

**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 SUBMISSIONS**

**on behalf of the Director-General of Conservation**

**Submitter No. 158 4 October 2023**

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## TABLE OF CONTENTS

1. INTRODUCTION.....	3
2. TREATY OF WAITANGI AND CULTURAL ISSUES.....	6
3. ADEQUACY OF INFORMATION.....	8
Section 104(6) – adequacy of information .....	8
S 104(7) – further information requests .....	14
104 (6) Conclusion .....	15
A precautionary approach is warranted .....	15
4. THE PROPOSED SANDBANK.....	15
The sandbank’s location.....	15
The effects of the sandbank – positive and negative .....	16
Will New Zealand Dotterels and Variable Oystercatchers use the sandbank as a roost?.....	18
What if the birds don’t use the sandbank? .....	18
Better alternatives .....	20
Various descriptions – avoidance, mitigation, compensation, measures to offset loss .....	21
Why it matters how the sandbank is described.....	22
5. THE PLANNING FRAMEWORK.....	24
Approach to policies .....	24
The PRP-AV.....	24
NZCPS and RPS.....	29
National Policy Statement for Indigenous Biodiversity (NPS-IB) .....	35
Whangarei District Plan .....	35
Bundling .....	38
6. CONDITIONS.....	40
7. CONCLUSIONS .....	40
APPENDIX 1 - ANALYSIS OF prp-av directive policies .....	42
PRP-AV Regionally Significant Infrastructure policies.....	42
PRP-AV Indigenous biodiversity policies .....	43

## MAY IT PLEASE THE PANEL

### 1. INTRODUCTION

1. These submissions are made on behalf of the Director-General of Conservation (the Director-General). The Director-General's interest in this case focused on indigenous avifauna, and relatively narrow. The approach taken is pragmatic. Based on expert avifauna opinion, the Director-General considers that critical changes are required, and this is supported by the planning framework.
2. These submissions are limited to the key issues relevant to the Director-General's focussed case and your determination, given the essential changes she says are necessary.
3. The Director-General records that even if this matter can be resolved, Treaty partners raise significant cultural effects that will need to be reconciled by the Panel before consent can be granted. It is not clear this is possible.
4. The Director-General lodged a submission in opposition to the proposal, raising concerns regarding:
  - a. The adequacy of information and adverse effects on:
  - b. Coastal processes;
    - Avifauna;
    - Marine ecology;
    - Marine mammals; and
    - Cultural values.
  - c. The measures proposed to address adverse effects, including in particular, the proposed sandbank which is intended to address the loss of high tide roosting habitat for wading birds from the reclamation component of the proposal.<sup>1</sup>
  - d. Inconsistency with the New Zealand Coastal Policy Statement (NZCPS), several policies in the Proposed Northland Regional Plan (PRP-AV), as well as ss 6(c) and 7(d) of the Act.<sup>2</sup>

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<sup>1</sup> See Director-General submission, paragraph 20.

<sup>2</sup> See Director-General submission, paragraphs 31 to 33.

5. The Director-General is calling two witnesses at the hearing.
  - Dr Tony Beauchamp (avifauna); and
  - Ms Linda Kirk (planning).
6. The aspects of the Applicant's proposal that the Director-General remains most concerned about, following the provision of further information from the Applicant, the production of the Council Reporting Planners' s 42A Report, exchange of Evidence in Chief (EIC) by the Applicant's experts, and expert conferencing, are:
  - a. Whether the Applicant has provided adequate information upon which the effects of the proposal on indigenous avifauna can be assessed;
  - b. The potential effects of the sandbank (both positive and negative) on indigenous avifauna which the Applicant proposes to create to the west of the port; and
  - c. The Applicant's experts' approach to planning matters.
7. In terms of the adequacy of information, the Director-General's view is that there is inadequate baseline data which is needed for a reliable assessment of effects, and a precautionary approach is therefore needed. Better solutions need to be designed in light of this information and a management framework developed to ensure adverse effects are addressed swiftly and effectively.
8. A strict interpretation of the planning framework would suggest this information is necessary *before* consent is granted. However, the Director-General recognises it is open to the Panel to weigh matters such that consent is granted, provided steps are interwoven with the project so effects are avoided and appropriately managed as it unfolds.
9. Because the Applicant's sole focus has been on a sandbank that the Director-General's avifauna expert says will not work, the following effects still need to be assessed and measures resolved:
  - New Zealand Dotterel - loss of high tide roost and foraging habitat and possible increase in disturbance.
  - Variable Oystercatchers - loss of high tide roost and foraging habitat and possible increase in disturbance.
10. With respect to the sandbank, the Director-General's view is that its proposed location is fundamentally misguided given its proposed location is:

- a. Within important foraging habitat for Lesser knot, an internationally migrant wader with a threat classification of “At risk – Declining, and whose numbers in the Whangārei Harbour are in sharp decline<sup>3</sup>;
  - b. At the site of an historic sandbar that has dispersed over time, and the proposed new sandbank is also expected to gradually erode and require regular top ups, resulting in the raising of the seabed between the sandbank and nearby beach, providing potential for further loss of Lesser knot foraging habitat;<sup>4</sup> and
  - c. Situated to the west of the port, in Marsden Bay, away from their current roost east of the port, and it is unlikely the displaced birds will use it.<sup>5</sup>
11. The Director-General considers the application for the sandbank<sup>6</sup> should be “decoupled” from the remainder of the activities requiring resource consent and declined outright: it is not integral to the port-related activities, and it will not work for the birds it is supposed to serve, creating new adverse effects on another threatened species.
12. In terms of planning matters, the Director-General considers there are some fundamental issues that you also need to determine before you can decide whether you can and should grant the consents sought. These include in particular:
- a. Whether any parts of the proposal are a non-complying activity, and if so, the degree to which the activities should be “bundled” together;
  - b. The approach you wish to take to the policy framework in the PRP-AV in light of the objectives and policies in it, and the extent of disagreement amongst the various parties’ expert planners on how the Panel should approach the policies. This includes deciding the amount of weight you wish to place on the various policies, and the matters relevant to those policies. The Director-General’s submission is that the protective policies for threatened indigenous fauna are strongly directive, in contrast to enabling port provisions; and
  - c. Reconciliation of adverse cultural effects.

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<sup>3</sup> Dr Antony Beauchamp EIC, paragraph 66.

<sup>4</sup> Dr Antony Beauchamp EIC, paragraphs 20 and 21.

<sup>5</sup> Dr Antony Beauchamp EIC, paragraphs 16, 54 to 59.

<sup>6</sup> All the planners agree that the sandbank is subject to Rule C.1.5.11 Deposition of material for beneficial purposes – restricted discretionary activity.

13. Upon resolution of the above matters and once the Applicant has gathered adequate data, the following could occur:
  - a. Assess effects on NZ Dotterels and Variable Oystercatchers based on appropriate data;
  - b. Explore a range of desired outcomes and potential measures. (In principle this could include a high tide roost but it will likely include other measures such as effective predator control in appropriate locations);
  - c. Develop a solutions package;
  - d. Implement the avifauna package.
  - e. Monitor for effectiveness and respond to triggers with timely action.
14. It is recommended transparent and independent oversight and reporting takes place (possibly by an independent avifauna panel).
15. Some practical issues such as the lapse date also need to be resolved. For example, at present, it is possible for avifauna measures to be agreed as per the process above and implemented in 30+ years' time when hopelessly out of date.

## **2. TREATY OF WAITANGI AND CULTURAL ISSUES**

16. The Director-General acknowledges the submissions lodged by and on behalf of Te Parawhau ki Tai, Te Parawhau Resource Management Unit, Dr Mere Kepa, Te Pouwhenua o Tiakiriri Kukupa Trust, Ngātiwai Trust Board, Patuharakeke Te Iwi Trust Board, and Ngati Kahu o Torongare Te Parawhau Hapu Iwi Trust, and the statement of evidence in chief of Juliane Chetham and the statement of evidence of Dr Meri Kepa.
17. The Director-General acknowledges that the submissions, evidence and statements of those listed above raise significant issues regarding effects on cultural values and the relationship of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, which are required to be recognised as a matter of national importance under s 6(e) of the Act.
18. The Director-General also draws your attention to the statements by Palmer J in *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZLR 882, regarding the way statements of effects on cultural values by mana whenua parties are to be treated. In *Tauranga Environmental*, the Environment Court had relied on expert evidence on behalf of the council which did not represent the views of the relevant hapū (Ngati Hē). In the High Court, Palmer J observed:

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngati Hē for Ngati Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngati Hē. But when the considered, consistent, and genuine view of Ngati Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngati Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngati Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Inc v Auckland Council*, approved by the High Court in 2018 that:

...

persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

19. Therefore, if the Panel finds that the evidence and statements presented by the mana whenua, mana moana, and mana takutai moana parties who are engaging in this Resource Management Act 1991 (RMA) process represent considered, consistent and genuine views, it is not open to Panel to find otherwise, or impose its own or others' view in respect of those issues.
20. The information before the Panel prepared by and on behalf of the persons and organisations who hold mana whenua, mana moana, and mana takutai moana recorded above consistently records that the proposal will result in significant adverse effects on cultural effects.
21. The Director-General also particularly acknowledges the impacts of the proposal on taonga species, including manu, over which mana whenua, mana moana, and mana takutai moana parties exercise kaitiakitanga.
22. While it is for these parties to speak to these effects themselves, the Director-General acknowledges the views expressed by Te Parawhau ki Tai, Te Parawhau Resource Management Unit, Dr Mere Kepa, Te Pouwhenua o Tiakiriri Kukupa Trust, Ngātiwai Trust Board, Patuharakeke Te Iwi Trust Board, and Ngati Kahu o Torongare Te Parawhau Hapu Iwi Trust, and Juliane Chetham on effects on cultural issues.

### **3. ADEQUACY OF INFORMATION**

23. The scheme of the Act directs that a fulsome and integrated approach be taken to addressing effects in order to determine the application.
24. The Director-General submits that the first consideration for the Panel is therefore whether there is adequate information to assess effects. If not, the application may be declined pursuant to s 104(6).
25. That information should include adequate baseline information on the receiving environment including clear information about any Threatened and At Risk species that may be present and affected by the proposal, and adequate data concerning the potential effects of the proposal.

#### **Section 104(6) – adequacy of information**

26. A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.
27. The Director-General submits that the Panel should consider whether it has adequate information on the following particular matters to enable it to properly determine how the proposal will affect indigenous avifauna species. This includes whether the Applicant has provided sufficient and reliable:
  - a. Baseline information on the roosting and foraging behaviour of the avifauna species that will be affected by the proposal.
  - b. Information on the availability and quality of alternative foraging sites for affected avifauna species.
  - c. Information on alternative roosting sites in the Whangārei Harbour.
  - d. Information on cumulative effects of foraging and roosting habitat loss.
  - e. Any other information needed to enable the effects of displacement from roosting and foraging habitat to be assessed overall.
28. As will be evident from the gaps described below, the Director-General considers that it is open to the Panel to conclude, at this point, that there are significant gaps in the information needed in order to properly assess the effects of the proposal.



### ***Baseline information on roosting and foraging behaviour***

29. As Dr Beauchamp records in his EIC,<sup>7</sup> there are gaps and a lack of consistency in the data relied on by the Applicant's avifauna expert Dr Bull. A clear picture of current status is important for understanding potential effects and designing potential solutions. Dr Beauchamp notes that:
- a. The data does not include information from all the roosting areas in Whangarei Harbour, and the numbers do not take account of seasonal differences in populations.
  - b. All current roost data is limited to daytime, so there is no information on how the foraging and roost habitats are used at night.
  - c. Dr Bull has used a single harbour figure for each species which generally exceeds the mean of published data.<sup>8</sup>
30. Dr Beauchamp considers that these issues are likely to have led to Dr Bull underestimating the magnitude of the proportional impact on some species<sup>9</sup>.

#### *Lesser knots*

31. Dr Beauchamp notes that we do not know how important the small area of the harbour where the sandbank to proposed to go, is to Lesser knots.
32. Recent counts have indicated the Whangarei Harbour population has declined to only 450-500 birds in summer (compared to 3,000 15 years ago), and we do not know if this decline is solely due to international<sup>10</sup> or local causes.<sup>11</sup>
33. While Dr Beauchamp acknowledges there is some data confirming that Lesser knots forage and roost in the areas to the west of the port in the middle Whangārei Harbour, there is no information on how, or if, foraging habitat has changed and how important a particular site is relative to others.<sup>12</sup>

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<sup>7</sup> Antony Beauchamp EIC, paragraphs 40 to 42.

<sup>8</sup> Antony Beauchamp EIC, paragraphs 40 and 41.

<sup>9</sup> Antony Beauchamp EIC, paragraphs 42.

<sup>10</sup> Studds, C.E. et al. 2017. Rapid population decline in migratory seabirds relying on Yellow Sea tidal mudflats as stopover sites. *Nature communications* 8: 14895. doi: 10.1038 / ncomms14895.

<sup>11</sup> Antony Beauchamp EIC, paragraph 66.

<sup>12</sup> Antony Beauchamp EIC, paragraph 22.

34. Without this information Dr Beauchamp considers it impossible to quantify the potential effect of the loss of foraging habitat on Lesser knots.<sup>13</sup>

***The availability and quality of alternative foraging sites for Lesser knots***

35. Dr Beauchamp does not accept Dr Bull's assessment that the loss of foraging habitat from the proposed sandbank would have a "negligible" magnitude effect on the basis that Lesser knot have better foraging habitat "to the west".
36. Ms Webb in her technical avifauna memo<sup>14</sup> comments that an important mitigating factor for loss of foraging habitat is the availability of wider foraging habitat within the harbour, and that the Applicant's assessments of "low" levels of effects were generally underpinned by the assumption that coastal waders will disperse to other, accessible intertidal areas. She also notes however that the Applicant had not addressed the potential increase in pressure on both foraging and high tide roosting of these alternative areas.
37. Ms Webb notes that further information was sought from the Applicant on displacement effects on alternative roosting and foraging sites. However, this has still not been adequately addressed.

***Alternative roosting sites in the Whangārei Harbour***

38. Ms Webb's technical memo notes<sup>15</sup> that supplementary information provided by the Applicant in July 2023 included an assessment by Dr Bull on shorebird displacement effects based on a study of high tide roost usage in the Whangarei Harbour and Ruakaka Estuary co-authored by Dr Beauchamp, which was published in 2007.<sup>16</sup>
39. Ms Webb notes that the study concluded that NZ Dotterels and Variable Oystercatcher populations were well dispersed and made use of several roosts throughout the harbour. It is thus inferred that alternative roost sites can accommodate the small number of birds displaced by the eastern reclamation. A similar conclusion is drawn for displacement effects on foraging habitat based on the same reasoning.

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<sup>13</sup> Antony Beauchamp EIC, paragraph 49.

<sup>14</sup> Ms Webb, Technical memo avifauna appended to s 42A Report, page 8.

<sup>15</sup> Ms Webb, Technical memo avifauna appended to s 42A Report, page 8.

<sup>16</sup> Beauchamp, A. J., & Parrish, G. R. (2007). Wader (Charadriiformes) and royal spoonbill (*Platalea regia*) use of roosts in Whangarei Harbour and Ruakaka Estuary, Northland, 1973-2000. *Notornis*, 54(2), 83–91. See: [notornis\\_54\\_2\\_83.pdf \(coastalrestorationtrust.org.nz\)](https://www.coastalrestorationtrust.org.nz/notornis_54_2_83.pdf)

40. Ms Webb goes on to note in her memo that the supplementary information referred to above provided no reasoning or evidence to support the conclusion on alternative roosts beyond the fact that (the 2007 report showed) there are alternative sites available with suitable characteristics for shorebirds, with capacity to accommodate the displaced birds on the basis of the small number of NZ Dotterels and Variable Oystercatchers as assessed to be present on average.
41. Ms Webb goes on to note she had residual questions regarding the cumulative effects of foraging and roost habitat loss that should be addressed. For example, is habitat loss and disturbance a key issue for shorebirds in the Whangarei Harbour? And are alternative locations stable, secure with adequate carrying capacity?<sup>17</sup>
42. Those questions remain unanswered by the Applicant.
43. Dr Beauchamp's view is that, while there may be capacity for additional birds, the existing alternative roost sites in Whangārei Harbour are under pressure, and are not particularly safe for waders.<sup>18</sup>

***Cumulative effects of foraging and roost habitat loss***

44. Ms Webb records in her technical memo various shortcomings in the Applicant's assessment of cumulative effects.
45. At page 4, she notes the need for the Applicant's assessment of cumulative effects to be expanded to consider other contributing activities or developments in the wider Harbour that could affect foraging and roosting of coastal avifauna species, including:
- Identification of the key issues causing population decline (of birds) in Whangarei harbour Zone of Influence (ZOI);
  - Identification of activities and related ecological effects that contribute to key avifauna issues in Whangarei Harbour ZOI;
  - Identification of Northport eastern reclamation construction and operation activities that contribute to these effects (if any); and
  - Assessment of the level of cumulative effects arising from the eastern reclamation.

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<sup>17</sup> Ms Webb, Technical memo avifauna appended to s 42A Report, page 8.

<sup>18</sup> Antony Beauchamp EIC, paragraph 85.

46. Ms Webb’s conclusion<sup>19</sup> was that there is uncertainty regarding the level of cumulative effects of habitat loss and displacement of shorebirds within Marsden Bay (in context of the Harbour), and that this should be addressed by the Applicant before the conclusions drawn by Dr Bull could be supported.
47. Dr Bull’s response as set out in her EIC<sup>20</sup> is that she conducted her effects assessment against the existing environment, which includes consideration of cumulative effects. The existing environment representing the environment ‘as it currently exists’, including all those activities listed in Table 14 of her EIC.
48. Table 14 is:

**Table 14: Coastal developments within Whangarei Harbour considered as part of the existing environment for the purposes of this assessment.**

EXISTING BUILT DEVELOPMENT	EXTANT RESOURCE CONSENTS
<ul style="list-style-type: none"> <li>• NorthPort site</li> <li>• CINZ site and wharves</li> <li>• Marsden Cove residential / marina development</li> <li>• Portland Cement</li> <li>• Port Nikau and Whangarei town basin</li> <li>• Parua Bay boat ramp and mooring</li> <li>• Parua Bay oyster farm</li> </ul>	<ul style="list-style-type: none"> <li>• NorthPort’s Berth 4 expansion</li> <li>• CINZ channel optimisation project</li> <li>• Port Nikau marina expansion</li> <li>• Whangarei Marina Management Trust’s new marina</li> </ul>

49. As Dr Beauchamp notes at paragraph 81 of his EIC, that Table 12 in Dr Bull’s EIC records that the CINZ channel optimisation project included in Table 14 in her EIC will create “project generated effects on shorebird habitat” and that this would have a “high” level of effect on shorebirds (waders) at Mair Bank. It is not clear where or how that has been factored into Ms Bull’s assessment of the proposal.
50. Dr Beauchamp further notes in his EIC<sup>21</sup> that, in his experience the Variable Oystercatchers that that feed on Mair Bank are likely to be the same birds that are to be displaced from their roost site by the construction of the eastern reclamation.
51. In Dr Beauchamp’s opinion, there is a potential cumulative effect if the birds are displaced from foraging habitat and roosting habitat, and this makes it even more important that the loss of habitat for VOCs is appropriately addressed. Birds so displaced may leave the area completely, which the Director-General would expect to be an effect of concern.

<sup>19</sup> Ms Webb, Technical memo avifauna appended to s 42A Report, page 11.

<sup>20</sup> Dr Leigh Bull, EIC, paragraph 96.

<sup>21</sup> Antony Beauchamp EIC, paragraph 81.

52. Neither of these cumulative effects appear to have been assessed by the Applicant.

***Adequacy of information overall to enable assessment of effects of loss of roosting and foraging habitat***

53. In addition to the above, Dr Beauchamp comments that a proper system-wide approach has not been taken by Dr Bull, given what has, and has not, been considered in her assessment, including there being:<sup>22</sup>

- a. No assessment of movement of birds between zones;
- b. No assessment of movement between foraging areas and between the eastern and western side of the port;
- c. No assessment of movement to and from roost sites; and
- d. No assessment of breeding birds on industrial land sites outside of the proposed reclamation zone (i.e. CINZ land) to assess the magnitude of the use of the beach and the intertidal habitat opposite breeding sites.

54. Dr Beauchamp considers that an assessment of the population of a species at risk, as the whole Whangarei Harbour population, is not appropriate for New Zealand NZ Dotterels and Variable Oystercatchers, and that such an approach increases the proportion of the population of these birds as being assessed to be affected by the proposal. From his own observations and knowledge of the behaviour of these species, Dr Beauchamp considers that they should each be considered as a local outer-harbour population.<sup>23</sup> Mr West supports Dr Beauchamp's opinion on this issue.<sup>24</sup> That assessment has not been undertaken.

55. Dr Beauchamp and Mr West also agree that such an approach would increase the proportion of the NZ Dotterel and Variable Oystercatcher populations that would be assessed as being affected by the proposal, and thus the level of impact could be greater.<sup>25</sup>

56. In light of his own observations and knowledge of NZ Dotterel and Variable Oystercatcher behaviour, Dr Beauchamp also considers that there is no robust evidence and a low likelihood these birds will move to the tide-surrounded sandbank which is proposed as a replacement roost. He also notes that there is no

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<sup>22</sup> Antony Beauchamp EIC, paragraph 46.

<sup>23</sup> Antony Beauchamp EIC, paragraphs 51 and 52.

<sup>24</sup> Avifauna-planning conferencing JWS, section 3.1.

<sup>25</sup> Avifauna-planning conferencing JWS, section 3.1.

consideration provided in Dr Bull's assessment of what will happen if Variable Oystercatchers affected by the eastern reclamation move elsewhere and do not move to the roost.<sup>26</sup>

57. Dr Beauchamp also notes that there is no assessment of the effects of both the placement of the sandbank and its ongoing erosion on the habitats present (including pools) and used by lesser knot at low tide, and any resulting invertebrate density changes. Dr Beauchamp considers that the region of impact could be far wider than the roost site footprint as currently assessed.<sup>27</sup> Mr West also notes a resultant 'spread of material' could cause further effects on biota which have not been assessed.<sup>28</sup>
58. For completeness, the Director-General also draws to your attention Dr Beauchamp's comment in his EIC in addition to those noted above, that the impacts on birds have been assessed against current populations and habitat use, so if the development is not instigated within five years of the granting of consent, then a full reassessment of avian impacts should be required (particularly given the ongoing reduction in some international migrant wader populations over the past 50 years).<sup>29</sup>
59. The Applicant is seeking a lapse period that coincides with the expiry of the consent. In effect, the consent would not lapse at all, and the Applicant could choose to commence construction work 30+ years after the grant of consent. This means effects avoidance and management measures could be 30+ years out of date.
60. The Director-General strongly opposes this unusual condition, particularly in light of the concerns expressed by Dr Beauchamp.

#### **S 104(7) – further information requests**

61. In making an assessment on the adequacy of the information pursuant to s 104(6), s 104(7) provides that the consent authority must have regard to whether any request made of the Applicant for further information or reports resulted in further information or any report being available.
62. Requests were of course made of the Applicant to provide additional information, resulting in further information being provided in February and July 2023, and some of this further (supplementary) information is referred to above.

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<sup>26</sup> Antony Beauchamp EIC, paragraphs 54 and 59.

<sup>27</sup> Antony Beauchamp EIC, paragraph 65.

<sup>28</sup> Mr West EIC, paragraph 19.

<sup>29</sup> Antony Beauchamp EIC, paragraph 26.

63. As noted by Ms Webb in her technical memo and Dr Beauchamp in his EIC, unanswered questions remain, notwithstanding the further information provided.

#### **104 (6) Conclusion**

64. The Director-General submits that, it is open to the Panel to decline consent for lack of adequate information.
65. If the Panel does not wish to do this, it must ensure the Applicant remedies information gaps in order to properly assess the effects on threatened avifauna, and determine appropriate solutions. It must also include a mechanism so avifauna effects management is current and not decades out of date.
66. The Director-General also submits that the consent for the sandbank should be declined outright, as in this location, its effects cannot be remedied by further information. The Director-General submits that there is adequate information to enable the Panel to conclude that the location is important foraging habitat for Lesser knots, and consent for the sandbank should be declined.

#### **A precautionary approach is warranted**

67. The Director-General submits that given the current state of information and significant information gaps, and the potential adverse effects on Threatened and At Risk indigenous avifauna species that depend on this part of the coastal environment, a precautionary approach should be taken.
68. This extends to assessing the effects of the proposal, and if the Panel is minded to grant consent to the port-related activities, the conditions it imposes.
69. In terms of what this means in practical terms, the Director-General submits that the conditions would need to include clear standards which are required to be met, a timeline and process for exploring and assessing options for addressing effects, and an adaptive framework for managing effects, to ensure that they are addressed quickly and effectively.

### **4. THE PROPOSED SANDBANK**

#### **The sandbank's location**

70. The proposed location for the proposed sandbank is:

- Outside of the area zoned for port activities (Marsden Point Port Zone (MPPZ));<sup>30</sup> but
- Within an area subject to “Significant Ecological Area” (SEA), “Significant Bird Area” (SBA) and “Significant Marine Mammal and Shorebird Area (SMMSA) overlays in the PRP-AV;<sup>31</sup> and
- Within an area of important foraging habitat for Lesser knots, which have a threat classification of “At risk – Declining”, and whose numbers in the Whangārei Harbour have declined from 3,000 birds to only 450 to 500 birds over the last 15 years.

### **The effects of the sandbank – positive and negative**

71. The Applicant is proposing to create the sandbank in the inter-tidal area to the west of the existing port facility in order to address the potential effects of the permanent loss of high tide habitat and disturbance to roosting birds associated with the construction of the eastern reclamation.<sup>32</sup> The intention is that the sandbank is created before the reclamation commences, and is maintained for the life of the consent.<sup>33</sup>
72. All the avifauna experts agree that provision of a high tide roost is an appropriate impact management measure in principle.<sup>34</sup>
73. To be commensurate with the loss of roosting habitat, any replacement roost would need to be above MHWS at all times.
74. While the avifauna-planning JWS records that Dr Bull and Mr West support the proposed bird roost in general terms, it also records that Dr Beauchamp, who has extensive local experience with waders and the Whangarei Harbour environs, does not support the proposed sandbank in this location as a measure to address the loss of roosting habitat of NZ Dotterels and Variable Oystercatchers.
75. Dr Beauchamp considers the sandbank, as proposed, is inappropriate, given it will result in loss of foraging habitat for another “At risk” wader, the Lesser knot, whose

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<sup>30</sup> See notation on the last plan included in the Applicant’s July 2023 s 92 response at [Compiled Plan Set - O14656 and O14656a \(Rev B - July 2023\) \(PDF 2.33 MB\)](#) . Also attached to Mr Hood’s EIC as Attachment BLH 3 (page 232 of 235 pages).

<sup>31</sup> See the PRP-AV planning maps appended to the Statement of Evidence in Chief of Linda Kirk.

<sup>32</sup> Dr Leigh Bull, EIC paragraph 70.

<sup>33</sup> Dr Leigh Bull, EIC paragraph 44.

<sup>34</sup> JWS Avifauna-planning, 20 September 2023, section 3.2.



Whangarei Harbour population has declined by approximately 85% over the last 15 years.<sup>35</sup>

76. As Dr Beauchamp explains in his EIC:

- a. Lesser knot numbers have sharply declined in Whangarei Harbour over the past 15 years.
- b. "Lesser knot" is the common name of the subspecies of the "red knot", in respect of which New Zealand has committed to arrangements with the Chinese government for the protection of areas used by them as stop-over habitat.
- c. The sandbank is expected to gradually erode due to wave overtopping and will therefore require regular top-ups to replace the sand that is washed away. This is expected to result in the raising of the seabed between the sandbank and nearby beach potentially smothering biota and more lesser knot foraging area. An increase in seabed may also increase the potential for disturbance via greater potential for access by dogs and people from land.
- d. Dr Bull considers that the creation of the sandbank will result in a "low" level of adverse effect on lesser knots, on the basis that they are expected to move to areas of higher benthic invertebrates to the west. However, the sandbank itself and the habitat it covers as it erodes, is expected to reduce the wet pooled foraging areas for lesser knots, and bar-tailed godwits, which are important habitat in Marsden Bay.
- e. While there is data confirming that Lesser knot forage and roost in the areas to the west of the Northport in middle Whangarei Harbour, it is clear Lesser knots are flying to Marsden Bay to feed, so the birds consider Marsden Bay as important foraging habitat.<sup>36</sup>
- f. Given that waders are totally dependent on having healthy foraging areas for feeding, and benthic invertebrates are susceptible to sediment deposition, any impacts that could cause even temporary disruption to waders' food supplies are of concern.<sup>37</sup>

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<sup>35</sup> EIC Dr Antony Beauchamp, paragraph 66, where he notes the number has declined from 3,000 birds to only 450 to 500 birds over the last 15 years.

<sup>36</sup> Dr Antony Beauchamp EIC, paragraphs 16 and 22.

<sup>37</sup> Dr Antony Beauchamp EIC, paragraph 23.

77. While a high tide roost might well be considered,<sup>38</sup> in this location it will cause new and adverse effects on a different species and is inappropriate.

#### **Will New Zealand Dotterels and Variable Oystercatchers use the sandbank as a roost?**

78. Dr Beauchamp's evidence is that, while they *may* use it, there is nothing demonstrating New Zealand dotterel and Variable Oystercatchers *likely will* use the proposed sandbank as a roost, and he has no confidence that any of those displaced birds will use it based on current evidence.<sup>39</sup>
79. The Applicant appears to be taking an "If you build it, they will come" approach to the sandbank.<sup>40</sup> While such an approach may work in a Hollywood blockbuster, it is inappropriate for dealing with effects on Threatened and At Risk avifauna.
80. Dr Beauchamp records that the proposed reclamation site is closest to a principal foraging area which is west of the CINZ wharf on the inner Mair Bank (see Dr Beauchamp's EIC Fig. 4). In his opinion, any change to the extent of the beach will likely push roosting birds to east, and not result in them moving their roost permanently to Marsden Bay.<sup>41</sup>
81. Dr Beauchamp also notes that NZ Dotterel have not been frequent or numerous users of Marsden Bay or harbour roosts (see his EIC, Appendix 4) and elsewhere in the harbour their predominant high tide roosts are in fields. He considers there is no robust evidence that they will move to the tide isolated roost, and there is no consideration of what will happen should they move elsewhere.
82. As such, Dr Beauchamp considers that there is no rationale for Dr Bull reducing her assessed level of effects from "moderate" to "low" with the roost in place.
83. The loss of roosting habitat would be permanent. And the loss of foraging habitat is not proposed to be addressed by the Applicant at all.<sup>42</sup>

#### **What if the birds don't use the sandbank?**

84. In commenting on the conditions proposed by the Applicant, Dr Beauchamp records in his EIC that, while the definition of "sandbank nourishment area" makes its creation

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<sup>38</sup> JWS Avifauna-planning, 20 September 2023, section 3.2.

<sup>39</sup> EIC Dr Antony Beauchamp, paragraph 26, 37-38.

<sup>40</sup> Ray Kinsella (played by Kevin Costner) in *Field of Dreams*, 1989.

<sup>41</sup> Dr Antony Beauchamp EIC, paragraph 56.

<sup>42</sup> Dr Antony Beauchamp EIC, paragraph 59.

and use specific to NZ Dotterels and Variable Oystercatchers paramount<sup>43</sup> but there is no requirement for NZ Dotterels and Variable Oystercatchers to be using the site when the eastern port construction begins, and no monitoring of the use of the sandbank is required.<sup>44</sup>

85. The Applicant has rejected a condition (should the consents be granted) that Council Reporting Planner Mr Masefield proposed with the S 42A Report, requiring monitoring that would show whether the sandbank is being used as a roost or not.
86. This condition was proposed as part of the operational conditions via an “Avifauna Management Plan”, being:<sup>45</sup>

**Avifauna**

190. Avifauna Management Plan

- a. The Plan should be submitted for certification prior to operation.
- b. The Plan should include but not limited to:
  - i. Operational protocols to avoid injury/mortality of coastal avifauna.
  - ii. Operational noise and lighting recommendations to minimise disturbance.
  - iii. Outcome monitoring of coastal bird use of the sandbank renourishment area.
  - iv. Adaptive management and monitoring methods.
  - v. Compliance reporting.

87. Despite the preparation of an Avifauna Management Plan as well as a Construction and Environmental Management Plan (CEMP) being proposed in Dr Bull’s Coastal Avifauna Assessment,<sup>46</sup> the Applicant is now proposing that there just be an avifauna section in the CEMP.<sup>47</sup>
88. Given the CEMP is concerned only with construction-related issues, there would be no opportunity to include provision for monitoring of the use of the roost following its

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<sup>43</sup> Proposed NRC conditions attached to S 42A Report, page 3.

<sup>44</sup> Dr Antony Beauchamp EIC, paragraph 92.

<sup>45</sup> See Proposed NRC conditions 17/8/23 attached to S 42A Report, pages 44 to 45 at [appendix-d-nrc-recommended-conditions-18-august-2023.pdf](#).

<sup>46</sup> Coastal Avifauna Assessment, Appendix 13 to AEE, sections 6.2.11 and 6.3.11.

<sup>47</sup> See proposed Conditions 82 and 90/91 and struck out proposed Condition 190.

creation or to respond should it not work or to respond to newly created adverse effects.<sup>48</sup>

89. There in fact appear to be no operational conditions relating to avifauna proposed by the Applicant, notwithstanding Ms Webb commenting on the desirability of such conditions, including an Avifauna Management Plan, and such a requirement being proposed with the S 42A Report.<sup>49</sup>
90. It is also noted that the Avifauna Management Plan condition proposed by the NRC Council Reporting Planner included provision for adaptive management and monitoring methods. The Director-General submits that an adaptive management approach for threatened avifauna is critical if the Panel is minded to grant consent.

### **Better alternatives**

91. At page 10 of her technical memo, Ms Webb notes that, while she considers the creation of high-tide roost area in proximity to the impact site is an appropriate offset in principle, it may not result in the long-term benefits to shorebirds and the enhancement of roost sites elsewhere should be explored by the Applicant.
92. Ms Webb also notes in the conclusion to her technical memo (page 11) that additional compensation options to enhance roosts elsewhere in the Harbour should be explored, as the long-term stability of the new high-tide roost is questionable alongside the adverse impacts on foraging habitat west of Northport.
93. This suggestion is noted at paragraph 631 of the s 42A Report in discussing new or amended conditions proposed with that report:
  - e. Avifauna: identification and enhancement of alternative roost areas that may be used by displaced avifauna.
94. However, a condition requiring the Applicant to identify and enhance alternative roost sites has not been included in the conditions proposed by the Regional Council Reporting Planner.

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<sup>48</sup> It is also noted that the track-changed version of conditions attached to Mr Hood's EIC shows Condition 190 of the conditions proposed with the S 42A Report above, as not having included items (iv) and (v). As the amendments shown as track changes and referred to as "mark ups" by Mr Hood therefore do not appear to correctly reflect the original conditions proposed with the S 42A Report which he has marked up.. See Mr B Hood EIC, Attachment 4 Marked up NRC conditions, page 76 to 77, at [Microsoft Word - Compare Result 3 \(nrc.govt.nz\)](#)

<sup>49</sup> Ms Webb, Technical avifauna memo, page 11.

95. The inclusion of such a condition has been resisted by Dr Bull, who has taken issue with Ms Webb's suggestion,<sup>50</sup> and no such condition is proposed by the Applicant.
96. It is noted that the proposed conditions attached to Mr Hood's EIC include condition 193 that was proposed by the Regional Council Reporting Planner as proposed Condition 161, but has been reordered by Mr Hood as proposed Condition 193. This condition simply provides that, if an alternative replacement roost is provided, the conditions requiring geomorphological performance of the Sandbank Renourishment Area, and the efficacy of potential periodic renourishment "top-ups" cease to apply.
97. The Director-General submits that this condition is totally inadequate.
98. Dr Beauchamp considers that, in the event the Hearing Panel is minded to grant consent, options based on more accurate data may include:<sup>51</sup>
- a. Predator control over the Northport land, which is another area where large numbers of New Zealand dotterel also roost.
  - b. Protection of Variable Oystercatchers through fencing off their roosting site at the Marina Channel entrance in Marsden Bay, and other sites used by them within the marina complex by agreement with the land owners.
  - c. Data being collected on the way that waders are using the environment to assess types of mitigation and likely success. This may conceivably include a high tide roost in a different location.
  - d. Support being provided for the protection and development of high tide roosts in other parts of Whangārei Harbour.

**Various descriptions – avoidance, mitigation, compensation, measures to offset loss**

99. The Panel will need to decide how to characterise the sandbank offering in the RMA context.
100. The Applicant's Assessment of Environmental Effects (AEE) records:
- Due to the proportion of New Zealand dotterel and VOC that utilise the high-tide area for roosting, the potential effects, as detailed in Section 3.11 of this AEE, additional high tide roosting habitat is proposed to the west of Northport to avoid the effects associated with the loss of habitat within the proposed reclamation footprint. This will involve the

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<sup>50</sup> Dr Leigh Bull EIC, paragraph 105.

<sup>51</sup> Dr Antony Beauchamp EIC, paragraph 26.

reconstruction of an historic sandbank. This habitat will be created prior to the reclamation commencing so that it is available for use prior to the loss of habitat.”<sup>52</sup>

101. The Applicant’s avifauna and planning experts also contend that the sandbank is an “avoidance” measure.<sup>53</sup>
102. The sandbank is described in the s 42A Report as “mitigation”. Mr Masefield describes it in the Planning JWS as being “intended to be mitigation for habitat loss sufficient to avoid effects on variable oyster catcher and NZ dotterel species (to achieve NZCPS Policy 11 requirements).”<sup>54</sup>
103. Ms Webb refers to the sandbank throughout her technical memo as a measure to offset the loss of the roosting habitat, and she also describes the effect of the habitat loss from the eastern reclamation as an “unmitigated effect” which “is appropriately assessed as ‘moderate’ for NZ dotterels and VOC”.<sup>55</sup> Offsetting is generally not appropriate to address adverse effects on threatened taxa.<sup>56</sup>
104. Ms Kirk also considers (as is recorded in the planning JWS) that the benefits of the sandbank would not avoid or mitigate the adverse effects of the reclamation, and should be considered under s104(1)(ab) as a positive effect. It does not prevent the effects from happening (avoid) and it does not mitigate the effects (mitigate) because it does not address the effects at the point of impact.

#### **Why it matters how the sandbank is described**

105. The Director-General considers that describing the effect of the proposed sandbank as “avoidance” is strained and artificial, particularly given it will cause adverse effects on other threatened species. It also does not accord with RMA jurisprudence or best practice:
  - a. Describing the sandbank as “avoidance” is at odds with the High Court’s findings in *Royal Forest and Bird Protection Society of NZ Inc. v Buller District Council & Ors* [2013] NZHC 1346, given, even if it is effective in achieving its purpose (which the Director-General doubts will be the case), the sandbank would not address the adverse effects at the point of impact.

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<sup>52</sup> AEE, paragraph 584, page 158.

<sup>53</sup> Dr Leigh Bull EIC, paragraphs 105 and 147(a); JWS planning 28 September 2023, section 3.6.2.3.

<sup>54</sup> S 42A Report, paragraph 109, JWS planning section 3.6.2.3..

<sup>55</sup> Ms Webb, Technical memo avifauna, page 8.

<sup>56</sup> See Policy D.2.18.(7) of the PRP-AV and Policy 4.4.1 of the RPS.

- b. The provision of a sandbank that is hoped to be used as a replacement for the lost (reclaimed) roosting habitat, does not address the adverse effects at the point of impact, so cannot be considered as “avoidance” or “mitigation”.
  - c. In line with *Forest & Bird*, any benefits of the sandbank are better viewed as a positive environmental effect.<sup>57</sup>
  - d. Any benefits of the sandbank are more appropriately considered as a “measure proposed for ensuring positive effects to offset or compensate for the adverse effects of allowing the activity”, and should be taken into account under s 104(1)(ab).<sup>58</sup>
  - e. As a positive measure appropriately considered under s 104(1)(ab), it is not to be taken into account so as to reduce (or eliminate in the case of “avoidance”) the severity of adverse effects.
  - f. Properly described and treated, the benefits of the sandbank therefore cannot be treated as reducing the scale of the adverse effects of the reclamation from “moderate” to “low” as Dr Bull suggests. Any benefits from the sandbank are more appropriately treated separately, as positive effects, instead.
106. That is not to say that any benefits or positive effects from the sandbank would not be relevant to the Panel’s consideration. For example, Policy D.2.9 for Regionally Significant Infrastructure specifically requires you to “have regard and give appropriate weight to” such matters - Policy D.2.9(7) being:
- 7) the extent to which the adverse effects of the activity can be practicably managed, inclusive of any positive effects and environmental offsets or compensation proposed.
107. This is further discussed under “Planning matters” below.
108. The distinction in terminology is however particularly important where the Applicant seeks to demonstrate that the effects of the proposal meet an “avoid” or “no more than minor” threshold, and is reliant on the anticipated effects of the sandbank eliminating or reducing the severity of effects, e.g. from “moderate” which is clearly more than minor and would not meet either threshold.

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<sup>57</sup> *Royal Forest and Bird Protection Society of NZ Inc. v Buller District Council & Ors* [2013] NZHC 1346, paragraph [74].

<sup>58</sup> Note – s 104(1)(ab) was inserted into the Act by section 143 of the Resource Legislation Amendment Act 2017. This is subsequent to the *Forest and Bird* decision noted above, hence that decision does not refer to s 104(1)(ab).

## 5. THE PLANNING FRAMEWORK

### Approach to policies

109. The NZCPS, RPS and the PRP-AV have strong directive enabling provisions for Regionally Significant Infrastructure, as well as strong directive protection provisions.
110. The Director-General submits that, as currently framed, and with the current lack of information needed to properly understand the adverse effects on avifauna and how they can be addressed, it will be very difficult for the Panel to determine the proposal is consistent with the applicable policy framework.
111. It is however open to the Panel to place whatever weight it considers appropriate on the various policies, and the matters to be considered as set out in the policies.
112. To the extent that the Director-General and her planning expert Ms Kirk consider the current proposal is not fully consistent with the policy framework, more consistency would be achieved if the effects are able to be reduced.
113. As Dr Beauchamp states in his EIC, there are alternative measures that the Applicant could usefully explore to address the adverse effects of the proposal. However, there are also information gaps that need to be filled in order to properly understand the level of effects and how they can best be managed.
114. The following section of these submissions set out how the Director-General says the provisions relating to Regionally Significant Infrastructure and indigenous biodiversity are intended to be read in light of each other.

### The PRP-AV

115. To understand the policy framework of the PRP-AV, it is useful to start at the beginning of the Policy section of the Plan.
116. The introductory provision at the top of page 251 of the PRP-AV directs as follows:<sup>59</sup>

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<sup>59</sup> The Note below this provision immediately above the index expressly records “This is an index and guide to the policies in this section. It does not form part of the Plan.” By inference, the provision set out above does form part of the PRP-AV.



## D Policies | Ngā kaupapa

### **Application of objectives and policies:**

1. Regard must be had to all the relevant objectives and policies in the Plan when considering an application for a resource consent.
2. Where policies in this plan are in conflict, the more directive policies shall prevail.
3. Regard must be had to any relevant provisions of the Regional Policy Statement and National Policy Statements, and where appropriate Part 2 of the RMA, when considering an application for a resource consent.

117. The Director-General submits that this an important provision for the Panel to have regard to under s 104(1)(b). In the Director-General's submission, it directs that, in considering the application for the proposal:
- a. The Panel is to have regard to all the relevant objectives and policies in the PRP-AV;
  - b. Where policies in the PRP-AV are in conflict, the more directive policies must prevail;
  - c. The Panel is to have regard to any relevant provisions of the RPS and National Policy Statements (which include the NZCPS and the NPS-IB); and
  - d. The Panel is to have regard to Part 2 of the Act if it considers appropriate.

### ***Effect of the King Salmon and Port Otago Supreme Court judgments***

118. Both of the Supreme Court's decisions in *King Salmon* and *Port Otago* confirm that policies should be read so as not to conflict with each other as far as possible.
119. The Director-General submits that the requirement in clause (2) of the introductory provision above, namely that the more directive policies in the Plan prevail over other ones, is consistent with the Supreme Court's guidance.
120. As the Court noted in its recent *Port Otago* judgment:

Conflicts between policies are likely to be rare if those policies are properly construed, even where they appear to be pulling in different directions.<sup>59</sup> Any apparent conflict between policies may dissolve if "close attention is paid to the way in which the policies are expressed".<sup>60</sup> Those policies expressed in more directive terms will have greater weight than those allowing more flexibility.<sup>61</sup> Where conflict between policies does exist the area of conflict should be kept as narrow as possible.<sup>6260</sup>

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<sup>60</sup> *Port Otago Limited v Environmental Defence Society Incorporated & Anor* [2023] NZSC 112 [*Port Otago*], at [63], footnote 60: *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

121. The Supreme Court addressed the distinction between “strong” and “weak” directive policies in *King Salmon*, recording:<sup>61</sup>
- ... Those [policies] expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, “avoid” is a stronger direction than “take account of”.
122. The directive “take into account” has been interpreted as not being intended to require more than: considering the particular factor in making a decision, weighing it up with the other relevant factors, and giving it whatever weight is appropriate in all the circumstances”.<sup>62</sup>
123. In the Director-General’s submission, the same interpretation would apply to “have regard to”, being the term used in Policy D.2.9, and the same for “take account of” being the term referred to in *King Salmon* as above.
124. *Port Otago* concerned the provisions of the Otago RPS, and the requirement for provisions in it for ports.<sup>63</sup>
125. Both the Northland RPS and PRP-AV contain settled policies enabling ports (i.e. through the Regionally Significant Infrastructure provisions), as well as protective policies, which the enabling provisions are required to be read alongside. To this extent, the *Port Otago* judgment is of limited relevance.
126. However, it is helpful to note that the Supreme Court held, in the context of the facts of that case, that Ports Policy 9 in the NZCPS required the Regional Council to consider how and when to provide in its plans for the port’s efficient and safe

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<sup>61</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, paragraph [129].

<sup>62</sup> See *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, paragraph [72], in the context of ss 5 and 6 of the Hazardous Substances and New Organisms Act 1996.

<sup>63</sup> It is noted that Dr Mitchell quotes a passage from the *Port Otago* judgment at paragraph 3.25 of his EIC. Unfortunately, Dr Mitchell has quoted that passage out of context, and has omitted an important footnote. In the Director-General’s submission, that passage does not support the approach Dr Mitchell has taken in his evidence. Nor does it assist the Panel to place a general statement before it without providing the relevant context.

Footnote “92” which has been omitted from Dr Mitchell’s quotation directs the reader back to the source of the statement, being paragraph [76] of the judgment. The statement in paragraph [76] was qualified in the preceding paragraph [75] as “general guidance” only, and followed the Court’s finding that it is desirable to resolve any conflicts in the regional planning documents at that level, rather than leaving them to the resource consent stage.

The passage quoted by Dr Mitchell was in the context of a hypothetical situation where a decision maker may be required to consider a resource consent application where the ports and other directive provisions in the NZCPS remain in conflict (see *Port Otago*, paragraphs [69] and [70]). That is not the case here.

operation, the development of its capacity for shipping, and its connection with other transport modes.<sup>64</sup>

127. The Court commented in its judgment that reconciliation of any conflict between the NZCPS avoidance policies and the ports policy should be dealt with at the regional policy statement and plan level as far as possible, and that in doing so, those considering particular projects will have as much information as possible to allow them to assess whether it may be worth applying for consent and, if so, what matters should be the subject of focus in any application. Equally, decision-makers at the consent level will have as much guidance as possible on methods for addressing conflicts between policies.<sup>65</sup>
128. The remainder of the judgment provides “general guidance” as to how a decision-maker at the resource consent level might approach the reconciliation between the NZCPS ports policy and the avoidance policies.<sup>66</sup> In commenting on the safe and efficient operation requirement, the Court clarified:

Our comments are limited to the efficient and safe operation of existing ports. Because it is not before us, we do not deal with expansion of the operations of the ports, although the line between expansion and efficiency will not necessarily be fixed. As the Environment Court remarked, “even existing ports cannot necessarily expand indefinitely and whenever their operators want”.<sup>67</sup>

***The relevant objectives and policies of the PRP-AV and their force***

129. Dr Mitchell at paragraph 3.4 of his EIC records his opinion that “enabling” objectives and policies in the context of this application should be seen as similarly directive as any “avoidance” objective or policy.
130. At paragraph 3.17 of his EIC, in response to comments in the S 42A Report on the need for better definition of effects, and additional mitigation effort or agreement on proposed mitigation, Dr Mitchell also expresses his view that the strong “enabling” provisions in the relevant statutory documents mean that “avoidance” of adverse effects or “policy consistency” is not necessary in terms of a development within the areas identified for port development.

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<sup>64</sup> *Port Otago*, paragraph and [70].

<sup>65</sup> *Port Otago*, paragraph and [72].

<sup>66</sup> *Port Otago*, paragraph and [75] and following.

<sup>67</sup> *Port Otago*, footnote 78 at paragraph [76]

131. What Dr Mitchell appears to be saying here is that the strong directive protection policies in the PRP-AV do not apply to Regionally Significant Infrastructure development in the Marsden Point Port Zone. The Director-General does not agree.
132. While it is accepted that both the enabling and protective policies in the PRP-AV are strongly directive, the Director-General submits that Dr Mitchell's approach to the policies is wrong for three reasons:
- a. First, as the PRP-AV expressly states, the more directive policies are intended to "trump" the less directive policies, including policies which set out "matters to be considered". Policy D.2.18 is a strong directive policy, in respect of which the only enabling policy that could be regarded as "trumping" it, would be Policy D.2.10 which provides for the National Grid. Policy D.2.9, in contrast, and in line with *King Salmon*, is only a "weak" directive policy, given it sets out matters to be had regard to by the decision-maker.
  - b. Second, given the strong directive policies are intended to carry more weight than the weak directive policies, Policy D.2.18 must be treated as carrying more weight than Policy D.2.9.
  - c. Finally, the only strong directive "enabling" policies for Regionally Significant Infrastructure (other than for the National Grid) are:
    - Policy D.2.7 which enables the establishment and operation of Regionally Significant Infrastructure with no more than minor effects, but which must also meet the directives in Policy D.2.18; and
    - Policy D.2.8 which enables the upgrading and maintenance of Regionally Significant Infrastructure provided there are no significant effects and the effects are same as before the upgrading or maintenance were completed.
133. The port expansion proposal as currently framed, and on the current state of information, does not come within either of those policies. The PRP-AV therefore does not direct that the expansion proposal must be "enabled".
134. Rather, whether the proposal is considered appropriate, depends on the Panel's assessment of the proposal in light of the matters set out in Policy D.2.9 (mindful of Policies D.2.7 and D.2.8 and what is and what isn't required to be enabled), in accordance with the weight the Panel considers appropriate to each of those matters, and in light of the other relevant policies in the PRP-AV and the other matters in s 104 of the Act.

135. The relevant objectives and policies of the PRP-AV are set out in the Applicant's Planning Policy Analysis, Appendix 28 to the application and AEE,<sup>68</sup> and Ms Kirk has included a detailed discussion on the relevant Regionally Significant Infrastructure and indigenous biodiversity provisions in her EIC.
136. To assist the Panel in respect of which particular policies are strong directive policies, and which are weak directive policies, an analysis of the PRP-AV objectives and policies is also set out in **Appendix 1** to these submissions.

### **NZCPS and RPS**

137. Clause 3 of the Introduction to the Policies in the PRP-AV notes that regard must be had to any relevant provisions of the RPS and a National Policy Statement.
138. At paragraphs 87 to 89 of Ms Kirk's EIC and in the Planning JWS, Ms Kirk's opinion is recorded that Policy 11 of the NZCPS is relevant and necessary to consider in addition to the PRP-AV provisions, as it provides additional guidance for consideration of indigenous biodiversity.<sup>69</sup>
139. That is in the context of interpreting the indigenous biodiversity policies in the PRP-AV which incorporate a "minor or transitory effects" consideration, which stems from the Supreme Court's *King Salmon* judgment,<sup>70</sup> and which appears to have been adopted as a standard by the Applicant's planners and the Regional Council's Report Planner.<sup>71</sup>
140. For example, Dr Mitchell states at paragraph 3.19 of his EIC:
- 3.19 Having said that, it is clear to me that Northport's technical witnesses have comprehensively assessed the effects of this proposal, including effects on those species, habitats, attributes and characteristics to which the directive "avoid" provisions apply - and that, with the mitigation proposed / secured via conditions, the effects are avoided by being no more than minor or transitory.<sup>2</sup>

<sup>2</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38.

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<sup>68</sup> Appendix 28 to Application and AEE, at: [application-document-lodged-06-10-2022-appendix-28-planning-policy-analysis.pdf \(nrc.govt.nz\)](#)

<sup>69</sup> Planning JWS 28 September 2023, section 3.4.

<sup>70</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38, at [145].

<sup>71</sup> For example, see Dr Mitchell's EIC at paragraph 3.19

141. In terms of the use of the term “minor or transitory” in Policy D.2.18(5)(c) of the PRP-AV and the RPS, the Director-General submits that it does not make sense to apply the words “minor or transitory” as the standard which Policy D.2.18 directs be met, given:

a. The actual wording of Policy D.2.18(5)(c) which is:

5) assessing the potential adverse effects of the activity on identified values of indigenous biodiversity, including by:

...

c) *recognising that minor or transitory effects may not be an adverse effect, and [emphasis added]*

b. Such an approach does not align with the framework of the Policy, as it results in both parts (1)(a) and (2)(a) which delineate the coastal environment from areas outside of the coastal environment, having the same standard of “no more than minor adverse effects” applying.

c. It is clear that the intent of Policy D.2.18 is to require a higher degree of protection within the coastal environment, compared to areas outside of it.

Policy D.2.18(1) and (2), with the key phrases highlighted is:

## D.2.18 Managing adverse effects on indigenous biodiversity

Manage the adverse effects of activities on indigenous biodiversity by:

1) in the coastal environment:

a) avoiding adverse effects on:

- i. indigenous taxa that are listed as Threatened or At Risk in the New Zealand Threat Classification System lists, and
- ii. the values and characteristics of areas of indigenous vegetation and habitats of indigenous fauna that are assessed as significant using the assessment criteria in Appendix 5 of the Regional Policy Statement, and
- iii. areas set aside for full or partial protection of indigenous biodiversity under other legislation, and

b) avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects on:

- i. areas of predominantly indigenous vegetation, and
- ii. habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes, and
- iii. indigenous ecosystems and habitats that are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, intertidal zones, rocky reef systems, eelgrass, northern wet heathlands, coastal and headwater streams, spawning and nursery areas and saltmarsh, and

2) outside the coastal environment:

a) avoiding, remedying or mitigating adverse effects so they are no more than minor on:

- i. indigenous taxa that are listed as Threatened or At Risk in the New Zealand Threat Classification System lists, and
- ii. areas of indigenous vegetation and habitats of indigenous fauna, that are significant using the assessment criteria in Appendix 5 of the Regional Policy Statement, and

257

- iii. areas set aside for full or partial protection of indigenous biodiversity under other legislation, and

b) avoiding, remedying or mitigating adverse effects so they are not significant on:

- i. areas of predominantly indigenous vegetation, and
- ii. habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes, and
- iii. indigenous ecosystems and habitats that are particularly vulnerable to modification, including wetlands, wet heathlands, headwater streams, spawning and nursery areas, and

142. Policy D.2.18 gives effect to Policy 4.4.1 of the RPS, which sheds some light on why the words “minor or transitory” are included in that Policy. The relevant parts of Policy 4.4.1 and the Explanation which follow it, highlighted, are:

#### 4.4.1 Policy – Maintaining and protecting significant ecological areas and habitats

- (1) *In the coastal environment, avoid adverse effects, and outside the coastal environment avoid, remedy or mitigate adverse effects of subdivision, use and development so they are no more than minor on:*
  - (a) *Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;*
  - (b) *Areas of indigenous vegetation and habitats of indigenous fauna, that are significant using the assessment criteria in Appendix 5;*
  - (c) *Areas set aside for full or partial protection of indigenous biodiversity under other legislation.*
- (2) *In the coastal environment, avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of subdivision, use and development on:*
  - (a) *Areas of predominantly indigenous vegetation;*
  - (b) *Habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes;*
  - (c) *Indigenous ecosystems and habitats that are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass, northern wet heathlands, coastal and headwater streams, floodplains, margins of the coastal marine area and freshwater bodies, spawning and nursery areas and saltmarsh.*
- (3) *Outside the coastal environment and where clause (1) does not apply, avoid, remedy or mitigate adverse effects of subdivision, use and development so they are not significant on any of the following:*
  - (a) *Areas of predominantly indigenous vegetation;*
  - (b) *Habitats of indigenous species that are important for recreational, commercial, traditional or cultural purposes;*
  - (c) *Indigenous ecosystems and habitats that are particularly vulnerable to modification, including wetlands, dunelands, northern wet heathlands, headwater streams, floodplains and margins of freshwater bodies, spawning and nursery areas.*
- (4) *For the purposes of clause (1), (2) and (3), when considering whether there are any adverse effects and/or any significant adverse effects:*
  - (a) *Recognise that a minor or transitory effect may not be an adverse effect;*



**Explanation:**

Policy 4.1 seeks to protect important indigenous ecosystems and habitats and maintain the diversity of indigenous species. The policy reflects Policy 11 of the New Zealand Coastal Policy Statement 2011, which applies in the coastal environment, and takes into account the decision of the Supreme Court in *King Salmon (Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38)*.

The management approach has a tiered protection structure. Policy 4.4.1(1) provides the highest level of protection to ecosystems, habitats, and species (biological values) most at risk of irreversible loss, with the appropriate management response being to avoid adverse effects in the coastal environment and to ensure there are no more than minor effects elsewhere.

Areas of significant indigenous vegetation and significant habitats fall within this first tier and the criteria to identify these areas are provided in Appendix 5.

Policy 4.1 (2) and (3) provides a lower level of protection for ecosystems, habitats, and species at a lesser risk of loss. It covers the coastal environment and elsewhere.

It should be noted that Policy 4.1 (2) and (3) are broader in scope than section 6(c) of the Resource Management Act, which requires the protection of areas of significant indigenous vegetation and significant habitats of indigenous species as a matter of national importance. This is because in Northland many such habitats have been degraded, so there is a greater need to give some protection to the valued habitats that remain extant.

143. The reference to “minor or transitory” also appears in RPS Policy 4.6.1 for Natural character, Natural Features and Landscapes.
144. It is unsurprising that Policy 4.6.1 of the RPS would make reference to minor or transitory effects on natural character and landscapes, given *King Salmon* concerned Policies 13 and 15 of the NZPCS. However, the interpretation or application of Policy 11 of the NZCPS was not a matter before the Supreme Court in *King Salmon*, and its reference to “minor or transitory effects” related to effects on natural character and landscapes. They did not relate to effects on indigenous biodiversity with which Policy 11 is concerned.
145. Whether or not the words “minor or transitory” were included in Policy D.2.18 in error or deliberately is not clear. Either way, the Director-General submits that the Panel needs to consider both Policy D.2.18 of the PRP-AV and Policy 4.4.1 of the RPS in light of Policy 11(a) of the NZCPS, and have regard to Policy 11 itself.
146. Policy 11(a) of the NZCPS strongly directs that the indigenous biodiversity in the coastal environment is protect by avoiding adverse effects on (inter alia) Threatened and At Risk taxa in the coastal environment, being:

### **Policy 11 Indigenous biological diversity (biodiversity)**

To protect indigenous biological diversity in the coastal environment:

- (a) avoid adverse effects of activities on:
  - (i) indigenous taxa<sup>4</sup> that are listed as threatened<sup>5</sup> or at risk in the New Zealand Threat Classification System lists;
  - (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
  - (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare<sup>6</sup>;
  - (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
  - (v) areas containing nationally significant examples of indigenous community types; and
  - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation;

<sup>4</sup> Taxa: as defined in the Glossary.

<sup>5</sup> Examples of taxa listed as threatened are: Maui's dolphin, Hector's dolphin, New Zealand fairy tern, Southern New Zealand dotterel.

<sup>6</sup> Naturally rare: as defined in the Glossary.

#### ***The sandbank – Rule C.1.5.11***

147. The Applicant has applied for a coastal permit to create the sandbank intended as a replacement roost. The relevant part of the application records this as a:

coastal permit for a discretionary activity for deposition associated with the proposed roosting area (sandbar) (Marine 2 zone).<sup>72</sup>

148. It is now accepted, and the Planning JWS records, that the applicable rule is Rule C.1.5.11 of the PRP-AV, and this rule provides a framework for assessing the range of potential effects of the bird roost/sandbank.<sup>73</sup>

149. While the planning experts record that the bird roost/sandbank has been considered and assessed against Rule C.1.5.11,<sup>74</sup> there does not appear to be such an assessment within the material available to the Panel.

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<sup>72</sup> Application and AEE, Form 9, page 20.

<sup>73</sup> Planning JWS 28/9/23, section 3.6.2.3, with reference to the S 42A Report section 4.1, Table 2 and footnote 20 (regarding the Council's s92 request).

<sup>74</sup> Planning JWS 28/9/23, section 3.6.2.3.

150. Ms Kirk has set out the criteria in Rule C.1.5.11 at paragraph 148 of her EIC. The majority of the matters listed in Rule C.1.5.11 relate to the effects of the activity, including on the characteristics, qualities and values that make the area where the activity is to be located a mapped SEA and SBA.
151. In addition, given this component of the proposal has been bundled with the other activities as a discretionary activity, all the matters in s 104 of the Act are relevant to the Panel's assessment whether to grant consent for the sandbank. This includes the relevant policies and objectives of the planning documents.
152. Given the potential adverse effects of the sandbank as discussed in Dr Beauchamp's EIC, the Director-General opposes the grant of consent for this activity and seeks that consent for this component of the proposal be declined.

### **National Policy Statement for Indigenous Biodiversity (NPS-IB)**

153. The Planning JWS<sup>75</sup> records that the agreement of all the planners that the RPS, PRP and WDP provisions are consistent with the provisions of the NPS IB, and that the NPS-IB does not introduce any new matters for the application.

### **Whangarei District Plan**

154. There are three groups of activities requiring consent under the WDP. These are discussed in section 4.2 (pages 45 to 47) of the S 42A Report, and as listed in:
- a. Table 4 for the activities on the land once it is reclaimed and becomes above MHWS, and which are required to be treated as a discretionary activity due to it being an "innominate activity" once the land comes within the district, given it will become land of the district without an applicable zoning; and
  - b. Table 5 for the activities on land that is already above MHWS and zoned NOSZ, and subject to the "Coastal Environment" and "Coastal Hazards" overlays in the WDP, involving:
    - The construction of various components of the port (including earthworks and construction activities on the land adjoining the area in the CMA to be reclaimed) and the replacement public amenities; and
    - The operation of the port and public amenities once the construction works are complete.

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<sup>75</sup> Planning JWS 28/9/23, section 3.2.6.1.

155. The items in Table 5 appear to omit, in terms of the second bullet point above, the operational port activities once the construction is complete. The activity category of these activities are a matter of disagreement amongst the planning experts.
156. In the 28 September Planning JWS, Ms Kirk has confirmed her opinion that the activities which are intended to be undertaken on the area currently above MHWS and zoned NOSZ in the WDP, should be treated as a “non-complying” activity.
157. While Ms Kirk records her opinion that non-complying activity status applies because the activities are a “General Commercial Activity” in her EIC, the JWS records her agreement with the WDC Reporting Planner Ms Sharp, and Ms Niblock following the planning discussion, that the activity is properly regarded as an “Industrial Activity”. The Applicant’s planners Dr Mitchell and Mr Hood both disagree and consider the activity is “innominate” and required to be treated as a discretionary activity.<sup>76</sup>
158. A s 104 assessment has not been completed by either the Applicant’s planners or the Council’s Reporting Planner. Counsel however anticipates that the Applicant’s reply evidence will address this matter.
159. Counsel reserves the right for the Director-General’s planner Ms Kirk to present supplementary evidence in response to any issues raised on s 104D matters in the Applicant’s reply evidence. This also applies in the event an updated S 42A Report is prepared by the Councils’ Reporting Planners.

***Activity status of proposed activities in the Natural Open Space Zone***

160. It is accepted that the activity status of the land which is currently in the CMA but is proposed to be reclaimed as part of the proposal is to be treated as “innominate” given the operation of ss 87B and 89(2), and accordingly the activities for which consent is sought on the land once reclaimed must be treated as a “discretionary activity”.<sup>77</sup>
161. However, that is not the case with the WDC Esplanade Reserve land which is currently zoned “Natural Open Space” in the WDP.

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<sup>76</sup> Planning JWS 28 September 2023, section 3.1.

<sup>77</sup> See ss 81 and 87B of the Act, which clarify that the reclaimed land is not zoned until the council changes the Plan to do so, and activities for which consent is sought in the meantime are to be assessed as discretionary activity. See also *Tairua Marine Ltd v Waikato Regional Council* EnvC A108/05, where the Court held that where there is a resource consent application for activities on a proposed reclamation where that land is currently in the CMA, s 89(2) applies and the application is to be heard and decided as if it relates to the activity within the district. While the Court rejected the suggestion that s 81 applied instead, it is not clear why both provisions could not apply together.

162. From what counsel can gather, this area relates to the land shown below, which is a snip of a section of the orthorectified aerial photograph on the last page of the Pocket Park Concept Plan, being Appendix 6 to the Applicant's AEE.<sup>78</sup>



163. There is currently uncertainty as to whether the components of the proposal on land currently above MHWS and within the Natural Open Space Zone are to be treated as a non-complying or discretionary activity under the Whangarei District Plan (WDP). This will change how it has been assessed and needs to be decided by the Panel.
164. In recent expert conferencing which has followed the exchange of submitter evidence, the Whangarei District Council's Reporting Planner Ms Sharp and the Director-General's expert planner Ms Kirk have recorded that they consider the operational activities which the Applicant proposes to undertake in the area zoned NOSZ are a **non-complying activity** under the WDP. The Applicants' planners contend that they are innominate and therefore must be treated as discretionary.<sup>79</sup>
165. The Director-General says that the expert views of Ms Sharp and Ms Kirk should be preferred over that of the Applicant's planners, given Ms Sharp's substantial analysis set out in the 28 September Planning JWS, including the definition of "Industrial Activity" which includes distribution, which is clearly an intended function of the expanded port.

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<sup>78</sup> Pocket Park Concept Plan, Appendix 6 to the Applicant's AEE, last page. At [application-document-lodged-06-10-2022-appendix-6-pocket-park-concept-plan.pdf \(nrc.govt.nz\)](https://www.nrc.govt.nz/application-document-lodged-06-10-2022-appendix-6-pocket-park-concept-plan.pdf)

<sup>79</sup> See JWS Planning 28 September 2023, page 2.

166. This has raised the issue of whether a s 104D assessment needs to be undertaken, noting that the Council Reporting Planners had, prior to expert conferencing, treated the collective status the activities under a “bundled” approach as the most stringent activity status, being “discretionary”.
167. If the Panel accepts, as the Director-General submits it should, that those elements of the proposal are a non-complying activity, the proposed activities on land currently above MHWS would need to satisfy either limb of s 104D.
168. Given the area is WDC-owned esplanade reserve zoned “Natural Open Space”, and the proposal will (either essentially, by definition, or both) be an industrial activity which will inherently be incompatible with the land’s Natural Open Space zoning, and with adverse effects that would significantly affect the values sought to be protected through the zoning, the Director-General submits the activity is unlikely to pass either limb of s 104D.
169. The S 42A Report notes that the proposed expansion of a Port into the NOS zone is not considered commensurate with the amenity values and characteristics anticipated by the zone.<sup>80</sup>

### **Bundling**

170. If the Panel determines that the works in the Natural Open Space Zone are a non-complying activity, it will need to then determine whether all the district-based activities should be bundled together. Case law would suggest that they should, given a proposal which is the subject of a resource consent application cannot be treated as a hybrid of the status of its various elements, and an application must be decided by the most stringent status applying to any part of the proposal.<sup>81</sup>
171. Further, if the Panel were to consider bundling of the district-based components appropriate, this would lead to a further consideration as to whether all parts of the activity, i.e. both above and below MHWS, should be bundled and considered as non-complying as a whole. That was the case in *Tairua Marine* referenced above, which concerned the various above-and-below-MHWS components of a proposed marina, including dredging, reclamation, and activities on the reclaimed land once the reclamation was complete.

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<sup>80</sup> S 42A Report, paragraph 104.

<sup>81</sup> See *Aley v North Shore City Council* [1999] 1 NZLR 365; 4 ELRNZ 227; [1998] NZRMA 361 cited as authority in *Tairua Marine Ltd v Waikato Regional Council*, EnvC A108/05.

172. There the dredging component was a non-complying activity, and the Court decided that, notwithstanding the carparking and recreational activities above-MHWS being a discretionary activity, they should be “bundled” with the below-MHWS components, and treated as a whole on the basis of the most stringent activity being a non-complying activity:

[182] We have found that the proposed dredging is a non-complying activity; that the proposed reclamation is a discretionary activity; and that the proposed parking and recreation activities on the reclamation would be discretionary activities. The non-complying activity status of the dredging is the most stringent status, so we hold that the status of the proposal as a whole is a non-complying activity.<sup>82</sup>

173. A “total package” bundling approach would be consistent with the current approach to bundling in the S 42A Report, which at paragraph 177 notes:

The application is made as a bundled package of activities that overlap and are inter-dependent, requiring consent under both Regional and District Plan provisions.

174. Should the Panel determine in line with the analysis above that the activities proposed to be undertaken in the Natural Open Space Zone is a non-complying activity, the Director-General says it is open to the Panel to take the same approach as the Court in *Tairua Marine* above. That approach would be to treat the proposal as a whole as a non-complying activity on the basis that the most stringent status applies.

175. A further issue that requires clarity, should the Panel agree that the land-based components should be bundled and treated as a non-complying activity, is what policy provisions apply. Given there would be no applicable zone provisions as the reclaimed land would be zoneless until the Council applied a zoning to it as envisaged by s 81(3).

176. In light of the above, the Director-General suggests that further expert conferencing would be useful to work through these issues.

177. The Panel’s determination on the activity status is important. And the bundling approach would potentially change the framework for the entire assessment, depending on how widely the Panel considers bundling needs to go.

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<sup>82</sup> *Tairua Marine* as above, paragraph [182].

## **6. CONDITIONS**

178. General comments on the proposed conditions are included in paragraphs 83 to 87, and 92 to 96 above.
179. Dr Beauchamp has also set out some general comments in his EIC at paragraph 97 to 105.
180. Given the Applicant has signalled that it will be filing an updated set of conditions, we reserve further comment, pending our review of any such updated proposed conditions.

## **7. CONCLUSIONS**

181. In light of the above, the Director-General considers that the Applicant needs to “rethink” its approach to effects on the New Zealand Dotterel and Variable Oystercatchers, and in particular, revise its approach to effects management, such that the adverse effects of any port expansion undertaken are appropriately managed, mindful of the values at stake, and are in line with the policy directives in the relevant planning documents.
182. Further information is needed to properly assess effects, including that identified in Ms Webb’s technical memo and the evidence of Dr Beauchamp.
183. The Director-General supports Ms Webb’s conclusion that the Applicant should explore roosts elsewhere in the Harbour, given her shared concerns regarding the long-term stability of the new high-tide roost (sandbank), as well as the adverse impacts on Lesser knot foraging habitat. Dr Beauchamp outlines further information crucial in this re-assessment work.
184. However, further information will not remedy the bird roost location which is unlikely to work and will cause new adverse effects on another species. Whether or not the Panel considers it has enough information to grant or decline consent for the other components of the proposal, the Director-General says you should decline the restricted discretionary consent for the sandbank in that location.
185. Because the Applicant has focused solely on a bird roost that will not work, its effects package fails, and alternatives are needed. Dr Beauchamp discusses other methods that may be usefully considered.



186. The planning context is clear and directive in regard to protection of threatened indigenous avifauna. The Applicant has employed a strained use of the term 'avoid' by saying the bird roost is an 'avoidance' measure. However, the effect of permanent loss of roost and foraging habitat on threatened avifauna is not allowed on a plain reading of the directive planning provisions alongside the enabling port provisions.
187. The Director-General considers a strict reading of the planning documents could lead appropriately to a decline. However, she is mindful the Panel may use a weighting exercise and make a different decision.
188. The Director-General cautions that in any case, critical gaps remain in what has been assessed and proposed. What is key is that the Applicant properly assesses effects and reduces those effects with appropriate measures. Any consenting regime must address gaps before effects are caused by the project. This could be done through a carefully considered adaptive management regime.
189. It is expected the Applicant will file a new set of conditions and the Director-General expects to have the opportunity comment on these in the coming days.
190. The Panel must also grapple with the fact that the land above MHWS in an NOS zone attracts a non-complying status due to the port activities. A bundling approach would potentially change the framework for the entire assessment, depending on how widely the Panel considers bundling needs to go.
191. Given these legal submissions were requested to be filed simultaneously with the Applicant's opening legal submissions, there has been no opportunity to respond to matters raised by the Applicant. There has also not been the opportunity to consider any rebuttal evidence filed on behalf of the Applicant.
192. Counsel accordingly reserves the right to file reply submissions as necessary, and the opportunity for the Director-General's witnesses to comment at the hearing on any relevant points in the Applicant's reply evidence they consider a response is necessary.
193. The Director-General considers the protection of threatened avifauna is a critical matter, and more is required before this proposal meets the legal and planning framework.

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Counsel for the Director-General of Conservation

## APPENDIX 1 - ANALYSIS OF PRP-AV DIRECTIVE POLICIES

### PRP-AV Regionally Significant Infrastructure policies

1. The PRP-AV includes an objective for Regionally Significant Infrastructure (which includes ports) (F.1.6), directing that the national, regional and local benefits of regionally significant infrastructure be recognised, and their effective development, operation, maintenance, repair, upgrading and removal be enabled.
2. Objective F.1.6 is supported by the following policies:
  - a. Policy D.5.8 for the Marsden Point Port Zone (MPPZ) which directs recognition that the purpose of the Marsden Point Port Zone is to enable the development and operation of existing and authorised maritime industrial activities located within the zone.
  - b. Policy D.5.9 which provides guidance that development in the MPPZ will generally be appropriate (inter alia) where it associated with Regionally Significant Infrastructure.
  - c. Policy D.2.7 which directs that Regionally Significant Infrastructure be enabled by allowing minor adverse effects, but this is subject to consistency with other policies, including Policy D.2.18 which requires adverse effects on Threatened and At Risk indigenous taxa in the coastal environment to be avoided.
  - d. Policy D.2.8 which directs that maintenance and upgrading of Regionally Significant Infrastructure be enabled by allowing adverse effects, but only where the adverse effects are not significant or are temporary or transitory, and the adverse effects after the maintenance or upgrading is completed are not more than they were before the works were undertaken.
  - e. Policy D.2.9, which while not being a directive policy, sets out the matters to be had regard to by decision-makers in considering whether Regionally Significant Infrastructure proposals are appropriate. It provides for the decision-maker to determine the weight to be given to the listed matters.
  - f. Policy D.2.10 relating to the National Grid, and distinguishing it from other Regionally Significant Infrastructure, which directs that:
    - The reasonable operation, maintenance, and minor upgrading and development of existing National Grid infrastructure be enabled; and
    - The major upgrading of existing National Grid infrastructure and the development of new National Grid infrastructure to which Policies

D.2.17 (Natural character, ONLs and ONFs) and D.2.18 (Indigenous biodiversity) be provided for where specified measures are taken with regard to a specified order of preference.

- g. Policy D.2.11 which protects Regionally Significant Infrastructure from reverse sensitivity.

### **PRP-AV Indigenous biodiversity policies**

- 3. The PRP-AP includes protective objectives, including for indigenous ecosystems and biodiversity (Objective F.1.3) directing that, in the CMA, ecological integrity be safeguarded by:
  - a. Protecting areas of significant indigenous vegetation and significant habitats of indigenous fauna;
  - b. Maintaining regional indigenous biodiversity;
  - c. Where practicable, enhancing and restoring indigenous ecosystems and habitats to a healthy functioning state, and reducing the overall threat status of regionally and nationally Threatened or At Risk species; and
  - d. Preventing the introduction of new marine or freshwater pests into Northland and slowing the spread of established marine or freshwater pests within the region.
- 4. Objective F.1.3 is supported by Policy D.2.18 “Managing adverse effects on indigenous biodiversity” which directs that adverse effects of activities on indigenous biodiversity be managed by:
  - (1) In the coastal environment – avoiding adverse effects on specified matters, and avoiding significant adverse effects and avoiding, remedying and mitigating other adverse effects on specified matters;
  - (2) Outside the coastal environment - avoiding, remedying or mitigating adverse effects on specified matters so they are no more than minor;
  - (3) Recognising that areas of significant indigenous vegetation and significant habitats of indigenous fauna include Significant Ecological Areas, Significant Bird Areas, and Significant Marine Mammal and Seabird Areas;
  - (4) Recognising damage, disturbance or loss to specified matters as being potential adverse effects;

- (5) Assessing the potential adverse effects of activities on identified values of indigenous biodiversity by particular methods, including:
  - (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;
  - (b) Recognising that existing activities may be having existing acceptable effects;
  - (c) Recognising that minor or transitory effects may not be an adverse effect;
  - (d) Recognising that where effects may be irreversible, then they are likely to be more than minor;
  - (e) Recognising that there may be more than minor cumulative effects from minor or transitory effects
- (6) Recognising that appropriate methods of avoiding, remedying or mitigating adverse effects may include several listed matters;
- (7) Recognising that significant residual adverse effects on biodiversity values can be offset or compensated, in accordance with the Regional Policy Statement for Northland Policy 4.4.1, after consideration of the methods in (7) above;
- (8) Recognising the benefits of particular activities on biodiversity values.

### **Assessment**

5. In light of the above:
  - a. The “strong” directive policies above include:
    - For Regionally Significant Infrastructure – Policies D.5.8, D.2.7, D.2.8, D.2.10 and D.2.11.
    - For indigenous biodiversity – Policy D.2.18 (1) to (4), 5(a), (7) and (8).
  - b. The policies that are “weak” and less directive, include:
    - For Regionally Significant Infrastructure – D.5.9 and D.2.9.
    - For indigenous biodiversity – Policy D.2.18 (5)(b) – (e) and (6).
6. Policy D.2.9 sets out matters for consideration. It is not a “strong” directive enabling policy, but a “weak” directive policy, to which less weight must be afforded than the stronger directive policies. Policy D.2.18 must be given more weight.