

Decision following the hearing of an application for resource consent under the Resource Management Act 1991

Proposal

To extract sand from the coastal marine area off-shore at Pakiri.

This resource consent is **REFUSED**. The reasons are set out below:

Application number:	CST60343373 and DIS60371583
Site address:	Coastal Marine Area – Pakiri Beach
Applicant:	McCallum Brothers Limited (MBL) The original applicant (Kaipara Limited) transferred all interests in the applications and its existing coastal permit to MBL on 8 October 2021
Hearing commenced:	Wednesday 5 May 2021, 9.30 a.m. Wednesday 5 and Thursday 6 May were held at the Warkworth Town Hall. Friday 7 May was held at the Omaha Marae. Monday 10 and Tuesday 11 May were held at the Pakiri Hall. Wednesday 12 to Friday 14 May were held at the Warkworth Town Hall. The hearing was reconvened on 28 February and 1 March 2022 and held remotely by way of Microsoft Teams.
Hearing panel:	Les Simmons (Chair) Melean Absolum Juliane Chetham Karyn Kurzeja
Appearances:	<u>2021 Hearing</u> <u>For the original Applicant:</u> Kaipara Limited represented by: Morgan Slyfield, Counsel Steve Riddell, Kaipara Limited Dr Shaw Mead, Surf Break Impacts Mike Farrow, Landscape and Visual Clinton Healey, Seabed Survey Gregory Akehurst, Economics Jennifer Hart, Coastal Processes Jon Styles, Acoustics (Airborne) Dr Matthew Pine, Underwater Noise Deanna Clement, Marine Mammals Simon West, Marine Ecology David Hay, Planning

For the Submitters:

Annie Baines, Cultural

Christine Baines, Cultural

Sammy Williams, Cultural

Kelly Klink, Cultural

Pakiri G Trust

- Wayne Greenwood, Cultural
- Baden Brown, Cultural

Te Whanau o Pakiri

- Olivia Haddon, Cultural
- Tamati Stevens, Mātauranga Māori
- Sian John, Coastal Processes
- Pita Rikys, Cultural
- Ian Southey, Ornithologist
- Dr Craig Radford, Underwater Acoustics
- Ringi Brown
- Wendy Brown
- Sharley Haddon
- Tamihana Paki
- Michael Marris
- Elizabeth Allen
- Star Gossage
- Grace Gossage
- Marama Gossage
- Ra Gossage
- Jessie Stanley
- Carolyn Reid
- Vanessa Mutu

Auckland Conservation Board

- Lyn Mayes, Chair
- Dr Andrew Jeffs, Board member

Greg Bradford

Sam Bradford

Manuhiri Kaitiaki Charitable Trust

- Mook Hohneck, CEO
- Jason Pou, Counsel
- Ringi Brown, Trustee
- Vern Rosier, Trustee

AML Limited t/a Allied Concrete

- Lee Skinner, Corporate

McCallum Brothers Limited

- John MacRae, Counsel
- Callum McCallum, Corporate
- Derek Todd, Coastal Processes
- Tim Hegarty, Planning
- Shayne Elstob

SAVE Te Arai

- Aaron McConchie

Mangawhai Harbour Restoration Society

- James Carnie, Counsel
- Richard Bull, Chair

Department of Conservation

- Lisa Sutherland, Counsel
- Thomas Christie, Planning evidence tabled

Surf Break Protection Society

- Paul Shanks

Royal Forest and Bird Protection Society

- Nicholas Beveridge

Kayasand

- Bram Smith
- Andrew Turnbull

Damon Clapshaw

- Derek Nolan QC, Counsel
- Dr Shaw Mead, Coastal Processes

Friends of Pakiri Beach

- Sir David Williams, KNZM, QC, Chair
- Nick Williams, Counsel
- Dr Martin Single, Coastal Geomorphology
- Dr Philip Mitchell, Planning

Bjorn Hilke

For Council:

Chelsea Gosden, Team Leader

Colin Hopkins, Reporting Planner

Bin Qiu, Environmental Health Officer

Peter Kensington, Landscape Architect

Dr Kala Sivaguru, Coastal Ecologist

Ashiska Sharma, Coastal Processes Specialist

Alan Moore, Principal Specialist

Sam Otter, Senior Hearings Advisor

2022 Reconvened Hearing

For the Submitters

Te Whanau o Pakiri

- Vicki Morrison-Shaw, Counsel
- Pita Rikys, Cultural
- Sian John, Coastal Processes
- Olivia Haddon, Cultural

Director General of Conservation

- Dr Tom Shand

	<p>Damon Clapshaw</p> <ul style="list-style-type: none"> • Derek Nolan, Counsel • Damon Clapshaw • Dr Shaw Mead, Coastal Processes <p>Friends of Pakiri Beach</p> <ul style="list-style-type: none"> • Derek Nolan, Counsel on behalf of Nick Williams • Professor Mike Hilton, Coastal Processes <p><u>For the Council</u></p> <ul style="list-style-type: none"> • Colin Hopkins, Reporting Planner • Peter Kensington, Landscape Architect • Dr Kala Sivaguru, Coastal Ecologist • Ashiska Sharma, Coastal Processes Specialist • Sam Otter, Senior Hearings Advisor¹ <p><u>For the Applicant</u></p> <p>McCallum Brothers Limited represented by:</p> <ul style="list-style-type: none"> • John MacRae, Counsel • David Hay, Planning • Callum McCallum, Corporate • Tame TeRangi, Cultural • Gregory Akehurst, Economics • Derek Todd, Coastal Processes • Simon West, Marine Ecology
Hearing adjourned	Friday 14 May 2021 at 5.20pm
Hearing reconvened	Monday 28 February 2022
Commissioners' site visits	Tuesday 11 May, Thursday 13 May 2021 and Monday 7 March 2022
Hearing Closed:	Monday 14 March 2022

INTRODUCTION

1. This decision is made on behalf of the Auckland Council (“**the Council**”) by Independent Hearing Commissioners Les Simmons (Chair), Melean Absolum, Juliane Chetham and Karyn Kurzeja appointed and acting under delegated authority under sections 34 and 34A of the Resource Management Act 1991 (“**the RMA**”).
2. This decision contains the findings from our deliberations on the application for resource consent and has been prepared in accordance with section 113 of the RMA.
3. The application was publicly notified at the applicant’s request on 8 May 2020. A total of 660 submissions were received, with 4 in support, 1 being neutral and 655 in opposition.

¹The Panel would like to thank Mr Otter on behalf of all participants for his management of the hearing across multiple venues, including on-line.

SUMMARY OF THE PROPOSAL AND ACTIVITY STATUS

4. The applicant seeks coastal and discharge permits to extract sand from the coastal marine area off shore at Pakiri. Extraction is proposed to be undertaken using a trailer suction dredge. Consent is being sought to extract up to 2,000,000m³ of sand from between the 25m and the 40m isobaths over an approximate area of 44.12km², with no more than 150,000m³ per any 12 month period between the 25m and 30m isobaths.
5. The proposal requires resource consent for the following reasons, as set out in the s42A report.

“Coastal Permit (s12) – CST60343373

Auckland Unitary Plan (Operative in part)

Regional Coastal Use (operative plan provisions)

F2 Coastal – General Coastal Marine Zone

- *Consent is required as a discretionary activity for coastal marine disturbance for mineral extraction (excluding petroleum) in accordance with rule F2.19.4 (A28);*
- *Consent is required as a discretionary activity for coastal marine disturbance within the northern and southern control monitoring areas, that is not otherwise provided for in the GCMZ in accordance with rule F2.19.4 (A37);*

Discharge Permit (s15) – DIS60371583

Auckland Unitary Plan (Operative in part)

Regional Coastal Use (operative plan provisions)

F2 Coastal – General Coastal Marine Zone

- *Consent is required as a discretionary activity for the disposal or storage of waste or other matter arising directly from, or related to, the exploitation and associated offshore processing of seabed mineral resources in accordance with rule F2.19.2 (A15).*

*The reasons for requiring consent are considered together as a **discretionary activity** overall.*

Note:

“The application was lodged on the basis that it seeks all necessary consents to give effect to the application, and whilst initially consent was sought only with respect to F2.19.4 (A28), the applicant has subsequently confirmed that consent is also being sought with respect to F2.19.2 (A15) (see attachment 2B).

It is also noted that the initial Council interpretation and advice to the applicant was that consent was not explicitly required with respect to F2.19.2 (A15), with these matters forming part of the activities associated with F2.19.4 (A28) and the permitted activity F2.19.7 (A62). Noting, however, that there is some inconsistency with the interpretation of the relatively new rules of the AUP (OP) and some overlap of the activities, it is acknowledged that it is appropriate for consent to also be sought for this discharge.

In addition, the Council consider it appropriate that within the control areas (proposed for monitoring purposes), that it is appropriate to distinguish these activities from the mineral extraction activities and have therefore recommended that in line with the applicant seeking all the necessary consents for the activity, that consent also be considered for F2.19.4 (A37).²

6. We note that Mr Hay in his EIC agreed that consent should also be considered in terms of F2.19.4 (A37).
7. The above reasons for consent are from the s42A report dated 1 March 2021. By the time the hearing was closed in March 2022 it is relevant to note that the proposed northern control monitoring area is no longer proposed in its original location. The revised location of this northern area is within the Northland Region. A Certificate of Compliance has been issued by the Northland Regional Council confirming that monitoring within this control area is a permitted activity.³
8. Overall the proposal has been considered as a discretionary activity.

PROCEDURAL MATTERS

9. No late submissions were received.
10. No written approvals have been provided.
11. Kayasand Limited (Kayasand) lodged a submission opposing the application. Their submission stated that they were not a trade competitor of the applicant. The issue of whether or not Kayasand were trade competitors was raised, by the then applicant Kaipara Limited. We provided the opportunity for Kayasand to obtain and provide legal advice on the matter. Legal advice from Tompkins Wake dated 25 May 2021 submitted that Kayasand were not trade competitors.
12. The legal advice on behalf of Kayasand stated:

“9. In the present context, the Applicant is in the business of extracting and selling sand to the construction industry. Kayasand is in the business of supplying equipment to be used for the purpose of manufacturing sand. Kayasand is not itself in the business of extracting or selling sand, and is therefore not competing in the same commercial market as the Applicant. For these reasons we submit that Kayasand should not be considered to be in trade competition with the Applicant.”

²S42A report, Section 10

13. At the reconvened hearing on 1 March 2022 we informed Mr MacRae of this procedural matter and he was given the opportunity to respond to the Tompkins Wake legal advice. Mr MacRae provided a written response dated 11 March 2022 in which he submitted⁴ that the Tompkins Wake opinion had failed to address the relevant provisions of the RMA, made no reference to the 2009 Resource Management (Simplifying and Streamlining) Amendment Act which had significantly tightened the restrictions on trade competitors, nor made any reference to the relevant case law following that amendment.
14. The key submissions from Mr MacRae were:
- “10. The first point is whether Kayasand is engaged in trade competition with MBL or, in the words of s.308A(a) is a "trade competitor". In the absence of a definition in the Act, the Courts have taken a broad view of the matter. The test does not rely on a narrow analysis of markets or market segments but rather whether there is "a competitive activity having a commercial element"; see Montessori Pre-school Charitable Trust v Waikato District Council [2007] NZRMA 55at[19], a High Court decision which has been regularly applied by the Environment Court since.*
- 11. In the present case, Kayasand produces equipment which is capable of producing sand from aggregate which, says Kayasand, is of a quality suitable for making concrete. It is clear from Kayasand's submission that they see the use of their products as being in competition with the production of the kind of marine sand produced by MBL. Paragraphs 7-8 and 10-12 of the submission are aimed at persuading the Commissioners to restrict the supply of MBL's off-shore sand in order to promote the use of Kayasand's equipment. Clearly, Kayasand sees MBL's production of marine sand by the use of a dredge and excavating equipment as being an activity that competes with its own production of an alternative form of sand producing equipment. Kayasand's entire case in opposition to the application is that, if the production of marine sand is restricted, then its own position as the producer of alternative sand making equipment will be more competitive. It follows that there is a competitive activity and, of course, there is the requisite commercial element.*
- 15. None of the material contained in Kayasand's submission refers to, let alone establishes, a direct effect on Kayasand of any aspect of MBL's proposal that might potentially adversely affect the environment.”*
15. We have accepted Mr MacRae’s submissions and find that the Kayasand submission must be disregarded under section 104 (3) of the RMA.
16. In relation to the hearing and the process that was established for the caucusing of the coastal processes expert group we issued eight Directions between 22 March 2021 and 21 February 2022. These Directions are all available as part of the hearing records and we see no need to summarise them as part of our decision.

⁴ Paras 7-9

17. A Joint Witness Statement (JWS) dated 13 December 2021 resulted from the expert caucusing. It is also available as part of the hearing records and the most relevant contents of the JWS are referred to elsewhere in our decision.
18. The Panel undertook site visits on 11 May 2021 to Pakiri Beach and surrounding area, on 13 May 2021 to Te Arai Beach to observe the night time operation of the William Fraser and on 7 March 2022 an all day visit to various public locations and private properties from Pacific Road Beach in the north to the Pakiri River/Pakiri Beach locality in the south.

RELEVANT STATUTORY PROVISIONS CONSIDERED

19. In accordance with section 104 of the RMA, we have had regard to the relevant statutory provisions including the relevant sections of Part 2 and sections 104, 104B, 105, 107, 108, 108AA, 123, 125 and 128.

RELEVANT STANDARDS, POLICY STATEMENTS & PLAN PROVISIONS CONSIDERED

20. In accordance with section 104(1) (b) (i)-(vi) of the RMA, we have had regard to the relevant policy statements and plan provisions of the following documents.
 - New Zealand Coastal Policy Statement 2010 (NZCPS)
 - Hauraki Gulf Marine Park Act 2000(HGMPA)
 - Auckland Unitary Plan – Operative in Part (AUP)
21. We also considered the following other matters to be relevant and reasonably necessary to determine the application in accordance with section 104(1) (c) of the RMA.
 - The following Iwi Management Plans:
 - Te Uri o Hau Kaitiakitanga o Te Taiao (2011)
 - Te Iwi o Ngatiwai Iwi Environmental Policy Document (2007)
 - Marine and Coastal Areas (Takutai Moana) Act 2001
 - Tai Timu Tai Pari Sea Change Marine Spatial Plan

Local Board comments

22. No comments were received from the Rodney Local Board.

SUMMARY OF EVIDENCE

23. The Notice of Hearing dated 8 December 2020 included a timetable for the pre-circulation of the Council section 42A report and the evidence to be presented on behalf of the applicant and submitters. The majority of that evidence had been pre-circulated prior to the hearing being postponed due to Covid-19 restrictions. We issued directions

dated 17 March 2021 that requested an addendum to the section 42A report be prepared to address the matters raised in the previously pre-circulated evidence. We also directed a timetable for further expert evidence on behalf of the applicant and submitter's to be pre-circulated prior to the hearing commencing on 5 May 2021.

24. Following the adjournment of the hearing on 14 May 2021, Kaipara Limited, on 21 May, sought directions from us in relation to the remaining hearing process. In summary, following a series of directions, with support from the then applicant Kaipara Limited and general support from submitters, we directed that a further bathymetric survey be undertaken of the existing consented extraction areas and the proposed control areas being sought in relation to the current application. Kaipara had offered to undertake such a survey before the hearing was reconvened. In addition we directed that an expert coastal processes group be convened. The expert group originally consisted of the coastal process experts, seven in total, who had presented evidence during the hearing to date.⁵ Their evidence had been presented on behalf of the applicant, submitters and the Auckland Council. The group was to initially discuss and determine the extent of the proposed survey area and the methodology for the survey. Following completion of the survey the group was directed to convene and produce a joint witness statement (JWS). The group was chaired by an independent chair and a JWS dated 13 December 2021 was produced.
25. Following on from the JWS we directed that the parties who were still involved in the hearing (Kaipara Limited was no longer the applicant by this date) provide a supplementary statement of evidence explaining the extent to which the Expert Group caucusing outcomes had changed the conclusions of their evidence in chief presented in May 2021. We also directed, with the support of MBL (now the applicant), that the submitter parties who had engaged coastal experts could also present submissions in relation to the caucusing outcomes, the JWS and the supplementary evidence of the coastal experts.
26. At the reconvened hearing beginning on 28 February 2022 submissions and expert evidence was presented on behalf of the submitters. This was followed by the response of the Auckland Council reporting team and finally, the reply on behalf of MBL. All of the evidence had been pre circulated.
27. Section 113 (1) (ad) requires us to provide a summary of the evidence presented to us during the hearing. With respect to the evidence presented to us from all parties, we see no benefit in summarising it under a 'Summary of Evidence' heading in our decision. The evidence was comprehensive, and the majority of witnesses presented summary statements and those statements can be referred to as part of the hearing records. Additionally, we were presented with a significant volume of evidence in terms of both the numbers of witnesses and the length of many of the individual statements. Again, all evidence presented can be referred to as part of the hearing records. We record that an 'Evidence Index' has also been prepared as part of the hearing record. That index includes reference to the witness statements of evidence and the various legal submissions, communications, photographs, videos and other documentation that were presented to us, or tabled, during the hearing process.

⁵Dr Single was unavailable to participate in caucusing and was replaced by Professor Hilton.

28. In this particular case, in addition to the above factors, the issues that were in contention between the parties was extensive. Therefore we have summarised the evidence presented to us under the headings that we have identified as being the ‘Principal Issues in Contention.’
29. We have reviewed and considered all of the evidence presented to us. Not every witness will be specifically identified, nor will the individual statements made by every witness be specifically referred to in our decision.

PRINCIPAL ISSUES IN CONTENTION

30. After analysis of the application and evidence (including proposed mitigation measures), undertaking site visits, having considered the submissions received, the Council section 42A reports, the Council reporting team’s response to the evidence presented, the outcome of the caucusing of the coastal process experts and their joint witness statement and the applicant’s reply, we have identified the principal issues in contention listed below.
31. While some of these matters were not necessarily issues that were in contention between the parties, we consider that they are relevant in determining our findings on the principal matters that were in contention.
- Legal Submissions, Case Law and Planning Evidence with respect to interpreting the relevant Statutory Documents
 - The Need for a Precautionary Approach
 - Has Adequate Information been provided to determine the grant of consent (s104(6))
 - Cumulative Effects
 - Positive Effects
 - The Existing/Receiving Environment
 - The Permitted Baseline
 - Cultural/Mana Whenua Effects
 - Coastal Processes Effects
 - Ecological Effects
 - Recreational and Amenity Effects
 - Visual, Landscape and Natural Character Effects
 - Lighting Effects
 - Noise Effects (above water)
 - Economic Effects and Consideration of Alternatives
 - The Auckland Unitary Plan – Operative in Part (AUP)
 - The New Zealand Coastal Policy Statement 2010 (NZCPS)
 - The Hauraki Gulf Marine Park Act 2000 (HGMPA)

- Assessment in terms of s104 of the RMA
- Part 2 Matters

LEGAL SUBMISSIONS, CASE LAW AND PLANNING EVIDENCE WITH RESPECT TO INTERPRETING THE RELEVANT STATUTORY DOCUMENTS

32. The Panel was presented with planning evidence at both parts of the hearing (May-June 2021 and February-March 2022). At the 2021 hearing four of the five qualified and experienced planners (Messrs Hay, Hopkins, Hegarty and Christie) recommended that consent should be granted subject to conditions. Dr Mitchell declined to make a recommendation and, instead, focussed his evidence on the proposed conditions.

33. As the reconvened hearing focussed on the Auckland Council reporting team's response to the evidence heard, and the applicants reply, we heard only from Mr Hopkins and Mr Hay at this time.

34. In his reply Mr Hopkins, the reporting planner, recommended that consent should be refused. This was particularly after considering the cultural evidence that had been presented by Mana Whenua. In summary he considered that:

*"...adverse cultural effects as experienced by some mana whenua groups are of such significance that they will be unacceptable from a resource management perspective."*⁶

35. In addition to this further assessment in terms of the actual and potential effects on the environment, under s104 (1) (a) of the RMA, Mr Hopkins also revisited his previous assessment under s104 (1) (b) of the RMA. With respect to the NZCPS and Objective 3 and Policy 2, Mr Hopkins concluded that:

*"Overall, having considered the relevant matters in the NZCPS, the management techniques proposed by the applicant, along with the specialist assessments of the sand extraction activity, it is considered the proposed extraction and associated discharge activities cannot be managed in a way that is fully consistent with the anticipated outcomes of the NZCPS, and in particular this arises through the fundamental conflict between the nature of the activity and its impact on cultural values. Opportunities do exist to promote ongoing engagement in (a) manner generally consistent with the direction of the NZCPS"*⁷

36. He also stated that:

*"For completeness, beyond these matters, the proposal remains generally consistent with the NZCPS as outlined in the s42A report and the Addendum Report."*⁸

37. With respect to the HGMPA, Mr Hopkins also reconsidered his previous assessment. He now concluded that:

⁶ Reply to evidence dated 11 February 2022, page 4

⁷ Ibid, page 12

⁸ Ibid, page 12

“With respect to the management of the Hauraki Gulf in accordance with s8, within the framework of objectives to protect, maintain, and where appropriate enhance the life supporting capacity of the environment of the Hauraki Gulf and its islands there is a conflict between these identified matters of national significance in particular between the objectives seeking protection in 8(c) and (d) and the objective seeking maintenance in 8(e).

As such, having identified matters of national importance, as well as conflicts between the objectives to protect, maintain, and where appropriate enhance the life supporting capacity of the environment of the Hauraki Gulf and its islands, it is considered that the proposed sand extraction and associated discharge activities cannot be managed in a way that is fully consistent with the anticipated outcomes of the HGMPA. In particular, and notwithstanding the social and economic contribution to well-being of communities, this arises through the fundamental conflict between the nature of the activity and the ability to protect the cultural values of the Hauraki Gulf.

For completeness, on the basis of the assessments with respect to coastal process and coastal ecology, as well as amenity (with respect to recreation), the proposal is considered to remain consistent with the outcomes anticipated by the HGMPA.”⁹

38. Mr Hay, in his rebuttal evidence dated 21 February 2022, disagreed with the basis of Mr Hopkins’s recommendation to refuse consent. Mr Hay accepted the need for Mr Hopkins to reassess his earlier recommendations after having heard the evidence that had been presented, however he considered that Mr Hopkins had incorrectly applied the tests of “fundamental conflict” and “fully consistent” when reassessing the NZCPS and the HGMPA. Mr Hay stated that:

“There is not a further separate review of the proposal against the Auckland Regional Policy Statement (“RPS”) or the relevant sections of the Auckland Unitary Plan – Operative in Part (“AUPOP”).

The AUPOP (including the RPS and the Regional Coastal Plan) must give effect to the NZCPS and the HGMPA. That is, the objectives and policies of the AUPOP cannot be inconsistent or contrary with the objectives and policies of these higher order instruments. I therefore have an initial concern that although the Reporting Officer has formed the opinion that the proposal is not fully consistent with the NZCPS and the HGMPA there is no revised assessment of the proposal in terms of the AUPOP objectives and policies which give effect to the NZCPS for example (including the relevant objectives and policies of the RPS and the Regional Coastal Plan).”¹⁰

39. Mr Hay went on to comment on the key objectives and policies relating to the cultural effects concerns that had been raised by Mr Hopkins. We shall address the relevant AUP provisions later in our decision.

⁹ Ibid, page 14

¹⁰ Rebuttal evidence dated 21 February 2022, page 13

40. Before we do that, it is appropriate to record Mr MacRae’s submissions in Reply, as they relate to the differences between the planning evidence of Mr Hopkins and Mr Hay. It was his submission that:

“...Mr Hopkins did err in applying the provisions concerned with the protection of cultural values in the NZCPS and the HGMPA as cultural bottom lines (hence his “fundamental conflict”). As a result, he failed to go on to examine the provisions of the ARPS and the ARCP that are required to “give effect to” the NZCPS (per s.67 of the RMA) and “not conflict with” the HGMPA (s.9 (2)).

The ARPS and the ARCP clearly meet those statutory requirements of implementation and consistency respectively and are, therefore, the primary documents of reference for the purpose of assessing whether the balance required between the protection of cultural values and the economic and social benefits to be derived from the use and development of coastal resources has been reached in this case. Reference to the NZCPS and the HGMPA is appropriate for the purpose of assisting with the interpretation of the regional planning instruments but it is wrong to apply them as determining the issue without regard to the regional planning instruments or where the regional instruments satisfactorily address the matters in question; Tauranga Environment Protection Society Inc. v Tauranga City Council [2021] NZHC 1201 at paragraphs 119-128.”¹¹

41. Having carefully considered the High Court’s decision we note the following findings in particular;

“[2] (c) The Court erred in law in applying an “overall judgement” approach to the proposal and its approach to pt 2 of the Resource Management Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified ... and apply them to the proposal.

[2] (d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS)

[117] I agree it was reasonable for the Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction. There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP...

[118] The more major difficulty with the Court’s decision is that, consistent with its overall judgement approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition of the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested that regional and district plans “generally treat both the protection of ONFLs and the provision of network infrastructure as desirable. But it considered they did not “particularise how those broad objectives or policies are to be pursued or how potential conflict between them is resolved. Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how “potential conflict” between the NPSET

¹¹ Submissions in Reply, paras 55 and 56

and NZCPS is to be resolved, and moved to its overall judgement. As I held above, the Court’s employment of the overall judgement approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.”

42. Mr Hopkins and Mr Hay had both concluded that the proposed sand extraction was consistent with the direction of the AUP and in particular the regional coastal plan provisions contained in Chapter F2 which relates to the General Coastal Marine Zone. None of the other planners, apart from Dr Mitchell, specifically addressed Chapter F2.¹²
43. Adopting the findings referred to above of the Tauranga decision of the High Court, our starting point in terms of the relevant statutory documents, as set out below, is the AUP and to start with the Auckland Regional Coastal Plan and Chapter F2.

THE AUCKLAND UNITARY PLAN – OPERATIVE IN PART (AUP)

Chapter F2 Coastal – General Coastal Marine Zone

44. The proposed sand extraction seeks coastal and discharge permits within the Coastal-General Coastal Marine Zone. Coastal marine area disturbance for mineral extraction is a discretionary activity under Rule F2.19.4 (A28).
45. At F2.1 under the heading Zone description it is stated that:

“The Coastal – General Coastal Marine Zone comprises the majority of the coastal marine area.

The purpose of the Coastal – General Coastal Marine Zone is to provide for use and development in the coastal marine area, in particular those forms of use and development that have a functional or operational need to be undertaken or located in the coastal marine area, while:

- enabling people and communities to provide for their social and economic well-being, through the appropriate use and development of the coastal marine area;*
- enabling the construction, operation, maintenance and upgrading of infrastructure within the coastal marine area (that cannot be practicably located on land) where it has a functional or operational need;*
- protecting natural character, landscape values and natural features;*
- maintaining and enhancing water quality and the life-supporting capacity of the marine environment;*
- protecting significant ecological values;*

¹²Mr Hegarty only referred to the activities permitted in the zone.

- *protecting historic heritage values;*
- *recognising and providing for Mana Whenua values in accordance with tikanga Māori;*
- *maintaining and enhancing public access, open space, recreational use, amenity values, and access to and along the coastal marine area;*
- *not increasing the risk of subdivision, use and development being adversely affected by coastal hazards; and*
- *managing conflicts between activities within the coastal marine area.*

46. In summary, the zone's purpose is to provide for use and development for activities such as the proposed sand extraction, while of particular relevance to this proposal protecting natural character, landscape values, natural features, significant ecological values and heritage values, maintaining and enhancing water quality, the life-supporting capacity of the marine environment, public access, open space, recreational use, amenity values and access to and along the coastal marine area, recognising and providing for Mana Whenua values and managing conflicts between activities within the coastal marine area.

47. F2.1 also states that:

“Some parts of the Coastal-General Coastal Marine Zone have particular significant use or values that are mapped in overlays or precincts.”

48. The proposed sand extraction area is outside any of the mapped overlays or controls that have been applied in this particular locality. We note however that there are overlays that have been applied within the coastal marine area and the nearshore environments to the west of the proposed sand extraction area.

49. Further, F2.1 records that:

“The Plan has identified significant marine communities and habitats in the D9 Significant Ecological Areas Overlay. The coastal marine area has not been comprehensively surveyed for the purpose of identifying these. The D9 Significant Ecological Areas Overlay under-represents the significant marine communities and habitats present in the sub-tidal areas of the region. Additionally, in larger coastal marine areas with ecological significance, such as the Hauraki Gulf, or the Kaipara and Manukau harbours, it is difficult to map ecological values because of their scale and the highly mobile habits of marine fauna. A precautionary approach is therefore required to manage effects in the coastal environment. The criteria in Schedule 4 Significant Ecological Areas - Marine Schedule will be of use in determining whether a previously unidentified area has significant ecological value. The New Zealand Coastal Policy Statement will also be relevant in that regard, particularly Policy 11.”

50. Finally, we also note that B6.6 of the RPS Mana Whenua chapter “*Explanation and principal reasons for adoption*”, states “*for reasons such as limited investment, cultural sensitivities and mismanagement of information in the past, very little Mana Whenua*

cultural heritage has been scheduled despite the large number of Mana Whenua groups with strong associations to Auckland. The Council has a statutory responsibility to protect Mana Whenua cultural heritage from inappropriate subdivision, use and development.”

51. The sole objective in relation to mineral extraction is:

“F2.6.2 Objective [rcp]

- (1) *The extraction of minerals, sand, shingle, shell, petroleum, and other natural material occurs in a manner that does not have significant adverse effects on the coastal marine area or nearshore environments.¹³”*

52. The related policies to this objective are:

“F2.6.3 Policies [rcp]

- (1) *Provide for the extraction of minerals, sand, shingle, shell, and other natural material from appropriate areas, having regard to the values of the area and the natural rate of sediment being deposited over sediment lost from the area where extraction is proposed.*
- (2) *Adopt a precautionary approach to applications for petroleum exploration and for mineral extraction within the coastal marine area, which may include using an adaptive management approach in terms of the following:*
- (a) *staging the operation;*
 - (b) *the location of the activity;*
 - (c) *the maximum volume of minerals, sand, shingle, shell and other natural material to be extracted;*
 - (d) *the term of consent; or*
 - (e) *environmental monitoring.*
- (3) *Require applications for petroleum exploration or for mineral extraction to identify the significant adverse effects, and the extent to which they can be avoided, remedied or mitigated, for all of the following:*
- (a) *marine and coastal vegetation;*
 - (b) *marine and coastal fauna, including feeding, spawning and migratory patterns, bird roosting and nesting, fish and shellfish;*
 - (c) *water quality, including effects arising from sediment, turbidity or contaminants;*

¹³Underlining is the Panels.

- (d) *habitats of a rare or endangered species;*
 - (e) *dune stability and coastal erosion;*
 - (f) *changes to the bathymetry, foreshore contours, sediment particle size or physical coastal processes;*
 - (g) *the values of significant surf breaks identified in Appendix 4 Surf breaks;*
 - (h) *recreation and amenity values of the area;*
 - (i) *established lawful activities in the area; and*
 - (j) *Mana Whenua values.*
- (4) *Require applications for petroleum exploration or mineral extraction in the coastal marine area to include measures to manage any adverse effects, including remediation and mitigation measures.*

53. With respect to the planning evidence on these provisions Dr Mitchell in his EIC dated 22 February 2021 stated that:

37These mineral extraction provisions contain important caveats, to the effect that such activities are not appropriate in all circumstances and proposed extraction needs to be sustainable considering the flow of sediment into and out of the system, and effects on the values of the surrounding environment must align with the relevant policy directions.

39It is also important to note that while the purpose of the above provisions is to avoid 'significant adverse effects' on the Coastal Marine Area and nearshore habitats, that it doesn't alleviate the need for sand mining in the Mangawhai-Pakiri coastal system to also be consistent with the various policies which direct a more stringent approach be taken when managing effects on the various significant and outstanding values attributed to the environment.

40These policies include requirements to avoid:

- (a) Certain adverse effects on the adjacent SEA-M and on the significant indigenous fauna which is known to inhabit or pass through the area in which the proposed sand mining occurs; and*
- (b) Certain adverse effects on the ONL and ONF which are located inshore of the proposal."*

41As noted in paragraph 4, there is a high degree of agreement between the various technical experts for the applicant that the effects of the proposal, including on coastal processes and in the highly valued nearshore environment, will likely be acceptable and in accordance with the expectations of the planning documents."

42However, the provisions of the relevant planning documents also direct that a precautionary approach be taken; that the natural and physical resources of this

area be managed in an integrated way; and that the cumulative effects need to be considered.

43Accordingly, and based on the evidence of Dr Single, I consider that the conditions proposed by Mr Hay need to be enhanced, as I will now explain.”

54. In his evidence under the heading, the existing environment, Dr Mitchell stated that:

“22. The area inshore of the extraction area which is of particular concern to FOBP is attributed a range of notable values, and it is classified in the AUP as being a Significant Ecological Area (SEA), Outstanding Natural Feature (ONF), Outstanding Natural Landscape (ONL) and High Natural Character Area (HNC), and as containing various regionally significant surf breaks. The AUP schedules in Chapter L of the document contain a description of the values which contribute to the significance of each area. This is important as the planning documents contain specific and more onerous direction for managing effects on these areas. I return to this later in my evidence...

24. As the Commissioners will be aware, MBL hold existing consents to undertake sand extraction inshore of the proposal and are currently undertaking this activity under section 124 of the RMA whilst their application for a replacement consent is being processed. I understand Mr Hay has assessed the activity assuming the existing MBL activity does not form part of the existing environment for this proposal.

25. I am advised by legal counsel for FOBP that this determination may not be as clear cut as suggested in Mr Hay’s evidence and that this will be a matter addressed in FOBP legal submissions.

26. The MBL activity is obviously relevant when the Commissioners are considering the cumulative effects of the current proposal, particularly on coastal processes.”

55. Mr Hay in his EIC dated 12 February 2021 stated that:

“137. The sand extraction area has been specifically located so that sand extraction is seaward of the previously confirmed DOC (Depth of Closure) so that it does not have the potential to cause or exacerbate coastal erosion along the Pakiri coastline.

138. F2.6 sets out the objectives and policies for mineral extraction in the CMA. The sand extraction can continue to be undertaken in a manner which avoids significant adverse effects on the coastal marine area and the near-shore environment. Limiting the landward depth of the sand extraction area to the seaward DOC avoids or significantly reduces the risk of potential effects on the near-shore environment.

139. The site is considered suitable for continued sand extraction given the volume of available sand, the relatively small volume of sand being extracted over a twenty year period, and the relatively small extraction area.

140. An adaptive management approach is being undertaken through the implementation of an EMMP.”

56. In his EIR dated 16 April 2021, Mr Hay respond to Dr Mitchell’s evidence. With respect to Policy 2 and the precautionary approach Mr Hay stated that:

“28. Although I am in agreement that this policy is relevant I further consider that a precautionary approach is not specifically necessary in this case given the potential effects are well known and documented. However, the approach being taken in the application and proposed monitoring mirror those matters listed in this Policy in terms of taking a precautionary approach:”

29. If a precautionary approach is required to be undertaken then I consider that the formulation of the application and the recommended conditions reflect such an approach.”

57. Dr Mitchell in his supplementary evidence dated 14 May 2021 stated that:

“3 In paragraph 28 – 40 of my EIC I set out my assessment of the Auckland Unitary Plan (AUP) provisions which are most relevant to the proposal, including those which address the various significant values attributed to the Mangawhai-Pakiri embayment. For the reasons set out in my EIC these AUP provisions highlight the significant values which are present near the proposed sand extraction area, and dictate a precautionary approach be taken to identifying, monitoring and managing the effects of the proposal. The concerns expressed at the hearing about previous compliance and enforcement, further reinforces the planning imperative that a precautionary approach be taken here. The most logical way of achieving that is by robust conditions, the sharing of monitoring information, and potentially even limiting the term of any consent issued.

4 Mr Hay acknowledges the additional provisions I identified in his Evidence in Reply (EIR), concluding that the proposal is appropriate when assessed against them because the technical assessments do not identify any effects of concern that those provisions address. For the avoidance of doubt, the reason I highlighted these provisions was not because the technical evidence suggests they will not be satisfied, but because they contextualise the sensitivity and values of the general area within which this proposal is located, and because they underpin the need to have robust conditions in place which ensure those areas are protected. In my view Mr Hay’s analysis is too narrowly focussed on the findings of the technical assessments rather than considering the wider planning context, and how the proposed conditions will ensure that the various objective and policy outcomes will be achieved. In my opinion, the sensitivity of this area is such that the precautionary approach dictates that the conditions need to include a more comprehensive and robust regime of monitoring, reporting and enforcement in order to be able to detect and respond to any unexpected adverse effects that may eventuate.

8 As I stated in my EIC, my overall conclusion remains that the provisions of the relevant planning documents direct that a precautionary approach be taken, that

the natural and physical resources in this area be managed in an integrated way and that cumulative effects need to be considered.”

58. In his rebuttal evidence dated 21 February 2022, Mr Hay stated that:

“50. Having read the Joint Witness Statement prepared by the Coastal Processes Expert Caucusing Group and taking into account their outstanding issues, there is now a stronger argument that a precautionary approach is required particularly in terms of monitoring.

51. As outlined in paragraph 29 of the Reply Statement the approach taken in the application and proposed monitoring mirror those matters listed in Policy F2.6.3(2) of the AUPOP in terms of taking a precautionary approach. This approach has been further strengthened by the additional monitoring proposed in the extraction exclusion area and on the beach/foredunes which in part reflects the recommendations of the Expert Caucusing Group. In this respect, this better meets the requirements of taking a precautionary approach in terms of monitoring and reporting.”

59. In his s42A report¹⁴ Mr Hopkins stated with respect to F2.6 that:

“The demand for minerals, including sand from the CMA and the social and economic benefits that are associated with extracting the resource is recognised by the AUP (OP), along with need to ensure that the adverse effects of the mineral extraction are appropriately managed to ensure significant adverse effects do not occur.

As outlined in the assessments above, the location of the proposed extraction areas (beyond the DoC / Hallemeier limit) and management through the implementation of the EMMP (and application of the management cells) is considered appropriate to ensure that no significant adverse effects arise through the implementation of the activity.

Overall, the proposal is considered to be generally consistent with the outcomes anticipated by the AUP (OP) for activities in the General Coastal Marine Zone.”

60. In his Reply to evidence, dated 11 February 2022, Mr Hopkins did not specifically revisit Chapter F2, however in his Conclusion¹⁵ he retained his earlier position that the proposal *“has been demonstrated to be consistent with the direction of the Plan with respect to mineral extraction activities and discharges in the General Coastal Marine Zone.”*

61. In addition to the expert planning evidence we heard evidence from many other witnesses who considered that the proposed activity was not appropriately located for a variety of reasons. Some of this evidence was presented from experts in their field, such as some of the coastal process experts, ecologists and the like. Much of the evidence opposing the location of the proposed extraction areas was from Mana Whenua, local residents and interest groups, as well as from organisations such as the Auckland

¹⁴Page 34

¹⁵Page 15

Conservation Board and the Mangawhai Harbour Restoration Society. This evidence is discussed elsewhere in our decision.

62. We also received evidence in relation to the reasons why the proposed extraction area had been chosen by the applicant.
63. Mr Hay in his evidence in chief, as quoted above, stated that the proposed extraction area *“has been specifically located so that the sand extraction is seaward of the previously confirmed DOC so that it does not have the potential to cause or exacerbate coastal erosion.”*
64. Mr Riddell, the Managing Director of Kaipara Limited, confirmed Mr Hay’s understanding of why the proposed location of the extraction area had been chosen.¹⁶
65. Bearing in mind that the General Coastal Marine Zone comprises the majority of the coastal marine area, it is relevant to note that existing coastal permit 20795 extraction area, as indicated on BECA Drawing No.3233103-CA-013, covers an area of 636 km². Only a small part of the approved 636km² extraction area has been used for sand extraction as extraction is currently limited (by technology and equipment) to around 35-38m in depth, which may over time be extended to about 40m.¹⁷ The proposed extraction area is considerably smaller at approximately 42km².¹⁸
66. Mr Riddell also stated in his conclusion that based on the evidence of Ms Hart that:

“Our application is based on evidence that operating beyond the depth of closure (25 metres) has no discernible effect on the coastal processes and foreshore. This position was confirmed by Auckland Council section 42A officers report in recommending that consent be granted and also by Tonkin and Taylors review on behalf of the Department of Conservation.”¹⁹

FINDINGS ON CHAPTER F2

67. In the context of this proposal the purpose of the General Coastal Marine Zone is to provide for use and development in the coastal marine area, while, amongst other things; enabling economic well-being through the appropriate use of the coastal marine area; protecting natural character, landscape values and natural features; maintaining and enhancing water quality and the life-supporting capacity of the marine environment; protecting significant ecological values; recognising and providing for Mana Whenua values in accordance with tikanga Māori; and managing conflicts between activities in the coastal marine area.
68. These matters were not in dispute.
69. What was in dispute was the extent to which the above underlined matters can be achieved if the proposed sand extraction is to be consented as an appropriate use.

¹⁶Riddell EIC, para 26

¹⁷Riddell EIC, para 25

¹⁸Riddell EIC, para 16

¹⁹Riddell Reply evidence, para 37

70. It was the applicant's case that the proposal is an appropriate use largely because, subject to the conditions proposed, it avoids significant adverse effects on all the matters listed in Policy F2.6.3 (3).
71. Mr Hopkins, the reporting planner, recommended consent be refused because of the significant adverse effects on Mana Whenua values.
72. The submitters in support considered consent should be granted largely for reasons of economic well-being.
73. The submitters in opposition considered consent should be refused largely because they considered the extraction of sand is not an appropriate use in this particular part of the coastal marine environment, or not appropriate at all.
74. We agree with the expert planning evidence that the sole objective, F2.6.2, is that the extraction of sand from the General Coastal Marine Zone occurs in a manner that does not have significant adverse effects on the coastal marine area or nearshore environments.
75. With respect to Policy F2.6.3 (1), this policy is to provide for the extraction of sand from "*appropriate areas*" having regard to "*the values of the area*" and the "*natural rate of sediment being deposited over sediment lost from the area where extraction is proposed.*"
76. We accept that the location of the proposed extraction area had been identified by applicant because it was understood the area was to the seaward side of the depth of closure and "technology and equipment" limited extraction to depths around 35-38 metres. These were the primary reasons the proposed extraction area was considered to be suitable from the applicant's perspective. Mr Hay also stated that reasons also included the sand resource available and that a relatively small volume of sand was to be extracted from the proposed smaller extraction area.
77. We do not accept however, that the suitability of this location as determined by the applicant, means that the chosen area is necessarily "*an appropriate area*" in terms of Policy F2.6.3 (1). We accept that "*an appropriate area*" is one that is considered to be "*suitable or acceptable.*" However, in terms of this policy, the appropriateness of the chosen areas also requires consideration of the values of the area.
78. The planning evidence, in particular that of Mr Hay, focussed on the fact that the proposed sand extraction area was outside the outstanding natural landscapes, high natural character, outstanding natural features and the significant marine ecological areas identified in the AUP. These identified areas are located on the landward side of the proposed extraction area, either in the coastal marine area or on land within the coastal environment. In other words, he recognised the nature of the surrounding environment, primarily because, in his opinion, there were no significant adverse effects on the surrounding environment, this was an appropriate area for the proposed sand extraction to take place.
79. While understanding Mr Hay's conclusions based on Policy F2.6.3 (3) we are not convinced that his approach fully addresses the issue of "appropriateness" raised in Policy F2.6.3 (1).

80. Our findings on coastal processes, later in our decision, are that we do not have enough reliable information to fully understand the coastal processes and that there remains a great deal of uncertainty about the coastal processes taking place and the actual and potential effects of the sand extraction on those processes. In addition we have accepted the evidence of Mana Whenua and Mr Hopkins that there are significant adverse effects on Mana Whenua values. Given these two findings, we now revisit both of the above policies.
81. Overall we have preferred the evidence of Dr Mitchell where he clearly stated that the values of the surrounding environment, beyond the proposed sand extraction area, need to be taken into account. We note that Mr Hay and Mr Hopkins did not fundamentally disagree with the need to take this approach. We also agree with Dr Mitchell where in his supplementary evidence he considered that “...*Mr Hay’s analysis is too narrowly focussed on the findings of the technical assessments rather than considering the wider planning context, and how the proposed conditions will ensure that the various objective and policy outcomes will be achieved. In my opinion, the sensitivity of this area is such that the precautionary approach dictates that the conditions need to include a more comprehensive and robust regime of monitoring, reporting and enforcement in order to be able to detect and respond to any unexpected adverse effects that may eventuate.*”
82. Dr Mitchell’s conclusions reflect the fact that his overall evidence was focussed on the conditions that had been proposed by others at the 2021 part of the hearing. However, given the lack of reliable information that was identified in the JWS and the resultant uncertainty about the coastal processes, we have accepted Dr Mitchell’s approach to the sensitivity of the surrounding environment and the need to consider the wider planning context, particularly with respect to the question of the suitability of the area for sand extraction.
83. In order to determine if the extraction area chosen by MBL is in fact an “appropriate area”, we have concluded that considerable weight should be placed on the wider planning context as set out in the AUP. Firstly, in relation to the regional coastal plan provisions, and, later in our decision to other relevant plan provisions.
84. To be fair to Mr Hay he placed considerable weight on Policy F2.6.3 (3) when assessing the effects on the surrounding environment, because that policy requires the identification of “...*the significant adverse effects and the extent to which they can be avoided, remedied, or mitigated ...*” on all of the 10 listed matters.
85. With respect to Policy F2.6.3 (1) we find that in order to determine if the proposed sand extraction is from an appropriate area the following consideration is necessary. Having regard to the values of the area, Policy F2.6.3 (3) is a helpful starting point. If there are significant adverse effects that are not avoided, remedied or mitigated in relation to any of the listed matters, this would raise doubts about the suitability of the chosen area.
86. Based on the evidence of Mana Whenua and Mr Hopkins, we find that there are significant adverse effects on Mana Whenua values that have not been avoided, remedied or mitigated. The proposed Community Liaison Group, with an invitation to Mana Whenua to join does not appropriately address the identified effects.

87. With respect to dune stability, coastal erosion and changes to bathymetry, foreshore contours and physical coastal processes we find that there is a great deal of uncertainty and a lack of reliable information for us to understand or determine the extent of effects on these matters. We also cannot ignore the outcome of the expert caucusing and the resultant JWS. This has raised doubts that the previously identified depth of closure is in fact as robust, or as well understood and accepted by the coastal process experts, as had been claimed at the time of the 2021 hearing.
88. Having regard to all these matters we find that the proposed sand extraction area is not an appropriate one.
89. For completeness we note that in terms of Policy F2.6.3 (4) we were not informed of any appropriate measures to manage adverse effects, particularly for Mana Whenua²⁰, that involved remediation and mitigation measures.
90. With respect to Policy F2.6.3 (2) and the need to adopt a precautionary approach we note that this policy includes the option of using an adaptive management approach in terms of: staging the operation; the location of the activity; the maximum volume of sand to be extracted; the term of consent or environmental monitoring. The adaptive management approach and the conditions proposed by the applicant were largely accepted by Mr Hopkins if consent were to be granted. Given the uncertainty and lack of reliable information we have identified above we find the precautionary approach in this particular case supports the refusal of consent, rather than the grant of consent subject to the proposed conditions of consent.
91. Having regard to the regional coastal plan provisions in Chapter F2, as required by s104 (1) (b) of the RMA we find the proposal is not consistent with the zone description and the relevant objective and policies.

Chapters E18- Natural Character of the Coastal Environment and E19 - Natural Features and Natural Landscapes in the Coastal Environment.

92. These two chapters also contain provisions that are identified as being part of the regional coastal plan. Both chapters were assessed in the evidence of Mr Hopkins and Mr Hay. It is relevant to note that their assessments of these two chapters were set out in the evidence they presented at the 2021 part of the hearing. Mr Hopkins' overall conclusion was the proposal was generally consistent with both chapters. Mr Hay considered that the proposal was consistent with Objective E18.1 (1), Policy E18.3 (3), Policy E18.3 (1) and Policy E18.3 (2), and, was not contrary to Objective E19.2 (1) or its supporting policies. They did not review or update those assessments during the 2022 part of the hearing.
93. While these matters were not in contention between the two planners, we have taken them into account for two reasons.
94. Firstly because these regional coastal plan provisions state that they give effect to specific policies of the NZCPS and specific objectives and policies of the RPS. With respect to E18, the objectives and policies give effect to Policy 13 (1) (b) of the NZCPS and Objective B8.2.1 (2) and Policy B8.2.2 (4) of the RPS. With respect to E19, the

²⁰Specifically, the Ahi Kaa submitters

objectives and policies give effect to Policy 15(b) of the NZCPS and Objective B4.2.1 and Policy B4.2.2 of the RPS.

95. Secondly because it is appropriate that we revisit these chapters in light of our findings based on the evidence presented at the 2022 part of the hearing.
96. The Background statement in each chapter makes it clear that the provisions of E18 and E19 “...*apply to activities in the coastal environment that are proposed in areas that are not scheduled ...but that require resource consent.*”
97. Objective E18.2 (1) is:

“The natural characteristics and qualities that contribute to the natural character of the coastal environment are maintained while providing for subdivision, use and development.”

98. The most relevant policy is E18.3 (3). It seeks to manage the effects of subdivision, use and development in the coastal environment to avoid significant adverse effects, and avoid, remedy or mitigate other adverse effects, on the characteristics and qualities that contribute to natural character values, taking into account ten listed matters. The matters of particular relevance to the sand extraction proposal being:

“(b)the extent of anthropogenic changes to landform, vegetation, coastal processes and water movement;

(d) the temporary or permanent nature of any adverse effects;

(e)the physical and visual integrity of the area, and the natural processes of the location;

(g)the physical, visual and experiential values that contribute significantly to the wilderness and scenic values of the area;

(h)the integrity of landforms, geological features and associated natural processes, including sensitive landforms such as ridgelines, headlands, peninsulas, cliffs, dunes, wetlands, reefs, freshwater springs, streams, rivers and surf breaks;

(i)the natural characteristics and qualities that exist or operate across mean high water springs and land in the coastal environment, including processes of sediment transport, patterns of erosion and deposition, substrate composition and movement of biota, including between marine and freshwater environment.

99. In relation to E19 we note the wording of Objective E19.2 (1) is effectively the same as Objective E18.3 (1) and Policy E19.3 (2) (h) is identical to Policy E18.3 (h).
100. Policy E19.3 (1) relates specifically to managing uses in the coastal environment adjoining scheduled outstanding natural landscapes or outstanding natural features. Policy E19.3 (1) (b) is to “*avoid adverse cumulative effects on the values of outstanding natural landscapes or outstanding natural features.*”

FINDINGS

101. These objectives and policies are particularly relevant in terms of assessing the regional coastal plan, however we have received no planning evidence on them following the caucusing of the coastal experts and the JWS. Given the uncertainty and lack of reliable information we found earlier in relation to coastal processes, we find ourselves in the same position in relation to these provisions.

The Need for a Precautionary Approach

102. In his opening submissions²¹ Mr Slyfield submitted that the Applicant disputed that there is any evidence of uncertainty or lack of knowledge that could trigger a requirement for a precautionary approach. Instead he submitted that there was a considerable body of scientific knowledge concerning this coastal environment and that the relevant coastal processes are some of the most intensively studied in New Zealand. He also noted that monitoring data had been obtained from the operation of the existing consent.

103. Mr Slyfield also submitted that the proposal itself incorporated a number of precautionary aspects, including, what he described as the single greatest precautionary measure, siting the activity beyond the depth of closure. Other examples he identified were the requirements to undertake pre-extraction monitoring and assessments, limits on annual volume to be extracted from individual management cells, more robust reporting conditions, the requirement for extraction to be undertaken predominantly at night, post-extraction monitoring and adherence to a marine mammal management plan.

104. Mr Nolan, on behalf of Mr Clapshaw²², submitted that:

“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.

4.4 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.

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

²¹ Paras 108-117

²² Paras 4.1- 4.8

of the applicant's initial assessments was based on 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). 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, 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 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. 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."

105. Mr Williams on behalf of FOPB submitted that:

"2.7 A key provision of the NZCPS is Policy 3 (Precautionary Approach) required the adopting of "a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse..."

2.8 In "Science and the Precautionary Principle in International Courts and Tribunals" Dr Caroline Foster of the University of Auckland Law School, says that:

" ... it is commonly understood that precaution requires actors as wishing to engage in activities potentially involving risk of serious harm to bear the burden of proving the safety of the proposed activities before the activities are permitted to

proceed. This is often described as a reversal of the burden of proof although sometimes also as a lowering of the standard of proof. The key point is that a lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm”.

2.9 In the present case there is actual proof of harm: see evidence of Dr Shaw Mead, and as one example, the dredge trenches causing negative environmental impacts to the sediment transport process within the Mangawhai-Pakiri embayment; the evidence of Peter Kensington Landscape Architect expert (referred to below).

2.10 Since the precautionary principle is explicitly incorporated into the New Zealand Coastal Policy Statement it follows that there must be refusal of consent if there exists an environmental risk arising from the proposed dredging.”

106. In his Reply Mr MacRae submitted that:

“31. Several submitters, some supported by Counsel and/or their planners, have called for conditions of consent implementing the precautionary approach.

32. Mr. Slyfield submitted in opening that the precautionary approach does not apply as none of the requirements for it apply. These are set out in Policy 3(1) of the NZCPS and Policy B8.3.2(5) of the Auckland Regional Coastal Policy Statement (ARCPS). Those requirements apply to proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

33. The main point relied on by submitters such as FOPB and Mr. Clapshaw is that alleged areas of non-compliance have created uncertainty as to the effects of aspects of the activity. Mr. Williams takes up the point at paragraphs 2.7 -2.9 of his submissions and Mr. Nolan at his paragraphs 4.1 -4.8.

34. I have submitted in some detail above that the allegations of non-compliance have no proper basis in evidence and that Commissioners can have a high degree confidence in the reliability of the applicant’s assessment of effects. In my submission the risk of “significant adverse effects” is negligible.

35. Mr. Hay’s opinion, as you have heard is that, although a precautionary approach is not required, the proposed terms and conditions of consent incorporate substantial elements of the precautionary approach. In particular, they implement, in one way or another, all the precautionary requirements for mineral extraction, including elements of adaptive management, listed in Policy F2.6.3(2) of the Auckland Regional Coastal Plan.”

107. Ms Sutherland on behalf of the Director General of Conservation also submitted that a precautionary approach is triggered by this application and sought more robust conditions to be imposed.

108. Initially Messers Hopkins²³, Hay and Mitchell did not seek refusal of consent, but focussed on improved conditions. Dr Mitchell did state that:

“42. However, the provisions of the relevant planning documents also direct that a precautionary approach be taken; that the natural and physical resources in this area be managed in an integrated way; and that the cumulative effects need to be considered.”

FINDINGS

109. We have taken Chapter F2 as our starting point and in particular F2.6 which relates to mineral extraction in the coastal marine area, as referred to above
110. We find that a precautionary approach is required in this case, primarily because adequate information has not been provided to determine if consent can be granted, as set out in the coastal processes section, below. Alongside this, the outcomes of the JWS which set out what was agreed by the experts and included descriptions such as *“inconclusive”*, *“not possible to draw any conclusion”* and *“the volume, rate and direction of sediment transport are not able to be inferred from the data available at this time.”*
111. In addition we find that the sensitive nature of this environment, including many of the values and issues listed in F2.6.3 (3) also supports a precautionary approach.
112. On the basis of our findings in the Mana Whenua section, below, we have also found that the adverse effects of the proposal on Mana Whenua values are significant.
113. Policy F2.6.3 (2) is to adopt a precautionary approach, *“...which may include using an adaptive management approach.”*
114. Given the above circumstances, overall we do not consider that granting consent subject to conditions that would include adaptive management, will be sufficient in this case to appropriately adopt a precautionary approach.

Has Adequate Information been provided to Determine the Grant of Consent (s104 (6))

115. Mr Nolan, in his legal submissions on behalf of Mr Clapshaw, submitted that in terms of section 104 (6) of the RMA we should use the discretion to *“...decline an application for resource consent on the grounds it has inadequate information to determine the application.”* He made this submission during the 2021 part of the hearing, prior to the caucusing of the coastal processes experts and prior to the JWS that resulted from that caucusing.
116. Before discussing this further, we note that Mr Hopkins in his s42A report²⁴ advised that:

“The information submitted by the applicant is sufficiently comprehensive to enable the consideration of the following matters on an informed basis:

²³ Mr Hopkins changed his recommendation after hearing the evidence presented during the hearing

²⁴S42A report, Section 4

- *The nature and scope of the proposed activity that the applicant is seeking resource consents for.*
- *The extent and scale of the actual and potential effects on the environment.*
- *Those persons and/or customary rights holders who may be adversely affected.*
- *The requirements of the relevant legislation.”*

117. He went on to advise that further information had also been received during the processing of the application. That further information was attached to his s42A report.

118. Mr Nolan urged us to exercise our discretion under s104 (6) for the following reasons.

“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. That finding of the Environment Court was upheld on appeal, 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 should be exercised reasonably and proportionately in all the circumstances of the case”.

“6.6 Applying those dicta to the present circumstances:

a) There is difficulty in 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 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, 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."

119. As recorded above Mr Nolan's submissions predated the caucusing of the coastal process experts and the JWS that they produced. We also record that Mr Nolan was also supported by the legal submissions of Mr Williams.
120. It is relevant to record at this stage that the caucusing process and the JWS grew out of the 21 May 2021 memorandum from Mr Slyfield on behalf of the then applicant, Kaipara Limited. Mr Slyfield sought directions from us as to a pathway for the completion of the hearing. Of particular concern at that stage was the doubts that had been expressed by Dr Mead about the reliability of the March 2021 bathymetric survey that had been presented in Kaipara's evidence. In offering to undertake a further bathymetric survey, Mr Slyfield submitted that:

"15. The advantage of a further bathymetric survey and analysis is that it may provide the Commissioners with better information for assessing the relevance of allegations of past conduct under Kaipara's existing consent.

16. From Kaipara's perspective there can be no objection to such information being provided "in reply", as it clearly replies to specific allegations made by Dr Mead on the final day of the hearing. That said, Kaipara has already submitted (and maintains) that it is not for the Commissioners to enforce the existing consent, and the relevance of past conduct cannot go so far as to influence the decision whether to grant or decline Kaipara's current application.

17. Kaipara acknowledges that position has been disputed in the legal submissions given by Mr Nolan QC on behalf of Damon Clapshaw. Therefore, Kaipara considers it is at the discretion of the Commissioners whether this information is likely to assist in the determination of the consent and Kaipara requests the Commissioners' guidance."

121. In our directions dated 27 May 2021, after noting that it was premature to make any determinations on the merits of the evidence, and the legal submissions to date, we stated that:

“20. We do however see merit in the further bathymetric survey being offered by the applicant and supported by the Council. We consider that the proposal to survey the entirety of the approved extraction areas will address the concerns identified by Dr Mead. Analysis of the further survey has the potential to provide a more comprehensive understanding of the sediment transport processes within the Mangawhai-Pakiri embayment and any impacts on the beaches and dunes, based on robust and up to date information.”

122. In our further directions dated 23 June 2021 we clarified that:

“41(g) Following the completion of the survey, the experts shall be provided with the survey results. Caucusing shall take place and a joint witness statement shall be prepared setting out the areas of agreement and disagreement and the reasons behind the opinion of each expert. The joint witness statement shall specifically address the impact of the survey results on the understanding of the coastal processes and, in particular, the understanding of the sediment transportation process associated with the seabed features identified by the survey.”

123. Mr MacRae, in his Reply submissions dated 1 March 2022, responded to the question of the adequacy of information that had been raised.

“28. A number of submitters have suggested that the information and evidence presented in support of the application is so inadequate as to justify declining it. Mr. Williams and Mr. Nolan and other Counsel raised the issue in their legal submissions and suggested that claimed deficiencies and gaps in information, in large part stemming from the alleged instances of non-compliance referred to above, prevented a proper understanding of the activity proposed and would justify the Commissioners declining consent pursuant to their discretion under s.104 (6) of the RMA.

29. I was surprised that this matter was seriously advanced by experienced Counsel and submit that, for the following reasons, it warrants little of your attention:

a. The Council made a request for further information under s.92 of the RMA and this was answered by the applicant to the Council’s satisfaction. This is of relevance to your discretion under s.104 (6) pursuant to s.104 (7).

b. As a brief look at the applicant’s witness list indicates, the application was supported by the reports and evidence of its independent experts on almost every conceivable area of potential effect of the proposed activity. The one exception was effects on Maori cultural values and, in fairness, this is a difficult area for any applicant as independent expert advice is difficult to obtain. Further, as Mr. Hopkins recognised when presenting his report yesterday applicants and decision makers need to hear from the people who have cultural concerns in order to

properly understand them. As you have heard, the matter has been the subject of a great deal of attention by MBL since it became the applicant in September 2021.

c. As I have outlined above, the application has been significantly informed by the information gained from 18 years of the same activity, in the same off-shore location, and since late 2019 by the William Fraser using the same extraction equipment, as is proposed.

d. The Council, with its wide experience of every kind of application, has not raised any concerns as to the adequacy, or indeed the accuracy, of the information presented in support of the application.

30. I submit that this application far exceeds the standard of information required of applicants and that, if you were to find otherwise, you would be imposing a new standard which applicants generally would struggle to meet. That is not, of course, the intended outcome of s.104 (6)."

124. At this point it is relevant to consider the outcomes of the caucusing process. There were a number of issues that were agreed. In relation to sediment transportation processes, it was agreed that:

"23. The available information is inconclusive as to the source and mechanism for infilling, sediment transportation processes across the surveyed area, and any long term effects of the trenches on those coastal processes.

24. The available information indicates that sediment is moving in the surveyed offshore area, but it is not possible to draw any conclusion about diabathic or longshore transport. The volume, rate and direction of sediment transport are not able to be inferred from the data available at this time."

125. The JWS noted matters not agreed as follows.

"27. Nil, noting however that the CPECG members do not necessarily agree on points of interpretation of the historical and present-day body of coastal processes information that are outside the scope of the CPECG's caucusing."

126. A number of outstanding issues were recorded.

"28. The ability of the CPECG to draw conclusions is limited by the lack of high quality, repeat surveys covering the extraction area and would be enhanced by a time series of hydrographic data (e.g. Digital Elevation Model) covering the complete Mangawhai-Pakiri embayment, including the beach, nearshore and offshore areas.

29. The CPECG considers that a coordinated and sustained monitoring programme needs to be developed, approved and implemented for any sand extraction activities in the Mangawhai-Pakiri embayment, and linked to an adaptive management plan for those sand extraction activities. Such a monitoring programme might include, for example:..."

FINDINGS

127. We have carefully considered the legal submissions of both Mr Nolan and Mr MacRae, primarily because of the outcomes from the caucusing process and the JWS.
128. Section 104 (6) of the RMA provides a discretion than we “... *may decline an application for resource consent on the grounds that it has inadequate information to determine the application.*”
129. The caucusing of the coastal experts arose from the request from Mr Slyfield on behalf of the then applicant, Kaipara Limited. As we quoted above Mr Slyfield had concluded, at his paragraph 17, that:
- “Therefore, Kaipara considers it is at the discretion of the Commissioners whether this information is likely to assist in the determination of the consent and Kaipara requests the Commissioners’ guidance.”*
130. We determined at that stage that we saw merit in the caucusing process and directed that the JWS “...*shall specifically address the impact of the survey on the understanding of the coastal processes and, in particular, the understanding of the sediment transportation process associated with the seabed features identified by the survey.*”
131. Our expectation was that the caucusing process would clarify the competing expert evidence we had received during the first stage of the hearing in 2021.
132. The JWS set out what was agreed by the experts and included descriptions such as “*inconclusive*”, “*not possible to draw any conclusion*” and “*the volume, rate and direction of sediment transport are not able to be inferred from the data available at this time.*”
133. As identified in the JWS an outstanding issue was the lack of high quality repeat surveys from which comparisons could be made.
134. Rather than assisting us in our deliberations, the caucusing process raised more questions than answers.
135. Turning to Mr MacRae’s Reply he submitted firstly that s104 (7) needs to be considered, before we exercise our discretion under s104 (6).
136. We have already noted that the Council did receive further information and it was considered that sufficient information had been made available previously. The s.92 request was made on 7 October 2019 and the information was provided on 14 April 2020.²⁵
137. In having regard to the Council’s s92 request for further information we find that request is unrelated to the issue that has arisen for us some two years later.
138. Mr MacRae’s second submission in his Reply was that the application was “...*supported by the reports and evidence of its independent experts on almost every conceivable area of potential effect of the proposed activity.*”

²⁵S42A report, Section 4.

139. While this may be the case, this submission does not assist us in any way with the situation that we face following the outcome of the caucusing process.

140. Mr MacRae's third submission was that:

"...the application has been significantly informed by the information gained from 18 years of the same activity, in the same off-shore location, and since late 2019 by the William Fraser using the same extraction equipment, as is proposed."

141. Again, while this may be the case, this submission does not assist us in any way with the situation that we face following the outcome of the caucusing process.

142. Mr MacRae's fourth submission was that:

"The Council, with its wide experience of every kind of application, has not raised any concerns as to the adequacy, or indeed the accuracy, of the information presented in support of the application."

143. Again, while this may be the case, the Council's wide experience relates primarily to the information being provided at the lodgement and assessment stage of the application process.

144. At the decision stage of the process, following the caucusing of experts as has happened here, the Council's wide experience does not assist us with the situation we face.

145. Mr MacRae's fifth submission was that:

"...this application far exceeds the standard of information required of applicants and that, if you were to find otherwise, you would be imposing a new standard which applicants generally would struggle to meet. That is not, of course, the intended outcome of s.104 (6)."

146. We were not provided with any case law, or explanation, from Mr MacRae as to what the intended outcome of s104 (6) is, or maybe.

147. On the basis that all s104 matters relate to the consideration of applications and sits under the heading "Decisions" in the RMA, the intended outcome appears to be that decision makers must have regard to those matters in s104, that are relevant to the application under consideration. While s104 (6) may not be a relevant matter in the consideration of most applications, for the reasons we have set out above, we have found it to particularly relevant to our considerations in this case.

148. As the RMA provides decision makers with a discretion to decline consent on the grounds that they have inadequate information to determine an application, we have no difficulty in this case exercising our discretion.

149. In general terms we have accepted the submissions of Mr Nolan and preferred them to the submissions of Mr MacRae.

150. Our overall finding is that in terms of s104(6), after having regard to the earlier request for further information by the Council in terms of s104(7), we have inadequate information to determine the application.
151. We have however gone on to fully assess the application in terms of all the other relevant statutory tests, as set out elsewhere in our decision.

The Alleged Non-compliance under the Existing Consent

152. A number of submitters alleged that there had been non-compliances with the operation of the existing consent. There was considerable debate during the hearing on compliance issues. By the end of the hearing Mr Hopkins in his reply evidence dated 11 February 2022 advised that condition 3 of the existing permit 20795 had not been complied with. We are unaware of what action Auckland Council is taking, or plans to take with respect to this non-compliance.

FINDINGS

153. Compliance issues are matters for Auckland Council to respond to and they are not a matter for us to determine.

Cumulative Effects

154. In his EIC Mr Hay made the following statement under the heading, Cumulative Effects:

“107. For the purpose of considering cumulative effects, I observe that Kaipara Ltd’s application was filed, has been notified, and is proceeding to hearing all ahead of the various applications by McCallums. It is my understanding that any cumulative effects from the possible combination of offshore and nearshore extraction activities is therefore a matter for consideration for the application by McCallum Brothers and not this application.”

155. Mr Hay had relied on the evidence of Ms Hart and Mr West and quoted their evidence where they addressed cumulative effects:

“108. Ms Hart in her evidence has addressed cumulative effects on the seabed/coastal processes and has concluded:

Other consents that may affect the coastal processes in the embayment are the inshore extraction permits, which allow the annual extraction of up to 76,000m³ from nearshore areas inshore of the Depth of Closure. The inshore extraction and offshore extraction are therefore effectively separated from a coastal processes perspective, as the offshore extraction area is beyond the Depth of Closure. This minimises any potential for cumulative effects of the inshore and offshore extraction. Beach and bar system monitoring and analysis for the inshore sand extraction would necessarily include any cumulative effect on the beach and nearshore system from both the inshore and offshore extraction. As noted in paragraph 55, there was no reported change within the accuracy of the survey methods used that could be attributed to anything beyond natural variations arising from weather pattern variations.

109. Mr West has concluded that there will not be cumulative water quality effects and cumulative effects in terms of ecology and concludes:

From the standpoint of primary production and most other ecological components, it is very difficult to estimate or assess cumulative effects, as most of the effects of the sand extraction operations on the biota are transient in space and time. Operationally it is proposed not to repeatedly extract sand from the same specific area over short time periods of less than six months, thus limiting any cumulative effects of repeated disturbance.

The scallop fishery in the area has been very variable in catch between years, with the most recent plenary report (Hartill & Williams, 2014) showing a declining in catch. Thus the disturbance impact from commercial scallop dredging is not expected to be significant nor contribute greatly to any cumulative effects.

110. On the basis that only one extraction vessel will be operation in this area at any one time there are no cumulative airborne or underwater noise, recreational, plume or visual and landscape effects that require further consideration.”

156. Given the outcome of the caucusing of the coastal process experts we have concluded that we cannot rely on the depth of closure to “effectively separate” the proposed inshore and offshore extraction areas.
157. In addition we note that Mr West’s evidence was that “...it is very difficult to estimate or assess cumulative effects” and that, “it is proposed not to repeatedly extract sand from the same specific area over short periods of less than six months, thus limiting any cumulative effects of repeated disturbance.”
158. Given the repeated extraction revealed during the hearing process, we have also concluded that it is “very difficult” for us to make findings on the extent of any cumulative effects, as discussed in paragraph 283, below.
159. What is clear to us, is that the evidence that Mr Hay relied on, when he concluded that cumulative effects was not a matter for consideration in the application before us, is no longer as compelling as it may have appeared to be at the time Mr Hay prepared his EIC.
160. Mr Hopkins did not specifically address cumulative effects. He appeared to have relied on the evidence of the other members of the reporting team, that subject to conditions, any adverse effects from the proposal can be appropriately managed.
161. The only exception to this was his final conclusion in relation to cultural effects. In his Reply evidence he stated that:

“...in the context of this consent, cultural effects are broad ranging and are interlinked with effects on coastal ecology, coastal processes, and the cultural landscape”

Whilst it is acknowledged that the relationship between mana whenua and their tikanga and taonga is subjective as is their appreciation of their ability to exercise kaitiakitanga, the nature of the sand extraction activity (including the process of

extraction and the removal) is such that cultural effects of the activity are particularly sensitive in this case. In this regard, the submissions outline that for some mana whenua groups the adverse effects experienced are significant. On this basis they oppose the granting of consent and continuation of the activity.”

162. Dr Mitchell in his EIC had concluded that:

“52. The provisions of the relevant planning documents direct that a precautionary approach be taken; that the natural and physical resources of this area be managed in an integrated way; and that the cumulative effects need to be considered.”

163. The planning evidence from Mr Christie and Mr Hegarty did not specifically address cumulative effects.

164. With respect to legal submissions presented to us the following submissions were most relevant.

165. Mr Slyfield’s opening submissions included:

“8. The Depth of Closure is a central aspect of the present application...

10. In other words, extracting sand from the seabed beyond this depth is not expected to have any observable or measurable effect on nearshore coastal processes.

59. Some submitters raise concerns about the combination of effects between nearshore and offshore sand extraction — i.e. the combined effects of McCallums’ consented activity and Kaipara’s consented activity.

60. These issues are made more complex by McCallums currently holding two extraction consents, but also having two applications pending, one for replacement of the existing consents, and another for extraction from a location further offshore (but still inside the Depth of Closure).

61. It is appropriate to deal with existing and potential future consents separately, from a legal standpoint.

63. ...There is no legal requirement for you to assess the effects of Kaipara’s Proposal as if they are in addition to, or “cumulative upon” the effects of another activity that will have gone out of existence by the time the Proposal is implemented.

64. Accordingly, Kaipara’s witnesses assess the effects of Kaipara’s proposal on the basis that no combination of Kaipara’s proposed, and McCallums’ existing, consents need be considered. The one exception is Mr Farrow, who has been asked to provide an assessment both with and without McCallums’ consents out of an abundance of caution.

65. Turning to McCallums’ potential future consents (under either of its pending applications) the critical factor is that both applications have been made later in

time than Kaipara's application and neither of them has yet proceeded to notification. At this juncture it is entirely speculative what the outcomes of those applications may be, and accordingly there is no "cumulative" effects assessment to be made.

66. As the High Court held in *Rodney District Council v Gould*:

A cumulative effect must be one that arises as an effect of the particular application. It is not legitimate to consider, as cumulative effects in relation to a particular application, any effects relating to possible future applications. An effect that may never happen, or if it does, arises from a different activity from that for which consent is sought, is not a cumulative effect.

So, if Kaipara's application is granted, and either of McCallums' applications proceeds to determination, it is when that determination occurs that a cumulative assessment is required.

Disconnected by the Depth of Closure

67. In any event, quite aside from the correct legal approach, Kaipara maintains that there is another, practical, flaw in the suggestion that its effects must be assessed 'cumulatively' with McCallums' effects, at least insofar as coastal processes are concerned: There is no accumulation of any effects on coastal processes. The deliberate siting of Kaipara's proposal beyond the Depth of Closure means that the effects of its Proposal are disconnected from the coastal processes in the nearshore environment."

166. Mr MacRae in his Reply agreed with Mr Slyfield's submissions set out above.
167. Our earlier findings on the need for a precautionary approach and that adequate information has not been provided to enable us to grant consent, are particularly relevant to the issue of cumulative effects.

FINDINGS

168. We accept the evidence on behalf of Kaipara and MBL that the proposed extraction site was deliberately chosen beyond the depth of closure. We also accept that the primary reason for this location was because "*extracting sand from the seabed beyond this depth is not expected to have any observable or measurable effect on nearshore coastal processes.*"
169. We also accept Mr West's ecological evidence that is "*very difficult to estimate or assess cumulative effects.*"
170. There was no expert evidence or legal submissions that challenged this evidence.
171. Consistent with our earlier findings on the need for a precautionary approach, the outcome of the coastal processes expert group caucusing and our finding that we did not have adequate information to determine the grant of consent, we find that we do not

have adequate information with respect to the nature and extent of cumulative effects. Similarly, we have accepted that there are cumulative and historical effects on Mana Whenua which we discuss further in paragraphs 234-241 of this decision.

Positive Effects

172. Mr Hay and Mr Hopkins agreed that there would be positive effects from the proposal. Mr Hopkins summarised the positive effects in his s42A report as follows:

“Submissions

The submissions in support of the activity generally recognised the value of the resource to the construction industry.

Assessment

The applicant has outlined in section 5 of the submitted A.E.E that the proposal will have positive effects in terms of contributing to the supply of sand for use in the construction industry for concrete, and the importance of concrete to the region’s economy as it contributes to the built future of Auckland (including urban expansion for residential, business, and road construction).

In addition, the applicant has provided an Economic Assessment (see Appendix six of the submitted A.E.E), which identifies the positive benefits associated with the economic efficiency of transporting the sand for the market.

I generally agree with the applicant in respect to the identification of the positive effects and note the high level recognition in the AUP (OP) that mineral extraction activities in the coastal environment can have social and economic benefits and can be appropriate activities in the coastal environment.”

173. These positive effects were uncontested.

174. Mr MacRae in his Reply submitted that:

“60. Finally, it is notable in reviewing the submissions and evidence of submitters who oppose the application that, to the best of my recollection and with the exception of some expert planners, almost none have recognised the social and economic benefits of extracting Pakiri sand, the importance and comparative scarcity of such sand for making high strength concrete, the economic and environmental advantages of extraction at sea and transport by barge.

61. Having regard to the use and development provisions of the ARPS and the ARCP, these are very important factors for your consideration and, when taken together with the comparatively negligible adverse effects of the proposal, should, in my submission, tip the balance heavily in favour of granting consent.”

FINDINGS

175. We find that these positive effects will need to be considered in our overall 104 assessment when we have regard to all actual and potential effects on the environment.

The Existing/ Receiving Environment

176. We set out below the description from the s95 notification report.

“Site and surrounding environment description

The site is located within the coastal marine area adjacent to the north-eastern boundary of Auckland region. The extraction area is approximately 44km² and the western boundary, closest to the shoreline, closely follows the 25m isobath. The eastern boundary of the extraction area is between 1.2km and 2km from the shoreline. The Leigh Marine Reserve is located approximately 3.8km from the southern boundary of the area.

The western edge of the sand extraction area adjoins the following overlays as identified in the AUP, although noted in the AEE (‘Resource Consent Application and Assessment of Effects on the Environment for the Continuation of Sand Extraction’, prepared by Osbornehay and dated July 2019), that the activity itself will avoid these:

- Significant Ecological Areas Overlay – SEA-M2-87a, Marine 2*
- Outstanding Natural Landscapes Overlay – Area 22. Pakiri Beach*
- Outstanding Natural Landscapes Overlay – Area 28, Coastline from Pakiri River to Omaha Cove*
- Significant Ecological Areas Overlay – SEA-M1-86a, Marine 1*

On the landward side of the sand extraction area is the coastal areas of Pakiri and Te Arai and within Te Arai is a private golf course with rural-residential development within the area referred to as ‘Te Arai North’ and is subject to precinct provisions in the AUP. Development in this area has occurred recently with most sites created and development occurring on them. Te Arai South is another precinct area which has been going through the consenting process for the development of additional golf courses and rural-residential lots. At present this land is predominantly in forestry yet to be harvested.”²⁶

177. Mr Hay in his EIC dated 12 February 2021 set out a very similar description. In addition to the description he stated that:

“57. The existing environment includes the coastal marine area as it currently exists. The only relevant resource consent for the subject area of the CMA is the existing coastal permit for the sand extraction held by Kaipara Ltd and which expires in February 2023. At the request of Counsel for the applicant I have assessed the effects of the proposal without regard to the current permit on the

²⁶Section 8 of the s42a report

basis that the current consent will expire in 2 years' time or may be surrendered earlier if the new consent is given effect to.

58. Currently McCallums undertake sand extraction within the inshore area at Pakiri under a number of coastal permits (ARC28165, ARC228172, ARC28173 & ARC28174). These consents allow for the combined extraction of 76,000 m³/year of sand from the nearshore area between 5 m and 10 m water depths. These consents expired on the 6th September 2020 but resource consent applications for replacement consents have been lodged and are currently being assessed in terms of s95. A new coastal permit application for a further sand extraction site which will (if granted) replace the existing near shore sites has also recently been lodged by McCallums and I understand this application is to be notified shortly.

59. At the request of Counsel for the applicant I have not placed any weight on the current McCallums extraction activity as part of the existing environment.”

178. Mr Hay in his rebuttal evidence stated that:

“89. When assessing effects, the environment is made up of the existing environment and associated physical changes that have occurred from lawfully established activities. Given that sand extraction has been allowed in this wider area for 80 years, any existing physical modification resulting from this activity on the seafloor form part of the environment. The effects from the sand extraction to-date cannot be ignored and a theoretical pre-sand extraction environment used as the environment against which any assessment is undertaken. Likewise, this is not a static environment with natural events also modifying the seafloor over time. I have raised this matter as I am unclear of the description of the environment which the Officers assessment has been undertaken against.”

179. Dr Mitchell set out a description of the site for us in his EIC as previously stated in paragraph 53 of this decision.

180. With respect to the legal submissions on behalf of FOPB, Mr Williams stated that FOPB had:

“... tried in vain to convince the Council that it ought to combine the Kaipara hearing with that of the upcoming McCallum Brothers' application(s) so that the cumulative effects relating to adjacent consent areas could properly be considered. It is submitted that for the Commissioners as decision makers to make an informed decision they need to take into account not just the effects of this application but the cumulative and related effects of the pending nearshore applications.”²⁷

FINDINGS

181. Our overall finding is that the existing/receiving environment extends beyond the proposed extraction area. There was no dispute between Messers Hay, Hopkins and Mitchell on this point. Each of them included a description of the wider existing environment that extended from the land component of the coastal environment, the existing and proposed sand extraction areas and the coastal marine area beyond.

²⁷Legal submissions dated 14 May 2021, para 4.1.

182. The primary point of difference between the planners was how they had undertaken their assessment of effects on that existing environment. Mr Hay had relied on Mr Slyfield's legal advice that no weight should be placed on the existing sand extraction activities as part of the existing environment. As we understood Mr Slyfield's legal advice, it was largely based on the submission that:

"The deliberate siting of Kaipara's proposal beyond the Depth of Closure means that the effects of its Proposal are disconnected from the coastal processes in the nearshore environment."

183. By the end of the hearing process, and, particularly the outcome of the caucusing of the coastal processes experts, we were left with significant doubts that the effects of the Proposal are disconnected from the coastal processes in the nearshore environment.

The Permitted Baseline

184. Mr Hopkins in his s42A report agreed with Mr Hay that there is no permitted baseline that is relevant in this particular case. Both of them noted that the movement of vessels through the Coastal Marine Zone is a permitted activity and that this is of some relevance in relation to the visual and underwater noise effects of the activity.
185. Mr Hegarty considered that significant, rather than limited, weight should be given to the permitted activities that enable vessels to operate within the coastal marine area when assessing landscape and visual effects.

"19. Furthermore, the two rules above allow for the transit of extraction vessels between the embayment and the Port of Auckland Extraction vessels are also permitted to travel back and forth along the embayment as of right (as long as no extraction is underway). These vessels are also permitted to anchor within the embayment without the need to obtain resource consent. Given these factors, I consider that it would be appropriate to disregard the adverse effects of such activities when considering KL's applications under section 104(2). I therefore consider it appropriate for such permitted activities to be given significant weight when considering the actual and potential effects of this proposal."

186. In response to Mr Hegarty's evidence, Mr Hopkins, in his Addendum report dated 9 April 2021, stated that:

"...I do not consider it appropriate to apply the permitted baseline to the extent that effects should be disregarded. It is considered that the permitted movement of vessels is of relevance, however as identified through the submissions, the identification and association of the extraction vessel as an integral part of the extraction activity does distinguish it from other vessels (including by lighting and movement pattern), and therefore the consideration of those effects on visual and landscape amenity values associated with the activity remains appropriate ..."

FINDINGS

187. We have preferred the evidence of Mr Hopkins, Dr Mitchell and Mr Hay. We acknowledge the permitted activities in the AUP in relation to vessel movements and

associated activities, however for the reasons identified by Mr Hopkins we agree with him that the effects on visual and landscape amenity values fall within the realm of needing to be assessed, rather than disregarded.

Cultural/Mana Whenua Effects

188. At this juncture we wish to mihi to the Mana Whenua submitters for their manaakitanga during the Powhiri and hearing days at Omaha Marae and Pakiri Hall, and for enabling tikanga to be upheld (including during the online forum), setting the context and tone appropriate to the subject matter of the hearing.

Mana Whenua

Mandated Iwi Authorities

189. The submissions and evidence heard explained that Ngāti Manuhiri Settlement Trust (also represented by Manuhiri Kaitiaki Charitable Trust and hereafter referred to as “Ngāti Manuhiri”), and Te Uri O Hau Settlement Trust (“Te Uri o Hau”) are the mandated Iwi Authorities representing Māori affected by the application.²⁸ In addition, Ngātiwai Trust Board holds interests in the marine area offshore from the Pakiri Embayment and is a Mandated Iwi Organisation pursuant to the Maori Fisheries Act 2004.²⁹

- Ngāti Manuhiri

190. Mr Jason Pou, Counsel for Ngāti Manuhiri presented legal submissions supported by oral evidence from Chair Mr Mook Hohneck and Trustee Vern Rosieur.

191. A background was provided to the Ngāti Manuhiri Settlement Trust, the mandated tribal entity and Post Settlement Governance Entity for Ngāti Manuhiri following their Treaty Settlement in 2012. Manuhiri Kaitiaki Charitable Trust sits alongside the Settlement Trust and key functions include responding to all resource management matters affecting Ngāti Manuhiri. In outlining Ngāti Manuhiri’s authority as Mana Whenua, Mr Pou explained that the application’s location is within the region where “Ngāti Manuhiri developed their own distinct identity as a tribal grouping, joining with, and forming strategic alliances with others to cement their place as tangata whenua of the region.”³⁰ Ngāti Manuhiri oppose the proposal, and the ongoing impacts of removing taonga from the rohe in particular. Mr Pou pointed out that all Ngāti Manuhiri submitters are united in their opposition.

192. During the reconvened hearing we received correspondence from Mr Pou requesting an email be tabled for consideration alongside the evidence that was previously presented by Ngāti Manuhiri at Pakiri Hall. The email explained that the relationship between McCallums and Ngāti Manuhiri was an improvement upon their relationship with Kaipara and a number of constructive meetings had been held since the consent was transferred. However, Ngāti Manuhiri stated:

²⁸LegalSubmissions for Ngāti Manuhiri Settlement Trust May 11th 2021; Te Uri o Hau Cultural Effects Assessment, August 2020.

²⁹Ngātiwai Trust Board submission pp 1101 Vol 2

³⁰LegalSubmissions for Ngāti Manuhiri Settlement Trust, para. 11.

“we have not agreed to change our position and cannot support the consent. Because of the mistrust that has developed over time, we do not believe our people are ready to support such a change. To this extent, the Settlement Trust stands by the presentation that was made at the Pakiri Hall.”³¹

- Te Uri o Hau

193. While Te Uri o Hau representatives did not submit on the application or appear at hearing, the Te Uri o Hau Cultural Effects Assessment (“CEA”) prepared by Environs Holdings Ltd along with a letter from the Trust’s Chair tabled at the reconvened hearing was provided by the applicant. These documents identified Te Uri o Hau interests in the proposal area and position on the application. The CEA references the special relationship of Te Uri o Hau as Mana Whenua with association to Mangawhai, particularly in the context of the Te Uri o Hau Claims Settlement Act 2002.

194. It confirms Te Uri o Hau have two Statutory Acknowledgements in the Mangawhai area, the Mangawhai Harbour Coastal Area and Mangawhai Marginal Strip, and describes how these areas were traditionally used for seasonal gathering of kaimoana and other customary materials at Mahinga Kai and Nohoanga sites.³² Te Uri o Hau also claim a relationship to the coastline as kaitiaki.³³ We discuss the CEA in further detail below, but note it concludes that Te Uri o Hau’s relationship as kaitiaki is able to be accommodated in respect of the proposal, provided appropriate consent conditions are imposed and a relationship with the applicant established. Further to this, the applicant tabled a letter from the Settlement Trust’s Chair Antony Thompson³⁴ in reply stating;

“Our decisions [sic] to submit conditional support via our cultural values assessment was premised upon the insights of our executive and environmental team into the proposals submitted for Resource Consent applications by the McCallum Group. We are in the process of considering a relationship arrangement with the McCallum Group which will enable Te Uri o Hau to work in genuine partnership together, ensuring that the sand extraction activities are sustainable to the point of minimal environmental impact.”

195. While Mr Hay’s evidence notes a “cultural liaison agreement” is being finalised with Te Uri o Hau, at close of hearing we had yet to receive submissions or evidence presented confirming that an agreement had been entered into with Te Uri o Hau. However, we consider we have sufficient information to conclude that from Te Uri o Hau’s perspective, any potential cultural effects of the proposed sand extraction activity are acceptable.

- Ahi Kaa

196. The cultural evidence we heard over the course of the hearing described varied and layered Mana Whenua relationships to the application site. In addition to the Iwi Authorities set out above, we heard from the Māori community who have resided at Pakiri and surrounding areas for multiple generations. They are representatives of, and belong to, Omaha Marae; they are landowners of the various Taumata and Pakiri Blocks

³¹Email of Jason Pou, dated 28th February 2022.

³²Te Uri o Hau CEA pp 13

³³Te Uri o Hau CEA pp 41

³⁴ Letter from Antony Thompson dated 25th February 2022

contiguous to the Pakiri shoreline; they are kuia, kaumatua, kaitiaki, whanau of Pakiri, whanau whanui of Ngāti Manuhiri hapū and Ngātiwai iwi and their associated entities; and a blend of all or many of these relationships. The commonality among these witnesses is their status as Ahi Kaa of the Pakiri Coastline.³⁵ We were presented with historic documentation to support these relationships, including Māori Land Court records, Ngātiwai Trust Board correspondence, reports and correspondence by Laly Haddon dating back to the early 1990's, and decades of temporal photographic records of Pakiri Beach.³⁶

197. In her reply statement, Ms Haddon provided a summation of her evidence on behalf of Te Whanau o Pakiri which helpfully set out their enduring relationship to the whenua and moana at Pakiri:

“Te Whanau o Pakiri are the local tangata whenua community of Pakiri. Our hapu and iwi are Ngāti Manuhiri and Ngāti Wai. We have unbroken occupation of the Pakiri coastal area and are descendants of the Moekakara waka. We currently reside along the coastline and valleys of Pakiri and have been here mai-rano. Pakiri is one of the last and largest remnants of Maori Freehold land and customary holdings remaining in the Auckland region of which only 0.2% remain in indigenous territories or Māori title. As indisputable tangata whenua we have a direct, long and continuing traditional relationship with the coastal marine environment of Pakiri. We have lived and fished here for generations. We are the indigenous peoples of this place, these are our lands, territories and resources. Pakiri and the our marine environment is very special and unique.”³⁷

198. All Ahi Kaa submitters were united in their longstanding objections to the continued mining and dredging of the sea floor in their rohe. They opposed the application on grounds of direct and cumulative effects on the ongoing and enduring cultural relationship to the Pakiri coastline including rangatiratanga and kaitiakitanga, as well the cultural values relating to the mauri of, and effects on, the cultural landscape, taonga species and biodiversity.

Effects on Cultural Values

- Te Uri o Hau Cultural Effects Assessment

199. The Te Uri o Hau/Environs Cultural Effects Assessment (“CEA”) prepared by Environs Holdings Ltd was the only such assessment received regarding the application. The CEA summarises the consents sought, sets out the engagement undertaken with the applicant (then Kaipara), the history of the area and Te Uri o Hau interests, cultural values and practices. In addition to the Statutory Acknowledgements, applications for Customary Marine Title and Protected Customary rights have been lodged under the Marine and Coastal Area (Takutai Moana) Act 2011 in relation to the area between Te Arai Point and Bream Tail. The CEA outlines the resource management policy framework including listing relevant provisions of the RMA, NZCPS and RPS, and their own Te Uri o Hau Kaitiakitanga o Te Taiao Environmental Management Plan.

³⁵EIC Olivia Haddon, Para 17; Oral Submissions of Annie Baines, 7th May, Mook Hohneck, 11th May for example.

³⁶Attachments and supporting documents of Christine Baines, Annie Baines, Wayne Greenwood, Ringi Brown, Wendy Brown and Olivia Haddon for example.

³⁷Olivia Haddon, Supplementary Evidence in Reply, para. 2.

200. A key focus of the CEA assessment was the desire to build a meaningful relationship with the applicant including establishing a specific project related agreement. No sites of spiritual or cultural significance were identified relative to the application area. As kaitiaki, Te Uri o Hau's expectations were that cultural monitoring of sand extraction operations would be required under any project related agreement, along with exploration of potential opportunities for training and employment associated with the activity.
201. For the potential ecological effects of the activity, Te Uri o Hau considered overall they would be minor to moderate and noted that due to the connection between tangata whenua and biota inhabiting the coastal marine area such impacts effectively translate to a cultural effect. They were satisfied however, that the pre extraction surveys to identify and exclude shellfish beds from extraction zones, with accommodation for cultural monitoring and communication of relevant management plans under the consent conditions would allow their cultural values and role as kaitiaki to be discharged. A number of consent conditions were recommended to capture these matters³⁸, however we note these had not been incorporated into the proposed (or evolved) set of conditions at the time of close of hearing.
- Ngātiwai Trust Board Submission
202. Turning to Ngātiwai Trust Board, we note it's submission in opposition and that the Chair of Ngātiwai Trust Board, Mr Aperahama Edwards was present during the powhiri at Omaha marae and during whaikōrero offered his tautoko or support for the Marae's position (although he did not provide any further evidence during the hearing itself). Ngātiwai's submission raised concerns about the implementation of the historical Memorandum of Understanding ("MOU") and Project Agreement in place for the current consent and adverse effects on flora, fauna, kaimoana, water quality and the beach as observed by the whanau of Omaha Marae. We recognise that MBL, with assistance from Mr TeRangi, have recently re-engaged with Ngātiwai Trust Board.³⁹ However what we have before us remains a live submission in opposition, supporting the observations of adverse cultural effects put forward by Omaha Marae.

Cultural Effects as presented by Ahi Kaa / Ngāti Manuhiri

203. Recognising that all Ahi Kaa in this instance are Ngāti Manuhiri, the descendants of Rahui Te Kiri and Tenetahi⁴⁰, we have grouped the cultural effects identified in their written evidence and oral submissions presented at Omaha Marae and Pakiri Hall together.
204. Ahi Kaa witnesses described their long association to Pakiri having occupied the whenua and adjacent moana for at least 600 years discharging their rangatiratanga and kaitiakitanga responsibilities. During submissions, Mr Pou stressed the importance of S6(e) of the RMA to our assessment, noting that Chapter B6 of the RPS contains similar provisions and that these provisions have a relationship-focus which:

³⁸CEA, p.50.

³⁹Statement of Evidence in Reply of Callum McCallum, 23 February 2022, Attachment: Stakeholder Communication/ Feedback Register

⁴⁰Oral Submissions of various Omaha Marae submitters, 7th May 2021 & Mook Hohneck, 11th May 2021.

“reflects the whakapapa or kinship between mana whenua, and the lands, waters, places and taonga directly and indirectly affected by the proposal. Whakapapa creates connection to both physical and spiritual worlds. Features of the physical world are not just physical resources but entities in their own right that mana whenua have an obligation to care for and protect (kaitiakitanga).”⁴¹

- Effect on Oneonehaea and the wider cultural landscape

205. We heard from Ahi Kaa and Ngāti Manuhiri about the intricate web of values that make up the cultural landscape. Submitters described how the landscape is viewed “looking inward” from the sea back to the beach and river mouths, taking in the motu/islands, currents, tides, winds, cultural keystone/indicator species, maramataka (tohu and seasons), waahitapu, tauranga waka (ancestral waka landing sites), the remaining contiguous Māori land blocks/holdings, and includes the people and their relationships to all these components.⁴² These whakapapa links and relationships to the people are inherent in whakatauki, waiata, and are identifiers, for example when Ahi Kaa recite their pepeha.

206. Sand is an important component of this landscape, and we note Ms Haddon’s references to ‘Ko Oneonehaeate Taonga’ – in her pepeha and Mr Hohneck’s description of “Nga Oneonehaea” as *“the gleaming sands of Pakiri”* and onepu (sand) as *“he kiriwaiwai”* or the “skin” of this environment.⁴³ Mr Rosieur referred to Pakiri sands as a *“korowai of our people”* and the embayment as a “food basket to manaaki our people and marae,” while Mr Paki stated *“these sands are the sands of Pakiri, they are precious to us.”*⁴⁴ Ahi Kaa also commented on what they saw as the finite nature⁴⁵ of this taonga or treasure, with Ms Haddon describing the “Holocene relic” sands as *“tāongatukuiho”* (treasures handed down).⁴⁶

207. Coming back to the wider landscape, Mr Hohneck provided a series of maps (attachments to Ngāti Manuhiri Deed of Settlement) as a backdrop to his korero, illustrating the sites and areas of significance on the whenua and moana that make up Ngāti Manuhiri’s cultural landscape and seascape as recognised in their Statutory Acknowledgement.⁴⁷ He outlined a history of the effects on the hapū from land alienation and loss of access to resources and how the people had maintained their kaitiakitanga and rangatiratanga in the face of adversity and held on to, or bought back whanau land and sites of significance such that Pakiri is the largest remaining area of Māori freehold land in the Auckland region.

208. Ms Haddon described the features forming the landscape as:

“a critical part of a Whanua /Hapū/ Iwi sense of place and identity. Thus, cumulative changes to the surrounding hinterlands, beach, dunes, form and colour

⁴¹Legal Submissions for Ngāti Manuhiri Settlement Trust, para. 59.

⁴²EIC of Olivia haddon, para. 53, Oral Evidence of Mook Hohneck, 11th May 2021.

⁴³EIC of Olivia haddon, p.2, Oral Evidence of Mook Hohneck, 11th May 2021.

⁴⁴Oral Submissions of Vern Rosier and Tamihana Paki, 11th May 2021.

⁴⁵Oral Submissions of Wayne Greenwood, 7th May.

⁴⁶Summary Statement of Olivia Haddon, para. 6.

⁴⁷ Schedule 1: Coastal statutory acknowledgement area, as shown on deed plan OTS-125-06, Ngāti Manuhiri Claims Settlement Act 2012

of the sand as observed over a 50 year time frame and stated in the evidence presented in the submission made by my mother Sharley Haddon, is a huge intrusion into these values and a direct breach of the Crown's obligations and duties under Te Tiriti of active protection."⁴⁸

209. She further observed that *"past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the seabed."*⁴⁹
210. Ahi Kaa submitters also described the disruption and mamae (pain) the people "to whom this coastline belongs"⁵⁰ felt at seeing and hearing the hum of dredge vessels day and night for decades and seeing first hand effects on the beach and dunes.⁵¹ We note that Mr Kensington has also identified that the ongoing sand extraction activity has the potential to adversely impact Māori cultural landscape values.
211. Mr Kensington's original landscape and visual assessment did not touch on Māori cultural landscape values. His overall finding was the proposal would have very low (less than minor and not significant) adverse landscape, natural character and visual effects and could therefore achieve consistency with the relevant statutory provisions. However, in his addendum statement, he clarified that an assessment of landscape effects must take into account TeAo Māori perspectives and referenced the TuiaPito Ora / New Zealand Institute of Landscape Architects 'Te Tangi a te Manu: Aotearoa New Zealand Landscape Assessment Guidelines. He then qualified his earlier statement following his review of Ms Haddon's evidence, noting that he now held reservations over making such a conclusion on the level of effect. He understood from her evidence that past offshore sand extraction activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the seabed. He considered that the proposal to continue this activity could potentially cause ongoing cumulative adverse effects; which could possibly be remedied should the activity cease.⁵²
212. In his memorandum in reply, Mr Kensington further explained that his revised opinion was *"primarily in relation to Māori cultural landscape values; which I understand to represent a significant adverse effect in the eyes of tangata whenua.....clearly the 'Mangawhai-Te Arai -Pakiri' coastal environment is a landscape that has cultural value and significance to Māori. As summarised by Ms Haddon, previous sand extraction activity has had a cumulative adverse effect on these values, representing a slow degradation of whenua and a reduction in mana."*⁵³
213. To his understanding, adverse effects on Māori cultural landscape values for Ahi Kaa extend beyond the removal of sand from the embayment and include associated impacts on the health of the ecosystem and the ability of Mana Whenua to exercise appropriate tikanga and kaitiakitanga in relation to it. He went on to say that he interpreted Ms Haddon's submission and supporting information to infer that the effects on the cultural

⁴⁸EIC of Olivia Haddon, para. 61.

⁴⁹ Evidence in Reply of Olivia Haddon, para. 3.

⁵⁰ Oral Submissions of Wayne Greenwood, 7th May 2021

⁵¹ Oral Submissions of Sammy Williams 7th May 2021 and Ra Gossage, 11th May 2021.

⁵² Memorandum – Addendum technical specialist review, 8 April 2021, para. 16.

⁵³ Memorandum – Supplementary technical specialist review, 11 February 2022, para. 28-29, 36.

landscape are unable to be mitigated through controls over ongoing sand extraction activity;

“rather, past adverse effects can only be remedied (and potential future adverse effects avoided) by ceasing the sand extraction activity....In this instance, the ongoing sand extraction activity has the potential to adversely impact Māori cultural landscape values, with these impacts being well-communicated through the submissions and evidence of tangata whenua that have been presented during the hearing to date.”⁵⁴

FINDINGS

214. We acknowledge the effects on the people of Pakiri of observing and hearing the sand extraction vessel operating within their cultural landscape for many years. In our understanding of the evidence presented, effects on the cultural landscape and seascape are not confined to landscape, visual and amenity effects, ie. being able to see and hear the vessel operating. Rather, they extend beyond this to include such matters as the physical removal of the sand (a key component of that landscape) and interrelated impacts on the morphology of the beach, biodiversity, cultural identity and practices, and people’s wellbeing.
215. We accept that from a cultural landscape perspective, effects are not confined to the immediate locality of the offshore extraction site because the landscape essentially encompasses the entire Ngāti Manuhiri Coastal Statutory Acknowledgement Area. The cultural landscape is viewed as a whole, and Ahi Kaa do not necessarily distinguish the effects from inshore extraction and this offshore application.
216. We accept the evidence of Ahi Kaa that the past and cumulative effects they have identified on their cultural landscape and seascape are significant and adverse, and will continue under the current MBL application. We also accept Mr Kensington’s revised findings in relation to effects on cultural landscape which reinforce our findings in regard to effects on Mana Whenua. That being that the effects of the proposal on cultural landscape values for the Ahi Kaa of Pakiri will be significant and adverse.
217. We reiterate our earlier statement that B6.6 of the RPS, in setting out the explanation and principal reasons for adoption of the Mana Whenua Chapter, identifies that many sites and places of significance are yet to be protected via the mechanisms in Chapter D21, the Sites and Places of Significance to Mana Whenua Overlay, for reasons such as limited investment, cultural sensitivities and mismanagement of information in the past. Nonetheless, Council has a statutory responsibility to protect Mana Whenua cultural heritage from inappropriate subdivision, use and development and we consider the evidence on the cultural landscape before us is of such weight that granting of this offshore consent would not be consistent with the requirements of B6.5.1, namely:

- “(1) The tangible and intangible values of Mana Whenua cultural heritage are identified, protected and enhanced.*
- (2) The relationship of Mana Whenua with their cultural heritage is provided for.*

⁵⁴Memorandum – Supplementary technical specialist review, 11 February 2022, para. 30.

(3) *The association of Mana Whenua cultural, spiritual and historical values with local history and whakapapa is recognised, protected and enhanced; and*

B6.5.2. (1) Protect Mana Whenua cultural and historic heritage sites and areas which are of significance to Mana Whenua.”

- Effectson Taonga Species

218. Ahi Kaa submitters held serious concerns about the depletion of key Taonga species, and risks to them due to the operation of the sand extraction vessel and dredging of their feeding habitat. Ms Haddon referred to the plight of a number of ‘cultural keystone species’, including whai (sting ray), tara iti (fairy tern), and tohoro (whales) which are seen as kaitiaki in themselves and indicators of cultural health. Besides their role in the ecosystem, these species are significant in tribal folklore, language, traditions and identity. A number of Ahi Kaa submitters described their involvement with DOC in fairy tern conservation efforts including monitoring and habitat protection and restoration. We have discussed effects on tara iti in the ecology section of this decision.

219. Ahi Kaa have consistently observed a reduction in kaimoana in the Pakiri Embayment. Ms Sharley Haddon produced an email from Adam Kellian of Kellian Fishing Ltd⁵⁵, a local commercial fisherman who over the past 2 decades has observed decline in paddle crabs and fish species, as well as changes to the seafloor and dunes. Ms Olivia Haddon further elaborated:

“Kaimoana takendirectlyharvested the waters and sands adjoining Pakiri beach are Tuatua, Pipi, Paua, Kutai, Kanae, Makawhiti and Inanga, Tipa, Tio, Hururoa, kahawai, Tamuri and Pātiki, Tākeke, Parore, Moki. Our collective memory recalls abundance, our reality today is vastly different. There is a breakdown in the whakapapa and interrelationship between these species. We were reliant on this kaimoana resource, we harvested seasonally according to strict customary practices and tikanga.”⁵⁶

220. Potential adverse effects of sand extraction on the Hururoa (horse mussel), considered an important creator of biogenic habitat and a sentinel species was also a contentious topic. We discuss this further in the ecological effects section of this decision Mr Rikys criticised what he saw as limitations of the ways in which ecological assessments have been carried out, stating:

“My next point is specific to assessments of effects of the sand dredging on the marine environment which under prevailing practices very quickly becomes compartmentalised whereas the Maori traditional view is both ecocentric as opposed to anthropocentric...”⁵⁷

221. In relation to this, Ms Haddon expressed concern that mātauranga Māori and tikanga had not been appropriately recognised and provided for in this resource consent process. She emphasized the nature of traditional ecological knowledge including the daily observations of Ahi Kaa, stating:

⁵⁵Attachment to Evidence of Sharley Haddon, dated October 21, 2020.

⁵⁶EIC of Olivia Haddon, para. 69.

⁵⁷EIC of Pita Rikys, para. 17.

“The integration of our mātauranga and tikanga in this specific resource management processes is not evident to us,” and;

“Time is running out real damage is occurring. Fundamentally we ask for better management of our seafloor biodiversity our sea creatures the children of Tangaroa because we consider based on our intimate every day observations that the ecological and whakapapa damage caused by sand mining is more than minor.”⁵⁸

222. Mr Tamati Stevens, a mātauranga Māori researcher, provided evidence demonstrating the application of cultural/TeAo Māori frameworks to ecological understanding. He stressed the importance of cultural values such as tikanga, mātauranga, the maramataka, and whakapapa, noting the interdependence of indicator species such as tuangi (cockles), hururoa (horse mussels), and tipa (scallops). Mr Stevens has been diving and collecting and observing kaimoana and habitat in the Pakiri Embayment for some time. His mātauranga based research enabled him to conclude that due to prolonged sand extraction Pakiri is a degraded ecosystem, key markers/indicator species are missing, the whakapapa of the system has been altered and disrupted and it requires restoration to a healthy state.⁵⁹
223. We recognise that that there is a disconnect between the way in which technical assessments are carried out and a mātauranga or tikanga based approach. The Hururoa became an important example during the hearing illustrating these differences. A common theme between the ecologists was a lack of evidence to directly attribute ecological effects to sand extraction operations. The applicant and Council ecologists were agreed that pre sand extraction surveys would avoid direct and cumulative effects on horse mussels. However, Dr Sivaguru in reply had disagreed with Mr West that the effects of sand extraction are not permanent, using the non-recovery of horse mussel beds recorded in the 2003 survey as illustration. At the reconvened hearing we asked Dr Sivaguru to comment on the past effects raised by Ahi Kaa and she agreed with their concerns insofar as the ongoing removal of sand and disturbance of the seabed would not assist horse mussel recovery due to the long period required for their recolonisation. She advised that there were also gaps in knowledge and research around recruitment, settlement and other factors for this species.

FINDINGS

224. In our findings we have been cognisant of mātauranga and tikanga in relation to taonga species, including kaimoana. We recognise the need to look at these holistically, rather than in isolation. Therefore we agree with Ahi Kaa that the Proposal will result in significant adverse effects (including past and cumulative effects) on taonga species, and the Hururoa in particular (taking on board the comments of Dr Sivaguru above). We acknowledge that according to mātauranga and the lived experience and observations of the Ahi Kaa, the whakapapa and interrelationships with other species such as Tuangi, Tipa, Tara iti, Whai and Tohora are altered and diminished as a result of the ongoing sand extraction activity. Further, this has consequences in terms of kaitiakitanga, mauri, mana and manaakitanga which we discuss below.

⁵⁸EIC of Olivia Haddon, paras, 44 and 104.

⁵⁹Evidence of Tamati Stevens, para. 12.

- Effects on Rangatiratanga and Kaitiakitanga

225. Ahi Kaa and Ngāti Manuhiri were consistent in their belief that the Proposal will undermine their Rangatiratanga and does not provide for kaitiakitanga. Additional effects on interrelated cultural values, such as mauri, mana and manaakitanga were also raised.

226. Mr Hohneck provided a historical context to the alienation of whenua and removal of resources from Ngāti Manuhiri's rohe, including kauri timber as well as sand. According to Mr Hohneck, gaining recognition of their rights through Settlement had been a long and arduous process and the people are fatigued at having to continue to fight to uphold their rangatiratanga and kaitiakitanga. He saw the Proposal as an affront to those rights. Ms Haddon presented a history of her father and other kaumatua and tupuna's ongoing expression of rangatiratanga and kaitiakitanga in trying to prevent sand extraction in the rohe or at minimum establish an engagement strategy and ongoing involvement in the operation.⁶⁰ In legal submissions, Mr Pou affirmed that exploitation of Ngāti Manuhiri's resources for the development and expansion of Auckland has negatively affected taonga and the customary rights and practices of Mana Whenua within their ancestral rohe stating:

"the impacts are now a burden that Ngāti Manuhiri have had to shoulder intergenerationally", and

"The removal of sand is not just about the removal of something renewable, it is, in actuality, the removal of the rohe itself and the transferal of it into an area in which others hold mana. Through Ngāti Manuhiri eyes, once again, their land is being sold by others."⁶¹

227. Mr Hohneck described Pakiri as "the last bastion", and that despite so much of their rohe being lost, it is the biggest Māori landholding in Auckland, a testament to the Rangatiratanga and Kaitiakitanga of Ngāti Manuhiri. He was clear that this landholding extended to the adjoining moana, and we understand that whanau and hapū claims are in process under the Marine and Coastal Area (Takutai Moana) Act 2011.⁶² As Ms Haddon explained it:

"The moana adjacent to our kainga and the resources in the sea and below it are treasured possessions, our Taonga, that are part of our inheritance. We are dependent on them and we are the kaitiaki of them. The use, development and protection of sustainable management of these taonga is part of our heritage and our tino rangatiratanga."⁶³

228. Her evidence included a statement from her father in 1998 evidence to the Environment Court that read:

⁶⁰ Summary Statement of Olivia Haddon, para. 16.

⁶¹ Legal Submissions for Ngāti Manuhiri Settlement Trust, paras. 8 and 20.

⁶² Eg. Submission of Veronica Bouchier, Submissions Vol 1, p.930; and oral submissions of Annie Baines, 7th May 2021 and Jason Pou, 11th May 2021.

⁶³ Summary Statement of Olivia Haddon, para. 7.

“In his evidence statement accompanying the MOU and report submitted to the Environment Court, my father said “As tangata Whenua and as a representative of iwi, I can quite honestly say that the iwi of Ngāti Wai wish that no sand be taken at all from Pakiri beaches and that in a perfect world, existing operations would be stopped and our true role as kaitiaki of our resource would be restored.”⁶⁴

229. Mr Hohneck gave examples of taonga relevant to other iwi in other parts of the country where relationships to resources had elevated status or protection through Treaty Settlement and subsequently when it came to resource management decision making. These included the relationships between Tainui and the Waikato River, Ngāi Tahu and Pounamu, Te Arawa and their lakes, for example. He sought acknowledgement that the mauri and mana of the “sacred onepu or sand of Pakiri” and Ngāti Manuhiri’s relationship to it should be afforded the same status or depth of meaning and connection.
230. Ms Klink provided a broader background to kaitiaki work in Hauraki Gulf, and discussed the concept of utu to achieve balance, ie. putting something back where you have taken something out. When asked how she envisaged this could occur Ms Klink explained that rahui were required to stop the practice of sand mining and allow the space to replenish and for Mana Whenua to be active in that space.⁶⁵
231. Similarly, Ms Haddon and Mr Stevens gave evidence on how many decades of sand mining had diminished the mauri of the Pakiri-Mangawhai Embayment and wider Hauraki Gulf, concluding that continuing the sand extraction activity does not enable the restoration of mauri. Mr Stevens opined that the lack of kaimoana affected kaitiakitanga in that ancestral knowledge is unable to be passed down to the next generations and that the practice of manaakitanga, either through provision of kaimoana to manuhiri or kaumatua to uplift their mauri and wairua, cannot be maintained.⁶⁶
232. Ms Haddon urged us to:

“err on the side of caution and decline this application so that no further damage to our whole ecosystem and sea floor ecology will occur so that it may heal itself and that our mana and relationship to it continues.”⁶⁷

233. Mr Pou emphasized that kaitiakitanga was an obligation as opposed to a choice and this was echoed in the submission of Mr Hohneck and Ms Haddon. They did not see conditions or cultural liaison agreements as a means to mitigate adverse effects on kaitiakitanga or enable the expression of it. Mr Williams while stressing he was stridently opposed to the proposal did confirm conditions requiring better informing of the operation would be valuable.⁶⁸ Generally Ahi Kaa did not wish to engage in discussion with the Panel on potential conditions. Mr Pou’s perspective during questioning was quite telling:

⁶⁴ Summary Statement of Olivia Haddon, para. 14.

⁶⁵Oralsubmission of Kelly Klink, 7th May 2021.

⁶⁶Evidence of TamatiStevens, para. 11.

⁶⁷ EIC of Olivia Haddon, para. 107.

⁶⁸Oral Submission of Sammy Williams, 7th May 2021.

“Māori representatives on CLG type structures tend to become spectators to their own demise...bellwethers that have to take messages back to their communities and be chastised for being on them in the first place..”⁶⁹

FINDINGS

234. We agree that removing and relocating sand to another rohe where Ngāti Manuhiri are not mana whenua is not consistent with upholding rangatiratanga. We have already accepted that allowing the Proposal will result in significant adverse cultural effects (including past and cumulative effects) on the cultural landscape and taonga species. It is in their role as kaitiaki that Ahi Kaa have sought refusal of the consent to protect these values and allow the embayment to rest and be restored. We acknowledge that the effects on rangatiratanga and kaitiakitanga flow on to impact the mana and mauri of the environment and the people and also their ability to manaaki. We are also not convinced that mitigation in the form of cultural liaison agreements and conditions in this instance will be adequate to enable the expression of kaitiakitanga.

- Historical and cumulative impacts

235. We were struck by the historical narrative of sand extraction at Pakiri, the background to the long standing objections of Ahi Kaa and the impacts on their wellbeing. Ms Haddon described the burden of proof placed on whanau and the community to prove the mining activity has been damaging, stating:

“Decades of attending hearings and providing and fighting for an awareness at least of a partnership and advocating for our rights enshrined in the treaty, has subjected my whanau to significant threats of hardship. Our statements and cultural evidence are dismissed as “personal opinion”. We are small and the legal process is a Goliath. The submission process has been challenging when there is no respect for our traditional knowledge and cultural perspective and we are unable to be effective when the legislation is enabling unsustainable exploitation and, in our opinion, is still pernicious to our Indigenous rights. Our kaumatua are tired they have dedicated a good chunk of their productive lifetime to this issue, thus creating a sense of apathy in our ability to halt the incoming tide of encroachment to our value systems, relationships to our tāonga and way of life. This is not right.”⁷⁰

236. According to Mr Hohneck a 30 year consent equates to a whole generation, and now that the original people standing up regards this issue have passed on, tamariki and mokopuna will have to take up the mantle. He further commented that “applicants come and go, our responsibility for our whenua remains.”⁷¹

237. This was aptly illustrated in the evidence of Ms Grace Atea Gossage Myers who provided a rangatahi voice on behalf of the future generations of Pakiri. She articulated that preserving the treasures that tupuna had fought for and handed down was a responsibility keenly felt.

⁶⁹Legal Submissions for Ngāti Manuhiri Settlement Trust, 11th May 2021.

⁷⁰ Summary Statement of Olivia Haddon, para. 13.

⁷¹ Oral Statement of Mook Hohneck, 11th May 2021.

238. Her whanaunga, Ra Gossage, later commented on the detrimental and intergenerational impacts of sand mining on the health and wellbeing of Kaitiaki and Ahi Kaa, observing how her uncles have fought the fight, which Olivia Haddon has since carried on, and her heartbreak at having to see 17 year old Grace now having to continue it. Ms Gossage further described the mental and physical toll, time and expense incurred by Ahi Kaa having to continually participate in these processes.⁷²
239. As mentioned earlier, many Ahi Kaa submitters held concerns about changes to the beach profile and dunes and described observing changes over the decades whilst the current consent has been operating. Mr Wayne Greenwood and Mr Ringi and Ms Wendy Brown emphasized how Mana Whenua living at Pakiri will be affected by climate change and voiced concerns about how beach erosion and sea level rise was a threat to whanau landholdings behind the dunes. These concerns were echoed by Ms Haddon who considered the Proposal would exacerbate erosion and reduce defences to climate change impacts in the future. Mr Greenwood and the Brown Whanau produced articles and maps relating to projected sea level rise and a series of photos over time illustrating changes to the beach and dune system.
240. Mr Brown described how the undermining of sand dunes was resulting in exposure of waahitapu including koiwi, and one of his roles as a kaitiaki was to re-inter koiwi. Mr Tamihana Paki reinforced korero about historic battles and waahitapu along the Pakiri coastline and the need to protect them.
241. Ms Haddon was concerned that because sand dunes are not being replenished fairly tern nesting habitats are increasingly vulnerable to erosion which impacts on their breeding success. Mr West's evidence had confirmed that changes in beach morphology can impact seabird nesting due to habitat reduction but relied on Ms Hart's evidence that beach morphology changes at Pakiri and Te Arai beaches are not related to the offshore sand extraction which we discuss later.
242. Te Whanau o Pakiri called Ms Sian John as a witness in support of their concerns regarding the effects of the proposal in relation to climate change and cumulative effects on the beach and we find agreement with aspects of Ms John evidence in the coastal processes section of this decision.

FINDINGS

243. We accept the consistent and widely held beliefs of Ahi Kaa and Ngāti Manuhiri that renewal of this consent will continue to affect their cultural wellbeing, and represents a continuation of historical and cumulative effects of sand extraction in the Pakiri-Mangawhai Embayment. We recognise the concerns of Ahi Kaa in their role as kaitiaki regarding coastal erosion affecting valued sites and places, including habitat for taonga species and waahitapū, as well as the adjoining Māori land blocks. These concerns are relatively aligned with our findings in relation to coastal processes. That is, due to the uncertainty and conflicting evidence expressed by the coastal experts we are unable to conclude that sand extraction is not contributing to sand erosion on the beach.

⁷²OralSubmissions of Ra Gossage, 11th May 2021.

Engagement with the applicant

244. There was considerable discussion by the applicant and Ahi Kaa submitters about the MOU with Ngātiwai Trust Board and what it meant, including the payment, or lack of payment, of the cultural liaison fee. Suffice to say it appeared clear to us that there was little confidence from Ahi Kaa that the MOU had achieved beneficial outcomes for Pakiri. Mr Pou characterised the consultation that had taken place between Kaipara and Ngāti Manuhiri as haphazard and damaging to internal hapū relationships and the relationship with the applicant.
245. At the reconvened hearing, we were heartened to hear that consultation with the Treaty Settlement Entities, as well as Te Whanau o Pakiri, had improved under MBL and was progressing with the assistance of Mr TeRangi. We consider this best practice, regardless of the outcome of our decision.
246. Another point of contention around the MOU arose through Mr Slyfield and Mr Riddell suggesting the MOU and historical evidence of Laly Haddon indicated a preference by Mana Whenua for offshore sand extraction, although Mr Slyfield did concede their view may have changed over time.⁷³ Mr Hay considered the existing agreement between the Ngātiwai Trust Board and the consent holder for the current sand extraction in this location demonstrated that there was not a fundamental conflict between protection of cultural values and sand mining.⁷⁴
247. Mr Pou addressed the inference that Ngāti Manuhiri had in some way historically consented to sand mining in their rohe or shown a preference for offshore consents, describing this as “manufacturing consent”, and arguing that doesn’t mean the sand mining is necessarily acceptable:

“What should be kept in mind is that these positions might just have been taken out of a perception of inevitability... Care must be taken to ensure that the compromises that were made in the past are not re-engineered to be consent for the purposes of the current application.”⁷⁵

248. In the same vein Ms Haddon stated:

“The MOU presented by Mr Slyfield cannot be viewed in isolation, it is misleading offhim to suggest that Laly and Ngati Wai support offshore sand mining in totality- theirposition was very clear, it is also misleading to claim that our views and positionhave changed over time. Our collective view against the activity today is the same asit was documented in 1947, again in 1992 and in 1998, we have struggled for manyyears to realise a total cessation of mining at Pakiri - whether that is nearshore oroffshore.”⁷⁶

249. Mr Hohneck also stressed that sand extraction offshore was not more appropriate, detailing significant sites and kaitiaki responsibilities, for example in respect of the motu

⁷³OpeingLegalSubmissions for Kaipara, Para. 104.

⁷⁴Rebuttal Evidence of David Hay, para. 74.

⁷⁵ Legal Submissions for Ngāti Manuhiri, paras 37-38.

⁷⁶ Evidence of Olivia Haddon in reply, para 6.

(islands), a whale pathway or trail known as “Waimimiha”, and particular currents.⁷⁷ Ms Haddon included an excerpt from her father’s 1993 evidence which sums up the inseparable nature of elements of Ngāti Manuhiri’s rohe:

“Our traditional tribal domain of which we hold traditional ownership rights and mana whenua, mana moana and exercise tino rangatiratanga and kaitiakitanga includes the whole coastline of Pakiri... and extends over the ocean of Pakiri and beyond to the offshore islands. All three elements, the land, the sea and offshore islands are collectively on tribal domain and cannot be separated.”⁷⁸

FINDINGS

250. We consider Ahi Kaa evidence on the interrelated nature and relationships of the cultural landscape and seascape is compelling and does not create a distinction between offshore, mid-shore or nearshore extraction in terms of acceptability. We acknowledge that engagement, apart from with Te Uri o Hau, has been challenging and sometimes divisive for the parties, but accept that consultation with the relevant Mana Whenua groupings has occurred and appears to have improved under MBL.
251. Notwithstanding this, the evidence of Ahi Kaa and Ngati Manuhiri indicates that the adverse effects on cultural values are such that they are unable to be mitigated through the conditions proposed by the applicant such as the CLG. While Mr TeRangi and others on behalf of the applicant have expressed the view that cultural liaison agreements could also provide a pathway for mitigation, these are yet to be established. We accept that Te Uri o Hau consider consent conditions and a project agreement could allow for the expression of kaitiakitanga, for example through cultural monitoring. Submitters and witnesses like Ms Klink and Mr Stevens, on the other hand, described customary practises and utilisation of Mātauranga Māori in this context as essential to understanding the adverse effects of sand extraction activities on taonga species that must cease to enable balance to be restored, the space to replenish and for Mana Whenua to be active in that space. We accept the view of Ahi Kaa and Ngāti Manuhiri that in this instance, refusal of this consent better supports the integration of Mana Whenua values, mātauranga and tikanga in the management of natural and physical resources as anticipated in Policy B6.3.2.(2) of the RPS.

The Expert Planners’ Responses

252. Mr Hopkins did not include an assessment of B6 Provisions in the S42A report with the exception of a broad statement recognising that the applicant has engaged with Tangata Whenua and engagement was ongoing. In his reply Mr Hopkins did not elaborate on these provisions any further, instead focusing on NZCPS and HGMPA provisions. He did however include the following statements, in relation to cultural values in his reply, after considering the evidence presented by Mana Whenua on cultural effects.

“Whilst the presentation of of submissions is relevant to understanding all effects, it is of particular value given the subjective nature of cultural effects which are personally and collectively held by mana whenua. In this case a greater

⁷⁷Oral Submissions of Mook Hohneck, 11th May 2021.

⁷⁸EIC of Olivia Haddon, para. 25.

understanding of the cultural values and the expectations around the ability and practicality of either avoiding, remedying or mitigation these effects has been provided through this process.

Having considered this evidence, my understanding (based on the submissions and evidence presented) is that in the context of this consent, cultural effects are broad ranging and are interlinked with effects on coastal ecology, coastal processes and the cultural landscape.

For the purpose of my planning assessment, I have distinguished between my understandings of the cultural effects as they relate to the ongoing extraction of sand in two ways. In this section, I address the impacts of the sand extraction on the taonga of mana whenua, as well as the impacts of the sand extraction on the ability of mana whenua to exercise their kaitiakitanga (and how that may impact on their mana), as well as the adverse effects on their mana through the removal of their rohe to an area when others hold mana. I address cultural effects resulting on coastal processes (as they relate to impacts on the beach, dune system and underwater environment), and on coastal ecology and biodiversity (and the ability of mana whenua to exercise appropriate tikanga and kaitiakitanga) and the cultural landscape in the sections below.

In regards to the cultural effects associated with the ongoing sand extraction from their rohe, for some mana whenua groups this challenges the ability of mana whenua to demonstrate and exercise kaitiakitanga, with the consequence being a diminishing of their mana. Moreover, the physical removal of sand from their rohe to an area where others hold mana challenges their own mana.

Whilst it is acknowledged that the relationship between mana whenua and their tikanga and taonga is subjective as is their appreciation of their ability to exercise kaitiakitanga, the nature of the sand extraction activity (including the process of extraction and the removal) is such that cultural effects of the activity are particularly sensitive in this case. In this regard, the submissions outline that for some mana whenua groups the adverse effects experienced are significant. On this basis they oppose the granting of consent and continuation of the activity.

It is also understood that should consent be granted, the absence of meaningful engagement and partnership further contributes to the experience of adverse cultural effects.

With these considerations in mind, in the context of the fundamental nature of the sand extraction activity proposed, adverse cultural effects as experienced by some mana whenua groups are of such significance that they will be unacceptable from a resource management perspective.”

253. Mr Hay's primary evidence contained an attachment listing the relevant AUP objectives and policies (for cultural matters specifically B6.2.2 and B6.3.2) Overall he considered the application to align with RPS and in respect of cultural matters, noted the existence of an MOU with Ngātiwai Trust Board in relation to the previous consent, that engagement was underway with both Ngāti Manuhiri and Te Uri o Hau Settlement

Trusts' with a view to establishing new cultural liaison agreements to "ensure iwi are afforded the opportunity to implement their kaitiaki role."⁷⁹

254. In Mr Hay's reply statement he elaborated further that in terms of policy B6.2.2 opportunities for tangata whenua to participate in this consenting process have and continue to be provided (through CVA's, submissions and evidence; through continued dialogue between MBL and the two Settlement Trusts; and through the proposed CLG conditions and the cultural liaison agreements under negotiation). As such he considered that Policy B6.2.2 is being given effect to. For the reasons set out elsewhere in this decision, where we have addressed the provisions of the AUP(OP), we do not agree.
255. As regards policy B6.3.2 Mr Hay considers an appropriate assessment of cultural effects has been carried out, presumably referring to the Te Uri O Hau CEA, but noting that there are a range of views on the nature and degree of effects on cultural values. We concur with Mr Hay insofar as we have sufficient information from the CEA, submissions and evidence to determine that Mana Whenua have been able to identify their values as envisaged in B6.3.2.

FINDINGS

256. Overall, we have preferred the evidence presented on behalf of Mana Whenua together with the evidence of Mr Hopkins in terms of his recommendation to refuse consent based on his understanding of the Mana Whenua evidence.

Iwi Management Plans

257. While Iwi Management Plans are not expressly referenced in the objectives and policies of chapter B6 of the RPS, the explanation and principal reasons for adoption (in B6.6) describe how the policies relating to Mana Whenua values seek to ensure that resource management processes in Auckland are informed by Mana Whenua perspectives, and such perspectives are to be accorded status in decision-making and have the potential to influence outcomes. Iwi planning documents are identified as a valuable source of information for integrating mātauranga and tikanga into resource management in Auckland.
258. In this case, the relevant documents are the Te Uri o Hau Kaitiakitanga o Te Taiao (Environmental Management Plan) 2011 and Te Iwi o Ngatiwai Iwi Environmental Policy Document 2007 (hereafter referred to as EMP).
259. Mr Hopkins attached copies of these EMP's to his reply statement, however, there was no assessment of them either in his reply or the Hearing Report. Mr Hay noted this in his rebuttal⁸⁰ and included an assessment of both documents, although his assessment was limited to the mineral extraction sections of these documents.

⁷⁹EIC of Mr Hay, para 131.

⁸⁰ Statement of Evidence in Rebuttal of David Hay, 21 February 2022, para. 80.

- Ngātiwai EMP

260. In his review of Ngātiwai's EMP Mr Hay mentions the Mineral Resources section which sets out six objectives followed by supporting policies and methods. The objectives and policies relate to sustainable extraction and management of minerals; protection and enhancement of the mauri of mineral resources; recognition of tangata whenua relationships to mineral resources, including as kaitiaki; and increased Tāngata Whenua involvement and use of traditional environmental knowledge in the management and monitoring of mineral resources. Relevant methods are around notification with respect to consent notification, pre-application engagement and preparation of cultural impact assessments, and payment of royalties.
261. Mr Hay's opinion is that the current agreement between Ngātiwai Trust Board and the consent holder reflects these objectives in part and demonstrates that a "fundamental conflict" between sand extraction and cultural values does not exist, and the EMP does not seek prohibition of sand extraction within the Ngātiwairohe. He goes on to say the proposed CLG conditions support these objectives particularly in terms of monitoring. In assessing the methods, Mr Hay notes that while Ngātiwai Trust Board have not prepared a Cultural Impact Assessment, Environs Holdings Ltd have provided a CEA for Te Uri o Hau's area of interest. Ngātiwai Trust Board's submission states that the applicant did not request a CIA from them.⁸¹ Mr Hay also refers to the payment of a royalty to tangata whenua for mineral extraction. We are aware that there are ongoing discussions surrounding the existing agreement with Ngātiwai Trust Board and as alluded to in the reply of Mr McCallum and Mr TeRangi⁸², discussions are continuing with the various Iwi and Hapū entities on possible future agreements. Mr Hay therefore concludes that the proposal is not contrary to the Ngātiwai Environmental Policy and that "*the methods outlined have in part been or are being followed by the applicant and Council where relevant.*"⁸³
262. We think it worth mentioning that Method 11 actually states "*Where there is agreement from Tāngata Whenua that a mineral resource can be extracted, a benefit back to them (in the form of a royalty) will be payable.*"[our emphasis]. Therefore, while there may have been agreement reached with Ngātiwai Trust Board regards the existing consent (and we have heard from submitters about unresolved issues in relation to this agreement and fee payment) this is not the case for the application before us. The submission received from Ngātiwai in support of Omaha Marae was opposed to the application and, as noted elsewhere in our decision, at close of hearing the cultural liaison agreements being discussed with Mana Whenua were yet to be confirmed.
263. Besides the Minerals section, there are a number of other policy directives in Ngātiwai's EMP that are likely of relevance to this application. For example, Ngātiwai water objectives seek that:

"The life-supporting capacity of creeks, streams, water bodies, wetlands, swamps, springs, aquifers, thermal waters, estuarine waters and coastal waters enables

⁸¹Submission of Ngātiwai Trust Board, Submissions Vol 2, p. 1101.

⁸²Statement of Evidence in Reply of Callum McCallum, 23 February 2022, Attachment: Stakeholder Communication/ Feedback Register, and Rebuttal Evidence of Tame Te Rangi, para. 54.

⁸³Rebuttal Evidence of David Hay, para. 79.

*optimum health and wellness for all Tāngata Whenua; those they host within their rohe; their plants, animals and other whanaunga.*⁸⁴

264. Indigenous Fauna policies for Ngātiwai rohe include:

*“Only after appropriate effective engagement and adequate remediation or mitigation, or safety or security reasons, will Tāngata Whenua support any negative or destructive impacts on their indigenous fauna.”*⁸⁵

- Te Uri o Hau EMP

265. Mr Hay notes that Te Uri o Hau’s EMP does not state sand extraction should not be allowed in any circumstances, and instead outlines what should be considered in applications/consents. We generally agree, as Section 43 “Minerals and Sand Extraction” contains policies and methods seeking that sand mining be sustainable, adverse effects to the CMA are avoided, remedied or mitigated; compliance requires monitoring, and proactive relationships are to be developed. Notwithstanding this, we observe that the sole objective of this section somewhat contrasts with the policies and methods stating:

*“That all future sand extraction is land-based, and minerals are extracted within and outside the statutory area of Te Uri o Hau at a rate that is sustainable for future generations, and is profitable for Te Uri o Hau.”*⁸⁶

266. Like the Ngātiwai document, Te Uri o Hau’s EMP contains other topics that are relevant to consideration of sand mining activities, for example customary fisheries, biodiversity, marine mammals and cultural landscapes sections. Part 3 of the EMP describes values related to Mātauranga Māori including Spiritual and Cultural Connectedness, Tikanga, Taonga, Kaitiakitanga, Mana Whenua and Mana Moana, and Indigenous Flora and Fauna. The Te Uri o Hau CEA is of great assistance to our assessment, as it includes a specific section on the EMP⁸⁷ and Section 12 of the CEA systematically works through the set of values set out in Part 3 of the EMP in assessing the proposal. While the CEA does not specifically mention the Minerals and Sand Extraction section of the EMP, we record that the CEA’s analysis indicates that the proposal did not offend any of the EMP values and practices that were assessed.

FINDINGS

267. We accept that engagement has been occurring with the Iwi Authorities as envisaged in the EMPs, and that Ngātiwai and Ngāti Manuhiri did not prepare impacts assessments, for whatever reason. But we have no confirmation that agreements for the application before us have been reached with any Mana Whenua party and the existing MOU is not sufficient evidence in this regard. For the reasons set out above we do not agree that the proposed CLG and information sharing conditions are appropriate to ensure kaitiakitanga and traditional ecological knowledge is recognised and utilised and we

⁸⁴Ngātiwai EMP, p. 21.

⁸⁵Ngātiwai EMP, Policy 11, p. 31.

⁸⁶Te Uri o Hau EMP, p. 73.

⁸⁷CEA, Section 9.7.

received no confirmation from the Iwi Authorities on the adequacy of the proposed conditions.

268. While the Minerals section of the Ngātiwai EMP may not seek to prohibit sand extraction, it does point towards agreement needing to be reached. Other policies in the document contain direction around the life supporting capacity of coastal waters enabling tangata whenua wellbeing and that no negative or destructive impacts on indigenous fauna occur without appropriate engagement, remediation or mitigation. While perhaps not representing a “fundamental conflict” with sand extraction activities, we consider that in light of Ahi Kaa evidence on these matters it is finely balanced and therefore we are not convinced that the proposal is consistent with the Ngātiwai EMP.
269. While Te Uri O Hau’s EMP appears to prefer land-based sand extraction, we generally agree with Mr Hay’s summary in relation to the Minerals and Sand Extraction section, and the CEA findings give us further confidence that the Proposal is consistent with the Te Uri o Hau EMP. Ideally, we would have had confirmation from Te Uri o Hau that a cultural liaison agreement had indeed been established and that proposed consent conditions adequately captured the CEA recommendations. However, we were persuaded by the letter tabled from Antony Thompson⁸⁸ that the Proposal supports the outcomes sought by Te Uri o Hau through their EMP.

Overall Findings on Effects on Mana Whenua

270. We have carefully considered the evidence of Mana Whenua submitters. While recognising the authority of the relevant Settlement Trusts, we have differentiated evidence presented by Ahi Kaa and Ngāti Manuhiri, acknowledging them as Mana Whenua of the area south of Te Arai Point. We accept that for Te Uri o Hau the cultural effects of the proposed activity were considered minor to moderate⁸⁹ and that the Proposal is consistent with the Te Uri o Hau EMP. From Te Uri o Hau’s perspective, cultural relationships and Kaitiakitanga can be provided for through meaningful engagement including establishment of a formal relationship agreement, and implementation of a cultural monitoring regime to be secured by appropriate consent conditions.
271. This was not the case for Ngātiwai, Ngāti Manuhiri and the Ahi Kaa. These groups, while having differing mandates and layers of relationship to the Pakiri Embayment, were unified in their opposition to the Proposal. We have been cognisant of that in our decision. We have found their evidence on the adverse effects of the proposed sand extraction activity on their cultural landscape, taonga species, rangatiratanga, kaitiakitanga and cultural wellbeing compelling. Setting aside Te Uri o Hau’s position, the only conflicting view before us is that of Mr TeRangi, who relying on the applicant’s technical material⁹⁰ concluded:

⁸⁸ Letter from Antony Thompson dated 25th February 2022.

⁸⁹ Te Uri o Hau CEA, pp 46.

⁹⁰ Mr Te Rangi advised during the reconvened hearing that he had only read the application material and no evidence from other experts.

“I have formed an understanding that sand extraction at Pākiri is sustainable with minimal environmental effects as well as being able to co-exist with local tangata whenua alongside keeping their Māori cultural values intact.”⁹¹

272. This does not accord with our findings in relation to effects on ecology and coastal processes and those comparative values such as effects on taonga species, cultural landscapes and kaitiakitanga when applying a cultural lens. We therefore prefer the evidence of Ahi Kaa and Ngāti Manuhiri submitters in this regard, who are Mana Whenua of Pakiri with intimate intergenerational knowledge and understanding of that environment. In our view this is consistent with what is required of us by the policies relating to Treaty of Waitangi/TeTiriti o Waitangi partnerships and participation in Chapter B6 of the RPS, e.g. B6.2.2 (1). This evidence was given by Kaumātua and Pūkenga of, or recognised by, the hapū - specialists in the mātauranga and tikanga of their hapū and best placed to convey their relationship to the Pakiri-Mangawhai Embayment. They have told us that their cultural values and relationships, including mauri, and their mana and wellbeing have been, and will continue to be, eroded and diminished as a result of the current application. Refusal of consent is in our view appropriate to ensure Mana Whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight in resource management decision-making. In reaching this decision we have had particular regard to potential impacts on the holistic nature of the Mana Whenua world view; the exercise of kaitiakitanga; mauri, customary activities, including mahinga kai and sites and areas of significant spiritual or cultural heritage value to Mana Whenua as required by Policy B6.3.2. (6) of the RPS.
273. We have also been cognisant of the Coastal Statutory Acknowledgement Area of Ngāti Manuhiri and note that Poutawa Stream and Pakiri River are also subject to Statutory Acknowledgement under the Ngāti Manuhiri Claims Settlement Act 2012, while cultural redress properties include Hauturu, Pakiri Block Conservation Area, Pakiri Domain, and the Pakiri Riverbed.⁹² Policy B6.2.2 (2)(a) seeks that we recognise and provide for the historical association of the claimant group with the area, and any historical, cultural or spiritual values associated with the site or area in resource management processes, where a proposal affects land or resources subject to Treaty settlement legislation. Policy B6.2.2. (5) seeks to enable Mana Whenua to access, manage, use and develop cultural redress lands and interests for cultural activities and accessory activities. Given the submissions of Mr Pou and Hohneck of behalf of Ngāti Manuhiri in this regard, we consider refusal of consent is appropriate to recognise and provide for the associations and relationships to those particular sites and support use and development of cultural redress properties.
274. We acknowledge Mr TeRangi’s efforts and belief that genuine engagement with Mana Whenua can provide mechanisms to enable the expression of kaitiakitanga and other cultural values. While engagement may have occurred, and be continuing to occur, we are not satisfied that those mechanisms are in place, and we are not confident that what is proposed can mitigate the significant adverse effects that have been identified.

⁹¹ Rebuttal Evidence of Tame TeRangi, para 20.

⁹² See Appendix 21, AUP

Coastal Processes Effects

275. The Panel was presented with a great deal of evidence on coastal processes, both in the application and the evidence presented at both parts of the hearing (May-June 2021 and February-March 2022). The volume of technical information, the manner in which it was interpreted and presented to us and the conclusions drawn from it were often complex and conflicting.
276. Before considering the various aspects of coastal processes, we make a number of overall observations. Firstly, Mr Todd, coastal processes expert for McCallum Brothers Ltd, (MBL) found himself in an unusual position. During the first part of the hearing his client, MBL, were submitters in support of the application. As a result, Mr Todd's evidence concentrated, not on the potential effects of the proposed off-shore sand extraction application, but on the potential effects the proposal might have on the existing and proposed mid-shore and in-shore extraction activities. He also recommended that both operators (Kaipara and MBL) should share the burden of monitoring the beach and dunes as part of the consent conditions he promoted.
277. By the time the hearing reconvened, Mr Todd's client had become the applicant and at that point he turned his attention to the broader consideration of potential effects of the off-shore mining proposed.
278. Secondly, we note that it had been anticipated that the caucusing process would be an opportunity for the numerous differences of opinion on the multiple facets of the coastal processes at work in the Mangawhai-Pākiri embayment to be teased out and then explained in the JWS. Unfortunately, this was not the case and we had to rely on further questioning at the resumed hearing to gain a clearer understanding of why opinions differed so radically.
279. Despite this, an important benefit of the caucusing was the additional comparison data from the October 2021(DML for Kaipara), March 2021, (SurveyWorx for Kaipara) and September 2020 (eCoast for FOPB) surveys. The information this provided, in terms of trench infilling rates and the consensus of all members of the Coastal Processes Expert Caucusing Group (“CPECG”), as recorded in the JWS⁹³was very helpful.
280. It became clear that different witnesses were relying on different research and survey results in drawing their conclusions. These different sources included the Mangawhai-Pākiri Embayment Sand Study, (MPESS) from the 1990s, which was fundamental to the evidence of both Ms Hart and Ms Sharma and was relied on to various extents by other witnesses. More recent reports prepared by Jacobs for MCL's separate near shore and mid shore sand extraction applications, were relied on by Mr Todd, while the October 2021 seabed survey by DML was fundamental to the caucusing and JWS. The Panel did not have access to either the MPESS or the complete DML survey data and had to rely on interpretation of the various findings in them by different witnesses.
281. We were told by all of the coastal processes experts that despite 80 odd years of sand mining, at least 20 years of sand extraction monitoring work, as well as the information provided by both the MPESS and the Jacob's research, there remains a great deal of

⁹³Paragraphs 21 and 22 of the JWS

uncertainty about the coastal processes taking place in the embayment and the actual and potential effects of the sand extraction on those processes.

282. Responses to this uncertainty differed. Ms Hart, Mr Todd, Ms Sharma and Dr Shand were all of the opinion that, with appropriate conditions of consent that enabled an adaptive management regime to be put in place, this consent could be granted. Conversely, Ms John, Dr Mead and Professor Hilton were all of the opinion that until a greater understanding of the coastal processes at work was achieved, particularly the sediment transport system, consent for the offshore mining consent should be refused.
283. Just one of the complicating factors, as pointed out by Dr Mead is that the long term natural variations arising from such influences as intermittent storm events and the El Niño / La Niña southern oscillation weather cycle, all mask the actual effects of sand extraction on the beach and nearshore areas. The Panel also recognise that with more than one sand extraction operation occurring in the same embayment, it would be very difficult to determine which, if any sand extraction activity was causing any identified effect.
284. Lastly, as is explained more fully below under the heading 'Effects on significant surf breaks', the Panel had concerns with Dr Mead fulfilling expert roles for both the Applicant and a submitter in opposition. We observe, however, that at no point do we rely solely on Dr Mead's opinion with respect to coastal processes⁹⁴, but find that he is always supported in his view by other experts.

Extraction Tracks

285. Extracts from the DML survey showing shallow extraction tracks across a wide area of the seabed were included in Attachment 3 of the JWS, the DML hydrographic survey report dated October 2021. They are not annotated or specifically referred to in the report and it is not possible to infer from them how much of the surveyed area they represent. Professor Hilton, in referring to the same images, stated in his evidence that "*[T]he pattern and close spacing of trenches, compared with areas of seabed outside the mining areas, is suggestive of a 'ploughed paddock', one that is tens to hundreds of hectares in area.*"⁹⁵ A number of other witnesses also used the 'ploughed paddock' analogy.
286. We note that, as with other witnesses, it was not always clear in his evidence whether Professor Hilton, in using the term 'trenches', was referring to the 'normal' extraction tracks or the deeper and unexpected trenches in the southern end of existing extraction Area 1.
287. The Professor went on to suggest that these extraction tracks have been present for long periods of time, and concluded that "*the extent, dimensions and persistence of these trenches suggests rates of sand transport and accretion are less than the rates of sand mining in this area of the seabed*"⁹⁶.

⁹⁴There was no other expert evidence other than Dr Mead in relation to effects on surf breaks.

⁹⁵Professor Hilton's evidence dated 9 February 2022, para 3.3.

⁹⁶Professor Hilton evidence dated 9th February 2022, paragraph 4.1

288. Dr Mead, similarly asserted that the survey data confirmed the "*widespread and persistent impact to the seabed that has been identified while dredging within the consent boundaries ... the seabed imaging indicates that the hundreds of dredge trenches caused by 'normal' dredging activity are persistent and require severe storm events to recover.*"⁹⁷
289. Mr Todd, in his reply, pointed out that no evidence was presented to support the claims of persistence and transport rates. He went on to explain that he had presented evidence to the CPECG meeting on 29 November 2021, that the October 2021 DML survey did not show any evidence of extraction tracks in the area identified as the northern control area on the DML survey plan (page 21 of the JWS) which had been excluded from dredging since April 2021 as it was (then) to be the northern control area (this subsequently changed to a location north of the regional boundary). This showed, in his view, "*that extraction tracks from the William Fraser infilled within 6 months at water depths greater than 30m*".⁹⁸
290. Mr Todd went on to state "*This is backed up by the lack of shallow dredge tracks in the extraction exclusion area, which had also not been dredged since April 2021*". He also pointed out that this is "*in line with Dr. Mead's statement that "the hundreds of run-lines in the DML survey are all post the May [storm] events.*"⁹⁹
291. Mr Todd further explained that "*it is most probable that all of the dredge tracks in the figures presented by Professor Hilton and Dr. Mead actually occurred within four months of the October 2021 survey. From dredge operation information provided by McCallum's, this is entirely possible, as there was a total of 31 dredge trips to the offshore area over this period, involving a total 234 individual dredge tracks, including over 111 tracks in the area to the north of the Swale Exclusion Zone (Hilton figure 3 and Mead figure 2) and 20 in the northern part of Area 2 (Hilton figure 2)*".¹⁰⁰

FINDINGS

292. We accept this explanation from Mr Todd and are not surprised that areas where 'normal' sand extraction is taking place will show marks on the seafloor. We also accept Mr Todd's explanation of their likely persistence.

Beach and Dune Erosion

293. There was, overall, less emphasis on the potential effects of sand extraction on the beach and dunes in the evidence of the coastal processes experts, than there was from the local community. The majority of the Mana Whenua and other community groups who provided evidence to us commented on the loss of sand from the dunes, particularly to the south of Te Arai Point. Such claims were often accompanied by photographs said to be demonstrating the loss, along with references to structures such as fences and steps and trees, built and planted in the dunes now having been undermined or washed away.

⁹⁷Dr Mead Supplementary statement of evidence dated 28 January, para 3.4

⁹⁸Todd rebuttal evidence dated 21 February 2022, paragraph 12.

⁹⁹Ibid paragraph 12

¹⁰⁰Para 13 Statement of Rebuttal Evidence of Derek John Todd dated 21 February 2022.

294. Ms Hart explained the surveying of beach profiles along the embayment which was initiated following a severe storm in 1978 and has expanded and continued ever since. She clearly relied on the depth of closure and 1990s Sand Study in concluding that the *"profile surveys have been focussed on the nearshore changes and are not expected to be affected by sand extraction from beyond the Closure Depth."*¹⁰¹ In her evidence to the hearing she went on to say that based on the inshore extraction monitoring reports, that included surveys of the beach profiles, there was *"evidence of episodes of erosion and accretion of the regularly surveyed beach and bar profiles. There was no reported change, within the accuracy of the survey methods used, that could be attributed to anything beyond natural variations arising from weather pattern variations"*.¹⁰²
295. In contrast, Dr Shand stated in his report *"All profiles tend to show erosion during the late 1990s and early 2000s followed by recovery before additional erosion after 2010. In general profiles show fluctuations of up to 20m occurring on 10 to 20 year cycles with the southern profiles exhibiting a general erosion trend since the late 1990s while the northern profiles have been stable to accreting over this time."*¹⁰³ Dr Shand went on to conclude: *"A review of beach profiles does appear to show general erosion along the coast, apart from specific profiles since 1978 and more notably since the late 1990s. This differs from analysis by Jacobs (2020) in support of the nearshore application which suggests general accretion. We are uncertain of the reasons for this difference without further investigation or discussion."*¹⁰⁴ He provided the same conclusion in his evidence to the resumed hearing.
296. This opinion is clearly contrary to Mr Todd who concluded in the Jacobs 2020(b) report referred to by Dr Shand, that accretion has occurred over the last 50+ years.¹⁰⁵ Mr Todd pointed out in his supplementary evidence to the first part of the hearing that his assertions that there has been net shoreline accretion along the whole embayment is based on *"much more thorough and comprehensive assessment of shoreline movements than presented by Dr Shand in his report appended to the Mr Christie's evidence, which concluded general erosion based on 11 [sic - actually 13] surveyed beach profiles dated from various times since 1978."*¹⁰⁶ Similarly, at the resumed hearing Mr Todd stated *"there has not been any evidence of beach erosion since 2003 that can be attributed to sand extraction."*¹⁰⁷
297. The important point in this quotation is the reference to being able to attribute erosion to sand extraction activities. The Panel were unable to draw conclusions from the evidence provided with respect to the pattern of accretion and erosion along the foreshore. Perhaps more importantly no-one was able to demonstrate conclusively for us that there is no level of erosion that can be attributed to sand extraction. We do note that in analysing the dune profile data, Mr Todd used the 3.5m contour as proxy for the dune toe, while Dr Shand identified the 4m contour as the upper dune toe. We also note that Mr Todd used Digital Shoreline Analysis (DSAS) as well as beach profiles in his analysis, while Dr Shand appears to have relied on the profiles alone.

¹⁰¹Beca report Auckland Offshore Sand Extraction Site - Review of Coastal Processes Effects, July 2019, pp 4-5.

¹⁰²Statement of evidence of Jennifer Hart, dated 12 February 2021, paragraph 54

¹⁰³Beca report Auckland Offshore Sand Extraction Site - Review of Coastal Processes Effects, July 2019, p14.

¹⁰⁴Ibid page 19

¹⁰⁵Jacobs Pakiri Sand Extraction Consent report November 2020, p69.

¹⁰⁶Todd supplementary evidence dated May 2021, paragraph 9.

¹⁰⁷Todd statement of rebuttal evidence dated 21 February 2022, paragraph 7

FINDINGS

298. The Panel are concerned that they have both lay and expert witnesses reporting serious erosion, particularly along the southern part of the embayment, while at the same time other experts told us that there is no evidence of beach erosion attributable to sand extraction activities. Overall, we find we do not have enough reliable information to conclude that sand extraction is not causing or contributing to sand erosion along the beach.

The Changes to the Understanding of the Depth of Closure between the 2021 Hearing and the 2022 Hearing

299. As already indicated, the depth of closure established in the MPESS at 25m depth below mean sea level (MSL) was both emphasised by the Applicant and generally accepted by most expert witnesses during the 2021 part of the hearing. Importantly, however, its level of 'leakiness' was disputed. Ms Hart, Ms Sharma and Dr Shand expressed confidence that the level of sand movement from the offshore area into the nearshore was limited, except in storm conditions. This separation of the offshore and nearshore areas gave these particular experts confidence that the removal of sand from the offshore area would have minimal impact on the near-shore area and beach.

300. On the other hand, by the second hearing, the new applicant's expert Mr Todd, was adamant that offshore to nearshore transport of sand occurred to some extent even under ambient conditions, meaning the depth of closure was at best 'leaky' and was probably therefore nearer to 30-35m below mean sea level.

301. As clearly summarised in the legal submissions presented on behalf of MBL by Mr MacRae at the first part of the hearing, Mr Todd's *"approach has been largely to set aside the question of the location of the theoretical closure depth and to look at the impact, or lack of impact, on the seabed, beach and dunes of the volumes of sand that has been extracted from the embayment over the last 60 years. On this approach, the key question is, regardless of the location of the theoretical closure depth, what is the condition of the beach and dunes (erosive or accretive) and what are the inputs and outputs that the relevant coastal processes are delivering to or taking from the embayment that would account for that condition. The result is a sediment budget, a concept widely used and understood by coastal scientists."*¹⁰⁸

302. Mr MacRae went on to state, *"A consequence of the sand budget approach is that the existence and location of a theoretical depth of closure is a secondary issue and is not essential to a proper assessment of the effects of proposed sand extraction on coastal processes and thence beach and foreshore."*

303. Dr Mead agreed with Mr Todd that the depth of closure was 'leaky' and thus concluded that any offshore extraction must impact nearshore sand movement. Dr Single emphasised that the depth of closure is not a sediment transport boundary, but a morphodynamic boundary and that it is not consistent with good coastal science practice to treat the offshore environment as isolated, as a resource, from the rest of the coastal environment.

¹⁰⁸Outline of Legal Submissions on Behalf of McCallum Bros. Ltd, dated 12 May 2021, presented by John MacRae, paragraphs 7 & 8.

FINDINGS

304. The Panel accepts that there is doubt about whether the depth of closure is at 25m below mean sea level or further off-shore, as well as just how leaky it is. We do, however, accept Dr Single's advice to be cautious about assuming that the depth of closure provides confidence that off-shore extraction beyond it will have no effect on the in-shore or beach environment. We also note that by the time the JWS was prepared and agreed by all members of the CPECG, the certainty surrounding the depth of closure had diminished. Under the heading "Issues agreed and reasons" it states:

"The March 2021 survey indicated that trench infilling has occurred across both the September 2020 – March 2021, and the March 2021 – October 2021 periods.

The available information is inconclusive as to the source of and mechanism for infilling, sediment transport processes across the surveyed area, and any long term effects of the trenches on those coastal processes.

The available information indicates that sediment is moving in the surveyed offshore area, but it is not possible to draw any conclusions about diathic or longshore transport. The volume, rate and direction of sediment transport are not able to be inferred from the data available at this time."¹⁰⁹

305. This clear statement from seven independent experts underlines the uncertainty we feel about the coastal processes occurring in the embayment as a whole and the depth of closure in particular.

Deep Trenches

306. The discovery of a series deep trenches / swales in the southern part of the currently consented extraction area (Area 1) was made known to the Panel in the evidence of Dr Mead dated 21st February 2021. Annexure 2 of that evidence was the report "*Pakiri Sand Extraction Review: Dredge Trench Assessment*" prepared by Edward Atkin and Dr Mead of eCoast. A combination of side-scan sonar (SSS) and single beam echo sounder (SBES) survey techniques were used to identify and illustrate the presence of the trenches. In his primary evidence Dr Mead stated: "*It is very likely that trenches in the offshore area of 1 to >2.5m depth running shore-parallel for some 18km along the Mangawhai-Pākiri Embayment (~70% of the beach length) is greatly reducing and/or preventing transport of sediment to the beaches.*"¹¹⁰
307. It transpired, that as a consequence of this revelation, the consent holder (Kaipara Ltd) commissioned a survey of its existing coastal permit, ie extraction areas 1 and 2, in March 2021. Based on results of this survey data, Kaipara Ltd offered a condition of consent at the 2021 part of the hearing, preventing any further sand extraction in the area of the trenches until they had been infilled to within 0.5m of the surrounding seabed level. The survey also established that Dr Mead's suggestion that trenches extended along the full 18km length of the embayment were exaggerated.

¹⁰⁹JWS dated 13 December 2021, paragraphs 22-24.

¹¹⁰Paragraph 4.16 primary statement of evidence of Dr Shaw Mead dated 21 February 2021.

308. As a result of the survey findings, Kaipara Ltd requested, at the end of first part of the hearing, sufficient time to undertake further survey work before the hearing resumed and their reply was given. The result was the October 2021 DML survey and the caucusing and JWS, along with supplementary evidence from the coastal experts and further submissions from other parties.
309. All the coastal experts agreed that the deep trenches were made by repeated dredging over the same track numerous times. Dr Mead and Professor Hilton, in particular, emphasised that such dredging practices are contrary to the conditions of the existing consent. That is not a matter for us to determine in this hearing and apart from commenting that we were concerned to learn that a number of survey requirements of the existing consent had not been provided to Council, nor apparently sought by Council, we make no further comment on it.
310. The comparison of the October 2021, March 2021, and September 2020 surveys did enable all members of the CPECG to agree that there had been some infilling of the deep trenches during the intervening 11 months. This was expressed as "*the dredged trench features appear to have infilled by between 0.02m and 1.3m over the September 2020 to October 2021 period, however distinct dredged features ... remain evident*".¹¹¹
311. Dr Mead also claimed in his evidence to the resumed hearing that the area identified in the proposed conditions of consent where extraction of sand was not to take place because of the presence of the deep trenches (the Extraction Exclusion Area) was not large enough and did not cover all the seabed where deep trenches were present. He proposed two separate extension areas, one to the north and one to the south. We were told that all the CPECG members had interactive access to the DML survey data which would, we were assured, have enabled them to investigate Dr Mead's claims, at least by reference to point data, if not by the production of profiles. None of the experts did so.
312. Instead, we were told by both Ms Sharma and Mr Todd that "*The dredged trenches identified in the October 2021 survey were in similar locations and sizes as those identified in the September 2020 and March 2021 surveys. No other large areas of trenches [sic] identified*"¹¹² and that the DML survey "*did not detect any other large or deep trenches from the ones previously mapped and presented to the hearing*"¹¹³. Mr Todd went on to say, with respect to Dr Mead's claims, that "*I cannot comment on trench depths in these areas as there was no evidence presented to the CPECG on trench depths in the extension areas put forward by Dr Mead.*"¹¹⁴ Mr Todd confirmed he had not taken the opportunity to interrogate the DML survey data to check this, which the Panel find disappointing. He nevertheless stated that "*Mr Cox (of DML) made the statement that he felt the profiles covered all of the deep trenches*".¹¹⁵

FINDINGS

313. As a result, the Commissioners are uncertain about whether the Extraction Exclusion Area is sufficiently large to capture all the existing deep shore-parallel trenches. Thus,

¹¹¹JWS paragraph 21, dated 13 December 2021.

¹¹²Para 3 of Supplementary statement by Ashishika Sharma for Auckland Council dated 11 February 2022.

¹¹³Para 4 Statement of Rebuttal Evidence of Derek John Todd dated 21 February 2022.

¹¹⁴Para 24 *ibid*.

¹¹⁵Verbal comment made by Mr Todd during presentation of evidence.

were we to be granting consent, we would have included an additional condition requiring demonstration that the Extraction Exclusion Area does incorporate all the existing shore-parallel trenches at 0.5m or deeper, prior to sand extraction commencing.

Coastal Processes Effects Summary

314. In summarising the opinions of the various coastal experts, we record that Ms Hart, on behalf of the [then] Applicant stated, "*[O]n the basis of the assessed effects and findings, which take into account the results of past investigations and research, extraction monitoring under the existing consent, and fieldwork and analysis for the consent application, I consider that the proposed extraction is unlikely to result in significant effects on coastal processes.*"¹¹⁶ This conclusion was confirmed in her evidence in reply.¹¹⁷
315. Ms Sharma, for the Council, summarised her consideration of potential effects on coastal processes thus, "*[C]hanges indicated in bathymetric survey to date under the existing consent are shown over discrete areas centred around the targeted extraction locations. Observed cumulative effects of extraction to date indicate a small, distributed lowering of the bed level within the extraction areas. The overall effects on coastal processes will be minor.*"¹¹⁸ Ms Sharma's technical memo attached to the s42A Addendum Report, dated 7 April 2021, addresses the pre-circulated evidence of the other coastal processes experts and provides no additional assessment of effects. Her evidence, prepared for the resumed hearing, concludes "*[T]he submitters' statements and conclusions do not change my overall conclusions for the effects of the sand mining activities being less than minor on coastal processes and sediment movement.*"¹¹⁹
316. As already recorded, Mr Todd concentrated his first two statements of evidence on potential effects of the off-shore sand extraction on MBL's other mid-shore and in-shore interests, together with the appropriate conditions of consent. He did not undertake an overall assessment of effects on coastal processes in his reply evidence, prepared for the second part of the hearing, either. He did however conclude "*I believe that the proposed dredging management regime, along with the monitoring methodology and review process will ensure a better understanding of the coastal processes operating in the embayment, and the detection of changes before adverse effects occur.*"¹²⁰ He finally concluded with, "*...will mean that adverse effects on coastal processes can be avoided.*"¹²¹
317. As already recorded, Dr Shand disagreed with Mr Todd with respect to the accretion and erosion patterns along the beach and dune. More broadly, he agreed with Mr Todd that, with suitable conditions of consent, particularly the inclusion of a western control site along the landward side of the proposed extraction area, consent could be granted. In answer to questions he confirmed that in his view potential effects of the grant of consent would be minor to less than minor.

¹¹⁶Statement of Evidence of Jennifer Hart, dated 12 February 2021, paragraph 101.

¹¹⁷Evidence in reply of Jennifer Hart, dated 16 April 2021, paragraph 49.

¹¹⁸Technical Memo Specialist Unit, from AshishikaSharma and Karla Sivaguru, dated 14 January 2021, paragraph 3.1.6, Agenda page 328.

¹¹⁹Evidence of Ashishika Sharma, dated 11 February 2022, paragraph 16.

¹²⁰Rebuttal evidence of Derek Todd, dated 21 February 2022, paragraph 26.

¹²¹Ibid, paragraph 32.

318. Dr Martin Single, coastal processes expert on behalf of Friends of Pakiri Beach, (FOPB) having reviewed the application and other relevant technical reports concluded, "*I consider that the proposed extraction of sand from offshore should require monitoring of the beach and nearshore in addition to surveying of the offshore bathymetry to ascertain the ongoing effects of the activity. In addition, the cumulative effects of existing and any future mining of sand from the nearshore zone of the Mangawhai-Pakiri coastal environment should be managed in such a way that it recognises the contiguous nature of the across shore and inner shelf coastal environments.*"¹²²
319. It was clear that, like Dr Mitchell, planning expert for FOPB, Dr Single's focus was on the proposed conditions of consent and the need for these to include beach and nearshore monitoring requirements. This was emphasised in his supplementary evidence, as well.
320. At the CPECG and resumed hearing in 2022, Dr Single had been replaced by Professor Hilton whose focus was different from Dr Single's. His evidence concentrated on the deep trenches in the southern end of the existing extraction area and the results of the DML survey, which was instigated as a result of their discovery. He concluded "*Bathymetric data provided by DML Ltd. (October 2021) has provided the first synoptic overview of the seabed over a wide section of the Pakiri-Mangawhai embayment. Trenches arising from offshore sand mining are a conspicuous and worrying feature of this data. The extent, dimensions and persistence of these trenches suggests rates of sand transport and accretion are less than rates of sand mining in this area of seabed. However, the above observations, particularly the extent and number of trenches, is consistent with past work by me, and others, that sand transport at water depths greater than 25m is likely to be low and that replenishment of sand extracted at these depths is unlikely. ... I conclude by emphasizing there are large gaps in our knowledge of the Pakiri-Mangawhai Sand System, indicated by the astonishing results of the October 2021 survey, and that it is timely to exercise much greater caution in the management of this System.*"¹²³
321. Ms John, who provided an oral statement for Te Whanau O Pakiri, focussed on two matters, the inadequacy of consideration of climate change in the application and Council s42A response and the inadequacy of the cumulative effects assessment undertaken. Following participation in the CPECG and the production of the JWS, Ms John provided a supplementary statement of evidence at the resumed hearing. In it she emphasised that all the experts in the CPECG agreed that "*what is required to enable any conclusions to be drawn is a sustained monitoring programme, that covers the whole embayment (the offshore, nearshore and beach) and shows change over time.*"¹²⁴
322. Ms John concluded "*It is my opinion that a full understanding of the sediment transport processes associated with the Mangawhai-Pakiri seabed and the dredged features is obtained before any further extraction is consented. We cannot currently determine the long-term or cumulative effects of the dredging activity on sediment transport and should not consent an activity whose effects cannot be determined.*"¹²⁵

¹²²Evidence of Dr Martin single, dated 22 February 2021, paragraph 30.

¹²³Statement of Professor Mike Hilton, dated 9 February 2022, paragraphs 4.1-4.3

¹²⁴Supplementary statement of Sian John, dated 28 February 2022, paragraph 3.

¹²⁵Ibid, paragraph 5

323. As with most of the coastal processes experts, Dr Mead, expert for Damon Clapshaw, did not undertake an assessment of potential effects of the proposed off-shore sand extraction activity, per se. Instead, he concentrated on the breaches of the existing off-shore sand extraction consent and the consequential creation of the deep trenches in the southern part of the consented area. His concern was that the deep trenches would impede natural sand movements shoreward, with any refilling of trenches being extracted again in future. He was also critical of the existing consent's conditions and the manner in which they had or had not been followed by all parties concerned. He noted that despite 20 years of monitoring, *"very little has been learnt with respect to the impacts and sustainable management of the offshore dredging activity in the past 2 decades."*¹²⁶
324. Dr Mead reiterated his concerns at the resumed hearing and concluded with *"[A]s a result, there are a number of unknowns that are not addressed in the current application. In my opinion these issues need to be addressed before the consenting process continues, since the current application is inadequate and does not appropriately address the environmental effects of the activity."*¹²⁷
325. In summary then, the Panel have been provided with contradictory evidence from a range of experts on a variety of aspects of the coastal processes within the embayment. Overall and despite the apparent level of agreement in the JWS, the coastal experts broadly provided us with two opinions. On the one hand, Ms Hart, Ms Sharma, Mr Todd and Dr Shand agreed that, with appropriate conditions in place the proposed activity would result in minor or less than minor adverse effects, or as Mr Todd expressed it, adverse effects on coastal processes can be avoided.
326. In contrast, Dr Mead and Ms John, although falling short of identifying significant adverse effects, urged us to not grant consent without requiring more information about the long term and cumulative effects of sand extraction upon which to base a decision. Professor Hilton did not go quite as far, but did urge us to be very cautious in the management of the embayment. Given our previous findings that we did not have sufficient information to properly understand the effects of the proposal, combined with our findings that a precautionary approach needs to be taken, the Panel has determined that resource consent should be refused.

Effects on Significant Surf Breaks

327. As a result of a number of submissions raising concerns about potential effects of sand extraction on surf breaks in the Mangawhai-Pakiri embayment, the applicant commissioned eCoast to undertake an assessment of this potential in June 2020. The resultant report "Surf Break Impact Assessment" is dated 2 September 2020 and was provided to Council on 8 September 2020. Evidence supporting the report was prepared by one of the authors, Dr Mead on 12 February 2021.
328. These dates are important, in the Panel's view, because they overlap with the timing of the two reports also prepared by eCoast on behalf of Mr Damon Clapshaw, one of the submitters against the sand extraction application. Those reports are dated between

¹²⁶Summary of rebuttal evidence of Shaw Mead, dated 14 May 2021, paragraph 7

¹²⁷Supplementary evidence of Shaw Mead, dated 28 January 2022, paragraph 7.6

December 2020 and February 2021, while the evidence supporting them, again prepared by Dr Mead, is dated 21 February 2021.

329. The Panel noted that Dr Mead was an expert witness acting for both the Applicant and a submitter in opposition, at the same hearing. It became apparent that the Applicant was concerned about such an occurrence. In her primary evidence to the first part of the hearing, Ms Hart, coastal processes expert for the Applicant noted "*..and Dr Mead had not previously advised our team of the trenches when we worked together on further information for the application in 2020.*"¹²⁸
330. In his defence, Dr Mead did include reference to these two separate roles in his evidence to the first part of the hearing. He stated that "*after I was retained by FoPB and began working with Mr Clapshaw on the work described above, I was approached by Kaipara Ltd as applicant and requested to provide advice on any implications of the offshore dredging on the surf breaks at Pakiri. I consulted Kaipara Ltd, FoPB and the Surfbreak Protection Society on that matter and it was agreed that as this was not an effect of concern to them in relation to dredging in the offshore area, I could provide that separate advice to the applicant.*"¹²⁹
331. In answer to our questions, Dr Mead confirmed that he had undertaken this sort of dual role in the past. Given that Dr Mead confirmed that both of his clients were aware that he was providing advice to the other, the lack of transparency to Kaipara Limited was a concern.
332. In his report and evidence Dr Mead assessed potential effects on 5 surf breaks:
- Mangawhai Heads,
 - Black Swamp;
 - Te Arai Beach;
 - Forestry; and
 - Pakiri Beach.
333. He concluded that the "*magnitude of impacts on wave quality at the four central surf breaks (excluding Mangawhai Heads) in the Mangawhai-Pākiri embayment associated with changes to wave heights and directions due to reflection/refraction/diffraction as waves propagate over modified seabed bathymetry caused by extraction, are considered less than minor to negligible for the proposed resource consent application.*"¹³⁰ He went on, "*the magnitude of a reduced cross-shore sediment supply to the beaches in the Mangawhai-Pākiri embayment are considered less than minor to negligible for the proposed resource consent and associated management regime.*"¹³¹
334. We were also told of changes to surf breaks by some of the local residents. Mr Sam Bradford told us that in his almost 30 years of surfing along Pākiri Beach he considered there had been adverse effects on the quality of the surf. He said "*during periods of mining in close proximity to certain areas of the beach it has resulted in the degradation*

¹²⁸Jennifer Hart evidence dated 16 April 2021, paragraph 25

¹²⁹Evidence of Dr Shaw Mead, dated 21 February 2021, paragraph 3.6

¹³⁰Paragraph 6, Summary of statement of evidence of Shaw Mead dated 5 May 2021.

¹³¹Ibid paragraph 7.

of surf quality. The dissolution of banks of sand (those areas along which waves peel) occurs much more quickly when the mining is focussed in different parts of the beach."¹³²

335. Dr Mead's evidence was relied on by Mr Paul Shanks, who gave evidence on behalf of the Surfbreak Protection Society Incorporated (SPS). He pointed out the protection provided to Nationally Significant Surfbreaks in the NZCPS (Policy 16) and agreed with Dr Mead that monitoring and the adoption of an adaptive management regime would be important conditions of any consent. He also requested representation of the SPS on any Community Liaison Group that might be established under any such consent.
336. The importance of the local surf breaks was also pointed out by Mr Aaron McConchie on behalf of Save Te Arai, as well as in numerous submissions received.
337. Setting to one side our concern regarding Dr Mead's dual role, we have accepted Dr Mead's evidence on surf breaks and accept that the proposed off-shore sand extraction would have minor to negligible effects on the relevant surf breaks.

Effects on Marine and Coastal Flora and Fauna

338. The evidence presented by Mr West showed that the scientific monitoring conducted in the Kaipara Limited offshore area to date does not result in significant adverse effects to flora and fauna or diversity.¹³³
339. Mr West relied on Ms Hart's evidence that any perceived coastal erosion is not the result of sand extraction from Kaipara Limited offshore sand extraction area due to the siting of the offshore area being beyond the depth of closure. It was Mr West's opinion that variations in coastal habitats including perceived coastal erosion was more likely to be the result of natural storm events or land-based activity changes, and thus not related to sand extraction from the Kaipara Limited consented area.¹³⁴

Effects on Benthic Biota

340. Mr West provided the Panel with a summary of the ecological monitoring work that had been undertaken in the area to date. He concluded that the "*lack of complete sets of individual replicate baseline data for both grain size and benthic biota abundance and composition prevented any statistical analysis with future monitoring data*"¹³⁵. He advised the other issue with the data previously collected was that it was outside the proposed sand extraction area and therefore it was not relevant with which to make any comparison¹³⁶.
341. Mr West acknowledged that like any bottom contact activity (such as scallop dredging, bottom trawling, boat anchoring) sand dredging will result in some harm to the seabed benthic communities. However, he is of the opinion that, "*the severity of impact depends on a number of factors and does not preclude the ability of recovery over time following*

¹³² Verbal statement of Sam Bradford, page 2.

¹³³ Mr West's Evidence-in-chief at [6.10]

¹³⁴ Ibid at [6.11]

¹³⁵ Ibid at [9]

¹³⁶ Ibid at [3.10]

*the impact*¹³⁷. The “*sensitivity of the habitat, scale and frequency of disturbance are major factors in determining the impacts*”¹³⁸.

342. We were told by Mr West that the current and proposed draft conditions both include a requirement to assess an area prior to sand extraction activity beginning, which is to ensure sensitive habitats and biota are not damaged. It is also aimed at “*limiting any potential effects by avoiding areas of seabed that would create additional impacts, for example areas with greater than 20% fine sediment being excluded from sand extraction to avoid water quality impacts*”¹³⁹.
343. The current consent does not limit the total volume extracted per year for the entire area but allows a total consent limit of 2,000,000m³. It also limits the extraction volume for areas shallower than 30m, which is the area that sand is typically extracted from, to 150,000m³ per year. The draft proposed conditions seek to continue this and add further to the limitations by ensuring the sand extraction is not able to be concentrated in one small area, but spread out over the entire approved sand extraction area, using management cell limits¹⁴⁰. We were told by Mr West that the aim of this approach is to limit the scale and frequency of impacts to a sustainable level whereby the ecological values of the environment are not permanently degraded. It was Mr West’s opinion that the draft conditions and management plans proposed will achieve the desired result of balancing the extraction of sand and limiting any effects¹⁴¹.
344. A currently unknown percentage of benthic biota remains on the seabed after the passage of the dredge. Mr West advised that 95% of the macrofauna that pass through the dredge are returned to the sea alive. While a percentage of the smaller than 2.5mm sized biota will be retained in the sand hopper, the remainder will be discharged back to sea in an unknown state of health. It is also unknown how many of the species discharged will survive the trip to the seabed and re-establish themselves. The shorter lived small benthic biota will recolonise the seabed during the next seasonal settlement of larvae. Populations of large biota will also be supplemented by seasonal recruitment of larvae¹⁴².
345. Mr West advised that the literature estimates of the “*time taken for a benthic community to recover from a disturbance event of the scale of sand dredging is between 6 months to several years*”¹⁴³. He predicted that the shallow sand layer extracted by the William Fraser’s dredge head will result in a short recovery time of less than 1 year and similarly he considered there will be “*no significant differences in species composition and abundance of benthic communities in dredged areas as opposed to the non-dredged control areas*”¹⁴⁴.

¹³⁷ Ibid at [6.33]

¹³⁸ Ibid at [6.34]

¹³⁹ Ibid at [6.35]

¹⁴⁰ Mr West’s evidence-in-chief at [6.36]

¹⁴¹ Ibid at [6.36]

¹⁴² Ibid at [6.40]

¹⁴³ Ibid at [6.41]

¹⁴⁴ Ibid at [6.44]

346. Particular focus was given during the hearing to the potential effects of the sand extraction on *scleractinia* or stony corals which are protected under the Wildlife Act (1953).
347. Professor Andrew Jeffs, a marine scientist for the Auckland Conservation Board who has worked in the Hauraki Gulf, including at Pakiri, raised concerns about the direct and indirect effects of sand extraction on biological processes. Dr Jeffs considered that the dredge vessel will cause “*continual and widespread disturbance to subtidal benthic habitats, which appear to include the presence of protected stony corals*”¹⁴⁵.
348. According to Mr West, stony corals were not previously recorded in either the sand extraction area or the control area in 2003, 2006 or 2011. However, in 2017 two samples recorded the presence of stony corals. One sample in the sand extraction area (T7-E, 88m inside the eastern side near the southern end of Area 1) contained 15 individuals and one sample in the control area (T10-3, eastern side in the middle of the control area) contained 1 individual. Both sites were in a depth of approximately 35m¹⁴⁶. Mr West advised that “*this is relatively shallow for Stony Corals which have a normal habitat range from 50m to significantly deeper depths*”¹⁴⁷. The area deeper than 35m is not normally dredged as it is at the limit of current dredging technology.
349. Since stony corals are protected under the Wildlife Act (1953) sand extraction is required to avoid areas known to contain them. Consequently, Mr West advised the proposed conditions for the renewed consent require the area to be dredged is assessed for the presence of protected species and sensitive habitats, and that the area to be dredged is amended to exclude areas with protected species and sensitive habitats prior to being approved for sand extraction.¹⁴⁸
350. Dr Kala Sivaguru, Council’s Coastal Ecologist agreed with Mr West that “*amendments made to the draft EMMP to include a multi-staged process starting with the non-invasive sampling technique would be appropriate to avoid adverse effects on stony corals as required by NZCPS*”¹⁴⁹. Further, given that the proposed multi-staged approach is to be implemented, including non-invasive methods to detect the presence of them prior to undertaking sand extraction within the management cells, she concluded “*it is likely that the impacts on stony corals could be avoided*”¹⁵⁰.

Effects on Macrofauna / Shellfish

351. Mr Tamati Stevens provided us with a cultural perspective on biodiversity in the Taiao (living environment) on behalf of Te Whanau o Pakiri. He described the impacts of the declining environment on Maori cultural traditions. He explained that “*it is customary for whānau to serve kaimoana or the local produce, whenever there is an event. The*

¹⁴⁵ Professor Andrew Jeffs evidence-in-chief at [3]

¹⁴⁶ Ibid at [6.49]

¹⁴⁷ Mr West’s evidence-in-chief at [6.36]

¹⁴⁸ Mr West’s evidence-in-chief at [6.50]

¹⁴⁹ Dr Sivaguru’s Coastal Ecology memo Feb 2022 at [1.2]

¹⁵⁰ Ibid at [1.2]

*absence of the kaimoana is considered embarrassing, and an apology is offered whenever the local delicacy is absent from the table*¹⁵¹.

352. It was Mr Steven's opinion that *"the lack of kaimoana served is an indication that the ancestral knowledge is not being taught to the next generations and indicates the following*¹⁵²":

"a) Rangatahi are not learning to understand the value of traditional ways and are not familiar with the Maori environment.

b) Maori are not adapting our tikanga moana and management techniques to meet the changing times, society and environment about us, and

*c) Failure to accommodate the Maori environment to enable manaakitanga, sharing with many. We are not managing the concerns and have not developed a common understanding of monitoring and standards (goals) to achieve the abundance required to do so", (Manatūmōte Taiao, 2003)*¹⁵³.

353. Mr Stevens utilises a number of key indicators which he described to us in detail, such as Karepō (seagrass), in his research on declining ecosystems; linking them together to explain the whakapapa of the moana, which is based on Māori knowledge systems.

354. Mr Stevens concluded the dredging is causing significant change to the natural conditions of the essential ecosystems mentioned. He stated: *"it is clear to me the systematic breakdown is occurring due to the lengthy ritual of mining for sand. It amazes me that an essential element is allowed to be taken from the mōana with very little if any understanding of the impact to the taiao concerned"*.¹⁵⁴

355. In the case of Pakiri, the lack of living shellfish, in combination with other essential ecosystem services can cause regular algae blooms, not because of the eutrophication, but due to the lack of Karepō meadows in combination with the lack of life; where the Tuangi, Hururoa, and the other Whakapapa does not exist, in natural proximity¹⁵⁵. He elaborated on this with the following narrative:

*"If, the Karepō is failing, then the Takeke cannot tukuna (lay) ā rātou (their) hēki (eggs) Ki (in) te (the) pupuhuka (foam) o te (of the) tai rea (hightide), tai pariata (morning tide) o (of) te (the) Oturu (full moon), matitumuramura (Manuka white flowers are blooming indicating spring)." (Makiha, Wananga at ParoreRahi, 2019)*¹⁵⁶.

356. Mr West said the benthic biota and macrobenthic biota data presented in the application showed *"shellfish have not been destroyed in the sand extraction area, and in fact are not significantly different from that found in the non-sand extraction areas"*¹⁵⁷.

¹⁵¹ Mr Tamati Stevens evidence-in-chief at [10]

¹⁵² Ibid at [11]

¹⁵³ Ibid at [11]

¹⁵⁴ Mr Tamati Stevens evidence-in-chief at [12a]

¹⁵⁵ Ibid at [12f]

¹⁵⁶ Ibid at [12n]

¹⁵⁷ Mr West's evidence-in-chief at [6.24]

357. We were told by Mr West that 95 per cent of benthic macrofauna individuals sampled, were deemed to have survived the pumping and screen system on the William Fraser. There were differences between the taxa groupings of gastropods, bivalves and crustaceans. When the differing sizes of biota were cross referenced with damage, the data showed the large bivalves seem to be more susceptible to damage when extracted than smaller bivalves¹⁵⁸. Mr West noted there is still a possibility that they could suffer predation by fish on their descent to the seabed and prior to their reburial in the seabed sediments¹⁵⁹.
358. Mr West pointed out that: *“the longer-lived non mobile fragile animals will be adversely affected by any form of bottom contact activity, hence the condition to pre assess an area to be dredged and either approve or modify the area to be dredged based on the results, excluding areas of significant macrofauna”*¹⁶⁰.
359. Dr Jeffs was particularly concerned about the extensive band of horse mussel habitat that was identified in an expansive seafloor survey undertaken in 1995, which he claimed overlapped with the proposed area for consenting for sand mining¹⁶¹. He said we know from research on green-lipped mussels in the Hauraki Gulf that these shellfish beds or biogenic habitats have enormous ecological significance:
- “Research on green-lipped mussel beds show that compared to adjacent seafloor without a mussel bed they have:*
- *Six times the productivity*
 - *Three times more types of species*
 - *Four times more mobile animals*
 - *About ten times more small and juvenile fish*
 - *Remove around four times more nitrogen from the water column*
 - *Remove sediment from the water*
 - *Stabilise benthic sediment*¹⁶²
360. He contended that *“the high degree of uncertainty about the possible ecological impacts of this sand extraction activity warrants extreme caution in the decision making around further environmental disruption from sand mining”*¹⁶³.
361. With respect to the Hururoa, Mr West advised us that horse mussels are considered a transient species in that they form beds and are then affected by natural storm events which remove large numbers of animals. The beds often do not recover immediately but

¹⁵⁸ Ibid at [6.28]

¹⁵⁹ Ibid at [6.29]

¹⁶⁰ Ibid at [6.30]

¹⁶¹ Dr Jeffs evidence-in-chief at [Section 3]

¹⁶² Ibid at [3]

¹⁶³ Ibid at [3]

require appropriate conditions for the supply of and settlement of planktonic larvae from further afield.¹⁶⁴

362. Dr Sivaguru considered there is “*potential that the disturbance of the seabed by sand extraction would have had an impact on horse mussel beds*”¹⁶⁵. She elaborated that this may be from a direct impact on the horse mussel beds and/or an indirect effect from increased suspended solid concentrations in and around the area during extraction. In addition, she considered that the ongoing disturbance in the area from sand extraction could have affected the recovery of horse mussel beds in the area. Further, Dr Sivaguru stated the literature suggests that horse mussels are periodically subject to widespread die-offs for which the cause is not definitely known but possible reasons include storm scour, shell damage and subsequent predation, as well as exceeding carrying capacity¹⁶⁶.
363. However, Dr Sivaguru concluded that while there is a high possibility that sand extraction within the consented area may have contributed to the absence of horse mussel beds after 2003, she stated there is “*no strong evidence to support that the decline or absence of horse mussel beds is only related to sand extraction activity within the area because, there are a number of other factors which contribute to the settlement and survival of this species*”¹⁶⁷.
364. Dr Sivaguru did acknowledge there is evidence that these horse mussel bed habitats have not recovered, noting that large bivalve species are likely to take longer to recover than small species.¹⁶⁸ She therefore did not agree that all macrofauna inhabiting the application area will recover within five years as suggested by Mr. West. Whilst she accepted there are limited number of options for the location of the control area, she strongly recommended having two control areas (areas which have not been extracted before) in the EMMP, to reduce the variability of comparison between impacted and unimpacted areas¹⁶⁹.

FINDINGS

365. We found that we did not have enough evidence to confirm that the effects on the macrofauna from the sand extraction were going to be at acceptable levels. Rather, as Mr Stevens (and Dr Jeffs) told us, as the whole system is interconnected any effects on one aspect of the ecosystem will directly impact on the next. From a cultural perspective, the evidence we received was that these adverse effects on the macrofauna were considered to be significant. We agree.

¹⁶⁴ Ibid at [6.31]

¹⁶⁵ Dr Sivaguru’s Coastal Ecology Memo Feb 2022 at [1.1]

¹⁶⁶ Ibid at [1.1]

¹⁶⁷ Ibid at [1.4]

¹⁶⁸ Ibid at [1.4]

¹⁶⁹ Ibid at [1.4]

Effects on Birds

366. Concerns relating to the New Zealand fairy tern or tara-iti and New Zealand dotterels have been the subject of a number of submissions.¹⁷⁰ The seabird with the most significant potential for population level effects is the nationally and critically threatened fairy tern. The concerns raised by submitters focus on the loss of nesting habitat, disturbance of feeding, and loss or compromised food sources, and the significance is related to its very low numbers. It has been suggested by several submissions that the foraging range or area the fairy terns visit, overlaps with the sand extraction area, thus the operation of the dredging vessel could adversely affect the fairy tern.
367. Mr West provided us with an overview of where the fairy tern feeds, including the extent to which they forage and nest. Mr West advised us that the literature on diet and observations suggest the majority of fairy terns feed in estuaries, which are not affected by the dredging activity¹⁷¹. He further noted that since fairy terns are visual predators feeding during daylight hours, the majority of the dredging activity will not coincide with tern feeding¹⁷².
368. Mr West told us that the fairy tern nests just above the high tide level on sandy beaches and estuarine shores. The majority of the remaining population nest on the shores inside the Mangawhai Estuary to the north-west of the sand dredging areas. Intermittently pairs have nested at the Te Arai and Pakiri Stream outlets on the open coast, at least 1800m west of the sand dredging area. Mr West agreed that changes in beach morphology could be detrimental to seabird nesting by reducing suitable space. However, he relied on Ms Hart's evidence that beach morphology changes at Pakiri and Te Arai beaches are not related to the offshore sand extraction, therefore he concluded that any changes to beach morphology are related to other causes such as natural sea level rise, climate change weather pattern changes, or other near shore or onshore sand extraction activity.¹⁷³ He did acknowledge that, if caused by sand dredging, these changes are not likely to be rapid events, much like climate changes, he considered the birds will have time to find suitable habitat or nest elsewhere.¹⁷⁴
369. Like fairy terns, Mr West advised that dotterels nest on the shore and can be affected by extreme storm events, activity on the beach or erosion of the beach. Again, he relied on Ms Hart's evidence which shows that shoreline erosion is not directly caused by the extraction of sand from the offshore consented area. He advised that dotterels consume a wide range of suitably-sized marine, littoral, and terrestrial invertebrates, and occasionally small fish. None of these food sources occur in the sand extraction area, therefore, the dredging activity will not affect New Zealand dotterels food sources.¹⁷⁵
370. Ian Southey, an ornithologist for TWOP has undertaken several research projects on the fairy tern. He was concerned about the lack of assessment on these threatened and at-

¹⁷⁰ A variety of other birds were also considered in the various assessments including red billed gulls, Caspian terns, penguins, and shearwaters.

¹⁷¹ Mr West Evidence-in-chief at [6.14]

¹⁷² Ibid at [6.15]

¹⁷³ Ibid at [6.13]

¹⁷⁴ Ibid at [6.13]

¹⁷⁵ Mr West's Evidence-in-Chief at [6.18]

risk species of birds that use the proposed sand extraction site. In particular, he noted there had been no effort made to identify the species present or identify any potential threats to them.¹⁷⁶

371. Mr Southey explained that the fairy tern is New Zealand's rarest endemic bird. Since 2012 all five deaths of fairy tern have taken place in the one or two breeding pairs at Pakiri and Te Arai, but none elsewhere. He advised these are the breeding pairs most dependent on the area affected by the sand mining and he is concerned that the sand extraction may limit future population growth. He stated: "*if sand mining has affected food supplies enough to play a role in this mortality it would be a major concern*".¹⁷⁷
372. When monitoring fairy terns on Mangawhai Harbour on fine, calm mornings Mr Southey had often noticed that some to many of the normally resident birds often cannot be found. He suspects that these birds are feeding at sea as these are the conditions when the pair at Pakiri were most likely to be feeding at sea with well-defined slicks extending well offshore. This occurred at times when suitable fish in the harbour were abundant and even during the short, about four-hour, time window around low tide when harvesting gobies there is possible and efficient. He suggested that this indicates a preference for offshore food whenever it is available.¹⁷⁸
373. Mr Southey considered if the effects of sand mining reduce the numbers of small pelagic fish in and around the area to be mined it will change the cost effectiveness of foraging at sea. It is uncertain just how big an area will be affected by the sand mining operations and whether or not fairy terns can reasonably be expected to fly beyond it if the impact is severe. If the quantity or quality of the food supply close to the nest is reduced then the energetic cost of harvesting fish relative to the gain in energy will also increase, perhaps to the point where productivity is impacted or adult survival is reduced.¹⁷⁹ He stated "*it is uncertain, at present, whether or not sand mining has actually caused adverse effects on fairy terns, or any other species, but it may have*".¹⁸⁰
374. Mr Southey concluded that more certain information is required before resource consent could be granted.¹⁸¹ He noted that monitoring of at-risk birds is not included in the EMMP and he urged that a "*cautious approach be taken and the resource consent be declined until the effects of dredging on fairy terns and other bird species can be properly assessed*".¹⁸²
375. Mr West stated in the case of fairy terns there is "*no food chain linkage between the seabed biota of the offshore dredging area and fish prey of New Zealand Fairy terns in the estuaries*"¹⁸³. Whereas Mr Southey advised us that:

"While we may not know just where fairy terns feed offshore we do know, from the observations at the Pakiri nest, that they do, and also that they obtain a moderate

¹⁷⁶ Mr Southey – Evidence-in-Chief at [49]

¹⁷⁷ Ibid at [30]

¹⁷⁸ Mr Southey – Evidence-in-Chief at [39]

¹⁷⁹ Ibid at [44]

¹⁸⁰ Ibid at [56]

¹⁸¹ Ibid at [58]

¹⁸² Ibid at [61]

¹⁸³ Mr West's Evidence-in-chief at [6.17]

*proportion of their food there. They have the ability to feed right across the mining site but the proposed mine covers much of the water that is available for them to use and their only means of avoiding it is to stay inshore where the published studies quoted by Mr West and Dr Sivaguru suggest that little feeding actually takes place. The possibility of existing but unrecognised, or further harm to fairy terns from sand extraction suggests to me that this mining site may be situated in the worst possible place in Auckland from an indigenous biodiversity perspective adding risk to the animal species most likely one to become extinct in the near future. To proceed with granting this resource consent without making any realistic attempt to assess the potential effects of the sand extraction on fairy terns, and also the other “threatened” and “at risk” bird species present, does not make sense.*¹⁸⁴

376. Mr Nick Beverage, a volunteer from Forest and Bird also discussed the distance fairy terns travel offshore for their food. Mr Beverage agreed with the evidence of Mr Southey which was that the fairy tern habitat extends to at least 2km offshore at Pakiri, which clearly overlaps with the proposal site. He noted that Mr West had not provided evidence to dispute that the fairy tern habitat extends to at least 2km off shore¹⁸⁵.
377. Mr Beverage also considered that *“the hours of operation proposed by the applicant would extend beyond hours of darkness and potentially overlap with the NZ Fairy Tern foraging at dawn and dusk when daylight hours start before 7am and extend beyond 6pm and when sand extraction would be undertaken on up to 10 weekend days per year with no time restriction”*¹⁸⁶. Again, we noted Mr Beverage agreed with Mr Southey’s evidence because of his experience and expertise as opposed to the response provided by Mr West.¹⁸⁷
378. The Forest & Bird submission stated that any adaptive management approach is unlikely to be appropriate given the precautionary approach and protection requirements in the NZCPS. It considered that caution must be taken first, not after the adverse effect has occurred. Forest & Bird therefore urged the application of the precautionary approach when considering the location and scale of the proposal and improvements in the monitoring requirements¹⁸⁸, if consent was granted. Mr Beveridge agreed with this stance.
379. Further, it was Mr Beverage’s view that there needs to be a high level of certainty that any adverse effects on the fairy tern will be avoided by the proposal, if it is granted. This included any potential for adverse effects on their food chain as a result of sand extraction activities.
380. Dr Sivaguru stated *“the key aspect of fairy tern ecology that could be affected by the sand extraction proposal is food supply”*¹⁸⁹, noting that Mr Southey’s evidence covers this in some detail.

¹⁸⁴ Mr Southey – Supplementary Evidence at [48]

¹⁸⁵ Mr Beverage’s Statement-of-Evidence at [8]

¹⁸⁶ Ibid at [8]

¹⁸⁷ Ibid at [9]

¹⁸⁸ Ibid at [12]

¹⁸⁹ Dr Sivaguru’s Coastal Ecology Memo Feb 2022 at [1.5]

381. While fairy terns are mainly estuarine and inshore feeders, Dr Sivaguru noted they also feed in the Te Arai dune lakes, and some feeding probably occurs offshore, possibly out to 2km or more, but she stated we do not know what species are eaten or how important this is at critical times in the breeding cycle¹⁹⁰. She concluded that *“further information is needed on the importance of offshore feeding. This is an information gap, although the proposed sand extraction area in the Mangawhai-Pakiri embayment possibly lies outside the main fairy tern foraging habitats¹⁹¹”*. As a result, Dr Sivaguru initially agreed it would be appropriate to include a monitoring programme in the proposed EMMP related to food supply for fairy terns (as recommended in the Department of Conservation’s submission).
382. Mr West, in his second evidence in reply told us he did not agree with Mr Southey or Dr Sivaguru, *“who both consider further research is necessary to establish that the food source of the New Zealand fairy tern is not affected by the activity of the sand extraction vessel.”* To do so, Mr West advised this would likely involve gps/radio tagging of birds at some risk to the individual birds and for obvious reasons he did not support that¹⁹². Mr West considered there is an *“extremely low likelihood of New Zealand fairy terns attempting to feed in the same space and time as the sand extraction vessel in operation, and that the magnitude of the effect will be negligible as the New Zealand fairy terns have the freedom to catch fish in the offshore area other than the insignificant area temporarily affected by the operation of the sand extraction vessel”*, therefore he considered the sand extraction from the new proposed offshore area will not have any significant effect on the fairy tern individuals or population.¹⁹³
383. However, we did note that Dr Sivaguru ultimately agreed with Mr West that a monitoring programme should not form a part of the proposal:

“Overall, as identified in my assessment and addendum whilst the additional information on fairy tern foraging and food supply would be invaluable, I agree with Mr West that requesting monitoring programme on fairy tern foraging and food supply is out of the scope of this application. This is because there is no evidence to link any direct or indirect adverse effects from the sand extraction operation on birds including fairy terns”¹⁹⁴

FINDINGS

384. We prefer the evidence of Mr Southey, Mr Beveridge (and Dr Sivaguru to an extent) and find that given the uncertainties and the lack of information available on the potential impacts on the food sources of these endangered birds, we conclude that a precautionary approach should be applied and refuse consent, especially given the potential for significant adverse effects on the New Zealand fairy tern population. We find that the proposed conditions do not provide enough certainty that significant adverse effects on these birds will be avoided.

¹⁹⁰ Ibid at [1.5]

¹⁹¹ Ibid at [1.5]

¹⁹² Mr West’s second evidence-in-reply at [30]

¹⁹³ Ibid at [29]

¹⁹⁴ Ibid at [1.5]

Effects on Fish

385. A small number of submissions raised concerns over effects to fish or fisheries stocks by destruction of seabed habitats. An even smaller number of submissions suggested the sand extraction process produces underwater noise at levels harmful to fish.
386. Mr West advised the monitoring conducted to date has not shown significant adverse effects to benthic biota over and above that occurring naturally (as discussed above), therefore he concluded, relying on the site-specific levels of underwater noise that have been measured by Styles Group (set out below) that no adverse effects to fish food stocks has occurred or is likely to occur at the level of sand extraction proposed¹⁹⁵.
387. Relying on the site-specific levels of underwater noise that have been measured by Styles Group in 2020 and shown not to exceed levels deemed harmful to fish or marine mammals, Mr West advised:

“It has been identified that there is a risk of auditory masking for fish; however, the risks are substantially smaller than for marine mammals. For example, the 50% probability of a low behavioural response in the delphinids was within 28m compared to 0m for a moderate response. Behavioural response ranges of fish are considered to be smaller still, meaning very small areas and low numbers of fish could potentially be affected.”¹⁹⁶

388. Dr Sivaguru’s review on the impacts on fish was that any adverse effects will be less than minor¹⁹⁷.

FINDINGS

389. We agree with the expert opinions of Mr West and Dr Sivaguru and find that the impacts on fish from the sand extraction activity will be less than minor.

Underwater Noise

390. Dr Matthew Pine of Styles Group prepared a report, “Assessment of Underwater Noise Effects” (the Underwater Noise Assessment), dated 31 March 2020, which was submitted as part of the Section 92 response dated April 14 2020. He summarised the methodology employed and his assessment findings in his evidence to us.
391. Dr Pine advised that the Underwater Noise Assessment informed the Cawthron Institute’s “Marine Mammal Assessment of Effects” (the Cawthron Assessment) dated 14 April 2020.
392. Dr Pine utilised underwater noise modelling to assess the effects on nine marine mammal species identified by the Cawthron Institute as species potentially affected by the activity, due to their presence in the proposed sand extraction area. Dr Pine advised that *“the potential noise effects on invertebrate and fish species are not expected to be*

¹⁹⁵ Mr West’s Evidence-in-Chief at [6.21]

¹⁹⁶ Mr West’s evidence-in-chief at [6.22]

¹⁹⁷ Dr Sivaguru’s Coastal Memo dated January 2021 at [3.23]

*greater than for marine mammals (due to their hearing biology)*¹⁹⁸, consequently, the underwater acoustic modelling was therefore performed specifically for marine mammals.

393. To assess the potential underwater noise effects of the sand extraction activities, Dr Pine obtained data to identify the existing soundscape; and he measured the noise levels of the William Fraser while in extraction mode within the proposed sand extraction area¹⁹⁹. The predicted noise emissions of the William Fraser operating within the proposed sand extraction area were evaluated in terms of the critical distances for which risk of injury, behavioural effects and auditory masking will occur for the species of interest.²⁰⁰
394. Dr Pine concluded that injury from the sand extraction activities using the William Fraser is not expected to occur at any stage of operation (including active extraction) within the sand extraction area, for any species.²⁰¹ However, Dr Pine advised that behavioural effects can be expected to occur within limited ranges from the vessel and he relied on the findings of Ms Clement which are set out in the following section. In terms of auditory masking Dr Pine assessed the degree of Listening Space Reduction (**LSR**) on the identified marine mammals. The LSR was highest for fur seals (76% reduction in LSR within 15m of the vessel), followed by bottlenose/common dolphins (69% LSR), killer whales (68% LSR), then Bryde's whales (66% LSR). The spatial extent of any auditory masking (i.e. greater than 1% LSR) was highest for fur seals, followed by killer whales, bottlenose/common dolphins and then Bryde's whales.²⁰²
395. Dr Kala Sivaguru, Council's Senior Coastal Specialist had reviewed the risk of underwater noise effects and she concluded that the effects from the predicted levels would be less than minor, and that there is unlikely to be any risk of Temporary Threshold Shift (**TTS**) or Permanent Auditory Injury (**PTS**) for marine mammals in the extraction area.²⁰³
396. Both Dr Pine and Dr Sivaguru agree that if a different vessel to that of the TSHD William Fraser is used it would need to operate under similar conditions and be of a similar size and power, or smaller, for the effects to be commensurate with or less than what has been assessed in this process.
397. Dr Craig Radford, underwater acoustician for TWOP advised he would be concerned if the application was approved on the basis of the "*very limited acoustic assessment provided by the Styles Group*"²⁰⁴. Dr Radford was of the opinion that "*the likely effects on marine mammals from underwater sound generated by the sand extraction activity have not been adequately considered.*"²⁰⁵

¹⁹⁸ Dr Pine evidence-in-chief at [17]

¹⁹⁹ Ibid at [19]

²⁰⁰ Ibid at [23]

²⁰¹ Ibid at [24]

²⁰² Ibid at [29]

²⁰³ Dr Sivaguru, Coastal technical Memo dated January 2021 at [3.26]

²⁰⁴ Dr Radford, Letter at [5]

²⁰⁵ Ibid at [2]

398. He was particularly concerned about the potential impacts of transit activity of the sand extraction vessels between the Auckland offloading facilities and the Pakiri extraction sites. He considered the approval of the consent will result in a significant number of vessel transits, which will result in increasing the overall underwater noise levels, not only at the extraction site but along the entire transit path to and from Pakiri. He opined that this *“will expose marine mammals to increased noise levels above what they are currently exposed to. This could also potentially displace these animals from important feeding and breeding grounds in the Hauraki Gulf.”*²⁰⁶
399. He advised that underwater sound is also important for many fish and invertebrate species as well and he noted that this was not addressed in Dr Pine’s underwater acoustic assessment. Dr Radford was concerned that both within the extraction site itself and along the length of the vessel transit route many commercially and recreationally important fish and invertebrate species have the potential to be affected by the increase in noise levels. He advised that some of these animals are also *“not as mobile as the marine mammals and cannot simply swim away if disturbed by the noise generated as a result of the proposed activity.”*²⁰⁷
400. Lastly, he raised the issue of ground roll or substrate-borne vibrations, which are generated when noise producing structures come into contact or close proximity to the seafloor, such as the extraction method. He noted this source of noise is *“particularly important for marine animals that live in and on the substrate, such as bivalves (e.g. Hurooa - horse mussels) and crabs (e.g. NZ paddle crab)”*. Dr Radford further advised that: *“research has shown that substrate-borne vibrations can cause both behavioural (interferes with feeding) and physiological changes (structural damage) to these groups of animals.”*²⁰⁸
401. In reply to the matters raised by Dr Radford, Dr Pine advised:
- “The transit of the vessel is permitted under Policy F2.18.3 of the Auckland Unitary Plan. My initial assessment considered the noise from the vessel under extraction mode only, being the louder activity, given that the transit of the vessel is permitted under Policy F2.18.3 of the Auckland Unitary Plan.”*²⁰⁹
402. Dr Pine confirmed he had assessed underwater noise effects on fish and invertebrates and concluded the underwater noise effects on fishes and invertebrates were less than for marine mammals, and therefore the assessment, management and mitigation afforded to marine mammals would also provide overlap for fishes and invertebrates.²¹⁰
403. In addition, he confirmed that ground-borne vibrations may occur from the TSHD vessel while in extraction mode where the drag head moves over the sea floor. However, Dr Pine advised:
- “there is so little scientific data on the effects of ground-borne vibration from sand extraction activities, as well as vessels, on benthic and interstitial fishes and*

²⁰⁶ Ibid at [2]

²⁰⁷ Ibid at [3]

²⁰⁸ Ibid at [4]

²⁰⁹ Dr Pine’s Statement of Evidence in Reply at [9]

²¹⁰ Ibid at [12]

*invertebrates that it is not possible to meaningfully assess such effects in a regulatory context.*²¹¹

Further:

“If any ground-borne vibrations are generated, I expect that they would not propagate beyond the immediate vicinity of the drag head, where the threat of being sucked up the drag-head would be a greater impact than the ground-borne vibrations.”

FINDINGS

404. We note that Dr Sivaguru’s accepted the comments provided during the hearing by Dr Pine and agrees that there may be changes in the background underwater noise levels over time²¹². As such, Dr Sivaguru states it would not be appropriate to limit the underwater noise levels during the operation of sand extraction vessel. Dr Sivaguru accepted the deletion of the underwater noise condition. We agree, and if we were of the mind to grant consent then we would not have imposed a condition limiting underwater noise.

Effects on Marine Mammals

405. Dr Deanna Clement, of Cawthron Institute prepared a report, *“Kaipara Ltd Offshore Sand Extraction: Marine Mammal Assessment of Effects”* dated April 2020, which was submitted as part of the Section 92 response dated April 14 2020.

406. Having noted that *“no marine mammal research studies have focussed on the Mangawhai / Bream Bay region”*²¹³, based on all available species information, Dr Clement advised that *“the species most likely to be affected by the proposal are common and bottlenose dolphins, orca and Bryde’s whales. Other species of interest include NZ fur seals, southern right and humpback whales, pilot whales, and sperm whales, due to their potential vulnerabilities or conservation status.”*²¹⁴

407. Based on the limited data available, Ms Clement did not consider the Mangawhai / Bream Bay coastal waters as ecologically significant habitats for nearly all of the above species. *“The exception is the small population of critically endangered Bryde’s whales that use Hauraki Gulf waters as important resting and feeding habitats throughout the year. The general region also supports populations of nationally endangered or threatened bottlenose dolphins, orca and southern right whales that need to be considered in light of NZCPS Policy 11(a).”*²¹⁵

408. Dr Clement advised the *“extraction activities more likely to affect marine mammals are the production of underwater sound and vessel movements associated within the general extraction region”*. She noted that possible indirect effects of sand extraction

²¹¹ Ibid at [15]

²¹² Dr Sivaguru’s Coastal Ecology Memo Feb 2022 at [1.3]

²¹³ Dr Clement’s Statement of Evidence at [19]

²¹⁴ Ibid at [14]

²¹⁵ Dr Clement Statement of Evidence at [15]

include potential physical changes to the habitat itself that could adversely affect the health of the local ecosystem and / or impinge on important prey resources.²¹⁶

409. Based on the spatial modelled results of Pine (2020), Dr Clement summarised the results of her review as:

“any effects from the underwater noise generated from this sand extraction proposal will likely be transitory and non-injurious for local marine mammals. The overall levels and character of extraction noise will be much less than the numerous vessels currently travelling to and from the Ports of Auckland on a daily basis. The likelihood of any hearing injury effects (TTS or PTS) occurring is considered not applicable (Table 2). Effects will be predominantly limited to the temporary masking of some noise signals when animals are within several kilometres of the dredge and a range of potential behavioural responses at closer proximity (< 400 m).”²¹⁷

410. The assessment on marine mammals also considered the potential for collision risks from the dredge vessel transiting through the Hauraki Gulf water. Dr Clement advised that the species considered most vulnerable to any potential vessel collisions include “Bryde’s, southern right and humpback whales and to a much lesser extent, bottlenose dolphins and orca (given their current endangered species status rather than propensity for vessel strike)”. In seeking to further reduce any accidental interactions with Bryde’s whales, Dr Clement recommended that the activity should formally implement the Ports of Auckland’s Hauraki Gulf voluntary transit protocol for commercial shipping.²¹⁸
411. Dr Clement has assessed the overall risk of any impacts from sand extraction activities on local and visiting marine mammals to be “less than minor to negligible, when considering the types of effects, their spatial scales and durations, likelihood, potential consequences and the mitigation options that are currently implemented.”²¹⁹
412. To ensure that the most appropriate measures are in place and to reduce any identified risks, Dr Clement recommended that several best management practices and formalising of existing operational mitigation actions form a part of the development of a Marine Mammal Management Plan (MMMP).²²⁰
413. The Auckland Conservation Board raised concerns over the existing acoustic background along transit routes and how this project would be adding to those levels.²²¹ Dr Clement responded that in terms of underwater noise effects, multiple noise sources are not necessarily additive. Instead, she advised the loudest noise source usually covers or masks any quieter sources. Further, the noise levels generated from the proposal are expected to be lower than the commercial ships passing through the area, noting that the number of vessel trips to and from the extraction area will remain the same, or even reduce slightly, due to the increased volume capacity of the William Fraser.

²¹⁶ Ibid at [16]

²¹⁷ Ibid at [34]

²¹⁸ Ibid at [17]

²¹⁹ Ibid at [48]

²²⁰ Ibid at [17]

²²¹ Ibid at [53]

414. Mr Thomas Christie, Planner for the Director - General of Conservation while confirming that the findings of the Underwater Noise Effects prepared by Styles Group are generally accepted, considered it prudent for regular underwater noise monitoring to take place.²²² Dr Clement refuted the need for this to occur on the basis that there is little to be gained from regular noise monitoring unless something changes significantly in the operations from the status quo; i.e. new vessel, significantly different pumping system, etc.²²³
415. Mr Christie also considered a greater frequency of reporting is required within the MMMP, but provided no further details. In response, Dr Clement suggested one further change to the MMMP to require the extraction activity sightings log to be provided to Council and DoC upon request. It was Dr Clement's opinion that this level of marine mammal reporting is above and beyond what other vessels operating in the Hauraki Gulf are currently doing as part of the Hauraki Gulf Transit Protocol for Commercial Shipping.²²⁴ She also pointed out to us that under the Marine Mammal Protection Act 1978, the vessel is obligated to report any injury or mortality to DOC as soon as practicable.²²⁵

FINDINGS

416. We find in favour of Dr Clement and Dr Pine (and Dr Sivaguru) on the evidence before us that any effects from the underwater noise generated from this sand extraction proposal will likely be transitory and non-injurious for the local marine mammals and fish. Further, the proposed MMMP, if the resource consent had of been granted, would suitably mitigate any potential effects on marine mammals.

Effects on Water Quality

The level of effects from discharges of suspended solids from the William Fraser

417. Both underwater observation, as well as above water observation of the plume of the William Fraser whilst carrying out sand extraction activities has been undertaken and inform the findings of Mr West.
418. Mr West advised that water quality testing was completed in 2019 to quantify the natural background turbidity and the suspended solids concentrations in the sand extraction area and that in the water behind the sand extraction vessel during normal operation.
419. During normal sand extraction operations, Mr West advised that a plume is created behind the vessel which is approximately as wide as the vessel at 16m, with very little lateral spread being visually obvious. A very weak surface plume has been shown to only be present at any one location for no more than 3 minutes 15 seconds. The subsurface non-visible plume settles through the water column over a period of about 26 minutes after the passage of the dredge.²²⁶

²²² Mr Christie Evidence-in-Chief at [30]

²²³ Dr Clement Evidence in Reply at [9]

²²⁴ Ibid at [15]

²²⁵ Ibid at [28]

²²⁶ Mr West Evidence-in-Chief at [6.5]

420. Mr West explained that water currents in the sand extraction area are considered to be weak, in the order of 4-7 cm/s on average up to 15 cm/s. Based on the settling time of 26 minutes, the water body that the plume is in, is not expected to move more than about 233m during the period of time for which the plume is present.²²⁷
421. Mr West concluded that "*the magnitude of effects of sediment discharges on water quality are expected to be negligible*"²²⁸, in regard to the absence of contaminants in the sediments and the limited time period of the plume. He further advised it is not currently planned to operate more than one dredge vessel in the sand extraction area at the same time, thus cumulative effects from more than one vessel will not occur. Further, the short duration and small size of the plume means cumulative effects of repeated dredge passages on consecutive days or even within in the same day, will not occur. Other than natural events no other sources of suspended solids are known to input into the sand extraction area.²²⁹
422. On that basis, Mr West concluded that water clarity will not be adversely affected at the coast, and changes in water clarity will not be detectable or noticeable at Goat Island, Pakiri Beach, Te Arai Point or any other location where in-water recreational activity occurs, as any plume will be confined to the sand extraction area at its closest point being 1.3 km offshore.²³⁰
423. Further, the release of contaminants into the water from the seabed sediments is not expected by Mr West, as no contaminants have been found in the seabed sediments nor are there any sources of contamination. He considered the potential for a release of oils and fuel from the dredge vessel to be very unlikely and he advised us he was not aware of any such events occurring in the Pakiri embayment, by a dredging vessel. Such an event is only likely to occur if the vessel suffered a break down, damage or was in distress, which should not happen if the vessel has been maintained and operated in accordance with maritime codes of practice.²³¹

FINDINGS

424. We had no opposing expert evidence in regards to water quality, including effects arising from sediment, turbidity or contaminants, which Mr West concluded would be negligible.

Recreational and Amenity Effects

425. Amenity values are defined in the RMA as "*those natural or physical characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.*"²³²
426. Many submitters, both Māori and Pākeha, told us about their perceptions of the adverse effects (harm) the sand mining was having on their appreciation of the Mangawhai-Pākiri embayment, particularly their enjoyment of the beach.

²²⁷ Ibid at [6.6]

²²⁸ Ibid at [4.9]

²²⁹ Ibid at [4.9]

²³⁰ Ibid at [6.7]

²³¹ Mr West Evidence-in-Chief at [6.8]

²³² s2 RMA 1991

427. Similarly, a high number of submitters raised concerns about the proposal's potential effects on recreational values. These related to impacts on surf breaks (which are covered elsewhere in this report), recreational fishing and shellfish gathering, and the general enjoyment and amenity values of the Pakiri coastline.
428. Potential amenity and recreational effects identified were interlaced with other potential impacts including on coastal processes, ecology, landscape and natural character. We heard from long time Pakiri residents such as the Bradford, Reid and Stanley families about their observations of significant depletion of the dunes; changes in sand colour and depth from white sand to hard compacted sands or rock, the diminishing presence of shells and marine life along the shoreline, a decrease in surf quality, and the nuisance of noise and lighting impacts associated with vessel operation.
429. For example, Sharley Haddon, who has lived close to the beach for 50 years, and has walked and ridden horses along it regularly, told us "*There is an obvious change in sand colour and depth...it is now compact and hard and dark right up to the high tide mark. Now when I walk on the beach at low tide I get brown dirt on the soles of my feet this has never happened before...when I use my towel to dry my feet it goes brown with dirt...after swimming!!! And there is black sand showing in the water where the waves are breaking on the shore.*"²³³ These experiences are clearly related to her appreciation of the beach's pleasantness and recreational attributes. Very similar observations and concerns were voiced by other submitters, as well.
430. In a slightly different vein, Mr Greg Bradford, who lives on the southern side of Rahuikiri Road, told us that "*for each of the 30 years we have lived here the sand barge have always been present. You could set your watch by the time they arrive, 6pm every evening. My heart literally sinks every time I see it because I know the irretrievable damage it is causing.*"²³⁴ Clearly the sight of the extraction vessel is sufficient to undermine Mr Bradford's appreciation of the amenity values of his neighbourhood.
431. Ms Carolyn Reid and her daughter Vanessa, who have had a holiday home on Pakiri Block Road just south of the Poutawa Stream for over 50 years, provided many photographs illustrating their regular use of the beach and the changes they have noticed. One of these changes is the loss of shells on the beach which they told us were once much larger, numerous and varied but have more recently been depleted. They showed us many examples of what they had collected over the years. In their view this loss is a result of sand mining activities in the embayment which impacts their appreciation of the beach's amenity values.
432. These experiences were generally echoed by Ahi Kaa submitters.
433. Mr Farrow, landscape architect for Kaipara Ltd, described Pakiri Beach as having moderately high recreational use and identified it as a weekend and holiday destination for Aucklanders to swim, walk, fish and surf. Mr Hay relied on the assessments of Mr West and Dr Mead to conclude that effects on fisheries and surf breaks will be less than minor and otherwise narrowed his consideration of recreational issues to the immediate sand extraction area stating "*based on the location of the sand extraction area, the sand extraction methodology and experience to date, no effects on fishing or other*

²³³Evidence of Sharley Hadden, given on 10 May 2021, page 2.

²³⁴ Evidence of Greg Bradford, given on 11 May 2021, page 1.

recreational activities (including scuba diving, sailing, motor boating or recreational fishing) is expected."²³⁵ Further, he did not consider that being able to observe the William Fraser offshore adversely impacts the recreational use of the coastline.

434. Mr Kensington observed one or two vessels during his site visits in the waters of the proposed sand extraction area, however he stated that in his experience this part of the coastline is not heavily utilised by vessels. He did have some concerns about the potential for adverse amenity effects experienced by viewers of the sandmining operation, submitters' perceptions about the activity occurring by stealth, and the possibility of cumulative effects should more than one vessel be operating at once.
435. As such he recommended that conditions be imposed in respect of operational time restrictions and that an operational schedule be made available to the public to assist in maintaining the recreational use and enjoyment of the Pakiri coastal environment. This was principally in order to forewarn anyone planning to visit the beach for astrophotography purposes. Mr Farrow was in agreement about the need for operational time restrictions and supported such a condition.
436. Mr Hay did not have an issue with proposed time restrictions but disagreed with a condition requiring an operational schedule for the William Fraser to be publicly available. He considered the use of a phone application, such as the free and downloadable "Marine Tracker" to be a more appropriate tool for parties to use to identify if any boats (including the William Fraser) are operating in the area.
437. Overall, Mr Hay and Mr Hopkins were in agreement that effects on recreation and amenity values will be less than minor and acceptable from a resource management perspective

FINDINGS

438. Notwithstanding Messers Hay and Hopkin's conclusions, we acknowledge the statements of submitters in this regard and additionally, find it somewhat challenging to uncouple potential recreational and amenity effects entirely from other aspects of the application where we have found adverse effects to be more than minor. We accept that there has been a reduction in the recreation and amenity values of the beach as appreciated by the local community.
439. In respect of the policy framework regarding maintenance of recreation and amenity values, we generally agree with Mr Hay that the activity "*does not limit public access, or unreasonably affect recreational activities in the coastal environment.*"²³⁶
440. With regard to the outstanding difference of opinion between Mr Kensington and Mr Hay regarding a publicly available schedule for the vessel, we concur with Mr Kensington's comments recognising the potential for a perceived adverse effect, and a cumulative effect, relating to the experience of the community in regard to operations, including night time operations. Further, what he referred to as a "no surprises" approach could serve to alleviate some of the Pakiri residents' concerns regarding transparency of operations, particularly those concerns around consent compliance. In our view, had we

²³⁵Hay EIC para. 101

²³⁶s42A report pg.35

granted consent, a condition would be required tasking the consent holder with provision of an operating schedule of the sand extraction activity (which could also direct people to the 'Marine Tracker' application referenced by Mr Hay as an alternative source of such information).

Visual, Landscape and Natural Character Effects

441. Mr Peter Kensington of KPLC provided Council with a review of the application (which was not provided to us) and, following notification and receipt of the submissions, prepared a follow-up technical review memo, appended to the s42A report. Following receipt of the pre-circulated evidence, he prepared an Addendum Technical Specialist Review memo dated 8 April 2021. A Supplementary Technical Specialist Review memo, dated 11 February 2022, was provided by Mr Kensington ahead of the resumed hearing.
442. Mr Kensington, in the absence of an assessment of landscape, visual and natural character effects from the applicant to comment on, came up with six issues to consider while preparing his first memo.²³⁷ He then went on to consider the proposal under the headings, Visibility, Landscape Effects, Natural Character Effects, Cumulative Effects and Mitigation, while keeping those issues in mind.
443. While acknowledging that recent development north of Te Arai Point has increased the potential residential viewing audience, Mr Kensington concluded that "*adverse landscape effects are likely to be negligible or very low.*"²³⁸ In terms of adverse effects on natural character, Mr Kensington acknowledged there was potential for adverse natural character effects to occur, but concluded "*adverse natural character effects of the proposal will be very low, but controls should be placed over night operations in order to ensure successful mitigation of adverse lighting effects.*"²³⁹
444. Mr Kensington also considered the potential for adverse cumulative effects to arise, given that one other permit already exists and an additional extraction permit is in the pipeline. We were also advised by Mr Clapshaw, a submitter, that there have in the past been instances of up to four vessels operating simultaneously, although not necessarily in the same extraction consent area.²⁴⁰ Mr McCallum confirmed that since the William Fraser started operations in October 2019, the Kapua, a sand holding vessel, has not been required to supply the Auckland market and is used for occasional supply to other markets, such as Waiheke, Coromandel and Tauranga.²⁴¹ It thus appears that more than one vessel may operate at any one time, on occasion.
445. Three matters were of concern to Mr Kensington in his memos. The first was lighting on the vessel. Like the Panel, Mr Kensington had had the opportunity to see the William Fraser operating at night and to see the level of lighting on board. He recommended a condition of consent to ensure there was no objectionable glare produced by lighting on the vessel.

²³⁷Memo from Peter Kensington to Colin Hopkins dated 28 January 2021, paragraph 12.

²³⁸Ibid paragraph 15.

²³⁹Ibid paragraph 19.

²⁴⁰Evidence of Damon Clapshaw dated 26 February 2021, paras 3.18 & 3.19.

²⁴¹Evidence of Callum McCallum dated 3 May 2021, paragraph 31 and in reply to questions.

446. A number of local residents also told us about being able to regularly see the lights of the dredging vessel approaching from the south at dusk. We were also provided with photographs of the Coastal Carrier and a barge with lights on operating offshore from Poutawa Stream.²⁴² Ms Reid told us that the vessel "*looks like a bus, with blazing lights at the front.*" She confirmed that lights from the inshore dredging activity were worse than from the offshore operation.
447. The second was the need for publication of the extraction schedule which is addressed elsewhere in this report. The third issue raised by Mr Kensington was a limitation on the extraction occurring during daylight hours on weekends and public holidays.²⁴³
448. Although Mr Kensington's conclusions in his first memo found effects were "*less than minor and not significant*",²⁴⁴ after having heard the evidence of the other parties, his addendum memo was less certain. In relation to evidence from Ms Haddon on behalf of Te Whanau O Pākiri, he wrote, "*further information from the applicant is required in order for me to make an informed judgement as to whether the adverse cultural landscape effects identified by Ms Haddon can be successfully avoided, remedied or mitigated.*"²⁴⁵ He understood from Ms Haddon's evidence that past offshore sand mining activities have caused significant adverse effects on the cultural landscape of Pakiri Beach, including to the natural character of the seabed.
449. By his third memo, dated 11 February 2022, Mr Kensington had resolved, at least some of, his uncertainties. As already noted in the Mana Whenua section above, he found that the ongoing sand extraction activity had the potential to result in greater adverse effects than he had previously determined. He wrote "*In addition, much like the Coastal Processes Expert Group, without further detailed monitoring information, I am unable to determine whether adverse effects on the landscape and natural character of the beach and dune systems have occurred, and might continue to occur, as a result of ongoing seabed sand extraction.*"²⁴⁶
450. He interpreted Ms Haddon's evidence as inferring that the effects on the cultural landscape are unable to be mitigated through controls over ongoing sand extraction activity.
451. As a result of references to potential adverse landscape visual and natural character effects in submissions, as well as the inclusion of the first KPLC Ltd memo in the s42A report, Kaipara Ltd commissioned Mr Mike Farrow of Littoralis Landscape Architecture to undertake an assessment and provide evidence to the first part of the hearing.
452. Mr Farrow appended a copy of Mr Stephen Brown's report "*Pākiri Sand Extraction Project - Landscape Assessment*" to his evidence, although the 27 attachments to that report were not provided²⁴⁷. In doing so, Mr Farrow suggested it "*provides a*

²⁴²Presentation of Carolyn Reid.

²⁴³Technical Specialist Memo of Peter Kensington, dated 28 January 2021, paragraph 23.

²⁴⁴Ibid paragraph 32.

²⁴⁵Technical Specialist Memo of Peter Kensington, dated 8 April 2021, paragraph 18.

²⁴⁶Ibid, paragraph 37.

²⁴⁷Twelve un-referenced photographs taken by Mr Brown were included in the agenda, pages 177-188, and may have been appended to Mr Hay's assessment of discharges and disposal, and in response to Mr Kensington's preliminary comments on the application. It is noted that 'the Brown report' provided is dated September 2019, while the twelve photographs are dated September 2020, so we assume the photographs provided are not attachments to the report provided.

comprehensive description of the context of that application and the landscape values that have been recorded along the related portion of the Pākiri coast, most of which is common to this application."²⁴⁸ He also confirmed that the report was prepared for a different proposal and emphasised that *"I have not been influenced by Mr Brown's assessment ("the Brown report"), preferring to focus my findings on my own analysis."*²⁴⁹

453. Like Mr Hay, Mr Farrow referred to a number of nearby overlays in the AUP, namely:

- Outstanding Natural Landscapes Overlay - Area 22, Pākiri Beach;
- Outstanding Natural Landscapes Overlay - Area 28, coastline from Pākiri River to Omaha Cove;
- High Natural Character Overlay - Area 48, Te Arai and Pākiri Beach

454. Neither Mr Hay nor Mr Farrow (nor Mr Brown in his report) made reference to the other nearby overlay, namely:

- Outstanding Natural Feature Overlay - ID 149, Pākiri Beach.

455. Council's reporting planner, Mr Hopkins did, however, record this overlay in his s42A report. As the ONF sits within the same area as the ONL (and HNC, and is therefore difficult to differentiate on the AUP maps) and shares the same objectives, policies and rules as the ONL, the Panel were not concerned by this omission.

456. Mr Farrow emphasised the horizontal nature and large scale of the receiving environment; the proposed frequency and duration of extraction activities; and the fact that the majority of the extraction would occur at night.

457. He told us he had been asked to provide his opinion of the adverse landscape, visual and natural character effects under two different scenarios:

- "(a) as if Kaipara Ltd is not already undertaking sand extraction in the embayment, but that the consented McCallum extraction is in operation; and*
- (b) without the current sand extraction by McCallum Brothers Ltd."*²⁵⁰

458. He concluded, *"[i]n summary, it is my opinion that the two scenarios have closely balanced, very low levels of effects being generated by the Kaipara Ltd proposal. In the situation where both consents exist simultaneously, the slightly elevated effects of the McCallum consent serve to condition the lesser effects of the Kaipara proposal. In the circumstance where the Kaipara activity without the inshore conditioning of the McCallum consent, the greater distance and diminishing of perceived scale and detail of the vessel are the factors that limit experienced effects."*²⁵¹

459. In answer to questions, Mr Farrow did confirm that his assessment was based on only one extraction vessel operating at any one time and that these conclusions might change were the number of vessels to change.

²⁴⁸Statement of evidence of Mike Farrow, dated 12 February 2021, paragraph 31.

²⁴⁹Ibid paragraph 32.

²⁵⁰Ibid, paragraph 53.

²⁵¹ Ibid, paragraph 64.

FINDINGS

460. We find that we agree with both landscape architects that adverse visual effects will be minor, based on the use of only one vessel. However, we find we do not have enough evidence to confirm that the effects on natural character values from the sand extraction were going to be at acceptable levels.
461. We accept Mr Kensington's revised findings in relation to effects on the cultural landscape as they accord with our findings in regard to effects on Mana Whenua, as recorded elsewhere in this report. We too find that effects of the proposal on the cultural landscape values for the Ahi Kaa of Pakiri will be significant and adverse.

Lighting Effects

462. As recorded above, a number of submitters told us of the brightness of the lighting on the sand extraction vessels, as seen from their properties and the shore. It was not always clear whether the lights they referred to were operating in the in-shore or off-shore consent areas. Also as noted, we had the opportunity to observe the vessel operating in the off-shore consent area.
463. In response to concerns raised about lighting, the proposed conditions of consent appended to the evidence of Mr Hay, the Applicant's planner, dated 12 February 2021, included a condition controlling lighting on the vessel. Refinements were made to this condition during the course of the hearing and in the final version appended to Mr Hay's rebuttal evidence dated 21 February 2022, read:

"34. For all vessels associated with the sand extraction, to avoid or mitigate adverse effects on sea birds and on people viewing from land, lighting is to be inward and downward facing and minimised as far as practicable while still complying with any relevant maritime regulations and safety requirements."

FINDINGS

464. This condition was accepted by all parties and, were we to be granting consent, would have been acceptable to the Panel.

Noise Effects (above water)

465. Mr John Styles, of Styles Group prepared a report, "*Assessment of Airborne Noise Effects*", dated 25 February 2020 on behalf of the Applicant which was submitted to Council as part of the Applicant's s92 response. He summarised the methodology employed and his assessment findings in his evidence to us.
466. Mr Styles assessed potential noise effects on both beach users in either the Coastal Transition Zone (CTZ) or the Open Space Conservation Zone (OSCZ), as well as people in the Rural Coastal Zone, (RCZ). The CTZ and OSCZ run in a narrow strip immediately inland from Mean High Water Spring (MHWS), while the RCZ is the closest residential zone in the AUP to the sand extraction activity.
467. Noise measurements of the William Fraser with the drag-head operating were taken in a number of weather conditions with both on and off-shore winds. Similarly, ambient noise

levels were measured at the coastal interface in a variety of weather conditions. Three dimensional modelling of the sound contours was then created for a number of environmental scenarios.

468. The assessment concluded that *"sand extraction activities will only be audible on the beach in the very calmest of conditions when swell heights are close to nil and wind speeds are also nil."*²⁵² He went on to say, *"noise of sand extraction is likely to be barely audible even in meteorological conditions that enhance propagation towards the beach, and when the swell is very low."*²⁵³
469. In terms of potential impacts on residential receivers he concluded, *"the sand extraction noise levels received at the closest RCZ sites will be less than 20dB. This level readily complies with both daytime and night time noise limits applying in the RCZ. Due to the wave action on the beach, noise is unlikely to be audible above background noise levels at the closest RCZ receivers."*²⁵⁴

FINDINGS

470. Both Mr Styles and Mr Qiu, Council's noise specialist, agreed that a condition of consent requiring compliance with maximum specified noise limits would be appropriate, were consent to be granted. We agree.

Economic Effects and Consideration of Alternatives

471. Mr Greg Akehurst of Market Economics prepared a report entitled, *"The Economic Contribution and Impact of Pakiri Sand Extraction"* dated August 2019, which was submitted as part of the lodged resource consent application.
472. The purpose of the economic report was to highlight the role sand extraction at Pakiri plays in facilitating construction in (primarily) the Auckland market, and the implications to the sector and wider economy of not being able to source sand from Pakiri.²⁵⁵
473. Mr Akehurst advised us that housing growth in existing urban areas along with infrastructure development, non-residential construction, sports fields and school field development and the ongoing repairs and maintenance of existing and new built form, parks and recreational areas are all significant drivers of sand demand.²⁵⁶
474. Furthermore, Auckland's importance and dominance of the New Zealand economy will continue to grow rather than diminish over the next 30 years²⁵⁷. We were told by Mr Akehurst that over the next decade, *"it is estimated that Auckland requires investment of around \$26bn for infrastructure. The majority of this investment requires significant volumes of concrete and therefore significant volumes of sand"*²⁵⁸.

²⁵²Evidence of Jon Styles, dated 10 February 2021, paragraph 29.

²⁵³Ibid paragraph 32.

²⁵⁴Ibid paragraph 33.

²⁵⁵ This Report addresses all sand extraction at Pakiri — i.e. it covers both McCallum Bros Ltd's offshore sand extraction, as well as the nearshore sand extraction.

²⁵⁶ Mr Akehurst's evidence-in-chief at [18]

²⁵⁷ Ibid at [20]

²⁵⁸ Ibid at [21]

475. Further Mr Akehurst advised: *“sand is a low value, high transport cost item that needs to be sourced close to final use, sources in the south should be used by southern developments while developments in the centre and north should be supplied by the northern sand resources”*²⁵⁹.
476. In order to understand the value of renewing the resource consent for sand extraction at Pakiri, Mr Akehurst assessed the costs and benefits associated with the potential renewal in comparison with the principal alternatives to sourcing sand from the Pakiri marine consents.²⁶⁰
477. He concluded that the costs and benefits, from an economic perspective, are mostly derived from transportation costs (or their avoidance) from the Pakiri extraction site to the main markets compared with the principal alternatives.
478. We were told by Mr Akehurst that the current consented maximum volume from the Pakiri offshore location is 270,000 tonnes. This accounts for 16% of the overall maximum market supply. Of that total maximum consented amount, a total of 210,000 tonnes has been sold into the Auckland market, which equates to 26% of the current market supply.²⁶¹
479. Although he acknowledged that there is theoretically enough capacity within other resources across the Auckland Region to meet the deficit caused by the expiry of the Pakiri consents, Mr Akehurst stated *“in practice this is likely to be relatively expensive and inefficient in terms of transport. Renewing the Pakiri consent ensures a steady supply of high-quality sand to different markets in the North Island and requires no further infrastructural expansion or maintenance”*²⁶².
480. Mr Akehurst considered the renewal of the Pakiri consents will lead to a *“direct cost-saving of at least \$132 million from the transport cost savings within Auckland between 2023 and 2043 (based on the avoided direct road transport and environmental costs)”*²⁶³.
481. In his evidence-in-chief he concluded:
- “based on a current market share of 41% in the Auckland region, the Pakiri sand resource is one that needs to be considered as regionally significant and is potentially nationally significant given Auckland’s future growth and role as a driver of national economic activity. As such, it is essential that access to such an important resource is maintained”*²⁶⁴.
482. Mr Lee Skinner provided corporate evidence for Allied Concrete and he advised the Panel that *“at the current time there is no alternative to the use of sand for concrete production at the production rate required to meet the demand of the community”*²⁶⁵.
483. He said that the sand currently sourced from the application site is:

²⁵⁹ Ibid at [22]

²⁶⁰ Ibid at [49]

²⁶¹ Ibid at [48]

²⁶² Ibid at [68d]

²⁶³ Mr Akehurst’s evidence-in-chief at [68f]

²⁶⁴ Ibid at [72]

²⁶⁵ Mr Lee Skinner’s evidence-in-chief at [2.3]

“very good for concrete production because it has a very uniform and consistent grading (size distribution), it is “clean” and largely free of material contaminants so it requires minimal processing²⁶⁶”.

484. Further:

“The sand is transported to our concrete batching plants from the McCallum Sand Yard at the Ports of Auckland. In terms of timing, cost and average transport distance this is efficient.

We have investigated, and used, alternative sand supplies for our Auckland plants over the years, including Tomorata sand, Waikato River (Tuakau) sand, processed recycled glass, Kaipara inshore sand (Winstones).

These alternative sources are not suitable for a variety of reasons.

(a) Both Tomorata and Waikato River sand require transport over significantly longer distances; cost, fuel usage (carbon footprint) and truck movements on already congested roads,

(b) Waikato River sand increases potential alkaline silica reaction issues with some aggregates,

(c) Tomorata sand had a coarse grading which impacted concrete properties,

(d) Inshore sand deposits, limited supply – sand shortages were a fact of operational life, and

(e) Recycled glass is difficult to source in suitable quantities (even as a partial replacement), has increased health risks due to the respirable silica, and is expensive.

There is no manufactured sand in New Zealand at the current time. It would not be economically efficient to import manufactured sand for concrete production from overseas if there was a suitable source²⁶⁷”.

485. He elaborated that *“we are concerned that if the sea-based supply was swapped with a sand source from a quarry in the Waikato Region that this would result in a significant increase in truck movements in order to meet the supply/demand for our Auckland plants.²⁶⁸”*

486. Mr Skinner concluded by saying he *“fully supports the continued sand mining at the Auckland Off-Shore Sand Mining Site as this provides a secure and efficient supply of sand which is critical for sustainable concrete production in Auckland. An efficient and*

²⁶⁶ Ibid at [2.6]

²⁶⁷ Ibid at [2.7 – 2.10]

²⁶⁸ Ibid at [2.12]

*secure sand supply is critical for the on-going economic and social wellbeing of the Auckland community*²⁶⁹.”

487. Dr Jeffs of the Auckland Conservation Board considered the material presented by the applicant did not adequately address the potential for alternative sources of sand. He stated, *“while some alternative sources of sand are identified, their potential to replace in full, or in part, the use of sand from Pākiri Beach is given cursory assessment. There is no appraisal of the capacity of the Auckland sand market to absorb any additional supply costs given the potential risk and impact of conservation and amenity risks of the scale of sand extraction from Pākiri Beach proposed by the applicant*²⁷⁰”.
488. James Carnie presented legal submissions on behalf of the Mangawhai Harbour Restoration Society who also raised the matter relating to the availability of alternative sources of sand. He submitted that the application *“fails to identify or meaningfully consider several available alternative sources of sand (including numerous quarrying and dredging operations) in the upper North Island. The application also misrepresents the viability of one notable alternative source, being Kaipara Harbour, which it portrays as an unsuitable option*²⁷¹”.
489. Mr Carnie told us that *“the most significant commercial source of coastal sand in the Auckland region is the extraction of sand from within the Kaipara Harbour. Winstone Aggregates currently holds a consent to extract up to 350,000m³ per annum (CST80294086), and Mt Rex Shipping currently holds a consent to extract up to 450,000m³ per annum (CST80294873)*²⁷²”.
490. He further stated that *“the focus of Mr Greg Akehurst’s economic evidence for the Applicant is to demonstrate that the costs and benefits of extraction at Pakiri are preferable to those at Kaipara Harbour. However, in reaching that conclusion, Mr Akehurst makes several speculative and unsubstantiated assertions, which ultimately undermine his analysis.*²⁷³”
491. The Society considered it is unrealistic for Mr Akehurst to suggest that there would be ‘no renewals’ of the sand extraction consents from the Kaipara resources, leading to Auckland’s sand supply reaching ‘zero’. Mr Carnie told us that Mr Akehurst also *“failed to recognise the numerous other sources of sand in the Auckland region, most of which comes from quarries, not coastal sources (it appears that Mr Akehurst is not aware of the land-based supply sources that account for 66% of the total Auckland supply market)*²⁷⁴”.
492. In addition, Mr Carnie considered that Mr Akehurst’s analysis of transportation costs *“is seriously flawed because his analysis assumes that the final destination for all potential sand sources (whether transported by road or sea) would be downtown Auckland City. Of course, the sand extracted offshore at Pakiri is (for the most part) offloaded at the Port of Auckland, however that is not the final destination for the sand, which still needs*

²⁶⁹ Ibid at [2.14]

²⁷⁰ Dr Jeff’s evidence-in-chief at [4]

²⁷¹ James Carnie Legal Submissions at [4.1]

²⁷² Ibid at [4.4]

²⁷³ Ibid at [4.5]

²⁷⁴ Ibid at [4.9]

to then be transported - by road - to its final destinations. That road transportation of Pakiri sand is not counted by Mr Akehurst.²⁷⁵

493. He said: *“it is also incorrect for Mr Akehurst to assume that all sand transported by truck from Helensville (ie. the Kaipara Harbour sources) would be brought into the “Auckland CBD”¹². In reality, the journey would often be far less. For instance, Mount Rex and Winstone Aggregates’ sand distribution yards are located in Helensville itself (as shown on the map at Appendix A of Mr Akehurst’s evidence). Also, major concrete manufacturers such as Atlas Concrete, Firth Concrete and Allied Concrete are all based north of Auckland City at Silverdale, Albany and Kumeu (i.e. much nearer to Helensville). The associated transportation costs from Kaipara Harbour sources would therefore be far less than those calculated by Mr Akehurst.*²⁷⁶”

494. Mr Carnie concluded that *“in both scenarios (Pakiri and Kaipara Harbour sources), transportation of the sand to its final destination is not accounted for by Mr Akehurst. The true transportation costs are therefore unknown and Mr Akehurst’s evidence must be taken as inconclusive and unreliable.*²⁷⁷”

495. The Society further submitted that:

(a) “The sand system at Kaipara Harbour is dynamic and sustainable – there are millions of cubic metres of sediment input each year; and

*(b) Notwithstanding the extraction already taking place by other operators in the industry, there is plenty of additional sand available at Kaipara Harbour to meet Auckland’s current and foreseeable requirements.*²⁷⁸”

496. Mr Carnie also pointed out to the Panel that *“McCallum Bros Ltd has previously acknowledged the Kaipara Harbour as an alternative source for sand”*.

*“...Mr McCallum said the company accepted near-shore extraction at Pakiri would not give a long-term supply and intended to develop the offshore Kaipara resource as an alternative future source.*²⁷⁹”

497. We note that Mr Hopkins generally agreed with Mr Akehurst’s assessment, concluding: *“mineral extraction activities in the coastal environment can have social and economic benefits and can be appropriate activities in the coastal environment”²⁸⁰.*

498. In his rebuttal evidence, Mr Akehurst reinforced: *“although there are a number of existing alternative sand extraction sources in and around the Auckland Region, the reality is that they are not as economically or environmentally efficient or effective at getting sand to market as the McCallum Bros Ltd sand sourced from their consents in the Mangawhai-Pakiri Embayment”²⁸¹.* He further elaborated in response to questions from the Panel

²⁷⁵ Ibid at [4.10]

²⁷⁶ Ibid at [4.11]

²⁷⁷ Ibid at [4.12]

²⁷⁸ Ibid at [4.15]

²⁷⁹ Ibid at [4.21]

²⁸⁰ Section 42a report, page 23

²⁸¹ Mr Akehurst’s rebuttal evidence at [49]

that those alternatives are a significant additional cost to the Auckland economy which is already under pressure from building material price increases.

499. When questions were posed to Mr Akehurst about the Helensville sand supply and the rail freight alternative (as opposed to road transport), he informed us he had looked into the costs associated with that, but the costs were not easily available. Therefore, on the basis that the rail line at Helensville has been available for around 100 years and the fact that it had not been used so far, he concluded that it is just not economically viable for it to happen, therefore he did not consider rail freight was a viable alternative.
500. When we put the question to Mr Akehurst of what would be the economic effects of the Pakiri sand consent not being renewed he advised it is not going to impact on the demand for concrete for sand demand out of Auckland. Instead, prices would go up because that volume of sand which is currently taken from the offshore consent at Pakairi (270,000 tonnes) has to be sourced from elsewhere, and he concluded all of the alternative sources are more expensive. So, while it is a relatively small percentage of the overall construction costs, Mr Akehurst responded that the cumulative effects of the price rises will start to impact on the household buying public, which while not being a vast percentage of the overall construction costs, is not insignificant.

FINDINGS

501. We were not convinced by Mr Akehurst that the renewal of the Pakiri offshore sand extraction consent was required from an economic effects point of view. We heard that there are significant alternative sand sources available, for example at Kaipara Harbour from the Mangawhai Harbour Restoration Society and the Auckland Conservation Board, and that there are alternative ways of transporting the sand to its end destination. We were not provided with conclusive evidence as to whether the costs of these alternatives would be more (or less) expensive than sourcing and transporting sand from the off-shore site at Pakiri.

THE AUCKLAND UNITARY PLAN – OPERATIVE IN PART (AUP)

Other relevant provisions of the AUP

502. Having initially considered the relevant provisions of the regional coastal plan, consistent with the *Tauranga* decision of the High Court, we now consider the relevant provisions of other chapters of the AUP. The most relevant expert planning evidence was presented by Messrs Hopkins and Hay and Dr Mitchell. Overall Messrs Hopkins and Hay had concluded the proposal was consistent or generally consistent with all of the relevant provisions of the Chapter B, Regional Policy Statement (RPS) chapters.
503. Mr Hopkins in his s42A report identified Chapters B4, B6, B7 and B8 as being relevant, but did not assess the specific provisions of any of these chapters.
504. Mr Hay identified the same chapters as Mr Hopkins as being relevant. Mr Hay assessed what he considered to be the most relevant provisions.

505. Dr Mitchell took a slightly different approach to the other two planners. Instead of forming an opinion on the extent to which the proposal was consistent with these chapters, his overall conclusion was that:

“52. The provisions of the relevant planning direct that a precautionary approach be taken; that the natural and physical resources in this area be managed in an integrated way; and that the cumulative effects need to be considered.”

506. We start our considerations with Chapter B8.

Chapter B8 – Coastal Environment

507. With respect to Chapter B8, Mr Hay’s assessment in his EIC included the following.

“120. The proposal will not have significant adverse effects on those areas of the coastal environment which are not otherwise identified as having outstanding or high natural character.

121. ...the proposed sand extraction area is generally within the already consented area (except for part of the landward boundary) but the area which consent is now being sought for has been significantly reduced to reflect that area where sand extraction has been undertaken and can reasonably be expected to occur in the future.

122. Given the depth of sand extraction is seaward of the DoC, the sites history of sand extraction, the lack of significant habitats and features, the ability to monitor the site and its accessibility to the Auckland market, it is considered that the site is an appropriate area for continued sand extraction. In particular, sand extraction, site monitoring and delivery of sand to the Auckland market can be undertaken at this site in an efficient manner.

123. Sand extraction can be continued at this site in a manner which avoids significant adverse effects on the environment (including along the coastline) while also avoiding potential conflict with other coastal activities or create risk of reverse sensitivity effects.

125. Given the history of sand extraction in this area, the studies undertaken for the original application, the monitoring and assessment undertaken during the life of the current consent and the latest assessments, it is considered that a precautionary approach is not required to be undertaken as the potential effects are well known and documented.

128. The continued sand extraction will have a positive economic effect in terms of efficiently providing a required construction product to the Auckland community. The sand extraction can be continued in a manner which does not affect the environmental quality or life-supporting capacity of the Hauraki Gulf and no potential adverse cumulative effects have been identified.

129. The proposal will not result in any further degradation of the coastal environment in this location or the net loss of sensitive marine ecosystems. The extraction site is off-shore, seaward of the DoC and approximately 3.8 km from the Cape Rodney-Okakari Marine Reserve. The potential presence of stony coral and scallop and horse-mussel beds have been identified. The use of the pre-sand extraction assessment methodology will identify such areas and allow for these areas to be excluded from the approved sand extraction areas.”

508. In his rebuttal evidence dated 21 February 2022 Mr Hay acknowledged that after reading the JWS there is now a stronger argument that a precautionary approach is required particularly in terms of monitoring.

509. In his EIC under the heading “Regional and National Directives” Mr Hay stated that:

“231. I have addressed the relevant objectives and policies of the AUPOP which includes the Auckland Regional Policy Statement and the Auckland Coastal Plan. I disagree that the proposal is “out of step” with the AUPOP as the AUPOP specifically provides for this activity as a discretionary activity. As a discretionary activity the AUPOP recognises that this activity may be appropriate and can be undertaken in locations where effects on the environment will be to an acceptable level (with appropriate mitigation/consent conditions). If sand mining was considered to be inappropriate activity within Auckland then it could have been deemed a prohibited activity.”

FINDINGS

510. Mr Hay provided the most comprehensive assessment of the Chapter B8 provisions of all the planners. While he had identified the above quoted provisions in support of the proposed extraction area, there are a number of provisions that he had not commented on.

511. In terms of Policy B8.3.2 (3) (d), he did not specifically address how the proposal would “enable the use of the coastal marine area by Mana Whenua for Maori cultural activities and customary uses.”

512. In terms of Policy B8.5.2 he did not specifically address policies (11) and (13).

“(11) Work in partnership with Mana Whenua to protect and enhance culturally important environmental resources and values of the Hauraki Gulf that are important to their traditional, cultural and spiritual relationship with the Hauraki Gulf.

(13) Require management and decision-making to take into account the historical, cultural and spiritual relationship of Mana Whenua with the Hauraki Gulf, and the ongoing capacity to sustain these relationships.”

513. We consider that the “Issues” at B8.1 and the “Explanation and principal reasons for adoption at B8.6 are relevant and that they assist in weighing or balancing the sometimes competing aspects of the use of the coastal environment and the natural and physical resources of the coastal environment.

514. In B8.1 the issues include the need for uses within the coastal environment to be in an appropriate place and of an appropriate form.

515. In B8.6 the explanation includes:

“The coastal environment and the resources of the coastal marine area comprises some of the most important taonga to Mana Whenua, who have a traditional and on-going cultural relationship with the coast.”

516. With respect to the appropriateness of the siting of the proposed extraction area, we find that Mr Hay has placed considerable weight on the current and past use for sand extraction, and, on the economic and efficiency benefits. He also placed considerable weight on the location of the proposed extraction area beyond the depth of closure. Based on the JWS we doubt the depth of closure approach can now be relied upon to support this as an appropriate location. In contrast however he has not satisfactorily addressed the aspect of “appropriateness of the siting” in terms of the cultural relationship that Mana Whenua have with this particular coastal environment.

517. When Mr Hay addressed the regional directives in his EIC, he concluded that:

“If sand mining was considered to be inappropriate activity within Auckland then it could have been deemed a prohibited activity.”

518. We note that he recognised that this proposal is a discretionary activity. As a discretionary activity he stated that this activity may be appropriate and can be undertaken in locations where effects on the environment will be to an acceptable level.

519. From Chapter A of the AUP we note the following description of a discretionary activity.

“A1.7.4. Discretionary activity

Resource consent is required for a discretionary activity and may be granted or refused for any relevant resource management reason. An application for resource consent for a discretionary activity will be fully assessed in terms of the relevant provisions of the Plan, including all relevant objectives and policies, and the Resource Management Act 1991, including in particular Part 2.

Activities are classed as discretionary where they are not generally anticipated to occur in a particular environment, location or zone or where the character, intensity and scale of their environmental effects are so variable that it is not possible to prescribe standards to control them in advance. A full assessment is required to determine whether the activity, subject to any conditions, would be appropriate in terms of the provisions of the Plan, the effects of the activity on the environment and the suitability of the proposed location.”

520. We find that Mr Hay has only focussed on one aspect of how a discretionary activity is to be assessed. In doing so he has overlooked the need to also assess the proposal “in terms of the provisions of the plan” and “the suitability of the proposed location.”

521. In terms of the regional coastal plan provisions of Chapter F2 we find the provisions of Chapter B8 are consistent with and do not conflict with the mineral extraction provisions at F2.6. Policy F2.6.3 provides for sand extraction “*from appropriate areas, having regard to the values of the area,*” including “*Mana Whenua values.*”
522. Overall we find that Mr Hay has taken a too narrow an approach to the provisions of Chapter B8, and, has not recognised the significance of this particular coastal environment to Mana Whenua, nor has he given sufficient assessment to “the provisions of the plan” and “the suitability of the proposed location” when concluding the proposed extraction area is an appropriate one.

B6 Mana Whenua

523. With respect to Chapter B6 Mr Hay’s in his EIC stated:

“130. Turning to B6 (Mana Whenua), the applicant currently has a Memorandum of Understanding with the Ngatiwai Trust Board for the current consent. As outlined by Mr Riddell, although this worked well initially there have been issues in giving effect to it in recent years with staff changes at the Trust Board and concerns being raised about the distribution of the Cultural Liaison Fee.

131. The applicant has entered discussions with both the Te Uri o Hau and Ngati Manuhiri Settlement Trusts on a new Cultural Liaison Agreement. I understand that agreement is close to being finalised with Te Uri o Hau but there have been on-going issues in obtaining feedback from Ngati Manuhiri. This agreement includes the establishment of an iwi liaison group to ensure that both Te Uri o Hau and Ngati Manuhiri representatives can oversee the carrying out of the operation and to ensure iwi are afforded the opportunity to implement their kaitiaki role in respect of the sand resource.

132. Cultural Impact Assessments were sought from both Te Uri o Hau and Ngati Manuhiri. An assessment was received from Te Uri o Hau and submitted to Council. No assessment has been received from Ngati Manuhiri.

133. Having assessed the relevant objectives and policies of the RPS I have formed the opinion that the granting of the consents would be consistent with the RPS.”

524. In his rebuttal evidence dated 21 February 2021 he stated that:

“64. In terms of Policy B6.2.2, opportunities have been and continue to be provided to tangata whenua to participate in this consenting process (though the provision of cultural impact assessments if they choose, submissions and evidence and through the continued dialogue MBL is undertaking with the two Settlement Trusts) and in the consent through the recommended conditions relating to the CLG. Further opportunities outside the Resource Management Act 1991 processes may arise through the Cultural Liaison Agreements currently being negotiated. I therefore consider that Policy B6.2.2 is being given effect to.

65. *In respect to Policy B6.3.2, it is considered that an appropriate assessment of cultural effects has been provided. It is clear there are a range of views on the nature and degree of the effects on cultural values, which is not uncommon, but Council has not identified that an appropriate assessment has not been undertaken through the consenting process.*

66. *In terms of Objective B7.4.1(6) and supporting Policy 7.4.2(7), I remain of the opinion that mana whenua values have been recognised and can be provided for and guidance on how this can be achieved was provided in the Cultural Effects Assessment. This will result in effects on cultural values being minimised to an appropriate level although I recognise that effects on cultural values cannot be practically avoided in their entirety. Furthermore, effects on cultural values may differ amongst different people depending on their relationship with the area. The AUPOP is clear that not all effects on cultural values have to be avoided if this is not practical.”*

525. Earlier in our decision under the heading “Mana Whenua” we have addressed the evidence presented during the hearing on behalf of Mana Whenua and set out our findings. We have also discussed the provisions of Chapter B6 there as well.

526. In addition to the specific objectives and policies, we note the following wording in B6.6 under the heading “Explanation and principal reasons for adoption.”

“In making and implementing the Plan, the Council must, as a matter of national importance, recognise and provide for the relationship of Mana Whenua and their culture and traditions with their ancestral lands, water, sites, wāhitapu and other taonga. The Council must also:

- have particular regard to kaitiakitanga;*
- take into account the principles of Treaty of Waitangi/Te Tiriti o Waitangi; and*
- recognise the historic, traditional, cultural, and spiritual relationship of Mana Whenua with the Hauraki Gulf/ Te Moana Nui o Toi/Tikapa Moana.*

In the policies relating to Mana Whenua values, the Unitary Plan seeks to ensure that resource management processes in Auckland are informed by Mana Whenua perspectives, including their values, mātauranga and tikanga. Mana Whenua perspectives need to be considered early within resource consent processes, accord status in decision-making and have an opportunity to influence outcomes.”

FINDINGS

527. Consistent with our findings on Mana Whenua issues earlier in our decision, we have preferred the planning evidence of Mr Hopkins to that of Mr Hay. While Mr Hay specifically addressed Chapter B6 provisions we find that his conclusion that, providing the opportunity for Mana Whenua to participate in the proposed Community Liaison Group, if consent were to be granted, falls well short of what Chapter B6 anticipates. In respect of the Ahi Kaa this is particularly in relation to engagement early within the consenting process, and an opportunity to influence outcomes.

528. In contrast to Mr Hay, Mr Hopkins has not specifically addressed individual Chapter B6 provisions. However during the hearing process she provided updates with respect to cultural values. In his s42A report, dated 2 February 2021, when commenting on Chapter B6 he stated:

“It is recognised that the applicant has engaged with Tangata Whenua (noting that engagement remains ongoing)”

529. His overall conclusions in his s42A report were as follows.

“19. Conclusion

Having considered the proposal against the relevant matters in the AUP (OP), the proposed extraction of sand and associated discharge has been demonstrated to be consistent with the direction of the Plan with respect to mineral extraction activities and discharges in the General Coastal Marine Zone. The proposal is considered to have positive social and economic benefits associated with the extraction of the resource, whilst the actual and potential adverse effects can be managed to ensure that they are acceptable from a resource management perspective.

In the context of the consideration and testing the broad discretionary aspects of the application, the proposal is also considered to be consistent with the outcomes of the NZCPS, HGMPA, and intent of Part 2 and is an efficient use of a natural resource.

Overall, the proposed sand extraction is considered to be acceptable in the context of the receiving and surrounding coastal environment, and I am satisfied that subject to conditions of consent this proposal can be supported from a resource management perspective.”

530. In his Addendum report, dated 9 April 2021, before the hearing commenced, he stated:

“Cultural Values

As outlined in the s42A report, a number of submissions in opposition to the application raised that the proposed activity will have broad adverse cultural effects. These cultural effects have been identified and expanded upon in the evidence of Olivia Haddon and Pita Rikys on behalf of Te Whanau O Pakiri. This is also reflected in the in the evidence submitted on behalf of the Pakiri G Trust (Christina Baines and Wayne Greenwood).

This evidence identifies that in considering effects on cultural values, and informing the considerations of the application against the New Zealand Coastal Policy Statement(NZCPS), that consideration needs to be given to these mana whenua groups, beyond the mana whenua engaged by the applicant.

The Auckland Council identify the representation of mana whenua interests by 19 iwi authorities, and whilst this does not seek to exclude other mana whenua groups from input, this does provide a starting point to assist applicant’s in engaging with mana whenua to identify whether proposals will affect mana whenua values

(Council's internal processes also make the lodgement of applications available to all iwi authorities for comment). The pre-circulated evidence identifies that mana whenua consultation should extend beyond these iwi authorities. Although the pre-circulation of evidence has enabled the identification of these values (particularly beyond the extent of the submissions), it is expected that a greater understanding of the cultural values and the expectations around the ability and practicality of either avoiding, remedying or mitigation these effects will be addressed. It is however understood that (and not undermining their position that consent should not be granted) that should consent be granted that Te Whanau O Pakiri and Pakiri G Trust seek meaningful ongoing consultation and engagement in recognition of their rohe.

Based on the evidence it is recommended that should consent be granted that the provisions in the conditions for consultation and engagement with Te Uri O Hau Settlement Trust be broadened to recognise the rohe of the other identified mana whenua groups.

It is acknowledged that effects on biodiversity and ecology also present as effects on cultural values. The assessments of effects on biodiversity and ecology are considered in the s42A report and with respect to the evidence submitted in the specialist assessments above, where it was concluded that any adverse effects would be less than minor. Whilst further clarification is expected to be provided at the hearing, it is anticipated that these effects will still give rise to cultural values effects of significance, further reinforcing the role of mana whenua for ongoing consultation and engagement though the conditions of the consent should it be granted.”

531. We have previously covered Mr Hopkins discussion in his Reply dated 11 February 2022 in the part of this decision relating to Cultural/Mana Whenua effects. After hearing the further articulation of cultural effects in the reply evidence and submissions presented during the hearing, as well as through the legal submissions and other submissions presented on behalf of Ngāti Manuhiri Settlement Trust he provided his final conclusion:

“Conclusion

On the basis of the assessments above, it is appropriate to revisit the conclusion of the s42A report.

Having considered the proposal against the relevant matters in the AUP (OP), the proposed extraction of sand and associated discharge has been demonstrated to be consistent with the direction of the Plan with respect to mineral extraction activities and discharges in the General Coastal Marine Zone. Although the proposal is considered to have positive social and economic benefits associated with the extraction of the resource, and the actual and potential adverse effects arising from the proposal can generally be managed to ensure that they are acceptable from a resource management perspective, the proposal has adverse cultural effects beyond (and irrespective) of the technical understanding of effects of coastal processes and coastal ecology.

In the context of the consideration and testing the broad discretionary aspects of the application, whilst the proposal can be managed such that it is generally consistent with the outcomes of the NZCPS, with respect to adverse cultural effects, these are of a nature that the proposal will not be consistent with the NZCPS in this regard. In addition, the proposal raises conflicts between the management outcomes for matters of national significance in the HGMPA.

Overall, the proposed sand extraction is considered to have adverse cultural effects that are unacceptable from a resource management perspective.”

532. While clearly stating his conclusion had been assessed against the relevant matters in the AUP he did not refer to any specific Chapters or provisions. We note that was the same approach he had taken in his s42A report dated 2 February 2021.

533. Mr MacRae, in his Reply, submitted as follows in relation to Mr Hopkins final conclusion.

“Effects on Maori cultural values

53. In the Council Officer’s final report, Mr. Hopkins, having heard the extensive evidence given by a range of individuals, whanau, hapu and other groups, concludes that the proposed activity of sand extraction does raise significant cultural concerns and that, as the evidence stood after the hearing in May 2021, these had not been resolved to the point where, consent should be granted. Indeed, he sees a “fundamental conflict” between the nature of the activity and cultural values. He acknowledges that ongoing engagement with tangata whenua through a structure such as a Community Liaison Group as suggested by Mr. Mitchell and a willingness to explore partnership opportunities, do offer the possibility of a resolution but obviously considered that these had not been sufficiently addressed.

54. Mr. TeRangi and Mr. Hay have responded to Mr. Hopkin’s report and pointed to some flaws in his understanding of Maori cultural values and his application of the New Zealand Coastal Policy Statement 2010 (NZCPS), the Hauraki Gulf Marine Park Act 2000 (HGMPA) and the regional planning instruments that apply (the ARCPS and the ARCP).

55. In my submission, Mr. Hopkins did err in applying the provisions concerned with the protection of cultural values in the NZCPS and the HGMPA as cultural bottom lines (hence his “fundamental conflict”). As a result, he failed to go on to examine the provisions of the ARCPS and the ARCP that are required to “give effect to” the NZCPS (per s.67 of the RMA) and “not conflict with” the HGMPA (s.9(2)).

56. The ARPS and the ARCP clearly meet those statutory requirements of implementation and consistency respectively and are, therefore, the primary documents of reference for the purpose of assessing whether the balance required between the protection of cultural values and the economic and social benefits to be derived from the use and development of coastal resources has been reached in this case. Reference to the NZCPS and the HGMPA is appropriate for the purposes of assisting with the interpretation of the regional planning instruments

but it is wrong to apply them as determining an issue without regard to the regional planning instruments or where the regional instruments satisfactorily address the matters in question; Tauranga Environmental protection Society Inc. v. Tauranga City Council [2021] NZHC 1201 at paragraphs 119 – 128.

57. The objectives and policies in the ARPS and the ARCP, whilst acknowledging the need to protect cultural values, also encourage the use and development of coastal resources. Many of the relevant provisions, including those which address the HGMPA, are set out in Mr. Hay's AEE, pages 17-24. Clearly, no cultural bottom lines are prescribed and no fundamental conflict is envisaged.

58. In any event, since the conclusion of the hearing in May last year, the position has changed considerably:

a. MBL as the applicant has a quite different relationship with Maori than Kaipara and has a quite different understanding of the options for appropriately providing for cultural values;

b. The engagement of Mr. TeRangi has provided MBL with expert and independent advice on all aspects of cultural values and on the resolution of competing claims to mana whenua by groups and individuals with interests in the area.

c. MBL has vigorously pursued constructive discussions with Ngati Manuhiri and Te Uri O Hau with a view to entering into cultural liaison agreements that satisfy their cultural concerns and aspirations for an economic partnership. As you have heard, good progress has been made and Mr. McCallum and Mr. TeRangi expect that agreement will be reached.

d. MBL has included detailed provision for a CLG in the proposed conditions of consent in a manner designed to facilitate the flow of information between the applicant, tangata whenua and local community groups.

59. It is clear from the evidence that MBL, in good faith and with a well advised understanding of the issues, is offering to provide opportunities and mechanisms for the incorporation of kaitiakitanga and other cultural values in the operation, management and monitoring of the proposed activity. In my submission, the requirements of the relevant statutory and planning instruments have been met in a way that should positively encourage the granting of consent. “

FINDINGS

534. Consistent with our findings on Mana Whenua issues earlier in our decision, we have preferred the planning evidence of Mr Hopkins to that of Mr Hay. While Mr Hay specifically addressed Chapter B6 provisions we find that his conclusion that, providing the opportunity for Mana Whenua to participate in the proposed Community Liaison Group, if consent were to be granted, falls well short of what Chapter B6 anticipates. In respect of the Ahi Kaa this is particularly in relation to engagement early within the consenting process, and an opportunity to influence outcomes.

535. While we accept that Mr Hopkins did provide a more detailed assessment of the NZCPS and the HGMPA in his Reply, we do not agree that this undermines his conclusions with

respect to the AUP provisions. We will address the NZCPS and the HGMPA further later in our decision.

536. Bearing in mind Mr Hopkins did not appear to have the benefit of structuring his final conclusions in a manner consistent with the *Tauranga* decision, the layout of his initial conclusions, in his s42A report, and his final conclusions, in his Reply, appear to be following the same approach. The first paragraph in each document relates to the provisions of the AUP and the second relates to the broader discretionary aspects, including the NZCPS and the HGMPA.
537. We have therefore concluded that Mr Hopkins has assessed the AUP provisions separately from the higher order NZCPS and the HGMPA.
538. We find overall that Mr Hopkins conclusion with respect to adverse cultural effects is consistent with the provisions of Chapter B6, consistent with the evidence presented on behalf on Mana Whenua and consistent with our overall findings in relation to Chapters F2 and B6.

B7 Natural Resources

539. In his EIC Mr Hay stated:

“113. The AUPOP has mineral objectives and policies at a RPS level (B7.6) which are then supported by objectives and policies in the Regional Coastal Plan (F2). Coastal water objectives and policies are addressed in B7.4.

114. In terms of B7.4 (Coastal water, freshwater and geothermal water), the discharge from the sand extraction operation involves excess seawater, oversized material and a small amount of fine clay. These discharges do not contain any introduced or foreign contaminants. By discharging underneath the barge, the material disperses rapidly with the bulk of the material sinking to the seafloor. This occurs within a short period of time.

115. This discharge does not degrade the water quality with any plume only lasting a matter of minutes. No potential significant ecological effects have been identified from this process. I therefore consider that the proposal is not contrary to the B7.4 objectives and policies.

116. In respect to Objective B7.6.1 (minerals), I consider that granting consent for the continuation of sand mining at this site ensures that the sand resource is utilised in an effective and efficient manner. Sand extraction and delivery to the market can be undertaken at a volume and at a cost which currently meets the community requirements.

117. Turning to the supporting policies, both Policies B7.6.2(1) and (4) are relevant. I consider that this site is a suitable area for sand extraction as sand extraction can be undertaken in a manner which avoids significant adverse effects and the sand product can be delivered to the Auckland community in a timely and cost effective manner. Potential significant effects can be avoided or mitigated and

it is important to note that the word “significant” has been used in B7.6.2(4) in terms of identifying the scale of adverse effects which need to be addressed.”

540. Mr Hopkins in his s42A report stated that:

“The proposal reflects the high level direction of the plan to provide for mineral extraction activities in the Auckland region.”

541. B7.6 contains the most relevant provisions, identified by Mr Hay in relation to mineral extraction activities.

542. While not raised during the hearing we note that the definition of “mineral extraction activities” in the AUP specifically excludes “common marine and coastal area mineral extraction.” The definition in the AUP is that “mineral extraction activities” are “activities carried out at a quarry.”

543. We therefore have doubts as to how relevant B7.6 is in relation to the proposed sand extraction in the coastal marine area. Looking at the policies referred to by Mr Hay we note the consistent use of the term “mineral extraction activities.”

544. Turning to the “Explanation and principal reasons for adaption” set out in B7.7, to assist our interpretation, we note that under the heading “Minerals” sand is mentioned. However while “quarries” and “mineral extraction activities” are also identified, there is no reference to sand extraction in the coastal marine area.

FINDINGS

545. We find that the provisions at B7.6 are irrelevant and relate only to land based mineral extraction activities.

B4 Natural Heritage

546. Dr Mitchell, in his EIC, considered Chapter B4, and, in particular B4.2, as being relevant with respect to how the effects of the proposed activities will be managed on the outstanding natural features and landscapes identified in the coastal environment. He raised this in the context of whether the proposed extraction area was located in an appropriate area.

547. Mr Hay, in his EIR, responded by stating that:

“19. If it was considered that B4.2 did require consideration then in my opinion the proposal is not an inappropriate development in terms of Objective 1 or supporting Policy 3 as the physical and visual integrity of the High Natural Character overlay area is not being adversely affected.

Objective (1)

Outstanding natural features and landscapes are identified and protected from inappropriate subdivision, use and development.

Policy (3)

Protect the physical and visual integrity of Auckland's outstanding natural landscapes from inappropriate subdivision, use and development."

548. In his s42A report Mr Hopkins stated that:

"The proposal is not located in any Significant Ecological Area or Outstanding Natural Landscape Overlay areas."

FINDINGS

549. In accordance with our findings on visual effects earlier in our decision, we find adverse visual effects will be minor, based on the use of only one vessel. We have thus concluded that the proposal would be consistent with the relevant provisions of B4 in that respect.

550. With respect to our earlier findings on the effects on landscape values, including Mana Whenua cultural landscape values, we find the proposal is inconsistent with the relevant provisions of B4.

551. Following our earlier findings on effects on natural character values, we find we have insufficient evidence to make a finding in relation to the relevant provisions of B4.

B1 Issues of Regional Significance

552. Although not specifically identified in evidence we note that B1.4 identifies the significant resource management issues for the Auckland region. They include:

- (5) *issues of significance to Mana Whenua*
- (6) *natural resources*
- (7) *the coastal environment*

553. We also note B1.5 states that:

"The regional policy statement must be read as a whole. If an issue relates to more than one section, then the relevant objectives and policies in each section must be read"

FINDINGS

554. Our overall finding is that when reading the regional policy statement as a whole, the provisions are consistent with the provisions of the regional coastal plan at Chapter F2.

555. In considering an application for consent for sand extraction in the coastal marine environment, there are many issues and values to be assessed.

556. The sole objective in Chapter F2 is that the extraction of minerals, sand in this case, occurs in a manner that does not have significant adverse effects on the coastal environment, which includes the coastal marine area and the near-shore environments.

557. The policies are to provide for extraction from appropriate areas having regard to the values of the area and the coastal sediment processes. In addition, a precautionary approach is to be adopted. A precautionary approach, may include using an adaptive management approach. Significant adverse effects are to be identified and assessed in relation to ten issues or values. Finally, remediation and mitigation measures are required.
558. Without repeating the relevant provisions of the RPS, all of these regional issues, objectives, policies and explanations and reasons for the adoption of the objectives and policies, consistently use similar language in terms of whether an environment is an appropriate one in terms of the values that exist in that environment.
559. While the “significance” test of adverse effects is a high one, the RPS consistently requires that the values of the particular environment, including the sensitivity of that environment and the need for a precautionary approach are to be assessed on a case-by-case basis.
560. Mana Whenua values not only have an entire chapter, those values are an integral component of the other relevant chapters, especially in B8 the coastal environment.
561. When read together with the provisions of the regional coastal plan, we find the regional policy statement provisions have not been fully or appropriately assessed by any of the planners. To be fair to the planners they did not appear to have been aware of the *Tauranga* decision when they prepared their evidence.

The New Zealand Coastal Policy Statement 2010 (NZCPS)

562. Dr Mitchell stated in his EIC that:

“28. Mr Hay and the s42A report have identified the relevant planning provisions as being those contained in the New Zealand Coastal Policy Statement 2010 (NZCPS), sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (HGMPA) and the AUP. Mr Hay includes a long list of the provisions from those documents which address matters of relevance to the proposal in Appendix B and C of his evidence, and both the s42A report and Mr Hay include broad analysis of how the proposal would align with this broad suite of provisions.

29. The AUP post-dates both the NZCPS and HGMPA and therefore gives effect to them. As I outline below, the AUP also contains bespoke provisions which address mineral extraction in the coastal environment and the various significant values attributed to the surrounding environment. As such, in my view a focussed analysis of these directly relevant AUP provisions is of fundamental importance when addressing s104(1)(b).”

563. There was no contrary evidence or submissions to the fact that the AUP post-dates the NZCPS and therefore gives effect it.
564. The evidence of Mr Hopkins in his s42A report was that “... *the proposed sand extraction and associated discharge activities can be managed in a way that is consistent with the anticipated outcomes of the NZCPS.*”

565. In his Reply evidence dated 11 February 2022 Mr Hopkins had reached a different conclusion and considered the proposal cannot be managed in a way that is fully consistent with the anticipated outcomes of the NZCPS.

“Overall, having considered the relevant matters in the NZCPS, the management techniques proposed by the applicant, along with the specialist assessments of the sand extraction activity, it is considered the proposed sand extraction and associated discharge activities cannot be managed in a way that is fully consistent with the anticipated outcomes of the NZCPS, and in particular this arises through the fundamental conflict between the nature of the activity and its impact on cultural values. Opportunities do exist to promote ongoing engagement in [a] manner generally consistent with the direction of the NZCPS.

For completeness, beyond these matters, the proposal remains generally consistent with the NZCPS as outlined in the s42A report and the Addendum Report.”

566. In response to Mr Hopkin’s final conclusions, Mr Hay considered “... *that the assessment in the Officers Reply is incomplete and flawed.*” Mr Hay’s rebuttal evidence dated 21 February 2022 included the following.

“82. In terms of how the NZCPS is to be applied in the processing of resource consent applications, it states:

- a consent authority, when considering an application for a resource consent and any submissions received, must, subject to Part 2 of the Act, have regard to, amongst other things, any relevant provisions of this NZCPS (section 104(1)(b)(iv) refers);*

83. The term “have regard to” reflects the term used in S104 which the application is being considered under. I am unaware of the “fully consistent” test which is being used in the Officers Reply. Rather, the Council must have regard to the relevant provisions of the NZCPS. I consider that both the application and the Officers Report gave appropriate regard to the Act and I accept that after hearing evidence and submissions it is reasonable for the Reporting Officer to review the assessment of Objective 3 and Part 2. I am in disagreement that the basis for declining consent can be purely on the basis that an opinion has been formed that the proposal is not “fully consistent with the anticipated outcomes of the NZCPS”. The NZCPS does not outline anticipated outcomes so I am unsure of what outcomes are being referred to and, as I have outlined, I consider that although there are conflicting considerations and views these could not be described as a “fundamental conflict” in terms of sand extraction and cultural values.

84. In terms of the assessment against the HGMA in the Officers Reply, the “fully consistent” test is again being used. As for the NZCPS, there is no such test and the conclusion that consent has to be declined because of this is incorrect. Regards has been given to the HGMA and I have addressed this in Paragraphs 187 and 188 of my original evidence. Furthermore, both Ngati Wai and Te Uri O Hau in their Environment Policy and Iwi Management Plan do not state

that sand extraction should not be allowed in any circumstances in the Hauraki Gulf but rather they identify what needs to be considered in any such applications and consents.”

567. The legal submissions on behalf of a number of submitters requested us to take into account the relevant provisions of the NZCPS. Many submitters also made reference to these provisions of the NZCPS in support of their submissions seeking the refusal of consent to the proposed sand extraction application.
568. We also received planning evidence in relation to the NZCPS.
569. The most relevant provisions identified were: Objective 1-Coastal environment integrity, form, functioning and resilience; Objective 2-Natural character preservation and protection; Objective 3-Treaty of Waitangi; Objective 5-To ensure that coastal hazard risks, taking into account climate change are managed; Objective 6-To enable people and communities to provide for their social, economic and cultural wellbeing; Policy 1- Extent and characteristics of the coastal environment; Policy 2- The Treaty of Waitangi, tangata whenua and Māori heritage; Policy 3-Precautionary approach; Policy 4- Integration; Policy 6-Activities in the coastal environment; Policy 11-Indigenous biological diversity (biodiversity);Policy 13-Preservation of natural character; Policy 15-Natural features and natural landscapes; and, Policy 23-Discharge of Contaminants.
570. Mr MacRae, in his reply submissions, referred us to the *Tauranga* High Court decision and he submitted that Mr Hopkins had erred in applying the provisions of the NZCPS. In particular he submitted that:

56. ...Reference to the NZCPS and the HGMPA is appropriate for the purpose of assisting with the interpretation of the regional planning instruments but it is wrong to apply them as determining an issue without regard to the regional planning instruments or where the regional instruments satisfactorily address the matter in question.”

FINDINGS

571. We have preferred the planning evidence of Dr Mitchell that AUP provisions post-date the NZCPS and therefore give effect to them.
572. We also accept the legal submissions of Mr MacRae that reference to the NZCPS is appropriate for the purpose of assisting with the interpretation of the regional planning instruments.
573. Our overall finding is that the provisions of the NZCPS have been fully and appropriately addressed in the regional planning documents. In particular, we find that the AUP has specifically addressed the competing issues in this particular case where sand extraction activities are proposed in a sensitive coastal environment from cultural, coastal processes and ecological perspectives.

The Hauraki Gulf Marine Park Act 2000 (HGMPA)

574. We were also requested in the legal submissions and evidence of many submitters to take into account the relevant provisions of the HGMPA.
575. We also received planning evidence in relation to the HGMPA.
576. The most relevant provisions identified to us were: section 7- Recognition of national importance of Hauraki Gulf and Section 8- Management of the Hauraki Gulf.

FINDINGS

577. We have preferred the planning evidence of Dr Mitchell that AUP provisions post-date the HGMPA and therefore give effect to them.
578. We also accept the legal submissions of Mr MacRae that reference to the HGMPA is appropriate for the purpose of assisting with the interpretation of the regional planning instruments.
579. Our overall finding is that the provisions of the HGMPA have been fully and appropriately addressed in the regional planning documents. In particular, we find that the AUP has specifically addressed the competing issues in this particular case where sand extraction activities are proposed in a sensitive coastal environment from cultural, coastal processes and ecological perspectives.

Assessment in terms of s104 of the RMA

580. Section 104 (1) (a) requires us to have regard to actual and potential effects on the environment of allowing the activity.
581. In terms of Mana Whenua/cultural effects we have found these to be adverse and significant.
582. In terms of coastal processes effects we have found we do not have enough reliable information to fully understand the coastal processes and that there remains a great deal of uncertainty about the coastal processes taking place and the actual and potential effects of the sand extraction on those processes.
583. In terms of the array of ecological effects identified we have found these to range from less than minor to significant, given the evidence we have heard from Mana Whenua, in particular the Ahi Kaa submitters.
584. In terms of recreational and amenity effects, visual and landscape effects, lighting effects, and, above water noise effects we have found these to be minor or less than minor.
585. In terms of economic effects, our findings determined that the effects were inconclusive. Again, with regards to the consideration of alternatives we were not provided with conclusive evidence as to whether the costs of these alternatives would be more (or less) expensive than sourcing and transporting sand from the off-shore site at Pakiri.

586. Overall, in terms of section 104 (1) (a) we find that from an effects basis the effects will be significant.
587. Section 104(1) (b) requires us to have regard, in this case, to any relevant provisions of the NZCPS, the HGMPA, and, the AUP.
588. We find that the AUP has been prepared in a manner that is fully consistent with and gives effect to the NZCPS and the HGMPA.
589. Overall, with respect to the relevant AUP Regional Coastal Plan provisions in Chapter F2, we find that the proposal is inconsistent with Objective F2.6.2, and it's supporting Policies F2.6.3 (1), (2), (3) and (4).
590. Overall, with respect to the relevant AUP regional policy statement provisions in Chapters B6 Mana Whenua and B8Coastal environment we find the proposal is inconsistent with Objective B6.2.1 (1), Policy B6.2.2 (1); Objectives B6.3.1 (1) and (2), Policies B6.3.2 (1), (2), (3), (4) and (6); Objectives B6.5.1(1), (2) and (3), Policy B6.5.2 (1); Objectives B8.3.1(1), (2), (3), (6) and (7), Policies B8.3.2 (3)(d), (4) and (5), and Policies B8.5.2(11), (13) and (17).
591. With respect to Chapter B7-Natural Resources, of the Regional Policy Statement we find that Objective B7.6.1 and Policies B7.6.2 relating to mineral extraction activities are not relevant to the extraction of sand from the coastal marine area.
592. In terms of section 104 (1) (c) we have considered:
- the following Iwi Management Plans -
 - Te Uri o HauKaitiakitanga o TeTaiao (2011);
 - Te Iwi o Ngatiwai Iwi Environmental Policy Document (2007);
 - The Marine and Coastal Areas (Takutai Moana) Act 2011;
 - Te Uri o Hau Claims Settlement Act 2002
 - Ngāti Manuhiri Claims Settlement Act 2012
 - Tai Timu Tai Pari Sea Change Marine Spatial Plan
593. These documents were considered to be relevant and reasonably necessary to determine the application, particularly with regard to effects on Mana Whenua values and its consistency (or otherwise) with B6 policies of the RPS.
594. In terms of section 104(6) we have found that we have an inadequate level of information to have an informed understanding of the nature, the extent and scale of the application, with respect to the adverse effects on the environment, particularly coastal processes and ecological effects.
595. Overall, in terms of section 104, after having regard to the actual and/or potential effects on the environment and having regard to the relevant provisions of the AUP, the NZCPS and the HGMPA, we have determined that consent be refused.

Part 2 Matters

596. Section 104 states our assessment is subject to Part 2 of the RMA. For completeness, we have turned our minds to the consideration of Part 2.

597. Mr Hopkins considered that “...an assessment against Part 2 would not add anything to the evaluative exercise.”²⁸² The reasons for this conclusion were that the provisions of the relevant statutory documents were prepared having regard to Part 2 and “...that they capture all relevant planning considerations and contain a coherent set of policies designed to achieve clear environmental outcomes.”

598. Mr Hay considered that “I am not aware of any reasons why the relevant planning provisions in the AUPOP cannot be relied upon and recourse is needed to be made to Part 2.”²⁸³

599. In response to our question Mr MacRae agreed with Mr Hay that we needed to go no further than the relevant planning provisions.

600. Mr Pou, Counsel for Manahuri Kaitiaki Charitable Trust, submitted that:

“As decision-makers, you must “recognise and provide for” the following matter of national importance, relevantly:

“the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga”²⁸⁴

601. Ms Sutherland, Counsel for the Director General of Conservation, submitted that: “The Director-General draws your attention to Part 2 matters:

“Section 6(e) relationship of Māori with ancestral lands, water, sites, waahi tapu and other taonga; Section 7(e) kaitiakitanga; Section 8 Treaty of Waitangi. These are matters that will need to be considered and provided for in order to achieve the sustainable management purpose of the Act.”²⁸⁵

602. Ms Morrison-Shaw, Counsel for Te Whānau o Pakiri, submitted that:

“The Treaty is the foundation on which the laws of this country are based. The guarantee in Article 2 of tinorangatiranga applies not only to land, but as the Supreme Court recently recognised, to the “marina environment”. Local authorities as successors to the Crown have a “responsibility for delivering on the Article 2 promise”.

The relevance of the Treaty in the RMA context is also confirmed in s.8 of the RMA. This section expressly directs decision-makers to take the principles of the Treaty into account when exercising their powers under the RMA. As the Supreme Court has found, this section should not be narrowly construed, and instead,

²⁸²S42A report, page 43

²⁸³EIC, para 203

²⁸⁴Opening Submissions, Para 58

²⁸⁵Legal Submissions, Para 43

should be given a “broad and generous construction”, there being no indication that statutory decision-makers intended “to constrain the ability of statutory decision-makers to respect Treaty principles.”

Decision makers under the RMA are bound by its terms and these include a “particular sensitivity to Māori issues”. It is well settled that sections 6(e), 7(a) and 8 contain “strong directions” which must be borne in mind at every stage of the planning process. In my submission, the language of these sections is crucial:

- (a) under s.6(e) the focus is on the “relationship of Māori and their culture and traditions with their ancestral lands, waters, wāhi tapu and other taonga.*
- (b) under s.7(a) particular regard must be had to kaitiakitanga:*
 - i. being the exercise of guardianship by tangata whenua in accordance with tikanga Māori;*
 - ii. tangata whenua meaning the iwi or hapū that holds mana whenua over that area; and*
 - iii. tikanga Māori meaning Māori customary values and practices – including customary law; and*
- (c) under s.8 Treaty principles are to be taken into account.*

603. *Nowhere in Part 2 of the RMA does Parliament make any reference to iwi authorities or post settlement governance entities. Such status is not an end in itself. What matters under the RMA is a submitter’s input in relation to effects, with decision-makers able to assess and weigh that evidence in the usual way. In any event, and as I note further below, in this case both TWOP and Ngāti Manuhiri have filed evidence regarding the significant adverse cultural effects of the proposal.”²⁸⁶*

604. Mr Nolan, Counsel for Mr Clapshaw, and Mr Carnie, Counsel for the Mangawhai Harbour Restoration Society Incorporated, also submitted that it was appropriate for us to have regard to Part 2.

FINDINGS

605. We find that it is appropriate to specifically refer to Part 2 for the following reasons.

606. We accept the legal submissions on behalf of submitters and acknowledge that we must recognise and provide for section 6 matters of national importance, including 6(a) and 6(e). We have also given particular regard to the other matters of section 7, including 7(a) and have taken into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) being Section 8.

607. Consistent with our earlier findings in relation to the provisions of the AUP (OP), we find our decision to refuse consent is also consistent with the relevant Part 2 matters. Having regard to Part 2 reinforces and does not raise any inconsistencies with our overall considerations under section 104.

²⁸⁶Legal Submissions, Paras 4-7

608. In terms of section 5 we acknowledge that Part 2 specifically excludes minerals, which includes sand, from section 5 (2) (a) “*sustaining the potential of natural and physical resources to meet the foreseeable needs of future generations.*” While relevant to our considerations, this exclusion does not alter our overall judgement in terms of Part 2 that section 6, 7 and 8 matters support the refusal of consent.

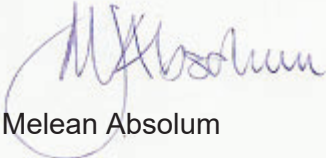
DECISION

609. In exercising our delegation under sections 34 and 34A of the RMA and having regard to the foregoing matters, sections 104, 104B, 105, 107 and Part 2 of the RMA, we determine that resource consent for the extraction of sand within the coastal marine area, offshore from Pakiri, as sought by McCallum Brothers Limited, is refused for the reasons set out throughout this decision.



Les Simmons

Chair



Melean Absolum



Juliane Chetham



Karyn Kurzeja

6th May 2022