

Decisions on applications for resource consents made under the Resource Management Act 1991 by Northport Limited

To (in summary):

An expansion of the existing Northport facility (construct, operate and maintain in conjunction with the existing Northport facility) – including reclamation and dredging.

Consent, pursuant to section 104B, 105, and 107 (and 104D) of the Resource Management Act 1991, is REFUSED for all of the consent sought. The full decision on the regional and district applications sought and reasons are set out below.

File Number:	Northland Regional Council: APP.005055.38.01 and Whangārei District Council: LU2200107
Applicant:	Northport Limited (Northport)
Site address and legal description:	Ralph Trimmer Drive and Coastal Marine Area, Marsden Point, Whangārei
Location co-ordinates:	At or about location co-ordinates 1734782E 6033287N
Hearing Panel:	Greg Hill (Chair) Jade Wikaira Hugh Leersnyder
Parties present at the hearing:	<u>Applicant:</u> <i>See Appendix 1</i> <u>Submitters</u> <i>See Appendix 1</i> <u>For the Council:</u> <i>See Appendix 1</i>

Hearing Dates:	9 – 16 and 30 -31 October 2023, 13 November 2023, 20 November 2023 (interim Reply) and 23 May 2024 (final Reply)
Hearing Adjourned:	<p>The hearing was adjourned on the 20 November 2023. This was at the request of the Applicant (and agreed to by the Hearing Panel) to allow a further opportunity for iwi/hapū submitters to consider and provide feedback on the updated draft cultural conditions; and for Northport and iwi/hapū submitters to engage further around the cultural concerns raised and alternative responses to those concerns.</p> <p>The hearing was reconvened on the 23 May 2024 having received correspondence from the Applicant that no agreement on the proposal had been agreed between it and iwi/hapū submitters.</p>
Hearing Closed:	4 June 2024

Summary of the Decision

1. **We have refused consent to this proposal.** This is due to the proposed reclamation in its current form. The reasons for this are the significant adverse effects on cultural values of tāngata whenua and on the loss of recreational values and public access to and along the coastal marine area (CMA). In regard to these two matters, the proposal is not consistent with a number of the relevant objectives and policies of the statutory planning documents, and does not meet Part 2 of the Resource Management Act (RMA).
2. We find that the adverse effects of the reclamation’s scale and extent, which results in the severance of the physical relationship to this cultural landscape, the beach, the dunes and the takutai moana, are significant and irreversible. Tāngata whenua identified these effects to be the most profound that the proposal would have on them. It is the magnitude of these effects and the site context as a place of significance to tāngata whenua which makes them significantly adverse. The effects are not mitigated by the Applicant’s proposed conditions such that those effects are not more than minor as set out in a number of the policies of the Proposed Regional Plan – Appeals Version (PRP-AV).
3. We accept public access and recreational opportunities will still be provided. However, due to the scale and extent of the reclamation, and the extent of the loss of beach (and its associated values), we do not consider sufficient mitigation or offsetting for that loss has been provided to address the significant residual adverse effects of the loss of recreational values and public access to and along the CMA.
4. Accordingly, granting the consents sought would not recognise or provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, or sufficiently maintain and enhance public access to and along the CMA. Both of these matters are matters of national importance in the Resource

Management Act (RMA)¹. Nor would it enable tāngata whenua's to fully exercise kaitiakitanga over this area; a section 7 matter of the RMA².

5. Given the applications were lodged as a 'package deal' we have refused all of the applications applied for.
6. We accept that had we granted consent to these applications there would have been a range of significant positive effects. These include a range of economic and social benefits associated with a dedicated container terminal at Whangārei, which would be part of an integral and efficient national network of safe ports.
7. We also find that any adverse effects of all the other matters have been avoided or appropriately mitigated (or offset), and would be consistent with the relevant objectives and policies of the statutory planning documents. These include: economics, coastal processes, marine ecology, marine mammals, avifauna, terrestrial ecology, landscape, natural character, visual amenity, noise, navigation, traffic, stormwater and air quality.
8. Had we granted consent, we would have imposed the suite of conditions proposed by the Applicant provided as part of the Final Reply Submissions³; but not those relating to the cultural and recreation/public access conditions. Furthermore, we would have imposed a 10-year lapse date and not the 20-year period sought by the Applicant.
9. Our reasons for this decision are fully set out in the rest of this decision report.

Introduction

10. These decisions are made on behalf of the Northland Regional Council and the Whangārei District Council ("NRC, WDC or the Councils") by Independent Hearing Commissioners Greg Hill (Chair), Jade Wikaira and Hugh Leersnyder - appointed and acting under delegated authority pursuant to section 34A of the Resource Management Act 1991 ("the RMA").
11. Resource consents for the 'port expansion' were sought from both the NRC and WDC. The hearing was a joint hearing, which heard all of the resource consents sought. While separate decisions have been made with respect to the regional and district consents, this decision report addresses all of the resource consents sought.
12. These decisions are prepared in accordance with section 113 of the RMA.

¹ Sections 6 (e) and (d) respectively of the RMA.

² Section 7 (a) of the RMA.

³ We acknowledge the considerable time and effort that will have gone into developing the suite of proposed consent conditions by the Applicant, Councils, and Submitters throughout the hearing process, including the expert conferencing sessions.

Summary of the proposal

13. Northport submitted applications to the NRC and WDC for resource consents to construct, operate and maintain an expansion to the existing Northport facility at State Highway 15, Marsden Point. In summary, the proposal includes:

Northland Regional Council:

- Approximately 11.7 hectares of reclamation and associated coastal structures for a 250-metre wharf extension.
- 1.72 million cubic metres of capital dredging and associated disposal and ongoing maintenance dredging.
- Riparian earthworks and associated stormwater diversions and discharges.
- Operational stormwater discharges from use of the reclamation area.
- Creation of an intertidal high tide bird roost.
- Ancillary coastal structures to the reclamation area for tug berths and a public pontoon.
- Port related activities on the proposed reclamation and wharves, and on parts of the proposed development above MHWS.

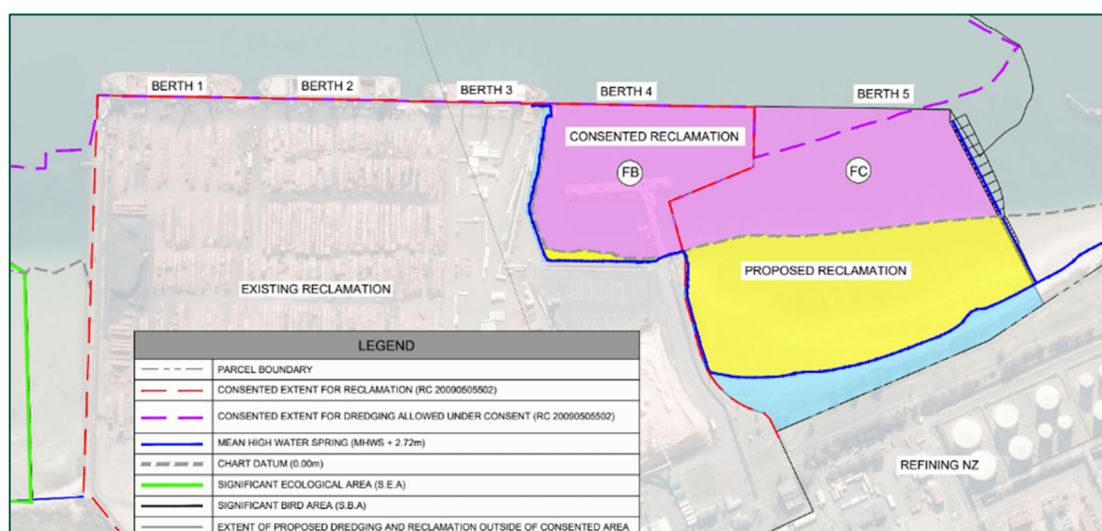
Whangārei District Council:

- Apply the Port Zone permitted activity standards for Building and Major Structure Height to, and enable port operations within, the proposed reclamation area.
- Apply the Port Noise Standards (NZS 6809:1999) rather than the District Plan Noise standards to port operations on the proposed reclamation area, and across the existing Port.
- Undertake earthworks and vegetation clearance in the Coastal Area and erection of public toilets within the coastal setback.
- Change/cancel noise and landscape conditions on existing resource consents for consistency with the proposed activity.
- Port related activities on the proposed reclamation and wharves, and on parts of the proposed development above MHWS.

14. The proposal, as set out in the application, seeks to enable the expansion of Northport's existing facilities to increase freight storage and handling capacity; and specifically, to support Northport's transition into a high-density container terminal.

15. A detailed description of the proposal was set out in Section 3 of the Assessment of Environmental Effects (AEE) titled "*Application for resource consents for the expansion of Northport*", prepared by Reyburn and Bryant, dated 6 October 2022 and the 29 appendices consisting of accompanying plans and technical assessments prepared in support of the application. The Councils' section 42A report also addressed this in some detail as did the legal submissions and evidence. We do not repeat this in detail but provide an overview in the following paragraphs.

16. A major part of the proposal is the construction (mainly by reclamation) of berth five and a container terminal. The existing Northport facility consists of three berths (Berths 1 – 3), with a fourth berth (Berth 4) consented but not yet constructed. The proposed expansion seeks to construct a fifth berth (Berth 5) to adjoin Berth 4, which involves:
- Reclaiming approximately 11.7ha of Coastal Marine Area to form land for the proposed berth and container terminal;
 - Extending the existing wharf for a further 250m along the northern face of the reclamation; and
 - Undertaking bulk earthworks within an area of approximately 2ha above mean high water springs (MHWS), including over the existing Esplanade Reserve.
17. The plan below shows the existing Northport facilities (Berths 1 – 3), the consented but not yet constructed Berth 4, and the proposed Berth⁴.



18. A range of other works and associated activities were also sought to be consented. These include the following (in summary):
- Dredging is proposed to increase the area and depth of the existing swing basin (enabling vessels to manoeuvre and dock at Berths 1 – 4), to extend the existing swing basin to serve proposed Berth 5 and to deepen the berthing and associated manoeuvring area of the tug berth facility,
 - The existing swing basin will be deepened to -14.5m below CD at the western end and up to -16m below CD at the eastern end. Approximately 1.72 million m³ of material is proposed to be dredged and used to construct the reclamation.

⁴ From the Section 42A report.

- Operation of the Container Terminal – over the longer-term Ship to Shore Gantry cranes are proposed across the port area (with a height of approximately 83m when in use, and approximately 117m when not in use⁵).
 - The proposed maximum heights of buildings and major structures on the container terminal are as follows, and match the heights permitted on the existing port area in the District Plan:
 - 20m - Building height.
 - 60m - Public utilities, light towers, silos, aerials, tanks.
 - 30m - Containers.
 - 85m - Operational height for cranes.
 - 20m - Storage/stockpiles.
 - The existing canal and pond-based stormwater collection and treatment system is proposed to be retained and utilised to capture and treat runoff from both the existing site and the proposed expansion area.
19. Northport has also sought to change how operational port noise is managed for activities undertaken on Berths 1 – 4, and for future activities undertaken on proposed Berth 5. The proposal is to manage noise in accordance with the New Zealand Standards for Port Noise (NZS Port Noise) rather than the noise provisions of the Whangārei District Plan.
 20. A new tug berthing facility for tugs, work boats, and pilot vessels is proposed to replace the existing tug wharf at the eastern end of the reclamation. A replacement water taxi berth and public fishing pontoon is also proposed in the same area as the new tug berthing facility.
 21. Access to the pontoon will be incorporated with a new public ‘pocket’ park with carparking and toilets. These are described in the application and are to mitigate loss of the existing Marsden Bay beach and esplanade reserve area.
 22. A high-tide seabird roosting sandbank, located in the inter-tidal area to the west of the existing port facility, is proposed to avoid the loss of high tide bird roosting habitat in Marsden Bay due to the port expansion.
 23. The proposal also includes amending existing consent conditions for landscaping and noise controls on the existing port. Some of the consents sought apply to the existing port area and operations as well as the proposed reclamation area. Some existing consents are sought to be surrendered and replaced by the consents sought by this proposal. They include those relating to noise, stormwater and RC36355.1 (Berth 1 and 2) and Decision Number 1 (Berth 3 and 4) (no known consent reference number).

⁵ Mobile harbour cranes will be used in the short to medium term.

Background and rationale for the project

24. Northport had investigated a range of alternative options for expanding its capacity since the completion of the existing port facilities (i.e. Berth 3) in 2007, in particular its ability to construct a dedicated container terminal. Options were evaluated for the expansion of the port and are set out in the AEE – the ‘Issues and Options’ report forming Appendix 2 to the AEE (section 9 “Alternative Options - 9.1 – Options Evaluation since 2010 and 9.2 Alternative considered). It was also set out in the evidence of Mr Moore, Mr Blomfield, Mr Khanna, and Ms Stanway. It was also addressed in the Applicant’s Opening Legal Submissions⁶ and referenced in the Interim and Final Reply Submissions.
25. Northport advised that numerous economic studies had been conducted on the future of the upper North Island supply chain and the implications for Ports of Auckland, the Port of Tauranga and Northport. In 2012 the Upper North Island Strategic Alliance (UNISA) completed a technical study of the supply and demand for ports and port-related infrastructure in the upper North Island.
26. The UNISA report concluded that there was strong growth predicted in the three upper North Island ports over the next 30 years, and that establishing a new port was likely to be significantly less cost-effective than incremental growth at each port. A subsequent report commissioned by the Government in 2018 entitled the Upper North Island Supply Chain Strategy (UNISCS) recommended a transition of Ports of Auckland Ltd (POAL) freight to Northport.
27. In order to accommodate the changes in freight tasks and to realise the benefits of the opportunities for the regional economy, the applications state that Northport needs to expand into a facility capable of efficiently handling additional freight streams. Northport commissioned Market Economics to undertake a technical assessment of the economic effects of the port expansion. Their assessment was based on the technical study undertaken by UNISA in 2012. Market Economics concluded that Northport would need to invest in infrastructure upgrades, including wharf extensions and port area reclamation, regardless of whether POAL freight is redirected to Northport. We address the economic evidence below.
28. In summary, Northport set out that the ongoing national supply-chain pressures, long-lead times in the development of port infrastructure, and growing demand from shipping companies indicated that it is an appropriate time for Northport to seek approvals to expand its facilities to address the above issues and to deliver a purpose-built, modern, and efficient container terminal.
29. In addition, Northport asserted that the port expansion would also be a catalyst to provide better infrastructure and services for Northland, as well as providing for regional economic growth by facilitating new industries and jobs for Northland.

⁶Paragraphs 7.27-7.28 of the Applicant’s opening legal submissions.

Notification

30. The applications were publicly notified on the 2 November 2022 with the submission period closing on the 15 December 2022. A total of 243⁷ submissions were received, of which 176 were in support, 10 were neutral or not stated and 57 in opposition.

Procedural Matters

Late Submissions

31. The following submissions were received late:

Sub	Name	Date received
<i>Late Submissions Received by Both Councils</i>		
176	Channel Infrastructure NZ Limited	15 December 2022 (6.23pm)
175	Waimarie Kingi (Te Parawhau Hapū Iwi Trust)	15 December 2022 (5.09pm)
177	North Sawn Lumber Ltd (Garth Morten Mortensen)	15 December 2022 (5.28pm)
178	Susan Dawnette Steedman	16 December 2022
179	Marsden Cove Canals Management Limited	19 December 2022
<i>Late Submissions Received by Whangārei District Council only</i>		
101	Swire Shipping Pte Ltd, including Pacifica Shipping (Alistair Skingley)	16 December 2022
121	Peter John Fitzgerald	16 December 2022

32. Pursuant to section 37 of the RMA, the Hearing Panel accepted all of the late submissions. The reasons being that they were not substantially late, did not affect the evaluation of the application or the hearing; and the Applicant agreed to us accepting them.

Withdrawal of Expert Evidence

33. Marsden Cove Limited (MCL) and Marsden Cove Canals Management Limited (MCCML) each filed a submission on the above resource consent application. Those submissions (dated 15 and 19 December 2022) “supported in part” the application, but raised issues about the potential for increased risk of sedimentation at the access channel to the Marsden Cove Marina.

⁷ One submission was subsequently withdrawn.

34. In a letter from TR Brooks (MCL) and GL Hopper (MCCML)⁸ advised that they and Northport had engaged in constructive discussions about the application, and how to manage any potential effects on MCL. As a result, Northport and MCL have agreed on measures to address the matters raised by MCL. Based on this agreement, MCL's position was that it now supported the application.
35. On the above basis, MCL withdrew its expert evidence previously filed. This included – Mr Lamason (Planning), Mr Hegley (Noise), Mr West (Marine ecology), and Mr Davis (Coastal Processes). Accordingly, we have not considered their evidence, including their opinions and views expressed in any JWSs.
36. Seafuels Limited ("Seafuels") filed a submission on the above resource consent application. That submission (dated 14 December 2022) opposed the application, and sought that resource consent not be granted until certain navigation safety concerns outlined by Seafuels were addressed, including to demonstrate that no adverse impacts would result on navigation, safety or functionality of vessels using the adjacent Channel Infrastructure Jetty.
37. Seafuels advised that Hearing Panel⁹ that since filing that submission, it and Northport had engaged in constructive discussions about the application, and how to manage any potential effects on Seafuels. As a result, Northport and Seafuels agreed on measures to address the matters raised by Seafuels in its submission. Based on this agreement, Seafuels' position was that it no longer opposed the application.
38. On the above basis, Seafuels withdrew its expert evidence previously filed. This included the expert evidence Mr Arbuthnot (Planning). We have not considered this expert evidence.

Site Description and Surrounding Environment

39. The description of the site and the surrounding environment was fully set out in the application documents, the section 42A report and the evidence before us. We agree with those descriptions having been to the site and surrounding area and having read and heard all of the evidence. Accordingly, we do not repeat it here in any detail.
40. The port is located at the entrance to the Whangārei Harbour at Marsden Point, Ruakākā, approximately 2.5km to the east of One Tree Point, 4km north of Ruakākā, and 1km south of Reotahi (across the Harbour).

⁸ Dated 9 October 2023.

⁹ Letter from Mr Mills, Director – dated 6 October 2023.

41. Northport currently has three berths available for handling dry cargo vessels, with a total length of 570m. An additional 270m of linear berth (Berth 4) is consented but not yet constructed. The overall Northport footprint is made up of multiple titles with much of the port located on reclaimed (crown owned) leased land.
42. The existing port facility is adjoined by the Channel Infrastructure New Zealand Limited's (CINZ) site to the south-east and the industrial-zoned Marsden Maritime Holdings (MMH) land holdings to the south-west.

Activity Status and Bundling

43. We have addressed activity status early in this decision. This is because there were differing opinions among the planners as to the activity status (discretionary or non-complying) of the consents sought under the District Plan.
44. The issue of bundling the applications sought was also discussed; should all of the consents sought (regional and district) be bundled together, with the appropriate activity status applying to all consents sought, or should the regional consents not be bundled with the district consent application, as it was, according to some planners, the land use consent in relation to the Natural Open Space Zone of the WDP-OP (NOSZ) that triggered the non-complying status.
45. Prior to the first planners' expert conferencing session it appeared there was a consensus (certainly amongst the Applicant and the Council planners) that the entire proposal (regional and district consents) was a discretionary activity. However, the planning Joint Witness Statement (JWS) recorded that a number of the planners¹⁰ considered that that part proposal on land zoned NOSZ in the Whangārei District Plan (the pocket park) was a non-complying activity. On the basis of bundling, it was their view that overall that the land use consents sought was a non-complying activity.
46. If the applications were a non-complying activity, then section 104D (often referred to as the 'gateway test') is relevant. It states that a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either:
 - 1(a) the adverse effects of the activity on the environment will be minor; or
 - 1(b) the application is for an activity that will not be contrary to the objectives and policies of:
 - (i) the relevant plan, or
 - (ii) the relevant proposed plan, or
 - (iii) both the relevant plan and the relevant proposed plan.
47. For the reasons set out below, we find the proposal would satisfy section 104D (1) (b).

¹⁰ Ms Sharp, Ms Kirk and Ms Niblock (noting that Ms Niblock decided at the hearing she was not giving expert evidence on behalf of the Infrastructure Team of the WDC – but corporate evidence).

48. The Applicant's planners, Dr Mitchell and Mr Hood, had a contrary view. It was their opinion that the entire application (regional and district) was discretionary. In their rebuttal evidence, Dr Mitchell (in some detail) and Mr Hood set out why, in their opinions, the applications were discretionary. Notwithstanding Dr Mitchell's opinion, he helpfully set out in section 3 – "District Plan Activity Status" an evaluation of the WDP-OP's activities and how that Plan should be interpreted. He also provided a section 104D assessment and stated¹¹:

"I conclude that even if the activities proposed within the Natural Open Space Zone were to be considered as non-complying, the gateway test in section 104D(1)(b) can readily be met, and therefore has no bearing on the evaluation of the proposal which is to be undertaken under section 104."

49. The Applicant's opening legal submissions set out why in their view the proposal was a discretionary activity. However, Mr Littlejohn requested that if the Hearing Panel found that the proposal was a discretionary activity, that it nonetheless undertake a section 104D evaluation. Further, relying on Dr Mitchell's rebuttal evidence, that the Hearing Panel finds that the proposal met the section 104D 'gateway test', and then assess the proposal on its merits (essentially as if it were a discretionary activity).

50. The Applicant addressed this topic again in its Interim Reply Statement as section 5. Among other things the Interim Reply stated¹²:

"Properly interpreted in a sensible and pragmatic manner, the rules in the District Plan Natural Open Space Zone relating to "Industrial Activities" or "Commercial Activities" (or any other activity) do not render the Proposal a non-complying activity. Adopting the interpretation proposed by DOC and WDC would be a triumph of legalistic sophistry over substance. It would result in precisely the type of "anomalous" or absurd outcome that the Court warned against in Auckland Council v Teddy and Friends Ltd. Instead, the application is for "Port Activities", and the fact that a small part of the application extends into the Natural Open Space Zone leads only to the outcome that the application (for that area) is innominate and therefore should be treated as a discretionary activity pursuant to s87B of the RMA."

51. Ms Sharp, in the addendum section 42A report maintained her view that the land use consents were a non-complying, for the reasons set out in the JWS. However, she provided an assessment of the 'gateway tests' and set out¹³:

"In accordance with s104D(a), Ms Sharp considers that the effects arm of the 'Gateway Test' is not met in this instance, as significant residual adverse recreation and landscape effects are generated by the proposal."

¹¹ Paragraph 3.35 of Dr Mitchell's rebuttal evidence.

¹² Paragraph 5.3 of the Applicant's interim reply submissions.

¹³ Paragraphs 48 and 49 of the addendum section 42A report.

With regard to the s104D(b) policy arm and further to the assessment provided within the Section 12.2.3 of the s42A Report, overall and on balance, Ms Sharp concludes that whilst several aspects of the proposal do not sit comfortably with the policy direction of the WDP-OP¹⁴, she does not consider that the proposal is contrary to the objectives and policies of the WDP-OP overall". [and provided her reasoning for this].

52. Having considered this matter, it is our finding that the proposal, overall, is a discretionary activity and not non-complying. We agree with the Applicant's position set out in the Opening and Interim Reply submissions and the evidence of Mr Hood and Dr Mitchell.
53. However, for the avoidance of doubt and an abundance of caution, we have undertaken a section 104D evaluation. In doing so, we agree with Applicant's planners and Ms Sharp's opinions that the proposal would satisfy section 104D of the RMA – namely section 104D 1(b); but only if the entire proposal is bundled (regional and district). We address this matter below.
54. Mr Doesburg, Counsel for NRC, addressed "bundling" in his legal submissions - *whether the district and regional activities relating to the Applicant's resource consent applications should be "bundled" together as an overall non-complying activity*¹⁵. He addressed this in some detail (paragraph 3 to 9), but in brief the issue is essentially the extent of overlap of the effects of the activities and if there are consequential and flow on effects.
55. Mr Doesburg submitted¹⁶:

"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."*

¹⁴ Namely those relating to Tāngata Whenua, the use of public esplanade reserve (NOSZ land) for port activities.

¹⁵ Paragraph 2(a) of NRC's legal submissions.

¹⁶ Paragraph 9 of NRC's legal submissions.

56. The Applicant agreed with Mr Doesburg's submissions, setting out in the Interim Reply submissions that *"even if the Panel finds that certain limited activities require consent as a non-complying activity under the District Plan, with reference to the legal submissions on behalf of NRC it is not appropriate in this context to bundle the district and regional activities to make the application overall non-complying activity"*¹⁷.

57. We agree to a certain extent with Counsel. However, notwithstanding this we find that the entire 'project' is interlinked (a 'package deal'), and for the purposes of the gateway test cannot not be unbundled as suggested. We accept that while the *"area within the NOSZ is a very small part of the project overall"*, it is the port expansion proposal (mainly the reclamation) that necessitates the earthworks (and development) within the NOSZ; and due to this we find the values of the NOSZ will be lost due to the extent the earthworks, roading and use of the land within (overlap and consequential and flow on effects).

58. The issues, objective and policy of the NOSZ are:

"The Natural Open Space Zone (NOSZ) identifies areas of open space land primarily managed for the conservation and protection of natural resources. The land is generally in Council or Department of Conservation ownership. Examples of such land include: bush reserves, headlands, natural wetlands and parts of the coastline. The Natural Open Space Zone provides for the natural, ecological, landscape, cultural and heritage values of these open spaces.

The Natural Open Space Zone often has high ecological/biodiversity values and it is therefore appropriate to limit the scale and intensity of activities and development to ensure there are minimal adverse effects and as little modification to the environment as possible."

Objective NOSZ-O1 Natural Environment:

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

Policies

59. 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-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."

¹⁷ Paragraph 5.6 of the Applicant's interim reply submissions.

60. It is our finding that the proposal, in relation to this zone, is contrary to the relevant objectives and policies of the NOSZ – the natural, ecological, landscape, cultural and heritage values within the land zoned would not be protected and enhanced. Those values would be lost and replaced with access roading and a pocket park. Ms Sharp accepted this in response to our questions saying the proposal would “*struggle*” in relation to this zone.
61. This, in our view, would result in the (overall) land use consents being contrary to the relevant objectives and policies of the WDC-OP. All of the planners (Applicant’s and Submitters’) considered that the effects would be more than minor (104D (1) (a)). On this basis, if the project were ‘unbundled’ it is unlikely that the land use consents would meet either of the gateway tests.
62. However, when the project is evaluated as a whole (which we address in the rest of this decision), we find that the proposal would not, overall, be contrary to the relevant objectives and policies of the regional and district plans. The reasons for this, in general, are:
- Ports and port development are specifically recognised with directive and enabling provisions (zoning and plan provisions) in the Regional Policy Statement and regional and district plans. That is, the port and port-related development are not only contemplated at this location, but are specifically directed;
 - Development of Northport at this particular location, including by dredging and reclamation, is specifically provided for in the zone provisions;
 - The proposal would enable the continued efficient and effective operation and expansion of the port operation, identified as “Regionally Significant Infrastructure”; and
 - The proposal is not contrary to the consultation and involvement in decision-making ‘thread’ of the Tāngata Whenua policies (as agreed by all of the planners in their JWS), noting the pre-lodgement consultation undertaken and commissioning of cultural assessments.
63. On this basis, and as set out above, it is our finding that the gateway test is satisfied. However, as we stated at the outset, it is our finding that set proposal is, overall, a discretionary activity.

Relevant statutory provisions considered

64. As set out above we have addressed section 104D – non complying activity of the RMA.
65. As a discretionary activity, the proposal can be assessed on its merits and a decision made pursuant to section 104B, and in relation to discharges sections 105 – Matters relevant to certain applications and 107 – Restriction on the grant of certain discharge permits, of the RMA. In this respect, and as required, we have considered the applications in terms of the matters set out in section 104, (and 105 and 107 of the RMA), which requires us to, subject to Part 2, 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.
66. With respect to section 104, despite its considerations being “subject to Part 2”, the Court of Appeal in the RJ Davidson case stated, among other things¹⁸:
- "Having regard to the foregoing discussion we agree with Cull J's conclusion that it would be inconsistent with the scheme of the Act to allow regional or district plans to be "rendered ineffective" by general recourse to pt 2 in deciding resource consent applications, providing the plans have been properly prepared in accordance with pt 2. We do not consider however that King Salmon prevents recourse to pt 2 in the case of applications for resource consent. Its implications in this context are rather that genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome."*
67. In our view that judgment says (in summary) that notwithstanding the Supreme Court's *King Salmon* decision, decision makers must consider Part 2 when making decisions on resource consents. However, where the relevant plan provisions have clearly given effect to Part 2, there may be no need to give further consideration to Part 2 as it would not add anything to the evaluative exercise.
68. In relation to this proposal, we have been able to rely on the provisions of the operative and proposed regional documents, and in particular the PRP- AV¹⁹ and the Whangārei District Plan (operative in part) to determine these applications without recourse to Part 2.

¹⁸ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, paragraph 83.

¹⁹ The PRP- AV is effectively operative with respect to these resource consents as there are no outstanding appeals in relation to these applications. On this basis we have had little regard to the operative regional plan and operative regional coastal plan.

69. We were ‘fortunate’ in that both the regional and district planning documents were essentially new (‘freshly minted’), and in our view had given effect to the higher-order planning documents including the New Zealand Coastal Policy Statement (NZCPS), the National Policy Statement for Indigenous Biodiversity (NPS- IB)²⁰ and the Regional Policy Statement (RPS).

70. In respect of the PRP- AV, we agree with the following statement from the planners JWS²¹.

“Phil Mitchell and Brett Hood also agree with Blair Masefield’s position²² as a matter of principle, but with the addition of the following context. Because all appeals have been resolved, the rules of the legacy regional plans no longer have any effect (s86F of the RMA). Furthermore, while the objectives and policies of the legacy plans are theoretically relevant, they should be given minimal, if any, weight.”

71. While we have stated we did not need to have recourse to Part 2, we do address it, notably section 6 (d) - in relation to public access to and along the CMA, 6(e) regarding the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and section 7(a) regarding kaitiakitanga.

Relevant standards, policy statements and plan provisions considered

72. In accordance with section 104(1)(b)(i)-(vi) of the RMA, we have had regard to the relevant plan provisions of the following documents:

- New Zealand Coastal Policy Statement 2010 (NZCPS);
- National Policy Statement for Indigenous Biodiversity 2023 (NPS-IB);
- Regional Policy Statement for Northland (RPS);
- Operative Regional Coastal Plan for Northland (RCP);
- Regional Plan for Northland;
- Proposed Regional Plan for Northland – Appeals Version (PRP- AV); and
- Whangārei District Plan – Operative in Part (WDP-OP).

²⁰ We address the National Policy Statement for Indigenous Biodiversity 2023 separately below.

²¹ JWS dated 28 September 2023.

²² Which was – “Because the Proposed Plan is not fully operative, the existing “legacy” plans are still operative and their objectives and policies are relevant considerations under section 104(1)(b)(vi).”

Summary of evidence

73. We received a vast amount of expert and non-expert (including corporate and lay) evidence. Because of this, we see little point in providing a separate summary of all of it here. We have provided (in Appendix 1) a list of all of those who prepared expert and lay evidence (including the area of expertise), and we address the expert and lay evidence in the separate topics listed below.
74. We summarise the statements of evidence of Northport's corporate evidence here. Mr Jagger, Northport – Board Chair²³ and Mr Moore, Northport - CEO gave a corporate overview which provides useful context to the proposal. We also address Mr Blomfield's evidence - Northport – Terminal Facilities Manager regarding consultation, design, and project management; also, as it provides useful context.
75. Mr Jagger's evidence addressed the "national discussion" around the future of Ports of Auckland (to clarify for the record Northport's position within that discussion); he outlined Northport's track record of investment in, and growth at, Northport; provided an overview of the rationale behind Northport's Vision for Growth and its objective for the future.
76. With respect to its objective for the future, Mr Jagger stated²⁴:
- "I believe strongly that, first and foremost, this Project presents New Zealand with a rare opportunity to develop, and enhance the resilience of, its national supply chain infrastructure.*
- It also represents a necessary and positive step in the development of infrastructure that the Northport Board believes will become essential to the effective economic development of the Upper North Island.*
- The Board believes that the Project will deliver significant social and economic benefits not only for Northland, but also for North Auckland."*
77. Mr Moore's evidence set out that Northport is New Zealand's northernmost deep-water port. It has three berths available for handling dry cargo vessels, with a total linear berth length of 570 m. The Northport facility totals 49.1 ha of land, including over 40 ha that is paved and used for cargo operations. Of the existing 49.1 ha footprint, 33.6 ha is reclaimed land.
78. He set out that Northport operates 24 hours a day, seven days a week to meet the trade demands of Northland and the wider Auckland region. It handles domestic freight and international imports and exports. Logs, woodchip and processed timber for export have comprised the bulk of cargo handled by the port. Other export items include kiwifruit, cement and manufactured goods.

²³ He is also Chairman of Marsden Maritime Holdings Limited, a 50 percent shareholder of Northport, and North Tugz, a joint venture with Ports of Auckland Ltd of which Northport is a 50 percent shareholder.

²⁴ Paragraphs 35 – 37 of Mr Jagger's evidence.

79. Imports are also an important part of Northport’s business and include fertiliser, gypsum, coal, steel, project cargo, and animal feed supplements.
80. Northport is a key partner with NRC and its harbourmaster due to the functions Northport carries out, which assist the safety of all marine craft navigating the harbour. These functions include responsibility for aids to navigation within the commercial channels, dynamic under-keel clearance system (DUKC), hydrographic survey, Whangārei Harbour radio and local port service (LPS) for commercial operations.
81. The cruise industry has been actively engaged with Northport to include Whangārei as a new cruise destination, the Hundertwasser Art Centre being Whangārei’s point of difference. Northport will berth vessels at the facility and enable disembarking/embarking directly to the shore, instead of vessels anchoring in Bream Bay and shuttling passengers by tender.
82. He also set out that *“Northport holds a very important role in Northland’s regional economy, supporting import and export activity. This role has expanded and diversified significantly since Northport began operating in 2002. Beyond its local and regional importance, and due to its integration into the NZ port network, Northport is significant nationally for its commercial, transportation and infrastructure functions”*²⁵.
83. Mr Blomfield’s evidence summarised Northport’s operations in the context of this proposal, including its previous dredging and reclamation experience, record of environmental compliance, and the operational constraints faced by Northport. He also discussed the design considerations, including a summary of the consideration of alternatives²⁶ (as did Mr Khanna’s and Ms Stanway’s evidence), and briefly explained the methodology, programme and procurement process for construction of the Project;
84. Mr Blomfield also set out the engagement with stakeholders around the design specifications, including seeking expert advice as required; management of the communication strategy, including the Vision for Growth website; engagement and management of experts; representation of Northport throughout the community consultation and engagement process.
85. In relation to the expert evidence, we directed expert conferencing. Expert conferencing sessions were held and Joint Witness Statements (JWS) filed on the following topics:
- Coastal Processes;
 - Marine Ecology;
 - Avi-Fauna;
 - Terrestrial noise;
 - Transport;

²⁵ Paragraph 22 of Mr Moore’s evidence.

²⁶ Which we have addressed above, and address further in the Cultural section of this decision.

- Landscape;
- Recreation (x2);
- Navigation;
- Stormwater and Groundwater; and
- Planning (x2).

86. We have, where appropriate, relied on the findings set out in the JWSs²⁷.

87. We record that we excused a number of the Applicant's expert witnesses (and their section 42A counterparts) from appearing at the hearing. This was on the basis that having read the applications, the Section 42A report, the Joint Witness Statements from the expert conferencing sessions and the expert evidence of the applicant and submitters and there being no issues in contention between the relevant experts, and/or the Hearing Panel had no questions for those witnesses.

- Mahim Khanna – Terminal Design;
- Jan Stanway – Structural;
- Ross Sneddon – Peer review Marine ecology;
- Craig Fitzgerald – Terrestrial noise;
- Andrew Curtis – Air Quality.
- David Fox – turbidity methodology, and
- Matthew Pine – underwater acoustics.

Principal issues in contention

88. The entire proposal was in contention as a number of submitters sought, for a variety of reasons, that the applications be refused consent. The section 42A authors (and their technical advisors) also raised issues that were not fully resolved through the hearing process. However, the main issues related to:

- Whether there was sufficient information to be able to make a decision, mainly in relation to questions about the validation and calibration of the hydrodynamic modelling, and reliance on its outputs by a number of the marine related experts in relation to the scale of effects and the lack of assessment of the effects of the proposal through a cultural lens.
- The adverse effects on:
 - Marine ecology including marine mammals;

²⁷ We wish to thank the experts of attending, participating and in many cases narrowing and/or resolving (but not in all cases) the issues between them. These were clearly set out in the JWSs. We are also very grateful for the expert facilitation of the expert conferencing sessions by Ms Oliver.

- Avi-fauna;
- Terrestrial ecology;
- Tāngata Whenua/cultural;
- Recreational/amenity/public access due to the loss of the beach from the proposed reclamation;
- Landscape, natural character and visual amenity;
- Noise – mainly from people living across the harbour (Reotahi);
- Navigation; and
- Transportation - impact on the roading network.
- Whether the effects of operational stormwater discharges had been appropriately addressed;
- The appropriate lapse period for the consents; and
- If a duration period was required for the reclamation consent.

89. The following issues were initially in contention, but following discussions/negotiations with the Applicant and/or expert conferencing, the following matters were resolved such that they were no longer in contention:

- All matters relating to the Marsden Cove Limited (MCL) and Marsden Cove Canal Management limited (MCCML), including sedimentation and noise related issues²⁸;
- All matters relating to CINZ²⁹ and Seafuels Limited (including navigation and safety)³⁰;
- The use of the Port Noise Standard, terrestrial noise effects and the appropriate conditions to be imposed if the applications were granted consent, as agreed by the noise experts (noting some submitters opposed the application based on noise effects)³¹; and
- The traffic effects of the proposal. The conditions to be imposed to address the adverse effects arising from the increased traffic from the expanded port were agreed between the Applicant, Waka Kotahi and WDC.

90. Notwithstanding that these issues were not in contention; we address noise and traffic below.

²⁸ The expert evidence was withdrawn – letter dated 9 October 2023 from TR Brook (Marsden Cove Limited) and GL Hopper (Marsden Cove Canal Management limited) with the submitter now supporting the proposal.

²⁹ CINZ did not present any expert evidence.

³⁰ The expert evidence from Seafuels was withdrawn – letter dated 6 October 2023 from W Mills.

³¹ While the noise experts agreed, there remained contention about this and the appropriate management of noise from a number of the residents (mainly Reotahi) who lived near the port.

Reasons for refusing consent and findings on the principal issues in contention

Overview of the relevant statutory Objectives and Policies for this proposal

91. We have set out an overview of the statutory policy position, mainly those in the ‘newly minted’ PRP- AV and the WDC-OP. We do this as it sets the context for how we have evaluated the applications determined to **refuse** the consents sought in respect of those matters.
92. As we indicated earlier³², there is specific and directive plan and policy support for the development and expansion of the port. However, there are also plan and policy provisions that address the appropriateness of the specific proposal sought (e.g. the implications for the area zoned NOSZ (as addressed earlier) and the effects of the proposal as we set out below.

Appropriateness of the Port, its operation and expansion in this location

93. We accept that both the regional and district statutory planning documents support the existence of and development of the port in this location. In a regional context, the RPS³³ and proposed PRP-AV provide direct support for the proposal in terms of a port development. However, as we address later in this decision, that support is not unqualified.
94. In the RPS, Northport, including the adjoining land used for the movement and storage of cargo is identified as “Regionally Significant Infrastructure”. In this regard PRP-AV sets out the following:

“Objective F.1.6 - Regionally Significant Infrastructure - Recognise the national, regional and local benefits of Regionally Significant Infrastructure and renewable energy generation and enable their effective development, operation, maintenance, repair, upgrading and removal.

Policy D.2.5 - Benefits of Regionally Significant Infrastructure Particular regard must be had to the national, regional and locally significant social, economic, and cultural benefits of Regionally Significant Infrastructure.

D.2.9 - Appropriateness of Regionally Significant Infrastructure proposals (except the National Grid).”

95. The PRP- AV also sets out port related zoning and plan provisions. The proposal (coastal marine area (CMA) component) sits entirely within the Marsden Point Port Zone (“MPPZ”). The purpose of that zone is to:

D.5.8 - Coastal Commercial Zone and Marsden Point Port Zone Purpose:

“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.

³² Discussion in relation to non-complying activities.

³³ Refer in particular Policies 5.2.1-5.2.2 relating to infrastructure; and 5.3.2-5.3.3 relating to Regionally Significant Infrastructure.

D.5.9 Coastal Commercial Zone and Marsden Point Port Zone

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.*

96. The reclamation is a key aspect of this proposal and satisfies this policy:

D.5.20 Reclamation

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

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

D.5.21 Reclamation

When considering proposed reclamations, have particular regard to the extent to which the reclamation and intended purpose would provide for the efficient operation of infrastructure, including ports, airports, coastal roads, pipelines, electricity transmission, railways and ferry terminals, and of marinas and electricity generation. [underlining is our emphasis]

97. Dredging is also a key aspect of this proposal and satisfies this policy:

"D.5.25 Benefits of dredging, disturbance and deposition activities

Recognise that dredging, disturbance and deposition activities may be necessary:

- 1) *for the continued operation of existing infrastructure, or*
- 2) *for the operation, maintenance, upgrade or development of Regionally Significant Infrastructure, ...* [Underlining is our emphasis].

98. The WDP-OP also specifically provides for the port, and its expansion. The port has a "Special Purpose Zone" - Port Zone (PORTZ). The PORTZ recognises the significance of the Port and its importance to the Whangārei district and the Northland region as regionally significant infrastructure.

99. The purpose of the Port Zone, as set out in the District Plan, is:

- *To enable the ongoing and future growth and development of the Port and any associated operational areas and facilities; and*
- *To provide for operations relating to the transportation of people and freight including within the Port Zone.*
- *To enable appropriate commercial and industrial development adjacent to Marsden Bay Drive, and to otherwise manage non-port related activities so as not to compromise or constrain the primary purpose of the zone.*

100. The relevant 'higher level' enabling objectives and policy are:

Objectives:

- *PORTZ-O1 Regionally Significant Infrastructure - Recognise and provide for the importance of the Port as regionally significant infrastructure and the contribution it makes to the economic and social wellbeing of the District and Region.*
- *PORTZ-O2 Current Operation and Future Development - Recognise the unique characteristics of the Port and provide for: 1. The efficient and effective ongoing operation of port activities within the Port Zone without undue constraints; and 2. The future development and expansion of Port operations and activities within the Port Zone.*

Policy:

- *PORTZ-P1 Regional Significance - To recognise the regional significance of the Port by providing for a wide range of existing and future port operations and port activities within the Port Zone.*

101. As set out in the Interim Reply Submissions³⁴:

“Development of Northport at this particular location, including by dredging and reclamation, has very clearly been considered and is specifically provided for in the zone provisions. Directive enabling support is provided by the MPPZ zoning. Relevantly, the MPPZ zone is limited to one location in all of Northland – being the area immediately around the existing Northport facility. This singular location includes all of the seaward area within which the Proposal is located.”

and

“Put simply, the enabling direction contained in the Proposed Regional Plan framework is so specific that it genuinely is a case of “if not here, then where”? Or, as expressed by Dr Mitchell in response to questions from the Panel, the significant directives in the policy documents for development of port facilities in the manner and location proposed mean that it is not a matter of where or how port-related development should proceed, but when.”

³⁴ Paragraphs 2.6 and 2.8 of the interim reply submissions.

102. Furthermore, the Applicant's submission to us that the specific, directive enabling purpose and provisions of the MPPZ could effectively be frustrated by any of the 'avoidance' provisions of that same plan, stating³⁵.

*"Such interpretation is in our view strained, and would, if adopted, lead to the inescapable position that development within the MPPZ, and consistent with its purpose, could be frustrated by the sometimes broad 'avoid' requirements"*³⁶. In this respect the following example was offered *"For instance, Ms Kirk for the Director-General of Conservation appeared to be suggesting that avoidance of effects is required in the Significant Marine Mammal and Seabird Area (SMMSA) overlay of the Proposed Regional Plan which applies not only to the entire Whangārei Harbour, but to the entire coast of the Northland region."*

103. The zoning in the regional and district plan, and their related provisions, are fundamental to the consideration of the proposal. This is because it is this location where the port and its expansion has been determined as being appropriate by the regional and district planning documents. In this respect we accept that this *"genuinely is a case of "if not here, then where?"*³⁷ and *"Put another way, the plan framework explicitly identifies and provides strong directive enabling support for port-related development at this precise location out of all of Northland's coastline"*³⁸.
104. While the zonings and the 'supporting and enabling' plan provisions establish that this is the appropriate location for the port and its expansion, there is a range of other planning provisions regarding the effects of any proposal, which we address in some detail below. Furthermore, the activity status of the resource consents within the MPPZ range from controlled (maintenance dredging; additions or alterations to structures), restricted discretionary (structures; deposition of material for beneficial purposes); with reclamation, capital dredging and stormwater discharges being fully discretionary.
105. In this respect we note the submission from Mr Matheson, counsel for Patuharakeke Te Iwi Trust Board ("PTITB"). While he considered directive enabling policies were more "general" in nature than submitted by the Applicant, he set out that notwithstanding those more enabling provisions, that reclamation and capital dredging, were fully discretionary (and not controlled or restricted discretionary activity); the same activity status as reclamations, and dredging in the other zones/areas in the PRP-AV (C.1.6.5 – Reclamation, C.1.5.13 – Dredging).
106. We address the other relevant objectives and policies of the planning documents under the various headings below.

³⁵ Footnote 18 of the interim reply submissions.

³⁶ Paragraph 2.11 of the interim reply submissions.

³⁷ Paragraph 2.10 of the interim reply submissions.

³⁸ Paragraph 2.10 of the interim reply submissions.

'Need' for the Project

107. Before addressing the effects of the proposal and the related objectives and policies, we address the issue of “need” for the proposal. This was raised and addressed through the hearing process.
108. The issue of ‘the need’ for the project now, and into the future, was raised mainly by Mr Masefield³⁹, and other submitters. This was largely in terms of 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
 - (d) The area occupied is necessary to provide for or undertake the intended use.
109. Mr Masefield queried whether the interpretation of (d) above required Applicant to demonstrate that there was demand for the activity. The Applicant argued (as set out below) 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 proposal⁴⁰.
110. Mr Doesburg set out in his legal submissions that⁴¹:
- “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. 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.”*
111. The Applicant’s legal submissions addressed this matter in Opening and the Reply submissions (“Necessity” for the Proposal). The Applicant’s legal Counsel also agreed with Mr Doesburg.
112. The final Reply Submissions, legal counsel stated⁴²:

³⁹ At 11.1.16 and 12.1.1.9 of the section 42A report.

⁴⁰ Paragraph 7.26 of the Applicant’s opening legal submissions.

⁴¹ Paragraph 21 of NRC’s legal submissions.

⁴² Paragraph 15.5 of the interim closing submissions.

“‘Necessity’ or ‘need’ for the Proposal: there is no policy nor legal requirement to demonstrate demand or that the Proposal is a “necessity”. Counsel for NRC agrees. The s42A Report Addendum concedes that the interpretation of the policy framework previously advanced by the s42A author regarding demand/need was incorrect. Notwithstanding that there is no requirement to demonstrate that the Proposal is needed, Northport has provided comprehensive evidence on future demand and demonstrating that the proposed footprint is required to handle predicted container volumes. No opposing evidence seriously called this into question. That evidence confirms that Northport will require further wharf extensions and reclamation as early as 2032. If Northport waits for demand to be manifest before seeking RMA approvals, it will be too late. “

113. We agree with the Applicant’s legal submissions on this matter. We accept that ‘need’ per se is not relevant. However, the issues raised by Mr Littlejohn (and Messrs Akehurst, Jagger and Moore) about the timing of the need to invest in growth (2 modelled scenarios, show Northport may outgrow even the expanded port, including Berth 4, as early as 2032) and efficiency are relevant. This has, in our view, implications on the appropriate lapse date for the regional consents. We address this below.

Positive effects

114. We find there would have been significant positive effects from the proposal had consent been granted. It would have facilitated, in our view, a range of economic and social benefits associated with a dedicated container terminal at Whangārei, which would be part of an integral and efficient national network of safe ports.
115. We accept that the Multi-Regional Input Output assessment undertaken by Market Economics (Mr Akehurst), noting again that there was no real contrary evidence questioning its findings. It showed that:
- *The annual value of Northport’s direct role (as a business) in the Northland economy could range from \$22 million value added under a Business as Usual (“BAU”) scenario to \$34 million under a North Auckland Imports (“NAI”) scenario, by 2050. The value added at this level could sustain the equivalent of 320 to 480 jobs annually.*
 - *The annual value of the economic activity facilitated by the Port (which includes the trade tasks it handles) in the Northland economy could range from approximately \$1.097 billion value added under a BAU scenario, to \$1.194 billion value added under the NAI scenario by 2050. In terms of jobs, this is equivalent to sustaining between 14,800 and 16,100 jobs for a year, each year. (ii) Overall, the Proposal will generate considerable positive economic effects for the local, regional, and national economies. It will enable the expansion of a highly valuable physical resource (i.e. the port), enabling the community to provide for its social, cultural, and economic wellbeing.*

116. We accept that there would also be efficiency improvements which would assist in securing Northport's ongoing future operation by providing container terminal handling capability, along with the key benefits Northport provides to the region - including direct value added (estimated to be up to \$34 million as set out above) and the wider economic activity facilitated by the port (estimated at up to \$1.194 billion)⁴³.
117. We also accept the evidence of Ms Mercer, Chief Executive of Marsden Maritime Holdings Ltd (MMH). She addressed the symbiotic relationship between the proposed port expansion and the master planned development proposed by the He Ara Huringa Business Park and Tech Hub. Ms Mercer described the port-related aspects of the MMH proposal, such as bulk storage, packing and unpacking of containers, freight forwarding, distribution hubs, cool stores, warehousing, workshops and engineering, which would be enabled by the port expansion. She stated that the Northport expansion will *"support Northland unlocking its potential and thereby improving the socio-economic well-being across the region"*⁴⁴.
118. We also heard from many ancillary and supporting businesses about the importance of the continued and expanded operations to the region, the district, and their businesses. These included from the cruise Industry, transport companies (trucking and shipping), logistics and technologies companies, forestry, as well as the Northland Chamber of Commerce and Northland Inc. All of these submitters set out the positive impact an expanded port operation would have not only on their own business, but the local, regional and national economy.
119. The Applicant suggested that the following would also have positive effects and/or provide significant environmental enhancement or other initiatives proposed, including⁴⁵:
- *Harbour restoration and other initiatives will be enabled through the Kaitiaki Group and associated Kaitiaki fund to be established through conditions of consent associated with Northport's cultural mitigation proposal.*
 - *The Integrated Marine Planning or "Sea Change" initiative provided for by conditions, which aims to facilitate integration of the full spectrum of interests towards enhancing the wellbeing of the marine environment.*
 - *Roosting habitat for variable oystercatcher and NZ dotterel will be provided through the proposed high-tide bird roost.*
 - *The pocket park, cycleway/walkway, and water taxi facility will create a range of land and sea-based recreation opportunities (including fishing, swimming, observing port operations from a safe location, and socialising).*
 - *The contribution to protect indigenous duneland vegetation in the Ruakākā area required by conditions.*

⁴³ Table 1 and paragraph 47 of Mr Akehurst's evidence.

⁴⁴ Paragraph 24 and verbal submission of Marsden Maritime Holding -12 October 2023.

⁴⁵ Paragraph 16.2 of the interim reply submissions.

120. While we accept these initiatives of themselves may well have positive effects or environmental enhancement, they have been provided to assist in, or addressing the adverse effects of the proposal. To 'list' these under the headings of positive effects is not correct in our view, and would be 'double counting' these as they (mostly) are required to avoid, remedy or mitigate (or offset) the adverse effects of the proposal.
121. That said, we accept there would be important and significant positive effects from granting the consents sought; significant economic and social benefits; not just to Northport but the Northland and New Zealand economy by providing for an expanded and efficient port providing access for a range of products, and improving the efficiency and resilience of the national port network.

Economics

122. Mr Akehurst provided an Economic Impact Assessment (EIA) as part of the application as well as expert evidence. We have partially addressed this above under the Positive Effects section.
123. The Northland Regional and Whangārei District Councils appointed Mr Clough of NZIER to provide a peer review of the Market Economics Report (Mr Akehurst) into the potential economic effects of Northport's expansion. While the two economists differed on the scale of the impact and the preferred model to use for assessing the economic impact of the proposal, there is broad agreement between them that the proposal will likely generate positive economic effects. On this basis we conclude there is little in contention between the economists about the potential economic benefits.
124. As Mr Akehurst set out that the EIA established four potential 'future scenarios' to highlight realistic potential trade tasks that could be handled by Northport in the long term. These future scenarios included: Business-as-usual (BAU); North Auckland Imports (NAI); Upper North Island Ports Constrained (UNIPC); and North Auckland Growth (NAG). In broad terms, he stated that the UNIPC scenario represents a high trade task future, NAG represents a low trade task future and NAI a mid-scenario.
125. Mr Akehurst said that the economic impact assessment reveals⁴⁶:
- "(a) Northport has an important regional role as part of the national port network. In terms of its economic role, the Port currently facilitates approximately \$438 million in value added and the equivalent of 6,300 jobs in the Northland economy.*
 - b) Northport's role is likely to change significantly in the future, mainly as a result of changing trade patterns due to constraints in the Upper North Island port network. There is uncertainty about the future, but all four of the modelled future scenarios (including BAU) show Northport's role expanding over the coming three decades.*

⁴⁶ Paragraph 15 of Mr Akehurst's evidence.

(c) *The change in operational activities (the Port as a business), as a result of the proposed expansion, and any subsequent change in supply chain effects, are relatively small compared to the facilitated effects due to changing trade patterns facilitated by the proposed expansion of the Port.*"

126. Mr Akehurst opined that all of the future scenarios modelled indicate that Northport will need to invest in infrastructure upgrades, which include wharf extensions and port area reclamation. He further set out that *"in two out of the four scenarios modelled (NAI and the UNIPC), Northport may outgrow even the expanded port (i.e. including Berth 4 yet to be constructed) as early as 2032. This is based on expected demand for container handling, driven mostly by demands from outside of the region" – "and that in three of the other forecast scenarios (NAI, UNIPC and the NAG) (and depending on actual and forecast trade demands), the proposed expansion could be required by 2036"*⁴⁷.
127. While we accept, as does Mr Akehurst, that the economic projections have been based on the best available information and these assumptions will contain uncertainties, we accept that the full potential of Northport cannot be achieved (along with the social and economic benefits to people and communities) unless at least some port expansion is enabled. As stated by Mr Akehurst – *"Northport might require additional berth capacity as early as 2032 to develop its container capacity to respond to changing economic needs"*⁴⁸.
128. Given the economist's view about the need and timing of any expansion, and even accepting the uncertainty of any modelling, it is difficult, in our view, to justify a 20-year lapse date (was 35 years as notified). This was a significant issue in contention between a number of parties, including the Applicant, NRC and PTITB. We address this matter later in this decision.
129. Notwithstanding the above, Ms Chetham giving cultural evidence on behalf of PTITB, did not think the Applicant had made a strong economic case for the port expansion due to the lack of adequacy of the assessment of alternatives and lack of full Multi Criteria Analysis including cultural considerations (including economics). We address the cultural values and effects from this proposal later in this decision.
130. As set out in the Cultural Effects Assessment (CEA)⁴⁹, insufficient analysis and evidence had been provided to determine the economic effects (whether positive or adverse) of the proposal on Patuharakeke and its taonga. It stated⁵⁰:

"From what we have seen we conclude economic benefits to the hapū will not outweigh the externalities particularly in terms of cultural and ecological effects. With regard to our Draft Hapū Strategic Plan, Pou Whaioranga (our economic pillar), focuses on developing opportunities for supporting Patuharakeke economic initiatives, with goals and measures framed around utilising our

⁴⁷ Paragraph 18 of Mr Akehurst's evidence.

⁴⁸ Paragraph 19 of Mr Akehurst's evidence.

⁴⁹ Provided as part of the section 92 response.

⁵⁰ Page 46 of the CEA.

whenua, sustainable ventures e.g. ecotourism, increasing financial literacy and governance and management capacity and understanding and developing the skills of our whānau / hapū. We do not have clarity at this stage as to how this proposal will specifically align to these goals if at all.”

131. The Applicant addressed cultural economic impacts in its Interim Reply submissions⁵¹:

“As set out in opening legal submissions⁵² and evidence⁵³ for Northport, and by many submitters supporting the Proposal, there are very significant positive economic benefits to the Whangārei district and Northland region in connection with the Proposal. These benefits have been quantified in the range of \$22-34 million per year in direct value added; and \$1.097-1.194 billion per year in facilitated value added.⁵⁴ These economic contributions will assist the community to provide for its social, cultural and economic wellbeing for years to come.”

While Northport has not attempted to quantify economic impacts between Māori and non-Māori, this is not a failing of the application. Indeed, this would be a very challenging exercise to achieve.”

132. Policy D.2.2 of the PRP-AV states:

Social, cultural and economic benefits of activities

Regard must be had to the social, cultural and economic benefits of a proposed activity, recognising significant benefits to local communities, Māori and the region including local employment and enhancing Māori development, particularly in areas of Northland where alternative opportunities are limited.

133. We are satisfied that the Applicant has had regard to the social, cultural and economic benefits of a proposed activity – and that there are likely to significant benefits from the proposed activity as outlined by Mr Akehurst, albeit not necessarily as set out in the CEA.

⁵¹ Paragraphs 4.21 and 4.23 of the Applicant’s interim reply submissions.

⁵² Paragraph 3.5 of the Applicant’s opening legal submissions.

⁵³ Mr Akehurst’s evidence-in-chief.

⁵⁴ Mr Akehurst’s evidence-in-chief, as summarised at para 3.5(i) of the opening legal submissions for Northport. We record here also that Mr Clough confirmed in response to questioning by the Panel on Hearing Day 1 that he doesn’t fundamentally disagree with Mr Akehurst’s assessment.

Coastal Processes (including the hydrodynamic and morphodynamics modelling)

134. An assessment of the effects of the proposed port expansion was prepared for the Applicant by Mr Reinen-Hamill⁵⁵, an experienced coastal engineer. The assessment described the physical coastal setting of Whangārei Harbour as a meso-tidal drowned river valley which is relatively shallow due to extensive intertidal flats. It also described the nature of the port site's sediment, typical suspended solids concentrations, tidal currents and wave climate. The assessment of the existing physical processes was undertaken through analysis of historic information and newly acquired field investigations together with calibrated and verified numerical modelling.
135. The assessment considered both the construction and long-term effects on coastal processes of the proposed dredging (both capital and maintenance), the reclamation for port activities and the construction of a bird roost for avifaunal mitigation. It drew on the results of a suite of numerical modelling exercises which simulate the hydrodynamics, morphodynamics and dredge plume dispersion⁵⁶. This modelling was undertaken by MetOcean Solutions.
136. The Applicant's modelling methodology and results were described by Dr Beamsley in his evidence. The MetOcean reports were informed by a suite of previous studies undertaken in the Whangārei Harbour since 2012 including wave, current and sediment dynamics models initiated by CINZ.
137. Dr Beamsley describes the modelling as⁵⁷:
- *“... Hydrodynamic modelling: we updated the bathymetry with the proposed dredge footprint and ran a full month of hydrodynamics (two spring/neap tide cycles).*
 - *Morphodynamic modelling: we modelled morphological change in the vicinity of the proposed dredge footprint and reclamation over a five-year period.*
 - *Sediment plumes modelling: we modelled sediment plumes which may be generated during the proposed dredging operations.”*
138. The port's site is also proximate to the consented dredging site of the harbour channel. Consent for this work is held by CINZ. The Applicant's assessment has included consideration of the effects with and without the CINZ dredging. It stated⁵⁸:
- “Effects have been considered based on hydrodynamic and morphodynamic modelling carried out by MetOcean Solutions Ltd (MOS, 2022 a and b) without the CINZ channel deepening project being in effect. However, MOS (2018) report on morphological response to capital dredging and land reclamation considered*

⁵⁵ AEE Appendix 10, Vision for Growth Port Development: Coastal Processes Assessment.

⁵⁶ AEE Appendix 9, Hydrodynamic, Morphodynamic, and Dredge Plume modelling reports.

⁵⁷ Paragraph 12 of Dr Beamsley's evidence in chief.

⁵⁸ AEE Appendix 10, Executive Summary, Vision for Growth Port Development: Coastal Processes Assessment.

morphological change both with, and without, the CINZ channel deepening. They concluded there was little difference and did not expect either situation to measurably change morphological change in the vicinity of the NPL project. Therefore, the findings and conclusion will apply whether or not the channel deepening project is realised."

139. Dr Beamsley's opinion for the site's hydrodynamics was that⁵⁹:

"...the results of the modelling showed only a minor effect of proposed layouts on the current field in the nearshore area surrounding the port. Small decreases in current speed near the reclamation area indicates a potential for an increase in sedimentation. Calibration and validation of the hydrodynamic model suggest the model satisfactorily reproduce the range of hydrodynamic conditions in the environs."

140. His opinion for the site's morphodynamics was that⁶⁰:

"The effect of the proposed design on the morphodynamics is expected to be limited to the immediate port environs. Significant differences observed between the existing and design scenarios are mainly attributed to the combination of dredging (deepening), slope changes, and the transport of sand wave features previously characterized in this region. Despite some predicted changes to the sediment transport and bathymetry within Marsden Bay, model results suggest these will not alter the bay morphology."

141. Dr Beamsley's opinion for the site's dredging, sediment plume and deposition footprints was⁶¹:

"The proposed reclamation has a limited impact on general plume dispersion patterns with a slight flow deflection in its vicinity. Predicted deposition fields for the proposed bathymetry (i.e., post-dredging) indicate possible sediment accumulation near the northwest and southeast edges of the new turning basin."

142. Dr Rautenbach reviewed the MetOcean modelling reports on behalf of the Councils. Following initial concerns with respect to the validation of the hydrodynamic modelling he concluded that the MetOcean reports utilise an appropriate numerical modelling approach⁶².

⁵⁹ Paragraph 13 of Dr Beamsley's evidence in chief.

⁶⁰ Paragraph 14 of Dr Beamsley's evidence in chief.

⁶¹ Paragraph 14 of Dr Beamsley's evidence in chief.

⁶² Paragraph 264 of the section 42A report.

143. Mr Reinen-Hamill's view was that the construction effects associated with the forming of the reclamation and the seawall that protects it, and the dredging to locally deepen part of the port area can be managed by implementing effective controls to reduce the release of fine sediment and therefore the likelihood of sedimentation outside the dredged area. With these controls in place Mr Reinen-Hamill's opinion was that:

"Construction effects on physical coastal processes outside the port area for the reclamation and seawalls is considered negligible⁶³."

144. In a similar vein Mr Reinen-Hamill considered the construction effects of the dredging, subject to effective controls, will also be negligible⁶⁴. He recommended that a monitoring regime⁶⁵:

"...should be included in the construction management plan to determine the actual level of plume extent and concentration. Mitigation for the potential risk could include sediment curtains around the dredge vessel or operating during limited periods associated with low tidal flows if required."

145. Mr Reinen-Hamill's opinion was that the resulting changes to the currents and wave climate caused by the eastern reclamation the overall cumulative effect on coastal processes in the vicinity would be "moderate". He considered the effects on coastal processes for the other inner harbour, inlet and Bream Bay areas would be minor⁶⁶.

146. With respect to the proposed bird roost provided for avifauna mitigation (addressed in more detail below) Mr Reinen-Hamill's view was that in the site's⁶⁷:

"...relatively low energy environment and over the long term the inclusion of sand and the ongoing top-ups will have a beneficial effect on coastal processes by increasing the sediment budget within Marsden Bay, offsetting to some degree sea level rise effects and will potentially reduce the overwash and landward retreat of the existing barrier beach."

147. A number of submissions were made with respect to the effects of the proposed port expansion on coastal processes⁶⁸. One submission was in support while 19 submissions were in opposition or support in part. The principal concerns raised by the opposing/partial support submissions were:

- The possible mobilisation of sediment, potentially contaminated, and the effects of its deposition in the surrounding environment including the nearby Marine Reserve, the access to Marsden Cove Marina and adjacent port infrastructure owned by CINZ.

⁶³ Paragraph 39 of Mr Reinen-Hamill's evidence-in-chief.

⁶⁴ Paragraph 41 of Mr Reinen-Hamill's evidence-in-chief.

⁶⁵ Paragraph 42 of Mr Reinen-Hamill's evidence-in-chief.

⁶⁶ Paragraph 11 of Mr Reinen-Hamill's evidence-in-chief.

⁶⁷ Paragraph 12 of Mr Reinen-Hamill's evidence-in-chief.

⁶⁸ Appendix B, s42A Staff Report. Key Issues raised in submissions.

- The potential for changes in water currents to affect accretion and erosion of nearby banks and consequential effects on shellfish populations and swimmer safety.
148. Relief sought, particularly from MCL, Marsden Cove Canals Management Ltd (MCCML) and CINZ, centred on the imposition of monitoring conditions and remediation in the event of impacts on their interests being realised. Agreement was reached between Northport and these parties resulting in additions to the proposed consent conditions⁶⁹.
149. Professor Bryan presented expert evidence on behalf of PTITB in relation to coastal processes and hydrodynamics. She summarised her key concerns being⁷⁰:
- *“The numerical modelling is not well validated or calibrated. Without this validation or calibration, the accuracy of numerical modelling scenarios cannot be sure, and therefore it is not possible to say with any confidence the effects of the proposed reclamation are minor. Other reports rely on numerical modelling, and so the lack of confidence would also influence the conclusions of these other reports.*
 - *A monitoring plan prior to any reclamation, which includes spatially resolved current measurements and suspended sediment measurements (along with the proposed bathymetric surveys), would ensure that the implications to coastal processes in the wider estuary could be assessed (beyond the sandy areas around the entrance).*
 - *Residence times and flushing times are a useful way to understand the effect on wider water quality in the estuary (as highlighted in the NIWA peer-review). Hydrodynamic measurements would need to be collected for more than a spring-neap cycle (preferably a month).*
 - *Suspended sediment measurements tend to be dominated by episodic rare events, and therefore should need a longer monitoring period to establish baselines.”*
150. An Expert Conference session on Coastal Processes and Planning was held on 22 September 2023. The coastal process experts attending were Mr Reinen-Hamill, Professor Bryan, Mr Davis for MCL and MCCML⁷¹ and Dr Treloar for NRC. Mr Reinen-Hamill agreed to provide further information to respond to the model validation questions and the effects of sea level rise raised by Professor Bryan⁷².

⁶⁹ Conditions 108 to 116 and 202 to 205, Draft proposed NRC conditions: Northport Ltd (Updated/ Final Version 16 May 2024.

⁷⁰ Paragraphs 5.1 to 5.4 of Professor Bryan’s Evidence.

⁷¹ Noting that Mr Davis’ evidence was subsequently withdrawn, and we have not considered it in this decision.

⁷² Paragraph 3.1, Joint Witness Statement in relation to: Coastal Processes and Planning.

151. In response to the questions raised by Professor Bryan, both Dr Beamsley and Mr Reinen-Hamill provided further evidence on the calibration of the hydrodynamic and morphodynamic models and the potential effects of sea level rise⁷³. They reiterated that the modelling results are based on their project specific studies but are further complemented with a range of proximate relevant observations and investigations. Mr Reinen-Hamill summarised their position as⁷⁴:

“The modelling results represent observed trends from the physical data and observations that have been carried out for many years, and supported outcomes from earlier modelling studies, so I am confident that the results of the modelling can be applied to provide understanding of the relative changes of the proposed development as well as supporting the assessment of the location, magnitude and scale of effects.”

152. With respect to the potential effects of sea level rise in combination to the effects of the proposed development Mr Reinen-Hamill considered that⁷⁵:

“...the relative effect of the proposal on sea level rise should also be minor; with the exception of the likely trend of a change in the tidal inlet from ebb dominated to flood dominated conditions which could locally increase the rate of sedimentation to the east of the port due to the presence of the reclamation. This potential effect would be identified in the proposed monitoring of the area already included in the consent conditions.”

153. The Councils sought further advice on the questions raised by Professor Bryan. The Councils' advisor on the effects of the proposal on coastal processes, Dr Treloar, provided a further technical memo in which he addressed the following matters:

- The adequacy of the numerical model calibration process that MOS have applied to their model systems and hence the reliability of MOS's modelling results near Marsden Point.
- The likely effects of sea level rise, perhaps by 1m at circa 2100.
- Model suitability to Northport's project.

154. Dr Treloar's opinion was that⁷⁶:

“...MOS's model system is suited to the investigations undertaken by them for Northport's proposed port development. Moreover, in terms of investigating changes in current characteristics, these changes have been determined on a like-for-like basis – that is, the same physically realistic model has been used.

⁷³ Dr Beamsley's and Mr Reinen-Hamill's rebuttal evidence.

⁷⁴ Paragraph 6 of Mr Reinen-Hamill's rebuttal evidence.

⁷⁵ Paragraph 8 of Mr Reinen-Hamill's rebuttal evidence.

⁷⁶ Section 3.3, Dr Treloar, Technical Memo- Turbidity and Coastal Processes.

Hence, any deficiencies would be the same for pre-development and post development calculations.”

155. With respect to sea level rise Dr Treloar’s view was that there would likely be no discernible change in the net sediment transport characteristics of the waterway. He added that, based on his experience with other sites, changes would be very slow and occur over a time-scale of about a century. Dr Treloar’s opinion was that⁷⁷:

“...subject to agreed conditions, the actual and potential adverse effects of the proposal on coastal processes will be adequately managed.”

156. One of the issues in contention was whether there was sufficient information to be able to make a decision, mainly in relation to questions about the validation and calibration of the hydrodynamic modelling, and reliance on its outputs by a number of the marine related experts in relation to the scale of effects. For the reasons we have set out above, we are satisfied that the matters raised in relation to the potential effects of the proposal on coastal processes have been appropriately addressed, and formed a sound basis on which a number of the experts for the Applicant based their expert opinion. Furthermore, we find we have sufficient and reliable information to make our decision.

Marine ecology⁷⁸

157. The topic of marine ecology was in contention between the marine scientists. While some specific issues were raised (we address these below) the most significant issues appeared to be whether:

- An appropriate assessment method had been used;
- Sufficient data had been provided to assess ecological effects;
- The systems against which ecological effects were assessed are appropriate; and
- Any major types of effect have been missed.

158. In this respect expert conferencing was held between the marine expert and the planning experts. All the marine ecology experts agreed that appropriate assessment methods had been used in the proposal. They also all agreed that data collection and presentation of results were appropriate and the characterisation of the biodiversity values of the harbour were appropriately addressed. They also agreed that the three scales used in the application - (footprint, outer harbour ecological zone (OHEZ), whole harbour) were appropriate descriptors.

159. In terms of the effects on intertidal sediment habitats and macrofauna - Policy D.2.18, subsection 5(a) of the PRP- AV states:

Manage the adverse effects of activities on indigenous biodiversity by:

⁷⁷ Section 3.3, Dr Treloar, Technical Memo- Turbidity and Coastal Processes.

⁷⁸ Note: Marine Mammals and Avifauna is addressed separately below.

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

a) *taking a system-wide approach to large areas of indigenous biodiversity such as whole estuaries or widespread bird and marine mammal habitats, recognising that the scale of the effect of an activity is proportional to the size and sensitivity of the area of indigenous biodiversity, [underling is our emphasis].*

160. Importantly, in our view this policy directs that a system-wide approach is taken for assessing effects on indigenous biodiversity. We note that despite the clear direction in the policy the experts disagreed on the appropriate assessment scale. While all of the experts agreed that effects on intertidal sediment habitats and macrofauna would be moderate, Dr Kelly and Dr Lohrer disagreed about the appropriate scale to use. Dr Kelly considers the appropriate scale is the harbour scale, whereas, Dr Lohrer considered that the scale should be OHEZ. Mr Sneddon (Applicant's peer review) and Dr Bulmer⁷⁹ agreed with Dr Lohrer.

161. Dr Lohrer considered that the effects were at the upper range of moderate at the OHEZ scale. Dr Kelly opined that effects were at the lower range of moderate at the harbour scale. Dr Kelly stated⁸⁰:

"...I consider my conclusion of a moderate effect at the harbour scale to be more conservative than Dr Lohrer's one of a moderate effect at the OHEZ, given the harbour is substantially larger."

162. Notwithstanding the above, both Drs Kelly and Lohrer agreed that the overall difference between the experts was relatively small. However, we record that in terms of Policy D.2.18, subsection 5(a) of the PRP- AV, we agree with Dr Kelly.

Cumulative Effects

163. There was a difference in opinion between the experts regarding "cumulative effects" and whether they had been appropriately assessed. Drs Lohrer and Bulmar opined that the cumulative effects had not been addressed appropriately; Dr Kelly disagreed. This was addressed in the experts' evidence and the JWS.

164. Dr Lohrer considered that; the individual effect recorded in the section 42A report⁸¹, suspended sediment concentration, and deposited sediments had been considered individually but not cumulatively. He also considered that effects on food webs were not considered cumulatively.

⁷⁹ Dr Bulmer noted that there was some disagreement amongst the modelling experts, and that his conclusion was dependent on the Applicant's modelling results not differing appreciably from those provided in the Application.

⁸⁰ Paragraph 140 of Dr Kelly's Evidence-In-Chief.

⁸¹ Section 42A report - Appendix C3, section 5.1.2 conclusion table on pages 7-8.

165. Drs Lohrer and Bulmer considered that cumulative impacts of climate change related effects were not adequately considered. These include increased inundation time of intertidal habitats and altered hydrodynamics (sea level rise), increased frequency and severity of storms (and thus sediment loading), increased atmospheric and sea surface temperatures, and decreased ocean pH.
166. Dr Kelly disagreed with both Drs Loher and Bulmer. He considered the cumulative effects had been appropriately addressed setting out the reasons for this in this evidence-in-chief⁸² and rebuttal (in relation to Dr Bulmer). With respect to climate change, Dr Kelly set out that the effects of climate change are a global issue that would have a fundamental impact on New Zealand’s marine environment, and that the effects of this proposal would be dwarfed by those broader scale impacts.
167. He stated⁸³:
- “More broadly, available information shows that effects of climate change are already significant and that they will continue to increase (Intergovernmental Panel on Climate Change, 2023). Against that background, any cumulative effects of the proposed port development will be negligible.”*
168. We note that the Applicant’s legal counsel (in their opening legal submissions) set out a summary of the approach adopted by Northport’s expert team, including Dr Kelly, towards considering/assessing cumulative effects⁸⁴. We agree with those legal submissions.
169. Having heard the evidence, it is our view that Dr Kelly, and the other Northport witnesses, have properly assessed cumulative effects, including by the appropriate recognition of the “existing environment”⁸⁵.

Kaimoana shellfish

170. The issue of kaimoana shellfish was also a matter in contention between the experts. Dr Kelly and Mr Sneddon considered the effects on kaimoana shellfish to be low at the harbour scale. They considered that the disruption to propagule dispersal by the proposal would be very small compared to the disruption from existing structures. Drs Lohrer and Bulmer considered that the effects to be moderate at the OHEZ scale.

⁸² Paragraphs 87 – 100 and 142 of Dr Kelly’s evidence-in-chief, and Paragraphs 4-9 of his rebuttal evidence.

⁸³ Paragraph 9 of Dr Kelly’s rebuttal evidence.

⁸⁴ Paragraphs 6.23 - 6.27 of the Applicant’s opening legal submissions.

⁸⁵ We have not set out the disagreement between some of the marine experts on the ‘existing environment’; suffice to say the Applicant’s legal counsel, planning experts and NRC’s planning expert made it clear to us what the ‘existing environment’ is in the context of this proposal – and we agree. We note that we find Dr Kelly had understood and undertaken his expert assessment in terms of what agree is the ‘existing environment’.

171. As set out by Dr Kelly, the key shellfish likely to be, or that will potentially be affected by the proposed activities are cockles (tuangi), pipi, and possibly scallops (tipa). Cockles are a ubiquitous feature of intertidal sites throughout much of the harbour, whereas the distributions of pipi and scallops are patchier. Green-lipped mussels (kuku) may also be present in the OHEZ, but have not been observed in surveys within the areas where the proposed activities will occur.
172. Drs Lohrer and Bulmer considered that there would be adverse effects on kaimoana shellfish arising from the proposed activities disrupting ecological connectivity. Dr Kelly addressed this in this evidence-in-chief in relation to the concerns raised by Dr Lohrer⁸⁶ and paragraph 7 of his rebuttal evidence in relation to matter raised by Dr Bulmer.
173. While we do not repeat all of Dr Kelly's evidence, we do quote the following⁸⁷:

"The rationale from my conclusion is largely provided in Paragraphs 87 to 100 above, and I do not repeat that. I also note that sediment plumes and deposition associated with the dredging are predicted to be largely confined to subtidal channels. Based on that, there appears to be little potential for sediment plumes to adversely affect intertidal pipi and cockle beds."

174. Attached to the Addendum section 42A report was Dr Lohrer's technical memo – Marine Ecology. Section 3.1 was – "Suitable mitigation for significant marine ecological effects". He set out in that section:

"Potential mitigation should be focused on shellfish enhancement, as shellfish have positive effects on biodiversity, food webs, water clarity and cultural/amenity values.

For scallops, juvenile scallops could be collected as wild caught spat (in spat collectors) and re-distributed to enhance beds and former beds in the subtidal zone for pipi (and also Atrina zelandica horse mussels), juveniles will most likely need to be reared from gametes to spat in a recirculating aquaculture system and re-seeded to beds (such as Mair/Marsden Bank) during windows of opportunity that optimise survivorship and growth.

I support the proposed Shellfish Repopulation Plan conditions in the set attached to the 42A Addendum."

175. Dr Lohrer's technical memo also addressed and sought conditions seeking Ecological assurance monitoring for shellfish and seagrass, as well as seeking a closed dredging season⁸⁸. Mr Masefield addressed these issues in the Addendum section 42A report⁸⁹. Mr Masefield recommended conditions of consent including: a shellfish repopulation plan, ecological assurance monitoring and a closed dredge season.

⁸⁶Paragraphs 87 – 100 and 142 of Dr Kelly's evidence-in-chief.

⁸⁷ Paragraph 142 of Dr Kelly's evidence-in-chief.

⁸⁸ Sections 3.2 – 3.4 of Dr Lohrer's technical memorandum – 16 November 2023.

⁸⁹ Section 2.7 Marine Ecology Effects in the Addendum section 42A report.

176. Northport's Legal Counsel addressed these matters in some detail in their Interim and Final Reply Submissions. We address these below.
177. It is the Applicant's position, particularly relying on the evidence of Dr Kelly and Mr Reinen-Hamill, that it does not agree with the suggestion that conditions requiring a shellfish repopulation plan be included. The Reply set out⁹⁰:

"The issue of declining harvestable shellfish populations at Te Poupuwhenua / Marsden Point is not new. It has been observed anecdotally for some time. The evidence acknowledges that there has been a major decline in shellfish in recent years, including Mair/Marsden Bank pipi. Despite many attempts to understand the cause of this decline, there is no clear understanding of the cause(s) – although it is worth recording that, given the timing, the cause(s) is clearly independent of the Proposal. Notwithstanding this, given the significance of Mair and Marsden Banks, including to the local community/iwi/hapū, Northport's experts⁹¹ have carefully considered potential adverse effects on these features. More specifically, Dr Lohrer has raised issues around ecological connectivity and sediment issues potentially impacting larval transport of shellfish. These concerns are directly rebutted by Dr Kelly.

While Northport fully agrees with comments such as that from Dr Lohrer that he "would like to see a bolstering of the pipi population" in the harbour, it must be remembered that the effects of Northport's Proposal on shellfish, outside the immediate footprint, have been assessed to be low, and that wider, existing, environmental concerns are not something that Northport is, or can be, solely or primarily responsible for through this consent process or otherwise."

178. For the reasons set out above, we agree with the Applicant.
179. In terms of additional marine ecology assurance monitoring, it was the Applicant's position that Dr Kelly had designed a comprehensive marine ecology assurance monitoring scheme, which would be secured through conditions proposed by Northport. On this basis, additional requirements for assurance monitoring are not justified. We agree.
180. In terms of a "closed dredging season", the Interim Reply Submissions pointed out the lack of evidentiary basis for, and potentially onerous implications of, a condition prohibiting capital dredging between 1 October and 31 January in any given year.
181. Notwithstanding this, the Applicant's position as recorded in the Final Reply Submissions is⁹²:

"While not resiling from that position [in the paragraph above], Northport has agreed to:

(a) a new condition which restricts the consent holder from undertaking capital dredging between 1 October and 31 January in two successive years; and

⁹⁰ Paragraphs 4.19 and 4.20 of the final reply submissions.

⁹¹ Including in particular Mr Reinen-Hamill and Dr Kelly.

⁹² Paragraph 4.27 of the final reply submissions.

(b) a new condition which prohibits maintenance dredging between 1 October and 31 January, “unless necessary to do so as a result of unforeseen events or there is no practicable alternative timing”. This is a pragmatic step, reflecting Northport’s intent to schedule maintenance dredging outside that ecologically important time period, but acknowledging the practical importance of maintaining a safe and effective channel/turning basin.

182. We are satisfied that the marine ecological effects (addressed above) have been appropriately assessed and addressed, and any adverse effects identified and mitigated to the extent necessary by the consent conditions recommended by the Applicant had we granted consent; and that the proposal is consistent with the relevant objectives and policies of the statutory planning documents.

Marine Mammals

183. Dr Clement, a marine scientist specialising in marine mammals, presented expert evidence on the potential effects of the proposed works on marine mammals⁹³. She considered the level of the proposed activities but also the spatial scales relevant to the marine mammal species involved. The assessment included collation of available information on marine mammal that use the Whangārei Harbour and the wider area of interest. This was complemented with an underwater acoustic programme consisting of the deployment four acoustic monitors in the vicinity of the proposed works.

184. Of the 27 cetacean (whales, dolphins and porpoises) and two pinniped (seals and sea lions) species reported by Dr Clement to have been recorded along the north-eastern coastline of the North Island she considers several marine mammal species may be present within the area of interest. This includes bottlenose dolphins, common dolphins, orca, Bryde’s whales, NZ fur seals, leopard seals, southern right whales and humpback whales.

185. It was Dr Clement’s view that, based on current knowledge, the proposal area is not ecologically more significant in terms of feeding, resting or breeding habitats for any marine mammal species relative to other regions along the north-eastern coastline.

186. She described increasing underwater noise as a principal effect from the proposed construction activities on marine mammals as they rely heavily on underwater sounds for communication, orientation, predator avoidance and foraging. She describes the levels of underwater noise generated by reclamation and construction of rock walls as generally expected to be several orders of magnitude less to those from pile-driving and dredging activities. In Dr Clement’s view the strongest response to underwater noise by these general construction activities could be temporary avoidance by marine mammals of the Whangārei Harbour entrance while the activities are occurring, but more likely, directed movement away from the immediate vicinity of the works until the activities have stopped.

⁹³ AEE Appendix 14, Potential effects of the proposed Northport reclamation on marine mammals in the Whangaree Harbour region.

187. Other effects considered by Dr Clement included pile driving noise, dredging noise, vessel strike, operational loss and possible entanglement (e.g. from lost ropes, support buoys, nets, bags and plastics), ecological effects of habitat and prey species and cumulative effects. A key conclusion was that the underwater noise from pile driving is the main factor that could adversely affect marine mammals in the vicinity of the works. With the potential for temporary hearing impairment near the piling source for several endangered marine mammal species she considered that a range of mitigation measures were required to meet the best practicable option for managing the underwater noise.
188. Nine submitters opposed the application citing concerns over the effects on marine mammals during both the construction and operational phases of the proposed port expansion. In particular these are:
- Insufficient assessment of the risk on marine mammals from shipping traffic and ship strike.
 - Protection of the habitat of Tohorā is necessary as a taonga of the Whangārei Harbour.
 - Inadequate assessment of taonga species (including marine mammals) and the relationship of Tāngata Whenua with those species.
 - The proposal will have a negative impact on marine mammals from the loss of habitat and limited entrance to the harbour.
 - Underwater noise can cause effects on marine mammal behaviour, acoustics/changes in communication and physiological injury – particular concerns raised regarding impacts on seals.
189. The Council’s expert on marine mammals, Ms McConnell, reviewed the Applicant’s assessment of effects of the proposal on marine mammals. She was in agreement with Dr Clement’s assessment of the existing environment and the species which frequent the area of interest⁹⁴.
190. Ms McConnell has also assessed the applicant’s proposed methodology to mitigate the effects of both the construction and operational phases of the port’s expansion. She concluded that⁹⁵:
- “Subject to conditions, the actual and potential effects on threatened marine mammal species can be avoided as required by the NZCPS.”*
191. Expert evidence was provided by Dr Brough on behalf of PTITP. It was his opinion that the while the best available information was used by Applicant’s and Councils’ experts to determine the potential impacts of the project on marine mammals the available information was inadequate. His view was that further information on the occurrence/abundance, habitat use and seasonality of the marine mammals of interest was critical to the effectiveness of any mitigation of the potential effects on marine mammals.

⁹⁴ Paragraph 3.1, section 42A report, Technical Memo- Marine Mammals.

⁹⁵ Paragraph 5.2, Section 42A report, Technical Memo- Marine Mammals.

192. Dr Brough's opinion was that the applicant's assessment was largely focused on the construction phase of the project and that the potential long term and cumulative effects resulting from an increase in port activity, particularly the effects of increased ship traffic had been omitted. His opinion was that⁹⁶:

"While I agree that the ecological effects on marine mammals from the proposed activities are negligible, I feel that there should be some consideration of potential ecological effects of increased shipping due to the expansion of the port."

193. Dr Clement summarised the points of agreement and disagreement with Dr Brough stating⁹⁷:

"Overall, Dr Brough seems to agree with my overall assessment of the potential effects, and the mitigation measures required, but disagrees with my interpretation of the relevant species' occurrence patterns and trends as well as how informative (or not) are the datasets and sources used."

194. Dr Clement further opined that⁹⁸:

"... each resource consent project does not necessarily need to fill in 'all the missing' knowledge gaps for the relevant marine mammal species in order to appropriately assess effects associated with those species. Often it is not possible or practicable to do so. As I have noted in my report and evidence-in-chief, in the absence of adequate population information, the potential risks to marine mammal species associated with various anthropogenic activities can still be assessed and the species adequately protected based on what we do know."

195. We accept the position that an absence of adequate population information does not preclude the ability to adequately assess and protect marine mammals from the effects of the port's expansion. In this respect the Applicant proposes to manage the effects of the proposed construction works on marine mammals through the implementation of a Marine Mammal Management Plan (MMMP). A draft of this plan is included in the application and is to be included as a part of the project's Construction Environmental Management Plan (CEMP) prior to construction.

196. The measures required in the MMMP include⁹⁹:

- Procedures for measuring underwater noise and establishing Marine Mammal Observation Zones.
- Pile driving methods aimed at minimising the effects on marine mammals
- Training and experience for construction staff and marine mammal observers,

⁹⁶ Paragraph 10.1 of Dr Brough's evidence.

⁹⁷ Paragraph 5 of Dr Clement's rebuttal evidence.

⁹⁸ Paragraph 14 of Dr Clement's rebuttal evidence.

⁹⁹ Draft Proposed NRC condition 101, Updated Final version 16 May 2024.

- Reporting and logging of marine mammal sightings and prohibition procedures if marine mammals are sighted.
197. Measures are also proposed through the recommended conditions of consent¹⁰⁰. These also propose the establishment of Marine Mammal Observation Zones in the vicinity of the pile driving prior to commencing any pile driving activities. Suitably trained personnel are to act as observers to searching for marine mammals during daylight hours prior to and during pile driving activities. The sighting of marine mammals within defined areas will trigger the pile driving activity to cease while the marine mammals remain in the specified area.
198. Measures proposed to minimise marine mammal ship strike during the port's operational phase are also included in the recommended conditions of consent¹⁰¹. These include the promotion of the adoption of the Hauraki Gulf Transit Protocol which sets out watch keeping, speed limits and reporting protocols.
199. Overall, we are satisfied that the matters raised in relation to the protection of marine mammals have been addressed and any effects on them would be appropriately avoided or mitigated.

Avifauna

200. We record at the outset that for the reasons that follow, we prefer the evidence of the Applicant's experts (Dr Bull, Mr Hood and Dr Mitchell) and Mr Masefield, to those of the submitters (DoC – Dr Beauchamp and Ms Kirk) and the NRC expert Ms Webb (accepting Ms Webb in some respects agreed with the Applicant's expert Dr Bull). We also agree with the Applicant's legal submissions on this topic, as opposed to those of DoC and Royal Forest & Bird Protection Society (Forest & Bird).
201. Expert conferencing between the avifauna experts and subsequently the planners was held. The JWSs set out the position of the respective experts (which we address below), noting that those positions were essentially maintained during the hearings process.
202. In terms of the avifauna experts' JWS Dr Bull and Ms Webb agreed that the level of impact on foraging habitat within the eastern reclamation footprint for variable oystercatchers is low and New Zealand dotterel is low at a harbour scale. Dr Beauchamp disagreed and contended the appropriate scale for assessment is local for the New Zealand dotterel and variable oyster catchers and the level of impact could be greater.
203. Dr Bull and Ms Webb agreed that the level of impact on roosting habitat within the eastern reclamation footprint for the same species is moderate at a harbour scale. Dr Beauchamp disagreed and contended the appropriate scale for assessment is local for the New Zealand dotterel and variable oyster catchers and the level of impact could be greater.

¹⁰⁰ Draft Proposed NRC conditions 68 to 82 Updated Final version 16 May 2024.

¹⁰¹ Draft Proposed NRC conditions 101 and 102 Updated Final version 16 May 2024.

204. All the avifauna experts agreed that the level of impact of operational lighting and pollution would be low to very low depending on the species. They agreed that the construction phase risks of mortality and injury are very low to the two species (identified as nesting), being variable oystercatcher and kororā. Also, all the avifauna experts agree that the operational risks of mortality and injury are low to very low for the species currently recorded nesting on the wider port site. We agree, and on this basis do not address these matters further, and find that that the relevant plan provisions are satisfied and any effects being no more than minor and appropriately addressed by the Applicant's proposed conditions of consent.
205. All the avifauna experts agreed that there was some at-risk and/or threatened bird species known to use the beach and intertidal area on the eastern side of the port. This was addressed in the expert evidence and the section 42A report. To address this the Applicant proposed a bird roosting area to be constructed on the western side of the port, ahead of construction of the reclamation itself, to provide suitable roosting habitat for various species, including NZ Dotterel and Variable Oystercatcher. This, together with a range of measures to be included in the Construction Environmental Management Plan (CEMP) would, as submitted by the Applicant, ensure that the effects on avifauna will be minor or less than minor. There was contention about whether the created bird roosting area would 'avoid' any adverse effects on the birds. This was the most significant avifauna issue before us and address it below.
206. With respect to the high tide roost all of the avifauna experts agreed that provision of a high tide roost is, in principle, an appropriate impact management measure. Dr Bull supported the proposed bird roost; Dr Beauchamp did not. Ms Webb and Dr Bull agreed that if the proposed bird roost was to be created, then additional conditions were required to ensure, that it was maintained, and that it should remain and not be limited to the 35 years duration of consent. We note that the conditions offered by the Applicant addressed this matter to our satisfaction.
207. However, the main difference between the experts was that both Dr Beauchamp and Ms Webb did not agree with Dr Bull's premise that the installation of a high tide roost before the construction of the proposed reclamation constitutes an avoidance measure. This was on the basis that the relevant 'policy tests', which we address in more detail below, was the avoidance of adverse effects on indigenous biodiversity.
208. It was Dr Bull's evidence¹⁰² that the "moderate" level of effect from permanent habitat loss on New Zealand dotterel and variable oystercatcher was associated with the permanent loss of high tide habitat, the proportion of the local populations utilising the high tide roost area, and the relative scarcity of such habitat in the wider Whangārei Harbour. It was her view that the purpose of the proposed high tide roost creation was to address this effect.

¹⁰² Paragraph 42 of Dr Bull's evidence-in-chief.

209. It was her opinion that constructing a nearby high tide roost prior to the reclamation construction would provide those birds currently roosting there an alternative location to roost. She further noted that the creation of the high tide roost prior to the commencement of the construction works, enables it to be viewed as an avoidance measure in relation to the loss of roosting habitat; but stated this *“would not be the case if it was constructed after the commencement of construction”*¹⁰³.

210. The location of the high tide roost was an issue discussed in the avifauna and planning expert conferencing. As set out in Dr Bulls’ evidence¹⁰⁴:

The rationale for the proposed location was provided in Section 6.7.1 of the avifauna assessment, and included the following:

- (a) Being reasonably close to the area lost;*
- (b) Be independent from the existing shoreline during high tide to provide separation from human and dog disturbance;*
- (c) The avoidance of a cockle bed; and*
- (d) An appropriate offset from the hightide shoreline and coastal wetland.*

211. Dr Beauchamp’s evidence was that the reclamation proposed to the east of Northport will result in the loss of what could be important foraging and roosting habitat for threatened and at-risk avifauna species and that the Applicant’s proposal to create a sandbank to the west of Northport to offset the loss of roost habitat was inappropriate, given¹⁰⁵:

- *It will result in loss of habitat for another at risk wader, the lesser knot.*
- *There is no certainty that any of the displaced New Zealand dotterels and VOCs will use it as a roost.*
- *These effects have not been fully quantified using a system-wide approach, given the absence of data on avifauna behaviour and movement both in Marsden Bay and the wider harbour, and the assertions that birds will move in specific ways and activities will be mitigated is not supported by evidence.*

212. On this basis he opined that the effects on threatened taxa would not been avoided.

213. We also note that Dr Beauchamp raised concerns around the impacts of the proposal on lesser knot, stating that: *“There was no assessments of the impacts on both the placement of the roost site...”*¹⁰⁶. Dr Bull recorded that this was not correct stating¹⁰⁷:

¹⁰³ Paragraph 18 of Dr Bull’s rebuttal evidence.

¹⁰⁴ Paragraph 20 of Dr Bull’s rebuttal evidence.

¹⁰⁵ Paragraphs 26 of Dr Beauchamp’s evidence.

¹⁰⁶ Paragraphs 61-66 of Dr Beauchamp’s evidence.

¹⁰⁷ Paragraph 19 of Dr Bull’s rebuttal evidence.

“Section 6.7 of the avifauna assessment assessed this potential effect, including on lesser knot. This species was considered throughout the entire assessment, using the data collected and assessing the effects in the context of the Whangārei Harbour population estimates provided by Riegen & Sagar (2020)”.

214. Ms Webb provided a Technical Memo – Coastal Avifauna which formed part of the Addendum section 42A report. In section 3.2 “Sandbank roost as an effects management measure”, she stated:

“As stated in the Avifauna Joint Witness Statement (20 September 2023), providing alternative high-tide roost is a suitable effects management measure in principle however, the effectiveness of the proposed sandbank remains uncertain. The applicant has partially addressed this uncertainty through consent conditions.

I concur with Dr Beauchamp’s view that it is unlikely that VOC and NNZD will use the roost after reviewing the distribution data for these species within the harbour.

For these reasons, I don’t support the sandbank renourishment area as a habitat offset and recommend that the applicant seeks an alternative avifauna initiative to manage population effects.”

215. We set out our finding on the scale of the effects and if the high bird roost would avoid the adverse effects as set out by the avifauna experts below. However, before that we need to record that we have placed less weight on Dr Beauchamp’s evidence and that of Ms Kirk’s planning evidence, to those of their counterpart experts. Our reasons are as follows. Dr Beauchamp’s evidence set out his role with DOC, but also stated¹⁰⁸:

“Privately, I have also carried out monitoring of the changes in status of the Port Whangārei wader roost sites and settlement ponds and continue to monitor public access areas at that site. I have also mapped and carried out counts (almost monthly 2012-2023) on the waders using the area of Whangārei Harbour north of Matakoho/Limestone Island and carried out evening and night work on wader and gull use of the Port Whangārei and Portland wharf roosts.”

216. We questioned Dr Beauchamp about this. His response was that the private work he has done is work that DoC did not pay him to do. It was clear to us that Dr Beauchamp has a professional as well as a personal interest in the harbour. This raised questions in our mind about his objectivity as an expert witness¹⁰⁹. We also agree with the Applicant’s Interim Reply Statement quoted below – noting this matter was raised by the Hearing Panel at the hearing in relation to Ms Kirk’s evidence¹¹⁰:

¹⁰⁸ Paragraph 5 of Dr Beauchamp’s evidence.

¹⁰⁹ We do not question Dr Beauchamp’s motives or his enthusiasm, but it raises a question about an expert’s objectivity.

¹¹⁰ Paragraphs 17.4 and 17.5 of the interim reply submissions.

“With regards to the evidence advanced on behalf of the Director-General of Conservation, we submit that there are several matters which go to the weight that this evidence should be afforded.

First, the expert witnesses on behalf of the Director-General of Conservation are employees of DOC and are, therefore, not independent (unlike the expert witnesses for Northport). DOC has a statutory mandate, which flavours the position of its expert witnesses. For example, one of its functions under section 6(b) of the Conservation Act 1987 is to advocate for the conservation of natural and historic resources. Such advocacy is not consistent with the role of a truly independent expert.”

217. Ms Kirk stated in her evidence¹¹¹:

“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.” [Underlining is our emphasis].

218. As we have said we have placed less weight on Dr Beauchamp’s evidence and therefore accord less to Ms Kirk’s¹¹². Also, in answering questions from the Hearing Panel Ms Kirk revealed she had not been to the site, and her planning analysis was “desk top”. We acknowledge that the Code of Conduct (which Ms Kirk agreed to) does not require a site visit to be undertaken, nevertheless, this is a matter that we find goes to the weight to be given to the relevant evidence. On this basis we struggle somewhat to understand Ms Kirk’s opinion on the bird roost when she has not been to the site.

219. The planners’ JWSs addressed avifauna effects. In the JWS dated 28 September 2023, they all agreed that¹¹³:

“That the National Policy Statement for Indigenous Biodiversity 2023 came into effect on 4 August 2023 after the applications for this proposal were lodged with the Councils. In considering this application, the Hearing Panel “must have regard to” to consider the NPS IB (section 104(1)(b)(iii)).

Section 1.3(2)(b) of the NPS IB states that “However ... specified highly mobile fauna are covered by this National Policy Statement, whether or not they use areas outside the terrestrial environment (such as the coastal marine area or water bodies) for part of their life cycle (see clause 3.20).”

The NPS IB defines: “specified highly mobile fauna means the Threatened or At Risk species of highly mobile fauna that are identified in Appendix 2”. Appendix 2 contains reference to the variable oystercatcher, New Zealand dotterel and

¹¹¹ Paragraph 34 of Ms Kirk’s evidence.

¹¹² To be clear, we do not question the DoC witness’s qualifications and experience to be expert witnesses.

¹¹³ Section 3.6.2.1 of the planners JWS.

lesser knot, the three bird species that the expert evidence (including JWSs) in relation to this proposal focusses on.

The RPS, PRP and WDP-OP provisions are consistent with the provisions of the NPS IB. The NPS IB does not introduce any new matters for this application.”

[Underling is our emphasis]

220. We agree with the JWS, and in this respect we do not need to specifically address the NPS further, other than note that – Appendix 2: Specifies highly mobile fauna including the NZ dotterel and variable oystercatcher. We address this later.
221. The planners agreed that the relevant ‘policy tests’ in relation to the avifauna effects were Policy 11 of the NZCPS, and Policy D.2.18 *Managing adverse effects on indigenous biodiversity* of the PRP- AV. It is our view that policy D.2.18 gives effect to the NZCPS (and NPS -IB). However, we also note policy D.2.18 – subpart 5), which addresses the issue of ‘scale’, is also important.
222. Policy 11 of the NZCPS - Indigenous biological diversity (biodiversity) states (as relevant):
- To protect indigenous biological diversity in the coastal environment:*
- (a) *avoid adverse effects of activities on:*
- (i) *indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;*
 - (ii) *taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;*
 - (iii) *indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;*
 - (iv) *habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;*
 - (v) *areas containing nationally significant examples of indigenous community types; and*
 - (vi) *areas set aside for full or partial protection of indigenous biological diversity under other legislation; ...*
223. Policies D.2.18 and D.2.20 (as relevant) state:
- Manage the adverse effects of activities on indigenous biodiversity by:*
- 1) *in the coastal environment:*
- (a) *avoiding adverse effects on:*
- i. *indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists, and*
 - ii. *the values and characteristics of areas of indigenous vegetation and habitats of indigenous fauna that are assessed as significant using the assessment criteria in Appendix 5 of the Regional Policy Statement, and*

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

- 5) *assessing the potential adverse effects of the activity on identified values of indigenous biodiversity, including by:*
- (a) taking a system-wide approach to large areas of indigenous biodiversity such as whole estuaries or widespread bird and marine mammal habitats, recognising that the scale of the effect of an activity is proportional to the size and sensitivity of the area of indigenous biodiversity, and*
 - (b) recognising that existing activities may be having existing acceptable effects, and*
 - (c) recognising that minor or transitory effects may not be an adverse effect, and*
 - (d) recognising that where effects may be irreversible, then they are likely to be more than minor, and*
 - (e) recognising that there may be more than minor cumulative effects from minor or transitory effects,*

D.2.20 Precautionary approach to managing effects on significant indigenous biodiversity and the coastal environment

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

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

224. The issue before us was; would the proposed high tide bird root avoid the adverse effects on indigenous biodiversity? As already stated, some experts (avifauna and planners) considered that it would and others that it would not. We address this, and our findings, below. It also raises the issue of what “avoid” means. On this matter, we received various legal submissions (from the Applicant, NRC, DoC, PTITB and Forest and Bird). We do not set these out in any detail (for brevity purposes) but set out what we find are the key issues in terms of avoiding “material harm” and the directive policies in the NZCPS (Policy 9- Ports and Policy 11 - Indigenous biological diversity (biodiversity) as recently addressed in *Port Otago Limited v Environmental Defence Society Incorporated (Port Otago)*).

225. In summary, there were various submissions on the relevance of the Port Otago decision to the applications, ranging from:

- The Applicant, who submitted 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.
- The Director-General of Conservation, who submitted 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.

- Forest & Bird, who submitted 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.
- PTITB, who submitted 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.
- NRC, who submitted that Port Otago is helpful given that it confirms that the avoidance policies and the ports policy of the NZCPS are all directive, and 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 Resources¹¹⁴. 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 avoided¹¹⁵.

226. While there is some debate about what amounts to “material harm”, the Supreme Court in Trans-Tasman Resources addressed this in some detail - being¹¹⁶:

(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:

(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.

227. Based on the evidence before us (avifauna and planning) and the legal submissions, it is our finding the high tide bird roost will avoid adverse effects on the birds, such that no material harm will occur. The reasons for this are:

- The evidence of Dr Bull confirms that the proposal’s effects, taking into account the reduction in effects brought about by the bird roost, are low (i.e., not amounting to material harm);
- Relying on Dr Bull’s evidence, and the reasons above, the birds are likely to use the new roost;
- That the bird roost, along with the conditions offered by the Applicant, is an appropriate impact management measure to ensure no material harm is caused;

¹¹⁴ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127.*

¹¹⁵ *Port Otago Limited v Environmental Defence Society Incorporated [2023] NZSC 112 at [65].*

¹¹⁶ Paragraph 35 of NRC’s legal submissions.

- The avifauna experts' JWS Dr Bull and Ms Webb agreed that the level of impact on foraging habitat within the eastern reclamation footprint for variable oystercatchers and New Zealand dotterel is low at a harbour scale and that the level of impact on roosting habitat within the eastern reclamation footprint for the same species is moderate at a harbour scale (policy D.2.18 – subpart 5);
- It is also the case, that the NZ dotterel and variable oystercatcher, which are identified highly mobile fauna species (as already set out), are highly mobile fauna species which cover long distances and move between different environments throughout their life cycle;
- That Mr Hood, Dr Mitchell and Mr Masefield's expert planning opinion was that the bird roost, with the recommended consent conditions, would avoid the adverse effects on the on variable oyster catcher and NZ dotterel species; and
- That we disagree with the Director-General of Conservation's contention 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"¹¹⁷. In this respect we agree with the legal submissions of the Applicant and NRC.

228. Given our finding above, we do not need to address the competing and directive policies 9 and 11 of the NZCPS. However, given our reasoning above, had we found the adverse effects had not been avoided, and the 'avoid' policy directives were not met, the Port Otago decision confirms that there would still be a consenting pathway for the Proposal.

229. 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). Had we been required to make this finding – that the proposal is required to provide for the safe and efficient operation of the ports - we would have.

Terrestrial Ecology

230. Dr Flynn, ecologist, provided expert evidence on behalf of the Applicant. She set out that works to expand Northport's footprint within the terrestrial environment included 1.77 ha of earthworks encompassing part of a remnant dune system that extends along the Marsden Point beachfront. She also set out that the vegetation cover comprised mainly native kōwhangātara (spinifex) grassland on the mobile foredune, with a mix of buffalo grass and 2 native pohuehue (interspersed with weedy exotic species and a row of planted pōhutukawa) on the dune crest. Pīngao (a sedge with a threat status of at risk – declining) was also present on the foredune.

231. Dr Flynn stated¹¹⁸:

¹¹⁷ Paragraph 105 of the Director-General of Conservation's legal submissions – 4 October 2023.

¹¹⁸ Paragraph 4.3 of Dr Flynn's evidence.

“Duneland ecosystems (though degraded) are a characteristic feature of the eastern coastline within Waipu ED, and large parts have been identified as significant natural areas in the Department of Conservation’s ‘Protected Natural Areas’ survey programme. The dune remnant within the project footprint is not included within any significant natural area identified by the Department of Conservation, or in any regional or district plans”. [underling is our emphasis]

232. As we have set out earlier Policy D.2.18 of the PRP- AV requires a system-wide approach to evaluating indigenous biodiversity when assessing and managing adverse ecological effects. Dr Flynn assessed adverse effects on indigenous biodiversity as minor (though permanent) relative to the wider duneland ecosystem in Waipu ED, and moderate at the scale of the Marsden Point beachfront.
233. It was her opinion that mitigation of local-scale effects could be achieved by enhancing the indigenous dune ecosystem present along the Marsden Point beachfront, but that the area has poor ecological restoration potential. On this basis she recommended that funds for such work are instead provided to a community organisation to enable restoration of dune ecosystems with better potential elsewhere in Waipu ED. She also recommended requiring a Lizard Management Plan (‘LMP’) as a condition of consent. We note that both of those recommendations were adopted by Northport in its proposed suite of recommended conditions, and we would have imposed them.
234. Ecologists, Ms Webb and Ms Huang for the NRC reviewed the terrestrial ecology assessment prepared for the application and provided a technical memorandum (Appendix C12) that informed the section 42A report. While Ms Webb and Ms Huang considered the appropriate assessment scale to assess the magnitude and level of effect on terrestrial ecology for this project to be the site and its immediate surroundings rather than the Waipu ED, they did agree that a ‘systems-wide’ approach should be used (based on Policy D.2.18).
235. Ms Webb and Ms Huang concurred with Dr Flynn’s assessment that the loss of extent would produce a moderate and low level of effect at the scale of the site and its surroundings, and the Waipu ED, respectively. Furthermore, all experts agreed that in accordance with EIANZ guidelines and the operative WDP - OP, effects management was appropriate to mitigate a localised, moderate level of effect on indigenous vegetation and fauna habitat, and that the proposed management will reduce ecological effects to levels that are no more than minor. Ms Webb and Ms Huang also agreed with Dr Flynn’s assessment that restoration of the remaining area of dune system on Marsden Point beach would be of limited ecological benefit.
236. The Planners’ JWS - 28 September 2023 stated:

“3.6.2.2 Terrestrial ecology – area of agreement between the planning experts
With regard to the terrestrial ecology components of the proposal (i.e. removal of the dune system and esplanade reserve vegetation), the planning experts agree that as per clause 3.10 of the NPS-IB, the NPS-IB applies to mapped terrestrial Significant Natural Areas (SNAs). The planning experts agree that there are no mapped SNAs within the WDP or PRP. Clause 3.16 of the NPS-IB applies to areas outside of mapped SNAs, where significant adverse effects on indigenous biodiversity are anticipated.

The planning experts agree that effects on terrestrial ecology identified by the relevant ecological experts have been determined to be less than significant. Absent any expert disagreement regarding terrestrial ecology, the planning experts agree that there are no planning issues arising from the proposal. “

237. Ms Webb and Ms Huang recommended requiring a duneland restoration and compensation plan as condition of consent, including the coast care group selected, the site selected for restoration and management, and the total “in-kind” dollar amount to be contributed to the fund, and / or its calculation methodology. They considered that this detail was necessary to demonstrate that the offsite restoration and weed management will successfully meet the NPS-IB compensation principles.
238. Dr Flynn disagreed, as do we, that there is a requirement to meet NPS-IB compensation principles. As noted in Dr Flynn’s evidence and the Planners’ JWS above, the NPS-IB only requires application of the mitigation hierarchy for significant adverse effects on biodiversity outside of SNAs. In this case, we accept that effects on indigenous biodiversity are not significant, and management must “*recognise and provide for the maintenance of biodiversity*”. It is our finding that it is unnecessary to impose the conditions sought by the NRC experts, and agree with Dr Flynn and the planning experts, that the effects management measures as provided for in the consent conditions will meet that requirement.
239. Overall, we accept Dr Flynn’s expert evidence (and note that Ms Webb and Ms Huang largely agree with Dr Flynn), and the expert opinion of the planners in their JWS. On this basis the terrestrial ecological effects are appropriately mitigated and satisfy the relevant policies in the statutory planning documents.

Māori Cultural Values and Effects

240. We address the cultural values of this area and the effects arising from the proposal as they were presented to us; and the evaluation of those values and effects against the statutory planning provisions. This is essentially in two parts given the relevant planning provisions: the consultation and engagement process; and the evaluation of the plan provisions and effects from the proposal on Māori cultural values.
241. We address engagement and consultation first. We then address the issues of the cultural values and the effects of the proposal; and whether from a cultural perspective the proposal is consistent with the relevant statutory planning provisions. We also address section 6(e) of the RMA (the relationships of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance which must be recognised and provided for) and section 7 (a) of the RMA (kaitiakitanga, to which we must have particular regard).

242. At the outset we acknowledge Patuharakeke as the tāngata whenua of the area Northport operates in and holds mana whenua and ahi kā status over Poupouwhenua/Marsden Point¹¹⁹. The PTITB represents their interests in matters including, among other things, environmental and resource management issues¹²⁰.
243. Ngātiwai claims mana whenua and mana moana from Rākaumangamanga to Mahurangi, across to Aotea, and returning to Rākaumangamanga by way of the many islands and waters of Te Moana Nui a Toi¹²¹.
244. Te Parawhau hapū and whānau are located at the southern boundary of Ngāpuhi and its rohe encompasses the area from Tangiteroria in the west, east to Whangārei and south to Piroa (Brynderwyn range). Both the Whangārei Harbour and the upper Northern Wairoa catchment of the Kaipara Harbour are inclusive of Te Parawhau's rohe¹²².
245. It is important to state that in making our findings on cultural issues, we have relied on the evidence presented to us (as well as legal submissions which included setting out relevant case law and how we are to interpret the 'package' of statutory planning provisions) from the Applicant and iwi/hapū. The cultural evidence on the values and effects of the proposal provided by iwi/hapū, including from PTITB, was uncontested.
246. Northport provided expert cultural evidence from Mr Isaacs. His evidence addressed¹²³:
- (b) *...the cultural engagement undertaken by Northport in relation to the Project, and how this aligns with best practice;*
 - (c) *...the cultural issues raised;*
 - (d) *...Northport's response regarding cultural issues, including the cultural mitigation proposal it is putting forward through conditions of consent).*
247. In this respect Mr Issacs' evidence is, aside from the issues relating to consultation, a response to the cultural issues raised, and the conditions of consent to address them. This is opposed to providing expert cultural evidence in relation to the cultural values and effects of the proposal as set out in the Cultural Values Assessment (CVA)¹²⁴ and the Cultural Effects Assessment (CEA)¹²⁵.

¹¹⁹ Appendix 24 of the Application, page 4.

¹²⁰ Appendix 24 of the Application, page 4.

¹²¹ Section 4.2.4 of the Application for Resource Consent, page 50.

¹²² Section 4.2.3 of the Application for Resource Consent, page 49.

¹²³ Paragraph 16 of Mr Issac's evidence.

¹²⁴ Appendix 24 of the Application – forming part of it AEE.

¹²⁵ Attachment 6 of the Applicants s92 Response Letter.

248. We record here that we accept the cultural evidence of the iwi/hapū for the reasons we set out below. The issue before us is therefore:

- Has the duty to consult tāngata whenua under the RMA been adequately undertaken and in a manner that satisfies the relevant planning provisions (objectives and policies) of the statutory planning documents;
- The extent to which any adverse effects on the cultural values have been appropriately avoided, remedied or mitigated by the proposal and the consent conditions proposed by the Applicant;
- Whether or not the proposal satisfies the relevant planning provisions (objectives and policies) of the statutory planning documents and the RMA; and/or
- Notwithstanding that there may be adverse effects on cultural values that are not avoided, remedied or mitigated, and not all of the objectives and policies are ‘satisfied’, nonetheless consents could still be granted as the proposal would better meet the purpose of the RMA (i.e. promote the sustainable management of natural and physical resources (section 5), than refusing them.

Engagement and Consultation

249. In their evidence for the Applicant Mr Blomfield and Mr Issacs, set out in some detail the engagement and consultation undertaken with iwi/hapū as part of this proposal. Mr Blomfield also set out that Northport is engaging with Te Parawhau hapū representatives to develop a Relationship Agreement between Northport and Te Parawhau¹²⁶. Mr Moore also detailed Northport’s existing relationship with local iwi and hapū, including what he described as the special relationship between Northport and Patuharakeke which is recognised by a Te Whakahononga (Relationship Agreement)¹²⁷.

250. Section D.1 of the PRP - AV D.1 provides direction on how: engagement should be undertaken between an Applicant and tāngata whenua; how Māori cultural values and their effects should be identified; and where practicable how effects can be avoided, remedied or mitigated. This was a matter discussed at the planners’ expert conferencing¹²⁸.

251. All the planners (as we understand it), including Ms Dalton (PTITB’s planner), agreed that the engagement expectations had been met. Submitters’ planners (Ms Kirk, Ms Niblock and Ms Dalton) considered that with the Applicant’s (late) production of recommended cultural conditions, the applications generally satisfied the D 1 provisions of the PRP-AV with the exception of policy D.1.4 (which we address in more detail below).

¹²⁶ He noted that the details of the Relationship Agreement between Northport and Te Parawhau are confidential between the parties.

¹²⁷ Noting the details of the Te Whakahononga / Relationship Agreement between Northport and Patuharakeke Te Iwi Trust Board is confidential between the parties.

¹²⁸ JWS – dated 28 September 2023.

252. As part of the Applicant's Interim Reply and confirmed in its Memorandum of Counsel for Northport Limited¹²⁹, the Applicant sought an adjournment of the hearing. This was to allow a further opportunity for iwi/hapū submitters to consider and provide feedback on the updated draft cultural conditions; and for Northport and iwi/hapū submitters to engage further around the cultural concerns raised and alternative responses to those concerns.

253. As set out in the Applicant's Final Reply Statement¹³⁰:

"Northport considers that the engagement with PTITB over a four-month period was productive¹³¹. While that engagement process was meaningfully undertaken, in a manner which Northport considers is reflective of the established and ongoing relationship between Northport and PTITB, it has not resulted in resolution of the issues as between Northport and PTITB."

254. Mr Matheson, counsel for PTITB, set out in an email to the Council once the engagement with PTITB over the four-month period was concluded, the following¹³²:

"My client does wish to record its appreciation to Northport for the most recent engagement which, although ultimately unsuccessful, demonstrated good faith by Northport and a willingness to listen to my client's concerns."

255. We accept Northport has appropriately engaged and consulted, and satisfied the provisions set out in section D 1 of the PRP- AV.

Cultural context

256. The significance of Rauiri - Poupouwhenua/Marsden Point to Patuharakeke, Ngāti Wai and Te Parawhau and their relationship to it and the potential effects on cultural values are at the core of their concerns with this proposal. This was detailed in the CVA and CEA and provided as part of the Applicant's AEE and section 92 response. The Māori history of the project area and its surrounds were also set out in the CVA under the heading – "Relationship of Tāngata Whenua to the Proposal Site"¹³³. Cultural evidence provided by the iwi/hapū submitters, notably Patuharakeke, also addressed their relationship to Rauiri - Poupouwhenua/Marsden Point, and the potential effects of the proposal on their cultural values.

¹²⁹ Dated 22 November 2023.

¹³⁰ Paragraph 1.3 (a) of the final reply statement.

¹³¹ The detail of the engagement was provided in the monthly reporting memoranda filed on behalf of Northport.

¹³² Email dated 9 April 2024.

¹³³ Section 5, pages 13-31.

257. We set out in some detail below the cultural values, environmental effects (from a cultural perspective) set out in the CEA and CVA, as well as the cultural evidence. This is because the effects on cultural values and the “*relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga* (section 6 (e) of the RMA) emerged as the most significant issue in hearing these applications; and is fundamental to our decision on these applications.

Cultural Values Assessment

258. The CVA lodged as part of the application identified tāngata whenua values through relationships with the site. It identified Patuharakeke’s relationships to the Northport site, the implications for the knowledge and practice of kaitiakitanga by tāngata whenua over their taonga and matters that have potential to affect the principles of the Treaty of Waitangi.

259. Section 4 of the CVA¹³⁴ provided an assessment methodology that included an analysis of historical, traditional and contemporary relationships against the key provisions of Part 2 of the RMA. Section 5¹³⁵ outlined the relationship of tāngata whenua to the proposal site and includes:

- a. *5.1 Tāngata whenua o Whangārei Terenga Paraoa:*
 - i. *This section outlines the strong connections amongst hapu and iwi of Whangārei Terenga Paraoa. Patuharakeke, as hau kainga and ahi kaa in the direct vicinity of the site acknowledge the mana of whanau, hapu and iwi that both by whakapapa and physically and spiritually to the harbour.*
 - ii. *The underpinning theme of mauri as woven through all matters concerning the relationship to the proposal and location.*
- b. *5.2 The relationship of Patuharakeke and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;*
 - i. *Ancestral lands – Poupouwhenua is outlined from a hapu view as ancestral land*
 - ii. *Cultural Landscapes, Seascapes and Waahi Tapu – outlines several important markers that form the cultural landscape and seascape that are integral to their histories*
 - iii. *Taniwha and Tupua*
 - iv. *Mahinga Mataitai sites*
 - v. *Other taonga – taonga species including tohora, paraoa; manu – shore birds, wading birds*
 - vi. *Contemporary Cultural Relationships*

¹³⁴ CVA Report, Appendix 24 of the Application, page 11 and Appendix A.

¹³⁵ CVA Report, Appendix 24 of the Application, pages 13-16.

vii. *Relationship through Kaitiakitanga and contemporary kaitiakitanga in Whangārei Terenga Paraoa*

viii. *The Whangārei Harbour Kaitiaki Roopu*

Cultural Effects Assessment

260. The CEA, provided as part of the Applicant's section 92 response, outlined the environmental effects the proposal would have on Patuharakeke's cultural values in terms of ecological effects, marine ecology, avifauna and marine mammals; discharges to air; climate change and coastal processes. We have addressed these effects elsewhere in this decision, relying on the relevant expert evidence. We acknowledge that these were not necessarily viewed through a 'cultural lens' and accept Ms Chetham's and Ms Dalton's evidence that there is a cultural dimension to those effects, which in terms of Patuharakeke's views contributes to their view on the adverse cultural effects from the proposal, which we address below.

261. In addition to the above, the CEA also outlined the effects on cultural landscapes and seascapes and sites of significance to Tāngata Whenua. It stated¹³⁶:

"Severance of the physical relationship to this cultural landscape, the beach, the dunes, the takutai moana is perhaps the most profound effect this proposal will have on mana whenua. This is twofold, firstly through the direct loss and alienation of the takutai moana that Patuharakeke never sold or relinquished their rangatiratanga over and secondly, through impeded access to sites and areas of significance.

and

"The loss of land and access to sites has numerous ensuing impacts. Notably the loss of te reo me ona tikanga, mātauranga, impacts on mauri, our obligations as kaitiaki, and mana."

262. The conclusion in the CEA on environmental effects was that¹³⁷:

"The actual and potential effects of the proposed reclamation and dredging and future port operations on marine ecology, our taonga species and their habitats, (including through coastal processes effects) will be significant and adverse, particularly in the context of an already degraded harbour"

263. The conclusion of cultural effects from the proposal in the CEA, was that¹³⁸:

¹³⁶ CEA, 7.3.2 Takutai Moana, loss, and 7.3.3 Ahurea/Patuharakeketanga.

¹³⁷ CEA, Conclusions – Environmental Effects, page 29.

¹³⁸ CEA, Conclusions – Cultural Effects, pages 37 and 38.

[The potential effects] ... *“are high and significantly adverse in terms of cultural landscapes, seascapes and customary access and rights to the Takutai Moana. Further, it will diminish our Patuharakeketanga, ahurea as it will not provide for te reo Māori me ona tikanga, and cultural and spiritual wellbeing. The proposed dredging will continue to erode the mauri of the harbour, and subsequently affect values such as kaitiakitanga, mātauranga māori, and mana. These direct and cumulative effects span the past, present and future and are deemed by Patuharakeke to be significant adverse effects that are unable be mitigated.”*

264. The CEA¹³⁹ also outlined the social effects in terms of hauora/health, noise and transport/traffic effects. It identified that if consent was granted to the expansion of Northport, the potential adverse effects on Patuharakeke’s social wellbeing, including physical and cultural health along with values such as amenity, would be more than minor.
265. The CEA also outlined the economic effects and concluded that insufficient analysis and evidence had been provided to determine the economic effects of this proposal on Patuharakeke and its taonga¹⁴⁰. We have addressed this matter in the Economic section of this decision.

The legal submissions presented by PTITB

266. Mr Matheson provided legal submissions on behalf of PTITB. He set out¹⁴¹:

“At stake in these proceedings is a tāonga to mana whenua and an irreplaceable natural resource highly valued and heavily utilised by the community. It will sever Patuharakeke’s last remaining direct connection to the takutai moana.

The evidence of the cultural witnesses before you is that the adverse effects on the tāonga of Whangārei Terenga Parāoa and its values is material and permanent... The uncontested mana whenua evidence is that the conditions proffered at the 11th hour by the applicant are woefully inadequate at addressing those effects.”

There is no contrary cultural evidence from mana whenua disputing those cultural effects or their magnitude.”

267. At section 3 of his legal submissions, Mr Matheson set out the “legal framework”. He set out, among other things, the provisions of the PRP-AV that in his submission were relevant to this proposal. We agree with those submissions. He then set out that while there was “no right of veto” by tāngata whenua, a rigorous assessment of the proposal was required. He stated¹⁴²:

¹³⁹ CEA, 7.4 Social Effects, pages 38-41.

¹⁴⁰ CEA, 7.5 Economic Effects, pages 42 – 46.

¹⁴¹ Paragraphs 1.1 - 1.3 of Mr Mathson’s legal submissions.

¹⁴² Paragraphs 3.18 and 3.19 of Mr Mathson’s legal submissions.

“At the outset of this part of my legal submissions, I acknowledge the settled law that tāngata whenua do not have a right of veto over resource consent applications in the marine environment,¹⁴³ and the existence of significant adverse effects (cultural or otherwise) is not an absolute bar to the grant of consent.

However, it is trite to say that in law (as in most things) context is everything, and the existence of significant cultural adverse effects alone can, in some circumstances, be sufficient to decline consent¹⁴⁴. That is particularly so where the conditions of consent offered by an applicant are insufficient to appropriately avoid or mitigate the adverse effects to the extent required by the relevant policy framework.”

268. Mr Matheson also set out that much of the Applicant’s case was *“understandably focussed on being in the “port zone” with supportive objectives and policies”¹⁴⁵*. He went on to address that the activity status for this proposal is (in our finding) discretionary, and therefore any Applicant for consent must satisfy the full gamut of relevant considerations. We have addressed this matter earlier on this decision, and address this further below as it was important to our overall findings on this proposal.

269. He also set out that¹⁴⁶:

“The Courts have provided clear guidance on the approach to considering and weighing cultural evidence:

(a) persons holding mana whenua are best placed to identify the impacts of a proposal on the physical and cultural environment valued by them;¹⁴⁷

(b) there can be more than one tāngata whenua group for a particular area;¹⁴⁸

¹⁴³ *“Maungaharuru-Tangitū Trust v Hawke’s Bay Regional Council [2017] NZRMA 147 (EC), at [126]; and Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294, at 307.”*

¹⁴⁴ *“As was recognised in Aqua King Ltd (Anakoha Bay) v Marlborough District Council EC Christchurch W71/97, 30 June 1997, where consent was declined principally on the basis of unacceptable cultural effects. See also Tauranga Environmental Protection Society Inc. In many other cases, applications have only just “got over the line” through substantial cultural mitigation conditions.”*

¹⁴⁵ Paragraph 3.20 of Mr Mathson’s legal submissions.

¹⁴⁶ Paragraph 3.26 of Mr Mathson’s legal submissions.

¹⁴⁷ *SKP Incorporated v Auckland Council [2018] NZEnvC 081, at [157], which was upheld on appeal, and supported and endorsed by the High Court in Tauranga Environmental Protection Society v Tauranga City Council [2021] NZRMA 492, at [66].*

¹⁴⁸ *Director General of Conservation v Taranaki Regional Council [2018] NZEnvC 203, at [234] and confirmed on appeal in Poutama Kaitiaki Charitable Trust v Taranaki Regional Council [2020] at [109], and [254].*

- (c) *where a particular tāngata whenua group states that a specific outcome is required to meet the Part 2 directions in accordance with tikanga Māori, RMA decision makers must meaningfully respond to those claims¹⁴⁹;*
- (d) *recognising and providing for Māori interests under s 6(e) necessarily involves seeking input from them about how their relationship - as defined by them in tikanga Māori - is affected by a resource management decision¹⁵⁰;*
- (e) *decision makers are entitled to, and must, assess the credibility and reliability of evidence for tāngata whenua using the well settled “rule of reason approach” set out in Ngāti Hokopū¹⁵¹. But where the considered, consistent and genuine view of tāngata whenua is that a proposal will result in significant adverse effects it is not open to a decision-maker to decide otherwise: a decision maker cannot substitute its view of the cultural effects for that expressed by tāngata whenua¹⁵²;*
- (f) *a logical extension of this principle is that nor should a decision maker substitute its view for that of tāngata whenua as to whether such effects are able to be appropriately avoided, remedied or mitigated; and*
- (g) *while there can be a role for technical evidence in interpreting values and concepts into terms comprehensible to non-Māori¹⁵³, such evidence cannot itself redefine the tāngata whenua values and beliefs.*

270. Again, we accept those submissions.

271. Mr Matheson also submitted that the Hearing Panel must consider the question of alternatives¹⁵⁴. We do this later in this decision.

¹⁴⁹ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whāia Māia Ltd [2020] NZHC 2768, at [68].*

¹⁵⁰ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whāia Māia Ltd [2020] NZHC 2768, at [73].*

¹⁵¹ *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council (2002) 9 ELRNZ 111 (EC), at [53]. This rule of reason approach has been cited with approval in (at least) two more recent High Court decisions: Ngāti Maru Trust v Ngāti Whātua Ōrākei Whāia Māia Ltd (2020) 22 ELRNZ 110 (HC), at [117]; and Poutama Kaitiaki Charitable Trust v Taranaki Regional Council (2020) 22 ELRNZ 202 (HC), at [106]-[108], and [167]-[168].*

¹⁵² *Tauranga Environmental Protection Society v Tauranga City Council [2021] NZRMA 492, at [65].*

¹⁵³ *Land Air Water Association v Waikato Regional Council EC Auckland, A110/01, 23 October 2001, at [396].*

¹⁵⁴ Paragraphs 3.27 – 3.29 of Mr Matheson’s legal submissions.

Evidence and Submissions - Cultural Effects

272. The cultural effects of the proposal were outlined in the evidence and oral submissions from representatives of PTITB, Ngātiwai and Te Parawhau at Takahiwai marae¹⁵⁵. We again record that none of the evidence and material presented to us by iwi and hapū witnesses was contested.
273. Patuharakeke and Te Parawhau witnesses explained their history and whakapapa to the ancestral lands and waters at Rauiri - Poupouwhenua affected by these applications. Much of the evidence presented detailed their connection to the site and area and the importance of retaining a clear connection to it. It also addressed concerns that the proposal would have negative impacts on intangible connections and values such as whakapapa, mauri, manaakitanga, mana, wairuatanga, rangatiratanga, mātauranga and te reo Māori me ōna tikanga.
274. Ms Chetham provided cultural evidence on behalf of PTITB. She also provided a map of Patuharakeke cultural landscapes to assist us in the consideration of Policy D.1.4 and D.1.5 of the PRP- AV which we discuss in further detail below. It was her view that the while the port area/zone was not mapped as a site or place of significance to tāngata whenua, it was in terms of Policy D.1.5 (3) (b) – being:

“a landscape of significance to tāngata whenua, which is a collection of related resources identified and described within a mapped area, with the relationship between those component resources identified.”

with the footnote to that policy stating:

“A landscape of significance to tāngata whenua may include Sites and/or Areas of Significance to Tāngata Whenua.”

275. Ms Chetham stated in her evidence¹⁵⁶:

“The CVA identified Patuharakeke’s cultural landscape and seascape associated with the project area, made up of historical, traditional, cultural and spiritual relationships with and between our people as ahikā and the landscape components. These include tupuna maunga, mahinga mātaimai, Poupouwhenua and te wahapu o Whangārei Terenga Parāoa and are underpinned by values such as whakapapa, mauri, mana, manaakitanga and kaitiakitanga.

The CEA identified a range of effects on Patuharakeke environmental cultural and social wellbeing. Whangārei Terenga Parāoa is already in a degraded state such that many of our cultural practices and taonga species are impacted. The area of the harbour subject to this application is special habitat not universally distributed throughout the harbour and is a vital for taonga species at different

¹⁵⁵ Two days of hearings were held on the Marae.

¹⁵⁶ Paragraphs 1.1 – 1.3 of Ms Chetham’s evidence.

life stages. As kaitiaki we have worked extremely hard to monitor and improve the health of our mahinga mātaītai after decades of cumulative impacts have set them on the brink of collapse and we believe the potential effects of this proposal on ecology are understated as echoed by our expert witnesses. These have flow on impacts undermining cultural values such as kaitiakitanga, manaakitanga, mauri and mana.

The proposed reclamation will permanently modify the harbour, disrupt cultural landscape connections, extinguish access and relationship to this important part of Poupouwhenua and severely frustrate our Treaty rights and rights we seek to have recognised under the Marine and Coastal Area Act. We do not consider the applicant has made a strong economic case for the port expansion nor did the CEA process identify benefits to the hapū that outweigh these significant and adverse cultural and ecological effects.”

276. Mr Milner presented on tikanga for PTITB. He referred to the Supreme Court case of *Ellis v R* [2022] NZSC 114 that represented an elevation of tikanga in law, recognising tikanga as the original law of Aotearoa that constitutes a separate legal framework. He continued that in his view the decision solidifies earlier indications from lower courts, such as *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843, which also recognised tikanga as an independent legal framework.
277. Mr Milner, further set out that tikanga are the customary protocols and practices hapū and iwi are guided by tupuna kōrero tuku iho to uphold respect and integrity for the hauora or health of the environment and the rangatira affected by the activities proposed in this consent application. In this context he explained rangatira tupuna whenua as Poupouwhenua and rangatira tupuna moana as Terenga Paraoa.
278. Both Ms Chetham and Mr Milner did not consider that the proposed cultural mitigation (via the proposed cultural conditions) constituted an adequate response to the significant adverse effects on Patuharakeke’s cultural values. Mr Milner’s opinion was that the adverse effects on cultural values outweighed the mitigation offered. Both witnesses retained their view that the consents should not be granted.
279. We also heard from Patuharakeke mana whenua witnesses - Luana Pirihi, Hollie Kereopa and Te Rauaroha Deja Tuhoro.
280. Ms Pirihi spoke in support of the submissions by Patuharakeke. She recalled the impacts of a resource consent granted in 1997, the resultant degradation of pipi beds and the establishment of the Whangārei Harbour Kaitiaki Roopu with a fund that did not provide any tāngata whenua initiatives until late in the piece. She expressed concern that¹⁵⁷:

¹⁵⁷ Statement of Ms Pirihi on behalf of PTITB, 30 October 2023.

“My understanding of this new extension is that we will lose our last piece of an area of significance on the eastern side of the Port Facility. It is like deja vue for me. We continue to sacrifice our special places and suffer losses over and over again. The accumulative loss over generations has been for the greater good of the region and country, without any discernible benefits to our hapu and marae.”

281. Ms Kereopa offered her perspectives as an indigenous marine biologist/environmental scientist in opposition to the proposal. She raised a number of concerns including that the proposed port expansion is disrespectful to their ability to exercise kaitiakitanga and will provide additional loss of habitat for taonga species, shellfish, manu (birds), dolphin and other marine mammals¹⁵⁸.
282. Ms Tuhoro asserted the relationship to Te Rerengaparaoa is an intrinsic one and that it is the mauri of our people, a connection inherited by whakapapa¹⁵⁹ and that the proposal would impede on their mana as tāngata whenua.
283. Ms Dalton provided expert planning evidence on behalf of PTITB. She firstly addressed the environmental effects that remained in contention, including coastal processes, marine ecology, marine mammals, avifauna and recreation; and then addressed the cultural issues that we have addressed above. She opined¹⁶⁰:

“Overall, taking into account the statutory planning documents, in my opinion, consent should not be granted until such time as complete and accurate environmental effects assessments have been undertaken and adequate mitigation has been identified.”

284. We do not share Ms Dalton’s views expressed above. Other than for recreational effects (which we address later) we have found that appropriate effects assessments have been undertaken and appropriate mitigation has been identified, including by the Applicant’s proposed consent conditions.
285. Ms Dalton also opined that the cultural effects of the proposal had not been effectively avoided, remedied or mitigated to a level that is minor as set out in Policy D.1.4 of the PRP-AV. On this basis it was her view that it would be inappropriate to grant the consents to the proposal. For the reasons that follow we agree with Ms Dalton in this respect.
286. Ms Mere Kepa outlined that the Māori values of rangatiratanga and mana do not align with the values of Northport.

¹⁵⁸ Statement of Ms Kereopa on behalf of PTITB, 30 October 2023.

¹⁵⁹ Statement of Ms Tuhoro on behalf of PTITB, 30 October 2023.

¹⁶⁰ Paragraph 1.6 of Ms Dalton’s evidence.

287. Peter and Eve Vaughan presented on behalf of Te Iwitahi Manihera whanau, Te Parawhau hapu, Ngapuhi iwi in support of the submission of Waimarie Kingi of Ngati Kahu Torongare. They detailed how Poupouwhenua is a sacred site and expressed strong objection to the Northport proposal¹⁶¹.
288. Mira Norris for Te Parawhau and Marina Fletcher for Whangārei Harbour Kaitiaki Roopu presented on their experiences with the unhappy imbalance between kaitiaki values and Northport's values. Ms Fletcher continued that the kaitiaki of Whangārei Harbour and Bream Bay have long standing occupation of their tribal lands in and around Whangārei Harbour; that this is their home¹⁶².
289. Nicki Wakefield and representatives of Rewarewa D Māori Incorporation, Ngāti Kahu o Torongare and Ngā Hapu o Whangārei presented concerns on the impact of the proposal on the relationship of tāngata whenua with their whenua, moana and ability to be kaitiaki. They presented in support of Patuharakeke's position.
290. All of these submitters articulated the significant adverse effects of Northport's proposed expansion of industrial and port activities. As set out, these adverse effects included the impact on their identity as tāngata whenua, their ability to exercise rangatiratanga, kaitiakitanga, and mana whenua/moana over the moana and taonga species.
291. We find that the evidence and submissions presented to us from a cultural perspective was consistent and genuine; and that view was that the proposal would result in significant adverse effects. We accept, based on Mr Matheson's legal submissions citing relevant case law, that it is not open to a us to decide otherwise, and we cannot substitute our view of the cultural effects for that expressed by tāngata whenua.
292. In our view, the proposal directly impacts the ability of tāngata whenua to maintain a connection and a relationship to the land and harbour. This impact adversely affects their ability to perform their kaitiaki responsibilities, resulting in the loss of cultural identity for local iwi/hapū. We also find that the adverse effects of the proposal on Patuharakeke's, and to a similar extent Te Parawhau's and Ngatiwai's, relationships with the land, water and taonga, and the impact on their historical, cultural and spiritual values, would be significant.

The Applicant's Position

293. The Applicant's legal position was set out in its Opening, Interim and Final Reply submissions. Counsel responded in some detail in the Interim and Final Reply Submissions to Mr Matheson's legal submissions and the cultural evidence presented to us. We provide a summary of those submissions before setting out our finding in relation to: the cultural values; the effect the proposal will have on those values; and whether or not the proposal is consistent with the relevant planning provisions.

¹⁶¹ Statement of P and E Vaughan, 30 October 2023.

¹⁶² Statement of M Fletcher.

294. The Interim Reply Submission set out¹⁶³:

“Throughout the scoping and development of the Proposal, pre- and post-application engagement, and during the hearing process, Northport has acknowledged that Whangārei Te Rerenga Parāoa forms an intrinsic part of the culture and heritage of iwi/hapū.”

and

“It is not disputed that cultural effects are best identified by mana whenua¹⁶⁴. Here, comprehensive cultural assessments (both a CVA and CEA) were prepared by PTITB, which were carefully analysed by Northport and interpreted with the assistance of Mr Isaacs and others.”

295. We accept this.

296. With respect to Policy D.1.5 - Places of significance to tāngata whenua, Northport acknowledged that Te Poupouwhenua (Mair and Marsden Banks) is a mapped place of significance to tāngata whenua. This was addressed in Mr Hood’s evidence¹⁶⁵.

297. However, it was the Applicant’s position was that while there is clearly a strong cultural connection with the area around Te Poupouwhenua/Marsden Point generally, there was insufficient evidence before us to geographically define places of significance to tāngata whenua,¹⁶⁶ and therefore to understand the values that are affected by the proposal beyond the mapped location at Te Poupouwhenua (Mair and Marsden Banks)¹⁶⁷.

298. We note Ms Dalton set out in relation to Policy D.1.5, that despite the area not being mapped as a place of significance to tāngata whenua in the PRP- AV that *“Patuharakeke’s Cultural Landscape” is a place of significance to tāngata whenua*¹⁶⁸. This was based on a map provided by PTITB which *“consolidates a number of cultural resources that are mapped, described and discussed in PTB’s HEMP, Marine and Coastal Area Claim, and from the CVA and CEA*¹⁶⁹.”

299. Mr Masefield set out his opinion in the Addendum section 42A report stating¹⁷⁰:

¹⁶³ Paragraphs 4.1 and 4.11 of the interim reply submissions.

¹⁶⁴ *Ngati Ruahine v Bay of Plenty Regional Council [2012] NZHC 2407, paragraph 90. Refer for example Tauranga Environmental Protection Society v Tauranga City Council [2021] NZRMA 492.*

¹⁶⁵ Paragraphs 8.88, 8.89, 8.99, and 8.169 (for example) of Mr Hood’s evidence-in-chief.

¹⁶⁶ As required by Policy D.1.5(5)(f) of the Proposed Regional Plan.

¹⁶⁷ Paragraphs 4.37(a) of the interim reply submissions.

¹⁶⁸ Paragraph 4.2 of Ms Dalton’s evidence-in-chief and 3.1 of her summary statement.

¹⁶⁹ Appendix A to Ms Chetham’s evidence-in-chief; and paragraph 3.2 and footnote 3 to Ms Dalton’s summary statement.

¹⁷⁰ Section 2.11 Place of Significance to Tāngata Whenua – paragraphs 28 and 29.

“The s42A Report queried whether the site was a Place of Significance to Tāngata Whenua for the purposes of RP Policy D.1.4. Ms Chetham provide the equivalent of an RMA s32 analysis of the site against the criteria in D.1.5 and her evidence concludes that it is.

Based on the footnote to D.1.4 and the robustness and uncontested nature of Ms Chetham’s evidence, Mr Masefield is of the opinion that the values and relevance of the place be given equivalent weight as if it was mapped.” [underlining is our emphasis]

300. We disagree with the Applicant’s position and agree with the evidence of PTITB and Mr Masefield’s opinion. We accept this area is a site or place of significance to tāngata whenua. This is an important aspect in terms of the applicability of the provisions of the PRP- AV which we address below.
301. Mr Matheson and Ms Chetham both addressed the need of the Applicant to have assessed alternatives to this proposal. The Applicant’s position was that alternatives had been assessed.
302. The issue of alternatives was set out in the ‘Issues and Options’ report forming Appendix 2 to the AEE (section 9 “Alternative Options - 9.1 – Options Evaluation since 2010 and 9.2 Alternative considered) as well as the evidence of Mr Moore, Mr Blomfield, Mr Khanna, and Ms Stanway. It was also addressed in the Applicant’s Opening Legal Submissions¹⁷¹.
303. We note that the ‘Issues and Options’ report: informed by the conceptual design study undertaken by consultants¹⁷², detailed the rationale for the project (being to provide additional freight capacity to Northland and the upper North Island); set out the advantages of closely integrating the Proposal with the existing port facility; addressed the various environmental constraints that existed; and set out the various location, footprint, design (including piled wharf) and operational alternatives considered. This was confirmed in the Applicant’s evidence as identified above.
304. It was Northport’s position that the evidence clearly demonstrated that the proposed location of the wharf and reclamation was the only practical location¹⁷³. It was also set out that even if it were possible for other land-based alternatives to be designed, there was no available land to do so¹⁷⁴.

¹⁷¹ Paragraphs 7.27-7.28 of the Applicant’s opening legal submissions.

¹⁷² ‘Northport Conceptual Design Study’, TBA Group, August 2021, attached to the Issues and Options report as Appendix A.

¹⁷³ Paragraphs 101-114 of Mr Blomfield’s evidence-in-chief; Paragraphs 41-42 of Mr Khanna’s evidence-in-chief; and section 9 of the Issues and Options report forming Appendix 2 to the application and AEE.

¹⁷⁴ Evidence of Ms Mercer, the Marsden Maritime Holdings Ltd CEO.

305. We also note that the Applicant addressed the nature of reclamation effects in their Reply submissions stating¹⁷⁵:

“During oral submissions, counsel for PTITB stressed the nature and permanence of reclamation impacts. By definition, reclamation involves turning what was once part of the CMA into land, and Northport has never shied away from acknowledging the permanence of the effects of the proposed reclamation. All Northport’s experts have been aware of these matters during their assessments and have proposed effects management measures as appropriate/required. Alternatives to reclamation have also been considered but are simply not practicable in this context¹⁷⁶.”

306. We are satisfied the Applicant had addressed a range of alternatives to this proposal.

307. Northport proposed a conditions framework that attempted to address the concerns of PTITB and other submitters regarding the impacts on cultural values of the proposal. This included a co-design process; to provide an on-going opportunity for Māori knowledge and tikanga/mātauranga Māori to be included into the design of the expansion of Northport, as well as a cultural monitoring framework.

308. The conditions also provided for a Tāngata Whenua Relationship Group to identify the cultural indicators for the monitoring framework, as well as to scope, design and implement initiatives for cultural and ecological restoration to enhance the mauri of Poupouwhenua and Whangārei Te Rerenga Parāoa. They also provided responsibility for establishing and designing the Pocket Park, with aims to educate visitors on mahinga kai, mahinga mātaaitai and traditional iwi/hapū practices.

309. We next address the planning provisions relevant to determining if the applications can be granted consent, noting that the main issue is the effects of the reclamation, as the port expansion is based on obtaining consent for it (and the dredging).

PRP- AV’s Policies

310. As set out in the Applicant’s Interim and Final Reply Submissions¹⁷⁷ the key provision relating to managing effects on places of significance to tāngata whenua is Policy D.1.4. That policy reads:

“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.” [Underlining is our emphasis]

¹⁷⁵ Paragraph 4.39 of the Applicant’s interim reply submissions.

¹⁷⁶ Paragraphs 119 – 120 of Mr Blomfield’s evidence-in-chief.

¹⁷⁷ Paragraphs 4.35 and 2.11 of the interim and closing submissions respectively.

311. As already set out, we have found from the CVA, CEA and the cultural evidence that the adverse effects on cultural values are significant. We have also been told by PTITB witnesses and the iwi/hapū submitters that the proposed cultural consent conditions proposed by the Applicant would not mitigate those effects such that the effects are “no more than minor”. Therefore, the “generally” qualifier in policy D.1.4 is critical to determining if the policy can be ‘satisfied’.

312. We agree Policy D.1.4 is a key policy, which needs to be read in context with other related policies. We address this below. However, firstly, we are grateful to Mr Doesburg, who in his legal submissions set out the where the “generally only” qualification in Policy D.1.4 came from. These words were deliberately added in response to submissions to the notified regional plan to explicitly acknowledge that resource consents could be granted in some situations where effects on the values of places of significance to tāngata whenua are unable to be managed so that they are no more than minor¹⁷⁸.

313. It is clear that the PRP- AV seeks to support and enable/provide for Regionally Significant Infrastructure, which includes Northport¹⁷⁹, but this support/enablement is not unqualified. For clarity we set the relevant (parts of the) Policies below.

314. D.2.5 states:

Benefits of Regionally Significant Infrastructure.

Particular regard must be had to the national, regional and locally significant social, economic, and cultural benefits of Regionally Significant Infrastructure.

315. Policy D.2.7 states:

Minor adverse effects arising from the establishment and operation of Regionally Significant Infrastructure.

Enable the establishment and operation (including re 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 D.1 Tāngata whenua,*
 - 3) *other adverse effects arising from the Regionally Significant Infrastructure are avoided, remedied, mitigated or offset to the extent they are no more than minor¹⁸⁰.*

316. Policy D.2.8 states:

¹⁷⁸ Paragraphs 26 – 31 of NRC’s legal submissions.

¹⁷⁹ We have addressed this matter in detail earlier in the decision.

¹⁸⁰ Noting there is no qualifying “generally” in this policy.

Maintenance, repair and upgrading of Regionally Significant Infrastructure

Enable the maintenance and upgrading of established Regionally Significant Infrastructure wherever it is located by allowing adverse effects, where:

- 2) *the adverse effects after the conclusion of the maintenance or upgrading are the same, or similar, to those arising from the Regionally Significant Infrastructure before the activity was undertaken. [Underlining is our emphasis]*

317. Policy D.2.9 states (relevant to this proposal):

Appropriateness of Regionally Significant Infrastructure proposals

When considering the appropriateness of a Regionally Significant Infrastructure activity (except the National Grid), have regard and give appropriate weight to:

- 1) *the benefits of the activity in terms of D.2.5 Benefits of Regionally Significant Infrastructure,*
- 4) *the extent to which any adverse environmental effects have been avoided, remedied or mitigated by route, site or method selection,*
- 7) *the extent to which the adverse effects of the activity can be practicably managed, inclusive of any positive effects and environmental offsets or compensation proposed*

318. These policies are directive in how regionally significant infrastructure proposals are to be assessed, alongside policies D.2.5 and D.1.4 and D.1.5, and other we have set out previously. We note that D.1.4 is also directive, but with the “generally” qualifier.

319. It was the Applicant’s position that the “generally” qualifier in D 1.4 should apply to Northport’s proposal. The Interim Reply Submissions stated¹⁸¹:

“In any event, we submit that the Proposal falls squarely into the category of application intended to be exempt from the broad (but qualified) application of Policy D.1.4. That is, it is exactly the type of application that may still be granted resource consent. This is for numerous reasons, but particularly the importance of Regionally Significant Infrastructure, its co-location with existing port infrastructure, the MPPZ zoning of the area, and the regional and national positive benefits associated.

and

“Northport therefore submits that the qualified nature of Policy D.1.4 sets it apart from some of the enabling policies relating to the MPPZ. In any event, we also submit that the Proposal is aligned with Policy D.1.4. “

¹⁸¹ Paragraphs 437 (c) and 438 of the interim reply submissions.

320. It was also the Applicant's position that policy D.1.4, in the context of the wider PRP-AV provisions, supports applying the qualifier. It was submitted that projects for Regionally Significant Infrastructure, such as this proposal, are precisely the type of projects intended to benefit from the exemption in policy D.1.4¹⁸².

321. We also note that Mr Hood's evidence set out that policy D.1.4 "*enables consent to be granted... notwithstanding that tāngata whenua have identified cultural effects as being more than minor*"¹⁸³."

322. The Applicant's Final Reply Submissions set out¹⁸⁴:

In summary on this issue, and for the reasons detailed in our interim closing submissions, Northport submits that

(i) the qualified nature of Policy D.1.4 sets it apart from some of the enabling policies relating to the Marsden Point Port Zone, and

(ii) in any event, the Proposal is aligned with Policy D.1.4.

323. In our view determining whether the "generally" qualifier should be exercised (or not) needs to be in the context of the specific and directive enabling plan provisions for the port and its expansion, and the significance of the place to tāngata whenua and the magnitude of the adverse cultural effects.

324. We accept, as we have already outlined, the proposal receives 'specific and directive enabling support' from the plan/policy framework including by:

- Policy 9 of the NZCPS relating to ports;
- The RPS policies 5.2.1-5.2.2 relating to infrastructure; and 5.3.2-5.3.3 of the relating to Regionally Significant Infrastructure.
- The proposal sits entirely within the Marsden Point Port Zone of the PRP - AV with the purpose of that zone being to: "*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.*"
- The Regionally Significant Infrastructure provisions as set out earlier; and
- Policy PORTZ-P1 'Regional Significance' of the WDP-OP, relating to landward port functions, provides: "*To recognise the regional significance of the Port by providing for a wide range of existing and future port operations and port activities within the Port Zone.*"

¹⁸² Paragraph 437 (c) the interim reply submissions.

¹⁸³ Paragraph 8.90 of Mr Hood's evidence-in-chief.

¹⁸⁴ Paragraph 2.13 of the final reply submissions.

325. However, reclamations and dredging within the Marsden Point Port Zone are discretionary activities. We are required to have regard to all of the relevant plan provisions; and have regard to them, to determine if the proposal would promote the sustainable management of natural and physical resource.
326. As set out above, the ‘policy support’ for this proposal is not unqualified as we have addressed in relation to Regionally Significant Infrastructure – e.g. Policies D.2.7, D.2.8 and D.2.9. Those policies have a focus on regionally significant infrastructure having no more than minor adverse effects, or the same, or similar effects to that of the existing Regionally Significant Infrastructure. Policy D.1.4 has the same focus in terms of no more than minor adverse effects.
327. As we have already determined, that the project area is a place of significance to tāngata whenua (Policy D.1.5). We also found that the adverse effects on cultural values are significant, and remain significant despite the conditions offered by the Applicant.
328. It is our view, having had regard to the relevant planning provisions, that the proposal is inconsistent with a number of those planning provisions as addressed above. This is because the adverse effects of the reclamation’s extent are significant and irreversible, which, as outlined by the PTITB, results in the severance of the physical relationship to this cultural landscape, the beach, the dunes and the takutai moana identified by tāngata whenua to be the most profound effect this proposal will have on them.
329. We find that due to the magnitude of the adverse effects on the cultural values of tāngata whenua that they are not mitigated by the conditions proposed by the Applicant. Those conditions mostly relate to tāngata whenua’s involvement in facilitating the port development (e.g. co-designing the expansion of Northport and developing the cultural indicators for the monitoring framework of the implementation of the consents and port expansion); something PTITB and the other iwi/hapū submitters do not want as they sought that the applications be refused. We do acknowledge the other conditions were proposed seeking to mitigate effects including offering \$75,000.00 per annum¹⁸⁵ for studies or projects¹⁸⁶.
330. Furthermore, given our findings above, the proposal would not recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as required by section 6 (e), a matter of national importance in the RMA. It also does not enable tāngata whenua’s to fully exercise kaitiakitanga over this area; a section 7 matter of the RMA.
331. We have refused consent for the reasons set out above (and for those reasons set out in the section addressing recreation and public access below).

¹⁸⁵ Proposed Condition 243 of the regional consents.

¹⁸⁶ Proposed Condition 239 (l) of the regional consents - Identify, develop, establish and/or approve suitable studies or projects designed to improve water quality, coastal processes, environmental, ecological, and cultural health of the Whangārei Harbour entrance (including its shores) and northern Bream Bay.

Recreation and public access to and along the Coastal Marine Area (CMA).

332. The loss of the beach and public access to and along the CMA, due to the reclamation was a matter of contention between the Applicant, Council and some submitters. This was whether sufficient mitigation, or offsetting (off site), had been provided to address this loss.
333. The reclamation involves the removal of an area of beach and esplanade reserve to the immediate east of Northport. While much of the existing beach, and access to it would be lost, public access from Ralph Trimmer Drive to the remaining beach area between the expanded port and the CINZ jetties would be provided along the southern edge of the expanded port and along the eastern edge of the proposed reclamation.
334. It was accepted by the Applicant (and the opinion of both the Applicant's expert Mr Greenaway and WDC's expert Mr Jones) that the effects of the loss of the beach and public access to the coast would be significant for recreational beach users, and more than minor effects at the regional level¹⁸⁷. We agree.
335. Northport's proposed measures to provide recreation amenity were incorporated into the proposal and/or would be secured via conditions of consent¹⁸⁸. In summary, these include:
- (a) A 'pocket park', incorporating relocation of toilets, access and car parking, a swimming area, fishing pontoon, and water taxi facility¹⁸⁹.
 - (b) A cycleway to connect to other cycleways planned for the area¹⁹⁰, including for users of the Te Araroa Trail¹⁹¹.
 - (c) Investigating, scoping and, if necessary, authorisations are obtained¹⁹², carrying out improvements to carparking, passive recreation, and beach access facilities at Mair Road.
336. With respect to the Mair Road conditions, the Applicant addressed this in their final Reply Statement setting out¹⁹³:

"The Augier condition providing for improvement works at Mair Road has been amended, following feedback during the hearing, and subsequently from WDC officers, as to its practical application and certainty.

¹⁸⁷ We have addressed the cultural effects of the loss or beach the access in the Cultural section above.

¹⁸⁸ These are discussed in some detail in the opening legal submissions at paragraphs 7.11-7.13.

¹⁸⁹ Noting that Northport is prepared to facilitate the permanent relocation of the water taxi facility if preferred by users. Note also that the design of the Pocket Park is to be subject to detailed design, including the updated requirement for Co-Design by the Tāngata Whenua Relationship Group.

¹⁹⁰ Noting the recent initiative by Marsden Maritime Holdings seeking to promote the Bream Bay Shared Path, as referenced in para 7.12 and Appendix A to the opening legal submissions.

¹⁹¹ Te Araroa Northland Trust filed a letter, dated 7 November 2023, clarifying its position on certain matters.

¹⁹² Including landowner approval. In this respect, discussions with representatives of DOC have been initiated.

¹⁹³ Paragraphs 4.21 – 4.23 of the final reply submissions.

As reframed, the condition requires the consent holder, before commencing construction of the Proposal, to create a 'Mair Road Improvements Plan' covering a range of matters, and to provide that plan to WDC for certification. The objective of the Plan is to investigate and detail improvements to the Mair Road carpark, beach access, and surrounding reserve area, to provide further mitigation of the effects of the port expansion Project on the coastal access and recreation values of East Beach and the adjacent public park. Importantly, the consent holder is then required to give effect to the improvements detailed in the Plan.

This amended condition provides the Hearing Panel with certainty that the Mair Road improvements will be delivered, and accordingly, that recreation mitigation will occur in a location proximate to the Proposal."

337. Expert conferencing between the recreation experts and the planners. The recreation experts provided 2 JWS's and in summary they agreed the following elements and outcomes were to be provided:
- *All mobility access to the beach from land;*
 - *Carparking;*
 - *Toilet to meet public needs;*
 - *Fishing access to deep water;*
 - *General pocket park design and function;*
 - *Revetment fishing with walking access;*
 - *Surfcasting off the beach;*
 - *Beach access;*
 - *Swimming directly off the beach;*
 - *Water taxi operations provided in the marina environment with a change in the Te Araroa walkway location "elements and outcomes"¹⁹⁴.*
338. While Mr Greenaway supported providing for a pontoon, Mr Jones did not. This was on the basis of Mr Jones' safety concerns and some potential recreation conflict issues including swimming, fishing and the movement of vessels, plus the proximity to the CINZ's infrastructure terminal.
339. In terms of off-site proposals both experts agreed that there were residual significant adverse effects at the local scale and more than minor at the regional scale that had not been avoided, remedied or mitigated. The residual effects relate to access to coastal space of scale, fishing, walking and passive recreation. They both agree that off-site mitigation is required to address these residual effects.

¹⁹⁴ Section 10.3 of the JWS – dated 21 September 2023.

340. A list of alternative off-site mitigation options that could be considered were set out in the initial JWS¹⁹⁵. No costings were provided for these. In the second recreation JWS¹⁹⁶ potential costs of the listed mitigation options in the first JWS, along with the experts' responses to each, was provided.
341. In the initial Planners' JWS¹⁹⁷ Dr Mitchell, Mr Hood and Ms Sharp acknowledged that the recreation experts had concluded that there are significant residual recreation effects. Mr Hood set out that he had reviewed the relevant objectives and policies in the WDP-OP and that there were no provisions directing there be no net adverse effects on recreation. He also noted that the Applicant was already proposing mitigation in the form of the pocket park and its constituent facilities, and the proposed cycleway from Mair Road to Northport, as well as investigating the possibility of relocating the Te Araroa Trail water taxi berth to Marsden Cove.
342. In the second Planners' JWS¹⁹⁸, which largely addressed the recommended consent conditions, Ms Sharp sought additional conditions to those proposed by the Applicant's planners, relying on Mr Jones' opinion. These proposed conditions were included in the Addendum section 42A report.
343. As part of the Addendum section 42A report¹⁹⁹ Mr Jones provided a technical memorandum setting out, among other things, the following:

"The mitigation options (in totality) proposed in the Recreation JWS Addendum are, in my opinion, the minimum required to offset the current recreational opportunities that will be negatively impacted by the Applicant's development proposal. Leaving minor recreational opportunity effects at the local level.

The mitigation options outlined in the Recreation JWS Addendum do not mitigate the loss of the recreational environment from the proposed development.

I remain concerned for the safety of recreationists if a pontoon is developed as proposed by the applicant.

I do not believe Mair Road carpark is a suitable long term access solution onto Marsden Point Beach (and the Te Araroa Trail). This is primarily due to the need for steps and boardwalks given the steep elevated nature of the dune face. These structures are at constant risk of being washed out in storm events. I also have concerns about the long term viability of access under the Channel Infrastructure wharf. "[Underlining is our emphasis]

¹⁹⁵ Dated 21 September 2023.

¹⁹⁶ Dated 25 September 2023.

¹⁹⁷ Dated 28 September 2023.

¹⁹⁸ Dated 9 November 2023.

¹⁹⁹ Dated 16 November 2023.

344. Ms Sharp set out in the Addendum section 42A report²⁰⁰:

“In relying on the advice of Mr Jones, Ms Sharp recommends a replacement condition for NP-34 36 (Mair Road Improvement Feasibility Study, noted as an Augier condition) to require the consideration and implementation of the off-site recreation mitigation options recommended by Mr Jones.”

345. We note Ms Sharp’s position was largely unchanged from the section 42A report²⁰¹. She stated²⁰²:

“Based on the specialist advice of Mr Jones, subject to conditions, I consider actual or potential recreational effects will range from less than minor to significant. The proposal, in its current form, is not considered by Council’s specialist to have adequately mitigated residual significant recreational effects.”

346. The cultural effects have been addressed earlier. However, the following paragraph from Ms Chetham’s cultural evidence for PTITB is important with respect to the recreational aspect of the proposal²⁰³:

“Mana Whenua were not involved in the design of the Pocket Park concept. In terms of somehow ameliorating impacts on our landscape we agree with Mr Brown’s conclusion that its effectiveness in mitigating the high landscape, natural character, and amenity effects at Marsden Bay beach will be low. Mr Greenaway has drawn similar conclusions in his recreation assessment noting residual adverse effects on recreation, particularly the reduced sense of scale, are likely to be significant for recreational users of the beach and more than minor at the regional level. When we add the layers of value pertaining to Mana Whenua ahi kā, spiritual and whakapapa based connections, relationship to the location as kaitiaki, and diminishing of mauri through to recreational, landscape and amenity losses, in our view, the effects become unacceptable. The Pocket Park is cosmetic at best and cannot possibly be considered to mitigate recreation and amenity effects, let alone the severance of cultural connection and relationship to the site.” [Underlining is our emphasis]

347. We accept both the both the district and regional plan provisions provide for the development of the port (as addressed above). We note, also as we have done previously, that reclamation within the port zone is a full discretionary activity. This means we need to have regard to all the relevant objectives and policies to determine the appropriateness of (the scale of) the reclamation. We address those relating to recreation and public access below.

²⁰⁰ Paragraph 27 of the Addendum section 42A report.

²⁰¹ Paragraphs 372 – 379 of the section 42A report.

²⁰² Paragraph 379 of the section 42A report.

²⁰³ Paragraph 3.31 of Ms Chetham’s evidence.

348. We accept Mr Hood’s opinion that there appears to be no policy directive requiring no net adverse effects in terms of ‘recreational loss’. However, we do not think that is the ‘test’ to be applied, but rather the extent and magnitude to which and recreational opportunities and public access is lost and the extent which that is consistent with the plans’ objectives policies.

349. Objective E 1 and F 1.8 of the of the PRP- AV state:

E.1.1 - Catchment-specific values

Recognise the following values in the Doubtless Bay, Waitangi, Poutō, Mangere and Whāngarei Harbour Catchments:

1) cultural and recreational uses associated with fresh and coastal waters, ...

F.1.8 Use and development in the coastal marine area

Use and development in the coastal marine area:

3) recognises the need to maintain and enhance public open space and recreational opportunities, [Underlining is our emphasis]

350. The language of the provisions is one of recognising the need to maintain and enhance public open space and recreational (and cultural) opportunities.

351. In terms of the WDP-OP, the following objectives are relevant from the Riparian and Coastal Margins and Coastal Environment chapters.

RCM-03

Maintain and enhance public access, where appropriate, to and along the coast and rivers.

RCM-05 - Objective 5

The relationship of tāngata whenua with their sites and other taonga is enhanced".

Coastal Environment

CE-06 Public Access

Maintain and enhance public access to and along the coast where appropriate. [underlining is our emphasis]

352. Again, the language of the provisions above is one of recognising the need to maintain and enhance public open space and recreational opportunities, accepting that this is cast as “*where appropriate*” in the WDP-OP. It is also about enhancing the relationship of tāngata whenua with their sites and other taonga.

353. In weighing the strategic and directive district and regional plan provisions against those relating to recreational values and uses, as well as the mitigation and offsetting provided by and offered (some on an Augier basis) by the Applicant, we find that the loss of recreational and amenity values and public access (matter of national importance) has not been sufficiently mitigated or offset. In this respect we agree with Mr Jones’ view.

354. We accept public access and recreational opportunities will still be provided (albeit not over the area to be reclaimed). However, due to the scale of the reclamation, and the extent of the loss of beach (and its associated values) we do not consider sufficient mitigation or offsetting for that loss has been provided to address the residual significant adverse effects of the loss of recreational values and public access to and along the CMA.

Landscape/Natural Character/Visual Amenity

355. For the Applicant, as part of its AEE, Mr Brown prepared an Assessment of Landscape, Natural Character, and Amenity Effects. This report addressed the landscape, natural character and amenity effects that would be generated by berthage expansion at the eastern end of Northport's current port area at Marsden Point.

356. Mr Brown provided evidence concluding that²⁰⁴:

“Overall, I have concluded, therefore, that the proposed port development’s landscape effects would range from very low to high, but that Marsden Point Beach and Bay is the one area that would be inordinately affected in this regard. Reotahi would be affected to a moderate-high degree, but effects in relation to the rest of Whangārei Harbour and its settled margins would typically be of a very low to low order.

Effects on the Harbour’s natural character values would be more modest because of the already modified, to highly industrialised, nature of parts of its coastline – in the vicinity of Marsden Point most of all. Such effects would peak at a moderate to moderate-high level near the entrance to the harbour and along Reotahi’s beachfront, but would also be of a typically very low to low order elsewhere.

Finally, amenity effects would reach a moderate to moderate-high level at Reotahi and Marsden Point Beach / Bay, but would rapidly tail off away from these locations – again being of a very low to low order for the vast majority of Whangārei Harbour’s coastal environs and hinterland.”

357. Mr Farrow provided a Council review of Mr Brown’s report. He noted that Mr Brown’s assessment has used a robust methodology consistent with best practice and concluding “*I concur with the types and levels of effects that are documented, and their impacts within the range of representative viewpoints that are examined by the Assessment*²⁰⁵.” However, he raised a number of concerns including the considerable scale of the STS cranes and bulk of stacked container storage relative to the stature of the existing Port infrastructure and adjacent refinery²⁰⁶.

²⁰⁴ Paragraphs 22 – 24 of Mr Brown’s evidence.

²⁰⁵ Paragraph 282 of the section 42A report.

²⁰⁶ Pages 65 to 66 in the section 42A report.

358. Expert conferencing on landscape matters between Mr Farrow and Mr Brown focused on the height and scale of proposed STS cranes and potential container stacks in relation to mapped ONLs.
359. Mr Farrow considered that the effects of the STS cranes and container stacks (maximum height 30 metres) on the experiential values of Motukaroro Island and Mount Aubrey portion of the ONL (Bream Head manaia sequence) would be more than minor. Mr Brown identified the contrasting nature of the two coastlines of Whangārei Harbour with the highly significant volcanic coastline of Whangārei Heads contrasting very markedly with the industrialised lowland and spit of Marsden Point. He considered that the port expansion would increase the contrast, and to a degree, tension between the two halves, but he did not consider that the effects generated by this proposal would change the fundamental nature of the harbour landscape or the values of its ONLs. We agree with Mr Brown.
360. Mr Farrow and Mr Brown confirmed they had read PTITB’s evidence and considered that it was most appropriate for PTITB’s witnesses to express their values and concerns in relation to the proposal. We accept this, and note this issue is addressed in the section on cultural values and effects.
361. Both Mr Farrow and Mr Brown considered that the landscape related effects of the loss of most of the Marsden Point Beach, bay, beachfront, dune system, and coastal vegetation will be significant and would only be partly mitigated/offset by the proposed pocket park. However, they both considered that the off-site mitigation opportunities identified in the Recreation JWS dated 21 September 2023 were supported. We have set out our finding on the effects of recreation and public access above.
362. The Applicant addressed the Landscape, Natural Character, and Amenity effects in its Interim Closing Submissions, noting Mr Brown’s view that the proposal would not materially affect the characteristics and values of any ONLs and that²⁰⁷:
- (a) *The Proposal is located at the “gateway to the harbour” and that an existing dichotomy presently exists at this location: being the industrial infrastructure and activity presently occurring in and around Marsden Point, contrasted with the “amazing volcanic landscape” present at Whangārei Heads.*
 - (b) *The Proposal would not represent a “qualitative change”, and that the contrast or “dichotomy” Mr Brown describes is due to the current/permitted level of development. In Mr Brown’s view, this contrast exists now and the situation would be “very much as it is at present” if the proposal were constructed.*
 - (c) *STS cranes are currently permitted, without a limitation on number or type, within ‘Port Operations Area A’ of the Whangārei District Plan, of which the Proposal is intended to eventually form a cohesive and integrated part.*

²⁰⁷ Paragraph 9.3 of the Applicant’s interim closing submissions.

363. We agree with Mr Brown's opinions and the submissions quoted above.
364. We are satisfied that the matters raised in relation landscape, natural character and amenity effects have been appropriately addressed and that any adverse effects from the cranes will be no more than minor. We also find that the relevant 'policy tests' in the statutory policy documents, (including the NZCPS, as well as section 6 (a) and (b) of the RMA) are satisfied. However, we agree that the effects of the proposal on the Marsden Point Beach, bay, beachfront, dune system, and coastal vegetation will be significant and would only be partly mitigated/offset by the proposed pocket park.

Noise (terrestrial)/Amenity

365. Noise, and its associated amenity effects, from the current and proposed expansion of the port was a matter of contention, raised by a number of submitters who lived near the port, and in particular those opposite the port in Reotahi. We wish to acknowledge time and effort those submitters put into their submissions and evidence, and to attend the hearing.
366. In terms of noise and its context, it appeared to us that most submitters appearing at the hearing concerned about noise accepted that they did not live in a quiet environment; some acknowledged that they had moved 'recently' to this environment; and some also understood and accepted the significant positive economic and social contributions the Port makes to the district and region, and that the port was identified as Regionally Significant Infrastructure.
367. Furthermore, we were made aware (by the Applicant) of a number of noise management initiatives by Northport, such as its publicly accessible "traffic light" system based on real time measured wind speed and direction, and the fact that reversing beepers are not permitted on vehicles at Northport as a noise management response (flashing blue reversing lights are used instead). It appeared that some submitters were not aware of these initiatives.
368. While understanding the concerns raised by the submitters, we accept the expert evidence and recommended conditions of consent that the Port Noise Standard is appropriate and that noise has been appropriately addressed and where necessary the effects mitigated. Our reasons are set out below.
369. Of significance to the Hearing Panel in accepting that the noise environment created by the proposed expanded port operation was appropriate is that following expert conferencing, there were no remaining areas of disagreement regarding construction noise and vibration, port noise limits, port noise mitigation, and noise in open spaces²⁰⁸. In particular, the experts agreed:
- The Port Noise Standard, as opposed to the District Plan noise rules, was appropriate;
 - Northport's proposed construction noise conditions are appropriate.
 - Northport's proposed port noise limit conditions are appropriate.

²⁰⁸ As set out in the noise experts JWS in relation to terrestrial noise dated 21 September 2021.

- Northport’s proposed port noise mitigation conditions are appropriate, including:
 - Northport-funded noise mitigation (e.g., mechanical ventilation/cooling) to be offered when monitored or predicted noise reaches a specified level at the façade of any habitable space in a residential unit²⁰⁹; and
 - the establishment and implementation of a Port Noise Management Plan to minimise port noise through best practice, including ongoing community liaison.

370. We also accept that the recommended conditions of consent appropriately address and mitigate the adverse effects arising for the proposal, including the mitigation (e.g., mechanical ventilation/cooling) to be offered when monitored or predicted noise reaches a specified level at the façade of any habitable space in a residential unit.

371. We note that the Applicant responded to the concerns of the submitters who presented evidence in its Interim Reply²¹⁰. We agree with the Reply statement and do not repeat it here but in our view, it appropriately addresses submitters concerns (accepting of course that the submitters may not agree with those reply submissions).

Navigation

372. The Applicant prepared a Navigation and Safety Report and this was included in the AEE. The report concluded that:

“The proposed expansion of Northport will not adversely affect navigation safety. Northport has through its safety management system a number of risk control mechanisms which address the changes to shipping brought about by the proposal.

The existing main shipping channel has been proven to be safe for shipping up to 300m. Such ships have been safely brought into Northport to date without materially impacting on navigation safety.

Recreational craft activities are considered to not be materially affected by the proposed expansion with regard to navigation safety.

373. Mr Goodchild, for the Applicant, provided evidence based on his extensive experience in navigation safety, particularly as it applies to the Whangārei Harbour. He described Northport’s Safety Management System (SMS) which manages navigation safety through a series of risk control mechanisms including²¹¹:

(a) Implementation of and regular review/updating of the Dynamic Underkeel Clearance (“DUKC”) system;

(b) Use of a ship simulator;

²⁰⁹ We note the final set of recommended set of conditions removed the limitation on the number of dwellings to be retrofitted per year.

²¹⁰ Paragraph 8.4, a – d of the interim reply submissions.

²¹¹ Paragraph 12 of Mr Goodchild’s evidence.

- (c) Careful consideration of turning basin dimensions;
- (d) Operating within environmental limitations;
- (e) Appropriate use of pilots and towage;
- (f) Navigation Aids; and
- (g) Local Port Service.

374. Commercial operations adjacent to the port, including Seafuels²¹², BP Oil New Zealand (BP)²¹³ and Channel Infrastructure New Zealand (CINZ)²¹⁴. They raised various matters with respect the effects of the port expansion on the navigation safety of their operations; in particular, the ability to manoeuvre safely in and around the expanded port.
375. Expert conferencing on navigation safety included representatives from Northport, NRC and Seafuels²¹⁵. Agreement was reached and that the matters raised in the submissions could be addressed through appropriate conditions of consent.
376. Following ongoing discussions between Northport, Seafuels and CINZ agreement was reached over the potential navigation safety effects and how these matters could be addressed in draft conditions.
377. The proposed draft conditions included a number of measures to address navigation safety through the design and construction of marine structures, the implementation of a Safety Management Plan for commercial shipping and during capital and maintenance operations.
378. Overall, we are satisfied that the matters raised in relation to both construction and operational navigation safety have been appropriately addressed, and any adverse effects appropriately avoided or mitigated.

Transport

Roading, and in particular the State Highways

379. All of the issues in relation to traffic, mainly between the Applicant and Waka Kotahi, were agreed between the parties. Waka Kotahi (Mr Mutton) filed a supplementary statement of evidence confirming this – stating²¹⁶:

“Waka Kotahi confirms that the conditions attached to Northport’s closing reflect the agreed changes.”

380. The Applicant also addressed this in its Interim Reply Statement.

²¹² Submission 130.

²¹³ Submission 168.

²¹⁴ Submission 176.

²¹⁵ Noting again that their expert evidence was withdrawn as set out in the section above regarding “Procedural Matters”.

²¹⁶ Paragraphs 3.2 of Mr Mutton’s supplementary statement of evidence.

381. We record that while there was initially a difference of opinion between the Applicant and Waka Kotahi on the traffic implications and methods/conditions for addressing the adverse effects (these being agreed by the parties), that Waka Kotahi was nonetheless supportive of the Proposal. The issue was how could the adverse effects be addressed (by consent conditions).

382. The Applicant, Waka Kotahi and the WDC acknowledged that the effects of the proposed expansion on the transportation network needed to be managed. In this respect, the traffic and planning experts assessed the effects and proposed conditions requiring a comprehensive suite of monitoring and response mechanisms for the potential future scenario whereby traffic (both public and Northport-related) reduces the level of service at identified intersections on SH15.

383. As set out in the Applicant's Interim Reply²¹⁷:

"Late last week, Northport and Waka Kotahi reached agreement between themselves on proposed transport conditions that completely satisfy the concerns raised by Waka Kotahi. The agreed conditions are incorporated into the set of conditions at Appendix A. To be clear – these are the conditions that Northport is seeking. The evidential basis for the agreed conditions is already set out in the evidence before the Panel."

384. The Hearing Panel has reviewed the statement by Waka Kotahi, the Applicant's Reply and the proposed conditions. We accept that agreement has been reached and that the proposed conditions avoid or appropriately mitigate the adverse traffic effects.

State Highway 1 upgrading

385. We note that the section 42A Report Addendum no longer recommended that a condition be imposed requiring that SH1 be four-laned between the Brynderwyns and the port. As in the case of the rail network proposal, we again make the point that such a condition would likely frustrate or nullify the grant of consent. Northport has no ability to control the timing of such and upgrade, but more to the point it is our finding that any such condition would be unreasonable and disproportionate to the effects sought to be addressed.

Rail Link

386. Mr Gordon, Chief of Capital Planning and Asset Development for KiwiRail Holdings Ltd, in his evidence and presentation to the Hearing Panel described recent investment in rail to Northland, and expressed "*real commitment from the Crown*" toward enabling a rail connection to Northport. Mr Gordon confirmed that Northport is seen by KiwiRail as an increasingly important part of the Upper North Island Supply Chain ("UNISC"), and that KiwiRail is coordinating with Northport to ensure complementary road and rail provision for an expanded port.

²¹⁷ Paragraph 6.3 of the interim reply submissions.

387. Council officers, early in the hearing process, proposed what was effectively a “condition precedent”; that the Proposal cannot occur unless/until a construction contract for the rail connection to Northport has been awarded. The Applicant responded to this in its Opening Submissions.
388. It appeared to us from the section 42A Report Addendum that the Council no longer remains of the view that such a condition is required. We support that view and agree with the Applicant that such a condition would be unnecessary, inappropriate, and ultra vires. It would, if imposed, have the effect of frustrating or nullifying the grant of the consent. We would not have imposed this as a condition of consent.
389. That said, we accept Northport’s position that *“the provision of a rail connection to Northport is supported and would improve freight transport efficiency; but the Proposal is not reliant on the proposed rail spur. It can, and should, “stand alone”*²¹⁸.

Stormwater

390. The application includes discharge consent for stormwater associated with the land-based activities, discharge of decant water from reclamation activities, and discharge of sediment plumes associated with dredging.
391. The Northport stormwater system was described in the Applicant’s “Stormwater Pond Assessment Report for the proposed Northport Expansion”²¹⁹. The existing footprint comprises 49ha of reclamation plus a further 4.6ha of consented but not yet constructed reclamation. The expansion proposal would add a further 13.7ha to the consented catchment footprint to give a total footprint area of 67.3ha.
392. Stormwater will be discharged from the site both during the construction phase and the operational phase. The management of stormwater during the construction phase was described in the Applicant’s Draft Management Plans²²⁰. This primarily focussed on minimising discharges of sediment laden water through implementing an array of erosion and sediment control measures.
393. Mr Pettersson’s evidence, for the Applicant, described the risks and mitigation measures to manage sediment discharges during construction. It was his view that²²¹:

“The primary risk of sediment entering the marine environment during the reclamation works are:

- (a) Sediment-laden stormwater generated from flow across exposed ground.*
- (b) Fines within the reclamation fill material being washed out or eroded by wave action.”*

²¹⁸ Paragraph 6.7 of the interim reply submissions.

²¹⁹ Appendix 20, AEE.

²²⁰ Appendix 5 Draft Management Plans, AEE.

²²¹ Paragraph 31 and 32 of Mr Pettersson’s evidence-in-chief.

394. Mr Pettersson opined that a range of standard industry practices could be applied to manage the discharge of sediment and that these would be detailed in the Construction Environmental Management Plan (CEMP). We note that draft conditions²²² were included with the application specifying the preparation of the CEMP and the erosion and sediment control measures to be implemented.
395. Operational stormwater from the existing Northport operations area is currently managed via a canal and pond-based system established under an existing NRC discharge consent. Consent was granted in 1997 to discharge water treated by the canal/pond system through a diffuser to the Whangārei Harbour. The system which has been in use since mid-2002 consists of approximately 4ha of ponds and 2,000m of canals. The pond system was extended in 2016 to accommodate an extension of the hardstand area behind the port, and in 2018 further improvements were made.
396. The Applicant described the stormwater quality treatment system for the port as having been based on Auckland Council’s stormwater treatment design guideline GD01 and its predecessor TP10²²³. An assessment of the dimensions of the pond system and the connecting canals concluded that the dead storage volume was less than the guideline’s design parameters. However, additional storage in the canal system can be created installing a 250mm weir within the canal directly upstream of the pond inlet weir. With this additional weir the dead storage design criterion described in the guidance document would be met.
397. Evidence on the effects of the proposed expansion on the discharge of stormwater was provided by Mr Blackburn (for the Applicant). It was his opinion that²²⁴:

“(a) The proposed operational stormwater management system under the full proposed port expansion scenario is anticipated to function effectively.

“(b) The operational stormwater consent conditions proposed by Northport are appropriate from a stormwater management/engineering perspective; including the proposed adjustment to stormwater quality monitoring/compliance – being the use of the current resource consent conditions’ mixing zone thresholds as a trigger for the application of proposed new at-source compliance parameters.”

²²² Draft conditions 90 to 98. Draft Proposed NRC Conditions; Northport Limited (Updated /Final Version 16 May 2024).

²²³ Section 5, Appendix 20, AEE.

²²⁴ Paragraph 2.4 of Mr Blackburn’s evidence.

398. Mr Blackburn described modelling using hydrological modelling software to assess the volumetric capacity of the pond for both the existing and proposed expansion of the port apron²²⁵. He noted that through calibration of the model with a selected event that it indicated noticeable losses from the pond and canal. He opined that this was likely due to exfiltration through the base of the unlined ponds and canals²²⁶. Accordingly, an exfiltration rate of 20mm/hr from the pond and canals was incorporated in the model.
399. Actual stormwater discharge volumes from the system were compared to a calculated volume based on the rainfall for the period from 2003 to 2015. The AEE stated that²²⁷:
- “The information shows that between 2003 and 2007 actual spill volumes were very much below the predicted volumes. In two of these years (2004 and 2006), there was in fact no discharge from the pond system. The Palmer report concluded that losses due to seepage and evapotranspiration over this period were very much higher than originally anticipated (in this case ‘evapotranspiration is the process by which water is transferred to the atmosphere by evaporation from the pond surface and by transpiration from the emergent plants within the pond).”*
400. Questioning during the hearing raised issues about the system’s design parameters being founded on stormwater quality guidelines which are not intended for industrial sites. Further information via the Hearing Panel Directions was sought from the Applicant to provide greater clarity as to how stormwater quality was to be managed on the site²²⁸. The information sought included preparation of a draft Stormwater Operations and Maintenance Plan (SOMP).
401. The Applicant’s response to the Hearing Panel’s Direction 15 included a draft SOMP²²⁹. We are satisfied that this plan is comprehensive and addresses the questions raised over the management of stormwater quality on the site.
402. Based on the evidence that untreated stormwater was being lost through exfiltration, further questions were raised over the potential effects of untreated stormwater discharges to ground and potentially groundwater through the base of the systems canals and ponds. Greater focus on these issues was the subject of expert conferencing directed by the Hearing Panel.
403. The experts involved in the Expert Conferencing agreed on several important points that flow from the Hearing Panel’s questions²³⁰. These are:

²²⁵ Section 8, Mr Blackburn’s evidence.

²²⁶ Paragraph 8.9, Mr Blackburn’s evidence.

²²⁷ Section 2.2, AEE Appendix 29, Stormwater Discharge Review, Ecological and Water Quality Report.

²²⁸ Hearing Panel Direction 15 (1 December 2023).

²²⁹ Attachments to the Legal Counsel’s memo dated 21 February 2024.

²³⁰ JWS in relation to Stormwater, Groundwater and Planning.

- That Northport's stormwater catchment was being developed and increased over time in the period 2015 through to current size. The consequence of this is that the volume of discharge has increased.
- The exfiltration rate from the system is likely to be significantly lower than expressed in the Stormwater Discharge Review, Ecological and Water Quality Report 2015 included as Appendix 29 of the AEE. Total losses to groundwater are likely to be closer to 400m³/day but will vary depending on groundwater levels, rainfall and pond levels and tides.
- Exfiltration from the pond system will be a diffuse discharge to Blacksmith Creek and will have a lesser effect than the direct discharge because the ground water will end up in the same receiving environment having been filtered through the sand of the aquifer and dilution through mixing with the natural groundwater throughflow.
- The eventual receiving environment is brackish and therefore the marine water quality criteria are appropriate in this instance.
- The parameters measured historically provide a reasonable oversight of the likely environmental effects and the 2023 groundwater monitoring indicates very low concentrations of all tested constituents.
- There is no need for groundwater monitoring on the basis that the volumes discharged to ground are low. Further, the surface stormwater monitoring proposed would provide an early warning of any potential effects.

404. Following conferencing the Hearing Panel understands that the experts engaged over the operational stormwater conditions and the Applicant proposed a revised suite of draft conditions. These conditions detail:

- The location for the discharge of treated stormwater.
- The preparation of a Stormwater Monitoring and Maintenance Plan (SMMP) to set out how the stormwater system is to be managed to achieve compliance with performance-based conditions.
- A suite of chemical parameters and concentrations to meet compliance.
- The monitoring location and frequency; and
- Reporting annually to the Council on the results of monitoring and the outcomes of any recommended remedial actions. The monitoring data are to be in a tabulated spreadsheet. Any exceedances of performance standards are to be notified to the Council within 24 hours and reported on within 10 days identifying the exceedance, possible causes and remedial action.,

405. Having regard to the above, we are satisfied that the matters set out in section 105 – Matters relevant to certain applications and 107 – Restriction on the grant of certain discharge permits of the RMA have been appropriately addressed and the proposed consent consents will ensure that, after reasonable mixing, none of the matters in section 107 (1) (c) to (g) will occur.

406. We are satisfied that the matters raised in relation to both construction and operational stormwater have been appropriately addressed. We are also satisfied that the consent conditions offered by the Applicant in relation to stormwater and groundwater are appropriate and will ensure any adverse effects are avoided or mitigated.

Air Quality

407. Mr Curtis provided expert Air Quality evidence for Northport. It was his view that the main potential air quality effects that could be generated are dust nuisance effects. It was his opinion that through the use of appropriate mitigation any potential for nuisance effects could be minimised such that the site should not result in offensive or objectional dust nuisance.

408. He did not consider that there was potential for any off-site effects caused by vehicles involved in the construction process, but recommend that appropriate maintenance and operational practice is used to minimise any emissions, and would be managed through conditions of consent, including management plan(s). Furthermore, no significant discharges are expected from the operation of the expanded container port, noting particularly as much of the port equipment will be electrified (or capable of electrification).

409. The Council officers in the section 42A report agreed with Mr Curtis' assessment and concluded²³¹:

"Based on the specialist advice of Mr Noonan and Mr Curtis, subject to conditions, I consider actual or potential air quality effects will be less than minor and suitably mitigated."

410. We also note that Ms Dalton for PTITB acknowledged that was a level of agreement between PTITB's and Northport's experts on a range of matters, including, air quality.

411. We accept, with the conditions offered by the Applicant, that the air quality aspect of the proposal has been appropriately addressed.

Lapse date for the Regional Consents

412. The appropriate lapse period was a matter in contention. Different views were held on this – particularly the Applicant (who initially sought a 35-year lapse but revised this to 20 years), the NRC (Mr Masefield) recommending 10-year lapse and Mr Doesburg submissions essentially supporting a 10-year lapse date, and Mr Matheson, counsel for PTITB, submitting that 5 to 8 years was sufficient. We address this below.

²³¹ Paragraph 391 of the section 42A report.

413. The Applicant’s legal submissions addressed the issue of ‘lapse’ in its Opening Submissions (paragraphs 7.30 – 7.31), its Interim Reply Submissions (paragraphs 20.5 – 20.10) and its Final Reply Submissions (paragraphs 4.5 – 4.7). Its case was essentially that a lapse period of 20 years is necessary to cover the likely development period for the proposal, with allowance for its complex nature, size and scale, and the range of external and unpredictable events which can cause delay to construction planning; and that this is consistent with other large-scale infrastructure projects.
414. As addressed by Messrs Jagger, Moore and Akehurst above, we accept the rationale and economic imperatives for the project. We also accept, as Mr Moore and others outlined, that for complex and significant proposals such as this, there is a degree of uncertainty about timing requiring the need for some flexibility for when the development can be undertaken. This clearly impacts on what may be an appropriate lapse period.
415. In relation to the above, we accept Mr Moore’s evidence that *“the development process alone for this Project will likely span 9-14 years”*²³². However, as he set out 5 to 7 years of that is *“Consenting pathway: application/hearings* (i.e. this process), with *“business case and detailed design”* being 1 – 2 years with *“build using local/NZ capability”* 3- 5 years. This means construction could be completed 7 years from when any consents were granted.
416. We also accept the complex nature, size and scale of the Proposal, and the range of external and unpredictable events which can cause delay to construction planning: the Applicant setting out recent examples including the Covid-19 pandemic and response, and Cyclone Gabrielle, both of which had material implications for Northport operations and future planning. The Applicant’s legal submissions set out a number of cases where longer (20 plus year) lapse periods were given.
417. Mr Masefield addressed the ‘lapse period’ in the two section 42A reports. In the Addendum section 42A report he stated²³³:
- “Mr Doesburg has provided useful submissions on both these issues. From these, Mr Masefield maintains that a 10-year lapse period strikes the appropriate balance between efficient use of time and resources to reconsider this matter if consents were not exercised and reconsider the appropriateness of the activity and how the existing environment may have changed.”*
418. Mr Doesburg’s submissions raised legal issues in respect of long lapse period. In cautioning about longer lapse periods he stated²³⁴:
- “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. Those policy reasons include (but are not limited to):*
- (a) physical and social environment change;*

²³² Paragraph 79 of Mr Moore’s evidence.

²³³ Paragraph 39 of the Addendum section 42A report.

²³⁴ Paragraph 11 of the NRC legal submissions.

- (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.”*

419. He also set out²³⁵:

“The physical and social environment is likely to change materially in that time [20 years as submitted by the Applicant], particularly in this dynamic coastal environment that has experienced significant change over the past 100 years, and in the context of future climate change. 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. 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. The same concerns are relevant in the context of a resource consent that allocates a limited resource to the exclusion of others.”

420. Mr Doesburg also addressed relevant case law²³⁶.

421. Mr Matheson also addressed the appropriate lapse period in some detail²³⁷, submitting, if consent were to be granted it should be no more than 5 or at most 8 years. He stated²³⁸:

“The concept of an appropriate lapse date lies at the heart of sound resource management principles. Imagine for a moment what a resource consent granted in 1990 might have looked like and what the conditions would have required. Then imagine that such a consent was implemented next year in reliance on those conditions.”

422. He further stated²³⁹:

“If the reclamation is essential or of such value to the Northland Region, then that reclamation should be undertaken without delay”.

²³⁵ Paragraph 15 of the NRC legal submissions.

²³⁶ Paragraph 12 of the NRC legal submissions.

²³⁷ Paragraphs 4.16 to 4.24 of PTITB’s legal submissions.

²³⁸ Paragraph 4.18 of PTITB’s legal submissions.

²³⁹ Paragraph 4.23 of PTITB’s legal submissions.

423. We agree with NRC's and PTITP's position; that it is not appropriate to provide a 20-lapse period for the reasons they set out. While the Applicant's legal submissions were that the 20-year lapse period was justified, we do not think the Applicant's evidence (Mr Akehurst and Mr Moore) makes a strong case for a longer lapse period. We agree that the longer period would have a significant effect on Patuharakeke (and others) as outlined in Mr Matheson's submissions²⁴⁰:

"A 35 year lapse date [revised to 20 years by the Applicant] would represent a "sword of Damocles" hanging over Patuharakeke, not knowing when their takutai moana would be taken from them, and being caught in an invidious position of not knowing whether they should invest very limited time and financial resources into the protection and restoration of the nearby kaimoana sites".

424. Had we granted consent we would have provided a 10-year lapse period. It is our view, based on the legal submissions and the evidence, that this is sufficient time, with some flexibility to have, commenced (and completed) the reclamation. If the consent was not given effect to by then, then it would be appropriate to re-assess the reclamation proposal at that time to understand what the potential benefits or adverse effects might be then.

Consent Duration

425. Consent duration was addressed in the Applicant's opening and reply submissions. This was mainly due to Mr Masefield's concern (as most recently set out in the section 42A Report Addendum). Mr Masefield's recommendation was that the duration of the reclamation consents be limited to 35 years, and recommended durations of 20 years for the other regional consents
426. The Applicant addressed this matter in its Interim Reply²⁴¹, and followed it up in its final Reply stating²⁴²:

"It seems that the NRC remains of the view that there should be a specified duration for the consents authorising the reclamation, which is unusual. Section 123(a) of the RMA provides that the default position is that a reclamation consent duration is unlimited. We are advised that Northport's previous reclamation consents included unlimited durations, which is routine. The rationale for the recommendation for a shorter duration is unclear. Once the reclamation is complete, there is nothing in the CMA to which the regional consents apply (i.e. NRC's jurisdiction over the reclamation ends)."

427. We agree with the Applicant. We would not have imposed a duration on the reclamation consent.

²⁴⁰ Paragraphs 4.44 (a) – (f), including (e) of PTITB's legal submissions.

²⁴¹ Paragraph 20.14 of the Applicant's interim reply submissions.

²⁴² Paragraph 4.9 of the Applicant's final reply submissions.

Part 2 of the RMA

428. As we set out earlier, we have been able to rely on the provisions of the operative and proposed regional and district planning documents, in particular the PRP- AV and the WDP- OP, to determine these applications without recourse to Part 2. However, given the nature of this proposal and its range of potential adverse and/or positive effects we have addressed the Part 2 matters in this decision. This has been, in particular section 6 (d) - in relation to public access to and along the CMA, and 6(e) regarding the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and section 7 (a) regarding kaitiakitanga.
429. We find that the Part 2 matters above are not met by the proposal in its current form.

Decision

430. For all of the reasons set out above, including the Part 2 considerations, we find that the proposal, in its current form, would not meet section 5 of the RMA – that the proposal would not “*promote the sustainable management of natural and physical resources*”.



Greg Hill (Chair)

On behalf of the Independent Hearings Commissioners.

5 July 2024

Appendix 1 – Evidence and/or Appearances at the Hearing

<p>Applicant – noting that those names marked * did not appear at the hearing as they were excused by the hearing Panel.</p>	<ul style="list-style-type: none"> • Kitt Littlejohn/Chris Simmons – Legal Counsel • Murray Jagger – Chairman of the Board of Directors for Northport Limited • Jonathan Moore – Chief Executive Officer of Northport Limited • Greg Blomfield – Terminal Facilities Manager at Northport Limited • Mahim Khanna* – Terminal design and alternatives at Northport Limited • Greg Akehurst – Economist • Dr Brett Beamsley – Hydrodynamic and Morphodynamic Modelling • Dr David Fox – Environmetrics - establishment of turbidity triggers • Richard Reinen-Hamill – Engineer - Coastal Processes • Dr Shane Kelly – Marine Ecology • Dr Leigh Bull – Ecologist, Avifauna • Dr Deanna Clement – Ecologist, Marine Mammals • Dr Sarah Flynn – Ecologist, terrestrial • Ross Sneddon* – Ecologist, peer review of marine ecology (excluding avifauna and marine mammals) • Jared Pettersson – Environmental Management • Stephen Brown – Landscape, Natural Character and Visual Amenity • Robert Greenaway – Recreation and Tourism • Nerissa Harrison – Transport • Dee Isaacs – Cultural • Jan Stanway* – design and construction • Craig Fitzgerald – acoustics • Dr Matthew Pine* - marine scientist specialising in underwater noise and ocean bioacoustics • Andrew Curtis* – Air Quality • James Blackburn – Stormwater • Bruce Goodchild* - Navigation safety • Brett Hood – Planner • Dr Philip Mitchell – Planner
<p>Submitters</p>	<ul style="list-style-type: none"> • Christopher Howell • Bream Head Conservation Trust: Nicola Hartwell • Peter Fitzgerald • Northland Chamber of Commerce Inc (North Chamber): Tim Robinson and Colin Hanna • Marsden Maritime Holdings: Rosie Mercer • Robert Twyman • Paul Cresswell • Whangārei District Council: Christine Niblock • Director-General of Conservation: Lisa Sutherland, Dr Tony Beauchamp and Linda Kirk

- Steve Tyson
- Waka Kotahi NZ Transport Agency: Christina Sheard – Legal Counsel, Steve Mutton - Director Regional Relationships Te Tai Tokerau me Tāmaki Makaurau, Cath Heppelthwaite – Planning, Angie Crafer – Transport
- National Road Carriers Association: Justin Tighe-Umbers - CEO and James Smith - GM Policy and Advocacy
- Clinton (Jack) Craw
- Te Araroa Northland Trust: Shane Knowler
- Stan Semenoff Transport Limited: Stan Semenoff
- IK & SM Newey Transport Ltd: Ian Newey
- KiwiRail: David Gordon – Chief Capital Planning and Asset Development and Marija Batistich – Legal Counsel
- Channel Infrastructure NZ Limited: Jack Stewart - GM Operations and Stephanie de Groot – Legal Counsel
- Wright Technologies Ltd: Colin Mitten
- Swire Shipping Ltd (including Pacifica Shipping): Alistair Skingley
- Northland Inc: Vaughan Cooper
- Forest & Bird: May Downing- Legal Counsel
- Northland Wood Council: Ursula Buckingham and Steve Weir
- Mountains to Sea Conservation Trust: Samara Nicholas
- Te Hononga Whakaruruhau o Whangārei Terenga Paraoa - Whangārei Harbour Marine Reserve Advisory Committee: Samara Nicholas
- New Zealand Cruise Association: Jacqui Lloyd
- New Zealand Shipping Federation: John Harbord - Executive Director
- Ruakaka Residents and Ratepayers Association Incorporated: Richard Morris
- Janice Ellen Boyes
- Matthew Oliver Evans
- Joshua James Gwilliam
- Patuharakeke Te Iwi Trust Board: Bal Matheson (Legal), Professor Karin Bryan (Hydrodynamics and Coastal Processes), Dr Richard Bulmer (Marine Ecology), Dr Tom Brough (Marine Mammals) Juliane Chetham (Cultural), Luana Pirihi, Taitamariki, Hollie Kereopa, Deja Tuhero, Makarena Dalton (Planning) and David Milner.
- Mere Kepa
- Te Parawhau (Mira Norris)
- Te Pouwhenua o Tiakiriri Kukupa Trust - Whangārei Harbour Kaitiaki Ropu (Marina Fletcher)
- Waimarie Kingi (Ngati Kahu O Torongare Te Parawhau Hapu Iwi Trust)

	<ul style="list-style-type: none"> • Nicki Louisa Wakefield (Rewarewa D Māori Incorporation, Ngati Kahu o Torongare and Nga Hapu o Whangārei)
<p>Council (NRC and WDC) - – noting that those names marked * did not appear at the hearing as they were excused by the hearing Panel.</p>	<ul style="list-style-type: none"> • Blair Masefield – Planner, section 42A author for NRC • Stacey Sharp – Planner, section 42A author for WDC • Dr Doug Treloar – Coastal Engineer • Mike Farrow – Landscape, Natural Character and Visual Amenity • Dr Drew Lohrer – Marine Ecology • Claire Webb – Coastal Avifauna • Helen McConnell – Marine Mammals • Scott Keane* – Navigation & Safety • Peter Runcie* – Terrestrial Acoustics • Craig Jones – Recreation • John McLaren – Stormwater • Suzanne Cawood and Mathew Noonan* – Air Quality • Robert Inman – Transport • Claire Webb and Sandy Huang – Terrestrial Ecology • Dr Christo Rautenbach* – Hydrodynamic, Morphology and Sediment Transport Modelling • Peter Clough – Economic • Scott Keane – Port Demand Design and Operations • Jonathan Vallarta* – Underwater Acoustics
<p>Hearings Administrator</p>	<p>Alissa Sluys - Consents and Hearing Administrator</p>