IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373)

LEGAL SUBMISSIONS ON BEHALF OF SUBMITTER DAMON CLAPSHAW

14 May 2021

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1. INTRODUCTION

1.1 These legal submissions are presented on behalf of Mr Damon Clapshaw, a submitter in opposition to the application by Kaipara Ltd for coastal permits to extract sand from the coastal marine area offshore at Pakiri (CST60343373) ("**the application**").

1.2 Mr Clapshaw will appear remotely at today's hearing and expert evidence will also be called from Dr Shaw Mead.

2. MR CLAPSHAW'S INTEREST IN THE APPLICATION

2.1 Mr Clapshaw's family have co-owned a farm at Pakiri Beach for over 18 years.[1] Having grown up in Auckland he has also holidayed there for over 45 years.

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[1] Clapshaw, [1.3].

2.2 Over time, the Clapshaw family have observed changes in the coastal environment bordering the farm.[2] It is Mr Clapshaw's belief that there are onshore changes to the beach and those changes are accelerating.

2.3 Mr Clapshaw and his family have been members of Friends of Pakiri Beach ("**FOPB**") since the 2003 to 2006 hearings on the initial near shore and offshore consents, including in the Environment Court. Mr Clapshaw remains a member of FOPB and has worked with FOPB to retain or initiate scientific work, including that of Dr Mead, for the purposes of the current application. That evidence, which is discussed further below, demonstrates a history of non-compliance with the conditions of consent, both on and off the water, and the undertaking of dredging in a manner quite different to what was understood at the time. The Council has also failed to properly monitor and enforce the conditions.

2.4 Mr Clapshaw's position is that as the consent-holder has not demonstrated proper compliance with the existing consent conditions, Kaipara Ltd should not be granted the renewal it seeks. Instead Mr Clapshaw seeks that the application be declined.

2.5 The operator and consent-holder have the remaining two years under the existing consent to get their house in order and to demonstrate proper compliance with the existing conditions, including proper monitoring and reporting. If that were done, there might then be a proper foundation and a sufficient information base on which to make a renewed application. That is certainly not the case now.

2.6 Arising out of the evidence of Mr Clapshaw and Dr Mead are the following issues, each of which will be addressed in turn:

a) the precautionary approach and its application to this case;

b) non-compliance with existing consent conditions as a matter to be considered under s 104(1)(c) of the RMA;

[2] Clapshaw, [1.7]

c) the need for a proper information base for a decision, and the ability of the Commissioners to decline an application under s 104(6) if inadequate information has been provided; and

d) the application of other matters under s 104, including the adverse effects of the proposal, which militate against the grant of consent.

3. BREACHES ON AND OFF THE WATER

3.1 Before addressing any of the above points it is necessary to inject some reality into this hearing. This is a reality of the dredging that Mr Clapshaw has highlighted from the outset.

3.2 The applicant in its application materials and in its primary evidence asserted there were no compliance issues. That was repeated by the Council in its Section 42A report. But nothing could be further from the truth or the reality. Something that has taken Mr Clapshaw, Dr Mead and FOPB to force the applicant and the Council to concede.

3.3 There has in fact been multiple breaches of the consent, over many years, both on and off the water. This includes a failure to carry out crucial work and to provide crucial information about the state of the environment in the extraction area.

3.4 The breaches and failures are covered in the original and supplementary statements from Mr Clapshaw and Dr Mead. They include:

a) Multiple breaches of Condition 1 of the current consent by extracting sand inshore of a line running parallel to the coastline 2 kilometres from MHWS. Mr McCallum sought to cast doubt on those breaches by suggesting AIS might not be accurate enough nor the position of MHWS certain enough. That is rejected. (To effectively legitimise its breaches going forward and partly overturn its agreement to go offshore, Kaipara at this hearing is seeking to remove the 2 kilometre control and move back inshore by, as Mr MacRae described it, “on average 700 metres.” This is unacceptable. FOPB will address this shortly).

b) Multiple breaches of Condition 3 where it says in the part not quoted nor addressed by counsel for Kaipara, “... and to endeavour to limit those extractions to no deeper than the thickness of the active sand layout.” The

trenches that have indisputably been caused by repeat dredging (as admitted by both Kaipara and McCallums) have been there for several years and have been kept in that state and not able to be filled by natural processes because of the repeat dredging. Mr MacRae for McCallums in his opening submissions said "the intent of the condition is clear although the consent gives no guidance to what is meant by the 'active sand layer'". There cannot be any doubt whatsoever that the trenches are far deeper than the active sand layer. Dr Mead and Dr Single, experts in this area, advise that at the depths applying to where the dredging is being carried out, the active sand layer is "a few tens of centimetres." They can confirm that today. What Kaipara and McCallums have been doing is repeatedly excavating the seabed and creating trenches not of a few centimetres, but of 1.5 metres to 2.7 metres. Breach after breach of this condition.

c) Conditions 11 to 12 require EMMPs to be prepared, covering the detailed matters set out there and under Condition 13, once approved, the EMMPs "shall be implemented by the Consent Holder." There have been multiple breaches of Condition 13 because the EMMPs have not been complied with, including:

i) In the EMMP for Area 1 (the southern area) it specifies that geomorphological monitoring is required to be undertaken at the conclusion of the extraction of every 250,000m³ of sand. Reports with the conclusions of that monitoring are to be presented to the Council analysing whether any significant change has occurred as a result of the extraction of the sand. Kaipara has failed to do that monitoring and reporting at each 250,000m³. Mr Hay in his reply evidence has conceded breaches of this condition.

ii) The EMMP for Area 1 says that when monitoring is done it shall include state of the art hydrographic surveys and simultaneous side scan sonar imagery of the sea floor. When Kaipara did do any of this monitoring, it completely failed to do the imagery of the sea floor – essential to pick up its trenches. The surveys it did do were also poorly done or unhelpful, as criticised not only by Dr Mead but also, rightly, the subject of adverse comment by Ms Hart from Beca.

iii) The EMMP for Area 1 requires that where the reports demonstrated a significant physical change to the seabed, described as a change greater than 1.5 metres, thereby indicating a significant instability of the sea floor, then sediment textural analysis involving bottom grab samples and video/photos were required, as well as a multi-variate sampling and biological analysis. Because Kaipara completely failed to do all the required studies at each 250,000m³ step and completely failed to use seabed imagery, it did not pick up the trenches of 1.5 – 2.7 metres deep it had caused and therefore breached the conditions by also failing to do this required tier 2 monitoring. None of this crucial, detailed environmental analysis was ever provided.

Worse, we were told by Mr McCallum when he gave evidence on Wednesday 12 May that they found out about the trenches in December 2018, dived to check them out in January 2019 and found them to be 2.5 metres deep, and that led them to do some imagery in March 2019. Did they submit that work to the Council disclosing the trenches? No. Did they immediately undertake the tier 2 monitoring? No. Instead, Mr McCallum says they discussed the matter with Kaipara and just moved their operations further north. So when Mr Riddell for Kaipara said in his primary evidence that he was "astounded" to hear about the trenches for the first time when he received Dr Mead's evidence in February 2021, how can that be correct?

3.5 The EMMP for Area 2 permits no sand extraction from further north than the Auckland Council boundary. There have been multiple breaches of this condition. As with the breaches of the 2 kilometre from shore control, Mr McCallum's explanations are rejected and are simply not credible. Mr Clapshaw and Dr Mead will address that today.

3.6 There were also breaches of Condition 14. That condition requires that upon the cumulative extraction of 500,000m³, 1,000,000m³, 1,500,000m³ and 2,000,000m³ of sand, the consent holder must provide to the Council an Environmental Impact Assessment of sand extraction operations. That is to apply to all of the area that is being used for sand extraction and there is a list of detailed work to be done set out in the condition. Kaipara accept in Mr Hay's reply evidence that this condition was breached

by the EIAs either not being done at each level and/or not for all areas where the sand extraction had been taking place.

3.7 These are just the multiple breaches that have been discovered by the work of Mr Clapshaw and the voluntary group FOPB, with the assistance of an expert consultant, Dr Mead. As I said before, none of this was disclosed by Kaipara in its application. None of it was disclosed in its primary evidence. It is also clear that the Council has done little to control or monitor the consent holder and operator during the many years of this consent, as made clear by its statement in the s42A report that were no compliance issues.

3.8 This is the reality against which you have Kaipara asking you to reward all of this poor behaviour by granting them a renewal for another 20 years.

4. THE PRECAUTIONARY APPROACH

4.1 At the heart of Mr Clapshaw's case is the precautionary approach. Established as a matter of principle as early as the Rio Declaration on Environment and Development in 1992, the Courts have long since recognised that its application is inherent in the provisions of the RMA.[3]

4.2 The precautionary approach (or principle, as it is sometimes referred to) is also now explicitly incorporated as part of the New Zealand Coastal Policy Statement 2010 ("**NZCPS**"), to which the Commissioners must have regard to pursuant to s 104(1)(b)(iii) of the RMA. Policy 3(1) of the NZCPS requires decision-makers to *"apply a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown or little understood, but potentially significantly adverse"*.

4.3 In giving effect to the NZCPS as required under s 67(3)(a) of the RMA, the regional coastal plan provisions of the Auckland Unitary Plan ("**AUP**") explicitly require the adoption of a precautionary approach to applications for mineral extraction within the coastal marine area.[4]

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[3] *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217 at [144], referring to *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC); see also *Rotorua Bore Users Association Inc v Bay of Plenty Regional Council* EnvC Auckland A138/98, 27 November 1998.

[4] AUP, Policy F2.6.3(2).

4.4 This case is unusual, in the sense that the precautionary approach is more normally applied to new activities for which there is an insufficient knowledge base and/or lack of available scientific data to accurately project the likelihood and intensity of adverse effects. This was the case, for example, in the Supreme Court's consideration of New Zealand King Salmon's application for a private plan change and resource consents for intensive salmon farming in the Marlborough Sounds.[5]

4.5 In the current case, the Commissioners are dealing with an established activity, but one that has been demonstrated by Mr Clapshaw and Dr Mead to have been undertaken otherwise than in accordance with the existing conditions of consent. There is uncertainty and a lack of knowledge or understanding of the effects of the existing operation "on the ground" because the dredging has not been carried out as originally envisaged or as required, crucial monitoring and other reports were not done or provided when required, and additional levels of investigations were not undertaken when they should have been. As such, the starting point for many of the applicant's initial assessments was based on a fallacy. There is also uncertainty as to what the effects of extraction are when the consent has not been exercised and properly monitored and assessed during the term of the current consent. The question for the Commissioners is how to approach the consideration of the likely adverse effects of a renewal, in circumstances where the consent-holder and operator have failed to establish a proper baseline built on past compliance and reporting.

4.6 In my submission, the precautionary approach is directly relevant to the Commissioners' application and analysis of the factual evidence under s 3 of the RMA, particularly the regard that must be had to potential effects (including those of low probability but high potential impact).[6] It requires you to treat with caution the degree of agreement between the various technical experts for the applicant (and the Council's review of that evidence) that the effects of the proposal will likely be acceptable and in accordance with the expectations of the planning documents,[7] where the fundamental basis for that agreement is founded on a total misapprehension as to compliance with the existing conditions of consent, how the dredging has been undertaken, and all of the detailed monitoring required by the conditions but not done. There is also disagreement between

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5 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.
6 Applying the dicta in *Golen Bay Marine Farmers v Tasman District Council* EnvC Wellington W42/2001, 27 April 2001.
7 As noted by Dr Mitchell in his evidence at [41] on behalf of FOPB.

the experts for the various parties as to the impact of these breaches of the consent conditions on the existing environment and on sediment transfer within the embayment. That is another reason to favour caution in your approach.

4.7 It is also directly relevant to your consideration of the proposal under s 104(1)(b) as a result of Policy 3 of the NZCPS and the equivalent policy in the AUP, which is a matter I return to later.

4.8 Counsel's opening legal submissions for the applicant referred to a requirement to establish uncertainty or lack of knowledge on the facts before the precautionary approach is invoked.[8] I accept that point as a matter of principle. However, uncertainty or a lack of knowledge has been demonstrated through the work of Mr Clapshaw and Dr Mead, among others, and the applicant's own statements that it was taken aback by the scale of the trench first discovered by Dr Mead and it has now had to admit to reports and monitoring not having been undertaken. So, the applicant's point fails on its own evidence, and a plausible basis has been established for a precautionary approach.[9]

5. NON-COMPLIANCE WITH EXISTING CONDITIONS OF CONSENT AND s 104(1)(c)

5.1 The High Court has held that while Part 2 of the RMA in particular places the focus on present and future consequences of an activity and not the *"just desserts of an applicant in light of his or her prior conduct"*, consideration of "*any other matter*" under what is now s 104(1)(c) of the RMA can include an applicant's prior conduct.[10] That is especially the case where having regard to past conduct would promote the general objectives of the RMA *"by encouraging observance of resource management requirements and procedures in the future"*.[11] While an applicant's prior conduct cannot be used to override one of the more explicit statutory criteria in s 104, where there is no such conflict it can be taken into account.[12]

5.2 In *Suncern*, the Planning Tribunal relied on this principle to consider the illegal nature of actions which damaged the roots of trees the applicant later sought resource consent to

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8 Applicant's opening legal submissions at [110], citing *Ngāti Kahu v Whangaroa Co-op Soc Ltd v Northland Regional Council* [2001] NZRMA 299 (EC) and *Sea-Tow Ltd v Auckland Regional Council* EnvC Auckland A066/06, 30 May 2006 at [462]. To the extent that these authorities are relied upon for any broader principles, counsel submit that they pre-date the Supreme Court's formulation of the precautionary approach in *Sustain Our Sounds*, above n 5 at [129] and should be treated with care accordingly.

9 *Sea-Tow*, above n 8 at [462].

10 *New Zealand Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 (HC)

11 Ibid.

12 Ibid.

remove. The High Court held that to do so was consistent with the principle of sustainable management, by avoiding conferral of an advantage on the applicant through their earlier misdeeds.

5.3 This case is again slightly different, in that the issue for the Commissioners is not whether the applicant's prior conduct might have otherwise made consent for this application a more achievable prospect, but whether on an application for renewal the Commissioners have (a) a sufficient knowledge base from the past consent on which to make a decision where that earlier consent has not been properly carried out, properly reported on, and properly monitored; and (b) confidence that any new conditions of consent will be complied with and the potential effects of the application will be as set out.

5.4 I return later in these submissions to the issue of adequacy of information. As to the second issue in (b) above, it must be noted that a consent authority is not entitled to rely on the possibility that an applicant, or his/her successors in title, might commit an illegal act as a ground for refusing an application.[13] That line of authority addresses a hypothetical, ie that the consent authority is entitled to assume compliance with a proposed consent. Otherwise, as observed by the High Court, nothing could ever be approved.[14] However, these cases do not address the situation where past non-compliance is ascertainable as a matter of fact, as in this particular case.

5.5 Read together, these authorities establish that past conduct can be relevant to the consideration of an application, even where an applicant is usually assumed to act legally and in accordance with its consent conditions.

5.6 In my submission, the Commissioners are entitled to and ought to draw adverse inferences from the past conduct of the consent-holder and operator in this case, as set out in the evidence of Dr Shaw and Mr Clapshaw, and apply those inferences to their consideration of the application under s 104(1)(c) – "any other matter". That approach is consistent with the principle of sustainable management in s 5(1) of the RMA as the High Court held in *Suncern*, and weighs heavily in favour of declining this application for a renewal of the frequently breached consent both on and off the water. The reporting officer in his addendum report now accepts that there have been previous breaches, but

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13 *Barry v Auckland City Corporation* (1975) 5 NZTPA 312 (CA), cited with authority in *Holm v Auckland City Council* [1998] NZRMA 193 (PT). See also *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLRM 271 (HC) at [134].

14 *88 The Strand Ltd v Auckland City Council* [2002] NZRMA 475 (HC) at [19].

does not grapple with their implications, other than to rely on the proposed consent conditions. As will be discussed further below, this does not go far enough.

5.7 In the applicant's opening legal submissions, counsel compared this situation to retrospective applications for consent, where the Court held it *"would be wrong to confuse the decision on a resource consent application with a prosecution or enforcement proceeding"*.[15] That may be so, but a decision-maker is still entitled to take the applicant's prior conduct into account when determining a further application. Indeed, the Court in *Hinsen*, relied upon by the applicant for the above point, went on to apply *Suncern* and consider the applicant's past conduct, including (among other reasons) to encourage observance of the Act and incentivise applicants to comply with it prior to seeking consent.[16] The same applies to the submissions by Mr McRae on behalf of the operator.[17]

5.8 I submit that the Court's statements in the other authority cited, *Playground Events Ltd v Waikato District Council*,[18] are an over-simplification of the test set down in *Suncern* and applied in *Hinsen*, as set out above. Put simply, it remains open to the Commissioners to consider the applicant's past conduct under s 104(1)(c) and draw adverse inferences from that conduct in the exercise of your discretionary judgement on this application. You should do so in this case as the applicant is otherwise being rewarded for repeated breaches and poor practices over many years. A decline would incentivise the applicant (and other consent holders and their contractors) to comply with their current consents.

6. INADEQUATE INFORMATION AND S 104(6)

6.1 The issue of adequacy of information to support an application for consent normally arises in the context of challenges to notification decisions. In *Discount Brands*,[19] Blanchard J held that information provided with an application for consent must be adequate for it to:

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15 Applicant's opening legal submissions at [75], citing *Hinsen v Queenstown Lakes District.Council* [2004] NZRMA 115 (EnvC) at [20]. The situation in *Kemp v Rodney District Council* is materially different to the facts here. For example, there is no agreement that consent can be granted subject to conditions. Counsel submit this authority is of little assistance to the Commissioners.

16 *Hinsen*, above n 15 at [23]-[30].

17 See submissions on behalf of McCallum Bros Ltd at [26].

18 Namely, that the past behaviour of an applicant is a matter for enforcement, and does not provide a legitimate ground to refuse consent, but may be relevant to the appropriateness of consent conditions where earlier conditions have proved to be unsatisfactory (at [16]).

19 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 15, [2005] 2 NZLR 597 at [114].

a) *"understand the nature and scope of the proposed activity as it relates to the district plan"*;

b) "*assess the magnitude of any adverse effect on the environment"*; and

c) in the context of a notification challenge, to identify who is potentially affected.

6.2 Blanchard J went on to say that the requirement *"is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis"*. He also held that the *"statutory requirement addresses more than the scope of the information. The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered*".[20]

6.3 Despite doubt as to whether the standard for adequacy is now less exacting than when *Discount Brands* was decided,[21] the High Court has since held that decisions based on wholly inadequate or insufficient information will always be amenable to challenge, whether made in the RMA context or otherwise.[22] It follows that the same threshold applies to decisions under ss 104 and 104C of the RMA in relation to the grant or refusal of applications.

6.4 This is also supported by the discretion given to consent authorities under s 104(6) of the RMA to decline an application *"on the grounds that it has inadequate information to determine the application"*.

6.5 This subsection was relied upon by the Environment Court in the *R J Davidson Family Trust* case to decline an application for a mussel farm in Beatrix Bay, in the absence of information from the applicant as to the potential cumulative impacts on King Shag habitat.[23] That finding of the Environment Court was upheld on appeal,[24] and was not disturbed by the further appeal on the relationship between s 104 and Part 2. The Environment Court held that the power to decline on the basis of inadequate information

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20 Ibid at [115].
21 As to which, see *Auckland Council v Wendco Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [47].
22 *Aspros v Wellington City Council* [2019] NZHC 1684 at [37].
23 *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.
24 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017]NZRMA 227 at [100]-[102].

"should be exercised reasonably and proportionately in all the circumstances of the case".[25]

6.6 Applying those dicta to the present circumstances:

a) There is difficulty is assessing the true nature and scope of the proposed activity for renewal, as what is proposed is not what has been taking place in reality at the site.

b) The expert assessments for the applicant all suffer from the same deficiency, in that they assume that the consent is being exercised lawfully and that the state of the seabed is as per a fully compliant situation, when that could not be further from the case. As demonstrated by both Mr Clapshaw and Dr Mead, the applicant's team had a poor understanding of how the dredging operation has in reality been undertaken, day in day out, they were unaware of the breaches on the water, they were unaware of the missing reports and the failed monitoring, they did not understand how the vessel operations occurred, they totally missed the fact that the operation was carving trenches through Area 1 and as they failed to pick that up in their non-compliant surveys, they also failed to do the required tier 2 detailed investigations.

c) In the absence of the proper investigations and monitoring as required by the existing conditions of consent, and the proper reporting and assessments, including as to seafloor imaging, over the period of the consent there is both insufficient information to enable the consent authority to consider matters *"on an informed basis"*; and the information that the applicant's experts have relied upon is not sufficiently reliable to make predictions as to the future impact of another 20 years of seabed mining.

d) It would be reasonable and proportionate in these circumstances to decline the application for renewal. The applicant still has a period of time within which to demonstrate compliance with the existing conditions of consent and to establish a proper baseline and foundation for assessment, without requiring them to cease operations. This submission is reinforced by the failure to comply with

[25] *R J Davidson Family Trust (NZEnvC judgment)*, above n 23 at [25]-[26].

monitoring conditions which, if they had been complied with prior to the renewal application being made, would have afforded the community a much better information base from which to critically analyse the assertions in the applicant's evidence.

6.7 It is therefore open to the Commissioners to decline the application on the basis of inadequate information and require the applicant to reapply once that information has been properly collated. This applies notwithstanding the fact that, as also in the *Davidson* case, the application had been accepted by the consent authority as "complete" pursuant to 88 of the RMA.

6.8 Indeed, so long as any refreshed application is made more than six months prior to the expiry of its existing consent,[26] the applicant could continue to operate under the existing consent until such time as a new consent is granted or declined and all appeal rights have been extinguished. That is a far more reasonable and proportionate response than making a judgment that based on multiple hypotheticals, both as to the environment as it exists now or should have existed, and the future environment as it might be modified by any renewed consent.

7. OTHER RELEVANT FACTORS UNDER S 104

Adverse effects – s 104(1)(a)

7.1 The evidence of Dr Mead establishes that the practice of repeatedly dredging the same shore-parallel dredge lines have caused multiple lines of trenches well over 1 m deep, with some over 2.5 m deep. His investigations have been vindicated by the applicant now conceding the presence of a large trench, somewhat deeper and wider, euphemistically called a swale. Dr Mead's opinion is that the trenches are very likely to have resulted in negative environmental impacts on sediment transport processes within the Mangawhai-Pakiri embayment.[27]

7.2 In Dr Mead's opinion, the deep trenches created are likely to capture shoreward-moving sediment during large storm events and where wave orbital is fast enough to lift sediment

[26] RMA, s 124(1); or between six and three months before the expiry of the existing consent with leave of the Council pursuant to s 124(2).
[27] Mead, [1.2].

off the seabed, even for very short periods of time.[28] That shoreward-moving sediment is then dredged from the trenches, interrupting or halting altogether sediment transport further inshore.[29]

7.3 In the opinion of Dr Mead this increases the risk of negative effects for the embayment's beaches over time, due to the loss of sand being transported shoreward.[30]

7.4 Mr Clapshaw also discusses other adverse affects of the trenches and makes the point that the seabed has environmental and cultural values and is not open slather, just because it may be beyond 25m in depth.

Relevant provisions of planning documents

7.5 In my submission, the most relevant objectives and policies are those identified in the evidence of Dr Mitchell for FOPB, especially Policy F2.6.3(2) of the AUP, requiring the adoption of a precautionary approach for applications of this type. It is accepted that adaptive management can be applied as part of a precautionary approach. The applicant says it is effectively adopting a precautionary approach through its proposed conditions, in the guise of what ought to be an adaptive management approach.

Adaptive management

7.6 The key requirements for an adaptive management approach are as follows:[31]

a) There must be good baseline information about the receiving environment.

b) The conditions must provide for effective monitoring of adverse effects using appropriate indicators.

c) Thresholds must be set to trigger remedial action before the effects become overly damaging.

d) Finally, the effects that might arise can be remedied before they become irreversible.

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28 Mead, [1.5].
29 Ibid.
30 Mead, [4.16].
31 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [133].

7.7 Ultimately, whether an adaptive management regime is sufficient to accord with the precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised.[32]

7.8 With regard to criterion (a), a sufficient baseline is required before adaptive management can be embarked on (as opposed to a prohibition of activity until any deficiency in baseline information is remedied).[33] However, in this case, the sheer size of the deficiency in baseline information because of what has happened, or not happened, over the past years, means there is a much higher level of risk and uncertainty, and significant adverse effects cannot therefore be discounted.

7.9 Dr Mitchell's evidence is also that there is *"no certainty that a precautionary approach will be followed"* and that delegating these matters to the EMMP *"does not accord with good practice"*.[34]

7.10 In relation to criterion (b), Dr Mitchell has criticised the conditions offered as failing to provide suitable standards against which to assess the anticipated adverse effects.[35] In his view, the conditions would need to be much more explicit before they were consistent with an adaptive management regime.

7.11 The same applies in relation to criterion (c) and the thresholds at which remedial action is required. The "*significant adverse effect*" threshold for the review condition (Condition 8) relied upon by Mr Hay is inconsistent with the significant values attributed to the surrounding environment and Policy F2.6.3(2) of the AUP.[36]

7.12 Finally, the Commissioners can have little confidence (at this stage) that any effects identified through the proposed conditions will be able to be remedied before they become irreversible. This is a function of:

a) the significant gap in the baseline information that ought to have been available (if the applicant had been complying with its existing conditions of consent); and

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32 Ibid at [139]-[140].
33 Ibid at [135].
34 Mitchell, [46].
35 Ibid.
36 Ibid at [48].

b) the lack of analysis undertaken through this process, in reliance on the assumption by the applicant's experts that it had been complying with its requirements and that the effects of such compliance would be relatively benign.

7.13 Ultimately, it is difficult to see how the proposal could possibly comply with Policy F2.6.3(2) of the AUP, or for that matter Policy 3 of the NZCPS which has been given effect to through the AUP policy.

7.14 In the s 42A addendum report, the reporting officer appears to resile from their earlier position that *"applying a precautionary approach is not required to restrict the activity in this case"*. The reporting officer now says that this comment related only to whether or not it was necessary to *"restrict the scope or granting of consent",* and did not relate to the framework of conditions where, in his view, a precautionary approach has been taken. These statements are both contradictory and confused. The principal mechanism to *"restrict the scope*" of a consent is through conditions. If appropriate restrictions cannot be achieved through conditions, either because they are ineffective or because there can be no certainty that they will be followed, the only option is to decline consent. The reporting officer's addendum does not grapple with this issue at all. The Council's position in this regard is inconsistent with a proper application of the precautionary approach.

"Subject to Part 2"

7.15 The recent decision of the Court of Appeal in *R J Davidson Family Trust* confirms that an assessment of the proposal must be made against Part 2 of the RMA.[37] That is a direct consequence of the inclusion of the words "subject to Part 2" in s 104(1), but also due to the nature of the obligations in Part 2 as "strong directions, to be borne in mind at every stage of the planning process".[38]

7.16 However, the Court of Appeal also cautioned against separate recourse to Part 2 in circumstances where plans had been *"competently prepared under the [RMA]"*, and also explicitly where the NZCPS was engaged. At paragraph 71 of the judgment, which is set out in full below, the Court set out its rationale:

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[37] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
[38] Ibid at [51], citing *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].

> Where the NZCPS is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS, and (notionally) by the provisions of the regional coastal plan giving effect to the NZCPS. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the NZCPS. But more than that, resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

7.17 Here, the NZCPS is engaged. So too are the objectives and policies of the relevant regional coastal plan. This application is fundamentally inconsistent with Policy 3 of the NZCPS and Policy F2.6.3(2) of the AUP. Arguably, it is *"demonstrably in breach"* of those policies, because of the lack of proper baseline information. The risk is that, in the absence of a proper knowledge base, there could be effects that would also contravene Policies 11, 13 and 15 of the NZCPS (in light of the recognised areas of significant value in the vicinity of the subject site).

7.18 In that case, the Court of Appeal's view was clear. The *"thrust"* of the relevant NZCPS and regional coastal plan policies cannot *"properly [be] put to one side"* by the applicant in this case by *"calling [Part] 2 in aid".*[39] Genuine consideration and application of the relevant plan considerations leave little room for any other outcome.[40]

East West Link decision

7.19 It must be acknowledged that a recent decision of the High Court concerning the East West Link project took a different approach to the application of the policies in F2 of the AUP.[41] In that judgment, Powell J declined appeals by Royal Forest and Bird and Ngāti Whātua against the Board of Inquiry's decision to grant consents and notices of requirement for the proposal. The two grounds of appeal advanced were that the Board erred in finding that the proposal passed the "objectives and policies" gateway under s

[39] Ibid at [81].
[40] Ibid at [82].
[41] *Royal Forest and Bird Protection Society of New Zealand Inc & Anor v New Zealand Transport Agency & Ors* [2021] NZHC 390.

104D(1)(b), in light of the directive policies in D9 and F2 of the AUP; and that it erred in adopting a "particularisation" approach to the NZCPS under ss 104 and 171 of the RMA.

7.20 The following points can be made:

a) The *East West Link* decision is distinguishable. First, it was principally addressed at issues under s 104D. This application is for a discretionary activity, and so s 104D is not engaged. Secondly, it also concerned Chapter E26 of the AUP, related to infrastructure. Chapter E26 is not engaged by this proposal, nor is it referred to in the evidence of Mr Hay. Thirdly, the absence of factors under E26 means there is no *"specific, albeit narrow, framework"* for this application to be considered.

b) The Court found that there was no error in the Board's approach to the NZCPS under ss 104 and 171. The Board gave genuine attention and thought to the NZCPS and the corresponding policies of the AUP, and *"to the extent that there were differences preferred the formulation contained in the AUP as it was entitled to do*" (at [84]). It follows that the Commissioners must have regard to the NZCPS, but to the extent there is any difference between the NZCPS and the regional coastal plan provisions in the AUP, you are entitled to prefer the latter.

Hauraki Gulf Marine Park Act 2000

7.21 For completeness, counsel note that regard must also be had under s 104(1)(b)(iv) of the RMA to ss 7 and 8 of the Hauraki Gulf Marine Park Act 2000, which must be treated as a New Zealand coastal policy statement pursuant to s 10 of that Act.

7.22 Section 8 includes within it an objective of the *"protection, and where appropriate, enhancement of the life-supporting capacity of the environment"* and the *"natural, historic, and physical resources"* of the Hauraki Gulf, its islands, and catchments (subsections (a) and (b)). The protection principle inherent in s 8 has been accepted as

important in decision-making processes under the RMA.[42] By contrast, the Environment Court has held that less emphasis and a *"lesser standard of approach"* is placed on the contribution of those resources to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand, such as the proposed activity for renewal in the present case.[43] That distinction, and the importance of protection in this context, adds further weight to the case for declining this application as it did in *Re Waiheke Marinas Ltd*.

8. CONCLUSION

8.1 In conclusion, there is much to be said for the application of the precautionary approach in this case. There is still much that we do not know about how the dredging has been carried out and its effects, given the reality of the operation and the extensive monitoring failures. A lot of what we (apparently) do know has been demonstrated conclusively by Mr Clapshaw and Dr Mead to be false or in error. The risk and uncertainty associated with acting in these circumstances, and the potentially significant adverse effects that could result, tell against the grant of consent.

8.2 The Commissioners should exercise their discretion and judgement under s 104C to decline this application for renewal and direct the applicant to do the work necessary to demonstrate they can comply with their existing conditions of consent. That will do two things. It will increase the certainty associated with the applicant's operations and the degree of any effects associated with them. Secondly, it will serve as an important reminder to all parties (including the regulatory authorities) that proper monitoring and enforcement of consent conditions sits at the heart of the purpose of sustainable management.

8.3 That approach is consistent with the relevant policies of the AUP and the NZCPS.

8.4 Mr Clapshaw seeks that this application for consent be declined.

Derek Nolan QC

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42 *Urban Auckland v Auckland Council* [2015] NZHC 1382, [2015] NZRMA 235 at [97] and [100] (accepted in principle).
43 *Re Waiheke Marinas Ltd* [2015] NZEnvC 218 at [650]-[651].

14 May 2021