi to date. AH.1 has been amended as requested by Council staff on 9 August. AH.2 has been amended, and AH.3 deleted, in response to questioning from Commissioner Majurey.

23.19 As explained in paragraph 16.2 above, RC.1 and RC.2 have been amended in response to the submission by STEPS. Instead of being limited to the Roy Clements Treeway, the enhancement works may now occur in another local area in the vicinity of Meola Creek and any new planting is to be eco-sourced native plants appropriate to the local habitat.

Consent Conditions

23.20 A number of the changes to the Consent Conditions are identical to the changes explained above. This section only comments on those amendments not already discussed above.

General

23.21 Former Condition 1.13 has been moved up to new Condition 1.11A, at the request of Council staff on 9 August. A minor correction has been made to Condition 1.12.

23.22 The wording in Condition 1.20 is similar, but not identical, to the wording in Condition AH.0. The changes merely reflect the fact that the Cultural and Archaeological Management Plan ("**CAMP**") forms part of the OPW documentation under the designation, whereas the CAMP (like the other management plans under the consents) is to be submitted for approval.

23.23 As explained in paragraphs 5.4 to 5.6 above, further thought has been given to the precise wording of the commencement date conditions (1.24 - 1.25). A requirement to notify the Council of commencement has also been added.

Groundwater

23.24 Condition 4.2 has been amended to clarify that its requirements relate to both temporary and permanent structures, and that the obligations continue once the structures have been completed.

23.25 Condition 4.2A has been added to address the query regarding the annulus between the temporary and permanent shafts. This wording has been prepared with the assistance of Mr Twose and Mr Cooper and will ensure that the backfilling of the annulus is undertaken to the appropriate engineering standard. The phrase "as far as practicable" has been deleted as requested by Council staff.

23.26 Condition 4.5 has been amended to make it clear that the Monitoring and Contingency Plan ("**M&CP**") can be for the Project overall, or for each of its relevant stages. This confirms the potential for a M&CP to be prepared for each site.

23.27 A new (j) has been added to Condition 4.5 to address settlement risk associated with trenching works in the M&CP. While the main trenching works are associated with construction of the Link 4 sewer, other local trenching will also occur on sites where connections are made to the local network. For this reason, the minor amendment sought by Council staff on 9 August has been made.

23.28 The Commissioners questioned the timeframes for submitting material to the Manager for approval under the groundwater conditions. The 12 month period in Condition 4.6 has been extended to 14 months to accommodate the various pre-construction monitoring requirements. The 10 working day timeframe has also been extended to 20 working days to enable adequate time for consideration in advance of shaft sinking. Condition 4.6 has also been amended to make it clear what aspects of the MC&P need to be submitted 14 months prior.

23.29 Minor edits have been made to Condition 4.11, principally to address the need for condition surveys to consider local geological conditions.

23.30 A new Condition 4.12 has been added, and is discussed in the reply evidence of Mr Cooper. It is based on, but different to, the version initially put forward in the Council Pre-hearing Report for the reasons set out by Mr Cooper. Consequential amendments have been made in 4.14, 4.15 and 4.16 to reflect the introduction of a new condition.

23.31 The definition of "Completion of Dewatering" has been amended to confirm that it is not until the permanent works are in place.

23.32 On reflection, Watercare no longer supports the final sentence in Condition 4.17 and now seeks it be deleted. The methodology for repairing any damage caused has to be approved by a Chartered Professional Engineer and then provided to the Manager. There is no need, or reason, for the Council to approve the Chartered Professional Engineer.

23.33 A new Condition 4.17A has been added, in response to the request from Council staff for new conditions 4.2(b) and 4.2(c). The new Condition 4.17A sits better alongside Condition 4.17 than 4.2 as proposed by Council staff, as it deals with repair of damage determined through condition surveys. The new Condition 4.17A reflects the same approach as 4.17, but addresses a process for repair of damage where this was otherwise unforeseen.

23.34 Minor edits have been made to Condition 4.24 and 4.26, as requested by Council staff on 9 August.

23.35 The Commissioners questioned the terminology used in Condition 4.30 and queried how the wording in the definitions of Alarm Level and Alert Level (particularly "design value") related to the "expected settlement level" used in the condition itself. Improvements to the wording have been developed by Mr Cooper and Mr Twose, and are discussed in the reply evidence of Mr Cooper. These have been reviewed by Council staff, and the suggested edits received on 9 August have been incorporated.

Stormwater

23.36 Conditions 6.1, 7.1 and 10.1 have been updated to reflect the request made in our opening submissions that these consents have a later commencement date and that, as a consequence, the 35 year term does not start running from the date of the decision (as wording in the Council's version) but starts from commencement.

23.37 A new Condition 6.3(fa) has been added in response to concerns expressed by Foodstuffs, and is discussed in the reply evidence of Mr Cooper.

Discharges to Air

23.38 A new Condition 7.8A has been added as requested by Council staff on 9 August, although the wording has been improved removing the need for an explanatory note to follow.

23.39 Watercare has also now agreed to submit details of any odour complaints to the Manager within 7 days of receipt. This has been added to Condition 7.9, as sought by Council staff.

Contaminated Land

23.40 The amendment to Condition 8.3 is a minor correction to correctly reference the full title of the document.

Coastal Works

23.41 New condition 9.2A is the wording agreed with Transpower. The outside edge of the tunnel is to be a minimum of 10 metres (measured horizontally) from the nearest foundation of Tower 36.

23.42 Watercare has agreed to prepare the Site Restoration and Landscape Plan for the two sites in the CMA (Pump Station 23 and the EPR) in consultation with the relevant Local Board and tangata whenua. This is now reflected in Condition 9.5.

24. CONDITIONS STILL IN DISPUTE

Designation conditions

24.1 It is clear from the discussion above that Watercare has proposed a number of changes to the Designation Conditions in response to the material presented during the hearing, and after considering the material received from Council staff on 9 and 12 August. However, there are a number of amendments proposed by Council staff that are opposed by Watercare. These are touched on briefly below, and many are discussed further in the reply evidence of Ms Petersen.

24.2 A number of the amendments sought by Council are the same as, or substantially similar to, the conditions set out in the Pre-hearing Report. In particular:

(a) Council staff remain of the view that only the Car Park site at Mount Albert War Memorial Reserve should be confirmed. This is clear from their amendments to DC.1(c) and the deletion of DC.1B. This is opposed by Watercare, for the reasons canvassed in opening submissions and evidence. Amendments have been proposed by Watercare to DC.1B, TM.3B - TM.3CA to respond to the concerns expressed by submitters about potentially lengthy delays before Watercare confirms its use of the Car Park site.

(b) Council staff are also still proposing that there be detailed site specific traffic management conditions for individual secondary construction sites. This affects DC.7(b), TM.2, TM.3F to TM.3N. With the exception of Lyon Avenue (referred to above), these amendments are opposed for the reasons set out in the opening submissions and the primary evidence of Ms Petersen and Mr Hills.

(c) An extensive new DC.7AA has been included by Watercare following discussions between Mr Goodwin and Mr Lister (based on his original SR.7). Council staff are still seeking 3 further edits, all of which are opposed:

(i) The new condition relates to new permanent buildings, including air treatment facilities. Council staff seek to add "and ventilation stacks". As there are no such features shown in the Hearing Drawing Set, and none are proposed as part of the Project this is unnecessary. There is an "air vent" at May Road, but it is not a building worthy of requiring architectural plans.

(ii) The new condition requires the architectural design of the buildings to take into account the listed matters. This wording is consistent with that in DC.7B below. Having to "satisfy the following criteria", as suggested by Council staff, is ambiguous and inappropriate in a condition.

(iii) Council staff have made a number of edits through-out aimed at the situation where multiple buildings are being considered at one time - such as replacing "building is" with "buildings are". It is preferable to refer to each building, rather than amend the matters to refer to buildings, as the sites will not have multiple buildings.

(d) Council staff remain of the view that Open Space Restoration Plans should be used in some instances, rather than Site Reinstatement Plans at all sites. This affects DC.7B(c) and SR.1 - SR.13. These amendments remain opposed for the reasons set out in the opening submissions and the primary evidence of Ms Petersen.

(e) Council staff remain opposed to the use of a statistical approach, and have suggested a number of changes to CNV.2 - CNV.6 focussed on strict compliance with the noise and vibration standards except in limited specified circumstances. As with the amendments proposed in the Council's Pre-hearing Report to these conditions, these latest changes are also opposed for the reasons set out in the evidence of a number of witnesses, including Mr Cooper, Mr Millar and Mr Cottle. You have heard considerable evidence (including in response to questioning) on this point during the hearing from Watercare's very experienced team of independent expert witnesses and the matter is not addressed further in reply.

(f) Council staff continue to seek the inclusion of CH.3 about restricting truck movements during school times. This condition is opposed for the reasons set out in the primary evidence of Ms Petersen and Mr Hills.

24.3 A small number of changes are new. Most of these respond to matters that were raised during the course of the hearing, and have already been discussed in detail above. In particular, the following amendments have already been discussed in earlier parts of these submissions and will not be commented on further here:

(a) Council staff are now proposing to delete "general" from "in general accordance with" in DC.1.

(b) Council staff are now proposing a 10 year lapse period in DC.4.

(c) Council staff are now proposing that the management plans required to be submitted under the OPW process should be submitted for "the Council's approval". This affects DC.7, CM.1, CNV.1, TM.3C, TM.3D, CH.2 and CIL.1.

24.4 These changes are all opposed for the reasons already discussed above.

24.5 That leaves only six amendments proposed by Council staff not yet discussed:

(a) Yesterday afternoon, Council staff requested the inclusion of a new CM.2(g) limiting the timing of all works at the Kiwi Esplanade site, not just those works outside the designated area. Ms Petersen comments on this in her reply evidence.

(b) The suggested deletion of CM.2(m) has not been accepted, as the reasoning for its deletion was unclear.

(c) As a minor point, Council staff seek to amend TM.2(g) to refer to Mount Albert War Memorial Reserve. This clearly falls within the phrase "parks, reserves" already used in that condition and as such does not need to be specifically listed. By listing it, it potentially creates confusion as to whether other reserves where events are held, such as Keith Hay Park and Walmsley Park, are covered by the condition.

(d) Council staff have proposed an alternative T.2 to that proposed in the original draft Reply Set. Ms Petersen comments on this in her reply evidence.

(e) Council staff proposed to delete from RC.3 the requirement for approval not to be unreasonably withheld. This is the only management plan required under the Designation Conditions that Watercare accepts is to be submitted to the Council for approval, reflecting the fact that it will occur well in advance of

the OPW for Lyon Avenue and will affect land outside the designated area. It is for this reason that, unlike all other management plans referred to in the Designation Conditions, this one is to be submitted for approval. It is appropriate that, as with the management plans required under the Consent Conditions, the approval is not to be unreasonably withheld.

(f) A number of new purported "Advice Notes" are suggested for the Designation Conditions. These are considered unnecessary for the reasons addressed in the reply evidence of Ms Petersen. While appearing as Advice Notes, they are not drafted as such and instead appear to either replicate the content of existing conditions or seek to introduce matters more properly covered in landowner approvals in due course.

Consent Conditions

24.6 Given the extent of overlap between the Designation Conditions and the Consent Conditions, most of the outstanding issues have already been covered above. In this section we only comment on the four other issues in dispute not already discussed.

24.7 Of the four outstanding issues, two relate to alternative versions of the groundwater conditions that have been put forward by Council staff with no explanation or reasoning:

(a) Condition 4.6 - where Council staff appear to have deleted the second half of the condition and replaced it with an advice note, possibly to avoid any confusion over the timing requirements (which Watercare has proposed to amend in its version).

(b) Condition 4.12 - where Council staff have reinstated the version originally included in the Council's Pre-hearing Report in a slightly modified form. Watercare was opposed to the original wording, as explained in the primary evidence, and the reply evidence of Mr Cooper addresses the preferred wording put forward by Watercare.

24.8 In both of these situations, Watercare opposes the alternative wording proposed by Council staff and supports its wording set out in the Reply Set.

24.9 There are two further edits proposed by Council staff that are opposed by Watercare:

(a) Staff have suggested deleting the phrase "use all reasonable endeavours" in Condition 4.33. This is the condition that sets the Differential Settlement Limit and Total Settlement Limit. These are the limits referred to in the definition of "Alarm Level" in Condition 4.30. While the contractor must use all reasonable endeavours to not cause greater settlement, the Alarm Level trigger process reflects the fact that this may occur (despite those endeavours). For this reason, the phrase has been retained by Watercare.

(b) The stormwater management objective for the May Road site in Condition 6.3(c) is "2 & 10 year ARI attenuation to pre-development levels". This is the same for the four sites where impervious surfaces could exceed 1000m^2, being Western Springs, Haverstock Road, Pump Station 25 and May Road. Council staff are now suggesting that, for May Road, this should be increased from the 10 year ARI to a 100 year ARI. This is opposed, and discussed in the reply evidence of Mr Cooper.

24.10 Watercare has given careful consideration to the various documents provided by Council staff throughout the course of the day on 9 August and the further amendments provided yesterday afternoon. Where acceptable, the amendments have been incorporated into the Reply Set. Where unacceptable, the amendments are discussed above. For all of the reasons set out above, Watercare opposes those additional amendments requested by Council staff identified above and requests that the Panel endorse the revised Reply Conditions as proposed by Watercare.

25. CONCLUSION

25.1 As stated in Watercare's opening legal submissions, the Project is a critical piece of new infrastructure. The expert evidence presented on behalf of Watercare has demonstrated that although the construction of the Central Interceptor, and any discharges from the EPR structure if it activates will result in temporary adverse effects on the environment, such effects are inevitable in a project of this scale and will be far outweighed by the long-term positive benefits to the community and the environment.

25.2 We therefore respectfully request that the Panel recommend confirmation of the NORs and grant the resource consent applications for the Project subject to the revised Reply Conditions as proposed by Watercare.

D A Nolan and B S Carruthers

Counsel for Watercare Services Limited
13 August 2013