**BEFORE THE INDEPENDENT HEARING COMMSSIONERS**

**AT WHANGĀREI**

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| **UNDER** | the Resource Management Act 1991 (RMA) |
| **AND** | |
| **IN THE MATTER** | of resource consent applications by Northport Limited under section 88 of the RMA for the Port Expansion Project at Marsden Point |

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# LEGAL SUBMISSIONS FOR NORTHLAND REGIONAL COUNCIL

**20 NOVEMBER 2023**

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## MAY IT PLEASE THE COMMISSIONERS

### Introduction

1. Wynn Williams has been engaged by Northland Regional Council (**Council**) to support its section 42A reporting officer. These submissions are presented to assist the Independent Hearings Panel.

2. These submissions address the following legal issues that have arisen during the hearing:

   (a) Bundling: whether the district and regional activities relating to Northport Limited's (**Northport or Applicant**) resource consent application (**Application**) should be "bundled" together as an overall non-complying activity.

   (b) Lapse: the case law on the appropriate lapse period.

   (c) Duration: the case law on the duration of consents.

   (d) Coastal occupation: the interpretation and application of Policy 4.8.1 of the Regional Policy Statement for Northland (**RPS**).

   (e) RSI: the interpretation and application of the regionally significant infrastructure (**RSI**) policies in the Proposed Regional Plan for Northland (**Proposed Plan**);

   (f) Mana whenua policy: the interpretation and application of Policy D.1.4 Managing effects on places of significance to tāngata whenua of the Proposed Plan;

   (g) Port Otago: the relevance of the Supreme Court's decision in *Port Otago Limited v Environmental Defence Society Incorporated*[1] (**Port Otago**) to the applications; and

   (h) Avifauna effects: an analysis of how the proposed high-tide roost should be considered against the planning and policy framework.

## BUNDLING ACROSS REGIONAL AND DISTRICT PLANS

3. An issue has been raised regarding whether the district and regional activities relating to the Application should be bundled together.

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[1] *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112.

4. Case law confirms that it is lawful to bundle activities across regional and district plans, provided that:[2]

   (a) there is overlap between the plans and the individual activity consents within those plans;[3] or

   (b) the consents have "consequential and flow on effects for one another".[4]

5. Whether there is an overlap or consequential and flow on effects will depend on the circumstances of the case.

6. The High Court in *Tairua Marine Ltd v Waikato Regional Council* found that there was an overlap between the district and regional activities relating to the development of a new marina, such that the most restrictive activity status (non-complying) should apply to the entire proposal.[5] As noted in the legal submissions for the Director-General of Conservation,[6] the Court decided to bundle the carparking and recreational activities above-MHWS with the below-MHWS components. The important point to note, which was not addressed in the Director-General of Conservation's written submissions, is why the Court decided to bundle those activities together.

7. The Court considered that without dredging and the proper disposal of dredged material (the non-complying aspect of the proposal), the proposed marina could not possibly proceed. In other words, the dredging and disposal was integral to the proposal, overlapped with the other activities and had interrelated adverse effects.

8. In this case, the activity at issue is a consenting requirement for a non-complying activity,[7] due to a small part of the activity occurring within the

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2 If activities are bundled together, they only need to be assessed against the objectives and policies of the plan that is relevant to each activity – see *Hamilton v Far North District Council* [2015] NZEnvC 12.

3 *Newbury Holdings Limited v Auckland Council* [2013] NZHC 1172.

4 *Southpark Corporation Limited v Auckland City Council* [2001] NZRMA 350 (EnvC).

5 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006.

6 Legal Submissions – Director-General of Conservation – 4 October 2023 at [118] and [172].

7 There is a disagreement between the experts as to whether the components of the proposal above MHWS and within the NOSZ are innominate (and therefore a discretionary activity) or fall within the definition of "industrial activity", such that they are a non-complying activity under Rule NOSZ-23 of the Whangarei District Plan. We do not

Natural Open Space Zone (**NOSZ**). The questions for the Panel are the degree of overlap between activities / plans and whether there are consequential or flow on effects.

9. In my submission, this case is a different situation to *Tairua.* Here the degree of overlap between activities and plans is questionable – it is difficult to see the overlap between the district plan consenting requirements from the activity in the NOSZ and the regional plan consenting requirements. The assessment of reclamation, maintenance dredging, deposition, stormwater discharge and the use of structures is not interrelated with that activity. In particular:

   (a) the relocation of a toilet, earthworks and the creation of a public park/reserve area are not fundamental to the main activity (being the port expansion) and they do not have "consequential and flow on effects" for one another. Without these activities, the port expansion could feasibly continue; and

   (b) the area within the NOSZ is a very small part of the project overall. Applying non-complying activity status to the entire proposal based on a very small part of it would unreasonably inhibit the project.

**APPROPRIATENESS OF PROPOSED LAPSE DATE**

10. The Application sought a 35 year lapse date, which has been modified to now seek a lapse date of 20 years for the regional consents.[8] The appropriate lapse date is a contested issue.

11. There are compelling policy reasons as to why a resource consent should not subsist for a lengthy period of time without being put into effect, as discussed in *Katz v Auckland City.*[9] Those policy reasons include (but are not limited to):[10]

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address this issue. Rather, our submissions are focussed on the issue of bundling (in the event that the Panel finds that the activities are non-complying under NOSZ-23).

8 The Applicant originally sought a lapse date of 35 years for the regional consents, but the Planning Joint Witness Statement dated 9 November 2023 confirms that it is now seeking a 20 years lapse date.

9 *Katz v Auckland City Council* (1987) 12 NZTPA 211; affirmed in *Body Corporate 97010 v Auckland City Council* (2006) 6 ELRNZ 303; *Ngāti Tama ki Te Waipounamu Trust v Tasman District Council* [2017] NZHC 1081 and *Akaroa Organics v Christchurch City Council* [2010] NZEnvC 37.

10 *Katz v Auckland City Council* (1987) 12 NZTPA 211 at page 7.

(a) physical and social environment change;

(b) changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary; and

(c) when a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene.

12. Case law also confirms that:

(a) Where an applicant seeks a longer lapse period under section 125 of the RMA, the court must undertake a balancing exercise where the reasons supporting a longer lapse period are weighed against those countervailing considerations discussed in *Katz.*[11]

(b) Particular and convincing reasons are needed for a significantly extended lapse period, such as ten years, given the impact on surrounding landowners and the fact that it prevents possible use by others. Once granted, a consent also becomes part of the existing environment and can have a profound effect on the consideration of other consent applications.[12]

(c) The financial viability of a project is not relevant to the consent authority's determination on the lapsing period. It would frustrate the purpose of section 125 if a resource consent could subsist until the applicant judged the economic circumstances to be favourable.[13]

13. The Applicant has submitted that the proposal is of regional and national importance and that the default period of five years under the RMA is insufficient.[14] It has relied on case law such as *Crest Energy* and *Re Meridian* as justification.

14. A longer lapse period of ten years was found to be appropriate in *Crest Energy Kaipara Ltd* due to the scale and national importance of the project

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11 *Akaroa Organics v Christchurch City Council* [2010] NZEnvC 37 at [17].

12 *Contact Energy Ltd v Manawatu-Wanganui Regional Council* [2010] NZEnvC 406 at [26]-[27].

13 *Akaroa Organics v Christchurch City Council* [2010] NZEnvC 37 at [22]-[23].

14 Opening Legal Submissions – Northport Limited – 5 October 2023 at [7.31].

(which related to coastal permits for a wave energy project) and the lengthy and exacting consenting process.[15] Similarly, the Court in *Re Meridian Energy Ltd* was of the view that five years was too short for a project of the nature and scale of a 33-turbine wind farm, but that ten years was appropriate.[16]

15. In my submission:

(a) While a ten-year lapse period was found to be appropriate in the above cases, a 20-year lapse period is a substantially longer period of time. The physical and social environment is likely to change materially in that time, particularly in this dynamic coastal environment that has experienced significant change over the past 100 years, and in the context of future climate change.

(b) The proposed conditions of consent are generally "static". They do not provide for ongoing review or an adaptive response to changes in the environment. If the environment changes and the consents are implemented in year 19, the conditions may no longer be appropriate.

(c) In the context of designations, the courts have expressed concerns with granting a 20-year lapse period, due to its potential to create planning blight.[17] The same concerns are relevant in the context of a resource consent that allocates a limited resource to the exclusion of others.

**DURATION**

16. The Applicant has sought a 35-year term for all the regional consents, but an unlimited term for the reclamation permit. The appropriate term of consent is a matter for the Panel to determine, if it is minded to grant consent.

17. The leading authority on the term of consent remains *PVL Proteins*, which identifies relevant considerations for the term of consent, including:

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15 *Crest Energy Kaipara Ltd v Northland Regional Council* [2011] NZEnvC 26.

16 *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [520].

17 *Beda Family Trust v Transit New Zealand* ENC Auckland A139/2004, 10 November 2004.

(a) a decision on term is to be made for the purpose of the Act, having regard to the actual and potential effects, the relevant provisions of policy and planning documents, the nature of the activity, the sensitivity of the environment, the applicant's reasons and possible alternatives.[18]

(b) the conditions that may be imposed (including best practicable option conditions, monitoring conditions and review conditions);[19]

(c) uncertainty for an applicant of a short term and the applicant's need for certainty may indicate a longer term;[20]

(d) a review condition may be effective at ensuring conditions do not become outdated;[21] and

(e) future change in the environment may indicate a shorter term, as will uncertainty about the effectiveness of conditions to protect the environment.[22]

18. In my submission, considering a shorter duration of consent is a tool available to the Panel, particularly in the face of evidence and submissions from parties regarding concern about the uncertainty of effects and changes to the environment over time.

**ALLOCATION OF COASTAL SPACE**

19. An issue between at least the Applicant and the section 42A reporting officer is the interpretation and application of Policy 4.8.1 (Demonstrate the need to occupy space in the common marine and coastal area) of the RPS. That Policy sits in the section titled "Efficient use of coastal water space" and directs decision-makers to only consider allowing the occupation of space where:

(a) there is a functional need;

(b) it is not feasible to locate the structure on land;

(c) it is not feasible to use an existing authorised structure; and

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18 *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, at [27].

19 *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, at [28].

20 *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, at [30].

21 *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, at [30].

22 *PVL Proteins Ltd v Auckland Regional Council* EnvC A061/01, at [31].

(d) "the area occupied is necessary to provide for or undertake the intended use".

20. The section 42A reporting officer queried whether the interpretation of (d) above required applicants to demonstrate that there was demand for the activity. The Applicant argues that there is no legal requirement to demonstrate demand or necessity for its proposal, and that Policy 4.8.1(1)(d) is about ensuring the occupation area sought is only what is needed for the proposal.[23]

21. There is some uncertainty with Policy 4.8.1 (which is not resolved by recourse to its heading or the section it sits within). In addition to the cases referred to by Northport, we are reminded of the comment in the early *NZ Rail* decision that financial viability of a development is more properly a matter for the boardroom than the courtroom.[24] In my submission, the best interpretation of Policy 4.8.1 is not that it requires applicants to prove demand for a proposal, but rather that it is concerned that only the minimum area of coastal space is occupied for a proposal.

**RSI POLICIES**

22. In her evidence, Ms Linda Kirk contends that Policy D.2.7 of the Proposed Plan establishes a "bottom line" for RSI and allows any minor adverse effects provided that the proposal is consistent with all matters in Policy D.2.7(1)(a)-(d).[25] Dr Philip Mitchell disagrees with Ms Kirk and considers that the "bottom line" approach would result in perverse outcomes.[26]

23. In my submission, Policies D.2.7, D.2.8 and D.2.9 are intended to work together as follows:

(a) *Policy D.2.7 Minor adverse effects arising from the establishment and operation of regionally significant infrastructure* enables the establishment and operation (including reconsenting) of RSI if it has minor adverse effects and the identified conditions are met.

(b) *Policy D.2.8 Maintenance, repair and upgrading of regionally significant infrastructure* provides that the maintenance and

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23 Opening Legal Submissions – Northport Limited – 5 October 2023 at [7.26].

24 *New Zealand Rail Ltd v Marlborough District Council* PT C36/93, at p 173.

25 Linda Kirk – Summary Statement – 31 October 2023 at [20].

26 Philip Mitchell – Rebuttal – 3 October 2023 at [3.62].

upgrading of established RSI wherever it is located should be enabled by allowing adverse effects in certain circumstances.

(c) *Policy D.2.9 Appropriateness of regionally significant infrastructure proposals (except the National Grid)* outlines considerations that decision-makers should have regard to and give appropriate weight to when considering the appropriateness of RSI proposals in circumstances where adverse effects are greater than envisaged in Policy D.2.7 and the proposal is not for maintenance, repair or upgrade under Policy D.2.8.

24. As confirmed in the Consent Order for Topic 10 of the Proposed Plan, a plan user would need to consider Policies D.2.7, D.2.8 and D.2.9 and determine which applies, but then also look to other relevant objectives and policies in the Proposed Plan, including those that seek to achieve environmental outcomes such as Policy D.2.17 Managing adverse effects on natural character, outstanding natural landscapes and outstanding natural features and Policy D.2.18 Managing adverse effects on indigenous biodiversity.[27] If the policies are in conflict, the more directive policy will prevail.[28]

25. For the reasons above, we do not agree with Ms Kirk that Policy D.2.7 establishes a "bottom line" by which all RSI activities must have minor (or less than minor) adverse effects. Such an interpretation reads a gloss into Policy D.2.7 that is not there.

## DIRECTIVENESS OF POLICY D.1.4

26. A question has been raised regarding the directiveness of Policy D.1.4 of the Proposed Plan. Policy D.1.4 provides:

> **D.1.4 Managing effects on places of significance to tāngata whenua**
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> Resource consent for an activity may generally only be granted if the adverse effects from the activity on the values of places of significance to tāngata whenua in the coastal marine area and water bodies are avoided, remedied or mitigated so they are no more than minor.

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27 Consent Order – Topic 10: Infrastructure and Energy – 23 March 2023. https://www.nrc.govt.nz/media/ortlnuh0/_2023_-nzenvc-050-royal-forest-and-bird-protection-society-v-northland-regional-council.pdf

28 Consent Order – Topic 10: Infrastructure and Energy – 23 March 2023.

27. Policy D.1.4 was included in the Proposed Plan as notified, however, it did not include the word "generally". The Independent Hearings Panel (**IHP**) that heard submissions on the Proposed Plan recommended that the word "generally" be inserted before the words "only be granted" in response to submissions.[29] The IHP noted that "this provides discretion to decision-makers to consider exceptions to the policy in appropriate circumstances".[30] The Council resolved to accept the IHP's recommendation for inclusion in the Decisions Version of the Proposed Plan. Policy D.1.4 was not appealed.

28. We submit that Policy D.1.4 is a directive policy – it uses forceful language to direct the outcome for resource consent applications with more than minor adverse effects on places of significance to tāngata whenua.

29. However, the qualifier "generally" cannot be overlooked. In my submission, Policy D.1.4 directs the outcome in the majority of cases, but provides for an exception in some cases. This is supported by the IHP's reasoning above, as well as relevant case law on this issue, where it has been held that "generally" acts as a qualifier and contemplates exceptions to criteria.[31]

30. The Proposed Plan provides no direct guidance on when the exception might apply. In my submission, the orthodox approach to plan interpretation should be taken. This requires the provisions of the plan to be given their plain and ordinary meaning, though regard may be had to their context where there is uncertainty.[32]

31. The relevant context in this case includes the related provisions,[33] as well as the wider objectives and policies of the Proposed Plan. Applying this logic to the Application, if the activity is inconsistent with Policy D.1.4 (by virtue of adverse effects being more than minor) but is consistent with all

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29 In response to submissions by Transpower New Zealand and Kaipara District Council and Whangarei District Council.

30 Report and recommendations of the Independent Hearing Panel for the Proposed Regional Plan for Northland – April 2019 - at page 76.

31 *Nelson Fisheries Ltd v Marlborough District Council* PT Wellington W098/95, 28 August 1995. See also *Minister of Conservation v Northland Regional Council* [2021] NZEnvC 113 where the Environment Court declined to introduce the word "generally" into a policy on the basis that it would introduce a "qualitative aspect to the criteria of the policy and suggest[ed] that there [would] be exceptions".

32 *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA), at [29]-[37].

33 Such as Policy D.1.5 of the Proposed Plan which defines what constitutes a "place of significance to tāngata whenua" for the purposes of the Proposed Plan.

other relevant objectives and policies of the Proposed Plan,[34] it may qualify as an exception.

**RELEVANCE OF PORT OTAGO**

32. There are various submissions on the relevance of the *Port Otago* decision to the applications, ranging from:

    (a) The Director-General of Conservation, who submits that *Port Otago* is of limited relevance. However, it notes that it is helpful insofar that it (alongside *King Salmon*) confirms that policies should be read so as not to conflict with each other as far as possible.[35]

    (b) Forest & Bird, who submits that the orthodox method to interpreting and reconciling competing policies confirmed by the Supreme Court's decision in *King Salmon* remains unaffected by the *Port Otago* decision.[36]

    (c) The Applicant, who submits that *Port Otago* is relevant insofar that it confirms there is a consenting pathway for port developments in circumstances where the "avoidance" policies may not be able to be met. However, it submits it is not relevant to the current proposal, given that it strictly avoids all adverse effects as required under the NZCPS.

    (d) Patuharakeke Te Iwi Trust Board, who submits that the Panel must apply relevant policies including through undertaking the "structured analysis" or identification of "material harm" directed in *Port Otago* and consider the question of alternatives.[37]

33. We submit that *Port Otago* is helpful given that it confirms:[38]

    (a) the avoidance policies[39] and the ports policy[40] of the New Zealand

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34 As well as the overarching sustainable management purpose of the RMA.

35 Legal Submissions – Director-General of Conservation – 4 October 2023 at [118] and [125].

36 Legal Submissions – Royal Forest & Bird Protection Society of New Zealand Inc – 13 October 2023 – at [11].

37 Legal Submissions – Patuharakeke Te Iwi Trust Board – 26 October 2023 – at [3.13(a)].

38 *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [83].

39 Policy 11 – Indigenous biological diversity (biodiversity); Policy 13 – Preservation of natural character; Policy 15 – Natural features and natural landscapes; and Policy 16 – Surf breaks of national significance.

40 Policy 9 – Ports.

Coastal Policy Statement 2010 (**NZCPS**) are all directive;

(b) ports are part of an existing network necessarily operating in the coastal environment. There is therefore potential for conflict between the ports policy and the avoidance policies; and

(c) where there is a conflict between the ports policy and the avoidance policies with regard to any particular project, the decision-maker would need to be satisfied that:

(i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;

(ii) if the work is required, all options to deal with the safety or efficiency needs of the ports have been evaluated and, where possible, the option chosen should not breach the relevant avoidance policies; and

(iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

34. It is also helpful as it clarifies that "avoid" in the context of the NZCPS means protection from "material harm" – a concept derived from the Supreme Court's decision in *Trans-Tasman Resources*.[41] In *Port Otago,* the Supreme Court confirmed that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided.[42]

35. There seems to be some debate about what amounts to "material harm". Helpfully, the concept is addressed in detail by the Supreme Court in *Trans-Tasman Resources*:

(a) decision-makers must either be satisfied that there will be no material harm or alternatively be satisfied that conditions can be imposed that mean:[43]

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

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

43 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [5].

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material, and

(b) the assessment of whether there is material harm requires qualitative, temporal, quantitative and spatial aspects to be weighed.[44]

36. While *Port Otago* was decided in a plan making context[45] (rather than a consenting context), we submit that it is relevant given that the avoidance policies and the port policy are engaged by the Application. *Port Otago* clarifies that if the proposal is required for the safe and efficient operation of the ports, and if all other options have been evaluated but the avoidance policies still cannot be met, the proposal may be undertaken (but only to the extent required to provide for the safe and efficient operation of the ports).

**AVOIDANCE OF EFFECTS – HIGH TIDE ROOST**

37. A further issue that has arisen between the parties is whether the proposed high-tide roost will ensure that any potential adverse effects on NZ dotterel and variable oystercatcher will be avoided.

38. The Director-General of Conservation contends that the high tide roost is not avoidance or mitigation of effects as it does not prevent the effects from happening and does not occur at the "point of impact".[46] However, she notes that any positive effects from the high-tide roost should be considered under s 104(1)(ab) of the RMA.[47]

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44 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [3].

45 In the context of the Otago Regional Policy Statement.

46 Legal Submissions – Director-General of Conservation – 4 October 2023 at [105].

47 Legal Submissions – Director-General of Conservation – 4 October 2023 at [106].

39. Respectfully, we disagree. We consider that *Buller* can be distinguished and that the "point of impact" test as set out in that case is not helpful in the circumstances of this Application.[48]

40. Applying the Supreme Court's comments in *Port Otago* and *Trans-Tasman* set out above, we submit that the key questions for the Panel are:

    (a) what are the values that are required to be protected (in this case, the high-tide roosting habitat for NZ dotterel and variable oystercatchers, which are required to be protected in accordance with Policy 11(a) of the NZCPS);

    (b) what impact (if any) will the proposal have on those values; and

    (c) whether the proposed high-tide roost will be effective in avoiding material harm to the roosting habitat for NZ dotterel and variable oystercatchers.

41. In this case, we are dealing with NZ dotterel and variable oystercatcher, which are identified highly mobile fauna species.[49] Highly mobile fauna species cover long distances and move between different environments throughout their life cycle. In *Buller*, the relevant habitat included mature indigenous forest and lizard and bird species that used the forest as habitat. Applying *Buller* in the context of highly mobile fauna would seem to artificially limit the remediation or mitigation options available for consideration.

42. Rather than getting caught up in the terminology of what is avoidance, remediation or mitigation vs. offsetting or compensation, we say that the correct assessment is to consider whether the proposal will avoid material harm. As noted above, this requires qualitative, temporal, quantitative and spatial aspects to be weighed.[50] Given that NZ dotterel and variable oystercatcher are highly mobile species, we submit that the Panel will need to carefully consider whether the evidence supports a finding that the potential adverse effects on those species (including through

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48 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346.

49 National Policy Statement for Indigenous Biodiversity 2023 – Appendix 2: Specified highly mobile fauna.

50 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [3].

proposed conditions of consent) can be avoided (so that overall the harm is not material) by the proposed high-tide roost.

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