

**BEFORE THE WHANGĀREI DISTRICT COUNCIL AND NORTHLAND REGIONAL
COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (“RMA”)

AND

IN THE MATTER of a resource consent application by Northport
Limited under section 88 of the RMA for a port
expansion project at Marsden Point

APPLICATION NO. APP.005055.38.01
LU 2200107

**CLOSING LEGAL SUBMISSIONS ON BEHALF OF
NORTHPORT LIMITED**

20 November 2023

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"Ka mua, ka muri" (often translated as "walking backwards into the future")

- Cultural Effects Assessment, Patuharakeke Te Iwi Trust Board, at 3.1

1. INTRODUCTION

- 1.1. During the opening of Northport Ltd's ("Northport") case, it was submitted that all consents sought should be granted because the port expansion proposal ("Proposal" or "Project") satisfies the relevant provisions of the Resource Management Act 1991 ("RMA").¹ We outlined to the Panel the importance of the expanded dedicated container port operations to the region and the country; and how the Proposal will generate increased efficiencies, securing the port's ongoing operation as part of the national network of ports; and with that, the significant benefits it provides to Northland and to New Zealand, into the future. We further noted that the Proposal is founded on rigorous expert assessment and incorporates comprehensive measures to address actual and potential adverse effects. On this basis, we submitted that the effects of the Proposal will be appropriately managed.
- 1.2. We submit that nothing transpired during the hearing that changed or detracted from the principal submissions we made in opening Northport's case.
- 1.3. These closing submissions respond briefly to: matters arising from the hearing, including questions from the Panel; submissions and evidence from submitters; and comments by the Councils' reporting officers.²

Summary

- 1.4. Northport has adopted a comprehensive approach to consultation and undertaken a thorough examination of potential adverse effects through a team of highly qualified and experienced independent experts. The timeframe for scoping, investigating, consulting on, and documenting the application has been in the order of at least six years, illustrating the dedication and investment by Northport to ensure its application is of high quality.

¹ Because the application was lodged before the Natural and Built Environment Act 2023 received Royal assent, by operation of Subpart 6 of Schedule 1 to the NBEA the application "*must be processed and determined under the RMA as if [the NBEA] had not been enacted*".

² Noting that the Councils' response is to be presented immediately prior to the presentation of these closing submissions and so additional issues could arise.

- 1.5. Of the 243 submissions received on the application, 176 submissions (over two thirds) support the Proposal. Numerous submitters, including immediate neighbours such as Channel Infrastructure, Seafuels, and Marsden Cove Canals, elected not to appear at the hearing, or amended their position to one of support for the application after making submissions. We submit that this is testament to the role Northport plays in the local community, the level of engagement through the process, and the various positive benefits the Proposal will deliver.
- 1.6. Following the adjournment of the hearing, Northport has engaged its expert advisors to consider closely the questions from the Panel, particularly with respect to the establishment, operation and funding of a “Tangata Whenua Relationship Group” (previously termed the “Kaitiaki Group”), appropriate lapse period, and the process for establishing and maintaining the sandbank renourishment area. Northport and its expert team have carefully considered these issues, and Northport now proposes additional or amended conditions to squarely address the questions from the Panel and ensure that key issues are comprehensively provided for so that any adverse effects are appropriately avoided, remedied or mitigated.
- 1.7. Overall, we submit that Northport has fully addressed all relevant effects associated with its Proposal. The expert assessment, having regard to the measures proposed by way of conditions, is that those effects will be minor in most instances. Each of the expert witnesses engaged by Northport supports the Proposal as being consistent with the relevant planning and policy framework, and otherwise appropriate in the context of s104 of the RMA.
- 1.8. In our submission, Northport has equipped the Panel with a sound basis upon which to grant consent, subject to the updated conditions proposed by Northport at **Appendix A**.

2. SPECIFIC AND DIRECTIVE PLAN AND POLICY SUPPORT

- 2.1. As described in opening submissions³ and Northport’s expert planning evidence,⁴ the Proposal receives specific and directive enabling support from the plan/policy framework. The Councils’ s42A Report agrees with the conclusions drawn by

³ Outline of legal submissions on behalf of Northport, 5 October 2023, at para 1.4.

⁴ EIC of Dr Mitchell at paragraphs 3.1-3.24; EIC of Mr Hood at paragraphs 8.27-8.29, 8.110-8.111, and 8.123-8.124.

Northport's planning expert regarding the consistency of the Proposal with the policy provisions.⁵

- 2.2. You have heard evidence⁶ that the Proposal will enable Northport to operate in tandem with Port of Tauranga and Ports of Auckland to form an integrated and resilient Upper North Island Supply Chain, consistent with Policy 9 of the New Zealand Coastal Policy Statement ("NZCPS").
- 2.3. In a regional context, the Regional Policy Statement ("RPS")⁷ and proposed Regional Plan for Northland ("Proposed Regional Plan")⁸ provide direct and compelling support for the Proposal. Within the coastal marine area, the Proposal sits entirely within the Marsden Point Port Zone ("MPPZ"), the purpose of which is to:

Recognise that the purpose of the Coastal Commercial Zone and Marsden Point Port Zone is to enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities located within these zones.

- 2.4. This zoning is fundamental to the consideration of the Proposal and must be front of mind in considering the application.⁹ As stated by Dr Mitchell, "[c]learly there are significant directives in the policy documents for development of port facilities in the manner and location proposed by Northport".¹⁰ Within the MPPZ, as noted in the s42A Report,¹¹ the activity status of the resource consents required for the Proposal range from controlled (maintenance dredging; additions or alterations to structures), restricted discretionary (structures; deposition of material for beneficial purposes), to discretionary (reclamation, capital dredging, stormwater discharges).
- 2.5. Policy PORTZ-P1 'Regional Significance' of the Whangārei District Plan, relating to landward port functions is:

⁵ Refer the opening legal submissions on behalf of Northport at 6.30 and the s42A Report at paras 410-411.

⁶ Refer evidence and submissions of Mr Moore, Mr Gordon for KiwiRail; and Mr Skingley for Swire Shipping.

⁷ Refer in particular Policies 5.2.1-5.2.2 relating to infrastructure; and 5.3.2-5.3.3 relating to Regionally Significant Infrastructure. Counsel for NRC agrees with Dr Mithell's interpretation of the RSI policies, stating at para 25: "...we do not agree with Ms Kirk that Policy D.2.7 establishes a "bottom line" by which all RSI activities must have minor (or less than minor) adverse effects."

⁸ October 2023, noting that all appeals in respect of the plan have been resolved, and Council is taking steps to make the plan fully operative.

⁹ For instance, in *Neil Construction Ltd v Rodney District Council* ENC Auckland A35/06 the fact that an application was consistent with the intention of the zone was a key consideration for the Court in approving a resource consent even though, in that case, the application was for a non-complying activity.

¹⁰ Dr Mitchell EIC at 3.14.

¹¹ At paragraph 168.

To recognise the regional significance of the Port by providing for a wide range of existing and future port operations and port activities within the Port Zone.

- 2.6. Development of Northport *at this particular location*, including by dredging and reclamation, has very clearly been considered and is specifically provided for in the zone provisions. Directive enabling support is provided by the MPPZ zoning. Relevantly, the MPPZ zone is limited to one location *in all of Northland* – being the area immediately around the existing Northport facility. This singular location includes all of the seaward area within which the Proposal is located – refer **Figure 1** below.
- 2.7. The inescapable conclusion of this zoning is that port-related development is not only contemplated at this location, but *it is specifically directed*. Northland Regional Council (“NRC”) has, via its Proposed Regional Plan, established clear policy direction for infrastructure development at this location.¹² Further, it has specifically anticipated that such development may include construction via dredging and reclamation. These provisions are the result of careful consideration of all relevant, and sometimes competing, considerations.

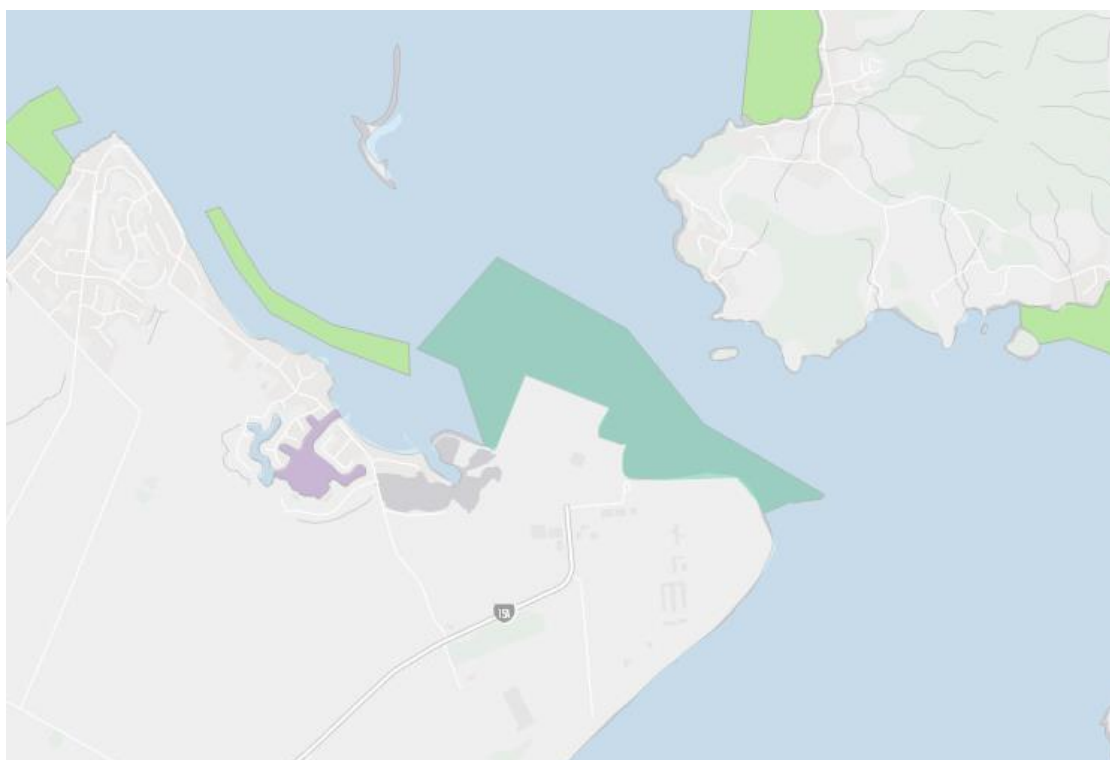


Figure 1: Extract from NRC planning maps showing the MPPZ (coloured teal)

¹² It is also worth recording that, prior to the Proposed Regional Plan, the existing Regional Coastal Plan identified the area as appropriate for port facilities at least as early as 2004.

- 2.8. Put simply, the enabling direction contained in the Proposed Regional Plan framework is so specific that it genuinely is a case of *“if not here, then where”*? Or, as expressed by Dr Mitchell in response to questions from the Panel, the significant directives in the policy documents for development of port facilities in the manner and location proposed mean that it is not a matter of where or how port-related development should proceed, but when.
- 2.9. That port infrastructure development is directed to occur at this location should not be surprising. Marsden Point has long been a focus of infrastructure development. Not only has Northport (expressly denoted as Regionally Significant Infrastructure in the RPS¹³ and Proposed Regional Plan¹⁴) been operating since 2002,¹⁵ but Channel Infrastructure operates a fuel import terminal immediately adjacent; Marsden Maritime Holdings is progressing plans for He Ara Huringa, a Business Park incorporating a range of ancillary commercial initiatives to support port-related functions; and Meridian Energy has publicly announced its intentions to construct a grid-connected battery and solar farm as part of a renewable energy park at Marsden Point. Northport is located at a strategic position at the mouth of a natural deepwater harbour, with existing road connections, and a potential future rail connection,¹⁶ to provide an essential infrastructure service to Northland and North Auckland. As expressed colloquially by a submitter *“we’ve already got a port, this is just a bit more of the same”*.¹⁷
- 2.10. Put another way, the plan framework explicitly identifies and provides strong directive enabling support for port-related development at this precise location out of all of Northland’s coastline. We submit that this clear policy direction weighs very heavily in favour of:
- (a) any reconciliation exercise against directive ‘avoidance’ policies - if required - being determined in favour of this specific, location-based enabling directive; and
 - (b) any ‘gateway’ assessment under s104D(1)(b) – again, if required – finding that the application is for an activity that will not be contrary to the objectives and policies of the relevant plans.

¹³ Appendix 3.

¹⁴ Appendix H.9.

¹⁵ Northport’s 21-year anniversary was acknowledged during the course of the hearing of the Proposal.

¹⁶ Refer the commitment expressed by Mr Gordon on behalf of KiwiRail to upgrade the main trunk rail line to Whangārei, and the steps taken to secure the Marsden Rail Link project.

¹⁷ Representatives of the Ruakaka Residents and Ratepayers Association.

- 2.11. We do not accept that it was intended by NRC when preparing its Proposed Regional Plan (nor that it is correct as a matter of interpretation) that the specific, directive enabling purpose and provisions of the MPPZ could effectively be frustrated by any of the ‘avoidance’ provisions of that same plan. Such interpretation is in our view strained, and would, if adopted, lead to the inescapable position that development within the MPPZ, and consistent with its purpose, could be frustrated by the sometimes broad¹⁸ ‘avoid’ requirements.
- 2.12. Counsel for Patuharakeke Te Iwi Trust Board (“PTITB”) attempted to “water down” the directive enabling policies by submitting they are not particularly directive and are in fact “general” in nature. For the reasons outlined above, including the site-specific nature of the MPPZ and the directive wording of the relevant policies, we submit this is not a persuasive interpretation. While it goes without saying that the plan drafters could have made the framework more enabling (counsel for PTITB suggested that reclamation could have been made a controlled or restricted discretionary activity, for example), this does not detract from the directive enabling nature of the applicable policies.¹⁹
- 2.13. In any event, through careful design and assessment, and comprehensive proposed conditions of consent, all involving input from a range of experienced independent expert advisors,²⁰ Northport has carefully designed its Proposal such that it achieves the strict ‘avoidance’ requirement – particularly with respect to the indigenous biodiversity provisions of the Proposed Regional Plan.²¹ We address this point below.

3. AVIFAUNA HIGH TIDE ROOST

- 3.1. Northport’s proposed bird roost²² sandbank featured heavily during the hearing. The bird roost’s proposed design and maintenance, its impacts/utility, and the relevant

¹⁸ For instance, Ms Kirk for the Director-General of Conservation appeared to be suggesting that avoidance of effects is required in the Significant Marine Mammal and Seabird Area (SMMSA) overlay of the Proposed Regional Plan. Counsel points out that this overlay applies not only to the entire Whangārei Harbour, but to the **entire coast of the Northland region**.

¹⁹ Also, large-scale reclamation as a controlled (or even restricted discretionary) activity would be very unusual. As examples only, the following plans all provide for large-scale reclamation as at least a discretionary or non-complying activity: Otago Regional Coastal Plan; Greater Wellington Natural Resource Plan; Hawke’s Bay Regional Coastal Environment Plan; Waikato Regional Coastal Plan; Bay of Plenty Regional Coastal Environment Plan; and Auckland Council.

²⁰ The evidence outlines how Northport has assembled a team of independent experts in their fields and has, at all project stages, taken on board the independent advice received.

²¹ Noting that certain experts, including Ms Kirk for the Director-General of Conservation, hold a different view as to the ‘avoidance’ requirement.

²² The function of the bird roost is to provide an area with some protection for the target species to rest at high tide, i.e., when tidal conditions do not allow birds to feed within the intertidal area. It is not akin to a ‘supermarket’, in the sense that birds do not forage/feed at the roost site. Equally, it is not a nesting site.

conditions have all been addressed at length. As outlined in our opening submissions and confirmed in the legal submissions for the Director-General of Conservation (“DOC”), all avifauna experts agree that provision of a high tide roost is, in principle, an appropriate impact management measure, however there is disagreement over the classification of the Panel’s consideration and the utility of the bird roost proposal.

- 3.2. The following section of these submissions focuses on demonstrating how the bird roost satisfies the requirement under the planning framework to “avoid” certain adverse effects.²³

Relevant policy framework

- 3.3. As outlined in opening submissions:

- (a) The Proposal, which includes the bird roost, satisfies the policy requirements to avoid certain effects on indigenous biodiversity, because:
- (i) It provides alternative bird roosting habitat to replace that lost following the proposed reclamation and does so before construction of the reclamation occurs and at the “*point of impact*”,²⁴ when conceived at the appropriate system scale in accordance with the Proposed Regional Plan.
 - (ii) The evidence of Dr Bull confirms that the Proposal’s effects – taking into account the reduction in effects brought about by the bird roost – are low (i.e., not amounting to material harm).²⁵ We outlined in detail in opening submissions that the Supreme Court in *Port Otago* has confirmed that the “avoid” directive means protection from material harm.²⁶ *Port Otago* also confirms that mitigation and remedy measures “...*may serve to meet the “avoid” standard by bringing the level of harm down so that material harm is avoided*”.²⁷

²³ Namely the requirement in the NZCPS and Proposed Regional Plan to avoid adverse effects on threatened or at risk species.

²⁴ Refer *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346 at [72]-[74].

²⁵ As confirmed in opening submissions, Dr Bull’s comprehensive and thoughtful avifauna evidence is that the Proposal’s potential effects on threatened or at risk species from the permanent loss of high-tide habitat may otherwise be moderate; and that the proposed high-tide roost area (outlined above) will reduce the level of effect to low.

²⁶ Opening legal submissions, paras 6.35-6.37, especially footnote 101.

²⁷ Refer to *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [65] and [66].

3.4. The above is consistent with the Supreme Court’s decision in *Port Otago*, including the Court’s statement of the requirements of the NZCPS’s avoidance policies and how they may be satisfied in the context of particular proposals. It is also consistent with the legal submission on behalf of NRC, with respect to both the application of *Port Otago* and whether the high tide roost can satisfy the avoid requirements.²⁸

3.5. As the Court in *Port Otago* reinforces, context is key:²⁹

All of the above means that the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

3.6. In the context of the Proposal, Dr Bull’s evidence confirms that the relevant system for avifauna purposes encompasses the reclamation area and proposed bird roost site. The relevant effects are on highly mobile bird species, and the ecosystem services of the area to be reclaimed (relevant to the potential effects) are not exclusive to that area. The same birds that roost and forage on the area proposed to be reclaimed will be able to roost and forage on the proposed sandbank,³⁰ thus avoiding the effects of the loss of roosting habitat arising from the Proposal and satisfying the applicable avoid policies.

3.7. At the hearing DOC and Forest & Bird advanced contradictory and confusing submissions on this point, drawing on the decision in *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council (“Buller Coal”)*.³¹ The DOC and Forest & Bird approach, contrary to the view expressed by planners for Northport and PTITB,³² seemed to be suggesting that it is not possible to avoid effects on the bird species in question, given that their roosting habitat is within the footprint of the proposed port. Our analysis in the above paragraphs is not inconsistent with the High Court’s decision in *Buller Coal*. This is due to the context of the Proposal/bird roost (summarised above and detailed in the evidence), including the appropriate system

²⁸ Acknowledging the NRC legal submissions do not take a firm position on whether the high tide bird roost does *in fact* avoid effects. Refer NRC legal submissions, paras 32-42.

²⁹ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [68].

³⁰ The proposed sand bank has been carefully designed to be twice the size of the useable roosting area ‘lost’ to reclamation.

³¹ [2013] NZHC 1346.

³² Ms Dalton confirmed in response to questions from the Panel on Hearing Day 7 her view that, as a proposition from a planning perspective, the proposed bird roost can avoid effects. Ms Dalton refrained from expressing a view as to whether, in fact, the proposed bird roost does avoid those effects, including because she did not hear all of the evidence on this issue.

scale and the highly mobile nature of the birds in question.³³ Counsel for Forest & Bird cited the following excerpt from *Buller Coal* to advance her arguments. However, we say it actually advances our argument.³⁴

[72] *I am of the view that... such offsets [discussed in the preceding section of the decision] do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, for example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was on the environment that is being destroyed was lifted and placed in the new environment...*

- 3.8. Finally, even if the Panel were to find that the avoid policy directives are not met, for the reasons addressed at length in opening submissions, *Port Otago* confirms that there would still be a consenting pathway for the Proposal. Counsel for NRC agrees.³⁵ Legal submissions to the contrary by Forest & Bird and DOC purport to subvert the plain meaning of the decision and, in our submission, should not persuade the Panel. Notwithstanding that Forest & Bird and DOC may not like the Supreme Court's decision, it is directly on point in this case.

Other matters relating to the bird roost raised at the hearing

- 3.9. We respond to other matters raised at the hearing below:
- (a) Parties have questioned the effectiveness of the bird roost from a coastal processes and avifauna perspective.³⁶ Extensive evidence has been provided by Mr Reinen-Hamill, Dr Bull, and Dr Kelly that the sandbank can be successfully maintained³⁷ and that it will be effective in avoiding relevant effects on avifauna (including that birds will relocate to it) such that the avoid policy

³³ As outlined above, this is because the proposed bird roost will directly address the particular relevant effects of the proposal at the point of impact (correctly interpreted at the applicable system scale) *as per* the decision in *Buller Coal*.

³⁴ [2013] NZHC 1346 at [72]. Emphasis added.

³⁵ NRC legal submissions, para 36.

³⁶ The position expressed on behalf of the Director-General of Conservation here seemed at least partially based on a view that other potential locations might better serve to provide roosting habitat. Dr Bull's considered response is that those alternative locations could have benefits to harbour-wide populations, but the proposed bird roost is most appropriate to avoid adverse effects on the particular birds that will have roosting habitat displaced by the proposed reclamation. We further record here that Ms Webb's concerns expressed in response to questions from the Panel (that the "*current location and design gives me pause*") must be considered in the context that her qualifications and experience are as a general coastal ecologist.

³⁷ We refer here to Mr Reinen-Hamill's response to questions from the Panel on Hearing Day 1 that the area around the proposed sandbank is a "*low energy setting*".

directives are met. The bird roost is not a novel approach. It is supported by empirical evidence from the Te Ara Tupua shared pathway in Wellington, as addressed in Dr Bull's rebuttal evidence. We submit there is a sound evidential basis for the bird roost proposal, which should give the Panel sufficient confidence that it can be successfully achieved. As discussed later in these submissions, the amended conditions now also provide a framework for alternative avifauna initiative options to be scoped and delivered.

- (b) Several parties raised potential effects of the reclamation in terms of loss of foraging habitat, including purported gaps or flaws in the analysis on behalf of Northport. In our submission the claimed deficiencies with Dr Bull's evidence are without substance. Dr Bull's evidence in chief and rebuttal evidence demonstrate that she has comprehensively assessed and accounted for all relevant effects, including on foraging ability.³⁸

4. CULTURAL ISSUES

- 4.1. Throughout the scoping and development of the Proposal, pre- and post-application engagement, and during the hearing process, Northport has acknowledged that Whangārei Te Rerenga Parāoa forms an intrinsic part of the culture and heritage of iwi/hapū. Further, Northport is strongly committed to actively fostering its relationships with mana whenua. In that respect, Northport has an existing relationship agreement with Patuharakake, and has closely engaged with PTITB, Te Pouwhenua o Tiakiriri Kukupa Trust (Te Parawhau ki Tai), and other iwi/hapū representatives and entities throughout the scoping, design, and preparation of its application.

Consultation

- 4.2. Through the design of the Proposal and shaping of proposed conditions (which have been materially updated since the commencement of the hearing) significant efforts have been made by Northport to address concerns expressed regarding cultural issues. Northport has approached these issues by consulting in a genuine, open manner and without preconceived ideas.
- 4.3. Importantly, as explained in evidence by Mr Jagger, Northport's Board Chairperson, the Northport Board consciously and deliberately selected the consent process that

³⁸ Dr Bull confirmed in response to questions from the Panel on Hearing Day 2 that foraging habitat has been comprehensively surveyed in the area from Northport to One Tree Point, and there is better foraging habitat outside the proposed roost location.

would ensure the greatest degree of community involvement and participation.³⁹ It was for this reason that Northport did not pursue alternative consent processes, such as fast-track consenting or direct referral.

- 4.4. Mr Isaacs in his evidence sets out a comprehensive summary of the approach to engagement with iwi/hapū, which Northport has been advancing over several years.⁴⁰ This has included multiple hui held with Northport and iwi/hapū, beginning with a hui on Takahiwai marae in October 2017. A technical hui was held in May 2021 that was open to all iwi/hapū. This hui was attended by Northport’s technical experts, who presented summaries of their initial draft reports and answered questions from the floor. The draft reports were then shared with iwi/hapū, including the sharing of feedback on the draft reports from NRC and Whangārei District Council (“WDC”). Many of these hui and meetings were attended by senior Northport management and directors, including the Board Chairperson⁴¹ and Chief Executive.⁴²
- 4.5. Mr Isaacs has also provided a summary of the more recent (and continued) engagement with the three mana whenua groups identified as being potentially affected by the Project, being Patuharakeke, Te Parawhau, and Ngātiwai.⁴³ This required acknowledgement of tikanga (protocols) specific to each of the affected iwi/hapū groups – which Mr Isaacs carefully assisted Northport to acknowledge and seek to achieve.
- 4.6. Acknowledging the important role of Patuharakeke, Northport has consulted with Patuharakeke, in keeping with the intent and obligations in the relationship agreement between them. This includes consulting with Patuharakeke representatives from the very outset of the Project’s conception; agreeing a process and methodology for engagement; funding the commissioning of a Cultural Values Assessment (“CVA”) and Cultural Effects Assessment (“CEA”); and assisting Patuharakeke to be meaningfully involved in the applications (including by funding an independent technical review of pre-application documents by experts instructed by PTITB and offering, at Northport’s cost, access to Northport’s expert consultants regarding any areas of concern).⁴⁴ There appears to be agreement that this process has accorded with best practice: in evidence Ms Chetham *“acknowledge[d] that substantive engagement with Northport*

³⁹ Refer paragraph 30 of Mr Jagger EIC.

⁴⁰ Refer paragraphs 26-32 of Mr Isaacs EIC.

⁴¹ Refer Mr Jagger EIC at paragraph 33.

⁴² Refer Mr Moore EIC at paragraphs 13 and 125.

⁴³ Refer paragraphs 33-72 of Mr Isaacs EIC.

⁴⁴ Refer paragraph 75(f) of Mr Isaacs EIC.

has occurred”;⁴⁵ and during the hearing, Ms Chetham acknowledged that there was a “*good and frank*” relationship with Northport staff, including specifically the Northport Chief Executive and Terminal Facilities Manager.⁴⁶ Despite this meaningful engagement regarding the Proposal, no agreement has been reached with Patuharakeke. As was submitted at the opening of this hearing, there has been a genuine effort by Northport to engage: the inability to reach agreement in and of itself does not represent a failure on Northport’s part, nor is it a flaw in the application.⁴⁷

- 4.7. Northport strongly opposes any suggestion that its approach to consultation for this application has been deficient; and refutes any purported shortcomings with its approach to consultation.⁴⁸ This is not to say that in future a more partnership-based model may be explored. We point out that Northport’s senior management, including its Board Chairperson and Chief Executive, have attended the hearing in person and have heard every submission.⁴⁹ We are informed that they (and the company) are, and remain, dedicated to working with iwi/hapū to continue to improve and consolidate that relationship – such that a best-practice approach to consultation is assured into the future.
- 4.8. Many iwi/hapū submitters would prefer to see a different outcome to that which Northport seeks in lodging its application for resource consents for the Project. In our submission, this is not unusual.⁵⁰ Nor does it suggest that the consultation exercise, including in relation to cultural issues, was in any way flawed or deficient.
- 4.9. In summary, we submit that the Panel can be confident that the longstanding consultation efforts made by Northport have been robust, genuine, and meaningful.

⁴⁵ Ms Chetham EIC at 5.3.

⁴⁶ Refer Ms Chetham’s response to questions from the Panel, Day 7 of the hearing.

⁴⁷ Refer opening legal submissions at 7.4.

⁴⁸ For completeness, we record that Counsel’s 27 October memorandum addressed certain incorrect statements in counsel for PTITB’s legal submissions (dated 26 October 2023) regarding engagement on proposed conditions.

⁴⁹ The good relationships between iwi/hapū submitters and Northport staff was recognised, including by Ms Fletcher, who stated in response to questions from the Panel on Hearing Day 8 that she has a “*really good relationship with Northport, including the three [Northport representatives] in this room*”.

⁵⁰ Refer for example the decisions where Port of Tauranga were granted resource consents, despite opposition from multiple iwi/hapū groups, *Te Runanga O Ngai Te Rangī Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402, *Te Runanga O Ngai Te Rangī Iwi Trust v Bay of Plenty Regional Council* [2012] NZEnvC 197, and *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 (HC).

Approach to assessing and responding to cultural effects

- 4.10. As acknowledged by counsel for PTITB,⁵¹ the courts have rejected the notion that iwi/hapū have a veto power over proposals where they do not agree with them.⁵² Rather, as the High Court has held, with respect to the Port of Tauranga dredging proposal: “[i]n hearings of this type the cultural evidence of affected iwi is only part of the factual matrix”.⁵³
- 4.11. It is not disputed that cultural effects are best identified by mana whenua.⁵⁴ Here, comprehensive cultural assessments (both a CVA and CEA) were prepared by PTITB, which were carefully analysed by Northport and interpreted with the assistance of Mr Isaacs and others. Considerable effort was made by Northport to engage with iwi/hapū submitters to carefully design the Proposal taking account of these identified cultural values and effects – within the parameters required for the safe and efficient operation of the port. It is acknowledged by Northport that this has not been an easy exercise. As explained by Dr Mitchell,⁵⁵ Northport has interpreted and responded to issues raised in the CVA and CEA: absent substantive conversation, it has been difficult for Northport to know how to respond to some of these issues.
- 4.12. Counsel for PTITB attempts to extend the above, widely accepted, proposition (i.e., that the decision maker should not substitute its view of cultural effects for that of tangata whenua). He submits:⁵⁶

a logical extension of this principle is that nor should a decision-maker substitute its view for that of tangata whenua as to whether such effects are able to be appropriately avoided, remedied or mitigated.

- 4.13. We do not find such “extension” to be logical. Nor do we consider it workable, nor supported at law. The idea that a decision-maker should be prevented from exercising its discretion to analyse cultural effects in the wider context of a particular application and the applicable planning framework, including to understand and make informed decisions around the appropriateness of any steps (including avoidance, remediation

⁵¹ Paragraph 3.18 of the Legal submissions for PTITB, 26 October 2023.

⁵² *Minhinnick v Watercare Services Ltd* [1997] NZRMA 289 at page 25. The Environment Court’s position with respect to the RMA not providing a veto right was confirmed in the High Court (*Watercare Services Ltd v Minhinnick* [1997] NZRMA 553); and Court of Appeal (*Watercare Services Ltd v Minhinnick* [1998] NZRMA 113). See also *Paokahu Trust v Gisborne District Council* A162/2003 to the same effect (paragraph 32).

⁵³ *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407, paragraph 90.

⁵⁴ Refer for example *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZRMA 492.

⁵⁵ Refer the response to questions from the Panel, Hearing Day 3.

⁵⁶ Refer paragraph 3.26(f) of the Legal submissions for PTITB, 26 October 2023.

and/or mitigation) to manage those effects, is antithetical to the proper role of a decision-maker pursuant to the RMA. It would, quite literally, provide a veto power.

Concerns raised by iwi/hapū submitters

- 4.14. You have heard submissions and evidence on a range of potential adverse effects of the Proposal on environmental, cultural, and social wellbeing. At the outset, the importance of the environmental health of the harbour to iwi/hapū is openly acknowledged by Northport. As succinctly put in the statement of Ms Norris:⁵⁷

The health of the harbour is intrinsically linked to the mana and mauri of our people.

- 4.15. The challenge for the Panel is to distil and attempt to quantify the effects which the Proposal will have, including on harbour health and, more broadly, on cultural and social wellbeing. The Panel must then assess the extent to which the management measures proposed by Northport address those effects, in order that it can make a balanced decision, having regard to the legislative and policy framework – including in particular those directive plan provisions.⁵⁸

Historical issues

- 4.16. Submitters provided wide-ranging discussion of historical events at Poupouwhenua and Whangārei Te Rerenga Parāoa. These include land confiscation,⁵⁹ changes in land use and industrial development,⁶⁰ the operation of the previous (and unrelated) Kaitiaki Roopu,⁶¹ and previous reclamation, including for the current port footprint.⁶²
- 4.17. This discussion provides historical context to the application. It evidences a range of concerns or grievances directed at historical actions, including by or on behalf of the Crown, local government (including NRC), and private individuals and corporate entities.

⁵⁷ Statement of evidence of Mira Norris on behalf of Te Parawhau ki Tai, undated.

⁵⁸ In this regard, we submit that some of the emotive statements made during oral submissions by counsel for PTITB were hyperbolic and not borne out by the evidence (for example comments to the effect that: “I can’t think of a situation where such a permanent, significant effect on cultural values” has been proposed; and that the proposal would, if granted “remove the last remaining area of foreshore from this location”.

⁵⁹ Submission of Luana Pirihi dated October 30 2023, at point 8. Refer also the submission of Peter and Eve Vaughan on behalf of Te Iwitahi Manihera whanau, 31 October 2023.

⁶⁰ Statement of evidence of Mira Norris on behalf of Te Parawhau ki Tai, undated, at point 3. Refer also EIC of Ms Chetham at 3.33.

⁶¹ Comments by Dr Mere Kepa in response to questions from Panel on Hearing Day 8. Refer also submission of Luana Pirihi dated October 30 2023, at point 11.

⁶² Submission of Luana Pirihi dated October 30 2023, at points 3-5. Refer also EIC of Ms Chetham at 3.10 and 3.33.

- 4.18. Northport acknowledges those grievances and notes that, while they are expressed in the context of Northport’s application, they are primarily directed at other sources. This in part may reflect the situation in Te Tai Tokerau at present, with unresolved Treaty of Waitangi Claims and unheard claims under the Marine and Coastal Area (Takutai Moana) Act 2011 currently causing immense dissatisfaction.
- 4.19. In the context of this Proposal we refer to our opening legal submissions where we set out in some detail an assessment of the existing environment.⁶³ To be clear, despite iwi/hapū having expressed a different view of the existing environment against which Northport’s application should be assessed,⁶⁴ the proper application of that concept under the RMA requires a ‘real world’ approach, being the environment as it actually exists, overlaid with permitted/consented activities.
- 4.20. While genuinely held, we therefore submit that broader grievances relating to historical actions of the Crown, Council, and third parties have no relevance, in RMA terms, to the Proposal.

Cultural economic impacts

- 4.21. As set out in opening legal submissions⁶⁵ and evidence⁶⁶ for Northport, and by many submitters supporting the Proposal, there are very significant positive economic benefits to the Whangārei district and Northland region in connection with the Proposal. These benefits have been quantified in the range of **\$22-34 million per year** in direct value added; and **\$1.097-1.194 billion per year** in facilitated value added.⁶⁷ These economic contributions will assist the community to provide for its social, cultural and economic wellbeing for years to come.⁶⁸

⁶³ Opening legal submissions at para 6.17-6.21.

⁶⁴ As noted in the opening legal submissions for Northport at 6.21, the evidence of Ms Chetham expresses the view that past development would be excluded from an existing environment analysis.

⁶⁵ At para 3.5.

⁶⁶ Mr Akehurst EIC.

⁶⁷ Refer the EIC of Mr Akehurst, as summarised at para 3.5(i) of the opening legal submissions for Northport. We record here also that Mr Clough confirmed in response to questioning by the Panel on Hearing Day 1 that he doesn’t fundamentally disagree with Mr Akehurst’s assessment.

⁶⁸ Ms Chetham states in her EIC (para 3.38): “*The CEA describes how construction of Northport and the Port Marsden Highway/ SH15 has enabled and promoted substantial industrial, commercial and residential growth in our rohe, however, this growth has been ad hoc and has not been accompanied by holistic infrastructure planning and future proofing*”. If granted, the Proposal – and Northport’s wider Vision for Growth – will go a long way to improving the future planning/investment landscape in the area. Consents for the Proposal, authorising a modern and efficient port, will assist others to plan and invest for growth (including with respect to road and rail infrastructure, and the range of business and other opportunities that the Proposal will help catalyse). Ultimately this will promote positive social, economic, and cultural outcomes for the community, including iwi/hapū.

- 4.22. Despite this, Ms Chetham replied to questions of the Panel stating that, irrespective of potential wider economic benefits for the district and region (and indeed for New Zealand as a whole), she was unsure as to the direct effects for iwi/hapū.
- 4.23. While Northport has not attempted to quantify economic impacts between Māori and non-Māori, this is not a failing of the application. Indeed, this would be a very challenging exercise to achieve.⁶⁹
- 4.24. Instead, Northport has adopted an approach of meaningful and longstanding engagement with iwi/hapū to understand and respond to cultural effects associated with the Proposal. These effects are responded to primarily through the (updated) draft conditions of consent which Northport proposes. We return to those conditions later in these submissions.

Assessment of alternatives

- 4.25. The evidence for PTITB is critical of the alternatives assessments undertaken by Northport.⁷⁰ In response to questioning by the Panel, Ms Chetham suggested that “*some sort of MCA [multi-criteria analysis] exercise*” could or should have been undertaken by Northport.
- 4.26. The application and evidence for Northport sets out a comprehensive and robust consideration of alternatives.⁷¹ The ‘Issues and Options’ report, itself informed by the conceptual design study undertaken by internationally recognized consultants,⁷² details the rationale for the Project, being to provide additional freight capacity to Northland and the upper North Island; the advantages of closely integrating the Proposal with the existing port facility; the various environmental constraints that exist; and the various location, footprint, design (including piled wharf) and operational alternatives considered. The evidence clearly demonstrates that the proposed location of the wharf and reclamation is the only practical location.⁷³ Further, even if it were

⁶⁹ In this regard, we note that Northport had earlier engaged with Ms Chetham at, and following, a hui in May 2021. Ms Chetham had suggested that she was aware of a third-party consultant (Richard Yao at Scion Research) having undertaken a cultural economic assessment. The independent economic experts advising Northport contacted Mr Yao, who advised that the method was still very much in a research phase and not ready for use.

⁷⁰ Ms Chetham EIC at 4.2-4.3.

⁷¹ Refer the ‘Issues and Options’ report forming Appendix 2 to the AEE, and the evidence of Mr Moore, Mr Blomfield, Mahim Khanna, and Ms Stanaway. Refer also the opening legal submissions for Northport at 7.27-7.28.

⁷² ‘Northport Conceptual Design Study’, TBA Group, August 2021, attached to the Issues and Options report as Appendix A.

⁷³ Refer EIC of Mr Blomfield at paras 101-114; EIC of Mahim Khanna at paras 41-42; and section 9 of the Issues and Options report forming Appendix 2 to the application and AEE.

possible for other land-based alternatives to be designed, there is simply no available land to do so.⁷⁴

- 4.27. We submit that the process adopted by Northport with respect to consideration of alternatives was robust and comprehensive. It is difficult to understand what ‘re-framing’ the analysis as a MCA-type exercise would add. Put simply, the Panel can have confidence that the Proposal and its design has undergone many years of careful scoping, optioneering, consideration by technical experts, and stakeholder and public consultation, feedback, and refinement.

Places of significance to tangata whenua

- 4.28. It is acknowledged by Northport that Te Poupouwhenua (Mair and Marsden Banks) are a mapped place of significance to tangata whenua.⁷⁵ Retention of access to, and coastal process and marine ecology effects on, that mapped area have been front of mind for Northport.
- 4.29. The CVA describes site-specific attributes of cultural landscapes, seascapes, waahi tapu,⁷⁶ and heritage sites in the vicinity of the Proposal.⁷⁷ The CVA goes on to note that: *“Patuharakeke continue to wait for a finding from the Waitangi Tribunal, but essentially the hapu view is that the subject land is ancestral Māori land”*.⁷⁸
- 4.30. This approach is broadly reflected in the evidence in chief for PTITB. The evidence of Ms Chetham states:⁷⁹

[t]he CVA identifies Patuharakeke relationships to the Northport site and environs, the implications for the knowledge and practice of Kaitiakitanga by tangata whenua over their taonga of the proposal, and matters that have potential to affect the principles of the Treaty of Waitangi... Recommendations included that Northport provide a continued role for PTB throughout the scoping and undertaking of any further technical studies required throughout the consenting stages of project and that Northport engage with our whānaunga hapū and iwi with interests in the harbour which has occurred through the subsequent phase two (CEA) process and working party hui that were facilitated.

⁷⁴ Refer the evidence of Ms Mercer, the Marsden Maritime Holdings Ltd CEO.

⁷⁵ Refer for example Brett Hood EIC at 8.88, 8.89, 8.99, and 8.169.

⁷⁶ CVA at 5.2.2.

⁷⁷ CVA at 5.2.2.3.

⁷⁸ CVA at 5.2.1. Here, we repeat our submission that matters of potential/future Treaty Settlements are not matters appropriate for the Panel to opine on.

⁷⁹ Ms Chetham EIC at 3.3 to 3.5.

- 4.31. In other words, no particular site-specific issues were raised with respect to the Proposal footprint.
- 4.32. Notwithstanding the above, the planning evidence for PTITB provides that, despite not being mapped as such in the Proposed Regional Plan, “Patuharakeke’s Cultural Landscape” is a place of significance to tangata whenua.⁸⁰ This is based on a map provided by PTITB which “*consolidates a number of cultural resources that are mapped, described and discussed in PTB’s HEMP, Marine and Coastal Area Claim, and from the CVA and CEA.*”⁸¹ Based on this, Ms Dalton provides the opinion that the “overwhelming evidence” of the existence of these (somewhat amorphous) sites and “significant effects” of the Proposal on them means that “significant weight” should be afforded to Policy D.1.5 of the Proposed Regional Plan.⁸²
- 4.33. In response, we submit that there is no specific information that enables the Panel to determine whether any places of significance to tangata whenua exist beyond the mapped location at Te Poupouwhenua (Mair and Marsden Banks).
- 4.34. In any event, we do not agree with Ms Dalton that it is a matter of the weighting that should be afforded to Policy D.1.5. That policy is intended to assist with identifying places of significance to tangata whenua, and while relevant, it is primarily a plan-making policy.
- 4.35. Rather, we submit that the key provision relating to managing effects on places of significance to tāngata whenua is Policy D.1.4. That policy reads:

Resource consent for an activity may generally only be granted if the adverse effects from the activity on the values of places of significance to tāngata whenua in the coastal marine area and water bodies are avoided, remedied or mitigated so they are no more than minor.

- 4.36. As outlined in legal submissions for NRC, the “generally only” qualification in Policy D.1.4 has been carefully and deliberately included to explicitly acknowledge that resource consents can be granted in some situations where effects on the values of places of significance to tāngata whenua are unable to be managed so that they are no more than minor.⁸³ As outlined in Mr Hood’s evidence, D.1.4 “*enables consent to be*

⁸⁰ Refer para 4.2 of Ms Dalton’s EIC and 3.1 of Ms Dalton’s Summary Statement.

⁸¹ Refer Appendix A to Ms Chetham’s EIC; and para 3.2 and footnote 3 to Ms Dalton’s Summary Statement.

⁸² Refer para 3.3 of Ms Dalton’s Summary Statement.

⁸³ Legal submissions for NRC, paras 26-31.

granted... notwithstanding that tāngata whenua have identified cultural effects as being more than minor.”⁸⁴

4.37. In summary on this issue, we submit that there is clearly a strong cultural connection with the area around Te Poupouwhenua/Marsden Point generally, but that:

- (a) There is insufficient evidence before the Panel to define geographically *places of significance to tangata whenua*,⁸⁵ and therefore to understand the values that are affected by the Proposal, beyond the mapped location at Te Poupouwhenua (Mair and Marsden Banks).
- (b) Even if the Panel were to determine that Policy D.1.5 of the Proposed Regional Plan was directly applicable, and that there were other *places of significance to tangata whenua*, the effects on those places have been characterised through the CEA and the evidence and submissions heard.
- (c) In any event, we submit that the Proposal falls squarely into the category of application intended to be exempt from the broad (but qualified) application of Policy D.1.4. That is, it is exactly the type of application that may still be granted resource consent. This is for numerous reasons, but particularly the importance of Regionally Significant Infrastructure, its co-location with existing port infrastructure, the MPPZ zoning of the area, and the regional and national positive benefits associated. Counsel for PTITB suggested that policy D.1.4 represents “*an incredibly tight test*” and that that the exemption afforded by the policy (i.e., “*may generally only*”) is aimed at small/minor projects (presumably things like private pontoons).⁸⁶ Properly interpreted,⁸⁷ D.1.4 – including in the context of the wider Proposed Regional Plan provisions – does not support such an interpretation. We submit that projects for Regionally Significant Infrastructure, such as the Proposal, are precisely the type of projects intended to benefit from the exemption in D.1.4.

4.38. Northport therefore submits that the qualified nature of Policy D.1.4 sets it apart from some of the enabling policies relating to the MPPZ. In any event, we also submit that the Proposal is aligned with Policy D.1.4.

⁸⁴ Mr Hood, EIC, at 8.90.

⁸⁵ As required by Policy D.1.5(5)(f) of the Proposed Regional Plan.

⁸⁶ Oral submissions of counsel for PTITB.

⁸⁷ Refer footnote 94 regarding the interpretation of plan provisions.

Nature of reclamation effects

- 4.39. During oral submissions, counsel for PTITB stressed the nature and permanence of reclamation impacts. By definition, reclamation involves turning what was once part of the CMA into land, and Northport has never shied away from acknowledging the permanence of the effects of the proposed reclamation. All Northport's experts have been aware of these matters during their assessments and have proposed effects-management measures as appropriate/required. Alternatives to reclamation have also been considered but are simply not practicable in this context.⁸⁸

Conclusion in respect of cultural issues

- 4.40. Northport greatly values the engagement with iwi/hapū, and their input to the Proposal. Northport has made a genuine commitment to meaningful engagement, and in the case of Patuharakeke has adhered to the shared values as recorded in the Te Whakahononga / Relationship Agreement.
- 4.41. Northport recognises the benefits of a “waka hourua” model as described by Mr Milner,⁸⁹ and understands that bringing western science together with Mātauranga Māori knowledge can result in better outcomes overall. Northport has heard the evidence and submissions around actual and potential cultural effects associated with the Proposal, and the various suggestions as to how these might be appropriately addressed.
- 4.42. In responding to cultural effects, Northport has:
- (a) Materially updated its proposed resource consent conditions with respect to the Tangata Whenua Relationship Group (“RG”), including to:
 - (i) more clearly establish the ‘co-design’ function of the RG;
 - (ii) provide for total self-determination of the RG structure, process, and functions; and
 - (iii) significantly increase the funding of the RG. The funding to be provided is **\$100,000 per annum, from the date of establishment of the RG, and**

⁸⁸ Mr Blomfield EIC, paras 119-120.

⁸⁹ Refer Mr Milner's Oral Submission document dated 31 October 2023, at para 36.

for the duration of the consents. In other words, this equates to a total of up to **\$3.5 million.**⁹⁰

- (b) Carefully designed the Proposal to minimise effects (including cultural effects) whilst achieving a viable, safe and efficient container terminal – maximising the efficiency gains from locating next to and integrating with the existing port.
- (c) Closely examined alternative locations, spatial extent required, and methods of construction.
- (d) Engaged a team of highly qualified and experienced independent experts to carefully scope and inform the application, such that all actual and potential effects can be well understood. Further to this, those experts have informed a comprehensive suite of detailed conditions which thoroughly provide for construction and operation of the Proposal to be managed, in order that effects will be avoided where appropriate, and otherwise remedied or mitigated. This includes 'best practice' conditions relating to avifauna, marine mammals, noise, and marine ecology – including thorough ecological assurance modelling requirements. These provide certainty, including that the effects associated with the reclamation are well known, and that any residual risk associated with the Proposal will be appropriately managed.

Next steps

- 4.43. Notwithstanding the above, Northport has heard the feedback from iwi/hapū submitters that more detailed discussions around proposed conditions, based on a waka hourua approach, would assist to ensure that the conditions are clear, comprehensive, and informed by the best advice, should resource consents be granted by the Panel.⁹¹ There are also opportunities for agreement on proposed cultural conditions more widely.
- 4.44. On this basis, Northport invites the Panel to provide a period of **three months** from the date of these closing submissions (20 February 2024) to allow a further opportunity for

⁹⁰ These figures are exclusive of GST (i.e., Northport will also pay GST, if applicable). Counsel for PTITB compared earlier conditions (including funding) proposed by Northport with examples from other large projects by very large entities: Waste Management's regional landfill at Wayby Valley and Watercare's water take from Waikato Awa ("Counsel notes", section 5). Putting aside that Northport is now proposing significantly revamped cultural conditions, including significantly increased funding, we submit that such examples are not especially instructive (and certainly not determinative) and should not be seen as some kind of "benchmark" – context is key.

⁹¹ Here we refer to various submitters, particularly the Oral Submission of Mr Milner, at para 50.

iwi/hapū submitters to consider and provide feedback on the updated draft cultural conditions, and for consideration of, and discussion on, any issues raised.⁹² This will provide the opportunity for an additional collaborative step of review and input to draft proposed conditions. Northport has engaged with Patuharakeke and understands that PTITB fully supports this proposed process.

4.45. Northport can provide regular update reports to the Panel, proposed to be on a monthly basis, on progress in the context of the purpose of the adjournment sought. At the conclusion of that period, Northport proposes to provide a final set of proposed consent conditions (including agreed changes, if any) to the Panel.

4.46. Finally in relation to cultural issues, we reiterate the words of Mr Jagger:⁹³

...the guidance, input and views of mana whenua are and will remain crucial when it comes to the decisions Northport makes about its operations and its future capabilities.

...

... through this Project, Northport has been in discussions with mana whenua about further developing the respective existing relationships based on trust, mutual recognition, and ongoing consultation. It is my sincere hope that these relationships are strengthened and, where appropriate, formalised.

5. ACTIVITY STATUS

5.1. At the hearing, Ms Kirk (for DOC) and Ms Sharp and Ms Niblock (for WDC) maintained a strained interpretation of the District Plan provisions to assert that the Proposal should be considered as a non-complying activity because of District Plan rules relating to the Natural Open Space Zone, which applies to a very small section of land affected by the application.

5.2. The principles applying to the interpretation of district plan rules are well settled.⁹⁴ We reaffirm our earlier submission that, for the reasons clearly expressed by Mr Hood and

⁹² Note that this is not intended as an opportunity to revisit substantive issues, nor for comment on wider submissions.

⁹³ Refer Mr Jagger EIC at paras 32-34.

⁹⁴ In *Auckland Council v Teddy and Friends Ltd* [2022] NZEnvC 128 at [10]-[13] Chief Judge Kirkpatrick stated (footnotes omitted and our emphasis): "... Under s 76(2) of the RMA, every district rule has the force and effect of a regulation under the RMA. The interpretation and application of legislation is governed by the Legislation Act 2019. Under that Act, legislation means the whole or a part of an Act or any secondary legislation. Secondary legislation includes an instrument (whatever it is called) that is made under an Act if the Act states that the instrument is secondary legislation. I proceed on the basis that s 76(2) of the RMA is a statement that district rules are secondary legislation. **The meaning of a district rule must therefore be ascertained from its text and in the light of its purpose and its context, with its text including the indications provided in the AUP-OP and in the RMA. The context of a rule will**

Dr Mitchell in the planning JWS and in their rebuttal evidence,⁹⁵ the Proposal is a discretionary activity, as originally accepted in the s42A Report.

- 5.3. Properly interpreted in a sensible and pragmatic manner, the rules in the District Plan Natural Open Space Zone relating to “Industrial Activities” or “Commercial Activities” (or any other activity) do not render the Proposal a non-complying activity. Adopting the interpretation proposed by DOC and WDC would be a triumph of legalistic sophistry over substance.⁹⁶ It would result in precisely the type of “anomalous” or absurd outcome that the Court warned against in *Auckland Council v Teddy and Friends Ltd.*⁹⁷ Instead, the application is for “Port Activities”, and the fact that a small part of the application extends into the Natural Open Space Zone leads only to the outcome that the application (for that area) is innominate and therefore should be treated as a discretionary activity pursuant to s87B of the RMA.⁹⁸
- 5.4. We also reinforce that even if the Panel were to conclude that part of the Proposal, or the Proposal overall, was a non-complying activity (which Northport strongly refutes), the s104D gateway test is clearly satisfied, as demonstrated in Dr Mitchell’s rebuttal evidence. Ms Sharp agrees the activity status issue is “academic” because the Proposal passes the s104D gateway.⁹⁹
- 5.5. Ms Dalton (for PTITB) indicated in response to questioning from the Panel that she takes a contrary view, and that in her view the application would not pass the s104D test. However, and given the only relevant policies Ms Dalton cites to support her position are Policies D.1.4 and D.2.18 of the Proposed Regional Plan, and NOSZ-P1 of the Whangārei District Plan,¹⁰⁰ we submit this conclusion lacks analytical rigor and is

include not only its immediate context in the AUP-OP, but also any relevant objectives, policies and other methods and, where any obscurity or ambiguity arises, may include other parts of the AUP-OP. The process of ascertaining the meaning of legislation in the particular context of the RMA should also be undertaken in a manner that avoids absurdity or anomalous outcomes, is consistent with the expectations of property owners and is consistent with practical administration of the rule.

⁹⁵ See in particular the detailed rebuttal evidence of Dr Mitchell at paras 3.1-3.42 and Mr Hood at paras 19-24.

⁹⁶ As identified in our opening submissions (footnote 164) with reference to *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [50], the Court of Appeal has held that it is undesirable that the law relating to resource consent applications, including the issue of consents required for an application, should descend unnecessarily into procedural technicalities. Substance is key.

⁹⁷ [2022] NZEnvC 128.

⁹⁸ There is an argument that the activity is permitted according to rule NOSZ-R1 of the Whangārei District Plan. This argument is not favoured by either Mr Hood or Dr Mitchell.

⁹⁹ At para 52 the s42A Report addendum states: “*In conclusion, Ms Sharp agrees with the Applicant’s planning experts that the issue of WDC activity status is largely academic and has little material impact on the consideration of the WDC consents. In Ms Sharp’s opinion, a Non-Complying activity status does not present an impediment to the granting of the WDC consents...*”.

¹⁰⁰ Refer paragraph 2.9 of Ms Dalton’s Summary Statement of Evidence dated 30 October 2023.

inconsistent with the orthodox approach to assessing this second limb of the s104D test. Rather, we submit it falls exactly into the category of *“isolating out one or two policies the activity might be contrary to”*, which the Environment Court has cautioned against.¹⁰¹ We therefore submit that Ms Dalton’s position on this issue is not tenable.

- 5.6. For the above reasons, we submit that a finding that the Proposal is a non-complying activity is not supported on a proper interpretation of the District Plan. Additionally, even if the Panel finds that certain limited activities require consent as a non-complying activity under the District Plan, with reference to the legal submissions on behalf of NRC it is not appropriate in this context to bundle the district and regional activities to make the application overall non-complying activity.¹⁰² In any event, even if wrong, we submit non-complying status would not have a material bearing on the ability to approve application, a point Ms Sharp acknowledges in the s42A report Addendum.

6. TRANSPORT

- 6.1. Waka Kotahi is supportive of the Proposal.¹⁰³ Legal counsel for Waka Kotahi acknowledged that there *“appears to be little disagreement between the experts about the nature and scale of the adverse effects of the port expansion Project on the transport network”*.¹⁰⁴
- 6.2. In the context of this high-level support and general alignment of views, it is acknowledged that the effects of the proposed expansion on the transportation network will need to be managed. In that respect, traffic effects have been assessed by Northport’s independent traffic and planning experts, who proposed conditions requiring a comprehensive suite of monitoring and response mechanisms for the potential future scenario whereby traffic (both public and Northport-related) reduces the level of service at identified intersections on SH15.¹⁰⁵ Northport remains of the firm

¹⁰¹ *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council*, Environment Court, Wellington, W025/02, at [728].

¹⁰² Paras 3-9.

¹⁰³ The Director Regional Relationships Te Tai Tokerau me Tāmaki Makaurau records that Waka Kotahi: *“supports Northport’s expansion application subject to appropriate conditions being in place to ensure that safety and efficiency of the SH15 can be maintained”*, and that: *“[t]he Northport expansion will bring benefits to the region, especially in relation to economic development. The resource consent is also complementary to and supportive of the strategic direction in Arataki [Waka Kotahi’s 30-year plan] and has alignment with the GPS 2021 [Government Policy Statement on land transport].”* Refer the Summary Statement of Evidence of Steve Mutton – Corporate, 12 October 2023, at paras 9 and 13.

¹⁰⁴ Legal submissions on behalf of Waka Kotahi dated 11 October 2023, at para 8.

¹⁰⁵ Refer Ms Harrison EIC at paras 44-46.

view that the conditions it earlier proposed adequately provided for future traffic levels and associated effects.

- 6.3. Notwithstanding, late last week, Northport and Waka Kotahi reached agreement between themselves on proposed transport conditions that completely satisfy the concerns raised by Waka Kotahi. The agreed conditions are incorporated into the set of conditions at **Appendix A**. To be clear – these are the conditions that Northport is seeking.
- 6.4. The evidential basis for the agreed conditions is already set out in the evidence before the Panel. To the extent that the Panel would like to hear a detailed explanation of the reasons for the proposed transport conditions agreed between Northport and Waka Kotahi, then we are happy to provide further submissions on this point.

Rail Link

- 6.5. The Panel heard from David Gordon, Chief Capital Planning and Asset Development for KiwiRail Holdings Ltd, who described recent investment in rail to Northland, and expressed “*real commitment from the Crown*” toward enabling a rail connection to Northport. Mr Gordon confirmed that Northport is seen by KiwiRail as an increasingly important part of the Upper North Island Supply Chain (“UNISC”), and that KiwiRail is coordinating with Northport to ensure complementary road and rail provision for an expanded port.
- 6.6. Council officers at one point proposed what is effectively a “condition precedent” that the Proposal cannot occur unless/until a construction contract for the rail connection to Northport has been awarded.¹⁰⁶ We responded to this in our opening submissions.¹⁰⁷ It appears from the s42A Report Addendum that the Council no longer remains of the view that such a condition is required, but to avoid any doubt, we submit that such a condition is unnecessary, inappropriate, and *ultra vires*.¹⁰⁸ It could have the effect of frustrating or nullifying the grant of the consent. Accordingly, in accordance with *Lyttelton Port Co Ltd v Canterbury Regional Council*,¹⁰⁹ it cannot be imposed.

¹⁰⁶ Proposed condition 13 of the recommended Council amendments to draft proposed conditions, as appended to the Council s42A Report.

¹⁰⁷ Paragraphs 9.6-9.8.

¹⁰⁸ Refer the discussion at paras 9.6-9.8 of the outline of opening legal submissions on behalf of Northport.

¹⁰⁹ EnvC C008/01, at [11]. See also *Richmond v Kapiti Coast District Council* [2016] NZEnvC 1 at [8]. See also *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130 at [43] (both referred to in the legal framework applying to conditions set out in Appendix B of opening legal submissions).

- 6.7. We reiterate the position clearly expressed on behalf of Northport during the hearing: the provision of a rail connection to Northport is supported and would improve freight transport efficiency; but the Proposal is not reliant on the proposed rail spur. It can, and should, “*stand alone*”.¹¹⁰

SH1 upgrading

- 6.8. While the s42A Report Addendum suggests such a condition is no longer recommended, at one point Council officers were also proposing a condition precedent requiring that SH1 be four-laned between the Brynderwyns and the port. As in the case of the rail network proposal, we again point out that such a condition would likely frustrate or nullify the grant of consent, given Northport has no ability to control, or even understand, the timing of such upgrade. Accordingly, it cannot be imposed. Beyond this issue regarding its lawfulness, any such proposed condition would be unreasonable and disproportionate. It would also ignore the role of Waka Kotahi in managing the state highway network.

7. STORMWATER DISCHARGES: SCOPE OF APPLICATION

- 7.1. Stormwater issues are largely agreed between the independent experts for Northport and NRC.¹¹¹ In response to questions from the Panel, both experts¹¹² confirmed their comfort with existing Northport capture and treatment systems for stormwater.¹¹³ The only outstanding matter raised during the hearing was a technical question as to the status of ancillary discharges into the ground from the sand-lined base of the stormwater canal.¹¹⁴
- 7.2. The application filed by Northport seeks all resource consents necessary to authorise the expansion of the existing Northport berth length and associated operations area, including for the discharge of stormwater via a stormwater treatment and disposal system. The application is clear that the existing canal and pond-based system for stormwater treatment is intended to continue to be used for the existing port footprint,

¹¹⁰ Refer the responses to questions from the Panel by Jon Moore, CEO of Northport Ltd.

¹¹¹ Refer in particular Appendix C9 to the s42A Report, being the Technical Memo – Stormwater, by John McLaren, Haigh Workman Ltd, dated 12 July 2023. That Technical Memo agrees with the adequacy of information provided by Northport and concludes that there is sufficient information to grant consents, on a 35-year term, subject to some minor amendments to conditions. Based on the high level of alignment between the two experts, witness conferencing was not required on this topic.

¹¹² Mr Blackburn, engaged by Northport, and Mr McLaren, engaged by NRC.

¹¹³ Mr McLaren indicated that he was “*fairly impressed with existing Northport operations*”, and that he was “*very happy with how the sand filter is operating*”.

¹¹⁴ The design of the canals utilises an unsealed base, with sand membrane for filtration of contaminants, which is replaced annually.

which is covered by existing resource consents,¹¹⁵ which will be surrendered when the expanded port becomes operational. Stormwater quality has been thoroughly assessed in the application.¹¹⁶ Mr Blackburn has confirmed: (i) the port is not an industrial site and therefore stormwater entering the system is “low risk/low load”; and (ii) the existing system has a demonstrated history of compliance and the canal/weir/holding pond approach was “shown to be effective”.¹¹⁷ As noted above, Mr Blackburn’s view was endorsed by Mr McLaren.

- 7.3. To the extent that ancillary discharges to ground may occur from the base of the canal, then such discharges are covered by the same Proposed Regional Plan rule authorising the diversion and discharge of stormwater into water.¹¹⁸ In other words, the Panel can have comfort that any ancillary discharges to ground which pass through the sand filtration at the base of the stormwater canal have been considered by the experts for both Northport and Council¹¹⁹ and may be authorised as part of the suite of resource consents sought.

8. TERRESTRIAL NOISE

- 8.1. In the context of terrestrial noise, there is no expert disagreement, but common themes from submitters appearing at the hearing were:
- (a) Acceptance of Northport as Regionally Significant Infrastructure and acknowledgment of the positive economic and social contributions it makes to the district and region.¹²⁰
 - (b) Acknowledgement of the positive existing relationship with Northport staff, key management measures currently implemented by Northport, and the effectiveness of its systems to respond to noise complaints.¹²¹ It was also apparent that some submitters may not be aware of recent initiatives by Northport, such as its publicly accessible “traffic light” system based on real-

¹¹⁵ Consent reference CON20090505532.

¹¹⁶ Refer in particular Appendix 20, the Stormwater Assessment prepared by Hawthorn Geddes.

¹¹⁷ Response to questions from the Panel by Mr Blackburn, Hearing Day 2.

¹¹⁸ Rule C.6.4.6 of the Proposed Regional Plan.

¹¹⁹ Refer Mr McLaren’s view in response to questions from the Panel, noted above, that he was “*very happy with how the [canal base] sand filter is operating*”.

¹²⁰ For example, Joshua Gwilliam stated that he “*understood commercial reality*” and acknowledged that Northport “*provides jobs*”.

¹²¹ Janice Boyes stated that “*complaints are dealt with promptly*”, and that she “*feels [Northport’s complaints mechanism] is pretty good so far*”. Joshua Gwilliam said he has “*good communication*” with the applicant. Steve Tyson said he was “*happy with the response*” when he has contacted Northport regarding noise issues. Robert Twyman stated that he has “*had good interactions with the personnel at Northport*”.

time measured wind speed and direction;¹²² and the fact that reversing beepers are not permitted on vehicles at Northport as a noise management response (flashing blue reversing lights are used instead).

- (c) A focus on the occasional/intermittent noise from the port, in particular impact-style noise described as the “banging of logs”.¹²³ This was clearly distinguished from other noises, described more commonly as a background “hum”.
- (d) Seeming lack of detailed understanding of the mitigation measures proposed by Northport to manage noise.

8.2. In our submission, the starting point for the Panel’s consideration of terrestrial noise issues should recognise that there are no remaining areas of disagreement between the experts regarding construction noise and vibration, port noise limits, port noise mitigation, and noise in open spaces.¹²⁴ In particular, the experts agree:

- (a) Northport’s proposed construction noise and vibration conditions are appropriate.
- (b) Northport’s proposed port noise limit conditions are appropriate.
- (c) Northport’s proposed port noise mitigation conditions are appropriate, including:
 - (i) Northport-funded noise mitigation (e.g., mechanical ventilation/cooling) to be offered when monitored or predicted noise reaches a specified level at the façade of any habitable space in a residential unit;¹²⁵ and
 - (ii) establishment and implementation of a Port Noise Management Plan to minimise port noise through best practice, including ongoing community liaison.

8.3. In submissions and at the hearing, several submitters shared their experiences of living near the port (in many cases having moved to the location relatively recently),

¹²² In simple terms, this system establishes environmental conditions during which “noise risk status” is triggered – and this is conveyed in real time to the Northport operations team. Refer <https://northport.co.nz/weatherfeed>.

¹²³ Refer comments from Peter Fitzgerald and Mr Tyson.

¹²⁴ Refer the JWS in relation to terrestrial noise dated 21 September 2021. Note that Mr Hegley, advising Marsden Cove Ltd, was not involved in conferencing on some matters.

¹²⁵ Northport’s proposed conditions limiting the number of installations to ten a year is based on practical and economic considerations as opposed to expert noise considerations.

and their concerns over potential noise effects from an expanded port.¹²⁶ Northport acknowledges the lived experiences of its neighbours and their genuinely held concerns. However, submitters' perceptions of port noise are subjective and varied.¹²⁷ Noise that is an issue for one person is not necessarily an issue for another. The Panel has been presented with no objective independent expert evidence that disputes the consistent and robust expert evidence.

8.4. For completeness, we respond to discrete matters raised at the hearing:

- (a) Submitters raised the Port Noise Standard and the port noise limits approach proposed by Northport.¹²⁸ In some cases these concerns are misconceived.¹²⁹ The Port Noise Standard is a balanced document that is accepted as best practice¹³⁰ and endorsed by all experts in this case; and, as outlined above, all noise experts agree that Northport's proposed port noise limits are appropriate.
- (b) Submitters raised the intermittent "bangs" / "crashes", often associated with log handling.¹³¹ Mr Fitzgerald's evidence is that effects of predicted noise levels from the port, including from one-off noises, will be reasonable and that the expanded port can comply with the proposed L_{AFmax} limits.¹³² All noise experts agree that the proposed noise limits, including L_{AFmax} limits, are appropriate. The proposed Port Noise Management Plan process is well equipped (and in fact better equipped than the framework in the existing plan provisions) to incorporate management techniques to minimise one-off noises. All of this is not to say that noise from the port will not be audible at times – but noise will be appropriate/reasonable, particularly given its intended future zoning. Relevantly

¹²⁶ Including Peter Fitzgerald, Robert Twyman, Paul Cresswell, Steve Tyson, Janice Boyes, and Joshua Gwilliam.

¹²⁷ As expressed by Matthew Evans, there are "*lots of stories and many opinions*" relating to port noise.

¹²⁸ For example, Mr Twyman and Mr Tyson.

¹²⁹ For example, as explained in Mr Fitzgerald's evidence in chief at paras 102(a) and (c), Mr Twyman's characterization of the Port Noise Standard as "*enabling higher noise levels*" is not correct.

¹³⁰ Refer to paragraph 5.29(b) of our opening legal submissions.

¹³¹ Refer, for example the submission of Peter Fitzgerald.

¹³² We reference here the anecdotal discussion from Mr Cresswell regarding his experience of staying at an apartment near Port Nelson. Mr Fitzgerald, who also advises Port Nelson, advises that the Nelson apartments in question are exposed to significantly higher noise levels than those measured at Mr Cresswell's in Darch Point. The difference, in Mr Fitzgerald's considered opinion, is that container handling L_{max} events measured at Nelson are usually quieter than experienced during log handling, such as at the present Northport facility.

also, the purpose of the expansion Proposal is for a *container* terminal. Log handling is not anticipated to occur on the expanded footprint.¹³³

- (c) Submitters suggested that improving ventilation for affected residential dwellings to reduce indoor noise levels might be an appropriate mitigation measure. It is unclear whether those submitters were aware that this mitigation is actually being proposed by Northport.¹³⁴
- (d) Mr Twyman raised concerns with Northport's proposed noise monitoring. He was concerned with the potential for Marshall Day to be engaged to undertake ongoing noise monitoring associated with the Proposal, and instead said he would prefer the Council to undertake ongoing noise monitoring. We understand this was a concern relating to perceived independence issues, given Marshall Day's previous roles associated with Northport and its involvement at this hearing. Mr Fitzgerald has provided independent expert evidence at this hearing, and it is standard practice for ports, and other industry operators, to engage independent noise advisors for the purpose of routine monitoring in accordance with consent conditions. The proposed Noise Management Plan conditions require reporting on noise monitoring to the Port Noise Liaison Committee, which will include the Councils. In addition, the Council will have overall compliance, monitoring, and enforcement responsibility and can undertake its own monitoring.

9. LANDSCAPE AND VISUAL AMENITY

- 9.1. The landscape experts advising the Applicant¹³⁵ and Council¹³⁶ are largely aligned¹³⁷ – indeed Mr Farrow indicated in response to a question from the Panel that he “*agrees with most of Mr Brown's evidence*”.
- 9.2. The key, and perhaps only, point of difference between Messrs Brown and Farrow appears to be that Mr Farrow considers that the scale and spatial relationship arrangement at the entrance to the Whangārei Harbour is such that the effects of the Proposal on the adjacent ONL are adverse and inappropriate. Mr Farrow's suggestion

¹³³ As the Panel is aware, Northport is not proposing restrictions on the type of cargo that can be handled on the expanded footprint, including to preserve flexibility for the port to respond to future events and changing circumstances.

¹³⁴ Refer paragraphs 83-91 of the Craig Fitzgerald EIC, 24 August 2023.

¹³⁵ Stephen Brown.

¹³⁶ Mike Farrow.

¹³⁷ Refer the landscape and planning JWS dated 21 September 2023.

to the Panel was that the STS cranes – which are essential to the operation of the proposed container port – should not be located where proposed.

9.3. In response, Mr Brown has reaffirmed his view that the Proposal will not materially affect the characteristics and values of any ONLs. In responding to questions from the Panel, Mr Brown provided a comprehensive reply to Mr Farrow’s concern, noting that:

- (a) The Proposal is located at the “*gateway to the harbour*” and that an existing dichotomy presently exists at this location: being the industrial infrastructure and activity presently occurring in and around Marsden Point, contrasted with the “*amazing volcanic landscape*” present at Whangārei Heads.
- (b) The Proposal would not represent a “*qualitative change*”, and that the contrast or “*dichotomy*” Mr Brown describes is due to the current/permitted level of development. In Mr Brown’s view, this contrast exists now and the situation would be “*very much as it is at present*” if the proposal were constructed.
- (c) STS cranes are currently permitted, without a limitation on number or type, within ‘Port Operations Area A’ of the Whangārei District Plan, of which the Proposal is intended to eventually form a cohesive and integrated part.

9.4. We add that, while Mr Farrow’s view seems to focus on the potential effect of the proposed cranes on some (unidentified) viewers of the ONLs at Whangārei Heads, as expressed by Mr Hood,¹³⁸ he does not appear to have considered the policy direction within the Whangārei District Plan requiring specific recognition that existing land use and development, including Regionally Significant Infrastructure, forms part of the characteristics and qualities of the environment where they are located.

9.5. We agree with the following conclusion in the s42A Report Addendum:¹³⁹

*Both Council Officers’ interpretation of Mr Farrow’s concerns is that the effects are likely to be experienced by transitory users of the Harbour as they traverse through the narrowed Harbour entrance ‘throat’ that would be further constrained by the reclamation. As such, **in accordance with the assessment direction provided by RPS Policy 4.6.1(3)(a), no conflicts with the avoidance ONL policies are identified.***

9.6. Finally, it is worth recording that there is an obvious practical issue with the recommendation made by Mr Farrow around the location of the STS cranes. This is

¹³⁸ Rebuttal evidence of Brett Hood, 3 October 2023, at paras 25-27.

¹³⁹ Para 23, emphasis added.

that the cranes *must* be positioned on or directly adjacent to the wharf frontage (“STS” means “ship to shore”). It is simply not possible, as suggested by Mr Farrow in response to questions from the Panel, to “*ensure cranes aren’t located at that location*”. Similarly, the recommended conditions in the s42A Report Addendum restricting the number and type of cranes are simply unworkable and would unduly constrain port operations.

10. RECREATION

10.1. As noted in our opening submissions,¹⁴⁰ the reclamation necessary for the Proposal will further reduce the extent of the beach area presently ‘sandwiched’ between Northport and Channel Infrastructure’s import terminal. The recreation experts have identified that the Proposal will have significant effects for recreational users of the beach, and more than minor effects at the regional level. For that reason, attention then turns to what, if anything, is required to manage these effects, given the local policy framework provides limited direction on what is expected in these circumstances.

10.2. Northport’s proposed measures to provide recreation amenity have been incorporated into the Proposal and/or will be secured via conditions of consent.¹⁴¹ In summary, these include:

- (a) A ‘pocket park’, incorporating relocation of toilets, access and car parking, a swimming area, and water taxi facility.¹⁴²
- (b) A cycleway to connect to other cycleways planned for the area,¹⁴³ including for users of the Te Araroa Trail.¹⁴⁴
- (c) Investigating, scoping and, if necessary authorisations are obtained,¹⁴⁵ carrying out improvements to carparking, passive recreation, and beach access facilities at Mair Road.

¹⁴⁰ Refer para 7.10.

¹⁴¹ These are discussed in some detail in the opening legal submissions are paras 7.11-7.13.

¹⁴² Noting that Northport is prepared to facilitate the permanent relocation of the water taxi facility if preferred by users. Note also that the design of the Pocket Park is to be subject to detailed design, including the updated requirement for Co-Design by the Tangata Whenua Relationship Group.

¹⁴³ Noting the recent initiative by Marsden Maritime Holdings seeking to promote the Bream Bay Shared Path, as referenced in para 7.12 and Appendix A to the opening legal submissions.

¹⁴⁴ Te Araroa Northland Trust filed a letter, dated 7 November 2023, clarifying its position on certain matters.

¹⁴⁵ Including landowner approval. In this respect, discussions with representatives of DOC have been initiated.

- 10.3. While aware of the ‘wish list’ of possible offsite recreation proposals assembled by Messrs Greenaway and Jones,¹⁴⁶ Northport’s position is that those proposals are simply the result of a ‘blue sky’ exercise, and that Northport’s proposals summarised above are considerably better scoped and more practicable.¹⁴⁷
- 10.4. Overall, we reiterate that the Panel can have comfort that it is able to grant the resource consents sought by Northport on the basis that an appropriate level of recreation amenity will be retained, and in some cases enhanced, and that any residual recreation effects are acceptable.

11. CUMULATIVE EFFECTS HAVE BEEN PROPERLY ASSESSED

- 11.1. In our opening legal submissions, we set out a summary of the approach adopted by Northport’s expert team, including Dr Kelly, towards considering/assessing cumulative effects.¹⁴⁸
- 11.2. Marine ecology experts, including Northport’s peer review expert Mr Sneddon, have reviewed¹⁴⁹ Dr Kelly’s thorough assessment of marine ecology effects and all agree with the assessment method, data collection, presentation of results, and characterisation of biodiversity values of the harbour.¹⁵⁰ When questioned, Dr Kelly indicated that the magnitude of difference in opinion with Dr Lohrer is very little; Dr Lohrer indicated that his views are “pretty close” with Dr Kelly.¹⁵¹ This alignment is significant.
- 11.3. Notwithstanding, two experts¹⁵² have made various suggestions regarding Dr Kelly’s assessment of cumulative effects. The position of these two experts is, with respect, both confused and confusing. They effectively compile a ‘grab bag’ of disjointed matters,¹⁵³ and suggest that there has been inadequate assessment of cumulative

¹⁴⁶ Refer the recreation JWS addendum, 25 September 2023.

¹⁴⁷ Refer para 7.14 of the opening legal submissions.

¹⁴⁸ Refer the opening legal submissions on behalf of Northport at paras 6.23-6.27.

¹⁴⁹ As noted in response to questions from the Panel, the experts, including Mr Bulmer for PTITB have undertaken a review of Dr Kelly’s report and evidence, rather than undertaking their own assessment. We submit that this should properly be factored into the respective weight to be afforded to that evidence.

¹⁵⁰ Refer JWS for marine ecology and planning, 19 and 25 September 2023.

¹⁵¹ Refer questioning of Dr Kelly and Dr Lohrer by the Panel on Hearing Day 2.

¹⁵² Dr Bulmer for PTITB and Dr Lohrer for Council.

¹⁵³ For instance, Dr Bulmer suggests at para 6.2 of his EIC that “*the ecological connectivity and cumulative multiple stressor response dynamics of the harbour*”, “*changes in sedimentation*”, “*sea level rise*”, and the expected “*decline over the next 30 years+*” of “*ecological communities both within and outside of the proposed consent area*” have not been adequately incorporated into a cumulative effects assessment.

effects of those matters. Dr Kelly has provided a fulsome response to the issue of cumulative effects, both in his EIC¹⁵⁴ and rebuttal evidence.¹⁵⁵

- 11.4. Having heard the evidence, we maintain that Dr Kelly, and the other Northport witnesses, have properly assessed cumulative effects, including by the appropriate recognition of the “existing environment”.

12. CONSULTATION

- 12.1. As outlined above with respect to engagement with iwi/hapū, wider community/stakeholder engagement has also been undertaken by Northport from a very early stage, and feedback was used to inform the scoping and development of the Project. Early consultation included proactive approaches to iwi/hapū, key stakeholders, and community groups. The open and genuine approach to consultation continued both before and during notification of the application. Public consultation included: distribution of flyers to households in Ruakaka, and Whangārei Heads communities; community ‘open day’ events with use of a transportable shipping container booth featuring videos, visual material, and summary handouts; port tours; dedicated community meetings with communities in Reotahi and One Tree Point to discuss noise issues; and making independent experts and Northport staff available to summarise key aspects of the Proposal and to answer questions.¹⁵⁶
- 12.2. A range of experts engaged by Northport have spent considerable time observing the site and surrounds, and consulting with submitters; iwi/hapū; interest groups; regulatory bodies (including DOC, the Harbourmaster, and NRC/WDC); stakeholders (such as Channel Infrastructure); commercial, recreational, environmental and special interest groups; and the public generally.
- 12.3. It is pleasing for Northport that numerous submitters acknowledged the comprehensive approach by the company towards consultation.¹⁵⁷

¹⁵⁴ Dr Kelly EIC, paras 87 – 100 and 142.

¹⁵⁵ Dr Kelly, rebuttal evidence at paras 4-9.

¹⁵⁶ A detailed summary of consultation undertaken is contained in the EIC of Mr Blomfield.

¹⁵⁷ Including representatives of the Bream Head Conservation Trust (who acknowledged that in contributing to various projects, Northport has “supported the Trust’s mahi”), the Mountains to Sea Conservation Trust, Te Hononga Whakaruruhau o Whangārei Terenga Paraoa, the Ruakaka Residents and Ratepayers Association, Janice Boyes and Joshua Gwilliam.

13. SURRENDER OF CONSENTS

- 13.1. If the Proposal is granted consent, Northport intends to surrender several existing resource consents. This is to establish single consolidated sets of applicable regional and district conditions for the port's future operation, which will achieve a range of efficiencies, including for consent administration, monitoring, and enforcement.
- 13.2. In response to a query raised at the hearing, the conditions are framed as requiring Northport to (within specified timeframes) give written notice to the relevant council of its "*intention*" to surrender the relevant resource consents simply because it is not up to the consent holder whether the relevant consents are in fact surrendered.¹⁵⁸ The Council has (limited) discretion to refuse a surrender and a consent condition cannot bind the Council to accept a surrender.
- 13.3. In our submission this is an immaterial issue. It is in Northport and the Councils' interests for the existing consents to be surrendered, and the wording of the proposed conditions is fit for purpose. Having said that, Northport is ultimately agnostic on the exact condition wording should the Panel have any concerns with the detailed drafting.

14. MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

- 14.1. In opening submissions, we outlined how Northport has discharged its obligations under the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA Act").¹⁵⁹ Given that no customary marine title or protected customary rights have been issued in respect of the area of Northport's resource consent application, the MACA Act is of no further relevance to the current application and should not (and cannot) affect the Panel's consideration of the Proposal under the RMA. This is confirmed in the recent decision in *Ngāti Kuku Hapū v Bay of Plenty Regional Council*.¹⁶⁰ During oral submissions, counsel for PTITB essentially accepted this position.

15. IRRELEVANT CONSIDERATIONS

Grievances not relating to the Proposal

- 15.1. Several submitters at the hearing raised matters which are not relevant to the Panel's consideration of these resource consents. For example, submitters have raised a range of observations and issues relating to general degradation of the Whangārei

¹⁵⁸ Associated advice notes also explain the rationale for this.

¹⁵⁹ Refer paragraphs 7.52-7.53 of our opening legal submissions.

¹⁶⁰ [2023] NZEnvC 163 at [122].

Harbour and other environments that are not related to the Proposal. Many such matters are historical, and several were advanced by submitters without any evidential basis.

- 15.2. Northport acknowledges that submitters have a range of grievances. However, the RMA requires the Panel to consider the applications before it, based on the environment as it currently exists (we outlined the application of the legal principle of the “existing environment” in detail in opening submissions). Issues unrelated to the Proposal should not be conflated with the effects of the current Proposal.
- 15.3. We also caution against the potential to incorrectly connect a range of observed environmental effects with Northport’s operations. Simply because the Northport Proposal is the latest “cab off the rank” does not mean that it should be responsible through this resource consent process to address previous and unrelated development activity.

“Necessity” for the Proposal

- 15.4. A continuing theme at the hearing was the ‘need’ for the Proposal. In opening submissions, we pointed to the evidence on the practical realities and constraints of major infrastructure planning and delivery. We also outlined that there is no policy nor legal requirement to demonstrate demand or that the Proposal is a “necessity”.¹⁶¹ Counsel for NRC agrees.¹⁶² The s42A Report Addendum concedes that the interpretation of the policy framework previously advanced by the s42A author regarding demand/need was incorrect.¹⁶³
- 15.5. Notwithstanding that there is no requirement to demonstrate demand or that the proposal is needed, Northport has provided comprehensive evidence on future demand and demonstrating that the proposed footprint is required to handle predicted container volumes.¹⁶⁴ Northport has – by some margin we submit – adequately demonstrated demand for the Proposal. No opposing evidence seriously called this into question. Ultimately, all of the future scenarios modelled by Mr Akehurst confirm that Northport will need to invest in further wharf extensions and reclamation. In two of

¹⁶¹ Refer to para 7.26 of our opening submissions.

¹⁶² Legal submissions for NRC, paras 19-21.

¹⁶³ S42A Report Addendum, para 35 (referencing the legal submissions for NRC).

¹⁶⁴ In opening legal submissions we outlined that the evidence demonstrates that the Proposal is consistent with RPS Policy 4.8.1, which requires, among other things, that the “*area occupied is necessary to provide for or undertake the intended use*”; the intended use being a 500,000 TEU container terminal.

the four modelled scenarios,¹⁶⁵ Northport may outgrow even the expanded port (i.e., including Berth 4) as early as 2032.¹⁶⁶ If Northport waits for demand to be manifest before seeking RMA approvals, it will be too late.

Property values

- 15.6. It has been suggested by one submitter¹⁶⁷ that, because of the expansion proposed by Northport, “*property values will almost certainly fall*”. For completeness, we respond by noting that not only is there no evidence before the Panel regarding property values, it is accepted that effects on property values *per se* are not a relevant matter in making a decision pursuant to s104 of the RMA.¹⁶⁸

Potential future development – dry dock

- 15.7. Northport is aware of recent media speculation as to potential future development to the west of the existing Northport facility. As clearly explained in its application,¹⁶⁹ Northport had earlier considered a western expansion as part of its Vision for Growth, incorporating a shipyard and dry dock. This was ‘decoupled’ from the current application and Northport currently has no plans to advance a possible westward expansion.
- 15.8. If a westward expansion of Northport was to occur in future (likely by a party other than Northport), then any application for resource consents would need to be assessed against the ‘future environment’ aspect of the existing environment. This would include the current Proposal, assuming that the necessary resource consents are granted.
- 15.9. Simply put, any potential future proposal for the area to the west of Northport is hypothetical and of no relevance to the current application.

16. CONSIDERATION OF POSITIVE EFFECTS

- 16.1. Numerous submitters, including many who made the time and effort to attend the hearing, expressed to the Panel the importance of Northport’s continued and expanded operations to the region, the district, and their businesses. These included many ancillary and supporting businesses, the Northland Chamber of Commerce, and

¹⁶⁵ NAI (North Auckland Imports) and the UNIPC (Upper North Island Ports Constrained). The Four scenarios are: Business-as-usual (BAU); NAI; UNIPC; and North Auckland Growth (NAG).

¹⁶⁶ Mr Akehurst EIC, para 18.

¹⁶⁷ Response to questions from the Panel by Clinton Crow.

¹⁶⁸ *Foot v Wellington City Council* EnvC W073/98 at [254]. See also *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137 at [56]-[60] and *Wilson v Dunedin City Council* [2011] NZEnvC 164 at [28].

¹⁶⁹ Refer the Issues and Options report (forming Appendix 2 to the application and AEE) at section 9.1.8.

many SMEs (small and medium enterprises) and family-owned businesses.¹⁷⁰ One submitter described the Proposal as “*the life blood of the region of Northland*”.¹⁷¹

16.2. As outlined in legal submissions and in evidence, key benefits of the Proposal include the following:

- (a) A range of economic and social benefits associated with a dedicated container terminal at Whangārei, representing an integral part of an efficient national network of safe ports.
- (b) Efficiency improvements which will assist in securing Northport’s ongoing operation into the future by providing container terminal handling capability, along with the key benefits Northport provides to the region - including direct value added (estimated to be up to \$34 million) and the wider economic activity facilitated by the port (estimated at up to \$1.194 billion).¹⁷²
- (c) The symbiotic relationship between the proposed port expansion and the master planned development proposed by Marsden Maritime Holdings Ltd (“MMH”) - the Ha Ara Huringa Business Park and Tech Hub. The submission presented on behalf of MMH¹⁷³ described the port-related aspects of the MMH proposal, such as bulk storage, packing and unpacking of containers, freight forwarding, distribution hubs, cool stores, warehousing, workshops and engineering, which would be enabled by the port expansion. The Chief Executive of MMH says that the Northport expansion will “*support Northland unlocking its potential and thereby improving the socio-economic well-being across the region*”.¹⁷⁴
- (d) The significant environmental enhancement or other initiatives proposed, including:
 - (i) Harbour restoration and other initiatives will be enabled through the RG and associated fund to be established through conditions of consent associated with Northport’s cultural mitigation proposal.

¹⁷⁰ For example, in presenting the submission for Newey Transport, Mr Ian Newey described the “indirect value” of the port expansion to his, and other, businesses in the area. The Panel heard evidence that Newey Transport has 25 staff and 35 trucks.

¹⁷¹ Refer the oral submission of Mr Semenoff, Hearing Day 5.

¹⁷² Refer the EIC of Greg Akehurst at Table 1 and para 47. In both instances these are annual values, projected as at 2050. Refer here also the various submissions on behalf of ancillary or downstream business and business groups, such as the National Road Carriers Association.

¹⁷³ Including the presentation by Rosie Mercer, Chief Executive of MMH.

¹⁷⁴ ‘Northport Resource Consent Hearing Verbal Submission – Marsden Maritime Holdings’, 12 October 2023, at para 24.

- (ii) The Integrated Marine Planning or “Sea Change” initiative provided for by conditions, which aims to facilitate integration of the full spectrum of interests towards enhancing the wellbeing of the marine environment.
- (iii) Roosting habitat for variable oystercatcher and NZ dotterel will be provided through the proposed high-tide bird roost.
- (iv) The pocket park, cycleway/walkway, and water taxi facility will create a range of land and sea-based recreation opportunities (including fishing, swimming, observing port operations from a safe location, and socialising).
- (v) The contribution to protect indigenous duneland vegetation in the Ruakaka area required by conditions.

17. BALANCED APPROACH TO WEIGHING EVIDENCE REQUIRED

- 17.1. Submitters, including some clearly passionate about Whangārei Harbour and its ecological, social, and cultural values, raised numerous issues for the Panel’s consideration. These issues largely do not require a further response by Northport – except to acknowledge them, and to acknowledge the wide variety of involved stakeholders, both longstanding residents and those relatively new to the area, who seek to maintain and improve the quality of the environment.
- 17.2. Against this acknowledgment, it is important for the Panel to carefully apply an analytical lens to its weighing of the evidence – expert and lay.¹⁷⁵ Unsubstantiated concerns should not outweigh expert evidence based on empirical data and/or robust modelling.¹⁷⁶ This is particularly the case where extensive conferencing of experts has occurred, and in many instances there is wide,¹⁷⁷ even complete,¹⁷⁸ alignment between experts. As the Panel will be well aware, objectivity is required when making important decisions on actual and potential effects.

¹⁷⁵ Refer for example to *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [60]-[67]: “What weight should be afforded to expert and lay witnesses?”

¹⁷⁶ Refer to *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [65]-[67].

¹⁷⁷ For instance, refer the Ecology and Planning JWS dated 19 and 25 September, which records “All marine ecology experts agree that appropriate assessment methods have been used in the proposal. Data collection and presentation of results are appropriate and the characterisation of the biodiversity values of the harbour are appropriately addressed. All marine experts agree that the three scales used in the application are appropriate descriptors (footprint, outer harbour ecological zone (OHEZ), whole harbour).”

¹⁷⁸ For instance, the acoustic experts are agreed on all matters, as recorded in the JWS dated 21 September 2023.

- 17.3. As a related point, we note that the submissions and evidence for both Forest & Bird and DOC appear to adopt something of a myopic approach to the evidence – clearly preferring the evidence of Dr Beauchamp over that of Dr Bull, without providing specific reasons. We submit that this does not reflect a balanced approach, given Dr Bull has extensive experience over 20 years working on the coastal and seabird aspects of a range of projects in the marine and coastal environments, including windfarms (onshore and offshore), coastal pathways, reclamations, port activities (Whangārei, Wellington, and Lyttelton), marina construction, aquaculture and dredging; and she has undertaken detailed field work and assessment in the context of this Proposal
- 17.4. With regards to the evidence advanced on behalf of the Director-General of Conservation, we submit that there are several matters which go to the weight that this evidence should be afforded.
- 17.5. First, the expert witnesses on behalf of the Director-General of Conservation are employees of DOC and are, therefore, not independent (unlike the expert witnesses for Northport).¹⁷⁹ DOC has a statutory mandate, which flavours the position of its expert witnesses. For example, one of its functions under section 6(b) of the Conservation Act 1987 is to *advocate* for the conservation of natural and historic resources. Such *advocacy* is not consistent with the role of a truly independent expert.
- 17.6. Counsel for the Department referred¹⁸⁰ to the *Tram Lease* decision,¹⁸¹ asserting that its experts are not acting as advocates. The evidence at issue in *Tram Lease* represents the extreme end of the scale. While the approach of the Department’s witnesses does not necessarily match the severity of the *Tram Lease* example, in our submission, some degree of advocacy is present in the evidence of the Department’s witnesses.¹⁸² Their evidence should therefore be weighted accordingly.
- 17.7. Some witnesses, including Ms Kirk, have not undertaken a site visit. As counsel for the Department has set out, certain circumstances have prevented Ms Kirk from undertaking a site visit in recent weeks while the hearing has been conducted. However, Ms Kirk’s involvement with this application has spanned at least several

¹⁷⁹ In *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130 at [32] the Environment Court raised concerns regarding a witness who received a significant majority of his income from and shared an office space with the party for whom he was giving evidence, ultimately choosing not to prefer that evidence.

¹⁸⁰ Memorandum of counsel on behalf of Director-General of Conservation, 2 November 2023.

¹⁸¹ *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137.

¹⁸² For example, as noted above, Ms Kirk (planner for DOC) prefers/adopts the evidence of Dr Beauchamp over that of Dr Bull, without any reasoning/analysis as to why. (Refer Ms Kir’s EIC, para 34.)

months during which it was open to her to arrange a site visit at any time, including prior to the preparation of her evidence. Instead, Ms Kirk has undertaken only a desktop analysis of the site, relying on the evidence of other experts (including Dr Bull), and Northport's application to familiarise herself with the site. A number of the PTITB witnesses advised that they have not undertaken a site visit for the purposes of informing their assessment of, or involvement in, this Proposal.

17.8. We acknowledge that the code of conduct does not require a site visit to be undertaken, nevertheless, this is a matter that we submit goes to the weight to be given to the relevant evidence.

18. EXPERT STUDIES HAVE BEEN COMPREHENSIVE; THE PANEL HAS SUFFICIENT INFORMATION

Expert studies on behalf of Northport have been comprehensive

18.1. Some submitters have questioned the sufficiency of the investigations and assessment undertaken and the level of understanding about the relevant environmental systems.

18.2. Forest & Bird submit that a "properly precautionary approach" has not been adopted and, with reliance on a scattergun of issues raised by experts for the Director-General of Conservation and PTITB, revert to the trope that Northport needs to "*go back to the drawing board*". In response, we record that Northport has spent six years at the drawing board scoping, consulting on, and refining its application. The outcome of that methodical and detailed analysis is the current Proposal, which has been thoroughly assessed by a team of highly qualified and experienced experts.

18.3. The technical experts for PTITB¹⁸³ adopted a uniform approach of suggesting that additional information or study by Northport is required.¹⁸⁴ This is not uncommon where technical scientific experts are briefed to review reports, rather than to undertake independent investigation.¹⁸⁵ However, the challenge for the Panel – as it is for any decision maker – is to carefully examine the evidence, and determine whether there are material deficiencies or 'gaps', or whether criticism falls into the category of

¹⁸³ Prof Bryan, Dr Bulmer, and Dr Brough. Under questioning from the Panel, it was revealed that none of these technical experts had conducted a site visit for the purpose of considering the effects associated with the Proposal. Indeed, Prof Bryan advised that she had last visited the harbour approximately 3 years prior.

¹⁸⁴ Taking just one example, Prof Bryan suggested at para 2.3 of her Summary Statement that "*[w]ithout sound calibration and verification data, I cannot be confident that the effects are minor*".

¹⁸⁵ In response to questioning by the Panel, each of the three PTITB technical experts referenced above agreed that they had been engaged to review the reports and evidence prepared on behalf of Northport, rather than to undertake their own work or assessment.

matters of scientific or technical differences in opinion, or “point scoring”. We submit that, on this occasion, it is the latter.

- 18.4. One example is the suggestion that additional model calibration is necessary with respect to currents.¹⁸⁶ The issues of model calibration/validation have been painstakingly considered by two highly qualified and experienced experts advising Northport.¹⁸⁷ They have both confirmed their considered view that the modelling undertaken is well calibrated, including through previous consent processes at this location. Several decades of empirical contextual information, including historic data and reports which have appropriately informed their assessments of coastal process effects. This provides, in their view, ‘real world’ comfort that validates the modelled outputs. The s42A Report Addendum provides further comfort that the models used, including their calibration, are fit for purpose.¹⁸⁸
- 18.5. Another example is with respect to potential effects on kai moana shellfish. The evidence acknowledges that there has been a major decline in shellfish in recent years, including Mair/Marsden Bank pipi.¹⁸⁹ Despite many attempts to understand the cause of this decline, there is no clear understanding of the cause(s)¹⁹⁰ – although it is worth recording that, given the timing, the cause(s) is clearly independent of the Proposal. Notwithstanding this, given the significance of Mair and Marsden Banks, including to the local community/iwi/hapū, Northport’s experts¹⁹¹ have carefully considered potential adverse effects on these features. More specifically, Dr Lohrer has raised issues around ecological connectivity and sediment issues potentially impacting larval transport of shellfish.¹⁹² These concerns are directly rebutted by Dr Kelly.¹⁹³
- 18.6. To ‘round out’ the issue of kai moana shellfish, as noted above, the issue of declining harvestable shellfish populations at Te Poupouwhenua / Marsden Point is not new. It

¹⁸⁶ Refer the EIC and summary statement of Professor Bryan at 4.2 and 5.1.

¹⁸⁷ Mr Reinen-Hamill and Dr Beamsley.

¹⁸⁸ Section 3.4

¹⁸⁹ Refer for instance the statement of Hollie Kereopa, undated, which states “[w]hen going diving in the channel recently to assess the state of the pipi beds, I was disheartened by the lack of living organisms [sic] and ecosystems”; and Ms Chetham EIC, which states at 3.10 “[m]ussels are mostly gone from the harbour and what pipi and cockle remain are of unharvestable size. Our taonga species are in a dire situation...”.

¹⁹⁰ A point acknowledged by numerous witnesses, including Ms Chetham who noted that “a direct causal link between Northport and pipi dieback” had not been found. Refer response to questions from the Panel, Hearing Day 7.

¹⁹¹ Including in particular Mr Reinen-Hamill and Dr Kelly.

¹⁹² Refer section 6.1 of Dr Lohrer’s Technical Memo forming Appendix C3 to the s42A Report. Dr Lohrer’s concerns are echoed by Dr Bulmer at para 3.2 of his EIC.

¹⁹³ Refer Dr Kelly EIC at paras 87-100, and rebuttal evidence at para 7.

has been observed anecdotally for some time. While Northport fully agrees with comments such as that from Dr Lohrer that he “*would like to see a bolstering of the pipi population*” in the harbour,¹⁹⁴ it must be remembered that the effects of Northport’s Proposal on shellfish, outside the immediate footprint, have been assessed to be low,¹⁹⁵ and that wider, existing, environmental concerns are not something that Northport is, or can be, solely or primarily responsible for through this consent process or otherwise.¹⁹⁶

- 18.7. In summary, given the nature and scale of the Proposal, and the dynamic and complex environment of the Whangārei Harbour, it is not surprising that there are some confined areas of technical disagreement among scientific experts. Further it is axiomatic that more could always be done. However, the modelling, field-assessment, studies and analysis undertaken for the Proposal have been extensive, having been undertaken by a team of highly qualified and independent experts over a period of several years. At all stages Northport has adopted a “belts and braces” approach to cover all bases of scientific / environmental inquiry. The number of experts and the depth and breadth of reporting produced in support of the Proposal is testament to this. A total of 23 independent and qualified experts have prepared evidence on behalf of Northport – the Panel has heard from 17 of those experts at the hearing.¹⁹⁷ Key reports have been peer reviewed, both internally and by independent experts on behalf of the Councils, and a ‘feedback loop’ completed to ensure that material comments have been appropriately addressed.

There is adequate information to determine the application

- 18.8. Counsel for DOC and PTITB have invited the Panel to decline the application on the basis of inadequate information (s104(6) of the RMA), although in oral submissions counsel for PTITB resiled somewhat from his more bullish written submissions in this regard.¹⁹⁸ For the reasons outlined in our opening submissions we reinforce that this case is far from a situation where the Panel should consider exercising its discretion to

¹⁹⁴ Response by Dr Lohrer to questions from the Panel, Hearing Day 2. To support this position, Northport considers that a continued healthy shellfish population is essential for, among other things, maintaining the geomorphological stability of the harbour entrance.

¹⁹⁵ Refer Dr Kelly EIC at Table 1.

¹⁹⁶ We add that shellfish reseeded is unproven to have results at this location – as acknowledged by Dr Bulmer in response to questions from the Panel on Hearing Day 7 that he “*wouldn’t throw all my eggs in that basket*”.

¹⁹⁷ Evidence was also presented by three company witnesses on behalf of Northport.

¹⁹⁸ With reference to s104(6) of the RMA.

decline the application under s104(6) of the RMA. Such an approach would be unreasonable and disproportionate in this context.¹⁹⁹

18.9. One example in this regard relates to the approach recommended by Dr Flynn of undertaking a lizard survey (and any subsequent responses) prior to construction, as part of a Construction Environment Management Plan.²⁰⁰ This recommendation has been appropriately adopted by Northport. However, Forest & Bird submit that this proposed approach “*would effectively leave critical decision-making on actions to address adverse effects to after any grant of consent*”²⁰¹ and “*takes important matters engaging national policy direction from a public process into the hands of a private entity. It also deprives the panel and other submitters the ability to engage at the hearing with a matter that is ‘plainly a fundamental aspect of the application’*”.²⁰² We submit that this sort of hyperbole does not reflect practical reality: Dr Flynn has carefully assessed the area to have “*minimal intact, remnant habitat*”, and “*while the site may provide habitat for a small native lizard population (most likely shore skink), the probability of a viable native lizard population persisting at this site is fairly low*”. Accordingly, Dr Flynn recognised that lizard species may be present and has recommended mitigation measures accordingly.

18.10. As a second example, questions were posed with respect to potential implications of future vessel numbers²⁰³ on underwater noise, marine mammals, and health and safety considerations for snorkelers at the Motukaroro Island marine reserve. To the extent necessary, these questions have been addressed.²⁰⁴

18.11. We submit that absolute scientific certainty with respect to potential adverse effects cannot be achieved in every case, nor is it required. More information is almost inevitably welcomed for scientific interest, but the relevant question must always be whether additional data is necessary for adequately understanding and managing effects on the environment. Consent authorities are well used to dealing with

¹⁹⁹ Refer to *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81, cited by counsel for Patuharakeke, where the Environment Court stated “[c]learly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case” (at [26]).

²⁰⁰ Refer para 7.15 of Dr Flynn’s EIC.

²⁰¹ Forest and Bird legal submissions, para 75.

²⁰² Forest and Bird legal submissions, para 75.

²⁰³ Northport has sought advice from its port design experts and other industry experts and is confident that any perception that there will be a direct correlation between container volume increases and ship visit increases is incorrect. Rather, ships will be larger and carry more containers per shipment.

²⁰⁴ Refer the rebuttal evidence of Dr Clement at paras 23-30. Refer also the position expressed by Ms McConnell in response to questions by the Panel on Hearing Day 2 that issues in relation to marine mammals have been resolved and that “*the information used [by Dr Clement] is appropriate*”, having been compiled utilising “*multiple lines of evidence/information*”.

uncertainty concerning adverse effects in determining consent applications under the RMA. The Panel has an extensive body of robust information before it on which it can confidently decide the application.

- 18.12. The comprehensive expert assessments undertaken have resulted in any remaining uncertainty being very limited in scope and scale; and the Project design and proposed conditions of consent appropriately manage and sufficiently reduce any residual uncertainty – through the considered use of monitoring and management approaches incorporated as part of the Proposal.
- 18.13. On each issue the Panel has heard evidence from Northport that demonstrates that the Proposal is robust, conservative, and can be relied upon to manage effects in line with the policy directives. An allegation of an “uncertainty”, in the absence of supporting evidence, does not amount to an adverse effect or a relevant consideration for the Panel. The Environment Court in *Baker Boys Ltd v Christchurch City Council*²⁰⁵ noted that an evidentiary burden arises for a party to support with evidence any relevant allegations it makes. Where evidence has been provided by submitters, Northport’s experts have responded. We submit that the Panel should prefer the evidence for Northport, which has drawn on years of in-depth scientific study and a wider team of more than 20 qualified and experienced experts.
- 18.14. The Panel can therefore be comfortable that the information before it is more than sufficient to grant consents for the Proposal.

19. ANY REMAINING RISKS ASSOCIATED WITH THE PROPOSAL ARE NOT INAPPROPRIATE

- 19.1. Applicants, especially major infrastructure operators, can never totally eliminate all risk associated with development to be enabled through consent applications (or, in the case of infrastructure operators, their operations generally). A precautionary approach does not mean that applications should never have been pursued, or granted consent. In *Wilson v Waikato Regional Council*²⁰⁶ the Environment Court noted that a precautionary approach can be effectively reflected in consent conditions, rather than dictating consent decline.
- 19.2. Through careful design and thorough assessment Northport has taken all reasonable steps to minimise risk; and has established systems in place to respond to potential

²⁰⁵ [1998] NZRMA 433, para 21.

²⁰⁶ [2021] NZEnvC 131 at [155].

eventualities such that environmental risks associated with the Proposal are appropriately managed.²⁰⁷ As stated in our opening legal submissions, “*the proposed consent conditions are sufficiently precautionary, and by a considerable margin*”.²⁰⁸ This is consistent with the Court’s comments in *Shirley Primary School v Christchurch City Council*,²⁰⁹ which confirmed that the RMA is not a “no risk” statute.²¹⁰

19.3. We submit that the Panel should adopt the pragmatic and realistic approach to risk that was set out by the Court in *Envirowaste Services Ltd v Auckland Council*.²¹¹

The Court has frequently said that the Act is not a no risk statute. This acknowledges that in all human enterprise there is always an element of risk. There are those risks that can be foreseen and prevented. But there are other risks which are beyond the best design or intent and can confound all human endeavor...

In examining risk under the Act, the Court therefore must take a practical and robust approach to both the risk itself and its prevention.

19.4. We submit that Northport has, through its comprehensive approach to scoping, designing and testing the Proposal using its team of qualified and experienced experts, appropriately assessed potential effects, including with respect to probability of occurrence and level of impact.²¹² We further submit that the Panel can be satisfied that the Project design, including management responses through conditions, is such that any remaining risks are appropriate.

²⁰⁷ Northport has the benefit of having constructed and operated the existing port for the past 20+ years, giving it practical experience with relevant environmental risks.

²⁰⁸ Refer para 7.40 of the opening legal submissions on behalf of Northport.

²⁰⁹ (1999) NZRMA 66, at [106].

²¹⁰ See also *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40 (for example paragraph 140) where the Supreme Court held (in relation to perceived risks to navigation safety due to aquaculture) that while the consequence associated with the relevant risk in that case was grave; overall the risk was acceptable given that it was very unlikely to eventuate.

²¹¹ [2011] NZEnvC 130, paragraphs 64-65. In *Eyre Community Environmental Safety Society Incorporated v Christchurch Regional Council* [2016] NZEnvC 178 the Court accepted that subjective community perceptions of risk, unsupported by evidence, could not influence a decision-maker. In *Land Air Water Association v Waikato Regional Council* A110/01 the Court, in setting out a list of six relevant factors when assessing matters of risk, stated that the focus should be on “[e]vidence of adverse effects or risk to the environment, rather than mere suspicion or innuendo”; and that “...the Act does not endorse a ‘no-risk’ regime” (paragraph 519).

²¹² In *Clifford Bay Marine Farms Ltd v Marlborough District Council* C131/2003 at [68] the Court stated “... each potential effect raised in the evidence should be assessed qualitatively, or preferably quantitatively, in light of the principles of the RMA, and the objectives and policies of the relevant instruments as to (a) probability of occurrence; and (b) force of impact”.

20. UPDATED CONDITIONS

- 20.1. During the hearing process, Northport has further updated its conditions to incorporate recommendations from its expert advisors and address issues raised by submitters, and in response to questions from the Panel. This is usual practice for a major resource consent hearing. Changes to subsequent versions of conditions have been shown in “mark-up”, to ensure that the Panel and parties have been kept informed of the amendments proposed by Northport.²¹³ The draft conditions have also been the subject of extensive expert conferencing, including as recently as 9 November 2023.²¹⁴ The commitment by Northport to extensive and continued expert conferencing reflects its commitment to best practice processes – to achieve a carefully examined and well-crafted suite of conditions, should resource consents be granted.²¹⁵
- 20.2. The recent s42A Report Addendum confirms *“there is generally wide-ranging consensus on [the] majority of the conditions between the Council Officers and the Applicant’s planning experts”* and *“[r]esidual areas of disagreement... are relatively narrow.”*²¹⁶ Notwithstanding, the S42A Report Addendum recommends a range of changes to conditions.
- 20.3. Below we:
- (a) Summarise key remaining areas of contention relating to conditions.
 - (b) Summarise material amendments to conditions now proposed by Northport (from Northport’s previously circulated set), noting that we have already traversed above certain key matters, including cultural conditions and conditions relating to transport.
 - (c) Address aspects of the conditions recommended with the Councils’ S42A Report Addendum (those conditions being received by Northport on the afternoon of Friday 17 November), including where:

²¹³ Refer the draft conditions sets attached to Mr Hood’s rebuttal evidence. The conditions attached to these submissions are marked-up to show the changes from the version attached to Mr Hood’s rebuttal evidence (dated 3.10.23).

²¹⁴ Refer the Planning JWS dated 9 November 2023.

²¹⁵ Despite an incorrect inference by counsel for PTITB that the conditions proposed by Northport are “based on those offered in a recent Environment Court hearing, in which I was the lead counsel for the applicant” (legal submissions for PTITB, at para 4.15(a)), the conditions proposed by Northport are primarily (and appropriately in our submission) based on an earlier set of conditions relating to a capital dredging and disposal project in Whangārei harbour and updated to reflect current practice by examining a variety of other resource consents for infrastructure projects.

²¹⁶ Para 64.

- (i) Northport does not agree with certain recommended changes; and
- (ii) further input from Northport’s experts and/or additional analysis is needed before Northport confirms its position.²¹⁷

20.4. Subject to the above, and to any amendments to cultural conditions arising out of the further period for discussions with iwi/hapū requested by Northport, the conditions now attached as **Appendix A** to these closing submissions represent the updated, and **largely final**, position for Northport. Northport’s intention is to file a further final set of proposed conditions incorporating any further proposed changes. Notwithstanding this, we submit that the updated conditions proposed by Northport in **Appendix A** are appropriate and lawful (in their present state) with respect to the legal framework detailed in our opening submissions.²¹⁸

Lapse period

20.5. The proposed lapse period was addressed in our opening submissions.²¹⁹ Northport maintains that a “lapse on expiry” approach (i.e., a 35 year lapse period and consent duration) for the regional consents is justifiable for the detailed reasons provided in opening submissions.

20.6. However, Northport has taken on board concerns raised by other parties. As a result, Northport now seeks a lapse period of **20 years** for the regional consents. In our submission, in the context of the Proposal, such a lapse period is appropriate for the same reasons given in opening submissions.

20.7. As described in evidence by the CEO of Northport, “[t]he development process alone for this Project will likely span 9-14 years”.²²⁰ This means that a lapse period of 20 years is sufficient to cover this likely development period, with some allowance for the complex nature, size and scale of the Proposal, and the range of external and unpredictable events which can cause delay to construction planning: recent examples include the Covid-19 pandemic and response, and Cyclone Gabrielle, both of which had material implications for Northport operations and future planning. These various

²¹⁷ Northport’s positions on the various proposed changes in the s42A Report Addendum are preliminary at this stage (given they were only received on Friday afternoon last week).

²¹⁸ Opening submissions, Appendix B.

²¹⁹ Paras 7.30-7.31.

²²⁰ Mr Moore EIC, at para 79.

factors all clearly point to a longer lapse period being appropriate,²²¹ consistent with those approved for other large-scale infrastructure projects.

- 20.8. Examples of infrastructure projects with longer lapse periods include KiwiRail's Marsden Point Rail Link (20 years);²²² Watercare's proposal to build two large reservoirs in Pukekohe (15 years);²²³ roading projects such as the Southern Links Project,²²⁴ the Tauranga Eastern Arterial Project,²²⁵ the Hamilton Ring Road Project, and the Penlink Project (each 20 years); Lyttelton Port Company's channel deepening project (10 years);²²⁶ and Channel Infrastructure's channel deepening and realignment at Whangārei harbour (35 years).²²⁷
- 20.9. We submit that a lapse period of "5 or at most, 8 years"²²⁸ sought by PTITB is demonstrably insufficient in this context based on the relevant authorities. The decisions referred to by counsel for PTITB, and much of the associated legal analysis, relate to lapse periods for *designations over private land*, which raise different policy and practical considerations. Notwithstanding, as we note above, twenty-year lapse periods for designations for major infrastructure projects are not uncommon. A lapse period along the lines sought by PTITB would simply mean a lapse period extension would need to be sought by Northport, relitigating matters, within the space of a few years. Counsel for PTITB ran an argument along the lines that *if the project is so important, Northport should get on and build it; if not, Northport can come back later and apply for consents*.²²⁹ This superficially attractive argument ignores the reality that major infrastructure proposals such as the port expansion are **both** critically important **and** take a long time to plan, design, fund, and construct.
- 20.10. We submit that a lapse period of at least 20 years is necessary and appropriate here.

²²¹ Refer the discussion in opening legal submissions at para 7.31, including regarding the Project's regional and national importance and complexity, the long lead times in consenting, designing, and constructing port infrastructure, period required for investment, and external factors such as political decisions regarding transport funding, availability of dredging vessels, and exchange rates.

²²² Refer to designation KRH-2 in the Operative Whangārei District Plan.

²²³ Both the Notice of Requirement and resource consent. See *Pukekohe East Community Society Inc v Auckland Council* [2017] NZEnvC 27.

²²⁴ Designation reference E107, Chapter 26 Designations, Hamilton City Operative District Plan.

²²⁵ Designation reference NZTA16 Appendix 10C: Designations, Chapter 10 Network Utilities and Designations, Tauranga City Plan.

²²⁶ Resource consents were granted for a 35-year term, with a ten-year lapse period (consent references CRC172455 and CRC172522).

²²⁷ A 35-year lapse period was imposed on the Channel Infrastructure consents. Refer consents AUT.037197.01.01 - AUT.037197.13.01.

²²⁸ Patuharakeke legal submissions, page 19.

²²⁹ Legal submissions for PTITB (para 4.23); and oral submissions on behalf of PTITB.

Duration

20.11. Consent duration was addressed in our opening submissions.²³⁰ During the hearing, no submitter seriously challenged the consent durations sought by Northport, although Ms Norris proposed that a maximum five-year duration be imposed.²³¹ For completeness, we submit that limiting the duration of consents for the Proposal to five years would be completely unjustified based on the evidence. Reducing consent duration would also limit the flow of funding through proposed conditions, for example funding for the RG which is proposed to be *via* annual payments for the duration of the consents.

20.12. In the recent s42A Report Addendum, Mr Masefield:

(a) makes the surprising recommendation that the duration of the *reclamation* consents be limited to 35 years; and

(b) recommends durations of 20 years for the other regional consents.

20.13. For the reasons set out in opening submissions, we reaffirm that the consent durations sought by Northport are appropriate in the context of the Proposal. Counsel for NRC cites the same leading case as we did in opening submissions, *PVL Proteins Ltd v Auckland Regional Council*,²³² and concludes only that a shorter duration “is available” to the Panel.

20.14. For completeness, Northport disagrees with Mr Masefield’s recommendation on the reclamation term, which is unusual. Section 123(a) of the RMA provides that the default position that a reclamation consent duration is unlimited. We are advised that Northport’s previous reclamation consents included unlimited durations, which is routine. The rationale for the recommendation for a shorter duration is unclear.²³³ Once the reclamation is complete, there is nothing in the CMA to which the regional consents apply (i.e. NRC’s jurisdiction over the reclamation ends).²³⁴

²³⁰ Paras 7.32-7.35.

²³¹ Mira Norris suggested that the consents should be granted for a maximum of five years - refer the statement of evidence of Mira Norris on behalf of Te Parawhau ki Tai, at the paragraph numbered 9.

²³² EnvC A061/01.

²³³ We do not understand Mr Masefield’s comments that an unlimited duration is “wholly inappropriate” or that the reclamation duration would “logically be the same” as the other permits (s42A Addendum Report, para 40).

²³⁴ Refer *Bayswater Marina Holdings Ltd v North Shore City Council* (2009) 15 ELRNZ 258.

Cultural conditions

- 20.15. After hearing from submitters and in response to questioning from the Panel, Northport has revisited its earlier proposed “Kaitiaki Group” conditions. It is very pleased to now offer a revised, comprehensive suite of conditions establishing an effective mechanism to recognise and provide for the kaitiakitanga of Māori who have a kaitiaki relationship with Whangārei Te Rerenga Parāoa.
- 20.16. The updated *Tangata Whenua Relationship Group (“RG”)* suite of conditions represents a genuine attempt by Northport to facilitate and enhance the exercise of kaitiakitanga. Northport is not seeking to dictate the terms for the RG – the proposed conditions establish wide purposes and roles for the RG and mandate the RG to establish a Charter setting out for itself the details of its operation.
- 20.17. Key aspects of the revised RG conditions include:
- (a) Funding is substantively increased, such that Northport would fund the RG by an **annual payment of \$100,000** (plus GST, if any) from the date of establishment of the RG, and continuing for the duration of the consents (up to a maximum of 35 years).
 - (b) Functions of the RG have been broadened. The RG functions now include promotion of five of the eight Pou contained in the Patuharakeke Strategic Plan, expressed as:
 - (i) environmental restoration and/or betterment;
 - (ii) whānau health;
 - (iii) educational opportunities for tangata whenua;
 - (iv) cultural well-being; and
 - (v) economic and social well-being for tangata whenua.
 - (c) The amended conditions establish a ‘Co-Design’ process, whereby the RG will be invited to participate in the detailed design of physical works authorised by the consents, including the reclamation, marine structures including wharves, berthing facilities and water taxi pontoon, the sandbank renourishment area, pocket park and stormwater infrastructure; and the preparation of all management plans. This will assist to ensure that mātauranga Māori is incorporated into the design, with the intention of aligning, to the greatest extent practicable, western science and engineering with kaupapa Māori research and core Māori values.

- (d) The conditions continue to provide for a cultural monitoring framework relating to the dredging, reclamation and construction works authorised by the consents. These include the Cultural Indicators Hub, or 'CIH', an online platform for sharing monitoring data and demonstrating compliance. Cultural indicators are to be developed by the RG and incorporated into the CIH. Northport is required to ensure all monitoring data is visualised on the CIH.
- (e) The RG is to be responsible for its own processes, including determining its name, decision making methods and rates of remuneration for members, and may invite other tangata whenua groups to join the RG. Northport may have a representative on the RG only if invited by the RG.

Integrated marine planning initiative: “reasonable endeavours”

20.18. During the hearing the Panel asked some questions regarding the drafting of the proposed WDC condition which requires the consent holder to use “reasonable endeavours” to establish a steering committee to examine and promote integrated marine planning and governance for Bream Bay.

20.19. As the condition identifies, it is for the purpose of promoting an integrated marine planning framework providing for the integration of all interests towards enhancement of the wellbeing of the marine environment. It is proposed as an *Augier* condition by Northport.

20.20. The use of “reasonable endeavours” clauses in consent conditions is relatively common.²³⁵ While introducing an element of interpretation, the Courts have held that reasonable endeavours conditions can be appropriate, especially where – as is the case here – matters are outside the control of the consent holder and it would be disproportionate for there to be a non-compliance with the consent conditions where the consent holder had reasonably applied itself.²³⁶

20.21. In this case, given the nature and scope of the integrated marine planning initiative proposal, it cannot be realised by Northport alone – therefore, by design, the scope of

²³⁵ *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2018] NZEnvC 242; *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130 and *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 214; *Re New Zealand Transport Agency* [2022] NZEnvC 221; *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 and *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2011] NZEnvC 150.

²³⁶ *Te Rangatiratanga O Ngati Rangitahi Inc v Bay of Plenty District Council* EnvC A128/09 at [7]-[12]; and *Skyline Enterprises Ltd v Queenstown Lakes District Council* [2017] NZEnvC 124 at [204]. See also *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [288].

the condition is intended to be something broader and more meaningful. Given elements of the condition requirements are outside of Northport's control, the "reasonable endeavours" qualification is entirely appropriate. Northport is committed to the initiative, and the conditions set out a framework for significant positive benefits to be achieved. If the relevant third parties do not co-operate, then it is not appropriate for the consent holder to be forced into a consent non-compliance through the default of another party. Of course, as part of its consideration on conditions the Panel is entitled to take account of the fact that the initiative described in the condition is not 'guaranteed', given the non-absolute nature of the "reasonable endeavours" wording.

20.22. For completeness, Northport has been advancing scoping/planning discussions with several relevant integrated marine planning parties, including NRC, WDC, NIWA, Ministry of Primary Industries, the Department of Conservation, and iwi/hapū representatives. Responses have been overwhelmingly enthusiastic.

20.23. In summary, Northport considers there to be significant potential benefits associated with this initiative, and submitters have confirmed their support for it.²³⁷

Summary of changes to NRC conditions

20.24. In this section we outline key updates to the proposed NRC conditions since the version previously circulated with Mr Hood's rebuttal statement.

20.25. Various conditions²³⁸ have been updated to reflect the agreements Northport has reached with Channel Infrastructure and Seafuels regarding potential effects on the Channel Infrastructure jetties and associated infrastructure.

20.26. The **sandbank renourishment area** conditions have been updated in response to matters raised at the hearing, for example by DOC, including to:

- (a) require additional assessment and detail, including monitoring requirements, through a Sandbank (Bird Roost) Management Plan;

²³⁷ Refer the response by representatives of the Bream Head Conservation Trust to questions from the Panel, Hearing Day 4.

²³⁸ For example the definition of "Channel Infrastructure"; the advice note accompanying the general condition establishing the definition of "general accordance"; and conditions relating to: the Stakeholder and Communications Management Plan; the project website; certification; engineering plans; marine structure design and construction; the Safety Management Plan; potential sedimentation at Channel Infrastructure jetties and turning basin; potential changes to mooring forces; and full mission bridge simulation.

- (b) provide a process for the planning and delivery of a potential alternative avifauna initiative, if proposed; and
- (c) reflect the agreement Northport has reached with the Marsden Cove Marina parties.

20.27. The **integrated marine planning** conditions²³⁹ have been updated to require **\$100,000 per year** payments for **five years** and to require payments from the *granting* of the consents.

20.28. Reinstating the proposed **construction noise and vibration limits**.²⁴⁰

20.29. The **Marine Mammal Observation Zone (MMOZ)** conditions and **pile driving prohibition** conditions have been amended to include further detail and proscription. We record here also that the Construction and Environment Management Plan conditions require piling methodology to establish procedures for reduction of noise levels at source, including available technologies where practicable, such as air balloons and/or bubble curtains.²⁴¹

20.30. An advice note has been added explaining the Wildlife Act 1953 permit process in the event native lizards are detected during lizard surveys.

20.31. The capital dredging turbidity monitoring conditions have been amended to clarify the purpose of the capital dredging monitoring programme.

20.32. The **intertidal marine ecology assurance monitoring** requirements for seagrass have been updated to provide for video transects as an alternative methodology and for the survey area to be refined through the EMMP.

20.33. A new condition has been added to provide a framework for the assessment of whether observed ecological effects from dredging are within the bounds of those anticipated in the application material; and, if not, a process for assessment/monitoring and the implementation of management measures (subject to Council certification) in specified circumstances. While Dr Kelly's informed view is that 'active restoration' type

²³⁹ Noting that these conditions are supported by submitters including the Bream Head Conservation Trust.
²⁴⁰ The acoustic experts earlier agreed as part of conferencing that the application is not seeking resource consent to infringe the construction noise or vibration permitted standards in the plan and that it is not necessary to repeat the plan permitted standards. Notwithstanding, Council representatives and Northport have agreed that it is appropriate to set these out in the conditions to provide clarity and certainty.
²⁴¹ Noting the particular environmental conditions at the Proposal location, including high current speeds, are likely to impose obvious practical constraints on the application of some relatively new technologies such as use of bubble curtains.

measures will not be required, this enables consideration of steps such as redistribution of shell hash on dredged areas, for example.

20.34. A new condition has been added to make it clear that **port noise** will be managed under the relevant WDC conditions.

20.35. Various conditions requiring payment of money will be **inflation indexed** or similar.

20.36. The definition of “**suitably qualified and experienced**” has been amended in response to questions from the Panel during the hearing.

20.37. **Cultural conditions** have been substantively revisited, as described above.

Summary of changes to WDC conditions

20.38. In this section we outline key updates to the proposed WDC conditions since the version previously circulated with Mr Hood’s rebuttal statement.

20.39. The condition relating to the submission of engineering plans prior to commencement has been updated to require confirmation of the relevant **consultation with the Tangata Whenua Relationship Group** required under the NRC conditions.

20.40. An *Augier* condition has been added covering **Mair Road improvement works**. The condition requires the consent holder, before commencing construction, to provide a Mair Road Recreation Area Improvements Feasibility Study, covering a range of matters, to WDC for certification. The objective of the Feasibility Study is to investigate potential improvements to the Mair Road carpark, beach access, and surrounding reserve area, to provide further mitigation of the effects of the port expansion Project on the coastal access and recreation values of East Beach and the adjacent public park. The consent holder is later required to advise WDC whether it intends to implement (at its cost) the proposed improvement works in whole or in part, and to provide updates to WDC on the works.

20.41. A condition has been added regarding the **maintenance of public walking access from Ralph Trimmer Drive** to the residual beach area during construction.

20.42. A condition has been added to deal with the **repair of any pavement damage to Ralph Trimmer Drive** during construction.

20.43. The contribution to protect **indigenous duneland** vegetation in the Ruakaka area has been set at a one-off payment of **up to \$100,000**, adjusted as appropriate.

20.44. As with the NRC conditions, the proposed **construction noise and vibration limits** have been reinstated.

20.45. The **port noise limit** condition has been updated in line with the agreed recommendations of the acoustic experts in the JWS.

Conditions recommended in the Councils' s42A Report Addendum

20.46. Northport requires further time to consider amendments proposed in the s42A Report Addendum on the following topics, several of which Northport does not oppose in principle:

*NRC*²⁴²

- (a) **Cost escalation** provision for certain conditions specifying monetary amounts.
- (b) **Operational stormwater changes**, namely to:
 - (i) Simplify the operational stormwater quality conditions so that they impose modified “at source” compliance limits only and remove the mixing zone trigger threshold aspects previously proposed by Northport. Northport supports this approach in principle.
 - (ii) Include sludge management, and groundwater management and monitoring requirements (including a Stormwater Operations and Maintenance Plan).

*WDC*²⁴³

- (a) **Operational port noise** changes relating to real-time noise monitoring (for management, as opposed to compliance, purposes) and website initiatives.

20.47. To the extent items have not already been addressed above, for instance around lapse date, Northport confirms that it does not agree with other proposed amendments to conditions in the s42A Report Addendum (including those below), which we submit are inappropriate and unjustified:

²⁴² Refer to section 4.1 of the s42A Report Addendum for a list of the Addendum report's proposed amendments to the NRC conditions.

²⁴³ Refer to section 4.2 of the s42A Report Addendum for a list of the Addendum report's proposed amendments to the WDC conditions.

(a) **“Closed dredging” season**

The s42A Report Addendum recommends a condition prohibiting capital dredging between 1 October and 31 January. The stated rationale for the proposed “no-dredge” period relates to managing effects on shellfish spawning and recruitment. This proposed condition has come somewhat out of ‘left-field’ in the context of this application, and its evidential basis with respect to these applications is unclear.²⁴⁴ Dr Kelly and Mr Sneddon have not recommended any such condition as being warranted to manage effects on kai moana shellfish.

A seasonal restriction on capital dredging of the nature proposed would have major impacts on the viability of the Proposal. It would clearly have important flow-on impacts on the timing for the completion of the reclamation and the project as a whole. It would be highly onerous with respect to logistics, including contracting, and project costs.

Overall, we submit that any seasonal restriction on capital dredging does not have a sound evidential basis in the context of this application and is unjustified. It would be both unreasonable and disproportionate in this context.

- (b) Additional **marine ecology assurance monitoring**. Dr Kelly has designed a comprehensive marine ecology assurance monitoring scheme, which is secured through conditions proposed by Northport. Additional requirements are not justified.

²⁴⁴ The s42A Report Addendum (para 17) and Mr Lohrer’s attached technical assessment (which contains only two short paragraphs addressing this matter) refer to a 2015 report which we have not identified in evidence before the Panel. A similar condition (applying to capital dredging in certain areas) was included in the conditions attached to the Commissioners’ decision on the application for Channel Infrastructure’s Crude Shipping Project, following contested evidence on the point. That condition was appealed by Channel Infrastructure, and later settled through an Environment Court Consent Order. The dredging authorised by the Crude Shipping Project is of a different nature and scale, and in a different location, to the dredging proposed as part of Northport’s Proposal. The Crude Shipping Project consents also did not involve the disposal of dredge material to a specific reclamation project and so there were not the same interdependencies between dredging and reclamation as for Northport’s Proposal. The Commissioners’ decision on the Crude Shipping Project stated (para 224) *“We do not see a closed season as a major imposition on the ability of the Applicant to undertake its capital or maintenance dredging as this still leaves eight months of the year in which the works can be programmed and undertaken – we were told that the capital dredging is expected to take in the order of six months.”* This is not the case for the Proposal. Mr Blomfield’s EIC (para 126) confirms that *“[t]he construction programme will last approximately three and half years for the completion of the dredging/reclamation and berth construction, depending on dredge style and piling rig configuration.”*

- (c) **Dredging / turbidity** condition amendments. The conditions proposed by Northport are comprehensive and fit for purpose. Additional requirements are not justified.
- (d) Additional **sandbank coastal monitoring requirements**; and an **operational avifauna management plan requirement**. The conditions proposed by Northport are comprehensive and fit for purpose. Additional requirements are not justified.
- (e) Requirement for a **shellfish repopulation plan**. The basis for Mr Masefield's recommendation for a shellfish repopulation plan²⁴⁵ includes assessed levels of effects on kai moana shellfish that are contested by Northport's experts and, we submit, an unfounded interpretation of Policy D.2.18 of the Proposed Regional Plan.²⁴⁶ Northport therefore does not consider a shellfish repopulation plan is justified.
- (f) **Restructure of channel design conditions**. Northport's proposed conditions on this topic have been subject to extensive negotiation, culminating in agreement with relevant parties. Northport therefore seeks retention of the conditions in the form Northport previously proposed.²⁴⁷

WDC

- (a) **Activity controls on the reclamation**. Some of the proposed controls are overly prescriptive, for example limiting what area of the reclamation (on a percentage basis) can be occupied by certain activities (e.g. the area for empty containers and container maintenance and repair can only take up 7% of the relevant area). Such controls would unduly constrain port operations and are unjustified. They would likely be unworkable and lead to major inefficiencies.

²⁴⁵ Paras 14-15 of the s42A Report Addendum.

²⁴⁶ Para 15 of the s42A Report Addendum states: *"The Applicant may be of the view that these footprint scale effects do not require mitigation because of the Proposed Regional Plan ('PRP') policy directive to apply a systems approach [D.2.18]. Mr Masefield is of the opinion that this directive assists in terms of a s104(1)(b) policy assessment, but in terms of a s104(1)(a) effects assessment, these significant residual effects remain in need of appropriate mitigation and a condition for a shellfish repopulation plan has been included in the attached set."* This is a curious approach, including given Policy D.2.18 is titled *"managing adverse effects on indigenous biodiversity"*. D.2.18 has been addressed in detail in evidence and submissions, and we are not aware of any basis for Mr Masefield's approach to interpreting D.2.18.

²⁴⁷ As outlined above, Northport will give further consideration to the proposed changes in the s42A Report Addendum.

- (b) **Controls on crane number and type.** As identified above, restricting the number and type of cranes would be simply unworkable and would unduly constrain port operations.

21. PRINCIPAL SUBMISSION

- 21.1. We submit that the totality of the evidence should give the Panel a high degree of confidence that there are no impediments to granting the consents sought by Northport, and that they therefore should be granted.
- 21.2. As outlined above, the Proposal represents the culmination of years of effort by Northport and its consultant team. Northport has invested significant time and resources in project scoping, and in determining how the Proposal can best be constructed and operated to appropriately manage adverse effects, as required by the RMA. In addition, Northport has gone to significant effort consulting with stakeholders and other potentially affected parties, including iwi/hapū, to genuinely seek to address their concerns. This process has continued after lodgement. The measures proposed by Northport to manage potential adverse effects are comprehensive and robust.
- 21.3. The Proposal will bring meaningful benefits for the district, the region and nationally, facilitating the much-needed expansion of Northport. Northport considers that the Proposal represents a significant and valuable opportunity to expand the Port as a nationally significant infrastructure resource and a key regional asset, and to contribute to regional and national social and economic wellbeing in an environmentally sustainable manner.
- 21.4. Northport's principal submission is that all consents sought should be granted because:
 - (a) The Proposal has been assessed against the requirements of the RMA, including s104.
 - (b) The evidence demonstrates that all aspects of the Proposal have been professionally considered and assessed, and that there are appropriate measures in place to ensure that any adverse effects are avoided or appropriately managed, by way of both detailed design and proffered consent conditions.

- (c) The Proposal will enable Northport to keep pace with growing demand and meet the future shipping needs of the upper North Island, unlocking tangible benefits for the region and its communities.
- 21.5. Ultimately, the Panel's assessment of the application requires a pragmatic weighing of the evidence presented and the concerns raised by submitters; namely between the Proposal's local adverse effects (which have been addressed through comprehensive conditions), as against the significant local, regional, and national benefits that will be generated over a long timeframe. This exercise must take proper account of both adverse and positive effects, in light of matters which are relevant under the RMA and the applicable planning framework.
- 21.6. Northport submits that the Proposal is well conceived; strongly supported by the relevant planning framework; will have a range of important positive benefits; and appropriately manages environmental effects. It is worthy of your support.

“No expansion means no opportunity.”

- Chris Howell, submitter

C H Simmons & K R M Littlejohn
Counsel for Northport Limited
20 November 2023

APPENDIX A: PROPOSED CONDITIONS