

Eastern Bays Shared Path project

Memorandum 6 – Response to matters raised in email dated 9 July 2020

This Memorandum 6 is the sixth memorandum submitted by Stantec, on behalf of Hutt City Council. It responds to the further information request received from Greater Wellington Regional Council and Hutt City Council dated 9 July 2020 from Shannon Watson and detailed further in the attachment to that email prepared by Shannon Watson and Dan Kellow.

As part of its response, Hutt City Council ("HCC") has reviewed its proposed draft conditions (referred to in this memorandum as the "**Revised Conditions**") to respond to matters raised in the attachment. The Revised Conditions are attached as **Appendix A**.

1 Biodiversity: Policy Framework and Effects

1. The applicant has carefully considered GWRC's comments on the biodiversity policy framework, level of effects, and the mitigation hierarchy as set out in the first part of the attachment.
2. This section sets out HCC's updated position, taking into account all of the measures now proposed, that mean that HCC complies with that policy framework. In particular, that effects will be avoided where that is required.

A. RELEVANT POLICY FRAMEWORK

3. The decisions version of the Proposed Natural Resources Plan (dated 31 July 2019) ("**PNRP (Decisions Version)**") includes amendments to objectives and policies that had previously been assessed in Appendix S (Statutory Assessment) of the application.
4. These changes include, as relevant to the application:
 - (a) the introduction of Policy P39A which requires that adverse effects on specific ecosystems, habitats and species must be avoided; and
 - (b) the inclusion of an exception to the mitigation hierarchy provided in Policy P41 for specific ecosystems and habitats identified in Policy P40 that requires that adverse effects be managed under Policy P39A.
5. Policies P39A, P40 and P41 are all subject to appeal to the Environment Court.

Policy P39A: Indigenous biodiversity values within the coastal marine area

6. Policy 39A provides direction as to how the indigenous biodiversity values of aquatic ecosystems, habitats and species within the coastal marine area ("**CMA**") are to be protected. Only Policy P39A(a) is relevant to the Project.¹ It requires the avoidance of adverse effects associated with use and development on a series of special and/or vulnerable ecosystems, habitats and species described in paragraphs (i) to (v).
7. Policy P39A(a) is intended to give effect, within the Wellington regional context, to Policy 11(a) of the New Zealand Coastal Policy Statement ("**NZCPS**") and is drafted in very similar terms:

Policy P39A(a) PNRP (Decisions Version)	Policy 11(a) NZCPS
To protect the indigenous biodiversity values of aquatic ecosystems, habitats and species, use and development within the coastal marine area shall: (a) avoid adverse effects on:	To protect indigenous biological diversity in the coastal environment: (a) avoid adverse effects of activities on: (i) indigenous taxa that are listed as threatened or at risk in the NZ Threat classification system lists;

¹ Policy P39A(b) relates to the ecosystem values of estuaries, which are not relevant to the Project.

<ul style="list-style-type: none"> (i) indigenous taxa listed as threatened or at risk in the NZ Threat classification system lists or as threatened by the International Union for Conservation of Nature and Natural Resources; (ii) indigenous ecosystems and vegetation types in the coastal marine area that are threatened or are naturally rare; (iii) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare; (iv) areas in the coastal marine area containing nationally significant examples of indigenous community types; (v) areas set aside for full or partial protection of indigenous biological diversity under other legislation. 	<ul style="list-style-type: none"> (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened; (iii) indigenous ecosystems and vegetation types in the coastal environment that are threatened in the coastal environment, or are naturally rare; (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare; (v) areas containing nationally significant examples of indigenous community types; (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and ...
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8. As GWRC is aware, policies using the word "avoid", as is the case with Policy P39A(a) of the PNRP (Decisions Version) and Policy 11(a) of the NZCPS, have been the subject of considerable judicial scrutiny. The Supreme Court has observed, albeit in the context of Policies 13 and 15 of the NZCPS, that minor or transitory effects are acceptable within the context an avoidance policy:²

"(...) It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."

9. We understand that this approach is broadly consistent with GWRC's position as expressed during the meeting on 22 January 2020 that consents can only be granted "if effects on threatened biodiversity are transitory or (less than) minor."

10. Further, the Environment Court in *Royal Forest and Bird Protection Society of New Zealand v Auckland Council* endorsed the approach of the Court of Appeal in *Man O' War*, as follows:³

"The Court of Appeal also noted, with respect orthodoxically, that the requirement to "avoid" adverse effects is contextual, so that whether any new activity or development would amount to an adverse effect must be assessed in both in the factual and broader policy context."

11. The consideration of avoidance therefore also requires context-specific queries which relate to the particular species affected, use and vulnerability of habitat, inevitable effects on the species or habitat at issue (whether those are generated by natural or man-made causes, such as from sea-level rise or existing infrastructure), and enhancement resulting from development. These matters are addressed at paragraph 38 below.

Policy P40: Ecosystems and habitats with significant indigenous biodiversity values

12. Policy P40 seeks to protect and restore ecosystems and habitats with significant indigenous biodiversity values. The following habitats, referenced in Policy 40(b) and (d) respectively, are relevant to the Project:

- (a) significant habitats for indigenous birds in the CMA identified in Schedule F2c:
 - (i) the foreshore area between Point Howard and Sunshine Bay (excluding Windy Point) falls within *Wellington Harbour (Port Nicholson) foreshore; northern end of Day's Bay to Point Howard*.⁴ Five threatened or at risk indigenous bird species are known to be resident or

² *Environmental Defence Society Inc. v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [145].

³ *Royal Forest and Bird Protection Society of New Zealand Incorporated v Auckland Council* [2017] NZHC 980 at [34]; citing *Man O' War Station Limited v Auckland Council* [2017] NZCA 24 at [65].

⁴ See page 467 of the PNRP (Decisions Version).

regular visitors to this habitat: *black shag, pied shag, little black shag, red-billed gull and variable oystercatcher*;

- (ii) subtidal habitats in and adjoining the Project area are located within the Wellington Harbour (Port Nicholson) – inland waters.⁵ Five threatened or at risk indigenous bird species are known to be resident or regular visitors to this habitat: *little penguin, fluttering shearwater, red-billed gull, Caspian tern and white-fronted tern*; and

- (b) ecosystems and habitat-types with significant indigenous biodiversity values in the CMA identified in Schedule F5: *seagrass and subtidal rocky reefs*.

13. The indigenous taxa listed in (a), and two additional species identified in Table ES-1 of Appendix C-1 (Avifauna and Vegetation) of the application (*reef heron and giant petrel*), fall within the scope of Policy P39A(a)(i). To comply with Policy P39A(a)(i), adverse effects on these species must be avoided.

Policy P41: Managing adverse effects on ecosystems and habitats with significant indigenous biodiversity values

14. Policy P41 manages adverse effects on ecosystems and habitats with significant biodiversity values identified in Policy P40 via an effects management hierarchy.

15. The policy requires that, in the first instance, activities that risk causing adverse effects on the values of a site with significant indigenous biodiversity values identified in Policy P40 must avoid such sites. If the ecosystem or habitat cannot be avoided, adverse effects must be managed in accordance with the mitigation hierarchy set out in Policy P41 (a) to (d).

16. However, amendments in the PNRP (Decisions Version) include an exception for certain ecosystems and habitats identified in Policy P40(b) to (d) on the following terms:

"If the ecosystem or habitat cannot be avoided, (except for those ecosystems and habitats identified in Policy P40(b), (c) and (d) that are identified and managed by Policy P39A(a)), the adverse effects shall be managed by...."

17. As a result, there is no ability to consider adverse effects on those ecosystems and habitats in accordance with the mitigation hierarchy in Policy P41. Instead, adverse effects must be managed under Policy P39A(a). Policy P41 (and the relevant exception) applies to the Policy P40(b) and (d) habitats listed in paragraph 12 above. Adverse effects on these habitats (and the relevant species) must be managed under Policy P39A(a).

B. POTENTIAL ADVERSE EFFECTS REQUIRING AVOIDANCE

18. Appendix C-1 (Avifauna and Vegetation) of the application identifies the following potential adverse effects on the habitats and species identified in paragraph 12:

- (a) the permanent loss of Schedule F2c and Schedule F5 habitats; and
- (b) temporary (construction) effects on shorebird species and little penguins.

19. These potential adverse effects, the level of effect, and avoidance requirements of the policy framework are summarised below.

Permanent loss of Schedule F2c habitats (intertidal foraging habitat for shoreline foragers and little penguin breeding habitat)

20. As identified above, a number of shorebird species categorised as 'threatened' or 'at-risk' forage, roost and nest on the foreshore and in intertidal areas around Wellington's coastline. As summarised in GWRC's earlier correspondence (dated 29 May 2019), while any potential adverse effects on the offshore fishers (shearwaters, terns and giant petrel) and inshore fishers (shags and reef heron) are likely to be temporary, the potential effects on shoreline foragers (gulls and oystercatchers) may result in a permanent reduction in their intertidal foraging habitat.

21. While there are no known little penguin breeding sites within the proposed Shared Path or seawall footprints, two sites have been identified within revetment upgrade areas and a number of other breeding sites are likely to be indirectly affected by the Project (see the table at paragraph 43 below).

⁵ See page 469 of the PNRP (Decisions Version).

Unless raised in the future, these sites (and especially those within the revetment upgrade areas) will be progressively lost to sea level rise. While the potential direct impact within the Shared Path footprint is small (two sites directly lost), further losses are possible as alteration of the surrounding habitat is known to result in the abandonment of nests.

22. Encroachment and the consequential loss of intertidal foraging habitat for shoreline foragers and little penguin breeding habitat is a key permanent (post-construction) effect of the Project. The potential for adverse effects of this habitat loss were assessed in Appendix C-1 (Avifauna and Vegetation) of the application as being more than minor. Extensive avoidance measures set out in detail in subsection C below, and in the application documents, have been designed to ensure that these effects are no more than minor.

Permanent loss of Schedule F5 habitats (seagrass and subtidal rocky reefs)

23. As detailed in the application and further information provided by the applicant, the Project alignment avoids all subtidal areas (including subtidal rocky reefs) and areas of seagrass identified in Schedule F5. The avoidance of these sites complies with Policy P41.
24. Potential adverse effects on seagrass beds during the construction stage will be avoided in accordance with the measures outlined in paragraph 37 below and the Revised Conditions. Temporary (construction) effects on subtidal rocky reefs are avoided by the plans appended to Appendix E (Coastal Process) of the application. Temporary occupation of the subtidal zone during construction is limited to that set out in those plans (see Revised Conditions C.4 and C.5).

Temporary effects on reef heron, shags, shoreline foragers and little penguins

25. Temporary effects on reef heron, shags, shoreline foragers and little penguins during the construction phase relate to sedimentation, food and waste, and noise and disturbance. The potential adverse effects of construction on these species are assessed in Appendix C-1 (Avifauna and Vegetation) of the application as being more than minor. There will be no effects on the offshore fishers (shearwaters, terns and giant petrel).⁶
26. Avoidance measures, set out in detail in the Revised Conditions and referenced at paragraphs 33 to 35 below, will ensure that construction is undertaken in a manner that avoids, or minimises adverse effects on reef heron, shags, shoreline foragers and little penguins such that they are no more than minor.

C. AVOIDANCE OF ADVERSE EFFECTS

Avoidance - Permanent loss of Schedule F2c habitats

27. The following measures have been incorporated into the Project design to reduce the extent of encroachment onto the foreshore, and thereby avoid the loss of intertidal foraging habitat for shoreline foragers and little penguin breeding habitat:
 - (a) Choice of steeply rising curved seawalls as the predominant seawall design to reduce the encroachment footprint of the revetment seawall types. This has reduced the extent of encroachment by approximately 5,356m² (a reduction of 2,589 m² in the CMA). The use of a vertical curved seawall reduces the amount of space required thereby reducing the encroachment onto the beach and subsequent loss of habitat.
 - (b) The adoption of curved seawall designs rather than revetment structures at north Lowry Bay and south Lowry Bay. This has reduced encroachment by approximately 2,029m².
 - (c) Beach nourishment and associated monitoring and management at Point Howard beach, York Bay and south Lowry Bay (see Revised Conditions EM.13 to EM.18). The effect will be to retain all the existing backshore habitat in these three bays.
 - (d) Landward realignment of Marine Drive is proposed to reduce beach encroachment at two areas (Sorrento Bay and York Bay). This has avoided 0.5 to 1 m of widening into the beach.
 - (e) Reducing the path width at certain beach locations (northern Lowry Bay, Mahina Bay and Sunshine Bay) from 3.5m to 2.5m. This decision maintains a continuous path, while limiting the

⁶ See Table ES-1 of Appendix C-1 (Avifauna and Vegetation) of the application.

impact to a highly valued public asset and avoiding encroachment and the resulting loss of significant avifauna habitats. This has reduced encroachment by approximately 777m².

- (f) The use of parallel steps and parallel boat ramps, and an increased angle for ramps, including the use of mini steps. These steps and ramps will be provided parallel to the seawalls, rather than perpendicular, to reduce beach encroachment.

28. Due to the above measures, the total proposed encroachment⁷ of the Project has been reduced to 5,500m², a reduction of approximately 6,897m² (potential area of 12,397m² minus proposed encroachment area of 5,500m²). Reclamation⁸ of the CMA has been limited to 3000m² (this forms part of the total 5,500m² encroachment area). Further details, including specifics relating to the scheduled areas in Schedule F2c are set out in the table below:

	Total area (m ²)	Area within Schedule F2c habitat (m ²)
Reduction measures⁹		
Initial potential area (assume 3.5 cycleway)	12,397	6,548
Reduction by reducing shared path width along beaches	777	284
Reduction by using vertical seawalls	5,356	2,589
Reduction by reducing revetment	2,029	1,430
Reduction by aligning accessways and boat ramps	106	75
Reverse encroachment (gain)	287	123
Total proposed area (encroachment)	5500	2,071
Total proposed area (reclamation)	3000	-
New habitat		
Protection areas (3 sites)	1950	-
	7800	-
	8800	-
Total	18,550	-

29. In addition to reducing encroachment into the Schedule F2c area, the Project will provide for the creation of new fenced protection areas for shoreline foragers and little penguins. The total combined area of three sites is 18,550m².

30. The protection areas will be established at the following locations:

- (a) Whiorau Reserve for penguins (1,950m²). This area will be established prior to the commencement of construction in accordance with Revised Condition EM.9(h)(i);
- (b) North of Bishops Park for penguins and potential area for shoreline foragers (7,800m²); and
- (c) HW Shortt Park for penguins and potential area for shoreline foragers (8,800m²).

31. The protection areas will be established subject to a Habitat Enhancement Plan ("HEP") (as detailed in the Revised Conditions) which requires:

- (a) the ability to accommodate a minimum of 20 little penguin nesting boxes in each of the protection areas;
- (b) the provision of additional foreshore habitat for shoreline foragers, including wooden poles for roosting;
- (c) pest management, planting, and provisions for ecological resilience to sea level rise.

⁷ "Encroachment" is the coastal area from the toe of the existing seawall (including the CMA).

⁸ "Reclamation" has the meaning given to that term in section 2.2 of the PNRP (Decisions Version) (dated 31 July 2019) as it relates to the CMA.

⁹ Not cumulative

32. As a result of all of the avoidance measures set out above and detailed in the Revised Conditions, the permanent (post construction) effects of habitat loss on shoreline foragers and little penguins are less than minor.

Avoidance – Temporary effects on reef heron, shags, shoreline foragers and little penguins

33. Temporary effects on reef heron, shags and shoreline foragers during the construction phase relate to sedimentation, food and waste, and increased noise and disturbance due to construction activities.
34. The existing environment already contains many noise sources to which the bird species of interest have adapted. For example, little shags and little black shags roost/nest in the macrocarpa trees above the pond at the Williams park carpark at Days Bay. However, construction disturbance and noise are the main effects of the Project on little penguins. These potential effects will be greatest during the little penguin breeding and moulting period (between July to February).
35. Avoidance measures, set out in detail in the Revised Conditions, will ensure that construction is undertaken in a manner that avoids adverse effects on reef heron, shags, shoreline foragers and little penguins. These measures, additional to those already identified, include:
- (a) Construction works must avoid active burrows or nests between 1 July and 31 January (little penguin breeding period) on the terms set out in Condition EM.1A.
 - (b) Noise arising from construction works must comply with the noise criteria at Condition GC.14.
 - (c) A Little Penguin Management Plan ("LPMP") must be prepared (Condition EM.2). The LPMP requires the following measures to avoid or minimise adverse effects on the little penguin population during construction, including:
 - (i) requiring two little penguin detection dog surveys to be undertaken in January prior to the commencement of construction to identify active burrows and nests that must be avoided (Condition EM.5);
 - (ii) providing that no construction works can occur in any areas that have not been surveyed (Condition EM.5); and
 - (iii) a protocol for enabling the relocation of burrows and nests outside of the construction area between 1 February and 30 June (Condition EM.5).
 - (d) The requirement for shoreline forager nesting surveys, and for experts to make recommendations on the management of nests and measures to minimise adverse effects on the nesting birds (Condition EM.1C).
 - (e) A requirement that the construction area and adjacent parts of the CMA are kept in a tidy condition in terms of disposal/storage of rubbish (Condition GC.7(j)).
 - (f) Procedures to manage and control erosion, sediment run-off and contaminants into the CMA (Condition GC.7(k), C.6 and C.7).
36. Due to the above measures (detailed further in the conditions), the temporary (construction) effects of the Project on reef heron, shags, shoreline foragers and little penguins are less than minor.

Avoidance – Temporary (construction) effects on seagrass

37. Potential adverse effects on the seagrass beds identified at south Lowry Bay from construction works and beach nourishment will be avoided in accordance with Revised Conditions EM.11(c) (Seagrass avoidance measures) and EM.13 to EM.18 (Beach Nourishment Plan and Beach monitoring and management – beach nourishment).

Avoidance - Context

38. As set out above, case law has indicated that context is relevant when determining avoidance. The context relevant for the Project includes:
- (a) Some of the significant habitat for foraging birds that is affected (Schedule F2c) is existing rock revetment and seawall. Therefore, some of the loss of the existing seawalls and revetment immediately triggers the PNRP (Decisions Version) Policies. Further, the inclusion of those defences indicates that seawalls and revetments are likely to provide new significant habitat for shoreline foragers (especially given their design to enhance such outcomes which do not exist on the existing defences).
 - (b) The habitats affected are already highly modified which reduces their ecological values (see Appendix C-1 of the AEE) and the ecological effect of the Project.

- (c) The listed foraging shorebirds (and little penguins) affected are accustomed to living in the highly modified habitat immediately adjacent to and affected by a busy Marine Drive with relatively high existing recreational activity.
- (d) Climate change and sea-level rise will, likely within the next 20-30 years, significantly reduce the existing extent of foreshore habitat protected by Schedule F2c. With the Project this loss will be slowed and the provision of protection areas and features within the seawalls and revetments themselves will provide habitat that will not otherwise exist.
- (e) Protected areas and ecological enhancements provided by the Project.

Avoidance - conclusion

- 39. The Project has been carefully designed and developed with expert assistance to ensure that adverse effects on indigenous biodiversity have been avoided to low levels, in line with Policy 11 (a) of the NZCPS, and Policies P39A(a), P40 and P41 of the PNRP (Decisions Version). Significant effort, and cost, has been applied to achieve an outcome whereby all effects on indigenous biodiversity are assessed as less than minor.
- 40. This has been achieved through the avoidance measures referenced above, detailed in the application documents and the Revised Conditions in **Appendix A** (dated 22 October 2020). Adverse effects on significant habitats and species have been avoided through an iterative design process, such that effects are less than minor. Overall, the adverse effects on the environment are assessed by HCC's experts to be no more than minor as summarised in Table ES-1 of the AEE.
- 41. There are also a number of positive effects that the Project will provide, such as the establishment of new ecological habitat, that the Project through enhancing the existing environment. The beach nourishment, while carefully avoiding affecting seagrass beds, will ultimately prolong their existence in the face of sea level rise. The effects of sea level rise, irrespective of the Project, will result within 1-2 decades result in the same, and greater (total beach loss), effects on indigenous biodiversity within the Project area.
- 42. Overall, the Project is consistent with Policies P39A(a), P40 and P41 of the PNRP (Decision Version) and Policy P11 (a) of the NZCPS and meets the gateway tests in section 104D(1) (while also meeting s104) of the Resource Management Act 1991.

2 Penguins and coastal birds

Extracts from the email outlining the key matters are as follows:

We acknowledge the applicant's ongoing efforts to work with relevant stakeholders to ensure an appropriate outcome is achieved for penguins and coastal birds, referencing the February workshop and recent site visits specifically, and that this work is ongoing. However, some expected outcomes or actions coming out of the February workshop remain unresolved. In particular, Dr Uys considers there is a need to understand the outcomes of the applicant's assessments of the mitigation and offset actions discussed at the workshop...

In order to make an informed assessment on the effects of the proposal, as a minimum Dr Uys considers the following information still needs to be provided:

- *Clarification on the number of penguins impacted by the proposal. The latest response raised confusion with regard to how many penguins/nests will be affected directly by the building of the path and indirectly through its increased use. What we need to know is:
 - i. *how many penguins/nests will be affected directly by the building of the path;*
 - ii. *how many penguins/nests will be indirectly affected through reduces access to nesting sites;*
and
 - iii. *how many penguins/nests will be indirectly through the use of the path.**

This is in order to ensure that any mitigation and offsetting proposed can be scaled and assessed against the predicted effects.

- *Explicit calculations (area in m²) as to what habitat (both penguin and shoreline foragers) is being lost either directly as a result of occupation by the path and indirectly through potential changes to bird behaviour as a result of the path.*

- Supporting transparent calculations or quantum as to what is being proposed to offset or compensate for any loss of habitat or biodiversity value.

Response:

43. In response to the questions above:

Number of penguin nests impacted by the proposal	# nests	Comments
How many penguins/nests will be affected directly by the building of the path	2	Point Howard/Sorrento Bay and Mahina Bay – located within the existing revetment; proposed new revetment will affect the nests; avoid construction works within 10m of nests during breeding season (Condition EM.1A)
How many penguins/nests will be indirectly affected through reduced access to nesting sites	17	Penguins cross the shared path to access their nests. Nests on the landward side (6) already require penguins to cross the road so the presence of the shared path will have a minimal affect; 10 nests are within the Whiorau Reserve; 1 nest is located in Point Howard on a rocky outcrop in the road corridor.
How many penguins/nests will be indirectly affected through the use of the path	16	Nests are located on the seaward side of the shared path; 9 nests are on rocky outcrops on the seaward side so no physical changes to the existing road (no works, only road markings); remaining 7 nests are in rocky vegetated areas in close proximity of the path.

44. Further details on the location of the nests are set out in Memorandum 5.

45. Calculations in response to your questions are set out in the tables below. The calculations were refined in respect of which habitat (both penguin and shoreline foragers) is being lost. Calculations undertaken by Dr John Cockrem (in his report dated 28 July 2019) were very high level (i.e. included calculations for Days Bay which is not within the Project area). The calculations were redone by EOS using GIS and are consistent with the methodologies used for the other calculations undertaken for the Project.

46. Details and a further breakdown are attached at **Appendix C** of the memorandum.

Habitat	Area (m ²)	Comments
Existing habitat	55,185	Existing habitat within the Project area between the toe of the existing seawall and the low tide mark
Proposed potential habitat	51,399	Existing habitat within the Project area between the toe of the proposed seawall and the low tide mark
Loss of habitat	3,786	

47. There is a 6.9% loss of habitat for shoreline foragers resulting from the shared path. While this represents a spatial loss of habitat, it is noted that the habitat is of a low value due to its location in a highly built up environment alongside a busy road. In addition, the protection areas to be established at Bishops Park (7800m²) and HW Shortt Park (8800m²) for little penguins will include the provision of additional foreshore habitat for shoreline foragers. These protection areas will be established in accordance with the timeframes in Revised Condition EM.9(h) and will, in addition to the measures identified above, avoid any loss of shoreline forager habitat.

48. The actions from the February 2020 workshop have been followed up. A site visit was undertaken in early July with Dr Roger Uys (GWRC), Mike Rumble, Dr John Cockrem, Janet Lawson & Jonathan Frericks (HCC Parks and Reserves), Brent Tandy (DoC) at Whiorau Reserve, the northern end of Bishops Park and HW Shortt Park.

49. All parties agreed that these locations were highly suitable locations to establish expanded and protected penguin breeding areas. Other aspects that were discussed were fencing, enhancing the vegetation, increased pest control, signage, and dog control. The actions table and plans showing the three

proposed sites are attached in **Appendix D** of this memorandum. The conditions proposed are discussed below.

50. Supporting calculations as to what is being proposed to avoid any loss of habitat or biodiversity value.

Penguin protection sites	Approx area (m ²)	Comments
Consolidate a Penguin Habitat Based on Existing Nesting Sites Within Whiorau Reserve	1950	Establish at Whiorau Reserve a fenced-off penguin protection area perhaps involving part of the reserve, acknowledging its recreational and boat launching uses. This will require: <ol style="list-style-type: none"> i. fencing; ii. establishment of suitable vegetative cover, iii. pest control; iv. management of human behaviour (signage and information circulated to the community to achieve behaviour change); v. closure of the entry gate at night and control of dogs (and prevention of access by dogs at night).
New Penguin Habitat at Northern End of Bishops Park	7800	There are known to be penguins nesting in the area. This will require: <ol style="list-style-type: none"> i. fencing; ii. controlling access to the beach with a gate; iii. establishing appropriate vegetative cover (which would also achieve dune restoration).
New Penguin Habitat at HW Shortt Park	8800	This is a rocky coastal habitat suitable for penguins.

Shoreline foragers

51. In terms of conditions, the applicant notes GWRC's comment that nesting surveys should be conducted no more than 10 working days prior to construction at each working bay/area and that there should be a minimum of 100m exclusion zone between construction works and nesting birds.
52. The applicant agrees it is useful to include a more specific timeframe in relation to the shoreline forager nesting surveys. In the Revised Conditions, the shoreline forager nesting survey is now provided for in Condition EM.1C (as opposed to Condition EM.7).
53. In addition to including a specific (10-working day) timeframe in Condition EM.1C, the applicant considers it necessary to include more specific wording around the species that the nesting survey will address and what the survey will entail. Without those specifics, any and all foraging species would be captured by the condition (including introduced species and pests) which is not what the survey was intended to address.
54. Accordingly, the applicant proposes the following wording in Condition EM.1C of the Revised Conditions:
- (a) *During the nesting season of any shoreline forager, no more than 10 working days prior to the Commencement of Construction, the Consent Holder shall engage a suitably qualified ecologist to undertake a shoreline forager nesting survey within the relevant construction area.*
 - (b) *If any shoreline forager nest in the relevant construction area is identified, the Consent Holder shall engage a suitably qualified ecologist to:*
 - (i) *GIS locate and mark on the ground the nest location;*
 - (ii) *advise on whether or not the nest of the shoreline forager contains eggs or chicks;*
 - (iii) *if it does contain eggs or chicks, advise on the management of Construction Works within 100m of the nest, including:*
 - A. *the use of specific machinery; and*
 - B. *the use of specific minimisation measures and/or working practices; and*

- (iv) *prepare a plan for works incorporating the matters in (iii) which the Consent Holder shall include in the CEMP under Condition GC.7.*

Little penguins

55. The conditions have been redrafted to reflect the three proposed penguin (and shoreline forager) protection areas (as mentioned above) and are included in the Revised Conditions.

Other matters

56. GWRC asks about existing and proposed waste management for the Eastern Bays. There are existing litter bins at locations where people tend to gather, ie. at Point Howard, Whiorau Reserve, Days Bay. These bins are emptied frequently depending on their location and season. There is a series of traps and bait stations along the coast managed by a local community group MIRO (Sally Bain is the key player in this project). Maps showing the detailed view is available on the GIS viewer:
<https://www.arcgis.com/apps/webappviewer/index.html?id=f0efb34b92e24e7db03504ca326fa4a3>
57. GWRC also asks about proposed measures to control dogs and cats. Existing bylaws require dogs to be on a lead along the Eastern Bays. The Project will include signage to promote this practice. No direct measures are proposed to control cats.
58. Finally, GWRC seeks explicit calculations for indirect loss of habitat through potential changes to bird behaviour as a result of the path. Dr Cockrem advises that exact calculations of the type sought by GWRC would not serve a useful purpose, noting "*habitat*" refers to the environment in which birds live whilst "*bird behaviour*" is an attribute of birds. Dr Cockrem states that potential changes to bird behaviour as a result of the path cannot be calculated because there is currently no data on the patterns of bird behaviour in the area available; in other words, changes in bird behaviour cannot be predicted when there is no knowledge of behaviour now.
59. As noted in the context section above, the area is already highly modified, and the birds have adapted to living in a noisy area frequented by humans (indeed some penguins nest under houses). The shared path is intended to increase the numbers of people utilising the path for recreation (and commuting) and some of those will access the CMA itself. However, with more people there also comes more self-monitoring and the use of signs should minimise potential adverse effects. In addition, the three protection areas, and proposed measures such as roosting poles, will provide areas protected from humans (and dogs) which do not presently exist along the coast.

3 Construction noise

Extracts from the email outlining the key matters are as follows:

The application stated that the proposal would comply with all construction noise standards (consistent with NZS6803:1984 – since superseded by NZS6803:1999), or if night works were required, consents for construction noise would be sought independently at the appropriate time. However, the applicant has now proposed noise standards in condition GC.14 that are not consistent with NZS6803:1999 and therefore construction noise may not be consistent with the requirements of the regional plans or the HCC District Plan.

Response:

60. In its Revised Conditions, the applicant has updated Table CNV1: Construction noise criteria (within Condition GC.14) so that it aligns with the format and standards set out in NZS6803: 1999.

4 Seawalls

Extracts from the email outlining the key matters are as follows:

Please confirm whether the applicant plans to adopt the following EOS recommendations:

- *Including textures on seawalls within the 'low encroachment zone' to help to offset the existing intertidal area lost to the 'high' and 'medium' encroachments.*

- Including textures where the seawall is wholly above the high tide mark to provide future ecological resilience to sea level rise (for double or triple curved sea walls the texture should be applied to any curve that is within 200 mm of the MHWS mark (i.e. any curve that is wholly or partly within the current intertidal zone).
- Providing shallow depressions 'rock pools' on the flat step of curved seawalls where it does not compromise structural integrity to any bottom flat step of double curved seawalls and any bottom and middle flat step of triple curved seawalls that are within 200 mm of the MHWS mark, where the seawall is located within the 'high' and 'medium' encroachment zones.
- Installing pre-cast 'plant pot/window box' structures that can be added to the surface of the curved seawall following completion of construction where the bottom seawall curve is within the mid-tide area and the seawall is less exposed to storm surge.

Response:

61. The applicant confirms that the principles of the EOS recommendations are adopted, and these are incorporated as appropriate in the Revised Conditions, see, in particular, new Condition EM.19 (these provisions were previously in LV.7).
62. In response to GWRC's comments within the Seawalls section of its memorandum (including its proposed Habitat Enhancement Plan condition), the Revised Conditions contain a new condition (Condition EM.19) that addresses seawall and revetment habitat. This new condition includes:

A Seawall and Revetment Habitat Plan ("SRHP") that provides for intertidal biota and includes the principles identified by EOS in its recommendations (in particular textures and depressions to the seawalls and drilled rock pools in the revetment rock)
63. Consequential amendments have been proposed to the Definitions section and to Conditions GC.8 (which specifies that the CEMP will incorporate or refer to management plans, including the SRHP), EM.17 (which is proposed to no longer cover the revetment on the basis this is now addressed under EM.19), LV.2 (which is proposed to no longer refer to ecology on the basis this is addressed under EM.19), LV.4 (which states that the LUDP shall reflect and/or incorporate the plan in Condition EM.19 as appropriate) and LV.7 (which has had detail removed from (a) and brought across to EM.19).
64. In GWRC's proposed Habitat Enhancement Plan ("HEP") condition, which the applicant has used as a basis for Condition EM.19, two plan requirements were proposed that the applicant does not adopt in the Revised Conditions. Those are:

(a) Objectives or success criteria for the habitat enhancement; and

...

(d) Proposed monitoring measures and remedial opportunities available to the consent holder should monitoring show that habitat enhancement has not been successful.
65. The applicant does not consider these are necessary additions to the SRHP on the basis of expert ecology evidence it has received. Both the Project and the Revised Conditions have been designed taking into account the views of the expert ecologists. The applicant does not consider including objectives or success criteria or proposed monitoring or remedial measures would add anything useful to Condition EM.19 over and above what expert ecologists have already advised are robust conditions. That position also reflects the inclusion of existing seawalls within the significant habitat area in Schedule F2c of the PNRP(Decisions Version). In other words, the intent of those proposed requirements (a) and (d) is already adequately and appropriately addressed by the existing conditions and Project design, which accord with expert ecologist views.
66. Equally, even in the unlikely event that adverse effects do arise that have not been foreseen by the applicant's expert ecologists (and that are not covered by the applicant's proposed conditions and measures), there is nothing that could be done to address those adverse effects, short of applying for a new resource consent. The seawalls, once built, must remain structurally fit-for-purpose. Given the extensive avoidance efforts proposed, the applicant's position is that even if such effects occurred, they are more than adequately minimised.
67. In terms of GWRC's comments that habitat enhancement is not appropriately placed in the Landscape and Urban Design Plan ("LUDP"), as above the applicant has reconfigured the conditions so that ecology

and habitat enhancement (including revetment habitat) are now in a standalone *Seawall and revetment habitat* condition (EM.19) and not LV.7. Where appropriate, references to ecology and to the specifics of seawall structures have been removed from the LUDP conditions (noting in some cases it has been appropriate to retain reference in the LUDP conditions to ecology, where ecology is relevant to design). Equally, reference to revetments has been removed from Condition EM.17 on the basis it is better dealt with in Condition EM.19.

68. Lastly, in terms of certification the applicant has clarified in Condition GC.8 that the Construction and Environmental Management Plan ("**CEMP**") will incorporate or refer to the SRHP.

5 Visual amenity and natural character

Extract from the email outlining the key matters are as follows:

Please confirm whether BSUDPs are considered to be a management plan for the purposes of GC.5 and accordingly will be submitted for certification prior to construction. ... In addition, Mr Head and Ms Hamilton are concerned that staged design could result in ad-hoc outcomes and the loss of overall cohesion and unity across the built landscape. this could be alleviated by providing detailed design up-front even if construction was to be staged.

We request a meeting so the applicant and their representatives can talk us through how the LUDP and BSUDP process is expected to work in practice to alleviate some of the concerns.

Response:

69. The Revised Conditions clarify that the BSUDPs are considered to be part of the management plans identified under Condition GC.5. That is now explicitly set out in Condition GC.8(a), which includes BSUDPs as one of the listed management plans that the CEMP "shall incorporate or refer to".
70. Further clarification is provided through amendments to Conditions LV.5 and LV.6.
- Condition LV.5 clarifies that the *final* BSUDPs (which include detailed design for a particular bay) will be included in the LUDP.
 - Condition LV.6 goes on to explain the two-stage process for preparation of the BSUDPs, including Stage 1 (drafting and receiving comments) and Stage 2 (finalisation of the BSUDPs). In Stage 2, it is clarified that "*the final BSUDPs [will] be certified either on their own (in accordance with Condition GC.5) or (if included in the initial LUDP) when the LUDP is certified under Condition LV.1.*"
71. In response to GWRC's concerns regarding the hierarchy of environmental effects included in Condition LV.4, as noted this responded to concerns raised by Mr Head and Ms Hamilton. They sought certainty of importance to avoid future uncertainty (in particular for certification). The applicant agreed and remains of the view that the provision of the hierarchy is important to avoid any disagreement or confusion at a later stage. The applicant accepts that there are linkages among the matters listed. The applicant agrees with GWRC that all factors are important; it is only in the event of conflict between those listed environmental effects that this hierarchy will be relevant, and the intention is certainly that all of the effects are reflected in the design. The applicant is happy to discuss if the order should be revised but, as previously noted, it reflects sections 5-7 of the RMA.
72. Should GWRC consider it would still be useful to meet, the applicant is happy to do so.

6 Safety barrier

Extracts from the email outlining the key matters are as follows:

Visual and landscape

There is still uncertainty about the location, the design parameters (height and bulk) and the design of safety barriers across the Project footprint...

Recreation amenity

As is the case for visual and landscape amenity, it is difficult to assess the effects on recreation amenity due to the lack of design and certainty about the parameters of the safety barrier.

Accordingly, if no further information is provided in advance of the hearing, the conclusions in the s42A report will reflect that adverse effects of the safety barrier may be more than minor.

Response:

73. The design parameters of the proposed safety barriers are outlined in the supplementary assessment undertaken by Ms Julia Williams in her report provided to GWRC in October 2019. Where safety barriers are necessary, they will be located on the seaward side of the shared path as outlined in Ms Williams' report. At no time has a 'double fence' been considered.

74. Copies of her landscape and visual assessment, plans indicating the extent of the proposed barriers and visualizations of the proposed barriers are outlined in the links below:

<https://www.gw.govt.nz/assets/Resource-Consents/Eastern-Bays-Shared-Path/Supplementary-report-to-LVA-revised-7-10-19.pdf>

<https://www.gw.govt.nz/assets/Resource-Consents/Eastern-Bays-Shared-Path/Appendix-4-Simulations-Lowry-York-Sunshine-Windy-Point-07-10-19.pdf>

<https://www.gw.govt.nz/assets/Resource-Consents/Eastern-Bays-Shared-Path/Appendix-5-rev-Supplementary-Report-to-Landscape-and-Visual-Assessment-7-10-19.pdf>

75. The findings of the supplementary report to the Landscape and Visual Assessment can be summarized as follows:

- Adverse effects on natural character will be Low in bays with no safety barrier, and localised Moderate - Low in bays where there is a safety barrier.
- Providing that features such as the shared path signage and path markings, safety structures, stormwater and piped stream outlets, bus shelters and street furniture are designed and located carefully to avoid visual clutter and maintain views, effects on residential visual amenity have the potential to be adverse Low to Very Low and for some residents may even be considered beneficial.

Moderate – Low is translated as “minor” in RMA terms and therefore the overall effects of the safety structures in conjunction with the effects assessed in the original LVA is assessed as being minor.

76. It is acknowledged that the community did not submit on any safety structures given that it was not part of the application that was notified in November 2019. In the response in Memo 5 on this matter, the historical decision not to install a barrier on the Eastern Bays project has predominantly hinged around the existing York Bay section having been constructed without a barrier, and from consultation with the bay communities. The general feedback from the community was that barriers were not acceptable from an aesthetic point of view, and a perceived interruption between the land and the coastal edge.

77. HCC is taking a cautionary approach now by introducing safety barriers in selected areas as outlined in Julia William's plans (referred to above). During the detailed design, the finer details will be determined once the heights of the seawalls (and drop off areas) have been accurately identified and the safety risk has been determined. The detailed design will inform the details of the LUDP and BSUDPs which will be prepared with input from stakeholders (including relevant resident associations) as identified in Conditions LV.3. Safety barriers and railings will be included in the BSUDPs as set out in Condition LV.7.

7 Recreation Amenity

Extract from the email outlining the key matters are as follows:

Lack of detail on designs submitted to date and concerns about how the LUDP and BSUDP processes will work in practice

Response:

78. As discussed above in sections 6 and 7 of this memorandum, the applicant has made amendments in its Revised Conditions to clarify how the BSUDPs and LUDP are intended to work together. Again, should GWRC consider it useful to discuss these amendments, the applicant is happy to meet.

79. In terms of detail of designs, the matters have been addressed in section 7 above and states that the detailed design will inform the details of the LUDP and BSUDPs under conditions LV.1 – LV.7. Space

available for recreational amenity activities, refuge and seating opportunities, signage and storyboards and other landscape and urban design details are included under Condition LV.7

8 Coastal processes and natural hazards

Extracts from the email outlining the key matters are as follows:

Comments on unintended changes to the intent of conditions and recommendation for further discussion on event monitoring.

Response:

80. The applicant has carefully considered GWRC'S comments on coastal processes and natural hazards and has made some minor amendments to Conditions EM.15 to EM.17. This includes amending the heading to widen the scope of the conditions that follow. The amended heading is proposed to read "Beach monitoring and management – beach nourishment" Similarly, the words "and/or maintenance" have been added to Condition EM.17 of the Revised Conditions to reflect that wider scope.
81. However, there are some comments and suggested changes made by GWRC that the applicant has not adopted.
82. In particular, there is no need for EM.15 to refer to "the effects of reclamation and encroachment on hydrodynamics and sediment transport and changes to coastal processes across all beaches within the project footprint." As Dr Allis outlines in his report *Eastern Bays Shared Path: Coastal Physical Processes Assessment*¹⁰, overall the Project will only have a minor effect on the changes to nearshore hydrodynamics and the coupled effect on nearshore sediment processes. While Dr Allis notes that "some key features" could have a potentially moderate effect on hydrodynamics, he also states that such an effect is unavoidable because of the need to maintain community access to the beach and he goes on to state that that effect "has been mitigated to minor through ensuring "smooth" tapering of transitions between seawall/foreshore types and accessways over a 20-30 m length of shoreline." Accordingly, the applicant does not consider including these effects in the Revised Conditions necessary or useful.
83. In terms of GWRC's comment that revetment monitoring should be dealt with in a standalone condition, as above the applicant's proposed new condition EM.19 addresses revetment monitoring (and reference to the revetments in Condition EM.17 has been removed accordingly).
84. Lastly, the applicant notes GWRC's proposal that the experts meet to consider an appropriate post-storm event monitoring trigger. Again, the applicant relies on Dr Allis's report and does not propose storm event monitoring as it would serve no utility.

9 Specific comments on other revised conditions

Extracts from the email outlining the key matters are as follows:

Specific comments on other revised conditions of consent not covered by the previous topics.

Response:

85. The applicant has reviewed GWRC's comments in respect of Conditions GC.5(g), GC.6, GC.7(a) and EM.14(g)(iii), and its responses are below.

Condition GC.5(g)

86. GWRC's comments regarding the 10-working day review timeframe are noted, and as such, the applicant now proposes a 15-working day timeframe for comments on a management plan (or amended management plan) to be received. The applicant considers this an appropriate and reasonable timeframe. The applicant also proposes some other minor amendments to Condition GC.5 to clarify when certification is required and what certification is required for (including a part or stage of a plan as well as an entire plan).

¹⁰ Page 9 of Dr Allis' report.

Condition GC.6

87. The applicant notes GWRC's queries regarding the enabling works, and accordingly has provided a definition for this term in the Definitions section of the conditions, as follows:

<i>Enabling Works</i>	<p><i>Includes the following and similar activities:</i></p> <ul style="list-style-type: none"> ● <i>geotechnical investigations (including in the CMA), including access on land for these investigations;</i> ● <i>establishing site yards, site offices, site entrances and fencing;</i> ● <i>establishing protection areas for little penguin and shoreline forager populations;</i> ● <i>demolition or removal of buildings and structures;</i> ● <i>relocation of services; and</i> ● <i>establishing minimisation measures (such as erosion and sediment control measures).</i>
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88. The applicant notes GWRC's comment that any required contaminated land investigations shall be sought independently as they are outside the scope of the current application. Accordingly, the applicant proposes an advice note as follows:

Advice note: Any investigations works, outside of those consented, which penetrate groundwater and/or any contaminated land investigations that do not comply with permitted standards will require separate consents.

89. Lastly, the comment that the CEMP may in some instances need to be provided to Hutt City Council for certification is noted. Accordingly, the applicant has amended Condition GC.5 so that any reference to a plan being provided to the Manager, Environmental Regulation (at GWRC) or the Team Leader, Resource Consents (at Hutt City Council) is now framed as "and/or".

Condition GC.7(a)

90. The applicant notes GWRC's concern that the existing wording of this condition may inadvertently suggest there is flexibility in the maximum length of seawall construction for situations other than where construction encroaches on the sub-tidal zone. While the applicant considers that condition to be sufficiently clear as it stands, for additional certainty and clarity it proposes the following amendment to Condition GC.7(a) in its Revised Conditions:

The CEMP shall include:

(a) Confirmation of the proposed staging and sequencing of construction, including staging of the Construction Works by bay. Continuous areas of seawall being constructed shall be limited to a stipulated length as set out in the CEMP and determined on a bay by bay basis. Works in the subtidal areas shall reflect Condition C.6(d) in that there is flexibility in terms of maximum length of seawall construction for works in these areas, but not for works outside of the subtidal areas.

Condition EM.14(g)(iii)

91. The applicant proposes an advice note at the bottom of Condition EM.14 addressing GWRC's comment that clearance of any accumulated material may¹¹ require a separate consent if the permitted activity standards cannot be complied with. The applicant's proposed advice note is as follows:

Advice note: Clearance of any accumulated material at the outlets will require a separate consent if not able to comply with permitted activity standards.

¹¹ In the applicant's view, it will.

Revised conditions – minor amendments (Condition GC.18)

92. In addition to amendments proposed that respond to specific comments from GWRC, the Revised Conditions also contain some minor stylistic and/or typographical amendments. Most of these are self-explanatory (and/or already addressed above in this memorandum), however in the interests of clarity, the applicant notes the following change to Condition GC.18: the wording "*maintain the site in good order and shall*" has been removed in the Revised Conditions, on the basis this is duplicative of the intent of Condition GC.17.

Appendix A Revised Conditions

Appendix B Avoidance Measures

Appendix C Loss of Habitat

Appendix D Actions table and plans showing the proposed sites