

**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

**OUTLINE OF OPENING LEGAL SUBMISSIONS ON BEHALF OF
NORTHPORT LIMITED**

5 October 2023

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CONTENTS

1.	INTRODUCTION	2
2.	NORTHPORT	3
3.	THE PROPOSAL.....	4
4.	NORTHPORT'S EVIDENCE	8
5.	PROCEDURAL CONTEXT	10
6.	STATUTORY AND LEGAL CONTEXT	21
7.	ISSUES	33
8.	ISSUES RAISED – SUMMARY	51
9.	CONDITIONS.....	51
10.	PRINCIPAL SUBMISSION	55

1. INTRODUCTION

- 1.1. This is a hearing of a resource consent application by Northport Limited (“Northport”) to both Northland Regional Council (“NRC”) and Whangārei District Council (“WDC”) for the expansion of Northport (the “Proposal”).
- 1.2. The evidence demonstrates that the Proposal strictly complies with the applicable “avoid” policies, and Northport’s case is therefore not advanced *in reliance* on the recent *Port Otago*¹ Supreme Court decision. Notwithstanding this, *Port Otago* confirms that there is still a consenting pathway for the Proposal, even if the Panel were to find that the “avoid” planning directives are not met.
- 1.3. The Proposal is necessary for the safe and efficient continued operation of Northport and will achieve a range of important benefits for Whangārei and Northland. It is founded on rigorous expert assessment and incorporates comprehensive effects management measures – through both careful project design and proposed conditions. It includes a range of initiatives addressing cultural issues: the “cultural mitigation proposal”, which draws on long-term good faith engagement with iwi/hapū.
- 1.4. Northport and its expansion are explicitly provided for in the Proposed Northland Regional Plan (“Proposed Regional Plan”) and the Whangārei District Plan (“District Plan”). A range of “enabling” provisions throughout the planning hierarchy also provide directive policy support for the Proposal.²
- 1.5. We submit the evidence demonstrates that the application satisfies the relevant provisions of the RMA and should be approved, subject to appropriate conditions.

Scope of submissions

- 1.6. The purpose of these submissions is to contextualise the large body of information before the Panel. These submissions:
 - (a) Briefly introduce Northport and the Proposal;
 - (b) Introduce the witnesses for Northport;
 - (c) Outline the procedural context;

¹ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112.

² As outlined in these submissions, the stated purpose of the Proposed Regional Plan’s Marsden Point Port Zone, within which the “seaward” Proposal footprint sits, is to “*enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities*” (Policy D.5.8). This is exactly what the Proposal is for.

- (d) Address the statutory/legal framework;
- (e) Comment on key issues, including as raised by submitters and the NRC and WDC officers' report under s42A of the RMA ("s42A Report");
- (f) Address the proposed consent conditions; and
- (g) Set out the principal submission in support of Northport's application.

2. NORTHPORT

- 2.1. Northport is described in detail in the evidence of Mr Jagger, Mr Moore, and Mr Blomfield. It began trading at Marsden Point in 2002 and is New Zealand's northernmost deep-water port. Northport has three available berths, with a total length of 570m. A fourth berth has been consented and is soon to be constructed.³ The overall Northport footprint includes 49.1ha of land, of which 33.6ha is reclaimed.
- 2.2. Northport operates 24 hours a day, seven days a week, handling domestic freight and international exports and imports.⁴ Recent investment in container handling equipment has seen an uplift in container trade, notably during the Covid-19 pandemic and response.
- 2.3. Northport plays a very important role in Northland's regional economy, supporting import and export activity and a range of ancillary activities. This role has expanded and diversified significantly since Northport began operating in 2002. Northport is recognised as regionally significant infrastructure in the Regional Policy Statement for Northland ("RPS"),⁵ the Proposed Regional Plan,⁶ and the District Plan.⁷ Beyond its local and regional importance, and due to its integration into the national port network, Northport is significant nationally for its freight handling, commercial, transportation, and infrastructure functions.

³ Northport is currently in the design phase of construction for the additional consented berth (Berth 4). This is sometimes referred to as the Berth 3 extension.

⁴ Logs, woodchip, and processed timber for export comprise the bulk of cargo handled by the port. Other export items include kiwifruit, cement, and manufactured goods. Imports are also an important part of Northport's business and include fertiliser, gypsum, coal, steel, project cargo, and animal feed supplements.

⁵ Appendix 3.

⁶ Appendix H.9.

⁷ Definitions Chapter. See also Objective PORTZ-O1 *Regionally Significant Infrastructure* and the Port Zone Chapter generally. Regionally Significant Infrastructure has elevated importance in the planning framework through specific objectives and policies, including provisions that seek to recognise, promote, and enable it (see for example RPS Objective 3.7; and Proposed Regional Plan Objective F.1.6).

- 2.4. Northport has a proven track record in successful port construction and operation. It is committed to sustainable business practices and environmentally responsible operations.

3. THE PROPOSAL

- 3.1. Northport has invested considerable time, resources, and consultant expertise – in consultation with stakeholders and the public – into feasibility studies, design, and effects analysis of the Proposal over numerous years. The application before you is the result of that extensive effort, assessment, and testing, and has been carefully crafted not only from a technical (effects) point of view, but also to efficiently utilise the valuable (and valued) coastal resource the site presents – in short, to deliver a sustainable outcome for Northland and New Zealand. The application has been designed to avoid effects on sensitive species, areas, and habitats, and refined to respond to issues raised by submitters, including iwi/hapū, and in the s42A Report.
- 3.2. A full description of the Proposal is set out in AEE, Northport’s evidence (especially Mr Hood’s statement) and in the useful precis in the s42A Report.⁸ In summary, the Proposal includes the following:⁹
- (a) Reclamation of approximately 11.7ha to the east of the existing port.¹⁰
 - (b) Capital and associated maintenance dredging to provide for the safe and efficient manoeuvring of vessels using the berths.
 - (c) A wharf structure along the seaward edge of the reclamation.
 - (d) Sheet piling and/or rock revetment structures on the eastern edge of the reclamation.
 - (e) A new tug berthing facility and water taxi pontoon.
 - (f) Creation of additional variable oystercatcher and NZ dotterel high-tide roosting habitat through augmenting a sandy flood spit feature in the intertidal area with additional sand deposition.

⁸ AEE section 3; S42A Report section 2.

⁹ The Proposal includes consolidating several aspects into single resource consents (with one set of conditions) for the entire expanded port (for example stormwater discharges, and port noise/other district consent matters). This will simplify the administration of the consents, including monitoring and compliance aspects. As a result, Northport intends to surrender certain existing consents. Refer Mr Hood’s EIC at 6.3-6.5.

¹⁰ The Proposal’s overall additional port area will be approximately 13.7ha, 1.8ha of which is above MHWS (i.e. not reclamation).

- (g) Construction of a public “pocket park” and walkway on the southeastern edge of the expanded port, plus car park and public toilet facilities.
 - (h) Earthworks and vegetation clearance to provide for the expanded port above MHWS, including to construct the proposed walkway and “pocket park”.
 - (i) Management of port noise from the entire expanded port via consolidated conditions of consent adopting the NZS 6809:1999 *Acoustics – Port noise management and land use planning* (“Port Noise Standard”) framework.¹¹
 - (j) Conveyance of operational stormwater via extension to the existing canal system, and treatment and discharge via the existing pond-based stormwater system and/or proprietary devices.
 - (k) Port related activities and structures on the proposed reclamation and wharves, and on parts of the proposed development above MHWS.
- 3.3. As originally confirmed in the s42A Report, and illustrated in Northport’s rebuttal evidence, we submit that overall the Proposal is a discretionary activity. We return to this issue below.

Monitoring/management regimes

- 3.4. The Proposal incorporates a comprehensive suite of measures to monitor and manage adverse effects. Northport is proposing detailed regional and district consent conditions, which have been prepared with input from Northport’s expert team, taking on board feedback from the s42A Report authors and submitters and expert conferencing. Northport’s proposed conditions address the full range of relevant effects from the Proposal. Key monitoring and management initiatives are summarised below:
- (a) A comprehensive cultural mitigation proposal, including a cultural monitoring framework (addressed below).
 - (b) A best practice “real time” continuous dredge turbidity monitoring and management programme (addressed below). Turbidity management will draw on comprehensive baseline monitoring and will be followed up with ecological “assurance monitoring” to confirm longer term effects.

¹¹ Similar noise management frameworks are in place for most of the other commercial ports in New Zealand: Port of Tauranga (Mt Maunganui), Napier Port (Napier), Eastland Port (Gisborne), Port Taranaki (New Plymouth), CentrePort (Wellington), Port Marlborough (Picton), Nelson Port (Nelson), Lyttelton Port (Christchurch), Port Otago (Dunedin), and South Port (Invercargill).

- (c) A comprehensive management plan framework to facilitate the effective delivery of monitoring and management requirements prescribed by conditions, including the following primary plans:¹²
- (i) Construction Environmental Management Plan (CEMP) – covering the reclamation and wharf construction.
 - (ii) Environmental Management and Monitoring Plan (EMMP) – covering environmental effects of the capital dredging operation.
 - (iii) Marine Mammal Management Plan (MMMP) – covering management of effects on marine mammals from all project parts/phases.
- (d) In accordance with the Port Noise Standard, proposed consent conditions include:
- (i) noise limits for residential receptors, agreed by all expert acousticians;¹³
 - (ii) 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; and
 - (iii) establishment and implementation of a Port Noise Management Plan to minimise port noise through best practice, including ongoing community liaison.

Key benefits of the Proposal

3.5. While some submissions in opposition naturally focus on concerns with the Proposal, we submit that it is important not to lose sight of the range of significant economic, employment, social, and other benefits of the Proposal.¹⁴ We submit that the key positive features of the Proposal are:

- (a) The Proposal will facilitate a range of significant and enduring economic benefits:

¹² A range of secondary plans are also required, for example Biosecurity Management Plans (**BMP**); Capital and Maintenance Dredging Management Plans (**Capital DMP** and **Maintenance DMP**); Air Quality Management Plan (**AQMP**); Stakeholder and Communications Management Plan (**SCMP**); Safety Management Plan (**SMP**); **Pocket Park Maintenance Management Plan**; Construction Traffic Management Plan (**CTMP**); Port Noise Management Plan (**PNMP**); Operational Lighting Management Plan ("**OLMP**"). As outlined in EIC of Mr Hood, the overall approach is that the proposed conditions of consent specify the "standards" that the Proposal is required to achieve, and the management plans will contain the detailed information/methodologies, as prescribed by conditions, to achieve those "standards" and appropriately manage identified potential effects on the environment.

¹³ Refer the JWS in relation to terrestrial noise dated 21 September 2021.

¹⁴ The many submissions in support speak to these benefits.

- (i) The Multi-Regional Input Output assessment undertaken by Market Economics shows that:
- The annual value of Northport’s **direct** role (as a business) in the Northland economy could range from \$22 million value added under a Business as Usual (“BAU”) scenario to \$34 million under a North Auckland Imports (“NAI”) scenario, by 2050.¹⁵ The value added at this level could sustain the equivalent of 320 to 480 jobs annually.
 - The annual value of the economic activity **facilitated** by the Port (which includes the trade tasks it handles) in the Northland economy could range from approximately \$1.097 billion value added under a BAU scenario, to \$1.194 billion value added under the NAI scenario by 2050. In terms of jobs, this is equivalent to sustaining between 14,800 and 16,100 jobs for a year, each year.
- (ii) Overall, the Proposal will generate considerable positive economic effects for the local, regional, and national economies. It will enable the expansion of a highly valuable physical resource (i.e. the port), enabling the community to provide for its social, cultural, and economic wellbeing.
- (b) The Proposal will improve the efficiency and resilience of the national port network.
- (c) A range of initiatives will have other positive effects and/or assist to manage adverse effects, including:
- (i) Harbour restoration and other initiatives will be enabled through the Kaitiaki Group and associated Kaitiaki fund to be established through conditions of consent associated with Northport’s cultural mitigation proposal (addressed below).
 - (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.

¹⁵ Refer the EIC of Mr Akehurst, including for a summary of the scenarios adopted in his analysis.

- (iv) The pocket park, cycleway/walkway, and water taxi pontoon 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.

3.6. Overall, we submit that the positive effects of the Proposal are significant.

4. NORTHPORT'S EVIDENCE

- 4.1. 26 witnesses have prepared comprehensive evidence in chief (EIC) and rebuttal evidence for Northport that fully describes the Proposal and addresses all relevant issues under the RMA.¹⁶
- 4.2. The evidence is the culmination of several years of detailed assessment by a range of highly experienced independent experts, who collectively possess a wealth of practical experience in the design and assessment of ports and/or major coastal development.
- 4.3. The following witnesses have prepared evidence on behalf of Northport:
 - (a) *Northport; project rationale and design; consultation*
 - (1) **Murray Jagger**, Northport – Board Chair (*corporate overview*)
 - (2) **Jon Moore**, Northport - CEO (*corporate overview*)
 - (3) **Greg Blomfield**, Northport – Terminal Facilities Manager (*consultation, design, and project management*)
 - (4) **Mahim Khanna**,* Portwise (*terminal design and alternatives*)
 - (5) **Jan Stanway**,* WSP (*design and construction*)
 - (6) **Jared Pettersson**, Enviser (*environmental management*)
 - (b) *Assessment of effects*
 - (7) **Greg Akehurst**, Market Economics (*economics*)
 - (8) **Dr Brett Beamsley**, MetOcean Solutions (*hydrodynamics, morphodynamics*)
 - (9) **Richard Reinen-Hamill**, Tonkin + Taylor (*coastal processes*)

¹⁶ Mr Hood also prepared an addendum, dated 13 September 2023, to his EIC.

- (10) **Prof. David Fox**,* Environmetrics Australia (*establishment of turbidity triggers*)
 - (11) **Dr Shane Kelly**, Coast and Catchment (*marine ecology, excluding avifauna and marine mammals*)
 - (12) **Ross Sneddon**,* Cawthron Institute (*peer review - marine ecology, excluding avifauna and marine mammals*)
 - (13) **Dr Leigh Bull**, BlueGreen Ecology (*avifauna*)
 - (14) **Dr Sarah Flynn**, Boffa Miskell (*terrestrial ecology*)
 - (15) **Craig Fitzgerald**,* Marshall Day (*terrestrial acoustics*)
 - (16) **Dr Matt Pine**,* Styles Group (*underwater acoustics*)
 - (17) **Dr Deanna Clement**, Cawthron Institute (*marine mammals*)
 - (18) **Andrew Curtis**,* Pattle Delamore Partners (*air quality*)
 - (19) **James Blackburn**, Hawthorn Geddes (*operational stormwater management*)
 - (20) **Nerissa Harrison**, WSP (*transport*)
 - (21) **Stephen Brown**, Brown NZ (*landscape and natural character*)
 - (22) **Rob Greenaway**, Rob Greenaway & Associates (*recreation*)
 - (23) **Bruce Goodchild**, various (*navigational safety*)¹⁷
- (c) *Consultation with iwi/hapū; cultural matters*
- (24) **Dee Isaacs**, 4Sight Consulting (*cultural*)
- (d) *Planning and statutory assessment*
- (25) **Brett Hood**, Reyburn & Bryant (*planning*)
 - (26) **Dr Phil Mitchell**, Mitchell Daysh (*planning - overview*)

4.4. You will hear from all the witnesses except for those identified with an “*” above, whom the Panel has excused from attending on the basis that there are no issues in

¹⁷ As clearly stated in his evidence, Mr Goodchild is an employee of Northport. He is also the Deputy Harbourmaster Commercial Shipping for NRC, the Northport Manager of the Local Port Service, and the manager of the marine simulator at Northport. He has directly relevant qualifications and experience, as outlined in his evidence.

contention between the relevant experts, and/or the Hearing Panel has no questions for those witnesses.¹⁸

5. PROCEDURAL CONTEXT

Consultation

- 5.1. Northport has made a concerted effort to engage constructively with iwi/hapū, key stakeholders and interested parties since it began its 'Vision for Growth' project in 2017. That commitment to engagement continues.
- 5.2. As Northport's company witnesses and Mr Isaacs outline, Northport has been, and remains, committed to meaningful consultation on the Proposal. As part of its commitment to environmental management and the local community, Northport and its advisors have, over several years, engaged early and in good faith with a wide range of parties (including iwi/hapū, the Councils, institutional stakeholders, and the local community) and have genuinely sought to address concerns raised. Dating back to 2017, Northport has proactively engaged with the community to share early plans for its project and has utilised feedback to inform and revise/refine the Proposal.
- 5.3. Northport has continued to engage proactively with submitters in the period leading up to the hearing to resolve or narrow issues. In some cases that has resulted in submitters' concerns being substantively addressed.

Submissions

- 5.4. At Northport's request, the Proposal was publicly notified in November 2022. 243 submissions were received:¹⁹ 176 in support; 10 neutral or not stated; and 57 in opposition.
- 5.5. The issues raised in submissions are neatly summarised in the s42A Report. Northport and its experts have carefully read and considered the submissions which are comprehensively addressed in Northport's evidence. Several issues are also addressed in these submissions.²⁰
- 5.6. It is worth reflecting on the very high proportion of supporting submissions which, in counsels' experience, is not common for a coastal/port development project of this nature and scale.

¹⁸ Refer to Panel Directions 9 and 10.

¹⁹ One submission was subsequently withdrawn.

²⁰ See for example Mr Hood's EIC, para 14.2.

S42A Report

- 5.7. The s42A Report prepared by Mr Masefield and Ms Sharp states:²¹

On the whole, the Applicant has promulgated an assessment and mitigation package that effectively manages the wide range of consequential effects to an acceptable level and Council experts have proposed additional or modified conditions to address residual effects, in a way that responds to and demonstrates policy consistency.

- 5.8. Northport acknowledges the extensive work of the s42A Officers and the Council peer reviewers in preparing a comprehensive appraisal of the Proposal to assist the Panel.
- 5.9. Northport has carefully considered the s42A Report, and its experts respond comprehensively to it in their evidence. Northport has adopted the Council peer reviewers' recommendations where appropriate to do so.
- 5.10. As confirmed in the s42A Report, there is generally a high degree of agreement between the experts for Northport and the Councils, with few outstanding issues remaining in contention between Northport and the Councils (albeit some of those are important issues).²² The outstanding matters identified in the s42A Report are generally areas where further analysis is sought from Northport, as opposed to fundamental differences.²³

Post-notification updates

- 5.11. In addition to addressing matters raised in the s42A Report, since notification Northport has carefully considered all feedback received, including issues raised in submissions and through expert conferencing and direct discussions with submitters, and has endeavoured to respond constructively.²⁴ Northport has further considered

²¹ At [10].

²² The s42A Report includes a useful table identifying Northport's specialist assessment topics/authors and the corresponding Council reviewers (section 6.4, Table 6). At [11] the s42A report states: "*There are five areas where better definition of effects, additional mitigation effort or agreement on proposed mitigation is necessary to address areas to a level that achieves policy consistency. These areas are: a. Marine ecology accumulative effects; b. Avifauna cumulative effects; c. Recreational mitigation; d. Landscape effects on the closest ONL; and e. Cultural effects.*" At Table 8, the s42A Report usefully provides a comparison (at the time the s42A Report was drafted) of conclusions on levels of effect as between the Councils' and Northport's experts, grouped by topic.

²³ At [15] and [657] the s42A Report states: "*In summary, there are a range of effect areas that would benefit for further evidence and expert interaction to assist with concluding on policy consistency, particularly marine ecology and tangata whenua / cultural, and further evidence to demonstrate efficient use and need for the allocation of coastal space. If the above can be adequately resolved then there is a likely consenting pathway, if not it is more difficult to see a pathway to the granting of consents.*"

²⁴ As confirmed in the s42A Report (refer for example [193]), no such changes result in any jurisdictional issues regarding the scope of Northport's application, including because the changes: (a) have not materially altered the scale or intensity of the Proposal; (b) have not altered the character of effects (and in fact have decreased the level of adverse effects); and (c) are not of a nature that may have altered who

aspects of the Proposal and the proposed conditions, which are captured in Northport's evidence. Key areas where additional work has been undertaken by Northport's experts since notification include:

- (a) Finalising the best practice dredge turbidity monitoring and management regime and associated conditions, including "real-time" responsive turbidity management (see the evidence of Mr Pettersson, Professor Fox, Dr Kelly, and Mr Sneddon).
- (b) Detailed analysis of cultural effects; and development of a cultural mitigation proposal addressing cultural effects (see the evidence of Dee Isaacs).
- (c) Amendments to conditions around the process for detailed design of the proposed facility, including to proactively monitor navigation safety, and to manage potential effects on the continued operation of the existing Channel Infrastructure NZ Ltd ("Channel Infrastructure") facility, including by Seafuels Limited.
- (d) Engagement with Waka Kotahi regarding the appropriate arrangement for managing potential future traffic effects. Here, Northport's planning and traffic experts have carefully restructured the proposed conditions requiring monitoring, and ultimately a contribution towards the upgrade of, three key intersections (refer the rebuttal evidence of Mr Hood and Ms Harrison).
- (e) Careful consideration of potential effects on the Marsden Cove marina including measures to minimise potential coastal process effects associated with the proposed Sandbank Renourishment Area (designed to provide high tide roost habitat for birds displaced by the proposed Northport facility).
- (f) Continuing to proactively investigate practicable and meaningful community recreation opportunities in the Marsden Point area.

5.12. This process of refinement means that at this hearing Northport is presenting what it considers to be an ideal proposal for the site; a proposal that both efficiently utilises the available physical resources, and appropriately manages adverse effects.

would have submitted on the application. It is common practice for applicants to utilise an iterative process involving refinements to applications before they are heard. In *Wakatipu Environmental Society v Queenstown Lakes District Council* (C164/04) the Court observed that it is inevitable that applications undergo refinement and that "this is to be expected and encouraged by the Court to obtain the best possible outcome in environmental terms" (paragraph 9). See also the High Court's decision in *Atkins v Napier City Council* CIV 2008-441-000564 which analysed several earlier cases and synthesized the legal tests.

Turbidity monitoring and management

- 5.13. Northport is proposing through conditions a sophisticated, best-practice turbidity monitoring and management regime.²⁵ It involves management of dredging operations by way of real-time turbidity monitoring coupled with a three-tiered system of management response triggers.²⁶ The regime will manage suspended sediment plumes from dredging through stepped management measures to ensure turbidity plumes are not greater than the modelled predictions. The proposed approach is based on approaches that have been previously consented, with robust testing and peer review, and implemented at several New Zealand ports, including Lyttelton and Napier.
- 5.14. The proposed turbidity monitoring and management regime is coupled with ecological assurance monitoring of the Whangārei Harbour to monitor longer-timescale potential environmental effects.

Cultural effects; and Northport's cultural mitigation proposal

- 5.15. As outlined in Mr Isaac's evidence, to address cultural issues Northport is proposing a comprehensive set of cultural mitigation initiatives through proposed consent conditions.²⁷ Northport's cultural mitigation proposal reflects the good faith engagement undertaken with iwi/hapū on the Project over several years.
- 5.16. We observe that Ms Dalton opines that "*...the lack of cultural mitigation provided in the AEE and subsequent s 92 Responses demonstrates an unwillingness by the Applicant to genuinely and fully engage with PTB*".²⁸ To the contrary, the core reason why Northport included its cultural mitigation proposal with its EIC is because of its desire to work with iwi/hapū to develop a robust proposal before publicly presenting it, as outlined in the evidence of Mr Isaacs. Northport also simply does not agree with Ms Dalton's statement that "*[i]n my opinion, there have been no demonstrable attempts to narrow the cultural issues...*".²⁹ Instead, and as acknowledged by Ms Chetham,

²⁵ The Modified IFD (intensity - frequency - duration) (M-IFD) method is the statistical basis for the trigger level framework. Refer to the EIC of Professor Fox.

²⁶ The first two trigger levels provide an indication to the dredge operator that turbidity levels are higher than typical, and measures should be implemented to reduce dredge-generated turbidity plumes. The third trigger level requires cessation of dredging in the vicinity of the relevant location whilst the trigger conditions prevail.

²⁷ In our submission Ms Dalton's assertion in her EIC at para 3.1(a) that "*...the proposal does not include any specific means of remediation or mitigation to the significant adverse cultural effects generated by the proposal on Patuharakeke's cultural values*" is not correct at the time her evidence was drafted. Ms Kirk acknowledges this elsewhere in her evidence.

²⁸ Ms Dalton EIC, para 6.9(a).

²⁹ Ms Dalton EIC, para 6.9(a).

substantive engagement with Patuharakeke Te Iwi Trust Board (and other submitters) has occurred.³⁰

5.17. Northport's cultural mitigation proposal is outlined below.³¹

Kaitiaki Group and Kaitiaki Fund

- (a) *The draft conditions provide for the establishment of a Kaitiaki Group.*³²
- (b) *The proposed conditions set out the broad functions of the Kaitiaki Group and a range of detailed roles/functions, both of which are intended to be further developed by the Kaitiaki Group.*
- (c) *Northport proposes to fund the Kaitiaki Group as follows (collectively called the "Kaitiaki Fund"):*
 - (i) *Pre-construction: An annual payment of \$25,000 (plus GST, if any);*
 - (ii) *During construction: An annual payment of \$50,000 (plus GST, if any); and*
 - (iii) *Post construction: An annual payment of \$25,000 (plus GST, if any) for a period of three years.*

Harbour restoration and enhancement

- (a) *The proposed conditions provide that the Kaitiaki Group may scope, design and implement a range of initiative(s) for:*
 - (i) *cultural and/or ecological restoration and enhancement of Poupouwhenua and Whangārei Te Rerenga Parāoa; and/or*
 - (ii) *cultural or community recreation projects in Poupouwhenua and Whangārei Te Rerenga Parāoa.*

Project design

- (a) *The proposed conditions provide for iwi/hapū involvement in matters of project design and delivery.*

Cultural monitoring framework

- (a) *The proposed conditions provide for the establishment of an online monitoring and reporting platform: the "Cultural Indicators Hub".*

Expertise/capacity building

³⁰ Refer Ms Chetham EIC, at para 5.3.

³¹ The below summary reflects the conditions proposed by Northport and draws on the EIC of Dee Isaacs.

³² Membership of the Kaitiaki Group is intended to be confirmed by iwi/hapū.

(a) *The proposed conditions provide for initiatives to develop expertise and capacity building for iwi/hapū.*

5.18. Various responses to cultural matters are also included within the design of the Proposal or other conditions of consent, including:

(a) The Proposal design retaining access from Ralph Trimmer Drive to the poupouwhenua mataitai (Mair Bank);³³ and

(b) Conditions of consent including specific management measures for taonga species, for example marine mammals and avifauna.

5.19. The above proposal represents a genuine effort by Northport to take on board its understandings from the good faith engagement process to date, in the face of reluctance by iwi/hapū to discuss such matters, and to put forward a set of initiatives to meaningfully address cultural issues that have been raised.

5.20. We address cultural issues further below.

Expert conferencing

5.21. The Panel directed expert conferencing. Conferencing on numerous topics was facilitated by former Environment Court Commissioner Ms Marlene Oliver, resulting in the production of the following Joint Witness Statements:

- (a) Transport;
- (b) Marine ecology;
- (c) Avifauna;
- (d) Recreation;³⁴
- (e) Landscape;
- (f) Terrestrial noise;
- (g) Coastal processes;
- (h) Navigation; and
- (i) Planning.

³³ This relates to wairuatangata (the distinctive identity or spirituality of people and places).

³⁴ A recreation JWS (21 September 2023) and addendum (25 September 2023) were produced.

5.22. The conferencing was effective in clarifying, narrowing, and in some cases resolving issues raised between experts. For example:

- (a) For terrestrial noise, 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. All the experts are agreed on the proposed conditions relating to terrestrial noise.³⁵
- (b) For marine ecology, the experts agree that:
 - (i) The appropriate assessment methods have been used;
 - (ii) Data collection and presentation of results are appropriate and the characterisation of the biodiversity values of the harbour are appropriately addressed; and
 - (iii) The scales used are appropriate descriptors.
- (c) For landscape and natural character, the only outstanding matter between the experts is the level of effect of STS cranes and container stacks on identified ONLs.³⁶
- (d) For recreation, the experts are essentially agreed on the assessment of recreation effects of the Proposal and on-site recreation aspects (including the pocket park).³⁷ The experts also agree there are a range of potential offsite mitigation opportunities that are capable of further managing effects of the Proposal. We return to discuss recreation mitigation below.
- (e) For navigation, the experts agreed that no further simulation is required at this stage and that it is appropriate for further simulation to be carried out prior to detailed design,³⁸ and that matters including overall risk assessment and marine oil spill risk are appropriately addressed in the proposed conditions.³⁹ On the issues traversed in the JWS, the experts agreed in principle that changes to conditions were appropriate, and referred those matters to the planning expert conferencing to give effect to.

³⁵ Refer the terrestrial noise JWS (21 September 2023).

³⁶ Refer the landscape JWS, section 3.1 (21 September 2023).

³⁷ Except for the provision of a pontoon to the east of the proposed reclamation which Mr Greenaway supports, but Mr Jones does not (due to safety and recreational conflict concerns and proximity to the Channel Infrastructure jetty). See the recreation JWS (21 September 2023).

³⁸ Refer the navigation JWS, section 3.4 (25 September 2023).

³⁹ Ibid, at section 3.6.

- (f) With respect to transport, there is a high degree of alignment between the experts regarding effects, with outstanding matters largely relating to condition wording. In particular, Northport does not agree with the position adopted by the Waka Kotahi witnesses that Northport should be responsible for all costs associated with intersection upgrades – instead it proposes proportional contributions. We return to address this below.
- (g) For planning, the experts agreed that the NPS-IB does not introduce any new matters for this application,⁴⁰ and relevantly that effects on terrestrial ecology identified by the relevant ecological experts have been determined to be less than significant.⁴¹

5.23. Northport's updated proposed conditions, attached to Mr Hood's rebuttal statement, incorporate numerous matters agreed at conferencing.

5.24. Northport is grateful to the Panel for directing the conferencing, and to Ms Oliver for facilitating the sessions.

Other parties' expert evidence

5.25. Expert evidence has been filed in advance on behalf of the following parties:

- (a) **WDC Infrastructure Group.** Ms Niblock (Team Leader of the WDC Infrastructure Planning Team) confirms her view that the Proposal's effects can be appropriately managed and that the consents sought should be granted, subject to certain matters.⁴²
- (b) **Marsden Cove Ltd and Marsden Cove Canals Management Ltd** have filed coastal processes, marine ecology, terrestrial noise, and planning evidence. Overall, there is a high level of agreement between the experts for the Marsden Cove parties and Northport,⁴³ although the Marsden Cove parties are seeking amendments to the Proposal regarding:
 - (i) the proposed bird roost; and

⁴⁰ Refer the planning JWS, section 3.6.2.1 (28 September 2023).

⁴¹ Ibid, at section 3.6.2.2.

⁴² These are "...*further expert conferencing and the negotiation of a Development Agreement or similar between Council and the Application*" (Ms Niblock evidence. Para 9.3)

⁴³ Mr Hegley (terrestrial noise) states at para 13 of his EIC that "*the proposed noise conditions will provide good acoustic protection for dwellings in the Marsden Cove area*". Mr West (ecology) states at para 8 of his EIC that "*I agree with the general assessments of values and effects*" with respect to reclamation; and at para 10 that "*I agree with the assessments of effects posed by dredging*".

- (ii) changes to conditions focussing on potential coastal process effects on the Marsden Cove development.
- (c) **Channel Infrastructure** filed coastal processes and navigational safety evidence focussing on potential impacts on its infrastructure (namely “Jetty 3”) and operations. Channel Infrastructure has since withdrawn its evidence and now supports the Proposal based on proposed conditions agreed with Northport.
- (d) **Seafuels Ltd** has filed planning evidence which is confined to potential effects on the manoeuvring of a future replacement marine fuels barge at Channel Infrastructure’s Jetty 3. Seafuels Ltd is seeking design changes to the Proposal, and/or other comfort that future vessels accessing the Channel Infrastructure facility will not be impacted by the Proposal.
- (e) **Waka Kotahi NZ Transport Agency** has filed corporate evidence and a joint transport/planning statement. Waka Kotahi supports the Proposal subject to appropriate conditions. There is a high degree of agreement on conditions, however Waka Kotahi is seeking further amendments to the conditions proposed by Northport with respect to the potential upgrading of four state highway intersections.⁴⁴ While discussions have been ongoing, conditions have not yet been agreed as between Waka Kotahi and Northport.
- (f) **KiwiRail** has filed corporate evidence addressing its future intentions for the rail network, including the Marsden Rail Link Project.
- (g) **Patuharakeke Te Iwi Trust Board** has filed cultural, marine ecology, marine mammals, hydrodynamics and coastal processes, and planning evidence. Patuharakeke’s primary position is that the application should be declined.
- (h) **Dr Mere Kepa** has filed a statement of evidence focussing on ecological and cultural issues.
- (i) **The Director-General of Conservation** has filed avifauna and planning evidence.

⁴⁴ Stephen Mutton EIC, section 8.

Issues remaining in contention

5.26. There is a relatively high level of agreement between the parties' experts. Even with respect to the experts for Patuharakeke and DOC there is material common ground. For example:

- (a) Ms Dalton for Patuharakeke acknowledges there is a level of agreement between Patuharakeke's and Northport's experts on a range of matters, including navigation and safety, terrestrial noise and vibration, archaeology, stormwater discharge, air quality, land transport, and terrestrial ecology.⁴⁵
- (b) In areas where disagreement remains between experts for Patuharakeke and Northport, there is agreement on certain fundamentals (for example Dr Brough agrees that ecological effects on marine mammals from the proposed activities in the harbour are likely negligible).⁴⁶

5.27. As a result of the engagement and conferencing undertaken, outstanding issues relate largely to the following:⁴⁷

- (a) Cultural issues;
- (b) Marine ecology;
- (c) Marine mammals;
- (d) Avifauna, including Sandbank Renourishment Area;
- (e) Coastal processes;
- (f) Recreation;
- (g) Road intersection upgrading;
- (h) Visual, landscape, and natural character effects;
- (i) Activity status;
- (j) Allocation of coastal space ('necessity'); and
- (k) Effects on particular submitters, including Seafuels Ltd and Marsden Cove Ltd.

⁴⁵ Ms Dalton EIC, para 2.14(c).

⁴⁶ Dr Brough EIC, para 10.1.

⁴⁷ This aligns with Ms Dalton's EIC, para 2.14(d).

Environment Court decision on District Plan noise provisions

5.28. We briefly mention Northport's previous involvement with Plan Change 144, part of WDC's rolling plan review. The background to that involvement is outlined in Mr Hood's evidence.⁴⁸ Ultimately, the Environment Court declined to introduce new noise limits into the District Plan based on the Port Noise Standards, as sought by Northport through the plan review process.⁴⁹ However, the decision was based on the Court's view that the plan change process was not the right time to make the changes sought by Northport because at that time the future development of Northport was unclear and consents for the port's expansion had not yet been lodged.⁵⁰ Clearly, Northport had no control over the timing of WDC's plan review process.

5.29. In its 2021 decision:

- (a) The Court made no comment on the merits of any noise controls that Northport may propose – and now has proposed – through the subsequent resource consent process. The Court explicitly stated that *"it would be unfair and unwise of us to suggest what type of [noise] controls may or may not appropriate at [the resource consent] stage."*⁵¹
- (b) The Court broadly endorsed the Port Noise Standard approach to managing noise effects at Northport:⁵²

*As a matter of general principle, we conclude that the Port Noise Standard is a better method to approach sound at the port, comprising at least an outer control boundary (and probably inner control boundary) with limits set in terms of Ldn.*⁵³

...

... we consider that when new limits are to be adopted or to be considered that the Port Noise Standard represents an appropriate methodology.

⁴⁸ Refer to Mr Hood's EIC at paras 14.4-14.9.

⁴⁹ *Northport Ltd v Whangarei District Council* [2021] NZEnvC 192. See also the minor corrections to the Court's 2021 decision outlined in *Northport Ltd v Whangarei District Council* [2022] NZEnvC 10.

⁵⁰ Refer [56]-[66] of the decision in [2021] NZEnvC 192. The Court was aware that a consent application for the Proposal was imminent at the time of the hearing, but had not been lodged. The decision states at [56]: *"We recognise that there is a tension between [noise controls] and the operation of the port and the exact terms of any Port noise management, application of the port noise standard and the measurements that would apply. These are clearly matters that need to be resolved in the long term. Fundamentally however we have concluded that this is not the time to do so."* At [79] the Court stated: *"We agree that the questions of economic versus amenity impact would need to be judged carefully. We are not able to do that in the current situation because the actual development on this site is unknown. It relies on further consents which may in themselves require significant evaluation and may be subject to many conditions."*

⁵¹ At [63].

⁵² At [51] and [85].

⁵³ The Court continued: *"However, whether extra parameters should be used i.e. LAeq Lmax and the exact wording of any mitigatory offers are matters we conclude we do not need to address on this occasion."*

5.30. The Court's decision on the WDC plan change therefore represents no impediment whatsoever to the Panel granting the consents now sought by Northport. Further, the decision offers support for the Proposal's adoption of the Port Noise Standard. Northport rejects any potential assertion, including from submitters, along the lines that the Court has already "rejected" the noise regime proposed by Northport. That is simply not the case. Instead, the current Proposal (for resource consents to enable the port's expansion) provides the detail that the Court did not have available to it at the time of its decision on a district-wide plan change. We submit that the earlier decision supports the approach of Northport: in that now *is* the time to make the changes to the noise regime sought by Northport. As the 2021 Court decision stated.⁵⁴

Whilst we accept there may be some level of change for residents in these areas, we consider that the impact of noise on the social and cultural amenity of residents needs to be weighed carefully with the value of the PORTZ zone and its activities. In our view, the appropriate time to do this is when the port development is much more certain, either after or as part of any application for further consents.

5.31. Mr Hegley, independent noise expert for the Marsden Cove parties, generally endorses Northport's proposed approach to noise monitoring and management. He confirms in his statement of evidence that the proposed noise conditions will provide good acoustic protection for dwellings in the Marsden Cove area.⁵⁵ Beyond this, all of the acoustic experts have agreed on the appropriate technical issues, as set out in the JWS.

6. STATUTORY AND LEGAL CONTEXT

6.1. Subject to Part 2, s104(1) sets out matters to which the Panel is required to have regard to in determining the application; in particular:

- (a) Any actual and potential effects on the environment (s104(1)(a));
- (b) Any measure proposed for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects (s104(1)(ab));
- (c) The relevant statutory documents (s104(1)(b)); and

⁵⁴ At [86].

⁵⁵ Mr Hegley's EIC, para 13. Mr Hegley also recommends several minor changes to Northport's proposed conditions.

(d) Any other matter the Panel considers relevant and reasonably necessary to determine the application (s104(1)(c)).⁵⁶

6.2. We address several matters that are relevant to this analysis below.

Approach to s104 and Part 2

6.3. The relationship between s104 matters and Part 2 has been the subject of considerable jurisprudence.

6.4. For resource consent applications, the Court of Appeal's decision in *Davidson*⁵⁷ provides a “definitive statement of the legal position in this regard”.⁵⁸ In summary, *King Salmon*⁵⁹ does not apply to decisions on resource consents, and recourse to Part 2 is permissible – and in some cases necessary – in the context of decisions on resource consents.⁶⁰ The Court of Appeal held that while reference to Part 2 would “likely not add anything” where a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes; if it appears that the plan has not been prepared in a manner that reflects the provisions of Part 2 (and/or has not been competently prepared), then it will be appropriate and necessary to refer to – and give emphasis to – Part 2. In other words, the extent to which Part 2 is relevant to the determination/outcome of a resource consent application will depend on the applicable RMA plans.

6.5. As confirmed by Mr Hood⁶¹ and Dr Mitchell (and in the planning JWS) the recently promulgated Proposed Regional Plan and the District Plan give effect to the RPS, which in turn appropriately gives effect to the New Zealand Coastal Policy Statement 2010 (“NZCPS”) (which reflects Part 2). Independent recourse to Part 2 will therefore add little in this case, which seems to be accepted by all planning witnesses.⁶²

⁵⁶ Under s104B of the RMA, the Panel has jurisdiction to grant or refuse consent for a discretionary activity and, if consent is granted, to impose any conditions it “considers appropriate” (s108).

⁵⁷ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

⁵⁸ *Panuku Development Auckland Ltd v Auckland Council* [2018] NZEnvC 179 at paragraph 675.

⁵⁹ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38. 1.1. The Supreme Court in *King Salmon* held that unless there is invalidity, incomplete coverage, or uncertainty of meaning in the statutory planning documents, decision-makers should not refer back to Part 2 when determining a plan change.

⁶⁰ At paragraph 47 the Court stated: “...we are satisfied that the position of the words “subject to Part 2” near the outset [of s104] and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so.” And at paragraph 51 the Court states: “...while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt 2”. The Court of Appeal confirmed at [52] that sections 6, 7, and 8 constitute “strong directions, to be borne in mind at every stage of the planning process”

⁶¹ Mr Hood EIC, at 8.2-8.3.

⁶² Refer for example to Ms Kirk's EIC at [177].

However, we submit that any direct reference to Part 2, which was analysed in detail in the AEE for completeness, simply confirms the appropriateness of the Proposal.

Section 104(1)(a): effects

- 6.6. Section 104(1)(a) requires consideration of “*any actual and potential effects on the environment of allowing the activity*”. The potential effects of the Proposal are comprehensively addressed in the AEE and technical reports submitted with the application, and the evidence that is before the Panel. Mr Hood’s evidence provides a detailed assessment of actual and potential effects within the relevant planning framework. These submissions will accordingly only comment briefly on the Proposal’s actual and potential effects.

Positive effects

- 6.7. Consistent with the definition of “effect” in the RMA, which includes positive effects, it is settled law that it is appropriate to consider all relevant effects, including a proposal’s positive effects.⁶³
- 6.8. Positive effects of the Proposal are detailed in Northport’s evidence and the s42A Report and outlined above.

Other effects

- 6.9. The various technical reports and associated evidence all conclude that the Proposal’s effects can be adequately managed and are appropriate overall in the context of the planning framework. All Northport’s experts consider that the proposed conditions (within their respective areas of expertise) are appropriate.
- 6.10. Key potential adverse effects where material disagreement remains between the experts are addressed below.
- 6.11. In summary, the evidence should give the Panel confidence that the construction and operation of the Proposal will occur in a manner that appropriately manages adverse effects, including by way of avoiding certain adverse effects as required by the applicable plans. The measures proposed by Northport to manage potential adverse effects on the environment – including through the Proposal’s design and through conditions – are comprehensive and robust.

⁶³ See for example *Elderslie Park Limited v Timaru District Council* [1995] NZRMA 433.

Existing environment and permitted baseline

- 6.12. It is important to outline the relevant context for the assessment required to be undertaken by the Panel in accordance with section 104(1)(a), as it applies to the Proposal. That requires consideration of, first, the relevant “environment” against which the Proposal’s effects must be assessed, and second, the scope of potential effects that can validly be taken into account for the purposes of that assessment. The former essentially involves consideration of the “existing environment”. The latter is the “permitted baseline” analysis.

Existing environment

- 6.13. The Environment Court in *Contact Energy v Waikato Regional Council*⁶⁴ stated its understanding of the term “environment” as follows:

We hold that consideration is to be given to the effects on the environment as it actually exists now...

- 6.14. The existing environment concept was extended by the Court of Appeal in *Hawthorn*,⁶⁵ which held:

In our view, the word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activit[ies] under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. [...] We think the legitimate considerations should be limited to those that we have just expressed.

- 6.15. In subsequent decisions,⁶⁶ the High Court has cautioned against *Hawthorn* being applied “like a statute” and has instead encouraged a “real world” approach to assessing the relevant environment which appropriately recognises the context of each proposal.

Permitted baseline

- 6.16. The concept of the permitted baseline as set out in s104(2) allows a consent authority to disregard certain effects of a proposed activity where a national environmental standard or plan permits an activity with that effect. As the Court of Appeal noted in

⁶⁴ *Contact Energy v Waikato Regional Council* (2000) 1 ELRNZ 1 (EnvC) at paragraph 38.

⁶⁵ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424, paragraph 84.

⁶⁶ For example, *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, at [85].

Hawthorn the purpose of the permitted baseline is “to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan”.

Assessment of existing environment

6.17. Consistent with the guidance from the courts on this issue, in our view it is appropriate and necessary to adopt a ‘real world’ approach to determine the existing environment. The existing environment in the context of the Proposal is detailed in the evidence, which we submit adopts an approach to the existing environment that is consistent with the established case law. We note here that the evidence for Northport:

- (a) Comprehensively describes the existing environment of the Northport site and the adjacent areas, in a manner consistent with the settled jurisprudence. The existing environment includes a range of natural features, as modified by long-term human activities, including the working commercial port and adjacent industrial and residential areas, and the fuel import and distribution facility (the former refinery).
- (b) Addresses development features comprising the “future environment” aspect of the existing environment. With respect to the Proposal, this includes extant resource consents where they are likely to be implemented, including Northport’s consented, but not constructed, Berth 4 (addressed in more detail below). In some cases, Northport’s experts’ assessment of effects is very conservative. For example, due to the difficulties associated with “separating” adverse effects currently authorised by dredging (such effects falling within the existing environment) and the proposed dredging, Dr Kelly has not “discounted” effects that are already authorised and will occur independent of the Proposal. This results in overstated effects for the Proposal.⁶⁷ In addition, while it is uncertain whether Channel Infrastructure’s consented channel deepening and realignment project will be implemented, where appropriate Northport’s experts have assessed these works within their existing environment – and cumulative effects – analysis. If the Channel Infrastructure consents are not implemented, then those cumulative effects will clearly not eventuate and the effects assessments by Northport’s experts will be highly conservative in this regard.

6.18. It is necessary to clarify some apparent confusion regarding the existing environment in the context of Northport’s Berth 4. In her statement of evidence, initially Ms Dalton

⁶⁷ Refer to the AEE report of Dr Kelly, page 127; and the EIC of Mr Hood at 13.9.

acknowledges that Berth 4 forms “part of the consented baseline and receiving environment”.⁶⁸ We agree with this.⁶⁹ However, Ms Dalton goes on to state:⁷⁰

... in my opinion [Berth 4] is unlikely to occur should the current application not be approved and, and based on PTB’s legal submissions, therefore it should not be included with the ‘existing environment’ for the purposes of the planning assessment.

- 6.19. The statement that Berth 4 is unlikely to occur if the Proposal is declined is incorrect. As outlined by Mr Moore,⁷¹ the detailed design of the consented Berth 4 is currently being actively progressed. Independent of the application for the Proposal, the Berth 4 proposal is scheduled to go to the Northport Board in early 2024 for “sign-off”, followed by construction. In our submission, Berth 4 clearly forms part of the existing environment in accordance with *Hawthorn*. Further, *Smith v Marlborough District Council*⁷² addressed the extent to which a consent that had been given effect to but not fully exercised should be taken into account as part of the existing environment. The Court’s preliminary view was that the existing environment includes the effects caused by full implementation of the existing consent, in this case being the full extent of the consented Berth 4.
- 6.20. Usefully on this issue, it is recorded in the JWS in relation to marine ecology and planning that “*There is no disagreement between the planning experts as to what constitutes the existing environment.*”⁷³
- 6.21. Northport and its experts acknowledge that iwi/hapū have expressed a different perspective on what constitutes the existing environment. For example, Ms Chetham expresses Patuharakeke’s view on the existing environment which we understand would exclude past development at Northport and in the wider area from the existing environment analysis (i.e. the effects of the Proposal would be compared against some more pristine or unmodified environment).⁷⁴ This suggestion is not consistent with the judicial interpretation as we have summarised above. Unsurprisingly different

⁶⁸ Ms Dalton EIC para 4.1(c).

⁶⁹ We note the Environment Court in recently stated in *Northport Ltd v Whangarei District Council* [2022] NZEnvC 10 at [10] that “[i]t appears to be common ground (and follows in our view from the fact that part of the consent has been implemented) that the [Berth 4] resource consent still remains available”.

⁷⁰ Ms Dalton EIC para 4.1(c).

⁷¹ See para 40 and 63. Some confusion may relate to the references in the evidence to “Berth 4” and the “Berth 3 extension”, being the same thing.

⁷² ENC Wellington W098/06, 9 November 2006.

⁷³ JWS dated 19 and 25 September, at section 3.2.

⁷⁴ Ms Chetham EIC at para 3.32.

“reference” or “starting” points used for the “existing environment” are likely to lead to very different assessments of the Proposal’s effects.

Application of the permitted baseline

6.22. As outlined in Mr Hood’s evidence, the relevant regional and district planning documents provide for a range of permitted activities on the Proposal site reflective of its zoning for port-related purposes. For relevant aspects of the Proposal (for example noise, lighting, certain visual effects), we submit that the relevant effects for the Panel’s consideration are only the effects beyond those of activities permitted by the planning framework.⁷⁵

Cumulative effects

6.23. The RMA defines “effect” to include (among other things):⁷⁶

...any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the effect...

6.24. Cumulative effects are concerned with things that will occur. The courts have expressed the concept as: “*effect A combining with effects B and C to create an overall composite effect D*”.⁷⁷

6.25. Cumulative effects include two components:

- (a) effects arising/building up over time; and
- (b) effects arising in combination with other effects.

6.26. Cumulative effects are not limited to those arising from the proposed activity but can include the effects of the proposed activity in combination with any “existing” effects, whether arising from existing uses, (non-fanciful) permitted activities, and consented and probable uses (as addressed in the existing environment section above).⁷⁸

6.27. Where relevant, Northport’s experts have addressed cumulative effects. For example, Dr Kelly addresses the cumulative marine ecology effects of the Proposal with the

⁷⁵ See section 10.3.4.

⁷⁶ Section 3(d).

⁷⁷ *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

⁷⁸ *Outstanding Landscape Protection Society Inc v Hastings DC* [2008] NZRMA 8 (EnvC).

effects of Channel Infrastructure’s Crude Shipping Project, and a condition of consent is proposed to restrict concurrent and consecutive dredging.⁷⁹

Section 104(1)(b): statutory documents

6.28. In accordance with s104(1)(b) the Panel must have regard to the various relevant statutory instruments. In our submission, the key planning documents that are relevant to the application are as follows:

- (a) The NZCPS;
- (b) The National Policy Statement for Indigenous Biodiversity (“NPS-IB”) (noting that the planning JWS records that the RPS, Proposed Regional Plan and District Plan provisions are consistent with the provisions of the NPS-IB, and that the NPS-IB does not introduce any new matters for this application⁸⁰);
- (c) The RPS;
- (d) The Proposed Regional Plan; and
- (e) The District Plan.

6.29. Each of these documents contains relevant objectives and policies, which are addressed in detail in Mr Hood’s and Dr Mitchell’s evidence and by other experts in relation to their specialist areas. Mr Hood and Dr Mitchell confirm that overall, and drawing upon the evidence of Northport’s experts, effects of the Proposal will be managed such that the Proposal is well aligned with applicable planning documents.⁸¹ The s42A Report largely aligns with that assessment.

6.30. The s42A Report states:⁸²

The Applicant has provided an extensive and thorough assessment of the relevant planning provisions to this application...

I agree that this material identifies the relevant provisions for consideration and in many areas, I agree with the conclusions drawn regarding the consistency of the proposal with the policy provisions.

⁷⁹ Both Mr Reinen-Hamill and Mr Treloar support proposed condition 118. For a succinct restatement of the position on cumulative marine ecology effects, refer the marine ecology and planning JWS at section 3.6.

⁸⁰ Refer section 3.6.2.1 of the planning JWS dated 28 September 2023.

⁸¹ This is notwithstanding that Northport’s independent expert planners acknowledge that the Proposal is not entirely consistent with every single policy.

⁸² Para 410-411.

- 6.31. We do not repeat Mr Hood and Dr Mitchell’s comprehensive analysis of the planning framework, however we provide some observations below. Based on that thorough analysis, we submit the Proposal is consistent with each of the applicable planning documents. In particular, the Proposal design and the various management measures enable it to satisfy the “avoid” directives within the planning framework. As outlined in our analysis of the recent *Port Otago*⁸³ Supreme Court decision (below), the evidence confirms that all adverse effects governed by “avoid” policies will be minor and/or transitory (i.e. not “material”). Therefore, the Proposal meets the applicable standard applying to avoid policies enunciated by the Supreme Court in *King Salmon*⁸⁴ (minor or transitory), and *Port Otago*⁸⁵ (protection from material harm), and in this case confirmed in the Proposed Regional Plan itself which records that “...*minor or transitory effects may not be an adverse effect*”.⁸⁶
- 6.32. While the “avoidance” policies are a focus of the evidence for submitters, we submit it is critical that the Panel does not lose sight of the fact that a range of objectives and policies at various levels in the planning framework provide specific and strong support for the Proposal. Not least of these is Policy 9 (ports) of the NZCPS which the Proposal directly aligns with and gains considerable support from. Other plan provisions recognise regionally significant infrastructure; social, cultural, and economic wellbeing: efficient and effective infrastructure: reclamation etc. Taken together, this set of provisions within the hierarchy of planning documents directs the enablement of port development in the location of the Proposal.⁸⁷ This is acknowledged, to an extent, in the s42A Report:⁸⁸

Recognition of the role infrastructure provides for community wellbeing is reflected in a number of policy provisions through the hierarchy of relevant documents. This ranges from Infrastructure generally, to Regionally Significant Infrastructure which the Port is identified as in the RPS, to specific and strong policy support for Ports in the NZCPS and via the Port zones in the PRP-AV and WDP-OP. There is little difference in opinion on consistency with the relevance supportive parts of these provisions to the proposal. Any potential inconsistency generally links to effects...

⁸³ *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112.

⁸⁴ At [145] the Court confirmed that, in the context of Policy 13 of the NZCPS “[i]t is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding.”

⁸⁵ See [64]-[66].

⁸⁶ Policy D.2.18(5)(d). Again, we stress that Northport’s case does not rely on the wider more balanced *Port Otago* approach, because it satisfies the strict *King Salmon* approach, as explained below.

⁸⁷ Refer to the EIC of Mr Hood and Dr Mitchell regarding the directive nature of the “enabling” provisions at play.

⁸⁸ At [13] (and repeated at [559] and [655]).

The Port Otago Supreme Court decision

6.33. As noted earlier, in our submission the Supreme Court's recent *Port Otago*⁸⁹ decision should give the Panel considerable comfort that the Proposal can and should be granted consent. The Supreme Court held as follows:⁹⁰

- (a) Policy 9 (ports) of the NZCPS "*must... be interpreted in light of the existence of an already established ports network... and the need to maintain the safe and efficient operation of the ports in that network*".⁹¹ The Supreme Court cited with approval the minority judgment of Miller J in the Court of Appeal which stated:⁹²

*For the Regional Council, **provision for ports is not optional**. There already exists a port at Port Chalmers which is essential infrastructure, forming part of a national ports network and servicing national and international shipping. **The NZCPS deems such infrastructure important to community wellbeing**. The Regional Council has no choice about deciding whether to provide for the port, and no choice about where to situate it. It follows that what policy 9 requires of the Regional Council is that it consider how and when to provide in its plans for the port's efficient and safe operation, the development of its capacity for shipping, and its connection with other transport modes. **In my opinion these requirements are imperative**, which sufficiently distinguishes them from the aquaculture policy at issue in King Salmon.*

- (b) The NZCPS avoidance policies⁹³ and ports policy⁹⁴ are all directive.⁹⁵ Ports are part of an existing network necessarily operating in the coastal environment. There is therefore potential for conflict between the ports policy and the avoidance policies where measures may be needed for the safe and efficient operation of a particular established port.

⁸⁹ [2023] NZSC 112.

⁹⁰ Para 83-84.

⁹¹ [70].

⁹² *Port Otago* at [70]; citing the Court of Appeal judgment at [111] per Miller J (footnotes omitted) (*Port Otago Ltd v Environmental Defence Society Inc* [2021] NZCA 638). Our emphasis.

⁹³ Policy 11 (indigenous biological diversity (biodiversity)); Policy 13 (preservation of natural character); Policy 15 (natural features and natural landscapes); and Policy 16 (surf breaks of national significance). These policies have been given effect to in the RPS and Proposed Regional Plan.

⁹⁴ Policy 9.

⁹⁵ At [69] the Supreme Court held: "*Turning to the NZCPS ports policy, we broadly agree with the Environment Court and Miller J that 'requires' is a key verb in the policy.73 We accept that 'recognise' is also an operative verb and that the clause begins with it. However, the verb 'requires' colours what the decision-maker is being asked to 'recognise'. In other words, the decision-maker is being directed to recognise that a port network is required. To recognise that something is required is to accept that it is mandatory. So, the directive nature of the ports policy arises from the two verbs taken together.*" The high Court in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 had previously confirmed that "enable" type policies can be expressed in strongly directive language and justify being afforded significant weight.

- (c) Where there is a potential conflict between the avoidance policies and the ports policy with regard to a particular project, the decision-maker at the resource consent level would have to be satisfied that:
- (i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;
 - (ii) if the work is required, all options for dealing with these safety or efficiency needs to have been evaluated and, where possible, the option chosen should not breach the avoidance policies (whether the avoidance policies will be breached must be considered in light of what is meant by “avoidance”, including whether conditions can be imposed that avoid material harm);⁹⁶ and
 - (iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

6.34. The Supreme Court went on to conclude:

Even where the option chosen encroaches on the avoidance policies only to the extent necessary for the safe and efficient operation of the ports, this does not mean that a resource consent would necessarily be granted. In deciding whether to grant a resource consent all relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.⁹⁷

The appropriate balance between the avoidance policies and the ports policy must depend on the particular circumstances, considered against the values inherent in the various policies and objectives in the NZCPS (and any other relevant plans or statements). All relevant factors must be considered in a structured analysis to decide whether, in the particular factual circumstances, the resource consent should be granted. This means assessing which of the conflicting directive policies should prevail, or the extent to which a policy should prevail, in the particular circumstances of the case.⁹⁸

⁹⁶ Citing *Trans-Tasman*, the Supreme Court in *Port Otago* held that to satisfy avoid policies, “...decision-makers must either be satisfied there will be no material harm or alternatively be satisfied that conditions can be imposed that mean: ‘(i) material harm will be avoided; (ii) any harm will be mitigated so that the harm is no longer material; or (iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material ... ”

⁹⁷ [84].

⁹⁸ [78].

*In the course of the structured analysis, decision-makers will of course assess the nature and importance of the particular safety or efficiency requirements the project addresses... Decision-makers will also identify the importance and rarity of the environmental values at issue in the particular circumstances and consider these against the background of the NZCPS's recognition of the intrinsic worth of the protected environmental values. As this Court said in King Salmon, protection of environmental values is an element of sustainable management.*⁹⁹

Relevance of the Port Otago decision

- 6.35. The *Port Otago* decision confirms the directiveness of the enabling NZCPS port policy. It represents a “softening” – in the context of ports – of the more absolute position adopted with respect to the NZCPS avoidance policies in *King Salmon*.¹⁰⁰ However, the current Proposal is not reliant on the *Port Otago* decision/approach. By way of careful design and robust proposed conditions of consent, the Proposal strictly avoids – as per the Supreme Court’s decisions in *King Salmon* and *Trans-Tasman* – all effects required to be avoided by the NZCPS avoidance policies.¹⁰¹ In other words, there is no conflict between the avoidance policies and ports policy in this case.
- 6.36. Nonetheless, the *Port Otago* decision confirms that even if this were not the case (i.e. if the Proposal breached one or more of the avoidance policies) it can still be granted consent. *Port Otago* therefore confirms there is a pathway to approval for the Proposal even if the Panel were to reject the comprehensive evidence on behalf of Northport and find that the Proposal does not achieve the NZCPS avoidance policies (for example by having those effects proscribed by Policy 11 (biodiversity), 13 (natural character), or 15 (natural features and landscapes)). For the avoidance of doubt, we submit that the evidence demonstrates that the Proposal satisfies the “consent pathway” requirements laid down by the Supreme Court in *Port Otago* and summarised above.
- 6.37. It is unclear whether Ms Kirk, DOC planner, had reviewed the *Port Otago* decision at the time of drafting her evidence. Curiously, this highly relevant decision is not referenced by Ms Kirk (while *King Salmon* is), and her policy analysis does not appear to reflect it. In any event, for the reasons discussed above, based on both *King Salmon*

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[79].

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Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38.

¹⁰¹

The evidence demonstrates that any such effects will be minor and/or transitory, therefore aligning with the Supreme Court’s exceptions in *King Salmon* (*King Salmon* at [145]) and with *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 where the Supreme Court held that the relevant “avoid” standard was protection from material harm (at [252] per Glazebrook J, [292]—[293] per Williams J and [309]—[311] per Winkelmann CJ. See also at [5]-[6] of the summary).

and *Port Otago* (among other authorities), we submit it is settled law that ‘avoid’ policy directives – including in Policy 11 of the NZCPS – can be met where effects are minor or transitory (i.e. not “material”). Ms Kirk is therefore incorrect when she opines that such an approach is “incorrect”.¹⁰² Her repeated references to the applicable “bottom lines” in the applicable avoidance policies also do not reflect the more nuanced position clearly set out in *Port Otago*.

7. ISSUES

- 7.1. The full range of issues and potential effects associated with the Proposal are comprehensively addressed in the AEE and technical reports submitted with the application, the subsequent s92 responses, and the evidence that is before the Panel. These submissions accordingly only comment on certain matters, and we will otherwise await an examination of evidence before making further comment.

Cultural issues

- 7.2. Northport acknowledges that Whangārei Te Rerenga Parāoa forms intrinsic part of the culture, heritage, and identity of iwi/hapū and that the Proposal will have a range of cultural effects.
- 7.3. Northport greatly values its longstanding relationships with iwi/hapū, and has engaged meaningfully with them throughout the scoping, design and refinement of the Proposal.¹⁰³ Engagement has included discussions and hui with numerous groups over an extended period both before and after lodgement. Northport continues to engage with iwi/hapū. Northport’s company witnesses and Mr Isaacs address in their evidence the extensive engagement that has been undertaken by Northport with iwi/hapū groups, and the outcomes of that engagement, including Patuharakeke’s Cultural Values Assessment (“CVA”) and Cultural Effects Assessment (“CEA”). Mr Isaacs concludes that Northport’s engagement process aligns with best practice.
- 7.4. Despite the engagement undertaken, the iwi/hapū submitters do not support the Proposal. That in and of itself does not represent a failure on Northport’s part, nor is it an unusual situation particularly in the context of large infrastructure projects.
- 7.5. Mr Isaacs addresses the cultural issues raised by iwi/hapū in his evidence. He also analyses Northport’s comprehensive cultural mitigation proposal – an integral part of

¹⁰² Refer to paras 84-95, and 128-130 of Ms Kirk’s EIC.

¹⁰³ Northport has a longstanding Memorandum of Understanding with Patuharakeke, which has informed Northport’s engagement with Patuharakeke.

its wider effects management framework – that includes a comprehensive range of initiatives aimed at addressing cultural effects (as outlined above). This represents Northport’s genuine attempt to address the matters raised by iwi/hapū. Acknowledging that iwi/hapū hold a different view, Mr Isaacs concludes that the Proposal appropriately and effectively responds to cultural matters/effects raised. Mr Hood and Dr Mitchell analyse the relevant cultural objectives and policies in detail.

- 7.6. Through the design of the Proposal and the proffered conditions, significant efforts have been made to address concerns expressed by iwi/hapū. Overall, and with reference to the evidence provided by Northport (including Mr Isaacs, Mr Hood, and Dr Mitchell) we submit that cultural issues have been appropriately addressed by Northport in accordance with the applicable planning framework.
- 7.7. As evidenced through its actions to date, Northport is strongly committed to actively fostering its iwi/hapū relationships. For the Proposal, Northport has been, and remains, committed to open and ongoing discussion with iwi/hapū, to ensure that all relevant cultural issues are identified, considered, and addressed where practicable to do so within an RMA framework.
- 7.8. We intend to address the legal framework relating to cultural matters in more detail in closing submissions, once all the evidence has been heard.

Recreation initiatives

- 7.9. Northport’s independent recreation expert (Mr Greenaway) has assessed the recreation effects associated with the Proposal. Focusing on the effects associated with the reduction in the beach between Northport and the existing Channel Infrastructure facilities, Mr Greenaway is of the opinion that there are significant residual adverse recreational effects at the local scale and more than minor effects at the regional scale.
- 7.10. This finding as to the level of adverse recreation effects is perhaps unsurprising, given that the proposal involves a reclamation of some 11.7ha. It does, however, need to be contextualised. The existing beach is ‘sandwiched’ between two longstanding infrastructure facilities: being Northport and the Channel Infrastructure import and distribution facility (formerly the refinery). Its recreation values are to be viewed in that context.
- 7.11. Measures to provide recreation amenity, originally proposed by Mr Greenaway, have been incorporated by Northport into the proposed design of the expanded port facility.

These include relocation of toilets, access and car parking, a swimming area, and water taxi facility as part of the 'pocket park' concept. This has been carefully considered to ensure that it can be utilised by the public in proximity to the operating port without presenting any safety concerns. While the final detailed design is yet to be confirmed, Boffa Miskell have provided a detailed concept which is incorporated in the draft conditions. Opportunities for refinement of that concept are expressly provided via the draft conditions, including by the Kaitiaki Group to incorporate cultural elements such as construction and installation of pou or waharoa, landscaping, planting plans, and cultural artwork/storytelling to provide information on cultural history of the area, mahinga kai, and taonga species.¹⁰⁴

- 7.12. Beyond this, the conditions proposed by Northport include a cycleway to connect to other cycleways planned for the area,¹⁰⁵ to provide a connected network of alternative transport, including for users of the Te Araroa Trail. Northport is also committed to exploring options for the relocation of the Te Araroa Trail water taxi connection: the draft conditions require this during construction,¹⁰⁶ but Northport is prepared to assist to facilitate this on a permanent basis. In that respect, it is acknowledged that third-party approvals will be required, and so it is not appropriate to include binding obligations on Northport. Nonetheless, Northport is proactively exploring opportunities in this regard - we provide as **Appendix A** a recent letter (and associated map) from Marsden Maritime Holdings expressing support for relocation of the Te Araroa Trail water taxi connection to Marsden Cove Marina, and an associated Bream Bay Shared Path cycleway connection.
- 7.13. Finally, as discussed in the rebuttal evidence of Mr Hood,¹⁰⁷ Northport is investigating potential improvements to the access, carparking, passive recreation, and beach access facilities at Mair Road. This is a well-used but poorly maintained area which suffered considerable storm damage during Cyclone Gabrielle. It is owned by the Crown, and so any improvement works will require the prior approval of the Department of Conservation ("DOC"). To that end, Northport has initiated discussions with local DOC staff. If the Panel saw it appropriate, Northport would consider the inclusion of an appropriate condition of consent requiring further investigation, and if appropriate, construction of works to upgrade the Mair Road facility.

¹⁰⁴ Refer NRC condition 231(c)-(d), Roles of the Kaitiaki Group.

¹⁰⁵ Refer WDC condition 71.

¹⁰⁶ Refer NRC condition 48.

¹⁰⁷ Paragraph 32 of Hood rebuttal evidence.

- 7.14. Despite these significant recreation initiatives proposed/commenced by Northport, Mr Greenaway and Mr Jones have produced what is perhaps best described as a ‘wish list’ of possible off-site recreation proposals for Northport to consider.¹⁰⁸ They cover a range of locations and options, and there is some consistency with the initiatives being progressed by Northport described above, including the relocation of the water taxi service to Marsden Cove Marina, and associated cycleway route. It is submitted that the initiatives proposed by Northport are considerably better scoped, more likely to achieve the relevant third-party involvement (and where necessary permission), and more practicable than the ‘wish list’ prepared between the two consultant experts because of a direction during expert conferencing.
- 7.15. In summary, it is submitted that Northport has proposed conditions which appropriately address the adverse recreation effects which are a necessary consequence of its Proposal. To the extent that the Panel may have remaining concerns as to management of recreation effects, Northport would consider a condition of consent requiring further investigation, and if appropriate, construction of works to upgrade the Mair Road recreation facility.

The proposed high-tide roost and its “status” in the effects management hierarchy

- 7.16. All avifauna experts agree that provision of a high tide roost is an appropriate impact management measure in principle, and Mr West agrees with Dr Bull that the bird roost included in the Proposal is appropriate in general terms. However, there is disagreement between the avifauna experts on the utility of the bird roost and its construction and maintenance.¹⁰⁹
- 7.17. Dr Bull’s comprehensive and thoughtful avifauna evidence is that the Proposal’s potential effects on NZ dotterel and variable oystercatcher 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.
- 7.18. Ms Kirk’s planning opinion is that the proposed high-tide roost is not a measure to avoid effects; rather it is “at best” an offset, but “more properly” compensation.¹¹⁰ Ms Kirk therefore considers that any benefits of the proposed high-tide roost can be taken into account under s104(1)(ab)¹¹¹ but that it does not involve the avoidance or

¹⁰⁸ Refer the Addendum to the Recreation JWS dated 25 September 2023.

¹⁰⁹ Refer to the Avifauna JWS, section 3.2.

¹¹⁰ Ms Kirk EIC, para 131.

¹¹¹ Ms Kirk EIC, para 132.

mitigation of effects because it does not deal with adverse effects of the proposal at the “point of impact”.

- 7.19. We agree with Dr Bull that the proposed high-tide roost will satisfy the policy directives requiring the avoidance of effects on NZ dotterel and variable oystercatcher. Adopting the system-wide approach in accordance with the Proposed Regional Plan and endorsed by Northport’s and the Councils’ experts, it will avoid habitat loss effects at the scale of the relevant system.¹¹²
- 7.20. Without resiling from this position, we have outlined above why, under the *Port Otago* Supreme Court decision, even if the Panel found that effects on these species were not avoided, this is not fatal to the application and there is a pathway to approving the consents as prescribed by the Supreme Court.

The “system-wide” approach for assessment of effects

- 7.21. Proposed Regional Plan Policy D.2.18 was recently confirmed by the Environment Court.¹¹³ It provides:

Manage the adverse effects of activities on indigenous biodiversity by:

...

- 5) ***assessing the potential adverse effects of the activity on identified values of indigenous biodiversity, including by: a) taking a system-wide approach to large areas of indigenous biodiversity such as whole estuaries or widespread bird and marine mammal habitats, recognising that the scale of the effect of an activity is proportional to the size and sensitivity of the area of indigenous biodiversity, and...***

- 7.22. Northport’s ecological experts have adopted a relevant system-wide approach in their assessment of effects, in accordance with Policy D.2.18.
- 7.23. DoC and Patuharakeke’s experts raise concerns with the system-wide approach.¹¹⁴ For the reasons outlined in Northport’s expert evidence, we submit that adoption of a system-wide approach is entirely appropriate. Indeed, it is required by the (practically operative) Proposed Regional Plan. The system-wide aspect of D.2.18 is not inconsistent with Policy 11, it simply provides more detailed direction on assessment and management of effects where NZCPS Policy 11 may be engaged. In our

¹¹² Bearing in mind the analysis above regarding “minor or transitory” effects / avoidance of “material harm”

¹¹³ [2020] NZEnvC 039.

¹¹⁴ See for example the EIC of Ms Kirk at paras 78 and 84-86; Mr Beauchamp at para 24; and Ms Chetham at 3.9.

submission, rather than “diluting” or underestimating effects, the system-wide approach mandated by D.2.18 confirms that assessment of effects, by definition, requires an appropriate context or scale.¹¹⁵ Assessed at the activity **footprint** scale, it is difficult to conceive of any reclamation or dredging proposal that would not have significant adverse effects.

Visual, landscape, natural character effects

7.24. As identified above, there is a very high level of agreement between Mr Brown and Mr Farrow.¹¹⁶ The only material outstanding matter of disagreement between the experts relates to the level of impact of cranes and container stacks on identified ONLs. Mr Farrow considers that such effects will be more than minor. Mr Brown’s evidence is that such effects will be very low to low, for the reasons set out in his statements of evidence.¹¹⁷ The difference in opinion is clearly relevant in the context of the policy framework, including Policy 15 of the NZCPS and the lower order provisions giving effect to the NZCPS.

7.25. We submit that the evidence of Mr Brown – one of the country’s most experienced landscaped architects – on this point is detailed, contextually-grounded, robust, and ultimately persuasive.¹¹⁸

The “need” for the Proposal

7.26. Several submitters, and the s42A Report, raise issues relating to the theme of whether the “need” for the Proposal has been demonstrated. We make several points in response:

(a) For major infrastructure projects of this nature, with long lead-in times, it is imperative to forward plan. While there will always be an element of uncertainty with demand forecasting (because nobody can predict the future),¹¹⁹ the alternative of waiting until there is present-day demand before applying for consent is simply untenable and is the antithesis of good planning, particularly

¹¹⁵ Refer Mr Sneddon’s EIC at para 25.

¹¹⁶ The section 42A Report states at para 283 “Mr Farrow notes that the assessment has used a robust methodology consistent with best practice and concludes “I concur with the types and levels of effects that are documented, and their impacts within the range of representative viewpoints that are examined by the Assessment”. The s42A report then goes on to detail the outstanding issue regarding effects on ONLs.

¹¹⁷ Mr Brown EIC, para 65.

¹¹⁸ In 2016 Mr Brown was described by a division of the Environment Court as “one of New Zealand’s most experienced landscape architects” (*Flax Trust v Queenstown Lakes District Council* [2016] NZEnvC 202, paragraph 147). In 2013 Mr Brown was described in a High Court decision as follows: “...a distinguished landscape architect of some 31 years experience. He has specialised in landscape assessment for planning purposes.” *Green v Auckland Council* [2013] NZHC 2364.

¹¹⁹ The inherent difficulties associated with projecting demand and growth, and therefore how to plan infrastructure, are evident in the evidence of Mr Jagger, Mr Moore, Mr Akehurst, and Mahim Khanna.

for regionally significant infrastructure. If Northport waits until demand is manifest (or for the “immediate need” purported as a relevant test in the s42A Report)¹²⁰ before seeking RMA approvals, then it will be too late to meet growing demand.

- (b) There is no **policy** requirement to demonstrate demand, or that the Proposal is a “necessity” or “needed” at the time of making the application. There is express policy support for taking a long-term view to planning and that infrastructure should be “flexible, adaptable, and resilient” and meet the “reasonably foreseeable needs of the community”.¹²¹ In addition, the evidence for Northport clearly demonstrates that the Proposal is aligned with the policy framework for reclamation¹²² and occupation of space in the CMA.¹²³ The planning JWS records that Mr Masefield agrees with Mr Hood and Dr Mitchell that the proposed size of the reclamation is required for the safe and efficient operation of a 500,000 TEU container terminal.¹²⁴ This, coupled with the analysis in Mr Hood’s and Dr Mitchell’s evidence (drawing on the evidence of Mahim Khanna), 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”,¹²⁵ the intended use being a 500,000 TEU container terminal.¹²⁶
- (c) There is no **legal** requirement to demonstrate the Proposal is a necessity. It is accepted law that an applicant for resource consent is not required to demonstrate that there is a need for the activity for which consent is sought.¹²⁷ The Environment Court has held that its task was to “consider the potential effects on the environment from granting consent, and not need (or lack of

¹²⁰ S42A Report, para 561.

¹²¹ Refer to the EIC of Mr Hood (14.7-14.19). See also Objective 3.8 of the RPS, for example.

¹²² E.g. Policy 10 of the NZCPS; and Policy D.5.20 and D.5.21 of the Proposed Regional Plan.

¹²³ E.g. RPS policy 4.8.1 and Proposed Regional Plan Objective F.1.8. See also RPS Objective 3.10. See Mr Hood’s EIC at 8.61, and 13.12-13.21; and Dr Mitchell’s evidence at 4.1-4.9.

¹²⁴ Planning JWS, 3.6.5.

¹²⁵ Policy 4.8.1(1)(d).

¹²⁶ Mr Masefield considers, however, that there is insufficient evidence to demonstrate the need for a 500,000 TEU container terminal (which we address in the subparagraph below) and that therefore the Proposal is inconsistent with RPS Policy 4.8.1(d) (see the JWS at paragraph 3.6.5). We note that RPS Policy 4.8.1(2) also explicitly provides that proposals that are contrary to 4.8.1(1)(a) and (b) may be appropriate where they make significant positive contribution to the local area or the region (acknowledging that the exception in 4.8.1(2) does not relate to 4.8.1(d)).

¹²⁷ *Gulf District Plan Association Inc v Auckland City Council* EnvC A101/03 at [101] and followed in *Living in Hope Inc v Tasman District Council* [2011] NZEnvC 157 at [24].

need) for the facility”.¹²⁸ Necessity for the activity is, therefore, simply not a relevant consideration.

- (d) Notwithstanding the above, there is comprehensive evidence for Northport outlining and assessing future demand¹²⁹ and demonstrating that the proposed footprint (both landward and seaward) is required to handle predicted container volume at Northport.¹³⁰ In our submission, Northport has – by some margin – adequately demonstrated demand for the Proposal. As outlined, the existing consented expansion (Berth 4) is in a final design phase, with construction likely to commence soon. All of the future scenarios modelled by Mr Akehurst confirm that Northport will need to invest in further wharf extensions and reclamation.¹³¹ In two of the four modelled scenarios,¹³² Northport may outgrow even the expanded port (i.e. including Berth 4) as early as 2032.¹³³ In three of the modelled scenarios, the expansion enabled by the Proposal could be required by 2036.¹³⁴ Recognising the value of coastal space in the area, the Proposal is not seeking to take up more space than is required. It represents an efficient use of resources.¹³⁵
- (e) From a practical perspective, a strong business case will be required before Northport elects to proceed with construction. As the Chief Environment Court Judge commented during the recent Port of Tauranga expansion hearing:¹³⁶

The port acknowledges it needs a resource consent for the work it proposes, and as I say they obviously believe that they've got good commercial reasons for doing that so that they operate as a successful business.

Consideration of alternatives

- 7.27. Northport and its expert team has comprehensively considered alternatives relating to each facet of the Proposal, as outlined in the evidence of Mr Moore, Mr Blomfield, Mahim Khanna, and Ms Stanway and others. The “*Issues and Options*” report

¹²⁸ *Gulf District Plan Assn Inc v Auckland CC* EnvC A101/03 at [101].

¹²⁹ Refer for example the EIC of Mr Akehurst and Mahim Khanna.

¹³⁰ As explained by Mr Blomfield and Mahim Khanna and identified above, the proposed area is needed to enable the construction of a two-berth container terminal, capable of handling future trade of 500,000 TEU and facilitating flexible growth during the transition period before full development capacity is reached.

¹³¹ Mr Akehurst EIC, para 17.

¹³² 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).

¹³³ Mr Akehurst EIC, para 18.

¹³⁴ Mr Akehurst EIC, para 18.

¹³⁵ Proposed Regional Plan Objective F.1.8. Refer the EIC of Mr Hood at 8.84-8.85 and 13.12-13.21.

¹³⁶ ENV-2021-AKL-000153 at transcript (Notes of Evidence Taken Before the Environment Court) page 73, lines 3-6. A decision on that application has not been issued at the time of writing these submissions.

accompanying the AEE outlines the alternatives assessment in detail, including for alternative port locations, alternative footprints, and alternative designs.

- 7.28. Consideration of alternatives at each stage has been comprehensive and robust. It has taken account of a wide range of matters, with environmental impact being front of mind. This is notwithstanding that potential options are in many cases driven by obvious practical constraints.¹³⁷ Northport considers that the Proposal represents the best outcome with respect to all alternatives considered at the various stages of the project timeline.

Lapse and duration

- 7.29. There appears to be some confusion in the s42A Report regarding the consent lapse dates and durations being sought by Northport. We therefore address these matters below.¹³⁸

Lapse

- 7.30. Northport is seeking the following lapse dates:

- (a) Regional consents: each consent lapses on its expiry.¹³⁹
- (b) District consents: Each consent lapses ten years after the commencement of those resource consents that are subject to section 116(2)(b) of the RMA.¹⁴⁰

- 7.31. Northport says the “lapse on expiry” approach for the regional consents is appropriate given the nature and scale of the Proposal and the significant investment involved:¹⁴¹

- (a) The Proposal is of regional and national importance and of some complexity.¹⁴²

¹³⁷ For example the existing port location and design, and the location of sensitive environmental areas (e.g. Blacksmith’s Creek).

¹³⁸ Duration and lapse are also addressed in detail in the EIC of Mr Hood and Dr Mitchell.

¹³⁹ The s42A Report is therefore not correct when it states at [116] that no lapse date is offered for the regional consents. Such a lapse date is lawful (refer s125(1) RMA).

¹⁴⁰ Pursuant to section 116(2)(b) of the RMA any district resource consent relating to an area of the coastal marine area that is proposed to be reclaimed does not commence until the proposed location of the activity has been reclaimed and a certificate has been issued under section 245(5) in respect of the reclamation.

¹⁴¹ The Environment Court in *Re Meridian Energy Ltd* [2013] NZEnvC 59 stated that “*we are of the clear view that five years is too short for a project of this nature and scale*” (referring to a 33 turbine wind farm). One of the factors leading to this conclusion was the submitters’ desire not to be engaged in a re-run of the resource consent procedures in the “*near future*”.

¹⁴² See for example *Crest Energy Kaipara Ltd v Northland Regional Council* [2011] NZEnvC 26 where the Environment Court held that a 10-year lapse period (for coastal permits relating to wave energy project) was appropriate on the basis that the project was “very large” and of national importance, and involved a lengthy and exacting consent process (as is the case here).

- (b) The reality is that there are long lead times in consenting, designing, and constructing port infrastructure.¹⁴³ In particular, the Proposal includes significant pre-development works (for example design, monitoring and reporting) that must be undertaken before construction can commence, and separate regulatory approval processes, which add to the Proposal's lead-in period.¹⁴⁴
- (c) The default period of five years provided under the RMA is an insufficient period within which such significant investment could be committed. The five-year default period may be appropriate for smaller scale developments, but not for significant infrastructure. The default lapse would inevitably result in a secondary application to extend the lapse period, which would incur unnecessary cost and uncertainty.
- (d) Construction will be influenced by several external factors which Northport cannot influence, including political decisions regarding transport funding upgrades, the availability of dredging vessels, and exchange rates.¹⁴⁵
- (e) The Proposal site is directly adjacent to a busy commercial port. The reclamation and dredge areas are within the Marsden Point Port Zone ("MPPZ") in the Proposed Regional Plan (they were also zoned for port purposes under the Operative Regional Coastal Plan). The stated purpose of the MPPZ is to *"enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities"* which is exactly what the Proposal entails.¹⁴⁶ It is not plausible that the Proposal site will be used for another purpose in the foreseeable future; the port and the shipping channel will remain in the area regardless of whether the application is granted. The normal policy reasons going against extended lapse periods are therefore not as pronounced as in some cases.¹⁴⁷
- (f) An extended lapse period is not inconsistent with the planning framework.¹⁴⁸

¹⁴³ Refer to the EIC of Mr Jagger, Mr Moore, Mahim Khanna, Mr Akehurst and others.

¹⁴⁴ See for example the Board's of Inquiry's decision on the *Turitea Wind Farm* (www.mfe.govt.nz) where the Board granted a 10-year lapse period stating it was a *"realistic period to accommodate the reasons advanced by Mighty River Power"*. Those reasons included the pre-construction studies to be undertaken. They also included New Zealand's demand for electricity, and the availability of the design of turbines at a favourable exchange rate.

¹⁴⁵ See footnote 144 above.

¹⁴⁶ Policy D.5.8.

¹⁴⁷ See the factors outlined in *Katz v Auckland City Council* (1987) 12 NZTPA 211 (PT) at 213 which were quoted and approved by the Court of Appeal in *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 529 (CA).

¹⁴⁸ See for example *Body Corporate 970101 v Auckland City Council* [2000] NZRMA 202 (HC).

- (g) The same approach was adopted in the decision by NRC for Channel Infrastructure’s channel deepening and realignment project, which was subsequently endorsed by the Environment Court in approving resource consents for the project.

Consent duration

7.32. Northport is seeking the following consent terms:

- (a) Regional consents:
- (i) Unlimited for the reclamation;¹⁴⁹
 - (ii) 35 years from commencement for other regional consents;
- (b) District consents: Unlimited.

7.33. Northport submits that it is crucial that the duration of the regional consents (excluding for the reclamation) is 35 years. The consent durations sought are justified with reference to the planning framework¹⁵⁰ and the various factors outlined by the Environment Court in the leading case of *PVL Proteins*;¹⁵¹ including in the context of the scale, cost and design of the Proposal, and its significant benefits as regionally significant infrastructure. Additional reasons include the following:¹⁵²

- (a) A consent duration of 35 years will provide appropriate certainty and security of investment for Northport.¹⁵³ A shorter duration could threaten the viability of the Proposal.
- (b) The potential adverse effects of the Proposal are relatively well understood and will be comprehensively managed through stringent conditions which provide for

¹⁴⁹ Section 123(a) provides that the period for which a coastal permit for a reclamation is granted is unlimited, unless otherwise specified in the consent.

¹⁵⁰ Refer to Policy D.2.14 of the Proposed Regional Plan and RPS Policy 4.8.3

¹⁵¹ *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01. The Environment Court’s decision reviews several cases regarding appropriate terms of consent and has been referred to/applied in numerous recent cases.

¹⁵² Many of the factors addressed below are discussed by the Court in *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01.

¹⁵³ The Court in *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, confirmed at paragraph 30 that: “[u]ncertainty for an applicant of a short term, and an applicant’s need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term.” Security of investment was also held to be a relevant factor in setting consent durations in *Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council* (2010) 16 ELRNZ 312 (HC) and *Crest Energy Kaipara Ltd v Northland RC* [2011] NZEnvC 26.

a regular supply of information to NRC through reporting obligations, while also providing sufficient security for Northport's considerable investment.¹⁵⁴

- (c) NRC's ability to review consent conditions under s128 should give the Panel comfort regarding the consent durations sought by Northport.¹⁵⁵
- (d) A consent duration of 35 years will allow flexibility to provide for operational constraints and external market and other factors.
- (e) Given the location of the Proposal is adjacent to a long-established busy commercial port (which is highly unlikely to change in the foreseeable future), there is no realistic prospect of compatible competing demands for the space.

7.34. For these reasons, Northport strongly disagrees that any uncertainty with demand predictions should translate to a reduced duration for regional consents, which is an idea floated (albeit equivocally) in the s42A Report.¹⁵⁶

7.35. Northport also strongly rejects any suggestion that the duration of regional consents for the Proposal should be pegged to the expiry date for Channel Infrastructure's channel deepening and realignment project (2052).¹⁵⁷ While there may be some very limited administrative benefits for NRC, in our submission these are significantly outweighed by the factors outlined above which demonstrably justify a 35 term for Northport.

Adequacy of information

7.36. Ms Kirk's evidence highlights the Panel's power to decline consent under s104(6) of the RMA in the event it considers it has inadequate information to determine the application. The basis on which Ms Kirk raises s104(6) appears to be as an "FYI" to the Panel, as she does not claim, nor present probate evidence, that there is insufficient information before the Panel such that s104(6) should be invoked.

¹⁵⁴ In *Te Rangatiratanga o Ngati Rangitahi Inc v Bay of Plenty Regional Council* (2010) 16 ELRNZ 312 the High Court held that consent conditions would appropriately manage environmental concerns while also protecting the investment of the applicant and therefore contributing to the national and regional economy, an objective within the purpose of the RMA. A similar approach was adopted by the Court in granting a 35-year consent for a significant tidal electricity generation proposal in *Crest Energy Kaipara Ltd v Northland RC* [2011] NZEnvC 26, [2011] NZRMA 420.

¹⁵⁵ The Environment Court in *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01 confirmed that: "...review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant, or inadequate" (paragraph 30).

¹⁵⁶ At [475].

¹⁵⁷ D.2.14 of the Proposed Regional Plan includes the following (among other matters) as a matter to have "particular regard to" when determining consent duration: "*the administrative benefits of aligning the expiry date with other resource consents for the same activity in the surrounding area or catchment*".

7.37. Given s104(6) has been raised by Ms Kirk, for completeness, Northport rejects any suggestion that there is insufficient information before the Panel and that the application should be declined under s104(6) of the RMA. In this respect, we note:

- (a) The Councils accepted the application for processing under s88.
- (b) The Panel also now has the benefit of comprehensive responses to information requests by the Councils.
- (c) The s42A Report explicitly states that the Panel has sufficient information on which to decide the application.¹⁵⁸ The application has also been subject to numerous independent peer reviews as part of the s42A Report process.
- (d) 26 witnesses prepared comprehensive evidence on behalf of Northport covering the full spectrum of relevant effects.
- (e) The work undertaken by Northport's experts has enabled the prediction of adverse effects with a sufficient degree of certainty for the Panel to make an informed assessment of them. The information before the Panel is more than sufficient for it to make an informed decision on the application, and to impose a monitoring and management framework through conditions that appropriately deals with potential effects. As outlined, conditions include pre-, during, and post-construction monitoring, coupled with real-time turbidity management. Conditions provide a framework through which any unexpected effects (however unlikely) can be remedied before they become irreversible. The conditions also include the ability for the Councils to review the consent conditions in such circumstances.¹⁵⁹ The regime provided in conditions will sufficiently diminish any remaining uncertainty/risk.¹⁶⁰

7.38. In our experience, raising "inadequacy", "uncertainty", seeking "further assessment", and offering the truism that "more could be done" are common refrains by those who oppose projects. There will always be some uncertainty with any proposed

¹⁵⁸ Refer para 37 of the s42A Report.

¹⁵⁹ As the High Court stated in *New Zealand Windfarms Ltd v Palmerston North City Council* [2013] NZHC 1504 at paragraph 69, the s128 review process is "no mere tinkering exercise". The Court stated at paragraph 67: "[t]he provisions in RMA covering public notification, submissions and hearings in respect of resource consents all apply with respect to a review under s 128. There is therefore a very public correction process and a reconsideration of the appropriate consent conditions." The High Court's decision was confirmed on appeal in *Palmerston North City Council v New Zealand Windfarms Ltd* [2014] NZCA 601.

¹⁶⁰ In *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130 at paragraph 64 the Court reiterated that the RMA is not a no risk statute (as has been stated in many decisions). It is therefore necessary to take a practical and robust approach to both the risk itself and its prevention.

development,¹⁶¹ and, by definition, more can always be done. However, simply pointing to a level of uncertainty or to other things that could be done should not be conflated with evidence of effects, and cannot be determinative, if we are to meaningfully assess the Proposal against the directive enabling planning provisions relating to ports. To do so would, without good reason, preclude careful port development that gives effect to those policy imperatives.

Precautionary approach

- 7.39. Also relevant in this context, Policy D.2.23 of the Proposed Regional Plan directs decision-makers to adopt a precautionary approach where the adverse effects of proposed activities are “*uncertain, unknown, or little understood*” with respect to a range of matters. In respect to effects in the coastal environment, the Policy also only applies where adverse effects are potentially significantly adverse. This mirrors the requirements of NZCPS Policy 3 which only requires adoption of the precautionary approach where “*...effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse*”.
- 7.40. We agree with Mr Hood, and the preliminary view provided in the s42A Report, that there is sufficient certainty, knowledge, and understanding of effects that a more precautionary approach is not justified in this case. Nor, on the evidence of Northport, will adverse effects be significant. Furthermore, the proposed consent conditions are sufficiently precautionary, and by a considerable margin.

Activity status

- 7.41. Ms Kirk (for DOC), and Ms Sharp and Ms Niblock (for WDC), adopt a myopic and strained interpretation of the District Plan provisions to assert that that Proposal is overall a non-complying activity because of District Plan rules relating to the Natural Open Space Zone which applies to a small section of land affected by the application.¹⁶²
- 7.42. For the reasons clearly expressed by Mr Hood and Dr Mitchell in the planning JWS and in their rebuttal evidence,¹⁶³ we submit that the Proposal is a discretionary activity,

¹⁶¹ In relation to effects that submitters say “could” occur, *McIntyre v Christchurch City Council* (see page 27 of the decision) established that the existence of a serious scientific hypothesis is not necessarily sufficient by itself to establish a potential effect, even one of low probability but high potential impact. Like any other evidence relating to a contested fact, the grounds for the hypothesis have to be tested and scrutinised to see whether they meet a basic threshold of reliability to assist the decision-maker to weigh the evidence and make a finding.

¹⁶² Activity status is addressed in detail in the planning JWS.

¹⁶³ See in particular the detailed rebuttal evidence of Dr Mitchell at paras 3.1-3.42 and Mr Hood at paras 19-24.

as originally accepted in the s42A Report. Properly interpreted, the rules in the District Plan Natural Open Space Zone relating to “Industrial Activities” or “Commercial Activities” (or any other activity) do not apply to render the Proposal a non-complying activity.¹⁶⁴

- 7.43. Even if the Panel were to conclude that part of the Proposal, or the Proposal overall, was a non-complying activity (which Northport does not accept) we submit that – as detailed in Dr Mitchell’s rebuttal evidence – the s104D gateway test is demonstrably satisfied. Therefore, a finding that the Proposal is a non-complying activity would not have a material bearing on the application.

Section 104E – statutory bar on considering climate change effects of greenhouse gas emissions

- 7.44. The Proposal does not require resource consent for discharges to air of greenhouse gases. However, activities that are consequential to the Proposal, such as visiting ships and port machinery, will emit greenhouse gases.¹⁶⁵ For the Proposal, the now-repealed (but still applicable in this case) s104E of the RMA means that the Panel is **precluded** (i.e. statutorily barred) from considering all climate change effects of greenhouse gas emissions.¹⁶⁶ The reasons are outlined below:

- (a) The Supreme Court in *West Coast ENT Inc v Buller Coal Ltd*¹⁶⁷ confirmed that s104 and 104E precluded climate change arguments for both: (a) applications to discharge contaminants; and (b) in contexts, such as the present, where discharges are incidental to the activity (i.e. they result indirectly/consequentially from the activity). In other words, section 104E of the RMA fully excluded

¹⁶⁴ The Court of Appeal has held that it is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. In *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA) at [50] the Court noted: “*The exact form of an application is not determinative although it must suffice to put before the consent authority the matters which it is required to consider and decisions must be made on them. An application can include incidental matters which may technically require separate consents. The consents given will be valid notwithstanding deficiencies in the form of the application, provided that appropriate procedures are followed, including notification where necessary, and the substance of the matter is properly considered. It is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. Substance is to be preferred to form.*”

¹⁶⁵ When considering whether to take into account effects of consequential activities, questions of fact and degree are likely to arise (*West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] at [119]).

¹⁶⁶ Section 104E provided: “*When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change...*”

¹⁶⁷ [2013] NZSC 87, paras 16-176. See also *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112.

climate change considerations relating to the effects of greenhouse gas emissions.¹⁶⁸

- (b) Section 104E was repealed on 30 November 2022 by the Resource Management Amendment Act 2020.¹⁶⁹ However, transitional provisions expressly confirm that where resource consents were lodged before the repeal of section 104E (November 2022) the “...resource consent must be determined as if the climate change amendments [including the repeal of s104E] had not been enacted”.¹⁷⁰
- (c) As noted in the s42A Report, because the application for the Proposal was lodged before the repeal of s104E of the RMA, the Panel is therefore precluded from considering any effects relating to the discharge of greenhouse gases on climate change. There is an unambiguous statutory bar on considering greenhouse gas effects on climate change. Parliament’s clear intention was that this statutory bar continues to apply to applications such as Northport’s application for the Proposal.¹⁷¹ As such, greenhouse emission considerations are barred from all aspects of the decision-making process, including with respect to conditions.

7.45. Notwithstanding the above:

- (a) the application and evidence comprehensively address potential air quality impacts, including from incidental activities;¹⁷² and
- (b) as detailed in the corporate evidence for Northport, the company takes its environmental responsibilities very seriously and is proactive in its approach to carbon emissions, implementing several initiatives to minimise impacts.¹⁷³

Other relevant RMA provisions

Section 105(1)

7.46. Section 105(1) requires the Panel to have regard to the following additional matters:

¹⁶⁸ Apart from the statutory carve-out in s104E relating to renewable electricity generation.

¹⁶⁹ Section 35.

¹⁷⁰ RMA Schedule 12, clause 26(3).

¹⁷¹ Refer to *Climate Justice Taranaki Inc v Taranaki Regional Council* [2022] NZEnvC 127 which confirmed this approach with respect to s70A of the RMA, being the equivalent provision to s104E in the context of rules relating to discharge of greenhouse gases.

¹⁷² Refer to the EIC of Andrew Curtis.

¹⁷³ Refer to the EIC of Murray Jagger, Jon Moore, and Greg Blomfield; and paragraph 14.5 of Northport’s s92 response dated 21 February 2023.

- (a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
- (b) the applicant's reasons for the proposed choice; and
- (c) any possible alternative methods of discharge, including discharge into any other receiving environment.

7.47. All the matters raised in s105 are set out in detail in the application material, and in the evidence of Northport. The Panel can have confidence that the above considerations have been considered in depth during the Proposal's design; and that, having regard to the above matters and those matters in s104, the Proposal is appropriate. No party has raised any issue with s105.

Section 105(2)

7.48. Section 105(2), which applies to reclamation applications, requires that the Panel consider whether an esplanade reserve or esplanade strip is appropriate, and – if so – impose a condition to that effect. Due to port operational and health and safety requirements, it is not practicable for any part of the area to be set aside as an esplanade reserve or esplanade strip. Accordingly, no condition is appropriate/necessary. No party has disputed this.

Section 107

7.49. Subsection 107(1) provides descriptive statutory minimum water quality standards after reasonable mixing; in relation to which lower standards are permissible only if resource consent is granted under the exceptions set out in subsection (2). The evidence for Northport confirms that none of the matters listed in subsection (1) will be triggered by the Proposal, meaning it is unnecessary to rely on the subsection (2) exceptions. Therefore, section 107 of the RMA represents no impediment to the granting of resource consents for the Proposal. No party has raised an issue with s107.

Section 89

7.50. Section 89 of the RMA confirms that where an application is made to a territorial authority for a resource consent for an activity which an applicant intends to undertake within the district of that authority once land has been reclaimed, then the application can be treated as if it relates to an activity within its district.

The Natural and Built Environment Act 2023

- 7.51. The Natural and Built Environment Act 2023 (“NBEA”) received royal assent in August 2023. While many of the Act’s provisions came into force immediately,¹⁷⁴ practically speaking there will be a lengthy period of transition to the new system and the new Act does not materially impact the application for the Proposal. To confirm:
- (a) Existing RMA documents and processes continue to have effect until replacements under the new system are developed/implemented.¹⁷⁵
 - (b) Any resource consent application lodged under the RMA before the region’s NBEA date,¹⁷⁶ such as the application for the Proposal, must continue to be processed and determined under the RMA (not the NBEA).¹⁷⁷
 - (c) Applications for “affected resource consents”¹⁷⁸ lodged before Royal assent of the NBEA, such as the application for the Proposal, must be processed and determined under the RMA as if the NBEA had not been enacted.¹⁷⁹

MACA Act

- 7.52. The Marine and Coastal Area (Takutai Moana) Act 2011 (the “MACA Act”) provides for the recognition of customary marine title and protected customary rights in the marine and coastal area. Section 62(3) of the MACA Act provides that an applicant for a resource consent that relates to a part of the common marine and coastal area in respect of which an applicant group has applied for recognition of customary marine title, before the resource consent application is lodged, must notify the applicant group and seek its views on the resource consent application. In accordance with s62(3), prior to lodging its application for the Proposal, Northport notified and sought the views of those applicant groups that have applied for recognition of customary marine title in the area affected by the Proposal.

¹⁷⁴ Section 2 of the Act

¹⁷⁵ Under Schedule 1, cl 73, every RMA document in force immediately before Royal assent continues in force according to its terms subject to the NBA.

¹⁷⁶ Under s 1 of the NBEA, “Region’s NBEA date” means the date that the decisions version of the first NBE Plan for a region is treated as operative (essentially being just after the decisions version of the Plan is published).

¹⁷⁷ Schedule 1 of the NBEA. See for example CI 19,

¹⁷⁸ The NBEA restricts the duration of certain water-related resource consents, including discharge permits (“affected resource consents”) to a maximum of five years after the date that the relevant rules have legal effect. (Refer to cl 38 and 39 of Schedule 12 of the RMA for the definition of “affected resource consent”; and Schedule 16 of the NBEA). Shorter-term consents of a maximum of ten years’ duration will also be required under s335-336 of the NBEA unless/until NBE Plans are updated on receipt of allocation statements.

¹⁷⁹ CI 24(2), Schedule 1 of the NBEA.

7.53. Northport has therefore discharged its obligations under MACA Act. Given that no customary marine title or protected customary rights have yet been issued in respect of the area covered by Northport's Proposal, the MACA Act is of no further relevance to the current application and cannot affect the Panel's consideration of the Proposal under the RMA. The MACA Act applications are for the High Court and/or the Crown to ultimately determine, and it is not for the Panel to pre-empt this separate statutory process.

8. ISSUES RAISED – SUMMARY

8.1. Taken together, Northport's expert witnesses conclude – and we submit the Panel can be satisfied – that:

- (a) there are no issues precluding the granting of consents for the Proposal;
- (b) the project design coupled with the proposed conditions of consent provide an appropriate framework under which all potential adverse effects can be managed in accordance with the policy directives; and
- (c) all submitter concerns and issues raised in the s42A Report are appropriately addressed.

8.2. For completeness, to the extent the Panel has outstanding concerns, we submit that all issues raised by submitters are capable of being addressed through amendments to conditions, as opposed to declining consent.

9. CONDITIONS

9.1. Northport, together with its expert advisors, has developed proposed consent conditions which it considers will appropriately and effectively manage the Proposal's adverse effects. Key aspects of Northport's proposed conditions are summarised in Mr Hood's EIC.¹⁸⁰

9.2. The conditions accompanying the s42A Report were broadly based off draft proposed conditions earlier provided by Northport, noting that – as outlined above – conditions for certain topics had not been circulated by Northport at the time the s42A Report was drafted. A complete set of conditions proposed by Northport, covering all topics, was attached to the EIC of Mr Hood. This set of proposed conditions was used for the

¹⁸⁰ Refer section 12 Mr Hood's EIC (and paras 13.42-13.55 of Mr Hood's EIC responding to conditions proposed in the s42A report).

purposes of expert conferencing. The latest set of conditions, which incorporates a range of recent updates, including from expert conferencing, is attached to Mr Hood's rebuttal statement.

- 9.3. The proposed conditions are addressed in detail in Northport's evidence (including the statements of the expert planners and the technical subject matter experts) and in these submissions above. In substance, the matters remaining in contention as between Northport and the s42A Report authors are limited in scope.
- 9.4. Overall, we submit that the conditions proposed by Northport are comprehensive, and represent best-practice with respect to projects of this nature. The proposed conditions incorporate input from the full range of expert disciplines and from submitters. Together with the Proposal's design, we submit they will appropriately manage adverse effects.
- 9.5. We comment on certain matters relating to conditions below. We also summarise the legal framework relating to conditions in **Appendix B**.

Transport: rail connection "consent trigger"

- 9.6. The s42A Report originally recommended a "consent trigger", being a condition that the regional consents *"must not be exercised until a construction contract for the Marsden Rail Link has been awarded"*, apparently on the basis that this will ensure strengthened regional transport connections will be in place at the time the Proposal is operational.¹⁸¹ Ms Chetham for Patuharakeke likewise states that construction of a rail connection *"should be a prerequisite for commencement of the port's expansion..."*.¹⁸²
- 9.7. The rail spur project is entirely outside of Northport's control. While its construction would provide for improved transport connections and resilience, all transport and planning experts attending the transport conferencing, including the s42A Report authors, now agree that its establishment is not required for the effective management of the Proposal's transport effects (the transport JWS¹⁸³ categorically confirms that all experts agree *"the proposed conditions should not include reference to the rail service for a particular rail link being available"*).

¹⁸¹ S42A proposed NRC condition 13. The rationale for the recommended condition provided in the s42A Report is: *"In order to achieve consistency with [NZCPS] policy 9, the proposal may benefit from being subject to transport infrastructure investment funding, prior to implementation of the resource consents."*

¹⁸² Ms Chetham evidence, paragraph 3.42.

¹⁸³ 5 September 2023 at section 3.1.

9.8. We submit that any condition precedent linking the Proposal to the rail spur project is unlawful and inappropriate/unjustified and should not be imposed by the Panel. It is disproportionate, having a major constraint on the project out of all proportion to the issues purported to be targeted by it.¹⁸⁴ This is not to say that Northport does not support the establishment of the rail link; it does. It considers that, once built, the rail link will assist to improve even further the resilience of the freight system that the Proposal is aimed at achieving.

Transport: intersection upgrade funding contribution requirements

9.9. The transport impacts of the Proposal have been carefully assessed by Ms Harrison. Ms Harrison has recommended, and Northport has proposed, a range of appropriate monitoring and management conditions. Those conditions have been the focus of extensive discussions, both directly with representatives of Waka Kotahi and at expert conferencing. Updated conditions have been proposed, as set out in the rebuttal evidence of Mr Hood.

9.10. There remain two key issues in contention between Northport and Waka Kotahi,¹⁸⁵ being:

(a) Whether Northport should pay for the full cost of the upgrade of three intersections on SH15? Northport says that it should make a proportionate contribution towards those costs based on the effects attributable to port expansion traffic;¹⁸⁶ and

(b) Whether there needs to be provision for the possible situation whereby Waka Kotahi might not implement the intersection upgrades, for instance because it might not have allocated sufficient funding? Waka Kotahi says that if it cannot undertake the intersection upgrades including due to a lack of funding, then Northport should be restricted to a maximum number of port-related traffic movements. Northport says that such a restriction is unnecessary, disproportionate, and inappropriate, including given that:

¹⁸⁴ Proportionality of conditions is addressed in *Donald Jones v Palmerston North City Council* [2014] NZEnvC 131 at [38].

¹⁸⁵ The position is summarised in more detail in paragraphs 6-18 of the rebuttal evidence of Mr Hood.

¹⁸⁶ Refer *Transit NZ v Southland District Council* [2008] NZRMA 379 (EnvC), where the Court held that it was, in principle, wrong to extract full costs for a roading improvement from just one developer – including because activities permitted in the area would result in the same level of effect without compensation to Transit. The Court held that the proposed Transit condition had an ulterior purpose of effecting improvements to remedy an existing deficiency in the State highway and was therefore contrary to the rationale of the *Newbury* decision.

- (i) Responsibility for funding of Waka Kotahi is not a relevant matter for a consent applicant.
- (ii) Northport's proposed conditions require monitoring and reporting to be carried out on behalf of Northport which will provide ample advance notice to Waka Kotahi of the required upgrades.
- (iii) Existing traffic effects associated with port operation have been considered as part of the existing consented port – noting that a \$1.5M contribution towards the construction of SH15 was levied on Northport in 1999 as a condition of the resource consents for port construction.
- (iv) It is unworkable and inappropriate to attempt to restrict traffic movements associated with only the port expansion, which is the subject of this application.

9.11. Instead, the conditions proposed by Northport establish a sophisticated process and formula to determine when upgrades are likely to be required, and the proportion of funding required by Northport.¹⁸⁷ This is consistent with the applicable case law.¹⁸⁸

9.12. It is submitted the approach proposed by Northport appropriately recognises, and manages, potential future effects on the road network.

Sandbank renourishment area / bird roost

9.13. As traversed above, Northport's highly experienced avifauna expert, Dr Bull, has carefully assessed effects on avifauna associated with the Proposal. Dr Bull has recommended that an area for high tide roosting, specifically designed for certain threatened/at risk species, be constructed prior to any port expansion. All avifauna experts agree that the provision of a high tide roost is an appropriate impact management measure in principle.¹⁸⁹ The conditions¹⁹⁰ require this sandbank renourishment area to be carefully designed and constructed, consistent with the concept plans provided.

¹⁸⁷ Refer in particular conditions 63-70 of the proposed WDC conditions attached to Mr Hood's rebuttal evidence.

¹⁸⁸ See for example *Landco Mt Wellington Ltd v Auckland City Council* [2009] NZRMA 132 where the Environment Court held that it is not the responsibility of a single developer to resolve existing transport issues across a wide area; and also stated at [11]: "[w]e understand those who say that we should not approve this proposal until the wider traffic infrastructure, already under pressure, has been upgraded sufficiently to absorb its projected output. In an ideal world that might be a viable course of action, but the world is not ideal." See also *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248 at [38] where the Court confirmed that the relevant effects are those which arise directly from a particular proposal. See also *Transit NZ v Southland District Council* [2008] NZRMA 379, noted above.

¹⁸⁹ Refer the avifauna JWS dated 20 September 2023, at 3.2.

¹⁹⁰ Refer NRC conditions 43-47.

- 9.14. Further, Dr Bull requires that the high tide bird roost is maintained on an ongoing basis. The conditions¹⁹¹ therefore also require careful geomorphological monitoring and reporting by an experienced coastal processes expert of the area around the sandbank renourishment area to determine the performance of the sandbank and whether replenishment of material, or 'top ups', is required. If recommended, Northport is to undertake those top ups.
- 9.15. It is acknowledged that some experts have differing views as to the potential impacts associated with the sandbank renourishment area, including the potential requirement for deposition of additional material (i.e. 'top ups'). To provide some flexibility if other equivalent or better proposals are identified in future, Northport has proposed condition 196, which provides the ability for the potential future implementation of an alternative initiative to provide roosting habitat for the relevant species. This is considered the most appropriate and practicable means to provide for this future possibility, particularly given that it is likely that additional resource consents and/or other approvals may be required.

10. PRINCIPAL SUBMISSION

- 10.1. We submit that the combined evidence of Northport and the Councils should give the Panel a high degree of confidence that there are no impediments to granting the consents sought by Northport, and that they should be granted.
- 10.2. 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 collection of measures proposed by Northport to manage potential adverse effects is comprehensive and robust.
- 10.3. The Proposal will bring meaningful benefits for the district and the region, 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

¹⁹¹ Refer NRC conditions 192-196.

regional and national social and economic wellbeing in an environmentally sustainable manner.

- 10.4. Northport's principal submission is that all consents sought should be granted because:
- (a) The Proposal satisfied 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 management measures in place to ensure that any adverse effects are avoided or appropriately managed.
 - (c) The Proposal will enable Northport to keep up with growing demand and meet the future shipping needs of the upper North Island, unlocking tangible benefits for the region and its communities.
 - (d) All actual and potential effects are appropriately managed by way of both detailed design and proffered consent conditions.
- 10.5. 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, as against the significant local, regional, and national benefits that will be generated over a long time frame. The balancing 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.
- 10.6. Northport submits that the Proposal achieves an appropriate outcome which will have a range of important positive benefits; and appropriately manages environmental effects.

K R M Littlejohn & C H Simmons

Counsel for Northport Limited

5 October 2023

Appendix A: Letter from Marsden Maritime Holdings



3 October 2023

Greg Blomfield

By Email:

Greg.blomfield@northport.co.nz

Re: Moving the Te Araroa entry point to Marsden Cove Marina

Dear Greg,

Marsden Maritime Holdings is extremely supportive of the concept of shared paths linking our communities locally. Please note that whilst we are not leading the shared pathway workstream, we are actively participating with Stephen Gibson our Business Development Manager in the steering group for the Bream Bay Shared Path.

Over the last few years several parties have developed various routes for biking and shared paths in the Bream Bay Area. These include:

- Connection to the Northland cycle Trail shown in red on the attached plan and detailed in a report on the Waipu to Marsden Cove Cycle trail prepared for the Whangarei District Council in April 2022.
- The Bream Bay Shared path proposed route shown in Pink in the attached plan with alternate routes A and B linking Ruakaka to Marsden Cove being the quickest route to connect communities and is along existing easement in the district plans.
- Whangarei District Council also recommended a Takahiwai loop, shown in purple, although we understand this is at very early stages of concept and mana whenua have not been engaged yet.

Having participated in recent meetings and the community engagement opportunities, our IMM representative has observed there is overwhelming support for the various concepts. Councillor Halse, who was speaking at one of the public meetings, suggesting that routes A and B could commence as early as 2024.

The Bream Bay Shared Path steering group approached the Whangarei District Council to ascertain if council was interested to find ways to progress the routes and if so, what was the best way to get into the Council Budget rounds for 2024. We received a positive response from Jim Sephton (WDC GM) interested in supporting the planning of this project.

P: 09 432 5033 | **E:** info@marsdenmaritime.co.nz | **W:** www.marsdenmaritime.co.nz
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In addition to participating in this planning work for the cycleway, Marsden Maritime Holdings has specifically looked at the Te Araroa Trail water taxi connection to enter via the Marsden Cove Marina. We have spoken to the water taxi operator who is happy to engage further on this option.

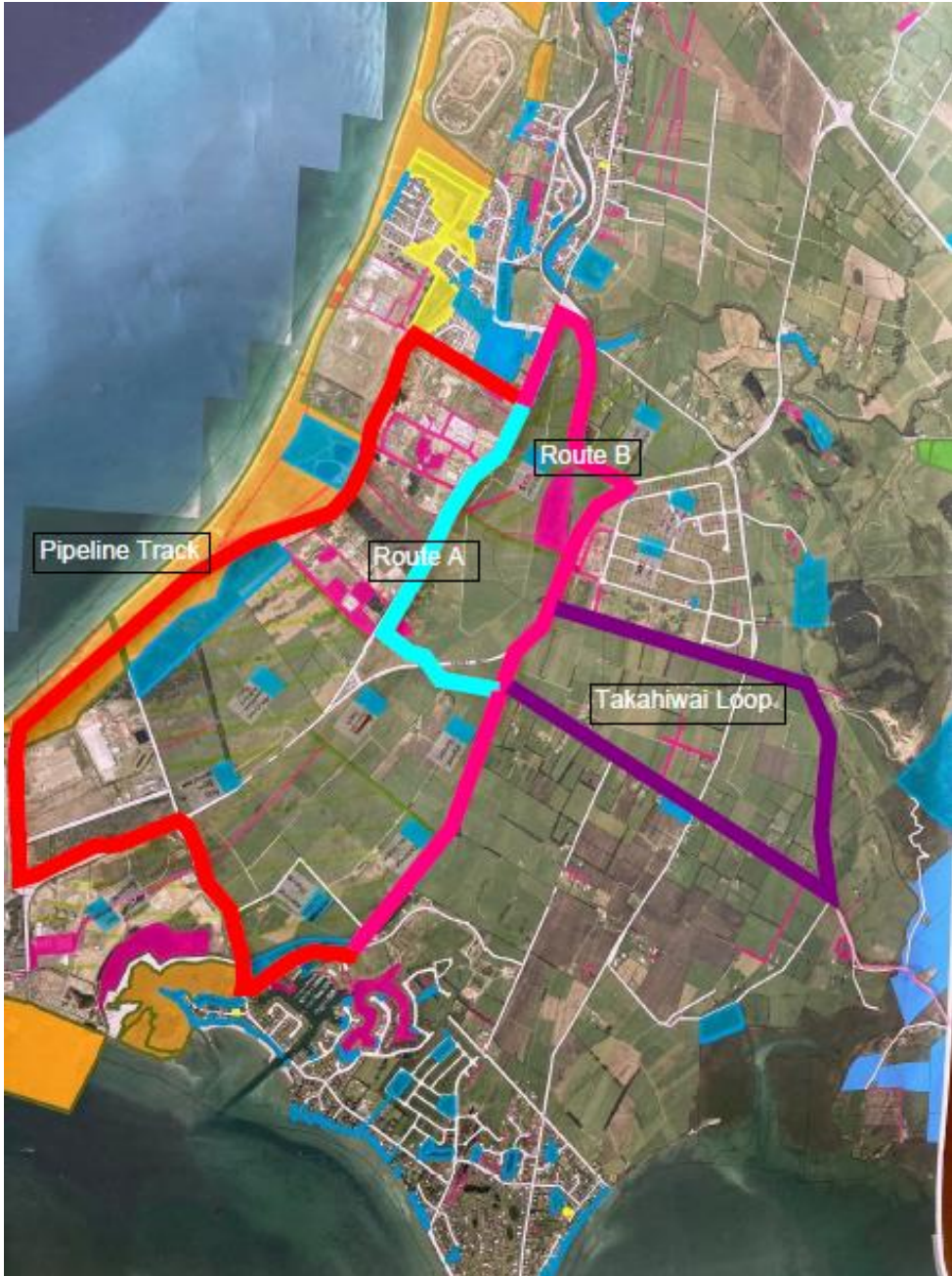
Marsden Maritime is therefore strongly supportive of this initiative and would highlight that if the Te Araroa walkway route was amended to utilise a connection via the Marsden Cove Marina additional benefits to the users of the Trail would include having access to the facilities at Marsden Cove Marina, as well as access to services including a 4 Square, a bakery, coffee outlets and a bottle store operating daily.

To confirm, Marsden Maritime is happy to further engage with Northport with respect to facilitating a relocation of the Te Araroa Trail Access point from the Northport eastern boundary to the Marsden Cove Marina, providing an overall uplift in access and facilities for the users of the Te Araroa Trail.

Yours Sincerely

A handwritten signature in black ink that reads "Rosie Mercer".

Rosie Mercer
CHIEF EXECUTIVE



Appendix B: Conditions - legal framework

Limits on conditions (s108 and 108AA)

- 1.1. The key RMA provisions relating to resource consent conditions are ss108 and 108AA.
- 1.2. The starting point for any resource consent condition is s108 of the RMA.¹⁹² In summary, s108 provides a general discretion to impose consent conditions,¹⁹³ except as expressly provided in s108 itself and in s108AA.
- 1.3. Section 108AA establishes limits on the power conferred by s108, requiring at least one of the following tests to be met before a condition can be included in a resource consent:¹⁹⁴
 - (a) the applicant agrees to the condition;¹⁹⁵ or
 - (b) the condition is directly connected to an adverse effect of the activity; and/or an “applicable” district or regional rule, or a national environmental standard;¹⁹⁶ or
 - (c) the condition relates to administrative matters that are essential for the efficient implementation of the consent.¹⁹⁷
- 1.4. With respect to (b) above, the Environment Court has confirmed:¹⁹⁸

The use of the word "effects" in section 108AA(1)(b)(i) RMA introduces causation to the RMA's scheme about resource consent conditions which had not previously been mandatory...

Then "connect" means "to join, fasten or link together" or "to become united or joined". "Directly" suggests that the linking must not be indirect or remote. Consequently under section 108AA(1)(b)(i) the condition must be directly connected to adverse effects of a proposed activity not to the activity itself...

¹⁹² This general summary of the law relating to conditions of consent reflects the decision in *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130 at [19]-[22].

¹⁹³ Including those kinds of conditions set out in s108(2).

¹⁹⁴ Section 108AA was introduced in 2017 by s147 of the Resource Legislation Amendment Act 2017.

¹⁹⁵ Section 108AA(1)(a). This requirement legislates the principle in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219(QBD) that an applicant who volunteers a condition is bound by it (see *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130 at [63]).

¹⁹⁶ Section 108AA(1)(b)(i)-(ii). Section 108AA(4) confirms that a district or regional rule or a national environmental standard is “applicable” if it “*is the reason, or one of the reasons, that a resource consent is required for the activity*”. Section 108AA(1)(b) relating to wastewater environmental performance standards is not relevant in this context.

¹⁹⁷ Section 108(1)(c).

¹⁹⁸ *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130 at [66]-[67]. Footnotes omitted.

The common law

- 1.5. In addition to the limitations set out in s108AA and 108 of the RMA, the common law provides further restrictions on the power to impose conditions.¹⁹⁹ The Supreme Court in *Estate Homes*²⁰⁰ summarised the relationship between the RMA and the common law with respect to conditions, and set out the common law requirements (being the well-known *Newbury*²⁰¹ tests):

In order for that [condition] to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.

- 1.6. In *Cookie Munchers Charitable Trust v Christchurch City Council*²⁰² the Environment Court expressed the “...tests for validity of resource consent conditions initially identified in *Newbury*...” as:

- *The condition must be for a resource management purpose, and not for an ulterior one.*
- *The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached.*
- *The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.*

- 1.7. The Court stated that “[t]he *Newbury* tests are a series of fundamental tests which conditions must meet in order to be lawful or *intra vires*.”²⁰³

- 1.8. Several other general factors go to the appropriateness and/or lawfulness of a condition:

¹⁹⁹ The common law restrictions are in addition to the limits imposed by section 108AA; but they cannot authorise a condition which does not meet the requirements in s108AA (*Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 130 at [61]). See *Wymondley Against the Motorway Action Group Inc v Transit NZ* EnvC A022/03 for a case confirming the relevance of the *Newbury* tests in the s128 context.

²⁰⁰ *Waitakere City Council v Estate Homes Ltd* [2007] NZRMA 137 (SC) at [61]. The Supreme Court’s decision related to the pre-2017 form of s108 of the RMA.

²⁰¹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL).

²⁰² *Cookie Munchers Charitable Trust v Christchurch City Council* EnvC W090/08 at [24].

²⁰³ *Ibid* at [26].

- (a) **proportionality** of the conditioned response (including in terms of cost) in the context of the benefits achieved can be considered in determining the appropriateness of a condition;²⁰⁴
- (b) whether it is sufficiently **certain**;²⁰⁵
- (c) whether it delegates or **reserves too much discretion** to a certifier/approver and is therefore invalid;²⁰⁶ and
- (d) whether it would effectively **nullify/negate** the consent.²⁰⁷

Summary

1.9. Distilling the above, there are two key questions.²⁰⁸

- (a) First, an inquiry whether or not the conditions in question can legally be imposed (i.e. do they satisfy the limitations in s108 and 108AA of the RMA, and do they satisfy the *Newbury* tests)? If they do not, they are not valid conditions and simply cannot be imposed.
- (b) Second, if the conditions can be validly imposed, are they *appropriate* conditions (i.e. consider the conditions on their merits). Section 108 empowers the Council to impose “... any condition [it] considers **appropriate**...”.²⁰⁹

²⁰⁴ *Donald Jones v Palmerston North City Council* [2014] NZEnvC 131 at [38].

²⁰⁵ *Sustain Our Sounds v New Zealand King Salmon Ltd* [2014] NZRMA 421 (SC) at [125]. In *Aubade NZ Ltd v Marlborough District Council* [2015] NZEnvC 154 at [40] the Environment Court held that uncertainty or ambiguity will not invalidate (i.e. make unlawful) a condition unless a point is reached where it cannot reasonably be given any meaning.

²⁰⁶ *Turner v Allison* [1971] NZLR 833 (CA).

²⁰⁷ *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].

²⁰⁸ See *Cookie Munchers Charitable Trust v Christchurch City Council* EnvC W090/08 at [30]-[33], noting that the decision pre-dates s108AA of the RMA.

²⁰⁹ Section 108(1). Our emphasis.