Before the Expert Fast-track Panel

FTAA-2511-1150

Under	the Fast-track Approvals Act 2024 (**FTAA**)
And	
In the Matter	of an application for approvals by **MCCALLUM BROTHERS LIMITED** for the Te Ākau Bream Bay Sand Extraction Project located at Te Ākau Bream Bay, Northland

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Legal Submissions on behalf of McCallum Brothers Limited in Response to Invited Comments

Dated 12 August 2026

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Introduction

1. These legal submissions are lodged on behalf of McCallum Brothers Limited (**MBL/Applicant**) and respond to invited comments received on the Te Ākau Bream Bay Sand Extraction Project (**Project**).

2. A total of 46 comments were received under s 53 of the Fast-track Approvals Act 2024 (**FTAA**).[1]

3. A package of evidence and revised management plans and conditions responding to comments has been prepared by MBL's experts which should be read alongside these submissions.[2]

4. Due to the large volume of invited comments, these submissions are advanced primarily on a thematic basis. Where comment-specific responses are required, those are clearly identified.

Matters to be Addressed

5. Thes submissions address:

    a. Responses to key legal issues arising from comments:

        i. **Part A** – Jurisdictional/Legal Matters:

            1. Asserted inappropriate use of FTAA fast-track process;

            2. Determination on existing resource consents for the same activity;

            3. Applicant’s asserted previous non-compliance with other legislation; and

            4. Relationship with requirements under the Fisheries Act 1996 (**Fisheries Act**).

[1] Including a late comment received from Te Runanga o Ngati Hine on 1 June 2026 which was accepted by the Panel at paragraph [8] of Minute 11 dated 2 June 2026.
[2] Refer Attachment A to these submissions.

ii. **Part B** - Other matters:

1. Cumulative effects;

2. Inconsistency with relevant planning documents and Part 2 of the RMA;

3. Uncertainty of effects, proposed adaptive management approach and precautionary approach;

4. Challenges to the Project's significant regional benefits assessment;

5. Cultural Matters - Treaty of Waitangi, consultation, tikanga, customary fishing/fisheries settlements and applications made under the Marine and Coastal Areas (Takutai Moana) Act 2011 (**MACA**); and

6. Additional matters.

Statutory Framework

6. The Memorandum of Counsel on behalf of MBL dated 22 January 2026 which accompanied the application when lodged includes commentary on decision-making criteria under the FTAA and the limited ability to decline an application.[3] Those comments remain apposite and therefore I do not repeat them here.

7. Various comments raise concerns that the Project does not achieve the purpose of the FTAA, does not provide significant regional or national benefits and/or should be declined on the basis that all relevant information has not been received.

[3] At paragraphs [14] – [45].

8. When responding to comments that raise purported issues with the overall FTAA legal framework, I place particular emphasis on the bespoke nature of the FTAA; specifically, the FTAA's requirement that the Panel must undertake an overall weighting exercise of the Project and the limited circumstances in which a Project can be declined.

9. Of note Section 81(3) FTAA refers to the schedules to the FTAA that provide specific criteria to be taken into account as relevant in the context of the type of application being dealt with - the criteria in each of these schedules starts with the "purpose of this Act" and direct the Panel to give the greatest weight to that purpose.

10. Turning to the limited circumstances in which a project can be declined identified in section 85, section 85(3) sets out the matters that must be considered by the Panel in forming a view that the approval sought should be declined, while Section 85(4) means that non-compliance with directive avoidance policies that may otherwise preclude the granting of an approval is not itself fatal to an application.

11. In a recently released decision[4], the panel with reference to section 85, stated[5] that "consistent with the approach adopted by other expert panels" they saw section 85(3) as requiring assessments of:

    a. The extent of the project's regional or national benefits;

    b. The significance of adverse impacts after having applied the ameliorating effect of any proposed conditions of consent; and

    c. Whether the remaining adverse impacts are "sufficiently significant" to be "out of proportion" to the regional or national benefits.

[4] Record of Decisions of the Expert Panel - Hananui Aquaculture Project FTA-2511-1138, dated 10 August 2026.

[5] At para [44].

Key Legal Matters

Part A – Jurisdictional Matters

12. Various comments have raised matters of a jurisdictional nature. These jurisdictional challenges assert that:

    a. Core information requirements in the FTAA are not satisfied and therefore consent cannot be granted; and/or

    b. The Applicant has a history of non-compliance with other relevant legislation which is a matter for the Panel to consider under the FTAA; and/or

    c. Additional approvals under other legislation are required and have not been sought as part of this application.

13. The Applicant's position is that there are no jurisdictional bars or other matters of significance arising from the assertions referred to above which are relevant to the grant of approvals sought under the FTAA. The Applicant has provided a comprehensive substantive application along with subsequent detailed responses to various requests for further information from the Panel.

14. As a starting point I record;

    a. The Project is a listed project under Schedule 2 of the FTAA;

    b. MBL lodged its substantive application on 26 January 2026;

    c. The Environmental Protection Authority (**EPA**) undertook the required completeness check under s 46 of the FTAA and determined the application was complete and within scope on 17 February 2026;[6]

[6] Record of decision on completeness and scope dated 17 February 2026.

d. The EPA undertook the required assessment of competing applications under s 47 of the FTAA and determined that the substantive application:[7]

   i. Does not have a competing application for the purposes of s 47(3) of the FTAA;

   ii. The EPA has not received notice from the consent authority or administering agency that a competing application has been determined and any rights of appeal that relate to that application have been exhausted or have expired under s 47(5) of the FTAA; and

   iii. In consultation with consent authorities and administering agencies the application does not have existing resource consents for the purposes of s 47(8) of the FTAA.

e. The Project was referred to the Expert Consenting Panel (**Panel**) on 31 March 2026.

15. I address the concerns arising from comments received below.

Inappropriate Use of FTAA Fast-track Process

16. The comment received from the Waipū Boat and Fishing Club (**WBFC**) raises a concern that the nature of the Project is such that the use of the FTAA process is "inadequate".[8] WBFC states that the FTAA removes the "normal rights of community members and hapū to be heard, to make submissions, and to seek judicial review through the Environment Court".[9] The comment refers to the proposed 35 year consent duration and public opposition to the

[7] Record of decision on competing applications and existing resource consents dated 26 February 2026. The EPA was delegated authority by the Minister to make the final decision. **Note:** the sections referred to in the EPA's decision reflect an earlier version of the FTAA as it stood prior to the amendments made on 31 March 2026 by s 25 of the Fast-track Approvals Amendment Act 2025. The effect of this amendment was to restructure s 47 to relate solely to the EPA's recommendation obligations and to introduce new s 47A which now contains (the previous s 47 references) to the Minister's decision-making obligations with respect to competing applications and existing resource consents. As a consequence, the decision's references to a determination under s 47(8) should now be read as a reference to s 47A(4). For completeness, the wording of s 47A(4) is the same as previous section 47(8).

[8] Comment at pg. 5.

[9] Comment at pg. 5.

Project as reasons to support an assertion that the effects of the Project will not be "minor" and it will create permanent, irreversible impacts on Northland's coastline.[10]

17. Similar concerns are found in the comment from the Endangered Species Foundation (**ESF**) which asserts that the Project does not meet the FTAA's threshold to "accelerate economically necessary development with genuine public benefit".[11] ESF's quote does not accurately capture the purpose of the FTAA, reading in new terminology such as "economically necessary" and "genuine public benefit". I say that is unhelpful and incorrect.

18. ESF raise specific issues it believes are engaged such as an asserted inability for the Project to be evaluated and assessed within the timeframe set in accordance with the FTAA, lack of public participation, ministerial influence in the referral process and constraints on provision of expert evidence.

19. In response to these comments, I submit:

    a. WBFC's comment critiques the FTAA process generally, which is not a relevant matter to raise in comments on a proposal progressing through the FTAA process. The FTAA is a law of New Zealand. It is an enabling statute, providing a pathway for listed or referred projects to proceed via that Act, rather than under 'traditional' legislation, where a project has a legal entitlement to progress through the FTAA. That pathway is a lawful one.

    b. As noted above, the Project is a listed project in Schedule 2 of the FTAA. The Project was reviewed by an Independent Advisory Group and chosen by Cabinet to be identified in the FTAA as a listed project. The Schedule 2 heading states "listed projects with significant regional or national benefits". While that heading does not predetermine the Panel's consideration of the merits of the substantive application, the express inclusion of the Project in Schedule 2 cannot be challenged through invited comments on the project.

[10] Comment at pg. 5.
[11] Comment at section 5, pg. 4.

c. With respect to ESF's assertion of ministerial influence, the Project was not referred by the Minister. Rather, Cabinet approved its inclusion in the FTAA. Furthermore, there is no evidence in support of the assertion, and more fundamentally as noted above lawfulness of the inclusion of the Project in Schedule 2 cannot be challenged through invited comments on the Project.

d. The FTAA provides its own, bespoke consenting process. The FTAA consenting process is deliberately different from the 'standard' RMA consenting process. Public participation is, by design, limited under the FTAA, albeit provision is made for comments to be invited by the Panel subject to a determination by them of who should be invited in accordance with a process under the FTAA. In this case, the invitations to comment have been cast widely. MBL does not accept, in light of its extensive consultation on the Project, and the list of persons invited to comment, that opportunities to comment have been inappropriately constrained (within the confines of the FTAA framework).

e. With respect to criticisms regarding the absence of a traditional appeal process, that is a creature of statute. The FTAA provides a limited opportunity for an appeal on a question of law[12] and a process for seeking judicial review.[13]

f. Expert evidence is not constrained by the FTAA. Unlike the traditional RMA process where evidence is produced generally as part of a hearing exercise, expert input has been sought from the get-go and continues to be ongoing with respect to responses to requests for further information and responses to comments received. The expeditious nature of the fast-track process does not mean that the Applicant has cut corners or not produced the required expert evidence. Rather, the opposite is true. As a matter of law the Panel has the ability to engage its own expert and technical witnesses if it so requires.

[12] FTAA, s 99.
[13] FTAA, s 100.

20. I submit that the fast-track process is appropriate for the consideration of the listed Project and its approvals sought and is fundamentally a lawful process the Applicant is entitled to utilise. There is no ability to challenge the appropriateness of the legislation through invited comments.

Existing Resource Consents for the Same Activity – s 47A(4) FTAA

21. The legal submission lodged on behalf of BBG asserts (inter alia) that MBL's application ought to have been returned on the basis that existing dredging consents held by Channel Infrastructure NZ Limited (**Channel Infrastructure**) are existing resource consents for the same activity by reference to s 47 of the FTAA.[14] As noted above, as a result of amendments effective 31 March 2026, the correct reference to a determination on existing resource consents is s 47A(4).

22. Although BBG is aware of the EPA's decision on existing consents for the same activity / competing applications (i.e. that there were none), BBG considers that decision to be incorrect.[15] In the alternative, BBG states that if the EPA's decision was correct, that the effects of the Channel Infrastructure consents need to be assessed by MBL.

23. BBG's position is misconceived by reference to its assertion regarding existing consents.

24. BBG's legal submissions identify the relevant FTAA provisions at paragraphs [37] – [38]. Due to recent FTAA amendments, I reproduce the relevant provisions (with new numbering) below.

25. Commencing with s 47(1):

> (1) The EPA must, in consultation with the relevant administering agencies and relevant consent authorities, make a recommendation to the Minister on—
>
> (a) whether a substantive application has any competing applications; and
>
> (b) if a substantive application seeks an approval described in section 42(4)(a) (resource consent), whether there are any existing resource consents of the kind referred to in section 30(3)(a) that are not identified in the substantive application.

[14] BBG Legal Submissions at [36](a).
[15] BBG Legal Submissions at [36](a).

26. BBG's submissions focus on s 47(1)(b) being whether there are "existing resource consents of the kind referred to in section 30(3)(a)".

27. As set out above, the EPA's decision[16] was that there were no competing applications under s 47(1)(a) and no existing resource consents of the kind referred to in s 47(1)(b) of the FTAA. The EPA's decision is correct.

28. Focusing on s 47(1)(b), the necessary check by the EPA is whether there are any existing resource consents of the kind referred to in s 30(3)(a) of the FTAA that are <u>not identified</u> in the substantive application. The MBL application did not identify the Channel Infrastructure consents in this context, because they are not relevant in the context of the provisions being discussed here.

29. After receiving a recommendation under s 47(1)(b), the Minister (or EPA upon delegation) must make a decision.

30. Section 30(3)(a) of the FTAA provides:

> (3) A [regional council] that receives the notice must, [within 10 working days after receiving it, notify the authorised person in writing]—
>
> (a) of any existing resource consent to which section 124C(1)(c) or 165ZI of the Resource Management Act 1991 would apply if the approval were to be applied for as a resource consent under that Act; or
>
> (b) that there are no existing resource consents of that kind.

31. Section 30(3)(a) specifically refers to two provisions of the RMA. Section 124C(1)(c) is relevant, s 165ZI[17] is not.

32. Section 124C provides:

> (1) This section applies when—
>
> (a) a person makes an application for a resource consent to undertake an activity under any of sections 12, 13, 14, and 15 using a natural resource; and
>
> (b) the person does not hold an existing consent for the same activity using some or all of the same natural resource; and
>
> (c) a consent granted as a result of the application could not be fully exercised until the expiry of the consent described in section 124B(1)(a); and
>
> (d) the person makes the application more than 3 months before the expiry of the consent described in section 124B(1)(a).

[16] As recorded in that decision dated 26 February 2026, the EPA was given delegated authority pursuant to (now) s 47C(1) to make the final decision on behalf of the Minister under (now) s 47A(4).

[17] This provision relates to applications for space already used for aquaculture activities. It is not engaged here.

33. Relevantly, s124C(1)(a) refers to an application using a natural resource and s 124C(1)(c) requires a consent granted as a result of the application could not be fully exercised until the expiry of the consent described in s 124B(1)(a) of the RMA.

34. The reference back to s124B(1)(a) is to an existing resource consent, with subsequent provisions making clear that the key aspect of relevance in the context of section 124B, section 124C, and the provisions of the FTAA being discussed, is whether that existing consent means that the new consent sought could not be fully exercised until the expiry of the existing consent.

35. To put the point in plain language, the matter engaged with is all about a decision maker understanding whether there is an existing consent that stands in the way of the new consent sought being exercised.[18] That is not the position here by reference to the Channel Infrastructure consent and the proposed consent for MBL. The consent sought by MBL is geographically distinct, and of fundamental importance to the legal point being addressed the Channel Infrastructure consent does not stand as a barrier to the MBL consent being exercised.

36. Therefore, while it is true that section 12(2) provides that no person may, unless authorised (inter alia) by a resource consent remove any sand, shingle, shell or other natural material from that area, and in general terms, the Channel Infrastructure consents might be described as authorising "activities including the dredging, removal and deposition of sand and discharge of sediment and water in Bream Bay", being a general description which could loosely be extended to cover the MBL application for consent, these matters do not equate to a scenario where those consents are competing - and specifically does not lead to a conclusion that the MBL consent could not be fully exercised until the expiry of the Channel Infrastructure consent.

37. In summary:

[18] Generally, this relates to an allocation issue, the classic case being with reference to water take.

a. Section 124C(1)(c) is only engaged where a consent granted as a result of the application (i.e. the Project) could not be fully exercised until the expiry of the consent described in s 124B(1)(a) of the RMA.

b. Therefore, the test under s 47A(4) is not simply whether an existing resource consent for the same activity exists[19], in addition the test is whether if such an existing consent is identified, whether the consents granted under the FTAA could not be fully exercised until the existing consents expire.

c. BBG has produced no evidence that the resource consents sought to be approved under the FTAA could not be fully exercised until the expiry of any existing consents described in s 124B(1)(a) of the RMA held by Channel Infrastructure.

d. The existing Channel Infrastructure consents and consents sought by MBL are:

    i. For separate projects, in separate locations for different activities; and

    ii. While both consents authorise dredging, they are not competing activities, and no allocation issues arise.

e. The MBL consents are not prevented from being fully exercised by the existence of the Channel Infrastructure consents.

38. I submit the EPA's decision on existing resource consents for the same activity was correct in law.

[19] In my view, it is not correct to describe the Channel Infrastructure Consent as being for the "same activity", because whilst they are both generally dredging consents, they relate to different geographical areas and are being carried out in different ways for different purposes.

Applicant's Asserted Previous Non-compliance with Other Legislation

39. Comments received on behalf of the ESF, the Waipū Cove Reserve Board (**WCRB**) and the Langs Cove Residents Association (**LCRA**) raise concerns with MBL's compliance history under the RMA and Wildlife Act.

40. While those comments do not expressly state that concern as the basis for a reason to decline the approvals sought, I respond below.

41. The LCRA raises MBL's compliance history as a "fundamental concern".[20] The LCRA comment goes on to assert that parts of the transcript of proceedings in earlier litigation relating to the Pākiri mining application are relevant to this Panel's decision-making.[21] The litigation referred to is stated as *McCallum Bros Limited v Auckland Council* ENV-2022-000121. That proceeding relates to an appeal against a decision of a consent authority to refuse a consent application for seabed mining at Pākiri. It is not evidence of previous enforcement action relevant to the Panel's substantive decision-making under s 85 of the FTAA. LCRA quote parts of the transcript which are not findings of the court.

42. LCRA states that MBL's application failed to comply with cl 2(1)(l) and cl 2(1)(m) of Schedule 7 to the FTAA.[22] Respectfully, LCRA has misinterpreted those clauses, which require an applicant to identify with respect to a wildlife approval:

    a. Whether the applicant or any company director, trustee, partner, or anyone else involved with the application has been convicted of any offence under the Wildlife Act 1953;[23] and

    b. Whether the applicant or any company director, trustee, partner, or anyone else involved with the application has any current criminal charges under the Wildlife Act 1953 pending before a court.[24]

[20] LCRA Comment at section 7, pg. 9.
[21] LCRA Comment at Section 7.4, pp. 9 – 10.
[22] LCRA Comment at Section 9, pg. 12.
[23] Schedule 7, cl 2(1)(l).
[24] Schedule 7, cl 2(1)(m).

43. MBL's application answered in the negative to those clauses because neither the Applicant (nor any other person identified in those clauses) have been convicted of an offence under the Wildlife Act, nor are there any current criminal charges under the Wildlife Act pending before a court.

44. LCRA's reference to a DOC investigation and issuing of subsequent formal warnings do not amount to a criminal conviction or a pending criminal charge required to be disclosed under cl 2, Schedule 7.

45. The assertions as to non-compliance are addressed by Mr Elstob in his evidence responding to comments.[25] Mr Elstob confirms that there are no Wildlife Act convictions or pending charges and further that MBL has not been subject to any enforcement action in the context of the RMA.

46. Therefore, I submit MBL has not misled or misidentified the relevant wildlife approval information requirements, nor has MBL been the subject of enforcement proceedings. No jurisdictional issues arise.

47. The comment received from the ESF states that "[t]he panel should give careful weight to MBL's track record before authorising any extraction at a new site."[26] The ESF refers to prior conduct at MBL's Pākiri operation as an example of "a pattern of inadequate compliance monitoring and insufficient enforcement that enabled ongoing harm"[27] and the assertion that "[a] company with this track record at an existing site should not be granted fast-track access to begin the same activity at a new and ecologically sensitive site where enforcement would again rely on the same inadequate monitoring frameworks."[28]

48. The planning evidence lodged on behalf of the WCRB[29] raises previous asserted non-compliance in the context of the adaptive management approach and the lack of monitoring by authorities of conditions of consent for MBL's Pākiri mining operation. Mr Cook states that WCRB's concerns

[25] At paragraphs [43] – [46].

[26] ESF Comment at section 6, pg. 4.
[27] ESF Comment at section 6, pg. 4.
[28] ESF Comment at section 6, pg. 4.
[29] WCRB Evidence of Evan Cook dated 22 May 2026 at [5.25] and [5.26].

around monitoring of operations are "exacerbated given the operator's track record of non-compliance".[30]

49. For the same reasons identified above, I submit that no issue arises relevant to the decision-making process under s 81 of the FTAA. The assertions made in comments are incorrect.

50. In summary I say:

   a. A consent holder is required to comply with the conditions of a resource consent. It is inappropriate and speculative to suggest that a consent holder will not comply with imposed conditions. In law, decision makers must assume that conditions of consent will be complied with.

   b. The enforcement of conditions of resource consent is a matter for the relevant consent authorities. The RMA contains appropriate provisions upon which a consent authority can act if it suspects that conditions of consent are being breached.

   c. To the extent previously consented operations at Pākiri is continuously raised as a concern in the context of this matter, I emphasise that this application is for a new Project, in a new location, with new and site-specific proposed conditions of consent, including monitoring conditions and obligations. In addition, extraction will be undertaken from a specialist vessel deploying new drag head technology in comparison to that traditionally used at Pākiri.

Relationship with Requirements under the Fisheries Act 1996

51. Comments have raised concerns about the need for approvals under separate legislation, specifically under the Fisheries Act.[31]

[30] At [5.26].
[31] For example, the Bream Bay Guardians, Patuharakeke Trust Board and the Northland Conservation Trust.

52. In particular, the BBG legal submission[32] asserts that the proposed dredging operation would contravene bans under the Fisheries Act even if the consent sought were granted. Consequently, BBG submits that it would be an error of law to allow the application to proceed.[33]

53. BBG's position is set out in paragraphs [21] – [34] of its legal submissions. BBG notes that:[34]

    a. Effective 1 April 2022 scallop fishery SCA1 is closed under s 11 of the Fisheries Act; and

    b. Effective 1 April 2026 there is a ban on the taking or possessing of spiny rock lobsters (crayfish).

54. The submissions go on to provide BBG's interpretation of the Fisheries Act's definition of "taking", concluding that the Project's proposed dredging activity will breach the identified bans.

55. In response, there is a question as to whether what is proposed will breach the Fisheries Act, and if it does, what the implication of that is for consenting of the project. With respect to the latter consideration I submit:

    a. The Fisheries Act is not legislation which the FTAA expressly refers to or requires consideration of.

    b. There is no jurisdiction for the Applicant to apply for, or the Panel to determine, any permits required under the Fisheries Act as part of the FTAA process. That is a matter of law.

    c. BBG's submission that this is "contrary to the concept of the FTAA providing a "one stop shop""[35] is incorrect. The FTAA provides a pathway for an applicant to apply for identified approvals. MBL has done so. The fact that other approvals, permits or actions might be required under different legislation does not necessarily frustrate the grant of approvals under the FTAA. For example, there may be

[32] Dated 25 May 2026.
[33] BBG Legal Submissions at [3].
[34] BBG Legal Submissions at [21] and [24].
[35] BBG Legal Submission at [34](c).

situations where a project requires an easement or consent notice to be varied or removed from a title. The FTAA does not provide a mechanism to vary or remove those instruments.

d. BBG asserts that "[a]pplicants should not be permitted to invoke the FTAA unless their application fits within the purpose of statute to actually facilitate the whole of a relevant project."[36] I say that is an overreach. MBL's application facilitates the whole of the Project to the extent that approvals are sought (validly) under the FTAA. Any residual risk for regulatory matters or other legislative regimes is left to an applicant.

e. The evidence lodged on behalf of MBL demonstrates that appropriate mitigation and monitoring measures will be put in place.

f. If permits for the taking of species identified by BBG are necessary, that is for MBL to resolve through the relevant legislative/regulatory process. MBL's position is that it is not fundamental to the consideration of the Project under the FTAA.

56. The legal submissions provided on behalf of Patuharakeke Iwi Trust Board and Ngātiwai Trust Board (**Patuharakeke/Ngātiwai**) also assert that additional approvals under the Fisheries Act are necessary.[37]

57. I submit for the reasons addressed above that no jurisdictional issue arises in the context of the FTAA with respect to any potential Fisheries Act permits that may be required (if it is correct that they may be required) to enable activities authorised by the Panel under the FTAA. Any requirement for approvals to be obtained under external legislation can occur in parallel or subsequent to determination of this application.

58. Returning to the concept of "fishing" and "taking" under the Fisheries Act, whether the assertions as to interpretation made by BBG are correct is largely a moot point in the context of the jurisdiction of this Panel under the FTAA. I

[36] BBG Legal Submissions at [34](c).
[37] Patuharakeke/Ngātiwai Legal Submissions dated 26 May at [1.4](f) and section 6.

do not propose to engage with that issue here because it is not for this Panel to determine.

59. Finally, if the Fisheries Act did apply to the proposed activities, then I record that the Fisheries Act includes in section 97 an ability to apply for a special permit, including (in addition to various specified purposes in section 97(a) and (b)) for “any other purpose”. Again, whether such a permit would ultimately be granted is a matter not within the jurisdiction of this panel under the FTAA. However, it is logical that an application for such a permit would not be advanced until such time as a sand extraction consent were granted because the particular conditions of consent governing the activity and ultimate extraction area approved would be directly relevant to an application for a special permit.

60. I also observe in the context of discussion regarding the Fisheries Act that Patuharakeke/Ngātiwai Legal Submissions suggest at paragraph 7.15 that asserted uncertainty as to whether a permit would be granted under the Fisheries Act goes directly to the Panel's assessment of the extent of the proposal's benefits. They suggest, as a consequence, that there should be a significant reduction in the extent of any benefits identified in the context of what they say is a significant risk that the benefits will not eventuate. This submission is misconceived. If a Fisheries Act permit is required, then the outcome is binary. It will be granted or it will not. In that context, the benefits of the proposal will either be fully realised, or they will not exist at all. Accordingly, there is no basis for discounting the potential extent of benefit.

Part B – Other Matters

61. The comments raise various matters many with a significant degree of overlap.

62. The approach taken in these submissions has been to group the substantive matters thematically. While commentary on a particular topic may be stated as a direct response to a particular commentor, the response equally applies to any other commentor who has engaged with the same matter.

63. I note the plethora of matters raised have been responded to comprehensively by evidence in response to comments for MBL. These legal submissions do not seek to summarise or comprehensively cross-reference all of that evidence, as the outcome would be legal submissions of unwieldy length.

Project's Benefits

64. Section 3 of the FTAA states that the purpose of the Act is to facilitate the delivery of infrastructure and development projects with *significant regional or national benefits*.

65. Various commentors raise issues relating to the Project's benefits and overall consistency with the purpose of the FTAA.

66. The consideration of the Project's benefits is crucial to the Panel's determination of:

    a. A consent application under cl 17, Schedule 5 of the FTAA;

    b. Whether to grant an approval under s 81 of the FTAA; and

    c. Whether there are 1 or more adverse impacts that are sufficiently significant to be out of proportion to the Project's regional or national benefits under s 85(3) of the FTAA.

67. The core matters arising from comments are:

    a. Economic benefits have been overstated or are not justified;

    b. Alternative sand sources undermine the benefits relied upon;

    c. The adverse impacts are out of proportion to the benefits;

    d. The benefits do not accrue to Northland;

    e. Whether benefits need to be "public benefits"?

68. MBL's position is that the Project <u>will</u> result in significant regional benefits for the Auckland region.

The Legal Context

69. In addition to the purpose of the Act referencing significant regional or national benefit, section 81(4) of the FTAA specifically requires the Panel to consider the extent of the Project's regional or national benefits.

70. I provided legal submissions regarding the assessment of regional benefits in a memorandum responding to the Panel's RFI #1, specifically with reference to whether the regional benefits need to be within the region that the project is located in.[38]

71. As numerous panels have identified, there is no specific definition of significant regional or national benefits in the context of listed projects. I note in the recent Hananui decision, already referenced, the panel recorded at paragraphs 94-95 that the criteria for assessing a referral application in section 22 include types of considerations relevant to regional and national benefit. In that context, the panel in Haranui recorded the view that "…it would be anomalous if the criteria for referral into the FTAA process could not be applied to an assessment of any resulting substantive application. The Panel also records that while it finds assistance from section 22, it does not consider that list of matters to be an exhaustive list, and that the Panel may consider (and has considered) other regional and national benefits not listed".[39]

72. The economic assessment undertaken by Mr McIlrath concludes that enabling sand extraction at Te Ākau Bream Bay would facilitate infrastructure development and support significant activities in the Auckland region.[40] The provision of a new, reliable source of sand for high-strength concrete in development and infrastructure projects will greatly reduce the risk of short supply of sand resources and its potential consequences for major development and infrastructure projects in the Auckland region and beyond.[41] In the context of section 22 referred to above, the project will support (in fact it will enable) development of natural resources, namely

[38] Memorandum of Council for MBL in response to RFI 1 dated 14 May 2026.

[39] At [95].

[40] AEE Attachment 18 – Assessment of Economic Effects at [4].

[41] AEE Attachment 20 – Statement of Paul Donoghue (Concrete Expert) at [46](c).

minerals.[42] Aspects of the benefits resulting, for example increased competition and improved resilience in the sand market with knock-on benefits for customers and consequential users, are matters which may be taken into account qualitatively as a benefit rather than necessarily quantitatively.

73. The evidence of Mr McIlrath in response to invited comments[43] includes a comprehensive analysis of and response to issues raised. Also relevant in this context are statements of evidence from Mr Donoghue, Mr Walters, Mr Elstob and Mr Sawyer[44] which engage with concrete production and sand demand.

Economic Benefits are Overstated / Unjustified and alternative sand sources

74. Some comments challenge MBL's economic assessment on the basis that benefits have been overstated by the Applicant or have not been the subject of sufficient assessment. Some of these criticisms incorporate propositions regarding alternative sand sources and assertions that additional sand supply is not required.

75. By way of example:

    a. BBG suggests that sand supply is not a constraint on Auckland's infrastructure and development.[45] BBG also makes the comment that MBL's "assumptions that existing supply will cease without replacement are unrealistic".[46]

    b. The Parliamentary Commissioner for the Environment alleges that "both the assessment of economic benefits and the environmental effects reporting contain significant limitations and shortcomings."[47] Specifically, the comment does not accept that

[42] Section 22(2)(a)(vi).

[43] Dated 12 August 2026.

[44] All statements dated 12 August 2026.

[45] BBG comment at [3.15].

[46] BBG Comment at [4.7].

[47] Parliamentary Commissioner for the Environment Comment at pg. 1.

the Bream Bay sand resource is necessary (in terms of both whether sand is necessary to support Auckland's growth and whether non-marine alternatives exist) and raises issues with a lack of evidence from MBL on social and environmental costs.

c. The ESF suggests that "MBL's application rests on a central claim of sand supply shortage, that claim does not withstand scrutiny"[48] and based on Mr Green's economic evidence states that the "economic reports produced by MBL were unreliable and misleading."[49]

76. MBL's economist, Mr McIlrath, has prepared a robust Economic Assessment and subsequent responses to the Panel's requests for further information.

77. Mr McIlrath's original assessment found that the Project's significant regional benefits include:[50]

a. Improving the resilience to the sand supply network and providing additional flexibility to the concrete supply chain – a key element of any infrastructure and climate change resilience programme (before or after extreme weather events);

b. Enabling the sand supply chain to avoid significant direct and indirect costs that will be borne by the construction sector, and ultimately Aucklanders; and

c. Contributing positively to enabling a well-functioning construction sector that can deliver infrastructure in a time- and cost-efficient manner.

78. Sand, as a resource, is critical to maintaining New Zealand's economy. As noted in Mr McIlrath's assessment, sand is included in the Critical Minerals List, an acknowledgment of it being essential to New Zealand's economy and susceptible to disruptions domestically and internationally.[51]

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[48] ESF Comment at section 3.

[49] ESF Comment at section 4.2

[50] AEE Attachment 18 – Assessment of Economic Effects at [42].

[51] AEE Attachment 18 – Assessment of Economic Effects at [3].

79. Various comments, including from Takahiwai Māori Committee[52], Patuharakeke/Ngātiwai[53], and BBG,[54] assert that there is no need for the Project as other alternative sources (including manufactured sand) exist. This issue is commented on by Dr Meade and Mr Green.

80. Mr McIlrath's economic assessment addressed potential alternatives at section 3.3.[55] His evidence in response to comments addresses Dr Meade and Mr Green's commentary on this issue and the BECA report regarding the availability of alternative sources of sand from paragraph [7] onwards.

81. Of note, Mr McIlrath identifies critical gaps in the BECA report and failings in the analysis undertaken of that report by Dr Meade and Mr Green.

82. To pick some examples, the assessments undertaken by Dr Meade and Mr Green draw on a list of sand sources classified as 'probable' in circumstances where the assessments do not identify whether a source is already in use, and therefore available volume may differ, potentially significantly, from the stated consented maximum values. The same list of sources includes some which are, at face value, questionable for a range of reasons identified by Mr McIlrath as to whether they are a viable and realistic alternative.

83. Practical real-world considerations such as the variance between consented volumes and how much of that volume converts to processed sand which can be used for different specified purposes are ignored.

84. Waikato sources of sand are listed as potential sources for the Auckland market without considering Waikato demand, in circumstances where the Waikato region's internal sand demand is likely to exceed its supply around 2030 to 2032. Mr McIlrath identifies that the failure to consider Waikato demand considerations means that the available spare capacity after meeting Waikato commitments is not calculated or reported.

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[52] At p.4.

[53] Appendix 9: Report of Dr Meade.

[54] BBG Comment at [3.17] – [3.20].

[55] AEE Attachment 18 – Assessment of Economic Effects at [82] – [98].

85. Mr McIlrath specifically responds to Dr Meade's assessment at paragraphs [43]-[166]. He addresses Mr. Green's assessment at [167] – [227]. These responses address a range of matters beyond alternative sand supply:

a. In responding to Dr Meade, Mr McIlrath speaks to:

i. The need for a full Cost Benefit Analysis (CBA);

ii. Growth outlook and the importance of concrete;

iii. Discount rates;

iv. GDP as a benchmark of significance;

v. Distance of origin vs destination;

vi. Partial and selective analysis, and

vii. Other points.

b. In responding to Mr Green, Mr McIlrath speaks to:

i. Demand projections;

ii. Availability of alternatives;

iii. Transparency and information availability;

iv. Transport cost savings approach;

v. Private vs public costs;

vi. Emissions Trading Scheme;

vii. Traffic risks (social costs), and

viii. Other points.

86. Mr McIlrath's evidence covers too much ground to summarise here. However, in my submission, his analysis is comprehensive and should be relied upon by you. His evidence relies in part upon the evidence of Mr Donoghue, Mr Walters, Mr Elstob and Mr Sawyer which identifies why it

remains correct to say that manufactured sand is not a complete replacement for natural sand, and why demand for natural sand remains. I note this evidence is prepared by persons with real-world involvement and experience in the sand and concrete markets, and therefore I say it is more persuasive than reports or evidence from consultants without that direct involvement.

87. Mr Donoghue, Mr Walters, Mr Elstob and Mr Sawyer's evidence taken together illustrates there remains a lack of uptake in the market for manufactured sand, at least to the extent that it might fully replace natural sand as opposed to replacing the PAP7 Portion of fine aggregate; give real-world examples of testing by manufacturers in the marketplace of manufactured sand products, with conclusions reached by those entities as a consequence that natural sand still has an important role to play; and confirmation that shortages of natural sand have been experienced over recent years, with real-world implications, notwithstanding the current relatively low level of concrete demand, which is expected to alter over time.

88. In short, the evidence of Mr Donoghue, Mr Walters, Mr Elstob and Mr Sawyer, coupled with that of Mr McIlrath who draws upon their expertise and evidence where appropriate, identifies that comments received in opposition to the application have advanced a proposition with respect to manufactured sand which is simplistic to the extent it suggests that manufactured sand can replace all natural sand requirements, and does not properly value the importance to the industry of diverse and competing sources of supply. With respect to the latter point, this value may be difficult to quantify in hard figures, but in my submission it is a real qualitative benefit for reasons identified in the application for consent and in the evidence lodged in response to comments.

89. In addition, I note Mr McIlrath's analysis properly does not count the use of natural sand as a replacement for PAP7 as relevant to the discussion around the substitution of manufactured sand for natural sand. In that context, it is important that data provided by opponents of this proposal regarding the availability and use of manufactured sand distinguishes between those use cases.

90. On the subject of sources, I also say that Mr McIlrath is correct in his view that it is inappropriate to include unconsented sources in any economic assessment.[56] Acknowledging that there may be potential other sources as a general proposition, is a different thing to make assumptions for an economic assessment that a potential source can be consented and therefore placing reliance on that hypothetical source as a firm factor in the calculation of benefit.

Benefits of the Project do not Accrue to Northland or Local Iwi

91. Some comments raise issue with the geographical extent of 'regional' benefits arising from the Project. For example:

    a. The ESF state that while the Project would generate financial revenue for MBL's owners, "the local community benefit is zero dollars".[57]

    b. Whangarei Heads Citizens state that a core concern is the limited benefit to Northland, stating that "[r]egional benefit is a requirement of the fast-track law. This project fails the most basic test of the Fast-track Act… The project is viewed as an extraction of Northland's natural resources for Auckland's financial gain."[58]

    c. Kōwhai Te Awhina Hapū o Te Parawhau Hapū Incorporation's comment notes a concern that "many of the asserted economic benefits are distributed externally across wider regional and metropolitan areas".[59]

    d. LCRA states that "the proposed extraction area is in Northland – not in the Auckland region where MBL has argued sand is needed for construction. Any economic benefit from the sand accrues primarily to Auckland and to MBL's commercial interests, while the environmental and amenity costs fall disproportionately on

[56] evidence in response to comments at 183-185.

[57] ESF Comment at [4.2].

[58] Whangarei Heads Citizens Comment at section 7.1.

[59] Kōwhai Te Awhina Hapū o Te Parawhau Hapū Incorporation Comment at section 6, pg. 6.

Northland communities who have no need for this sand and no voice in its extraction".[60]

92. From a legal perspective, whether the regional benefit in question needs to be within the region that the project is located in is addressed in my Memorandum of Counsel responding to RFI 1. In short, the answer is that the regional benefit may accrue to a different region than where the project site is located.

93. I note a cultural contribution is offered which if accepted, would remain in the Northland region. In that respect I would add the proposed conditions currently provide for:

   a. $5,000 annually toward NRC's Bream Bay beach-profile programme;

   b. $0.30 plus GST per cubic metre **to each** of Te Parawhau ki Tai, Ngātiwai Trust Board and Patuharakeke Te Iwi Trust Board; and

   c. $0.11 plus GST per cubic metre **to each** of Waipū Cove Surf Lifesaving Club, Ruakākā Surf Life Saving Patrol and Whangārei Volunteer Coastguard.

94. At the Schedule 2 maximum volumes — 150,000 m^3 annually for three years and 250,000 m^3 annually thereafter over a 35-year consent — the maximum extraction is 8.45 million m^3. On the current unindexed base rates, and excluding GST:

   a. condition 43 would contribute **$175,000** to the survey programme.

   b. condition 44 would distribute approximately **$7.605 million** across the three Māori entities;

   c. condition 45 would distribute approximately **$2.789 million** across the three community organisations.

[60] Langs Cove Residents Association Comment at section 11.

95. That is approximately $10.57 million in nominal local distributions, before indexation, in addition to any separate Te Parawhau package. The economic report separately estimates the present value of condition 44 at $5.5 million including GST.

96. Condition 44 is offered separately to all three named Māori entities and is not dependent on support for the project.

97. The broader bilateral relationship and outcomes package negotiated with Te Parawhau provides for additional payments and enduring, project-linked commitments through which a material part of the value generated by the Project will be directed by Te Parawhau toward hauora, papakāinga, rangatahi development, economic advancement, kaitiakitanga and environmental restoration.

The adverse impacts are out of proportion to the benefits

98. This consideration is a matter upon which the Panel will need to make a finding having considered the evidence before it. I have provided legal commentary where relevant on the requirements of the FTAA in making a decision on the grant of consent.

99. MBL's position is that adverse impacts of the proposal are avoided or mitigated or otherwise ameliorated by conditions in a manner which results in those adverse impacts not being out of proportion to the project's benefits.

Does the benefit need to be a "public" benefit?

100. Some of the comments summarised above with respect to concerns about the geographical extent of 'regional' benefits arising from the Project, also assert benefits arising will be private ones for commercial interests rather than public.

101. The evidence in response to comments received by Mr. McIlrath addresses private versus public benefits at paragraphs 208 – 213. He identifies in the context of cost saving benefits that "Supplying the market via Te Akau Bream Bay is more efficient than the alternative. By enabling the proposal,

Auckland's sand market can access sand at lower total delivered cost than counterfactual sand from Kaipara." There is no reason to assume that more efficient supply to the market would not translate to product being supplied at a lower cost.

102. At paragraph 212, he identifies real resource savings (for example: Less fuel consumed, Less vehicle wear, Lower infrastructure use) which while they may translate into a dollar value saving, also represent real savings in their own right. These are benefits which have both private and public aspects to them.

103. However, in the context of some commenters apparently assuming any benefits would be privatised, those commenters assert that the FTAA's purpose requires a significant regional or national benefit to be a public benefit.[61] By way of example:

    a. The ESF's Comment states that "the fast-track approvals process was designed to accelerate economically necessary development with genuine public benefit".[62]

    b. BBG submit that "the Panel will have to consider public benefit, as opposed to benefits accruing to private interests."[63] In support of that submission BBG points to Parliament progressing the Bill as a public, rather than a private, Bill through the House.

104. In response, I submit:

    a. The purpose of the FTAA is "to facilitate the delivery of infrastructure and development projects with significant regional or national benefits".

    b. Nowhere in the wording of the purpose of the FTAA does it state that (as asserted by the ESF) projects must be "economically necessary" or result in a "public benefit". While there is a need for applicants to undertake comprehensive economic assessment, the

[61] For example, ESF Comment at section 5; BBG Legal Submissions at [11] – [16].

[62] Comment at section 5.

[63] BBG Legal Submissions at [11].

commenter is wrong to 'read-in' additional threshold requirements of "necessary" and "genuine" where they do not exist in the FTAA.

c. The fact that the FTAA progressed as a public Bill through the House does not support an argument that any benefits of projects advancing under it need to be for the wider public. While MBL accepts that benefits to the public are important to the consideration of a Project, the wording of the purpose of the FTAA does not exclude consideration of private benefits, nor does it state that public vs. private benefits should be given different weight.

d. Therefore, in my submission, if private benefits accrue, they are not to be ignored or discounted. Having said that, MBL's position is that the benefits which will arise from this project include both public and private benefits, both of which are relevant and not all of which are quantitatively assessed because aspects of the benefit arising are best considered on a qualitative basis.

Assessment of Cumulative Effects

105. Some comments have raised concerns that MBL's application does not properly assess cumulative effects.[64]

106. As a general observation, those comments largely raise cumulative effects in the context of the existing Channel Infrastructure consents, with specific reference to an asserted inadequate assessment of the potential cumulative effects on coastal processes.

107. The legal submissions lodged on behalf of BBG state that the absence of assessment of cumulative coastal processes effects / effects arising from the Channel Infrastructure consents is a "crucial deficiency that absent remediation, ought to prevent the application being granted."[65]

[64] For example: BBG Legal Submissions at [40] – [41]; WCRB Planning Evidence at [5.19] – [5.20]; Comment from the Parliamentary Commissioner for the Environment at pp. 2 – 4; Comment from Te Kauika o Patuharakeke Waka Ama Incorporated at [6.4] – [6.5]; Comment from Whangarei Heads Citizens Association at section 6 pp. 14 – 15.

[65] BBG Legal Submissions at [41].

108. Some comments received also assert shortcomings in assessing cumulative effects with respect to other considerations. For example Forest & Bird suggest that corals affected by the proposal will be impacted by climate change and ocean acidification and that the effects of this application would be cumulative on those impacts. Other commentators query whether the proposed monitoring regime will adequately identify cumulative effects over time.

Cumulative Effects – the Law

109. For the purposes of decision-making under s 81 of the FTAA, clause 17 of Schedule 5 to the FTAA provides:

> (1) For the purposes of section 81, when considering a consent application, including conditions in accordance with clauses 18 and 19, the panel must take into account, giving the greatest weight to paragraph (a),—
>
> (a) the purpose of this Act; and
>
> (b) the provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and
>
> (c) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

110. While the purpose of the FTAA is at the top of the decision-making hierarchy, the provisions of (relevantly) Part 6 of the RMA apply to the consideration of a resource consent under the FTAA.

111. Part 6 of the RMA relevantly includes s 104(a) – the consideration of effects. Section 3(d) of the RMA defines "effect" as including "any cumulative effect which arises over time or in combination with other effects". Cumulative effects are therefore relevant to the assessment of the application under s 104 of the RMA and the FTAA.

112. A cumulative effect is concerned with things that <u>will</u> occur rather than with something that may occur.

113. It is important that cumulative effect is correctly understood. In law the position is this (as set out in a leading text):[66]

[66] Resource Management – Westlaw New Zealand.

In *Dye v Auckland RC*[67], the Court of Appeal held that the precedent effect that may result from the granting of a non-complying resource consent is not within the concept of cumulative effect. That **concept is confined to the effect of the activity itself on the environment**. The Court of Appeal found that the Environment Court was not required to have regard to the cumulative wastewater or other effects, resulting from the change in land use and increased population densities, that might result from subsequent subdivision proposals (which might follow from allowing the particular proposal in question). It noted that **such an inquiry would be a speculative exercise**. …

The Court in *Stallard v Nelson CC*[68] also applied the decision in *Dye v Auckland RC*, holding that **a finding of a cumulative effect requires evidence of a particular effect that would be cumulative on an effect of the same kind arising from other activities, past or present**.

The High Court in *Rodney DC v Gould*[69], held that it would be inconsistent with the approach of the Court of Appeal in *Dye* (above) to regard evidence on "community expectations" as relevant to precedent or to the integrity of the district plan. **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.**

[my emphasis]

114. I also note the Environment Court's conclusion in *Kuku Mara Partnership (Admiralty Bay West; Admiralty Bay East) v Marlborough District Council* that:[70]

But the definition of effect in s 3 of the Act includes … any cumulative effect which arises over time or in combination with other effects … regardless of the scale, intensity, duration or frequency of the effect … **So if the existing activity has adverse effects, and the proposed activity also has an adverse effect, even if only minor, which would add to the existing effects, then the definition requires a**

[67] [2002] 1 NZLR 337; (2001) 7 ELRNZ 209; [2001] NZRMA 513 (CA).
[68] EnvC C160/06.
[69] (2004) 11 ELRNZ 165; [2006] NZRMA 217 (HC).
[70] (2005) 11 ELRNZ 466 (EnvC) at [52].

consideration of both. That is because the new effect will have an impact in combination with other effects even if its scale, intensity, duration or frequency is not, of itself, more than minor. That would comply with the ordinary meaning of cumulative. It would be an exception to the permitted baseline concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together with the new effect, they produce a synergetic impact on the environment.

115. Therefore, applying the above, the relevant question from a cumulative effects perspective is whether the combined effects of the Project's proposed extraction activities and receiving environment effects are appropriate.

116. Looking to the future, I would accept it is also relevant whether the proposed monitoring regime will identify potential cumulative effects arising over time.

Cumulative effects - evidence

117. There is no evidence that cumulative effects (if any) arising in the context of this proposal will be inappropriate or significant.

118. Commencing with assertions as to cumulative effects relating to the Channel Infrastructure consent, at the time of writing that consent has not been given effect to. Consequently, at face value any effects arising from exercise of that consent are currently not existing and therefore cannot be considered in combination with the potential effects from this proposal.

119. However, in law the environment as defined embraces not only the existing environment, but also the future state of the environment as it might be modified by permitted activities and by resource consents which have been granted where it appears likely[71] that those consents will be implemented.[72] Therefore, I agree that effects arising from the Channel Infrastructure consent may form part of the environment if it is <u>likely</u> that this consent will be implemented.

[71] Likely means "more likely than not".

[72] *Queenstown Lakes District Council v Hawthorn Ltd* [2006] NZRMA 424 at [79].

120. In MBL's response to RFI 2, Mr Elstob's statement of evidence[73] at [26] records his understanding that, consequent on the change in activities at the former refinery, there is no longer a requirement for large tankers to access the berths. The change in use has the consequence that the consented dredging is not required to occur. On that basis, I submit there is no evidence that it is likely the consent will be given effect to.

121. Even if the Channel Infrastructure consent were given effect to, the evidence before the Panel is that no cumulative effects will arise by reference to that activity and what is proposed in this application – "The channel dredging operation is occurring in a geomorphically separate environment that is no connected to the proposed offshore extraction area. There is no potential for cumulative effects on physical coastal processes."[74]

122. With respect to corals and cumulative effects, Ms Beaumont[75] records that a section on cumulative impacts was provided in Beaumont et al. (2025) though this didn't go into any detail on the effects of ocean acidification on the corals present within the pSEA. Addressing that latter matter further, at [31] Beaumont notes that while no information is available on the effects of ocean acidification on the three species of corals recorded within the pSEA and therefore the effect is unknown, research on other temperate corals have shown ocean acidification to decrease recruitment efficiency and changes in population structure but reproduction and growth rates appear to remain unaffected. On that basis, in my submission, there are no cumulative effects arising in the context of corals and ocean acidification to a degree which is material to the grant of consent. The conditions and management plans requiring monitoring will appropriately provide for identification of cumulative effects over time.

123. Finally, with respect to assertions of cumulative effect in other aspects of the proposal, this is addressed through both the detailed assessments in the application as advanced and in the further evidence now provided in

[73] Dated 22 May 2026.

[74] Evidence from Richard Reinen-Hamill and Edward Beetham in response to invited comments dated 12 August 2026 at para [60].

[75] Evidence in response to invited comments.

response. In addition, with respect to concerns that the monitoring and adaptive management regime was insufficient to address the potential for cumulative effects and respond appropriately to it, although MBL held the view that the proposed monitoring and adaptive management conditions and actions identified in management plans as originally advanced were appropriate, those matters have been the subject of further review and significant strengthening. These changes are discussed in the further evidence provided in response, including notably in the evidence of Mr West, Dr Beetham and Mr Reinen-Hamill, and Mr Hay. I address these changes below in the context of considering principles of adaptive management.

Inconsistency with Planning Documents and Part 2 RMA

124. Some commenters assert that the Project is inconsistent with the relevant policy framework and Part 2 of the RMA.[76] The legal submissions lodged on behalf of Patuharakeke/Ngātiwai go further and suggest that the Project is *contrary* to Policies 11 and 13 of the NZCPS and relevant provisions of the regional plan.[77]

125. Addressing these comments thematically, the core matters raised are whether the Project is:

   a. Inconsistent with, or contrary to, the relevant policies of the NZCPS;

   b. Contrary to the relevant policies of the regional plan; and

   c. Contrary to Part 2 of the RMA.

126. Interrelated to the above matters are:

   a. The relevant assessment of resource consent approvals under the FTAA; and

[76] WCRB evidence of Mr Cook at section 6; Patuharakeke/Ngātiwai Legal Submissions at [9.4] – [9.35]; Royal Forest and Bird Legal Submissions at [8] – [25]; DOC Comment at [3.1] – [3.9].

[77] Patuharakeke/Ngātiwai Legal Submissions at [9.17] – [9.25].

b. The interpretation and application of "avoid" and other directive terminology.

127. The legal submissions filed by Royal Forest and Bird Protection Society of New Zealand (**F&B**) and Patuharakeke/Ngātiwai address avoid terminology.

128. The Patuharakeke/Ngātiwai legal submission classifies the asserted inconsistencies with directive RMA policies and Part 2 of the RMA as being "very significant" adverse impacts which are out of proportion with the Project's regional or national benefits.[78]

129. DOC's Comment asserts Policies 3 and 11 of the NZCPS are directly relevant to the Project and advises the Panel to adopt a precautionary approach when considering the application.[79] DOC's experts have recommended additional mitigation measures which they say adopt a precautionary approach.[80]

130. The planning evidence lodged on behalf of WCRB addresses the relevant RMA planning framework, concluding that the precautionary language of relevant provisions "weighs strongly against approval".[81]

131. I address these matters in further detail below.

General Comment – FTAA Obligations

132. This legal submission commenced with some reference to s 85 of the FTAA which sets out when a panel must or may decline approvals. For the purpose of this section, the appropriate focus is on a panel's <u>discretionary</u> ability to decline consent approvals.

133. Section 85(3) provides that:

> A panel may decline an approval if, in complying with section 81(2), the panel forms the view that –

[78] At 10.5.

[79] At [3.2] and [3.7].

[80] DOC Comment at [3.5].

[81] WCRB Evidence of Mr Cook at [6.71].

a. There are 1 or more adverse impacts in relation to the approval sought; and

b. Those adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered under section 81(4), even after taking into account—

i. Any conditions that the panel may set in relation to those adverse impacts; and

ii. Any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts

134. Importantly, I note that s 85(4) provides:

> To avoid doubt, a panel may not form the view that an adverse impact meets the threshold in subsection (3)(b) solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2).

135. The reference to a "specified Act" includes the RMA[82] and encompasses relevant planning documents made under it.[83] By way of relevant commentary, the decision on the Southland Wind Farm Project noted:[84]

> In its decision, the Expert Panel in *Waihi North* observed that s 85(4) of the FTAA means that non-compliance with, say, avoidance policies that would usually preclude the granting of an approval is not of itself fatal to an application.[85] In other words, an effect that is the subject of an avoidance policy is not to trump a regional or national benefit.[86]

136. While I do not interpret the legal submissions of F&B and Patuharakeke/Ngātiwai to assert the Project should be declined *solely* on the

[82] FTAA, s 4.
[83] As express in the wording of s 85(4) "specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2)".
[84] Record of Decision of the Expert Consenting Panel, Southland Windfarm dated 2 April 2026, at [56].
[85] Record of Decision of the Expert Consenting Panel, Waihi North dated 18 December 20225 at [10].
[86] As it did in *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38.

basis of inconsistencies with the relevant planning framework, I submit s 85(4) provides useful context to the discretion to decline as it demonstrates that although plan consistency is a relevant matter for assessment, it is not of itself (even where there are multiple inconsistencies with or contraventions of policy direction) a sole matter for decline.

137. I also note that even when identified in combination with other adverse impacts, s 85(3)(b) states that any adverse impacts identified must be "sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered under section 81(4)." Thus, any adverse impact arising from an asserted inconsistency with a relevant plan provision is also subject to the proportionality test.

138. It is clear from s 81(3)(a) that the Panel must, in relation to the resource consents sought, apply clauses 17 to 22 of Schedule 5 of the RMA. There is no doubt that most of the 'standard' RMA considerations apply to the Panel's consideration of the application (of which they must "take into account"),[87] albeit they are subject to the weighting exercise in cl 17(1). This expressly includes Part 2 of the RMA (engaging sections 5, 6 and 7 of the RMA).[88] For convenience, cl 17 provides:

[87] Refer cl 17(1), Schedule 5 to the FTAA. Noting that s 104D does not apply to consideration of an approval under the FTAA by reference to cl 17(1)(b), Schedule 5 (nor is that activity status engaged here).

[88] Clauses 17(1)(b) and 17(2)(a), Schedule 5 FTAA.

> **17 Criteria and other matters for assessment of consent application**
>
> (1) For the purposes of section 81, when considering a consent application, including conditions in accordance with clauses 18 and 19, the Panel must take into account, giving the greatest weight to paragraph (a),
>
> (a) the purpose of this Act; and
>
> (b) the provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and
>
> (c) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.
>
> (2) For the purpose of applying any provisions in subclause (1),—
>
> (a) a reference in the Resource Management Act 1991 to Part 2 of that Act must be read as a reference to sections 5, 6, and 7 of that Act; ... .
>
> ...

139. In the *Waihi North* Decision, the panel stated in relation to cl 17's "take into account" terminology:[89]

> [4] We understand the phrase "take into account" as requiring us to consider the matters so identified and give them genuine consideration; rather than mere lip service, such as by listing them and setting them aside.[90] We consider that this can be best effected (and demonstrated) by considering all relevant considerations (including the purpose of the Act) first but only at the weighing up stage, give effect to the "greatest weight" requirement.

140. That approach has been adopted in subsequent FTAA decisions.

141. While the cl 17(1)(b) of Schedule 5 of the FTAA requires the Panel to "take into account" the relevant RMA provisions (including s 104), s 104(1)(b)(iv) of the RMA requires a decision-maker considering a resource consent application to "have regard to" any relevant provision of the NZCPS.

[89] Record of Decision of the Expert Consenting Panel, Waihi North dated 18 December 20225 at Part G [4].

[90] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.

"Avoidance" and Directive Policies

142. As noted above, some commentors assert that the Project is inconsistent with or contrary to relevant policy documents, some of which include directives to "avoid" certain adverse effects.

143. The legal submissions on behalf of Patuharakeke/Ngātiwai state that the Supreme Court decisions in *King Salmon*[91]*, Port Otago*[92] and *East-West*[93] are authority for the propositions that directive plan provisions have greater potency, the term "avoid" means "not allow" or "prevent the occurrence of" and is a strong directive, and that objectives and policies must be read as a whole.[94]

144. I agree that the cases referred to by counsel are the leading authorities. However, in my submission Patuharakeke/Ngātiwai's position does not accurately reflect the more nuanced approach to the interpretation of directive language in *Port Otago* and *East West.*

145. In recent years there have been a number of landmark decisions by the higher courts analysing:

    a. The interrelationship between the purpose and principles set out in Part 2 of the RMA and the hierarchy of RMA planning instruments;

    b. The nature and effect of directive policies in planning instruments, such as a policy to "avoid" a certain outcome; and

    c. The implications of these matters for deciding resource consent applications under the RMA.

146. In *King Salmon* and *Port Otago* the Supreme Court considered these issues in the plan-making context, while the Court of Appeal in *R J Davidson*[95] and the

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[91] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

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

[93] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.

[94] Legal Submissions at [9.4].

[95] *R J Davidson v Marlborough District Council* [2018] 3 NZLR 283 (CA).

Supreme Court in *East-West Link*[96] applied those findings in the resource consent context.

147. The Supreme Court held in *King Salmon*[97] that various objectives and policies in the NZCPS are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others.[98] The Court stated that the differences in wording adopted matter. That observation applies to all environmental standard, policy statement and plan wording.

148. Of note in *King Salmon* were provisions using the term "avoid". That terminology encompassing of course "avoiding" and "avoided".

149. Even where avoid stands alone, the concepts of remedying and mitigation remain relevant. I say that is of key importance in the context of this application. Recent commentary from the Supreme Court in *Port Otago*[99] concluded that:

    a. It is clear from *Trans-Tasman* that the concepts of mitigation and remedy may serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided.[100]

    b. The avoidance policies in the NZCPS are to be interpreted in light of what is sought to be protected (including an area's relevant values) and when considering any development, whether measures can be put in place to avoid material harm to those values and areas.[101]

150. The point effectively being made above is that even "avoid" terminology should not be applied in a binary and blunt fashion. The relevance of nuance referred to here, is also engaged with reference to plan provisions which adopt less directive terminology.

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[96] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.
[97] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.
[98] See discussion in *King Salmon*, at [127].
[99] *Port Otago v Environmental Defence Society Inc* [2023] NZSC 112.
[100] At [65].
[101] At [68].

151. Returning to the position of Patuharakeke/Ngātiwai, the legal submission identifies that Policies 2, 3, 6, 11 and 13 are the most relevant to the Application and states that Policies 11 and 13 are identified as being contravened by the Project.[102] Those policies are characterised as relating "to the protection of the coastal environment.[103] While that is generally true, it is more accurate to take the purpose of those policies from the wording itself:[104]

a. Policy 11 - Indigenous Biological Diversity (biodiversity) "to protect indigenous biological diversity in the coastal environment"; and

b. Policy 13 – Preservation of natural character – "to preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development".

152. MBL does not dispute the existence of avoidance language in Policies 11 and 13. However I submit that it is important to correctly identify the wording of policies, including instances where avoidance language is qualified or subject to exemptions. Further, I say it is important to view those directives in light of the recent caselaw discussed above by avoidance of material harm can satisfy the avoidance directive.

153. Turning to consider the core policies, Policy 11(a) states (relevantly) to <u>avoid adverse</u> effects on:

a. Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;[105] and

b. Areas set aside for full or partial protection of indigenous biological diversity under other legislation.[106]

154. With respect to Policy 11(a)(i), Patuharakeke/Ngātaiwai state the Project is contrary to this policy.[107] Relevant species in the context of this policy are bottlenose dolphin, orca, Bryde's whales and false killer whales. Ms

[102] Legal Submissions at [9.8].
[103] Legal Submissions at [9.8].
[104] NZCPS.
[105] Policy 11(a)(i).
[106] Policy 11(a)(vi).
[107] Legal Submissions at [9.9].

McConnell has considered potential effects from underwater noise, habitat modification, ship strike, exposure to contaminants, marine debris, entanglement, artificial lighting and cumulative impacts.

155. Dr Brough concludes that the project is likely to result in the loss of core habitat for Bryde's whale and bottle nose dolphins. Ms McConnell accepts that there is a high likelihood of more frequent localised displacement from the discrete Project Area, but the overall level of impact is low.

156. Ms McConnell's conclusion above is in the context of her findings that multiple lines of evidence confirm that core habitat extends well beyond the Project Area; hence, alternative habitat of equivalent quality occurs nearby, and the 3 dB limit to soundscape change will protect against long-term habitat use changes for this species.[108]

157. The assessment of Ms McConnell engages with relevant provisions of the NZCPS, with reliance on the evidence of Dr. Pine, and concludes Policy 11(a) is satisfied in the context of the mitigation measures deployed and secured through proposed conditions of consent.[109] I submit this conclusion is correct in the context of the design and features of the proposed activity, coupled with the mitigation measures secured through proposed conditions of consent, meaning the proposal meets the "avoid" standard by bringing the level of harm down so that material harm is avoided.

158. With respect to Policy 11(a)(iv), in my submission, it is incorrect to characterise the impact of Fisheries legislation regarding the taking of scallops as establishing an area set aside for full or partial protection. It is true that the rules regarding taking of scallops and current prohibitions on doing so are subject to a fisheries management regime that includes quota management areas with geographic parameters - but I say that is a different thing to establishment by legislation of a specific area set aside for full or partial protection in the nature of a protected marine area.

[108] At [54].

[109] Evidence of Helen McConnell in response to comments, at para [84] – [85].

159. Even if I am wrong in my submission above regarding whether Policy 11(a)(iv) is engaged in the context of its 'area set aside' wording, MBL's evidence concludes that the activities enabled by the grant of consent will avoid material harm to areas set aside for the protection of indigenous biodiversity (i.e. scallops) through the location of the extraction area (sitting outside historic areas of scallop significance[110]) and compliance with conditions of consent and management plans, including comprehensive monitoring, with the implication that the proposal meets the "avoid" standard by bringing the level of harm down so that material harm to scallops is avoided.

160. I would add with reference to my submission above that if the particular policy discussed here is held to be engaged, in the sense that the analysis is about avoidance of material harm to an area set aside under other legislation, then that area must be defined as SCA-1.[111] The scale of that fisheries management area must be relevant to any assessment of material harm. SCA-1 is extremely large, covering the coastal waters of the Upper North Island from Reef Point (Ahipara) on the West Coast, around North Cape, down the East Coast to Cape Rodney (near Leigh). Given the size of SCA1, I submit there is no prospect of that area, considered holistically, as suffering material harm from the proposal before you, given the scale and nature of this proposal, subject to the offered conditions of consent.

161. Turning to consider Policy 11(b), that policy provides "avoid <u>significant</u> adverse effects <u>and avoid, remedy or mitigate other adverse effects</u> on activities on" relevantly:

    a. Indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification;[112] and

[110] Refer Evidence of Mr West and Mr Boyd in response to invited comments.

[111] SCA 1 being the Northland scallop fishery

[112] Policy 11(b)(iii).

b. Habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes.[113]

162. Patuharakeke/Ngātaiwai's legal submissions state that the Project is contrary to the above on the basis that the benthic habitat underneath the proposed mining area is only found in the coastal environment and includes habitat forming species.[114] They assert the effects will reach the threshold of "significant". F&B also states that "avoid" standards impose "bottom lines", specifically that the SCA1 quota management area for scallops in Northland prohibits the taking of scallops.[115]

163. MBL's evidence does not support that finding for the following reasons:

a. While the proposed activity location is within a coastal environment, the evidence for MBL (notably that of Mr West, Mr Boyd, Ms. McConnell, Dr. Pine, Ms Beaumont, Dr Beetham/ Mr. Reinen-Hamill and Dr Wilson/Ms Jones) establishes that material harm to indigenous ecosystems and habitats will not occur and thus significant adverse effects on indigenous ecosystems and habitats will be avoided. MBL's evidence concludes that the activity can be undertaken (and appropriate reductions in material harm put in place via conditions) in a manner that avoids significant adverse effects.

b. Applying *Trans-Tasman*, MBL's proposed mitigation and remedy measures serve to meet the "avoid" standard by bringing the level of harm down so that material harm is avoided. The matter sought to be protected here is coastal biological diversity. MBL has appropriate mitigation measures (including adaptive management) in place to ensure that material harm is reduced and responded to in such a way that the proposed activity can avoid material harm to biological diversity.

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113 Policy 11(b)(iv).

114 Legal Submissions at [9.12].

115 Legal Submissions at [17].

c. I submit that "protection" does not necessarily equate to retaining the status quo. The protection of coastal biodiversity, ecosystems and habitats (and recreational/cultural values and uses) can be appropriately achieved whilst also allowing other coastal activities and uses to occur. In light of the caselaw commentary above, subject to material harm being reduced or avoided, the Project can occur in this location.

164. With respect to the comments that raise Policy 13 (preservation of natural character) as an issue, I note:[116]

a. The comments do not accurately record that Policy 13(1) reference to "protect" is qualified:

> "To preserve the natural character of the coastal environment and to protect it from <u>inappropriate</u> subdivision, use, and development."

b. The project area's natural character will be preserved through the use of large off-shore setbacks, minimal machinery (i.e. one vessel) and the intermittent nature of seabed mining (three to five extraction visits per week, with a maximum of 3.5 hours of extraction on any given day). Other visual or character effects such as extraction plume in the water column behind the vessel have been assessed by MBL's experts as relatively quickly dispersing and consequently having effects which are minor. The Project does not propose any development or construction of structures in the coastal environment. The rotational nature of the extraction, the strict control on width and depth of extraction furrows, and the evidence from MBL witnesses regarding recovery over time all in form a conclusion that the natural character of the coastal environment will be appropriately preserved and the use proposed is not inappropriate.

c. The relevant provision of Policy 13(1)(b) states "avoid <u>significant</u> adverse effects and <u>avoid, remedy or mitigate other adverse effects</u> of activities on

[116] Patuharakeke/Ngātaiwai Legal Submissions at [9.14]; WCRB Mr Cook Evidence at [6.10] – [6.11].

natural character in all other areas of the coastal environment". The avoidance directive is qualified to avoid "significant adverse effects" and to "avoid, remedy <u>or</u> mitigate other adverse effects" on natural character. MBL's evidence is that there will be no significant adverse effects on the natural character of the coastal and that where other effects cannot be avoided altogether, that they are appropriately remedied or mitigated.

165. Turning to Policy 6 (activities in the coastal environment), Patuharakeke/Ngātaiwai state that this policy does not provide MBL with "a way around the clear, specific directives in Policies 11 and 13" and provides "no equally directive policy providing for seabed mining."[117] Mr Cook's evidence on behalf of WCRB acknowledges Policy 6's recognition of the importance of enabling economic use and development of the coastal environment, but that is "expressly subject to avoiding significant adverse effects and managing other effects". That statement is incorrect insofar as while objectives and policies ought to be considered as a whole, Policy 6 does not contain any express directive wording.

166. In response to Patuharakeke/Ngātaiwai, while I accept there is no express policy for seabed mining, I submit:

  a. The submission downplays the enabling nature of Policy 6. While counsel submits that objectives and policies should be read as a whole,[118] there is no proper engagement (wholistically or otherwise) with an acceptance in the NZCPS that activities can locate within the coastal environment.

  b. While there is no "directive policy providing for seabed mining", there is a general recognition of that type of activity in Policy 6(1)(a) which provides:

[117] Legal Submissions at [9.15].

[118] For example, Patuharakeke/Ngātaiwai Legal Submissions at [9.16].

"In relation to the coastal environment recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities which may be required for the social, economic and cultural well-being of people and communities".

c. While that does not expressly *provide* for seabed mining, there is some support for instances where mineral extraction may be required for economic well-being of people and communities. That is what MBL's evidence demonstrates.

d. MBL does not need to rely on Policy 6 to provide "a way around"[119] Policies 11 and 13. That is not the purpose of Policy 6. Policy 6 can stand alone.

e. Policy 6(2)(c) directs decision makers to "recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places". Policy 6(2)(d) states that "activities that do not have a functional need for location in the coastal marine area generally should not be located there". The term "functional need" is defined in the National Planning Standards 2019 as "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment."[120] As addressed in evidence, MBL's position is that there is a functional need for the activity (marine sand extraction) to locate in the coastal environment.

167. Mr Cook's evidence states with respect to Policy 6 that the Project will result in economic benefits to the operator, but those are outweighed by adverse effects on existing Northland commercial activities and that any economic benefits do not override the requirement to avoid adverse effects.[121] In my submission none of these matters have direct relevance to Policy 6.

[119] Patuharakeke/Ngātaiwai Legal Submission at [9.14].

[120] National Planning Standards at [58].

[121] At [6.13].

168. In addition, the asserted adverse effects on existing Northland commercial activities are wildly overstated, as identified in the evidence of Mr McIlrath. Further, the asserted adverse economic effects are fundamentally predicated on a proposition that significant damage to coastal processes and the foreshore is inevitable, with consequential knock-on effects for commercial activity. The expert analysis of Dr Beetham and Mr Reinen Hamill debunks the proposition that coastal erosion and coastal process damage will occur. In addition, comfort that this will not occur is provided by the strengthened conditions of consent now in place, with the associated package of management plans and monitoring.

169. Turning to Policy 3, MBL accepts that a precautionary approach is necessary and appropriate in the context of the Project.

170. In full, Policy 3 provides:

> **Policy 3 Precautionary approach**
>
> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>
> (a) avoidable social and economic loss and harm to communities does not occur;
>
> (b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>
> (c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

171. I submit that the Project is consistent with Policy 3 as MBL's expert team has adopted a precautionary approach. Significant data has been collected and analysis undertaken in the process of planning the application and settling on a range of parameters and proposed methodologies and conditions which will govern the activity.

172. Examples include coastal process investigation and modelling, leading to careful shifts to and refinements in the location of the extraction area, and ongoing collection via seafloor hydrophones of acoustic data informing analysis of the marine mammal population and consequent modelling of potential effects leading to adjustments in the timing and duration of extraction activities.

173. The precautionary approach has a relationship to concepts of adaptive management, which I address further below.

174. Mr Cook's evidence asserts that the application of Policy 3 "weighs strongly against granting consent where uncertainty remains and the potential consequences are permanent."[122]

175. In my submission, Policy 3 sets a cautionary standard. I accept that nothing in the FTAA displaces or lowers the standard set by NZCPS Policy 3(1) at the stage where the Panel is required to give effect to relevant policy instruments under clause 17(1)(b) of Schedule 5.

176. As a general observation Policy 3 is acknowledging that there will be instances where activities in the coastal environment that could result in uncertain effects that are potentially significantly adverse, but such effects can be managed through the precautionary approach.

177. I do not agree with Patuharakeke/Ngātiwai's submission that "Policy 3 requires the Panel to take a cautious approach to the potential adverse effects" of the Project.[123] That somewhat mischaracterises the thrust of the policy. I do not read Policy 3 as requiring a cautious approach to decision-making per se, rather it is mandating that where unknown or uncertain effects might exist, a precautionary approach must be adopted to manage those effects – for example, by way of conditions of consent imposing appropriate controls, triggers and monitoring of effects. While I accept that generally that is a more cautious approach to the management of effects, I do not read it as setting a higher standard or threshold requirement.

178. Other policies referred to in comments received, for example relating to surf breaks or coastal processes or natural hazards are addressed by expert specialist evidence for MBL (see, for example, the evidence of Mr Beamsley with respect to surf breaks and Dr Beetham and Mr Reinen-Hamill regarding coastal processes).

[122] WCRB Mr Cook's evidence at [6.6].

[123] Legal Submissions at [9.15].

179. I submit for the reasons addressed above that the Project is not contrary to or inconsistent with the relevant NZCPS policies.

180. Criticisms levied in comments received regarding regional plan provisions essentially reflect similar themes to what has been addressed in this legal submission. For that reason, I do not engage with those individually, but record that the concerns expressed in comments received are answered in the evidence on behalf of MBL.

Part 2 RMA

181. Part 2 of the RMA is relevant to decision-making on resource consents by reference to cl 17(1)(b) and 17(2)(a), Schedule 5 of the FTAA.

182. Some commenters assert that the Project is inconsistent with or contrary to Part 2 of the RMA. The legal submissions on behalf of Patuharakeke/Ngātiwai assert that the Project is contrary to sections 5, 6 and 7 of the RMA.[124] The planning evidence of Mr Cook on behalf of WCRB similarly concludes that the Project is inconsistent with Part 2.[125] MBL disagrees.

183. The legal submissions on behalf of Patuharakeke/Ngātiwai go on to state that "the approvals sought would inevitably be declined if sought under the standard RMA process."[126] Whether or not the consents would be approved under the standard RMA process has no bearing on the appropriateness of the Project for the FTAA process. In my view the FTAA process was intentionally designed to provide a more streamlined pathway for larger or more traditionally complex projects – this is evident through the removal of the s 104D threshold test, the ability to apply for an activity that is identified as a prohibited activity for which consent under the RMA cannot be granted, and the introduction of the FTAA's overall weighing/proportionality test.

[124] Legal Submissions at [9.34].

[125] Evidence of Mr Cook at section 7.

[126] Legal Submissions at [9.34].

184. Part 2 has been assessed in the application material.[127] That assessment concludes that the Project is consistent with the relevant provisions of Part 2.

185. To summarise MBL's position on and response to Part 2 matters, I submit:

a. With respect to s 5 – the Project is consistent with the purpose of the RMA as:

i. Sand is a natural resource which is a critical component for infrastructure and development projects in New Zealand.

ii. The grant of the approvals sought will ensure a local and sufficient supply of high-quality marine sand for future projects. Materials, such as sand, necessary for construction and development contribute to the social and economic well-being of the communities to which that development relates.

iii. Patuharakeke/Ngātiwai fail to acknowledge that the avoidance language of s 5(2)(c) is qualified.[128] It is not a straight avoidance directive, rather it states "avoiding, remedying, <u>or</u> mitigating any adverse effects of activities on the environment". That is important to note because there is an acceptance at the Part 2 level that it is not always possible to avoid adverse effects altogether if people are to provide for their social, economic, and cultural well-being. Additionally, s 5 expressly excludes minerals from subsection (2)(a). Again, I say that takes a real-world approach to the often competing values between enabling use and development and sustaining natural and physical resources.

iv. Mr Cook's evidence states the Project is inconsistent with s 5(2)(b) and (c) because the application does not provide

[127] Assessment of Environmental Effects [19.14] – [9.32].

[128] Legal Submissions at [9.30].

sufficient certainty that the life-supporting capacity of coastal ecosystems and natural coastal processes will be safeguarded nor that adverse effects on the environment can be avoided, remedied, or mitigated.[129] I say that properly understood, s 5 does not require or set a "sufficient certainty" threshold as suggested by Mr Cook. Section 5 requires a determination on the merits as to whether the Project achieves the sustainable management purpose of the RMA. I say it does.

v. MBL's evidence demonstrates that the proposed sand extraction methodology can be undertaken in a manner which avoids or minimises potential adverse environmental effects and is appropriately managed through conditions of consent and management plans.

b. With respect to s 6, the Project will not result in any adverse effects on matters of national importance for reasons addressed in the evidence for MBL. For completeness, I note that Mr Cook's evidence states that s 6(b) and (d) are engaged.[130] MBL does not agree with that proposition. The project area is not recognised as an outstanding natural feature or landscape, and public access to and along the coast or marine area will not be materially impacted by the Project.

c. With respect to s 7 of the RMA, the Panel is to have particular regard to the matters identified in s 7. The AEE assesses the relevant s 7 matters[131] and concludes that those matters have been addressed in the application material and that the project's effects with respect to those matters have been appropriately avoided, remedied or mitigated, or otherwise managed via proposed conditions of consent and management plans. I say further with

[129] At [7.5].

[130] At [7.6].

[131] At [9.24] – [9.32].

respect to these matters that the terminology "have particular regard to" does not elevate those matters to operate as a trump card in the context of assessment of effects from a resource consent application. These Part 2 matters remain subject to the overall weighting and proportionality exercise required by the FTAA. In any event, I say that the minimisation of effects through the proposed sand extraction location, extraction methodology and implementation of management plans and conditions of consent have all been considered through the lens of these particular considerations required to have particular regard to by s 7.

186. Overall I submit that the application it has been assessed appropriately by reference to Part 2 matters and that the Project is consistent with the matters engaged by reference to those sections of the RMA

Uncertainty of Effects, Adaptive Management and Precautionary Approach

187. Some commentors have raised concerns relating to the level of uncertainty of effects and the appropriateness of an adaptive management approach.[132] Commentary on these matters has some confluence with concerns about whether a sufficiently precautionary approach is being adopted.

188. The core themes arising from assertions in comments are:

   a. The substantive application contains insufficient assessment, numeric modelling and quantitative analysis of the extent of potential adverse effects;

   b. Such uncertainty (particularly on coastal processes and ecological recovery) may result in effects or impacts that are irreversible or significantly adverse; and

[132] WCRB Evidence of Evan Cook at [5.21] – [5.26]; Parawhau Hapu Incorporation Comment at pages 3 and 12; Royal Forest & Bird Protection Society Incorporated Memorandum of Legal Comments at [10] – [20]; Royal Forest & Bird Protection Society Incorporated Comment at [7] - [20]; Parliamentary Commissioner for the Environment Comment at pp. 2 – 3; Northland Conservation Board Comment at [3] and [4] – [4.2]; and DoC Comment at [2.48] and [3.1] – [3.9].

c. The Applicant's proposed adaptive management approach is inappropriate in light of such uncertainties. A precautionary approach should be adopted.

189. The general thrust of those comments is that the uncertainty of extent of effects is such that adaptive management approach is inappropriate.

General Comment

190. The FTAA provides a statutory process for the preparation and lodgement substantive applications. That process is sufficiently robust and allows an authorised person to obtain approvals that would otherwise be sought under other legislation.

191. The fact that an applicant chooses to proceed under the FTAA's fast-track process does not translate into a reduced or diminished assessment of effects in support of a project. Rather, the information requirements, assessment of effects and drafting of proposed conditions of consent are still held to a high standard (albeit, subject to a weighting exercise in favour of the purpose of the FTAA).

192. By way of general comment on the process:

a. The FTAA requires a substantive application to be accepted by the EPA as complete under s 46. As noted above, this obligation requires the EPA to be satisfied that the information has been "specified in sufficient detail to satisfy the purpose for which it is required" in relation to each approval sought. The EPA determined the Project complied with s 46.

b. Clauses 5 – 7 of Schedule 5 of the FTAA set out the information requirements for a substantive consent application. Specific information is required with respect to an assessment of the activity's effects on the environment.

193. The Applicant disagrees with general assertions that there is insufficient information to enable consideration of the Project. The Applicant's expert team have provided robust assessments of potential adverse effects, noting

that the underwater location of this activity creates some challenges to assessment when compared to terrestrial-based activities.

194. MBL's application material and evidence in response to comments set out the relevant assessment of environmental effects. Those assessments provide a comprehensive basis upon which to assess effects.

195. Further research and data collection has been undertaken, as reflected in the statements of evidence in response to comments received. For example, Dr Pine identifies a significant volume of additional acoustic data, which in turn has informed further detailed analysis by Ms McConnell.

196. I submit that the Panel has the required information to grant the approvals sought.

197. The Applicant has proposed a raft of effects management measures, including the use of an adaptive management approach. I submit that the use of an adaptive management approach is both necessary (by reference to Policy 3 of the NZCPS) and appropriate in the circumstances. An adaptive management approach ensures that any unknown or unforeseen adverse effects are detected and responded to appropriately and efficiently.

198. The proposed adaptive management approach has been significantly strengthened. Prior to discussing that further, I identify relevant legal commentary with respect to adaptive management.

Legal Commentary

199. The concept of adaptive management has been well-traversed by the courts in the context of the RMA. I submit this caselaw equally applies to consent approvals sought under the FTAA.

200. The leading case in adaptive management remains the Supreme Court's decision in *Sustain Our Sounds Incorporated v The New Zealand King Salmon Company Limited.*[133] The *Sustain Our Sounds* decision contains a detailed

[133] *Sustain Our Sounds* [2014] NZSC 40 at [113].

assessment of the New Zealand and international approach to adaptive management.[134]

201. In *Sustain Our Sounds* the Court considered an appeal against (relevantly) the grant of resource consents issued for salmon farms in the Marlborough Sounds, primarily on issues relating to water quality. The appeal stated that the Board did not have adequate information on water quality issues sufficient to support the grant of consent. Specifically, the challenge was that although King Salmon had modelled the effects on water quality at the maximum *initial* feed levels, it had not modelled effects at the maximum final feed level. The appeal also challenged the sufficiency of King Salmon's baseline information used to determine the initial feed level effects.

202. The relevant broad issue arising was whether the adaptive management approach taken by the Board was available.

203. In *Sustain Our Sounds* the Court held that before an adaptive management approach can be considered, there must first be an adequate evidential foundation to provide reasonable assurances that an adaptive management approach will achieve the goals of "sufficiently reducing uncertainty and adequately managing any remaining risk". [135]

204. The Court expressly stated that the adaptive management approach is not a "suck it and see" approach:[136]

205. At [129] the Court stated:[137]

> [129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:

[134] Refer [100] – [140].
[135] At [125].
[136] At [125].
[137] Cited and confirmed more recently in *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [67] and *Wilson v Waikato Regional Council* [2021] NZEnvC 131 at [155].

a. The extent of the environmental risk (including the gravity of the consequences if the risk is realised);

b. The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

c. The degree of uncertainty; and

d. The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

206. The Court concluded with respect to [129](a) above that the gravity of risk if realised (i.e. ecological disaster) was grave and that the extent of the risk was difficult to assess due to the uncertainties as to the baseline information and lack of modelling, however there was agreement between the experts that a change in trophic level of the Sounds was unlikely.[138] Notwithstanding that conclusion the Court held that the deficiency would be remedied via actions required in conditions before the farm was stocked and no structure could be placed on the farms if the Council did not approve the required baseline report.[139]

207. The importance of the activity identified in [129](b) was addressed in Policy 8 of the NZCPS which provides that aquaculture is important to the social, economic, and cultural well-being of people.[140]

208. With respect to the degree of uncertainty in [129](c) the Court noted that the uncertainty, particularly as to baseline and increased feed levels, was high and that the modelling that had been done could be seen as having reduced the uncertainty somewhat subject to the limits of modelling.[141]

209. With respect to the last, and most vital, point in [129](d), the Court stated:

[138] At [130].
[139] At [135].
[140] At [131].
[141] At [132].

> [139] The answer to the overall question from [129](d) of whether risk and uncertainty will be diminished sufficiently for an adaptive management regime to be consistent with a precautionary approach will depend on the extent of risk and uncertainty remaining and the gravity of the consequences if the risk is realised. For example, a small remaining risk of annihilation of an endangered species may mean an adaptive management approach is unavailable. A larger risk of consequences of less gravity may leave room for an adaptive management approach.
>
> [140] In this case, while a change in trophic state would be grave, the experts were agreed it was unlikely. Further, the information deficit is effectively to be remedied before the farms are stocked and before feed levels are increased. Remedial action will be taken if there is any significant shift in water quality. The Board was thus entitled to consider that the four factors it had identified were met. In this case, given the uncertainty will largely be eliminated and the risk managed to the Board's satisfaction by the conditions imposed, it was open to the Board to consider that the adaptive management regime it had approved, in the plan and the consent conditions, was consistent with a proper precautionary approach.

210. The Supreme Court stated that the "vital" part of the test is contained within [129](d) as it deals with the risk and uncertainty and the ability of an adaptive management regime to deal with that risk and uncertainty.[142] The Court went on to repeat the relevant factors identified by the Board of Inquiry:[143]

    a. There will be good baseline information about the receiving environment;

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

    c. Thresholds are set to trigger remedial action before the effects become overly damaging; and

    d. Effects that might arise can be remedied before they become irreversible.

211. Working through those factors, the Court noted:

[142] At [133].
[143] At [133].

a. In relation to (a) above, expressed that normally there would be sufficient baseline information before any adaptive management approach could be embarked upon. It was determined that in that case any deficiencies would be remediated prior to the activity occurring.[144]

b. With respect to (b) above, that the Board had determined that the conditions provided effective monitoring of adverse effects and that appropriate thresholds were met. The baseline report and ongoing monitoring reports were required to be prepared by an independent person, monitored by the peer review panel, and were required to be approved separately by the council.[145]

c. In relation to (c) and (d) above the Board impliedly determined that those effects could be remedied before they became irreversible through the use of conditions complying with a precautionary and adaptive management approach.[146]

212. Overall, the Supreme Court dismissed the appeal, concluding that the Board was entitled to consider the that the adaptive management approach was consistent a proper precautionary approach.[147]

213. In *Wilson v Waikato Regional Council,*[148] the Environment Court was asked to determine an appeal against the grant of a coastal permit to operate a mussel spat farm in Mercury Bay. The (relevant) matters on appeal were whether the proposed activity would create unacceptable risks for marine mammals (particularly marine mammal entanglement), significant habitats, and/or marine ecosystems.

214. The Court concluded that while on the evidence it was highly improbable that entanglement would occur, that the court should apply a precautionary

[144] At [135].
[145] At [136].
[146] At [137] – [138].
[147] At [158].
[148] [2021] NZEnvC 131 – the interim decision.

approach in view of the potentially high serious consequences of an entanglement.[149]

215. In applying *Sustain Our Sounds*, the Court held:

[155] Guided by *Sustain Our Sounds*, we find that a precautionary approach can be effectively reflected in consent conditions, rather than dictating consent decline. That is by reason of the following:

a. Our findings concerning the level of risks presented in regard to marine mammals and as to habitats;

b. The fact that the design of relevant elements, informed by industry experience, would minimise entanglement risks, particularly in the choice of heavy and tensioned looped lines;

c. The fact that there would remain effective capacity for intervention should science, including as to potential future environmental change, reveal this is warranted. In particular, the coastal permit, if issued, would be of only limited duration (≤ 20 years) and there is ample capacity for such effective intervention through related consent conditions.

216. Noting the above was an interim decision and the Court had determined that as advanced the proposed adaptive management conditions were deficient, the final decision recorded (in the context of amended conditions) that:[150]

[41] *Sustain Our Sounds* does not impose "specific requirements" of adaptive management. Rather, it lists factors to be considered when determining whether an adaptive management approach is appropriate. The Supreme Court emphasised the importance of considering risks but did not direct that a risk elimination or a strict avoidance approach be taken. Nor did it prescribe and benchmark for adaptive management to satisfy a precautionary approach.

[42] As the first interim decision found, in terms of a precautionary approach, it is important to consider both dimensions of risk, namely likelihood and

[149] At [154].
[150] *Wilson v Waikato Regional Council* [2022] NZEnvC 229.

> magnitude. Focussing unduly on magnitude, as it would appear the appellant has done, leads to impracticable, unduly risk-averse, outcomes not directed by the NZCPS or required by the RMA.
>
> [43] As for marine mammals, the court did not find fatal entanglement would occur. Rather, we found that any population-level consequence of any fatal entanglement or other incident would plainly also harm indigenous biodiversity in the coastal environment. In applying a precautionary approach, the court then found that the likelihood of harm (including of fatal entanglement) were so low that Pol 11 NZCPS would not be offended by an effective adaptive management regime under suitable consent conditions.

(footnotes omitted)

217. The above caselaw demonstrates that adaptive management is appropriate so long as there are robust conditions in place to manage potential adverse effects. The Panel needs to be satisfied that the extent of environmental risk and gravity of the consequences are low or, if they are not, that they can be appropriately conditioned to ensure that the risk and any uncertainty is diminished.

Adaptive Management Proposed

218. As noted above, the adaptive management framework proposed in this matter has been significantly strengthened through a package of amendments to conditions. The changes are summarised in the evidence and response to comments by Mr. Hay at paragraphs 12 – 26.

219. Mr Hay states at paragraph 12:

> The adaptive management approach adopted in Recommended Condition 20 (Extraction Area) and Recommended Condition 22 (PSEAR Requirements) has been significantly strengthened based on the recommendations of Mr West and Mr Reinen-Hamill/Dr Beetham. Mr West has addressed in detail in his Statement of Evidence Responding to Comments (Paragraphs 223 to 258) the changes to the adaptive management approach for the ecological monitoring results. Likewise, Mr Reinen-Hamill/Dr Beetham have also addressed the changes to the adaptive

management approach for the bathymetry monitoring results in their Statement of Evidence Responding to Comments (Paragraphs 66-80).

220. The proposed changes to conditions reflect amendments made to the EMMP in terms of the environmental monitoring design rationale set out in section 3 of that document and the sand extraction monitoring report addressed in section 6.

221. Mr Hay notes in particular with respect to section 6 that new sections have been included in terms of adaptive management recommendations and trigger alert responses for both bathymetric surveys and ecological monitoring. His evidence sets out tables now included as requirements for each SEMR, which identify response levels and required responses.[151]

222. The future increase in the annual sand extraction volume provided for by condition 23 has also been further refined as Mr Hay outlines at his paragraph 18. Monitoring obligations have been strengthened, and limits governing the ability to increase annual sand extraction have been clarified and strengthened.

223. The strengthening of provisions has also extended to improved and clarified turbidity level monitoring and controls for the plume generated by the ship when in operation, along with strengthened and clarified conditions addressing the underwater soundscape change limits, measurement methodology, and assessment and reporting requirements.

224. In this case, I submit the altered and strengthened adaptive management approach now advanced by MBL satisfies the factors identified in *Save Our Sounds*. MBL proposes sufficient monitoring, triggers and early and immediate intervention measures in place to ensure that any unforeseen events and/or effects are picked up and responded to.

[151] Evidence in response to comments received by Mr. Hay at paragraph 15 – 17.

Cultural Matters – Consultation, Treaty of Waitangi, Tikanga, Customary Fishing, Fishing Settlements and MACA Applications

225. Cultural matters have been raised by various commenters[152] as a core ground for opposition.

226. In contrast, this proposal is conditionally supported by the Trustees of Te Pouwhenua o Tiakiriri Kukupa Trust, on behalf of Te Parawhau ki Tai.

227. The matters arising from comments in opposition can be broadly categorised as:

    a. Inadequate consultation;

    b. Inconsistency with the Treaty of Waitangi and s 7 of the FTAA;

    c. Effects on customary fishing and fishing settlements;

    d. Effects on tikanga; and

    e. Effects on MACA applications.

228. There is a high degree of overlap of the matters arising from comments in opposition in the context of these themes, particularly with respect to matters relating to the Treaty of Waitangi and impacts of the Project on MACA applications. There are some differences of opinion between some commenters with respect to the consultation undertaken by MBL and matters relating to mana whenua.

229. I commence by acknowledging that cultural effects are properly a matter for Māori to identify and address. As an applicant, MBL has no standing to challenge or determine mana whenua status or draw conclusions with respect to matters of tikanga or Te Ao Māori.

[152] Including Patuharakeke/Ngātiwai, Te Ohu Kaimoana, Te Waiariki, Ngati Korora, Ngati Takapari, Te Parawhau Hapu Incorporation, Te lwitahi Manihera whanau

230. Therefore, MBL's response to cultural comments focuses on addressing the relevant matters of law and relevant factual matters with respect to the consultation undertaken and responses to other relevant legislation (e.g. MACA and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992).

231. MBL acknowledges that there is no single Māori view of the Project. Te Parawhau's conditional support does not determine or diminish the interests expressed by Patuharakeke, Ngātiwai or other groups. MBL says it is nevertheless probative evidence that, following sustained engagement and a comprehensive cultural assessment, Te Parawhau considers the Project capable of proceeding subject to the agreed conditions and finalisation of the Relationship Agreement and subsequently the Substantive Agreement. I also submit that differing positions can be appropriately addressed through interest-specific participation, monitoring and relationship mechanisms.

Consultation

232. As indicated above, some commenters raise issues with MBL's consultation. Common concerns include the extent of consultation, disagreement as to mana whenua status and whether the consultation undertaken was genuine.

233. I note that a full summary and record of consultation is contained in Appendix 5 of the AEE. Post-lodgement engagement is addressed in Mr Davis' evidence in response to Minute 4 (RFI 1). it is extensive.

234. The evidence of Mr McCallum[153] addresses a range of matters which have attracted comment that he was involved in as the leader of MBL, including matters considered in choosing the proposed extraction location, and the consultation undertaken with iwi, hapū, local tangata whenua and whānau since the inception of the Project in 2024.

235. As identified at paragraph 27 of his evidence, Mr McCallum records that MBL sought advice from Tai Tokerau kaumātua and Ngāti Whātua senior advisor

[153] Callum McCallum is the Managing Director of McCallum Brothers Limited. His evidence in response to invited comments is dated 12 August 2026.

Tame Te Rangi regarding engagement with tangata whenua. The outcome of that advice was that MBL should engage with Ngātiwai, Patuharakeke and Te Parawhau. MBL did so.

236. MBL were also advised by Northland Regional Council (**NRC**) to consult with relevant MACA applicants. MBL did so. MACA matters are commented on further below.

237. Comments which raise specific consultation concerns and/or raise issues as to status say (inter alia):

a. Te Iwitahi Manihera Whānau state that Ngapuhi Runanga is the iwi authority for Bream Bay[154] and "the rightful tangata whenua tangata moana are Te Parawhau, Ngati Kahu Torongare, and Ngati Tu".[155] The comment goes on to state that MBL did not appropriately engage with or meet with members of Te Iwitahi Manihera Whānau.

b. Mr Kerepeti-Edwards' evidence on behalf of Patuharakeke/Ngātiwai raises concerns with the extent of iwi and hapū groups invited to comment on the Project.[156]

c. Te Pouwhenua o Tiakiriri Kukupa Trust (Te Parawhau Ki Tai) (**Te Parawhau**) asserts that Te Parawhau hapū "have the strongest relationship" with the Project area[157] and therefore "have the greatest voice" in terms of s 6(e) and s 7(a) of the RMA.[158]

d. While Patuharakeke/Ngātiwai acknowledge that members of Te Parawhau have a relationship with Te Ākau Bream Bay, they say that "the information before the Panel demonstrates that Patuharakeke and Ngātiwai have the stronger relationship with Te Ākau Bream Bay, based on tikanga, meaning their views on the

154 Te Iwitahi Manihera Whānau Comment (Peter and Eva Vaughan) at pg. 1.

155 Te Iwitahi Manihera Whānau Comment (Peter and Eva Vaughan) at pg. 1.

156 Mr Kerepeti-Edwards Evidence at [1.5].

157 Te Parawhau Evidence of Mr Walker at [5] and [29].

158 Te Parawhau Legal Submissions at [9].

adverse cultural impacts and correct tikanga and kawa should be preferred by the Panel."[159]

e. Te Waiariki, Ngāti Korora me Ngāti Takapari state that "there have been no requests for hui or meaningful consultation" by MBL.[160]

238. Turning to consider the relevant law, s 29(1) of the FTAA sets out the pre-lodgement requirements for a listed project. MBL's application was lodged on 26 January 2026 and was therefore not subject to the relevant amendments to s 29 and s 11 made by the Fast-track Approvals Amendment Act 2025 (operative 31 March 2026) which altered the requirements for pre-lodgement consultation.[161]

239. Thus, at the time MBL's substantive application was lodged, by virtue of s 29 MBL was required to "consult" with all the groups listed in s 11(1)(a) of the FTAA which, at that time (pre-amendment) provided:

240. The groups referred to in (pre-amendment) s 11(1)(a) were:

(1) Before lodging a referral application, the applicant must consult—

(a) the relevant local authorities; and

(b) any relevant iwi authorities, hapū, and Treaty settlement entities, including—

(i) iwi authorities and groups that represent hapū that are parties to relevant Mana Whakahono ā Rohe or joint management agreements; and

(ii) the tangata whenua of any area within the project area that is a taiāpure-local fishery, a mātaitai reserve, or an area that is subject to bylaws or regulations made under Part 9 of the Fisheries Act 1996; and

(c) any relevant applicant groups with applications for customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011; and

(d) ngā hapū o Ngāti Porou, if the project area is within or adjacent to, or the project would directly affect, ngā rohe moana o ngā hapū o Ngāti Porou; and

(e) the relevant administering agencies; and

(f) if the proposed approvals for the project are to include an approval described in section 42(4)(f) (land exchange), the holder of an interest in the land that is to be exchanged by the Crown.

241. That obligation was much wider than what it is now and included a requirement to "consult" any relevant iwi authorities, hapū and Treaty Settlement entities.

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[159] Patuharakeke/Ngātiwai Legal Submissions at [1.4](b).

[160] Te Waiariki, Ngāti Korora me Ngāti Takapari Comment at pg. 2.

[161] This amendment removed the requirement for a substantive application for a listed project to "consult" with the groups identified in (now) s 11(1)(b), the effect is that now those groups need only be notified of an application.

242. The term “consult” is not defined by the FTAA. I note that s 36A(1)(a) of the RMA provides that there is no duty under the RMA to consult any person about a resource consent application, but the meaning of consultation has been the subject of consideration by the Courts. While s 36A is not expressly engaged by reference to the FTAA,[162] I say that Courts’ commentary on consultation is relevant because the FTAA engages with the same (or similar) types of interested parties and environmental effects.

243. Relevant commentary on RMA consultation can be found summarised in the Environment Court Decision of *Land Air Water Association v Waikato Regional Council*[163] as:

> [453] We are guided by the above authorities in considering the allegation that there was inadequate consultation in the context of the evidence of this case. We synthesise from them the following relative principles:
>
> (i) The nature and object of consultation must be related to the circumstances.
>
> (ii) Adequate information of a proposal is to be given in a timely manner so that those consulted know what is proposed.
>
> (iii) Those consulted must be given a reasonable opportunity to state their views.
>
> (iv) While those consulted cannot be forced to state their views they cannot complain, if having had both time and opportunity, they for any reason fail to avail themselves of the opportunity.
>
> (v) Consultation is never to be treated perfunctorily or as a mere formality.
>
> (vi) The mu-ties are to approach consultation with an open mind.
>
> (vii) Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement.
>
> (viii) Neither party is entitled to make demands.
>
> (ix) There is no universal requirement as to form or duration.
>
> (x) The whole process is to be underlain by fairness.

[162] For example, it is not included in cl 17, Schedule 5 of the FTAA.

[163] Auckland A110/01, 23 October 2001 (EC).

244. The term "consult" in the RMA context "is not merely to tell or present. Nor, at the other extreme, is it to agree."[164] I say that the above principles are the correct approach to take to the obligation to consult under the FTAA.

245. Consultation and the adequacy of consultation under the FTAA has been the subject of limited commentary. The only commentary available at the time of writing is in the application for interim orders in *Ngāti Kuku Hapū Trust v The Environmental Protection Agency*.[165] In that case, the applicant for judicial review asserted (inter alia) that the Port of Tauranga's substantive application for the Stella Passage Project was incomplete (and should not have been determined by the EPA to be within scope) because it did failed to meet the consultation requirements under s 29 of the FTAA by not consulting with all relevant iwi and hapū groups. While the Court considered the ground for review to be "possibly arguable", the ground was not pursued in the substantive judicial review hearing.

246. In response to these comments, I submit:

   a. MBL did not and does not propose to propose its own findings with respect to mana whenua or mana moana status. It would not be appropriate to do so.

   b. Therefore, MBL has no response to assertions that it consulted with too many, not enough, or the 'wrong' iwi and hapū groups other than to say that MBL's consultation was undertaken in good faith and on the advice of its Cultural Advisor and the Northland Regional Council's database of MACA claimants.

   c. MBL fulfilled the FTAA's consultation requirement for a listed substantive application. A summary of the consultation undertaken by MBL is set out in Appendix 5 to the AEE. That summary (in addition to the evidence of Mr McCallum) demonstrates that:

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[164] *Port Louis v Attorney-General of Mauritius* 1965 AC1111 at pg. 1124 cited with approval in *Land Air and Water* at [449]; referred to in *Ngāti Kuku Hapū Trust v Environmental Protection Agency* at [44].

[165] [2025] NZHC 2046 (Interim Order Application). Note that this ground of appeal was not pursued in the final decision in *Ngāti Kuku Hapū Trust v The Environmental Protection Agency* [2025] NZHC 2453.

i. MBL consulted and engaged with relevant iwi, hapū, whanau and MACA applicants by way of emails, phone calls, text messages, online meetings, in-person meetings and hui at marae. MBL scheduled regular hui with Patuharakeke during February – November 2025.[166]

ii. MBL invited and hosted iwi on board the *William Fraser* to further discuss the Project.

iii. Significant effort was placed into contacting and inviting comments on the Project from relevant MACA applicants (individual or via counsel). While many groups did not respond, MBL followed up and continued to engage with groups who indicated they were interested (for example, Ngātiwai, Ngāti Tū ki Ngāpuhi and Te Parawhau ki Tai).

iv. Overall, MBL invested significant time and effort into consultation.

d. With respect to Te Iwitahi Manihera Whānau, that comment expressly includes snippets of communications from Mr McCallum regarding a willingness to meet with the whānau and a reluctance on behalf of MBL to form a view with respect to mana whenua and mana moana status. The comment contains various criticisms of MBL's Cultural Advisor and other iwi and hapū groups. Again, MBL does not provide a response to those matters other than to state that consultation was undertaken in good faith with iwi, hapū and whanau it was advised to consult with.

e. By reference to the RMA consultation principles identified above, I say that:

i. MBL consulted with the relevant groups in a timely manner and provided adequate information for the Project.

[166] Appendix 5 to the AEE at pg. 80.

ii. A reasonable amount of time to state views and concerns were given. MBL proactively followed up various groups and sought to communicate and correspond in different formats.

iii. MBL did not treat consultation as a mere formality, rather there was genuine and ongoing attempts to consult and engage with relevant groups. This is evident through commitments to regular meetings and hui and by inviting groups to attend meetings aboard the *William Fraser*.

iv. MBL has approached consultation with an open mind and has been prepared to amend conditions and management plans to respond to matters raised by iwi and hapū.

v. While full agreement has not been reached with those consulted with, MBL's position is that the consultation has been both meaningful and purposeful and has resulted (in most instances) in a dialogue between parties.

247. I submit that the FTAA requirement for consultation has been satisfied by MBL.

Treaty of Waitangi, Effects on Fisheries Settlements and Customary Fishing, and s 7 of the FTAA

248. Various commenters assert that the Project breaches Treaty of Waitangi principles and/or is contrary to s 7 of the FTAA.[167] That assertion is most comprehensively addressed in the legal submissions lodged on behalf of Patuharakeke/Ngātiwai.[168]

249. The legal submissions on behalf of Patuharakeke/Ngātiwai state that although the FTAA does not contain a general Treaty clause or refer to the TOW or its principles (beyond references to Treaty Settlements), that "it is well-established that Te Tiriti and its principles are relevant to the interpretation and application of

[167] For example, Patuharakeke/Ngātiwai; New Zealand Conservation Society; Te Ohu Kaimoana.

[168] Patuharakeke/Ngātiwai Legal Submissions at [5.7] – [5.19].

statutory provisions even when not referred to in legislation or only a Treaty clause which is limited in scope".[169] Paragraphs [5.7] – [5.13] go on to cite caselaw relating to the status of the Treaty of Waitangi. Various Treaty principles are also referred to (in particular, principles of active protection and the duty to act in good faith).

250. The legal submissions assert that the grant of approvals would breach the Crown's obligations under the Treaty to take steps to enable Patuharakeke/Ngātiwai to "use and exercise their tino rangatiratanga, meet their kaitiaki responsibilities in their rohe moana, and benefit from the outcomes of the Fisheries Settlement."[170] The submissions go on to state that the breaches of the Treaty are, in the context of assessment under the FTAA, sufficiently significant to outweigh any benefits of the Project.[171]

251. Turning to consider the asserted breach of s 7, Patuharakeke/Ngātiwai submit that the Panel must decline an approval if it considers that if granted the approval would breach s 7 FTAA (regarding treaty settlements and recognised customary rights). They suggest that the approval would be inconsistent with the Fisheries Settlement and the Panel must decline the application.[172]

252. Section 7 of the FTAA requires all persons performing and exercising functions, powers and duties under the FTAA to act in a manner consistent with obligations arising under relevant Treaty settlements. Section 85 of the FTAA provides that the Panel must decline an application if approving it would breach s 7 of the FTAA. However, s 84 allows a Panel to set conditions to recognise or protect a relevant Treaty settlement. As a result, an application must only be declined where conditions cannot ensure the settlement is protected.

253. In response to Treaty comments, I submit:

    a. It overstates the position to suggest that s 7 and Treaty (fisheries) settlements should be given a "broad and generous interpretation",

[169] Patuharakeke/Ngātiwai Legal Submissions at [5.7].
[170] Patuharakeke/Ngātiwai Legal Submissions at [5.14].
[171] Patuharakeke/Ngātiwai Legal Submissions at [5.19]
[172] Patuharakeke/Ngātiwai Legal Submissions at [10.3].

if what is meant by that approach equates to introducing an additional gloss to or heightening the obligations over and above the legislation as it is worded.[173] That is because:

i. We must take the wording of legislation as we find it. Section 7 of the FTAA is clear that a panel must act in a manner "consistent" with Treaty Settlements.

ii. Section 7 is intentionally and deliberately limited to obligations arising under <u>existing</u> Treaty settlements and customary rights recognised under MACA or Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

iii. Section 7 therefore <u>does not</u> contain an express obligation to be consistent with Treaty principles more generally. This approach has been considered in the High Court where it was stated:[174]

> "<u>The principles of Te Tiriti o Waitangi are not referred to in the FTAA,</u> with the Act instead providing that those exercising functions, powers, and duties under the Act must act consistently with obligations under existing Treaty settlements.[175] Similarly, <u>tikanga appears only to be referred to in relation to conducting a hearing</u> on a fast-track application.[176]"

(my emphasis)

iv. I do not say that Treaty principles or consideration of tikanga are irrelevant considerations. That the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and secondary legislation giving effect to s 10 of that Act made under Part 9 of the Fisheries Act engages s 7 FTAA is acknowledged. I simply state that the structure and

[173] Patuharakeke/Ngātiwai Legal Submissions at [6.1].

[174] *Ngati Kuku Hapu Trust v Environmental Protection Agency* [2025] NZHC 2046 at [46].

[175] FTAA, s 7.

[176] FTAA, s 58.

purpose of the FTAA is such that Parliament has deliberately chosen the wording of this legislation to prioritise (as is seen the FTAA's purpose and overall weighting obligations) the facilitation of projects with significant regional and national benefits. While a Panel must consider adverse impacts (which includes cultural effects), the FTAA is a separate and bespoke process to that under the standard RMA process. On that basis, I caution the application of caselaw commentary that might be in conflict with the plain meaning and obligations of the FTAA.

b. In any event, and ultimately more importantly, MBL's application material and evidence demonstrate that the Project will not be inconsistent with any Fisheries Settlement. I say, in reliance upon MBL's evidence and the comments of Te Parawhau ki Tai, that the exercise of customary rights recognised under MACA and obligations arising from relevant Fisheries Treaty obligations and the Project can co-exist in Te Ākau Bream Bay. The presence or exercise of rights accruing under the resource consent sought does not necessarily exclude or materially affect another set of rights.

c. As identified by Mr McCallum at paragraph 40 of his statement of evidence, MBL incorporated information provided by Patuharakeke during the development of the Project and refined aspects of the proposal accordingly, including consideration of the areas identified by Patuharakeke in its various statutory applications, planning documents and management plans when refining the location of the proposed extraction area to ensure the extraction area sat outside areas identified by Patuharakeke – refer to Figures 1 to 4 in Mr McCallum's statement.

d. To the extent that MBL can respond itself to effects of a cultural nature, I say that through ongoing consultation, reliance on expert input regarding potential effects, adjustments to the proposed location of the extraction area and control sites, proposed amendments to management plans, and agreeing a Relationship

Agreement and subsequently the Substantive Agreement with Te Parawhau ki Tai, which establishes a comprehensive framework for ongoing collaboration, cultural participation, environmental monitoring, Mātauranga Māori integration, cultural contributions and other initiatives over the life of the Project, that the Applicant has addressed to the best of ability adverse cultural effects.

254. In further response to Fisheries Settlement comments, I submit:

a. The Treaty Settlements and other Obligations Section 18 report records that:

   i. the identified historical settlement areas do not include the precise extraction seabed;

   ii. mandated iwi organisations hold quota in the wider quota management area, although the report could not determine whether those interests would be affected;

   iii. the extraction area is within a customary food-gathering rohe regulated under Part 9;

   iv. the project may affect the ability to exercise customary food-gathering practices; and

   v. the stability of Marsden and Mair Banks is relevant to a temporary customary shellfish closure.

b. MBL's evidence states that the Project and proposed conditions and management plans will appropriately avoid, remedy, or mitigate adverse impacts on fisheries and fish. MBL says there would not be any material impact on commercial quota, access to fishing grounds, customary authorisations or shellfish and bank stability.

c. As noted above, s 7 of the FTAA requires a panel to act in manner that is "consistent" with obligations in treaty settlements. That does not automatically mean that a project co-locating in an area subject to or adjacent to a treaty settlement area is automatically inconsistent with those obligations.

d. The evidence of Mr Boyd concludes the loss of a very small part of the annual food supply of tāmure (snapper) and other demersal fishes from the sand extraction area is very unlikely to materially reduce the overall food supply and productivity of these populations.[177]

e. With respect to shellfish, those over 2 mm in size extracted through the drag head will as a result of the screen utilised on the *William Fraser* be immediately returned through the moon pool to the ocean. Regarding scallops specifically, the evidence in response to comments of Mr West addresses scallop recovery, scallop avoidance, and scallop management. He concludes by reference to earlier assessment and new information obtained that the proposed extraction area is not demonstrated to be one which supports a dense or commercially viable scallop bed. He agrees that scallop recruitment and recovery should remain a specific monitoring focus and advises that future monitoring, including with reference to scallop density, juvenile recruitment, and localised scallop recovery areas, should inform cell management, including closure or avoidance of affected cells where appropriate.[178] Thus, potential effects on shellfish are managed and mitigated in a manner whereby treaty settlement obligations will not be breached.

f. From the perspective of vessel operations potentially hindering access, the extraction is undertaken by a singular vessel within a small proportion of Te Ākau Bream Bay, and sand extraction will only occur for a 3 ½ hour period after 12:00 pm, and does not occur every day. In my submission, this is not a material restriction on access to the broader area or even the subject site (which even on

[177] At paragraph 90.

[178] Evidence in response to comments of Mr. West at paragraphs 58-61.

an extraction day will be accessible for 20.5 hours per 24-hour period).

g. MBL has proposed conditions of consent and management plans which place appropriate controls and management to (inter alia) manage adverse effects, including with respect to any effects which may have implications for fish (and therefore effects on fishstocks and fisheries treaty settlement obligations).

h. There is no persuasive evidence to support the assertion that the project will undermine the redress in the Settlement Act.

i. Contrary to Patuharakeke/Ngātiwai's submission, the grant of approvals will not "enable an activity that would undermine the exercise of rangatiratanga and customary fishing due to harm to fish and aquatic life, and at times, actual exclusion"[179]. The activities can co-exist.

Tikanga

255. As noted above, MBL does not propose to respond to matters relating to tikanga as it would be inappropriate for them to do so.

256. This is a Project which, by its nature, is unlikely to ever result in all interested parties seeing eye to eye. What MBL can say is that the Project has been the subject of ongoing consultation, including various hui to understand concerns raised with respect to tikanga. MBL has, to the best of its ability, attempted to approach the Project and the extraction location, methodology and management plans in a manner that is respectful and, to the extent possible, responsive to concerns raised by iwi, hapū and whanau.

257. As already identified, the proposal is conditionally supported by the Trustees of Te Pouwhenua o Tiakiriri Kukupa Trust, on behalf of Te Parawhau ki Tai.

[179] Patuharakeke/Ngātiwai Legal Submissions at [6.10].

Asserted Effect on MACA Applications

258. As noted by Mr McCallum, MBL was initially advised and directed by Northland Regional Council (**NRC**) to consult with 23 MACA applicants.[180] An initial email advising of the proposed Project was sent in February 2025, inviting comments and views.[181] As set out in Mr McCallum's evidence, most of those communications were not responded to. MBL did engage with applicants requesting involvement.

259. The legal submissions on behalf of Patuharakeke/Ngātiwai state that the evidence presented during the hearing of their MACA applications means they "would likely" have customary marine title. As addressed in that submission, changes to that legislation mean that the matter must be reheard. At the time of writing, no customary marine title or customary rights have been recognised in the context of Patuharakeke/Ngātiwai's application under MACA.

260. The reference in section 7 FTAA to customary rights recognised under MACA clearly relates to customary rights which have been determined in the context of that legislation, not prospective applications or applications yet to be determined. Whatever was produced in evidence during a previous MACA hearing (which must now be reheard) has little to no weight in the context of s 7 of the FTAA. The same reasoning would apply to the Panel's ability to decline a consent under s 85(1)(b) as that only captures recognised customary rights.

261. The submission[182] that absent MACA's amendments that the likely grant of customary rights would have meant the Project would have been an ineligible activity similarly has no weight. We must take the law as we find it. The Project does not include any ineligible activities. it is lawful for the project to proceed to be determined under the FTAA.

[180] Evidence of Mr McCallum at [63].

[181] Evidence of Mr McCallum at [63].

[182] Patuharakeke/Ngātiwai Legal Submissions at [5.17].

Other Matters Arising

262. I have already provided three separate legal memoranda[183] in response to RFIs issued by the panel, which engage with how the "environment" is defined and assessed, relevant considerations in assessing regional benefit, the ability of the panel to certify draft management plans, the approach to economic assessment and the state of the future environment. To the extent those matters are raised in comments received, the legal analysis in these memoranda is relevant.

263. Concerns raised on behalf of recreational users of the CMA, including Waka Ama, regarding displacement and/or navigational risks are overstated. The original navigational and maritime safety assessment stands unchallenged. The operational location is almost 5 km offshore. The singular vessel undertaking the activity has a professional crew operating in compliance with all relevant maritime and navigational rules. It moves slowly during its transit phase and extremely slowly during its extraction phase. It is only present in this location 3 to 5 days a week for a maximum of 3.5 hours on those days. there is no basis for an assertion that the vessel and its operation pose any material navigational safety risk, and in the context of assertions as to displacement, even on days when the vessel is extracting it is not present for 20.5 hours out of 24 hours in the day.

264. Comments received take the position that the local authority and DOC should be responsible for certification of management plans. MBL maintains its view that the management plans are sufficiently complete and informed by data and analysis such that the Panel can certify those plans. If the Panel determines otherwise, then in the context of finalising conditions of consent, amended conditions can be introduced providing a certification mechanism.

265. The evidence of Ms Beaumont in response to comments includes at paragraph 11, a reference to recently discovered mis-identification of two dead specimens, now known to be *Culicia rubeola*. This species was not previously understood to be present, and the discovery has arisen at a point

[183] Dated 14 May 2026 (RFI 1), 22 May 2026 (RFI 2) and 22 May 2026 (RFI 3).

when processing of this application was already underway. A Wildlife Act approval for the disturbance, capture, collection, and incidental killing of *Culicia rubeola* will be required. I signal that, following lodgement of the response to comments received, MBL proposes to make an application to the panel convener pursuant to section 62 FTAA for a direction that processing of the application be suspended to enable further approvals to be sought relating to *Culicia rubeola*.

Conclusion

266. Key themes are addressed above.

267. With respect to the economic methodology and assertions regarding benefits, consistent with the panel's approach in *Waihi North*, MBL has identified economic benefits and monetised comparable externalities where reliable market or public values exist. It has not attempted to assign monetary values to every ecological or cultural effect. Those matters are assessed on their own evidence and weighed under s 85. This avoids both artificial monetisation and double counting.

268. Turning to questions of demand and alternative sources of sand or use of manufactured sand, MBL has provided expert evidence from witnesses directly engaged in the industry, which responds to these concerns.

269. Asserted shortcomings in MBL’s adaptive management approach have been responded to by a significant strengthening of relevant conditions of consent and associated management plans.

270. Finally, MBL acknowledges that there is no single Māori view of the Project. Te Parawhau’s conditional support does not determine or diminish the interests expressed by Patuharakeke, Ngātiwai or other groups. It is nevertheless probative evidence that, following sustained engagement and a comprehensive cultural assessment, Te Parawhau considers the Project capable of proceeding subject to the agreed protections. As in *Waihi North*, differing positions are appropriately addressed through interest-specific participation, monitoring and relationship mechanisms rather than by requiring the Panel to rank competing assertions of mana unnecessarily.

271. MBL maintains its position that the grant of consent/approval to this Project is appropriate.

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Jeremy Brabant

Counsel for McCallum Brothers Limited

12 August 2026

Attachment A – MBL Response to Comments – List of Documents

Person	Category
Jeremy Brabant	Legal Submissions
Shayne Elstob	Corporate - Operations
Callum McCallum	Corporate and Engagement
Paul Donoghue	Concrete
Trevor Sawyer	Concrete
Tim Walters	Concrete
Simon West	Benthic
Rick Boyd	Fisheries
David Thompson	Avifauna
Helen McConnell	Marine Mammals
Matt Pine	Underwater Acoustic
Brett Beamsley	Surf Breaks
Lawrence McIlrath	Economics
Jennifer Beaumont	Corals
Eddie Beetham and Richard Reinen-Hamill	Coastal Processes
Pete Wilson and Emily Jones	Water Quality
David Hay	Planning
Hay – Planning Attachments	
Attachment A	Updated Attachment Twenty-Six – Conditions Tracked
Attachment B	Updated Attachment Twenty-Six – Conditions Clean
Attachment C	Table Addressing Comments on Conditions
Attachment D	Updated Attachment Thirty-Five – WA Conditions Tracked

Attachment E	Updated Attachment Thirty-Five – WA Conditions Clean
Attachment F	Table of Comments on DoC Recommended Changes WA
Attachment G	Updated Attachment Twenty-Nine – EMMP Tracked
Attachment H	Updated Attachment Twenty-Nine – EMMP Clean
Attachment I	Updated Attachment Twenty-Seven – SEOP Tracked
Attachment J	Updated Attachment Twenty-Seven – SEOP Clean
Attachment K	Updated Attachment Twenty-Eight – MMMP Clean
Attachment L	Updated Attachment Twenty-Eight – MMMP Tracked
Attachment M	Updated Attachment Thirty-One – BMP Tracked
Attachment N	Updated Attachment Thirty-One – BMP Clean
Attachment 30	Updated Attachment Thirty – Cup Coral Management Plan Clean
Attachment 30	Updated Attachment Thirty – Cup Coral Management Plan Tracked
Summary Table of Responses – Wayfinding Document	