

**BEFORE THE HEARINGS PANEL
AT WHANGĀREI**

IN THE MATTER OF the Resource Management Act 1991
AND
IN THE MATTER of submissions on applications by Northport Ltd – Port
Expansion project at Marsden Point

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY
INC
13 October 2023**

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. These submissions are presented on behalf of the Royal Forest & Bird Protection Society (**Forest & Bird**).
2. Forest & Bird opposes the grant of the consent on the grounds that it will result in the permanent and incontrovertible elimination of habitat for many coastal species – spanning megafauna (such as orca), coastal avifauna, herpetofauna (such as shore skinks) right down to invertebrate species and seagrass. It will result in adverse effects and potentially significant adverse effects on cultural, benthic, coastal process, natural character, landscape, recreational, and other indigenous biodiversity values.
3. The application, in its current form, is incompatible with the planning framework, including the New Zealand Coastal Policy Statement (**NZCPS**), National Policy Statement for Indigenous Biodiversity (**NPSIB**), the Northland Regional Policy Statement (**RPS**), the Proposed Regional Plan for Northland – Appeals Version (**PRP-AV**) and the Whangarei District Plan (**WDP**).
4. These submissions examine critical issues that concern Forest & Bird relating to the ecological attributes affected by the proposal.
5. The submissions do not address the legal context regarding the Treaty, and sections 6(e), 7(a) and 8, to be traversed by mana whenua, mana moana and mana takutai moana. Forest & Bird nevertheless acknowledge and tautoko the importance placed over these critical issues, which largely overlap with the biophysical attributes, subject of this hearing.

LEGAL CONTEXT

Bundling

6. A preliminary issue is identified in the Planning Joint Witness Statement as to the activity status for port activities on land once it is reclaimed and above mean high water springs.¹

¹ JWS Planning at [3.1].

7. Counsel has had the benefit of reviewing the legal submissions for the Director-General of Conservation dated 4 October 2023 addressing the matter,² and respectfully adopts and endorses those submissions. Counsel agrees the activities fall under the plain meaning of “industrial activity” under the Whangarei District Plan (**WDP**), triggering non-complying activity status, and that there are no valid reasons to deviate from the orthodox approach of bundling to the most restrictive activity status.
8. In any event, Counsel submits that consent should be declined, irrespective of whether the application is discretionary or non-complying.

Approach to reconciling competing policies

9. Section 104(1)(b) requires the Panel to have regard to the relevant provisions of the NZCPS, NPSIB, PRP, PRP-AV, and WDP. Consent decision under s 104 are “subject to Part 2.”
10. NZCPS Policy 9 “ports” and NZCPS Policy 11 “indigenous biological diversity”, inter alia, are engaged by the application. These policies were the subject of the Supreme Court decision in *Port Otago Limited v Environmental Defence Society Incorporated*³ (**Port Otago**). *Port Otago* addressed the methodology to interpreting higher order direction, specifically the interaction between the “ports” policy, and policies that direct avoidance of adverse effects (“avoidance policies”).
11. Saliently, the orthodox method to interpreting and reconciling competing policies confirmed by the Supreme Court’s decision in *King Salmon* remains unaffected by the *Port Otago* decision:
 - a. “The language in which the policies are expressed will nevertheless be significant, particularly in determining in how directive they will be”.⁴
 - b. “A policy might be expressed in such directive terms, for example, that a decision-maker has no choice but to follow it, assuming no other conflicting directive policy”.⁵

² Legal submissions on behalf of the Director-General of Conservation dated 4 October 2023 at [154]-[177].

³ [2023] NZSC 112.

⁴ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [61].

⁵ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [62].

- c. “Those policies expressed in more directive terms will have greater weight than those allowing more flexibility.”⁶

The concept of “material harm”

- 12. The Supreme Court considered the avoidance policies with reference to reasoning from *Trans-Tasman Resources v Taranaki-Wanganui Conservation Board*,⁷ observing the concept of “material harm” is applicable to the NZCPS avoidance policies.⁸
- 13. In *Trans-Tasman Resources*, the Supreme Court qualified the requirement in s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act to “protect the environment from pollution” by reading in a requirement to protect from “material harm.”
- 14. Contrary to the Applicant’s submission that it is “settled law” that “avoid” directives (including NZCPS Policy 11) can be met where effects are minor or transitory,⁹ the Supreme Court considered that when interpreting avoidance policies:¹⁰
 - a. the “standard was protection from material harm, albeit that **temporary harm can be material**” (emphasis);
 - b. “concepts of mitigation and remedy may serve to meet the ‘avoid’ standard by bringing the level of harm down so that material harm is avoided”.
- 15. Clearly, a “minor or transitory effect” falls within the realm of “temporary harm” and may result in material harm and thus fail to meet an “avoid” directive.
- 16. The problem with the applicant’s application of *King Salmon* and *Port Otago* is that it reads in qualifiers to NZCPS Policy 11 that are not there. NZCPS Policies 13 and 15 both refer to protecting from “inappropriate subdivision, use, and development” – wording that is not present in NZCPS Policy 11 – respectively reflecting their “roots” in section 6 (a), (b) and (c).¹¹

⁶ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [63].

⁷ *Trans-Tasman Resources v Taranaki-Wanganui Conservation Board* [2021] NZSC 127.

⁸ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [65].

⁹ Northport Opening at [6.37].

¹⁰ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [65].

¹¹ Section 6(a): “the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them **from inappropriate**

17. This is an appropriate legal and policy response, particularly where threatened and at-risk species are concerned. The High Court in *Clearwater Mussels Limited v Marlborough District Council* found that the Environment Court made no error of law when it interpreted NZCPS Policy 11(a) as meaning that “no risk, however infinitesimal, is tolerable in respect of a vulnerable or threatened species”.¹² The High Court found:¹³

[100] Given the gravity of consequences to the King Shag species if even one bird suffered adverse effects, the Environment Court was entitled to take the approach to protect an endangered species with a risk (albeit small) of annihilation of the species. A small risk of annihilation of an endangered species requires more rigorous protection of the bird.

18. In *Port Otago*, NZCPS Policy 11 was not examined by the Supreme Court in isolation, but rather, alongside NZCPS 13 (Natural character), 15 (Natural features and natural landscapes), and 16 (Surf breaks). In *King Salmon*, only Policies 13 and 15 were examined. Careful scrutiny of which particular NZCPS policies are engaged is therefore warranted.

19. The Supreme Court in *Port Otago* concluded that the relevant values and areas are critical in interpreting the avoidance policies:¹⁴

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

20. The requirement to identify the relevant values and areas therefore means that “material harm” cannot be interpreted in a vacuum and must be determined in relation to the values and areas in question. For example, whether values and areas are covered by Policy 11 (a) or (b) of the NZPCS.

21. It is also important to note the different statutory context the findings in *Trans-Tasman* were made, being under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

subdivision, use, and development:”; s 6(b): “the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;” s 6(c) “the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.”

¹² *Clearwater Mussels Limited v Marlborough District Council* [2019] NZHC 961 at [92].

¹³ *Clearwater Mussels Limited v Marlborough District Council* [2019] NZHC 961 at [100].

¹⁴ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [68].

22. The purpose Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 is not fleshed out in the same way as the RMA in terms of its hierarchy of planning documents including the NZCPS. Counsel submits that in the RMA context, these planning documents ultimately guide the suitable approaches as to what may amount to an adverse effect, protection from “material harm”, or otherwise.
23. This is entirely consistent with Supreme Court’s findings in *Trans-Tasman* [per Glazebrook J]:¹⁵

The standard used by the Court of Appeal, “material harm”, seems sensible as a bottom line. If the environment is materially harmed, then it cannot be said to have been protected from pollution. **On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm. What amounts to “material harm” and the period over which this is measured will be for the decision-maker to determine on the facts of each case. Of course, harm does not have to be permanent to be material. Temporary harm can be material.**

24. The NZCPS avoidance policies apply different thresholds depending on the value or area affected. These thresholds are central to determining whether material harm will occur. A minor but not significant adverse effect on a threatened or at-risk species may breach the clear and unambiguous words of Policy 11(a)(i) and amount to material harm. However, a more than minor but not significant adverse effect on a Policy 11(b) matter may not breach the policy and would not be a material harm.

Effect at the consent stage

25. The obvious distinction between cases such as *Port Otago* and *King Salmon* is their core focus was policy and plan development rather than a consenting scenario.
26. Forest & Bird’s position is that, when read in their statutory context (and having regard to the RMA’s purpose), consenting provisions under the RMA require that environmental bottom lines are upheld in consenting decisions.
27. The leading authority on interpreting objectives and policies in consenting decisions is *R J Davidson Family Trust v Marlborough District*, where the Court of Appeal observed that the NZCPS may contain environmental bottom lines to be upheld in consenting decisions:¹⁶

¹⁵ [2021] NZSC 127 at [252], agreed by Williams J at [292]-[293].

¹⁶ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [71].

Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS.

28. The Court of Appeal also observed that:¹⁷

If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) **should be to implement those policies in evaluating a resource consent application.**

29. The High Court in *Tauranga Environmental Protection Authority v Tauranga City Council* affirmed that the focus should be on text as opposed to an "overall judgement":¹⁸

... the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application. **This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgement".**

30. These issues are the core subject matter of the appeal to the Supreme Court on *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency*¹⁹ ("**East West Link**") – a decision which is currently reserved. Forest & Bird agrees with the High Court's finding in *East West Link*, that, in order to reach a conclusion as to whether a proposal is not contrary to the objectives and policies of the Auckland Unitary Plan (AUP) for the purposes of s104D(1)(b) requires relevant plan provision to be considered comprehensively and, where possible, appropriately reconciled.²⁰ This is the simple application of *King Salmon*. Forest & Bird says that the High Court erred in its interpretation and reconciliation of AUP provisions which was to provide for infrastructure that will have adverse effects which must, according to directive biodiversity policies, be avoided.²¹

¹⁷ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [74].

¹⁸ *Tauranga Environmental Protection Authority v Tauranga City Council* [2021] NZHC 1201 at [93].

¹⁹ *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 309.

²⁰ *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 309 at [30].

²¹ *Royal Forest & Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 309 at [43].

31. Until a decision is issued, Forest & Bird maintains that the proper approach is to carefully interpret the meaning and text of relevant policies and apply them to consent applications, in accordance with *RJ Davidson and Tauranga*.
32. Section 104D(1)(b), at issue in *East West Link*, must be interpreted such that a non-complying activity is contrary to the objectives and policies of the plan if it would contravene a directive avoidance policy.
33. Similarly, it cannot be the case that a consent authority can properly have had regard to a plan for the purposes of sections 104 if the consent authority grants a consent for an activity that will have effects that contravene a directive avoidance policy in the NZCPS. These are environmental bottom lines. Further, consent decisions under sections 104 are “subject to part 2”. The NZCPS is the embodiment of part 2 of the RMA in the coastal environment.²²
34. Counsel submits that this means that the avoidance policies of the NZCPS have significant prescriptive effect on activities within the coastal environment. Their exact application depends on a factual assessment of what the effects of activities will be. The avoidance policies provide a graduated level of protection depending on the level of protection given to a particular area. The adverse effects to be avoided are not any adverse effects, but those which affect the protected qualities.
35. While the Supreme Court in *Port Otago* has confirmed that NZCPS Policy 9 (ports) is of a directive character, counsel submits that:
 - a. the applicant in this case still has not addressed the directive policies in the higher order objectives and policies to the extent that the authorities traversed above state are necessary.
 - b. The Panel and submitters are faced with a combination of inadequate information and uncertainties around the level of potential risks and the level of ensuing environmental effects. The Panel cannot have confidence that the proposal conforms with the higher order direction. Too many information gaps remain.

²² *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [85].

- c. The multitude environmental bottom lines breached by the proposal overwhelm NZCPS Policy 9.

HIGHER ORDER POLICY SETTINGS THAT FRAME THE LEGAL AND PLANNING APPROACH

New Zealand Coastal Policy Statement

36. The proposal engages, and offends against, a raft of directive NZCPS provisions. Of particular concern to Forest & Bird are NZCPS Policies 3, 10, 11, 25, and 26 (and their counterpart provisions in lower order documents).

Ports

37. In its consideration of “port” versus “avoidance policies,” the Supreme Court provided guidance conflict between these policies, noting a decision-maker would have to be satisfied:²³
 - (a) The project is required to ensure the safe and efficient operation of the ports in question (and not merely desirable);
 - (b) Assuming the project is required, all options to deal with the safety or efficiency needs of the ports have been considered and evaluated. Where possible, the option chosen should be one that will not breach the relevant avoidance policies. Whether the avoidance policies will be breached must be considered in light of the discussion above on what is meant by “avoidance”; including whether conditions can be imposed that avoid material harm; and
 - (c) If a breach of the avoidance policies cannot be averted, any conflict between the policies has been kept as narrow as possible so that any breach of the avoidance policies is only to the extent required to provide for the safe and efficient operation of the ports.
38. “Where possible” is a high standard to satisfy.
39. The terms “where possible” were examined by the High court in *Tauranga Environmental Protection Society Inc v Tauranga City Council*.²⁴ In discussing the assessment of “practicable, practical and possible”, the High Court considered that the costs are relevant to consideration of “practicability or practicality”, noting that:²⁵

it is always difficult to put a price a culture, which is what is implied in a finding that the cost of an alternative is “too” high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not the applicant.

²³ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [76].

²⁴ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

²⁵ [2021] NZHC 1201 at [147].

40. In determining whether it was “possible” to avoid adverse effects (in this case on values and attributes of the Outstanding Natural Features and Landscape) the High Court found that cost would not come within the analysis – as the plain meaning of “possible” suggests that if an alternative is technically feasible it is possible “whatever the cost”.²⁶
41. In *Port Otago* the Supreme Court also cautioned that:
- a. “even where the decision-maker is satisfied of the above, this does not mean that a resource consent will necessarily be granted.”²⁷
 - b. “The appropriate balance between the avoidance policies and the ports policy must depend on the particular circumstances, considered against the values inherent in the various policies and objectives in the NZCPS (and any other relevant plans or statements).”²⁸
 - c. Decision-makers must also “identify the importance and rarity of the environmental values at issue in the particular circumstances and consider these against the background of the NZCPS’s recognition of the intrinsic worth of the protected environmental values.”²⁹
 - d. The structured analysis is not the same as the overall judgement approach rejected by the Supreme Court in *King Salmon*.³⁰
42. Contrary to this, shortcomings remain in the applicant’s assessment of the wide array of environmental values at stake.
43. Counsel submits that in the circumstances of this case, the applicant has not exhausted all options to satisfy that relevant directive policies will not be breached.
44. Conflict between policies has not been “kept as narrow as possible so that any breach of the avoidance policies is only to the extent required to provide for the safe and efficient operation of the ports” (per *Port Otago*).

²⁶ [2021] NZHC 1201 at [149].

²⁷ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [77].

²⁸ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [78].

²⁹ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [79].

³⁰ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [81].

45. Counsel agrees with the legal analysis undertaken by counsel for the Director-General of Conservation on the PRP-AV's provisions pertaining to Regionally Significant Infrastructure development in the Marsden Point Port Zone and how they are to be reconciled with strong directive protection policies.³¹
46. Notably, the PRP-AV does not “enable” port expansion beyond the bounds of directive provisions (for example, D.2.18 “Managing adverse effects on indigenous biodiversity”). The direction to “enable” is restricted to situations of:
- a. Establishment and operation where the effects are “no more than minor” (D.2.7);
 - b. Upgrading and maintenance, where there are no significant effects and the effects are the same before the upgrading or maintenance were completed (D.2.8).
47. Strong and directive “enabling” policy is reserved for the National Grid under D.2.10 to “enable the reasonable operation, maintenance and minor upgrading of existing National Grid infrastructure”. Upgrading of existing National Grid may be “provided for” where a series of bespoke steps are met to ensure minimal compromise of natural character and indigenous biodiversity values. However, the application at hand is not afforded similar policy direction as “regionally significant infrastructure”, where D.2.9 lists matters that a decision maker only has to “have regard to and give appropriate weight to” when considering the appropriateness of a regionally significant infrastructure activity.

Reclamation and de-clamation

48. NZCPS Policy 10(1)(a) directs “avoid reclamation of land in the coastal marine area, unless land outside the coastal marine area is not available for the proposed activity.”

49. This is simply reflected in PRP-AV D.5.20:

Reclamation of land in the coastal marine area shall be avoided unless all the following criteria are met:

- 1) land outside the coastal marine area is not available for the proposed activity;**
- 2) the activity which requires the reclamation can only occur in or adjacent to the coastal marine area;
- 3) there are no practicable alternative methods of providing the activity; and

³¹ Legal submissions on behalf of the Director-General of Conservation dated 4 October 2023 [129]-[136].

4) the reclamation will provide significant regional or national benefit

50. The evidence does not establish that land outside the coastal marine area is strictly unavailable. The planning evidence of Ms Dalton for PTB identifies:³²

The land-based option assessed was not accompanied by any concept designs or provide analysis of this option in combination with consent Berth 4. The report also appears to reference third-party ownership as a constraint despite much of the surrounding land being undeveloped and not accounting for the closure of the refinery activities. Given the lack of analysis and concept layouts for land-based options, in my opinion, the Applicant does not demonstrate that land outside of the coastal marine area is not available.

51. There is no weighting matrix collectively evaluating and scoring advantages (including ecological) and disadvantages of each site.
52. The applicant's alternatives assessment acknowledges the "underdeveloped" commercial, industrial and port zoned land in the Marsden Point area (southward land-based expansion). The applicant appears to dismiss it as an option as:³³

This land, while owned by third parties, may be beneficial to Northport in that it provides capacity for support facilities such as warehousing, log scaling and handling, and other port-related activities which do not need to be adjacent to a wharf.

53. The assessments do not weigh the benefits of land-based expansion in their alternatives assessment exercise. Accordingly, the Panel cannot have confidence that the proposal is consistent with NZCPS Policy 10.

Indigenous biodiversity

54. NZCPS Objective 1 is to "safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land."
55. Related to this is, NZPCS Policy 11 is to:
- (a) Avoid adverse effects on items specifically listed in Policy 11(a):
 - (b) Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects on items specifically listed in Policy 11(b).

³² Dalton EIC at [7.19].

³³ AEE Appendix 2 "Issues and Options report" at 9.2.3.3.

56. Policy 11(a) of the NZCPS “covers the highest biodiversity values over defined areas”.³⁴ It provides that the appropriate management response is the avoidance of adverse effects of activities on those taxa, ecosystems, vegetation types, habitats, and areas.
57. Key Policy 11(a) directives engaged by the proposal include, but are not limited to:
- a. Policy 11(a)(i): “indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists.”
 - b. 11(a)(vi): “areas set aside for full or partial protection of indigenous biological diversity under other legislation”.
58. Importantly, the NZCPS makes no express provision for offset and compensation.
59. Policy 11(a) is reflected in the PRP-AV Policy D.2.18(1) as follows:
- 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
60. For marine mammals, the Policy 11(a) imperative in Northland includes D.5.27(3):
- D.5.27 Underwater noise
- Activities causing underwater noise (such as blasting, vibratory piling and drilling, construction, demolition and marine seismic surveying) must:
- 1) adopt the best practicable option to manage noise so that it does not exceed a reasonable level, and
 - 2) in the case of marine seismic surveying, demonstrate compliance with Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Surveying Operations (Department of Conservation, 2013), and
 - 3) avoid adverse effects on marine mammals listed as Threatened or At Risk in the New Zealand Threat Classification System, and**
 - 4) avoid, remedy or mitigate other adverse effects on marine mammals, having regard to the location and duration of the proposed activity and the benefits of activities:
 - a) to be undertaken in association with scientific research and analysis, or

³⁴ *CEP Services Matauwhi Ltd v Northland Regional Council* [2020] NZEnvC 039 at [54].

- b) involving the maintenance or enhancement of navigational safety in permanently navigable harbour waters, or
- c) to be undertaken in association with the operation, maintenance and protection of regionally significant infrastructure, or
- d) that mitigate natural hazards.

61. Above mean-high water springs, where the Whangarei District Plan applies to indigenous biodiversity³⁵, the direction is:

CE-P4 Biodiversity within Significant Natural Areas

To avoid adverse effects of subdivision, use and development on:

1. Indigenous taxa that are listed as threatened or at risk in the NZ Threat classification system lists;
2. The ecological values and attributes of areas of indigenous vegetation and habitats of indigenous fauna that are significant using the assessment criteria in Appendix 5 of the Northland Regional Policy Statement 2016; and
3. The ecological values and attributes of areas set aside for full or partial protection of indigenous biodiversity under other legislation;

62. It is submitted that if any adverse impact is treated as able to be offset or compensated for as the primary goal, rather than avoided, the outcome could be the loss and decline of biodiversity, including of threatened species or ecosystems. This would not achieve “protection of indigenous biodiversity in the coastal environment” as outlined in NZCPS Policy 11 (or its counterpart policies in lower order instruments).

63. This is reflected in the Northland RPS:

- a. The provisions in the Northland Regional Policy Statement follow the hierarchy of protection provided in Policy 11. Policy 4.4.1 (1) requires that adverse effects on threatened and at risk species, indigenous vegetation and habitats of indigenous fauna that meet the assessment criteria in Appendix 5, are avoided.
- b. Policy 4.4.1 (2) 5 requires that significant adverse effects are avoided and that other adverse effects are avoided, remedied or mitigated, including in areas of predominantly indigenous vegetation and indigenous ecosystems and habitats that are particularly vulnerable to modification.

³⁵ Northland RPS, section 1.6 Statement of the regional and district council responsibilities. District Councils are responsible for specifying objectives, policies, methods on indigenous biological diversity for all other land and surface water in lakes and rivers.

- c. Policy 4.4.1 (5) of the RPS provides for the ability, if appropriate, to consider the next steps in the mitigation hierarchy 1, i.e. offsetting followed by compensation. The policy requires that effects must be avoided, remedied or mitigated first before offsetting is considered.
- d. RPS policy 4.4.1(5) is clear that it does not allow for offsetting or compensation to be considered in areas that meet RPS Policy 4.4.1(1). The policy framework in the RPS requires avoidance of adverse effects in the most significant areas of indigenous biodiversity in the coastal environment that meets Policy 4.4.1 (1) - thereby giving effect to NZCPS Policy 11(a).

64. These RPS imperatives are reflected in the Policy D.2.18(6) and (7) of the PRP-AV:

6) recognising that appropriate methods of avoiding, remedying or mitigating adverse effects may include:

- a) careful design, scale and location proposed in relation to areas of indigenous biodiversity, and
- b) maintaining and enhancing connections within and between areas of indigenous biodiversity, and
- c) considering the minimisation of effects during sensitive times such as indigenous freshwater fish spawning and migration periods, and
- d) providing adequate setbacks, screening or buffers where there is the likelihood of damage and disturbance to areas of indigenous biodiversity from adjacent use and development, and
- e) maintaining the continuity of natural processes and systems contributing to the integrity of ecological areas, and f) the development of ecological management and restoration plans, and

7) recognising that significant residual adverse effects on biodiversity values can be offset or compensated:

- a) in accordance with the Regional Policy Statement for Northland Policy 4.4.1, and
- b) after consideration of the methods in (6) above, and

65. Similarly, the Whangarei District Plan also cross-references 4.4.1 of the Northland RPS:

CE-O12 Indigenous Biodiversity

Identify and protect the values and attributes of indigenous biodiversity within the Coastal Environment in accordance with Policy 4.4.1(1) of the Northland Regional Policy Statement 2016 ("Significant Natural Areas").

66. Contrary to these directions, the Applicant has not demonstrated that actual and potential adverse effects (or “material harm”) on Policy 11(a) values will be avoided. Some examples follow.

Dunelands

67. The Panel cannot be satisfied that adverse effects on dunelands, and their threatened or at-risk inhabitants, will be avoided. Gaps remain in the assessment of the values and potential and actual effects of 2 hectares of earthworks of land which is ascribed reserve status under the Reserves Act 1977, the WDC Esplanade Reserve, a portion of which is remnant duneland:³⁶
- a. The applicant’s terrestrial ecologist has only undertaken an assessment of effects on vegetation and flora. No commensurate assessment of fauna habitat values has been undertaken.³⁷
 - b. The evidence of Ms Chetham for PTB observes that no surveys for species such as shore skinks and Katipo spiders were undertaken, and that PTB’s Pou Taiao unit were involved in dune surveys with NRC and found these species in the wider Te Akau/Bream Bay.³⁸
68. Duneland inhabitants such as ornate skink and shore skink (both at risk – declining)³⁹ and Katipo spider (at risk – declining)⁴⁰ are afforded the highest level of protection under NZCPS Policy 11 (and PRP-AV D.2.18(1)(a), WDP CEO-12). Despite this, the applicant has not demonstrated how adverse effects on them will be avoided.
69. Counsel submits that the conglomerate approach promoted by some Northport witnesses, whereby offset and compensation measures are either relied on or conflated with avoidance measures, does not follow directive policy and is misleading.

³⁶ Webb and Huang, Technical memo – Terrestrial ecology at page 2.

³⁷ Dr Flynn EIC at [1.6].

³⁸ Ms Chetham at [3.16].

³⁹ Dr Flynn EIC at [7.13].

⁴⁰ NZ Threat Classification Series “Conservation status of New Zealand Araneae (spiders)” 2020 at page 16

70. Rather than applying NZCPS direction, the applicant’s ecologist relies on provisions of the NPSIB⁴¹ to suggest compensation measures appropriate, for example via funding towards a community organisation to undertake dune restoration elsewhere in the Waipu Ecological District.⁴² This is not the same as avoiding adverse effects on species occupying the dunelands, including pīngao, and the unassessed fauna.
71. The NPSIB applies in the terrestrial environment throughout Aotearoa New Zealand,⁴³ including land and associated natural resources above mean high-water springs,⁴⁴ and therefore outside the coastal marine area.⁴⁵
72. Both the NPSIB and NZCPS apply in the terrestrial coastal environment, however in the event of conflict between the NPSIB and NZCPS, the NZCPS prevails.⁴⁶
73. While the remnant dune habitat occurs outside the coastal marine area, it occurs within the coastal environment as mapped in the Northland RPS. Accordingly, NZCPS Policy 11 applies and prevails over the NPSIB provisions that provide for a lower standard of protection. This also aligns with Northland RPS Policy 4.4.1 outlined above and is appropriate given the threat status of the potentially affected coastal taxa.
74. Any offsetting or compensation that gives rise to adverse effects is inappropriate. Compensation involves a risk of management failure and consequently irreversible loss of such taxa.
75. In terms of lizards, the applicant’s ecologist considers that “a lizard survey (and any subsequent responses) can be completed prior to construction, as part of a Construction Environment Management Plan.”⁴⁷ This would effectively leave critical decision-making on actions to address adverse effects to after any grant of

⁴¹ Dr Flynn EIC at [10.14].

⁴² Dr Flynn EIC at [4.6].

⁴³ NPSIB 1.3(1).

⁴⁴ NPSIB 1.6.

⁴⁵ RMA, section 2: **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water— (a) of which the seaward boundary is the outer limits of the territorial sea: (b) of which the landward boundary is the line of mean high water springs.

⁴⁶ NPSIB 1.4(2).

⁴⁷ Dr Flynn EIC at 7.15.

consent. The Supreme Court in *Trans-Tasman* has found such an approach unacceptable (per Justice Glazebrook):⁴⁸

[277] In my view, there is also force in the Royal Forest and Bird Protection Society of New Zealand Inc's submissions about conditions in this case meaning there was a deprivation of participation rights, as the Court of Appeal found. Participation is only meaningful on the basis of sufficient information, including as the possible effects of the conditions. That information was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.

76. In a similar vein, Justice Williams found:⁴⁹

TTR's management plans did not contain clear parameters at all; rather, their first purpose would be to set the parameters. This allowed the applicant to postpone this task to a post consent administrative phase. The Court of Appeal was right that this deprived submitters of the ability to engage at the hearing with what was plainly a fundamental aspect of the application.

77. The approach of leaving final decisions on lizard management to consent conditions would be deferring to Northport a decision-making role in ensuring the actions effectively meet the high standards imposed NZCPS. Essentially, this takes important matters engaging national policy direction from a public process into the hands of a private entity. It also deprives the panel and other submitters the ability to engage at the hearing with a matter that is "plainly a fundamental aspect of the application" (per *Trans-Tasman*).⁵⁰

Avifauna

78. The legal submissions for the Director-General of conservation have undertaken a comprehensive assessment of the applicant's proposed measures to address avifauna effects against the objectives and policies of the PRP-AV and other relevant planning instruments. Counsel adopts and endorses those parts of the submissions for the Director-General.⁵¹

79. Offset measures, such as that proposed through the creation of a sandbank, are not an appropriate response. It does not avoid adverse effects of the proposal in accordance with NZCPS Policy 11(a).

⁴⁸ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [277].

⁴⁹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [295].

⁵⁰ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [295].

⁵¹ Legal submissions on behalf of the Director-General of Conservation at [115]-[152].

80. Perversely, as set out in the evidence of Dr Beauchamp, the sandbank may generate further adverse effects on other species (i.e. the lesser knot) by removing their habitat.⁵²
81. The applicant's approach to avifauna is like that taken with coastal herpetofauna and dune ecosystems – bypassing “avoid, remedy, mitigate” straight to offset and compensation.
82. The High Court in *Royal Forest and Bird Protection Society Inc v Buller District Council*⁵³ makes it clear that mitigation does not include habitat enhancement outside the area where the habitat is being destroyed:

[72] I am of the view that counsel for Forest and Bird are correct, that such offsets do not directly mitigate any adverse effects of the activities coming with the resource consents on the environment. This latter proposition is best understood in context. So, **for example, if open cast mining will destroy the habitat of an important species of snails, an adverse effect, it cannot be said logically that enhancing the habitat of snails elsewhere in the environment mitigates that adverse effect, unless possibly the population that was in the environment that is being destroyed was lifted and placed in the new environment.** Merely to say that the positive benefit offered relates to the values affected by an adverse effect is, in my view, applying mitigating outside the normal usage of that term. And the normal usage would appear to apply when reading s 5(2). **The usual meaning of "mitigate" is to alleviate, or to abate, or to moderate the severity of something. Offsets do not do that. Rather, they offer a positive new effect, one which did not exist before.**

83. The proposed sand bank does not avoid, remedy, or mitigate adverse effects of the reclamation.⁵⁴
- a. Council's avifauna expert, Ms Webb, observed that the creation of high-tide roost area in proximity to the impact site is an appropriate offset in principle, but may not result in the long-term benefits to shorebirds.
- b. Dr Beauchamp's evidence is that there is no certainty that any of the displaced New Zealand dotterels and variable oyster catchers will use it as a roost.⁵⁵

⁵² Dr Beauchamp EIC at [26], [65]-[66].

⁵³ [2013] NZHC 1346.

⁵⁴ S42A, Appendix C4, at page 10.

⁵⁵ Dr Beauchamp EIC at [26].

Areas protected under other legislation

84. The evidence of Dr Bulmer, PTB's marine ecologist, explains:⁵⁶
- a. That the applicant's consultants have assessed the potential impacts of the proposed port developments on the direct impacts of dredging and reclamation on ecological communities within the development footprint.
 - b. The assessment "does not include a thorough assessment of the potential cumulative impacts of the development on the wider harbour, such as assessing how interactions with sea level rise, sedimentation, and ecological connectivity may impact marine ecology."
85. The wider harbour includes the Whangarei Harbour Marine Reserve, across the channel from Northport, which has been in place since 2006.⁵⁷ While an assessment of effects on coastal processes and recreational values on the Marine Reserve have been provided,⁵⁸ there does not appear to be any assessment of the potential adverse effects on biodiversity values by the applicant including on the impacts of increased vessel movement on biosecurity and noise effects on marine fauna.
86. Another portion of the wider harbour (shown below) is subject to a rāhui, or "temporary closure" under section 186A of the Fisheries Act⁵⁹ prohibiting the take of shellfish.⁶⁰ While the closure expires the close of 28 June 2024, it is noted the rāhui under the Fisheries Act has been in place (via reapplication) since at least 2014.⁶¹ This area comes within the ambit of "areas set aside for full or partial protection of indigenous biological diversity under other legislation" per Policy 11(a).

⁵⁶ Dr Bulmer EIC at [1.2].

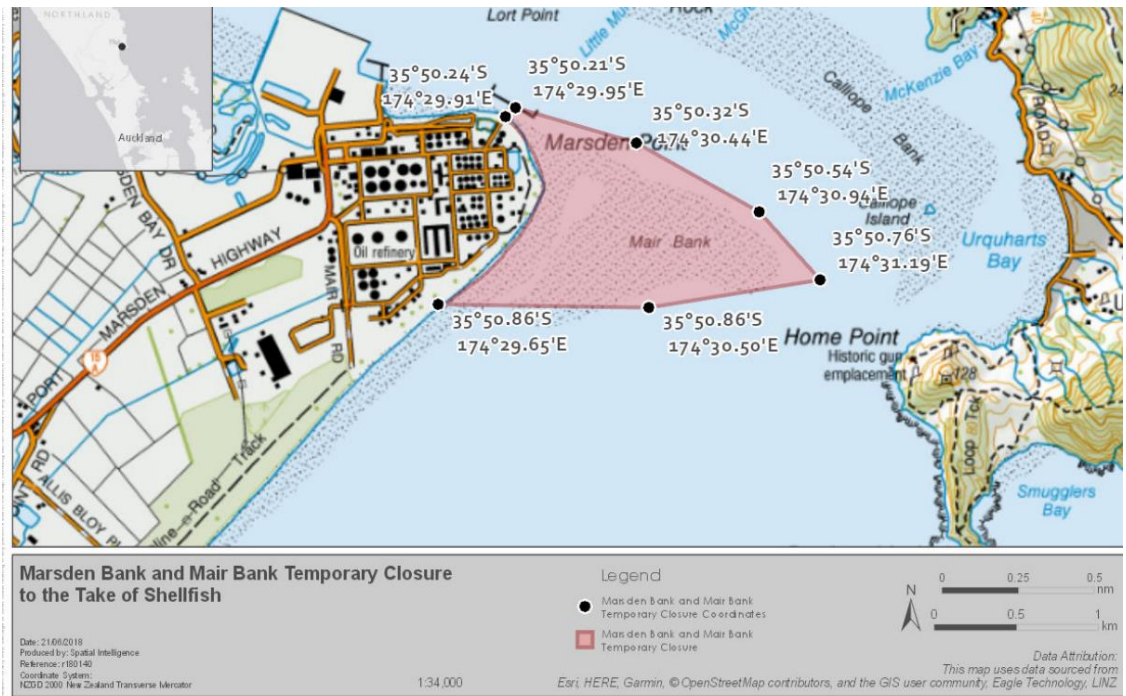
⁵⁷ Marine Reserve (Whangarei Harbour) Order 2006.

⁵⁸ Greenaway EIC at

⁵⁹ Fisheries (Marsden Bank and Mair Bank Temporary Closure) Notice 2022 (notice No. MPI1498).

⁶⁰ Fisheries (Marsden Bank and Mair Bank Temporary Closure) Notice 2022 (notice No. MPI1498), per clause 4.2 "shellfish" defined as "all species of the *phylum Echinodermata* and *phylum Mollusca* and all species of the class *Crustacea* at any stage of their life history, whether living or dead."

⁶¹ Fisheries (Marsden Bank and Mair Bank, Closure of Pipi Fishery) Notice.



87. Council’s marine ecologist, Dr Lohrer, explains that effects on kaimoana shellfish will be at least “moderate” due to:⁶²
- Disruption of sediment and propagule transport pathways that likely support kaimoana shellfish populations on sand banks including Mair/Marsden bank; and
 - Elevated suspended sediment concentrations and deposition rates from dredging activities that will have deleterious effects on suspension-feeding kaimoana shellfish.
88. Notwithstanding this, the applicant has not demonstrated how adverse effects on both the Marsden Bank and Mair Bank Temporary Closure will be avoided.
89. There are no conditions setting any thresholds that trigger remedial actions before adverse effects occur.
90. The proposed conditions suggest a clause providing:⁶³

The last monitoring report covering the period 3-years after dredging is completed in accordance with Conditions 165 and 171, shall consider and assess whether the observed ecological effects of dredging are within the bounds of those anticipated

⁶² Section 42A, Appendix C3, at page 14.

⁶³ Hood Rebuttal, attachment 2 NRC conditions, condition 173.

in the report titled Northport expansion project: Assessment of marine ecological effects lodged in support of this consent. If the observed effects exceed those anticipated, the Consent holder shall engage a suitably qualified and experienced person to assess whether benthic habitats and communities are recovering, but at a lower than anticipated rate.

91. The proposed conditions are only geared toward remediation. There is nothing requiring trigger points to be measured (and assess adverse effects before they occur) at Marsden Bank and Mair Bank, and the Whangarei Harbour Marine Reserve.
92. The applicant's approach is to allow for direct adverse effects to occur during the life of the consent and potentially become irreversible. This offends against clear policy direction throughout the planning hierarchy traversed above.
93. The WDC Esplanade Reserve also comes within scope of NZCPS Policy 11(a)(vi), as a reserve under the Reserves Act 1977. However, as discussed earlier in these submissions, the applicant has skipped any avoidance measures and jumped straight to proposing inadequate compensatory measures.

Coastal hazards and climate change

94. NZCPS Objective 5 is to ensure that coastal hazard risks, taking account of climate change, are managed by:
 - locating new development away from areas prone to such risks;
 - considering responses, including managed retreat, for existing development in this situation; and
 - protecting or restoring natural defences to coastal hazards.
95. The NZCPS sets out a series of policies to give effect to this objective.⁶⁴
96. For Forest & Bird, most relevant is Policy 25, which provides:

Policy 25

In areas potentially affected by coastal hazards over at least the next 100 years:

- a. avoid increasing the risk of social, environmental and economic harm from coastal hazards;
- b. avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;
- c. encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme

⁶⁴ NZCPS Policies 24, 25, 26, 27.

- circumstances, and designing for relocatability or recoverability from hazard events;
- d. encourage the location of infrastructure away from areas of hazard risk where practicable;
- e. discourage hard protection structures and promote the use of alternatives to them, including natural defences; and
- f. consider the potential effects of tsunami and how to avoid or mitigate them.

97. Counsel submits the proposal offends against Policy 25, particularly clauses (a) to (c).

25(a) avoid increasing the risk of social, environmental and economic harm from coastal hazards

98. Policy 25(a) is directive and unqualified, directing decision-makers to avoid increasing the harm from coastal hazards. The policy is broad in that it refers to “social, environmental, and economic harm” recognising that social and environmental adverse effects can result from coastal hazards and coastal hazard responses. Nonetheless, the proposal fails to implement this requirement.

99. There is uncertainty as to the level of harm from sea level rise that may be exacerbated by the proposal.

100. For the Applicant, Mr Reinen-Hamill contends the proposal will result in some localised changes to coastal processes, including small areas of sedimentation and accretion, but that “those effects are relatively minor and will not affect the integrity, functioning or resilience of the coastal environment.”⁶⁵

101. Professor Bryan for Patuharakeke Te Iwi Trust Board observes that:⁶⁶

There is no modelling provided on the effects to the upper reaches of the harbour, or to understand changes that might be caused by predicted sea level rise (although the coastal processes report does highlight that sea level rise might be important in this estuary). The modelling is entirely focused on the immediate entrance area.

102. In his rebuttal, Mr Reinen-Hamill acknowledges the uncertainty:⁶⁷

the effects of sea level rise on tidal inlets is very complex and still very much an area of new research. In my opinion modelling would require significant assumptions to be made that could also be challenged and could still be considered an academic exercise.

⁶⁵ Mr Reinen-Hamill EIC at [59](a).

⁶⁶ Professor Bryan EIC at [4.5].

⁶⁷ Reinen-Hamill rebuttal at [7].

103. There is no certainty that harm from coastal hazards will be avoided by the proposal. At best, Mr Reinin-Hamill contends that the effect of the proposal should be minor and that sedimentation rates to the east of the port:⁶⁸

As there is no significant change of the inlet cross section due to the combination of reclamation and dredging, I consider the relative effect of the proposal on sea level rise should also be minor; with the exception of the likely trend of a change in the tidal inlet from ebb dominated to flood dominated conditions which could locally increase the rate of sedimentation to the east of the port due to the presence of the reclamation.

104. Policy 25(a) makes no distinction as to scale of social, environmental and economic harm from coastal hazards. Whether it be minor, moderate or significant, the direction is to avoid *increasing the risk* of harm. Counsel accordingly submits that this policy is not implemented by the proposal.

25(b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards

105. Similarly, NZCPS policy 25(b) is unqualified and employs directive language. Notwithstanding this, in light of the discussion above, the panel cannot have confidence that the proposal does not increase the risk of adverse effects from coastal hazards.

25(c) encourage redevelopment, or change in land use, where that would reduce the risks of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structure or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events

106. Policy 25(c) recognises that in some situations the managed retreat/relocation of assets will be the best approach. Guidance on NZCPS hazards policies acknowledges that “managed retreat can include measures such as the creation of new allotments inland where assets can be relocated to (or re-development can be located)”.⁶⁹

107. NZCPS Policy 10 (reclamation) is also relevant to the consideration of this policy. As discussed earlier, the panel cannot be confident that the applicant has

⁶⁸ Reinin-Hamill rebuttal at [8].

⁶⁹ NZCPS 2010 guidance note “Coastal hazards: Objective 5 and Policies 24, 25, 26 & 27” at page 50.

comprehensively considered land-based alternatives, it is even more doubtful that NZCPS Policy 25(c) has even been considered by the applicant.

108. Also relevant is NZCPS Policy 26 “Natural defences against coastal hazards” – which links closely to Policy 25. Policy 26 elucidates what is anticipated by “natural defences” and directs:

(1) Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards.

(2) Recognise that such natural defences include beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands.

109. Dunes do not only supply a habitat value as discussed earlier in these submissions, but are also important as a natural defences against coastal hazards. Policy 26 requires decision-makers to recognise this. However, rather than look at ways to protect existing natural defences, the applicant seeks to remove them.

110. Above mean high water springs, where district councils are responsible for hazards,⁷⁰ the NZCPS hazards policies cascade down to the Whangarei District Plan as follows:

CE-O7 Coastal Hazards

Avoid increasing the risk of social, environmental, and economic harm from coastal hazards.

CE-O8 Natural Defences

Protect and enhance natural defences against coastal hazards.

CE-P18 Earthworks in Sand Dunes

To avoid earthworks in sand dunes where this will diminish their ability to protect development from coastal hazards.

CE-P19 Protecting Indigenous Vegetation

To protect indigenous vegetation which contributes to either the character and visual quality of the Coastal Environment or protects against natural hazards.

111. Concerningly, these provisions do not appear to have been assessed by the applicant. The s42A Report acknowledges gaps in this assessment:⁷¹

The permanent removal of 7,200m² of foredune system is not assessed within the Applicant’ policy analysis. In the absence of specialist policy opinion, this component of the proposal does not sit comfortably with the direction to avoid earthworks (and presumably the permanent removal of) sand dunes and to protect indigenous vegetation that contributes to the character or visual quality of the

⁷⁰ Northland RPS, section 1.6.

⁷¹ S 42A Report at page 101.

coastal environs. This aside, I acknowledge that the removal of dune systems is not raised by either the Applicant's nor Council's coastal process or landscape specialists and being of notable concern in this instance and that conditions are proposed to manage potential risks of coastal hazards.

112. Contrary to the clear direction in the WDP to "avoid increasing the risk of social, environmental, and economic harm from coastal hazards" the planning evidence of Mr Hood for Northport states: "the effects of coastal hazards have been carefully considered by Mr Reinen-Hamill, including tsunami, and the expanded port can be designed to minimise risk to the extent practicable."

113. The terms "sand dunes", "dune system" or "earthworks" are not mentioned once in the primary evidence of Mr Reinen-Hamill.

114. Reflecting direction in NZCPS 25 and 26, the WDP hazards policy language is direct and unequivocal. Despite this, the application material lacks any analysis on the effects of removing dune systems, such that the Panel cannot be satisfied these policies have been met.

Precautionary approach

115. Closely related to NZCPS Policy 11 and the coastal hazards provisions is Policy 3, which requires decision-makers to:

- 1) Adopt a precautionary approach towards proposed activities whose effect on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
- 2) In particular, adopt a precautionary approach use and management of coastal resources potentially vulnerable to effects from climate change, so that:
 - (a) Avoidable social and economic loss and harm to communities does not occur;
 - (b) Natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
 - (c) The natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

116. In the Northland context, and in giving effect to the NZCPS, the PRP-AV explicitly requires (per D.2.20):

That decision makers adopt a precautionary approach where the adverse effects of proposed activities are uncertain, unknown or little understood, on:

- 1) indigenous biodiversity, including significant ecological areas, significant bird areas and other areas that are assessed as significant under the criteria in Appendix 5 of the Regional Policy Statement; and
- 2) the coastal environment where the adverse effects are potentially significantly adverse, particularly in relation to coastal resources vulnerable to the effects of climate change.

117. It is evident that these policies are engaged, as:

- a. the entire reclamation footprint is located within the Significant Marine Mammal and Seabird Area, an area of the proposed dredging footprint is located within the Significant Bird Area, and the proposed high-tide bird roost will be located within Significant Ecological Area;
- b. the area is vulnerable to the effects of climate change.⁷²
- c. Gaps, uncertainties, and unknowns remain in the potential adverse effects generated by the proposal.

118. Counsel submits that a properly precautionary approach has not been adopted.

119. The issue is particularly pronounced with respect to avifauna, where significant unknowns remain:

- a. On the direct permanent loss of habitat, Dr Beauchamp's evidence is that there is a lack of information demonstrating how important the site is to lesser knots, and a lack of current knowledge about other foraging sites used by lesser knots in the harbour. Without this information, it is not possible to quantify the potential effect of the loss of foraging habitat.⁷³
- b. On the proposed roost site, he says that there are no assessments of the impacts of both the placement of the roost site, its ongoing erosion on the habitats present (pools) at low tide and invertebrate density changes. The region of impact could be wider than the roost footprint.⁷⁴
- c. The importance of the area to lesser knots is unknown, and recent counts of the species has indicated their decline in the Whangarei Harbour to now only 450-500 (compared to 3,000 15 years ago) – the cause of which is unknown.⁷⁵

120. Dr Beauchamp's conclusion is that the effects of the application will be significant.⁷⁶

⁷² Lohrer, Section 42A, Appendix C3 at page 13; Professor Bryan EIC at [4.5]; Reinen-Hamill rebuttal at [7].

⁷³ Dr Beauchamp EIC at [49].

⁷⁴ Dr Beauchamp EIC at [65].

⁷⁵ Dr Beauchamp EIC at [66].

⁷⁶ Dr Beauchamp EIC at [107].

121. Similarly with marine mammals, Dr Brough, marine ecologist for PTB also highlights inadequacies and uncertainties associated with the applicant's evidence:

- a. Data and information sources used are not sufficiently robust to determine the importance of Whangarei Harbour or Bream Bay to marine mammals, and it is not possible to draw robust conclusions on the severity of impacts.⁷⁷
- b. There is an omission of the potential effects of increased shipping on marine mammals in terms of noise pollution and a significant lack of detail on the forecast in shipping traffic due to the increase in Northport's capacity.⁷⁸ In her rebuttal, Dr Clements states she is "unaware of any attempts to quantify or forecast what changes in shipping traffic between ports are expected."⁷⁹

122. The application is also lacking with respect coastal hazards, where it is simply not possible to assess whether key policy direction will be adhered to.

123. With respect to broader attributes affected by the proposal, Ms Dalton's planning opinion is:⁸⁰

Relying on the evidence of Professor Bryan, Dr Bulmer, and Dr Brough, in my opinion, a precautionary approach is warranted for the following reasons:

- (a) Cumulative effects on marine ecology are potentially significant;
- (b) The scale of magnitude of adverse effects on marine mammals is uncertain given the lack of systematic surveying of marine mammals, and adverse effects cannot be determined; and
- (c) The baseline hydrological numerical modelling does not follow best practice, and adverse effects of sedimentation is potentially higher than those levels concluded.

124. The evidence establishes that in many instances, the applicant needs to "go back to the drawing board".

125. The application of NZCPS Policy 3, and its counterpart Policy D.2.20 under the PRP-AV, point towards a decline of the consent, particularly in its current state. It is difficult to fathom how granting the proposal in light of these uncertainties, whose

⁷⁷ Dr Brough EIC at [1.1].

⁷⁸ Dr Brough EIC at [4.10].

⁷⁹ Dr Clements rebuttal at [24].

⁸⁰ Ms Dalton EIC at [7.23].

effects are not fully understood, will “meet the needs of future generations” per NZCPS Policy 3(2)(c).

126. Counsel submits that declining consent would be a more appropriate course than relying on incomplete or uncertain information in circumstances where the potential effects of the proposed activities could be significant.

INADEQUATE INFORMATION UNDER S 104(6)

127. The separate but related issue of adequacy of information under s 104(6) to support an application for consent also arises here. Under s 104(6), consent authorities are given discretion to decline an application “on the grounds that it has inadequate information to determine the application”.

128. This subsection was deployed by the Environment Court in *RJ Davidson Family Trust* to decline an application for a mussel farm in Beatrix Bay, in the absence of information from the applicant as to the potential cumulative impacts on King Shag habitat.⁸¹ That finding of the Environment Court was upheld on appeal,⁸² and was not touched by the further appeal on the relationship between s 104 and Part 2 of the RMA. The Environment Court held that the power to decline on the basis of inadequate information “should be exercised reasonably and proportionately in all the circumstances of the case”.⁸³

129. In the situation at hand there are numerous examples of inadequate information,⁸⁴ some have already been addressed in the legal submissions for the Director-General of Conservation.⁸⁵

130. As such, the Panel should decline the application on the basis of inadequate information – a more appropriate course than relying on inaccurate, incomplete, or uncertain information in circumstances where the effects of the proposed activities could be significant.

CONCLUSION

⁸¹ *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

⁸² *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227 at [100]-[102].

⁸³ *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC [25]-[26].

⁸⁴ See paragraphs [119]-[123] of these submissions.

⁸⁵ At [53]-[66].

131. Forest & Bird's position is that:

- a. The proposals fail to pass the objectives and policies gateway and are unacceptable in terms of s 104(1)(b), as the proposals breach numerous bottom lines in the NZCPS and as reflected in lower order objectives and policies.
- b. Granting approval of the application in its current form, with its looming information gaps, is contrary to the precautionary approach.
- c. Inadequate information has been provided to inform the Panel's determination of these applications under s104(6) of the RMA.

132. The Panel is therefore requested to decline the applications for consent.

Dated this 13th day of October 2023 at Wellington

A handwritten signature in blue ink, appearing to read 'M Downing', is positioned above the printed name.

M Downing
Counsel for Forest & Bird