

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

Under The Resource Management Act 1991

And

In the matter of a resource consent application by Northport Limited under section 88 of the Resource Management Act 1991 for a port expansion project at Marsden Point

Application No. Whangārei District Council: LU2200107  
Northland Regional Council:  
APP.040976.01.01

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**LEGAL SPEAKING NOTES IN REPLY**  
**on behalf of the Director-General of Conservation**  
**Submitter No. 158**

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## MAY IT PLEASE THE PANEL

### 1. INTRODUCTION

1. The Director-General of Conservation (D-G) has taken a very targeted approach to this case, focusing on the additional risk to indigenous avifauna that are *already* threatened.<sup>1</sup>
2. Harm to Variable Oystercatchers (VOC) and New Zealand Dotterels in the coastal marine area must be avoided. The approx. 11.ha reclamation will adversely affect this threatened taxa through loss of habitat.
3. As long as a reclamation destroys habitat, that harm has not been avoided. Whether you frame it as material harm. Or harm that is not minor or transitory. Or harm that is significant or moderate. In this case, everyone agrees the effect on New Zealand Dotterels and VOC must be addressed. The Director-General's avifauna expert says permanent loss of this habitat is a significant adverse effect.
4. The Applicant still relies on constructing a replacement bird roost (also known as the sandbank renourishment area) to address the harm the reclamation will cause. It has proposed nothing else.
5. There is still no behavioural evidence to support the supposition that birds roosting and foraging in the east will change to the western roost location nearly 1 km away.
6. Dr Bull says providing a 'choice' of 'some additional habitat'<sup>2</sup> a quick fly over an enlarged working port (and over a construction site in the years that occurs) means the permanent loss of threatened species habitat is avoided. However, this proposal is not *avoiding* harm, it is offsetting or compensating for it.
7. All avifauna experts agree a bird roost sited in an *appropriate* location could be a positive measure, but the Director-General says such a proposal falls under 104 (1) (ab).
8. The Director-General says a positive measure to address adverse effects on a threatened species such as VOC (at risk, recovering), should not cause new adverse effects on another even more threatened species - Lesser Knot (at risk, declining).

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<sup>1</sup> The D-G reiterates that even if the matters of concern to her can be resolved, cultural concerns remain outstanding.

<sup>2</sup> Response by Dr Bull at the hearing on Tuesday 10<sup>th</sup> October 2023.

9. The Applicant suggests that there will be no effects on Lesser Knot. But the Applicant has not properly explored the effects of the proposal on Lesser Knot and the applicant's planners have not factored effects on Lesser knot into their assessment.<sup>3</sup>
10. The Director-General says the application for resource consent to site a bird roost in the currently proposed location should be declined.
11. This leaves a gap.
12. Adverse effects (moderate/significant) on threatened avifauna New Zealand Dotterel and VOC have not been avoided.
13. The Panel must weigh these adverse effects alongside all the relevant considerations in s104 (1). If the proposal deals with adverse effects on New Zealand Dotterels and VOC for whom effects have not been avoided to a very high standard, including management through creating positive effects, offsetting and / or compensation, that may satisfy the Panel.
14. According to Dr Beauchamp appropriate management responses are possible, ecologically. The Applicant needs to address data shortages and undertake an assessment at the appropriate scale, and look at how it will deal with changes that occur at the time of construction and operation (rather than relying on anticipated behavioural responses that might not occur). It could look for alternative bird roost locations (that do not cause adverse effects on Lesser knot) and introduce alternative measures to protect threatened birds holistically, such as reducing disturbance and/or implementing predator control. The consenting envelope could include an adaptive management framework that monitors to see whatever is proposed actually works, and ensures timely actions occur if not.
15. The Director-General also says this ecological solution is possible within the planning framework you are dealing with. Fortunately, as Mr Littlejohn<sup>4</sup> said at the start, that planning framework has been developed with Northport in mind. The Director-General says it has been developed with threatened indigenous biodiversity in mind, too.
16. The regional significance of this port is recognised (e.g. F.1.6) and as it has been provided its own bespoke zone in the regional and district plans (e.g. D.5.8 and D.5.9), particular regard must be had to its benefits (e.g. D.2.5). And when it comes to

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<sup>3</sup> There is no assessment of the bird roost against C.1.5.11.

<sup>4</sup> Kit Littlejohn at the hearing on Monday 9<sup>th</sup> October 2023.

development – establishment and operation is to be enabled (e.g. D.2.7) provided it is consistent with certain things.<sup>5</sup>

17. Matters port development must still be consistent with include avoiding adverse effects on threatened indigenous taxa in the coastal environment (D.2.18 (1)). For less critical values in the coastal environment (D.2.18 (1) (b)) there is a bit more flexibility and in other areas there is more flexibility again (D.2.18 (2)).<sup>6</sup> But threatened taxa in the CMA get the highest level of protection. This is consistent with higher order policy documents such as the Regional Policy Statement (4.4.1) which makes plain a hierarchy of protection is intended.<sup>7</sup>
18. How the port development 'lands' in this framework is one of the things that needs to be considered by the Panel under 104 (1) (b) in addition to the effects (104 (a)) and positive measures (104 (1) (ab)). So, it may be open to the Panel to decide that a package offering positive effects, offsetting and / or compensation on threatened avifauna for whom effects have not been avoided, provided they are satisfied it is to a very high standard, is appropriate in all the circumstances. However, a package of that standard is not in front of you.<sup>8</sup>
19. There is also the matter of the Natural Open Space Zone (NOSZ) in the middle of adjacent industrial/commercial/port zone. The NOSZ is there for a reason. Without a plan change, development within the existing zoning above MHWS needs to take place within the existing zoning definitions. Port activities such as port carparking hardstand, are not compatible with a plain reading of the objectives and policies of the zone. The proposal would be non-complying. There is still no assessment of port activities within that zone in the evidence. This is a live issue that needs to be resolved before you assess this application.

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<sup>5</sup> D.2.9 also contains a list of matters to consider. Note The Director-General does not accept a project of this scale is mere upgrading (D.2.8). Upgrading is not defined in the plan but the dictionary definition is 'Upgrade means improve (equipment, machinery etc) especially by replacing components' (Oxford Dictionary, 1998 ed). In any case it could not meet D.2.8 (2) that adverse effects after the upgrading are the same or similar to before the activity was undertaken given the nature and scale of the proposed activity.

<sup>6</sup> D.2.18 is relevant to all activities – not just regionally significant infrastructure.

<sup>7</sup> As does ministerial direction contained in the NZCPS. Note that National Grid exceptions in D.2.10 don't make sense unless this interpretation is taken.

<sup>8</sup> In fact, the D\_G says information gaps are such that given the critical values at stake, the Panel could decline under 104 (6).

20. Unfortunately, the proposed 35-year lapse period risks undermining any solution that might be worked through at this hearing. Solutions we talk about now may not be implemented for decades.
21. The Applicant is asking the Panel to recognise and accommodate dynamism in regard to the business case but saying the environment in regard to effects on and measures for avifauna and their habitat, must remain static. This can be remedied by reducing the lapse period to a 5-year period so measures are fit for purpose and address actual risk. This is a practical approach.

**Lisa Sutherland**

**12 October 2023**