

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 3 |
| Qualifications and experience | 3 |
| Code of Conduct | 4 |
| Material considered | 4 |
| Executive Summary | 5 |
| The proposal | 8 |
| STATUTORY FRAMEWORK | 9 |
| Section 104(1) of the Resource Management Act 1991 (RMA) | 9 |
| Effects of the proposal (s 104(1)(a)) | 11 |
| Positive effects of the proposal (s 104(1)(ab)) | 12 |
| Relevant provisions of planning documents (s 104(1)(b)) | 13 |
| <i>New Zealand Coastal Policy Statement 2010 (NZCPS)</i> | 20 |
| Part 2 RMA matters | 38 |
| Adequacy of information (s104(6)) | 38 |
| Conclusions | 39 |

INTRODUCTION

1. My name is Linda Elizabeth Kirk.
2. I have been asked by the Director-General of Conservation ((DGC) to provide planning evidence on the resource consent application by Northport Limited for its proposed port expansion project at Marsden Point.

Qualifications and experience

3. I am employed by the Department of Conservation / Te Papa Atawhai (DOC) as Senior RMA Planner, providing planning advice and assistance in resource consent applications and planning matters. I have worked for DOC since March 2018.
4. I hold the following qualifications:
 - a. Massey University: Master of Philosophy (Resource and Environmental Planning) (2002);
 - b. University of Canterbury: Master of Arts with Distinction (Thesis: "*Coastal Management and Planning and New Zealand*") (1994); Bachelor of Arts Second Class Honours (Division One) (1993); and Bachelor of Science (1992), all majoring in Geography.
5. I have over 20 years experience in local government, with approximately 12 years in resource management planning and policy. I was contracted as an Environment Advisor for He Mahi Poha, the Environmental Entity for Te Rūnanga o Kaikoura (2015- 2016), and Senior Environment Advisor for Te Rūnanga o Ngāi Tahu (2013-2014). I was employed by Environment Canterbury for 14 years (1999-2013), starting as a Senior Resource Management Planner in 1999-2005, and was involved in the development of the Canterbury Natural Resources Regional Plan. Prior to that, I was a Policy Analyst at Southland Regional Council for almost 5 years (1994-1999) and was involved in the development of the Proposed Regional Coastal Plan for Southland and the Regional Policy Statement for Southland.

6. I have previously provided independent planning evidence, am a signatory to various joint witness statements and participated in mediation processes and development of consent orders as required on the following Environment Court cases:
 - a. Proposed Southland Land and Water Plan (pSWLP) (2018 to the present);
 - b. Proposed Natural Resources Plan for the Wellington Region (pNRP) (2021-2022);
 - c. Joint declaration and enforcement orders proceedings of Christchurch City Council and Brent Thomas, Willesden Farms Limited and Wangan Hills Limited (2018-2021) at Kaitorete Spit (later withdrawn)
7. I have also previously participated in mediation processes and consent orders in relation to appeals to the Environment Court on the Proposed Regional Plan for Northland (2022-2023).

Code of Conduct

8. I confirm that I have read the code of conduct for expert witnesses as contained in clause 9 of the Environment Court's Practice Note 2023 (the **Code**) and I agree to comply with it. I have complied with the Code when preparing my written statement of evidence. I confirm I will also comply with it in presenting any oral evidence.
9. The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence to follow. The reasons for the opinions expressed are also set out in the evidence to follow.
10. Unless I state otherwise, this evidence is within my sphere of expertise and I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

Material considered

11. In preparing this evidence, I have read and considered the following documents:

- a. Northport's Resource Consent Application (WDC: LU2200107; NRC: APP.040976.01.01);
- b. Section 42A Northland Regional Council (NRC) & Whangārei District Council (WDC) Officer Report (**s42A Report**);
- c. Director-General's submission (Submitter No. 158);
- d. Statement of evidence prepared for the DGC by Dr Tony Beauchamp (avifauna);
- e. Relevant sections of the Regional Policy Statement for Northland 2016 (RPS);
- f. Relevant sections of the Regional Coastal Plan for Northland 2004 (RCP);
- g. Statement of evidence prepared for Northport by Philip Mitchell (Planning);
- h. Statement of evidence prepared for Northport by Leigh Bull (coastal avifauna);
- i. Statement of evidence (dated 25 August 2023) and addendum to that statement of evidence (dated 13 September 2023) prepared for Northport by Brett Hood (Planning);
- j. National Policy Statement for Indigenous Biodiversity 2023 (NPSIB);
- k. New Zealand Coastal Policy Statement 2010 (NZCPS);
- l. Relevant sections of the Proposed Regional Plan for Northland June 2023 – Appeals Version (PRP-AV);
- m. Relevant sections of the Whangārei District Plan Operative in Part 2022 (WDP).

Executive Summary

12. The port, including each of its components¹, is recognised as Regionally Significant Infrastructure in the relevant regional and district plans. The

¹ The definition of "Regionally significant infrastructure" in the PRP-AV refers to the list of identified regionally significant infrastructure in Appendix H, and states that Regionally

plans also include a special port zone in which the current port facilities are located.

13. The planning framework relevant to the proposal is enabling of Regionally significant infrastructure including ports, while also providing a strong directive for the protection (through avoidance) of habitat of Threatened and At risk indigenous taxa in the coastal environment.
14. There are Threatened and At risk indigenous avifauna taxa in the area of the coastal environment subject to the application, in respect of which adverse effects are required to be avoided.
15. The applicant's avifauna expert Dr Bull has described the creation of a sandbank which is intended to compensate for the loss of foraging habitat for VOC and New Zealand dotterel from the proposed reclamation as "avoidance".²
16. I do not consider that the creation of the sandbank is "avoidance" for assessing the effects and the proposal against the relevant statutory provisions. Instead, I consider it would more properly be considered as a positive effect under s104(1)(ab).
17. The proposed sandbank would cause further adverse effects through its position in foraging habitat for lesser knots, which is another At risk species for which adverse effects on its taxa are required to be avoided under the regional planning framework.
18. The creation of adverse effects on Threatened and At risk taxa in the coastal environment from the reclamation and creation of the sandbank as part of the port development is contrary to the policy framework in the regional planning documents. In particular:
 - a. The standard required for Regionally significant infrastructure (now operative Policy D.2.7 of the PRP-AV) is "minor", subject to compliance with other specified policies. Those policies include Policy D.2.18 which requires adverse effects on Threatened and At Risk indigenous taxa to be avoided.

significant infrastructure extends to the site-related components that enable the asset to function.

² Dr Bull evidence in chief, paragraph 105.

- b. Dr Bull has assessed the level of effects of the proposed reclamation as “moderate” not taking into account the creation of the sandbank to the west of the port as replacement roosting habitat.
 - c. Dr Beachamp (as does Ms Webb’s the council’s avifauna expert) have serious doubts that the sandbank will in fact be used by variable oystercatcher / tōrea (*At Risk-Recovering*), and New Zealand dotterel / tūturiwhatu (*Threatened-Nationally Increasing*), that will be displaced from the roosting habitat to be lost from the reclamation.
 - d. Dr Beauchamp also considers that there is not currently adequate data on avifauna behaviour in the Whangarei Harbour to properly assess the adverse effects on avifauna, He also considers that Dr Bull has likely underestimated the adverse effects from the sandbank on lesser knot (*At Risk-Declining*), and from the reclamation on variable oystercatcher and New Zealand dotterel.
19. Where the adverse effects of activities on 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 Northland RPS are uncertain, unknown or little understood, the PRP-AV directs a precautionary approach be adopted.³
20. Dr Beauchamp’ expert opinion is that there is not enough data on avifauna behaviour in the Whangarei Harbour to assess the effects of the proposal. And the proposal is within areas identified in the PRP-AV as Significant Marine Mammal and Seabird Area (SMMSB), Significant Bird Area (SBA), and Significant Ecological Area (SEA).
21. I therefore do not agree with Mr Hood’s conclusion that the proposal has been designed to avoid significant areas of indigenous biodiversity, nor that the effects of it are well understood.⁴
22. I also do not consider that the applicant’s planner Mr Hood has properly assessed the proposal against the relevant planning or statutory

³ PRP-AV Policy D.2.20.

⁴ Mr Hood evidence in chief, paragraph 8.109.

provisions, nor has he assessed the restricted discretionary elements against the specific criteria as required in the PRP-AV.

23. While the district planning framework is enabling of port infrastructure as identified Regionally significant infrastructure, but the elements of the proposal above MHWS will affect land not zoned for such development, and are not consistent with the purpose for which the land is zoned, being Natural Open Space. The applicant's planning consultant Mr Hood also appears to consider this to be the case.⁵
24. I consider that the components of the proposal that are to be located in the area which is currently esplanade reserve and zoned Natural Open Space, is a non-complying General Commercial activity under Rule NOSZ-R35. I also consider that the proposal (or at least the land-based/district components of it) should be bundled as a non-complying activity.
25. As currently proposed, I do not consider the proposal is consistent with or meets the standards for regionally significant infrastructure in the PRP-AV, and is inconsistent with the provisions applying to the above MHWS components in the Whangarei District Plan.
26. In my opinion, in order for the Hearing Panel to be able to be satisfied that the expansion of the port is consistent with the statutory and policy frameworks, the proposal needs to be revised by incorporating appropriate measures to address adverse effects on Threatened and At risk avifauna taxa and further reduce the adverse effects of the proposal.

The proposal

27. Northport have applied for a suite of resource consents from the NRC and WDC to construct, operate, and maintain an expansion of the existing Northport facility. Northport seek to enable the transition of its existing facility into a high-density container terminal.
28. The current Northport facility consists of three berths. A fourth berth was consented in 2004 but this has not been given effect to as no fourth berth

⁵ Mr Hood evidence in chief, paragraphs 8.154 to 8.157.

has been constructed. The proposed expansion seeks to construct a fifth berth to adjoin the consented, but not yet constructed, fourth berth.

29. The construction of the fifth berth is proposed to involve:
- a. Reclaiming approximately 11.7ha of Coastal Marine Area (CMA) to the east of the current port facilities to form land for the proposed berth and container terminal;
 - b. Extending the existing wharf a further 250m along the northern face of the proposed reclamation to form an extension to the consented (but not yet constructed) Berth 4;
 - c. Creating a 2,703 m² sandbank to the west of the current port facilities⁶ prior to undertaking the eastern reclamation, which is proposed to address the potential effects of permanent loss of high tide habitat and disturbance to roosting birds associated with the construction of the eastern reclamation;⁷ and
 - d. Undertaking bulk earthworks and filling within an area of approximately 2ha above MHWS to the east of the existing Port facility, including over the existing dune system and Esplanade Reserve.
30. The “bundled” applications have been assessed overall as a discretionary activity, and a consent duration of 35-years is sought for the Northland Regional Council consents (including coastal, discharge, and water permits).

STATUTORY FRAMEWORK

Section 104(1) of the Resource Management Act 1991 (RMA)

31. Section 104(1) of the RMA (see below) provides the framework for my planning evidence, from which I have identified relevant provisions that I consider to be applicable for consideration of this application in accordance with s104(1)(b).

⁶ Dr Bull evidence in chief, paragraph 128.

⁷ Dr Bull, evidence in chief, paragraph 70.

Section 104(1) of the RMA:

- “(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to—*
- (a) any actual and potential effects on the environment of allowing the activity; and*
 - (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and*
 - (b) any relevant provisions of—*
 - (i) a national environmental standard:*
 - (ii) other regulations:*
 - (iii) a national policy statement:*
 - (iv) a New Zealand coastal policy statement:*
 - (v) a regional policy statement or proposed regional policy statement:*
 - (vi) a plan or proposed plan; and*
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.”*

32. While I agree with much of the analysis in the s42A Report and the evidence in chief of Mr Hood and Dr Mitchell, there are some aspects of that I do not agree with, and there are additional matters that I consider are relevant to the Panel’s consideration which have not been included in Mr Hood’s or s s42A Report analysis. These matters include in particular:
- a. The level of potential adverse effects on At risk and Threatened indigenous avifauna upon which Mr Hood’s and the s42A report analysis is based;
 - b. The way the proposal to create the sandbank to the west of the existing port facilities to address lost roosting habitat as result of the eastern reclamation has been described (i.e. as avoidance or mitigation);
 - c. The overall regional planning framework, including its “bottom line” directives, and the assessment criteria included in relation to the proposed sandbank;

- d. The adequacy of information that is available to the Hearing Panel to enable it to make its decision, and the s42A Report and Mr Hood's conclusions that there is adequate information, and a precautionary approach is therefore not required.

33. The remainder of my evidence focusses on these matters.

Effects of the proposal (s 104(1)(a))

- 34. I have read the evidence in chief of Dr Bull, and I acknowledge her conclusions on adverse effects on avifauna. However, given the concerns raised by Dr Beauchamp regarding Dr Bull's approach to addressing effects on avifauna, I have relied on the observations and conclusions relating to effects on avifauna as set out in Dr Beauchamp's evidence in chief instead.
- 35. The issues of concern raised by Dr Beauchamp in respect of Dr Bull's approach to assessing the effects of the proposal on avifauna, include in particular:
 - a. The effects of the loss of foraging and feeding habitat for Variable oystercatchers and New Zealand dotterel that will result from the eastern reclamation;
 - b. The effects of the creation of the proposed sandbank to the west of the port which is intended to be used by the Variable oystercatchers and New Zealand dotterel affected by the reclamation as alternative roosting habitat. The sandbank is proposed to be located in foraging area used by large numbers of lesser knots; and
 - c. The harbour-wide approach to assessing effects on for Variable oystercatchers and New Zealand dotterel;
- 36. The creation of the sandbank will cause its own adverse effects on At risk avifauna through the loss of additional foraging habitat, and Dr Beauchamp doubts whether it will be in fact used by the birds it is intended to benefit.

37. Dr Beauchamp also considers that the behavioural data that is needed to properly assess the adverse effects of the reclamation and sandbank is absent, that Dr Bull has inappropriately assessed the level of effects, and has likely underestimated the adverse effects on these species.

Positive effects of the proposal (s 104(1)(ab))

38. As I note above, the proposed sandbank intended for use as a roost has been described as avoidance in Dr Bull's evidence in chief,
39. The Advice note which accompanies Conditions 42 to 46 of the conditions proposed by the applicant (attached to Mr Hood's evidence in chief), relating to the proposed sandbank states:

Advice note: *The purpose of the Sandbank Renourishment Area is to provide additional roosting habitat for key avifauna species, namely Tōrea pango (Variable oystercatcher) and Tūturiwhatu (New Zealand dotterel)*

40. I consider this a more appropriate description of the sandbank, which has been proposed to offset or compensate for the loss of roosting habitat resulting from the eastern reclamation.
41. I do not consider it to be avoidance, as it does not prevent the loss of habitat from occurring, and it is not mitigation as it does not address the adverse effects at the point of impact. Rather, I consider that the proposed sandbank should be treated as a matter under s 104(1)(ab), which includes:

“any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and “

42. Treating the sandbank as a matter under s 104(1)(ab) is also more appropriate than treating it as avoidance or mitigation, as its effectiveness is uncertain, as Dr Beauchamp explains in his evidence, and as Ms Webb discusses in her report attached to the s42A Report.

43. Treating it as a s 104(1)(ab) matter also means that the level of effects under s 104(1)(a) are not treated as being ameliorated under the “avoid, mitigate, remedy” effects management hierarchy in s 5(c) of the Act. I consider this appropriate, given the concerns with the expected performance and further adverse effects that are likely to be caused by it, as Dr Beauchamp’s evidence in chief explains.

Relevant provisions of planning documents (s 104(1)(b))

National Policy Statement for Indigenous Biodiversity 2023 (NPS-IB)

44. The NPS-IB came into effect on 4 August 2023. The s42A Report (dated 3 August 2023) is silent on the NPS-IB.
45. The Applicant’s planning assessment prepared by Mr Hood considered the relevance of the NPS-IB to the Northport proposal from paragraph 8.4.
46. I agree with Mr Hood the NPS-IB is relevant.
47. Part 2 of the NPS-IB states the objective and 17 policies (see Appendix 2).

2.1 Objective

(1) The objective of this National Policy Statement is:

- (a) to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and
- (b) to achieve this:
 - (i) through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and
 - (ii) by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and
 - (iii) by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and
 - (iv) while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.

48. Objective 2.1(a) refers to “maintain indigenous biodiversity”. Clause 1.7 states what maintaining indigenous biodiversity requires:

1.7 Maintaining indigenous biodiversity

- (1) Maintaining indigenous biodiversity requires:
 - (a) the maintenance and at least no overall reduction of all the following:
 - (i) the size of populations of indigenous species:
 - (ii) indigenous species occupancy across their natural range:
 - (iii) the properties and function of ecosystems and habitats used or occupied by indigenous biodiversity:
 - (iv) the full range and extent of ecosystems and habitats used or occupied by indigenous biodiversity:
 - (v) connectivity between, and buffering around, ecosystems used or occupied by indigenous biodiversity:
 - (vi) the resilience and adaptability of ecosystems; and
 - (b) where necessary, the restoration and enhancement of ecosystems and habitats.

- 49. In my opinion, the evidence of Dr Beauchamp provides clear uncertainty as to whether the maintenance and at least no overall reduction of the variable oystercatcher, New Zealand dotterel and the lesser knot is achieved.
- 50. Dr Beauchamp considers that the artificial roost will not work for New Zealand dotterel and the variable oystercatcher. This means the permanent loss of foraging and roosting habitat that has not been effectively addressed. Dr Bull characterises the effect as ‘moderate’ without the roost and Dr Beauchamp agrees it is significant.
- 51. Therefore, I disagree with the finding of Mr Hood, based on Dr Bull’s evidence (Hood at [56]) that the proposal adequately manages effects on avifauna thereby giving effect to Objective 2.1 above.
- 52. Further, I disagree with Mr Hood who relying on Dr Bull considers the roost measure gives effect to policies 4: that indigenous biodiversity is managed to promote resilience to the effects of climate change, and 15: that areas outside SNAs that support specified highly mobile fauna are identified and managed to maintain their populations across their natural range, and information and awareness of highly mobile fauna is improved.”
- 53. Dr Beauchamp is concerned construction of the bird roost will smother the habitat of the lesser knot and over time, erosion will smother a wider area

around the constructed roost, also used by the lesser knot. This effect has not been addressed by Dr Bull.

54. Dr Beauchamp considers that Dr Bull has assumed that New Zealand Dotterel and Variable Oystercatchers will move west to the artificial roost once their habitat is lost and that lesser knot will also move west once the artificial roost is constructed smothering the foraging habitat they currently use. He points out that Dr Bull has not studied how the birds move through and around the site or the immediate area around the port, or throughout the harbour and so there is inadequate data to support these assumptions (REF). Therefore, the risk of adverse effects remains on threatened taxa contrary to the objective and these policies.
55. I rely on Dr Beauchamp's evidence in that the scale of the avifauna populations should be at a "local outer-harbour population, not as the "whole Whangārei harbour population." This is an important factor to implement clause 1.7(1)(a) but does not alter that the key avifauna species to be considered as Dr Beauchamp states that this approach *"would increase the proportion of population affected by the proposal, but not alter the conclusion that these are key species to consider."*
56. The size of the avifauna populations are of concern, in particular, the lesser knot which Dr Beauchamp's evidence shows is in significant decline in Whangārei Harbour by over 75% during the last 15 years.
57. Policy 1 directs how indigenous biodiversity is managed and that it must give effect to the decision-making principles and take into account the principles of the Treaty of Waitangi:

"Policy 1: Indigenous biodiversity is managed in a way that gives effect to the decision-making principles and takes into account the principles of the Treaty of Waitangi."
58. MI note that my evidence focuses on the decision-making principles aspect of Policy 1 and I have not undertaken an assessment of the principles of the Treaty of Waitangi. If this would assist the Hearing Panel, I can do this at their direction or it may be beneficial to assist the Hearing Panel if this was done at expert conferencing.

59. Clause 1.5 (as shown below) states the decision-making principles of the NPS-IB which Policy 1 refers to These decision-making principles must inform the implementation of the NPS-IB and be considered by the Hearing Panel. The decision-making principles prioritise the mauri, intrinsic value and wellbeing of indigenous biodiversity and recognises people's connections and relationships with indigenous biodiversity.

1.5 Decision-making principles

- (1) This National Policy Statement prioritises the mauri and intrinsic value of indigenous biodiversity and recognises people's connections and relationships with indigenous biodiversity.
- (2) It recognises that the health and wellbeing of people and communities are dependent on the health and wellbeing of indigenous biodiversity and that in return people have a responsibility to care for and nurture it. It acknowledges the web of interconnectedness between indigenous species, ecosystems, the wider environment, and the community, at both a physical and metaphysical level.
- (3) Consistent with this, the decision-making principles that must inform the implementation of this National Policy Statement are as follows:
 - (a) prioritise the mauri, intrinsic value and wellbeing of indigenous biodiversity;
 - (b) take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi);
 - (c) recognise the bond between tangata whenua and indigenous biodiversity based on whakapapa relationships;
 - (d) recognise the obligation and responsibility of care that tangata whenua have as kaitiaki of indigenous biodiversity;
 - (e) recognise the role of people and communities (including landowners) as stewards of indigenous biodiversity;
 - (f) enable the application of te ao Māori and mātauranga Māori;
 - (g) form strong and effective partnerships with tangata whenua.

60. I consider that the application is not consistent with these decision-making principles in regard to avifauna.
61. Policy 3 "*a precautionary approach is adopted when considering adverse effects on indigenous biodiversity*" is also relevant. As noted above, the NZCPS also has a policy on the precautionary approach (Policy 3 of the NZCPS) which has different wording to the NPS-IB policy on the same matter.
62. However, I do not consider there is a conflict between the two policies and that both precautionary policies are relevant to the consideration of this proposal. This is because Policy 3 of the NPS-IB is "considering adverse effects on indigenous biodiversity" and Policy 3 of the NZCPS refers to the coastal environment. Policy 1 of the NZCPS identifies the extent and

characteristics of the coastal environment. In particular, Policy 1(2)(e) is not in conflict with the NPS-IB as it refers to the habitat of indigenous coastal species including migratory birds:

NZCPS Policy 1(e) “*coastal vegetation and the habitat of indigenous coastal species including migratory birds*”

63. In addition, Clause 3.7 ‘Precautionary approach’ of the NPS-IB is directly relevant in implementing the NPS-IB. Clause 3.7 is not inconsistent with Policy 3(1) of the NZCPS:

3.7 Precautionary approach

- (1) Local authorities must adopt a precautionary approach toward proposed activities where:
 - (a) the effects on indigenous biodiversity are uncertain, unknown, or little understood; but
 - (b) those effects could cause significant or irreversible damage to indigenous biodiversity.

64. I rely upon Dr Beauchamp’s evidence that identifies the adverse effects on the avifauna as well as raising issues of uncertainty in the effects of the proposed activities on the habitat of avifauna. As such, I consider it is appropriate that a precautionary approach is taken in respect of potential adverse effects on Threatened and At risk avifauna.
65. Policy 7 of the NPS-IB is relevant as the Whangārei District Plan Operative in Part 2022 (WDP) provides criteria for ranking significance of areas of indigenous vegetation and Habitat in ECO–Appendix 1. In my opinion, while the WDP does not map significant natural areas (SNAs), if an area meets the ECO-Appendix 1 criteria, then that is not inconsistent with Policy 7 and such areas are to be protected by avoiding and managing adverse effects from new development. Further discussion of the ECO provisions is below.
66. Policy 8 of the NPS-IB is directly relevant and does not rely upon the identification of SNAs. Policy 8 recognises and provides for the importance of maintaining indigenous biodiversity outside SNAs. As discussed above, I am relying upon Dr Beauchamp’s evidence, and there is uncertainty as to whether or not indigenous avifauna will be maintained.

67. Related to Policy 8, is clause 3.16 'Indigenous biodiversity outside of SNAs'. Clause 3.16(1) applies to new development outside an SNA and that any significant adverse effects must be managed by applying the effects management hierarchy. Clause 3.16(2) applies to all other adverse effects that may adversely affect indigenous biodiversity outside an SNA and that these must be managed to give effect to the objective and policies of the NPS-IB.
68. In my opinion, Policies 7 and 8 (and clause 3.16) are in conflict with NZCPS Policy 11(a), and as such, clause 1.4(2) directs that the NZCPS provisions prevail. This is because:
- a. NZCPS Policy 11(a) directs the protection of indigenous biological diversity in the coastal environment and to **avoid** [my emphasis] adverse effects of activities on indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System; and
 - b. NZCPS Policy 11(b) directs to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on habitats, including areas and routes, important to migratory species (Policy 11(b)(e)) (amongst other matters).
69. I rely on Dr Beauchamp's evidence and conclusions that the proposed sandbank renourishment area (proposed roosting sandbank) triggers both NZCPS Policy 11(a) and 11(b). Policy 11(a) must be applied in relation to Threatened and At risk avifauna. There are direct adverse effects on the lesser knot due to the destruction of its foraging habitat and as such, the proposed roosting sandbank must be avoided.
70. In addition, the proposed roosting sandbank as a proposal for the displaced roosting of variable oystercatchers and New Zealand dotterel is inadequate and inappropriate as there is no evidence to show that the proposed roosting sandbank will be used by these two species, nor may it be maintained in perpetuity.
71. In summary, the proposed roosting sandbank provides more adverse effects on other Threatened or At risk birds (the lesser knot) and does not address the loss of roosting and foraging habitat for the variable

oystercatcher and the New Zealand dotterel. In my opinion, the proposed sandbank renourishment area should not be a condition of consent.

72. Policy 15 is a key relevant policy as it directs that specified highly mobile fauna populations are maintained and awareness is improved. As discussed above, Dr Beauchamp's evidence, there is uncertainty as to whether or not indigenous avifauna will be maintained, and that the lesser knot population has been significantly declining in the last 15 years.
73. Policy 17 is a key relevant matter which requires that "*there is improved information and regular monitoring of indigenous biodiversity*". Dr Beauchamp evidence discusses the monitoring of affected avifauna as well as the lack of monitoring, including his concerns with the proposed consent conditions. I agree with Dr Beauchamp's comments in relation to the proposed conditions of consent. If the Hearing Panel is of mind to grant the consent, then appropriate monitoring conditions should be required. This redrafting of conditions could occur at expert conferencing if required.
74. Appendix 2 identifies the specified highly mobile fauna to help implement Clause 3.20. I note that Appendix 2 includes the lesser knot, NZ dotterel and variable oystercatcher and red-billed gull.
75. I disagree with Mr Hood who relying on Ms Flynn considers that clause 3.16 (indigenous biodiversity outside SNAs) is not engaged (Hood at [8.8]). The evidence of Dr Beauchamp shows that significant adverse effects on indigenous biodiversity will result from the proposal.
76. While not directed by the NPS-IB, the PRP-AV has identified significant bird area, significant marine mammal and seabird area and significant ecological area that would include high mobile fauna (refer to Appendix 1 for these maps). I consider this is not inconsistent with clause 3.20(2) as these layers apply to highly mobile fauna.
77. The proposed expansion footprint (including the reclamation and dredging areas) is located within the Marsden Point Port Zone under the PRP-AV. The entire reclamation footprint is located within the Significant Marine Mammal and Seabird Area (SMMSB) of the PRP-AV and part of the existing (and proposed) dredging footprint is located within the Significant

Bird Area (SBA). The proposed sandbank will be located within the Significant Ecological Area (SEA) located to the west of the existing Port. Some aspects of the port expansion proposal are in the coastal marine area and some are in the district, therefore both the PRP-AV and WDP apply. The relevant provisions are discussed further below.

New Zealand Coastal Policy Statement 2010 (NZCPS)

78. I consider that most of the NZCPS objectives and policies have been given effect to in the PRP-AV. The exceptions to this are Objective 7 which has not been given effect to at all, and Policy 11 which I consider has substantially been given effect to in the PRP-AV, apart from the allowance for “minor or transitory effects”, and the direction that a “system-wide approach” be taken in Policy D.2.18, which I consider are out of place. I discuss these issues further below.

Objective 7 – International obligations

79. I consider that Objective 7 relating to New Zealand’s international obligations is also relevant, given the Whangarei Harbour contains important habitat for large numbers of lesser knots, an internationally migratory species.
80. Objective 7 of the NZCPS is:
- “To ensure that management of the coastal environment recognises and provides for New Zealand’s international obligations regarding the coastal environment, including the coastal marine area.”*
81. Dr Beauchamp’s evidence notes that New Zealand has committed to international arrangements for the protection of areas used by red knot as stop-over habitat”. This includes an agreement with the Chinese Government for the protection of red knot⁸ habitat.
82. New Zealand is also a signatory to the United Nations Convention of Biological Diversity (CBD),⁹ which requires areas to be identified and

⁸lesser knot is the common name of the subspecies “red knot”

⁹ See [cbd-en.pdf](#)

strategies and policies implemented for the protection of various elements including habitat that is important to migratory species.¹⁰

83. As neither the RPS nor the PRP-AV give effect to Objective 7, I consider that the Hearing Panel should have specific regard to it in assessing whether approving the proposal, in particular the proposed roosting sandbank in the SBA to the west of the port, would be consistent with the need to recognise and provide for New Zealand's obligations under international agreements which require the habitat of lesser knots to be protected.

Policy 11 – Indigenous biological diversity (biodiversity)

84. I do not consider that Policy 11 has been fully given effect to in the PRP-AV Policy D.2.18, which is the relevant indigenous biodiversity policy, in two respects.
85. First, Policy D.2.18(5)(a) directs that, in assessing the potential adverse effects of an activity on identified values of indigenous biodiversity, a “system-wide” approach is to be taken. This is not consistent with the direction in Policy 11 of the NZCPS, which directs that adverse effects on indigenous Threatened and At risk taxa are avoided.
86. As Dr Beauchamp explains in his evidence, taking a broad “system-wide” approach can lead to the underestimation of adverse effects on the values that are sought to be protected.
87. Second, Policy D.2.18(5)(c) states that, in assessing potential effects, it is to be recognised that minor or transitory effects may not be an adverse effect. I do not consider this provision is consistent with Policy 11 of the NZCPS, and to the extent those words appear to have been included in recognition of the Supreme Court's *King Salmon* decision, I do not consider this a correct approach.

¹⁰ See CBD, Articles 6 to 8 and the criteria in Annex I.

88. Policy 11 of the NZCPS was not considered in the *King Salmon* decision, and the “minor or transitory” provisos noted in that decision were directed to Policies 13 and 15 relating to natural character and landscape matters.
89. As such, I consider Policy 11 of the NZCPS should be specifically considered by the Hearing Panel, to the extent that Policy D.2.18 does not properly give effect to it. In particular, Policy 11(a) which has clear ‘avoidance’ directive for Threatened and At risk taxa, of **any adverse effects** [*my emphasis*].
90. Mr Hood concludes at [3.11] that the proposal aligns with Policy D.2.18 due to the effects being identified, at the relevant system scale, as no more than minor on the basis of avoidance and mitigation measures identified by the applicant’s experts and as incorporated in the proposed conditions of consent.
91. I do not agree with this conclusion, as:
- a. The adverse effects have not been demonstrated to be no more than minor;
 - b. “No more than minor” is not the relevant bottom line for indigenous Threatened and At risk taxa in the coastal environment, as Policy 11(a) of the NZCPS directs that the adverse effects on these taxa be avoided;
 - c. A system-wide approach may cause the level of adverse effects to be underestimated;
 - d. The proposed roosting sandbank designed to offset/compensate the loss of roosting habitat will create further adverse effects on At risk taxa, and there is no evidence demonstrating it will provide the benefit it is intended to provide.
92. I also do not agree with Dr Mitchell’s conclusion at [3.17] regarding the NZCPS’s strong “enabling” provisions for ports mean that “avoidance” of such effects or “policy consistency” is not necessary in terms of a development within the areas identified for port development. Dr Mitchell considers that they are matters that should be considered, but they do not “trump” other provisions.

93. My interpretation of the NZCPS is that the objectives and policies for ports and the protection of indigenous biodiversity are both directive, and should be read together to the extent possible.
94. My reading of the PRP-AV is that (subject to my comments above) it appropriately reconciles and gives effect to the NZCPS policies relating to both ports and indigenous biodiversity.
95. As I discuss in more detail below, the PRP-AV provides a “bottom line” for ports which are listed as Regionally significant infrastructure (as Northport is), in that they are enabled provided their adverse effects are no more than minor. However, compliance is also required with other relevant policies in the PRP-AV. This includes, but not limited to, Policy D.2.18 which requires effects on Threatened and At risk indigenous taxa in the coastal environment to be avoided.

Proposed Regional Plan for Northland – Appeals Version (PRP-AV)

96. The Regional Council’s webpage for the PRP states that:¹¹
- a. All objectives and policies other than those marked in the PRP-AV version of the proposed plan are either not under appeal or have had their appeals resolved by consent order; and
 - b. The objectives and policies that are not subject to challenge will be given greater weight in decision-making than the objectives and policies in the operative regional plans.
97. I have therefore focussed my regional planning analysis on the PRP-AV, which I discuss below.
98. The coastal marine area surrounding the current port facilities is zoned “Marsden Point Port Zone” (MMPZ). The port is also listed in the PRP-AV as “Regionally significant infrastructure”. The provisions relating to the MMPZ and Regionally significant infrastructure, as well as the indigenous biodiversity provisions, are all no longer subject to appeals, and can therefore be afforded greater weight than the corresponding provisions in the operative regional coastal plan.

¹¹ See [New Regional Plan - Northland Regional Council \(nrc.govt.nz\)](https://nrc.govt.nz/).

99. However, if it would assist the Hearing Panel to undertake an analysis of the provisions of the operative regional coastal plan, then I will do so. This could be done in expert conferencing or a further supplementary statement of evidence as so directed by the Hearing Panel.

Marsden Point Port Zone – Policies D.5.8 and D.5.9

100. Policy D.5.8 sets out the purpose of the Marsden Point Port Zone (MPPZ), being to enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities located within the zone.
101. Policy D.5.9 sets out where development is appropriate in the MPPZ, either on the basis of the development being consistent with various listed matters, or if it is listed Regionally significant infrastructure.
102. While Dr Mitchell relies on Policy D.5.8 which recognises that the MPPZ is to enable the development and operation of existing and authorised maritime-related commercial enterprises within the zone, I note that Dr Mitchell does not refer to Policy D.5.9 which sets out when development in the zone is generally appropriate.
103. Policy D.5.9 is:

Development in the Coastal Commercial Zone and the Marsden Point Port Zone will generally be appropriate provided it is:

1) consistent with:

a) existing development in the Coastal Commercial Zone or the Marsden Point Port Zone, and

b) existing development on adjacent land above mean high water springs, and

c) development anticipated on the land above mean high water springs by the relevant district plan, or

2) associated with regionally significant infrastructure in the Marsden Point Port Zone.

Development that is inconsistent with 1) or 2) will not necessarily be inappropriate.

104. Given that the eastern reclamation is not consistent with the existing esplanade reserve amenities or the Natural Open Space zone of the Whangarei District Plan, I consider the expansion proposal is unlikely to meet the criteria in Policy D.5.9(1)(b) and (c). However, the proposal clearly meets Policy D.5.9(2) as it is associated with Regionally significant infrastructure.
105. Policy D.5.9 therefore links back to the Regionally significant infrastructure policies, including Policy D.2.9 which sets out assessment criteria for deciding whether a Regionally significant infrastructure proposal is appropriate.
106. I disagree with Dr Mitchell's conclusions as set out in paragraphs 3.20 to 3.24 of his evidence in chief in a number of respects.
107. First, while the development is located in the MPPZ in the PRP-AV, only two of the ten resource consents needed for the proposal¹² are for a controlled activity, which must be granted. These include maintenance dredging, and additions and alterations to existing structures. The remainder of the consents needed for the proposal are a combination of restricted discretionary activities with specified matters of discretion, and discretionary activities, which in many cases have assessment criteria also listed. It is therefore it is not a "given" that all port development is appropriate and is to be consented.
108. Second, Policy D.5.8 (referred to by Dr Mitchell at {3.10}) which sets out the purpose of the MPPZ refers to "existing and authorised" enterprises:

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

109. The matters required to be considered in authorising Regionally significant infrastructure proposal are set out in Chapter D.2 of the PRP-

¹² These are set out in Table 2 of the s42A Report (pages 42 to 43).

AV, which includes Policies D.2.7 and D.2.9 which direct that the Regionally significant infrastructure must be consistent with other policies in the PRP-AV. This includes Policy D.2.18 relating to the protection of indigenous biodiversity, as I discuss below.

Regionally Significant Infrastructure – Objective 5.1.6 and Policies D.2.5 to D.2.9

110. I note that the s42A Report does not assess the proposal against Policies D.2.5 to D.2.9, which I consider is a significant omission.
111. At [8.80 to 8.83] of Mr Hood's evidence, he discusses Objective F.1.6 and Policies D.2.5 to D.2.9 relating to Regionally significant infrastructure. Mr Hood considers that Policy D.2.9 should be given more weight than Policy D.2.5, and I agree, given that Policy D.2.9 mirrors the requirement to consider the benefits of Regionally significant infrastructure in Policy D.2.5, but also directs that regard and appropriate weight be afforded to other relevant matters.
112. Subject to my comments below, I generally agree with Mr Hood's approach to Policies D.2.7, D.2.8, and D.2.9 being intended to work together, with Policy D.2.7 being to enable new Regionally significant infrastructure by allowing minor adverse effects, D.2.8 being to enable the upgrading of established Regionally significant infrastructure in certain circumstances, while the intent of D.2.9 is to identify relevant considerations for more substantial infrastructure proposals.
113. While Policies D.2.7 and D.2.9 do not expressly refer to "development" or "expansion", I consider both policies are relevant to the proposed port development. This is also supported by the definition of "Regionally significant infrastructure" in the PRP-AV in that it notes that Regionally significant infrastructure extends to the site-related components that enable the asset to function. I therefore consider that the addition of the further components to the existing port proposed by the applicant (including the new fifth berth and other elements needed to transition to a high-density container terminal) are to be properly regarded as the "establishment" of a Regionally significant infrastructure and Regionally significant infrastructure "activity" respectively.

114. I do not agree with Mr Hood's interpretation of Policy D.2.7 as I do not agree that the "bottom line" in Policy D.2.7 is "minor effects".
115. As noted above, Policy D.2.7 directs that proposals are consistent with the listed other PRP-AV policies, including Policy D.2.18, which I do not consider the proposal is consistent with, given adverse effects on Threatened and At risk indigenous taxa will not be avoided.
116. I also do not agree with Mr Hood's conclusion that the proposal aligns with Policies D.2.7 and D.2.9, given the level of adverse effects that proposal will cause, particularly on avifauna, as is discussed in Dr Beauchamp's evidence.
117. I also do not agree with more detailed discussion on these policies set out in the Planning Analysis set out in Appendix 28 to the application, but which is not reproduced in Mr Hood's evidence.

Policy D.2.7 – Enabling Regionally significant infrastructure

118. While Policy D.2.7 directs that Regionally significant infrastructure be enabled, it also includes provisos which I consider form a "bottom line" which Regionally significant infrastructure is intended to meet.
119. I consider Policy D.2.7 is a strong overarching policy which pulls together the different policies in the PRP-AV, and directs how the policies are to be reconciled.
120. Policy D.2.7 of the PRP-AV states:

D.2.7 Minor adverse effects arising from the establishment and operation of regionally significant infrastructure

Enable the establishment and operation (including consenting) of regionally significant infrastructure by allowing any minor adverse effects providing:

- 1) The regionally significant infrastructure proposal is consistent with:*
 - a) all policies in Section D.1 Tāngata whenua, and*
 - b) Policy D.2.16 Managing adverse effects on historic heritage, and*
 - c) Policy D.2.17 Managing adverse effects on natural character, outstanding natural landscapes and outstanding natural features, and*
 - d) Policy D.2.18 Managing adverse effects on indigenous biodiversity, and*
- 2) the regionally significant infrastructure proposal will not likely result in*

over-allocation having regard to the allocation limits in H.4.3 Allocation limits for rivers, and

3) other adverse effects arising from the regionally significant infrastructure are avoided, remedied, mitigated or offset to the extent they are no more than minor

121. As is signalled by the word “providing” in Policy D.2.7, enabling Regionally significant infrastructure by allowing minor adverse effects is subject to the requirements in Policy D.2.7(1) to (3) being met.
122. This includes Policy D.2.7(1)(d) which refers to Policy D.2.18 Managing adverse effects on indigenous biodiversity. As discussed below, Policy D.2.18(1)(a) requires adverse effects on Threatened and At-risk indigenous taxa in the coastal environment to be avoided.

Policy D.2.9 – Assessing the appropriateness of Regionally significant infrastructure

123. Policy D.2.9 provides criteria for assessing the appropriateness of Regionally significant infrastructure proposals, apart from the National Grid. I consider that Policy D.2.9 needs to be considered alongside Policy D.2.7 which sets out the environmental bottom line for Regionally significant infrastructure activities.
124. I do not agree with either Mr Hood’s assessment of Policy D.2.9 as set out in [8.8.2] of his evidence or the analysis of Policy D.2.9 as set out on page 61 of the Planning Analysis document attached as Appendix 28 to the resource consent application.¹³
125. Neither provide an assessment against all the criteria in Policy D.2.9, and I do not agree with the statement in the Planning Analysis document that Policy D.2.9 specifically contemplates circumstances where the adverse effects of regionally significant infrastructure will be greater than those contemplated by Policies D.2.7 and D.2.8.
126. As noted above, I consider that Policy D.2.7 sets out the “bottom line” that all Regionally significant infrastructure is expected to meet. There is nothing in Policy D.2.9 that suggests a lower standard of environmental protection is acceptable. If this was the intention, I would have expected

¹³ See [application-document-lodged-06-10-2022-appendix-28-planning-policy-analysis.pdf \(nrc.govt.nz\)](#)

Policy D.2.9 to expressly state that it overrides Policy D.2.7, and to also expressly provide for a lower standard of environmental protection, for example, by requiring adverse effects to be avoided, remedied or mitigated effects as opposed to being consistent with the protective policies listed in Policy D.2.7.

127. While Policy D.2.9(7) does refer to “avoiding, remedying or mitigating” adverse effects, this is specifically in relation only to route, site and method selection.

Policy D.2.18 - Indigenous biodiversity

128. At [8.75] of Mr Hood’s evidence he states that *“Specifically, I consider that the relevant effects in D.2.18(1)(a) and (b) will be avoided⁶⁵ (respectively) as per the framework for assessing effects set in the wider policy.”*
129. Footnote 65 to [8.75] of Mr Hood’s evidence states *“I rely on the advice of Mr Simmons that avoiding adverse effects does not preclude minor or transitory effects as per the Supreme Court Decision Environmental Defence Society Inc v New Zealand King Salmon Company Limited [2014] NZSC 38 (paragraph. 145)”*.
130. As noted above, I do not consider it appropriate to allow minor or transitory adverse effects on the basis of the Supreme Court’s *King Salmon* decision, given that decision related to Policies 13 and 15 of the NZCPS, and not Policy 11 which Policy D.2.18 of the PRP-AV is intended to give effect to.
131. I also do not consider that the creation of a roosting sandbank prior to the reclamation being undertaken can be regarded as “avoidance”. Put simply, you cannot avoid the effect of removing the roosting and foraging habitat by attempting to replace the roosting habitat in a different area. At best, this would amount to an “offset”, but here, given it is not the creation of like for like habitat for the affected species, I consider it to be properly described as “compensation”.
132. As such, I consider that the benefits of the proposed roosting sandbank (assuming actual benefits can be demonstrated with confidence that they will eventuate, which I don’t consider is the case, given Dr Beauchamp’s

and Ms Webb's opinion), are more properly to be taken into account under s104(1)(ab) of the RMA.

133. The creation of the roosting sandbank will not result in the avoidance, or mitigation, of adverse effects, as it will not deal with the adverse effects caused by the eastern reclamation at the point of impact.
134. I note that section 10.4.17 of the s42A Report at [405], discusses "positive effects", including the sandbank. I consider that this further illustrates that the positive effects of the sandbank is matter for consideration under s104(1)(ab), even though the s42A Report does not expressly address it in this way. It should not be treated as avoidance as Dr Bull describes it, or mitigation as the S42A Report describes it elsewhere.
135. In addition, as Dr Beauchamp's evidence explains, the creation of the roosting sandbank will, in itself, cause adverse effects on At risk taxa including the lesser knot. I therefore do not consider that it meets the intent of Policy D.2.18 of the PNRP. I also note that the s42A Report does not consider effects on lesser knots in the assessment of adverse avifauna effects.
136. The s42A Report at [483] states that Policy D.2.18(7) provides a pathway to offset effects where there are significant residual adverse effects. I do not consider that is the case, as Policy D.2.18(7)(a) requires measures to avoid, remedy or mitigate be considered first, and Policy D.2.18(7)(b) requires offsets and compensation to be consistent with Policy 4.4.1 of the Northland RPS.
137. I am not aware of any measures being proposed to avoid, remedy or mitigate the loss of roosting and foraging habitat that would result from the eastern reclamation, and as Dr Bull explains in her evidence in chief, the sandbank is proposed to make good the loss of roosting habitat and avoid disturbance during construction (assuming the affected birds will move away from the eastern area and use the sandbank to the west instead), and doesn't seek to address the loss of foraging habitat.
138. In relation to Policy D.2.18(7)(b), Policy 4.4.1 of the RPS limits offsetting and compensation to areas outside of the coastal environment.

Significant adverse effects on these values therefore need to be addressed at the point of impact, so they are avoided, and compensation is not available to address these adverse effects.

139. For the reasons outlined above, I do not consider that the proposal is consistent with Policy D.2.18.
140. For completeness, I refer to my comments above regarding the “system-wide” approach to assessing adverse effects directed under Policy D.2.18(5)(a).
141. As Dr Beauchamp also explains in his evidence, taking a broad “system-wide” approach can lead to the underestimation of adverse effects on the Threatened and At risk indigenous taxa that are sought to be protected.

Policy D.2.20 Precautionary approach

142. Policy D.2.20 directs that a precautionary approach is adopted towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
143. I do not agree with the conclusion in the s42A Report at [445] that “*there appears to be sufficient understanding of the effects such that a precautionary approach is not necessary*”. Dr Beauchamp considers that there is not sufficient understanding of the effects on coastal avifauna to accurately assess the level of adverse effects that will be caused by the proposal.
144. As such, I consider it appropriate that a precautionary approach is taken in respect of potential adverse effects on threatened and at-risk avifauna.

Restricted discretionary rule and criteria for assessing the sandbank – Rule C.1.5.11.

145. Rule C.1.5.11 of the PRP-AV sets out the criteria for assessing whether to grant consent for the sand bank, and what conditions to impose.
146. I cannot locate any assessment of this aspect of the proposal against the Rule C.1.5.11 criteria in either the applicant’s Planning Analysis

(Appendix 28 to the application), Mr Hood's evidence, or the s42A Report.

147. Given the concerns raised by Dr Beauchamp and Ms Webb regarding the functioning of the proposed roosting sandbank, I consider it important that this component of the development is considered against the criteria set out in Rule C.1.5.11.
148. Rule C.1.5.11 is:

C.1.5.11 Deposition of material for beneficial purposes – restricted discretionary activity

*Deposition of material for beneficial purposes onto land (including the foreshore and seabed) is a restricted discretionary activity, provided that, within the coastal marine area, the deposited material is not waste or other matter (as listed in Regulation 4(2) of the Resource Management (Marine Pollution) Regulations 1998) which is dumped from a ship, aircraft or offshore installation. **Matters of discretion:***

- 1) Volume and location of material to be deposited.*
- 2) Methods used to carry out the activity and timing of the activity.*
- 3) Effects on coastal processes, including effects on the stability of the seabed and nearby shorelines.*
- 4) Effects on the foreshore and seabed associated with the deposition activity. 5) Effects on indigenous biodiversity and aquatic ecosystem health.*
- 6) Effects on tāngata whenua and their taonga.*
- 7) Effects on existing uses and activities undertaken in the area of deposition.*
- 8) Effects on the characteristics, qualities and values that contribute to make any of the following mapped (refer I Maps | Ngā mahere matawhenua) places outstanding or significant:*
 - a) Nationally Significant Surf Breaks.*
 - b) Regionally Significant Surf Breaks.*
 - c) Outstanding Natural Features.*
 - d) Areas of Outstanding Natural Character.*
 - e) Site or Area of Significance to tāngata whenua.*
 - f) Significant Ecological Area.*

g) Significant Bird Area.

h) Outstanding Natural Landscape.

9) Effects on the characteristics, qualities and values that contribute to any mapped (refer I Maps | Ngā mahere matawhenua) Historic Area or Site.

10) The positive effects of the activity.

149. As no assessment appears to have been completed to date, I consider there would be value in this being included as part of expert conferencing of planning and other relevant experts.

Tangata whenua

150. The relevant objectives and policies relating to tangata whenua within the PRP-AV are Objectives F.1.9 and F.1.12, supported by Policies D.1.1, D.1.2, D.1.3, D.1.4, and D.1.5.
151. Section 10.4.2 of the s42A Report considered that the cultural effects of the proposal are significant. I agree with the assessment of cultural effects within the s42A Report.
152. The Patuharakeke submission (submission #164) identifies Te Poupouwhenua as a significant ancestral site and a sacred spiritual pathway – rerenga wairua – for their people. Together with the Whangārei Te Rerenga Paāoa and other sites identified in the Cultural Effects Assessment provided with this submission, Te Poupouwhenua forms Patuharakeke's cultural landscape and seascape.
153. I do not wish to speak on behalf of Patuharakeke but wish to bring these matters to your attention.

Precautionary approach

154. The Applicant's planning evidence prepared by Mr Hood considered Policy 3 of the NZCPS and Policy D.2.20 of the PRP-AV in relation to the proposal.
155. Policy D.2.20 requires that decision makers adopt a precautionary approach where the adverse effects of proposed activities are uncertain, unknown, or little understood on indigenous biodiversity and the coastal

environment. Policy D.2.20 gives effect to Policy 3 of the NZCPS, which has been assessed above.

156. In line with my assessment above, I consider it appropriate that a precautionary approach is taken in respect of potential adverse effects on threatened and at-risk avifauna.

Whangārei District Plan Operative in Part 2022 (WDP)

157. The consent authority must have regard to the WDP when considering an application for resource consent.
158. The matters I do not agree with, or I wish to expand on further from the Applicant's planning assessment and the s42A Report in relation to the some of the relevant WDP provisions are discussed in the following paragraphs.

Ecosystems and Indigenous Biodiversity (ECO)

159. In terms of relevant planning provisions, I agree that Objectives ECO-O1 and ECO-O2, and Policies ECO-P1 to ECO-P4 of the WDP are relevant to the Northport proposal as identified within the Applicant's planning assessment prepared by Mr Hood and the s42A Report.
160. In my opinion, the ECO objectives and policies have a strong directive to protect significant indigenous vegetation and fauna and to maintain and enhance ecosystems and biodiversity. Policy ECO-P1 provides this direction through the criteria in ECO-SCHED1 Criteria for Ranking Significance of Areas of Indigenous Vegetation and Habitat (ECO-Appendix 1):

ECO-P1 Significant Indigenous vegetation and Significant Habitats of Indigenous Fauna

To recognise as significant, and provide protection for, indigenous vegetation and habitats of indigenous fauna, including indigenous wetlands, which are of Moderate, Moderate-High, High and Outstanding value using the criteria set out in ECO-SCHED1.

161. I rely upon Dr Beauchamp's evidence [26], where he concludes that there is "important foraging and roosting habitat for Threatened and At risk avifauna species". In my opinion, the criteria of ECO-SCHED1.1 is met and the site is of outstanding value.

162. Therefore, the habitats that the proposed reclamation and proposed roosting sandbank would be inconsistent with the ECO planning framework in the WDP.
163. However, to assist the Hearing Panel this matter may be further considered at expert conferencing.
164. Paragraph 531 of the s42A Report refers to offset, mitigation, and compensation as avoiding or mitigating the adverse effects arising from the permanent removal of the beach, dune system, and associated esplanade reserve. As above under my assessment of Policy D.2.18(7) within the PRP-AV, this does not apply for adverse effects in the coastal environment, as this is guided by Policy 4.4.1(5) of the RPS which only anticipates resorting to offsets and compensation to address residual adverse effects outside of the coastal environment.

Natural Open Space Zone (NOSZ)

165. I agree with the s42A Report that Objective NOSZ-O1 and NOSZ-O2 are relevant, as are Policies NOSZ-P2, NOSZ-P3 and NOSZ-P5. I also consider that Rules NOSZ-R4, NOSZ-R5, NOSZ-R6, NOSZ-R13 and NOSZ-R23 are also relevant.
166. My major concern is in relation to the application of Rule NOSZ-23 which identifies industrial activities in the Natural Open Space Zone as a non-complying activity.
167. I understand that the proposal is for a reclamation including the sand dunes above mean high water springs. However, the definition of “reclamation” from the PRP-AV is explicit that reclamation is not on land above mean high water springs:

“Reclamation:

The formation of permanent land located above mean high water springs that was formerly below the line of mean high water springs.

Reclamation does not include:

- 1) land that has risen above the line of mean high water springs as a result of natural processes, including accretion, or*

2) any infilling where the purpose is to provide beach nourishment,
or

3) structures such as breakwaters, moles, groynes or sea walls.”

168. The esplanade reserve to the east of the Port is zoned Natural Open Space Zone (NOSZ) under the WDP. Therefore, any development over the esplanade reserve must consider the relevant Natural Open Space Zone provisions.
169. I agree with Mr Hood at [8.154], that "Objective NOSZ-O1 and Policy NOSZ-P1 seek to protect and enhance the values of the NOSZ (the zone applying to the esplanade reserve behind the beach)." Mr Hood continues at [8.154] to acknowledge that the proposal does not implement the policy, which I agree with. I also consider that the proposal in the NOSZ is inconsistent with the breadth of the NOSZ provisions.

Objectives

NOSZ-O1 Natural Environment

Protect and enhance the natural, ecological, landscape, cultural and heritage values of the Natural Open Space Zone.

NOSZ-O2 Activities and Buildings

Buildings associated with recreational, educational, cultural and conservation activities, complement and do not compromise the values and qualities of the Natural Open Space Zone.

Policies

NOSZ-P1 Open Spaces

To identify and protect open spaces that are managed primarily for conservation and have high natural, ecological, landscape, cultural and heritage values.

NOSZ-P2 Adverse Effects

To manage adverse **effects** on the values and qualities of the Natural Open Space Zone by limiting the use, location, scale, and design of **buildings**.

NOSZ-P3 Enable Appropriate Structures

To enable **structures** and platforms in appropriate locations to enhance visitors understanding and experience of natural, cultural and heritage values.

NOSZ-P4 Limiting Inappropriate Activities

To avoid, remedy and mitigate adverse **effects** on the values and qualities of the Natural Open Space Zone by managing the scale and nature of activities.

NOSZ-P5 Manage Activities

To avoid adverse **effects** on amenity and character of the Natural Open Space Zone by managing activities to ensure that they support ongoing conservation.

170. However, neither the s42A Report nor Mr Hood considers Rule NOSZ-R35 in their assessments. In my opinion this is a key omission as

commercial activities in the NOSZ is a **non-complying activity** (my emphasis]. Thus, as a bundle, the proposal would therefore become a non-complying activity and would need to be assessed accordingly:

WDP Rule “**NOSZ-R35 General Commercial**

Activity Status: Non-Complying

Where: 1. The activity is a primary activity or ancillary activity”

171. I note that the Council’s Seal of approval linked to the Whangarei District Plan webpage ([council-seal-of-approval.pdf \(wdc.govt.nz\)](#)) states that the WDP was made partially operative on 15 September 2022. This precedes the lodgement of the application for the proposal which was 6 October 2022.
172. If it may assist the Hearing Panel, this may be a matter that would be assisted with in any expert planning conferencing.
173. I agree with the observation in the s42A Report at [430] of the *“acceptance by WDC that the taking of an esplanade reserve around the proposed reclamation is not appropriate given the intended use of the reclamation, and public access being appropriately achieved by the existing western walkway and jetty and the similar proposal for the new eastern edge.”*
174. I also agree with the s42A Report at [504(c)] that:
- "The identified amenity values associated with NOSZ (signalled in DGD-P12) reflect the existing and anticipated use of the esplanade public land for conservation and recreation activities, not Port activities. On that basis, the proposed expansion of a Port into this zone is not considered commensurate with the amenity values and characteristics anticipated by the NOSZ."
175. As suggested by the s42A Report at [515], I support further expert conferencing on the above issues in relation to the NOSZ as this zoning will remain regardless.

Port Zone (PORTZ)

176. I agree with the relevant assessment in the s42A Report and that the application is inconsistent with respect to public access. I support that

further consideration on the location and layout of the proposed public facilities would be beneficial and that this matter may be considered at expert conferencing to assist the Hearing Panel.

Part 2 RMA matters

177. I generally agree with the assessment under section 15 of the s42A Report, for the reasons the Officers set out, that an assessment of the application against the provisions of Part 2 of the RMA is not required.

Adequacy of information (s104(6))

178. I note for completeness that s104(6) of the RMA provides the Panel with a discretion to decline consent where it does not have adequate information to make a determination:

104(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

179. If the Panel is uncertain about the potential effects or the demand for this port expansion at this time, notwithstanding the expert evidence, it may exercise its discretion to decline the application under s104(6) on the basis that there is not adequate information to make a determination.

Conditions

180. As I am aware that expert conferencing has been scheduled following the exchange of submitters' expert evidence. Mindful that the proposed conditions may change because of expert conferencing, I do not propose to make specific comments on the conditions proposed by the applicant in my evidence.
181. In addition to the general comments that Dr Beauchamp discusses at [97-105], Dr Beauchamp at [105] suggests that the "conditions do not appear to deal with the impacts of a lag in the time between consent granting and the implementation of the development."
182. I note that the s42A Report discussed lapse date of resource consent at [635-637] which seeks clarification of this matter. I support such clarification and this may be appropriate at expert conferencing.

Conclusions

183. In conclusion, I do not consider all relevant provisions of the statutory documents have been adequately assessed either by the Applicant nor the s42A Report.
184. In my opinion, the statutory framework is highly directive requiring the protection of threatened species.
185. I consider that a precautionary approach should be taken in regard to the port extension proposal, particularly when considering the proposed sandbank and loss of avifauna habitat.
186. There is uncertainty around the potential effects of the port extension proposal. For example, Dr Beauchamp's expert evidence on the effects of the proposal on avifauna considers that adverse effects will potentially be significant and Dr Beauchamp considers that the Applicant's evidence does not demonstrate that adverse effects will be no more than minor.
187. There is uncertainty in relation to the demand for the port expansion as this has not been demonstrably needed for the "safe and efficient operation" of the port.
188. As discussed within the evidence, I consider there are other matters that may be relevant to enable the Panel to determine the application in accordance with section 104 and s104B of the Resource Management Act 1991 (RMA).
189. I consider that the positive effects of the sandbank is matter of consideration under s 104(1)(ab).
190. Other matters under s104(1)(c) of the RMA could include the international arrangements for the protection of lesser knot referred to in Dr Beauchamp's evidence and under my assessment of Objective 7 of the NZCPS above. In my opinion, it would be inconsistent with these arrangements to approve a proposal that removes important foraging habitat for lesser knots, in an effort to offset adverse effects on other avifauna species.

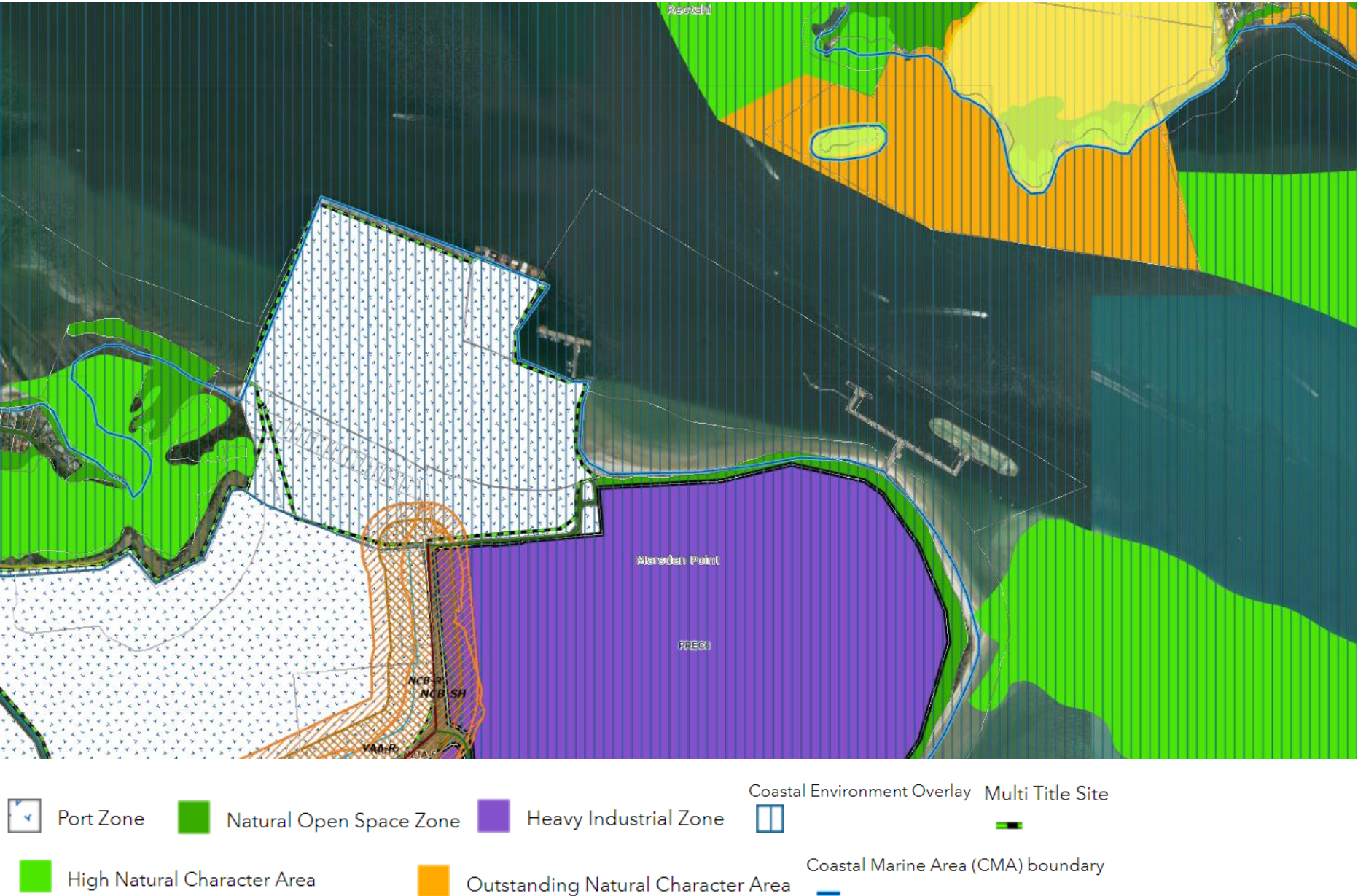
191. If the Panel is uncertain about the potential effects notwithstanding the expert evidence, it may exercise its discretion to decline the application under s104(6) on the basis that there is not adequate information to make a determination.

Linda Kirk

18 September 2023

APPENDIX 1 – Zoning and Overlay Maps

Whangarei District Plan Operative in Part 2022 – Key Zoning and Overlays – Northport



Proposed Regional Plan for Northland – Appeals Version (Significant Bird Areas - SBAs)



Proposed Regional Plan for Northland – Appeals Version (Significant Marine Mammal and Seabird Area - SMMSA)



Proposed Regional Plan for Northland – Appeals Version (Significant Ecological Areas - SEAs)



Proposed Regional Plan for Northland – Appeals Version (Coastal Zones)



Proposed Regional Plan for Northland – Appeals Version (High & Outstanding Features; Sites and Areas of Significance to Tangata Whenua; and Historic Heritage)



Part 2: Objective and policies

2.1 Objective

- (1) The objective of this National Policy Statement is:
- (a) to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and
 - (b) to achieve this:
 - (i) through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and
 - (ii) by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and
 - (iii) by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and
 - (iv) while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.

2.2 Policies

Policy 1: Indigenous biodiversity is managed in a way that gives effect to the decision-making principles and takes into account the principles of the Treaty of Waitangi.

Policy 2: Tangata whenua exercise kaitiakitanga for indigenous biodiversity in their rohe, including through:

- (a) managing indigenous biodiversity on their land; and
- (b) identifying and protecting indigenous species, populations and ecosystems that are taonga; and
- (c) actively participating in other decision-making about indigenous biodiversity.

Policy 3: A precautionary approach is adopted when considering adverse effects on indigenous biodiversity.

Policy 4: Indigenous biodiversity is managed to promote resilience to the effects of climate change.

Policy 5: Indigenous biodiversity is managed in an integrated way, within and across administrative boundaries.

Policy 6: Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach.

Policy 7: SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development.

Policy 8: The importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for.

Policy 9: Certain established activities are provided for within and outside SNAs.

Policy 10: Activities that contribute to New Zealand's social, economic, cultural, and environmental wellbeing are recognised and provided for as set out in this National Policy Statement.

Policy 11: Geothermal SNAs are protected at a level that reflects their vulnerability, or in accordance with any pre-existing underlying geothermal system classification.

Policy 12: Indigenous biodiversity is managed within plantation forestry while providing for plantation forestry activities.

Policy 13: Restoration of indigenous biodiversity is promoted and provided for.

Policy 14: Increased indigenous vegetation cover is promoted in both urban and non-urban environments.

Policy 15: Areas outside SNAs that support specified highly mobile fauna are identified and managed to maintain their populations across their natural range, and information and awareness of highly mobile fauna is improved.

Policy 16: Regional biodiversity strategies are developed and implemented to maintain and restore indigenous biodiversity at a landscape scale.

Policy 17: There is improved information and regular monitoring of indigenous biodiversity.

Clause 1.5

1.5 Decision-making principles

- (1) This National Policy Statement prioritises the mauri and intrinsic value of indigenous biodiversity and recognises people's connections and relationships with indigenous biodiversity.
- (2) It recognises that the health and wellbeing of people and communities are dependent on the health and wellbeing of indigenous biodiversity and that in return people have a responsibility to care for and nurture it. It acknowledges the web of interconnectedness between indigenous species, ecosystems, the wider environment, and the community, at both a physical and metaphysical level.
- (3) Consistent with this, the decision-making principles that must inform the implementation of this National Policy Statement are as follows:
 - (a) prioritise the mauri, intrinsic value and wellbeing of indigenous biodiversity:
 - (b) take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi):
 - (c) recognise the bond between tangata whenua and indigenous biodiversity based on whakapapa relationships:
 - (d) recognise the obligation and responsibility of care that tangata whenua have as kaitiaki of indigenous biodiversity:
 - (e) recognise the role of people and communities (including landowners) as stewards of indigenous biodiversity:
 - (f) enable the application of te ao Māori and mātauranga Māori:
 - (g) form strong and effective partnerships with tangata whenua.

Clause 1.7

1.7 Maintaining indigenous biodiversity

- (1) Maintaining indigenous biodiversity requires:
 - (a) the maintenance and at least no overall reduction of all the following:
 - (i) the size of populations of indigenous species:
 - (ii) indigenous species occupancy across their natural range:
 - (iii) the properties and function of ecosystems and habitats used or occupied by indigenous biodiversity:
 - (iv) the full range and extent of ecosystems and habitats used or occupied by indigenous biodiversity:
 - (v) connectivity between, and buffering around, ecosystems used or occupied by indigenous biodiversity:
 - (vi) the resilience and adaptability of ecosystems; and
 - (b) where necessary, the restoration and enhancement of ecosystems and habitats.

Clause 3.7

3.7 Precautionary approach

- (1) Local authorities must adopt a precautionary approach toward proposed activities where:
 - (a) the effects on indigenous biodiversity are uncertain, unknown, or little understood; but
 - (b) those effects could cause significant or irreversible damage to indigenous biodiversity.

Clause 3.16

3.16 Indigenous biodiversity outside SNAs

- (1) If a new subdivision, use, or development is outside an SNA and not on specified Māori land, any significant adverse effects of the new subdivision, use, or development on indigenous biodiversity outside the SNA must be managed by applying the effects management hierarchy.
- (2) All other adverse effects of any activities that may adversely affect indigenous biodiversity that is outside an SNA (other than indigenous biodiversity on specified Māori land (see clause 3.18)), must be managed to give effect to the objective and policies of this National Policy Statement.
- (3) Every local authority must make or change its policy statements and plans to be consistent with the requirements of this clause.

Clause 3.20

3.20 Specified highly mobile fauna

- (1) Where information about areas used by specified highly mobile fauna is available, every regional council must record areas outside SNAs that are highly mobile fauna areas, by working together with tangata whenua (in the manner required by clause 3.3), any potentially affected landowners, territorial authorities in its region, and the Department of Conservation.
- (2) If it will help manage adverse effects on specified highly mobile fauna, regional councils must include in their regional policy statements (where practicable) a map and description of each highly mobile fauna area in the region.

- (3) Local authorities must include objectives, policies, or methods in their policy statements and plans for managing the adverse effects of new subdivision, use, and development on highly mobile fauna areas, in order to maintain viable populations of specified highly mobile fauna across their natural range.
- (4) Local authorities must provide information to their communities about:
 - (a) highly mobile fauna and their habitats; and
 - (b) best practice techniques for managing adverse effects on any specified highly mobile fauna and their habitats in their regions and districts.

Appendix 2

Appendix 2: Specified highly mobile fauna

| Scientific name | Common name | Ecosystem | Threat category |
|--|-------------------------------------|------------------|---------------------------------------|
| <i>Anarhynchus frontalis</i> | ngutu parore/wrybill | coastal/riverine | Threatened (Nationally Increasing) |
| <i>Anas chlorotis</i> | pāteke/brown teal | wetland/riverine | Threatened (Nationally increasing) |
| <i>Anas superciliosa superciliosa</i> | pārera/grey duck | wetland/riverine | Threatened (Nationally Vulnerable) |
| <i>Anthus novaeseelandiae novaeseelandiae</i> | pīhoihoi/NZ pipit | forest/open | At Risk (Declining) |
| <i>Apteryx australis</i> 'northern Fiordland' | northern Fiordland tokoeke | forest/open | Threatened (Nationally Vulnerable) |
| <i>Apteryx australis australis</i> | southern Fiordland tokoeke | forest/open | Threatened (Nationally Endangered) |
| <i>Apteryx haastii</i> | roa/great spotted kiwi | forest/open | Threatened (Nationally Vulnerable) |
| <i>Ardea modesta</i> | kotuku/white heron | wetland/riverine | Threatened (Nationally Critical) |
| <i>Botaurus poiciloptilus</i> | matuku/bittern | wetland/riverine | Threatened (Nationally Critical) |
| <i>Bowdleria punctata stewartiana</i> | mātātā/Stewart Island fernbird | wetland/riverine | Threatened (Nationally Vulnerable) |
| <i>Bowdleria punctata punctata</i> | koroātito/South Island fernbird | wetland/riverine | At Risk (Declining) |
| <i>Bowdleria punctata vaeleae</i> | mātātā/North Island fernbird | wetland/riverine | At Risk (Declining) |
| <i>Calidris canutus rogersi</i> | huahou/lesser knot | coastal/riverine | At Risk (Declining) |
| <i>Chalinolobus tuberculatus</i> | pekapeka/long-tailed bat | forest/open | Threatened (Nationally Critical) |
| <i>Charadrius bicinctus bicinctus</i> | pohowera/banded dotterel | coastal/riverine | At Risk (Declining) |
| <i>Charadrius obscurus aquilonius</i> | tūtiriwhatu/northern NZ dotterel | coastal/riverine | Threatened (Nationally Increasing) |
| <i>Charadrius obscurus obscurus</i> | tūtiriwhatu/southern NZ dotterel | coastal/riverine | Threatened (Nationally Critical) |
| <i>Chlidonias albastriatus</i> | tara pirohe/black- fronted tern | coastal/riverine | Threatened (Nationally Endangered) |
| <i>Egretta sacra sacra</i> | matuku moana/reef heron | coastal/riverine | Threatened (Nationally Endangered) |
| <i>Falco novaeseelandiae ferox</i> | kārearea/bush falcon | forest/open | Threatened (Nationally Increasing) |
| <i>Falco novaeseelandiae novaeseelandiae</i> | kārearea/eastern falcon | forest/open | Threatened (Nationally Vulnerable) |