

Before the Independent Hearing Panel appointed by the Northland Regional Council

UNDER the Resource Management Act 1991 (“the Act”)

And

IN THE MATTER OF APP.040213.01.01 by Mangawhai Historic Wharf Trust to place, use and occupy space in the coastal marine area with a wharf facility inclusive of a wharf, a building, a gangway, pontoon and piles.

APP.040213.02.01 by Mangawhai Historic Wharf Trust to disturb the foreshore in the coastal marine area during the construction of the wharf facility.

BY **THE MANGAWHAI HISTORIC WHARF TRUST**
Applicant

SYNOPSIS OF SUBMISSIONS
on behalf of the
DIRECTOR-GENERAL OF CONSERVATION
TE TUMUAKI AHUREI

(Submitter No: 176)

DATED 21 September 2020 [\[updated 28/9/20\]](#)

Department of Conservation

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MAY IT PLEASE THE PANEL

1 INTRODUCTION

- 1.1 These submissions are made on behalf of the Director-General of Conservation (the Director-General) in respect of the application for resource consents by the Mangawhai Historic Wharf Trust (the Applicant) for its proposal to construct and operate a wharf, building, gangway, pontoon and piles in the Mangawhai Harbour, and to disturb the foreshore in the coastal marine area (cma) during construction of the wharf facility (the wharf proposal).¹
- 1.2 The Director-General opposes the application outright, and has lodged a submission requesting that the application be declined.²

2 SUMMARY OF THE DIRECTOR-GENERAL'S CASE

- 2.1 The Applicant foresees that the proposed wharf and pontoon will (inter alia):
- (a) Provide direct access to the harbour from the village;
 - (b) Facilitate passive water sport activity;
 - (c) Provide a focal point for families to picnic, swim, and/or fish; and
 - (d) Provide a linkage by water between the Heads and the Village.³
- 2.2 The Director-General has significant concerns about the increase in human activity the wharf would bring throughout the Mangawhai harbour, and the potential consequences on New Zealand Fairy tern (Tara iti) which rely on the harbour for feeding, roosting and breeding.
- 2.3 The Director-General is particularly concerned about the potential cumulative effects of the wharf proposal. Tara iti are already subject to disturbance by people and other stressors in the environment, and the additional adverse effects resulting from this wharf proposal could lead to the Tara iti population becoming extinct.

¹ APP.040213.01.01 (containing sub-applications APP.040213.01.01 and APP.040213.01.02).

² Submission dated 23 June 2020, the D-G is Submitter No. 176.

³ Application for Resource Consent to Build a Replica of the Mangawhai Wharf, Introduction, Colin Leach, March 2020, p 6.

- 2.4 There are currently only around 40 Tara iti in existence,⁴ they have the highest (worst) conservation status of “*Threatened - Nationally critical*”,⁵ and they are New Zealand’s most threatened bird.⁶
- 2.5 There are currently only nine known breeding pairs, six of which bred at Mangawhai in the last breeding season.⁷ All the breeding birds are reliant on the harbour for foraging at critical times, and virtually all of the Mangawhai Harbour is used by Tara iti for foraging.⁸
- 2.6 The Department of Conservation, in partnership with Iwi and several community groups, goes to significant efforts to protect Tara iti, with the aim of ensuring their survival.⁹
- 2.7 The Director-General’s view is that the Applicant’s proposal, which is aimed at providing more and better access to the harbour, and a hub of activity within the harbour, runs the risk of wasting these efforts, and is likely be detrimental to the ongoing survival of Tara iti.
- 2.8 There are two key effects of the proposal of particular concern:
- (a) Potentially significant adverse effects on Tara iti as a result of *increased disturbance by people* of their foraging activities. Increased numbers of people in the harbour brought by the proposed wharf development is likely to result in more disturbance of Tara iti foraging, which poses risk to breeding and fledgling success.
 - (b) Potentially significant adverse effects (including cumulative effects which would compound the effects of people using the harbour currently) on Tara iti as a result of *increased disturbance of the water* in the Mangawhai Harbour by additional people using the harbour, including with small boats and kayaks. Tara iti rely on being able to fish when the tides are right, in the shallow water of the harbour.¹⁰

⁴ Dr Antony (Tony) Beauchamp EIC, paragraph 4.2.

⁵ Tony Beauchamp EIC, paragraph 5.4.

⁶ Troy Makan EIC, paragraph 4.13.

⁷ Tony Beauchamp EIC, paragraph 4.2.

⁸ Tony Beauchamp EIC, paragraph 5.14.

⁹ Troy Makan EIC, paragraph 4.12.

¹⁰ Tony Beauchamp, EIC paragraph 5.16.

- 2.9 There have been very few studies of Tara iti behaviour, in particular on the effects of disturbance. The Director-General says that because the adverse effects of the proposal (including cumulative effects) on Tara iti are potentially significant, taking a precautionary approach means that the application should be declined. A precautionary approach is also directed by the relevant planning documents against which the application is to be assessed.
- 2.10 The Director-General also says that you *must* decline the application, as the proposal does not pass through either of the “gateways” in s 104D of the Act.

3 APPROACH TO CONCERNS ABOUT POTENTIAL EFFECTS ON TARA ITI

- 3.1 Concerns about the risk of potentially significant effects on Tara iti was raised with the Applicant some time ago, including in the early stages of development of the proposal.
- 3.2 The Applicant’s approach has been to essentially dismiss concerns raised regarding potential impacts of the proposed wharf on Tara iti. The Applicant has not engaged a Tara iti expert to present evidence to the Panel. Instead, it has presented essentially “desktop” analyses of the issues facing Tara iti, seeking to convince the Panel that potential effects on Tara iti should not be of concern. [The desktop exercise is fraught. Dr Craig, who Counsel described as having “vast” experience with Fairy Terns, referred us to the Te Arai work he has been involved with.](#)
- [Dr Beauchamp and Mr Southey have extensive experience working with and observing Tari iti. The Director-General says that more weight should be given to their evidence.](#)
- 3.3 Many of the conclusions reached by the Applicant’s consultants are implausible, and the approach has largely been that the effects of the proposed wharf are limited to the construction of it, and the use of the structure itself – as opposed to the wider use of the harbour which the proposal is also designed to encourage.
- 3.4 Dr Craig’s broad approach is that Tara iti will habituate to disturbance like other birds, and effects of the proposal are minor and transitory.

- He says Tara iti are adaptable and resilient. He also seems to think that the only effects are those relating to the wharf structure.
- 3.5 Mr-Dr McDermott's conclusion is that human settlement and human disturbance on the harbour does not pose a threat because they are adaptable and resilient, and there are bigger threats at play that it would be better to concentrate on.
- 3.6 All the Applicants' witnesses maintain that adverse effects of the wharf proposal will be minor or less than minor.
- 3.7 That is against the backdrop of the serious concerns noted by Messrs Don and Qureshi in their 2019 Bioresarches report, which is Appendix 9 to the Applicant's resource consent application. These concerns were highlighted in the Director-General's submission on the proposal.
- 3.8 The Bioresarches report also made the point that Tara iti are "significantly less tolerant to disturbance than its Australian [fairy tern] counterpart."¹¹ It is therefore unclear how Dr Craig can be so confident that Tara iti will habituate like the other birds that he has experience with.
- Dr Craig's response to a question on this (Qu 37) was: "I haven't looked at Fairy Tern in Australia, so I can't comment." That he has not even followed up on the suggestion by other report authors that Tara iti is "...significantly less tolerant to disturbance than its Australian counterpart" is astounding, given his brief for this hearing.
- 3.9 The expert evidence for the Director-General and the NZ Fairy Tern Charitable Trust, records direct observations (that is, probative evidence) of what Tara iti are already experiencing with the current level of activity on the harbour.
- 3.10 Dr Beauchamp's expert opinion is that the proposed wharf would result in effects on Tara iti that are likely to be significant, and which could "tip the balance" for Tara iti.¹²

¹¹ Bioresarches report (Graham Don and Yusuf Qureshi) January 2019, Appendix 9 to Application documents, pages 11 and 12, point (xi).

¹² Tony Beauchamp EIC, paragraph 4.11.

3.11 Mr Southey's expert opinion is that the Tara iti population is not in good health, and the risk of further impacts should not be taken lightly or allowed without evidence showing that adverse impacts will be avoided.¹³

3.12 Both these experts [Dr Beauchamp and Mr Southey] provide evidence that there was zero breeding success at Mangawhai in 2018/2019. And Dr Beauchamp's evidence shows greatly increased times for food to be delivered to chicks (from 6 mins in 2013 to 15 mins in 2019).

3.13 Mr Southey's reference to a shortage of food does not necessarily mean there is not enough food available. Rather, it means it takes a longer time to get it - for whatever reason – which *could* be a disturbance.

3.14 The Applicants' experts suggest that more could be done, for example, to "offset" adverse effects, such as pest control. DOC is already doing predator control at all the nesting sites – Dr Beauchamp's EIC, paragraph 5.9 states this clearly.

3.15 The Director-General says the expert evidence of Dr Beauchamp and Mr Southey should be preferred over that of Dr Craig and Dr McDermott.

4 THE LEGAL FRAMEWORK FOR CONSIDERING THE APPLICATION

4.1 In assessing the wharf proposal, the Panel is directed by s 104(1) of the Act, subject to Part 2, to have regard to:¹⁴

- (a) Actual and potential effects on the environment of allowing the activity (s 104(1)(a));
- (b) Any measure proposed (or agreed to) by the Applicant for the purpose of ensuring positive effects offset or compensate for any adverse effects that will or may result from allowing the activity (s 104(1)(ab));
- (c) Any relevant provisions of—

¹³ Ian Southey EIC, paragraph 12.4.

¹⁴ Matters in s 104 which are not relevant to this application are omitted.

- The New Zealand Coastal Policy Statement (NZCPS) (s 104(1)(b)(iv));
 - The Regional Policy Statement (RPS) (s 104(1)(b)(v)); and
 - The operative and proposed Regional Coastal Plans (RCP and PRP) (s 104(1)(b)(vi)); and
- (d) Any other matter the consent authority considers relevant and reasonably necessary to determine the application (s 104(1)(c)).

4.2 In considering the adverse effects of the proposal, you may disregard an adverse effect of the proposal if the relevant plan permits an activity with that effect (s 104(2)). This is a discretionary power (rather than a mandatory requirement), which is commonly referred to as the “permitted baseline” approach.

4.3 As the proposal falls to be considered as a non-complying activity,¹⁵ you need to be satisfied that the wharf proposal is able to pass through one of the gateways in s 104D before you are able to consider whether to grant consent.

4.4 You may decline the application if you consider that you have inadequate information to determine the application (s 104(6)).

5 NON-COMPLYING ACTIVITY GATEWAYS - S 104D

Law

5.1 Section 104D provides that:

- (1) a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
- (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—
- ...

¹⁵ Section 42A Staff Report, page 5.

- (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

- 5.2 The Panel must therefore be satisfied that the wharf proposal will cause no more than minor adverse effects, or that the proposal is not contrary to the policies and objectives of the RCP and PRP.
- 5.3 The Panel's consideration must be of the objectives and policies as a whole, as opposed to isolating out specific policies that the proposal does or does not comply with.¹⁶

Submission

- 5.4 The Director-General agrees with the conclusion in the s 42A Staff Report that the proposal does not pass either gateway in s 104D:
 - 5.4.1 The potential adverse effects of the proposal as a whole are more than minor; and
 - 5.4.2 The proposal is contrary to the relevant objectives and policies in the RCP and PRP ~~(that is in addition to being contrary to the directive objectives and policies in the New Zealand Coastal Policy Statement (NZCPS)).~~

6 THE ADVERSE EFFECTS OF THE PROPOSAL (s 104(1)(a))

- 6.1 As noted earlier, the adverse effects of the proposal of most concern to the Director-General include:
 - (a) Adverse effects on indigenous birds, including Tara iti in particular through disturbance by them of people encouraged or enabled to use the harbour by the proposed wharf;
 - (b) Adverse effects on Tara iti from disturbance of the coastal water in which they feed through boat wash and churning up of the seabed; and also -
 - (c) Adverse effects on natural character of the coastal environment - a matter raised in the Director-General's submission (in respect

¹⁶ *Kuku Mara partnership (Forsyth Bay) v Marlborough District Council* (EC) W 025/02.

[of s6\(a\) of the Act\).](#)

6.2 ADVERSE EFFECTS OF THE PROPOSAL (AS A WHOLE)

Law

- 6.2.1 A consent authority is required to give a sufficiently wide interpretation of s 104(1)(a) to ensure that all reasonably foreseeable effects are taken into account.¹⁷
- 6.2.2 The adverse effects to be considered are therefore the adverse effects of the proposal as a whole.¹⁸
- 6.2.3 This includes both the direct adverse effects and the indirect or consequential effects of an activity which are not directly caused by the activity for which resource consent is sought, itself. Adverse effects have been held to include:
- (a) Effects of the discharge (for which no resource consent was being sought or was required) of ballast from tankers entering Doubtful Sound, in servicing a water bottling plant in the Sound;¹⁹
 - (b) Boat wash from fast ferries causing disturbance of the foreshore in the Marlborough Sounds, notwithstanding [that](#) no consent was needed for the ferries to pass through the sounds, and the disturbance was an indirect effect;²⁰ and
 - (c) Noise from helicopters taking off and landing at a heliport for which consent was being sought, although the use of the helicopters themselves did not require resource consent.²¹ [Note - the noise from overflying helicopters was not taken into account because s 9 does not apply to “overflight”. But the Court said this was not the case for landings and taking off, and it went on to consider those effects \(see paragraph 70\).](#)

¹⁷ *Aquamarine*, page 366.

¹⁸ *Aquamarine Ltd v Southland Regional Council* (Planning Tribunal) 2 ELRNZ 361, page 365.

¹⁹ *Aquamarine*, pages 366, 367.

²⁰ *Marlborough District Council v New Zealand Rail Limited*, W40/95, page 6.

²¹ *Dome Valley District Residents Society Inc v Rodney District Council and Anor* (HC) 14 ELRNZ 237 at [70].

Submission

- 6.2.4 The adverse effects of the entire wharf proposal (both direct and indirect) are required to be considered by the Panel as adverse effects of the proposal.
- 6.2.5 This includes the wash from boats approaching or departing from the wharf and the effects of it including:
- (a) The effects of disturbance of the water and the seabed from the wash of boats going through the harbour; and
 - (b) The effects of disturbance of birds such as Tara iti by the presence or passage of boats in the harbour.
- 6.2.6 That is even though the use of boats or the disturbance caused by them is not of itself the subject of this resource consent application.²²
- 6.2.7 Adverse effects also include the effects of disturbance by people and their kayaks, dogs, and horses which have all been observed using the harbour at times Tara iti use it for foraging.
- 6.2.8 This is also an appropriate place to note that the RCP prohibits recreational use of the foreshore (which would include virtually the entire harbour excluding the channels) where this results in the disturbance of roosting, feeding, or breeding of indigenous or migratory birds. [Rule 31.3.2 and the associated provisions of the RCP were discussed at some length today.](#)
- 6.2.9 As noted in Ms Kirk's statement of planning evidence for the Director-General at paragraph 6.29, Rule 31.3.2 prohibits such recreational activity as both a permitted activity condition, and as a prohibited activity rule.
- 6.2.10 In the Director-General's submission, it would be an entirely perverse outcome for resource consent to be granted for a development that has the consequence of increasing an activity that is specifically prohibited by the region's regional coastal plan.

²² See *Aquamarine* discussed above.

Rule 31.3.2 and response to submissions from the Applicant on the rule, and other matters

6.2.11 The next section of these submissions goes through the provisions that lead to Rule 31.3.2, and responds to a number of points made in submissions by counsel for the Applicant in respect of the PRP and RPS.

Proposed Regional Plan (PRP)

6.2.12 In **paragraph 14** of counsel for the Applicant's submissions which I'd like to respond to first, counsel says that the PRP ought to be up to date, therefore no resort to Part 2 is required, and it can be accepted it gives effect to the NZCPS.

6.2.13 It has already been noted today in discussions with the representative from Forest & Bird, that the PRP is under appeal. DOC is a party to the appeals, and there are a number of provisions under appeal, including Forest & Bird seeking quite substantial changes to the significant areas mapping provisions.

6.2.14 In my submission the PRP isn't to be afforded more weight than the RCP, and it doesn't reflect Part 2, so Part 2 can be considered in the course of your consideration of this application.

6.2.15 The PRP does not give effect to the NZCPS or the RPS, for example, RPS Policy 4.4.1, referred to by counsel for the Applicant and provided with counsel's legal submissions. This is discussed further below.

Regional Policy Statement (RPS)

6.2.16 At **paragraph 18** of counsel's legal submissions counsel refers to Policy 4.4.1 of the RPS. Counsels' submissions attach Policy 4.4.1 (page 15 of legal submissions). Policy 4.4.1 specifically states:

"(1) In the coastal environment, avoid adverse effects, and outside the coastal environment avoid, remedy or mitigate adverse effects of subdivision, use and development so they are no more than minor."

6.2.17 It doesn't say "so that they are no more than minor". It says "avoid adverse effects".

6.2.18 Policy 4.4.1(4) are also relevant here. Policy 4.4.1 (4) states:

“For the purposes of clause (1), (2) and (3), when considering whether there are any adverse effects and/or significant adverse effects:

(a) Recognise that a minor or transitory effect may not be an adverse effect;

(b) Recognise that where the effects are or maybe irreversible, then they are likely to be more than minor;

(c) Recognise that there may be more than minor cumulative effects from minor or transitory effects.”

6.2.19 Policy 4.4.1(5) dealing with offsetting also notes that:

“For the purpose of clause (3), if adverse effects cannot be reasonably avoided, remedied or mitigated then it maybe appropriate to consider the next steps in the mitigation hierarchy i.e. biodiversity offsetting followed by environmental biodiversity compensation, as methods to achieve Objective 3.4.”

6.2.20 But offsetting is limited to clause (3) which deals with areas outside the coastal environment and where clause (1) does not apply. The offsetting guidance in the RPS is that offsetting is only appropriate to consider in terms of matters outside of the coastal environment.

6.2.21 Also, the second part of the Explanation is important. It reads:

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

6.2.22 The test is “avoid”. It is not “allow minor or transitory adverse effects”.

Operative Regional Coastal Plan (RCP)

6.2.23 Counsel for the Applicant also provided one page of the Operative RCP. In the RCP in my submission, the protection afforded to the coastal environment, is in two parts.

(a) Protection of important conservation values – the Marine 1 (Protection) Management Area provisions

6.2.24 Objective 25.3 sets out the objectives for the Marine 1 (Protection) Management Area:

“1. The protection of the important conservation values identified within Marine 1 (Protection) Management Areas including their ecological, cultural, historic, scientific, scenic, landscape and amenity values.

2. Subdivision, use, and development in Marine 1 (Protection) Management Areas occurring without adverse effects on the areas’ important values and natural character.”

6.2.25 Those objectives are: (1) the protection of important conservation values, and (2) use and development without adverse effects on the important values.

6.2.26 The relevant Policy 25.4(1) is:

“The Council and Consent Authorities will give priority to avoiding adverse effects on the important conservation values (as identified in Appendix 9) associated with an area within any Marine 1 (Protection) Management Area when considering the subdivision, use, development and protection of the Northland Region’s Coastal Marine Area.”

6.2.27 That takes you to Appendix 9, which sets out the criteria to determine Important Conservation Values for areas, which includes (at pages 563, 564 of the RCP):

“5. Marine Mammals and Birds

Areas including or near any:

(a) marine mammal breeding or haul-out site;

(b) habitats of endangered, vulnerable, rare or threatened bird species;

(c) important roost sites, or feeding areas of wading birds.”

6.2.28 Chapter 6.5 “Methods of Implementation” referred to on page 39 provides:

“The Marine 1 (Protection) Management Area is applied to those areas within Northland’s coastal marine area identified as being Areas of

Important Conservation Value. The priority in these areas will be the protection of those significant described values specifically identified as occurring within each particular area. The boundaries and values of these areas are summarised in Appendix 6.”

6.2.29 Appendix 6 on page 556 records the area and values for the Mangawhai Estuary:

<u>NAME</u>	<u>AREA</u>	<u>VALUES</u>
<u>Mangawhai Estuary</u>	<u>The entire Coastal Marine Area identified within Mangawhai Harbour including an area extending outside the harbour entrance, excluding the specific MM4 Area as indicated in the Coastal Plan Maps, Map Sheet B26.</u>	<u>Protected areas, coastal wetlands, marine mammals, birds, ecosystems and habitat values. Inter-tidal areas, shellbanks and estuary provide important significant habitat for international migratory and NZ endemic wading and wetland birds, including some threatened species and an endangered sub-species.</u>

6.2.30 Finally, at page 366, which is the Assessment Criteria for determining applications for coastal permits – Number 15 on page 366 states that:

“15. For applications within Marine 1 (Protection) Management Areas, the effects of the proposal on the important conservation values (as identified in Appendix 9) pertaining to the particular area and the measures proposed to be undertaken to ensure that these values will be protected.”

6.2.31 These are matters that need to be taken into account. It is not just construction effects - it is all the effects on the particular area.

6.2.32 That is the first part of the protection direction in the RCP. The second part is to do with recreation in Chapter 16.

(b) Chapter 16 Recreation provisions

6.2.33 At page 114, Objective 16.3 is:

“Provision for recreational uses of the coastal marine area while avoiding, remedying, and mitigating the adverse effects of recreational activities on other users and the environment.”

6.2.34 The policies to achieve that include Policy 16.4(1) which is:

“1. To adopt a permissive approach toward recreational activities in Marine 1 and Marine 2 Management Areas, except where these:

(a) require associated structures; or

(b) cause adverse environmental effects, including those resulting from discharges of contaminants, excessive noise, and disturbance to significant indigenous vegetation and significant habitats of indigenous fauna; or...”

6.2.35 The Explanation to Policy 16.4(1) states:

“**Explanation.** Recreation is arguably the most significant way in which the general public gain direct benefit from the coastal marine area. Therefore, such activity should be permitted unless it causes adverse effects.”

6.2.36 Chapter 16.5 Methods of -Implementation for Policy 16.4(1) is where leads us to Rule 31.3.2(a), (b) and (c). The Methods include:

(for Policy 1)

1. Include rules in this Plan permitting recreational activity in Marine 1 and Marine 2 Management Areas, provided that it meets specified conditions.

cross-references

31.3.2(a) 31.4.2(a)

2. Include rules in this Plan making recreational activity in Marine 1 and Marine 2 Management Areas either a discretionary activity or prohibited activity if the specified conditions referred to in Method 1 above are not met.

cross-references

31.3.2(b) 31.4.2(b)

31.3.2(c) 31.4.2(c)

(for Policy 2)

6.2.37 This directly cross-references Rule 31.2.3(a) to (c).

6.3 THE LEVEL OF ADVERSE EFFECT AND RISK OF IT OCCURRING

Law

- 6.3.1 The RMA jurisprudence that developed over several years on notification decisions, has been applied in the context of assessing what can be considered as an adverse effect under s 104 of the Act.
- 6.3.2 This includes the Court of Appeal's decision in *Bayley v Manukau City Council*, where the Court held that a consent authority can disregard potential adverse effects that will certainly be *de minimis*, or those whose occurrence is merely a remote possibility.²³
- 6.3.3 This was the approach taken by the High Court in *R J Davidson v Marlborough District Council*, where it confirmed the original decision of the Environment Court in assessing the threshold for what amounts to a potential effect where this relates to future risk. The High Court noted that the Environment Court "did not assess the risk as *de minimis* or a remote possibility."²⁴ [and confirmed the Environment Court's decision.](#)
- 6.3.4 The High Court's approach in *Davidson* was followed and cited with approval by the High Court in *Clearwater Mussels v Marlborough District Council*.²⁵ [Davidson involved a new application for an activity and Clearwater involved reconsementing an activity for a further 20 years.](#)
- 6.3.5 Both the *Davidson* and *Clearwater Mussels* cases were concerned with the risk to King Shags posed by proposals for marine farms. In *Clearwater Mussels*, the proposal [for "re-consenting" for a further 20 years](#) was declined on the basis of potential effects of disturbance of the extremely vulnerable King Shag ("*Nationally Endangered*" [\(one down from 'Nationally Critical' as is the case for Tara iti\)](#), and a population of 839) by vessels that would visit the marine farm, notwithstanding the additional disturbance from the proposed marine farm would be very small in the context of the existing disturbance from human activities already occurring.²⁶

²³ *Bayley v Manukau City Council* [1999] 1 NZLR 568, CA, at p 576.

²⁴ *Davidson* (HC) at [132].

²⁵ *Clearwater Mussels Ltd v The Marlborough District Council* (HC), [2019] NZHC 961,

²⁶ *Clearwater Mussels v Marlborough District Council* (EC) [2018] NZEnvC 88, at [114].

6.3.6 In *Davidson*, the Environment Court found (inter alia) that the proposed marine farm would change the King Shag habitat, with a low probability (very unlikely but possible) that the King Shag would become extinct as a result of the application.²⁷ At the end of the day, the Environment Court declined consent under s 104(6) on the basis that it had inadequate information to determine the application, particularly in respect of the effects of the proposed marine farm in combination with the effects of other marine farms and other major environmental stressors.²⁸ The High Court confirmed the Environment Court's decision to decline consent.

6.3.7 In the High Court's decision in *Davidson*, the Court also addressed the issue of standard of proof needed to demonstrate a potential future risk, noting that there is no standard approach to what level of risk needs to be proven, although it definitely does not need to be proven to the civil standard of "the balance of probabilities".²⁹

"[129] Determining actual effects on the environment is relatively straightforward, because it concerns existing factual circumstances that can be proved on the balance of probabilities. However, the authority must also take into account the potential effects on the environment. The word "potential" denotes something other than proof, and cannot be assessed on the balance of probabilities. Instead, it was appropriate to assess risks that carry less than a 50 percent chance of eventuating. In particular, the risk of species extinction is much less than 50 percent and it cannot be proved that extinction is more likely than not to occur. Instead, it is appropriate to assess existing facts on the balance of probabilities, and consider whether any particular evidence is proved to that standard. The assessment of potential effects then depends on an evaluation of all of the evidence but does not depend on proving that potential effect will more likely than not occur."

There is no onus on the Department to prove the risk, but rather, to provide a factual basis on which risk is to be assessed.

²⁷ ~~Clearwater Mussels~~ *Davidson* (EC) [2018] NZEnvC 818 at [206].

²⁸ *Davidson* (EC) at [207], [298].

²⁹ *Davidson* (HC) [104] to [110] and conclusion [129].

6.3.8 The evidential standard to be applied regarding risk that has become accepted by the courts is in fact a very low one. While the appropriate standard for asserting a fact is the balance of probabilities, the basic minimum required for the hypothesis of a high impact risk to be taken into account is “a scintilla ([a tiny spark](#)) of evidence to support it”.³⁰

Submission

6.3.9 In respect of the proposed wharf, the Director-General says that:

- (a) The level of potential adverse effects on Tara iti is significant. It is not *de minimis*, and the risk is not simply a remote possibility.
- (b) There is a real risk of serious harm occurring if the wharf proposal were to proceed.
- (c) There is sufficient factual evidence on which the certainty of risk is based.

6.4 ADVERSE EFFECTS INCLUDE CUMULATIVE EFFECTS

Law

6.4.1 The Act defines “effect” in s 3 to include “any cumulative effect which arises over time or in combination with other effects”.³¹

6.4.2 Cumulative effects are therefore effects that add to or compound existing adverse effects.

6.4.3 The High Court in *Davidson* found that the adverse effects of the proposed marine farm would add cumulatively to the existing environmental stressors on the King Shag (i.e. and existing adverse effects).³²

6.4.4 The Court also noted that the majority of the Environment Court had properly exercised its discretion to take cumulative effects into account under s 104(1)(c).³³ The Environment Court majority had appropriately made its finding that the adverse effect on King Shag

³⁰ *Shirley Primary School v Telecom Mobile Communications Ltd* (EC) C 136/98 at [142, applied by the High Court in *Ngati Maru Iwi Authority v Auckland City Council* (HC), AP 18/02 at [68].

³¹ RMA s 3(d).

³² *Davidson* (HC) at paragraph [146].

³³ *Davidson* (HC) at paragraph [148].

habitat under the proposed site would be minor but that the cumulative adverse effects could be serious.³⁴

Submission

- 6.4.5 The Director-General says, based on the expert evidence, the cumulative effects of the proposed wharf, when assessed in combination with the existing adverse effects (or stressors) on Tara iti already being experienced, are potentially significant.
- 6.4.6 Even if the Panel were to find that the potential effects of the wharf proposal on Tara iti are minor (which the Director-General submits is *not* the case), the Panel would still be entitled to determine that the potential cumulative effects caused by the proposed wharf are significant.

6.5 THE “ENVIRONMENT” – WHAT IT INCLUDES

Law

- 6.5.1 The “environment” against which effects are assessed under s 104(1)(a) is the existing environment, as modified by the utilisation of rights to carry out permitted activities, and as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.³⁵

Submission

- 6.5.2 The “environment” for the purposes of the Panel’s assessment is the existing Mangawhai Harbour environment as it may be modified by future authorised structures and activities that have not yet commenced.
- 6.5.3 The s 42A Staff Report notes at paragraph 8 on page 8 that:

“... coastal structures in the vicinity of the proposed wharf include a kayak ramp and stairs 130 metres to the north-west, two swing moorings 250 metres and 400 metres to the north-west, two hard

³⁴ *Davidson* (HC) at paragraph [150].

³⁵ *Queenstown Lakes District Council v Hawthorne Estate Limited and Ors* (CA) 12 ELRNZ 299, paragraph [84].

protection structures (groins) 290 metres and 340 metres to the south-west, the back bay jetty and walkway 900 metres to the north-west and a consented board walk facility (not yet constructed) between 850 and 950 metres to the north-west. The Moir Street boat ramp immediately to the south of the proposed wharf does not appear to have been previously authorised. A consent for mangrove removal and associated foreshore disturbance and deposition includes an area of mangrove forest approximately 300 metres north and 300 metres south-east of the proposed wharf.

6.5.4 The environment against which effects (including cumulative effects) are to be assessed would include the lawful structures and the as yet unconstructed structures and activities that have been consented, or permitted activities, provided it is likely that these consents will be implemented.

Madame Chair has mentioned that decision-makers need to assume that the law will be enforced, including bylaws (for example, in relation to the 5 knot speed limit). We have also heard that about dogs, but that only applies above MHWS.

[Discussion, Council officer asked to check where KDC has delegated power to control dogs in the CMA, given the contents of signs indicating the bylaws extend into the CMA].

7 PERMITTED BASELINE (s 104(2))

Law

- 7.1.1 In considering the adverse effects of the proposal, you may disregard an adverse effect of the proposal if the relevant plan permits an activity with that effect (s 104(2)).
- 7.1.2 Section 104(2) provides a partial codification of the permitted baseline test that emerged from the decisions of the Court of Appeal in *Bayley, Smith Chilcott* and *Arrigato Investments* in 1999 to 2002.³⁶
- 7.1.3 The power is discretionary, rather than a mandatory requirement, and the Panel must decide whether to apply it or not.

³⁶ *Auckland Regional Council v Living Earth Limited* (CA) 14 ELRNZ 305 at paragraph [47].

7.1.4 As the reference in s 104(2) is to the “plan”, and “plan” is defined in the Act to mean the “operative” plan, you may decide to disregard any adverse effects of the proposal which are permitted under the RCP.

In response to the question from Commissioner Lieffering:] In terms of the PRP where rules are beyond legal challenge, those rules should not be treated as operative. The provisions still need to be approved under clause 19 of the First Schedule to the Act, and the Minister has the power under clause 19 to amend the provisions before approving them.

7.2 The purpose of the permitted baseline is to allow a consent authority to disregard effects of permitted activities as those effects are contemplated as contributing to the character of the environment. It applies only to what is permitted *on the site in question*.³⁷

Submission

7.2.1 The Director-General says that the Panel *should not* apply the permitted baseline in this case. What is permitted under the RCP is extremely complex, with Rule 31.3.2 prohibiting recreational use of the foreshore which results in disturbance of feeding, roosting or breeding indigenous birds, but not over the channel part of the harbour which would not be regarded as foreshore.

7.2.2 Most of the site of the proposed wharf appears to be foreshore where Rule 31.3.2 of the RCP applies, and a small area of channel. As it does not appear that a “hybrid” approach can be taken, the Director-General says that the permitted baseline should be put to one side. In any event, it does not assist the Applicant, because most of the site of the proposed wharf would not benefit from its application.

7.2.3 *In addition, no new structures are permitted under the RCP - only ski lane markers, signs and monitoring equipment are permitted under the RCP.*

³⁷ *Auckland Regional Council v Living Earth Limited*, page 323 – quoting the Environment Court.

8 POSITIVE EFFECTS OF THE PROPOSAL (s 104(1)(ab))

Law

- 8.1 The positive effects of the proposal are relevant under the Panel's 104(1)(a) assessment of effects.
- 8.2 However, positive effects cannot be applied to effectively "discount" negative effects for the purpose of the assessment required under s 104D.³⁸

Submission

- 8.3 The Director-General says while there may well be benefits to the community from the wharf proposal, the positive effects are outweighed by the potentially significant adverse effects. The positive effects do not warrant consent being granted for the proposed wharf in light of the potential significant adverse effects.

8.4 Section 104(1)(ab) requires you to consider positive effects that might offset or compensate for adverse effects. While you are required to consider offsets, that doesn't mean that offsetting adverse effects, as opposed to avoiding them, is appropriate.

8.5 In terms of positive effects designed to offset adverse effects, the Applicant is proposing that the wharf be used to display educational material. That can be regarded as an offset.

8.6 But an offset isn't an acceptable alternative to avoiding adverse effects in a situation like we have here. The RPS Policy 4.4.1 records that offsets are not an appropriate substitute for avoiding adverse effects, which is the requirement under Policy 4.4.1(1) in respect of this type of environment. That is, where there are indigenous taxa that are threatened, and significant habitat of indigenous fauna.

8.7 It is open to an Applicant to offer an offset, but the direction in the RPS is that it is not a suitable alternative to going through the mitigation hierarchy, or to get something "over the line" in terms of residual adverse effects.

³⁸ *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403.

9 RELEVANT PLANNING DOCUMENTS (S 104(1)(b))

Law

- 9.1 Section 104(1)(b) requires the Panel to have regard to the relevant objectives and policies in the NZCPS, the RCP and PRP.
- 9.2 The “minor and transitory” qualifiers that the Supreme Court applied to Policies 13 and 15 in *King Salmon* do not apply to Policy 11.³⁹

Policy 11 is discussed in the Environment Court decision in *Davidson* (this aspect of the decision was not challenged in the High Court appeal), and by the High Court in *Clearwater Mussels*. In the latter, the High Court noted (at paragraphs [99] to [100]):

“Furthermore, s 3 of the Act defines “effect’ widely to include “any potential effect of low probability which has a high potential impact.” Under 104(1)(a) of the Act, a consent authority must have regard to any actual and potential effects on the environment of allowing the activity. All effects must be considered.

Given the gravity of the 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.

Submission

- 9.3 The relevant objectives and policies are set out in the s 42A Staff Report and the evidence of Ms Kirk and Mr Chandra.
- 9.4 Ms Kirk’s expert opinion is that
- (a) The NZCPS has a strong directive planning framework for the preservation and protection of various matters from inappropriate subdivision, use, and development of the coastal environment, including:

³⁹ *Davidson* (EC) [275] and [286] (not subject of appeal to the HC; *Clearwater Mussels* (HC) [98] to [100].

- indigenous biological diversity (biodiversity): Policy 11 – protect and avoid adverse effects on indigenous taxa that are listed as threatened or at risk, with Tara iti being footnoted as an example;
- natural character: Policy 13 – preserve;
- natural features and natural landscapes: Policy 15 – protect; and
- historic heritage: Policy 17 – protect.

9.5 [An important](#) point to note here is that the “minor and transitory” qualifiers that the Supreme Court applied to Policies 13 and 15 in *King Salmon* do not apply to Policy 11 for very good reason. Put simply, even a minor or transitory effect could tip the balance for a threatened species. That was the situation in the *Davidson* and *Clearwater Mussel* cases, which is exactly what we have here with the wharf proposal and the potential effects on Tara iti.

9.6 In respect of Policies 11, 13 and 15, the Director-General says that the potential adverse effects of the wharf are neither minor nor transitory. Tara iti and other wading birds form part of the natural character of the harbour landscape. If they were to disappear, that would have a significant effect on natural character values.

9.7 Ms Kirk also notes that Policy 3 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.*” Policy 3 is discussed further detail below.

9.8 Dr Beauchamp’s expert opinion is that the wharf proposal has the potential to cause significant adverse effects on indigenous biodiversity, such as the nationally critical threatened Tara iti. This directs that a precautionary approach is taken in the consideration of this application.

9.9 The RCP and PRP also have a strongly protective directive framework. In particular, as noted above, the prohibited activity rule for recreational activities which disturb the feeding, roosting or breeding of indigenous and migratory birds sends a very strong signal for what is contemplated as being appropriate for the harbour environment.

10 OTHER RELEVANT MATTERS (S 104(1)(c))

10.1 The Director-General says that other matters relevant for you to consider under s 104(1)(c) include:

(a) the need for a precautionary approach to be taken in respect of the proposal; and

(b) Alternative locations for the proposal.

(c) Iwi Management Plan

(d) Conservation efforts

[Madame Chair suggested a further matter might be the efforts made to protect Tara iti. Response: the Director-General agrees.]

11 THE NEED FOR A PRECAUTIONARY APPROACH

Law

11.1.1 Policy 3 of the NZCPS sets out clear direction as to when a precautionary approach should be taken in decision making:

Policy 3 Precautionary approach

- (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
- (2) In particular, adopt a precautionary approach to 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.

11.1.2 The precautionary approach suggests that decision makers should exercise their discretion where there is inadequate information about adverse effects, to consider declining the application under s 104(6) of the Act.⁴⁰

Submission

11.1.3 The Director-General says that the Panel should adopt the precautionary approach and decline the application for the wharf proposal.

11.1.4 Just as was the case with risk to King Shags in *Davidson* [and Clearwater Mussels](#), there is uncertainty in the vulnerability of the small population of Tara iti, and the wharf proposal would add cumulatively to the existing environmental stressors on Tara iti.

12 THE REQUIREMENT TO CONSIDER ALTERNATIVE LOCATIONS WHERE SECTION 6 MATTERS ARE AT ISSUE

Law

12.1.1 Where there are matters of national importance such as s 6 matters raised by a proposal, an assessment of alternative locations for the activity for which resource consent is sought, is required.⁴¹

Submission

12.1.2 The s 42A Staff Report records that the Applicant's AEE concluded that any adverse effects for the activity would be no more than minor, and so it did not include any alternative methods or locations.⁴²

12.1.3 Given that the wharf proposal raises s 6 issues (effects on significant habitat and natural character), as well as s 5 issues (adverse effects on

⁴⁰ *Davidson* (EC) at [281] confirmed as appropriate by the High Court at paragraphs [104] - [105] and [146].

⁴¹ *TV3 Network Services Ltd v Waikato District Council* (HC) [1998] 1 NZLR 360, at 373.

⁴² Section 42A Staff Report, paragraph 50, page 18.

threatened taxa), it was required to consider alternative locations for its proposal.

- 12.1.4 The Director-General says that this is a shortcoming in the Applicant's process and is relevant to your consideration of the proposal.

13 DISCRETION TO DECLINE THE APPLICATION DUE TO INADEQUATE INFORMATION (s104(6))

Law

- 13.1.1 Should the Panel consider it does not have adequate information, you may exercise your discretion to decline consent under s 104(6).
- 13.1.2 As noted above, where environmental effects are both uncertain, unknown or little understood, and potentially significantly adverse, Policy 3 of the NZCPS directs that a precautionary approach be taken.
- 13.1.3 Section 104(6) provides an express mechanism to decline consent based on inadequate information to determine the application, which includes assessing the potential effects.

Submission

- 13.1.4 The Director-General says that the Applicant has [fallen well short of providing the level of information needed, and has](#) not provided enough information [for the Panel to be able to properly](#) determine the application.
- 13.1.5 The Applicant has not presented any data from studies or surveys of current use of the harbour so that there is a proper understanding of the current level of use. The evidence of Mr Southey and Dr Beauchamp demonstrates that there is significant use of parts of the harbour for recreational activities, but this has not been quantified by the Applicant. [It has also been noted that what Mr Southey and Dr Beauchamp have provided in their evidence are only snapshots of actual recreational use.](#)
- 13.1.6 The Applicant has also not provided any predictions of future use based on reliable data, so the potential increase in use of the different parts of the harbour cannot be understood.

13.1.7 As both Dr Beauchamp and Mr Southey explain in their evidence, there is a lot we don't know about Tara it. The Applicant has not brought any meaningful data or expert opinion on the potential risks of the proposed wharf on Tara iti. As a result, there is inadequate information and uncertainty around the level of potential risk. It is incumbent on the Applicant to prove its case – that includes that the proposal passes the s 104D test, which includes that adverse effects would be no more than minor, including potential cumulative effects that add to existing effects, and future effects.

13.1.8 The Director-General says that if you are not minded to decline the application for reasons set out in the earlier sections of these submissions, you should decline the application under s 104(6) on the basis of inadequate information.

14 COMMENTS ON THE SECTION 42A STAFF REPORT

14.1 The Director-General supports the findings and recommendation in the s 42A Staff Report, that the application be declined.

14.2 The Director-General also supports the conclusions of Ms Hansen as set out in her report attached as Appendix 3 to the Staff Report.

15 WITNESSES

15.1 The Director-General will be calling the following witnesses:

(a) Dr Antony (Tony) Beauchamp, who has extensive experience in the field working with Tara iti. Dr Beauchamp's expert opinion is that:

- The survival of Tara iti is highly dependent on Mangawhai Harbour being suitable for breeding. Added disturbance at critical times could lead to the Tara it's extinction;
- Any new or additional impacts caused by the provision of further recreation based at the proposed wharf recreational hub would add to the challenges the Tara iti already faces;

- If recreation is encouraged in the upper and middle harbour through the development of infrastructure such as the proposed wharf, this will threaten the Tara iti population; and
 - The proposed wharf would result in effects on Tara iti (including cumulative effects) that are likely to be significant. The proposal could potentially tip the balance for the Tara iti. A precautionary approach is therefore needed.
- (b) Mr Troy Makan, the leader of the Department of Conservation's Tara Iti Recovery Group (via video link). Mr Makan's evidence is that:
- Tara iti is experiencing death by 1000 cuts. Historic predation, mangrove removal, dredging, residential development and increased disturbance due to increasing population and their recreation has shrunk Tara iti's habitat to a few critical areas – Mangawhai Harbour chief among them;
 - While we simply don't know what the effects of the wharf proposal will be, we do know that they are currently being disturbed by people, dogs and craft using the harbour; and
 - As there are only 40 Tara iti in existence, negative impacts could lead to the population becoming extinct.⁴³
- (c) Ms Linda Kirk, who is providing planning evidence. Ms Kirk's expert opinion is that:
- All relevant provisions of the statutory documents have not been adequately assessed either by the Applicant, nor in the s42A Officer's Report;
 - The Applicant has not fully assessed the potential adverse effects of the proposal in concluding that the adverse

⁴³ Troy Makan EIC, paragraphs 7.1 and 7.2.

effects will be no more than minor [in terms of the first gateway test](#); and

- The Applicant has not demonstrated that the proposal is not contrary to the objectives and policies in the relevant plans, and therefore has not demonstrated that either of the gateway tests in s 104D are met, as required, to enable consent to be granted.⁴⁴

15.2 Dr Beauchamp's and Ms Kirk's statements of evidence have been pre-circulated in accordance with the Panel's directions. Mr Makan's evidence is not in the nature of expert evidence, and he will be reading a statement of evidence he has prepared copies of which have been provided to the Hearing Co-ordinator, also in accordance with the Panel's directions. As Mr Makan is recovering from a recent operation and is unable to travel to the hearing, arrangements have made for him to appear by video link.

16 CONCLUSIONS

16.1 For the ~~above~~ reasons [I have explained](#), the Director-General says that the Panel cannot grant consent for the wharf proposal, as it cannot pass through either of the gateways in s 104D of the Act.

16.2 In the event the Panel were to consider that the requirements of s 104D are able to be met, the Director-General requests that the Panel adopt a precautionary approach, on the basis that either there is adequate evidence on which you can conclude that the proposal poses significant risk to Tara iti, or decline the application under s 104(6) of the Act. [Absence of evidence does not mean evidence of absence.](#)

16.3 The Director-General says that the wharf proposal:

- (a) Poses an unacceptable risk to Tara iti in addition to the stressors Tara iti is already struggling with;
- (b) Is contrary to the NZCPS, and the RCP and PRP; and

⁴⁴ Linda Kirk EIC, paragraph 4.6.

- (c) Does not promote sustainable management and is contrary to matters of national importance in s 6 of the Act;

Discussion

Madame Chair raised the possibility that the order of the Director-General's submission might be different. That is:

1. If the consent authority believes they have inadequate information to determine the application, they may decline it under s 104(6), but then;
2. If the panel believes the information is adequate, then the gateway tests in 104D are not met.

Response: Agreed.

17 SUPPLEMENTARY SUBMISSIONS ON PIERAU V AUCKLAND COUNCIL RAISED BY COMMISSIONER LIEFFERING

17.1 During discussions with counsel for the Director-General on Day 2 of the hearing Commissioner Lieffering questioned whether counsel was familiar with the *Pierau* decision.⁴⁵ Counsel was not familiar with that decision, but having read it overnight, counsel requested the opportunity to address the Panel briefly on it.

17.2 The decision of the Environment Court in *Pierau* considered Policy 11 of the NZCPS. That discussion starts at paragraph [244], and at paragraph [245] the Court asked “what does “avoid” mean?”.

17.3 At paragraphs [251] and [252] the court agreed with the Environment Court decision in *Davidson* at paragraphs [275] and [277], that the requirement to avoid adverse effects means to *avoid*.

17.4 The Court then determined what “avoid” means under the two alternative approaches being argued in that case, finding:

- (a) Under the *precautionary approach* lens - “avoid” means *avoid as per King Salmon* paragraph [96];⁴⁶ and

⁴⁵ *Pierau v Auckland Council* [2017] NZEnvC 090.

⁴⁶ *Pierau* paragraph [257].

(b) The same answer applies whether the precautionary approach or the second approach – the Part 2 lens – is applied.⁴⁷

17.5 At paragraph [267] the Court referred to the requirement to avoid adverse effects on the rare and endangered birds at issue.

17.6 It is also noted that the *King Salmon* “absolute” avoidance approach is that recorded by the Supreme Court at paragraph [96] of its judgment. That approach was quoted in *Pierau* at paragraph [245], and adopted at paragraph [257]. It does not contain the “minor or transitory” qualifiers which the Supreme Court applied later in its judgment to Policies 13 and 15 of the NZCPS (i.e. at *King Salmon* paragraph [145]). Therefore, “avoid” means “avoid”.

Shona Bradley

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21 September 2020 [\[track changed version 28/9/20\]](#)

⁴⁷ [Pierau paragraph \[256\]](#).